

Report

The political economy of pre-trial detention

Indonesia case study

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Acronyms

BPHN	National Law Development Agency
DGC	Directorate General of Corrections
KUHAP	Kitab Undang-Undang Hukum Acara Pidana (Criminal Procedure Code)
KUHP	Kitab undang-undang hukum pidana (Criminal Code)
KOMPOLNAS	Komisi Kepolisian Nasional atau disingkat (National Police Commission)
CDS	Center for Detention Studies
ICJR	Institute for Criminal Justice Reform
INP	Indonesian National Police
KPK	Komisi Pemberantasan Korupsi (Corruption Eradication Commission)
KPKPN	Komisi Pemeriksa Kekayaan Penyelenggara Negara (Public Officials Audit Commission)
MLHR	Ministry of Law and Human Rights
NGO	Non-governmental organisation
SDP	Sistem Database Pemasyarakatan (Corrections Database System)
TAF	The Asia Foundation

Executive summary

Pre-trial detention has increasingly become recognised as an important problem in prisons, contributing to overcrowding and poor prison conditions. It can indicate how state and society treats suspects, and can indicate problems with compliance with the principles of due process, presumption of innocence, and the application of the rule of law more broadly.

This is a study of the political economy of pre-trial detention in Indonesia. It analyses the key features of pre-trial detention with a view to developing policy and reform recommendations aimed at reducing its length and ensuring that detention is used for proper purposes. The study applies an analytical framework that draws on political economy analysis tools to identify the drivers of excessive pre-trial detention (Domingo and Denney, 2013). This includes an analysis of potentially relevant factors disaggregated along the stages of the criminal justice chain. The study looks at factors related to incentives, conduct, capabilities and resources that exacerbate the problem of pre-trial detention in Indonesia.

The framework of analysis addresses different stages of the criminal justice chain, from police arrest, investigation and detention at the police cell, through to the prosecution stage and life at that detention centre or pre-trial cell in prison where detainees await trial. Information and statistics from the Corrections Database System (SDP), a new system implemented in 2011 through the Directorate General of Corrections, supported the analysis. At each stage the analysis identifies blockages that are related to the particular combination of the wider structural socio-political context, the existing rules of the game (both formal and informal) relating to the criminal justice and corrections system, and the incentive and interest structures and balance of power between relevant actors and stakeholders within that system.

Key actors include the detainees and their families, different law-enforcement personnel, correctional staff, legal counsel and adjudication actors whose engagement and conduct have consequences for the conditions and duration of pre-trial detention.

This analysis enables a more accurate identification of potential entry points for support which could aim at reducing the incidence of pre-trial detention at the different stages of the justice chain. The report helps to pinpoint where *actual* problems are situated, and therefore help to determine where support can be most effectively targeted.

Problem-focused political economy analysis has in recent years become an analytical approach in

development literature that seeks to support more effective and relevant engagement by international and policy actors through understanding the concrete features of the problem at hand. But its practical application remains a challenge. Using a more focused framework that targets the details of the different components of the justice chain *as they feature in the Indonesian context* allows for a more granular understanding of the specific institutions, incentives and relationships that feature at the different stages of the process, and which may be the root of the problem. This study aims to reveal concrete opportunities for support to change adapted to specific political economy conditions and context.

The study focuses primarily on the political economy of the ‘pre-adjudication’ stage – i.e. arrest and detention in the police cell and the conditions in the detention centres and prisons while detainees await trial and sentencing. Less attention is paid to the workings of the court system in the criminal justice procedure, although a follow-up study could fruitfully explore these.

1. The problem: pre-trial detention in Indonesia

Indonesia is potentially at a political crossroads: there is opportunity for legal change and institutional reform in relation to the criminal justice system and a societal consensus that reform of the justice system is a priority. There is currently an appetite for reform within the Ministry of Law and Human Rights, the Directorate General of Corrections, and an active network of civil society and legal aid organisations. This alignment of interests is important both for domestic and international actors seeking to address pre-trial detention.

Pre-trial detention in Indonesia is acknowledged nationally and internationally as a problem that contributes to overcrowding and poor prison conditions and which has wider development and social consequences. The problem reflects some of the worst excesses of the criminal justice system, of violations of principles of due process, and of the governance and transparency deficits in Indonesia. The challenges of over-crowding, understaffing, chronic underfunding combine with practices of corruption, as well as issues of gang violence, poor water and sanitation, and a lack of basic health and education services.

Between 2004 and 2011 the prison population more than doubled from 71,500 to approximately 144,000, while prison capacity has increased by less than 2%

(Sudaryono, 2012). In December 2014, according to the Directorate General of Corrections (DGC) Database System (the SDP), there were 163,000 prisoners (34% of which are pre-trial detainees) held in 463 facilities. This information does not include the police detention facilities. While the overcrowding rate nationally is 30%, the rate of prison overcrowding in many major cities is as high as 520% over intended capacity.

Excessive and arbitrary pre-trial detention in Indonesia – as elsewhere – is a reflection of deep-rooted failings of the state to observe basic human rights and the statutory rights of detainees and apply the necessary resources and planning to improve the status of detainees. Moreover, pre-trial detention brings costs for the detainee and his/her family as well as for the wider community, in terms of loss of earnings, the costs of paying for services for the detainee, case-related costs, and the costs of visits. These costs have development consequences not only for the individual detainee and the family but also for the state and wider society.

2. Disaggregating the criminal justice chain

The political changes in Indonesia since 1998 have included a range of reform efforts aimed at strengthening the rule of law and justice provision through changes in justice and law enforcement mechanisms. Along with fighting corruption, rule of law has been high on the public and political agenda, even though the practice and institutionalisation of new measures, laws and institutions has been far from effective. This ‘thickening’ of the legal and normative framework in Indonesia, associated with introducing better mechanisms for rule of law development, accountability, and rights protection, even if imperfectly implemented, is not unimportant.

The criminal justice system, inherited from the Dutch, is administered through the Criminal Procedures Code (KUHAP), dating from 1981. A draft Bill to reform the 1981 KUHAP has been tabled in the legislature since 2010. More recently in 2011, a Legal Aid Law was passed which grants the right to legal aid to all citizens, for private, criminal and state administrative cases.

The legal framework is in many ways more than adequate. On paper, for example, pre-trial detainees in Indonesia benefit from the presumption of innocence and due process. However, in practice once an individual enters the criminal justice system the presumption of innocence is overwhelmingly denied.

There have been some concrete measures aimed at addressing the problem of overcrowding and overstaying, and others at improving the chances for due process of detainees to be observed. Other changes, in theory, contribute to building up mechanisms of oversight and accountability of law enforcement officials.

While there has been a range of reforms to the criminal justice system, it is not possible to speak of an integrated

approach to building the rule of law. Rather, the reforms have been conducted in a way that fuels the sense of a fragmented criminal justice system. This is made worse by the fact that the different law enforcement bodies compete for resources, influence and ownership of different parts of the system. The interests of the different actors who benefit from ineffective oversight and accountability, fragmentation and lack of simplicity represent robust sources of resistance to the improvement of due process and transparency in the criminal justice system, and in how corrections centres work in practice.

Indonesia’s history also has a great impact on the present. There are political and institutional challenges associated with the legacies of authoritarian rule and resistance to practices of rule of law, accountability and due process. This is not least because of the implications for entrenched interest structures at different levels of the political and state establishment – including in the law-enforcement bodies.

There are advocates of reform to be found among law practitioners, within law enforcement bodies, and among political elites. Potential coalitions for change are critical and can help articulate solutions and recommendations for reform.

Social norms, attitudes and belief systems in any society are an important factor in shaping the treatment of prison populations. Indonesia’s wider environment of socio-cultural norms, beliefs and attitudes to the prison population is not especially supportive of a culture of human rights and due process. In particular, prison populations are not seen as citizens with rights, and a punitive attitude towards detainees tends to prevail among the population. However, it remains a state obligation to ensure that due process is observed and that the release of detainees does not put the public at risk.

3. Findings and recommendations for action

This study unpacked the range of interests and incentive structures, the legal and formal institutional framework, and the wider configuration of informal and social norms that drive excessive pre-trial detention. The findings identify not only the drivers of excessive and/or sub-standard pre-trial detention, but also the potential entry points for strategic action by the different stakeholders in reform coalitions at different levels of the justice chain that can contribute to meaningful change. The study also found that international actors can carefully contribute to change processes through more strategically targeted support to the relevant reform processes and coalitions of reform champions. This could include adapting support to reform efforts in ways that maximise emerging opportunities in a changing political and institutional environment using what have been termed ‘problem driven, iterative and adaptive’ approaches to the problem (Andrews, 2013).

At the *national political level* there is incipient buy-in for reform, including among the more entrenched power and interest structures that have traditionally benefitted from the old order within the criminal justice system. The challenges, however, remain formidable – in terms of the resistance of vested interests. In addition, wider social attitudes towards the prison populations reflect a ‘tough on crime’ approach that translates into high levels of stigmatisation of all detainees. However, emerging strategic alliances between activist civil society organisations and reformers within the Ministry of Law and Human Rights, and concretely within the Directorate General of Corrections are important. Moreover, targeted political advocacy can raise the reputational costs for the government of failing to address prison conditions and more generally its weak commitment to advancing the rule of law. For instance a recent conflict between Corruption Eradication Commission (KPK) and the Indonesian National Police, which brought attention to the discretionary powers of the police has resulted in a public outcry. This may result, perhaps through Constitutional Court action, in renewed efforts to check police conduct in arresting suspects.

The study found that the *police detention and investigation* stage of the criminal justice system constitutes the least promising link in the justice chain. The police remain a powerful stakeholder with political leverage, and they are likely to resist reform. Advances in legal aid legislation are a key opportunity to change the balance of power during the police investigation in favour of the detainee – but much will depend on resourcing and implementation and also buy-in from the police hierarchy. Reformers within the corps may find motivation derived from cultivating an improved public image.

The most promising area for engagement to address pre-trial detention is in the *prosecution phase* of the justice chain. Once the detainee has moved to the detention centre or detention cell in prison there are more concrete opportunities to find ways of both reducing overstaying – through promoting access to legal counsel, advocacy and awareness raising among detention centre staff, detainees and their families, and working to identify where the blockages are in the justice chain – and of improving the living conditions of detainees. The balance of power remains heavily stacked against detainees, but there is more scope to improve their rights at this stage because of the more positive relationship between detainees and detention centre staff and the nature of the incentive structures dictating conduct among criminal justice stakeholders.

Recommendations for action are disaggregated to reflect different levels of ambition: immediate, intermediate level and high-level measures.

4. Immediate measures

Given the opportunity structures for change found in the study, there is a range of immediate action that can contribute to quick and effective gains in addressing pre-trial detention. These include the following:

- Use opportunities within existing systems and infrastructure to enable change in incentives and attitudes, and invest in building relevant capabilities. This includes:
 - Supporting creative use of detention centre and prison space to encourage recourse to legal aid, for instance through providing *on site* legal aid clinics for detainees.
 - Supporting and clarifying the role of the legal aid officers within prisons, allocating resources for staff to be more actively engaged in facilitating access to legal aid for detainees;
 - Investing in capacity development of detention centre and prison staff regarding the legal aid system, and improving access to legal aid for detainees.
- Support the development of university legal aid clinics to provide access to legal aid for detainees, using recently allocated resources; and to serve as practical training of law students on legal aid for detainees.
- Support and facilitate existing ‘good’ relationships, networks and reform coalitions to advance the rights of detainees. This includes:
 - Making strategic use of the existing ‘benevolent’ attitudes of prison and detention centre staff towards detainees in order to facilitate information about legal aid and how to access it.
 - Supporting awareness-raising among detainees and their families on their rights and the benefits of recourse to legal aid, as this becomes more widely available under the new Legal Aid law.
- Invest in the Indonesian legal research community which is well placed to contribute to reform in the criminal justice system. This includes supporting research capabilities in the use of evidence, including the SDP (Corrections) database, to strengthen the knowledge base on the prisons system and criminal justice process.
- Disseminate key research findings on the merits of addressing pre-trial detention to different stakeholders. This includes:
 - Stakeholders in the criminal justice chain: Ministry of law and Human Rights, including the DGC and the National Law Development Agency (BPHN); the Indonesian National Policy; Attorney General’s Office and the Supreme Court; bar associations. Working to reduce arbitrary pre-trial detention particularly in non-violence, victimless, trivial offences that will reduce costs to and has reputational benefits in terms of rule of law advancement.

- International donors and NGOs investing in justice sector reform should use findings of problem-focused political economy analysis to reorient resources accordingly.

5. Intermediate and mid-level measures

There are intermediate measures that can contribute to altering the balance of power *over time* in the detention process. This includes shifting the incentives structures within law enforcement agencies and building the capabilities of relevant civil society and legal aid providers to lobby for change.

- Invest in adapting the new legal aid architecture in practice at key points in the criminal justice chain to change incentives and improve access to legal aid for detainees. This may include the following measures:
 - Invest in streamlining systems and protocols between the DGC and BPHN (in charge of legal aid provision) to facilitate access to legal aid for detainees.
 - Develop a 24 hour guaranteed hotline to a call centre to register requests from detainees, provide legal advice and if necessary assign a legal aid organisation to the case. At the investigation phase, this will require buy-in from the Police Chief to regulate access to such a hotline in police units and to supervise its implementation.
- Build-in provision of, and access to, legal aid, should be established as a key performance indicator of detention facilities in order to incentivise legal aid provision for detainees.
- Invest in supporting police capacity on the implementation of the legal aid law. This includes changing incentives and reward systems within the criminal justice chain regarding treatment of, and attitudes towards detainees.
- Alter the budgetary incentives through performance measures for the police and prosecution so that the value/gravity of the cases instead of the quantity of arrests are rewarded.
- Invest in engaging law firms and bar associations with the legal aid law to meet obligations on providing pro bono legal aid to detainees, including to enhance implementation of the law
- Support civil society and legal aid organisations in monitoring as possible police practice in identifying suspects through the pre-trial hearing mechanism recently sanctioned by the Constitutional Court. This can contribute to raising reputational costs for poorly substantiated arrest practices. Overtime the onus should be on building positive incentives for police conduct.

6. High-level measures

There remains some political premium around improving the rule of law, and strengthening both internal and external mechanisms of oversight and accountability along the criminal justice chain to reduce the opportunities for rent seeking at the expense of detainees. Such reforms should address impunity and seek to reward observance of due process. This includes enhancing accountability over detention by including *habeas corpus* into the system, (ICJR, 2014 and 2011). Reform requires building buy-in across the range of relevant law enforcement actors, including the police, the judiciary and the prosecution around the reputational benefits of supporting reform.

- There remains an on-going political opportunity to reform the criminal procedure law (KUHAP) and the criminal code (KUHP), including through investing in alliances with reformers in the Ministry, and in the legislature. In relation to pre-trial detention, this includes supporting legal change that:
 - alters indictment and sentencing practices from a systemic preference for severity to a wider range of punitive action (including non-custodial)
 - provides alternative options to detention (suspended detention, home/city arrest);
 - strengthens the immediate right to legal counsel and observance of due process, including through the provision of a single agency to administer legal aid provision.
- Political efforts to push for concerted reform of detention practices and prison conditions should continue. This includes using recent public interest in prison life as an opportunity to generate awareness and sensitisation on both the conditions for detainees and inmates and the wider development and both social and economic costs for Indonesian society of pre-trial detention. It also includes building strategic alliances with key stakeholders along the criminal justice chain and in political life, around the merits of reducing excessive pretrial detention and overcrowding in prisons.

1. Introduction

Prison and detention processes in which there is a systemic lack of oversight with respect to due process are closed systems where the discretionary power of one group of stakeholders (law enforcement actors) over another (detainees) gives rise to incentives and opportunities for rent-seeking that can result in rights violations and injustice. In contexts where the rule of law is weak, pre-trial detention is such a system. Prisons precisely represent a highly observable spatial category of ‘closed and full discretion’ of one person over another, where police officers or other law enforcement actors may have full discretion to determine another person’s basic daily living conditions (whether they sleep, have food, or can see their families), as well as the longer-term justice outcomes. Studying the political economy conditions of this space provides insights into the particular features of the rent-seeking logic that prevails in the Indonesian criminal justice system as well as the potential entry points for reform. Moreover, this study has relevance beyond the Indonesia case in terms of: highlighting the analytical value of such an approach to the study of criminal justice systems, and other justice sector or governance problems; pointing to potentially recurrent drivers of excessive pre-trial detention in other contexts; taking the analysis of policy responses to excessive pre-trial detention in a new direction and away from the more legalistic approaches that have tended to prevail.

This is a study of the political economy of pre-trial detention in Indonesia which analyses the key features of lengthy and sub-par pre-trial detention with a view to developing policy and reform recommendations to reduce its incidence. To this effect, the study applies an analytical framework that draws on political economy analysis tools to identify the drivers of pre-trial detention (Domingo and Denney, 2013). This framework maps out the clusters of potentially relevant factors disaggregated along the stages of the criminal justice chain that contribute to driving excessive and arbitrary pre-trial detention.

The case study has three objectives. First, it tests the usefulness of this framework in improving our understanding of the problem of excessive pre-trial detention and its drivers. Second, it analyses the concrete political economy of the criminal justice and corrections system in Indonesia in order to identify the blockages and features *along the justice chain* that exacerbate excessive pre-trial detention. Third, in doing so, the study identifies entry points for supporting the changes in incentives, conduct, capabilities and resources needed to reduce excessive pre-trial detention.

The study then sets out recommendations for policy, legal reform and practical interventions at the different stages of the criminal justice chain to help alleviate the problem of pre-trial detention and the problems associated with overcrowding in the corrections system.

2. Structure

The case study is structured as follows. The paper first presents a brief introduction to the analytical framework of the political economy of pre-trial detention and a summary of the methodology. It then reviews the scale of the problem of excessive pre-trial detention in Indonesia and the costs that result from it. Next it reviews the wider socio-political, institutional and legal context that shapes the current criminal justice and corrections system is presented. This is followed by a presentation of findings from the fieldwork, focusing on the drivers of excessive

pre-trial detention, the challenges and constraints facing reform efforts, and the opportunities for action and change along the criminal justice chain. The paper concludes with a summary of findings and recommendations arising from the analysis to inform policy and reform as well more piecemeal measures in the criminal justice system that can contribute to iterative change in the balance of power, incentive structures and conduct among a range of actors involved in the criminal justice and corrections system.

3. Analytical approach and methodology

3.1 Political economy analysis of pre-trial detention: disaggregating the criminal justice chain

Problem-focused political economy analysis has in recent years become an analytical approach in development literature that seeks to enable more effective and relevant engagement by international and policy actors through a better understanding of the concrete features of the problem in question (Harris, 2013; Leftwich and Hudson, 2013; Andrews, 2014). The approach takes account of how – in relation to a concrete issue or problem – political and economic processes interact in society to shape the rules of the game, the incentive and interest structures, the belief systems and ideas that underpin the conduct of different groups and individuals, and how power is distributed between them.

This study starts from the position that excessive or arbitrary pre-trial detention is the ‘problem’ to be addressed, and that the objective is to reduce its incidence. The analytical framework applied seeks to identify the concrete drivers of excessive pre-trial detention; that is, those blockages that derive from the particular combination of the wider structural socio-political context, the existing rules of the game (both formal and informal) relating to the criminal justice and corrections system, and the incentive and interest structures and balance of power between relevant actors and stakeholders within that system. Taking account of structural and institutional conditions, the framework examines the nature of the relationships between different relevant actors in the justice chain, including the detainees and the different law-enforcement, correctional, legal counsel and adjudication actors whose engagement and conduct has consequences for the conditions and duration of pre-trial detention.

Figure 1 summarises the factors to be considered at the different stages of the criminal justice chain. The first and second tiers of this framework provide an initial mapping of the context and of where some of the institutional and actor-related blockages are situated and which specifically contribute to the problem of pre-trial detention. The third tier of questions is where the interface between structure and agency – that is, between the (changing) rules of the game and the conduct of relevant actors – is analysed,

including to identify how interventions might more effectively target the relevant blockages.

A challenge associated with problem-focused political economy analysis is that, beyond identifying the problem and highlighting the complexity of the issues involved, it often falls short of providing practical recommendations moving forward. In order to address this, our framework allows for a further level of disaggregation of the problem of pre-trial detention to account for the very concrete incentive and power structures that feature at the different stages of the criminal justice chain. This close analysis of the different components of the justice chain allows for a more granular understanding of the specific institutions, incentives and relationships that feature at the different stages of the process, and which are at the root of the problem.

Figure 2 summarises what an analysis of the political economy conditions of pre-trial detention along the justice chain may tell us in terms of the factors that exacerbate the problem, and where there may be opportunities for reform or to reconfigure the incentive and interest structures that underlie the problem.

The fieldwork for the Indonesia study focused primarily on the political economy of arrest and detention in the police cell and the conditions in the detention centres and prisons while detainees await trial and sentencing – that is the stage of ‘pre-adjudication’. There remains an opportunity for a later study to focus on the workings of the court system in the criminal justice procedure.

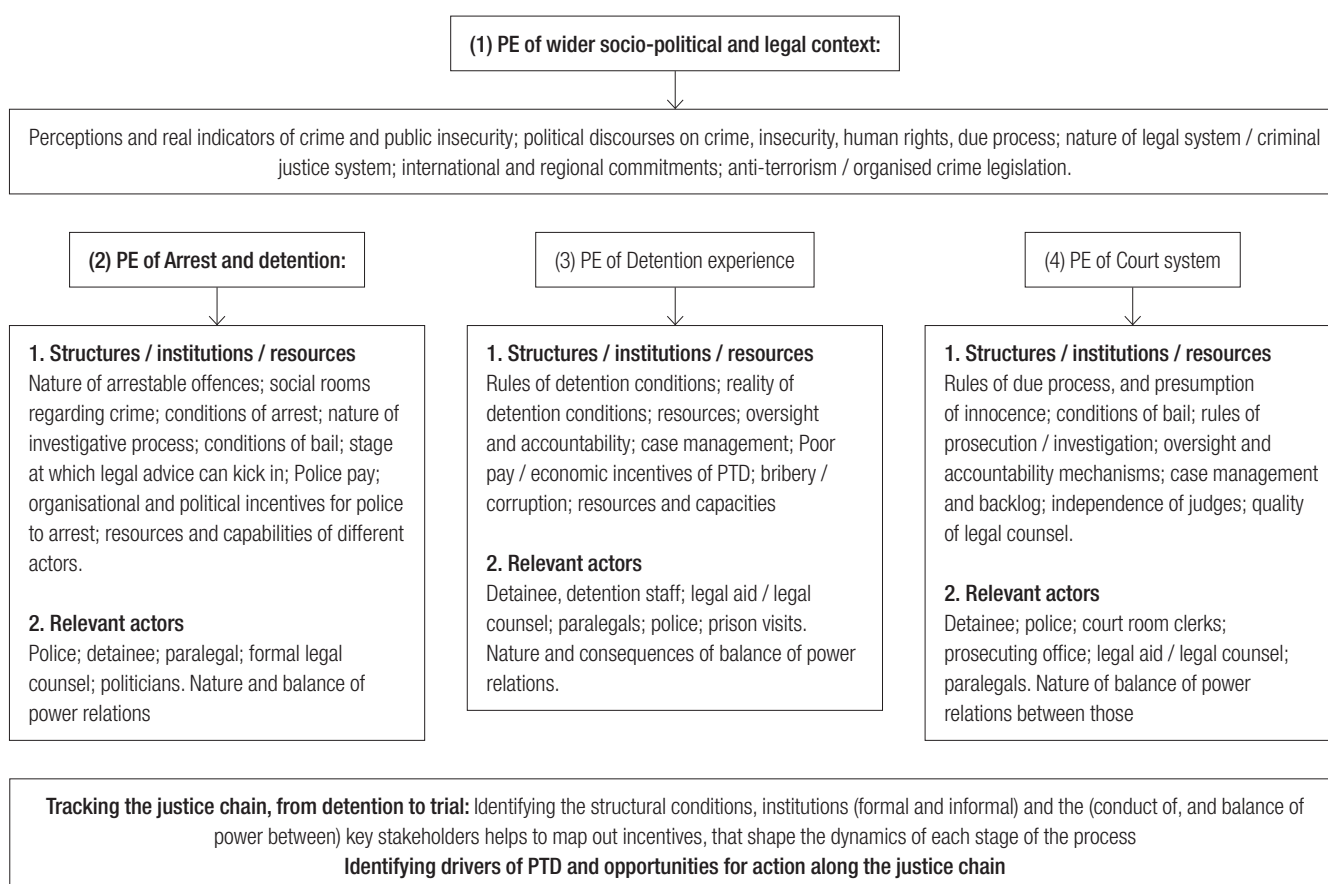
Recommendations in this report are targeted at three levels of intended change. First, there are recommendations which refer to immediate measures focusing on short-term, concrete, practical interventions (such as training detention centre staff or supporting advocacy and legal literacy efforts among pre-trial detainee populations and supporting paralegal organisations). This could involve working with relevant NGOs or legal aid organisations already focusing their efforts on working with pre-trial detainees, as well as working with detention centres and prison staff. Second, there are intermediate-level recommendations involving more practical medium-term planning, sensitisation and advocacy work with relevant stakeholder groups. This could include engagement with the relevant corrections actors and agencies, such as the

Figure 1: Some relevant political economy questions for pre-trial detention

Relevant structural factors and institutions - formal and informal	<ul style="list-style-type: none"> • Relevant factors of the wider socio-political environment • Socio-cultural norms, belief systems and dominant ideas about justice and public attitudes towards crime, punishment and perceptions about public insecurity • Legal framework: content of formalist institutions and criminal justice system • Informal institutions, and the practice of how rules are interpreted and applied, and where relevant particularities of legal-pluralism • Nature of resource and capacity constraints on the system
Actors, incentives and interest structures	<ul style="list-style-type: none"> • Who are the relevant actors: detainees, police, prosecutors, detention centre staff, judges, lawyers, paralegals - as relevant at each stage of the justice chain • How are different relevant groups positioned in relation to each other and to above institutional factors? Issues of power relations between relevant actors • What is the nature of their interests, beliefs and motivations? How do ideas shape perceptions? How do these actors gain or lose from PTD? How do they gain or lose from relevant legal, institutional or process related change? How / why do they resist change?
Intersection between structure and agency, and the impact of change Spotting opportunities for action	<ul style="list-style-type: none"> • In reviewing the above, where is there room for securing buy-in from key actors? • How does changing the formal institutions, or process related resources at any point of the criminal justice chain affect incentives, beliefs and potentially conduct? • What are the opportunity structures that might emerge from legal change, process related change, investment in resources and capacities? • Where is there potential for cultivating buy-in from key state-holders, or forging strategic alliances for change and innovation?

Source: Domingo and Denney (2013)

Figure 2: Summary of the political economy of pre-trial detention at each stage of the process



Source: Domingo and Denney (2013)

Directorate General of Corrections (DGC) of Indonesia, and other criminal justice and law enforcement actors along the justice chain, such as detention centre and prison staff, police authorities, as well as international actors involved in supporting such change processes in collaboration with the government. Third, there are long-term objectives involving high-level legal and policy change (including change processes that require political engagement at government level) and change processes that address wider social norms and attitudes towards the prison population.

3.2 Why Indonesia?

Indonesia is an interesting case study for number of reasons, not least of which is its relatively favourable conditions for corrections system reform. Excessive pre-trial detention in Indonesia is acknowledged as a problem by different national and international actors, as it contributes to overcrowding and poor prison conditions which have wider development consequences.

There is currently a range of reform actors, including within the DGC, civil society and legal aid organisations whose interests align behind addressing the issue. Work has already been undertaken over a number of years and any further engagement would build on recent analysis and organisational change undertaken in Indonesia by such organisations such as The Asia Foundation (TAF), the Institute for Criminal Justice Reform (ICJR) and the Centre for Detention Studies (CDS). These organisations have contributed to building an important body of evidence and research on pre-trial detention and overcrowding in prisons.

3.3 Fieldwork methods

Field research drew mostly on **qualitative methods**, as is appropriate for a political economy analysis approach. Sources of information have included the following. First, a review of the relevant legislation and criminal justice codes and an examination of data on arrest, conviction rates and case management. Second, the team drew on the relevant literature and the existing knowledge base on the history and conditions of the criminal justice and corrections systems in Indonesia, and an assessment of how this is connected to the wider context of socio-cultural and political change in the post-1998 years. Third, fieldwork

included semi-structured interviews and focus group discussions with key actors identified as relevant in the different stages of the criminal justice stage, including justice and law enforcement officials, detention staff, detainees, and legal aid and litigation actors. The material from interviews has been cross-referenced with analysis of legal frameworks, analysis of policy orientation, and available quantitative data, including official statistics and material from published reports to ensure triangulation.

Interviews sought to capture the *informal* rules of interaction between the different stakeholders, how these both reflect and shape prevailing power relations, incentive and interest structures and thus also the behaviour of the different stakeholders in the criminal justice chain. The interviews also aimed to capture how actors in the system see opportunities for change. Fieldwork thus focused on describing the political economy of the criminal justice system and the particular sets of incentive and interest structures that exacerbate the problem of excessive pre-trial detention.

Fieldwork was conducted in February 2014 by eight researchers from ODI, TAF, CDS and ICJR; the latter two have worked on the Indonesian criminal justice system since 2008 and 2006 respectively.

The team visited the following detention centres:

- **Pondok Bambu Women's Detention Centre:** a women's prison in East Jakarta, founded in 1947. It accommodates female prisoners, female detainees and male juveniles. With a capacity of 619 inmates, it housed 1,026 in December 2014.
- **Salemba Detention Centre:** a male prison in central Jakarta built by the Dutch in 1918. It should accommodate between 862 and 1200 inmates, but it housed 2,977 in December 2014
- **Tangerang Juvenile Centre:** a juvenile centre built by the Dutch during the colonial period located 40 km west of Jakarta. This facility is now a juvenile prison hosting those convicted and those awaiting trial. The design capacity is for 220 inmates; it housed 126 inmates in December 2014.
- **Banjarmasin Prison** (Class IIa), South Kalimantan; is one of the most overcrowded prisons in Indonesia, calculated at being 648% over-capacity. It is designed to hold only 366 inmates but currently hosts 2,371. It mixes convicts (61%) and those waiting for trial.

4. The scale of the problem of overcrowding and pre-trial detention in Indonesia

4.1 Conditions of pre-trial detention

The prison system in Indonesia reflects some of the worst excesses of the criminal justice system, and routinely violates the principles of due process required by law in Indonesia. There are challenges of over-crowding, understaffing, wide discretionary detaining authorities, chronic underfunding combined with practices of corruption, as well as issues of gang violence, poor water and sanitation, and a lack of basic services in health and education.

Between 2004 and 2011 the prison population managed by the DGC has more than doubled from 71,500 to approximately 144,000, while prison capacity has increased by less than 2%.¹ In July 2015, according to the DGC's Correction Database System (SDP), there were 78,063 prisoners (34% of whom are pre-trial detainees) held in 477² facilities. This information does not include data relating to the police detention facilities (Sudaryono, 2012). While the overcrowding rate nationally is 145%, the rate of prison overcrowding in many major cities is as high as 520% over intended capacity.

There are a number of devastating consequences of pre-trial detention in Indonesia – and overcrowding more generally.

First, overcrowding exacerbates the already dramatically poor health conditions of the prison population. The health budget in the corrections system was cut in response to the state budget deficit in the last three years. In 2014 state funding for health services for inmates was removed from the prisons budget.³ This has further undermined already

limited access to medical care. In interviews detainees and their families underlined, for instance, the high recurrence of skin and upper respiratory infection diseases. Inmates have to survive on US\$0.50 to cover three meals a day, leading to malnutrition among the prison population. HIV-affected detainees receive very limited treatment due to budget cuts. Around 890 inmates are estimated to have died of opportunistic infections in the Jakarta area alone in 2008.⁴

Second, there are security risks for the prisons population associated with severe overcrowding in detention centre cells. For instance, inmates take turns to sleep in the cells. A result is that only prison blocks can be locked, not the cells, potentially putting detainees at greater risk, especially where those convicted and those awaiting trial are mixed (Joniansyah, 2012). The guard to prisoner ratio is as low as 1:450 in Banjarmasin Prison; at the national level the ratio is 1:44⁵. This situation makes prison management especially challenging as it increases the levels (and threat) of violence and the risk of other criminal activity, including gang formation.

Third, particular groups are especially at risk. While the total number of female detainees represents just 3% of total inmate population, their situation is much worse. 85% of them are detained in the male adult facilities.⁶ This means they have to live in much smaller, restricted areas than their fellow male inmates due to reasons of security and for their personal safety.⁷ Detainees from minority

1 smlap.ditjenpas.go.id, accessed July 10 2015

2 In 2013 the police detained 92,000 potential offenders across 33 provinces, INP Statistic on the Police-held Detainee 2012 & 2013, a respond to the ICJR Public Information Request to the INP's Crime Unit (Bareskrim Polri, 2014, not published)

3 Interview with prison officials: Banjarmasin on 17 February 2014, Salemba on 12 and 13 February 2014, Pondok Bambu on 12 February 2014, as admitted by the Director General 17 December 2014.

5 The DGC Annual Report, 2014.

6 Wawancara dengan narapidana dan petugas pondok bambu tanggal 11 February 2014.

7 The latest data the number of prisoners each regional office of DITJEN PAS, accessed at http://smlap.ditjenpas.go.id/public/grl/current/monthly/sort:jml_ndp/asc/page/0

groups, particularly lesbian, gay, bisexual and transgender prisoners, experience similar if not more vulnerabilities.

Juvenile detainees experience additional problems. Criminal charges in juvenile detention include theft, assault, illicit drug use, rape and murder. Of those juveniles charged, around 98% are detained, and 90% of those do not have legal counsel, although the law establishes this as a mandatory requirement (Law on Juvenile Justice System No 11/2012, article 23). Thus, juveniles are just as vulnerable as adults to the over-use of custodial detention.

Prolonged pre-trial detention for juveniles has further devastating consequences in a number of respects. First, there are implications in terms of schooling, both during and after detention. Juveniles in pre-trial detention do not have access to schooling. Once sentencing has occurred they can take part in lessons and in other leisure or recreational activities, but during the period that they are in pre-trial detention the options for engaging in any productive or learning activity are very limited and support to education programmes of any kind at this stage is mostly lacking. This has consequences beyond the pre-trial detention period – and after custodial sentences generally (noting that the vast majority of pre-trial detainees are convicted). The fieldwork revealed, for instance, the weight of the stigma associated with having been in prison. Juveniles returning to their communities, it was noted in interviews, are mostly not re-admitted into local schools, which affects their life prospects and the nature of their reintegration into community life.

Second, fieldwork confirmed that in practice there is no classification and separation of juvenile inmates based on their age and conviction category. This means that younger inmates (including those as young as 12) are grouped with youths aged 18, and that detainees accused of minor crimes are grouped with potentially more dangerous detainees accused of serious crimes. In addition, there are only 17 juvenile facilities in Indonesia, with the result that 85% of juvenile inmates are held in adult facilities. Whilst sleeping cells for juveniles seem to be generally separate from the adults, juveniles are exposed to common areas, such as the open field, places of worship and so forth.⁸ Shared facilities, moreover, put juveniles at risk of sexual and other types of assault.

Excessive and arbitrary pre-trial detention in Indonesia – as elsewhere – is a reflection of deep-rooted failings of the state to observe basic human rights and the statutory rights of detainees.

4.2 Development costs of pre-trial detention

Pre-trial detention involves costs not only for the detainee and their family but also for the wider community, and reflects a poor use of public resources.

Prolonged pre-trial detention imposes a direct cost on the detainees and their families. Families often lose their key breadwinner, resulting in a loss of income. In addition they need to cover the costs of supporting their detained relative, estimated at ranging between \$50 to \$450 USD a month. In Indonesia, where the monthly average earning is between \$200 to \$250 USD, this represents a huge burden for families.

The fieldwork revealed two informal payment structures associated with detention. These vary along the justice chain (as discussed further in Section 5). First, there are costs to the family and the detainee related to the legal process itself. Some of these, such as ‘informal’ payments to law-enforcement officials are perceived as necessary to negotiate and diminish the severity of the sentence. Most of those interviewed considered the possibility of being found innocent very remote, so detainees and their families focus on reducing the duration of both pre-trial detention and of sentencing outcomes in the belief that paying off relevant criminal justice actors will make a difference.⁹

Second, there are severe socio-economic costs for the detainee and the family associated with providing for the detainee’s basic living conditions while in detention. This includes travel costs for the family to get to the detention centre or prison; the cost of visiting the detainee, including the ‘informal fees’ to the detention staff and detention centre prefects (appointed from among the inmates) who administer the visits; costs related to providing the detainee with food and basic needs, and to pay for services within the prison or detention centre community. There are also costs associated with covering health care needs. Most detainees come from low-income households and have low expectations of getting a positive or fair justice outcome from the legal process. Family resources focus on making life in detention bearable. The effects of prolonged detention inevitably lead to a loss of income and to a decline in the living conditions and life prospects of the detainee and other family members. The associated stigma of detention further diminishes the prospects of reintegration into the community and work life for detainees.

Integrating the possibility of alternative options to pre-trial detention, where appropriate, would contribute to mitigating income loss for the family. The lack of

⁸ A new juvenile justice law was passed in July 2012, replacing that of 1997. The law includes some important changes, including raising the age at which a child can be arrested from 8 to 12.

⁹ Also confirmed in the statistical data, see Center for Detention Studies (2014).

Box 1: Costs of pre-trial detention for detainees and their families in Jakarta prisons

Family of inmates in prisons have to allocate between IDR 500,000 (USD 45) to IDR 4,600,000 (USD 440) a month to provide for basic needs of their relative in prison, such as soap, additional foods and shared liquid petroleum gas for cooking. The costs vary depending on the facilities, on what the family can afford and on priority needs. Inmates on police detention in South Kalimantan noted that the monthly cost per month of two meals a day, drinking water, TV contribution, and cleaning service is approximately IDR 1,120,000 rupiahs.

Four of six of the families interviewed underlined the severe impact of covering detention costs on their livelihood. This includes income lost if the detainee is the main breadwinner, and the additional costs covering the needs of the detainee. This often pushes them to resort to the support of extended family members, to liquidate assets, or to borrow money. The other two families continued to run their family businesses, but also suffered a net loss of income.

Source: interviews

alternatives to pre-trial detention within the Indonesian criminal justice system mean that families routinely suffer income loss when their relative is detained.

Accurate data on the wider development costs of excessive pre-trial detention are unavailable. It is clear, however, that lower-income groups are much more

vulnerable to detention in Indonesia, so the costs of the problem affect the poorest sectors disproportionately. In addition, as indicated in following sections, the presence of pre-trial detainees adds costs to the criminal justice system, though it is beyond the scope of this study to establish an estimate of these costs.

5. Wider socio-political and legal context

Following the ‘justice chain’ outlined in Figure 2 above, this section briefly reviews the key features of the wider socio-political and legal context within which the criminal justice chain is embedded in Indonesia.

5.1 Political context

Indonesia has undergone important political and institutional change since 1998, with the fall of the New Order regime under Suharto. Moving away from authoritarian rule towards the normalisation of democratic alternation in government, a number of important institutional and political reforms have taken place. These have affected the balance of power between different interest groups, allowing for an opening up of political space, and the introduction and development of mechanisms of checks and balances, oversight and accountability. In practice, there are mixed readings regarding the depth and breadth of the political and institutional change in Indonesia and what has been achieved in terms of the rule of law and democratic consolidation (see Chaudhuri, 2009 and essays in Bünte and Ufen, 2009).

The legacies of the New Order regime and the practices associated with neo-patrimonial authoritarian rule continue to permeate state agencies, social norms and political practice in many respects. This has an impact on how citizens experience law enforcement and the justice system. Rule of law remains weak, a culture of impunity in public office remains high, and principles of due process and respect for the rights of citizens remain underdeveloped. At the same time, there is no doubt that the reform period since 1999 has resulted in a number of political and institutional change processes that are contributing to reshaping the rules of the game regarding access to political power, decision-making and governance (Harris, 2011; Chaudhuri et al., 2009).

Since 1998, key milestone reforms include: first, the introduction and normalisation of competitive elections as the route to accessing decision-making roles and political power; second, the fact that the legislative branch

has become a meaningful political actor with a say on law-making; and third, a number of reforms aimed at building the rule of law and putting in place mechanisms of accountability and oversight as well as an assortment of anti-corruption measures.

While corruption and impunity remain first-order problems, it is also the case that during this period the range of measures and institutional reforms aimed at addressing these issues potentially constitute the foundations of a system of accountability and oversight and ultimately of the rule of law. These measures include: laws and decrees which step up the instruments and provisions designed to check corruption; measures to improve the state’s capacity to audit the wealth of public officials through the Public Officials Audit Commission (*Komisi Pemeriksa Kekayaan Penyelenggara Negara* – KPKPN); a number of anti-corruption measures intended to speed up court proceedings and to review loopholes in the law; the creation of a Corruption Eradication Commission (KPK); and the creation of a National Ombudsman Commission in 2000 tasked with overseeing probity in public office (Schutte, 2007 and Stockmann, 2007).

There is, however, also growing concern that law enforcement agencies continue to reproduce old practices of militarism, corruption and other forms of abuse of power. The police, for instance, resist the exercise of oversight or wider public criticism, as demonstrated in the recent reaction to investigate a member of National Police Commission (KOMPOLNAS), for making a public statement on corruption within the police (Perdani 2014). More recently a conflict between the Corruption Eradication Commission (KPK) and the Indonesian National Police brought attention to the discretionary powers of the police, resulting in a public outcry¹⁰.

At the same time, despite the continuities of neo-patrimonialism and authoritarian structures, there have been some important changes in state–society relations and in wider social expectations about the potential merits of democratic governance, and advances in probity in public office.

10 <http://www.thejakartapost.com/news/2015/02/18/kpk-vs-polri-children-light-and-children-darkness.html>

5.2 Legal framework, and changing landscape in the criminal justice and corrections system

The political changes in Indonesia since 1998 have already included a range of reform efforts aimed at building up the rule of law and justice provision, through changes in the justice and law enforcement mechanisms. Along with the fight against corruption, the rule of law has been high on the public and political agenda, although new measures, laws and institutions have been far from effective in practice in many cases.

Key changes intended to improve the justice system include the following: the affirmation of the principle of the separation of powers in 1999; the creation of the Human Rights Commission in 1999 (already provided for in 1993, and a law of 2008 has added to its functions); the establishment of a Constitutional Court in 2003 which has begun to play a meaningful role in Indonesian politics through judicial review; the creation of a Judicial Commission (2004) mandated to oversee the conduct and selection of judges.

The criminal justice system, inherited from the Dutch, is administered through the 1981 Criminal Procedures Code (KUHAP). Articles 20-30 of KUHAP in particular are relevant for dictating the conditions and grounds for arrest and detention. There have been limited reforms to KUHAP thus far. A draft Bill to reform the KUHAP has been tabled in the legislative branch since 2010, and initiated by the government, that would introduce a more transparent detention process requiring a judicial hearing within 24 hours of arrest (in contrast to the current potential 110 days of pre-adjudication). The Bill, however, has rapidly become a battlefield between the police and other law enforcement agencies, not least because it touches upon the balance of power between different interests in the criminal justice system.

The Bill is nested in a wider political and legal context and shifting reform process that reflects a less than cohesive approach to addressing the shortcomings of the criminal justice system. In the current law, there are a number of provisions that, in principle, commit law enforcement bodies to ensuring due process in the administration of criminal justice; in practice the actual treatment of the prison population is deeply problematic, and this is exacerbated by prolonged pre-trial detention and conditions of overcrowding. On paper, pre-trial detainees in Indonesia benefit from the presumption of innocence; in practice, once an individual enters the criminal justice system the presumption of innocence is overwhelmingly denied.

At the same time a number of changes underway since 1998 have been altering how the criminal justice system operates. Key measures in relation to the criminal justice system (on the roles of different law-enforcement bodies and on criminal justice precepts) include the following:

- The third amendment of the 1945 Constitution, article 28 (i) enshrined the right to the presumption of innocence. This was reaffirmed in the 1999 Human Rights Law which states that all individuals in the criminal justice system have the right to the presumption of innocence (as also echoed in the KUHAP).
- The Legal Aid Law of 2011 grants the right to legal aid to all citizens, for private, criminal and state administrative cases (Law no. 16/2011).
- The 2002 Law on Child Protection already provides for juveniles to be entitled to legal aid. The law of 2012 on the Juvenile Criminal Justice System states that minors in detention can only be held in temporary juvenile correctional facilities and that the conditions of detention must consider the physical and psychological wellbeing and development of the minor (as well as the social and public interest).
- The National Police Regulation of 2012 on Criminal Investigation sets out conditions for the treatment of adult, women and juvenile detainees in keeping with principles of due process.
- The Indonesian Criminal Code (KUHP) continues to recognise only three types of penalty: imprisonment, fines and the death penalty. The Supreme Court has issued a regulation (PERMA No 2/2012) which raises the threshold for what constitutes an arrestable offence from 2.5 US cents to \$250. However the Police and Prosecutor have stated they are not bound by the Supreme Court Regulation. Non-custodial sentences have begun to feature since 2010 when drug rehabilitation was introduced as an option under the Law on Narcotics. Mostly, however, prosecutors and judges tend not to apply this option.

Measures specifically aimed at reducing overcrowding and overstaying include the following (Sudaryono, 2013):

- A programme led by the DGC to reduce overcrowding allowed for relaxing parole requirements or the reduction of sentences starting after 2008. This resulted in the release of a number of inmates, but became discredited for two reasons. First, in the absence of rehabilitation programmes the re-offending risk of released inmates has not been really addressed. Second, there was a perception that some of those benefiting from this had been charged for corruption or terrorism offences.
- New prisons have been built. Efforts have been made by the government to address the issue by constructing 32 new prisons and releasing 25,000 inmates between 2009 and 2011 (DGC Annual Report, 2011). However the total number of prisoners increased from 119,000 to 161,000 in the same period (Correction Database System, SDP v2, 2013).
- In 2010 the Supreme Court issued a circular letter (SEMA No 2/2010) ordering court clerks to expedite sending conviction verdicts to the prosecutor's office

as required by Criminal Procedure Code. But in the absence of oversight and sanctions, follow-up has proved problematic (Sudaryono, 2013a). Moreover, the circular is not legally binding across the criminal justice chain and is relevant only for judges.

- A directive by the Ministry of Law and Human rights obliges prison wardens to release overstaying prisoners and to refuse to take in detainees sent by law enforcement bodies without the appropriate documentation (Sudaryono, 2013b). Our fieldwork found that this is not always applied in practice, and particularly in appeal cases where an inmate has received a sentence from a lower court that is longer than the current detention period.
- There have been organisational and process-related changes within the DGC. This includes, the creation of a database and computer system, the SDP (Correction Database System), installed throughout all Indonesian prison and detention centres, that enables detainees to track where their case is in the justice chain, when their detention warrant expires and with which law enforcement agency. This has been available since 2011 and has both considerably transformed the corrections system's administrative capacity and enabled a centralised and readily accessible corrections data system that gives different types of users access to case information. Users include detainees and inmates who previously had very limited access to their documentation or had no ability to track where their case was in the criminal justice chain.
- The Bill to reform KUHAP represents an important attempt to overhaul the criminal justice system, and it continues to be an important objective for those actors aiming to improve due process and the experience of prison populations. Notably, in relation to overcrowding, it should bring in other options to detention. In relation to pre-trial detention, the Bill initially prohibited the police from holding a detainee for more than 24 hours (as opposed to the current discretionary 60 days) before a pre-detention hearing. But in the recent legislative deliberation this has been prolonged to 5 x 24 hours.

Additional measures include, first, reforms to the office of the Attorney General (at the head of the prosecution system) aimed at ensuring more effective internal supervision and oversight mechanisms over the procedural aspects of detention. According to the Ombudsman's office (and confirmed in fieldwork interviews), most of the overstaying cases in 2012 were due to the late submission of arrest warrants by prosecutors.

There has also been a strengthening of oversight of police work through a number of mechanisms. First, the establishment of the National Police Commission (KOMPOLNAS) in 2006 has been important (Perdani, 2013). Its mandate is to advise the president on national

police policy and its implementation. Citizens have taken cases to the KOMPOLNAS regarding police conduct. While it has leverage within the police, however, it has limited disciplinary powers, providing only recommendations to the President and the Police Chief.

A second mechanism is the National Human Rights Commission, which has the authority to conduct enquiries into human rights violations. There are a number of cases of ill treatment of inmates during police detention. However recent friction within Komnas HAM has promoted a poor public image of the institution (Mahbub, 2013).

A third oversight mechanism is the Ombudsman of the Republic of Indonesia, recently strengthened to deal with the maladministration in public office. The Ombudsman has greater powers than KOMPOLNAS but its areas of competence in the criminal justice system are confined to the administrative aspects of detention (UU No 37/2008).

Thus, some measures have been aimed at addressing the problem of overcrowding and overstaying, others at improving the chances for due process of detainees to be observed. Others in theory contribute to building up mechanisms of oversight and accountability over the general conduct of law enforcement officials.

There are also competing priorities and objectives reflected in some of the reforms. For instance, there have been regulatory changes, such as the Supreme Court Regulation No 2/2012, that have altered the threshold of what constitutes an arrestable offence, aimed at limiting the number of detainees. But at the same time, tough new anti-terrorism legislation, heightening police powers in their investigation, have encouraged 'tough on crime' attitudes in the name of public and national security; these have implications for due process and undermine the principle of presumption of innocence (Law on Terrorism No 15/2003, Law on Narcotics No 35/2009, and others.)

The above measures all constitute a cumulative body of new norms and mechanisms that over time have the potential to change (and in some cases are already changing – see Section 5) incentive structures within the workings of the criminal justice system. Some may contribute to improving due process and weakening the drivers of excessive pre-trial detention.

It is not possible to speak of an integrated approach to building the rule of law or reforming the criminal justice system. Segmented reforms fuelled a sense of a fragmented criminal justice system. This is made worse by the fact that the different law enforcement bodies compete for resources. The interests of the different actors who benefit from ineffective oversight and accountability in the criminal justice system represent robust sources of resistance to the improvement of due process and transparency in the criminal justice system, and in how corrections centres work in practice.

Some of the changes are recent and there is a need for a longer-term horizon to be able to assess their impact. Progress is slow, the rule of law remains weak, and

legacies of authoritarian rule persist in the political and institutional order of contemporary Indonesia. This is reflected, for instance, in police attitudes towards crime prevention and law and order, and the treatment that suspects and detainees are perceived to deserve.

Finally, if the national reform process regarding the justice system is itself fragmented, this is not helped by the approach of international actors involved in supporting the rule of law. For instance, international donors tend to cluster support to judicial and prosecution reform into 'rule of law' programming, while police reform tends to fall under 'security sector reform'. Moreover, donors often map reform processes in ways that mirror their own justice system, with insufficient consideration of the legal traditions in the countries they work in. These negative features of the substantial donor support that the Indonesian criminal justice system receives help to further fragment the country's own weakly coordinated reforms.

5.3 Wider social norms

In any society, social norms, attitudes and belief systems are an important factor in shaping the treatment of prison populations. The tough law enforcement approach of the Indonesian police – rooted in an authoritarian military tradition – is itself a reflection of (and reinforces) wider social norms, beliefs and attitudes about crime, punishment and law and order. Public attitudes towards the prison population reflect a number of factors.

First, there prevails in Indonesia a 'tough on crime' approach, exacerbated by public perceptions about the deterioration of public security and by anti-narcotics and anti-corruption campaigns. This fuels pressure on political elites to adopt a hard-line discourse towards the prison population, and for law enforcement bodies to appear tough on all suspects. The different law enforcement and criminal justice system agents interviewed expressed the challenges associated with seeming to look soft on criminals. High arrest, high conviction rates and harsh sentencing are rewarded institutionally and socially, fuelling institutional incentives to incarcerate.

Second, and associated with this, is the chronic public distrust toward the police and prosecutors if they are not seen to be actively detaining suspects. Failure to detain is seen as ineffective law enforcement, creating post-facto incentives to detain with a view to securing the community's trust.

Third, the principle of the presumption of innocence is not only weak in the criminal justice system; it is echoed in wider social attitudes. Once an adult or minor has entered the criminal justice system through arrest, there is a high level of stigmatisation which has negative consequences both on the chances of finding for the innocence of the detainee and for their eventual reintegration into the community. Detention in practice is already considered part of punishment – even in the pre-trial stage. The stigma

for juveniles seems especially devastating in terms of their options for rehabilitation. Such attitudes are reinforced by the poor distinction between pre-trial detainees (in practice presumed guilty) and convicted prisoners in the minds of the wider population.

Fourth, an argument made in defence of the use of detention is that it provides a form of 'protection' for suspects where there is a risk of community retaliation or vigilante reaction. This is particularly the case in rural settings where community life is stronger than in urban settings. Thus, it is not the merit of the case that reinforces excessive pre-trial detention, but rather the presumption of guilt reflected in wider social norms.

The focus in the last decade on high-level corruption crimes and the arrest of high public officials and celebrities has contributed to unprecedented levels of media attention on prison life (Mann, 2013). Most notably, increased public interest in prison life is the result of reporting on the privileges that wealthier inmates can pay for to improve their personal experience of detention, generating public outrage about the informal payment systems of bribes, influence and privilege that permeate the criminal justice system. Such media attention has in any event contributed to making visible the realities of prison life, including the harsh conditions associated with excessive overcrowding.

Corruption is widely condemned in Indonesian society, but equally there is a widespread belief that bribery, undue influence and corruption prevail at all levels of public office (Schutte, 2007). Moreover, there is a widely shared assumption that bribery and pay-offs obtain results. This assumption is prevalent within the criminal justice system, and reflected in the different informal payment systems that feature in prison life. Such beliefs contribute to shaping the incentive structures and power relations that characterise detention and prison life from the moment of arrest. Detainees widely believe, for instance, that paying off law enforcement agents will result in a better legal outcome than if they seek legal counsel. The latter course, they believe, is likely to annoy officials and lead to harsher sentencing. A review of 36 cases (see Annex 1) of comparable drugs-related cases reveals that having legal counsel does not substantially make a difference to detainees' sentencing prospects. There is a need for more research on this.

At the same time, since the end of Suharto's regime, an active civil society and legal aid community has emerged throughout the country. This activism is contributing to change in different ways. First, it gives visibility to the harsh realities of prison life and the operation of the criminal justice system, raising awareness about the shortcomings of the corrections system and the problems associated with the lack of due process, overcrowding and overstaying – including in terms of the practical realities of pre-trial detention. Second, these actors are making a case for the need to reform the criminal justice and prisons

system, not only for their own sake but also because the failure to do so is costly to the Indonesian state and society.

5.4 Summary: implications of the wider social, political and legal context

In sum:

- The process of institutional and political change in Indonesia since 1998 has opened up the political space for reform processes. Over time these can constitute the foundations for accountable and rule-bound government and for rights-based understandings of state–society relations, including in the administration of criminal justice.
- At the same time, the reform processes has been fragmented, resulting in a criminal justice system where the different law enforcement bodies that compete for resources are disconnected and poorly incentivised to work together. There is also active resistance to building up oversight and accountability mechanisms
- There are political and institutional challenges associated with the legacies of authoritarian rule and resistance to practices of rule of law, accountability and due process, not least because of the implications for entrenched interest structures at different levels of the political and state establishment, including in the law enforcement bodies. Such resistance is manifested in political opposition to reform efforts (e.g. reforming KUHAP) or passive non-compliance with new laws and regulations by law-enforcement actors.
- The wider environment of socio-cultural norms, beliefs and attitudes to the prison population is not especially supportive of a culture of human rights and due process. In particular, prison populations are not seen as citizens with rights, and a punitive attitude towards detainees prevails among the population.
- There are also reform advocates among law practitioners, within law-enforcement bodies and in some political elites that support change. Such coalitions of change are critical and can contribute to articulating solutions and recommendations for reform.

6. Interests, incentives and power structures along the criminal justice chain

As set out above, the criminal justice system is regulated through the KUHAP, which sets out the grounds for detention, the types of detention and the competencies of the different law enforcement actors in terms of investigation, prosecution and adjudication. Detention orders can only be issued when there is ‘sufficient evidence’ that a criminal act has been committed – although there is limited explanation of what this means. In keeping with international norms, KUHAP specifies that detention is warranted when there is a risk that the suspect will abscond, will damage or destroy evidence, or will repeat a criminal act.

Detention in Indonesia, regulated in articles 20-31 of KUHAP, authorises a number of law enforcement agencies to conduct arrests. There are three stages of detention: detention as part of the investigative process (undertaken by the police); detention by the prosecution; and detention by the court system (including District Court, High Court and Supreme Court judges).

Pre-trial detention in Indonesia includes the period from the point of arrest to the point when the court hearing process begins – effectively this refers in Indonesia to ‘pre-adjudication’. For this study, therefore, we focus on the investigative and prosecution stages, but not the trial process. However, the fieldwork also took note, as relevant, of the experience of the detainee awaiting the court’s verdict and sentencing. During this period there are three pre-sentencing stages:

1. At the investigation phase, detention orders can be issued for up to 20 days and extendible to 40 (by the police as investigator). If during this time the investigation is not concluded the detainee must be released.
2. On conclusion of the investigation the file is handed over to the prosecutor, who takes over the investigation. At this stage detention can be prolonged to up to 50 days, as the prosecutor completes the investigation and compiles the case to be taken to court. During the

investigation and prosecution stages, then, detainees can be held for up to 110 days (ICJR, 2012).

3. Once the case has been handed to the District Court, judges may extend detention during the hearing period to up to 90 days. At this point pre-trial detainees may have been in detention for up to 200 days.

Upon sentencing, there may be an appeal by the detainee or by the prosecution to the High Court or the Supreme Court. It is thus possible for a suspect to remain in detention before final judgment for up to 200 additional days. By the end of the criminal justice process, detainees can have been held for up to 400 days.

The key actors in this process are: the detainees and their families; the private lawyers, including pro-bono counsel or state-provided legal aid (which needs to be certified through the new legal aid architecture); the investigative and arresting police officers; the prosecution officials and their clerks; judges in the court; and the corrections service actors, including detention-centre staff.

Management of the detention process

The conduct of corrections system staff is itself central to the experience of detainees. Prisons are managed by the DGC, who sits within the Ministry of Justice and Human Rights. Within the justice and law enforcement system the DGC has been one of the most neglected institutions, until recently, in terms of reform, capacity development and investment efforts. A key challenge has been that, until 2014 the DGC had no administrative responsibility over the prisons system. This included a lack of planning and budgeting power and decision-making authority over human resource management and resource allocation. Rather, the DGC was responsible for developing non-legally-binding technical guidance. This situation left prisons under the weak control and supervision of the Inspectorate General of the Ministry (a separate branch within the Ministry), which has a limited understanding of the issues of overstaying and pre-trial detention. Thus

the DGC was unable to implement or follow-up on the application of new policies or directives issued in relation to pre-trial detention.¹¹

Since the DGC has been managing the SDP database system rolled out in 2011, this had enabled the office to become more accurate and to have updated information from prisons. This enables more information on prisons budget submission, and the monthly implementation report. At the start of the financial year of 2014/15 the DGC was given the authority to approve the budget submitted by prisons to the secretariat general of the Ministry, which means that the DGC can now implement policies more effectively.

6.1 Police detention/investigation

Looking more closely at the police investigation phase and detention during the prosecution phase enables a more detailed analysis of what drives the problem of overstaying and excessive use of pre-trial detention. Here the key actors include the police, the prosecutor, legal counsel (although the vast majority of detainees choose not to use legal counsel) and the detainee and their family.

6.1.1 Drivers of pre-trial detention and overstaying

The law (KUHAP, General Explanation, Article 3 (c)) provides for the principle of presumption of innocence and for the observation of due process. Detainees have the right to legal counsel (reaffirmed in the new Legal Aid Law) while torture is inadmissible by law. In practice, however, fieldwork overwhelmingly confirmed that once an arrest has been committed the system treats detainees as guilty. The burden of proof lies, in reality, with the detainee. In addition, police investigation is in practice characterised by heavy-handed methods towards the detainee with a view to extracting confessions which are then admissible for the case file.

Below we examine the range of factors that contribute to excessive pre-trial detention within the criminal justice process.

Legal aspects

The law itself is problematic. Under KUHAP, the police have full, unchecked authority to detain a person for up to 60 days. There is a set of detention criteria for detaining someone, but there is no mechanism to scrutinise or challenge such power. KUHAP allows for alternatives to detention, including house arrest, city arrest and suspension of detention, but it is silent on how or when to apply these alternative mechanisms, leaving this as a matter of choice for the police. In practice, as reported by lawyers, recourse to alternatives to detention is a matter of negotiation.

A 'tough on crime' policy bearing, which has increased in the last decade, has included raising the number of new offences for which there is a sentence of over five years' imprisonment. This has considerably strengthened police powers to detain people. Apart from KUHAP (Criminal Code), until 2014, there were 443 offences whose maximum sentence is more than five years.¹² According to KUHAP, those suspected of such offences should be detained.

Importantly, the current KUHAP Bill does not introduce new alternatives to detention. It does, however, strengthen judicial oversight over police, while charges would need to be presented to the court within 24 hours of detention.

Finally, one interviewee mentioned a police regulation of 2011 which restricted police discretion in detaining suspects. One of the requirements was that preliminary evidence in a case should be examined and approved by the head of police crime unit before detention could take place. However, this was deemed inefficient and was overturned in 2013.

Budgetary, administrative and organisational factors

It is evident that a strong incentive for arrests comes from the budgetary needs of the police stations. Budget income for police stations is associated with meeting arrest and conviction targets. This has the direct effect of creating 'arrest' targets at the individual level for police officers, whose job appraisal and career prospects are associated with meeting them. Police budgets are also based on the type and severity of crime, with police stations dealing with more serious crimes receiving higher budgets. This contributes to the tendency to inflate the severity of cases (for instance, often from drug use to drug possession, which carries a harsher penalty). Budgets are set based on prediction of arrests, so that failure to achieve these targets reduces the next annual budget.

But while this contributes to explaining heightened numbers of arrest and more severe charges than might be warranted, there are other issues that explain prolonged stays in police detention. Here, two relevant financial incentives include: first, that the cost system for holding detainees involves the police receiving a state budget allocation of 35,000 rupiah per detainee per day for meals for up to 60 days (compared to just 6,000 rupiah received by the detention centre); and second the performance of the police unit is measured on the number of cases they have handled. This potentially contributes to incentivising both the prolonged length of stay of detainees in police detention, as well as the police tendency to prefer detention to other options to custody.

11 See Regulation of the Ministry of Justice and Human Rights No. M.HH-05.OT.01.01 of 2010 on the Organization and Operational Procedures Ministry of Justice And Human Rights, and the Regulation of the Ministry of Justice and Human Rights No. 19 of 2013 on the Amendment Regulation of the Minister of Law and Human Rights No. M.HH-05.OT.01.01 Year 2010.

12 *Briefing Paper*, The Note For Memorial Day against torture International 2014: 16 Years After the Ratification of the Convention Against Torture in Indonesia, 'Working Group on the Advocacy against Torture 2014', page 19. See also at research results of ICJR 2011.

In addition, as noted in separate focus group discussions, there is generally poor coordination between the police and the prosecutor in terms of how cases are handled – through the investigation and into the prosecution stages. Each law enforcement body blames the other for the prolongation of the pre-trial detention period. The police, for instance, noted that the prosecutor often simply returns the case to the police every time there is no district attorney available to handle the case. On their part, the prosecutors complained about the poor quality of the investigation stage, resulting in cases which are insufficiently developed. Either way, detainees end up with pre-trial detention of near the maximum period.

Informal rules and social norms relating to the investigation process

In practice the police have great discretionary powers over how the investigative process takes place. Detainees are typically held for up to the 60 days allowed by the system, which far exceeds international standards. Interviews with detainees confirmed that in practice these days are not really used for investigative purposes, as mostly they were interviewed only a few times, mostly soon after detention. There is no evident reason, therefore, in terms of the investigation needs for the prolonged detention at this stage of the justice chain.

The use of physical abuse to obtain confessions from detainees remains prevalent and continues to be a key component in making the case for conviction. Physical abuse in police detention featured recurrently in interviews as standard practice, including for juveniles. At the same time the law guarantees access to legal counsel ('In the interests of defence, the suspect or the accused is entitled to legal aid from one or more legal counsel during the time and at every level of the examination, according to the ordinances specified in this law' – Article 54 KUHAP).

The Legal Aid law of 2011 (Art 3) affirms a number of principles including the right to (and guaranteed provision of) legal aid. In practice most detainees do not have a lawyer present during questioning: according to ICJR (2012), only 2% of detainees have legal counsel present during police questioning. The police stress that this is a choice, but there is a widespread belief among prisoners that resorting to legal counsel is likely to worsen their experience in police detention and to increase the severity of the charges.

The referral system between the investigative and prosecution stages also seems deeply problematic. There are no incentives for either the police or prosecution bodies to expedite progress in the case. The police blame the prosecution service for the delays. At the same time, interviews indicated that prosecutors feel that the police tend not to present strong enough cases, which means they are often returned to the investigative phase for more information. There are no incentives on the part of the prosecution to accept a poorly developed case as it weakens their own position in advancing the case.

Prosecutors have similar rewards systems in terms of career advancement that mean that success in securing harsh convictions is rewarded.

Of interest is that, for crimes that carry a sentence of five years or more (where there is a statutory requirement for access to legal counsel), the paperwork associated with the police investigation is complied with diligently: the investigation transcript is accompanied with the attorney appointee letter from the police (which states that legal counsel was made available), a letter by the detainee choosing to refuse legal aid, and a letter from legal counsel that they have received all documents, and thus that all due diligence has been done. Completing the paperwork, moreover, is not problematic because detainees believe they will be better off without legal counsel – so letters rejecting legal counsel are not hard to obtain. This concern with formalities, however, suggests an awareness of the need to appear to be observing the principle of due process, and a concern with the consequences of failing to do so.

Overall the police remain a formidable political power, still well positioned to resist legal reform of the criminal justice process that would increase oversight or undermine their rent-seeking interests. The 'tough on crime' stance and military culture within the organisation remains strong, and external oversight over police practice is underdeveloped. Within the criminal justice chain, what happens in the investigation phase is instrumental in determining the outcome of the case. Thus, from the start the system is stacked to both incentivise excessive pre-trial detention and to ensure that cases result in unduly severe charges.

At the same time, there are no incentives for the police (or the prosecutors) to facilitate access to legal counsel. Interviews with detainees reveal that they are actively discouraged from using a lawyer. It is possible that improved access to legal aid can begin to alter this preference as well as the balance of power within the police detention process, which is where detainees experience the highest degree of physical abuse.

Nature of oversight and accountability mechanisms

Fieldwork confirmed the weak presence of oversight or accountability during police investigation, either by the courts or the corrections system. Oversight by external bodies remains mostly lacking and there is a lack of information about both police cell conditions and how the investigation is conducted in practice. The oversight mechanisms that do exist are inadequate.

Article 77 of KUHAP provides for authorities of the court to administer the 'pre-trial hearing' mechanism. However, as revealed in recent ICJR research (ICJR, 2014), this mechanism does not allow for a full consideration of the merits of the case. Rather, the pre-trial hearing is limited to considering whether the administrative process surrounding the decision to detain is in keeping with the law.

Formally, there are three external commissions which can monitor the police, but none have the power to subpoena or sanction them and can do no more than issue recommendations. First, KOMPOLNAS can invite the head of police responsible for the detention to give an explanation. However KOMPOLNAS can only issue recommendations. Second, the Ombudsman has ‘soft power’ to approach the different actors, based on their goal of pushing the Supreme Court to declare itself on overstaying issues – as part of their mandate. The Ombudsman can only pass down recommendations. Even then, the Supreme Court can also only issue recommendations – and these are mostly directed at the prosecutor and the judges, rarely the police, including because most complaints are about the extension of the detention by the prosecution. Finally Komnas HAM (the Human Rights Commission) can be called upon to observe if there are basic rights violations, but can also only provide recommendations.

In addition the police have their own internal oversight mechanisms in place. This includes the provision for a detainee to report misconduct to a superior police officer, but this is predictably ineffective and not used in practice.

Mostly, these remain weak mechanisms of accountability and oversight.

The role and influence of other stakeholders in the investigation phase

Legal counsel in practice does not have an effective presence in the investigative phase. Interviews confirmed that police questioning mostly takes place in the absence of lawyers. The limited access to police detention means that detainees are especially vulnerable to torture and extortion at this stage of the criminal justice chain. In the current political economy conditions, opportunities to support detainees directly are extremely limited during police detention.

However, changes in the legal aid system are beginning to provide more statutory support for legal counsel to have more presence at this stage of the investigation. There is a view among legal aid lawyers that awareness raising and advocacy campaigns can be helpful, and that this should include capacity development for police investigators with a view to contributing to changing attitudes towards detainees. The potential effectiveness of this approach could not be explored within the scope of the fieldwork, but the focus group meeting with the police signalled a potential window of opportunity for buy-in among younger generations of officers motivated by the desire to improve their public image.

6.1.2 Opportunities for change and recommendations for action

The opportunities to alter the incentive structures within the investigation process are highly constrained by both the criminal justice dynamics described above and the wider political economy conditions. These include the on-going

resilience of the political power of the police force within the political system, and the weight of social norms which reflect high levels of public tolerance (and even approval) towards poor treatment of detainees and hard-line police conduct.

However, there are also some piecemeal windows of opportunity for change here in relation to the ‘stop-start’ process of legal and criminal process related reforms, and growing demand for ending venial conduct in the exercise of public office, including in the criminal justice system.

- The legal framework remains deeply problematic, but to the extent that there are reform efforts underway there are opportunities to advance change on process issues. Many important changes are already contemplated in the KUHAP reform Bill. These include:
 - Changes in the police detention process to shorten the possible detention period and to ensure greater judicial scrutiny of this. In the most recent version of the Bill, the police have discretion to detain someone for up to five days – which is still more than international standard of 24 hours, but less than current practice. After that the court should be able to hear the case and issue a warrant for further detention.
 - Changes regarding and implementation of alternatives to detention. There are currently no alternatives to detention in the current KUHAP Bill, but incorporating some would offer scope for helping to reduce overcrowding.
- Increasing transparency and accountability regarding the conditions of police detention conditions continues to be an important objective. Fieldwork revealed that in North Sumatra one police cell holds the high number of 230 people. However, data on overcrowding in police detention cells remains inaccessible. A recent request for public information submitted by ICJR under the Freedom of Information Law to the national police did receive a response, though: the police stated that every year there are 92,000 offenders processed (detained and released), and the total number of detainees in police detention cells in December 2013 was 19,000 (ICJR Public Information request to INP: 2014). Changes and action to advance transparency and accountability, including by addressing current incentive structures, could include:
 - Altering the logic of the reward system of detention. This requires building in incentives not to reward the severity of the charge, but rather to encourage a broad use of different detention options (such as house arrest). Such a change requires identifying reformers within the police force and building strategic alliances that can begin to nurture police ‘buy-in’ and to incentivise attitudinal and behavioural change within the police corps.

- Lobbying for more information and transparency on the conditions in prison cells at police detention centres.
- Using accountability mechanisms outside the police, such as exploring options to activate a constitutional review of police cell conditions.
- The new legal aid architecture constitutes an important opportunity in the medium term. Given the current constraints on working directly with detainees to make full use of the law, alternative pathways to achieve change include some of the following:
 - Working with the families of detainees to raise awareness about detainees' rights and the merits of resorting to legal counsel, including at the investigation phase. This can contribute to changing prevailing perceptions among the prisoners about the value of legal counsel.
 - Given that in many respects the case is sealed at the investigation stage, lobbying for legal aid lawyers to have physical presence as a matter of course in police detention centres could help alter the balance of power in favour of the detainees' rights and the principle of due process. This could include exploring the viability of mechanisms to increase access to legal counsel.

Notwithstanding the challenge of changing existing incentive structures for the police investigators, there is a strong case for building efforts to cultivate the buy-in of the police at different points of the reform effort and at different levels of the police hierarchy to reduce overcrowding generally, improve due process and specifically to address the excesses of pre-trial detention at the investigative stage. The current political context moreover is potentially an opportunity to mobilise political capital around such efforts, including among more reform-minded police officers keen to prove their rule of law credentials and improve their public image.

6.2 Detention period

The second 'link' of the chain includes what happens during the prosecution phase and once the detainee has been transferred from the police detention to a detention centre or pre-trial cell in a prison.

6.2.1 Challenges and drivers

Once the police investigation is completed and the case has passed to the prosecutor, the latter has up to seven days to request clarification or proceed with putting the case together to present to the courts. At that stage the detainee is transferred from police detention to the detention centre or a pre-trial prison cell to wait for the prosecutor to finalise the case, and therefore trial.

Here the key stakeholders include: the detainee and their family; those actors involved in finalising the investigation

and the prosecution process (the prosecution, the police, and legal counsel); the range of actors in detention centres that shape the conditions and experience of detention, including detention centre staff (employees of the corrections system under the DGC) and registration staff; and the legal aid organisations and supporting CSOs that can make a difference to the lives of detainees, including paralegal organisations.

Legal aspects

As with the investigative period, KUHAP already allows for some alternative options to detention (house arrest, city arrest or suspended detention), but the mechanisms for deciding on this in the current law are not clear. This has created huge variations in practice, particularly with regard to the grounds and criteria for granting alternatives to detention that are invoked, and the system is open to corruption.

Budgetary, administrative, organisational issues

The corrections system has a number of budgetary issues that shape incentives regarding the reality of pre-trial detention and prison overcrowding more generally. The long chain of bureaucracy and the limited budget in the corrections system has left prisons unable to adapt the budget to cope with current number of inmates. This has created a situation of prisons building up debts to a range of service suppliers (particularly food suppliers). To settle the debt these suppliers can only deal with the Secretariat General's Finance Bureau of the Ministry as the budget holder. The complexities of navigating the payments bureaucracy creates room for corruption. Research by CDS (in support of the development of the Corrections Blueprint in 2008) found that some suppliers admitted to receiving less payment than what they sign for in the receipt.

A key challenge during this detention stage is that detention centre staff have limited scope to refuse entry to a detainee, unlike the police or prosecutors who can decide whether to proceed or not with a criminal case. Detention centres face a constant pressure to accommodate the influx of inmates sent by other law enforcement agencies; and at the same time, overcrowding in the detention centres poses a security risk, as highlighted in interviews. This could be better regulated, as noted in interviews, in order to provide scope for wardens to refuse incoming inmates.

The SDP database has considerably changed both the administrative tasks of registration, the options for following the case in the detention centre and the availability of information for detainees on where their case is in the system. In making case information accessible, the database is potentially an important game-changer in the criminal justice system. It not only alters the dynamics of case-flow management, but also alters the balance of power between different actors in the justice chain, with the prime beneficiary being the detainee in a number of ways.

First, detainees' dependency on lawyers and detention centre staff for information ends, and with it a potential

source of informal rent creation for these actors. Of course, informal payments structures adapt to change, and rents for detention centre staff may now include informal payments for access to the computer terminal.

Second, the data system also now makes clear where cases are delayed, and which law enforcement agency is responsible for delays. This increased transparency may over time create reputational costs for different law enforcement agencies (such as the prosecutors), thus resulting in speedier case management (although it was not possible to verify this within the scope of this study). Importantly, being able to point to the blockages in case management through the database represents an important opportunity for reformers.

Interviews indicated that management staff in detention centres overall were more committed and incentivised than other law enforcement actors to reducing overcrowding generally, and pre-trial detention-related overstaying specifically, for a number of reasons. These include the strain that overcrowding brings on limited resources and related security risks and the increasing reputational costs. It also helps that there is reform-minded leadership at the DGC level, where there is currently a heightened commitment to addressing issues of overcrowding and pre-trial detention.

In relation to detention centres, fieldwork revealed significant variation in terms of how important an issue overcrowding is for detention centre and prison staff and management. For instance, in Salemba it is clear that overcrowding related to pre-trial detention was the main security or resource concern. Indeed, there have been several riots, particularly in the larger prisons where inmates have organised themselves in gangs. Overcrowding in these conditions presents a security risk, and the incentives to address overcrowding are strong for detention centre and prison staff.

Third, in all detention centres, the lack of coordination between police, prosecutors and courts was perceived to be a major driver of prolonged pre-trial detention, with each blaming the other for delays.

Finally, it is also worth noting how parole is used to reduce overcrowding. Prison authorities rely on the use of parole to ease the pressure of overcrowding. Although pre-trial detainees do not directly benefit from this, they do benefit from less overcrowding in the prison environment. There has been a relaxation of the procedure and there is now a digitalised process for applying for parole online. This has cut the application period down from 2-3 months to three weeks, speeding up release. However there are three risks associated with the parole initiative: first the absence of a system of assessment and classification to review the risk of re-offending; second, the lack of effective rehabilitation programme to reduce the re-offending risk; and third, an inability to monitor and provide in-community programmes for the parolee. Expedited parole may help reduce overcrowding in the short run, but there

is a need to reduce risks to the public and to support the rehabilitation process of parolees.

Informal rules and practices, and prevailing social norms

There are a number of ‘push factors’ associated with wider social norms and general attitudes towards prison populations, as well as informal rules in how prisons are run, that contribute to reaffirming practices that prolong pre-trial detention and overstaying.

First, it was confirmed in interviews that a prevailing attitude towards detainees (within the community and even, in some cases, in the families of detainees) is to believe in the culpability of the suspect from the start. Detention awaiting trial, then, is already perceived as a form of punishment. The trial and sentencing merely legalises and confirms this. The problem with this is that any seemingly early decision to release the detainee will be seen as an act of corruption by the community, who will believe that the police and prosecutor were bribed to release suspects. The police and prosecutors interviewed in fieldwork stressed that even if they think that the suspect should not be detained, if the person is released the community or supervisor will assume that a bribe was paid. It was noted that judges could also be suspected of bribes in the face of perceived leniency. Of course, interviews provide partial accounts of a more complex wider reality, but such perceptions are important.

Second, the lack of resources tends to result in extending detention periods in advance of sentencing. Judges and prosecutors feel that they do not have enough resources for risk assessment, for instance related to flight risk. Thus they mostly opt to delay their decision. In one interview, an example was provided of a prosecutor in South Jakarta who was suspended because he decided not to continue the detention when the suspect did not appear in court. So while the prosecutor had not in fact received a bribe, the community’s suspicion that he had led to his suspension. To be seen to be lenient is thus perceived as too high a risk for prosecutors and judges.

Third, internal hierarchies reinforce not penalising overstaying – rather the reverse. For instance, prosecutors need to present their case before a panel of their supervisors to ensure that the indictment is in keeping with the accepted standard. If a person has been in detention for two months, the indictment will typically be for a minimum of two months. Thus, the rule in practice is that indictments need to at least match time served, and failure to apply this principle will be corrected by supervisors. Indictments therefore do not respond to the merits of the case, but to the need to protect the reputation of the law enforcement bodies.

In the hearing itself judges, in turn, cannot be seen to be more lenient than the prosecutors. It is in the interests of both the courts and the prosecution service to confirm each other’s position on any case to avoid appeal or requests for further

justification of the case. If the judge delivers a sentence that is more lenient than the indictment suggests it undermines the performance of the prosecutor, who will then appeal.

Fourth, then, there is an alignment of interests among the players in the system to recognise time served in pre-trial detention as the minimum sentence that can be passed. In interviews, judges noted that for some petty crimes, while a sentence of 15 days is sufficient, if the offender has been in detention for a longer period the court practice is for sentencing to at least match time served. That way, overstaying does not result in any law enforcement actor being penalised – rather the system adapts to accommodate them at the expense of the detainee. If the offender does not have legal counsel, these practices, moreover, are not put to scrutiny. Thus, at the prosecution and court stages of the criminal justice chain, using legal counsel is unsurprisingly also discouraged.

From the perspective of the detainees, there is – as noted above – a wide belief that using legal counsel also at this stage worsens their case. A rapid review of cases (see Table 1 in the Annex) however, indicates that that it is not clear that this is the case. Moreover, prison staff noted that when detainees do resort to legal counsel, there appears to be a better chance of a speedier court decision, reducing the risk of overstaying. This was also noted in relation to parole. Lawyers can monitor the processing of parole application to prevent prolonged delay. The presence of lawyers, while rare (only representing 3% of all inmates), it was claimed, can contribute to expediting the release of detainees.

Oversight and accountability

The running of prisons is monitored by the Inspectorate General, whose supervision is widely considered to be ineffective (as confirmed in interviews). First, there is a perceived issue of insufficient capacity development and technical training among the Inspectorate General's personnel. Second, officials from the Inspectorate General generally focus on issues relating to budget implementation. Thus, beyond the pre-trial detention hearing (which itself is a limited mechanism), oversight and accountability remain very poorly developed and administered in relation to pre-trial detention.

There is a consensus that the new Legal Aid Law is an especially promising opportunity structure to secure better protection for detainees against excessive pre-trial detention in the medium term, but currently implementation is still at an early stage.

Legal counsel currently takes different forms. For those who can afford it, private lawyers are available at varying fee rates. In principle, those who can claim 'poor status' at local government level (Law No 21/2003, PP No 83/2008) have access to pro-bono legal work made available by advocates, normally as part of required legal training for interns.

The new Legal Aid Law establishes a formal, state-sponsored system of legal aid provision. The system provides for state funding of legal aid to be managed by the

Ministry of Law and Human Rights (MLHR), and through its National Law Development Agency (BPHN). The funds are to be channelled to different legal aid providers and organisations for criminal and civil cases under a regulatory framework administered by the MLHR. The BPHN has been considered to be inadequately equipped to manage the legal aid administration across the country. Moreover, there is a belief that the provision of legal aid should be defined principally by demand. It has been suggested that the DGC could also administer and register legal aid provision (if not the funding) at the point of the delivery of service – that is, in the detention centres or prisons. This would have the benefit of ensuring that legal aid provision responds to where the need for legal aid exists.

It is calculated that services are delivered by around 300 individual legal aid organisations. The organisations and CSOs which provide legal aid are required to undergo a process of accreditation which sets the status (and funding) that they are eligible for (Kristomo, n.d.). Some of these organisations provide paralegal services as well as legal counsel. It is important to note, however, that while legal aid provision is set to increase, the population of detainees remains pitifully under-represented. It is calculated that 'only 310 Indonesian lawyers are certified to provide services in a country of over 245 million' (Afrianty, 2014).

In addition to what the law provides for it is also important to stress that the quality of legal counsel varies in practice. Interviews with detainees and family members revealed bad experiences with poor quality service provision among private lawyers, or practices of outright complicity between lawyers and law enforcement agencies at the expense of the detainee. It is important to differentiate this from the *bona fide* state-funded legal aid provision which is supposed to be available to detainees through the Legal Aid Law.

Interaction between key stakeholders

The balance of power between the different actors at the prosecution stage, and once the detainee is in the detention centre, is not weighted towards any single actor in the same way that the police's interests trump everyone else's during police investigations. In the detention centre, the nature of the relationship between the detainee, the detention centre staff and the law enforcement actors takes on a different character.

As regards the criminal justice process, the prosecutor (and later the judges) are the key law enforcement actors. Detainees and their families have no direct contact with the prosecution, and communication is mediated either through legal counsel or the DGC staff. The latter act mostly to administer documentation on the case and information flows between the detainee and the criminal justice system (the prosecution and the courts). Interviews revealed high levels of distrust towards the prosecution. Detainees share the belief that only by arranging to pay

off the prosecution could their case move along and the severity of the charge be negotiated.

For detainees it is important to take account of the two (informal) payment systems that shape their options: the first relates to payments for getting information about their case or to ‘buying’ a better legal outcome; the second relates to payments within the detention centre to pay for services and better living conditions. Where detainees’ families have few resources and in a system in which innocence is not presumed, resources are mostly aimed at covering the latter set of costs, which of course has little bearing on the legal outcome of their case.

For detention centre staff, there is less at stake in terms of the pace and outcome of the legal process. In prisons, there is nothing to be gained for detention staff by prolonging pre-trial detention or protecting the police, prosecution or court system. Although they do benefit from the informal payments associated with living conditions and services for the detainees, including giving access to information on the case-file, it was confirmed in interviews that detention centre staff are more trusted by detainees than any other actor in the criminal justice chain. This included lawyers, who were mostly seen to be untrustworthy.

There are important variations in terms of prison conditions. However, fieldwork revealed that the relationship between detainees and detention centre staff seemed to be the most promising in terms of trust, and to some extent, of mutual interest in not prolonging pre-trial detention and overstaying. This relationship, therefore, constitutes an untapped opportunity in terms of creating awareness about the merits of recourse to legal aid and counsel, and fostering legal literacy among detainees.

6.2.2 Opportunities for change and recommendations

There are more opportunities for concrete interventions at this stage of the criminal justice chain to reduce excessive pre-trial detention than in the police investigation stage. These opportunities are linked to the fact of greater support for reform within the DGC than in other law-enforcement agencies, as well as to recent legal changes in legal aid. But they are also related to the nature of the relationships among relevant actors, which provide more space for finding practical entry points that can alter the balance of power within the criminal justice system in favour of strengthening due process.

In addition to the (somewhat) more favourable internal political economy of the corrections system, there is currently an important *political* window of opportunity that is at this time conducive to reform. The convergence of a reformist political leadership since the general election of 2014, an active network of active civil society and legal aid organisations and the presence of a reform-minded leadership in the DGC constitute an important enabling environment for legal reform and policy change in the criminal justice and corrections system. In line with recent work on ‘thinking and working politically’, there is therefore

political space that relevant actors can use strategically to make a difference in the reform coalition on this issue.

Following from this, and drawing on fieldwork findings, recommendations for action include:

- Push for progress on the implementation of the Legal Aid Law. Given the constraints that arise from the current administrative and management structure through the BPHN, there is strong case for reforming the legal aid provision system. Using the DGC to lead the implementation of the legal aid law may be especially effective. Some concrete recommendations include the following:
 - Given the very weak presence of legal aid in the detention centres and prisons, there is a case for redirecting and restructuring the administration and management of state-funded legal aid provision. At present, the legal aid fund is registered and disbursed by the MLHR (through BPHN) to the organization which files for the provision of legal aid services. Given the shortcomings of the system noted above, we recommend that the Ministry through DGC could also administer and register the legal service provided at prisons level, which is where the demand lies (97% of inmates have no lawyer). The fund disbursement would still be managed by BPHN or the regional office.
 - It is also important to restructure who administers legal aid. Given the concerns about current capacity to manage the scheme, there is an opportunity for a dedicated Directorate General for Legal Aid to be assigned within the MLHR. Such a proposal has been submitted to the Transition Team of the new government in the reform of the MLHR.
 - The function of the DG for Legal Aid would be to administer, fund and certify legal aid, to provide capacity building and to facilitate inter-organisational cross-learning. Thus, it would more than an administrative role.
 - The provision of legal aid is also regulated in the Advocate Law (UU 18/2003) and its implementing Regulation (PP 83/2008). The potential for this law is important, but it is poorly not implemented. Investment should be to improve the synergy between the Advocate Law and the Legal Aid Law, both administered by one single state institution such as the proposed DG of Legal Aid.
 - There is scope to promote access to, and awareness of, legal aid in the criminal procedural court. In the context of the KUHAP reform, this should include making legal aid compulsory at police detention. This should include police obligation to provide free, guaranteed access to legal aid through a proposed legal aid hotline

number. This should register the calls it receives and administer the immediate provision of legal aid.

- There is a political opportunity to make legal aid compulsory at police detention, as part of the legal aid provision. This could include establishing a 24-hour service to assign a lawyer to the detainee at the police station. This should be ‘joined up’ for the duration of the pre-trial period to follow the case from detention through investigation to prosecution, thereby addressing some of the pre-trial detention blockages found in the fieldwork. The single administration of legal aid will be important to record and ensure that the budget is duly assigned. This requires ‘connecting’ the police, the legal aid institute and the DGC administration. Oversight would reside in the proposed DG of Legal Aid. In order to make legal aid provision more effective, it has to work with the police and the prosecutor – and also oversee that the proposed 24-hour hotline is made available. This is a big game changer, so police buy-in is necessary but also politically challenging. Currently, and given reform-minded leadership in the DGC, access to a hotline is likely to be most feasible in DGC facilities to begin with.
- Fieldwork found that the relationship between detainees and detention centre staff is one of the least destructive in the criminal justice chain, reflecting the highest levels of ‘trust’ among the detainee population. This currently constitutes an untapped resource for addressing overstaying. Using detention centre staff more strategically, for information, sensitisation, awareness raising and capacity development, as well as to support the administration of legal aid in terms of access to legal counsel, may be an effective and untapped entry point. This can include support to workshops in situ, working with civil society and legal aid organisations to make their presence in prisons and detention centres more effective.
- Strategic use of the SDP database can be supported more effectively as a means to signal where pre-trial detention blockages are taking place. The database has a direct purpose in this respect for cases within the detention centre. It also constitutes a valuable source of information that can make the situation of pre-trial detention more visible to the public. In this respect it can alter the balance of power between the relevant stakeholders in the criminal justice system, generating reputational costs in relation to delays for the police, prosecution and courts. The data system is also an important source for strategic research to inform policy-makers (and international donors) on entry points for reform purposes.
- The enactment of the Law on Juvenile justice – SPPA (UU 11/2012 - article 23(1)) has made the provision of legal counsel compulsory for juveniles. However there is a need for a better regulatory framework.
- Finally, there is currently a historic political moment of opportunity to reform the criminal justice system more holistically. This includes revising both KUHAP and KUHP – and potentially pushing for a more ambitious reform than that contained within the sitting KUHAP Bill.

7. Key findings and recommendations

7.1 Political economy of pre-trial detention in Indonesia

Indonesia continues to face formidable barriers to reform in criminal justice system. The goals of observing due process and the principle of presumption of innocence remain key challenges – and associated with that, the problem of excessive and arbitrary pre-trial detention. Current levels and conditions of pre-trial detention not only contribute to overcrowded prisons and contempt for the rights of detainees, but also reflect a system-wide disregard for justice and rule of law.

This study has reflected on the costs that excessive pre-trial detention bring to bear on both the Indonesian state and society generally, as well as concretely on the lives and livelihoods of detainees and their families. In addition, the study has unpacked the range of interests and incentive structures, the legal and formal institutional framework, and the wider configuration of informal and social norms that drive excessive and arbitrary pre-trial detention. Through the study of the political economy of the criminal justice system it has been possible to identify not only the drivers of pre-trial detention, but also the potential windows of opportunity and entry points for strategic action by the different stakeholders in reform coalitions across different levels of the justice chain that can contribute for change.

Enlightened international actors can also contribute to change processes through more strategically targeted support to the relevant actions, networks and coalitions of key actors. They can do this through the application of a problem-focused political economy analysis of the institutional and socio-political features of the criminal justice system. This should include adapting support to reform efforts in ways that maximise emerging opportunities in a changing political and institutional environment using what has been termed ‘problem driven, iterative and adaptive’ approaches to the problem (Andrews 2013). The framework used in this paper can guide approaches that adapt to the complexity of context.

Returning to the political economy framework that underpins this analysis, at the level of the *national political and legal context and social norms* there is potentially a window of opportunity under the government voted in in

2014 to lobby for reform. Political developments in the following months and years will test the resilience of a strengthened reform coalition and whether the political moment can over time result in a sufficiently enabling environment to nurture buy-in for reform, including among those more entrenched power and interest structures that have traditionally benefitted from the old order within the criminal justice system. The challenges are formidable, both in terms of the resistance of vested interests and the nature of wider social norms and attitudes towards prison populations. But strategic alliances and political advocacy can raise the reputational costs of maintaining the status quo and can highlight the merits of reform outcomes.

The study has found that the *police detention and investigation* stage of the criminal justice system constitutes the least promising link in the justice chain. The police remain powerful political actors likely to resist reform. Advances in legal aid legislation constitute a key opportunity to change the balance of power during the police investigation in favour of the detainee – but much will depend on resourcing and implementation, and also buy-in from the police hierarchy. Reformers within the corps may find motivation derived from an improved public image.

The most promising area for engagement to address pre-trial detention is in the *prosecution phase* of the justice chain. Once the detainee has moved to the detention centre or prison there are more concrete opportunities to find ways of both reducing overstay – through promoting access to legal counsel, advocacy and awareness raising among detention centre staff, detainees and their families, and working to identify where the blockages in the justice chain – and of improving the living conditions of detainees. The balance of power is still heavily stacked against detainees, but there is more scope in the current socio-political conditions to improve their rights.

7.2 Recommendations for action

Taking account of the political economy conditions in Indonesia, there is a limited political opportunity for advancing reforms in the criminal justice system to enhance due process and to address the challenges of excessive and arbitrary pre-trial detention. Importantly, identifying

opportunities for reform and concrete entry points for action involves working within what is politically and socially plausible to incentivise reform. But, moreover, it involves promoting technical, legal and institutional reform efforts that are both realistic and suited to existing conditions, and can, in turn, contribute to intended change processes relating to the ‘problem’ of excessive pre-trial detention.

Here we summarise concrete reform and action recommendations to address the problem of pre-trial detention. These are drawn from applying a problem-focused approach to understanding the incentive structures and power relations that feature at different stages of the criminal justice chain. We disaggregate between immediate, intermediate and high-level measures. They reflect different levels of ambition.

7.2.1 Immediate measures

Given the opportunity structures for change found in the study, there is a range of immediate action that can contribute to quick and effective gains in addressing pre-trial detention. These include the following:

- Use opportunities within *existing* systems and infrastructure to enable change in incentives and attitudes, and invest in building relevant capabilities. This includes:
 - Supporting creative use of detention centre and prison space to encourage recourse to legal aid, for instance through providing *on site* legal aid clinics for detainees.
 - Supporting and clarifying the role of the legal aid officers within prisons, allocating resources for staff to be more actively engaged in facilitating access to legal aid for detainees;
 - Investing in capacity development of detention centre and prison staff regarding the legal aid system, and improving access to legal aid for detainees.
- Support the development of university legal aid clinics to provide access to legal aid for detainees, using recently allocated resources; and to serve as practical training of law students on legal aid for detainees.¹³
- Support and facilitate existing ‘good’ relationships, networks and reform coalitions to advance the rights of detainees. This includes:
 - Making strategic use of the existing ‘benevolent’ attitudes of prison and detention centre staff towards detainees in order to facilitate information about legal aid and how to access it. Civil society organisations working with legal aid provision may contribute to this.

- Supporting awareness-raising among detainees and their families on their rights and the benefits of recourse to legal aid, as this becomes more widely available under the new Legal Aid law.
- Invest in the Indonesian legal research community which is well placed to inform and contribute to reform in the criminal justice system. This includes supporting research capabilities in the use of evidence, including the SDP (Corrections) database, to strengthen the knowledge base on the prisons system and criminal justice process.
- Present key research findings on the merits of addressing pre-trial detention to different stakeholders. This includes:
 - Stakeholders in the criminal justice chain: Ministry of law and Human Rights, (including the DGC and BPHN); Police; Attorney General’s Office and the Supreme Court; bar associations. Working to reduce arbitrary pre-trial detention particularly in non-violence, victimless, trivial offences that will reduce costs to and has reputational benefits in terms of rule of law advancement.
 - International donors and INGOs investing in justice sector reform should use findings of problem-focused political economy analysis to reorient resources accordingly and in ways that are relevant to the specific drivers and opportunities for change.

7.2.2 Intermediate and mid-level measures

There are also intermediate measures that can contribute to altering the balance of power *over time* in the detention process. This includes shifting the incentive structures within law enforcement agencies and building the capabilities of relevant civil society and legal aid providers to lobby for change.

- Invest in adapting the new legal aid architecture *in practice* at key points in the criminal justice chain to change incentives and improve access to legal aid for detainees. This may include the following measures:
 - Invest in streamlining systems and protocols between the DGC and BPHN (in charge of legal aid provision) to facilitate access to legal aid for detainees.¹⁴ This may include creating a unified system for BPHN to register detainees’ legal representation needs which accredited legal aid organizations across the country can access.
 - Develop a 24 hour guaranteed hotline, initially through a pilot program, to a call centre to register requests from detainees, provide legal advice and if necessary assign a legal aid organisation to the case.

¹³ It will be important to draw on the experience of CDS in 16 universities implementing a program involving awareness-raising, training and prison visits is especially.

¹⁴ Both bodies fall under the Ministry of Law and Human Rights but lack mechanisms to jointly facilitate the provision of legal aid.

At the investigation phase, this will require buy-in from the Police Chief to regulate access to such a hotline in police units

- Built-in provision of, and access to, legal aid should be established as a key performance indicator of detention facilities in order to incentivise legal aid provision for detainees.
- Invest in supporting police capacity on the implementation of the legal aid law. This includes changing incentives and reward systems within the criminal justice chain regarding treatment of, and attitudes towards detainees.
- Alter the budgetary incentives through performance measures for the police and prosecution phases so that the value/gravity of the cases instead of the quantity of arrests are rewarded.
- There may be value in using strategic litigation to challenge the constitutionality of current conditions of pre-trial detention and associated rights violations. There is a need for more research on the viability and effectiveness of different legal routes and their impact on accountability for pre-trial detention (such as recourse to the Constitutional Court or administrative courts).
- Invest in engaging law firms and bar associations with the legal aid law to meet obligations on providing pro bono legal aid to detainees, including to enhance implementation of the law.
- Support civil society and legal aid organisations in monitoring as possible police practice in identifying suspects through the pre-trial hearing mechanism recently sanctioned by the Constitutional Court. This can contribute to raising reputational costs for poorly substantiated arrest practices. Overtime the onus should be on building positive incentives for police conduct.

7.2.3 High-level measures

There remains some political premium around improving the rule of law, and strengthening both internal and external mechanisms of oversight and accountability along the criminal justice chain to reduce the opportunities for rent seeking at the expense of detainees. Such reforms should address impunity and seek to reward observance of due process. This includes enhancing accountability over detention by including *habeas corpus* into the system, (ICJR, 2014 and 2011). Reform requires building alliances, strategic relationships and buy-in across the range of relevant law enforcement actors, including the police, the judiciary and the prosecution around the reputational benefits of supporting reform.

- There remains an on-going political opportunity to **reform the criminal procedure law (KUHAP) and the criminal code (KUHP)**, including through investing in alliances with reformers in the Ministry, and in the legislature. In relation to pre-trial detention, this includes supporting legal change that:
 - alters indictment and sentencing practices from a systemic preference for severity to a wider range of punitive action (including non-custodial) that increases the threshold of what constitutes an arrestable offence;
 - provides alternative options to detention (suspended detention, home/city arrest);
 - strengthens the immediate right to legal counsel and observance of due process, including through the provision of a single agency to administer legal aid provision.
- Political efforts to push for concerted **reform of detention practices and prison conditions** should continue, using recent public interest in prison life as an opportunity to generate awareness and sensitisation on both the conditions for detainees and inmates and the wider development and both social and economic costs for Indonesian society of pre-trial detention.

At all levels there are entrenched structures of resistance, inertia and social attitudes towards the prison population that contribute to sustaining current practices of arbitrary arrest and overstaying. Reform strategies in this area need to address the range of deeply entrenched incentives structures and power relations favouring current practices of excessive pre-trial detention in the criminal justice system.

There is no single pathway to reform. However, unpacking the political economy of the criminal justice chain helps to identify the concrete opportunities and relationships that signal entry-points for an iterative approach to reform that can contribute to shifting the incentive structures and power imbalance in favour of principles of due process and better observance of the rights of detainees. International actors wishing to support such efforts need to engage with the particular features of the ‘problem’ and work with local knowledge brokers to navigate existing incentives and interest structures and support reform processes that are politically realistic and adapted to the possibilities of context.

8. Annex

The table below shows 36 drugs-related cases, drawing on the SPD database.¹⁵ Results show that 96% of inmates without counsel lawyer received a sentence of less than 5.5 years. By contrast only 72% of inmates with legal

counsel are sentenced under 5.5 years. 28% of inmates with lawyers received harsher sentences of over 5.5 years. The absence of legal counsel seems marginally – but not substantially – better.

Without lawyer			With lawyer		
Sentence length (yrs)	# of convicts	%	Sentence length (yrs)	# of convicts	%
4 - 4,8	7	39%	4 - 4,3	11	61%
5 -5,6	10	56%	5 - 5,6	2	11%
6	1	2%	6	1	6%
7	0	0%	7	2	11%
14	0	0%	14	1	6%
Life	0	0%	Life	1	6%

¹⁵ The data draws on a review of the database of 150 cases convicted of drugs-related crimes (articles 1.1.1. and 1.1.2. of the Anti-Narcotics law) which carry custodial sentences. 36 cases were identified as comparable – sentenced for the same offence with similar amount of drugs – for the purposes of this study.

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