

The LCCSA response to the Lammy Review of BAME Representation in the Criminal Justice System – Call for evidence

(Insert LCCSA Preamble)

1. Introduction

- 1.1. Our starting point is a proposition at once both simple and complex, that people of colour live at a disadvantage within a culture that is institutionally racist. (Statistics on Race and the Criminal Justice System 2014.)
- 1.2. Class, gender and race issues weave together within policy and economic frameworks that under-allocate resources in education, housing, and healthcare. Destructive cyclical problems of gangs, post-codes and drug dealing lie at the nexus of policy failure and are compounded by issues around identity in a white and unfair world. Over many years there has been a remorseless reduction in facilities for working class people and their children; ranging from the cut back of the sure start programme; the loss of open public spaces including school playing fields and sports facilities; youth clubs; free access to swimming pools, library closures; holiday 'play' schemes; ratios of health visitors and so on. We might characterise this as institutional disadvantage.
- 1.3. Identity is a crucial outcome of environment and education. There is an appalling failure in education to relate an accurate view of the colonial legacy ([Richard Gott: 2011](#)). Identity is a critical issue. In the absence of educational or employment progression, of ambition, it may become a default position to fall in with 'gang' which offers others 'rewards', albeit both high risk and short-term but certainty of identity.
- 1.4. Institutional racism plays its part. Black youth feature as over-represented in stop and search leading to resentment and reinforcement of 'us' and 'other' categories of thought. Figures published on the 7th August 2015 state that "black people are up to 17.5 times more likely than white people to be stopped and searched by the police in certain areas of the UK." "The issue of stop and search has dogged the police service for decades, sparking riots in Brixton in 1981 and in various parts of the country in 1985."([The Guardian: 07/08/2015](#)). "Black people are stopped and searched at just over 3 times the rate of white people across London in 2014/15 whilst people from mixed backgrounds were searched at one and a half times the rate of whites."([Stopwatch](#)). It also represents a police attitude that defines entry points to the CJS. Distorted policing leads to decision making less favourable at each stage of the CJS. Temporally as follows; to stop and search; to arrest (on suspicion); to caution rather than NFA: to charge and to treat more harshly on sentence. Some examples are set out in S.2.
- 1.5. Actual and perceived injustice is rife. The litany of (never prosecuted) black deaths in custody, sometimes sparking waves of disorder in which the other factors mentioned above play their part (Scarman report 1981, August 2011 riots). ([The Guardian: 17/02/1999](#) and [Wikipedia](#)). While elsewhere individual acts of violent racism on occasion lead to the exposure of police culture as well as white racism. In the UK there was the MacPherson enquiry, while in the US there was the case of 70 deaths of black women at the hands of the police over a 3 year period ([Sir William MacPherson of Cluny: 1999](#) and [The Guardian: 31/05/2016: Page 12](#)).

At its heart the problem of 'over representation' of black people in custody needs a societal response, a cultural shift, policies that allocate land resources fairly, provide excellent education from early years, an education that assists the development of identity within a clear sighted view of history – that is political, and articulates an understandable discourse to which young people can relate their lived experience.

2. Inside The Criminal Justice System

2.1. What are the backgrounds of Judges?

- “Of the current senior judiciary (High Court and above), 81% have Oxbridge degrees, 76% attended fee-paying schools, and half went to boarding schools” ([Cheryl Thomas: 2005:8](#)).
- “Of the 1868 judges who declared their ethnicity there are 177 (9.5%) who declared their background as Black or Minority Ethnic (BME)”. ([Courts and Tribunals Judiciary: 2015](#)).
- 81% of judges Oxbridge educated in 2004 ([Sutton Trust Survey: 2005](#)).

There appears very little erosion of this white hegemony.

2.2. If you are a black defendant, especially in the Crown Court (and certainly should you reach the Court of Appeal) you can expect white Judges, mostly men and often still an all-white court room. Role reversal is a useful exercise. Imagine if you are white appearing in an all-black courtroom where you believe you have been harshly treated. Later you might read of higher sentences for white people; that white deaths in custody never result in any prosecution. That white youth are disproportionately stopped and searched. You may imagine a lack of equality in the criminal Justice processes.

2.3. The Metropolitan Police have failed post-McPherson to reach 'proportionate' ethnicity to the policed population ([Sir William MacPherson of Cluny: 1999](#)). 88% of police force are white compared to 60 % of population being white in London ([Police.uk](#)).

2.4. By 2015, only 5.5% of police officers in England and Wales were from a Black or Minority Ethnic (BME) background ([Parliament.uk](#)).

2.5. The endemic nature of establishment whiteness is demonstrated by the fact that top jobs at MI5 and MI6 are all held by white people, according to diversity figures released by parliament's intelligence and security committee. “The latest figures show that 27% of senior roles at MI5 are held by women” none of whom are BAME (black, Asian or minority ethnic) ([The Guardian: 06/07/2016: page 14](#)). “For MI6, one in five of its senior officials are women but none is from BAME backgrounds” ([The Guardian: 06/07/2016: page 14](#)).

- 2.6. Projections (The Guardian on 08/07/16 in 'Black flight: how England's suburbs changed colour by Hugh Muir) are that by 2061 white Britons will account for 70% of UK population, ethnic minorities 30%. What will diversity look like in the CJS? On present trends there may be little change.
- 2.7. For a particular subset of defendants the jurisprudence of the CA is highlighted by Powell and Zaman in "A challenge to the Jurisprudence of the Court of Appeal? Why working class black 'foreign' women get a tough deal." (2016). Recent immigration legislation has sought to create a hostile environment its ideological, institutional racism and practical parallel is to be found in this line of authority, justifying the immediate custodial sentence policy for (black) women committing document offences.

3. Legal Aid

- 3.1. Legal Aid accidentally presented opportunities for lawyers of a non-white heritage to be small scale entrepreneurs. Recent Legal Aid policy has disadvantaged small firms. The Government has sought economies of scale as an outcome of policy (fewer larger firms) managing larger volumes following cuts in unit (case) prices. It is another policy with a negative impact on opportunity and diversity.
- 3.2. There has been an erosion of resources within the structure of Legal Aid. Payment of fixed fees rather than on the basis of time inevitably leads to an emphasis on speed at the expense of time taken with clients.
- 3.3. In the police station this hands the initiative to police officers who by contrast are time rich, detention being allowed for 24 hours before charge. Custody sergeants rarely exercise proactive 'control' over the pace of proceedings despite authorising detention for 'interview'. Speedy justice does not apply. We know of no statistics regarding the length of detention of black people compared to white, but for considerable insight into police culture. "In a report commissioned by the Ministry of Justice, Vicky Kemp reviewed 5000 arrests made over a 3-month period in 2012 by Nottinghamshire Police. She found that 'a significant minority' involved suspects who were known to be prolific in the past but who had been wrongfully arrested with no evidence linking them to the crime for which they had been detained" (Iain Gould: 24/06/2013). Approximately 50% of people are interviewed without a solicitor.

4. How Do Cases Reveal Institutional Racism (IR) in Practice?

4.1. Example 1. Decision to arrest and detain. At 22:00.

A GBH occurs. The description of the three assailants, Male 1. 19 years old braided hair, Somali with goatee beard. Male 2. Black taller than 1st Somalian origin. Male 3. 6' black, 16 years old with short hair. The suspect is 13 has a very distinctive hair style (nothing like the description), is of Caribbean descent and significantly shorter without facial hair. Is this a case of subtle (or perhaps not even subtle) IR in practice? A simple inability to distinguish descriptions, a 'blindness' compounded by the snails pace of the investigation culminating in a decision to keep the boy in a cell overnight despite

vociferous objection. Would this have happened in this way if he was not black but white? They didn't interview in the night because of outstanding suspects?! The interview is not until 10.40 am. The police officers are all white.

4.2. Example 2.

It is difficult on a case by case basis to extract the IR that appears from overall statistical analysis. In this case a group of men are involved in a conspiracy to supply class A drugs. Two D's are black, the others white. To D1 is ascribed the 'leading role'. It is the solicitor and counsel's view that the evidence does not support that conclusion. Is this the working out in practice of IR? His sentence after trial 10 years, his white Co-D's 6 years. We know the C.A. will be reluctant to interfere with the Judge's 'view', and when is IR a ground of appeal when nothing overt has been said and the conclusion of leading role 'fleshed out' by references to this or that piece of evidence?

4.3. Courts adopt a 'position' of colour blindness and yet black Ds enter the 'system' more frequently and are disproportionately represented within prisons. "Out of the British national prison population, 10% are black and 6% are Asian. For black Britons this is significantly higher than the 2.8% of the general population they represent. Overall black prisoners account for the largest number of minority ethnic prisoners (49%)." ([Prison Reform Trust](#)). Our examples are we hope a demonstration of how difficult it is to unpick prejudice within a system that in pretending it isn't prejudiced.

Training, greater diversity, and perhaps a public recognition within sentencing guidelines that institutional racism exists and care must be taken. , submissions invited, consideration given at sentence. Can recognition of institutional racism become a part of CJS process and discourse to prevent unfair practices?

5. Vulnerable Ds and Mental Illness

"People from ethnic minorities remain disproportionately represented on mental health wards with no signs of this reducing, the Care Quality Commission revealed" in 2011. "The census found admission rates to hospitals were at least two times higher than average for people from black Caribbean, black African and mixed white/black groups in 2010. Rates of detention were between 19% and 32% above average for these groups." ([Community Care: 2011](#)). There is a substantial con-over between the Mental Health and Criminal Justice systems. In our submission "over representation" is rooted in similar IR acting upon pathways to detention.

6. Police Powers of stop and search and Detention

6.1. How is one to reconcile this paradox? The code for stop and search says "powers to stop and search must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination. Under the Equality Act 2010, section 149, when police officers are carrying out their functions, they also have a duty to have due regard to the

need to eliminate unlawful discrimination, harassment and victimisation, to advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it, and to take steps to foster good relations between those persons”, and yet statistics above shows over proportionate use on black youth. (PACE 1984 Code A: 2013: Page 3). The simple answer is a flagrant disregard of the code is the product of Institutional Racism. It is the first step on the pathway to over representation.

- 6.2. It is difficult to exclude evidence ‘unlawfully’ obtained. There is a lack of weight or regard for a community interest is ‘rule’ adherence/standards versus always the desire to convict ‘the guilty’.
- 6.3. Avoidance of Police Criminal Evidence Act 1984 (PACE). The ‘street’ bust. A man cycles down the street and allegedly discards a spliff. The passing police take him to the police station. They obtain a confession signed in a notebook and then let him go and follow up with a postal requisition. A guilty plea follows. The safeguards of PACE, the delivery of rights, access to lawyer avoided. This is picking the criminal low hanging fruit (see Billie Holiday “Strange Fruit”)
- 6.4. What was PACE 1984? A rebalancing of police powers and suspect rights, but it also reflected a long held or still held vigorously pursued policing agenda. See Nick Blake Police Powers and Powell/Magrath Pace - a Practical Guide. Has PACE in fact failed?
- 6.5. The period of detention. Long forgotten is the debate on the acceptable length of detention (imprisonment in a police cell) before charge and a decision on bail; 12 or 24 hours. The impact of 24 hours is to increase costs to police through cell occupancy and often overtime but this burden is also an advantage as it allows police officers to manipulate the process of detention. (See Vicky Kemp). While the fixed fee regime reduces effective time spent by defence lawyers in the police station.
- 6.6. Surely there is a powerful economic and process case for re-examining the period of pre-charge detention. There are no statistics we are aware of but we suspect that on average non-white people are detained longer.

7. Conclusions

- 7.1. Statistics as far as they go highlight “over-representation”. It is our everyday experience that the CJS is replete with examples of IR selection and prosecution of Defendants.
- 7.2. The difficulty is gathering evidence and the context the failure of PACE protections.
- 7.3. The coherence of society depends on a general acceptance of fairness and trials justice applies to all. At this point The Lammy Review is an important step but it is our view that real resources need to be devoted to statistical analysis and a review of rights. That public expenditure in community resources needs rebalancing post-austerity to restore resources to the most disadvantaged communities. That concrete steps need to be taken to address diversity throughout the CJS and education and training re IR are priorities and IR should be addressed through sentencing guidelines.

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