

The role of adult custodial remand in the criminal justice system

Justice Committee Inquiry

Written Evidence

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Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This submission addresses questions posed by the Justice Committee concerning the role of adult custodial remand in the criminal justice system. In responding to the questions, we have drawn on our Working Parties: *A Parole System Fit for Purpose (2022)*; *Tackling Racial Injustice: Children and the Youth Justice System (2021)*; and *Mental Health and Fair Trial (2017).*

3. We refer also to JUSTICE's ongoing observational research which monitors remand hearings in the magistrates' courts. Whilst in its early stages, we have been able to use this data to identify several troubling trends relating to the use of custodial remand.

To what extent is the legislative framework for determining whether to remand an individual to custody (a) fit for purpose, and (b) being appropriately applied?

4. Pursuant to the Bail Act 1976 (the "**Act**"), when an individual is brought before a court accused of an offence, or remanded after conviction for enquiries or a report, they must be granted bail without condition, if none of the exceptions to bail apply.[1] Since 2020, JUSTICE has been conducting research into how decision-makers use the Act in the magistrates' courts. In particular, our research has looked at if and how the exceptions to bail in the Act are referred to when deciding whether to grant bail in this context.[2]

[1] Section 4, Bail Act 1976. The exceptions to bail are set out in Schedule 1 to the Act. The Act also sets out what the court should consider when deciding to remand an individual in custody.

[2] In conducting our research, we sent law students and lawyers to observe 158 bail hearings across 7 magistrates' courts, 6 in London and 1 in the Northeast. Whilst observing cases, our researchers were required to fill out a questionnaire which asked, amongst other things, whether the decision maker, prosecution advocate and where applicable defence advocate, made correct use of the Act. The questionnaire comprised a mix of closed "yes/no" and multiple-choice questions, as well as some open format questions, where researchers could provide greater detail of their observations.

5. This project is in its early stages, and JUSTICE is aware of several limitations.[3] Nevertheless, our preliminary evidence suggests that courts are not applying consistently the requirements of the Act. Whilst our data pool is still relatively small, our analysis so far has revealed a clear pattern of magistrates, district judges, prosecution, and defence advocates failing to make appropriate reference to the Act during bail hearings.

6. Key findings include:

   a) Magistrates and district judges referred to the test in the Act when justifying their decisions in just 36% of the cases.
   b) The number was slightly higher in the case of district judges, who referred to the Act in 44% of cases, with magistrates referring to the Act in only 20% of the cases we assessed.
   c) Most concerningly, the exceptions in the Act were referred to in just 66% of cases where the individual was ultimately remanded in custody. Our research found that in 8% of cases magistrates and District Judges instead referred to the fact that remand in custody would be reasonable, proportionate, or fair in the circumstances.
   d) In 25% of cases, no test was referenced at all.

7. Where references were made to the Act, these tended to be generic - with only a tiny proportion of district judges and magistrates specifically setting out the exceptions by reference to the facts of the case. Our research also found that decisions-makers often confused the exceptions to bail, with the considerations to which regard should be had when making custody decisions. For instance, a number of decisions were made on the basis of the seriousness of the offence or the defendant's criminal record without mention of the exceptions in the Act.

8. Similarly, our data shows that both prosecution and defence advocates also fail to make appropriate use of the Act during bail hearings. The test in the Act was introduced and

[3] First, as of yet our data set remains small and geographically limited. To this end JUSTICE is continuing to gather more data points, collection of which was suspended for periods during the COVID-19 pandemic. Moreover, JUSTICE is currently looking into ways to widen the geographical scope of the project, by working with universities and law firms outside of London. Second, JUSTICE is also aware of the inherent limitations of observational research. Namely that it is subject to human error and subjectivity. Whilst there is no way to mitigate against this entirely, JUSTICE hopes to eventually gather enough data to account for any anomalous results that may arise. Furthermore, in analysing the data already gathered we have been extremely careful not to rely too heavily on the subjective evaluations of our researchers, using open form questions to spot potentials trends and areas in need of further investigation, rather than to arrive at concrete conclusions.

relied on by prosecution advocates in 28% of cases. In cases where the defendant was represented, the defence advocate set out their submissions based on the test in the Act just 34% of the time.

9. Our findings in this area are extremely concerning. Individuals should not be remanded in custody (save in certain types of cases)[4] unless one of the exceptions in the Act applies. However, our data shows that individuals are being remanded in custody without reference to this test and potentially in instances where this test would not be satisfied. This is particularly worrying given the increased lengths of time individuals are now spending on remand, as discussed in further detail below.

10. This also has implications for Article 5 of the European Convention on Human Rights ("**ECHR**"). Whilst Article 5 ECHR allows for the deprivation of liberty in certain circumstances, including those set out as exceptions to bail in the Act, such a deprivation is only permitted "in *accordance with a procedure prescribed by law*". However, if courts are failing to reference, correctly and consistently, the Act in the majority of cases, as our data suggests, then this latter condition is arguably not being met. The extent to which the Act is being misapplied in the magistrates' courts suggests that it is not fit for purpose.

Why has the number of people on remand increased since Covid, and what work is being done to address this?

11. JUSTICE considers that there are two key reasons why the number of people on remand has increased since the start of the Covid-19 pandemic.

12. First, the court backlogs, exacerbated by the pandemic, have extended the length of time defendants have had to wait between their bail hearing and trial, and between trial and sentencing.[5] Where the defendant is remanded in custody, this means more time spent on remand. Increased custody time limits, introduced to cope with the delay, have further compounded this by enabling courts to remand individuals in custody whilst

[4] Murder, manslaughter, and serious sexual offences where the person charged has previously been convicted of one of those offences. Drug related cases involving class A drug users (designated areas only). See CPS, *Legal Guidance: Bail* (updated July 2021).

[5] National Audit Office, 'Reducing the backlog in criminal courts' (2021)

awaiting trial for longer than was permitted pre-pandemic.[6] This has increased the overall number of people on remand, as defendants remain in custody and for longer periods, whilst the proportion people leaving remand (i.e., through being convicted and sentenced or acquitted) has decreased.[7]

13. Second, an increase in the number of people being remanded in custody by the courts could also be contributing to an overall increase in the remand population. This likely reflects an increase in arrests following allegations of serious criminal offences.[8] It is worth highlighting that the number of ethnic minority individuals on remand has disproportionately increased over recent years.[9] JUSTICE's recent report, *Tackling Racial Injustice: Children and the Youth Justice System* (2021) suggests several reasons for this disparity.[10] Whilst the report focused on children and young adults, its findings can equally explain the increased likelihood of remand more generally, as well as the disproportionate likelihood of remand for ethnic minority individuals beyond the youth justice system.

14. As recognised in our report, policies such as PREVENT,[11] the Gangs Violence Matrix,[12] and the expansion of 'section 60' Stop and Search Powers are purported to 'crackdown' on serious crime,[13] making arrests more likely. The consequences are felt most profoundly by ethnic minority individuals (and especially Black men) who are

[6] CPS, *Legal Guidance: Custody Time Limits, including coronavirus protocol* (updated November 2020).

[7] In the Crown Courts the time between offence and completion increased by 11% between Q3 2020 and Q3 2021. There has also been an increase in the number of convicted individuals in prison awaiting sentencing, see Ministry of Justice and HM Prison and Probation Service, 'Offender management statistics quarterly: July to September 2021' (January 2022).

[8] D Clark, 'Number of violent offences in England and Wales 2002-2021' (2022).

[9] Mirren Gidda, Eleanor Rose and Rajeev Syal, 'Proportion of remand prisoners who are minority ethnic rises 17% in six years', *The Guardian* (March 2022)

[10] JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System* (2021).

[11] PREVENT is one of four elements of CONTEST, the government's counter-terrorism strategy. See JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System* (2021), pp.42-45.

[12] The Gang Violence Matrix is an intelligence tool the Metropolitan Police Service uses to identify and risk-assess individuals – often children and young adults – across London who are allegedly involved in 'gang' violence. Other forces, such as in Manchester, use similar databases. See Metropolitan Police Service, 'Gang Violence Matrix'. See also JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System* (2021), pp.31-42.

[13] Section 60 of the Criminal Justice and Public Order Act 1994 allows any senior officer to authorise the use of stop and search powers within a designated area for up to 48 hours where they reasonably believe that incidents involving serious violence may take place, or that weapons are being carried. Once authorisation is given, the implementing officer does not require any grounds to stop a person or vehicle within the area. See JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System* (2021), pp. 17-25, 29-31.

disproportionately targeted by such policies. This in turn increases the chances of individuals, particularly those from targeted communities, being remanded in custody. Moreover, insofar as these policies are highly racialised, they generate suspicion of ethnic minority communities on the part of those working in the criminal justice system, exacerbating the over-policing of these communities, further increasing the likelihood of arrest for serious crimes, and therefore being remanded in custody.[14]

15. Our report also identified biased decision making in courts as a potential factor in the disproportionate increase in the number of ethnic minority individuals on remand.[15] For this reason we recommended that the Ministry of Justice engage with academics to measure bias within judicial decision making.[16] JUSTICE is concerned that court backlogs and the increased pressure this has placed on courts' time and resources, has lessened any scope to 'correct' for biases, increasing the likelihood of them operating in the remand context. This is particularly so given the lack of diversity amongst decision-makers, with our preliminary findings indicating that in 71% per cent of bail cases, the decision was made by an all-White lay bench or White district judge.

How long are people being held on remand? What are the implications of people being held for long periods on remand?

16. Delays caused by court backlogs mean that defendants are spending increasingly long on remand. In assessing the impact of the court backlog the National Audit Office estimated that as of 30 June 2021 individual defendants in the Crown Court backlog who were remanded in custody spent an average of 209 days on remand.[17] This was up 86 days compared with 31 March 2020. Moreover, Fair Trials' research has revealed that as of 30 June 2021, 3,949 people have been held on remand for more than six

[14] JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System* (2021), p. 14-49. Indeed, police mistrust of minority communities was brought into focus during the Covid-19 pandemic, with ethnic minority individuals being more likely to be fined than their White counterparts, see R. Currenti and J. Flatley, Policing the Pandemic: detailed analysis on police enforcement of the Public Health Regulations and an assessment on disproportionality across ethnic groups, (National Police Chiefs' Council, July 2020), p. 3.

[15] JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System* (2021), p.92 – 95.

[16] *Ibid*, recommendation 43 (para 4.56).

[17] National Audit Office, 'Reducing the backlog in criminal courts' (2021), p.23.

months, a 10% increase since December 2020, with 1,523 of those people having been held on remand for over a year.[18]

17. Spending long periods of time on remand has significant deleterious effects on the individual remanded in custody. As recognised by the criminal justice joint inspectorates, increased time spent on remand adds to the anxieties and frustrations of those in prison.[19] Individuals on remand are more likely to suffer from mental health problems than the rest of the prison population[20] and remand status is a significant risk factor for suicide in custody.[21] Moreover, suicides amongst the remand population doubled in the period between 30 September 2020 and 30 September 2021 when compared to the previous year, as did the likelihood of suicide when compared with the general prison population.[22] Whilst there are probably several factors responsible for this – including the deterioration of prison conditions during the pandemic – it is reasonable to conclude that the uncertainty generated by long periods on remand has played a part.

18. Being remanded in custody for long periods of time is likely to have a particularly severe impact on women defendants, who due to a dearth of women's prisons, are more likely to be remanded further from home.[23] For such women, being held on remand for long periods may significantly weaken their relationships with family and friends, contributing to feelings of isolation and making it harder for them to reintegrate when they are released from custody.[24]

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[18] Fair Trials, 'One in ten of the remand population in England and Wales have been in prison for more than a year' (2021)

[19] Criminal Justice Joint Inspection, 'Impact of the pandemic on the Criminal Justice System' (2021), p.23.

[20] National Institute for Health and Care Excellence, 'Clinical guidance scope' (2014)

[21] S Zhong et al, 'Risk factors for suicide in prisons: a systematic review and meta-analysis' (2021) 6 Lancet Public Health 164, pp.164, 167-168.

[22] Connie Dimsdale and Thomas Saunders, 'Delay and uncertainty is killing people as remand inmates account for 40 per cent of suicides in prison', *I News* (January 2022)

[23] Office for National Statistics, 'Reporting on the Sustainable Development Goals: People on remand in custody in England and Wales' (2018), p. 5.

[24] Ministry of Justice, 'Farmer Review Report: The Importance of Strengthening Prisoners' Family Ties to Prevent Reoffending and Reduce Intergenerational Crime' (2017), p.4; K Bullock and A Bunce, 'The prison don't talk to you about getting out of prison': On why prisons in England and Wales fail to rehabilitate prisoners' (2020) 1 Criminology & Criminal Justice 111, p. 113.

19. Moreover, holding defendants on remand for long periods of time raises concerns regarding Article 5 ECHR. Whilst remanding individuals in custody pre-trial is permitted in certain circumstances, Article 5(3) ECHR makes clear that where this the case the person detained must be brought to trial within a reasonable time or released pending trial. It is questionable whether those who have been held on remand for over a year can be said to have been given a trial within a reasonable time, particularly as this is significantly over the Custody Time Limits introduced by the government, including the extended time limits introduced in response to the pandemic.[25]

What effect does the increasing remand population have on the prison population?

20. The increasing remand population exacerbates the overcrowding of prisons. As highlighted in JUSTICE's report, *A Parole System fit for Purpose* (2022), prison-overcrowding contributes to a lack of educational and training provisions and reduced health and mental health care.[26] This not only decreases the quality of life of those in custody, it also worsens individual's risk profiles making them more likely to re-offend when released.[27] Employment problems and drug use have both been correlated with an increased risk of reoffending.[28] However, when prisons are overcrowded, criminogenic needs cannot be met. This undermines their successful reintegration into society, at significant cost to both the person trapped in a cycle of re-offending and the taxpayer.

21. Moreover, as outlined previously, the increased time many defendants now spend on remand is likely to have a deleterious effect on the well-being of this already vulnerable group. A large and increasingly frustrated remand population has the capacity to cause significant instability amongst the wider prison population.[29] This potential for instability

[25] CPS, *Legal Guidance: Custody Time Limits, including coronavirus protocol* (updated November 2020).

[26] JUSTICE, *A Parole System fit for Purpose* (2022), pp. 4, 103 -104 .See also Criminal Justice Alliance, 'Crowded Out? The Impact of prison overcrowding on rehabilitation' (2012).

[27] *Ibid.*

[28] Ministry of Justice, 'The factors associated with proven re-offending following release from prison: findings from Waves 1 to 3 of SPCR' (2013); National Offender Management Service, 'A compendium of research and analysis on the Offender Assessment System (OASys) 2009-2013' (2015).

[29] Criminal Justice Joint Inspection, 'Impact of the pandemic on the Criminal Justice System' (2021), p.23.

is amplified by the increased strain on prison staff, caused in part by prison overcrowding.[30]

What alternatives are there to the use of custodial remand (such as more effective tagging)?

Some people who are held in custody on remand, will at trial be found not guilty and immediately released. What support is available for this category of people, upon their release from prison?

22. In the year preceding June 2021, only 75% of people remanded in custody at the Crown Court were given custodial sentences. Only 11% of defendants remanded in custody at the magistrates' courts were sentenced to immediate custody, albeit a further 66% were committed for trial or sentencing at the Crown Court.[31] Whilst there is no data available on what proportion of the defendants not given custodial sentences were acquitted, JUSTICE considers similar interventions should be available to all those remanded in custody who do not ultimately end up in prison for their alleged crime.

23. That such a high proportion of those remanded in custody do not receive a custodial sentence provides further evidence that the remand system is not operating as it should. The seriousness of a defendant's offence and the likelihood of receiving a custodial sentence are both factors that decision-makers are required to consider when determining whether to remand in custody.[32] Whilst these are not the only relevant factors, and whilst the test for remand is different to whether someone is found guilty, the fact that 25% of defendants remanded in custody end up being released post-trial suggests that in a substantial portion of cases insufficient weight is being given to these factors.

24. This is deeply troubling, as every individual remanded in custody in these circumstances represents a wasted opportunity to provide a more holistic, community-based response to their potential offending. During our magistrates' courts research, JUSTICE came across numerous decisions to remand individuals in custody made on the basis that the

[30] Criminal Justice Alliance, 'Crowded Out? The Impact of prison overcrowding on rehabilitation' (2012), p. 10-12.

[31] Ministry of Justice, 'Criminal Justice Statistics quarterly: June 2021' (2021), p.6.

[32] Section 9(a), Bail Act 1976.

defendant's drug abuse, homelessness or mental health made them less likely to attend future court dates or less able to comply with bail conditions. In at least one instance a decision to remand an individual in custody was made in the hope that time in prison would enable the defendant to curb his drug use, despite explicit recognition from the court that the offence was not particularly serious. Whilst we have no way of knowing whether the individuals in these cases ended up receiving custodial sentences, our preliminary research does suggest that factors such as drug use, mental health problems and homelessness increase an individual's likelihood of being remanded in custody, irrespective of the offence's seriousness.

25. This is unacceptable. Social care issues such as these require social care solutions, rather than incarceration which, as highlighted previously, is likely to exacerbate these problems and raise the defendant's risk of offending in the future.

26. JUSTICE considers that rather than remanding individuals in custody, where vulnerabilities such as mental health, homelessness, and drug use are identified, efforts should be made to address these at source, through specialised programmes delivered in the community. As highlighted in our report, *Mental health and fair trial* (2017), opportunities to be diverted out of the criminal justice system should be available early in the criminal justice process and should form part of a wider strategy to prioritise the welfare of vulnerable individuals over punitive responses through the criminal justice system. [33]

What data on remand should be collected and published that isn't already?

27. The substantial lack of data on remand was a driving force behind JUSTICE's decision to undertake its own research into remand hearings in the magistrates' courts.

28. As we have identified above, an increase in the remand population is likely to have a disproportionate impact on ethnic minority communities. Given this, JUSTICE considers that more data needs to be collected on the ethnicity of individuals remanded in custody

[33] JUSTICE, Mental health and fair trial (2017).

so as to better track and scrutinise the inevitable disparities that exist when compared to their White counterparts, as well as their likelihood of receiving a custodial sentence.[34]

29. JUSTICE also considers that more data should be collected on individuals remanded in custody, who are ultimately acquitted at trial or given non-custodial sentences. The Government should work with academics to assess the extent to which remand is being used as a 'solution' to unmet social needs such as homelessness, mental health conditions, or drug abuse. Similarly, research should be conducted to establish whether remand decision-makers are taking appropriate account of the seriousness of the offence and the likely penalty when making decisions to remand a defendant in custody. Data should also be gathered on whether courts are remanding individuals in custody for crimes that do not attract a custodial sentence, and if so, what were the reasons for this. Moreover, separate data should be gathered indicating the proportion of individuals remanded in custody who are ultimately acquitted and released.[35]

30. In addition, we recommend that the Ministry of Justice centrally collates the reasons which courts give for bail and remand decisions and makes the information publicly available. This will allow for better scrutiny of the decision-making processes, as well as identify, with the benefit of data, patterns in reasons given – aiding analysis of underlying systemic issues.[36]

31. Finally, given that the sharp rise in the remand population is likely partially explained by individuals spending longer on remand, JUSTICE is concerned that the Ministry of Justice does not publish data on the estimated total time spent by defendants on remand

[34] Whilst JUSTICE is currently gathering data the on ethnicity of those remanded in custody as part of its research in the magistrates' courts, more wide-reaching data collection which looks beyond isolated remand hearings is required. In particular, gathering data on the likelihood of receiving a custodial sentence after being remanded in custody will help expose potential biases in the remand decision-making process itself. For instance, if data showed that a group was disproportionately being remanded in custody, despite receiving a lower or similar proportion of custodial sentences, this may indicate a need to address bias in remand decisions. Identifying trends such as these is crucial to developing targeted solutions to combat racial injustice in the criminal justice system.

[35] Although JUSTICE has already gathered some data on this and has begun to identify some concerning trends, given the relatively small scale of our research, and the fact that our findings on this front rely on our researchers' evaluations, we are not best placed to draw concrete conclusions on this issue. A larger research project is required - one which has wider access to decision makers themselves and the ability to follow cases as they progress through the criminal justice system.

[36] This was recommended by JUSTICE in our report *Tackling Racial Injustice: Children and the Youth Justice System* (2021). See p.84.

in custody.[37] A more complete picture, and one that includes defendants remanded in custody at magistrates' courts, is needed to allow for a better assessment of the scope of the problem. Moreover, providing remand decision-makers with accurate estimations of the length of time a defendant is likely to stay in custody may help them make more proportional decisions, potentially reducing the number of defendants being remanded in custody.

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[37] Data provided on this by the National Audit Office is calculated as the average number of days defendants who were on remand in custody at receipt or first hearing have spent on remand, from the time their case was received by the Crown Court until the end of the reporting period. See National Audit Office, 'Reducing the backlog in criminal courts' (2021).