

Minimising pre-trial detention

CHECKLIST 1

For Chief Justice
Judge, Magistrate and Court Staff



NEW ZEALAND
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**FEDERAL COURT
OF AUSTRALIA**



Purpose Statement and User Guide

This is the 1st in a series of six Human Rights Checklists designed to support coordinated “best practice” actions to apply human rights in the daily practice of judges, magistrates and court staff. The Checklists provide practical step-by-step guidance for applying relevant human rights standards to particular groups of court users and for making courts more inclusive and welcoming.

Each checklist has separate sections containing guidance for judges/ magistrates and court staff which can be ticked off by the user as each step is taken. While not every recommended action will be attainable for all courts from the outset, Courts are encouraged to also use the checklists as an end-point for guiding ongoing reform of court processes.

The Checklists are designed to be used alongside the PJSI Human Rights Toolkit, (available here <https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf>), which provides further background about the human rights standards that the recommended actions in the checklists are based upon. The Checklists are designed to provide general guidance for Pacific court actors and not specific legal advice. Court actors should always ensure that the actions they take are also consistent with national laws and in accordance with the guidance and direction provided by Chief Justices.

Full Series of Human Rights Checklists

- **Checklist 1** Minimising Pre-Trial Detention
- **Checklist 2** When juveniles/children come to court
- **Checklist 3** Judicial visits to places of detention
- **Checklist 4** When victims of family or sexual violence come to court
- **Checklist 5** When people with disabilities come to court
- **Checklist 6** Creating welcoming, inclusive courts

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For Chief Justices to consider

- The right to be treated as innocent until proven guilty is a fundamental tenet of international fair trial standards and is also enshrined in most Pacific constitutions. Yet despite these robust legal protections, protracted pre-trial detention remains a major problem across many Pacific jurisdictions. The guidance provided in this Checklist is intended to support the existing efforts of Chief Justices to adopt court-wide systems to minimise the use of pre-trial detention and to ensure that it always remains lawful.....
- Consider endorsing this Checklist and encouraging or directing judges, magistrates and court staff to use this checklist in their daily practice to create an “all of court” coordinated response.

For further background and guidance see PJST Human Rights Toolkit <https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf> especially Chapter 5

RECOMMENDED ACTIONS

Chief Justices can lead efforts to minimise pre-trial detention by focusing on five main areas, to:

- 1 Provide and monitor implementation of a Pre-trial Detention Practice Direction applicable to all courts and judicial officers.
- 2 Set pre-trial detention targets for the court, and ensure regular collection and monitoring of pre-trial detention data towards meeting these targets.
- 3 Ensure that treatment of detainees/prisoners being transported to or held at the court meets minimum standards
- 4 Support or lead follow up with corrections, police and oversight bodies where issues of mistreatment or substandard conditions of detention become known to the court.
- 5 Ensure there is support for a regular roster of prison/detention visits by judicial officers.
- 6 Educate the public about the court’s duty to apply the presumption of innocence and address common community misunderstanding that pre-trial release indicates the suspect has been exonerated and will not face justice.



1 Pre-trial Detention Practice Direction and Implementation

- Promulgate a pre-trial detention Practice Direction across higher and lower courts (and consider including the points set out below.
- Ensure that each file concerning a detained person includes:
 - ▶ all detention review checklists signed-off by judicial officers;
 - ▶ prominent recording of pre-trial detention period; and
 - ▶ 'red flag' at 12 months system of recording in case management system.
- Monitor individual performance of all judicial officers regarding:
 - ▶ number of cases where pre-trial detention ordered; and
 - ▶ number of cases where detainees are held for longer than 12 months.
- Conduct case review with judicial officers responsible for conduct of trials where a suspect has been detained for 12 months and conduct ongoing monitoring of these matters.

2 Set pre-trial detention targets and data monitoring:

- Appoint court staff responsible for providing judges with monthly data on pre-trial detainees and to actively monitor data. Data should include:
 - ▶ Number of charges and length of pre-trial men/women/under 18/boy/girl detainees nationally/by province;
 - ▶ Number of sentenced men/women/under 18/boy/girl detainees nationally/by province (so % of pre-trial detainees can be monitored); and
 - ▶ Length of pre-trial detention should be prominently recorded on each criminal file and in electronic case management system (including a 'red flag' at 12 months and at monthly intervals subsequently).



3 Ensure adequate conditions at court and follow up complaints of mistreatment and sub-standard detention conditions

- Appoint staff member responsible for ensuring that detainees are properly treated at court including making sure they have:

- Adequate space, separation (juveniles and women) and ventilation while being transported to court;
- Cleanliness of holding cells and bathroom;
- Access to food and water; and
- Access to information about the process.

▶ Raising complaints with the head of police, corrections or other oversight bodies where allegations of mistreatment or substandard conditions are raised by judicial officers on behalf of detainees.

4 Prison/detention centre visits

- Prepare an ongoing roster of prison/detention centre visits;
- All judicial officers should be trained and participate as a scheduled part of their regular duties;
- Visits should include police cells, remand centres, prisons, ie: all places where pre-trial detainees are held;
- Visits include a mix of planned visits and spot checks.

See separate checklist for judicial officers to use during visits

5 Public Education

- Use annual addresses, media interviews, and issue press releases clarifying court processes/judgments in high profile cases to incrementally build community knowledge of the court's duty to ensure fair trials, including presumption of innocence.
- Seek support of Minister of Justice, Attorney General and other members of the Executive to defend the role of courts in providing fair trial standards, including the presumption of innocence.



Judge and Magistrate responsibilities

Overview of responsibilities

The right to be treated as innocent until proven guilty is a fundamental tenet of international fair trial standards and is also enshrined in most Pacific constitutions. Yet despite these robust legal protections, protracted pre-trial detention remains a major problem across many Pacific jurisdictions. It is the responsibility of judges and magistrates to minimise the use of pre-trial detention and to ensure that any detention always remains lawful and tightly managed.

For further background and guidance see PJST Human Rights Toolkit <https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf> especially Chapter 5

Judges/Magistrates have responsibilities they need to proactively address in two stages:

- 1 First time a suspect appears before court
- 2 Ongoing detention review/case management hearings

The judicial officer assigned to a case is responsible for:

- Managing the pre-trial process to ensure that pre-trial detention only occurs as a last resort, for the shortest possible time, and never becomes 'unreasonable' or 'arbitrary'.
- Remaining in control of the case in all three phases to ensure that any pre-trial detention remains lawful.
- Monitoring detention conditions and treatment of detainees at each hearing.

RECOMMENDED ACTIONS

Suspect's first appearance before the Court

The decision to detain

- Judicial officer to implement the Practice Direction regarding detention.
- If there is no practice direction then only order detention if you are satisfied of each element as per below.
- Require the prosecution 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 review hearing.
- Judge/magistrate to provide case-specific reasons in writing for each decision to impose pre-trial detention.
- If suspect is under 18 years old, then the threshold for detaining is even higher. Court must always hear directly from the parents/responsible adult and social services to help identify any alternatives to detention. Use Checklist for cases involving child/juvenile suspects (under 18 years old).

Detain only if you are satisfied of all of these, as a last resort:

- Person charged with serious violent crimes against the person (never for property offences or minor offences).
- Evidence has been presented which is of sufficient quality and lawfully obtained which could support a conviction.
- Charges, if proven, would result in a substantial period of imprisonment which would be longer than the period of pre-trial detention.
- There is no other way to ensure the suspect will attend court. Consider:

▶ **Bail:** Set at a reasonable and feasible level;

▶ **Reporting conditions:** Require evidence if it is submitted that reporting conditions would not be sufficient;

▶ **Other monitoring:** Require evidence if it is submitted that undertakings of family/friends to monitor/support would not be sufficient to ensure attendance at court; check if GPS electronic monitoring is an option.

▶ **Combination of these options**



Make inquiries about detention conditions/treatment

Judge/magistrate should always make inquiries to the suspect about his/her treatment and conditions of detention including:

- Explain that the court has a role and powers to ensure detention conditions are humane and that detainees are not mistreated.
- Assure detainee they are safe to disclose any issues concerning their detention or treatment without fear of retribution, including by court staff, police, guards or other detainees.
- Ask detainee if they were safely transported to the court, and have had access to water, food, and the bathroom while held at the court.
 - ▶ **If not, raise these issues with the Chief Justice.**
- Observe condition of detainee, including if they have any visible injuries and ask them how they got them.
- Ask detainee if anyone, including guards, police or other detainees has physically harmed or threatened them since being detained, including during questioning.
 - ▶ If mistreatment used during questioning/obtaining admission, this then becomes part of the case and defence will need to call police involved as witnesses.
 - ▶ In addition, judicial officer can initiate new case against guard/police officer, lodge complaint with corrections/police/Ombudsman/human rights body, to ensure the alleged mistreatment is investigated and accountability.
 - ▶ **Also raise with Chief Justice.**
- Ask detainee if he/she is held with other pre-trial detainees or with sentenced prisoners
 - ▶ If with sentenced prisoners, report to corrections service/police that separation is required.
- Ask detainee if he/she has
 - ▶ adequate space, enough light, bedding, clean water, food, essential items (like toothbrush, toothpaste, soap, sanitary items for women or if they need any of these)
 - ▶ daily opportunity to exercise outside
 - ▶ **If any of these are lacking report to correction service/police that these must be provided and also raise with Chief Justice.**
- If they are under 18 years old, additionally ask if
 - ▶ they are being detained with others under 18 years old, or with adults
 - ▶ if family have been able to visit them
 - ▶ if they are receiving any regular education, training, sport or other activities
 - ▶ **If any of these are lacking report to correction service/police that these must be provided and also raise with Chief Justice.**
- If they are female, ask if they are being detained separately from men and guarded by women, if detainee has contact with male detainees or prisoners:
 - ▶ report to corrections service/police that full separation is required and that female guards must be provided or that male guards must be accompanied by a female guard
 - ▶ **and also raise with Chief Justice.**

Ongoing Detention Review and Case Management Hearings

Judges and Magistrates to:

- Remain firmly in control of case timetabling and firm with parties who fail to meet the time frames as set down in Directions (if parties fail to comply with court directions/order, submit a complaint against them to the chief prosecutor or law society and, if necessary, warn parties you will find them in contempt).
- Monthly meaningful in-person (not 'on the papers') review of ongoing detention requiring 'sign off' on above criteria again each time AND
- Satisfaction via direct contact with prosecution and suspect's lawyer (and social services if case involves a minor) that there has been no change of circumstances which would enable release.
- Reasons for extending detention must be clear, particular to the case and in writing each time pre-trial detention is extended.
- Dismiss charges or grant conditional release where there is inadequate evidence put forward to support a conviction.
- At each hearing judge/magistrate Judicial officer to ask detainee about his/her treatment and conditions of detention and follow up appropriately (as per previous section).
- If delays are caused by difficulty in obtaining forensic evidence, prosecution requested to carefully consider if other available evidence will suffice in supporting conviction.
- Reduce adjournments by providing a 'last adjournment' warning and then if the matter was still not completed, proceed without it, including if it may result in discharge of charges.
- Include a 'red flag' period of 12 months maximum of pre-trial detention. Conduct fresh assessment and release detainee unless there is evidence that conditional release not possible (as per criteria above).

Accelerate trial timetable. Chief Justices will conduct case reviews with judges/magistrates where detention has reached 12 months and will want to know why trial has been delayed for 12 months and why detainee should not be conditionally released or charges dropped.





Court staff responsibilities

Overview of responsibilities

Court staff make important contributions to ensuring that the rights of people who are detained are fully observed when they come to court. They also play important roles in producing data and managing cases so that pre-trial detention can be closely monitored and tightly managed by the judge or magistrate.

For further background and guidance see PJST Human Rights Toolkit <https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf> especially Chapter 5

RECOMMENDED ACTIONS

Prior to/on day of hearing

- Liaise with police/corrections to ensure adequate space, separation (juveniles and women) and ventilation while person/people are being transported to court
- Check and ensure cleanliness of holding cells and bathroom before they are used
- Be present/monitor during arrival at court and liaise with police/corrections officers
- Ensure that any child/juvenile is held separately from adult detainees while they wait at court and are given special care and attention.
- Ensure that all people detained have access to food, water and a bathroom while they wait.
- Ensure that all people detained are provided with information by court officer about:
 - ▶ What the process will be and
 - ▶ Role of judge, prosecutor and defender
 - ▶ How long they will likely need to wait
 - ▶ Court etiquette: how to address the judge, to stand and bow when they enter and leave the hearing room etc.
 - ▶ What will be expected of them during the hearing and that they should ask their lawyer/ the judge any questions they have during the hearing
 - ▶ Where bathroom/other facilities are
 - ▶ Who and how they can contact court staff if they need to communicate anything
 - ▶ Once person is in the court room, explain to person again where different court actors will be and what will happen once the hearing commences, and to ask their lawyer or the judge any questions they have during the hearing.

Case management of detainee files

- Ensure that detainees' files are colour-coded and clearly flagged in data system.
- Ensure that length of pre-trial detention is prominently recorded and updated minimum monthly on each file and in electronic case management system.
- Ensure there is a 'red flag' in the system when detention reaches 12 months.
- Inform the presiding judge/magistrate at 11 months, that the 12 month limit is approaching
- Monitor court direction dates and provide reminders to parties of upcoming court deadlines and that they will need compelling reasons to be granted any adjournments.
- Prepare monthly data for the Chief Justice including:
 - ▶ Number of charges and length of pre-trial men/women/under 18/boy/girl detainees nationally/by province; and
 - ▶ Number of sentenced men/women/under 18/boy/girl detainees nationally/by province (so % of pre-trial detainees can be monitored).



