

**Path of little resistance: is pre-trial
detention of children really a last
resort?**

By Penelope Gibbs and Fionnuala Ratcliffe
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About Transform Justice

Transform Justice is a national charity campaigning for a fairer, more humane, more open and effective justice system. Penelope Gibbs set up the charity in 2012 to help create a better justice system in the UK. Transform Justice promotes change through generating research and evidence to show how the system could be improved, and by persuading practitioners and politicians to make those changes.

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Foreword

This report shines a light on the scandal of the overuse of custodial remands for children.

Every child remanded to prison has been placed there following a series of decisions, actions or omissions by adults in the criminal justice system.

Applications are made by a prosecutor for a child to be remanded to custody. Lawyers representing children are responsible for resisting such applications and making further applications for bail. Youth offending team and social workers are responsible for preparing plans that can be used as alternatives. Magistrates and judges make the final decision. At every step of the way, these decisions by adults have an important part to play in whether or not a child is remanded to custody. As a solicitor for the Howard League for Penal Reform's specialist legal service for children in prison, for over a decade, I have seen first-hand how these chains of decisions can go terribly wrong and result in the unnecessary incarceration of children in the absence of sufficient thought, effort and resources.

In addition to uncovering current practice surrounding remanding children to custody, the report makes clear recommendations aimed at each group of adults involved in the process.

Custody is the most serious punishment that can be imposed in our society. At the present time, it is much more than a deprivation of liberty: for many it can be a deeply traumatic experience, and on occasion, such as in the tragic suicide of William Lindsay at Polmont in Scotland, it can be a death sentence.

The UK, along with every other country in the world except for the US, has signed up to the principle that children should only be detained as a last resort (UNCRC Article 37). In other words, it is widely

accepted that any detention of a child must be absolutely necessary. Yet, despite legislation in 2012 designed to reduce the number of children remanded to custody, remanded children now make up a quarter of the child prison population compared to one-fifth when that legislation was introduced. Not only is it prolific but it is often misguided: as this report reveals, around two thirds of children who are remanded to custody do not go on to get a prison sentence and 180 children were remanded to custody for 7 days or less in the course of a single year. The data speaks for itself: the over use of remands to custody is a flagrant breach of children's rights.

On top of the central concern that we remand too many children to prison, it is especially troubling that in doing so, we discriminate against children from ethnic minorities: 54 per cent of children remanded to custody are from black and minority ethnic backgrounds (BAME). This figure is greater than the over representation of minority children in prison generally and significantly more than the proportion of BAME children arrested by the police: 45 per cent of sentenced children in prison are from minority backgrounds and just 23 per cent of child arrests involve children from minority backgrounds. Research shows that minority defendants are more likely to be acquitted or their cases discontinued than other defendants.¹

This report provides a vital snapshot of the overuse of custodial remands for children, illustrating shocking data and revealing systemic failures.

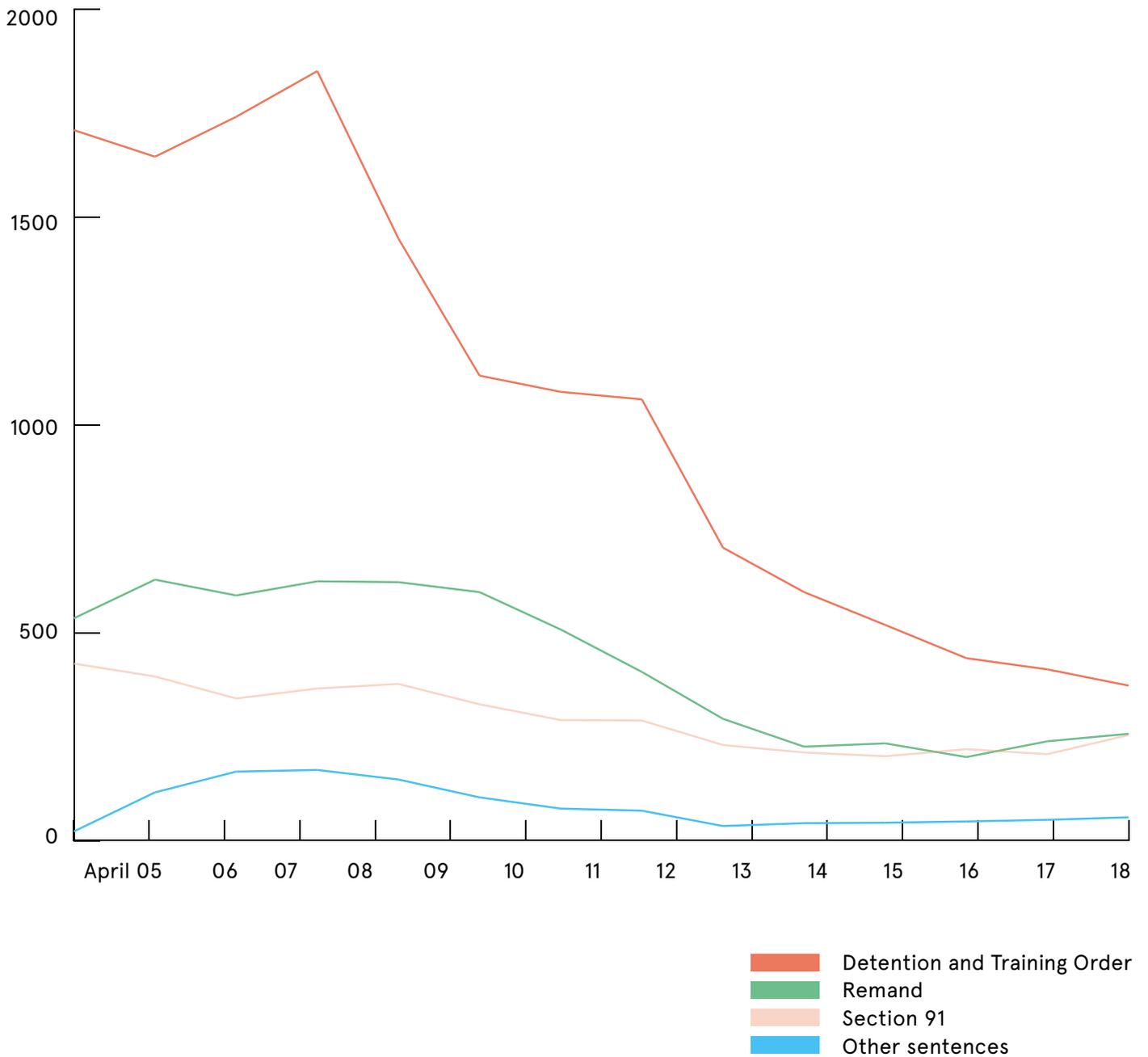
Something is going seriously wrong in the decision-making affecting children who are remanded to custody. This report is an important warning bell that we ignore at our peril.

*Dr Laura Janes
Legal Director, Howard League for Penal Reform*

Figure 1

Number of children in custody by legal basis over time

Source: Ministry of Justice Youth Custody Data, Under 18 secure population by legal basis for detention, 2005/06 - 2018/19²



Executive summary

Too many children are imprisoned before a court has found them innocent or guilty. Remand – as this type of imprisonment is known – is overused, when it is internationally recognised that imprisonment for children (under 18 year olds) should be a last resort for the shortest appropriate period. Most children on remand are maintaining their innocence. At trial, most are either found not guilty or given a non-custodial sentence. This brings into question the use of imprisonment for children who have been accused of crimes, but have not yet had their case heard in court.

Last year children were remanded in custody 1,269 times. Remand is a limbo period and as such can be even more damaging than a short sentence. A child on remand has the stress of being catapulted into prison with scant warning and, once in, they never know when or if they might be getting out. The prison inspectorate's last survey revealed that unsentenced boys reported a poorer experience than sentenced, including being more likely to feel unsafe, and less likely to take part in activities such as education. Custodial institutions find it hard to engage and do effective work with a child who is there for such a short, uncertain period.

There are many fewer children remanded today than ten years ago, but the proportion of the child custody population is higher and children are still being remanded for short periods, sometimes "instead" of a short custodial sentence. So it seems that despite significant changes in the way custodial remand for children is funded and legislated, we still imprison too many children pre-trial. And the reasons why have not changed much.

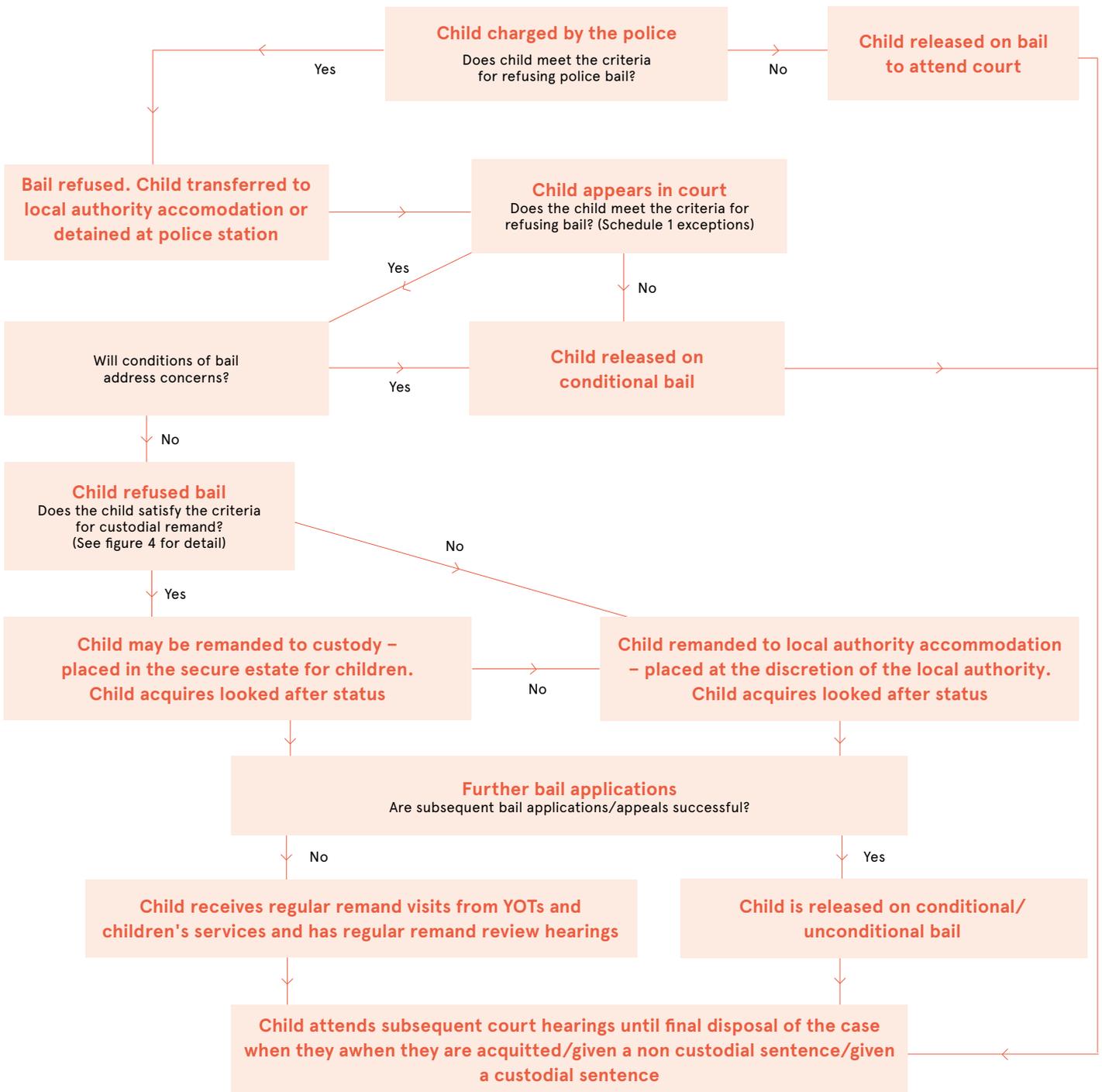
Children are too often treated as mini-adults for remand purposes. They are too often detained in police cells, brought to court in a secure van, held in court cells, brought into court accompanied

by a security guard and placed in a secure dock. Their remand hearing is sometimes presided over by magistrates with no youth training, bail is opposed by non-specialist prosecutors, and the law applied mirrors adult remand law. As with adult remand decisions, magistrates and district judges tend to be risk-averse, and lack of suitable accommodation means alternatives, such as remand to local authority, are woefully underused.

Our report, the first new research on child remand for nine years, analyses existing data on the children who are imprisoned on remand, and the reasons why they are remanded, and puts forward recommendations for practice and legislative change. If implemented, the remand population could be radically reduced – from the current 21% of the total custody population to 5% or less.

Figure 2

A child's pathway to custodial remand



Methodology

This report draws on previous published research and guidance on child remand, particularly the Prison Reform Trust's "Children: Innocent until proven guilty" report on child remand³ and the National Association for Youth Justice's briefing "Reducing remands to the secure estate"⁴. We reviewed published Ministry of Justice statistics and data received from the Ministry of Justice through freedom of information requests. Transform Justice conducted 12 telephone interviews with officers and managers from youth offending teams and children's services, as well as defence solicitors. We held a roundtable with 17 key stakeholders to discuss draft findings and shape recommendations. We also conducted a Twitter poll on the reasons for release on bail after short remand periods.⁵ The quotes in this report all come from our own interviews, the roundtable discussion or from published guidance and research.

Trends in child remand

The good news is that child custodial remand is being used for fewer children. Numbers have been falling since 2006. Figure 1 shows the number on remand at any one time. The law and funding for child remand were changed in 2012. The LASPO Act introduced more stringent criteria for the use of custodial remand (officially remand to youth detention accommodation), the elimination of an anomaly whereby sixteen and seventeen-year olds were treated differently to other children, and the delegation of remand budgets to local authorities. The child remand population continued to drop for a year after the change in legislation, flattened and then started rising in 2016. Other indicators on child remand are cause for concern.

- A very high proportion (21% in the year ending March 2017) of children in custody are on remand⁶ and this is on the rise. In June 2018, 30% of children in custody were on remand, which is the highest monthly figure for ten years.⁷
- The number of children remanded in custody has fallen much less than the number sentenced to detention and training orders – the most common custodial sentence for children.
- Black and minority ethnic (BAME) children are significantly over-represented at 54% of those on remand. This is higher than the proportion in the sentenced population (45%) and far higher than the general 10-17 population (18%).⁸
- Children are still being remanded for very short periods. Almost half of all remand episodes end within three weeks, with just over a quarter lasting a week or less. The average (median) number of nights on remand is just 23.⁹
- Two thirds of children who are imprisoned on remand do not receive a custodial sentence.¹⁰ 29% are acquitted and 36% receive a non-custodial sentence. Of those dealt with entirely in magistrates/youth courts three quarters of those who are remanded do not go on to receive a custodial sentence, compared with 44% in the Crown Court.¹¹

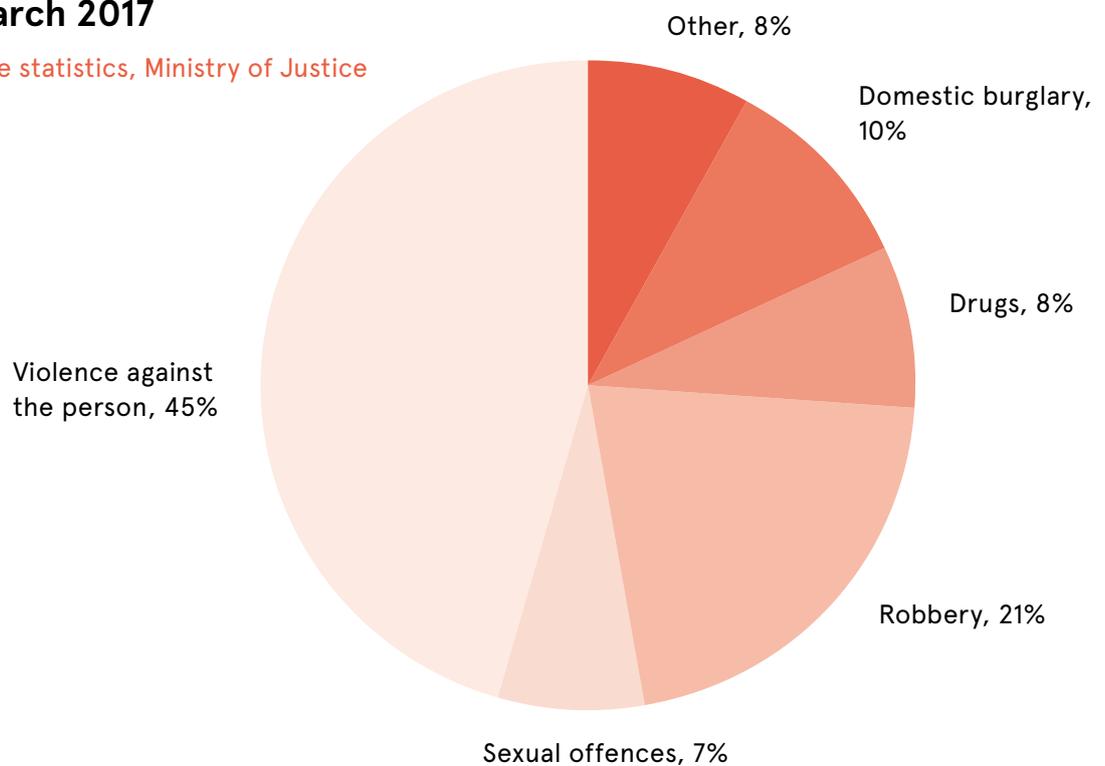
What crimes are remanded children accused of?

It is not clear from the data exactly what kind of crimes children are remanded for. The biggest category (45%) is violence against the person (see figure 3), a broad category which spans involvement in a playground fight to murder. 21% of children are remanded for robbery, 10% for domestic burglary, 8% for drugs, 7% for sexual offences, and 8% for other (such as motoring offences, or racially aggravated offences).¹² At least a quarter of children are imprisoned on remand for offences which are neither violent nor sexual.

Figure 3

Child remands by offence type, year ending March 2017

Source: Youth justice statistics, Ministry of Justice



YOTs we spoke to felt the recent rise in remand (up to 30% of the custodial population in June 2018¹³) may be due to a more punitive and risk-averse reaction to knife crime. The number of offences involving possession of a knife or offensive weapon committed by children has gone up 11% since the year ending 2012, while the number committed by adults has gone down 10% in same period¹⁴. Remand becomes particularly likely if the child is said by the prosecution to be involved in a gang, particularly given that the government's definition of gang-related violence is broad.¹⁵

Because it's a group activity they use the word 'gang'. They're not necessarily in a gang in the way that we would say it, but once they [the police] go down a gang route then that puts them at a disadvantage in terms of getting bail. (YOT officer)

It is understandable that benches and judges may be risk-averse in dealing with those accused of "gang" related and knife offences but safety concerns can and should be met by a tailored bail/RLAA package (see figure 2 and p.17 for alternatives to remand to custody). Children involved in county lines and arrested far away from their home are also at risk of remand.

I can't speak for the other courts, but I think if you're from the city and you end up in some shire, and they're not used to it, they might see these young people as some kind of gangsters. I don't think they see that behind it they might be criminally exploited, or vulnerable. They just see the impact of this visitor to their county selling drugs on a large scale so they might be quite strict. The tolerance level for that sort of thing is low. (YOT manager)

One reason for short remands is that the prosecution sets a temporary charge based on evidence they haven't received yet. Once the police provide the

evidence, the original charge sometimes doesn't stick. They then reduce the charge and the case no longer meets the remand criteria. But no data is available on what proportion of short remands follow this pattern. In a Twitter poll conducted by Transform Justice on the most common reason for release on bail after a short remand period, only 17% of respondents (57 out of 333) said it's because the charge is reduced.¹⁶

Child remand – are the criteria applied and are they right?

If they're being remanded and then they come back and they're not given a custodial sentence, why are you then remanding them? (YOT officer)

I'd rather that the young person got custody at the point of sentence and not this sort of quasi route where they're kept on remand and when they actually get to sentence they're released. (YOT manager)

The criteria for imprisoning on remand are different to those for sentence (see figure 4). There are a number of problems with the way the law is interpreted and with the criteria themselves:

- Several of the criteria are broad and too open to interpretation. "Violent" (as in "has been charged with a violent offence") applies to a wide spectrum of seriousness, while children can be imprisoned for almost all childhood crimes, and it is always possible to argue that there is a real prospect of a custodial sentence being imposed. The criterion that remand is necessary to keep the child from committing further imprisonable offences is a particularly weak link, making it too easy for courts to justify remand to custody.
- Remand to local authority accommodation (RLAA) is often not explored. This option means the local authority takes on "corporate parent" responsibilities and supervises the child in the community (see page 17 for more detail), and should be the default option for those refused bail. The guidance to the legislation says: "Where a child is not released on bail, section 91 of the LASPO Act 2012 requires the court to remand the child to local authority accommodation in accordance with section 92 unless one of the sets of conditions set out in sections 98 to 101 are met"¹⁷.
Guidance to the Crown Prosecution Service

also states that prosecutors should seek RLAA if bail is not appropriate, unless conditions for custodial remand are met.¹⁸ But in practice RLAA is only considered if put forward by the defence as an option.

- Many of the children remanded for short periods are given a community sentence, a fine or a discharge when convicted. So a remand, in practice, replaces a short custodial sentence. This is a misuse of custodial remand which should only be used in circumstances where it is either necessary "to protect the public from death or serious personal injury" or "to prevent the commission of further imprisonable offences."¹⁹

It's unclear whether all remand decisions fully meet the legal criteria, but clear that many remand decisions do not meet the spirit behind the LASPO reforms:

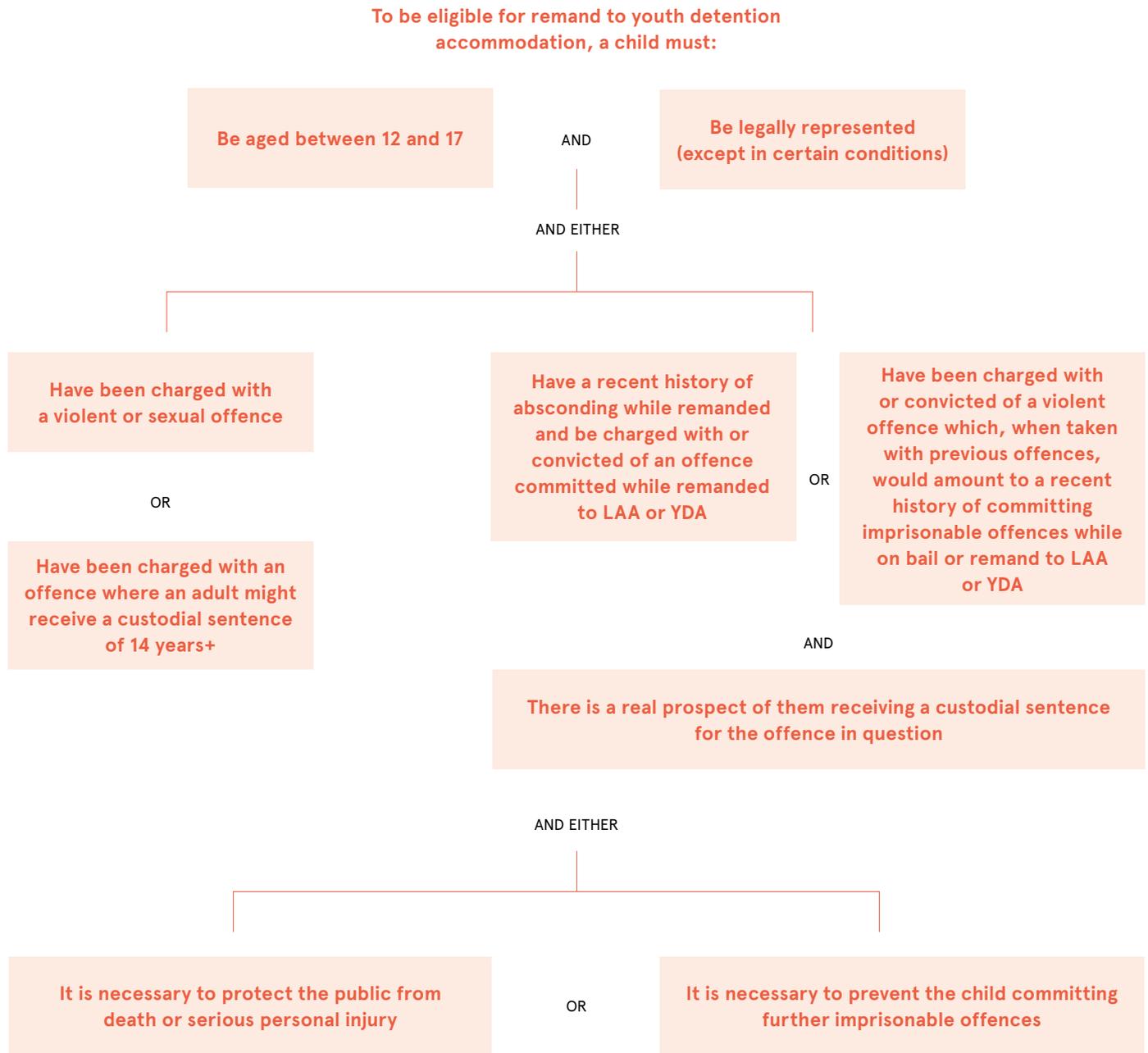
"Changes to the youth remand framework were made following public concern that 17-year olds were being remanded like adults and not on the same principles as younger children... Furthermore, many 15-17-year olds whose alleged offences are not the most serious and whose behaviour does not pose a risk to the public are remanded securely. A better approach to youth remand that maintains community-led supervision, support, education and training is needed".²⁰

One way of ensuring this intention is honoured would be to introduce further changes to legislation, to tighten the criteria even further. Alternatively, knowledge and practice of the current law could be improved. If all prosecutors, YOT staff, defence advocates, legal advisors, magistrates and judges understood both the letter and the spirit of the current legislation, fewer children would be subject to short remands. A particular challenge is to get

Figure 4

Criteria for custodial remand of a child

Source: Adapted from Ministry of Justice, circular no. 2012/06²¹



courts to understand that remand to local authority accommodation should be the default option when bail is refused, rather than a useful option to consider if presented. Judges and magistrates should have to justify in open court why they have not used remand to local authority accommodation when making a decision to remand a child in custody.

Some scrutiny of remand decisions may also help develop practice. Most of those involved in the initial decision to imprison a child on remand probably have no idea if their decision is overturned within days, as can happen if defence press for a hearing by a judge in chambers.

Postcode remand

There appears to be different rates of remand in seemingly similar areas and inconsistency even within the same area: "It's so ad hoc sometimes, one bench would bail a person, another would say no way is this person getting out. There's no parity, everybody's looking at it differently. That's the issue." (YOT officer)

There are considerable differences in the use of remand between one YOT area and another – the rate of remand (number of custodial remands divided by number of convictions) ranges from 1% or lower in Cumbria, Kingston and Richmond, and Portsmouth to 13% in West Mercia.^{22, 23}

Overall many YOT practitioners and defence practitioners thought magistrates and district judges were far more likely to use custodial remand for the equivalent offence than Crown Court judges. Crown Court judges were seen as more understanding of the circumstances of complex crimes and more willing to consider bail applications, to the extent that some defence advocates focus their efforts

on applying for a Crown Court judge to review the magistrates' court decision in a private hearing (judge in chambers): "Sometimes the defence wouldn't bother if it's looking bad for their young person. They'll say... I'm just going to go to a judge in chambers application. I'm wasting my time here." (YOT manager)

Over a quarter of respondents to a Transform Justice Twitter poll said that a change in judge was the most common reason for children getting bail after a short remand period.

Why are so many children on remand from ethnic minorities?

Of the ten remands we've got at the moment, seven of them are BAME young people. They're all in for violent robbery offences. A lot of our BAME come in at high end offences and a lot of them are coming in with knife crime offences. (YOT manager)

I think the reasons [Lammy] gave for the adult BAME population being high... would apply equally to children and young people, which is children in the system not making admissions in interview early, not making any kind of guilty pleas early so therefore they're not engaging with the system in the same way as others do, from other backgrounds. (prosecutor)

The disproportionality of children on remand is shocking and difficult to explain. Over half (54%) of children in custodial remand are BAME – this is higher than in the custodial sentenced population (45%) and much greater than in the general 10–17-year-old population (18%).²⁴ The proportion increases as the remand period lengthens: for custodial remand episodes over 6 months, 62% are BAME children.²⁵ This disproportionality also seems to be getting worse: the proportion of BAME children in custodial remand has increased from 49% in 2015 and 52% in 2016.

David Lammy's report²⁶ on the treatment of, and outcomes for Black, Asian and Minority Ethnic individuals in the criminal justice system suggested some possible causes of this disparity:

- BAME children are over represented at every stage from being stop and searched onwards
- The offences of which BAME children are accused, which may be knife crime and/or gang related are particularly likely to lead to a request for refusal of bail.

- BAME children are apt to plead not guilty and thus to be remanded. This may be due to lack of trust in the justice system, or a higher proportion of BAME children being charged in cases of joint enterprise²⁷: "they just throw a net of conspiracy over a load of kids, then you're going to get more not guilty pleas. There's a stabbing. They arrest seven black kids because they all fit the description of the black kid who did the stabbing and they charge them all because they were there at the time." (defence lawyer)

No research has been done into why the disproportionality of children on remand is quite so high and this needs commissioning.

The rushed process

For ones that are on the cusp it's because there's not been enough time and planning happen before they've landed in court. (YOT manager)

Children attending court for a remand hearing will most likely have been initially denied bail by the police. They are kept overnight in the police station, or in a local authority "PACE" bed, and brought to their court hearing the next day the court sits as required by law. Figure 2 shows the journey a child may take to end up in custodial remand.

If a child is detained by the police, the preparation for their court appearance is done in the worst of circumstances. The YOT will learn early in the morning (or not at all) that a child was detained by the police and is appearing in court. The YOT then has to get to the court, which is sometimes far away, and prepare a bail package in a matter of minutes. If the child is "known", whether because they are "looked after" or because of their offending history, a bail/RLAA packages is easier to assemble, but no package is ever easy, particularly if it involves identifying new accommodation. The time pressure is exacerbated by the desire of benches to get child remand decisions heard as early as possible to prevent children languishing in court cells.

The YOT will need to find information about the child, interview the child, find out about the alleged offence, assess vulnerabilities, liaise with the defence advocate and possibly find and vet new accommodation. This is a tall order, made almost impossible if the child is not known to the YOT or children's services, or is from a different local authority.

No wonder so many children (probably all detained by the police) are remanded for short periods while defence advocates and the YOT get the information they need and put the bail/RLAA package together. 28% of respondents to a Transform Justice Twitter poll said that a delayed bail package was the most

common reason for short remands.²⁸ This fast track process needs to be anticipated, avoided (by reducing the number of children detained by the police) and, when it can't be avoided, slowed down in court.

Anticipating remand hearings

Children who are detained by the police are entered on a database as soon as charged and detained. This may be at 7 at night or 3 in the morning. A high proportion of those detained by the police have their court bail opposed by the CPS. This necessitates fast track action to advocate for bail, but in the case of most YOTs, this fast track action does not start until many hours after the child has been detained. In order to prevent children being remanded unnecessarily it would be ideal if YOTs could start putting a package together earlier, say the evening before the court appearance. If a child is charged and detained on Saturday evening, could someone start working on a bail package on Sunday morning? Or when the police requests a PACE bed from children's services, could they also alert the YOT? It would also be helpful if the police formally charged as soon as possible, rather than delaying this until after the child has woken up in the morning.

The role of liaison and diversion teams

Liaison and diversion services are commissioned by NHS England to support vulnerable people when they first encounter the justice system. They assess health and social care needs, refer on to other services, and divert people from the criminal justice system where appropriate.

There are national standards for liaison and diversion services, which emphasise communication with other agencies as well as a 24/7 service.²⁹ But nothing much is said about how liaison and diversion services could support children at risk of custodial remand. Their presence in police stations puts them in a position to help. For example, they could flag to YOTs when children are being detained by the police (this happens already in some areas). This would allow YOTs to start preparing a bail proposal earlier.

Avoiding remand hearings by reducing police detention

Only children who are detained by the police have to appear in court the next working court day. Children bailed by the police appear in front of the next Youth Court, which may be up to a week after their arrest. All our interviewees were convinced both that the majority of children who get custodial remand are detained by the police first, and that police detention is still over-used. If police detained fewer children, the number who were remanded in custody for just a few days could be reduced.

A Howard League report in 2010 found more than 50,000 overnight detentions of children under 16 during 2008 and 2009.³⁰ The criteria used by the police for denying a child bail are different to court bail criteria – a child can be denied police bail if the police believe they would not attend court, to prevent further offences or injury to others, to prevent interference with police investigations, or for the child's own protection.³¹ A child denied bail and held overnight in a police cell must go in secure transport to court, at which point the court authorities take over care of the child.

Slowing down remand hearings

YOTs and defence advocates need as much time as possible to prepare for a fast track remand hearing. Time is needed to speak to the child to understand risk and what bail package is suitable. YOTs must liaise with relatives to establish whether they can support the child if they were to be bailed. Sometimes a visit to the family member is required, which takes even longer if they live out of area (often a condition of bail).

Practitioners agree that having time for discussion between YOTs, the child, relatives, the prosecutor and the defence advocate would solve many issues. But time pressures on courts and lawyers (and the well-intentioned desire of all to reduce the time children spend in court cells) make this difficult. We recommend that court staff timetable the hearing as late as possible in the morning. If not ready, YOTs should be confident in asking to adjourn to the afternoon. If there is still insufficient information, maybe a child who has previously been remanded to secure/non-secure accommodation by the police could be refused bail and remanded to local authority accommodation overnight?

Does police detention bias the courts?

We've found a correlation that if the child comes from custody into the court they're more likely to be remanded into custody. That may be because the parents aren't there. I think subconsciously, particularly to lay magistrates, seeing the child come from custody would probably unconsciously prejudice them against that young person. (YOT manager)

When I first practiced [the child defendant would] be sat beside me and that humanised them somewhat. Now they're behind a screen sometimes on the far side of the courtroom. And that immediately sets up the presumption that they're a dangerous young thing. (defence lawyer)

It is court practice for children remanded in police cells to be kept in court cells until their appearance in court, and to appear in a secure dock accompanied by a security guard.³² This signals that the child is "dangerous" and may increase the likelihood of remand. Magistrates can ask for the child to be brought out to sit alongside their family or solicitor. But this rarely happens. We recommend that the use of court cells for children should be minimised and that the child should sit in the well of the court during the hearing.

An underused alternative to police detention is "PACE beds" – local authority accommodation for children charged with an offence who are denied bail.³³ No PACE beds being available is not a good enough reason to keep children in police cells overnight, but frequently that's what happens. The prisons inspectorate found in 2015 that, where the police refused bail, only 1 in 636 children were transferred to a PACE bed.³⁴ Data from one police force showed that PACE accommodation was offered in only 7% of cases where children were denied police bail in the last year.

Since bringing a child from police detention may prejudice the court, increasing use of PACE beds is likely to reduce the number of children being remanded.

Whatever happened to remand to local authority accommodation?

Some courts, if they're not a youth bench sitting and they're looking at remand, don't even consider remand to local authority. That's where we have to push and say this is what we need to do. (YOT manager)

Accommodation issues cropped up again and again in our interviews. YOTs are against the clock to confirm accommodation with family in order to strengthen the case for bail. But if bail is refused and staying with relatives is not possible, children should be remanded to local authority accommodation unless the strict remand criteria are met.

Remand to non-secure local authority accommodation should be the default remand option for children who are refused bail. Campaigners thought its use would increase substantially after remand budgets were delegated to local authorities (see page 20). But this has not happened; partly because of ignorance that it is the legal default, partly because children's services find it hard to facilitate.

Remand to local authority accommodation – what is it?

If a child is refused court bail, they are remanded to local authority unless they meet the criteria for custodial remand. This means that the local authority is responsible for finding accommodation for them, either back with their own family, with relatives, in specialist remand accommodation, foster care or a children's home.

All children remanded to the local authority, or to custody, are classed as "looked after". The local authority acts as "corporate parents", with a duty to promote and safeguard the welfare of that child. In practice this means the children's services department is responsible for care planning, placement and case review for the child, in co-operation with other agencies.

If the court decides to remand a child into the care of the local authority, the court cannot specify where they should stay, but they can specify locations where they cannot stay e.g. the child's own home.

Remand to local authority as default?

Remand to local authority accommodation is getting lost in the gap between bail and custodial remand. There is a lack of understanding of its function distinct from bail with supervision, which means courts and prosecutors do not see it as a sufficiently robust alternative to remand to custody: "If they feel that the YOT are just going to send that young person back to reside at their family home, then that doesn't sufficiently allay their fears." (defence lawyer)

When bail is refused, social services should be consulted on what a remand to local authority accommodation option would look like. But this conversation often gets compressed: "it's just straight to: can we help with anything? No, I rang the office, no they don't have anything. That's it." (defence lawyer). Rather than fast-forwarding to remand to custody, YOTs and social services should always try to produce an RLAA package if bail is refused.

In an attempt to unblur the lines between bail and RLAA, some YOTs have introduced a policy whereby they guarantee that a child on RLAA will not return to their family home. But this approach overlooks the difference that looked-after status can make to a child's ability to comply with conditions set by the court. Instead, courts, prosecutors and defence lawyers need more clarity on the role of remand to local authority accommodation and how it differs from bail and remand to custody.

Lack of accommodation

We do not have the sufficiency of placements... to meet the needs of these children [on RLAA]. Those children go where the bed is, rather than where the best bed is.... Things that we used to have, for example crisis carers, emergency

carers, remand foster carers, they've been swallowed up. (children's services manager)

There is a huge shortage of suitable placements for children remanded into the care of local authorities. For adults, HMPPS provides specialist accommodation for those on bail. There is hardly any specialist provision of accommodation for children on bail/RLAA, and less now than ten years ago, partly because there are fewer children on bail/RLAA, partly because of the big increase in demand for accommodation for looked-after children. This is a particular problem "where they're older, about 15+, there just isn't any accommodation for that particular cohort and we struggle" (YOT manager). Of our YOT interviewees, only one had access to specialist accommodation – supported accommodation for those 16 and over. The delegation of budgets to local authorities has not inspired greater availability of local or regional specialist accommodation.

With no specialist remand accommodation on offer, children remanded to the local authority rely on getting placed with a foster carer or children's home which happens to have a spare bed. However, YOTs report a dearth of available placements and agencies face the same issues when trying to get bail for children who have been remanded: "There is no accommodation for them to go out to. On the times where we have tried to push and challenge, we've had [instances] where there's just nowhere for them to live. So they go to court and get the bail, and there's nowhere for them to go." (secure children's home manager)

Even when children's homes have a space, they are very reluctant to take children on a short-term basis.

Accommodating children on remand – risky and low-priority

Availability of accommodation aside, children on remand are hard to place under any circumstances:

“Placements will have their own decision-making about which young people they’ll accept and which they won’t. And most people who are going into custodial remand are people with serious criminal histories who will be probably fairly unattractive to a lot of placements.” (YOT manager)

If children are remanded to local authority accommodation, they can theoretically live at home if the court allows, but sometimes their parents or carers won’t have them back anyway: “In a care home situation, if they won’t have them back they won’t have them back. That can cause a lot of difficulties in terms of getting that young person out on bail – the court will want an address...to tag them to”. (YOT officer)

Children’s services are overwhelmed with other demands and are sometimes reluctant to take on responsibility for difficult adolescents: “Sometimes where we’ve spoken to social workers about finding a placement for someone, they’ve said they’re too risky, we want them remanded. And we’ve said well they aren’t going to be remanded because they don’t meet the remand criteria. So you [children’s services] go and do your job and find them somewhere to live”. (YOT officer)

Both YOT workers and defence advocates get frustrated by the “foot dragging” of children’s services – this can lead to chicken and egg situations where children’s services won’t act until the court does and vice versa: “They don’t share our sense of urgency. Maybe it’s lack of understanding of how the courts work – they [children’s services] can sit on their hands and say I’m not going to provide you

a placement until the courts have bailed them, and the courts say they’re not going to bail them until you provide us with an address”. (YOT manager)

Finding accommodation – desperate measures

Suitable alternative accommodation is frequently so difficult to find that YOTs end up letting children get remanded for a few days while they identify the right place or use places they know to be unsuitable. One YOT looked all day for RLAA accommodation for a child: “He ended up put in terrible accommodation overnight, a homeless shelter, basically in a side room, a room by himself for the night.... But it’s that gamble of where you put somebody for temporary reasons, because obviously the young people who meet the remand criteria are very risky”.

One manager told us that, in desperation, he defied the letter of the court’s order (that the child defendant shouldn’t remain at home) and placed the child back in his children’s home, next door to the house he had allegedly burgled: “We had to make the decision that it’s in the best interest for that child to return back to that children’s home rather than making another placement move. Even though that is not what the court intended. Partly because we think that’s the best thing for the child, and partly because...we don’t have anywhere else for that child to go”.

Such sentiments are not rare amongst YOT and children’s services workers. In many instances they feel that the court stipulates alternative accommodation which is neither necessary, nor in the interests of the children concerned. YOT workers believe that some judges underestimate the threat posed to the welfare of a child through forcing them to leave their home, whether for a custodial or other placement.

Making local authorities pay – has it made a difference?

Certainly the whole idea of a remand budget was that they hoped local authorities would use that money to invest in re-providing their own accommodation. I don't think many local authorities have chosen to do that. (YOT manager)

In 2009, campaigners like the Prison Reform Trust and the Standing Committee for Youth Justice advocated for the budgets for child remand to be delegated to local authorities. The theory was that, if the budgets were delegated, local authorities would develop or expand specific services to meet the needs of children on bail or on RLAA and strive even harder to prevent the remand of children in their area.

The jury is out on how much difference the delegation of budgets has made to local authority practice and to the reduction in numbers. What is clear is that few authorities have developed specialist accommodation services and programmes, either on their own or in partnership with other authorities. And that very few children are remanded to local authority accommodation (see figure 5).

The cost of custodial remand does not seem to incentivise social services staff to avoid it. Instead they sometimes mistakenly see RLAA as the more expensive option: "You can get into that terrible catch 22 position and we say well actually, I'm sorry it might be expensive but it's a child's liberty and you have a statutory legal duty to provide it. But getting everyone's head round that very simple point... is no mean feat". (defence lawyer)

It looks as if the delegation of budgets has had less influence than hoped. One reason may be that children's services have been overwhelmed by the increase in children coming into care. Another may be that the formula for charging authorities was not

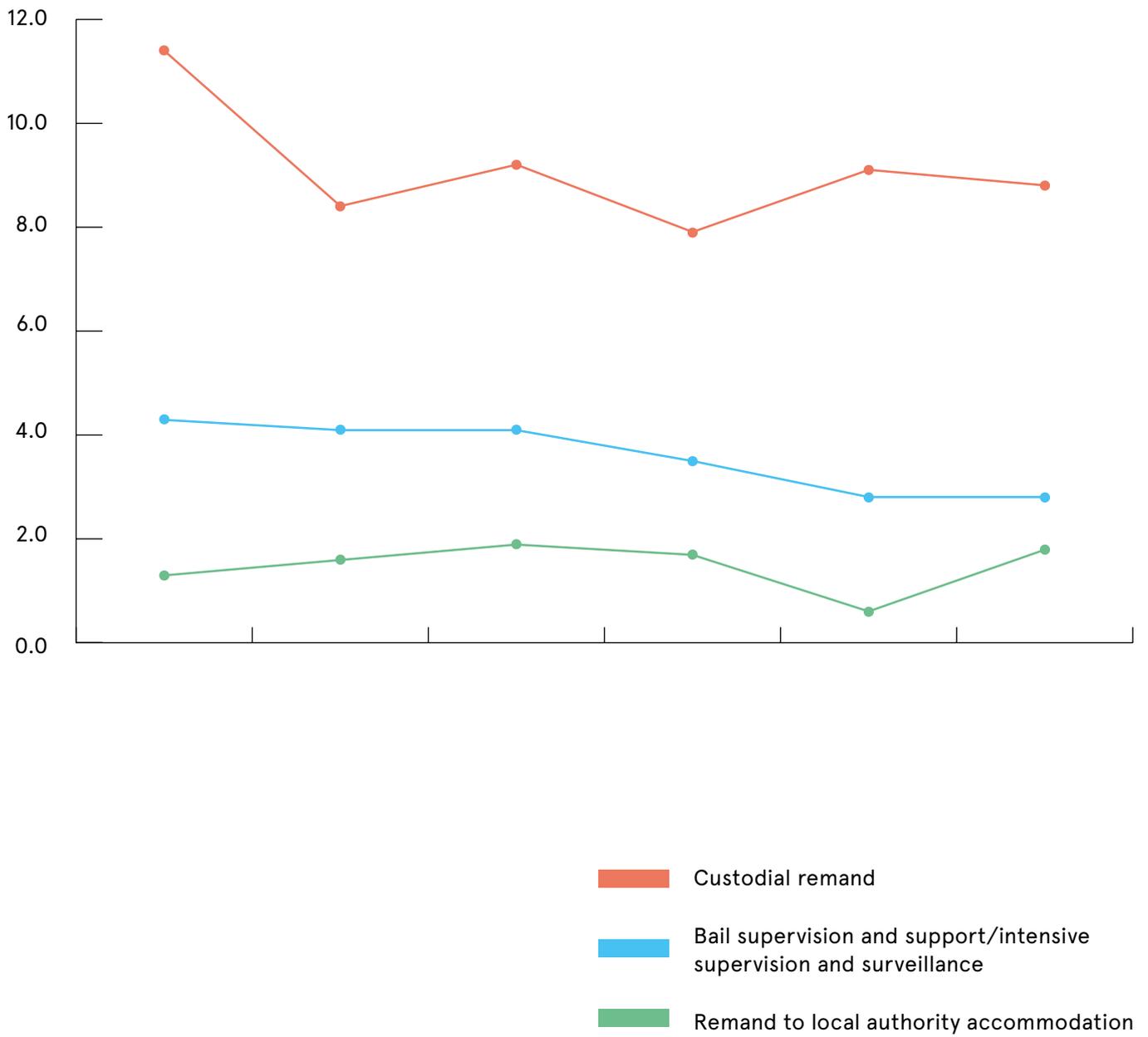
well designed. Authorities are charged per night for each child according to the type of provision in which they are placed.³⁵ Yet in most cases authorities have no control over whether a child is placed in an expensive Secure Training Centre or a less expensive Youth Offender Institution. And the local authority can suffer financially as a result of some court decisions over which they have no control – such as if a child is involved in a very serious case and spends months on remand. Finally, the sums involved for each authority may just not be great enough to influence practice.

Some interviewees felt that the obligation to pay had led to small changes in the behaviour of children's services, but not to the extent campaigners had hoped. Could changes to the way remand budgets are delegated drive further decreases in the use of remand? It may be worth adjusting the formula to avoid penalising authorities according to the kind of custodial institution used, and to better incentivise a reduction in the use of very short (under 3 week) remands. Another option would be to increase scrutiny of practice. For instance, one director of children's services introduced a system whereby their YOT had to report to them the day after a child had been remanded to discuss why it had happened and what alternative provision had been presented to the court.

Figure 5

Remand types as a percentage of total remand decisions, since 2012

Source: Youth justice statistics, Ministry of Justice



Court reform – a threat to bail for children?

If a child gets picked up for a reasonably serious offence and is denied [police] bail and put before the next available court, it is invariably never in front of a youth court. They tend to be appearing in front of adult benches, and I find that the bench is more likely to remand them. (YOT officer)

In recent years many youth courts have closed or reduced the number of days they sit, mainly because fewer children are appearing in court. Some magistrates' courts only run a youth court one day a week. This means decisions to use custodial remand are increasingly unlikely to be made by a youth court bench. Any child who is detained by the police must be taken to court the next day the court sits. So if the youth court is not sitting on that day (including Saturday, bank holidays and many weekdays), the child will appear in an adult magistrates' court. An FOI request to the Ministry of Justice found that 41% of decisions to remand children in the year ending March 2017 were made by adult courts.

Youth court magistrates have specific training in youth court law and in communicating with children. An adult bench may know little about either. Our interviewees were concerned that decision-making was often poor, and certainly not child-focused. In theory all the practitioners in the adult court should be sufficiently expert in youth court law that the bench always gets the right advice, but in reality the prosecutor, legal advisor and defence advocate may have little specialist training in youth court law. Magistrates are trained to take the prosecution case "at its highest", that is, to accept it. So if the prosecutor opposes bail for a child, and the defence advocate lacks expertise and confidence (and possibly a good bail/RLAA package), decisions to remand children can go through without a lot of scrutiny. When in doubt, some adult benches simply remand the child

to appear in front of the next youth court – but in the meantime, the child is imprisoned. In some courts there is an informal protocol that youth court magistrates should always be involved when there is a strong risk of custodial remand. These courts always have at least one on the rota to be drafted in as needed, or else the case would be heard by a district judge. But this was not the case in all areas.

Good relationships between YOTs and court play an important role in reducing risk of remand, as courts have trust in YOTs to manage children in the community. With fewer youth courts sitting and youth courts being closed, YOTs face great challenges in building relationships with the court and the bench.

There is also growing pressure for reviews of remand decisions to be heard on video with the child in custody linked to the court and appearing on a screen. There is evidence from adult hearings that those who appear on video are likely to get more punitive outcomes³⁶, and all evidence on child defendants appearing on video suggests their participation is negatively affected by their being isolated from the court and their lawyer:³⁷ "using video link is actually detrimental to the child. You're not going to get the YOT supporting the child because they're not going to be there. Parents are probably not going to be there. The defence isn't there. There is so much stacked up against it whereas actually we really just ought to be sorting out the infrastructure issues which are causing the problems in the first place." (YOT manager)

The role of the prosecutor

Our stumbling block a lot of the time is the prosecution. They're not willing to concede or consider or change their mind. If you get a really good youth prosecutor lawyer it's good, but if you don't then you're just hitting your head against a brick wall. (defence lawyer)

Many of our YOT interviewees felt that the quality of prosecutors was variable and too many were overly rigid in their approach. Ideally, all recommendations by the police to refuse bail should be reviewed by a youth court specialist prosecutor before the court hearing. But, in many cases this does not happen. One defence lawyer told us that youth specialist prosecutors are few and far between. When a child appears straight from the police station, the decision to oppose bail is likely to be made by a non-specialist prosecutor, or an agent, on the morning itself. Even prosecutors with youth court training spend much of their time in adult courts, which can embed an adult justice mindset and make them rusty on the specific conditions for remanding a child.

Concerns were expressed about the lack of flexibility of prosecutors and about their understanding of child welfare – as in this example:

"This young man, he's fourteen. It's his third breach of bail. He's pleaded guilty to robbery last month. He's got a trial going ahead in October for a public order. His breach consists of him going outside in his back garden for a cigarette, for five or so minutes about three occasions during the night. And now they want to ask to remand him.... Just ask them to extend

the parameter of the garden so he can have a cigarette rather than standing on his doorway setting off his tag. It's little things like that which sometimes the CPS don't understand. They just see a breach of bail, it doesn't matter how he's done it, they want to remand him to custody". (YOT worker)

Even in "county lines" cases which are likely to involve child exploitation, there is a feeling among YOTs that child welfare is secondary to prosecution: "the default thinking from the CPS seems to be to charge and then we go down the line of actually have they been trafficked, referrals to support. But we're always dealing with that charge." (YOT manager)

The quality of advocacy

The law on child remand has always been complex and YOTs have always had concerns about the lack of knowledge of some lawyers. Despite the law being (somewhat) simplified in 2012, those concerns remain.

Defence advocates should ideally both know the law inside out and push as strongly as they can for children to get unconditional or conditional bail, or RLAA if this is not available. Skilled lawyers say they can now usually get bail for a child even if they are charged with a very serious offence: "One of my colleagues had an attempted murder case the other day and he got bail. They are giving bail on really serious cases...Only when it's very, very serious – murders and things like that – are they keeping them in, or if they've got loads of previous". But many prosecution applications to refuse bail go unopposed. This is probably because the advocate is not yet able to put forward a bail package. But in those circumstances an experienced advocate would ask for an adjournment or argue that the refusal of bail criteria had not been met. Many YOT officers feel their knowledge of the law is superior to some of the lawyers they meet in court: "only last week I was in court with someone and the defence solicitor was going oh can I have a look at that crib sheet, that looks really good?". Another YOT officer worked out that, of the 29 most recent remands in her area, no bail application had been made by a defence lawyer for ten of them.

Any defendant has a right to two bail applications, or more if there is a change of circumstances. However, many lawyers feel it is not worth trying without a new bail/RLAA package, particularly since judges can be reluctant "to release on bail because they don't want to be seen to contradict what that previous bench has decided". (YOT manager). This should not be the case, given that all children have a prima facie right to bail which continues

until they are sentenced. But the belief that the only realistic means of getting bail is by presenting a significant change of circumstance is a barrier to defence advocates requesting a new hearing.

Defence lawyers are also hamstrung by a lack of detailed information about why bail was refused initially, making it difficult to propose a remedy: "If you keep a child, whether it's in the police station, at court, or transfer them to youth detention accommodation for whatever reason, there should be a reasoned dossier setting out for the lawyers the reasons for that. So that they can think about whether it's challengeable or not." (defence lawyer)

In court, the best results come from close working between the YOT and the defence advocate since neither can put together the best bail package without the other. The training and development of defence and prosecution advocates should focus on improving their knowledge and skills, and their understanding of how to work best with YOTs. This should be supported by strong guidance on the remand criteria, what can and should be done to challenge refusal of bail and what the different responsibilities are.

Getting children out once in

Many of the barriers to children getting bail arise from a lack of coordination between agencies. Without one agency holding responsibility, children on remand can fall between the cracks.

A successful initiative run in the 90s introduced remand review workers, who were based in custody and were responsible for going through the list of children who'd been remanded in custody. They would ensure all services were joined up to present a bail package, including YOTs, defence advocates, social services and family members. But this service no longer exists, and there is often no one in custody taking responsibility for getting children bailed. One idea would be to strengthen the role of custody caseworkers³⁸ in YOIs and other secure establishments, to identify children who are remanded and bring different agencies together to develop a bail package.

Conclusion

The numbers of children subject to custodial remand have reduced significantly, but a lot of the poor practice continues. For children's rights, practical and welfare reasons children should only be imprisoned pending trial in exceptional circumstances. But this is not the case - children are being imprisoned on remand over a thousand times a year.

This report suggests some things that are going wrong. Too many children are still being detained by the police overnight, catapulting them into a busy, adult court, in which they are treated as dangerous mini-adults. The speed of arriving in court leaves prosecution, defence and the YOT little time to prepare properly for the hearing. So the court is too often given little information, and sometimes no bail package is offered. The bench relies on information presented by the prosecution, and is often not trained to treat children differently to adults. No one understands the role of remand to local authority accommodation well enough, so remands are made without RLAA being offered, or for that matter pushed for by the bench. So too many children are imprisoned on remand for a short period while a bail/RLAA package is put together.

Risk aversion dominates the decision to remand, rather than the best interests of the child. It is in no child's best interests to spend a night in police cells, followed by a week in a children's prison, then maybe to be forced to live away from their home and community pending their trial. It's necessary to keep some children in a secure place as they await their trial or sentence, but the number of remands which do not end up with the child getting a custodial sentence suggest that the legal criteria are either wrong, or being misinterpreted.

YOTs do their best, but children's services are overwhelmed by child protection concerns and do not always step up to the plate. There is a risk that everyone has got too used to the status quo - that short remands are accepted as a necessary evil. There is an argument for further legislative change to the custody threshold, raising the minimum age for custodial remand to 14 and reserving remand only for those accused of crimes which would be heard in the Crown Court. But the following practice changes would also bring about a reduction in the numbers imprisoned on remand:

Recommendations

1. The police should continue to reduce the number of children whom they detain in police custody and the number they recommend to the CPS be denied court bail.
2. Defence advocates to be better trained in child remand law.
3. CPS should subject police requests to deny bail to more scrutiny, ensure that all non-custodial avenues, including RLAA, have been explored and meet with defence and the YOT before the hearing.
4. CPS to alert defence and the YOT to their decision to oppose bail as early as possible and to disclose all relevant evidence at the same time.
5. Judges, magistrates, prosecutors and legal advisers need better training in child rights, in child welfare, and in the spirit as well as the letter of the law on child remand. This includes being more open to granting bail, even without a change of circumstances.
6. Courts should be allowed to slow down for child remand hearings – both to allow for adjournments during the day, and for as much time as is required when the parties are in court.
7. Make it mandatory for at least one youth court magistrate to be sitting on any bench deciding whether a child should be remanded.
8. A better audit trail needs to be created of why bail and/or RLAA is opposed, to improve understanding of the use of child remand and help YOTs and defence advocates to provide alternatives.
9. Update the Youth Court Protocol to make it the default for children to sit with their defence lawyer and family rather than in the secure dock.
10. YOTs and defence solicitors need to focus more on promoting RLAA as the default legal option when they think a custodial remand is a risk.
11. YOTs should try to present a bail/RLAA package at every first hearing where bail is opposed. If time constraints make this impossible, consider reworking the staff rota so bail package preparation starts earlier.
12. YOTs should develop protocols with liaison and diversion teams, police, emergency duty teams and others to receive earlier alerts of children at risk of remand.
13. Local authorities should review the availability of PACE beds and specialist accommodation for those on remand and work with neighbouring authorities to increase the provision.
14. Children's services staff need a better understanding of the role they could play in reducing custodial remand.
15. Re-examine the formula for delegating remand budgets to local authorities, to ensure it is fair and incentivises the reduction of short remands.
16. Strengthen the role of custody case workers in supporting remanded children to get bail.
17. Develop succinct strong guidance on the process and duties of all parties focused on promoting bail/RLAA.

End notes

- 1 Feilzer, M. & Hood, R. (2004). Differences or Discrimination? Minority ethnic young people in the youth justice system: Youth Justice Board, London
https://www.oijj.org/sites/default/files/documental_2129_en.pdf
- 2 <https://www.gov.uk/government/statistics/youth-custody-data>
- 3 <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Children-%20innocent%20until%20proven%20guilty%20%28report%29%283%29.pdf>
- 4 <http://thenayj.org.uk/wp-content/uploads/2016/02/PRTNAYJ-Reducing-remands-to-the-secure-estate-Jan-16.pdf>
- 5 <https://twitter.com/PenelopeGibbs2/status/1061910689244155905>
- 6 <https://www.gov.uk/government/statistics/youth-justice-annual-statistics-2016-to-2017>
- 7 <https://www.gov.uk/government/statistics/youth-custody-data>
- 8 <https://www.gov.uk/government/statistics/youth-justice-annual-statistics-2016-to-2017>
- 9 <https://www.gov.uk/government/statistics/length-of-time-spent-in-youth-custody-2016-to-2017>
- 10 Most (86%) of 15-17 year olds are on remand before trial, with the other 14% awaiting sentence. See <https://www.gov.uk/government/statistics/offender-management-statistics-quarterly-april-to-june-2018> Data for other age groups is not publicly available.
- 11 <https://www.gov.uk/government/statistics/youth-justice-annual-statistics-2016-to-2017>
- 12 <https://www.gov.uk/government/statistics/youth-justice-annual-statistics-2016-to-2017>
- 13 <https://www.gov.uk/government/statistics/youth-custody-data>
- 14 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/676072/youth_justice_statistics_2016-17.pdf
- 15 <https://www.gov.uk/government/publications/injunctions-to-prevent-gang-related-violence-and-drug-dealing>
- 16 <https://twitter.com/PenelopeGibbs2/status/1061910689244155905>
- 17 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/219974/circular-06-12-youth-remand-adult-bail.pdf
- 18 <https://www.cps.gov.uk/legal-guidance/bail>
- 19 Legally, a child's time in remand should not be factored into sentencing. Many campaigners seek to change this and bring it in line with the adult justice system. However, our interviewees told us that magistrates do, in practice, often take time spent in remand into consideration when sentencing children.
- 20 *ibid*
- 21 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/219974/circular-06-12-youth-remand-adult-bail.pdf
- 22 An individual YOT's approach to diversion will also have some impact on remand conversion rate. Those diverting high numbers of children away from formal sanctions are likely to have a higher remand rate than those who divert fewer cases away from prosecution
- 23 <http://www.transformjustice.org.uk/wp-content/uploads/2018/12/Local-YOT-data-on-number-of-custodial-remands.pdf>
- 24 <https://www.gov.uk/government/statistics/youth-justice-annual-statistics-2016-to-2017>
- 25 <https://www.gov.uk/government/statistics/length-of-time-spent-in-youth-custody-2016-to-2017>
- 26 <https://www.gov.uk/government/publications/lammy-review-final-report>
- 27 Joint enterprise means someone can be found guilty for another person's crime if they are considered to have knowingly assisted or encouraged the crime
- 28 *ibid*
- 29 <https://www.england.nhs.uk/commissioning/wp-content/uploads/sites/12/2014/04/ld-ser-spec-1314.pdf>
- 30 https://howardleague.org/wp-content/uploads/2016/05/Overnight_detention_of_children_in_police_cells.pdf
- 31 <https://www.legislation.gov.uk/ukpga/1984/60/section/38>
- 32 <https://www.yjlc.uk/wp-content/uploads/2017/09/Youth-Court-Protocol-2017.pdf>
- 33 Police have a duty to transfer children who have been refused bail to a PACE bed in all but exceptional circumstances. Local authorities have a corresponding duty to provide PACE beds.
- 34 <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/the-welfare-of-vulnerable-people-in-police-custody.pdf>
- 35 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/414608/payment-cost-recovery-arrangements.pdf
- 36 <http://www.transformjustice.org.uk/wp-content/uploads/2017/10/Disconnected-Thumbnail-2.pdf>
- 37 <http://scyj.org.uk/wp-content/uploads/2018/04/SCYJ-Child-defendants-and-video-links.pdf>
- 38 Any child in custody will have a custody caseworker or key worker assigned to them. These caseworkers are based within the secure establishment and responsible for supporting the child's resettlement, education and training.

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