



28th May 2020

Response to the Government consultation on Police Powers: Pre-charge Bail

Context

The issue of pre-charge bail arises at a time in the investigation process when there is insufficient evidence to charge suspects and when additional enquiries are required. Pre-charge bail is a legal mechanism, and is therefore regulated, which allows suspects to be released pending further investigations. It requires individuals to return to a police station to answer bail at a particular date and time. It was originally introduced by the Police and Criminal Evidence Act (PACE) 1984 to facilitate the release of suspects from police detention. The time suspects could be held in police detention was rightly limited by PACE 1984 because there was recognition that not all investigations could be completed within these time limits. Overtime, pre-charge bail was used increasing and for longer periods because of complex mix of factors including changes in investigation techniques – the increasing importance of forensic evidence - and cultural, organisational and practical reasons (Hucklesby, 2015a).

In the immediate period prior to the Policing and Crime Act 2017, pre-charge bail had become synonymous with the imposition of bail conditions, thereby resulting in restrictions (e.g. residence, curfews, exclusion zones etc.) being in place for many of the suspects subject to pre-charge bail. However, pre-charge bail could, and still should be, imposed with or without additional conditions. Conditions should only be imposed when they are necessary and proportion.

Criteria for pre-charge bail

The Policing and Crime Act 2017 introduced a presumption against bail which had unintended, although partly foreseeable, consequences. Research conducted in two police forces prior to 2017 suggested that the police viewed pre-charge bail as an indispensable and necessary tool during investigations, which had a range of uses beyond its legal remit (Hucklesby 2015a). The history of PACE clearly demonstrates that the police find mechanisms to circumvent legal regulation, which work against their working practices and/or which involve what is viewed as excessive bureaucracy.

After the Policing and Crime Act 2017 was enacted a high proportion of individuals who are suspected of committing a criminal offence are release under investigation (RUI) rather than on bail. RUI is an informal unregulated procedure. No date is provided for the end of the investigation or for progress to be reviewed leaving suspects, victims and witnesses without a clear idea of when the investigation might be completed and the police with no date to work to. According to the police, having a deadline when suspects are required to return to the police station is an important driver for completing investigations and for managers to monitor the investigation process (Hucklesby, 2015a). Without this, cases are more likely to drift and this appears to be one of the outcomes of the change in the law by the Policing and Crime Act 2017.

As a result, the general presumption against bail should be repealed and be replaced with a legal requirement for bail to be necessary and proportionate (option 4). At the same time, it should be reiterated that bail may be granted with or without conditions. Consideration should also be given to enshrining a presumption in favour of unconditional bail in PACE 1984 for all suspects who have been arrested. This would make a clear distinction between when bail and RUI should be used (see below)

as well as aligning pre-charge bail more closely with the Bail Act 1976 which regulates the grant of bail by courts. Currently, unconditional bail has the advantage over RUI in that it requires a date to be set for when the investigation is expected to end, which may be extended after a formal review of whether bail remains necessary and proportionate and has judicial oversight.

The criteria proposed in the consultation for considering whether the use of bail is necessary and proportionate do not align with the grounds for the refusal of bail in the Bail Act 1976, which may result in confusion, particularly for suspects. It is also important to note that a report by the Law Commission (2001) found that the legal framework provided by the Bail Act 1976 for the grant of bail was compliant with the Human Rights Act 1998. The Bail Act 1976 has four main grounds for the refusal of bail: risk of absconding, risk of further offences; risk to the smooth administration of justice; and that a defendant was on bail at the time of the alleged offence. The nature of the offence is a consideration or reason which may support one of these grounds but is not a ground on which bail can be refused or conditions added. Similarly, risk to the public is encompassed in the at least two of the three grounds found in the Bail Act 1976 rather than being a separate factor. Risk to the public is a very broad ill-defined catch all factor which could easily be misused. I would therefore support using the following risk factors: b) need to safeguard victims and witnesses c) prevent offending (subject to caveat below); and, d) managing risk of absconding but not a) nature of offence and e) manage risk to the public. Importantly, suspects have not been charged or convicted of the offences under investigation so the terminology used to describe the factors is important. So, c) should not include the word 'further' and a) should include 'alleged'.

Timescale for pre-charge bail

My own research data corroborates Home Office data cited in the consultation that many investigations take longer than 28 days. Hucklesby (2015a) found that investigations took a median time of 47 to 48 days (five to six weeks) prior to the Policing and Crime Act 2017. This corresponded to the average length of time the police suggested was required for the analysis of forensic evidence. Most suspects were on bail for relatively short periods with the majority on bail for less than two months (between two-thirds and three quarters). Only a minority of cases were on bail for very lengthy periods of time (around 11% of suspects were on bail for over six months). The research also found broad agreement that complex cases took longer to investigate. However, this reality is already recognised in the 2017 Act which builds in special provisions for complex cases, lengthening the available time between reviews and so on. A key finding of Hucklesby's research was the close management of investigations by specialised bail officers or superiors (usually sergeants) was a successful mechanism for ensuring that cases were completed expeditiously.

I agree that the current procedures for oversight of the process should be replaced because they have disincentivised the use of bail and promoted the use of RUI which is unregulated. I am not convinced that any of the models proposed in the consultation would strike a balance between effective oversight and pragmatism. I do, however, agree with the timescales for the first six months set out in Model A. The initial bail period of two months corresponds to my proposal of a 60 days limit in previous consultations on pre-charge which fits the available evidence about how long cases the majority of cases take to conclude. Setting the initial bail period at two months should ensure that the majority of cases are completed within the initial bail period, thereby reducing the barriers to the use of bail whilst incentivising the completion of cases expeditiously. All subsequent reviews for the remainder of the bail period should be at two monthly intervals to ensure that investigations do not stagnate, but with provision for courts to grant permission for longer extensions in very exceptional circumstances. There should be a pattern of full and light touch reviews. At six and twelve months and at four monthly intervals thereafter a much more rigorous examination of the case and the arguments for and against the continuation of bail should be required and should take place at a court hearing where all parties are present and represented. This should ensure that the process is not simply presentational and that it is a transparent process in which all parties have the opportunity to be heard. Throughout this process suspects should have access to free legal advice and an effective and transparent appeals

process should be in place. A clear requirement for victims to be updated about the bail status of suspects should be enshrined in law.

The proposal in the consultation is for custody officers to conduct the first review. This would be a new role for custody officers and no rationale for this proposal is provided. Legally custody officers provide independent scrutiny of police detention and make initial detention/bail decisions so this new role may fit into their broader remit. However, there are questions about their capacity to carry out this role given the multiplicity of roles they have already, the time needed to provide adequate scrutiny of cases and whether they are sufficiently independent and/or will have sufficient knowledge of cases. Instead consideration should be given to mandating the appointment of bail managers. Hucklesby's (2015a) research found that specialised bail managers (either police officers or police staff) were an effective mechanism of accountability which were also valued by investigating officers and police leaders.

Judicial oversight of pre-charge bail was introduced to allay concerns about a lack of transparency and independence in the bail process and to reduce both the length of time spent on bail and the number of suspects on bail for lengthy periods. It is important that these principles remain to ensure that all parties have confidence in the investigation process. However, preparing cases for court to request extensions to bail requires an investment of police time and this seems to have been a major driver for the drop in the use of bail. Given these issues I would favour a process whereby decisions about initial bail extensions (at two months) are made by an Inspector and by a Superintendent at four months. All subsequent extensions (at and from six months) would be considered by the magistracy/judiciary. This strikes a balance between expediency and accountability.

Importantly, there should be a statutory requirement at each decision-making point to review, not only whether bail is necessary and proportionate, but the necessity and proportionality of each and every bail condition. This is because the need for bail conditions is not routinely reviewed when suspects bail is extended (Hucklesby, 2015a). As the investigation progresses the need for bail conditions is likely to change. For example, as it becomes clear that an individual is no longer a witness.

Non-bail investigations

The regulation of RUI is necessary and of paramount importance to safeguard the rights of suspects. Under the proposals outlined in the consultation, RUI would become analogous to unconditional bail. I would suggest that this is the wrong approach and that a clear distinction should be made between RUI and unconditional/conditional bail. Consequently, I would propose that RUI is limited to cases in which suspects have 'voluntarily' attended (VA) interviews. Bail shall be used in all cases in which suspects are arrested when additional investigations are necessary (subject to a legal presumption of unconditional bail) and remain available in cases involving VA when it is deemed necessary and proportionate to impose it. This will ensure that there is a clear distinction between the regulated bail process and the more informally managed VA/RUI processes and when each should be used. It would provide a clear rationale for the divergence in procedures proposed in the consultation in respect of judicial oversight. Only if this distinction is made should the review procedures for RUI be wholly undertaken by the police, otherwise it should also require judicial oversight. This is important because if the police remain solely in control of RUI then the current situation will remain, whereby RUI is used instead of bail. There will be a very clear disincentive to impose bail which might at a later date require the police to apply for an extension to court. Mandating the use of bail in certain cases is the only way to prevent the police from continuing to use RUI in cases where bail is necessary and proportionate.

Effectiveness of bail conditions

Concerns about the effectiveness of bail conditions are not new (Hucklesby, 1994). In the 1980s and again in the 1990s, consideration was given to whether breaching bail conditions should be a criminal offence in respect of court bail. On all occasions it has been deemed inappropriate and not legally possible. I strongly support this view. A breach of conditions currently requires a reconsideration of

bail at all stages of the pre- and trial processes (pre- and post-charge bail and court bail) and this is the current approach. There is no robust evidence about levels of compliance with bail conditions. There is also little or no evidence about *inter alia*: whether all conditions are necessary and proportionate; the extent to which they are effectively communicated to individuals; or police action or court decision-making when non-compliance is uncovered (see Hucklesby, 2001). Bail conditions are onerous and may impact upon suspects' lives considerably and for lengthy periods of time at a time in the investigation when there is insufficient evidence to charge suspects. Any changes which are made must therefore be evidence-based. Currently the evidence base does not exist and there are significant problems with recording and accessing data on the use of bail conditions generally and pre-charge specifically (Hucklesby 2015a).

Hucklesby's research (2015a) also uncovered a disincentive for the police to take formal action when non-compliance allegedly occurred. The law requires that if the police suspect that bail conditions have been breached, suspects should be arrested and detained for court. Any time spent in police custody awaiting a court appearance counts against the original detention clock. This along with a view that courts would rebail suspects were reported to disincentivise enforcement action. However, alternative explanations are also feasible including that most non-compliance is relatively minor and an informal warning is sufficient to ensure future compliance. In all areas of criminal justice, a graduated process for dealing with non-compliance exists which uses seriousness and frequency of the non-compliance as criteria to guide enforcement action (Hucklesby, 2018). For these reasons, I would caution against making any changes to the current position without a strong evidence base to support them, which currently does not exist.

Other issues

The history of workarounds leading to unintended consequences in this area of the police work (and others) demonstrates the need for caution in proposing any further legal changes. Yet another piecemeal reform will not deal with the problem of needing an effective system for managing situations in which the police require more time to collect the evidence necessary to charge suspects. A more systematic and wide-ranging review is required. I reiterate the points I have made in previous consultations (Hucklesby, 2014; 2015b) which demonstrate that a number of problems existed with the law prior to the enactment of the Policing and Crime Act 2017 which have not been tackled and, in some cases, have been exacerbated.

- The law relating to pre-charge bail in PACE 1984 is very complex with a myriad of sections. In PACE 1984 now, and prior to the Policing and Crime Act 2017, there are four separate sections which deal with decisions whether or not to release suspects and, if so, whether bail is necessary and proportionate (sections 34(5); 37(2); 37(7) and 47(3)). Hucklesby (2015a) found considerable confusion and inconsistent practice about which sections of PACE were/should be used and in what circumstances. Overlying regulations of RUI will increase the level of complexity still further.
- The relationship between sections 37(2) and 37(7) is unclear leading to misuse. Legally, there are two different stages during the pre-charge process when bail may be granted. The first is when the police do not have sufficient evidence to charge and require additional time for investigations (legislated for by the legal framework outlined above) (s. 37(2)). The second is when the police have sufficient evidence to charge but the Crown Prosecution Service (CPS) have yet to make a charging decision (S. 37(7)). In practice, however, these sections are used interchangeably and most suspects remain on bail under s. 37(2) even when the police deem there is sufficient evidence to charge and send the file to the CPS.
- 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 involve 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. Hucklesby (2015a) 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.

This document largely responds to the specific questions raised in the consultation document and only briefly discusses more fundamental problems with the way in which pre-charge bail and RUI is currently operating. I would be pleased to have the opportunity to discuss the wider issues in more detail. I urge the Government to take this opportunity to more fully review this area of police powers to provide an effective mechanism to facilitate police investigations which takes full account of the interests of suspects, victims, the police and wider criminal justice system as well as the public.

Professor Anthea Hucklesby
Professor of Criminal Justice
School of Law
University of Leeds
Leeds, LS2 9JT.

Tel. 07702959910

E-mail: A.L.Hucklesby@leeds.ac.uk

References

Hucklesby, A. (1994) 'The Use and Abuse of Conditional Bail', *Howard Journal*, 33(3): 258-270

Hucklesby (2001) 'Police bail and the use of conditions', *Criminal Justice*, 1(4): 441-464

Hucklesby, A (2014) *Use of Pre-charge bail: response to the Public Consultation of College of Policing* at: <https://essl.leeds.ac.uk/law-research-expertise/dir-record/research-projects/771/pre-charge-bail>

Hucklesby, (2015a) Pre-charge bail: an investigation of its use in two police forces, at: <https://essl.leeds.ac.uk/law-research-expertise/dir-record/research-projects/771/pre-charge-bail>

Hucklesby, A. (2015b) *Pre-charge bail: a response to a Consultation on the Introduction of Statutory Time Limits and Related Changes* at: <https://essl.leeds.ac.uk/law-research-expertise/dir-record/research-projects/771/pre-charge-bail>

Hucklesby, A (2018) 'Non-compliance and the breach process in England and Wales' in Boone, M., and Maguire, N. (eds) *The Enforcement of Offender Supervision in Europe: Understanding Breach Processes*, London: Routledge: 134-151.

Law Commission (2001) *Bail and the Human Rights Act 1998*, Law Commission report no. 269, London: House of Commons at: <https://www.lawcom.gov.uk/project/bail-and-the-human-rights-act/>