The John Howard Society of Alberta

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AN ANALYSIS OF THE ISSUE OF "DELAY" FOR SENTENCING PURPOSES BY ACCUSED HELD IN REMAND

March, 2009

Contextual Background

Over-crowding at Alberta (and Canadian) Remand Centres has been endemic for years. Clearly, facilities that were constructed several decades ago are no longer sufficiently large enough to house remanded populations that are bound to increase as Alberta's population increases – even though Alberta's overall crime rate has been steadily declining for at least the last 15 years.

Recently however, officials within the justice system, primarily Attorney's-General, Solicitors-General, and police, have publicly commented that a primary reason for the over-crowding and rising remand populations is that those in remand are looking to increase the time spent in remand so that upon conviction and sentencing, the time spent will be credited at the rate of 2:1 or even, in some (very rare) instances, 3:1. In other words, many held in remand are either instructing their defense counsel to "delay" their matter as much as possible or, defense counsel are advising their clients to so instruct them.

In either event, so goes the assertion, the end result is the same – convicted offenders are "thwarting justice" by having their just sentences significantly reduced as a result of time spent in remand, and in turn, our remand centres are dangerously over-crowded, and becoming more and more difficult to manage.

By a *News Release*, dated March 27, 2009, the Honourable Rob Nicholson, Q.C., Attorney General of Canada has announced that:

THE GOVERNMENT OF CANADA INTRODUCES LEGISLATION RESTRICTING CREDIT FOR TIME SERVED

OTTAWA, March 27, 2009 – The Honourable Rob Nicholson, P.C., Q.C., M.P. for Niagara Falls, Minister of Justice and Attorney General of Canada, today introduced legislation to clearly limit the amount of credit that the courts may grant to convicted criminals for the time they served in custody prior to their sentencing.

"Our Government is following through on its commitment to ensure that individuals found guilty of crimes serve a sentence that reflects the severity of those crimes," said Minister Nicholson. "The legislation I have introduced today would strictly limit the amount of credit that may be granted for time served in custody prior to sentencing, bringing greater certainty and clarity to the sentencing process."

The proposed *Criminal Code* amendments in this legislation would provide the courts with sentencing guidance and limits for granting "credit for time served". Specifically, the legislation would:

- make it the general rule that the amount of credit for time served be capped at a 1-to-1 ratio, i.e., give only one day of credit for each day an individual has

spent in custody prior to sentencing;

- permit a credit to be given at a ratio of up to 1.5 to 1 only where the circumstances justify it;
- require courts to explain the circumstances that justified a higher ratio; and,
- limit the pre-sentencing credit ratio to a maximum ratio of 1 to 1 for individuals detained because of their criminal record or because they violated bail, with no enhanced credit being granted under any circumstances.

Courts typically take into account certain factors in determining the amount of credit for pre-sentencing custody, such as overcrowding or a lack of programming for inmates. This has resulted in courts traditionally awarding credit at 2 to 1 for pre-sentencing custody. On rare occasions, the credit awarded has been as high as 3 to 1.

"Our Government continues to take tough action against crime and stand up for victims in this country," said Minister Nicholson. "I appreciate the support from my provincial and territorial counterparts for this legislative amendment to provide greater truth in sentencing. Our Government calls on all parties in Parliament to provide unanimous consent to ensure fast passage of this important legislation."

This Analysis examines this issue from a primarily evidentiary basis, with the intent being to help inform Canadians on this important issue; in other words, to "test" the advisability of this legislative course of action.

Factual Background (the Alberta Experience)

- While the actual numbers fluctuate on literally a daily basis, recent data indicates that some 56% of all those housed in Alberta Correctional Institutions are being held on remand, while 44% are serving sentences. To characterize this as an "inversion" of a reasonable expectation of how our justice system ought to function, does not adequately reflect the seriousness of the situation. While we are not aware of any established "benchmarks" on what is "an ideal ratio" of sentenced offenders to those held in remand, nor do we have any idea whether it is even possible (or advisable) to try to establish such a "benchmark", nonetheless we think most would agree that those serving sentences ought to outnumber those held on remand by some factor greater than 5.6:4.4 (as opposed to the current 4.4:5.6).

- To the best of our knowledge and information, the Alberta Corrections Branch experience is that the average length of stay in remand is 14 days. Obviously some will be there considerably longer, and some considerably less, but the "churn" is 14 days.

- Further to the best of our knowledge and information, the average length of term of incarceration in an Alberta correctional institution for sentenced offenders is 32 days.

- And finally, to the best of our knowledge and information these figures (average length of stay in remand and average length of stay of sentenced offenders) have not shown any appreciable change in at least the last 5 years.

- What we do not know is whether there is any data to indicate that while the "churn" rate for remands has not changed in any significant way, there has nonetheless been a shift in the ratio of those held for lengthier periods than those held for a shorter period. In other words, has the number of those being held for lengthier periods gone up, or the length of time they are held has gone up (on average), while at the same time those being held for shorter periods have gone up even more dramatically or the period of time held declined dramatically (on average). **That is, is there any data that would support, even inferentially, the assertion that over-crowding is a result of those held doing what they can to lengthen their time in remand to reduce the time held as a sentenced offender?**

Evidentiary Issue(s)

There are two evidentiary issues that need to be examined if policy formulation is to be ***evidence-based***.

First:

- Since what we do know tends to indicate that there is no statistical foundation for the assertion that those held in remand are "extending their stay", for whatever reason, and since there does not appear to be any data to support that assertion, the question that must be asked is: **What is the factual basis for this assertion?**

And second:

- Aside from the issue of what the Alberta Corrections data may indicate, **is there any foundation to the assertion that defense counsel, or their clients, are the "cause" of the over-crowding issues in remand?**

The first question may be able to be answered by Alberta Corrections.

There is anecdotal "evidence" concerning the second question, and that anecdotal evidence consists of:

- Police, Crown and other Justice officials, (perhaps) some in Corrections, and some members of the media say that this is happening; and

- Defense counsel say that it isn't happening.

Accordingly, and within a very limited scope and time frame, in November, 2008, the John Howard Society of Alberta conducted a survey to at least get a sense of the second issue.

A series of questions were devised on *surveymonkey.com* and the link to this survey was sent electronically to several prominent members of the criminal defense bar in Edmonton and Calgary, along with a request to in turn forward it to their colleagues, with a request that all take the time to respond to the questions for the purposes of this Analysis.

Obviously, this is not a "random sample", nor is the methodology one that stands up to rigorous statistical scrutiny. But it does provide some indication of the experience of criminal defense lawyers in Alberta with respect to this issue.

In sum, certainly on the basis of this survey:

- **there is no indication whatsoever that defense counsel in Alberta are routinely, or even occasionally, advising their clients that it would be in the client's interest to "delay" matters as long as possible to gain double-credit for time spent in remand;**
- **there is no evidence that any significant numbers of those being held in remand are instructing their counsel to delay matters for this reason, or even seeking their advice on this issue;**
- **there is some considerable evidence that on those rare occasions when a client has purported to instruct their counsel to delay matters, the most common response from defense counsel is to advise them of the folly of such a course of action; and**
- **that in almost every instance if the client persists in those instructions, defense counsel withdraws from representing that client.**

Those responding to the survey range from those that are relatively "new" at the Bar, to those that have been practicing for decades. Almost all respondents practice primarily (or exclusively) criminal law.

By far the most common experience of defense counsel in Alberta with respect to clients in remand, is that the client is instructing counsel to do whatever it takes (most often a guilty plea) to "get out of remand" as quickly as possible. Indeed, there is a strong indication that it is not all uncommon for individuals to plead guilty when they have a case, or the Crown does not appear to have a case – in other words, when there is at least a reasonable chance of the charge(s) being dismissed at trial.

The exact opposite of that assertion being made as indicated above!

But there's more than this in the way of "evidence to the contrary":

- Prof. Michael Jackson, in the case of Trang v. E.R.C.1, adduced evidence as follows:

> It has been noted that the conditions in Canada's pre-trial detention centres have the potential to compromise the integrity and fairness of our criminal justice system. Empirical evidence has established the common-sense proposition that a pre-trial inmate being held under the harsh conditions of pre-trial detention will often elect to plead guilty to criminal charges in order to obtain improved living conditions -- even if he is innocent and/or wishes to invoke his constitutional right to raise full answer and defence to the charges he faces. These concerns have recently been affirmed in a Statistics Canada report entitled *Custodial Remand in Canada, 1986/87 to 2000/01*:
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> **Impact on the accused**
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> Another consideration with respect to pre-trial detention is the impact of custodial remand on the accused. Time on remand is commonly referred to as 'dead time', where the inmate may have little or no access to activities such as recreation, work and rehabilitative programs and services... Provincial correctional facilities are designed and programmed primarily for inmates serving short sentences, such as 50 to 100 days, but not long-term remands. Structured programming (e.g., substance abuse treatment, anger management, etc.) usually requires a minimum time commitment whereas time on remand is indeterminate and frequently short in duration. In some instances the inmate may avoid programming so as not to jeopardize his or her case in court. For example, a remanded person charged with impaired driving may choose not to become involved in alcohol abuse treatment in order to avoid the appearance of acknowledging an alcohol abuse problem. The concept of 'dead time' also reflects situations where the accused is spending time in prison without being sentenced, and where this period of time is not put toward (credited to) a sentence of incarceration. This situation can have some unintended negative consequences for the accused. Kellough and Wortley (2002) note that:
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> > Thus, since accused persons held in pre-trial detention often have to spend a considerable amount of time in prison before their case will be heard, they may feel pressured to plead guilty to the original charge (or to a lesser charge) for a variety of reasons including the fact that: (1) the sentence for the crime they plead guilty to may not involve incarceration and they will ultimately be released from prison; (2) they do not want to do 'dead time' (i.e. time in prison without being sentenced); (3) they may receive 'time served' if they plead guilty and thus be immediately released from

1 A portion of the Exhibit submitted in this case in the Alberta Court of Queen's Bench in which the Honourable Justice Marceau reserved decision, provided by counsel for the Applicant.

> jail; or (4) pleading guilty would mean being moved from an overcrowded, pre-trial detention facility to a more pleasant correctional institution with better facilities and programmes. (p. 190)

In fact, several studies have found that those detained in pretrial custody were more likely to plead guilty, less likely to have their charges withdrawn and were more likely to receive harsher sentences than those who were not detained, even when controlling for relevant factors such as offence type and criminal history (Koza and Doob, 1975; Kellough and Wortley, 2002).

Furthermore, persons held in remand for lengthy periods of time may receive 'time served' sentences (i.e., released at court), or have a short period of incarceration to serve once sentenced. This could potentially decrease their chances of being provided rehabilitative programs and services that they would have had access to if they had not been remanded for a lengthy period of time, but had rather spent the remanded time under a custodial sentence.[1][1]

The above Statistics Canada report cites the important 2002 study *Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions*, by Professor Gail Kellough of York University and Professor Scot Worley of the University of Toronto. The methodology of this study included a review of over 1,800 criminal cases appearing in two Toronto bail courts over a six month period between October 1993 and April 1994. Kellough and Worley's findings indicate that the detention of accused persons in pre-trial detention centers is an important resource that the prosecution uses to encourage (or coerce) guilty pleas from accused persons.[2][2] Those accused who are not held in pre-trial custody, by contrast, are much more likely to have all their charges withdrawn by the prosecution. At page 200-01, the article states as follows:

> Even for those who didn't view a [guilty] plea as the way to get on with their lives in the community, the kinds of conditions experienced in the remand centres frequently meant that pleading was an action that one could take to better one's situation. As one accused those us:
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> > The overcrowding . . . not enough beds . . . rats and mice . . . eventually you will have some run-ins and the only way to avoid it is to plead and get it over with quickly and get transferred.

[1][1] Sara Johnson, "Custodial Remand in Canada, 1986/87 to 2000/01" (Juristat, Canadian Centre for Justice Statistics, Statistics Canada Catalogue no. 85-002-XIE, Vol. 23, no. 7), at p. 5. **[Tab 56]**

[2][2] Kellough, G. & Wortley, S. (2002). "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions" . British Journal of Criminology, Vol. 42, pp. 186-210, at p. 186. **[Tab 57]**

The examples provided above illustrate how pre-trial detention can put pressure on accused persons and encourage them to plead guilty soon after being remanded to custody. Nonetheless, we also interviewed a number of accused who, despite being detained, insisted that they would fight their charges and not plead guilty regardless of anything the Crown offered. However, while some accused may be determined to force the state to prove what they view to be weak or unfair charges, being held in custody tends to erode this determination over time. Those who are not granted release or cannot meet the surety requirement of their release order quickly realize the wisdom of making a bargain. Waiting three or more months for trial in the worst of institutions is weighed against the reality of spending less time in a more desirable institution with a likelihood of an early release date. As cases were tracked through the system, we discovered that many who had indicated they would not plead guilty to any of their charges were eventually persuaded to do so. The following case example is typical of this change of mind:

> The accused, a white male with a prior record, is facing three charges of fraud. The bail court granted him a conditional release order that required a high surety bail be provided ($50,000), a condition which the accused was unable to meet. When interviewed, he stressed his determination to go to trial, stating that he definitely would not plead guilty to any of these charges. After 120 days in remand, however, his case was concluded when he plead guilty to one fraud charge and had the other two charges withdrawn. His sentence: time served.

Another example illustrates how sitting in detention centres for a lengthy period of time can convince the accused to plead guilty, even if it appears obvious that the Crown will be unable to prove the charges in court. The outcome in this case also illustrates that the time an accused spends awaiting trial in custody can often exceed the eventual sentence of the court:

> The accused is a black male with a minor record involving three convictions for mischief, theft under, and a traffic charge. He appears in bail court charged with five conspiracy to commit arson; one break, enter & theft, one mischief over and three theft over. Bail was denied and he spent 312 days in custody before he finally accepts a plea to reduce one theft over to theft under, while having all the rest of the charges withdrawn. His sentence was two years probation.

While accused persons may resolve not to plead guilty to charges they feel are unfair, we found that, given enough time in custody, the likelihood is that most individuals who are remanded into custody will eventually plead

guilty to something. Sooner or later, most come to a realization that the rational choice is to accept a bargain. [3][3]

- In a *Juristat Article* (2008) Kong and Peters state:

Use of custodial sentences for some types of offences has increased

While the median length of custodial sentences has become shorter, adult court data from 8 jurisdictions suggest that frequency with which custodial sentences are imposed has remained relatively stable: for each year between 1996/1997 and 2006/2007, about one in three cases with a finding of guilt resulted in a sentence to custody. However, underneath this overall stability are some changes at the level of individual offences. For some offences, such as impaired driving, common assault and drug trafficking, the use of custodial sentences has declined slightly over this period. For others, including attempted homicide, weapons offences, theft, possession of stolen property and some sexual offences, the use of custodial sentences has increased.

At present, the data cannot tell us how much the lesser use of custodial sentences for some offences may be due to full credit for time served. However, the consistent and even increased use of custody for some types of offences, including violent offences, suggests that the effect of credit for time served might be a reduction in the length of custody when custody is justified, rather than no custody at all.

Summary

The increased use of remand and longer stays in remand are issues facing the Canadian justice system on a number of fronts, one of which is the impact that this trend may have on sentencing. Because S*ection 719 (3)* of the *Criminal Code* of Canada allows judges to count time spent in remand as time served and adjust their sentences accordingly, the rise in remand and the length of stay has implications for the offender, the community and the performance of the criminal justice system.

During the ten-year period beginning in 1996/1997, the number of adults held in remand custody grew, and by the end of the period, there were more adults being held in remand than in provincial/territorial sentenced custody. The length of time individuals spent in remand also increased during this period.

Over this same period, the proportion of adults sentenced to custody increased for some offences and declined for others, resulting in little change in the overall use of custodial sentences by judges. However, the length of sentences has decreased. At the provincial/territorial level, sentences of 1 month or less accounted for more than half of all custodial sentences in 2006/2007, compared to 47% a decade earlier. In the federal

[3][3] Kellough, G. & Wortley, S. (2002). “Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions” . British Journal of Criminology, Vol. 42, pp. 186-210, at p. 200-01. **[Tab 57]**

correctional system, which is responsible for offenders sentenced to 24 months or more, the median amount of time served declined.

This article has drawn parallels between trends in remand and sentencing in an effort to contribute to the body of knowledge on the issue of the increased use of remand in Canada. To confirm connections between increases in remand and sentencing patterns, further analysis is required.2

In sum, there is evidence to support the proposition that those held in remand are far more eager to "get out" of remand, to the extent of pleading "guilty" even though they (or their counsel) do not otherwise feel they are, in fact or law (or both) guilty.

And there is no evidence to support the proposition that many held in remand are "working the system" to delay matters to "benefit" from "credit for time served".

Jurisprudential Issue(s)

There is no provision in the Criminal Code that time spent in Remand awaiting trial **must** taken into account when passing sentence; *section 719(3)* states as follows:

> *In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence.*

In R. v. Wust, [2000] 1 S.C.R. 455, the unanimous judgment of the Court was delivered by the Honourable Madam Justice Arbour who on the issue of the application of s. 719(3) said this:

> **44** I see no advantage in detracting from the well-entrenched judicial discretion provided in s. 719(3) by endorsing a mechanical formula for crediting pre-sentencing custody. As we have re-affirmed in this decision, the goal of sentencing is to impose a just and fit sentence, responsive to the facts of the individual offender and the particular circumstances of the commission of the offence. I adopt the reasoning of Laskin J.A., *supra*, in *Rezaie*, *supra*, at p. 105, where he noted that:
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> > *. . . provincial appellate courts have rejected a mathematical formula for crediting pre-trial custody, instead insisting that the amount of time to be credited should be determined on a case by case basis. . . . Although a fixed multiplier may be unwise, absent justification, sentencing judges should*

2 Kong, Rebecca and Peters, Valerie; Remand in Adult Corrections and Sentencing Patterns, *Juristat Article*, Vol. 28, No. 9,October, 2008, Statistics Canada Catalogue no. 85-002-X.

> *give some credit for time spent in custody before trial (and before sentencing). [Citations omitted.]*
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> **45** In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example if the accused has been detained prior to trial in an institution where he or she has had full access to educational, vocational and rehabilitation programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the *Corrections and Conditional Release Act* apply to that period of detention. "Dead time" is "real" time. The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

Earlier in this decision, the learned Justice said:

> **30** Several years ago, Professor Martin L. Friedland published an important study of pre-sentencing custody in which he referred to Professor Caleb Foote's Comment on the New York Bail Study project, noting that "accused persons . . . are confined pending trial under conditions which are more oppressive and restrictive than those applied to convicted and sentenced felons": *Detention Before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts* (1965), at p. 104. As Rosenberg J.A. noted in *McDonald*, *supra*, at p. 72: "There has been little change in the conditions under which remand prisoners are held in this province in the almost forty years since Professor Friedland did his study". Considering the severe nature of presentencing custody, and that the accused person is in fact deprived of his or her liberty, credit for pre-sentencing custody is arguably less offensive to the concept of a minimum period of incarceration than would be the granting of statutory remission or parole.

There are of course, literally thousands of Canadian cases at the trial and appellate levels where the Courts have commented on the appropriate us of credit for time served in calculating imposition of sentence, and the reasons therefore.

Public Policy Issue(s)

Canadians expect their Government(s) to enact legislation that will contribute to "the public good"; legislation that will benefit our country and its citizens. Indeed, it could be stated that that is the primary job of government.

So, it is reasonable to ask the question: **"How will this proposed legislation benefit Canadians?"**

The reasons given by the Attorney General of Canada for the introduction of this proposed amendment to the Criminal Code are:

1. "Our Government is following through on its commitment to ensure that individuals found guilty of crimes serve a sentence that reflects the severity of those crimes"; and

2. "Our Government continues to take tough action against crime and stand up for victims in this country".

As to the first assertion, to consider whether there will be a benefit to Canada and its citizens, we must ask the following:

- **Is there any evidence to suggest that those found guilty of crimes are not being sentenced "severely enough" for the crimes they have committed?**

- **But more importantly, is there any evidence to suggest that "severe sentences" will benefit Canada; i.e.: by reducing crime.**

Whether a sentence imposed is "severe enough" is clearly an entirely subjective matter insofar as the general public (and indeed apparently most politicians) is concerned. The Courts on the other hand, endeavour to conscientiously apply the sentencing principles found in the *Criminal Code* and precedent to as objectively as possible impose a sentence that is appropriate to the offence, the circumstances of the offence (including victim impact) and the particular offender – in other words to be as objective as possible when imposing sentence.

But even more important, there is no evidence whatsoever to indicate that "harshness" of sentences will lead to reductions in crime and indeed, **there is a growing body of evidence which suggest that jurisdictions having relatively more harsh regimes experience higher levels of violence in the community and therefore community safety is actually diminished**.

As to the second assertion, in considering the benefit to Canadians, we must ask:

- **Is there any evidence to suggest that harming offenders benefits victims?**

- **And of course, even if there is evidence to suggest that victims somehow "benefit" thereby, is there any evidence to suggest that Canada as a whole will be benefit; i.e.: again, by achieving an outcome of safer communities?**

Bluntly, there is no evidence whatsoever to support the proposition that "harming" offenders" benefits victims. What evidence there is in this regard, overwhelmingly indicates that the most effective (and perhaps only) way for victims to overcome the trauma their victimization has occasioned is by forgiving the offender. **In other words, when it comes to "healing" the victim, compassion trumps retribution.**

And as noted above, even if there was some evidence to suggest that victims might somehow benefit, the evidence is clear that our communities as a whole will not benefit from such a course of action.

Conclusions

- **There is no evidence that overcrowding in Canadian remands is arising because of those being held "working the system" to delay imposition of sentence to thereby "reduce" length of sentence;**

- **There is evidence to the contrary, that indicates that most held in remand are eager to get out of remand as soon as possible, even to the point where there is a disturbing indication that many held in remand feel compelled to plead "guilty", whether they are actually guilty or not, to reduce the length of time they have to spend in remand;**

- **There is evidence that overcrowding in Canadian remand centres has been rising as a result of growth in the Canadian population (but not in the availability of space in remand), and more greater use of custody in remand pending trial;**

- **There is no evidence to suggest that reducing the credit that can be given by the Court for time held in remand will in any way reduce the overcrowding in remands;**

- **There is evidence to suggest, or at least infer, that entirely the opposite effect will occur – since there is no (alleged) benefit to be gained by a "timely guilty plea", there is no reason to plead early and every reason to take the matter to trial;**

- **And there is also evidence to suggest that innocent people, wrongly accused, once remanded in custody will plead "guilty" to get out of remand as soon as they can;**

- **There is no evidence to suggest that sentences imposed by Canadian Courts are insufficiently severe;**

- **There is no evidence to suggest that victims can or will benefit from the imposition of more severe sentences;**

- **There is evidence to suggest that "tough on crime", which really means "tough on offenders", results in more, not less, crime in our communities – in other words it's outcome is "tough on communities"; and finally**

- **It is clear that adoption of this Bill will signal yet further curtailment of judicial discretion to "do justice" in all the circumstances before the Court in each individual case.**

Recommendations

- **Do not introduce the proposed Bill or, if it has already been introduced, withdraw it at the earliest opportunity;**

- **Clearly identify what public policy/benefit it is intended to be achieved – reduction of overcrowding in remands, reduced crime, or "healing victims";**

- **Use the available research to guide the development of the policies and legislation most likely to achieve the intended outcome and, where availability of data is lacking, undertake the research necessary to obtain that data. For example, if overcrowding is the issue, it would make sense to find out who is in remand, for how long, and most important the reason(s).**