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Brief submitted by the Association of Legal Aid Plans of Canada (ALAP) to the Senate Legal and Constitutional Affairs Standing Committee regarding *Bill C-48: An Act to amend the Criminal Code (bail reform)*



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The Association of Legal Aid Plans of Canada (ALAP) appreciates the opportunity to provide submissions to the Legal and Constitutional Affairs Standing Committee on *Bill C-48: An Act to amend the Criminal Code (bail reform)*.

ALAP represents legal aid programs in all provinces and territories. Legal aid plans, by way of either direct staff services, or the funding of private bar lawyers, provide representation for the majority of accused persons in bail courts in Canada. As a result, ALAP is intimately aware of how bail operates, and its impact on the poor, and often most marginalized members of Canadian society, who have been charged with a criminal offence. ALAP is therefore well-positioned to provide input on Bill C-48.

### **Summary of key points and recommendations:**

- ALAP, without detracting from the important goals of Bill C-48, wishes to bring the Committee's attention to how bail decision-making is experienced by legal aid clients, who make up the majority of accused persons in bail courts;
- ALAP would like to share its expertise by alerting the Committee to the negative, unintended impacts of Bill C-48 on i) legal aid clients, ii) the capacity of legal aid plans to assist clients, and iii) the fairness and efficiency of the criminal justice system;
- Canada is facing a bail and remand crisis, with over 70% of individuals in provincial and territorial custody being presumptively innocent individuals awaiting trial – not persons convicted of offences and serving sentences. The majority of these individuals are reliant on legal aid plans for assistance and representation;
- If passed, Bill C-48 will exacerbate the bail crisis. Bill C-48 will have a disproportionately negative impact on Indigenous, Black and racialized individuals and communities, as well as on individuals dealing with mental health and addictions issues, all of whom are already overrepresented in the criminal justice system generally, and in custodial populations in particular;
- If passed, Bill C-48 will increase the length and complexity of many bail hearings, putting additional strains on defence and court resources. Since legal aid plans fund most bail hearings, a corresponding investment in legal aid will be required to address the negative impacts of Bill C-48 on many vulnerable legally-aided accused, including victims and survivors of intimate partner violence, Indigenous, Black and racialized individuals, as well as persons dealing with mental health and addiction issues;

- If passed, Bill C-48 will contribute to delays in bail hearings, ultimately worsening backlogs in criminal courts, and potentially resulting in stays of proceedings due to delay, including stays of serious charges.

In light of the above, ALAP recommends:

- That Bill C-48 be amended to remove the expansion of reverse onus provisions, focusing instead on the requirement that courts consider the safety and security of the community in making bail decisions;
- In the alternative, that Bill C-48 be amended to remove the expansion of a reverse onus to accused persons facing allegations of intimate partner violence who have previously only been discharged of an offence of that nature; and
- That, should Bill C-48 receive Royal Assent, a corresponding investment in legal aid be made by the federal government, so as to enable provincial and territorial legal aid plans to address the negative impacts of this legislation on legal aid clients.

## The Bail/Remand Crisis in Canada

*Liberty lost is never regained and can never be fully compensated for; therefore, where the potential exists for the loss of freedom for even a day, we, as a free and democratic society, must place the highest emphasis on ensuring that our system of justice minimizes the chances of an unwarranted denial of liberty.*

- Justice Iacobucci

The presumption of innocence is “a hallowed principle lying at the very heart of criminal law... [that] confirms our faith in humankind.”<sup>1</sup> A corollary of this presumption is the right to reasonable bail. Bail must not be denied without just cause, the terms of bail must be reasonable, and release should occur at the earliest opportunity.<sup>2</sup>

Bail should only be denied in a narrow set of circumstances.<sup>3</sup> For bail to be denied, detention must be necessary to ensure the accused’s attendance in court, necessary for the protection or safety of the public, or necessary to maintain confidence in the administration of justice.<sup>4</sup>

Notwithstanding these foundational legal and constitutional principles, Canada is in the midst of what can only be described as a worsening bail and remand crisis.<sup>5</sup> The percentage of individuals on remand, compared to inmates serving provincial

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<sup>1</sup> *R v Antic*, 2017 SCC 27, at para 66, quoting *R v Oakes*, [1986] 1 S.C.R. 103, at pp 119-20

<sup>2</sup> *Ibid.*, at para 67

<sup>3</sup> *Ibid.*, at para 40

<sup>4</sup> *Criminal Code of Canada*, Section 515(10)

<sup>5</sup> For a full discussion, see: [Set Up to Fail: Bail and the Revolving Door of Pre-Trial Detention](#). Canadian Civil Liberties Association and Education Trust. Final Report (2014); “[The crisis in Canada’s bail system is not one of an overly lax or lenient system](#),” Professor Nicole Myers, *Brief presented to the House of Commons’ Standing Committee on Justice and Human Rights* (March 2023); [A Legal Aid Strategy for Bail](#) (2016)

sentences, has grown dramatically over the last several decades – from 41% in 2001/02, to 54% in 2011/12, to over 70% in 2021/22.<sup>6</sup>

These are presumptively innocent individuals who have not been found guilty of the allegations against them, and who can remain in custody for months, if not years, while awaiting trial. A recent Department of Justice report, while noting the importance that remand plays in the protection of society and the administration of justice, summarized the problem of increasing remand populations as follows:

[I]ncreases in the number and proportion of people held in remand/pre-trial detention can be indicative of deeper systemic issues. This includes issues related to legal rights (e.g., presumption of innocence), human rights (e.g., poor conditions, overcrowding, lack of correctional programming), access to justice, a culture of inefficiency/delays, and the criminal justice system's disproportionate impact on vulnerable and marginalized people.<sup>7</sup>

Remand populations are disproportionately Indigenous, or Black, or struggling with mental health issues, and very often reliant on legal aid for representation.<sup>8</sup> Across Canada, while Indigenous persons make up approximately 5% of the population, in 2021/22, 32% of individuals in provincial and territorial remand admissions identified as Indigenous.<sup>9</sup> In certain provinces, the overrepresentation of Indigenous persons is much higher.<sup>10</sup>

While less specific data are available on the racial makeup of remand populations, it is clear that Black individuals are overrepresented in provincial admissions to custody in the jurisdictions that report on racial identity of inmates. In Nova Scotia and Ontario, for example, the percentage of Black adults admitted into provincial custody is, respectively, 3.7 and 2.8 times more than the percentage of Black adults in the populations of those provinces.<sup>11</sup>

Individuals in pre-trial detention are subject to restrictive conditions of confinement with little to no access to recreation, treatment or rehabilitative programs, often spending many hours under lockdowns unable to leave their cells. Pre-trial detention “comes at a significant cost in terms of their loss of liberty, the impact on their mental and physical well-being and on their families, and the loss of their livelihoods.”<sup>12</sup> For those dealing with mental health and addiction issues, such conditions can have serious, even life-threatening consequences.<sup>13</sup>

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<sup>6</sup> Statistics Canada. [Table 35-10-0154-01. Average counts of adults in provincial and territorial correctional programs](#)

<sup>7</sup> [State of the Criminal Justice System: Impact of Covid-19 on the Criminal Justice System](#), at pp 39-40

<sup>8</sup> For example, Legal Aid Ontario estimates that 80% of accused persons at bail hearings are represented by duty counsel or private bar lawyers acting on legal aid certificates.

<sup>9</sup> Statistics Canada. [Table 35-10-0016-01 Adult custody admissions to correctional services by Indigenous identity](#)

<sup>10</sup> In Saskatchewan, for example, 79% of inmates on remand self-identified as Indigenous in 2021/22 – compared to 17% of the population who self-identified as Indigenous.

<sup>11</sup> [JustFacts: Overrepresentation of Black people in the Canadian criminal justice system](#)

<sup>12</sup> [R v Myers](#), 2019 SCC 18, at para 27

<sup>13</sup> [A Legal Aid Strategy for Bail; Report on Conditions of Confinement at Toronto South Detention Centre](#), Ontario Human Rights Commission

Courts have long recognized that pre-trial detention “can have serious detrimental impacts on an accused person’s ability to raise a defence,”<sup>14</sup> thus raising the spectre of wrongful convictions. Pre-trial detention puts individuals at a higher risk of pleading guilty simply to ‘get it over with,’ whether or not they are guilty of the charges. Moreover, “certain sub-populations, such as young persons, Indigenous persons, and those with cognitive deficits or mental health issues, or who are otherwise marginalized due to factors such as race, poverty or some combination of these factors, may be particularly vulnerable to false confessions and false guilty pleas.”<sup>15</sup> The ability to prepare a defence while in custody is further complicated by lockdowns, staffing issues and scarcity of video suites at detention centres for court appearances and counsel meetings, and complications related to hybrid court proceedings.

Studies have also shown that individuals who go through corrections have much higher rates of subsequent contact with police for a new offence than those whose contact with the criminal justice system ends with the police or the courts.<sup>16</sup> As noted in a 2015 report published by the Department of Justice, “[i]t is no secret that any time in prison increases the likelihood of future criminal behaviour.”<sup>17</sup>

## **Bill C-48 and its Unintended Impacts**

ALAP does not deny the seriousness of the risks that the government is seeking to address by introducing Bill C-48. The commission of a violent offence by a person who has been released pending trial, no matter how rare, must be taken seriously as an affront to our shared sense of community safety.

At the same time, ALAP wishes to put forward other, perhaps less fully understood, negative impacts of Bill C-48, particularly as they pertain to legal aid clients.

## **Expansion of Reverse Onus Provisions**

ALAP is concerned that, by expanding reverse onus provisions, Bill C-48 will only provide additional challenges for the fair treatment of legal aid clients in the criminal justice system. These individuals are often the most vulnerable members of society, belonging to the most marginalized communities.

There is a real risk that the expansion of reverse onus provisions in Bill C-48 undermines the *Charter* rights to the presumption of innocence and not to be denied reasonable bail without just cause. It undermines these rights in an environment where

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<sup>14</sup> [R. v. Myers](#), *supra*, note 12, at para 27

<sup>15</sup> [Innocence at Stake: The Need for Continued Vigilance to Prevent Wrongful Convictions in Canada](#), Report of the Federal/Provincial/Territorial Heads of Prosecutions Subcommittee on the Prevention of Wrongful Convictions (2018), at p 172

<sup>16</sup> [JustFacts: Recidivism in the Criminal Justice System](#)

<sup>17</sup> Webster, C. [“Broken Bail” in Canada: How We Might Go About Fixing It](#), at p 12; see also [Releasing people pretrial doesn’t harm public safety: When these states, cities, and counties began releasing more people pretrial, there were no corresponding waves in crime](#) for a briefing on the impact of bail reforms on a number of jurisdictions in the United States. As the title suggests, analysis revealed that pre-trial release did not negatively affect public safety. For example, following the introduction of new legislation virtually eliminating the use of cash bails in New Jersey, the remand population declined significantly, and violent crime decreased by 16%.

so many accused persons from marginalized communities, the majority of whom are legally aided, are already unable to exercise them.

Many legally-aided accused are disadvantaged in obtaining release, as well as release on reasonable conditions. This is true even when the onus is on the Crown to show why the accused should be detained or released on strict conditions. Requiring the accused to show why detention is not necessary will only exacerbate the issue.

## **Reverse Onus and Firearms and Weapons Charges**

Firearms charges disproportionately impact Indigenous, Black and other racialized communities. A 2022 report showed that admissions of Indigenous, Black and other racialized individuals into federal custody for firearms offences punishable by a mandatory minimum penalty (MMP) were higher than their overall representation in federal custody admissions. Moreover, trends in federal custody admissions reveal an increase in the proportion of Indigenous and racialized individuals admitted into federal custody for an MMP-punishable firearms offence since 2016/17.<sup>18</sup> Racial profiling and the over-policing of Black communities contribute to the issue.<sup>19</sup> Preliminary examination by Legal Aid Ontario reveals that Black clients in particular, as well as Indigenous clients, would be disproportionately impacted by a reversal of the onus for the four firearm charges identified in Bill C-48.

ALAP points to the inclusion of possession of a loaded firearm in the proposed reverse onus expansion as an example of the disproportionate impact of Bill C-48. As a practical matter, the circumstances under which a person may be prosecuted for this offence are wide in scope. The charge, for example, can easily be laid against persons without prior criminal involvement who happen to be in a household where the police locate a firearm. Given evidence that Indigenous, racialized and Black communities are over-policed, particularly with respect to firearm offences, it is easy to see how imposing a reverse onus for this offence will further increase their over-representation in the remand population.

The reversal of the onus where the accused is charged with a violent offence involving a weapon and has a prior conviction for the same type of offence in the previous five years is also expected to have a significant impact on bail courts generally, and on vulnerable individuals in particular. While Bill C-48 restricts this new reverse onus to offences with a maximum term of imprisonment of ten years or more, this still captures many minor charges that often affect legally-aided accused.<sup>20</sup> For example, the offence of assault with a weapon<sup>21</sup> carries a maximum sentence of ten years; however, the

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<sup>18</sup> [\*JustFacts: The Impact of Mandatory Minimum Penalties on Indigenous Peoples and Black and Other Racialized Groups\*](#)

<sup>19</sup> Owusu-Bempah, A & Jeffers, S, [\*Black Youth and the Criminal Justice System: Summary Report of an Engagement Process in Canada\*](#)

<sup>20</sup> For these reasons, the Canadian Civil Liberties Association intends to challenge the proposed legislation. See Adler, M (June 1, 2023) [\*Fix Canada's 'broken' bail system by giving more people bail, and more supports, some Toronto experts say: Federal Bill C-48 won't bring safety benefits public is promised, say some judicial system experts\*](#)

<sup>21</sup> S.267 of the *Criminal Code*. This is a hybrid offence that carries a maximum sentence of ten years if the Crown proceeds by indictment; however, since matters are deemed indictable unless and until the

allegations involved, as well as prior convictions for this offence, may be rather minor.<sup>22</sup> As such, this proposed new reverse onus provision is overbroad, as it would capture not only serious offences of violence involving weapons, but also individuals who, for various reasons, have relatively minor records for charges involving weapons.

## Reverse Onus and Charges of Intimate Partner Violence

ALAP very much supports the federal government's ongoing efforts to address gender-based violence in this country. Many legal aid plans provide additional supports and expanded eligibility for survivors of intimate partner violence. ALAP is of the view, however, that the proposed reversal of onus for individuals charged with domestic violence allegations who have a prior discharge for a domestic offence may do little to protect the lives and safety of women and children in this country.<sup>23</sup> Discharges are findings of guilt without a conviction. They are granted only for more minor offences, where the court finds that a discharge is "not contrary to the public interest."<sup>24</sup> Thus, the proposed legislation would make release more difficult for individuals with a history of the least serious domestic charges, and would not advance the important goal of the legislation to limit pre-trial release for persons with a history of violent offences. Furthermore, the silence of Bill C-48 on the timeframe within which prior discharges ought to be considered is likely to give rise to significant litigation, thereby also prolonging bail hearings.

ALAP is also concerned that the expanded use of reverse onus in this regard risks further criminalizing and incarcerating women who are themselves victims of domestic violence, and are disproportionately Indigenous, Black, and racialized. ALAP points out that, increasingly, police forces have adopted mandatory charging practices when responding to complaints of domestic violence. Police charging practices have meant that, over time, a "disproportionate number of women who were reporting violence against them, found themselves facing criminal charges."<sup>25</sup> In the face of how the police proceed on complaints of domestic violence, ALAP would urge caution in further expanding the scope of reverse onuses to these kinds of offences. Instead, ALAP recommends, as did the Barbra Schlifer Commemorative Clinic with respect to Bill C-75, that, as a minimum step, before proceeding with legislative change, the government conduct an impact assessment of its potential "unintended consequences." The impact assessment could ensure that Bill C-48 not "place an excessive burden on women who are swept up in criminal responses" and not "disproportionately affect racialized and Indigenous Canadians."<sup>26</sup>

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Crown elects to proceed summarily, this offence would fall under the Bill C-48 reversal of onus for violent offences involving weapons.

<sup>22</sup> Throwing a bottle of water or a pillow at someone, for example, can constitute an assault with a weapon.

<sup>23</sup> As a result of Bill C-75 amendments, an accused facing domestic charges who has a prior *conviction* for domestic charges is already in a reverse onus situation.

<sup>24</sup> S.730 of the *Criminal Code*

<sup>25</sup> Barbra Schlifer Commemorative Clinic, "[Criminalization of Women](#)"

<sup>26</sup> Barbra Schlifer Commemorative Clinic, "[Submissions: Bill C-75: An Act to Amend the Criminal Code, the Youth Criminal Justice Act and Other Acts](#)" (September 1, 2018)

## Bill C-48's Impact on Limited Legal Aid Resources and the Justice System

The amendments proposed in Bill C-48 would not only impact those individuals directly affected by the reversal of the onus for the offences named in the Bill, but would further delays in already busy bail courts, thus keeping many vulnerable, legally-aided individuals in custody for longer periods of time.

Increasing the use of reverse onus provisions in bail will impose additional demands on already limited legal aid resources. In a reverse onus hearing, it is the accused, who is very often legally aided, who must lead evidence and make the case for release. These cases almost by definition require additional time and resources. Without the further investment of funds to respond to this increased demand on resources, legal aid plans may be required to move resources from other defence services, or leave the accused without legal representation.

Furthermore, ALAP remains concerned that the attention already paid to the Bill as a response to the perceived failures of the bail system will only add to the culture of risk aversion in obtaining judicial pre-trial release in this country. It may be reasonably anticipated that, after the Bill's passage, prosecuting Crown attorneys, even when not seeking detention, will increasingly insist on releasing accused persons only with the oversight of a surety and/or on onerous conditions.

With Bill C-48, legal aid plans will be hard-pressed to find the resources to adequately protect the rights of the accused in the increasingly time-consuming, costly and litigious bail process. Many jurisdictions, coincident with the introduction of Bill C-48, have already directed additional funding to support the prosecution of accused persons in bail courts, particularly for serious violent offences. In none of these jurisdictions has there been funding directed to legal aid plans for the defence of these matters.

The Supreme Court of Canada has recognized that a risk averse bail decision-making culture must be "tempered" by compliance with constitutional principles. In *R v Zora*, Justice Martin, writing for the Court, observed:

Courts and commentators have consistently described a culture of risk aversion that contributes to courts applying excessive conditions.... In *Tunney*, Di Luca J. emphasized that this culture continues despite the directions of *Antic*. He rightly noted, in my view, that "the culture of risk aversion must be tempered by the constitutional principles that animate the right to reasonable bail."<sup>27</sup>

The provisions set out in Bill C-48, by exacerbating an already existing risk-averse culture in bail courts, will make it significantly more difficult for members of ALAP to provide the necessary resources for defence representation to "temper" this type of constitutionally suspect decision-making.

By increasing the complexity of bail proceedings, Bill C-48 will put additional demands on already limited court resources and on the state's ability to provide a detained accused with a timely bail hearing and, more generally, a trial within a reasonable period of time. These constitutional rights are already under great strain.

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<sup>27</sup> [R v Zora](#), 2020 SCC 14, at para 77



Delays in bail courts can easily lead to stays of proceedings. In a recent Ontario case,<sup>28</sup> for example, serious charges were stayed due to a seventeen-day delay in addressing bail – a delay caused by systemic issues. Manitoba has also had stays as a result of significant delays in holding bails hearings.<sup>29</sup> As was observed years ago, “[a]n arrested person should not face the prospect of having to, in effect, make an appointment for his or her bail hearing. Unjustified detention includes unreasonably prolonged custody awaiting a bail hearing.”<sup>30</sup>

## Recommendations

In light of the above, ALAP recommends the following:

- That Bill C-48 be amended to remove the expansion of reverse onus provisions, focusing instead on the requirement that courts consider the safety and security of the community in making bail decisions;
- In the alternative, that Bill C-48 be amended to remove the expansion of a reverse onus to accused persons facing allegations of intimate partner violence who have previously only been discharged of an offence of that nature; and
- That, should Bill C-48 receive Royal Assent, a corresponding investment in legal aid be made by the federal government, so as to enable provincial and territorial legal aid plans to address the negative impacts of this legislation on legal aid clients.

Respectfully submitted this 22<sup>nd</sup> day of September, 2023

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<sup>28</sup> *R v Alhajsalem*, [2023] OJ No 2388

<sup>29</sup> *R v. Balfour and Young*, 2019 MBQB 167

<sup>30</sup> *R v Villota*, [2002] OJ No 1027, at para 66