



Bar Council and Criminal Bar Association response to the Lammy Review of BAME Representation in the Criminal Justice System: call for evidence (21 March to 30 June 2016)

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Lammy Review of BAME Representation in the Criminal Justice System: call for evidence (21 March to 30 June 2016).
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council welcomes the opportunity to comment on the Lammy Review of BAME Representation in the Criminal Justice System. The Bar Council recognises the over-representation of BAME individuals as defendants and endorses the need for the Review. We believe we should properly understand the reasons for any over-representation of BAME defendants before steps can be taken to address this.
5. The fact that there is over-representation is made plain by the statistics, and in particular in "*Statistics on Race and the Criminal Justice System 2014*" (published November 2015). This is an important and long awaited piece of research. It is clear that the perceived problems of BAME over-representation in the CJS have persisted for some time and have long since needed addressing.

6. However, the statistics used in formulating the Review have their own shortcomings and limitations, and prohibit a comprehensive empirical analysis. This means that the most important question “*Are members of the BAME population treated unfairly within the criminal justice system?*” cannot be properly considered. The Bar Council would want this question answered as part of the Review, with solutions being part of the conclusions.

7. We also welcome reference in the Review to the under-representation of BAME individuals in positions of authority in the Criminal Justice System (judges, prison officers, lawyers etc.), and the intention of the Review to explore how this may contribute to the problem.

8. In fairness, many of the questions posed in the Review (in relation to prosecution, sentencing and remand) do contain the important qualification that the figures upon which the questions are asked “... [do] not control for differences between ethnic groups in the type or seriousness of the offences committed, or previous criminal history”. However, this is merely added as a “Note” to a “footnote”. Without this control the questions inevitably invite anecdotal evidence or speculative theory without evidential underpinnings.

9. While such responses may well have a proper place in a wide reaching review (for instance in gauging the perception of those who are involved with the Criminal Justice System), the Bar Council emphasises the need for that evidence before the Lammy Review is concluded. We believe this is important to maintain the integrity and credibility of any findings or proposals. This issue is of too great a significance to risk being criticised for a lack of supporting evidence and in particular for not comparing “like for like” situations (as was apparently achieved in the review of jury bias and the subsequent report “*Are juries fair?* (2010)).

10. Therefore, whilst we support the purpose of this exercise, any response by the Bar Council will necessarily be limited at this stage for the reasons set out.

11. Having said that, in the spirit of making the exercise as effective as possible we make the following observations and suggestions, of which the provision of improved statistical analysis is paramount. In particular, we note:

- i. That additional dimensions such as ‘immigration status,’ and ‘nationality’ do not form part of the research. Whilst we understand why this may be envisaged as being too broad we believe that in order to truly consider equal treatment, all these intertwined aspects need to be considered;
- ii. Further, the perception by a black Defendant of Christian faith may well be very distinct from a black Defendant of Muslim faith. Often the issues of ethnicity and treatment within the Criminal Justice System simply cannot be separated from faith and indeed nationality in the current climate;
- iii. In addition, individuals from a travelling community heritage do not appear to have been referenced within the questions, and it is submitted that this is a relevant ethnic

group who ought to be referenced within any review of representation of ethnic groups in the Review.

12. It may be worth tackling a small section of the Criminal Justice System such as multi handed murder trials involving Joint Enterprise. The Supreme Court in R v Jogee and others [2016] UKSC 8 has reformed this area somewhat, but the findings of the Justice Committee report in December 2014 are highly pertinent.

Sir Alan Beith set out that: 'it is noticeable that Black and mixed race young men are disproportionately represented amongst those convicted under joint enterprise...' The Cambridge Institute of Criminology Research sample findings were that, '37.2% of those serving very long sentences for joint enterprise offences were Black/Black British, eleven times the proportion of Black/Black British people in the general population and almost three times as many as in the overall prison population.'
www.crim.cam.ac.uk/research/ltp_from_young_adulthood/evidence_to_justice_committee.pdf.

Specific Concerns

13. We wish to concentrate on three specific concerns:

- 1) The first is that the paper begins from too late on in the process. For example, question 11 states that prosecution rates per head of the population are higher for Black adults than for White and Asian adults. Whilst on its own this may be correct, it is meaningless without looking at arrest rates. If a disproportionate number of Black adults are being arrested, then it is no surprise that a disproportionate figure is then prosecuted. It is only by plotting the path of suspects through the system that the problem areas can be properly identified.
- 2) The second is, as flagged above, the lack of reference to previous convictions in the analysis. For example question 8 states that Black defendants are more likely than White to be remanded in Custody. This again is a meaningless statistic unless viewed in context. If Black defendants have on average more previous convictions, or are charged with more serious offences then it is not surprising that they are more likely to get remanded. Focus then needs to look at why they have more previous/more serious offences. If however, White defendants charged with a similar previous and a similar offences are consistently getting bail when Black defendants are not, then a properly identifiable issue has been raised at that stage in proceedings and ways can be found to address it.
- 3) Some of the data relied on in the consultation document appears contradictory. This may be reconcilable if more information is made available to contextualise the data. For example, question 10 states BAME defendants are more likely to be acquitted or not tried later. This is potentially a very significant statistic however, question 15 conversely states that BAME defendants are more likely to be convicted.

Both statistics could conceivably be true depending on how the figures are broken down in relation to the route to conviction or acquittal. Therefore the statistic from Question 10 needs to distinguish between cases where juries acquit and cases where the Crown make the decision to offer no evidence, both of which will be recorded as an acquittal even though there is a big difference between these two positions. Also, it would be helpful to have a figure for how many cases a Judge stops or directs an acquittal because there is insufficient evidence. This will enable meaningful analysis as to whether, for example, the CPS are correcting their own decisions to charge once cases have got to court (and perhaps once independent Counsel become involved) or indeed the judge is stepping in to stop cases. It is only armed with that breakdown that the statistics from questions 10 and 15 can be reconciled (i.e. it is only comparing cases that are decided a jury, taking out cases where the Crown have offered no evidence).

Recommendations

14. We make the following recommendations:
 - i. Analysis needs to be conducted between individuals with similar offending records, in similar situations to be meaningful. At each stage, from arrest, through charging decision, arraignment, trial, verdict, sentence and reoffending, rates for BAME suspects need to be plotted alongside White comparables. We can then see the extent to which racial bias may or may not affect the decisions at each step. Only then can we seek to find ways to address this and minimise it.
 - ii. Concentrating research on one specific offence or group of offences, as suggested above, may make the task of comparing like with like easier.
 - iii. We believe that the following areas also need to be considered in any analysis for it to be meaningful:
 - a) Immigration status/nationality
 - b) Religious belief
 - c) The experience of those within the travelling community.

Bar Council
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