Consultation –*Bill 75 SCHEDULE 2*

BAIL ACT

Submitted to: Ministry of the Solicitor General

Submitted by: Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association ("OBA") provides comments to the Ministry of the Solicitor General ("SOLGEN") concerning proposed amendments to the *Bail Act*, as described in Schedule 2 of Bill 75, *Keeping Criminals Behind Bars Act*, 2025 ("Bill 75").

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with more than 17,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public, and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared by members of the OBA Criminal Justice Section, which includes both Crown and defence counsel practicing in a wide range of criminal justice matters before all levels of court across Ontario, from the Greater Toronto Area to northern and remote communities.

Comments & Recommendations

Schedule 2 of Bill 75 makes various amendments to the *Bail Act,* including the proposed requirement of accused persons or their sureties to provide a cash deposit. Currently, if the court orders release on a promise to pay, no cash deposit is required. However, under the proposed new system, the court would require a cash security deposit in the full amount ordered once the accused person is released from custody. If the accused follows the terms of their release, the deposit would be returned once the case concludes or the surety's

obligations end. Contrarily, if the bail conditions are not met, the money would be automatically recovered upon being ordered forfeited by the court.

If implemented, this amendment would expand the current restricted use of cash deposits, which under section 515(2)(e) of the *Criminal Code*, R.S.C., 1985, c. C-46, is limited to circumstances where the accused resides out of the province or more than 200 km from the place where they are in custody.[1]

Respectfully, the proposed reform should not be pursued. The introduction of a cash bail system carries substantial unintended consequences that run counter to the Ministry's policy objectives which include enhancing public safety and improving court efficiency. The risks of such consequences are well documented in case law and past government reports.[2]

Accordingly, the following submission raises several concerns that the Ministry ought to consider before advancing any proposal to implement a cash bail deposit system in Ontario. Notably, there is a common theme underlying each issue identified. That is, that the Ontario bail system is already under significant strain, particularly concerning the number of individuals held in pre-trial detention and the limited capacity of courts and correctional institutions to handle that pressure. In Ontario, unlike any other Canadian jurisdiction, accused persons are being forced to "languish in custody" because of courts not having the time to hold a bail hearing.[3] As demonstrated below, the unintended consequences of a cash bail deposit system risk exacerbating this issue, which has

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[1] *Criminal Code*, RSC 1985, c C-46, s. 515(2)(e).
[2] *R. v. Antic*, 2017 SCC 27, [2017] 1 SCR 509, per Wagner J., at paras. 64-67; Canada. Canadian Committee on Corrections. *Report of the Canadian Committee on Corrections — Toward Unity: Criminal Justice and Corrections*. Ottawa: Queen's Printer, 1969 ["Ouimet Report"], online: <https://publications.gc.ca/collections/collection_2021/sp-ps/JS52-1-1968-eng.pdf>. See also *R. v. Rowan*, 2011 ONSC 7362, at para. 9; and *R. v. A.N.*, 2019 ONCJ 588 (CanLII), at paras. 41-43; and Friedland, Martin L. *Detention before Trial: A Study of Criminal Cases Tried in the Toronto Magistrates' Courts*. Toronto: University of Toronto Press, 1965.
[3] Legal Aid Ontario, A Legal Aid Strategy for Bail (18 July 2019), online: Legal Aid Ontario <https://www.legalaid.on.ca/documents/a-legal-aid-strategy-for-bail/>.

downstream effects that greatly undermine the Ministry's objective to "keep violent, repeat offenders behind bars."[4]

There are Significant Unintended Consequences Associated with Cash Bail Deposits

1. ***Cash Bail Risks Having a Disproportionate Impact on Vulnerable and Low-Income Accused***

As addressed by the Supreme Court of Canada in *R. v. Antic*, 2017 SCC 27, requiring cash in advance to secure pre-trial release could operate "harshly against poor people"[5] as it makes an accused person's release contingent on his or her access to funds.[6]

The proposed cash-based bail system would have its most severe consequences for those with limited financial means. Accused who cannot afford the required deposit risk facing prolonged pre-trial detention. Thus, the proposal risks creating a wealth-based system of pre-trial detention.

Consequently, this system would not achieve the intended objective of reducing the release of repeat or violent offenders, as the proposed reform hinges on the individual's ability to *pay* rather than on the nature or severity of the alleged offence or public safety risk. In practice, cash deposit requirements would result in the pre-trial detention of individuals with limited financial means, irrespective of whether their release poses a genuine risk.

Moreover, under s. 493.2 of the *Criminal Code*, in making a decision under Part XVI: Compelling Appearance of an Accused Before a Justice and Interim Release, a peace officer, justice or judge shall give particular attention to the circumstances of:

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[4] Ontario, Ministry of Attorney General, "Ontario Tightening Bail Requirements to Protect Communities" (24 November 2025), online: Ontario Newsroom <https://news.ontario.ca/en/release/1006759/ontario-tightening-bail-requirements-to-protect-communities>.
[5] *R. v. Antic,* 2017 SCC 27, at para. 28 [*Antic*].
[6] *Ibid.* at para. 4.

a) Aboriginal accused; and

b) accused who belong to a **vulnerable population** that is **overrepresented** in the criminal justice system and that is disadvantaged in obtaining release under this Part.[7] [Emphasis added.]

Section 493.2 has been interpreted to include "individuals living in poverty."[8] The impetus of this requirement was to "remedy the problem of overuse of pre-trial custody as well as the overrepresentation of certain populations in the criminal justice system in general and the remand population in particular."[9] Mandating cash bail deposits as a default requirement is thus contrary to the objectives of s. 493.2, as such reform does not permit meaningful consideration of the individual circumstances of accused persons who face systemic or socio-economic barriers in obtaining release. As a result, it leads to *de facto* detention of the accused, who are otherwise releasable and presumed innocent.

Thus, the proposed amendment risks undermining Parliament's attempt to "tackle the stubborn and unacceptable problem of overrepresentation,"[10] as requiring cash bail will likely further the overrepresentation of vulnerable and economically disadvantaged populations in the Ontario criminal justice system.

2. Disincentivizing Sureties

Sureties play an essential role within Ontario's bail system by ensuring compliance with bail conditions, permitting release in cases where detention might otherwise be ordered. Their participation helps mitigate pressure on Ontario's overburdened pre-trial detention system.

There is concern that the introduction of mandatory cash bail deposits would significantly deter, or effectively prevent, individuals from acting as sureties. For instance, under the

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[7] Supra note 1, at s. 493.2.
[8] *R. v. Ismail*, 2020 ONSC 5519, at para. 23.
[9] *R. v. E.B.*, 2020 ONSC 4383.
[10] *R. v. A.A.*, 2022 ONSC 4310, at para. 48.

current system, sureties often pledge their assets (for example, real estate, investments, valuable items, etc.). However, if the proposed amendment is implemented and a significant up-front cash deposit is required, it is unlikely that a surety would be willing or capable of liquidating assets (e.g., sell property), in order to satisfy the deposit amount.

Bill 75 also proposes the creation of a surety database that "would help hold sureties accountable, improve efficiency, increase public safety and strengthen information sharing between police services by allowing police to access data collected by other jurisdictions."[11] There are concerns that this heightened surveillance may also further discourage individuals from acting as sureties. Additionally, the creation of a surety database raises privacy and cyber security concerns for both sureties and the accused, as their personal and financial information may become subject to cyber-attacks and be compromised.

A reduction in the availability of sureties would have serious consequences for our bail system as a whole. Fewer releases would result in increased reliance on pre-trial detention, putting unsustainable strain on our pre-trial detention system. In addition, sureties provide supervision that can facilitate opportunities for rehabilitative efforts, and a reduction in their availability could result in consequences counter to Bill 75's policy objectives, such as increasing recidivism rates.

3. Reduced Sentencing Due to Poorer Detention Conditions

Contrary to Bill 75's objective to enhance public safety and "Keeping Criminals Behind Bars," the implementation of cash bail deposits risks *reducing* sentencing time. As demonstrated above, the proposed reform will increase the number of individuals held in pre-trial detention due to an inability to pay the required amount.

Through incarcerating more accused persons, this amendment will exacerbate the difficult condition issues of Ontario detention centers, such as overcrowding, triple bunking,

[11] Supra note 4.

inadequate hygiene, public health concerns, staff shortages, lockdowns, inadequate access to resources, lack of medical attention and more.

Harsh jail conditions undermine the province's goal of protecting communities by holding offenders accountable, as these conditions are causing judges to reduce sentences through *Duncan* credits or enhanced pre-sentence credit. Instead of serving longer sentences, offenders are receiving reduced time or early release because of the harsh conditions in Ontario detention centers.[12] The table below provides examples where Ontario judges afforded enhanced sentencing credit due to harsh presentence incarceration conditions.

Case Name	Sentencing Reductions
R. v. Inniss, [2017] OJ No. 2420	Sentence reduced by 1 year
R. v. Andrew, [2021] OJ No. 2911	Sentence reduced by 19 months
R. v. Perry, [2020] OJ No. 5817	Sentence reduced by 8 months
R. v. Nguyen, [2025] OJ No. 1728	Harsh conditions of custody treated as a mitigating factor in the case.
R. v. K.P., [2025] OJ No. 2402	Sentence reduced by 5 years
R. v. Mitchell, [2025] OJ No. 2021	Sentence reduced by 81 days

In *R. v. Whitlock*, 2025 ONSC 6006, the court ordered the judicial stay of proceedings pursuant to s. 24(1) of the *Charter* for first-degree murder and attempted murder charges against three accused because of the egregious state conduct in pre-trial detention. [13] This case provides a further example of how measures that increase pre-trial detention without targeting individualized risk may undermine the stated objective of the proposed *Bail Act* amendment, by increasing the likelihood of stays and sentence reductions for individuals, including violent and repeat offenders.

[12] *R. v. Duncan*, 2016 ONCA 344; *R. v. Marshall*, 2021 ONCA 344.
[13] *R. v. Whitlock*, 2025 ONSC 6006.

4. Potential Increase in Wrongful Convictions

The requirement of cash bail deposits risks increasing the number of individuals who are denied bail, and in turn, increase the likelihood of wrongful convictions. Studies indicate that once denied bail, an individual is 2.5 times more likely to plead guilty than those released into the community.[14] The reasonings for such correlation include the challenges detained individuals have in accessing counsel to prepare a defence, as well as the significant pressure to plead guilty to be released from harsh pre-trial detention conditions.[15]

Aside from the detrimental effects wrongful convictions have on individuals, they also impose significant systemic consequences. Meaning, these errors divert judicial resources, reduce public confidence in the administration of justice, result in costly lawsuits, and weaken the integrity of the criminal justice system.

5. Possible Requirement to Defend Constitutional Authority

The Ministry should also consider the potential for the proposed amendment to face constitutional challenges. In particular, the *Bail Act* amendment may be found *ultra vires* if the imposition of cash bail requirements is found to be a matter of criminal law and criminal procedure, and thus strictly under federal purview.

In such a scenario, the Ministry could face a temporary stay of the provision pending the outcome of the challenge. Consequently, the proposed reform could be delayed for years, limiting its intended effect, whereas a more targeted approach that is constitutionally sound (see pages 10-12) could be implemented promptly and achieve the desired policy objectives without the risk of delay.

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[14] Cheryl Marie Webster, "*Broken Bail" in Canada: How We Might Go About Fixing It* (Ottawa: Department of Justice Canada, 2014).
[15] 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.

6. Enforcement Issues & Further Strain on Judicial Resources

There are several challenges concerning the enforcement of cash bail deposits. Firstly, there are practical challenges involved in setting the quantum of a cash deposit. As cited in *R. v. Antic*,

> A system which requires security in advance often produces an insoluble dilemma. In most cases it is impossible to pick a figure which is high enough to ensure the accused's appearance in court and yet low enough for him to raise: the two seldom, if ever, overlap.[16]

Moreover, it is likely that in attempts to enable accused to meet bail, judges and justices may simply require insignificant amounts of cash deposits, thus undermining the intended policy objectives of Bill 75.

Lastly, there is concern that enforcing the collection of cash bail deposits would require the expenditure of scarce judicial and Court resources, further burdening our strained judicial system. For instance, the administration and recovery of these deposits would require additional court appearances, enforcement proceedings, potential appeals, and administrative oversight. By increasing the burden on the judicial system, there is a risk of delaying proceedings and having cases stayed under the *Jordan* principle, risking the allowance of individuals, including repeat or violent offenders, to avoid prosecution.[17] Thus, judicial resources must be properly focused to "keep violent and repeat offenders behind bars."[18]

Alternative Measures to Achieve Bill 75's Policy Objectives

The Ministry should consider alternative measures that advance the policy objectives of Bill 75, without introducing the unintended consequences associated with the expanded use of cash bail deposits. There are existing mechanisms within Ontario's bail system that,

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[16] *Antic*, supra note 5, at 27.
[17] *R. v. Jordan*, 2016 SCC 27.
[18] Supra note 4.

if enhanced, could better compliance, improve court efficiency, reduce system strain, and protect the public. For instance,

(1) **Enhance Use of Estreatment:** Under the current system, where an accused fails to appear for court or violates bail conditions, their surety can be ordered to pay the amount pledged at the time the release order was entered. While estreatment provides an available enforcement mechanism, it is not commonly relied upon in Ontario. Thus, the Ministry should consider allocating resources toward the consistent enforcement of financial pledges through estreatment proceedings (that is, increasing available judiciary, court time, administrative staff etc.). Doing so would enable the province to collect forfeited bail payments when bail conditions are violated, without detaining individuals who are otherwise suitable for release.

(2) **Address Systemic Delays**: To improve the bail system, initiatives ought to target the persistent delays within the system itself. As previously raised in a 2022 OBA letter to the Solicitor General, there have been substantial delays between an accused who is in pre-trial custody being requested in court and their actual attendance in court.[19] These delays directly contribute to overcrowding in Ontario jails, where a substantial proportion of inmates are held in pre-trial detention. Overcrowding, in turn, has downstream effects on sentencing outcomes, undermining the Ministry's objective to "keep violent, repeat offenders behind bars."[20] Accordingly, targeted investments in bail court staffing, transportation resources, and facility management should be made to help reduce system delays. Additional efficiencies could also be achieved through the streamlining of the electronic disclosure process, allowing matters to proceed more expeditiously and reducing unnecessary adjournments at the bail stage.

(3) **Charge Screening:** The Ministry should consider examining pre-charge screening protocols implemented in other provinces, such as British Columbia. If a similar model was advanced in Ontario, with the proper investment to support Crown workload, it would likely help alleviate unnecessary strain on courts, enabling the court to concentrate necessary resources on viable prosecutions involving genuine public safety concerns.

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[19] Ontario Bar Association, "Letter to Solicitor General on Continuing Issues on Client access in Ontario's Correctional Facilities" (30 March 2022) online: OBA < https://oba.org/Our-Impact/Submissions/Letter-to-Solicitor-General-on-Continuing-Issues-of-Client-Access-in-Ontario%E2%80%99s-Correctional-Faciliti>.
[20] Supra note 4.

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The OBA would be pleased to discuss this further and answer any questions that you may have.