

To what extent have the recommendations in the Lammy Report been applied to the sentencing process and has this had an effect in mitigating any bias and/or disparities in outcomes based on ethnicity?

Introduction

In 2015/16, before the Lammy Review was published, Black people accounted for 12% of adult prisoners despite being around 3% of the general population.¹ By 2021-22, that figure had slightly increased to 13% of the prison population.²

On the face of it, this measurement paints a sober picture: the recommendations made in the Lammy Report, some of which are being integrated into the sentencing process, have not (yet) mitigated the disparity on this particular key outcome.

Building trust

The nature of the recommendations in the Lammy Report are not quick-fixes. Some of its effect on outcomes are unlikely to be seen in the medium-term. For example, Lammy cites building trust as a core principle to tackle disproportionate representation of BAME prisoners.³ Building trust in the sentencing process is a generational battle: defendants who mistrust the system are likely to have entrenched views. That, in turn, limits the impact any trust-building exercise will have on BAME defendants pleading guilty at the first opportunity (and therefore, securing up to a third reduction on their sentence).

Scrutinising sentencing decisions using data

Lammy recommended that the response to disproportionate representation of BAME defendants should be underpinned by creating a culture of scrutiny by 'bringing decision-making out into the open'.⁴ He noted that process included improving the

¹ Ministry of Justice, [NOMS annual offender equalities report: 2015 to 2016](#) (2016), page 9

² Ministry of Justice, [HM Prison and Probation Service Offender Equalities Annual Report: 2021/22](#), page 5

³ [The Lammy Review](#), Key principles, (2017), page 6

⁴ [The Lammy Review](#), Key principles, (2017), page 6

quality of data collected and published⁵ to enable any disparities to be measured. It is an integral part of the sentencing process as it can trigger a corrective feedback loop to sentencers.

To a large extent, the openness and improvement in data collection that Lammy recommended has still not been achieved. ‘Very little is known about ethnicity-related sentencing differentials’ in the Magistrates’ Court⁶ where most sentencing happens. The Magistrates’ courts data collections by the Sentencing Council do not appear to ask sentencers about ethnicity.⁷ In the year ending March 2022, ethnicity was unknown for 29% of children sentenced for indictable offences at all courts.⁸ The recommendation that ‘all sentencing remarks in the Crown Court should be published in audio and/or written form’⁹ has not been heeded – the government cited ‘prohibitive’ costs given ‘current technology’ in its 2020 update.¹⁰

The Lammy Report recommended that it should be possible to view sentences, broken down by ethnicity, for individual offences at individual courts.¹¹ That recommendation was accepted by the Government in 2017.¹² By 2020, the Government claimed that this data was ‘produced and updated annually’ as part of the Criminal Justice Statistics publication.¹³ Alex Chalk MP confirmed the position in Parliament: that this recommendation had been ‘completed’.¹⁴ However, it appears that the data set referred to enables filtering by Police Force Area rather than by individual courts. This deficiency means that a recommendation that could have increased transparency (and therefore, scrutiny) in the sentencing process is not achieved. Sentencing outcomes for individual courts could – in the medium term – reduce bias by incentivising outlier courts to ‘explain or reform’ their racial disparities.¹⁵

⁵ [The Lammy Review](#), Key principles, (2017), page 6

⁶ Sentencing Academy, [‘Sentencing Guidance, the Sentencing Council, and Black & Ethnic Minority Offenders’](#), Roberts and Ashworth (2022), p. 2

⁷ Sentencing Council, [Magistrates’ courts data collections](#)

⁸ [Youth Justice Statistics: 2021 to 2022](#), Sentencing of children, 5.6

⁹ [The Lammy Review](#), Trust – demystifying courts, Recommendation 13 (2017), p. 36

¹⁰ [Tackling Racial Disparity in the Criminal Justice System: 2020 update](#), p. 60

¹¹ [The Lammy Review](#), Fairness - sentencing, Recommendation 12 (2017), p. 34

¹² Ministry of Justice, [‘Government Response to the Lammy Review on the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System’](#) (2017), p. 9

¹³ Ministry of Justice, [‘Tackling Racial Disparity in the Criminal Justice System: 2020 Update’](#) (2020) p. 57

¹⁴ House of Commons Written Question, [Treatment of, and Outcomes for, Black, Asian and Minority Ethnic Individuals in the Criminal Justice System Independent Review](#) (2020)

¹⁵ [The Lammy Review](#), Insight to action (2017), p. 14

However, there have been some improvements. The Sentencing Council have made concerted efforts to improve its demographic data. In May 2021, to improve accuracy, they published their first statistics using self-identified ethnicity (rather than one identified by officers). Since the publication of the Firearms offences guidelines in December 2020, they have published data tables of sentencing outcomes, average custodial sentence lengths and sentence length distribution stratified by each demographic group.¹⁶

Sentencing Guidelines

Improved quality of data collection and publication (as Lammy recommended) has directly mitigated bias insofar as sentencers are explicitly reminded (for offences where there is a known disparity) to be mindful of disparities based on ethnicity. For example, at Step 2 in the guideline for ‘Firearms – Possession of prohibited weapon’, it is flagged that sentencers ‘should be aware that there is evidence of a disparity in sentence outcomes for this offence...’¹⁷ In that context, it refers sentencers to guidance at Chapter 8 in the Equal Treatment Bench Book (ETBB). That guidance starts by noting ‘BAME individuals are over-represented in the criminal justice system.’¹⁸

The Sentencing Council has further mitigated bias by using ‘the analysis and awareness of how different demographic groups may be treated’ to amend explanations to the factors and wording in the guidelines.¹⁹ In explaining ‘remorse’ as a mitigating factor, the guidelines advise that it can present itself ‘in many different ways’ and an ‘offender’s demeanour...could be misleading’ due to ‘a belief that they have been or will be discriminated against.’²⁰ This acknowledgement is in line with, and helps to mitigate, Lammy’s observation of alarmingly low levels of trust among the BAME population in the criminal justice system.²¹

¹⁶ Sentencing Council, [‘Ethnicity data: what we have and how we use it in developing guidelines’](#), June 2021

¹⁷ Sentencing Council, [‘Firearms – Possession of prohibited weapon’](#), January 2021

¹⁸ [Equal Treatment Bench Book](#), Chapter 8, Paragraph 186

¹⁹ Sentencing Council, [‘Ethnicity data: what we have and how we use it in developing guidelines’](#), June 2021

²⁰ For example: Sentencing Guidelines for [‘Possession of a controlled drug with intent to supply it to another’](#)

²¹ [The Lammy Review](#), Key Principles (2017), p. 6

Pre-sentence reports

The ETBB makes reference to Lammy's observations relating to the importance of pre-sentence reports (PSRs). It states that PSRs ensure judges are 'equipped with the information they need', which is 'particularly important for shedding light on individuals from backgrounds unfamiliar to the judge.'²² Lammy laments the decline in their use, particularly where judges have received guidance discouraging their use for drug offences like 'Possession with intent to supply class A drug' given this is 'precisely the type of offence' where sentencing disparities exist. For drug offences, Lammy found the odds of receiving a prison sentence were around 240% higher for BAME offenders, compared to White offenders.²³ In that context, he recommended the use of PSRs be reviewed.²⁴

Although it is positive that this aspect of the Lammy Report is flagged in the ETBB (which, in turn, is referred to in the sentencing guidelines), the use of PSRs have not increased as Lammy hoped. In 2022, it decreased by 6% to 83,240.²⁵ That is in line with the general downward trend in the use of PSRs that Lammy reflected on.

'Explain or reform'

Lammy's endorsement of the principle that criminal justice system agencies must reform if they cannot provide an evidence based explanation for disparities between ethnic groups is a commendable goal. However, for this recommendation to have an effect on mitigating disparities, it requires a formal process or mechanism to hold such agencies to account. That would facilitate its implementation by defining, for example, what constitutes a sufficient explanation or what reforms are deemed necessary (and in what time frame). Without that, this principle is limited in its ability to reduce disparities in sentencing outcomes.

²² [The Lammy Review](#), Fairness – sentencing (2017), page 34

²³ [The Lammy Review](#), Fairness – sentencing (2017), page 33

²⁴ [The Lammy Review](#), Fairness – sentencing (2017), page 35

²⁵ [Offender management statistics quarterly: October to December 2022 and annual 2022](#)

Conclusion

Although many recommendations from the Lammy Report have not been implemented completely, there have been significant improvements in the scrutiny of sentencing decisions as well as a greater understanding of factors that have a disproportionate effect on outcomes. The Sentencing Council is actively tackling those disparities. They have used data to increase transparency and identify disproportionality. In turn, they have used that knowledge to encourage sentencers to be mindful of racial disproportionality. However, it is worth noting that disproportionality is entrenched well before sentencing: in 2020, White defendants had a 79% guilty plea rate in the Crown Court compared to 68% for Asians and 66% for Black defendants.²⁶

The process of mitigating bias is slow and uncertain: it may take generations to yield its desired results. Some recommendations – such as building trust and improving diversity in the judiciary – are inherently glacial processes.

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²⁶ [Ethnicity and the Criminal Justice System](#) (2020), 5.6