

## **Sentencing Guidelines and Black and Minority Ethnic Offenders**

### **Background Memo for Presentation to the MSGC**

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Sentencing ethnic and racial minorities has emerged as a key issue around the world. This reflects growing concern about racial disproportionality in criminal justice statistics.<sup>1</sup> As a result, jurisdictions with sentencing commissions or councils have begun to scrutinise their guidelines to determine whether amendments are necessary. The existence of racial disproportionality in criminal justice statistics requires consideration by individual sentencers and also by the authority which issues guidelines. Sentencers should ensure that their decisions do not contribute to racial disproportionality, and that where relevant, the special circumstances of Black and Minority Ethnic ('BAME') offenders are appropriately recognised in sentencing outcomes. The guidelines authority has a duty to ensure that elements of its guidelines do not inadvertently contribute to disproportionality – for example in prison admissions or prison populations.

#### *A note about recent Canadian developments*

Some jurisdictions have been more interventionist than others in responding to issues relating to sentencing ethnic and racial minorities. In Canada (a jurisdiction without guidelines), a provision in the Code directs courts to 'consider all alternatives to custody, with particular attention to the circumstances of Aboriginal offenders'. This clause was introduced to address the high rates of indigenous incarceration. More recently, courts have begun to apply the provision more broadly, to address the over-representation of Black offenders, and in recognition of systemic anti-Black racism in Canadian society. The Ontario Court of Appeal is currently hearing an appeal against a trial court sentence imposed on a Black offender convicted of illegal possession of a loaded firearm in a public place. The trial court imposed a significantly reduced prison sentence to reflect the systemic factors in the offender's social circumstances and background.<sup>2</sup> The case will likely proceed to the Supreme Court of Canada, as the issue has attracted much professional and public interest, and the appeal involved multiple intervenors.

#### *England and Wales*

England and Wales has followed a different approach, more tentative and nonremedial in nature. The Sentencing Council of England and Wales (SCEW) has taken a number of steps to address the sentencing of BAME offenders. First, Council has published research findings documenting limited sentencing differentials for certain offences.<sup>3</sup> Second, it recently announced its intention

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<sup>1</sup> The Ministry of Justice has a statutory duty to publish an annual set of statistics. See: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/849200/statistics-on-race-and-the-cjs-2018.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/849200/statistics-on-race-and-the-cjs-2018.pdf)

<sup>2</sup> The trial court noted it had taken into account 'the problem we have in the unfair and disproportionate jailing of Black offenders... this is what I did in a case I decided in April this year'. R. v. Morris, [2018] O.J. No. 4631, para 7.

<sup>3</sup> <https://www.sentencingcouncil.org.uk/publications/item/investigating-the-association-between-an-offenders-sex-and-ethnicity-and-the-sentence-imposed-at-the-crown-court-for-drug-offences/>.

to commission research to determine whether its guidelines may contribute to disparity in sentencing outcomes.<sup>4</sup> This step is consistent with the Minnesota Sentencing Guidelines Commission's 'neutrality review'. Third, the Council has incorporated information relating to Black and Ethnic Minority ('BAME') defendants into several of its recent guidelines.

The SCEW operates offence-specific guidelines, and I illustrate this approach by reference to the Robbery guideline. The street robbery guideline lays down nine separate steps for courts to follow. (See Appendix for an extract from the robbery guideline consisting of the categories at step one and the factors which determine which category is appropriate for the case being sentenced.) The first step is the most important as it determines the limits of the sentence range that the court will work within as it proceeds through the remaining steps of the guideline. At Step 1 the court assigns the case to one of three levels of harm, and the defendant to one of three levels of culpability (high, medium and lesser).

Once a court has determined which of three categories of harm and culpability is appropriate (guided by the factors listed in the guideline and recommendations from the advocates), it proceeds to Step 2 which contains a matrix with starting point sentences and sentence ranges for each category. For example, if the court decides the offense involves intermediate harm (category 2), committed by an individual of the lowest culpability, the guideline provides a starting point sentence of two years imprisonment and range of one to four years' imprisonment. The court begins at the starting point sentence and then moves up and down within the category range considering a non-exhaustive list of mitigating and aggravating factors (along with any other factors proposed by advocates). This exercise results in a provisional sentence. Thereafter, the court works through the remaining steps including awarding credit for any assistance to the police or prosecution (Step 3) or for a guilty plea (Step 4).

### **The Council's Race and Sentencing Initiative (2020)**

The 2018 definitive guideline for sentencing young persons contained the following text:

*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 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.*

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<sup>4</sup> <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/>.

More recently, the Council has included similar material in its guidelines for drugs and firearms offences. For example, the following direction is provided in the definitive guideline for 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 123 to 129 of the [Equal Treatment Bench Book](#).

The guideline thus highlights evidence of a disparity in sentence outcomes and suggests sentencers consult sections of the Equal Treatment Bench Book (hereafter, 'ETBB'). These paragraphs are reproduced in Appendix A.

### **Disproportionality Statistics**

The ETBB documents two trends, the over-representation of BAME people at various stages of the criminal process and the lower levels of confidence and trust in criminal justice found in BAME communities. The material provided in these paragraphs of the ETBB documents the over-representation of BAME individuals at various stages of the CJS. For example, para 125 notes that BAME defendants are more likely than white defendants to receive prison sentences for drug offences, even when factors such as past convictions are taken into account. The text also offers explanations for some over-representation statistics.<sup>5</sup> The text also notes that BAME people (and not just offenders) believe that 'the justice system discriminates against particular groups or individuals' (para 127). This material consists of background information for sentencers rather than guidance. The key question for sentencers then is the following: *How should the sentencing exercise change to reflect this direction from Council?*

It is important to note what the guidance does not suggest. The Council's direction is not intended as a blanket, automatic, or categorical reduction in sentence to reflect BAME over-representation in CJS statistics. The information is not provided to encourage courts at sentencing to take remedial steps regarding BAME over-representation.

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<sup>5</sup> For example, BAME defendants are more likely than white defendants to plead not guilty in court and plea decisions 'are an important factor' in the disproportionate number of BAME individuals in the prison population (relative to their numbers in the general population).

The additional information in ETBB has three objectives:

- (i) to ensure that individual sentences do not contribute to BAME over-representation;
- (ii) to ensure that sentencers have all necessary information, regardless of their level of familiarity with the defendant's background;
- (iii) to ensure that sentencers explain their sentences in a way which may help to address BAME (and other) defendants' perceptions of unfairness at sentencing.

In my brief presentation to MSGC, I will highlight the kinds of steps that courts in England will likely be expected to follow as a result of this guidance. I will also attempt draw out any implications for the MSGC.

## Appendix A: Extract from English Robbery Guideline

### STEP ONE Determining the offence category

The court should determine the offence category with reference **only** to the factors listed in the tables below. In order to determine the category the court should assess **culpability** and **harm**.

The court should weigh all the factors set out below in determining the offender’s culpability.

**Where there are characteristics present which fall under different levels of culpability, the court should balance these characteristics to reach a fair assessment of the offender’s culpability.**

**Culpability** demonstrated by one or more of the following:

<b>A – High culpability</b>	<ul style="list-style-type: none"> <li>• Use of a weapon to inflict violence</li> <li>• Production of a bladed article or firearm or imitation firearm to threaten violence</li> <li>• Use of very significant force in the commission of the offence</li> <li>• Offence motivated by, or demonstrating hostility based on any of the following characteristics or presumed characteristics of the victim: religion, race, disability, sexual orientation or transgender identity</li> </ul>
<b>B – Medium culpability</b>	<ul style="list-style-type: none"> <li>• Production of a weapon other than a bladed article or firearm or imitation firearm to threaten violence</li> <li>• Threat of violence by any weapon (but which is not produced)</li> <li>• Other cases where characteristics for categories A or C are not present</li> </ul>
<b>C – Lesser culpability</b>	<ul style="list-style-type: none"> <li>• Involved through coercion, intimidation or exploitation</li> <li>• Threat or use of minimal force</li> <li>• Mental disability or learning disability where linked to the commission of the offence</li> </ul>

#### **Harm**

The court should consider the factors set out below to determine the level of harm that has been caused or was intended to be caused to the victim.

<b>Category 1</b>	<ul style="list-style-type: none"> <li>• Serious physical and/or psychological harm caused to the victim</li> <li>• Serious detrimental effect on the business</li> </ul>
<b>Category 2</b>	<ul style="list-style-type: none"> <li>• Other cases where characteristics for categories 1 or 3 are not present</li> </ul>
<b>Category 3</b>	<ul style="list-style-type: none"> <li>• No/minimal physical or psychological harm caused to the victim</li> <li>• No/minimal detrimental effect on the business</li> </ul>

## STEP TWO

### Starting point and category range

Having determined the category at step one, 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. A case of particular gravity, reflected by multiple features of culpability or harm in step one, could merit upward adjustment from the starting point before further adjustment for aggravating or mitigating features, set out on the next page.

Consecutive sentences for multiple offences may be appropriate – please refer to the *Offences Taken into Consideration and Totality* guideline.

Harm	Culpability		
	A	B	C
Category 1	<b>Starting point</b> 8 years' custody	<b>Starting point</b> 5 years' custody	<b>Starting point</b> 4 years' custody
	<b>Category range</b> 7 – 12 years' custody	<b>Category range</b> 4 – 8 years' custody	<b>Category range</b> 3 – 6 years' custody
Category 2	<b>Starting point</b> 5 years' custody	<b>Starting point</b> 4 years' custody	<b>Starting point</b> 2 years' custody
	<b>Category range</b> 4 – 8 years' custody	<b>Category range</b> 3 – 6 years' custody	<b>Category range</b> 1 – 4 years' custody
Category 3	<b>Starting point</b> 4 years' custody	<b>Starting point</b> 2 years' custody	<b>Starting point</b> 1 year's custody
	<b>Category range</b> 3 – 6 years' custody	<b>Category range</b> 1 – 4 years' custody	<b>Category range</b> High level community order – 3 years' custody

## **Appendix B: Extract from Equal Treatment Bench Book**

### **BAME individuals and the criminal justice system**

123. *Black, Asian and Minority Ethnic ('BAME') individuals are over-represented in the criminal justice system. In January 2016, the government asked the David Lammy MP to lead an independent review, sponsored by Ministry of Justice, to investigate the treatment and outcomes of BAME individuals within the criminal justice system in England and Wales.*

124. *Ministry of Justice research feeding into the review, made these findings:*

*Black men were 3 times more likely to be arrested than white men; black women were twice as likely to be arrested as white women. The criminal justice system then added a degree of notable disproportionality at subsequent stages, though not to the same degree as at the arrest stage.*

*BAME men and women were disproportionately more likely than their white counterparts to be committed for trial at the Crown Court. For black young males, this was just under 60% more likely. For Asian young males, it was just less than 2.5 times more likely.*

*All adult BAME groups were more likely than the white group to be remanded in custody at the Crown Court.*

*BAME adults, both male and female, were more likely to receive custodial sentences at the Crown Court compared to the white group. The disparities did not apply to every offence type. Custodial sentencing for those committing drugs offences was particularly disproportionate.*

*There was no disproportionality against BAME defendants in CPS charging decisions and conviction at Crown Court. This may be because those matters would be determined by rules of evidence and a degree of institutional oversight as opposed to subjective decisions by individuals which can be influenced by elements of unconscious racial bias.*

125. *Some key findings relevant to the courts are these:*

*Although only 14% of the population, BAME individuals make up 25% of adult prisoners and 41% of under 18s in custody.*

*In both the youth and adult systems, there is no single explanation for the disproportionate representation of BAME groups.*

*Overall, youth offending has fallen considerably over the last decade, but less so amongst BAME young people in each of the categories of offending, reoffending and going into custody.*

*BAME defendants are consistently more likely than white defendants to plead not guilty in court. Plea decisions are an important factor in the disproportionate make-up of the prison system, since admitting guilt can result in community punishment rather than custody.*

*BAME defendants are more likely than white defendants to receive prison sentences for drug offences, even when factors such as past convictions are taken into account (see research above).*

*Sentencing decisions need greater scrutiny, but judges must also be equipped with the information they need. Pre-sentence reports may be particularly important for shedding light on individuals from backgrounds unfamiliar to the judge. This is vital considering the gap between the difference in backgrounds – both in social class and ethnicity – between the magistrates, judges and many of those*

*offenders who come before them. The Review says judges have received guidance discouraging them from using PSRs altogether for some offences which includes drug offences, precisely the area where sentencing discrepancy has been identified.*

*Parenting orders for young offenders of all ethnicities are now very little used. Rather than give up on them altogether, they should be well evidenced and well-designed, if necessary, developing new alternatives.*

*BAME youths are less likely than the white group to be identified on reception at prison as having health, educational or mental health problems. This may indicate unidentified needs and could have a knock-on effect on the services and support made available to them. There is evidence of similar patterns with adults, eg because BAME individuals are less likely to have accessed mental healthcare in the community.*

*126. The lack of trust of BAME offenders is a major difficulty, increasing the chances of reoffending, and increasing the likelihood of pleading not guilty (or changing their plea to guilty at a late stage) because of a belief that they would get a fairer hearing from a jury than from magistrates.*

*127. 51% of UK-born BAME people (not just offenders) believe that the criminal justice system discriminates against particular groups or individuals.*

*128. A key reason for lack of trust is the absence of diversity among those making important decisions in every part of the criminal justice system, including amongst the judiciary. There is a gulf between the backgrounds of defendants and judges. 20% of defendants who appeared in court in 2016 were from BAME backgrounds, compared with 11% of magistrates and 7% of court judges (10% of those under 60).*

*129. Other factors contributing to lack of trust are failure to understand what is happening in court and failure to understand the basis of sentencing decisions:*

*Many BAME prisoners harbour grievances about their sentences because they know others who they believe have committed similar offences, but who have received quite different sentences.*

*The system should do much more to ensure that offenders understand why they have been given the sentences they have. This includes clear explanations by judges in their sentencing remarks, bearing in mind that this is the only time the offender is given a full formal explanation for the sentence; and a new system whereby sentencing remarks are published in audio and written form.*

*Many young adults feel 'distanced' in court, as the case seems to happen around them, without them being much involved. Many do not understand much of what is said in their own cases.*

*In general, there is a responsibility for judges to ensure that all those in court understand what is going on and believe that they are being treated fairly. The Review says many judges already do this, using plain language not legal jargon and taking care to ensure that victims, witnesses and defendants all understand how a trial will proceed, which decisions have been taken, and why. However, more could be done to ensure that justice is not just done, but is seen to be done.*