

## **Use of Pre-Charge Bail: Improving standards for the Police Forces of England and Wales**

### **Public Consultation**

#### **Response of the Centre for Crime and Justice Studies (CCJS)**

The Centre welcomes the opportunity to respond to the consultation on the use of pre-charge bail. The power of the police to release a person, who has been arrested and detained, on bail without having charged them with an offence clearly has significant advantages in relation to police investigations. Its use may also benefit suspects by reducing the period for which they are kept in police detention. However, whilst a balance does have to be struck between the investigative needs of the police and the liberty of the citizen, the current law is heavily weighted in favour of the police, with few procedural protections for those who are subjected to the power. The result is that thousands of people are placed on pre-charge bail each year, many for lengthy periods of time, and many subject to conditions, without the ability to challenge police decision-making.

The intention of the College of Policing to establish Bail Principles is useful. In particular, given the absence of reliable information about the use of pre-charge bail, we strongly endorse the proposals in the section on Bail Data. However, the impact of Bail Principles can only be limited, since they rely on the voluntary co-operation of police forces and individual police officers to give effect to them but, more importantly, they cannot effectively deal with most of the fundamental problems regarding pre-charge bail: lack of effective participation by suspects in bail decision-making; lack of accountability of the police in making bail decisions; and the absence of any effective mechanisms for challenging bail decisions. In our view, these can only adequately be remedied by legislation and revision of the Police and Criminal Evidence Act (PACE) 1984 Codes of Practice.

For these reasons, we do not intend to contribute to the consultation process by answering the four questions posed. Rather, our response consists of some general comments on the coverage of the Principles, a brief account of our concerns about pre-charge bail, and an explanation of why a set of principles is not a sufficient response to the problems of pre-charge bail.

#### **General comments**

The Background section, in referring only to sections 37(2) and section 37(7)(a)-(c) of the PACE 1984, does not fully set out the extensive powers the police have to release a person on bail without having charged them with a criminal offence. Powers also include those under section 34(4) (grounds for detention have ceased to apply), section 40(8) (officer conducting a review concludes that detention can no longer be justified), section 41(7) (expiry of 24 hour time limit), and under sections 42, 43 and 44 (expiry of further detention time limits).

However, conditions can only be attached to bail where it is granted under section 37, and given that this is the section referred to in the consultation it is surprising that the proposed Bail Principles make no mention of principles that should be applied to decisions to impose conditions. This is especially so given that it is acknowledged on page 7 of the consultation document that conditions 'can substantially restrict the freedom of suspects' and that this can be 'particularly distressing for individuals who have been subject to lengthy periods of conditional bail...'. The relevant legislation (PACE 1984, s47(1A) and the Bail Act 1976, ss3(6) and 3A(5)) requires that conditions must appear necessary for certain specified purposes, but does not refer to any proportionality requirement. PACE Code of Practice C does not include any relevant provisions. We would have expected that any attempt to improve police practice regarding pre-charge bail would also have encompassed decision-

making regarding bail conditions, and in doing so, make reference to relevant factors such as the relationships between conditions and length of bail.

### **The problems of pre-charge bail**

The problems associated with pre-charge bail have been well-rehearsed, so we will deal with them briefly here.

(a) A police officer considering pre-charge bail, with or without conditions, is under no obligation to receive representations from the suspect and/or his or her solicitor, nor under any obligation to take into account any representations received. This may be contrasted with the obligation of a review officer, under Code C, paras 15.3 and 15.5, to give a suspect and his or her solicitor the opportunity to make representations about continued detention, and to consider those representations. It may also be contrasted with the situation where bail is being considered by a court, where an accused or their lawyer would have the right to make representations and the court would be obliged to take them into account.

(b) The discretion to impose conditions is very broad. Whilst the relevant officer must regard conditions as being necessary for the defined purposes, there is no obligation on the officer to have regard, for example, to the seriousness of the suspected offence, and no proportionality requirement.

(c) There is no time limit on pre-charge bail. This may be contrasted with post-charge bail in respect of which, whilst there is no explicit time limit, the period on bail is limited by the PACE 1984, s47(3A), so that the period that the person is on police bail will normally be no longer than one or two days.

(d) There is no limit on the number of times that a person can be re-bailed.

(e) Whilst a suspect, as noted above, may apply to a custody officer or to a magistrates' court to rescind or vary conditions imposed, they have no effective right to challenge the imposition of bail itself (as distinct from unconditional release). The courts have made it clear that they will only intervene in the decision regarding pre-charge bail in exceptional circumstances (see *R (C) v Chief Constable of A* [2006] EWHC 2352 (Admin)). We are aware of no reported case where a court has, in fact, intervened.

### **Why principles are not sufficient**

Whilst an attempt to articulate principles is to be applauded, it is evident that they cannot effectively deal with the problems identified in respect of pre-charge bail. For example, whilst Principle 3 states that the initial bail period should be no longer than 28 days, a suspect has no right of challenge if this is not complied with. Similarly, whilst Principle 6 states that a decision to re-bail a suspect (in fact the term 'offender' is used which, to say the least, is an unfortunate term to use in this context, and rather undermines the suggestion that voluntary principles are an adequate response to the problems identified in the consultation paper) should be 'escalated to a supervising officer for review', there is no recourse for a suspect if a decision is made to re-bail them, and they have no right to make any representations to that officer. In any event, many cases involving multiple re-bails are likely to be led by a senior officer, so it is difficult to see how 'escalating' the decision will have any effect.

The problem identified in (a) above requires an amendment to Code of Practice C, introducing a requirement on an officer making a bail decision to solicit representations from the suspect or their solicitor, to take them into account, and to record the representations made, the decision, and the reasons for the decision.

With regard to the problem identified in (b) above, we note that the Northern Ireland Law Commission (*Bail in Criminal Proceedings*, NILC 14 (2012), Recommendation 4) recommended that the power to attach conditions to pre-charge bail (which is almost

identical to the power in England and Wales) be removed. We agree. This, of course, will require legislation.

For the reasons given above, the problems identified in (c) and (d) cannot be adequately dealt with by the mechanisms suggested in the Principles since, as noted in (e), they cannot be effectively challenged. Dealing with the problems identified will require legislation. We note that Principle 3 provides that any period in excess of 28 days 'should be justified and recorded in the custody record'. We agree that it should be justified, but we believe that the justification should be made to a magistrates' court. We note that Principle 3 does not suggest any procedure to be followed where bail is imposed in excess of 28 days, nor any principles by which the decision should be justified. The fact that the decision is recorded in the custody record is likely to be of no consequence since custody records are not routinely subjected to internal scrutiny, and even though a suspect or his/her solicitor has a right to inspect the record, since they have no effective right of challenge, the information will be of little or no assistance to them.

An alternate to an automatic court hearing at the 28 day stage is for a suspect to have the right to ask a court to review a bail decision. The Northern Ireland Law Commission recommended that in order to secure adequate oversight of pre-charge bail decisions, a suspect placed on pre-charge bail should have the right to apply to a custody officer to review the decision, with appeal to a magistrates' court thereafter.

The case for a court to have jurisdiction in respect of pre-charge bail is bolstered by the observation in the report by the Judiciary of England and Wales (*Magistrates' Court Disclosure Review*, May 2014, p21) that '[t]he effect of bailing a defendant for a lengthy time is for the investigation to lose impetus'. This is a reference to bail from a court, but is equally relevant to pre-charge bail. A requirement that the police be required to justify to a court why continued bail is necessary is likely to focus the mind of the investigating officer on relevant questions, including what investigative actions have been taken, what investigative actions are planned, and what facts exist to justify a belief that the suspect will fail to attend a police station if released unconditionally rather than being placed on bail. Such a hearing is also likely to encourage officers to ensure that they are pursuing the investigation with all due expedition.