

## **Written evidence from Professor Anthea Hucklesby, University of Birmingham<sup>1</sup>**

The Committee's enquiry into the rise in the prison remand population during the 2020 pandemic is welcome. Given that the majority of the remand population are legally innocent, review and reflection of the law, policy and practice relating to remand is vital to ensure that England and Wales meets its obligations under international law. Despite its importance, the bail law, policy and practice and the prison remand population are neglected parts of the criminal justice process and scrutiny is infrequent. This submission draws insights from over thirty years of research on the remand process and twenty years of research on electronic monitoring.

### ***Drivers of the increasing prison remand population***

Ministry of Justice statistics demonstrate that the increase in the prison remand population since March 2020 is driven predominantly by a rise in the time spent on remand rather than increasing numbers of individuals remanded in custody. Whilst the daily remand population increased from 10,043 on 31<sup>st</sup> March 2020 to 12,990 30<sup>th</sup> September 2021, the number of first receptions increased by much less (3%) - 9,065 defendants were received into prison for the first time April to June 2020 compared with 9,383 July to September 2022 (MoJ, 2022).

Whilst some delays in case processing would be expected because of the disruption to normal court operations, the introduction of a temporary framework for Custody Time Limits (CTLs) is likely to have contributed to increasing the time spent awaiting trial. CTLs were introduced to ensure that cases are dealt within expeditiously and have been largely effective. The temporary CTL framework introduced in April 2020 relaxed time limits to cope with disruption to courts and criminal justice agencies. Although these emergency measures may have been needed at the time, the framework is still operating two years after it was introduced. Not only does this mean that specific cases take longer, but it sends a broader message the completing cases as quickly as possible is not the priority, or at least not as higher priority as it was. The temporary framework should be revoked as soon as possible. It is also worth noting that no time limits apply to cases when defendants are bailed. The time taken to complete these cases is also likely to have increased significantly during the pandemic with considerable implications for individuals, especially those on conditional bail (see below).

The number of females first received into prison on remand increased by 9% between April to June 2020 and July to September 2021, representing a rise from 636 to 691 women (MoJ, 2022). The reasons for the disproportionate impact warrant further investigation, especially given that 40% of females remanded in custody do not receive a custodial sentence (MoJ, 2020).

### ***The convicted unsentenced population***

As the terms of reference point out, a rise in the convicted unsentenced population has been the main driver of the increasing prison remand population since March 2020. The daily population in custody increased significantly from 3438 on 31<sup>st</sup> March 2020 to 4555 on 31<sup>st</sup> September 2021 (MoJ, 2022). Data suggest for this population too, the increase is explained by longer waiting times rather than a rise in number of individuals awaiting sentence. Data show that January to March 2020, 4,877 individuals were received into custody awaiting sentence, matching almost exactly the number received July to September 2021 (n=4868). However, there was a significant decrease in receptions of this group in March 2020 (n=3,438) which returned to pre-pandemic levels very quickly - by July to September 2020 4864 individuals were received into custody awaiting sentence (MoJ, 2022). The temporary dip is likely to be explained by disruption to the courts and the drive to empty prisons at the start of the pandemic.

Delays in sentencing are the most likely explanation of the rising population awaiting sentence. These are likely to have been driven by backlogs in the courts caused by temporary court closures and delays in pre-sentence and other reports, particularly medical reports, which would have been delayed as NHS resources were diverted to tackle Covid19. The reunification of the Probation Service in June 2021 will also have impacted upon its capacity to produce court reports and their timeliness. The number of probation reports prepared was already falling pre-pandemic (by 18% in the year Jan-Mar 2019-2020) and, after a dip at the start of the pandemic, returned to pre-pandemic levels by June-September 2021, but not yet to the levels seen in Jan-March 2019 (MoJ, 2022).

The number of defendants awaiting sentence in custody is of concern and the rapid, if temporary, reduction in numbers at the start of the pandemic suggests that there is potential to reduce this population. How many of this group are remanded in custody only to be given a non-custodial sentence is unknown, although a quarter of all defendants remanded in custody do not receive a custodial sentence.

### ***Impact of lengthy remand periods***

The impact of custodial remands have been known since the first research studies in 1960s. They include disruption to normal life including loss of employment, education, income, housing and family life. The impact spreads beyond the remanded individuals to their families and friends. Children are affected in different ways and, may result in them being looked after by local authorities or family members. This may have long term impacts on their life chances. Other caring responsibilities, including those for elderly relatives, may also be disrupted and put additional burdens on family members or the state. The household may lose all or some of its income resulting in financial hardship. Any treatments for medical conditions, drug and/or alcohol use or mental health being received by remanded individuals are also likely to be disrupted, resulting in immediate and long-term impacts. The experiences of remand prisoners are well documents by HM Inspectorate of Prisons (HMIP, 2012).

There have been no specific studies on the impact of longer periods of custodial remands. Much of the impact is immediate and compounded by the fact that remanded individuals generally have no opportunity to make any arrangements before entering prison and need to rely on others to do basic and very necessary tasks such secure homes. However, there is no doubt that the longer they are remanded the more difficult it becomes to keep lives going on the outside and return to 'normal' life. For example, employers may keep jobs open for individuals but this is unlikely to be for an indefinite

periods, benefits are only paid for 13 weeks and many landlords will not keep tenancies open after an initial period, if at all.

The psychological, as well as practical, impacts of custodial remands are likely to grow the longer individuals spend in custody with concerns about what is happening outside increasing, contact with families becoming harder, and perhaps less frequent, as well as uncertainty about the case and its outcome. These impacts are likely to be greater if individuals are, or believe themselves to be, innocent. Data suggest that around 10% of those remand in custody are acquitted every year (MoJ, 2021a). No support or financial compensation is available for this group. They are simply released from the court on the day they are acquitted.

As well as the social and economic impacts of custodial remands, there are legal and criminal justice affects. Preparing court cases in custody is more challenging and access to legal representation more difficult, especially after the legal aid cuts of in recent years. Those who are remanded in custody are more likely to plead guilty. Lengthening remand times may increase the perceived pressures to plead guilty. Those remanded in custody are more likely to be found guilty than those on bail.

The terms of reference of the inquiry only refer to the impact of longer periods spent in prison on remand but a high proportion of individuals are bailed with conditions, which may be onerous. This is a hidden problem and I urge the committee to broaden its terms of enquiry to include the impact time spent subject to bail conditions (see below).

### ***Reviewing bail decisions***

During the time that individuals are on remand, cases can change significantly which may impact on the likely outcome. For example, some charges may be changed or dropped, and results of forensic evidence become available. Legally, defendants are initially remanded in custody for up to eight days and subsequently for up to 28 days by magistrates' courts or when cases are ready to proceed in the Crown Court. Whether a systematic review of the necessity and proportionality of custodial remands takes place at subsequent hearings is questionable. Data are not available for the proportion of defendants who are initially remanded in custody and subsequently released on bail before the case concludes. Anecdotal evidence would suggest that this happens infrequently, because research has shown that decision-makers tend to confirm previous decisions and the legal and practical barriers to applying for bail. Since the Criminal Justice Act 1988, defendants have the right to make two bail applications. Subsequent applications require proof of a change in circumstances. This is challenging when remanded in custody and often relies on defence lawyers, family and friends. The increasing use of 'live-link' technology for court hearings and consultations between defendants and their legal representatives increases the barriers to preparing and making bail applications, and for effective review of defendants' bail status.

### ***Legislative framework***

The Bail Act 1976 provides the legal framework for remand decisions in England and Wales. Research has consistently demonstrated that practitioners view the Bail Act 1976 as working well, providing the necessary legal scaffold for remand decisions. This view is generally shared by practitioners from all parts of the criminal justice process. Research also suggests legal changes often make little, if any, long term difference to remand decision-making. Historically, decision-making has changed prior to, or in anticipation of, legal change rather than as a reaction to it. By implication, legal change may not be the most effective vehicle for driving change.

### ***Bail conditions***

An area which requires scrutiny is bail conditions. Being released on conditional rather than unconditional bail is now the norm. Bail conditions are an important safeguard for decision-makers, providing reassurance that defendants' behaviour may be constrained and offending behaviour deterred, thereby giving them confidence to grant bail. They may act as an alternative to custodial remands, although evidence of their effectiveness in this role, as well as a mechanism to constrain unwanted behaviour, is limited. However, there is also a risk of inappropriate use of conditions which overly constrain individuals' lives, and potentially for long periods of time. Individual conditions can be onerous in themselves, but packages of conditions may not be proportionate and may have particularly harsh consequences. Agreeing to abide by whatever conditions are viewed as necessary is a common tactic used by defence lawyers to leverage bail, resulting in courts not necessarily giving sufficient scrutiny to what is being proposed.

The Bail Act 1976 provides no guidance on the type of conditions available (with the exception of electronic monitoring (EM)), what circumstances they can be used, their intensity (e.g. minimum and maximum EM curfew hours) or when specific conditions should and should not be imposed. This leaves courts with maximum discretion resulting in variability. In practice, most courts stick to a relatively small range of conditions (residence, curfews, banning defendants from particular places or from seeing specific people). Although the law requires courts to review conditions at every appearance, they usually impose the same conditions after a rudimentary check with the prosecution and defence. This is unacceptable when the case may have changed significantly since conditions were first imposed. The necessity for conditions and what conditions should be are largely determined by the police very early on in the investigation when suspects/defendants are bailed from the police station after charge.

The impact of the pandemic on the use of conditional bail is unknown because data are unavailable.

### ***Electronic monitoring***

Electronic monitoring (EM) is a tool used to monitor bail conditions. EM does not incapacitate wearers. It does not, and cannot, stop defendants' unwanted behaviour, although it provides concrete evidence of non-compliance. Managing expectations of what EM does and what is not able to do is important to retain its credibility and legitimacy.

Curfews have been a popular bail condition since they were introduced in 1967. For the last 20 years or so, EM has been used effectively to enforce them using radio-frequency technology which monitors defendants' presence at a particular address. The advantages of this type of monitoring is that it is reliable, easy to understand and works for long periods of time without the need to charge the equipment. Evidence from EM's use with community sentences suggests that it can be 'habit-breaking', keeping wearers away from the people and places linked to their offending (Hucklesby, 2008). Consequently, it may reduce offending on bail and increase compliance with bail (Hucklesby, 2009). There is some evidence that more intense EM regimes may reduce its effectiveness. Curfews tend to be set in standardised patterns, usually 19.00-07.00 seven days a week, despite the opportunities for more flexible and creative use, which better fits the circumstances of wearers, bail risks and alleged offences (Hucklesby and Holdsworth, 2016).

Location monitoring using GPS technology has been introduced more recently. Currently it is used predominantly to monitor exclusion zones imposed as conditions of bail. This works by alerting the monitoring company when exclusion zones are breached. It is also possible to impose trial monitoring when data are collected continuously for scrutiny retrospectively and/or to match against known crime data. Both of these applications have privacy, ethical and practical implications which need to be considered especially for those not convicted of any offence. Location monitoring has

several downsides, the most notable of which are unrealistic expectations of its effectiveness, drift - when the signal shows that the wearer is somewhere different to where they are, short battery life (around 24 hours) resulting in a challenging charging regime for wearers and information overload. There is also the pressing issue of how the police should respond if EM monitoring suggests that victims are in immediate danger.

There is little doubt that the prison remand population would be higher without EM because it provides reassurance to decision-makers that bail conditions will be monitored systematically and that concrete evidence of breach will be available. However, EM does not always act as an alternative to custody and has resulted in 'net-widening', whereby some defendants have been subject to more stringent monitoring and/or bail conditions because EM exists. There is also a danger that increasing the use of EM will increase the prison remand population because of a rise in the number and seriousness of breaches.

There is potential to use EM more as demonstrated by the rise in its use during the pandemic. In March 2019, 2570 defendants were subject to EM bail, compared with 3621 in March 2020 and 6,001 by March 2021 (MoJ, 2021b). But without further data on how EM is currently used, evidence-based expansion is not possible. Furthermore, EM bail is the 'Cinderella' of EM with far more scrutiny of its other uses to monitor community sentence and early release requirements (see HMIP, 2022). Before any expansion takes place, a clear policy is required which tackles some long-standing issues with the use of EM bail such as the appropriateness of a 15 minute breach threshold, how the police manage the large number of breach reports, consequences of breach, safeguarding concerns and the provision of support. Without these issues being addressed there is a risk that EM bail will lose its credibility and legitimacy.

### ***Data availability***

Data on the remand process is extremely limited. What is available is not consolidated into one publication but spread across different Ministry of Justice publications e.g. Criminal Justice Statistics, Offender Management statistics and women and race and the criminal justice system. It is impossible to follow defendants' journeys through the remand process.

Key data are missing from published data. These include: number of defendants subject to conditional bail and bail conditions imposed; length of time remanded in custody or on bail; the relationship between police, Crown Prosecution Service and court decisions; reasons for decisions; and demographic data to allow remand decisions to be scrutinised for different groups of defendants and answer important questions about whether they vary for different groups of defendants.

A data strategy is needed to provide effective scrutiny of bail decisions and the consequences for individuals.

### ***Remand decisions for different defendant groups***

Lack of data hampers any in-depth analysis of remand decisions for different defendant groups but data points to variations which require further investigation. A lower proportion of women than men are remanded in custody. Whilst this would be expected given that women tend to be less risky according to a range of factors related to bail e.g. they are charged with less serious offences and are less likely to have previous convictions, lack of data does not allow for an analysis of whether women are disproportionately at risk of custodial remand or are subject to more or less stringent conditional bail. Similarly, published data suggest that remand decisions may vary according to race and ethnicity but it is not possible to investigate further, because of lack of data which precludes

evidence based explanations. No data are published on the ethnic origin of the prison remand population which is unacceptable.

A disproportionately high number of remand prisoners are foreign nationals. Their experience of custodial remand is particularly alienating given known issues such as language barriers and access legal advice. They are also likely to be of higher risk of custodial remands because of range of factors including perceived or real lack of community ties, lack of access to legal advice and support, reliance on translators, the climate of suspicion of migrant populations and legal frameworks including the Bail Act 1976 with its reliance on community ties, immigration law and the legal requirement to deport most convicted offenders (Robson, 2022).

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