



General Scheme of the Bail Bill 2015
August 2015

**Submission by the Irish Council for Civil Liberties (ICCL) to the
Oireachtas Joint Committee on Justice, Defence and Equality**

A. Introduction

1. The Irish Council for Civil Liberties (ICCL) believes that a fair and just criminal justice system is a cornerstone of any modern democracy. Having long advocated for both the fair trial rights of suspected, accused or convicted persons, as well as the rights of victims of crime, the ICCL welcomes this opportunity to comment on the *General Scheme of the Bail Bill 2015* (hereinafter the “General Scheme 2015”).¹
2. The adjudication of bail applications should be guided by principles including that:
 - The person making a bail application has not been convicted of the specific alleged crime and is protected by the presumption of innocence;
 - Victims of crime and potential witnesses have the right to protection and privacy;
 - The consequence of a refusal of bail is detention of a legally-innocent person impacting on their rights to privacy, family life and to earn a livelihood.
3. Consequently, bail refusals should be exceptional and justified in the circumstances of the specific cases. Any criminal law reform must, at a minimum, comply with the relevant procedural standards set out in the Irish Constitution and international human rights standards, including:
 - Prohibition of torture and inhuman or degrading treatment or punishment (Article 3 ECHR, Article 4 EU Charter);
 - Right to liberty and security (Article 5 ECHR, Article 6 EU Charter, Article 9 ICCPR);
 - Right to a fair trial (Article 38.1 Constitution of Ireland, Article 6 ECHR, Article 47 EU Charter);
 - Presumption of innocence (Article 38.1 Constitution of Ireland, Article 6 ECHR, Article 48 EU Charter);
 - Limiting Pre-Trial Detention (Principle 6 Tokyo Rules).
4. Refusal of bail and the use of pre-trial detention can be justified when it is required to safeguard the legitimate interests of justice, in a manner that is lawful, proportionate and objectively necessary. However, although people held on remand (pre-trial detention) are presumed innocent until guilty, they may well experience overcrowding and poor detention conditions while in prison. It is, in part, because of the risk that legally-innocent people will be exposed to inhuman or degrading treatment or punishment that international human rights standards require that pre-trial detention should be an exception rather than the rule.
5. The ICCL’s analysis of the General Scheme is framed in this context and this submission covers the following issues: current Irish law on bail; applicable

¹ July 2015, available at http://www.justice.ie/en/JELR/Pages/Bail_Bill, accessed on 20.08.15.

human rights standards; refusal of bail, conditions of and breach of bail and the use of pre-trial detention.

B. Overview of Current Law and Human Rights Standards

6. Leading case law includes *People (AG) v O'Callaghan*,² and *DPP v Ryan*,³ and the issue is also dealt with in Part III of the *Criminal Procedure Act 1967*,⁴ the *Criminal Justice Act 1984*,⁵ and the *Bail Act 1997*,⁶ all of which have been amended by the *Criminal Justice Act 2007*.⁷ The General Scheme aspires to codify this case law and legislation into a new single Act. The ICCL welcomes this aspiration, but would caution that some proposed elements of (and/or omissions from) the General Scheme may require attention in order to ensure that the procedural rights of accused or convicted persons are appropriately safeguarded.
7. Opposition to granting bail can currently be raised under conditions set out in the O'Callaghan case, and/or under section 2 of the *Bail Act 1997*. If an objection is raised under the O'Callaghan conditions, the court, in determining whether the applicant will evade justice if granted bail, will consider a number of factors,⁸ which can be summarised as:
 - (1) a belief/fear that the applicant would abscond, and/or,
 - (2) a belief/fear that the applicant will interfere with witnesses.
8. Following the 1996 referendum, which resulted in the insertion of Article 40.4.6 in the Constitution, bail opposition can also be made under section 2 of the *Bail Act 1997*. Section 2.1 of the 1997 Act permits the refusal of bail where an application for bail is made by a person charged with a serious offence "if the

² [1966] IR 501.

³ [1989]ILRM 333.

⁴ No. 12 of 1967, Available at <http://www.irishstatutebook.ie/1967/en/act/pub/0012/>, accessed on 20.08.15.

⁵ No.22 of 1984, Available at <http://www.irishstatutebook.ie/1984/en/act/pub/0022/>, accessed on 20.08.15.

⁶ No.16 of 1997, <http://www.irishstatutebook.ie/1997/en/act/pub/0016/>, accessed on 20.08.15.

⁷ No. 29 of 2007, Available at <http://www.irishstatutebook.ie/2007/en/act/pub/0029/>, accessed on 20.08.15.

⁸ Murnaghan J in High Court listed the following factors to be taken into account when determining a bail application:

"1, *The nature of the accusation or in other words the seriousness of the charge.* It stands to reason that the more serious the charge the greater is the likelihood that the prisoner would not appear to answer it.

2, *The nature of the evidence in support of the charge.* The more cogent the evidence the greater the likelihood of conviction and consequently the greater the likelihood of the prisoner attempting to evade justice.

3, *The likely sentence to be imposed on conviction.* The greater the sentence is likely to be, the greater the likelihood of the prisoner trying to avoid it. The prisoner's previous record has a bearing on the probable sentence and consequently must be before this Court.

4, *The likelihood of the commission of further offences while on bail.* In this connection, a prisoner facing a heavy sentence has little to lose if he commits further offences. A prisoner may consider that he has to go to prison in any event and in an effort to get money to support his family may commit further offences.

5, *The possibility of the disposal of illegally acquired property.* Stolen property may be stored or cached away.

6, *The possibility of interference with prospective witnesses and jurors.*

7, *The prisoner's failure to answer to bail on a previous occasion.*

8, *The fact that the prisoner was caught red-handed.*

9, *The objection of the Attorney General or of the police authorities.*

10, *The substance and reliability of the bailsmen offered.* (This is primarily a matter for the District Justice).

11, *The possibility of a speedy trial.*

Please note, however, that the Supreme Court on appeal rejected factor no. 4.

court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.” Section 2.2 further provides for a list of factors to be taken into account when the court is exercising its jurisdiction.⁹ A “serious offence” is one listed in Schedule One of the Bail Act 1997, namely one for “which a person of full capacity and not previously convicted may be punished by a term of imprisonment for a term of 5 years or by a more severe penalty.”¹⁰

9. Before an accused or convicted person is granted bail, the court will require the applicant to enter into a legal obligation, i.e. recognisance to not commit any offence, be of good behaviour and to surrender to custody at a certain given date and time.¹¹ In addition, the court may require the applicant to pay their own monetary bond or that their bond is paid via a surety. Moreover, the court may attach a number of conditions, which the person must abide by whilst released on bail in accordance with section 6 of the *Bail Act 1997*.¹² In terms of the Garda Síochána powers of arrest, if a person released on bail fails to appear in court; breaches a condition of their bail recognisance; or a breach is anticipated, then a Garda may arrest them on foot of a warrant.¹³

10. Under Article 9.3 of the International Covenant on Civil and Political Rights (ICCPR) persons awaiting trial should not be detained in custody as a general rule, and release may be subject to guarantees to appear for trial. General Comment No. 35 of the UN Human Rights Committee notes that Article 9 of ICCPR protects against arbitrary detention and unlawful detention with the concept of “arbitrariness” to be interpreted “more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality”.¹⁴ While Article 5 (1) (c) ECHR permits the arrest and pre-trial detention of a person in certain circumstances, Article 5(3) provides the following safeguards to such persons:

⁹ (a) the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction,

(b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction,

(c) the nature and strength of the evidence in support of the charge,

(d) any conviction of the accused person for an offence committed while he or she was on bail,

(e) any previous convictions of the accused person including any conviction the subject of an appeal (which has neither been determined nor withdrawn) to a court,

(f) any other offence in respect of which the accused person is charged and is awaiting trial,

and, where it has taken account of one or more of the foregoing, it may also take into account the fact that the accused person is addicted to a controlled drug within the meaning of the Misuse of Drugs Act, 1977 .

¹⁰ In accordance with section 1 of the Bail Act 1997.

¹¹ Section 6 of the *Bail Act 1997*.

¹² Section 6 (1) of the *Bail Act 1997* outlines the following conditions, which may be imposed (i) that the accused person resides or remains in a particular district or place in the State, (ii) that the accused person reports to a specified Garda Síochána Station at specified intervals, (iii) that the accused person surrenders any passport or travel document in his or her possession or, if he or she is not in possession of a passport or travel document, that he or she refrains from applying for a passport or travel document, (iv) that the accused person refrains from attending at such premises or other place as the court may specify, (v) that the accused person refrains from having any contact with such person or persons as the court may specify.

Please note that although section 11 and 12 of the *Criminal Justice Act 2007* does make provision for electronic monitoring of someone released on bail, this has never been commenced by way of statutory instrument.

¹³ Sections 6, 9 (4) *Bail Act 1997* and Form 22.3 Schedule B of the District Court Rules.

¹⁴ United Nations, Human Rights Committee General comment No. 35 Article 9 (Liberty and security of person), 16 December 2014, CPR/C/GC/35, available at file:///C:/Users/g.mulvey/Downloads/G1424451.pdf , accessed on 24.08.15, p.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.

The European Court of Human Rights has held that a presumption in favour of release during the pre-trial period exists and that:

Continued detention therefore can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention".¹⁵

C. General Scheme of Bail Bill 2015: Key Proposals

(i) Refusal of Bail

Right to a Fair Trial within a Reasonable Time

11. Objections to an accused person's release on bail can be raised under the O'Callaghan conditions, and/or under section 2 of the *Bail Act 1997*, (for further information see Section B of this submission). Head 26 and Head 27 of the General Scheme provide for refusal of bail in certain circumstances, whilst Head 28 provides for the power to hear "complainant" evidence in bail applications.
12. The principles outlined in O'Callaghan (as elaborated by Ryan) are placed on a statutory footing in the General Scheme (Head 26). The ICCL notes that 3 key factors set out in the O'Callaghan test¹⁶ have not been included in the General Scheme with respect to initial bail applications.¹⁷ These are as follows: the possibility of a speedy trial; the objection of the Attorney General or the police authorities, and, the substance and reliability of the bailman offered." It is imperative that this new statutory framework does not dilute the jurisprudence of the Supreme Court in O'Callaghan and subsequent cases, most importantly as regards to the "possibility of a speedy trial". Although, there is no explicit constitutional right to an expeditious trial the Irish Courts have interpreted Article 38.1 to implicitly include a constitutional right to a fair trial within a reasonable time.¹⁸ Furthermore, Ireland was recently found by the European Court of Human Rights to be in violation of Article 6(1) ECHR in the case of *McFarlane v. Ireland*.¹⁹ In this regard, Head 26 of the General Scheme should be amended to include all existing bail determination factors, and explicitly including the possibility of a speedy trial.

¹⁵ *McKay v United Kingdom*, [2006] ECHR 820 Paras. 41, 42, available at [http://hudoc.echr.coe.int/eng?i=001-77177#{"itemid":\["001-77177"\]}](http://hudoc.echr.coe.int/eng?i=001-77177#{), accessed on 24.08.15.

¹⁶ As laid out in footnote 8.

¹⁷ However, Head 13 lists "undue delay" [having regard to the complexity of the case] as a factor to be considered in the context of the bail renewal applications made under Head 26 or 27 when the trial of the person for the offence has not commenced within 4 months from the date of such refusal.

¹⁸ See for example *State (O'Connell) v Fawsitt* [1986] I.R. 362; *DPP v Bryne* [1994] 2 I.R. 236; *McFarlane v DPP [2008] I.E.S.C. 7*. It is important to note however, that it would appear a significant delay would be required for such a violation to exist. [*McFarlane v DPP [2008] I.E.S.C. 7*, Kearns J.

¹⁹ European Court of Human Rights, Application no. [31333/06](https://www.echr.coe.int/eng?i=001-100413#{), 10 September 2010, available at [http://hudoc.echr.coe.int/eng?i=001-100413#{"itemid":\["001-100413"\]}](http://hudoc.echr.coe.int/eng?i=001-100413#{), accessed on 24.08.15.

Recommendation:

- **Amend Head 26 to include all existing bail determination factors and explicitly include the possibility of a speedy trial.**

Interference with Witness and Victim Evidence

13. The General Scheme elaborates on what constitutes “interference with witness”, which includes “direct or indirect interference or attempted interference with the complainant, a witness, juror or judge” or a family member of such a person (Head 26).²⁰ The ICCL welcomes efforts to afford additional protections to victims and their family members by guarding against such “interference”. This could reduce the risk of exposure to secondary and repeat victimisation, from intimidation and from retaliation in line with the Victims’ Directive.²¹

14. However, the General Scheme also proposes that the Court can hear “complainant” evidence in the bail application in relation to any such interference, as well as evidence regarding the nature and seriousness of any danger presented by the release of an accused person on bail (Head 28).²² The ICCL expresses concern that permitting a “complainant” to give subjective evidence of the “likelihood” of any interference against a person who has not yet been convicted of any crime, in its current construction, potentially risks the violation of the accused person’s constitutional rights to a good name and to a fair trial. The very damaging potential of such evidence is implicitly recognised in Head 28 (3), (4) and (5), which proposes penalties of a fine not exceeding €50,000 or imprisonment of up to 3 years for publication of such information.

Recommendation:

- **Remove Head 28 in its entirety, or, at a minimum, it should be narrowly construed having regard to the accused’s right to a fair trial.**

Serious Offending

15. Head 27 both reiterates section 2 of the *Bail Act 1997*, i.e. the refusal of bail to prevent the commission of a serious offence, and extends the factors the Court is to consider by ensuring that due regard is had to “persistent serious offending” as well as the nature and seriousness of any danger presented by the grant of bail to a person charged with an offence punishable by 10 years or more imprisonment. Although pre-trial detention may be permissible²³ if a defendant poses a “serious threat to public order”,²⁴ the ECtHR has held that a suspicion that the accused

²⁰ Head 33, 34, 36 (through Head 26) and 37, which deal with post-conviction bail applications take into account, amongst other factors, any “reasonable risk” of interference with, retribution against or other harm to a person of whom the offence was committed or their family member.

²¹ In accordance with Article 18 of the *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA* [hereafter “Victims’ Directive”].

²² Head 35 permits a court to hear victim evidence in post-conviction bail proceedings “in respect of whom the offence was committed as to the risk that the convicted person will interfere with, seek retribution against, or otherwise cause harm to the person in respect of whom the offence was committed or a family member of that person.”

²³ *Tomasi v France* [1992] ECHR 53, paragraph 19.

²⁴ Recommendation Rec(2006)13 of the Committee of Ministers of the Council of Europe to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse (adopted September 27, 2006), available at <https://wcd.coe.int/ViewDoc.jsp?id=1041281>, accessed on 24.08.15.

person has committed an offence, no matter how serious the offence, or the strength of the evidence against the person, is not sufficient to justify continued detention.²⁵ Head 27 should be amended to reflect these principles.

16. Head 27 also introduces the refusal of bail when the accused person has been convicted of a dwelling burglary offence no more than 5 years prior to date of bail application; is charged with, and is awaiting trial for two or more dwelling burglary offences; is convicted of and is awaiting sentence for two or more dwelling burglary offences under the "*Criminal Justice (Burglary of Dwellings) Act 2015*". In light of the expansion of the circumstances in which bail can be refused under Head 27, it is vital that Head 27 of the *Bail Bill 2015* is reviewed in conjunction with the relevant sections of the *Criminal Justice (Burglary of Dwellings) Bill 2015*, which has yet to be published.²⁶ The ICCL recommends that Head 27 be revisited once the *Criminal Justice (Burglary of Dwellings) Bill 2015* is published.

Recommendations:

- **Amend Head 27 in light of European standards namely to take consideration that a suspicion that the accused person has committed an offence, no matter how serious the offence, or the strength of the evidence against the person, is not suffice to continue detention;**
- **Revisit Head 27 once the *Criminal Justice (Burglary of Dwellings) Bill 2015* is published.**

Addiction to a controlled drug or intoxicating liquor

17. The General Scheme restates section 2 of the *Bail Act 1997* i.e. the refusal of bail to prevent the commission of a serious offence (Head 27), including a restatement of factors for the Court to consider such as taking into account an addiction of the accused person to a controlled drug within the meaning of the *Misuse of Drugs Act 1977*. Under the General Scheme,²⁷ this has been extended to include "intoxicating liquor".²⁸ In this regard, the ICCL wishes to make reference to its recent submission to the Joint Committee on Justice, Defence and Equality on the *Review of Ireland's approach to the possession of limited quantities of certain drugs* which presents a human rights perspective on drugs policy. It sets out situations where current drug policies may adversely affect the enjoyment or effectiveness of a range of fundamental rights. Of course, certain interferences with peoples' fundamental rights can be justified in a democratic society in order to achieve the legitimate goals of drug policies, for example, it is necessary for example to

Please note that this view has been challenged by the Office of the UN High Commissioner for Human Rights in a paper in association with the International Bar Association (2003) *Human Rights and the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (United Nations), available at <http://www.ibanet.org/Document/Default.aspx?DocumentUid=d7cc7605-4340-4021-a614-2e46916f6d6c>, accessed on 24.08.15, p. 194.

²⁵ *Tomasi v France* [1992] ECHR 53, see also *Caballero v UK* [2000] ECHR 53

²⁶ The General Scheme of the Bill is publically available.

²⁷ Head 27 (2)(f)(i).

²⁸ Heads 33 and 34, which deal with post-conviction bail also take this factor into account when deciding on post-conviction bail and bail applications on appeal.

protect children and preserve public health. However, the submission argues that such interferences must be based in laws that meet human rights requirements.

18. In determining a bail application, it should be mandatory for judges to consider alternatives to pre-trial detention in the first instance (discussed further below). Given the complexities involved with addiction and the reasons giving rise to drug or alcohol use, consideration of alternatives is particularly important in remand hearings where the accused person is an addict.

Recommendation:

- **Amend Head 27(2)(f)(i) to include a requirement that alternatives to pre-trial detention are considered in cases where the person is addicted to intoxicating liquor or a controlled drug.**

(ii) Conditions of, and Breach of Bail

Victim-Specific Bail Condition

19. Part III of the General Scheme outlines potential bail conditions that can be imposed, collectively or individually, should bail be granted. Head 16 largely restates section 6 of the *Bail Act 1997*, which includes a provision obliging the accused to refrain from having contact with any other person. The General Scheme goes further by specifically providing for a victim-specific bail condition, namely obliging the accused person to refrain from having direct or indirect contact with the victim or any member of the victim's family unless such contact is approved by the court.²⁹ The ICCL welcomes the addition of this victim-specific provision which should help to protect "victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation" in accordance with the Victims' Directive.³⁰

Vulnerable Categories of Accused Persons

20. Certain vulnerable categories of persons, for example those experiencing mental ill-health, homelessness and drug addiction may find it difficult (without any support) "to adhere to bail conditions which may be imposed, e.g. to refrain from contact with certain people or being with certain people or abstaining from alcohol or drugs."³¹ In order to support the integrity of the bail process, it is crucial that provision is made for the establishment of bail supports and services within the community.³²

²⁹ In addition, another condition can now be imposed "that the accused person shall not drive a mechanically propelled vehicle (within the meaning of the Road Traffic Acts 1961 to 2014), where the person has been charged with a serious offence related to the driving of such a vehicle and the court considers it necessary to impose such a condition to prevent the commission of a serious offence related to the driving of such a vehicle."

³⁰ In accordance with Article 18 of the *Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA* [hereafter "Victims' Directive"].

³¹ IPRT, *discussion Document on Remand Detainees*, 08.07.15, available at http://www.iprt.ie/files/130708_Discussion_Document_on_remand_detainees_for_law_seminar_v_final_8_July_13.docx, accessed on 24.08.15.

³² As proposed by IPRT, *discussion Document on Remand Detainees*, 08.07.15, available at http://www.iprt.ie/files/130708_Discussion_Document_on_remand_detainees_for_law_seminar_v_final_8_July_13.docx, accessed on 24.08.15.

Recommendation:

- **Tailored bail supports should be developed and adequately funded for vulnerable categories of accused persons.**

(iii) Use of Pre-Trial Detention*Maximum length of pre-trial detention required*

21. The practical application of the General Scheme in its current format may result in the increased use of pre-trial detention. Under the proposals, the length of time for which a Court may hold a person on remand will increase from **8 to 15 days** without an appearance before a Court (other than on the occasion of the person's first appearance).³³
22. Contrary to best practice in certain other EU countries, there is no statutory maximum duration of remand detention in Ireland. Legal practitioners note that in practice it is not unusual for people remanded in custody to spend up to 12 months in pre-trial detention. In 2011, the High Court criticised remand conditions in Irish prisons.³⁴
23. Committee members will be well aware of reports of severe overcrowding in some Irish prisons. In its most-recently published Report on Ireland, the European Committee for the Prevention of Torture (CPT) recommended that the Irish authorities should, "continue to pursue vigorously multi-faceted policies designed to put an end to overcrowding in prisons",³⁵ including by having regard to the Council of Europe Recommendation on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse.³⁶ Paragraph 3 of this Recommendation notes that:

In view of both the presumption of innocence and the presumption in favour of liberty, the remand in custody of persons suspected of an offence shall be the exception rather than the norm.

It continues:

In order to avoid inappropriate use of remand in custody the widest possible range of alternative, less restrictive measures relating to the conduct of a suspected offender shall be made available.³⁷

Recommendations:

- **Remand periods should be maintained at 8 days (amendment to Head 7(3) and Head 7(5));**

³³ Head 7(3) and Head 7 (5).

³⁴ *Kinsella v the Governor of Mountjoy Prison* [2011] IEHC 235.

³⁵ European Committee for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Government of Ireland on the visit to Ireland carried out by the European Committee for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment from 25 January to 5 February 2010*, available at <http://www.cpt.coe.int/documents/irl/2011-03-inf-eng.pdf>.

³⁶ Recommendation Rec(2006)13 of the Committee of Ministers to member states on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse, available at <https://wcd.coe.int/ViewDoc.jsp?id=1041281>.

³⁷ At paragraph 4.

- **The General Scheme should contain an express provision limiting the use of pre-trial detention to circumstances where it is absolutely necessary.**

Alternatives to pre-trial detention

24. The General Scheme focuses on bail refusal rather than provision of alternatives to pre-trial detention. With the exception of “electronic monitoring” as a possible bail condition (Head 18), which is reinstating existing statutory provision not yet commenced, the General Scheme fails to identify any alternatives to pre-trial detention. This is particularly evident in relation to lower level offending and alleged offending by vulnerable accused persons, who tend to face a disproportionate risk of being held in pre-trial detention.³⁸

25. The Council of the European Union recognises that:

Excessively long periods of pre-trial detention are detrimental for the individual, can prejudice the judicial cooperation between the Member States and do not represent the values for which the European Union stands.”³⁹

Furthermore, the European Commission’s 2011 *Green Paper on the application of EU criminal justice legislation in the field of detention* states that the “proportionality principle in criminal matters requires that coercive measures, such as pre-trial detention or alternatives to such detention, are only used when this is absolutely necessary and only for as long as required.”⁴⁰ Moreover, the UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) provide that pre-trial detention should be used as a last resort, (with due regard for the investigation of the alleged offence and for the protection of society and the victim) with alternatives being utilised as early as possible.⁴¹

26. The development of non-custodial alternative measures to pre-trial detention must take into account “the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.”⁴² Examples of some bail supports have been put forward include bail information schemes, bail support/supervision schemes bail hostels,⁴³ electronic monitoring or house arrest.⁴⁴

³⁸ Open Society Justice Initiative, *Presumption of Guilt: The Global Overuse of Pretrial Detention*, 2014, Published by Open society Foundations. P.1 notes that ethnic and religious minorities, foreigners, mentally ill and intellectually challenged persons tend to face a disproportionate risk of being held in pre-trial detention. P.3 further highlights that “Miserable conditions, the heightened risk of torture and abuse, and uncertainty about the outcome of their impending trials all contribute to a high incidence of mental health problems among pretrial detainees.”

Fair Trials International, *Detention without Trial*, available at <http://www.fairtrials.org/documents/DetentionWithoutTrial1.pdf>, accessed on 24.08.15, p.3 notes that 26% Percentage of EU’s pre-trial detainees who were foreign nationals in 2009.

³⁹ *Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings* (OJ C 295) 4.12.2010, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF>, accessed on 24.08.15, p.3.

⁴⁰ Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327, Brussels 14.06.11, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0327:FIN:en:PDF>, (accessed on 24.08.15), p.3.

⁴¹ Principle 6.1 and 6.2, United Nations, Adopted by General Assembly resolution 45/110 of 14 December 1990, available at <http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>, accessed on 24.08.15, p. 3.

⁴² Principle 1.5, United Nations, Adopted by General Assembly resolution 45/110 of 14 December 1990, available at <http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>, accessed on 24.08.15, p.1.

⁴³ See IPRT, *discussion Document on Remand Detainees*, 08.07.15, available at http://www.iprt.ie/files/130708_Discussion_Document_on_remand_detainees_for_law_seminar_v_final_8_July_13.docx,

Recommendation:

- **Include a section in the General Scheme which provides for alternatives to pre-trial detention for low-level offending as well as vulnerable categories of accused persons, for example bail support/supervision schemes, house arrest, bail information schemes and bail hostels.**

D. Conclusion

27. The excessive use of pre-trial detention undermines the rule of law, a core concept in Irish democracy. It is accepted that there are exceptional circumstances in which the imposition of pre-trial detention is unavoidable, for example to prevent the commission of a serious offence, or interference with a victim or witness. However, remand imprisonment is very costly and refusal of bail potentially impacts significantly on the human rights of a legally-innocent accused person.⁴⁵ The provision of alternatives to pre-trial detention should be prioritised; refusal of bail should be a last resort, not the “default setting” of the criminal justice system.⁴⁶

accessed on 24.08.15, p. 24 reference to Seymour, M., Butler, *Young People on Remand* Report commissioned by the Office of the Minister for Children and Youth Affairs, Department of Health and Children, Ireland, 2008, p. 3. (Although these suggestions have been made in relation to young offenders, it is put forward in this current submission that these could be beneficial to adult offenders).

⁴⁴ Fair Trials International, *Stockholm’s Sunset: New horizons for justice in Europe*, March 2014, available at <http://www.fairtrials.org/wp-content/uploads/Stockholms-Sunset.pdf>, accessed on 24.08.15, p. 32.

⁴⁵ Open Society Justice Initiative, *Presumption of Guilt: The Global Overuse of Pretrial Detention*, 2014, Published by Open society Foundations, p. 7 notes “Pretrial detention is one of the most severe things that can happen to a person: the detainee immediately loses his freedom, and can also lose his family, health, home, job, and community ties.”

⁴⁶ Open Society Justice Initiative, *Presumption of Guilt: The Global Overuse of Pretrial Detention*, 2014, Published by Open society Foundations, p. 1.