



What's wrong with remanding children to prison?

Remand briefing one: Emerging themes

Image: Andy Aitchison

Howard League for Penal Reform

Key points

- The number of children remanded to custody increased between 2017 and 2019, even though the number of children sentenced to custody has been falling since the late 2000s
- Two-thirds of children remanded to custody do not get a prison sentence
- In 2019/20, Black and mixed-race children were more likely to be remanded to custody than white children and more likely to be acquitted at trial
- During the Covid-19 pandemic, children were held in custody on remand for excessively long periods with an impoverished and restricted regime
- Work by the Howard League with children on remand in prison in 2021 identified that children are spending months on remand because of the failure of the services around them
- Some children do not apply for bail or are unsuccessful because the local authority has failed to meet its statutory duty to provide a safe place for them to live in the community
- Children with adult co-defendants are often left waiting on remand for long periods
- Children's experiences of exploitation were often not sufficiently explored and factored into remand decisions
- Transferring children who turn 18 while on remand to adult prisons is damaging to their welfare and long term prospects.

Introduction

Remanding a child to custody disrupts their life, their plans for the future and their relationships with friends and family. Penal institutions are always harmful and (re)traumatising for children (Gooch, 2016; Peterson-Young, 2021). Children's experiences in custody became far worse during the Covid-19 pandemic. Many children spent over 22 hours a day in their cell for months at a time, compounded by excessive delays in the court process (Howard League for Penal Reform, 2020a).

Most remanded children will not get a prison sentence. Since 2011, the Youth Justice Board has published annual data on sentencing outcomes for children who have been remanded to custody. In every year from 2013 to 2020, more than six in 10 children who were remanded to custody were either acquitted or given a non-custodial sentence. From 2015 onwards, this rose to approximately two-thirds of children remanded to custody (Ministry of Justice, 2021, Table 6.3; Ministry of Justice, 2017, Table 6.5).

Qualitative research shows that sentencing and remand decisions in England and Wales are based on different criteria. Sentencing decisions focus on the evidence and the offence, whereas remand decisions focus on perceived risk and perceived welfare needs of the child. As a result, remand decisions punish children for the accumulated disadvantage which they have experienced in and beyond the criminal justice system (van den Brink, 2021a).

Black and minority ethnic children, children with disabilities and children from deprived backgrounds receive harsher remand decisions. Children who have been excluded from education are less likely to be given bail, even though exclusion is in turn linked to other forms of marginalisation and disadvantage – including racism, poverty, status as a child in need and special educational needs (van den Brink, 2021b; Timpson, 2019).

The number of children sentenced to custody has fallen dramatically over the past fifteen years and remains on a downward trajectory. However, remand decision-making has not followed the same pattern and whilst the

number of children in prison on remand has reduced, they have become a growing proportion of children in custody. In June 2021, remand was the most common legal basis for holding children and eighteen year olds in youth custody. Forty-six per cent of the youth custodial population – almost half – were held on remand (Her Majesty's Prison and Probation Service and Youth Custody Service, 2021, Table 5).

Despite improvements in sentencing, remand decisions continue to punish children for the failures of the services around them. This injustice is compounded by racial disparities in remand and, during the pandemic, by children's experiences of isolation in custody and long court delays.

There is no independent scrutiny or review of remand decisions, which can be particularly egregious for Black and minority ethnic children.

The Howard League's work on child remand

Over the years, the Howard League has seen from its legal work that children are let down by statutory services when they try to seek bail or await sentencing. Some local authorities fail to provide accommodation and support and in many instances YOTs and criminal lawyers do not put pressure on children's services to comply with their statutory duties.

The Howard League's work has regularly involved supporting children who contact our legal service with their bail applications. Howard League lawyers make sure that a package of accommodation and support is in place, liaise with criminal solicitors to bring forward sentencing hearings or make bail applications and ensure that information about children with particular vulnerabilities is available. This work has to be done after a child has already spent time in custody because it was not done properly from the start.

In March 2021, Howard League lawyers began working with staff at a children's prison to identify children on remand with unmet legal support needs with a view to understanding why they were there and to see if they could be supported to get bail. This briefing is based

on the first stage of the project, which included legal casework with eight boys, all of whom were subsequently acquitted or sentenced. Most were not given prison sentences at court. Four received non-custodial sentences, two were acquitted and two were sentenced to immediate custody.

Howard League lawyers wrote to children, reviewed their documents and liaised with their YOT workers and (where relevant) local children's services. In four cases, the Howard League wrote letters of mitigation which were used at children's sentencing hearings. Alongside its work with individual children, the Howard League reviewed the academic and policy literature on remand and reflected on the legal and policy issues arising in its casework. This briefing presents the emerging themes from the work with children in context.

The Howard League's expertise in working with children on remand

The project builds on the Howard League's previous work with children on remand.

Between 1993 and 1997, the Howard League ran a Troubleshooter Project which worked with 15 year olds who had been remanded or sentenced to custody. The Troubleshooter, a barrister, supported children on remand by liaising with their youth justice team, advising on bail support proposals, appealing to the crown court for bail and exploring the availability of local authority secure beds.

Then as now, the Troubleshooter Project found that remand was used inappropriately and that it entrenched racial discrimination. Of the 345 remanded children who were referred to the project, 154 (45 per cent) were from ethnic minority backgrounds. 108 children – 31 per cent of all remanded children – were from Caribbean backgrounds. Fifty-eight per cent of all remanded children in the project and 61 per cent of children from Caribbean backgrounds did not go on to receive a prison sentence (Howard League, 1997).

Since 2002, the Howard League has provided a specialist legal advice service for children and young people aged 21 and under in custody. In the year from March 2020 to February 2021,

young people were most likely to contact the Howard League about resettlement issues (24 per cent of all cases). These cases included young people who had been remanded to custody for extended periods, but who could have been living safely in the community if the right support had been in place. Howard League lawyers support children who are on remand by liaising with YOTs and children's services and by writing letters of mitigation for children's sentencing hearings.

During the Covid-19 pandemic, the Howard League has challenged the pre-trial detention of children through its publications and through correspondence with the Ministry of Justice. In spring 2020, the Howard League and Garden Court Chambers published a practitioners' guide to ending the detention of unsentenced children during the pandemic (Howard League and Garden Court Chambers, 2020).

Context: changes in the child prison population over time

The youth custodial population

Over the past fifteen years, the number of children in prison has fallen significantly. About 3,000 children were held in custody at any given time in 2006/7, compared to under 800 in 2019/20 and less than 500 in June 2021 (Her Majesty's Prison and Probation Service and Youth Custody Service, 2021, Table 1).

The number of children in prison has never been lower and there could be no better time to tackle the continued injustices in children's entry to custody, including racial discrimination and the unnecessary use of custodial remand. Nearly a third of children in prison overall and more than a third of those remanded to custody are Black, though Black people make up only about three per cent of the general population (Her Majesty's Prison and Probation Service and Youth Custody Service, 2021, Table 6; Ministry of Justice, 2021a, Table 6.7; Ethnicity Facts and Figures, 2018).

Until 2017, the number of children held in custody on remand fell alongside the number of children sentenced to imprisonment. Between 2017 and 2020, the average number of sentenced children in custody continued to fall (by 13 per cent). Yet the average number of

children in custody on remand rose and then stalled (Ministry of Justice, 2021a, Table 6.3). In the five years from January 2016 to January 2021, the proportion of children in custody who were on remand doubled from 20 per cent to 40 per cent (Bateman, 2021).

Legislative and policy responses to the overuse of remand for children

The data shows that attempts to significantly reduce the use of remand for children through changes to the statutory test (Legal Aid, Sentencing and Punishment of Offenders Act 2012) were unsuccessful.

Even before the Covid-19 pandemic, the overuse of remand for children was raised with the government. In 2019, the Independent Inquiry into Child Sexual Abuse (IICSA) reported on the sexual abuse of children in custodial institutions. The inquiry described serious concerns about the culture and ethos of young offender institutions (YOIs) and secure training centres (STCs) and recommended research into why so many children were being held in custody on remand (Independent Inquiry into Child Sexual Abuse, 2019).

Parliament's Justice Committee raised concerns about remand in November 2020, in the first report of its inquiry into children and young people in custody. The committee found that racial disparities in remand had not been adequately explained, urged the Ministry of Justice to provide more information about its review of remand and expressed concern about children being remanded to custody pending psychiatric reports (Justice Committee, 2020).

The Ministry of Justice has carried out a review of remand in response to IICSA's recommendation, which is due to be published in 2021 (Ministry of Justice, 2019). In summer 2020, the Youth Custody Service sought to review the status of all children on remand (Frazer, 2020).

Subsequently, the government proposed changes to remand for children in its Police, Crime, Sentencing and Courts Bill. Clause 131 of the Bill increases the threshold for remanding children to custody. The white paper that preceded the Bill expressly stated that the changes were designed to reduce the

unnecessary use of remand for children. If this clause is passed, courts will be prompted to consider the interests and welfare of a child before remanding the child to youth detention accommodation. Courts will be unable to remand a child to custody unless they believe that the child is very likely to receive a custodial sentence, that the risks posed by them cannot be managed in the community, and that any history of offending or absconding is both recent and significant (Police, Crime, Sentencing and Courts Bill 2021).

These attempts to tackle the overuse of remand for children are welcome and could lead to positive change for children on remand. However, the current law is sufficiently flexible to allow fewer children to be remanded and this has not happened.

The impact of Covid-19

From March 2020 onwards, the restrictions introduced to cope with the Covid-19 pandemic compounded existing court backlogs (Crest Advisory, 2020). Trials were delayed for months at a time, while youth court closures led to fewer bail and remand hearings (Her Majesty's Inspectorate of Probation, 2020). Children spent longer on remand than normal, in significantly worse circumstances. Most children in YOIs were locked in their cells for more than 22 hours a day for months and their families were unable to visit.

Over the first year of the pandemic, the average number of sentenced children in custody fell by a third (because of court decisions and delays; no children were released early because of Covid-19). Meanwhile, the number of children in custody on remand fell by only two per cent – an average of six fewer children in prison each month. In June 2021, nearly half of the children and eighteen year olds in youth custody were on remand (Her Majesty's Prison and Probation Service and Youth Custody Service, 2021, Table 5).

Even before Covid-19, the average length of time which children spent in custody on remand was increasing. Remanded children spent an average of 33 nights in custody in 2019/20 (the median length), compared to 29 nights the year before and 21 nights in 2014/15. Seven per

cent of remand episodes were longer than six months and two per cent were longer than nine months (Ministry of Justice, 2021, Table 7.27a).

In May 2020, the Howard League published a briefing on children's experiences in prison during Covid-19. Children had told Howard League lawyers that they were getting only half an hour of fresh air a day and that they had unsuitable worksheets pushed under their cell doors by way of education. The Howard League spoke to children who were anxious about their family members and cut off from the outside world: no visits could take place and many support services had withdrawn from custody (Howard League, 2020a).

Remand and race

The starkest racial disparities in the criminal justice system are found in remands to youth custody. In 2019/20, nearly six in ten children remanded to custody were from Black, Asian or minority ethnic backgrounds. Thirty-five per cent were Black, 14 per cent were mixed-race and nine per cent were Asian or other (Ministry of Justice, 2021, Table 6.7).

In January 2021, the Youth Justice Board published a report on ethnic disproportionality in remand and sentencing, based on independent analysis of case management and assessment data between 2017 and 2019. The data showed that over this period, 26 per cent of Black children given a remand decision, 23 per cent of mixed-race children and 22 per cent of Asian children were remanded to custody. In contrast, 15 per cent of white children received custodial remand. The report found that demographic and offence-related factors could not explain the greater likelihood of custody for Black and mixed-race children. Instead, the analysis suggested that Black and mixed-race children experienced worse outcomes because practitioners assessed them to be riskier than white children (Youth Justice Board, 2021).

Significantly, the higher rates of remand for Black and mixed-race children are not reflected in higher conviction rates when cases come to trial. In 2019/20, 37 per cent of Black children, 34 per cent of mixed-race children and 29 per cent of white children were acquitted after custodial

remand (Ministry of Justice, 2021, Table 6.7). The year before, 34 per cent of Black children, 31 per cent of white children and 28 per cent of mixed-race children were acquitted (Ministry of Justice, 2020, Table 6.7).

Remand and gender

This briefing is based on casework which took place at a boys' prison. However, the lessons from the casework are likely to apply across the youth estate, including for the small number of girls who are remanded into custody: on average, seven girls were held in custody on remand each month in 2019/20 (Ministry of Justice, 2021, Table 6.3).

In summer 2021, the Youth Custody Service took the unprecedented step of mixing girls and boys in a prison. In the wake of an Ofsted inspection which found that Rainsbrook secure training centre, run by a private company, was failing to keep children safe or effectively care for them, 33 children were moved to other establishments (Ministry of Justice, 2021b). Two of the five girls at Rainsbrook were placed in the Keppel Unit at Wetherby prison, a unit designed to accommodate boys with complex needs. There is a real risk that these recent changes will see more vulnerable girls remanded to male prisons. Girls are more likely to be remanded to prison, ostensibly for their own welfare or protection, a practice which the All-Party Parliamentary Group on Women in the Penal System has said should be abolished. (Howard League, 2020b).

Better community support

When a child is not released on bail, the default option should be remand to local authority accommodation (RLAA). In practice, this is rare.

In 2018, Transform Justice interviewed criminal defence solicitors, youth offending team (YOT) workers and staff from children's services about remand decisions for children. Interviewees agreed that the shortage of suitable accommodation for children aged 16 and over made RLAA more difficult. The research also found that RLAA was often not explored at all, not least because YOTs have so little time to put together a bail package (Gibbs and Ratcliffe, 2018).

Children who have been remanded to local authority accommodation do not have to go to a children's home or supported accommodation. The local authority can place them in foster care, with relatives or in their own family home. However, courts often don't understand bail packages which would return children to their family home and specialist remand foster placements are rare (National Association for Youth Justice and Prison Reform Trust, 2015; Lipscombe, 2003).

There are some examples of good practice among YOTs in providing appropriate accommodation and support in the community. Camden Youth Offending Service (YOS) provides high-risk bail packages with strict conditions for children who are at risk of custodial remand, including Intensive Surveillance and Supervision (ISS) or robust alternatives. The YOS has regular meetings with children's services and has created a flowchart which explains the RLAA process and the role of both social care and YOS staff. The bail packages have the confidence of the courts and, as a result, children under the supervision of Camden YOS are almost never remanded to custody.

Emerging themes from the Howard League's child remand project

Based on its casework so far, the Howard League has identified four issues faced by children who are remanded to custody:

1. The court backlog means that children are spending unnecessarily and unlawfully long periods of time in custody
2. Children are let down by inadequate professional and legal responses to exploitation
3. Children's services often fail to provide wrap-around support and accommodation for children on remand, even though they have a statutory duty to do this
4. Eighteen-year-olds are transferred to the adult estate midway through trial when this is not in their best interests, especially in the context of Covid-19.

1. The court backlog

Some children spend extremely long periods on remand in custody. In the most extreme

example, one child who we worked with had been in custody for a year and five months by the time he was sentenced. He was given a community order.

Children with adult co-defendants were most likely to spend an extended time in custody on remand. Where a child is charged jointly with an adult who is tried in the crown court, the child must be sent to the youth court unless a joint trial is in the interests of justice (Sentencing Council, 2016).

In July 2020 Justice William Davis, the Judicial Lead for Youth Justice, published a note about allocations during Covid-19. The note was endorsed by the Lord Chief Justice, the President of the Queen's Bench Division, the Chairman of the Sentencing Council and the Senior and Deputy Presiding Judge. It explained that the impact of Covid-19 on crown court listings was:

"an obvious additional factor to be considered when applying the interests of justice test ... It may lead to youths being tried separately in the Youth Court, whereas previously they would have been sent for trial to the Crown Court jointly with the adult defendant(s). This is because the disadvantages of delay in trying the youth or youths may outweigh any injustice of separate trials." (Davis, 2020)

Criminal lawyers and the judiciary should seek to sever trials where possible, especially in the context of crown court delays and the restricted regime in custody. Yet in its casework, the Howard League found that the disadvantages of delay for children were not always being considered.

In one case, Howard League lawyers were told that a judge had decided not to sentence a child until his adult co-defendants went to trial. The court did not consider the fact that the child would turn 18 later in the year and risked missing out on vital support from children's services and being sent to an adult prison.

In another case, the Howard League supported a child who had pleaded guilty and yet spent nearly a year and a half on remand awaiting sentence. The child's adult co-defendants had pleaded not guilty and were awaiting trial. His criminal lawyers did not argue that he should be

sentenced as soon as possible and separately from the adults until the Howard League intervened. His sentencing hearing was brought forward and he got a community sentence. The child did not understand the reasons for the delay and felt that he had been failed.

In autumn 2020, the government extended the length of time which children and adults could spend in custody before trial. Although this was subsequently reversed following a legal challenge, many children were affected (Howard League, Just for Kids Law and Liberty, 2020; Just for Kids Law, 2021). Half of the children who the Howard League worked with on the project were held in custody on remand for more than 182 days, and two for more than 238 days.

2. The response to exploitation

Four of the children the Howard League worked with on the project had recorded concerns about criminal exploitation in their files. Two children were thought to have been exploited in the past, but this had not been picked up and there was no National Referral Mechanism (NRM) referral. One child had a positive NRM on “reasonable grounds”, but no “conclusive grounds” decision – despite repeated chasing on the part of his YOT worker. Another child had a conclusive grounds NRM for exploitation which had taken place when he was 14. Though his offence was linked to this exploitation, he received a long custodial sentence.

While some children who have committed offences as a direct result of their exploitation may be able to use the defence set out in s45(4) of the Modern Slavery Act 2015, many offences are excluded (Modern Slavery Act 2015, schedule 4). In the Howard League's project, both children with positive NRMs had been charged with excluded offences. Children are also let down by a lack of awareness about the defence among criminal lawyers, long delays in the NRM process and the high evidential threshold for proving exploitation in court.

Once an NRM referral is made, it is considered by Home Office caseworkers at the Single Competent Authority. The caseworkers first make a “reasonable grounds” decision (whether they suspect that the person is a

victim of exploitation/modern slavery) and then, after collecting more evidence, a “conclusive grounds” decision based on the balance of probabilities. At the beginning of 2021, there were nearly 18,000 outstanding conclusive ground decisions. The median waiting time for a decision was 430 days (Independent Anti-Slavery Commissioner, 2021). In the Howard League's project, NRM delays meant that a child who was awaiting sentence did not receive a conclusive grounds decision before he turned 18 or before the sentencing hearing – despite the Single Competent Authority agreeing to escalate his case.

3. Accommodation and support

In its wider resettlement casework, the Howard League is frequently contacted by and about children who remain in custody because they do not have a safe place to live in the community.

The local authority should provide suitable accommodation for children who do not have a safe place to live on bail (whether it is the child or the court who feels that their existing home, if they have one, is unsafe). All children on remand are legally “looked after” by their home local authority. Guidance from the Department for Education clearly states that: *“Where a child is remanded to local authority accommodation, the designated local authority is responsible for identifying a suitable placement. For as long as they remain looked after, these children are entitled to the same care planning and review processes as other looked after children”* (Department for Education, 2021). The Children Act additionally requires local authorities to provide accommodation and support for any child in need who does not have suitable accommodation or care in place (Children Act 1989, s20).

When a child applies for bail, their YOT worker must put together a bail support proposal which sets out – for example – how often a child will report to their YOT worker, any non-contact and curfew arrangements, any required engagement in education and where the child will live.

In both the remand project and its wider resettlement casework, the Howard League has found that children's services often fail to provide accommodation or support for children who

might otherwise be released from custody on bail. YOT workers often do not expect children's services to find and pay for accommodation and so are reluctant even to ask for this. Howard League lawyers find themselves chasing up local authorities that have had minimal, if any, engagement with the children who they are legally looking after.

In the remand project, several children's bail applications were undermined by local authorities' unwillingness to fund alternative accommodation and by poor communication between YOTs and children's services. There was one example of good practice, where a YOT proactively worked with children's services to make sure that a child had somewhere safe to go if they were released on bail.

4. Transfers

When a child turns 18, they are transferred to the adult prison estate. As the Howard League has argued previously, it is almost always best for young people who are on remand to stay in the children's estate. Abrupt transitions can add to the stress prior to trial or sentence and disrupt preparation (Howard League for Penal Reform, 2020c).

Pre-sentence reports for young people remanded to custody often draw on correspondence with their custody caseworker, and a young person's behaviour in custody and engagement with education and courses can be important factors in mitigation. When an 18 year old is transferred before sentencing, information about their behaviour and progress in custody becomes fragmented between prisons and there is often little education or contact with officers in the adult local prisons.

Transition to the adult estate is likely to be especially difficult for young people in the context of Covid-19. The Howard League supported one young man who turned 18 during the

project and was transferred to an adult prison. At the point of transfer, he had been convicted but was awaiting sentencing. Previously, at a YOI, he had spent four or five hours a day out of his cell. In the adult estate, he was only able to leave his cell for 45 minutes a day.

Youth Custody Service guidance states that transfers to the adult estate "should take place at an appropriate point based on the best interests of the young person" (Her Majesty's Prison and Probation Service and Youth Custody Service, 2017). Transfer is unlikely to be in the best interests of a young person who is awaiting trial or conviction.

Looking ahead

This briefing summarises the emerging themes from a legal support project on remand, based on casework with a small number of children on remand in one prison in spring and summer 2021. The emerging themes will inform the Howard League's casework with children on remand in the next stages of the project, as well as a leaflet which the Howard League is producing for children. Future publications will discuss the experiences of children on remand and how criminal lawyers can effectively support children with bail applications and resettlement.

About the Howard League for Penal Reform

The Howard League is a national charity working for less crime, safer communities and fewer people in prison.

We campaign, research and take legal action on a wide range of issues. We work with parliament, the media, criminal justice professions, stakeholders and members of the public, influencing debate and forcing through meaningful change.

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