

# Response to the Justice Select Committee's inquiry into the role of adult custodial remand in the criminal justice system

**April 2022**

## **Introduction**

1. The Criminal Justice Alliance (CJA) is a network of over 180 organisations working towards a fair and effective criminal justice system. Many of our member organisations are legal action and human rights organisations whose work focuses on criminal courts and sentencing in England and Wales.
2. We welcome the opportunity to respond to the Justice Select Committee's remand inquiry. Our response draws on roundtables regarding the inquiry's terms of reference with CJA's Remand Expert Group and CJA members during March 2022.<sup>1</sup> It also draws on CJA's previous work to reduce the use of remand, promote Bail Information Services (BIS) across courts and prisons, and raise concerns about the increase in Custody Time Limits (CTLs) during the COVID-19 pandemic.
3. Members we consulted with included: Fair Trials, Howard League for Penal Reform, JUSTICE, Prison Advice and Care Trust (PACT), Prison Reform Trust, Transform Justice and Women in Prison.

## **Increase in the use of remand**

4. The latest Ministry of Justice (MoJ) statistics show that the remand population has dramatically increased since June 2019. At the end of 2021, the remand prison population made up 16 percent (12,780) of the overall prison population.<sup>2</sup> This increase has occurred while the number of cases passing through the criminal courts have decreased, particularly during the COVID-19 pandemic. The criminal justice inspectorates have raised their concerns about the increase in remand during this time.<sup>3</sup>
5. The MoJ does not routinely publish data on the average length of time spent on remand. However, CJA member Fair Trials found that as of June 2021, one in ten people on remand had been in prison for over a year and almost 500 people had been remanded in prison for more than two years, which is far beyond the legal time limit of six months.<sup>4</sup>
6. Members tell us that recent measures introduced to tackle the courts backlog risk prioritising efficiency over fairness and justice. For example:
  - **Extension of custody time limits:** CTLs were extended from six to eight months for unconvicted defendants awaiting trial.<sup>5</sup> CJA member Fair Trials has found that CTLs were being extended routinely.<sup>6</sup> Some defence

lawyers told Fair Trials that judges were granting extensions whenever a trial was adjourned due to COVID-19, with little regard for the necessity of continued custodial remand. Our members are concerned that the extension of CTLs created a blanket extension for those on remand that was arbitrary and disproportionate, as it was not considered or properly justified for each individual case.

- **Increase in magistrates' sentencing powers:** The maximum six-month prison sentence that can be given by magistrates is to be doubled to one year.<sup>7</sup> Magistrates are responsible for the vast majority of remand decisions.<sup>8</sup> We understand that the new mandatory training for magistrates, which is provided by the Judicial College and is to be completed by magistrates before the extended powers can come into force, does not cover custodial remand. **We recommend this power is reversed.** If enacted, **we recommend magistrates have to complete additional specific training on custodial remand.**

## The legislative framework

7. Most defendants have a right to unconditional bail, depending on the offence.<sup>9</sup> To oppose bail and to justify pre-trial detention (also known as custodial remand), the court must be satisfied that there are 'substantial grounds' for believing that the defendant would either: fail to surrender to custody; commit an offence while on bail; or interfere with witnesses or otherwise obstruct the course of justice. These exceptions are provided for in Schedule 1 to the Bail Act 1976.
8. Members told us that the grounds for withholding bail are often not appropriately applied and guidance is not properly followed. The limited amount of research carried out by academics and legal action charities over the last decade also shows that judges have often made poorly reasoned decisions to remand suspects unnecessarily.<sup>10</sup> For example:
  - **Reasons for remand decisions:** Research shows that sentencers do not regularly provide reasons for their decisions to impose custodial remand; where any reasoning is given, it is often brief, generic and lacking in detail. During nearly 60 percent of court hearings observed by researchers, sentencers provided no reasons for the decision to withhold bail and remand a defendant in custody.<sup>11</sup> For example, the defendant would be told they were being remanded 'due to fear of further offences', without any additional explanation. International human rights jurisprudence and national legal requirements provide that reasons for remanding a person into custody must be substantiated. The failure to provide adequate reasoning also makes it more difficult for the defence to address the court's concerns in a subsequent bail application. **We recommend reasons for remand decisions are set out in full and are recorded.**
  - **Seriousness of offending:** The Crown Prosecution (CPS) legal guidance on bail states that prosecutors should consider the seriousness of the offence in opposing bail.<sup>12</sup> Expert members tell us that people are often remanded for first-time offences and less serious offences, such as theft and low-level

drug crimes. According to the latest MoJ data, as of September 2021, 60 percent of those on remand were being held for drug offences.<sup>13</sup>

- **‘No real prospect’ test:** Remand should not be sought for an unconvicted defendant if there is no real prospect of a custodial sentence.<sup>14</sup> CJA member Transform Justice noted that, despite the implementation of this test, many defendants are being remanded when other alternatives are or should be available.<sup>15</sup>
  - **Training and guidance:** Guidance exists to assist sentencers in applying the Bail Act 1976 in line with international human rights standards.<sup>16</sup> However, judges and magistrates have previously indicated that they had received little or no training on applying human rights standards to remand decisions.<sup>17</sup> More recently, academics have suggested training on the legal requirements related to bail decisions is currently ‘ineffective in ensuring that practice reflects the law.’<sup>18</sup>
  - **Information and evidence:** The inconsistent approach to the disclosure of information by prosecutors and defence lawyers have affected decisions to withhold bail. Evidence shows that the detail and timing of information that is provided varies significantly. Researchers found that in 50 percent of court hearings where the defendant was detained, disclosure was often late, minimal or incomplete and there is often little opportunity for the evidence to be seriously tested.<sup>19</sup>
  - **Timings:** Research shows the amount of time spent on remand decision-making is limited. A research study showed that 38 percent of criminal court hearings observed lasted between ten and 20 minutes and 35 percent lasted five to ten minutes.<sup>20</sup> During those hearings, the decision to withhold bail lasted a matter of minutes and represented less than a third of the overall time; in 60 percent of these hearings observed by researchers, less than five minutes was spent on this. Most of the cases which resulted in detention involved very short remand discussions. Our members have told us this is caused by the pressure to resolve cases quickly and a general emphasis on speed in hearings, together with managing high caseloads with limited resources, all of which have been worsened by the COVID-19 pandemic.
9. These issues persist despite recent changes to the Criminal Procedure Rules (CPR) to address some of them, including that: sufficient time is taken for remand decision-making; courts fully explain their reasoning for their remand decisions; and all evidence is provided in sufficient time for it to be considered. A recent study shows that despite judges having good awareness of these legal changes to the CPR, this had led to little or no improvement in practice.<sup>21</sup>
10. Our members raised that remand decisions are not being sufficiently monitored or scrutinised and accountability mechanisms are not effective. No criminal justice inspectorates assess remand decisions. Expert members tell us that reviews of magistrates’ decisions are carried out by peers rather than external, independent bodies. When a person who has been remanded into custody reapplies for bail, the judge does not look at whether the original

decision to withhold bail was correct, but whether bail can now be safely granted. Similarly, when a person appeals the decision to withhold bail, a judge will review the decision to detain in more depth – there are limited routes by which poor practice is identified.<sup>22</sup>

11. Our members have welcomed the government’s commitment to tighten the criteria to remand children and young adults into custody in the Sentencing White Paper and subsequent provisions in the Police, Crime, Sentencing and Courts Bill.<sup>23</sup> **We recommend the government also review the criteria for adults and considers whether more restricted criteria could be introduced, particularly for young adults (up to the age of 25).** This could include the Bail Act specifically referring to sentencers’ assessment of whether a defendant will commit a ‘serious’ offence while on bail.

### **Disproportionality in the use of remand**

12. We recommend the Committee look at the differences in the use of custodial remand for groups with one or more protected characteristics, and therefore may experience different forms of discrimination at the same time.
13. The latest MoJ figures show that over half of women (52 percent) entering prison between July and September 2021 were on remand.<sup>24</sup> After violent offences, the most common offences for which women are remanded for are theft, drugs and other low level offences such as TV licence evasion and less serious criminal damage.<sup>25</sup> Many women remanded into custody do not go on to receive a custodial sentence: in 2019, seven in ten (70 percent) women remanded by the magistrates court and nearly three-fifths (59 percent) tried by the Crown Court did not receive a custodial sentence. The MoJ does not collect data on how many women remanded to prison are pregnant or primary carers. Investigations into the tragic death of a baby in prison in 2019 show that the baby’s mother was in prison on remand for a first-time offence of robbery.<sup>26</sup>
14. The proportion of Black and minority ethnic people in the total remand population was 34 percent at the end of September 2021 – 15 percent of those on remand were Black. The likelihood that a person from a Black or minority ethnic background will be held on remand had increased by 17 percent from 2015 to 2021.<sup>27</sup> Data shows that Black defendants are more likely to be remanded at Crown Court, despite being less likely than white people to receive an immediate custodial sentence. Remand is disproportionately used for Black women. Black women are 29 percent more likely than white women to be remanded in custody at the Crown Court and women who are Chinese and ‘other ethnic group’ were three times more likely.<sup>28</sup>
15. The MoJ’s Female Offender Minority Ethnic (FOME) working group are reviewing the use of remand for Black, Asian and minority ethnic women, but it needs greater urgency, transparency and resource. **We recommend the MoJ and Home Office (HO) end the disproportionate use of custodial remands for Black, Asian, minority ethnic and migrant women.** When Black, Asian and minority ethnic women are remanded, **we recommend HMPPS improve the provision available, such as support from specialist**

**organisations, legal advice and purposeful activity.<sup>29</sup> We recommend the MoJ collect, publish, and analyse data on the use of remand for Black, Asian and minority ethnic women.**

16. Research shows that ‘foreignness’ has become grounds for suspicion as there is an assumed risk of defendants absconding overseas due to a lack of community ties.<sup>30</sup> CJA member Fair Trials have highlighted how foreign nationals experience discriminatory decision-making on remand despite being settled residents in England and Wales and having family links.<sup>31</sup> Foreign national women are more likely to be remanded in custody while awaiting trial or sentencing than British women, often for less serious offences.<sup>32</sup>
17. A distinct approach is needed for children and young adults throughout the criminal justice system, including at the remand stage. Custodial remand has a disproportionately negative impact on young adults who may have low levels of maturity.<sup>33</sup> **We recommend all young adults have a bail assessment report before being considered for custodial remand.**

## **Alternatives to remand and reducing the remand population**

### ***Improving trust and confidence in alternatives to custody***

18. Members tell us that sentencers’ lack of knowledge and confidence in alternative measures have led to an overuse in remand. The use of conditional bail, Bail Accommodation and Support Service (BASS) and Women’s Centres as an alternative to custodial remand requires prosecutors and courts to have confidence in the effectiveness of these requirements. Members told us that sentencers do not see the ‘success stories’ (for example, defendants who are not remanded and as such, move away from crime). This lack of trust is worsened by the current lack of routine monitoring of compliance with certain bail conditions, the enforcement of bail conditions and the timely reporting of any breaches.<sup>34</sup> **We recommend mechanisms for monitoring bail conditions should be reviewed, with a view to improving confidence in them as an alternative to custodial remand.**

### ***Bail requirements***

19. The courts can apply ‘requirements’ as necessary to bail conditions – such as a curfew, reporting requirements or electronic monitoring – when some grounds or risks need to be addressed. Members of our Remand Expert Group reported that conditional bail is not used as flexibly or as frequently as intended. For example, some magistrates were not using the reporting to a police station requirement after being told by local police they did not have the staff capacity to process people on bail reporting to them. Another example given was of a defendant who was deemed a ‘flight risk’ being remanded into custody instead of their passport being surrendered to the court.

### ***Bail Accommodation and Support Service***

20. BASS provide short-term housing support to people who are eligible for bail but do not have suitable accommodation. We understand that defendants are remanded due to there being a lack of bail accommodation space in some areas. However, in other areas, there is a lack of referrals to BASS and services remain underused. Women often cannot access suitable bail accommodation due to its location, and there are often limited spaces for women.<sup>35</sup> **We recommend more bail accommodation is made available and a specialist, tailored BASS is developed for women.**

### ***Women's Centres***

21. Women's Centres are specialist community-based support services for women involved in the criminal justice system; many provide access to specialist advocacy, advice and support on housing, substance misuse, mental and physical health, employment, debt, domestic abuse and family and parenting issues.<sup>36</sup> Courts can refer women to their local Women's Centre during the period leading up to trial, where the root causes of offending could be addressed prior to a court hearing, as an alternative to custodial remand. The government has set out its ambition to reduce the use of custody for women in the Female Offender Strategy.<sup>37</sup> However, the National Audit Office has found that there has been insufficient investment and resources allocated to the strategy's implementation, and more sustainable funding is needed for Women's Centres.<sup>38</sup> **We recommend the MoJ end plans to build 500 new prison places for women and instead, in line with the Female Offender Strategy, divert resources towards community-based support services, such as creating sustainable funding for Women's Centres.**

### ***Bail Information Services***

22. BIS in courts are vital as they reduce the number of people getting swept into prison. If more proactive court-based BIS were available, prosecutors could address any concerns they may have which are causing them to oppose bail. If decision-makers have no information about how potential risks can be mitigated, they are more likely to rely on remand. Members told us that currently, many bail-decision-makers will often be guided by prosecutors and previous bail decisions.

23. There is limited information available on where BIS exist in courts and prisons and who can access them. The CJA have previously requested this data.<sup>39</sup> Research shows that there is inconsistent provision of BIS across different courts, and within the same court depending on the day of the hearing. Recent data collated by CJA member Transform Justice surveyed over 400 defence lawyers working in magistrates courts as to whether a Bail Information Officer (BIO) was available to prepare a bail package for first hearings – 90 percent said either seldom or never.<sup>40</sup> To reduce the number of people entering custody on remand, **we recommend the urgent scaling up of court-based BIS and proactive bail support schemes, so that they are routinely available to provide bail packages in all magistrates courts.**

24. In July 2020, the MoJ assessed the potential for the voluntary sector to collaborate with bail services and a peer-led model, where people with lived experience of the criminal justice system could support people on bail. The

scoping study also explored a tiered approach with a focus on greater levels of support for different cohorts depending on need/over-representation in the remand population. **We recommend that the government develop plans to involve the voluntary sector in bail services.**

25. BIS should also be available in prisons so that people held on remand can access legal advice and apply for bail. We welcome the commitment in the government's recent Prisons Strategy White Paper to enable more women on remand to access bail support. We understand that HMPPS have piloted BIS in prisons across the Northwest of England and Wales pre-pandemic and across 31 public sector reception prisons during the pandemic.<sup>41</sup> We understand the data and evaluations of these pilot schemes will inform a 'dedicated and pro-active national BIS in courts and prisons'.<sup>42</sup> **We recommend any evaluation, data or analysis of the recent BIS pilots in prisons is published publicly.**
26. **We recommend the government embed a dedicated and pro-active BIS service in all courts and prisons across England and Wales.** The Equality Impact Assessment for such services should set out the ways in which groups who are disproportionately remanded will receive specialist support.

### ***Place of safety***

27. Schedule 1 of the Bail Act allows bail to be withheld if the court is satisfied that the defendant must be kept in custody for their own protection. Despite concerns being raised by Select Committees, criminal justice inspectorates, and CJA members, the practice of remanding vulnerable individuals to prison for their own protection continues, although the scale of the issue is unclear due to the lack of government data. We support the Committee's previous recommendation for reform to the Bail Act 1971, so that it is unlawful to remand anyone to custody simply for their own protection or welfare.
28. Although the Government has agreed that we should end the use of prison as a place of safety for individuals with severe mental health issues in the Mental Health Act White Paper, progress has been too slow and a cross-departmental Working Group is not due to 'agree its priorities' until September 2022. **We recommend the government urgently fund more mental health care in the community in order to end the inappropriate use of prison as a place of safety under the Mental Health Act, and that these alternatives to prison are available for sentencers to use.**

### **Data**

29. Members told us that cross-tabulated data should be made available on: the reasons given for withholding bail and custodial remand; whether defendants are given a custodial sentence at sentencing; the offence they are accused of/have been found to have committed; and defendants' demographics, protected characteristics and whether they have caring responsibilities. Data should also be collected on prosecutors' requests for withholding bail. In addition, data on magistrates' decisions – for example, whether cases are sent to the Crown Court and outcomes at Crown Court – should be fed back to



magistrates and be published. **We recommend the MoJ routinely publish data on the average length of time spent on remand and how many people are being held for six months or more.**

***The views expressed in this consultation response are not necessarily those of any individual CJA member or funder.***

For more information about this consultation response, please contact Hannah Pittaway, Senior Policy Officer, on:  
[hannah.pittaway@criminaljusticealliance.org.uk](mailto:hannah.pittaway@criminaljusticealliance.org.uk).

---

## References

- <sup>1</sup> Our Remand Expert Group, made up of members working within criminal courts and sentencing as well as academics and a sitting magistrate, informs our work to reduce the use of remand.
- <sup>2</sup> Ministry of Justice, [Offender Management Statistics Bulletin, England and Wales Quarterly: July to September 2021](#) (2022).
- <sup>3</sup> Criminal Justice Joint Inspectorates (CJJI), [Impact of the pandemic on the Criminal Justice System](#) (2021).
- <sup>4</sup> Fair Trials, [One in ten of the remand population in England and Wales have been in prison for more than a year](#) (2021).
- <sup>5</sup> The Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020 (SI 2020/953) extended custody limits for cases sent for trial to the Crown Court from a maximum of 182 days to 238 days. This came into force on 28 September 2020 and was not extended beyond 28 June 2021.
- <sup>6</sup> Fair Trials, [Justice Under Lockdown. A survey of the criminal justice system in England & Wales between March and May 2020](#) (2022).
- <sup>7</sup> Ministry of Justice and HM Courts and Tribunals Service, [Magistrates courts given more power to tackle backlog](#), dated 18 January 2022.
- <sup>8</sup> Tom Smith, [The Practice of Pre-trial Detention in England & Wales - Changing Law and Changing Culture](#), European Journal on Criminal Policy and Research (2022).
- <sup>9</sup> Crown Prosecution Service, [Bail legal guidance](#), updated 2 July 2021.
- <sup>10</sup> Fair Trials, [A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU](#) (2016). Tom Smith and Ed Cape, [The practice of pre-trial detention in England and Wales: Research report](#) (2016).
- <sup>11</sup> Tom Smith and Ed Cape, [The practice of pre-trial detention in England and Wales: Research report](#) (2016). Tom Smith, [The Practice of Pre-trial Detention in England & Wales - Changing Law and Changing Culture](#), European Journal on Criminal Policy and Research (2022).
- <sup>12</sup> Crown Prosecution Service, [Bail legal guidance](#), updated 2 July 2021.
- <sup>13</sup> Ministry of Justice, [Offender Management Statistics Bulletin, England and Wales Quarterly: July to September 2021](#) (2022).
- <sup>14</sup> See Schedule 11 in The Legal Aid Sentencing and Punishment of Offenders Act 2012.
- <sup>15</sup> Criminal Justice Alliance, [How to start reducing the prison population](#) briefing (2018). Transform Justice, [Presumed innocent but behind bars – is remand overused in England and Wales?](#) (2018).
- <sup>16</sup> The Law Commission, [Bail and the Human Rights Act](#) report (2001).
- <sup>17</sup> Fair Trials, [A Measure of Last Resort? The practice of pre-trial detention decision-making in the EU](#) (2016). Tom Smith and Ed Cape, [The practice of pre-trial detention in England and Wales: Research report](#) (2016).
- <sup>18</sup> Tom Smith, [The Practice of Pre-trial Detention in England & Wales - Changing Law and Changing Culture](#), European Journal on Criminal Policy and Research (2022).
- <sup>19</sup> Tom Smith, [The Practice of Pre-trial Detention in England & Wales - Changing Law and Changing Culture](#), European Journal on Criminal Policy and Research (2022).
- <sup>20</sup> Tom Smith, [The Practice of Pre-trial Detention in England & Wales - Changing Law and Changing Culture](#), European Journal on Criminal Policy and Research (2022).
- <sup>21</sup> Tom Smith, [The Practice of Pre-trial Detention in England & Wales - Changing Law and Changing Culture](#), European Journal on Criminal Policy and Research (2022).
- <sup>22</sup> The Howard League for Penal Reform, [Rethinking remand for women](#) (2020).
- <sup>23</sup> Criminal Justice Alliance, [A smarter approach to sentencing?](#) (2020).



- <sup>24</sup> Table 2.1. in Ministry of Justice, [Offender Management Statistics Bulletin, England and Wales Quarterly: July to September 2021](#) (2022).
- <sup>25</sup> Table 2.4.b. in Ministry of Justice, [Offender Management Statistics Bulletin, England and Wales Quarterly: July to September 2021](#) (2022).
- <sup>26</sup> Prisons and Probation Ombudsman, [Independent investigation into the death of Baby A at HMP Bronzefield on 27 September 2019](#) (2021).
- <sup>27</sup> Liberty Investigates, [Proportion of remand prisoners from ethnic minorities rises 17 percent in six years](#), dated 17 March 2022. The Guardian, [Proportion of remand prisoners who are minority ethnic rises 17% in six years](#), dated 17 March 2022.
- <sup>28</sup> Prison Reform Trust, [Counted Out: Black, Asian and minority ethnic women in the criminal justice system](#) (2017). [The Lammy Review](#) (2017).
- <sup>29</sup> Hibiscus Initiatives, Muslim Women in Prison, Zahid Mubarek Trust, Agenda, Criminal Justice Alliance and Women In Prison, Tackling Double Disadvantage. [Ending inequality for Black, Asian, minoritised and migrant women in the criminal justice system. 10-point action plan for change](#) (2022).
- <sup>30</sup> The Griffins Society, May Robson, [A suspect population? An examination of bail decision making for foreign national women in criminal courts in England and Wales. Executive Summary](#) (2020).
- <sup>31</sup> Fair Trials, [Locked up in Lockdown](#) report (2021).
- <sup>32</sup> The Griffins Society, May Robson, [A suspect population? An examination of bail decision making for foreign national women in criminal courts in England and Wales. Executive Summary](#) (2020).
- <sup>33</sup> Transition to Adulthood, Rob Allen, [Young Adults on Remand. A Scoping Study for T2A](#) (2021).
- <sup>34</sup> Tom Smith, [The Practice of Pre-trial Detention in England & Wales - Changing Law and Changing Culture](#), European Journal on Criminal Policy and Research (2022).
- <sup>35</sup> Prison Reform Trust and Women in Prison, [Home truths: housing for women in the criminal justice system](#) (2016).
- <sup>36</sup> Women's Budget Group, [The Case for Sustainable Funding for Women's Centres](#) (2020).
- <sup>37</sup> Ministry of Justice, [Female Offender Strategy](#) (2018).
- <sup>38</sup> National Audit Office, [Improving outcomes for women in the criminal justice system](#) (2022).
- <sup>39</sup> Letter to CJA from Ministry of Justice regarding [Custody Time Limits and Remand](#), dated 27 January 2021. Letter to CJA from Ministry of Justice regarding [Bail Information Services and Extended Custody Time Limits](#), dated 3 June 2021.
- <sup>40</sup> Penelope Gibbs, [Twitter](#), dated 28 March 2022.
- <sup>41</sup> Letter to CJA from Ministry of Justice regarding [Custody Time Limits and Remand](#), dated 27 January 2021.
- <sup>42</sup> Letter to CJA from Ministry of Justice regarding [Custody Time Limits and Remand](#), dated 27 January 2021.