Bail Reform: Proposals to Amend the Criminal Code of Canada

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Executive Summary

This paper proposes reform of the *Criminal Code* that is more comprehensive than recent provincial government recommendations, which focus on relatively narrow issues (e.g., adding more reverse onus offences). It proposes a major overhaul of the law regarding judicial interim release hearings, including new principles for decision-making and new grounds for detention. It clearly states a policy that pretrial detention is to be reserved for people who are charged with serious offences and that the criminal justice system should reduce its over-reliance on incarceration, particularly for persons accused of less serious offences. The paper also takes a more systemic approach to reform by recognizing the importance of the decisions by police and prosecutors prior to the bail hearing stage of the criminal justice process. More specifically, it proposes reform of the *Code* provisions on alternative measures (extrajudicial measures) and provisions on detention by police. Reform of the law governing decisions made by the police and prosecutors at the pre-bail stage can have a significant impact on the flow of cases into the bail court, including reducing the backlog of bail cases and enabling the bail courts to focus on serious cases.

Part A: Concerns about Pretrial Detention and Release

Numerous concerns have been raised about bail and pretrial detention. Some concerns focus on tragic cases in which innocent people have been harmed or killed by persons who have been released on bail lead some to believe that the bail system is too lenient. Other concerns have focused on the negative impacts on the huge and increasing number of accused people - many of whom are charged with minor offences - being detained in overcrowded and dangerous correctional facilities. These concerns lead some to believe that the bail system is too harsh, unfair and counter-productive - too many innocent people are being locked up; their lives and the lives of their families are being disrupted; and pretrial detention actually increases the risk of future crime.

1. *Serious crimes by persons released on bail*

There have been media reports about rare cases of serious violent crimes committed by persons who had been released on bail. There is a lack of data on what percentage of people on bail commit a serious violent crime.

2. *The number of accused people in detention has increased significantly*

Over a twenty year period, the average *number* of adults in detention *increased by 67%*. The adult detention *rate* increased by 30%.[2]

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[2] Statistics Canada, *Average counts of adults in provincial and territorial correctional programs.*

3. *The percentage of adults in remand in correctional facilities has increased significantly.*
The percentage of adults in custody who are in remand, as opposed to sentenced custody, increased from 45% to 73% of the total number of adults in custody.[3]

4. *Pretrial detention results in the punishment of large numbers of innocent people.*
Half of all criminal charges against pretrial detention inmates did not result in a conviction. Thousands of innocent people are, in effect, being punished, often for weeks or months.[4]

5. *Most bail cases appear to involve non-violent offences, including administration of justice offences.*
Research has found that the largest offence category of bail cases is administration of justice charges, representing almost three in five cases.[5]

6. *Negative impacts on the accused person*
The negative impacts include inhumane conditions; job loss; physical harm, including death; a straining of family and community relationships; pressure to plead guilty; and a greater likelihood of being convicted and of receiving a custodial sentence.

7. *Negative impacts of pretrial detention on public safety*
Research has shown that detention for a week or longer while awaiting trial *increases* the likelihood of long-term offending.[6]

8. *Delays in making the bail decision*
Research has found that over 33% of bail cases required three or more court appearances, 10% took five to seven appearances, and 6% took 8 or more appearances.[7]

9. *Excessive and inappropriate conditions of release*
Too many conditions are imposed; are often unrelated to the risk that the accused is alleged to pose; and some are difficult to comply with, thereby setting up the person for failure.

10. *Tertiary ground for detention (maintain confidence in the administration of justice)*
The tertiary ground essentially authorizes detention of an accused person on the basis of the court's perception of public opinion. Some legal scholars and dissenting judges of the Supreme Court of Canada have argued that it is unconstitutional and should be repealed.

11. *Reverse onus provisions*

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[3] Statistics Canada, *Average counts of adults in provincial and territorial correctional programs.*

[4] King, T. and Doob, A., John Howard Society of Canada blog, April 17, 2025.

[5] Webster, C., *Policy Options*, February 8, 2023, p. 4.

[6] Doob and Sprott, "Using Money Wisely to Reduce Crime", John Howard Society of Canada blog, June, 16, 2025)

[7] Webster, C., "Calls for harsher bail laws are misguided", *Policy Options*, February 8, 2023.

Reverse onus provisions conflict with the presumption of innocence. There is no statistical evidence that reverse onus provisions increase public safety.

12. *The use of justices of the peace for bail hearings*
Justices of the peace (at least those who are not lawyers), lack the legal training of judges. Given the importance of the decisions for the accused and the public, it is argued that these decisions should be reserved for judges.

13. *Risk aversion*
There is concern that police, prosecutors, justices of the peace and judges are often inclined toward recommending detention because of a perception that it is the safer or less risky choice and less likely to be criticized.[8]

14. *Inconsistent application of the law*
The *Code* provisions on pretrial detention and release are relatively general and vague, open to a range of interpretations and contribute to inconsistency in the application of the law.

15. *The prediction problem*
Predictions about the risk of non-appearance and future offending are unlikely to be accurate.[9]

16. *Over-representation of Indigenous and Black people*
For example, Indigenous people make up 2.9% of Ontario's population but make up 19.4% of those admitted to Ontario's prisons without a finding of guilt. Courts have held that the over-representation of other vulnerable groups in the justice system includes Black persons.[10]

17. *The financial cost of keeping people in pretrial detention is high*
The cost of pretrial detention is more than 6 times the cost of placing the accused in community supervision. The average annual cost in provincial and territorial adult correctional services in 2022/23 was $118,990 per inmate.[11]

18. *Detention by police*
The legal criteria for police detention decisions are vague and open to a wide range of interpretations. A result is that police are likely to be more risk averse in their decision-making, thus increasing the flow of cases into bail court.

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[8] *R. v. Zora*, 2020 SCC 14, at para. 77.

[9] James R.P. Ogloff, "Risk Assessment of Dangerousness", in *Forensic Psychology:* Part 4: Chapter 15, Correctional Service Canada, Government of Canada) https://www.canada.ca/en/correctional-service/corporate/library/forensic-psychology/forensic-psychology-part-4-chapter-15-assessing-offender-populations. html.

[10] Canadian Civil Liberties Association, *Still Failing: The Deepening Crisis in Bail and Pre-trial Detention in Canada*, (2024).

[11] Statistics Canada, *Operating expenditures for adult correctional services.*

19. *Lack of information*

There is a serious lack of statistical information about how the bail system operates. It is difficult to get an overall picture of bail in Canada from available sources. This impedes the development of a solid base of evidence for rational bail reform.

Part B: The *Youth Criminal Justice Act* - A Model for Bail Reform

In 2003, when the *YCJA* came into force, it incorporated the bail provisions of the *Criminal Code.* However, in the early years, the YCJA was not achieving Parliament's objective of reducing the over-use of pretrial detention. In 2012, amendments were made that removed the *Code* provisions and set out different, stand-alone bail provisions. Since 2012, there have dramatic reductions (-77%) in the use of pretrial detention while the adult system under the *Code* has continued to experience increasing use of detention (+67%).

There are some significant differences between the *YCJA* grounds for detention and the *Code* grounds. In particular, the *YCJA* has more restrictive and explicit criteria for detention; its underlying objective is to reduce the use of detention for less serious alleged offenders; it greatly limits the use of the tertiary round; and it places the onus on the prosecution in all cases.
If an objective of adult bail reform is to reduce the increasing use of pretrial detention, particularly for the large number of accused persons charged with relatively less serious offences, then amending the *Code* along the lines of the *YCJA* would seem to be an effective way of helping to achieve that objective.

Part C: Proposed Amendments - Judicial Interim Release

The proposed provisions take account of the concerns about pretrial detention and release, the *YCJA*'s pretrial detention provisions, the differences between the *YCJA* provisions and the comparable *Criminal Code* provisions, and research findings based on more than a decade of experience under the *YCJA*.

Key features of the proposed amendments regarding judicial interim release include:

- The Declaration of Principles incorporates important decision-making principles, including many identified by the Supreme Court of Canada in various judgments.
- Detention is reserved for people who are charged with serious offences - i.e., indictable offences for which the maximum punishment is imprisonment for five years or more. The underlying goal is to reduce the large number of people charged with relatively minor offences who are in pretrial detention.
- Reverse onus offences are deleted.
- Instead of reverse onus provisions triggered by certain very serious repeat offence charges, the proposed amendments identify these offences as factors that increase the likelihood that the presumption of release should be rebutted and that the accused should be detained. Unlike the current reverse onus provisions in the *Code*, the amendments are not in conflict with the presumption of innocence.

- The tertiary ground of detention is deleted.
- The criteria and factors for decision-making are more specific, explicit and directive than the *Criminal Code* provisions.
- In the determination of whether an accused person should be detained, an emphasis is placed on whether the person has a record of relevant past offences, which research has shown has better predictive value than other commonly used factors.
- Specific principles are set out for making decisions regarding release conditions, including the requirement that a condition may not be imposed unless it has a direct and rational connection to the risk that the accused is alleged to pose.

Part D: Proposed Legislative Amendments: Extrajudicial Measures

Key features of the extrajudicial measures provisions that are different from the current *Code* provisions on police charging and alternative measures include:
- They set out a range of extrajudicial measure options for police and prosecutors: taking no further action; informal warnings; police cautions; Crown cautions; referrals to a community program; and extrajudicial sanctions.
- Police are required in all cases, before starting judicial proceedings, to consider whether an extrajudicial measure would be sufficient.
- Police are directed that extrajudicial measures, rather than a charge, should be used if an extrajudicial measure would be adequate to hold the person accountable.
- Extrajudicial measures are presumed to be adequate to hold a person accountable if the person has committed a nonviolent offence and has not previously been found guilty of an offence.
- Extrajudicial measures are presumed to be adequate for administration of justice offences unless the person has a history of repetitive breaches or the breach caused harm or risk of harm to public safety.
- An extrajudicial measure must be proportionate to the seriousness of the alleged offence.
- The use of "conferences" is authorized and encouraged; they enable members of the community to assist decision-makers in the criminal justice justice system (e.g., a restorative justice conference).

Part E: Proposed Legislative Amendments: Detention by Police.

Key features of the proposed amendments regarding detention by police are:
- The scope of the authority of police to detain depends on whether the alleged offence is serious or non-serious.
- A "serious offence" is an indictable offence for which the punishment is imprisonment of five years or more.
- If the alleged offence is not serious, the police officer may not detain the person.
- "in the public interest" is removed as a ground for detention by police.
- The proposed amendments attempt to structure the decision-making process of the police officer by setting out several considerations that are relevant to whether detention is necessary.

Conclusion

It has been more than fifty years since the last major reform of bail law in Canada. The concerns about bail and pretrial detention discussed in this paper suggest that it is time for another major reform. What is required is more than "tinkering" with specific provisions. This paper attempts to take a more comprehensive approach to bail law reform that includes re-thinking some long-standing provisions.

Finally, it is important to recognize that effective bail reform requires more than legislative changes. A lesson from the *YCJA* is that various non-legislative efforts were important in bringing about the success of the *YCJA.* Those efforts included wide consultation on legislative proposals, research that provided evidence in support of the proposals, extensive professional education programs and materials, public education, pilot projects and their evaluation, and provincial/territorial implementation of the new legislation through programs, professional training, policies, and funding that was consistent with the legislative reform. Similar efforts would be important in making *Criminal Code* bail reform a success in achieving its objectives.