

## 6. Health in pre-trial detention

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### Key points

Pre-trial detainees are a particularly vulnerable group when it comes to health conditions and the provision of health services.

- Many more people move in and out of pre-trial detention than will spend time in prison after conviction.
- People in pre-trial detention have been arrested and accused of a crime but not been found guilty of the crime(s) charged.
- Places of pre-trial detention are often ill-equipped to provide health services.
- People in pre-trial detention often spend time in worse conditions than people who have already been convicted.
- According to international legal standards, health interventions should be available at the earliest possible stage in the criminal justice system.
- Particular attention should be devoted to ensuring continuity of treatment at all stages of the criminal justice process.
- Under international legal standards, pre-trial detention is to be used as an exceptional cautionary measure and wide use is to be made of alternatives to detention.
- Pre-trial release (release pending completion of the criminal justice process) can be an effective health intervention by allowing people to be supervised in the community where health services are more readily available. It is also an effective way to reduce prison overcrowding.

### Introduction

It is estimated that about one third of the global prison population is detained prior to the completion of a criminal justice process. In a single year, more than 10 million people globally will spend some time in this type of detention. That is, they have been arrested for an alleged offence and are held but have not been found guilty of that crime. In many countries, pre-trial detainees account for the majority of people incarcerated by the criminal justice system, thereby contributing to overcrowding issues (where such exist).

In some instances, pre-trial detainees are held in special pre-trial detention centres but in others, they are held in police cells or in prisons along with the convicted population. Where pre-trial detainees are held in special pre-trial detention centres, these centres may not provide

the same health services as the prisons because they are considered short-term detention facilities. Police cells are often ill-equipped to house detainees longer-term, and often lack even basic necessities such as toilets or beds. On the other hand, where pre-trial detainees are held in prisons with convicted prisoners, they may not be provided with access to the existing facilities owing to their non-convicted status. For example, they may be denied treatment that requires a long-term commitment (such as treatment for TB) because they are deemed temporary detainees, or they may not have access to prison services simply because they are not under the legal jurisdiction of the prison while they are awaiting trial. In addition, people frequently experience interruption of critically important medications, such as medication to treat HIV, TB or drug dependence, upon arrest, when they are detained in police cells, transferred to pre-trial detention facilities or appearing in court.

### Defining pre-trial detention

Most criminal justice systems formally differentiate between sentenced and unsentenced prisoners, that is, people who have been charged and convicted of a crime and people who have been arrested on suspicion of a crime but have yet to be tried and convicted. It is helpful to note that the terms unsentenced prisoner, pre-trial detainee, remand prisoner, remandee, awaiting trial detainee and untried prisoner are used interchangeably in the literature. According to Penal Reform International, “remand prisoners are detained during criminal investigations and pending trial. Pre-trial detention is not a sanction, but a measure to safeguard a criminal procedure” (1). Most countries will also afford individuals who are accused but not convicted a different legal status, in keeping with international standards and norms.

### Guidelines

International human rights norms emphasize the important distinction between people who have been found guilty (convicted by a court of law and sentenced to prison) and those who have not. Prisoners awaiting their trial, or the outcome of their trial, are regarded differently because the law sees them as innocent until found guilty (2–5).

The use of pre-trial detention is restricted by several international human rights treaties. The International Covenant on Civil and Political Rights states the following in the relevant part (2):

Anyone arrested or detained on a criminal charge 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 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.

International standards permit detention before trial only under certain, limited circumstances. In 1990, the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders (6) established the following principle:

Pre-trial detention may be ordered only if there are reasonable grounds to believe that the persons concerned have been involved in the commission of the alleged offences and there is a danger of their absconding or committing further serious offences, or a danger that the course of justice will be seriously interfered with if they are let free.

One of the major achievements of the Eighth United Nations Congress was the adoption, by consensus, of the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) (7). These rules provide that pre-trial detention shall be used as a means of last resort in criminal proceedings, and that alternatives to pre-trial detention shall be employed at as early a stage as possible.

The tenor of international norms and standards in relation to pre-trial detention is clear: restricting a defendant's freedom should be used sparingly and under prescribed circumstances only. It follows that detention of an accused should occur under circumstances that preserve the presumption of innocence and will not entail a punishment without a trial.

### Challenges of pre-trial detention

Pre-trial detainees can be a particularly vulnerable group. The hours following an arrest can be confusing: there may be a delay in communicating with the outside world; torture to obtain confessions, when it happens, typically occurs before trial; and temporary places of detention (such as police cells) are often dirty, poorly lit and ventilated, overcrowded and lacking basic equipment such as beds and toilets.

Various factors exacerbate poor health conditions in pre-trial detention. Firstly, pre-trial detention is seen as a temporary circumstance with the ultimate goal being dismissal of charges, acquittal or conviction after trial. This creates three subsets of problems:

- in many countries pre-trial detention occurs in facilities that are ill-equipped to deliver health services or to house long-term residents, such as police stations;

- in other countries, pre-trial detainees fall under the jurisdiction (care) of an institution other than the agency that oversees convicted prisoners, leading to accountability and oversight problems;
- in many countries, pre-trial detainees are not entitled to participate in programmes that facilitate recovery and re-entry into the community because these are characterized as rehabilitation programmes and a person who has not been convicted cannot by definition be rehabilitated.

Unfortunately for pre-trial detainees, the short-term nature of their status is often part of an illusory legal construct. In 2003, the average length of pre-trial detention in 19 of the then 25 member states of the European Union (EU) was five and a half months, according to a European Commission investigation (8). But in some EU countries (such as France), pre-trial detention can be allowed for years and there are reports of people spending as many as six years without conviction (9, p.25). In Ireland, individuals can spend 12 months without even a review of the grounds for detention, let alone a trial (9, p.26). In many developing countries, the situation is worse. In 2005, the average length of pre-trial detention in Nigeria was 3.7 years (10). In 2010, half of Nigeria's pre-trial detainees had been detained for between 5 and 17 years, according to the country's National Prison Service (11), with cases reported of detainees awaiting trial for up to 20 years (12). In Pakistan, many defendants "spend more time behind bars awaiting trial than the maximum sentence they would receive if eventually convicted" (13), notwithstanding the fact that the law stipulates that detainees must be brought to trial within 30 days of their arrest.

In many countries the majority of people in prison are pre-trial detainees. Likewise, in many countries, prisons are overcrowded by housing many more inmates than they were designed to hold. Where these two factors conflate, the health problems associated with prison overcrowding arise from a failure to provide provisional release – in violation of international norms – to people who have not been convicted and are qualified to await their trial in the community.

Interruption of treatment is one of the most complex issues facing pre-trial detention centres and detainees. For people who have been receiving treatment for a medical condition in the community, arrest and detention represent a potentially deadly interruption of treatment. Treatment may be discontinued for short or long periods of time following arrest and detention in police cells, when detainees are transferred to other facilities or have to appear in court, and upon release. Of particular concern

is the interruption of treatments (such as for HIV) that can lead to negative health outcomes for the individual patient and also, through development of drug-resistant strains of HIV, to negative public health consequences.

Even where pre-trial detainees have access to the same services as convicted prisoners, prison health care is often limited in some ways. Prisons may not have the necessary specialized equipment, they may carry some types of medication but not others, the medical team in the prison may not be experienced in a particular illness, and/or prison regulations may prevent family members from providing medical assistance, such as doctors or medication, even when it is not available in the institution and they have the resources to provide it.<sup>8</sup>

### **Improving health conditions at the pre-trial stage**

Health delivery in prisons should meet the minimum standards set out in international laws, rules and conventions. Most of the problems described here would be greatly diminished by a reduction in pre-trial detention and the use of less restrictive alternatives, such as provisional release paired with a referral to community health care. Without reduced use of pre-trial detention and the attendant problems of overcrowding, it is difficult to imagine how these problems will be addressed. As stated in the 2013 policy brief *HIV prevention, treatment and care in prisons and other closed settings: a comprehensive package of interventions*, “reducing the excessive use of pre-trial detention and greatly increasing the use of non-custodial alternatives to imprisonment are essential components of any response to HIV and other health issues in prisons and other closed settings” (14, p. 1). In addition to this solution, however, there are ways in which health services could be improved and the possibility enhanced for observing the health rights of persons in detention. Some of these measures might also generate information that would be helpful in advocating the reduced use of pre-trial detention. Some avenues toward improved practices and enhanced information are described below.

#### **Investing in improved pre-trial detention health services as a state obligation and an opportunity for early detection, care and linkage to continued care**

Pre-trial health services and staffing are often inadequate compared to those in prisons and do not fulfil the state’s obligation for early detection of health problems and initiation of care. The non-involvement of ministries of health in remand health services undermines links to community-based care and may compromise the quality

of health services in remand facilities and the right to equivalence of services for detainees. Pre-trial detention is often a missed opportunity to avert illness and even death, especially in cases of HIV, hepatitis, TB and some mental disorders that require extended treatment and for which early detection and treatment are crucial to good outcomes. As mentioned above, it is extremely important to ensure the continuation of therapy begun before a person’s entry into detention. Each of the situations in which treatment may be interrupted should be addressed and mechanisms established to ensure this does not happen. Policies and guidelines should be developed specifying that people living with HIV (and other conditions necessitating uninterrupted treatment) are allowed to keep their medication with them, or are to be provided with their medication upon arrest and detention and at any time they are transferred within the system or to court hearings. Police and staff working in detention settings need to be educated about the importance of continuity of treatment. Particular attention should be devoted to discharge planning and links to community aftercare.

Because the organization of pre-trial detention may be chaotic, with a rapid turnover of detainees, there is a tendency not to initiate services that could be sustained even in such an environment. Again, links between community-based and prison-based care are crucial. It should be possible to include pre-trial detention in a continuum of care with regard to methadone therapy, for example, as well as directly observed treatment, short-course for TB and antiretroviral treatment for HIV. Health promotion and information involving peers should be possible, even with a high turnover, if staff develop rapid orientation and training to build capacity for peer leadership and engagement.

Finally, the provision of adequate basic services, including health care, water, sanitation, food and protection from the cold and/or heat, would have important benefits beyond the obvious public health outcomes. To the degree that detainees, including children and women, have to trade sex for access to food, blankets and water, adequate provision of these basic services will be a disincentive to coercive sex. Violence linked to competition for access to basic amenities would also be reduced.

#### **Transparency, complaint mechanisms, access to counsel**

Much of what is known about the unhealthy and inhumane conditions faced by pre-trial detainees is

<sup>8</sup> It is commonplace in the United States, for example, to refuse to provide any medication to inmates that was not purchased through the prison system, to avoid issues of provenance and legality of substances. This means that if, for instance, a schizophrenic person is arrested and is carrying medication on his/her person, the authorities will confiscate that medication, assuming that it is contraband, and substitute the closest equivalent found in the prison dispensary.

found in reports of occasional visits by regional and international human rights monitors. There is an urgent need to open pre-trial detention conditions to wider scrutiny, and to establish regular monitoring and public reporting mechanisms. In many countries, access to legal counsel and to the courts by pre-trial detainees would be one avenue for addressing abusive and negligent health practices. There should also be functioning and sustained mechanisms for detainees to report abuses and seek redress without endangering themselves. Such mechanisms should involve competent and independent health professionals.

### ***Mechanisms for prison staff to be independent and to speak out against abuse***

Health professionals working in detention settings need to be able to make independent, evidence-based decisions to ensure that health needs and rights are met. Their role as advocates for the health of detainees should be safeguarded. They should also be protected from being complicit in any practice that may constitute cruel, inhuman or degrading treatment or torture, but must be held accountable if they cross that line.

### ***Involvement of ministries of health***

Achieving equivalence of care in prisons and remand facilities to that of care in the community argues for greater involvement of ministries of health. At a minimum, they should be responsible for monitoring the quality of care for detainees. The complete isolation of prison and remand health services from the principal health authorities of the state is a recipe for trouble.

### ***Awareness-raising among key stakeholders***

In addition to the need for more information and research, there is an urgent need for what is already known about health in pre-trial detention to be more widely disseminated, especially to those whose actions might affect change. Ministries of health may be shielded from day-to-day knowledge of conditions and services if they are not involved in remand facilities, but their involvement and awareness of conditions are important for positive change to happen. Beyond the health sector, judges, prosecutors, police, juvenile justice officials and other people involved in law enforcement must be made aware of the health consequences of heavy use of pre-trial detention. Human rights commissions and nongovernmental organizations not already involved with prison health should be engaged.

### ***Research and access to research results***

Access to detention settings for researchers may be restricted in many countries. The fact that health services may be managed in remand facilities by ministries other

than the ministry of health may be a barrier to researchers accustomed to interacting with health sector officials. In particular, there are research needs in the following areas:

- better data on the extent of pre-trial detention, particularly among women, children, people living with drug dependency, people with mental illness and others vulnerable to abuse and health problems;
- the relationship between the extent and duration of pre-trial detention and a variety of health outcomes;
- the physical and mental health impact of overcrowding in pre-trial detention, including whether it is possible to determine critical levels of crowding that trigger accelerated transmission of infectious diseases;
- the physical and mental health impact of extended pre-trial detention on men, women and children;
- the difficulties faced by health professionals in situations of pre-trial detention where services are inadequate and abuse is prevalent;
- best practices for ensuring continuity of care for a wide range of physical and mental health conditions between the community and pre-trial detention, and pre-trial detention and prison or the community;
- the feasibility of and best practices in TB detection, treatment and support in pre-trial detention and beyond.

Where there are efforts to reform pre-trial justice and reduce the use of pre-trial detention, health officials and practitioners should be involved in the planning and implementation of reforms, and the health impact of reforms should be documented.

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# Communicable diseases

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