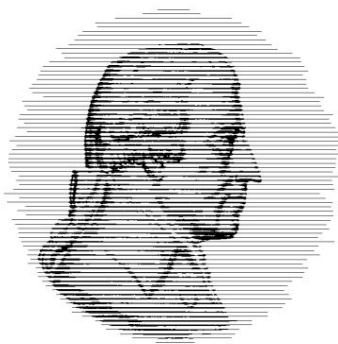


Standing Committee on Prison Conditions in Ontario

Second Report to the Board
Remand in Ontario



John Howard Society of Ontario
Approved December 1, 2007

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Introduction

This report is the second thematic written report submitted to the Board of Directors of the John Howard Society of Ontario (JHSO) by the Committee on Prison Conditions in Ontario (“the Committee”) since its establishment.

By way of background, this Committee was established to further the Society’s mission by “promot[ing] the fair and humane treatment of all incarcerated persons and seek[ing] to ensure that all forms of detention and imprisonment comply with relevant legal and human rights standards.” As a standing committee, the Board provided the following Terms of Reference:

Mandate

- *Monitor, assess and report on prison conditions in Ontario by undertaking the following:*

Responsibilities

- *Forming linkages with JHSO Institutional Services staff across Ontario;*
- *Visiting federal and provincial institutions in Ontario and providing reports to the Board with recommendations where relevant;*
- *Examining reports/findings from external authorities, including Provincial Ombudsman, Federal Correctional Investigator, Coroner’s inquests, and the Provincial Auditor to maintain current knowledge and understanding, and report to the Board on these reports and, where relevant, propose a plan of action for the Board’s review and approval;*
- *Bringing to the attention of government officials matters of concern relevant to prison condition issues, whether individual, group or systemic, and report such actions to the Board;*
- *Reporting to JHSO Board at each meeting and provide an annual report with findings as well as recommendations on strategies and actions, where relevant;*
- *Undertaking other activities as directed by the Board.*

The Committee’s first task was to examine the conditions in the province’s “superjails” and to report back to the Board with recommendations. From their study which included tours of the institutions, follow-up contacts with government officials, a review of the pertinent data, studies and reports and consultations with John Howard Society (JHS) staff, they produced the “First Report to the Board: Superjails in Ontario” which was approved by the Board in June, 2006. It was then submitted to the Minister of Community Safety and Correctional Services and the Attorney General of Ontario and their senior officials and distributed widely to interested individuals and organizations and, via the JHSO website, to the public. To date, the Committee has pursued action on the recommendations of the report via a schedule of meetings with the Minister of Community Safety and Correctional Services, the Commissioner of Corrections for Ontario and other senior officials of the Ministry of Community Safety and Correctional Services (MCSCS). The report and notes on the follow-up can be found on the JHSO website at <http://www.johnhoward.on.ca/Library/library.htm>

Current Focus

During the work on the superjails, the Committee became increasingly aware of issues relating to the special circumstances of remand prisoners, the relative size of the remand population in the provincial prisons and the connection between these issues and the prison conditions identified in the first report of the Committee as those of most concern. It, therefore, seemed logical to adopt remand issues as the Committee's next area of work.

The Committee, following approval from the Board, developed a plan of activities based on the following objective:

To contribute to the understanding of the factors underlying the dramatic growth of remand in Ontario and to promote the implementation of initiatives/programs that can reduce its use.

The workplan detailed activities in the following areas:

- Information gathering
 - Available data on current situation in Ontario, with comparative references nationally and internationally
 - Visits to other detention centres (primarily for remand prisoners)
 - The research and literature around remand and bail and initiatives/programs focused on reducing the use of remand and supporting bail
 - Information from affiliates who deliver bail programs and institutional services
 - Plan developed by government around managing the remand situation and the status of the implementation of that plan
- Sponsor a symposium/roundtable on remand
- Promote additional research
- Support the work of the Association of Bail Service Providers, particularly in the areas of evaluation/research and professional development
- Promote action on recommendations coming out of the symposium and the research through public education and advocacy with government.

This report documents what the Committee has learned to date and what is outstanding and why and makes recommendations concerning next steps.

Activities Undertaken

Information gathering

- ❖ Review of available data
- ❖ Literature review
- ❖ Survey of Affiliates providing Bail Supervision Programmes
 - Exploratory Research Survey
 - Symposium Survey

Tours of Detention Centres

- ❖ Toronto Jail
- ❖ Ottawa-Carleton Detention Centre (OCDC)

Contacts with government officials to determine actions and plans regarding remand reduction

- ❖ Ministry of Community Safety and Correctional Services (MCSCS)
- ❖ Ministry of the Attorney General (MAG)
- ❖ National Judicial Institute

Contacts related to research proposal

- ❖ Federal Government
 - Public Safety Canada
- ❖ Provincial Government
 - MCSCS

Other

- ❖ Correspondence with the Ontario Ombudsman
- ❖ Feedback from affiliates on the draft report

Documents Reviewed

Government

Remand Working Group Final Report submitted to the Heads of Corrections, February 2005: *The Remand Crisis in Adult Corrections in Canada*

Justice Summit Bail and Remand Working Group: *Best Practices Protocol*

Crown Policy Manual: *Bail Hearings*

Slide Deck developed for JHSO by Ontario's Provincial Justice Sector October 2006: *The Remand Crisis – Overview*

Course materials manual for Justices of the Peace by National Judicial Council/Ontario Court of Justice December 11-14, 2006: *Effectively Managing the Bail Hearing*

Presentation to Senior Managers MCSCS by Tony Doob October 18 2006: *Pretrial Remand in Ontario: Sentencing's neglected cousin?*

Statistical Services, Program Effectiveness, Statistics & Applied Research, Ministry of Community Safety and Correctional Services (Ontario), "Adult Correctional Populations 2005-06", and earlier years

Statistics Canada:

"Custodial Remand in Canada, 1986/87 to 2000/01" *Juristat* Vol. 23 no. 7, September 2003

"Adult Correctional Services in Canada, 2004/2005" *Juristat* Vol. 26 no. 5, October 2006

Other

Evidence of Professor Anthony N. Doob, Centre of Criminology University of Toronto at the hearings of the Legislative Committee on Bill C-35, May 1, 2007

<http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=204914&Lang=1&PARLSES=391&JNT=0&COM=12669>

UN Economic and Social Council, *Report of the Working Group on Arbitrary Detention* (E/CN.4/2006/7), December 2005

"Pre-Trial Custody, Terms of Imprisonment and the Conditional Sentence: Crediting "Dead Time" to Effect "Regime Change" in Sentencing" by Julian V. Roberts in *Canadian Criminal Law Review* March, 2005

Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, Toronto: The Commission, 1995

Ontario, *Report of the Criminal Justice Review Committee*, Ontario February 1999

Kellough, Gail and Scot Wortley 2002 "Remand for Plea: The Impact of Race, Pre-trial Detention and Over-Charging on Plea Bargaining Decisions." *British Journal of Criminology* 42 (1): 186-210

Wortley, Scot and Gail Kellough. 2004. "Racializing Risk: Police and Crown Discretion and the Overrepresentation of Black People in the Ontario Criminal Justice System." pp. 173-205 in Anthony Harriott, Farley Brathwaite and Scot Wortley (Eds.), *Crime and Criminal Justice in the Caribbean and Among Caribbean Peoples*, Kingston, Jamaica: Arawak Publications

Ombudsman Saskatchewan, *Remand Inmates: Inmate Services and Conditions of Custody in Saskatchewan Correctional Centres*, Special report, October 2002
http://www.legassembly.sk.ca/officers/omb/Locked_Out/10%20Remand.pdf

What We Found

Dramatic growth in remand¹ over the past decade

We know from looking at the data from Statistics Canada and the Ontario Ministry of Community Safety and Correctional Services that there has been significant growth in the remand population in Ontario correctional facilities from 1991/92 to 2005/06. The remand average daily count grew steadily and consistently from 2,270 in 1991/92 to 5,123 in 2005/06 – an increase of 126%. This means that there were 2,853 more individuals held on remand in 2005/06 than there were in 1991/92.

The growth is associated only minimally with the change in the total number held in custody, which did increase but relatively moderately (+10%). Primarily it is connected to the dramatic shift in the proportion of sentenced and remand prisoners in the prison population.² In 1991/92, 31% were on remand, with 68% serving a sentence; in 2005/06, almost the reverse was the case, with 63% on remand and 35% on sentence.

Admissions to remand during this period increased 40% (from 44,479 to 62,404), certainly more moderately than the remand average count. The difference in the average count and admissions trends is indicative of an increase in time people spent in remand. We do know that the average number of days spent on remand increased from 24.2 to 33.5 in the decade 1995/06 to 2004/05.

A national problem but Ontario the worst

The data also tell us that significant growth in the remand population has occurred in other provinces as well. The most recent national figures show that:

The increase in the average daily count of adults held on remand in 2004/2005 is a continuation of a trend that began in the mid-1980s. Over the past decade since 1995/1996, the average daily remand count has grown substantially from approximately 5,300 to 9,600 adults, representing an increase of 83%.³

¹ Remand is defined as the population of those who are being held in custody while awaiting a further court appearance. While a relatively small percentage have been tried and found guilty and are awaiting sentencing, the majority are awaiting trial. Some may be awaiting a decision with respect to bail, and others have been denied bail who, unless released through judicial review, will remain in custody until their trial.

² There is also another category of prisoners – “Other”, which consists of those who on immigration hold or temporary detention and represent a small proportion of the total average population (between 1% and 3%)

³ All of the information regarding 2004/05 data and trend data for 1995/96 came from “Adult Correctional Services in Canada, 2004/2005”, *Juristat* (publication of Statistics Canada) Vol. 26, no. 5, October 2006

In 2004/05, Ontario was responsible for 48% of the national remand population which has remained virtually unchanged from the decade before.

While the percentage growth may have been greater in some provinces⁴, Ontario's impact is in its sheer numbers. While jurisdictions like New Brunswick may have experienced a high percentage increase, it is important to view this in terms of the actual numbers. New Brunswick detained 48 people on remand on average in 1995/96 and 93 in 2004/05, compared with Ontario which held, on average, 2,465 people in 1995/96 and 4,670 in 2004/05. Quebec and B.C. are the closest to Ontario in terms of the number detained but it is important to note that these numbers are significantly lower (1,645 in Quebec and 1,002 in B.C.).

In terms of the proportion of remand relative to the total population, Ontario has the distinct honour of being the highest. The 2004/05 data show that 63% of the total average count in Ontario were remand/other (of which a very small percentage are "other"⁵). In other provinces/territories, the proportion of remand/other ranged from a high of 57% in Manitoba to a low of 14% in North West Territories. The proportion nationally was 50%.

Negative consequences

Our concern about the deprivation of freedom for those who are untried, particularly when unnecessary or excessive, is important for a number of reasons, most notably because of the negative consequences associated with remand.

For those on remand

We know, from what clients and JHS staff tell us, comments from judges in cases reported in the media, and what we saw on tours of facilities, that conditions for remand prisoners are particularly harsh. 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. 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. They have no access to gymnasiums and generally no more than 20 minutes of fresh air. There are no librarians and few if any teachers. On our tour of the Toronto Jail which has 500 + prisoners on average, we were told that there was one teacher who can only visit each unit once a week to oversee courses which have to be paid for by the prisoner. There are no opportunities for work. Other programs and services are virtually non-existent for remand prisoners. In the Toronto Jail, there was only one small area for programs for the

⁴ From 1995/96 to 2004/05, average counts in a number of other provinces was higher than that of Ontario (+89%) - (Manitoba (+142%), Alberta (+115%), Saskatchewan (+102%) and New Brunswick (+94%). The growth was significantly lower in Quebec (+41%) and Prince Edward Island (+47%).

⁵ Of the 4,878 held on average in provincial custody, only 209 were "other" (190 immigration holds and 19 other temporary detention).

whole institution and these programs were delivered by organizations like JHS or faith-based organizations co-ordinated through the one Volunteer Co-ordinator. In OCDC, we were told that there was really nothing for male prisoners except for education. All visits are behind glass and visiting areas, particularly in the large detention centres, are crowded and noisy. Basically they are warehoused.

Admissions often exceed capacity; many of those who are admitted are from vulnerable populations who have significant physical and mental health issues; all are under stress by virtue of their uncertain status; there is tremendous turnover of prisoners in these institutions. These factors make for conditions in these facilities that are often overcrowded, unsanitary and dangerous.

Being held in custody, even for a very short period of time, disrupts one's personal life and can have serious consequences, such as the loss of accommodation, employment/school and the ability to meet child care responsibilities. Many of those who find themselves remanded are vulnerable to begin with in terms of maintaining housing, jobs and family responsibilities and even a short time in jail is enough to put them into crisis. We know this from our experience working with clients in prisons and the community and we now have evidence confirming incarceration as increasing the risk of homelessness.

Beyond the immediate suffering connected with harsh conditions and disruptions in personal life, 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"⁶. Further, 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.

For the Justice and Correctional System

Our correctional system suffers when there is an overuse of remand. We were constantly told by corrections officials of the administrative problems and safety issues connected with managing a system where the majority are on remand. There are more tensions between correctional staff and prisoners and among prisoners. The poor living conditions for prisoners described above also make for unhealthy working conditions for staff. Staff morale becomes an issue as they find themselves as guards just containing prisoners rather than correctional officers working with prisoners. Delivering programs and services is problematic given the turnover. Attention and resources are diverted from the sentenced population. The costs attached to transporting prisoners to and from court have grown considerably. The opportunities for contraband increase. The cost of maintaining someone in prison is high (\$154 a day), affecting resources which could be available at a fraction of the cost for supporting people in the community. It was clear to us that those

⁶ Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*, Toronto: The Commission, 1995, page 115.

who manage and work in the Ontario correctional system would like to see solutions to the current high use of remand.

Further, there are important issues for our justice system connected with the current remand situation. It was mentioned earlier that those detained are more likely to plead guilty. We hear stories of those, even when they maintain that they are not guilty, who plead guilty to escape the harsh conditions in jail either in anticipation that they will not receive a sentence of imprisonment or will be transferred to a prison for sentenced offenders. Evidence suggests that pre-trial detention is used in a discriminatory manner, with the poor, homeless and otherwise disadvantaged more likely to be denied bail and held in detention because the criteria for assessing the risk of flight (employment status and residential stability) and the imposition of conditions for bail, particularly surety, disproportionately disadvantages certain groups. Our tour of the Toronto Jail certainly served to reinforce a finding of the 1995 Commission on Systemic Racism in the Ontario Criminal Justice System that being a black male made one more vulnerable to pre-trial detention. Further we wonder, from what we hear from JHS staff, if the same is not the case for Aboriginal people in Northern Ontario. Also, there is concern that the current situation (more people serving more time on remand and the resulting increase in time credited for the time spent on remand) is exacerbating the public perception about leniency with respect to sentencing.

For Human Rights and our international obligations

The treatment of remand prisoners in Ontario violates our international human rights obligations with respect to the treatment of accused persons. The United Nations International Covenant on Civil and Political Rights (to which Canada is a signatory) and the Standard Minimum Rules for the Treatment of Prisoners (which Canada has endorsed) specify that accused persons in detention are supposed to be treated appropriate to their status as untried and presumed innocent. Appropriate treatment is defined to indicate that untried persons are afforded better living conditions and freer access to the community than sentenced prisoners. This is certainly not the case in Ontario today.

It should be noted that in the report of the United Nations Working Group on Arbitrary Detention (which monitors countries' compliance to the articles in the International Covenant on Civil and Political Rights relating to arbitrary detention) regarding its visit to Canada in 2005 commented on the dramatic rise in pre-trial detention, spoke to how it disparately impacts vulnerable groups and made recommendations for government action.

Under-researched area

Given the worrisome trends and the impact on individuals and the correctional and justice system, we were surprised to find so little current Canadian research on remand and bail. The Ontario Ministry of Community Safety and Correctional Services produces numbers of those admitted, average counts, time spent on remand, offence, all of which is very

current and easily accessible. Court data is collected by the Ministry of the Attorney General but we have not been able to access court bail data as it has been undergoing revision for the past few years. Some statistical material has been made available to us through material produced by the National Judicial Institute for a course for Ontario Justices of the Peace on Effectively Managing the Bail Hearing. We have seen nothing with respect to police decision to detain. All of this provides little detail to describe why people are detained in the first place, who is released on bail and who is not and why and what is the outcome (e.g. released to sentenced, acquitted or charges withdrawn). It seems obvious to us that this level of detail and analysis is necessary to determine and prioritize remedial strategies.

One study we found was that done by Kellough and Wortley in 1993 on bail and remand in Toronto courts. It was both quantitative and qualitative in nature and we believe was very instructive in terms of remedial strategies. Despite the need, this study has never been updated or expanded to describe the situation more broadly in Ontario.

Recognizing the need, the JHSO Research Department developed a letter of intent for such a research proposal and submitted it in 2005 to Public Safety Canada. Public Safety Canada was very interested in moving forward with this research initiative and indicated that money was available to fund it; however, they needed to have the agreement of the Ontario Ministry of the Attorney General to go ahead with it and could not obtain it. The reasons provided for the unwillingness of the Ministry of the Attorney General to participate (undertaking their own research, lack of staff resources) seem inadequate to us.

No one solution, no “magic bullet”

While we do believe that current and province-specific research which confirms the extent of the problem, describes who it impacts and the nature of the impact and identifies the factors that have contributed to the growth and the degree of their contribution is needed, what we do know suggests that reducing the use of remand requires actions on many fronts and will involve a number of government ministries. These actions we believe would involve:

- the decision-making of police and Crown Attorneys,
- conduct of defence attorneys,
- adequacy of legal aid resources,
- other resources directed at Court infrastructure and staff to minimize unnecessary delays in bail hearings and decisions,
- judicial decisions with respect to surety and conduct restrictions limiting financial surety,
- resources for alternatives to remand (e.g., bail supervision, bail hostels), and
- diversion of the mentally ill.

Setting priorities and the specific nature of the actions requires further research, we believe.

The major players with respect to remedial actions are the Ministry of the Attorney General, the Ministry of Community Safety and Correctional Services and the Ministry of Health and Long-Term Care. While there have been some efforts at joint planning and initiatives, horizontality is not something that comes easily within government. As well, the community agencies and organizations who work with many of those affected in large part have not been consulted on the measures that could and should be implemented to reduce the use of remand. In fact, we found it very difficult to find out just what various government ministries were doing and who to talk to within that ministry.

Some government action but limited results to date

We do know that Ontario government officials in the relevant ministries and the judiciary have taken some steps to impact the remand population. Since 2002, the Bail and Remand Working Group (a sub-committee of the Justice Summit⁷), whose membership included representatives of all institutions having responsibilities within the criminal justice system from the time of arrest to the conclusion of a bail hearing, has been operating to identify and implement best practices. The Justice Delay Reduction Initiative and the Backlog Reduction Initiative are focused on providing extra resources to reduce the backlog in targeted sites. There have been initiatives to improve the Weekend and Statutory Holiday (WASH) Courts. There has been work on ensuring an objective appointment process and appropriate levels of qualification and experience for justices of the peace (although recent appointments still include those with no legal training or experience). Bail Supervision programs have been expanded to a number of communities. Funding has been made available to divert the mentally ill from the criminal justice system. Up Front Justice Programs meant to divert low-risk, minor offenders are now being piloted in a number of sites. As well, Ontario officials participate in various Federal/Provincial/Territorial committees studying the problem with respect to justice efficiencies, chronic offenders and sentencing in order to make recommendation to Justice Ministers.

However, despite these initiatives, the remand population continued to grow and now represents 63% of the total population in Ontario provincial prisons. What has been done so far does not seem to be stemming the tide. It is difficult to know at this point whether these actions either are not targeting what needs to be done or are the right targets but just not enough to make an impact.

⁷ The Justice Summit first convened in early 2002, co-hosted by the Deputy Attorney General and the chief Justices of the Superior Court and the Ontario Courts of Justice, to address growing backlogs in criminal and child protection cases. The meeting which has reconvened annually includes, for the criminal matters under discussion, representatives from the judiciary, the bar, the Ministry of the Attorney General and Legal Aid Ontario. The work of the Summit is furthered by committees on bail and remand issues and criminal case management.

No champion evident

Throughout this process, Committee members and staff found that, while everyone acknowledged that this was a significant issue, there was no one body or person who has championed the need for change and could co-ordinate a plan of action. Our beginning assumption was that the Attorney General and the Ministry of the Attorney General would be that person and that body within government but we did not find that level of interest and/or will emanating from there. We wondered whether this was related to the kind of increasingly risk-adverse society we are becoming and the political response to that. It may be that there is less potential political cost in maintaining the current situation than that attached to detaining fewer people. The risk is that some heinous crime will be committed by someone released by the police or on bail. Unfortunately society may be sacrificing fundamental rights with respect to detention in the process. We believe that the remand situation is a reflection of this.

The Committee also is looking towards the Ombudsman of Ontario in this regard, particularly with respect to conditions in detention centres as a consequence of remand. We have corresponded with Mr. Marin about utilizing the mechanism that he has developed since his appointment to deal with systemic issues, the SORT (Special Ombudsman Response Team) investigation. There has been no action in this direction to date and we do have a meeting scheduled with him in November where we hope to discuss this further.

Recommendations

1. To the government of Ontario:

- i. Publicly acknowledge that there is no need to have as many people detained in custody awaiting trial as we currently have in Ontario. Additionally, speak to the public about the need to return the focus of pretrial detention to circumstances where there is evidence that the person has a substantial likelihood of not showing up at court or has an unusual likelihood of committing a serious offence. We believe that pretrial detention – and full bail hearings – should be reserved for those for whom release would be a serious threat to the administration of justice or public safety.
- ii. Be transparent in terms of its actions and plans with respect to bail and remand and the results of its initiatives. We believe that the public should be informed that there is a need to return the correctional system of Ontario to one that largely punishes people for what they have been found guilty of. Hence, the people of Ontario deserve to be given a blueprint of the plans that are contemplated for returning pretrial detention to a practice whereby only those who present the most severe threats to the integrity of the justice system or public safety would be held.
- iii. Undertake or participate in research that would better inform the decisions regarding priorities and specific approaches. There are known costs to society of a practice of imprisoning large numbers of people prior to trial. We need to understand better what these are.
- iv. Establish a small independent working group to look into ways in which the system in Ontario could be improved. The mandate of this group would be to study the issue, invite the views of interested parties and make recommendations for change.

2. To the Ontario Ombudsman:

- i. Review the complaints received by the Ombudsman's office that are related to the impacts of the remand situation in Ontario, give consideration to conducting a SORT (Special Ombudsman Response Team) investigation on the performance of the relevant government ministries and, if the decision is not to proceed, provide JHS Ontario with the reasons for this decision.

3. To John Howard Society of Ontario and the affiliates:

- i.** Seek the support of the Ontario government to convene a roundtable/symposium of those with special knowledge/experience and influence to identify short and long-term actions needed.
- ii.** Encourage the affiliates to monitor trends in the remand population in their area institutions and document impacts on those held on remand. Further, those affiliates who deliver bail supervision programs should be supported in their evaluation and research endeavours relating to the operation of these programs.
- iii.** Request a meeting with Ministry of Health and Long-Term Care officials and the Minister, if relevant, with respect to mentally ill offenders, generally, and those held in prison on remand, in particular.
- iv.** Continue to seek relevant data from appropriate government ministries.
- v.** Seek partnerships with other organizations (e.g. Elizabeth Fry Society, Legal Aid Ontario) on the issue of reducing the use of remand and furthering the other recommendations made in this report.