Fact Sheet

#17

in a series of fact sheets that examine questions frequently asked about the criminal justice system

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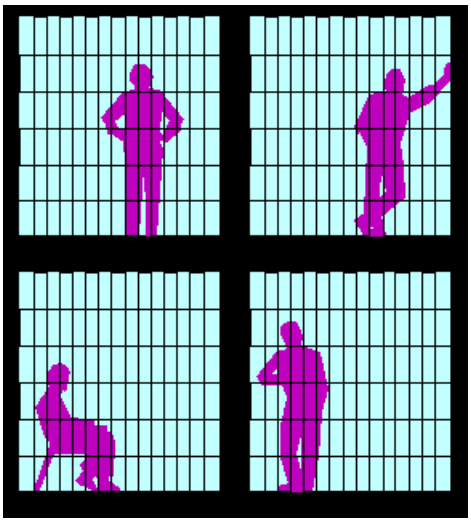
Doing "Dead Time": Custody before trial

On any given day, thousands of untried people are detained in our country's jails and provincial prisons. With the exception of a relatively small number who are held for immigration purposes, these are individuals who are held in custody either pending a decision on bail or, if denied bail, until trial and sentencing. The numbers of untried in custody are substantial and are growing across Canada. In Ontario, their numbers have been identified as a major contributor to maintaining prison populations, despite declining crime rates and sentenced populations.

Concern about the deprivation of freedom for those who are untried is important for a number of reasons. Our system of justice requires that people be considered innocent until proven guilty and that those accused of an offence have the right not to be denied reasonable bail without just cause. These are two important principles articulated in the our *Charter of Rights and Freedoms.* Further, incarceration has high social, economic and human costs and its effectiveness as the primary means of achieving public protection is highly questionable. Achieving an "effective, just and humane" criminal justice system demands that we scrutinize the use of pre-trial detention to ensure that it is neither excessive nor unnecessary.

What do we know about the extent of and trends in the use of pre-trial detention in Ontario? What is the law with respect to release after arrest and prior to trial? Do we know if the practice is consistent with the law? Is there any evidence relating to what factors influence the decision to detain or not to detain? Are there barriers to being released prior to trial that put certain groups more at-risk of pre-trial detention? What do we know about the conditions of pre-trial detention and its effect on the outcome of the case? Do any programs or services exist that are geared to reducing the use of pre-trial detention in Ontario?



This Fact Sheet is intended to bring attention to the issue of untried prisoners in Ontario, generate discussion about the need to reduce the use of pre-trial detention and begin to look at ways to accomplish this objective, while being mindful of public safety concerns.

Use of pre-trial detention in Ontario

People in prison are categorized as "remand" (mostly untried, some awaiting sentencing), "sentenced" (tried and sentenced) or "other" (temporary detention, immigration holds).

Correctional statistics show that:

- admissions to remand are substantial - 52,179 in 2000/01;
- remand admissions have increased 17% over the decade, with the largest increase taking place within the last year;
- on any given day in 2000/01, there were 3,701 people on remand in Ontario prisons;
- the average daily count of remand prisoners grew steadily and significantly - by + 63% - over the past decade (Chart 1); and,
- currently, there are almost 1,500 more untried people in prison in Ontario than there were 10 years ago.

Over the past decade, there have been substantial declines in both the crime rate

Average Daily Count
Ontario Provincial Prisons
1991/92 to 2000/01

Chart 1

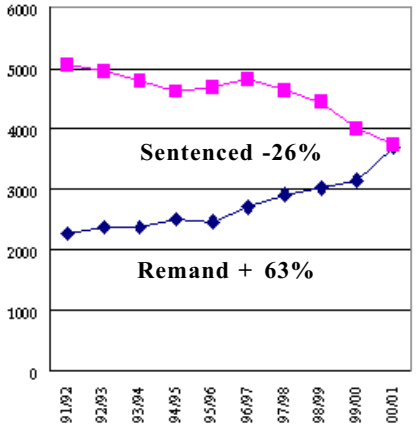
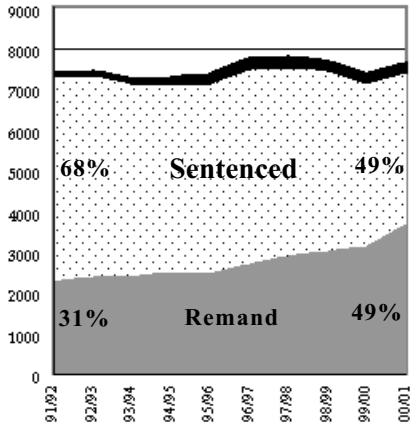


Chart 2



Source: Statistics Canada and Ontario Ministry of Correctional Services

and the number of sentenced offenders in Ontario. Without the increases in remand, the total provincial prison population would have declined, not increased by 3%, and would be significantly lower than it is today.

In 1991/92, 68% of the total population on any given day were sentenced and 31% were on remand (with the remainder "other"). A decade later, 49% were sentenced and 49% were on remand (Chart 2). Now, almost one-half of those held in Ontario prisons are on remand, the vast majority of which are untried.

These trends demonstrate that any attempt to reduce the use of imprisonment must consider how we deal with those who are accused of an offence awaiting trial.

To release or detain before trial: The law

Part XVI of the *Criminal Code* defines the law with respect to release and detention prior to trial.

Not everyone who is accused of a crime is arrested by the police. The police officer may simply issue an appearance notice immediately or arrange for a summons to be sent later.

Even if arrested and taken to the police station, a person can be released by the officer-in-charge with a promise to appear in court at a time and place specified. At this point, a deposit of cash or some valuable, and/or the imposition of some conditions (reporting, travel or other restrictions, surrender of one's passport) can be required to secure release. Police have a duty to release unless they have reasonable grounds to believe that the accused will fail to attend at court or that release is not in the public interest, i.e. the accused will continue to commit crimes or will interfere with the investigation of the current offence.

If the person is not released by the police, he/she must be brought before a justice, normally within 24 hours, for a hearing as to whether to permit a "judicial interim release" (conventionally known as bail) until the trial date. Generally, the onus is on the Crown to show why the accused should not be released on the basis of risk of non-attendance at court, for the protection of the public safety or in the public interest. There are specific situations when the onus is on the accused to show why he/she should be released: the person is charged with an indictable offence while on bail awaiting trial for another indictable offence; the person is charged with an indictable offence and is not a resident of Canada; the charge is for a failure to appear or for a failure to abide by the conditions of bail; or, the person is charged with specific offences under the *Narcotics Control Act*.

At the bail hearing, the accused, with a lawyer or with the assistance of Duty Counsel if a lawyer has not been retained, can make arguments and submit evidence as to why he/she should be released or should not be detained in custody.

If detention is not proven to be justified, the accused can be released with just an agreement to appear in court at a time and place specified. The justice can, however, also make the release conditional if persuaded that, while detention is not justified, some extra assurances are necessary to compel the accused's appearance at court or to protect public safety. Such assurances may take the form of financial conditions such as a cash deposit or a promise to pay for failure to appear either by the accused or by someone else in the community (the latter known as a "surety"). The justice may require the person to enter into an agreement to abide by certain conditions, such as geographical and association restrictions, curfews and/or reporting to the police.

If the justice is persuaded that detention is justified, the accused will be held in custody until trial, unless he/she applies for a review of the order to detain and can persuade the reviewing judge that the original order should be changed.

Implementation of the law

As it is written, the law seems to encourage release prior to trial, subject to exceptional circumstances based on compelling evidence that the accused is unlikely to show up for trial or presents a danger to the public. An analysis of the current data and trends on remand,

however, would suggest that pre-trial detention is not an exceptional event in Ontario. Judging from the available information, research and government studies, the reasons for the discrepancy between the law and practice likely represents an interplay of a number of factors relating to the operation of criminal justice agencies.

The police may not be making full use of their powers to release, as was suggested by the Criminal Justice Review Committee in its 1999 report to the Ontario government. The Committee, recognizing the lack of research into police discretion to release, recommended that the government undertake such research and report back to a proposed criminal justice co-ordinating committee for action. The 1995 Report of the Commission on Systemic Racism in the Ontario Criminal Justice System went even further in its recommendations to ensure full and equal access to release by the police. The recommendations included: (1) the development of guidelines based on the principle of restraint in exercising the powers both to detain and to impose restrictions (guidance and direction to the police), and (2) a requirement to document the reasons for detention and the imposition of conditions, provide adequate explanation to the accused, record the response of the accused and provide information on how to apply for relief of conditions (greater accountability for and visibility of the decisions).

If the police decide not to release, the accused will remain in detention until a bail hearing and the person is officially "on remand". The data suggest that people are spending longer on remand. In 1999/2000, one-half of the releases from remand took place in 8 days or less, up from 5 days in 1993/94. Many of the reports suggest that the increase in time spent on remand may be partially due to *stretched court and legal resources and lack of preparation for bail hearings.* Proposals for remedies include: (1) additional bail courts in busy jurisdictions adequately staffed with Crown Attorneys and Duty Counsel, (2) streamlining existing procedures, and (3) the establishment of "bail interview officers".

Concerns about *the nature and quality of information available to the Crown and to the judge* have prompted calls for more control over the assessment and verification of information related to eligibility for bail and the conditions which may be imposed. Currently, the police prepare a "show cause" report for submission to the Crown, offering recommendations on release and conditions. It should be a factual summary of the alleged offence and the background of the accused, relevant only to risk of flight and of re-offending.

Some research (Commission on Systemic Racism in the Ontario Criminal Justice System, 1995, Kellough and Wortley, 2001) has shown, however, that these reports often contain unverified information, comments irrelevant to risk of flight or of re-offending before trial and subjective moral assessments of the accused. Given busy bail court dockets, the police report is very influential in the Crown's decision to oppose release or to request the imposition of bail conditions. It is significant that the "show cause" report is not disclosed to the accused or his/her lawyer, leaving no opportunity to challenge information or impressions contained in the report. More guidance with respect to what and how information is presented in police reports, disclosure of police reports to the accused and the establishment of an independent agent for assessment and verification have been suggested as ways to control the nature of the information and to improve its quality.

Criteria for assessing risk of flight and of re-offending and the imposition of conditions may disproportionately disadvantage certain groups. Because employment status and residential stability are used as criteria for assessing risk, accused persons can be denied bail because they are homeless and/or unemployed. Despite no known evidence which demonstrate that these factors are predictive, the practice, which certainly has a disproportionate effect on the poor and groups that are economically disadvantaged (aboriginals, blacks, women), continues. The imposition of conditions, such as surety, can have a similar discriminatory effect. Research on bail in Toronto found that 45% of all bail orders had a surety requirement, compared to 1%-3% in the United Kingdom. This study also found that 15% of those who were granted bail with surety were unable to meet the surety condition and, therefore, remained in jail. Remedies proposed include: (1) conducting research on factors associated with risks relevant to bail and using this information to train justices and inform their decision-making, (2) restricting the use of financial conditions, and (3) implementing bail supervision programs. It is significant to note that bail supervision programs in Ontario faced the prospect of elimination in 1997, suffered cuts (are available in only five jurisdictions currently) and are not slated for any expansion at this time.

In Toronto, it is common knowledge in legal circles that persons detained while awaiting trial are now usually forced to live in cells designed for two persons but occupied by three or four. That means that many inmates including persons awaiting trial must sleep on the floor of an overcrowded, smelly cell within inches of an open toilet. They have virtually no privacy. Everything that they do, including using the toilet, is open to the view of the guards and inmates. They must appease inmates who try to intimidate them or risk physical harm.

Ted Matlow, Superior Court Judge, Ontario

The research on bail in Toronto also found that conduct restrictions attached to bail were disproportionately imposed on Black males and "morally suspect" women. Various reports have expressed concern about not only the unfairness but also the relevance of conditions sometimes imposed and the consequences. Conduct restrictions can have little or no connection with the alleged offence, be more intrusive than necessary to achieve the objectives of attendance at court and prevention of offences, can criminalize behaviour that is otherwise legal and, if breached, make the person more likely to be subsequently denied bail and detained until trial.

There seems to be *considerable disparity in the exercise of judicial discretion* with respect to bail. Data from the courts in Ontario on bail decisions in 2000/01 showed that, while provincially 89% of persons requesting bail were granted it, there was great variation across the province. The percentage of persons granted bail, while high in some areas (96% in Windsor and 92% in St. Catherines), were very low in others (34% in Belleville and 50% in Kitchener). While discretion is essential, it should not be uncontrolled or uninformed. Education, training and flexible guidelines must be part of the solution to the current situation of wide disparity.

The consequences of pre-trial detention

Canada is a signatory to the United Nations *International Covenant on Civil and Political Rights* which states that accused persons are to be segregated from convicted persons and treated appropriate to their status as accused persons. Appropriate treatment is further defined in other United Nations documents to indicate that untried persons should be afforded better living conditions and freer access to the community than sentenced prisoners. This certainly is not the case in Ontario.

In addition to the "normal" toll of the loss of liberty and of prison life on the incarcerated person, the prison experience in Ontario is often harsher for untried prisoners than for sentenced prisoners. All remand prisoners are held in maximum security prisons, regardless of the nature of the alleged offence and whether the person is a first-time offender or has an extensive criminal background. Conditions in these facilities are often overcrowded and unsanitary and dangerous. A prisoner is locked in a small cell, with two or three others, for 12 hours a day or more. Even when they are let out of their cells, there is little or no opportunity for structured activities. No recreation staff are available now and gymnasiums are being closed to make space for those serving sentences on weekends. There are no opportunities for work. Programs and services are virtually non-existent for remand prisoners. Visiting areas, particularly in the large detention centres, are crowded and noisy. "Warehousing" has often been used to describe the treatment of remand prisoners.

Beyond the immediate suffering connected with harsh conditions and disruptions in personal life (family, job, school), pre-trial detention can have an effect on the outcome of the case and the sentence. The Commission on Systemic Racism in the Ontario Criminal Justice System found that "imprisoned accused who plead not guilty are less likely to be acquitted at trial than those who are not detained before trial; and that whatever the plea they are much more likely to receive a prison sentence if convicted."

A study of bail in Toronto courts found that those detained were more likely to plead guilty and less likely to have their charges withdrawn than those who are not detained. Interviews conducted in this study with those detained indicated that some plead guilty to escape the harsh conditions in jails and detention centres, either in anticipation that they would not receive a sentence of imprisonment or to be transferred a prison for sentenced offenders. This occurred even with people who maintained that they were not guilty.

Need for reform

If we are committed to the rights of the accused, as articulated in our laws and human rights instruments, we must take the actions required to restrain the use of pre-trial detention and to improve the conditions of confinement for those who must be detained. Action is needed in Ontario now.

Effective, just and humane responses to crime and its causes

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