

Sentencing Guidance, the Sentencing Council, and Black & Ethnic Minority Offenders

SENTENCING
ACADEMY

Julian V. Roberts and Andrew Ashworth

May 2022

Executive Summary

Sentencing offenders from ethnic and racial minorities has emerged as a key issue around the world. At sentencing, it is important to determine whether offenders from different ethnic and racial backgrounds receive different sentencing outcomes – and if so, why. Sentencing laws and guidelines may contribute, directly or indirectly, to ethnic differences in sentencing outcomes.

This report examines the current guidance provided with respect to this issue in England and Wales.

The Sentencing Council has provided a direction to courts regarding BAME defendants which has been inserted into several of the Council's recent guidelines. All Council guidelines refer to the Equal Treatment Bench Book (ETBB). In its Consultation document on the Drug Offences Draft Guidelines, the Council noted that 'by putting this information before sentencers at the beginning of each guideline, we are reminding sentencers of the need to consider equal treatment, and directing them to the information they need to help them do this' (Sentencing Council, 2020a, pp. 45-46).

It is important to understand the nature of the information which Council is bringing to courts' attention. In some other jurisdictions, some courts have recognised diminished culpability claims made on behalf of racial or minority ethnic offenders at sentencing. Courts have used the offender's social context to justify what may be termed 'diminished culpability' mitigation.

The material in the ETBB does not address issues of systemic discrimination, social disadvantage, or diminished culpability. Rather, the paragraphs in the ETBB document two key research findings: (i) the over-representation of BAME people at various stages of the criminal process, and (ii) the lower levels of confidence and trust in criminal justice found in BAME communities. However, this material consists of background information for sentencers rather than specific guidance such as that contained in the guideline regarding sentence reductions for a guilty plea. A key question for sentencers is the following: How should the sentencing exercise change to reflect this direction from Council?

In order to assess the relevance and weight of sentencing factors, courts need to ensure that all relevant information about the offender and the offence is available at the time of sentencing. Sentencers should be aware that certain circumstances may be more commonly present in the social backgrounds of BAME defendants, and this is what the relevant paragraphs of the ETBB address. The Council's guidance encourages courts to consider the sentencing process in the context of the defendant's social background, and to avoid a mechanical application of the guidelines which assumes that all offenders share a common set of circumstances.

One practical consequence is that courts may find it necessary to take additional steps in order to ensure that this information to be brought to court. The Pre-Sentence Report (PSR) is the primary means of providing information about the offender.

If sentencers have a comprehensive understanding of the offender's background, relevant mitigating factors will be more consistently (and fairly) applied. Some sentencing factors may affect BAME offenders differentially, and BAME defendants may be disadvantaged with respect to some sources of mitigation. Courts should scrutinise all relevant mitigating and aggravating factors to determine whether in these cases any have particular relevance to the case, to ensure

that the factors are not overlooked, or under or over-weighted at sentencing, and that they are applied consistently across all cases. This report examines several such factors in more detail.

One of the mitigating factors in the guideline for the offence of carrying a weapon in a public place is the following: Offender co-operated with investigation and/or made early admissions. Courts should ensure that they fully understand the reasons for a failure to co-operate or make early admissions and also to avoid giving excessive weight to this factor in a way that may exacerbate differences between offenders of different ethnic backgrounds. If BAME defendants hold more negative views of the criminal justice system or professionals working within it, this may explain why they are less co-operative at the pre-trial stage – and less likely to benefit from this ground of mitigation as a result. Members of ethnic minorities may be reluctant to co-operate with the police, perhaps because they, or people they know, have suffered discrimination at the hands of the police or other criminal justice agents. Similarly, they may be more reluctant to make early admissions. Courts should ensure that they fully understand the reasons, in the particular case, for a failure to co-operate or make early admissions.

Research has long demonstrated that ethnic minority defendants are less likely (than other profiles of defendant) to plead guilty. BAME defendants are also acquitted at a higher rate than White defendants. This may account for the lower guilty plea rate of BAME defendants. In 2020, 79% of White offenders pleaded guilty, compared to 66% of Black offenders (Ministry of Justice, 2021b). In addition, it may also be the case that when they do plead guilty, they do so later than other offenders. Having been sensitised to the link between ethnicity and plea, courts should ensure that the appropriate level of reduction is awarded in all cases. This may require an inquiry into reasons for a late plea, in all cases, and not just certain defendants.

Finally, with respect to a third objective of the ETBB, courts need to make a greater effort to explain the sentence to BAME offenders who may have less confidence that they will be treated fairly at sentencing. In light of their life experiences, minority defendants may feel that sentencers are insufficiently aware of their social backgrounds and important sources of mitigation. Some individuals may perceive White defendants to have an advantage in this regard, and it is important for sentencers to address any such perceptions.

It may be useful or even necessary to inquire of the offender whether he or she fully understands the reasons for the sentence being imposed. Sentencers may also need to encourage legal representatives to ensure that the reasons for the sentence are clear to their clients. If possible, written reasons for sentence should be provided to counsel so that they can explain the sentence to their clients and answer any queries. Again, the purpose of the guidance is not to direct courts to apply special consideration for any particular category of offender, but simply to ensure that all understand the reasons for the sentence. This direction is particularly important when the court imposes a sentence of immediate imprisonment.

To summarise, the direction to ensure all necessary information about the offence and the offender is before the court attempts to ensure that courts have the same level of knowledge of the offender prior to sentencing. Seen in this light, the direction to courts regarding BAME defendants and disproportionality is consistent with the Council's approach to guidelines more generally: the goal is to ensure a consistent application of all relevant circumstances and principles, and not to encourage courts to focus on harmonising outcomes.

The report concludes by identifying research priorities in the area.

Contents

| | |
|---|-----------|
| Introduction | 1 |
| I. Exploring the Sentencing Council’s Guidance | 3 |
| II. Further Research Priorities and Related Council Activities | 10 |
| Conclusion | 12 |
| References | 13 |

Introduction

Sentencing offenders from ethnic and racial minorities has emerged as a key issue around the world. This reflects growing concern about racial disproportionality at all stages of the criminal process. At sentencing, it is important to determine whether offenders from different ethnic and racial backgrounds receive different sentencing outcomes – and if so, why. As a result, jurisdictions with Sentencing Councils have begun to scrutinise their guidelines to determine whether any amendments are necessary to address racial disproportionality. US Sentencing Commissions have a duty to ensure that no elements of their guidelines inadvertently contribute to racial disproportionality – for example, in prison admissions or prison populations. Sentencing laws and guidelines may contribute, directly or indirectly, to ethnic differences in sentencing outcomes.

The Sentencing Council in England and Wales has analogous duties. First, it has a Public Sector Equality Duty (PSED) as set out in section 149 of the Equality Act 2010 (the 2010 Act) which came into force on 5 April 2011. This legal duty requires public authorities (and those carrying out public functions on their behalf) to have ‘due regard’ to three ‘needs’ or ‘limbs’ when considering a new policy or operational proposal. Complying with the duty involves having due regard to each of the three limbs: (i) the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited under the 2010 Act; (ii) the need to advance equality of opportunity between those who share a ‘protected characteristic’ and those who do not; (iii) the need to foster good relations between those who share a ‘protected characteristic’ and those who do not. The second relevant statutory duty is to monitor the operation and effect of its guidelines and to draw conclusions about the effect of the guidelines on ‘the promotion of consistency’ and ‘the promotion of public confidence’.¹ Understanding any unintended effects of the guidelines on racial and ethnic minority defendants is within this duty.

This report explores current guidance from the Sentencing Council relating to sentencing ethnic minority offenders in England and Wales. After providing a brief summary of research findings documented more fully elsewhere (Roberts and Bild, 2021), Part I provides a commentary on the guidance recently issued by the Council. Part II identifies some research priorities in this area.

Summary of empirical research findings on sentencing differentials

Despite the accumulated research, our knowledge of differential sentencing across ethnic groups remains imperfect.² Many gaps exist in terms of the nature and extent of the problem. That said, we draw the following preliminary conclusions from the studies published to date.

¹ Coroners and Justice Act 2009 s 128 (1)(c) and (d).

² However, it is worth noting that as a result of the duty under section 95 of the Criminal Justice Act 1991, much more is known about sentencing of ethnic minority defendants in England and Wales than most other jurisdictions. The Ministry of Justice publishes an annual report containing a range of statistics relating to BAME groups. Few countries routinely publish sentencing statistics broken down by the race or ethnicity of the offender.

* Research on sentencing outcomes has used both third-party classifications and self-reported ethnicity, although the most common approach employs self-identification. While differences in the manner of classification may affect statistical patterns, the general finding is that Black, Asian and Minority Ethnic (BAME)³ groups are associated with a greater use of incarceration.

* While visible minority offenders attract higher custody rates than White offenders for a number of offences, the ordering of different groups varies from study to study. The most recent *Statistics on Race and the Criminal Justice System* report found that the categories 'Chinese and Other' and 'Asian' attracted the highest custody rate (averaged over all offences). Although group-based differences in custody rates and custodial sentence lengths are relatively modest, they are statistically significant.

* To date, research has focused on two measures of imprisonment: **Custody Rates** and **Average Custodial Sentence Lengths**. There is long-standing evidence of ethnicity-based differences using both measures.

* An '**Expected Custodial Sentence**' which combines both measures reveals that all BAME groups are associated with a higher use of custody as a sanction, with Asian and then Black ethnic profiles attracting the highest imprisonment scores. Over the period 2009-2019, Black offenders attracted the most punitive imprisonment levels.

* The differences between ethnic groups are striking for some offences, small for others, and absent for many categories of offending. Ethnicity-based differences have emerged most consistently and strongly for drug offences. This is the only offence category that has been explored using the most detailed (yet time-limited) sentencing database (the Sentencing Council's 'Crown Court Sentencing Survey').

* Most studies to date have been restricted to indictable offences in the Crown Court. Very little is known about ethnicity-related sentencing differentials in the magistrates' courts.⁴

³ We are using the BAME designation in this report as this has been used in most of the official reports this paper reviews and also in the Equal Treatment Bench Book (Judicial Office, 2021).

⁴ The biennial *Statistics on Race and the Criminal Justice System* reports covering the period before 2009 provide sentencing outcomes for BAME groups in both the magistrates' courts and the Crown Court.

I. Exploring the Sentencing Council's Guidance

In 2021, the Sentencing Council announced it was commissioning research to determine whether its guidelines may contribute⁵ to disparity in sentencing outcomes.⁶ In addition, in recent years the Council has introduced references to the issue in its evolving guidance for courts.

The first reference to the issue appears in the Council's 2017 guideline for sentencing young persons:

'There is evidence to suggest that black and minority ethnic children and young people are over-represented in the youth justice system. The factors contributing to this are complex. One factor is that a significant proportion of looked after children and young people are from a black and minority ethnic background. A further factor may be the experience of such children and young people in terms of discrimination and negative experiences of authority. When having regard to the welfare of the child or young person to be sentenced, the particular factors which arise in the case of black and minority ethnic children and young people **need to be taken into account** (emphasis added)'. (Sentencing Council, 2017a, para. 1.18)

This direction from Council suggests that sentencers should be aware of the experiences of BAME children, and in particular those who have been subject to forms of discrimination.

More recently, Council has provided a direction to courts regarding BAME defendants which has been inserted into several of the Council's recent guidelines. All Council guidelines refer to the Equal Treatment Bench Book (ETBB),⁷ although no mention is made of any specific paragraphs of the document.⁸ In its Consultation document on the Drug Offences Draft Guidelines, the Council noted that 'by putting this information before sentencers at the beginning of each guideline, we are reminding sentencers of the need to consider equal

⁵ Other guidelines authorities have also taken this step. For example, in 2020, the Minnesota Sentencing Guidelines Commission launched a 'guidelines neutrality review' to ensure that its guidelines did not differentially affect racial minorities and thereby contribute to racial disproportionality in the prison population. The Commission initiated a 'neutrality' review of its guidelines and will publish findings from the review later in 2022. See https://mn.gov/sentencing-guidelines/assets/2021MinnSentencingGuidelinesCommReportLegislature_tcm30-463260.pdf

⁶ Council noted that its research would: 'review any potential for its work to cause disparity in sentencing. Aspects to be examined will include those such as the language used, factors, offence context, expanded explanations and structure of sentencing guidelines. As well as examining the guidelines, the work will consider whether any aspects of the guideline development cycle could have any implications for equalities and disparity in sentencing. The review will also consider how the Council can best engage with underrepresented groups to increase awareness and understanding of sentencing guidelines.' See: <https://www.sentencingcouncil.org.uk/news/item/commissioning-research-to-review-any-potential-for-the-work-of-the-sentencing-council-to-cause-disparity-in-sentencing-2/>.

⁷ This resource for the judiciary is issued by the Judicial College. It is revised and updated periodically, with the most recent complete version being published in February 2021 and revised in December 2021. It is used by all courts across England and Wales with the goal of ensuring that 'all those in and using a court leave it conscious of having appeared before a fair-minded tribunal' (Judicial College, 2021, p. 2).

⁸ The guidance states: 'Guideline users should be aware that the Equal Treatment Bench Book covers important aspects of fair treatment and disparity of outcomes for different groups in the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.'

treatment, and directing them to the information they need to help them do this' (Sentencing Council, 2020a, pp. 45-46).

Disproportionality statistics in the ETBB

It is important to understand the nature of the information which Council is bringing to courts' attention. In some other jurisdictions, some courts have recognised diminished culpability claims made on behalf of racial or minority ethnic offenders at sentencing. Courts have used the offender's social context to justify what may be termed 'diminished culpability' mitigation.⁹

The material in the ETBB does not address issues of systemic discrimination, social disadvantage, or diminished culpability. Rather, the paragraphs in the ETBB document two key research findings (see above): (i) the over-representation of BAME people at various stages of the criminal process, and (ii) the lower levels of confidence and trust in criminal justice found in BAME communities. The relevant section of the ETBB cites key findings from Ministry of Justice research and the Lammy Review (Judicial College, 2021, Chapter 8). However, this material consists of background information for sentencers rather than specific guidance such as that contained in the guideline regarding sentence reductions for a guilty plea.¹⁰ A key question for sentencers is the following: *How should the sentencing exercise change to reflect this direction from Council?*

Since the Council's direction appears at Step 2 of the guidelines' methodology, it would appear that Council does not see this information to be a primary consideration relevant to the determination of the offender's level of culpability; if it did, it would have been inserted at Step 1. Step 1 factors exercise a greater influence over sentence outcomes since they determine the sentence range which the court will use. Step 2 factors affect the sentence only within the range established at Step 1.

Other approaches could have been adopted. For example, the guideline could include an extra step – prior to giving reasons – where a court is asked to take a last look to see whether the sentence was proportionate. In the guideline for corporate offenders convicted of fraud, bribery or money laundering offences, an additional step (5) requires courts to 'step back and consider the overall effect of its orders' (Sentencing Council, 2014).

Similarly, the 'steer' to review the ETBB appears in certain offence-specific guidelines – those where disproportionality has been most clearly documented – and not in the guidelines of general application. This may suggest that the information is unrelated to any wider consideration of the individual offender's level of culpability.

⁹ For example, a recent Canadian sentencing decision from the Ontario Court of Appeal noted that: 'The moral blameworthiness of [the offender] is mitigated by his mental and physical health issues, as well as his educational and economic disadvantages. All of those factors are influenced by the systemic anti-Black racism Mr. Morris has experienced. The factors can only properly be understood, for the purposes of determining the appropriate sentence, by having regard to that context.'; see [R. v. Morris, 2021 ONCA 680 \(ontariocourts.ca\)](#).

¹⁰ As is well-known, this guideline prescribes specific levels of reduction for pleas entered at different stages in the criminal process. See Sentencing Council (2017b).

Objectives of the ETBB information

The additional information in the ETBB appears to have three objectives:

- (i) To ensure that sentences do not inadvertently contribute to BAME over-representation in criminal justice system statistics or otherwise exacerbate sentencing differentials;
- (ii) To ensure that sentencers have all necessary information, regardless of their level of familiarity with the defendant's background. Relying on the evidence adduced at trial may be insufficient; the sentencer may need to have more information about the offender's background.
- (iii) To ensure all offenders, regardless of their background, have a full understanding of the consequences of their sentence and the court's reasons for imposing this particular sanction.

The following steps might prevent sentencing from contributing to ethnic differences.

(i) Promoting general awareness of defendants' backgrounds

The Council has included guidance on this issue in its guidelines for drugs and firearms offences. For example, the following direction is provided at Step 2 of the guideline for some firearms offences:

'Step 2 – Starting point and category range

Having determined the category at step 1, the court should use the corresponding starting point to reach a sentence within the category range below. The starting point applies to all offenders irrespective of plea or previous convictions.

Sentencers should be aware that there is evidence of a disparity in sentence outcomes for this offence which indicates that a higher proportion of Black and Other ethnicity offenders receive an immediate custodial sentence than White and Asian offenders.

There may be many reasons for these differences, but in order to apply the guidelines fairly sentencers may find useful information and guidance at Chapter 8 paragraphs 185 to 193 of the Equal Treatment Bench Book.' (Sentencing Council, 2021a)

The purpose of these directions is to ensure that sentencers have a general awareness of the problem of BAME disproportionality. The guideline thus highlights disparity in sentence outcomes and suggests sentencers consult sections of the ETBB.

The question to be addressed is whether Council can provide any more guidance regarding the judicial consideration of this material. The paragraphs of the ETBB are informative, but they do not indicate particular ways in which sentencers can ensure fairness in applying the guidelines. Instead, they imply that sentencers should stand back and consider whether an offender's ethnicity has (directly or indirectly) been a factor in arriving at the sentence imposed.

It is important to note what the guidance does not suggest, and to be realistic about the degree of guidance that can be offered. The Council's direction is clearly not intended as an automatic or categorical reduction in sentence to reflect BAME over-representation in

criminal justice system statistics. Courts sentence individuals, not cohorts or categories of offender, and sentencers cannot solve a systemic problem by adjusting individual sentences.¹¹ But there remains the question of how exactly a sentencer should proceed in this context.

(ii) Understanding cultural differences

In order to assess the relevance and weight of sentencing factors, courts need to ensure that all relevant information about the offender and the offence is available at the time of sentencing. Sentencers should be aware that certain circumstances may be more commonly present in the social backgrounds of BAME defendants, and this is what the relevant paragraphs of the ETBB address. The Council's guidance encourages courts to consider the sentencing process in the context of the defendant's social background, and to avoid a mechanical application of the guidelines which assumes that all offenders share a common set of circumstances.

One practical consequence is that courts may find it necessary to take additional steps in order to ensure that this information to be brought to court. The Pre-Sentence Report (PSR) is the primary means of providing information about the offender (Robinson, 2022). This importance of the PSR was stressed in the Lammy Review, which noted that judges must be equipped with the information they need (Lammy, 2017, p. 34). The September 2020 White Paper indicated the Government's intention to introduce 'new ways of delivering timely and high quality' pre-sentence reports (Ministry of Justice, 2020, p. 36).¹²

A full appreciation of the offender's circumstances is necessary when sentencing any offender, but a court may need to make a greater effort to understand the circumstances of individuals from backgrounds which may be unfamiliar to the judge – for reasons related to both class and ethnicity.¹³ The judicial diversity statistics report that in 2021, 91% of judges and 87% of magistrates were White (Ministry of Justice, 2021a). In addition, defence advocates have a clear duty to place all relevant information before the court at sentencing.

If sentencers have a comprehensive understanding of the offender's background, relevant mitigating factors will be more consistently (and fairly) applied. Some sentencing factors may affect BAME offenders differentially, and BAME defendants may be disadvantaged with respect to some sources of mitigation. Courts should scrutinise all relevant mitigating and aggravating factors to determine whether in these cases any have particular relevance to the case, to ensure that the factors are not overlooked, or under or over-weighted at

¹¹ This said, there may be room for broader structural factors to be taken into account when sentencing an individual. For example, an offender raised or living in an environment in which racism is widespread should be able to cite this circumstance in mitigation. In this respect, at least, sentencers should consider wider social circumstances as they apply to specific individuals.

¹² A pilot project commenced in May 2021. See: <https://www.gov.uk/guidance/pre-sentence-report-pilot-in-15-magistrates-courts>.

¹³ Although it is beyond the remit of the Council, we note that in some other jurisdictions, courts consider reports which focus specifically on the circumstances of racial minority offenders. Canada has introduced 'Impact of Race and Culture Assessments' (IRCAs). These documents are extensive psycho-social assessments which supplement more traditional pre-sentence reports. IRCAs are intended to provide judges at sentencing with a fuller appreciation of the person and their background and to help determine whether (and for how long) they should go to a prison or serve time in their community (see Dugas (2020)).

sentencing, and that they are applied consistently across all cases. Several such factors are now examined in more detail.

1. Co-operation with investigation and/or made early admissions

One of the mitigating factors in the guideline for the offence of carrying a weapon in a public place is the following: Offender co-operated with investigation and/or made early admissions. Courts should ensure that they fully understand the reasons for a failure to co-operate or make early admissions and also to avoid giving excessive weight to this factor in a way that may exacerbate differences between offenders of different ethnic backgrounds. If BAME defendants hold more negative views of the criminal justice system or professionals working within it, this may explain why they are less co-operative at the pre-trial stage – and less likely to benefit from this ground of mitigation as a result.

One reason why such co-operation might not be forthcoming from BAME offenders may be found in the widely acknowledged disparity in stop-and-search rates between White and BAME people (Phillips and Bowling, 2017). Members of ethnic minorities may be reluctant to co-operate with the police, perhaps because they, or people they know, have suffered discrimination at the hands of the police or other criminal justice agents. Similarly, they may be more reluctant to make early admissions. Courts should ensure that they fully understand the reasons, in the particular case, for a failure to co-operate or make early admissions.

What is the implication of this for sentencing guidance? Clearly, it would be wrong to treat failure to co-operate with the investigation as an aggravating factor: at best, it could only be non-mitigating. But if it can be shown that the defendant had reason (from previous encounters) to be reluctant to co-operate, how should the court respond to that? It would seem strange to credit offenders with this as a mitigating factor; and yet failure to accord any weight to this factor might exacerbate differences between offenders of different ethnic backgrounds.

2. Sentence reductions for a guilty plea

Research has long demonstrated that ethnic minority defendants are less likely (than other profiles of defendant) to plead guilty (Gormley et al., 2020; Hood, 1992). BAME defendants are also acquitted at a higher rate than White defendants. This may account for the lower guilty plea rate of BAME defendants. In 2020, 79% of White offenders pleaded guilty, compared to 66% of Black offenders (Ministry of Justice, 2021b). In addition, the acquittal rate of BAME defendants has for many years been higher than for White defendants.¹⁴ In addition, it may also be the case that when they do plead guilty, they do so later than other offenders. Having been sensitised to the link between ethnicity and plea, courts should ensure that the appropriate level of reduction is awarded in all cases. This may require an inquiry into reasons for a late plea, in all cases, and not just certain defendants.

¹⁴ For example, in 2020, 19% of Black defendants were acquitted compared to 13% of White defendants. In 2010, the statistics were, respectively 25% and 19%. Source: Crown Court data tool. Available here: <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2020>.

3. *Remorse*

The Council's 'expanded explanations' of sentencing factors contains this direction: 'the court will need to be satisfied that the offender is genuinely remorseful'. But how is a court to be satisfied about this? The Council has warned that:

'the offender's demeanour in court could be misleading due to nervousness, a lack of understanding of the system, a belief that they have been or will be discriminated against, peer pressure to behave in a certain way because of others present, a lack of maturity, etc.' (Sentencing Council, 2021b, pp. 26-27)¹⁵

This warning spells out some of the difficulties in assessing remorsefulness, particularly in relation to young BAME offenders. The Council's general guidance which contains expanded guidance regarding sentencing factors notes that 'lack of remorse should never be treated as an aggravating factor' (Sentencing Council, 2019). It is appropriate to give credit to an offender who genuinely shows remorse. However, BAME offenders should not be penalised for failing to show remorse in the traditional manner.

4. *Mental disorder or learning disability*

It has long been accepted as a mitigating factor that the offender is suffering from mental disorder or learning disability. There is statutory recognition of this in section 78 of the Sentencing Act 2020 (the Sentencing Code) which preserves the court's power to mitigate sentence for offenders suffering from a mental disorder. In many cases the court will have requested a psychiatric report, which will then be used to select an appropriate sentence or order. The Council's guideline for sentencing offenders with a mental disorder states that:

'It is important that courts are aware of relevant cultural, ethnicity and gender considerations of offenders within a mental health context. This is because a range of evidence suggests that people from BAME communities may be more likely to experience stigma attached to being labelled as having a mental health concern, may be more likely to have experienced difficulty in accessing mental health services and in acknowledging a disorder and seeking help, may be more likely to enter the mental health services via the courts or the police rather than primary care and are more likely to be treated under a section of the [Mental Health Act 1983]. In addition, female offenders are more likely to have underlying mental health needs and the impact therefore on females from BAME communities in particular is likely to be higher, given the intersection between gender and race. Moreover, refugees and asylum seekers may be more likely to experience mental health problems than the general population. Further information can be found at Chapters six and eight of the Equal Treatment Bench Book.' (Sentencing Council, 2020b)

This draws attention to these possibilities in the context of sentencing BAME offenders, but once again the question is *how* courts should take one or more of these adverse possibilities into account. For example, if the judge or magistrates become aware of the possibility that mental disorder is a factor in the case, but it has not been mentioned by the defence, the court should raise it with the defence advocate (always bearing in mind the

¹⁵ For similar remarks in relation to young defendants, see Sentencing Council (2017a), para. 1.15.

sensitivities listed above). It may then be appropriate to request a psychiatric report, with a view to making some form of treatment order. Thus, the issues with this mitigating factor are a) recognising that the defendant is suffering from a mental disorder, and b) the making of an order that is appropriate and well-adjusted to the possible sensitivities.

5. 'Looked after' children and young people

The Council's overarching guideline on *Sentencing Children and Young People* states that 'a significant proportion of looked after children and young people are from a black and ethnic minority background' (Sentencing Council, 2017a, para. 1.18). The overarching guideline alerts the courts to the 'additional complex vulnerabilities that are likely to be present in their background.' Thus:

'For example, looked after children and young people may have little or no contact with their family and/or friends, they may have special educational needs and/or emotional and behavioural problems, they might be heavily exposed to peers who have committed crime, and they are likely to have accessed the care system as a result of abuse, neglect or parental absence due to bereavement, imprisonment or desertion.' (Sentencing Council, 2017a, para. 1.16)

This and other paragraphs of this overarching guideline make it clear that courts should be aware of these issues when sentencing children. Although the guideline does not explicitly say so, it implies that courts should take a less severe view of child offenders to whom such factors apply. Moreover, the guideline states that a looked after child 'may be before the court for a low-level offence that the police would not have been involved in, if it had occurred in an ordinary family setting' (Sentencing Council, 2017a, para. 1.16), implying that courts should take a particularly lenient view of such cases.

The reference to 'additional complex vulnerabilities' that are likely to be present in looked after children suggests that the possible factors set out above amount to 'diminished culpability' mitigation. Just as offenders suffering from mental disorder or learning disability may have reduced culpability, so may child offenders who are (or have been) 'looked after'. This may apply equally to White looked after children, but the point is that sentencers should be aware that a disproportionately high number of BAME offenders may fall into this category.

(iii) Explaining the sentence to the defendant

Finally, with respect to the third objective of the ETBB, courts need to make a greater effort to explain the sentence to BAME offenders who may have less confidence that they will be treated fairly at sentencing. In light of their life experiences, ethnic minority defendants may feel that sentencers are insufficiently aware of their social backgrounds and important sources of mitigation. Some individuals may perceive White defendants to have an advantage in this regard, and it is important for sentencers to address any such perceptions.

It may be useful or even necessary to inquire of the offender whether he or she fully understands the reasons for the sentence being imposed. Sentencers may also need to encourage legal representatives to ensure that the reasons for the sentence are clear to their clients. If possible, written reasons for sentence should be provided to counsel so that they can explain the sentence to their clients and answer any queries. Again, the purpose of

the guidance is not to direct courts to apply special consideration for any particular category of offender, but simply to ensure that all understand the reasons for the sentence. This direction is particularly important when the court imposes a sentence of immediate imprisonment.

To summarise, the direction to ensure all necessary information about the offence and the offender is before the court attempts to ensure that courts have the same level of knowledge of the offender prior to sentencing. Seen in this light, the direction to courts regarding BAME defendants and disproportionality is consistent with the Council's approach to guidelines more generally: the goal is to ensure a consistent application of all relevant circumstances and principles, and not to encourage courts to focus on harmonising outcomes.

II. Further Research Priorities and Related Council Activities

The suggestions made so far are relevant to the micro level – to sentencers imposing sentence in individual cases. Consideration should also be devoted to the macro level, namely when devising or amending the guidelines.¹⁶ What else might the Council do, alone or in conjunction with the Ministry of Justice and other partners?

1. Extend differential sentencing analyses to all high-volume offences

As noted, the Council has taken the first step of conducting and publishing research addressing outcome differentials for offenders from different ethnic backgrounds. This research exercise should be extended to cover other high-volume offences, particularly those with higher numbers of ethnic minority defendants. The absence of much granularity in the research published to date limits its ability to establish the exact degree of racial or ethnic differentials. For example, when comparing sentencing outcomes for different categories of offender, it has not been possible to control for the seriousness of the crime beyond the category of offence.

The one exception is the research on drug offence sentencing published by the Council. Most offences are now covered by a guideline, and the guidelines break the sentence range down into levels of seriousness. If the sentencing data capture the offence seriousness level as determined by the court, it becomes possible to make more fine-grained comparisons between categories of offenders sentenced for the same offence. For example, it would be possible to make comparisons between different groups of offenders

¹⁶ It may be necessary to consider structural aspects of the guidelines. For example, in the US, Black defendants tend to have more serious criminal histories. Since US guidelines assign great weight to prior convictions at sentencing, prior record enhancements contribute greatly to racial disproportionality in prison populations (see Frase and Roberts (2019), Chapter 7). Prior convictions carry less weight in England and Wales, yet other features of our guidelines may require greater scrutiny to determine whether they may contribute to ethnic differences in sentencing outcomes.

who were assigned to the same seriousness level by the court (at Step 1 of the guidelines methodology).¹⁷

2. Explore the impact of general guidelines on BAME offenders

In addition, Council could undertake research to determine if its 'generic' guidelines affect BAME offenders differently. We have noted that BAME defendants are less likely to plead guilty, and therefore less likely, as a group, to benefit from plea-based sentence reductions. It is therefore important to determine whether BAME offenders who do plead guilty receive comparable sentence reductions in return for their plea. Research to date has focused on guilty plea rates. More fine-grained analyses should explore whether certain individuals enter later pleas, even if their overall plea rate is no different from other groups of defendants.

3. Conduct racial impact projections of future guidelines

When Council develops a new or amended guideline it is required to conduct an impact assessment to predict the effect of the new or amended guideline on the prison population. For guidelines relating to offences with significant proportions of BAME offenders, Council should assess the likely impact of the proposed guideline on BAME offenders, and their over-representation in sentencing and prison statistics. For example, in 2017 Council issued an amended guideline regarding sentence reductions for a guilty plea. In light of the ethnic differentials arising with respect to guilty plea rates, Council should examine the impact this new guideline has had on BAME offenders, focusing on imprisonment rates and sentence lengths.¹⁸ Has the new guideline had any effect on levels of BAME disproportionality? This information would then contribute to the consultation process for any new or revised guideline. Thereafter, Council should conduct similar projections for all future guidelines.¹⁹

4. Explore the relationship between ethnicity and other sanctions

As noted in our summary of research, to date the focus has been exclusively upon comparing custody rates and prison sentence lengths for different categories of offender. In conjunction with the Ministry of Justice, Council should test for any differences using length of community and suspended sentence orders, the requirements attached to both orders, and other non-custodial sentences such as fines and discharges.

In addition to these sanction-specific comparisons, it would be useful to compare categories of offender using a global punitiveness measure, one that incorporates all principal sanctions. A number of such methodologies have been proposed to evaluate the

¹⁷ For example, consider two offenders convicted of street robbery. If the court assigns one to Category 1A and the other to 3C, the starting point sentences, and the sentences ultimately imposed, will be very different. The starting point for 1A is 8 years' custody, compared to 1 year from 3A, yet both offenders would be entered as having been convicted of the 'same offence'.

¹⁸ This proposal is consistent with the US Commission's 'racial impact statements' which predict the impact, if any, on the racial composition of admissions to prison and prison populations.

¹⁹ In the US, for example, sentencing commissions conduct 'racial impact' analyses prior to recommending changes to existing guidelines. For example: [MSGC Demographic Impact Statement Policy 2.0.docx \(mn.gov\)](#)

overall impact of sentencing on offenders of different backgrounds (see, for example, Pina-Sánchez et al. (2019)).

5. Explore the impact of ethnicity on the application of sentencing factors

In order to allay any apprehension that some sentencing factors are applied differentially across ethnicities, Council could conduct analyses using its Crown Court Survey database. This unique source of data would shed light on the questions of whether some aggravating or mitigating factors are invoked more frequently, or carry more or less weight for BAME defendants. Although the data are rather dated now,²⁰ the *Crown Court Sentencing Survey* could be used to determine whether ethnicity differentials exist with respect to the effects of various mitigating and aggravating factors on sentencing outcomes. Council may also be able to draw upon more recent 'snapshot' data collections for this purpose. These databases contain much more detailed information about cases than is found in pre-existing Ministry of Justice sources.

Council has already made changes to the guidance regarding some mitigating factors (such as remorse) in order to achieve a more equal application of these factors (Sentencing Council 2021b, p. 27) and, as noted, Council recently announced its intention to commission a review of its guidelines for this purpose. For example, across all cases, is the mitigating effect of remorse the same for BAME and White defendants?

Finally, analyses of sentencing decisions focus on a single stage of the criminal process. Yet disparity between ethnicities can occur at all stages of the criminal justice system. Accordingly, it is important to adopt a more holistic approach, testing for differences at all stages. In this way, we will learn how disparities early in the criminal process affect subsequent decision-making.

Conclusion

The over-representation of ethnic minority individuals in criminal justice system statistics, including prison admissions and populations, has many causes. Research suggests that disproportionality is greatest at earlier stages of the criminal process, well before sentencing takes place.²¹ This finding explains why sentencers should not attempt, in their sentences, to 'correct' biases created at earlier stages of the criminal process. Nevertheless, it is important that sentencers avoid exacerbating the problem of racial disproportionality, and it is essential that all offenders receive the same degree of individualised sentencing.

²⁰ Council discontinued the Crown Court Sentencing Survey in 2015.

²¹ See for example annual statistics published by the Ministry of Justice (e.g., 2021b).

References

- Dugas, M. (2020) 'Committing to justice: The case for impact of race and culture assessments in sentencing African Canadian offenders'. *Dalhousie Law Journal*, 43(1): 103-158.
- Frase, R. and Roberts, J.V. (2019) *Paying for the Past: Prior Record Enhancements in the US Sentencing Guidelines*. New York: Oxford University Press.
- Gormley, J., Roberts, J.V., Bild, J. and Harris, L. (2020) *Sentence Reductions for a Guilty Plea: A review of policy, practice and research*. London: Sentencing Academy.
- Hood, R. (1992) *Race and Sentencing*. Oxford: The Clarendon Press.
- Judicial College (2021) *Equal Treatment Bench Book*, February 2021 edition (December 2021 revision).
- Lammy, D. (2017) *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*.
- Ministry of Justice (2020) *A Smarter Approach to Sentencing*. CP 292.
- Ministry of Justice (2021a) *Diversity of the judiciary: Legal professions, new appointments and current post-holders – 2021 Statistics*.
- Ministry of Justice (2021b) *Ethnicity and the Criminal Justice System, 2020*.
- Pina-Sánchez, J., Gosling, J.P., Chung, H., Bourgeois, E., Genelietti, S. and Marder, I.D. (2019). 'Have the England and Wales Guidelines Affected Sentencing Severity? An Empirical Analysis Using a Scale of Severity and Time-Series Analyses'. *British Journal of Criminology*, 59(4): 979-1001.
- Phillips, C. and Bowling, B. (2017) Ethnicities, Racism, Crime and Criminal Justice. In: S. Maruna, A. Liebling and L. McAra (eds.) *Oxford Handbook of Criminology*. Sixth Edition. Oxford: Oxford University Press, pp. 195-202.
- Roberts, J.V. and Bild, J. (2021) *Ethnicity and Custodial Sentencing: A review of the trends, 2009-2019*. London: Sentencing Academy.
- Robinson, G. (2022) *Pre-Sentence Reports: A review of policy, practice and research*. London: Sentencing Academy.
- Sentencing Council (2014) *Corporate offenders: fraud, bribery and money laundering*.
- Sentencing Council (2017a) *Sentencing Children and Young People*.
- Sentencing Council (2017b) *Reduction in sentence for a guilty plea - first hearing on or after 1 June 2017*.
- Sentencing Council (2019) *General guideline: overarching principles*.
- Sentencing Council (2020a) *Drug Offences Consultation*.
- Sentencing Council (2020b) *Sentencing offenders with mental disorders, developmental disorders, or neurological impairments*.
- Sentencing Council (2021a) *Firearms – Possession of prohibited weapon*.
- Sentencing Council (2021b) *Drug Offences: Response Document*.