School of Law

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Policing and Crime Bill 2015-16: Pre-charge Bail (Part 4, Chapter 1)

Legislative change in relation to pre-charge bail is long overdue and I broadly welcome the general direction of change in the Policing and Crime Bill. The main changes in the Bill i.e. a presumption of release without bail and limits to the time spent on pre-charge bail without review are important principles. However, without complementary strategies they are unlikely to have the desired effect of ensuring that pre-charge bail is used effectively, efficiently and justly. A more radical overhaul of the system of pre-charge is required.

My response is based on empirical research conducted in two police forces between 2011 and 2013. The research used a mixed method approach to examine the use of pre-charge bail for further investigations in two forces in the England. The data collected for the project includes: observations; 14,173 records of cases in which pre-charge bail was imposed; 297 questionnaires completed by police officers; and 38 interviews. The research with the second police force has yet to be fully analysed. The views presented in this response are, however, my own and do not represent the views of either force.

Release without bail

The Bill introduces a presumption in favour of release without bail unless certain pre-conditions for bail are satisfied. This is an important principle and reducing the number of suspects who are bailed must be a priority given:

- the large number of suspects released on pre-charge bail (estimated to be 80,000 at any one time);
- that just under half of all cases (47% and 48%) in which pre-charge bail was imposed end with no further action being taken; and
- that many officers reported that they were often able to foresee at the time bail was initially imposed the cases which would end in no further action.

The impact of the proposed changes is uncertain given the strong culture of using pre-charge bail within the police. The danger is that the police will not use the new requirement to release without bail continuing instead to bail suspects. My research suggests that there are deeply ingrained cultural values and practices which support the widespread use of pre-charge bail. The majority of police officers in the study viewed the present system as working well, regarding pre-charge bail as a necessary policing tool and believing that its current use was not excessive. The practice was to release suspects on bail even in cases where the evidence was very slim and a conviction was unlikely because ‘there is always a chance’ of a conviction even when it appeared to be unlikely during the initial stages of the investigation. More sophisticated forms of evidence gathering, such as improvements in forensic evidence techniques, have contributed to officers’ views that it was always worth

checking whether any evidence could be uncovered. Furthermore, these views resulted in officers waiting for each and every piece of evidence to be analysed before taking no further action, even when the outstanding evidence would not result in the cases reaching charging thresholds. For these reasons, officers reported that they would always bail suspects if any evidence was outstanding. Suspects would remain on bail until all the relevant evidence had been collected and/or analysed contributing to the length of bail periods. Officers articulated the following advantages to releasing suspects on bail rather releasing them without bail:

- Bail provided assurances that they would be able to track down suspects because they were required to return to the police station;
- Bail saved police resources in tracking down suspects;
- Bail enabled conditions to be imposed which provided an element of control over suspects whilst they were on bail;
- Bail provided reassurances to victims and demonstrated that the case was being taken seriously by the police;
- Bail provided an impetus for the outstanding investigations to be completed which would not be present if suspects were released.

It is not clear whether release without bail deals adequately with the downsides of existing alternative mechanisms to pre-charge bail which were investigated during my research. These included taking no further action (at this time) and rearrest when necessary (i.e. release without bail). Officers had mixed views and experiences of using this mechanism but a significant number thought that at least theoretically it could be used more often, particularly because no significant issues had been raised when it had been used during the *Hookway* era. However, they also identified considerable resistance to its greater use based primarily based on its perceived downsides: concerns about sending the wrong message to victims; that officers would not complete outstanding enquiries because psychologically the case would be finished; and the time and resources potentially taken up with tracking down and rearresting suspects instead of them answering bail. The main perceived advantage of the release and rearrest approach was that a fresh custody clock would begin if suspects were rearrested. However, given that the investigations would continue under the current legislative proposals this advantage of release is unlikely to remain. Most importantly release without bail will preclude the police from attaching conditions. In my research, particularly in the force where conditions were available to be used, bail was synonymous with conditional rather than unconditional bail. Data shows that two thirds (67%) of suspects were bailed with conditions and in one police area within this force three quarters (76%) of suspects were bailed with conditions. Such cases will satisfy one of the pre-conditions of bail resulting in only a small number of suspects being eligible and considered for release without bail.

One barrier to greater use of release without bail dealt with adequately by the Bill is a clearer legal definition of what constitutes fresh evidence. This is important because interviewees expressed considerable uncertainty about what constituted fresh evidence. However, they were also unclear about the procedure and the grounds on which suspects could be rearrested and this will need to be clarified if the legislation is to have the desired effect.

Limits on periods of bail

Time limits are an important legal safeguard which should be introduced for pre-charge bail but it is important to set the time limit at an appropriate level to ensure a fair and workable system. The initial limit of 28 days will require a significant shift from current practice if bail periods are not to be routinely extended.

In terms of the duration of time limits, my research provides some evidence of the length of time suspects spend on bail under existing legislation:

- The average time spent on bail was around 6 weeks - suspects spent an average of 47 days on bail in Force A and 46 days on bail in Force B.
- Suspects who were being investigated for drugs or sexual offences spent longer on bail on average than suspects charged with other types of offences.

Table 1 below provides details of the proportion of cases which were completed in the two forces in the study within 28 and 90 days. It suggests that the proposed time limit of 28 days would result in between two thirds and a half of cases exceeding it if current practices do not change. Somewhere between a quarter and 14% cases would exceed the proposed three month limit before cases would be reviewed by a court resulting in a significant additional workload for the courts.

Table 1 Cases completed within 28 and 90 days

	Force A (%)	**Force B (%)**
28 days	31	45
90 days	72	86
Total number of cases	3928	9752

My research provides ample evidence that officers tend to work to the maximum period available to them rather than carry out their enquiries at the earliest opportunity. Mechanisms and resources will be required to ensure that bail periods are kept to a minimum rather than routinely extended. There was no evidence in my research that senior officers refused requests to rebail suspects thus extending their time on bail but that policies and procedures for formal reviews by senior officers did provide an impetus for officers to manage investigations more expeditiously.

A danger of setting legally binding time limits is that the time limits become the norm. This appears to be a particular danger with sections of the Bill which state specific time limits for stages of investigations. For example, Section 48 could be interpreted currently as requiring all suspects to be bailed for a fixed period of 28 days rather than for a period of *up to* 28 days. A small but significant proportion of suspects in my study were bailed for less than 28 days. It was also commonly recognised that a greater number of suspects could be bailed for short periods of time (less than a week). I suggest therefore that section 48(8) states instead that the bail end date can be *up to a maximum* of 28 days. Similarly, section 47ZD(2) could be interpreted to mean that extensions made by senior officers must be for a period of 3 months. It states currently that 'the senior officer may authorise the applicable bail period in relation to a person to be extended *so that it ends at the end of the period of 3*

months beginning with the person's bail start date'. As the data above recognises many extensions will not need to be for the full 3 months resulting in lengthened rather than shortened bail periods. Consequently, section 47ZD(2) should be redrafted to read 'the senior officer may authorise the applicable bail period in relation to a person to be extended for a *maximum* period of 3 months beginning with the person's bail start date'. Similar issues exist in all sections of the Bill which mention specific time limits.

Additional resources will be required to ensure that time limits can be adhered to. My research clearly indicates that according to the police the primary reason for lengthy bail periods was the time taken to receive evidence from outside of the investigation team. Nearly without exception all interviewees reported that forensic evidence especially analysis of telephones and computers took considerable periods of time and was the most frequently cited reason for enquiries not being completed within bail periods. Officers reported that resources were insufficient to handle the amount of evidence which required analysis by both internal and external agencies.

Wider review of PACE relating to pre-charge bail

The proposed changes to pre-charge bail do not tackle a number of pressing issues with its use. A wider review of the operation of PACE in this area is required. My research suggests that a number of problems exist with the current law namely:

1. Amongst interviewees including custody officers there was a considerable amount of confusion and inconsistent practice relating to which sections of PACE (ss. 34(5); 37(2) and 37(7)) should be used and in what circumstances. For example, the two forces in the study were using different sections of PACE to bail suspects for further investigations.

2. The relationship between sections 37(2) and 37(7) of PACE was unclear leading to differential use of 37(7). In one force 37(7) was used as a mechanism to impose conditions on pre-charge bail and in the other force section 37(7) was reported to be rarely used. The practice in this force was to keep suspects on bail under 37(2) until they were charged even when all the evidence had been collected and CPS advice sought. Consequently, officers in this force reported that bail under 37(7) was rarely used.

3. The process of rebailing suspects places burdens on both the police and suspects. A number of practices had developed in both forces to streamline procedures. These mainly involved keeping suspects out of the custody suite by rebailing them at the front desk of the station, posting bail notices to home addresses or visiting suspects' homes in order to deliver bail notices. The research uncovered a variety of practices in each force and considerable confusion amongst officers about what might or might not be lawful. Such practices militate against a full review of cases, and particularly the necessity and proportionality of bailing suspects, when there is an identified need for bail to be extended.

4. Bail conditions are used extensively. The lack of guidance on the use of bail conditions is concerning and statutory guidance should be introduced. This should include a definitive list of available conditions and the circumstances in which they may be used. A statutory criterion should be created for the police to take account of the impact on the suspect of the *package* of conditions imposed as well as each

individual condition. Alongside this, police forces should be required to collect and report on the use of conditions. Currently, data on their use are not routinely available. For example, in Force B only data relating to the number of suspects bailed with conditions were available. No data were retrievable relating to conditions such as the number imposed on individual suspects or the types of conditions used.

The research conducted in the two forces provides an opportunity for evidence based legislative and policy change. It provides independent insights into how pre-charge bail operates from the perspective of the police. This document provides only a brief summary of the research findings as they relate to the proposal in the Police and Crime Bill. I would be pleased to be given the opportunity to discuss the research in more detail.

Please contact me if you have any questions relating to my evidence or would like to discuss my research findings in more detail.

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