Bail reform

Getting fair outcomes for victims in Canada’s criminal justice system

PUBLIC ENGAGEMENT ON THE FEDERAL GOVERNMENT’S CRIMINAL JUSTICE SYSTEM REVIEW

OFFICE OF THE FEDERAL OMBUDSMAN FOR VICTIMS OF CRIME

NOVEMBER 2017
Context
In August 2017 the Office of the Federal Ombudsman for Victims of Crime launched a national engagement process to hear from those with lived experiences of victimization, victim service providers, victim advocacy organizations, and other victims’ issues experts about how Canada could better support victims and survivors of crime.

The engagement was undertaken in response to the Government of Canada’s commitment to reviewing the criminal justice system, with the intention of providing timely, relevant and informed options to the Minister of Justice and Attorney General of Canada for how to transform federal laws, legislation, services and policies. The engagement focused on areas of interest to the Government, such as: bail reform, administration of justice issues and restorative justice; as well as on the Canadian Victims Bill of Rights (An Act for the Recognition of Victims Rights).

The following document is one in the series of Getting fair outcomes for victims and survivors papers that present what was heard, along with research, best practices and options for change. The papers focus on:

> Bail reform
> Administration of justice offences
> Restorative justice
> The Canadian Victims Bill of Rights
> Canada’s criminal justice system

The full suite of documents can be found on the Office’s website (victimsfirst.gc.ca). The Office would like to thank all of those who contributed to this project.

OFFICE OF THE FEDERAL OMBUDSMAN FOR VICTIMS OF CRIME

Telephone (toll-free) 1-866-481-8429
TTY (teletypewriter) 1-877-644-8385
Fax 613-941-3498
Email victimsfirst@ombudsman.gc.ca
Website www.victimsfirst.gc.ca

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What is bail?

Generally speaking, bail is the procedure to determine if a person charged with a criminal offence will be released or detained while awaiting trial.

If a person accused of a crime is taken into custody and held in jail or prison until they appear in court, a bail hearing must be held within twenty-four hours (or as soon as possible).

At a bail hearing, a prosecutor (in most cases) summarizes the nature of the offence(s), the evidence against the accused and the factors that will assist the court in making a decision. During the hearing, the court must also take into account any evidence about the need to ensure the safety of victims or witnesses; this can include the seriousness of the charge or whether it involves violence. The court then decides whether to detain the accused person before the case goes to trial.

Pre-trial detention, remand and releases

Pre-trial detention also includes remand. It is not uncommon for accused persons to be remanded into prison custody while awaiting their bail hearing.

If the court determines that an accused person should be detained, it orders that they remain in prison pre-trial. Under current federal law, this can be done to ensure appearance in court, to keep the public safe (including victims and witnesses), or to maintain confidence in the administration of justice given the gravity of the offence and similar factors.

When the court determines not to detain a person charged with a crime, it orders that they be released while awaiting trial. Based on the information and evidence presented at the bail hearing, the court can include conditions of release that the accused person must respect. For example, the court can order the accused to abstain from communicating with the victim(s) and refrain from being in specified places.

What rights do victims currently have with respect to bail?

> If a court is considering judicial interim release with respect to an offence involving violence against a person – actual, threatened or attempted – the court must consider whether conditions that ensure the safety and security of any victim should be imposed as part of a release order. The court is required to include a statement on the record that it considered the safety and security of every victim in making the decision.

> Under the Criminal Code, a victim of an offence is entitled to receive – on request – a copy of the bail hearing order (the decision to detain or release the accused, along with any conditions).

Considerations

> Exploring bail reform is part of the modernization work specifically included in the Minister of Justice and Attorney General of Canada’s mandate letter.

> In its 2015 electoral platform, the Liberal Party of Canada committed to amend the Criminal Code to reverse onus on bail for accused persons with previous convictions of intimate partner violence. If enacted, this change would mean that an accused would be kept in custody unless they can demonstrate that their detention is not justified.

> There is currently no legal duty to automatically inform victims when an offender is released on bail. This means victims with legitimate concerns for their safety may not be made aware when the accused person is released and what conditions may or may not be in place.

- Interviews reveal that only two-thirds of victims were informed about the accused being released on bail, with just over half of these victims being told about the time of release (55 percent) and about the release conditions (57 percent).
Ensuring victims have this information allows them to make informed choices when it comes to safety planning, and accessing protective victim services.

If victims are not informed when an accused is released, secondary victimization can often occur if the information is learned after the fact, via the news, or on the internet. Those most affected can experience a level of stress similar to that of the actual offence.

Given that ensuring the security and safety of victims and witnesses is an essential part of the decision-making process in bail procedures, it is important that victims be able to provide information about how the release of an accused person could affect their safety and security. This information needs to be considered by police, prosecutors, and courts in the lead up to making bail decisions.

Based on interviews, about 70 percent of victims said that they made their safety concerns known, mostly to police. For the other 30 percent of victims, the most common response was that no one asked them about safety issues.

Victims have legitimate concerns about the potential for some accused to commit further offences while on bail. In Canada, there have been documented cases of accused persons committing violent crimes while on bail.

**New Zealand: Nature of offending on bail by most serious offence committed (2004-2009)**

<table>
<thead>
<tr>
<th>Colour coding used to distinguish violent offences.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abduction, harassment and other offences against the person (2.4%)</td>
</tr>
<tr>
<td>Acts intended to cause injury (13.8%)</td>
</tr>
<tr>
<td>Dangerous or negligent acts endangering persons (4.2%)</td>
</tr>
<tr>
<td>Fraud, deception and related offences (1.4%)</td>
</tr>
<tr>
<td>Homicide and related offences (0.3%)</td>
</tr>
<tr>
<td>Illicit drug offences (6.2%)</td>
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<tr>
<td>Miscellaneous offences (0.3%)</td>
</tr>
<tr>
<td>Offences against justice, government security and operations (17.2%)</td>
</tr>
<tr>
<td>Prohibited and regulated weapons and explosives offences (2.3%)</td>
</tr>
<tr>
<td>Property damage and environmental pollution (4%)</td>
</tr>
<tr>
<td>Public order offences (8.9%)</td>
</tr>
<tr>
<td>Robbery, extortion and related offences (2.5%)</td>
</tr>
<tr>
<td>Sexual assault and related offences (1%)</td>
</tr>
<tr>
<td>Theft and related offences (11.2%)</td>
</tr>
<tr>
<td>Traffic and vehicle regulatory offences (19.1%)</td>
</tr>
<tr>
<td>Unlawful entry with intent/burglary, break and enter (5.2%)</td>
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</tbody>
</table>

At the same time, a key consideration in many conversations about bail reform is centred on an accused person’s rights under section 11 of the Canadian Charter of Rights and Freedoms – specifically, an accused person’s right “not to be denied reasonable bail without just cause.” The Charter also guarantees legal rights to life, liberty and security of the person. These rights exist for everyone, including victims and persons accused of crimes. To balance how these legal rights are applied, the Criminal Code generally requires courts
to release accused persons without conditions while they await trial. However, if the prosecutor shows cause at a bail hearing, the court can order pre-trial detention or interim release with necessary conditions.

A number of studies have highlighted serious problems associated with an increasing number of accused persons held in jails and prisons while awaiting bail hearings and trials\(^9\), including:

- Potential violations of *Charter* rights of accused persons – increasing numbers of presumptively innocent people spending days and sometimes weeks in prison before their bail hearing;
- increased costs – e.g. facility costs and costs related to hearing delays;
- inefficiencies – e.g. strain on correctional facilities and hearing delays;
- increased potential for exposure to criminality in prisons; and
- a more significant impact on vulnerable populations who are detained at higher proportional rates.

According to Statistics Canada, there are now more people held in custody awaiting a bail hearing or trial than in custody as a result of a criminal conviction.\(^10\)
PARTICIPANT PERSPECTIVES

The Participant Perspectives section provides an overview of what we heard from those who contributed either in person, in writing or by phone.

“Nobody takes responsibility for informing the victim about the accused being released; the ball gets dropped multiple times as everyone assumes that someone else is informing the victim.”

NEED TO CONSIDER VICTIMS CAREFULLY

- The current bail regime gives victims certain protections/rights with respect to having their safety and security considered, and having a copy of the bail release. However, no mechanism presently exists to ensure that a victim:
  - has been consulted with respect to safety and security needs; and
  - knows about their right to request a copy of the bail release order.
- There is currently no legal duty to automatically inform victims when an offender is released on bail. This means victims with legitimate concerns for their safety may not be made aware when the accused person is released and what conditions may or may not be in place.
- In some cases where the victim is notified, it can happen too close to release, causing high levels of stress and anxiety and reducing the capacity for effective safety planning.

FLEXIBILITY AND RESPONSIVENESS

- “There has to be room for victims to express what they need for safety without necessarily always defaulting to keeping people locked up.”
  - A lack of systemic responsiveness to the victim may mean fewer reported crimes. For example, in cases of interpersonal violence, not all victims want the accused in jail; they may be very fearful of other risks they and their children may face as a result (e.g., homelessness, poverty). If we want a system that can be trusted and used, there has to be more flexibility to adapt to individual circumstances and more supports in place for people.
- In domestic violence cases, involvement of the police or of other criminal justice system actors is a significant risk factor for escalating violence. Research indicates that the risk of violence (including lethal violence) is greatest when the victim is attempting to leave an abusive partner. It also shows that the rate of non-compliance with protective conditions is high.
  - Better awareness and training are required throughout the criminal justice system on the trauma bond between the victim and their offender, particularly in the context of domestic violence.
  - A victim who has returned to their abusive partner many times may not be taken seriously and may be seen as ‘crying wolf’ in relation to a complaint.
• Victims should have more input into what is considered threatening behaviour.

• “We need to understand the long term dynamics and how, (for) example, some behaviours actually mean something significant and are experienced as threatening. The victim knows that person very well. It’s listening to how they understand it because they understand it best.”

• There is a need to take into account an individual’s past convictions, particularly in cases of intimate partner violence.
RECOMMENDATIONS AND OPTIONS

This section suggestions options and makes recommendations to the federal government for how to address issues with Canada's bail system. The recommendations provided were developed after carefully considering a variety of source material, such as: participant perspectives, the Office's past work and experience, research, literature reviews and more.

ENHANCE SAFETY AND SECURITY MEASURES (CRIMINAL CODE)

- Add offences involving domestic or sexual violence to the list of “reverse onus” offences in section 515(6)(a) of the Criminal Code. At a minimum, the presumption of bail should be reversed where the accused has been previously charged with, or convicted of, offences involving domestic or sexual violence.

- Require prosecutors to consult with victims before bail hearings and then convey necessary details to the deciding judge and/or allow victims to submit information directly to the court. A straightforward document to record and submit evidence relating to the security and safety of victims or witnesses could be developed and piloted. These approaches would be consistent with existing victim rights in section 14 of the Canadian Victims Bill of Rights.

- Require that a judge/justice of the peace inquire as to whether a victim has been consulted about their safety and security requirements in making any bail decision or at a hearing where a request has been made to change bail conditions. (Could be based on current sections 672.5(15.2), 722(2), 737.1(2)).

- Require a judge/justice to inform any victim who is a witness at a bail hearing of the right to have their safety and security considered (albeit unusual for a victim to be a witness at a bail hearing). (Could be based on existing sections 486.4(2)(a), (2.2(a)).

- In situations where a person accused of a violent, sexual and/or domestic violence offence is released from custody, ensure that identifiable victims are contacted and provided with information pertaining to the timing of the release as well as any bail conditions relating to victim security and safety. Could be applicable to sections 497(1), 498(1), 499(1) and 515(4)).

- Amend section 515(14) of the Criminal Code to provide clear responsibility to provide copies of bail orders, including release conditions, to identifiable victims of the offence so that victims are better positioned to make informed safety planning decisions, and seek protective victim services as needed.

- Have a notification requirement, if there is ever a request by an accused to change any bail conditions that have been put into place relating to the safety and security of a victim. (Could be based on existing sections 672.5(13.2), 13.3)).

- Require that a victim be informed of their right to legal representation. (Could be based on current section 278.4(2.1)).
## Recommendations and Options

### Enhance Safety and Security Measures (Criminal Code) [Continued]

- Allow a victim or a victim’s representative to make submissions relating to safety and security measures. (Could be based on current section 278.4(2)).
- Provide an application process so that additional family members – and not just those set out in the CVBR – who may be affected by bail could come forward and apply to have rights to information in order to be able to be informed when bail conditions are set and when bail conditions are broken, and undertake safety planning as necessary.
- Retain sections like 497(1.1) and 498(1.1) (i.e., ensuring safety and security of any victim/witness).
- Allow a victim to initiate an application to change bail conditions, if safety and security measures need to be changed. (Could be based on current section 486.1(2), new provisions under 499, 503).

### Enshrine Rights in the CVBR

- Subsection 18(1)(a) of the CVBR could be amended to include bail amongst the interactions included in the investigation and prosecution on an offence.
- A new subsection could be added to section 8 of the CVBR, explicitly providing victims the right to information about bail proceedings and interim release conditions.

### Ensure That Supports and Information Are Available to Victims

- Establish clear requirements that victims be provided with detailed and explanatory information related to their safety and security, with clear responsibility assigned to a single, reliably-available resource.¹¹

### Ensure That Remand Policies and Practices Are Safe for Victims and Witnesses

- Federal policies, regulations and practices could be strengthened to better ensure that the safety, security and well-being of victims serving as witnesses is not compromised (e.g. no transportation in the same vehicle as the accused person(s) charged with the offence). The federal government could champion this same principle in the development of applicable federal/provincial/territorial (or national) frameworks or standards.
4 Refers to additional victimization through interactions with institutions and individuals following the initial victimization, which can further traumatize crime victims.
7 New Zealand Ministry of Justice, Bail Amendment Bill: Ministry of Justice initial briefing to the Law and Order Committee, 18 July 2012, https://www.parliament.nz/resource/en-NZ/50SCLO_ADV_00DBHOH_BILL11370_1_A258044/90efc290524a897b240069fccc27ee093bae8fedd.