

A SMARTER APPROACH TO SENTENCING

Overarching Equality Statement

This Equality Statement (ES) relates to the government's Sentencing White Paper, entitled A Smarter Approach to Sentencing. It presents a high-level summary of the equalities issues, benefits, risks and mitigations for the measures within the White Paper.

Summary of Policy Areas

The ES covers the following policy areas:

Protecting the Public from Serious Offenders: Ensuring that serious sexual and violent offenders spend a longer proportion of their sentence in prison, while further protecting the public by introducing a mechanism for offenders who become of significant public protection concern to be risk assessed by the Parole Board before release.

Supervising Offenders in the Community: Intervening early to deflect offenders away from future offending and to provide them with the support they need to turn their lives around, while also ensuring that we use the best technology available to monitor offenders.

Empowering Probation: Implementing a new sustainable model for probation services in England and Wales.

Reducing Reoffending: Improving the way we supervise and support offenders following release from custody.

Youths: Giving the courts the tools they need to ensure that children can be diverted from custody into stronger high-end community sentences, while ensuring that in the most serious cases, where custody is necessary for public protection, custodial sentences work fairly and properly reflect the culpability of a child and the seriousness of their offending.

The measures in the White Paper will ensure that serious and dangerous offenders are kept off the streets for longer, protect the public, deliver punishments that really do fit the crime, work to tackle the many complex causes of offending, and provide the opportunity and support to reform for those who truly want to turn their backs on crime.

Public Sector Equality Duty

In line with our Public Sector Equality Duty (PSED) responsibilities under section 149 of the Equality Act 2010, we have paid due regard to the need to:

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

Having due regard to the PSED needs to be considered in light of the following nine protected characteristics:

- Race
- Sexual Orientation

- Marriage/Civil Partnership
- Gender (sex)
- Religion or Belief
- Gender Reassignment
- Disability
- Age
- Pregnancy/Maternity

We have undertaken early consideration of the equality impacts of the proposals contained in the Sentencing White Paper. We have used the best available data and evidence in proportionately undertaking the Equality Statements that accompany the White Paper to assess the likely equalities impacts on offenders' protected characteristics.

Where relevant to the White Paper proposals our equalities considerations have included the recommendations from the Lammy Review to 'explain or reform' any disparity in outcomes for BAME users of the Criminal Justice System.

We have considered the policy proposals in accordance with the statutory obligations under the Equality Act 2010. The following is a summary of our overall assessment.

Direct discrimination: We hold the view that none of the White Paper measures are likely to be directly discriminatory within the meaning of the Equality Act 2010 as they apply equally to all offenders or because there would be no direct discrimination within the meaning of the Equality Act 2010. Of the four or five pilot locations for our proposal on Problem Solving Courts, one is anticipated to be for female offenders and therefore carries the potential risk of direct discrimination against men. However, the Equality Act 2010 expressly allows differential single sex services treatment provided (amongst other things) they are a proportionate means of achieving a legitimate aim which we consider to be the case here in terms of reducing reoffending and the use of custody for a particularly high-needs/vulnerable cohort. We have chosen this focus for one of the pilot sites in light of the high proportion of female offenders in receipt of short prison sentences, the promising outcomes of the Manchester women's problem-solving court model, and our commitment to addressing the underlying needs of female offenders in line with our Female Offender Strategy (June 2018). The remaining locations will remain accessible to both men and women.

Indirect discrimination: Indirect discrimination occurs when a policy applies equally to all individuals but would put those sharing a protected characteristic at a particular disadvantage compared to those who do not. Our initial assessment recognises that some individuals with protected characteristics are likely to be over-represented in the groups of people the White Paper will affect as a result of the demographics of the existing offender population.

For example, we know that offenders with certain protected characteristics are over-represented in both the adult and youth offender populations in both custodial and community settings when compared with the general population as follows: those who are male, adults aged 18-39, those with a disability (including those with mental health issues and neuro-divergent offenders) and people with a Black or Black British ethnicity. Those from a mixed ethnic group and Muslim offenders are also over-represented when compared with the general population. Men are significantly over-represented with only 5% of offenders being female, and a significant and growing proportion of the prison population are over 50.

This over-representation applies to some of the offender groups that will be affected by the White Paper's proposals. The more specific ways in which these changes may indirectly

affect offender groups is outlined below, together with how we consider the impacts are likely to be mitigated where necessary.

Protecting the Public from Serious Offenders

We are proposing to extend the automatic release point from halfway to two-thirds for certain serious sexual and violent offenders sentenced to a standard determinate sentence (SDS) of between 4 and 7 years. Men, people with a Black or Black British ethnicity as well as younger adult offenders (aged 18-24) and offenders over the age of 50 are slightly more represented amongst those who would be affected by this change than those who would not. However, we consider that it is unlikely to result in a particular disadvantage for offenders in these cohorts and that, overall, the policy is a proportionate means of achieving the legitimate aims of protecting the public and achieving consistency within the sentencing framework.

The Sentencing White Paper will include a proposal which changes the threshold for passing a sentence below the minimum term for repeat offences including “third strike” burglary, “second strike” knife possession and “third strike” Class A drug trafficking. While we do not have data on repeat offences, the data available for those offences in general shows that BAME individuals, and particularly those who are black British, are highly represented in the affected cohort. However, our overall assessment is that this is justified as a proportionate means of achieving the legitimate aims of the policy which is to bring consistency for passing a sentence below the minimum term for repeat offences.

We are proposing the introduction of a new power that would allow the Secretary of State for Justice to prevent the automatic early release of those serving a standard determinate sentence (SDS) who are considered to pose a terrorist risk or other significant danger to the public. These cases would be referred to the Parole Board instead of being released automatically before the end of the sentence. Although men, those aged between 30 and 39 and BAME individuals are over-represented in the SDS cohort in scope of this measure, it will apply to a very small number of offenders who are considered to pose a terrorist risk or other significant danger to the public. It is not possible to determine what types of offenders will pose a national security risk or danger to the public but in any event, the role of the Parole Board in the process means the offenders will be released if safe to do so and therefore not disadvantaged by the measure. We therefore consider that it is unlikely to result in a particular disadvantage for offenders with protected characteristics in this cohort and that, overall, the policy is a proportionate means of achieving the legitimate aim of protecting the public from dangerous offenders.

Managing Offenders in the Community

We will simplify the Out of Courts Disposal (OCD) framework. Both remaining OCDs will allow the police to attach conditions or actions to the disposals, meaning that the offender will need to engage with the outcome. Offenders are required to admit the offence in order to receive an OCD. Non-admission may lead to prosecution of the offence. The lower levels of trust in the Criminal Justice System amongst people who are BAME, as evidenced in the Lammy Review, may mean they are less likely to admit the offence and benefit from the OCD measure. There is a risk that this may therefore indirectly discriminate against those who are BAME since an OCDs will not be an option without an admission. We will mitigate this by addressing disproportionality in the new OCD guidance. We consider that, although there may be some disadvantage for those who are unable to receive an OCD conditions, overall this change is considered to be a proportionate means of achieving the legitimate aim of creating an OCDs framework that provides consistency, simplification and more

opportunities for engagement with intervention services. We do not consider that it will be likely to put any protected characteristic at a particular disadvantage.

There is also a risk that our proposed pilot for Problem Solving Courts (PSC) would put BAME offenders at a disadvantage for similar reasons to OOOD. Eligibility for PSCs, which will attempt to address the underlying needs of individuals as a driver of offending, would also be dependent on a guilty plea. However, while choosing the locations for the pilot, we will consider the most diverse areas to ensure that the broadest group of offenders are able to benefit from PSCs. We will also use data on protected characteristics collected during the pilot to inform any national roll-out of PSCs. We do not therefore think that the pilot puts any protected characteristic at a particular disadvantage in the mixed-sex offender sites. As men will be eligible for the PSC programme in the majority of pilot sites, we do not consider that the proposals would result in men being put at a particular disadvantage.

Our plans to abolish Senior Attendance Centres and Senior Attendance Requirement would only affect those between the ages of 18 and 24. However, from the Offender Management Statistics Quarterly shows that since 2017, approximately 80 offenders per month have been sentenced to an Attendance Centre Requirement, resulting in c.950 cases annually (less than 1% of all Community Order and Suspended Sentence Order starts).¹ Given their low usage, we do not consider that this measure will result in any particular disadvantage since these facilities were not used particularly often. The alternative requirements such as the Rehabilitative Attendance Requirement will be likely to help ensure that future services can be better tailored to meet the rehabilitative needs of the individuals concerned.

To strengthen the non-custodial options available to sentencers, we intend to both increase the use of Electronic Monitoring and introduce greater flexibility into the system. Based on the available data, which covers only gender and age, we have not identified any group that would be disproportionately affected by our measures.

Empowering Probation

We are proposing to increase the discretionary powers of Offender Managers. Assuming the affected cohort is similar in makeup to the overall probation caseload, individuals affected by this change will be disproportionately young, male, and BAME compared to the general population in England and Wales. However, the Tiering Model used in offender management is designed to allow for changes as new evidence emerges around appropriate supervision levels for different groups. This should help ensure appropriate interventions and supervision is undertaken by all OMs when managing all offenders (including young, male and BAME offenders). For the purposes of the Sentencing White Paper, we are only considering the principle of legislative change, and will further consider the equalities implications within the scope of operational guidance in the future, after the White Paper consultation process has completed. We do not therefore consider that this principle of legislative change is likely to put any offenders with protected characteristics at a particular disadvantage.

Reoffending

To better enable rehabilitation, we are proposing to allow certain sentences over 4 years in length to become 'spent'. We will also reduce the amount of time it takes for sentences shorter than 4 years to become 'spent'. Those who are convicted of sexual, violent or terrorist offences will be excluded from the changes to sentences over 4 years.

¹ Ministry of Justice, Probation Statistics 2018, Table A4_8 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/796919/probation-2018.ods

It is the nature of the offence and the seriousness of their offending, reflected in the sentence they receive, that determines whether the change applies. No offender will be treated less favourably in relation to any protected characteristic.

The proposals apply equally to people with a criminal record, irrespective of whether they have a protected characteristic: we do not consider that the measures would result in people being treated less favourably because of protected characteristics.

Males, younger people (18-24) and those over 50 are overrepresented in relation to the most serious sexual and violent offences. For those offenders given a sentence of over 4 years (and again males are overrepresented by sentence length), the proposed changes will not apply to them, and their conviction will continue to not be subject to a rehabilitation period. Our assessment is that by excluding those convicted of sexual, violent or terrorist offences is a proportionate means of achieving the legitimate aim of ensuring that the nature and seriousness of these offences means that they should continue to be disclosed.

BAME groups in scope of the policy sentenced to over 4 years SDS for applicable offences have a higher proportion than those sentenced to under 4 years. Males from a BAME background who received a custodial sentence of over 4 years which are not for a Schedule 15 or terror offence are therefore likely to be positively impacted by this policy.

Youth Sentencing

We will also apply measures outlined in the White Paper to young offenders. Our aim is to ensure that children are diverted from custody and managed in the community wherever possible, whilst at the same time making sure those who commit the most serious offences serve an amount of time in custody which reflects the seriousness of their offending. Based on the available data, we believe that children who are older, Black, Asian, and Minority Ethnic (BAME) and male may be more likely to be affected by these changes because they are over-represented in the youth justice system. Where age is a specific factor of the sentence, older children are likely to be given longer sentences than younger children in most cases and will therefore be disproportionately affected. However, these changes were made with the specific intention to reflect the differences in maturity and development between older and younger children and we believe this impact is justified. While we recognise that there may be indirect impacts on children with certain protected characteristics, we believe that the principle of public protection and the overarching aim of the youth justice system to prevent offending by young people justify the changes outlined.

To the extent that the impacts from these over-representations might be considered a particular disadvantage for those affected (and hence be potentially indirectly discriminatory under the 2010 Act), our overall assessment is that such impacts would be justified as a proportionate means of achieving the legitimate aims of these reforms which are to introduce a more targeted and nuanced approach to sentencing. This will restore confidence in our Criminal Justice System by ensuring that the public are better protected while criminals will be both punished proportionately and given more opportunities to turn their back on crime.

Discrimination arising from disability and the duty to make reasonable adjustments:

We do not consider that the proposals are likely to result in any discrimination against people with disabilities. Our proposals to improve neurodivergence and mental health training for HMPPS staff, together with our plans to make it easier to identify neurodiversity needs

amongst those on probation, would help meet the needs of offenders with related disabilities and increase the range of reasonable adjustments available to them.

In an OOC, it is important to ensure that individuals with disabilities (including those with learning difficulties or mental health issues) understand the implications of admitting guilt or accepting responsibility for the offence committed, and how they can comply with the conditions imposed on them. The current Code of Practice for Adult Conditional Cautions states that officers must have regard to the provisions of PACE Code C concerning mentally disordered or mentally vulnerable offenders and the use of an appropriate adult. This provision would be reinforced in the revised Code of Practice.

A number of our proposals, for example the CSTR Programme and PSCs are specifically intended to benefit offenders with particular disabilities, for example mental health conditions.

All our proposals recognise that it remains important to continue to make reasonable adjustments for disabled offenders to make sure appropriate support is given to enable rehabilitation and fair access to justice.

Advancing equality of opportunity: We have considered this limb of the duty and our overall assessment is that there will be some measures within the White Paper that are likely to advance equality of opportunity. Many of our proposals are designed to recognise the differing needs of offenders, which will often be linked to protected characteristics. The proposals to support community rehabilitation, reduce reoffending and divert offenders away from courts are likely to be of benefit to everyone. Our proposals around Neurodivergent offenders should improve outcomes for disabled offenders with certain conditions or impairments, with greater steps being taken to identify and meet the unique needs of neurodivergent offenders. Similarly, our plans to increase funding for Community Sentence Treatment Requirements should advance equality of opportunity for offenders who are neurodiverse or have mental health problems, as well as those with substance abuse issues.

We also consider that our proposed pilot of Problem-Solving Courts, with its focus on addressing offenders' needs, will advance opportunities for those with mental health issues, women and those who have children.

The proposed simplification of the OOCs framework will provide more opportunities for offenders to engage with intervention services that address the behaviours that drive their offending, such as drug and alcohol misuse. It will also have a positive impact on victims, amplifying their voice in the process and increasing the opportunities available for reparation.

We will be launching a pilot looking at the impact of improved delivery of timely and quality PSRs on offender outcomes. We have chosen three cohorts (women, young adults and those on the cusp of custody) who are both more likely to have specific needs and more likely to benefit from rehabilitation. This therefore has the potential to improve outcomes for those who are currently overrepresented in custody, such as younger offenders, offenders who are Black or Black British, and those with a disability.

Our proposal to allow certain sentences over 4 years in length to become 'spent' advance equality of opportunity for women and people of a BAME background with a criminal record, as it may make it easier for them to enter employment.

Fostering good relations: We have considered the implications of the White Paper measures on fostering good relations and suggest that some of the proposals aimed at protecting the public and reducing the harm caused to victims and communities by

reoffending may support this limb of the duty. This also applies to those proposals which have the potential to increase awareness around the benefits of taking a more holistic approach to high needs offenders, including those with disabilities such as mental health conditions, in order to drive down re-offending and create other positive change.

Good relations may be harmed if the simplification of the OOCDF framework is perceived to disadvantage the BAME community. However, the MoJ has taken steps to restore the trust of BAME communities in the Criminal Justice System by implementing some of the recommendations of the Lammy Review. For example, we are piloting the Chance to Change programme, which places less of an emphasis on guilt and allows offenders to benefit from intervention without accepting responsibility for the alleged offence.

Ongoing equalities assessment: We will continue to consider the equalities impacts of the individual measures within the White Paper as they become clearer.

We have assessed the impact of each of the broad measures within the White Paper on equalities and undertaken Equality Statements for the most substantial proposals.

Welsh language: We have considered the implications for Welsh language in the development of the White Paper and will be publishing a Welsh version in due course.