

Bail beware – hidden ‘landmines’ in changes to pre-charge bail

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Recent amendments to pre-charge bail procedures courtesy of the Policing and Crime Act 2017 have brought with it hidden ‘landmines’ that practitioners must be aware of when advising clients under criminal investigation. High profile cases such as the phone hacking scandal and Operation Yewtree led to calls for reform, notably from celebrities who had been adversely affected by the law. Due to the public nature of the investigations, many public figures facing criminal investigation railed against the indeterminate period of time given to police to investigate cases. Campaigners argued that it was unfair to subject people to lengthy bail periods without recourse to independent judicial review.

On the face of it, the reforms are considered to favour persons under criminal investigation. However, there are a number of important exceptions. This article explores the lesser-known amendments to the Police and Criminal Evidence Act 1984 which have the effect of lengthening overall police bail periods in a significant manner.

Policing and Crime Act 2017

The Policing and Crime Act 2017 amends the Police and Criminal Evidence Act 1984 which is the primary legislation governing the conduct of police and the rights of those under criminal investigation. Historically, following arrest, and before there is sufficient evidence to lay charges, the police would release

a suspect on police bail, subject to conditions if necessary. Such conditions may require suspects to surrender travel documents, not to contact witnesses or otherwise do anything that may interfere with an ongoing investigation.

The amendments have turned the notion of bail on its head; there is now a presumption that no bail will be imposed, unless considered ‘necessary and proportionate’ to do so. From 3 April 2017, for those made subject to police bail, the law now provides for statutory time limits whereby suspects are entitled to challenge their bail status by appealing firstly to an officer at Superintendent level, and if this fails, to a Magistrate.

Those embroiled in recent celebrity scandals most complained about the length of time taken for the police to investigate matters, resulting in undue stress, anxiety and financial loss. The irony is that if these provisions had been in place at the time, it would be likely that such celebrities would not be considered a bail risk and be released without bail. This puts them entirely outside the operation of the Policing and Crime Act 2017. Accordingly, the police would still have as much time as needed to investigate matters, without fear that this could be interrupted by judicial intervention.

Another interesting development concerns the duty of the police to inform suspects in writing, when a decision has been made to take no further action on a particular case. This amendment is likely borne out of

the case of Lord Brittan, who passed away without being told by the police that they had dropped its historic rape investigation 4 months prior to his death.

No limits bail limits?

Depending on the type of investigation, persons may be subject to an initial pre-charge bail period of either 28 days (for standard cases) or 3 months (for Serious Fraud Office (‘SFO’) and ‘exceptionally complex’ cases). This is referred to as the ‘Applicable Bail Period’ (‘ABP’). It has not been widely reported that the cumulative ABP will be lengthened, when a case is referred to the Director of Public Prosecutions, i.e. the Crown Prosecution Service, for consideration. When this occurs, the ABP is automatically suspended. There are no time limits for how long the Crown may review the case, so in fact, the notion of bail being limited to 28 days only applies to the period in which the case is within police hands for further investigation. It is not a true representation of the actual spent by a suspect on police bail.

Furthermore, if the clock is re-started with less than 7 days left on the original ABP, the police will automatically receive a further 7 days’ grace. For instance, if in a standard case, the police refer the matter to the Crown for review on day 26 (out of a total 28 days). The ABP clock is suspended. It may take the Crown another 21 days to consider the matter for a charging decision before referring the case back to the police. As the

clock was stopped with less than 7 days out of the original 28 days, the police have a further 7 days to investigate. In this example, the total bail period becomes 54 days (26+21+7).

The practical difficulty for defence practitioners is keeping track of these bail periods. It would appear that neither the police nor the Crown owe a separate duty to keep records of how long the ABP clock is suspended and it would be up to the defence to make their own enquiries, without any means of checking to ensure that the system isn't being abused.

Practitioners should note that this does not apply to Serious Fraud Office or Financial Conduct Authority investigations. This ability to suspend the ABP clock only applies to cases referred to the DPP for charging decision.

Criminal offence for breach of travel restriction

Section 68 of the Policing and Crime Act 2017 imposes a criminal offence where a travel restriction condition is breached. Travel restrictions include conditions prohibiting an individual from leaving the U.K, to surrender travel documents, not to obtain travel documents or have any travel documents in their possession. This is the first time that a breach of a police bail condition gives rise to the commission of a separate criminal offence. If found guilty of breaching travel restriction conditions, on indictment, the offence carries a maximum sentence of 12 months imprisonment.

Too hard to implement?

Since these provisions came into force on 2 April 2017, anecdotal evidence suggests that the police may be opting

to bypass the system by releasing suspects without bail. Instead of properly considering whether bail conditions are necessary, suspects are issued with a letter, warning them that further offences may be committed if they were to interfere with witnesses whilst the investigation is ongoing.

This would ordinarily be dealt with by the imposition of bail conditions which prohibit such conduct, and enables police to arrest suspects if they were to contact witnesses whilst on police bail. As suspects are no longer obligated to return to the police station at a future date for charging decisions, police are opting instead to send written requisitions by post, which in effect replaces the charging process that is normally carried out in front of the custody sergeant.

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