



BRIEFING PAPER

Number 7469, 15 January 2016

Pre-charge bail

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Summary

Pre-charge bail, or 'police bail', has been variously described as a legal limbo, an assault on liberty and punishment without trial. It is also recognised as an important power by which the police can continue to investigate allegations whilst allowing suspects to maintain their normal routines and affording victims of crime a degree of protection.

There are limits on the length of time police can detain a suspect in custody before they must either charge or release. A third option frequently used is to release the suspect but on pre-charge bail.

Critics condemn what they call the police's 'flypaper' tactic in recent high profile cases of arresting someone, leaking the details, then endlessly re-bailing them in the hope that other people come forward. Others accuse the police of using pre-charge bail conditions as a means of controlling and silencing legitimate protesters.

These criticisms are strenuously denied by the police, who have their own concerns about the exercise of pre-charge bail powers. They cite the problem of delays caused by third-party contributors to criminal investigations, and the relative 'toothlessness' of pre-charge bail in cases of suspected terrorism.

Following these and other criticisms of the powers, the Coalition Government consulted on statutory changes to reduce both the number of those on pre-charge bail and its average duration. In March 2015 the Home Secretary Theresa May promised to introduce significant reforms in this parliament, including time limits, a presumption that suspects will be released without bail, regular reviews by the courts and formal guidance governing the imposition of conditions.

A *Policing and Justice Bill* was promised in the Queen's Speech in May 2015. The Government described one of the main benefits of Bill as 'putting a stop to people remaining on bail for months or even years with no independent oversight of the police's investigation'.

However the question of conditions to pre-charge bail - and the debate as to whether the rules as a whole ought to be limited or strengthened - has now returned to the fore following a terrorist suspect leaving the UK for Syria whilst on police bail.

1. What is it?

Releasing someone from custody on pre-charge bail allows the police to continue its investigation of an alleged offence whilst allowing the suspect to return to his or her normal routine. Conditions can be attached to bail allowing the police to offer protection to complainants or witnesses, to preserve evidence and to mitigate the risk of further criminality.

1.1 The detention clock

The *Police and Criminal Evidence Act 1984* (PACE) and its Code of Practice C governs the use by police of their powers of detention. It sets limits on the length of time that the police can detain a suspect without charge.

The first time limit is 24 hours.¹ After 24 hours the suspect must be released at that time, either on bail or without bail.

A police officer of the rank of superintendent or above can authorise the continued detention of a suspect for up to 36 hours if certain conditions are met.²

The period of detention can be extended further by a magistrates' court if it is satisfied, on an application on oath made by a constable and supported by information, that there are reasonable grounds for believing that the further detention of the suspect is justified.³ A warrant of further detention may not be for a period of more than 36 hours, though this can be extended by the court up to a maximum period of 96 hours.⁴

These time limits are often referred to as the 'detention clock' - a countdown to the time when a suspect must be charged or released.

1.2 Police power to grant bail

The police can buy themselves more time to continue investigations by releasing the suspect on pre-charge bail.

¹ PACE s.41 (1). This basic time limit is subject to the provisions of s.41 (2)-(9) and s.42 and s.43.

Note that those arrested under the *Terrorism Act 2000* can be detained without charge for up to 14 days.

² S.42 (1) - the officer must have reasonable grounds for believing that:

- (a) further detention of the suspect without charge is necessary to secure or preserve evidence relating to an offence for which he is under arrest, or to obtain such evidence by questioning him;
- (b) an offence for which the suspect is under arrest is an indictable offence - one tried by judge and jury in the Crown Court; and
- (c) the investigation is being conducted diligently and expeditiously.

³ PACE s.43

⁴ PACE s.44

5 Pre-charge bail

Police are required to grant bail, with or without conditions attached, in the following scenarios:

- Where there is insufficient evidence to charge the suspect and it is necessary to continue investigating without the suspect being detained;⁵
- Where police consider there to be sufficient evidence to charge the suspect but await a charging decision by the Crown Prosecution Service.⁶

The police have extensive powers to release someone on bail without having charged them with an offence. Even where the grounds for a person's detention have ceased to apply and the police custody officer knows of no other grounds on which his continued detention could be justified under PACE, where further investigations are deemed to be necessary the police are empowered to release the person on bail.⁷

Police can impose conditions on pre-charge bail.⁸ These conditions can be varied by a custody officer at the relevant police station, including the imposition of more onerous requirements.⁹ A person on bail may apply to a magistrates' court for the conditions to be varied.¹⁰

1.3 Principles of good practice

The Home Office responded to concerns about the use of pre-charge bail by approaching the College of Policing to develop principles of good practice. These principles were introduced as part of the College of Policing's [Authorised Professional Practice](#) in October 2013.

The principles identify the following points among best practice for managing pre-charge bail:

- Investigating officers should strive to finalise investigations within the first period of detention wherever possible. Where the complexity of a case renders lengthy investigations and therefore bail unavoidable, an investigative plan and management regime should be in place to ensure that the suspect is on bail only for the minimum period required to complete the investigation.
- Where a period of bail extends beyond 28 days, the approval of increasingly senior officers should be required.¹¹

⁵ PACE s.37 (2)

⁶ PACE s.37 (7)

⁷ PACE s.34 (5)

⁸ *Criminal Justice Act 2003*, Schedule 2, para 6 (3)

⁹ Bail Act 1976, s3A (6)

¹⁰ PACE ss.37C and 46A

¹¹ The principles recognise that where the period of bail exceeds 28 days, forces should apply the following approval process:

- beyond 28 days – seek the approval of an additional independent sergeant
- beyond 3 months – the approval of an inspector is required
- beyond 6 months – the approval of a superintendent is required.

- A single point of contact must monitor compliance with the investigation plan timelines and keep the suspect informed about the investigative progress and the reasons for any bail extension, change or imposition of conditions.
- The period of bail should be proportionate to the investigation still to be completed.
- Conditions imposed on bail should be proportionate, legitimate and necessary, and must not be automatically imposed in every case or applied wholesale to any situation.

2. Criticisms

2.1 Length of time

In contrast to the detention clock operating when a suspect is held in custody, there is no limit to the length of time someone can be on pre-charge bail.

In a letter to the *Telegraph* former ministers, current MPs, lawyers and campaigners attacked the current rules governing pre-charge bail as 'a perversion of justice' that leaves suspects in a 'legal limbo'.¹² The letter's signatories argued that the 'mental anguish' inflicted on those waiting many months to find out whether or not they will face charges amounts to a form of punishment without trial.

The high profile cases of Paul Gambaccini, Freddy Starr and journalists arrested as part of the phone hacking scandal highlighted the impact of prolonged periods of pre-charge bail on suspects. Former *News of the World* editor Neil Wallis, on conditional bail for 19 months before the CPS decided there was insufficient evidence for a realistic prospect of conviction, has written of how he lost his job and his family was 'put through hell' in this intervening period.¹³

Conditions attached to pre-charge bail can make it particularly onerous. Greg Foxsmith, president of the London Criminal Courts Solicitors Association, has pointed out that pre-charge bail conditions can be more restrictive than an ASBO.¹⁴ In its consultation on the use of pre-charge bail, the College of Policing noted:

...the conditions imposed on this type of bail can substantially restrict the freedom of suspects. This can be particularly distressing for individuals who have been subject to lengthy periods of conditional bail and ultimately not charged with any offence.¹⁵

2.2 The fight against terrorism

The system of pre-charge bail attracted criticism following the revelation that a suspected terrorist was free to leave the UK following his release on pre-charge bail whilst investigations into alleged terrorism offences continued. The mayor of London, Boris Johnson, described pre-charge bail regulations as 'a pretty ineffective system' and called for a more robust approach.¹⁶

Former director of public prosecutions Lord Macdonald argued that in terrorism cases police should not release a suspect on pre-charge bail

¹² ['The injustice of pre-charge police bail'](#), *the Telegraph*, 1 December 2014

¹³ ['Phone hacking: the other victims'](#), *the Guardian*, 2 March 2013

¹⁴ ['Freddie Starr case: how can it be right to be on bail for 19 months?'](#), *The Justice Gap*, 16 May 2014

¹⁵ [Public consultation, Use of Pre-Charge Bail](#), College of Policing, March 2014, page 7

¹⁶ ['Boris Johnson: Bail laws impeding police in extremism cases'](#), *BBC News*, 7 January 2016

without the prior agreement of a specialist prosecutor from the CPS Counter Terrorism Division.¹⁷

The Prime Minister told the House of Commons Home Affairs Select Committee that he would 'look carefully' at police bail powers after the Metropolitan Police assistant commissioner Mark Rowley described them as 'weak and toothless'.¹⁸

2.3 Protesters' claims of abuse of powers

The imposition of conditions on pre-charge bail limiting freedoms of expression and association have led to accusations that police are abusing their powers to prevent legitimate protest.

On the opening night of the 2012 Olympic Games in London police arrested 182 cyclists participating in the monthly pro-cycling 'Critical Mass' ride for causing a public nuisance. The cyclists were initially detained, many for close to the 24 hour limit, before 178 were then released on pre-charge bail. Conditions imposed on bail prohibited them from entering areas of London and from the vicinity of Olympic venues (even those hosting events for which they had tickets). The majority of those subject to such conditions were eventually told they would not be charged and no further action would be taken.

Lawyers have criticised the 'growing trend' of police forces following-up the mass arrest of protesters with the imposition of bail conditions prohibiting return to certain geographical areas and restrictions on association with certain groups of people in public. They described the 'tactic' of arrest and release on pre-charge bail as 'a way to deter protesters and allow biometric data to be gathered'.¹⁹

The use of pre-charge bail in the protest context was of concern to Maina Kiai, UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, on his visit to the United Kingdom in January 2013:

I am also dismayed about very strict police bail conditions which have been imposed on protestors who have been arrested, to deter them from further exercising their rights. Such conditions may be challenged before a court, but the process is costly and can be a strain to some, especially when legal aid is being cut as part of austerity measures.²⁰

¹⁷ ['Police powerless to follow terror suspects to seize passports, Boris Johnson reveals'](#), *The Telegraph*, 7 January 2016

¹⁸ ['David Cameron vows police bail shake up as top cop says it is toothless'](#), *the Telegraph*, 12 January 2016

¹⁹ ['Misuse of bail conditions'](#), *Law Gazette*, 2 February 2015

²⁰ [Statement by the United Nations Special Rapporteur on the rights to freedom of peaceful assembly and of association at the conclusion of his visit to the United Kingdom](#), 23 January 2013

9 Pre-charge bail

Data obtained by the *Guardian* in December 2014 showed around 85% of those whose bail conditions prohibited participation in protests were not subsequently charged with any crime.²¹

²¹ [‘Revealed: Police using pre-charge bail to muzzle protesters’](#), *The Guardian*, 25 December 2014

3. The police view

Perhaps overlooked in the debate on pre-charge bail are the demands it places on police forces. According to the College of Policing,

Bail is an increasingly challenging process to manage. Excessive bail duration and repeat bailing compromise resources and custody capacity. They can also have a detrimental effect on investigations, sometimes leading to poorer outcomes for victims, witnesses and communities, due to loss of momentum in the investigations.²²

3.1 Length of time

In summarising the responses to its own consultation on pre-charge bail principles, the College of Policing noted the widespread concerns as to the length of time some suspects remain on bail.

Police forces that submitted responses stressed that organised crime often presents complex cases requiring detailed and substantial investigations that invariably take longer to complete. Similarly HMRC cases often feature international elements that take time to resolve, or require digital forensic analysis on which third party experts must be instructed.

The length of time that some suspects are on pre-charge bail frustrates officers themselves, who reported being angered at being placed under the spotlight for delays caused by external, third party agencies. In addition to fears about cuts and fewer available staff, officers highlighted the speed and quality of third-party contributions to investigations over which they have no control. Another major concern expressed was that there are no national standards governing the timescale for CPS charging decisions.

For these reasons the College of Policing argues no 'one size fits all' approach is possible and insists on the need for flexibility in the system of pre-charge bail. Nevertheless it recognises that the initial period of pre-charge bail ought to be realistic, taking account of outstanding investigative activities. It recommended that this be explained to suspects and that officers consider any representations by the defence.

3.2 Bail and terrorism

Police share concerns about the effectiveness of pre-charge bail in the cases of suspected terrorists. In his evidence to the House of Commons Home Affairs Select Committee, Mark Rowley, Assistant Commissioner for Specialist Operations in the Metropolitan Police, described pre-charge bail as 'a weak provision'. His evidence followed the case of a suspected terrorist leaving the UK for Syria within 24 hours of being

²² College of Policing, [Public consultation: Use of pre-charge bail](#), March 2014, page 7

released on pre-charge bail. Drawing a distinction with the bail following charge, he told MPs:

...most importantly, the only thing that is an offence in terms of breach of police bail is not coming back on the due date at the end. If conditions are put on somebody—which may be a curfew, it may be non-association, it may be surrendering passport immediately or in a short period of time—if that person breaches those conditions in a police bail process, we can arrest them but we cannot prosecute them for anything. They are back in police custody with a very tight timescale, so they just get bailed again with the same conditions. It is fairly toothless, whereas court bail when someone is charged, if someone breaches the conditions put down by a court, the court can take much stronger action.²³

3.3 Protests

The Association of Chief Police Officers, the predecessor of the National Police Chiefs' Council, strenuously denied that police forces exercised pre-charge bail powers in a manner designed to silence protesters. It asserted the commitment of police to allowing legitimate demonstrations to take place:

The police service's primary concern is public safety, which is why we take very seriously our responsibilities in balancing that safety with protecting the right of lawful, peaceful protest and acting against disorder where necessary during protest situations.

We are participating thoroughly in the review of the bail system, which does need to be overhauled, and are committed to maintaining the equilibrium between civil liberties and public order.²⁴

²³ Home Affairs Committee, *Countering extremism*, 12 January 2016, HC 428, Q765

²⁴ ['Revealed: Police using pre-charge bail to muzzle protesters'](#), *The Guardian*, 25 December 2014

4. Home Office consultation and proposals for legislation

In December 2014 the Home Office introduced a series of measures designed to reduce the number of people subject to, and the average duration of, pre-charge bail. Following a public consultation that ran until 8 February 2015 the Home Secretary Theresa May announced she would legislate to bring about 'the greatest reform of police bail legislation since it was passed 30 years ago.'²⁵

The Government heeded calls for statutory limits on pre-charge bail. It asserted that introducing limits would lead to speedier justice for both victims and accused; a fairer system better protecting civil liberties; and a reduction in the negative emotional and financial impacts of being on pre-charge bail.

A *Policing and Criminal Justice Bill* was announced in the Queen's Speech in May 2015. The Government promised the Bill will stop people remaining on bail for lengthy periods without independent oversight of the police investigation.²⁶

4.1 The proposed changes

The proposed legislative changes include:²⁷

- Enabling the police to release someone pending further investigation without bail in circumstances where bail is not considered to be necessary
- Introducing a presumption to release without bail, with bail only being imposed when it is both necessary and proportionate
- Placing a limit on the length of pre-charge bail at 28 days, with further extension permitted only in certain circumstances
- Allowing a senior police officer (Superintendent rank or above) to authorise a single extension of bail to a maximum of three months in total
- Requiring any further extensions of bail to be authorised by the courts and enabling the courts to review the duration and/or conditions of pre-charge bail.

Police forces submitted an alternative model to those in the consultation document that proposed the retention of pre-charge bail authorisation by police for six months with judicial oversight thereafter, and with clear necessity and proportionality tests at 28 days and three months. This was rejected by the Government as not going far enough.

²⁵ Home Office News Release, [Home Secretary announces time limits for police bail](#), 23 March 2015

²⁶ Prime Minister's Office, [The Queen's Speech 2015](#), 27 May 2015, page 66

²⁷ Home Office, [Pre-Charge Bail: Summary of Consultation Responses and Proposals for Legislation](#), 23 March 2015

4.2 Judicial oversight

The Government proposed that pre-charge bail hearings will be heard in the magistrates' courts. The responses to the consultation were divided on the question of whether cases should be dealt with by judges in the Crown Court. The Home Office was ultimately persuaded that the number of such cases would exceed the available capacity in Crown Court centres. As the overwhelming majority of cases where pre-charge bail exceeds twelve months are dealt with in large urban centres where District Judges sit regularly, it argues that such cases can still be decided by professional judges without the involvement of the Crown Court.

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