

Police bail without charge: the law of unintended consequences

Ed Cape

Emeritus Professor of
Criminal Law and Practice



Brief history of police bail without charge

- Police bail w/o charge first introduced in 1925 – as a ‘safeguard of liberty and freedom’ – but no conditions could be attached
- Power to attach conditions to police bail w/o charge was an incremental process which went almost un-noticed
 - Criminal Justice Act 2003 introduced power to attach conditions pending charge decision by Crown Prosecutor
 - Police and Justice Act 2006 extended power to attach conditions where bail granted under any power in PACE s37

The pressure for change

- Pressure built between 2012 and 2015 as a result of the telephone hacking, and historical sex abuse, cases involving people like Neil Wallis (News of the World executive editor) and Paul Gambaccini
- I was contacted by many people, who told of the impact on their lives

Policing and Crime Act 2017

- Introduced presumption that release without charge must be without bail unless pre-conditions for bail are satisfied
- In 'ordinary' cases, initial bail period authorised by custody officer was 28 days
- This could be extended to a total of 3 months by a superintendent
- Thereafter, extension of bail could only be authorised by a magistrates' court, up to 3 months at a time – but without limit on the number of extensions
- The suspect must be told if a decision had been made not to prosecute them

Changes in police behaviour following 2017 changes

- Within two months of the 2017 Act coming into force, use of bail w/o charge fell from 26% of cases in March 2017 to 4% in May
- It was largely replaced by RUI – used in 25% of cases following the changes
- RUI has no legal status, and police were (and are) under no obligation to tell suspect whether investigation is continuing
- Essentially, by their response to the 2017 changes, the police rejected the idea of regulation, scrutiny and accountability

Police, Crime, Sentencing and Courts Act 2022

- Presumption of release without bail was removed
- Time limits for bail and levels of authorisation changed
 - up to 3 months by custody officer
 - up to 6 months by inspector
 - up to 9 months by superintendent
 - thereafter, by magistrates' court
- No regulation of RUI, as Home Office suggested it would rarely be used

Trends and issues identified by Prof Hucklesby's research

- Only a minority of suspects (under one third) subjected to bail or RUI are charged with a criminal offence
- The length of investigations is increasing – whether the suspect is on bail or RUI
- Investigating officers don't like scrutiny and transparency, and will take action to avoid it where they have discretion to do so
- The 'independent' role of custody officers regarding bail and charge is being undermined
- Suspects and defence lawyers are being sidelined
- Bail is regarded as a protection for victims but is, in effect, unenforceable

What is to be done?

- How to re-assert 'independence' in relation to bail decisions?
- Should RUI be 'abolished' or regulated?
- How to balance the rights of legally innocent suspects with the need to protect putative victims (and the criminal justice process) in the period between release from the police station and determination of guilt?
- If investigating officers (and their superior officers) game the system, is the answer to regulate the length of investigations?