

Disparities in youth diversion – an evidence review

Introduction

Point-of-arrest youth diversion gives young people the chance to avoid both formal criminal justice processing and a criminal record, in return for the completion of community-based interventions. Youth diversion is an increasingly well-embedded practice in England and Wales: research by the Centre for Justice Innovation in 2019 found that 88% of youth offending teams offer some form of diversion¹. However, while the emergence of diversion is a welcome development trend, if access to diversion is not evenly distributed, it can actually exacerbate racial disparities in criminal justice outcomes for young people².

There is a growing awareness of the scale of racial disparities in the criminal justice system, and in the youth justice system in particular. The Justice Select Committee noted last year that “race disproportionality is significant and fundamental, visible in every part of the youth justice system”³. The 2017 *Lammy Review* highlighted disproportionality in the youth justice system as its ‘biggest concern’.⁴ Indeed, it is striking that the welcome advancements in the youth justice system like diversion have been less likely to benefit Black, Asian and Minority Ethnic (BAME) children and young people. As Justin Russell, Chief Inspector of Probation put it “somehow the system seems to be better at diverting white children away from the formal criminal justice system than it is for BAME children and young people.”⁵

This concern is borne out in the available statistics. For example, while the number of first time entrants (FTEs) from a Black background has decreased in the decade to March 2019, they have doubled as a proportion of all FTEs, going from 8% to 16%.⁶ Furthermore, BAME children and young people are more likely to escalate through the system: in 2018 they made up 31% of arrests, 35% of prosecutions, 53% of custodial remands, and 51% of the custodial population.⁷

As part of our commitment to ensuring that youth diversion is better understood, the Centre is undertaking a research project to explore disparities in youth diversion. This paper is a rapid literature review which summarises the evidence base on racial and ethnic disparities in youth diversion. We will be following this with a second paper later this spring, which will look at the impact of race and ethnicity on children and young people’s access to and engagement with youth diversion in two areas of England and Wales, drawing on testimony from practitioners and young people themselves.

Defining youth diversion

The phrase “youth diversion” is used to refer to a range of approaches which seek to eliminate or reduce young people’s involvement with the criminal justice system. In this paper we will be using “youth diversion” as a short hand for point-of-arrest youth diversion, an approach which provides children and young people suspected of committing an offence with a voluntary community-based intervention as an alternative to formal criminal justice processing (either an out of court disposal or

- **Youth diversion can contribute to keeping children and young people out of the formal justice system. But if access to diversion is unequal, it can increase racial inequality across the youth justice system.**
- **Race-neutral eligibility criteria like “number of previous offences” can increase disproportionality because of inequalities in how different communities are policed.**
- **Practitioners’ unconscious biases can influence which young people they think are suitable for diversion.**

prosecution) which could lead them with a life-long criminal record as well as other sanctions. Though practice is variable, youth diversion tends to involve short assessments of arrested children and quick referrals into light-touch, voluntary programming.

A focus on the front end

The question of who has access to diversion at the point of entry to the criminal justice system is important. Children and young people who are diverted avoid the collateral consequences of formal criminal justice system processing, including: labelling; interruption of education, training and employment; and a criminal record. Contact with the justice system can itself be criminogenic, deepening and extending children and young people's criminal careers, with outcomes generally worse the further they are processed.⁸ Diversion limits this contact and the decision whether to divert can drive children and young people's escalation into or trajectory out the formal criminal justice system. In this way, as recognised in the adult diversion context, diversion has the potential to exacerbate or mitigate racial disparities downstream.⁹

Research shows that unequal outcomes at the front end of the justice system can 'accumulate into larger disparities'.¹⁰ A US Office of Juvenile Justice and Delinquency Prevention literature review, found that studies of earlier decision points (e.g. arrest) in the youth justice system 'overwhelmingly found that there was some racial disadvantage to minority youth', whereas far fewer of those focused on later decision points (e.g. probation) found this.¹¹ One reason given for this is that the scope of officials' discretion tends to diminish further into the system. However, we should note that in the English and Welsh context we can identify a number of downstream points where at least some discretion can be exercised including remand decisions, pre-sentence report proposals and breach decisions.

One of the benefits of youth diversion is administrative efficiency: its police burden reduction and cost avoidance potential are highlighted in the Centre's youth diversion toolkit.¹² The resulting short time scales, imperfect information, and relatively unfettered discretion, however, can lead to reliance on simplifying heuristics (shorthand cues) for decision making. These may operate to the detriment of BAME children and young people. For example, Fader et al. found that even in juvenile court, decision makers use 'racialized perceptual shorthand,' judging children and young people from racial and ethnic minorities as more culpable and less capable of reform.¹³

The discretion that youth diversion affords practitioners demands particular attention. Diversion is a 'loosely coupled' decision-making point in the youth justice system, i.e. one relatively unconstrained by legal rights or statutory criteria.¹⁴ While the decision to divert is ideally a joint one between police and the Youth Offending Service (YOS), and even a wider scrutiny panel, in practice the decision may turn on frontline police discretion, exercised with a high degree of autonomy. As our mapping exercise highlighted, youth diversion schemes vary widely across England and Wales and there is large scope for professional discretion to be exercised from decisions about who is eligible right through to what constitutes non-compliance.¹⁵ If this discretion is exerted in a biased fashion, diversion schemes may not be procedurally fair, exacerbating disproportionality, running counter to due process ideals and undermining normative compliance with the system as a whole.¹⁶ The *Lammy Review* argued that the impact of bias on the exercise of discretion can be mitigated by subjecting individual decision-making to scrutiny since: "first, it encourages individuals to check their own biases. Second, it helps identify and correct them"¹⁷.

The evidence on youth diversion disparities

The evidence base on the extent of disparities in access to youth diversion is still emerging, but a number of studies do raise concerns. Acknowledging that research in this area is still in its infancy, Schlesinger notes that 'so far most studies find that intake workers... are less

likely to refer black or Latino youth to diversion programs than legally similar white youth.¹⁸ Similarly, Bishop found that African American and Hispanic children and young people are less likely to be diverted and more likely to be referred for formal processing compared with white youth.¹⁹ Ericson and Eckberg noted the 'discrepancy between those eligible to be diverted and those actually diverted is worse for juveniles of color', with five of the eight police agencies investigated having more eligible non-white children and young people that were not diverted than white children and young people.²⁰ Leiber and Stairs found a significant racial disparity in youth diversion even when accounting for severity of offence.²¹

In contrast, a study in Nebraska, comparing the race of children and young people referred to diversion to the racial and ethnic composition of the youth population in the area, found that white youth were less likely to be diverted than black youth.²² However, a comparison was not made between law enforcement contacts and diversion referrals, meaning that overrepresentation in the latter group could be explained by overrepresentation in the former.

Bishop and Frazier discovered that diversion was denied to children and young people if their family could not be contacted, did not respond to requests, or were deemed uncooperative.²³ Similarly, in a more recent study, Love and Morris found that racial disparities in youth diversion are significantly mediated by family structure, noting that 'African American youths are denied diversion opportunities largely because they disproportionately live in alternative family arrangements.'²⁴ It was often assumed that such family structures would make successful completion of diversion less likely, an assumption that was proven incorrect.

Research also suggests that the substance of diversion may be different for children and young people from different backgrounds. For example, Fader et al. found that intervention packages for minorities were more likely to include a physical aspect (e.g. bootcamps), while interventions for their white counterparts were more likely to be therapeutic (e.g. substance misuse support).²⁵

Explanations advanced for diversion disparities

Racial disparities in access to diversion can be driven by inequalities in policing. BAME communities are more tightly surveilled, increasing the chance of detection and arrest, and are more likely to be arrested in situations and for behaviour white people would not.²⁶ As the Magistrates Association note, 'an increased use of stop and search on one particular group may result in that group having a much higher rate of out of court disposals or arrests against them.'²⁷ In this way, racial disparities attach to the apparently race-neutral measure of 'prior record' which can be an important determinant of a person's trajectory through the criminal justice system and can bar access to diversion. Records of previous criminal justice system contact are taken as indicators of character and capacity for reform, and their 'validity as proxies for actual behaviour is seldom questioned'.²⁸

Minorities may be deemed more culpable and less amenable to reform, barring the opportunity of diversion. Bridges and Steen note that practitioners separate internal (personality) factors from external (environmental) factors as causes of offending, with the latter entailing less culpability and therefore resulting in greater leniency.²⁹ They found that probation officers tended to attribute black children and young people's offending to negative attitudes or personality traits, while using environmental factors to explain white youths' offending. However, a later study of theirs added complexity to this dichotomy for low-level cases, e.g. finding that the offence was considered 'out of character' in a similar proportion of cases for black and white young people and there was no notable difference between black and white young people in the category 'the youth needs, and is amenable to, treatment'.³⁰ The dichotomy was, however, more apparent in moderate risk cases, with probation officers classing 38% of black people as in need of being held accountable compared to 6% of white people. Similarly, in the high risk category, probation staff were much more likely to describe black people as having a criminal lifestyle (32% versus 16%), and white people as having a

lack of constructive activities (20% versus 6%).

Criminal justice practitioners' perceptions of BAME children and young people may result in them being up-risked and deemed unsuitable for diversion. Tittle and Curran note that 'non-whites and youth symbolize to white adults resentment-provoking or fear-provoking qualities like aggressiveness, sexuality, and absence of personal discipline.'³¹ Interpretations of behavioural and attitudinal indicators of risk may therefore operate to the detriment of BAME children and young people especially. Steen et al., in the context of juvenile court, note that 'in every legal category, a larger percentage of black offenders are categorized as "high risk" than white offenders.'³² Risk assessments of minority children and young people may lack nuance. Steen et al. highlighted that double the number of white offenders were classed as moderate risk than black offenders, suggesting a tendency to assess 'black offenders as either low risk (i.e., victims) or high risk (i.e., hardened offenders), with little middle ground.'³³

Inappropriate tools that have not been 'normed or validated' for different groups of children and young people may lead to unduly conservative assessments of risk.³⁴ This up-risking is evident in the Metropolitan Police's Gangs Matrix, in which black people are starkly over-represented. Although the matrix purports to be a risk management tool, Amnesty International highlight that its 'conflation of elements of urban youth culture with violent offending is heavily racialised' and results in 'over-broad and arbitrary identification of people as gang members.'³⁵ As Bishop notes, 'racial and ethnic disparities derive in part from laws that differentially target the behaviors, statuses, and life conditions associated with youths of color'.³⁶

Furthermore, the orientation of the youth justice system necessarily involves a focus on welfare, with individual and social factors becoming 'legitimate considerations...even if they are unevenly distributed by race.'³⁷ In this way, as Bishop notes, the 'deck is stacked against minorities by virtue of "needs" that reflect social and economic disadvantage.'³⁸ As Love and Morris highlight, 'seemingly non-racial proxies often provide cover for racially unequal treatment or thinking in a color-blind context.'³⁹

Diversion disparities may also stem from the fact that BAME people have significantly lower trust in the criminal justice system than their white counterparts. As our 2017 *Building Trust* report highlighted, a majority (51%) of British-born BAME people believe that the criminal justice system discriminates against particular groups and individuals, compared to just 35% of the British-born white population.⁴⁰ The *Lammy Review* similarly flagged this trust deficit, noting that it renders BAME people less likely to admit an offence or plead guilty at court.⁴¹ This can bar young people from diversion, which often requires a formal admission of guilt, as well as preventing access to formal out of court disposals and sentencing discounts.

Strategies to address diversion disparities

To tackle racial disparities in diversion, Schlesinger urges the use of 'race conscious eligibility criteria' and risk assessments that 'don't replicate or exacerbate racial disparities'.⁴² She suggests that risk assessments should hinge on static (e.g. past arrests) rather than dynamic (e.g. residential or family instability) reoffending predictors. The former factors could feed into eligibility criteria, while the latter could be used to inform interventions. Acknowledging 'prior record' is not race-neutral, Schlesinger suggests looking to measures that 'hold the least accumulated racial discrimination' e.g. arrests for violent crimes rather than arrests generally. Similarly, Cabaniss et al. urge careful development of criteria to avoid indirect discrimination, for example asking if a responsible adult is willing to facilitate the child or young person's engagement with the scheme, rather than judging whether a 'good family structure' is in place.⁴³ The same research also recommends cultural competency training for staff.⁴⁴

In the Centre's recent briefing on eligibility criteria for diversion, we recommended that flexible criterion of "accepting responsibility" should be used rather than requiring a formal admission of guilt.⁴⁵ Admitting guilt is often interpreted as an indicator of remorsefulness and willingness to comply with the requirements of a diversion scheme, assumptions which Schlesinger

points out 'may be highly racialized'.⁴⁶ Maclure et al. note that these expectations may 'weigh against those youth who, for cultural, linguistic, or other reasons, may be unable or unwilling to articulate expressions of remorse.'⁴⁷ In a bid to address racial disparities, the Ministry of Justice's Chance to Change diversion pilots, following the recommendation of the *Lammy Review*, do not require a mandatory admission.⁴⁸ Similarly, Outcome 22, a new police option for recording diversionary activity, does not depend on an admission of guilt.

As outlined in the Centre's youth diversion toolkit, schemes should not overdose: requirements should be proportionate and not set children and young people up to fail.⁴⁹ Similarly, schemes should not have draconian responses to minor incidences of non-compliance as these can result in 'shockingly low' rates of completion.⁵⁰ A study by Norris et al. flagged that increasing the number of sanctions on diversion schemes was linked to earlier reoffending.⁵¹ This points to the importance of prioritising scheme completion. For example, if lack of transport is identified as an issue in engagement, transport should be provided.

Transparency around the youth diversion process, especially eligibility criteria, could facilitate accountability and act as a useful check on discretion. Smyth, for example, noted that the lack of transparency in selection criteria for diversion in Ireland left room for selection bias and an increased risk of discrimination against certain individuals and groups.⁵² However, Mears warns that practitioners give criteria different weight depending on the context, and so explicit criteria will not necessarily remove decision-maker subjectivity and lead to consistency.⁵³ For example, Maclure found that although flexibility around admissions of guilt was part of the eligibility criteria, 'straightforward acceptance of responsibility is not always considered to be sufficient'.⁵⁴

In interviews with juvenile justice stakeholders conducted by Dawson-Edwards et al., '[t]he suggestion of the possibility that disproportionate minority contact (DMC) might be the result of "prejudice" or "discrimination" was consistently met with strong denials.'⁵⁵ Indeed, a reliance on the differential offending explanation for disparities was often in evidence, e.g. 'You have to remember, Black kids are just more likely to commit crime.'⁵⁶ It is important, therefore, to educate youth justice stakeholders on the existence and pervasiveness of racial and ethnic disparities if they are to be effectively addressed.

In its roundtable report on disproportionality in the youth justice system, the Magistrates Association highlighted some steps to guard against bias of disparity in court decisions, the following are pertinent in the case of diversion too: promote awareness of the issue; use language carefully (e.g. negative peer influence rather than gang involvement); address unconscious bias through training and accountability mechanisms; improve understanding of BAME communities; encourage the challenge of decisions and improve opportunities to whistleblow; collect data on decisions and make them accessible; and focus on reflective practice in relation to decisions.⁵⁷ In terms of improving police interactions' effect on disproportionality, it was suggested that scrutiny panels' work could be improved, and rates of diversion increased.

While these scheme-level improvements are pressing, they should not detract attention from structural causes of inequality. Bishop cautions that a 'needs' focus 'deflects attention from broader social structural and cultural circumstances, convenient rationalization for an exercise of greater control over minority offenders.'⁵⁸ A top down and bottom up approach is needed. As highlighted by the Office of Juvenile Justice and Delinquency Prevention, strategies for reducing racial disproportionality ought to include: 1) direct services, which address the risks and needs of the youth; 2) training and technical assistance to justice system practitioners; and 3) system change, which involves altering aspects of the youth justice system that contribute to disparities.⁵⁹

Conclusion

A research project to explore the impact of race and ethnicity on children and young people's access to, and engagement with, youth diversion in England and Wales is much needed. The discretion that abounds at the front end of the system demands attention, and unequal outcomes here can accumulate into larger disparities downstream. Research from other countries, notably the US, shows that racial disparities can pervade diversion schemes. Explanations advanced for this include: unfettered discretion and the use of simplifying heuristics; the unquestioned use of apparently race-neutral indicators e.g. prior record; a lack of trust in the criminal justice system; racialised perceptions of culpability and capacity for reform; racialised assessments of risk; and a focus on welfare needs. The research posits strategies to overcome disparities should they exist, such as accountability measures to appropriately constrain discretion.

Endotes

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About the Centre for Justice Innovation

The Centre for Justice Innovation seek to build a justice system which all of its citizens believe is fair and effective. We champion practice innovation and evidence-led policy reform in the UK's justice systems. We are a registered UK charity.

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