

**Sentencing Council meeting:
Paper:**

**14 June 2019
SC(19)JUN04 – Race and Gender
analysis**

Lead officials:

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1 ISSUE

1.1 This paper presents a suggested action plan to take forward work stemming from research on race and gender disparities in sentencing, particularly in relation to drug offences, in the context of the consultation on the revised drug offences guideline to be discussed later today.

2 RECOMMENDATION

2.1 That the Council:

- notes the findings from the analysis, updated with information from a small transcript analysis exercise;
- agrees the next steps as outlined in this paper; and
- agrees the timetable for initial discussions and publication of the research findings and consultation paper.

3 CONSIDERATION

Research findings – context

3.1 In April you considered an interim summary of findings of our research into race and gender disparities in sentencing drug offences, and asked for further work on analysis and planning for next steps. Since then, further transcript analysis, the findings of which will be discussed at the meeting, has not changed the overall picture substantially; there are still disparities in sentencing between non-white and white offenders, and between male and female offenders, which are not explained by any of the factors analysed. In considering race, the size of the disparity is considerably less than that suggested by the research published in the Lammy

review, but is nevertheless still present and, therefore, still a serious concern. In considering gender, there is a clear disparity even when many factors are accounted for.

3.2 There may be several reasons for the disparities. Firstly, it may be that there are other factors which the research did not take into account. Secondly, the disparities in sentencing outcomes may reflect other differences in society, so that the disparity could be between, for example, offenders who are employed and offenders who are not employed, and white offenders may be more likely than non-white offenders to be employed. Thirdly, it may be that there is a disparity elsewhere in the criminal justice system which is feeding into disparities in sentencing. For example, if pre-sentence reports are more likely to highlight certain factors for white offenders than they are for non-white offenders, even if those factors are in reality present equally for both white and non-white offenders, this may lead to disparity in sentencing decisions. Finally, it may be that there is some sort of otherwise unaccountable bias (whether conscious or not) influencing sentencing decisions. In practice, we believe that some combination of all these explanations is likely to be behind the disparities noticed in our research.

3.3 Some of the potential causes of the disparities fall within areas of the Council's control/influence, but most do not. There is therefore a limit to what we will be able to do alone, and a considerable part of our work on this will involve sharing our findings more widely with other organisations within the CJS and working with other organisations on areas of joint responsibility.

Next steps: actions for the Council

3.4 The first actions to consider are those which we can carry out ourselves within our current work revising the Drug Offences guidelines and in other areas. In the mental health draft guideline the Council is consulting on including references to the Equal Treatment Bench Book in light of the findings of the Independent Review of the Mental Health Act concerning disproportionality in the mental health system. Some respondents to the consultation on Expanded Explanations (to be discussed later in this meeting) suggested inclusion of a reference to the Equal Treatment Bench Book in all guidelines, or as part of the expanded explanation of some factors. Given the disparities highlighted by our research, and the response to the Expanded Explanations consultation, we propose to include a link to the Equal Treatment Bench Book in all guidelines. If the Council felt the need to consult further on this proposal this could be done as part of the next scheduled

consultation, the draft Firearms guideline due to be published in September. The proposal is that reference to the Equal Treatment Bench Book would be placed with some of the other general information near the beginning of the guideline before Step 1, reminding sentencers of where to look to find more information on these issues. It would also show other users of guidelines, including the wider public, where to find more information on how judges should be taking account of equal treatment considerations, which would be a positive step in making sentencing more transparent and reinforce guidance given in the Expanded Explanations guideline. Suggested wording is as follows:

Guideline users should be aware that information regarding gender, cultural and ethnicity considerations and outcomes for different groups in the criminal justice system is available in the Equal Treatment Bench Book. [INSERT LINK].

Question 1: Does the Council agree to including the above wording in all guidelines. If so, can this be done immediately or should it be subject to consultation?

3.5 A second potential area of action is to ensure that we consider how our guideline factors may be interpreted in ways which we had not intended, which may lead to disparities and bias within sentencing. This is something which the Council has already worked on when developing the Bladed Articles and Offensive Weapons guidelines in relation to how the guidelines referred to offences committed as part of a group or gang. In these guidelines, respondents to consultation felt that the factor as originally drafted risked being applied disproportionately to non-white offenders, and the Council made some changes to the factor to mitigate that risk.

3.6 In light of the research findings, and action which the Council has already taken in this instance, it seems appropriate to consider more pro-actively whether there are other factors which may risk being misinterpreted or applied in different ways to offenders of different ethnicities. This would also contribute to our meeting our public sector equality duty. There are two main ways in which we could do this:

- a) Enhance the equality impact section of all our consultation documents, asking a specific question to find out whether respondents feel that any of the factors given in the draft guideline could risk being interpreted in a way which leads to disparity in sentencing between different groups. At the moment, the standard equality impact question used in most consultations is very general,

asking simply whether there are “any other equality and diversity issues” which the guideline should address. Asking a more specific question would prompt respondents to suggest factors which may need to be reconsidered. Such a question, which would be in addition to the general question above, could be worded as follows:

Do you have any equality and diversity concerns about any of the factors proposed in this guideline, or how they may be interpreted and applied to different groups/offenders with different protected characteristics?

Including this question would also require policy leads and the Council to consider these risks during the guideline’s development and be more aware of potential problems, and we would add this to our checklist of things to consider when developing guidelines.

- b) Seek advice of experts on potential risks in the factors as currently drafted to support the development of future guidelines and perhaps make changes to existing guidelines where necessary. To support consideration of equality and diversity concerns as we develop future guidelines, we could commission work from external experts in this area (working with, for example, the Government Equalities Office or the Equality and Human Rights Commission) to review factors and suggest where there are potential risks. This could be done as part of development of future guidelines and/or with factors in existing guidelines or parts of the expanded explanations, particularly in light of the policy on making changes to guidelines which we published on 31 May. As a first step towards this, subject to resources, we could carry out a literature review of academic work on equality and diversity and use of language in the Criminal Justice System which would suggest any areas of concern and potential experts whose input and advice may be useful to the Council.

Question 2: Does the Council agree to enhancing our standard consultation question on equalities to prompt respondents to consider any concerns about factors?

Question 3: Does the Council agree to carrying out a literature review and scoping work with external experts on other potential risks within our factors?

3.7 Considering consultation, there is also separate action we can take to ensure we consult with a wider range of stakeholders. The Lammy review highlighted the importance of transparency and demystifying the court and sentencing process,

and one way we can begin to increase transparency is to be more proactive in contacting organisations from different sections of the community when we consult on a draft guideline and when we publish new guidelines. Seeking views more widely from a range of groups should help to bring any concerns about equality and diversity to our attention. It should also help to bring our work to a wider audience and make more people aware of sentencing guidelines. Work has already begun on this, with the intention of consulting more broadly from the next consultation (Firearms) in September.

3.8 Another potential area of work is in relation to guidance on suspending sentences. The data analysis and transcript research suggests that the disparities in sentencing may relate to judges sometimes suspending sentences in cases of white offenders but not in cases of non-white offenders. The reasons behind these differences are not clear, and further research would be needed. Judges sometimes give no reasons for suspending a sentence, or sometimes refer to “personal circumstances” of the offender leading them to suspend the sentence, but without setting out clearly what those circumstances were. This may be because they had been set out by the defence during the sentencing hearing, so they are clear to those who are present in court but not to anyone reading the remarks afterwards. It would be very helpful for us, and for anyone else carrying out research in this area, as well as for the wider public and parties in the case, to understand the reasons behind suspending a sentence, or considering suspending but deciding not to.

3.9 There are several actions the Council may be able to take to address this. Firstly, we could add research on reasons for suspending sentences to our list of research topics on which we are seeking to collaborate with academics. Secondly, and in light of further evidence, we may need to consider whether to revise the Imposition guideline to ensure that provisions on suspended sentences are not applied differently to white and non-white offenders. The Imposition guideline came into force on 1 February 2017, and no evaluation work has started yet, but revisions to parts of the guideline would be possible if there were particular concerns. Thirdly, we could discuss reasons for suspending sentences with the judicial office and Judicial College, to find out whether this is an area in which they have any concerns, what training is available about this, etc. Finally, we may wish to discuss potential changes to the Criminal Procedure Rules/Practice Directions with the Rules committee to require judges to give reasons for suspending a

sentence when giving their reasons for the sentence under s174 Criminal Justice Act 2003.

Question 4: Is the Council content for us to add “reasons for suspending sentences” to our list of proposed research topics?

Question 5: Does the Council agree to our carrying out some initial scoping work to identify areas where changes may be needed to the Imposition guideline?

Next steps: gender

3.10 The above discussion has primarily concerned the findings on race, since they were the driver behind our research and are likely to be most scrutinised when we publish the findings alongside the consultation on drug offences. Our research has shown significant disparities in sentencing for drug offences between men and women, which are not explained by any of the variables looked at. For example, our research found that, for a white offender aged 26 to 50, who pleaded guilty to a Class B PWITS offence, significant role, harm category 3, no aggravating or mitigating factors, a male was 82% more likely to receive an immediate custodial sentence than a female offender. The findings from the transcript analysis was similar in some ways to the findings for race, but the reasons behind some of the differences are not clear, so there are no specific next steps in terms of guidelines, beyond those suggested above for consultation, which should help us gather better information and strengthen connections with different groups. However, other organisations have carried out considerable research in this area and a review of this may suggest areas of the guidelines where we can take action. We therefore propose, subject to resources, to review research in this area to enable us to decide on any next steps, and help us present our research in context.

3.11 Findings of our research into these drug offences run somewhat counter to the views expressed by campaign groups such as the Prison Reform Trust, which believes that women are sentenced more harshly than men for the same offences, and has some evidence of this. We will need to address this when presenting our findings on gender, taking care to explain what our research looked at and how it relates to other work, and will speak directly to key groups working in this area as soon as the research is published.

Next steps: working with others

3.12 The third and fourth actions above, and suggested work on gender, go beyond the remit of guidelines and the Council, and are examples of steps which we can take in conjunction with other bodies within the Criminal Justice System, and information we can share with them. As suggested above, it is possible that the disparities discovered in our research result from problems elsewhere in the system (for example, production of pre-sentence reports). In relation to concerns about suspended sentences, actions three and four above require us to work with others to let them know about the results of the work, and see whether joint work can take place in the future.

Question 6: Does the Council agree to our holding initial discussions with the Judicial Office and Judicial College about suspended sentences?

3.13 More broadly, there are many organisations within the Criminal Justice System who will be interested in the research, and who, when we publish the findings alongside our consultation on the revised Drug Offences guideline in the autumn, will be challenged to take action. We need to work with them before publication to make them aware of our overall findings on both race and gender, and the implications for their areas of work, and to ensure we know what actions or further work they may wish to undertake, and how we can support them and work with them on areas of joint responsibility. We have already presented the initial findings of the research to a group of the senior criminal courts judiciary, and have discussed the research and methods with analysts at the MoJ. Building on this, we therefore propose to have some initial, confidential discussions with several organisations over the summer. These discussions may yield valuable information to us about other potential reasons which we have not identified, where we need to take action or carry out further research. It would also mean that, upon publication, we can set out actions we intend to take including those which involve working with others, and would mean that other organisations whose role and potential actions will be scrutinised when we publish the findings will be fully aware and able to set out publicly at that stage what action they will be taking in response.

3.14 The bodies with which we propose to hold initial, confidential discussions are:

- a) Judicial Office
- b) Judicial College
- c) HMPPS – probation

- d) Criminal Procedure Rules team
- e) CPS
- f) MoJ policy leads on Sentencing
- g) HMCTS
- h) The post-Lammy-review team at MoJ

3.15 We do not propose to speak to any stakeholders outside the criminal justice system at this stage prior to publication. At this stage, we wish to ensure that our discussions are kept confidential within internal CJS organisations, and focused on the main findings of the research, views from others on reasons behind the disparities, and next steps for all involved. We will report back to Council in September on the results of these discussions. When the research is published we would be able to hold wider discussions with other key groups and individuals, including criminal defence practitioners, and campaigning/charitable groups such as the Prison Reform Trust.

Question 7: Does the Council agree to our holding initial, confidential discussions with the above range of internal CJS stakeholders?

Question 8: Are there any additional internal/external bodies whom the Council wish to consult prior to publication?

3.16 The next steps set out above are summarised in the following table:

	Action	Timescale
1	Adding a reference and link to the equal treatment bench book to guidelines	From our next consultation on the draft Firearms guideline (in September 2019)
2	Enhance our consultation questions on equality and diversity	From our next consultation on the draft Firearms guideline (late September 2019)
3	Carry out a literature review of research into use of language and racial/gender disparities in the criminal justice system	Dependent on resources
4	Continue work on expanding our consultations and including a wider range of organisations	Ongoing, but further work beginning with the consultation on the draft Firearms guideline (late September 2019)

5	Adding “reasons for suspending sentences” to our research topics list	June 2019
6	Adding the Imposition guideline to our “long list” of guidelines for potential revision.	June 2019
7	Holding initial discussions with Judicial Office and Judicial College about suspended sentences	Summer 2019
8	Holding initial discussion with a range of internal CJS stakeholders	Summer 2019, to feed into publication of our research findings and consultation on the revised Drug Offences guideline (late October 2019)

Question 9: Are there any additional steps which the Council wishes to take at this stage?

3.17 We intend to bring the results of these discussions over the summer, and anything additional arising which needs to be covered in the Drug offences consultation paper, to Council in September, prior to the launch of the consultation. After the September meeting, we will also consider communications and approach to external discussions (including with David Lammy MP).

Monitoring

3.18 The action plan above sets out several actions over a period of months. We will return to Council with an update in September, prior to publication of the research and consultation on the draft revised Drug Offences guideline. We also intend to provide Council with updates on progress against the action plan, and further actions, every quarter.

4. IMPACT AND RISKS

4.1 Most of the actions proposed above can be carried out within existing guideline timescales and resources. Any changes to the Imposition guideline would, of course, require a “slot” in our workplan and may delay the development of another guideline. There is a risk, if we discuss the research and possible next steps with other CJS bodies, that information about our findings and next steps might leak out beyond those with whom we hold discussions. However, as we intend to publish the findings anyway, that may not be such a significant problem,

and we would mitigate it by taking care over the level of information we discuss, and selecting those we talk to. We should also bear in mind that all the actions above should help to mitigate reputational risks which would stem from taking no action on this issue when we publish the consultation on the revised Drug Offences guideline. However, we should be alive to the risk that other organisations with whom we discuss our findings decide not to take any actions, which could increase pressure on the Council to take further actions which may not be within our remit.