



**Justice Committee Inquiry:
Children and young people in custody**

Written evidence of JUSTICE

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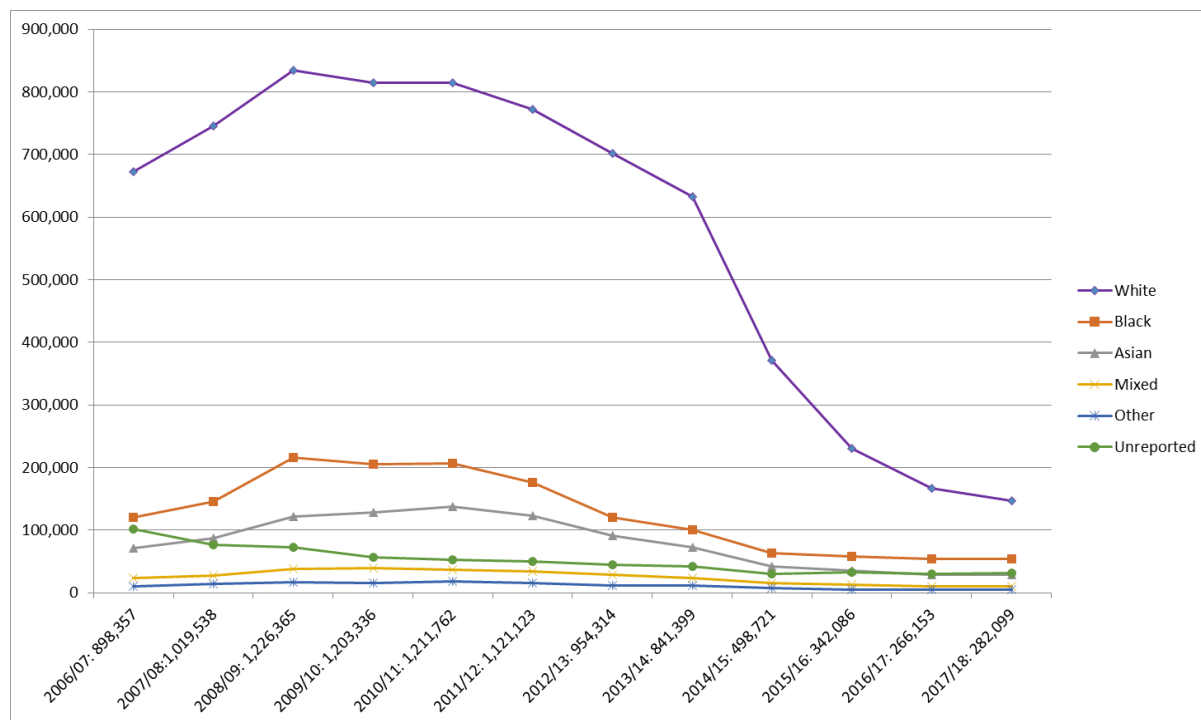
Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – administrative, civil and criminal – in the United Kingdom. It is the UK section of the International Commission of Jurists.
2. In October 2019, we convened a Working Party on Racial Disparity in Youth Justice, chaired by Sandra Paul of Kingsley Napley and supported by Travers Smith LLP. The Working Party is on-going, and so has not yet come to any firm conclusions or recommendations. As such, this evidence amounts to our initial observations on the topic. We aim to produce our report in the autumn.

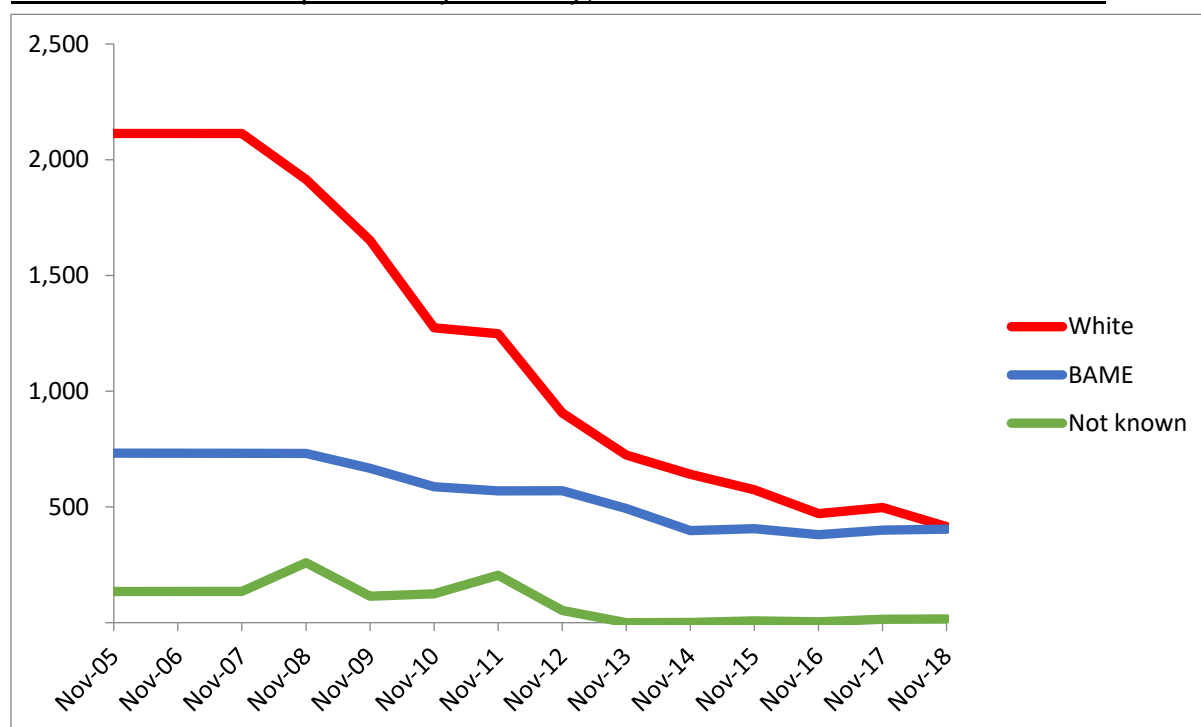
Why we convened the Working Party

3. In recent years, the youth justice system (YJS) has made many important strides that have resulted in reduced numbers of children arrested, charged and held in custody. There is now more focus on the needs of children and working with children to reduce the chance that they will commit criminal acts. This can be seen most clearly in the large uptake of diversion schemes throughout England and Wales.
4. However, these promising developments have been distributed unevenly. The tables below demonstrate that reduction has largely meant fewer white children being involved in the YJS. The numbers of Black and Minority Ethnic (BAME) children have fallen, but at a far slower rate than white children.
5. In terms of First Time Entrants (FTEs) to the youth justice system, there is a similar pattern, with numbers falling for each ethnicity, yet larger reductions for white children. However, there were small increases for Black children between the years ending March 2014 and 2015 and March 2016 and 2017. This has led to an increase of the proportion of Black FTEs over the last ten years from 8% to 16%, and the proportion of Asian FTEs increasing from 5% to 7%.

Number of Stop and Searches conducted by police throughout England and Wales¹



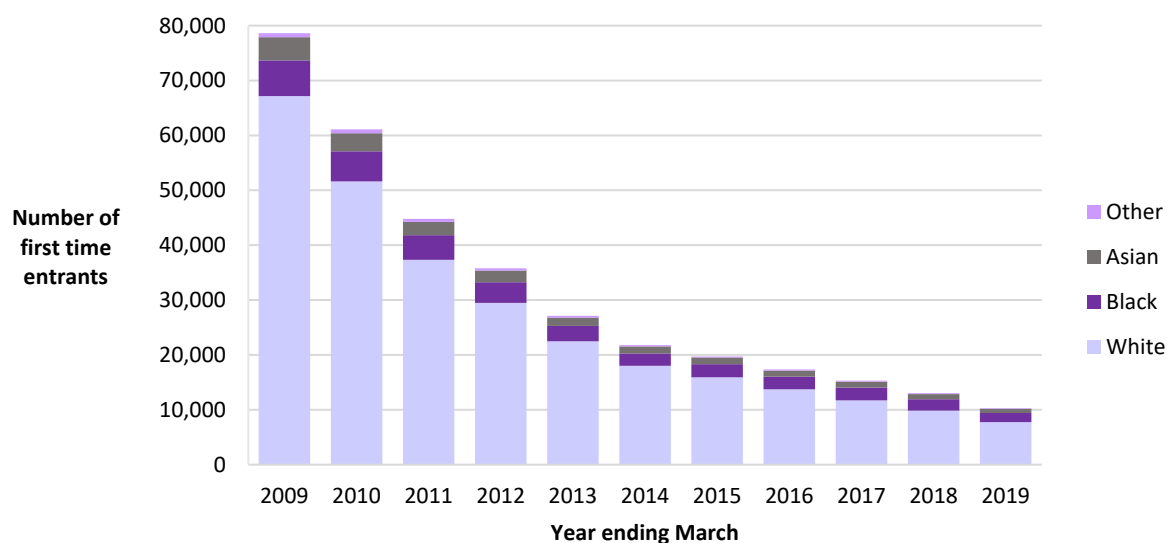
Under 18 Secure Population by Ethnicity, November 2005 – November 2018²



¹ Statistics provided by Home Office <https://www.ethnicity-facts-figures.service.gov.uk/crime-justice-and-the-law/policing/stop-and-search/latest>

² Figures provided by Ministry of Justice, *Youth Custody Data: November 2018*

First time Entrants to the Youth Justice System by ethnicity³



6. This trend has exacerbated racial disparities through the YJS. In our view, there is clearly something wrong where one cohort experiences positive change, while another does not. That there are such disparate outcomes told us two things:
 - a. Good practice within the YJS exists; and
 - b. This practice is not applied consistently.
7. The Working party sees it as its role to identify and shine a light on this good practice, as well as the reasons for its inconsistent application. Its terms of reference are:

To examine the causes of BAME disproportionality in the Youth Justice System (YJS) of England and Wales. The Working Party will make practical recommendations with a view to reducing that disproportionality. In addition, it will seek to ensure that children are not needlessly criminalised by improving the attitudes, processes and procedures in the YJS. In pursuing its aims, the Working Party will review (through the lens of racial disparity):

- a. The causes of BAME distrust in the justice system. This will examine issues such as policing responses to crime, gang matrices and stop and search, as well as the lack of diversity within the legal professions. In particular it will focus on addressing attitudes between law enforcement and the wider criminal justice system, and BAME young people and their communities.

³ Youth Justice Board, *Youth Justice Statistics 2018/19: England and Wales*, p. 13, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/862078/youth-justice-statistics-bulletin-march-2019.pdf

- b. The current response to crime carried out by young people aged up to 25 years old and alternatives to traditional criminal justice interventions. This will include community engagement, diversion, the age of criminal responsibility and sentencing;
- c. The YJS's low expectations towards and misperception of BAME young people, particularly, but not limited to, dangerousness, maturity, and vulnerability; and
- d. Current processes and procedures in the YJS, to identify whether they contribute towards disproportionality, whether they achieve the aims of the YJS and whether they take into account the best interests of the child.

The Working Party will consider the approach in comparative jurisdictions and identify best practice solutions where they are relevant to its work.

The Progress of the Working Party

8. This is a vast topic and with limited resources our work has consisted of taking evidence from experts in the field and those with lived experience, desk-based research and our own expertise. We chose to focus on what we felt were the most pressing issues within the youth justice system:
 - a. Policing and community;
 - b. Biased perceptions; and
 - c. The Youth Court process.
9. The structural racism that BAME people face every day does not manifest solely in overt racism. It is often discretionary decisions, or subtle actions, that drive poor outcomes for BAME people within England and Wales. For instance, in his polemic, *Natives: Race and Class in the Ruins of Empire* (2019), Akala explained how some white teachers refused to accept his intelligence. These assumptions, or expectations, of how BAME people should behave are prevalent within society, and the YJS reflects society.
10. In one way, these inherent biases make our work more difficult. They often manifest in the YJS at junctures where discretionary decisions determine outcomes for children. For instance, in the belief that certain behaviour is suspicious, or in the labelling of a group of friends, caught up in violence, as a gang. It is difficult to pinpoint the reasons for discretionary decisions, where so many factors are at play, and where there is no indication of overt racism.
11. From our discussions with leaders within policing, the CPS and the judiciary, we know that there is a willingness from the top to improve outcomes for BAME children, and to improve the culture within their organisations. The biased decisions described above take place within organisational structures, presenting a clear route to reducing the prevalence of such decisions. It is through improving processes and culture within criminal justice agencies, rather than solely focusing on the individuals within these organisations, that racial disparities will be reduced.
12. That is not to say that reducing racial disparity in youth justice will be easy. Large institutions and organisations are often slow to change. What it does

mean is that, through improved processes, outcomes due to inherent bias can be scrutinised, challenged and changed, reducing racial disparity.

13. The Working Party considers that too much responsibility is placed on the individuals within an organisation to change. Biased decisions and outcomes are treated as individual failings, capable of change through proper training and reform of racist individuals. While it is important that individuals do change, this can only ever be a small part of a solution. The structures of organisations must be used to scrutinise actions and decisions of people within it, to address any decisions and actions that were not correct and to hold to account racism within each organisation. In addition, the systems that BAME children go through, and the perceptions imposed on them, must be scrutinised and reformed. For instance, we have heard how children acting streetwise can be construed as the children showing maturity, rather than just adapting to their current context. Understanding such misperceptions will ensure that BAME children are assessed in a similar way to white children rather than assuming capacity for adult thought processes.
14. The change that is required means that the YJS must acknowledge that it is not just 'a few bad apples' that lead to worse outcomes for BAME children. Rather, it is a systemic issue. This requires a shift from individual to organisational responsibility. In addition, it requires organisational actors within the YJS to cooperate and challenge each other to ensure the system that they work in treats everyone within it fairly.
15. It is clear from conversations we have had with many experts in the field that there is a certain amount of disillusionment with attempts to improve racial justice within England and Wales. There have been many reports and initiatives seeking to achieve racial justice but while they are often welcomed by the executive, the recommendations are not immediately implemented or are implemented in a piecemeal way absent the other reforms required to make them successful.⁴ Shifting focus to organisational structures and processes, ensuring that organisations champion and embed reforms is one way of achieving lasting change.
16. However, it must be acknowledged that many (although not all) of the drivers for contact with the YJS are caused by factors outside of the jurisdiction of the YJS. BAME children are more likely to grow up in deprived areas, more likely to be victims of crime and more likely to be excluded from school, than white children. There is a clear causal pathway from exclusion to meeting the YJS. It is our view that any governmental response to this issue must look holistically at the causes of criminal behaviour and seek to address these as a priority. This will, in itself, reduce racial disparity.

⁴ Since the murder of Stephen Lawrence, there have been three major reports into race and the criminal justice system within England and Wales. The Macpherson Report, the Young Review and the Lammy Review all made sensible recommendations to improve outcomes for BAME people within the justice system. Despite this, many of their recommendations have not been implemented and racial disparity within the justice system is worsening.

17. Although reform of the YJS in itself cannot solve all of the causes of racial disparity within youth justice, it can mean that the YJS takes into account the context of the children within it. It requires a truly child-centred approach. This does not mean excusing criminal behaviour but understanding the drivers behind it and taking that context into account when finding ways to change behaviour. It may mean requiring that all children have legal representation at the police station (rather than actively having to request it); ensuring there are people children can trust in justice spaces; understanding how and why a child has not been attending school; or seeing the exploitation inherent in some criminal acts.
18. It also means a YJS that does not give up on children, affording them the opportunity to grow into valuable members of society. That opportunity may be needed more than once and the failure of one intervention should not mean that no other interventions are offered or that they should form an escalating tariff. It is clear to us that a YJS that places welfare and encouragement at the forefront, rather than the absolute requirement for admission of guilt, shame and punishment, is more likely to produce better outcomes for children as a whole, and more likely to address the challenges BAME children face.

Emerging themes

19. As our work has progressed the following themes and proposals have emerged. These are not our final recommendations but indicate the direction of our current thinking. The recommendations that we will produce will be concrete, practical ideas to implement these themes. The themes that have emerged are:
 - a. Trust
 - b. Understanding and voice;
 - c. A truly child-centred approach;
 - d. Getting it right the first time; and
 - e. Not pigeonholing

Trust

20. As David Lammy MP has described,⁵ BAME communities distrust the justice system. This lack of trust runs throughout the justice system, from the police to the courts, with many seeing the system as 'us vs them'. This distrust is historical and must be addressed before lasting change can be achieved.
21. For today's youth, this distrust is fed through micro interactions and how the pillars of the YJS behave or interact with them. For instance, through being overpoliced and feeling constantly under suspicion. It is common for BAME

⁵ D. Lammy, *The Lammy Review: an independent review of the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the criminal justice system*, 2017, p. 6, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf

children to have been stopped and searched on multiple occasions. One person giving evidence to the Home Affairs Committee described what this felt like:

My next interaction after that was being pulled over because there were suspicions that I had a knife on me; and I was about six years old coming home from the park. [...] The only interaction you have with an officer is when he is pulling you to the side, emptying out your pockets. [...] Now you are being looked at and labelled as a criminal when you have done absolutely nothing wrong. What that is now doing, it is creating a state of mind for young people to want to hate the police.⁶

22. From our discussions, we have learned that while many BAME children understand the need for stop and search as a policing tool, they dislike how it is used. We have been told that stops are often aggressive and do not take into account the possibility that the child may be scared.
23. We have heard that BAME children would appreciate some kind of acknowledgement of the embarrassment and inconvenience caused, by way of an apology, after each stop where nothing is found. In response, police believe an apology is unnecessary as carrying out the stop and search is part of their job. In our collective opinion, this response misses the point. The children do not want an apology for the police doing their job, or for an admission of wrongdoing. Rather, children want a genuine recognition that they were wrongly suspected and that their day has been disrupted. Often, little courtesy is shown to children who are stopped and there is little understanding of the grievance the children feel because of this, particularly when the stop has been fruitless. An acknowledgement of this would be seen by any reasonable objective bystander as positive and it costs the police nothing. Such a change may also lead to more thoughtful and courteous stops in the first instance. Moreover, its positive effect on the perception of the police may contribute to improved relationships.
24. However, stop and searches are now more often carried out by Territorial Support Groups. It is our understanding that these groups do not have an on-going relationship with the community and are therefore less invested which may lead to less care. This lack of care or investment in the outcome means that TSGs are treated with suspicion and largely disliked. A return to or greater balance towards neighbourhood policing may be another solution that builds trust.
25. We have heard that BAME children often see courts as largely white spaces, which adds to the belief that the justice system is against them. They often do not believe that magistrates or judges could relate to them, due to the perceived gulf between their respective lives. For instance, one child told the Centre for Justice Innovation that “they were dead posh them judges.”⁷

⁶ Home Affairs Committee report on Serious Youth Violence, 31 July 2019, available at https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/1016/101608.htm#_idTextAnchor055

⁷ Centre for Justice Innovation, *Young people’s voices on youth court*, May 2020, available at https://justiceinnovation.org/sites/default/files/media/documents/2020-05/20200512_young_peoples_voices_on_youth_court_final.pdf

26. Clearly, improving diversity within the justice professions is important but it is not enough. Judges and magistrates could take the time to introduce themselves and others in the court, and find out a little about the child, to make the child feel more at ease. Reverse mentoring is one solution that would encourage this. This would mean judges and magistrates listening to and learning from BAME children.

27. In addition, ensuring access to trusted faces throughout the justice system would help both in building trust and in making important decisions.

Understanding and voice

28. It is clear to us that children have little understanding of their rights, from the point they are stopped on the street to when they are sentenced. This is particularly important for BAME children who come into contact with the YJS more regularly than white children.

29. Identifying how to improve knowledge of rights should be a priority. Innovative work by Dr Vicky Kemp, who has developed an app for children in police custody, and Release, who have developed an app detailing rights under stop and search, need to be built on.

30. In addition, children often do not understand the YJS or what happens to them as they go through it. This contributes to a lack of control and feeling of distrust. Improved attempts must be made to demystify the process and to make children feel more comfortable in justice spaces. Although this is part of the role of YOTs, it is clear that many children do not understand the youth court process.⁸

31. This lack of understanding contributes to a lack of voice in the YJS, where children and their parents may feel unable to challenge decisions made because they do not understand them, the ramifications of the decisions, or the system. This lack of voice can be particularly acute in some BAME communities where parents do not speak English as a first language. Ensuring BAME children and parents have the confidence to challenge decisions will contribute to improved outcomes for BAME children.

A child-centred approach

32. Although there is meant to be a child-centred YJS,⁹ in response to the heavy critique of our process by the European Court of Human Rights in *T v the United*

⁸ *Ibid*

⁹ For instance, the National Police Chiefs' Council, *Child Centred Policing* strategy, emphasised that 'it is crucial that in all encounters with the police, those below the age of 18 should be treated as children first. All officers must have regard to their safety, welfare and wellbeing as required under [...] the Convention on the Rights of the Child, in: NPCC, *Child Centred Policing – National Strategy for the Policing of Children and Young People*, 2016, p. 8, available at <https://www.npcc.police.uk/documents/edhr/2015/CYP%20Strategy%202015%202017%20August%202015.pdf>

*Kingdom*¹⁰, this is woefully inadequate. There is no permanent child custody suite in England and Wales, with children routinely detained in police cells alongside adults;¹¹ children are often held responsible where they may have been exploited; the vulnerability of children is all too often not acknowledged because they look older than they are; and the youth court in many respects still operates like an adult magistrates' court.

33. We do acknowledge that since *T*, there has been ambition to change the YJS and distinguish it from the adult court. These efforts include a real emphasis on reducing the number of youth cases in the Crown Court and a real drop in numbers of those in custody. However, these changes have not tackled the issue of overrepresentation or the lack of trust some communities have in the YJS. These issues have been exacerbated by court closures and children having to travel long distances to attend court.
34. From our consultees, we have heard that BAME children are often considered more mature than they are, sometimes due to their physical attributes. A brief review of recent judgments, such as *R v Adan*¹² show that assessments of culpability are still being based on assumptions of maturity or the type of offence being committed, rather than developmental maturity and the agency of the child. In *R v Clarke & ors*,¹³ the Lord Chief Justice stated that "reaching the age of 18...does not represent a cliff edge for the purpose of sentencing", acknowledging the growing scientific consensus that adolescence continues to about 25 years of age. Together with an improved understanding of adolescence, factors of culpability and maturity should be judged critically, taking into account all circumstances that provide the context for the offending behaviour and the true culpability of a child when their brain is still developing.
35. Our YJS must put the fact that those within it are children front and centre of any response to criminal behaviour. We have heard how practitioners within the YJS sometimes do not see a child before them, but a criminal, with detrimental consequences to the child. More common sense is needed. It should not be seen as normal for a child to be carrying a knife; it should not be seen as normal for a child to be missing school; it should not be seen as normal for a child to be participating in criminal acts. It is our view that racialised thinking normalises such actions for certain groups and a child-centred justice system must counter this. This requires a far less process-driven approach to conduct, a more flexible setting at court and problem-solving with the child(ren) involved as complainants, witnesses and accused.

¹⁰ (app. no. 24724/94), ECtHR Grand Chamber, 19 December 1999

¹¹ This is a particular concern where police have the power to detain a child in custody in their own interest: s. 38(1)(b)(ii) Police and Criminal Evidence Act 1984. This power is often used in a welfare capacity, such as in the recent case of *Archer v Commissioner of Police of the Metropolis* [2020] EWHC 1567. Holding a child in adult custody suites, together with adults, should not be considered an acceptable welfare-based intervention, making the need for child custody suites all the more pressing. Even a relatively short period in adult custody can be damaging for a child.

¹² [2020] EWCA Crim 272

¹³ [2018] EWCA Crim 185

36. As well as putting the child front and centre, the YJS must also tend to the welfare needs of a child and ensure that these needs are met. The aim should be to provide the child with all the educational, health, social and/or financial assistance they need to take a different path.

Getting it right the first time

37. Reducing racial disparity does not necessarily mean reinventing the YJS. There is evidence that aspects of the YJS work well, but primarily for white children. This suggests that when BAME children come through the system, the wrong decisions are made or opportunities are missed. These missed opportunities often have long-lasting detrimental consequences for BAME children.
38. It must therefore be a priority to ensure that all opportunities are explored at every stage of the YJS. This requires both scrutiny and diligence. Where discretionary decisions are in the hands of one person, checklists could be used to ensure that they consider all options. Moreover, where a discretionary decision is taken, the ability to challenge it may prove to be a useful safeguard against subconscious bias.
39. Regular scrutiny of discretionary decisions would identify how to improve practice to reduce the influence of subconscious bias. The CPS regularly scrutinises case files to improve its practice and is one arm of the justice system that does not produce large racially disparate outcomes. In addition, the CPS has begun Community Engagement Forums, with the aim to better understand the concerns of community and further scrutinise where subconscious bias may influence their practice.
40. Where possible, discretionary decisions should be taken out of the hands of individuals, and instead taken by groups that understand both the child and the community. This could mean that rather than police officers making decisions about diversion, community panels will instead. Another example could be where a child is convicted, those interested in the child's future are engaged with to find the best disposal option and sentencing plan.

Not pigeonholing

41. Throughout this submission we have used the term 'BAME' to refer to all those children who are not white. We do not do this because we think BAME is a homogenous group; rather it is comprised of myriad different identities and cultures, all with a unique relationship to society and to the justice system. As such, identifying concrete solutions for everyone within this grouping is difficult. Moreover, just because a child is from a specific group does not mean that they experience their identity as others understand it.
42. The YJS must be aware of this and not pigeonhole people in certain categories. This means that the YJS should acknowledge that it may not fully understand the identity and context of those going through it and must work with each child individually to understand this better.

43. Moreover, we do not consider it feasible for police officers, lawyers and judges, as well as other YJS practitioners to be expert in every ethnicity and culture. Rather, it should become instinctive that an additional set of factors are relevant and they should know where to turn to find information, or to find people who may be better able to understand the child. They should be willing to accept the input of others and adapt their thoughts and behaviour as needed. The YJS needs to be more flexible to the nuances of ethnicity and culture, in order to ensure that every child it encounters is treated fairly.
44. We consider that the YJS must understand that there is no one solution that fits all. Rather it requires an approach that understands the difference between the children moving through it. For instance, asking children about their experience and needs, rather than making assumptions, is a simple solution that may have a large impact in reducing racial disparity in the youth justice system.

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