



# Key Findings and Recommendations from *Set Up to Fail*

## Key Findings

### *Decreasing use of police powers to release*

- The available data (drawn from Ontario) shows that police are increasingly holding individuals for appearance in bail court.
- Defence counsel who were interviewed related instances where individuals were seemingly needlessly detained:
  - “In one case, there was a woman with no criminal record, no outstanding charges, who was arrested for a domestic assault. The charge was assault with a weapon; it was alleged that she hit her husband with a tea towel. She was arrested over a long weekend and not released in WASH [Weekend and Statutory Holiday] court, meaning that she was in custody for days before being released from bail court.”
- The majority of individuals brought before bail courts are charged with minor, non-violent offences. The frequent presence of minor cases in bail court suggests individuals are being needlessly detained by police.

### *Delays in bail courts*

- Individuals spend a median of seven days in pre-trial detention, although if bail is denied a person can spend months, or even years, in detention waiting for trial.
- Each day, over half the cases brought before bail courts were adjourned – the accused person was sent back to jail, and their case was rescheduled to be heard another day. Multiple adjournments contributes to increased time spent in pre-trial detention.
- Ontario was the only jurisdiction observed where individuals were sent back to detention simply because the court did not have time to hear their case that day.

### *Ontario and Yukon: disproportionate reliance on sureties*

- A surety, one of the more restrictive forms of release, requires an accused person to identify a friend or family member that will agree to supervise the accused in the community. If the accused violates a condition or fails to appear for court, the surety may lose money.
- In Ontario and Yukon, over half of the observed releases were required to have a surety. Not a single surety release was observed in British Columbia or Manitoba.
- Surety releases contribute to delays in bail courts, as it often takes time for an accused person to find a ‘suitable’ surety. In Ontario, sureties regularly have to take time off work and testify in court before they are approved.
- Finding a surety can be particularly difficult for individuals who come from impoverished communities or who have weak family or community support networks.
- Accused persons who have been transported far from their home may not be able to find someone who can travel to appear in court and secure their release.

### *Overly restrictive bail conditions*

- Despite a legal presumption that, in most cases, individuals should be unconditionally released prior to trial, almost everyone who is processed through Canada’s bail courts is being released under onerous and restrictive bail conditions, frequently starting a cycle of criminalization and incarceration.
- Out of 196 bail releases observed across the country, not a single person was released without restrictive conditions. Individuals are required to follow an

average of 7 conditions after their release; one individual had 34 conditions imposed. Common bail conditions included strict curfews, residency requirements, movement and communication restrictions, abstaining from alcohol or drugs, and vague orders to follow the rules of the home or ‘keep the peace and be of good behaviour’.

- Most people are released on consent – but interviews suggested that individuals face considerable pressure to agree to any conditions in order to be released from pre-trial detention.
- Violating any bail condition is a criminal offence – even if the underlying behaviour would not otherwise be a crime.

#### *Failure to comply charges: return to pre-trial detention*

- Failure to comply charges – ie. charges for violating a bail condition – are common.
- These charges are clogging our courtrooms. Between 2006 and 2012, the number of charges of failing to comply with a bail order increased from 131,841 to 167,291 – an increase of 27%. Administration of justice charges – which include failure to comply and violations of other court conditions – are the most serious charge in 20% of all cases before Canadian criminal courts.
- A failure to comply charge is the most common reason for a person to be brought into to pre-trial detention, accounting for one out of every 10 cases in bail court.
- Even where the original substantive allegation is withdrawn, a person may still be prosecuted for failing to comply with his or her bail conditions. As explained by one defence counsel:

“I remember one accused person in particular who ... had no substantive convictions on his record. His record was six to seven pages long, he had probably 25-30 convictions – not one was substantive.... But every time he got arrested ... he would get three or four breaches in between. The man had substance abuse problems, and when you give someone with a chemical addiction an abstain condition.... he ends up getting three convictions for breaching his bail, landing in jail for a couple weeks at a time.”
- Interviews revealed that Manitoba, which has a relatively high charge rate for failure to comply, has a zero-tolerance policy toward breaches of bail conditions. Even being a few minutes late for an appointment with a bail supervisor can result in a criminal charge, and a return to pre-trial detention.

## **Recommendations**

Bail and pre-trial detention are complex. Police, prosecutors, defence counsel, justices of the peace, judges, bail supervisors and the correctional system all play key roles. Reform must be approached with all these actors at the table. The Report offers numerous recommendations for governments and professionals involved in the bail system, including:

- A system-wide return to the presumption of innocence through revisions to Crown policy manuals, increased judicial attention to *Charter* violations at the bail stage and concrete measures to combat institutional risk aversion.
- A moratorium on imposing abstention conditions at the bail stage.
- Reducing the widespread over-use of sureties in Ontario and immediate attention to continuing systemic delays in the bail courts.
- An end to Manitoba’s zero tolerance policy for breaches of bail conditions.

## **Methodology**

Five provinces/territories were selected for examination: British Columbia, Manitoba, Nova Scotia, Ontario and Yukon, and both in-court observations of bail court and interviews with criminal justice professionals were conducted. In all, researches conducted 35 formal interviews and 44 days of in-court observation, recording data on 718 bail appearances.