

Centre for Women's Justice briefing on pre-charge bail Police, Crime, Sentencing and Courts Bill

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Centre for Women's Justice (CWJ) is a lawyer-led charity focused on challenging failings and discrimination against women in the criminal justice system. We carry out strategic litigation and work closely with frontline women's sector organisations on using legal tools to address police and prosecution failings around violence against women and girls.

CWJ submitted a police super-complaint¹ on pre-charge bail in 2019, which is still under investigation by HM Inspectorate of Constabulary, Fire & Rescue Services. We very much welcome the provisions on pre-charge bail in the Bill, which will address the key concerns raised in our super-complaint. However, in our view there are a number of measures that could significantly enhance the effectiveness of the new bail regime and provide tailored protections for domestic abuse victims, the group most widely impacted by the previous changes to bail in 2017.

We propose three amendments to strengthen the effectiveness of the new pre-charge bail regime. In particular, pre-charge bail is often seen as a "toothless tiger" due to lack of enforcement powers. It would be a missed opportunity if this Bill did not address its practical impact on the ground. Our proposals are supported by the Victims Commissioner, the Domestic Abuse Commissioner and domestic abuse charities. The first is the most far-reaching.

1. Breach of bail in domestic abuse cases – enforcement with DAPOs

We propose a two-stage escalating enforcement where a breach of bail conditions triggers a presumption that the police will impose a Domestic Abuse Protection Notice (DAPN) and apply for a Domestic Abuse Protection Order (DAPO). Once a DAPO is in place a further breach will be a criminal offence. This will create a 'two strikes and you're out' process.

2. Consultation with victims during bail extensions

We propose extending the provisions in the Bill for consulting with victims on bail conditions at the initial bail decision and decisions on variation of bail, so that there is a similar duty to consult at the bail extension stage.

3. No bail extensions due to police delay – use of DAPOs

We propose a presumption that the police impose a DAPN and apply for a DAPO if bail cannot be extended due to delays in the police investigation, where the criteria for DVPN/O are met.

1. Breach of bail in domestic abuse cases – enforcement with DAPOs

We propose a two-stage escalating enforcement where a breach of bail conditions triggers a presumption that the police use DVPN/Os, unless it is not necessary and proportionate in the circumstances.

Domestic abuse cases, by their very nature, involve a pattern of repeat offending where the parties know one another. Use of bail conditions during the police investigation is therefore particularly important. It is well known that separation and reporting to police are periods of heightened risk in abusive relationships and the effectiveness of bail conditions can be critical.

We hear from frontline women's services that breaches of bail are extremely common and that women often cease to report these once they find that nothing is done by the police after their initial reports. We hear that some victims withdraw support for a prosecution in these situations, and sometimes disengage from the domestic abuse service. Support workers feel undermined when they encourage victims to report breaches, but there is no police response. They report that in the worst case scenarios women feel so unprotected that they reconcile with suspects and return to abusive relationships, because the separation has increased the dangers they face in the short term.

As the only power available to police following a breach of pre-charge bail is to arrest the suspect and release him again on bail, officers sometimes say there is nothing they can do. Police often don't contact a victim until some time has passed since the reported breach, and many breaches are by phone or electronic communications. In these situations there is little purpose in arresting and releasing the suspect on bail again, and it is understandable that officers take no action. Support workers tell us that some suspects feel that they can act with impunity whilst on pre-charge bail. In practice pre-charge bail conditions are often simply not enforced.

We also hear that although repeat breaches of bail conditions would amount to a fresh offence of harassment or stalking, police officers frequently do not arrest for these offences, but just treat these situations as bail breaches.

There need to be effective enforcement measures for breaches of bail, to create a system that provides real protection. Now is the time to do that if the law around bail is being overhauled and a new system put in place which works for all those involved. There is little purpose in creating a carefully balanced system for pre-charge bail if it is not adhered to in practice.

If breaches were effectively policed, the number of breaches should reduce as there would be a genuine deterrent. Therefore, a functioning enforcement mechanism could reduce the number of reported breaches the police need to respond to, and focus resources on the worst offenders.

We believe that DAPOs can create an enforcement mechanism specific to domestic abuse which would be a proportionate way forward, ensuring that bail breaches have consequences, but giving the suspect a second chance to comply. The amendment would create a presumption or norm that DAPN/Os are used, whilst retaining a discretion for the police not to do so where it is not necessary and proportionate in a particular case. For example, if a breach is reported by someone other than the victim and she does not support a DAPO, imposing one against her wishes creates a risk that she may withdraw her support for the prosecution, and would not be necessary and proportionate.

We understand that the Home Office and College of Policing are willing to consider including the use of DAPN/Os within police guidance on pre-charge bail. However, we believe that these measures will be far more effective if they form part of the statute, rather than only included in the guidance. We are concerned that measures in guidance are frequently overlooked. For example, the National Police Chief's Council introduced guidance on use of bail in domestic abuse and other 'high harm' cases in 2019. However, an inspection into bail and 'release under investigation' by HMICFRS published in December 2020² found that "few forces comply with this guidance" and that "few officers were aware of this guidance and where to find it". The inspection found that many victims of domestic abuse and stalking were left unprotected.

We also note that the predecessor to the DAPO, the current Domestic Violence Protection Order (DVPO) is very little used. The most recent published data shows that DVPOs were sought by the police in only around 1% of domestic abuse crimes.³ We believe that this limited use is due to the cost of court fees, as well as the time and expertise required. This suggests that there will be little incentive for police to use DAPOs to address bail breaches if this option is merely within guidance. A requirement within the statute is more likely to result in a change in practice on the ground. Rather than an additional option in a few scattered cases, enforcement of bail breaches needs to happen across the board if bail is to be an effective mechanism which provides protection to domestic abuse victims.

2. Consultation with victims during bail extensions

The Bill provides for consultation with victims on bail conditions at the initial decision to impose bail and any decision on variation of bail (section 22), which should be replicated at the bail extension stage.

The police have to assess risk when deciding whether to extend bail after the initial bail period at three-month intervals. It is difficult to see how an accurate risk assessment can be carried out without consulting with the victim to establish whether bail conditions have been breached and what the current situation is. For the reasons given above, victims of domestic abuse often do not report bail breaches, or do not continue to report them. Whilst victims ought to report breaches, they should not be penalised if they do not do so for understandable reasons, and the need for appropriate decisions on risk and safety remains.

The bail extension provisions require consultation with the suspect or his legal representative.⁴ Parallel consultation with the victim is crucial to ensure that officers have the full picture when making these important decisions. Those cases that involve extensions after three or six months are likely to be the more serious cases, where investigations take longer, and risk is also higher. Consultation every three months may also reduce attrition rates, as victims often disengage from the criminal justice process when they have no communication or feel that their safety is being disregarded.

It is not sufficient to say that it is open to officers to consult with victims if they wish, or that this can be included in the guidance. Consultation with victims is included in the Bill at the initial bail decision and variation, and for consultation at the extension stage to become routine it should be part of the regime within the Bill. Based on current practice, we have no confidence that officers would consult. Frontline domestic abuse workers report that their clients are very rarely consulted on bail conditions. Sometimes they are not even informed that bail conditions have been lifted, and only discover this when they report contact by the suspect.

3. No bail extensions due to police delay – use of DAPOs

This amendment would create a presumption that police impose a DAPN and apply for a DAPO if bail cannot be extended due to delays in the police investigation, where the criteria for a DAPN/O are met, unless not necessary and proportionate.

There are four conditions A to D that must be met before bail can be extended.⁵ Condition C requires that the police investigation and the charging decision are being conducted diligently and expeditiously.

We understand that Condition C is intended to provide motivation for officers to progress investigations speedily. Speeding up investigations is an important aim, however in reality, with stretched resources and increases in reporting of violence against women offences, the conditions to extend bail may not be met in many cases because investigations have not been progressed promptly.

This situation leaves victims exposed through no fault of their own. Even in high-risk cases where there is no question that protection is required, officers may not have the power to grant extensions. In this situation lifting bail conditions can be a windfall for the suspect and the current law does not achieve a proper balance between the rights of suspects and victims. This proposal would retain an incentive to progress cases swiftly whilst meeting the duty to address the safety needs of victims.

¹ <https://static1.squarespace.com/static/5aa98420f2e6b1ba0c874e42/t/5c91f55c9b747a252efe260c/1553069406371/Super-complaint+report.FINAL.pdf>

² <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/pre-charge-bail-and-released-under-investigation-striking-a-balance-1.pdf> page 23 HM Inspectorate of Constabulary, Fire and Rescue Services report

³ Office for National Statistics domestic abuse data tool year ending March 2018, DVPO data is not included for subsequent years, see also HMICFRS Feb 2019 update report on police response to domestic abuse page 42

⁴ Police and Criminal Evidence Act 1984 section 47ZD

⁵ Police and Criminal Evidence Act 1984 section 47ZC