

# the **Howard League** for **Penal Reform**



## **What if police bail was abolished?**

What if...? Series of challenging pamphlets



Mannheim Centre for  
**CRIMINOLOGY**



# **What if police bail was abolished?**

A pamphlet for the Howard League for Penal Reform by Professor Ed Cape,  
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**the Howard League** for Penal Reform



### *Foreword*

The Howard League for Penal Reform and the Mannheim Centre at the London School of Economics are working in partnership on the 'What if?' pamphlet series with the aim of challenging conventional thinking on penal and criminal justice issues. We have been working with established thinkers, academics and practitioners to develop innovative, and perhaps controversial, ideas that can work as a stimulus to new policy initiatives and ultimately achieve change. In this edition of the series, Professor Ed Cape proposes a radical overhaul of police bail powers. He argues that, as currently regulated, pre-charge bail and street bail are neither proportionate nor necessary, and their use often punishes innocent people, with those subjected to lengthy pre-charge bail sometimes experiencing massive detrimental impact on their physical and mental wellbeing. Professor Cape argues that pre-charge bail should be subject to a non-extendable time limit of 14 days, and also that the power of the police to impose conditions on those on pre-charge bail should be removed. Professor Cape contends that street bail, as a process which is inherently contradictory and lacks transparency, should be abolished entirely.

Professor Cape explores how street bail and pre-charge bail are currently regulated, before assessing their scale and impact, concluding that the process is the punishment, and it is often innocent people who are being punished. Professor Cape goes on to discuss the common assumption that pre-charge bail is a necessary police power, before providing salient examples to show that the police would be able to carry out their work without the extensive police bail powers currently at their disposal. This makes a compelling case for contracting police bail powers, thereby reducing the number of people being unnecessarily exposed to coercive powers.

Professor Cape's proposals support the Howard League's work to reduce the unnecessary involvement of the criminal justice system in people's lives. As the gatekeepers to the system the police have a crucial role to play, and over the last few years the Howard League has worked with the police to reduce the flow of people into the system; specifically on reducing numbers of child arrests.

The ideas contained in this pamphlet were expounded by Professor Cape at a public seminar attended by senior practitioners and academics from across the criminal justice system. Alex Marshall, the Chief Executive Officer of the College of Policing and Professor Roy Greenslade were on the panel as discussants, and their prepared responses were discussed alongside Professor Cape's proposals. These seminars form part of a structured programme of events and publications drawing together the public and senior practitioners in a forum for discussing radical ideas designed to reform the principles and practices of justice. We would like to thank all those who attended the seminar and contributed to developing this publication.

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### 1. Introduction

Police officers have extensive powers to place people they arrest on bail. They can do so immediately following an arrest, without taking the person to a police station (hereafter 'street bail'). If they take the person to a police station, they can release them on bail without charging them with a criminal offence if they decide that there is insufficient evidence to charge, or decide that there is sufficient evidence to charge but want to carry out further investigations before making a charge decision (hereafter 'pre-charge bail'). If they charge the person with a criminal offence, they can release them on bail pending their appearance in court. This sounds fairly innocuous. Surely it is better to be released on bail rather than being held in custody. However, where a person has not been charged with a criminal offence, the alternative to bail is not necessarily custody, and certainly not lengthy incarceration. The consequence for the person granted bail is that they are under a legal obligation to attend a police station as and when required – and the police can, and do, change both the date and the police station whenever they like – and they can be arrested for failing to do so. When granting bail, the police have wide powers to impose conditions, requiring the person to reside at a particular address, not to go to a particular address or location, not to contact specified people, to abide by a curfew, to report to a police station on a regular basis, or a combination of any of these. Police bail powers can be exercised by the police alone, without supervision by or the consent of a Crown Prosecutor, and largely in the absence of judicial scrutiny. Yet there is no restriction on the period for which a person can be placed on bail. For these reasons, contrary to the usual reference to a person being granted bail, this paper refers to bail being imposed. For many of those placed on police bail, especially when conditions are attached, it feels like an imposition. Indeed, it often feels like a punishment.<sup>1</sup>

This paper focuses on police powers to impose bail on people who have been arrested, but who have not been charged with a criminal offence, that is, street bail and pre-charge bail. The reasons for doing so are twofold. First, it is so-called pre-charge bail<sup>2</sup> that has been the subject of so much dissatisfaction and concern and which, since it has affected people with the ability to articulate their concerns in the public arena, has come to the attention of the mainstream media. It has also been the subject of consultations by the College of Policing (2014) and the Home Office (2014a). Second, as the Northern Ireland Law Commission (hereafter NILC) recognised in its consultation on bail, the considerations arising in respect

of pre-charge bail differ from those relating to post-charge bail (2010, para 7.6). Post-charge bail presupposes that, as a minimum, there is sufficient evidence to charge the person with a criminal offence and that it is in the public interest to initiate criminal proceedings.<sup>3</sup> A police decision to withhold bail or to impose bail subject to conditions following charge is subject to judicial scrutiny within, at most, a couple of days following charge (Police and Criminal Evidence Act (PACE) 1984, s.46). After a person has been charged with an offence the alternative to bail, whether or not subject to conditions, is for them to be kept in custody. Pre-charge bail, on the other hand, requires only minimal information justifying suspicion, is not time-limited and, with the exception of the right to ask a court to amend or remove conditions, is entirely a matter for the police. The alternative to pre-charge bail is normally unconditional release.

Following its consultation, the Home Office (2015) has set out a number of proposed reforms regarding pre-charge bail.<sup>4</sup> First, it suggests that there should be a legislative presumption that, in circumstances where a person is released without charge, such release should be unconditional. A person should only be released on bail if it is both 'necessary' and 'proportionate'. Whilst this is welcome, it is doubtful whether custody officers are equipped to make objective decisions regarding necessity and proportionality. Second, the Home Office proposes that pre-charge bail should be subject to an initial time limit of 28 days, but that this may be extended by a police superintendent for up to three months, and extension thereafter would require the approval of a magistrates' court. The Home Office does not propose any absolute time limit, nor any limit on the number of times that bail can be renewed. Furthermore, it makes no proposals for reform in respect of bail conditions.

This paper argues that the proposed reforms will make little or no difference to the use of pre-charge bail. This paper does not propose that pre-charge bail should be completely abolished, but notes that the competing considerations for and against pre-charge bail powers are finely balanced. On the one hand, removing pre-charge bail powers altogether could lead to more people being unnecessarily charged and potentially remanded in custody, only to find that the case against them is discontinued after weeks, or months, on remand in prison. On the other hand, pre-charge bail facilitates, if not encourages, tardy investigation (Judiciary of England and Wales, 2014: 21<sup>5</sup>), is largely unenforceable, and is not regarded as a necessary power in most other countries (NILC, 2010: 87). However, it is argued, in common with the NILC (2012, para 2.37), that street bail should be abolished. With regard to pre-



charge bail this paper argues, again as the NILC does (*Ibid.*, para 2.32), that the power of the police to impose conditions should be removed.<sup>6</sup> It is also argued that pre-charge bail should be subject to a non-extendable time limit of 14 days. Giving superintendents and magistrates' courts the power to review the need for pre-charge bail will be ineffective, because superintendents, being police officers, are not sufficiently independent, and the experience of magistrates' courts in supervising other investigative procedures, such as search warrants, demonstrates that they often ignore clear procedural requirements and are rarely willing to intervene.

### *2. What is the problem with police bail?*

To understand the problems with street bail and pre-charge bail, it is necessary to understand how they are currently regulated.

#### **The regulation of street bail and pre-charge bail**

Street bail and pre-charge bail are the subject of separate regulatory regimes, with many similarities but some key differences both in law and in practice. Street bail is governed by the Police and Criminal Evidence Act (PACE) 1984 (see further, Hucklesby, 2004). Normally, when a person is arrested other than at a police station, they must be taken to a police station as soon as is practicable (PACE, 1984, s. 30(1)). However, the arresting officer may, instead of taking the arrested person to a police station, release them on bail, under an obligation to attend a specified police station on a future date (*Ibid.*, s. 30(1)). The officer may attach conditions to that bail for the purpose of ensuring that the person turns up at the police station, preventing further offences, preventing interference with witnesses or obstruction of the administration of justice, or for the person's own protection (*Ibid.*, s. 30A(3B)). Any condition can be imposed, provided it is designed to achieve one of these objectives, other than a surety or security or a condition to reside in a bail hostel (*Ibid.*, s. 30A(3A)).<sup>7</sup> The arrested person has no legal right to make any representations regarding bail or conditions, and the arresting officer is under no obligation to take into account any representations that are made. In any case, given the circumstances in which the bail decision is made, the arrested person is unlikely to have the benefit of legal advice or assistance. There is no statutory time limit on the period of time for which bail can be granted,<sup>8</sup> and the police may vary the time and place for surrender (PACE 1984, s. 30B(6) and (7)). Furthermore, when the person does attend at the police station, they may then be subjected to pre-charge bail. They can apply to a custody officer, and thereafter to a magistrates' court, to vary or remove conditions (*Ibid.*, ss. 30CA and

30CB), but they have no right to make an application for bail to be removed altogether. Although failure to attend the police station on the due date, and breach of conditions, are not criminal offences, the person may be arrested if they fail to surrender (*Ibid.*, s. 30D(1)), or if a police officer has reasonable grounds for suspecting that any of the conditions imposed have been breached (*Ibid.*, s. 30D(2A)).<sup>9</sup>

Pre-charge bail is regulated by the PACE 1984 and the Bail Act 1976. Under the PACE 1984 the police have extensive powers to release on bail a person who has not been charged with a criminal offence. These include circumstances where the grounds for detention have ceased to apply (*Ibid.*, s. 34(4)), where an officer conducting a review of detention concludes that detention can no longer be justified (*Ibid.*, s. 40(8)), and on the expiry of a detention time limit (*Ibid.*, ss. 41(7), 42, 43 and 44). Where bail is granted under any of these provisions, conditions cannot be imposed. However, the significance of this was negated by the decision of the High Court in *R (Torres) v Commissioner of Police of the Metropolis*,<sup>10</sup> in which it was held that in all circumstances where a person in police detention can be released on bail without charge, the police can release them under the PACE 1984, s. 37(2). This is important because where a person is bailed under s. 37(2), or under s. 37(7), conditions can be imposed by virtue of the PACE 1984, s. 47(1A).

The power to bail a person under section 37 affects two distinct groups of people. First, when an arrested person is taken to a police station, the custody officer must determine whether there is sufficient evidence to charge them with the offence for which they were arrested. If the officer decides that there is insufficient evidence for this purpose, he or she must, under the PACE 1984, s. 37(2), release the person, either on bail or without bail unless detention is necessary to secure or preserve evidence or to obtain evidence by questioning. The effect of the *Torres* case is that the custody officer can bail the person at any time during detention, not just when the arrested person first arrives at the police station. Second, if a custody officer decides that there is sufficient evidence to charge the person with a criminal offence – whether initially or after some investigation or interrogation has been conducted – but the investigating officer wants to carry out further investigation before a charge decision is made, they can release the person on conditional bail under the PACE s. 37(7).<sup>11</sup> The custody officer can also release the person on pre-charge bail if they want advice on charging from the Crown Prosecution Service (CPS) or if the CPS are to make the charge decision. Thus conditional bail can be imposed on a person when the police

do not have sufficient evidence to charge them with a criminal offence, or when they do have sufficient evidence but want to strengthen the evidence before making a charge decision. It is important to note, however, that under section 37 the release from detention does not have to be on bail. Whether or not there is sufficient evidence to charge the person, the police can simply release the person without bail, that is, unconditionally.

Pre-charge bail shares many features with street bail. Conditions can be imposed for the same purposes as for street bail, although when attached to pre-charge bail conditions can include requiring a surety or security. The custody officer is under no obligation to receive representations from the suspect or his or her solicitor, and under no obligation to take into account any representations that are made.<sup>12</sup> Whilst the Law Society and others have made the case on many occasions over the past decade that, as a minimum, the PACE Code of Practice C should be amended to make provision for representations by the suspect or their lawyer regarding bail, these have been ignored. A person released on pre-charge bail can make an application to a custody officer or magistrates' court to vary or remove conditions (Bail Act 1976, s. 3A(4), and PACE 1984, s. 47(1D) and (1E)), but they have no right to apply for removal of bail itself. As with street bail, a person may be arrested for breach of bail conditions, and in addition may be arrested for an anticipated breach of conditions, although breach does not amount to a criminal offence (PACE 1984, s. 46A(1) and (1A)). However, failure to surrender to custody following release on pre-charge bail is a criminal offence (Bail Act 1976, s. 6, as applied by PACE 1984, s. 47(1)). As a result, a person may be punished for failure to attend the police station even though they are never charged with the offence for which they were originally arrested or any other substantive offence.

Pre-charge bail, like street bail, is not subject to any statutory maximum time-period, and the implications of this in combination with the features of pre-charge bail discussed above mean that pre-charge bail (particularly if conditions are imposed), is far more draconian than street bail, and can have a lasting adverse impact on the person on bail. Street bail is in practice likely to be limited to, at most, a matter of weeks, but pre-charge bail can, and does, last for months and sometimes years.<sup>13</sup> During that time, the police can change the date on which the person must attend the police station whenever they feel the need; the person may simply receive a letter or telephone call telling them that their bail has been extended. The person on bail may never know what investigations are being carried out, and will not

know how long bail will last. As Paul Gambaccini's solicitor told the Home Affairs Committee, when her client was on bail, 'I did not really know what was going on. I had no idea what investigations were taking place or where those investigations were going and the weight of the evidence' (House of Commons Home Affairs Committee, 2015: 10). At the end of it the person may, of course, be charged with an offence but equally they may simply be notified that no action is to be taken against them, often with no explanation, and with no question of any compensation for the losses, both physical and psychological, that they have suffered.

### **The scale and impact of street bail and pre-charge bail**

Since police bail has come to public attention, particularly following the telephone hacking and historical sexual abuse investigations, many personal testimonies written by journalists either about their own experiences or those of others have been published. Libby Purves wrote in the *Times* newspaper about a teacher, Simon Warr, arrested in December 2012 for indecent assault allegedly carried out decades earlier, who was repeatedly bailed and then charged nine months after his arrest. At his trial, which was not held until 12 months after he was charged, Purves wrote that the jury deliberated for only 40 minutes before acquitting him. Despite his months on bail, the police had apparently never followed up the alibi which Warr had given when first arrested (Purves, 2014). Tom Crone, former legal manager of News International, was arrested in 2011 in connection with the telephone hacking investigations and placed on bail for over two years before being informed that he would not be prosecuted. He described pre-charge bail as 'a grotesque abuse of power' which resulted in 'huge reputational damage and untold stress on families' (Channel 4 News, 2014). Paul Gambaccini, who was placed on police bail for almost a year, during which time he was re-bailed six times before being informed that no further action would be taken, said this experience made him feel that he was the victim of a 'witch hunt' (House of Commons Home Affairs Committee, 2015: 10).

The treatment of Neil Wallis, the former executive editor of the *News of the World*, provides another example of the impact of lengthy pre-charge bail, and also illustrates why it simply may not be necessary. Wallis was on pre-charge bail for 19 months before the CPS announced there was insufficient evidence to charge him in connection with telephone hacking. He wrote in the *Guardian* newspaper that 'I lost my job, and my family went through hell...' (Wallis, 2013). An interesting feature of this case was that five months after Wallis was released from bail he was then charged with an offence of conspiracy to hack

telephones (Deans, 2014). Since there was no problem in charging him at a time when he was not on bail, this raises the question of why it was necessary to impose conditional bail on him in the first place.

It is important to note that pre-charge bail also has a dramatic impact on the lives of many people who do not have the resources or connections to publicly articulate their experiences, which are therefore never reported. A few months ago the author was contacted by a woman who was desperately concerned about her 16-year-old son. He was arrested following a fight, and pre-charge bail with conditions was imposed on him, with an obligation to return to the police station two months later. He was then bailed for another two months, and then a further two months, before being charged eight months after he was first arrested. She wanted to know why it took such a long time to investigate such an offence, but her greatest concern was the effect that lengthy bail had had on her son. He felt he could not go out or continue with college, and became depressed to the extent that there was a question about whether he would be fit to plead. Another person contacted the author who had been arrested on suspicion of theft from the shop where she had worked for a long time, an offence which she vehemently denied. Over a period of nine months, she was re-bailed six times, at the end of which period she still did not know what was going to happen. As a result of the investigation, she was suspended from work, received no wages, and could not claim any benefits. She was prescribed anti-anxiety medication and felt that she could not leave the house without being accompanied. Having never been in trouble with the police before, she described the experience as 'an absolute nightmare, not just for myself but for my family too'.<sup>14</sup>

These personal stories illustrate the impact that pre-charge bail can have on people, but how large is the problem? Surprisingly, statistics on street bail or pre-charge bail are not routinely collected in England and Wales.<sup>15</sup> The College of Policing states that all police forces should 'evidence, monitor and make transparent information and data surrounding bail', including data on the number of people bailed, the number re-bailed and the length of re-bails (College of Policing, 2013). However, until recently, figures on the use of pre-charge bail for England and Wales have only come to light following Freedom of Information (Fol) requests, and from recent research carried out by Professor Anthea Hucklesby at Leeds University.<sup>16</sup> The recent Home Office consultation on pre-charge bail, having no statistics of its own to rely on, and having commissioned no research, was forced to rely on Fol requests made by the BBC (Home Office, 2014a: 21<sup>17</sup>).

In 2013 BBC Radio 5 Live made Fol requests to all police forces, asking them how many people were currently on pre-charge bail, how many of those had been on bail for longer than six months, and what was the longest period spent on bail (Harmes, 2013).<sup>18</sup> Data from 40 out of 44 police forces (including the Metropolitan police, which is by far the largest) showed that 71,526 people were on pre-charge bail when the statistics were compiled. The BBC statistics also showed that of those on bail, 5,480 had been on bail for over six months. The longest period spent on bail, concerning a person bailed by the Metropolitan Police, was over three and a half years. Northumbria police reported that one person had spent almost three years on bail, and three other forces reported cases of bail lasting two years or more. The Home Office scaled these figures up to take account of the four police forces that had not responded to the Fol request, arriving at a total of 78,679 people on pre-charge bail, with 6,294 people (8% of the total) having been on bail for over six months. Subsequently, the College of Policing provided data from a sample of 12 police forces for the Home Office consultation on pre-charge bail (Home Office, 2015: 24, 25). Scaled up to provide national figures for the 12 months from April 2013, over 400,000 people were placed on pre-charge bail, 26,000 (6%) of whom were on bail for more than six months.

It is difficult to know how accurate these statistics are. The following table shows figures from the BBC Fol requests as reported in May 2013, and two separate Fol requests dated 15 July 2014 and 8 September, all relating to the Metropolitan Police.

Date	People on pre-charge bail	Number on bail for over six months	Longest period on pre-charge bail
BBC Fol figures	12,178	910	1,304 days
15 July 2014	18,898	4,630	2,991 days
8 September 2014	13,979	1,376	1,287 days

These figures appear to indicate a very volatile pre-charge bail population, especially given the differences between July and September 2014. However, it is more likely that they are simply inaccurate. The data for the number of people on bail is based on a count of custody records, and a person may have multiple custody records (if, for example, they are arrested on a number of occasions for different offences) and, as explained in the Fol response dated 15 July 2014, not all records have a unique number for the suspect. In



calculating the period spent on bail, the same FoI response indicates that this is based on the date of arrest rather than on the date that the person was first bailed; although this would make a difference of, at most, a few days. The statistics for the longest period spent on bail are particularly prone to data entry errors. For example, the police reported that when the custody record for the person who had apparently spent 2,991 days (more than 8 years) on police bail was examined, it was found that a decision to take no further action had been taken (on an unspecified date), but that this had not been recorded on the electronic data system. However, no such caveat was recorded in respect of the figure of 1,287 days (more than 3.5 years), and this period was reported as applying to five people.

Whatever questions there are about the accuracy and reliability of the data, it is clear that the police impose pre-charge bail on a large number of people and, in respect of a significant proportion of them, for lengthy periods of time. What these figures do not show is the proportion of arrested people who are placed on pre-charge bail, the use made of conditions, and the relationship between pre-charge bail and case disposal. Information on these vital questions is very limited. Figures reported by the Criminal Justice Inspectorate Northern Ireland (CJINI) shed some light, although they are nearly a decade old (CJINI, 2006: 33), and whilst the laws regarding pre-charge bail (but not street bail) are almost identical to those in England and Wales, the patterns of police investigation may well differ. The Inspectorate found that just over 17 per cent of all people arrested were released on pre-charge bail, and that the proportion of those against whom some action was taken who had been placed on bail was 18 per cent. In other words, nearly one in five of those arrested were subsequently placed on pre-charge bail, and a similar proportion of those prosecuted (or who had some other action taken against them) had been on pre-charge bail.

However, the report from the Inspectorate did not disclose what proportion of those placed on bail were subsequently charged with a criminal offence, information that is also missing from the BBC FoI (and Home Office) data.<sup>19</sup> This figure is important because it would give some indication of whether people are being subjected to police-imposed restrictions in circumstances where there was never sufficient evidence to justify criminal proceedings. Professor Hucklesby's research on the use of pre-charge bail in two police forces between 2011 and 2013 provides some information on this. She found that nearly half of those subjected to pre-charge bail were neither prosecuted

for an offence nor had any other action taken against them. Figures supplied to the House of Commons Home Affairs Committee show that in 2014, 38 per cent of those persons placed on pre-charge bail had no further action taken against them (House of Commons Home Affairs Committee, 2015: 2). The significance of this is even clearer when considered in the context of two other findings by Hucklesby. First, police officers reported that they were often able to foresee at the time that bail was imposed that a charge was unlikely. Second, in one of the forces in the study, conditions were imposed in two-thirds of cases where a person was released on pre-charge bail. If Hucklesby's findings can be generalised, they show not only that conditional pre-charge bail is imposed on a large number of people despite there never being sufficient evidence to prosecute them, but also that the police often know that this is likely to be the case. The process is the punishment, and it is often innocent people who are being punished.

There is no available statistical evidence on the use of pre-charge bail by reference to ethnicity or other demographics, although, as the Home Office itself suggests, since

*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 [they are] more likely to be placed on pre-charge bail. (Home Office, 2014a: 16)*

Since a black person is three times more likely to be arrested than a white person (Ministry of Justice, 2015: 39), it is highly likely that pre-charge bail is used disproportionately in respect of black people. Furthermore, there is some evidence that the police use pre-charge bail as a way of avoiding the courts and controlling people extra-judicially. Using data obtained from FoI requests, and from other sources, the *Guardian* newspaper has reported that since 2008 approximately 85 per cent of people placed on pre-charge bail following their arrest at lawful demonstrations were not subsequently prosecuted for any offence. Bail conditions imposed included prohibitions on attending any demonstrations, associating with other persons arrested, entering any university premises, and congregating with more than 10 other people (Rawlinson, 2014). In this context, the promise of the Coalition Government, following its election, to 'restore the rights of individuals in the face of encroaching state power' and to 'restore rights to non-violent protest' looks, to say the least, a bit thin (HM Government, 2010: 11).



### **Reluctance of the courts to get involved**

Thus the evidence, such as it is, shows that tens of thousands of people are subjected to pre-charge bail every year, and that a significant minority of them are bailed for lengthy, and sometimes very lengthy, periods of time. Those subjected to lengthy pre-charge bail often suffer as a result, ranging from mere inconvenience to a massive detrimental impact on their physical and mental wellbeing, which may extend to their families and friends. Yet Hucklesby's research suggests that in as many as half of cases where pre-charge bail is imposed, the liberty of a person is, at least, restricted without any criminal proceedings being initiated, let alone a finding of guilt; and other evidence suggests that certain sections of the community – whether defined by ethnicity, vulnerability or democratic engagement – are disproportionately affected.

Despite this, it appears that pre-charge bail is rarely challenged in the courts, and when it is, the courts pursue their normal policy of reluctance to intervene in police operational decisions.<sup>20</sup> In one of the few reported decisions on pre-charge bail, *R (C) v Chief Constable of A and A Magistrates' Court*,<sup>21</sup> C was arrested on 24 May 2006 during the execution of a search warrant in connection with a child pornography investigation. He was subsequently bailed without charge to 6 December 2006, over six months later. Conditions were not imposed because the power to do so was not then available. As a result of his arrest and subsequent bail, C was facing 'acute professional and employment difficulties' (at para. 4). At the time of the hearing in September 2006 the police accepted there were 'strong indications' that the person responsible was not C, but C's son. Despite this, the court refused to intervene, merely encouraging the police to complete their investigation as soon as possible. It appears that C was primarily arguing that the court should order the police to stop the investigation, as opposed to ordering them to release him unconditionally, and there is an important distinction between the two. Nevertheless, it demonstrates the difficulties faced by those who want to challenge police decisions regarding bail.

In a paper published in the *Cambridge Law Journal* in 2010, Cape and Edwards argued that pre-charge bail breaches Article 5(3) of the European Convention on Human Rights (ECHR), which requires a person arrested or detained to be produced promptly before a judge (Cape and Edwards, 2010). The obligation of prompt production before a judge is triggered by an arrest (or detention), the purpose of which is to provide a safeguard against arbitrary arrest and detention and to provide practical recognition of the presumption of

innocence. It was argued that the power of the police to place a person on pre-charge bail without any judicial involvement breaches that requirement. This argument was comprehensively rejected by the Northern Ireland High Court in *HA (a minor)* in October 2014.<sup>22</sup> The use of the disjunctive ‘arrest or detention’ in Article 5(3) was, said the court, not significant; if a person is released on bail they are not deprived of their liberty, and therefore the obligation of prompt production before a judge does not apply (at paras. 33 and 34). Cape and Edwards further argued that conditional pre-charge bail could, depending on the nature and extent of the conditions imposed, amount to a deprivation of liberty for the purposes of Article 5, and could also breach a person’s rights to respect for private and family life (Article 8), freedom of expression (Article 10), and freedom of assembly and association (Article 11). These arguments do not yet appear to have been authoritatively determined by the courts.

If the court in the case of *HA* is correct, then it appears that the extensive powers of the police to place people on pre-charge bail for lengthy periods of time are all but immune to legal challenge. Conditional bail may be susceptible to challenge by reference to the ECHR, but as with the challenges to conditions attached to control orders under the terrorism legislation,<sup>23</sup> the threshold is likely to be high and court determinations highly fact-specific.<sup>24</sup> Pre-charge bail imposed by the police thus occupies a ‘legal twilight zone’ (Cape and Edwards, 2010: 556). Whilst the police may use their powers as a negotiating tactic (Raine and Wilson, 1997: 605), as a form of summary punishment, to shield their control of what they consider to be deviant populations (Choong, 1990: 625; Hucklesby, 2001: 444), or simply as a cover for inefficient investigation, those who are subjected to those powers have no effective way of challenging them.

## 2. *How did we get here?*

In announcing the consultation on pre-charge bail, Theresa May, the Home Secretary, said that she was consulting on potential changes that would result in the greatest reform since the PACE 1984 was enacted (House of Commons, 2014). Whilst the consultation indicated a willingness to tackle a pressing issue, a willingness that was long overdue, it would not be right to suggest that the problems associated with pre-charge bail, or street bail, started with the PACE 1984 itself. The power of the police to place those they arrest on pre-charge bail long pre-dates PACE 1984; although street bail and the power to attach conditions to street bail and pre-charge bail were introduced little more

than a decade ago. It is not necessary to set out here a full history, but a brief explanation of the developments leading to this position, which has given rise to such concern and dissatisfaction, will assist in considering what action should be taken to address concerns.<sup>25</sup>

The power of the police to bail a person without charging them with a criminal offence can be traced back to the Criminal Justice Act 1925. Ironically, given the current concerns, pre-charge bail was introduced as a safeguard against police high-handedness and abuse of the Judges' Rules. Indeed, commenting on the provision, the *Law Times* said that it should be seen in the same class as the Habeas Corpus Act, as a safeguard of liberty and freedom (*The Law Times*, 1925: 189). Only one year later, pre-charge bail was described by the Royal Commission on Police Powers and Procedure as a valuable power that should be used as 'freely' as possible, arguing that it meant that a suspect could be released pending further enquiries without the stigma of a court appearance (Lee, 1929: Cmd. 3297, ch. 5). There is not much evidence of how the power was used in the decades before the PACE 1984, but what evidence does exist indicates that pre-charge bail came to be used as a tool of police investigatory convenience rather than a way of preserving liberty. Bottomley and Pease, citing research carried out for the Royal Commission on Criminal Procedure (RCCP), observed that by the 1980s police bail was used as a sifting procedure to select those people the police wanted to prosecute (Bottomley and Pease, 1986: 66). However, despite the concerns expressed about both pre-charge and post-charge police bail, the RCCP (the recommendations of which were largely enacted by the PACE 1984) dealt with the subject only briefly, recommending that the police should have the power to re-bail a person who had surrendered following the earlier grant of police bail, and that they should have the power to attach conditions to post-charge bail (but not pre-charge bail).

When the PACE 1984 was enacted it introduced, or codified, a range of powers to grant pre-charge bail, which are largely still in place, but it did not provide for street bail and nor did it permit conditions to be imposed on pre-charge bail. The Royal Commission on Criminal Justice (RCCJ), reporting in 1993, recommended the introduction of a power to attach conditions to both pre-charge and post-charge bail. Although research commissioned by the RCCJ had warned that the police sometimes used their discretion regarding bail to induce suspects to talk, or even to confess (McConville and Hodgson, 1993: 121), it concluded that a power to impose conditions

on pre-charge bail 'should lead to more thorough investigations' (Royal Commission on Criminal Justice, 1993: 73). However, although the power to attach conditions to post-charge bail was introduced by the Criminal Justice and Public Order Act 1994,<sup>26</sup> no immediate action was taken in response to the recommendation regarding pre-charge bail.

The Criminal Justice Act of 2003 (CJA 2003) marked a real watershed in terms of police bail powers prior to charge. The Act introduced street bail, and also gave the police the power to attach conditions to pre-charge bail, but only for a very limited purpose. The idea of street bail was first suggested in the government white paper *Justice for All*, published in 2002, which questioned whether it was essential for all people arrested to be taken to a police station immediately (Home Office et al., 2002: CM 5563). This had been prompted by a report, *Diary of a Police Officer*, which suggested that 43 per cent of a police officer's time was spent in the police station, and that on average it took three hours to 'process' a person following their arrest (PA Consulting Group, 2001: 9,12). Giving the power to grant bail before taking an arrested person to a police station would, it was suggested, enable police officers to make efficient use of their time by enabling them to deal with the people they arrest on a planned basis. The idea was taken forward in a review established by the Home Secretary (the *Joint Review*), which published its report recommending the introduction of street bail just two days before the Criminal Justice Bill was presented to Parliament (Home Office/Cabinet Office, 2002. See also Zander, 2003 and Cape, 2004). So a substantial police power, not subject to any statutory time limit, nor any oversight or supervisory mechanism, was introduced with little consideration, and without the benefit of any pilot or research.<sup>27</sup> There was no mention, at the time, of any possibility of attaching conditions to street bail, other than the duty to attend a police station as instructed by the police.

The introduction of conditional pre-charge bail was even less auspicious. The CJA 2003 introduced the statutory charging scheme under which the decision to charge a person with a criminal offence (other than minor offences) was to be made by a Crown Prosecutor rather than a police officer. In order to facilitate this, where a custody officer had decided that there was sufficient evidence to charge, the PACE 1984 would be amended to enable the officer to release the person on bail subject to conditions pending the prosecutor's decision. Despite the fact that this gave the police the power to attach conditions to pre-charge bail for the first time in the history of policing, the amendment to the PACE 1984 was

buried in a Schedule to the Act. The power to impose conditions had not featured in any of the pre-legislative reviews or white papers, and no mention of it was made in the Explanatory Notes to the Act other than a reference to the consequences of breach of conditions.

The Police and Justice Act 2006 enabled the hardly less surreptitious extension of the power to attach conditions to street bail and to pre-charge bail whenever it is granted under the PACE 1984, section 37. The Home Office consultation paper that preceded the Serious Organised Crime and Police Act (SOCPA) 2005 had not mentioned it (Home Office, 2004a), and neither had the white paper that preceded the 2006 Act (Home Office, 2004b). Concerns raised by organisations such as Liberty which, in respect of street bail, argued that it would cause 'potentially severe restrictions on liberty that could remain in place indefinitely and could be used as a long lasting preventative measure' beyond the supervision of the courts, were ignored (Liberty, 2006: 11).

Before considering what should be done about police bail one further development, not directly concerning bail but intimately connected to it, needs to be considered: police powers of arrest. The RCCP was of the view that the use of coercive powers by the police, such as the power of arrest, could not be justified without reasonable grounds for suspicion that an offence has been committed and that use of the power is both necessary and proportionate. These principles were imperfectly reflected in the PACE 1984, as originally enacted, in that the power of arrest was confined to 'arrestable offences' which, broadly, were defined as more serious offences, although the power to arrest for non-arrestable offences was preserved provided that arrest was 'necessary'.<sup>28</sup> The SOCPA 2005, which was rushed through Parliament in the run-up to the 2005 general election thus receiving inadequate scrutiny, amended the PACE 1984 by extending the power of arrest to all criminal offences. As John Spencer wrote at the time, 'the police will be able to arrest anyone without warrant for anything, whether trivial or serious' (2005: 477). The government sought to allay such concerns by asserting that the powers would be limited by a new requirement that an arrest would not be lawful unless it was 'necessary'. Therefore, it was argued, the police would not be able to arbitrarily arrest people because they can only use their power of arrest if they have reasonable grounds for suspecting that the person has committed an offence,<sup>29</sup> and have reasonable grounds for believing that arrest is necessary (PACE 1984, s. 24(4) and (5)).

In practice, police powers of arrest are all but arbitrary. Whilst there must be some objective basis for suspicion to be regarded as reasonable, the courts

have interpreted the requirement so that police officers have a wide degree of discretion in deciding whether to arrest someone. A police officer can rely on (even anonymous) third-party information,<sup>30</sup> including from a police informant,<sup>31</sup> or on an entry in the police national computer.<sup>32</sup> An arrest may be lawful even if the real purpose is not directly related to the offence for which the arrest is carried out,<sup>33</sup> or even if it is employed ‘as a means of exercising some control over a suspect with a view to securing a confession or other information where there is a need to bring matters to a head speedily’.<sup>34</sup> A police officer may not only rely on flimsy information, but in deciding whether that information is enough to give rise to reasonable suspicion, is bolstered by the judicial approach that ‘the threshold for the existence of reasonable grounds for suspicion is low’.<sup>35</sup> Despite the assurances of the then government, the necessity requirement suffers from the same weakness. The statutory list of reasons for which an arrest may be necessary is broadly drawn, and includes ‘to allow the prompt and effective investigation of the offence’ for which the person is to be arrested – covering almost any eventuality (PACE 1984, s. 24(5) (e)). Furthermore, whilst there are some nuanced disagreements in judicial interpretation of the necessity condition,<sup>36</sup> it has been held that it is sufficient for the arresting officer, having considered the alternatives, to conclude that arrest is the ‘practical and sensible’ option;<sup>37</sup> thus not ‘necessary’ – in the dictionary sense of a course of action that is indispensable – at all.<sup>38</sup> It is worth noting that with the exception of the power to take intimate samples, investigative procedures and powers such as interview, search of the person and property, and taking fingerprints and non-intimate samples, can all be carried out with the consent of a suspect who is co-operating with a police investigation without being arrested, but normally they are not given the opportunity of demonstrating their willingness to co-operate.

### 3. *What is the solution?*

It might be thought that this has been a rather long introduction to a proposal that police bail powers prior to charge should all but be abolished. However, the use of pre-charge bail has become firmly entrenched as a routine feature of police investigative practice. The common assumption is that since many investigations cannot be completed whilst the suspect is in police detention, pre-charge bail is a necessary police power. Despite the recent flurry of consultations and inquiries, there has been no consideration of what bail is designed to achieve, and whether it is effective. History and context are crucial in determining whether this practice and these assumptions are both necessary and sustainable. So what has been established so far?



## What if police bail was abolished?

1. Whilst pre-charge bail has existed for a good part of the past century, the way in which it has come to be used reflects investigative convenience rather than a means of maximising liberty.
2. Street bail is little more than a decade old, and its introduction was not based on any demonstrable need (other than potential financial savings), nor consideration of the impact on those placed on bail.
3. The power to attach conditions to street bail and pre-charge bail was introduced only 10 years ago (except for the limited power introduced by the CJA 2003), and was introduced with little Parliamentary consideration, or understanding of the potential implications or consequences.
4. There is little credible evidence on the use made of street bail and pre-charge bail, statistics are not routinely collected, and those that do exist are likely to be unreliable. Evidence suggests that a large proportion of those placed on pre-charge bail are never prosecuted. On the other hand, there is no rigorous evidence that placing a person on bail, as opposed to unconditionally releasing them, is essential for effective investigation.
5. Street bail and pre-charge bail are only available to the police in respect of those people that they have arrested, but powers of arrest are defined and interpreted in such a way as to give the police almost unfettered discretion as to who they arrest and, therefore, who they place on bail. As a result, a person can be on bail for months, or even years, even though there is almost no evidence against them.
6. Despite the fact that pre-charge bail, in particular, is not time-limited and has considerable detrimental consequences for those subjected to it, it is almost immune from judicial scrutiny.

The College of Policing, in response to a request from the Home Office to develop principles of good practice, has recommended that the principles governing police bail should be reinforced with clear standards, that each police force appoint a 'bail SPOC' (single point of contact), that self-assessment of the bail process be introduced, and that the police and CPS inspectorates should inspect against the standards and self-assessment criteria (College of Policing, 2014). Whilst a desire to improve standards is to be welcomed, the proposals simply do not address the problems with pre-charge bail identified in this paper,

and do not encompass street bail at all. Existing College of Policing guidance already suggests that, unless there are exceptional circumstances, the initial period of bail should not exceed 28 days, and that a decision to re-bail a suspect should be ‘escalated and reviewed by a supervising officer’ (College of Policing, 2013). The proposal in the consultation response to ‘*consider a hierarchy to escalate [bail] decision-making*’ (emphasis added) hardly inspires confidence that the College has understood the level of dissatisfaction with the current use of police bail, nor the adverse impact it can have on those subjected to it. It would seem that the Home Secretary had a change of mind because shortly after the College of Policing consultation response was published, the Home Office issued its own consultation on pre-charge bail, suggesting that whilst the College recommendations were useful, legislative action was necessary (Home Office, 2014a). This resulted in the Home Office proposals noted earlier: an initial time-limit of 28 days, extendable by a police superintendent up to three months, and by a magistrates’ court thereafter.<sup>39</sup>

These proposals do not go far enough. Principles other than investigative need or convenience, which have taken precedence over the past two decades, need to be re-asserted. The principles propounded by the RCCP are as relevant today as they were in the early 1980s when the Commission reported, and they reflect those embodied in the ECHR. Coercive powers cannot be justified unless:

- there is certainty of, or reasonable grounds for, suspicion that a specific crime has been committed;
  - use of a power is necessary in all the circumstances, reinforced by safeguards that enable immediate challenge to and subsequent review of its use;
  - their use is proportionate in the sense that sufficient account is taken of the seriousness of the suspected offence, and of the effectiveness of the power in investigating the offence concerned and of the importance that society places upon bringing those suspected of it to trial.
- (Royal Commission on Criminal Procedure, 1981: paras. 22 and 23)

Respect for these principles requires that ‘reasonable suspicion’ and ‘necessity’ of arrest and detention are invested with real meaning. The power of the police to impose bail, especially if conditions are attached, is a coercive power. Unless, and until, real limits are placed on police powers of arrest,



the power to bail those people arrested in circumstances where there is not sufficient evidence to charge them with an offence must be abolished or drastically curtailed. As has been demonstrated in this paper, a person can be placed on street bail or pre-charge bail having been arrested on the basis of little or no credible information, and in circumstances where they are arrested despite the fact that they are willing to co-operate with the investigation.

### **Abolish street bail**

Street bail suffers from a number of defects which cannot be satisfactorily resolved. The circumstances in which street bail is used, by a police officer at the time of the arrest, mean that the officer does not have the time or resources to adequately consider the need for bail, or for conditions, and cannot be effectively supervised. The process inherently lacks the transparency necessary to ensure the power is not used inappropriately. This is particularly important given that certain sections of the community are subjected to arrest powers, and therefore potentially bail powers, disproportionately. Moreover, even if a right of the suspect to make representations to the arresting officer regarding bail and/or conditions was introduced, such a right would be meaningless.

Whilst the purposes for which conditions can be imposed are specified in the legislation, the factors that may be taken into account, for example, seriousness of the suspected offence, propensity to commit further offences, likelihood of turning up at the police station, are not. The arresting officer simply has to conclude that conditions are necessary for one of the specified purposes. Thus the question of whether it is proportionate to impose conditions is one exclusively for the arresting officer to resolve, a judgement that they are ill-equipped to make. Indeed, the very premise of street bail, police efficiency, means that the decision on bail and conditions is likely to rest on convenience for the police rather than proportionality of the use of the power.

Street bail is infected by two central contradictions. First, if a suspected offence is serious, street bail is unlikely to be appropriate. However, if the suspected offence is not serious, then imposing bail, especially if conditions are attached, is difficult to justify by reference to the need for proportionality. Second, given that an arrest is only lawful if it is necessary, it is contradictory to then say that the person can be released on bail rather than be taken to a police station. If a suspected person is co-operative, then arrest should not be regarded as necessary. If they are not co-operative, it is questionable whether it would be appropriate to immediately release them on bail.

Under the present law, a person can be arrested if an officer has reasonable grounds for suspecting that they have breached any condition imposed, or if they fail to attend at a police station when required to do so. The power to arrest a person for breach of a condition or for failing to attend a police station gives the police no greater power than they would have if the person had not been arrested, or had been arrested and unconditionally released. To create offences of breach of conditions or failure to surrender would risk unnecessarily criminalising a person who may not have committed the ‘substantive’ offence for which they were originally arrested.

In Northern Ireland, where the police have the power to grant street bail but not to impose conditions, the NILC concluded that the fundamental defects with street bail cannot be satisfactorily remedied, and street bail powers should therefore be abolished (NILC, 2012: 22), a conclusion equally applicable to street bail powers in England and Wales.

### **Abolish powers to attach conditions to pre-charge bail**

The history of the development of police powers to impose conditions when releasing a person on pre-charge bail is a history of ‘mission creep’. First, a limited power was introduced surreptitiously, justified by the fact that the power was confined to a narrow set of circumstances, and introduced only for a specific purpose. Shortly afterwards, the power was massively expanded to apply to all situations where pre-charge bail is granted, but consideration and scrutiny was muted by the fact that it was justified as merely an expansion of an existing power. Use of the power was then largely hidden because no statistics were collected, the government sponsored no research, and the people affected by the power had no ‘voice’ and little influence. Only when the power affected people working for influential newspapers and media ‘personalities’, and was thus exposed in the media, did it attract political attention.

Abolition of the power to impose conditions has not been proposed by the Home Office, even for consideration. This is surprising because the NILC proposed precisely that little more than two years previously, but the Commission’s recommendations have been completely ignored. The power to impose conditions should be abolished for the following reasons.

Whilst the decision-making process regarding pre-charge bail is more transparent than for street bail, since the decision is made by a custody officer and the custody officer must give oral and written reasons for imposing conditions,<sup>40</sup> the police still act as a judge in their own cause.

Even if a right of the suspect to make representations, and a duty on the custody officer to consider them, were introduced, custody officers are not sufficiently independent of the investigative process to enable them to make an independent decision regarding the necessity for conditions. Research evidence suggests that custody officers tend to support their colleagues by giving them what they want even if they are privately unhappy with the decision (Sanders et al., 2011: 216 and 217 (note however that most of the research was conducted more than a decade ago)). Moreover, at the time that conditions are imposed, the officer cannot know for how long the person will be on bail and, therefore, for how long the conditions will last. As we have seen, pre-charge bail, and therefore conditions, may continue for months, and even years.

As with street bail, breach of conditions can result in arrest, but the question then arises of what the police should do when such an arrest takes place. Subject to the time left on the 'detention clock',<sup>41</sup> the person could be detained at the police station, but if the investigating officer is still not ready to proceed, the only available course of action is to release the person again on pre-charge bail. Making breach of conditions a criminal offence would not be appropriate for the same reasons as for street bail. Therefore, as the NILC noted, there is no 'meaningful mechanism to take action on breach of such conditions' (2012: 19). However, this does not provide any solace for the person subject to conditions since repeated arrest for breach of conditions is hardly an attractive prospect and does not lessen the impact of conditions on their lives and the lives of those close to them.

Also as with street bail, whilst the purposes for which conditions can be imposed are specified in legislation, the police are given a free hand in determining what conditions they wish to impose. The Home Office has suggested that statutory guidance be issued for both custody officers and magistrates on the circumstances in which particular conditions would be appropriate (Home Office, 2014a: 10 and 11) although in its proposal for legislation it is more circumspect (see Home Office, 2015: 12). However, it is difficult to conceive of guidance that would curtail the considerable discretion of the police to apply bail powers as they see fit in any particular set of circumstances.

The Home Office has also proposed that magistrates' courts be given the power to review bail conditions. However, as the Home Office accepts, the law already provides for this and 'anecdotal evidence suggests that challenges to bail conditions are rare' (Home Office, 2014a: 10). Following a point made by

Liberty, the Home Office suggested that this may be because ‘there is little by way of statutory guidance’ (Ibid.: 10). However, a more likely explanation, apart from uncertainty about whether legal aid is available, is that there is little faith in the ability or willingness of magistrates to intervene in the investigative process. Two cases illustrate the point.

In *Carson*,<sup>42</sup> the claimant was arrested on suspicion of racially aggravated harassment towards her neighbours. She was given pre-charge bail subject to conditions, one being that she could not continue to reside in her home. She made two applications to a magistrates’ court for that condition to be removed, and on both occasions she was unsuccessful, despite the fact that the courts received evidence that the claimant cared for her father who suffered from dementia. The only way of challenging these decisions was by way of judicial review, and when this was sought by the claimant the Divisional Court removed the condition, finding that it was ‘quite disproportionate’ (at para. 13). In making its judgement, the court made two telling points which are relevant whenever a person is placed on pre-charge bail subject to conditions. First, ‘the claimant has not of course been convicted of any offence: she has not even been charged. Because she has not been charged, she has not even seen the evidence against her’ (at para. 9). Second, ‘because the claimant has not been charged, the bail conditions will, unless a contrary order is made, remain in place for at least several months’ (at para. 11). A condition that was considered quite disproportionate by the Divisional Court had been endorsed not by one, but by two panels of magistrates.

In the case of *Ajaib*,<sup>43</sup> the claimant who was being investigated on suspicion of fraud was placed on pre-charge bail subject to conditions, and at the time that he made an application to vary those conditions he had been on bail for over five months. The police opposed the variation, asserting that they had evidence that the claimant was a flight risk, but declined to disclose the source of that information. The application for variation was refused, a decision that was upheld by the Divisional Court which held that sufficient information had been disclosed to enable the judge to make a fair decision. Whilst it is understandable that the police may wish to withhold sensitive information during the course of an investigation, the case demonstrates that the right to seek variation of bail conditions is a very weak right. Mere assertion by the police that information exists is sufficient to outweigh other considerations, and without knowing the source of the information, the person on bail has no way of countering it. Statutory guidance would make no difference.

There is also good evidence to suggest that magistrates and judges are generally reluctant to subject police investigative decisions to critical scrutiny, a matter that will be explored further in the next section.

Abolishing the power to attach conditions to pre-charge bail would do no more than restore the position as it existed prior to 2003. Whilst it is true that there have been developments in both the nature of crime, forms of evidence, and police investigative methods in the decade or so since then, many of the reasons given for why investigations can be complex and lengthy existed before 2003. What is missing from the arguments of those who insist that the power to attach conditions is essential is any evidence of why the power is necessary now when it was not necessary then. What is also missing is any explanation of how, given the absence of any meaningful mechanism for dealing with breach of conditions, conditional bail is an effective power.

### **Introduce an absolute limit of 14 days for pre-charge bail**

The Home Office, in common with others such as the police, the CPS and civil society organisations such as Liberty, argue that an absolute time limit on pre-charge bail could have the effect of frustrating complex investigations (Home Office, 2014a: 8). The unspoken assumption of this approach is that if an investigation is being conducted, the police should have the power to impose bail on the suspect. This approach conflates two inter-related, but separate issues: it assumes that the power to impose bail is a necessary adjunct to a police investigation. It is important to separate these two issues. The key question is not whether the police should be able to decide what to investigate and for how long they can continue to investigate, because such decisions are highly fact-specific, and the courts have rightly indicated that they would only intervene 'in the most exceptional cases'.<sup>44</sup> The key question is in fact whether, during an investigation, the police should have the power to impose bail on the suspect.

It could be argued that pre-charge bail should be abolished altogether. It is inimical to the presumption of innocence, its utility is unproven, and since the alternative to pre-charge bail (other than short-term detention at a police station) is unconditional release it is largely unenforceable. However, at this stage complete abolition is likely to prove too much of a challenge to a long-standing police investigative culture. For this reason, it is argued here that pre-charge bail should be subject to a short, absolute time limit.

If police bail is extendable, someone will have to make that decision. The Home Office, having considered various models (Home Office, 2014a: 13)<sup>45</sup> has opted for a scheme involving police superintendents and magistrates' courts (Home Office, 2015: 17). Can a police officer, of whatever rank, bring to the decision a sufficient degree of independence? The reviewing officer is essentially being asked to make a quasi-judicial, if not judicial, decision without any judicial training; and police officers are professionally and culturally attuned to making decisions which, in their view, are in the best interests of the police. Research evidence from the 1990s suggests that custody officers rarely, if ever, decide not to authorise detention of a suspect at a police station, and officers reviewing detention of a suspect at a police station often engage only superficially with the question of whether detention continues to be justified (See Sanders et al., 2011: 208–209 for an account of the relevant research evidence).

By comparison, when an accused appears before a court following charge, a decision regarding bail can only be made by a magistrate or judge, and only after hearing representations by both a prosecutor and the accused, or more usually their lawyer. Furthermore, bail from a court is subject to a number of factors designed to ensure that the case is progressed as quickly as possible; factors that do not apply to pre-charge bail.

Should a court have the power to extend pre-charge bail beyond the initial time limit? It was suggested earlier that there are good reasons to doubt the ability of magistrates to make fair and just decisions in respect of pre-charge bail conditions, and the same reasoning applies to decisions regarding extension of bail. Furthermore, both the Carson and Aijab cases illustrate a fundamental problem in relation to reviewing the need for pre-charge bail: the suspect will not have seen the evidence, and if the police decide that they cannot disclose certain information relevant to the bail decision, the suspect will have no way of countering it and the court will have to take the police at their word, which, unfortunately, is not always subsequently shown to be justified.<sup>46</sup> In such circumstances, a review by the court may have the appearance of fairness, but with no due process substance.

In any event, evidence suggests that the courts are ill-equipped to make decisions about police investigative decisions, and are often reluctant to intervene. As Mr. Justice Eady said in the *Hanningfield* case, '[i]t is not for a judge to second guess the operational decisions of experienced police officers'.<sup>47</sup> The Home Office cited in support of the proposal for judicial

involvement in reviewing pre-charge bail the fact that magistrates already have power under the PACE 1984 to issue a warrant of further detention, which may authorise pre-charge detention for up to 96 hours (Home Office, 2014a: 14). However, although relatively few warrants are applied for, magistrates almost always grant the application. In 2012/13, 457 warrants were applied for, of which 92 per cent were granted (Home Office 2014b). This does not suggest a judicial culture by which police investigative decisions are subjected to careful and critical scrutiny.

A similar picture can be seen from the courts' treatment of applications for search warrants which also, of course, entail judgements regarding police investigations. A decision regarding the issue of a search warrant entails consideration of a number of statutory factors set out in the PACE 1984 (and other relevant legislation). As Lord Hoffman said in his judgment in *A-G for Jamaica v Williams*, the duty of a magistrate or judge to satisfy themselves that the relevant criteria for issue of a warrant have been satisfied 'is a duty of high constitutional import [which] relies upon the independent scrutiny of the judiciary to protect the citizen against the excess which would inevitably flow from allowing an executive officer to decide for himself whether the conditions under which he is permitted to enter upon private property have been met'.<sup>48</sup> Whilst it sometimes seems that the judiciary are more scrupulous about protecting property rights than they are about protecting the right to liberty, this injunction is surely also apposite in relation to pre-charge bail. Yet time and again, the courts simply accede to a request for a search warrant without adequately testing whether the statutory criteria for the issue of a warrant are met, without recording the information relied upon, and without providing reasons for their decisions. Judgments of the higher courts, when decisions to grant a search warrant are challenged, are replete with observations such as there having been a 'lamentable failure' by the first instance court to observe the guidance given by the higher courts.<sup>49</sup>

This is not an argument that courts are not fit to take judicial decisions. Rather, it is an argument that the courts are not only reluctant to intervene in investigative decisions taken by the police, but that they routinely do not take sufficient account of the relevant legal criteria and do not devote sufficient time and resources to taking such decisions. For these reasons, it is difficult to conceive of an appropriate mechanism for reviewing the need for continued pre-trial bail, leading to the logical conclusion that any time limit on pre-trial bail should be absolute. The question then is what that time limit should be.



This is a more difficult question to resolve. On the one hand, a short time limit may result in undesirable consequences, in particular, that the police or Crown Prosecutor may make a decision to charge a suspect in circumstances where this is not warranted by the available evidence, or is premature. Although the relevant test is whether there is sufficient evidence to provide a realistic prospect of conviction, and prosecution is in the public interest, it is sufficiently flexible to give a great deal of discretion as to whether the conditions for charge have been satisfied. In any event, once a decision to charge has been made, the only recourse for the accused is to plead not guilty and face a trial, possibly many months later. On the other hand, if the time limit is lengthy, pre-charge bail will accordingly be lengthy, and even if this is ameliorated if the power to attach conditions is abolished, it would not achieve the objective of ensuring that pre-charge bail is both necessary and proportionate.

One approach is to go back to the question of why a person who is the subject of a criminal investigation needs to be on pre-charge bail, as opposed to being unconditionally released. As was argued earlier, even though failure to attend a police station when required is an offence, this provides little security for the police. If the person fails to turn up, the police will have to decide whether to arrest them, which they could do in any event if there is new evidence justifying a further arrest; which, if the investigation results in evidence that might lead to a charge, there is likely to be (PACE 1984, s. 47(2)). All that is achieved is that the suspect may be charged with the offence of failure to surrender, which they may be guilty of even though they are never charged with the offence for which they were originally arrested.

This would suggest that a shorter, rather than a longer, time limit is appropriate, assuming that a power to impose pre-charge bail can be justified at all. It might be argued that the choice is between 14 days and 28 days. Neither will satisfy the police nor the CPS, who argue that 28 days is not sufficient (Home Office, 2015: 10–11), but they are unlikely to be satisfied with any absolute time limit. Interestingly, this argument has not been made by the police in relation to pre-charge bail of persons arrested and detained under the Terrorism Act 2000, s. 41, on suspicion of being a terrorist. In these circumstances, pre-charge bail is not permitted at all, unless the person is subsequently arrested for a specific offence.<sup>50</sup> A person arrested under section 41 can be detained without charge for up to 14 days. Thereafter, if they are not charged, they must be released unconditionally. If 14 days pre-charge detention for investigation of terrorism is sufficient, why is 14 days pre-charge bail (on top of the period for which a person may be kept in pre-charge detention) not sufficient in other cases?



### Conclusions

Police powers to impose pre-charge bail, originally introduced as a safeguard of liberty, have become, particularly with the relatively recent addition of the power to impose conditions, a serious infringement of liberty which blights the lives of many people. Street bail should be abolished. We know almost nothing about how it is used, and it is contradictory to require police officers to determine that it is necessary to arrest a person, and then allow them to immediately release the person on bail. The power to attach conditions to pre-charge bail should be abolished. They are virtually unenforceable, and court review of their necessity and proportionality cannot work effectively. With regard to pre-charge bail itself, since the alternative is unconditional release, there is no effective enforcement mechanism. As a result, ironically, the imposition of pre-charge bail is more likely to adversely affect the lives of law-abiding people than it is to control the conduct of those who have little to lose. Whilst the police, the CPS, and the Home Office have consistently argued that pre-charge bail is a necessary feature of modern police investigation, they have produced no evidence of its efficacy. It may be a step too far to abolish it altogether, but the time limit should be short and, since the courts have proved themselves unwilling to take responsibility for supervising police investigative decisions, the time limit should be absolute.

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<sup>1</sup> This characterisation of police bail, as an imposition, has been accepted by the Home Office. See Home Office, 2015: 7.

<sup>2</sup> ‘So-called’ pre-charge bail because a significant proportion of people placed on ‘pre-charge’ bail are never charged with a criminal offence. It would be more accurate to refer to people bailed without charge. However, the term is used here since that is the term that is used in other literature on the subject.

<sup>3</sup> The relevant evidential sufficiency and public interest tests are set out in the Code for Crown Prosecutors, available at [http://www.cps.gov.uk/publications/code\\_for\\_crown\\_prosecutors/](http://www.cps.gov.uk/publications/code_for_crown_prosecutors/).

<sup>4</sup> The proposals have been broadly supported by the House of Commons Home Affairs Committee (House of Commons Home Affairs Committee, 2015).

<sup>5</sup> The report was referring to bail from a court, but it is equally relevant to pre-charge bail.

<sup>6</sup> The NILC suggested that England and Wales, together with Northern Ireland, are in a small minority of jurisdictions in which the police have the power to impose bail on a person without charging them with a criminal offence. See NILC, 2010, para. 6.6.

<sup>7</sup> A surety is essentially a promise by a third party to pay a sum of money if bail is

breached. A security is a deposit of something valuable, such as money or a passport, by the person granted bail.

<sup>8</sup> The Home Office Circular issued when the provisions came into force suggested a normal maximum for street bail of six weeks (Home Office, 2003). The College of Policing Authorised Professional Practice, *Detention and custody: Arrest, detention and transportation* (2013) now simply states that '[t]he use of street bail must be exercised reasonably according to the nature of the offence, the victim, the circumstances of the suspect and the needs of the investigation'.

<sup>9</sup> Although unlike pre-charge bail, the person cannot be arrested for an anticipated breach of conditions (see page 7).

<sup>10</sup> [2007] EWHC 3212 (Admin).

<sup>11</sup> Although it is not pursued further in this paper, note that there is a question over whether a person who is released on bail under s. 37(7)(b) can be further detained without charge when they surrender (see Ormerod, 2014, para. D2.4). Where the custody officer determines that there is sufficient evidence to charge, they may also bail the person pending a decision on charge by a Crown Prosecutor, but this is not considered further here since a charge decision is likely to be made relatively quickly. The College of Police Authorised Professional Practice (2013) states that where bail is granted for this purpose it should normally be for no longer than 72 hours, and 'should be used only when necessary, and not routinely', although if the investigating officer sends an 'advice file' to the CPS the guideline timescale is 6 weeks. Responses to the College of Policing consultation on the use of pre-charge bail suggest that the target timescales are often not met (see College of Policing, 2014: 10–12).

<sup>12</sup> The PACE Code of Practice C, which is a statutory code governing the detention, treatment and questioning of suspects, does not include any provisions on the decision to grant pre-charge bail. This may be contrasted with, for example, the obligation of an officer conducting a review of detention to give the suspect or their solicitor the opportunity to make representations about continued detention (Code C, paras. 15.3 and 15.5), and the right of a defendant or their lawyer to make representations to a court at a pre-trial detention (bail) hearing. Unlike street bail, the custody officer must give reasons for imposing conditions, both orally and in writing (Bail Act 1976, s. 5A(2) and (3)).

<sup>13</sup> The College of Policing Authorised Professional Practice (2013) provides that 'in the first instance' pre-charge bail should not be for longer than 28 days, but beyond that period simply states that the decision 'should be escalated and reviewed by a supervising officer'.

<sup>14</sup> For further examples, see the case studies set out in Home Office (2015), pp. 8–11.

<sup>15</sup> This is in contrast to Northern Ireland where the NICHE records management system enables the Criminal Justice Inspectorate to collect statistics on the use of police bail (CJINI, 2006: 33).

<sup>16</sup> Hucklesby's research has not yet been published, but she provided some data from her research in her submission to the College of Policing's consultation on the use of pre-charge bail, and has kindly agreed to their publication in this paper. Professor Hucklesby can be contacted at a.i.hucklesby@leeds.ac.uk.

<sup>17</sup> The consultation paper states that the BBC study was carried out in October 2014, but in fact the BBC first reported its study in May 2013.

<sup>18</sup> Initially, the BBC obtained responses from 34 forces, but this was subsequently updated in 2014 (BBC, 2014).

<sup>19</sup> The Inspectorate also reported concerns that the figures were inaccurate.

<sup>20</sup> See, for example, *Austin v Commissioner of Police of the Metropolis* [2009] 1 AC 564 (kettling); *Hayes v Chief Constable of Merseyside Police* [2012] 1 WLR 517 (necessity for arrest); *Al Fayed v Metropolitan Police Commissioner* [2004] EWCA Civ 1579 (necessity for detention); and *R v Metropolitan Police Commissioner, ex parte Thompson* [1977] 1 WLR 1519, and *R (Mondelly) v Metropolitan Police Commissioner* (2007) 171 JP 121 (decision to charge).

<sup>21</sup> [2006] EWHC 2352 (Admin).

<sup>22</sup> [2014] NIQB 115.

<sup>23</sup> Prior to their repeal by the Terrorism Prevention and Investigation Measures Act 2011.

<sup>24</sup> See, for example, *Re E* [2007] UKHL 47; *Re JJ* [2007] UKHL 45; *Re MB* [2007] UKHL 46; *Re AF* (No. 3) [2009] UKHL 28; and *AP* [2010] UKSC 24.

<sup>25</sup> For a fuller account, on which this summary is largely based, see Cape and Edwards 2010: 531–544.

<sup>26</sup> Criminal Justice and Public Order Act 1994, s. 27(2)(a), amending the Bail Act 1976, s. 3 and PACE 1984, s. 47.

<sup>27</sup> The Joint Review did refer to the Milton Keynes retail theft initiative model, but this did not involve street bail.

<sup>28</sup> For a more detailed explanation see Cape, 2008.

<sup>29</sup> Or is committing or is about to commit an offence: PACE 1984, s. 24(1)-(3). In fact a lawful arrest can be made in the absence of reasonable suspicion provided that it is established that an offence was committed. In practice, the police normally rely on those powers involving reasonable suspicion. See *Shields v Chief Constable of Merseyside Police* [2010] EWCA Civ 1281.

<sup>30</sup> *King v Gardner* (1979) 71 Cr App R 13; *DPP v Wilson* [1991] RTR 284.

<sup>31</sup> *James v Chief Constable of South Wales* [1991] 6 CL 80.

<sup>32</sup> *Hough v Chief Constable of Staffordshire Police* [2001] EWCA Civ 39.

<sup>33</sup> *R v Chalkley* [1998] QB 848, in which the real purpose of the arrest was to give the police the opportunity to install a listening device in the home of the arrested person in connection with the investigation of a separate offence.

<sup>34</sup> *Al Fayed v Metropolitan Police Commissioner* [2004] EWCA Civ 1579, at para. 83.

<sup>35</sup> *Howarth v Commissioner of Police of the Metropolis* [2011] EWHC 2828 (Admin), at para. 31. The judge referred to the judgement in *Raissi v Commissioner of Police of the Metropolis* [2008] WCA Civ 1237, para. 20, which in turn referred to a long line of cases confirming this approach.

<sup>36</sup> See, for example, *Richardson v Chief Constable of West Midlands Police* [2011] 2 Cr App R 1, and *Hanningfield v Chief Constable of Essex* [2013] 1 WLR 3632.

<sup>37</sup> *Re Alexander* [2009] NIQB 20, and *Hayes v Chief Constable of Merseyside Police* [2012] 1 WLR 517.

<sup>38</sup> It is interesting to note that whilst the court in *Hanningfield* held, in effect, that the necessity requirement created a higher threshold in the context of a planned investigation, the necessity for arrest does not appear to have been challenged in respect of any of the arrests in the recent hacking and historical sex abuse investigations.

<sup>39</sup> See text to n. 4.

<sup>40</sup> Bail Act 1976, s. 5A(2) and (3).

<sup>41</sup> A person may be detained without charge for an initial maximum of 24 hours from the time that detention was authorised. This may be extended to 36 hours on the authority of a superintendent or above, and up to a maximum of 96 hours on the authority of a warrant for further detention issued by a magistrates' court (PACE 1984, ss. 41-44).

<sup>42</sup> *R (Carson) v Ealing Magistrates' Court* [2012] EWHC 1456 (Admin).

<sup>43</sup> *R (Ajaib) v Birmingham Magistrates' Court* [2009] EWHC 2127 (Admin).

<sup>44</sup> *R (C) v The Chief Constable of 'A' Police* [2006] EWHC 2352 (Admin), para. 33.

<sup>45</sup> Under both models, the initial bail decision is made by a police inspector, for up to 28 days. Thereafter, under Model 1, a magistrates' court can extend bail up to 12 months, and a Crown Court thereafter. Under Model 2, a Chief Superintendent can extend bail up to 3 months, then a magistrates' court up to 12 months, and extension thereafter is by the Crown Court.

<sup>46</sup> For example, in the recent case of *Zenati v Commissioner of the Police of the Metropolis* [2015] EWCA Civ 80, the court was critical of the fact that, on an application for bail, the court was informed by the prosecutor that they needed 28 days to check whether the claimant's passport was a forgery despite the fact that the police had received confirmation that it was genuine more than two weeks earlier.

<sup>47</sup> *Hanningfield v Chief Constable of Essex Police* [2013] EWHC 243.

<sup>48</sup> *A-G for Jamaica v Williams* [1998] AC 351, at para. 358.

<sup>49</sup> See, for example, *Sweeney v Westminster Magistrates' Court* [2014] EWHC 2068 (Admin); *R (Goldfrate) v Crown Court at Southwark* [2014] EWHC 840 (Admin); and *Glenn & Co (Essex) Ltd v Revenue and Customs Commissioners* [2011] EWHC 2998 (Admin).

<sup>50</sup> *R (I) v City of Westminster Magistrates' Court* [2008] EWHC 2146 (Admin), especially paras. 21 and 22.

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