

Earning trust: improving criminal justice outcomes for ethnic minorities

BRIEFING PAPER

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This paper discusses some of the issues facing ethnic minorities in the criminal justice system, and how policymakers might improve their outcomes – particularly by increasing their trust in the system.

KEY POINTS

- Ethnic minorities are over-represented within the criminal justice system, and on some key measures, disparities are getting worse.
- There are many factors that contribute to such inequalities, but our discussion focuses on:
 - The greater willingness of White defendants to plead guilty to charges, which gives them access to ‘out of court disposals’ rather than prosecution and shorter sentences.
 - Under-representation of ethnic minorities within criminal justice professions.
 - Detention of younger minorities, especially on remand.
- Fundamentally, the issue is one of trust – the reluctance of ethnic minority defendants to trust in the criminal justice system, but also the system’s failure to trust communities and defendants.

IMPLICATIONS FOR POLICY

- No single measure on its own can strengthen trust and eliminate ethnic disparities within the system, but policymakers should explore:
 1. Increasing the use of out of court disposals, by removing the requirement to plead guilty in order to be eligible for them. This may require changes to the Police, Crime, Sentencing and Courts Bill.
 2. Focused efforts to recruit more ethnic minority magistrates and judges.
 3. Reducing the detention of young ethnic minorities, especially on remand.
 4. Reviewing the process of legal advice for ethnic minority defendants.

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FOREWORD FROM THE SPONSOR

Last year, civil rights and social justice protests highlighting injustices served as a catalyst for change, sparking important conversations about race, discrimination and social inequalities globally. Around the world, one of the most systemic barriers to social justice is the mistreatment of certain groups within criminal justice systems.

Research into the ways women, ethnic minorities and low-income people experience criminal justice reveals a broken system. These groups do not receive equal treatment or obtain equitable outcomes when compared to white people, high-income individuals, or men, which is unacceptable.

In England and Wales, for example, over half the women in prison report having suffered domestic violence, with 53% of women reporting having experienced emotional, physical, or sexual abuse as a child. Low-income individuals are more likely to end up in court and more likely to be convicted. Ethnic minorities are more likely to be charged, convicted, and imprisoned than white people. The UK population is 16% ethnic minority, but ethnic minorities make up 22% of people arrested and 27% of people in prison. These figures point to a criminal justice system that is not delivering equal justice for all.

AIG is committed to making a positive difference in the communities where our employees live, work, and serve our customers by supporting organizations that help create a more resilient future for individuals, families, and communities. AIG's commitment to criminal and social justice reform is a central part of our global corporate citizenship agenda and a key pillar of our Pro Bono Program.

Racial and social injustices continue to plague societies. A more equitable future requires a commitment to action from governments, businesses, and society as a whole. AIG's pro bono support for social justice causes will enable us to make a meaningful difference in the lives of those most in need of legal and related support.

This is why, we are delighted to be working with the highly respected Social Market Foundation (SMF) on this series of events and publications. We are also excited to be supporting the work of the three NGOs who are partnering with SMF on this series – the Centre for Women's Justice, EQUAL and LawWorks. By convening far-reaching conversations about inequities in the criminal justice system and ways to remove them, SMF is making a valuable contribution to the cause of social justice in the UK.

Tackling injustice is one of the biggest challenges of our time – in the UK and across the world. Our goal is to have these discussions and the published expert reports to follow not only inform the debate, but also serve as a call to action.

Lucy Fato

Executive Vice President, General Counsel & Global Head of Communications and Government Affairs

ABOUT THIS PROJECT

This briefing paper is based on a seminar organised by the Social Market Foundation in July 2021, as part of the *Justice in the Balance* project we are undertaking in partnership with AIG. The event, held under the Chatham House rule brought together senior policymakers and experts in the criminal justice system, and the position of ethnic minorities within it. The names of those who attended are private, but participants included members of the Government. While this paper anonymously reports some of the views expressed by seminar participants, the conclusions and recommendations made here are those of the SMF authors alone.

DISPROPORTIONALITY IN THE CRIMINAL JUSTICE SYSTEM: AN OVERVIEW

Ethnic disparities at different stages of the criminal justice system

Ethnic minorities are over-represented within the criminal justice system, an issue central to debates surrounding racial justice and inequality in the UK today. Yet as Figure 1 shows, responsibility for that disparity is not evenly shared between different stages of the criminal justice system. Ethnic minorities are considerably more likely to be arrested than white people, accounting for 23% of arrests compared to 16% of the general population. That proportion changes little for prosecutions, convictions and immediate custodial sentences, suggesting that these stages largely preserve – but do not exacerbate – the disparity. However, ethnic minorities make up a higher share still of the prison population – 27% – which demonstrates that disproportionality is made worse through long-term prison sentences.

Figure 1: Proportion of ethnic minorities at different stages of the criminal justice system – England & Wales, 2019



N.B. Dashed line represents proportion of ethnic minorities in the general population (16%)

Source: House of Commons Library, Ethnicity and the Criminal Justice System

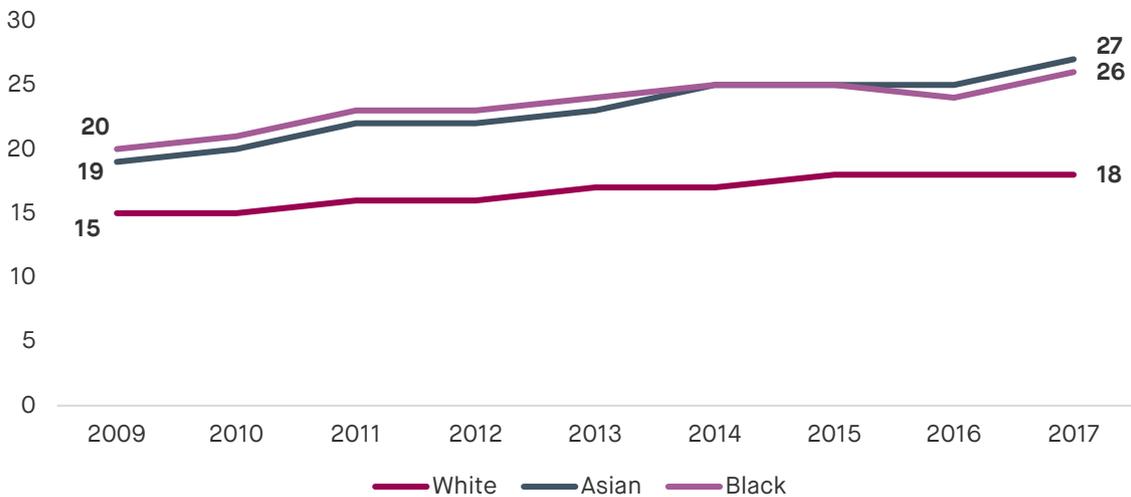
In our roundtable, and in this briefing, we focused more on the right-hand side of Figure 1 (prison sentences, and trying to limit their use) than the left (arrests, and the policing

tactics that give rise to them). That is certainly not to say that policing is not important – it is merely to restrict the scope of what would otherwise be too broad a discussion. As we shall see, this restriction cannot be maintained too rigidly, since policing cannot be so easily hived off from the rest of the criminal justice system, especially when it comes to issues of trust.

Disproportionality in sentencing

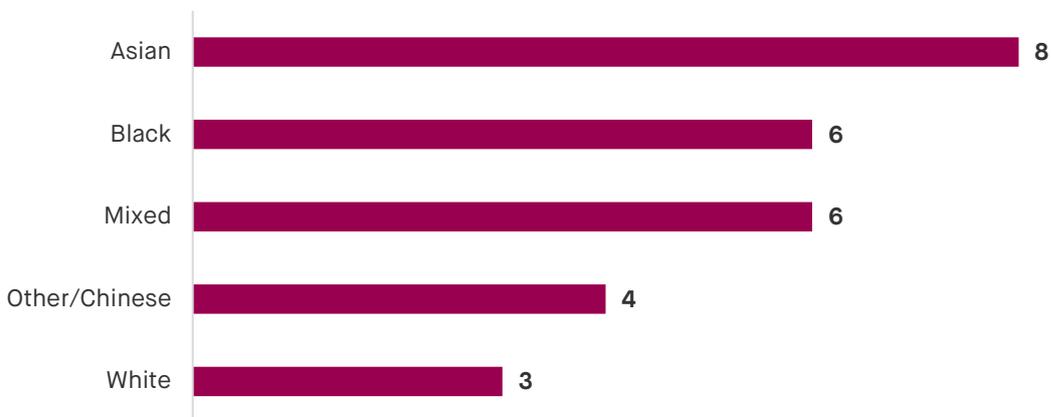
Figure 2 illustrates that ethnic minorities have for some time received longer custodial sentences than white defendants. Yet, while sentences have increased across the board, they have risen more significantly for minority defendants, widening this disparity. The average sentence increased by eight months for Asians and six months for Black and mixed defendants, but only by three for White defendants (Figure 3).

Figure 2: Average length of custodial sentence in months – England & Wales, 2009-17



Source: Gov.uk, Average length of custodial sentences

Figure 3: Increase in average length of custodial sentence (months), England & Wales, 2009-17

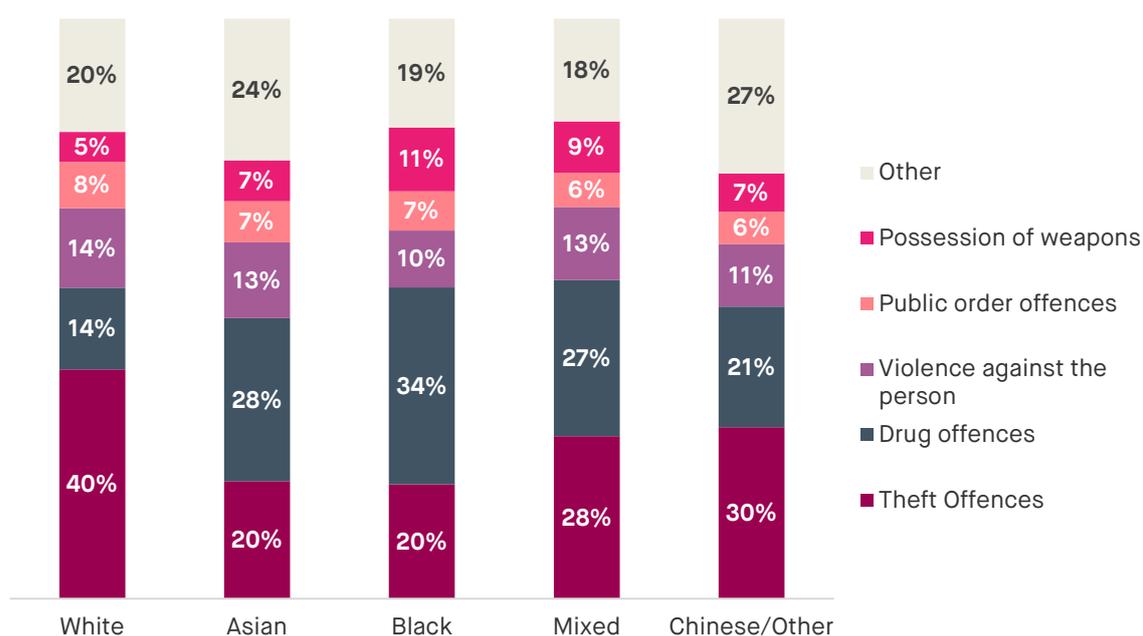


Source: Gov.uk, Average length of custodial sentences

Differences in convicted offence type by ethnicity

To a certain extent this may reflect differences in the sorts of offences that different ethnic groups are arrested, prosecuted and convicted for. Figure 4 shows that White people are most likely to be convicted of theft, whereas drug offences are the most common source of convictions among Black and Asian people. Whereas drug offences account for 34% of Black convictions and 28% of Asians, they make up just 14% of White convictions.¹ The custody rate is slightly lower for drug offences than for theft – in 2019, 23% of drug convictions led to prison compared to 32% of theft offences.² But this is outweighed by the average length of prison sentences, which is nearly four times higher for drug offences: 39 months, compared to 11 for theft.³

Figure 4: Convictions by offence type and ethnicity – England & Wales, 2017

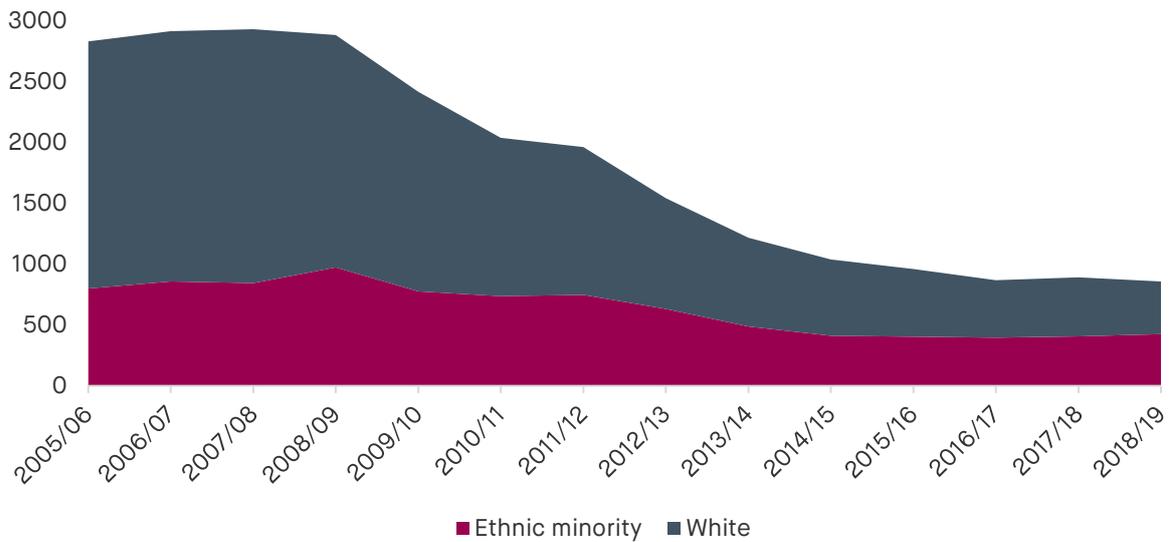


Source: Gov.uk, *Ethnicity facts and figures: Prosecutions and Convictions*

Moreover, ethnic minorities are significantly more likely to receive a prison sentence for drug offences – even compared to White offenders that enter the same plea, have a similar previous record and are of the same age and sex.⁴

Inequalities in youth detention

One area where disproportionality is particularly glaring is in the custody of young people. In recent years, there have been concerted efforts to reduce the number of under 18s that are detained. As Figure 5 shows, these have met with some considerable success, with the total number of young people in custody falling by over two-thirds since 2008. However, the decline has been much greater among White youths – 79%, compared to 50% for ethnic minorities as a whole and 40% for Black youths. That means that half of young people in custody today are ethnic minorities, up from 29% in 2008.

Figure 5: Number of young people in custody – England & Wales

Source: Gov.uk, *Young people in custody*

While the absolute number of detained young people is relatively small (859 in 2019), these inequalities are significant. First, because they are so wide and so glaring, in such a highly prominent part of the criminal justice system. Second, because the treatment of young people has such potentially broad ramifications for adult outcomes as they grow up.

More work is needed to explain and address these inequalities, but one notable difference between the White and ethnic minority youth custody populations is that ethnic minorities are more likely to be on remand (i.e., awaiting trial or sentencing hearing). Remand orders account for 33% of ethnic minority under 18s in detention, compared to 24% of White young people.⁵ Finding ways of reducing the number of ethnic minorities detained on remand – for example, exploring different options for bail of young people that do not have family connections that easily allow them to be returned to the community – could help address these high youth custody rates.

Differences in pleas

Another factor that contributes to ethnic disparities in the criminal justice system, receiving substantial attention in recent years, is the greater tendency of White defendants to plead guilty to charges, compared with their ethnic minority counterparts. In 2019 crown court trials, 37% of ethnic minority defendants plead not guilty, compared to 27% of White defendants.⁶ This has two effects. First, it means that ethnic minorities are more likely to go to prison and White defendants more likely to have access to ‘out of court disposals’ (OOCs). OOCs divert offenders towards treatment for substance misuse or mental health problems, addressing the underlying causes of their offending. They can also help people to avoid criminal records that could undermine their future employment and life prospects – and thus reduce their chances of re-offending. Yet in order to be eligible for an OOC, defendants are often required to admit their guilt. Second, for those defendants that are sent to prison,

ethnic minorities' decision not to plead guilty may lead to longer sentences, since a guilty plea carries a 'discount', cutting sentences by up to a third.

THE TRUST DEFICIT

A lack of trust in the criminal justice system is widely held to be one of – if not the – major reasons for this disparity in pleading behaviour, and indeed many of the inequalities within the system. Two high-profile government-commissioned reports in recent years, the Lammy Review into the treatment of Black, Asian and Minority Ethnic individuals in the criminal justice system, and the Commission on Race and Ethnic Disparities (the 'Sewell Review') both highlighted trust as a key issue:

“The reason that so many BAME defendants plead not guilty, forgoing the opportunity to reduce sentences by up to a third, is that they see the system in terms of ‘them and us’. Many do not trust the promises made to them by their own solicitors, let alone the officers in a police station warning them to admit guilt. What begins as a ‘no comment’ interview can quickly become a Crown Court trial”.

*The Lammy Review*⁷

“At the heart of this remains the question of trust, and we urge police services, criminal justice agencies, and ethnic minority communities to work together to understand and address this reluctance to admit guilt”

*Commission on Race and Ethnic Disparities*⁸

Analysis conducted for the Lammy Review offers one indicator of such mistrust. Figure 6 shows that 51% of British-born ethnic minorities believe that the criminal justice is discriminatory, compared to 35% of White people born in the UK.⁹

Figure 6: Proportion of British-born population agreeing with the statement “The criminal justice system discriminates against particular groups and individuals”



Source: *The Lammy Review*

Participants in our seminar broadly shared the diagnosis that there is a “trust deficit” in the criminal justice system. In particular, three sources of mistrust were raised. First, the cumulative effect of regular and widely publicised allegations of discrimination in policing, exacerbated by prominent controversies from the US. Second, a lack of trust in legal advice that ethnic minority defendants receive. Third, the belief that ethnic

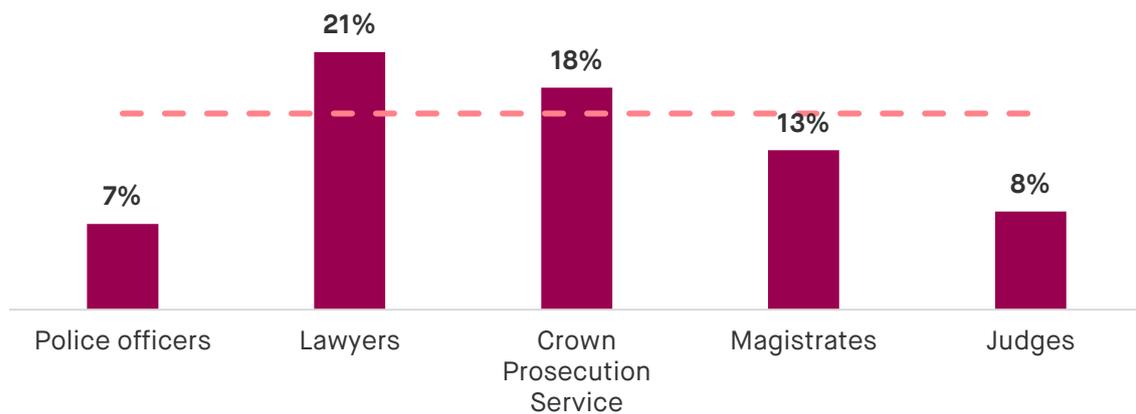
minorities will not receive a fair trial at a magistrates' court, leading them to plead not guilty and seek out jury trials in crown court instead.

Representation

Participants suggested that this behaviour should lead us to reflect on the merits of the jury system, and why it seems to be able to garner greater trust than other elements of the criminal justice system. Importantly, the statistics suggest that ethnic minorities have good reason to put their faith in juries: ethnic minorities are no more likely to be convicted in jury trials than White defendants.¹⁰

Some of the reasons put forward as to why juries appear to be fairer and more trustworthy follow from their unique role in the justice system. The fact that they are not as 'institutionalised', convened on an ad hoc basis, apart from the rest of the system. The fact that they involve open deliberation, where people have to justify their judgements to their peers. However, one feature that perhaps *is* more replicable is the representativeness of the jury. Being randomly selected, juries more or less reflect the social backgrounds of the communities they serve. That is not true for much of the criminal justice system, as Figure 7 shows.

Figure 7: Proportion of staff identifying as ethnic minority



N.B. Dashed line represents proportion of ethnic minorities in the general population (16%)

Source: Home Office, Police workforce, England and Wales, as at 31 March 2020; House of Commons Library, Ethnicity and the Criminal Justice System; Crown Prosecution Service, Workforce diversity data; Ministry of Justice, Diversity of the judiciary 2020 statistics.

Figure 7 highlights the relative success of the Crown Prosecution Service in recruiting ethnic minorities. Indeed, the CPS' "unusually diverse workforce" was highlighted by the Lammy Review as one way in which it could be an exemplar to the rest of the criminal justice system, alongside its openness to external scrutiny and systems of internal oversight.¹¹ Another possible model is the Parole Board, which in 2019 engaged in an extensive recruitment campaign focused on ethnic minorities. As a result, the share of non-White members rose from 5% to 13%.¹²

Some roundtable participants queried the value of such efforts to improve representation. Certainly, there is scepticism that they will make much difference if

not reinforced with other measures to support ethnic minorities and changes in organisational culture. As one person put it, “diversity is great...but inclusion is what really matters”. At worst, there is a risk that new recruits will quickly drop out, finding their new surroundings to be unwelcoming or even hostile.

At the same time, most were agreed that increasing ethnic minority representation can be positive if handled effectively. In particular, there was a belief that getting ethnic minorities into positions of senior leadership can make a significant difference to the direction of key organisations. Within the police, for example, “sixteen women chief constables is a huge step forward in the space of a few months, if we could change that as well with the ethnicity of the senior leadership, it will change, though it isn’t a short-term solution”.

Representation also matters to many of those subject to the criminal justice system. Leaders Unlocked’s ‘Young Adult Advisors’ panel, a group of 18–25-year-olds with direct experience of criminal justice carried out peer research with over 500 young people to identify their policy priorities. Representation emerged as a central issue:

“Young people told us that, on their journey through the criminal justice system, the decisions being made about them were made by people that did not reflect the communities they came from. This contributed to BAME young adults feeling that their background, where they came from, and their support needs, were not understood by decisionmakers. This had the effect of alienating BAME young adults from the criminal justice process, making it difficult for them to engage in and understand what is happening to them”.¹³

Our discussion focused primarily on increasing the number of ethnic minority magistrates. As Figure 7 shows, 87% of magistrates are currently White, though that already reflects improvements in recent years – in 2014, the figure was 92%.¹⁴ More progress is needed, although it is likely to be challenging in an environment where the total number of magistrates is falling, having halved in the past decade.¹⁵

Similar concerns apply to judges, too. 92% of them are White – slightly down from 94% in 2014 – though it is important to recognise that judges tend to come from older age groups with fewer ethnic minorities.¹⁶ Even so, there has for some time been concerns about the relatively low success rates of ethnic minority applicants for judicial positions, and calls for more support to help them through the process.¹⁷

Legal advice

As if to demonstrate the point that representation by itself is insufficient to address the problems ethnic minorities face in the criminal justice system (ethnic minorities account for a proportionate share of lawyers), the issue of trust in legal advice was raised in our discussion. It is clearly bad for a number of reasons if ethnic minorities do not have faith in their advocates, but among other things, it may help explain why they are less willing to plead guilty.

There may be scope to improve the way defendants’ legal rights and options are explained to them. Collaborations with specialist organisations used to working with ethnic minorities, young people or other affected groups might better tailor communication to the intended audience. Training provided by organisations such as

the Solicitors' Regulation Authority and Legal Aid Agency could be improved to ensure lawyers are better equipped to engage with a wider range of clients and to provide the best possible guidance.

The Lammy Review called for greater experimentation in this area.¹⁸ It also called for defendants to receive earlier access to legal advice from barristers, rather than having to initially go through solicitors, in order to build trust with a single contact. It was suggested in our roundtable that this direct access route could be better publicised because awareness seems to be low at present.

Out of Court Disposals

Participants in the seminar were insistent that trust does not only go one way, and that as well as asking why defendants are so unwilling to trust the criminal justice system, we should also be considering how far the criminal justice system trusts defendants, and indeed outsiders, such as community organisations. In particular, we might question why the onus should be on the defendant to have to plead guilty in order to access out of court disposals. A number of police services have done so and as a result have experimented with 'deferred prosecution' schemes.

The most prominent such trial is West Midlands Police's 'Operation Turning Point' scheme project, which waived the requirement of an admission of guilt in order to be eligible for an out of court disposal. Under the scheme, a person would meet with the offender management team within 72, and usually within 24, hours of being arrested. Together they would agree and sign a 'turning point contract', setting out a set of actions, including a pledge not to re-offend and measures to address the causes of re-offending, such as attending drug or alcohol treatment. Evidence suggests Turning Point, and similar initiatives, reduce harm and reoffending relative to court prosecution. Moreover, they have also been found to provide the victims of crime with more satisfaction and confidence in the process compared to having to ensure a trial.¹⁹

That led some to argue that the Police, Crime, Sentencing and Courts Bill currently making its way through parliament should contain a provision explicitly removing the requirement of a guilty plea in order to benefit from an out of court disposal. The Government's position is more cautious, with such measures currently permissible, but not wholeheartedly endorsed or required. It claims to be supporting trials of schemes to encourage the use of OOCs, in order to review the evidence as it emerges.

However, some participants in our discussion expressed frustration that the Government seems to need more evidence in order to act, with the idea having been under consideration since 2014. With highly encouraging results from the Turning Point pilot in the West Midlands²⁰, and positive initial outcomes from an ongoing project in London²¹, they noted that the case was stronger than for many other policies: "Two trials – one a replication of the other, is rather unusual good practice in this territory".

As it currently stands, the Bill requires the Ministry of Justice to prepare a "code of practice in relation to diversionary and community cautions", setting out the circumstances under which measures to divert people from prosecution may be used,

the procedures for doing so, the conditions that may be attached to them and specifying who is entitled to use such measures.²² Participants in the seminar suggested that the framing and wording of this code of practice will be critical, and that the code needs to actively enable and encourage the use of deferred prosecution, “making it clear that deferred prosecution is not just allowed but supported by good evidence and is likely to reduce disproportionality”.

In promoting the use of deferred prosecution and out of court disposals more generally, it will be critical to ensure that the Crown Prosecution Service is also supportive in its actions. We heard from participants that the requirement for all conditional cautions to be passed to the CPS had discouraged police officers from using the measure. Given some apparent scepticism of deferred prosecution within the CPS, the Government should watch out for similar bureaucratic hurdles.

IMPLICATIONS FOR POLICY

Our seminar identified a number of steps policymakers could take to try and address ethnic disproportionality in the criminal justice system:

1. **Increase the use of out of court disposals, removing the requirement to plead guilty in order to be eligible for them.** This may require rewording or reframing of certain elements of the Police, Crime, Sentencing and Courts Bill, in particular the code of practice for diversionary measures. It will also require support from the Crown Prosecution Service to ensure that bureaucratic hurdles are minimised. Given the over-representation of ethnic minorities in drug convictions, low-level drug offences should be prioritised for such measures.
2. **Make focused efforts to increase representation of ethnic minorities in the judiciary.** This should include a sustained and targeted recruitment programme for ethnic minority magistrates, building on success in diversifying the Parole Board, as well as resources to help non-White applicants achieve positions as judges.
3. **Reduce the detention of young ethnic minorities, especially on remand.**
4. **Review the process of legal advice for ethnic minority defendants,** exploring and experimenting with different ways of communicating their options (e.g., with training schemes for lawyers and by working with community organisations). Also consider promoting direct access to barristers.

ENDNOTES

¹ Gov.uk (2020), Ethnicity facts and figures: Prosecutions and Convictions

² Ministry of Justice (2020), Criminal justice system statistics quarterly: December 2019.

³ Ibid.

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⁵ <https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/courts-sentencing-and-tribunals/young-people-in-custody/latest>

⁶ <https://commonslibrary.parliament.uk/ethnicity-and-the-criminal-justice-system-what-does-recent-data-say/>

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¹⁴ <https://www.magistrates-association.org.uk/News-and-Comments/statistics-published-on-diversity-in-the-magistracy>

¹⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918529/diversity-of-the-judiciary-2020-statistics-web.pdf

¹⁶ Ibid.

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¹⁹<https://www.npcc.police.uk/Publication/NPCC%20Out%20of%20Court%20Disposals%20Evidence%20assessment%20FINAL%20June%202018.pdf>

²⁰ <https://whatworks.college.police.uk/Research/Research-Map/Pages/ResearchProject.aspx?projectid=307>

²¹ <https://justiceinnovation.org/project/turning-point-londons-north-west-borough-command-unit>

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