

Pre-Trial Detention Custody Time Limits

ENSURING COMPLIANCE IN MALAWI



Acknowledgements

This report was written by Clifford Msiska (Paralegal Advisory Services Institute-PASI), Victor Mhango (Centre for Human Rights Education, Advice and Assistance-CHREAA), and Jean Redpath (independent consultant) with contributions from Luke Tembo and Christina Nthenda (Centre for Human Rights and Rehabilitation-CHRR); Enock Kamundi and Ruth Banda (Catholic Commission for Justice and Peace-CCJP); Sipiwe Malihera and Lusako Phambana (CHREAA); and Alfred Munika and Edward Gama (PASI). The project was managed by PASI under Clifford Msiska. The authors and contributors would like to thank the interviewees and discussants for their time and insights.

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Executive Summary

Many pre-trial detainees in Malawi will spend months or even years in detention – without being tried or found guilty. An audit of pre-trial detainees in Malawi, which was undertaken by the Open Society Initiative for Southern Africa (OSISA), the Open Society Foundations Human Rights Initiative and the Open Society Foundation for South Africa in 2011, revealed several systemic procedural and structural problems in the criminal justice system that contribute to this situation.

In recent years, the Malawian government has introduced a number of reforms in relation to criminal justice procedures. For example, legislation was enacted in 2010, through amendments to Malawi's Criminal Procedure and Evidence Code (CPEC), which specifies legal custody time limits for pre-trial detainees. However, many pre-trial detainees are still detained well beyond the legal time limits, partly because the CPEC does not explicitly stipulate any means of tracking custody time periods. Indeed, the OSISA audit found a number of key problems related to the implementation of custody time limits, including the:

- Lack of appropriate record-keeping to assist in determining how long detainees have been in custody;
- Lack of clarity as to who is responsible for ensuring that custody time limits are met;
- Lack of a mechanism to identify detainees who have been held in excess of the custody time limit; and
- Lack of clarity as to the process that should be followed in situations where custody time limits have been exceeded.

The research upon which this report is based sought to identify proposals that would improve the implementation of custody time limits in Malawi. The project commenced with a literature review to understand the ways in which four other countries monitor detention length and enforce custody time limits. Material emanating from the literature

review then formed the basis of a questionnaire, which was used in interviews with government officials and other key stakeholders. The findings from this process resulted in some concrete proposals, which were discussed at a validation seminar involving representatives from across the criminal justice system.

One of the key findings was the lack of buy-in from, or incentives for, officials to ensure adherence to custody time limits. The implication is that pressure must be brought to bear by the detainees themselves or by paralegals or lawyers, who are independent of the system. Another critical finding was that there is limited knowledge about, and no uniform interpretation of, Malawi's criminal procedure as it relates to custody time limits.

The report also found that basic information procedures, which would enable officials to determine the length of time that detainees have spent in custody, are not yet uniformly in place across Malawi. The consultation process suggests that very simple changes to existing paper-based record keeping will go a long way towards ensuring better compliance – and help to prevent people from being detained for too long and having their basic rights violated. However, uniformity, the adequate provision of stationary, training and regular spot-checks will be needed to ensure that the new process is effective.

In addition, the research found that most officials have little reason to comply with custody time limits since it is magistrates who are empowered by the legislation to grant bail when time limits are exceeded. Thus pressure must be brought to bear by remandees and paralegals or lawyers working on their behalf to ensure that their cases are dealt with and that, where appropriate, bail is granted. In this regard, public awareness campaigns – using posters and pocket guides – as well as educating detainees about their rights and providing pro-forma bail applications will be extremely useful.

However, the state must also begin to take responsibility for the application of its own laws and the research supports the idea that this process should begin with the prosecution, commencing with those who fall under the Directorate of Public Prosecutions (DPP). Processes culminating in a policy applicable to all prosecutors should be supported since this would begin to change mind-sets. Incentives should also be considered to help to enforce such a policy or standard.

The research also found that there is support for the idea of Prison Heads regularly supplying lists of detainees on expired warrants to magistrates. These lists would be compiled using the proposed new record-keeping mechanisms and would bring custody time limit violations to light much earlier. For those held in police custody, there would have to be reliance on monitoring by independent groups, such as the various paralegal organisations. Indeed, the new Police Act (2010) provides for the establishment of lay-visitors' scheme and, once up and running, this could be used to good effect in this regard.

The process to ensure adherence to custody time limits could be fine-tuned through Court User Committees (CUC), which are comprised of all criminal justice stakeholders and whose role it is to ensure coordination among these stakeholders, including paralegals, at each court. Ultimately, however, the process must involve a bail application or the court 'moving itself' (acting of its own accord) where violations are brought to its attention. The research concluded that paralegals and remandees would benefit from proforma legal documents in this regard. The validation seminar at the end of the research process highlighted the need to develop a common understanding of criminal procedure, particularly around issues such as when a trial may be said to have commenced and at what point the prosecution is entitled to ask an accused person to plead.

Supported by the research and endorsed by the seminar participants in a plenary resolution, the process highlighted a number of proposals that would help to reduce the number

of people in Malawi who are detained beyond legal limits, including the:

- Development of a new standard court case folder; printing and distributing these folders to all courts; making financial provision for the on-going production of the folders and training for clerks about how to use them;
- Development of a new standard for court registers with relevant columns for custody time limits; printing and distributing them to all courts and making provision for the on-going production of the registers and training about how to complete and maintain them correctly;
- Development of a new standard prison register with relevant columns for on-going calculation of time on remand; printing and distribution of these to all prisons; making provision for the on-going supply of the registers to prisons; training on the completion of these registers and the submission of lists of detainees to the Court User Committees and to magistrates;
- Design, printing and distribution of posters to police stations, courts and prisons to raise public awareness about custody time limits;
- Design, printing and distribution of a pocket guide to custody time limits for officials working in the criminal justice system;
- Development of a pro-forma bail application to bring bail applications on behalf of remandees whose custody time limits have been exceeded;
- Funding for Court User Committees to meet regularly and plan additional court times for bail applications; and
- Support for the development of a prosecutorial policy under the auspices of the DPP, which includes diarising, reviewing requirements and setting time targets, which will be monitored by managers in the prosecution service.

Introduction

On any given day, an estimated three million people around the world are behind bars awaiting trial. Many will spend months and even years in detention – without being tried or found guilty – languishing under worse conditions than people convicted of crimes and sentenced to prison. Many pre-trial detainees are exposed to torture, violence and disease. They are also subject to the arbitrary actions of corrupt officials. Throughout their ordeal, most never see a lawyer and often lack information on their basic rights. When they eventually reach a courtroom – usually without representation – the odds are stacked against them. Research shows that the longer a detainee is held before trial, the more likely he or she is to be found guilty. Excessive and arbitrary pre-trial detention, compounded by inadequate representation, leads to egregious rights abuses. Pre-trial detainees may lose their jobs and homes; contract disease; and suffer physical and psychological damage that lasts long after their detention ends.¹

The audit of pre-trial detainees in Malawi undertaken by OSISA in 2011 revealed a number of systemic procedural and structural problems in the criminal justice system. Malawian prisons are currently holding double their capacity. As a result, there is considerable overcrowding, contributing to extremely poor living conditions: shortage of food, water and clothing, and poor sanitation. There are a high number of detainees in police detention. They face intimidation and abuse, and are particularly prone to coerced confessions and guilty pleas. It was also found that pre-trial detainees are spending inordinately long periods of time in detention on expired warrants. Access to relatives and courts depends on the whims of the police and prison warders. Not only do detainees often lack awareness of their rights in a criminal justice context, there is also no clarity in general about many key issues, including the powers of the police to arrest and detain a person, the role of police officers in releasing a person with or without bail, and in which cases, when and under what circumstances is recourse to a magistrates court to challenge a detention

necessary. The procedures for applying for bail are incomprehensible to many accused people as well as the general public.

In responding to these problems, the Malawian government has introduced a number of reform efforts in respect of criminal justice. Pertinent to this report, legislation was enacted in 2010, through amendments to the country's Criminal Procedure and Evidence Code (CPEC), which specifies legal custody time limits for pre-trial detainees. The time limits run from the expiry of the 48 hours after arrest during which the accused must be brought before court for any further detention to be ordered. A person accused of an offence that may be tried in a subordinate court can legally be held in custody pending the commencement of trial for a maximum period of 30 days. In cases under the jurisdiction of the High Court, a person may be held for 30 days pending committal to the High Court and 60 days pending the commencement of the trial (in respect of certain serious offences such as treason the latter can be extended to 90 days) after which detention is no longer legal and bail should be granted.

However, despite the provisions in law, pre-trial detainees are frequently detained well beyond the legal time limits and neither the CPEC nor its regulations explicitly stipulate any means of tracking custody time periods. While accused persons may be aware of the time they have spent in detention, they may have neither the means nor the knowledge to approach the courts for release. The courts and the prosecution, on the other hand, may be ignorant of how long a particular detainee has been in custody, given the absence of any particular mechanism to bring it to their attention. While the prisons are in the best position to measure custody time length, there is no obligation on them to track whether custody time limits have been exceeded. There is thus nothing in the legislation, practice, policy or regulation that stipulates what processes should be followed to ensure adherence to these custody time limits.

1. See Open Society Justice Initiative Global Campaign on Pretrial Justice

Nor are there clear processes to ensure accused persons are released from custody in cases where the time limits are exceeded – as the law intends.

Overall, the OSISA audit of pre-trial detainees in 2011 found that there are numerous problems with the implementation of custody time limits in Malawi, including the:

- Lack of appropriate record-keeping to assist in ascertaining how long detainees have been in custody;
- Lack of clarity as to who is responsible for ensuring adherence to custody time limits;
- Lack of a mechanism to identify detainees who have been held in excess of the custody time limit; and
- Lack of clarity as to the process that should be followed in situations where custody time limits have been exceeded.

Given these problems, OSISA and the Open Society Foundations Human Rights Initiative commissioned four Malawian organisations – the Paralegal Advisory Services Institute (PASI), the Centre for Human Rights Education, Advice and Assistance (CHREAA), the Catholic Commission for Justice and Peace (CCJP) and the Centre for Human Rights and Rehabilitation (CHRR) – to conduct this research so as to better understand the current application of the law in respect of custody time limits and to outline a set of concrete proposals that would improve their implementation.

Methodology

The research commenced with a literature review, which sought to better understand the legal framework in Malawi in respect of custody time limits and to examine the ways in which four countries – the Netherlands, England and Wales, the United States and Zimbabwe – monitor detention length and implement custody time limits. While there are a number of countries that are attempting to introduce systems to ensure that pre-trial detainees do not overstay their warrants (e.g. India and Ivory Coast among others), coverage of all of these was beyond the scope of this report. Instead, the authors elected to focus on those four countries given the existing documentation on their models and because they represent both adversarial and inquisitorial traditions.

Material emanating from the literature review formed the basis of a standard questionnaire, which was used in prisons, courts and police stations in Malawi and in interviews with other practitioners in the criminal justice system, in order to:

- Explore perceptions among officials working in the criminal justice system around the reasons for the failure of custody time limits;
- Test the feasibility and acceptability of proposed mechanisms for improving the implementation of custody time limits arising out of the literature review; and
- Explore other ideas among practitioners for the better implementation of custody time limits.

Strategic discussions were also held with key stakeholders to test attitudes and approaches to custody time limits.

THIS SECTION OF THE REPORT SEEKS TO OUTLINE HOW VARIOUS COUNTRIES HAVE IMPLEMENTED CUSTODY TIME LIMITS IN PRACTICE, INCLUDING WHO TAKES RESPONSIBILITY FOR OBSERVANCE OF THE LIMITS AND HOW SUCH RESPONSIBILITIES ARE ENFORCED. THE AIM OF THE LITERATURE REVIEW IS TO INFORM THE DEVELOPMENT OF VARIOUS MEASURES IN MALAWI TO ENSURE COMPLIANCE WITH MALAWI'S LEGISLATED CUSTODY TIME LIMITS.

Custody time limits in Malawi

Pre-trial custody time limits in Malawi are determined by the jurisdiction of the court trying an accused person and thus by the seriousness of the offence. The time limits run from the expiry of the 48 hours after the arrest of an accused person during which he must be brought before court for any further detention to be ordered.

A person accused of an offence that may be tried in a subordinate court can legally be held in custody pending the commencement of his trial for a maximum period of 30 days, according to amendments introduced in 2010 to the CPEC. However, recent research shows that in practice it is not uncommon for persons accused of such offences to be kept in custody for more than 30 days (Muntingh et. al. 2011). The legislation does not explicitly stipulate any means of tracking custody time periods.

The law states that at the expiry of a custody time limit or of any extension thereof, the court may grant bail to an accused person on its own motion or on application by or on behalf of the accused person or on information from the prosecution. In the absence of the actual commencement of the trial or extension of the custody time period, further detention of the accused is no longer legal (Kayira, 2011). While an accused may be acutely aware of the time he has spent in detention, he may have neither the means nor the knowledge to approach the courts for release. The courts and the prosecution, on the other hand, may be ignorant of how long a particular detainee has been in custody, given the plethora of matters in their hands and the absence of any particular mechanism to bring it to their attention. While the prisons may be in the best position to measure custody time length, there is no obligation on them to track whether custody time limits have been exceeded

Indeed, there appears to be nothing in the legislation, practice, policy or regulation that stipulates what processes or mechanisms should be followed to ensure these specific custody time limits are met. Nor are there any clear processes to ensure that accused persons are released from custody in cases where the time limits are exceeded, as the law intends.

Currently prisons still appear to operate on remand warrants issued every fortnight. Remand warrants only authorise continued detention for a fortnight at a time. As long as a remand warrant has not expired, the prison considers itself entitled to hold the accused in custody. If the warrant is soon to be exceeded, it is simply renewed as a formality through the submission of piles of such warrants to magistrates for renewal, with no attention apparently being paid to the overall time period that an accused may already have spent in custody.

It is sometimes the case that remand warrants are renewed without the accused even appearing before the court. Clearly, the original intention of the fortnightly warrants – that the magistrate would have an opportunity to check on the health of the accused and the progress of the case, and in turn would be able to approach the court for relief of whatever nature – has been subverted in practice.

The maximum period that a person accused of an offence falling within the jurisdiction of the High Court may be held in lawful custody pending committal for trial to that court is 30 days. Committal is a procedure whereby a case is formally transferred from the subordinate court to the High Court. Recent research (Muntingh et. al. 2011) found that a great

deal of the delay in relation to offences to be heard in the High Court emanated from committal proceedings. Again nothing appears to be in place to ensure adherence to time limits in these cases.

Once the case has been committed to the High Court, the maximum period that a person may be held in lawful custody pending commencement of the trial is 60 days. Certain more serious cases, such as treason and murder, have a 90-day limit before commencement of the trial.

The prosecution may apply for an extension of the custody time limit as long as the application is lodged before the court at least seven days before expiry of the custody time limits. An extension can only be granted when the prosecution provides the court with good and sufficient cause. However, the Act does not define what constitutes 'good and sufficient cause'. The legislation provides that an extension of custody time limits 'shall not exceed thirty days'. Kayira (2011) argues that the use of the word 'shall' suggests that there is no room for any extension beyond an additional thirty days.

The CPEC also sets down periods for the commencement and completion of a trial. The completion provisions imply that, even when further custody of the accused is legal due to the commencement of the trial, the trial must be concluded within specified time limits. Commencement and completion provisions apply to all cases, not solely those where the accused is in custody. Thus for cases to be tried in a subordinate court or the High Court, the law provides that trial shall commence within twelve months from the date the complaint arose and be completed within twelve months from commencement of the trial.

Unfortunately, this does not apply to offences punishable by imprisonment for more than three years. This means that for accused persons held in custody on more serious offences, when delays occur after the trial has commenced, there is no specific time limit for the completion of the matter. Only general constitutional 'reasonableness' provisions apply.

Other than these more serious offences, when a trial does not commence or is not completed within the prescribed period, the accused must be discharged. An exception is when the cause of the delay cannot be attributed to the prosecution, in which case the court shall order an extension in time to ensure the completion of the trial.

Conclusion

As Kayira (2011) puts it regarding custody time limits: "The scheme, therefore, envisages a situation where all key players in the criminal justice system, namely the presiding court, the prosecution and the defence have to work together to ensure that detainees do not remain in custody beyond the prescribed limits." Unfortunately, that theory has not yet been translated into practice.

The aim of the next section of the report is to explore the ways in which other countries have ensured such co-operation. In particular, in relation to custody time limits, the report seeks to answer questions such as: What kind of record keeping is needed? Who in the system bears what responsibilities? What kinds of mechanisms can be used to monitor and enforce custody time limits? And what processes should be in place to ensure compliance?

Comparative pre-trial detention and custody time limit schemes

Internationally, the investigative stage of a criminal case is increasingly recognised as more important than the trial phase – in all jurisdictions many more people are subject to investigative processes than will ever be brought to trial (Cape, 2007). Procedures in the investigative stage of the criminal process, which is also known as the pre-trial phase, vary widely from country to country – partly because of each nation’s different legal tradition. In particular, understanding the mechanisms related to custody time limits and other measures to expedite the criminal justice process requires an understanding of the underlying legal tradition applicable in each country.

The common law or adversarial legal tradition, which emanates from England and Wales and on which Malawi’s criminal procedure is based, is founded on the notion that the best way of determining guilt or innocence is by a contest between two parties – the accuser and the accused – with the state filling the role of the accuser as opposed to the complainant. The judge is not involved in the investigation and at trial plays a relatively passive role. A trial can be circumvented by the accused pleading guilty.

A person accused of a crime in such a system is not (in theory) the passive object of an investigation but a party to the process of establishing guilt or innocence (Cape, 2007). “The judge has no duty to ensure that all the evidence in the case is brought to court. The assumption is that the two contending parties are legally represented, therefore they are evenly balanced and all the judge has to do is be the referee.” (Schärf, 2004) Obviously, there are problems with the notion that an accused person and the prosecution in Malawi are evenly balanced, given the extreme poverty experienced by ordinary people and the absence of any comprehensive legal aid provided at the state’s expense. Nevertheless, the adversarial model is said to apply in Malawi and criminal procedure is based on that model.

By contrast, in the more centralised inquisitorial model common in Europe and Francophone countries in Africa, the evidence that comes before the court is the product of an enquiry for which a public prosecutor or judge is responsible. The evidence has already been evaluated and consequently

the pre-trial process is a form of pre-judgement. The investigation of a crime is a neutral enquiry conducted by a judicially trained official (Cape, 2007). Judges in the inquisitorial systems, which in Africa are usually derived from French and Portuguese colonial law, have a stronger duty to find the truth and therefore have a greater interventionist role in criminal trials (Schärf, 2004).

Socialist legal systems are sometimes described by commentators as a third form of legal tradition in which the law is subordinate to state policy, while others consider them to be a sub-category of the inquisitorial system. In socialist systems, the focus is again on the pre-trial investigative process, which is heavily reliant on confessions. Since the collapse of the Soviet Union in the late 1980s, many former state-socialist legal traditions have become heavily influenced by the adversarial system but in widely different ways (Cape, 2007).

Another class of criminal procedure can also be identified, which may be labelled as traditional or religious, of which Sharia procedural law (in countries such as Nigeria) is a good example. In Sharia systems, the imams/religious judges preside over the gathering of evidence much like in the inquisitorial system. Sharia is a fusion of religious principles and procedures. Much like customary law, its interpretations vary from region to region (Schärf, 2004).

This report considered notable aspects of pre-trial criminal procedure relevant to pre-trial detention and in particular custody time limits in four countries, which include those from both adversarial and inquisitorial traditions. The aim was to analyse these different models to see if there were lessons that Malawi could learn to ensure custody time limits are adhered to and that accused persons are not held in pre-trial detention for long periods of time. The review may also be of use to other countries that are exploring ways of reducing the time that accused persons spend in pre-trial detention.

The Netherlands

The Netherlands Criminal Procedure is based on the Code of Criminal Procedure (CCP) 1926, which sought to promote adversarial proceedings (Prakken, 2007:155). Despite the intention to introduce more adversarial elements, the system remained largely inquisitorial in nature. Legislative change in

2000 changed the role of the investigating judge so that he/she is no longer the director of the investigative stage; this role now belongs to the prosecution, which falls under the Minister of Justice (Prakken, 2007:156). Police must obey the public prosecutor's orders in relation to the investigation. This is similar to the police prosecution system in Malawi, where prosecutors employed by the police conduct most prosecutions and direct investigators. The role of the investigating judge is limited to that of giving consent to the most intrusive methods of investigation. There is no position of investigating judge in Malawi and any judicial officer may authorise intrusive methods of investigation, such as search warrants and phone taps.

In the Netherlands, persons who have been arrested on reasonable suspicion of an offence may be held for questioning at a police station for a maximum period of six hours. This does not include the hours between midnight and 9 am, with the result that the maximum period is in reality 15 hours (ophouden voor onderzoek, Art. 61 CCP). In relation to criminal offences where the law provides for detention on remand, either the public prosecutor or the assistant public prosecutor can extend the period of police custody (inverzekeringstelling, Art. 57 CCP) by three days in the interests of the investigation. The suspect must then be brought – so within a maximum period of three days and 15 hours after his arrest – before the investigating judge, who will test the legality of the detention, although usually this only occurs when the prosecutor wants the detention to be extended. Suspects are normally released before the expiration of the time period (Jahae, 2005). This is similar to the 48-hour rule in Malawi, where further detention must be sanctioned by a court order.

A judge will not make an order for detention on remand unless there is evidence amounting to a serious suspicion connecting the suspect to the offence. This is a heavier requirement than the reasonable suspicion required for arrest and police custody: extra evidence is needed that the suspect probably committed the offence. In addition, the judge must be convinced that at least one of the following five grounds for keeping the suspect in custody applies (Art. 67a CCP) – namely that there is:

- A risk that the suspect might flee;
- A danger that the suspect might commit another offence punishable by a penalty of at least six years' imprisonment;

- An acknowledgement that the offence has seriously shocked society and that it is punishable by at least twelve years imprisonment;
- A risk that the suspect might prevent or obstruct the investigation into his case; and
- A risk of recidivism related to a listed number of offences, especially some minor offences that are seen as a threat to public order, such as systematic shoplifting.

Although the CCP recognises the concept of bail in theory (Art. 80 CCP), in practice bail in the form of the payment of an amount of money is rare. More frequently, a conditional order is made for release from detention on remand, subject to general conditions. The usual conditions are that the suspect must not flee, must not commit a criminal offence and must appear before the police or the court, when so requested (Prakken, 2007).

Detention on remand time limits

The CCP provides for two successive forms of detention on remand by order of the judge after the initial period of police custody. Detention on remand is permitted only for offences that can be punished with four years of imprisonment or more (these include aggravated theft, public violence, drug offences and manslaughter).

The first form of detention is remand in custody (bewaring), which can be ordered by the investigating judge for a maximum period of 14 days (Art. 63 and 64 CCP). The second is pre-trial detention by court order (gevangenhouding), which can be ordered by the court sitting in camera (raadkamer) for a maximum period of 90 days (Art. 65 CCP). The law provides that pre-trial detention cannot last longer than the combined 104 days (Art. 63 and further CCP). Within those 104 days, the case must be brought before a trial-judge for a first hearing. The mechanism by which the time limit is applied is that the case is brought before the trial court at the expiry of the time limit. However, the trial judge can adjourn the case for a specified period or generally.

The period of detention on remand may also not exceed the sentence likely to be imposed (Prakken, 2007). The presumption is generally in favour of conditional release except for more serious offences. But even in relation to serious offences, it may still be granted.

Conclusion

In summary, the mechanism applied in the Netherlands is that the matter is set down for hearing by the investigating judge within the maximum time period applicable to pre-trial detention before first hearing by prior court order. The trial judge then hears the matter, extends the time period or sees to the release of the accused. In other words, the mechanism is embedded within the inquisitorial court process.

Court records must record all dates, especially the set-down date for trial before the expiry of the limit. The investigating judge determines the period of detention and the trial judge must enforce the custody limits. The mechanisms are embedded into the criminal justice processes.

Little of this approach is importable to the Malawian context because of the differences in the underlying system and the fact that the limits are embedded in the entire process in the Netherlands. It may be more appropriate for African countries whose legal systems arose from inquisitorial systems, such as Guinea. However, aspects that could be imported into the Malawi context are the decision made by the investigating judge at the outset of the matter about how long it should take to be ready for trial as well as the setting of a trial date, within the time limits, at the outset of the matter. This forces all those concerned to return to court within the time limit.

Setting a trial date at the outset would require a fundamental change in the way that matters are set down for trial in Malawi. However, it may be possible to set a 'final remand' date at the outset - after which the court would be obliged not to order further remand and to grant bail instead. Calculating and noting final remand dates on the court file and on the first remand warrant issued could be a function of the clerk of the court in Malawi.

England and Wales

England and Wales have an adversarial criminal procedure based on common law but one that has been largely codified in the form of inter alia the Police and Criminal Evidence Act (PACE) 1984 and Criminal Justice Act (CJA) 2003. In England and Wales, the conditions under which an arrest can occur include that there is a 'reasonable suspicion' that an offence has been, is being or is about to be committed. In

addition, the officer must believe that the arrest is 'necessary' for one or more reasons. When the accused is still in custody on being charged, he must ordinarily be released either on bail or without bail. Unless the accused has a previous conviction (or equivalents in cases of insanity) for certain specified homicide or sexual offences, the accused must be released on bail or without bail unless he is accused of an imprisonable offence and there are substantial grounds for believing that he will abscond, commit further offences or interfere with witnesses.

Custody time limits

Custody time limits apply in terms of the Prosecution of Offences Act 1985. This sets out the maximum amount of time that an accused person awaiting trial can spend on remand. The basic rule is that if the trial has not started within the time limit then the accused must be released on bail. The time limits refer to the time between committal into custody by a court and the start of trial. For offences that can be heard in the Magistrates' Court, the limit is 112 days. However, for offences such as murder, which can only be heard in the (higher) Crown Court, the time limit is 182 days. The state can apply for an extension of the custody time limit due to:

- The illness or absence of the accused, a necessary witness, a judge or a magistrate;
- A postponement that is occasioned by the Court ordering separate trials to be held in the case of two or more accused people or two or more offences; or
- Some other good and sufficient cause as long as the prosecution has acted with all due diligence and expedition.

If a custody time limit expires, the accused has an immediate right to bail under the provisions of the Bail Act 1976, as amended by Regulation 8 of the Regulations (Archbold 3-11). In such a situation, a court may impose conditional bail but cannot impose a requirement that an accused provide a surety or give a security to ensure surrender to custody. The entitlement to bail lasts only until the next stage of proceedings.

Implementation mechanisms

In England and Wales, the Crown Prosecution Service has assumed a great deal of responsibility for the management of time limits, as the courts have placed a duty on the prosecution to act with all due expedition. The Director of Public Prosecutions (DPP) has approved a 'National Standard for the Effective Management of Prosecution Cases Involving Custody Time Limits'. (This is available on www.cps.gov.uk)

This standard – a policy of the Crown Prosecution Service – places various responsibilities on prosecutors and their managers to manage Custody Time Limit (CTL) cases, including:

- Various endorsements on the prosecution and court file covers are required, including that CTLs apply and the relevant expiry date;
- The national ready reckoner, which is an excel spread sheet set up to calculate dates taking into account all eventualities, must be used to calculate expiry dates;
- Duplicate monitoring systems are required, i.e. an electronic and paper-based system, and when a file is transferred, it must be clear where the responsibility lies for monitoring the CTL and the new expiry date must be updated on the appropriate monitoring system within 24 hours of the case being committed;
- Managers in the prosecution service must carry out a weekly check of the Case Management System print out and diary, which will have been endorsed with the action taken, to assure themselves that the monitoring system is being adhered to, all necessary actions have been taken and all live CTL cases are being monitored;
- Cases must be reviewed sufficiently early before expiry dates to ensure appropriate action may be taken;
- Files must be retrieved from the filing system on the review date and handed to the Deputy Chief Prosecutor (DCP) to consider whether the file should be passed to a specific lawyer for an application for a CTL extension to be prepared or whether it may proceed;
- Any CTL file requiring action must be handed to a named lawyer. If that lawyer is not available, the file must be

handed to another lawyer nominated by the DCP for action. Under no circumstances must a CTL file requiring action at the CTL review date be left on any person's desk. It must always be handed to someone for action that day;

- If the reason for delay in case progression lies with the police, a written explanation should be requested from the officer in the case to assist in the decision on how to proceed;
- A system of target dates must be established when requesting further work from the police. Dates must be monitored and follow up action taken if necessary. Minutes to the police must highlight the CTL expiry date on every occasion. The police must also be made aware of changes to the expiry date or in the custody status of the defendant. The police must be reminded, in minutes from the CPS, to record contact made with other agencies, such as the Forensic Science Service, regarding efforts made by the police to expedite or progress the provision of evidence in case the court asks for this information; and
- Where it is decided that a case is to be discontinued and the defendant is remanded in custody only on that particular case, urgent steps must be taken for the immediate written confirmation of this decision to be sent to the court by way of a notice of discontinuance.

There is also 'The Protocol for the Supply of Forensic Science Services to the Police and the Crown Prosecution Service, which provides that the Forensic Service Provider (FSP) will use the fast track procedure when a defendant is in custody. The prosecution must, as part of that Protocol, inform the FSP of any relevant CTL expiry date.

Conclusion

Implementation mechanisms in England and Wales are reliant on formal policies and protocols within the Crown Prosecution Service, the police and forensic services. In summary, in England and Wales, the emphasis is on annotations to court and prosecution file folders. Furthermore, there are both paper and electronic monitoring systems, which set targets and review expiry dates. The prosecution bears the responsibility for expediting cases.

Mechanisms exist in the form of national standards (policy) and protocols between the prosecution, police and forensic services. The usual court processes are buttressed by changes to prosecution practice embedded in prosecution policy.

The development of appropriate policies by the DPP for prosecutors under his ambit, and similarly for the Chief of Police for police prosecutors is certainly importable to the Malawian context, largely due to the similarity of the legal processes. Such a policy could build on record keeping that is already used by police and prosecutors, such as notes on file covers and in the various registers.

One concern is that the England and Wales CTL implementation method is manageable because the majority of cases are not CTL cases – the presumption is in favour of release in the majority of cases. This is not the situation in Malawi or indeed in many other countries in Africa. The possible burden of cases must be borne in mind when developing any such policy. In other words, the policy may need to be implemented in tandem with a more lenient bail policy.

Protocols among the various actors in the criminal justice system outlining their agreement on how to manage CTL cases would also be highly desirable and implementable in the Malawian context, as long as they were reasonable and developed jointly.

The United States of America

The United States of America (US) has an adversarial criminal justice system. Each state has its own criminal law embodied in a criminal code, although many states have adopted in whole or in part the Model Penal Code promulgated by the American Law Institute in 1962. Federal laws also apply in all states, and overarching the whole system is the American Constitution.

Police in the US may arrest a person if they observe a crime being committed or the evidence leads them to believe there is probable cause that a crime has been committed (Bonfield, 2006: 250) Within 48 hours the defendant must be brought before a judge or a magistrate for a determination of both pre-trial probable cause (a heavier standard than on arrest) and to address the issue of pre-trial

release. At this hearing, the prosecution must provide the court with a sworn statement, usually by a police officer in the form of an affidavit, establishing probable cause to believe the defendant has committed a crime.

If the crime is minor (a misdemeanour), the defendant will usually be released on his own recognisance. In 1984, Congress replaced the Bail Reform Act of 1966 with a new bail law, codified as United States Code, Title 18, Sections 3141-3150. The main innovation of the law was that it allowed pre-trial detention of individuals based on their danger to the community; under prior law and traditional bail statutes in the U.S., pre-trial detention was based solely upon the risk of flight.

The United States Code provides in 18 USC 3142(f) that persons who fit into certain categories may be subject to detention without bail, including persons charged with a crime of violence that carries a maximum sentence of life imprisonment or death; persons charged with certain drug offences for which the maximum offence is greater than 10 years; repeat felony offenders; and, defendants who pose a serious risk of flight, obstruction of justice or witness tampering.

There is a special hearing held to determine whether the defendant fits within these categories and whether any condition or combination of conditions will reasonably assure the appearance of such person as required and the safety of any other person and the community (18 USC 3142). Anyone not within these categories must be admitted to bail.

If the defendant is charged with a felony (a crime which involves a potential punishment of a year or longer in prison) then he is entitled to a preliminary hearing before a judge unless the prosecutor obtains an indictment from a grand jury (a panel of 12 to 23 ordinary citizens to whom the prosecution presents its case behind closed doors). The purpose of both the grand jury and preliminary hearing processes is to determine whether there is sufficient evidence to bring the defendant to trial (Bonfield, 2006). Although the standard of evidence remains probable cause, there is a higher level of scrutiny of the evidence than at the initial appearance stage. The defendant is then formally arraigned or charged with the offence (assuming the indictment is returned or information filed) and must enter a plea of guilty or not guilty.

Speedy trial innovations

The American Constitution requires a speedy trial. During the 1970s, 94 federal district courts implemented two major policy initiatives, Rule 50(b) of the Federal Rules of Criminal Procedure and the Federal Speedy Trial Act, as well as associated sanctions, that were designed to combat delays in the processing of federal criminal cases. These initiatives:

- Established a national priority for delay reduction in criminal cases;
- Encouraged local district court planning to assist with delay reduction;
- Established reporting procedures for monitoring local compliance; and,
- Provided for the determination of quantitative goals for the time to disposition of criminal cases.

The 'determination of quantitative goals' means that time limits for various stages of the criminal process were set by each court depending on what was appropriate for that court. For example, the Eastern District of Texas has a limit of 30 days between arrest and filing of indictment (via grand jury) or information (preliminary hearing) and 70 days thereafter for the commencement of trial. For defendants in custody, trial must begin within 90 days of continuous custody commencing (Speedy Trial Plan for the Eastern District of Texas, 1980).

Research into the impact of such initiatives via a multiple-intervention time-series model found that they contributed to a dramatic reduction in the time to disposition in US federal criminal cases by the late 1980s (Garner, 1987).

Conclusion

In summary, the setting of custody time limits in each federal district court is preceded by research and analysis to determine the trends in each court. The time limits determined for each stage of the criminal process are based on evidence regarding what is 'usual' in each court. This means that the time periods are more likely to be reasonable and attainable by each court. This is

something that cannot be replicated in Malawi as the time periods have already been set in legislation. However, the research preceding this report suggests that the legislative limits set for Malawi are not unreasonable for most cases (Muntingh et. al 2011). However, for countries considering the implementation of time limits, it would be advisable first to understand current time trends in order to set reasonable and achievable limits.

Furthermore, US time limits are embedded into the entire planning process of the courts - with monitoring and compliance procedures as well as sanctions ('punishments') for non-compliance (based in employment law). The time limits are highly specific to the multi-stage process of the US system, which requires an ever-increasing burden of evidence to continue to proceed with the case. The Malawi system does not appear to require an increasing burden of evidence. While it can be argued that the committal process in Malawi is similar to the multi-stage US process, it appears to be treated more as a formality to be met rather than one requiring an evidential burden to continue to detain an accused.

Possibly the most 'importable' aspects of the US system is the creation of a national priority to reduce delay and the creation of information and reporting procedures to monitor compliance with custody time limits.

Zimbabwe

Zimbabwe has an adversarial system currently compromised by politicisation of the criminal justice process. The country does not have explicit legislated custody time limits but has a general, constitutionally derived requirement that cases should be resolved in a reasonable time and without persons being detained for excessive periods.

The main implementation mechanism adopted by the magistracy is that the provincial magistrate receives a list of all persons held in custody and the time periods for which they have been held on a weekly basis from the relevant correctional centres falling under his jurisdiction. In relation to those held for longer time periods, the magistrate contacts the relevant prosecutor and enquires as to the reasons for the delay and encourages resolution of the case (Muntingh & Redpath, 2012).

However, magistrates have indicated that they have no power over the prosecution service and that this is not necessarily an effective method of reducing time periods relating to pre-trial detention in Zimbabwe (Muntingh & Redpath, 2012). Magistrates also operate in an environment where their tenure is threatened when they make decisions that are unpopular to the state, in this case the prosecution service.

In Zimbabwe, unlike Malawi the courts are not explicitly legislatively mandated *mero motu* (on their own motion) to grant bail to accused persons when they have been detained for too long. It could be argued that they have the inherent jurisdiction to do so, but perhaps only in a situation when time in detention has become obviously excessive.

Conclusion

The mechanism that ensures that magistrates are informed by correctional officials on a weekly basis of the time periods that persons under their care have spent in detention is one that could be effective in the Malawian context. It could result in courts on their own motion seeing to the release of detained persons on bail when custody time limits have been exceeded.

The system in Zimbabwe involves a simple electronic spreadsheet that records the date the detainee was received into custody. It automatically calculates the total time in detention on any given day, which can then be printed out and delivered to the magistrate. This could easily be replicated in Malawi.

Conclusions from the literature

The literature suggests the feasibility of the following should be tested if Malawi wishes to develop a workable scheme for ensuring adherence to custody time limits:

Prisons

Correctional Officials

How feasible is it to produce a weekly list of all remand-prisoners in their care and their total time in detention, which would then be delivered each week to the senior

magistrate having jurisdiction? What changes would need to occur to the record-keeping process for this to be implemented?

Prison Management

How feasible is it to require your officials to ensure that the above gets done? What sanctions or incentives would make it more likely to occur? What form of national instruction, order or policy would be necessary to make this mandatory in individual prisons, and in all prisons?

Courts

Magistrates

How feasible is it for magistrates to grant bail on their own motion when it is brought to their attention that custody time limits have been exceeded? How would this occur in practice? How could magistrates ensure such orders are implemented?

Clerks of the Court

How feasible is it for clerks of the court to calculate and note in registers and on case files the custody time limit expiry date and thus the final date on which a further remand may be granted for each case? What would need to change in registers and on case files? What kind of national instruction order or policy would make this mandatory for all courts?

Director of Public Prosecutions

Prosecutors

How feasible would it be to note on all files whether custody time limits are applicable and the relevant dates, especially in cases of committal? What would be the best way of ensuring compliance with a national instruction from the DPP that required this?

Would it be possible to set up a monitoring system that warned prosecutors when dates were about to expire? What would be the best form for such a system?

What would make you ensure compliance with custody time limits in your own cases?

Management

What is the feasibility of developing a national standard on the management of cases with custody time limits? How could it be enforced?

Police

Management and clerks

How feasible would it be to produce a weekly list of all detainees in their care who have exceeded 48 hours in detention with their total time in detention, which should be delivered each week to the senior magistrate having jurisdiction? What changes would need to occur to the record-keeping process for this to be implemented? What form of national instruction, order or policy would be necessary to make this mandatory?

Police Prosecutors

How feasible would it be to note on all files whether custody time limits are applicable and the relevant dates, especially in cases of committal? What would be the best way of ensuring compliance with a national instruction that required this?

Would it be possible to set up a monitoring system that warned prosecutors when dates were about to expire? What would be the best form such a system would take?

What would make you ensure compliance with custody time limits in your own cases?

Section B:

Fieldwork Research

THE FIELDWORK INVOLVED INTERVIEWING CRIMINAL JUSTICE OFFICIALS ABOUT THE FEASIBILITY OF ADOPTING THE MECHANISMS SUGGESTED BY THE LITERATURE REVIEW AND ANSWERING THE QUESTIONS OUTLINED AT THE END OF THE PREVIOUS SECTION. IN ADDITION, KEY STAKEHOLDERS WERE ASKED ABOUT THE REASONS FOR THE FAILURE OF CUSTODY TIME LIMITS AND THE POLITICAL FEASIBILITY OF DEVELOPING A PROTOCOL TO PROMOTE THE BETTER MANAGEMENT AND MORE EFFECTIVE IMPLEMENTATION OF THEM. IN PARTICULAR, THE DPP WAS APPROACHED ABOUT THE POSSIBILITY OF IMPLEMENTING A NATIONAL STANDARD SIMILAR TO THAT USED IN ENGLAND AND WALES ACROSS ALL HIS OFFICES. FINALLY, A SEMINAR WAS CONDUCTED DURING WHICH THE FINDINGS FROM THE FIELDWORK AND LITERATURE REVIEW WERE PUBLICLY DISCUSSED, INITIATIVES ENDORSED AND A RESOLUTION AGREED UPON.

The findings from the literature review were presented to a team from the four consortium organisations - PASI, CHREAA, CCJP and CHRR. The team members were then provided with training on how to administer a structured questionnaire, which was designed to:

- Explore perceptions around the causes of the failure of custody time limits;
- Test the feasibility of ideas arising from the literature; and

- Illicit proposals put forward by the interviewees.

The questionnaire was used by team members in confidential one-on-one interviews with key officials and other people who work in the criminal justice system between May and June 2012. 36 interviewees were targeted and ultimately 30 questionnaires were submitted for analysis. The results of the questionnaire-based interviews were analysed using quantitative and qualitative methods. The geographical, institutional and occupational distribution of respondents appears in Figures 1-3.

FIGURE 1: DISTRIBUTION OF STRUCTURED QUESTIONNAIRE RESPONDENTS BY GEOGRAPHICAL LOCATION

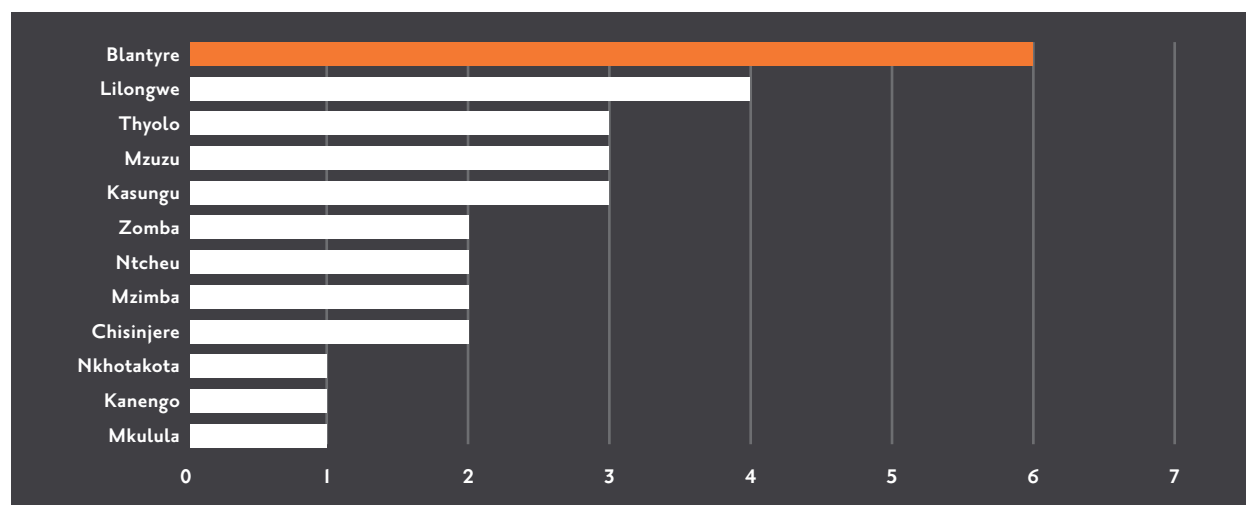


FIGURE 2: DISTRIBUTION OF STRUCTURED QUESTIONNAIRE RESPONDENTS BY INSTITUTION

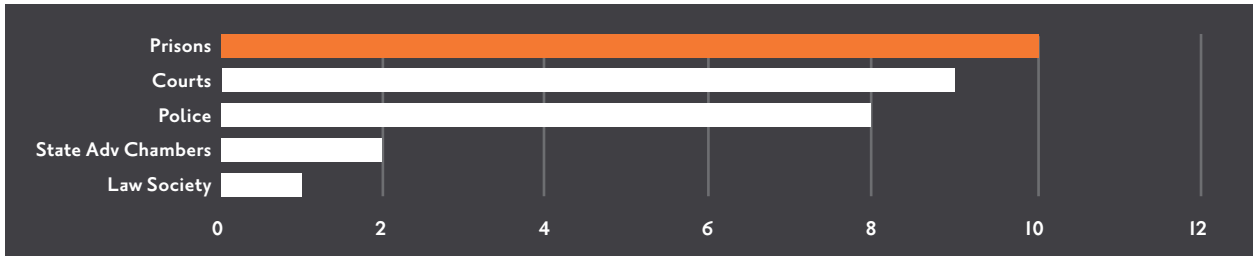
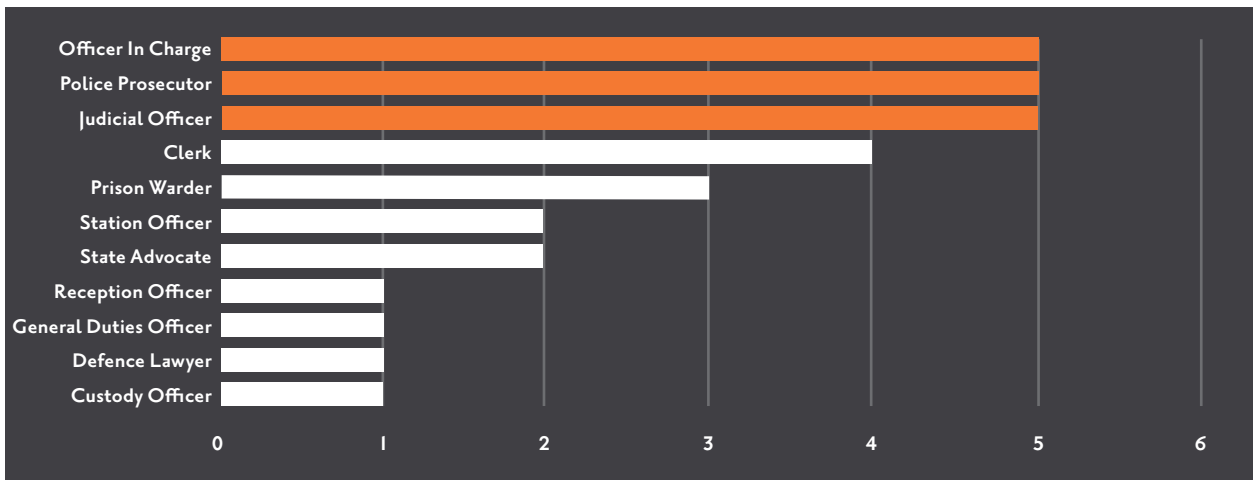


FIGURE 3: DISTRIBUTION OF STRUCTURED QUESTIONNAIRE RESPONDENTS BY OCCUPATION



On-the-record discussions were also held with six high-level stakeholders:

- Chairperson of the Prisons Inspectorate, Justice Ken Manda
- Chief Resident Magistrate, Central Region, Her Worship Ruth Chinangwa
- Director of Public Prosecutions, Bruno Kalemba
- Registrar of the High Court, Lilongwe Registry, His Honour Thom Ligowe
- Solicitor General and Secretary for Justice, Anthony Kamanga
- Officer-in-Charge of Prosecutions and Legal Services at National Police Headquarters, Happy Mkandawire

Their comments are recorded in the analysis where appropriate.

On completion of the research and a preliminary report, a validation seminar was held in Lilongwe in August 2012.

It was attended by representatives from all sectors of the criminal justice system including police, prosecutions, paralegal organisations, legal aid, judiciary and prisons. The intention was to present the findings of the literature and fieldwork research; stimulate discussion and debate; and obtain consensus on initiatives that would help to ensure greater compliance with custody time limits.

In particular, the seminar participants were asked to consider and report back on the following questions:

- Which of the recommendations of the research - relating to case folders, court and prison registers, public awareness campaigns, proforma bail applications, Court User Committees and prosecution policy - are supported by the group?
- Are there any additional recommendations the groups would like to table which are generally relevant?
- Are there any additional recommendations the groups would like to table relevant to their profession?
- What processes need to be followed to ensure that recommendations are implemented?

Reasons for failure to comply with custody time limits

Interview findings

In the interviews with criminal justice officials, respondents mentioned multiple reasons for the failure to comply with custody time limits. The reasons predominantly focused on the causes of delay in the criminal justice process, rather than the failure to apply custody time limits. The most common reasons given were slow or delayed investigations, and lack of resources. None of the respondents of their own accord mentioned lack of knowledge and understanding of the custody time limits, although lack of training in this regard was mentioned (13 percent) and this was raised in almost all of the high level discussions.

This suggests that respondents did not interpret the legislation to require release on bail of an accused person when the time limit has been exceeded. In other words, unavoidable delays are regarded as a reason that trumps the right to release. Respondents believe that accused persons must continue to remain in custody until the conclusion of their cases, whatever the reason for any delays. The idea that accused persons should be released on bail when time limits have been exceeded has not been internalised by those working within the criminal justice system – neither as a possibility nor as a legal requirement.

A prison official summarised the attitude of actors in the criminal justice system to delays in the hearing of cases as being ‘aphwe madzi’, which can be translated as ‘let him feel it’. This suggests that a fundamental change of mindset among all role-players is required if custody time limit mechanisms targeted only at state officials were to succeed.

“Station officers do not have a keen interest in pre-trial custody time limits.”

– Officer-In-Charge of Prosecutions and Legal Services at National Police Headquarters

Indeed, this view is supported by the fact that 27 percent of respondents mentioned negligence, laziness, scepticism or lack of commitment as reasons for the lack of adherence to custody time limits. It further suggests that the interventions that are most likely to succeed are those that directly involve accused persons and/or paralegals, rather than those that need to be implemented solely by state officials in the criminal justice system. In particular, the importance of educating remandees about their rights so that they could ‘move’ magistrates to grant them bail was highlighted in a number of the high-level discussions.

“Awareness sessions with remandees on pre-trial custody time limits are necessary in order for them to challenge their continued detention when pre-trial custody time limits are exceeded.”

– Registrar, Lilongwe High Court

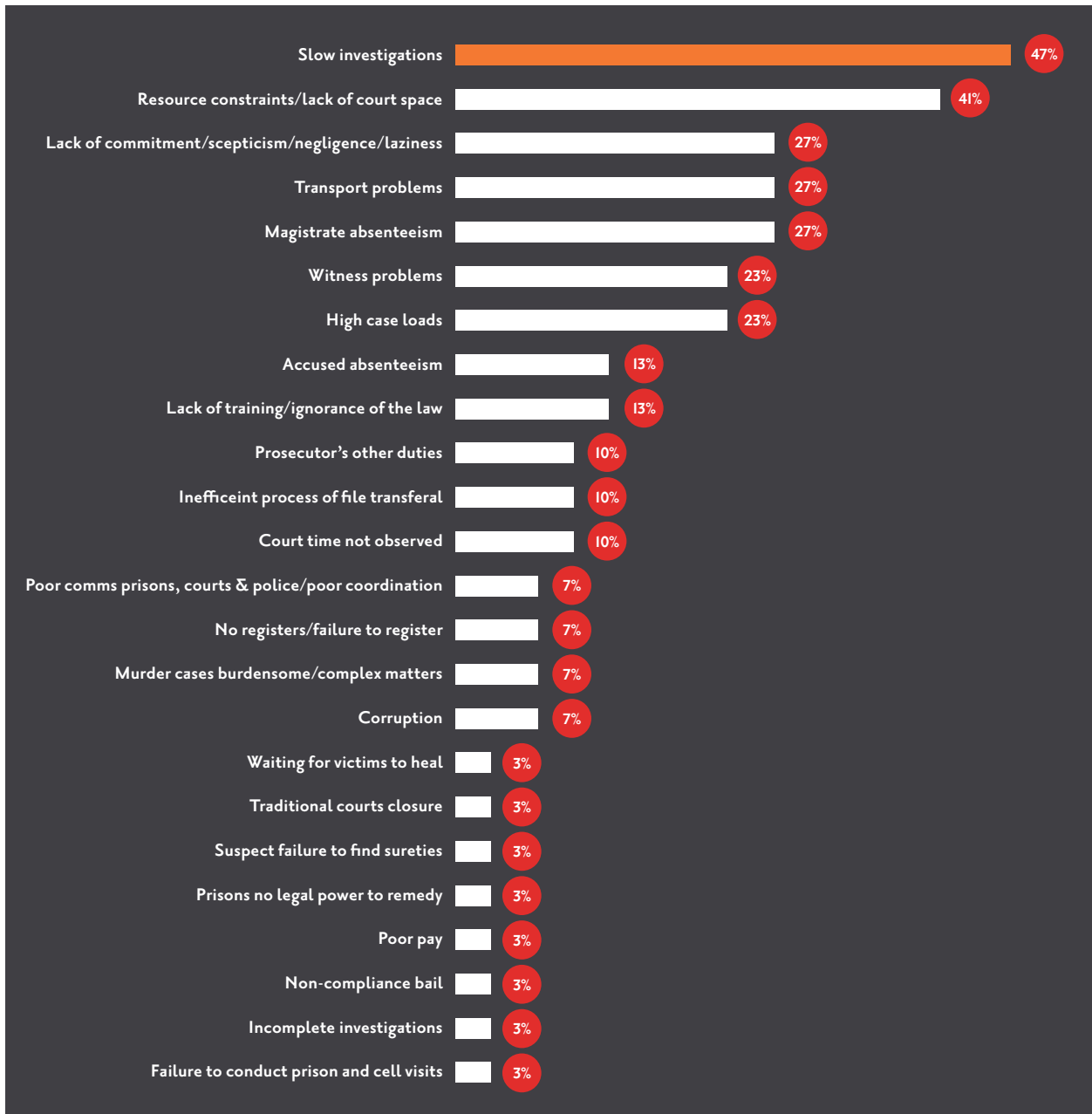
Three out of four police prosecutors mentioned that they were not exempt from other police duties and thus struggled to prioritise their prosecutorial work.

“Prosecutors are also assigned to other duties such as being part of the usual duty roster, where one might work all night.”

- Structured questionnaire respondents

Respondents gave the following reasons for why custody time limits were exceeded (see Figure 4).

FIGURE 4: REASONS GIVEN BY RESPONDENTS FOR CUSTODY TIME LIMITS BEING EXCEEDED



NOTE THAT RESPONDENTS WERE NOT PROVIDED WITH A LIST OF REASONS BUT CAME UP WITH THEIR OWN AND WERE ABLE TO LIST MORE THAN ONE REASON. CONSEQUENTLY THE PERCENTAGES REFER TO THE PERCENTAGE OF RESPONDENTS WHO CITED THE REASON – WHICH IS WHY THE OVERALL TOTAL EXCEEDS 100 PERCENT.

Validation seminar findings

Similar to the input received during the interview process, many seminar participants concentrated on 'unavoidable' reasons for delays – perhaps implying that such situations should be regarded as exceptions to the custody time limit rule. For example, when transport is not available or the magistrate is ill. Other participants disagreed.

A member of the police prosecution delegation commented that the custody time limit rules do not make provision for certain situations – such as when magistrates are away from their duty stations due to other obligations or when delays are caused by the 'malingering' of accused persons. However, a member of the magistracy responded that if magistrates are not available, this must be dealt with; it should not be used as a reason to ignore custody time limits. The legislation provides for the prosecution to make an application for an extension of the time limit if necessary. The issue of custody time limits is a collective responsibility, and the issue of the unavailability of magistrates is similar to prosecutors sometimes not being available because of other duties – neither can be used as a reason for prolonging the detention of accused persons.

The Acting Chief Resident Magistrate noted that when a magistrate is away or a prosecutor is not available or has been transferred, measures must be put in place to ensure the timely transfer of responsibility for any outstanding cases.

It was noted that there is a need for detailed case management. While the High Court has a listing system that permits cases to be tracked, this proposal would be problematic in lower courts. In the magistrate's court, listing is only done when matters are presented to court, before which a detainee may already have spent a great deal of time in custody. Case management needs to be carefully thought through in the lower courts.

Participants at the seminar also suggested that cases should be set down for the full time required for trial so that the entire matter can be dealt with at trial. This avoids the matter being delayed because of other duties such as meetings. Attempts should also be made to schedule meetings and training during vacation times or when courts are not busy. In addition, not all magistrates should go to seminars at the same time.

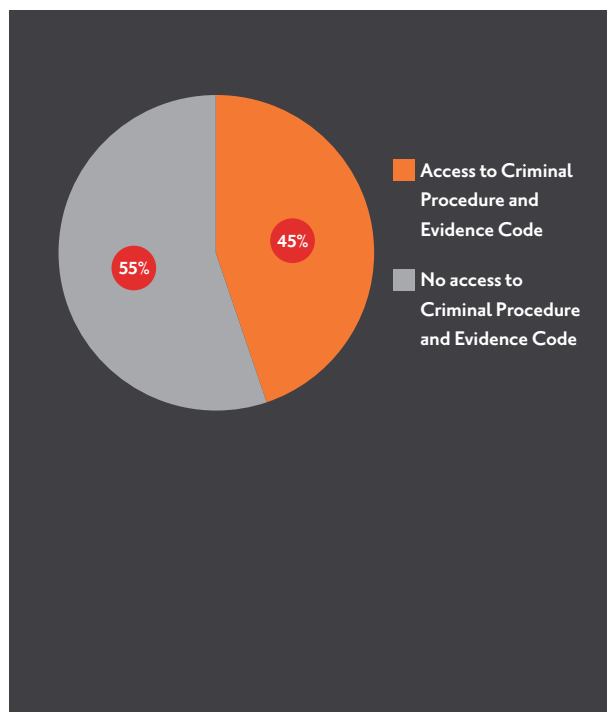
The seminar also discussed the issue of when the charge sheet should be ready. The prosecution should only bring a case before court when it is ready to prosecute but sometimes the charge sheet is only drafted on the day the accused is brought to court. Then there is the issue of whether all the witnesses are present. The system should permit the testimony of the witnesses who are actually there to continue and not simply postpone the entire matter as a result of one missing witness.

Access to legislation and interpretation of legislation

Interview findings

The majority of respondents did not have access to the Criminal Procedure and Evidence Code, which sets out custody time limits.

FIGURE 5: QUESTIONNAIRE RESPONDENTS' ACCESS TO LEGISLATION



While all judges, magistrates, police prosecutors and state advocates interviewed said that they had access to the CPEC, this access was often shared with colleagues – i.e. there is only one copy in an office comprised of many officials. None of the clerks of the court, none of the respondents in prisons (even officers-in-charge) and only one of those in the police who were not prosecutors (i.e. station officers, reception officers, and custody officers) had access to the CPEC, which governs the length of time that the state may lawfully hold a person in detention.

Her Worship Ruth Chinangwa, Chief Resident Magistrate (CRM) for Central Region, attributed poor adherence to custody time limits to a number of factors, including the:

- Poor distribution of the provisions of the pre-trial custody time limits among criminal justice agencies;
- Poor understanding of the provisions by some judicial officers;
- Inability of suspects/remandees to move the courts (prompt the court to take action) if there is a violation of pre-trial custody time limits; and
- Low number of lawyers who are interested in pro-bono work to help people who are not legally represented.

Meanwhile, the registrar of the High Court was of the view that the provisions of the new law are not properly understood by criminal justice agencies and recommended workshops for judges, magistrates, prosecutors and police investigators on custody time limits.

This suggests that improving access to the legislation and/or developing and providing plain language pocket guides on the legislation may be an advisable intervention. Extra training would also be required to improve the implementation of custody time limits.

Seminar findings

The plenary discussion focussed on the lack of common understanding of the legislation. Much of the debate centred on the issue of when exactly a trial can be said to have commenced. If a trial commences when a suspect pleads, then the current practice of prosecutors asking

the accused to plead before immediately adjourning the case could operate to subvert the intention of the custody time limit legislation. The chair asked the question why accused persons are asked to plead by the prosecution when witnesses are not available and the prosecution is not ready to proceed. The extended discussion which ensued strongly suggested that any initiative around custody time limits should be preceded by a clarification of the issues around when trials officially commence and when the prosecution is entitled to ask for accused persons to plead.

Where does responsibility lie for implementation of custody time limits?

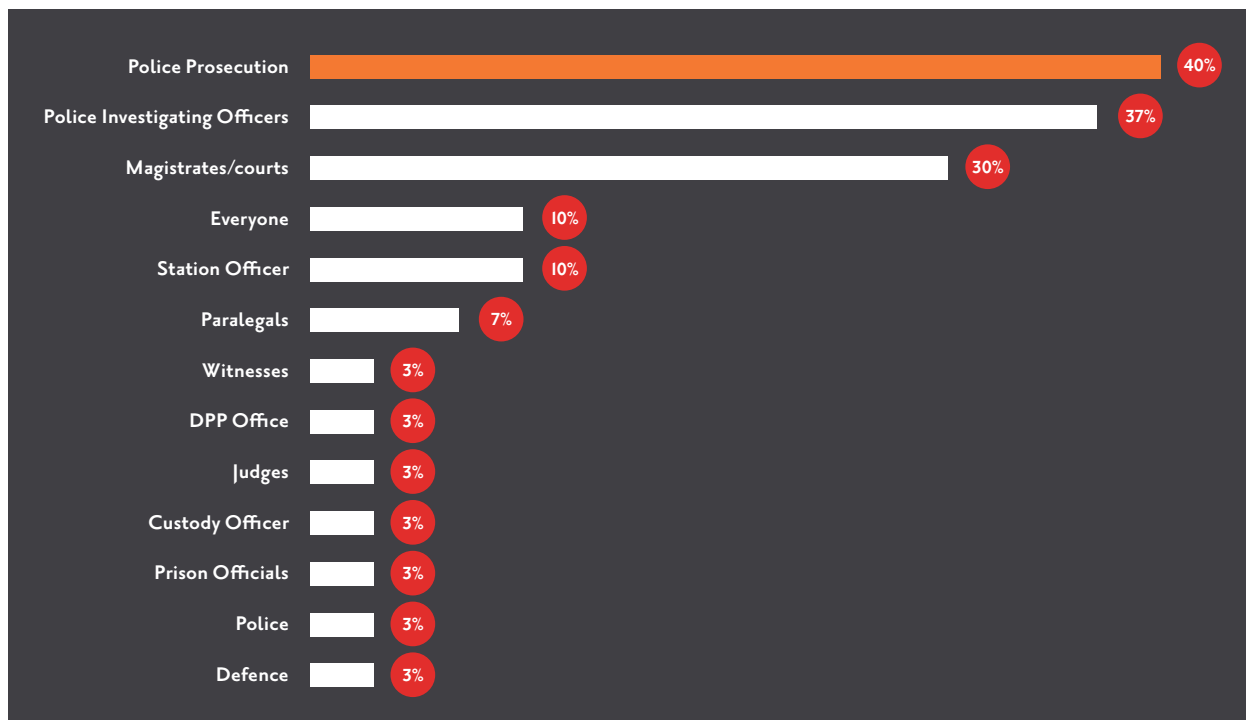
There was a great deal of variation among interview respondents as to who is primarily responsible for ensuring that custody time limits are adhered to.

Respondents primarily cited police investigating officers and police prosecutors as responsible for the implementation of custody time limits. This is consistent with the perception that the general causes of delay in criminal cases – usually relating to investigations – are to blame for the failure to apply custody time limits. Furthermore, it highlights the degree to which the fate of remandees is perceived to be in the hands of investigating officers and police prosecutors.

However, the CRM for Central Region pointed out that it is the responsibility of magistrates to ensure that pre-trial custody time limits are respected, regardless of the status of the case.

During the validation seminar, there was an acknowledgement of joint responsibility, with the understanding that the final responsibility lies with the judiciary to grant bail when custody time limits are exceeded.

FIGURE 6: RESPONDENTS' VIEWS ON WHO IS MAINLY RESPONSIBLE FOR IMPLEMENTATION



NOTE THAT RESPONDENTS WERE NOT PROVIDED WITH A LIST OF REASONS BUT CAME UP WITH THEIR OWN AND WERE ABLE TO LIST MORE THAN ONE REASON. CONSEQUENTLY THE PERCENTAGES REFER TO THE PERCENTAGE OF RESPONDENTS WHO CITED EACH SPECIFIC CAUSE – WHICH IS WHY THE OVERALL TOTAL EXCEEDS 100 PERCENT.

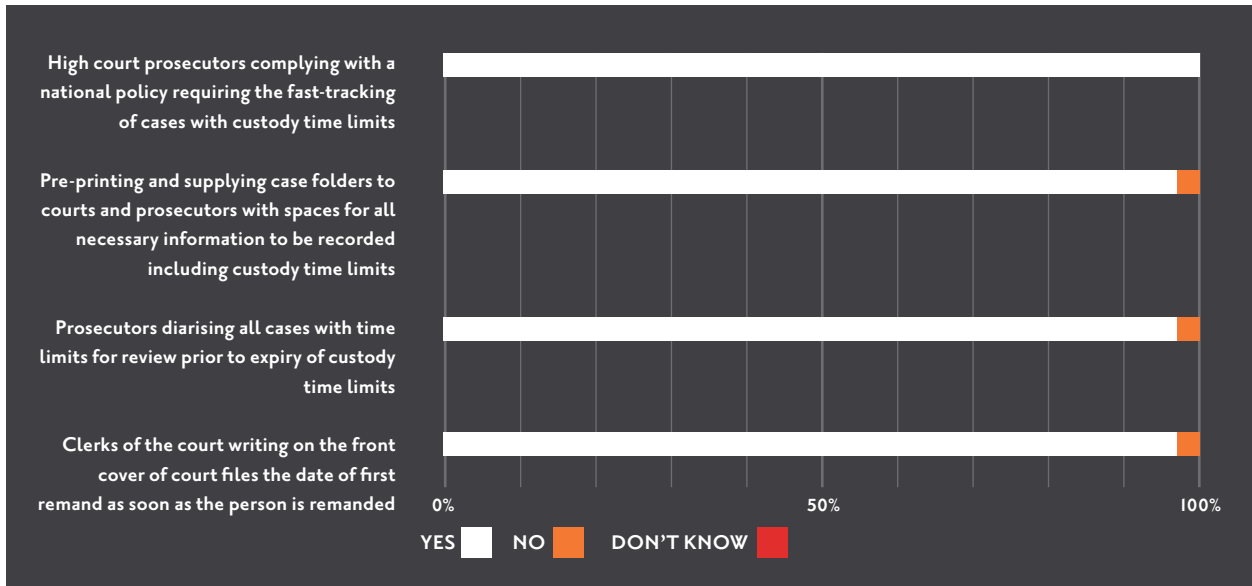
“Judicial officers are supposed to be proactive in discharging their duties in order to protect the rights of accused persons and release on bail all remandees who are unlawfully kept in prisons or other places of detention based on pre-trial custody time limits. In order for this to happen there is need for institutions which are independent of the judiciary to compile lists of all prisoners who are illegally detained contrary to pre-trial custody time limits and submit such lists to courts frequently. Lawyers can also help by bringing to the attention of the courts names of remandees who are unlawfully kept in prisons or police cells.”

- Chief Resident Magistrate, Central Region

Attitudes to proposed mechanisms for ensuring adherence to custody time limits

Interview findings

FIGURE 7: PROPOSALS WITH OVERWHELMING SUPPORT FROM RESPONDENTS



All respondents (including state advocate respondents) were in favour of a DPP policy for state advocates on compliance with custody time limits. Such an intervention would currently only affect cases in the High Court (mostly homicide matters). However, these are matters that are frequently inordinately delayed because of the process

of committal to the High Court and the need for forensic reports coupled with the shortage of forensic skills in the country. The custody time limit provisions are also more complicated for these matters.

And there is support from the DPP himself for such an intervention.

“I am keen to see to it that Sections 41 and 42 of the Malawi Constitution are adhered to by prosecutors in order to protect the rights of suspects. It is against this background that I am keen to see that Part IVA of the Criminal Procedure and Evidence Code - Pre-Trial Custody Time Limits is respected at all times. I am keen to make Sections 41 and 42 of the Constitution as well as Part IVA of the Criminal Procedure and Evidence Code practical tools for prosecutors. A Policy or a Protocol can be useful in this regard.”

- Director of Public Prosecutions

However, such an intervention on its own is unlikely to have a widespread effect. As argued above, pressure must also emanate from remandees themselves for compliance to be actualised, given the attitudes among officials working in the criminal justice system. This will require significant public education in order to ensure that pre-trial detainees and their families are aware of their rights in law and how these might be accessed.

folders and the need for remand dates to be recorded on the cover of case folders. It was noted that the former used to be available, but have not been available for some years. It was argued that these initiatives would bring uniformity, which currently does not exist since clerks of the court have to create their own folders using a ruler and pen. In addition, they would facilitate the accurate and clear calculation of exactly how long an accused person has been in custody.

Two additional proposals that received significant support included the creation and distribution of pre-printed case

FIGURE 8: PROPOSALS THAT RECEIVED VERY STRONG SUPPORT FROM RESPONDENTS



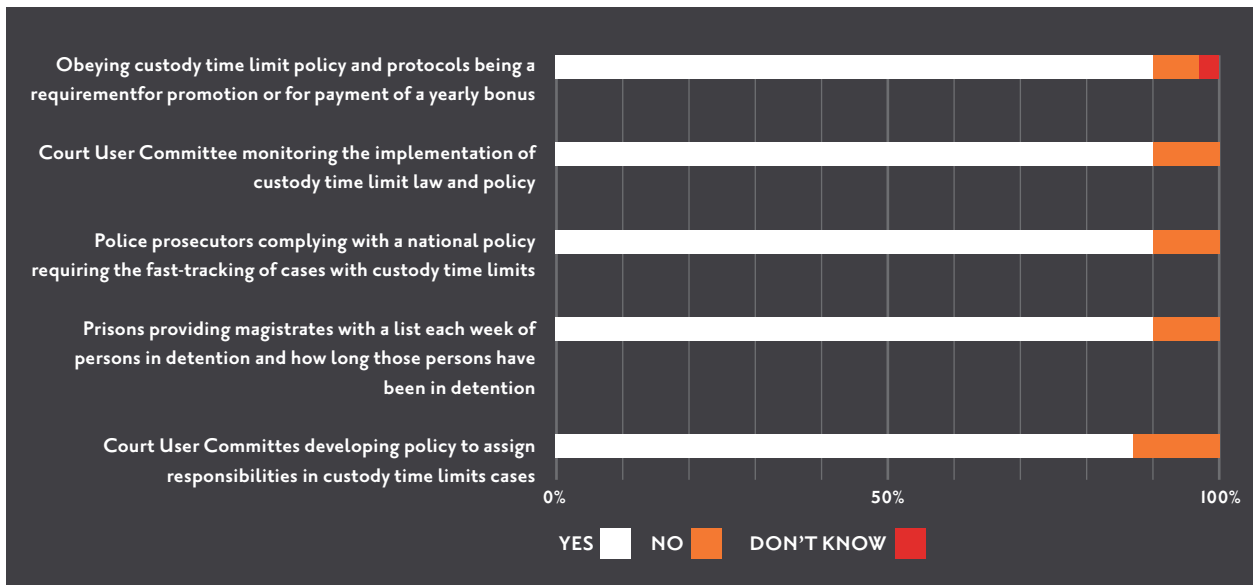
The proposals in Figure 8 are largely self-explanatory and mainly focus on ensuring that it is clear how long persons have been in custody and highlighting the expiry date for prosecutors. The proposal that magistrates act mero motu without the need for an application from the accused for bail when time limits have been exceeded surprisingly elicited support from all respondents, except two police respondents, who feared it may be open to abuse by magistrates.

“Additional Circulars by the Chief Justice will not change anything as far as respect for pre-trial custody time limits is concerned. What is required is to mount pressure on the courts whenever people languish in prisons or police cells - beyond pre-trial custody time limits.”

- Chief Resident Magistrate, Central Region

However, the CRM had a more realistic view of the extent to which magistrates might respond to a circular on the issue.

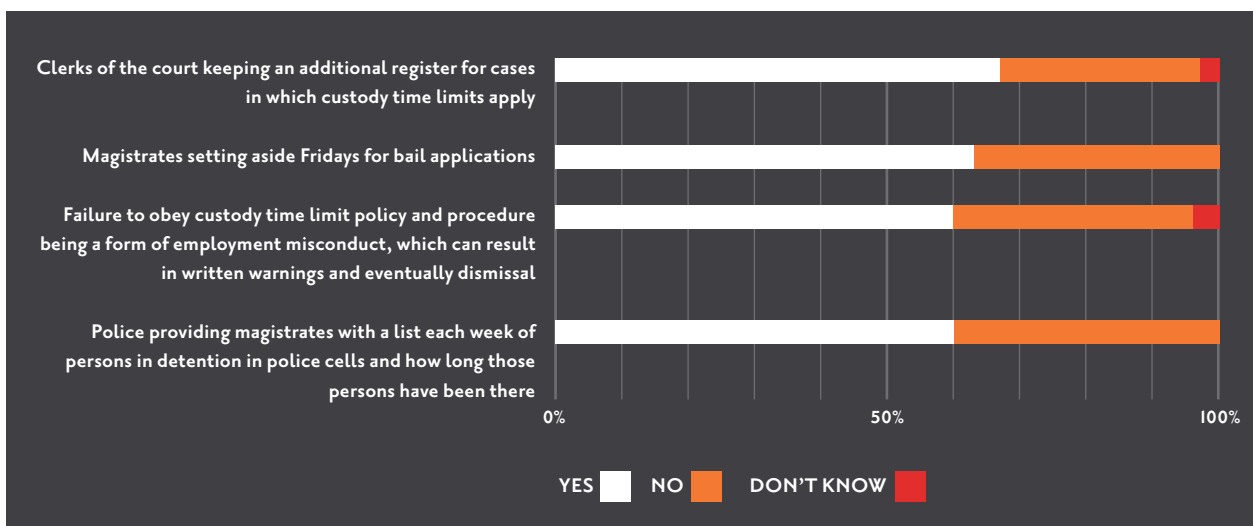
FIGURE 9: PROPOSALS THAT MET WITH SOME DISSENT FROM RESPONDENTS



Those who were against relying on monitoring by Court User Committees were of the view that they were not sufficiently independent bodies and did not have the resources or authority to implement any resolutions arising from their monitoring efforts. The few respondents who disagreed with the need for the development of a

prosecution policy doubted it would have impact, while most of those who did not support the provision by prisons of a weekly list of persons in detention were police prosecutors – presumably because such lists might reflect poorly on their performance. Among dissenters, the proposal for an additional court register was rejected on the

FIGURE 10: PROPOSALS WITH SIGNIFICANT DISSENT FROM RESPONDENTS



basis that it would create confusion through the duplication of registers. Meanwhile, the proposal for a specific day for bail applications was rejected by many on the basis that it would become practice for bail applications only to be heard on that day, thus preventing accused persons from applying for bail on any other days.

The proposal that failure to comply with custody time limits should be categorised as a form of misconduct was criticised on the basis that it was too severe a consequence given the challenges faced in the system and that other avenues should be explored to ensure compliance.

The suggestion that police should provide a weekly list of detainees in their custody was rejected by some on the basis that police could not be expected to admit they had violated the 48-hour rule and therefore would manipulate the list. It was suggested that such a list should instead be compiled by independent means, such as through paralegals monitoring police cells.

Seminar findings

On the basis of the proposals outlined above, eight suggestions were put to seminar participants:

- Developing a new standard case folder; printing and distributing the folder to all courts; making provision for the on-going supply of these folders and training for clerks on using them;
- Developing a new standard for court registers with the relevant columns for custody time limits; printing and distributing them to all courts; and making provision for the on-going supply of these registers and training on how to complete and maintain them;
- Developing new standard prisons registers with the relevant columns for on-going calculation of time on remand; printing and distribution them to all prisons; making provision for the on-going supply of the registers to prisons; training on how to complete these registers and how to submit lists to the Court User Committees and to magistrates;
- Developing and printing public education posters for distribution in police stations, courts and prisons;

- Developing and printing a pocket guide to custody time limits for distribution in prisons, courts and police stations;
- Developing a pro-forma bail application to bring bail applications on behalf of remandees whose custody time limits have been exceeded;
- Funding for Court User Committees to meet regularly and plan additional court times for bail applications; and
- Supporting processes for the development of a prosecutorial policy under the auspices of the DPP, which would include diarising and reviewing requirements, and the setting of time targets to be monitored by managers.

The seminar groups accepted all these proposals with some with additional comments and modifications. Regarding the process required for implementation of these proposals, the paralegal group said periodic monitoring and the provision of oversight functions would be necessary for the implementation of custody time limits. Furthermore, there would be a need for training and orientation of the relevant stakeholders. There would also need to be regular reports, returns and feedback for possible review. The first step would be to sell the ideas to the heads of criminal justice agencies and to lobby for a custody time limit policy.

The prisons group said there would need to be a joint task force formed at different levels for monitoring and evaluation of adherence to custody time limit law and policy. Meanwhile, the prosecution group said there needed to be an implementation plan against each recommendation for the responsible officers and institutions – and that lobbying for funds should be done collectively.

Additional recommendations

Interview findings

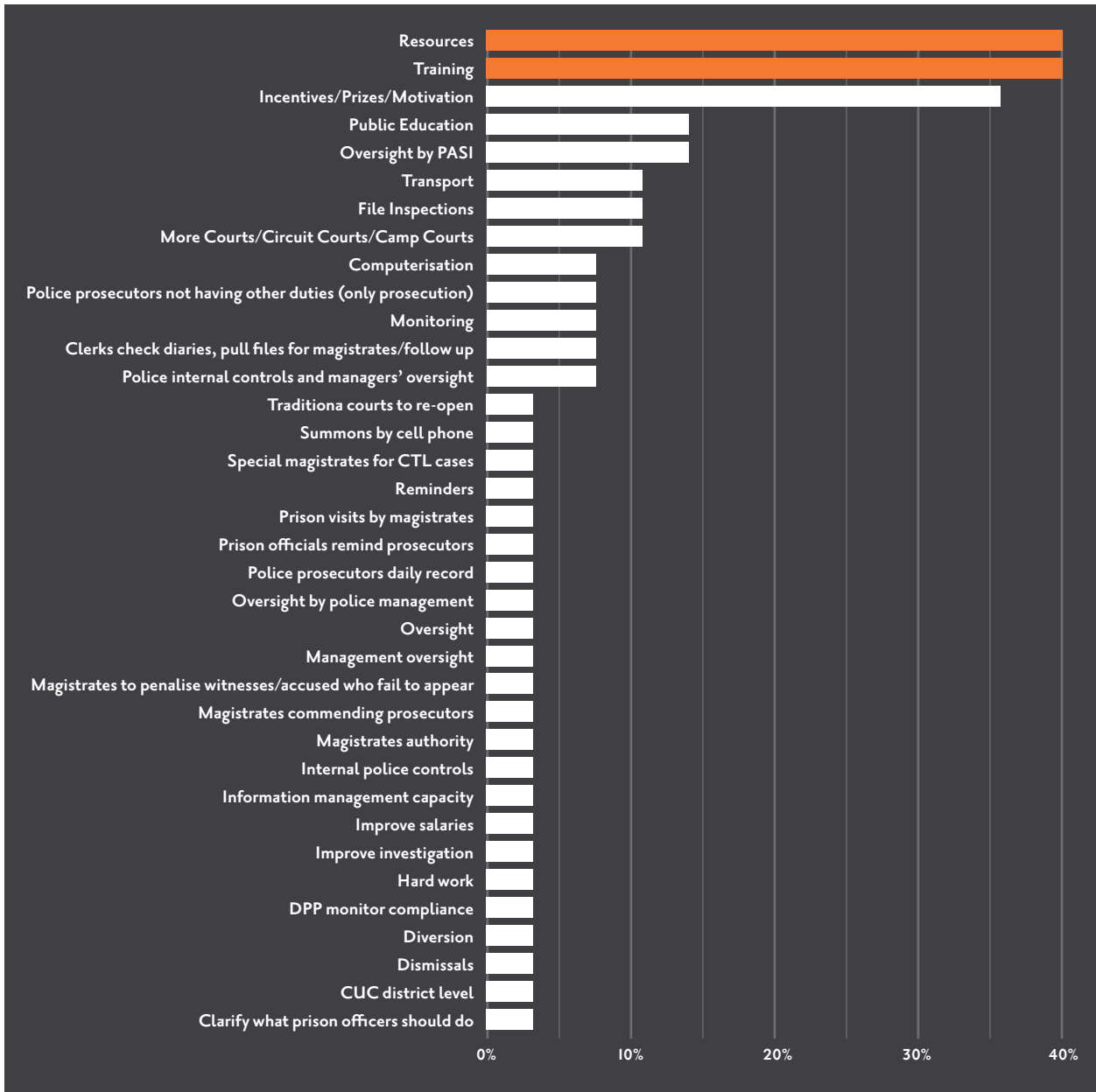
Apart from the usual pleas for additional resources, the most prominent call from criminal justice officials was for training for all officials on the existence of custody time limits and what their obligations are in this regard. There was also recognition that officials do not have any incentives – either negative or positive – to ensure compliance with the

legislation and that some careful thought needs to be given to how this might be addressed.

Respondents also recognised the need for public education so that arrested persons are more aware of their rights and witnesses are aware that if they prevent a trial from

commencing by failing to appear, then the accused can be released on bail. There was also significant support for the idea of paralegals carrying out monitoring and oversight and bringing relevant cases to the courts. Figure 11 shows all the additional recommendations mentioned by respondents, showing the frequency with which these were mentioned.

FIGURE II: ADDITIONAL RECOMMENDATIONS FROM RESPONDENTS



High level stakeholders

To ensure that the custody time limits are observed and respected, the Prisons Inspectorate suggested that:

- Homicide cases should be adjourned to specific dates since they are currently adjourned to a date not known;
- The courts need to have information regarding all suspects being kept in prisons;
- The system should track every detail of the progress of an accused person entering the system; and
- There should be strict compliance with the 48-hour rule.

The DPP pointed out that police prosecutors are currently acting on behalf of the DPP due to a shortage of state advocates. However, it is envisaged that all prosecutions in future will be directly handled by the Directorate throughout Malawi. The DPP indicated his support for initiatives to ensure pre-trial custody time limits are respected, and indicated that a policy or a protocol may be useful in this regard. But the DPP felt that in order to develop a useful policy or protocol on prosecution, it would be necessary to find out whether prosecutors are pro-active or reactive in discharging their duty. He also noted that police station officers are required to visit police cells every morning to ascertain the number of suspects in the cells, and should be able to detect those that have been detained for too long, which mainly occurs in districts where there are no prisons. The extent to which this is done is not clear.

The CRM is the most senior judicial officer responsible for all magistrates in the Lilongwe judicial region. All magistrates in the region are answerable to her. She pointed out that it is the responsibility of magistrates to ensure that pre-trial custody time limits are respected regardless of the status of the case. Judicial officers are supposed to be proactive in discharging their duties in order to protect the rights of accused persons. They should release on bail all remandees who are being kept in prisons or other places of detention unlawfully because pre-trial custody time limits have been exceeded. But for this to happen there is a need for institutions that are independent of the judiciary to compile lists of all prisoners who are illegally detained, contrary to pre-trial custody time limits, and for these lists to be submitted to the courts on a regular basis. Lawyers

can also help by bringing to the attention of the courts the names of remandees who are unlawfully detained in prisons or police cells. The CRM indicated her interest in engaging magistrates on pre-trial custody time limits.

The Registrar of the High Court was of the view that the provisions of the new law on time limits are not properly understood by officials of the criminal justice agencies and their stakeholders – and as a result the law has fallen into disuse. The registrar recommended:

- Workshops for judges, magistrates, prosecutors and police investigators on pre-trial custody time limits, which should also discuss other sections of the CPEC that deal with the discharge of cases;
- Awareness raising sessions with remandees so they can challenge their continued detention after pre-trial custody time limits have expired; and
- Public education sessions on pre-trial custody time limits in communities.

The Solicitor General and Secretary for Justice was concerned that judicial officers and prosecutors sometimes operate as if Part IVA of the CPEC does not exist. In order to ensure that the law is adhered to, he suggested the following:

- Sensitisation workshops for prosecutors, lawyers and paralegals; and
- Sensitisation workshops for judicial officers and their support staff, such as court clerks.

The Officer-in-Charge of Prosecutions and Legal Services at National Police Headquarters acknowledged the fact that some suspects are detained for too long in police cells and on remand in prisons. From the police point of view, he said that following factors contribute to the failures to respect pre-trial custody time limits:

- Police prosecutors lack transport to take suspects/ remandees to and from courts in major cities;
- Court space is an issue so some suspects fail to appear before a magistrate; and

- Police officers at station level do not have any incentives – or face any sanctions – that would compel them to adhere to the law in respect of pre-trial custody time limits.

To tackle the problem, he recommended:

- Dedicating one vehicle for the prosecution department, which comprises police prosecutors, at every police station – and ensuring that priority is given to urban and semi-urban police stations because of their high workload;
- Providing two vehicles at the national police headquarters for the prosecution department to enable it to monitor prosecutors in the regions as well as remote areas; and
- Sensitising station officers and officers-in-charge of all police establishments (stations and posts) about pre-trial custody time limits.

help expedite homicide cases but which ceased to operate due to lack of funding, should be revived.

The judicial officers group said that the lists of persons on remand should be submitted to CRMS and the registrar. An inter-agency prosecutorial protocol on custody time limits should be also issued by the DPP, while the envisaged pocket guide should include general procedures on prosecution. Inter-agency statistics should be compared during Court User Committee meetings to increase the visibility of remandees.

Seminar findings

Members of the prisons group suggested a common register for the courts, police and prisons in order to assist with time tracking. They further suggested that judicial officers should intensify prison visits as “visiting justices”. They said there was a need for training in record-management for prison officers. Indeed, the group stressed the need for joint training in record-management with other stakeholders so that the forms are familiar to – and can be effectively used by – everyone in the system.

The prosecutions group said a review of procedures for communication between stakeholders was needed, especially concerning file transfers and sharing information. Camp courts (courts which sit outside of court buildings in designated sites, for example, places of detention) should be extended. The scope of custody time limit implementation measures should be broadened to include investigating officers, officers-in-charge and station officers because they are key to implementation. Homicide cases should be specifically addressed because they contribute most to the problem of delays. The homicide stakeholder meetings, which were convened a few years ago in order to

This research project sets out to find possible ways of addressing the main problems with the implementation of custody time limits in Malawi, namely the:

- Lack of appropriate record-keeping to assist in ascertaining how long detainees have been in custody;
- Lack of clarity as to who is responsible for ensuring custody time limits are met;
- Lack of a mechanism to identify detainees who have been held in excess of the custody time limit; and,
- Lack of clarity as to the process that should be followed in situations where custody time limits have been exceeded.

The proposals and recommendations outlined in this report are based on the conclusion that the mechanisms to provide the basic information that is necessary to ascertain how long accused persons have been in custody are not yet in place across Malawi (lack of appropriate record-keeping). There appears to be a widespread acceptance of the report's proposals in this regard, which involve very simple changes to existing paper-based record keeping. Uniformity, the adequate provision of stationary, training and regular spot-checks will be required to ensure these are effective.

The second conclusion is that officials have little reason to comply with the limits, even if it were clear who was responsible for ensuring that custody time limits are adhered to (lack of clarity as to who is responsible). Ultimately, it is magistrates who are empowered by the legislation to grant bail when time limits are exceeded. Therefore, pressure must be brought to bear on the courts by remandees as well as by paralegals and lawyers who work on their behalf. In this regard, public education and the provision of posters and pocket guides as well as pro-forma bail applications will be useful. However, the state must also begin to take responsibility for the application of

its own laws and this research supports the idea that this process must begin with the prosecution, commencing with those who fall under the DPP. Processes culminating in a policy applicable to all prosecutors would be supported – and this could begin to change mind-sets. Incentives should also be considered to help implementation of such a policy or standard.

There is also broad support for prisons to supply magistrates with lists of remandees, which will be compiled using the proposed new record keeping system, and also to bring to their attention any violations of custody time limits (lack of appropriate mechanisms). For those held in police custody, there will have to be reliance on monitoring by independent entities such as PASI or the proposed lay visitors scheme as contemplated in the new Police Act 2010.

The process to be followed when custody time limits have been exceeded (lack of clarity as to the process) can be fine-tuned through Court User Committees, but ultimately must involve a bail application or the court acting of its own accord when violations are brought to its attention. Paralegals and remandees could benefit from pro-forma instruction and guidance in this regard.

The validation seminar also highlighted the need for developing a joint understanding of criminal procedure, in particular, when trials may be said to have commenced and when the prosecution is entitled to ask an accused to plead.

In conclusion, some key proposals were supported by the research and were endorsed by seminar participants in the following resolution, which was adopted at the end of the validation meeting:

"We, the participants of the National Custody Time Limits Stakeholders' Seminar held from 8 to 9 August 2012 in Lilongwe:

Mindful of those remanded in custody for extended periods without trial in Malawi;

Mindful of the laws, known as custody time limits, passed by our Parliament designed to prevent persons being remanded for extended periods without trial;

Noting the findings of the research presented at this seminar detailing practical measures to improve the implementation of these laws;

Hereby endorse and commit ourselves to supporting the following recommendations:

1. Developing a new standard case folder; printing and distributing such a folder to all courts; making provision for the on-going provision of such folders, including training for clerks on the completion of such folders;
2. Developing a new standard for court registers with the relevant columns for custody time limits; printing and distributing to all courts and making provision for the on-going provision of these, inclusive of training on these;
3. Developing a new standard for prisons registers with the relevant columns for on-going calculation of time on remand; printing and distribution of these to all prisons; making provision for the on-going provision of such registers to prisons; training on the completion of these registers and the submission of lists to the Court User Committees and to magistrates;
4. Developing and printing posters for public education for distribution in police stations, courts and prisons;
5. Developing and printing a pocket guide to custody time limits for printing and distribution in prisons, courts and police stations;
6. Development of a pro-forma bail application to bring bail applications on behalf of remandees whose custody time limits have been exceeded;

7. Seeking Funding for Court User Committees to meet regularly and plan additional court times for bail applications;

8. Supporting processes for the development of a prosecutorial policy under the auspices of the DPP, which includes diarising and reviewing requirements, and the setting of time targets, to be monitored by managers.

And we call upon the all stakeholders in the criminal justice system to take all necessary steps to ensure the above recommendations are considered for incorporation in work during the coming year."

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CHRR

The Centre for Human Rights and Rehabilitation 's mission statement is to contribute towards the protection, promotion and consolidation of good governance by empowering rural and urban communities in Malawi to become aware of and exercise their rights through research, advocacy and networking in order to realize human development.



CHREAA

CHREAA's vision is a Malawian society that upholds human rights, justice and the rule of law. Its mission is to promote and protect human rights by assisting the vulnerable and marginalised people in Malawi to access justice through civic education, advocacy and assistance.



PASI

The Paralegal Advisory Service Institute's vision is 'to make justice accessible to all people in Malawi through improving the efficiency and effectiveness of the justice system and making it responsive to the needs of all users, particularly the poor and vulnerable'.



CCJP

The Catholic Commission for Justice and Peace works to contribute to the creation of a god-fearing, just, loving and peaceful Malawian society.



Pre-Trial Detention Custody Time Limits

Ensuring compliance in Malawi

Many pre-trial detainees around the world will spend months or even years in detention – without being tried or found guilty. An audit of pre-trial detainees in Malawi, which was undertaken by the Open Society Initiative for Southern Africa (OSISA), the Open Society Foundations Human Rights Initiative and the Open Society Foundation for South Africa in 2011, revealed several systemic procedural and structural problems in the criminal justice system that contribute to this situation. In recent years, the Malawian government has introduced a number of reforms in relation to criminal justice procedures. For example, legislation was enacted in 2010, through amendments to Malawi's Criminal Procedure and Evidence Code (CPEC), which specifies legal custody time limits for pre-trial detainees. However, many are still detained well beyond the legal time limits, partly because the CPEC does not explicitly stipulate any means of tracking custody time periods. Indeed, the OSISA audit found a number of key problems related to the implementation of custody time limits, including the:

- Lack of appropriate record-keeping to assist in determining how long detainees have been in custody;

- Lack of clarity as to who is responsible for ensuring that custody time limits are met;

- Lack of a mechanism to identify detainees who have been held in excess of the custody time limit; and

- Lack of clarity as to the process that should be followed in situations where custody time limits have been exceeded.

In 2012/2013, a Consortium of four Malawian organisations namely: the Paralegal Advisory Services Institute (PASI), the Centre for Human Rights Education, Advice and Assistance (CHREAA), the Centre for Human Rights and Rehabilitation (CHRR) and the Catholic Commission for Justice and Peace (CCJP) undertook a research project which sought to identify problems in the existing criminal justice system in Malawi in respect of custody time limits, to review existing mechanisms for ensuring adherence in four other jurisdictions and to develop a set of concrete recommendations as to how best to ensure compliance with the provisions in the CPEC. The results of this endeavour are contained in this report.