



## **Proposed Amendments to Bill C-48 and Important Considerations about the Bail System**

A brief on Bill C-48, *An Act to amend the Criminal Code (bail reform)*

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Submitted to the Senate Standing Committee on Legal and Constitutional Affairs by

Barbra Schlifer Commemorative Clinic

Canadian Association of Elizabeth Fry Societies (CAEFS)

Luke's Place

Women's Legal Education and Action Fund (LEAF)<sup>1</sup>

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<sup>1</sup> Pam Cross (Advocacy Director, Luke's Place), Nyki Kish (Associate Executive Director, CAEFS) and Kat Owens (Project Director, LEAF) are the primary authors of this submission. Contributors to this submission include (in alphabetical order): Emilie Coyle, Pam Hrick, Deepa Mattoo, Emily Murray, Eleni Poulosofos, and Sukhpreet Sangha. Ifrah Mukhtar provided research support. Our organizations would also like to acknowledge [the previous advocacy](#) on this topic by CAEFS, the Canadian Civil Liberties Association, and Dr. Nicole Myers.

## **About this brief**

This brief is the result of a collaboration among organizations that work with and on behalf of women and gender-diverse people who have faced gender-based violence, intimate partner violence, and processes of criminalization.

In the aftermath of tragic incidents, public narratives have focused on reforms to Canada's bail system that will 'tighten' the system. It is understandable to feel outrage in the face of these incidents. Efforts to restrict access to bail, however, exclude evidence about incarceration in Canada, and do not consider the current context within provincial and territorial jails.

Bill C-48 pushes Canada's bail system in a direction that will harm rather than protect individuals and the public by increasing reverse onus provisions. Such provisions lead to increased criminalization of marginalized communities, including survivors of intimate partner violence.

Current broad considerations about reform focus only on increasing the system's ability to restrict liberty – we urge an expansion of scope to meaningfully consider all changes that have demonstrable efficacy in relation to promoting public safety.

## **Areas of Consideration and Proposed Amendments**

**In studying Bill C-48 and considering potential amendments to it, we urge you to keep in mind the following three areas of consideration:**

1. Current discourse and reform efforts centered on Canada's bail system ignore the evidence related to the appropriate application of, or adverse impacts related to, pre-trial detention in this country.
2. Reverse onus provisions create real harms by increasing access to justice barriers for accused persons and increasing the prevalence of systemic discrimination.
3. The real crisis facing Canada's bail system results from too many people being incarcerated, and from deplorable conditions within provincial and territorial jails. The implementation of this legislation will exacerbate the issues it seeks to resolve, by incarcerating even more accused persons.

**With this in mind, we make the following two recommendations for amendments to Bill C-48 to alleviate risks related to the Bill:**

1. Remove the proposed amendment to s. 515(6)(b.1) of the *Criminal Code*, which would expand this reverse onus provision to apply to an accused person who has previously received an absolute or conditional discharge for intimate partner violence.

2. Require a review by committee on the second or third anniversary of the day on which this Act receives royal assent, rather than on the fifth anniversary.

**In addition to these substantive changes, any reforms made to Canada’s bail system need to rely on an evidence-based approach. They must also consider, and be responsive to and compatible with, related necessary infrastructure, such as the:**

- funding of appropriate research;
- completion of an impact assessment of Bill C-48’s potential unintended consequences;
- implementation of an external, independent evaluation of Canada’s bail system; and
- funding of community supports and social services to disrupt the larger relationship between incarceration, mental health, addiction, discrimination, poverty, and other social disadvantages.

## **Context**

**Point one: Current discourse and reform efforts centred on Canada’s bail system ignore the evidence related to the appropriate application of, or adverse impacts related to, pre-trial detention in this country.**

While rates of crime, including violent crime, have risen in recent years, Canadian crime rates continue to be relatively low compared to crime rates from the mid-1970s through early 2010s, and remain lower than 2019 rates.<sup>2</sup> Moreover, these increases are generally consistent with Canada’s population growth.<sup>3</sup> The overall incarceration rate in Canada has also declined, at the federal, and provincial and territorial levels.<sup>4</sup>

Despite low crime rates and declining incarceration rates, the number of people in pre-trial detention has more than quadrupled since 1978.<sup>5</sup> The vast majority of individuals in provincial and territorial institutions are now in pre-trial detention. In 2021/2022, 70.5% of people in Canada’s provincial and territorial jails were detained pending trial and had not been found guilty of any offence.<sup>6</sup>

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<sup>2</sup> Statistics Canada, [“Chart 2: Police-reported crime rates, Canada, 1962 to 2022”](#) (2023).

<sup>3</sup> Public Safety Canada presentation to the NAACJ, September 20<sup>th</sup>, 2023.

<sup>4</sup> In 2021/22 the federal incarceration rate per 100,000 adults was 39.96, compared to 50.90 in 1978/79 and a high of 63.76 in 1994/95: Statistics Canada, [“Average counts of offenders in federal programs, Canada and regions”](#) (2023). In 2021/22 the provincial/territorial incarceration rate per 100,000 adults was 66.84, compared to 80.44 in 1978/79 and a high of 93.76 in 1982/83: Statistics Canada, [“Average counts of adults in provincial and territorial correctional programs”](#) (2023).

<sup>5</sup> Statistics Canada, [“Average counts of adults in provincial and territorial correctional programs”](#) (2023).

<sup>6</sup> Statistics Canada, [“Average counts of adults in provincial and territorial correctional programs”](#) (2023).

Criminal law already provides sufficient mechanisms to detain people in pre-trial custody where appropriate, including for public safety.<sup>7</sup> In contrast to current public discourse, bail in Canada has in fact become *more* as opposed to less restrictive over time. This is reflected not only in multiple academic studies<sup>8</sup> but also in calls from the Supreme Court of Canada recognizing problems with the current approach and calling for a consistent, fair, and *Charter*-compliant application of the law of bail.<sup>9</sup>

The instances that have sparked calls for increasing the restrictiveness of the bail system are tragic, with devastating consequences for those affected. While they may be rooted in systemic deficits, these deficits do not lie within the bail system. Instead, they rest within the health, housing, and community service sectors, and specifically a lack of access to meaningful social supports both pre- and post-incarceration. They also rest within the conditions of confinement within institutions, discussed below.<sup>10</sup>

It is important to understand that the criminal justice system simply cannot accurately predict let alone eliminate risk. Attempts to do so will not work, and will result in discrimination against marginalized groups – particularly Indigenous, Black, and racialized communities that are already over-represented in the criminal justice system.<sup>11</sup> In addition, while removing an individual from the broader community through pre-trial detention may improve public safety

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<sup>7</sup> *Criminal Code*, RSC, 1985, c C-46 at s 515(10)(b).

<sup>8</sup> See e.g., Cheryl M Webster, Anthony N Doob & Nicole M Myers, “The Parable of Ms. Baker: Understanding Pre-Trial Detention in Canada” (2009) 21:1 *CICJ* 79; Nicole M Myers, “Eroding the Presumption of Innocence: Pre-Trial Detention and the Use of Conditional Release on Bail” (2017) *Brit J Criminology* 664; Marie Manikis & Jess De Santi, “Punishing while Presuming Innocence: A Study on Bail Conditions and Administration of Justice Offences in Quebec” (2019) 60:3 *Cahiers de droit* 873.

<sup>9</sup> *R v Antic*, [2017 SCC 27](#) at paras 64-66; *R v Myers*, [2019 SCC 18](#) at paras 25-26; *R v Zora*, [2020 SCC 14](#) at paras 76-77.

<sup>10</sup> Catherine Hu et al, [“when you first walk out the gates.where do \[you\] go? : Barriers and opportunities to achieving continuity of health care at the time of release from a provincial jail in ontario”](#) (2020) *PLoS One*, 15(4), e0231211; *Civil Penalties, social consequences*, Christopher Mele & Teresa A Miller, eds (New York: Routledge, 2004); Kelly Hannah-Moffat & Nathan Innocente, “To thrive or simply survive: Parole and the post-release needs of Canadian women exiting prison” in *Women exiting prison*, Bree Carlton & Marie Segrave, eds (London: Routledge, 2013).

<sup>11</sup> Per Dr. Nicole Myers, “Any attempts to predict risk are both unreliable and discriminatory, especially against Indigenous people, Black people and other racialized communities”: Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, [Evidence](#), 44th Parl, 1st Sess, No 53 (8 March 2023) at 2.

As Dinardo Jones observes, racialized, Indigenous, and Black people “because of how we read risk and how risk is kind of inscribed on bodies... whether it is the Crown’s onus or it’s a reverse onus, are seen as less likely to adhere to whatever bail condition they have received than someone not in their position. We have certain narratives around who is more trustworthy. That is the threshold for evidence in a bail hearing – credible and trustworthy evidence. Some people, because of certain racial narratives, as I said, are deemed to be more credible and more trustworthy. We’re talking about not just the accused person but also any sureties they may rely on”: Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, [Evidence](#), 44th Parl, 1st Sess, No 53 (8 March 2023) at 18.

in the short-term, that temporary impact is likely to be undermined by longer-term, negative public safety outcomes.

**Point two: Reverse onus provisions create real harms by increasing access to justice barriers for accused persons and increasing the prevalence of systemic discrimination.**

**a. Reverse onus provisions increase access to justice barriers**

Both Canadian and international law enshrine the presumption of innocence, and the corresponding right not to be denied reasonable bail without just cause.<sup>12</sup> The Supreme Court of Canada has emphasized that this right “is an essential element of an enlightened criminal justice system.”<sup>13</sup>

Given the fundamental importance of the presumption of innocence and the right to reasonable bail, it should rest with the state to prove that a person’s continued detention is justified. Reverse onus provisions, including those proposed in Bill C-48, flip this burden. In doing so, they ignore the significant inequalities and power imbalances between an accused person and the state.

Reverse onus provisions can increase the amount of time a person spends incarcerated, even if they are eventually released on bail. An accused person may feel pressure to put together a stricter release plan (e.g., with sureties) when facing a reverse onus, a time-consuming process which means more time in detention. They may also accept unnecessarily onerous bail conditions to secure a release with the consent of the Crown, despite their entitlement to the least onerous conditions adequate in their circumstances.<sup>14</sup> The situation will be even more heightened for people in rural and remote communities, who already face higher barriers to release based on their location and lack of recognized available resources in their home communities.

In addition, reverse onus provisions can increase the likelihood of convictions, including potential wrongful convictions.<sup>15</sup> These provisions can increase the number of people denied bail.<sup>16</sup> Once denied bail, an individual is more likely to plead guilty: one study found that

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<sup>12</sup> [Canadian Charter of Rights and Freedoms](#), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, at ss 11(d)-(e); [International Covenant on Civil and Political Rights](#), 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976) at arts 9(3), 14(2).

<sup>13</sup> *R v Antic*, [2017 SCC 27](#), at para 1.

<sup>14</sup> *Criminal Code*, RSC, 1985, c C-46, at s 515(2.01). This is known as the “ladder principle” and is explained in greater detail in *R v Antic*, [2017 SCC 27](#) at paras 4, 67.

<sup>15</sup> See Cheryl Marie Webster, “Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty in Canada” (2022) 3:2 *Wrongful Conviction L Rev* 128.

<sup>16</sup> Cassandra Richards, “Learning From Those on the Ice: The Impact of Bill C-75 on Nunavummiut” (2020) 51:1 *Ottawa L Rev* 157 at para 45.

accused persons who are denied bail are 2.5 times more likely to plead guilty than those released into the community.<sup>17</sup> This flows logically given the challenges detained individuals face in accessing counsel to prepare a defence,<sup>18</sup> and the significant pressures to plead guilty to be released from jail. These pressures include separation from family and loved ones, potential loss of children or employment, and potential loss of housing.<sup>19</sup> One Ottawa woman, denied bail on shoplifting charges, pleaded guilty to avoid missing her chemotherapy appointment.<sup>20</sup>

### **b. Reverse onus provisions exacerbate systemic discrimination**

Restricting access to bail through reverse onus provisions disproportionately impacts members of marginalized communities, who already face systemic discrimination in the bail system. This includes, but is not limited to, Indigenous people; trans, non-binary, and Two-spirit people; and people with mental health considerations and active addictions.

Indigenous people in Canada face rampant systemic discrimination in the criminal justice system, including over-policing, under-protection, and mass incarceration.<sup>21</sup> This discrimination is also present in the bail system. Indigenous individuals are more likely to be detained pending trial, and for longer, than non-Indigenous individuals.<sup>22</sup> Indigenous accused persons may be denied bail due to difficulties finding suitable sureties because of factors stemming from historic and ongoing colonialism.<sup>23</sup>

Trans, Two-spirit, and non-binary individuals are likely to be disproportionately affected by new reverse onus provisions as they face multiple risks and harms in detention facilities. These

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<sup>17</sup> Cheryl Marie Webster, *“Broken Bail” in Canada: How We Might Go About Fixing It* (Ottawa: Department of Justice Canada, 2014) at 6. A U.S. study looking at pre-trial detention in Philadelphia County and Miami-Dade County found that 44% of initially detained accused persons pleaded guilty compared to only 20.7% of those who were initially released: Will Dobbie et al, “The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges” (2018) 108:2 Amer Econ Rev 201 at 213-214.

<sup>18</sup> Recognized by the Supreme Court of Canada in *R v Hall*, [2002 SCC 64](#) at para 59 and acknowledged more recently in *R v Myers*, [2019 SCC 18](#) at para 27.

<sup>19</sup> Cheryl Marie Webster, “Remanding Justice for the Innocent: Systemic Pressures in Pretrial Detention to Falsely Plead Guilty in Canada” (2022) 3:2 Wrongful Conviction L Rev 128 at 141.

<sup>20</sup> Gary Dimmock, [“Ottawa cancer patient denied bail, sent to jail after shoplifting charge”](#), *Ottawa Citizen* (7 April 2016).

<sup>21</sup> As of May 2022, Indigenous women made up half of the population serving sentences in federal penitentiaries designated for women, while making up only 4% of the total population of women in Canada: Patrick White, [“‘Shocking and shameful’: For the first time, Indigenous women make up half the female population in Canada’s federal prisons”](#) (5 May 2022) *The Globe and Mail*.

<sup>22</sup> Paul Robinson et al, [“Over-representation of Indigenous persons in adult provincial custody, 2019/2020 and 2020/2021”](#) (2023) 85:2 Juristat 1 at 15; Scott Clark, [“Over-representation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses”](#) (Ottawa: Department of Justice Canada, 2019) at 20.

<sup>23</sup> These include social isolation, transportation challenges in remote communities, the over-criminalization of Indigenous people (making it harder to find a surety without previous criminal justice system involvement), and economic marginalization (making it harder for a surety to fulfil the amount of the bail). See Jillian Rogin, [“Gladue and Bail: The Pre-trial Sentencing of Aboriginal People in Canada”](#) (2017) 95 Can Bar Rev 325 at 344-345.

facilities are generally sex-segregated despite policy changes in some Canadian jurisdictions. Transfeminine<sup>24</sup> detainees have shared experiences of being detained in men's facilities where they faced or witnessed other transfeminine individuals face harassment, threats, or assault from other prisoners or correctional staff. Even when they successfully transferred to the appropriate identity-concordant facility, it did not remove the risk of violence in detention and in one case led to placement in protective confinement due to safety concerns.<sup>25</sup>

Many individuals in pre-trial detention have intersecting mental health considerations and active addictions, yet do not receive necessary supports while detained. As observed by the Ontario Chief Coroner's Expert Panel on Deaths in Custody:

The dominant profile of the [remand] population has become one of complex needs that require health care, mental health care, addictions treatment and recovery, and transition supports that can facilitate continuity of care and success at living in the community. Almost none of these things can be provided to the required degree in any of our prisons, and most certainly not in a prison where lockdowns due to capacity limitations have become the norm.<sup>26</sup>

Overall, "tightening" the bail system and increasing reliance on pre-trial detention will have discriminatory outcomes and undermine efforts to combat systemic discrimination and the legacies of colonialism.

**Point three: The real crisis facing Canada's bail system results from too many people being incarcerated, and from deplorable conditions within provincial and territorial jails. The implementation of this legislation will exacerbate the issues it seeks to resolve by incarcerating even more accused persons.**

There is a persistent crisis in pre-trial detention institutions across Canada. This results from too many people being incarcerated, especially for reasons rooted in intersections of mental health, socio-economic precarity, and addiction.<sup>27</sup>

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<sup>24</sup> Transfeminine is a term that refers to trans individuals with a predominantly feminine gender identity, who may or may not identify as female.

<sup>25</sup> William Hébert et al, [A Qualitative Look at Serious Legal Problems: Trans, Two-Spirit, and Non-Binary People in Canada](#) (Ottawa: Department of Justice Canada, 2022) Department of Justice Canada at 41-43. Interviewees had experienced different forms of detention, including pre-trial detention.

<sup>26</sup> [An Obligation to Prevent: Report from the Ontario Chief Coroner's Expert Panel on Deaths in Custody](#) (Ontario: Ministry of the Solicitor General, 2022) at 10.

<sup>27</sup> [Bail & Remand Archives - John Howard Society of Ontario.](#)

In Canada, approximately 44% of all individuals incarcerated in federal, provincial, and territorial institutions in 2021/2022 were in pre-trial detention.<sup>28</sup> Canada is an outlier in this regard. In the United States, individuals in pre-trial detention made up 23.3% of the total prison population in 2019.<sup>29</sup> Individuals in pre-trial detention made up an even smaller share of the total prison population in England and Wales in 2022, at only 12%.<sup>30</sup>

The large number of individuals in pre-trial detention results in an overwhelmed system that subjects those who become incarcerated to harmful and deplorable conditions. Individuals experience warehouse style conditions in pre-trial custody,<sup>31</sup> along with significant deprivation to environment, family, health, and opportunity. There are virtually no rehabilitative or support programs in pre-trial custody.<sup>32</sup>

At the Toronto South Detention Centre, for example, prison staff “routinely use segregation, restrictive confinement, lockdowns, and ‘time in cell’ sanctions to manage the prison population”.<sup>33</sup> Individuals in pre-trial detention can receive limited time outside of their cell, with the consistent occurrence of lengthy and significant lockdowns in many facilities.<sup>34</sup>

The Elgin-Middlesex Detention Centre in Ontario is “overcrowded, unsanitary and dangerous”, with conditions described as “dehumanizing, antithetical to rehabilitation and reintegration, and pos[ing] a serious risk to the health and safety of prisoners and correctional officers alike.”<sup>35</sup> In one Ontario jail, staff placed people in cells covered in feces. One woman resorted to drinking water from her toilet as she lacked access to water.<sup>36</sup>

This crisis both produces real harm to the disproportionately marginalized communities who experience incarceration in Canada, and fails in achieving its public safety purpose. The reality is that people are dying in provincial and territorial jails. Earlier this year in Nova Scotia, a young Mi’kmaw mother repeatedly asked for access to basic health care in a provincial jail, but was

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<sup>28</sup> Statistics Canada, [“Average counts of adults in provincial and territorial correctional programs”](#) (2023); Statistics Canada, [“Correctional services statistics: Interactive dashboard”](#) (2023).

<sup>29</sup> World Prison Brief, Institute for Crime & Justice Policy Research, [“United States of America”](#) (no date).

<sup>30</sup> Ministry of Justice, [“Offender Management Statistics Bulletin, England and Wales”](#) (27 October 2022) at 2-3.

<sup>31</sup> The Chief Commissioner of the Ontario Human Rights Commission observed that the Elgin-Middlesex Detention Centre in Ontario regularly housed three to five people in cells designed for a single person: Renu Mandhane, [“Letter to Solicitor General Jones – Elgin Middlesex Detention Centre”](#) (2019).

<sup>32</sup> [Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention](#) (Toronto: Canadian Civil Liberties Association, 2014) at 9.

<sup>33</sup> Ontario Human Rights Commission, [“Report on conditions of confinement at Toronto South Detention Centre”](#) (2020).

<sup>34</sup> See, e.g., the discussion in *R v Persad*, [2020 ONSC 188](#) at paras 2, 7-17.

<sup>35</sup> Renu Mandhane, [“Letter to Solicitor General Jones – Elgin Middlesex Detention Centre”](#) (2019).

<sup>36</sup> Emilie Coyle, [“Proposed bail reform could harm rather than protect Canadians”](#) (31 May 2023), *The Hill Times*.



ignored and died days later of double pneumonia.<sup>37</sup> Between 2010 and November 2022, 280 people died in Ontario jails. Individuals on remand face greater risks of suicide and drug overdose than those serving sentences after conviction.<sup>38</sup>

The use of segregation and restrictive confinement causes and exacerbates mental health conditions, leads to psychological harm, and increases self-harm and suicidal ideation.<sup>39</sup> Lockdowns also negatively affect physical and mental health, create stress and tension for both those detained and staff, and negatively affect human dignity.<sup>40</sup>

Even short amounts of time in jail can have devastating consequences<sup>41</sup>. These consequences include development and exacerbation of adverse mental health outcomes,<sup>42</sup> loss of employment, loss of vocational trajectory, and loss of income,<sup>43</sup> housing,<sup>44</sup> custody of children, and connection to family and community<sup>45</sup>. Incarceration affects not only the person detained, but has a ripple effect on families, especially children and dependents, leading to intergenerational harms.<sup>46</sup>

For individuals with precarious immigration status, time in detention means they cannot meet the conditions required to maintain their status, like pursuing work, education, or training. If they eventually receive a discharge, or have their charges dropped, they would still have had their capacity to continue with their status or apply for the next stage of the immigration process disrupted.

Detained individuals face consequences regardless of whether they are ultimately convicted of any crime. As one woman explained recently to CAEFS:

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<sup>37</sup> Zane Woodford, "[Sarah Rose Denny's family sues Nova Scotia over Mi'kmaw mother's pneumonia death in custody](#)" (24 August 2023), *Halifax Examiner*.

<sup>38</sup> Tracking (In)Justice: A Law Enforcement & Criminal Justice Data & Transparency Project, [Ontario Deaths in Custody on the Rise 2022](#) (2022) at 5-6.

<sup>39</sup> Ontario Human Rights Commission, "[Report on conditions of confinement at Toronto South Detention Centre](#)" (2020).

<sup>40</sup> Ontario Human Rights Commission, "[Report on conditions of confinement at Toronto South Detention Centre](#)" (2020).

<sup>41</sup> [Bail & Remand Archives - John Howard Society of Ontario](#); Daniel Antonowicz & John Winterdyk, "A Review of Deaths in Custody in Three Canadian Provinces" (2014) 56:1 Can J of Crim & Crim Jus 85.

<sup>42</sup> [Structured Intervention Unit Implementation Advisory Panel: 2021/22 Annual Report](#) (Ottawa: 2022).

<sup>43</sup> [Set Up to Fail: Bail and the Revolving Door of Pre-trial Detention](#) (Toronto: Canadian Civil Liberties Association, 2014) at 10.

<sup>44</sup> Ruth Elwood Martin et al, "Homelessness as viewed by incarcerated women: participatory research" (2012) 8:3/4 Int'l J of Prisoner Health 108.

<sup>45</sup> Emily van der Meulen et al, "A Legacy of Harm: Punitive Drug Policies and Women's Carceral Experiences in Canada" (2018) 28:2 Women & Crim J 81.

<sup>46</sup> Linda Mussell, *Handing Over The Keys: Intergenerational Legacies of Carceral Policy in Canada, Australia, and New Zealand* (2021); Melissa Munn & Chris Brucket, *On the Outside: From Lengthy Imprisonment to Lasting Freedom* (Vancouver: UBC Press, 2013).

Remand time is like death. There's no access to programs, no mental health supports and almost no health care. I spent 96 days waiting for justice and in the end they withdrew the charges and let me out. But by the time I got out I lost my apartment because I couldn't pay rent, all my belongings were thrown away and my beautiful cats were taken. I came out with my disability support cut off, nowhere to live and no access to my life saving medication. My life was ruined. And for what?<sup>47</sup>

A person's life is dramatically impacted by a criminal charge, especially when they are a trauma survivor. Even after the charge has been withdrawn, accused persons face the additional hurdle of ensuring that police records, like fingerprints and photographs, are destroyed. If they do not do so, they risk having this information come up on background checks when they are applying for work or volunteering, as well as when they are applying for school programs. This impedes a survivor's ability to move forward with their life, after overcoming the trauma and abuse they have endured. A person who was detained pretrial is likely to experience a more protracted version of this process, as they must regain stability in the more urgent aspects of their life before pursuing the destruction of records. The Schlifer Clinic's Criminalization of Women Project admits 5-6 new clients per week who are facing the aforementioned issues, with client files staying open longer and clients facing increasingly ongoing, complex needs.

Instead of making it more difficult to access bail, governments need to fund appropriate community supports and social services to disrupt the larger cycle of poverty, discrimination, and incarceration. These include trauma-informed counselling, social workers, and holistic supports.

## **Proposed amendments**

**Recommendation #1: Remove the proposed amendment to s. 515(6)(b.1) of the *Criminal Code*, which would expand this reverse onus provision to apply to an accused person who has previously received an absolute or conditional discharge for intimate partner violence.**

Expanding this reverse onus provision to apply to an accused person who has previously received an absolute or conditional discharge for intimate partner violence (IPV) deepens the criminalization of both perpetrators and victims of IPV. It also fails to recognize the significant overlap between those who are both perpetrators and victims themselves. Both men and women who become incarcerated in Canada have elevated histories of sexual and/or physical

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<sup>47</sup> Emilie Coyle, ["Proposed bail reform could harm rather than protect Canadians"](#) (31 May 2023), *The Hill Times*.

victimization, with over half of the federal prison population overall, and over time, entering federal sentences as victims of myriad forms of violence and abuse.<sup>48</sup>

Indeed, there is no neat dividing line between survivors of IPV and those charged with IPV.

Canada's mandatory charging policies, in effect since the mid-1980s, were created to address the very real problem of police officers failing to take responsibility for laying charges in IPV cases. However, these policies have resulted in women being inappropriately charged. Bail conditions often prohibit or significantly limit the woman's time with her children. This can lead to a significant negative impact on her family law case, even if she is later exonerated of the charge.

It is not uncommon for survivors who are inappropriately charged – and who are often unrepresented – to enter a quick guilty plea simply to be relieved of bail conditions and freed to spend time with their children and pursue their family court case.

Imposing a reverse onus provision in this circumstance would exacerbate an already serious problem for survivors of IPV.

The proposed expansion of the reverse onus provision would cause the most harm to members of marginalized communities, including Black and Indigenous women, who are both more likely to have experienced IPV and to face criminalization. A 2022 paper, for example, examined the experiences of 15 Black women in Ontario charged with an IPV-related offence, all of whom had experienced intimate partner violence themselves.<sup>49</sup> More than 43% of Indigenous women have experienced physical or sexual violence from an intimate partner, with more than 60% having experienced psychological violence.<sup>50</sup> At the same time, 50% of all federally incarcerated people in penitentiaries designated for women are Indigenous.<sup>51</sup> These concentrations appear higher in pre-trial facilities, but data collection within provincial incarceration is opaque.

**Recommendation #2: Require a review by committee on the second or third anniversary of the day on which this Act receives royal assent, rather than on the fifth anniversary.**

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<sup>48</sup> Correctional Services Canada, "[Women offenders](#)" (2019); Howard Sapers, "[Annual Report of the Office of the Correctional Investigator 2015-2016](#)" (30 June 2016).

<sup>49</sup> Patrina Duhaney, "[Criminalized Black Women's Experiences of Intimate Partner Violence in Canada](#)" (2022) 28:11 Violence Against Women 2765.

<sup>50</sup> Loanna Heidinger, "[Violent victimization and perceptions of safety: Experiences of First Nations, Métis and Inuit women in Canada](#)" (2022) 85:2 Juristat 1 at 7-8.

<sup>51</sup> Patrick White, "['Shocking and shameful': For the first time, Indigenous women make up half the female population in Canada's federal prisons](#)" (5 May 2022) *The Globe and Mail*.

The potential consequences of Bill C-48 on marginalized communities and a bail system in crisis require attention as soon as possible. The review must pay particular care to the risks of Bill C-48 placing an excessive burden on women and gender-diverse people swept up in criminal responses and of it disproportionately affecting Indigenous, racialized, and non-status communities.

Any review should also commission and integrate the findings of an independent, external evaluation of Canada's bail system. The structure of external evaluations provides a coherent framework to gather necessary insight, including multiple data collection points and a focus on the efficacy of broader goals of programs, policies, and legislation through centering the experiences of impacted populations alongside empirical evidence.

This is particularly true in the broader context of Canada's bail system, which features a significant lack of data that hampers the ability to make evidence-based policy reforms.<sup>52</sup> There is an underreporting of bail decisions compared to the frequency of their issuance, a lack of national statistics on bail or judicial interim release, and a lack of statistics on the numbers or rates of contested and uncontested bailing hearings.

There is an urgent need for real data collection and appropriate analysis, to ensure that review is led by accurate statistics rather than headlines. This should include: the number of people in pre-trial detention (disaggregated by race and gender identity), the experiences and needs of impacted communities, a metric to measure re-incarceration and recidivism, the length of pre-trial detention, the basis for a detention order, and the number of individuals who breach bail conditions (and what those conditions are).

## **Conclusion**

There is a crisis in Canada's bail system, but it is not that the system is too lax or that it releases too many people pending trial. Bill C-48 will not solve the true bail crisis, and risks exacerbating the systemic discrimination faced by members of marginalized communities, including survivors of intimate partner violence.

In addition to the amendments proposed in this submission, any broader reforms made to Canada's bail system need to rely on an evidence-based approach. They must also consider, and be responsive to and compatible with, related necessary infrastructure. This includes the funding of appropriate research, and the funding of community supports and social services to

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<sup>52</sup> Multiple witnesses before the House of Commons' Standing Committee on Justice and Human Rights, including then-Minister of Justice David Lametti, referred to the need for better data on the bail system. See, e.g., Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, [Evidence](#), 44th Parl, 1st Sess, No 52 (6 March 2023) at 5; Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, [Evidence](#), 44th Parl, 1st Sess, No 56 (27 March 2023) at 1, 4.

disrupt the larger relationship between incarceration, mental health, addiction, discrimination, poverty, and social disadvantage.

## **Annex 1: About the Signatories to this Submission**

### **The Barbra Schlifer Commemorative Clinic**

Barbra Schlifer Commemorative Clinic offers legal services and representation, trauma-informed counselling and multilingual interpretation to diverse women who have experienced violence. We cultivate women's skills and resilience by fostering their safety, dignity and equality and we amplify women's voices to create individual and collective change.

### **The Canadian Association of Elizabeth Fry Societies (CAEFS)**

The Canadian Association of Elizabeth Fry Societies (CAEFS) is a national feminist organization whose purpose is to address the persistent ways that criminalized women and gender diverse people are excluded from community and denied their humanity. We do this through advocacy, law reform, public engagement, coalition-building, and thought leadership.

### **Luke's Place**

Luke's Place is an award-winning non-profit organization solely devoted to improving the safety and experience of women and their children as they proceed through the family law process after fleeing an abusive relationship. The only stand-alone family law support centre of excellence for abused women in Canada, Luke's Place provides direct services to hundreds of women and their children in Durham Region every year.

### **Women's Legal Education and Action Fund (LEAF) / Fonds d'action et d'éducation juridique pour les femmes (FAEJ)**

LEAF is a national charitable organization that advocates for the equality of all women, girls, trans, and non-binary people through litigation, law reform, and public education. Since 1985, LEAF has intervened in over 150 cases - including many before the Supreme Court of Canada - that have advanced gender equality in Canada.