

Amendment to the Prosecution of Offences (Custody Time Limits) Regulations 1987 (1987/299) to extend the amount of time a defendant can be held in custody prior to their Crown Court trial due to Covid-19

Equality Impact Statement

Purpose of this Document

1. This equality analysis has been undertaken to assist the Secretary of State in deciding whether to temporarily extend the amount of time a defendant can be held in custody before their Crown Court trial is heard and before which time the prosecution must apply to extend it – referred to as a Custody Time Limit (CTL). The decision will be taken in the context of the challenges that the coronavirus pandemic has placed on the criminal courts.
2. The analysis supports the Secretary of State in fulfilling his duty under the Public-Sector Equality Duty (PSED) by having due regard to the equality impact of implementing the proposed provision.
3. This document assesses the potential equalities benefits and risks that have been identified by the proposed policy. It considers the justification for the change and any necessary mitigating actions which have been proposed to reduce the likelihood of the risks and includes an assessment of any equality benefits.
4. MoJ continues to undertake proportionate equality assessments for Covid-19-related justice work in line with existing MoJ PSED policy and practice. We have used the best available evidence within limited timescales to consider the potential effects of these proposals on equalities, within the overriding need to respond urgently to Covid-19 challenges.
5. Subject to the availability of new data, we will be reviewing the equalities impact of this measure and updating our assessment as the impacts become clearer or new evidence emerges. This approach is in line with the continuing ongoing nature of the PSED.

Introduction

6. To comply with social distancing restrictions and protect the safety of court users, the Crown Court in England and Wales has not been able to hear as many jury trials as normal. This has led to delays in jury trials, with cases where the defendant is currently held in custody on remand being increasingly affected. This has resulted in an increase in applications to extend the time defendants are held on remand pending trial.
7. The Government is taking action to ensure that, as we work to restore capacity to pre-Covid levels, courts have sufficient powers to effectively manage these unavoidable delays.
8. The proposed change recognises the delays caused to the listing of trials due to the current circumstances and provides more certainty for victims and the public in cases where there is a risk that defendants may abscond, or commit offences if released back into the community on bail.

Policy Summary

Introduction to Custody Time Limit (CTL)

9. Custody Time Limit (CTL) safeguards un-convicted defendants by preventing them from being held on remand in the custody of a prison for an excessive amount of time before they have their trial. Currently, there are two main maximum periods of custody provided for by the Prosecution of Offences (Custody Time Limits) Regulations 1987 (1987/299) where the period set by the Regulations begins the day after the court appearance at which the defendant was first remanded in custody prior to a trial. These are 56 days for offences awaiting summary trial in the magistrates' court and 182 days for offences awaiting trial on indictment in the Crown Court.
10. In rare circumstances, there is an alternative CTL of 112 days which can apply to criminal offences awaiting trial in the Crown Court:
 - a. if the prosecution is granted a Voluntary Bill of Indictment under section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933 by a High Court Judge; or
 - b. following an order by the Court of Appeal for a retrial on a fresh indictment.
11. Section 22(3) Prosecution of Offences Act (POA) 1985 provides for a CTL to be extended, or further extended, if the prosecution apply to the court before the limit expires but shall not do so unless the court is satisfied that the prosecution has acted with all due diligence and expedition and the need for the extension is due to:
 - a. the illness or absence of the accused, a necessary witness, a judge or a magistrate;
 - b. postponement which is occasioned by the ordering by the court of separate trials in case of two or more accused persons, or two or more charges; or
 - c. some other good and sufficient cause;
12. The Act and Regulations do not define what is meant by a "good and sufficient cause". It is for the court to determine based on the facts of the case. The duty to establish this falls on the Crown Prosecution Service (CPS). The following principles have emerged:
 - a. The seriousness of the charge or the shortness of the extension sought, will not in themselves amount to a good and sufficient cause.¹ They may however be factors to be taken into account.
 - b. Factors linked to the refusal or granting of bail cannot alone amount to a good and sufficient cause.²
 - c. The protection of the public is not, in itself, a good and sufficient cause to extend a CTL. However, the interests of justice in trying jointly charged defendants together is capable of being a good and sufficient reason to extend CTL of one or more of them.
13. The legal burden of monitoring and complying with CTLs rests on the prosecution. There exists a "Protocol" between the CPS and HM Courts & Tribunals Service (HMCTS) for

¹ *R v Governor of Winchester Prison, ex parte Roddie* [1991] 2 All ER 931

² *R v Crown Court at Sheffield, ex parte Headley* [2000] Crim L R 374

the effective handling of CTL cases to reduce monitoring errors and ensures cases are finalised before CTL dates expire.

Background for the handling of CTL cases during Covid-19

14. The Covid-19 pandemic has presented unprecedented challenges for the criminal justice system (CJS) in England and Wales. The scale and seriousness of the situation has presented significant difficulties to the criminal court process, including the Crown Court's ability to hear jury trials.
15. Work to increase the capacity of the Crown Court to hear jury trials is ongoing however, it is not yet possible for courts to resume business as usual. Even though, as of 25 August 2020, 66 out of 81 Crown Court buildings had re-started jury trials, the limitations posed by social distancing means that the courts are unlikely to achieve pre-Covid levels of trial throughput for some time. Consequently, it is proving difficult to hear jury trials for all defendants within their CTL – especially for multi-handed cases with 3 or more defendants. The total number of outstanding CTL cases in the Crown Court has gradually risen since monitoring began on 1 April 2020, even though these cases have been prioritised.
16. On 27 March 2020 – at the start of the pandemic – HMCTS, the CPS, and the Senior Presiding Judge (SPJ) agreed to an adapted “Coronavirus Crisis Protocol”³ that set a temporary framework for the efficient and expeditious handling of cases that involve a CTL. The adapted protocol acknowledges that the pandemic is an exceptional situation and the adjournment of CTL trials as a consequence of government health advice and of directions made by the Lord Chief Justice (LCJ) amounts to “good and sufficient cause” to extend CTLs. It contains rules of practice only and does not create legal obligations or restrictions on any party, nor does it override independent judicial discretion. In a judicial review heard on 16 June 2020, the courts upheld that the pandemic constituted a “good and sufficient cause” to extend a CTL under section 22(3) POA 1985 and rejected the complainant's contention that the protocol unlawfully fettered the discretion of any judge hearing an application to extend.
17. However, the current system of extending CTL on a case-by-case basis under the framework of the “Coronavirus Crisis Protocol” was only intended as a short-term measure and needs to be reviewed in light of the scale of impact the pandemic has had on court business and the potential for a further spike in coronavirus cases. Legislative change will help provide more certainty and consistency in the way remand prisoners and CTLs are managed during the transition to full court capacity.

Negative statutory instrument (SI) to temporarily amend duration of CTL in the Crown Court

18. This policy seeks to amend the Prosecution of Offences (Custody Time Limits) Regulations 1987 (“the 1987 Regulations”). The amended Regulations will temporarily extend the Custody Time Limit (CTL) by 56 days from 182 days to 238 days for all triable either-way and indictable only criminal offences awaiting trial on indictment at the Crown Court. And from 112 days to 168 days, in rarer cases, where a voluntary bill of indictment is preferred, or a fresh trial has been ordered by the Court of Appeal.

³ https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/Revised-Coronavirus-Protocol-for-CTL-cases-signed-07042020.pdf

19. This extension will apply to a defendant remanded in custody for the first time from commencement of the Regulations during the temporary 9-month period⁴ for which time the amended Regulations will apply (it will not be applied retrospectively so will not affect prisoners currently on remand that are subject to a CTL that began before the amended Regulations came into force).
20. In addition to the above, the new extended periods of 168 and 238 days will continue to apply where a defendant's period on remand in custody begins anytime from commencement of these Regulations but before the expiry of the Regulations, where their CTL extends beyond the expiry of these Regulations (i.e. their period on remand will not revert back to 182 days (or 112 days)).
21. The objective of this temporary change is to create more consistency and certainty about the way in which the CJS manages the CTL for untried defendants held on remand. Increasing the length of the CTL would delay the need for an application to extend and, in some cases, negate an application entirely if the trial could be listed within the additional time-limit. This would help to protect against releasing defendants, who are likely to abscond or who pose a risk to the public, into the community on bail before their trial can be heard. It should also help to manage demand while the Crown Court transitions to full jury trial capacity.

Equality Duties

22. Under the [Equality Act 2010](#)⁵, when exercising its functions, the MoJ has an ongoing legal duty (PSED) to pay due regard to the need to:
- eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010;
 - advance equality of opportunity between different groups of persons who share a protected characteristic and those who do not; and
 - foster good relations between different groups.
23. We also recognise that, as well as having an obligation not to directly or indirectly discriminate against disabled people, the MoJ as a service provider has a duty to make reasonable adjustments for disabled people.
24. The payment of due regard to the PSED needs to be considered in light of the nine protected characteristics:
- Race
 - Sexual Orientation
 - Marriage/Civil Partnership
 - Gender (sex)
 - Religion or Belief
 - Gender Reassignment
 - Disability
 - Age
 - Pregnancy/Maternity

⁴ Guaranteed by the inclusion of a sunset clause that provides that the statutory instrument shall cease to have effect after a specific date..

⁵ http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf

Sources of Information

Primary data sources

25. The main source of information used for this analysis is the MOJ's Court Proceedings Database (underpinning Criminal Justice Statistics Quarterly - National Statistic).⁶

26. We have also consulted:

- Criminal Court Statistics Quarterly - National Statistic⁷
- Race and the Criminal Justice System, 2018 – National Statistic⁸
- The Lammy Review 2017⁹

Availability of data

27. Detailed data on Crown Court remand outcomes is widely available for three of the nine protected characteristics – age, sex and ethnicity. We have used this data for our equality analysis.

28. It should be noted that there are some data limitations, namely:

- a. The policy impacts untried defendants who are remanded in custody and who have not yet been convicted or sentenced for the accused crime. However, MOJ Crown Court remand data does not separately identify these untried defendants from convicted/sentenced individuals as defendants are reported against their principal (i.e. most serious) remand status. Crown Court custodial remands therefore include those remanded in custody at any stage of proceedings at court who may also have been given bail or not remanded at some stage of those proceedings.
- b. The length of time spent on remand is unknown as the defendants are counted once their case completes at court.

29. Data is presented where known, therefore where an individual's sex, ethnicity or age is not stated or unknown, they are omitted from analysis.

Affected Groups

30. The proposed change will have a direct impact on those defendants:

- a. who are awaiting a criminal trial for a triable either-way or indictable only offence on indictment in the Crown Court; and
- b. whose case is subject to a new CTL that begins during the temporary 9-month period the amended Regulations apply.

⁶ <https://www.gov.uk/government/collections/criminal-justice-statistics-quarterly>

⁷ <https://www.gov.uk/government/collections/criminal-court-statistics>

⁸ <https://www.gov.uk/government/statistics/race-and-the-criminal-justice-system-statistics-2018>

⁹ <https://www.gov.uk/government/publications/lammy-review-final-report>

31. These defendants have the potential to be held in custody on remand for an additional 56 days before their trial takes place or before the prosecution must apply to extend the CTL if the case is not listed before this time.
32. The change will also affect these defendants' families including spouses and civil partners as well as children, but data on the impact on marriage/civil partnership is unavailable.
33. The change will also affect victim and witnesses involved in those cases that are subject to an extended CTL, and the general public. We are not able to identify by protected characteristics the victims or witnesses involved in the cases of the specific cohort of defendants affected by this change.

Defendants

34. Over the last 5 years, the proportion (and volume) of defendants not remanded by the Crown Court has been increasing from 15% to 27% in 2019 (16,000 to 23,200), while the proportion (and volume) of those remanded on bail fell from 49% to 36% (52,700 to 30,500). The proportion of those remanded in custody was 37% (31,700) in 2019 and has been increasing since 2016. However, the number of custodial remands increased 2% in the latest year, following a four year decrease in custodial remands¹⁰.
35. In 2019, of those remanded in custody at the Crown Court 75% (23,800) were later sentenced to immediate custodial sentences; 10% (3,300) went on to be found not guilty (acquitted, not tried, dismissed etc.); 13% (4,200) were found guilty but not handed a custodial sentence; and 1% (400) failed to appear.¹¹ Of all defendants who were not remanded at Crown Court, 51% (11,800) received an immediate custodial sentence.¹⁰
36. This means that there is potential for the proposed change to lengthen the amount of time a proportion of defendants would spend in prison who would later be found not guilty, or found guilty but not receive an immediate custodial sentence.

Sex

37. Over the past 5 years, males consistently made up the majority of defendants remanded in custody at Crown Court (94% since 2015) - this is broadly in line with the general prison population. In 2019, 39% of males were remanded in custody at Crown Court, compared to 23% of females.¹⁰

Ethnicity

38. Over the last 5 years, defendants from Black, Mixed, and Chinese or Other ethnic groups¹² consistently had a higher proportion of individuals remanded in custody at Crown Court compared to the White ethnic group. In 2019, 47% of Black defendants were remanded in custody during Crown Court proceedings compared to 38% of White defendants.¹⁰

¹⁰ Published Criminal Justice System Statistics available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888657/remands-crown-court-tool-2019.xlsx

¹¹ Percentages may not sum to 100% due to rounding.

¹² Figures for ethnicity are categorised using the 5+1 self-identified classification based on the 16+1 classification used in the 2001 Census.

39. In addition, a higher proportion of ethnic minority groups were remanded in custody at Crown Court and did not go on to get an immediate custodial sentence. In 2019 for example, 24% of White defendants were remanded in custody and then did not get an immediate custodial sentence compared to 26% for Black defendants.¹⁰ This means that despite Black defendants being more likely to be remanded in custody at Crown Court, they are less likely than White defendants to go on to receive an immediate custodial sentence at the conclusion of proceedings.
40. Of all defendants dealt with at Crown Court in 2019, 77% were dealt with for a triable either way (TEW) offence, with the overall custodial remand rate for TEW offences being 33%. This proportion differed by ethnic group; Black defendants had the highest proportion of defendants remanded in custody at 40%, compared to 34% for White defendants.¹⁰
41. The majority of defendants who are dealt with at the Crown Court for a TEW offence are directed there by the magistrates' court. In 2019 32,262 defendants for TEW offences were directed to Crown Court by magistrates, with approximately 22,746 of those defendants sent for jury trial.¹³
42. However, a smaller number of defendants also self-elected for a TEW offence to be dealt with at Crown Court. In 2019, 5,277 defendants elected for a TEW offence to be dealt with at the Crown Court, with approximately 2,180 of those defendants electing for a jury trial¹⁴. The election rate differed by ethnic group; approximately 16% of Black and 15% of Asian defendants elected to have their triable either-way offence tried by a jury at the Crown Court in 2018 which is around 5 percentage points higher than the election rate for White defendants recorded at 10%.¹⁵
43. Therefore, not only are Black defendants disproportionately remanded in custody, but they are also more likely to elect for a trial by jury than White defendants which would place their case into the jurisdiction of the Crown Court (and therefore, potentially within scope of the policy if held on remand). According to the Lammy Review, the lack of diversity among those who have the power to make decisions is a fundamental source of mistrust in the CJS among BAME groups – it is also an influential factor in higher election rates for a jury trial among BAME defendants.

Age

44. Children were a small minority of individuals dealt with at Crown Court (1% in 2019), young adults (aged 18-20) made up 10%. Children however were disproportionately remanded in custody (45%) at Crown Court compared to adults (37%) and young adults (36%).¹⁶

Other protected characteristics

¹³ Published data available at: <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2020>

¹⁴ Published data available at: <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2020>

¹⁵ Published data available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/848776/defendants-tables-2018.ods

¹⁶ Published data available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888657/remands-crown-court-tool-2019.xlsx

45. We are not currently able to identify the likely impacts of this policy on the other protected characteristics of disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, religion or belief, and sexual orientation. This is due to the lack of data for the cohort of defendants likely to be affected. Some data is not available, whereas some other sources of data are available but are not sufficiently reliable. We are however, looking at ways to obtain relevant new data, improve the reliability of other data sources, and make better use of unpublished data to provide additional evidence with regard to equality in the CJS.

Victims, witnesses, and the general public

46. The change should have a positive impact on the victims and witnesses, and the families of the victims and witnesses in the cases of these defendants, and the general public.

47. It minimises the risk that defendants who pose a risk to the public or those likely to evade justice will be released back into the community on bail and protects victims, witnesses, and the public who will have more certainty that these defendants will remain in custody pending their trials. This should help maintain public confidence in the criminal justice system.

48. We are not able to identify by protected characteristics the victims or witnesses involved in the cases of the specific cohort of defendants affected by this change. However, the Crime Survey for England and Wales for the year ending March 2020 showed that men and people from a non-white ethnic group were over-represented among victims of crime.

Equality considerations

Eliminating Unlawful Discrimination

Direct Discrimination

49. Direct discrimination occurs when a policy results in people being treated less favourably because of a protected characteristic. We believe that **extending the amount of time a defendant can be held in custody** is not directly discriminatory within the meaning of the 2010 Act, as it applies in the same way to all individuals regardless of their protected characteristics. It is the mode of trial and the criminal court's decision to remand the defendant in custody for the first time¹⁷ before their trial has taken place (during the temporary period the amended Regulations are in place) that determines whether the change will apply to them. Therefore, no defendant will be treated less favourably in relation to any protected characteristic as a direct result of this policy.

Indirect Discrimination

50. Indirect discrimination occurs when a policy applies equally to all individuals but would put those sharing a protected characteristic at a particular disadvantage compared to those who do not. We believe that **extending the amount of time a defendant can be held in custody** may pose a risk of indirect discrimination within the meaning of the Equality Act as explained below. At the very least, it is likely to compound the disproportionality that already exists within the Crown Court remand population.

¹⁷ Whether this decision is taken during the first hearing at magistrates' court or later on in proceedings if for example, the defendant was subsequently remanded at Crown Court for the first time having breached bail conditions whilst awaiting trial.

51. As evidenced in the statistical paragraphs above, defendants who are Black, Mixed, Chinese or Other ethnic groups, males, or children are more likely to be remanded in custody during any point in Crown Court proceedings. Therefore, we consider that temporarily extending the CTL in the Crown Court in respect of those awaiting a trial will also disproportionately impact on people with these protected characteristics.

52. However, there are several factors that may reduce the number of defendants likely to be affected or disadvantaged by this policy and therefore, any disproportionate impact that this policy has on the protected groups highlighted above. These are outlined below:

- a. It is likely that any additional time that defendants impacted by this policy are held in pre-trial detention in its earlier stages, will have also been likely under the “Coronavirus Crisis Protocol”. This is because the majority of CTLs would likely continue to be extended by judges even if this legislation did not come into force, on the basis that the pandemic constitutes a “good and sufficient cause”.
- b. This policy wouldn’t affect a defendant’s ability to make a bail application to the court to have their pre-trial detention scrutinised by a judge. This provides an alternative mechanism for review.
- c. Not all defendants who would be subject to the extended CTL would necessarily be remanded in custody for the full additional 56 days before a trial was listed; the CTL is a time limit, not a target date for trial. Therefore, there is potential for defendants to be held in pre-trial detention for less time than 238 days (and 168 days), or even 182 days (and 112 days), particularly in the later stages of this policy as court capacity increases and trials can be listed earlier.
- d. As explained earlier, of those remanded in custody at the Crown Court in 2019, the majority (75%) were later sentenced to an immediate custodial sentence.¹⁸ Under Section 240ZA of the Criminal Justice Act 2003, the amount of time spent by an offender on remand in custody by a court is credited in full towards the amount of time that the offender will spend in prison as a result of any custodial sentence that might be subsequently imposed by the court. Therefore, some defendants affected by this change would not spend longer in custody overall.
- e. Where there has been an unreasonable delay in proceedings since apprehension which is not the fault of the offender, and it has had a detrimental effect on the offender, the court may take this into account by reducing the sentence. No fault should attach to an offender for not admitting an offence and/or putting the prosecution to proof of its case.¹⁹
- f. The policy would be a temporary measure that was subject to a sunset clause, meaning it would only be in force for a limited duration of 9 months.

53. We recognise that defendants with the protected characteristics detailed above may experience some disadvantage from a longer period of time held on remand. However,

¹⁸ Published Criminal Justice System Statistics available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888657/remands-crown-court-tool-2019.xlsx

¹⁹ <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/>

since the mitigating factors detailed above may apply, overall our assessment is that extending CTLs that begin during the temporary 9-month period for all defendants remanded in custody awaiting trial at the Crown Court by 56 days is a proportionate means of achieving the legitimate aim of protecting the safety of our court users during the Covid-19 pandemic, safeguarding victims and witnesses, protecting the public, and ensuring justice continues to be served. Therefore, we do not consider that the policy change results in any unlawful indirect discrimination.

Discrimination arising from disability and duty to make reasonable adjustments

54. In so far as this change extends to disabled defendants, we believe that the policy is proportionate, having regard to its aim. It would not be reasonable to make an adjustment for disabled defendants so that they are out of scope of the proposals, but it remains important to make reasonable adjustments for disabled defendants to ensure appropriate support is given. We do not consider that any adjustments are required for disabled people over and above the ones already in place in prisons.

Harassment and victimisation

55. We do not consider there to be a risk of harassment or victimisation within the meaning of the Equality Act as a result of this change.

Advancing Equality of Opportunity

56. We have had regard to this aspect of the equality duty but do not consider that this change will particularly advance equality of opportunity, although there will be positive impacts for victims and witnesses which may affect certain groups more.

Fostering Good Relations

57. Our assessment is that extending CTLs may impact on fostering good relations between groups with protected characteristics. However, we believe the policy to extend CTLs is a proportionate means of achieving our legitimate aim and that there may be positive impacts for victims and witnesses.

Ongoing Duty

58. The equality duty is an ongoing duty and we will draw on any relevant new data that becomes available that could provide evidence of any further equality impact this change could have on the affected cohort of defendants, including groups who are currently overrepresented in this area.