Issues, Proposals and Questions

Criteria for pre-charge bail

Issues

To address concerns about individuals being placed on pre-charge bail for long periods, the Policing and Crime Act 2017 introduced a presumption against pre-charge bail unless its application is considered both necessary and proportionate in all the circumstances.

The government has been clear that it fully supports the use of pre-charge bail. This point is also reinforced by guidance released by the National Police Chiefs' Council (NPCC), which stresses the need to consider bail in high harm[1] cases.

However, following discussions with the police and other stakeholders we are concerned that pre-charge bail is not being used in cases where it may be 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.

The Government therefore considers it necessary to review the presumption against pre-charge bail and the criteria for its application.

Through discussions with stakeholders four main approaches for achieving this have been identified:

1. a return to the use of bail for all cases following arrest;
2. removing the general presumption against bail and introducing offence-based criteria for when bail should be used;
3. removing the general presumption against bail and introducing specific risk-based criteria indicating when bail should be used;
4. removing the general presumption against bail but maintaining the requirement for bail to be necessary and proportionate.

We believe the bail rules should assist the police to make risk-based decisions, and to use their experience to consider the application of pre-charge bail on a case by case basis, rather than being required to apply bail for specific offences or in all cases. An offence specific approach would also ignore the vulnerability and needs of victims and witnesses

[1] Cases where the offences incur significant adverse impacts, whether physical, emotional or financial, upon individuals or the wider community.

for lower level offences. As such, the government believes a risk-based approach warrants further consideration.

Proposal

Proposal 1: The Government proposes legislating: (i) to end the presumption against pre-charge bail, instead requiring pre-charge bail to be used where it is necessary and proportionate and (ii) to add a requirement that a constable must have regard to the following factors when considering whether application of pre-charge bail is necessary and proportionate:

1. The severity of the actual, potential or intended impact of the offence;
2. The need to safeguard victims of crime and witnesses, taking into account their vulnerability;
3. The need to prevent further offending;
4. The need to manage risks of a suspect absconding; and
5. The need to manage risks to the public.

Questions

Q1. To what extent do you agree/disagree that the general presumption against pre-charge bail should be removed?

Strongly agree

Q2. To what extent do you agree/disagree that the application of pre-charge bail should have due regard to specific risk-factors?

Strongly agree

Q3. To what extent do you agree/disagree that the application of pre-charge bail should consider the following risk factors:

a. **The severity of the actual, potential or intended impact of the offence;**

` Strongly agree

b. **The need to safeguard victims and witnesses, taking into account their vulnerability;**

Strongly agree

c. The need to prevent further offending;

Strongly agree

d. The need to manage risks of a suspect absconding; or

Strongly agree

e. The need to manage risks to the public.

Strongly agree

Q4. Do you have any other comments? For example, are there any other risk-factors we should consider? Or any comments on the discounted approaches identified on page 7? *(250 words)*

1. *The South-Eastern Circuit ('SEC',) whilst agreeing that the presumption should be removed, would emphasise that the real problem arising from the RUI regime has been delay. 'RUI' has proven to have deleterious effects for the criminal justice system overall, principally owing to the delays it has either caused or enabled. The system needs overhaul so that charging decisions are taken more swiftly. All participants in the criminal justice process currently suffer owing to the stasis to which RUI contributes. Complainants, defendants, witnesses are often left waiting 'in limbo', which has various damaging effects - fading memory, anxiety, life on hold etc.*
2. *However, the SEC cannot emphasise enough that reform to RUI will only lead to proper and just outcomes if it is accompanied by other reforms further 'upstream', which the SEC deems imperative. Police resources, long depleted, need to be deployed to the investigation of crimes, so that rates of case resolution are improved. CPS resources must be similarly augmented. But the current state of the Court system is probably the single most important inhibiting factor in terms of seeing a real benefit from any reform of RUI. Prior to the COVID19 pandemic, there was an ever-increasing backlog of cases in the Crown Court (about 37000,) which is now rising. The main reason for the backlog was the severe restriction on court sitting days, which has left courtrooms empty and the judiciary under-utilised. Lockdown permitting, an urgent increase in sitting days is required, and all courts and court buildings must be fully utilised.*
3. *The SEC's view is that merely removing the presumption against pre-charge bail will not cure the underlying problem until the matters in (2) are also addressed*

Timescales for pre-charge bail

Issues

To address the issue of individuals being under investigation for long periods, sometimes with excessive bail conditions, the Policing and Crime Act 2017 introduced:

- An initial 28-day limit to the use of pre-charge bail authorised by an inspector; with subsequent extensions up to 3 months and beyond to be authorised by senior officers (superintendents or above) and magistrates, respectively; and

- A requirement for senior officers and magistrates to authorise extensions to bail only if there are reasonable grounds for suspecting the individual under investigation to be guilty. The senior officer must also have reasonable grounds for believing that: further time is needed to make a charging decision or further investigation is needed; the decision to charge is being made, or the investigation is being conducted, diligently and expeditiously; and the use of pre-charge bail is still necessary and proportionate in all the circumstances.

Policing stakeholders have told us that these changes have disincentivised the use of bail, especially in complex cases which require further investigation and can be difficult to progress and/or conclude in 28 days. Following discussions with stakeholders we consider it necessary to review the existing statutory framework to more accurately reflect investigatory timescales.

Home Office data[2] [3] from published statistical bulletins on crime outcomes for those offences where pre-charge bail might be more commonly applied, suggest cases do take longer than the 28-day limit, which corroborates the concerns raised by stakeholders. In both 2017/18 and 2018/19, 29% of all offence types took longer than 30 days to reach an outcome. For violence against the person offences, the proportion was higher at 36% in 2017/18 and 37% in 2018/19[4].

Bespoke analysis of the 2017/18 dataset (see graph) shows that 78% of violence against the person offences were dealt with within 60 days and a further 7% had an outcome

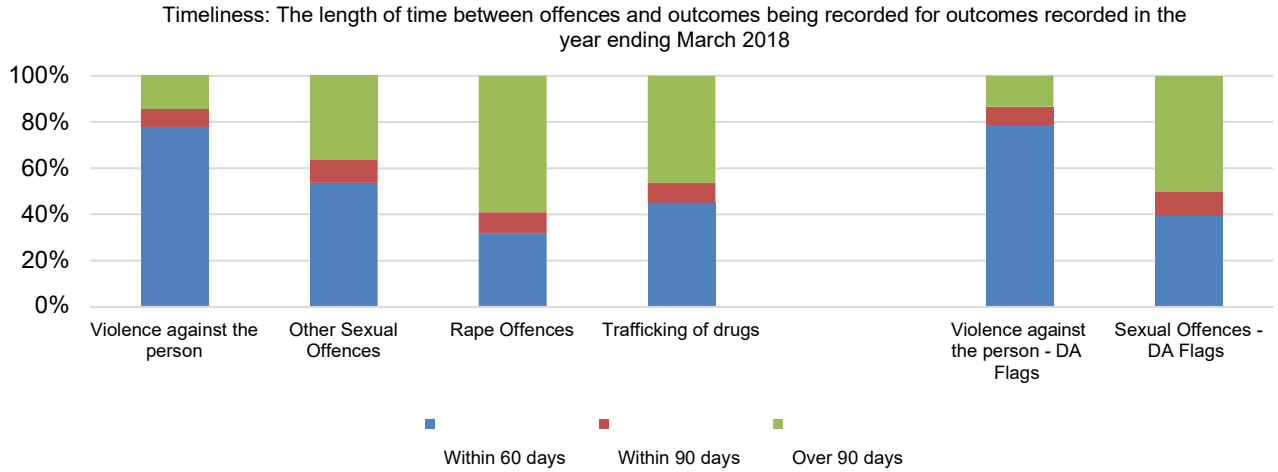
[2] Police data available from the Home Office Data Hub cover date of crime recording and date an outcome is recorded for that crime. The time between these two dates can be considered investigation time, though the data is not able to identify specifically those cases where pre-charge bail was applied.

[3] Crime outcomes in England and Wales 2017 to 2018: https://www.gov.uk/government/statistics/crime-outcomes-in-england-and-wales-2017-to-2018; Crime outcomes in England and Wales 2018 to 2019: https://www.gov.uk/government/statistics/crime-outcomes-in-england-and-wales-2018-to-2019

[4] These figures relate to the time between an offence being recorded and an outcome being assigned. There are no national data on the time between arrest and outcome. However, in most cases where an arrest takes place it will tend to occur relatively soon after an offence is recorded.

recorded within 90 days. Violence offences flagged as domestic abuse showed similar proportions.

Sexual offences had longer investigation times. For example, only 32% of rape offences concluded within 60 days, with a further 9% dealt with within 90 days. Around 59% of rape offences required more than 90 days for the investigation to be closed.



Proposal

Proposal 2: The Government proposes legislating to amend the statutory framework governing pre-charge bail timescales and authorisations and seeks views on three potential models.

We have developed three models that are intended to remove disincentives against use of pre-charge bail whilst supporting the timely progression of investigations.

All three models propose:

- restoring the initial bail authorisation to custody officers given both their independence from investigations and their experience in making risk-based decisions;
- introducing additional points at which the investigation including the use of pre-charge bail will be reviewed;
- maintaining an initial bail period - but increasing its length; and
- maintaining judicial oversight but changing the point at which judicial oversight of authorisations is introduced.

Statutory timescales and judicial oversight could be removed altogether but we believe both safeguards are important for ensuring that pre-charge bail is used appropriately, proportionately and also to support the management and progression of investigations.

The table below compares each model to each other and against the current regime.

	Current	Model A	Model B	Model C
Initial Bail period	To **28** days, **Inspector**	To **two** months, **Custody Officer**	To **three** months, **Custody Officer**	To **three** months, **Custody Officer**
First extension	To **three** months, **Superintendent**	To **four** months, **Inspector**	To **six** months, **Inspector**	To **six** months, **Inspector**
Second extension	Beyond **three** months, **Magistrate** (at three-month extension intervals)	To **six** months, **Superintendent**	To **nine** months, **Superintendent**	To **nine** months, **Superintendent**
Third extension	As above.	Beyond **six** months, **Magistrate** (at three-month extension intervals)	Beyond **nine** months, **Magistrate** (at three-month extension intervals)	To **12** months, **Superintendent**
Fourth extension	As above.	As above.	As above.	Beyond **12** months, **Magistrate** (at three-month extension intervals)

The table below visualises the differences between these models, to aid comparison.

Months	Current	Model A	Model B	Model C
1	Initial bail period **Inspector**	Initial bail period **Custody Officer**	Initial bail period **Custody Officer**	Initial bail period **Custody Officer**
2	First extension **Superintendent**			
3		First extension **Inspector**		
4	Second extension **Magistrate**		First extension **Inspector**	First extension **Inspector**
5		Second extension **Superintendent**		
6				
7	Third extension **Magistrate**	Third extension **Magistrate**	Second extension **Superintendent**	Second extension **Superintendent**
8				
9				
10	Fourth extension **Magistrate**	Fourth extension **Magistrate**	Third extension **Magistrate**	Third extension **Superintendent**
11				
12				
13	Fourth extension **Magistrate**	Fifth extension **Magistrate**	Fourth extension **Magistrate**	Fourth extension **Magistrate**
14				
15				

To understand the potential impact of the proposed models, we have compared each against the data set out above on the length of investigations for different offence types.

Model A would require frequent authorisations by magistrates for complex cases such as sexual offences, as more than 6 months will often be required for investigation to conclude. Model A would however capture most of the violence and drug offences and low-level offences within the initial or first bail extension period.

Model B would require fewer authorisations by magistrates in comparison to model A as the 9-month Superintendent limit could expect to capture at least 70% of sexual offences with magistrate approval only required in 30% of cases.

Model C would require the fewest magistrate authorisations of the three models. However, magistrate authorisations would still be required in 36% of all rape offences resulting in a charge, compared to the 47% in model B. This suggests the addition of a Superintendent bail extension up to 12-months would not significantly reduce the number of complex cases that require magistrate oversight.

Models B and C would both capture most crimes without requiring judicial oversight. However, some serious and complex offences such as rape would still require magistrate authorisations of extensions to pre-charge bail in a large proportion of investigations in both models.

Questions

Q5: Please rank the options below in order of preference (1st, 2nd, 3rd and 4th).

Current model	4
Model A	1
Model B	2
Model C	3

Q6. Do you have any other comments? For example, do you have a different proposal or are there circumstances in which the proposed timescales would not be appropriate? *(250 words)*

The SEC reiterates that the real problem under the current regime has been delay, which can only in part be blamed upon 'RUI'. Delay has proven to have deleterious effects for the criminal justice system overall. The underlying reason for delay has been lack of resource, as stated above at Q4. One of the principal goals of reforming the current regime should be to eradicate unnecessary delay to any criminal investigation.
For that reason the SEC favours Model A of the available options but would add that, if anything, there should be more constraints and checks/balances built into the model, to generate both pressure and incentive to pursue and resolve investigations effectively and expeditiously.
Model A could therefore be improved by providing for relatively early judicial oversight, and more strict timetabling. For examples of what the SEC recommends, we would propose that the initial bail period remain 28 days, albeit authorised by the Custody Officer; and that judicial oversight commence at 3 (not 6) months, with extensions at 1 or 2 month intervals. The SEC could go further into the details but relies on these two substantive examples to illustrate what the SEC considers the best approach to reach the desired outcome.

Non-bail investigations

Issues

Prior to 2017, all individuals released after arrest while investigations continued were released on pre-charge bail. Reforms enabled individuals under investigation to be released without bail instead, known as “released under investigation” or RUI.

Not all individuals on RUI have been arrested, it has become increasingly common for individuals to be interviewed voluntarily. This is known as Voluntary Attendance (VA). We therefore use the terminology “non-bail” to refer to investigations when pre-charge bail is not used, including cases where the individual may not have been arrested but is still under investigation.

As stated previously, we believe the 2017 reforms disincentivised the use of pre-charge bail which has led to the fall in the use of bail and the subsequent rise in the use of RUI and other non-bail investigations. RUI and other non-bail investigations are not subject to the same statutory framework as pre-charge bail. This means there are no timescales or oversight set out in legislation.

Stakeholders have raised concerns that the increased use of RUI has had two major impacts:

a. **Longer investigations**

   The police do not have fixed dates to update individuals, victims and witnesses on the progression of their investigations and there are no legal requirements governing timescales. Stakeholders are concerned that this may be disincentivising the timely progression of investigations. However, there are other complex drivers that are also contributing to longer investigations such as the capacity of non-police agencies and increasing amounts of digital evidence. The impact of RUI on investigatory timescales is being explored by HMICFRS as part of their thematic inspection on the issue and their findings will inform our final proposals.

   Longer investigations may increase the risk of individuals offending/re-offending while under investigation and may increase the likelihood of victims and witnesses disengaging or withdrawing as more time passes from the date of the original offence. In addition, individuals under investigation may be left without a decision on their case for a long time which can cause uncertainty and stress, especially in cases when the person under investigation is innocent and there is ultimately no further action.

b. Delays to courts

As individuals on RUI are not required to return to a police station for a charging decision, they are instead charged via post known as a "postal charge and requisition" (PCR). As stated above, we are aware of concerns that pre-charge bail is not always applied to individuals where it would be necessary and proportionate to effectively manage risk of them absconding. As such there may be individuals on RUI who are at risk of absconding and who are, therefore, less likely to respond to their PCR.

Individuals who fail to respond to their PCR are therefore failing to turn up to court for their hearing, known as 'failure to attend' (FTA). FTA is an offence for which a magistrate can issue a warrant so the police may arrest the individual and bring them to court. An increase in the rate of FTA creates delays in the progression of cases to court, increased costs to court, increased costs to the police and decreased likelihood of prosecution.

The National Police Chiefs' Council (NPCC) have sought to address the lack of statutory oversight of RUI by issuing guidance that recommends supervisory reviews of RUI cases every 30 days, regular updates to victims and individuals, and the setting of target investigation end dates. It is too soon to determine whether the guidance has had an impact.

The statutory framework governing the use of pre-charge bail puts in place clear timescales and requirements for supervision. However, there is no equivalent framework for RUI and VA cases.

Proposal

Proposal 3: The government proposes a new framework for the supervision of RUI and VA cases.

We propose that the framework for RUI and VA cases would mirror the timescales already in place for pre-charge bail and any changes that may be made to those timescales as a result of this review. The proposed framework would not put a limit on the length of police investigations, and reviews would be carried out by the police and not be subject to judicial oversight. Individuals on RUI and VA would not be subject to conditions.

This framework would be set out in codes of practice. This approach ensures compliance whilst allowing the regime to be amended should the length or nature of investigations change in the future.

Questions

Q7. To what extent do you agree/ disagree that there should be timescales in codes of practice around the supervision of 'released under investigation' and voluntary attendance cases?

Strongly agree

Q8. Do you have any other comments? For example, if you disagree, do you have alternative proposals for the supervision of 'released under investigation' and voluntary attendance cases? *(250 words)*

The SEC reiterates that the real problem arising from the RUI regime has been delay. The system needs overhaul so that charging decisions are taken more swiftly. All participants in the criminal justice process currently suffer owing to the stasis to which RUI contributes. One of the principal goals of reforming the current regime should be to eradicate unnecessary delay to any case, and to resolve cases in a timely manner. Any proposals should therefore generate both pressure and incentive to pursue and resolve investigations effectively and expeditiously. The SEC therefore supports all proposals that institute timescales and reviews that lead to that outcome. But the SEC recognises that any investigation on a no-bail/no charge basis cannot have a time limit; and that in those circumstances there is no place for external or judicial supervision or intervention.
The SEC reiterates that reform to RUI will only lead to proper and just outcomes if it is accompanied by other reforms further 'upstream'. Police resources and CPS resources must be augmented.
The current state of the Court system is probably the single most important inhibiting factor in terms of seeing a real benefit from any reform of RUI. Even prior to the COVID19 pandemic, there was an ever-increasing backlog of cases, caused in the main by the severe restriction on court sitting days which left courtrooms empty and the judiciary under-utilised. The SEC notes that the Consultation is concerned by 'issue (b): delays to courts' caused by postal requisition and failures to attend, when the by far greatest contributor to delay in hearing cases has been the restriction on sitting days and under-utilised courts.

Effectiveness of bail conditions

Issue

Individuals released from police custody on pre-charge bail may be subject to conditions, for example, prohibiting them from contacting the victim. We are aware of concerns around the efficacy of these conditions.

There are two ways pre-charge bail can be infringed:

- **Failing to answer** pre-charge bail; and
- **Breaching** pre-charge bail conditions.

Failure to answer pre-charge police bail (i.e. to return to the police station) is a criminal offence, whereas breaching pre-charge bail conditions is not.

When an individual on pre-charge bail fails to answer, they can be arrested on suspicion of committing a criminal offence under section 6 of the Bail Act 1976, which carries a maximum three-month sentence of imprisonment or a fine on conviction.

If an individual breaches their conditions of pre-charge bail, they can be arrested and taken to the police station. A breach of pre-charge bail conditions is not a criminal offence, although the breach action may be a separate offence. For example, contacting a witness may also be an offence under the Protection from Harassment Act 1997 where someone pursues a course of action that amounts to harassment of another. If there is sufficient evidence at the time of the breach, officers may charge the individual for the original offence for which they are under investigation, or any subsequent offence, and keep them in custody on remand, or re-release them on bail. Someone's behaviour while on bail may be relevant evidence of the original offence, or relevant for the purposes of sentencing on conviction. However, more commonly the individual is brought into custody only to be re-released on pre-charge bail with the same conditions as previously.

Stakeholders have raised concerns with the Home Office that the lack of criminal penalty associated with breaching bail conditions may have negative consequences. For example, as breach of conditions carries no penalty individuals may be more likely to breach their conditions and the police may be less likely to act upon them. Breaches of pre-charge bail conditions may negatively impact on the public's trust in the criminal justice system especially when the breaches do not result in police action. In addition, breaches of conditions can also often mean further offences have been committed.

To understand these issues in more detail we are seeking views on the effectiveness of bail conditions.

Questions

Q9. To what extent do you agree/disagree that pre-charge bail conditions could be made more effective:

a. **to prevent someone interfering with victims and witnesses?**

Neither agree or disagree

b. **to prevent someone committing an offence while on bail?**

Neither agree or disagree

c. **to prevent someone failing to surrender to custody?**

Neither agree or disagree

Q10. What could be done to make bail conditions more effective? *(250 words)*

No comment beyond previous observations as to the need for time constraints, check and balances and judicial oversight at an early stage.

Other issues

Q11. Are there any other issues or proposals you would like to raise with us in relation to the use of pre-charge bail or released under investigation? *(250 words)*

Only to repeat our response to Q4; SEC cannot emphasise enough that reform to RUI will only lead to proper and just outcomes if it is accompanied by other reforms further 'upstream', which the SEC deems imperative. Police resources, long depleted, need to be deployed to the investigation of crimes, so that rates of case resolution are improved. CPS resources must be similarly augmented. But the current state of the Court system is probably the single most important inhibiting factor in terms of seeing a real benefit from any reform of RUI. Prior to the COVID19 pandemic, there was an ever-increasing backlog of cases in the Crown Court (about 37000,) which is now rising. The main reason for the backlog was the severe restriction on court sitting days, which has left courtrooms empty and the judiciary under-utilised. Lockdown permitting, an urgent increase in sitting days is required, and all courts and court buildings fully utilised.

Your experience

We would like to hear from you if have been a victim of crime, witness or under investigation. Please remove any personally identifiable information from your answers such as names, locations and dates.

Q12. How have you been personally affected by 'pre-charge bail' or 'released under investigation'?

N/A

Q13. If you have been affected, how do you think the system could be improved?

N/A

Thank you for participating in this consultation.

Impact of Proposals

Equalities Statement

Section 149 of the Equality Act 2010 places a duty on Ministers and Departments, when exercising their functions, to have 'due regard' to the need to eliminate conduct which is unlawful under the 2010 Act, advance equality of opportunity between different groups and foster good relationships between different groups. We will undertake a full assessment of the impact of our final proposals following this consultation.

Eliminating unlawful discrimination

In general, young people (16-25 years old), people from black and minority ethnic (BME) backgrounds and those with mental health problems and learning disabilities are more likely to be involved with the criminal justice system and are therefore more likely to be placed on pre-charge bail. We do not consider that any other groups with protected characteristics are over-represented among those who are placed on pre-charge bail or RUI by the police.

Initial analysis suggests racial disparities in those groups arrested, with black individuals 3.5 times more likely to be arrested than those from the white group. As bail can only be applied post-arrest, our changes may also result in similar disparities in the use of pre-charge bail. Similarly, we would expect men and individuals over 21 to be over-represented, with 86% of those arrested male, and 82% of all arrestees over 21. Further analysis is necessary.

However, there may also be benefits to BME communities, men and young people if changes lead to better or quicker investigations as data suggests they are more likely to be subject to or experience crime. The public generally could benefit from these reforms if they improve the efficiency of investigations and therefore the public's confidence in the police.

Advancing equality of opportunity between different groups

We do not consider that these proposals would have any particular impact on the achievement of this objective.

Fostering good relationships between different groups

We do not consider that these proposals would have any particular impact on the achievement of this objective

About you

Please use this section to tell us about yourself. Please note you are completing this section **voluntarily**; your details will be held securely according to the data protection legislation. More information on what data we are collecting, why and how it will be look after can be found here: www.gov.uk/government/consultations/police-powers-pre-charge-bail.

We have not asked you for any personal data, however your opinions may constitute personal data and by responding electronically we will have your IP address and/or your email address. These personal data will be deleted after the response to the consultation have been published.

What region are you in? 1. North East 2. North West 3. Yorkshire/Humberside 4. East Midlands 5. West Midlands 6. Wales 7. South East 8. South West 9. Greater London 10. Scotland 11. Northern Ireland 12. Other (please specify)	South East
If relevant, which if any, best describes you/your organisation? 1. Victim of crime/survivor 2. Witness 3. Individual currently or previously under investigation 4. Member of the public 5. Police/law enforcement 6. Local authority 7. Charity / voluntary sector 8. Civil society group 9. Legal practitioner 10. Academic / thinktank 11. Other (please state)	9, 11 The South Eastern Circuit ("SEC") represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners
Name of company/organisation (if applicable)	The South Eastern Circuit