Police Powers: Pre-charge Bail

Government consultation

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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 changes proposed by the Home Office to review the pre-charge bail process under the Police and Criminal Evidence Act 1984 ('PACE') as amended by the Policing and Crime Act 2017 ('the 2017 Act').

3. JUSTICE recognises the concerns raised with the current regime, namely that:

    - pre-charge bail is not always being used by the police in circumstances where it would be appropriate to do so[1];
    - there has been a significant reduction in the use of pre-charge bail, mirrored by a marked increase in release without bail – release under investigation ('RUI')[2]; and
    - investigation times have increased as RUI is being used for longer periods of time than pre-charge bail, which negatively impacts complainants and suspects as under RUI there are is no obligation for the police to keep those affected by the investigation up to date on progress, leading to uncertainty.

4. However, we do not agree that the proposals will change decision-making practices and improve the effectiveness and efficiency of police investigation, or help protect victims and the rights of those under investigation. These proposals do not address the root causes of the issues they seek to fix.

5. In our briefing on the 2016 Bill that lead to the 2017 reforms, we contended that limiting bail periods (and also RUI) would not resolve the problem of being under suspicion for over-long periods – only limiting the investigation periods would achieve this.[3] We maintain the recommendations in that briefing.

6. Our briefing identifies 5 main issues with the reform proposals:

    - **Removing the perceived presumption against the use of pre-charge bail is unnecessary and will have no material effect on police practices or the decision-making process;**

    - **The risk factors a constable must have regard to when considering if bail is necessary and proportionate are poorly worded and lack specificity. They also require the officer to make determinations beyond their powers;**

    - **The three models for governing bail timescales and authorisations provide the police with an unfettered level of autonomy over the investigation process with less oversight from senior ranking officers or magistrates. Extending the timescales for when authorisation or an extension must be sought will not re-incentivise the use of bail, but will instead lead to lengthier investigations.**

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[1] Home Office (2020) Police Powers: Pre-charge Bail. Government consultation. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879759/20191127_ConDoc_PCB_May.pdf p. 5

[2] *ibid.,* p.27

[3] JUSTICE briefing – House of Lords Second Reading Briefing Part 4: Pre-charge investigations, June 2016, available https://justice.org.uk/wp-content/uploads/2020/02/JUSTICE-Briefing-Policing-and-Crime-Bill-Part-4-pre-charge-bail-2016.pdf

- **Non-statutory frameworks for supervising RUI and voluntary attendance cases will not help reduce the length of investigations. For as long as they remain unregulated by statute, they will remain a more attractive option than bail, and therefore not remedy the underuse of bail and overuse of RUI; and**

- **Making breach of bail conditions a criminal offence in itself is not acceptable and may lead to unjustifiable outcomes for suspects.**

Removing the presumption against the use of bail

7. JUSTICE does not agree with the removal of the perceived "presumption" against the use of pre-charge bail.

8. While there is an assertion in the consultation paper (and elsewhere) that the 2017 Act "introduced a presumption against pre-charge bail"[4], it did not in fact do so. This is a misinterpretation of the legislation which does not explicitly refer to any presumption and did not intend to create one. We do, however, acknowledge that the 2017 Act introduced new wording and requirements into PACE that are unclear and confusing, and believe this will have contributed to this misinterpretation.

9. In order to determine whether to release a suspect on bail, officers must comply with section 37(2) of PACE. It provides that if a custody officer does not have before them enough evidence to charge the person arrested, then that person shall be released either: (a) without bail (i.e. RUI) unless the preconditions for bail (set out at s50A PACE) are satisfied; or (b) on bail if those pre-conditions are satisfied.

10. The s50A "preconditions" are: (a) the custody officer is satisfied that releasing the suspect on bail is *necessary* and *proportionate* in all the circumstances (having regard, in particular, to any conditions of bail which would be imposed); and (b) the decision to bail has been authorised by the rank of inspector or higher.

11. These above provisions differ from the bail test for remand hearings in the magistrates' court, governed by the Bail Act 1976 ('the 1976 Act'), which does clearly set out a general presumption that bail "shall be granted … except as provided in Schedule 1."

12. Instead of creating a presumption against the use of bail, the 2017 Act simply introduced the requirement that the police must be satisfied that releasing the suspect on bail is necessary and proportionate, and if it is not, then they must release the suspect without bail. Therefore, the proposal to "end the presumption against pre-charge bail, instead requiring pre-charge bail to be used where it is necessary and proportionate"[5] is ill-conceived and unnecessary and, in reality, makes no substantive change to the current regime.

13. In any case, even if it did create such a presumption, there is no evidence or data to suggest that this led to the overall reduction in the use of bail.

Risk factors when considering necessity and proportionality

Necessary and proportionate

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[4] *ibid.,* p.7
[5] *ibid.,* p. 8

14. One of the main concerns with the current regime that the Home Office and other relevant stakeholders have focused on is police unwillingness to use bail when it should be considered necessary. The consultation paper says bail is necessary "to prevent an individual from failing to surrender to custody, to prevent the individual from committing an offence whilst on bail or to prevent the individual from interfering with witnesses or otherwise obstructing the course of justice."[6]

15. However, the current legislation contains no guidance on what necessary and proportionate means, or the factors which must be considered. It states only that the decision to bail must be "necessary and proportionate in all the circumstances (having regard, in particular, to any conditions of bail which would be imposed)".[7] This has led to a lack of clarity and inconsistencies in the use of bail.

16. In practice and based upon available guidance, it seems that when determining whether bail is necessary, the police must have regard for whether there is a need for conditions to be imposed on the suspect, which if answered in the affirmative, would usually indicate that bail is therefore necessary.[8]

17. Under s30A of PACE, which provides the power to release on bail any time prior to arrival at a police station, the reasons for imposing bail *conditions,* as opposed to bail itself, are:

- To secure that the person surrenders to custody;
- To secure that the person does not commit an offence while on bail;
- To secure that the person does not interfere with witnesses or otherwise obstruct the course of justice; and
- For the person's own protection or, if the person is under the age of 17, for the person's own welfare or in their own interests.

18. The consultation paper proposes that the police will have to have regard to the following five factors when determining if bail is necessary and proportionate:

i) The severity of the actual, potential or intended impact of the offence;
ii) The need to safeguard victims of crime and witnesses, taking into account vulnerabilities;
iii) The need to prevent further offending;
iv) The need to manage risks of a suspect absconding;
v) The need to manage risks to the public.

19. Other than (i) above, the two lists contain the same conditions, but for different purposes. In our view (i) should not be added to the list of conditions. Rather than focussing on possible risk factors while the suspect is released, it relates to the nature of the offence already committed, which is an irrelevant consideration, see para 23 below. The proposal raises the question of in what circumstances it would be deemed necessary to release a person on bail but without conditions; if necessity is assessed based on the need for conditions, then it may presuppose that bail should always be with conditions, which isn't the case in practice.

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[6] *ibid.,* p.7
[7] Section 50A PACE
[8] Home Office (2015) Pre-Charge Bail Summary of Consultation Responses and Proposals for Legislation https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/418226/150323_Pre-Charge_Bail_-_Responses___Proposals.pdf p.5

20. Notwithstanding this, the NPCC's 2019 operational guidance states that authorisation of bail may be considered necessary if it is used for:

    - "preventing that person from failing to surrender to custody or committing further offences;
    - preventing that person from interfering with witnesses or otherwise obstructing the course of justice, whether in relation to himself or any other person; or
    - that person's own protection or, if he is a child or young person, for his own welfare or in his own interests."[9]

21. This guidance is very similar to the new proposed factors, and the reasons for imposing bail conditions pursuant to section 30A PACE. However, the guidance has seemingly done little to assist the police in deciding whether to use bail. We are therefore sceptical that the proposed statutory list of factors would have any significant effect on decision-making.

22. We do not disagree that considering any risk the suspect may pose should be relevant for determining whether bail is necessary in the circumstances, but believe clear and coherent legislation is needed to comprehensively set out the distinction between assessing necessity of bail and the necessity of adding conditions, if any at all.

Proposed risk factors

23. The risk factors set out in the consultation (and at para 18 above) do themselves require addressing, as their wording lacks specificity and could result in negative implications for suspects:

    - Factor i) – assumes that the person arrested is guilty of the offence, although at the time an officer considers bail they do not have before them sufficient evidence to charge the suspect nor determine whether the suspect has actually committed the offence.

      We are also concerned by the proposal's intention to take into account the severity of the alleged offence that has been committed. Bail is a tool used to ensure that the investigative process is not interfered with or that further offences are not commissioned while the investigation takes place. It is not a tool used to punish suspects, as no determination of guilt has yet been made. The proposal to have police officers take into account the severity of offending when considering whether to place restrictions on an individual is misconceived. In remand hearings, the severity of the offending is only a secondary consideration once it is determined that there is a risk an individual may interfere with the investigation or pose a risk to others. Further, what weight to place on the severity of offending is determined by magistrates, with requisite experience. We do not see any reason to give police greater power and leeway than magistrates when determining bail and believe it is inappropriate to do so. As such, we consider that the severity of offending should not be a factor when considering whether bail is necessary and proportionate.

    - Factor ii) – is worded such that the officer must have regard for *victims* of crime and *witnesses* generally, as opposed to the specific victim(s) and witness(s) involved in the case being investigated. Having regard for victims of crime (as a whole) would allow for officers to be influenced by personal value judgements. It must be specified that

[9] National Police Chiefs' Council - Operational Guidance for Pre-Charge Bail and Released under Investigation – Updated January 2019. https://cdn.prgloo.com/media/832fb4a76353450ab555b7db1c93ed48.pdf p.1

the consideration is in relation to those involved in the case, either as a victim or witness.

- Factor iv) – states "manage risks of **a** suspect absconding", which lacks specific reference to the suspect under investigation. This factor must specify "**the** suspect".

Timescales and authorisation

24. JUSTICE considers the current model is more appropriate than the proposed alternatives, as it best protects victims and the rights of the accused, and promotes the timely progression of investigations through internal and external oversight.

25. We do not believe either of the proposed new models would 'remove disincentives against [the] use of pre-charge bail whilst supporting the timely progression of investigations"[10]. Instead, they would lead to protracted investigations due to an unreasonable level of autonomy given to officers, with oversight from senior ranking officers or magistrates introduced later on in the investigation timeline.

26. Stakeholders have focused on the current regime disincentivising officers from using bail in complex cases that are difficult to progress and/or conclude within 28 days. However, we are not convinced by this. Currently, if an inspector cannot complete their investigation within the 28-day initial bail period, they must seek authorisation from a superintendent to extend the bail for a further two months, allowing for a total of three months to investigate. Currently, 71% of cases reach an outcome within the 28 days. Therefore, having a period of three months for investigation should be sufficient to complete the investigation in the majority of cases.

27. As such, we see no convincing reason or evidence that changes to the current model are necessary. Moreover, we have concerns that prolonged periods of bail may create supervision problems, with resources being expended on supervising bail conditions rather than investigating crimes.

28. Moreover, PACE already acknowledges that some investigations are inherently complex and will take longer than 28 days, and contains provisions for circumstances in which the initial bail period should be longer. For example: in cases under investigation by the Serious Fraud Office (SFO) the initial bail period is three months[11]; and for exceptionally complex cases ('designated cases'), such as those dealt with by the SFO or the Central Casework Units of the CPS, it is possible to extend bail administratively to a total of six months before seeking the approval of the courts, instead requiring approval by a commander or assistant chief constable (or a higher rank), or a CPS prosecutor.[12]

29. The three proposed models replace inspectors with custody officers as the initial authorisers of bail; inspectors would instead be responsible for the first extension of bail. Neither rank has performed their proposed new role before and so we have concerns as to suitability and competence. Allowing the initial bail period to be two or three months is unnecessary and disproportionate and fails to recognise the effects on suspects, and victims of longer delay – the main mischief that the introduction of these provisions was intended to reduce, but has in fact extended. It would also have the effect of disincentivising speedy investigations.

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[10] n.1, p.11
[11] *Section 47ZB(1)(a) PACE 1984*
[12] Section 47ZE PACE 1984

30. Authorisation above the rank of inspector (i.e. superintendent) is not required in the proposals until four months (Model A) or six months (Model B and C), and magistrates would not become involved until either six months (Model A), 9 months (Model B), or 12 months (Model C). These changes represent a significant reduction and delay in proper oversight of decisions affecting liberty and are therefore inadequate.

Non-statutory framework for RUI and Voluntary Attendance ('VA') cases

31. Although stated in the consultation and elsewhere that the 2017 reforms introduced the power for the police to RUI, this is not the case. The police have long been able to release suspects without bail, although the reforms can be viewed as encouraging a greater use of it.

32. JUSTICE agrees that supervision of RUI and VA is essential. We are concerned the RUI is used as "an administrative tool to help manage their workload"[13], and used for extended periods of time above and beyond that proscribed by pre-charge bail. As noted by Professor Ed Cape, Matthew Hardcastle and Sandra Paul, "officers have been incentivised to use RUI rather than pre-charge bail because of the perceived advantages to them of less scrutiny, by their supervisors and/or by the courts, of the investigation".[14] To avoid this, the framework for governing its use and timescales must be such that RUI does not appear to be a more attractive alternative to using pre-charge bail.[15] The only way to achieve this is to ensure the governing framework is set out in statute, not in guidance or codes of practice.

33. Similar concerns have already been stressed. The Home Office identified in its 2015 pre-charge bail summary of consultation responses and proposals that many had: "expressed concern that enabling release under investigation would not solve the underlying issue of an extended period of uncertainty for suspects between being arrested and the subsequent decision on charging. Indeed, some respondents were concerned that, without even the minimal level of scrutiny brought by the current process of granting and extending bail, there would be the potential for non-bail cases to take even longer to resolve, with priority given to cases where bail would need to be justified to the courts."[16]

34. The NPCC already provides guidance that states: "investigations must have a documented supervisory review at least every 30 days until the investigation has been completed and a disposal actioned", with high priority cases with safeguarding issues requiring review by a sergeant every 10 days. It also suggests that an inspector should review RUI at 3 months and a superintendent at 6 months. This, however, does not seem to have had any positive and evidential impact on practice.

35. The Law Society also published recommendations for better governance of RUI, advising that: "Strict time limits must be introduced to RUI, with senior approval required to extend those time limits, mirroring the bail requirements. However, we acknowledge that the police, like the defence and prosecution, are under resource pressure, so we understand the need for a mechanism which is less restrictive than bail in terms of time limits and extension approvals. We would therefore suggest an approximate first period of around

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[13] n.1, p.28
[14] Professor Ed Cape, Matthew Hardcastle and Sandra Paul – Police Powers and Pre Charge Bail. https://www.lag.org.uk/article/207940/police-powers--pre-charge-bail
[15] See: Cape, E, Police bail without charge – leaving suspects in limbo, October 2019. https://www.crimeandjustice.org.uk/resources/police-bail-without-charge-leaving-suspects-limbo; and Zander, M, Extraordinary shift in the way the police use bail, 28 September 2017. https://www.thetimes.co.uk/article/extraordinary-shift-in-the-way-the-police-usebail-vtrws5ldz
[16] n.7, p.7

56 days authorised by a sergeant, with approval needed from a Chief Inspector or Superintendent for an extension to 6 months. For an extension of up 12 months, approval from a magistrate would be needed."[17]

36. Although we agree that better supervision of RUI (and pre-charge bail) is needed, the fundamental issue which must be addressed is the overall time taken for investigations. In 2016, JUSTICE submitted a briefing on the 2016 Bill that introduced the 2017 reforms. Drawing on recommendations from our *Complex and Lengthy Criminal Trials* report[18], which identified that for as long as the investigation continues, so too does the label of suspicion. Our briefing advised (in summary) that:

    i) 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). At the 12 months point, an officer, independent of the investigation and of at least detective superintendent rank, should review the investigation and identify any need to refocus the investigation. The police should also be able to extend the investigation time limit for a further 12 months, or reduce it, if necessary[19]; and

    ii) if investigation period is extended past 12 months, the suspect should have the right to apply to the local Resident Judge to review the investigation and discontinue it, if necessary. We consider that a judge, with more seniority than a magistrate is required to review the investigation.

37. These recommendations remain relevant and necessary to implement in order to encourage better efficiency and effectiveness while maintaining the suspect's right to a fair trial.

38. Another key to improving the current RUI regime is proper funding. In 2018 the National Audit Office found that police funding had been significantly cut, with central government funding to commissioners falling by 30% in real terms since 2010-11.[20] There has also been a marked reduction in officers; some 45,000 jobs with the police force have been lost. The police are faced with the difficult task of being able to effectively and efficiently respond to crimes and manage their investigations whilst working within ever tightening resources and dwindling financial support. JUSTICE does not believe the rise in RUI is due to officers intentionally or maliciously trying to circumvent the appropriate criminal justice response to crime, but more so well-intentioned officers who are trying to manage every growing workloads within limited circumstances.

Effectiveness of bail conditions

39. As noted in the consultation, although breaching bail conditions is not currently a criminal offence, the police do have the power of arrest if they have reasonable grounds to believe the conditions imposed have been breached.[21] Where a person has been rearrested, section 37C(2)(b*)* of PACE 1984 gives the police the power to either:

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[17] The Law Society (2019) Release under investigation. https://www.lawsociety.org.uk/policy-campaigns/campaigns/criminal-justice/release-under-investigation/ p.6
[18] Available at http://justice.org.uk/our-work/areas-of-work/criminal-justice-system/complex-and-lengthy-trials/
[19] JUSTICE briefing – House of Lords Second Reading Briefing Part 4: Pre-charge investigations, June 2016. Para 19
[20] National Audit Office - Financial sustainability of police forces in England and Wales 2018, https://www.nao.org.uk/wp-content/uploads/2018/09/Financial-sustainability-of-police-forces-in-England-and-Wales-2018.pdf, p.7
[21] S46A(1A) of PACE

i) release the suspect without charge, either on bail or without bail; or
ii) charge the suspect for the original offence, and either keep them in custody on remand to appear at a magistrates' court, or re-release them on bail. Section 37C(4) states explicitly that if a person is released on bail under section 37C(2)(b), then they shall be subject to whatever conditions applied before the re-arrest.[22]

40. Also, breaching bail can be used as an aggravating factor if the suspect is eventually charged and convicted of the original offence arrested for.

41. We do not agree that a breach of pre-charge bail conditions should be a criminal offence in itself. We oppose this for the below reasons:

- there is no evidence that the threat of further punishment will result in a suspect's better compliance with conditions;
- if the police have reasonable grounds to suspect that the breach was the commission of a (new) substantive offence, then the suspect can be arrested and potentially charged for this separate offence; and
- evidence from a study by Professor Anthea Hucklesby into the use of bail in two forces between 2011 and 2013 found that over half of those on pre-charge bail did not go on to be charged for the alleged offence they were originally arrested and bail because of.[23] Therefore, subjecting the person to criminal charges for breaching those conditions, yet dropping charges for the original offence that lead to the conditions being applied, would result in unfair and arbitrary use of power and restriction of liberty.

42. We consider that what is required is better management and supervision of suspects on bail, and a more considered approach to the conditions placed upon people.

JUSTICE
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[22] See CPS guidance on Bail - https://www.cps.gov.uk/legal-guidance/bail
[23] Professor Anthea Hucklesby - Pre-charge bail: an investigation of its use in two police forces https://essl.leeds.ac.uk/law-research-expertise/dir-record/research-projects/771/pre-charge-bail