

Released Under Investigation: High Time to Bail Out

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Abstract

Prior to the Policing and Crime Act 2017, the provision of bail was set out by the Bail Act and refined by the Police and Criminal Evidence Act 1984 (PACE). Bail provisions changed under the Policing and Crime Act 2017, which created a presumption against bail. The legislation permitted police to *release suspects under investigation* (RUI) which was permitted to last as long as the police required. This article contends that neither the police, suspects or victims of crime have benefitted from the changes and a new balance needs to be struck in order to achieve fair and just outcomes, in keeping with the doctrines outlined in Police, Crime, Sentencing and Courts Bill 2021.

Keywords

RUI, ECHR, bail, suspects' rights, presumption of innocence

Introduction

Bail is a set of restrictions on the rights of a suspect prior to a court hearing or a return to a police station. Bail is necessary to balance the needs and rights of the state to ensure a defendant or suspect attends a court or a police station, and, in the interim, does not commit any further offences, or acts which may alter the natural course of justice; with the needs and rights of a suspect not to be punished without it having been established that they have broken the law (*nulla poena sine lege*) and a lawful sentence imposed.

There are three types of bail (Crown Prosecution Service, 2019):¹

- Police bail: the subject is released without being charged but must return to the police station at a stated time;

1. Crown Prosecution Service (2019) 'Bail' [Online] <<https://www.cps.gov.uk/legal-guidance/bail>> accessed 16 April 2020.

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- Police to court bail: after being charged, a suspect is given bail but must attend their first court hearing at the date and court stated;
- Court bail: after a court hearing, a suspect is granted bail pending further investigation or while the case continues.

This article is focussed on how pre-charge bail is working and what are the ramifications for proposals contained within the Police, Crime, Sentencing and Courts Bill 2021.

Hitherto, a suspect who had been arrested but is yet to be charged can be either released on bail or released without bail as the investigation was ongoing. Being released on bail means the suspect is allowed to be free, subject to their bail conditions. These conditions might be necessary for myriad of reasons, namely: to prevent a suspect from failing to surrender to custody, preventing further offending or to prevent someone from interfering with either witnesses or generally obstructing the course of justice. Furthermore, conditions can be imposed for the suspects own safety and each of these restrictions are subject to strict time-limits.

However, this regime changed when Policing and Crime Act 2017 legislation came into force. The legislation created a 'presumption against bail' unless it was both necessary and proportionate and provided timescales and processes for the initial granting of bail, as well as the introduction of judicial oversight should need to be extended over three months. The legislation permitted police to 'release suspects under investigation' and thus circumventing the statutory time limits laid out in legislation. RUI would be the preferred method of policing unless it was both necessary and proportionate to use bail. This decision of proportionality and necessity needs to be authorised by an inspector (s.50(1)(A) Police and Criminal Evidence Act 1984). As such, there is now a presumption that a person will be released without bail unless the pre-conditions of bail are met. This is in response to calls that the police were overusing bail without charge (BWC). Estimates indicate that some 400,000 people are placed on BWC each year and Hucklesby (as cited by Cape², 2019) suggests that half of those people are never charged with a criminal offence. It is further estimated that between 6–8% of those cases are on bail for six months or more. Some, like Paul Gambaccini, were on bail for 11 months and he believed he was being used as 'human fly paper' to allow further people to come forward and make historical claims of sexual abuse. In order to combat this problem, the new legislation only allows for BWC for an initial 28 days (s.47ZB(1)) and this can only be extended if various conditions under s.47ZBC are met.

Early research from the College of Policing showed March 2017 bail was authorised in 26% of cases. However, from April to June 2017, this dropped to 4%. Nevertheless, the number of people who were 'released under investigation' stood at 25%,³ and therefore almost mirrors the amount of people who were BWC. Releasing a suspect under investigation has an obvious attraction. It is likely that that police investigations will take much longer than the 28 days allowed under the bail provisions, especially if the investigation involves the forensic examination of electronic devices. However, are the police simply playing the system and releasing people under investigation, rather than embracing the new rules which sought to lessen the amount of people on bail? Home Secretary Amber Rudd suggested that the old regime of bailing people for 'months or years' simply 'cannot be right'⁴ Yet, the initial statistics from the College of Policing suggest that very little has changed. This article will examine the use

2. E. Cape, Police bail without charge – leaving suspects in limbo <<https://www.crimeandjustice.org.uk/resources/police-bail-without-charge-leaving-suspects-limbo>>

3. S. Furlong, Victoria Richardson and Andy Feist, Home Office, Pre-charge Bail, An Overview of the Evidence <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/952065/PCB_evidence_review_FINAL.pdf>

4. T. Peck. *Police bail for suspects capped at 28 days* The Independent [Online] <<http://www.independent.co.uk/news/uk/politics/28-day-police-bail-limit-suspects-charged-new-police-rule-comes-into-force-today-a7663196.html>>.

of RUI as well the potential way forward in light of the Policing and Crime Bill highlight the ramifications for suspects and complainants in the criminal justice system.

Prior to the Policing and Crime Act 2017,⁵ the provision of bail was set out by the Bail Act⁶ and refined by the Police and Criminal Evidence Act 1984 (PACE).⁷ Under these Acts, suspects could be kept on bail, effectively in perpetuity since there was no restriction on the length of time for which a suspect could be kept on bail. Partly due to the Human Rights Act⁸ which enshrined the European Convention on Human Rights⁹ and partly due to an increasing groundswell of opinion, reform was carried out to limit the amount of time which suspects could be restricted by bail to 28 days (with certain exceptions) as set out on the Policing and Crime Act 2017.¹⁰ As a result of the PCA, if an investigation is forecast to take longer than 28 days, then the suspect will be *Released Under Investigation* (RUI), a doctrine under which no restrictions could be put in place by the police, bar the legislative ones which apply to all subjects. These are: with respect to intimidation of witnesses, jurors and others (Criminal Justice & Public Order Act 1994),¹¹ with respect to harassment (Protection from Harassment Act 1997)¹² and the common law approach with respect to perverting the course of justice. It must be made clear at this point, RUI is an alternative to bail; if the police need more than 28 days in which to conclude an investigation then the subject must be RUI'd and cannot be bailed.

It has become apparent that some unintended consequences may have emerged from this reform. RUI requires no review dates and is effectively open-ended. This was not the case with bail, which had a defined end-date. There was of course the provision for the police to rebail continually, which meant that cases could continue long beyond what was anticipated but that at least it was finite and had some oversight, checks and balances. This means that suspects have no certainty and can feel left in a legal wilderness, unable to plan their lives or make any life decisions (for example, holidays, job-changes, house moves to name but three). Suspects are told that 'once the investigation is complete, you will be notified of the outcome (by a postal requisition from the Crown Prosecution Service (CPS) and whether you are going to be charged, summonsed to court or no further action taken against you. Until such time, the suspect continues to be Under Investigation'. There is no indication as to when this might happen. Under bail, there are set review periods, which gives some type of certainty to the suspect.

The counter side to this development is the fact that no restrictions can be put in place regarding a suspect's whereabouts or what they can and cannot do, means that the complainants can often feel vulnerable and unprotected by the state. The new perceived lack of urgency on behalf of the police, now unfettered by the (albeit elastic) limits set by bail dates mean that there is uncertainty for the complainants, who have no timeline whatsoever for the conclusion of their criminal complaint. This issue was thrust into the public consciousness in September 2018 when Alan Martin, was arrested on the 8th September after his wife accused him both rape and assault. After his arrest, Martin was RUI'd but murdered his wife some 11 days later before committing suicide. Martin had a history of domestic abuse and an FOI request by BBC's Newsnight claimed there were 93,098 suspects RUI'd for violent crimes and sexual offences (BBC News 23rd August 2019).¹³ As such, there has been a great deal of scrutiny on the RUI regime, with the Mayor of London stating that that:

5. Policing and Crime Act 2017.

6. Bail Act 1976.

7. Police and Criminal Evidence Act 1984.

8. Arts. 6 & 7 Human Rights Act 1998, Schedule 1.

9. European Court of Human Rights (1950) '*European Convention on Human Rights*' [online] <https://www.echr.coe.int/Documents/Convention_ENG.pdf> accessed 17 April 2019.

10. Policing and Crime Act 2017.

11. S.51 Criminal Justice & Public Order Act 1994.

12. S.2 Protection from Harassment Act 1997.

13. BBC News 23rd August 2019, [Online] <<https://www.bbc.co.uk/news/uk-england-tyne-49446943>>

I am a strong proponent for a change to the RUI system and I have been lobbying for a change to the legislation that brought RUI into effect. This lobbying has been significantly supported by my Victims' Commissioner and her publication of the London Rape Review, which added to the evidence base around the posed to domestic violence complainants if their alleged attacker was RUI'd. The Review specifically called on the Government to make changes to RUIs by amending legislation and changing the length of time suspects can be release on pre-charge bail, in order to more effectively protect victims.¹⁴

It is clear the demand for a regime change is abundant, this article will go some way to highlight what those changes might mean.

The History of Bail Provision in England

Prior to the instigation of untried prisoners being conditionally released, one of the earliest references to bail was the authority of medieval sheriffs having the power to release or detail the accused at their whim. The Statute of Westminster¹⁵ laid out which crimes were and which were not bailable, and set the first structure and guidance for the sheriffs.

The Petition of Right¹⁶ includes an early reference by Parliament to bail, which resulted from the filing of *habeas corpus* by five noblemen imprisoned by James I for refusing to offer him fealty. Parliament opined that *Magna Carta* had been flouted by the King acting as such.

The Habeas Corpus Act¹⁷ states:

A Magistrate shall discharge prisoners from their Imprisonment taking their Recognizance, with one or more Surety or Sureties, in any Sum according to the Magistrate's discretion, unless it shall appear that the Party is committed for such Matter or offences for which by law the Prisoner is not bailable.

Subsequently the English Bill of Rights¹⁸ states:

Excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects. Excessive bail ought not to be required.

The authority for the police to release a person whilst placing condition upon them before charging them with a criminal offence goes back to the Criminal Justice Act 1925¹⁹. Not without retrospective irony, at the time it was lauded as a 'safeguard of liberty and freedom, allowing the police to release a suspect pending further enquiries without the stigma of a court appearance.'²⁰ A more modern rendition of the provisions for bail is given by the Bail Act 1976²¹ which gave detail to the circumstances under which bail could be denied (and therefore breach the doctrine of *nulla poena sine lege*), but the underlying doctrine was still that bail should be offered unless there was a specific valid reason why it should not be.²² Under the Bail Act²³, the main reasons for bail refusal rest on the notion that the defendant is accused of an imprisonable offence and there are substantial grounds for believing that the defendant would either abscond, commit further offences while on bail or interfere with witnesses.

14. Mayor of London, 2019 <<https://www.london.gov.uk/questions/2019/20709>>

15. The Statute of Westminster 1275.

16. Petition of Right 1628.

17. Habeas Corpus Act 1679.

18. The English Bill of Rights 1689.

19. Criminal Justice Act 1925.

20. E. Cape, 'Police Bail Without Charge: The Human Rights Implications' (2010) 69(3) Cambridge Law Journal 529–560.

21. Bail Act 1976.

22. S. Dell, 'The Bail Act 1976' (1977) 17(2), The British Journal of Criminology 185–188.

23. The Bail Act, 1976 Schedule 1.

The Bail Act was the legislation governing the provision of bail for 41 years; but during that time it became apparent that the doctrine of *nulla poena sine lege* was being breached, since police were routinely extending the bail without any oversight, subjects were finding themselves on bail with the concomitant restrictions on their freedom for periods in excess of a year.²⁴ It has been suggested that bail was being misused, and sometimes this may have been less about being a case of Parkinson's Law (work expands so as to fill the time available for its completion)²⁵ and more about being a case of the police using suspects as bait-goats to urge other complainants to come forward,²⁶ (we should also note in fairness, a modified form of Hanlon's Razor: 'let us not attribute to malice and cruelty what may be referred to less criminal motives'). The Police and Criminal Evidence Act 1984²⁷ and the bail conditions contained within the Act allowed conditions to be imposed the reported abuse of which caused the coming into force of the 2017 Policing and Crime Act. Cape²⁸ describes the situation thus:

there was no limit on the period of time for which a person could be placed on bail, no limit on the number of times the person granted bail without charge could be re-bailed and no provision for judicial oversight (other than by way of judicial review).

The Policing and Crime Act²⁹ included an amendment to this provision which allowed bail of a single period of up to 28 days, with extensions only in exceptional circumstances. The alternative to bail, RUI, has no time limits or conditions. This aimed to give suspects more rights in terms of disallowing the police to restrict their freedoms for more than 28 days, but in many respects has had the opposite effect, and has had a negative impact on both suspect's rights and complainants' rights. Now, the police can take as long as they wish to investigate a suspect who will often feel left in a legal limbo with no updates on their case for an unlimited time.

Police Bail: Bail by Police After Arrest but Prior to the Subject Being Charged

Section 47 PACE 1984³⁰ affords the right for a police officer of the rank of inspector or above to release a subject on bail without them being charged. This is in accordance with the Bail Act 1976,³¹ Crucially, for the purposes of this work, post the Policing and Crime Act 2017, police bail can now last no more than 28 days for most offences or three months in the case of serious fraud offences. Prior to the Policing and Crime Act 2017³² police could re-bail the subject, effectively in perpetuity, the concomitant restrictions on their liberty for a long period of time amounting to *nulla poena sine lege* (no penalty without law). The doctrine of *nulla poena sine lege* is enshrined in common law, but also the European Convention on

24. O. Bowcott, (2019) 'Suspects Left in Legal Limbo by Delays to Inquiries, Say Solicitors'. *The Guardian*. 10th June 2019 [Online] <<https://www.theguardian.com/law/2019/jun/10/suspects-left-in-legal-limbo-by-delays-to-inquiries-say-solicitors>> accessed 17 April 2019.

25. T. Wen, (2019) 'A British historian famously wrote that work expands to fill available time – but what was he actually saying about inefficiency?' *BBC Worklife* [Online] <<https://www.bbc.com/worklife/article/20191107-the-law-that-explains-why-you-cant-get-anything-done>> accessed 17 April 2019.

26. J. Travis, (2015) 'Paul Gambaccini: Police Used Me as 'Flypaper' for Almost a Year'. *The Guardian*. 3rd March 2015 [Online] <<https://www.theguardian.com/media/2015/mar/03/paul-gambaccini-police-flypaper-for-almost-a-year-abuse-mps-bail-limit>> accessed 16 April 2020.

27. Police and Criminal Evidence Act 1984

28. E. Cape, 'Police Bail Without Charge: The Human Rights Implications', (2010) 69(3) *Cambridge Law Journal* 529–560.

29. The Policing and Crime Act 2017.

30. Police and Criminal Evidence Act 1984.

31. Bail Act 1976 ss 3, 3A, 5 & 5a.

32. Policing and Crime Act 2017.

Human Rights (ECHR), articles 6³³ and 7(2)³⁴ which require that no one can be punished without law and a fair trial. The PCA included provision to address this by restricting police bail to one period of no more than 28 days (Policing and Crime Act 2017, s.62)³⁵ subject to certain exceptions. The 28 days can be extended for a further three months if authorised by a police officer of Superintendent rank or above and periods above this can only be authorised by a magistrate's warrant.³⁶ If a case is deemed to be 'exceptionally complex' such as those involving the Financial Conduct Authority (FCA) or Serious Fraud Office (SFO) an 'appropriate decision maker' (a relevant FCA/SFO officer, or otherwise a police commander or assistant chief constable) may extend until six months (Policing and Crime Act 2017, s 63, 47ZB.).³⁷ Any further extension may only be authorised by warrant of a magistrates' court.³⁸

The Policing and Crime Act 2017,³⁹ afford police bail to be granted where there is as yet insufficient evidence to charge a suspect with an offence and it is necessary to continue to investigate without them being held in custody; or where the police consider there is sufficient evidence to charge the suspect, but the case has been referred to the Crown Prosecution Service (CPS) for a charging decision.

The College of Policing Authorised Professional Practice on Detention and Custody⁴⁰ (APP) had previously issued non-binding guidelines regarding the length of bail which proposed: initially, a sergeant can authorise bail up to 28 days. Where the period of bail exceeds 28 days, the APP suggested that forces should apply the following approval process: beyond 28 days, to seek the approval of an additional independent sergeant; beyond three months, to seek the approval of an inspector, and; beyond six months; to seek the approval of a superintendent.

According to the Policing and Crime Act 2017, the police bail may be granted subject to conditions (House of Commons 2019)⁴¹ for the following purposes:⁴²

- to secure that the person surrenders to custody;
- to secure that the person does not commit an offence while on bail;
- to secure that the person does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person, or;
- for the person's own protection or, if the person is under the age of 18, for the person's own welfare or in the person's own interests.

It would be unusual for a subject to be released on police bail to be required to post a recognisance, surety or security, or to require residence in a bail hostel.⁴³

The first objective revolves around the law not being frustrated by the non-appearance of the subject, so, to ensure the defendant surrenders to either a police station or to a court for their hearing. An underlying doctrine in the justice system is *nulla poena sine lege*, no punishment without law,⁴⁴ this is

33. European Convention on Human Rights, Art. 6.

34. European Convention on Human Rights, Art. 7.

35. Policing and Crime Act 2017, s 62.

36. Policing and Crime Act 2017, s 63, 47ZD.

37. Policing and Crime Act 2017, s 63, 47ZB.

38. See Policing and Crime Act 2017, s 63, 47ZF-G.

39. S 63, 47ZB Crown Prosecution Service (2019) 'Bail' [Online] <<https://www.cps.gov.uk/legal-guidance/bail>> accessed 16th April 2020.

40. College of Policing Authorised Professional Practice on Detention and Custody (2020) 'Detention and Custody'. [Online] <<https://www.app.college.police.uk/app-content/detention-and-custody-2/>> accessed 16 April 2020.

41. House of Commons Library Briefing Paper 7469 [Online] <<http://researchbriefings.files.parliament.uk/documents/CBP-7469/CBP-7469.pdf>> accessed 16 April 2020.

42. Police and Criminal Evidence Act 1984 s 30A(3B)

43. Crown Prosecution Service (2019) 'Bail' [Online] <<https://www.cps.gov.uk/legal-guidance/bail>> accessed 16 April 2020.

44. G. Slapper, 'It Is Wrong To Impose Pain Before Proving Blame' (2013) 77(5) Journal of Criminal Law 355–357.

enshrined in Magna Carta which outlines the precept as being that it is wrong to expose someone to a punishment or legal pain unless they have broken the law. Clause 39 states:⁴⁵

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way except by the lawful judgement of his equals or by the law of the land.

This forbids the state from incarcerating or otherwise punishing an untried/unconvicted individual prior and excessive bail would be a breach of this precept in the absence of compelling and lawful reasons.

The second objective is to prevent the subject from committing further offences, since the fact that they have been arrested indicates a predisposition to do so. The third objective seeks to prevent the course of justice not being perverted by intimidation or interference of witnesses and the fourth, preservation of the subject's own life and limb.

Only in the most serious cases or when there is a specific reason to suggest that a defendant will not surrender to a court or police station will the state imprison an untried and unconvicted defendant. It will however restrict their freedoms by the minimum in order to allow justice to succeed.

Once a subject has returned to the police station, they will be either charged or released. Upon charge, the second type of bail, bail by police after charge becomes relevant:

Changes to the Bail Act Contained Within the Policing and Crime Act 2017

As a result of growing uneasiness and disquiet concerning the perceived misuse/abuse of bail by the police,⁴⁶ The Policing and Crime Act 2017⁴⁷ brought in changes to the rules concerning the provision of bail to those arrested but hitherto not charged. The pressure for change appears to have started in 2013 and 2014 when it was found that over 71,000 individuals were on police bail at the relevant time, and of those, 5500 had been on bail for over six months, one of whom had been on bail for three and a half years.⁴⁸ As such, The Law Society started a campaign to reform this area of law.⁴⁹

It is possible that the higher echelons of the police saw the writing on the wall since an early iteration of the updated post-arrest/pre-charge provisions were suggested by the College of Policing (2016),⁵⁰ which appeared to endorse the earlier Home Office's proposals⁵¹ that:

- Presume the release from custody without pre-charge bail unless the custody officer is satisfied that releasing the person on bail is necessary and proportionate in all the circumstances;

45. The National Archives (2020) 'Magna Carta, Clause 39 (1215)'. [Online] <<http://www.nationalarchives.gov.uk/education/medieval/magna-carta/index.php?page=source/3/7>> accessed 16 April 2020.

46. See generally, M. Roach, 'Proposed Changes to Pre-Charge Bail' (2015) 179 Criminal Law & Justice Weekly 631, E. Johnston, 'Howzat!' (2017) 181(46) Criminal Law & Justice Weekly, S. Labinjoh, 'Misuse of Bail Conditions' (2015) 112(4), Law Society's Gazette 10, The Daily Telegraph (2014) 'The Injustice of Pre-charge Police Bail'. [Online] <<https://www.telegraph.co.uk/comment/letters/11266386/The-injustice-of-pre-charge-police-bail.html>> accessed 16 April 2020 and G. Foxsmith, (2014) Freddie Starr case: how can it right to be on bail for 19 months?, *The Justice Gap* 6th May 2014 [Online] <<https://www.thejusticegap.com/freddie-starr-case-can-right-bail-19-months/>> accessed 16 April 2020.

47. Policing and Crime Act 2017 s 63.

48. BBC News (2014) 'Police Bail Time Limit for Suspects Considered'. [Online] <<https://www.bbc.co.uk/news/uk-29624498>> accessed 16 April 2020.

49. BBC News (2013) 'Law Society Calls For 28-Day Limit on Police Bail'. [Online] <<https://www.bbc.co.uk/news/uk-22624648>> accessed 16 April 2020.

50. College of Policing Ltd. (2016) 'Bail report. Pre-charge Bail – an Exploratory Study'. [Online] <https://www.college.police.uk/News/College-news/Documents/Bail_report_document_439E0816_2.pdf> accessed 16 April 2020.

51. Gov.UK (2014) 'Pre-charge bail: consultation on statutory time limits and related changes'. [online] <<https://www.gov.uk/government/consultations/pre-charge-bail-consultation-on-statutory-time-limits-and-related-changes>> accessed 16 April 2020.

- That an officer of the rank of inspector or above authorises the release on bail (RoB);
- Where bail is deemed to be necessary and proportionate, authorisation may be given by an inspector for up to 28 days and from 28 days up to three months may be authorised by a superintendent, longer periods of bail would require the authorisation of a magistrate.

The Provision within the Policing and Crime Act (PCA) 2017⁵² was an attempt to overhaul the regime of police pre-charge bail; due to the increasing concern that the previous bail provisions under the Bail Act 1976 and then Police and Criminal Evidence Act (PACE) 1984 resulted in suspects were being kept on bail for excessively long periods of time; with the 2016 national average being 56 days⁵³ (the bane of averages is that they present an unclear picture of the reality. For every suspect bailed for below the average, one was bailed for longer than the average). This effectively breached the precept of *nulla poena sine lege*, no punishment without law, and potentially Article 7 of the Human Rights Act.⁵⁴ The Act ensures the right to a fair trial and forbids punishment without law. Under the PCA, police bail is now restricted to 28 days (extendable to three months by order of a Superintendent and with certain other limited exceptions). The replacement for bail over 28 days, involves suspects being RUI'd; an open-ended arrangement to which no conditions can be attached. This has resulted in unsatisfactory outcomes for suspects who face open-ended uncertainty, and complainants who are sometimes denied the prospect of speedy justice.⁵⁵

Under the 2017 Act, police bail can only be justified if an inspector deems it 'necessary and proportionate'.⁵⁶ 'Necessary and proportionate' remains undefined, but the intention was to set the bar to be high. Police guidance lists the following criteria as defining 'necessity':⁵⁷

Authorisation may be considered necessary, if it is:

- In the interests of national security;
- For the prevention of disorder or crime;
- In the interests of the economic well-being of the United Kingdom;
- In the interests of public safety;
- For the purpose of protecting public health.

The 'new' bail provision have run since 2017, and the aim of the new provision was to stop alleged-suspects from being on bail for excessively long periods of time, since this breached their human rights on two counts, the right to a fair trial and *nulla poena sine lege*. Clearly this development attempted to better-protect the rights of the suspect but did not intend to change the then position of the complainant to the same degree. In the ensuing time it became clear that in most cases both the complainant and the suspect were worse off. Moreover, in certain circumstances the restrictions allowed by bail have been described as 'pretty ineffective'.⁵⁸

52. Policing and Crime Act 2017, s 54.

53. P. Burnley, D. McNally, & L. Gilligan, (2017) 'The Policing & Crime Act 2017 – To bail or not to bail?' [Online] <www.freeths.co.uk/2017/08/16/the-policing-and-crime-act-2017-to-bail-or-not-to-bail/> accessed 17 April 2020.

54. E. Cape, 'Police Bail Without Charge: The Human Rights Implications' (2010) 69(3) Cambridge Law Journal 529–560.

55. The Law Society (2019) 'Release Under Investigation'. <<https://www.lawsociety.org.uk/policy-campaigns/campaigns/criminal-justice/release-under-investigation/>> accessed 16 April 2020.

56. J. Brown, 'Why Is Police Bail Being Reviewed Again?' House of Commons Library. 6th January 2020 [Online] <<https://commonslibrary.parliament.uk/insights/why-is-police-bail-being-reviewed-again/>> accessed 16 April 2020.

57. College of Policing Authorised Professional Practice on Detention and Custody (2020) 'Pre-charge bail management'. [Online] <<https://www.app.college.police.uk/app-content/detention-and-custody-2/response-arrest-and-detention/#pre-charge-bail-management>> accessed 16 April 2020.

58. BBC News (2016) 'Boris Johnson: Bail laws impeding police in extremism cases'. [Online] <<https://www.bbc.co.uk/news/uk-35249585>> accessed 16 April 2020.

Released Under Investigation (RUI)

The new regulations introduced by the PCA prescribe the substitute for bail of greater than 28 days as 'Released Under Investigation' (RUI). RUI is a slightly curious doctrine inasmuch as it is standard practice for all 43 UK police services but does not emanate from any Act of Parliament and seems almost to be an agreed-upon custom and practice by the police services. It appears almost as if the police have made it up as they have gone along, and the introduction of the RUI as a doctrine or practice appears to be almost a result of a conference at ACPO (Association of Chief Police Officers), National Police Chiefs' Council (NPCC) or the College of Policing (COP). RUI appears to mean that a suspect is being released with no restrictions, and that is the end of it unless the police either sends a postal requisition; a letter from the Crown Prosecution Service (CPS) that serves as a summons or alternatively communicate with them by whatever means that no prosecution is to take place. There appears to be no statutory duty for the police to inform a suspect who has been RUI'd if there is to be no prosecution which is at variance from a suspect released on bail, since there is a duty under the Policing and Crime Act for the custody officer to inform a suspect in writing if a prosecution is not to take place.⁵⁹ This is precisely what the Policing and Crime Act was introduced to prevent, the unending uncertainty afforded to the suspect and complainant.

RUI and the Effect on the Suspect's Rights

RUI means that a suspect is released while an investigation continues. The police are not able to attach any conditions to their release no matter how serious the offence. What they commonly do when Releasing under Investigation is darkly and somewhat vaguely allude to the consequences of 'Witnesses Intimidation,' Harassment' or 'Perverting the Course of Justice'. This is done by means of a form⁶⁰ issued to the suspect which lists the overarching offences which may be committed should they try to contact or influence the complainant or witnesses.

Rather than having bail condition which, upon breach, could lead to the immediate arrest of a suspect, the only sanctions available to the police for malfeasance when the suspect is RUI is to invoke the consequences of either S.2 of the Protection from Harassment Act 1997⁶¹ or the Criminal Justice and Public Order Act 1994⁶², which states:⁶³

- s.51(1) creates an offence directed at acts against a person assisting in the investigation of an offence or is a witness or potential witness or juror or potential juror whilst an investigation or trial is in progress; and;
- s.51(2) creates an offence directed at acts against a person who assisted in an investigation of an offence or who was a witness or juror after an investigation or trial has been concluded.

These are acts covered by the wider act of 'attempting to pervert the course of justice' which encompasses many different offences.⁶⁴

The key difference between RoB and RUI is that even taking into account the concomitant restrictions on liberty with RoB there is some type of certainty and template afforded to the suspect. The absence of this certainty has been reported to have implications on the health and well-being of suspect. In addition,

59. Policing and Crime Act 2017, s 66.

60. Hertfordshire Constabulary (2020) 'Notice to Suspect Released Under Investigation'. [Online] <<https://www.herts.police.uk/assets/FOI-Herts/FOI-2017/FOI-Herts-FOI201701125-Nov2017.pdf>> accessed 16 April 2020.

61. Protection from Harassment Act 1997, s 2.

62. Criminal Justice and Public Order Act 1994, s 51.

63. Crown Prosecution Service (2020) 'Witness Intimidation'. [Online] <<https://www.cps.gov.uk/cps-page/witness-intimidation>> accessed 16 April 2020.

64. Crown Prosecution Service (2020) 'Public Justice Offences Incorporating the Charging Standard'. [Online] <https://www.cps.gov.uk/legal-guidance/public-justice-offences-incorporating-charging-standard#_Toc536105663> accessed 16 April 2020.

a survey of 109 lawyers conducted by the London Criminal Courts Solicitors' Association (LCCSA) on release under investigation reported:⁶⁵

- 98% of solicitors said delays in an investigation have impacted on their client's mental health;
- 99% of solicitors said delays in an investigation have impacted on their client's family life;
- 100% of solicitors surveyed said delays in an investigation impacted on their client's employment status.

These data need to be regarded with some circumspection and may not be as detached as good academic reportage may require. The responding solicitors are, by definition, defence-focused, whose interest is protecting and promoting the rights of their clients. Solicitors are not health professionals and unable to diagnose mental health issues; is the impact on mental health speculation by these solicitors or something more 'solid'. How has this impacted employment status? These are questions that are important to ask about research. Lastly, the sample size (109) is probably too low a sample to be significant but nevertheless, conclusions can be drawn.

RUI and the Effect on Complainants' Rights

Complainant's rights are probably most obviously enshrined in the ECHR, and less formally, enforceable in the Victim's Code.⁶⁶ Prior to the Policing and Crime Act, complainants in general and those of serious crimes in particular, had some reassurance afforded to them by the provision of bail. This is particularly true regarding violent or sexual offences, as there will be direct and immediate consequences should the suspect breach a bail condition. The Bail Act⁶⁷ allows for arrest without warrant 'any person if he has reasonable grounds for believing that that person is likely to break any of the conditions of his bail or has reasonable grounds for suspecting that that person has broken any of those conditions.'⁶⁸ Prior to the 2017 Act, the unlimited provision to bail and rebail a suspect allowed the police to keep restrictions on a potentially violent suspect whilst what might be a lengthy investigation took place. Now, the police have 28 days to conduct their investigation while the suspect is on bail, which is manifestly inadequate for many investigations, especially those for the more serious offences such as murder or sexual assault. These offences might require detailed biological or digital forensic analysis (for example DNA on clothes) or analysis of electronic devices, especially when these are password locked and the suspect is unwilling to divulge the unlock key. Under these circumstances the police must apply to a Crown Court for a Section 49 Regulation of Investigatory Powers Act (RIPA notice) which renders a refusal to provide such information becomes a criminal offence under Section 53 of the Act. Investigations of this type are necessarily time consuming and often complicated; the 28-day limit therefore provides insufficient time to the police investigating these types of offences which necessitates the suspect to often be released under investigation rather than released on bail in these circumstances.

We opine that the negative consequences of RUI can be outlined in terms of:

- Lack of bail conditions to protect complainants;
- Lack of time for investigation if bailed;

65. London Criminal Courts Solicitor's Association (2019) 'Top Findings for Released Under Investigation' = (RUI) Survey May 2019' [Online] <<https://www.lccsa.org.uk/wp-content/uploads/2019/06/RUISURVEY-TOP-FINDINGS.pdf>> accessed 16 April 2020.

66. Ministry of Justice (2015) 'Code of Practice for Victims of Crime' [Online] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/476900/code-of-practice-for-victims-of-crime.PDF> accessed 16 April 2020.

67. Bail Act 1976, s 7(3).

68. Crown Prosecution Service (2020) 'Breach of Conditions of Bail'. [Online] <<https://www.cps.gov.uk/legal-guidance/bail#c20>> accessed 16 April 2020.

- Lack of certainty in terms of outcomes of proceedings if RUI; just as a suspect remains unsure of outcomes of RUI, and lacking any time limit for an outcome, the same is true for complainants;
- The symbolic value of bail in terms of a complainant feeling believed by the police, and for their friends and family to believe them.

The inevitable consequence of this is that the police RUI suspects for these offences which require lengthy investigations with the consequence that suspects for very serious offences with often-vulnerable complaints were being released with no restrictions.⁶⁹ This has led to some perplexing situations as reported by the Law Society:⁷⁰

- A solicitor had a client who was released under investigation for two separate knife crime murders. This individual has also been released under investigation for two separate knife robbery offences. During the time he has been subject to RUI he was also charged with a separate s.18 grievous bodily harm (GBH) knife crime and has undergone a Crown Court trial.
- A solicitor in a region outside London had a client who was arrested for rape and bailed, accused of a further sexual offence against the same complainant, then placed under RUI under the original rape accusation due to bail not being extended.
- An individual in the West Midlands was arrested for murder, placed on bail, but after the bail was expired was placed under RUI.

According to Fouzder, in the year 2017–2018 193,000 subjects were RUI'd⁷¹ and The Law Society⁷² revealed that:

- In Nottinghamshire, the number released on bail between 2016 and 2017 was 7392. In 2017–2018 this fell to 562, and the number RUI'd was 4728.
- In Thames Valley, the number released on bail between 2016 and 2017 was 13,768. In 2017–2018 this fell to 379, and the number RUI'd was 11,053.
- In Cheshire, the number released on bail between 2016 and 2017 was 4742. In 2017–2018, this fell to 526, and the number RUI'd was 4640.
- In London, the number released on bail between 2016 and 2017 was 67,838. In 2017–2018, this fell to 9,881, and the number released under investigation was 46,674.

These data reveal that 'The number of suspects freed on bail has decreased dramatically, appearing to have been replaced almost entirely by RUI in some police authorities.'⁷³

69. See, Centre for Women's Justice Super-complaint (2019) '*Police failure to use protective measures in cases involving violence against women and girls*' [online] <<https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/5c91f55c9b747a252efe260c/1553069406371/Super-complaint+report.FINAL.pdf>> accessed 16 April 2020, Learnmouth, S. (2018). A system to keep me safe: An exploratory study of bail use in rape cases. Dissertation: London Metropolitan University. [Online]. Available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/797416/Sarah_Learnmouth_Masters_dissertation.pdf> accessed 6 April 2020.

70. The Law Society (2019) '*Release Under Investigation*'. <<https://www.lawsociety.org.uk/policy-campaigns/campaigns/criminal-justice/release-under-investigation/>> accessed 16 April 2020.

71. M. Fouzder, (2019) 'Police Figures Confirm 193,000 Suspects Were Released Under Investigation' *The Law Society Gazette*. 10th October 2019 [Online] <<https://www.lawgazette.co.uk/news/police-figures-confirm-193000-suspects-were-released-under-investigation/5101742.article>> last accessed 16 April 2020.

72. The Law Society (2019) '*Release Under Investigation*'. [Online] <<https://www.lawsociety.org.uk/policy-campaigns/campaigns/criminal-justice/release-under-investigation/>> accessed 16 April 2020.

73. O. Bowcott, (2019) 'Sharp Rise in Suspects Being Released Without Bail Conditions'. *The Guardian*. 9th October 2019 [Online] <<https://www.theguardian.com/law/2019/oct/09/rise-number-suspects-released-under-investigation-without-bail-conditions-police>> accessed 16 April 2020.

Table 1 Selected average length of time suspects have been released under investigation 2017–2018.

Nottinghamshire	114 days
Leicestershire	120 days
Norfolk	135 days
Cambridgeshire	155 days
Surrey	228 days

Table 1⁷⁴ shows selected average length of time suspects have been released under investigation: It should be noted the slightly deceiving nature of averages. For every suspect Released under Investigation for less than the average there is one who was RUI'd for more than the average. In the case of Surrey Police (average 228 days) this makes for a grim figure for a suspect to have to live with such uncertainty for such an indeterminate length of time.

For the comparison of duration of RoB and RUI, data is only available for 10 police services; for this cohort the results indicate that mean duration of RoB in 2016/17 was 90 days whilst the mean duration of RUI in 2017/18 was 138.7 days. *This difference is statistically significant ($p=0.03$, 2-tailed paired t-test).*

For the number of individuals RoB'd and RUI'd the Paired t-test has been used. Technically this test should not be used for 'count' data, but in reality, where the 'counts' are high (i.e. over about 100) the test does hold. Treating the count data as approximately continuous, it can be seen that 6973 individuals were RoB'd in 2016/7 but 6228 individuals RUI in 2017/18. Whilst this is a 10.7% decrease, there is large variation between services. Overall the difference between 2016–17 and 2017–18 is not statistically significantly different ($p=0.4$, 2-tailed paired t-test). There are some anomalies, particularly the data for Norfolk, Suffolk, British Transport Police, Merseyside and Lancashire, it appears as if there has been a policy of using RUI rather than RoB previously. Meanwhile it appears as if Derbyshire are outliers. When the anomalies are removed the picture changes, overall the number of RoB in 2016–17 was significantly greater than the use of RUI in 2017–18.

Finally, Surrey have increased duration from 74 to 228 days, in increase if 208%, meanwhile Police Service Northern Ireland (PSNI) have gone from 53 to 143 (170%), and Cambridgeshire has gone up by 172%. Surrey exhibits the most extreme variance between pre-PCA bail times (74 days) and current post-PCA RUI times (228 days).

Interestingly, whilst it has been established that post-PCA bail longer than 28 days should be the exception rather than the norm, all ten of the reporting services reported RoB times *above* 28 days (98, 70, 98, 108, 92, 43, 67, 71, 165, 45 days) with several reporting averages for the post-PCA times *greater* than pre-PCA times. This again is the deceiving nature of averages, the bail periods post PCA would by necessity include all the 28-day examples but also the exceptions which would include the 'complex' cases or those where the bail period had been extended properly and with authority.

The difference between the number RoB'd pre-PCA (2016–2017) with those RUI'd (2017–18) are less relevant, since the latter are dictated by the likely length of the investigation.

To the statistical non-expert what the statistical analysis means is the following: one cannot look at two sets of data and on the basis that one has higher numbers than the other, decide that the difference is statistically significant. Where chance plays a part it may be that chance has caused the difference, which therefore is not statistically significant. Statistical tests consider the natural (random) variation within the data sets and estimates whether the observed differences could just be an extreme of normally expected variation, or whether the differences look greater than would be expected by random variation and sampling error. The test used, the Student's paired t-test compared each service's data with itself at the two time points, i.e. only the extent of change was considered not the absolute values. The outcome of

74. *Supra* fn 72. Please see the Law Society's Report for the full dataset of average length of RUI.

the statistical test is a probability value (p), which is the probability that the observed differences could have occurred by chance. By convention, where p is less than 0.05 (5%) it is considered unlikely that the differences have occurred by chance and therefore the conclusion is drawn that the observed differences are 'statistically significant' and that they represent a real change.

In this case, we are attempting to compare the pre-PCA bail times (2016–2017) with the post PCA RUI times (2017–18). For the ten forces for which these data are available, the post PCA RUI times certainly 'look' higher than the pre-PCA bail times (2016–2017) but in order to state definitively that they are a prescribed statistical test needs to have been done which in this case is the Paired t-test. The test results indicate that the difference is statistically significant that is, suspects **are** spending longer on RUI than they had been on bail.

A Way Forward

There have been a number of recommendations made to address the over swing of the pendulum, which are now being considered by the government.⁷⁵ They do not recommend returning the pre-2017 bail regime, which left suspects on tight restrictions for lengthy periods. Rather they propose that RUI be formalised and tightened but not to the same degree as bail and that a sliding scale be used to ensure RUI is only used when appropriate.

The Law Society's recommendations from their policy briefing 'Release Under Investigation',⁷⁶ are summarised below:

1. Ensure release under investigation is used appropriately: The police need to ensure decisions around whether to place someone under bail or RUI are necessary and proportionate – as they are required to do under the PACE Codes of Practice. This means that those who are of a potential risk to the complainant or to the public in general should not be placed under RUI.
2. Time limits on release under investigation: Strict time limits must be introduced to RUI, with senior approval required to extend those time limits, mirroring the bail requirements. The Society suggests a sergeant-authorised first period of 56 extendable by a Chief Inspector or Superintendent for an extension to 6 months. For an extension of up to 12 months, approval from a magistrate would be needed.
3. Fairer ways to update the accused: A single 'postal requisition' letter to the accused's address original is not acceptable, especially given the long times people are released under investigation and the likelihood of people moving in this time. Police forces should use additional and appropriate methods to contact the accused.
4. Better data collection: There should be a central register of the numbers of people released under investigation, broken down by police authority area, by the crime the individual has been accused of, and the date of when the individual is placed under RUI. This will help the Government monitor numbers and determine whether it is being used appropriately.

With the failings of RUI in mind, the government have suggested a raft of changes under the Police, Crime, Sentencing and Courts Bill. These changes make amendments to the existing provisions concerning pre-charge bail and move away from the presumption against pre-charge bail. In early 2020, the government held a public consultation in which it proposed a departure from the presumption against bail notion. The consultation garnered 844 responses and 80% of respondents agreed with the proposed

75. M. Fouzder, (2019) 'Bail Reforms which Left Thousands in Legal Limbo to be Reviewed' *The Law Society Gazette*. 6th November 2019 [Online] <<https://www.lawgazette.co.uk/news/bail-reforms-which-left-thousands-in-legal-limbo-to-be-reviewed/5102062.article>> Last accessed 16 April 2020, BBC News, (2019) 'Police Bail Time Limit for Suspects Could Be Trebled' [Online] <<https://www.bbc.co.uk/news/uk-51388989>> accessed 16 April 2020.

76. *Supra* fn 72.

removal of the presumption. Furthermore, 88% of respondents strongly agreed that bail conditions need to be made effective to prevent interference with victims and witnesses.⁷⁷

In the Government's response to the consultation, the government claim there has been a number of 'knock-on effects' regarding the presumption against pre-charge bail.⁷⁸ Whilst the aim of the Police and Crime Act 2017 was to introduce safeguards for suspects who were on bail for lengthy periods, it has 'inadvertently led to an increase in the number of people who are RUI'd and who are still under investigation for lengthy periods but not subject to the oversight and reporting requirements that they would have under pre-charge bail.'⁷⁹ This announcement is somewhat surprising, the government took steps to reform the bail regime but for a number of reasons, the replacement regime has failed. It has not only failed suspects but victims have been adversely affected by the use of RUI. We mentioned earlier the Alan Martin case where he was RUI'd and went on to murder his wife. Unsurprisingly, this has led to victims of crime to feel less protected by the police.⁸⁰ As such, the government will remove the presumption against bail and make it easier to use bail where necessary. However, it is important to note, the Police and Crime Act 2017 never removed the option to bail a suspect, it created legislation to ensure it was both proportionate and necessary. However, whilst bail was never prohibited by legislation, it was clear the use of bail was disincentivised owing to the strict time-limits. The 2017 Act allowed for an initial 28-day limit on pre-charge bail,⁸¹ which would be authorised by an officer of the rank of Inspector. This could be extended by 3 months Senior Officers and magistrates.'⁸² As discussed earlier, cases are often complex and would take longer than 28 days to complete, as such pre-charge bail was no longer an attractive option.

The government proposal suggested 3 models of time constraints and claim that all models restore initial bail authorisation to custody officers, given their independence from investigators and their experiences in making-risk based decisions. However, there have long been questions concerning their independence have long been raised. The proposals will also introduce additional review points for bail, as well as keeping the judicial oversight, although this will now come and at a much later juncture. The most popular model from respondents from the public and police was 'Model B'. This model has the following components:

Initial bail Period to three months, authorised by custody officer

1st extension to six months, authorised by an Inspector

2nd extension to nine months, authorised by a Superintendent

3rd extension beyond nine months, authorised by a magistrate

(to be reviewed at three-month intervals)

4th extension as above.

The government response is to 'put Model B on a statutory footing'⁸³ and will decrease the burden on the court system as they will not be overburdened with extensions at an earlier stage and yet provide judicial oversight of the use of pre-charge bail (Police, Crime, Sentencing and Courts Bill 2021).⁸⁴ Should the Bill become legislation, the numbers of RUI'd suspects is expected to dramatically fall as the presumption against bail will be removed and its use can return to being common place. RUI was an unmitigated

77. Police Powers: Pre-charge Bail Government Response (2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953715/2021-01-14_Response_to_PCB_consultation__003_.pdf> Last Accessed November 2021

78. See, Police Powers: Pre-charge Bail Government Response (2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/953715/2021-01-14_Response_to_PCB_consultation__003_.pdf> Last accessed November 2021.

79. *Ibid*

80. *Ibid*

81. *Ibid*

82. *Ibid*

83. *Ibid* at 15

84. The new bail regime can be found in Schedule 4, s.43 Police, Crime, Sentencing and Courts Bill <<https://publications.parliament.uk/pa/bills/cbill/58-01/0268/200268.pdf>>

disaster for complainants and suspects alike. However, a viable working solution has not been advanced, instead the government have returned to using bail as a way of managing suspects. The government believe that the return to a bail regime is good news for both victims and suspects, as RUI does not include statutory timescales, accountability for the police or regular communication with victims and suspects.⁸⁵ The true impact of this potential return will require future research to ensure the process is working as intended and does not reflect another catastrophic Conservative Party criminal justice policy.

Conclusion

Prior to the advent of the Police and Crime Act 2017, a suspect could be continuously re-bailed without any judicial oversight. The Police and Crime Act altered this and allowed the police one 28-day period for which a suspect can be bailed. This also came at the time of a presumption against the use of bail, which given the constrictive time-frames, looked rather unappealing to a busy police officer. As such, the use of RUI came to fore and became the central tool in how the police manage suspects. Of course, having a system which contained no conditions on the suspect's whereabouts, behaviour or interactions with others should have been foreseen to be problematic. It was. Those who were RUI'd for serious offences committed others, including murder. As such, the push back from the public would always be strong and vocal. However, the current government, pander to the public clamour to be seen to be 'tough on crime' and the proposals contained within the Crime, Sentencing and Punishment Bill, are indeed tough. The adoption of 'Model B' means it will be nine months before there is any judicial oversight on a bail application. Although in reality, this may make little difference to the current regime. The aforementioned Table 1 highlighted the timeframes for which suspects were RUI'd:

Nottinghamshire 114 days (3.6 months)
 Leicestershire 120 days (3.8 months)
 Norfolk 135 days (4.3 months)
 Cambridge 155 days (5 months)
 Surrey 228 days (7.3 months)

All of these would fall well within the police time limits before any judicial supervision kicks in. It will be interesting to see those first cases before the magistrates' court, will the court rectify the disaster of the RUI regime or will they continue to perpetuate the failure, at the suspect's expense. The government had an opportunity to remedy the ills of the RUI system, instead they have just stared further into the abyss of delay, inefficient use of resource and denial of justice. For everyone involved.


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85. Police, Crime, Sentencing and Courts Bill 2021: pre-charge bail factsheet, see 4.2 <<https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-pre-charge-bail-factsheet>> Last accessed November 2021.