A JUSTICE Report

Remand Decision-Making in the Magistrates' Court: A Research Report

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JUSTICE

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EXECUTIVE SUMMARY

A defendant awaiting trial faces either bail, with or without conditions, or remand in custody. This decision is predominantly determined in the magistrates' court by either a bench of lay magistrates or a district judge. Decisions to remand and individual in custody or release them on bail awaiting trial must be made in accordance with the Bail Act 1976. Despite the stringent test for custodial remand, and the serious consequences arising from a decision to remand an individual in custody, recent years have seen a sharp increase in the number of people awaiting trial in custody.

This increase has placed significant strain on the prison estate, with consequence for both remand prisoners and the general prison population, as well as the public purse. Individuals remanded in custody are at risk of losing their employment, accommodation, and ties with key support systems, and face some of the worst conditions in the prison estate. The increased remand population also exacerbates the capacity crisis in UK prisons. This contributes to a lack of educational and training provisions and reduced health and mental health care for both remand and sentenced prisoners. This reduces prisoners' quality of life, exacerbates the criminogenic effects of prison, and undermines the rehabilitative aim of incarceration. Individuals from Black and racialised backgrounds have been disproportionately impacted by the increased use of custodial remand.

Despite the impact of bail decisions on both the individual awaiting trial and the prison estate more broadly, there is a significant lack of published data shedding light on this type of decision-making in the magistrates' courts. This makes it difficult to assess whether the law on remand is being properly applied and undermines efforts to identify and address concerning trends in remand decision-making. In response to this JUSTICE has conducted an observational research project looking at the processes and outcomes of remand decisions in magistrates' courts across England. This report sets out the finding of that research, along with recommendations as to where better data provision is needed.

Using data collected from 742 hearings the report highlights several concerning trends. First, processes for determining bail do not appear to be properly followed in the magistrates' courts, undermining the fairness of remand decision-making and increasing the likelihood of custodial remand being imposed unnecessarily. The findings also call into question the quality of remand decision-making. Decision makers rarely provided reasons for their decisions, despite the requirements in the Bail Act and Criminal Procedure Rules that they do so. This failure makes it difficult to scrutinise remand decisions to determine why and to what extent custodial remand is being overused. Disparities in outcomes, particularly for non-White defendants, foreign national defendants, defendants appearing via video-link and in a secure dock, and defendants lacking representation, must also be noted. Indeed, such disparities suggest biased decision-making driven by perceptions of risk, likely exacerbated by a lack of diversity amongst decision makers.

Whilst this represents a step towards identifying and addressing concerning trends in remand decision-making, further work is required in order to uncover both the extent of the issues identified and the most effective solutions. In the context of increasingly high rates of custodial remand, it is crucial that more is done to identify why and in what circumstances decision makers favour custodial remand over conditional bail, and that the Government revisit the efficiency of the magistracy compared to district judges in remand decision-making. The Government should also prioritise measuring how racial bias and appearing via video link impact remand decision-making, and further research should be conducted regarding the practice of remanding individuals in custody for their own protection. Crucially, whilst we understand that the Government collects some of data types noted in the report, all of the data types we have explored should be collected, made publicly available and evaluated on a nationwide level.

I. INTRODUCTION

Background

1.1 When an individual is charged with a crime and appears for their first appearance before a magistrates' court, a decision will be made whether to release that individual on bail, with or without conditions, or to remand the individual in custody to await their trial. Most court bail decisions in England and Wales are made in the magistrates' courts,[1] by either a bench of usually three lay magistrates, or by a district judge. Lay magistrates are volunteers and are assisted by legal advisors, who advise on points of law, practice, and procedure.

1.2 Decisions about whether to remand an individual in custody or release them on bail are largely governed by the Bail Act 1976 (the "**Bail Act**"). Section 4 of the Bail Act creates a rebuttable presumption in favour of bail for defendants awaiting trial.[2] The starting point is that defendants be released on bail without condition to await their trial in the community. However, where potential concerns arise, the court must consider whether the defendant should be remanded in custody or be released on bail subject to certain conditions.

1.3 A defendant can be remanded in custody pre-trial if one of the statutory exceptions to bail applies. These exceptions are set out in Schedule 1 of the Bail Act and include there being substantial grounds for believing that the defendant would, if released on bail: fail to surrender to custody; commit an offence; or interfere with a witness or otherwise obstruct the course of justice. The court can also refuse bail if it is satisfied that the defendant must be kept in custody for their own protection.[3] [4] In practice, the prosecutor will make submissions to the court objecting to the grant of bail by reason of one or more of the exceptions arising, or the court may raise matters of its own motion. The defence will have an opportunity to respond before the court reaches a decision.

1.4 The test for remanding an individual in custody is, in principle, a stringent one, so where there are concerns as to a defendant's compliance, rather than refuse bail entirely, the court may instead attach conditions to the grant of bail. These could include, for example, imposing a curfew on the defendant, prohibiting them from going to a particular place or contacting a particular person, or making them subject to electronic monitoring. The conditions imposed on the defendant must be necessary to address the risks identified in the exceptions to bail.[5]

1.5 The Bail Act and the Criminal Procedure Rules 2020 ("**Crim PR**") require courts to ensure that sufficient time is given to remand decision-making[6] and to give reasons for remand decisions in language the defendant can understand, and with reference to the circumstances of the defendant

[1] Justice Committee, Seventh Report of Session 2022-23, *The role of adult custodial remand in the criminal justice system*, HC 264, p. 14.

[2] There are some, limited, exclusions to this general right to bail. However, these circumstances did not arise in our data set. For the exclusions see Bail Act 1976; CPS, *Bail: Legal Guidance* (26 April 2023).

[3] Whilst the criteria for detaining a defendant pre-trial vary depending on the alleged offence, all pre-trial remand decisions should involve a consideration of whether any of the exceptions to bail are satisfied. See CPS, *Bail: Legal Guidance* (26 April 2023), Annexes One, Two and Three.

[4] In taking a decision under one of the exceptions, Schedule 1, section 9 of the Act provides that the court must have regard to the nature and seriousness of the offence; the character, associations and community ties of the defendant; the defendants previous record of being granted bail; and the strength of the evidence that the defendant has committed the offence in question. In addition, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced the 'no real prospect' test, which states that defendants should not be remanded into custody if the offence is such that they are unlikely to receive a custodial sentence if convicted.

[5] Bail Act 1976; CPS, *Bail: Legal Guidance* (26 April 2023).

[6] Criminal Procedure Rules 2020, Rule 14.2(1)(d)(ii).

and the facts of the case.[7] The implication of this is that decision-makers are required to examine the features of every case when determining whether custodial remand or conditional bail is justified, and provide thoughtful reasoning, specific to the facts of the case.[8]

1.6 However, despite this, and despite the fact that the majority of remand decisions are made in magistrates' courts, there is a significant lack of published data shedding light on decision-making processes and outcomes in this context. This makes it difficult to assess whether the law on remand is being properly applied and undermines efforts to identify and address concerning trends in remand decision-making.

1.7 Understanding how remand decisions are made is particularly important in the current context. The number of people on remand has increased sharply in recent years, and in September 2022 was the highest it had been in at least 50 years.[9] As of March 2023, the remand population stood at 14,591. This reflects a 14% increase from last year, and a 45% increase from March 2020.[10] The increase in the remand population has largely been driven by an increase in the number of people on remand awaiting trial,[11] and appears to have been caused in part by an increase in the number of defendants being remanded into custody by the courts.[12]

1.8 Individuals from Black and racialised backgrounds have been disproportionately impacted by the increased use of custodial remand. The likelihood of any given prisoner held on remand being from a Black or racialised background has risen by 17% in the 6 years up to September 2021.[13] Some of this likely reflects the fact that Black and racialised people are disproportionately policed,[14] arrested[15] and charged with offences[16] – a situation exacerbated by the expansion of highly racialised policies such as PREVENT[17] and the Gangs Matrix,[18] and increased 'suspicion-less'

[7] Section 5, Bail Act 1976; Criminal Procedure Rules 2020, Rule 14.2(5).

[8] Tom Smith, 'The Practice of Pre-Trial Detention in England and Wales – Changing Law and Changing Culture' (2022).

[9] Russell Webster, 'Prison and Probation Trends Autumn 2022' (2022).

[10] Ministry of Justice, Offender Management Statistics Bulletin, England and Wales (2023), p.3.

[11] Russell Webster, Prison and Probation Trends Spring 2023, (2023).

[12] Justice Committee, Seventh Report of Session 2022-23, *The role of adult custodial remand in the criminal justice system*, HC 264.

[13] Mirren Gidda, Eleanor Rose and Rajeev Syal 'Proportion of Remand Prisoners from Ethnic Minorities Rises 17 Percent in Six Years' (2022), *Liberty Investigates*.

[14] See also Home Office, National statistics: Police powers and procedures: Stop and search and arrests, England and Wales, year ending 31 March 2022 (2022) table 2.6.

[15] Home Office, Ethnicity facts and figures: Arrests (2022), see arrest rates per 1,000 people, and number of arrests, by ethnicity over time.

[16] A recent study by the Crown Prosecution Service has found that defendants from Black and racialised backgrounds are more likely to be charged for comparable offences than white British defendants. CPS, CPS charging decisions – examining demographic disparities in the outcomes of our decision making (2023).

[17] PREVENT is one of four elements of CONTEST, the government's counter-terrorism strategy. For an overview of the disproportionate impact of the police on Black and racialised people see JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System* (2021), pp.42-45.

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

Stop and Search powers.[19] However, concerns have also been raised about the possible impact of judicial bias on outcomes for Black and racialised defendants,[20] including in the remand context.[21]

1.9 The increase in the remand population has placed significant strain on the prison estate, with consequences for both those held on remand and the general prison population. In November 2022, the Government responded by invoking Operation Safeguard, which allows police cells to be used to house prisoners on a short-term basis where space in prison is unavailable.[22] The measure was extended to the whole of England and Wales in February 2023,[23] and as of October 2023 is still being used.[24] Concerns have been raised over the suitability of police custody to hold remand or sentenced prisoners,[25] as well as the cost implications.[26]

1.10 Remand prisoners already face some of the worst conditions in the prison estate and have fewer opportunities than sentenced prisoners.[27] Individuals on remand are more likely to suffer from mental health problems[28] and are more likely to have problems accessing mental health care.[29] Remand status is a risk factor for suicide in custody.[30]

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

[20] Keir Monteith KC et al, *Racial Bias and the Bench* (2022); JUSTICE, '*Tackling Racial Injustice: Children and the Youth Justice System*' (2021), paras 4.52 -4.59.

[21] Keir Monteith KC et al, *Racial Bias and the Bench* (2022).

[22] HC Deb, 30 November 2022, cols 914–915 [Commons Chamber]

[23] HC, Prisoners: Police Custody, Question for Ministry of Justice, tabled on 22 February 2023.

[24] See e.g. Megan Carr, 'Ministry of Justice triggers Operation Safeguard as HMP Elmley on Sheppey 'reaches capacity' with problems 'all across the country'' (October 2023), *Kent Online;* Duncan Browne, 'Lincolnshire received more than £300,000 to help provide space for prisoners' (October 2023) *Spalding Today.* Matthew Cundall, 'Government spends millions on overspill prison cells in police stations, exclusive data reveals' (August 2023), *Channel 4 News*.

[25] Peter Dawson, 'Blog: Operation Safeguard – what does it tell us? (2022), Prison Reform Trust; Deborah Coles, Joe Sim, Steve Tombs and Martha Spurrier, 'Operation Safeguard will put prisoners in danger' (2022), *The Guardian*.

[26] Freedom of Information data provided to Channel 4 has revealed that housing a prisoner in a police cell costs around three and a half thousand pounds per prisoner per night – 27 times the average daily cost of housing someone in the prison estate. . Matthew Cundall, 'Government spends millions on overspill prison cells in police stations, exclusive data reveals' (August 2023), *Channel 4 News*.

[27] For overview see Liz Campbell et al, The Criminal Process 5th edn, (2019), Oxford University Press, p.249. For current context see Prison Reform Trust, Prison Reform Trust response to the Justice Committee's inquiry on the role of adult custodial remand in the criminal justice system (2022).

[28] Graham Durcan, *The future of prison mental health care in England: A national consultation and review* (2021), Centre for Mental Health; Graham Durcan and Karen Knowles, *London's prison mental health services: A review* (2006), London Development Centre and Sainsbury Centre for Mental Health; National Institute for Health and Care Excellence, *Clinical guidance scope* (2014).

[29] Justice Committee, Seventh Report of Session 2022-23, *The role of adult custodial remand in the criminal justice system*, HC 264, pp. 22-24.

[30] Shaoling Zhong et al, 'Risk factors for suicide in prisons: a systematic review and meta-analysis' (2021) 6 Lancet Public Health 164, pp.164, 167-168. Justice Committee, Seventh Report of Session 2022-23, The role of adult custodial remand in the criminal justice system, HC 264, pp. 22-24. INQUEST, 'Death of Racialised People in Prison: Challenging racism and discrimination' (2022).

1.11 The deleterious consequences of being remanded in custody have been exacerbated by the increased length of time individuals are spending on remand. The National Audit Office estimated that as of 30 June 2021 individual defendants in the Crown Court backlog who were remanded in custody spent an average of 209 days on remand.[31] This was up 86 days compared with 31 March 2020.[32] Freedom of Information requests submitted by Fair Trials show that in December 2022, over 2,000 people on remand had been in custody for more than a year,[33] 500 more than in December 2021.[34] Black and racialised defendants have been particularly impacted by increased waiting times. In 2022, Black defendants spent 70% longer on remand that White defendants, whilst mixed race and Asian defendants spent 54% and 48% longer respectively.[35]

1.12 As recognised by the criminal justice joint inspectorates, increased time spent on remand adds to the anxieties and frustrations of those in prison.[36] In addition, individuals remanded in custody for long periods of times are at heightened risk of losing their employment and accommodation, and severing ties with their family, community and local support services.[37] There is evidence to suggest that being remanded in custody for long periods has a disproportionate impact on women, who are more likely to be held further from home owing to the small number of places in the female estate.[38]

1.13 The increasing remand population also has consequences for the prison population as a whole. Overcrowding contributes to a lack of educational and training provisions, and reduced physical and mental health care for both remand and sentenced prisoners.[39] This not only decreases the quality of life of those in custody, but also worsens individuals' risk profiles making them more likely to re-offend when released.[40] Employment problems and drug use, for instance, have both been correlated with an increased risk of reoffending.[41]

1.14 Given the substantial negative consequences that remand in custody can have on an individual, and the negative consequences of an increase in the use of custodial remand on the prison estate, it is vital that custodial remand is a last resort and that decisions concerning remand are made with proper regard to due process and the law. However, owing to a lack of publicly available data, little is known about how these decisions are made. Increased understanding is therefore vital for any effort to critically scrutinise and accordingly improve the system.

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

[32] Ibid.

[33] Fair Trails, 'England and Wales: Justice system completely broken as hundreds face fourth Christmas on remand' (2022).

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

[35] Mark Wilding and Rajeev Syal, 'Black remand prisoners held 70% longer than white counterparts in England and Wales' (2023) *The Guardian.*

[36] Criminal Justice Joint Inspection, 'Impact of the pandemic on the Criminal Justice System' (2021), p.23. 'A joint thematic inspection of the criminal justice journey for individuals with mental health needs and disorders' (2021), p.44.

[37] Loraine Gelsthorpe, Nicola Padfield KC, The role of adult custodial remand in the criminal justice system: a response to the Justice Committee of the House of Commons (2022).

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

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

[40] Ibid.

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

1.15 To shed light on remand decision-making in the magistrates' courts, JUSTICE has conducted an observational research project looking at the process and outcomes of remand decisions in this context. This report sets out the findings of that research, along with recommendations as to where better data provision is needed.

Methodology

Data Collection

1.16 The analysis in this report uses data on remand decision-making in magistrates' courts collected by JUSTICE between January 2020 and December 2022.

1.17 To collect the data, JUSTICE volunteers[42] observed hearings involving pre-trial remand proceedings in magistrates' courts across the England.[43] This included magistrates' courts in busy urban areas, as well as courts serving less populated areas. Observations were conducted in publicly open hearings, most of which were first instance hearings following charge. A smaller number of hearings observed concerned a review of bail or a new application by the prosecution following a breach of bail by the defendant. Around half of the cases observed were presided over by a bench of lay magistrates, whilst the other half were presided over by district judges acting in the magistrates' courts.

1.18 As remand decision-making generally occurs as part of a broader pre-trial hearing and is not listed as a specific hearing type in advance, observers were required to identify hearings where decision-making regarding remand would likely arise. Observers were also required to exercise a level of judgement to identify what part of a hearing concerned remand decision-making. For these purposes remand proceedings refers to the part of a hearing observed where issues of whether a defendant should be released on bail, with or without condition, or remanded in custody pending trial arose.

1.19 Observers filled out hearing logs containing a mixture of closed/quantitative questions and open qualitative questions. These questions were designed to examine the process and outcomes of remand decision-making in the magistrates' courts, specifically the application of the Bail Act by magistrates and district judges. Data was also collected on the demographics of the bench, court staff and court users, the nature of the offence(s), legal representation, the length of hearings, disclosure, defendant understanding of the proceedings, and the defendant's presence in court.

1.20 To ensure, as far as possible, consistency in the data, JUSTICE provided observers with training and detailed guidance on filling out the hearing logs.

Data Analysis

1.21 The dataset includes records for 742 hearings. For some variables, there are a number of missing entries. Analysis on these missing entries has been performed and there are no systematic patterns in the missing data. The missing entries have been removed and cleaned respectively. For transparency, all populations and missing entries included in the analysis are reported alongside

[42] The volunteer cohort was made up of law students with at least one year's legal study, and trainee and qualified lawyers.

[43] Observations took place in the following courts: Bradford and Keighley magistrates' courts; Chester magistrates' court; Chesterfield Magistrates Court; Derby magistrates' court; Ealing magistrates' court; Exeter magistrates' court; Gateshead magistrates' court; Guildford magistrates' court; Highbury Corner magistrates' court; Leeds District magistrates' court; Milton Keynes magistrates' court; Newcastle magistrates' court; North Staffordshire magistrates' court; Norwich magistrates' court; Nottingham magistrates' court; Oxford magistrates' court; Reading magistrates' court; Cambridge magistrates' courts; Stevenage magistrates' court; Stratford magistrates' court; Thames magistrates' court; Westminster magistrates' court; Willesden magistrates' court.

results. The missing entries are random, therefore there is little risk of bias in the results due to these.

1.22 All observations are presented on a single offence basis. For most observations, only a single offence is recorded, and it is therefore clear that the outcome reflects the offence. In some observations, several offences are recorded against a single outcome. In these instances, the most serious offence is taken as the principal offence to avoid the matching of minor offences with inflated outcomes.

1.23 To assess disproportionality between various subsamples in the dataset, each analysis is restricted to 'the universe' of the subsample. For example, to assess differences in legal representation between white and non-white defendants, represented white (non-white) defendants are compared against the total population of white (non-white) defendants. This eliminates any effect of over/under representation of white (non-white) defendants in the dataset.

1.24 The descriptive analysis that follows is based on a sampling snapshot and the results reported apply only to a subgroup of individuals who have appeared in bail hearings over the study period. As such, no claim to explaining the nature of bail hearings in general is made. Equally, no causal claims are made as to the reported relationships. The findings are nonetheless useful in signalling important issues and questions and could be used to provide motivation for further research.

Key Findings

1.25 This report explores how remand proceedings and decision-making operates in practice using the data gathered from a number of magistrates' courts across England. The key findings of our research can be divided into findings concerning case characteristics, decision-making, and outcomes. Our key findings, examined in greater depth in the rest of this report, are as follows.

1.26 *Case Characteristics*:

a. For our dataset defendants were mostly male and under 35, and disproportionately from Black backgrounds. Decision-makers were mostly white, with an average perceived age of 52. Whilst there was more diversity amongst the magistracy than amongst district judges, 67% of cases presided over by magistrates involved an all-white bench.

b. The average length of proceedings concerning remand decision-making was 17 minutes. There is nothing per se concerning about this – whether sufficient time was spent on a decision will depend on the case at issue.

c. However, the minimum time reported for first instance proceedings where custodial remand was the outcome was two minutes – this was reported in 2 cases. It is questionable whether two minutes could ever be sufficient time for such a decision to be made. Moreover, 17% of cases where remand was the outcome were reported as lasting between 2 and 10 minutes.

d. Late and incomplete service of evidence by the prosecution remains an issue, as do decision-makers' responses to it. Action was taken by the court in just 38.7% of cases where late service of evidence was raised as an issue by the defence. Where additional evidence was provided during the proceedings, the defence was given the opportunity to consider the evidence only 33.3% of the time.

e. Defendants were reported as having limited, very little, or no understanding of proceedings over 10% of the time. Only 21% of defendants for whom English was not their first language and who were reported as having a poor understanding of English were provided with an interpreter in court.

1.27 *Decision-making*

a. For cases where objections to bail were raised by the prosecution, the Bail Act was referred to by decision-makers when justifying their decisions concerning remand in just 37.8% of cases.

b. Instead of referring to the Bail Act, decision-makers referred to the decision being "reasonable" or "proportionate" 9.9% of the time. In 48.4% of cases, decision-makers made no reference to any test at all.

c. District judges referred to the Bail Act more frequently than magistrates – 42.8 and 33.1% of the time respectively. Magistrates were reported as making no reference to any test 52.6% of the time, compared with 43.8% for district judges.

d. Where no test was cited by the decision-maker, the most frequent outcome was conditional bail, followed by remand in custody, with the latter being the outcome in over a quarter of cases where no test was cited by decision-makers.

e. Where the Bail Act was referenced by decision-makers, this tended to be in the form of generic statements, or a combination of generic statements with some limited reference to the facts of the case. In only 19.5% of cases where the Bail Act was referred to, and remand in custody or conditional bail was the outcome, did decision-makers explain their decision by setting out the exceptions in the Bail Act with specific reference to the facts of the case.

f. Prosecution and defence advocates also failed to make appropriate use of the Bail Act during remand proceedings. In cases where the prosecution raised objections to bail, prosecution advocates introduced and relied on the Bail Act just 46.3% of the time. Where the defendant was represented, the defence advocate set out their submissions based on the Bail Act just 35.7% of the time.

g. Advocates' submissions were very rarely interrogated by decision-makers. District judges challenged advocates' submissions more frequently than lay magistrates did – 28.7% of the time compared with 16.2%. Defence submissions were challenged twice as frequently as prosecution submissions.

1.28 *Outcomes*

a. The most frequent outcome in our dataset was conditional bail at 42.4%, followed by remand in custody at 35%. Despite the stringent test for custodial remand and imposing conditions on bail under the Bail Act, unconditional bail was the outcome just 21 % of the time.

b. Defendants accused of low to moderate severity offences[44] were remanded in custody 31% of the time.

c. Non-white defendants accused of high to very high severity offences were 50% less likely to be granted unconditional bail than white defendants accused of similar offences.

d. For those accused of high to very high severity offences, being without legal representation increased the likelihood of being remanded in custody by 44%.

e. Non-UK nationals were almost 50% more likely to be denied bail than their UK national counterparts. This is despite little evidence to suggest foreign national offenders fail to surrender to court more frequently than UK nationals.

[44] As classified by the Crime Severity Score (CSS) measure. The CSS is derived by calculating the mean number of days imprisonment that offenders were sentenced to serve after conviction for each type of offence. The measure converts non-custodial sentences into nominal days of imprisonment as outlines in the Office for National Statistics (2022). Low to moderate severity offences have been classified as those which attract (equivalent) sentences of between 1 and 364 days. High and very high severity offences are those which attract sentences of over 365 days.

f. For those accused of high to very high severity offences, being without legal representation increased the likelihood of being remanded in custody by 44%.

g. Defendants appearing by video-link were 40% more likely to be remanded in custody. This rose to 76% for defendants accused of high to very high severity offences. Those accused of low to moderate severity offences who appeared by video-link were 30% more likely to receive the outcome of remand.

h. Defendants appearing in a secure dock were more than 8 times as likely to receive an outcome of custodial remand compared to defendants sitting in the central area of the courtroom. For defendants appearing for low to moderate severity offences, appearing in a secure dock increased their chances of being remanded in custody over five-fold.

II.CASE CHARACTERISTICS

Court Demographics

3.1 Observers were asked to report on the gender, ethnicity[45] and age[46] of the individuals involved in each case, including the bench (magistrates or district judge), legal advisor, and defendant.

3.2 For our dataset, the vast majority of defendants – 87% – were male, and most were under 35.[47] Defendants were disproportionately from Black backgrounds. 19% of defendants were reported as being Black, despite making up 4% of the general population. Conversely, only 58% of defendants were reported as white, compared with 81.7% of the general population.[48]

3.3 Most decision-makers in our data set were identified as being from a white background. 88% of decision-makers were reported as being white, while 5.6% of decision-makers were reported as being Black. Whilst this is slightly higher than the proportion of the general population that Black people represent, it is worth noting that the majority of observations were conducted in magistrates' courts in urban areas where the proportion of people from racialised backgrounds tends to be higher.[49]

3.4 Observers reported very little racial diversity amongst district judges, with 95.4 % being recorded as white. Strikingly, just 0.3% of district judges were identified as being Black. Whilst there was more diversity amongst magistrates than district judges overall, 67% of cases presided over by magistrates were reported as involving an all-white panel. The average age of decision-makers was 52.

3.5 Legal Advisors appear to be more representative both in terms of age and, taking into account the fact that most observations took place in urban areas, ethnicity. As well as being more representative generally, for our data set Legal Advisors were also more representative of defendants (see figures 2.1 and 2.2).

[45] All recorded ethnicities are based on observers' personal perception. Whilst we recognise the pitfalls of recording ethnicity based on researcher perception, we nevertheless consider it to a worthwhile exercise for the purpose of this research. First, whilst there may be errors in researchers' perceptions of ethnicity, given the purpose of this research is to point towards possible trends, rather than draw concrete conclusions, we consider personal perception to be sufficiently accurate. Second, researcher perceptions of ethnicity will give a reasonable indication of the perceptions of those in the court, including the bench and defendants. These perceptions are relevant when considering the possible impact of ethnicity on decision-making, and when considering the impact of diversity or lack thereof on the defendant.

[46] For defendants age was generally reported as stated in open court. For the bench, advocates and court staff age was recorded as an approximation based on personal perception. Where ages have been recorded in a range, the mid-point has been taken and rounded.

[47] The mean average age of defendants was 35. However, as the difference between the mean and maximum age was far greater than the difference between the mean and minimum age, the majority of observations were concentrated below the mean.

[48] Assuming constant population across the time period analysed. See Home Office, Ethnicity facts and figures: Population of England and Wales (2022). .

[49] For instance, 46.2% of observations concerns cases in magistrates' courts in London were 13.5% of the population identify as Black. Office for National Statistics, Regional Ethnic Diversity (2022).

FIGURE 2.1: Ethnicity (percentage)

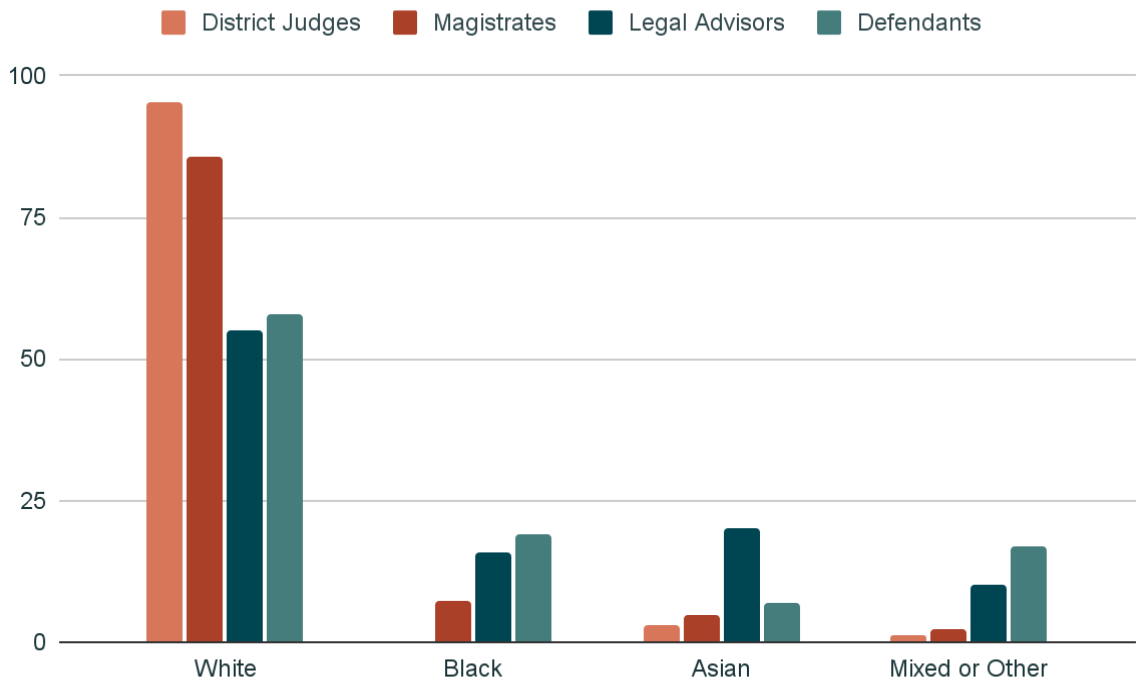
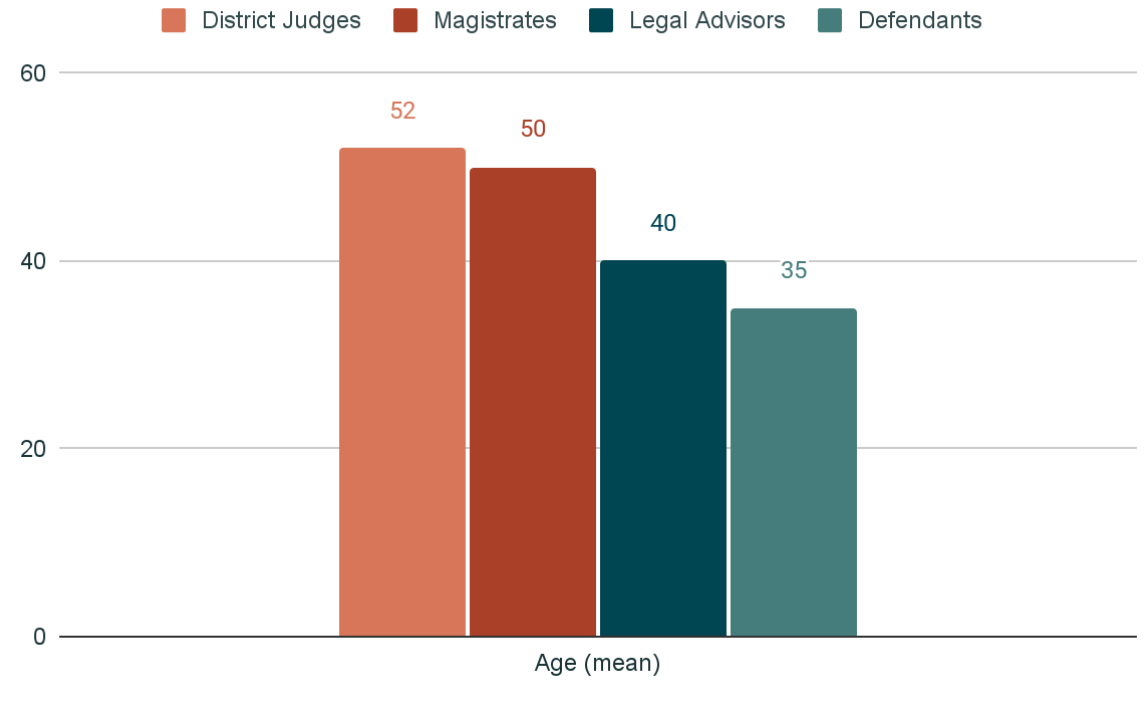


FIGURE 2.2: Age (mean average)



3.6 Decision-makers in the cases observed were neither representative of defendants in those cases, nor of the population.[50] Although our data set showed lack of diversity to be less acute for magistrates than for district judges, lack of diversity in the magistracy raises particular concerns. The role of the magistracy is underpinned by principles of local and peer-led justice. A purported benefit of the magistracy is that it should provide a link between the public and the judiciary and should therefore be reflective of the community it serves.[51] Our data suggests that for the hearings observed this was not the case.

Length of Remand Proceedings

3.7 Of the cases observed, the overall average length of proceedings concerning remand decision-making was 17 minutes.[52] For proceedings where a decision was made to remand a defendant in custody, this was slightly longer, at 20 minutes.[53] There was a disparity between the length of proceedings conducted by magistrates and district judges. Proceedings presided over by magistrates took longer on average, both overall and where remand in custody was the outcome (see figure 2.3).

3.8 The shortest length of time it took to conduct remand proceedings was two minutes. This was true of cases involving magistrates or district judges, and of cases where remand in custody was the outcome.

FIGURE 2.3: Length of bail hearings (minutes)

	Median	Minimum	*n*[54]
Total	17	2	612 (130)
Magistrates	20	2	337
District judges	15	2	275
Remand in custody as outcome	20	2	212
Magistrates	23	5	97
District judges	15	2	115

[50] This broadly tracks other available data on the ethnicity of magistrates and district judges, and defendants in criminal proceedings.

[51] Justice Committee, Sixth Report of Session 2016-17, *The role of the magistracy* (2016); Penelope Gibbs, Amy Kirby, *Judged by peers? The diversity of lay magistrates in England and Wales* (2014).

[52] This is the median length of hearings rather than the mean. Whilst mean is the most commonly used measure of an 'average,' it can be heavily influenced by outliers and/or skewness. In this case the median was less than the mean in all of the breakdowns analysed, meaning that the bulk of observations were concentrated above the mean (positive skew). This shows that hearings ran for less time than the mean suggests. The median is therefore a better measure of central tendency, and the mean is therefore not reported. Because the data is positively skewed, the usual measure of how dispersed the data is in relation to the mean, the standard deviation, is of limited use and is also not reported.

[53] As previously outlined pre-trial remand decision-making generally forms part of a broader pre-trial hearing. Observers were asked to provide information only in relation to proceedings concerning remand decision-making. This required them to identify which hearings or parts of hearings concerned decisions about remand. There is scope for error in this.

[54] n = observed population, with missing observations in parentheses.

3.9 The CrimPR require that the court takes "*sufficient time*" in bail proceedings to consider parties' representations and reach its decision.[55] The requirement was introduced in 2017, following research which suggested remand proceedings where generally very brief,[56] and that insufficient time was taken by the court to fully consider each decision.[57] Whether sufficient time has been given to remand proceedings by the court will depend entirely on the case at issue, and the averages revealed by our data are not necessarily cause for concern.

3.10 It is notable, however, that the minimum time reported for remand proceedings was two minutes, even in cases where remand in custody was the outcome. Given that remanding an individual in custody involves a deprivation of liberty, it is questionable whether two minutes could ever be "sufficient time" for such a decision to be made. A great deal is at stake when an individual is remanded in custody. Such individuals risk losing housing and employment, as well as links to family and other community support networks.[58] Being remanded in custody is also associated with poor mental health[59] and an increased risk of suicide.[60] These risks are particularly acute in the current context, given the long periods of time individuals are spending on remand,[61] and the increasingly poor conditions in which remand prisoners are kept.[62]

3.11 That there is any evidence of such consequential and potentially harmful decisions being made in such a short time frame is extremely concerning. The two cases where remand in custody was decided by the court in two minutes both involved first instance bail applications and were both conducted by district judges. In neither case were the prosecution's objections interrogated, and the district judges were reported as not having justified their decision with reference to the Bail Act in either case. Moreover, it is worth noting that 17% of cases where an individual was remanded in custody were reported as lasting between 2 and 10 minutes.[63]

3.12 Finally, it is also of note that proceedings involving magistrates took longer on average than those involving district judges. Longer bail proceedings may reflect a more detailed consideration of the case at hand. However, this does not appear to be the likely explanation for our dataset. Our data on decision-making below shows that magistrates justified their decisions with reference to the Bail Act less frequently than district judges and repeatedly failed to justify their decisions with

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[55] Rule 14.2 (1)(d)(ii).

[56] Ed Cape and Tom Smith, *The practice of pre-trial detention in England and Wales: Research report* (2016) Fair Trials, ch IV. For this report observation of 68 cases showed that where submissions were made by prosecution and defence advocates concerning remand these lasted on average 2.5 and 5.63 minutes respectively. The report also highlights research from the 1980s and 1990s showing that remand decision-making generally took five minutes or less. See p. 16.

[57] ibid. See also Ministry of Justice, *Ministry of Justice Explanatory Memorandum to the Criminal Procedure (Amendment) Rules 2017 No. 144* (2017).

[58] Loraine Gelsthorpe, Nicola Padfield KC, The role of adult custodial remand in the criminal justice system: a response to the Justice Committee of the House of Commons (2022)

[59] Graham Durcan, *The future of prison mental health care in England: A national consultation and review* (2021), Centre for Mental Health; Graham Durcan and Karen Knowles, *London's prison mental health services: A review* (2006), London Development Centre and Sainsbury Centre for Mental Health; National Institute for Health and Care Excellence, Clinical guidance scope, (2014). This is due to both higher rate of mental health conditions amongst remand population, and difficulty providing mental health care to the remand population.

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

[61] Fair Trials, 'England and Wales: FOI reveals almost 1,800 people in pre-trial detention for over a year' (2022); Fair Trials, 'One in ten of the remand population in England and Wales have been in prison for more than a year' (2021).

[62] Prison Reform Trust, Prison Reform Trust response to the Justice Committee's inquiry on the role of adult custodial remand in the criminal justice system (2022).

[63] n 257.

specific reference to the facts of the case. Instead, the disparity in length may suggest that proceedings conducted by magistrates are less efficient than those conducted by district judges.

3.13 The inefficiency of magistrates as opposed to district judges was highlighted by the Ministry of Justice in 2013.[64] This report concluded that the difference in efficiency was not great enough to compensate for the higher hourly costs for district judges. It did, however, recognise that other factors may reduce or reverse this cost gap, and that neither the quality of decision-making nor wider criminal justice costs were included in their model.[65]

3.14 The Government should revisit the efficiency of the magistracy compared to district judges in remand decision-making, accounting for quality of decision-making and taking into account the context of increasingly high rates of custodial remand, and the impact of this on the wider criminal justice system. Whilst the 2013 report raised issues of subjectivity as a reason for not including decision-making quality in its model, accounting for the quality of decision-making is more straightforward in the remand context than during trial or sentencing, given the circumscribed reasons for imposing custodial remand set out in the Bail Act.

Provision of evidence

3.15 Defence advocates raised an objection to having been provided with evidence or documentation late in 4.2% of cases. Where late provision of evidence was reported, action was taken by the bench only 38.7% of the time (see figure 2.4). Action taken by the bench included adjourning for a short recess to allow the defence to consider to evidence and adjourning to another day to allow for proper preparation.

FIGURE 2.4: Late provision of evidence (percentage)

Frequency	4.2	*n* 742
Action taken	38.7	*n* 31

3.16 Observers also reported any mention by the court or the defence of missing evidence or documentation. Observers reported that, from what was known during the hearing, the court did not have sight of all documentation relevant to the case in 11.2% of cases. In 43.4% of those cases further evidence or documentation was provided to the court. However, where additional evidence or documentation was provided the defence was given the opportunity to consider this only a third of the time (see figure 2.5).

FIGURE 2.5: Incomplete provision of evidence (percentage)

Frequency	11.2	*n 742*
Further documentation provided	43.4	*n 83*
Defence given opportunity to consider new documentation	33.3	*n 63*

[64] Ministry of Justice, *The strengths and skills of the Judiciary in the magistrates' courts*, (2013)

[65] Ibid, p. 4.

3.17 As well as requiring sufficient time be given by the court to remand proceedings, the 2017 changes to the CrimPR place a duty on the court to ensure that where information about the prosecution case is supplied later than usually required, the defence is allowed sufficient time to consider it.[66] Our findings suggest that this rule is not being adhered to in a significant number of cases. This supports previous research on the impact of the amendments to the CrimPR.[67]

3.18 There are various possible reasons for this failure to give the defence the opportunity to consider late evidence. The Explanatory Memorandum to the rule changes highlighted that information not being provided quickly enough by the prosecution, was placing pressure on courts to continue "*more quickly than might be just*".[68] That the prosecution failed to disclose evidence in a timely manner in 15.4% of observed cases, suggests that this remains an issue. As highlighted in previous research, the failure of the court to ensure sufficient time could also reflect a continued preoccupation with handling cases as quickly as possible, and the fact that remand decision-making is not considered a priority by decision-makers.[69]

3.19 The fact that our data reveals a continued failure to ensure timely service of evidence, and sufficient time for the defence to consider evidence provided later than required, despite the rule changes, also lends support to the suggestion that this kind of legislative reform may not be the most effective way of driving change in remand decision-making.[70]

Defendant Understanding

3.20 Whilst the majority of defendants in the observed cases were identified as having at least some understanding of the remand decision-making process, defendants were reported as having a limited understanding, or no or very little understanding over 10% of the time. Good understanding of proceedings was reported only 32% of the time (see figure 2.6).[71]

3.21 In several cases, observers reported that the defendant appeared unaware that the proceedings concerned remand, rather than being a trial. There were also several cases where the inability of the defendant to hear the proceedings was cited as a reason for their poor understanding. In cases where poor understanding of proceedings was apparent, defendants who had legal representation tended to be reliant on their defence advocate to explain what was happening in the court.

[66] Ministry of Justice, *Ministry of Justice Explanatory Memorandum to the Criminal Procedure (Amendment) Rules 2017 No. 144* (2017).Criminal Procedure Rules 2020, Rule 8.4 and 14.2(1)(d)(i).

[67] Tom Smith, The Practice of Pre-trial Detention in England & Wales - Changing Law and Changing Culture, (2022).

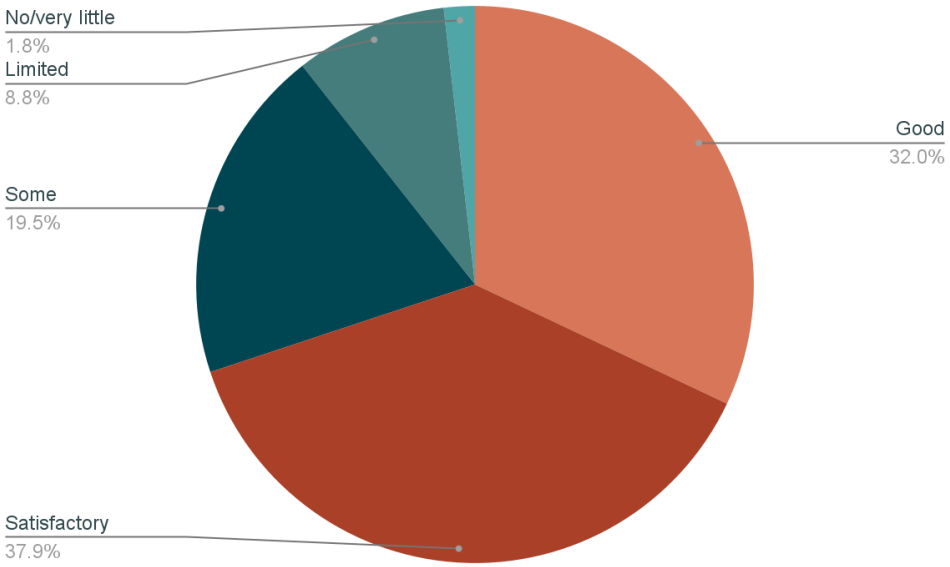
[68] Ministry of Justice, *Explanatory Memorandum To The Criminal Procedure (Amendment) Rules 2017 No. 144*, (2017).

[69] Tom Smith, The Practice of Pre-trial Detention in England & Wales - Changing Law and Changing Culture, (2022).

[70] Anthea Hucklesby, Written evidence: The role of adult custodial remand in the criminal justice system, (2022).

[71] Reporting was based on observers' personal perception. Factors taken into account included the reliance of the defendant on their lawyer, the number of general questions they asked, how confused they appeared, how irritated and or/perplexed they became during the hearing. Observers were asked to provide reasons for their answers.

FIGURE 2.6: Distribution of defendants' understanding of proceedings (percentage)

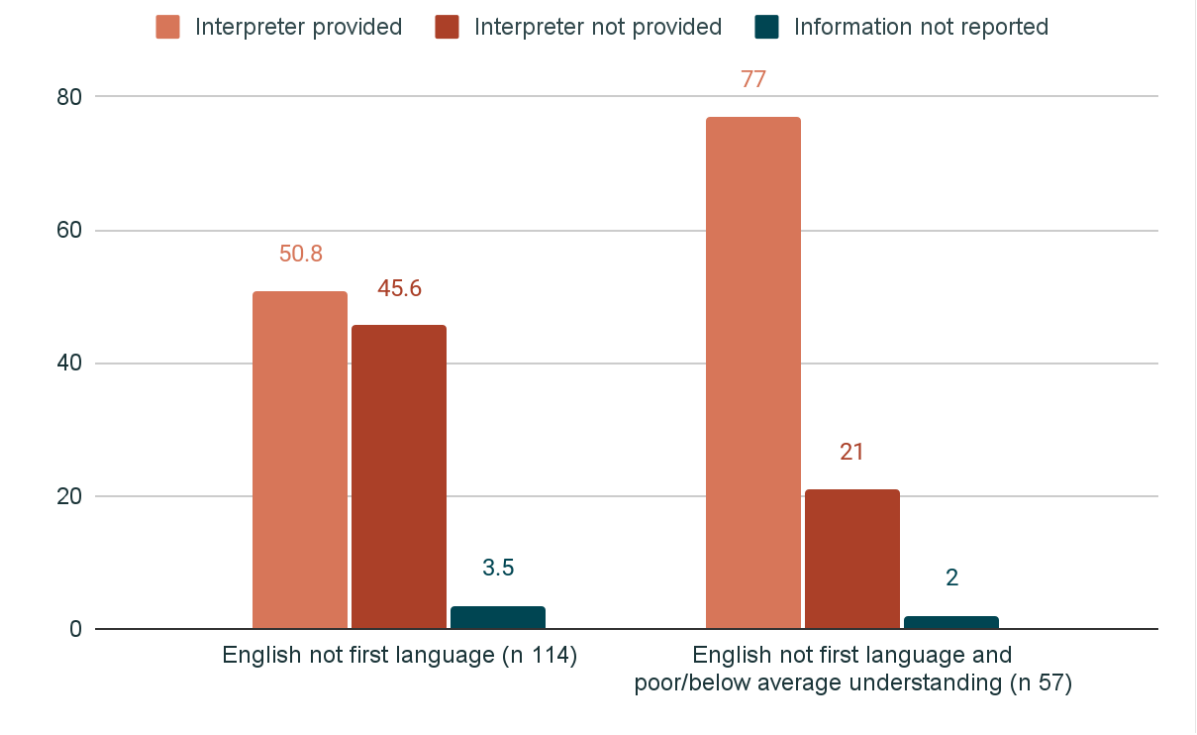


n 668 (74)

3.22 Our data also reveals challenges for defendants for whom English was not their first language. For the 114 defendants who were reported as not having English as their first language,[72] an interpreter was provided to just over 50%. Concerningly, of the defendants who were also reported as having a poor or below average understanding of English, only 77% were reported as being provided with an interpreter in court, whereas 21% were not (see figure 2.7). Unsurprisingly, defendants who were reported as having a poor or below average understanding of English, where also reported as having limited, very little or no understanding of the proceeding as a whole in all but one case.

[72] In the majority of cases this was stated in open court (57 %), in a smaller number of cases this was reported as being based on the observer's personal perception (35 %). In 9 cases this was not specified.

FIGURE 2.7: Provision of interpreters for defendants whose first language is not English (percentage)



3.23 The results above regarding defendant understanding is cause for concern. As recognised in the Equal Treatment Bench Book, ensuring that everyone involved in a case understands and is understood underlies the entire legal process.[73] Without this understanding, defendants' ability to participate in proceedings involving them is severely limited, and decisions are more likely to be perceived as unfair.[74] Ensuring that defendants understand processes involving them is best practice across courts and procedures, but in the remand decision-making context there is a specific requirement to explain decisions to defendants in language they can understand.[75]

3.24 The fact that in just over 10% of cases, defendants exhibited limited, little or no understanding of the proceedings raises questions about the extent to which magistrates and district judges are fulfilling this duty to explain their decisions in a way that is accessible to defendants.[76] The reasons given by observers for defendants' limited understanding also suggest broader accessibility issues in the pre-trial remand process. It is, for instance, concerning that inability to hear was identified as a reason for poor understanding in a number of cases.[77] In one case the defendant reported that they were unable to lip read because of the position of the dock and the advocates. There is nothing to suggest that action was taken at the hearing to accommodate this.

3.25 The lack of provision of interpreters for defendants for whom English is not their first language is also notable. The Ministry of Justice has recently published experimental statistics on language

[73] Judicial College, *Equal Treatment Bench Book*, (2023).

[74] Ibid. JUSTICE, *Understanding Courts* (2019).

[75] Crim PR and section. 5 Bail Act.

[76] This supports concerns to this effect raised in evidence to the Justice Committee's inquiry into the role of adult custodial remand. Justice Committee, Seventh Report of Session 2022-23, *The role of adult custodial remand in the criminal justice system*, HC 264, p. 15.

[77] Inability to hear was identified as the reason for the defendants having limited, or little or no understanding in 4 out of 71 cases. However, as inability to hear was not a prompt on the form, it is possible that that this issue arose in more hearings than were reported.

interpreter and translation services. These show that where interpretation or translation services are requested by the courts, these requests are generally successful.[78] This, in tandem with our data suggests that there may be instances where interpreters or translation services may be needed but requests are not being made.

3.26 The lack of provision of interpreters for individuals who have poor or below average understanding of English has obvious implications for the accessibility of proceedings for these defendants, and well as for their right to a fair trial as enshrined in Article 6 of the European Convention on Human Rights ("**ECHR**"). This affords defendants with an absolute right to an interpreter if they cannot understand or speak the language used in court.[79] Courts have a responsibility to identify whether a defendant may need an interpreter – an obligation which arises whenever there are reasons to suspect that the defendant is not proficient enough in the language of the proceedings.[80]

3.27 Our data show that interpreters were not provided to 21% of defendants for whom English was not their first language and who appeared to have a poor or below average understanding of English. The fact that no action was taken to address this suggests that decision-makers in the magistrates' courts may be failing to fulfil this obligation.

Recommendations

3.28 **Recommendation 1:** The Government should revisit the efficiency of the magistracy compared to district judges in remand decision-making, accounting for quality of decision-making and taking into account the context of increasingly high rates of custodial remand, and the impact of this on the wider criminal justice system.

[78] Ministry of Justice, Criminal court statistics quarterly: April to June 2022; Experimental Statistics - language interpreter and translator services, (2022).

[79] European Convention on Human Rights, Article 6 (3) (e). This applies for pre-trial proceedings see *Kamasinski v. Austria*, 1989, para. 74; *Hermi v. Italy* [GC], 2006, para 70; *Baytar v. Turkey*, 2014, para 49.

[80] *Vizgirda v. Slovenia*, 2018, para 81.

III: DECISION-MAKING

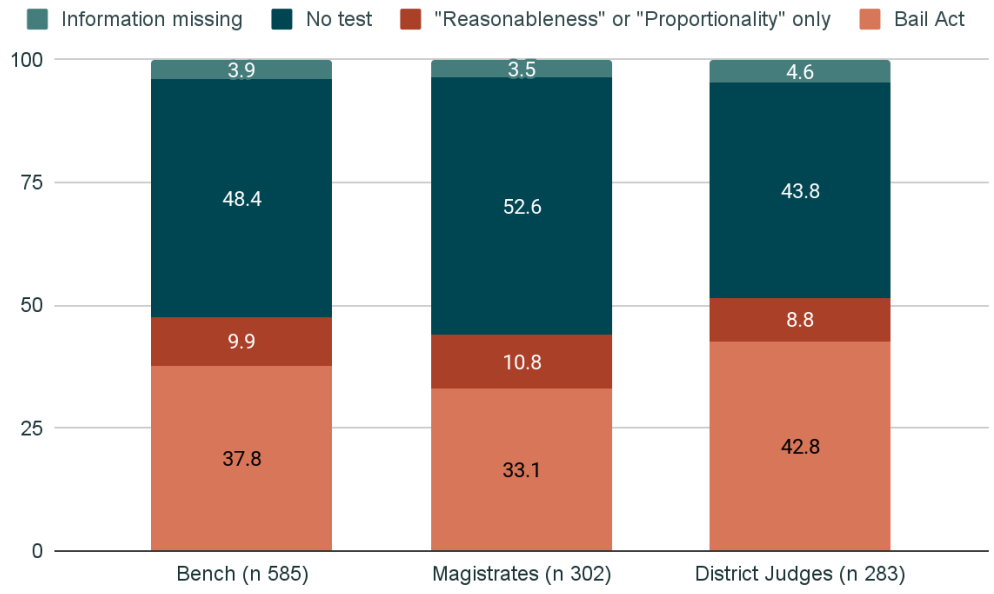
4.1 This chapter provides an analysis of remand decision-making in the magistrates' courts, with the aim of highlighting possible pitfalls in the quality of such decision-making. It examines how and to what extent decision-makers refer to the Bail Act when remanding individuals into custody or granting conditional or unconditional bail. It also explores the extent to which decision-makers challenged advocates on both sides' submissions concerning bail.

The Operation of the Bail Act

4.2 Across cases where the prosecution raised objections to bail, decision-makers referred to the Bail Act when justifying their decisions concerning remand just 37.8% of the time.[81] District judges referred to the Bail Act when justifying their decisions 42.8% of the time, compared with 33.1% for magistrates (see figure 3.1)

4.3 Rather than referring to the Bail Act, decision-makers instead referred to the decision being "reasonable" or "proportionate" in 9.9% of cases observed.[82] In 48.4% of hearings, observers reported that no test at all was referred to. Magistrates failed to refer a test when making remand decisions more frequently than district judges, with magistrates being reported as making no reference to any test 52.6% of the time, compared with 43.8% for district judges (see figure 3.1).

Figure 3.1: Frequency of reference to Bail Act, "Reasonableness" or "Proportionality" only, and no test at all (percentage)

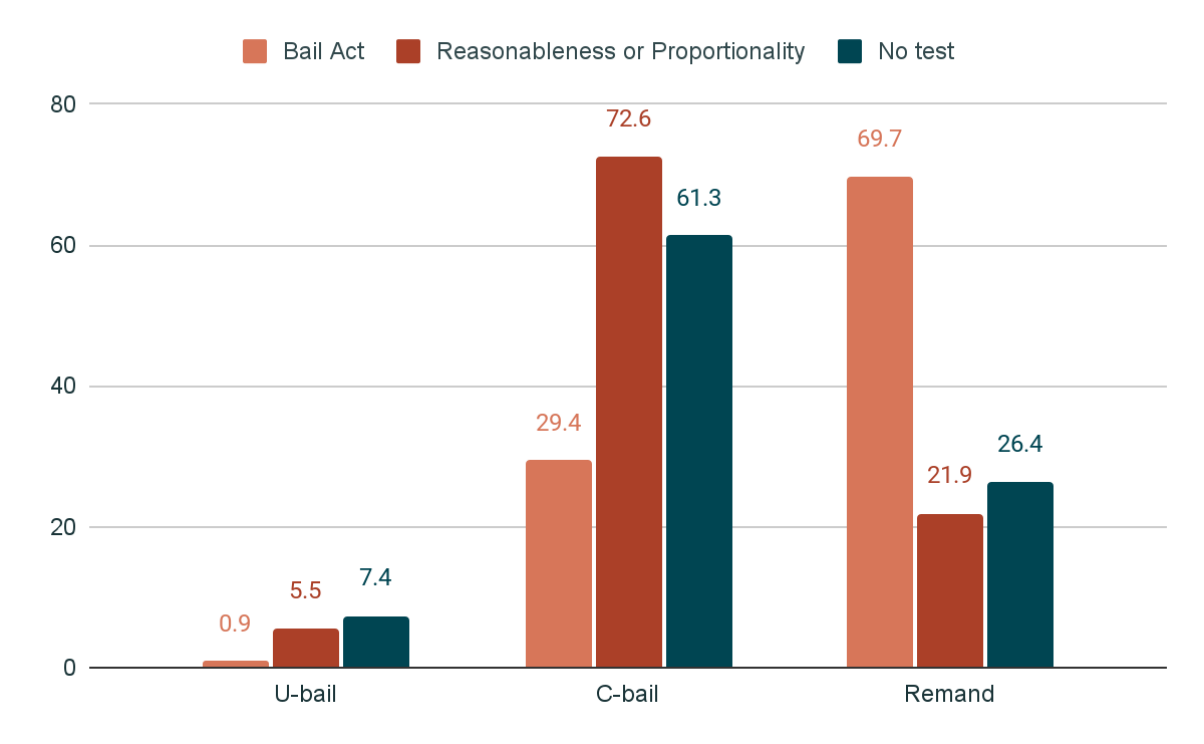


[81] The results in this section concerning frequency of reference to the Bail Act exclude cases where the prosecution position was that unconditional bail would be appropriate. Given the presumption in the Bail Act in favour of unconditional bail, decision-makers would not have been required to make a substantive decision concerning remand in most of these cases. Including these cases in the results would therefore likely result in an underestimation of the extent to which decision-makers made appropriate reference to the Bail Act when making remand decision. For all hearings the Bail Act was referred to by decision-makers 31.8 % of the time.

[82] Whilst, per CPS guidance on bail, reasonableness and proportionality are relevant considerations, particularly when determining bail conditions, this figure refers to instances where this test was the only one referred to by decision-makers. See CPS, *Bail: Legal Guidance* (26 April 2023).

4.4 In those cases where decision-makers referenced the Bail Act, the most frequent outcome was remand in custody. When "reasonableness" or "proportionality" alone were referenced the most frequent outcome was conditional bail, followed by remand in custody. When no test at all was cited, the most frequent outcome was also conditional bail, followed by remand in custody, with the latter being the outcome in over a quarter of cases where no test was cited by decision-makers (see figure 3.2).

Figure 3.2: Test cited by decision-maker and hearing outcomes (percentage)



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4.5 Our data shows that decision-makers are consistently failing to refer to the legal test for bail when making remand decisions. The failure to reference the Bail Act makes it difficult to determine whether such decisions are being made in accordance with the law. This has implications for public scrutiny of the administration of justice.[83] Moreover, the fact that decision-makers referred to no test at all in nearly half of cases where the prosecution put forward objections to bail raises questions about the robustness of their decisions.

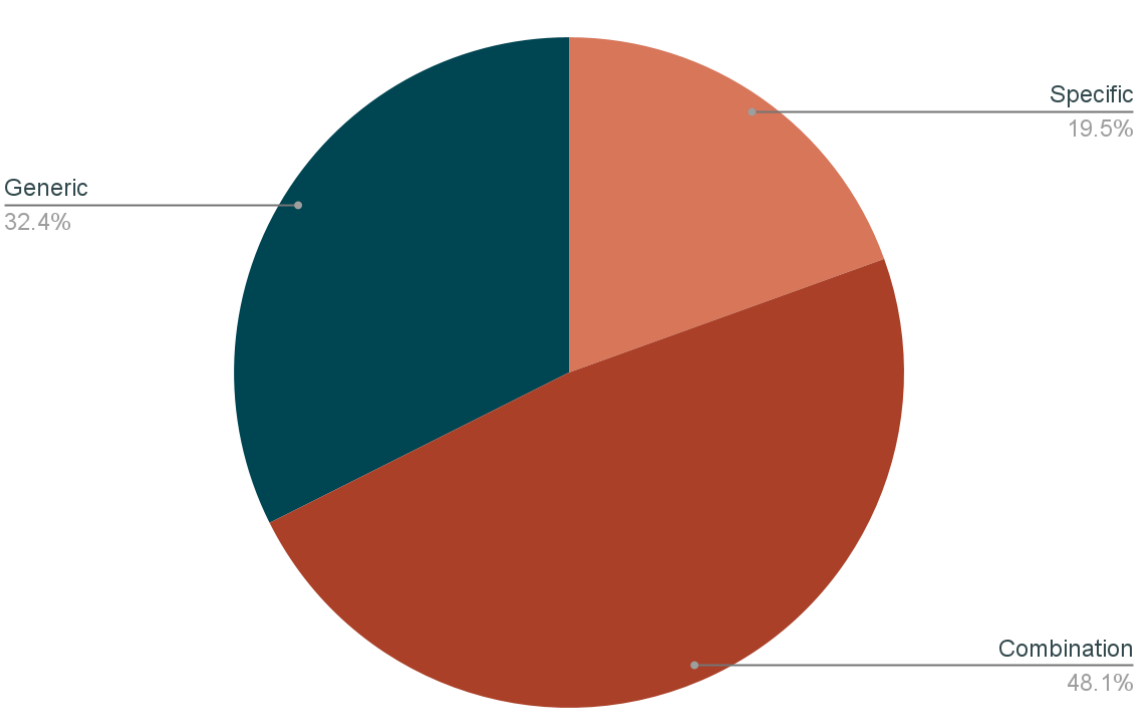
4.6 It is particularly concerning that conditional bail and remand in custody are the most frequent outcomes when the Bail Act is not cited. Under the Bail Act, an individual should not be remanded in custody unless one of the exceptions to bail applies. Our data shows that individuals are being remanded in custody without reference to the test for bail in the Bail Act, potentially in instances where this test would not be satisfied. Equally, under the Bail Act, conditions should only be placed on bail where they are necessary to address one of the exceptions in the Act. Our data suggests that the necessity of bail conditions to address Bail Act exceptions may not be being considered by the courts, increasing the risk of onerous conditions being unduly placed on defendants.

[83] *Tase v Romania* App no 29761/02 (ECtHR, 10 June 2008), para 41.

4.7 This failure to refer to the Bail Act has implications for the right to liberty and security as guaranteed by Article 5 ECHR. Whilst this allows for the deprivation of liberty in certain circumstances, including those set out as exceptions to bail in the Act, such a deprivation is only permitted "*in accordance with a procedure prescribed by law*". However, if courts are failing to reference, correctly and consistently, the Bail Act in the majority of cases, as our data suggests, then this latter condition is arguably not being met.

4.8 Our data shows that even where decision-makers make reference to the Bail Act, these tended to be in the form of generic statements, or a combination of generic statements with some limited reference to the facts of the case. In only 19.5% of cases where the Bail Act was referred to, and remand or conditional bail was the outcome, did decision-makers explain their decision by setting out the exceptions in the Bail Act with specific reference to the facts of the case and circumstances of the defendant (see figure 3.3). This is despite the requirement in both the Bail Act and CrimPR that decision-makers give reasons for their decisions with specific reference to the circumstances of the defendant and the facts of the case.[84]

Figure 3.3: Manner in which test for bail is cited by decision-makers (percentage)



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4.9 The failure to provide fully reasoned decisions concerning remand, even where the Bail Act is being referenced, further undermines scrutiny of remand decision-making,[85] and obscures problematic trends and inconsistencies in how the law is being applied. Moreover, the above

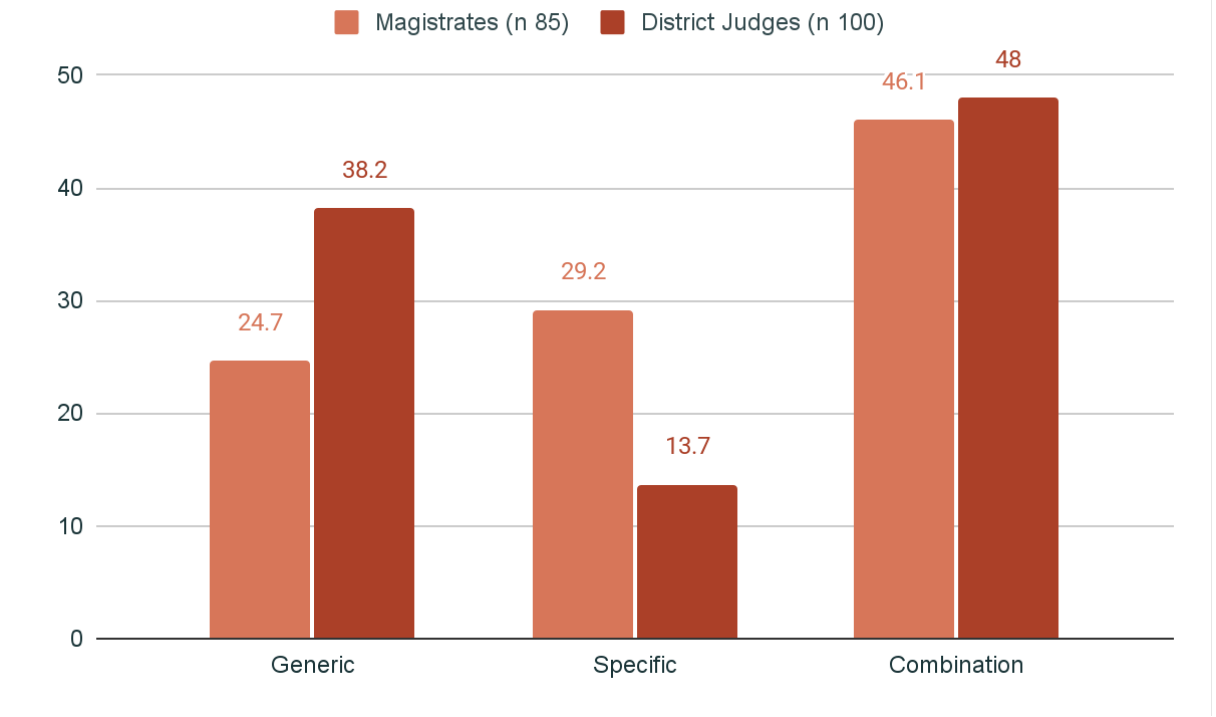
[84] Bail Act 1976, s.5 (1)-(4). Criminal Procedural Rules 2020, Rule 14.2(5). See also *Aleksanyan v Russia* App no. 46468/06 (ECtHR, 22 December 2008), paras. 178 -9; *Rubtsov and Balayan v Russia* Apps nos. 33707/14 and 3762/15 (10 April 2018), paras. 30-32.

[85] *Tase v Romania* App no 29761/02 (ECtHR, 10 June 2008), para 41.

suggests that even where the Bail Act is being considered and cited, it may not be being applied correctly. The European Court of Human Rights has repeatedly emphasised that decisions to remand individuals in custody cannot be justified on the basis of "general and abstract" arguments,[86] and cannot use "stereotyped" forms of words.[87] Justifying decisions with generic reference to the Bail Act, and without reference to the facts of the case or circumstances of the defendant, may well fall foul of this.

4.10 Notably, despite referring to the Bail Act less frequently than district judges, when magistrates did refer to the Bail Act in justifying their decisions, they more frequently did so with specific reference to the facts of the case. Magistrates also justified their decisions with generic references to the Bail Act less frequently than district judges (see figure 3.4).

Figure 3.4: Manner in which test for bail is cited by magistrates compared with district judges (percentage)



4.11 Finally, our data also suggests that prosecution and defence advocates fail to make appropriate use of the Bail Act during remand proceedings. Where the defendant was represented, the defence advocate set out their submissions based on the Act just 35.7 % of the time. In cases where the prosecution opposed unconditional bail, prosecution advocates introduced and relied on the Bail Act just 46.3% of the time. This suggests a broader lack of proper engagement with the Bail Act in hearings concerning remand, beyond decision-makers, and could highlight a need for better training amongst advocates.

4.12 The lack of reference to the Bail Act by prosecution advocates raising objections to bail is particularly concerning. The CrimPR require that prosecutors opposing bail specify the exceptions to bail that they are relying on.[88] Similarly, conditions can only be imposed on bail where they are

[86] *Boicenco v. Moldova*, 2006, 142; *Khudoyorov v. Russia*, 2005, 173; *Smirnova v Russia,* 2003.

[87] *Yagci and Sargin v Turkey* (1920) 20 EHRR 505, [52]; *Caballero v UK* (2000) 30 EHRR 643, 652 [21].

[88] Criminal Procedure Rules 2020, Rule 14.5 (3).

necessary to address the exceptions to bail in the Bail Act,[89] with prosecutors being required to explain the purpose to be served by each condition.[90] It would therefore be expected that all prosecution objections to bail would make reference to the Act.

4.13 It is possible that the failure of prosecution advocates to set out their case with reference to the Bail Act contributes to the lack of similar reasoning from decision-makers. For magistrates, in particular, who have no professional legal background, it may be difficult to challenge submissions or couch decisions in terms of the Bail Act when the objections have not been presented in these terms by the prosecution.

4.14 Understanding remand decisions is important, and according to research by the Centre for Public Data, information about the reasons why bail is refused is purportedly already collected and stored through the Common Platform. We agree that the government should publish statistics on the reasons why courts refuse bail.[91] However, this will only show part of the picture. The Common Platform only enables reasons to be recorded in line with the exceptions set out in the Bail Act. This potentially obscures any failure to properly consider the Bail Act during remand proceedings themselves. Moreover, publishing this data would not provide insight on the extent to which decision-makers adequately explain their decisions, with specific reference to the facts of the case, or whether decisions are reasoned in these terms.

4.15 The publication of Common Platform data regarding reasons for refusing bail, should also be supplemented by qualitative research investigating the perceptions of court users, court staff and decision-makers about the quality of remand decision-making in the magistrates' courts. More could also be done to ascertain decision-makers' views on what good remand decision-making involves, and how they implement good decision-making in practice.

Lack of challenge

4.16 Observers were asked to record the extent to which magistrates and district judges interrogated advocates' submissions regarding remand. Challenges to advocates' submissions on either side[92] were raised by decision-makers in less than one-fifth of cases where unconditional bail was opposed by the prosecution (see figure 3.5).[93]

[89] Bail Act 1976, section 3 (6); CPS, *Bail: Legal Guidance* (26 April 2023).

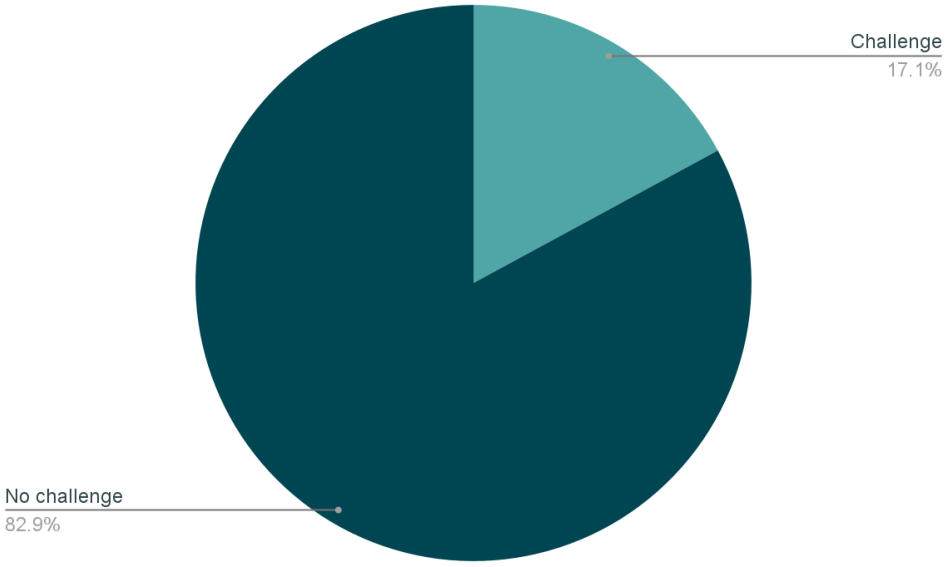
[90] Criminal Procedure Rules 2020, Rule 14.5(4).

[91] For more detail see Centre for Public Data, *Research paper: Data and statistical gaps in criminal justice* (2023) p. 10.

[92] I.e. challenges to either prosecution or defence submissions or both.

[93] The figures in the section exclude those cases where unconditional bail was not opposed by the prosecution. Given that challenges to the prosecutions' submissions would generally only apply when unconditional bail is opposed, the figures for total hearings are likely to underestimate the proportion of hearings with challenges to the prosecution's submissions and so are not reported here.

FIGURE 3.5: Challenges to advocates' submissions



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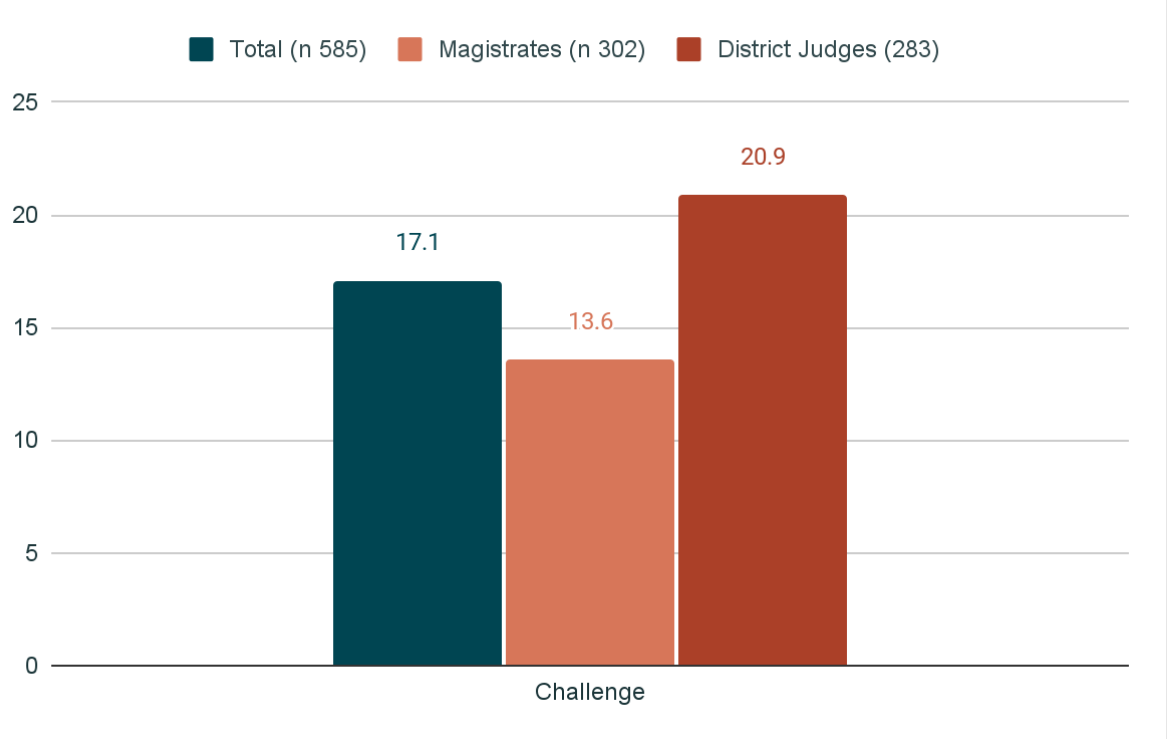
4.17 The failure to interrogate advocates submissions was more acute in cases involving magistrates than cases involving district judges. District judges challenged at least one advocates' submissions in 20.9% of cases, whereas magistrates did so in only 13.6% of cases (figure 3.6).

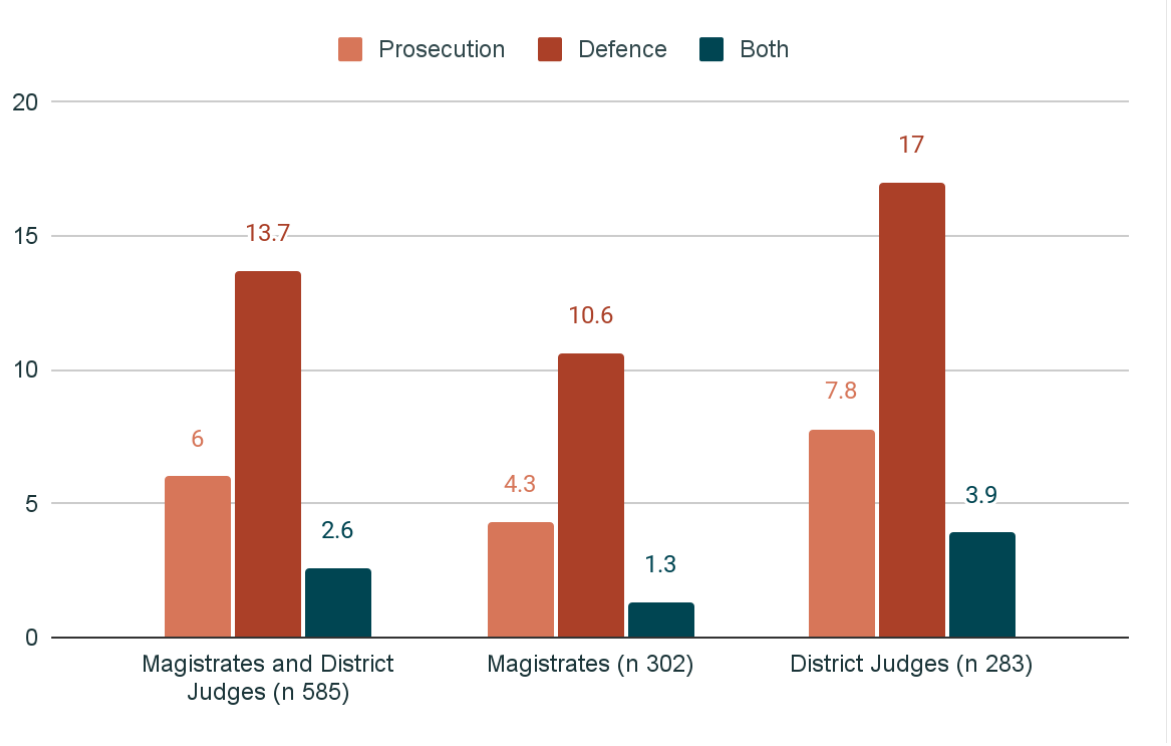
FIGURE 3.6: Frequency of challenges to advocates' submissions by magistrates and district judges



4.18 Observers also reported significant disparities between decision-makers' challenges to prosecution and defence submissions. Both magistrates and district judges challenged prosecution submissions far less frequently than defence submissions. Prosecution submissions were subject to interrogation just 6% of the time, compared to 13.7% of defence submissions – meaning that defence submissions were challenged more than twice as frequently as those of the prosecution (figure 3.7). This difference was particularly pronounced for magistrates, who challenged defence submissions 2.5 times more frequently than prosecution submissions, compared to 2.1 times for district judges.

4.19 Challenges to both defence and prosecution submissions were relatively rare, occurring in just 2.6% of cases (figure 3.7). However, district judges challenged both sides' submissions 3 times more frequently than magistrates.

FIGURE 3.7: Frequency of decision-makers challenges to advocates on both sides about their submissions (percentage)

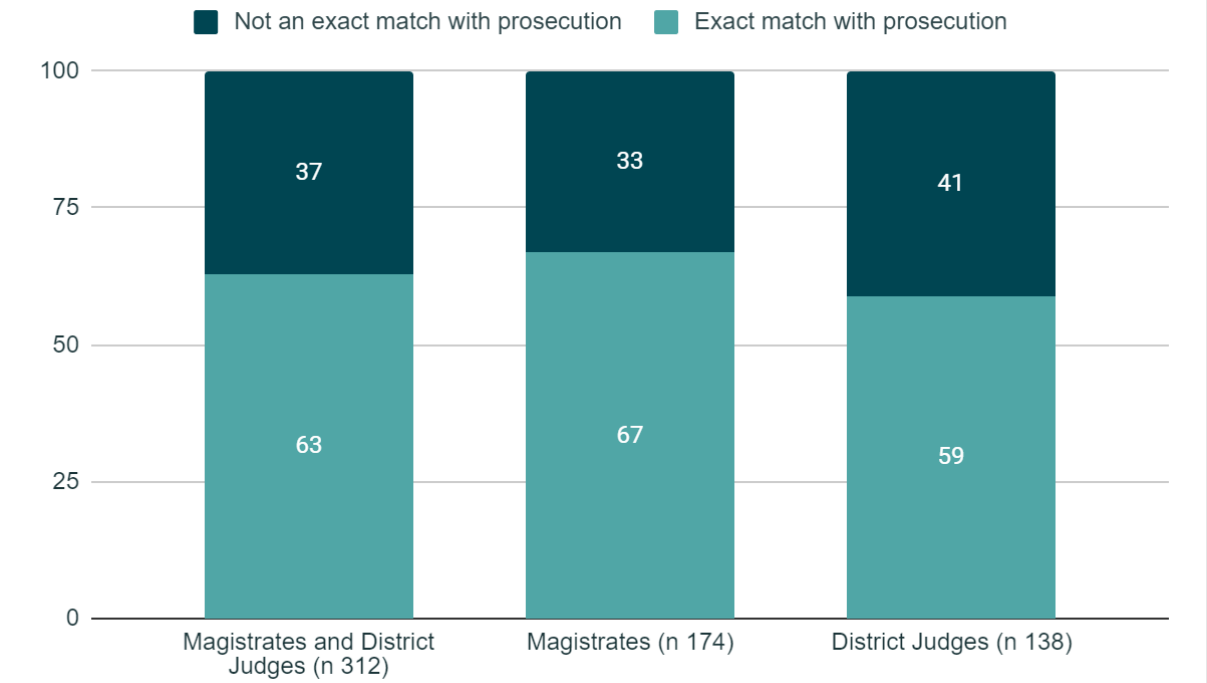


4.20 That advocates' submissions were interrogated so infrequently by decision-makers in cases where objections to bail were put forward raises several points of concern. As outlined in the previous subsection, our data shows that both defence and prosecution advocates more often than not failed to make their submissions with reference to the Bail Act. Given that prosecution advocates are required to set out the exceptions to bail on which they are relying, it would be expected that decision-makers should interrogate this lack of reference. However, our data suggests that there is no such scrutiny from decision-makers, and particularly magistrates, in a large proportion of cases.

4.21 That prosecution advocates had their submissions challenged less frequently than defence advocates could suggest a deference amongst decision-makers towards the prosecution. Further evidence of deference towards the prosecution can be seen when looking at the application of bail conditions. In the cases observed, we found high levels of concordance between the bail conditions put forward by the prosecution and the bail conditions imposed by magistrates and district judges. In 63% of cases where conditional bail was the outcome, the conditions imposed exactly matched those sought by the prosecution. This concordance was more acute for cases presided over by

magistrates, where bail conditions matched those put forward by the prosecution 67% of the time. This contrasts to 59% in cases overseen by district judges (see figure 3.8).

FIGURE 3.8: Frequency that bail conditions imposed by magistrates/district judges match those put forward by prosecution (percentage)



4.22 The infrequency with which advocates' submissions are challenged and the particular lack of challenge to prosecution advocates' submissions raises questions about the extent of decision-makers' engagement with the adversarial process. That these issues appear to be more acute for magistrates than district judges could suggest that magistrates are less able to recognise flaws in advocates' submissions, and are less equipped to challenge them. Data suggesting a particular deference from magistrates towards the prosecution supports previous research demonstrating concordance between prosecution advocates and magistrates.[94]

Recommendations

4.23 **Recommendation 2:** The Government should publish statistics on the reasons why magistrates' courts refuse bail, as recorded on the Common Platform. The publication of this data should be supplemented by qualitative research investigating the perceptions of court users, court staff and decision-makers about the quality of remand decision-making in the Magistrates Courts.

4.24 **Recommendation 3:** More needs to be done to understand why and in what circumstances decision-makers favour custodial remand over conditional bail. Efforts should be made to ascertain whether and to what extent conditional bail is being sought and imposed where unconditional bail would be appropriate.

[94] Liz Campbell et al, The Criminal Process 5th edn, (2019), Oxford University Press; Ed Cape and Tom Smith, *The practice of pre-trial detention in England and Wales: Research report* (2016).

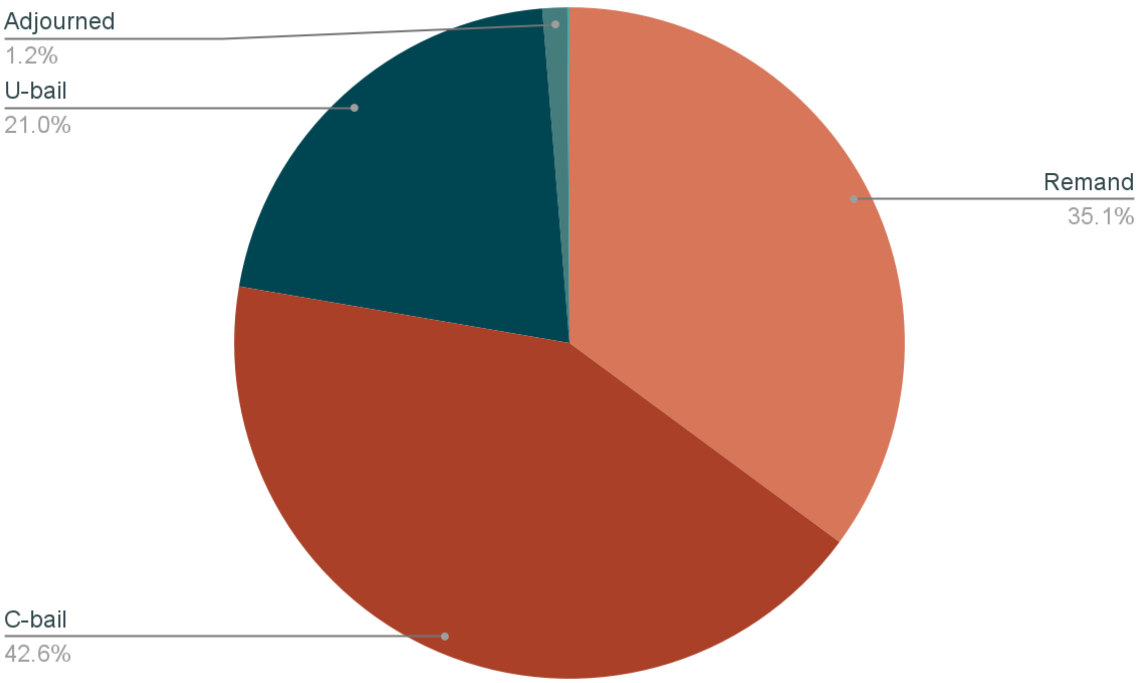
IV: OUTCOMES

4.25 This chapter examines trends in the outcomes recorded across the cases observed. First, it looks at how bail outcomes are distributed across remand in custody, conditional and unconditional bail, and makes suggestions, based on the data, as to possible reasons for high rates of custodial remand. Second, it looks at disparities in outcome, and assesses the impact of certain factors, such as ethnicity and legal representation, on a defendant's likelihood of receiving custodial remand, or conditional or unconditional bail.

Distribution of outcomes

4.26 Across all hearings observed, including those where the prosecution position was that unconditional bail would be appropriate, the most frequent outcome was conditional bail at 42.6%, followed by remand in custody at 35.1%. Unconditional bail was the outcome just 21% of the time (see figure 4.1).

FIGURE 4.1: Distribution of bail hearing outcomes

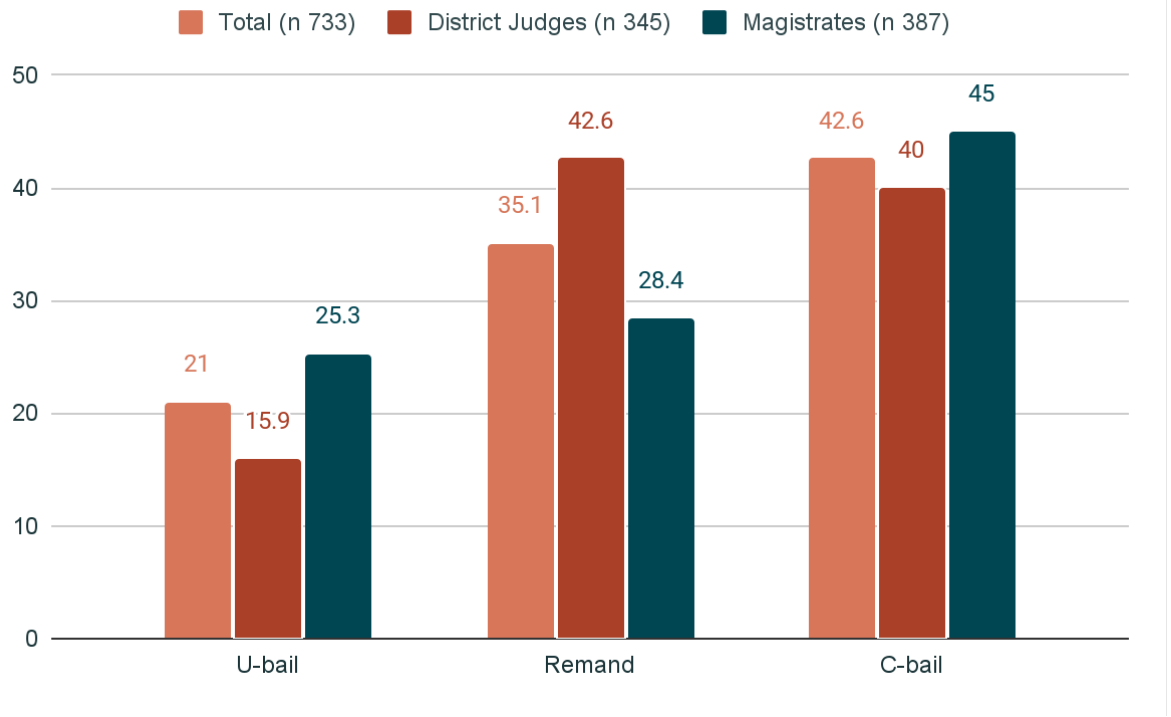


n 733 (9)

4.27 District judges remanded defendants in custody more frequently than magistrates and granted conditional or unconditional bail less frequently (see figure 4.2). This could suggest that district

judges are more 'custody minded' than magistrates. However, the fact that district judges generally preside over the most complex and serious matters[95] could also account for some of this disparity.

FIGURE 4.2: Frequency of outcomes for district judges compared with magistrates (percentage)



4.28 Across all cases observed unconditional bail was the least frequent outcome. This is striking given the stringent test for custodial remand and imposing conditional on bail under the Bail Act. It is particularly concerning that individuals were more frequently remanded in custody than granted unconditional bail. Remand in custody is supposed to be a last resort for cases where it is not possible to address the exceptions in the Bail Act in any other way.

4.29 The high rate of custodial remand does not necessarily show that custodial remand was inappropriately used in the observed cases. However, the fact that custodial remand was the outcome over one-third of the time, coupled with the risk of poor-quality decision-making outlined in Chapter 3, suggests that the magistrates' courts may be remanding individuals outwith the requirements of the Bail Act.

Reasons for high remand rates: failure to apply the no prospect test?

4.30 Our data shows that defendants accused of low to moderate severity offences, classified by the Crime Severity Score ("**CSS**") measure,[96] were remanded in custody 31% of the time (see Figure 4.3). The high rate of remand for such cases could suggest that remand is being overused in cases concerning defendants accused of less serious offences.

[95] Courts and Tribunals Judiciary, Magistrates Courts.

[96] The CSS is derived by calculating the mean number of days imprisonment that offenders were sentenced to serve after conviction for each type of offence. The measure converts non-custodial sentences into nominal days of imprisonment as outlines in the Office for National Statistics (2022). Low to moderate severity offences have been classified as those which attract (equivalent) sentences of between 1 and 364 days. High and very high severity offences are those which attract sentences of over 365 days.

FIGURE 4.3: Remand in custody and low to moderate crime severity (percentage)

CSS 31 *n* 530

4.31 When making decisions concerning bail, decision-makers should have regard to the nature and seriousness of the offence, and the probable consequences for the defendant if convicted.[97] Save in certain limited circumstances,[98] unconvicted defendants should not be remanded in custody where there is no real prospect of them receiving a custodial sentence.[99]

4.32 For many of the cases included in the above dataset a custodial sentence would not have been a likely outcome on conviction. The fact that remand in custody was the outcome in so many of the cases concerning low to moderate severity offences suggests decision-makers in the magistrates' courts may not be appropriately applying the no real prospects test when deciding whether to remand an individual in custody.

4.33 Moreover, whilst offence seriousness and likely method of disposal are not the only relevant factors, the high rate of remand for cases concerning low to moderate severity offences could suggest that decision-makers are not giving sufficient consideration to these factors, as required by the Bail Act.

Reasons for high remand rates: underuse of conditional bail?

4.34 The House of Commons Justice Committee's inquiry into the role of adult custodial remand has suggested that high rates of custodial remand could reflect a lack of knowledge amongst decision-makers, and in particular magistrates, about conditional bail as an alternative to custody, and the effectiveness of conditions such as electronic monitoring.[100]

4.35 Given this, it is notable that conditional bail was the most frequent outcome across all cases observed, with magistrates more likely than district judges to impose conditional bail (see figure 4.2 above). Of these cases, 16% involved the imposition of electric monitoring, with magistrates also using electronic monitoring slightly more frequently than district judges (see figure 4.4).

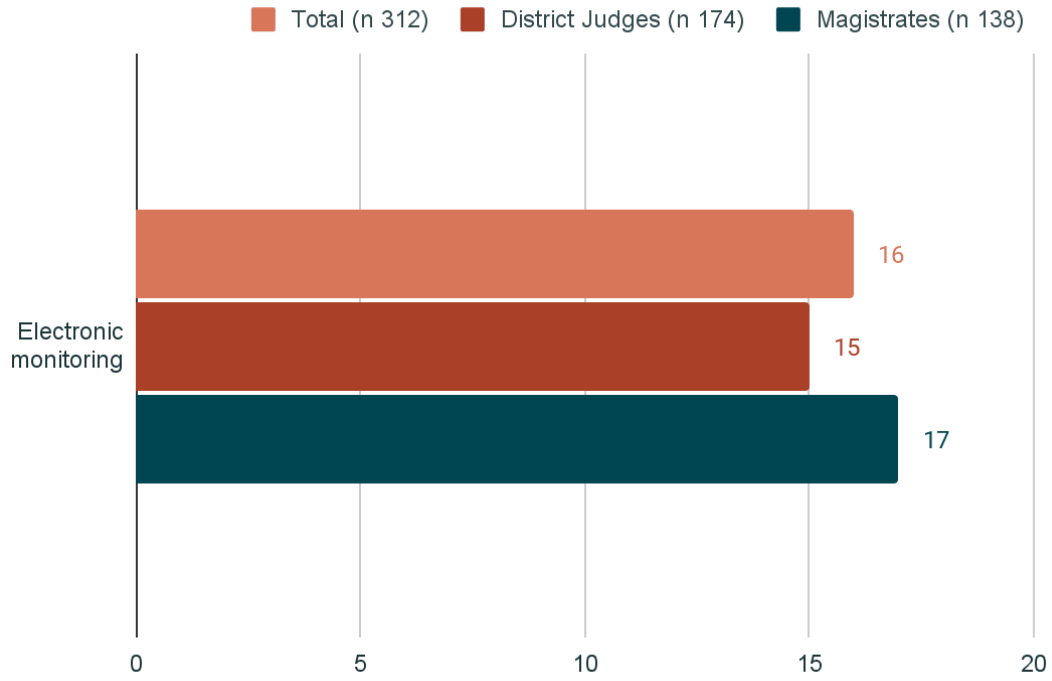
[97] Bail Act 1976, Schedule 1.

[98] See CPS, *Bail: Legal Guidance*, Annexes (updated 17 July 2023).

[99] Introduced by Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 11. See Bail Act 1976, Schedule 1.

[100] Justice Committee, Seventh Report of Session 2022-23, *The role of adult custodial remand in the criminal justice system*, HC 264.

FIGURE 5.4: Frequency that electronic monitoring is imposed as an outcome (percentage)



4.36 Whilst this does not exclude the likelihood that conditional bail is being underused in favour of custodial remand it does suggest an awareness amongst decision-makers of alternatives to custodial remand and their effectiveness, and a readiness to apply these alternatives in a range of cases.

4.37 Moreover, it is worth considering whether the high rate of conditional bail may also reflect its overuse in cases where unconditional bail would be appropriate. This is supported by the fact unconditional bail was the least frequent outcome in our data, despite stringent tests for imposing conditions on bail or remanding an individual in custody. This again points away from the notion that alternatives to custodial remand are not sufficiently understood and applied and could instead suggest a tendency amongst decision-makers towards outcomes that generate the least risk or, relatedly, to favour outcomes put forward by the prosecution.[101]

4.38 If this is the case, then a solution focused on raising awareness amongst decision-makers of the effectiveness of alternatives to remand may not be the most effective way of reducing custodial remand. An approach, for instance, that emphasises that custodial remand should only be a last resort, and highlights that conditions should only be attached to bail when necessary, may be preferred. To determine the best way forward more needs to be done to understand why and in what circumstances decision-makers favour custodial remand over conditional bail. Efforts also need to be made to ascertain whether and to what extent conditional bail is being sought and imposed where unconditional bail would be appropriate.

[101] This is supported by the high level of concordance between bail conditions but forward by the prosecution and those imposed by decision-makers, as well as the particular failure to challenge interrogate prosecution submissions.

Reasons for high remand rates: use of remand to address social issues?

4.39 Our data also suggests that a willingness to remand defendants in custody to address social issues, such as drug addiction, homelessness, or mental illness, has an impact on remand rates, particularly for defendants accused of less serious offences.

4.40 Whilst we did not specifically ask observers to record information on the use of remand to address social issues, this arose several times in additional comments provided by observers. In seven cases, observers reported that homelessness was cited as a reason for remanding a defendant in custody. A further seven cases saw drug addiction referred to as a justification for remanding an individual in custody. In addition, the mental ill health of the defendant was cited as a reason for custodial remand in three cases.

4.41 In the majority of these cases, the defendant had been accused of a low to moderate severity offence. In one case the court expressly recognised that the case was not serious, but were nevertheless concerned that the defendant, if released on bail would "*use drugs, and this would worsen his life*". As we did not ask observers to comment on this, the true number of defendants remanded with reference to social issues may be much higher.

4.42 Whilst the legal basis for remanding these individuals in custody was not always clear, it is possible that the above cases represent examples of the use of "remand for own protection," as permitted by the Bail Act.[102] As previously articulated by JUSTICE and many others, remanding individuals in custody ostensibly for their protection or welfare or to address social issues they may be experiencing, is counterintuitive. Prisons are not suitable places for vulnerable people, and social issues are often exacerbated by incarceration.[103] This is particularly true for remand prisoners, who are often held in the worst conditions, with the least access to healthcare and support services.

4.43 Rather than remanding individuals in custody when vulnerabilities such as mental health, homelessness, and drug use are identified efforts should be made to address these at source, through specialised programmes delivered in the community.[104] As we recommended in our 2017 report Mental Health and Fair Trial, opportunities to be diverted out of the criminal justice system should be available early in the criminal justice process and should form part of a wider strategy to prioritise the welfare of vulnerable individuals over punitive responses through the criminal justice system.[105]

4.44 To facilitate this, more data should be gathered on the practice of remanding individuals in custody for their own protection. This recommendation has been put forward by the Justice Committee, and the Government has in principle agreed to collect more data on the use of remand for one's own protection.[106] However, little information has been provided on what data will be collected and how this data will be used.

4.45 It is our view that as well as collecting and publishing data on the frequency of its use, the government should also publish demographic data on defendants subject to this provision, and data on where remand for one's own protection is being used. Analysis should be done to identify

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[102] Schedule 1.

[103] Karen Bullock and Annie Bunce, 'The prison don't talk to you about getting out of prison': On why prisons in England and Wales fail to rehabilitate prisoners', Criminology & Criminal Justice 2020, Vol. 20(1).

[104] JUSTICE, Written Evidence: The role of adult custodial remand in the criminal justice system (2022).

[105] Ibid. See also JUSTICE, *Mental health and Fair Trial* (2017).

[106] Justice Committee, Tenth Special Report of Session 2022-23, *The role of adult custodial remand in the criminal justice system: Government Response to the Committee's Seventh Report* (2023).

the factors that increase an individual's risk of being remanded for their own protection.[107] This will enable the identification and implementation of community-based alternatives, better suited to addressing vulnerability than custodial remand.

Disparities in outcomes

4.46 Our research looked at the possible impact of different factors on a defendant's likelihood of being remanded in custody. This was done by determining Relative Rate Indices ("**RRI**") for different groups of defendants. The RRI is the outcome rate for one group (usually the group 'at risk') divided by the rate for another group (the 'reference'), creating a standard ratio measure of relative difference in outcomes between two groups. This analysis revealed notable disparities in outcomes for non-white defendants; non-UK nationals; defendants without legal representation; defendants who appeared by video link; and defendants who appeared in a secure dock.

4.47 In the below analysis, an RRI greater than 1 indicates an outcome that is more likely for (i) non-white defendants compared to their white counterparts; (ii) unrepresented compared to represented defendants; (iii) defendants appearing by video link compared to those present in the room; and (iv) defendants in secure and open docks compared to those in the central area of the room. It is accepted that RRIs below 0.8 and above 1.25 are noteworthy.

4.48 It is worth stating that there are likely to be confounding individual and court specific factors that have not been accounted for in the relative rates below. It is therefore not possible to draw conclusions regarding causal relationships. However, our analysis does highlight concerning trends that warrant further investigation and provides support for hypotheses put forward in other pieces of research.

Ethnicity

4.49 For all observed cases, white and non-white defendants were almost equally as likely to receive remand, conditional bail, and unconditional bail. This was also the case for hearings where the defendant was accused of an offence with a low to moderate severity score. However, for high to very high severity offences, non-white defendants were more than 50% less likely to be granted unconditional bail than their white counterparts (see figure 4.5). This difference is notable.

FIGURE 4.5: Relative Rate Indices (RRI) for outcomes for non-white defendants compared to white defendants.

	Total	Low-Moderate	High-Very high
Remand	0.99	0.96	0.95
C- bail	1	0.95	1.46
Remand/C-bail	1	0.95	1.14
U-bail	0.87	1.08	0.47
n	(417, 305)	(310, 213)	(100,83)

[107] It has been suggested that women may be more at risk of being remanded in custody for their own protection. See Justice Committee, Seventh Report of Session 2022-23, *The role of adult custodial remand in the criminal justice system*, HC 264, p. 18.

4.50 There are various explanations for this disparity. For instance, it could be attributable to different patterns in the underlying offences i.e., it could be that for our dataset the offences non-white defendants are charged with were at the most serious of the high-very high severity scale. Whilst there is little if any evidence to suggest a relationship between racial background and involvement in the most serious crimes,[108] policing of Black and racialised communities has resulted in the overrepresentation of these groups in prosecutions, including for some crimes at the higher end of the severity scale.[109] Given that offence seriousness is a relevant consideration when determining whether or not to grant unconditional bail it is plausible that biased policing, and the overrepresentation of non-white defendants in prosecutions for very serious offences contributes to this disparity in rate of unconditional bail - albeit our data was not sufficient to conduct such an analysis for the cases observed.

4.51 As well as systemic biases in the criminal justice system, racial bias amongst decision-makers themselves could also contribute to differences in likeliness of being granted unconditional bail. Our data shows that magistrates and district judges are failing to reference the Bail Act in their decision-making, and the Bail Act may not be being stringently applied (see chapter 3). This creates significant latitude for subjective assessments within which biases may arise, particularly regarding the heightened risks posed by racialised defendants.[110] It is notable that the disparities arise in cases concerning offences at the higher end of the severity scale, as this is where concerns about risk to the public are likely to be most acute.[111]

4.52 Whether the disparity revealed by our data can be explained with reference to systemic biases within the criminal justice system, bias from decision-makers, or most likely a combination of both, this is an area that requires greater attention. In 2017, the Lammy Review highlighted the need to address data gaps in the magistrates' courts, particularly regarding remand decisions. Our results further highlight the need for greater scrutiny of decision-making in the magistrates' courts and racial disparities arising from these decisions. The Ministry of Justice should engage with academics to measure bias within remand decision-making.[112]

4.53 It is regrettable that the size of our data set is not comprehensive enough to allow for an examination the experiences of different non-white groups. Responding effectively to racial inequalities requires sensitivity to the different experiences of different racialised groups. Future work in this area should be mindful of this.

Foreign National Status

4.54 For observed cases non-UK nationals were almost 50% more likely to be denied bail than their UK national counterparts, where the exceptions to bail in the Bail Act are cited. This supports

[108] Professor Clifford Stott et al, *Understanding ethnic disparities in involvement in crime – a limited scope rapid evidence review* (2021); Dr Patrick Williams, *Being Matrixed – The (Over)policing of gang suspects in London* (2018).

[109] Professor Clifford Stott et al, *Understanding ethnic disparities in involvement in crime – a limited scope rapid evidence review*, (2021); Dr Patrick Williams, *Being Matrixed – The (Over)policing of gang suspects in London*, (2018). See also JUSTICE, *Written Evidence: The role of adult custodial remand in the criminal justice system* (2022) para. 14; JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System* (2021).

[110] Professor Clifford Stott et al, *Understanding ethnic disparities in involvement in crime – a limited scope rapid evidence review*, (2021).

[111] It is also worth noting that this issue is not specific to magistrates' courts. Analysis of data from the Crown Courts has revealed that individuals from racialised backgrounds are between 2 and 24 % more likely to be remanded in custody compared to their white counterparts. The effect of offence severity on remand is larger among defendants from racialised backgrounds compared to white defendants. Kitty Lymperopoulou, Patrick Williams and Jon Bannister, *Ethnic Inequalities in the Criminal Justice System*, (2022).

[112] JUSTICE, Written Evidence: The role of adult custodial remand in the criminal justice system (2022); JUSTICE, *Tackling Racial Injustice: Children and the Youth Justice System* (2021), recommendation 43 (para 4.56).

previous research suggesting that non-UK nationals may be perceived by decision-makers as lacking community ties and thereby posing a greater risk of absconding than UK nationals.[113] This perception persists despite little evidence to suggest foreign national offenders fail to surrender to court more frequently than UK nationals.[114]

FIGURE 4.6: Relative Rate Index (RRI) for remand for non-UK nationals compared to UK nationals

Remand	1.46	(199,44)

4.55 Prior recognition of the potentially prejudicial impact of perceived foreign national status is reflected in changes made to the CrimPR in early 2021 to no longer require defendants to state their nationality during pre-trial proceedings.[115] This followed reports that the requirement was perceived by practitioners as discriminatory and damaging to the perception of fairness in the justice system.[116] It is concerning, therefore, that our data showed defendant nationality being stated in court in cases observed well after these changes came into force,[117] especially as our research provides evidence that non-UK national status does, in fact, have an adverse impact on defendants' likelihood of being granted bail.

Representation

4.56 Across the cases observed, 11% of defendants had no legal representation. Non-white defendants were slightly more likely to be without legal representation than white defendants, at 10% and 12% respectively.[118]

4.57 There is evidence to suggest that unrepresented defendants in the criminal courts generally have more negative experiences, are less able to participate, and are subject to harsher outcomes than represented defendants.[119] Lack of representation has also been said to have a negative impact on the efficiency of court proceedings.[120] However, the lack of routinely published data on legal representation in the magistrates' courts has made it hard to evaluate the extent and impact of lack of legal representation this context.[121]

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[113] Failure to surrender is an exception to bail under the Bail Act and community ties are included in a bundle of considerations in support of the exceptions to bail. For previous research see May Robinson, A suspect population: An examination of bail decision making for foreign national women in criminal courts in England and Wales, (2022).

[114] Transform Justice, Written evidence from Transform Justice: The role of adult custodial remand in the criminal justice system, (2022).

[115] The Criminal Procedure (Amendment) Rules 2021.

[116] Commons, *How the requirement to declare nationality is undermining equality before the law*, (2020).

[117] Nationality was recorded in 359 cases which took place in 2022. 59 where recorded as being non-UK-nationals. This figure excluded those recorded as having dual British citizenship.

[118] These figures take into account the distribution of ethnicities in the sample.

[119] For an overview of research see Centre for Public Data, 'Unrepresented defendants in the magistrates' courts: Why better data is urgently needed and how the government can publish it' (2023).

[120] Ibid, p. 4.

[121] In 2015 the Ministry of Justice conducted a study across five magistrates' courts, which revealed that 13 % of defendants in the magistrates' courts had no legal representation. However, this is the only publicly available data on the representation of defendants in the magistrates' courts. See Ministry of Justice, 'Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales and indicative volumes in magistrates' courts' (2016).

4.58 Overall, our data showed that unrepresented defendants were 53% more likely to received unconditional bail than their represented counterparts (see figure 5.7). This might initially seem counterintuitive, given the evidence that lack of representation leads to worse outcomes for defendants.[122] However, we consider that this likely reflects the fact that unrepresented defendants for low-moderate severity offences may anticipate unconditional bail as an outcome and therefore do not seek representation.

4.59 Notably, however, those accused of high to very-high severity offences who were unrepresented were 44% more likely to receive an outcome of remand in custody that their represented counterparts (see figure 4.7). This shows that for more serious offences, where questions of bail are more likely to arise, lack of representation may lead to substantially worse outcomes for defendants.

FIGURE 4.7: Relative Rate Indices (RRI) for unrepresented defendants compared to represented defendants

	Total	Low-Moderate	High-Very high
Remand	0.93	0.91	1.44
C- bail	0.79	0.73	0.73
Remand/C-bail	0.85	0.8	1.14
U-bail	1.53	1.66	0.47
n	(651, 79)	(463, 63)	(173, 12)

4.60 More data is needed to fully evaluate the relationship between legal representation and remand outcomes in the magistrates' courts. This should include data on the overall number of unrepresented defendants in the magistrates' courts, as well as linked data concerning remand outcomes. Given that a lack of representation appears to increase the likelihood of custodial remand in cases involving more serious offences, more data should also be published on the types of offences where defendants are likely to represent themselves.

4.61 Our observations did not reveal any large disparity between representation for white and non-white individuals. However, given the comparatively small scale of our research, and the vital importance of ensuring fair outcomes in criminal justice matters, attention should also be given to the impact of ethnicity, as well as sex, age, and location, on the likelihood of being legally represented.

4.62 These recommendations reflect those put forward by the Centre for Public Data, whose research has highlighted the relative ease with which HMCTS would be able to extract most of the above information.[123]

Appearance by video-link

4.63 Defendants appearing by video-link were 40% more likely to be remanded in custody, this rose to 76% for defendants accused of high to very high severity offences. Those accused of low to

[122] Magistrates Association, 'Evidence to the Justice Select Committees Inquiry on the Future of Legal Aid' (2020); Transform Justice, 'Justice denied? The experience of unrepresented defendants in the criminal courts' (2016).

[123] The Centre for Public Data, 'Unrepresented defendants in the magistrates' courts: Why better data is urgently needed and how the government can publish it' (2023).

moderate severity offences who appear by video link were 30% more likely to receive the outcome of remand. Defendants appearing by video-link were overall around 40% less likely to be granted unconditional bail (see figure 4.8)

FIGURE 4.8: Relative Rate Indices (RRI) for defendants appearing via video-link compared to defendants present in the courtroom.

	Total	Low-Moderate	High-Very high
Remand	1.4	1.3	1.76
C- bail	0.78	0.87	0.29
Remand/C-bail	1.05	1.04	1.12
U-bail	0.62	0.68	0.55
n	(663, 53)	(479, 39)	(172, 10)

4.64 There are likely a number of confounding reasons for the above results. Defendants appearing by video-link are those who are already in custody. Such defendants might be serving a custodial sentence or be remanded in custody for other matters. Some of the disparity may therefore reflect an increased tendency amongst decision-maker to impose custodial remand on defendants in these situations, either because of the perception that such defendants pose a greater risk of committing further offences on bail, or because they see little point in granting unconditional bail to someone already in custody.[124] Equally, defendants appearing by video-link may be in police custody following arrest. It is possible that those who appear via video-link from police custody are those accused of the most serious offences,[125] and/or are perceived as presenting the most risk.

4.65 The disparity in outcomes for those appearing via video-link compared with those present in the courtroom could also reflect intrinsic problems with the use of video-links in remand proceedings. Previous research has raised concerns that the physical separation of defendants and their lawyers may impact the quality of legal representation they receive.[126] Particular concerns have been raised about the ability of vulnerable defendants to fully participate in hearings where they appear via video-link,[127] as well as the potential disproportionate impact on defendants for whom English is

[124] Note that where this is the case the process for making bail decisions remains the same. Prosecutors are instructed not to consent to "technical bail" in circumstances where a defendant is already in custody in relation to another offence, where there are grounds to believe remand in custody is justified. The grounds for remanding an individual in custody must still be satisfied. See CPS, *Bail: Legal Guidance* (2023). Anecdotal evidence from observers suggests that where defendants were already in custody in relation to another offence remand was almost automatic.

[125] However, in this regard it is worth noting that even for low to moderate offences appearing via video link notably increases the likelihood of custodial remand.

[126] Whilst lawyers are allowed to go to the police station or prison for the video hearing, consult with their client in person, and then sit with them on video for the hearing, many feel better able to defend their client if they appear in court. See Penelope Gibbs, *Defendants on video – conveyor belt justice or a revolution in access* (2017) *Transform Justice*. See also Nigel Fielding, Sabine Braun, Graham Hieke and Chelsea Mainwaring, *Video Enabled Justice Evaluation* (2020), *Sussex Police and Crime Commissioner and the University of Sussex*; Matthew Terry, Steve Johnson and Peter Thompson, *Virtual Court Pilot Outcome Evaluation* (2010), *Ministry of Justice*.

[127] Kai Briscoe, Eleanor Rose and Irina Pehkonen, *An evaluation of remote hearings' impact on the duration and outcomes of hearings and trial cases in the Crown Court* (2023), Ministry of Justice; Janet Clark, *Evaluation of remote hearings during the COVID 19 pandemic* (2021), HMCTS. D.L.F. de Vocht, *Trials by video link after the pandemic: the pros and cons of the expansion of virtual justice* (2022).

not a first language.[128] Research has also indicated that defendants appearing by video-link feel less 'seen' by decision-makers, and have less opportunities to make a good impression.[129] Defendants may be less likely to be seen as credible when they are not present in the courtroom.[130]

4.66 Enabling defendants to appear via video-link is designed to promote efficient administration of justice. However, if it is the case that appearance via video-link disproportionately results in custodial remand, as our research suggests, then this ambition is undermined. To this end, we support the Justice Committee's recommendation that the Government should conduct research into the use of video-links in prisons and police custody.[131] This research should further investigate both the extent to which this technology is impacting the number of individuals being remanded in custody, and the extent to which such technologies effects individual defendants' likelihood of being remanded in custody.

Appearance in secure dock

4.67 Defendants appearing in a secure dock were more than 8 times more likely to receive an outcome of custodial remand compared to defendants sitting in the central area of the courtroom. Such defendants were also 30% less likely to receive unconditional bail (see figure 4.9).

4.68 Part of this difference could be attributable to the fact that defendants appearing in a secure dock may be accused of the most serious offences. However, even for defendants appearing for low to moderate severity offences, those who appeared in a secure dock were over five times more likely to receive custodial remand. They were also around 30% less likely to receive unconditional bail (see figure 4.9). Less notable disparities are apparent for cases at the high to very high severity end of the spectrum.

FIGURE 4.9: Relative Rate Indices (RRI) for defendants appearing in a secure dock compared to appearing in central courtroom.

	Total	Low-Moderate	High-Very high
Remand	8.39	5.3	0
C- bail	0.6	0.7	0.34
Remand/C-bail	1.07	1.1	0.92
U-bail	0.71	0.67	1.57
n	(43, 479)	(31, 357)	(11, 119)

4.69 Our results suggest that appearance in a secure dock may have an adverse impact on outcomes for defendants. JUSTICE has previously documented the possible negative impact on defendants of

[128] Penelope Gibbs, *Defendants on video – conveyor belt justice or a revolution in access* (2017) Transform Justice; Non-English-speaking defendants in the magistrates' court: a comparative study of face-to-face and prison video link interpreter-mediated hearings in England, Yvonne Fowler 2013.

[129] D.L.F. de Vocht, *Trials by video link after the pandemic: the pros and cons of the expansion of virtual justice* (2022).

[130] Ibid.

[131] Justice Committee, Seventh Report of Session 2022-23, *The role of adult custodial remand in the criminal justice system*, HC 264, p. 39.

appearing in a secure dock in criminal proceedings.[132] Appearing in a secure dock can negatively affect a defendant's ability to participate in proceedings concerning them,[133] and communicate with their legal representation.[134] There is also some evidence that appearing in a secure dock may have a negative impact on decision-maker assessments of a defendant.[135]

4.70 Moreover, our research showed no principled reason why some defendants ended up appearing in a secure dock whilst others did not. Whilst there is no statutory basis for the use of the secure dock,[136] the reason for its use in modern times is to prevent escape or violence.[137] However, our research suggests that this may not be a key consideration impacting the use of the secure dock in remand proceedings in the magistrates' courts.

4.71 First, whilst defendants accused of more serious offences are not necessarily more likely to be violent, some correlation between perceived risk of violence and offence seriousness is to be expected. However, appearance in a secure dock did not seem to reflect offence severity – where court position was recorded, the frequency with which defendants appeared in a secure dock was roughly the same for low to moderate and high to very high severity offences – 7.98% and 8.46% respectively. Our observations also showed that defendants tended to appear in a secure dock one after the other, and that cases where appearance in a secure dock was recorded tended to be heard on the same day in the same courtroom in front of the same bench. This suggests that rather than appearance in a secure dock being defendant specific, a range of court specific or practical factors, such as court design, court staff or bench preference, or convenience, may influence whether a defendant appears in a secure dock.

4.72 The seeming lack of principle and consistency in how the secure dock is used from court to court, courtroom to courtroom and even day to day, raises significant issues of fairness, particularly if, as our research suggests, appearance in a secure dock could increases a defendant's likelihood of being remanded in custody. At a minimum, guidance should be provided to decision-makers and court staff on the use of the secure dock in pre-trial hearings in the magistrates' courts. Moreover, given the extra-legal impact appearance in a secure dock appears to have on remand proceedings, consideration should be given as to whether the use of the secure dock in the magistrates' courts can ever be justified.[138] This is particularly so, given the limited evidence of the risk of escape or violence posed by defendants in the magistrates' courts.[139]

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[132] JUSTICE, *In the Dock: Reassessing the use of dock in criminal trials* (2015). In this report JUSTICE argues against the use of both secure and open docks. Our present research suggests that appearing in an open dock may actually improve a defendant's chances of receiving unconditional bail and reduced their chances of being remanded in custody. However, the number of observations for both secure dock and open dock where very low, so caution should be exercised. Moreover, as our 2015 report argues, there are reasons to be sceptical about the use of secure and open docks, aside from impact on outcome.

[133] Linda Mulcahy, "Putting the Defendant in their place: Why do we still use the dock in criminal proceedings?" (2013).

[134] JUSTICE, *In the Dock: Reassessing the use of dock in criminal trials* (2015).

[135] Meredith Rossner, David Tait, Blake McKimmie and Rick Sarre, *The dock on trial: courtroom design and the presumption of innocence* (2017). This study looked at the prejudicial impact of the secure and standard dock on juror perceptions of the defendant.

[136] JUSTICE, *In the Dock: Reassessing the use of dock in criminal trials* (2015).

[137] Ibid.

[138] There have been numerous calls over the years for the abolition of the dock in criminal proceedings, including a recent call from former Lord Chief Justice, Lord Thomas, to abolish docks in the magistrates' courts. For an overview see Howard League, *What if the dock was abolished in criminal courts?* (2020).

[139] Lindy Mulcahy, Meredith Rossner and Emma Rowden, *What if the dock was abolished in criminal courts?* (2020).

Recommendations

4.73 **Recommendation 4:** More data should be gathered on the practice of remanding individuals in custody for their own protection. This should include the demographics of defendants subject to this provision, and data on where this provision is being used. Analysis should be done to identify the factors that increase an individual's risk of being remanded for their own protection. This data should be used to identify and implement suitable community-based alternatives to custodial remand, better suited to addressing vulnerability.[140]

4.74 **Recommendation 5:** Opportunities to be diverted out of the criminal justice system should be available early in the criminal justice process and should form part of a wider strategy to prioritise the welfare of vulnerable individuals over criminal justice responses.

4.75 **Recommendation 6:** The Government should engage with academics to measure racial bias in remand decision-making in the magistrates' courts. Responding effectively to racial inequalities requires sensitivity to the different experiences of different racialised groups. Future work in this area should be mindful of this.

4.76 **Recommendation 7:** More analysis is needed of the relationship between legal representation and remand outcomes in the magistrates' courts. To facilitate this data should be gathered on the overall number of unrepresented defendants in the magistrates' courts, as well as linked data concerning remand outcomes. More data should also be published on the types of offences where defendants are likely to represent themselves. In carrying out this analysis attention should also be paid to the impact of ethnicity, as well as sex, age, and location, on the likelihood of being legally represented.

4.77 **Recommendation 8:** The Government should conduct research into the impact of appearing for a remand hearing from prison or police custody via video-link. This research should investigate both the extent to which this technology is impacting the number of individuals being remanded in custody, and the extent to which such technologies effects individual defendants' likelihood of being remanded in custody.

4.78 **Recommendation 9:** Guidance should be provided to decision-makers and court staff on the use of the secure dock in pre-trial hearings in the magistrates' courts. Serious consideration should be given as to whether the use of the secure dock in the magistrates' court can ever be justified.

[140] Whilst identifying suitable community-based alternatives is outside the scope of this report, provision of pre-trial accommodation for those who otherwise wouldn't have any has been brought to our attention as one of a range of possible alternatives.

VI: CONCLUSION

4.1 The data presented above reveals several concerning trends in magistrates' courts decision-making that warrant further investigation.

4.2 Our data suggests that the processes for determining bail may not be being properly followed in the magistrates' courts. This has been shown to undermine the fairness of remand proceedings and increase the risk of custodial remand being inappropriately imposed. Fairness in remand proceedings, including the ability to effectively participate, is crucial, as is ensuring that remand is only used as a last resort. A lot is at stake in remand decisions, both for the defendant and, given the current context of prison overcrowding, the criminal justice system as a whole.

4.3 Relatedly, our data raises concerns about the quality of decision-making. Fully reasoned decisions, which made reference to the Bail Act and the facts of the case, were rarely provided by decision-makers. This not only represents a failure to follow proper procedure, but it also makes it hard for such decisions to be scrutinised, making it difficult to establish the extent to which custodial remand is being overused, and the reasons for this. That decision-makers rarely interrogated prosecution advocates on their submissions, along with the high level of concordance between bail conditions sought by the prosecution and those imposed by decision-makers, raises further concerns about the quality of decision-making and the engagement of decision-makers, and in particular magistrates, in the adversarial process.

4.4 Our data also shows concerning disparities in outcomes for non-white defendants, foreign national defendants, defendants lacking representation, and defendants appearing via-video link and in a secure dock. Whilst various reasons have been put forward for these disparities in outcomes, they may also reflect issues with decision-making. This report raises concerns about the risk aversion of decision-makers, and the possible impact this may be having on the outcomes of remand hearings. In particular, our data raises questions about how perceptions of risk may contribute to biased decision-making – something likely to be exacerbated by the lack of diversity amongst decision-makers.

4.5 The findings in this report provide a starting point for identifying and evaluating problems with remand decision-making in magistrates' courts. However, more comprehensive, systematic data collection and analysis needs to be conducted to identify the extent of the problems uncovered by this report, and the most effective solutions for them. Our understanding is that the government already collects some of the types of data outlined above. This data should be made public, and the government should work with academics and NGOs to evaluate it at a nationwide level. Where data types outlined in this report are not systematically collected, the government should work to put systems in place to collect and publish such data.

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