

This is an Open Access document downloaded from ORCA, Cardiff University's institutional repository:<https://orca.cardiff.ac.uk/id/eprint/159693/>

This is the author's version of a work that was submitted to / accepted for publication.

Citation for final published version:

Dehaghani, Roxanna , Smith, Tom and Newman, Daniel 2023. Suspects still left in limbo? The continuing challenge of pre-charge bail. *Criminal Law Review* 8 , pp. 492-511.

Publishers page:

Please note:

Changes made as a result of publishing processes such as copy-editing, formatting and page numbers may not be reflected in this version. For the definitive version of this publication, please refer to the published source. You are advised to consult the publisher's version if you wish to cite this paper.

This version is being made available in accordance with publisher policies. See <http://orca.cf.ac.uk/policies.html> for usage policies. Copyright and moral rights for publications made available in ORCA are retained by the copyright holders.



Suspects still left in limbo? The continuing challenge of pre-charge bail

Roxanna Dehaghani, Tom Smith, Dan Newman*

Abstract

Pre-charge bail has undergone significant reform in recent years. In 2017, changes introduced by the Policing and Crime Act 2017 placed time limits on pre-charge bail. Notwithstanding this attempt to more effectively regulate the use of bail, police found a helpful workaround in the form of 'release under investigation', an informal status which proved hugely problematic for both victims and suspects. As a result, the Police, Crime, Sentencing and Courts Act 2022 introduced further changes to the law in this area, designed to address the detrimental effect on the former, yet seemed to show little concern for the latter. This article, drawing on original interview data with criminal defence solicitors in Wales and analysis of the legislative framework, examines the changes to pre-charge bail and the negative impact this has had and may continue to have on suspects. It explores the role of police culture regarding these changes, offers suggestions for how the most recent reforms may be interpreted, and urges that suspects' rights be more robustly protected.

Introduction

Pre-charge bail has undergone significant reform in recent years. In 2017, changes came about as a result of the Policing and Crime Act (PCA) 2017. The PCA 2017 placed time limits on pre-charge bail, yet the police found a helpful workaround in the form of 'release under investigation' (RUI).¹ This workaround has proven problematic – it has had a clear detrimental impact on victims² and suspects alike. The proposed solution has been ushered in through the Police, Crime, Sentencing and Courts Act (PCSC) 2022, under a legislative package dubbed 'Kay's Law'.³ Unlike the 2017 changes, which resulted from the clear recognition of the detrimental effect of (lengthy) pre-charge bail on suspects, the 2022 changes appear to have been driven primarily by a concern about the protection of victims. In contrast, any remedy for the pre-charge 'limbo-like' conditions for suspects resulting from PCA 2017 appears to be a secondary benefit rather than a central objective, suggesting the rights of suspects were of limited importance in this context. Arguably, the purpose of the 2017 reforms – to prevent suspects from languishing in a limbo state prior to charge – may not in fact be achieved, with the possibility of further challenges in years to come.

Drawing from 20 semi-structured interviews conducted with criminal defence solicitors in Wales in 2018 and 2019,⁴ we provide a frontline insight into the contemporary use of bail and RUI in England

* Roxanna Dehaghani, Senior Lecturer in Law, Cardiff University: Fatemi-DehaghaniR@cardiff.ac.uk (Corresponding Author); Tom Smith, Associate Professor in Law, University of the West of England: thomas8.smith@uwe.ac.uk; Dan Newman, Reader in Law, Cardiff University: NewmanDC@cardiff.ac.uk

¹ Release without bail was possible prior to the 2017 Act, although it came to be known as RUI and used routinely post-2017 Act.

² We have used the word 'complainant' as the investigation is ongoing whilst the suspect is on bail or RUI. We have used the word 'victim' where appropriate.

³ Named for Kay Richardson, who was killed by her ex-husband whilst he was RUI in 2018. See Cowling P, Clayton J, Newman M, "Scandal brewing' as thousands of suspects released' (*BBC News*, 4 December 2019): <https://www.bbc.co.uk/news/uk-50563533> (accessed 31 August 2022).

⁴ Anonymised to protect their identity. Interviews lasted between 29 and 122 minutes, with an average length of 62 minutes, and were analysed using thematic analysis – a method for identifying, analysing, and reporting patterns across a data set (see Braun, V, Clarke, V. 'Using thematic analysis in psychology' (2006) *Qualitative Research in Psychology*, 3(2)). See Newman, D, Dehaghani, R. *Experiences of Criminal Justice* (2022, Bristol: Bristol University Press for more detail on methods. Social constructivism informed the analysis – see, e.g., Denscombe, M. *Ground Rules for Good Research: a 10 point guide for social researchers* (2002, Buckingham, Philadelphia: Open University Press. See also Blumer, H. *Symbolic Interactionism: Perspective and Method* (1969, Los Angeles: University of California Press).

and Wales (E&W).⁵ Interviews broadly focused on the lawyer-client relationship and the solicitor's perceptions of how suspects and defendants experienced the criminal justice system. Solicitors were asked about their views on the process of bail and remand, their input in bail and remand decisions, and their thoughts on how their clients would experience these processes. RUI emerged as a core concern for solicitors and their clients. The focus on those who had experience of the criminal process in one region provides a "thick description" of how certain aspects of the criminal process are working in practice.⁶

To begin, we explore the provisions on pre-charge bail pre-2017; the problems that the PCA 2017 was responding to; the changes brought about by the PCA 2017 and the problems associated with them; and lawyers' perceptions thereof. Thereafter, we examine the recent changes to pre-charge bail under the PCSC 2022, and reflect on whether the PCSC 2022 will mitigate the detrimental impact on suspects caused by its legislative predecessor. Finally, we reflect on the 2022 changes through the lens of the 2017 changes, particularly by reference to the regulation of police and the enduring effect of police culture in responses to legislative change. We make the case that further reform is necessary to address the mischief of the 2017 changes and offer some suggestions regarding the possible effect of the 2022 changes (which at the time of writing are not yet apparent).

1 Before PCA 2017: the problem of pre-charge bail

The basic concept of police bail involves the release of a suspect from custody (after arrest or detention), subject to the requirement to attend at a police station or to appear at court at an appointed time in the future. There are three types of police bail, which occur at different stages of the pre-court process and are decided by different figures: bail which is granted following arrest, but before arrival at the police station (known as 'street bail'), determined by the arresting officer;⁷ bail without charge from a police station, determined by a Custody Officer (hereafter, CO);⁸ and bail following charge, again decided by a CO.⁹ Once a suspect arrives at a police station, the CO adopts responsibility for making decisions about bail (outlined in various sections of Part IV of the Police and Criminal Evidence Act (PACE) 1984). The first decision regarding bail will relate to releasing a suspect without charge— that is, when the police are 'not in a position, or don't want, to charge a person they have arrested'.¹⁰ Bail becomes an active issue if the CO decides that there is insufficient evidence to charge and the grounds for detention for investigation under PACE s37(1) are not satisfied.

If the CO decides to release on bail without charge, this may be unconditional, beyond the requirement to attend at a police station or court at a later date. However, in some circumstances, further conditions may be attached to bail. The CO has the 'normal powers to impose conditions' on bail without charge, set out in the Bail Act (BA) 1976;¹¹ this essentially means the same powers as a court in making bail subject to requirements (though unlike the courts, the police are unable to impose electronic monitoring or hostel residency requirements).¹² Under s 3(6) of the BA 1976, one or more conditions can be attached to ensure, primarily, that the person released surrenders to custody when required; does not commit any offences; and/or does not interfere with witnesses or obstruct the investigation (among other objectives). Conditions could include a curfew; being prohibited from contacting certain people; exclusion from a geographical area; confiscation of a passport; and frequent

⁵ Whilst research was conducted in Wales, 'England and Wales' is one unitary jurisdiction (at least for now) and therefore findings are transferable to England. See, for example, Dehaghani, R, Newman, D. 'Criminal legal aid and access to justice: an empirical account of a reduction in resilience' (2022) *International Journal of the Legal Profession* 29(1); and Newman, D. 'Attitudes to Justice in a Rural Community' (2016) *Legal Studies*, 36(4), 591-612.

⁶ Travers, M. *The Reality of Law: Work and Talk in a Firm of Criminal Lawyers* (1997, Aldershot: Ashgate).

⁷ PACE 1984, s 30A.

⁸ Note that this is called 'without' rather than 'before' charge; 'before' charge would be to assume that a suspect will eventually be charged (which is not necessarily the case).

⁹ PACE 1984, s.38.

¹⁰ Cape, E, 'Police bail. A right old mess' (Centre for Criminal Justice Studies, 30 May 2017): www.crimeandjustice.org.uk/resources/police-bail-right-old-mess (accessed 7 May 2020).

¹¹ PACE 1984, s 47(1A)

¹² BA 1976, s 3A(2)

reporting to a police station.¹³ The effect is to regulate a person's behaviour upon release from custody whilst further investigations are pursued or whilst a decision is made, by the police or prosecution, on whether the person can or should be charged with an offence. Failure to comply with conditions can result in the suspect being arrested or – in the case of a failure to surrender to custody – to be charged with a further offence.¹⁴ Bail, and the conditions imposed, are therefore coercive.

Until 2017, the CO had significant freedom to choose whether or not to release a suspect without charge either with or without bail.¹⁵ Release on bail was not subject to a time limit, which meant that coercive and restrictive conditions could be applied to someone not yet charged with an offence for as long as the police so wished. This represented a concerning and possibly excessive interference with the right to liberty under Article 5 of the European Convention on Human Rights (ECHR) and caused significant harm, distress, and embarrassment to persons bailed for lengthy periods – particularly if the original allegations were highly sensitive and if no charge was ever brought.¹⁶ Significant problems with the use of bail without charge were evident. The College of Policing evidence demonstrated that, in 2013-14, approximately 400,000 suspects were bailed without charge across all police forces, with around six percent bailed for over six months;¹⁷ the Metropolitan Police Service (MPS) bailed just under 20,000 individuals without charge, with 25 percent having been in this situation for more than six months.¹⁸ Hucklesby found that nearly 50 per cent of those bailed were not prosecuted; that conditions were imposed on two-thirds of people bailed; and that police officers were often able to foresee that there would be no charge when bailing a person, but did so anyway.¹⁹ In 2016, around half of the roughly 80,000 people on pre-charge bail at any one time were never charged.²⁰ These were recognised as substantial numbers of people who were not only liable to be subject to conditions of release without charge,²¹ but essentially placed under long-term suspicion with the consequential psychological burden of a possible investigation and charge, with no guarantee of any conclusion.

¹³ Courts may also impose electronic monitoring as a condition (under s 3(6ZAA)) though as stated, the police cannot. Beyond this, the BA 1976 does not specify what conditions can be imposed, beyond saying that they must be 'necessary' to ensure the aims summarised above. For more on the use of conditions (including examples), see Hucklesby, A. 'Police Bail and the Use of Conditions' (2001) *Criminology & Criminal Justice* 1(4), 441; and Cape, E, Smith, T, 'The Practice of Pre-trial Detention in England and Wales' (University of the West of England, 2016): www.fairtrials.org/wpcontent/uploads/Country-Report-England-and-Wales-MASTER-Final-PRINT.pdf (accessed 7 May 2020).

¹⁴ See PACE 1984, s 46A(1) and (1A) regarding arrest for breach of bail conditions or failure to attend a police station when required. See BA 1976, s.6 regarding offence for failure to attend after release.

¹⁵ The position has changed significantly since 2017 – discussed below.

¹⁶ The broadcaster and journalist, Paul Gambaccini, provides a high-profile example – he was bailed without charge for 11 months in relation to allegations of historical sex abuse and was never prosecuted – see Home Affairs Committee, Oral evidence: Police bail (HC 962, 3 March 2015):

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/police-bail/oral/18431.html> (accessed 7 May 2020).

¹⁷ Home Office, 'Pre-Charge Bail: Summary of Consultation Responses and Proposals for Legislation' (March 2015), 25: [https://](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/418226/150323_Pre-Charge_Bail_-_Responses___Proposals.pdf)

assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/418226/150323_Pre-Charge_Bail_-_Responses___Proposals.pdf (accessed 7 May 2020)

¹⁸ Cape, E, 'What if police bail was abolished?' (Howard League for Penal Reform, 2015), 10:

<https://howardleague.org/wpcontent/uploads/2016/03/What-if-police-bail-was-abolished-web.pdf> (accessed 10 May 2023).

¹⁹ Hucklesby, A, 'Pre-charge bail and investigation of its use in two police forces' (University of Leeds, 2015):

[https://essl.leeds.ac.uk/download/downloads/id/811/briefing_paper_pre-](https://essl.leeds.ac.uk/download/downloads/id/811/briefing_paper_pre-charge_police_bail_report_summary.pdf)

[charge_police_bail_report_summary.pdf](https://essl.leeds.ac.uk/download/downloads/id/811/briefing_paper_pre-charge_police_bail_report_summary.pdf) (accessed 10 May 2023); see also College of Policing, 'Bail report: Pre-charge bail – an exploratory study' (September 2016): [www.college.police.uk/News/College-](http://www.college.police.uk/News/College-news/Documents/Bail_report_document_439E0816_2.pdf)

[news/Documents/Bail_report_document_439E0816_2.pdf](http://www.college.police.uk/News/College-news/Documents/Bail_report_document_439E0816_2.pdf) (accessed 7 May 2020).

²⁰ College of Policing, 'Pre-charge bail: The possible implications of research' (October 2016), 2:

www.college.police.uk/News/College-news/Documents/College_of_Policing_Precharge_Bail_Briefing.pdf

(accessed 7 May 2020).

²¹ A notable gap in the evidence base was the lack of retained data on frequency and type of conditions used. The Home Office did not (and still does not) have data on how conditions were used, what conditions were imposed, and what proportion of those placed on bail were eventually charged. As such, there has been and continues to be a lack of critical information on the use of bail without charge.

2 PCA 2017: the problem of ‘released under investigation’

PCA 2017 extensively amended PACE 1984 in what represented the largest shake-up of police bail in three decades.²² The legislation created a presumption of release *without* bail for all suspects, unless certain pre-conditions were satisfied, namely, that the CO was satisfied that releasing on bail was necessary and proportionate; and that an officer of rank inspector or above authorised the release on bail, having considered the representations of a suspect and their lawyer.²³ The default position was thus unrestricted release for suspects, with greater scrutiny of the use of bail via the principles of necessity and proportionality. Whilst it did not introduce a maximum overall time limit, PCA 2017 limited initial release on bail to 28 days in standard cases.²⁴ After 28 days, PCA 2017 required a senior officer to authorise any extension (up to three months), subject to certain conditions;²⁵ thereafter, only a magistrates’ court could extend the period further.²⁶ At each stage, pre-charge bail would therefore be reviewed. Combined, these changes sought to significantly accelerate the pace at which investigations progressed, and (in effect) prevented the police from simply bailing a suspect and allowing a case to continue unresolved and with infrequent scrutiny for long, indeterminate periods of time. However, the legislation, crucially, did not directly address the length of police investigations, a perennial problem which continues to be fraught with a variety of challenges.²⁷

These changes imposed significant limitations on the (over)use of bail without charge, requiring the police to repeatedly consider whether or not to utilise it; creating strict timeframes for its use; and introducing an element of judicial scrutiny. Undoubtedly, the purpose of the legislation was to substantially reduce the (ab)use of this police power, particularly in terms of long, unsupervised periods of bail ending with no charge. The police, it was believed, would be incentivised to decide upon charge or, alternatively, seek an extension within the 28 day timeframe imposed by the legislation. Bail without charge, as predicted, reduced dramatically.²⁸ Yet, as with many well-intentioned reforms, these changes to pre-charge bail had unanticipated consequences which created problems of equal seriousness for suspects, defence lawyers, the police, and victims.²⁹

2.1 Extensive Use of RUI

Specifically, the changes led to a significant number of persons arrested on suspicion of an offence, but not charged, being released without bail (that is, simply ‘released’) and informed that they were ‘released under investigation’: a police operational term that had, and continues to have, no formal, legal status. Police practice shifted very swiftly from extensive use of bail without charge to extensive use of RUI. Within two months of the changes coming into force (April 2017), use of pre-charge bail dropped from 26 percent in March 2017 to only four percent. In contrast, 25 percent of cases involved RUI, which was virtually unused prior to PCA 2017.³⁰ A more comprehensive Freedom of Information request by the Law Society (covering 31 police forces, including the MPS) found that the use of pre-charge bail and RUI had changed dramatically between April 2017 and April 2018. Prior to PCA 2017, just over 200,000 suspects were on pre-charge bail; a year later, this figure had dropped to just over 40,000.³¹ In contrast, RUI was used for just under 200,000 persons in 2017/18.³² Furthermore, the average length of time suspects were RUI, before charges were brought or the investigation formally

²² For a fuller discussion of the impact of PCA 2017, see Hucklesby, A, ‘Pre-charge bail and Release Under Investigation (RUI): An urgent case for reform’ (2021) *Crim LR*, 2.

²³ PACE 1984, s 50A (as amended by PCSC 2022)

²⁴ PACE 1984, s 47ZB(1) (as amended)

²⁵ See PACE 1984, s 47ZC (as amended).

²⁶ With no limit on the number of extensions available.

²⁷ For example, issues in relation to resources and staffing; as well as issues related forensic evidence services.

²⁸ See College of Policing, ‘Pre-charge bail data’ (September 2017):

www.college.police.uk/News/Collegenews/Documents/Pre-charge%20bail%20data.pdf (accessed 7 May 2020)

²⁹ For a review of the changes under PCA 2017, see Sosabowski MH, Johnston E, ‘Released Under Investigation: High Time to Bail Out’ (2022) *J of Crim L*. <https://doi.org/10.1177/00220183221078935>

³⁰ College of Policing (n 28).

³¹ The Law Society, ‘Released under investigation’ (7 November 2019):

www.lawsociety.org.uk/policycampaigns/campaigns/criminal-justice/release-under-investigation (accessed 7 May 2020).

³² *Ibid.*

ended, increased significantly: research suggested that the average period spent on pre-charge bail prior to PCA 2017 was between 48 and 90 days;³³ this increased to nearly 140 days in 2017/18.³⁴ The dramatic nature of these changes led lawyers to suggest that bail ‘doesn't exist anymore, essentially... [laughs] no-one on bail at the moment’ (DS7); rather, ‘nearly everybody gets released under investigation’ (DS1).

2.2 Absence of Time Limits

Unlike the PCA 2017 framework which limited initial pre-charge bail by the police to 28 days, RUI was not subject to any time limits. The 28-day limit to pre-charge bail introduced a form of swift review and imposed information requirements. For example, if there was insufficient evidence to charge the suspect, they had to be notified in writing that they were ‘not to be prosecuted’;³⁵ that is, that they are not being charged *at that point in the investigation* (although this does not preclude future charge and prosecution).³⁶ The changes introduced by the PCA 2017 – coupled with pre-existing provisions in PACE 1984 – provided, in theory, more certainty and clarity, as the police were obligated to give *some* information about the status of the case to a person released on bail, and to follow a legislatively defined timetable in doing so. For example, when there is sufficient evidence to charge but a decision is needed by the CPS, the CO must tell the suspect that they are being released on bail for this purpose;³⁷ and if a person is released on bail without charge, and a decision about prosecution has not yet been taken, they must also be told this.³⁸ In contrast, the emergent practice of RUI did not require any of the above. Whilst the term clearly suggested a police investigation was continuing, it was (and remains) an informal term applied to people released without bail; it has no legal basis, and therefore no applicable time limits. Persons so released – and victims³⁹ – could not require the police, or any other body for that matter, to review ongoing investigations or provide information. As Cape highlighted, ‘suspects ha[d]... no idea whether the police are continuing to investigate, how long that is likely to go on for, whether the police will want to interview them again, whether they will be re-arrested, or whether they will eventually be prosecuted’.⁴⁰

Lawyers appeared to regard this situation to be a natural result of the 28-day time limit imposed by PCA 2017, a timeframe which simply did not reflect the realities of investigation. As DS7 highlighted:

There needed to be something done about [bail], but there wasn't really any consultation... If you'd asked a defence practitioner “is twenty-eight days appropriate?” we would have said no... If ... anything needs to be sent off for forensics or phone work, you can't. The police aren't going to do that in twenty-eight days... Three to six months would have been a reasonable amount of time to conduct... a more serious investigation, but no-one listened.

Therefore, the reactionary emergence of RUI as a response to such time limits was arguably ‘worse for people because they haven't got any sort of end date’ (DS17):

At least with bail, there's a date set... and in that time [the police are] meant to then speak to the CPS,⁴¹ or they're meant to take statements, or they're meant to speak to defence

³³ The 48-day figure is drawn from Hucklesby (n 19); the 90-day figure is drawn from the Law Society (n 31).

³⁴ *Ibid.*

³⁵ PACE 1984, s.37(6B).

³⁶ *Ibid.*, s.37(6C) states that this notice ‘does not prevent the prosecution of the person for an offence if new evidence comes to light after the notice was given’.

³⁷ *Ibid.*, s.37(7B).

³⁸ *Ibid.*, s.37(8).

³⁹ Although see the Code of Practice for Victims, which requires that victims be provided with key information at critical junctures, including bail or release (Ministry of Justice, ‘Code of Practice for Victims of Crime in England and Wales’ (November 2020):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/936239/victims-code-2020.pdf (accessed 10 May 2023).

⁴⁰ Cape (n 10).

⁴¹ HMICFRS found that the CPS ‘were often unaware that a suspect had been released under investigation’, which created problems for prosecutorial decision-making (HMICFRS, State of Policing: The Annual Assessment of Policing in England and Wales 2020’, 94: <https://www.justiceinspectores.gov.uk/hmicfrs/wp-content/uploads/state-of-policing-2020.pdf> (accessed 10 May 2023). That the CPS were often unaware of

witnesses or whatever it is that they're meant to be doing. At least the individual knows, "Right, I'm answering bail in twenty-eight days' time, I should know the outcome of what's going on." Obviously, it's a frustrating process for them but at least there's some sort of deadline... (DS17)

As such, this clarity regarding when the investigation might terminate – as well as a form of natural 'structure' to its progression – had provided a degree of certainty and comfort for suspects who are, otherwise, unable to control or necessarily predict the nature and outcome of an investigation. Perversely, PCA 2017 had removed this by driving the emergence of RUI:

All RUI has done is it effectively means they don't have to go back to the police station every twenty-eight days or three months or something; they're just left pondering their fate until they get notification—and they may never get it—from the police saying there's no further action or you're going to be charged, or rather you've been requisitioned and you have to be... back [at] the police station at a certain date to be re-interviewed, or you've been requisitioned to court and you're effectively charged, or not charged of course but you're summoned effectively to attend at court. (DS18)

Bail, whilst problematic, nevertheless provided suspects with concrete information that, at the very least, suggested that the investigation was progressing (or appeared to be):

Being on bail, at least you've got a bail date. At least you know, "Oh, this is the date I'm attending the police station," so you've got something to focus on. Released under investigation is, pfft, it's just a joke... it can be anywhere from up to two weeks to a year... It's not better than being on bail. At least with bail, you know when you're back at the police station; you've got something to work for. Released under investigation, it just frees up ... the attendee... to do what they want without bail conditions. And that's, and that's nice, for them, especially if they want to work in the area or contact people that they're used to contacting, but it's that not knowing. It's torture for a lot of them. (DS2)

The release under investigation scenario [is] far worse than anything else at the moment. Because if they're on bail with conditions, yeah, they can't do x, y, and z, but they understand why. And they've got a case that's in the system, and they—we're dealing with it. But someone's been arrested for a rape, and they're released under investigation, it's a serious allegation, when are they going to hear that either no further action's being taken or whether they're going to be charged? There's no date. (DS7)

These responses clearly demonstrate the 'invisibility' of RUI as a pre-charge procedure, with no information and – crucially – no rationale for the individuals subject to it. Owing to this uncertainty, suspects would seek updates from their lawyers, yet the lawyers themselves were also left in the dark:

We have them ringing up all the time, "What's going on?" "Well, I don't know, I'll chase it if you want me to", but as we all know there's a whole load of offences being investigated that just aren't going anywhere, they're just being brushed under the carpet. (DS7)

"Am I going to get a summons through the post? Am I going to get a knock on the door?" ... They're living in fear because they don't know what's going to happen... You know, people are phoning me all the time, "What's going on? What's going on?" I'm saying, "I don't know." Because I can email or write to the court, ... I [can] try write to the police station, email the officer – they get back sometimes, sometimes they don't. And if they do get back all they'll say is, "The matter's ongoing." ... There's nothing that I can do about that. Because there's no restriction on [the suspects'] liberty. (DS14)

As such, in addition to feeling shut out of this process by the police, suspects could be left with the impression that their lawyers were failing to promote and advance their interests by obtaining information (even if the lawyers simply could not). Ultimately, the resulting frustration could lead to a strain on this relationship, a loss of confidence and trust, and a poor experience of the process overall.⁴²

2.4 Case Progression

There were further unintended consequences of the changes and resulting delays, such as the case ultimately being dropped or forgotten about. For this reason, lawyers became reluctant to press for an update on progress, as DS11 indicated:

You can tell them ‘til you’re blue in the face, “Look, let’s take it on the chin, wait, let’s see what’s going to happen because the likelihood is that the longer this goes on, the less likely it is to go ahead,” whereas if I’m phoning [the police] all the time I’m keeping it live and you might find that a case that otherwise might have just died and gone and away is resurrecting itself. And clients just don’t like that; they don’t like the position of not knowing what’s happening. And in the current system you’ve got a situation that’s happening quite often where your clients don’t know what’s happening. [RUI] is a bit of a sticking plaster, really, because you can say to the client, “Look, you’re not on bail. You might never hear about this.” And they are happier with that, because... they feel, “Oh right, there’s nothing hanging over me at the moment.” But ... it’s just another side of the same coin as far as I can see.

From a lawyer’s perspective this arguably represents serving the suspect’s best interests. It is therefore possible that delays caused by RUI deferrals could, on occasion, work in the lawyer’s and/or suspect’s favour. Yet, that the outcome ultimately works in their favour may be little to no consolation for the stress endured in the lead-up. Again, this has the potential to strain the lawyer-client relationship. Moreover, the suspect’s perception of their own best interests may be different from that of the lawyer – the suspect may place greater value on knowledge, resolution, and finality. Whilst RUI without conditions attached may result in (theoretical) freedom as compared with bail, the unwelcome state of nescience created by RUI – and the attendant stress generated – could potentially cause the suspect to value the acquisition of information and closure more than longer-term gain, such as the case being dropped.⁴³ Moreover, whilst this strategy may ultimately prove beneficial for the suspect, it was undoubtedly problematic for processes of justice in general and for the victim in particular.

2.5 Lack of Oversight

RUI was (and technically remains) entirely informal and unregulated; unlike bail, it was not subject to oversight by senior officers or the courts. Its informality clearly created a deficit in information-sharing and communication between investigators and the accused:

Suspects are being left in limbo. They don’t know what’s going to happen. They don’t know whether they’re going to be charged, whether they’re going to go to court, whether they should tell their employers; whether they should tell their families because they simply do not know what’s going to happen, which is... unfair. (DS12)

⁴² For more on the importance of procedural justice in this context, see Hough M, Jackson J, Bradford B, Myhill A, Quinton P. ‘Procedural Justice, Trust, and Institutional Legitimacy’ (2010) *Policing: A Journal of Policy and Practice*, 4(3).

⁴³ The predicament of managing short-term versus long-term gain can also be observed in other parts of the investigation stage; for example, in relation to seeking out legal advice in custody – see Skinns L, ‘The Right to Legal Advice in the Police Station: Past, Present and Future’ (2011) *Crim LR*; and Kemp, V, ‘Effective Police Station Legal Advice Country Report 2: England And Wales’ (April 2018): <http://eprints.nottingham.ac.uk/51145/1/Country%20Report%20England%20and%20Wales%20Final%20.pdf> (accessed 1 September 2022).

Lawyers expressed concerns regarding a lack of effective (or any proper) oversight of RUI. DS1 explained that:

Decisions are made in the absence of the client, and they're made in the absence of the lawyer, because where it's RUI'd off, ... they're just emailing a file off to the CPS. And the CPS lawyer, wherever they are, makes the decision and tells the officer. So, there's no input by defence at all, or by the client or anybody else.

Aside from the clear issues of procedural fairness thus created, the absence of oversight and input from lawyers could be particularly problematic when the suspect had moved address in the interim, lived in a block of flats with shared – or no – mailboxes, or in otherwise shared accommodation:

Most things will be on a voluntary basis at the police station now so they won't be charged. They'll receive what's called a postal requisition, which is like a summons, but it's a charge sheet through the post. Quite often these go to the wrong address because they've been released under investigation for more than six months. So, if a client has moved address, the letter will go to the address that he gave when he was arrested. And the magistrates will issue a warrant for his arrest. I've had a clean character client, never been arrested before, come before a court, in custody, having been arrested on a warrant because they didn't attend the first hearing because they never received the letter. [The police or CPS] don't notify us that that person is being charged... A letter just goes out, which can get lost in the post, especially if you live in a block of flats ... it can easily go to the wrong address. You only get one, and if you don't attend that hearing a warrant is issued for your arrest. (DS7)

Therefore, this absence of any external involvement in such processes could, in combination with the timeframe issues raised earlier, create avoidable inefficiency and clearly unjust and unnecessary use of coercive powers (such as the arrest and detention of people who would not otherwise be arrested and detained). Moreover, a failure to appear may then have implications for decisions made at court; for example, it may provide grounds for further detention, based on a fear of failure to surrender.⁴⁴ This was particularly problematic where the failure was not, in fact, the suspect's fault, but rather a flaw in the mechanisms for communicating information to suspect's effectively (a challenge common to both bail and RUI decision-making).

With bail, it was possible to press for answers as external scrutiny formed an accepted part of the process (according to the accounts provided by the lawyers interviewed).⁴⁵ In contrast, no such presumption appeared to exist in relation to RUI:

If you had a bail date, you'd, to a certain degree, get on with things because you know you've got a date that there's going to be a decision by. Or you can have input in what's going on... If we go back on a bail date, we can ask the officer, "Well, why aren't you ready to charge or make a decision or submit the file to the CPS? Why?" And then the custody sergeant will get involved, and go, "Yeah, why aren't you...? Why haven't you done this?" So, we'd get an explanation. ... you don't get any of that now... we've had rapes commenced through postal requisitions, quite serious sexual offences, a lot of indecent images cases are commenced by that method now. (DS7)

The benefit of bail was that police decisions would be scrutinised; they 'would be under a duty to keep revisiting and revisiting and dealing with them appropriately' (DS15). Instead, under RUI, as DS12

⁴⁴ BA 1976, Schedule 1, Part 1, Para. 2(1)(a).

⁴⁵ It should be noted, however, that there is no clear evidence that lawyers attending police stations do, in fact, play a significant role in bail decisions. A prevailing concern is that lawyers are 'interview focused' and therefore provide little or no input into bail or RUI decisions (which occur later) – not because they cannot, but because they choose not to remain *in situ*. Whilst the lawyers interviewed suggested otherwise (see below), it is important to recognise that this comes from a relatively small sample of lawyers who *may*, due to social acceptability bias, be presenting a positive but not necessarily realistic account of their behaviour or the behaviour of lawyers generally.

claimed, police officers would 'just... sit on their hands... and [don't] investigate'. It was, however, possible that the lawyer could act as an accountability mechanism, as DS1 explained:

What we generally do, because at the start what would happen is the client then gets a letter from the police, telling them to go to court. And sometimes they tell us, sometimes they wouldn't. So, to try and remain involved in the process, we automatically now email the officer, asking them for an update. Unless the client tells us they specifically don't want us to do that, because they might just want it to go into the long grass. But generally, they all get an email, the officer gets an email saying, "Please update us, what's happening?" And then that'll happen on sort of monthly reviews. So, then the officer will email us, generally, to say, "I've had CPS advice, your client's going to get a postal requisition, you need to contact your client."

It is evident that the decision of whether to chase the matter would depend upon the suspect's wishes and thus what was considered to be in the suspect's best interests. Whilst the accounts provided above paint a picture of good practice on the lawyer's behalf, it is questionable how many lawyers do, in reality, take this approach owing to their unmanageable workloads, the low fees payable for legally aided work, and the 'interview focused' nature of police station representation in the modern era.⁴⁶ Moreover, such practices would likely have evolved on an individual *ad hoc* basis rather than in a considered and systematic manner, leading to inconsistent approaches in this regard. Clearly, this had the potential to create a 'postcode lottery' system.

Further, rather than placing the onus on the CPS or the police to manage these cases effectively, the rules were *de facto* shifting the burden of oversight and responsibility on to the suspect – to instruct their lawyer (if, indeed, they do so);⁴⁷ and/or to await communication from the police and/or CPS – and on to the lawyer. Defence lawyers in this instance created their own informal regulatory framework to fill the vacuum left by the emergence of RUI. Whilst the 'wait and see' approach may be stressful for the suspect, they may have been placated if informed that their case would never reach the courts. However, this also had negative implications. It may be that justice was denied for a legitimate victim if the offence had indeed been committed, but was not prosecuted due to delay. If the suspect was innocent, the 'wait and see' approach could result in undue months – if not years – of stress and anxiety.⁴⁸ At the early stages of an investigation, it may be difficult – if not impossible – to predict how the investigation – and thus the case – may play out. Nevertheless, process issues may impact directly on substantive outcomes. It may also have bearing on matters such as court backlogs – something that was a problem before the Covid-19 pandemic, but has undoubtedly been exacerbated by the various measures since.⁴⁹ As the Law Society claimed, suspects were increasingly likely to be 'left in limbo' by the long wait before receiving any form of resolution, as DS12 highlights:

I had a guy last week. Came into the office, he was investigated by the Serious Fraud Office about two years ago, so they went into his business, took all his accounts, you know, and he couldn't continue with his business, and he had to wind his business up... He only found out within the last couple of weeks [that] they're going to prosecute him for fraud and money laundering. Now this is two years ago so all the stuff that's happened to him in between, lost his business, family breakdown, ... it can't be right that he has to live, or anybody in that situation has to live, in limbo, not knowing what's going to happen to them, based on certain changes made in the criminal justice system, which is, I think, inefficient ... There's got to ... be a change in what they do there. If there's sufficient evidence, charge. If there isn't, find some

⁴⁶ Newman and Dehaghani (n 4).

⁴⁷ It is well-established that many suspects do not obtain legal advice.

⁴⁸ As was described by various former, high-profile suspects who proposed reforms prior to PCA 2017.

⁴⁹ College of Policing, 'Record courts backlog 'will take time' to resolve' (24 November 2021), <https://www.college.police.uk/article/record-courts-backlog-will-take-time-resolve> (accessed 05 October 2022).

or just leave them, and I think after a certain time, they should be barred [chuckles] from looking any further.⁵⁰

There are therefore prevailing narratives and debates about efficiency of the system, rather than the achievement of just outcomes. Arguably, the changes of PCA 2017 were not simply about the latter – they were also about improving the efficiency of investigations (by ensuring that they were not protracted). However, quite the opposite occurred; instead, greater inefficiencies emerged, leading to unjust processes – as opposed to unjust outcomes.

3 Reform under the Police, Crime, Sentencing and Courts Act (PCSC) 2022

The logic behind PCA 2017 was to create a time limit which would incentivise the expeditious progression of police investigations (with the ultimate negative consequence being the cessation of a case if an extension of bail could not be justified) and thereby reduce the likelihood of suspects being left in limbo for months or even years. The problem of lengthy investigations is, however, not purely legal or regulatory in its nature – it is also cultural (as discussed below) and arguably an issue of capacity and resource (discussed above). Ironically, in the well-intentioned attempt to more effectively regulate the use of pre-charge bail via PCA 2017, there was, effectively, a near total deregulation of bail *in practice*, as it was almost entirely replaced by the unregulated practice of RUI: a shadow status with no safeguards or time limits; no requirements on the police; no rights to challenge; and little data on use.⁵¹ Yet, the ‘whiff’ of suspicion attached to suspects so released and the impression of police control over a suspect population remained, realities that perhaps explain its emergence. Its use represented a workaround an otherwise restrictive scheme, and thereby ‘remove[d]... all the pressures associated with a release on bail’, providing police with a free hand to investigate people, whilst evading the restrictions of the legislative time limits and oversight of senior officers and the judiciary.⁵² As such, core objectives of policing – such as maintaining control and limiting scrutiny – remained key drivers of behaviour, rather than the requirements imposed by legal rules.

Since the solution introduced by PCA 2017 were considered simply unworkable from both a police and defence perspective – with the resulting use of RUI to ‘get around the... changes’ (DS1) – it became clear that further reform was inevitably needed. Acknowledging the concerns with the use of RUI, in February 2019, the Home Office launched a public consultation on amending the legislation in various ways, including removal of the presumption against pre-charge bail; extending the length of initial bail to at least two months; and introducing a regulatory framework for the use of RUI.⁵³ After receiving 844 responses (64 per cent of which came from police forces),⁵⁴ the Government concluded that there was ‘generally high agreement’ with the proposals, though noted that ‘members of the public who

⁵⁰ In short, this proposes the equivalent of a statute of limitations on the charging process. This would, of course, create problems in relation to complex or historic cases.

⁵¹ For more, see S Furlong, V Richardson, and A Feist, ‘Police powers: pre-charge bail overview of the evidence’ (January 2021):

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/952065/PCB_evidence_review_FINAL.pdf; and HMICFRS, Britain Thinks, ‘Research into victim and suspect experiences of changes to the Policing and Crime Act 2017 Research commissioned by Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services’ (December 2020):

<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/research-into-victim-suspect-experiences-changes-policing-crime-act-2017.pdf> (accessed 31 August 2022)

⁵² Cape, 2017 (n 38).

⁵³ See Home Office, ‘Police Powers: Pre-charge Bail Government consultation’ (February 2020): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879759/20191127_ConDoc_PCB_May.pdf (accessed 7 May 2020).

⁵⁴ Home Office, ‘Police powers: pre-charge bail government response’ (September 2021):

<https://www.gov.uk/government/consultations/police-powers-pre-charge-bail/outcome/police-powers-pre-charge-bail-government-response-accessible-version#summary-of-responses> (accessed 31 August 2022).

had been investigated and lawyers were less supportive of the longest timeframes of bail'.⁵⁵ In a particularly damning conclusion, the Government acknowledged that RUI had:

“[A]n unsatisfactory process which does not provide the necessary level of accountability around decision-making, communication with the suspect, victims and witnesses, and timescales for completing the investigation.”⁵⁶

The proposed reform package – dubbed ‘Kay’s Law’⁵⁷ – was included in PCSC 2022, and closely reflected the conclusions of the consultation.⁵⁸ Part 1 of Schedule 4 amended the provisions of PACE 1984 related to the granting of pre-charge bail by removing the presumption against it, whilst retaining a set of pre-conditions for bail to be granted. Authorisation of bail can now be granted by the CO (as opposed to the more senior level established in PCA 2017), based on a variety of risk factors (outlined in Part 2). This therefore paves a smoother road for COs inclined to release suspects on bail, reversing the arguably disincentivising position of PCA 2017.

Several timescale models were considered, although all proposed significantly lengthening the initial period of bail from 28 days, with the possibility of further extensions beyond this.⁵⁹ In contrast to PCA 2017, PCSC 2022 amended PACE 1984 to allow the police (at increasing levels of seniority) to extend bail without external approval up to 9 months; with any further extensions being approved by a Magistrates’ Court.⁶⁰ As such, the Act not only substantially increases the potential length of pre-charge bail but grants the police greater independence to utilise bail before the intervention of the courts is necessary. The purported rationale is to strike a balance between the problems identified prior to the PCA 2017 – namely, overuse of long, unjustified, and under-scrutinised periods of pre-charge bail – with the need to regulate the behaviour of released suspects and protect victims, whilst granting enough time for practitioners (particularly the police) to undertake investigative actions.⁶¹

The Government thus proposed legislating to remove the presumption against pre-charge bail and establish a ‘neutral position’;⁶² and implement the ‘Model B’ timeframe for pre-charge bail, introducing significant longer periods for pre-charge bail (see *Figure 1* below).

⁵⁵ *Ibid.* It is worth noting these categories of respondent together represented less than a third of the overall responses received.

⁵⁶ *Ibid.*

⁵⁷ Named for Kay Richardson, who was killed by her ex-husband whilst he was RUI in 2018. See Cowling P, Clayton J, Newman M, ‘Scandal brewing! as thousands of suspects released’ (BBC News, 4 December 2019): <https://www.bbc.co.uk/news/uk-50563533> (accessed 31 August 2022).

⁵⁸ Section 45; and Schedule 4, the latter introducing the substantive changes.

⁵⁹ See PACE 1984, s.47ZB; for an overview, see Figure 1, in Section 1.3.

⁶⁰ PACE 1984, ss.47ZD, 47ZE, 47ZF, and 47ZG.

⁶¹ See discussion in Section 1.

⁶² Home Office (n 54).

	Current Model	Model A	Model B	Model C
Initial Bail Period	To 28 days, Inspector	To two months, Custody Officer	To three months, Custody Officer	To three months, Custody Officer
First extension	To three months, Superintendent	To four months, Inspector	To six months, Inspector	To six months, Inspector
Second extension	Beyond three months, Magistrate (at three-month extension intervals)	To six months, Superintendent	To nine months, Superintendent	To nine months, Superintendent
Third extension	As above.	Beyond six months, Magistrate (at three-month extension intervals)	Beyond nine months, Magistrate (at three-month extension intervals)	To 12 months, Superintendent
Fourth extension	As above.	As above.	As above.	Beyond 12 months, Magistrate (at three-month extension intervals)

Figure 1 – proposed models for pre-charge bail timescale

The legislation is clear in its objective of reviving the use of pre-charge bail. In this sense, PCSC 2022 not only reverses virtually the entirety of the scheme created in 2017, but does so with a quite different emphasis of intention. The well-meaning but flawed changes ushered in by PCA 2017 were primarily driven by long-running concerns about over-use and poorly justified use of bail to the detriment of suspects. In contrast, the Government’s pre-Act factsheet on Kay’s Law made clear what it regarded as the primary mischiefs motivating reform, stating that the new legislation would “encourage the police to impose strict conditions on bail more frequently in high harm cases”; re-balance (in other words, lengthen) the timeframes for bail; and protect victims.⁶³ Whilst the protection of vulnerable victims (such as Kay Richardson) from violent abusers is undoubtedly necessary and laudable, the language suggests limited interest in, and therefore motivation to address, the disadvantages of RUI (and bail) for suspects. Indeed, the Government declined to create a formal framework (with timeframes) for RUI, on the basis that RUI would likely reduce significantly post-reform.⁶⁴

4 Ways, Means and Workarounds

PCA 2017 was clearly designed to strengthen protections for suspect, yet its effect was blunted by police adaptation. As DS14 highlighted:

The bail provisions were changed to benefit the person on bail. They weren’t changed to give the police officer more time to mess about.

In developing RUI, the police entirely defeated the intention of PCA 2017, demonstrating police reluctance to change practices or comply with rules where a change or rule does not suit police objectives.⁶⁵ The reforms of the PCA 2017 ultimately did not benefit suspects, and the recent reforms under PCSC 2022 will arguably not do so either. PCSC 2022 is not only problematic because it significantly extends time limits on bail, it, as with the PCA 2017, does nothing to address some of the

⁶³ Home Office, ‘Pre-charge bail: Police, Crime, Sentencing and Courts Act 2022 factsheet’ (August 2022): <https://www.gov.uk/government/publications/police-crime-sentencing-and-courts-bill-2021-factsheets/police-crime-sentencing-and-courts-bill-2021-pre-charge-bail-factsheet> (accessed 10 May 2023).

⁶⁴ *Ibid.*

⁶⁵ See, for example, Dehaghani, R., *Vulnerability in Police Custody: Police Decision-Making and the Appropriate Adult Safeguard* (Routledge, 2019).

main drivers behind the length of investigations – police workloads, work patterns, and the increasing complexities of investigations. Reflecting on the PCA 2017 changes, lawyers acknowledged the demands on the police and the effects these demands were having on investigation lengths:

To be fair to the police, ... an awful lot nowadays is telephone work. So, everybody has got a smartphone, everybody has got internet on their smartphone, and whole ranges of offences from drugs, sex offences, harassment, that sort of stuff... they're looking at the phones, and I think the forensic lot are pretty much overrun with it. (DS11)

Officers don't know what's happening, shifts will then change, and lines of enquiry are not followed up. Those delays in lines of enquiry not being followed up results in evidence not being obtained, positive evidence or negative evidence, witnesses being seen, CCTV getting erased, people leaving the country (DS12)

DS12 attributed the pre-PCA 2017 problems with long periods on bail to 'the cuts in the number of police officers'⁶⁶, which meant that 'they were not investigating offences within ... these time frames'. The response of Parliament, as outlined above, was to remedy this by imposing stricter time-limits and introducing tests of necessity and proportionality for use of bail. In short, the approach to the issue was to employ the 'stick' (of restrictive rules) rather than the 'carrot' (e.g., providing additional resources).⁶⁷ The result, as we have shown, was not improved behaviour by the police, but avoidance by adapting new methods to manage the 'problem', thereby creating a new one in the form of RUI.⁶⁸ DS1 underlined the significance of police culture in responding to the bail changes, and was adamant that this was an operational decision that had emerged from the senior ranks of police officers:

It's behavioural, isn't it? If you find a way to get around something tricky then you will... This isn't individual officers deciding that RUI is the best thing... it's got to come from the top to do it, to avoid the time limit.

A speculative, albeit likely, explanation would be that changes were deliberate and strategic in approach, particularly given the near overnight shift from use of bail to use of RUI. Lawyers were certainly of the view that RUI provided 'the police officer [with a] *carte blanche* to take as long as he wants with the case' (DS14), providing time to police officers who were in 'no rush... to deal with ... files' (DS17).

RUI was seen as a 'new way...for the police to get around the Bail Act',⁶⁹ by using RUI, the police could claim that 'people are not on bail for lengthy pieces of time which they used to be'. Whilst 'technically correct', the use of RUI meant that the reality was rather different, with suspects on RUI 'for lengthier pieces of time.' (DS17). For DS18, RUI had been 'a way to obviate the criticisms the police suffer'. The police were, therefore, technically complying with the intention behind PCA 2017 – by abandoning bail as a practice – whilst in fact making no substantive change to their practice; there was superficial compliance with the intentions of the reform with no reflection of compliance in reality. This was echoed by DS14:

It's nonsense, because the police aren't doing their job within a reasonable time now... what they will say is, "There's no restriction on your liberty." You know, "There's no bail conditions, we're not doing anything wrong."

⁶⁶ National Audit Office, 'Financial Sustainability of Police Forces in England and Wales' (2015, London: Home Office).

⁶⁷ See, for example, Cram, F. 'The 'carrot' and 'stick' of integrated offender management: implications for police culture' (2020) *Policing & Society* 30(4).

⁶⁸ The phenomenon of the police responding in an avoidant manner to such an approach is not new – see the discussion in Cape E, 'Police bail without charge – leaving suspects in limbo' (2019, Centre for Crime and Justice Studies): <https://www.crimeandjustice.org.uk/resources/police-bail-without-charge-leaving-suspects-limbo> (accessed 1 September 2022).

⁶⁹ Note, the relevant legislation is PACE 1984 and BA 1976.

As noted above, the changes were intended to prevent 'people being on bail for long periods of time' and therefore ensure that 'speedy justice is ... done' (DS17); instead, it was perceived as 'worse for people than it used to be... because now they're sort of waiting by the post to see if a letter comes and they're going to court' (DS17). It was noted that the post-PCA 2017 regime, as alluded to above, 'increased the workload on the files', in part 'because the chances of people with ... chaotic lifestyles remembering to ring us to tell us that they're in court is pretty slim' (DS1). DS12, in particular, desired a return 'back to being what it was because...it's causing inefficiencies within the criminal justice system'.

All told, this implies that legal change (as represented by PCA 2017 and PCSC 2022) is, alone, insufficient and ineffective as a method of addressing practical problems such as the misuse of bail provisions. Such rules, unless compliant with pre-existing police objectives and behaviours, are regarded as a hindrance to be worked around. Commenting on PCA 2017, DS7 felt that the police 'can't be bothered' working with the obstacles presented by the legislation – such as the 28-day maximum time limit, the requirement for authorisation from an officer of a higher rank (specifically, a Superintendent) for up to 3 months bail, and the requirement to then apply to a magistrate. Instead, a workaround which allows established practice to continue disrupted, was the natural response. In short, the culture and practice of policing in this context appears to be so entrenched that the police will adapt to maintain the status quo despite legal change. This was, arguably, a predictable outcome considering pre-existing understandings of the complex relationship between formal legal rules, police culture, and police practice. It has long been argued that policing is 'immune to reform' (or at the very least resistant to it),⁷⁰ and that attempts to force compliance with due process norms produce what might be termed masking behaviour – that is, 'the police [will] continue to pursue their own purposes, while making their actions appear to be in conformity with the rules'.⁷¹ These might therefore be considered, within the famous typology developed by Smith and Gray, as 'presentational rules' (as opposed to those which effectively inhibit police misbehaviour).⁷² The police response to the introduction of PACE 1984, as examined in seminal studies by Dixon *et al.* and McConville *et al.*, represents a classic example of debate about the influence of legal rules.⁷³ Indeed, one of the clearest messages transmitted by the latter study was 'the *non-impact* of PACE on police practices';⁷⁴ as Dixon summarised:

'In this account, police culture is dominant. Police consistently seek to evade or stretch legal controls. Legal reform, at best, legitimates policing practices'.⁷⁵

In short, McConville *et al.* argued that PACE 1984 was moulded to comply with and enable pre-existing police priorities. By contrast, Dixon took a more restrained view, suggesting that McConville *et al.* 'overstate police resistance to controls', arguing that 'it should be acknowledged that policing has changed in recent years, and that PACE has contributed to that change'.⁷⁶

Either way, if one accepts the general proposition that legal rules have a limited ability to directly control police practice, much of the scholarship in this area identifies police culture as playing a central role in any resistance to externally imposed change.⁷⁷ The belief that any attempt to structure police discretion by 'the promulgation of new rules and guidelines' are likely to be futile is accompanied by an implicit assumption that 'street-level police culture' has a 'deleterious effects upon rule compliance

⁷⁰ Dixon, D. 'Legal Regulation and Policing Practice' (1992) *Social & Legal Studies* 1(4), 515.

⁷¹ Smith, D. 'Case Construction and the Goals of Criminal Process' (1997) *Brit J of Crim*, 37(3), 342.

⁷² Smith, D, Gray, J. *Police and People in London* (1983, Aldershot: Gower Publishing), 161-173.

⁷³ Dixon, D, Bottomley, K, Coleman, C, Gill, M, Wall, D. 'Safeguarding the Rights of Suspects in Police Custody' (1990) *Policing and Society* 1(2); McConville, M, Sanders, A, Leng R. *The Case for the Prosecution* (1991, London: Routledge).

⁷⁴ *Ibid.* (McConville *et al.*), 189.

⁷⁵ Dixon (n 70), 522.

⁷⁶ *Ibid.*, 523; 532.

⁷⁷ For an extended discussion of this, see Welsh, L, Skinnis, L, Young, R. *Sanders & Young's Criminal Justice* (5th Ed.) (2021, Oxford: OUP), 59.

and general police behaviour'.⁷⁸ As Dixon *et al.* have pointed out, discussions of the police response to PACE 1984 were characterised by 'routine references... to the impermeability of police culture and the inadequacy of external controls'.⁷⁹ Applying a similar analysis to the matter of pre-charge bail and the apparent failure of legal rules to control police (mis)behaviour (as it was characterised prior to the passage of PCA 2017), we cannot ignore the influence of police culture.⁸⁰ We might therefore argue that what is therefore required is a shift in police culture at a grass roots level, rather than a simple re-configuration of the rules on the assumption that they did not work because they were simply designed badly.

To achieve this, it is imperative to entrench within police culture (and most importantly, CO sub-culture) an acceptance that restricting liberty on the basis of an allegation, at the earliest stage of an investigation, should be authorised in certain instances only, those which clearly merit it. There is, however, just cause for pessimism in this regard. If one considers a fundamental example of this principle – detention in custody on the basis of necessity,⁸¹ and its long-standing failure to manifest in practice⁸² – we might question how likely it is that COs will show such restraint when authorising pre-charge bail. Unfortunately, the 2022 changes are unlikely to change the precarious and disadvantaged position of suspects; indeed, for some suspects, the 2022 changes will prove more problematic, with longer times on bail, albeit subject to review. Aside from police culture, the 2022 changes have done nothing to address the underlying issues of workload and resource, and so it is likely that suspects will continue to remain in some form of limbo state. The Government, in declining to create a formal framework (with timeframes) for RUI on the basis that RUI would likely 'drop significantly' post-reform,⁸³ have not only failed to protect the suspect from RUI's continued, unregulated use, but have failed to recognise the deeper factors which drove its emergence.⁸⁴ Whilst the evidence suggests that RUI emerged primarily in response to the restrictions placed on pre-charge bail, it remains a speculative justification and underplays fundamental drivers behind the police response to both the PCA 2017 and the 2019 consultation on reforming it – the desire to maintain (and strengthen) control over a suspect population;⁸⁵ to avoid bureaucracy;⁸⁶ and to avoid scrutiny (both of senior officers and the courts).⁸⁷

Conclusion

This article has explored the provisions on pre-charge bail, the problems that PCA 2017 was responding to, the changes brought about by PCA 2017, and the subsequent changes to pre-charge bail under the PCSC 2022. Further, it has examined lawyers' perceptions of the changes to pre-charge bail, exploring their views of the position pre-PCA 2017, the extent of the use of RUI, the impact on

⁷⁸ Goldsmith, A. 'Taking Police Culture Seriously: Police Discretion and the Limits of Law' (1990) *Policing and Society*, 1(2), 91.

⁷⁹ Dixon *et al.* (n 73), 135.

⁸⁰ See, for example, the updated edition of Robert Reiner's classic account of police culture (Bowling B, Reiner R, Sheptycki J, *The Politics of the Police* (2019, OUP: Oxford).

⁸¹ PACE 1984, s.37(1).

⁸² See McKenzie, L, Morgan, R. Reiner, R. 'Helping the Police With Their Enquiries: The Necessity Principle and Voluntary Attendance At The Police Station' (1990) *Crim LR*; Dehaghani, R. 'Automatic authorisation: an exploration of the decision to detain in police custody' (2017) *Crim LR* 3; Kemp, V. 'Authorising and reviewing detention: PACE safeguards in a digital age' (2020) *Crim LR*, 7.

⁸³ Home Office (n 54).

⁸⁴ At the time of writing, there was not yet evidence to demonstrate what has changed as a result of PCSC 2022.

⁸⁵ For fuller discussion of the inherent need for the police to exercise control over 'police property', see Bowling *et al.* (n 80), Chapters 1 and 8.

⁸⁶ For an example of this, see Marsh, S, 'Police criticise 'staggering' bureaucracy for recording use of force' (*The Guardian*, 8 July 2017): <https://www.theguardian.com/uk-news/2017/jul/08/police-criticise-staggering-bureaucracy-for-recording-use-of-force> (accessed 10 May 2023).

⁸⁷ For more discussion, see Delsol, R, Shiner, M, 'Regulating Stop and Search: A Challenge for Police and Community Relations in England and Wales (2006) *Critical Criminology* 14.

suspects left in limbo, the absence of oversight, and police responses to the changed provisions. Finally, the article has considered how the changes introduced by PCSC 2022 do not seek to address the evident negative impacts on suspects and fail to engage with deeper issues that drove the emergence of RUI. As such, the article suggests that PCSC 2022 was a missed opportunity to safeguard suspects' rights and to, arguably, truly address the mischief of the 2017 changes, and does nothing to address wider matters of police culture and behaviour in response to legal change.

The data offered in this article suggests that the legislative changes introduced by PCA 2017 were ineffective and detrimental. The reforms were unrealistic in that they were, essentially, punitive without incentivising or enabling police behaviour to change. The police were previously regarded as misusing bail and the response of Parliament was fix this by way of the 'stick' (introducing time limits that had to be adhered to), rather than the 'carrot' (providing the police with more resources to investigate in a timely manner). The result was not improved behaviour by the police. In contrast, what emerged was avoidance of the problem through the adoption of new methods of managing investigations which arguably created greater problems. Indeed, the fact that further legislation has been passed only a few years after the initial reforms is testament to how significantly PCA 2017 failed to produce a more effective and fair system of pre-charge bail.

Old practices appear to remain entrenched. RUI created uncertainty without the controls of bail and, as a result, rather than shortening the time that someone was awaiting an outcome, the length of time remained the same, if not extended further. Indeed, getting 'a letter a year down the line', as earlier recounted by DS1, was not a clear resolution (as the letter could simply inform the suspect that the investigation was still ongoing). The problem with RUI was that – similar to the previous bail provisions – suspects did not have an end in sight or indeed in any framework for understanding investigative progress, information, or a right to challenge or question such processes.

This raises questions about reasonable time. The police might argue that the restrictive bail time limits under PCA 2017 were not reasonable in the context of issues with workload (reflected in the comments of the respondents). However, even if one accepts that this is true, defence lawyers argued that the police were pushing the unrestricted timeframe of RUI too far; it is evident that suspects and victims agreed, based on the reasonably swift reversal of much of PCA 2017 under PCSC 2022. In short, what is *reasonable* might be somewhere in between these two perspectives, a balance that the reforms introduced under the PCSC 2022 seemingly aims to strike. However, the latter legislation does not necessarily seek to respond to the problems facing the suspect; rather, it aims to protect victims in 'high harm' cases. Neither does it attempt to address the underlying cultural problem underpinning the issues in this area – the willingness of the police to utilise coercive measures without charging a suspect. In this sense, we might argue that even if PCSC 2022 represents a *potentially* positive step for suspects in moving away from the uncontrolled era of RUI towards a more structured framework for pre-charge bail, it still remains relatively generous in its timeframe for officers; offers lower levels of external scrutiny than the pre-PCA 2017 framework; and ultimately makes the same, erroneous, assumption made during the passage of PCA 2017: that passing legislation will lead to fair and effective police use of power.

The decision to effectively ignore the RUI problem and let it 'evolve' out of existence is telling: whilst RUI may well cease to be used in many if not most cases involving alleged violence or an identifiable victim, it is unclear whether the resurrection of pre-charge bail will cause it to disappear entirely. In those cases where concerns about victim safety do not exist, bail may be considered unnecessary, and RUI may continue to be viewed as a viable option for the police (especially as it has become an established practice). In these kinds of cases, continued use of RUI may not cause any of the identified issues for victims (and therefore not offend the stated intention of PCSC 2022); but those problems affecting suspects – such as the lack of any time limit, lack of challenge and review, and lack of a right to information – all remain live and unregulated. Moreover, determining whether or not bail is necessary – in line with the revised legislation – is something that is ultimately left to the police and remains open to significant interpretation. As with many other police powers, operational discretion remains at the heart of bail decision-making, allowing police culture to influence its use. As such, it would seem reasonable to conclude that any redress for suspects offered by the PCSC 2022 will be

merely a serendipitous, secondary effect of the reforms. For Hucklesby, ‘the current Home Office proposals are likely to be no more than a sticking plaster and create as many problems as they solve’.⁸⁸ Only time will tell how practice in this area will develop, but the experience of PCA 2017 (and numerous other attempts to change police behaviour via top-down legislation) warrants pessimism about the protection of suspects’ rights at this crucial stage in the foreseeable future.

⁸⁸ Hucklesby (n 22), 92.