

Extending magistrates' court sentencing powers

Equality Impact Statement

Purpose of this Document

1. This equality analysis has been undertaken to assist the Secretary of State in deciding whether to make an SI extending sentencing powers in the magistrates' court from maximum 6 to 12 months' imprisonment for a single triable-either-way (TEW) offence.
2. The analysis supports the Secretary of State in fulfilling his duty under the Public Sector Equality Duty (PSED) by having due regard to the equality impact of implementing the proposed provision.
3. This document assesses the potential equalities benefits and risks that have been identified by the proposed policy. It considers the justification for the change and any necessary mitigating actions which have been proposed to reduce the likelihood of the risks and includes an assessment of any equality benefits.
4. MoJ continues to undertake proportionate equality assessments for Covid-19-related justice work in line with existing MoJ PSED policy and practice.
5. We will be reviewing the equalities impact of this measure and updating our assessment as the impacts become clearer or new evidence emerges. This approach is in line with the continuing ongoing nature of the PSED.

Introduction

6. We are extending sentencing powers in the magistrates' court from a maximum of 6 to 12 months' imprisonment for a single TEW offence by commencing existing provisions in the Sentencing Act 2020 and Criminal Justice Act 2003.
7. The policy objective is to retain more cases in the magistrates' courts and reduce the flow of cases into the Crown Court. Cases which are heard at the magistrates' court tend to be processed more quickly, which will aid court recovery.

Policy Summary

8. This policy will extend sentencing powers in the magistrates' courts to allow them to impose a sentence of up to a maximum of 12 months' imprisonment for a single offence, on summary conviction of a single TEW offence.
9. Under this measure District Judges (DJs) and Magistrates would both get these extended powers and would be able to sit either alone as DJs or sit as a bench of

2/3 Magistrates to hear these cases (as they do now with other cases). There will be no change to consecutive sentence provisions, the present limit of 12-month sentences for two or more offences will not be affected.

10. Defendants who are charged with a TEW offence will continue to have the right to elect for a Crown Court trial. This means that where a magistrates' court is inclined to retain a more serious case, the defendant can still choose to instead have the case tried in the Crown Court.
11. There has recently been other work done in order to retain more cases in the magistrates' court. This includes updates to the 'Allocation to the Crown Court Guidance and Good Practice' in February 2021. Magistrates are now advised, subject to issues of complexity, to keep any case which is expected to have a sentence of up to 18 months although they will still need to go to Crown Court for sentencing. This means that cases within scope of extended sentencing powers, that require a trial can already be retained in magistrates' courts for trial.

Equality Duties

12. Under the [Equality Act 2010](#)¹, when exercising its functions, the MoJ has an ongoing legal duty (PSED) to pay due regard to the need to:
 - eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the Equality Act 2010;
 - advance equality of opportunity between different groups of persons who share a protected characteristic and those who do not; and
 - foster good relations between different groups.
13. We also recognise that, as well as having an obligation not to directly or indirectly discriminate against disabled people, the MoJ as a service provider has a duty to make reasonable adjustments for disabled people.
14. The payment of due regard to the PSED needs to be considered in light of the nine protected characteristics:
 - Race
 - Sexual Orientation
 - Marriage/Civil Partnership
 - Gender (sex)
 - Gender Reassignment
 - Disability
 - Age
 - Pregnancy/Maternity

¹ http://www.legislation.gov.uk/ukpga/2010/15/pdfs/ukpga_20100015_en.pdf

- Religion or Belief

Sources of Information

Primary data sources

15. Much of our analysis below is based on data from 2019 as this is the best pre-pandemic measure for the impact the criminal court provisions will have. Data from 2020 and 2021 is not comparable, given the impact of Covid. The main source of information used for this analysis is the MOJ's Court Proceedings Database (underpinning Criminal Justice Statistics Quarterly - National Statistic)

16. We have also consulted:

- Criminal Court Statistics Quarterly - National Statistic
- Criminal Justice Statistics Quarterly: Sentencing – National Statistic
- Race and the Criminal Justice System, 2018 – National Statistic
- The Lammy Review 2017

Availability of data

17. Detailed data on Crown Court and magistrates' court outcomes is widely available for three of the nine protected characteristics – age, sex and ethnicity. We have used this data for our equality analysis.

- a. It should be noted that there are some data limitations, namely that the lack of granularity in sentencing data does not allow tracking of outcomes for individual cases committed to the Crown Court for sentencing but which were tried in the magistrates' court.

18. Data are presented where known, therefore where an individual's sex, ethnicity or age is not stated or unknown, they are omitted from analysis.

Affected Groups

19. The proposed change will have a direct impact on those defendants:

- a. who are charged with a single TEW offence; and
- b. do not elect for a Crown Court trial; and
- c. are given a sentence of between 6 – 12 months' imprisonment.

20. It may also impact cases that would have previously been sent to the Crown Court but can now be retained in the magistrates' court due to the extended sentencing powers. However, following the changes to the 'Allocation to the Crown Court Guidance and Good Practice' in February 2021, magistrates' courts should already

be retaining cases which are likely to carry sentences up to eighteen-months' imprisonment, subject to complexity.

21. We have therefore concentrated on equalities impacts for sentencing, as it should not affect conviction rates.

Defendants

22. There is an overrepresentation of certain protected characteristics in our criminal justice system when compared to the general population. For instance, statistics show us that young, black and minority ethnic males are overrepresented in the defendant and prison population.

23. Of all defendants dealt with at Crown Court in 2019, 77% were dealt with for a triable either way (TEW) offence. The majority of defendants who are dealt with at the Crown Court for a TEW offence are directed there by the magistrates' court.

24. However, a smaller number of defendants also self-elected for a TEW offence to be dealt with at Crown Court. In 2019, 5,277 defendants elected for a TEW offence to be dealt with at the Crown Court.²

25. Note that this policy should only affect which court sentences offenders, not which court defendants are tried in. Under current allocations guidance, relevant cases should already be retained in magistrates' courts for trial, so this policy is not expected to increase the numbers of cases tried in magistrates' courts.

Sex

26. We do not have data to show the breakdown by sex of those defendants whose cases were tried at the magistrates' court but committed to the Crown Court for sentence, and who received between 6 – 12 months' imprisonment for a single TEW offence, i.e., those whose sentencing hearings would be in scope of this change. However, it is expected that this policy will affect more males because 90% of TEW offences heard at the Crown Court in 2020 involved male defendants.³ However, it is important to reiterate that this policy change does not alter a defendant's right to elect for a jury trial in the Crown Court nor should it affect where a case is heard. Magistrates and District Judges will receive training and will continue to adhere to the Sentencing Guidelines as they, and judges, do currently.

² Published data available at: <https://www.gov.uk/government/statistics/criminal-court-statistics-quarterly-january-to-march-2020>

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/987717/prosecutions-and-convictions-2020.xlsx

27. With the mitigation that a defendant would retain the right to elect for a jury trial in the Crown Court, we do not believe the effect of this measure will cause any disadvantage to this group.

Ethnicity

28. We do not have data to show the breakdown of ethnicity on those defendants whose cases were tried at the magistrates' court but committed to the Crown Court for sentence, and who received between 6 – 12 months' imprisonment for a single TEW offence.

29. There are some disparities of verdicts in magistrates' court, particularly between ethnic groups among female defendants. Black, Asian, Mixed ethnic and Chinese women were all more likely to be convicted in the magistrates' court than white women.⁴ This compares to jury conviction rates, which the Lammy Review found to be very similar for different ethnic groups across a range of offence types.

30. Public confidence in the system has already been identified as an area of concern, which has been linked to protected characteristics. The Lammy Review states that many defendants from ethnic minorities believe they will not receive a fair hearing from magistrates. This can be seen reflected in the election rate: approximately 16% of black and 15% of Asian defendants elected to have their triable either-way offence tried by a jury at the Crown Court in 2018, which is around 5 percentage points higher than the election rate for white defendants recorded at 10%.⁵

31. However, it is important to reiterate that this policy is not expected to increase the number of trials that will take place in the magistrates' court; this policy change does not alter a defendant's right to elect for a jury trial in the Crown Court nor should it affect where a case is heard. As such, we would argue that defendants from ethnic minorities are unlikely to be adversely impacted by this policy. Magistrates and District Judges will receive training and will continue to adhere to the Sentencing Guidelines as they, and judges, do currently, so we do not consider there should be a change in sentencing behaviour as a result of this policy. In addition, this policy will also reduce the waiting times for cases and minimise the time needing to be spent on bail or on remand for defendants.

32. Therefore, while we do recognise that there is a risk that election rates could potentially increase under this proposal, we consider this measure to be a

⁴ Table 2, page 34, [The Lammy Review \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

⁵ Published data available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/848776/defendants-tables-2018.ods

proportionate means of achieving the policy aim of increasing efficiency in the Crown Court.

Age

33. This policy will only affect adult defendants, because cases with child defendants are heard in Youth Courts. Adult offenders make up the majority of individuals charged with a TEW case (95% in 2020 of all Individuals charged with a TEW case were adults).⁶

34. In 2019, 2% of defendants proceeded against at magistrates' court (including youth court) and 2% of defendants dealt with at the Crown Court were under the age of 18 years.

Other protected characteristics

35. We are not currently able to identify the likely impacts of this policy on the other protected characteristics of disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, religion or belief, and sexual orientation. This is due to the lack of data for the cohort of defendants likely to be affected. Some data are not available, whereas some other sources of data are available but are not sufficiently reliable. We are however looking at ways to obtain relevant new data, improve the reliability of other data sources, and make better use of unpublished data to provide additional evidence with regard to equality in the CJS.

Victims, witnesses, and the general public

36. We are not able to identify by protected characteristics the victims or witnesses involved in the cases of the specific cohort of defendants affected by this change. However, the Crime Survey for England and Wales for the year ending March 2020 showed that men and people from a non-white ethnic group were over-represented among victims of crime.

37. Given that the policy rationale behind this change is that it will improve efficiency in the criminal courts and help with court recovery, helping to reduce the Crown Court backlog by freeing up approximately 1,700 Crown Court sitting days each year, we consider that the policy will have a positive impact on victims and witnesses as their case is likely to be heard more quickly. This will help deliver swift access to justice and maintain confidence in the criminal justice system.

Diversity of the Judiciary and Magistracy

⁶ Published data available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1063887/sentencing-2020-revised.xlsx

38. A source of mistrust in the CJS among ethnic minorities has been held to be the lack of diversity within the judiciary, and an influential factor in the higher election rates among defendants from ethnic minorities.
39. The ethnic breakdown of court judges has remained broadly similar between 2019 and 2021. However, compared to 2015, the Judicial Diversity Statistics for 2021 show us that the proportion of court judges from an ethnic minority background has increased from 6% to 9%. Similarly, the percentage of female court judges currently in post has increased from 25% in 2015 to 34% in 2021.
40. Magistrates also tend to be regarded as less representative of local communities than juries, and a lack of diversity amongst magistrates has been criticised in recent years (e.g. by the House of Commons Justice Committee in 2019). However, the Judicial Diversity Statistics for 2021 show that, in all regions, over half of magistrates are women, and in England and Wales, 13% of all magistrates are from ethnic minority backgrounds (this percentage increases to 31% when we look at the London region alone).⁷

Equality considerations

Eliminating Unlawful Discrimination

Direct Discrimination

41. Direct discrimination occurs when a policy would result in people being treated less favourably because of a protected characteristic. We do not consider that extending magistrates' court sentencing powers will result in people being treated less favourably because of their protected characteristics, as they will apply equally to those with and without protected characteristics. There is therefore no direct discrimination within the meaning of the Equality Act 2010.

Indirect Discrimination

42. 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. We do not believe that this proposal to extend magistrates' court sentencing powers will result in any indirect discrimination since the proposal is not considered likely to cause any particular disadvantage to people with protected characteristics compared to those without.
43. However, as is the case more generally across England and Wales, there is over-representation in the criminal justice system of people with certain protected characteristics, who in turn are likely to be affected by this policy. Despite this, we do not expect this change to have a negative impact on any particular group, as the

⁷ Published data available at: [Diversity of the judiciary: 2021 statistics - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/diversity-of-the-judiciary-2021-statistics)

policy is designed to increase the efficiency and therefore timeliness of the criminal courts, which will help deliver swifter justice for all court users. It is important to reiterate that this policy is not expected to increase the number of trials that will take place in the magistrates' court; this policy change does not alter a defendant's right to elect for a jury trial in the Crown Court nor should it affect where a case is heard. Magistrates and District Judges will receive training and will continue to adhere to the Sentencing Guidelines as they, and judges, do currently. Furthermore, we consider the proposal is a proportionate means of achieving the legitimate aim of supporting members of the public to obtain justice more swiftly, whilst reducing the costs of the courts to the taxpayer.

Discrimination arising from disability and duty to make reasonable adjustments

44. We do not consider that there is likely to be any discrimination in relation to disability and will continue to make reasonable adjustments for disabled people impacted by the policy proposals.

Harassment and victimisation

45. We do not consider there to be a risk of harassment or victimisation within the meaning of the Equality Act as a result of this change.

Advancing Equality of Opportunity

46. We have considered the impact of this measure on the advancing equality of opportunity limb of the duty in relation to removing or minimising disadvantages suffered by people due to their protected characteristic. We believe that this policy will support a reduction in waiting times for cases and minimise the time needed to be spent on bail or on remand for defendants. This proposal will also support victims and witnesses to receive earlier justice and reduce the stress and worry of unnecessary delays to the hearing of cases.

Fostering Good Relations

47. We have considered the implications of this policy on fostering good relations between groups with different protected characteristics. We recognise that Race relations could suffer as a consequence if this policy is perceived to disadvantage ethnic minority groups.

48. Work is ongoing to help improve Black defendants' trust in the criminal justice system through the implementation of the Lammy Review recommendations.

Mitigation

49. We recognise that our consideration of the impact of extending magistrates' court sentencing powers is based on the assumption that the election and appeal rates do not change as a result of this measure, and that there is no difference in sentencing behaviours between magistrates and judges.

50. This policy change does not alter the defendant's right to elect for a jury trial in the Crown Court.

51. Further, training has been designed and rolled out to magistrates and legal advisors, and the commencement date for the extension was chosen based on the point at which sufficient numbers of magistrates and legal advisors would have completed training. We have also worked with the Sentencing Council to update sentencing guidelines, to which magistrates' must, like judges, adhere.

52. We have legislated to include a power in the Judicial Review & Courts Bill which will allow the government to vary the limit on magistrates' court sentencing powers for TEW offences so that the maximum sentence length can be reduced back to 6 months if needed. This power can therefore be used to mitigate the risk that our assumptions set out above are incorrect, and there is an increase to the election rate or appeal rate, both of which would negatively impact court efficiency and the backlog. It can also be used to mitigate the assumption that there will be no difference in sentencing behaviours between magistrates and judges, which could have an untenable impact on the prison population.

53. In order to identify early indications of potentially untenable impacts that would inform whether to consider use of the 'varying' power, we will monitor on key indicators including:

- a. The Crown Court backlog
- b. Average custodial sentence lengths
- c. Appeal rates
- d. Election rates
- e. Prison population rates

54. Where it is available, we will use data on a regional level, as well as data pertaining to protected characteristics.

Continuing Analysis

55. The equality duty is an ongoing duty and we will draw on any relevant new data that could provide evidence on the impact of this change to inform the future review after 6 months of how the policy works for all affected offenders, including those with protected characteristics who are currently overrepresented in this group.