

Time to reset the trust deficit?

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Corporate Crime analysis: Edward Henry, a barrister at QEB Hollis Whiteman specialising in crime, business crime and regulatory law, analyses the recent findings of the Lammy Review on Black, Asian and minority ethnic (BAME) defendants.

What does the report indicate about the increase in likelihood of arrest and charges based on belonging to a BAME group?

In his famous letter to Lord Alfred Douglas, De Profundis, Oscar Wilde observed:

'Society takes upon itself the right to inflict appalling punishments on the individual, but it also has the supreme vice of shallowness, and fails to realise what it has done. When the man's punishment is over, it leaves him to himself: that is to say, it abandons him at the very moment when its highest duty towards him begins.'

These words forcefully convey the damage caused by criminalisation, not merely through incarceration, but the deleterious consequences upon release, with a continuing blight on the ex-offender's prospects.

Wilde's words are especially apposite in the light of the preliminary findings of the Lammy review, which is due to be published in Spring/Summer 2017. David Lammy's open letter to the Prime Minister, published on 16 November 2016, confirms what many criminal practitioners have known, anecdotally, for a long time: that 'our criminal justice system has a trust deficit', as he puts it, in the way it treats those of black, Asian and minority ethnic backgrounds.

What do the statistics suggest about a BAME defendant being dealt with in the Crown Court?

Lammy's update suggests that arrest rates are higher for the BAME population in comparison to the white population. To begin with, this means there are a greater number of BAME defendants entering the criminal justice system. They are often the subject of escalation and while many will elect Crown Court trial, as there is a distrust of summary justice, a disproportionate number (on pleading guilty before magistrates) will be committed for sentence to the Crown Court.

What do these statistics appear to suggest about the effect of race on sentencing?

Lammy has found that black men and women were more likely to receive custodial sentences in comparison to their white counterparts. This imbalance continued into the prison system where black prisoners were disproportionately allocated to high security prisons where their opportunities to work, education and access to rehabilitative programmes were restricted. This harsh regime has been described to Lammy as 'a second sentence' which almost guarantees recidivism.

Are these statistics open to interpretation?

Disraeli once said that there are 'lies, damned lies, and statistics' but it is difficult to see how Lammy's emerging findings can be undermined, except by stereotypical and slanted assertions that BAME individuals are involved in more serious crime. This is plainly false, and Release, the national drugs charity, has previously exposed these misconceptions in its report on 'stop and search' ('The Numbers in Black and White: Ethnic Disparities in the policing and prosecution of Drug Offences in England and Wales'). This corroborative report (published in 2013) established that people from black and minority ethnic groups (contrary to widely held preconceptions) use illegal drugs at a similar or lower rate than among whites, but were treated more severely.

Release's report, based upon empirical research, found that:

- o in 2009/10 there were ten stop and searches for drugs for every 1,000 people in England and Wales. Black people were stopped and searched for drugs at 6.3 times the rate of white people, while Asian people were stopped and searched for drugs at 2.5 times the rate and those identifying as mixed race were stopped and searched for drugs at twice the rate of white people
- o black people are arrested for a drugs offence at six times the rate of white people, and Asian people are

- o arrested at almost twice the rate of the white
- o black people are more likely to receive a harsher police response for possession of drugs. In 2009/10 78% of black people caught in possession of cocaine by the Metropolitan Police were charged for this offence and only 22% received cautions. In comparison 44% of white people were charged for the same offence and 56% received cautions
- o black people caught in possession of cannabis by the Metropolitan Police are less likely to receive a cannabis warning than white people, and are charged at five times the rate of whites

Lammy, similarly, has been rigorous in his methodology and his review is (as he puts it) 'evidence led.' He advocates stringent monitoring and the necessity of collating data, which he believes to be of fundamental importance in maintaining 'oversight and accountability.' He realistically accepts that if this imbalance is to be resolved, not all of the answers lie within the criminal justice system, but that the system must be 'scrupulously fair' and do 'everything it can to help offenders turn their lives around.' The other contributing factors, such as socio-economic deprivation and marginalisation, cannot be underestimated. Who now remembers Tony Blair's promise, not simply to be tough on crime but also tough on the causes of crime?

How does this correspond with your experience as a corporate crime lawyer?

I have seen at first hand that BAME offenders are treated harshly. In two unconnected cases, one involving environmental offences, my client of African heritage was disqualified as a company director, which I successfully overturned in the Court of Appeal. In another, a father and son of Asian background faced financial ruin for an unintentional health and safety offence and believed that they had been unfairly treated by the local council, with some justification.

Regrettably, issues of race are endemic within the criminal justice system. There is widespread concern that in cases of medical gross negligence manslaughter (GNM) race exerts a disproportionate influence. In this essay, 'Medicine, Mistakes and Manslaughter: a criminal combination' (Dr Oliver Quick, Cambridge Law Journal, March 2010) one finds:

'The statistics (albeit small) reveal that a disproportionate number of non-white practitioners feature in prosecutions—over 50%. This is high given that the number of non-white NHS hospital doctors is estimated to be around 25%.'

In the last six years, the rising tide of GNM prosecutions has reinforced the validity of Dr Quick's findings. This hardly instils confidence in the process.

Dr Quick observed that the role of race, education, and social background were all powerful determinants of individual success, and that that probably played a part in the findings. If this can apply to the privileged field of medicine, with BAME professionals being unfairly dragged into the system, how much more likely is it that small owner-managers of BAME heritage, running under-resourced micro-businesses, will face injustice? As for those who are vulnerable and socially disadvantaged, the picture is even more pessimistic.

Do you consider these findings statistically significant for corporate crime lawyers?

All lawyers should be interested in this report, particularly if they became lawyers because they believed in justice. The criminal justice system has come a long way, but there can be no room for complacency. The dangers of prejudice cannot be denied and must be acknowledged. Monitoring will enable us to assess whether we are moving forwards or regressing, but it is not enough. It is retrospective.

Prospectively, we have to find ways to divert BAME individuals from the criminal justice system. Experience has shown that once they enter it, they are, as Lammy has stated: 'locked into existing patterns of disproportionality by making it harder for offenders to break the cycle'.

Interviewed by Lucy Trevelyan.

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