CPS response to the Home Office’s Consultation on Police Bail

**Q1:** To what extent do you agree or disagree that the Police and Criminal Evidence Act should be amended to enable the police to release someone pending further investigation without bail in circumstances where bail is not considered to be necessary?

Agree.

Since it is not possible for a suspect to be bailed with conditions under section 34(5) PACE, most releases are in fact releases to bail under section 37, which enables bail conditions to be imposed (under section 47 (1A) PACE). As the consultation paper points out, s37 is not generally used for release without bail where it is proposed to continue the investigation.

The police already have the power under section 29 PACE to ‘invite’ suspects for questioning as a volunteer and then to use the charge by post/requisition process. Most, though not all, PACE investigative powers are available to them but some of the more coercive powers require the police to effect an arrest as there is a pre-condition that a suspect should be in police detention: e.g. for taking certain kinds of sample.

Clarity might arise from amending s.37(2) to include a requirement that where the custody officer determines that there is not sufficient evidence to charge, but there is a need for further investigation, the suspect can be released on bail or without bail. The ability to impose conditions on those released on bail under s.47(1)(A) would remain.

The proposed amendment to s.34(5) would maintain the position where there are two similarly worded provisions allowing the police to release on bail or without bail, only one of which would attract the power to impose bail conditions. The confusion that results, as highlighted in Torres, would not be addressed.

**Q2:** To what extent do you agree or disagree that it would be appropriate to change the definition of ‘new evidence’ (on the basis of which a fresh arrest could be made) to include material that was in the police’s possession but which it was not reasonable to have expected them to analyse while the suspect was previously in detention or on bail?

Agree.

Section 47(2) PACE makes it clear that a person released on bail may be rearrested if new evidence comes to light which is sufficient to justify a further arrest. This may
be after a release on bail to attend a police at a future time (section 47(3)) or after the pre-charge custody time limit has expired (sections 41(9), 42 (11) and 43 (19) PACE).

If police bail is restricted as proposed, we agree it would be preferable to broaden the definition of “new evidence”, to allow the police to properly complete an investigation, including interviewing the suspect, prior to the commencement of proceedings.

Investigations, including interviewing a suspect, will sometimes not be completed within a 28 day period or longer for a number of reasons:

- It is not difficult in complex investigations for the entire initial custody time period of 24 hours to be exhausted while the police conduct such inquiries as are then open to them. This time period has also to include time for the suspect to have periods of rest and sleep. Time in custody may also be more readily exhausted if the suspect avails his or her self of the right not to answer any police questions: the extent to which any matter may be admitted can obviate the need to collect additional evidence at that stage and reduce the time in the police station.

- Police inquiries post arrest, particularly during searches of property, may unearth a significant volume of additional evidence. In its raw unexamined state, it is impossible in many cases to know whether items seized will turn out to be important evidence. Seizures may include computers or other storage devices of some kind, mobile phones, chemical substances, foreign language literature or personal items, such as clothing.

- In many cases, only superficial questions are possible at interviews during the initial questioning. Questions may cover ownership and access, PIN codes and passwords and of course record initial responses. Many suspects will not provide any information; breaking into encrypted data may take months. At any rate, whether it is evidence against the suspect or not will only become known when full examination takes place, often by agencies which are already over-burdened. Material seized can result in voluminous amounts of information, all of which has to be carefully sifted, analysed and often translated.

- Although DNA samples are routinely taken, they do not form evidence against a suspect until profiled and the possibility of a match with a crime stain profile is identified. Toxicology services are in short supply and there is no evidential value until analysis is undertaken. Cell site analysis to show location of a phone has become extremely popular and is in great demand. As a result,
applications take longer: each analysis has to wait its turn in the queue.

- Evidence obtainable from abroad through letters of request to countries either within the EU or elsewhere in the World can take considerable amounts of time from jurisdictions which are not subject to our domestic timescales; domestic forces can only request expedited responses. Some of this information may be critical to existing inquiries and provide evidence on which questioning the suspect is vital to clarify essential elements of the offence or to show propensity.

- It is fundamentally important for the police to be able to question and confront a suspect with the results of an analysis before trial, for which purpose the clear right to make a further arrest is important. On some occasions, being able to do so may clarify aspects of the investigation to the benefit of the suspect and may result in the discontinuance of the case.

- Failure to be able to ask these questions could result in the suspect being asked about the results of the analysis for the first time at court in front of a jury. The unsatisfactory nature of this is self-evident. Responses to questions could lead to the need for further police inquiries (for example, to obtain information for re-examination); applications for an adjournment of the case in such circumstances could lead to delay and increased costs. For these reasons, it is vital for the police to be able to have the opportunity to question suspects with the results of the various scientific examinations.

The drafting of the clause that provides the definition of “new evidence” would need to be considered with care. The question in the Consultation paper suggests wording to the effect: “that it would not have been reasonable to have expected (the police) to analyse (the items) while the suspect was previously in detention.”

In addition to the word “reasonable”, we suggest the words “or practical”, as other more urgent matters may divert the police from the case in question, when it would otherwise seem reasonable for them to complete an analysis of the items.

For avoidance of doubt, in cases where it has not been practical to have sent these items or samples for scientific or technical analysis (or to have received the results) during or before the expiry of the initial custody period, it should be made clear that the results of the analysis may provide grounds for making a further arrest. Although this is thought to be a statement of the current law, which also permits an arrest even when the subject is due to return to the police station on bail, clarification will do much to remove anxiety in criminal justice circles that the proposed changes will work to the disadvantage of successful prosecutions.
Finally, if the further enquiries or scientific analysis provide additional evidence which would constitute a separate offence to that for which bail was granted (and for which there was not previously sufficient to otherwise arrest), the police should have clear authority to arrest and conduct a fresh investigation, with a new custody clock. An example might be where a DNA profile produced evidence of involvement in a further offence.

**Q3:** Do you think there should be an absolute maximum period of pre-charge bail?

*No.*

**Q4:** If yes, how long should that period be?

*There should be no maximum period of pre-charge bail.*

**Q5:** What do you think the benefits of introducing statutory limits for pre-charge bail durations would be?

*See the response below.*

**Q6:** Should there be different periods for different types of case? If yes, which?

*See the response below.*

As these questions are grouped together in the Consultation paper we have responded to the both below.

For the reasons set out below, we see no criminal justice benefits of imposing an absolute limit on pre-charge bail and neither do we believe the problem can be solved by categorising certain classes of cases as exceptional, so requiring different bail periods. If, however, limits are imposed, we see benefits in exempting certain classes of casework altogether. The limits are more appropriate for volume, straight forward crime, rather than complex casework such as serious and complex fraud, non-recent child sexual exploitation and counter-terrorism prosecutions.

- Having an absolute limit on bail will introduce a period between the ending of the bail and the commencement of proceedings where there is no control over a suspect. A person under investigation who, for example, has a condition of bail to surrender his passport or has been prohibited from contacting a victim or witness would be free to leave the country or make contact (as long as there was no criminality), all of which could be to the detriment of the continuation of the investigation and cause great anxiety to a victim or witness.
Some of the large child abuse investigations, particularly where they span a number of years of offending, involve such complexity that they are still developing investigations, even at say the 6 month absolute time limit suggested by Liberty. Allegations of possible further offences come to light as more witnesses are discovered or come forward. This type of witness has to be carefully interviewed by police experts and can result in months of meticulous detective work. After extensive searches of local authority records going back over decades, further witnesses are often traced and have to be interviewed.

Some terrorist investigations use PACE powers, as they are not covered by the counter-terrorist legislation. Police bail with conditions under PACE may take place on occasions, if appropriate. These investigations can throw up considerable volumes of material, sometimes with hundreds of computers that have to be seized and examined for terrorist publications. Bail conditions are an absolute prerequisite, particularly seizure of passports to prevent foreign travel and non-association provisions as an anti-radicalisation tool. Stripping the police of the powers to continue these bail provisions is unthinkable and there is a very strong case to remove these cases from the oversight of magistrates’ courts altogether.

The police are required under the Criminal Procedure and Investigations Act 1996 to investigate all reasonable lines of enquiry. Investigations may take considerably longer than a superficial examination may imply. The police cannot therefore simply stop investigating at the first piece of evidence that suggests guilt: this would risk a miscarriage of justice.

As has been made plain in the Consultation paper, the challenge for some suspects would be to eke out the bail control period to the detriment of the investigation and to the disadvantage of the police and to victims and witnesses. It is clearly preferable avoid the complications of an absolute bail limit which could also encourage poor quality casework from the police. Some police officers might be tempted to rush an investigation or to take inappropriate short cuts to meet a bail limit, with a disadvantage to the rest of the criminal justice system.

If an upper limit is thought to be absolutely necessary, it needs to be set at a realistic period of time which takes account of complexity and difficulty and does not disadvantage the prosecution. Twenty eight days would be wholly inappropriate and unworkable given the reality of police resources and their conflicting demands. The College of Policing suggested period of twenty eight days was never set as a standard for a draconian cut-off period. It was merely a target for dealing with much of what is characterised as ‘volume crime’: the daily diet of the magistrates’ courts.
• Our modern criminal justice system is properly concerned with victims and witnesses of crime. It is to their advantage if there is an early resolution of casework. Where for good reason this is impossible, the system ought not to give the appearance of favouring suspects over those allegedly wronged or hurt by the actions of the suspect. An unintended consequence of the proposals may be to disincentivise victims and witnesses from giving evidence: when bail is taken away, the police lose control over suspects, who may interfere with victims and witnesses, who in turn may refuse to give evidence through fear. As a result, culprits may evade justice.

• An attempt to differentiate between different classes of casework is far from straightforward. Even cases normally dealt with as ‘volume crime’ can throw up considerable complexities, whereas some fraud work can be dealt with reasonably quickly. Further, many prosecutions contain issues which could easily cross ‘artificial’ classification boundaries: uncertainty or controversy over whether a case should have a different bail period could easily lead to satellite litigation and increased costs.

• Finally, it should be borne in mind that a defendant has a legal remedy in proceedings for delay: a defendant may make an abuse of process application on the grounds that the delay in the investigation process meant no fair trial was possible; and an alternative remedy is a reduction in sentence.

Q7: To what extent do you agree or disagree that it should be possible to extend the period of pre-charge bail?

Strongly agree.

Q8: If pre-charge bail could be extended, who should be able to authorise that?

A senior police officer.

Q9: To what extent do you agree or disagree that the criteria set out above for the authorising of a bail extension are the right ones?

We agree in principle but please note the concerns set out below.

Q10: Are there other criteria that should be added or substituted?

See the response below.
As questions 7-10 are grouped together in the Consultation paper, we have answered them all below.

We strongly agree that bail should be extendable. If this were not the case, a great number of volume cases and certainly difficult or complex cases would fall foul of a likely limit, to the detriment of the investigation, and to victims and witnesses.

Most volume crime investigations are complete within a relatively short period of time, but the timetabling of responses to requests for an expert’s report by independent agencies are not within the gift of the police; for example, for forensic analysis, a medical report and specialist agencies that provide detailed analysis of computers, storage devices, phones etc.

By the nature of the injury, medical evidence is most frequently requested from Accident and Emergency consultants or doctors whose time, especially at present, is extremely limited. Evidence from pathology or toxicology is drawn from a small pool of specialists, whose research on the materials under examination may itself be lengthy and complex. For example, a brain needs a period of rest of a month before removal for specialist examination.

Underlying these concerns is the need to be able to control some suspects by bail conditions as opposed to seeking their remand into custody. The need to do so can be determined by a number of risk factors, including any previous convictions and previous record on bail together with the type and circumstances of the offence alleged. If there were no substantial risk of flight, interference with witnesses or real concerns about the commission of further offences, there would be no need for bail conditions.

It is open to the CPS to charge a suspect under what is called the Threshold Test in the Code for Crown Prosecutors (Chapter 5). This allows the charging of a suspect when not all the evidence is available to apply the Full Code Test and where the suspect is a continuing substantial bail risk. It is therefore restricted to suspects for whom the prosecution will seek a remand into custody pre-trial. If these conditions are present and the seriousness and circumstances of the case justify the making of an immediate charging decision, and provided the missing evidence can be obtained in a reasonable time, the Threshold Test can be employed.

If these conditions are not present and the evidence is insufficient to satisfy the Full Code Test, the suspect must be bailed.

It would seem that likely test for extension of bail as envisaged in the Consultation paper includes factors set out in the Bail Act 1976, which is concerned with the right to bail and the control of risk pending the outcome of the case. However, the proposed test additionally includes the factor whether the investigation has been
conducted diligently and expeditiously, mirroring the criteria under the warrants of further detention process (section 43(4)). This appears to overlook the fact that the bail risk may still be present, and will be more likely to materialise should an extension not be granted.

What is not clear is if the court finds, for example, lack of diligence but a clear risk to victims or witnesses or other substantial bail risk, would it be entitled to continue bail or would there have to be a positive finding in respect of all criteria before it could extend bail? If the latter, we query whether the proposal intends the consequence that suspects who are a bail risk would have no bail and no conditions imposed if all criteria are not met.

The use of criteria lifted from warrants for further detention seems inappropriate: more draconian consequences than bail applying those cases, and they apply only to indictable offences. The criteria should not apply to the question of the continuation of bail. Much of the serious summary only work concerns domestic violence (common assault and the majority of criminal damage, which is triable summarily), where controls of bail are extremely important. Absent such controls, a remand in custody would be likely to be required, to protect vulnerable spouse or partner victims. This in turn may have adverse consequences on the prisons.

There is a pressing need at a time of extreme pressure on budgets not to impose additional duties for which there is no additional funding. Every court appearance to obtain more time requires a case to be listed, suspects to be notified, and applications made to a court. Preparation of the case will be hindered and it is likely that these hearings, if opposed, will take up a substantial amount of court time: calling evidence may become necessary to prove a need for a bail extension with conditions. Given that the Law Society have strongly advocated a twenty eight day limit, it is far from certain that, as some claim, that the hearings would be a rubber stamp for the police to continue the investigation with the suspect on bail.

It seems unlikely that a suspect would not be legally aided to oppose an application: the “equality of arms” principle has been held to apply to bail hearings; an unrepresented suspect may incriminate his or herself in an effort to avoid bail; and the court legal adviser, who would have very little prior knowledge about the case, may find it difficult to assist an unrepresented suspect. Further, the police or prosecutor may have to ask the court for an ex-parte hearing so that some of the reasons for continuing bail in the case can be heard in the absence of the suspect or representative. An ex parte hearing would require an application for such a hearing and this in itself would be likely to be opposed.

The cost implications of the hearings are therefore not inconsiderable, which leads to the inevitable conclusion that the threshold for involving the courts ought to be set at a point which will not involve a multiplicity of hearings but is still sufficiently proximate.
to the date of the alleged offence. The possible fuller cost implications are dealt with later in this response.

As a benchmark for when the courts should become involved in pre-charge bail, we have taken the summary limit during which a prosecution must be brought - 6 months. Taking into account the usual delays by outside agencies in the vast majority of cases, we would strongly suggest that a court hearing should not be required until 6 months, with an Inspector extending bail from 28 days to 3 months, and a Superintendent further extending bail up to 6 months. As a parallel example, the custody time limit for a person in custody pre-trial in the Crown Court is also 6 months.

Subject to comments below under questions 15 and 16, we agree court involvement may be sensible after a period of 6 months. A magistrates’ court may make determinations for up to two further periods of 3 months, up to a maximum of 12 months; and a Crown Court may make determinations for further periods of 3 months beyond 1 year. However, we do not see the need to return every 3 months if a court which has heard an application were prepared to grant a longer period.

The criteria for extension are satisfactory save for the diligent and expeditious criteria. We would add that there should always be a requirement that the suspect has a fixed address and is suitable to receive postal service should proceedings follow an investigation when bail had not been extended. We make this point in order to avoid wasted hearings where defendants do not respond to postal requisitions or summonses, which will be necessary if there is no requirement to surrender to be bail to be charged. This would also avoid the subsequent issue of warrants for arrest due to non-attendance at court and all the attendant costs.

It should be made clear that the limits on the pre-charge bail regime will not apply to bail imposed by the court post charge after the first hearing. The court should not be inhibited from imposing bail with conditions on a defendant once charged, whether on bail previously or not.

**Q11:** To what extent do you agree or disagree that the police should seek to agree memoranda of understanding for the provision of evidence from other public bodies rather than seeking production orders from the Crown Court?

Agree but see the response below for clarification.

There have been previous attempts within the CJS to agree protocols with third parties, which have not always been successful.

A protocol was agreed with the National Health Service for the supply of medical reports. It was not possible to agree this at a national level, so attempts were made
to agree a standard service with accident and emergency consultants some years ago. This proved problematic with different health trusts operating very differently; some refused agreements while others demanded considerable payments from the police for a report. Some were lacking in any response whatsoever.

While it is recognised that hospital staff’s main focus must be the treatment and care of patients, the delays caused to the criminal justice system are well documented and responses are dependent entirely on local goodwill and good working relationships. Accident and Emergency staff are overrun with work and there is little time for them currently, whatever the CJ pressures, to break away and prepare response to specific legal questions; for example, for an opinion on causation of an injury where the suspect is claiming accident.

A similar problem was experienced with the 2003 Protocol for child abuse cases, which promoted local agreements whereby third parties would provide information to the police relating to such cases. The protocol proved ineffective in eliminating delays in obtaining evidence and sharing information, and was therefore replaced by the 2013 Protocol and Good Practice Model which itself has not always been as effective or successful as hoped.

In the absence of co-operation with an agency required to produce information, the alternative proposal, for a witness summons to be obtained with a requirement to produce documents, is unsatisfactory. Such a step could remove a consultant from his primary health care duties, particularly unnecessary when written evidence from a reputable source could be agreed by the defence. A duty to respond created in statute, although draconian, would of course be likely to make substantial savings in investigative time and indeed would assist processes at court. However, enforcement in any meaningful way would be impossible and counter-productive.

A possible alternative option is to obtain agreement for the efficient provision of medical reports. This could be done, for example, at Ministerial level and at a similar level in private companies that are contracted with the police for other kinds of reports. Something similar could cover local authorities, whose voluminous reports in cases of historic child abuse sometimes refer back 30 or more years, and can be responsible for considerably lengthening police investigations.

A final option would be for the police to seek to re-contract with the forensic and other providers, where there is already a commercial agreement in place for the delivery of results. We assume that earlier deadlines, if attainable, would require an investment of additional staff and equipment for the various laboratories and would also involve considerable extra cost to the police.
Q12: To what extent do you agree or disagree that individuals who are the subject of pre-charge bail should be able to challenge the duration as well as the conditions in the courts?

Agree.

Q13: Do you think there should be statutory guidance to custody officers and magistrates as to the appropriateness of particular bail conditions? If yes, who should provide it?

No.

As these questions are grouped together in the Consultation paper, we have responded to both below.

Much of the mischief with police bail and its conditions is that they are seemingly not periodically reviewed and the suspect is left in limbo with often little information as to the progress of the investigation, other than the fact that their bail has been extended. The assessment of risk appears not to be re-examined as time passes.

It is sensible to allow those who are subject to restrictions on their liberty to challenge, after a period, both the imposition of bail and the bail conditions. Bail conditions can currently be challenged under section 47 (1E) PACE, though this provision is rarely used: the custody officer can also agree to vary police bail conditions, which is clearly simpler and less bureaucratic. There is no legal aid funding (the application is limited to varying the conditions of bail), and the fact of being able to apply for a variation appears not to be widely known. The longer the period on bail, the more important this right is. It acts as a reminder that the police are accountable for their bail decisions.

However, in order to mount a meaningful challenge, suspects will require legal advice and representation. As stated above, an unrepresented suspect may inadvertently undermine his or her right to silence. Utterances in court may be noted and raised in possible future cross examination. The airing of arguments for and against bail may in effect be a foretaste of the trial. Whether this is fair to defendants is debateable.

Statutory guidance on the appropriateness of bail conditions is probably unnecessary. The issues surrounding bail and the impositions of conditions on the grounds of necessity are well rehearsed in the criminal justice system. Each case has to be dealt with on its own facts. Nothing in the suggested test for bail conditions involves any new concept and the language is well known.
Q14: To what extent do you agree or disagree that the extension of pre-charge bail should only be available in certain types of case, such as fraud or tax evasion, or those involving international inquiries, or should it be available in all cases where there are exceptional reasons for an extended investigation?

An extension of pre-charge bail should be available in all cases.

It is difficult to conceive of any short period of time (3 months or less) that would not generally be problematic. Any longer periods would still require exceptions. The necessity to have exemptions or extensions is an absolute requirement, whether under senior police authority or, potentially, under judicial oversight. Any model risks the criticism of bureaucracy and distraction from pursuing offenders.

As discussed above, an extension of pre-charge bail should be available in all cases, not only in certain types of cases.

There are multiple reasons for delay in an investigation. Some cases take longer and it is in the interests of justice for the police to be given time to conduct a thorough and fair investigation before a decision is made on charge. The police are also obliged, under CPIA, to carry out thorough investigations, and this can often act as a safeguard for suspects, where other lines of enquiry lead way from the initial suspect to another suspect.

Reasons for an investigation to take time include:
- The emergence of multiple victims at different times during the investigation;
- The development of further evidence from victims’ accounts;
- The need to trace key witnesses and related suspects.

The following are examples of evidence that can complicate and lengthen investigations. This evidence will invariably be useful and in some cases decisive:

- Forensics
- Experts’ reports
- Telephone and other media
- Financial records
- Medical and Social work records
- Computer evidence (highly problematic in resource terms and time required)
- Evidence from abroad
- Records from local and central government departments

The factors that cause the difficulty with such material are the requirement to go through various processes to obtain the material in the first place, the scale of the material itself, the need for detailed examination, the use of experts, and the availability of experts (an increasing concern). Sometimes there is a need to arrest in the first place to obtain the material.
There are further factors to be considered. The length of time needed for an investigation is case and resource dependent. The police also face resourcing pressures and changing priorities. This could be due to immediate one-off operational reasons, such as a case officer responding to other more urgent incidents; or the requirement for a more sustained response to a development, for example, to deal with actual or potential public order issues, or a major homicide.

Sometimes it is argued that the police should investigate first before making an arrest, thus shortening the period of police bail. Whilst we recognise that this is good practice, it is not always possible to complete the majority of the investigation pre-arrest: many arrests are of necessity reactive to events or emergencies which give no opportunity for pre-arrest investigations; and many other cases require post-arrest analysis of samples taken or items seized from homes or offices.

Finally, Q14 suggests that bail should be extendable only for exceptional reasons. We disagree that exceptional reasons should be required and suggest that operational reasons is a more appropriate criteria. It is not an exceptional reason to need more time to obtain forensic or other technical evidence. Rather, this is the practical reality of many investigations.

However, if the “exceptional” reasons criteria is to be pursued, a possible approach could involve concepts such as: the nature and breadth of investigation; the gravity of offence; new evidence; the suspect or his agents contributing to the delay; and the particular category of evidence outstanding. All of this would require considerable thought but, ultimately, may lead to bureaucracy and extended litigation.

Q15: To what extent do you agree or disagree that there are certain types or characteristics of cases where the 28 day / 3 month limit (depending on the model adopted) should not apply?

Strongly agree – see below.

Q16: What alternative arrangements do you think should apply in those types or characteristics of case?

Review process starts later / Reviews less frequent / Both / Same review process as other cases

See below.

Questions 15 and 16 raise similar issues, so we respond to both below.

Some types of cases should be exempted from the scheme altogether or, at most, have limited Crown Court supervision of bail.
For example, generally terrorist offences, non-recent child sexual exploitation, serious or complex fraud and corruption, particularly where there is an international link, cases involving fatalities, and organised crime cases demand significant and thorough investigations. The type of evidence required to be gathered in these cases takes time:

- Forensics
- Experts’ reports
- Telephone and other media
- Financial records
- Medical and Social work records
- Computer evidence (highly problematic in resource terms and time required)
- Evidence from abroad
- Records from local and central government departments

It would therefore not be appropriate to impose artificial or unrealistic time limits on bail for suspects in such cases.

Should bail be necessary, it would be wholly inappropriate for this to be challenged in such cases simply on the basis of the time being taken to complete the investigation.

As an example, fraud cases may take years for an investigation to be completed due to immense complexities and evidence hidden in financial institutions or accounts which may be multi-national in character. Bail conditions may be necessary to prevent interference with the evidence or absconding. A magistrates’ court may be asked to sit for a number of hearings for applications relating to various suspects on bail, even though the court will not try the case.

Complex alleged financial frauds are unsuited for this process. Such cases should therefore either be exempted from the scheme or subject to alternative arrangements. One possibility is to draw up a clear list of exceptions which, if not exempted, are at most periodically supervised in the Crown Court by a judge accustomed to try this type of case.

For more detailed comments on terrorist offences and sexual offences investigations, see our answers to questions 5 and 6 above.

**Q17:** To what extent do you agree or disagree that, where the reviewing officer or court agrees with the investigating officer that it could harm the interests of justice to disclose sensitive details of the investigation to the suspect, such as where it might enable the suspect to dispose of or tamper with evidence, it should be possible to withhold the details from the suspect and their legal representative?
Strongly agree.

Q18: If sensitive details were to be withheld from a suspect so as to not jeopardise an investigation, what procedural safeguards should be incorporated to ensure the system operates fairly?

See the response below.

Questions 17 and 18 raise similar issues, so we respond to both below.

It is of concern that the police, who have undeveloped advocacy skills except at Superintendent level (warrants of further detention), will have to make applications, without revealing sensitive details of the investigation, including information on which the suspect has yet to be interrogated, but providing sufficient information to enable the court to make a decision in their favour.

This may prove difficult for the police and further comments are made on this below, in the section on costings.

There is no legal requirement for the police to present a *prima facie* case or to give the legal advisor a full briefing before questioning the suspect. It may not be appropriate to reveal the existence or nature of investigative material (telephone evidence, a witness’s account, forensic analysis) that indicates a link between the suspect and the crime scene prior to an interview; to do so might enable the suspect to develop a false response to it rather than provide an untainted account of their movements or associations. PACE Code G at Note for Guidance 3 provides the rationale for this decision process. Support for this can also be found in *R v Farrell [2004] A ER D (432)* and other earlier cases.

Accordingly, it is appropriate to allow an *ex parte* procedure so that certain information is not given in public in the presence of the suspect or their representative to the detriment of the investigation. By way of analogy, recently, Mr Justice Sweeny set out a procedure for some of the evidence in terrorist cases to be given *ex parte* where the prosecution were seeking authority to question the defendant post charge under the Counter Terrorism Act 2008. Not to have done so would have alerted the suspect to the post-charge questioning he was likely to face and therefore prepare fabricated answers. The remainder of the hearing which was not sensitive took place *inter partes* with the representative present.

The procedure that could be adopted is for a written application to be made in support of making an *ex parte* application, which would allow the reasons for the hearing to take place in private to be fully aired. The suspect would be allowed to make representations in principle against such a hearing but without knowing the
detail to be covered. There are similar procedures adopted when the prosecution is seeking a Public Interest Immunity (PII) ruling from a judge not to disclose material to the defence. As with PII applications, the exact procedure to be adopted could vary according to the sensitivity of the information that is sought to be withheld. Information on these procedures is set out in the CPS Disclosure Manual.

Q19: To what extent do you agree or disagree that the Crown Court should take responsibility for certain types of case at an earlier point?

See the response below.

Q20: If the Crown Court were to take responsibility for certain types of case at an earlier point, when and what types or characteristics of case should these arrangements apply to?

See the response below.

Questions 19 and 20 raise similar issues, so we respond to both below.

The Crown Court is not set up to deal with cases out with its jurisdiction. None of the cases contemplated will have yet been sent to the Crown Court under section 51 of the Criminal Justice Act 2003. The magistrates’ court is well used to dealing with issues of bail, even in complex cases, being the court of first hearing.

However, for reasons stated above, we would support the identification of a class of case that could best be supervised in the Crown Court and in particular by judges accustomed to trying the type of case involved. The obvious examples are those quoted at question 14, fraud and tax evasion, but other classes of cases should be considered, as set out in our answer above to questions 15 and 16, if they are not exempted altogether from the new regime: terrorism, non-recent child sexual exploitation, serious or complex fraud and corruption, particularly where there is an international link, cases involving fatalities, and organised crime cases.

Identification should be by class so as to avoid argument and satellite litigation about the particular circumstances of the case. This is of particular importance given recent initiatives, such as Transforming Summary Justice, which aim to reduce the number of hearings, so as to reduce the pressure on courts.

Q21: To what extent do you agree or disagree that the introduction of these changes would be likely to influence the speed with which investigations are dealt with?

See the response below.

We agree that there is a need to address the unfortunate position whereby individuals have remained on police bail for extended periods of time. Bail,
particularly where conditions are imposed, is a restriction on the individual’s liberty, and so we should seek alternative remedies where possible.

We also agree that some investigations are likely to be carried out more quickly if bail time limits are imposed, and we would welcome quicker investigations and prosecutions, as this will provide a better service to victims and witnesses.

We also welcome the fact that the proposal acknowledges that the bail time limits that are introduced will not apply once the police file is sent to the CPS for review and a charging decision. It is important to retain the distinction between a police investigation and a prosecutorial assessment of the evidence and charging decision. This serves to preserve the independence of the prosecution function.

However, the introduction of these changes will not speed up all investigations, as some cases require time to investigate fully and properly. And in cases where investigations are carried out more quickly due to the imposition of bail time limits, there is a risk that in some of these cases the investigation will be incomplete, causing further remedial work post-charge, delaying proceedings at court.

For these reasons, we suggest that it may be useful to explore alternative, more flexible, ways of ensuring that the police do not impose bail periods for any longer than is strictly necessary, and not at all in cases which do not require bail. For instance:

- Performance measures which are transparent, for which the police could be held to account;
- Supervision of police performance, so that bail and bail conditions are only imposed and extended where necessary.

The Consultation appears to be based on an underlying assumption that any delay in charging a suspect or in informing him or her that there will be no further action is one of poor organisation or inefficiency. We would suggest that this assumption is incorrect. We accept that there are some cases where decisions could be taken earlier but in many cases this is not possible, for a variety of operational reasons.

We have set out above in answer to question 14 reasons why an investigation may take time and the types of evidence that can complicate and lengthen investigations. We have also set out, in answer to questions 15 and 16 above, the types of cases that should be exempted from the proposed scheme altogether, as investigations invariably take longer in these cases. In respect of these case types, we do not think the proposals are likely to have a significant influence on the speed of investigation.

Further, cases where the police are subject to the resources of other agencies are likely to be unaffected, unless police requests for urgency are met by these
agencies, or more effective agreements are implemented and actioned, as discussed at question 11.

It is also worth noting that many cases are currently dealt with by the police issuing a summons, where there is no necessity or power of arrest, and the process in these cases is often considerably slower than in bail cases.

We have identified a number of risks to the CJS that may materialise as a result of increasing the speed on investigations by way of inflexible time limits:

- A reduction in the quality of the work, as short cuts are taken or investigatory leads are not followed in order to comply with whatever timescale has been set.
- A greater volume of work being sent to the CPS prematurely.
- A greater number of cases sent back to the police by the CPS, with a pre-charge Action Plan, to gather evidence required before a charging decision can be made. This will cause the CPS to review such cases at least twice.
- An increase in CPS Action Plans post charge, causing further reviews.
- Delay to court proceedings, where the CPS is forced to apply for adjournments to obtain evidence that has not been received pursuant to Action Plans.
- A detrimental effect on our service to victims, whose expectations have properly been raised in recent years, as a result of the work that the CPS and other CJS agencies have put into improving the quality of service we provide to victims. For instance, the number of guilty pleas may decrease due to weaker evidence; cases may take longer to reach trial due to the delay in obtaining evidence; and cases may be discontinued due to a lack of evidence.

As such, the proposals may inadvertently assist the guilty, by reducing the chances of an effective prosecution.

Much depends on the structures of individual police forces and whether the officer in the case has control of court file preparation, or whether the file is prepared by a specialist unit. Criminal justice units have suffered considerable austerity cuts, making it more likely that an officer will be entirely responsible for putting a file together. The speed with which this is done will clearly depend on competing priorities.

For example, if an arrest takes place towards the end of an officer’s shift, the suspect will often have to return on bail. Even when an arrest has been made earlier in a shift, an officer responsible for the questioning and preparation of a file may be deployed on an emergency call, and his inquiries will have to wait until he returns.
File quality and timeliness is already a major issue in the CJS, as we prepare for implementation of Transforming Summary Justice. Anything that diminishes the ability to deliver a quality file will be to the detriment of this major initiative, which is widely supported by Ministers, the Judiciary and criminal justice agencies.

For the reasons above, it may be beneficial if the principles of bail management set out in the College of Policing Authorised Professional Practice are given time to bed-in, and for an assessment of their operational impact by HMIC and HMCPSI takes place, before statutory time limits are imposed. This would provide the police with an opportunity to improve their use of pre-charge bail without the imposition of inflexible statutory time limits, and provide an evidence base for the most suitable statutory regime, should it subsequently be decided that time limits are indeed necessary.

**Q22: For your organisation, what would be the resource implications of each model set out above?**

**See the response below.**

It is difficult to predict the resource implications on the CPS, since it is dependent on police responses to the initiative and any new legislation.

As stated above, the CPS is concerned about the impact on the quality of police files. If files are sent to the CPS prematurely, to avoid seeking an extension of bail and to retain bail conditions, it is likely that the CPS will request further investigative work from the police. This may be set out in an action plan pre-charge or post charge. These requests for further evidence can impact adversely on both CPS and court proceedings: the CPS is required to review the file again, with significant resource implications, and the proceedings may need to be adjourned for the police to obtain further evidence. This is contrary to the principles of Transforming Summary Justice: we expect a single file review in the CPS prior to the first hearing in the magistrates’ court.

Moreover, weak or incomplete files tend to produce more not guilty pleas and if, under the Transforming Summary Justice proposals, there is insufficient time for corrective action and distribution of additional material prior to trial, it is more likely that trials will be adjourned or abandoned, or the trial will take place without some evidence, increasing the likelihood of an acquittal. An increase in the amount of trials and adjourned hearings will have significant resource implications, not only for the CPS but also for the police and courts. It will also have a negative impact on victims and witnesses.

**Q23: Do you have a preference between the two models? If you do, why?**

**See the response below.**
For the reasons set out in answer to questions 7-10 above the CPS prefers model 2.

The CPS is of the view that there ought to be no court involvement until the 6 month period is reached.

Model 2 suggests that police decisions on bail extensions should be made by a Chief Superintendent. We suggest that it is more appropriate for a Superintendent than a Chief Superintendent to make these decisions. Many forces have very few Chief Superintendents. The Superintendent rank is well suited to the overall control of casework progression, without direct involvement in the case. His or her knowledge of the officers under his/her command makes him or her especially suitable, and s/he would be appropriately in touch with local issues and current policing priorities. Moreover, in a smaller force, involvement in one or two high profile murders can decimate police resources. And additional counter terrorism duties are going to prove an additional drain on police resources.

Finally, model 2 is also preferable because it places less additional burden on the courts. As set out above, whichever model is implemented, it will increase the amount of court work, through bail extension applications and through an expected increase in adjournments and court hearings and trials, for additional NG plea cases. Courts are able to deal with lack of court sitting times by extending the bail of suspects to whatever date is available for trial. This delay can be over a year in many bail cases, as priority listing is sought for those in custody. The result will be increasing delays within the court system for bail cases. Arguably, this will be more stressful for suspects than a longer period on police bail. Therefore, a model which minimises court involvement in the process is preferable.

**Additional comments on costings.**

Much of the projected costing for the procedure for extending bail has yet to be resolved, as no detailed procedure has been clearly articulated. There is no comprehensive data on the extent of the bail population. In October 2014, the BBC, following a FOI request to all forces, stated there were some 71,526 persons on pre-charge bail in one report and 57,428 persons in another. Additionally, 5480 or 3172 suspects were said to be on bail in excess of 6 months. This was based on responses either from 40 or 34 forces.

The College of Policing has produced data from 12 police forces, including the MPS, which shows that there were a total of almost half a million arrests in the financial year 2013/2014.

For illustration purposes, we have extrapolated these figures to 42 forces, to calculate the possible court bail extension hearings per case, based on a first hearing at 28 days and/or 3 months, as is canvassed in the Consultation paper. We
have added additional hearings to represent the periodic hearings through to the Crown Court, to illustrate possible costs.

Once the police send the CPS a file and request a charging decision, the new bail provisions would cease to apply, so as to preserve the independence of the prosecution function. We note, however, that it needs to be made clear whether the bail clock would recommence if a file was passed back to the police for further evidence to be obtained. We assume this is the intention, and we have based our costings on this assumption.

Costings will depend on who conducts the hearings to make an application: the police or the CPS. The police have largely lost their advocacy skills except perhaps at Senior Investigating Officer level. Cases that require an *ex parte* application will almost certainly require skilled advocacy assistance. Further, it would seem appropriate for the CPS to conduct hearings where it had made requests for the police to obtain more evidence, assuming that the bail clock would recommence in such circumstances: it would not be appropriate for a police officer to explain the deficiency of a police file to the court when seeking more bail time.

We therefore anticipate that the CPS would be requested to make applications in approximately half of the cases in the magistrates’ court, and all of the cases in the Crown Court, and we have based our costings on this assumption.

If the CPS is to conduct the application for a bail extension in some hearings, the power to do so may be placed in the relevant statutory provision.

The number and length of applications will depend on how controversial the applications prove to be with the defence and whether there is advantage for them in the airing of some aspects of their defence at an early stage. Where the defence might be keen to avoid further questioning, these applications will be keenly fought and may take up some considerable amount of court time, especially as there will in many cases be a need to inform the court of some details of the prosecution without the defendant or his representative being present. That type of *ex parte* hearing would itself be subject to the need to apply for a hearing in the absence of the defence and would be likely to be opposed. A successful prosecution application could also be followed by an application to vary bail, lengthening the hearing further. Our costings are based on an estimated hearing time of 30 minutes for each hearing.

Costings for the court have already been provided in the Consultation paper from HMCTS. What should be noted is that the listing of these extension hearings cannot be delayed, in the way that trials are, to the next available trial slot. Instead, it is assumed that the necessity to hear a bail extension application before the expiry of the time limit will force other court business to be delayed.
In order to avoid costs for a non-effective hearing, we suggest that a suspect need not attend the hearing provided he or she has been given notice of the hearing. The question of anonymity of suspects and reporting will have to be determined.

Given that courts are currently struggling to list trials, it is clear that extension hearings will impact adversely on the court’s daily business. Hearings at 28 days would seem to be disproportionate to the remedy sought, due to the possible costs and the dislocation to the court’s business. Further, these hearings would be likely to capture too many volume crime cases just creeping over the 28 day limit. An initial hearing at 3 or 6 months would be less expensive and disruptive. Significantly, there are far fewer suspects still on police bail at the 3 and 6 months time periods, as compared to the 28 day period, as by then much of the delay caused by the police awaiting the results of analysis from other agencies is resolved.

The workings and results of the costings for CPS involvement in these proposals are attached to this paper. The costings show that the CPS will appear in an estimated 289,738 hearings, at an estimated annual cost of £3,735,405.

Crown Prosecution Service
February 2015
### Pre-charge bail costing (CPS)

<table>
<thead>
<tr>
<th>Bail length</th>
<th>Potential number of hearings</th>
<th>Potential number of hearings requiring CPS to present</th>
<th>Total minutes (at 30 mins per occurrence)</th>
<th>Total equivalent prosecutor years</th>
<th>Total annual cost (Lawyer in MC and Crown Advocate in CC)</th>
</tr>
</thead>
<tbody>
<tr>
<td>28 days to 3 months</td>
<td>204,335</td>
<td>102,168</td>
<td>3,065,025</td>
<td>33.16</td>
<td>£2,406,415</td>
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<tr>
<td>3 - 6 months</td>
<td>58,611</td>
<td>29,306</td>
<td>879,165</td>
<td>9.51</td>
<td>£690,251</td>
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<tr>
<td>6 - 9 months</td>
<td>11,030</td>
<td>5,515</td>
<td>165,450</td>
<td>1.79</td>
<td>£129,898</td>
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<tr>
<td>9 - 12 months</td>
<td>10,469</td>
<td>10,469</td>
<td>314,070</td>
<td>3.40</td>
<td>£337,968</td>
</tr>
<tr>
<td>12 - 18 months</td>
<td>3,899</td>
<td>3,899</td>
<td>116,970</td>
<td>1.27</td>
<td>£125,871</td>
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<tr>
<td>Over 18 months</td>
<td>1,394</td>
<td>1,394</td>
<td>41,820</td>
<td>0.45</td>
<td>£45,002</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>289,738</strong></td>
<td><strong>152,750</strong></td>
<td><strong>4,582,500</strong></td>
<td><strong>49.58</strong></td>
<td><strong>£3,735,405</strong></td>
</tr>
</tbody>
</table>

*Hearings up to 9 months would be in MC and hearings after that in CC*

- % of hearings requiring presentation by CPS in MC (assumption is 100% for CC) 50%
- Assumption re time required per occurrence (mins) 30
- Conversion factor - national (converts mins to years taking into account sickness, leave, training) 0.00001082
- Lawyer salary (Full costs - Senior Crown Prosecutor -national) £72,562
- Crown Advocate salary (Full costs - Crown Advocate Ctrl Div. - national) £99,454

*Salary costs as per Finance Ready Reckoner 2014/15*