Policing and Crime Bill

House of Lords
Second Reading Briefing Part 4:
Pre-charge investigations

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Summary

- **Limiting bail periods will not resolve the problem of being under suspicion for over-long periods. Only limiting investigation periods will achieve this. A 12 month, extendable limitation should apply from the point a suspect is interviewed. Where extended by a senior officer, resort to court for review must be available**
- **When a decision not to prosecute is taken, all persons under suspicion must be notified and given reasons – whether they are in police custody or were previously released with or without bail**
- **Re-arrest should not trigger a new bail period, but continue within it. It must also only be used where new evidence/analysed existing evidence justifies further arrest**

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.

2. This briefing addresses the new pre-charge bail process set out under Chapter 1 of Part 4 of the Bill. JUSTICE welcomes the introduction of a presumption of release without bail. Where bail with conditions can be granted as an alternative to remand in custody, it serves as a means of ensuring the greatest amount of liberty for the suspect. However, bail itself can also inhibit liberty where it is imposed unnecessarily. The presumption of release without bail and means of reviewing necessity for bail proposed by this Bill will therefore reduce its use.

3. Our briefing nevertheless identifies three concerns with the reform proposals. The issues raised in this briefing should not be taken as our sole concerns with regard to the proposals contained in the Bill.

4. First, the limitations on pre-charge bail proposed by the Bill will not reduce the time it takes to charge or drop cases. While an investigation continues, so does the label of suspicion. We therefore propose alternative provisions to ensure that investigations are proportionate in length and kept under control, drawn from the recommendations of the JUSTICE working party on *Complex and Lengthy Criminal Trials*. Those recommendations are that investigations should be subject to an extendable limit of 12

months from the point of first interview, and where a detective superintendent extends an investigation, suspects should be able to apply to the local Resident Judge for it to be discontinued.

5. Second, it is important that a person is told when an investigation against them has come to an end, and they are no longer under suspicion. The Bill goes some way towards requiring this, but not far enough. As currently drafted, a custody officer need only provide notification that a prosecution is not going to be proceeded with at the point when a suspect is released from the police station. This leaves anyone who is released while an investigation is continuing with no prospect of receiving a notification if the police later decide to stop the investigation. A notice should be provided when a decision to discontinue an investigation has been taken, whenever that occurs. We also consider that the notice should briefly set out the reasons why an investigation has been stopped.

6. Third, the Bill extends the power to re-arrest someone from circumstances where new evidence is discovered, to where examination of existing evidence could not reasonably have been made before the person's release. The proposed amendment removes the requirement of justification for further arrest. We think this layer of protection can prevent unnecessary arrests and should be retained. We also think that, if bail periods are kept, any re-arrest should not result in a fresh bail period should the person be again released without charge. The Bill must specify that the bail period continues to run.

New provision - A time-limit on police investigations

7. The government's intention in amending the pre-charge bail process was set out by the Home Office in its consultation paper:[1]

> While the complexity of some investigations means that it can rightly take the police a significant period of time to assemble and analyse evidence and present it to the Crown Prosecution Service, it can be extremely stressful for individuals to be under suspicion for extended periods of time, particularly if onerous conditions are attached to their bail.[2]

[1] *Pre-Charge Bail, Summary of Consultation Responses and Proposals for Legislation*, (Home Office, March 2015) ('*Consultation*'), at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/418226/150323_Pre-Charge_Bail_-_Responses___Proposals.pdf.
[2] *Ibid,* Foreward by the Home Secretary, p.3.

8. Case studies submitted as part of the consultation process included an on-going investigation involving a 13-year-old suspect who had been on pre-charge bail for 300 days, almost entirely due to waiting for forensic results. His family described how "[h]is education, health and life chances are being significantly eroded by the actions of the Metropolitan Police in their decision to not make a decision on charging".[3]

9. While the child's family referred to "anxiety around bail dates and uncertainty as to a result of those bail dates" as a source of additional stress for the child, "the prolonged period of police bail" that the child had been subjected to was the chief cause of concern. A review of bail may result in the formal condition of bail being removed. But this does not revoke the allegation, or put a halt to the investigation: it would make no difference to the fact that the suspect is still under suspicion, which was acknowledged in the summary of consultation responses.[4] The Government has identified the issue of prolonged periods of suspicion, and committed itself to addressing it. But the response in the Bill is a process which focusses on bail only.

10. Last year, a JUSTICE working party of members and invited experts, chaired by Sir David Calvert-Smith,[5] was tasked with reviewing the current processes that lead to complex and lengthy criminal trials. The report, *Complex and Lengthy Criminal Trials,*[6] presents a series of recommendations designed to deliver increased efficiency and effectiveness within those criminal justice processes while maintaining the absolute right to a fair trial. Our members also identified the problem of unlimited investigations for suspects.

History of pre-charge bail

[3] *Ibid.,* p.8.
[4] *Consultation*, p.7.
[5] The working party, drawn from JUSTICE's membership, featured a wealth of expertise from across the legal profession – including legal, academic, judicial and police experience. Sir David was assisted by Douglas Day QC, Anand Doobay, Anthony Edwards, Stephen Gentle, Benjamin Myers QC, HHJ Rebecca Poulet QC, D. Ch. Insp. Paul Richardson, Ros Wright QC, and Professor Michael Zander QC. Neil Gerrard, Paul Jarvis, Monty Raphael QC, Paige Rumble and Tony Shaw QC were sub-group members. The working party took evidence from numerous individuals and organisations, including police bodies, specialist investigators, judges and prosecutors.
[6] Available at http://justice.org.uk/our-work/areas-of-work/criminal-justice-system/complex-and-lengthy-trials/

11. Pre-charge bail has never had any control over the underlying investigation, or even over whether there actually is an investigation taking place. That has never been its function.

12. Bail was originally introduced as an alternative to pre-trial incarceration. It has come to be seen as preferential to incarceration in the majority of cases – there is a presumption in favour of bail under section 4(1) Bail Act 1976. Until the Criminal Justice Act 1925, bail was only available after charge. The then Lord Chancellor introduced pre-charge bail in recognition of the fact that "it does sometimes happen that the police want to make further inquiry before lodging a formal charge and it is desirable that they should have time to do that".[7] Speaking during a time when arrests were generally made once an investigation was complete, he described how the police often felt pressured to charge before they were ready by the fact that the suspect had to remain in custody until they did so.

13. However, as soon as pre-charge bail was introduced, investigations became longer. Pre-charge bail came to be viewed as a valuable power that should be used as often as possible in order to provide the police with more time to investigate.[8]

14. Nowadays, arrest is normally the start of a police investigation. At the same time, investigations respond to crimes that are far more complex and far-reaching than they once were, mainly due to advances in technology, which have led to vast amounts of material being seized that then has to be reviewed. Research conducted by Professor Anthea Hucklesby suggests that pre-charge bail (at least in the two force areas surveyed) is now considered "an enabling police power which allows officers to use it in a wide variety of circumstances and disparate reasons."[9] There was even "a culture amongst officers of using pre-charge bail just in case new evidence came to light even if the chances of it doing so were remote."

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[7] HL Deb, vol 62, col 1303 (9 December 1925). It gave effect to a recommendation in the report of a statutory enquiry following the case of Major Sheppard, an individual of high social standing who was arrested and detained while the police completed their investigations, highlighting that the police had no power to grant bail until they charged someone with an offence. See *Report of an inquiry held by the Right Hon. JFP Rawlinson KC, MP, into the arrest of Major R O Sheppard* (HMSO 1924-5), Cmd. 2497.

[8] Royal Commission on Police Powers and Procedures (1928–29) Cmd. 3297, p.143.

[9] Professor Anthea Hucklesby, 'Pre-charge bail: an investigation of its use in two police forces', (University of Leeds), available at http://www.law.leeds.ac.uk/assets/files/research/ccjs/pre-charge-bail/Briefing-paper-Pre-charge-Police-Bail.pdf

15. As the members of our working party on *Complex and Lengthy Criminal Trials* have noted, the problem of when to charge, when to extend police bail, and when to do neither and rely upon invitations to return for further questioning under caution, is one which is almost impossible to resolve.[10] Charging before the investigation is complete leads to the possibility that the investigation will either terminate before the full extent of the offending has been discovered or that subsequent investigations will invalidate the decision. The police are sometimes put under strong pressure to charge as early as possible by varying combinations of media pressure and the desire within their force to deploy its limited resources to the greatest number of cases.

16. However, waiting until the investigation is actually complete risks an unacceptable delay for both victim and suspect. People can be kept under suspicion for very lengthy periods while a complex investigation is taking place. Our Working Party members know this to be regularly in excess of two years in complex cases. This causes significant worry and uncertainty for both suspects and victims, which can be unfair, unreasonable and very hard to bear. Suspects may be treated as "guilty by association" by the public, and may never in fact be charged. During this period they receive scant, if any, update on the progress of the investigation and why they remain a suspect.

17. Pre-charge bail, while ensuring the liberty of the suspect, is unable to prevent longer and longer police investigation periods. These investigation periods currently continue with impunity. What is needed is a mechanism by which the investigation itself can be prevented from becoming unreasonably long. This will achieve the aims the Government has rightly identified as being necessary.

A new system of investigation review

18. In *Complex and Lengthy Criminal Trials* we proposed two mechanisms of review, designed to ensure that investigations are of a reasonable duration, which we believe Parliament should now legislate to create.

19. First, we consider that a time limit of 12 months should be placed on all investigations, starting from the point that the suspect is interviewed (either voluntarily or under arrest). This should be reasonable for most circumstances and focus the investigation with that end date in mind. It means early investigatory work can be undertaken prior to

[10] *Complex and Lengthy Criminal Trials, supra,* pp 15-17.

interviewing a suspect and commencement of the count down. At the 12 months point, an officer, independent of the investigation and of at least detective superintendent rank, should conduct an internal review of the investigation and determine whether it should continue – identifying the necessary refocus and priorities to be progressed. We feel that the officer should have a power to extend the investigation up to a further 12 months, but also to impose a more limited period. We see no reason why, with the current efforts to improve efficiency, it should take longer than two years of investigation post interview to charge a suspect.[11]

20. Second, if the chief superintendent extends the investigation, the suspect should have the right to apply to the local Resident Judge to discontinue the investigation. We consider that the experience of a more senior judge is necessary, compared to the magistrates' court review of bail periods being proposed by the Bill. The exercise of this power would be upon request rather than automatic, thereby responding to the circumstances of each case. Such a procedure would enable independent judicial consideration of the issues in the case. It should, crucially, also lead to investigators communicating better with suspects about the on-going inquiry, which would in turn avert unnecessary applications.

21. It has long been presumed that police operations may not be subject to judicial oversight. *R(C) v Chief Constable of A*[12] is cited as the basis of this view. We disagree that the decision in *R(C)* precludes court intervention to stop a police investigation. In fact, the court held that such relief could be granted - though it would "only be appropriate, if at all, in the most exceptional cases"[13] and that where "there were unquestionably reasonable grounds initially to suspect a person under investigation, the Court should be very slow to second-guess the police in deciding at what point [the suspect] can be dismissed from the enquiry."[14]

22. Far from standing as precedent for the fact that courts cannot review police investigations, the court in *R(C) did* review the police investigation, the police having provided an account of their present state of thinking and the steps they intended to carry out before excluding the Claimant from their enquiries.[15] On the facts, and applying a test of rationality (since this was a judicial review), the Court found that the

[11] Which include digital case management and case ownership improvements.
[12] *R(C) v Chief Constable of A* [2006] EWHC 2352 (Admin)
[13] *R(C),* at [33].
[14] Ibid.
[15] At [32].

police were not wrong for continuing to include the Claimant in their enquiries.[16] Even so, it advised the police to "take the remaining steps which they think necessary as quickly as they properly can,"[17] in light of the difficulties the Claimant was experiencing as a result of being under suspicion. JUSTICE's proposals go no further than the process of review engaged in by the court in *R(C)*. But by adopting provisions that proscribe how an investigation should cease, Parliament will be able to ensure court decisions are made uniformly and within the parameters of Parliament's intentions.

23. In fact, the courts are both legitimately able to make decisions of this nature and used to doing so. The courts already oversee the continuance of investigations, in part, through issuing search warrants – for which the court must be satisfied that there are reasonable grounds to believe that there is material of substantial value to the investigation and that it is likely to be relevant evidence.[18] They are also tasked with extending pre-charge police detention: further detention after 36 hours is only justified if it is necessary to secure or preserve evidence relating to an indictable offence for which the suspect is arrested, or for questioning, and the investigation is being conducted diligently and expeditiously.[19] These processes already require the review of investigations.

24. In any case, the caution expressed by the judge in *R(C)* as to whether a court should intervene is now superseded by Parliament's intentions already expressed in this Bill.[20] Under new section 47ZC (clause 60), the reviewer of bail[21] will be required to assess the reasonable need for further time to investigate/charge ("Condition B"), and the diligence and expediency of the investigation/charging decision ("Condition C"). These conditions

[16] At [33].
[17] At [37].
[18] Pursuant to s. 8(1) PACE 1984. It requires "the most mature careful consideration of all the facts of the case" (per Lord Widgery CJ in *Williams v Summerfield* [1972] 2 QB 512, 518).
[19] Pursuant to s. 43(4) PACE 1984.
[20] Mr Justice Underhill identified four main areas of concern (at [33]). First, that a review of an investigation would be an onerous task. Nevertheless, this is the process which must be gone through to extend a bail period under the Bill. Second, that the continuance of an investigation is a factual rather than a legal state of affairs, with no formal status, and it was as such unclear what form of relief would be appropriate. That can be resolved by legislation rather than judicial review proceedings. Third, that investigations may continue at varying degrees of intensity, stopped without prejudice to the possibility of being later revived, and do not necessarily have a defined conclusion. Not only must that be wrong, since it fails to consider the requirement of proportionality under common law and article 8 ECHR, it also envisages exactly the situation the new pre-charge bail arrangements under the Bill are being implemented to avoid. Forth, that the police should not be required to make declarations of innocence. This concern is resolved by the new provisions requiring the police to notify a suspect once the investigation has stopped.
[21] Who is either a senior or qualifying police officer, or a magistrates' court, depending on the stage of proceedings.

go to the heart of the police investigation and demonstrate that Parliament is satisfied with courts undertaking such detailed review.

25. But the fundamental problem with the proposals is that if the reviewer concludes that those conditions have not been met, she or he may only withhold a bail extension. They have no power either to require the police to step up a legitimate investigation or to put a halt to an unduly lengthy and spurious one.

26. If courts were given the power to halt an unduly long investigation on application by the suspect, that would be a genuinely effective way to ensure not only that police investigations are more focussed but that suspects and victims are not languishing without an outcome. This is not to suggest that lengthy investigations are never necessary, and some may necessarily require a number of years to conclude, but in JUSTICE's view, and in accordance with UK law and international human rights principles, the length of investigations must be proportionate.

27. Our proposals would place the power to extend an investigation squarely with the police – ensuring appropriate operational considerations are reviewed by a senior and experienced officer. The opportunity for the suspect to apply to the court for review of an extension will give them equality of arms and a right to be heard in a process which, until that point, they will have been entirely excluded from.

28. We recognise that the police may wish to present sensitive information in response to the application, disclosure of which might prejudice the enquiry. This could be considered in the absence of the suspect and the public, should the judge consider it appropriate. Such a procedure would at least enable independent judicial consideration of the issues in the case. The Bill already provides for a similar procedure in relation to applications to extend pre-charge bail, under new section 47ZH (withholding sensitive information) (clause 60). We also recognise that new evidence may come to light and would agree that the investigation recommence as if the time limits were 6 months rather than 12 months, to enable that to be considered.

Clauses 63 and 64 – Duty to notify person that not to be prosecuted

29. The absence of a legal requirement upon the police to notify a suspect when an investigation concerning them has ceased has been raised by some former suspects as a cause of concern. The Home Affairs Select Committee heard evidence from Paul

Gambaccini in 2015 that he was kept on bail for over a year in respect of an allegation that was fictitious. On the basis of this evidence, it recommended that, where a person is on bail for longer than six months, and where the final decision is to take no further action, the CPS should write to the individual explaining its decision.[22]

30. The Home Office acknowledged that a number of responses to its consultation on pre-charge bail had also raised the matter of notification: "Where an investigation concludes with a decision that there should be no further action (NFA), a suspect must be formally released from bail. A number of consultation responses stated that, if release without bail were to be available, there should still be a requirement to notify a suspect of that decision. We agree and will include that requirement in the legislation."[23]

31. New Clauses 63 and 64 were then introduced at Committee Stage. The Committee Stage Briefing explains that "[t]wo new clauses … were added to require the police to notify a suspect released under various sections of the Police and Criminal Evidence Act 1984 (PACE) if the police then decide that there isn't enough evidence to charge them".[24]

32. However, the Clauses only provide that a custody officer must give notice that a prosecution is not going to be proceeded with if he or she makes that decision at the point when the suspect is released from the police station. There is no obligation to notify a person released pending further enquiries, if the police later decide to stop the investigation. This was clearly not Parliament's intention. In fact, it appears to have been Parliament's intention to deal with the problem of people languishing on bail. The new clauses do not assist them. JUSTICE considers that a person must be notified when a decision not to prosecute is taken, whether that is when they are released from police detention, or when they are in the community with or without bail. We understand that this should already be happening – with the same notice generated by custody sergeants at the point of releasing someone from custody who is told that no further action will be taken, being sent out in the post by bail managers once a CPS decision has been received. We agree with the Home Affairs Committee that a proactive confirmation must be made to the person by letter that there will be no prosecution

[22] Home Affairs Committee, *Seventeenth Report, Police Bail,* HC 962, (20th March 2015), at http://www.publications.parliament.uk/pa/cm201415/cmselect/cmhaff/962/96206.htm
[23] *Consultation*, p.7.
[24] *Policing and Crime Bill: Committee State Report*, (House of Commons, 22nd April 2016), p.11, at http://researchbriefings.files.parliament.uk/documents/CBP-7563/CBP-7563.pdf

against them – either by the police or by the CPS. It is helpful to have this on a statutory footing so that all forces follow the same procedure.

Reasons

33. Clauses 63 and 64 also only provide for a notice of non-prosecution. There is no requirement to give reasons, despite the Home Affairs Committee's recommendation for an explanation to be given.

34. At Second Reading, the Minister asserted that there was no need to legislate on something that "is just the common-decency way to treat people".[25] With respect, we do not agree that leaving the giving of reasons to common decency is realistic. We understand that this practice should already be happening, but given the concerns raised it clearly isn't a uniform practice. Police resources are extremely limited and, unless there is an obligation to do so, officers may not accommodate this consistently. Officers may also be reluctant to provide reasons without guidance about the parameters in which to do so. Guidance could be provided in notes to the PACE Codes of Practice, for example. But this would also not be undertaken without a statutory obligation to do so. As such, we consider that the requirement to give reasons should be included in the Bill.

35. This would not have to be an onerous exercise. Where the practice is currently used, a standard form is generated with a tick box reason given as to why no further action is being taken. The police and CPS are also required to record detailed reasons for internal scrutiny, which could be used to give more detailed reasons should a request to do so be made.

Clause 62 – Release under provisions of PACE: re-arrest

36. Clause 62 extends the limited circumstances in which the power to re-arrest can be exercised - from the discovery of new evidence to where analysis of existing evidence could not reasonably have been carried out before the person's release.

37. We are concerned that the words "justifying further arrest" that currently proscribe the power to re-arrest set out in PACE have been omitted from clause 62. The discovery of

[25] Mike Penning MP, HC Deb, vol 607, column 67 (7th March 2016).

new evidence may not justify arrest. The provisions relating to initial grounds of arrest are insufficient to cover this scenario since this is a *further* arrest – therefore a heightened justification must be required. This must have been the intention of the current language in PACE and it should be retained in the new proposal to ensure that the new evidence or analysis in fact justifies a further arrest.

38. It is also not clear whether a new bail period, if the proposal is retained, would commence were the person again released without charge. We consider that this would be inappropriate because the purpose of re-arrest must be to test new evidence that either cements suspicion sufficient to charge, or at least gets significantly closer to it. In our view, the existing bail limit – and extension - proposals are sufficient for the introduction of new evidence.

JUSTICE

28th June 2016