

**Liberty's Response to the College of Policing
Consultation on Pre-charge Bail**

June 2014

About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at
<http://www.liberty-human-rights.org.uk/policy/>

Contact

Isabella Sankey
Director of Policy
Direct Line: 020 7378 5254
Email: bellas@liberty-human-rights.org.uk

Rachel Robinson
Policy Officer
Direct Line: 020 7378 3659
Email: rachelr@liberty-human-rights.org.uk

Sara Ogilvie
Policy Officer
Direct Line: 020 7378 3654
Email: sarao@liberty-human-rights.org.uk

Introduction

1. Liberty welcomes the College of Policing consultation on the use of pre-charge bail, also commonly known as police bail. There is currently no legal limit on the length of time for which the police may keep someone on police bail. This means that when suspects present themselves at a police station as required a few weeks or months following their arrest and initial bailing, the police can simply re-bail them – i.e. ask them to return again at a later date - and can continue doing this for as long as they wish. The consultation responds to widespread parliamentary and public concern over the lengthy periods of police bail that many suspects are now made subject to while they await a decision either to charge or for no further action to be taken.

2. As a result of our public advice and information service, Liberty has long been aware of, and concerned about, the damage caused by this legal limbo, both to suspects, victims and their families. During the passage of the *Police (Detention and Bail) Bill* in 2011 many parliamentarians voiced similar concerns and pressed the Government on the problems of principle and practice created by an effectively indefinite police bail period. Since then, public concern has grown. Yet despite acknowledging these concerns almost three years ago and pledging to consult on the matter, the Government has done nothing in response.

3. Liberty believes that a six-month statutory limit on pre-charge bail is the only effective way of ensuring diligent and efficient police investigations and justice for victims and suspects. While the intention of the College of Policing in bringing forward the present consultation to consolidate national police guidance is welcome, it is an insufficient response to this legal problem. The consultation paper asks whether ACPO and College of Policing measures are sufficient “*or whether there is a need for more formal regulation of the use of police bail*”.¹ In this response we set why the latter is indeed the case: examining the existing legal framework, the problems with the current system and making the case for the Government to pass legislation introducing a six-month police bail limit.

Current law

4. The *Police and Criminal Evidence Act 1984* ('PACE') sets limits on the length of time for which suspects can be detained without charge. The basic time limit is 24 hours (section

¹ Public consultation, Use of Pre-charge bail, Improving standards for the Police Forces of England and Wales, College of Policing, March 2014 available at: http://www.college.police.uk/en/docs/Pre_charge_bail_consultation.pdf, page 5.

41(1)). An officer ranked superintendent or above can extend this to 36 hours in some circumstances (section 42(1)). Finally, the Magistrates' Court may allow a suspect to be detained for up to 96 hours (section 43(1)). The police speak of a suspect having a certain amount of time left on their "custody clock": this refers to time remaining until the suspect reaches the maximum time for which they can be detained without charge under PACE.

5. After arresting a suspect, but before a charging decision has been made the police may release the suspect on bail. This is known as granting "pre-charge bail" or "police bail". Under PACE the police are required to grant pre-charge bail in certain circumstances: for instance, they must do so when they do not have enough evidence to charge a suspect with an offence, but think it necessary to continue their investigation without holding the suspect in custody; or when they have enough evidence to charge a suspect but are waiting for a decision from the CPS on whether charges should be brought.² Police are also empowered to grant bail if further investigation is needed even if grounds for detention have ceased to apply.³

6. A suspect's "custody clock" is paused when they are granted police bail, and only starts again when they are brought back into detention. That means that the police can use pre-charge bail to buy themselves more time to investigate a crime before bringing a charge. Take the example of a suspect to whom the maximum 96-hour limit applies under section 43(1) of PACE. Assume that the suspect has been detained for 90 hours, is released on police bail, and is then detained again a month later. At this point, the police can detain the suspect for a further 6 hours before reaching the limit for bringing a charge. As there is no limit on the length of time for which the police may keep a suspect on bail, the police can theoretically pause the "custody clock" indefinitely.

7. The *Criminal Justice Act 2003* introduced the power for police to attach conditions to bail.⁴ At present the only limitations on the conditions imposed are the requirement that a condition serves a purpose for which bail can be granted⁵ and the exclusion of a small

² Police and Criminal Evidence Act 1984, sections 37(2) and 37(7)(a) respectively.

³ PACE, section 34(5); bail granted under this section cannot have conditions attached.

⁴ By the *Criminal Justice Act 2003*, Schedule 2, paragraph 6(3).

⁵ Under sections 3(6) and 3A of the BA, a custody officer can impose police bail conditions where it appears necessary to ensure that the person: surrenders to custody; does not commit an offence while on bail; does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person; for his own protection or, if a child or young person, for his own welfare and in his own interests.

number of conditions in the *Bail Act 1976* ('BA').⁶ Once bail has been granted by a custody officer that officer or another at the same police station can vary the conditions and in doing so can impose more onerous conditions.⁷

8. Where a person is released on bail, after arrest but before charge, in circumstances where there has been a duty imposed to attend at a police station, and that person fails to attend the police station at the appointed time, they will be guilty of an offence⁸ and can be arrested without a warrant.⁹ Where a person breaches other police bail conditions, there is a power of arrest under s. 46A (1A). While a person released on conditional police bail can apply to the Magistrates' Court for the conditions to be varied¹⁰ there is little in the way of statutory guidance as to when a Magistrate should adjust the conditions.

9. A suspect subject to lengthy police bail has the option to make a habeas corpus judicial review application to the High Court. However, the courts show significant deference to the police's conduct of investigations. This was made clear in the case of *R (on the application of C) v Chief Constable of 'A' Police and another*,¹¹ where the claimant, who had been given six and a half months' bail, invited the court to order that the investigation against him be halted, citing among other factors the "unduly leisurely timetable" which the police had followed. The court refused to do so, stating that it would only close down a police investigation "in the most exceptional cases". This judicial deference leaves bailed suspects largely at the police's mercy. As Conservative MP, Gareth Johnson, a former criminal solicitor, said during the debate on the *Police (Detention and Bail) Bill* in July 2011:

*I have dealt with numerous situations in which people have been bailed for [...] inordinate periods [...]. There is little recourse for those people, other than making a lengthy and costly judicial review application to the High Court. They simply have to suffer the inordinate delay and return again and again to the police station, waiting, and sometimes hoping and pleading, for a decision to be made in their case.*¹²

⁶ Under the *Bail Act 1976*, section 3A(1) and (2), a custody officer cannot require suspects to subject themselves to electronic monitoring, stay in bail hostel, make themselves available for police inquiries or attend a police interview before they are required to surrender to custody.

⁷ Sections 3A(6) and 5B of the BA.

⁸ Section 6 BA. A warrant can be issued for a person who has absconded: s 7 BA.

⁹ Sections 37C and 46A PACE Act.

¹⁰ Section 47(1E) PACE Act.

¹¹ [2006] EWHC 2352 (Admin).

¹² Hansard, 7 July 2011: Column 1708.

Hookway and the Government's response

10. In 2011 the High Court held in *Hookway*¹³ that the way in which PACE was drafted meant that the “custody clock” continued to run while a suspect was on pre-charge bail. In other words, the police had to charge a suspect within 96 hours in “real time” of their arrest, even if they released the suspect on bail during that time. This effectively reduced the maximum period of detention *and* pre-charge bail to 96 hours.

11. The *Hookway* judgment caused alarm and confusion in many quarters, raising the prospect that the police would be required to release numerous suspects suddenly and unexpectedly. The Government responded by passing emergency legislation, the *Police (Detention and Bail) Act 2011*, to clarify that releasing a suspect on bail did, as most previously had assumed it did, pause the custody clock.

12. Liberty supported the *Police (Detention and Bail) Act*. We accept that some modern day police investigations will take longer than 96 hours, particularly complex cases involving fraud, terrorism and the analysis of forensics. Further, since 1984, the relevant provisions of the PACE Act read together with relevant sections of the BA had been interpreted to mean that when a suspect is bailed by police, the detention clock effectively stopped running and only started again when the suspect answers to bail and is detained again. In our view the Act was therefore clarificatory, returning the law to the original intention of Parliament and the way in which it had been interpreted – by judges, prosecutors and defence lawyers – for the best part of 25 years. However, in our briefing on the Bill we made clear that while a police bail period of over 96 hours was required, an indefinite police bail period was unjustified and unjust.

13. During the debates on the Bill in July 2011, many MPs and Peers voiced concerns about the duration of pre-charge bail in certain cases and the cumulative impact of onerous restrictions. As the consultation paper explains, concerns expressed related to “*prolonged bail periods and frequent re-bailing; disproportionately restrictive or inappropriate bail conditions and the use of bail as a quasi-judicial punishment*”.¹⁴ For the Opposition, the Shadow Home Secretary, Yvette Cooper, said “*the House should also have concerns about the possibility of the use of endless police bail. There are cases, and there have been cases, where people have been left on police bail, including with conditions, long after another*

¹³ *R (Chief Constable of Greater Manchester Police) v City of Salford Magistrates Court and Paul Hookway* [2011] EWHC 1578 (Admin).

¹⁴ See footnote 1, page 7.

suspect has confessed to the offence. There are other cases where investigations have run dry but action was not taken to end the bail arrangements. Long bail can sometimes mean that delays are allowed to develop, and they eventually become counter-productive in securing justice".¹⁵ In response, the Government made clear at the time its intention to address these concerns. The then Home Office Minister, Baroness Browning, said in the House of Lords that "*we will reflect carefully on the debates on the Bill, both in this House and in the other place. In relation to these concerns, it is our intention in autumn this year to consult on matters relating to bail more generally and to the conditions that apply to them*".¹⁶ Nearly three years after this statement, the Government is yet to turn intention into action.

The need for reform

14. Presently, the only practical restriction on the duration of police bail is the requirement that the CPS charges someone suspected of a summary offence within 6 months. There is no statutory maximum limit for police bail and no equivalent practical backstop for indictable or either way offences. In response to concerns expressed over the passage of the *Police (Detention and Bail) Act 2011* ACPO has introduced ten key principles aimed at encouraging efficient investigations and charging decisions. These generally encourage diligence, state that bail periods must be "*proportionate to the enquiries that are necessary to finalise the investigation*" and should be no more than 28 days in the first instance "*unless there are exceptional circumstances*".¹⁷ However these principles set no maximum limit, are non-binding and appear to be routinely ignored and breached. As the consultation paper acknowledges "*there are wide variations in the length of time people can remain on bail in different police areas*".¹⁸

15. Use of excessive police bail periods is reportedly widespread. While the Home Office does not collect official figures (despite calls for it to do so)¹⁹ a BBC study in May 2013 found that more than 3,172 people had been on pre-charge bail for longer than six months: that

¹⁵ Hansard, 7 July 2-11: Column 1690.

¹⁶ Hansard, 12 July 2011: Column 609.

¹⁷ ACPO Bail Principles available in the College of Policing's pre-charge bail consultation http://www.college.police.uk/en/docs/Pre_charge_bail_consultation.pdf, pages 9&10.

¹⁸ See footnote 1, page 5.

¹⁹ For example, in the debate on the Police (Detention and Bail) Bill in July 2011, Labour MP Frank Dobson said, "*it seems to me that there has been a gradual build-up of protracted periods of bail. My understanding is that neither the Home Office nor the police have the faintest idea whether that is true, because they do not have any figures. I urge the Minister to accept that it would be a sound idea for the Home Office to start collecting such figures*" (Hansard, 7 July 2011: Column 19707).

amounts to nearly 6% of all uncharged suspects identified in the study.²⁰ To add to this, in 2011 the National Policing Improvement Agency ('NPIA') and ACPO Criminal Justice Business Area undertook a data collection exercise across all police forces and (having received returns from 23 forces) found that "over a six month period approximately one-third of individuals brought into custody were reported to have been given bail. While there were some data quality issues, the results suggest that the use of pre-charge bail in England and Wales is widespread."²¹ An earlier data collection exercise involving ten police stations estimated that one fifth of individuals brought into custody were released on police bail and found there was wide variation between police bail use between police stations and that use of police bail was on the rise.²² Fear about a widespread and inappropriate use of police bail is supported by Liberty's experience of the issue. Through our public advice and information service, Liberty regularly encounters people who have spent long periods on bail. In the last few months alone we have received several requests for help from individuals subjected to police bail for over one year.

16. Public unease at the lack of statutory backstop has grown since the *Police (Detention and Bail) Act 2011* was passed. The problem attracted significant media and public attention in light of the prolonged police bail periods for journalists suspected of involvement in the phone-hacking scandal. In September 2013, *The Sun* expressed concern over the time that suspects in Operations Elveden and Tuleta had spent on bail: it reported that 39 suspects remained on bail without charge after two years.²³ *The Guardian* reported the Metropolitan Police's response to this, in which it admitted that "there is genuine concern on our part about the length of time that some of those arrested have been bailed".²⁴

17. In Liberty's view, the police power to bail a suspect rather than continue to detain them is important. It can help ensure that necessary evidence is collected in accordance with PACE and that complex charging decisions are properly taken. However allowing the police the power to bail and re-bail indefinitely is a counter-productive policy that causes harm to suspects and victims alike. Suspects face the uncertainty and fear of having the threat of prosecution hanging over them indefinitely; living with that threat entails making no plans,

²⁰ "Law Society calls for 28-day limit on police bail", *BBC News*, 28 May 2013: <http://www.bbc.co.uk/news/uk-22624648>.

²¹ "The police use of pre-charge bail: An exploratory study", National Policing Improvement Agency report, June 2012, p12.

²² Entry in the criminal justice system: a survey of police arrests and their outcomes, C Phillips & D Brown, Home Office Research study 185 (1998).

²³ "Axe endless bail", *The Sun*, 1 October 2013.

²⁴ "Liberty calls for bail time limit as journalists and others left on bail for up to two years", *The Guardian*, 29 September 2013: <http://www.theguardian.com/law/2013/sep/29/liberty-bail-limit-hacking-suspects>.

putting life on hold. In addition and as the College of Policing have recognised “*excessive bail duration and repeat bailing compromise resources and custody capacity. They can also have a detrimental effect on investigations, sometimes leading to poorer outcomes for victims, witnesses and communities, due to loss of momentum in investigations.*”²⁵ Short of this, long bail periods at the very least cause distress to victims, who understandably want to see the perpetrators of crime charged quickly.

18. The wide police discretion to impose conditions over this period compounds the problem. Liberty recognises the role that conditions can play in ensuring that victims and witnesses feel protected – particularly in domestic violence cases - and that suspects are not able to abscond. However, aside from limited exclusions, police discretion to impose conditions is unfettered by law allowing restrictions to be imposed that, in the aggregate, cause hardship and deepen the misery caused by an indefinite state of limbo. As the College of Policing recognises “*the conditions imposed on this type of bail can substantially restrict the freedom of suspects*” and that “*this can be particularly distressing for individuals who have been subject to lengthy periods of conditional bail and ultimately not charged with any offence*”.²⁶ Examples of conditions which police can impose include a requirement to live at a fixed address, report to a local police station, obey a curfew, avoid named people or places, surrender a passport, obey a prohibition on the use of a bank account and provide a financial guarantee for attendance at court. Life on bail can be just as painful for suspects’ family members as for suspects themselves: letters we receive from people on bail often speak of the impact on their spouses and children. Liberty has heard of cases whereby conditions have been placed on a suspect’s family members as well as the individual suspect.

19. The need for reform is further supported by evidence about current practice. A study undertaken by the NPIA in 2012 “*instigated due to a concern about the size and management of the bail population and its potentially high operational impact on the police service*”²⁷ found that bail was being used excessively and unnecessarily to the detriment of the police service. The report identified myriad administrative problems and internal disincentives to the timely conduct of investigations which lead to the over-use of police bail.²⁸ The first issue was unplanned arrests, reportedly driven in part by policies which mandate immediate arrest for certain offences (including for example, shoplifting) or required

²⁵ See footnote 1, page 7.

²⁶ See footnote 1, page 7.

²⁷ See footnote 21, page 10.

²⁸ See footnote 21, pp. 5 and 48.

'named suspects' to be arrested within 14 days regardless of whether investigative work had been completed or not. The second issue was the insufficient quality of primary investigations and a trend towards arresting first and investigating later, even for planned arrests. The demand on custody space was identified as a third significant issue contributing to over-use of police bail and the fourth the: "*considerable uncertainty amongst officer participants concerning the level of evidence required by the CPS to charge particular offences.*"²⁹ The report also pointed to: the over-use of conditional police bail which can further clog the system and drain police time when individuals are re-arrested for breach; poor communication with the CPS in cases requiring a prosecutorial charging decision; and internal police performance targets that favour arrests over completed investigations and charging decisions. None of these factors are appropriate justifications for subjecting suspects to inordinate periods on police bail. Rather, they are examples of bad practice and inefficiency that have been allowed to build up as a result of its indefinite availability.

Liberty's proposals for reform

20. Liberty believes that as a matter of principle there should be a six-month statutory limit on police bail. Just as the law has long recognised the need to prescribe a maximum period of pre-charge detention for suspects, so too should it recognise the significant interference with rights posed by police bail (especially where conditions are attached) and the corresponding need for protection and safeguards against abuse.

21. Further, a statutory maximum limit is, in practice, the best way to ensure diligent and expeditious investigations. The law's current silence on when a charging decision must be reached encourages what Lord Thomas has called a "*culture of delay*" to develop.³⁰ Even the police have started to acknowledge this. ACPO has introduced ten key bail principles, and some forces have included maximum bail periods in their own policies.³¹ The 2012 NPIA report confirms beyond all doubt that investigations could be conducted much quicker if there was a genuine incentive to do so and certain internal processes were reformed.

22. Why should the statutory limit be six months? As we have previously set out³² a six-month limit strikes an appropriate balance between the need to give the police time to

²⁹ See footnote 21, page 24.

³⁰ Hansard, 12 July 2011: Column 619.

³¹ See footnote 21, page 20.

³² "Liberty's Briefing on all stages of the Police (Detention and Bail) Bill in the House of Commons", July 2011, p. 9; "Liberty calls for bail time limit as journalists and others left on bail for up to two

conduct thorough investigations and the need to limit the distress that bail causes for uncharged suspects. We recognise that making the maximum bail period too short could have adverse consequences. Unduly limiting the period for which a suspect may be bailed by police could encourage premature and inappropriate charging or impede public protection by inhibiting the police's ability to gather sufficient evidence to deal with crime, particularly in complex cases and/or those involving forensic analysis.³³

23. It should not be assumed that imposing a reasonable maximum bail period would place unmanageable strain on police investigations. The evidence strongly suggests that six months will be more than adequate for police to gather and analyse evidence post arrest. The 2012 NPIA report found that *"forensic (e.g. DNA, blood, fingerprints) and digital forensic (e.g. on computers and mobile phone) tests were associated with waits of least four weeks in all of the forces visited"*.³⁴ While digital forensic tests could reportedly take longer, there is nothing to suggest that such tests would take anything like six months. Further, the report provided evidence that forensic analysis could be conducted more swiftly given that in *"a drive to save money and increase efficiency, evidence was being sent for forensic analysis in a piecemeal fashion. For example, SpIOs might send DNA evidence first, and only on a negative result send other evidence. In other areas, SpIOs waited until a match of evidence was available before they sent it for analysis in one go...and hence increase the probability of the use of bail."*³⁵ The NPIA report concluded that in addition to improving the quality of investigations prior to planned arrests, a number of straightforward changes to policies and processes could significantly improve the speed of investigations. In one policing force area surveyed *"a substantial cultural shift had reportedly been achieved, whereby ambivalent attitudes towards bail had been challenged by senior management, and officers had been encouraged to take responsibility for the use of bail."*³⁶ This is encouraging and demonstrates that such reform can be achieved. But to maintain this standard and achieve consistency between forces a statutory maximum police bail limit is required.

24. While not unduly short, the statutory backstop needs to be short enough to protect individuals' rights and to act as a genuine incentive towards efficient investigations. While it may be necessary in certain cases, six months is already a significant amount of time to subject an individual to considerable interference with their lives pre-charge and a longer

years", *The Guardian*, 29 September 2013: <http://www.theguardian.com/law/2013/sep/29/liberty-bail-limit-hacking-suspects>.

³³ See footnote 21, page 42.

³⁴ See footnote 21, page 20.

³⁵ See footnote 21, page 42.

³⁶ See footnote 21, page 39.

period cannot be justified in principle nor on the evidence. ACPO's own principles state that bail should only last more than 28 days in exceptional circumstances.³⁷ All this suggests our proposed time limit is fair and realistic. It would give police sufficient time to complete investigations and achieve charging decisions while offering long overdue protection against protracted periods of police bail. It is also important to emphasise that a six-month "backstop" would not stop the police from bringing charges at a later date. If a suspect's bail period expired and new evidence came to light later suggesting that there were grounds for a charge, the police would still have the power to re-arrest and charge them.

Conclusion

25. Many parliamentarians have supported a statutory time limit on bail.³⁸ The Coalition Government acknowledged concerns after the *Hookway* judgment, when it declared its intention to consult on the police bail regime.³⁹ Liberty believes that introducing a six-month limit is a straightforward and sensible way of reducing the harm that the existing system is causing to suspects and victims alike. Such an important matter of principle with huge human rights implications for victims, potential witnesses and suspects should not be a matter for individual police forces to determine through internal policies and non-binding guidance. For this reason, the present consultation and its proposal to "*update advice and guidance to forces*" is an inadequate response to the issue. This initiative by the College of Policing, while welcome, is no substitute for legislation.

Isabella Sankey

Tom Westwell

³⁷ See footnote 17.

³⁸ See, for example, Lord Dholakia in Hansard, 14 July 2003: Column 682; Frank Dobson MP in Hansard, 7 July 2011: Column 1707; Dr Julian Huppert MP in Hansard, 7 July 2011: Column 1708; Lord Thomas in Hansard, 12 July 2011: Column 618.

³⁹ Baroness Browning in Hansard, 12 July 2011: Column 625.