

The Police, Crime, Sentencing and Courts Act 2022: *rejuvenating pre-charge bail*

The Police, Crime, Sentencing and Courts Act 2022 (the “PCSCA 2022”) has introduced significant changes to the application of pre-charge bail in England and Wales, which came into force on 28 October 2022. The main changes include:

- the removal of the presumption against pre-charge bail, meaning that bail should be used in every case where it is deemed necessary and proportionate;
- the introduction of statutory factors to be considered when deciding whether to grant pre-charge bail;
- the introduction of a duty to seek the views of the alleged victim on the proposed pre-charge bail conditions; and
- the extension of the time limits that a suspect can be released on pre-charge bail before requiring further authorisation and a widening of the scope of officers who are able to authorise bail.

The intention of these change is to guide officers into granting bail to suspects of criminal offences rather than releasing them under investigation. Here we provide some context to these changes, before considering what they are and what they mean for those suspected of criminal offences in more detail.

What is pre-charge bail?

Pre-charge bail is a tool used by the police and/or investigators to manage suspects who have been arrested on suspicion of an offence but where more time is needed to establish whether there is sufficient evidence to charge the suspect. It is used because a suspect can only be detained in custody for up to 24 (in most cases) or 36 hours, known as the custody clock, before they must be charged or released.

Bail is generally accompanied by a set of conditions, such as reporting to a police station or the imposition of a curfew or place of residence, intended to prevent a suspect from failing to surrender, making contact with the alleged victim or committing further offences. It is also possible for a suspect to be released on pre-charge bail without conditions or released under investigation unconditionally.

Why the change?

Before 2017, suspects were often released on pre-charge bail for long periods of time with stringent conditions, such as regular reporting to a police station. In cases where no further action was eventually taken, this approach was considered to be a disproportionate interference with the suspect’s rights.

In an attempt to address these concerns, the Policing and Crime Act 2017 (the “2017 Act”) brought in a presumption against the use of pre-charge bail unless it was deemed necessary and proportionate (s.52(4)). It also introduced clear statutory timescales for the initial imposition and

extension of bail, in which judicial approval was needed for the extension of pre-charge bail beyond three months.

The effect of these changes, largely due to the increased administrative burden imposed on officers in granting bail, resulted in a drastic reduction in the use of pre-charge bail and a corresponding increase in the number of individuals released under investigation unconditionally. This shift away from the use of pre-charge bail has over recent years raised two serious concerns. Firstly, that it was not always being used when appropriate, exposing the public to a greater risk of re-offending. And secondly, that it was leaving individuals with an undefined timescale (sometimes running into several years) before a decision was made about whether to bring charges, which in many cases were never even made.

So although the 2017 Act might have solved the issues of leaving suspects on stringent bail conditions for long periods of time, in doing so, it created a different problem – investigators had no set parameters or incentive to conclude investigations expeditiously, leaving individuals with even longer waits for a decision on charge.

The new regime

The new legislation seeks to address these issues through the following changes.

1. Removal of the presumption against pre-charge bail

This is the key change introduced in order to reverse the presumption against pre-charge bail, by amending the language of the Police and Criminal Evidence Act 1984 (“PACE”) to make “release on bail” the default position (Schedule 4, Part 1 PCSCA 2022). For example, the section of PACE that deals with limits on police detention has been amended to “*A person whose release is ordered under subsection (2) must be released on bail if subsection (5A) applies*” from “*A person whose release is ordered under subsection (2) above shall be released without bail unless subsection (5A) applies*”. Similar changes are made in relation to other provisions concerning pre-charge bail.

While it could be argued that the change is purely semantic, the government have clearly stated the intention of this change is “*to lead to an increase in the number of those placed on bail and a decrease in the number of those subject to the released under investigation process.*”

2. Introduction of factors to be considered when deciding whether to grant pre-charge bail

This position is reinforced by a range of factors that the custody officer must consider when determining whether releasing a suspect on bail is necessary and proportionate (Schedule 4, Part 2 PCSCA 2022). These include:

- the need to secure that the person surrenders to custody;
- the need to prevent offending by the person;
- the need to safeguard victims and witnesses, taking into account any known vulnerabilities of any alleged victim of, or alleged witness to, the offence;
- the need to safeguard the person, taking into account any known vulnerabilities;
- the need to manage risks to the public.

3. New duty to seek the views of the victim on the proposed pre-charge bail conditions

Perhaps the most controversial change to the rules is that the investigating officer should now seek the views of the alleged victim (if any) of the offence, if reasonably practicable to do so, about whether conditions should be imposed on the suspects bail (Schedule 4, Part 3 PCSCA 2022). Taking this together with the new statutory requirement to safeguard victims when determining whether it is necessary to grant pre-charge bail, there is a clear emphasis on the protection of alleged victims in the new regime.

4. Extension of time limits and widening of the scope of officers able to authorise pre-charge bail

In order to support this change of emphasis, the new legislation also seeks to reduce the administrative burden that place upon officers in granting bail. It does this by both increasing the time limits before further authorisation to extend bail is required and lowering the rank of officer able to carry out that authorisation (Schedule 4, Part 4 PCSCA 2022). The grounds for extending bail remain unchanged.

	Previous Regime	New Regime under PCSA 2022
Initial bail	Time limit: 3 months for cases investigated by the SFO and 28 days in all other cases Authorisation: Inspector or above	Time limit: 6 months for cases investigation by SFO, FCA, HMRC, or NCA, and 3 months in all other cases Authorisation: Custody Officer (who can be rank of Constable or above)
First extension	Time limit: 3 months Authorisation: Superintendent or above	Time limit: 6 months Authorisation: Inspector or above
Second extension	n/a	Time limit: 9 months Authorisation: Superintendent or above
Extension in exceptionally complex case	Time limit: 6 months Authorisation: Commander or Assistant Chief Constable or above	Time limit: 12 months Authorisation: Commander or Assistant Chief Constable or above
	these cases must be designated exceptionally complex by one of the Chief Executive of the Financial Conduct Authority, the Director of the Serious Fraud Office or the Director of Public Prosecutions.	
Initial extensions by a court	Time limit: 6 months for standard cases and 9 months for exceptionally complex cases. This can be increased to 9 and 12 months respectively in cases where a charging decision is unlikely to be reached in the previous timeframe.	Time limit: 12 months for standard cases and 18 months for exceptionally complex cases. This can be increased to 18 and 24 months respectively in cases where a charging decision is unlikely to be reached in the previous timeframe.
Further extensions by a court	Applications can be made to court to extend bail by 3 or 6 months.	

It is important to note that the changes to timescales have no effect on the overall length of time an individual may be on bail; they only amend the procedure for authorising release on bail.

A step forwards or backwards?

As a starting point, the government are right to recognise that the increasing number of suspects being released under investigation is unsustainable. It both discourages officers to deal with cases expeditiously, resulting in an ever-growing backlog of cases, and unfairly leaves suspects in limbo, often for many years, as to whether they will be charged. The effect this can have on an individual's well-being can be severe and it does not bring any form of justice to the alleged victim. A change is undoubtedly necessary.

The key question is: are these changes a step towards solving the issues with the pre-charge bail regime or will they reinvoke some of the issues of the previous regime?

The government would argue that the nuances applied to the administration of bail means that it will now be used more effectively and appropriately. While it does seem inevitable that these changes will see a rise in the use of bail as a tool to manage suspects, they are unconvincing in their attempt to reduce the time period an individual can be left under investigation. If anything, any reduction in the administrative burden on officers created by the changes to the authorisation of bail will only be offset by the new statutory duty to consult victims on bail conditions.

More significantly, the position fails to consider the more fundamental issue of the police force's capacity to process and investigate the case itself – tinkering with bail time limits does very little to solve this.

There is a strong risk, therefore, that these changes will only lead to a rejuvenation of the period before the previous changes were made, in which suspects are left on bail for long periods of time with onerous conditions. This may provide some security to alleged victims, but the reality is that the slow administration of justice is in the interest of nobody, and especially not suspects yet to be charged with an offence (and often never are). So, until the government is willing to address this more fundamental issue head on, these new changes to the bail regime will be little more than a step backwards.