

## Written evidence from Transform Justice

### Introduction

Transform Justice is a charity which advocates for a fair, humane, open and effective justice system. It published a report “Presumed innocent but behind bars – is remand overused in England and Wales?” in March 2018<sup>1</sup> and has analysed recent data on adult remand for this inquiry.

### Trends in the use of remand

Numbers subject to pre-trial detention were very high in the early 2000s, declined from 2006 to 2018 and have risen since then, with the rise accelerating with the pandemic. In 2021 the total remand population stood at 11,503, 48% higher than in 2018.

The proportion of our prison population accounted for by remand has fluctuated in recent years with a recent significant increase. Those on remand now account for 15% of the prison population, up from 10% in 2018. Compared to many European countries the percentage of the England and Wales prison population on remand is not so high (Germany 20%, Denmark 40%<sup>2</sup>) but our per capita prison population is much higher than these countries, so our per capita remand population is higher too.

In 2002 only a third of those on remand were convicted but unsentenced. This proportion is now over half. It is not clear why the convicted remand population has grown so much. The court backlog over the pandemic has undoubtedly contributed but the trend upwards started well before then. No research has been done on the convicted unsentenced population and there is no specific data.

34% of adults on remand in September 2021 were from a black or minority ethnic background<sup>3</sup>, a proportion significantly higher than in the general population (14%<sup>4</sup>).

### What crimes are those remanded accused of?

Most people who are remanded are accused of non-violent offences. In December 2021, there were 4,185 people who had been remanded for more than six months, 54% whom were in custody for alleged non-violent offences.<sup>5</sup> Of all those remanded in 2021, 6.7% were accused of summary (the least serious) offences. This proportion was a little lower than pre-pandemic but still surprising given prison conditions.

In the two most recent years people remanded for drug offences have made up the biggest group (30% of the remand population) followed by those accused of violence against the person (24%).

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<sup>1</sup> [https://www.transformjustice.org.uk/wp-content/uploads/2018/03/TJ\\_March2018report.pdf](https://www.transformjustice.org.uk/wp-content/uploads/2018/03/TJ_March2018report.pdf)

<sup>22</sup> <https://www.prisonstudies.org/map/europe>

<sup>3</sup> Liberty Investigates, 17 March 2022: <https://libertyinvestigates.org.uk/articles/prisoners-on-remand-increasingly-likely-to-be-black-or-from-an-ethnic-minority-figures-show/>

<sup>4</sup> House of Commons Research Briefing: Ethnic diversity in politics and public life November 2021 <https://researchbriefings.files.parliament.uk/documents/SN01156/SN01156.pdf>

<sup>5</sup> <https://questions-statements.parliament.uk/written-questions/detail/2022-02-10/122646/>

## Why is remand used?

Pre-trial remand is used where the risk of leaving a defendant in the community is regarded as too high. The specific risks are:

- Risk of failure to surrender to bail/absconding. This refers to the risk of the defendant not appearing at court.
- Risk of committing further offences while on bail. The seriousness of the alleged offence and any record of serious offences previously committed while on bail contribute to consideration of this risk.
- Risk of interfering with justice e.g. contacting prosecution witnesses.
- Risk of harm to self, usually used in the case of defendants with severe mental illness.

If the prosecution applies for refusal of bail, they should provide evidence of the *particular* risk posed. The defence may or may not contest the prosecution case. The bench/judge should take into account whether there is any “real prospect” of the defendant receiving a custodial sentence if convicted.

The legislative framework appears adequate (bar remand for own protection which should not be permitted) but there are considerable problems in the way it is applied<sup>6</sup>

- 1) Defence lawyers complain that information provided by police to the prosecution is inadequate.
- 2) Prosecutors list reasons to refuse bail without giving any details to justify those reasons which are relevant to the particular case.
- 3) Despite the paucity of information presented by prosecution, the prosecution’s case is seldom challenged by the bench.
- 4) Judges sometimes don’t give reasons for refusing bail or, if they do, use general reasons rather than explaining in detail how they apply to the particular defendant concerned.

## How did the pandemic affect remand practice?

During the pandemic the police were asked to focus on the most serious crimes (and Covid breaches). This should have led to less use of remand, but other factors counteracted these, including difficulties in suspects and defendants receiving legal advice.

For much of the pandemic, suspects in police custody could only receive legal advice on the phone or on video<sup>7</sup>. If charged, many of the defendants were forced to appear on video from police custody for their first court appearance. Immediately before that hearing they may only have had a hurried phone consultation.

Meanwhile the conditions in prison during Covid were poor. Due to the risk of infection, most prisoners were seldom allowed out of their cells and family visits were restricted. Lawyers were banned from visiting their clients and found it hard to have pre-court consultations.

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<sup>6</sup> <https://link.springer.com/article/10.1007/s10610-022-09504-y>; <https://www.thegriffinsociety.org/suspect-population-examination-bail-decision-making-foreign-national-women-criminal-courts-england>

<sup>7</sup> <https://www.transformjustice.org.uk/wp-content/uploads/2021/02/Not-Remotely-Fair-Report-Feb2021.pdf>

The Lord Chief Justice gave a key judgment in late April 2020 signalling that courts could and maybe should consider greater leniency during the pandemic: “*Judges and magistrates can, therefore, and in our judgment should, keep in mind that the impact of a custodial sentence is likely to be heavier during the current emergency than it would otherwise be*”<sup>8</sup>. Unfortunately, this was little cited or acted upon in magistrates’ courts. The director of Transform Justice observed magistrates’ hearings (many dealing with remand) in May and June 2020 and seldom heard it mentioned, nor reference made by lawyers or judges to prison conditions.

### **What are the outcomes for those remanded?**

The majority of adults who are remanded and tried in the magistrates’ court do not get a custodial sentence. In 2020, 63% of those remanded and tried in the magistrates’ court did not receive an immediate custodial sentence.

Of those whose cases were tried in the Crown Court in 2020, 24% of defendants who were remanded pre-trial did not go on to get an immediate custodial sentence. Of these, 35% were acquitted and the rest received other types of sentences.<sup>9</sup>

These statistics suggest the “no real prospect” test is not working well in the magistrates’ court. Either the information judges are given is erroneous or they find it hard to estimate the likely sentence in the event of conviction, and lean heavily towards risk aversion.

Variation in remand outcomes by ethnicity are impossible to track because of poor recording of defendant ethnicity in the magistrates’ court - 56% of defendants attending magistrates’ court remand hearings do not have their ethnicity recorded. Crown Court data is better, but still 25% of defendants are missing ethnicity data. Where ethnicity is recorded, 40% of White defendants in the Crown Court go on to receive an immediate custodial sentence, 50% of Black defendants, 41% of Asian defendants, 47% Mixed heritage defendants and 51% of defendants who are Chinese or another ethnicity.

### **Video hearings**

Before the pandemic many prisoners on remand had their remand review hearings held over video. They were linked from prison to the magistrates’ or Crown Court by video, with their lawyer in the physical court.

Pre-pandemic, a few police forces had also trialled video first appearances – keeping police-remanded defendants in police custody for their first appearance and connecting them with their lawyers and the court by video link. In Spring 2020 these video-first appearances from police custody were introduced countrywide. The companies who normally transport defendants from police custody to court and supervise them there (PECS) said the courts cells were not covid safe and, in nearly all areas in England and Wales, refused to work in them. This forced police forces to set up makeshift video systems and police officers became court workers for a few months. Many of these first court hearings heard arguments about bail and remand.

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<sup>8</sup> <https://www.bailii.org/ew/cases/EWCA/Crim/2020/592.html>

<sup>9</sup> Remands at the Crown Court: Pivot Table Analytical Tool for England and Wales Year ending December 2020

Evidence on the impact of video links on defendants available from pre-pandemic indicates that appearing on video negatively impacts effective participation and the relationship between client and lawyer<sup>10</sup>. There are also indications from this research that sentencing outcomes are prejudiced by video appearances, but there has been no evidence particular to remand decisions.

No research has been done about remand decision making in the pandemic, but a number of studies suggest that video links impaired the quality of criminal justice<sup>11</sup>. Research by the Magistrates' Association found multiple problems with the technology available and 76% of magistrate respondents said video links hampered their own communication with defendants.<sup>12</sup>

### **Police remand**

There is little research, but anecdotal evidence suggests that police remand is a driver to poor quality remand decision making by courts. Police use similar criteria (under PACE) to courts to decide whether to release a defendant post charge or remand them in police cells until their first court appearance. Police are relatively risk averse in their use of remand and (unlike in court) decisions are made behind closed doors, often without a lawyer making representations. When defendants are remanded by police, they are then taken to the next sitting of the magistrates' court in prison vans, kept in court cells and appear in court in the dock. This makes them appear riskier than bailed defendants.

All defendants remanded by police are subject to this fast-track procedure. The pressure on time means anyone police-remanded is at a disadvantage in trying to get bail. The prosecution and defence are given only minutes to prepare their applications, including the defence consulting with the defendant about their plea and possible bail conditions. Defence frequently don't have time to find information to challenge the evidence presented by the prosecution or to reassure the court about bail.

Part of the answer to reducing the use of court remand is to reduce the use of police remand. Of course, police need to be able to remand some people but data on outcomes suggest they can be over cautious. In 2021 two thirds of those remanded by the police were not remanded by the court.

### **Bail and bail information**

Suspects have a *prima facie* right to unrestricted bail, but in many circumstances judges will only allow bail with conditions. A stable address away from important prosecution witnesses is key, particularly in the case of domestic abuse. Other conditions can be to report regularly to police, to wear a tag and/or undergo a mental health assessment.

The problem with bail conditions is the difficulty for defence lawyers to get the information they need in the time available. They may be able to find an address but lack time to get it

<sup>10</sup> <https://www.sussex-pcc.gov.uk/media/4862/vej-final-report-ver-12.pdf>

<https://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>

<https://www.gov.uk/government/publications/virtual-courts-pilot-outcome-evaluation-report>

<sup>11</sup> <https://www.fairtrials.org/publication/justice-under-lockdown>;

<https://www.lawsociety.org.uk/en/topics/research/law-under-lockdown-the-impact-of-covid-19-measures-on-access-to-justice-and-vulnerable-people>

<sup>12</sup> <https://www.magistrates-association.org.uk/Portals/0/Magistrates%27%20Courts%20and%20Covid-19%20SCREEN.pdf>

checked out to reassure the court. Most other bail conditions require the help of the probation service, but probation trained officers who used to help put together bail packages are no longer available in courts. Bail information officers were tasked with identifying cases at risk of remand and supporting defence to create a bail package for that first court appearance. Before the pandemic, bail information officers in courts had all but disappeared. It was then announced by the Ministry of Justice that they would be reinstated as a pandemic measure. Bail information services were supposed to be available in every magistrates' court from April-August 2020 but it is not clear that the programme got off the ground<sup>13</sup>. Bail information officers weren't mentioned by anyone who observed magistrates' courts in this period (including staff at Transform Justice). Transform Justice recently surveyed lawyers asking whether bail information officers were available to prepare a bail package for that first hearing. Of 397 responses, 54% said bail information officers were never available and 36% said seldom<sup>14</sup>.

The lack of a bail information service in courts explains why so many defence practitioners do not oppose the prosecution application for refusal of bail at the first appearance<sup>15</sup>. We appreciate that bail information officers were probably cut for cost reasons but believe this was a false economy. It would be helpful to see an evaluation of the relaunch of BIS and understand why it was so little used. Bail information services also used to exist in prisons, it is not clear whether such services are still available.

### **Attendance at court**

An important reason for denial of bail is risk of absconding or not appearing for the next court hearing. Prosecution cite previous failures to appear, lack of a "fixed abode", or foreign national status as indicators of risk of absconding. But there is little evidence that many truly abscond i.e. leave the country or try to disappear. Many defendants fail to appear (FTA) for all kinds of hearings. Usually, defendants are still living where they normally live and failed to turn up because they forgot or because they lead a chaotic life. The courts need defendants to turn up for hearings, but it would be more cost effective to support defendants to do so, than to remand them. Courts should focus on reminding defendants and support workers of court dates.

Foreign national defendants are particularly likely to be remanded for fear of them not surrendering to bail<sup>16</sup>. In December 2021, 27% of foreign national prisoners were on remand, compared to 14% of British prisoners<sup>17</sup>. There is little evidence that they are any more likely to FTA than other defendants. The court is anyway permitted to confiscate a foreign national defendants' passport if they fear absconding.

### **Accommodation**

Lack of suitable accommodation is never a legal reason for remanding someone, but it underlies other reasons like risk of absconding or risk of interfering with witnesses. Courts

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<sup>13</sup> <https://www.theyworkforyou.com/wrans/?id=2020-07-21.77544.h&p=11921>

<sup>14</sup> <https://twitter.com/PenelopeGibbs2/status/1508482422819762188>

<sup>15</sup> <https://link.springer.com/article/10.1007/s10610-022-09504-y>;

<sup>16</sup> <https://www.thegriffinssociety.org/suspect-population-examination-bail-decision-making-foreign-national-women-criminal-courts-england>

<sup>17</sup> MOJ Offender Management Statistics Quarterly Prison population 31 December 2021

want reassurance that defendants have a stable address that is not in the vicinity of potential witnesses. Police often want to check out that address. If the accommodation put forward is deemed unsuitable, or can't be checked out, the court will use remand. Pressure to get through cases quickly means that courts will seldom wait hours for the information. This leads to many homeless defendants and defendants accused of domestic abuse being remanded when a few hours phoning round might have prevented it.

Bail hostel and bail accommodation and support services (BASS) used to provide accommodation especially for those at risk of remand. But bail hostels no longer exist, and BASS places have been taken over by those released from prison sentences. In 2017, BASS provided accommodation for 1,683 defendants on bail. In 2021 this was 728, so numbers more than halved in four years. Defendants on bail now only take up 19% of BASS places.

### **Scrutiny and training**

Magistrates are trained in remand decision making as part of their introductory training. This is perforce brief since the whole training is only two days. There is no CPD training on remand and bail, and magistrates are seldom offered presentations on this subject.

Magistrates receive no feedback on their remand decisions, and data on remand outcomes is not regularly disseminated and discussed. Further training might encourage magistrates to challenge the prosecution case more often, to better judge the risks posed by the defendant and to more accurately predict whether the defendant would be likely to receive a custodial sentence. It may be helpful for legal advisers to have training too.

Remand decisions are subject to very little scrutiny by those inside or outside the system. Data is difficult to obtain and little research is conducted. The government has not commissioned any specific research on adult remand in the last twenty years. Neither the CPS nor the prisons inspectorate have looked at remand decision making either in detail, or for a long time. A recent HMPCSI report on the management of custody time limits<sup>18</sup> is positive about prosecution processes:

*“inspectors found that prosecution advocates made appropriate applications to remand defendants into custody at the first court hearing in all cases examined. Prosecution remand applications were successful in all but one case in our file sample”*. Given other research evidence that remand is frequently based on incomplete information and inappropriately used, we find this finding surprising.

Remand decisions are reviewed by courts and sometimes bail is granted. But there is no public record of these decisions and hearings are sometimes held *in camera*. So learning on how and why decisions are made is not captured and disseminated.

Remand decisions would benefit from greater scrutiny by inspectors, academics, and judges. The CPS inspectorate might ask why the no real prospect test is not working. They might also analyse the reliability of the information the prosecution uses to assess risk.

### **Recommendations**

1. Better research and data is needed on both pre-trial and post-sentence remand, particularly on the evidence underlying applications to refuse bail, the reasons for refusing bail, whether and what nature of bail packages are put forward and the

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<sup>18</sup> <https://www.justiceinspectors.gov.uk/hmcpai/inspections/cps-handling-of-custody-time-limits/>

outcome of remand decisions. We also need more demographic information about those remanded, whether they were legally represented in police custody/ court, and whether they appeared remotely.

2. Improve the training of judges and magistrates on remand legislation (in particular on implementation of the criminal procedure rules) and on how to legitimately challenge applications for refusal of bail.
3. Improve scrutiny of police decision-making on remand. Police remand is a significant driver to court remand since those remanded by the police appear more dangerous and may have insufficient preparation time for identifying bail conditions.
4. Increase the availability of bail information in courts/prisons. Without expert help to put together bail conditions, defence lawyers find it much harder to present cogent arguments against remand.
5. Increase the availability of suitable accommodation for those at risk of remand. Assess why BASS is under-used for this purpose.
6. Address high levels of FTA through creative and more cost-effective policies that support defendants to attend court rather than remanding them in custody.
7. Abolish remand for own protection.
8. Encourage better scrutiny of remand by inspectors, academics and judges – both decision making and conditions in prison. The CPS inspectorate should review why the no real prospect test is not working and analyse the reliability of the information prosecutors use to assess risk.
9. Reduce use of video links for remand hearings pending an evaluation of their impact on effective participation, the take-up of legal representation and the impact on remand decisions.
10. Reduce the perceived and/or actual risk posed by foreign national defendants and those accused of domestic abuse, so more get bail.