The Bar Council

Law Reform Committee observations on the Home Office consultation paper on 'Police Powers: Pre-Charge Bail'.

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Home Office consultation paper on 'Police Powers: Pre-Charge Bail'[1].

2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

4. Rather than responding to the specific questions asked, some of which require policy judgments rather than legal input, we consider that it would be of assistance to offer a narrative response. There are three broad topics in the consultation, and these are dealt with in turn below:

[1] Consultation paper

1) Removal of the presumption against pre-charge bail ("PCB");
2) Time limits and how to make them effective; and
3) Extension of sanctions for breach of pre-charge bail

Removal of presumption against PCB

5. We consider that this is a sensible suggestion. The proposed factors to be considered when deciding whether to admit a person to PCB appear to be appropriate.

Time limits

6. This is a rather thornier issue. One of the fundamental problems that the consultation paper aims to address is excessive delay, for understandable and widely acknowledged reasons which are clearly set out in the paper.

7. To mitigate this, three alternative models are proposed, each of which specifies the various levels of authorisation required to allow a suspect to remain on PCB, culminating in oversight by the magistrates' court (MC) with (apparently unlimited) periodic reviews. As noted above, deciding between these three models is very much a question of policy rather than a legal one. The merits of each are set out in the paper, and we do not express a view on the matter here.

8. There is however a more fundamental issue, with which the consultation paper does not appear to engage. Nowhere is it explained what is intended to happen where either (a) authorisation to extend the duration of a period of PCB is not sought; or (b) authorisation is sought but is refused. Presumably in each of those cases the suspect would no longer remain on bail but would be released under investigation.

9. A similar timetable to that relating to PCB is proposed for suspects released under investigation ("RUI"). In such cases it does not appear that the consultation paper contemplates any consequence for breach of the timetable. If that is right, it is particularly difficult to understand the intended purpose of a time limit in such cases.

10. The fundamental issue with these proposals is the lack of any real incentive to meet the timetable – or, put another way, the absence of any sanction for breach of the time limits. Without such an incentive / sanction it is difficult to be optimistic

about the prospect of the proposed reforms tackling the issue of delay to any significant extent. While the court has a power to stay proceedings as an abuse of process on the ground of delay, the principles governing the exercise of this power provide that even where a delay is unjustifiable a permanent stay should be the exception rather than the rule, and no stay will be granted in the absence of serious prejudice to the defendant such that no fair trial can be held.

11. We have considered what might be realistic sanctions for breach of these time limits. One obvious comparable regime is that which applies to custody time limits (CTLs). There is a tangible consequence for failure to meet or extend a CTL – in simplest terms, the accused is required to be released on bail. Our experience is that this has the desired effect of focusing minds through incentivising diligence and expedition.

12. It is of course difficult to identify a comparable sanction for breach of PCB time limits, particularly in a case in which the suspect is on bail without conditions and therefore a downgrading in his status from PCB to RUI is in effect purely cosmetic.

13. However, the criminal law of England and Wales does include provisions which contain such a sanction, which is expressed as a limitation on the ability to prosecute – in common parlance, proceedings become "time barred". Four examples are sufficient to illustrate the different ways in which such a limitation can be drafted:

(a) "Regulatory" offences

14. For many "regulatory" offences there is a statutory limitation which dates either from the date of the offending conduct or the date of discovery of the offending by the prosecutor. By way of example, Reg. 14 of the Consumer Protection from Unfair Trading Regulations reads as follows:

Time limit for prosecution

14. (1) No proceedings for an offence under these Regulations shall be commenced after—

> **(a) the end of the period of three years beginning with the date of the commission of the offence, or**
>
> **(b) the end of the period of one year beginning with the date of discovery of the offence by the prosecutor, whichever is earlier.**

(2) For the purposes of paragraph (1)(b) a certificate signed by or on behalf of the prosecutor and stating the date on which the offence was discovered by him shall be conclusive evidence of that fact and a certificate stating that matter and purporting to be so signed shall be treated as so signed unless the contrary is proved.

15. That drafting (or similar) is mirrored in provisions relating to a wide range of regulatory offences.

(b) Offences relating to the revenue

16. Section 146A of the Customs and Excise Management Act 1979 provides two slightly different mechanisms. Indictable offences are subject to an absolute bar after 20 years from the date of commission:

146A.— Time limits for proceedings.

(1) Except as otherwise provided in the customs and excise Acts, and notwithstanding anything in any other enactment, the following provisions shall apply in relation to proceedings for an offence under those Acts.
(2) Proceedings for an indictable offence shall not be commenced after the end of the period of 20 years beginning with the day on which the offence was committed.

17. Summary offences, however, must be brought within 3 years of the date of commission and within 6 months from the date on which the prosecuting authority is seized of knowledge of *"sufficient evidence to warrant the proceedings"*:

(3) Proceedings for a summary offence shall not be commenced after the end of the period of 3 years beginning with that day but, subject to that, may be commenced at any time within 6 months from the date on which sufficient evidence to warrant the proceedings came to the knowledge of the prosecuting authority.

(4) For the purposes of subsection (3) above, a certificate of the prosecuting authority as to the date on which such evidence as is there mentioned came to that authority's knowledge shall be conclusive evidence of that fact.

(c) Summary-only offences

18. Section 127 of the Magistrates' Courts Act 1980 precludes the commencement of a prosecution for a summary-only offence outside 6 months of the date of the offence.

127 Limitation of time.

(1) Except as otherwise expressly provided by any enactment and subject to subsection (2) below, a magistrates' court shall not try an information or hear a complaint unless the information was laid, or the complaint made, within 6 months from the time when the offence was committed, or the matter of complaint arose.

(2) Nothing in—

(a) subsection (1) above; or

(b) subject to subsection (4) below, any other enactment (however framed or worded) which, as regards any offence to which it applies, would but for this section impose a time-limit on the power of a magistrates' court to try an information summarily or impose a limitation on the time for taking summary proceedings,

shall apply in relation to any indictable offence.

(d) "Overseas operations"

19. The Overseas Operations Bill is presently progressing through Parliament. It contains provisions which provide for a presumption against prosecution (or the continuation of a prosecution) of members (or past members) of the armed forces in relation to conduct taking place (a) while they were deployed on overseas operations and (b) more than 5 years before proceedings are instituted. If the relevant prosecutor decides that, exceptionally, a prosecution should be brought, they then require the AG's consent to be provided.

Modelling a limitation period for pre-charge bail

20. We recognise that rendering proceedings time-barred is a serious step and we do not recommend it here. The issue would benefit from a separate specific consultation. There are plainly significant interests that would need to be balanced were such a proposal to be under consideration, not least the interests of victims of crime and the requirement that law-enforcement agencies conduct investigations and pursue all reasonable lines of enquiry thoroughly.

21. It is however possible to consider how a time bar could operate in the context of pre-charge bail. One model could look like the following:

i. A limitation period could in all cases not otherwise covered by legislation be set to run from the commencement of the investigation (rather than the time of the offence). That would focus the minds of the investigators – and in due course the court – on the key issue.
ii. The limitation period could be extended indefinitely, subject to regular reviews.
iii. The test for extension could be akin to that which applies to CTLs, incorporating due diligence and expedition on the part of the investigator. Plainly some investigations take far longer than others, for good reason. If there were a delay due to, for example, the examination of a large volume of digital evidence, or the need to make enquiries overseas, this would be likely to be considered a good reason for extending the PCB timetable. A non-exhaustive list of such factors could be included in the enabling legislation.
iv. In exceptional cases, review hearings at the MC could be conducted *ex parte* as and when sensitive issues arose in the investigation.
v. If the extension of the PCB timetable were refused, the consequence would be that proceedings would become time-barred.
vi. That bar could perhaps be subject to a direct right of appeal (not least because judicial review would not be available if the decision were considered to relate to trial on indictment).
vii. Alternatively, any bar could be subject to a final opportunity at the end of the investigation to apply to the High Court for a voluntary bill of indictment where (a) a prima facie case is made out and (b) it is in all the circumstances in the public interest to permit the prosecution to be commenced.

22. A similar regime could apply to suspects released under investigation. There is no reason why the bail status of a suspect should determine the pace of the investigation or the standards to which, in the interests of justice, investigators should be held.

23. The model in paragraph 21 above is merely an attempt to illustrate how such a scheme could work. This is very much the start of a discussion about what might be the consequences of investigative delay, which would as noted above properly form a separate topic for consultation in its own right. Different law enforcement agencies will have their own views on such a proposal. However, absent any meaningful sanction for unjustified delay, the existing problems with interminable investigations seem likely to persist.

Strengthening bail conditions

24. We understand the issues around the present regime concerning a suspect's breach of PCB. We consider however that the proposal to make breach of PCB a criminal offence is both unfair and unworkable for the following reasons (among others):

- It would make breach of PCB more serious than breach of court bail.
- It would require mini-trials to be conducted, with all the attendant Article 6 obligations that would entail, including representation and disclosure. In some cases, the complainant(s) would need to give evidence in such proceedings as well as at the trial for the underlying offence.
- Such proceedings would have the potential to clog up the courts and divert the attention and efforts of the investigators from the investigation, hence potentially prolonging any delay.

25. We consider that other options would be preferable, including one or more of the following:

- Widening the power of arrest to include *"reasonable grounds to suspect breach of a bail condition"*, thereby enabling the police to act proactively.
- Permitting charging under the threshold test rather than the full code test in circumstances where someone has been arrested for breach of a bail condition, thereby speeding up the progress of cases in which greater urgency might be required.

- Adding the option of an electronic monitoring requirement to curfew provisions following a breach of PCB, if the breach concerned the whereabouts of the suspect.
- Introducing fixed penalty notices for breach of PCB conditions. However, although this would require the opportunity of an appeal hearing and so would only be appropriate where the complainant in the underlying proceedings is not expected to be a witness in any hearing convened to consider a breach of PCB.
- Requiring a court to consider any breach of PCB when considering post-charge bail in the event that a suspect is later charged. This would typically be done in any event, but it could be made a requirement.
- Widening the use (in appropriate cases) of domestic violence protection notices and orders under s24-33 Crime and Security Act 2010. A breach results in the offender being taken into custody; a breach of the order constitutes a civil contempt. Their wider use in DV cases may be an effective alternative to criminalising breach of PCB. However, the *caveat* remains that that proving the breach in contempt proceedings would presumably still require evidence from the complainant.

Bar Council[2]
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[2] Prepared for the Bar Council by the Law Reform Committee