

CHRI 2022



GUILTY TILL PROVEN INNOCENT?

**SAFEGUARDING THE RIGHTS OF PRE-TRIAL DETAINEES
ACROSS THE COMMONWEALTH**

**A report by the International Board of CHRI, chaired
by Professor Alison Duxbury**



CHRI

Commonwealth Human Rights Initiative
working for the *practical* realisation of human rights in
the countries of the Commonwealth

Commonwealth Human Rights Initiative

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-government, non-profit organisation with offices in New Delhi, India, London, the United Kingdom, and Accra, Ghana.

Although the Commonwealth is an association of 54 countries with shared traditions, institutions and experiences, there was little specific focus on human rights issues when founded. So, in 1987, several Commonwealth professional associations set up CHRI to promote adherence to the Universal Declaration of Human Rights, the Commonwealth Harare Principles and other internationally recognised human rights instruments, as well as domestic instruments supporting human rights.

CHRI has worked for the practical realisation of human rights through periodic investigations, comparative research, strategic advocacy, and engagement as well as mobilisation around these issues in Commonwealth countries.

CHRI's specialisation in the areas of Access to Justice (ATJ) and Access to Information (ATI) is widely known. The ATJ programme has focussed on Police and Prison Reforms, to reduce arbitrariness in law enforcement and ensure transparency while holding duty-bearers to account. The ATI programme focuses on Right to Information (RTI) and Freedom of Information laws across geographies, provides specialised advice, sheds light on challenging issues and process and develops capacity for the effective implementation and widespread use of transparency laws. CHRI reviews pressures on freedom of expression and media rights while a focus on Small States seeks to bring civil society voices to bear on the UN Human Rights Council and the Commonwealth Secretariat. A growing area of work is SDG 8.7 where advocacy, research and mobilisation is built on tackling contemporary forms of slavery and human trafficking through the Commonwealth 8.7 Network.

CHRI has special consultative status with the UN Economic and Social Council and is accredited to the Commonwealth Secretariat. Recognised for its expertise by governments, oversight bodies and civil society, it is registered as a society in India, a trust in Ghana, and a public charity in the United Kingdom.

International Board: Alison Duxbury, Chairperson. Members: Wajahat Habibullah, James Robbins and Sam Okudzeto.

Executive Committee (India): Wajahat Habibullah, Chairperson. Members: B. K. Chandrashekar, Jayanto N. Choudhury, Kishore Bhargava, Maja Daruwala, Nitin Desai, Ashok K. Ganju, Kamal Kumar, Poonam Muttreja, A P Shah and Venkatesh Nayak (ex-officio Secretary and Director).

Executive Committee (Ghana): Sam Okudzeto, Chairperson. Members: Akoto Ampaw, Kofi Quashigah, Emile Short, Juliette Tuakli and Mina Mensah (ex-officio Secretary and Director).

Executive Committee (UK): James Robbins, Chairperson. Members: Pralab Barua, Joanna Ewart-James, Owen Tudor, Cherisse Francis, Emma Kerr, Hannah Ratcliffe, Salil Tripathi, Michael Weaver, Kim West and Sneha Aurora (ex-officio Secretary and Director).

ISBN: 978-93-81241-77-6 © Commonwealth Human Rights Initiative, 2022. Material from this report may be used, duly acknowledging the source.



CHRI Headquarters, New Delhi

55A, Third Floor, Siddharth Chambers-1
Kalu Sarai, New Delhi 110 016, India
Tel: +91 11 4318 0200
Fax: +91 11 4318 0217
E-mail: info@humanrightsinitiative.org

CHRI London

Room No. 219
School of Advanced Study
South Block, Senate House, Malet Street
London WC1E 7HU, United Kingdom
E-mail: london@humanrightsinitiative.org

CHRI Africa, Accra

Dr. Stanley Marbell Plaza
H/No. 158/2
Asylum Down, Accra
Ghana
E-mail: chriafrika@humanrightsinitiative.org

GUILTY TILL PROVEN INNOCENT?

**SAFEGUARDING THE RIGHTS OF PRE-TRIAL DETAINEES
ACROSS THE COMMONWEALTH**

**A report by the International Board of CHRI
chaired by
Professor Alison Duxbury**

**Lead Author
Madhurima Dhanuka**



CHRI
Commonwealth Human Rights Initiative
working for the *practical* realisation of human rights in
the countries of the Commonwealth

TrustLaw

with pro bono assistance facilitated by TrustLaw, Thomson Reuters
Foundation



**THOMSON REUTERS
FOUNDATION**

Legal Notice and Disclaimer

This report is provided for information purposes only. Although we believe that the research will be helpful, we cannot warrant that it is accurate or complete, particularly as circumstances may change after completion of the research and before its publication. This report was prepared with research assistance from representatives of law firms and local counsel from across the 54 Commonwealth Member States. This research support was provided on a pro bono basis and does not reflect the personal views of any of the lawyers or staff of the contributing pro bono legal teams. The inputs which form the basis of this report have been collected solely for the purpose of comparative research of legal and policy frameworks and do not, and are not intended to, constitute legal advice for the use of any person in specific cases. Readers are urged to seek advice from qualified legal counsel in relation to their specific circumstances. Further, the comparative analysis of legal frameworks has not been attempted in this report with the intent of critiquing existing legal systems. Instead, this report has been put together to highlight good practices with regard to pre-trial detention from different jurisdictions, in the hope that they will serve as a guide to attempt reform in jurisdictions where they are not in vogue.

“ Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. ”

Article 11, Universal Declaration of Human Rights, 1948

TABLE OF CONTENTS

Foreword	01
Acknowledgements	03
A Summary of Recommendations to the Commonwealth Heads of Government	04
01 INTRODUCTION	06
1.1 Background & Context	07
1.2 Structure of the report	08
1.3 Research Methodology, Limitations and Terminology	09
02 PRISONS AND THE COMMONWEALTH	11
2.1 Tracing the role of the Commonwealth in enhancing access to justice and the rule of law	12
2.2 Prison and Pre-trial Detention: Data & Trends	14
03 PRE-TRIAL PROCEDURES & SAFEGUARDS: STANDARDS AND GOOD PRACTICES IN THE COMMONWEALTH	26
3.1 Impacts of overuse of pre-trial detention	27
3.2 International and regional safeguards to pre-trial detention	28
3.3 Pre-trial safeguards and procedures under national laws: Guidance	35
3.4 Analysis of pre-trial procedures and safeguards in Commonwealth countries	37
04 SUSTAINABLE DEVELOPMENT GOALS AND REPORTING BY COMMONWEALTH STATES ON SDG TARGET 16.3.2	99
05 CONCLUSION AND RECOMMENDATIONS	110
Bibliography	115
Annexure A: Research Questionnaire	126
Annexure B: Details of Research Assistance	130
CHRI's Previous Reports to CHOGM	132

FOREWORD



Professor Alison Duxbury
Chair, International Board of the
Commonwealth Human Rights Initiative

The presumption of innocence, as affirmed in the Universal Declaration of Human Rights, is one of the most fundamental human rights principles. Yet, of the 1.5 million prisoners detained across the Commonwealth more than 0.5 million are pre-trial detainees. In at least 15 countries pre-trial detainees form more than half of the total prison population. Thousands of persons, presumed innocent until proven guilty, spend years in detention waiting for their trials to conclude. For those thousands, the presumption appears to have become guilty until proven innocent.

Given these statistics, in 2022 the Commonwealth Human Rights Initiative (CHRI) has focussed its attention on the incarceration and deprivation of the freedoms and liberties of pre-trial detainees. This report is one of a series produced by CHRI every two years for consideration at the Commonwealth Heads of Government Meeting (CHOGM). In accordance with the 2022 Rwanda CHOGM's theme of 'delivering a common future: connecting, innovating, transforming', CHRI calls upon Member States to prioritise and take collective measures to reduce the use of pre-trial detention across the Commonwealth. This is a Commonwealth-wide phenomenon, which not only impacts the persons in pre-trial detention, but can have a damaging socio-economic impact on detainees' families and communities outside prison.

At this juncture, it is important to recognise that while this issue predated COVID-19, the pandemic has precipitated crises in prisons worldwide, leading to the marked deterioration of prison conditions and extended duration of incarceration of pre-trial detainees. In this context the recommendations contained in CHRI's 2022 report are all the more timely. Governments must prioritise efforts to check the use of pre-trial detention and consider this a priority on their legal reform agenda.

The report points to the ills of prolonged pre-trial detention and presents an analysis of statistical data on imprisonment trends as well as the legal frameworks of

the 54 Commonwealth countries. It documents important international legal frameworks and reports published by organisations across the Commonwealth that highlight the causes and consequences of the use, and overuse, of pre-trial detention. The report provides a comparative analysis of key pre-trial procedures that can effectively safeguard the rights of thousands of individuals who come into contact with the criminal justice system every year. It provides insights into the policy and legal frameworks, and highlights gaps that have led to the overuse of pre-trial detention and its impacts on individuals. Through this report, CHRI call upon Commonwealth Members and the international community to put in place strong legal provisions and implement them effectively to reduce the problem of pre-trial detention and consider the use of alternative non-custodial measures.

CHRI reminds Commonwealth Members that the Sustainable Development Goals (SDGs), adopted by United Nations Members, include SDG Indicator 16.3.2 which requires demonstrable reduction in the number of “unsentenced detainees as a proportion of overall prison population.” In practice, only a handful of Commonwealth Members have reported on this important indicator in their Voluntary National Reports to the High Level Political Forum. We hope this report will encourage Commonwealth Members to review their policy and legal frameworks and address the phenomenon of the use of pre-trial detention and overcrowding in their prisons.

In conclusion, CHRI is committed to engaging with criminal legal systems across the regions of the Commonwealth to work to achieve SDG 16. We will share our extensive experience of working with prison administrations in South Asia and Africa with the Member States to enable them to meet their commitments to uphold, protect and fulfil the basic human rights of pre-trial detainees. This report provides the framework and the recommendations – it is up to Commonwealth leaders and their governments to take action to ensure that the presumption of innocence is fully realised.



ACKNOWLEDGEMENTS

CHRI is grateful to several institutions and individuals in the preparation of this report. The contribution of Catia Trevisani, who volunteered with CHRI during the initial stages of this research and helped with the preliminary literature review which has been vital in the completion of this report. Siddharth Lamba worked hard for the collation and analysis of data with regard to imprisonment in Commonwealth countries. The report has benefitted from the assistance provided by a number of interns, including Anshita Agarwal, Vasu Aggarwal and Sushant Arsh Massey Khalkho, who worked on various aspects of the report during its preparation.

The research that forms the foundation of this report could not have been completed without the invaluable pro bono assistance facilitated by TrustLaw, the Thomson Reuters Foundation's global pro bono service for the research and documentation of legal standards and good practices across Commonwealth Countries. Special credit is due to Robert Houston associated with K&L Gates Straits Law LLC, Camilla de Moraes associated with K&L Gates LLP and Hannah K Davies formerly associated with K&L Gates Straits Law LLC, who enabled pro bono engagement of local counsels in 37 Commonwealth countries and supervised the timely submission and review of research documentation by them.

All law firms and individuals who extended pro bono assistance including Amie Bensouda & Co, Anjarwalla & Khanna LLP, Robinson Bertram, Webber Newdigate, Sacranie Gow & Co., Juristconsult Chambers, Couto, Graça e Associados, Lda, LGA, Koep & Partners, Aluko & Oyebode, Trust Law Chambers, Appleby, Bowmans, Katende Ssempebwa & Co, Velma Law, Yusof Halim & Partners, SHC Lawyers LLP, Zafar & Associates LLP, D.L.&F. De Saram, Higgs & Johnson, Courtenay Coye LLP, Henry, Henry & Bristol, Baptiste & Co., Human Rights Clinic, Hugh Wooding Law School, A.G. Erotocritou LLC, Mamo TCV Advocates, Office of the Public Legal Service, Chapman Tripp, Geoffrey Gee & Partners, Munro Leys, Clarke Ey Korla Lawyers, Doulah & Doulah, Kelsick Wilkin & Ferdinand, Corpus Legal Practitioners, Whitlam K Togamae Lawyers, Rashad Braithwaite, Assistant Lecturer at the University of the West Indies, Family Protection Legal Aid Centre, Ministry of Justice, Shearman & Sterling LLP, Allen & Overy, and Nyoh Law Chambers, deserve our deepest gratitude.

CHRI's research has been informed by its longstanding engagement with issues related to prisons and pre-trial detention in India and Ghana. The three CHRI offices were involved in the conceptualisation and preparation of this report. Our special thanks to David White who was with our London office; Sneha Aurora Director, CHRI-UK, Mina Menshah, Director, CHRI-Africa; Gideon who worked in our Accra office; Maja Daruwala, Senior Advisor; CHRI-India; Sanjoy Hazarika, formerly International Director, CHRI; and colleagues Vinu Sampath Kumar, Yashasvi Nain, Aditi Patil, Devika Prasad, Devyani Srivastava, Raja Bagga, Sugandha Shankar, Siddharth Lamba, Amrita Paul, Deepan Kumar Sarkar, Kakoli Roy, Sabika Abbas, Vatsala Khandelwal and Pooja Larvin in Delhi. Some of them have moved on during the course of completing this study but their assistance was invaluable. Thanks to Chenthil Kumar for designing the report and Sugandha Shankar for designing the cover.

CHRI sincerely acknowledges the support and assistance of all persons involved with the report and assumes full responsibility for all the opinions expressed herein.

Madhurima Dhanuka

Head, Prison Reforms Programme, CHRI India

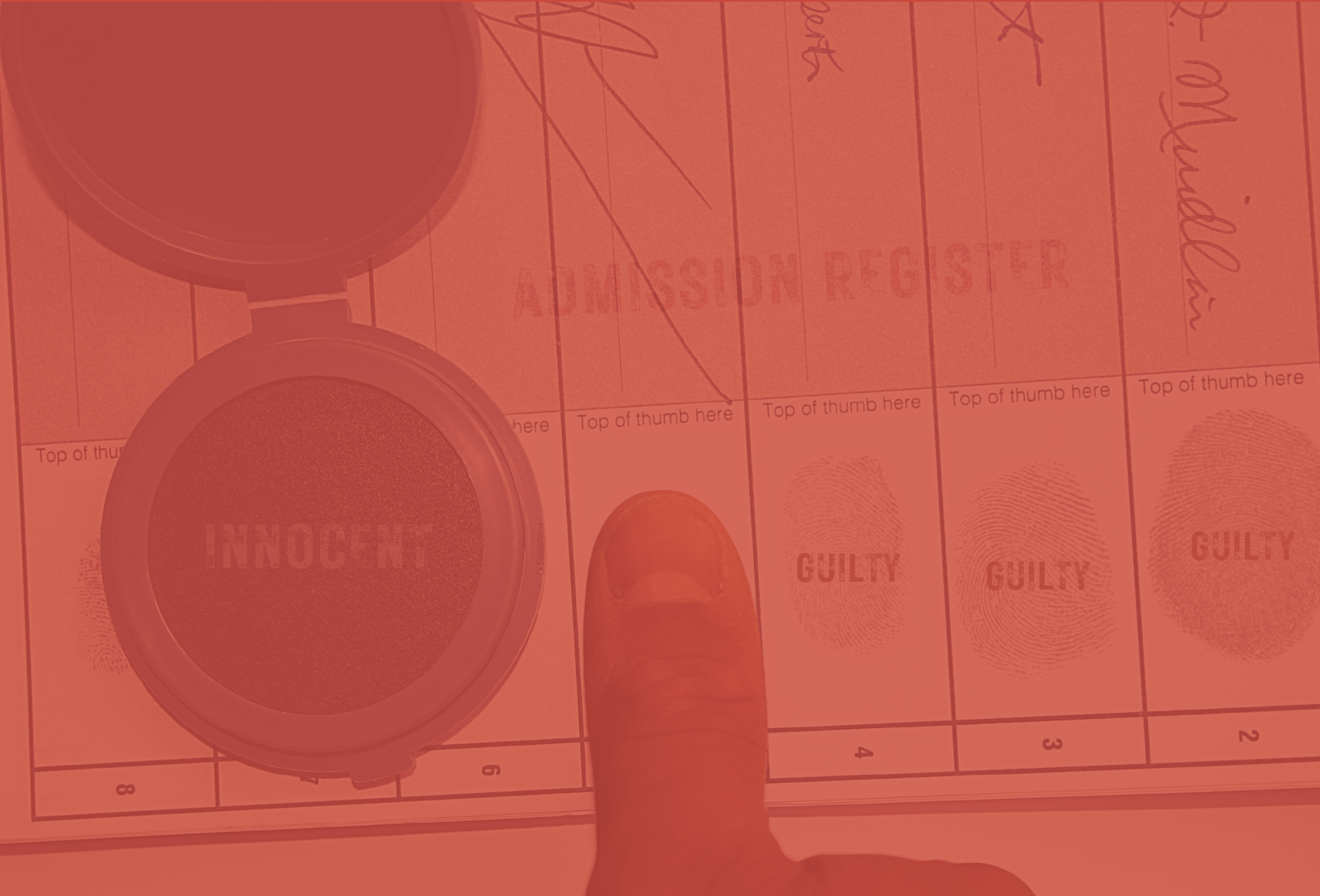
Venkatesh Nayak

Director, CHRI India

A SUMMARY OF RECOMMENDATIONS TO THE COMMONWEALTH HEADS OF GOVERNMENT

- 1** Governments must prioritise efforts to address the increasing use of pre-trial detention and ensure that cases of pre-trial detainees are regularly reviewed to prevent unnecessary and prolonged detention.
- 2** Governments must ensure that the grounds for carrying out arrests, even for serious offences, are narrow, defined in law, and are subject to review by authorities senior to officers making such arrests. Appropriate remedies to compensate individuals for unlawful detentions must also be enacted, and be accessible to them.
- 3** Governments must commit themselves to and deliver on the practical realisation of constitutional guarantees of fair trial: in particular the right to legal representation through enactment of enabling legislation that places duties upon the police, prosecution, judiciary and defence to uphold the principles of fair trial.
- 4** Governments should design, upgrade and upskill legal aid systems in conformity with the UN Model Law on Access to Legal Aid so that there is a demonstrable time bound reduction in pre-trial detention. Efforts must be made to ensure provision of legal aid through a robust national legal aid body, to suspects, arrested persons and accused persons at all stages – from police stations to prisons.
- 5** Governments must adopt realistic alternative measures, to ensure that in practice pre-trial detention is only considered an exception, a measure of last resort.
- 6** Governments must ensure that there is prompt reporting of official data of all persons who are arrested and detained. Statistics on pre-trial detention, practices and prison populations must be regularly placed in the public domain. Without accurate data, it is difficult to determine the depth and extent of the problem, and also to undertake effective legal reforms to address it. The Commonwealth Foundation may support efforts for the collation and review of this data to produce an annual analysis report on Commonwealth prison trends.
- 7** Governments must report periodically progress made on SDG 16.3.2 indicator, with regard to the proportion of unsentenced prisoners, in their Voluntary National Reports at the High-Level Political Forum, as a vital measure in charting their achievement towards SDG 16.

- 8 Governments and the Commonwealth Secretariat must consider reconvening the Conference of Commonwealth Correctional Administrators, for continued and regular deliberations on issues related to imprisonment and penal reforms in the Commonwealth Member States.
- 9 Governments must agree to include the issue of incarceration and pre-trial detention as a priority area for discussion at future meetings of the official organs and agencies of the Commonwealth including that of the Commonwealth Law Ministers' Meetings, meetings of the Commonwealth Lawyers Association, and of Commonwealth Magistrates' and Judges' Association, various international, regional and national conferences, and push for prompt review and effective implementation of legal and policy frameworks that safeguard rights of suspects, accused and prisoners.
- 10 The Commonwealth Foundation should, in view of the emergent need for conducting more in-depth comparative research on this issue across the Commonwealth, initiate and support research in these areas. The Civil and Criminal Reforms Unit of the Commonwealth Secretariat should develop Model Laws on thematics such as 'Protecting Rights of Suspects, Arrested and Accused Persons' and on 'Speedy Trials and Dispensation of Justice', using good practice examples found in similar legislations that exist across the Commonwealth.



INTRODUCTION

I. INTRODUCTION

1.1 Background and Context

Pre-trial detention refers to the practice of depriving individuals of their fundamental freedoms because they are accused of committing an offence or are merely suspected of being involved in a crime. Such persons are detained by law enforcement agencies or in prisons before they are tried by a competent court or other judicial authority. Such detentions should, however, be used by law enforcement agencies as a measure of last resort and in very limited circumstances because the detainee has the right to be presumed innocent until proven guilty. The overuse of the practice of pre-trial detention has a harmful impact on individual lives, families, communities, the rule of law, and exposes people presumed to be innocent until proven guilty to disease and overcrowding.¹ Pre-trial detention often disrupts the economic prospects of detained individuals, adversely affecting their ability to earn, pushes their families toward poverty, damages the educational prospects of their children and impacts their ability to access health care apart from a host of other public services essential for leading a life of dignity free from want. It also negatively affects the social wellbeing of family members, placing a strong burden on other members of the family, who may turn destitute, hungry and homeless.²

The excessive and arbitrary use of pre-trial detention is a global problem, affecting developed and developing countries alike.³ The situation is no different across the Commonwealth, with pre-trial detainees comprising more than half of the prison population in 15 Member States.⁴ On an average, 34.6% of prisoners across the Commonwealth are pre-trial detainees. Since 2000, the total prison population has increased by 40.8%, whereas the global increase has been around 24%. An average prison occupancy level of 126.1% is indicative of chronic overcrowding, with average occupancy levels being more than 200% in some countries like Uganda, Malawi, Mozambique and Zambia.

Excessive use of pre-trial detention, cell overcrowding, poor conditions and neglect of prison services have caused prisons to be a weak link in criminal justice systems and a low priority in reform efforts. The international community, stakeholders and civil society have been concerned about the costs of excessive use of pre-trial detention, including prison overcrowding, inhumane treatments and conditions of detainees and socioeconomic and psychological impacts on prisoners' lives, families, and communities.⁵ In April 2021, the United Nations Systems Common Position

¹ Open Society Justice Foundations (2011), *The Socioeconomic Impact of Pre-trial Detention*, pg 16.

² Ibid, pg 27.

³ Open Society Justice Initiative, Ludwig Boltzmann Institute of Human Rights and University of Bristol, (2011), *Pre-trial Detention and Torture: Why Pre-trial Detainees Face the Greatest Risk*, pg 6: <https://www.osce.org/odihr/83202?download=true> as on 30th June 2022.

⁴ See Chapter II for a more detailed analysis of the prison statistics.

⁵ *Supra* note 1.

on Incarceration, acknowledged⁶ these concerns and emphasised the need to ensure that incarceration remains high on the political agenda including as part of the discussions relating to the 2030 Agenda for Sustainable Development.

Since 1991 CHRI has undertaken efforts to bring to the attention of the Commonwealth Heads of Government, vital human rights issues faced by the Member States. CHRI's first report to

the Commonwealth Heads of Governments - Put Our World to Rights Towards a Commonwealth Human Rights Policy 1991, strongly advocated for the adoption of a robust Commonwealth human rights policy, which would act as a statement of aspiration of these governments to not only abide by their commitments to the principal international human rights instruments and their relevant national legislation but to also proactively pursue the practical realisation of human rights. Among others, the report had recommended that the reform of law and practice of detention should be high on the agenda of the Commonwealth.⁷ Three decades later, the need for the Commonwealth and its Member States to seek fresh paths to more democratic and participatory criminal justice systems is still widespread and forms the foundation upon which this present research was conceptualised.

It is in this overall context, that this report identifies and presents a one-of-a-kind comparative analysis of pre-trial safeguards in the existing legal and policy frameworks of all 54 Member States that constitute the Commonwealth. The report seeks to review legal and policy frameworks across the Commonwealth governing criminal procedures related to arrest and detention, and identify gaps in substantive and procedural safeguards against international standards. The report builds on existing research on this topic, and brings a specific focus to the Commonwealth with a view to assisting Member States to improve their national standards.

This report calls upon the Commonwealth Heads of Government to take note of these findings and take all necessary remedial actions that will enable their Governments to prevent the extensive use of pre-trial detention, and address the abysmal prison conditions caused due to overcrowding.

1.2 Structure of the report

Chapter II of this report summarises past initiatives of the Commonwealth bodies and Heads of Government for enhancing the rule of law and people's access to justice. It also presents statistical trends on imprisonment, prison overcrowding and pre-trial detention in the countries of the Commonwealth.

⁶ UNODC (2021), *United Nations System Common Position on Incarceration*, pg. 2: https://www.unodc.org/res/justice-and-prison-reform/nelsonmandelarules-GoF/UN_System_Common_Position_on_Incarceration.pdf as on 30th May, 2022.

⁷ CHRI (1991), *Put our world to rights*, pg. 54.

- Sustainable Development Goal (SDG) 16 (Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.)
 - Target 16.3 (Promote the rule of law at the national and international levels and ensure access to justice for all)
 - ✓ Indicator 16.3.2 (Unsentenced Detainees as a proportion of the overall prison population)

Chapter III outlines various pre-trial procedures and safeguards; summarises international principles and standards and provides an analysis of the legal systems across the 54 Commonwealth Member States. It also highlights examples of good legislative practices that can be adopted by Governments which have not paid adequate attention to pre-trial detentions in their jurisdictions. Chapter IV focuses on the relevant Sustainable Development Goals and summarises reporting by various Commonwealth Member States on SDG target 16.3.2. Chapter V draws the attention of various stakeholders, including Heads of Government, government institutions, civil society organisations, and other institutions towards our recommendations for reducing the use of pre-trial detention.

1.3 Research Methodology, Limitations and Terminology

1.3.1 Research Timelines

This report was conceptualised in February 2019 for submission at the Commonwealth Heads of Government Meeting (CHOGM) 2020 that was originally scheduled to be held in Kigali, Rwanda in June of that year. However, the postponement of CHOGM in 2020 and 2021 allowed CHRI more time to complete the collation of research documentation from all Member States.

1.3.2 Research Questionnaire and Collaborators

The report is premised on relevant information collected from each of the 54 Commonwealth countries using questionnaires. The questionnaire contained eighteen questions, two of which sought statistical data about pre-trial detentions in each country. The remaining questions were designed to garner substantive information about the legal frameworks applicable at various stages of the criminal proceedings in every country. In order to ensure clarity about the kind of information that was being sought, examples from other jurisdictions were included in the questionnaire. Further, responses were required to be substantiated with details of constitutional/statutory/administrative or other mandates in each country. In order to cross-verify the responses received, the questionnaire sought the information to be provided in the form of footnotes. The questionnaire template is at Annexure A.

For 42 of the 54 countries, research was completed by local counsel/law firms on the situation in those countries. For Ghana and India, members of CHRI's offices based there completed the research. Research for the remaining countries were covered through desk-based research of publicly available resources. The country-wise break-up of survey respondents and sources of information is at Annexure B.

1.3.3 Limitations

This report focuses on the policy and legal frameworks that safeguard the rights of pre-trial detainees. It does not look at the implementation of these safeguards in actual practice. CHRI acknowledges

that strong legislative provisions cannot guarantee the protection of these rights unless such laws are effectively implemented. However, it is also true that robust legal and policy frameworks play a key role in protecting the rights of pre-trial detainees.

It must also be borne in mind that this report is not intended to provide a critique of existing legislative frameworks, but is an effort to highlight gaps in procedural frameworks, which when addressed, can help to safeguard the rights of pre-trial detainees. Also, the effort has been to highlight good legislative language and provisions that can be adopted by other countries.

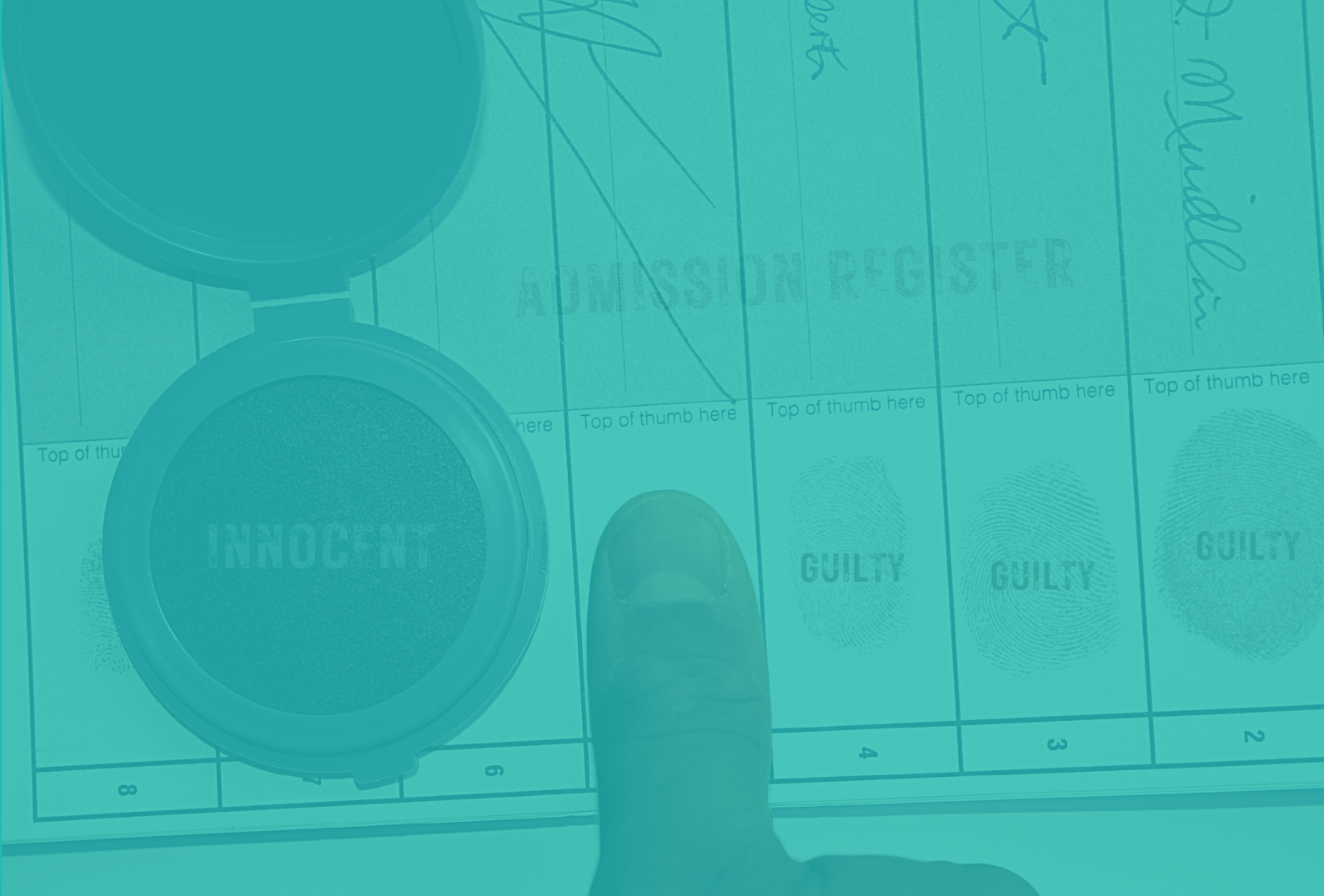
Terminology

- a. **Pre-trial Detainees:** Internationally, there is no universally accepted nomenclature for denoting, ‘unsentenced’ prisoners or prisoners awaiting trial.⁸ Different jurisdictions, even within the Commonwealth, use different terms such as ‘remandees’, ‘remand prisoners’, ‘undertrials’, ‘unconvicted’ or ‘unsentenced’. The lack of a universal definition and the use of multiple terminologies results in challenges in collecting accurate data and information of pre-trial prisoners. For the purpose of this report, the term *pre-trial detainee* denotes a person deprived of their liberty, in connection with an alleged offence, following a judicial or other legal process but who has not been definitively sentenced by a court for the offence.⁹ This might include any person who has been deprived of her/his liberty and is a) undergoing investigation, i.e., they are being interrogated by the investigating agency and are yet to be charged; b) awaiting trial, i.e., the period after investigation is completed and a decision taken to bring a court case; c) undergoing trial, i.e., while the trial is taking place; d) awaiting sentence i.e., they are convicted by the court, but sentence is yet to be handed down.
- b. **State-funded legal aid services:** This term refers to the provision of free and quality legal services by the government to ensure that the opportunities for securing justice are not denied to any person by reason of economic, social, physical, linguistic or other relevant disability. This includes the provision of legal advice, representation in courts or proceedings under other State tribunals, assistance in drafting of documents and pleadings, mediation, assistance in navigating the rules and procedures of State administrative agencies, along with a range of other services.¹⁰

⁸ For more information see Open Society Justice Initiative (2014), *Presumption of Guilt: The Global Overuse of Pre-trial Detention*, pg 12: <https://www.justiceinitiative.org/uploads/de4c18f8-ccc1-4eba-9374-e5c850a07efd/presumption-guilt-09032014.pdf> as on 30th May 2022.

⁹ World Prison Brief, World Pre-trial/Remand Imprisonment List (Fourth edition): https://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_list_4th_edn_final.pdf as on 30th May 2022.

¹⁰ UNDP and UNODC (2016), Global Study on Legal Aid: Global Report: https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/Global-Study-on-Legal-Aid_Report01.pdf as on 30 May 2020.



PRISONS AND THE COMMONWEALTH

II. PRISONS AND THE COMMONWEALTH

2.1 Tracing the role of the Commonwealth in enhancing access to justice and the rule of law

It was in 1949¹¹ that, the British Commonwealth of Nations, along with the newly independent countries of Africa, Americas, Asia, Europe, and the Pacific, formed the Commonwealth as an inter-governmental association. Principles such as democracy, international peace and security, sustainable development, good governance, rule of law and human rights have been emphasised in several Commonwealth Charters and Declarations. Over the years, the Commonwealth Member States have often affirmed the importance of rule of law, good governance and access to justice.

In April 2005, the Commonwealth Secretariat organised the Pan-African Forum on the Commonwealth (Latimer House) Principles on the accountability of and relationship between the three branches of Government, in Nairobi, Kenya.¹² The Forum was convened to consider ways and means of promoting and advancing the Commonwealth (Latimer House) Principles¹³ following their adoption by Commonwealth Heads of Government in Abuja in December 2003.¹⁴ Within the thematic of access to justice, ‘the delegates recognised that the formal structures of justice, high costs, and the culture of delays, physical distances of courts, limited effective participation of the people, especially the poor in accessing justice.’¹⁵ ‘They suggested the need to incorporate procedures and institutions into the mainstream judicial system that guaranteed better access to justice. Delegates proposed that legal aid should be broadened to enhance access to justice and that the traditional court system can be strengthened to improve justice.’¹⁶ In October 2005, the Commonwealth Law Ministers met in Accra (Ghana).¹⁷ The deliberations of the Law Ministers mainly covered issues of civil and criminal justice, the progressive development and reform of the law, the role of law and the legal profession in supporting democracy and good governance, as well as certain areas of international law.¹⁸ In 2006, at the opening of a five-day Commonwealth Workshop on Human

¹¹ The Commonwealth, Our history: <https://thecommonwealth.org/history> as on 13 May 2022.

¹² Commonwealth Secretariat (2005), *The Pan-African Forum on the Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government*, Communiqué: http://www.humanrightsinitiative.org/old/programs/ai/rti/news/pan_african_account_communique.pdf as on 12 May 2022.

¹³ The Latimer House Principles were developed in June 1998 by a group of parliamentarians, judges, lawyers and legal academics to provide an operational manual of good practice in relation to the Commonwealth’s fundamental values of promoting democracy and good governance, human rights and the rule of law. In December 2003 they were endorsed by Commonwealth Heads of Government and form part of the Commonwealth’s fundamental values. See, The Commonwealth, Strengthening Justice in Papua New Guinea: <http://thecommonwealth.org/media/news/strengthening-justice-papua-new-guinea> as on 14 May 2022.

¹⁴ *Supra* note 12.

¹⁵ *Ibid* para.30.

¹⁶ *Ibid*.

¹⁷ Human Rights Update (2006), Newsletter of the Human Rights Unit of the Commonwealth Secretariat, *The 2005 Meeting of Commonwealth Law Ministers*, Issue No. 7, 2006: https://web.archive.org/web/20060930141553/http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/A71F9844-1B16-4444-A55F-368FBF4119B6_HumanRightsUpdateIssue7.pdf as on 17 May 2020.

¹⁸ *Ibid*.

Rights Training for Police in Eastern Africa in Kampala, a manual, Commonwealth Manual on Human Rights Training for Police, was launched.¹⁹ The Manual was designed to assist officer training institutions in Commonwealth countries to build knowledge and respect for human rights among police and prison administrative personnel.²⁰

In 2013, senior prison officials from 12 African Commonwealth countries, Botswana, Cameroon, Ghana, Kenya, Lesotho, Mauritius, Mozambique, Nigeria, Seychelles, Sierra Leone, Swaziland and Uganda attended a specifically designated course on human rights in prison care, custody and management.²¹ The course included sessions on the well-being of prison personnel; the rights of prisoners and balancing security requirements with rehabilitation; providing adequate healthcare; and ensuring independent inspections of detention conditions.²² Publicly available resources²³ indicate the organisation of several conferences of Commonwealth Correctional Administrators, the first held in Hong Kong in 1985.²⁴ However not much information is available as to why this practice of holding such conferences was discontinued.

In 2013, Law Ministers and Attorney-Generals of Small Commonwealth Jurisdictions signed a Charter that emphasised on ‘the importance of promoting health and well-being in combatting communicable and non-communicable diseases’ in prisons. The Charter also made a commitment to ‘advance ... democracy and equal rights, with peace and prosperity so that all can share the benefits of social and economic development’.²⁵ The new Charter promoted the rule of law to protect the people and to ensure limited and accountable government, and supported the creation of an independent, impartial and competent legal system.

Three years later, a similar meeting was held in London. Its theme was the Rule of Law and Sustainable Development, with emphasis on the rule of law as both a development

¹⁹ The Commonwealth Secretariat, Human Rights Update, Newsletter of the Human Rights Unit of the Commonwealth Secretariat, HRU News – Launch of the Commonwealth Manual on Human Rights Training for Police, Issue No. 8, 2006: https://web.archive.org/web/20060930115444/http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/C462B349-50EC-4E39-A629-20E99768E92B_HumanRightsUpdate8.pdf as on 17 May 2020.

²⁰ *Ibid.* The manual was developed from a similar manual produced for West African Commonwealth countries, and which was launched on International Human Rights Day on December 2005 by the Secretary-General.

²¹ The Commonwealth, News, African prison officials attend human rights training, February 2013. The training was organised in Maputo, Mozambique, and it marked the second regional collaboration between the Commonwealth Secretariat and the Penal Reform International: <http://thecommonwealth.org/media/news/african-prison-officials-attend-human-rights-training> as on 20 May 2020.

²² The Commonwealth, News, Training prison officials on human rights in prison management, 2012-2013: <http://thecommonwealth.org/project/training-prison-officials-human-rights-prison-management> as on 17 May 2020.

²³ Garne, T G (1992) “*Outside the Region: United Kingdom (England and Wales) Changes in the Disciplinary System*”, Third Conference of Commonwealth Correctional Administrators Held in Zimbabwe, Corrections in Asia and the Pacific.

²⁴ Management of corrections in the Commonwealth (1985), Commonwealth Law Bulletin, 11:3, pg. 1057-1070: <https://www.tandfonline.com/doi/citedby/10.1080/03050718.1985.9985823?scroll=top&needAccess=true> as on 20 May, 2020.

²⁵ The Commonwealth (2013), *Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions meeting*, 13 September: <https://thecommonwealth.org/events/law-ministers-and-attorneys-general-small-commonwealth-jurisdictions-meeting-2013> as on 25 May 2022.

end and an enabler in the achievement of the Sustainable Development Goals (SDGs), including reporting on targets pertaining to pre-trial detention.²⁶

Given the Commonwealth's past commitments to improving prison administration and conditions of prisoners, CHRI calls upon the Heads of the Commonwealth Governments to reaffirm their promises, and prioritise the issues outlined in this report.

2.2 Prison and Pre-trial Detention: Data and Trends

Justice systems should have effective information management systems that provide current, accessible information on the status of persons in detention and details of criminal cases.²⁷ This requires strengthening of capacities to expedite information gathering about the performance of the justice system at various stages of criminal proceedings. Prison population figures and occupancy rates have foundational importance in informing the policy making process with regard to the administration of prisons. It is important to bear in mind that there are limitations on the use of data about prisons. It is often sourced from national prison authorities. This data is only as reliable as the people who collect them and as accurate as the systems that generate them.²⁸

The research questionnaire issued for the purpose of this report sought the following figures from all 54 Commonwealth Member States:

- i) total population of each country,
- ii) total number of criminal courts established,
- iii) total number of judges available,
- iv) total number of police stations,
- v) total number of arrests of persons made by the law enforcement authorities in a year,
- vi) total number of prisons,
- vii) sanctioned and actual occupancy rates,
- viii) total prison population,
- ix) total number of sentenced and unsentenced prisoners, prisoners under other categories and,
- x) inclusion of persons below 18 years of age in the detention figures reported.

The responses from several Commonwealth countries indicate the lack of availability of data on the above-mentioned parameters in the public domain. Reasonably complete information was

²⁶ The Commonwealth, Meeting of Law Ministers and Attorneys General of Small Commonwealth Jurisdictions, Outcome Statement, 2016: http://thecommonwealth.org/sites/default/files/inline/FINALMSCJOutcomestatement_0.pdf as on 13 January 2020.

²⁷ *Supra* note 8.

²⁸ *Ibid.*

obtained from 31 countries about the general population, number of courts, judges, police stations and arrests made [i.e., points (i) to (v)], whereas in 20 countries only partial information was available. Only 38 countries cited public sources for such information.²⁹ In five countries³⁰ information was sourced directly from the Government authorities³¹. Information for Cameroon, Mozambique and Tuvalu was not available at all.

In comparison, reasonably complete information about prisons [i.e., points (v) to (x)], was available only from 28 countries³². In 18 others, only partial information was available. Information obtained from 33 countries was based on publicly accessible sources, with nine being sourced from the World Prison Brief website³³. Information for five countries³⁴ was made available through direct sources i.e., government authorities, whereas no information was available for eight countries³⁵.

In 36 countries the information on prison population includes persons below 18 years,³⁶ i.e., information on children confined in juvenile centres or observation homes. The detention figures of adult prisoners is likely to be only a subset of this larger statistic.

Given the disparity with regard to the quality and quantum of information received, a definitive assessment of trends and patterns is difficult to attempt. Therefore, in this section, in order to provide relevant statistics and trends pertaining to prisons in the Commonwealth, an analysis of data made publicly available by the World Prison Brief³⁷ has been undertaken.

This analysis of prison data³⁸ on Commonwealth Member States reveals trends and patterns that have not been discussed before in this manner and may surprise the reader. Our main findings are

²⁹ Public sources refer to sources available in the public domain, which also includes information disclosed by Government authorities on their websites.

³⁰ Bahamas, Lesotho, Pakistan, Rwanda and St Vincent and the Grenadines.

³¹ Direct source refers to instances where requests were made to the government authorities to share data, as it was not available in the public domain.

³² Brunei, Canada, the Gambia, Ghana, Grenada, Guyana, India, Kiribati, Lesotho, Malaysia, Malta, Mauritius, Namibia, Nauru, New Zealand, Nigeria, Papua New Guinea, Singapore, Solomon Islands, St Vincent and the Grenadines, Kingdom of Eswatini, Tanzania, Tonga, Uganda and UK.

³³ World Prison Brief website: <https://www.prisonstudies.org/world-prison-brief-data>, as on 30th May 2022.

³⁴ Bahamas, the Gambia, Lesotho, Malta and Tonga.

³⁵ Cameroon, Fiji, Malawi, Mozambique, Rwanda, Samoa, St Kitts and Nevis and Tuvalu.

³⁶ Antigua and Barbuda, Bangladesh, Belize, Brunei, Cyprus, Dominica, Fiji, the Gambia, Ghana, Grenada, Jamaica, Kenya, Kiribati, Lesotho, Malaysia, the Maldives, Malta, Mauritius, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Solomon Islands, South Africa, St Lucia, St Vincent and the Grenadines, Kingdom of Eswatini, Tanzania, Tonga, Trinidad and Tobago, Uganda, UK, Vanuatu and Zambia.

³⁷ The World Prison Brief is an online database providing free access to information on prison systems around the world. It is a unique resource, which supports evidence-based development of prison policy and practice globally. It is hosted by the Institute for Crime and Justice Policy Research (ICPR), at Birkbeck, University of London. It was launched in 2000 using data compiled by Roy Walmsley, Founder of the World Prison Brief.

³⁸ The analysis focuses on changes in prison data among the Commonwealth countries since the year 2000. Data has been collated from data available on the World Prison Brief website. The base year is taken as the year closest to 2000 for which the data is available and the end year to which the change is calculated in the latest year for which the data is available for a particular country. The actual base year may vary between 2000 to 2004 depending on the availability of the data for a particular country. Similarly, the latest available data on which the change is calculated may vary from 2011 to 2021.

outlined below:

- i) **Availability of prison statistics:** Only seven countries among the Commonwealth Member States - Kenya, Mauritius, Namibia, Nigeria, Uganda, United Kingdom and New Zealand - made prison-population numbers publicly available in 2022, whereas 25 countries made it available up to 2021 and 10 up to 2020 only. The least updated information on prison population is from Nauru, Tonga and Tuvalu which have published them up to 2014 only.
- ii) **Number of prisons:** There are a total of 3,711 prisons in the 54 Commonwealth countries. The highest number of prisons is in India (1,306) which is more than five times the number in Uganda (254) which comes second on this list. Countries with higher number of prisons, have higher prison occupancy levels and tend to be overcrowded. (Refer to Table 1 and 3)
- iii) **Prison Population Rate³⁹ (per 100,000 of national population):⁴⁰** The average prisoner to population rate (number of prisoners per 100,000 of national population) across the Commonwealth is 177, whereas the global average is 167. More specifically, Rwanda has the highest prison population rate at 580, followed by St. Kitts and Nevis at 423. When viewed region-wise, the highest average prison population rate is in the 'Caribbean and Americas' region at 277 followed by the African region at 154.5 whereas the European region has the lowest average at 118.4. The Maldives shows the greatest drop in the prison population rate from 793 in 2000 to 333 in 2020 whereas the steepest increase is in Fiji from 146 in 2000 to 276 in 2020. Interestingly, statistics from some of the Commonwealth Small States⁴¹ demonstrate an increasing trend in prison population rates⁴², though the reasons are difficult to ascertain. (Refer to Table 1 and Graph 1)
- iv) **Prison Population:** The total prison population has increased from 1,090,334 to 1,535,377 (40.8%) between 2000 and 2022. This is significantly higher than the 24% increase in global prison population reported for the shorter period between 2000 and 2022. Between the 2000 and 2022 period only eleven countries have reported a decrease in their respective prison populations, with the greatest percentage decrease being recorded by Botswana (42.2%) followed by Barbados (39.8%) and Tanzania (26.4%). Among the Commonwealth regions, Oceania recorded the highest overall increase of 81% in its prison population over a period of two decades. The lowest increase was recorded in the countries of the Caribbean and Americas region (3.5%). (Refer to Table 1)

³⁹ This term used by the World Prison Brief refers to the prisoner-to-population unit ratio as explained above. It is also termed as incarceration rate.

⁴⁰ This analysis should be read with a disclaimer that the prison population data of 35 out of the total 54 countries is from the years 2020 and 2021 when there might have been large releases in response to the COVID-19 pandemic.

⁴¹ Commonwealth Small states are countries with a population of 1.5 million people or less or countries with a bigger population but which share many of the same characteristics. Please see the Commonwealth, Small States: <https://thecommonwealth.org/our-work/small-states> as on 20 May 2022.

⁴² Seychelles, St Kitts and Nevis, Fiji, Samoa and Tonga.

- v) **Prison Occupancy and Overcrowding:** The average prison occupancy levels in the Commonwealth is 126.12%, which is close to the global average of 126.23%. Uganda has the highest prison occupancy level at 341.5%, followed by Zambia at 247.8%. Only 18 countries have prison occupancy levels within capacity i.e., 100% or below, while as many as four countries have more than 200% occupancy – Uganda, Zambia, Mozambique and Malawi. As per regions, the highest average prison occupancy level is in Africa at 152.5% followed by Asia at 138.8%. Europe has the lowest average at 94.4%. (Refer to Table 2 and Graph 2)
- vi) **Women Prisoners:** The average share of female prisoners against total prison population of the Commonwealth nations is 3.8%, which is slightly less than the global average of 4.8%. Brunei Darussalam has the highest share of female prisoners in its prisons at 11.9%, followed by Singapore at 10.8%. By region, the highest average share of female prisoners is in Asia at 5.7% followed by Europe at 5.3%. Caribbean and American nations have the lowest average at 3%. Trends indicate that the number of women in prisons of Commonwealth countries has increased by 58% (from 37,572 to 59,344) over an approximate period from 2000 to 2022. The world female prison population has increased by 53% from 2000 to 2017.⁴³ Among the regions, Oceania saw the highest increase of 122% in its female prison population over this period, followed by Asia with an increase of 97%. Europe and Caribbean and Americas have seen a slight reduction in total female prison populations by 20% and 0.1% respectively over the given period.
- vii) **Pre-trial detainees:** The average proportion of pre-trial detainees is 35.13%, close to the global average of 33.9%. As of 2020, Bangladesh had the highest share of pre-trial detainees in its prisons at 80%, followed by India at 76.1%. Looking at regions, the highest share of pre-trial detainees is in Asia at 42.9% followed by the Caribbean and Americas at 38.5%. Oceania nations have the lowest average at 22.5%. Pre-trial prisoners form more than half of the total prison population in 15 countries.⁴⁴ 26 countries have less than one third of their prison population as pre-trial prisoners. (Refer to Table 2). Trends suggest that the percentage of pre-trial detainees as a proportion of total prison population has increased from an average of 31.3% to 35.1% over an approximate period of 20 years from 2000. The highest increase in the percentage of pre-trial prisoners is seen in Namibia from 5.2% to 54% (48.8 percentage points) followed by St. Lucia from 28.4% to 70.7% (42.3 percentage points) and the Gambia from 18.5% to 55.6% (37.1 percentage points). Individually among the Commonwealth countries, the percentage of pre-trial prisoners out of the total prison population has decreased in 16 countries over the given the period. For instance, the largest decrease in the percentage of pre-trial prisoners is seen in Mozambique- from 72.9% to 31.9% (41 percentage points) followed by Eswatini- from 49.6% to 23.9 (25.7 percentage points) and Lesotho- from 35.3% to 19.5% (15.8 percentage points). (Refer to Table 1 and Graph 3)

⁴³ Penal Reforms International, (2018), *Global Prison Trends 2018*. pg 16: https://cdn.penalreform.org/wp-content/uploads/2018/04/PRI_Global-Prison-Trends-2018_EN_WEB.pdf, as on 30th May 2022.

⁴⁴ Bangladesh, Barbados, Cameroon, the Gambia, India, Mauritius, Namibia, Nigeria, Pakistan, St. Lucia, Sierra Leone, Sri Lanka, Tanzania, Trinidad and Tobago, and Uganda.

Table 1: Information on no. of prisons, prison population, and prison population rate

Region	Name of Country	No. of Prisons	As on Date	Prison Population (Total) (including pre-trial detainees/remand prisoners)	Prison Population Rate (per 100,000 of national population)	As on Date
Africa	Botswana	23	2015	3882	162	May 2021
	Cameroon	79	2020	31815	117	Sep 2021
	Gambia	3	2014	543	23	Apr 2021
	Ghana	43	2020	13480	43	Sep 2021
	Kenya	134	2022	52979	97	Mar 2022
	Eswatini	12	2017	3362	244	Sep 2021
	Lesotho	14	2018	2216	104	Dec 2019
	Malawi	30	2019	14500	71	Dec 2020
	Mauritius	11	2018	2513	193	Apr 2022
	Mozambique	157	2020	18752	58	Dec 2020
	Namibia	13	2019	8900	318	Dec 2022
	Nigeria	240	2021	70797	33	Jan 2022
	Rwanda	14	2020	76099	580	Jan 2021
	Seychelles	3	2019	286	287	Dec 2021
	Sierra Leone	21	2021	4430	54	Aug 2021
	South Africa	235	2019	140948	235	Mar 2021
	Tanzania	126	2015	33570	52	Jun 2021
	Uganda	254	2019	68261	141	Mar 2022
	Zambia	90	2019	22823	123	Dec 2019
	Caribbean and Americas	Antigua and Barbuda	1	2021	246	254
Bahamas		1	2014	1617	409	Dec 2020
Barbados		1	2016	850	296	Dec 2018
Belize		1	2021	1046	258	Jun 2021
Canada		216	2015	38570	104	Dec 2018
Dominica		1	2018	204	276	May 2020
Grenada		1	2021	365	323	Aug 2021
Guyana		7	2021	1914	242	Sep 2021

Region	Name of Country	No. of Prisons	As on Date	Prison Population (Total) (including pre-trial detainees/remand prisoners)	Prison Population Rate (per 100,000 of national population)	As on Date
	Jamaica	11	2021	3719	130	Aug 2021
	St. Kitts and Nevis	2	2014	220	423	Jun 2017
	St. Lucia	1	2021	484	263	Oct 2021
	St. Vincent and the Grenadines	2	2018	385	347	Sep 2021
	Trinidad and Tobago	10	2021	3802	276	Apr 2021
Asia	Bangladesh	68	2020	83837	49	Apr 2021
	Brunei Darussalam	3	2019	841	186	Nov 2020
	India	1306	2020	488511	35	Dec 2020
	Malaysia	52	2019	69507	212	Aug 2021
	the Maldives	11	2019	1800	333	Jul 2020
	Pakistan	116	2021	85670	38	Sep 2021
	Singapore	13	2019	10262	169	Dec 2021
	Sri Lanka	60	2019	22000	102	Sep 2021
Europe	Cyprus (Republic Of)	1	2018	716	80	Sep 2020
	Malta	1	2021	821	159	Feb 2021
	United Kingdom	136	2021	88642	116.33	Apr 2022
Oceania	Australia	111	2015	42403	165	Sep 2021
	Fiji	15	2019	2550	276	Feb 2020
	Kiribati	4	2012	129	113	Jul 2016
	Nauru	1	2014	14	140	Nov 2014
	New Zealand	18	2019	7669	149	Mar 2022
	Papua New Guinea	18	2020	5087	58	Jan 2019
	Samoa	4	2010	400	202	Dec 2017
	Solomon Islands	6	2018	500	79	Jul 2019
	Tonga	4	2014	176	166	Jul 2014
	Tuvalu	2	2011	11	110	Aug 2014
	Vanuatu	4	2015	253	86	Aug 2020
	Total	3711		1,535,377	177 (Average)	

Source: World Prison Brief Website 2022

Graph 1: Depiction of country wise prison population rate, occupancy levels and pre-trial detention rates: A comparative chart

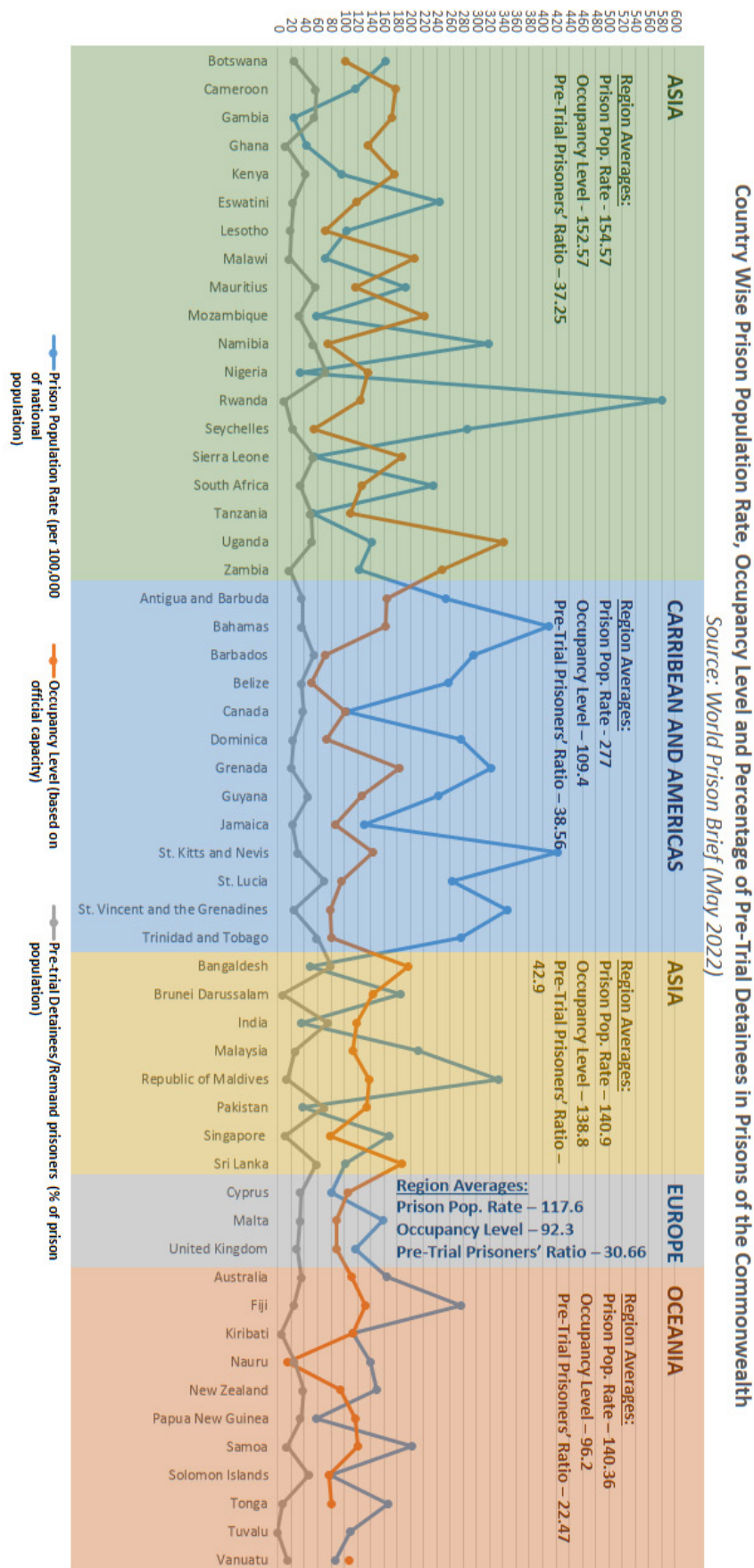


Table 2: Information on prison occupancies and proportion of pre-trial detainees

Region	Name of Country	Occupancy Level (based on official capacity)	As on Date	Pre-trial Detainees (% of prison population)	As on Date
Africa	Botswana	100.9	Jul 2016	24.5	Jan 2015
	Cameroon	177.6	Sep 2021	58	Sep 2021
	Gambia	172.5	Nov 2014	55.6	Apr 2021
	Ghana	135.5	Sep 2021	11.8	Sep 2021
	Kenya	176.6	Mar 2022	42.7	Mar 2022
	Eswatini	118.5	Sep 2021	23.9	Sep 2021
	Lesotho	70.6	Aug 2014	19.5	Aug 2014
	Malawi	207.1	Dec 2020	17.6	Dec 2020
	Mauritius	116.9	Aug 2011	56.7	Apr 2022
	Mozambique	220.7	Dec 2020	31.9	Dec 2020
	Namibia	75.4	Feb 2022	54	2022
	Nigeria	136.7	Jul 2021	72.4	Jan 2022
	Rwanda	124.1	Jan 2021	9.7	Mar 2020
	Seychelles	53.8	2016	22.4	Dec 2021
	Sierra Leone	186.5	Aug 2021	54	Aug 2021
	South Africa	127.2	Mar 2021	34	Mar 2021
	Tanzania	109	Apr 2020	50	Jun 2021
	Uganda	341.5	Mar 2022	51.6	Mar 2022
	Zambia	247.8	Oct 2019	17.6	Oct 2019
	Caribbean and Americas	Antigua and Barbuda	164	Oct 2021	37
Bahamas		161.7	Dec 2020	37	Dec 2020
Barbados		70.7	Oct 2014	54.7	Dec 2018
Belize		49.8	Jun 2021	35.8	Jun 2021
Canada		102.2	2015	39	2019
Dominica		73	Jul 2015	23.7	Mar 2016
Grenada		184.3	Aug 2021	20.4	Dec 2017
Guyana		127.2	Sep 2021	46	Sep 2021
Jamaica		87	Aug 2021	22.5	Aug 2021
St. Kitts and Nevis		144	2014	30.5	Jun 2017
St. Lucia	96.8	Oct 2021	70.7	Oct 2021	
St. Vincent and the Grenadines	79.8	2018	24.3	Sep2018	

Region	Name of Country	Occupancy Level (based on official capacity)	As on Date	Pre-trial Detainees (% of prison population)	As on Date
	Trinidad and Tobago	81.8	Sep 2018	59.7	Sept 2018
Asia	Bangladesh	197.5	Apr 2021	80	Apr 2021
	Brunei Darussalam	143.8	Nov 2020	7.1	Jun 2015
	India	118	Dec 2020	76.1	Dec 2020
	Malaysia	113.5	Aug 2021	26.7	June 2018
	the Maldives	138.5	2020	14.3	2020
	Pakistan	133.7	Sept 2021	70	Sept 2021
	Singapore	79.2	Sept 2013	10.8	Dec 2021
	Sri Lanka	186.9	Sept 2021	58.9	2019
Europe	Cyprus (Republic Of)	105.3	Sept 2020	34.6	Jan 2020
	Malta	88.6	Feb 2021	33.9	Feb 2021
	United Kingdom	89.26	Mar 2022	28.66	Mar 2022
Oceania	Australia	112.2	2017	35.9	Sept 2021
	Fiji	132.8	Feb 2020	24	Feb 2020
	Kiribati	112.8	Sept 2014	5.4	June 2016
	Nauru	14	Nov 2014	25	Dec 2010
	New Zealand	93.8	June 2019	39	March 2022
	Papua New Guinea	116.5	Jan 2019	34.4	Jan 2019
	Samoa	121.2	Dec 2017	14	Sept 2007
	Solomon Islands	77.7	Jun 2017	46.8	2018
	Tonga	81.5	Sept 2013	7.4	July 2014
	Tuvalu	-	-	0	Aug 2014
	Vanuatu	106.7	Sept 2016	15.3	June 2018
	Total Average	126.12		35.13814815	

Source: World Prison Brief Website 2022

Graph 2: Depiction of Occupancy Levels in Commonwealth Countries (in %)

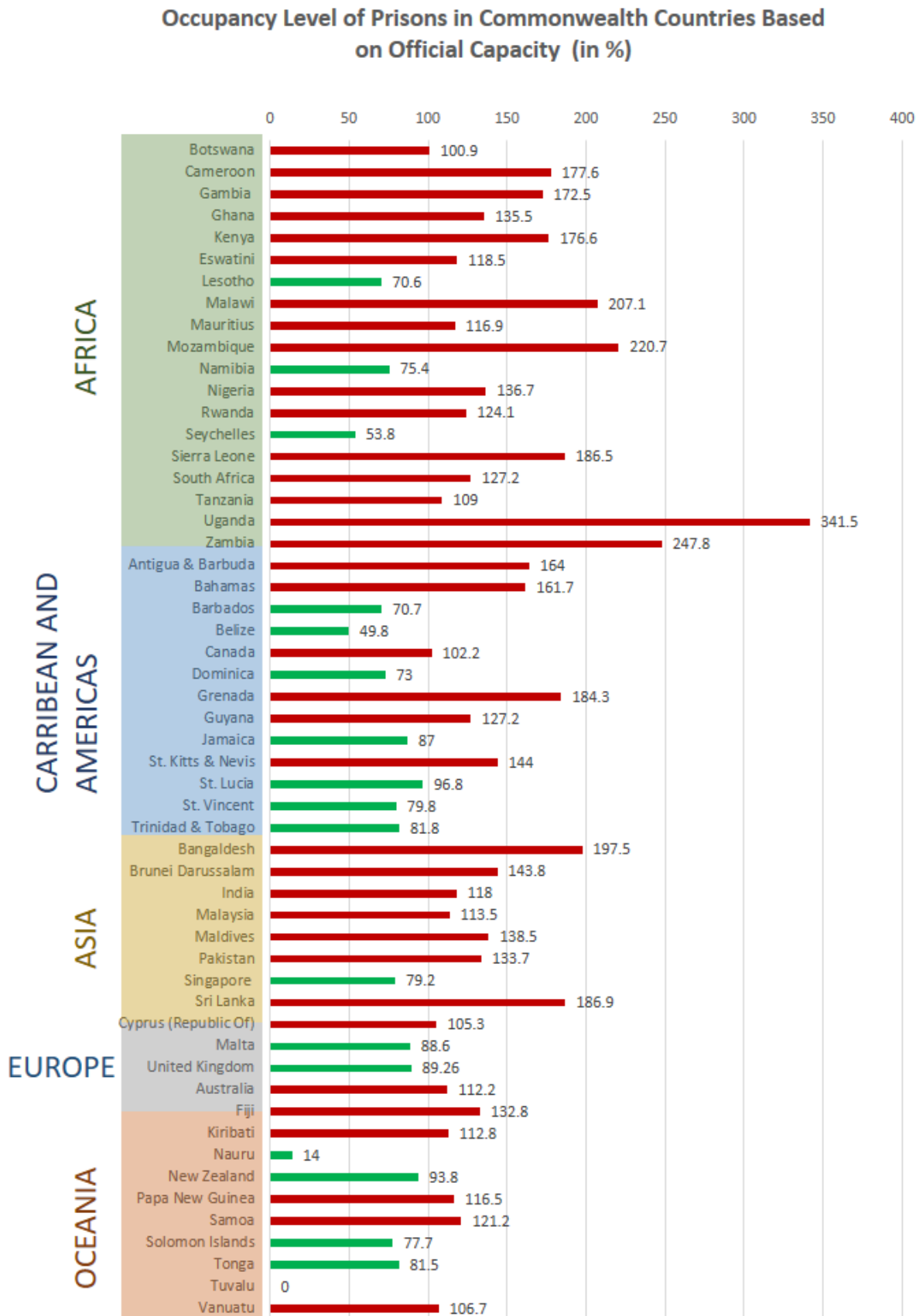
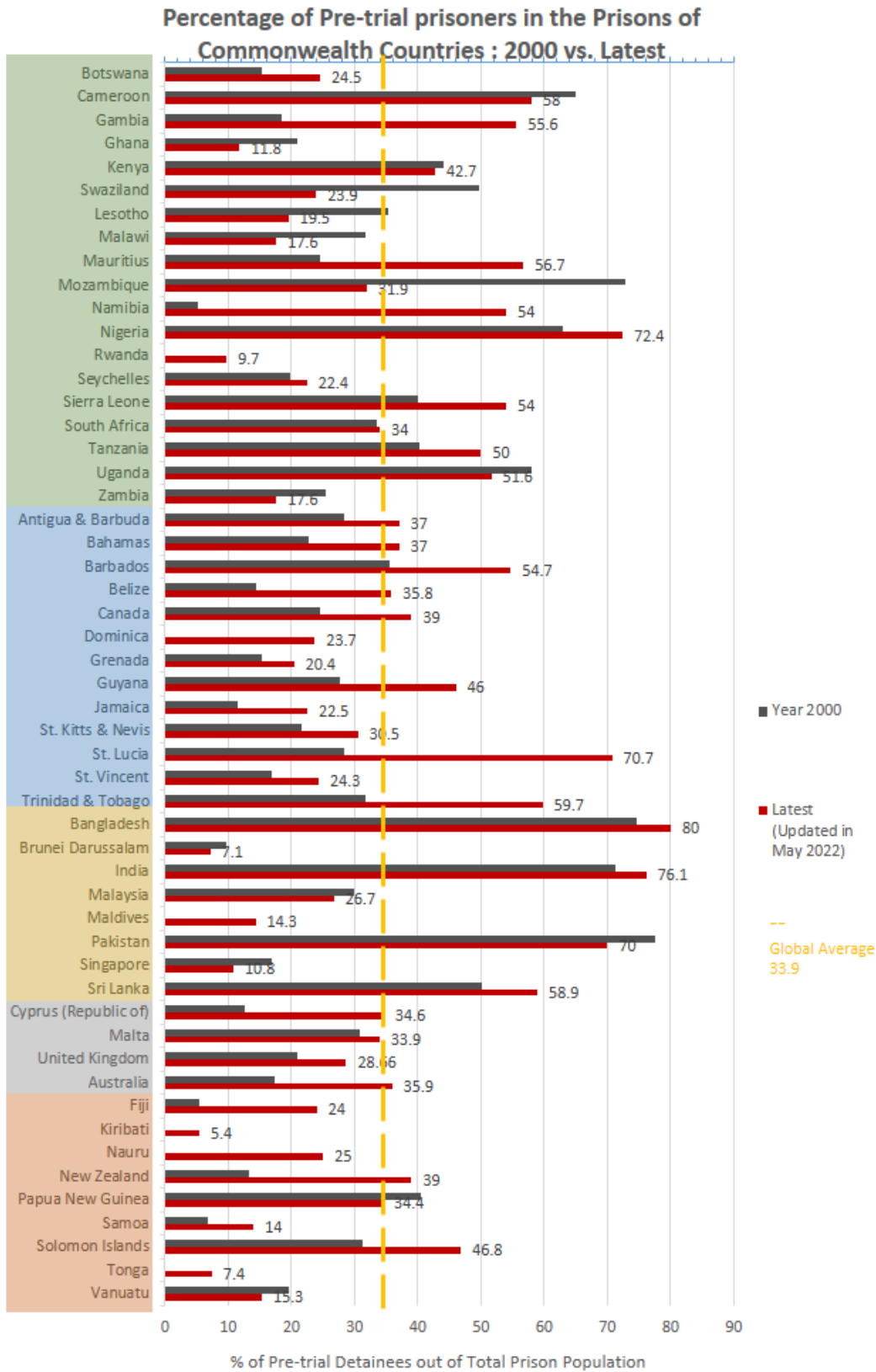


Table 3: Information on number of prisons vs. prison occupancy

S No.	Name of Country	No. of Prisons	Occupancy Level (based on official capacity)
1	Antigua and Barbuda	1	164
2	Bahamas	1	161.7
3	Barbados	1	70.7
4	Belize	1	49.8
5	Dominica	1	73
6	Grenada	1	184.3
7	St. Lucia	1	96.8
8	Cyprus	1	105.3
9	Malta	1	88.6
10	Nauru	1	14
11	St. Kitts and Nevis	2	144
12	St. Vincent and the Grenadines	2	79.8
13	Tuvalu	2	-
14	Gambia	3	172.5
15	Seychelles	3	53.8
16	Brunei Darussalam	3	143.8
17	Kiribati	4	112.8
18	Samoa	4	121.2
19	Tonga	4	81.5
20	Vanuatu	4	106.7
21	Solomon Islands	6	77.7
22	Guyana	7	127.2
23	Trinidad and Tobago	10	81.8
24	Mauritius	11	116.9
25	Jamaica	11	87
26	Maldives	11	138.5
27	Eswatini	12	118.5
28	Namibia	13	75.4
29	Singapore	13	79.2
30	Lesotho	14	70.6
31	Rwanda	14	124.1
32	Fiji	15	132.8
33	New Zealand	18	93.8
34	Papua New Guinea	18	116.5
35	Sierra Leone	21	186.5
36	Botswana	23	100.9
37	Malawi	30	207.1
38	Ghana	43	135.5
39	Malaysia	52	113.5
40	Sri Lanka	60	186.9
41	Bangladesh	68	197.5
42	Cameroon	79	177.6
43	Zambia	90	247.8
44	Australia	111	112.2
45	Pakistan	116	133.7
46	Tanzania	126	109
47	Kenya	134	176.6
48	United Kingdom	136	89.26
49	Mozambique	157	220.7
50	Canada	216	102.2
51	South Africa	235	127.2
52	Nigeria	240	136.7
53	Uganda	254	341.5
54	India	1306	118

Graph 3: Depiction of proportion of pre-trial detainees in Commonwealth countries: A comparative of figures from 2000 and 2022





PRE-TRIAL PROCEDURES AND SAFEGUARDS: STANDARDS AND GOOD PRACTICES IN THE COMMONWEALTH

III. PRE-TRIAL PROCEDURES AND SAFEGUARDS: STANDARDS AND GOOD PRACTICES IN THE COMMONWEALTH

3.1 Impacts of overuse of pre-trial detention

In many countries, acts of torture and other inhumane or ill-treatment may occur at any stage of pre-trial detention, targeting specific vulnerable groups for the purpose of obtaining information about crimes or extracting confessions.⁴⁵ Individuals in vulnerable situations are the most over-represented and negatively affected when detained pre-trial. These include the poor and marginalised; ethnic and religious minorities; foreigners; indigenous people; elderly; LGBT+ people; women, particularly those who are pregnant, persons with disability or have given birth in prison; and young offenders. More recently, there is also an increasing tendency in several countries of incarcerating political prisoners- also known as ‘prisoners of conscience’.⁴⁶

Further, the excessive period of time spent in pre-trial detention can also contribute towards reoffending or recidivism. Given the non-availability of data on the period of detention of pre-trial detainees, trends with regard to the exact time spent in detention are difficult to identify. Some studies on the impact of pre-trial detention in Africa reported that in 2013 the average period of pre-trial detention in countries like Sierra Leone and Ghana was 20 months,⁴⁷ in comparison with three years in Nigeria⁴⁸. In contrast, the average length of pre-trial detention in 19 of the then 25 European Member States was around five months, according to the 2003 European Commission investigation.⁴⁹

Prolonged periods of detention also impact the physical and mental health of detainees. In particular, the overcrowding of cells and lack of access to safe and potable water, inadequacy of sanitation facilities, food and basic living conditions and necessary medical care affect individuals inside detention centres.⁵⁰ These factors make prisons a high risk environment for the transmission of

⁴⁵ *Supra* note 3.

⁴⁶ Amnesty International defines Prisoners of Conscience as ‘someone who has not used or advocated violence or hatred in the circumstances leading to their imprisonment but is imprisoned solely because of who they are (sexual orientation, ethnic, national or social origin, language, birth, colour, sex or economic status) or what they believe (religious, political or other conscientiously held beliefs)’. See <https://www.amnesty.org/en/what-we-do/detention/> for more information.

⁴⁷ Ibe, S (2013), ‘*Envisioning a Better Future for Pre-trial Detention in Africa*’, Open Society Justice Initiative: <https://www.justiceinitiative.org/voices/envisioning-better-future-pretrial-detention-africa> as on 30 May 2022.

⁴⁸ Nwapa, A (2008), ‘*Building and Sustaining Change: Pre-trial Detention Reform in Nigeria*’, Open Society Justice Initiatives, pg 86: https://www.justiceinitiative.org/uploads/2f65cc09-c4da-4a48-9929-c8bff4110f53/Justice_Initiat.pdf as on 30 May 2022.

⁴⁹ Accompanying document to the Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, 2006: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006PC0468&from=EN> as on 30 May 2022.

⁵⁰ Csete, J (2010), ‘*Consequences of Injustice: Pre-Trial Detention and Health, International Journal of Prisoner Health*’, International Journal of Prisoners Health: <http://joannecsete.com/documents/ijph-2010.pdf> as on 30 May 2022.

HIV and TB among prisoners and pre-trial detainees.⁵¹ Depression, high rate of suicidal tendencies and substance abuse-related disorders in prisons are also linked to the increasing use of pre-trial detention. For instance, research on mental health problems in Nigeria's prisons, conducted in 2015, demonstrated a high prevalence of mental health disorders among prison inmates (between 34% and 57% of the prison population in comparison to the 5.8% in the general population).⁵²

'Pre-trial detention wastes human potential and wrecks lives' in many ways.⁵³ It is important to not only identify the reason behind the increasing use of pre-trial detention, but also the mechanisms that must be put in place to safeguard against its arbitrary and excessive use. Studies have indicated that non-adherence to international norms by incorporating them in domestic legal frameworks⁵⁴, inefficient and counter-productive pre-trial procedures⁵⁵ and structural weaknesses in criminal justice systems⁵⁶ often lead to pre-trial injustice. As a remedy legal provisions and policies have been identified that can curb the use and restrict the length of pre-trial detention.⁵⁷ A number of such legal provisions and safeguards are identified and highlighted in subsequent sections of this chapter.

3.2 International and regional safeguards to pre-trial detention

Although 'there is no single international instrument that sets out all human rights on pre-trial detention',⁵⁸ several international, regional legal frameworks, as well as national legislation seek to address and regulate the use of pre-trial detention, and to prevent arbitrariness and excessive reliance on detention before trial. While the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988⁵⁹ (hereinafter referred to as Body of Principles) enumerates some safeguards, their non-binding⁶⁰ nature, render them ineffective.

⁵¹ Jürgens, R, Nowak, M and Day, M (2011), "HIV and incarceration: prisons and detention", Jürgens et al. Journal of the International AIDS Society: <https://onlinelibrary.wiley.com/doi/pdf/10.1186/1758-2652-14-26> as on 30 May 2022.

⁵² Abdulmalik, JO, Adedokun, BO and Baiyewu, OO (2015), "Prevalence and correlates of mental health problems among awaiting trial inmates in a Prison facility in Ibadan, Nigeria", Afr J Med Med Sci. Author manuscript: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4682912/> as on 30 May 2022.

⁵³ Commonwealth Human Rights Initiative, Ghana (2013), *Global Campaign for Pre-trial Justice and UNDP, The Socioeconomic Impact of Pre-trial Detention in Ghana, 2013*: https://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/The%20Socioeconomic%20Impact%20of%20Pre-trial%20Detention%20in%20Ghana_2013_EN.pdf as on 30 May 2022.

⁵⁴ Open Society Justice Initiative (2012), *Improving Pretrial Justice: The Role of Lawyers and Paralegals*, pg. 31. Available at: <https://www.justiceinitiative.org/uploads/ce76d68b-747d-4743-a594-4cd18d1759cb/improving-pretrial-justice-20120416.pdf> as on 20 May 2022.

⁵⁵ *Ibid*, pg 34.

⁵⁶ ICPR (2019), *Pre-Trial Detention and Its Over-use, Evidence from Ten Countries*, pg. 23: <https://www.prisonstudies.org/news/pre-trial-detention-and-its-over-use-evidence-ten-countries> as on 30 May 2022.

⁵⁷ *Ibid*, pg 33.

⁵⁸ Hausler K and McCorquodale R (2014), "Pre-trial detention and human rights in the Commonwealth: Any lessons from civil law systems?", Vol 2 No. 1, Journal of Human Rights in the Commonwealth, School of Advanced Studies, University of London: <https://journals.sas.ac.uk/jhrc/article/view/2097> as on 30 May 2022.

⁵⁹ UN General Assembly (1988), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988, UN Resolution 43/173: <https://www.ohchr.org/sites/default/files/bodyprinciples.pdf> as on 30 May 2022.

⁶⁰ A non binding instrument is one which cannot be legally enforced and does not entail any legal obligation upon the State to implement.

At the international level, the 1948 Universal Declaration of Human Rights (UDHR) sets forth main safeguards relating to the use of pre-trial detention and to prevent its abuse under Articles 9, 10 and 11.⁶¹ Further, through the International Covenant on Civil and Political Rights (ICCPR), 1966 (entry into force in 1976) the UN monitors the implementation of safeguards against pre-trial detention provided in Articles 9 and 10.⁶² Another milestone in promoting the use of non-custodial measures and the minimum safeguards for persons subject to alternatives to imprisonment, are Articles 5 and 6 of the Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)⁶³ adopted by the UN General Assembly in 1990.

In order to investigate cases of deprivation of liberty imposed arbitrarily or inconsistently with the international standards, a Working Group on Arbitrary Detention (WGAD) has been setup at the UN level.⁶⁴ The Working Group investigates alleged cases of arbitrary detention by sending urgent appeals and communications to the Government concerned to bring these cases to their attention. In its 2014 annual report, the WGAD affirmed that procedural guarantees are an essential component of due process rights.⁶⁵ It further emphasised that the right to challenge the lawfulness of detention and the right to a remedy where there is a wrong is supported by uniform international practice and state practice.

Universal Declaration of Human Rights⁶⁶

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which she/he has had all the guarantees necessary for his defence.

⁶¹ United Nations (1948), *Universal Declaration of Human Rights, 1948*: <https://www.un.org/en/universal-declaration-human-rights/> as on 30 May 2022.

⁶² United Nations (1966), *International Covenant on Civil and Political Rights, 1966*: <https://www.ohchr.org/en/professional-interest/pages/ccpr.aspx>.

⁶³ United Nations (1990), *United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), 1990*: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/TokyoRules.aspx> as on 30 May 2022.

⁶⁴ The UN Human Rights Council has extended the Working Group's mandate for three years in September 2019.

⁶⁵ WGAD (2014), *Report of the Working Group on Arbitrary Detention 2014* pp 19: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/070/08/PDF/G1407008.pdf?OpenElement> as on 30 May 2022

⁶⁶ *Supra* note 61.

1. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

International Covenant on Civil and Political Rights 1966⁶⁷

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

⁶⁷ *Supra* note 62.

The Tokyo Rules 1990⁶⁸

Rule 5. Pre-trial dispositions

5.1 Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate.

Rule 6. Avoidance of pre-trial detention

6.1 Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.

6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under Rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings.

6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

Regional bodies, human rights instruments and mechanisms have also laid down principles on the interrelated aspects of pre-trial detention, covering specific thematic such as - the lack of access to legal aid and legal advice; the treatment of specific groups of prisoners; the condition of prisons and the use of pre-trial detention as a measure of last resort.⁶⁹ In Africa, Articles 6 and 7 of the African Charter on Human and Peoples' Rights, recognises the rights of due process during arrest and detention and the right to a fair trial.⁷⁰ In addition, the 2014 Luanda Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention⁷¹ adopted by the African Commission on Human and

⁶⁸ *Supra* note 63.

⁶⁹ Heard C and Fair H (2019), "Pre-Trial Detention and its Over-Use: Evidence from ten Countries", Institute for Crime & Justice Policy Research: https://prisonstudies.org/sites/default/files/resources/downloads/pre-trial_detention_final.pdf as on 30 May 2022.

⁷⁰ Organization of African Unity (1981), *African Charter on Human and Peoples Rights*: <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf> as on 30 May 2022.

⁷¹ African Commission on Human and Peoples' Rights (2014), *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa*: https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/udgivelser/hrs/guidelines_on_arrest_police_custody_detention_final_en_fr_po_ar.pdf as on 30 May 2022.

People's Rights, advances pre-trial justice and addresses the unnecessary and arbitrary use of arrest and pre-trial detention on the continent of Africa, which cause overcrowding of prisons, corruption, torture and precipitate socioeconomic impact on detainees, their families and their communities.⁷²

In Europe, pre-trial detention has also been the focus of the Council of Europe. Article 5 of the European Convention on Human Rights, 1953 recognises the rights to liberty and security, including safeguards against the deprivation of liberty and emphasises the imperative of the lawfulness of the detention.⁷³ Additionally, the 2006 European Prison Rules⁷⁴ provide a non-legally binding standard on good principles and practices in the treatment of detainees and in the management of detention facilities. In particular, the Rules, applicable to both pre-trial detainees and sentenced prisoners, stress that 'the enforcement of custodial sentences and the treatment of prisoners necessitate taking account of the requirements of safety, security and discipline while also ensuring prison conditions which do not infringe human dignity and which offer meaningful occupational activities and treatment programmes to inmates, thus preparing them for their reintegration into society'.⁷⁵

In 2011, the European Commission presented a Green Paper on pre-trial detention, describing a 'package of measures on procedural rights of suspected and accused persons that will assist in achieving the necessary mutual trust between judicial practitioners, whilst taking into account the differences between the legal traditions and systems of the Member States'.⁷⁶ However, till date, this Green Paper has not fructified into implementable standards. Therefore, no European Union legislation has been adopted on pre-trial detention.

In addition to the various UN General Assembly resolutions⁷⁷ adopted to address prolonged incarceration and the excessive and arbitrary use of pre-trial detention against men, women and youth, the UN Office on Drugs and Crime (UNODC) has commissioned studies and developed criminal justice toolkits on the issue of pre-trial detention and legal aid. In 2006, the UNODC published the criminal justice assessment toolkit, titled: "Access to Justice: Legal Defence and Legal

⁷² UNODC (2014), *The Luanda Guidelines: a rights-based approach to Arrest and Pre-trial Detention in Africa*: https://www.unodc.org/documents/congress/background-information/NGO/Open_society_foundation/The_Luanda_Guidelines.pdf as on 30 May, 2022.

⁷³ Council of Europe, European Convention on Human Rights: <https://www.coe.int/en/web/human-rights-convention#:~:text=A%20Convention%20to%20protect%20your.prerequisite%20for%20joining%20the%20Organisation> as on 30 May 2022.

⁷⁴ Council of Europe (2006), *European Prison Rules*: <https://rm.coe.int/european-prison-rules-978-92-871-5982-3/16806ab9ae> as on 20 January, 2020.

⁷⁵ *Ibid.*

⁷⁶ European Commission (2011), Green Paper: http://eujusticia.net/images/uploads/pdf/E_Com_Green_Paper_on_detention_16.6.11.pdf as on 30 May 2022.

⁷⁷ GA Resolution 55/89 - Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2000; GA Resolution 47/133 - Declaration on the Protection of All Persons from Enforced Disappearance 1992; GA Resolution 43/173 – Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment 1988 etc.

Aid.⁷⁸ This handbook provides guidance for assessing the availability of legal representation to poor people being investigated for, or charged, with a criminal offence.⁷⁹

In 2012 the UN General Assembly, adopted unanimously the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.⁸⁰ The Guidelines established minimum standards for the right to legal aid in criminal justice systems and provided practical guidance on how to ensure access to effective legal aid services to suspects, accused, witnesses and victims in criminal cases.⁸¹ The guidelines affirm that:

- legal aid is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law;
- it is a foundation for the enjoyment of other rights, including the right to a fair trial, as a precondition to exercising such rights; and
- an important safeguard that ensures fundamental fairness and public trust in the criminal justice process.

More specifically, Guideline 4 outlines guidance for provision of legal aid at the pre-trial stage. This is in furtherance to the recognition that, an effective legal aid system, as part of a functioning criminal justice system, may:

- reduce the length of time suspects are held in police stations and detention centres,
- reduce prison population,
- prevent wrongful convictions,
- reduce prison overcrowding and congestion in the courts, and
- reduce reoffending and revictimisation.

During the 42nd session of the UN Human Rights Council, held in 2019, Member States adopted a resolution on human rights in the administration of justice, including juvenile justice,⁸² touching upon a number of core human rights issues like access to justice, the independence and impartiality of the judiciary, the best interest of children in detention, other rights of persons deprived of their

⁷⁸ UNODC (2006), *Access to Justice Legal Defence and Legal Aid, criminal justice assessment toolkit*: https://www.unodc.org/documents/justice-and-prison-reform/cjat_eng/4_Legal_Defence_and_Legal_%20Aid.pdf as on 30 May 2020.

⁷⁹ UNODC (2012), United Nations to help extend legal aid in the criminal justice system: <https://www.unodc.org/unodc/en/frontpage/2012/May/crime-commission-takes-another-step-to-protect-human-rights-in-the-criminal-justice-system.html> as on 30 May 2022.

⁸⁰ UN General Assembly (2012), United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, A/RES/67/187: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf as on 30 May 2022.

⁸¹ *Ibid.*

⁸² UN HRC (2019), *Human rights in the administration of justice, including juvenile justice*, 42nd session, resolution 42/11 at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G19/280/35/PDF/G1928035.pdf?OpenElement> as on 30 May 2022.

liberty and the UN commitment to strengthening the rule of law.⁸³ The resolution encouraged States to address overcrowding in detention facilities by taking effective measures, including the use of alternatives to pre-trial detention⁸⁴ and custodial sentences, access to legal aid, mechanisms for crime prevention, and early release and rehabilitation programmes.

More recently in April 2021, the UN Common Position on Incarceration was prepared to address prison and associated challenges at the global, regional and national levels. This document classifies the overuse of pre-trial detention and imprisonment as the foremost global prisons-related challenge. As priority areas, the document identifies that pre-trial detention and imprisonment should be restricted to a measure of last resort, and that procedural bottlenecks in criminal justice systems and other deficiencies that contribute to delays and prison overcrowding should be identified and effectively addressed.⁸⁵

In support of international and regional guidelines (and their implementation), civil society⁸⁶ across the globe including from the Commonwealth has also contributed to addressing the pre-trial detention issue. In particular, it has published toolkits and handbooks to highlight and overcome problems relating to the excessive use of pre-trial detention, providing good practices and recommendations for States.⁸⁷ In May 2021, Principles on Effective Interviewing for Investigations and Information Gathering (also known as the Mendez Principles) were released which outline a number of legal and procedural safeguards that are essential components of the interviewing process.⁸⁸

During the last two years, the COVID-19 pandemic also threw a spotlight to the increasing use of pre-trial detention. In a guidance note on ‘Ensuring Access to Justice in the context of COVID-19’

⁸³ Oral Statement of Austria before the Human Rights Council, the sponsor of the Resolution: <https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session42/Pages/42RegularSession.aspx> as on 30 May 2022.

⁸⁴ Refer to section 3.4 for various alternatives to pre-trial detention.

⁸⁵ UNODC (2021), *United Nations System Common Position on Incarceration*, pg. 17: https://www.unodc.org/res/justice-and-prison-reform/nelsonmandelarules-GoF/UN_System_Common_Position_on_Incarceration.pdf as on 15 May 2022.

⁸⁶ Including organisations such as Penal Reform International, Fair Trials, International Legal Foundation etc.

⁸⁷ For more information refer to Penal Reform International, Ten-point plan on reducing pre-trial detention, Available at <https://www.penalreform.org/resource/ten-point-plan-reducing-pre-trial-detention/>; Fair Trials, A Measure of Last Resort? The practice of pre-trial detention decision making in the EU, 2016. Available at: https://fairtrials.org/sites/default/files/publication_pdf/A-Measure-of-Last-Resort-Full-Version.pdf; Fair Trials, Where’s My Lawyer? Making legal assistance in pre-trial detention effective, 2019. Available at: <http://www.apador.org/blog/wp-content/uploads/2019/10/Wheres-my-lawyer-making-legal-assistance-in-pre-trial-detention-effective.pdf>; World Prison Brief, World Pre-trial/Remand Imprisonment List (Fourth edition), 2020. Available at https://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_list_4th_edn_final.pdf; Open Society Justice Initiative, Presumption of Guilt: The Global Overuse of Pre-trial Detention, 2014. Available at: <https://www.justiceinitiative.org/uploads/de4c18f8-ccc1-4eba-9374-e5c850a07efd/presumption-guilt-09032014.pdf>; ICPR, ‘Pre Trial Detention and Its Over-use, Evidence from Ten Countries’, 2019; UNDP, and Open Society Justice Initiative, The Socioeconomic Impact of Pre-trial Detention, 2011. Available at: <https://www.justiceinitiative.org/uploads/84baf76d-0764-42db-9ddd-0106dbc5c400/socioeconomic-impact-pre-trial-detention-02012011.pdf>; OSJI, Improving Pre-trial Justice: The Roles of Lawyers and Paralegals, 2012 etc.

⁸⁸ Association for Prevention of Torture (2021), *Principles on Effective Interviewing for Investigations and Information Gathering*. Available at <https://www.ap.torture.org/en/resources/publications/new-principles-effective-interviewing-investigations-and-information> as on 30 May 2022.

issued by UNODC and UNDP, the need to reduce the use of pre-trial detention, by increasing use of alternatives was emphasised.⁸⁹ Release of pre-trial detainees was identified as one vital strategy to reducing the risk of the spread of COVID-19 infections in prisons. In a joint statement issued by UNODC, WHO, UNAIDS and OHCHR, political leaders were urged to consider limiting the deprivation of liberty, including pre-trial detention, to a measure of last resort.⁹⁰ A report documenting releases of prisoners amid the pandemic indicate that several jurisdictions including India, Iraq, Ethiopia, Mozambique, Kenya, Jordan etc. released pre-trial detainees as a means to decongest prisons.⁹¹

3.3 Pre-trial safeguards and procedures under national laws: Guidance

A key objective of this research has been to understand what safeguards are necessary in pre-trial procedures to effectively prevent arbitrary and excessive pre-trial detention. Each country's national legal and policy frameworks and the provisions which, in theory, would safeguard the rights of pre-trial detainees has been analysed. Even though, in reality, there may be inadequacies in effective implementation of these laws, the need for robust national legislative frameworks for effectively protecting the rights of pre-trial detainees cannot be neglected.

A 2016 study that analysed the practice of pre-trial decision making in the European Union,⁹² asserted that 'standards of procedural protections in pre-trial decision making continue to be insufficient to protect the fundamental rights of criminal defendants in the EU'. It further emphasised that 'soft-law' measures such as guidelines or handbooks are inadequate to improve protection in this area. Essentially the study supported the need for tough laws that safeguard the rights of pre-trial detainees, as they hold benefit of being a coherent restatement of international and regional standards; thus, making it easier for prosecutors, lawyers and judges to apply and for defendants to understand.⁹³

In the Commonwealth, while the laws and policies providing the framework for conduct of criminal proceedings vary from country to country, there are some shared basic principles, practices and institutions. This is probably on account of the shared constitutional and legal histories between

⁸⁹ UNODC and UNDP (2020), *Guidance Note – Ensuring Access to Justice in the Context of COVID-19*: https://www.unodc.org/documents/Advocacy-Section/Ensuring_Access_to_Justice_in_the_Context_of_COVID-191.pdf as on 30 May 2022.

⁹⁰ UNODC, WHO, UNAIDS and OHCHR (2020) *Joint Statement on COVID-19 in Prisons and Other Closed Settings*: <https://www.who.int/news/item/13-05-2020-unodc-who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings> as on 30 May 2022.

⁹¹ DLA Piper (2020), *A global analysis of prisoner releases in response to COVID-19* pg. 11: https://www.dlapiper.com/~/_media/files/insights/publications/2021/03/dla-piper-prison-population-during-covid-19.pdf?la=en&hash=F5C1EBBA0D3D86BDDA58FAC87DB9EF3CAE3815DF as on 30 May 2022.

⁹² Fair Trials (2016), *A Measure of Last Resort? The practice of pre-trial detention decision making in the EU*, pg. 41. Available at: <https://www.fairtrials.org/app/uploads/2022/01/A-Measure-of-Last-Resort-Full-Version.pdf> as on 30 May 2022.

⁹³ *Ibid.*

Commonwealth countries.⁹⁴ The legal analysis indicates that there exists a number of enabling provisions that are aimed at protecting the rights of suspects, arrestees, and pre-trial detainees. These provisions seek to uphold the presumption of innocence and guarantee the right to fair trial for defendants.

In 2019, a report by the Institute for Crime and Justice Policy Research, UK,⁹⁵ presented research on the use of pre-trial detention in ten contrasting jurisdictions- including some Commonwealth Member States and other countries⁹⁶. This study was based on an analysis of national legal systems followed by interviews with 60 experienced criminal defence lawyers. The report highlighted the disparities in the use of pre-trial imprisonment across the ten countries and identified transferable lessons on preventing misuse of pre-trial detention. One of the primary recommendations of the report related to the laws and policies to prevent misuse of pre-trial imprisonment. The report provided the following guidance points⁹⁷ for framing laws and policies:

1. Laws on pre-trial detention should fully reflect international standards, be clear, and not contain conflicting provisions;
2. Use of pre-trial detention should be ruled out, where there is no likelihood of a custodial sentence if the defendant is convicted;
3. The overall time that a person can be detained pre-trial should be limited;
4. Judges should be required to, when imposing or extending pre-trial detention, provide concrete, case-specific reasons for their decision, in writing;
5. Consideration of alternatives to pre-trial detention should be mandatory;
6. Where money bail is used, it must be set with due regard to the defendant's means;
7. The prosecution must be required to disclose to the defence the case file or the principal evidence on which the charges are based, prior to the first pre-trial detention hearing;
8. The time spent in pre-trial detention should always be deducted from any custodial sentence; and
9. Introduction of laws and policies likely to increase the misuse of pre-trial imprisonment should be avoided.

⁹⁴ Apart from Mozambique and Rwanda, all other countries were a part of the colonial British empire.

⁹⁵ *Supra* note 56 at pg 33.

⁹⁶ Kenya, South Africa, Brazil, the United States of America, India, Thailand, England and Wales, Hungary, the Netherlands and Australia.

⁹⁷ *Supra* note 56 at pg 33.

With reference to the last point, the research also identified provisions and policies that tend to increase the risk of unnecessary use of pre-trial detention, such as:

1. Blanket restrictions on the right to conditional release based solely on the offence which the defendant is charged with, or on the defendant's criminal antecedents;
2. Guidelines or policies that fix the amount of bail according to the offence, and not the defendant's means to pay it;
3. Routine use of money bail as an alternative to remand;
4. Provisions shifting the burden of proof from prosecution to defence so that defendants charged with certain offences must prove that they should be released pre-trial; and
5. Provisions limiting the proper exercise of judicial discretion. These can hinder the evaluation of the defendant's personal circumstances and can thus prevent courts from upholding the principles of fair trial.

3.4 Analysis of pre-trial procedures and safeguards in Commonwealth countries

This section of the report contains the findings of the research and comparative analysis of pre-trial procedures and safeguards across Commonwealth countries. Additionally, safeguards, both substantive and procedural⁹⁸, that are necessary to secure the rights of pre-trial detainees at various stages of the criminal proceedings, have been identified from the national legal and policy frameworks of 54 countries. This section also contains references to progressive procedures and practices prevalent in Member States which can be adapted by other countries to strengthen pre-trial safeguards in their own jurisdictions.

It is recognised that legal and policy frameworks that seek to protect the rights of pre-trial detainees should not only restate international standards, but should also 'aim to provide guidance on procedures through which these standards can be operationalised.'⁹⁹ This means that provisions should also provide criminal justice functionaries with step-by-step procedures through which they

⁹⁸ Substantive Law is the legal provision given in a statute, which determines the rights and obligations of the person citizen to be protected by law, whereas procedural Law prescribes the procedures and methods for enforcing rights and duties and for obtaining redress.

⁹⁹ *Supra* note 92 at pg 42.

can effectuate the protection of rights. Keeping this as the principal framework, the comparative analysis into the legal frameworks of the 54¹⁰⁰ Member States of the Commonwealth, sets forth ten basic¹⁰¹ safeguards that are critical in facilitating a fair trial, and are aimed at protecting the rights of pre-trial detainees. These include:

1. Review of arrest by a competent authority within a stipulated time;
2. Remedies against illegal and arbitrary arrests;
3. Rights of suspects and accused persons to be informed of their rights by the apprehending authorities;
4. Provision of release on bail by the police;
5. Right to representation by a legal counsel for suspects, arrestees and prisoners;
6. Presence of robust state-funded legal services mechanisms to ensure compliance with right to legal representation;
7. Consequences where accused is unrepresented in a criminal proceeding;
8. Time limits on the period of investigation, trial and detention;
9. Mechanisms for periodic review of continued detention for pre-trial detainees; and
10. Availability of non-custodial measures as alternatives to pre-trial detention.

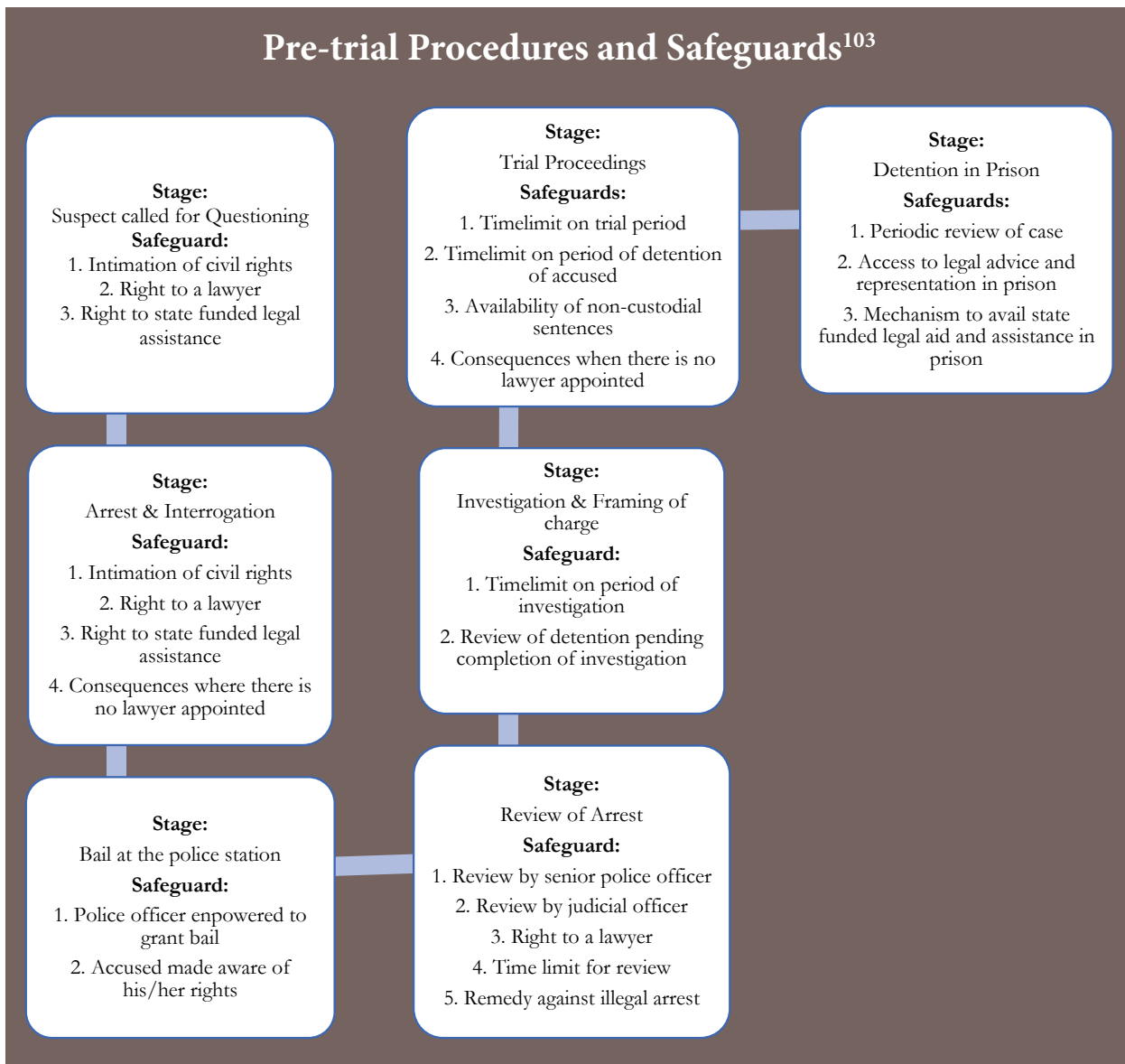
Of the safeguards outlined above, it must be borne in mind that these are applicable at various stages of criminal proceedings, and some of these are recurring ones i.e., they are necessary at more than one stage of the criminal proceedings. The graphic below attempts a description of the above-mentioned safeguards at various stages of a criminal proceeding.¹⁰²

¹⁰⁰ For the purpose of analysis, United Kingdom and Australia, despite having different jurisdictional regimes, have been treated as single jurisdictions only. However, good practices for separate jurisdictions have been mentioned where necessary.

¹⁰¹ These are just the basic safeguards and should not be considered as a comprehensive list of all possible safeguards.

¹⁰² These stages may be termed differently or have minor differences across countries, but can be considered a fairly adequate representation based on our research analysis.

Pre-trial Procedures and Safeguards¹⁰³



1. Review of arrest by a competent authority within a stipulated time

Standard: Article 9 of ICCPR¹⁰⁴ states that ‘Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release’. Principle 11 of the Body of Principles¹⁰⁵, states that ‘a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority’. It further states that ‘a judicial or other authority shall be empowered to review as appropriate the continuance of detention’. Article

¹⁰³ This depiction is made only in context of the aspects covered in this report, and should not be considered a comprehensive list of safeguards.

¹⁰⁴ *Supra* note 61.

¹⁰⁵ *Supra* note 59.

5(3) of the European Convention on Human Rights¹⁰⁶, and Article 7(5) of the American Convention on Human Rights¹⁰⁷ also affirm the same.

Analysis: The research indicates that in 50 of the 54 Commonwealth countries¹⁰⁸ arrests are subject to a review by an authority other than the functionary who made the arrest. However, the time within which the accused is to be brought before a judge or other competent authority, varies considerably. In 17 countries,¹⁰⁹ the time period for production of the arrestee before the reviewing authority is within 48 hours of the time of arrest; whereas in 15 countries,¹¹⁰ the arrestee must be produced before the reviewing authority within 24 hours.; In 4 countries,¹¹¹ production of the arrestee before the reviewing authority may be made within 72 hours of the time of the arrest. In **Barbados, Guyana, Mauritius, New Zealand and Papua New Guinea**, an arrested person is to be brought before a reviewing authority as soon as possible; in **Solomon Islands, St Kitts and Nevis** they are to be brought within a reasonable time and in **Papua New Guinea and Trinidad and Tobago** they are to be produced without delay or promptly. The longest period permitted for production of the arrestee before the reviewing authority is in **Tuvalu** i.e., 7 days¹¹² where arrest is without a warrant, and in all other cases between one to two weeks. The shortest period within which the arrestee must be produced before the reviewing authority is reported from **New South Wales, Australia** i.e., within 6 hours of the arrest.¹¹³

Some countries observe exceptional procedures with regard to production time lines: for instance,

¹⁰⁶ *European Convention on Human Rights*, European Court of Human Rights, Council of Europe: https://www.echr.coe.int/documents/convention_eng.pdf as on 20 May 2022. A. 5(3): “Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

¹⁰⁷ *American Convention on Human Rights*, 1969. Available at: <https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf> as on 20 May 2022. A 7(5): “Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.”

¹⁰⁸ The research responses for Mozambique, Namibia, Samoa and Zambia either stated no to the question, or were not clear on their response.

¹⁰⁹ Antigua and Barbuda, Bahamas, Belize, Botswana, Brunei, Cameroon, Fiji, Ghana, Grenada, Lesotho, Malawi, Malta, Singapore, South Africa, St Vincent and the Grenadines, Kingdom of Eswatini and Uganda.

¹¹⁰ Bangladesh, Canada, Cyprus, India, Jamaica, Kenya, Kiribati, Malaysia, the Maldives, Nauru, Nigeria, Pakistan, Seychelles, Sri Lanka and Vanuatu.

¹¹¹ Dominica, the Gambia, Sierra Leone and St Lucia.

¹¹² *Island Courts Regulations*, 2008 (Tuvalu): https://tuvalu-legislation.tv/cms/images/LEGISLATION/SUBORDINATE/1965/1965-0034/IslandCourtsRegulations_1.pdf as on 30 May 2022. R. 11(1): “When a person has been apprehended under a warrant, he shall be brought before the island court which issued such warrant and thereupon, either by warrant in Form 5 in Schedule 1, committed to prison, or, orally, to the custody of the officer apprehending him or to such other safe custody as may be thought fit; and the island court may order him to be brought up at a certain time and place before it and shall give notice accordingly to the person who laid the charge in question: Provided, however, that no committal under this regulation shall exceed 7 days.”

¹¹³ *Law Enforcement (Powers and Responsibilities) Act 2002*, (NSW): <https://legislation.nsw.gov.au/view/html/inforce/current/act-2002-103> as on 30 May 2022. Section 115. “A person who is arrested can only be held without charge for a maximum investigation period of 6 hours, which may be extended by a detention warrant.”

in **Rwanda**¹¹⁴ the investigator has five days to present a suspect to the prosecutor, and the prosecutor has another five days to present a suspect to the judge for provisional detention. Whereas, in cases where the accused/suspect is caught red-handed the investigator presents he/she is presented to the prosecutor within 72 hours of arrest, and the prosecutor has five days to decide to present the suspect before the judge.

In England and Wales in the **UK**, reviews are to be conducted at certain key intervals following arrest. After being arrested,¹¹⁵ he/she must be brought before the custody officer as soon as practicable. The custody officer then determines the availability of sufficient evidence to charge the subject. If not charged, the person must be released within 24 hours; however the police have the power to extend this period to 36 hours,¹¹⁶ and a further detention of 36 hours can be authorised by a magistrate's court.¹¹⁷ Thus, in effect, an arrested person might be detained in police custody for a maximum of four days before being released or charged.

However, a good practice is noticed, whereby arrests are subject to review by police officers at key intervals of custody. In all cases where an arrest has been made, the police are obliged to carry out periodic reviews of the grounds for the detention, and a first review must be held within six hours after the detention was first authorised, and all subsequent reviews are to be conducted at intervals of not more than nine hours.¹¹⁸

Good Practices:



Review of arrests at key intervals of custody following arrest by competent police officers

England and Wales: The key intervals, and responsible persons for such review are as follows¹¹⁹:

1. After being arrested and brought to a police station, the suspect must be brought before the **custody officer** (who must be of the rank of Sergeant at least or above) as soon as practicable. The custody officer must determine whether there is sufficient evidence to charge the suspect with the offence for which he or she has been arrested;

¹¹⁴ Law n° 027/2019 of 19/09/2019 Relating to the Criminal Procedure, 2019 (Rwanda): <https://www.judiciary.gov.rw/index.php?id=31> as on 30 May 2022.

¹¹⁵ The provisions differ for those arrested under section 41 Terrorism Act 2000, wherein they can be held without charge for upto 48 hours, and the pre-charge detention can be extended to a maximum period of 14 days by a judicial authority or senior judge.

¹¹⁶ *Police and Criminal Evidence Act*, 1984, (UK): <https://www.legislation.gov.uk/ukpga/1984/60/contents> as on 30 May 2022. Available at <https://www.legislation.gov.uk/ukpga/1984/60/contents>. See Section 42.

¹¹⁷ *Ibid.* See Section 43.

¹¹⁸ *Ibid.* See section 40(3).

¹¹⁹ *Ibid.* See Sections 37(1), 42, 43, 44, 40 (1), 40 (3), 40 (1)(a) 40 (1)(b).

2. If not charged, a suspect must be released within 24 hours. The police have the power to extend this period to 36 hours from the time of arrest and the authorisation must be given by an officer of the rank of a Superintendent at least or above; and
3. A Magistrates court can issue a warrant for further detention up to a maximum of 36 hours. This court has the power to extend the warrant for any further period of indeterminate length no later than 96 hours after the arrest.

In effect, a suspect might be detained in police custody for a maximum of four days before being released or charged.

There is also periodic review of arrests from time to time, by responsible persons as follows:

Persons who have not been charged

The police are obliged to carry out periodic reviews of the grounds for the detention to ensure the grounds on which the arrest was initially authorised are still valid. The **first** review shall be no later than **six hours after the detention** was first authorised, the **second** – no later than **nine hours**, and **subsequent** reviews shall be at intervals of not more than **nine hours** each. The officers in charge of these periodic reviews should be of at least the rank of inspector and one who has not been directly involved in the investigation.

Persons who have been charged

The above periodic review as applicable to persons who have not been charged applies, except that the officer in charge of the reviews is the custody sergeant/police officer.

Scotland:

A custody review must be carried out every continuous period of 6 hours, by an officer of at least the rank of inspector and one who has not been directly involved in the investigation.¹²⁰



Maximum period of questioning specified

Australia – Queensland:

After arresting a suspect, the police officer may detain him/her for a reasonable period of time to investigate or question such person not exceeding 8 hours. The maximum period of questioning permissible under law is four hours.¹²¹

¹²⁰ *Criminal Justice (Scotland) Act*, 2016 (UK): <https://www.legislation.gov.uk/asp/2016/1/contents> as on 20 May 2022. See Section 7.

¹²¹ *Police Powers and Responsibilities Act*, 2000 (Qld). Available at: <https://www.legislation.qld.gov.au/view/pdf/inforce/2017-09-13/act-2000-005> as on 20 May 2022. See Sections 403(2) and 403(3).

2. Remedies against illegal and arbitrary arrests

Standards: Article 9(1), of the International Covenant on Civil and Political Rights (ICCPR)¹²² states that no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as established by law. Article 9(4), ICCPR states that anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. It further provides in Article 9(5) that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation. Principle 2 of the Body of Principles¹²³ also states that ‘arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials of persons authorised for that purpose’. Further Principle 7, suggests that States should enact laws that prohibit acts contrary to the rights and duties outlined in the principles, and subject such violations to sanctions through conduct of impartial investigations.

Analysis: Of the 54 countries reviewed for this report, a few provide specific language in their criminal laws to define illegal arrests. In **the Maldives**, an unlawful arrest is defined as being arbitrarily detained, arrested or imprisoned except as provided by law in accordance with the Constitution.¹²⁴ Further, where any person is arrested unlawfully, he or she has a right to compensation.¹²⁵ While **Rwanda** provides a list of scenarios¹²⁶ where an arrest would be termed as illegal, **South Africa** provides for four conditions that must be met for an arrest to be considered lawful. These four pillars are:

- a) The arrest is authorised by some statutory provision;
- b) The arrester must exercise some form of physical control over the arrestee;
- c) The arrestee must, in accordance with the constitutional provisions, be informed of the reasons for his/her arrest promptly;
- d) The arrestee must be taken to the appropriate authorities as soon as possible.

In other countries¹²⁷, the legal provisions outline what constitutes a lawful arrest, and it is presumed that any arrest that fails to meet those standards, would automatically be ‘unlawful’, ‘arbitrary’

¹²² *Supra* note 62.

¹²³ *Supra* note 59.

¹²⁴ *Constitution of the Maldives 2008* (Maldives): <https://presidency.gov.mv/Pages/Index/15> as on 20 May 2022. A. 45 “Everyone has the right not to be arbitrarily detained, arrested or imprisoned except as provided by law enacted by the People’s Majlis in accordance with Article 16 of this Constitution.”

¹²⁵ *Constitution of the Maldives 2008* (Maldives): <https://presidency.gov.mv/Pages/Index/15> as on 20 May 2022. A. 58: ‘Everyone who has been arrested or detained without legal authority or justification has the right to be compensated.’

¹²⁶ Refer to text box below on page 44.

¹²⁷ Botswana, Canada, Cyprus, Dominica, Guyana and Nigeria.

or ‘illegal’ and thus appropriate remedies become applicable. In some countries¹²⁸ case law has nuanced the understanding of lawful and unlawful arrests. In the **Bahamas**, a wrongful or illegal arrest is characterised by depriving a person of his liberty for any time, however short without lawful excuse. Also, an arrest that might otherwise be justified will be unlawful and become a ground for an action of false imprisonment, where the requirements to make it clear to the arrested person that she/he is under lawful restraint, to inform him of the grounds for his arrest, and/or to take him before the appropriate authorities within a reasonable time are not complied with.¹²⁹

Many countries clearly define the remedies available against illegal arrests, including the right to compensation or instituting civil or criminal proceedings against the offending police officers. In **Cyprus**, as a measure of providing remedies against an illegal arrest, the court can order the release of the person who was illegally arrested; and/or order the payment of compensation to such person.¹³⁰ Further where police officers arrest a person illegally, they may be found guilty of a criminal offence punishable with imprisonment.¹³¹ In **Mauritius**, any person who, without any order from the competent authorities, and except in cases where the law directs the arrest of accused parties, detains, or sequesters any person, shall be punished with imprisonment and a fine.¹³² Further, statutory provisions enable a complaint of illegal detention to be brought before a

judge, in order to assess if his detention is justified.¹³³ In **South Africa**, an individual who has been subjected to unlawful arrest may institute civil proceedings against the Ministry of Police. The civil proceedings will take the form of a delictual claim¹³⁴ whereby the Minister of Police can be held vicariously liable¹³⁵ for the conduct of his/her employee.

Good Practices:



Definition of ‘Unlawful Detention’

Rwanda:

Unlawful detention is defined in Article 143 of Law N° 027/2019 of 19/09/2019: Any detention

¹²⁸ Antigua and Barbuda, Bahamas and Singapore.

¹²⁹ *Seymour v The Commissioner of the Police and another* (2017) 1 BS J. No. 54.

¹³⁰ *Cyprus’s Constitution of 1960*, (Cyprus): https://www.constituteproject.org/constitution/Cyprus_2013.pdf?lang=en as on 20 May 2020. See Article 11(7) and (8).

¹³¹ *Rights of Suspects, Arrested Person and Persons in Custody Law of 2005*, (Law 163(I)/2005), (Cyprus).

¹³² *Criminal Code (Cap. 195)*, 1838 (Mauritius): http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=85779 as on 20 May 2020. See Section 258.

¹³³ *Ibid.* See Section 188.

¹³⁴ A delictual liability is concerned with damages suffered by a person resulting from a wrongful act, or omission of another, for which that person is entitled to compensation or other remedy as per law.

¹³⁵ Under the concept of vicarious liability, one person is held responsible for the wrong committed by the other.

in violation of provisions of Articles 66, 74 and 79¹³⁶ of this Law is unlawful and punishable.

Unlawful detention includes:

1° detaining a person in an irrelevant facility;¹³⁷

2° detaining a person for a period longer than the period specified in the arrest statement and in the provisional detention warrants;

3° continued detention of a person after a decision rejecting provisional detention or its extension or granting provisional release was taken;

¹³⁶ Law n° 027/2019 of 19/09/2019 Relating to the Criminal Procedure, 2019 (Rwanda): <https://www.judiciary.gov.rw/index.php?id=31> as on 30 May 2022.

Article 66: Arrest and detention: A suspect normally remains free during investigation. He or she may be held in provisional detention if there are sufficient grounds to believe that he or she committed an offence which is punishable with imprisonment for a term of at least two (2) years. However, even if the penalty provided for is less than two (2) years but not less than six (6) months, the investigator or prosecutor may provisionally detain the suspect if: 1° there is reason to believe that the suspect may evade justice; 2° the identity of the suspect is unknown or doubtful; 3° the provisional detention is the only way to prevent the suspect from disposing of evidence or exerting pressure on witnesses and victims or prevent collusion between the suspect and their accomplices; 4° such detention is the only way to protect the accused, to ensure that the accused appears before judicial organs whenever required or to prevent the offence from continuing or reoccurring. The investigator or prosecutor, while taking the decision to detain, considers other circumstances related to the conduct and behaviour of the suspect, the category and the gravity of the offence or whether the objective of detaining the suspect may not be achieved through any other means. A statement of arrest and detention of the suspect is valid for five (5) days which cannot be extended. A copy of such a statement is reserved to the suspect. A suspect who is arrested is immediately released if the organ in charge of investigation or the Public Prosecution finds in the course of investigation that there are no serious grounds for suspecting him or her of having committed or attempted to commit an offence. Such a decision is put in writing whose copy is reserved to the suspect.;

Article 74: Prosecution's case file on provisional detention: If the public prosecution decides to prosecute the suspect while in provisional detention, it prepares the case file and submits it to the competent court. The case file to be submitted to the court contains all the investigation records from the organ in charge of investigation to public prosecution as well as the public prosecution's conclusions providing the following: 1° the file number; 2° full particulars of the suspect; 3° the alleged offence; 4° brief description of the commission of offence; 5° serious grounds for suspecting a person of an offence, separately justified and linked with the relevant penal provisions. If the offence was committed by several people, how the offence was committed in general, the role of everybody in the commission of the offence as well as serious grounds justifying the request for provisional.;

Article 79: Duration of a provisional detention order: The provisional detention order against a suspect is valid for thirty (30) days including the date on which it was rendered. The order is subject to renewal for more thirty (30) days on a continuous basis. The renewal of such thirty (30) days must be justified in relation to what was done in the previous thirty (30) days in regard to the investigation and the objective of additional time requested. However, for petty offences, if the period of thirty (30) days expires, it is not renewed. For misdemeanours, the period cannot be renewed after three (3) months the person is in detention, and for felonies such a period cannot be renewed after six (6) months the person is in detention. If the time limits provided for under this Paragraph expire before the case file is submitted to the court, the suspect under provisional detention is granted provisional release. A court order for renewal of provisional detention is rendered by the court under the circumstances and time limits provided for under Article 77 of this Law. A court order for provisional detention or renewal of the provisional detention must be reasoned. A court order to release or renew provisional detention is rendered by the judge who is nearest to the place of detention of the accused after considering whether the grounds that led the previous judge to order detention are still valid. Provisional detention may also be ordered if the accused deliberately failed to comply with conditions imposed on him or her by the court.

¹³⁷ Irrelevant facility refers to an inappropriate place or unauthorised place of detention.

- 4° continued detention of a person after a decision of acquittal was taken;
- 5° continued detention of a person who was punished by a fine;
- 6° detaining a person whose sentence was suspended;
- 7° continued detention of a person who served his or her sentence;
- 8° being detained by an unauthorised person;
- 9° detention that does not comply with formalities of arrest and provisional detention.

Remedies

Cyprus:

Where the court finds that the arrest was illegal, the court may:

- (i) order the release of the person who was illegally arrested; and/or
- (ii) order the payment of compensation to the person who was illegally arrested.¹³⁸

Where a police officer arrests a person illegally, they may be found guilty of a criminal offence punishable with up to 3 years' imprisonment.¹³⁹

India:

Section 220 of the Indian Penal Code, 1860 provides punishment to an officer or authority who detains or keeps a person in confinement with a corrupt or malicious motive. However, a judicial pronouncement¹⁴⁰ has affirmed that statutory provisions are inadequate to repair the wrong done to citizens, and that victims need to be compensated monetarily also.

Mauritius:

Any person who, without any order from the constituted authorities¹⁴¹, and except in cases where the law directs the arrest of accused parties, detains, or sequesters any person, shall be

¹³⁸ Cyprus's Constitution of 1960, (Cyprus). See Article 11(7) and (8).

¹³⁹ Rights of Suspects, Arrested Person and Persons in Custody Law of 2005, (Law 163(I)/2005), (Cyprus), see section 31.

¹⁴⁰ DK Basu vs. State of West Bengal, Writ Petition (CRL) NO. 592 OF 1987, order dtd. 18th December 1996.

¹⁴¹ Constituted authority refers to an individual, group or body vested with legitimate power to carry out specific duties.

punished by penal servitude for a term not exceeding 10 years and by a fine not exceeding 10,000 rupees.¹⁴²

Papua New Guinea:

Section 26 of the Arrest Act 1977 provides a civil remedy for the wrongful exercise of powers conferred by the Act. The court has the power to award exemplary damages.

Rwanda:

If a person has been arrested illegally, the court may decide to retain or release the suspect. The court may also convict the person accused of illegal detention and punish them with penalties provided by the law.¹⁴³

3. Rights of suspects and accused persons to be informed of civil rights by apprehending authorities

Standards: Article 9(2) of ICCPR¹⁴⁴ states that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. The American Convention on Human Rights¹⁴⁵ and the European Convention on Human Rights¹⁴⁶ also reiterate these standards. These standards require that any person arrested must be told in simple, non-technical language that he can understand, the reasons for his/her arrest, i.e., which of his/her actions are offences in the eyes of which law.¹⁴⁷ This information should also be conveyed promptly. Principle 13 of the Body of Principles¹⁴⁸ further states that any person shall, at the moment of arrest or promptly thereafter, be provided by the authority responsible for his arrest, with information on and an explanation of his rights and how to avail himself of such rights. The Luanda Guidelines 2014¹⁴⁹ list out twelve rights of arrested persons, and further state that all persons, at the time of their arrest, must be informed of all the rights orally and in writing and in a language and format that is accessible and is understood by the arrested persons.¹⁵⁰ While

¹⁴² Criminal Code (Cap. 195), 1838 (Mauritius). See Section 258.

¹⁴³ Law N° 027/2019 of 19/09/2019 Relating to the Criminal Procedure, 2019 (Rwanda): <https://www.refworld.org/docid/60873af94.html> as on 20 May 2022. See Articles 144 and 145.

¹⁴⁴ *Supra* note 62.

¹⁴⁵ *Supra* note 107, Article 7(4).

¹⁴⁶ *Supra* note 106, Article 5(2).

¹⁴⁷ *Fox, Campbell and Hartley vs. The United Kingdom*, Appl. No. 12244/86; 12245/86; 12383/86), Council of Europe: European Court of Human Rights, 30 August 1990: <https://www.refworld.org/cases,ECHR,3ae6b6f90.html> as on 15 May 2022. See, pg. 19, para. 40.

¹⁴⁸ *Supra* note 59.

¹⁴⁹ *Supra* note 71.

¹⁵⁰ African Commission on Human and People's Rights (2014), *The Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines)*: https://www.achpr.org/public/Document/file/English/conditions_of_arrest_police_custody_toolkit.pdf as on 12 May 2020. See Guidelines 4 and 5.

most of the earlier international frameworks provide for the rights of arrested persons, more recent guidelines and provisions extend rights to both suspects and accused persons.¹⁵¹

The Luanda Guidelines 2014

- 4. Rights of an arrested person:** The following rights shall be afforded to all persons under arrest:
- a. The right to be free from torture and other cruel, inhuman and degrading treatment and punishment.
 - b. The right to be informed of the reasons for their arrest and any charges against them.
 - c. The right to silence and freedom from self-incrimination.
 - d. The right of access, without delay, to a lawyer of his or her choice, or if the person cannot afford a lawyer, to a lawyer or other legal service provider, provided by state or non-state institutions.
 - e. The right to humane and hygienic conditions during the arrest period, including adequate water, food, sanitation, accommodation and rest, as appropriate considering the time spent in police custody.
 - f. The right to contact and access a family member or another person of their choice, and if relevant consular authorities or embassy.
 - g. The right to urgent medical assistance, to request and receive a medical examination and to obtain access to existing medical facilities.
 - h. The right to information in accessible formats, and the right to an interpreter.
 - i. The right to apply for release on bail or bond pending investigation or questioning by an investigating authority and/or appearance in court.
 - j. The right to challenge promptly the lawfulness of their arrest before a competent judicial authority.
 - k. The right to freely access complaints and oversight mechanisms.
 - l. The right to reasonable accommodation which ensures equal access to substantive and procedural rights for persons with disabilities.

Analysis:

- i) **Suspects:** In 34¹⁵² of the 54 countries, our study found that suspects have the right to be informed of their civil rights at the time of arrest. In some of the remaining countries, these

¹⁵¹ *Ibid*; UNODC (2012), *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*: https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf as on 30 May 2022; Council of the European Union (2009), *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, (2009/C 295/01): <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF> as on 30 May 2022.

¹⁵² Australia, Bahamas, Bangladesh, Barbados, Belize, Canada, Fiji, the Gambia, Ghana, Grenada, Guyana, Jamaica, Kenya, Kiribati, Lesotho, Malawi, the Maldives, Mauritius, Namibia, Nigeria, Papua New Guinea, Rwanda, Seychelles, Solomon Islands, South Africa, St Kitts and Nevis, St Lucia, Kingdom of Eswatini, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Vanuatu and Zambia.

provisions were applicable only to ‘arrested persons.’¹⁵³ Several jurisdictions cited case law which extended the rights of arrested persons to suspects. For instance, in **South Africa**, the Constitution sets out the rights of the arrested, accused and detained persons, but not specifically for suspects. However, by virtue of the developing jurisprudence, suspects are entitled to all constitutional pre-trial rights of arrested and detained persons.¹⁵⁴ In **Canada**, some guidance is given as to when a suspect is considered to be in detention. When a police officer or other state agent assumes control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel, such a person is said to be under detention.

With respect to the mode of conveying information about his/her rights to the suspect, a majority of the countries surveyed require it to be done orally. In **Australia (New South Wales), Bangladesh, Kiribati, Malta and the United Kingdom**, the information has to be conveyed to the suspect in writing. Most countries also emphasise that the information should be shared in a language that can be understood by the suspect.¹⁵⁵ While most countries stated that this information must be shared with the suspect as soon as possible, **the Gambia** provides for such communication of their rights to suspects within 3 hours of commencement of detention. In **Cyprus**, as soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he/she shall be cautioned/warned by the police.¹⁵⁶

ii) **Arrested Persons:** Barring two States,¹⁵⁷ in all other Commonwealth Member States, arrested persons have the right to be informed of their civil rights immediately upon arrest. In **Brunei**, there are no provisions that compel police officers to give reasons for a person’s grounds of arrest and detention.¹⁵⁸ In **Singapore** too, despite there being a constitutional right of arrested persons to be informed of their rights, there are no provisions that mandate the competent authority to inform them of their rights. This scenario sets forth a lacuna in the legal framework. While there may be a constitutional right to be informed of the ground of arrest, without a complementary statutory provision or procedural safeguard, there is no enforceable mandate imposed on the competent authorities to effectuate that right. Analysis indicates that in some countries in order to implement the constitutional mandate of communicating information about the arrestee’s rights, complementary laws giving effect to them have been enacted. For instance, in **Belize**, rules framed state that whenever a police officer has arrested or detained a person he should promptly inform the person of the reasons

¹⁵³ India, Dominica, Uganda.

¹⁵⁴ *S vs. Orrie and Another* (SS 32/2003) [2004] ZAWCHC 25 (14 October 2004); *S vs. Sebejan and Others*, 1997 (8) BCLR 1086 (T).

¹⁵⁵ Belize, Guyana, Grenada, the Gambia,

¹⁵⁶ *Judge’s Rules and Administrative Directions to the Police 1964* (see Rule 2) are applicable in Cyprus by virtue of section 8 of the *Criminal Procedure Law, Cap. 155*.

¹⁵⁷ Brunei and Singapore.

¹⁵⁸ *Zainuddin Dato Seri Paduka Haji Marsal vs. Pengiran Putera Negara Pengiran Haji Umar bin Pengiran Datu Penghulu Pengiran Haji Apong & anor* [1996] 1 JCBD 112

for the arrest or detention.¹⁵⁹ In **Queensland**, Australia, there is a specific Police Powers and Responsibilities Act 2000 (Qld) drawn up for competent authorities, which outlines specific responsibilities and mandates of the police in relation to suspects and arrested persons. In **Jamaica**, the Jamaican Code of Conduct for Civilian-Police Relations states that arrested persons must clearly be informed of their rights. It further states that the arrested person must be allowed a phone call or message to a person of their choice, and they are not to be forced into a vehicle without an explanation of what is happening and where they are being taken. In **Cyprus**, the Rights of Suspects, Arrested Person and Persons in Custody Law of 2005 provides specific provisions which outline mandates of the police.

Further, in terms of mode of communicating such information laws in only seven¹⁶⁰ countries, require that arrestees be informed of their rights in writing, and in the remaining Member States of the Commonwealth such information is to be conveyed orally promptly or within a reasonable period of time. In **the Gambia**, similar to suspects, arrestees must be informed of these rights within three hours of the arrest.

Good Practices:

Suspects to be cautioned before questioning

United Kingdom: England and Wales:

Suspects must be cautioned before any questions about an offence they are suspected or accused of committing are put to them. The person giving the caution must explain to the suspects that¹⁶¹

- they are not under arrest and can leave the station;
- the purpose of the voluntary interview is to question them to obtain evidence about their involvement in the offence described in the caution;
- their consent is required for the interview;
- they have the right to be informed about the offence(s) in question;
- they have the right to free legal advice and how they may obtain legal advice; and
- what other rights and entitlements apply to the interview.

¹⁵⁹ *Judges' Rules: Being Guidelines for The Interviewing Of Persons And Obtaining Statements From Them While In Police Custody*, 2000 (Belize): http://www.belize-law.org/web/e_library/judges_rules.html as on 30 May 2022.

¹⁶⁰ Antigua and Barbuda, Australia: New South Wales, Bangladesh, Cameroon, Cyprus, Kiribati and Malta.

¹⁶¹ UK Home Office (2019), *Code of Practice for the detention, treatment and questioning of persons by police officers*, see sections 10 and 11, framed in accordance with *Police and Criminal Evidence Act 1984*, section 66.

The suspect must be given a written notice summarising these rights. Further, the consent of the suspect to the interview must be recorded in writing by the interviewing officer.

✓ **Right to telephone friend, relative, or lawyer before questioning**

Kiribati:

Before a police officer starts to question a suspect for an offence, the police officer must inform the suspect that they may phone or speak to a friend or relative or a lawyer. The police officer must make a phone available to the suspect, and delay the questioning for a reasonable time to allow the suspect to speak to the friend, relative or lawyer. The investigating police officer must also allow the friend, relative or lawyer to be present, and give advice to the suspect during questioning.¹⁶²

Tuvalu:

Suspects must be informed by a police officer that they may telephone a friend, relative, or lawyer before questioning and the suspect may request that any of them be present during questioning. If the suspect exercises this right, the police officer must delay questioning the suspect for a “reasonable time” (2 hours, unless special circumstances exist) until such person’s arrival.¹⁶³

✓ **Procedural rights of suspects**

Malta:

It is the duty of the police or of the court, as the case may be, to inform the suspect or the accused without undue delay of the following procedural rights:

- a. the right of access to a lawyer;
- b. any entitlement to free legal advice and the conditions for obtaining such advice;
- c. the right to be informed, in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of his rights of defence, of the offence she/he is

¹⁶² *Police Powers and Duties Act 2008* (Kiribati), sections 114, 115, 116.

¹⁶³ *Police Powers and Duties Act 2009* (Tuvalu), section 128

suspected or accused of having committed: Provided that the suspect or accused shall be promptly informed of any changes in the information given in accordance with this article where this is necessary to safeguard the fairness of the proceedings;

- d. the right to interpretation and translation;
- e. the right to remain silent;
- f. the right to have a third party informed of the suspect's or the accused person's deprivation of liberty;
- g. the right to communicate with third persons and with consular authorities when the suspect or an arrested person is deprived of his liberty;
- h. the right to be allowed to consult a medical practitioner;
- i. should the suspect or arrested person be illiterate, the right to have the Letter of Rights read out and explained to him.

This information is to be given either orally or in writing, in simple and accessible language, taking into account any particular needs of the vulnerable suspected or accused persons.¹⁶⁴

 **Procedure when suspect is questioned in any other place and not at the police station**

Australia: Queensland:

There are regulations¹⁶⁵ that require a police officer who wants to question a person as a suspect when not at a police station or a police establishment, to caution the person in a way that substantially complies with the following:

“I am (name and rank) of (name of police station or police establishment. I wish to question you about (briefly describe offence). Are you prepared to come with me to (place of questioning)? Do you understand that you are not under arrest and you do not have to come with me?”

¹⁶⁴ *Criminal Code*, Chapter 9, The Laws of Malta 1854 (Malta), Article 534AB.

¹⁶⁵ *Police Powers and Responsibilities Regulation 2012*, (Queensland), Australia: <https://www.legislation.qld.gov.au/view/pdf/asmade/sl-2012-0251>, as on 30 May 2022.

Before the police officer starts to question the person, the police officer must caution the person in a way substantially complying with the following:

“Do you understand you are not under arrest? Do you understand you are free to leave at any time unless you are arrested?”

Further, if a person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence the following safeguards must be complied with:

- (a) before a police officer starts to question the person, the police officer must inform the person that he or she may:
 - (i) telephone or speak to a friend or relative to inform the person of his or her whereabouts and ask the person to be present during questioning; and
 - (ii) telephone or speak to a lawyer of the person’s choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning.

The police officer must delay the questioning for a reasonable time to allow the person to telephone or speak to the above people and for that person(s) to arrive.

- (b) If the person asks to speak to a friend, relative or lawyer, the investigating police officer must as soon as possible provide reasonable facilities to enable the person to speak to the other person and in circumstances where the conversation cannot be overheard in the case of a lawyer.



Rights of Arrested Persons

South Africa:

Upon being arrested by a police officer, the accused person is entitled to be informed of his/her civil rights set out in the Constitution:

Everyone who is arrested for allegedly committing an offence has the right:

- a. to remain silent;
- b. to be informed promptly:

- i. of the right to remain silent; and
- ii. of the consequences of not remaining silent;
- c. not to be compelled to make any confession or admission that could be used in evidence against that person;
- d. to be brought before a court as soon as reasonably possible, but not later than:
 - i. 48 hours after the arrest; or
 - ii. the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
- e. at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
- f. to be released from detention if the interests of justice permit, subject to reasonable conditions.¹⁶⁶

Belize:

The Constitution states that any person who is arrested or detained shall be entitled,

- (a) to be informed promptly, and in any case no later than twenty-four hours after such arrest or detention, in a language he understands, of the reasons for his arrest or detention;
- (b) to communicate without delay and in private with a legal practitioner of his/her choice and, in the case of a minor, with his/her parents or guardian, and to have adequate opportunity to give instructions to a legal practitioner of his/her choice;
- (c) to be informed immediately upon his/her arrest of his/her rights under paragraph (b) of this subsection; and
- (d) to the remedy by way of habeas corpus for determining the validity of his/her detention.¹⁶⁷



Complementary Legislation to effectuate Constitutional Mandates

Belize:

In furtherance of the *Supreme Court of Judicature Act, the Judges' Rules: Being Guidelines for the Interviewing of Persons and Obtaining Statements from them while in police custody, 2000* have been prepared which provide enabling provisions to effectuate the constitutional rights¹⁶⁸:

¹⁶⁶ *The Constitution of the Republic of South Africa 1996*, section 35(1).

¹⁶⁷ *The Constitution of Belize 1981*, section 5(2).

¹⁶⁸ *Judges' Rules: Being Guidelines for the Interviewing of Persons and Obtaining Statements From Them While in Police Custody, 2000* (Belize): http://www.belize-law.org/web/e_library/judges_rules.html as on 30 May 2022.

Rule 2: “Whenever a police officer has arrested or detained a person he should promptly inform the person of the reasons for his arrest and detention, and in any case, he must do so no later than 48 hours after such arrest and detention.”

Rule 3: “Whenever a police officer has arrested or detained a person, he must immediately inform that person that she/he is entitled to speak privately with and instruct a lawyer or, if the person is a minor, to speak with his parents or guardians.”

Australia – Queensland:

In order to outline the powers and responsibilities of the police, the *Police Powers and Responsibilities Act 2000 (QLD)* a police officer is required to inform an arrested person that he/she is under arrest and of the nature of the offence for which he/she has been arrested.

Jamaica:

The Jamaican Code of Conduct for Civilian-Police Relations states that arrested persons must clearly be informed of their rights. It further states that the arrested person must be allowed a phone call or send a message to a person of their choice, and they are not to be forced into a vehicle without an explanation of what is happening and where they are being taken.

Cyprus:

As per the *Rights of Suspects, Arrested Person and Persons in Custody Law of 2005*, arrested persons have the right to be informed of their civil rights immediately after their arrest and without undue delay.

India:

Section 50, of the *Code of Criminal Procedure 1973* provides provisions for the person arrested to be informed of grounds of arrest and of right to bail.

- (1) Every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which she/he is arrested or other grounds for such arrest.

Additionally, Section 50A outlines the obligation of person making the arrest to inform about the arrest, etc. to a nominated person.

4. Provision of release on bail by the police

Standards: Interestingly, the ICCPR or the Body of Principles do not provide any references or standards for release on bail by the police. Guideline 7 of the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (the Luanda Guidelines) 2014 do, however, state that ‘all persons detained in police custody shall have a presumptive right to police bail or bond’. Though the functionality of police bail has been subject to criticism,¹⁶⁹ when implemented effectively, it can be an effective safeguard of liberty.

Analysis: In as many as 47 of the 54 countries, domestic laws relating to criminal procedures permit bail to be granted at the police station itself without requiring the arrestee to be produced in court. Ordinarily this provision applies to situations where the arrestee is suspected of having committed petty offences which invite a very short period of imprisonment or merely a monetary fine. No such provision was reported from Botswana, Cyprus, Dominica, Lesotho, the Maldives, Mozambique and Uganda in the course of our study. The type of offences where bail could be granted by the police officer varies considerably across jurisdictions. In Nigeria, administrative bail can be granted at the police station for offences other than those punishable with death.¹⁷⁰ In a number of other countries including **Ghana, Malaysia, Pakistan, Singapore, Sri Lanka, India, and Zambia** police are authorised to grant bail in bailable cases, which are usually offences punishable with two or three-year sentence. In **Rwanda** administrative bail is available for petty offences, i.e., offences that carry less than six-month imprisonment and misdemeanours i.e., offences that carry six months to five years imprisonment).¹⁷¹

Good Practices:

- ✓ **Bail to be granted at the police station where person cannot be brought before magistrate within 24 hours**

Barbados:

On a person being taken into custody for an offence without a warrant, a police officer not below the rank of inspector or a police officer in charge of the police station to which the person is brought, if it will not be practicable to bring him before a magistrate within 24 hours after his being taken into custody, shall inquire into the case, and,

¹⁶⁹ Howard League for Penal Reform (2015), *What if police bail was abolished?*: <https://howardleague.org/wp-content/uploads/2016/03/What-if-police-bail-was-abolished-web.pdf> as on 30 May 2022.

¹⁷⁰ *Administration of Criminal Justice Act*, 2015 (ACJA), (Nigeria). Section 158: “When a person who is suspected to have committed an offence or is accused of an offence is arrested or detained, or appears or is brought before a court, he shall, subject to the provisions of this Part, be entitled to bail.”

¹⁷¹ Article 81, *Law N° 027/2019 of 19/09/2019 Relating to the Criminal Procedure*, 2019 (Rwanda); Articles 17 and 18, *Law N°68/2018 of 30/08/2018 Determining Offences and Penalties in General*, 2018 (Rwanda).

- (a) if the offence is not one punishable with imprisonment, shall grant the person bail; and
- (b) if the offence is one punishable with imprisonment, may, unless the offence appears to be a serious one, grant the person bail with or without sureties subject to a duty to appear before a magistrate at such time and place as the officer appoints.¹⁷²



Liberal provisions for grant of bail by police officers

Canada:

Release from custody where arrest was made without warrant¹⁷³: If a person has been arrested without warrant for an offence, other than treason, inciting to mutiny, intimidating Parliament, piracy, seditious offences, piratical acts or murder, and has not been taken before a court of justice or released from custody of peace officer shall, as soon as practicable, release the person, if

- (a) the peace officer¹⁷⁴ intends to compel the person's appearance by way of summons;
- (b) the peace officer issues an appearance notice to the person; or
- (c) the person gives an undertaking to the peace officer.

Release from custody where arrest was made with warrant¹⁷⁵: If a person who has been arrested with a warrant by a peace officer is taken into custody for an offence other than treason, inciting to mutiny, intimidating parliament, piracy, seditious offences, piratical acts or murder and the warrant has been endorsed by a court of justice, a peace officer may release the person, if

- (a) the peace officer issues an appearance notice to the person; or
- (b) the person gives an undertaking to the peace officer.

¹⁷² *Bail Act Cap 122A* (Barbados), Section 6: <http://104.238.85.55/en/ShowPdf/122A.pdf>, as on 30 May 2022.

¹⁷³ *Criminal Code* (R.S.C., 1985, c. C-46), (Canada), section 498: <https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html>, as on 30 May 2022.

¹⁷⁴ In Canada a peace officer includes a mayor, sheriff, member of correctional service so designated, police officers, police constables, bailiff etc.

¹⁷⁵ *Criminal Code* (R.S.C., 1985, c. C-46), (Canada), section 499.

5. Right to a lawyer for suspects, arrestees and prisoners

Standards: The right to be defended by a lawyer is enshrined in the basic human right to fair trial. Article 14 (3)(d) of the ICCPR affirms that in the determination of any criminal charge against him, everyone shall be entitled to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right. As per Principle 12 of the Body of Principles and Article 10(2) of the Declaration on Enforced Disappearance¹⁷⁶, all arrested or detained persons shall have access to a lawyer or other legal representative, and adequate opportunity to communicate with that representative. The arrest record shall be communicated to the detainee, or to his legal counsel. Article 8 of the American Convention on Human Rights outlines the right to a fair trial and affirms that during the proceedings every person is entitled, with full equality, to the minimum guarantees of the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel. Similar provisions can be found in the European Convention for the Protection of Human Rights and Fundamental Freedoms [Article 6], and the Luanda Guidelines [Guideline 4(d)]. An interpretation of these provisions suggests that the right to be defended by a lawyer should be available to suspects, arrested persons and accused persons during the course of the criminal proceedings.

Analysis: In 11¹⁷⁷ of the 54 countries, no legal provisions appear to be in place that mandate the right to a lawyer during the process of the questioning of suspects. At the time of arrest, **Brunei** is the only country in the Commonwealth, which does not have specific provisions that allows for a lawyer's presence after a person has been arrested. The disparity across jurisdictions is greater when it comes to the rights of prisoners to have lawyers represent them during the course of their trial. In **Singapore**, while the Constitution states that an arrested person shall be allowed to consult and be defended by a legal practitioner, the courts have interpreted the phrasing 'shall be allowed' as being couched in the negative, meaning there is no obligation imposed on the relevant authority to inform and advise the person under custody of his right to counsel.¹⁷⁸ Thus, in Singapore when a person is unable to afford a lawyer or unable to get legal aid, that person will need to conduct the case themselves.¹⁷⁹

In **Cyprus**, suspects and arrested persons, have the right to a lawyer both before and during questioning and interrogation.¹⁸⁰ In **Jamaica**, the Jamaican Code of Conduct for Civilian - Police Relations states that arrested persons, have the right to have a lawyer present both at the time of

¹⁷⁶ UN General Assembly (1992) Declaration on the Protection of all Persons from Enforced Disappearance, Resolution 47/133: <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-protection-all-persons-enforced-disappearance#:~:text=Article%20-,1..and%20eradication%20of%20enforced%20disappearance> as on 30 May 2022.

¹⁷⁷ Bangladesh, Brunei, Dominica, Grenada, India, Malaysia, Samoa, Sierra Leone, South Africa, Sri Lanka and St Lucia.

¹⁷⁸ *Rajeewan Edakalavan v Public Prosecutor* [1988] 1 SLR (R) 10 at 19, Singapore.

¹⁷⁹ Website of the Singapore Supreme Court: <https://www.supremecourt.gov.sg/services/self-help-services/self-help-guides/self-representation-basics>, as on 30 May 2022.

¹⁸⁰ *Rights of Suspects, Arrested Person and Persons in Custody Law of 2005*, (Law 163(I)/2005), (Cyprus), Section 3(2A) and (2B).

arrest and during interrogation. The arrested person also possesses the right to refuse to answer any questions during interrogation without having a lawyer present. In **New Zealand**, if the police are holding a suspect for questioning, they have the right to talk to a lawyer, in private, without any unreasonable delay before they decide whether or not to answer the police's questions.¹⁸¹ The police's questioning powers are further limited by the freedom of the person (if the person is not arrested) to walk away from the questioning at any time. The police have no general power to detain people for the sole purpose of questioning them.

There is a further problem. Where there is a constitutional right to a lawyer, securing such a right may become difficult where there is no obligation upon the authorities to inform the suspect or arrested person of this right. For instance, in the **Bahamas** our study indicates that the law does not impose a duty on the police officers who were responsible for the arrest and detention of an accused person/suspect to inform him/her of the right to have and consult a legal representative. Judicial pronouncements too have affirmed the right to counsel for suspects. For example in **Botswana**, 'a suspect or accused person who, of his own accord, demands access to a legal practitioner, must be afforded that access and may not be denied, even if the period within which he makes the demand is within the 48 hours during period which the police may detain a suspect before bringing him/her to court'.¹⁸² Further, in Botswana there is no obligation on the part of the police or investigating authorities to provide the arrested person with a lawyer, although the arrested person has such a right. In **Canada**¹⁸³ too, while there is a right to retain counsel, it is not absolute and is subject to reasonable limitations such as considerations for the needs of the society etc.

Good Practices:



Statutory provisions clearly outlining the right of suspects and the accused to a lawyer

Malta:

Article 355AUA of the *Criminal Code 1854* provides that a suspect or accused shall have the right of access to a lawyer without undue delay and during whichever of the points in time listed below is the earliest:

- i) before being questioned in respect of the commission of a criminal offence by the Police or other Law enforcement or judicial authority;

¹⁸¹ Courts of New Zealand (2007), Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006) [2007] 3 NZLR 297: <https://www.courtsofz.govt.nz/assets/going-to-court/practice-directions/practice-notes/high-court/pnpoliceq.pdf> as on 30 May 2022.

¹⁸² *State vs. Fly* (2008) 3 BLR 258 (High Court of Francistown), Botswana.

¹⁸³ *The Constitution Act 1982*, (Canada), PART I, Canadian Charter of Rights and Freedoms, Sections 7, 10(b) and 11(d): <https://laws-lois.justice.gc.ca/eng/const/page-15.html> as on 30 May 2022.

- ii) upon carrying out of an investigative or other evidence-gathering act;
- iii) after deprivation of liberty; and
- iv) when summoned to appear before a court having jurisdiction in criminal matters in due time before they appear before that court.

A request for legal assistance is recorded in the custody record. In case the suspect or accused elects to be assisted by an advocate for legal aid, the authorities will assign a lawyer for such purpose.

Mauritius:

Section 5(3)(c) of the *Constitution of Mauritius 1968* provides that any person who is arrested or detained, upon reasonable suspicion of his being likely to commit breaches of the peace, and who is not released, shall be afforded reasonable facilities to consult a legal representative of his/her own choice.

Delay in questioning to allow consultation with lawyer

Australia - Queensland: According to the *Police Powers and Responsibilities Act 2000*, if a person is in the company of a police officer for the purpose of being questioned as a suspect about his or her involvement in the commission of an indictable offence:

- (a) before a police officer starts to question the person, the police officer must inform the person that he or she may:
 - (i) ...
 - (ii) telephone or speak to a lawyer of the person's choice and arrange, or attempt to arrange, for the lawyer to be present during the questioning.

The police officer must delay the questioning for a reasonable period of time to allow the person to telephone or speak to the above people and for that person to arrive.

Complementary provisions to effectuate constitutional mandates

Belize: As per Section 5 (2) (b) (c) of the *Constitution 1981*, any person who is arrested or detained shall be entitled:

- (b) to communicate without delay and in private with a legal practitioner of his choice and, in the case of a minor, with his parents or guardian, and to have adequate opportunity to give instructions to a legal practitioner of his choice;
- (c) to be informed immediately upon his arrest of his rights under paragraph (b) of this subsection;

Additionally, the *Judges' Rules: Being Guidelines for the Interviewing of Persons and Obtaining Statements from them while in Police Custody, 2000*, state:

Rule 3: “Whenever a police officer has arrested or detained a person, he must immediately inform that person that she/he is entitled to speak privately with an instruct a lawyer or, if the person is a minor, to speak with his parents or guardians.”

India:

Article 22 (1) of the *Constitution of India 1950*, states that no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. Section 41D, *Code of Criminal Procedure 1973* specifies the rights of arrested person to meet an advocate of his choice during interrogation, and states that ‘When any person is arrested and interrogated by the police, he shall be entitled to meet an advocate of his choice during interrogation, though not throughout interrogation.’ However, no specific duty has been cast upon the investigating authority to inform the suspect or arrested person of his right to legal representation.

Mauritius:

Paragraph 7(a) of Appendix B of the *Judges' Rules 1965* provides that a person in police custody should be allowed to communicate with his legal adviser. Paragraph 7(b) of the Appendix B to the *Judges' Rules 1965* provides that the persons in police custody should be informed orally of the rights and facilities available to them and the notices describing them should be displayed at the police station and drawn to their attention.

6. A robust state funded legal aid mechanism

Standards: The right to state-funded legal assistance is integral in ensuring the right to legal representation. The right to free legal assistance has been integrated into Article 14 (3)(d) of the ICCPR, in as much as it mandates that everyone shall have legal assistance assigned to him/her,

in any case where the interests of justice so require, and without payment by him/her in any case if he does not have sufficient means to pay for it. Principle 6 of the Basic Principles on the Role of Lawyers¹⁸⁴, states that any persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services. Guidance on the effective mechanisms to provide state-funded legal aid can be found in the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012. The UN principles recognise that legal aid is an essential element of a fair, humane and efficient criminal justice system. They provide a broad definition of legal aid which includes legal advice, assistance and representation for persons detained, arrested or imprisoned, suspected or accused of, or charged with a criminal offence and for victims and witnesses in the criminal justice process that is provided at no cost for those without sufficient means or when the interests of justice so require. These Principles and Guidelines set forth a number of benefits of establishing a functioning legal aid system in the following manner:

1. it may reduce the length of time suspects are held in police stations and detention centres, in addition to reducing the prison population, wrongful convictions, prison overcrowding and congestion in the courts, and reducing reoffending and revictimisation.
2. it may also protect and safeguard the rights of victims and witnesses in the criminal justice process.
3. legal aid can be utilised to contribute to the prevention of crime by increasing awareness of the law.
4. legal aid plays an important role in facilitating the use of community-based sanctions and measures, including non-custodial measures; promoting greater community involvement in the criminal justice system; reducing the unnecessary use of detention and imprisonment; rationalizing criminal justice policies; and ensuring efficient use of State resources.

Principle 3 of the UN Principles sets out the responsibility of the State to ensure that anyone who is arrested, detained, suspected of or charged with a criminal offence punishable by a term of imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process. Additionally, the police, prosecutors and judges should also ensure that those who appear before them who cannot afford a lawyer and/or who are vulnerable are provided with access to legal aid. It also suggests that legal aid should be provided regardless of the person's means if the interests of justice so require.

¹⁸⁴ Office of the High Commissioner for Human Rights (OHCHR) (1990), Basic Principles on the Role of Lawyers: <https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-role-lawyers> as on 18 December 2021.

Analysis: These Principles indicate the duty of governments to focus deeply to ensure that their legal aid systems are in adherence with the international standards. Our study covered the following aspects of the right to free legal aid and assistance: the right to state-funded legal aid for suspects, arrested persons and prisoners during the course of their trial; the eligibility criteria for availing legal aid and the specific mechanisms that enable provision of legal assistance at various stages of criminal proceedings. These are not exhaustive indicators, but primary indicators that relate to the availability of legal aid for pre-trial detainees.

Right to legal aid and assistance: In 21¹⁸⁵ of the 54 countries, legal aid is available for suspects of crime; in 25¹⁸⁶ countries legal aid can be accessed by arrested persons; and in 45¹⁸⁷ countries prisoners can avail legal aid during the course of their trial. In some of the countries, there is no national legal aid body, and legal assistance is provided either through law school clinics¹⁸⁸, bar associations¹⁸⁹, law firms or non-profit organisations.¹⁹⁰ The right to legal aid finds mention in the Constitutions of several countries. In **the Maldives**, the Constitution mandates that in serious offences, the state must provide a lawyer where the accused person cannot afford one. In **India**, the Constitution sets out the responsibility of the state to provide legal services by enacting suitable legislation or schemes. Pursuant to this directive, the Legal Services Authorities Act, 1987 enacted by Parliament outlines the entitlement of persons to legal aid and assistance, who intend to file or defend a case.

However, in many jurisdictions, there is no absolute right to legal aid, and assistance is provided only in specific cases. For instance, in **Belize, Botswana, Brunei, Grenada, Pakistan, Sierra Leone, and Singapore** – legal aid is provided in trials for offences punishable with a death sentence. Moreover, various eligibility criteria have been spelled out under the national legislations, and thus legal aid is available only to a limited number of persons.¹⁹¹ Also, legal aid is usually subject to submission of an application by or on behalf of the person who needs it, and approval by the competent legal aid body or authority. Therefore, even where suspects and arrested persons have the right to legal aid, the application process is often time consuming, and is not adequately responsive to the immediacy of legal advice required at the time of their questioning and interrogation.

¹⁸⁵ Canada, Cyprus, Fiji, the Gambia, India, Kenya, Malawi, Malaysia, the Maldives, Malta, Namibia, New Zealand, Nigeria, Solomon Islands, South Africa, Tanzania, Trinidad and Tobago, Uganda, UK, Vanuatu and Zambia

¹⁸⁶ Canada, Cyprus, Fiji, the Gambia, India, Jamaica, Kenya, Malawi, Malaysia, the Maldives, Malta, Mozambique, Namibia, New Zealand, Nigeria, Papua New Guinea, Seychelles, Solomon Islands, South Africa, Kingdom of Eswatini, Tanzania, Trinidad and Tobago, UK, Vanuatu and Zambia.

¹⁸⁷ Australia, Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei, Cameroon, Canada, Cyprus, Fiji, the Gambia, Ghana, Grenada, India, Jamaica, Kenya, Lesotho, Malawi, Malaysia, the Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Samoa, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, St Vincent and the Grenadines, Kingdom of Eswatini, Tanzania, Tonga, Trinidad and Tobago, Uganda, UK, Vanuatu and Zambia. Though in some of these countries, legal aid is available only certain type of offences.

¹⁸⁸ The Bahamas.

¹⁸⁹ Rwanda, Samoa.

¹⁹⁰ St Vincent and the Grenadines, Grenada, Malawi.

¹⁹¹ See Table 4.

On the other hand, some countries provide immediate legal assistance through duty solicitors/lawyers present in police stations and courts. For instance, in the **UK**, the Scottish Legal Aid Board has the power to arrange for a duty solicitor to be available for the purpose of providing advice and assistance to suspects and arrested persons.¹⁹² In **Canada**, the police cautions suspects about their right to a lawyer and legal aid. The Right to Legal Counsel Caution used by the Royal Canadian Mounted Police (RCMP) explains their duty towards suspects and arrested persons in the following manner: 'It is my duty to inform you that you have the right to retain and instruct counsel of your choice in private and without delay. Before you decide to answer any question concerning this investigation you may call a lawyer of your choice or get free advice from Duty Counsel. If you wish to contact Legal Aid duty counsel I can provide you with a telephone number and a telephone will be made available to you.'¹⁹³

Eligibility Criteria: As explained above, while several jurisdictions guarantee the right to a lawyer and legal aid, there are often eligibility criteria that must be satisfied, for an individual to be provide legal aid by the state. There are usually the following tests that are adopted by countries, to decide who will or will not receive legal aid and assistance:

- a) The Jurisdiction Test, looks at whether legal aid is available in that jurisdiction and area of law.
- b) The Means Test, looks at the income and assets of the accused person. If he/she is eligible, then some legal aid bodies also look at how much contribution he/she will be required to pay towards the cost of availing such service.
- c) The Merit Test, looks at whether, considering all the circumstances of the case, it is reasonable to grant legal aid. Among the criteria into account are matters such as the existence of a reasonable prospect of success and whether providing legal assistance will benefit the accused.
- d) The Matters Test, looks at if the crime, or case (such as murder, treason, domestic violence etc.) is eligible for legal funding according to the type of legal problem and the surrounding situation.
- e) The Availability of Funds Test, means that aid will only be granted if the legal aid body has sufficient funds available for use.
- f) The Interests of Justice Test, looks at whether that grave injustice might occur if the person were not afforded legal representation, or the consequences can lead to long term imprisonment.

¹⁹² *Legal Aid (Scotland) Act*, 1986, Section 31(8).

¹⁹³ Law Library of Congress (2016), Miranda Warning Equivalents Abroad, pg 5: <https://tile.loc.gov/storage-services/service/l1/l1gird/2016296556/2016296556.pdf> as on 30 May 2022.

In **India**, the Legal Services Authorities Act, 1987 lays down the eligibility criteria for providing legal services. Section 12 (g) states that every person who is in custody shall be entitled to legal services. Thus, irrespective of means or merit or any other criteria, all persons in custody, including suspects, arrested persons, and prisoners are eligible to receive legal aid. Similarly in **Namibia** there is no eligibility criteria and state-funded legal practitioners are available to all accused persons in criminal matters, provided they apply for such services. In **Kiribati** too, suspects, defendants or accused persons including prisoners in criminal cases are exempted from eligibility tests.

Table 4: Eligibility criteria for legal aid in Commonwealth Countries

S. N.	Country	Eligibility Criteria
1	Antigua and Barbuda	Not available for criminal matters
2	Australia: i. New South Wales	Jurisdiction Test, Means Test, Merit Test and Availability of funds Test
	ii. Victoria	Means Test, Applicable guidelines, merits test, reasonableness test
	iii. Queensland	Means Test, Matters Test, Merits Test
	iv. Western Territory	Matters Test, Means Test, Merits Test
	v. Tasmania	Merits Test, Matters test
	vi. Northern Territory	Means test, Matter Test, Merit Test.
3	Bahamas	No statutory scheme for legal aid.
4	Bangladesh	Means Test
5	Barbados	Matters Test
6	Belize	Matters Test
7	Botswana	Assistance limited to civil cases, or capital cases.
8	Brunei	Matters Test; Only available in capital offences
9	Cameroon	Means Test
10	Canada	Criteria differ across its provinces. Means test is usually applied.
11	Cyprus	Means Test, Matters Test

S. N.	Country	Eligibility Criteria
12	Dominica	Means Test, Matters Test
13	Fiji	Means Test, Merit test
14	Gambia, The	Matters Test, Legal Assistance in capital cases or case can lead to imprisonment.
15	Ghana	Means Test
16	Grenada	There scheme for legal aid.
17	Guyana	No state-funded legal aid available. Guyana Legal Aid Clinic is active. Means Test and Merit Test.
18	India	All persons in custody are entitled to legal aid, no further tests or criteria required.
19	Jamaica	Means Test
20	Kenya	Merits Test, Matters Test, Means Test, Interest of Justice test.
21	Kiribati	Means test, Matters test – not applicable for criminal cases
22	Lesotho	Means Test
23	Malawi	Interest of Justice test, Means test, Matters test
24	Malaysia	Means Test
25	Maldives, the	Means Test, Matters Test, and must apply to seek legal assistance
26	Malta	No criteria, any person can make application for legal aid.
27	Mauritius	Means Test
28	Mozambique	No criteria, if person does not have a lawyer, the government will appoint one.
29	Namibia	No criteria, legal aid available to all accused persons in criminal matters, provided their service is applied for.
30	Nauru	Matters Test, legal aid only available in civil offences.
31	New Zealand	Means Test, Interest of Justice Test
32	Nigeria	Means test
33	Pakistan	Matters Test, Courts appoint lawyers for offences punishable with death

S. N.	Country	Eligibility Criteria
34	Papua New Guinea	Matters test, available for indictable offences.
35	Rwanda	Only available for minors.
36	Samoa	Means Test
37	Seychelles	Matters Test, Means Test. Only available in capital offences or exceptional circumstances.
38	Sierra Leone	Interest of Justice, Means Test
39	Singapore	Means and Merit Test for all non-capital offences; for capital offences all persons eligible
40	Solomon Islands	Means Test
41	South Africa	Means test
42	Sri Lanka	Means Test, Interest of Justice Test
43	St Kitts and Nevis	Not available
44	St Lucia	Not specified in response
45	St Vincent and the Grenadines	Matters test and means test; available in cases of murder
46	Kingdom of Eswatini	No legislation for legal aid provision.
47	Tanzania	Means Test, Merits Test, Matters Test
48	Tonga	Matters Test: Only available in cases of domestic violence
49	Trinidad and Tobago	Means Test and Interest of justice Test
50	Tuvalu	Means Test
51	Uganda	Matters Test

S. N.	Country	Eligibility Criteria
52	UK	
	i) England and Wales	Matters Test, Means Test
	ii) Scotland	Means Test, and also where accused i. Is likely to go to prison if convicted ii. Is likely to lose your job if convicted iii. Cannot follow the trial due to mental / physical disabilities or language barriers iv. Are kept in custody until trial v. Wishes to appeal a decision vi. Have been charged with a serious offence or petition under solemn procedure.
	iii) Northern Ireland	Means Test and Interest of Justice Test
53	Vanuatu	Means test and Merit test
54	Zambia	Means test

Specific mechanisms for suspects, accused and prisoners: In order to ensure that the right to legal aid is available at all stages of a criminal proceeding, mechanisms that regulate the provision of such services to suspects during questioning, arrested persons during interrogation and prisoners during the course of their trial must be in place. However, such mechanisms are not available in a majority of the jurisdictions covered in this study. Some good practices exist in Queensland, Australia, India, New Zealand, England and Wales in the United Kingdom and New South Wales, Australia. In **Queensland**, legal assistance is provided through a duty lawyer system, where free legal advice or representation in criminal matters is available at Magistrates Court; and the prison lawyer system where prisoners can seek appointments with a legal aid lawyer. In **India**, specific schemes enable the provision of legal aid at police stations, in courts and prisons.¹⁹⁴ Duty lawyers must be available through roster systems at the police stations; remand lawyers must be available in courts; and every prison must have a prison legal aid clinic to be run by the jail visiting lawyers and paralegal volunteers. In **New Zealand**, the Police Detention Legal Assistance Scheme regulates the provision of legal assistance at early stages of the investigation; duty lawyers are available in courts; and in some prisons, community centre lawyers are available to provide legal aid to prisoners. In **England and Wales**, a duty solicitor is available at the police station and can be requested for help via phone calls, made by the police officers, to the Defence Solicitor Call Centre (DSCC).

¹⁹⁴ NALSA's Early Access to Justice at Pre-Arrest, Arrest and Remand Stage Framework (2019): <https://nalsa.gov.in/acts-rules/guidelines/early-access-to-justice-at-pre-arrest-arrest-and-remand-stage> as on 30 May 2022; NALSA Standard Operating Procedures for Representation of Prisoners (2016): <https://nalsa.gov.in/acts-rules/guidelines/standard-operating-procedure-for-representation-of-persons-in-custody> as on 30 May 2022; NALSA (Legal Services Clinics) Regulations (2011): <https://nalsa.gov.in/acts-rules/regulations/national-legal-services-authority-legal-services-clinics-regulations-2011> as on 30 May 2022.

In prisons legal aid is provided for parole, adjudications before the independent adjudicator and sentence calculation. In **New South Wales**, Australia, legal aid lawyers are present in court, lawyers of the Prisoners Legal Service visits prisoners and provide advice and assistance in their cases. In **Nigeria**, legal aid is accessible through branch offices of Legal Aid Councils situated in the 36 states. Private practitioners, National Youth Service Corps Legal Aid group; and Non-Government Organisations (NGOs) provide legal aid services. Additionally, magistrates who visit prisons and detention centres every month can also recommend the provision of legal services. In **Sri Lanka**, the Legal Aid Commission provides legal assistance through mobile clinics for remand prisoners. Services include providing assistance for securing bail for those in custody; conducting legal awareness programmes; filing applications, appeal applications and revision applications on behalf of remand prisoners; seeking advice from the Attorney General regarding bail issues; conducting legal awareness programmes for remand officers; providing special assistance for remandees in the national institute of mental health and conducting legal awareness programmes for remand prisoners.

Good Practices:



Constitutional Mandate for Legal Aid in Criminal Cases

The Maldives:

Article 53 of the *Constitution of the Maldives 2008* guarantees the assistance of legal counsel, as follows:

1. Everyone has the right to retain and instruct legal counsel at any instance where legal assistance is required.
2. In serious criminal cases, the State shall provide a lawyer for an accused person who cannot afford to engage one.

India:

Article 39A of the *Constitution of India 1950* states as follows:

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

The Legal Services Authorities Act, 1987 lays down the eligibility criteria for giving legal services, and Section 12 (g) states that every person who is in custody shall be entitled to legal services.

Mauritius:

Section 10(2)(b) of the *Constitution of Mauritius 1968* provides that every person charged with a criminal offence shall be permitted to defend himself in person, or at his own expense by a legal representative of his own choice or where so prescribed by a legal representative provided at the public expense.

Mozambique:

Article 62 of the *Constitution of Mozambique 2004* states as follows:

1. The State shall guarantee that citizens have access to the courts and that persons charged with a crime have the right to defence and the right to legal assistance and aid.
2. The accused shall have the right freely to choose a defence counsel to assist in all acts of the proceedings. It shall be ensured that adequate legal assistance and aid is given to accused persons who, for economic reasons, are unable to engage their own attorney.

Further under Article 70 of the Penal Proceedings Code 2014, any person involved in a criminal proceeding who is called upon to give evidence has the right to be accompanied by a defender, either before the judicial authority or before the criminal police authority.

Nauru:

Article 10(3)(e) of the *Constitution of Nauru 1968* states that a person charged with an offence: 'shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice or to have a legal representative assigned to him in a case where the interests of justice so require and without payment by him in any such case if he does not, in the opinion of the court, have sufficient means to pay the costs incurred.'

✓ **Clear eligibility criteria specified in legislation**

Kenya:

The *Legal Aid Act, 2016* provides that for a person to be eligible for state-funded legal aid, the legal aid service needs to confirm that:

1. the cost of the proceedings is justifiable in the light of the expected benefits;
2. resources are available to meet the cost of the legal aid services sought;
3. it is appropriate to offer the services having regard to the present and future demands;
4. the nature, seriousness and importance of the proceedings to the individual justify such expense;
5. the claim in respect of which legal aid is sought has a probability of success;
6. the conduct of the person warrants such assistance;
7. the proceedings relate to a matter that is of public interest;
8. the proceedings are likely to occasion the loss of any right or the person may suffer damages;
9. the proceedings may involve expert cross-examination of witnesses or other complexity;
10. it is in the interest of a third party that the person be represented;
11. denial of legal aid would result in substantial injustice to the applicant; or
12. there exists any other reasonable ground to justify the grant of legal aid.¹⁹⁵

Malawi:

Section 18(2) of the *Legal Aid Act 2010* specifies the eligibility criteria for providing legal aid as follows:

A person shall be eligible for legal aid in criminal matters if:

- (a) it is in the interests of justice that such person should have legal aid provided in accordance with this Act with respect to those criminal investigations or criminal proceedings in respect of which he seeks legal aid; and

¹⁹⁵ *Legal Aid Act, 2016* (Kenya), section 36.

- (b) he has insufficient means to enable him to obtain the services of a private legal practitioner.
- (2) The factors to be taken into account by a competent authority in determining whether it is in the interests of justice that legal aid be granted in criminal matters shall include the following—
- (a) the offence is such that if the applicant were convicted it is likely that the court would impose a sentence which would deprive the accused of his liberty or lead to loss of his livelihood or to serious damage to his reputation;
 - (b) the determination of the case may involve consideration of a substantial question of law and adequate legal representation would make a material difference to the accused in receiving a fair trial;
 - (c) the accused may be unable to understand the proceedings or to state his own case because of his inadequate knowledge of the English language or due to mental illness or physical disability or on account of any other valid cause;
 - (d) the nature of the defence is such as to involve the tracing and interviewing of witnesses or to involve expert cross examination of a witness for the prosecution;
 - (e) it is in the interests of someone other than the accused that the accused be represented; and
 - (f) the accused would, if convicted, be given the option of a fine and such fine would remain unpaid for more than one month after the imposition of sentence.

Seychelles:

Section 6(1) of the *Legal Aid Act 1986* provides that legal aid shall be available to any person accused of an offence and shall relate to proceedings in any court in the exercise of its original or appellate jurisdiction in criminal matters in respect of that offence.

Mechanism to ensure legal aid at all stages of the criminal proceeding

Australia – Queensland:

Legal Aid Queensland (LAQ) is the provider of state-funded criminal law assistance, providing free legal advice with regard to a large number of areas pertaining to Queensland's

criminal law.¹⁹⁶ LAQ provides legal advice and representation upon successful applications assessed by a pre-defined criteria. They provide a number of other services to compliment this primary provision of legal assistance including:

- **Duty Lawyer System** – Legal Aid Queensland provides a duty lawyer to provide free legal advice or representation in criminal matters at the magistrates court. This is in addition to the usual legal aid applications and is specifically for assisting people on the day of trial.¹⁹⁷
- **Prison Lawyer System** – The prison lawyer system may be accessed by people being detained in a correctional centre by requesting an appointment through the legal aid prison legal advice list. The appointment allows prisoners to access free legal advice provided by legal aid either face-to-face, via video conference or over the phone.¹⁹⁸
- **CLC Referrals** – Community Legal Centres (CLC) are also predominantly state-funded and partner with Legal Aid Queensland in providing a range of free legal services. The majority of CLCs do not practice criminal law, however there are a number of associated services such as the Prisoner Legal Service who provide legal advice to prisoners about prison laws and parole decisions.¹⁹⁹

India:

At police stations and court:

NALSA Early Access to Justice at Pre-Arrest, Arrest and Remand framework 2019 mandates the provision of legal assistance for suspects and accused persons at the police station, and at production hearings in the magistrate's court (also known as remand hearings).

In prisons:

The NALSA (Legal Services Clinic) Regulations 2011 and the NALSA Standard Operating Procedure on Representation of Persons in Custody, 2016 mandates the setting up of a Prison Legal Aid Clinic in all prisons across the country to ascertain legal representation for persons in custody.

¹⁹⁶ Legal Aid Queensland, Criminal Cases in the District and Supreme Courts website: <http://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Criminal-court-process/Criminal-cases-in-the-District-and-Supreme-Courts> as on 30 May 2022.

¹⁹⁷ Legal Aid Queensland, Criminal Law Duty Lawyer Website Available at: <https://www.legalaid.qld.gov.au/Find-legal-information/Criminal-justice/Criminal-court-process/Criminal-law-duty-lawyer#toc-what-is-a-duty-lawyer--2> as on 30 May 2022.

¹⁹⁸ Legal Aid Queensland, Are you in prison and need legal help Website Available at: <https://www.legalaid.qld.gov.au/Find-legal-information/Factsheets-and-guides/Factsheets/Are-you-in-prison-and-need-legal-help> as on 30 May 2022.

¹⁹⁹ Prisoners Legal Service, *Legal Advice* website: <http://pls.qld.com/get-help/prisoners-advice-services> as on 30 May 2022.

New Zealand:

At the Police Station:

If an individual has been detained, they can talk to a lawyer through the Police Detention Legal Assistance (PDLA) scheme. This is available at the time of both questioning and interrogation. which might happen at the police station, in the individual's home, on the street or elsewhere. Such services are usually provided over the phone – but a lawyer may come in and meet with the individual when required.

In court:

If a person does not have a lawyer (and has not applied for legal aid) they can use a duty lawyer for free. The duty lawyer can be found in the court premises itself. If it is a minor charge and a guilty plea is entered, then the individual charged need not see another lawyer.

In prisons:

Different prisons have different arrangements for prisoners to get legal advice. Some prisons receive regular visits from volunteer lawyers or from Community Law Centre lawyers. In other prisons, lawyers will visit when requested for. Prisoners can inquire with a prison officer or visiting advocate about the arrangements in their prison.

England and Wales - United Kingdom:

At the police station:

1. The police station's 'duty solicitor' is available 24 hours a day and is independent of the police.
2. Once arrested, a person can tell the police that he/she would like legal advice and the police will contact the Defence Solicitor Call Centre (DSCC).
3. If the person is suspected of committing a less serious offence, they may be offered free and independent legal advice over the phone instead of a duty solicitor.

In Prison:

Following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, (LASPO), legal aid is available for the following purposes:

1. Application for parole
2. Adjudications before the independent adjudicator²⁰⁰ and
3. Sentence calculation.²⁰¹

7. Consequences in proceedings where accused is unrepresented

Standards: The importance of guaranteeing every suspect, arrestee or pre-trial detainee the right to a lawyer is best understood in terms of its consequences, i.e., what would happen if a lawyer is not available at the time of questioning, interrogation or trial? Unless there are adequate consequences arising from a failure to honour and fulfil the right to legal aid, it will remain unfulfilled. Despite our best efforts, we were unable to locate international standards that specify any consequences in trial proceedings where a lawyer is not available to defend the accused.

Analysis: Unfortunately, legal systems across the majority of countries are also silent on this vital aspect. There is little, if any, difference where the suspect, arrested person, or prisoner remains unrepresented in court during trial. In 34 of the 54 countries, the proceedings will continue despite the absence of a lawyer. In 28 countries the police will continue questioning and interrogation, and in 33 of the Commonwealth Member States the trial proceedings are permitted to continue despite the accused being unrepresented. In several countries, an alternative is for the defendant to represent himself/herself.²⁰²

In **Tuvalu**, suspects have the right to telephone a friend, relative, or lawyer before questioning. If the suspect exercises this right, the police officer must delay questioning the suspect for a reasonable time, until such a person's arrival within a period of 2 hours, unless special circumstances exist²⁰³. In the **UK**, if a suspect chooses to have a solicitor present during questioning, even though the suspect cannot afford legal advice, the police cannot start questioning in the absence of counsel at the police station. Further, as the legal aid scheme will cover the advice, and there is no means

²⁰⁰ Disciplinary cases before independent adjudicators, that involve the determination of a criminal charge for the purposes of Article 6.1 European Convention on Human Rights (the right to a fair trial), or in which representation is allowed following application of the Tarrant criteria (a. The seriousness of any charge against a prisoner; b. The consideration for fairness; c. Whether a prisoner is able to represent themselves adequately; d. Any points of law that might arise, requiring expert legal advice; e. Procedural difficulties that might arise; f. Possible penalties if a prisoner is found guilty; g. Factors involved in hearing the charge within a reasonable time; h. Other matters which a prisoner might bring to the attention of the adjudicator), will be in the scope of criminal legal aid for prison law.

²⁰¹ Prison law proceedings were removed from the scope of legal aid unless they: involve the determination of a criminal charge for the purposes of Article 6 of the European Convention on Human Rights (the right to a fair trial), are proceedings before the Parole Board where the Parole Board has the power to direct release, or sentence calculation matters where the date of release was disputed or when the prisoner requests representation at a prison disciplinary hearing.

²⁰² Singapore, Sri Lanka, Nigeria, Dominica.

²⁰³ Tuvalu, See *Police Powers and Duties Act*, 2009, section 128(5).

test, an accused will always have access to free legal advice during questioning, if they so choose. In **Jamaica**, the *Jamaican Code of Conduct for Civilian-Police Relations* states that police officers must not conduct interrogation without the presence of an attorney, and therefore interrogation should be halted until such time when an attorney is present. In **Nigeria**, the police can initiate questioning of an individual in the absence of counsel, if there is an official of a Civil Society Organisation or a Justice of the Peace or any other person of his/her choice present. In **Queensland – Australia**, questioning must be delayed for a reasonable time to allow the lawyer to attend the questioning, with what is considered a reasonable time depending on the particular circumstances, although unless special circumstances exist, a delay of more than 2 hours may be unreasonable.²⁰⁴ In **Fiji**, if the suspect is unable to afford a private lawyer and still wishes to be legally represented during caution interview,²⁰⁵ then the police will not proceed with the interview until and unless the suspect chooses to waive that right. A duty solicitor may attend to the suspect at the police station until a proper assessment of the case is made and a legal aid lawyer is assigned to the case. However, in court, the magistrate or judge would allow more time for the accused to find a lawyer and not initiate the proceedings.

In **Eswatini**, elaborate guidance is given to courts, on how to continue proceedings in the absence of a lawyer.²⁰⁶ In **India**, there are no provisions which restrict the police from continuing the questioning of suspects or arrested persons in the absence of a lawyer. However, during trial, it is the mandatory duty of the judge to ensure that the accused has legal representation²⁰⁷ through a private lawyer, or through the state-funded legal aid mechanism. Where there have been cases that the accused was unrepresented which were appealed or reviewed in higher courts, courts have sent them back for re-trial.²⁰⁸

Good Practices:



Guidance on continuation of hearing in absence of legal counsel

Kingdom of Eswatini:

In cases where there is no lawyer, the trial proceeds but with the guidance of the court. Section 70 of the *Criminal Procedure and Evidence Act 1938* gives a clear indication of how the trial should proceed if the accused is not represented. It sets out as follows:

70. (1) After the examination in the presence of the accused of the witnesses in support of the charge, the magistrate shall ask such accused what, if anything, he desires to say in

²⁰⁴ *Police Powers and Responsibilities Act 2000* (Queensland, Australia), s 418.

²⁰⁵ An interview under caution is a formal interview with the suspects in an investigation.

²⁰⁶ See textbox below for more information.

²⁰⁷ *Code of Criminal Procedure*, 1973, section 304; *Mohammad Ajmal Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1.

²⁰⁸ *Mohd. Hussain Zulfikar Ali v. State (Government of NCT of Delhi)* (2012) 2 SCC 584, India.

answer to the charge against him; and shall, at the same time, caution him that she/he is not obliged to make any statement but that what he says may be used in evidence at his trial.

(2) Such accused may then, or at any later stage of the proceedings, make any statement or give evidence on oath, and every such statement or evidence shall be taken down in writing in so far as the same may be relevant to the charge and after being read over to him shall be subscribed by him, if he will subscribe it, and also by the magistrate, and shall be received in evidence before any court upon its mere production without further proof unless it is shown that such statement or evidence was not in fact duly made or given, or that the signatures or marks thereto are not in fact the signatures or marks of the persons whose signatures or marks they purport to be.

(3) Before or after the accused's statement (if any) has been made under subsection (2) he may call and examine witnesses in his defence and, either before or after the examination of any such witness, may himself give evidence on oath.

Nigeria:

Section 17 of the Administration of *Criminal Justice Act, 2015* states:

(1) Where a suspect is arrested on allegation of having committed an offence, his statement shall be taken, if he so wishes to make a statement.

(2) Such a statement may be taken in the presence of a legal practitioner of his choice, or where he has no legal practitioner of his choice, in the presence of an officer of the Legal Aid Council of Nigeria or an official of a Civil Society Organisation or a Justice of the Peace or any other person of his choice.

Australia – Queensland:

Before a police officer begins to question a relevant person for an indictable offence, they must inform the person that they may speak to a lawyer of their choice or arrange for their lawyer to be present during their questioning. The questioning must be delayed for a reasonable period of time to allow the lawyer to attend the questioning. What is considered a reasonable period of time depends on the particular circumstances, although unless special circumstances exist a delay of more than 2 hours may be unreasonable. Following the lapse of a reasonable period of time or if the suspect/accused is unable to arrange a lawyer then the questioning is permitted to proceed, albeit with the usual safeguards applying such as:

the period of detention for questioning does not exceed 8 hours unless successfully extended by a judicial officer. The questioning itself does not exceed 4 hours and the prohibition on obtaining a confession by threat or promise.²⁰⁹

8. Time limits on the period of investigation, trial and detention

Standards: Article 9(3) ICCPR²¹⁰ states that anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. In other words:

- a) the officers effecting an arrest must promptly produce the arrestee before a judge or other authority competent to review the arrest and
- b) the suspect must be tried for the offence he/she is accused of within a reasonable period of time.

The entitlement to trial within a reasonable time is also stipulated in Principle 38 of the Body of Principles²¹¹, Article 7 and 8 of the American Convention on Human Rights²¹² and Article 5 and 6 of the European Convention²¹³. Where an accused is in pre-trial detention, authorities have a special duty of diligence to bring his detention to an end without further delay.²¹⁴ To prevent delays in the conduct of trial, Guideline 13 of the Luanda Guidelines states that ‘judicial authorities shall investigate any delay in the completion of proceedings which could substantially prejudice the prosecution, the pre-trial detainee or his or her lawyer or other legal service provider, the State or a witness. In considering the question of whether any delay is reasonable, the judicial authority shall consider the following factors:

- i. the duration of the delay;
- ii. the reasons advanced for the delay;
- iii. whether any person or authority is responsible for the delay;
- iv. the effect of the delay on the personal circumstances of the detained person and witnesses;

²⁰⁹ See *Police Powers and Responsibilities Act*, 2000, (Queensland, Australia), sections 403, 403(4), 416, 418, 420 and 421.

²¹⁰ *Supra* note 62.

²¹¹ *Supra* note 59.

²¹² *Supra* note 107.

²¹³ *Supra* note 106.

²¹⁴ *Scott v. Spain*, 84/1995/590/676, Council of Europe: European Court of Human Rights, 18 December 1996.

- v. the actual or potential prejudice caused to the State or the defence by the delay;
- vi. the effect of the delay on the administration of justice;
- vii. the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued; and
- viii. any other factor which in the opinion of the judicial authority ought to be taken into account.

If the judicial authority finds that the completion of the proceedings is being delayed unreasonably by the State or its agents, the judicial authority may issue any order as it deems fit in order to overcome the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order to release the accused if the length of his or her detention is inconsistent with the right of detained persons to trial within a reasonable time. In such cases, however, release may be accompanied by any proportionate and necessary safeguards.

Analysis: A comparative analysis indicates that timelines limiting the period of investigation, trial and detention are scarce but not absent in Commonwealth Member States. Interestingly, no country has prescribed timelines for all these stages of a criminal trial. Only **Lesotho** appears to have specific legislation: Speedy Trials Act, 2002 which provides for time limits and exclusions at different stages. Our main findings from the Commonwealth-wide study of practices with regard to conducting criminal investigation and trial are given below:

- i) **Investigation:** In 40 of the 54 countries, it was reported that there was no time limit for completing investigation. In some jurisdictions, the criminal investigations are required to be completed within a ‘reasonable’ period of time. In **Mozambique**, timelines were established for specific type of offences,²¹⁵ whereas in the **Bahamas**, investigation has to be completed within six months of the alleged event in case of offences that can be tried summarily, otherwise the complaint or charge would become statute barred i.e., it will be no longer legally enforceable owing to a prescribed period of limitation having lapsed.²¹⁶ In **Papua New Guinea**, the police are given four months to investigate a criminal case and bring charges against the accused. In **South Africa**, provisions permit the release of a person

²¹⁵ Articles 323, *Penal Proceedings Code 2014* (Mozambique). For instance, criminal proceedings related to drug traffic must be investigated within 90 days.

²¹⁶ *Criminal Procedure Code*, 1969 (Bahamas): http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/1968/1968-0038/CriminalProcedureCodeAct_1.pdf as on 30 May 2022. Section 213: “Except where a longer time is specially allowed by law, no offence which is triable summarily shall be triable by a magistrate’s court unless the charge or complaint relating to it is laid within six months from the time when the matter of such complaint or charge arose: Provided that if the circumstances giving rise to the complaint or charge occurred upon a vessel upon the high seas, then the court shall have jurisdiction in respect thereof if the complaint or charge was laid within six months after the arrival of the vessel at her port of discharge in The Bahamas.”

if there is unreasonable delay by the court. In **Namibia**, an accused person can ask for the criminal proceedings to be struck from the court's roll due to undue delay.²¹⁷ In **Lesotho**, any charge or indictment²¹⁸ charging a person with the commission of an offence shall be filed within 48 hours from the time of arrest or service of summons.²¹⁹ In **India**, there is a specified time for completion of investigation, non-compliance of which results in the right of the accused to mandatory bail.²²⁰ However, after the accused is released on default bail the police may continue with the investigation for an unlimited period of time. In **Bangladesh**, the maximum period for presentation of the report of a criminal investigation is 120 days, though the magistrate has powers to extend the time required for completing the investigation for justified reasons.²²¹ After the completion of this period, the accused has the right to be released on bail. In **Malta**, accusations must be notified to the accused within the prescriptive period, which ranges from three months to twenty months depending on the gravity of the offence.²²² In **Scotland**, the maximum time a crime can be investigated is 28 days,²²³ after which investigations must conclude even though investigation officers may not generate sufficient evidence to prefer a charge against the suspect²²⁴. Similarly, in **Northern Ireland** cases are subject to investigation up to a maximum of 28 days.²²⁵

- ii) **Trial:** 20 of the 54 countries reiterate that trial should be completed within a reasonable time, however what constitutes 'reasonable' period of time is not specified in their criminal procedure laws. In **South Africa**, Section 342A of the Criminal Procedure Act, 1977 places an onus on the court to investigate any delay that may be experienced resulting in the prolongation of a trial. In investigating delays, courts are required to consider any prejudice that may be suffered by the accused, the State, the accused's legal adviser, the State's legal adviser or any witnesses. In **Malawi**, the limits are specific to non-serious offences. The law provides that the trial of any person accused of an offence other than one punishable by imprisonment of more than three years, shall commence within twelve months from the date the complaint arose, and completed within twelve months from

²¹⁷ Namibia's Constitution, 1990 (Namibia): https://www.constituteproject.org/constitution/Namibia_2010.pdf as on 13 May 2020. Article 12(1)(b): "A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released."

²¹⁸ Indictment refers to a formal charge or accusation of committing a crime being made against the individual.

²¹⁹ *Speedy Court Trials Act*, 2002 (Lesotho): https://lesotholii.org/ls/legislation/act/2002/9/speedy_court_trials_act_2002.pdf as on 10 May 2020. See section 3.

²²⁰ *Code of Criminal Procedure*, 1973 (India): <https://legislative.gov.in/sites/default/files/A1974-02.pdf> as on 30 June 2022. See Section 167.

²²¹ *The Code of Criminal Procedure*, 1898 (Bangladesh): <http://bdlaws.minlaw.gov.bd/act-75.html> as on 30 May 2022. See Part IV.

²²² *Criminal Code*, Chapter 9, The Laws of Malta 1854 (Malta): <https://legislation.mt/eli/cap/9/20220425/eng> 1 as on 30 May 2022. Article 575 (5), (6)(a).

²²³ *Criminal Justice (Scotland) Act*, 2016 (UK): <https://www.legislation.gov.uk/asp/2016/1/contents> as on 30 May 2022. See Section 17(1).

²²⁴ Police Scotland, Standard Operating Procedure: <https://www.scotland.police.uk/access-to-information/policies-and-procedures/standard-operating-procedures/standard-operating-procedures-p-s/> as on 30 May 2022. See Section 6.8.1.

²²⁵ *Police and Criminal Evidence (Northern Island) Order*, 1989 (UK): <https://www.legislation.gov.uk/nisi/1989/1341/contents> as on 30 May 2022. See Art 48(2).

the date the trial commenced.²²⁶ It is further stated that a person accused of an offence shall not be liable to be tried, or continue to be tried, for the offence if his trial does not commence or has not been completed within the 12-month period and in such case the accused person shall stand discharged of the offence at the expiry of such period.²²⁷

In **India**, as per section 437(6) of the *Code of Criminal Procedure 1973*, in less serious offences, if the trial of a person is not concluded within a period of 60 days from the first date fixed for taking evidence in the case, then such person can be released on bail. In **Nigeria**, the *Administration of Criminal Justice Act* provides that if a trial has not been completed within 180 days of arraignment²²⁸, the court shall forward to the Chief Judge, the case particulars and reasons for failure to complete the trial.²²⁹ Additionally, in Nigeria, the Constitution prescribes that the judgment in any proceedings should be delivered within 90 days after the presentation of evidence and adoption of final addresses, in other words, submission of the concluding or final arguments of the prosecution and the defence. In **Lesotho**, in cases where a plea of “not guilty” is entered, the trial should commence within 60 days from the date of entry of such plea. Upon commencement, the trial should continue on a day-to-day basis until it is concluded.²³⁰ In **New Zealand**, the Bill of Rights 1990 provides the criteria for assessing delays in the completion of trials. Such criteria include: the length of the delay; waiver of time periods; prejudice to the accused and the reasons for the delay, such as: inherent time requirements of the case; actions of the accused; actions of the Crown; limits on institutional resources; and other reasons for the delay.

In **Tuvalu**, the term reasonable time in the context of criminal trial has been explained in the case law developed by courts. While deciding a case, the Chief Justice of Tuvalu opined²³¹ that ‘reasonable time’ means the time from when the offence took place to the time the actual hearing takes place. In considering whether any delay in the police’s filing of the charge with the court, when the case is listed for hearing, or when the case is actually heard, the courts must have regard to other relevant issues, such as the reasons for the delay and whether they were the fault of either party or of the system as administered by the court, any waiver of the time periods and the prejudice to the accused and, to a much lesser extent, the prosecution. In **Canada**, as per a Supreme Court case,²³² superior courts have up to 30 months to complete criminal cases, starting from the time a charge is laid until the conclusion of the trial. Lower courts have 18 months to complete criminal proceedings against the accused.

²²⁶ *Criminal Procedure and Evidence Code* (Malawi). Available at: https://www.imolin.org/doc/amlid/Malawi/Malawi_Criminal_Procedure_and_Evidence_Code.pdf as on 30 May 2022. See Sections 261(1) and 301A(1).

²²⁷ *Ibid*, sections 261(4) and 302A(4).

²²⁸ Arraignment is the legal process in a court of law where someone is accused of a particular crime and asked to convey if they are guilty or not.

²²⁹ *Administration of Criminal Justice Act*, 2015 (ACJA), (Nigeria), Section 110 (4).

²³⁰ *Speedy Court Trials Act*, 2002 (Lesotho), section 5.

²³¹ *In Mailemua vs. R*, [2009] TVHC 4 (Tuvalu).

²³² *Carter v. The Queen*, [1986] 1 S.C.R. 981.

- iii) **Detention:** Surprisingly, when it comes to the maximum length of detention of an accused/suspect, only 10²³³ of the 54 countries prescribed limitations. However, in some jurisdictions such as **Bangladesh**, the timelines on investigation and trial result in limiting the total period of detention for an arrested person.²³⁴ In **Malaysia**, limitations are prescribed where charge has not been framed against the suspect. In **Singapore**, there are no limitations on the maximum period of detention. Further the Internal Security Act permits indefinite detention of a suspect without trial. In **Cameroon**, the period of maximum remand of a suspect has to be specified in the remand warrant and it cannot exceed one year. In **India**, a pre-trial detainee is entitled to not be detained beyond the maximum term of imprisonment that may be imposed if the court finds him/her guilty. Further, a pre-trial detainee is entitled to be considered for release on bail if he/she has been detained in prison for more than half of the maximum prison term that may be imposed if found guilty.²³⁵

In **Lesotho**, a person shall not be remanded in custody for a period exceeding 60 days unless there are compelling reasons to the contrary, and such reasons shall be recorded in writing.²³⁶ In **Eswatini**, where a person is not brought to trial after expiry of six months from the date of his/her commitment, he/she shall be released from prison. In **England** and **Wales**, there is a concept of custody time limits, ranging between 56 days and 182 days, which sets time limits on the period of detention. Any extension needs to be justified by the prosecution.

Good Practices:

- ✓ **Consequence due to delay**

Namibia:

Article 12 (1)(b) of the *Namibian Constitution 1990* states that trials should take place within a reasonable time, failing which the accused shall be released.

Bangladesh:

Section 167 (5) of the *Code of Criminal Procedure 1898*, states that, 'if the investigation is not concluded within one hundred and twenty days from the date of receipt of the information relating to the commission of the offence or the order of the magistrate for such investigation-

²³³ Cameroon, India, Kenya, Lesotho, Malta, Nigeria, Rwanda, Kingdom of Eswatini, Sri Lanka and UK: England and Wales.

²³⁴ Limitations are placed on completion of trials within 120 or 360 days, depending on the competent court. Where a trial isn't concluded within this stipulated time, the person can be released on bail.

²³⁵ *Code of Criminal Procedure*, 1973 (India), section 436A.

²³⁶ *Speedy Court Trials Act*, 2002 (Lesotho), section 4.

- (a) the magistrate empowered to take cognizance of such offence or making the order for investigation may, if the offence to which the investigation relates is not punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such magistrate; and
- (b) the Court of Session may, if the offence to which the investigation relates is punishable with death, imprisonment for life or imprisonment exceeding ten years, release the accused on bail to the satisfaction of such court:

Provided that if an accused is not released on bail under this sub-section, the Magistrate or, as the case may be, the Court of Session shall record the reasons for it:

India:

Section 167 of the *Code of Criminal Procedure 1973* states that the magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days; if she/he is satisfied that adequate grounds exist for doing so, but no magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding: -

- (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
- (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if she/he is prepared to and does furnish bail.

Prescriptive period to complete investigation

Malta:

As per the *Criminal Code 1854*, in cases where the Court of Magistrates conducts an inquiry, if the Attorney General fails to file the bill of indictment or decides to send the accused to be tried by the Court of Magistrates through summary proceedings within:

- a. twelve months in the case of a crime liable to the punishment of imprisonment of less than four years;

- b. sixteen months in the case of a crime liable to the punishment of imprisonment of four years or more but less than nine years; and
- c. twenty months in the case of a crime liable to the punishment of imprisonment of nine years or more

to run from the day the accused is brought before the court or from the day on which she/he is arrested, that person must be granted bail.²³⁷

Lesotho:

Section 3 of the *Speedy Court Trials Act of 2002* states that,

- (1) Any charge or indictment charging a person with the commission of an offence shall be filed within 48 hours from the time of arrest or service of a summons unless the filing of a substantive charge within the prescribed time will not be possible due to the complexity of a case.
- (2) If a charge or an indictment is not filed within the time stipulated in subsection (1), the charge or indictment shall be filed within 90 days from the date on which an accused first appeared before a judicial officer.
- (3) A judicial officer may, on good cause, extend the time limit referred to in subsection (2) to 120 days.



Prescriptive periods for grant of bail pending completion of trial

Malta:

As per the *Criminal Code 1854*, bail is always granted in cases where a final judgment acquitting, convicting or sentencing the person accused has not been entered within:

- a. four months in the case of a contravention or of a crime liable to the punishments established for contraventions or to imprisonment for a term not exceeding six months;
- b. eight months in the case of a crime liable to the punishment of imprisonment for a term exceeding six months but not exceeding four years;

²³⁷ *Criminal Code*, Chapter 9, The Laws of Malta 1854 (Malta), Article 575(5), 6(a).

- c. twelve months in the case of a crime liable to the punishment of imprisonment for a term exceeding four years but not exceeding ten years;
- d. twenty-four months in the case of a crime liable to the punishment of imprisonment for a term exceeding ten years but not exceeding fifteen years;
- e. thirty months in the case of a crime liable to the punishment of imprisonment for a term exceeding fifteen years to run, in cases where no inquiry takes place, from the day when the accused has been brought before the court or when he was arrested and in cases where there has been an inquiry, either from the day the Attorney General sends the accused to be tried summarily or from the day he files the bill of indictment.²³⁸

Lesotho:

Section 5 of the *Speedy Trial Act 2002* states that:

- (1) Upon commencement, a trial shall continue from day to day until it is concluded unless there are compelling reasons to the contrary and they shall be recorded in writing.
- (2) In all criminal trials a judicial officer shall upon entry of a plea of guilty, consult with the counsel for an accused and the prosecutor, for the purpose of setting down the case for trial on a specified date or time which shall not exceed 30 days from the date of entry of the plea.
- (3) In any case in which a plea of guilty is entered, the trial of an accused shall commence within 60 days from the date of entry of the plea, or from the date an accused first appears before a judicial officer pursuant to arrest or service of a summons.



Prescriptive periods for maximum period of detention

Cameroon:

According to section 221(1) of the Criminal Procedure Code 2005 the examining magistrate is required to specify the period of remand in custody, in the remand warrant. Such period shall not exceed six months ordinarily. However, such period may by reasoned ruling of the

²³⁸ *Criminal Code*, Chapter 9, The Laws of Malta 1854 (Malta), Article 575 (7) (8) and (9).

examining magistrate be extended for a maximum period of twelve months in the case of a felony and six months in the case of a misdemeanour²³⁹.

India:

Section 436A of the *Code of Criminal Procedure 1973*, stipulates the manner in which an undertrial prisoner may seek to be released on bail if the investigation of the offence or an inquiry or the trial has dragged on for too long. It is provided that:

‘Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the court on his personal bond with or without sureties:

Provided that the court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation – In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded.’

UK – England and Wales:

As per the *Criminal Procedure Rules 2020*, Rules 14.18 persons remanded in custody are subject to custody time limits (CTL). Extensions to these must be justified by the prosecution and received from the court:

²³⁹ *Law No. 2016/007 of 12 Jul 2016 Relating to the Penal Code, 2016* (Cameroon). Available at: <https://www.tobaccocontrolaws.org/files/live/Cameroon/Cameroon%20-%20Penal%20Code.pdf> as on 30 May 2022; As per section 21(1) (a), a felony shall mean any offence punishable with death or with loss of liberty for a maximum of more than ten years. Examples of offences that can fall under felony are murder, rape and aggravated theft. In summary felony constitute the highest offence in Cameroon. Whereas a Misdemeanour means an offence punishable with loss of liberty or fine, whereas the loss of liberty shall be for more than ten days but not for more than ten years and the fine more than twenty five thousands francs. An example of such an offence is theft.

- 56 days for Magistrates' Court trial.
- 70 days for committal to the Crown Court.
- 182 days from committal to the Crown Court trial.

Lesotho:

Section 4 of the *Speedy Trial Act 2002* states that, a person shall not be remanded into custody for a period exceeding 60 days unless there are compelling reasons to the contrary and such reasons shall be recorded in writing.

Rwanda:

As per the law relating to criminal procedure, for a person prosecuted, but yet to be sentenced:

1. For all crimes other than misdemeanours and petty offences, the detention cannot go beyond 6 months;
2. For misdemeanour, the detention cannot go beyond 3 months; (a misdemeanour is an offence punishable under the law by a principal penalty of imprisonment for a term of not less than six months and not more than five years; for example, blackmail, concubinage, public indecency) and,
3. For petty offences, the detention cannot go beyond 30 days.²⁴⁰

Eswatini:

Section 136 (2) of the Criminal Procedure and Evidence (CP&E) Act 1938 states that:

If such person is not brought to trial at the first session of such court held after the expiry of six months from the date of his commitment, and has not previously been removed for trial elsewhere, he shall be discharged from his imprisonment for the offence in respect of which he has been committed.

²⁴⁰ Law n° 027/2019 of 19/09/2019 Relating to the Criminal Procedure, 2019 (Rwanda), Article 79.

Sri Lanka:

Section 16 of the Bail Act 1997 states that unsentenced prisoners shall not be detained for a period exceeding 12 months from the date of arrest, however that time period can be extended by 3 months at a time by making a request to the Attorney General.

Section 3 (1) of the Release of Remand Prisoners Act 1991 provides that where a person has been granted bail by a competent court, but continues to remain in remand on the expiry of one month from the date of the order of remand due to his inability to furnish bail, the Superintendent of the Prison in which such person is remanded, shall produce him before the court remanding such person and the court shall release such a person upon his executing a bond without sureties for his appearance in court.

Section 3 (2) provides that where such person has been in remand for a period of three months from the date of the order of remand, the Superintendent of the Prison in which such a person is remanded, shall on the expiration of the three months, produce such person before the court remanding such person, and the court, shall if no proceedings have been instituted against such person at the time she/he is so produced, release such person on his executing a bond without sureties for his appearance in court.

Section 3 (3) provides that where such person has been in remand for a period exceeding one year the Superintendent of the Prison in which such person is remanded shall upon the expiration of such period produce him/her before the court remanding such person, and where-

(a) trial against him/her has not commenced, the court shall release such a person on his executing a bond without sureties for his appearance in court;

(b) trial has commenced, the court may release such a person on his executing a bond without sureties for his appearance in court, unless it appears to the court for good and sufficient reasons to be recorded, that he should not be, so released.



Power of Court to Prevent Further Delay

South Africa:

Section 342A of the *Criminal Procedure Act, 1977* gives the court certain powers which are aimed at preventing any further delay in completion of criminal proceedings. These powers are:

- (a) Refusing to grant further postponements;
- (b) Granting a further postponement subject to conditions that the court may determine;
- (c) Where an accused has not yet pleaded to the charge, the case is to be struck off the roll and the prosecution be prohibited from resuming or instituting the matter de novo without the written instruction of the attorney-general;
- (d) Where the accused has pleaded to the charge, the matter is to proceed as if the party to the proceedings who is causing the delay has closed their case;
- (e) The party causing the delay, be it the State or the accused, pay the other's costs incurred and occasioned by such a delay; and
- (f) Referring the matter to the appropriate authority for an administrative investigation and possible disciplinary action against any person responsible for the delay.

9. Mechanisms for periodic review of pre-trial detainee cases

Standards: Guidelines 12 of the Luanda Guidelines provides detailed standards for conducting review of pre-trial detention orders. They emphasise on the provision of regular reviews of pre-trial detention in the national law, including conduct of regular reviews by both judicial and detaining authorities. Emphasis is also placed on judicial authorities to consider the need for continued detention, while taking decisions extending or renewing pre-trial detention.

Luanda Guidelines 2014

Guideline 12:

- a. 'regular review of pre-trial detention orders shall be provided for in national law. Judicial authorities and detaining authorities shall ensure that all pre-trial detention orders are subject to regular review.
- b. In making a pre-trial detention order, or in extending or renewing pre-trial detention, judicial authorities shall ensure that they have thoroughly considered the need for continued pre-trial detention and shall give consideration to the following issues:
 - i. Assess whether sufficient legal reasons exist for the arrest or detention and order release if they do not exist.
 - ii. Assess whether the investigating authorities are exercising due diligence in bringing the case to trial.

- iii. If the individual is suspected of a criminal offence, assess whether in the circumstances of the case of the individual, the detention pending trial is necessary and proportionate. In such assessment, among other things, responsibilities as primary caretakers should be taken into consideration.
- iv. Enquire about and take means necessary to safeguard the well-being of the detainee
- c. Judicial authorities shall provide written reasons for orders to extend or renew pre-trial detention.

Analysis: Only in 11²⁴¹ of the 54 countries a mechanism to periodically review the cases of pre-trial detainees has been reported. In **the Bahamas**, the remand court conducts a periodic review of cases of unsentenced prisoners every 7 days. A probation officer can also submit a report on the behaviour of the unsentenced prisoner to the court, to assist the process²⁴². In **Canada**, the *Criminal Code 1985* provides for a judicial hearing 30 days after the last detention order in summary offence cases, and 90 days in indictable offence²⁴³. In **India**, section 167 of the *Code of Criminal Procedure 1973*, states that a judicial officer must review each case of detention within every 15 days, till the investigation is complete and the charge framed. Additionally, district level committees have been constituted with the mandate to review cases of undertrial prisoners every month and recommend their release to the concerned courts. In **Lesotho**, a person awaiting trial must appear before a judicial officer every 15 days if he has been denied bail; such a person may not be remanded in custody for a period exceeding 60 days unless there are compelling reasons to the contrary.

In **Malta**, in cases where an inquiry takes place before the Court of Criminal Inquiry, an accused who has not been granted bail, is to be brought before the court at least once every two weeks so that the court decides whether she/he is to remain under arrest. In **Nigeria**, the Chief Magistrate is mandated to conduct monthly inspections of the police stations and other places of detention to review the records relating to the detention of persons, and may call for records. The Chief Magistrate may direct bail in appropriate cases. Further as per Section 110 of the *Administration of Criminal Justice Act, 2015* (ACJA) a review of unsentenced prisoners after 180 days of arraignment by magistrate courts are undertaken to ensure that prisons are decongested. In **Eswatini**, every prisoner must appear every eighth day before a magistrate to make a decision as to whether he/she may be remanded back into custody or be released on bail.

²⁴¹ Bahamas, Canada, India, Jamaica, Lesotho, Malta, New Zealand, Nigeria, Solomon Islands, Kingdom of Eswatini, and Vanuatu.

²⁴² *Penal Code, 1927* (Bahamas): http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/1873/1873-0015/PenalCode_1.pdf as on 30 May 2022. See Section 124(14)(c).

²⁴³ Indictable offences are usually more serious in nature than summary offences.

Good Practices:

- ✓ **Weekly review of cases**

The Bahamas:

Every seven days there is a periodic review of cases of unsentenced prisoners by the Remand Court. Section 122 of the *Criminal Procedure Code 2010*, provides that “the court will take this action, if it considers it necessary or advisable to adjourn the inquiry, the court may from time to time by warrant remand the accused for a reasonable time and the court may in writing order the officer or person in whose custody the accused person is or any other fit officer or person, to continue to keep the accused in his custody, and to bring him up at the time appointed for the commencement or continuance of the inquiry.”

- ✓ **Dedicated mechanism to conduct review**

India:

In India, Under Trial Review Committees²⁴⁴ have been constituted in every district to review the cases of unsentenced prisoners or prisoners awaiting trial who are confined in prisons in their jurisdiction. These committees are mandated to review cases on a monthly or quarterly basis and recommend cases for release of such prisoners to the concerned courts. Cases are reviewed under 14 broad categories, including those who have completed maximum term of imprisonment that could be imposed, women, sick and infirm, young offenders, cases eligible for release on probation etc.²⁴⁵

- ✓ **Monitoring of prisoner information**

Nigeria:

Section 111, of the Administration of Criminal Justice Act 2015 requires the Comptroller-General of Prisons to file returns every 90 days to the Chief Judge and the Attorney-General of the Federation, stating the number of persons awaiting trial and held in custody in Nigerian prisons for a period beyond 180 days from the date of arraignment. Section 110 of the ACJA provides for a review of unsentenced prisoners after 180 days of arraignment.

²⁴⁴ In India, unsentenced prisoners are termed as under trial prisoners. These committees have been constituted as per directive of the Supreme Court of India in *Re – Inhuman Conditions in 1382 Prisons* [Writ Petition (Civil) No. 406 of 2013].

²⁴⁵ For more information see: CHRI (2020), Undertrial Review Committees and You: <https://www.humanrightsinitiative.org/publication/under-trial-review-committees-and-you> as on 30 May 2022.

Returns will be made by the magistrate court to the Chief Judge who ensures that the prisons are decongested.

✓ **Review by the Supreme Court**

Vanuatu:

Section 56 of the *Penal Code 1981*, provides guidance on review of confinement.

- (1) In the case of every person confined in any manner other than by imprisonment or periodic detention under the provisions of this Code, a full report on his condition and the necessity to continue to detain him, shall be sent to the Supreme Court by the authority concerned at intervals not exceeding 12 months.
- (2) Notwithstanding the provisions of subsection (1), the Supreme Court may, upon receiving any representation or complaint from any person, call for such a report at any time.
- (3) The Supreme Court may reach a decision upon the necessity to continue to detain any such person upon the report itself or may call for such further information or evidence, including the personal attendance before it of any person, as it shall consider necessary or desirable. The Court may, if it thinks fit, visit the place of confinement for the purpose of inspecting the same or interviewing any person.
- (4) The Supreme Court shall have power, upon reaching a decision in any case that the person detained should be released from confinement, to make such order or give such directions for his release as may be appropriate in the circumstances. Such order or directions shall be binding upon the authority concerned, who shall report to the court without delay upon the execution thereof.

10. Availability of non-custodial measures as alternatives to pre-trial detention

Standards: The UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) 1990 promote the use of non-custodial measures and intend to promote greater community involvement in the management of criminal justice, and to promote among offenders a sense of responsibility towards society. Rule 6.2 states: ‘alternatives to pre-trial detention shall be employed at as early a stage as possible’. Rule 2.3 states: ‘in order to provide greater flexibility consistent with the nature and gravity of the offence, with the personality and background of the offender and with the protection

of society and to avoid unnecessary use of imprisonment, the criminal justice system should provide a wide range of noncustodial measures, from pre-trial to post-sentencing dispositions. Rule 2.4 states: the development of new non-custodial measures should be encouraged and closely monitored and their use systematically evaluated. While the need for alternatives to pre-trial detention has been mentioned in various rules, neither the rules nor the official commentary explains what such alternatives might be.²⁴⁶

Analysis: The application of alternatives can either occur at the pre-trial stage, i.e., at the time of review after arrest, wherein the competent authority decides to send a person to custody; during trial, i.e., at the time of review of continued detention, or at sentencing i.e., the competent authority must decide the appropriate punishment for the crime committed. Availability of measures at the pre-trial stage would ensure that lesser number of individuals are sent to custody, thus impacting the number of persons detained pre-trial. The availability of measures at other stages can result in a reduction of the total period of detention. Therefore, the availability of alternatives can indeed have a substantive impact on the pre-trial detention figures.

Our analysis indicates the availability of non-custodial measures in a majority of jurisdictions.²⁴⁷ (Refer to Table 5) In particular, some common measures available include probation or judicial supervision, which can be imposed in 19 countries²⁴⁸; community correction orders or community service orders in 27 countries²⁴⁹; and fines or monetary orders that can be imposed in 37 countries²⁵⁰. The analysis of these measures indicates that majority of them are applicable at the sentencing stage of the criminal proceedings, and not quite at the pre-trial stage. Additionally, given the lack of clarity on what measures would constitute effective non-custodial measures, applicable at the pre-trial stage, it is difficult to highlight good practices. There are some interesting non-custodial sentences that emerged from the research, and include²⁵¹:

1. **Community Correction Order (CCO)** – is a community-based sentencing option that a judicial officer may consider as a suitable alternative to a term of imprisonment. A CCO

²⁴⁶ UNODC (2007), *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment*, pg 19: https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Handbook_of_basic_principles_and_promising_practices_on_Alternatives_to_Imprisonment.pdf as on 30 May 2022.

²⁴⁷ Information for six jurisdictions – the Gambia, Ghana, Grenada, Pakistan, Sierra Leone and Vanuatu was not shared.

²⁴⁸ Antigua and Barbuda, Australia (New South Wales), Bangladesh, Brunei, Canada, Cyprus, India, Jamaica, Malawi, Malta, Mauritius, Singapore, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Tanzania, Trinidad and Tobago, Uganda and UK (Scotland).

²⁴⁹ Australia, Bahamas, Bangladesh, Barbados, Brunei, Canada, Cyprus, Fiji, Jamaica, Kiribati, Malawi, the Maldives, Malta, Mauritius, Mozambique, Namibia, New Zealand, Nigeria, Rwanda, Samoa, Kingdom of Eswatini, Tanzania, Tonga, Trinidad and Tobago, Uganda, UK and Zambia.

²⁵⁰ Australia, Bahamas, Barbados, Belize, Botswana, Brunei, Canada, Cyprus, Dominica, Fiji, Guyana, India, Jamaica, Kenya, Lesotho, Malawi, Malaysia, the Maldives, Mauritius, Mozambique, Namibia, New Zealand, Papua New Guinea, Rwanda, Samoa, Seychelles, Solomon Islands, South Africa, St Lucia, St Vincent and the Grenadines, Kingdom of Eswatini, Tonga, Trinidad and Tobago, Tuvalu, Uganda, UK and Zambia.

²⁵¹ A more detailed analysis of alternatives has not been undertaken in this report as our research only sought information on the various non-custodial measures available, and no further details on applicability etc. was sought.

will have standard conditions which includes that an offender must not commit any more offences. A CCO may also include additional and/or further conditions dependent on the type of offence, community safety, and an offender's circumstances. Additional conditions may include supervision, community service work, curfews, alcohol and drug abstinence, non-association, place restriction, programs, treatment home detention, electronic monitoring or a curfew.

2. **Conditional Release Order (CRO)** – a community-based sentencing option that provides the court with an option to divert low-risk and less serious offenders away from the criminal justice system. A CRO can be imposed with or without conviction for the offence. A CRO will have standard conditions which includes that an offender must not commit any more offences. A CRO may also include additional and/or further conditions dependant on the type of offence, community safety, and an offender's circumstances. Additional conditions may include supervision, alcohol and drug abstinence, non-association, place restriction, programs and treatment.
3. **Fines or monetary orders** – monetary orders include requirement of paying court costs, witness expenses, compensation and professional costs.
4. **Apprehended Violence Orders (AVO)** - an order that prohibits certain behaviour for a period of time. Orders can include not to assault, harass or intimidate a protected person; not to contact a protected person, or not to attend premises where a protected person lives or works. Breaching an apprehended violence order can result in a person being arrested and charged with an offence.

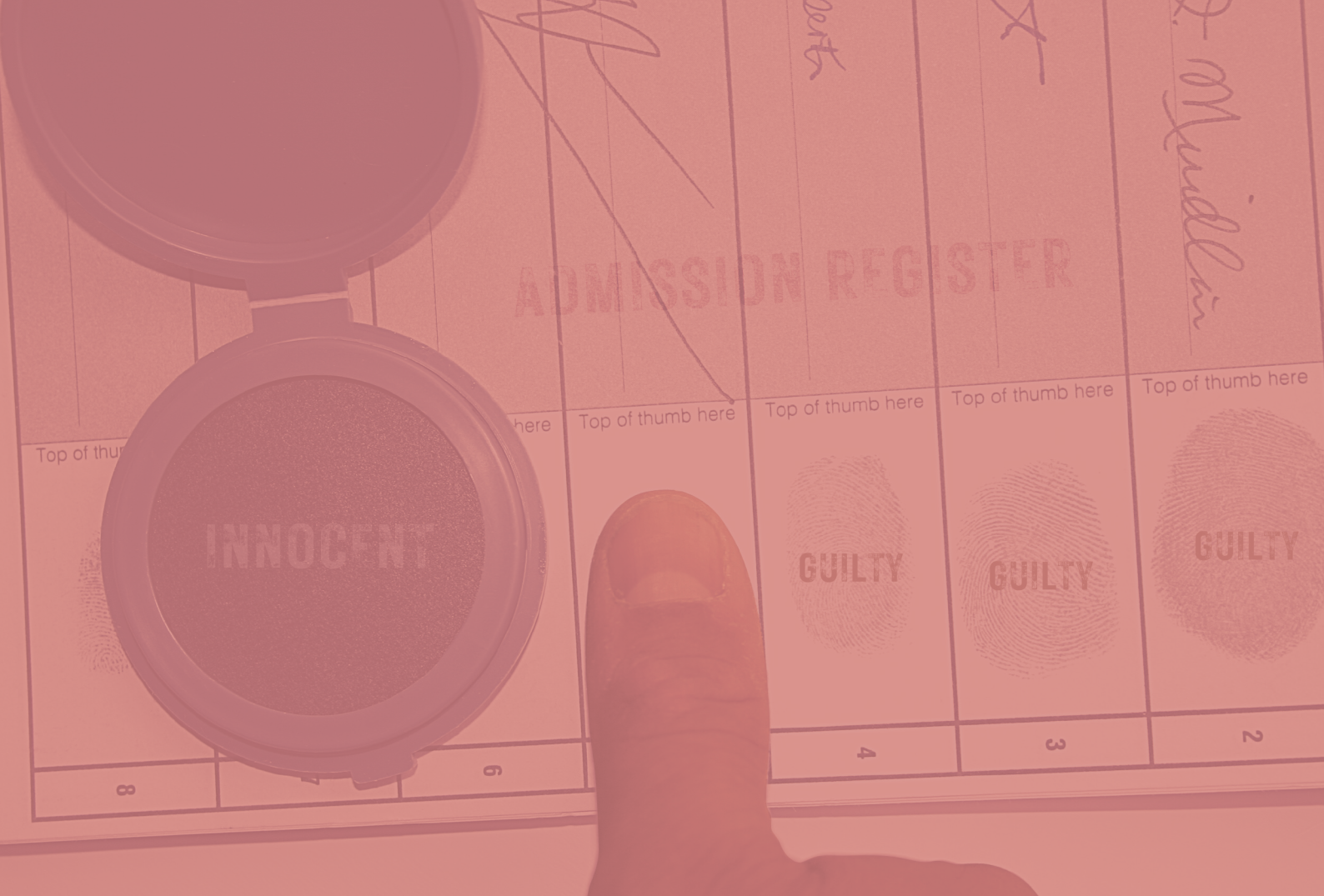
Table 5: List of Non-custodial Measures in Commonwealth countries

S. N.	Country	Types of Non-Custodial Sentences Available
1	Antigua and Barbuda	Probation, conditional discharges with damages and costs
2	Australia: i. New South Wales ii. Victoria iii. Queensland iv. Western Australia v. Tasmania vi. Northern Territory	Community correction order (CCO), conditional release order (CRO), fines or monetary orders, apprehended violence orders (AVO) Community correction order, fines or monetary orders, dismissals, discharges or adjournments Good behaviour orders, orders for restitution or compensation, non-contact orders, banning orders, fines, probation orders, community service orders, graffiti removal orders, intensive correction orders, suspended imprisonment, drug and alcohol treatment orders, control orders Conditional release order, fine, suspended fines, community-based order, supervision order, suspended imprisonment, conditional suspended imprisonment Community correction orders, home detention orders Good behaviour bonds, fines, community work orders, community-based orders, mental health orders, restitution and compensation orders, non-association and place restriction orders, cancellation of driver's licence, passport orders, forfeiture of property orders
3	Bahamas	Discharges, fines and community service orders
4	Bangladesh	Verbal sanction, conditional discharge, probation order, community service order, victim compensation order
5	Barbados	Community service, curfew orders, fine
6	Belize	Fine
7	Botswana	Fine, forfeiture

S. N.	Country	Types of Non-Custodial Sentences Available
8	Brunei	Fine, probation, absolute or conditional discharge; community service, reformative training, good behaviour bond, order of supervision
9	Cameroon	Suspended sentence
10	Canada	Absolute or conditional discharge, probation, restitution, fines, conditional sentence (sentence served in the community), intermittent imprisonment, long-term offender (combination of imprisonment and community supervision)
11	Cyprus	Fines, damages to injured party, conditional discharge, probation, community service, vocational or other training
12	Dominica	Fine
13	Fiji	Community work, fine
14	The Gambia	Information not provided
15	Ghana	Information not provided
16	Grenada	Information not provided
17	Guyana	Fines, payment of compensation for injury done, disqualification from holding of offices
18	India	Probation including release on admonition and supervision by probation officer, fines, security for keeping peace
19	Jamaica	Only for convicts: paying fines suspended sentences, suspended sentence supervision order, admonished and discharged, probation order, community service order
20	Kenya	Fine
21	Kiribati	Community service, subject to supervision
22	Lesotho	Fine
23	Malawi	Discharge without conviction; conviction and discharge; deportation, attendance centre orders, probation, community service orders, curfew orders, fine, compensation, suspended sentence, public work, security for keeping peace, police supervision, and binding over
24	Malaysia	Conditional discharge (or a 'good behaviour bond'), fine, compulsory attendance order, treatment and rehabilitation for drug offenders

S. N.	Country	Types of Non-Custodial Sentences Available
25	The Maldives	House arrest, community service and fines
26	Malta	Suspended sentences, probation orders, community service orders, combination orders and conditional discharges
27	Mauritius	Absolute discharge, conditional discharge, imposition of a fine or community service, probation orders
28	Mozambique	Fine, community service, temporary prohibition of rights
29	Namibia	Fine, community sentence
30	Nauru	Conduct labour
31	New Zealand	Discharge, fine and reparation, community-based sentences, community-based sentences and community detention, home detention, sentence of imprisonment
32	Nigeria	Victim compensation, restitution, community service, suspended sentence, rehabilitation or correctional centres, parole
33	Pakistan	Information not provided.
34	Papua New Guinea	Fine and finding security to keep the peace
35	Rwanda	Fine and community service
36	Samoa	Discharges, payment of fines and/or reparation; community work; supervision; order to undertake a rehabilitative programme
37	Seychelles	Fine, compensation, forfeiture, finding security to keep the peace and maintain good behaviour, liability to police supervision
38	Sierra Leone	Information not provided
39	Singapore	Probation
40	Solomon Islands	Fine
41	South Africa	Fine, correctional supervision
42	Sri Lanka	Conditional discharge, suspended sentence
43	St Kitts and Nevis	Suspended sentence, probation conditional discharge
44	St Lucia	Probation; extra mural (employment in public work), curfew order, combination order, dismissal with reprimand, fine, forfeiture, compensation

S. N.	Country	Types of Non-Custodial Sentences Available
45	St Vincent and the Grenadines	Fine, payment of compensation, finding security to keep peace, probation, forfeiture of articles involved in the offence, costs, supervision order, suspended sentence, discharge etc.
46	Kingdom of Eswatini	Fine, suspended sentence, community service, diversion, suspended sentence, community service
47	Tanzania	Probation, community services, parole
48	Tonga	Discharge without conviction, payment of costs, community service, fines
49	Trinidad and Tobago	Probation, community services, fines, compensation
50	Tuvalu	Weekend detention, fine instead of imprisonment, security, residence orders
51	Uganda	Fines, caution, discharge without punishment, probation, community service
52	UK i) England and Wales ii) Scotland iii) Northern Ireland	Community orders, fines, conditional discharges, absolute discharges. for youths, referral orders, youth rehabilitation orders Community payback orders, deferred sentences, compensation orders, fines. Community service orders, fines, probation orders, conditional or absolute discharge. for youths, attendance centre orders, community responsibility orders, reparation orders, youth conference orders
53	Vanuatu	Information not provided
54	Zambia	Community service, fine, forfeiture, payment of compensation and deportation



SUSTAINABLE DEVELOPMENT GOALS AND REPORTING BY COMMONWEALTH STATES ON SDG TARGET 16.3.2

IV. SUSTAINABLE DEVELOPMENT GOALS AND REPORTING BY COMMONWEALTH STATES ON SDG TARGET 16.3.2

In 2015, the United Nations adopted the 2030 Agenda for Sustainable Development which sets out 17 Sustainable Development Goals (SDGs). These are successors to the Millennium Development Goals which started as a focused global effort in the year 2000 to tackle poverty, and represent a universal call to action to meet urgent and contemporary worldwide economic, environmental and political challenges.²⁵² SDGs cover a much wider area of development where not only human society but also the environment and climate have emerged as focal points requiring global intervention. Of these 17 SDGs, Goal 16 focuses on peace, justice and strong institutions and aims to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.’²⁵³ The Goal has 12 targets and several indicators for countries to fulfil in order show progress made with regard to Agenda 2030.²⁵⁴ Indicator 16.3.2 developed for assessing the performance of UN Member States in delivering on SDG Goal 16 focuses on ‘unsentenced detainees as a proportion of overall prison population.’²⁵⁵ It underlines the importance of addressing the issue of pre-trial detention, through effective implementation of national and international safeguards. Demonstrable reduction in the number of unsentenced detainees languishing in prison is the implied measure of progress with regard to this aspect of SDG 16.

As part of its review mechanism, the 2030 Agenda for Sustainable Development encourages Member States to conduct regular and inclusive reviews of progress at the national and sub-national levels, which are country-led and country-driven. These reviews are to be voluntary, State-led, undertaken by both developed and developing countries, and involve multiple stakeholders.²⁵⁶ These voluntary national reviews (VNRs)²⁵⁷ are expected to serve as a basis for the regular reviews by the High Level Political Forum on sustainable development (HLPF), which meets every year under the auspices

²⁵² UNDP, Sustainable Development Goals: <https://www.undp.org/content/undp/en/home/sustainable-development-goals/background/>.

²⁵³ SDG Knowledge Platform, Sustainable Development Goal 16 Promote peaceful and inclusive societies for sustainable development, provide: <https://sustainabledevelopment.un.org/sdg16>.

²⁵⁴ SDG Indicators, Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development: https://unstats.un.org/sdgs/indicators/Global%20Indicator%20Framework%20after%202019%20refinement_Eng.pdf.

²⁵⁵ *Supra* note 252.

²⁵⁶ United Nations Division for Sustainable Development Goals (2018), *Transforming our World: The 2030 Agenda for Sustainable Development*, pg. 39. See also GA resolution 67/290, para 8, for more on the reviews and the mandate of the HLPF: <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf> as on 30 May 2022.

²⁵⁷ For more information on VNRs see Handbook for the Preparation of Voluntary National Reviews (2022 edition), published by the Department of Economic and Social Affairs (DESA), United Nations: https://sustainabledevelopment.un.org/content/documents/29410VNR_Handbook_2022_English.pdf as on 30 May 2022.

of the UN Economic and Social Council (ECOSOC). As of 2022, 205 VNRs have been conducted, with 176 countries having presented VNRs once with 59 countries having conducted more than one VNR.²⁵⁸ All the 54 countries of the Commonwealth Member States have either already conducted a VNR or will be conducting their first in 2022.²⁵⁹

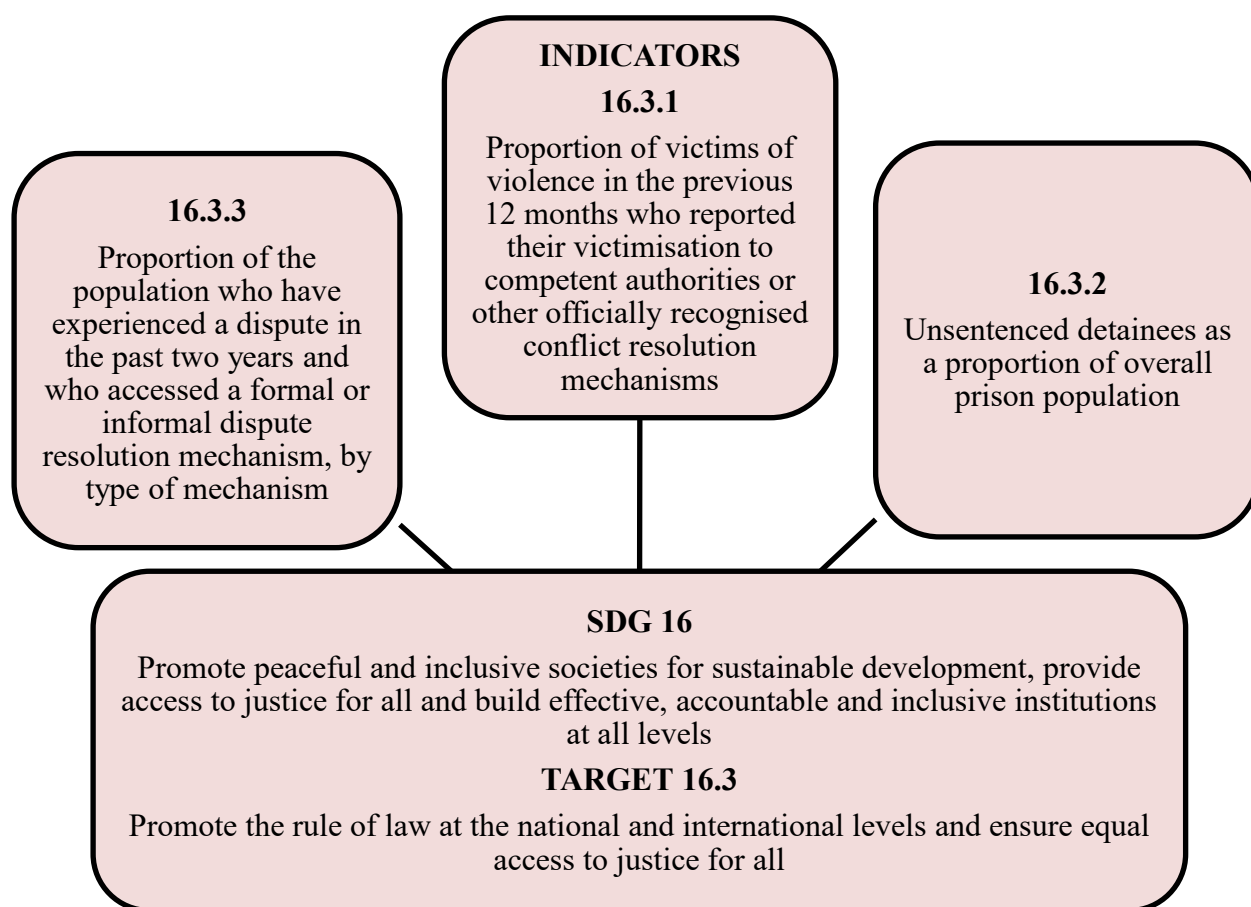


Table 6: Commonwealth countries conducting a VNR in 2022/2023 or having conducted a VNR in the past

S. No.	Name of Country	Year of submission of first and subsequent VNRs		
1	Antigua and Barbuda	2021		
2	Australia	2018		
3	Bahamas	2018	2021	
4	Bangladesh	2017	2020	
5	Barbados	2020		
6	Belize	2017		
7	Botswana	2017	2022	
8	Brunei Darussalam	2020	2023	

²⁵⁸ *Ibid.*

²⁵⁹ Dominica, Gambia, Grenada, St Kitts and Nevis and Tuvalu.

S. No.	Name of Country	Year of submission of first and subsequent VNRs		
9	Cameroon	2019	2022	
10	Canada	2018		
11	Cyprus (Republic of)	2017	2021	
12	Dominica	2022		
13	Fiji	2019	2023	
14	Gambia	2022		
15	Ghana	2019	2022	
16	Grenada	2022		
17	Guyana	2019		
18	India	2017	2020	
19	Jamaica	2018	2022	
20	Kenya	2017	2020	
21	Kiribati	2018		
22	Lesotho	2019	2022	
23	Malawi	2020	2022	
24	Malaysia	2017	2021	
25	Maldives	2017		
26	Malta	2018		
27	Mauritius	2019		
28	Mozambique	2020		
29	Namibia	2018	2021	
30	Nauru	2019		
31	New Zealand	2019		
32	Nigeria	2017	2020	
33	Pakistan	2019	2022	
34	Papua New Guinea	2020		
35	Rwanda	2019		
36	Samoa	2016	2020	
37	Seychelles	2020		
38	Sierra Leone	2016	2019	2021
39	Singapore	2018	2023	

S. No.	Name of Country	Year of submission of first and subsequent VNRs		
40	Solomon Islands	2020		
41	South Africa	2019		
42	Sri Lanka	2018	2022	
43	St. Kitts and Nevis	2022		
44	St. Lucia	2019		
45	St. Vincent and the Grenadines	2020		
46	Eswatini	2019	2022	
47	Tanzania	2019		
48	Tonga	2019		
49	Trinidad and Tobago	2020		
50	Tuvalu	2022		
51	Uganda	2020		
52	UK	2019		
53	Vanuatu	2019		
54	Zambia	2020		

In the context of pre-trial detention, and reporting on SDG indicator 16.3.2, a review of VNRs highlights that only a handful of Member States of the Commonwealth have reported on this important indicator. While several have reported on progress towards achievement of SDG 16, few have reported on the situation in prisons, or on pre-trial detention specifically. The initiatives reported by countries in their VNRs are summarised below.

Australia in its VNR in 2018 stated that the focus of the country with regard to improvement of prisons is on training, rehabilitation programs, prison-to-work program and employment services for the Aboriginal and Torres Strait Islanders prisoners.²⁶⁰ It also stated that the government is working to support youth during their transition out of detention and return to the community safely.²⁶¹ It also reported on the functioning of legal aid commissions and other initiatives towards achieving the goals.

The Bahamas, in its 2017 VNR affirmed that the Government established a Public Defenders Unit financially supported by the Inter-American Development Bank. The Unit aims to accelerate access to justice for those groups that are unable to afford defence counsel in criminal matters and to reduce

²⁶⁰ Australian Government, (2018), *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*: https://sustainabledevelopment.un.org/content/documents/20470VNR_final_approved_version.pdf as on 30 May 2022.

²⁶¹ *Ibid.*

court delays. The Citizen Security and Justice Programme (CSJP) also aimed at contributing to the reduction of crime and violence in the country by the implementation of targeted programmes.²⁶²

Cameroon in its 2019 VNR stressed efforts made to guarantee the rights of citizens and to establish social justice. It is important to point out that as per the report of its Ministry of Justice, as on 2017 out of 30,701 prisoners, 58% (17,845 detainees) were awaiting trial.²⁶³ Also that it has been reported that due to the lack of space in prisons, there is no separation of those awaiting trials and convicts.²⁶⁴

Canada in its 2018 VNR, reported on the process of review of its criminal justice system which addressed several issues, including reducing the over-representation of vulnerable populations in prison.²⁶⁵ Moreover, the government claimed to have supported economically disadvantaged persons through its Legal Aid Program.²⁶⁶ Canada with the appropriate Indigenous Justice Program supported the community in offering culturally relevant alternatives justice process.²⁶⁷

Cyprus, in its 2017 VNR, reported, on efforts of the competent ministry to monitor and implement legislation with regard to the administration of justice.²⁶⁸ The government is said to have initiated a comprehensive and thorough revision of penal legislations, in order to reform the penitentiary system.²⁶⁹ Additionally, one of the government's priorities was the improvement of detention and living conditions of prisoners based on the principles of international human rights law, respect for human dignity and equal treatment without any distinction.²⁷⁰

The **Kingdom of Eswatini** in its VNR 2019, provided information on efforts undertaken to promote the rule of law at the national and international levels. It, however, did not report on any reforms related to arrest and detention.²⁷¹

²⁶² Government of The Bahamas (2018), *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*, pg. 124: https://sustainabledevelopment.un.org/content/documents/19874VNR_document_03.07.18_master_document.pdf as on 30 May 2022.

²⁶³ Republic of Cameroon (2018), *Report of the Ministry of Justice on Human Rights in Cameroon in 2017*, pg. 275. Available at: http://www.minjustice.gov.cm/components/com_flexicontent/uploads/rapport_minjustice_2017_en.pdf as on 30 May 2022.

²⁶⁴ *Ibid.*

²⁶⁵ United Nations Division for Sustainable Development Goals (2018), Canada's *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*, pg. 113. Available at: https://sustainabledevelopment.un.org/content/documents/20312Canada_ENGLISH_18122_Canadas_Voluntary_National_ReviewENv7.pdf as on 30 May 2022.

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ Republic of Cyprus (2017), *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*: <https://sustainabledevelopment.un.org/content/documents/15886Cyprus.pdf> as on 30 May 2022.

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ The Kingdom of Eswatini (2019), *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*: https://sustainabledevelopment.un.org/content/documents/24651Eswatini_VNR_Final_Report.pdf as on 30 May 2022.

Fiji, in its VNR 2019, affirmed its commitment towards the expansion of legal aid services, giving low-income earners in Fiji more significant opportunity to seek legal advice and enjoy security, assurance and full protection of the law, creating an equal society.²⁷² As per the National Development Plan Report, the government continues to provide correctional services and rehabilitation of inmates for reintegration into society and to improve access to justice.²⁷³

Ghana, in its VNR 2019, stated that while legislations mandate that individuals detained in police cells should not be held on remand for longer than 48 hours, yet a large number of prisoners remain in custody beyond this time limit.²⁷⁴

Guyana, in its VNR 2019, reported that it prioritised people-focused reforms and implementation concerning the security sector.²⁷⁵ The Government provided training for police prosecutors, the magistracy and probation services. It was implementing a restorative justice programme, and strengthening the Law Reform Commission. The legal aid programme, in particular, aims to assist persons accused of minor, non-violent offences who are currently in pre-trial detention. The legal aid programme comprised a team of lawyers and paralegals who seek the dismissal of charges, arrange for diversion where appropriate or argue for bail and, generally, avoid procedural delays.²⁷⁶

Jamaica reported several achievements in its 2018 VNR including the 2015 justice reform implementation plan; implementation of a case management system to automate case and document management in the courts island wide; implementation of the data collection system to track the number of cases before the courts and improvement of the justice sector reform programme; expansion of court infrastructure to improve the quality and delivery of justice service; refurbishing of a number of court houses; implementation of the Justice Undertaking Social Transformation (JUST) Programme and the Justice, Security Accountability and Transparency (JSAT) Programme with financial support from international development partners and use of video-link technology for witnesses unable to attend court.²⁷⁷

²⁷² Republic of Fiji (2019), *Key Messages for the Voluntary National Review*. <https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=1162&menu=3170>.

²⁷³ Republic of Fiji, Ministry of Economy (2017), *5-year and 20-year National Development Plan, Transforming Fiji*. Available at: <https://www.fiji.gov.fj/getattachment/15b0ba03-825e-47f7-bf69-094ad33004dd/5-Year-20-Year-NATIONAL-DEVELOPMENT-PLAN.aspx> as on 30 May 2022.

²⁷⁴ Republic of Ghana (2019), *Voluntary National Review Report on the Implementation of the 2030 Agenda for Sustainable Development* pg. 86: https://sustainabledevelopment.un.org/content/documents/23420VNR_Report_Ghana_Final_print.pdf as on 30 May 2022.

²⁷⁵ Co-operative Republic of Guyana (2019), *Guyana First Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*: https://sustainabledevelopment.un.org/content/documents/24297Guyana_VNR2019_FINAL_REPORT_070819.pdf as on 30 May 2022.

²⁷⁶ *Ibid.*

²⁷⁷ Jamaica (2018), Jamaica, *Voluntary National Review Report on the Implementation of the 2030 Agenda for Sustainable Development* pg. 102: https://sustainabledevelopment.un.org/content/documents/19499JamaicaMain_VNR_Report.pdf as on 30 May 2022.

The **Kingdom of Lesotho**, in its 2019 VNR, reported on attempts to improve the conditions of prisoners and place of detention.²⁷⁸ This included renovations of prisons in adherence with international standards. Access to legal aid, and enhanced use of non-custodial sanctions were mentioned as priority areas in the reform initiatives.

Mauritius, in its 2019 VNR, stressed its acceptance of most of the UN human rights treaties and conventions as the basis for respecting human rights domestically.²⁷⁹ It also affirmed some policies adopted over the past years, including among others adoption of the Independent Police Complaints Commission Act and amendments to the Criminal Code- both in 2018.²⁸⁰ Following the obligation under the Optional Protocol to the Convention Against Torture, at the national level, the Mauritius' Parliament in 2012 established the National Preventive Mechanism Division (NPMD).²⁸¹ The NPMD aims to visit detention places regularly to ensure the protection of human rights and against torture or inhuman treatment of detainees.²⁸²

New Zealand, in its 2019 VNR, affirmed its independent and robust system of justice as well as the excellent performance in terms of transparency, accountability, and promotion of the rule of law and equal access to justice.²⁸³ It also noted that specific and vulnerable groups faced barriers in access to justice or in participating in democratic processes.²⁸⁴ In particular, the review reported that the Māori²⁸⁵ are and have been severely overrepresented in New Zealand's prison population for several decades. The Māori make up only 15% of the general population, but approximately half of New Zealand's prison population. The Māori are also 38% of the people proceeded against by the police and 42% of the people convicted.²⁸⁶ To overcome challenges of high rates of imprisonment and reoffending, in 2018, the government reviewed the legal aid system. The review included examination of the income thresholds for eligibility and the need to repay legal aid. The review specifically looked at the impacts on different population groups, including women.²⁸⁷ The VNR also listed governmental priorities within correction places such as: improving aspects such as safety, rehabilitation, transition of detainees.²⁸⁸

²⁷⁸ Kingdom of Lesotho (2019), the *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development* https://sustainabledevelopment.un.org/content/documents/23777Lesotho_VNR_Report_2019_Final.pdf as on 30 May 2022.

²⁷⁹ Mauritius (2019), *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*: https://sustainabledevelopment.un.org/content/documents/23462Mauritius_VNR_Report_2019.pdf as on 30 May 2022.

²⁸⁰ *Ibid.*

²⁸¹ Government of Mauritius, National Human Rights Commission, National Preventive Mechanism Division: <http://nhrc.govmu.org/English/AboutUs/Pages/National-Preventive-Mechanism-Division-.aspx>

²⁸² *Ibid.*

²⁸³ New Zealand (2019), *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*, *He Waka Eke Noa Towards a Better Future Together*: https://sustainabledevelopment.un.org/content/documents/23333New_Zealand_Voluntary_National_Review_2019_Final.pdf as on 30 May 2022.

²⁸⁴ *Ibid.*

²⁸⁵ The Māori are the indigenous Polynesian people of mainland New Zealand. For more read <https://www.britannica.com/topic/Maori>. The manner of pronouncing this name is also explained at this link.

²⁸⁶ *Supra* note 283.

²⁸⁷ *Ibid.*

²⁸⁸ Government of New Zealand, Department of Corrections, Ara Poutama Aotearoa: https://www.corrections.govt.nz/about_us/Our_vision_goal_and_priorities/our_priorities.html.

Rwanda, in its 2019 VNR, reported on how it has reformed the judicial system to enhance access to quality justice.²⁸⁹ Rwanda introduced the use of the IT System (IECMA) with the twin aims of reducing delays and transaction costs associated with judicial cases and improving the provision of access to justice.²⁹⁰ The Justice, Reconciliation, Law and Order (JRLO) sector outcome emphasises improving universal access to quality justice, including the intervention in promotion legal aid for universal access to affordable and quality justice.²⁹¹ It reported that the provision of legal aid services - through the Maison d'Accès à la Justice (Access to Justice Bureau, MAJ) services and abunzi mediation committees²⁹², at the local level, has improved access to universal, quality and affordable justice.²⁹³

Saint Lucia, as per its 2019 VNR, remained committed to SDG 16. However, it faced a huge backlog of cases in the court system, which increased the proportion of prisoners held in detention without being sentenced.²⁹⁴ According to the report, the police force enjoyed a high level of public confidence. However, in recent years there have been allegations of brutality and potentially unlawful killings levelled at the police. These issues, combined with inefficiencies in the judiciary, have challenged Saint Lucia's efforts to tackle crime.²⁹⁵ It also reported on the Citizen Security SRA programme and project, aimed to achieve the goal of reducing crimes, backlog of cases, recidivism and improve public perception of safety.²⁹⁶

Sierra Leone, in its 2019 VNR, shared information on the establishment of the Legal Aid Board to provide legal services to low-income people. The Board, it said, provides legal advice and representation, especially for the rural and disadvantaged citizens, including those in pre-trial detention and prisons. It further stated that the number of less privileged persons with access to justice has increased substantially from 25,000 in 2015, to more than 215,000 in 2019.²⁹⁷ The second policy implemented in the country was a mobile justice application, which aided the tracking and management of cases by the judiciary. The piloting of Prison Courts assisted in identifying inmates on prolonged detention, which resulted in 425 new indictments drafted and served as well as the release of over 100 inmates.²⁹⁸

²⁸⁹ Sustainable Development Goals, Rwanda. Available at: <https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=1662&menu=3170>

²⁹⁰ Republic of Rwanda, (2019), *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*: https://sustainabledevelopment.un.org/content/documents/23432Rwanda_VNR_Document_Final.pdf as on 30 May 2022.

²⁹¹ *Ibid.*

²⁹² The abunzi are local mediators in Rwanda, who are mandated by the state as the conciliatory approach to resolve disputes, ensuring mutually acceptable solutions to the conflict.

²⁹³ *Ibid.*

²⁹⁴ Saint Lucia (2019), *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*: https://sustainabledevelopment.un.org/content/documents/23570SAINT_LUCIA_VNR_REPORT_JUNE_2019.pdf as on 30 May 2022.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ Sierra Leone (2021) Presentation of the Voluntary National Review, <https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=1477&menu=3170> as on 30 May 2022.

²⁹⁸ *Ibid.*

South Africa in its first VNR submitted in 2019, stressed on improvements and transformations made by the government concerning access to justice and the police system which serves and treats all persons equal under the law.²⁹⁹ Moreover, it also reported the institution of legal aid services which are available to all.³⁰⁰ In 2019 the government released a Legal Aid Manual which in furtherance of the Legal Aid South Africa Act 39 of 2014 and the national legal aid body - Legal Aid South Africa provides comprehensive information and guidance on the procedures regarding effective applications of legal aid procedures regulating private legal practitioners.³⁰¹

Sri Lanka's 2018 VNR report, highlighted furtherance of the credibility of the judiciary sector through reform measures, including the enactment of the 19th Constitutional Amendment, the introduction of independent institutions such as the Police Commission, and Judicial Service Commission and building capacities such as forensics, investigation which had helped the judiciary regain credibility.³⁰²

UK is one of the select Commonwealth countries which reported on SDG Indicator 16.3.2 i.e the proportion of remand prisoners in its 2019 VNR.³⁰³ It also reported on the increased investment in prison staff between October 2016 and March 2019, resulting in a rise in the number of prison officers by 4,675 personnel.

Tanzania submitted its VNR in 2019. The Government of Zanzibar said it had implemented in the legal sector several programmes and policies, including the Legal Aid Policy; Chief Act and its implementation strategy; Leadership Ethics Commission; Anticorruption and Economic Crime and its Strategy; construction of Regional Child Courts; Legal Aid Act, No. 2017; Criminal Act No. 7/2018; Penal Act No. 6/2018; Kadhis Court, No. 9/2017; Evidence Act No. 9/2016; Zanzibar Public Leaders Code of Ethics, No 4/2015; the Judiciary Management Act, No. /2018; and the Strengthening Office of the Department of Public Prosecutions.³⁰⁴

Vanuatu in its 2019 VNR reported on the implementation of Justice and Community Services

²⁹⁹ South Africa (2019), Presentation of the *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*: https://sustainabledevelopment.un.org/content/documents/24474SA_VNR_Presentation_HLPF_17_July_2019_copy.pdf as on 30 May 2022.

³⁰⁰ *Ibid.*

³⁰¹ Legal Aid South Africa (2018), *Legal Aid Manual*: <https://legal-aid.co.za/wp-content/uploads/2018/11/Legal-Aid-Manual.pdf> as on 30 May 2022.

³⁰² Sri Lanka (2018), *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*, 2018, pg. 99: https://sustainabledevelopment.un.org/content/documents/19677FINAL_SriLankaVNR_Report_30Jun2018.pdf as on 30 May 2022.

³⁰³ United Kingdom (2019), *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*. Ref: Indicator 16.3.2: unsentenced detainees as a proportion of the overall prison population. The proportion of the prison population remanded in custody. Annex III: Statistical Annex: https://sustainabledevelopment.un.org/content/documents/23681UK_VNR_Annex_III_Statistical_Annex.pdf as on 30 May 2022.

³⁰⁴ United Republic of Tanzania (2019), *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*, pg. 116: https://sustainabledevelopment.un.org/content/documents/23429VNR_Report_Tanzania_2019_FINAL.pdf as on 30 May 2022.

Sector Capacity Development Strategy 2017-2020, which includes efforts to build support for justice and community services.³⁰⁵ It also reported on the establishment of an external inspection team to inspect and report on conditions of prisoners.³⁰⁶

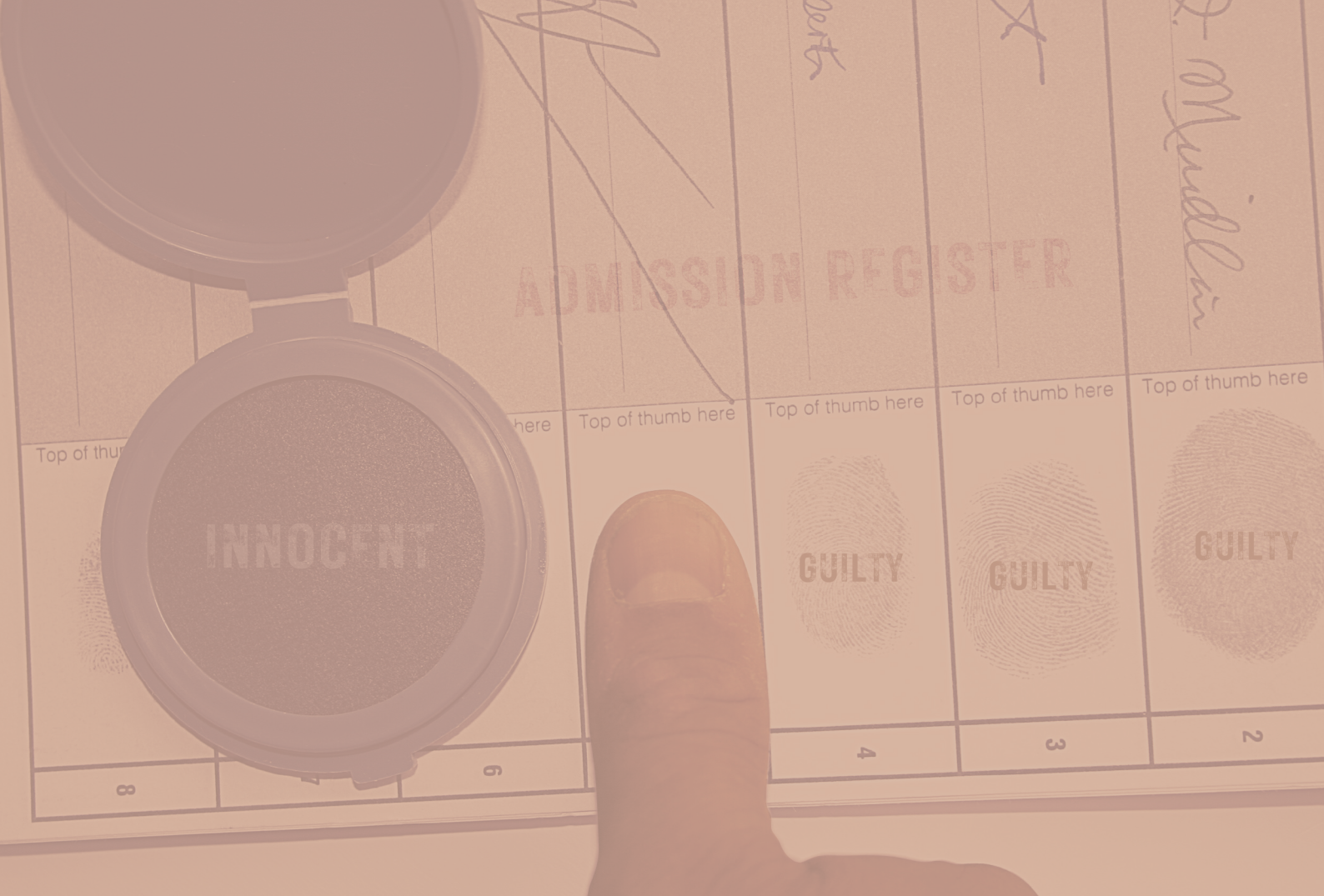
Inclusion of pre-trial detention as one of the indicators under the Sustainable Development Goals is global recognition of the problem and the impact of pre-trial detention on human development.³⁰⁷ However, an analysis of country reports as part of their voluntary national review process clearly indicates that this indicator is obscured by other indicators relating to poverty, hunger and health, and rarely have countries made an effort to report on it. The negative impact of pre-trial detention on not only the person detained, but their families and the society necessitate that governments acknowledge the importance of SDG Indicator 16.3.2.

CHRI urges governments to report on this specific indicator in their future voluntary national review reports.

³⁰⁵ Republic of Vanuatu (2019) *Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development*: https://sustainabledevelopment.un.org/content/documents/23336Republic_of_Vanuatu_VNR_2019.pdf as on 30 May 2022.

³⁰⁶ Ministry of Justice & Community Services (2018), *Strategy for the Justice and Community Services Sector 2018-2021, In Pursuit of Justice for Everyone*: https://mjcs.gov.vu/images/reporting/JCSSS_2018-2021_-_28.03.18.pdf as on 30 May 2022.

³⁰⁷ CHRI (2018), *Report on Proceedings of the Roundtable on Pre-trial Detention and 2030 Sustainable Development Agenda*, Pg. 5. Available at <http://www.humanrightsinitiative.org/publication/report-on-roundtable-on-pretrial-detention-and-2030-sustainable-development-agenda> as on 10 June 2022.



CONCLUSION AND RECOMMENDATIONS

V. CONCLUSION AND RECOMMENDATIONS

Indisputably some Commonwealth Member States have undertaken crucial reforms to address the issue of rising prison populations, which is indicated in their reports submitted to the High-Level Political Forum. However, while effective implementation of existing laws is necessary, it is also imperative that one identifies the lacunae and shortcomings in existing legal frameworks. It is because of these gaps that often pre-trial detentions go unnoticed and remain unaddressed for long periods of time. As a result, individuals spend a considerable time of their lives in prison, despite the presumption of innocence.

The study presented in this report highlights the numerous gaps in existing legal and policy frameworks in the countries of the Commonwealth. Key issues are presented below:

1. **The need to revisit laws relating to review of arrests** – to ensure that such reviews are done promptly and frequently. Good practices from other countries should be explored in this context. For instance, a good practice that has emerged from our study is the provision for review of detention of suspects and the accused by senior police officers every four to six hours in addition to review by judicial authorities. This should be implemented through appropriate legislative measures and administrative regulations by clearly laying down procedures for time bound review of all pre-trial detentions.
2. **The need for enacting complementary legislation to further constitutional guarantees** – to protect and fulfil the rights of suspects, arrested persons and accused persons/prisoners. Constitutional rights have no meaning, unless they are backed by enabling legislation that place duties and responsibilities on functionaries of the criminal justice system to effectuate those rights.
3. **The need to frame liberal provisions permitting bail at the police station** – so as to ensure that arrested persons can seek bail at the time of arrest in non-serious offences. This can reduce caseload in court, and prevent unnecessary pre-trial detention.
4. **The need to define illegal arrests and insert adequate remedies in law** – in order to address the issue of abuse of the power of arrest that is widely prevalent across most of the Commonwealth. A detailed definition of illegal arrest would impose the obligation upon police officers to ensure that all parameters for lawful arrest are complied with. The availability of specific remedies will foster accountability for arbitrary arrests. The role of National Human Rights Institutions, which are mandated to promote and protect human rights, should be strengthened in this context.

5. **The need to place time limits on investigation, trial and detention** – in order to reduce detention periods for pre-trial detainees. Time limits will ensure that functionalities perform and complete necessary criminal procedures within established timeframes, and not at the cost of the liberty of the individual.
6. **The need to strengthen legal aid systems** – to enable effective access to legal aid for suspects, arrested persons and prisoners. Effective mechanisms must be put in place to ensure that all persons in custody, who are unable to hire a lawyer, have access to effective and quality legal aid services.
7. **The need to articulate consequences where suspects, arrested persons, and accused are not represented in criminal proceedings** – to enable effective implementation of laws and frameworks that aim to ensure the right to legal representation.
8. **The need for states to publicly share data and statistics** – relating to the performance of prisons, courts, police, prosecution and legal aid in every Commonwealth country.
9. **The need to opt for non-custodial alternatives** – as an effective substitute for pre-trial detention in cases where such detention is not necessary. Research indicates that only select countries have explored the use of alternatives at the pre-trial stage, with majority of non-custodial sentences implemented at the sentencing stage i.e., after conviction. This necessitates a review by governments on their existing legal policies and frameworks, in the context of good practices in other countries.

RECOMMENDATIONS AND WAY FORWARD

It is evident from the analysis presented in this report that the use of pre-trial detention is not considered by governments as an exceptional measure or a procedure of the last resort. In-depth study of the root causes behind the increasing use of pre-trial detention should be undertaken at the earliest. Based on the analysis in this report, several recommendations emerge, which the Heads of Government, law ministers, Commonwealth institutions, civil society organisations, lawyers, prison officials, and all other stakeholders must pay heed to and prioritise initiatives and interventions related to reforming justice delivery systems, prisons and reducing pre-trial detention.

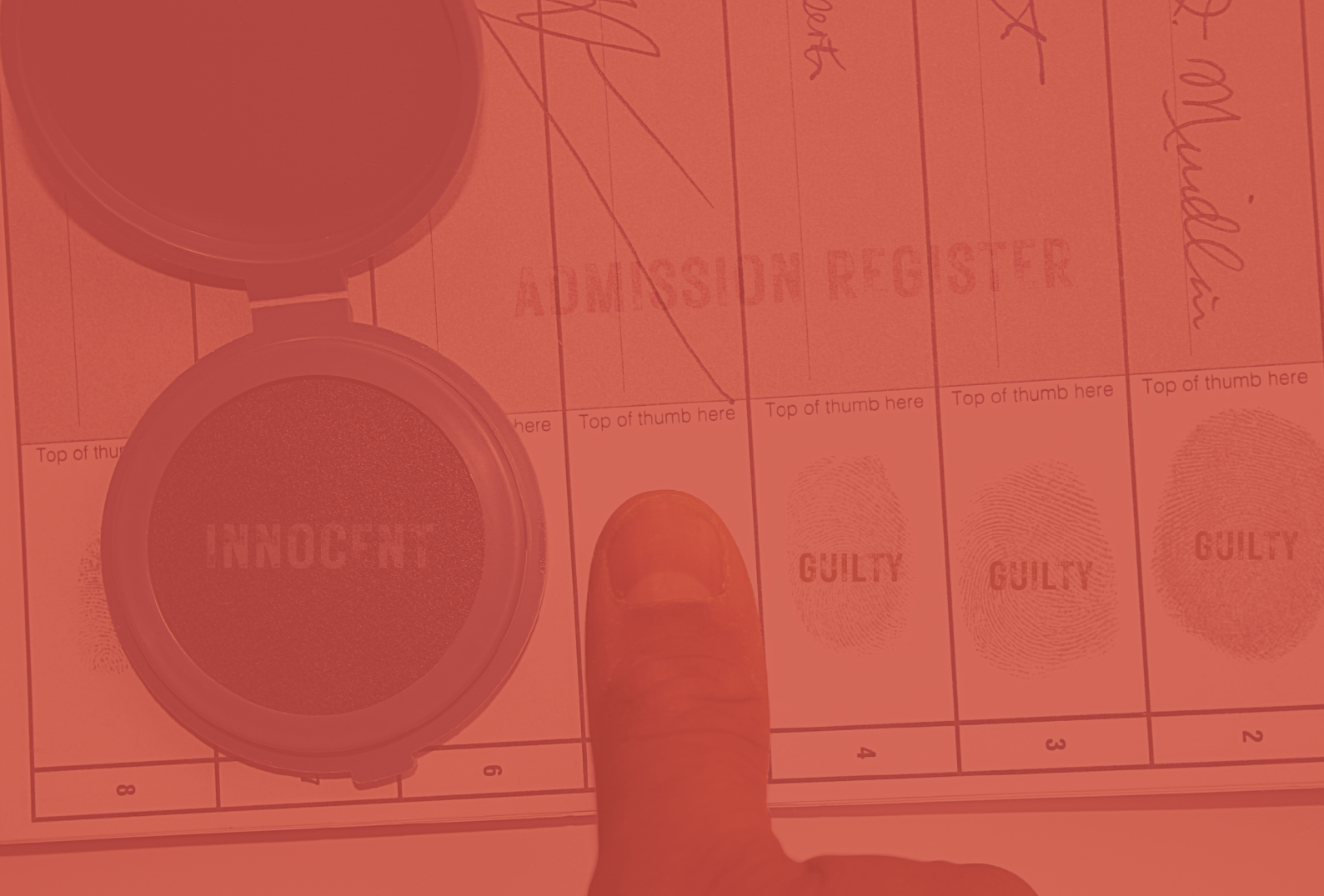
The international community, scholars and activists have repeatedly tried to address the problem of excessive and arbitrary use of pre-trial detention as well as its negative impact on individuals, families, communities and societies. Researchers and specialists have provided governments and international and local public opinion forums with recommendations, alternative measures and good practices to overcome issues interrelated to the abuse of pre-trial detention. However, similar

research with specific focus on Commonwealth countries has largely been absent.

In this context CHRI highlights some key recommendations, that may be considered by the Heads of Governments of the Commonwealth Member States for initiating appropriate action:

1. Governments must prioritise efforts to address the increasing use of pre-trial detention and ensure that cases of pre-trial detainees are regularly reviewed to prevent unnecessary and prolonged detention.
2. Governments must ensure that the grounds for carrying out arrests, even in serious offences, are narrow, defined in law, and are subject to review by authorities senior to officers making such arrests. Appropriate remedies to compensate individuals for unlawful detentions must also be enacted, and be accessible to them.
3. Governments must commit themselves to and deliver on the practical realisation of constitutional guarantees of fair trial: in particular the right to legal representation through enactment of enabling legislation that places duties upon the police, prosecution, judiciary and defence to uphold the principles of fair trial.
4. Governments must design, upgrade and upskill legal aid systems in conformity with UN Model Law on Access to Legal Aid such that there is a demonstrable time bound reduction in pre-trial detention. Efforts must be made to ensure provision of legal aid, through a robust national legal aid body, to suspects, arrested persons and accused persons at all stages – from police stations to prisons.
5. Governments must adopt realistic alternative measures, to ensure that in practice pre-trial detention is only considered an exception and a measure of resort.
6. Governments must ensure that there is prompt reporting of official data of all persons who are arrested and detained. Statistics on pre-trial detention, practices and prison populations must be regularly placed in the public domain. Without accurate data, it is difficult to determine the extent of the problem, and also to undertake effective legal reforms to address it. The Commonwealth Foundation may support efforts for the collation and review of this data to produce an annual report on Commonwealth prison trends.
7. Governments must periodically report progress made on SDG 16.3.2 indicator, with regard to the proportion of unsentenced prisoners, in their Voluntary National Reports at the High-Level Political Forum, as a vital measure in charting their achievement towards SDG 16.

8. Governments and the Commonwealth Secretariat must consider reconvening the Conference of Commonwealth Correctional Administrators, for continued and regular deliberations on issues related to imprisonment and penal reforms in the Commonwealth Member States.
9. Governments must agree to include the issue of incarceration and pre-trial detention as a priority area for discussion at future meetings of the official organs and agencies of the Commonwealth including that of the Commonwealth Law Ministers' Meetings, meetings of the Commonwealth Lawyers Association, and of Commonwealth Magistrates and Judges Association, various international, regional and national conferences, and push for prompt review and effective implementation of legal and policy frameworks that safeguard rights of suspects, accused and prisoners.
10. The Commonwealth Foundation should, in view of the emergent need for conducting more in-depth comparative research on this issue across the Commonwealth, initiate and support research in these areas. The Civil and Criminal Reforms Unit of the Commonwealth Secretariat should develop Model Laws on thematics such as 'Protecting Rights of Suspects, Arrested and Accused persons' and on 'Speedy Trials and Dispensation of Justice', using examples of good practice found in similar legislations that exist across the Commonwealth.



BIBLIOGRAPHY

BIBLIOGRAPHY

A. Nwapa (2008), “Building and Sustaining Change: Pre-trial Detention Reform in Nigeria”, Open Society Justice Initiatives

Administration of Criminal Justice Act (ACJA), 2015 (Nigeria)

African Commission on Human and Peoples’ Rights (2014), Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa

Association for the prevention of torture (2021), New principles on effective interviewing for investigations and information gathering

Bail Act Cap. 122A, 2019 (Barbados)

Carter v. The Queen, [1986] 1 S.C.R. 981

Commission of the European Communities (2006), Proposal for a “Council Framework Decision” on the European supervision order in pre-trial procedures between Member States of the European Union

Commonwealth Law Bulletin (1985), Management of Corrections in the Commonwealth

Constitution of the Republic of Maldives, 2008

Council of Europe (2006), European Prison Rules

Council of Europe (1950), European Convention for the Protection of Human Rights and Fundamental Freedoms

Council of the European Union 2009, Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings

Commonwealth Human Rights Initiative in Ghana, Global Campaign for Pre-trial Justice and UNDP (2013) “The Socioeconomic Impact of Pre-trial Detention in Ghana”

CHRI (2018), Legal Aid at Police Stations

CHRI (1991), Put our world to rights

CHRI (2018), Roundtable on Pre-trial Detention and 2030 Sustainable Development Agenda

C. Heard and H. Fair (2019), “Pre-Trial Detention and Its Over-use: Evidence from Ten Countries”, Institute for Crime & Justice Policy Research

Criminal Justice (Scotland) Act 2016 (CJSA)

Criminal Procedure Amendment Act, 2007 (Mauritius)

Criminal Procedure Code, 1969 (Bahamas)

Criminal Code [The Revised Statutes of Canada (R.S.C.) 1985, c. C-46]

Criminal Code of 1854 (Malta)

DLA Piper (2020), A global analysis of prisoner releases in response to COVID-19

European Court of Human Rights and Council of Europe (1953), European Convention on Human Rights

European Commission (2011), Green Paper

Fair Trials (2016), A Measure of Last Resort? The practice of pre-trial detention decision making in the EU

Fair Trials (2019), Where’s My Lawyer? Making legal assistance in pre-trial detention effective

Guyana First Voluntary National Review High-level Political Forum on Sustainable Development 2019, Ministry of Finance, Republic of Guyana

Human Rights Update (2006), Newsletter of the Human Rights Unit of the Commonwealth Secretariat, The 2005 Meeting of Commonwealth Law Ministers, Issue No. 7

Human Rights Update (2006), Newsletter of the Human Rights Unit of the Commonwealth Secretariat, Launch of the Commonwealth Manual on Human Rights Training for Police, Issue No. 8

Howard League for Penal Reform (2015), What if police bail was abolished?

In *Mailemua v R* [2009] TVHC 4

In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No. 406 of 2013, 'Re- Inhuman Conditions in 1382 Prisons'

J. Csete (2010), "Consequences of Injustice: Pre-Trial Detention and Health", International Journal of Prisoner Health

JO Abdulmalik, BO Adedokun, and OO Baiyewu (2015), "Prevalence and correlates of mental health problems among awaiting trial inmates in a prison facility in Ibadan, Nigeria", Afr J Med Med Sci. Author manuscript

Julius Kamau Mbugua vs Republic [2010] eKLR

K. Hausler and R. Mc Corquodale (2014), "Pre-trial detention and human rights in the Commonwealth: Any lessons from civil law systems?", Journal of Human Rights in the Commonwealth, Volume 2 Issue 1

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

Legal Aid South Africa (2018) Legal Aid Manual

Legal Aid (Scotland) Act, 1986

Legal Aid Queensland (last updated 2022), Criminal cases in the District and Supreme Courts

Legal Aid Queensland (Last updated 2019), Criminal Law Duty Lawyer

Legal Aid Queensland (Last updated 2016), Are you in prison and need legal help

Ministry of Home Affairs, National Crime Records Bureau, Prison Statistic India 2017.

Ministry of Economy, Republic of Fiji, '5-year and 20-year National Development Plan: Transforming Fiji' 2017

Ministry of Justice and Community Services, Republic of Vanuatu, Strategy for the Justice and Community Services Sector (2018-2021)

NALSA 2016, Standard Operating Procedures for Representation of Prisoners

NALSA 2011, Legal Services Clinics (Regulations)

Open Society Justice Initiative (2014), Presumption of Guilt: The Global Overuse of Pre-trial Detention

Open Society Justice Initiative, Ludwig Boltzmann Institute of Human Rights and University of Bristol (2011), Pre-trial Detention and Torture: Why Pre-trial Detainees Face the Greatest Risk

Open Society Justice Initiative (2012), Improving Pre-trial Justice: The Role of Lawyers and Paralegals

Open Society Foundations (2011), The Socioeconomic Impact of Pre-trial Detention

Organisation of African Unity (1981), African Charter on Human and Peoples' Rights ("Banjul Charter")

Organisation of American States (1969), American Convention on Human Rights

Penal Reform International (2016), Ten-point plan on reducing pre-trial detention

Police and Criminal Evidence Act, 1984 (England and Wales)

Police and Criminal Evidence Act (1984), PACE Code C, Detention, treatment and questioning of persons by police officers

Police and Criminal Evidence Order, 1989 (Northern Ireland)

Police Powers and Responsibilities Act, 2000 (Queensland)

Police Powers and Duties Act, 2009 (Tuvalu)

Police Scotland 2018, Crime Investigation Standard Operating Procedure

Rajeevan Edakalavan v Public Prosecutor [1988] 1 SLR (R) 10 at 19, Singapore

R. v. Willier, 2010 SCC 37, The Supreme Court of Canada

R. Jürgens, M. Nowak and M. Day (2011), "HIV and incarceration: prisons and detention", Jürgens et al. Journal of the International AIDS Society

R. Rebecca, Children in Limbo: The Need for Maximum Limits for Juvenile Pre-trial Detention, Minnesota Journal of International Law, 2019.

Republic of Fiji, Ministry of Economy, 5-year and 20-year National Development Plan, Transforming Fiji.

Republic of Cameroon (2018), Report of the Ministry of Justice on Human Rights in Cameroon in 2017

Royal Canadian Mounted Police Act (R.S.C. 1985)

Scott v. Spain, 84/1995/590/676, Council of Europe: European Court of Human Rights, 18 December 1996

S. Elias (2017), 'Practice Note on Police Questioning', The Evidence Act 2006, The Parliament of New Zealand

S. Ibe (2013), "Envisioning a Better Future for Pre-trial Detention in Africa", Open Society Justice Initiative

Seymour v The Commissioner of the Police and another (2017) 1 BS J. No. 54.

Speedy Code Trials Act, 2002 (Lesotho)

Sustainable Development Goals (SDG), Republic of Fiji (2019), Key Messages for the Voluntary National Review

SDG, Jamaica Voluntary National Review Report (2018), the Implementation of the 2030 Agenda for Sustainable Development

SDG Voluntary National Review 2018, Sustainable Development Goals to the High-Level Political Forum of the United Nations Economic and Social Council, Government of The Bahamas

SDG Voluntary National Review 2018, Canada's Implementation of the 2030 Agenda for Sustainable Development, Government of Canada

SDG Review on the Implementation of the 2030 Agenda in Cyprus, 2017, Ministry of Foreign Affairs, Republic of Cyprus

SDG Voluntary National Review 2019, Ministry of Economic Planning and Development, The Kingdom of Eswatini

SDG Voluntary National Review Report on the Implementation of the 2030 Agenda for Sustainable

Development 2019, Republic of Ghana

SDG Voluntary National Review Report of Mauritius 2019, Regional Integration and International Trade, Ministry of Foreign Affairs

SDG, He Waka Eke Noa Towards a Better Future, Together, New Zealand's progress towards the SDGs, 2019

SDG, Republic of Rwanda 2019 Voluntary National Review High-Level Political Forum (HLPF) on Sustainable Development

SDG, Saint Lucia Voluntary National Review Report on the implementation of the 2030 Agenda for Sustainable Development, July 2019

SDG, Sierra Leone Voluntary National Review 2021

SDG, South Africa Voluntary National Review 2019

SDG, Government of the Democratic Socialist Republic of Sri Lanka Voluntary National Review on the status of implementing the Sustainable Development Goals, 2018

SDG, United Republic of Tanzania Voluntary National Review (VNR) 2019, Empowering People and Ensuring Inclusiveness and Equality, A Report on the Progress of the Sustainable Development Goals (SDGs)

SDG, Republic of Vanuatu Voluntary National Review on the Implementation of the 2030 Agenda for Sustainable Development, 2019

State v Fly (2008), 3 BLR 258 (High Court of Francistown)

The Bahamas, Penal Code 1927

The Cameroon Penal Code, 2016

T.G. Garne (1992), "Outside the Region: United Kingdom (England and Wales) Changes in the Disciplinary System", Third Conference of Commonwealth Correctional Administrators Held in Zimbabwe, Corrections in Asia and the Pacific

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)

The Code of Criminal Procedure, 1973 (India)

The Code of Criminal Procedure, 1898 (Bangladesh)

The Commonwealth, Events (2017), Commonwealth Law Ministers Meeting

The Commonwealth, Event (2019), Commonwealth Law Ministers Meeting

The Commonwealth (2016), Meeting of Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions, Outcome Statement

The Commonwealth, News (2013), Law Ministers and Attorneys-General of Small Commonwealth Jurisdictions meeting

The Commonwealth, Our History.

The Constitution of Brunei Darussalam, 1959

The Constitution of the Republic of Namibia, 1990

The Constitution of the Republic of Rwanda of, 2003 revised in 2015

The Constitution of the Republic of Cyprus, 1960

The Criminal Code Amendment Act, 2012 (Mauritius)

The Criminal Procedure and Evidence Code, 1968 (Malawi)

The Laws of Belize (2000), Judges' Rules: Being Guidelines for The Interviewing Of Persons And Obtaining Statements From Them While In Police Custody

The Legal Aid Act, 2016 (Kenya)

The National Legal Services Authority (NALSA) 2019, Early Access to Justice at Pre-Arrest, Arrest and Remand Stage Framework

The Kingdom of Lesotho Voluntary National Review on the implementation of the Agenda 2030, Report 2019

The Pan African Forum on the Commonwealth (Latimer House) Principles, Communique (2005),

‘The accountability of and the relationship between the three branches of government’

The Rights of Suspects, Arrested Person and Persons in Custody Law, 2005 (Cyprus)

United Nations (1948), Universal Declaration of Human Rights

United Nations (2021), United Nations System Common Position on Incarceration

United Nations General Assembly Resolution 43/173 (1988)

United Nations, the Department of Economic and Social Affairs (DESA) 2022, Handbook for the Preparation of Voluntary National Reviews

United Nations General Assembly (2013), United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, A/RES/67/187

United Nations General Assembly (1990), United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)

United Nations General Assembly (1966), International Covenant on Civil and Political Rights

United Nations (2010), Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)

United Nations Office on Drugs and Crime (2006), Access to Justice Legal Defence and Legal Aid, criminal justice assessment toolkit

United Nations Office on Drugs and Crime (2012), ‘United Nations to help extend legal aid in the criminal justice system’

United Nations Office on Drugs and Crime (2014), The Luanda Guidelines: a rights-based approach to Arrest and Pre-trial Detention in Africa

United Nations Office on Drugs and Crime and United Nations Development Programme (2020), Guidance Note- Ensuring Access to Justice in the Context of COVID-19

United Nations Office on Drugs and Crime 2013, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

United Nations High-Level Political Forum on Sustainable Development 2018, Report on the

Implementation of the Sustainable Development Goals, Government of Australia

UN General Assembly Resolution 55/89 (2000), Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

UN General Assembly Resolution 47/133 (1992), Declaration on the Protection of All Persons from Enforced Disappearance

UN General Assembly Resolution 43/173 (1988), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

UN General Assembly (2015), Transforming our world: the 2030 Agenda for Sustainable Development

United Nations Human Rights Office of the High Commissioner (1990), Basic Principles of the Role of Lawyers, The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba

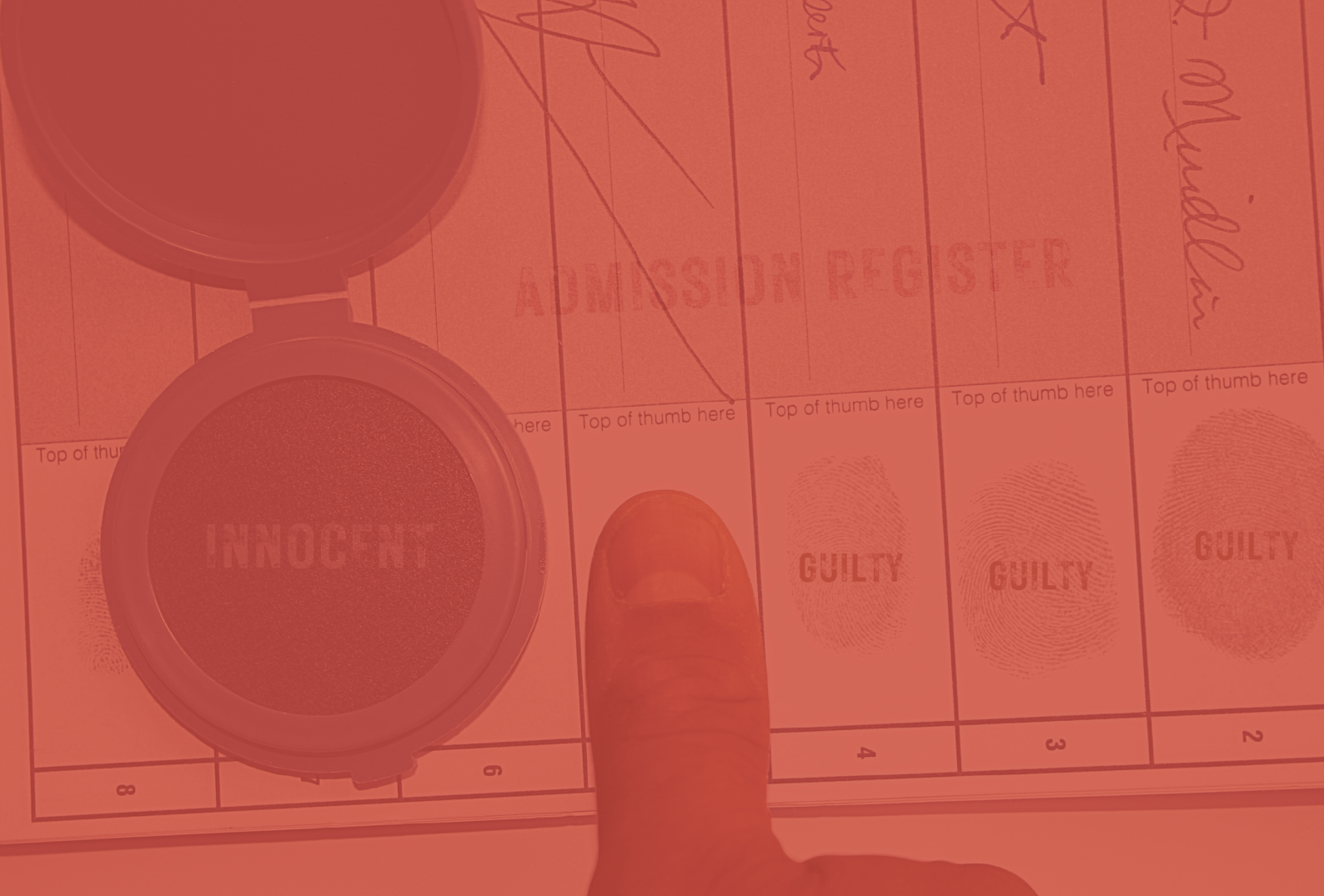
United Nations Human Rights Council 42nd session (2019), resolution 42/11 Human rights in the administration of justice, including juvenile justice

UNODC, WHO, UNAIDS and OHCHR (2020), Joint statement on COVID-19 in prisons and other closed settings

UNDP and UNODC (2016), Global Study on Legal Aid: Global Report

Walmsley R. (2020), "World Pre-trial/Remand Imprisonment List", World Prison Brief

World Prison Brief (2020), World Pre-trial/Remand Imprisonment List (Fourth edition)



ANNEXURES

ANNEXURE A: RESEARCH QUESTIONNAIRE

Questionnaire on Pre-trial Safeguards in Commonwealth Countries

Q 1. Please provide general information as per the table below.

[Please insert data that is most recent, also footnote the link of the information source.]

Total Population of the country	Total no. of courts	Total no. judges	Total no. of police stations	Total no. of arrests in a year		
				Men	Women	Other
As on _____	As on _____	As on _____	As on _____	For the period ____ to _____.		

Q 2. Please provide information pertaining to prisons in your country as per the table below. [Please insert data that is most recent, also footnote the link of the information source.]

Total no. of Prisons	Actual Capacity of prisons	Occupancy Rate
As on _____	As on _____	As on _____

Total Prison Population			Total no. of sentenced prisoners			Total no. of unsentenced prisoners			Total no. of prisoners under other categories, please specify (e.g. preventive detention/ civil)		
Men	Women	Other	Men	Women	Other	Men	Women	Other	Men	Women	Other
As on _____			As on _____			As on _____			As on _____		

Does the no. of prisoners include persons below 18 years of age? (Yes/No) -- _____

Q 3. Are arrests subject to review? If yes, by whom and the time limit.

(e.g. In India all arrested persons must be produced before judicial magistrate within 24 hours of arrest and in Ghana between 48 hours of arrest)

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

Q 4. Can bail be granted at the police station? If yes, for what kind of offences?

(e.g. in India, for bailable offences, bail can be granted at the police station)

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

Q 5. Is there a definition of ‘illegal arrest’ available under the legal framework? Are there any consequences of an illegal arrest?

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

Q 6. Who is responsible for investigation (prosecution, police, other – please specify)? What is the maximum period within which investigation must be completed?

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

Q 7. Are there any provisions which set a time limit on the duration of trial i.e. period within which trial has to be completed?

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

Q 8. Are there any provisions which provide maximum period of imprisonment for unsentenced prisoners?

(For e.g. in India, Section 436A of the Code of Criminal Procedure 1973 proscribes detention of unsentenced prisoners beyond the maximum term of the sentence they could have been awarded if convicted.)

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

Q 9. Are there any provisions which provide for a periodic review of cases of unsentenced prisoners? If yes, summarise the mechanism and periodicity of such review.

(e.g. in India, Under Trial Review Committees are setup in each district to conduct a quarterly review of the cases of prisoners and make recommendations; also in Ghana, under the Justice for All programme, special courts are set up in the prisons to review such cases.)

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

Q 10. Do the following persons have a right to be informed of their civil rights (e.g. being informed of grounds of arrest, right to remain silent etc.) at the time of questioning/arrest? If yes, by whom and how.

a) suspects

(e.g. by the police, by lawyer, in writing, through audio visuals etc.)

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

provision exists. Please footnote the link of the information source, if available]

b) arrested persons

(e.g. by the police, in writing, through audio visuals etc.)

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

Q 11. Do the following persons have a right to a lawyer:-

a) Suspects at the time of questioning?

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

b) Arrested persons at the time of arrest and during interrogation?

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

c) Accused persons during trial?

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

Q 12. Do the following persons have a right to state-funded legal aid –

a) Suspects at the time of questioning?

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

b) Arrested persons at arrest and during interrogation?

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

c) Prisoners during the course of their trial?

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

Q 13. If the response to Q 12 (a), (b), or (c) is yes, then what is the eligibility criteria for seeking state-funded legal aid.

[Mention all constitutional/statutory/administrative or other mandates that exist. Please mention criteria

for each category. Please footnote the link of the information source, if available]

Q 14. Explain the framework within which the state delivers/provides access to state-funded legal aid services at police station and in prisons?

(e.g. are there police station legal aid clinics, presence of paralegals in police stations, lawyer on call systems, public defender model or retainer or mixed models, presence of paralegals/lawyers in prisons, prison legal aid clinics etc.)

[Mention all constitutional/statutory/administrative or other mandates that exist. Please footnote the link of the information source, if available]

Q 15. What happens in the event a suspect/accused is unable to afford a lawyer, and is unable to also get legal aid? How do the proceedings continue? Does the police initiate questioning/interrogation in the absence of a counsel? What happens if the accused is unrepresented during production/review hearings or trial?

[Mention all constitutional/statutory/administrative or other mandates (judicial precedents etc.) that exist. Please footnote the link of the information source, if available]

Q 16. In your jurisdiction, are unsentenced prisoners further sub-categorised? If yes, what categories exist? Please mention the number of prisoners under each category, if available.

(e.g. some jurisdictions further classify unsentenced prisoners as 'pre-trial' or 'pre-court' stage i.e. after the decision has been made to proceed with the case but while further investigations are continuing or, if these are completed, while 'awaiting trial' or other court process; those at the 'court' stage, while the case is being heard at court for the purpose of determining whether the suspect is guilty or not etc.)

[Mention all constitutional/statutory/administrative or other mandates that exist. Please footnote the link of the information source, if available]

Q 17. Are there any provisions for non-custodial sentencing? If yes, please provide details.

[Mention all constitutional/statutory/administrative or other mandates that exist. Mention N/A if no such provision exists. Please footnote the link of the information source, if available]

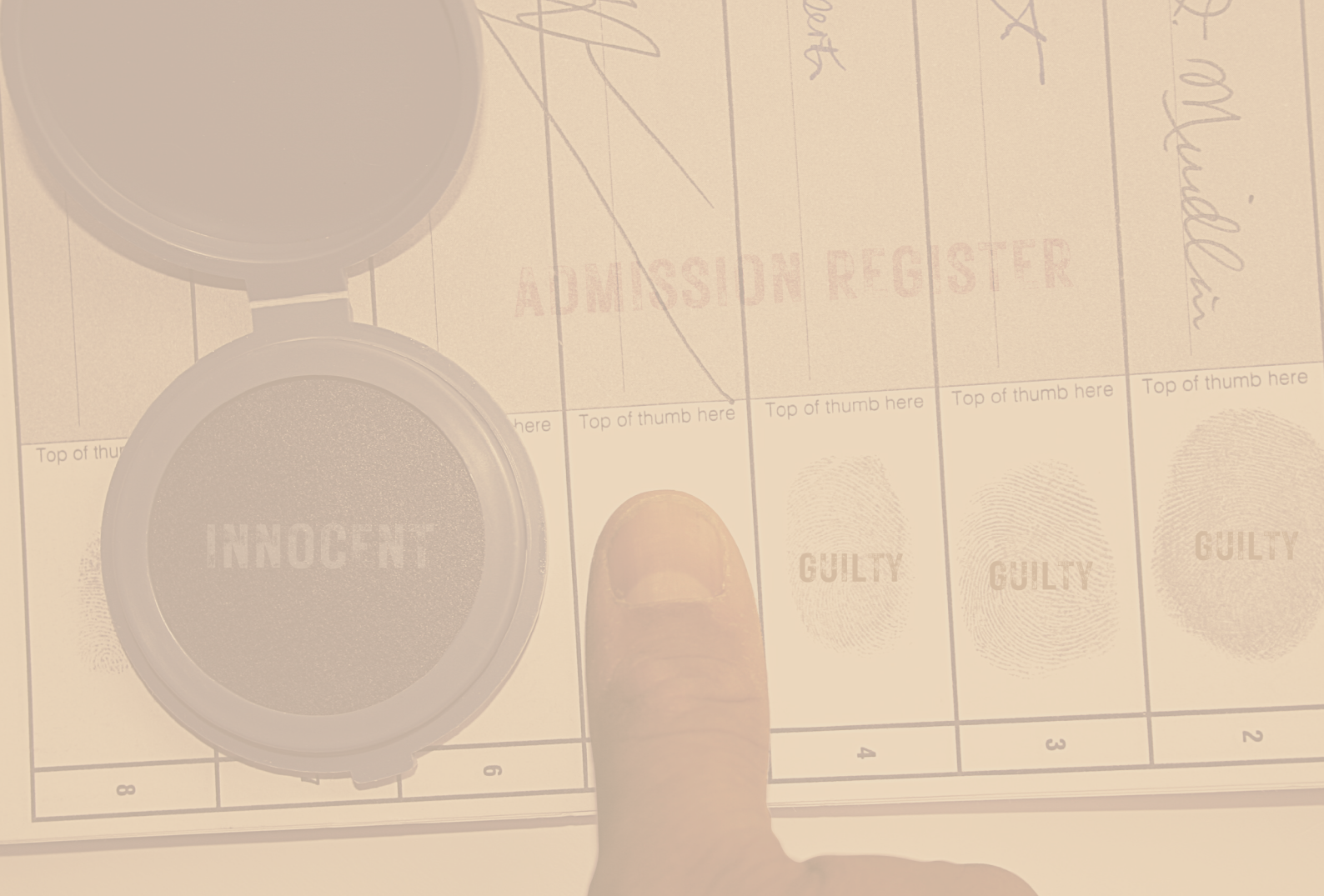
Q 18. Any other relevant information you would like to share

ANNEXURE B: DETAILS OF RESEARCH ASSISTANCE PROVIDED FOR COMPLETION OF RESEARCH QUESTIONNAIRE

Research by:	Jurisdictions	Name of Law Firm/Organisation
Questionnaires finalised by local counsel	1. The Gambia	1. Amie Bensouda & Co
	2. Kenya	2. Anjarwalla & Khanna LLP
	3. Kingdom of Eswatini	3. Robinson Bertram
	4. Lesotho	4. Webber Newdigate
	5. Malawi	5. Sacranie Gow & Co.
	6. Mauritius	6. Juristconsult Chambers
	7. Mozambique	7. Couto, Graça e Associados, Lda. LGA
	8. Namibia	8. Koep & Partners
	9. Nigeria	9. Aluko & Oyeboade
	10. Rwanda	10. Trust Law Chambers
	11. Seychelles	11. Appleby
	12. South Africa	12. Bowmans
	13. Uganda	13. Katende Ssempebwa & Co and Bowmans
	14. United Republic of Tanzania	14. Velma Law
	15. Brunei	15. Yusof Halim & Partners
	16. Maldives	16. SHC Lawyers LLP
	17. Pakistan	17. Zafar & Associates LLP
	18. Sri Lanka	18. D.L.&F. De Saram
	19. The Bahamas	19. Higgs & Johnson
	20. Belize	20. Courtenay Coye LLP
	21. Grenada	21. Henry, Henry & Bristol
	22. St Vincent and The Grenadines	22. Baptiste & Co.
	23. Trinidad and Tobago	23. Human Rights Clinic, Hugh Wooding Law School
	24. Cyprus	24. A.G. Erotocritou LLC
	25. Malta	25. Mamo TCV Advocates
	26. Kiribati	26. Office of the People's Lawyer
	27. New Zealand	27. Chapman Tripp
	28. Vanuatu	28. Geoffrey Gee & Partners
	29. Fiji	29. Munro Leys
	30. Samoa	30. Clarke Ey Korua Lawyers
	31. Bangladesh	31. Doulah & Doulah
	32. St Kitts and Nevis	32. Kelsick Wilkin & Ferdinand
	33. Zambia	33. Corpus Legal Practitioners
	34. Solomon Islands	34. Whitlam K Togamae Lawyers
	35. Barbados	35. Rashad Braithwaite, Assistant Lecturer at the University of the West Indies
	36. Tonga	36. Family Protection Legal Aid Centre, Ministry of Justice

Questionnaires completed through desk-based research only	37. Papua New Guinea 38. Botswana 39. Sierra Leone 40. Dominica 41. St Lucia 42. Jamaica 43. Tuvalu 44. Guyana 45. Nauru 46. Antigua and Barbuda	K&L Gates LLP
Questionnaires completed through others	47. Canada 48. Malaysia 49. UK 50. Australia 51. India 52. Ghana 53. Singapore 54. Cameroon	47. Shearman & Sterling LLP 48. Shearman & Sterling LLP 49. Allen & Overy 50. Allen & Overy 51. CHRI India 52. CHRI Africa 53. Allen & Overy 54. Nyoh Law Chambers

Note: Upon completion of the draft report, best efforts were made to obtain confirmation from the various firms who provided input as to the accuracy of the information presented in respect of each jurisdiction. We do not accept liability for any information that may be incorrect.



CHRI'S PREVIOUS REPORTS TO CHOGM

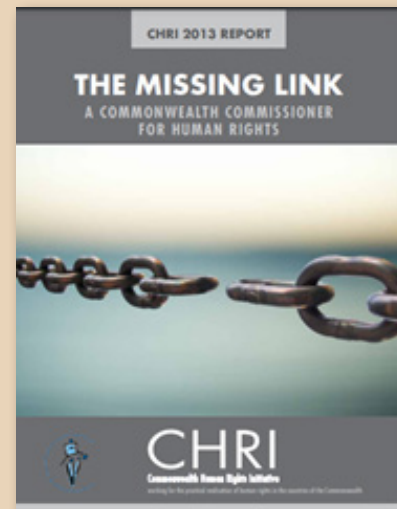
CHRI's Previous Reports to CHOGM



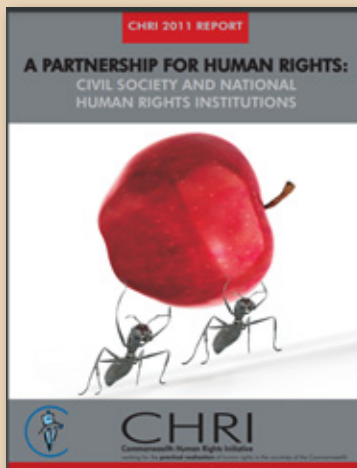
Creating an effective coalition to achieve SDG 8.7 (2018)



Civil Society and the Commonwealth Reaching For Partnership (2015)



The Missing Link: A Commissioner for Human Rights (2013)



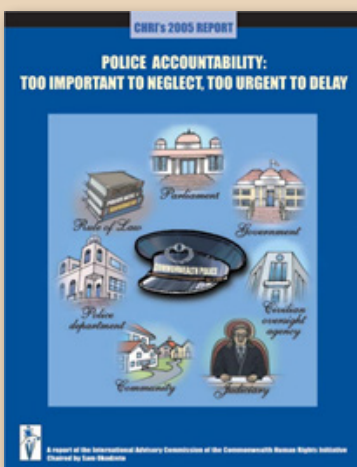
A Partnership For Human Rights: Civil Society and National Human Rights Institutions (2011)



Silencing the Defenders: Human Rights Defenders in the Commonwealth (2009)



Stamping Out Rights: The impact of anti-terrorism laws on policing (2007)



Police Accountability: Too Important to Neglect, Too Urgent to Delay (2005)



Open Sesame: Looking for the Right to Information in the Commonwealth (2003)



Right Must Come First (1999)

CHRI PROGRAMMES

CHRI seeks to hold the Commonwealth and its member countries to high standards of human rights, transparent democracies and Sustainable Development Goals (SDGs). CHRI specifically works on strategic initiatives and advocacy on human rights, Access to Justice and Access to Information. Its research, publications, workshops, analysis, mobilisation, dissemination and advocacy, informs the following principal programmes:

1. Access to Justice (ATJ) *

* **Police Reforms:** In too many countries the police are seen as an oppressive instrument of state rather than as protectors of citizens' rights, leading to widespread rights violations and denial of justice. CHRI promotes systemic reform so that the police act as upholders of the rule of law rather than as enforcers of a regime. CHRI's programme in India and South Asia aims at mobilising public support for police reforms and works to strengthen civil society engagement on the issues. In Tanzania and Ghana, CHRI examines police accountability and its connect to citizenry.

* **Prison Reforms:** CHRI's work in prisons looks at increasing transparency of a traditionally closed system and exposing malpractices. Apart from highlighting systematic failures that result in overcrowding and unacceptably long pre-trial detention and prison overstay, it engages in interventions and advocacy for legal aid. Changes in these areas can spark improvements in the administration of prisons and conditions of justice.

2. Access to Information

* **Right to Information:** CHRI's expertise on the promotion of Access to Information is widely acknowledged. It encourages countries to pass and implement effective Right to Information (RTI) laws. It routinely assists in the development of legislation and has been particularly successful in promoting Right to Information laws and practices in India, Sri Lanka, Afghanistan, Bangladesh, Ghana and Kenya. In Ghana, CHRI as the Secretariat for the RTI civil society coalition, mobilised the efforts to pass the law; success came in 2019 after a long struggle. CHRI regularly critiques new legislation and intervenes to bring best practices into governments and civil society knowledge both at a time when laws are being drafted and when they are first being implemented. It has experience of working in hostile environments as well as culturally varied jurisdictions, enabling CHRI bring valuable insights into countries seeking to evolve new RTI laws.

* **Freedom of Expression and Opinion -- South Asia Media Defenders Network (SAMDEN):** CHRI has developed a regional network of media professionals to address the issue of increasing attacks on media workers and pressure on freedom of speech and expression in South Asia.

This network, the South Asia Media Defenders Network (SAMDEN) recognises that such freedoms are indivisible and know no political boundaries. Anchored by a core group of media professionals who have experienced discrimination and intimidation, SAMDEN has developed approaches to highlight pressures on media, issues of shrinking media space and press freedom. It is also working to mobilise media so that strength grows through collaboration and numbers. A key area of synergy lies in linking SAMDEN with RTI movements and activists.

3. International Advocacy and Programming

Through its flagship Report, *Easier Said Than Done*, CHRI monitors the compliance of Commonwealth Member States with human rights obligations. It advocates around human rights challenges and strategically engages with regional and international bodies including the UNHRC, Commonwealth Secretariat, Commonwealth Ministerial Action Group and the African Commission for Human and People's Rights. Ongoing strategic initiatives include advocating for SDG 16 goals, SDG 8.7 (see below), monitoring and holding the Commonwealth members to account and the Universal Periodic Review. We advocate and mobilise for the protection of human rights defenders and civil society spaces.

4. SDG 8.7: Contemporary Forms of Slavery

Since 2016, CHRI has pressed the Commonwealth to commit itself towards achieving the United Nations Sustainable Development Goal (SDG) Target 8.7, to 'take immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.' In July 2019 CHRI launched the Commonwealth 8.7 Network, which facilitates partnerships between grassroots NGOs that share a common vision to eradicate contemporary forms of slavery in Commonwealth countries. With a membership of approximately 60 NGOs from all five regions, the network serves as a knowledge-sharing platform for country-specific and thematic issues and good practice, and to strengthen collective advocacy.



COMMONWEALTH HUMAN RIGHTS INITIATIVE

55A, Third Floor, Siddharth Chambers-1
Kalu Sarai, New Delhi 110 016, India
Tel: +91 11 4318 0200 | Fax: +91 11 4318 0217
E-mail: info@humanrightsinitiative.org
Web: www.humanrightsinitiative.org