

Justice Committee

Oral evidence: [The role of adult custodial remand in the criminal justice system](#), HC 264

Tuesday 12 July 2022

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Members present: Sir Robert Neill (Chair); Rob Butler; James Daly; Laura Farris; Paul Maynard.

Questions 85 - 160

Witnesses

[I](#): John Bache, Former Chair of the Magistrates Association; and Tom Franklin, Chief Executive Officer of the Magistrates Association.

Examination of witnesses

Witnesses: John Bache and Tom Franklin.

Chair: Welcome to the Justice Committee. We are very grateful to our witnesses for coming to give evidence to us today. This is the last of our hearings in relation to the role of adult custodial remand in the criminal justice system. Before we start the evidence session, we have to declare our interests. I am a non-practising barrister.

James Daly: I am a practising solicitor and partner in a firm of solicitors.

Rob Butler: Prior to my election, I was a magistrate for 12 years, a member of the Sentencing Council and a non-executive director of HMPPS.

Q85 **Chair:** That's put our form in, so to speak. Welcome, John, and Tom. Can you introduce yourselves for the record, please?

John Bache: I am John Bache. I was a magistrate from 1989 until 2020. During that time I held various positions, the final one being national chair of the Magistrates Association for three years from 2017 until 2020. It is only fair to say that I have not sat since November 2020, so in that respect I am a little bit out of date, but obviously I had a lot of experience before that.

Chair: A long time, yes.

Tom Franklin: I am Tom Franklin, chief executive of the Magistrates Association.

Q86 **Chair:** John, given your experience, perhaps you could kick off. In your experience, when a bench of magistrates is determining whether or not to remand someone what are the principal factors?

John Bache: There is a standardised process and I will ask Tom to talk about that. Basically, you have three choices: unconditional bail, conditional bail or remand in custody. The starting point is that everyone is entitled to unconditional bail. Unconditional bail is a slight misnomer because there is a condition that you turn up in court when you are told to turn up, but other than that, there are no conditions on it. Conditional bail, as it says, has various conditions. Those conditions are put on to ensure that the defendant in front of you does not commit further offences.

The starting point is—

Q87 **Chair:** Would you also have conditions to ensure there is attendance?

John Bache: Yes. The starting point is that they allow bail. You have the defence and prosecution putting their case in front of you. If they both agree that unconditional bail is appropriate, that is probably the end of the matter. You could override them, but there is no logic in doing that. If they both agree that custody is appropriate, again you could overrule them but it would not be a logical thing to do. The difficulty, or the challenge, is when



they disagree. In that case, the usual situation is that the prosecution wants them to be remanded in custody and the defence does not want them to be remanded in custody. That is where it becomes difficult. You have to make a decision. You can put certain conditions on them to make sure they attend again and do not commit offences and so on. There is a range of conditions, which I am happy to go through if you want me to do so.

In normal circumstances there are three magistrates. They then retire, or do not retire, and decide whether or not they want to remand the person in custody, but the bottom line always is that they have a right not to be put into custody. You have to remember that at this stage they are not guilty; they have not been found guilty. The evidence may be against them, but they have not been proved guilty.

Q88 **Chair:** I get that. If the prosecution is seeking a remand in custody, the burden of proof in effect is on the prosecution, isn't it?

John Bache: That's right. Absolutely.

Q89 **Chair:** To what extent in your experience are you and your colleagues able to take into account—or do you—the impact of the remand on the individual or their families?

John Bache: Very much so. That is a major factor. It is not the only factor and it may not be the most important one, but it is a major factor. That is one reason—this is probably finer detail than you are looking for at the moment—why, hopefully, fewer women are put into custody than men, because as an obvious generalisation women have more caring responsibilities, and that is a factor you certainly take into account.

Q90 **Chair:** Another thing, which perhaps may be more recent because of what has happened with the pandemic and so on, is to what extent it would be proper for the bench to take into account how long the case is likely to take because of the backlogs, which were substantial even before Covid and are now worse.

John Bache: That is very relevant. I finished in November 2020, so the pandemic had then been in place for about eight or nine months. At that stage, we were worried that the pandemic could spread like wildfire through the prisons. Fortunately, that does not seem to have happened to a major extent, but it was a factor. What we did not want to do was send someone to custody, potentially risking their life and other people's lives as well. Fortunately, that did not happen, but the bottom line was that you still had to make the decision whether to send someone to custody or could impose conditions to ensure they came back and did not commit further offences. It was definitely a factor to take into consideration for their own sake and for the sake of their families and other prisoners.

Q91 **Chair:** Tom, perhaps you could take us through the steps.



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Tom Franklin: The process that magistrates follow is very structured. I have pulled up, I think from the Judicial College website, some of the flow charts used for different types of offences. You can see step by step the process they need to go through. The first is whether there is a right to unconditional bail. In most situations, but not all, that is the case. What type of offence is being dealt with? There are different things for different types of offences. Which Bail Act exemptions apply and is the no real prospect test relevant?

Q92 **Chair:** Could you explain the no real prospect test?

Tom Franklin: The no real prospect test is that, if there is no real prospect of the defendant receiving a custodial sentence, that rules out a remand to prison. It is an important test along the way. The fourth step is whether conditions of bail will allay any fears identified in the exceptions. The final one, after that, is either conditional bail or refusal of bail and remand to prison. The structure is very logical and straightforward.

I think a lot of magistrates would say that decisions on remand are some of the most difficult and complex they face and are sometimes on a par with the decision on the plea and sentencing. They have to work with the information they have and, particularly for first hearings, that may be limited. As a matter of risk, they have to weigh up the liberty of the individual and the presumption of unconditional bail against public safety, due process and due justice. That is why a lot of magistrates find it particularly complex and difficult. As John said, it weighs very heavily on the freedom of the individual and the effect remand could have on that individual.

Chair: You talked about the structure. Mr Butler, do you want to come in on that?

Q93 **Rob Butler:** I was just checking on my phone to see whether I could get the right page. There are very clear exceptions to bail, aren't there? Essentially, it is not a discretionary matter. Magistrates and judges have to be very clear on what basis the exception to being released on bail is met. I wondered whether you have more details on what you have printed out, Mr Franklin, that set out specifically what those exceptions are, or indeed whether Mr Bache recalls them from his time in the courts.

John Bache: I do not recall them, Rob, because I had a legal adviser who would tell me.

Q94 **Rob Butler:** Indeed. That underlines my point that magistrates are not just sitting there thinking, "I'm a bit worried about this." There are some very specific criteria.

Tom Franklin: They are basically about whether there are substantial grounds for believing that the defendant would fail to surrender, would commit an offence on bail or would interfere with witnesses or otherwise obstruct the course of justice. There are some others, such as keeping the defendant in custody for their own protection and so on, but magistrates



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have to follow very specific criteria. The experience of my colleagues in the Magistrates Association is that they take those very seriously. They have to apply them and, if they do not, as John said, their legal adviser is there to make sure they get back on track.

Q95 Rob Butler: Having found the right page, perhaps I could chip in that somebody can be remanded in custody if previously they have been released on bail but committed an offence while on bail. That can be an acceptable legal reason for bail to be withheld subsequently.

Tom Franklin: That would be one of the factors. When making a judgment about whether there is a substantial risk, the history will play a part in that decision. If there is a history of not surrendering to the court previously, or committing offences, that will be taken into account in coming to a decision.

Q96 James Daly: Mr Franklin, you have just about explained this but, for the record, could you say how the presumption in favour of bail works in practice during court proceedings?

Tom Franklin: That is the starting point. The starting point is very clear that, apart from the very small number of cases to do with murder and the like, and some issues to do with class A drugs and that sort of thing, there is the presumption of unconditional bail. Then the exceptions are looked at. Even then, if some of the exceptions are considered to apply, the next element is this: are there conditions that could be put on the bail that would satisfy the magistrates that the risk can be mitigated? It is only if, as a result of all of that, the answer is that they cannot be mitigated that remand in prison is an option.

Q97 James Daly: I have a background in this and we have a magistrate and barrister here. I have been on the Justice Select Committee, except for a few months away from it, for most of this Parliament. A succession of witnesses has appeared before this Committee and the Home Affairs Committee, on which I also sit. Generally, although I am sure they are all good people, there is now a general view to look at custody as a bad option and something you should not be considering, certainly for short-term sentences and remand. Certainly, all the academics and various other people come before this Committee with that general point of view. When I started practising before the courts that was not even a concept; it was just nonsense. Do magistrates feel impacted by, shall we say, the mood music of the legal debate? Some people use very strong terms for remanding people in custody, that it is morally wrong and things like that. Do you feel any pressure as a result of that?

John Bache: Magistrates have a range of views. A good magistrate should not have an extreme view either way. Most of them are middle of the road. As a personal opinion, I am not in favour of custody. I prefer not to send people to custody either on remand or permanently. If you ask anybody about the five purposes of sentencing, the first, which always comes up, is punishment, but in fact it is only one of the five.



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I encourage magistrates to think of the other four purposes. If those four purposes can be fulfilled by not sending people into custody, I would be against sending them to custody. I am sure that you remember that David Gauke and Rory Stewart were keen to take away, in effect, the power of custodial sentences from magistrates. That was never going to work because you have to have custody as a safeguard if people refuse to co-operate with a non-custodial sentence. If you sentence someone to a community punishment and they do not do it, you have to have some way to deal with that.

- Q98 **James Daly:** You have just made a very interesting statement, and I thank you for it. Can I tell you why that is from my perspective? You are an eminent man who has been on the bench for a long time. Forgive me, but I consider that slightly concerning. It is not a criticism at all.

Magistrates have broad principles regarding remand and the other things that they do, whether it is a sentence or whatever it is. Parliament should give you broad principles to work in, sentencing guidelines, but effectively local justice was about common sense. It was knowing your area and using your life experiences to know, when 6 Acacia Avenue has been burgled, or Freddie's out at a certain pub in wherever on a Saturday night, what the situation is. My concern is that that common sense, local justice and open-mindedness, looking at this in the way normal human beings and the people who elect Members do, is being forgotten and all of this is turning into a sort of intellectual exercise where you prioritise a view. Do you see what I am saying? If you come to any remand exercise on the basis that, "I don't think that as a concept people should be remanded to custody"—I know that was not exactly what you said—

John Bache: It is not exactly what I said.

- Q99 **James Daly:** I am not criticising you for that, but I find it quite concerning.

John Bache: But if you live at 6 Acacia Avenue and you have been burgled, you are cross about it, aren't you?

- Q100 **James Daly:** Of course.

John Bache: You would be even more cross if you were burgled a second time, so the question is whether there is some sentence you can give that stops you being burgled. You cannot be unburgled. If you have been burgled once you cannot be unburgled, but if there is a sentence you can give that will stop it happening a second time, to me that is preferable to sending someone away to custody, so you know that you are not going to be burgled for the next three months, but four months later you are burgled again. Do you see what I mean? The other thing is that you have to take each case on its merits.

- Q101 **James Daly:** I was about to say that. I am very much against politicians prescribing to magistrates a definitive outline of how you should think about things. The court does not work on that basis. As you know, it works on the individual circumstances of each case. If a solicitor cannot do their



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job and they are not giving you sufficient information, or at least one option, that is not your fault as a bench of magistrates. In every court I have ever been in I can count on one hand the number of cases where there has not been sufficient information to make an informed decision regarding bail.

Effectively, bail comes down to two things. We could get on to some of the exceptions, but in the majority of cases it is about whether the person is going to turn up and whether they will commit another offence. I have not yet heard a sensible argument that would persuade me, if I was a magistrate, that if either of those things were the case the person should not be remanded in custody. I do not think it is anything to do with cost or philosophy. If they are not going to turn up for the next hearing, or you think they are going to commit an offence, they should be remanded, no matter what the offence is or what the circumstances are.

John Bache: Unless you can put some conditions on that will significantly reduce the chances of them committing an offence again. You should be able to do that because there is a range of conditions you can put on. We have sentencing guidelines. I know we are not talking about sentencing now, but we follow the sentencing guidelines. If you do not follow them, you have to give a reason why you have not followed them.

- Q102 **James Daly:** Since I stopped going before the courts there are sobriety tags and things that enhance conditions in a way, but, although conditions work—let's not get away from that—in my view, if you think somebody should get bail, they should get bail. One of the things I always argued about is that in some cases conditions are appropriate, but in a lot of cases why impose conditions if you think somebody should be given bail anyway? If you think they are going to commit an offence or you think they will not turn up, bail conditions will not address that concern, or am I wrong?

John Bache: They can do. It depends on what the conditions are.

- Q103 **Chair:** Like reporting restrictions or something like that.

John Bache: Yes. The other thing is that we are lucky because we have three magistrates who can discuss it between themselves, which is obviously not the case for a district judge.

Tom Franklin: It is important to distinguish remand hearings from sentencing hearings.

- Q104 **Chair:** Indeed. They are completely separate things.

Tom Franklin: In remand hearings, it is all about managing risk. Regardless of individual views about prison or otherwise, the key thing about remand hearings is that the presumption is bail unless X, Y or Z is the case.

Chair: The exemptions.

- Q105 **James Daly:** This Committee has considered parole. It could be argued that one of the situations where people are recalled—this is not something



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I am asking you about—is that the package of conditions imposed on people is unrealistic. If prolific offenders are coming before you and there is a desire to keep them out of custody and you put a whole range of very restrictive conditions on them, which are probably completely unrealistic in their circumstances and will not work, although I accept that every case has to be taken on its merits, you are condemning them to a period in custody. Well, not condemning them, but do you understand the point? It seems to me to be a strange logic to impose conditions on people who realistically will not abide by them, because of a desire to keep them out of custody, or again am I wrong in that respect?

Tom Franklin: One of the tests that magistrates have to consider with conditions is whether they are realistic. Are they achievable? Can you measure whether they are being fulfilled? It cannot be just any condition; it has to be that they have thought it through.

Q106 **James Daly:** Tom, is it your opinion that magistrates are piling conditions on to people to keep them out of custody?

Tom Franklin: No, it is not. They take that very seriously. In this area, and right across the issue of remand, more evidence-based research needs to be done. It would be interesting to look at conditions, their application and so on, and draw some conclusions from that. They take them very seriously. Sometimes the issue is that they do not have all the information that would make it a simpler process as far as those conditions are concerned. Sometimes that may lead to remand because some of the information is missing—it might be available later on—in setting the conditions, but it is very clear that, if the conditions do not in the magistrates' minds reduce the risk to an acceptable level, the only option is remand.

John Bache: As a general rule, you should not give more than two or three conditions; otherwise, it becomes ridiculously complicated. A good example is reporting. Some magistrates say that you have to report every Tuesday to the police station. There is no logic in that at all. The only logic in reporting is to make sure they come before the court. If I report to a police station today, I can be in Australia by tomorrow, so there is no point in doing that. Sometimes there is not a great deal of logic in the conditions imposed. As Tom said, they have to be practical; they have to be policeable as well.

Q107 **Chair:** Tom, you talked about the steps that are taken. What is the guidance and training magistrates get? John, you have gone through it. I know that the association helps with training for magistrates and so on.

Tom Franklin: Having talked to magistrates about their experiences of that, there is a feeling that it is comprehensive right from induction, where remand training is a major part. It comes up after a year of being in place and sitting, when there is more training. It also comes up through continuation training. The materials produced by the Judicial College are of



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a good standard; they are very crisp and clear. I think that magistrates generally feel that the training is good.

One of the issues for magistrates, particularly around continuation training, is that at the moment a lot of changes are taking place, so there is a lot of ad hoc training going on. There is a concern that things like remand within continuing training are being crowded out a bit. There is a place for online and self-guided training, but one thing I think magistrates are missing a bit is some of the CPD-type training where magistrates are brought together on problem solving and are able to say, "I am finding this particularly challenging. Can anyone help with this?" There is a bit of a gap at the moment in opportunities for magistrates to do that. There is so much online and doing it in your own space, on your own.

Q108 **Chair:** Does the bench book cover the key concepts of remand?

Tom Franklin: It does. It is clear, crisp and succinct.

Q109 **Chair:** For those who don't know, it is a folder that all magistrates have with them in court or that is available to them.

John Bache: It is online now.

Q110 **Rob Butler:** We used to carry in a great big folder, but now it is all online. It is all on a tablet.

John Bache: And if you were in youth, you had to have two great big folders because you needed the youth one as well.

Q111 **Rob Butler:** One of the reasons I was very keen at the beginning for you to set out the strict criteria that have to be followed is that there is considerable concern about the increase in the number of people who have been remanded in custody in recent years. I wanted to set the context for that. Mr Bache, why do you think that number has increased?

John Bache: I'm afraid I do not know the answer to that. It is disappointing. There is no logical reason. It is pre-Covid, isn't it?

Q112 **Rob Butler:** Mr Franklin?

Tom Franklin: There is a real issue. I know that you are holding a parallel inquiry into open justice. A very powerful witness from the Legal Education Foundation gave evidence.

Q113 **Chair:** Dr Natalie Byrom.

Tom Franklin: That's right. She was talking about open data. What strikes me in the area of remand is the lack of data, so we are grappling in the dark to understand what is going on. I think that applies right the way across justice, but very much here. The supposition is that because of the backlogs in the Crown court it is a bit like a dam. There is the same flow coming in, but a dam has built up because fewer people are coming out the other side of remand. It seems that is the case, but it is not based on hard evidence because we do not have the data to be able to show that.



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Q114 **Rob Butler:** As far as I am aware—you need to correct me if I am wrong—there have not been any changes in the legislation or the advice and guidance to magistrates and judges about the reasons to refuse bail, so there is nothing in formal procedure that would explain what has happened.

Tom Franklin: No. Talking to magistrates, we do not have the feeling that there has been a massive change in the level of remand decisions that they are making. One thing that is interesting—again, there is no evidence for this, but it is something where data would help and a bit of a research piece—is that in ways as a society we are becoming more risk averse. We can see that at other points in the justice system—for instance, at parole where it is also about balancing risk. It would be interesting to be able to see whether those who are taking decisions on remand are in any way affected by that because they are balancing risk. Has their risk appetite, if you like, changed over time? We do not know because there is no research at this stage.

Q115 **Rob Butler:** But what you are saying is that anecdotally your members are saying to you that, essentially, they do not notice an increase in the flow of the number of people they are remanding to custody, be it pre-trial or pre-sentence.

Tom Franklin: That's right. They are also saying that the work of magistrates has changed over the last few years, particularly with out-of-court disposals and so on, so they are dealing with more serious cases overall, but they do not think the flow has changed.

Q116 **Rob Butler:** Mr Bache, I remember that when you were chair of the Magistrates Association you were very keen on the extension of the maximum custodial sentence that magistrates could impose, from six to 12 months. That may or may not have been a personal view, given what you have just said, but it was the view of the association. That has come to pass, so magistrates can now impose a sentence of 12 months for a single offence. Do you think that will have any impact on the remand population and on decisions that magistrates are making at the earlier stage of the process, given that they know they might be holding on to some cases that previously they would have been sending to the Crown court?

John Bache: It is too early for any figures, but that could be the case, which I think would be a problem. They could end up with more people being remanded in custody.

Q117 **Rob Butler:** Do you think magistrates would be more likely to remand in custody than a judge in the Crown court for a similar offence?

John Bache: As a pure guess, yes, they probably would, because what is serious to a magistrate is not particularly serious to a Crown court judge.

Q118 **Rob Butler:** Mr Franklin?

Tom Franklin: I am more optimistic on this than John. It shouldn't be more likely, because whoever is taking the decision follows the same



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process and logic, but the fact is that there is such a long wait. It takes up to two and a half years for cases to come before the Crown court. If those cases were heard in magistrates courts, where the backlog is in a much healthier state, it should mean that the outflow from the dam is faster and that should have a positive impact. I do not know how much. It will be about a year before we can tell, but it should have a positive effect.

Q119 **Rob Butler:** The point you have just made illustrates the fact that there are two different factors determining the size of the remand population: the flow, which we have just been talking about—the number of people being remanded to custody on any one day or in any one week—and the length of time they remain remanded in custody. It is perfectly feasible that the increase in the number of people remanded in custody is due entirely to an increase in the length of time rather than a change in the decision making and the flow.

Tom Franklin: Yes.

Q120 **Laura Farris:** On the subject of flow, I want to ensure that I have understood it correctly. Is it your evidence that the number of people who are being sent to remand, if that is the correct expression, is consistent throughout magistrates courts, and does that mean the reason for the increased numbers is the court backlogs?

Tom Franklin: Part of the issue is to do with the fact that there is a paucity of data in this area. Everything I say is—

Laura Farris: Sorry, I should have said “using your best estimate.”

Tom Franklin: Exactly. Based on what our members say, that would be the case. They are not experiencing a big uptick in the number of cases that end in remand, so that suggests that it is the latter as far as the backlog goes.

Q121 **Laura Farris:** Do you think there is a gap in the law? I am not a criminal practitioner, but would it be right to say that, historically, magistrates felt confident recommending remand because they were able to assume that the hearing would be heard reasonably promptly and they did not have to specify that? Do you think we should change the law where an additional consideration that a magistrate would have to have in their mind would be how long it is, realistically, before the matter would be heard?

Tom Franklin: That is difficult for me to answer because of the role of magistrates. In a sense, our role is to take the law and apply it—

Q122 **Laura Farris:** Rather than to make recommendations.

Tom Franklin: That is a matter for parliamentarians.

Q123 **Laura Farris:** John, do you have a view?

John Bache: It is difficult because you make the decision on the basis of whether they are going to turn up to court again and whether they are going to commit further offences. What happens after that is not—



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Q124 **Laura Farris:** But very important to any defendant's article 6 rights would be a proportionality consideration. If the offence is non-violent and the remand period could in extremis be three or four years, do you think it would be helpful? Would that be much too long?

James Daly: For magistrates, it would be.

Laura Farris: But three times longer than usual because of the backlog.

John Bache: Yes, I hope that you would take that into consideration.

Q125 **Laura Farris:** But there would not be any specific guidance.

John Bache: I do not know if you would need to change the law to do that. The Sentencing Council could produce guidance. The Lord Chief Justice or the senior presiding judge could produce guidance. That would be sensible. One thing that changed when Covid came is that the Lord Chief Justice said that we must take it into consideration when deciding to remand someone in custody or not, but that, of course, would reduce the number, not increase it. If the magistrates know that somebody is not going to be dealt with for a significant length of time—six or eight months or whatever—they should certainly take that into consideration because it would be totally wrong to remand someone in custody for that length of time for what is, by definition, a fairly minor offence.

Q126 **Laura Farris:** To the extent that that kind of consideration is being weighed up at the moment, would that be quite subjective and vary from magistrate to magistrate, or are you aware of any consistency?

John Bache: Inevitably, it would vary from magistrate to magistrate to a certain extent. The problem is that magistrates often do not know how long it is going to be. If you have someone whose maximum sentence was going to be four months and you know they are going to be remanded in custody for eight months, there would be no logic in that whatsoever. The magistrates are not going to know that they will be remanded for eight months. That is the trouble. They do not have the information. They can only go on the information they have.

Laura Farris: Thank you. That is helpful.

Q127 **James Daly:** Mr Franklin, are your members coming back to you and saying, "Oh, my god, Tom, we are making these really bad remand decisions and it is all our fault and we are not following the guidelines"?

Tom Franklin: No.

Q128 **James Daly:** The logic of that position, taking into account what Mr Butler and Ms Farris have said far more articulately than me, is that at this moment in time, whatever the reasons for it in terms of the backlog and the length of time, there is no evidence to suggest that magistrates are making decisions that are wrong, bad or unlawful—we can go through a wide range of phraseology—is there? There is no evidence whatsoever. This is why I asked the question at the start.



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If more people are remanded, you need to look at that. All those decisions may be correct decisions. They may be based on the evidence at the time. It is not like a blanket thing where you impose custody on 1,000 people at once. These are individual circumstances. I do not think you should accept criticism of the magistracy. It is wrong to do that and say, "Oh, my god, we are remanding too many people into custody. It is awful." For all we know on this Committee, they could be exactly the right decisions for protecting local communities. That could be exactly what is needed. Am I wrong?

Tom Franklin: In one sense, our job is to rise above some of that criticism, and there will be criticism. We just have to make sure that our members are as trained as they can be, continually looking at how to improve, and doing what they think is right. As John said, each case is different, so they need to look at each case on its merits and individually. The issue is that there is a vacuum of information. When there is a vacuum of information, it is filled by all sorts of supposition, hearsay and everything else. The answer is to get to the bottom of that and to make sure that there is information, so that factual answers can come out as to why there has been a rise, but that is not there at the moment.

John Bache: Another factor that has changed since Covid is that people are appearing on video rather than in front of you. I think most people would agree it is less satisfactory.

Q129 **Chair:** That is actually one of the things I was going to move on and ask about. What impact has the increase in the use of video hearings had on remand proceedings?

John Bache: Again, I cannot give figures. I do not think anybody has the figures. It is much easier talking to somebody face to face—we all know that—than to talk to a screen. Whether to send someone to custody or not is an important decision. I would much prefer to have them in front of me rather than just on a screen.

Q130 **Chair:** Tom, do you have any details on that?

Tom Franklin: We did a survey of magistrates and their experiences of remote links during Covid when so much moved over to remote links, and 86% said that they had encountered technical difficulties and 76% said that remote links with adult defendants had made communication more difficult. They were particularly concerned about vulnerable defendants. Very often, magistrates were not told in advance about the vulnerabilities of defendants. It is something that concerns us. I am not saying there is not a place for it, but our concern is the headlong rush into it without proper research.

There has been some research about the experience of magistrates. As far as we know, there has been no research into the experience of defendants. Taking the maxim that justice needs to be seen to be done as well as done, it feels like a very big hole in understanding the impact of remote hearings if we do not know how they are perceived by defendants.



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In researching for today, I watched some of your previous hearings, and the quality online was amazing. You could hear what everybody was saying. The picture was great. It was broadcast quality. The reality, particularly when it was done through police stations, was more like probably all of our experiences of being in a Zoom meeting where you are the one online and you feel as if you are forgotten, you cannot see who is speaking and you cannot hear them. That is very concerning as far as the experience of defendants goes. It is something that concerns us, and it needs to be thought through. It is not a cheap option, either. If it is to be done at all, it needs to be done very well, to broadcast-style quality.

Q131 **Chair:** That is very helpful. To what extent is it normal to have legal representation when people are being remanded? In some areas of the law, there has been a growth in litigants in person. Has that happened in relation to people appearing in those hearings?

John Bache: From my experience, they have representation, but the representation may well be in the courtroom with the magistrates, whereas the person in custody is remote. It is probably even less satisfactory because they are trying to talk to their solicitor.

Q132 **Chair:** Remand hearings make that harder.

John Bache: Yes.

Q133 **Chair:** Even if we leave aside the video element, generally, is it your experience that people are represented when they appear in person?

John Bache: There is less representation than there used to be—I am going back many years—but I did not notice a particular difference in the last few years I was sitting.

Tom Franklin: Magistrates would say that it makes a big difference to the quality if they are represented, because of the fact that it helps in informal conversations with the prosecution beforehand, it can smooth things and it can speed things up. There is the ability to ask questions as the process goes on, so that the defendant understands what is going on and clears up any misunderstandings.

Q134 **Chair:** Do you have any evidence of the extent to which that has declined and why?

Tom Franklin: It is another data question. It is all the sorts of things that should be there in data for understanding the difference in outcomes between those who are represented and those who are not. As John said, the impression of our members is that there has been a reduction and a reduction in the quality because the overloading of the system means that representatives have less time with their clients, and it is all more rushed. Our members say they do not have support, and the quality of the support overall has deteriorated.

John Bache: Magistrates go out of their way when they have an unrepresented defendant to make sure that they get a fair hearing.



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Obviously, they cannot possibly be on the defendant's side, but they go out of their way to make sure that they have a very fair hearing.

Q135 **Chair:** It has been a while since I was doing this sort of thing. You would get somebody produced unrepresented, perhaps from custody or whatever, and you would get the duty solicitor to see them.

John Bache: That's right.

Q136 **Chair:** Is that still an option?

John Bache: Yes, it is an option, but sometimes they do not want to. You can take a horse to water, but you can't make it drink.

Q137 **Chair:** That is where the defendant declines to be represented.

John Bache: Yes, that's right.

Q138 **Chair:** Has there been a problem with availability of duty solicitors if people want representation? There is a suggestion that there are fewer solicitors doing legal aid work.

John Bache: They have had to wait longer, certainly, but I have never known anyone who wanted to be represented who could not be.

Tom Franklin: My understanding is that it is another issue in terms of the bottlenecks and delays that can come about.

Chair: Okay, that is helpful.

Q139 **Paul Maynard:** We may have covered this in Mr Daly's questioning, particularly on conditional bail, but what alternatives to custody are open to magistrates besides conditional bail, in your view?

John Bache: I have written a list of the conditions. You can have it. There are quite a few of them. Do you want me to go through them very quickly?

Q140 **Paul Maynard:** Yes, please recite them.

John Bache: There is reporting to a specific police station, which I have mentioned before. I cannot really see the logic of that except possibly the day before trial; to report every Friday does not make much sense. There is a condition of residence. That is quite an important condition, and can be with a curfew that can be tagged or not tagged. You can have what is called a doorstep curfew where the police can turn up at the door and make sure you are there, or you can be electronically tagged. That is a very useful and helpful condition because you know exactly where they are.

There is keeping out of shops or keeping out of on-licence premises. That is a bit iffy because people have to go to shops whether they are on bail or not. How do you stop them? You cannot have a policeman at every shop. It is very difficult to police that. You can make it a condition, but there is not a great deal of logic.



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There is a condition of location: keep out of the centre of Blackpool, for instance. The trouble with that is, what is the centre of Blackpool? You have to define the centre of Blackpool on a map or something. Does it mean you cannot go up the tower? It is not easy to police. They have to understand it as well because they can break their condition by mistake.

There is a condition of no contact. That is really important, particularly in domestic violence situations. There is no contact with witnesses, and you have to explain what that means. It does not mean just that you cannot go and see them; it means you cannot telephone them, you cannot use social media and you cannot get someone to be a messenger. There must not be contact in any way. That is an important and very common condition.

There are various drugs conditions. They have to take part in drug assessment things. There are things like surety where someone gives money if they do not turn up. The main conditions are residence, location—keeping out of a certain area—and no contact. Those are the most common, and they are quite useful. If you use them sensibly, you can often keep the person out of custody. If they break their bail, they are liable to be arrested and sent straight to custody. Of course, they have to understand the conditions. If we take the example of Blackpool and they did not understand, it is not really fair if they end up in prison because it has not been explained properly.

Q141 **Paul Maynard:** We often hear, “You can’t visit your grandmother,” but that is where their natural route to school is.

John Bache: That’s right. It does not make any sense.

Q142 **Paul Maynard:** You mentioned e-tagging. It has been suggested to us by a number of witnesses that magistrates are not aware of, do not understand or do not have sufficient confidence in e-tagging to make as full use of it as they might as a way to avoid remanding people into custody. Is that your experience?

John Bache: Very much so. I think e-tagging is very underused. I am not quite sure why. I remember speaking to a defendant once who had a tag, and he absolutely hated it. It is like being in prison, except they are not actually in prison, because they are very restricted. It is easier than being in prison, but it is not an easy option. I think it is a really useful way. The other thing is that, if they are found guilty and come to sentence, that is considered in deciding the sentence, so it is not wasted time, if you see what I mean. If magistrates became more aware, first, of the fine details of how tagging can be done and, secondly, of how restrictive defendants find it, I would like to think it would be used much more often, and that will be beneficial and get fewer people put in prison.

Q143 **Paul Maynard:** Tom, how would we go about ensuring that magistrates were more aware? Where does that responsibility sit? Is it with the MOJ, yourselves or some third party?



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Tom Franklin: Probably a mixture of all of those. The Judicial College has a particular role in the training of magistrates. We have a role, and we do a lot of work, with informal webinars and other opportunities through our branches, for members to understand different options. If there is an aim to reduce the remand population in prison, the more that magistrates can be reassured that the conditions can be met, the better, and the more magistrates are able to make a decision on bail as well.

Before the case comes to a hearing, if there is more work done on a package that could meet the likely conditions, that could really help magistrates. If there is somebody helping to co-ordinate with the prosecution and hearing the prosecution's concerns and that sort of thing and saying, "Okay, these are some of the options," and then that comes to magistrates, it will make it easier for magistrates to have the information to pass the various tests to say, "Okay, we can agree to bail."

Q144 **Paul Maynard:** Taking that one stage further, it has also been suggested to us that a lack of bail officers in the court or the inadequacies of the bail support services in finding accommodation and the lack of accommodation—not in Blackpool where we have too much bail accommodation, frankly—can make the magistrate's decision much harder because the package you describe is far harder to put together in a visible format. Would that be something you would agree with?

Tom Franklin: We would agree with that strongly. In many cases, that is not done. Bail hostels are a bit of a misnomer.

Q145 **Paul Maynard:** It is cheap accommodation.

Tom Franklin: The Bail Accommodation and Support Service seems to be patchy, to put it politely. You are absolutely right; anything that can make it easier for magistrates to say, "Okay, these various conditions are met," the better. In a sense, the role of the magistrate is to go through the structure that we talked about and reassure themselves on the balance of risk. It is for others to make sure that the package is there, which will mean that the various tests are met.

Q146 **Paul Maynard:** Without that, there is not enough confidence on the part of the magistrates that they have the full vision in front of them of the different options they have available to them, and they could therefore remand to custody in the absence of an adequate package.

Tom Franklin: Yes.

John Bache: That, of course, is where a good defence advocate comes in, because he does your work for you, quite honestly. He tells you the dangers of letting them out, but he gives you ways round it. If he has done his work properly, he has done your work for you.

Q147 **Paul Maynard:** Because you are not a social worker.

John Bache: Yes.



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Paul Maynard: Thank you.

Q148 **Chair:** That is helpful, thank you. Tom, you talked about conditions and so on and the basic premises on which you operate, but you mentioned the exception where you could remand someone in custody for their own protection. How often is that actually used? Do you have any data on that?

Tom Franklin: No, I don't have any data. Our members say that it is a very difficult decision to take. It is very often in a situation when the bench agrees there is serious risk to life and limb if they were to—

Q149 **Chair:** What sort of risk might that be? Is it self-harm or somebody else harming them?

Tom Franklin: It is particularly in cases such as county lines or modern slavery. One magistrate said that the situation that some people can find themselves in is almost beyond the imagination of the person in the street. In that situation, what is so difficult is that these are by nature some of the most vulnerable people, and prison is probably not the place to put them. Magistrates are faced with a situation where it is the least-worst option because there are no alternatives. It comes back to the earlier point that if there were alternatives it might be possible to agree with conditions for them going elsewhere, whether that is hospitalisation or secure accommodation. Magistrates say it is a really difficult one. It is not easy.

Q150 **Chair:** Do you have any data as to what percentage of remands in custody are done on that ground?

Tom Franklin: No, I do not. I am not sure that the data exists. If anyone finds it, we would love to see it.

Q151 **Chair:** John, Tom makes a fair point. With these vulnerable people, as very often they are, can you ever say prison is a place of safety for some?

John Bache: The number would be very small, thank goodness. I can think of one particular case a long time ago, and it should never have happened. A girl of about 15 or 16 had been arrested, and she had nowhere to go. If we had not sent her to custody, she would have spent the night on the streets, so we remanded her to custody for her own safety. That should not have happened, but it did.

Q152 **Chair:** Do you think it is still justified to have that as a ground for refusal of bail?

John Bache: I would not have wanted to be responsible for what could have happened to her if we had let her out.

Q153 **Chair:** I see. Do you have a sense of how often you would remand someone on those grounds?

John Bache: That is the only case I can remember in 31 years. There are probably others, but that is the one that stands out because it made such an impression on me. It should not have happened.



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Q154 **Chair:** I understand that. That is helpful. That is for lack of alternatives, basically.

John Bache: Yes.

Q155 **Rob Butler:** Picking up on data, I recognise, from my experience, the lack of its collection. I am not sure, Mr Bache, whether it happened before you retired, but has the common platform, to your knowledge, improved data collection at all?

John Bache: I am afraid the common platform came in just as I was going out. I think it is at Crewe station, but I am not quite sure.

Q156 **Rob Butler:** Mr Franklin, do you know anything about whether the common platform is helping with data collection?

Tom Franklin: Not so far. There have obviously been various teething problems with the common platform. One of the aspirations is that it will help, but so far, no. It is still proving difficult. One of our concerns is making sure that the improvement in data does not lead to lots more form filling by everybody concerned, including legal advisers, and that sort of thing. It ought to be something that the system generates as well.

It would be useful to have that broken down both by locality, so that we can see the difference in different parts of the country, and by demographics, so that we can see whether there is sentencer bias or whatever and then take action on that with training and that sort of thing. Everyone agrees on this, but it is moving on to it actually happening. We and other people are frustrated that there is such a lack of this and it is not there yet.

Q157 **Rob Butler:** There is a legal duty on judges and on magistrates to explain their decisions when they are being asked to consider bail or remand in custody. Are there challenges that magistrates face when trying to communicate effectively and efficiently?

John Bache: I don't think so. As you know, we have pronouncement cards. You say what you decided and then you give the evidence for that. There are standard phrases. To be fair, we say what we are doing and why we have come to that decision. There is only a limited number of things you need to say.

Q158 **Rob Butler:** Do you think those standard pronouncements are easily understandable to the layperson, particularly defendants who might struggle to communicate in all sorts of ways?

John Bache: Communication is not easy at the best of times, and you have to target your communication skills to the audience in front of you. Forgetting completely the problem of language, it is still difficult. You do your best. People ask if I can explain to them what I have just said. I am not sure of the effectiveness of that. You usually have the knowledge that the defence solicitor will explain it to them later on.



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Hopefully, you tailor the information to the recipient and hopefully they understand it, but it is not always easy. Sometimes, it is well-nigh impossible, but you have to do your best. They can say to the defence advocate, "Can you explain again?" once they have left the court. It is really important on conditions of bail because, if they do not understand, they can break their bail conditions unwittingly and end up in custody.

Q159 Rob Butler: That is a really important point you have just raised. If somebody is remanded on bail and breaks the conditions of that bail, they can be brought back to the court and the court will then decide whether or not they should be released back on to bail, or they might then be remanded in custody because they have not complied with their bail conditions.

John Bache: That is right, but they would have the chance to explain.

Rob Butler: Absolutely.

John Bache: For instance, if a close relative was ill and they had to take them to hospital, and that made them break their bail, obviously, that is understandable, but if they have just wantonly ignored it, they probably deserve to go to custody. If it was a fine decision in the first place and they have then broken the conditions, that is probably a reason to send them to custody.

Q160 Rob Butler: Mr Franklin, is there anything you would like to add about explanations and communication challenges?

Tom Franklin: There are checks and balances. It is important that the legal adviser, who is responsible for the resulting document, is clear, and, if not, they should be asking for clarification. There is the defence as well. I heard in a previous session one of your witnesses say that this was an area they were concerned about. We would want to know more. As John said, it is so important that there is clarity, and communication is really difficult, particularly for a defendant for whom it could be the biggest day of their life so far in terms of the implications. We would want to know what can be done to improve that and what we and others responsible for training magistrates can do to help with communication. It is something that concerns us, and we would be interested in understanding more what could be done.

Rob Butler: Thank you.

Chair: Gentlemen, thank you very much. You have been very clear and you have covered a good deal of ground for us. It has been most helpful. I am grateful to you for your time and for your evidence, and for coming in on such a hot day. We are much obliged. The session is concluded.