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Comment

Policing and Crime Act 2017: Changes to pre-charge bail and the impact on digital forensic analysis

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ABSTRACT

Following the enactment of the Police and Crime Act 2017, subsequent amendments to the Police and Criminal Evidence Act 1984 have seen a 'cap' placed on the length of time a suspect can be released on bail; a process commonly referred to as 'police bail' or 'pre-charge bail'. Whilst designed to instil consistency and certainty into bail processes to prevent individuals being subject to lengthy periods of regulation and uncertainty, it places additional pressures on forensic services. With a focus on digital forensics, examination of digital media is a complex and time-consuming process, with existing backlogs well documented. The need for timely completion of investigations to adhere to pre-charge bail rules places additional stress on an already stretched service. This comment submission provides an initial analysis of new pre-charge bail regulations, assessing their impact on digital forensic services.

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1. Introduction

Bail is a long established process of the criminal justice system, providing an option to temporarily release an individual from custody subject to future investigation or legal proceedings (Gov.uk, 2017a). Bail can be both 'pre' and 'post' charge, impacting an individual subject to such conditions in different ways. Following section 37 of the Police and Criminal Evidence Act 1984 (PACE), post-charge bail can occur where sufficient evidence exists in order to charge a suspect with an offence (Crown Prosecution Service, 2017). Bail conditions can be imposed upon the bailee following section 47 PACE, requiring them to attend court at a future date with repercussions

for those who breach conditions. Pre-charge bail (sometimes referred to as 'police bail') provides the converse, where no charge occurs but further investigation or consultation is required, allowing an individual to continue with their normal life whilst potentially subject to bail terms (McGuinness, 2016). The cases of Paul Gambaccini and Freddy Starr provide insight into the use of long-term pre-charge bail times and subsequent criticisms of this process (McGuinness, 2016).

Prior to the changes by the 2017 Act, those subject to pre-charge bail may previously have faced an indefinite wait for police investigations to complete. Such a scenario has attracted the following dissenting comments from Home Secretary Amber Rudd.

"Pre-charge bail is a useful and necessary tool but in many cases it is being imposed on people for many months, or even

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years, without any judicial oversight - and that cannot be right.” (Gov.uk, 2017b)

Now, following the enactment of the Police and Crime Act 2017 (PACA), which came into force in April 2017, pre-charge bail must now be limited to 28 days (subject to extension request requirements). The new provisions under Part 4 (s.63) of the PACA have added to the existing rules under PACE, inserting s. 47ZA-47ZM to the original framework. Whilst this amendment provides an increased level of certainty in terms of length of proceedings to the suspect, its implementation places additional pressure on forensic investigatory services, particularly those involved with digital device analysis.

This submission provides a discussion of the pre-charge bail amendments, examining their potential impact upon digital forensic services.

1.1. Pre-charge bail: an overview

Pre-charge bail regulation changes in regards to length of time a person can remain ‘on bail’ now set out the following conditions.

- Following any initial detention, a 28-day length limit is imposed upon any subsequent pre-charge bail imposition (s.47ZB PACE).
- A superintendent maintains the ability to extend pre-charge bail to a total of 3 months (starting from initial pre-charge bail date, s.47ZD PACE).
- In some circumstances, an additional extension (beyond the powers of a superintendent) can be sought from the Magistrates Court, provided the requirements set out under either s.47ZF or s.47ZG PACE are satisfied.

Bail will be imposed under section 34 PACE, provided two conditions are met. First, a custody officer deems it necessary, for further investigation of any matter in connection with which the person was detained, or proceedings may be taken against the person. Second, bail must be authorised by an inspector or above. For an extension to pre-charge bail to be applicable, the statutory conditions under section 47ZC PACE need to be considered (College of Policing, 2017). The inclusion of the words ‘necessary and proportionate suspicion’ within this section ensure that the new provisions are consistent with the issue of ‘reasonable grounds’ found in respect of other powers under PACE (notably the powers to stop and search under s.1(3) and the powers of arrest under s.24). Moreover, these provisions ensure compatibility with the rights guaranteed by *European Convention on Human Rights and Fundamental Freedoms (1950)* (ECHR), as determined by the Strasbourg Court in cases such as *Gillan and Quinton v United Kingdom (2010)* ECHR 28, which the Police, acting as a public authority, are legally required to protect (s.6 Human Rights Act 1998).

The *Crown Prosecution Service (2017)* have stated that ‘bail decisions made by a Court can result in the deprivation or restriction of liberty for a substantial period of time’. It should be noted that despite deterring repeated and indefinite bailing, legislation did not wholly prohibit it (Bernard, 2016). The amendments to PACE, brought about via PACA are designed to

safeguard bailees and arguably better protect their right to liberty, under Article 5 ECHR, ensuring greater consistency, which is a fundamental principle in any democracy, determined by the rule of law. Such sentiment is echoed by the Minister for Policing Brandon Lewis (Gov.uk, 2017).

“We needed to rebalance this system for the benefit of all concerned. Today’s changes will bring an end to those long periods of bail without any independent oversight that we have seen in the past.

Police officers will keep on doing their crucial work. But now anyone on pre-charge bail will have their case reviewed regularly and independently. That’s the right thing to do and I thank the police for their swift and efficient work in preparing for these new rules.”

The length of time which individuals spent on bail prior to recent amendments had led to serious concerns (Mckinnon, 2017; Siddorn, 2017), leading to pre-charge bails portrayal as ‘a legal limbo, an assault on liberty and punishment without trial’ (McGuinness, 2016). In 2014, over 70,000 individuals were reported to be subject to pre-charge bail and over 5000 for at least six months (Green et al., 2014). In 2016, *College of Policing (2016b)* reported that ‘around 80,000 people will be on bail at any one time and that nearly a half of these cases will result in no charges being brought’. Whilst in decreasing pre-charge bail time, a greater sense of procedural certainty is provided to those subject to this process, however, in doing so, the pressure to complete necessary investigations in increased.

2. Implications of time on investigations

College of Policing’s (2016) study into the use of pre-charge bail found that the mean length of initial pre-charge bail for sampled cases was 46 days. 41% of cases involving violence or sex offences were bailed for over 28 days, and 9% of cases were initially pre-charge bailed for over 90 days (cases involving rape and sexual offences or drug offences). *Hucklesby’s (2013)* investigation into pre-charge bail found that from around 14,000 pre-charge bail records analysed from two UK police forces, ‘just under half of all cases in which pre-charge bail was imposed ended in no further action. Suspects were bailed ‘just in case’ evidence came to light even when it was foreseeable that their cases would result in no further action’.

Further, it is reported that forensic analysis is one of the main factors in 60% of the cases where over 90 days are required for pre-charge bail (*College of Policing, 2016a,b*). In regards to bail, ‘it should always be the investigative officer’s objective to complete the investigation in the first period of detention wherever possible’ (*College of Policing, 2017*). Whilst a valid statement, case management, work loading and resource issues may in reality hinder the success of achieving this goal. One area of particular concern surrounds digital forensic analysis services (*College of Policing, 2016a,b*), where the examination and interpretation of data stored on a seized digital device is needed before further decisions can be made. Digital Forensics backlogs have been widely reported for some time (*BBC News, 2015; Scanlon, 2016; Lillis et al., 2016; BBC News, 2017*), with delays of up to 5 months for computer-based investigations in Greater Manchester noted by MP Ann Coffey

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