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Use of Pre-charge bail: response to the Public Consultation of College of Policing

Scrutiny of the pre-charge bail is long overdue and the consultation is welcome. Most of the bail principles outlined in the consultation have merit but 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.

Overview of the potential for change

Considerable barriers exist to any attempt to restrict the use of pre-charge bail because the majority of police officers in the study generally viewed the present system as working well, viewing pre-charge bail as a necessary tool, believing that its current use is not excessive. Pre-charge bail is an enabling police power which allows officers to use it in a wide variety of circumstances and for disparate reasons. It in no way constrains or restricts what they are able to do and enables them to work according to their working assumptions and rules which in turn reinforces current working practices in relation to bail. Any overhaul of the system will need to consider the cultural values and practices which surround pre-charge bail and the impact this may have on any proposed developments.

The legal framework

It is of concern that the consultation document makes no recommendations in relation to the law relating to pre-charge bail. The research uncovered a considerable amount of confusion around the legal framework for pre-charge bail and which sections of PACE 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. It is clear that additional guidance is required on the current legal framework for pre-charge bail and that consideration should be given to whether legislative change is required to provide a coherent legal basis for its use.

The use of pre-charge bail

Much of the focus of the debate about pre-charge bail has been on the length of time suspects spend on bail and on the use of rebails (see below). However, reducing the number of suspects who are bailed in the first place must be a priority given the large number of suspects involved (estimated to be 80,000 at any one time). A clearer statement about requiring the minimum use of pre-charge bail should be included in any policy to ensure that it is used sparingly. Further guidance should also be given about when it is necessary to use bail and when it is more appropriate to release suspects.

One measure (albeit imprecise) of how often pre-charge bail is used appropriately is the outcome after investigations have been completed. Whilst recognising that cases change over time and that it would not be expected that every suspect would be charged after being on bail, the fact that in both forces just under half (47% and 48%) of all cases in which pre-charge bail was imposed ended with no further action being taken is of concern. This indicates that bail is being used in cases where a charge is unlikely and that its use could be reduced. Indeed officers were clear that they were often able to foresee at the time bail was imposed the cases which would end in no further action.

Understanding the reasons why officers rely on the use of bail is important in implementing any proposal which seeks to reduce its use. Whilst some answers to this question appear to be relatively straightforward and are documented in the consultation document, the overall picture is complex. For example, the consultation and many officers in the study mentioned improved and more sophisticated forensic techniques as a major driver for the increased use of bail. However, the correlation between bail and forensic evidence is not simply linear but is also linked to the cultural goal of gaining convictions. Improved forensic techniques have increased the chances of a successful conclusion to a case (i.e. a conviction) even on what appears to be the slimmest of evidence. As a result, officers reported bailing suspects even if they believed that evidence would prove to be negative just because 'there is always a chance' of evidence coming to light to enable them to charge suspects. For the same reasons, officers reported waiting for all avenues of investigations to be completed before releasing suspects even if the outstanding evidence was likely to be insufficient to result in a charge.

Enshrining a principle stating that detention periods should be used fully to reduce the necessity for releasing suspects on bail is useful. The research suggests that there is work to do in this regard: the two forces in the study released 71% and 62% of suspects during the first 12 hours of detention. In some cases it is clear that the evidence cannot be gathered in the time available in detention and bailing suspects is appropriate. However, significant disincentives exist to using the detention clock fully including ensuring that there is sufficient time left on the detention clock to re-interview suspects and concerns about rushing evidence gathering and potentially missing vital information.

Officers mentioned the higher standards of evidence required by the CPS to charge suspects (which may require them to interview suspects again) and the separation of responsibilities for neighbourhood policing and evidence gathering into different teams to have contributed to a greater use (and increasing length) of bail.

The research investigated alternative mechanisms to pre-charge bail aimed at reducing its use with officers during interviews. These included taking no further action (at this time) and rearrest when necessary which had been used more frequently in some forces immediately

after the *Hookway* ruling. Officers had mixed views and experiences of using this mechanism but a significant number thought that it could be used more often particularly when no significant issues had been raised when it had been used during the *Hookway* era. As the consultation mentions the main advantage of this approach is that a fresh custody clock begins if suspects are rearrested. The downsides are: 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 rather than them answering bail. Interviewees also expressed considerable uncertainty about the procedure and the grounds on which suspects could be rearrested, specifically what constitutes fresh evidence. National guidance on several issues, such as what constitutes fresh evidence and how suspects' property should be handled, is necessary to make this procedure acceptable and workable.

Conditions

The consultation document makes no mention of bail conditions. Given that bail conditions are used frequently (in two thirds of cases in one force), can be restrictive and imposed for long periods of time, this is a significant gap and one which will jeopardise the legitimacy of the policy. Furthermore, just over half of cases in which conditions were imposed ended in no further action being taken. My research also uncovered inconsistencies in whether forces used conditions which results in differential requirements on suspects depending on the force area in which they are arrested and differential use of conditions within a force. A further cause for concern was that the necessity for conditions to be imposed was not routinely reviewed at key stages of the investigation including when suspects were rebailed or charged and bailed. A clear policy on the principles for the use of conditions is required which should make reference to the necessity of them being imposed alongside a commitment to minimising their use.

Length of bail periods/rebails

The principles relating to minimising the time spent on bail and rebails is to be welcomed and the research findings support the general principles outlined in the consultation document.

The average time spent on pre-charge bail in the two forces was between 6 and 7 weeks. A small proportion of suspects spent considerably longer on bail. Lengthy bail periods were almost uniformly explained by officers as resulting from the complexity of some investigations. But the length of bail periods varied within and between forces suggesting that there may be scope to reduce the time spent on bail. Frequent reviews by supervising officers and clear policy statements from forces were reported to impact positively on bail times and the use of rebails so the proposals in the consultation on this point (re-bail authority) may be effective but only if they are implemented effectively. However, pressure to reduce the number of rebails has the capacity to increase bail periods because officers play it safe and bail for longer to avoid rebailing suspects.

Several organisations have called for maximum time limits on pre-charge bail but my research suggests that strict time limits may not be workable. Generally, interviewees were concerned about imposing time limits on bail periods because of unforeseen circumstances which prolong investigations whilst at the same time recognising the problem of overlong bail periods. There was some support from officers for the introduction of time limits on bail periods but with built in flexibility. Custody time limits, which have existed in courts for over

two decades, could provide a workable model for their implementation. Time limits are set alongside procedures for dealing with exceptional cases which require longer for evidence to be gathered. Review by a court would make the extension process more legitimate and should be considered. However, the research uncovered ample evidence that officers worked to the maximum opening up the possibility that time limits may increase not decrease bail periods in some cases.

Given average lengths of bail periods currently which are often reported to be based on the periods required for specific enquires to be carried out (especially forensic examinations) plus time for slippage, the proposal to impose a blanket 28 day limit would appear to be unrealistic unless more resources are allocated to forensic services. A more nuanced approach to setting bail periods based on necessity and proportionality is likely to be more workable.

Training

Whatever policy changes are implemented a comprehensive dissemination and training package will be required. The research found that officers' knowledge of the law was superficial and dated and they were confused about various aspects of the law, policy and procedures relating to pre-charge bail. Most officers had received little or no training on pre-charge bail.

Bail data

The inclusion of requirements for data capture in the proposed policy is welcomed. The two forces which took part in the research collated routine data on the number of suspects on pre-charge bail, the length of time they had spent on bail, the number of suspects who had failed to answer bail and the number of rebails to enable them to scrutinise the bail process and to inform their bail management strategies. Beyond this, data are not easily retrieved. For example, one force was able to provide data on the total time spent on bail but not the period between individual rebails. A particular gap was in data relating to bail conditions. Data were available on whether conditions were imposed but not the individual conditions. Similarly, no data was retrievable on the reasons why suspects were bailed. Consequently, current data storage systems do not enable in-depth scrutiny of the bail process.

Please do not hesitate to contact me if you have any questions relating to my response or more generally about my research on pre-charge bail.

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