



JUDICIAL  
COLLEGE

# Equal Treatment Bench Book

**February 2021 edition**

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## Foreword

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The Equal Treatment Bench Book has, particularly since its last major revision, published in February 2018, become a key work of reference. It is used, daily, by the Judiciary of England and Wales. It is referred to in their training courses and commended by the appellate courts. It is admired and envied by judiciaries across the globe.

It is also living document, constantly updated and amended to reflect changing circumstances and to incorporate the most up to date knowledge.

However, this most recent edition represents the first major revision in three years. It is the product of many months of dedicated and painstaking work by the Editorial Team.

It contains much that is new, notably far reaching changes to the existing text to reflect the effects of the Covid pandemic on society and on the justice system and the inclusion of a new appendix on remote hearings.

The sections dealing with the criminal justice have been updated to take account of action following the Lammy Report and the more intense focus on racial injustice.

Readers will also find new material on subjects as disparate as Welsh/English bilingualism, disability, and litigants in person.

What the revision has not done is to diminish in any way what made the 2018 edition such a leap forward. This is still a work of reference that is comprehensive yet easily navigated, authoritative yet accessible. The Editors have decided, wisely, to retain the Foreword to the 2018 edition, written by Lady Justice Rafferty, my predecessor as Chair of the Board of the Judicial College. I echo and endorse her words.

To them I add my own thanks to the Editorial Team for their extremely hard work, and my pleasure at being able to commend this edition of the Equal Treatment Bench Book to judges and non-legal tribunal members alike.

**The Right Honourable Lady Justice King DBE, Chair of the Judicial College**



## **Foreword (to the February 2018 edition)**

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The starting point for this updated work is more than compliance with a prevailing legal framework. The profound desire of the team responsible for this revision is that all those in and using a court leave it conscious of having appeared before a fair-minded tribunal.

To that end there are practical suggestions, useful glossaries, guidance on reasonable adjustment, and plenty more. But we live in interesting times. The depth and clarity of the thinking reflected on these pages will show you that the editors have done far more than edit. You will for example find new sections on anti-Semitism, Islamophobia, modern slavery, and multicultural communication. The increase in litigants in person is reflected in expanded help. And the list goes on.

For the first time the format is web-based, designed to let you navigate quickly. Each chapter has a brief overview and then developed text.

The team has not shrunk from the hardest or knottiest of tasks and the job has not been easy. Do please take advantage of their skills and experiences, which amount to far more than the sum of their parts. They have worked tirelessly and the results are a major asset to us all.

**The Right Honourable Lady Justice Rafferty DBE, Chairman of the Judicial College**

## Acknowledgments

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Thanks are due to:

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See [Appendix G](#) for past contributors.

## Preface

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‘A judgment which results from an  
unfair trial is written in water.’

Lord Reed  
*Serafin v Malkiewicz and others* [2020] UKSC 23

# Introduction: Equal Treatment and the Judge

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## *Introduction*

‘...I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.’

1. Fair treatment is a fundamental principle embedded in the judicial oath and is, therefore, a vital judicial responsibility. For many judges this will be how they will approach much of the guidance provided in this Bench Book. For most, the principles of fair treatment and equality will be inherent in everything they do as judges and they will understand these concepts very well. The Bench Book seeks to support and build on that understanding. It is not intended to be prescriptive, but simply to inform, assist and guide.
2. Although the Bench Book does not express the law, judges are encouraged to take its guidance into account wherever applicable. It is increasingly cited in judgments and by practitioners as to the approach to be adopted.
3. To ensure equality before the law, a judge must be free of prejudice and partiality and conduct themselves, in and out of court, so as to give no ground for doubting their ability and willingness to decide cases solely on their legal and factual merits, as appears from the exercise of an objective, independent and impartial judgment (to paraphrase Lord Bingham).
4. True equal treatment may not, however, always mean treating everyone in the same way. As Justice Blackmun of the US Supreme Court commented:  

‘In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.’

Treating people fairly requires awareness and understanding of their different circumstances, so that there can be effective communication, and so that steps can be taken, where appropriate, to redress any inequality arising from difference or disadvantage. This Bench Book covers some of the important aspects of fair treatment of which all judges should be aware, making some suggestions as to steps that judges may wish to take, in different situations, to ensure that there is fairness for all those who engaged in legal proceedings in our courts and tribunals.

5. Judges will also wish to make reference to the ‘Guide to Judicial Conduct’ (now updated to March 2020). The Guide is wide-ranging, but at its heart are the six core judicial ‘values’ derived from the Bangalore Principles of Judicial Conduct, namely independence, impartiality, integrity, propriety, ensuring equality of treatment, and competence and diligence.<sup>1</sup>
6. The Lord Chief Justice’s and Senior President of Tribunals’ Equality and Diversity Statement recognises that the principles of fair treatment and equality are fundamental to the judicial role and apply both in and outside the court or tribunal.

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<sup>1</sup> [Guide to Judicial Conduct \(revised March 2018, updated March 2020\).](#)

7. By their very nature, however, these documents provide only generic guidance. The following paragraphs deal briefly with issues that arise daily in the court or tribunal.

### ***Good communication***

8. Effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood. Otherwise the legal process will be impeded or derailed.
9. This is a particular challenge in the context of remote hearings and judges will need to be sensitive to the many barriers that can reduce effective engagement in a hearing.
10. Understanding means understanding the evidence, the materials, the process, the meaning of questions and the answers to them.
11. If someone remains silent it does not necessarily mean that they understand. It may equally well mean that they do not understand, that they are unable to understand, that they feel intimidated or inadequate, that they are too inarticulate to speak up, or that they are otherwise unable to communicate properly.
12. It may be possible for a judge to test understanding by asking a supplementary question or summarising what he or she understands the position to be and asking if the party or witness agrees. It is usually most reliable to ask the party or witness to repeat back their understanding of what has been said to them.
13. Litigants in person may not have the courage to test the understanding of others or to admit that they do not fully understand a point.
14. People perceive the words and behaviour of others in terms of the cultural conventions with which they are most familiar. Our outlook is based on our own knowledge and experience, and this may lead to misinterpretation or a failure to understand those who are different or have different perspectives from us.
15. Effective communication requires an awareness of ‘where a person is coming from’ in terms of background, culture and special needs, and of the potential impact of those factors on the person’s participation in the proceedings. It applies to witnesses, advocates, members of the court or tribunal staff and even members of the public who intervene when they should not.
16. Judges should try to put themselves in the position of those appearing before them. An appearance before a court or tribunal is a daunting and unnerving experience. As a result parties and witnesses may appear belligerent, hostile, rude, confused or emotional. A possible consequence is that they may not give a good account of themselves. The court or tribunal should endeavour to put them at their ease to enable them to do so. The more information and advice that is available before the hearing, the easier this will be to achieve.
17. Empathy is critical. As Judge Brian Doyle has said, ‘Empathy is a quality all judges need – it is not partisanship, but understanding how someone is reacting in a process which is alien to most people’.<sup>2</sup>

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<sup>2</sup> Judge Brian Doyle, then President of the Employment Tribunals in England and Wales, on BBC Radio 4’s Law in Action, March 2020.

18. Many participants are concerned about how to address the judge. Others worry about where they should sit and whether they should sit or stand. These concerns add to their likely anxiety and can be dispelled by a helpful introduction and a tactful explanation.
19. Lay people do not understand legal jargon and technical terms ('disclosure', 'directions', 'application for permission to apply'), so judges should keep language as simple as possible, and should give clear explanations where required.
20. Inappropriate language or behaviour is likely to result in the perception of unfairness (even where there is none), loss of authority, loss of confidence in the system and the giving of offence.
21. A thoughtless comment, throw away remark, unwise joke or even a facial expression may confirm or create an impression of prejudice. It is how others interpret the judge's words or actions that matters, particularly in a situation where they will be acutely sensitive to both.
22. Conversely, where people feel that they have been heard, and treated fairly, they are more able to accept an adverse outcome: procedural justice is important for the operation of the rule of law.

### ***Demonstrating fairness***

23. Fair treatment does not mean treating everyone in the same way: it means treating people equally in comparable situations. For example, a litigant in person with little understanding of law and procedure is not in a comparable situation to a QC. It is substantive equality that counts.
24. When parties do not get the outcome they would like or expect, it is particularly important that they feel they were fairly treated, fully heard and fully understood.
25. People who have difficulty coping with the language or procedures of the court or tribunal, and are perhaps less engaging litigants as a result, are entitled to justice in the same way as those who know how to use the legal system to their advantage. Any disadvantage that a person faces in society should not be reinforced by the legal system.
26. Judges should identify a situation in which a person may be at a disadvantage owing to some personal attribute of no direct relevance to the proceedings, and take steps to remedy the disadvantage without prejudicing another party.
27. The sooner the disadvantage is identified, the easier it is to remedy it. Where possible, judges should ensure that information is obtained in advance of a hearing about any disability or medical or other circumstance affecting a person so that individual needs can be accommodated, eg access to interpreters, signers, large print, audiotape, oath-taking in accordance with different belief systems (including non-religious systems), more frequent breaks and special measures for vulnerable parties and witnesses can and should be considered. Very often the steps that will be required will be obvious and may require little more than pragmatic alterations to normal procedures.
28. Litigants in person should not be seen as an unwelcome problem for the court or tribunal. Judges may not be able to assist them with their case, but can ensure they have every reasonable opportunity to present it.

29. The disadvantage to litigants from poor representation is a challenging issue. Judges should consider how representatives can be managed to assist them to represent their client effectively.
30. People who are socially and economically disadvantaged may assume that they will also be at a disadvantage when they appear in a court or tribunal.
31. Those at a particular disadvantage may include people from minority ethnic communities, those from minority faith communities, those who do not speak or understand the language of the court or tribunal, individuals with disabilities (physical, mental or sensory), women, children, older people, those whose sexual orientation is not heterosexual, transgender people, those who have been trafficked and those who through poverty or any other reason are socially or economically marginalised.
32. It is for judges to ensure that all these can participate fully in the proceedings. It will assist to display an understanding of difference and difficulties with a well-timed and sensitive intervention where appropriate.
33. Recognising and eliminating prejudices, including a judge's own prejudices, is essential to prevent wrong decisions and to prevent erroneous assumptions being made about the credibility or actions of those with backgrounds different from the judge's own.
34. Unconscious prejudice (demonstrating prejudice without realising it) is more difficult to tackle and may be the result of ignorance or lack of awareness.
35. Ignorance of the cultures, beliefs and disadvantages of others encourages prejudice. It is for judges to ensure that they are properly informed and aware of such matters, both in general and where the need arises in a specific case.
36. Stereotypes are simplistic mental short cuts which are often grossly inaccurate, generate misleading perceptions and can cause mistakes. It is important not to:
  - Assume that, because people meet particular criteria (eg they are of South Asian origin or wheelchair users), they will behave in a particular way or have particular limitations.
  - Attach labels to people (eg learning disabled or youths) and then use the label to undermine their rights (eg assume they are incapable of giving evidence or that they will lie or be disrespectful).

## ***Diversity***

37. Judicial diversity, in terms of ethnicity, gender, disability, social status and so on, is vitally important in holding the confidence of the public and court users, as well as bringing a variety of perspectives which realistically reflect our society. In many courts and tribunals there has been a wide gulf in social background and life experience between the parties and the judges making decisions. Efforts have been made in recent years to increase diversity. The Diversity and Community Relations Judges work to bridge the gap between the judiciary and the communities that they serve.
38. In addition, it is for all judges, whatever their background, to gain and hold the confidence of those appearing in court. This entails making themselves aware

of the range of social experience of court users and treating them with understanding and respect.

***A note on terminology***

39. The term 'judge' in this Bench Book has been used to include, where appropriate, all judicial office holders. Similarly, on many occasions the term 'court/courts' has been used to encompass all courts and tribunals.



## **England and Wales: A Single Legal Jurisdiction**

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England and Wales form a single jurisdiction. A person appearing in a court or tribunal in Wales should therefore be able confidently to expect to receive treatment equal to persons appearing before courts and tribunals in England. Welsh is an official language within one geographical part of the single jurisdiction, and Welsh speakers are entitled as of right to use their first language or their language of choice before courts and tribunals in their native country. Litigants, defendants and witnesses who are Welsh speaking should be able to participate fully in the process of justice, whether in England or in Wales. The making of any reasonable adjustments, or accommodating of any needs, to ensure that this is achieved is not a form of favouritism or bias – it is necessary to provide a level playing field. Welsh speakers should be able to expect that the court or tribunal will deal with their case in Wales in as ‘natural’ a manner as would a court or tribunal dealing with an English case in England.

### ***The Welsh Language: Official Status***

Provision for the use of Welsh in courts and tribunals in Wales was made under The Welsh Language Act 1993. In the administration of justice in Wales, the Welsh and English languages are to be treated on the basis of equality. Primary legislation enacted by the Senedd and subordinate legislation made by the Welsh Ministers are almost without exception enacted or made in both English and Welsh. The Government of Wales Acts provide that where such laws are enacted or made in both languages, the two language versions are ‘to be treated for all purposes as being of equal standing’.

Almost all Welsh speakers in Wales are also able to speak English fluently. However, this does not mean that they are equally comfortable in using both languages. To be treated equally with English speakers, therefore, they need to be able to participate in the language in which they are most ‘at home’.

# Chapter 1 Litigants in Person and Lay Representatives

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## Overview

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### Litigants in person ('LIPs')

'Litigant in person' ('LIP') is the term used by courts and tribunals to describe individuals who exercise their right to conduct legal proceedings on their own behalf. When speaking to such individuals, it would usually be better to use a non-technical term, such as 'a person without a representative'.

There are a number of reasons why individuals may choose to represent themselves rather than instruct a lawyer. Many do not qualify for public funding, either financially or because of the nature of their case. Some cannot afford a solicitor or even distrust lawyers. Others believe that they will be better at putting their own case across.

The number of litigants in person has risen significantly in recent years, and is likely to continue doing so as a result of financial constraints and the consequences of the Legal Aid reforms.

### The courts' duty to LIPs

Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.

The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.

Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal.

All too often, litigants in person are regarded as the problem. On the contrary, they are not in themselves 'a problem'; the problem lies with a system which has not developed with a focus on unrepresented litigants.

### Common procedural misunderstandings in case preparation

LIPs vary in their social and educational background, and in their aptitude for litigation. However, experience shows that certain issues frequently arise. The difficulties faced by litigants in person stem from their lack of knowledge of the law and court or tribunal procedure. The procedure is so familiar to lawyers and judges, that they often do not realise the extent of a LIP's misunderstandings.

The court's aim is to ensure that litigants in person understand what is going on and what is expected of them at all stages of the proceedings

LIPs may have additional difficulties, eg because they are not fluent in English, because they have a disability, or because they come from a socially excluded background. There is more detail about these difficulties in chapters 5, 3, 4 and 9.

The key is to maintain a balance between assisting, and understanding what the litigant in person requires, while protecting their represented opponent against the problems that can be caused by the litigant in person's lack of legal and procedural knowledge.

This chapter looks in detail at each stage of case preparation and at common misunderstandings which LIPs demonstrate, and gives suggestions as to how judges can best handle these. For example, it helps to:

- Explain the importance of evidence from documents and witnesses in proving facts, and that they must be brought on the day.
- Explain what documents are considered 'relevant' for the duty of disclosure.
- Explain the difference between disclosure and trial bundles. Explain how a trial bundle is put together.
- Where possible, not to ask LIPs to provide excessively complicated written particulars of their case.
- Explain how to structure a witness statement and what it should cover. Explain that the LIP is also a witness and will need a witness statement.

### **Difficulties at the hearing and how to help**

This chapter also looks at common difficulties at the final hearing and how to assist. For example, it is helpful for the judge to:

- Explain basic rules and procedure at the start of the hearing.
- Help the LIP formulate questions when cross-examining opposition witnesses once it is clear what the LIP is trying to ask.
- Ask the advocate on the other side to give closing submissions first, so that the LIP sees how this is done. Reassure the LIP that he or she is not expected to replicate the advocate's style.

Litigants in person often believe that, because they are aggrieved in some way, they automatically have a good case. When explaining, if necessary, that they have no case, bear in mind that this will come as a great disappointment to a litigant, who will have been waiting for his or her day in court for some time.

### **Criminal cases**

Where a defendant wishes to dispense with representation, give guidance as to its value. If – notwithstanding this – the defendant decides to represent him or herself, the judge must explain the process and ensure proper control over the proceedings is maintained.

### **Jargon and legalese**

One of the greatest barriers to participation for non-legal users and observers of courts and tribunals is the language used by the legal system. This language has become so embedded that it is hard to notice when it is being used.

Technical terms and artificial and legalistic use of language should be avoided or, if that is not possible, explained. Examples are given in the full chapter.

### **Assistance and representation from lay representatives**

In most tribunals, litigants can freely choose to be helped or represented by non-lawyers. The position is different in civil courts and family proceedings, where a litigant requires permission from the court to receive assistance or even be represented by a person without rights of audience.

In a climate where legal aid is difficult to obtain and lawyers may be beyond a litigant's means, the McKenzie friend and lay representatives make a significant contribution to access to justice. The judge has to identify those situations where such support is beneficial and distinguish circumstances where it should not be allowed. Guidance is set out in the main body of the chapter.

***Litigants in person ('LIPs')***

1. 'Litigant in person' (or its abbreviation, 'LIP') is the term used in courts and tribunals to describe individuals who exercise their right to conduct legal proceedings on their own behalf (as opposed to other terms such as 'self-represented litigant' or 'unrepresented party').<sup>1</sup> When speaking to such individuals, it would usually be better to use a non-technical term, such as 'a person without a representative'.
2. There are a number of reasons why individuals may choose to represent themselves rather than instruct a lawyer. Many do not qualify for public funding, either financially or because of the nature of their case. Some cannot afford a solicitor or even distrust lawyers. Others believe that they will be better at putting their own case across.
3. The number of litigants in person has risen significantly in recent years, and is likely to continue doing so as a result of financial constraints and the consequences of the Legal Aid reforms. One of the consequences of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is that public funding in civil and family cases, and in tribunals, is now available in only exceptional circumstances.
4. The vast majority of defended civil actions in the county court are dealt with under the small claims procedure, now covering claims up to £10,000 (subject to a few exceptions in personal injury cases). The procedure is designed specifically to assist the public to pursue claims without recourse to legal representation and has created a huge increase in the number of litigants in person. Public funding has never been available for small claims. The great majority of people appearing in tribunals are also unrepresented.
5. LIPs regularly appear in the High Court and in particular in the Queen's Bench Division interim applications court (known as 'Court 37'). They are also often seeking injunctive relief against public bodies in the Administrative Court.
6. LIPs are appearing with increasing frequency in the Court of Appeal. Some have represented themselves at first instance. Others, having had lawyers appear for them in the court below, take their own cases on appeal, often as a result of a withdrawal of public funding after the first instance hearing.
7. This chapter aims to identify the difficulties both faced - and caused - by LIPs before, during and after the litigation process, and to provide guidance to judges with a view to ensuring that both parties receive a fair hearing where one or both is not represented by a lawyer. Some of the guidance will only be applicable to civil court cases or to tribunals hearing party-and-party cases. There are also significant differences between criminal and civil procedure.
8. There are many practical suggestions in this chapter for enabling LIPs to participate fully in the court process, but they are just suggestions. It is for courts and tribunals in each individual case to decide what is the fairest, most appropriate and practical approach.

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<sup>1</sup> *Practice Guidance (Terminology for Litigants in Person)* 11 March 2013 [2013] 2 All ER 624

9. This chapter is specifically about litigants in person and lay representatives. However, court processes need to be understood by all users, including parties who have legal representation, defendants, witnesses and jurors.<sup>2</sup>

### ***The courts' duty to LIPs***

10. Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may well be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.
11. The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.
12. Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal which is concerned to adjudicate in proceedings in which that person is a party. But in general, those who exercise this personal right find that they are operating in what feels like an alien environment.
- 'All too often the litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists'. (Lord Woolf, Access to Justice, Interim Report June 1995.)
  - 'It is curious that lay litigants have been regarded ... as problems, almost as nuisances for the court system. This has meant that the focus has generally been upon the difficulties that litigants in person pose for the courts rather than the other way around'. (Prof. John Baldwin, 'Monitoring the Rise of the Small Claims Limit'.)
13. In 2013, a judicial working party chaired by Mr Justice Hickinbottom summed up the position as follows:<sup>3</sup>
- 'Providing access to justice for litigants in person within the constraints of a system that has been developed on the basis that most litigants will be legally represented poses considerable and unique challenges for the judiciary. Cases will inevitably take more time, during a period of severe pressure on judicial time. However, litigants in person are not in themselves 'a problem'; the problem lies with a system which has not developed with a focus on unrepresented litigants. We consider it vital that, despite the enormous challenge presented, judges are enabled and empowered to adapt the system to the needs of litigants in person, rather than vice versa.'

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<sup>2</sup> 'Understanding Courts – A report by JUSTICE' (2019) makes recommendations for improving the understanding of the court process by lay users.

<sup>3</sup> 'The Judicial Working Group on Litigants in Person: Report' (July 2013). This report is well worth reading.

### ***Difficulties faced by LIPs***

14. There is no typical litigant in person, and they will come from a diverse range of social and educational backgrounds. Some may be very skilled at representing themselves. A litigant in person's knowledge, aptitude and general attitude towards the proceedings are largely unknown quantities at the outset of the hearing. Having said that, the issues identified in this chapter are encountered with some frequency when litigants represent themselves.
15. The difficulties faced by LIPs stem from their lack of knowledge of the law and court or tribunal procedure. The procedure is so familiar to lawyers and judges, that they often do not realise the extent of a LIP's misunderstanding. For many LIPs, their perception of the court or tribunal environment will be based on what they have seen on the television and in films. They tend to:
  - Be unfamiliar with the language and specialist vocabulary of legal proceedings.
  - Have little knowledge of the procedures involved, and find it difficult to apply the rules even when they do read them up.
  - Be ill-informed about ways of presenting evidence.
  - Be unskilled in advocacy, and so unable to undertake cross-examination or test the evidence of an opponent.
  - Be unable to understand the relevance of law and regulations to their own problem, or to know how to challenge a decision that they believe is wrong.
  - Be unable to understand the concept of a cause of action.
  - Lack objectivity and emotional distance from their case.
16. All these factors have an adverse effect on the preparation and presentation of their case.

### ***Ways to help***

17. The aim is to ensure that litigants in person understand what is going on and what is expected of them at all stages of the proceedings – before, during and after any attendances at a hearing. This means ensuring that:
  - The process is (or has been) explained to them in a manner that they can understand.
  - They have access to appropriate information (eg the rules, practice directions and guidelines – whether from publications or websites).
  - They are informed about what is expected of them in ample time for them to prepare and comply.
  - Wherever possible, they are given sufficient time for their particular needs.

### **Holding the confidence of both sides**

- Judges must be aware of the feelings and difficulties experienced by litigants in person and be ready and able to help them with the court process, especially if a represented party is being oppressive or confrontational.



- Maintaining patience and an even-handed approach is also important where it is the LIP who is being oppressive or confrontational towards another party or their representative, or towards the court or tribunal. The judge should, however, remain understanding so far as possible as to what might lie behind the LIP's behaviour.
- The key is to maintain a balance between assisting and understanding what the LIP requires, while protecting his or her represented opponent against the problems that can be caused by the LIP's lack of legal and procedural knowledge.
- LIPs commonly feel at a profound disadvantage. The aim of the judge should be to ensure that the parties leave with the sense that they have been listened to and had a fair hearing – whatever the outcome.

### ***Sources of outside help and information for LIPs***

18. Some litigants in person are unaware of the explanatory leaflets available at the court, or of the lists of advice agencies. Citizens Advice has an informative online information system, and local Citizens Advice offices may be able to offer assistance with case preparation. Advicenow also has a useful collation of resources on its 'Going to court or tribunal' website page. While these possibilities may be flagged up to LIPs, it is important not to overestimate the availability and extent of voluntary sector assistance. Advice agencies have been subject to severe funding cuts, both to grants and to legal aid income, in recent years. LIPs are likely to have difficulty in getting prompt appointments or finding the level of specialist expertise needed. The experience of trying to find help without success can itself be very demoralising.
19. Many LIPs believe that court or tribunal staff are there to give legal advice, but staff can only give information on how a case may be pursued; they cannot give legal advice under any circumstances. This may have to be explained to a LIP.

### ***Particular areas of difficulty***

#### **Language**

20. The courts and tribunals in England and Wales predominantly conduct proceedings in English. However, there is a provision under the Welsh Language Act 1993 for proceedings in Wales to be conducted in Welsh. English (or Welsh as the case may be) may not be the first language of the litigant in person, and they may have particular difficulties with the written language. Any papers received from the court or tribunal or from the other side may need to be translated. In some circumstances, an interpreter will be required.
21. For a discussion of the potential difficulties in communicating with people from different cultures and/or who speak English as a second language, see the sections on '[Communicating interculturality](#)' and '[Language interpreters](#)' in chapter 8. Those sections consider communication with witnesses, but difficulties are likely to become more acute when a person is also presenting his or her own case, without any representative to mediate cultural and linguistic understanding.

## **Disability**

22. Litigants in person with certain mental disabilities may have difficulty presenting their case and giving evidence for a variety of reasons. Difficulties faced by disabled witnesses are likely to be exacerbated where the individual is representing him or herself. For detail of potential needs and adjustments, see [chapter 4 \(Mental Disability\)](#).

## **Social and educational background**

23. Litigants in person come from a variety of social and educational backgrounds. Some may have difficulty with reading and writing. Judges should be sensitive to literacy problems and be prepared where possible to offer short adjournments to allow a LIP more time to read, or to ask anyone accompanying the LIP to help them to read documents. It may also be appropriate for judges to ask representatives to read out documents to which they are referring when asking questions, or for judges to read out such documents themselves. If possible, this should be done without drawing undue attention to the reason.
24. For barriers facing socially excluded people and their possible response to courts and tribunals, as well as ideas for helping, see [chapter 11 \(Social Exclusion\)](#).

## ***Common procedural misunderstandings in case preparation***

25. The following sets out common areas of difficulty and ways that have been found to help. Procedures vary in the different jurisdictions as well as between criminal and civil cases. Some of the suggestions will not apply to non party-and-party tribunals. Judges will recognise difficulties they have encountered in their own courts/tribunals and can take from these suggestions what might work in their own jurisdiction.

## **Statements of case / Pleadings and limitation periods**

26. Litigants in person may make basic errors in the preparation of civil cases in courts or tribunals by:
- Failing to choose the best cause of action or defence.
  - Failing to put the salient points into their statement of case.
  - Describing their case clearly in non-legal terms, but failing to apply the correct legal label or any legal label at all. Sometimes they gain more assistance and leeway from a court in identifying the correct legal label when they have not applied any legal label, than when they have made a wrong guess.
  - Overlooking limitation periods, and not understanding the relevant law and evidence required for an application to extend time.
  - LIP claimants often think that an automated or clerical acceptance of their claim form and processing of their case means that it is accepted the time-limit has been complied with. They are unprepared when at a later stage they have to deal with this issue.

- Sometimes they also understand from the word ‘acceptance’ that a judge has accepted their argument.
- LIPs sometimes believe that a ‘Statement of Truth’ is the same thing as a witness statement, or that they must attach their evidence to the claim form as part of the ‘Statement of Truth’, and it may be necessary to explain the difference between the two.

### **Case management: understanding directions and court orders**

27. Where pre-hearing directions are given in writing, litigants in person may not understand exactly what they are supposed to do, or they may not have the skill-set to do it correctly.
28. Case management hearings, where they are held, provide a greater opportunity to assess what the LIP might realistically be able to do, give a fuller explanation, and check understanding.

#### *Case management hearings*

29. In conducting case management hearings, it is useful to:
  - Start by explaining this is only a case management hearing, not a hearing to decide the case itself.
  - Explain every direction or court order clearly, not only by avoiding jargon, but by anticipating common misunderstandings.
  - Involve litigants in person in the process of giving directions (eg asking them how much time they need to take a particular step and why) so that they realise how the directions relate to the conduct of their own case.
  - Check that the LIP understands, by asking him or her to feed back what he or she must now do and on what date. Do this in a manner which reassures the person that it is not a test, and that there is no criticism if he or she has failed to grasp all the points.
  - Do not simply ask ‘Do you understand?’ Even if you indicate that you are happy to explain, LIPs might say ‘yes’ out of embarrassment or because they are anxious to appease if there is time pressure, or because they wrongly believe they do understand, or to save face. Saving face is a universal concept, but this can be a particularly important issue for certain cultures (see ‘[Communicating interculturality](#)’ in chapter 8).
  - Make realistic directions given the capabilities of the LIP in question. Offer hands-on help if appropriate, eg in identifying the exact nature of the claim. Where possible, engage the help of the represented party, eg in making the first draft of a list of issues, or putting together a proposed trial bundle.
  - At the end of the case management hearing, go back over key dates and actions and check the LIP has written them down.
  - Confirm the directions/orders in writing as soon as possible after the case management hearing, so that the LIP receives the letter in good time to prepare for the earliest required action, and to take advice if needed. This

might involve marking the file for the case management letter to go out as a priority.

- As well as orders, include in the case management letter, key points of explanation or advice on procedure which the LIP might otherwise forget.
- Make any reasonable adjustments required if the LIP is disabled (see 'Adjustments for case preparation' in [chapter 3 \(Physical Disability\)](#) and [chapter 4 \(Mental Disability\)](#)). It is not only at the final hearing / trial that such adjustments may need to be made. Disabled LIPs may be less assertive about raising their needs than where they have representation.
- Similarly, if English is not the LIP's first language, check whether an interpreter is necessary. Even if not, see the sections on '[Communicating interculturality](#)' and '[Language interpreters](#)' in chapter 8. These considerations do not only apply to the final hearing / trial.

### *General difficulties with case preparation*

30. As well as the particular areas set out under sub-headings below, litigants in person frequently have these difficulties:

- *Who to send information and documents to and in what form:* An instruction as apparently simple as 'send it to the respondents by [date]' can cause uncertainty – Who are 'the respondents'? Does that mean sending to the respondents or their solicitor or (if there has been a case management hearing where the respondents are represented by a barrister), their barrister? Does the court or tribunal have to be copied in? Is sending it to the court or tribunal sufficient? Is email allowed? Can documents be scanned and sent?

*How to help:* These difficulties can be dealt with by clear explanation in advance and using people's names rather than labels such as 'respondents' or 'respondents' solicitor'.

- *Particularisation of their case / Issues for hearing:* Lawyers find it relatively easy to precis and identify key points of an argument. For many other people, this is extremely difficult. As a result, when ordered to provide particulars, LIPs tend to either miss the deadline, avoid the task altogether, or do it wrongly – either omitting key information or overloading with excess information, often beyond the scope of the original pleading. Similar problems can arise in jurisdictions where parties are required to produce a list of issues for the hearing.

*How to help:* Where practical, avoid making orders that LIPs must particularise their case beyond one or two very simple questions on a clear point, eg 'You say your rent deposit is owing. How much deposit did you pay and on what date?' Ordering LIPs to provide complex schedules of their claim is rarely a good idea. Where necessary, it is better to hold a case management hearing and talk the LIP through their claim, extracting the required particulars and recording them in the case management order. In regard to the list of issues, if the other party is represented, they can be asked to prepare the first draft from what the LIP has so far put in writing.

- *Schedule of loss:* It is difficult to compose a sensible schedule of loss without a full understanding of (i) the extent of a court/tribunal's powers to award compensation, and (ii) how these might apply in the LIP's own case. It might be unfair to hold a LIP to figures put in a schedule of loss written without appropriate advice.

*How to help:* Sometimes guidance or a pro forma can be given to the LIP with the appropriate headings. Alternatively, there may only be one or two elements which a court/tribunal and the other side really need to know in advance of the hearing, eg in an employment case, the most important information may be details of any earnings since dismissal.

- *Short deadlines for directions/orders:* LIPs will usually take longer to carry out tasks than represented parties because of unfamiliarity with the process and uncertainty what to do. They may also be receiving advice from a Citizens Advice office or other source, and may have to wait for an appointment.

*How to help:* As far as possible, set deadlines that take the reasonable needs and resources of both parties into account and avoid excessively short deadlines. Where the order is made at a case management hearing, ask LIPs how long they will need, impressing upon them the importance of sticking to their estimate.

- *Overload:* If LIPs are required to carry out a number of steps at once or in close succession, this can feel overwhelming. Even giving a set of directions at one time for a series of steps at reasonable intervals can require diarising and organisational skills of a kind which many find difficult, especially if they do not have jobs requiring similar skills. LIPs with depression, or with any other form of mental disability, or who lack fluency in spoken English, will be particularly disadvantaged.

*How to help:* Where a sequence of directions are set out in writing, whether or not following a case management hearing, it can help additionally to create a mini table with date / who does the action / what the action is, by way of a summary. Sometimes during the course of case preparation, if matters have become involved, it can help to write to the parties with a simple, non-wordy recap of the state of play. Where there is serious difficulty, eg due to mental disability or a LIP trying, but not coping, it may help to send out the directions one at a time.

- *Pressure from the represented party:* Sometimes the represented party can add to this sense of confusion and overload by repeated letters demanding more information and threatening to go for tribunal/court orders and strike out. A judge may not always realise this is going on behind the scenes in addition to the directions/orders which the court or tribunal has agreed to make.

*How to help:* It may or may not be legitimate for the represented party to be taking this approach. Some LIPs can be frustrating and even uncooperative, and make it very hard for the other side to understand and prepare the case for hearing. The judge should attempt to take the heat out of the situation and take control of the process, reminding both parties of their duty to

cooperate with each other and the court or tribunal under the overriding objective.

### *Compliance with directions/orders*

31. Given the greater emphasis in the current Civil Procedure Rules on enforcement of rules and orders, it is crucial that litigants in person understand both what is required of them and the consequences of non-compliance.
32. LIPs do not necessarily realise that court orders are more than aspirational.<sup>4</sup> They may also fail to understand that if they do not comply with an order, they are at risk of being struck out. Although standard letters advise of the consequences of non-compliance, a LIP may not have read the letter to the end, or retained what it said, or understood the formal words and jargon involved ('non-compliance', 'strike out' etc). In addition, LIPs may have become embroiled in heated correspondence with the other side, and have lost track of the overall picture.
33. LIPs may also not understand the automatic effect of an 'Unless Order'.
34. There is also the possibility that the LIP does understand the risk, but simply does not know how to comply with the order. 'Unless Orders', in particular, should be made with great care where there is a possibility that the LIP does not understand how to comply, as opposed to being unwilling to do so.
35. Having said that, cases do need to be prepared and the other side is entitled to a level of information and cooperation. It is a question of enabling LIPs to do what is necessary, without excessively indulging any failure to cooperate.
36. LIPs can in turn become very agitated if the other side does not comply on time with pre-hearing directions. Sometimes LIPs believe that, if the other side has failed to comply on time with such directions, that in itself is evidence in support of their own case, or that the opponent should be prevented from defending or proceeding further. They often feel upset at what they regard as an over-tolerant attitude by the court or tribunal to delays by solicitors. The reasons for any decision to extend time for the represented party should therefore be carefully explained.

### **Disclosure of documents**

37. The duty to disclose documents is frequently neglected by litigants in person:
  - Some will have little or no appreciation that they should adopt a 'cards on the table' approach, and will try to hold back key documents until the hearing.
  - It is particularly common to hold back secret recordings.
  - LIPs may not understand what documents count as 'relevant'. They may need to be told, for example, that diaries and text message exchanges are included.
38. Late disclosure of relevant documents can cause delays at the hearing and in extreme cases, adjournment. When a pre-trial or case management hearing

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<sup>4</sup> 'The Judicial Working Group on Litigants in Person: Report' (July 2013).

takes place, it can help to explain exactly what the duties of disclosure are, including for example where both sides must disclose adverse documents, and to explain that the same applies to their opponents too.

### **Understanding the importance of documentary evidence**

39. Litigants in person may not understand the importance of documentary evidence. Experience shows that they:
- Tend not to make sufficient use of documentary or photographic evidence in their cases.
  - Fail to appreciate the need for maps and plans of any location relevant to the case.
  - Often do not bring all relevant documents with them to the hearing. The court or tribunal is often faced with the comment: 'I can produce it – it is at home', but it is then too late. An adjournment is unlikely to be granted at that stage because of the costs and delays involved.
  - Conversely, some LIPs file all their evidence 'up front', without realising that preparation happens in stages. It can help to explain there will be opportunity in the case timetable for them to file evidence later, when it becomes clear exactly what is needed.
40. The LIP should have been warned in advance not only to disclose disclosable documents to the other side (having explained what these are), but to ensure that important and relevant documents are included in the trial bundle, and (where necessary, eg because the document's authenticity is disputed or because the copy in the trial bundle is illegible,) to bring the originals to the hearing. Case management hearings represent an opportunity to give guidance on these matters.

### **Trial bundles**

41. Many litigants in person find it difficult to understand the difference between disclosure and collating documents for the trial bundle. It needs to be explained to them that not all documents which have been disclosed need to be seen by the court or tribunal at the final hearing.
42. The archaic term 'trial bundle' adds to confusion. It should be explained that this simply means a tagged or lever arch file of documents.
43. Where a joint bundle of documents is required:
- The parties should be told who is to prepare the trial bundle. It is usually best that this is done by the represented party. Explain to the LIP that this is not favouring the represented party; on the contrary, it is to help the LIP. The reason is only that the represented party will have more experience of what such a bundle should look like, and more resources to prepare and copy it.
  - Inform the parties that any document which either party wishes to go into the bundle must be included. However, both parties should bear in mind that only relevant documents are necessary.
  - Arguments often arise when a LIP wishes to add what the represented party sees as unnecessary and bulky documents. However, it may be difficult for

LIPs to understand which documents might be important. LIPs may fear they will inadvertently omit something crucial. Indeed, it is not unusual for junior or trainee solicitors asked to prepare a trial bundle to include all documents out of the same anxiety.

- Set a time-scale to ensure that the LIP is not given the finalised bundle at the last minute before the hearing.
  - In many jurisdictions it will be appropriate to ask the represented party with the resources to bring additional copies of the bundle for the court or tribunal with them. Tell LIPs that they must nevertheless bring their own copy of the agreed bundle.
  - Ensure that LIPs are provided with a hard copy of the bundle rather than an electronic bundle. LIPs are unlikely to have the facilities to print out large trial bundles at home.
  - If the hearing is to be conducted remotely on a video platform, a LIP is still likely to need a hard copy as well as electronic bundle. Even if LIPs feel comfortable about accessing a remote hearing, they are unlikely to have large additional screens on which electronic documents can be seen at the same time, or the ability to navigate these while also thinking about how to present their case.
  - Tell LIPs that if for any reason there is unresolved disagreement about the content of the bundle, they can bring copies of the documents which they wanted included, but which have been omitted. However, they must also bring copies of those extra documents with the pages consecutively numbered for the other side and for the court/tribunal.
44. In situations where bundles need not be agreed and each party is to bring their own, explain to the LIP how to put one together, ie numbered pages in chronological (or 'date') order, ideally with an index, and fastened in some way. Dividers are unnecessary, but if they are used, the numbering should not restart in each section. Explain how many copies will be needed and for whom. All this seems obvious to lawyers, but LIPs commonly arrive at tribunal with a handful of uncopied, unbound and unnumbered original documents, or unnumbered pages grouped thematically in a series of plastic envelopes.

### **Witnesses and witness statements**

45. Litigants in person sometimes do not realise they will have to give evidence themselves.
46. Judges are often told by LIPs at the hearing/trial: 'All you have to do is to ring Mr X and he will confirm what I am saying.' When it is explained that this is not possible, litigants in person may become aggrieved as a result of failing to understand that it is for them to prove their case.
- They should be informed at an early stage that they must prove what they say by witness evidence, so they may need to approach witnesses in advance and ask them to come to court.



- When there is a need for expert evidence, this should also be explained, together with the fact that no party can call an expert witness unless permission has been given by the court, generally in advance.
47. LIPs might not know what a 'witness statement' is. Experience suggests that LIPs from other countries may believe that what is required is a formal 'statement' as to who will be a witness.
  48. LIPs should be given some guidance on how to structure a witness statement and its approximate length.
  49. LIPs, even when intending to give evidence, may not understand that they are also a 'witness' and must therefore also provide a witness statement.
  50. LIPs should be told of the consequences of failing to file or serve their own witness statements in advance of the hearing/trial (and not understanding that in consequence they may not be able to give evidence).
  51. LIPs may not understand that a witness statement is of little value without attendance of the witness in support and indeed may not be admitted at all.
  52. If a LIP applies to adjourn to call a witness, bear in mind that he or she may genuinely not have realised just how important the attendance of the witness is. If the application is refused a clear explanation should be given.

### **Adjournments**

53. Litigants in person may not appreciate that they need permission for an adjournment if a hearing date presents them with difficulties. They may believe they can simply say they are unable to attend.
54. LIPs may also fail to think about the fact that the other party may incur costs if the adjournment request is made right at the last moment.
55. When seeking an adjournment, LIPs may not realise:
  - That they need a good reason with supporting evidence.
  - That it is beneficial first to consult the other side.
56. Conversely, LIPs may find it difficult to understand:
  - Why cases need to be adjourned to a later date, rather than simply run on to the next day, if they do not finish on time.
  - Why cases 'float' and do not start on time.

### **Case law**

57. Most litigants in person do not have access to legal textbooks or libraries where such textbooks are available and may not be able to download information from a legal website. In some circumstances it will be sensible to let an individual, accompanied by a member of the court or tribunal staff, have access to the court or tribunal library (where it exists) or to a particular book.
58. Sometimes LIPs do not understand the role of case law and are confused by the fact that the court or tribunal appears to be referring to someone else's case or a case with different facts.

- A brief explanation of the doctrine of precedent will enable a LIP to appreciate what is going on and why.
- Explain that 'Although the facts of this case are not the same as your own, it is being said that it establishes a legal rule that also applies to your case'.
- A represented party's lawyer should be told to produce any authorities to be relied on at the latest at the outset of a hearing, and preferably in advance of the hearing, if there is a case management hearing at which appropriate directions can be given.
- A LIP must be given proper opportunity to read such authorities and make submissions in relation to them.

## ***Compromise***

59. Litigants in person face many potential difficulties in relation to compromise and negotiated settlements:

- They may not realise it is possible or how to go about it procedurally. They may not even realise that they are allowed to speak to the other side with a view to trying to reach a compromise.
- They are unlikely to have built up any rapport with a legal representative on the other side which might open up the way to negotiations.
- They may not have had access to advice on the merits or value of their claim.
- They may not know how to go about negotiation.
- They may find emotional difficulty in the concept of compromising their own case.
- They may be feeling pressure not to compromise from friends and family members, who may have no idea about the legal strength of the case.

60. It can help during any case management hearing to:

- Tell them, particularly in civil proceedings, that the role of the court is dispute resolution. Explain forms of alternative dispute resolution (ADR) as appropriate.
- Ask them whether they have tried to resolve their differences by negotiation and, if possible, spell out the best and worst possible outcomes at the outset. This can lead to movement away from the idea that to negotiate is a sign of weakness.
- Suggest they get a one-off advice on the strength and value of their case.
- If a mediation is held, suggest they bring along a friend who has no vested interest in the outcome to discuss things with and offer support. In some jurisdictions, explain that the friend may not be allowed to sit in during the mediation itself.

61. It is useful to remind LIPs to tell the court in advance of the hearing if their case has been settled.

***Difficulties at the hearing and how to help***

62. The judge is a facilitator of justice and may need to assist the litigant in person in ways that would not be appropriate for a party who has employed skilled legal advisers and an experienced advocate. This may include:

- Attempting to elicit the extent of the LIP's understanding at the outset, and giving explanations in everyday plain language.
- Making clear the concept of a just trial on the evidence, ie that the case will be decided on the basis of the factual evidence presented and the truthfulness and accuracy of the witnesses called.
- Exercising considerable patience when LIPs demonstrate their scant knowledge of law and procedure.
- Not interrupting, engaging in dialogue, indicating a preliminary view or cutting short an argument in the same way that might be done with a qualified lawyer. Endorsing this, the Supreme Court has added:<sup>5</sup>

‘Training and experience will generally have equipped the professional advocate to withstand a degree of judicial pressure and, undaunted, to continue within reason to put the case. The judge must not forget that the litigant in person is likely to have no such equipment and that, if the trial is to be fair, he must temper his conduct accordingly.’

- When hearing submissions at any stage, allowing the LIP to conclude his or her prepared submission rather than asking questions as they naturally arise. LIPs not infrequently want to read out what they have written, and if they are thrown off track may need to go back to the beginning. It helps to save relevant questions until the end of the prepared submission.
- Not engaging in a legalistic dialogue with a legal representative which can make the LIP feel excluded and appear to be unfair.
- For the particular difficulties which a litigant in person may encounter in a remote video hearing, see [Appendix E on Remote Hearings](#).

**Introductory explanations by the judge**

63. Basic conventions and rules need to be stated at the start of a hearing:

- The judge's name and the correct mode of address should be clarified.
- Individuals present need to be introduced and their roles explained.
- Mobile phones must be switched off, or at least in silent mode. (Having said that, if someone's mobile phone does later start ringing, it is better to be reassuring than irritated. The person will be flustered enough.)
- The judge should explain the procedure and timing of the day.
- A litigant in person who does not understand something or has a problem with any aspect of the case should be told to inform the judge immediately so that the problem can be addressed.

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<sup>5</sup> *Serafin v Malkiewicz and others* [2020] UKSC 23.

- The purpose of the hearing, and the particular matter or issue on which a decision is to be made, must each be clearly stated.
  - A party may take notes but the law forbids the making of audio or video recordings (without the express consent of the judge).
  - If the LIP needs a short break for personal reasons, he or she only has to ask.
  - Only one person may speak at a time. Each side will have a full opportunity to present its case.
64. The purpose of a particular hearing may not be understood. For example, the hearing of an application to set aside a judgment may be thought to be one in which the full merits of the case will be argued. The procedure following a successful application to set aside should be clearly explained, such as the need to serve the proceedings on the defendant, for a full defence to be filed and directions which may be given thereafter so that the parties know what is going to happen next.
65. It can be hard to strike the due balance when assisting a LIP in an adversarial system. LIPs may easily get the impression that the judge does not pay sufficient attention to them or their case, especially if the other side is represented and the judge asks the advocate on the other side to summarise the issues between the parties. Consider:
- Explaining the judge's role during the hearing.
  - If doing something which might be perceived to be unfair or controversial in the mind of the LIP, explain precisely what you are doing and why.
  - Adopting to the extent necessary an inquisitorial role to enable the LIP fully to present their case, (though not in such a way as to appear to give the litigant in person an undue advantage).

### **The real issues of the case**

66. Many litigants in person will not appreciate the real issues in the case. For example, a LIP might come to the court or tribunal believing that they are not liable under a contract because it is not in writing, or that they can win the case upon establishing that the defendant failed to take due care, when the real issue in the case is whether or not the defendant's negligence caused the loss.
67. At the start of any hearing it is vital to identify and, if possible, establish agreement as to the issues to be tried so that all parties proceed on this basis. Time spent in this way can shorten the length of proceedings considerably.

### **Advocacy**

68. If a LIP does not know where to start in cross-examining an opposing witness, it may be helpful to suggest they prepare by reading through the latter's witness statement and marking the parts of evidence he or she does not agree with.
69. When trying to cross-examine opposition witnesses, litigants in person often phrase questions wrongly or ask several questions in one sentence, and some find it hard not to make a statement or launch into their own evidence.

70. Explain that once you understand the point they are getting at, you can assist them to put it in question form.
71. LIPs frequently have difficulty in understanding that merely because there is a version of events being presented that is different from their own, this does not necessarily mean that the other side is lying. Similarly, they may construe any suggestion from the other side that their own version is not accurate as an accusation of lying. Be ready to explain that this is not automatically so.
72. LIPs may not understand the importance of ‘putting’ their key points to the other side’s witnesses. It is often appropriate to help them do this, rather than hold it against them later that they have failed to do so. The significance of a LIP failing to put a point is likely to be less than a lawyer failing to put a point. If it is a matter of giving a witness a chance to respond, in many jurisdictions, it will be possible to recall the witness. If there is a risk that a LIP will accidentally omit to put points, especially if he or she gives evidence second in the case, greater care should be taken with releasing opposition witnesses after they have given evidence.
73. Following cross-examination, a represented witness has the opportunity to clear up misunderstandings and draw out extra points on re-examination. LIPs do not have a representative to re-examine them. Explain they will instead have the opportunity at the end of their evidence to add any extra thoughts on something which has been discussed during cross-examination. They should also be allowed to have a pen and paper with them in the witness box so that they can jot down a note of any points they think they might want to come back to.
74. At the end of their evidence, LIPs should be asked if they have said everything they need to, and reminded that this is their last opportunity to give evidence.
75. Where one party is represented, invite this advocate to make final submissions first, so that the LIP can see how it should be done. This can be intimidating, so reassure the LIP that he or she is not expected to replicate the advocate’s style. If necessary, be ready to guide the LIP through his or her final submissions by recapping the other side’s key points topic by topic and asking for the LIP’s comments. If there is time, allow the LIP a break to compose his or her final submissions.
76. Although LIPs will have been advised before giving evidence that this was the opportunity to give all their points and that new evidence cannot be given during final submissions, this is a subtle distinction and most LIPs find it hard to apply it.
77. LIPs are likely to be unfamiliar with the word ‘submissions’ and daunted if you use the word ‘speech’. Closing submissions can better be described as ‘your final opportunity to tell the court, given (or despite) what the witnesses have said, why you should win’ or words to that effect.
78. Opposition Counsel in a party-and-party case and the State’s representative in tribunals where the State is the respondent, are expected to draw to the court or tribunal’s attention a fair picture of the law and not omit cases which go against his or her side’s interests. They should be reminded of this.

## Giving judgment

79. Bear in mind that LIPs sometimes do not understand whether they have won or lost their case, even when judges believe they have been clear. The outcome needs to be plainly stated.
80. It is always important that parties understand why they have won and why they have lost.
81. Litigants in person often believe that, because they are aggrieved in some way, they automatically have a good case. When explaining, if necessary, that they have no case, bear in mind that this will come as a great disappointment to a litigant, who will have been waiting for his or her day in court for some time.
82. Although in the context of represented parties who are vulnerable, [chapter 2](#) provides interesting examples of family court decisions which make a particular effort to communicate with affected parties. Another possibility in appropriate cases is starting the judgment with a short and clear accessible summary. The following example contains an 'Accessible language summary' at the start, which it explains is not part of the judgment: *Just Digital Marketplace Limited v High Court Officers Association and others* [2021] EWHC 15 (QB). Certain websites have tools which can help test text for accessibility (see [Resources in this chapter](#)).

## Criminal cases

### Useful guidance materials

83. In relation to Crown Court proceedings, there is extensive guidance on unrepresented defendants in the Crown Court Compendium at paragraph 3-5. This document should be consulted for additional information beyond that set out in this chapter. See also various formal Guidance and practice notes issued pursuant to the Coronavirus Act 2020.
84. A similar approach to helping an unrepresented defendant is appropriate in the Magistrates' Court, making apt adjustments as regards summary trial, and applying the relevant parts of the Criminal Procedure Rules and Criminal Practice Directions (see in particular Crim.P.D. 24A.7-10,16). In particular, it should be noted that a legal adviser has an obligation to assist an unrepresented defendant.

## Guilty pleas

85. The Plea and Trial Preparation Hearing is likely to be the first occasion when an unrepresented defendant will be asked to enter a plea to the charges at the Crown Court. Before unrepresented defendants plead guilty, it is important to ensure they understand the elements of the offence with which they are charged, especially if there is, on the face of it, potential evidence suggesting they may have a defence to the charge.
86. Prior to arraignment the judge should ensure unrepresented defendants understand that pleading guilty means they accept they committed the offence

and that only in very rare cases will they be allowed to reverse a guilty plea at a later stage.<sup>6</sup>

87. It is advisable not to use acronyms such as PTPH, FCMH or PTR or legal terminology such as 'arraignment' when dealing with unrepresented defendants.

### **The value of representation**

88. Under Article 6(3) of the European Convention of Human Rights (Sch 1, Human Rights Act 1998), everyone charged with a criminal offence has the right to defend him or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance, to be given it free where the interests of justice so require.
89. Where Legal Aid has been refused, it might be advisable for a judge to make some enquiries of an unrepresented defendant to establish the basis of the refusal before proceeding further and to determine whether a short adjournment to submit or re-submit the application might resolve the issue.<sup>7</sup>
90. One reason that people may dispense with legal assistance is because they decline to accept the advice which they have been given, whether as to plea or the conduct of the trial. This, a defendant is entitled to do. However, guidance as to the value of representation may persuade such defendants that they are better advised to retain their representatives. If a defendant decides, notwithstanding advice and guidance, to represent him or herself, then the judge must explain the process and ensure proper control over the proceedings is maintained. This is particularly relevant to offences where an unrepresented defendant is barred by law from cross-examining a witness. In such cases, the judge should ensure they understand the effect such restrictions places on their rights.<sup>8</sup>

### **Assistance during the trial**

91. Throughout a trial, a judge must be ready to assist a defendant in the conduct of his or her case. This is particularly so when the defendant is examining or cross-examining witnesses and giving evidence.
92. At the Plea and Trial Preparation Hearing ('PTPH'), the judge should be prepared to explain:
- The stage process for the disclosure of evidence to be adduced at trial and establish how the prosecution proposes to serve the case papers and any electronic material on the unrepresented defendant.
  - What a defence statement needs to contain and the possible consequences of a failure to comply, and should provide the unrepresented defendant with

<sup>6</sup> See Part 38.5 of the Criminal Procedure Rules.

<sup>7</sup> The Criminal Legal Aid Manual (updated 1<sup>st</sup> January 2020) gives guidance on the application of Legal Aid in the Crown Court, incorporating changes reflecting the extension of criminal legal aid means testing to relevant Crown Court proceedings.

<sup>8</sup> Sections 34, 35 and 36 Youth Justice and Criminal Evidence Act 1999 and Criminal Procedure Rules Part 23 apply.

a note or copy of section 6A of the Criminal Procedure and Investigations Act 1996 (which serves as a useful checklist).<sup>9</sup>

- The need to identify the names of any defence witnesses.
- The need to know if defence evidence will be adduced (and in what form).
- What the prosecution schedule of non-sensitive material is and how the unrepresented defendant may have to justify access to such material.<sup>10</sup>
- The Court's powers to order disclosure in certain circumstances.
- The Court's general case management powers.<sup>11</sup>
- The defendant's right to use a laptop to take notes of evidence but that any recording device must be switched off.

93. Before the trial begins, the judge should be prepared to explain:

- The course of the proceedings and the order in which the case will progress.
- How and when the unrepresented defendant will be allowed to question witnesses.
- That the judge cannot be a substitute for an unrepresented defendant's advocate.
- The unrepresented defendant's duty to comply with the rules of evidence and that any persistent failure to do so may result in him or her being stopped from asking certain questions of witnesses.
- That something will be said to the jury about the lack of legal representation to avoid any speculation on their part or unfairness generated towards the unrepresented defendant.

94. To ensure the rules are complied with, it might be worth suggesting that an unrepresented defendant should write down the questions he or she wishes to ask a witness beforehand and provides the judge with a copy. This may avoid unnecessary or irrelevant lines of questioning being pursued. However, judges should always be prepared to explain to unrepresented defendants in simple terms why they will not allow them to ask certain questions or raise certain topics with witnesses. It might be worth providing unrepresented defendant with a written ruling – or guidance document – to ensure they understand what is or is not permissible.

95. At trial, the judge should be prepared to:

- Assist the unrepresented defendant in the presentation of his or her case and stick to the relevant issues.
- Restrain unnecessary, intimidating or humiliating lines of questioning.

<sup>9</sup> In accordance with Sections 6 and 6A of the Criminal Procedure Act 1996.

<sup>10</sup> CPS Disclosure Manual 2018, CPIA and Code of Practice, Part 15 of the CPR 2015, CPIA (Defence Disclosure Time Limits) Regulations 1997, CPIA (Notification of Intention to Call Defence Witnesses)(Time Limits) Regulations 2010, Attorney General's Guidelines on Disclosure 2013 and the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases 2013.

<sup>11</sup> See the Crown Court Compendium, Part 1, section 3-5.



- Help to elicit evidence from a witness who is reluctant or refuses to answer questions posed directly by the defendant.
  - Explain the order in which any defence witnesses are called, starting with the defendant first.<sup>12</sup>
  - Enquire what documentary or other material the defendant may need when he or she gives evidence and ensure there are sufficient copies before the defendant enters the witness box or establish if it can be seen via the ClickShare system.
96. Criminal Practice Directions 2015 VI: Trial, 26P.5 (as amended May 2020) puts a duty on a judge to address an unrepresented defendant when appropriate and in the presence of the jury, as follows:
- ‘Now is your chance to give evidence if you choose to do so. If you do give evidence it will be on oath [or affirmation], and you will be cross-examined like any other witness. If you do not give evidence the jury may hold it against you. If you do give evidence but refuse without good reason to answer the questions the jury may, as I have just explained, hold that against you. Do you now intend to give evidence?’
97. It might be worth providing the unrepresented defendant with a copy of these words in a written document beforehand and explaining how the jury may regard the defendant’s failure to give evidence. Explain that the question has to be asked in the presence of the jury and the defendant is obliged to indicate whether he or she will or will not give evidence. It may also be worth explaining at this stage that limitations are placed on defendants in a closing speech to the jury if they have not given evidence, and then giving the defendant time to digest this before asking the question in front of the jury.
98. Since it is common practice for the jury to receive written legal directions, the unrepresented defendant may need some time to read and absorb them. You may wish to explain whether the prosecution will or will not be permitted to make a closing speech and the reason.<sup>13</sup> That may also involve requiring the prosecution to provide a written document to assist the unrepresented defendant to focus on why the prosecution says he or she is guilty and respond to those points.
99. You may also wish to adjourn and allow the unrepresented defendant time to prepare his or her closing remarks to the jury and request a copy of them in advance to avoid inadmissible material being referred to at the closing stages of the trial.
100. Once the jury has retired, you may wish to explain to the defendant the procedure you propose to follow once a verdict is reached and what may occur if the verdict is an adverse one.

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<sup>12</sup> Police and Criminal Evidence Act 1984, section 73.

<sup>13</sup> Section 2 of the Criminal Procedure Act 1865 and Section 3 of the Criminal Evidence Act 1899 restrict the circumstances in which the prosecution may make final representations without the court’s permission. See also the CPR r25.9(2)(j).

101. If the jury finds the defendant guilty you may wish to give time for mitigation to be prepared and provide them with a copy of any relevant sentencing guidelines.

### ***Jargon and legalese***

102. One of the greatest barriers to participation is the language used by the legal system – by judges, legal representatives and court administration. This language is so embedded, that it is hard for lawyers to notice when it is being used.
103. For many LIPs, the written or oral use of jargon and legalese by judges and representatives can lead to gaps in their understanding, if not complete confusion as to what is happening and what they are expected to do. Even where such language is understood or guessed at, it is likely to increase the sense of being in an alien environment.
104. Lay representatives, depending on their level of experience, may also appreciate an explanation and use of straightforward language.
105. It is not only a question of whether LIPs understand what is being said. Represented parties should also be able to follow the proceedings in real time, and should not have to depend on explanations from their representatives in breaks. After all, it is the parties' case.
106. Where it is necessary to use technical terms, such as party, full merits hearing, remedy, particulars, pleading, submissions, mitigation, summary dismissal, summary offence, affirm, in person, right of audience, these should be explained.
107. Artificial and legalistic use of language can often be avoided, eg it is usually possible to say:
- Decide (instead of 'determine').
  - Pause / break / postpone (instead of 'adjourn/adjournment').
  - Fix a date (instead of 'list').
  - Permission to do something (instead of 'leave').
  - Deciding the case on his or her own (instead of 'sitting alone').
  - Amongst other things (instead of 'inter alia').
  - Evidence that is not allowed (instead of 'inadmissible').
108. Where legal representatives use technical language, judges can explain the meaning to any LIP. If the terms 'my learned friend' or 'my friend' are used by legal representatives, explain what they mean, as they can be taken literally by lay users, who may think there is some excessively cosy relationship behind the scenes.<sup>14</sup> This requires particular care if a lay user has some disability or restriction in their understanding, social interaction or communication skills, for

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<sup>14</sup> The JUSTICE report 'Understanding Courts' (2019) recommends that legal professionals avoid using those terms.

example, if a person is on the autism spectrum. The use of such terminology may enhance their sense of exclusion.

109. All these considerations will be even more important when a LIP or lay participant is speaking English as a second or third language, or when an interpreter is being used. For more details of intercultural communication, see [‘Communicating Interculturally’](#) in chapter 8.

## ***Assistance and representation from lay representatives***

### **Overview**

110. Litigants in England and Wales are not obliged to instruct lawyers to represent them. They have the right to conduct litigation and address the court personally. If a litigant wants help or representation from a non-lawyer, the rules vary according to the type of court or tribunal.
111. In most tribunals, litigants can freely choose to be helped or represented by non-lawyers on a paid or non-paying basis, although there is external regulation in some circumstances.
112. In civil courts, family proceedings and criminal courts (though it arises more commonly in magistrates’ courts than in the Crown Court), a litigant or defendant needs permission from the court to be represented, or even simply helped in court, by a non-lawyer who does not have rights of audience. Such a person might, for example, be a friend, member of the family, or charity worker.
113. Permission is required whether or not such a person is described as a McKenzie friend and whether or not he or she is paid by the litigant. In particular, the judge must seek to establish whether the person has any financial or other personal interest vested in the outcome.
114. Note also the importance of family members helping as informal interpreters (see [‘Informal interpreters’](#) in chapter 8).

### **Lay representatives and tribunals**

115. In most tribunals, it is common to have non-lawyers help the litigant in a variety of ways, and there is no need for the tribunal’s permission. For example, a friend, relative, voluntary sector agency, trade union representative or non-legal consultant may act as the individual’s representative in case preparation, act as his or her advocate at one or more hearings, or simply sit next to the litigant during the hearing and help. The latter is analogous to a McKenzie Friend in the courts, but that formal term is not usually used in tribunals.
116. With some tribunals, there is specific external regulation of representatives who charge fees in order to protect litigants. For example, under the Financial Services and Markets Act 2000 as amended, a paid representative of a claimant in the employment tribunal must be registered as a claims manager in his or her own name or the name of the business. There are exemptions for legal practitioners, registered charities, not-for-profit agencies and independent trade unions. There is also a regulator for the provision of immigration services, whose role is to prevent migrants and their families getting poor quality or dishonest immigration advice, the Office of the Immigration Services Commissioner or OISC. The OISC regulates advice which is not given by

qualified lawyers such as solicitors, barristers and chartered legal executives, and they should register with OISC. If they have not registered or if they do not comply with the scheme, the OISC investigates and prosecutes those who give immigration advice. There are further restrictions in relation to applications for judicial review.

117. Lay companions or representatives will be of varying experience and competence. Some will be very experienced and need no particular assistance from the tribunal. On the other hand, a party may have been unable to afford competent professional advice or unable to assess the experience of the individual he or she has approached. There is a danger that judges will offer less guidance to an inexperienced lay representative than they would have offered to the party if he or she was unrepresented, to the detriment of that party.
118. Friends, family members or inexperienced voluntary sector representatives who have offered to help will often feel a degree of emotional involvement in the case and may be extremely nervous that they might let the party down. They may also be wary of revealing any ignorance of procedures in case that damages the confidence of the party. It is therefore important to be encouraging, helpful and tactful. This can include similar steps to those which would be taken to enable the participation of a litigant in person, eg:
- Avoiding or explaining jargon. (See section on '[Jargon and legalese](#)' above.)
  - Setting out at the start of the hearing the procedure which will be followed.
  - Explaining any case law in clear terms.
  - Not engaging in a technical discussion or making 'in-house' references to a solicitor or barrister on the other side.
  - Paying equal attention to both representatives and ensuring the lay representative gets his or her turn.
  - Bear in mind that the lay companions or representatives may themselves need adjustments, eg if speaking English as a second or third language, or if they have a disability.
  - All this should be done in a way which is not patronising and, depending on the circumstances, does not assume that the lay representative needs such assistance. As already stated in this chapter, a hearing should in any event be conducted in a way that as far as possible ensures that lay parties understand what is happening as it happens (not relying on a later explanation), regardless of whether they are represented and by whom.

### **'McKenzie Friends'**

119. The term 'McKenzie Friend'<sup>15</sup> refers to an individual (whether a lawyer or not) who assists in presenting the case in a courtroom by taking notes, quietly

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<sup>15</sup> The term 'McKenzie Friend' derives from *McKenzie v McKenzie* [1971] P 33, a decision by the Court of Appeal. Levine McKenzie, a petitioner in divorce proceedings, lodged an appeal on the basis that the trial judge had denied him the opportunity to receive limited assistance from an Australian barrister, Ian Hanger, who was not qualified to practice in the UK. The judge ruled that Mr Hanger must sit in the public gallery during the hearing, and that he could only advise Mr McKenzie during

making suggestions or offering advice and guidance. A McKenzie Friend may also provide assistance in private (chambers) hearings, although the judge will seek to ensure that a litigant in person is assisted so that he or she understands the processes of the hearing from the outset and during the course of the hearing.

120. The role differs from that of advocate in that the McKenzie Friend does not generally (but always subject to the judge's discretion in the specific case) address the court or examine any witnesses.
121. Although the judge's permission is required for a McKenzie Friend, there is a presumption that such permission will be granted, whether a hearing is in chambers or not.<sup>16</sup>
122. A McKenzie Friend is not allowed to act as the agent of the litigant in relation to the proceedings nor manage the case outside court, eg by writing letters in his or her own name as representative of the litigant, or by signing court documents.
123. A person will not be permitted to perform the role of McKenzie Friend if unsuitable, eg if he or she has an interest in any financial outcome of the case.
124. Increasingly, individuals also wish for their McKenzie Friend to act as their advocate. This also requires the court's permission, as with any other lay person seeking rights of audience (see section below).
125. In a climate where legal aid is strictly limited in certain cases and lawyers may not be affordable, the McKenzie Friend and lay representatives make a significant contribution to access to justice. The judge has to identify those situations where such support is beneficial and distinguish circumstances where it should not be allowed.
126. Guidance as to the circumstances in which permitting a McKenzie friend in civil and family proceedings will be appropriate, and related advice, can be found in the 'Practice Guidance (McKenzie Friends: Civil and Family Courts)' issued by the Master of the Rolls and the President of the Family Division on 12 July 2010. A few extracts are set out below, but this should be read in full.
127. The Practice Guidance says the following factors should not be taken to justify the court refusing to permit a litigant receiving assistance from a McKenzie Friend:
  - The case or application is simple or straightforward, or is, for instance, a directions or case management hearing.
  - The litigant appears capable of conducting the case without assistance.
  - The litigant is unrepresented through choice.
  - The other party is not represented.
  - The proposed McKenzie Friend belongs to an organisation that promotes a particular cause. The consideration for the court is the purpose that the

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adjournments. The Court of Appeal subsequently ruled that the trial judge's decision had denied Mr McKenzie rightful assistance, in the form of taking notes, and quietly making suggestions and advice as the hearing proceeded. Paragraph 1(2) of schedule 3 to the Legal Services Act 2007.

<sup>16</sup> See clause 7 of the Practice Guidance (McKenzie Friends: Civil and Family Courts).

proposed McKenzie Friend will serve in assisting the party, so long as the involvement of any such McKenzie Friend does not give rise to any conflict of interest between the agendas of the party and the proposed McKenzie friend.

- The proceedings are confidential and the court papers contain sensitive information relating to a family's affairs.
128. On the other hand, the court can refuse permission because to grant it might undermine the efficient administration of justice, eg if the assistance is unreasonable or is being used for an improper purpose or the McKenzie Friend is using the litigant as a puppet, or is directly or indirectly conducting the litigation or does not fully understand the duty of confidentiality.
129. In 2016, the government issued a consultation, 'Reforming the courts' approach to McKenzie friends'. While 'McKenzie Friend' only properly applies to individuals providing LIPs with reasonable assistance, it has come to be used to describe individuals who are granted rights of audience (ie allowed to represent) in a particular case. The consultation noted that this lack of clarity was confusing for LIPs and led to situations where LIPs had false expectations that their McKenzie friend could address the court. The consultation sought views on whether 'McKenzie friend' should be replaced by a more understandable term that more clearly defined the role; whether there should be a set of codified rules governing the role; and whether McKenzie friends should be permitted to charge fees. Following the consultation, in September 2017 the Judicial Executive Board decided to establish a further judicial working group to review the original proposals in the light of the responses. The response was published in February 2019. It recommended that the Practice Guidance published in 2010 should be updated. Further, it was a matter for the government to consider the appropriate steps that needed to be taken to enable LIPs to secure effective access to legal assistance, legal advice and where necessary, representation.<sup>17</sup>

## **Support Through Court & Citizens Advice**

130. Litigants should also be aware of the services provided by Support Through Court (previously known as the Personal Support Unit ('PSU')). There are several Support Through Court offices in various locations across the UK, but they are not universally available. Volunteers provide free support in the civil and family courts and some tribunals, dealing with issues such as contact with children, divorce, eviction and money claims. They explain how courts work, discuss the concept of settlement, help with completing forms, help the LIP plan what he or she wants to say in court, etc. They do not give legal advice. They may sit next to the LIP in court or tribunal, taking notes and providing moral support. Citizens Advice offices provide advice and assistance to litigants in person in a number of Court Centres. In effect, the same rules apply as to any other McKenzie friends or lay representatives.
131. Further information about the type of assistance which the Support Through Court or Citizens Advice may be willing to offer can be obtained from their respective websites.

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<sup>17</sup> 'Consultation response: Reforming the Courts' approach to McKenzie Friends' (February 2019).

## Rights of audience

132. Rights of audience are governed by Part 3 of the Legal Services Act 2007 which came into force on 1 January 2010. This refers to the right of a non-legal representative to represent the litigant and address the court, as opposed to simply sitting next to a litigant in person and assisting as a McKenzie Friend in the traditional sense.
133. Under the Legal Services Act 2007, apart from LIPs, lay people are not allowed to conduct litigation or act as advocates for LIPs, and LIPs are not allowed to receive or authorise such assistance. Although courts can grant a right of audience in a particular case, the courts have in the past been cautious, although they have been more flexible since the advent of the CPR.
134. The Judicial Working Group on Litigants in Person in its 2013 report made these observations:
- ‘Generally, the practice has been that where it will be beneficial to the fair and just determination of a case to have a lay person conduct a hearing on behalf of a litigant in person, then the right is granted in the interests of justice. However, there has in recent years been a substantial increase in ‘professional’ lay advocates who, without the requisite training or regulation of a professional lawyer, seek to act as advocates for litigants in person in court on the payment of a fee. Some of these representatives charge fees which are similar if not more than those of a professional lawyer. Some are unable effectively to represent the litigant. Some are positively disruptive to the proceedings.’
135. The courts also have power to allow lay people to conduct the litigation (ie work outside court) on behalf of LIPs. Although LIPs often get informal off-the-record help with case preparation, the Judicial Working Group observed that the court’s power to allow a lay person to conduct litigation is very infrequently exercised. The Working Party said, this was ‘for obvious good reason; such individuals are not legally trained, they owe no obligations derived from professional regulation, and they do not owe any obligation to the court. These requirements are generally essential for the protection of other parties and to the proper administration of justice.’
136. The Working Party did however go on to acknowledge that lay assistance and representation has developed quite differently in the tribunal system where the same statutory constraints do not apply and lay representatives provide a vital resource to individuals in the tribunal system who would otherwise be without any support in often technical areas.
137. In *Graham v Eltham Conservative & Unionist Club and Ors*,<sup>18</sup> Mr Justice Hickinbottom (as he then was) gave helpful guidance as to the practical approach to applications by litigants in person to be allowed a lay advocate, including information a court may require to enable it to make a properly informed decision on whether to grant a lay person the right to speak. The following is a summary and paraphrase of his key points.
- (1) In passing the 2007 Act, Parliament made it clear that, in general, advocates are restricted to those who are subject to the statutory scheme of regulation:

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<sup>18</sup> [2013] EWHC 979 (QB).

section 1(1) sets out a series of 'statutory objectives' which includes ensuring that those conducting advocacy adhere to various 'professional principles', maintained by the rigours of the regulatory scheme for which the Act provides. This is reinforced by legislation allowing lay representation, eg in small claims in the county court (section 11 of the 1990 Act which is unaffected by the 2007 Act, and the Lay Representatives (Rights of Audience) Order 1999 (SI 1999 No 1225), and the fact that to act in purported exercise of a right of audience when none has been conferred is both a contempt of court and a criminal offence (sections 14-17 of the 2007 Act).

- (2) So, the discretion to grant rights of audience to those unqualified should only be exercised in exceptional circumstances. In line with the overriding objective of dealing with cases justly (CPR Rule 1.1 and similar provisions in other Procedural Rules), that discretion is more likely to be exercised in a case where it will be of real assistance if a litigant were to have someone who is not an authorised advocate to speak for them, eg for health reasons, where the litigant is vulnerable, relatively inarticulate, has a particular anxiety about the case, or is unacquainted with legal proceedings.<sup>19</sup>
- (3) Courts may wish to allow a relative or friend to speak on a party's behalf, particularly if they are well-attuned to the party's case and wishes, and more able to articulate those than the party, making the hearing more focused and shorter. This flexibility is more important as the result of recent legal aid reforms which have resulted in a substantial reduction in public assistance and a consequent increase in litigants in person.
- (4) In exercising its discretion, however, the court should ensure that an appropriate application is made at the first opportunity where any other party might make representations. Once the right to appear as an advocate has been given to a lay person, it will extend to all hearings unless specifically directed otherwise, or the right is revoked. Revocation might occur if the lay advocate proves unhelpful or disruptive.
- (5) Before deciding about informal representation, information should be available (or sought) as to:
  - The relationship between the litigant and the proposed advocate, including whether it is a commercial one: 'the courts should pause long before granting rights to individuals who [make] a practice of seeking to represent otherwise unrepresented litigants'.<sup>20</sup>
  - The reasons for the request, including any difficulties the litigant might have in presenting his or her own case.
  - Any experience the proposed advocate has had in presenting cases to a court.
  - Any court orders that might be relevant to the appropriateness of the proposed advocate (eg orders made against him or her acting in person

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<sup>19</sup> Some of these suggestions were taken from paragraph 21 of the Practice Guidance (McKenzie Friends: Civil and Family Courts) (12 July 2010).

<sup>20</sup> *Paragon Finance plc v Noueri* [2001] EWCA Civ 1402 at [53] and following per Brooke LJ).



or as an advocate in previous proceedings, including orders restraining him or her from conducting litigation or from acting as an advocate).

- (6) Given the importance of the role of an advocate, establishing these matters is essential to ensure that proper respect is given to the general principle that advocacy rights are restricted save in exceptional circumstances.

### **Small Claims**

138. Under section 11 of the Courts and Legal Services Act 1990 the Lord Chancellor authorised the Lay Representatives [Rights of Audience] Order 1999.<sup>21</sup> This is also set out in CPR 27 PD 3.2 (2). This Order survives the 2007 Act coming into force. It authorises lay representatives to appear in small claims. It provides that a lay representative may not exercise any right of audience (1) where the party fails to attend the hearing, (2) at any stage after judgment, or (3) on any appeal. The court has discretion to hear a lay representative even in any of these circumstances but granting a right to appear in an excluded case would require reasons. A lay representative exercising this right may be restricted if he or she is unruly, misleads the court or demonstrates unsuitability.

### **Housing Authority Officers and Employees of Arm's Length Management Organisations [ALMOs]**

139. Sections 60 and 60A of the County Courts Act 1984 give a right of audience, where proceedings are brought by a local authority, to an authorised officer of that authority. This is restricted to housing claims in the County Court.
140. Section 60 does not cover situations where a local authority has contracted out its responsibilities to a non-government agency known as an 'ALMO'. Section 60A, introduced by section 191 of the Legal Services Act 2007, was intended to remedy this situation, but has not yet been brought into force. In practice, when this situation arises in a hearing, it is dealt with practically and pragmatically by granting such rights.

### **Companies**

141. An employee may represent the company at a fast-track or multi-track interim or final hearing, provided the employee has been authorised by the company to appear and the court gives permission (CPR 39.6).
142. This does not apply to small claims. Any officer or employee may represent the company on a small claim (CPR 27 PD 3.2(4)).

### **Official Receivers**

143. Rule 7.52 of the Insolvency Rules 1986 gives Official Receivers a right of audience in both the High Court and a county court.

### **Official Solicitor**

144. The Official Solicitor represents parties to proceedings who lack capacity to conduct litigation ('protected parties') or who are deceased or unascertained

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<sup>21</sup> SI 1999/1225

when no other suitable person or agency is able and willing to do so in civil courts. The purpose is to prevent a possible denial of justice and safeguard the welfare, property or status of the party.

145. The Official Solicitor usually becomes formally involved when appointed by the Court, and may act as his or her own solicitor, or instruct a private firm of solicitors to act for him or her.

### **Representing adults who lack capacity**

146. Mental incapacity is addressed in detail in [chapter 5](#).

147. An order directing the Official Solicitor to act as a legal representative in a civil court for a protected party will either be made with his prior consent or only take effect if his consent is obtained.

148. Before the Official Solicitor will agree to act on behalf of a protected party in proceedings three requirements must be met:

- Evidence that the adult lacks capacity (this does not of course apply in the case of a child).
- *There must be nobody else suitable and willing to act.*  
The Official Solicitor is the litigation friend of last resort so he can only act where there is no one else suitable and willing to act. It is better for a person who knows the protected party, such as a relative or friend, to act as litigation friend. Therefore, all possible candidates should be considered and approached if suitable.
- *Cover for the Official Solicitor's costs.*  
The Official Solicitor does not charge for acting as litigation friend, but does require funding for the costs of instructing solicitors to act in the litigation, or for his own charges where he also acts as solicitor. The Official Solicitor is not funded to subsidise private litigation and will only consent to act in a particular case if his costs are secured from the outset. Where the Official Solicitor is asked to act for a defendant and there is no other method of funding his costs of obtaining legal representation, he will require an undertaking from the claimant to meet his costs.

149. Enquiries and requests for assistance from the Official Solicitor are frequently made by the judiciary and members of the legal profession. Contact details are in the '[References and resources](#)' section within this chapter.

### **References and resources**

Click on the references below to go to the source referred to. Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link. References are in alphabetical order (discounting the first 'the' or 'a').

### **References**

['Advocate's Gateway Toolkit 19: 'Supporting Participation in Courts and Tribunals'](#) (Sept 2020).

[‘Consultation: Reforming the courts’ approach to McKenzie friends’](#) (2016).

[‘Consultation Response: Reforming the Courts’ approach to McKenzie Friends’](#) (February 2019).

[‘Crown Court Compendium, Part 1: Jury and Trial Management and Summing up’](#): Judicial College. (July 2020).

[‘The Judicial Working Group on Litigants in Person: Report’](#): chaired by Mr Justice Hickinbottom (2013).

[‘Practice Guidance: McKenzie Friends \(Civil and Family Courts\)’](#). (12 July 2010).

[‘Understanding Courts – A report by JUSTICE’](#) (2019).

## **Cases**

Cases were relevant as at the date of publication.

[Graham v Eltham Conservative & Unionist Club and Ors](#) [2013] EWHC 979 (QB).

[Just Digital Marketplace Limited v High Court Officers Association and others](#) [2021] EWHC 15 (QB).

[Paragon Finance plc v Noueiri \(Practice Note\)](#) [2001] EWCA Civ 1402.

[Serafin v Malkiewicz and others](#) [2020] UKSC 23.

## **Other**

Official Solicitor and Public Trustee  
Victory House  
30-34 Kingsway  
London WC2B 6EX

Website: [www.gov.uk/government/organisations/official-solicitor-and-public-trustee](http://www.gov.uk/government/organisations/official-solicitor-and-public-trustee)

Email: [enquiries@offsol.gsi.gov.uk](mailto:enquiries@offsol.gsi.gov.uk)

Telephone: 020 3681 2750

*Accessibility websites:*

[WebFX Readability Test Tool](#)

[Microsoft Word Tool](#)

## Chapter 2 Children, Young People and Vulnerable Adults

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## Overview

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### Who is covered by this chapter?

Witnesses and parties may be ‘vulnerable’ in court as a result of various factors, and reasonable adjustments need to be made. Although touching on the wider powers to make adjustments, much of this chapter focuses on the statutory regime in criminal cases for taking ‘special measures’ for ‘vulnerable’ witnesses. Those are defined as witnesses who are under 18, have a disability, or where various other factors apply.

Family courts have increasingly adopted the regime of ‘special measures’ by way of ‘participation directions’, and certain other courts and tribunals have derived ideas and guidance to adopt within their own general procedures.

Where reasonable adjustments for disabled people are required, the starting point would be [chapter 3 \(Physical Disability\)](#), [chapter 4 \(Mental Disability\)](#) and the [Disability Glossary](#) in the appendix. If criminal proceedings are involved, this chapter would also be important. Mental Capacity is addressed in [chapter 5](#).

### The rights of young and vulnerable witnesses to effective participation

Accommodating a vulnerable person’s needs (as required by case law, the Equality Act 2010, the European Convention on Human Rights, the UN Convention on the Rights of the Child, the UN Convention on the Rights of Persons with Disabilities) requires the court or tribunal to adopt a flexible approach in order to deal with cases justly.

Child witnesses and defendants have been shown to experience much higher levels of communication difficulty in the justice system than was previously recognised.

This is also likely to be the case for vulnerable adult witnesses and the elderly. There also is a strong case for a distinct approach to the treatment of young adults in the criminal justice system. The House of Commons Justice Committee in its report, ‘The treatment of young adults in the criminal justice system’, says that dealing effectively with young adults while the brain is still developing is crucial for them in making successful transitions to a crime-free adulthood.

Children and vulnerable adults under stress can function at a lower level, making it harder for them to remember accurately and think clearly, and affecting their mental health.

### The duty to safeguard children and vulnerable adults

Courts and tribunals have safeguarding responsibilities in respect of children and vulnerable adults. The exercise of judicial discretion often has a safeguarding dimension.

The judiciary should be alert to vulnerability, even if not previously flagged up. Indicators may arise, for example, from someone’s demeanour and language; age; the circumstances of the alleged offence; a child being ‘looked after’ by the local

authority; or because a witness comes from a group with moral or religious proscriptions on speaking about sexual activities.

### **Competence**

All witnesses, regardless of age, are presumed competent. It is recognised that the age of the witness is not determinative of their ability to give truthful and accurate evidence. Competence is not judged by comprehension, and a judge should ensure questions are put in such a way that the individual witness can understand them.

### **Expedited time-scales and active case management**

It is a judge's responsibility to ensure that all parties and witnesses are able to give their best evidence. Therefore particular thought has to be given to the special measures and other steps that can be taken to achieve this. Decisions about how procedures should be adapted should be made as early as possible.

Trial management powers should be exercised to the full where a vulnerable witness or defendant is involved. A trial date involving a young or vulnerable adult witness should only be changed in exceptional circumstances. The capacity of a vulnerable witness is likely to deteriorate if there is delay.

It is important to schedule a 'clean start' to the evidence of vulnerable witnesses as their evidence is also likely to deteriorate if they are kept waiting. There are practical suggestions in the full chapter to help achieve this.

### **Special measures participation directions and related adjustments**

All courts and tribunals have a general duty to ensure a fair hearing which will include making reasonable adjustments where necessary to assist a party or witness to give evidence.

The statutory regime for certain 'special measures' in criminal proceedings and 'participation directions' in family cases includes giving evidence behind screens, pre-recorded, or by live video link; the appointment of intermediaries and the holding of ground rules hearings.

The witness's or guardian / carer's opinion of the most appropriate special measures should be accommodated. Witnesses are likely to give better evidence if they choose how it is given.

Judges and magistrates should ask for relevant information if not provided, (in the case of vulnerable prosecution witnesses, by the police and Witness Care Units). Information relevant to reasonable adjustments may also be provided by parents or guardians, social workers or other professional assessments.

The President of the Family Division has stated repeatedly since 2014 that the family justice system lags behind the criminal justice system in the practices and procedures available to support vulnerable parties and witnesses.

### **Intermediaries**

Intermediaries are communication specialists whose main responsibility is to enable complete, coherent and accurate communication with the witness. They are officers of the court.

Intermediaries write an assessment report, attend pre-trial meetings, and can attend the hearing itself, either for the duration of the vulnerable person's cross-examination or, if needed to ensure full participation and comprehension, throughout.

Their use should be considered by parties at an early stage so that assessments do not delay proceedings. Any resulting applications should be made in good time.

Intermediaries are not always available, and the court may need to consider how best to adapt its procedure and language to ensure effective participation with the assistance of other tools.

Although the decision whether to use an intermediary is ultimately the judge's, it is important to remember that the extent of communication difficulties can sometimes be hidden, and that despite best intentions, advocates do not necessarily have the required expertise either to diagnose difficulty, or to adapt their questioning.

### **Ground rules hearings**

A ground rules hearing is the opportunity for the trial judge and advocates to plan any adaptations to questioning and/or the conduct of the hearing that may be necessary to facilitate the evidence of a vulnerable person. Where an intermediary is appointed, the purpose of the hearing is 'to establish how questions should be put to help the witness understand them and how the intermediary will alert the court if the witness has not understood or needs a break'.

In section 28 proceedings (special measure involving pre-recorded cross-examination) a ground rules hearing form has been developed and is in use in every case.

### **Adjustments to cross-examination**

If justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy may be necessary. There is strong support from the higher courts for detailed constraints on the length, tone and wording of cross-examination where required. Appropriate explanations should be given to the jury. Practical guidelines are in the full chapter.

Judges and magistrates also need to consider how to communicate clearly with and reduce the anxiety of the vulnerable witness.

## ***Who is covered by this chapter?***

1. This chapter applies to vulnerable witnesses and parties generally, who may appear in any kind of civil or criminal court or tribunal hearing. It includes certain procedures which are specific to the criminal and family courts.
2. Witnesses and parties may be ‘vulnerable’ in court as a result of various factors. There is no general definition of ‘vulnerability’ under the law. However, the criminal justice system and family justice system require judges at an early stage of proceedings to consider the vulnerability of parties and witnesses. Once there is a finding of vulnerability, the person becomes eligible for certain reasonable adjustments to ensure their participation in the hearing.
3. The criminal justice system defines as ‘vulnerable’, those witnesses who are under 18, have a disability, or where various other factors apply (see below).
4. The family court assesses vulnerability on the basis of a number of different factors which are likely to diminish a party or witness’s ability to participate in the case. When assessing these factors, the court should consider the ability of parties or witnesses to understand the proceedings and their own role, put their views to the court, instruct their representatives and attend the hearing without significant distress.
5. This chapter focuses on children, young people and others who would be eligible for these statutory measures to support their participation in court hearings, although it discusses adjustments which can be made beyond those specific measures. The chapter particularly focuses on the criminal court system, because the rules on ‘special measures’ (including intermediaries, and accompanied by ground rules hearings) are well-established. However, it also deals with the family court’s framework of participation directions, and notes that certain other courts and tribunals have derived ideas and guidance to adopt within their own general procedures.
6. This chapter should be considered in conjunction with other chapters in this Bench Book where they also apply. These will give more detail of the potential vulnerability of such witnesses together with suggestions as to reasonable adjustments which can be made to enable participation in the court or tribunal process, eg:
  - Older witnesses. (If there are issues regarding dementia, see [Disability Glossary](#)).
  - Disabled witnesses. (See [chapter 3 \(Physical Disability\)](#), [chapter 4 \(Mental Disability\)](#), and [Disability Glossary](#).)
  - Witnesses who have been subjected to sexual abuse or other forms of domestic abuse. (See [chapter 6 \(Gender\)](#).)
  - Trans witnesses. (See [chapter 12 \(Trans People\)](#).)
  - Witnesses who have been subjected to modern slavery. (See [chapter 7](#)).
  - Witnesses who are refugees or asylum seekers, or do not speak English as a first language. (See [chapter 8](#) for details of the experiences of these groups.)



- Witnesses who have been subjected to hate crime, eg because of their race, religion or sexual orientation. (See chapter 8, sections on [Antisemitism](#) and [Islamophobia](#), and [chapter 10 \(Sexual orientation\)](#).)
- Witnesses who are unable to read or write or verbally communicate very well. (See [chapter 11 \(Social exclusion\)](#).)
- Witnesses who might lack mental capacity, see [chapter 5](#).

### ***The rights of young and vulnerable witnesses to effective participation***

7. Dealing with cases justly is fundamental to our courts and tribunals system. This may present more of a challenge to the decision-maker when parties or witnesses are children or vulnerable adults and have difficulty engaging with the court or tribunal process.
8. The need for swift adoption of remote hearings during the Covid-19 pandemic has magnified difficulties faced by children and vulnerable adults in hearings. Judges need to be alert to these issues and to mitigate them where possible. See Appendix E regarding [Remote Hearings](#).
9. The United Nations Convention on the Rights of the Child sets out a number of key principles, including:
  - Article 3: The best interests of the child must be a top priority in all decisions and actions that affect children.
  - Article 12: Every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously. This right applies at all times, for example during immigration proceedings, housing decisions or the child's day-to-day home life.
10. Similarly, the United Nations Convention on the Rights of Persons with Disabilities outlines in articles 12 and 13 the need for States to ensure equal recognition before the law and effective access to justice.
11. The Family Justice Council has set out 'Guidelines in relation to children giving evidence in family proceedings' to support courts in deciding whether a child should give evidence.<sup>1</sup> The Guidelines cover practical and procedural matters that should be considered at an early stage in the case.
12. The effective participation in criminal proceedings by young and vulnerable defendants has been considered in a series of cases<sup>2</sup> and it is relevant to the issue of a fair trial under article 6 of the European Convention on Human Rights. The Equality and Human Rights Commission has recently expressed concerns about whether effective participation is working well in practice, particularly amongst adults with mental impairments.<sup>3</sup>

<sup>1</sup> 'Guidelines in relation to children giving evidence in family proceedings': Working Party of the Family Justice Council (Dec 2011).

<sup>2</sup> For example, *V v UK* (2000) 30 EHRR 121; *SC v UK* (2005); *R(TP) v West London Youth Court* (2005) EWHC 2583 (Admin.); *R v Dixon* [2013] EWCA Crim 465, [2014] WLR 525 at para 97.

<sup>3</sup> 'Inclusive Justice: a system designed for all': Equality and Human Rights Commission (June 2020).

13. In criminal proceedings, the Criminal Procedure Rules (Part 18) and the Consolidated Criminal Practice Directions set out (in part 3) the court's duties to adapt its process to assist the young and vulnerable witness and defendant.
14. The Sentencing Council in its 'Sentencing Children and Young People - Definitive Guideline' makes it clear that when sentencing the court must consider both statutory duties which apply, ie the principal aim of the youth justice system (preventing offending), and the welfare of the child or young person. The welfare principle in section 44 of the Children and Young Person Act 1933 applies to all young people before the court – whether witnesses or defendants.
15. Welfare considerations include:
  - Any mental health problems or learning difficulties/disabilities.
  - Any experiences of brain injury or traumatic life experience (including exposure to drug and alcohol abuse), and the developmental impact this may have had.
  - Any speech and language difficulties, and the effect this may have on the ability of the child or young person (or any accompanying adult) to communicate with the court, to understand the sanction imposed or to fulfil the obligations resulting from that sanction.
  - The vulnerability of children and young people to self-harm, particularly within a custodial environment; and
  - The effect on children and young people of experiences of loss and neglect and/or abuse.

### ***Vulnerability of young and adult offenders***

16. The Youth Justice Board and Ministry of Justice, looking at children who had been sentenced in 2018/2019, found that the proportion of the total children assessed who had a Speech, Language and Communication concern was 71%.<sup>4</sup> A survey earlier in 2015, reported that a significant proportion of youth justice services have no access to speech language therapy provision or access to any support for their service users with speech, language and communication needs (SLCN).
17. Evidence shows that both 'looked after' children and young people, and BAME (black, Asian and minority ethnic) children and young people, are overrepresented in the criminal justice system.<sup>5</sup> There is an ongoing inquiry into the youth justice system by the Justice Committee<sup>6</sup> and disproportionality is to be part of the investigation. See also chapter 8 regarding [BAME people in the youth justice system](#).

<sup>4</sup> '[Assessing the needs of sentenced children in the Youth Justice System 2018/19](#)': Youth Justice Board and Ministry of Justice (28 May 2020).

<sup>5</sup> Paras 1.16 and 1.18 Overarching Principles: Sentencing Children and Young People (Sentencing Council Definitive Guideline).

<sup>6</sup> 'Children and Young People in Custody': House of Commons Justice Committee Inquiry (opened 2 June 2020).

18. As regards children sentenced in 2018/2019,<sup>7</sup> there were concerns on learning (education and training) in 65% of cases, substance misuse concerns in 75%, 45% of them had a care history, 71% were rated as having mental health concerns, 47% had physical health concerns and overall, over half (56%) of children assessed showed them to be a current or previous Child in Need. (A Child in Need is defined as a child who is unlikely to achieve or maintain a reasonable level of health or development, or whose health and development is likely to be significantly or further impaired, without the provision of services.)
19. The 'No one knows' Prison Reform Trust programme found that between 20% and 30% of adult offenders have learning disabilities or difficulties that interfere with their ability to cope within the criminal justice system.
20. The House of Commons Justice Committee published its report on the treatment of young adults in the criminal justice system in October 2016, with a follow-up report published in October 2018.<sup>8</sup> It found that research from a range of disciplines strongly supports the view that young adults are a distinct group with needs that are different both from children under 18 and adults older than 25, underpinned by the developmental maturation process that takes place in this age group.
21. This is important as young people who commit crime typically stop doing so by their mid-20s. Those who decide no longer to commit crime can have their efforts to achieve this frustrated both by their previous involvement in the criminal justice system due to the consequences of having criminal records, and by limitations in achieving financial independence due to lack of access to affordable accommodation or well-paid employment, as wages and benefits are typically lower for this age group.
22. The Justice Committee felt there was a strong case for a distinct approach to the treatment of young adults in the criminal justice system. Young adults are still developing neurologically up to the age of 25 and have a high prevalence of atypical brain development. These both impact on criminal behaviour and have implications for the appropriate treatment of young adults by the criminal justice system as they are more challenging to manage, harder to engage, and tend to have poorer outcomes. For young adults with neuro-disabilities, maturity may be significantly hindered or delayed. Dealing effectively with young adults while the brain is still developing is crucial for them in making successful transitions to a crime-free adulthood. They typically commit a high volume of crimes and have high rates of re-offending and breach, yet they are the most likely age group to stop offending as they 'grow out of crime'.<sup>9</sup> The Justice Committee in 2018 indicated that, as part of the Ministry of Justice's 'Justice 2030' project, they expect prison and probation services to have developed approaches which properly assess and address young adults' needs, recognise their strengths,

<sup>7</sup> ['Assessing the needs of sentenced children in the Youth Justice System 2018/19'](#): Youth Justice Board and Ministry of Justice (28 May 2020).

<sup>8</sup> 'The treatment of young adults in the criminal justice system': House of Commons Justice Committee (October 2016); 'Young adults in the criminal justice system' House of Commons Justice Committee (June 2018).

<sup>9</sup> See paragraphs 7 – 10 and 24 of the Justice Committee report.

and support them to develop non-criminal identities, resulting in better outcomes both for them and society at large.<sup>10</sup>

23. Flawed interventions that do not recognise young adults' maturity can slow desistance and extend the period of involvement in the system.

## ***The duty to safeguard children and vulnerable adults***

### **Safeguarding generally**

24. Local authorities have overarching responsibility for safeguarding and promoting the welfare of all children and young people in their area. However, everyone who comes into contact with children and families has a role to play.<sup>11</sup> Safeguarding and promoting the welfare of children is defined for the purposes of that guidance as:
  - Protecting children from maltreatment.
  - Preventing impairment of children's health or development.
  - Ensuring that children grow up in circumstances consistent with the provision of safe and effective care; and
  - Taking action to enable all children to have the best outcomes.
25. Safeguarding adults is defined as protecting an adult's right to live in safety, free from abuse and neglect. It is about people and organisations working together to prevent and stop both the risks and experience of abuse or neglect, while at the same time making sure that the adult's wellbeing is promoted including, where appropriate, having regard to their views, wishes, feelings and beliefs in deciding on any action.<sup>12</sup> This must recognise that adults sometimes have complex interpersonal relationships and may be ambivalent, unclear or unrealistic about their personal circumstances.<sup>13</sup>

### **Safeguarding in courts and tribunals**

26. Individuals may have distressing experiences at court as a result of an accumulation of procedural failures and the way they are questioned. In safeguarding and other thematic reports on children, victims and vulnerable witnesses, the Criminal Justice Inspectorates highlight the risk of secondary abuse from the criminal court process.
  - For example, a 2012 report stressed<sup>14</sup> that victims and witnesses, particularly those who are young and vulnerable 'continue to be adversely affected by an absence of real focus on their needs... the [CJS] system itself appears to be unable to maintain a consistent and acceptable level of care

<sup>10</sup> 'Young adults in the criminal justice system': House of Commons Justice Committee (12 June 2018).

<sup>11</sup> 'Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children': HM Government (2018).

<sup>12</sup> 'Care and support statutory guidance': Department of Health & Social Care (updated 24 June 2020), para 14.7.

<sup>13</sup> Definition taken from the 'Care and Support Statutory Guidance' Issued under the Care Act 2014: Department of Health (updated 24 June 2020).

<sup>14</sup> 'Joint inspection report on the experience of young victims and witnesses in the Criminal Justice System': HMCPSP and HMIC (2012).

as cases pass through it'. A 'Victims Strategy' (September 2018) has now been published by the government.

- Similarly, in 2014, it was found that the needs of many people with learning disabilities are going unnoticed when they are arrested by police, go to court and are sentenced.<sup>15</sup>
27. The Inspectorates have recommended that courts' existing safeguarding policy and practice be brought together into 'overarching strategies'. HMCTS has developed a safeguarding policy for court staff (addressing, for example, listing strategy and the need for ushers working with vulnerable witnesses to have police checks). Two key documents are:
- 'Safeguarding Policy for Victims and Witnesses – The Criminal Courts April 2014.'
  - 'Customer Accessibility and Inclusion Reasonable Adjustment Guidance' – For staff working with disabled court and tribunal customers November 2018.'

### **The judiciary's role in safeguarding**

28. Judges and magistrates have a role in safeguarding vulnerable people at court in ways which further the overriding objective and do not interfere with judicial independence.
29. The Government's safeguarding policy 'Working together to safeguard children' (2018) emphasises that:
- Safeguarding is everyone's responsibility, requiring each professional and organisation to play their full part.
  - A child-centred approach is needed, based on a clear understanding of children's needs and views.
30. Ways in which to discharge this responsibility include:
- Being alert to safeguarding concerns when dealing with a child (or vulnerable adult) and addressing them through effective planning and proactive enquiries.
  - Ensuring that a named individual has responsibility for the vulnerable person's welfare at the hearing, with a line of communication to alert you to difficulties.
  - Requiring that a parent or guardian attends with a child or young person appearing before the court.<sup>16</sup>
  - Having contingency plans (eg regarding the timing of the vulnerable witness's evidence) if things go wrong in ways affecting the witness's welfare.
31. Safeguarding concerns should not be over-ridden because of pressures arising elsewhere in the justice system process. Whether the witness should seek pre-

<sup>15</sup> 'A Joint Inspection of the Treatment of Offenders with Learning Disabilities within the Criminal Justice System – Phase 1 From Arrest to Sentence': Criminal Justice Joint Inspection (2014).

<sup>16</sup> Children and Young Persons Act 1933, Section 34A.

trial therapy is not a decision for the police, prosecutor or court; the best interests of the witness are the paramount consideration.<sup>17</sup> The government's Victims Strategy has announced plans for new guidance and a toolkit to assist prosecutors and therapists.

32. Safeguarding is most at risk when responsibilities are unclear and there is a breakdown of communication, as illustrated by these examples:
  - An usher was alone with a young witness in the TV link room. The witness became distressed by giving evidence and began to bang his head against the wall. The witness's mother was nearby and came to assist but the usher was not sure what to do – whether he could touch or restrain the young person.
  - A specialist police officer had provided support to a victim of sexual assault over a lengthy period, building up the trust and confidence of the victim. However, the trial was listed when she was on annual leave and unable to attend. This reduced the support available to the victim when it was most required.<sup>18</sup>

Such situations can be avoided by flexibility of approach, clear communication and robust case management.

33. This chapter focuses primarily on ways to adapt criminal proceedings to accommodate children and other vulnerable witnesses and defendants, but much of it is also relevant to civil and family cases, and to tribunal hearings with a vulnerable witness, party or litigant in person.
34. The Civil Justice Council Working Group in February 2020 reported on how the civil justice system can better help vulnerable individuals to participate in civil litigation and give the best evidence that they can, recommending immediate and widespread changes to rules, practices, training and resources.<sup>19</sup> The April 2021 amendment to the CPR's overriding objective and a new Practice Direction 1A have resulted from this work.
35. Similarly, new procedure rules are being considered by tribunals.

## Competence

36. A witness of any age is competent to give evidence unless the court considers that they are not able to understand the questions put to them and give intelligible answers to those questions.<sup>20</sup> This may require the assistance of an intermediary (see below). The test does not require the witness to understand every question, or to give a readily understood answer to every question; the test is not failed because the forensic techniques of the advocate or court

<sup>17</sup> 'Provision of therapy for child witnesses prior to a criminal trial' and 'Provision of therapy for vulnerable or intimidated adult witnesses prior to a criminal trial': CPS, Department of Health and Home Office Practice Guidance (2001).

<sup>18</sup> Examples taken from the Joint inspection report on the experience of young victims and witnesses in the criminal justice system.

<sup>19</sup> 'Vulnerable witnesses and parties – current position and recommendations for change': Civil Justice Council (Feb 2020).

<sup>20</sup> Youth Justice and Criminal Evidence Act 1999, section 53.

processes have to be adapted to enable witnesses to give the best evidence of which they are capable.<sup>21</sup>

37. Even if competence is assumed, or ruled upon in favour of the witness by the judge, the judge is under a continuing duty to keep the matter under review and a party is not precluded from raising it during the course of the trial if justified.
38. When there is material indicating that the witness satisfies the competency test (such as an ABE (Achieving Best Evidence) interview and an intermediary report), the court and the parties should carefully consider whether a competency hearing is, in fact, necessary at the initial stage of the case. In some circumstances, such a hearing may serve to do no more than cause delay, increase expense and put unnecessary strain on the witness.<sup>22</sup>
39. The problem of communicative competence may not be that of the witness, but of the questioners. In *R v F*, the court found that ‘the problem arose over an issue of ability to communicate with H in a non-leading way, rather than an issue of H’s comprehension and thus her competence... what was intended to be a test of competency was seriously flawed’.
40. As to the effect of a ruling of competence, Lord Judge LCJ in *R v B* added ‘in our collective experience the age of a witness is not determinative on his or her ability to give truthful and accurate evidence. ...If competent, as defined by the statutory criteria, in the context of credibility in the forensic process, the child witness starts off on the basis of equality with every other witness.’

### ***The need to adapt procedures***

41. Courts and tribunals are expected to adapt normal trial procedure to facilitate the effective participation of witnesses, defendants and litigants, by taking ‘every reasonable step to facilitate the participation of any person, including the defendant’ in preparation for trial.<sup>23</sup> There are also duties to make adjustments to enable the full participation of disabled people.<sup>24</sup>
42. The Senior President of Tribunals issued the ‘Child, Vulnerable Adult and Sensitive Witnesses Practice Direction’ in 2008, which applies to the First Tier and Upper Tribunal.<sup>25</sup> A witness falling within any of these categories will only be required to attend as a witness and give evidence at a hearing, where the tribunal determines that the evidence is necessary to enable the fair hearing of the case, and that their welfare would not be prejudiced by doing so. The tribunal, having heard representations from the parties and others affected, such as the parents of a child, must consider how to facilitate the giving of any evidence from such a witness. It may be appropriate for the tribunal to direct that the evidence should be given by telephone, video link or other means or to direct that a person be appointed for the purpose of the hearing who has the

<sup>21</sup> *R v B* [2010] EWCA Crim 4.

<sup>22</sup> *R v F* [2013] EWCA Crim 424.

<sup>23</sup> Criminal Procedure Rules 2020, as amended, rule 3.9(3)(b).

<sup>24</sup> See chapter 4, ‘Mental Disability’, for more detail.

<sup>25</sup> See also the Joint Presidential Guidance Note 2 of 2010 which, although developed for the First Tier Immigration and Asylum Chamber, has principles of good judgecraft which can be adapted more widely.

appropriate skills or experience in facilitating the giving of evidence by a child, vulnerable adult or sensitive witness.<sup>26</sup>

43. In a 2017 Court of Appeal asylum case, the SPT gave important guidance on the fair determination of claims involving children, young people and other incapacitated or vulnerable persons whose ability to effectively participate in proceedings may be limited. Flexibility is key, as is the welfare of the individual. There is particularly useful guidance regarding how to assess such a person's evidence fairly, and indeed whether oral evidence should be required at all. It is recommended that such guidance be read along with the Practice Direction. The SPT added that whilst there is no specific provision to appoint a litigation friend, there is flexibility in the tribunal rules or through the overriding objective to permit this where the child or incapacitated adult would not be able to represent him/herself and obtain effective access to justice without the appointment. For more detail on litigation friends, see [chapter 5](#).
44. In the 2013 Toulmin Lecture, the Lord Chief Justice, Lord Judge, said that:  

'Just because a change does not coincide with the way we have always done things does not mean that it should be rejected....Do proposed changes cause unfair prejudice to the defendant?: if so, of course, they cannot happen. If however they make it more likely to enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective'.<sup>27</sup>
45. These principles have been reflected in criminal and family appellate decisions. For example:
  - 'When necessary, the processes have to be adapted to ensure that a particular individual [in this case, a defendant with complex needs] is not disadvantaged as a result of personal difficulties, whatever form they may take'.<sup>28</sup>
  - A judge's general duty to manage all cases to achieve targets 'cannot in any circumstance override the duty to ensure that any litigant... receives a fair trial and is guaranteed what support is necessary to compensate for disability'.<sup>29</sup> In this case, the Court of Appeal found a breach of article 6 rights where, despite a report recommending special measures, a father of 'limited capacity' gave evidence in family proceedings with only 'unsatisfactory makeshift' arrangements.
  - Where a mother with learning difficulties was denied an intermediary for giving evidence, there had been a fundamental breach of her rights under article 6 of the European Convention on Human Rights and she had been denied a fair trial. Although her needs had not been identified by her legal team, once she had started giving evidence and the difficulties became

<sup>26</sup> *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123 provides guidance regarding the general approach to vulnerable witnesses in asylum claims. *RT v SSWP (PIP)* [2019] UKUT 207 (AAC) makes it clear that failure to follow the Practice Direction will amount to an error of law.

<sup>27</sup> 'Half a Century of Change: The Evidence of Child Victims'. King's College London.

<sup>28</sup> Lord Chief Justice, para 29, *R v Cox* [2012] EWCA Crim 549; see also *R v B* [2010] EWCA Crim 4.

<sup>29</sup> Lord Justice Thorpe, para 21, *In the Matter of M (A Child)* [2012] EWCA Civ 1905.



apparent, there should have been an adjournment for a cognitive assessment.<sup>30</sup>

46. Decisions about how procedures should be adapted should be made as early as possible.
47. In criminal proceedings the role of special measures in assisting witnesses and defendants is set out in statute. These are set out in the section 'Special measures and related adjustments' below.
48. There is a parallel framework for the family courts, assisting parties and witnesses by way of 'participation directions'.
49. The Youth Court Panel Protocol offers advice to magistrates and district judges (magistrates' court) on dealing with children and young people in the youth court.<sup>31</sup>
50. In employment tribunals, there is Presidential Guidance in relation to vulnerable parties and witnesses (including children).<sup>32</sup> The Guidance suggests 'vulnerability' could be defined as where someone is likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case. The Guidance states that the tribunal and parties need to identify any party or witness who is a vulnerable person at the earliest possible stage of proceedings. They should also consider whether the quality of the evidence given by a party or witness is likely to be diminished by reason of vulnerability. The Guidance states while the Covid-19 pandemic continues to affect society, and legal proceedings in particular, 'appropriate regard shall be had to its effect upon vulnerable persons and their participation in Employment Tribunal proceedings in the context provided by this Presidential Guidance'.

## ***Expedited time-scales and active case management***

### **Rules and materials**

51. The relevant procedural rules and useful materials for case management are:
  - Part 3 and Part 18 of the Criminal Procedure Rules
  - Criminal Practice Directions Division I: General Matters
    - 3A Case management
    - 3D Vulnerable people in the Courts
    - 3E Ground rules hearings to plan the questioning of a vulnerable witness or defendant
    - 3F Intermediaries
    - 3G Vulnerable defendants.
  - Criminal Practice Directions XIII Annex 2 Sexual offences in the youth court.

<sup>30</sup> *N (a child)* [2019] EWCA Civ 1997.

<sup>31</sup> A Magistrates' Association document, at Appendix A of the Judicial College Youth Court Bench Book.

<sup>32</sup> 'Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings' (April 2020).

- Part 3A Family Procedure Rules ('FPR') 2010.
- Practice Direction 3AA (supplementing the FPR) – Vulnerable Persons: Participation in Proceedings and Giving Evidence.
- Practice Direction 12A (supplementing the FPR) – Care, Supervision and Other Part 4 Proceedings: Guide to Case Management. PD 12A para 5.8 addresses parallel care and criminal proceedings. See also the 2013 Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings (October 2013).<sup>33</sup>
- Practice Direction 12B (supplementing the FPR) – Child Arrangements Programme, especially PD12B, para 4, in relation to the child's involvement in proceedings.
- Practice Direction 12J (supplementing the FPR) – Child Arrangements and Contact Orders: Domestic Abuse and Harm. See para 10 in relation to participation and need for special arrangements.
- President's Guidance of 10 April 2018 – Family Proceedings: Parents with a Learning Disability.
- 'Judicial College Bench Checklist: Young Witness Cases' (2012).
- 'Protocol between the National Police Chiefs' Council, the CPS and HMCTS to Expedite Cases Involving Witnesses under 10 Years' (2018). This is sometimes referred to as the 'Young witness protocol'.
- The Advocate's Gateway toolkits.<sup>34</sup>

## Timetabling

52. Section 1(2) of the Children's Act 1989 says that 'in any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.' This does not apply exclusively to family or care cases. A question regarding the upbringing of a child could arise eg in decisions regarding changes of name, or interim payments in personal injury or clinical negligence cases for accommodation for a child or to enable a disabled parent to look after a child at home where the parent became disabled because of the personal injury.
53. Case management powers should be exercised to the full where a vulnerable witness or defendant is involved. Vulnerable people are often more adversely affected by delay, both in terms of their recall and their emotional well-being. Timetabling is therefore an issue that impacts upon best evidence and safeguarding.<sup>35</sup>

<sup>33</sup> The Protocol and Good Practice Model 2013 (and associated documents) can be accessed on the Judicial Intranet.

<sup>34</sup> See References and resources section at the end of this chapter.

<sup>35</sup> 'Falling short. A snapshot of young witness policy and practice': Plotnikov and Woolfson. NSPCC (Feb 2019).

54. The Young Witness Protocol<sup>36</sup> sets out a timetable for the investigation stage of cases which may be coming before the criminal courts where a witness aged 10 or under is involved. It should ensure that such cases are given priority during investigation and subsequent prosecution. It also sets out expedited timescales within which trials should take place.
55. Every magistrates' court centre should have in place an arrangement to ensure that they have early notification from the police of the first listing of sexual offences in the youth court as these cases must be listed before an authorised judge.<sup>37</sup>
56. The judge should schedule responses and make orders as necessary at the first appearance in the magistrates' court or preparatory hearing or plea and trial preparation hearing (PTPH) in the Crown Court, eg by:
  - Prioritising vulnerable witness cases.<sup>38</sup> Delay in a case involving a child complainant should be kept to an 'irreducible minimum'.<sup>39</sup>
  - Obtaining availability dates not just for witnesses but for any intermediary or named supporter, and dates to avoid for exams or other important events.
  - Fixing young witness trials, not behind another trial or as a 'floater'. In exceptional circumstances, floating the trial may be appropriate: the Inspectorates describe as good practice offering a young witness an earlier floating date to try to ensure that her evidence is given before her school examinations start. If there are child witnesses under the age of 10 years, the initial case management hearing in the Crown Court must be held 14 days after sending and the trial should be fixed not more than 8 weeks from the date of plea.<sup>40</sup>
57. To ensure a fast time-table can be adhered to, pre-planning is necessary:
  - Where section 28 of the Youth Justice and Criminal Evidence Act 1999 applies, allowing vulnerable and intimidated witnesses to video record their cross-examination before the trial, the timetable set out in Criminal Practice Directions V Evidence 18E must be followed.<sup>41</sup>
  - If necessary, fix the courtroom for a live link trial. In an intermediary case, plasma screens will give a better view of intermediary/witness interaction.
  - Timetable any editing of the DVD interview, allowing time for the witness to see the edited version. Check that the DVD is compatible with court equipment. Consider the need for a transcript and, if used, check its accuracy. Where important non-verbal communication is omitted or key passages are marked 'inaudible' because the witness's speech is hard to hear or decipher, intermediaries have been asked to revise the transcript.

<sup>36</sup> 'A Protocol between the National Police Chiefs' Council, the CPS and HMCTS to Expedite Cases Involving Witnesses under 10 Years' (2018).

<sup>37</sup> Criminal Practice Directions XIII Annex 2.

<sup>38</sup> 'Achieving Best Evidence in Criminal Proceedings': Ministry of Justice (March 2011), section 4.83.

<sup>39</sup> *R v B* [2010] EWCA Crim 4.

<sup>40</sup> 'A Protocol between the National Police Chiefs' Council, the CPS and HMCTS to Expedite Cases Involving Witnesses under 10 Years' (2018).

<sup>41</sup> See also 'Guidance on the use of section 28 YJCEA 1999; pre-recording of cross-examination and re-examination. For witnesses captured by section.17(4) YJCEA 1999' (30 September 2019).

- Ensure that applications for disclosure of third party material/public interest immunity hearings are made and dealt with at an early stage.
- Address special measures and any other necessary modifications to the trial procedure to provide greater certainty to the witness. While special measures applications should be made within 28 days of entry of a not guilty plea in the magistrates' court and 14 days in the Crown Court, a late application should not be rejected solely because it is made out of time. Be aware that the Inspectorates warn that police and Witness Care Unit needs assessments are often inadequate, with a detrimental effect in criminal cases which progress to trial. Be alert to the possibility that needs have not been considered or identified and ask for information to be updated if necessary. Special measures should be tailored to the individual witness. Applications may be made at the first hearing in the magistrates' court and should be dealt with immediately if possible. This provides reassurance to the witness well in advance of a trial date.
- Schedule a ground rules hearing at least a week before the day of trial to give advocates time to adapt their questions to the witness's needs.

### **Avoiding adjournments**

58. A trial date involving a young or vulnerable adult witness should only be changed in exceptional circumstances. By exerting tight control at an early stage, it will be less likely that an adjournment will be necessary to safeguard the rights of the defendant. Research, even before the Covid-19 pandemic, indicates that at least one-third of young witness trials are adjourned, many of them more than once. This can have a detrimental impact upon witness recall and emotional well-being as well as on the fairness of outcomes.
59. If an application for an adjournment is sought, consider the adverse effect of delay on the vulnerable person and consider whether:
  - Another judge can take the trial on the original date.
  - The trial can be heard elsewhere, taking account of witness/defendant views.
  - A trial with a lesser priority can be vacated instead.
  - The trial really needs adjourning. Can the matter be dealt with by admissions? In many cases where section 28 applies, it will not be necessary to adjourn a section 28 cross-examination as the problem in question can be dealt with by evidence other than from the vulnerable witness.
60. If postponement is unavoidable, a trial involving a vulnerable witness should be re-listed as a priority and in the shortest possible time.

### **Scheduling a 'clean start' to witness testimony**

61. The capacity of a vulnerable witness to give evidence is likely to deteriorate if he or she is kept waiting.
62. The Inspectorates express concern that many vulnerable witnesses experience lengthy delays, exceeding court waiting time targets, even when a 'clean start' is

scheduled for their testimony. This can be devastating both for the witness and the quality of the evidence. Problems result from:

- The judge having to deal with other matters first. CrimPD Division XIII Listing at A.3(a) sets out the requirement for cases to be tried within as short a time of their arrival at court as is consistent with the interests of justice and the needs of victims and witnesses, imposing a duty on the Resident Judge to ensure that good practice is implemented such that all hearings commence on time (CrimPD Division XIII Listing A.5). Reasons for this policy, particularly in respect of vulnerable witnesses, should be brought to the attention of the Listing Officer.
  - Witness waiting times artificially extended by advice to arrive at the hearing early, in order to avoid seeing or being seen by the defendant. There are other ways to avoid confrontation, eg in one case, a judge ordered the defendants to be seated in the dock for ten minutes at the start and end of each court day to ensure that young witnesses could enter and leave the building calmly.
  - Discussions which do not, in the end, result in a guilty plea.
63. Last-minute legal discussions should not be allowed to have the knock-on effect of prejudicing the effectiveness of a vulnerable witness's evidence through tiredness and stress.
64. An option is to schedule the start of a vulnerable witness trial in the afternoon (enabling the trial judge to deal with any outstanding issues), with the first vulnerable witness listed promptly at the start of the second day (with further directions for other vulnerable witnesses). Even if the court has to rise early, it is a small price to pay to maximise the quality of evidence of the vulnerable witness the next morning. If there is any risk that their evidence will not start on time, they should be advised to wait on standby.
65. It is important to:
- Agree staggered witness start times, ensuring opening/preliminary points will be finished when the first witness's evidence is due to start.
  - Schedule testimony to start while the witness is fresh (usually at the start of the day though for some vulnerable witnesses this may be different), taking account of concentration span and the effect of any medication.
  - Schedule each stage of the witness's evidence, including breaks. Duration should be developmentally appropriate and limits may be imposed.<sup>42</sup>
  - Scheduling children to give evidence for short periods, with breaks, and in the mornings. As a general rule, a young child will lose concentration after about 15 minutes, whether or not this becomes obvious. In most cases a child's cross-examination should take no more than an hour and usually considerably less. Advocates must be required to adapt to the witness and not the other way round.<sup>43</sup> Control needs to be taken at the ground rules hearing to ensure that only those matters which are relevant are put. Not

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<sup>42</sup> Rule 3.11(b)(ii), Criminal Procedure Rules October 2020, as amended.

<sup>43</sup> *R v Lubemba* [2014] EWCA Crim 2064 – Hallett LJ at para 45.

everything needs to be put to the child, and thought should be given as to whether the evidence can go in front of the jury in another form.

- Schedule a ground rules hearing on a suitable date prior to the hearing, so that it does not risk causing delays. If deferred until the day of the witness's testimony, ensure that the hearing does not add to the witness's waiting time.
- Permit witnesses who are unable to give evidence, eg because of distress due to a delayed start or as a result of inappropriate questioning), to come back the next day (if necessary, following a further ground rules discussion between the judge and advocates), rather than dismissing the case immediately.
- Allow time for introductions, and take account of the witness's wishes. Prosecutors are expected to meet the witness and defence advocates may find it useful to do so. Accompanying the advocates at such a meeting can be a useful opportunity for judges to introduce themselves and to 'tune in' to the witness's level of communication. Where justified by the circumstances, some trial judges have met the vulnerable witness with the advocates before the day of the witness's evidence.

## ***Special measures, participation directions and related adjustments***

### **Special measures**

66. This section discusses ways to ensure that statutory 'special measures' and related directions achieve their objective of helping the witness or defendant to give evidence and improving the quality of that evidence.
67. In the criminal courts, 'vulnerable' for the purposes of special measures automatically includes all those under 18 years of age. Those people with a mental disorder or learning disability, a physical disorder or disability, or who are likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case, may also be entitled to the protection of special measures if the court decides that the quality of their evidence is likely to be diminished by reason of their vulnerability.<sup>44</sup> Witnesses to certain offences have automatic eligibility for special measures.
68. Special measures are set out in sections 16 – 33 of the Youth Justice and Criminal Evidence Act 1999. Also applicable are Criminal Procedure Rules October 2020 (as amended), rule 18.8 – 18.13, and Criminal Practice Directions, Division 1, 3D to 3G and 3N.11.<sup>45</sup> Those who are entitled to special measures are as follows:
  - All witnesses under 18 at the time of the hearing or video recording.
  - Vulnerable witnesses affected by a mental or physical impairment.
  - Witnesses in fear or distress about testifying.

<sup>44</sup> Youth Justice and Criminal Evidence Act 1999, section 16 and section 17.

<sup>45</sup> See also the Judicial College's 'Crown Court Compendium', Part 1, section 3-6 on 'Special Measures'.

- Adult complainants of sexual offences, or trafficking/exploitation offences, and
- A witness to a 'relevant offence', currently defined to include homicide offences and other offences involving a firearm or knife.

69. The statutory special measures are:

- Screening the witness from the accused.
- Giving evidence by live link, so that the witness can give evidence from another room in the same or a different building, accompanied by a supporter.
- Giving evidence in private, available for sex offence or human trafficking cases or where there is a fear that the witness may be intimidated.
- Removal of wigs and gowns while the witness gives evidence.
- Video recording of evidence-in-chief. (This is the ABE recorded interview.)
- Video recording of cross-examination and re-examination where the evidence in chief of the witness has already been video recorded. (This is under section 28.)
- Examination through an intermediary.
- Provision of aids to communication.
- Anonymity.

### **Disapplying special measures**

70. It is open to a party to ask that a previously granted special measure be lifted or to opt out of special measures altogether if there has been a material change in circumstances. Care should be taken to ensure this is a genuine request and not for some underlying reason such as frustration or threats. The request should be carefully assessed by the court before granting it to ensure it is in the interests of justice to alter the special measures direction.

### **Participation directions in the family court**

71. A family court must consider whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and if so, whether it is necessary to make one or more participation directions. Before making any such directions, the court must consider any views expressed by the party or witness about giving evidence. The court must set out its reasons for making or deciding not to make any participation direction.<sup>46</sup>
72. The factors which the court is required to take into account when assessing vulnerability are:
- The impact of any actual or perceived intimidation of the party or witness.

<sup>46</sup> FPR 2010 rules 3A.5 and 3A.9.

- Whether they suffer from mental disorder or have a significant impairment of intelligence or social functioning, have a physical disability or suffer from a physical disorder or are undergoing medical treatment.
- The nature and extent of any information before the court.
- The issues arising in the proceedings including concerns about abuse – this includes domestic, sexual, physical and emotional abuse, racial and/or cultural abuse or discrimination, forced marriage or so called ‘honour based’ violence, female genital or other physical mutilation, abuse or discrimination based on gender or sexual orientation and human trafficking.
- Whether a matter is in dispute.
- The age, maturity and understanding of the party or witness.
- Their social and cultural background and ethnic origins.
- Their domestic circumstances and religious beliefs.
- Any questions which the court is putting to a witness on behalf of a party.
- Any characteristic of the party or witness relevant to the participation directions.
- The nature and extent of any information before the court.

73. Participation directions can:

- Prevent a party or witness from seeing another party or witness.
- Allow a party or witness to participate/give evidence by live link.
- Provide for use of a device to help communication.
- Provide for the assistance of an intermediary.
- Deal with the structure and timing of the hearing, the formality of language to be used in court and whether the parties should attend court via different entrances and use different waiting areas.

74. If necessary, the court may consider sitting at another location, for example if live link facilities are only available at certain court buildings.

### **Avoiding confrontation**

75. Standard 14, of the MOJ’s Witness Charter<sup>47</sup> requires court security and staff to ensure that there are appropriate safety measures in place in court for vulnerable and intimidated witnesses. This will include being able to use a separate waiting area or, if a separate area is not available, being allowed to wait on standby near the court. Judges should enquire about the effectiveness of procedures at their court, including whether vulnerable witnesses are able to use an alternative entrance.

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<sup>47</sup> ‘The Witness Charter: Standards of Care for Witnesses in the Criminal Justice System’: MOJ (Dec 2013). See also the ‘Code of Practice for Victims of Crime’: MOJ (Nov 2020).



## Screens

76. Emphasis is now given to the witness's viewpoint as to how evidence should be given. Witnesses are likely to give better evidence when they choose how it is given. Witnesses eligible for special measures and not wishing to be seen by the defendant may prefer screens.
77. Where the witness and defendant are screened from one another in court, if it is not feasible also to shield the witness from the dock and public gallery while entering court, he or she should be behind the screen before the defendant and members of the public are seated, and leave at a different time during adjournments.
78. Arrangements should be made for the witness to enter court through a private entrance or the judge's entrance to ensure there can be no inadvertent meeting between the witness and the defendant and/or his or her supporters.

## Evidence by live link

79. It is good practice to use remote live links where there is a risk of confrontation. Courts can now connect to other court buildings; many are routinely linked to a non-court facility (with good experiences reported by judges and witnesses) or have used mobile police equipment at schools and hospitals. Decide what evidence needs to be taken to the remote site and make sure it is working properly in advance of the day the witness will give evidence.

### *Effectiveness of evidence by live link*

80. The Inspectorates have expressed concern that presumptions are being made about the best method for vulnerable witnesses to give evidence and that some feel pressured not to use the live link:
  - Studies here and in other countries over a period of 20 years have found no significant difference in conviction rates when witnesses use live links.<sup>48</sup>
  - A 2012 study by Ellison and Munro found that special measures had no consistent impact upon juror evaluation of the testimony of female adult rape complainants, juror perceptions of credibility or trial fairness.<sup>49</sup>

### *Witness entitlement to practise on the live link*

81. Witnesses who will be giving evidence by live link are entitled to practise speaking and listening on it<sup>50</sup> and should be shown screens in place. The court may wish to direct that a court familiarisation visit takes place before the trial. This can help identify whether use of the live link interferes significantly with the quality of witness communication.
82. It is helpful (though not a replacement for a visit) if courts provide supporters and intermediaries with photos of live link rooms and screens, or allow them to take photos for the purpose of preparing the witness. The Resident Judge or

<sup>48</sup> 'Child Abuse: Law and Policy Across Boundaries': Hoyano and Keenan (2010). See overview.

<sup>49</sup> 'Special measures in rape trials: Exploring the impact of screens, live links and video-recorded evidence on mock juror deliberation': Ellison and Munro (2012).

<sup>50</sup> 'The Witness Charter: Standards of Care for Witnesses in the Criminal Justice System': MOJ (Dec 2013), standard 11.

Judicial Business Group for the magistrates'/youth court should ensure there is a consistent policy at each court, and support the taking of photographs for this purpose where possible (subject to whatever restrictions are considered appropriate, having regard to court security requirements).

### *Emotional support while using the live link*

83. Potential benefits to witness recall and stress reduction flow from the presence of a known and trusted supporter who can provide emotional support:
  - Courts may specify who accompanies a witness in the live link room and must take the witness's wishes into account.<sup>51</sup>
  - This can be anyone who is not a party / has no detailed knowledge of evidence; ideally, the person preparing the witness for court.
84. A member of the court staff will need to be present to manage the link, administer the Oath or affirmation, and liaise with the court. Clearly they will not be able to offer emotional support to the witness so this will need to be achieved in a different way.

### *Flexible use of the live link*

85. Examples of using the live link process flexibly include:<sup>52</sup>
  - Advocates moving to the live link room to conduct their questioning.
  - Use of an egg-timer in the live link room to time short three minute breaks as required by the witness with the court remaining sitting.
  - Allowing a witness to take a comfort toy into the live link room.
  - Turning off or covering the 'picture in picture' on the witness's TV screen, where this may be a distraction to the witness.
  - Using combined special measures. For example, if a witness who is to give evidence by live link wishes, screens can be used to shield the live link screen from the defendant and the public, as would occur if screens were being used for a witness giving evidence in the courtroom.<sup>53</sup>
86. Young witnesses and those with some disabilities may struggle to communicate across the video link. In such circumstances the judge and the advocate asking questions may move to the live link room and sit with the witness who can then communicate directly. It is important however, not to have too many adults in the live link room at once, as the rooms may become too crowded and intimidating for the witness. Those advocates not asking questions should remain in the courtroom and watch, with the defendant, across the live link. If there is re-examination, or a second defence advocate to ask questions, the advocates can change places as appropriate. Not all intermediaries are aware of this facility and it may need to be raised by the judge.

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<sup>51</sup> Youth Justice and Criminal Evidence Act 1999, section 24 (1A) and (1B).

<sup>52</sup> The Advocate's Gateway – Identifying vulnerability in witnesses and parties and making adjustments – Toolkit 10.

<sup>53</sup> 18A.2, Criminal Practice Directions.

87. Allow children to pause cross-examination briefly to relieve their stress without leaving the live link room, eg by going under a table, behind a curtain or under a blanket, and (in the case of a child with urinary urgency) being permitted to leave the room without prior permission to use the toilet.
88. In one example, a fearful eight-year-old was allowed to calm herself quickly by taking herself out of sight of the main live link camera (but still visible to the judge on the overview camera). The child and intermediary practised these 'in room' breaks beforehand, using a large 30-second egg timer. The judge requested everyone to wait, rather than adjourning the court. The child took around 15 brief breaks (two or three 'egg timer' intervals lasting around 60-90 seconds) across two hours of evidence. Only one complete break and adjournment was required.

### **Refreshing witness memory**

89. Witnesses who give recorded evidence in chief (on DVD) are entitled to refresh their memory before trial.
90. The first viewing is often distressing or distracting and should be scheduled before the day of testimony.
91. Vulnerable witnesses should not be required to watch a DVD of the ABE interview at the same time as the judge and jury. It is both tiring and distressing for them. There is no legal requirement that they do so. Arrangements should be made for them to watch it separately and in advance, and to attend only for cross-examination, unless the particular circumstances of the case require otherwise. Arrangements do need to be made for an independent person (often the officer in the case) to be present and record anything said during the watching of the DVD. This is not the responsibility of the intermediary. These matters should be covered at the ground rules hearing.<sup>54</sup>
92. If it is appropriate to swear the witness, do so just before cross-examination, asking if he or she has watched the DVD and if its contents are 'true', in words tailored to the witness's understanding.
93. Decisions about how, when and where refreshing should take place should be made on a case-by-case basis. There is a risk that a viewing combined with the court familiarisation visit will result in 'information overload'. For more detailed guidance, see Criminal Practice Directions Division V Evidence PD 18C.
94. Arrangements should be judicially led, and are likely to be determined at a ground rules hearing. Someone (usually a police officer, not an intermediary) should be designated to take a note and report to the judge if anything is said during the viewing. In the case of a very young child, it may be appropriate to record the viewing. If the DVD is ruled inadmissible, identify an alternative method of refreshing.

<sup>54</sup> CPD V Evidence 18C.3 and 18C.4 and 'Achieving Best Evidence in Criminal Proceedings' MOJ. (Mar 2011) at section 4.51.

## ***Intermediaries: facilitating complete, coherent and accurate communication***

### **The function**

95. Intermediaries are one of the statutory special measures for prosecution and defence witnesses.<sup>55</sup> They are communication specialists whose primary responsibility is to enable complete, coherent and accurate communication.<sup>56</sup> They are often, but not exclusively, speech and language therapists.
96. Intermediaries are impartial, neutral officers of the court. They are not expert witnesses. Their job is to facilitate communication between all parties and to ensure the vulnerable person's understanding and participation in the proceedings. This includes making an assessment and reporting, orally or in writing, to the court about the communication needs of the vulnerable person and the steps that should be taken to meet those needs.
97. A review into the provision of Registered Intermediaries for children and vulnerable victims and witnesses<sup>57</sup> has found that intermediaries are invaluable in giving vulnerable victims and witnesses a voice in the criminal justice system and in turn, providing them with equality of access to justice. In a 2015 survey of 77 judges, Plotnikoff and Woolfson reported that 'two-thirds of judges say that working with intermediaries has changed their own practice'.
98. The follow-up report encourages those with management responsibility for the registered intermediary scheme to link quality assurance procedures to feedback from judges, lawyers and witnesses for whom intermediaries are appointed, and to produce a competency framework against which performance can be assessed.<sup>58</sup>
99. Historically, there has been a lack of Welsh-speaking registered intermediaries in Wales. There are now a handful. Where one is not available, the Welsh Language Unit can provide an interpreter to assist communication with the witness, but this is not ideal in situations where there are already communication difficulties.

### ***Before the hearing***

100. The need for an intermediary should be considered at the earliest stage in the proceedings possible. An early ground rules hearing is important because the vulnerable person is likely to need help not only during hearings but also away from court for the purpose of giving instructions and considering advice and options.
101. The intermediary will also write an assessment report, indicating the witness's likely needs in court, including whether an intermediary will need to be present.

<sup>55</sup> Youth Justice and Criminal Evidence Act 1999, section 29. For the use of intermediaries for defendants (as opposed to witnesses), see 'Non-registered intermediaries for vulnerable defendants in criminal proceedings' below.

<sup>56</sup> Youth Justice and Criminal Evidence Act 1999, section 16.

<sup>57</sup> 'A Voice for the Voiceless: The Victims' Commissioner's Review into the Provision of Registered Intermediaries for Children and Vulnerable Victims and Witnesses' (January 2018).

<sup>58</sup> 'Falling short? A snapshot of young witness policy and practice': Plotnikov and Woolfson. NSPCC (Feb 2019).

Intermediaries' assessment reports are valued as a guide to how questioning can best be adapted to the individual's needs.

102. In addition, it is common practice for advocates to request intermediary advice ahead of trial about adapting their questions. Where the assessment indicates that some restrictions on cross-examination may be necessary, the judge should review the questions with the intermediary at a ground rules hearing. This can be done without the witness seeing the questions in advance.
103. It is important to appreciate that the intermediary is there to assist and advise the judge, but that it is the judge and not the intermediary who will make the final decision about which questions are or are not to be asked.
104. The way court listings are organised has a detrimental effect on the availability of intermediaries. More precise and reliable court listing of trial dates would result in more Registered Intermediaries being available for work. This in turn would improve waiting times for victims and witnesses to be matched to appropriate intermediaries.<sup>59</sup>

### *During the hearing*

105. Intermediaries are expected to prevent miscommunication from arising, and 'actively to intervene when miscommunication may or is likely to have occurred or to be occurring'.<sup>60</sup>
106. While intermediaries can assist the judiciary to monitor the questioning of vulnerable witnesses and defendants, responsibility to control questioning remains with the judge or magistrates.
107. During the hearing, it can be useful to allow regular breaks with sufficient time for the intermediary to explain to the vulnerable person, what has just happened and is about to happen, as well as time for a proper break in itself. The frequency of breaks may depend on the nature of the evidence being given and whether the vulnerable person is giving evidence.
108. The Judicial College's 'Crown Court Compendium', Part 1 at section 3-7 on 'Intermediaries' deals with the procedure for appointment of intermediaries and directions that should be given, including filing or discussion of the advocates' questions prior to the ground rules hearing.
109. Registered Intermediaries for prosecution and defence witnesses are appointed through the Ministry of Justice Witness Intermediary Scheme involving regulation, police checks, accreditation training, support and standards for matching skills to witness needs.<sup>61</sup>
110. For the use of intermediaries for defendants, see '[Non-registered intermediaries for vulnerable defendants in criminal proceedings](#)'. An intermediary is not usually available for a litigant in person in civil proceedings. They may be supported in appropriate circumstances by a family member or McKenzie friend.

<sup>59</sup> 'A Voice for the Voiceless: The Victims' Commissioner's Review into the Provision of Registered Intermediaries for Children and Vulnerable Victims and Witnesses' (January 2018).

<sup>60</sup> *R v Cox* [2012] EWCA Crim 549.

<sup>61</sup> 'The Registered Intermediary Procedural Guidance Manual': Ministry of Justice, (2019).

## Should an intermediary be appointed?

111. The Criminal Justice Inspectorates highlight poor levels of awareness about the benefits of intermediary use. For example, intermediaries appointed post-interview often find that a written statement has been taken from a witness who does not understand it and cannot read it. Sometimes this has necessitated taking another statement.<sup>62</sup>
112. Even where no application for a Registered Intermediary has been made, a judge may always request assessment of a vulnerable prosecution or defence witness whose communication needs may have been overlooked.<sup>63</sup>
113. Assessment by an intermediary should be considered if the person seems unlikely to be able to recognise a problematic question or, even if able to do so, may be reluctant to say so to a questioner in a position of authority. Studies suggest that the majority of young witnesses, across all ages, fall into one or other or both categories.
114. All young witnesses should ideally have an intermediary assessment as, no matter how advanced they appear, their language comprehension is likely to be less than that of an adult witness.<sup>64</sup>
115. A deaf person should always be assessed by an expert in deafness and/or a suitably qualified and experienced intermediary.
116. Intermediaries have a role and specialism which is sometimes essential for a fair hearing. Notwithstanding this, the court can and should play a significant role in facilitating questioning.

## If the application is contested

117. The intermediary should always attend the hearing to explain their recommendations and in what way their presence will facilitate 'complete, coherent and accurate' communication. It may be suggested that the intermediary is not needed at trial because:
  - *The interview was conducted without the need for an intermediary.* Communication during the trial process is more challenging than the investigative interview, leading to greater stress and potentially more opportunities for miscommunication.
  - *An intermediary was present at the interview but apparently took no active part.* This is often because the intermediary had already provided advice to the interviewer about how to adapt his or her questions and therefore did not need to intervene.
  - *The advocates will comply with guidance in the intermediary's report.* In practice, many advocates find it more difficult to adapt key questions than they anticipate. It can also be difficult to keep in mind all aspects of questioning that may be problematic for the individual witness. An

<sup>62</sup> 'Joint inspection report on the experience of young victims and witnesses in the Criminal Justice System': HMCPSP and HMIC (2012).

<sup>63</sup> Youth Justice and Criminal Evidence Act 1999, section 19(1)(b).

<sup>64</sup> 'A Protocol between the National Police Chiefs' Council, the CPS and HMCTS to Expedite Cases Involving Witnesses under 10 Years' (2018).

intermediary who has already assessed the witness's communication is able to alert the court to any problems or loss of concentration.

### **If the intermediary is not available on the day**

118. The essential task of the court is to ensure a fair hearing. The absence of an intermediary for a vulnerable person does not necessarily mean that a fair hearing cannot take place and it would be unusual to stay or adjourn because an intermediary is not available. However, it is the responsibility of the court to adapt the trial procedure to ensure effective participation. This might require re-convening a ground rules hearing and re-visiting directions.

### **Intermediaries in family cases**

119. Many parties and witnesses in family proceedings will have conditions that affect their ability to communicate, requiring the court to make adjustments and take steps to ensure that these basic requirements are met.

120. There has been an acknowledgement<sup>65</sup> that the family jurisdiction has been lagging behind the criminal justice system in terms of support for vulnerable parties and witnesses. Part 3A Family Procedure Rules 2010 now provides that the court must consider whether:

- A party's participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.<sup>66</sup>
- The quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so whether it is necessary to make one or more participation directions.<sup>67</sup>

The factors to be taken into account are set out at rule 3A.7. 'Participation directions' which the court can make under rule 3A.8 include:

- For a party to participate in proceedings with the assistance of an intermediary, and
- For a party or witness to be questioned in court with the assistance of an intermediary – see the case of *N (a child)*.<sup>68</sup>

121. It may also be possible in appropriate cases, if essential to ensure full and effective participation, for the court to order the appointment of a 'lay advocate'. This is not a legal representative or McKenzie Friend, but someone whose function is to ensure the party understands and is able to respond to the information provided, and is thereby enabled to participate effectively in the proceedings. The lay advocate should be someone who is qualified and/or has experience in legal proceedings of assisting a party with an intellectual impairment or learning difficulty which compromises his or her ability to process and comprehend information.

<sup>65</sup> See views of Sir James Munby, President of the Family Division in his 'View from the President's Chambers (16)' (January 2017).

<sup>66</sup> Rule 3A.4.

<sup>67</sup> Rule 3A.5.

<sup>68</sup> [2019] EWCA Civ 1997.

122. A lay advocate in this sense is not an intermediary, although some intermediaries may also be qualified to act as a lay advocate. Whereas the focus of an intermediary is on enabling communication between the court and the party, the focus of a lay advocate is directly to assist the party.
123. In *Re C (s)*,<sup>69</sup> the High Court ordered lay advocates to be appointed for each of the parents, to enable engagement with the proceedings and a fair hearing. In a subsequent hearing clarifying the funding route, it was agreed that payment for lay advocates at hearings was a matter for HMCTS and that payment for lay advocates to assist with communication between the client and his or her solicitor out of court was, in cases benefitting from legal representation funded by civil legal aid, a matter for the Legal Aid Agency.
124. 'Practice Direction 3AA – Vulnerable persons: Participation in proceedings and giving evidence' sets out the procedure and practice to be followed where rule 3A applies.

### **Non-registered intermediaries for vulnerable defendants in criminal proceedings**

125. Section 104, Coroners and Justice Act 2009 inserts section 33BA of the Youth Justice and Criminal Evidence Act 1999, providing an intermediary to an eligible defendant while giving evidence. This has not been implemented. However, courts have exercised their inherent discretion to appoint intermediaries for a vulnerable defendant's testimony, or for the whole trial.<sup>70</sup> In one trial which lasted 12 weeks, the judge appointed two non-registered intermediaries who took turns to attend.
126. See Criminal Procedure Rules Part 18 and CrimPD Division 1, 3F.12 to 3F.26 for the process and guidance on the approach to take on whether to direct an intermediary for a defendant, including for a young defendant. See also The Advocate's Gateway Toolkit 16 (2 Sept.2019) – Intermediaries: step by step, Parts 7 and 8.
127. Any intermediary appointed to assist a defendant is considered to be 'non-registered' even though the individual carrying out this role may be a Registered Intermediary in respect of witnesses.
128. Criminal cases vary greatly in their factual complexity and legal and procedural difficulty. In many cases, competent representation, various adaptations and good trial management can overcome any difficulties. However, where it is clear that all other adaptations to the trial process will not ensure that the defendant can effectively participate in the trial, an intermediary must be appointed. Otherwise the defendant will not have had a fair trial.<sup>71</sup>
129. An application for an intermediary therefore needs to be addressed carefully, with sensitivity and caution. It is important, when making this assessment:

<sup>69</sup> *Re C (Lay Advocates)* [2019] EWHC 3738 (Fam); *Re C (lay advocates) (no.2) A local authority v M and others* [2020] EWHC 1762 (Fam).

<sup>70</sup> *R (AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin).

<sup>71</sup> *TI v Bromley Youth Court* [2020] EWHC 1204 (Admin); *R v Dean Thomas* [2020] EWCA Crim 117. These recent cases summarise the significant case law. The EHRC discusses the need for intermediaries for some disabled defendants in 'Inclusive justice: a system designed for all' (June 2020).



- Not to make assumptions that just because the court or representatives have experience of such issues arising, it is possible to make adequate adjustments for the particular defendant in the particular case.
- Not to assume that a defendant can necessarily follow court proceedings because he or she has been able to give a coherent account to the police or to give instructions to solicitors. This may be an indicator, but the previous level of input and assistance needs to be looked at carefully.
- Not to assume that it does not matter if the defendant cannot follow what is said in the rest of the case as long as he or she can give evidence. That is not consistent with a fair trial.
- If an issue is the ability of the defendant to concentrate throughout a hearing, to consider what adaptations could ensure the defendant's engagement throughout.

130. Non-registered intermediary appointments are not routine:

- Appointments should be considered in 'obvious cases [such as] those in which the defendant was a young child or a person with complex problems of the sort that defendants in the reported cases have suffered from'.<sup>72</sup>
- Appointment of an intermediary by itself may not in itself be a sufficient adjustment. In *R v Jordan Dixon*<sup>73</sup> an intermediary was appointed to assist a vulnerable defendant during the trial, but failures to hold a ground rules hearing and to modify the language used during the proceedings were described as 'regrettable' by the Court of Appeal.
- Even where a judge concludes that he or she has a common law power to direct the appointment of an intermediary, the direction will be ineffective if no intermediary can be identified for whom funding would be available.<sup>74</sup>
- In *R v Rashid*,<sup>75</sup> it was held that the judge must make the assessment of the type of assistance that is required on the basis that the proper level of professional competence from the advocates is available. 'In the event that one of the advocates asked a question that was too complex or tagged, then the judge as part of the usual trial management by any judge would have intervened to correct the error.' The decision that the intermediary was required solely for the defendant's evidence was upheld.

131. The Legal Aid Agency pays for a non-registered intermediary's assessment and pre-trial involvement, subject to prior authority; his or her attendance at trial is paid for by HM Courts and Tribunals Service from Central Funds (agreement between the Legal Aid Agency, Ministry of Justice and HM Courts and Tribunals Service). The matching service for Registered Intermediaries run by the Ministry of Justice and National Crime Agency cannot assist in obtaining a non-registered intermediary.<sup>76</sup>

<sup>72</sup> Recorder of Leeds, *R v GP and 4 Others* (2012) T20120409, 'Guidance for future applications'.

<sup>73</sup> [2013] EWCA 465.

<sup>74</sup> *R v Cox* [2012] EWCA Crim 549.

<sup>75</sup> [2017] EWCA Crim 2.

<sup>76</sup> CrimPD 3F.16.

## Sources of other information about intermediaries

132. See also:

- The Advocate's Gateway section on Intermediaries.
- The Advocate's Gateway toolkit 16: 'Intermediaries: step by step', which describes the role, the process for obtaining an intermediary, both in and beyond the criminal justice system and a summary of what the intermediary report will contain.

## ***Communication aids recommended by intermediaries***

133. Intermediaries can also assist in recommending appropriate communication aids. Courts have permitted a wide range to augment or replace oral testimony, eg pen and paper, models, picture cards, signal boards, visual timetables, human figure drawings and technology.<sup>77</sup> Aids have helped improve the quality of evidence and given access to justice to some vulnerable witnesses who were previously excluded.

134. Intermediaries will, with the approval of the court:

- Advise on the selection of appropriate aids, eg a body map for a witness asked to clarify intimate touching. The failure to ask a non-verbal witness to identify body parts by reference to pictures was criticised in *R v F*.<sup>78</sup>
- Develop aids specifically tailored to the needs of the witness and the advocate's questions, eg development of a visual timeline to support questions about several incidents over time.

135. Where helpful, witnesses should be allowed to write and draw to clarify answers.

## ***Ground rules hearings***

### **Function of ground rules hearings**

136. Ground rules hearings provide an opportunity to plan any adaptations to questioning and/or the conduct of the hearing that may be necessary to facilitate the evidence of a vulnerable person. They should take place in the presence of the trial judge or magistrates, advocates and any intermediary who has been appointed.

137. Where an intermediary is appointed, the purpose of the hearing is 'to establish how questions should be put to help the witness understand them and how the intermediary will alert the court if the witness has not understood or needs a break'.<sup>79</sup>

138. Discussions have been held in court, in chambers and over a remote live link when the intermediary is at a different location with the witness.

139. In section 28 proceedings (special measure involving pre-recorded cross-examination), a ground rules hearing form has been developed and is in use in

<sup>77</sup> The Advocate's Gateway – Toolkit 14 – 'Using communication aids in the criminal justice system'.

<sup>78</sup> [2013] EWCA Crim 424.

<sup>79</sup> Application for a special measures direction, part F1.

every case. This is a helpful form that sets out most of what needs to be considered in relation to a young or vulnerable witness.

140. Ground rules hearings should usually be held as early as possible and, if at all possible, before the day of the hearing.

141. The hearings are:

- *Mandatory* in all trials using intermediaries. They remain vital even where participants have previously worked with an intermediary, as arrangements need to be agreed that are specific to the individual before the court. The intermediary must be present but need not take the oath.
- *Good practice* in all young witness cases and other cases with a vulnerable witness or vulnerable defendant with communication needs.
- *Also appropriate* where the defendant is unrepresented. Sections 34 to 40, Youth Justice and Criminal Evidence Act 1999 prohibit unrepresented defendants from cross-examining young witnesses for certain offences and give a wider discretion to judges to prohibit cross-examination of witnesses by unrepresented defendants in other circumstances.
- *Always necessary* in family cases where the court is required to hear a case 'put' to a key factual witness where the allegations are serious and intimate, and where the witnesses are themselves the accused and accuser. See the full observations on suggested procedure pending legislative reform made by the High Court in the case of *PS v BP*.<sup>80</sup>

142. If needs change or become more apparent, it may be necessary to hold a further ground rules hearing and revisit ground rules agreed at an earlier stage.

### Topics for discussion at a ground rules hearing

143. A ground rules hearing should discuss as relevant:<sup>81</sup>

- The general care of the witness.
- If, when and where the witness is to be shown their video evidence.
- Where, when and how the parties (and judge if identified) will introduce themselves to the witness.
- Any communication aids which may be needed.
- The length of questioning and frequency of breaks,
- The manner, techniques and type of questioning. See 'Adjustments to cross-examination' below for the type of adjustments which can be agreed.
- What information should be given to the jury about restrictions to cross-examination and use of intermediaries.

144. Judicial interventions in questioning can be minimised if the approach to questioning is discussed in advance at a ground rules hearing and adhered to by the advocates. It is now quite common (and expected) for advocates to be directed to disclose their proposed questions in writing to the judge in advance

<sup>80</sup> [2018] EWCHC 1987 (Fam).

<sup>81</sup> *R v Lubemba; R v JP* [2014] EWCA 2064; CPR 3.9(7).

of the ground rules hearing. Those are then discussed at the ground rules hearing and approved or amended as appropriate. In order to control questioning, judges should construct developmentally appropriate questions if advocates fail to do so.

145. The advantage of such planning is not only to ensure that the witness is asked questions in a way which ensures their participation, but that questions do not get lost if advocates find it difficult to adapt on the spot. Research in 2019 found that where advocates were unable or unwilling to modify their questions, three-quarters of judges in the study rarely stepped in and asked the advocate's remaining questions themselves.<sup>82</sup>

### **Trial practice note of boundaries**

146. The Inns of Court College of Advocacy (formerly the Advocacy Training Council) recommends that a 'trial practice note' is created following the ground rules discussion, indicating that all parties expect the judge to ensure ground rules and boundaries are complied with. The judge may prepare the note, or ask for one to be prepared by the parties with the participation of the intermediary.<sup>83</sup> The note may include:

- An agreed description of the nature of the vulnerability of the witness/defendant.
- A list of any particular developmental issues/milestones reached or unattained, which should be taken into account when questioning and in trial management.
- For those with learning disabilities/a mental health diagnosis, an outline of particular concerns which should inform questioning or trial management.
- How long the witness should expect to be questioned in one session, and what breaks will be taken.
- What arrangements are to be made for memory refreshment pre-trial.
- How a prompt start for the witness' evidence will be ensured.
- An agreed outline for the formulation of appropriate questions.

### **Sources of other information on ground rules hearings**

147. See also:

- Criminal Practice Directions Section 3E, Ground rules hearings to plan the questioning of a vulnerable witness or defendant.
- The Advocate's Gateway, Toolkit 1: 'Ground rules hearings and the fair treatment of vulnerable people in court', Ground rules hearing checklist and other toolkits addressing a range of communication issues.

<sup>82</sup> 'Falling short? A snapshot of young witness policy and practice': Plotnikov and Woolfson. NSPCC (Feb 2019).

<sup>83</sup> 'Raising the Bar: The handling of vulnerable witnesses, victims and defendants in court': Advocacy Training Council (Mar 2011). This approach was endorsed in *R v Wills* [2011] EWCA Crim 1938.

- Family Justice Council ‘Guidelines in relation to children giving evidence in family proceedings’ (2011).

## ***Adjustments to cross-examination***

### **The court’s duty to control questioning**

148. Judges and magistrates have a duty to control questioning, as required by the overriding objective. Witness testimony must be adduced as effectively and fairly as possible. The case law encourages judges to intervene if needed, even if an intermediary – if any – does not:

- Witnesses must be able to understand the questions and enabled to give answers they believe to be correct. If the witness does not understand the question, the answer will not further the overriding objective.
- The manner, tenor, tone, language and duration of questioning should be appropriate to the witness’s developmental age and communication abilities.

149. A departure may be necessary from normal cross-examination practice, in which leading questions are asked, and the case is ‘put’ to the witness. Ideally this would already have been discussed at a ground rules hearing (see above) so that advocates are prepared.

150. The Court of Appeal has said: ‘It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way around.’<sup>84</sup>

151. This need not be an inhibition on the power of cross-examination. The Court of Appeal has observed that ‘some of the most effective cross-examination is conducted without long and complicated questions being posed in a leading or ‘tagged’ manner’.<sup>85</sup>

152. The Court of Appeal has endorsed limitation of cross-examination in certain circumstances, including requiring advocates to:

- Ask direct, not leading, questions.<sup>86</sup>
- Not put the defendant’s case directly to the witness, but to tell the jury of challenges to the witness’s evidence, in a form and at a time agreed with the judge and the party calling the witness.<sup>87</sup> In this way, failure to cross-examine in such circumstances is not taken as tacit acceptance of the witness’s evidence.

153. Prior to decisions being made about the type of questioning that is appropriate for the individual witness, it is useful for a judge to consider the appropriate toolkit from The Advocate’s Gateway.<sup>88</sup>

154. Where limitations on questioning are ‘necessary and appropriate’:<sup>89</sup>

<sup>84</sup> *R v Lubemba*; *R v JP* [2014] EWCA 2064, para 45.

<sup>85</sup> *R v Wills* [2011] EWCA Crim 1938.

<sup>86</sup> *R v Edwards* [2011] EWCA Crim 3028.

<sup>87</sup> *R v Wills* [2011] EWCA Crim 1938.

<sup>88</sup> See References and resources section at the end of this chapter.

<sup>89</sup> *R v Wills* [2011] EWCA Crim 1938.

- The limits must be clearly defined.
- The judge should explain them to the jury and the reasons for them.<sup>90</sup>
- The judge or advocate may point out important inconsistencies after – instead of during – the witness's evidence, following discussion with the advocates. (Be alert to alleged inconsistencies that are not, in fact, inconsistent, or that are trivial. Remind the jury of important inconsistencies during summing up).
- The judge has a duty to ensure that limitations are complied with. If the advocate fails to comply, the judge should give relevant directions to the jury as it occurs, and prevent further questioning that does not comply with the ground rules settled upon in advance.

### Limiting the length of cross-examination

155. Judges are fully entitled to impose reasonable time limits on cross-examination.<sup>91</sup> They are expected to challenge unrealistic estimates in the Plea and Trial Preparation Hearing questionnaire (Crown Court) or Preparation for Effective Trial form (magistrates' courts), and to keep duration under review at trial. The judge may direct that some matters be dealt with briefly in just a few questions.
156. Duration of cross-examination must not exceed what the vulnerable witness can reasonably cope with, taking account of his or her age / intellectual development, with a total of two hours as the norm and half a court day at the outside. The witness's needs may require questioning to take place over more than one day.

### Questioning techniques to avoid

157. Cross-examination techniques using complex vocabulary and syntax, and leading, multi-part questions, have been demonstrated to mislead and confuse adult witnesses, undermining the accuracy and completeness of their evidence.<sup>92</sup>
158. The Inns of Court College of Advocacy have produced training for advocates which has also been used by the Judicial College, with a useful set of Principles of questioning and conduct, which should normally be adopted.<sup>93</sup>
159. Before any topic is introduced the witness should be given a headline telling them what the topic is, eg: 'I am going to ask you questions about when you were 9', or 'I am going to ask you questions about what happened in the shed'.
160. During questioning:

<sup>90</sup> See guidance in *R v YGM* [2018] EWCA Crim 2458.

<sup>91</sup> Criminal Procedure Rules 2020, rule 3(11)d.

<sup>92</sup> 'Exploring the influence of courtroom questioning and pre-trial preparation on adult witness accuracy': Ellison and Wheatcroft (2010).

<sup>93</sup> 'Advocacy and the Vulnerable. National Training Programme. The 20 Principles of Questioning': The Inns of Court College of Advocacy (2019). There is a critique of the 2018 version in the International Journal of Evidence and Proof: 'One step forward and two steps back? The '20 Principles' for questioning vulnerable witnesses and the lack of an evidence-based approach' by Penny Cooper and others (Birkbeck University of London, ICPR, London, UK).

- Pronouns should not be used. When referring to a person the name of the person should be used on every occasion.
- Questions should be simple and contain only one matter. There should be no compound questions.
- There should be no directive leading questions, which are both coercive and unnecessarily complex.<sup>94</sup> A directive leading question ('You are lying, aren't you') has been found to elicit significantly less accurate responses than a non-directive leading question ('Are you lying?'). Another example of a directive leading question would be 'The young woman who answered the door had long hair, didn't she?' as opposed to a non-directive leading question: 'Did the young woman who answered the door have long hair?'<sup>95</sup> Children find it difficult to disagree with an adult and may agree even though that would not be correct.
- Questions should be in a chronological order or in another structure advised by the intermediary, such as by topic.
- There should be no repetitive questioning.
- In cases where there is more than one defendant, the cross-examination should be led by one advocate alone, with advocates for a second or third defendant only putting supplementary points not already put by the first advocate.

161. Questions proving particularly problematic for children and adult witnesses with communication needs include the following:

- *'Tag' questions* (eg 'Jim didn't touch you with his willy, did he?'). These are powerfully suggestive and complex: to respond accurately, the witness has to be able to judge whether the statement part of the question is true; understand that the tag expresses the advocate's point of view, and is not necessarily true; be able to counter that point of view; and (if the question combines both a positive and a negative) understand that a positive statement takes a negative tag and vice versa. Lord Judge, when Lord Chief Justice, described tag questions as unacceptable for children and indicates the need for 'full judicial insistence that questions of a young witness should be open ended'.<sup>96</sup> By analogy, tag questions should also be avoided with adults whose intellectual development equates to that of a child or young person, or who otherwise have particular communication needs. More direct questions should be put: eg 'Did Jim touch you?' (answer) followed by 'How did Jim touch you?'. The name of the alleged perpetrator should be used, as the witness may not always immediately connect 'he' with this person.
- *Other assertions* such as 'Isn't it a fact that...'. 'Is that right?', give undue emphasis to the suggestion. Alternatives include: 'Are you sure?'; or 'Is it true Jim hit you?'. Questions in the form of statements, eg 'You went to his

<sup>94</sup> 'Advocacy and the Vulnerable. National Training Programme. The 20 Principles of Questioning': The Inns of Court College of Advocacy (2019).

<sup>95</sup> 'Rethinking leading: the directive non-directive divide': Wheatcroft and others. University of Gloucestershire (2015).

<sup>96</sup> 'Half a Century of Change: The Evidence of Child Victims'. Toulmin Lecture, King's College London (2013).

house that night' may not be understood as requiring a response. Lord Judge (see above) criticised the technique, 'particularly damaging' in young witness cases, of asking a 'long assertion, followed by 'did he?' or 'did you?' or sometimes not even a question, but raising the voice in an inflexive questioning tone'. Only questions should be asked, and statements should not be put.

- *'Do you remember...?' questions.* These are complex, particularly where the witness is asked, not about an event, but about what he or she told someone else.
- *Questions containing negatives,* which are harder to uncode. Judges are usually alert to double negatives but difficulties can arise from single negatives, negative forms (eg 'incorrect', 'unhappy') and concealed negatives (eg 'unless').
- *'Forced choice' questions.* These may omit the correct answer so it is preferable to offer an open-ended option as well.
- *Questions using figures of speech* (eg 'I'm going to jog your memory') and the present tense (eg 'Are you at school?') which may be interpreted literally.
- *Questions repeated by an authority figure, such as an advocate,* as these may cause the witness to conclude that the first answer was wrong (even if correct) and to change it. If a question must be repeated because an answer was unclear, this should be explained to the witness.
- *Series of leading questions inviting repetition of either 'Yes' or 'No' answers.* An acquiescent witness may adopt a pattern of replies 'cued' by the questioner and cease to respond to individual questions.
- *A challenge that the witness is lying or confused.* If this is developmentally appropriate for the witness it should be addressed separately, in simple language, at the end of cross-examination. Repeated assertions to a young or vulnerable witness that he or she is lying are likely to cause the witness serious distress. They do not serve any proper evidential purpose and should not be permitted. In the case of a young child it is not necessary to do more than say '(D) says he did not ... is D telling the truth or a lie'. That does not suggest the child has lied but puts the challenge if a challenge is needed. In many cases the defendant's case will be clearly known to the jury so a challenge may not be necessary.

### **Questions about third party material**

162. Consideration should be given to the place in cross-examination when questions about third party material should be put to the witness. A witness who does not anticipate being asked questions arising from third party disclosure, such as GP records, may become very distressed. Where such questions were asked at the start of cross-examination, in some instances the witness was unable to go on to answer questions relating to the current alleged offence.
163. Questioning on third party material should be resolved in advance of the witness being questioned. It is within the judge's powers to require the advocate to justify why questions arising from third party material are being asked, before



such questions are asked. This helps ensure questioning is kept to a minimum and is relevant.

### **Reporting restrictions**

164. Even when assured about reporting restrictions, children and vulnerable adult witnesses remain concerned that enough detail will be published to make them identifiable, especially in small communities. Key guidance includes:

- *'Reporting Restrictions in the Criminal Courts April 2015 (Revised May 2016)'*. Section 45 of the Youth Justice and Criminal Evidence Act 1999 enables courts to restrict reporting the identity of victims, witnesses and defendants under 18 in magistrates' courts and the Crown Court. Section 44 of the Children and Young Persons Act 1933 requires all courts to have regard to the welfare of such children. The child's welfare is likely to favour a restriction on publication. Section 45A of the YJCEA gives the criminal courts a power to grant life-long anonymity to victims and witnesses under 18. There is a separate power under the Sexual Offences (Amendment) Act 1992 whereby victims of a wide range of sexual offences are given lifetime anonymity.
- Note that section 39 Children and Young Persons Act 1933 continues to apply to civil and family proceedings and has been extended to cover online publications.
- *Press Association, R (on the application of) v Cambridge Crown Court* [2012] EWCA Crim 2434. The Court of Appeal allowed an appeal against a trial judge's imposition of an indefinite prohibition on the publication of 'anything relating to the name of the defendant which could lead to the identification of the complainant [an adult rape victim] which could have serious consequences for the course of justice'. The Lord Chief Justice said that it was for the press to decide how appropriately to report the case so as to ensure the anonymity of the complainant. However:

'the judge is entitled to express concerns as to the possible consequences of publication, and indeed to engage in a discussion with representatives of the press present in court about these issues, whether on his own initiative, or in a response to a request from them. The judge is in charge of the court, and if he thinks it appropriate to offer comment, we anticipate that a responsible editor would carefully consider it before deciding what should be published. The essential point is that whatever discussions may take place, the judicial observations cannot constitute an order binding on the editor or the reporter'.
- *Reporting on Court Cases involving Sexual Offences* (IPSO). This warns editors to take account of information about the case that is already in the public domain in order to avoid 'jigsaw identification' of the victim. The guidance includes examples of where publication of such information led to a complaint being made and upheld.
- *The Family Courts: Media Access & Reporting* (President of the Family Division, Judicial College and Society of Editors 2011). This summarised the current position and further guidance was issued by the President of the Family Division in October 2019.

- *The views of children and young people regarding media access to the family courts* (Children's Commissioner for England 2010). This found that 96 per cent of children who had been involved in family proceedings would have been unwilling to talk to a clinician if advised that a reporter might be in court. The report expressed concern that family courts may be faced with making difficult decisions with incomplete evidence from children and limited or no information from clinicians about children's wishes and feelings. There is still a live debate over the issue of transparency in the family jurisdiction. Similar concerns were expressed in a follow-up report in 2014.<sup>97</sup>

## **Communicating at trial**

### **Before the vulnerable person gives evidence**

165. Take account of the person's actual arrival time at court and ask to be updated about the time they have waited and the impact of any delay on him or her.
166. Confirm the timetable and that the following checks have already been made:
  - All directions are in place and the person's needs are catered for.
  - The equipment is working and if a DVD is to be used, that it is compatible with equipment in the courtroom where the trial is listed.
  - In the case of a vulnerable witness, that the defendant cannot be seen over the live link (checked before the witness enters the live link room).
167. Early signs of the person's loss of concentration may not be apparent to the court, especially over the live link. Ask the intermediary or supporter accompanying the witness or defendant to alert you.

### **Simplified instructions from the judge or magistrate**

168. Efforts to simplify language should not be confined to cross-examination. Any instructions should avoid court jargon and figures of speech. Use simple language with which the person is familiar. This includes advice to a witness about to give evidence, which should be tailored to their needs and understanding, for example:
  - 'Tell the truth. Don't guess. Tell everything you remember'.
  - 'Say if you don't know the answer'.
  - 'Say if you don't understand'. (But do not rely on witnesses to do so; they often try to answer anyway. Be alert to non-verbal clues to miscommunication, eg puzzled looks, knitted eyebrows, downcast eyes and long pauses.)
  - 'You should say if someone says something wrong.' (Research shows that telling even 'ordinary' adult witnesses that they do not have to agree with questioners if what they say is not correct, helps them give more accurate responses.)

<sup>97</sup> 'Safeguarding, privacy and respect for children and young people & the next steps in media access to family courts': Brophy and others. NYAS and Association of Lawyers for Children (2014).

- ‘We will take a rest in about X minutes. If you need a rest before then, tell me.’ (Witnesses may not ask for a break, even if needed, in order to get things over with.)
- ‘Tell me if you have a problem. I can always see you over the live link even when you can’t see me.’ (Some witnesses fail to tell the judge about a problem, because they cannot see the judge, and believe the judge cannot see them. Giving the witness a coloured ‘signal’ card in the live link room may help them to indicate a problem or the need for a break.)

### **While the vulnerable person is giving evidence**

169. Ensure that someone using the live link can always see the questioner’s face.
170. Do not allow the witness to give his or her address aloud without good reason.
171. Ensure duration of questioning is appropriate to the witness’s needs and attention span. Do not exceed the estimated time without good reason. Monitor the time approaching planned breaks, as otherwise the agreed time is often exceeded. Be alert to the need for unscheduled breaks (the need may be urgent). Giving the witness a brief rest is sometimes sufficient, without sending out the jury. Questioning may be curbed if the witness becomes seriously distressed or ill.
172. Be alert for possible miscommunication and ask the advocate to rephrase. Do not ask ‘Do you understand?’ as many vulnerable people do not recognise when difficulties occur or would be embarrassed to admit this. If appropriate, check directly on understanding by asking the person to explain the question.
173. Prevent questioning that lacks relevance or is repetitive, oppressive or intimidating.
174. Where ground rules on cross-examination are necessary, you have a duty ‘to ensure that limitations are complied with’. Give relevant directions to the jury at the time when the failure to comply occurs.<sup>98</sup>
175. If the advocate is unable or unwilling to adapt his or her questions appropriately despite repeated interventions, some judges exercise their duty to ensure directions are complied with by taking over and asking the advocate’s questions in a simplified way.
176. Be prepared to address the jury about an advocate’s persistent failure to comply with directions when that occurs, and to prevent further questioning that does not comply with the ground rules set in advance.

### **Information for the jury**

177. The ground rules hearing should have discussed what information should be given to the jury in respect of any restrictions on questioning and the role of the intermediary. In *R v Edwards*,<sup>99</sup> the judge had ruled at the ground rules hearing that defence counsel should not put leading questions to a six-year-old witness. He therefore advised the jury as follows (and reminded them before the child gave evidence):

<sup>98</sup> *R v Wills* [2011] EWCA Crim 1938.

<sup>99</sup> [2011] EWCA Crim 3028.

‘The directions that I have given to Mr X in this case are that he can and should ask any question to which he actually wants answers, but he should not involve himself in any cross-examination of [the witness] by challenging her in a difficult way. In this case the defendant has already set out in some detail what his defence is. It is not a question of putting it to a witness and challenging her about it, so you won't hear the traditional form of cross-examination. I thought you ought to know that from the outset.’

178. When intermediaries are appointed to facilitate communication of witnesses or defendants at the Crown Court, it is customary for the judge to explain their presence to the jury. The intermediary may also be asked to explain to the jury his or her role and qualifications and the purpose of any communication aids. Examples of a judicial explanation to the jury are as follows:<sup>100</sup>

*Example 1: explanation to the jury where a witness has an intermediary*

‘During this trial, W will be helped by {name} who is an intermediary.

Intermediaries are used when a witness needs help to understand what is being said in court. They are also used to make sure that the witness is understood by everyone in court. An intermediary will intervene if they feel W is having difficulty understanding something or needs a break.

An intermediary does not discuss the evidence with a witness or give evidence for him.

Before today, the intermediary met and got to know W, and now the intermediary will help W to follow the proceedings. At an earlier hearing it was decided how W would be asked questions, for how long and in what way. The intermediary helped the court make these decisions.

The fact that W is being helped by an intermediary must not affect how you assess W's evidence and it is no reflection on D or W.’

*Example 2: explanation to the jury where a defendant has an intermediary*

‘During this trial, D will be helped by {name}, who is an intermediary.

Intermediaries are used when a defendant needs help to understand what is being said in court. If a defendant gives evidence, intermediaries are also used to make sure that everyone in court understands what D is saying. The intermediary will intervene if they feel D is having difficulty understanding something or needs a break.

The intermediary does not discuss the evidence with the defendant or give evidence for the defendant.

Before today, the intermediary met and got to know D, and now the intermediary will help D to follow the proceedings. At an earlier hearing it was decided how D would be asked questions, for how long and in what way. The intermediary helped the court make these decisions.

<sup>100</sup> Wording of examples taken from the Judicial College's Crown Court Compendium (Dec 2020), section 3–7 on ‘Intermediaries’.

The fact that D is being helped by an intermediary must not affect how you assess any of the evidence in this case and it is no reflection on D' (if appropriate: 'or any other D').

## The judgment

179. Judgments and reasons for decisions always need to be clear, but language and approach is especially important when vulnerable parties and witnesses are involved:

- The judgment in *A Council v Jack's Mother, Jack's Dad and Jack* is an example of clarity in explaining to a parent with a learning disability the reason for the decision.<sup>101</sup>
- In the case of *A Father v A Mother and Stepfather and A Young Person*, the main part of Mr Justice Peter Jackson's judgment was a letter to the 14-year old subject of proceedings.<sup>102</sup>
- In *Lancashire County Council v Mr A, Mr B, The Children*, Mr Justice Peter Jackson explained that the judgment was as short as possible so that the mother and older children could follow it.<sup>103</sup>
- In *Oxfordshire County Council v A mother (by her litigation friend, the Official Solicitor) and G*, the judge attached to her short judgment, a sympathetic and explanatory letter to a mother with learning disabilities.<sup>104</sup>
- There is an example of using an accessible summary at the start of [the judgment in chapter 1](#).

## Further examples of adapting procedures(disability)

180. [Chapter 3 \(Physical Disability\)](#) and [chapter 4 \(Mental Disability\)](#) set out in detail the various adjustments which could be made in case preparation and during the hearing for disabled parties and witnesses. As well as suggestions in the general body of this chapter, some further examples of adjustments which have been made at criminal trials are as follows:

- Seating the advocate at the end of the clerk's table, within a metre of a lip-reading witness who gave evidence behind a screen with the assistance of a Registered Intermediary, as even a skilled lip-reader may clearly understand less than half of what is said.
- Seating a defendant with impaired vision near the jury while they were empanelled, to enable him to object to jurors if necessary; and seating a defendant with a hearing problem in the body of the court (such defendants have particular difficulty following proceedings from the dock because advocates speak with their backs to them).
- Allowing a defendant with autism spectrum disorder to have quiet, calming objects in the dock to help him to pay attention.

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<sup>101</sup> Case No: SN17C00073 (27 March 2018).

<sup>102</sup> [2017] EWFC 48.

<sup>103</sup> [2016] EWFC 9 (04 February 2016).

<sup>104</sup> [2020] EWFC B40 (3 September 2020).

- Letting a witness with autism spectrum disorder give evidence wearing a lion's tail, his 'comfort object' in daily life.
- Allowing a Registered Intermediary to relay the answers of a witness with autism spectrum disorder and behavioural problems who gave evidence with her back to the live link camera; and in other cases to relay the replies of witnesses who would only whisper their answers.
- Requesting that all witnesses be asked 'very simply phrased questions' and 'to express their answers in short sentences', to make it easier for a defendant (who had complex needs but no intermediary) to follow proceedings.<sup>105</sup>
- Allowing cross-examination of a witness with autism by presenting her with written questions in the witness box and letting her type answers in real time; the answers being read out loud before moving on; the witness wearing headphones playing white noise to minimise external stimuli and distractions; and regularly reviewing the arrangements with her.<sup>106</sup>

### ***The importance of routine feedback***

181. Judges and magistrates should ensure that there are systematic procedures for requesting and acting upon regular feedback from those responsible for the welfare of vulnerable witnesses and defendants about what local arrangements work well and what could be improved, and encourage the use of local surveys for this purpose.

### ***References and resources***

Click on the references below to go to the source referred to. Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link. References are in alphabetical order (discounting the first 'the' or 'a').

#### **References**

[‘Achieving Best Evidence in Criminal Proceedings’](#): Ministry of Justice (March 2011).

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[‘Code of Practice for Victims of Crime’](#): MOJ (Nov 2020).

[‘The Crown Court Compendium’. Part 1: Jury and Trial Management and Summing Up’](#): Judicial College. (December 2020).

<sup>105</sup> *R v Cox* [2012] EWCA Crim 549.

<sup>106</sup> *In the matter of Re C (No.2) (Children: Welfare)* [2020] EWFC B36 (24 August 2020).

‘Exploring the influence of courtroom questioning and pre-trial preparation on adult witness accuracy’: Ellison and Wheatcroft (2010).

[‘Falling short. A snapshot of young witness policy and practice’](#): Plotnikov and Woolfson. NSPCC (Feb 2019).

‘Great Expectations: Towards better learning outcomes for young people and young adults in custody’: Prisoners’ Education Trust (2016: 4).

[‘Guidance on the use of s.28 YJCEA 1999; pre-recording of cross-examination and re-examination. For witnesses captured by s.17\(4\) YJCEA 1999’](#) (30 September 2019).

[‘Guidelines in relation to children giving evidence in family proceedings’](#): Family Justice Council (2011).

[‘Half a Century of Change: The Evidence of Child Victims’](#): Toulmin Lecture, King’s College London (2013).

[‘Inclusive Justice: a system designed for all’](#): Equality and Human Rights Commission (June 2020).

[‘A Joint Inspection of the Treatment of Offenders with Learning Disabilities within the Criminal Justice System – Phase 1 From Arrest to Sentence’](#): Criminal Justice Joint Inspection (2014).

[‘Joint inspection report on the experience of young victims and witnesses in the Criminal Justice System’](#): HMCPSI and HMIC (2012).

[‘Judicial College Bench Checklist: Young Witness Cases’](#) (2012).

[‘The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System’](#) (2017).

[‘Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings’](#) (April 2020).

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[‘Provision of therapy for child witnesses prior to a criminal trial – practice guidance’](#): CPS, Department of Health and Home Office (2001).

[‘Provision of therapy for vulnerable or intimidated adult witnesses prior to a criminal trial – practice guidance’](#): CPS, Department of Health and Home Office (2001).

[‘Raising the Bar: The handling of vulnerable witnesses, victims and defendants in court’](#): Advocacy Training Council (Mar 2011).

[‘Registered Intermediary Procedural Guidance’](#): Ministry of Justice, (2019).

[‘Rethinking leading: the directive non-directive divide’](#): Wheatcroft and others. University of Gloucestershire (2015).

[‘Sentencing Children and Young People - Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery: Definitive Guideline’](#).

[‘Special measures in rape trials: Exploring the impact of screens, live links and video-recorded evidence on mock juror deliberation’](#): Ellison and Munro (2012).

[‘The treatment of young adults in the criminal justice system’](#): House of Commons Justice Committee (Oct 2016).

[‘Victims Strategy’](#): HM Government (Sept 2018).

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[‘A Voice for the Voiceless: The Victims’ Commissioner’s Review into the Provision of Registered Intermediaries for Children and Vulnerable Victims and Witnesses’](#) (January 2018).

[‘Vulnerable witnesses and parties – current position and recommendations for change’](#): Civil Justice Council (Feb 2020).

[‘The Witness Charter: Standards of Care for Witnesses in the Criminal Justice System’](#): MOJ (Dec 2013).

[‘Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children’](#): HM Government (2018).

[‘Young adults in the criminal justice system’](#): House of Commons Justice Committee (12 June 2018).

[‘Youth Court Bench Book’](#): Judicial College.

## **The Advocate’s Gateway**

Extremely practical and helpful toolkits are available on its website at [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org) including:

1. Ground rules hearings and the fair treatment of vulnerable people in court. Ground rules hearing checklist (although written with criminal proceedings in mind, may also be useful for other courts/tribunals where there is an application for the ground rules approach).

1a. Case management in criminal cases when a witness or defendant is vulnerable.

Essential questions checklist.

8. Effective participation of young defendants.

10. Identifying vulnerability in witnesses and parties and making adjustments.



13. Vulnerable witnesses and parties in the family courts.
14. Using communication aids in the criminal justice system.
16. Intermediaries: step by step.
17. Vulnerable witnesses and parties in the civil courts.

## Cases

Cases were relevant as at the date of publication.

[\*AM \(Afghanistan\) v Secretary of State for the Home Department\*](#) [2017] EWCA Civ 1123

[\*A Council v Jack's Mother, Jack's Dad and Jack\*](#) Case No: SN17C00073 (27 March 2018)

[\*A Father v A Mother and Stepfather and A Young Person\*](#) [2017] EWFC 48

[\*In the Matter of M \(A Child\)\*](#) [2012] EWCA Civ 1905

[\*In the matter of Re C \(No.2\) \(Children: Welfare\)\*](#) [2020] EWFC B36 (24 August 2020)

[\*Lancashire County Council v Mr A, Mr B, The Children\*](#) [2016] EWFC 9 (04 February 2016)

[\*N \(a child\)\*](#) [2019] EWCA Civ 1997

[\*Oxfordshire County Council v A mother \(by her litigation friend, the Official Solicitor\) and G\*](#) [2020] EWFC B40 (03 September 2020)

[\*PS v BP\*](#) [2018] EWHC 1987 (Fam)

[\*R v B\*](#) [2010] EWCA Crim 4

[\*R v Cox\*](#) [2012] EWCA Crim 549

[\*R v Dean Thomas\*](#) [2020] EWCA Crim 117

[\*R v Edwards\*](#) [2011] EWCA Crim 3028

[\*R v F\*](#) [2013] EWCA Crim 424

*R v GP and 4 Others* (2012) T20120409

[\*R v Jordan Dixon\*](#) [2013] EWCA 465

[\*R v Lubemba; R v JP\*](#) [2014] EWCA 2064

[\*R v Rashid\*](#) [2017] EWCA Crim 2

[\*R v Wills\*](#) [2011] EWCA Criminal 1938

[R v YGM](#) [2018] EWCA Crim 2458

[R \(AS\) v Great Yarmouth Youth Court](#) [2011] EWHC 2059 (Admin)

[Re C \(Lay Advocates\)](#) [2019] EWHC 3738 (Fam)

[Re C \(lay advocates\) \(no.2\) A local authority v M and others](#) [2020] EWHC 1762 (Fam)

[Shui v University of Manchester and others](#) UKEAT/2360/16

[TI v Bromley Youth Court](#) [2020] EWHC 1204 (Admin)

## **Conventions**

[United Nations Convention on the Rights of the Child](#)

[United Nations Convention on the Rights of Persons with Disabilities](#)

## Chapter 3 Physical Disability

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#### **Related content in other chapters**

[Mental Disability](#) (chapter 4)

[Capacity \(Mental\)](#) (chapter 5)

[Disability Glossary: Impairments and Reasonable Adjustments](#) (appendix)

Note: the Glossary contains a list of different impairments, where it is possible to click straight through to the relevant impairment. Although not necessarily to be regarded as a disability, obesity is included.

## Overview

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### Why this chapter matters

Disabled individuals may be affected in many different ways by the court process, some visibly, others invisibly.

Adjustments should be made provided they do not impinge on the fairness of the hearing or trial for both sides.

Each person with a disability must be assessed and treated by the judge or tribunal panel as an individual so that his or her specific needs can be considered and appropriate action taken. It is crucial to be aware that what is perceived as the same or similar impairment, may well have a different impact upon different individuals. Failure to do this may result in a decision being overturned on appeal.

The guidance in the Equal Treatment Bench Book regarding disability 'is important advice which every judge and every justice of the peace is under a duty to take into account'.<sup>1</sup>

This chapter concerns physical disability. However, physical health problems significantly increase the risk of poor mental health. [Chapter 4](#) contains information on how to recognise and accommodate mental disability.

### Who do these considerations apply to?

A physical impairment/disability can impact upon the parties, the representatives of the parties, witnesses, observers, members of the jury, tribunal lay members, clerks and ushers, amongst others. Consideration of adjustment ought to take place where a physical disability impairs any potential participant's engagement with the court/tribunal process.

### Identifying an individual's needs

Ideally courts and tribunals should have systems for identifying at an early stage, well before the final hearing / trial, whether any adjustments for disability will be required.

Certain kinds of adjustment need to be decided upon in advance of the full hearing, eg selecting appropriate venue and room; booking interpreters and intermediaries; arranging evidence by video link; planning constraints on cross-examination style.

### Adjustments for case preparation

Making adjustments in the way pre-trial case preparation takes place is sometimes overlooked. It could include: format of materials; extension of time-limits; staggered orders; additional preliminary hearings, in person or by telephone as appropriate; expediting the final hearing date.

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<sup>1</sup> *R (on the application of King) v Isleworth Crown Court* [2001] All ER (D) 48 (Jan).

## **Adjustments for the hearing**

Adjustments for the trial / hearing might include:

- Adjusting the timing, length or number of breaks and the length of the day.
- Avoiding the temptation to extend hours or to cut needed breaks in order to finish within the allotted time.
- Adjusting the order in which evidence is heard / the timing of the disabled person's evidence.
- Adapting communication style (although this is more frequently an issue with mental disability – [see chapter 4](#)).
- Facilitating representation in a form which might not otherwise have been permitted.

The [Disability Glossary](#) contains a list of some of the most prevalent disabilities, with their common effects and suggested adjustments. However, the effects of an impairment vary for each individual. It is therefore important not to guess or assume what adjustments an individual might need. Communication with the person concerned is key to understanding what adjustments are needed for that individual. Not only does this ensure that appropriate adjustments are considered, but it also helps protect the dignity of the person concerned.

## **Criminal court procedure – statutory measures**

The above principles apply to criminal courts as much as to civil courts. In addition, there are specific statutory rules allowing 'special measures' for 'vulnerable witnesses' in criminal cases. These have been adopted to some extent in family courts.

Adjustments and 'special measures' for the hearing should usually be discussed at a preliminary hearing or, where 'special measures' apply, at a 'ground rules' hearing.

'Intermediaries' can be appointed to facilitate communication in criminal and family cases.

## **What if the individual does not raise the subject of disability?**

In some cases, people might not tell the court or tribunal that they have a physical disability or that they are having difficulties. The judge should therefore be alert to any indicators that adjustments might be required. In such situations, assistance should be offered tactfully, not overtly suggesting the person has a disability.

## **Acceptable terminology**

There are two ways of perceiving disability: the medical model and the social model. Many disabled people prefer the social model (ie that they are 'disabled' by social barriers) and would expect a judge to be aware of the difference.

There are expressions and terms which should not be used as they may cause offence.

### **The Equality Act 2010**

Discrimination in relation to disability is unlawful under the Equality Act 2010. The Act carries its own definition of 'disability'.

## ***What is physical disability?***

1. The Papworth Trust<sup>2</sup> estimates that approximately 1 in 5 people in the UK have a disability. Some people have more than one disability. The prevalence of disability increases with age. Only 17% of people with disabilities are born with them. Most are acquired later in life.
2. Physical disability can take many forms, eg affecting mobility, dexterity, motor skills, ability to lift, sensory impairment, continence, circulation and stamina. Intense or persistent pain can affect ability to concentrate in court or attend for lengthy periods.
3. The majority of impairments are invisible, or are visible only in some contexts, eg chronic back pain, fibromyalgia, diabetes, sleep disorder, renal failure, epilepsy, chronic fatigue syndrome, hearing loss, some visual impairment, and many mental impairments. The fact that symptoms are invisible can lead to misunderstandings.
4. Some people have multiple disabilities, including both mental and physical disabilities. Physical health problems significantly increase the risk of poor mental health and vice versa. Around 30% of people with a long-term physical health condition also have mental ill health, mainly depression and anxiety.
5. Disabled people are disadvantaged in the labour market, are more likely to live in poor housing and face a higher risk of poverty. On average, their day-to-day living costs are 25% higher than for others because of expenditure on basics such as mobility aids, care and transport. Many police forces have reported an increase in disability hate crime.
6. The Independent Monitoring Mechanism set up to monitor disabled people's rights in the UK ('UKIM') says there is a real concern that disabled people are bearing the brunt of the accumulated impact of cuts in public spending.<sup>3</sup>
7. As explained in the 'Acceptable Terminology' section below in this chapter, the term 'disabled person' is currently usually preferred to 'person with disabilities' as it better reflects the social model of disability.

## ***Why this chapter matters***

8. It is not a question of being 'kind and sympathetic' towards a disabled person. That is patronising. The important point is that disabled litigants, defendants and witnesses (and, where appropriate, advocates, jurors and others involved in the court process) are able to participate fully in the process of justice. Making reasonable adjustments or accommodating the needs of disabled people is not a form of favouritism or bias towards them, but part of showing respect for people's differences and helping to provide a level playing field. The focus should be on actions that remove any unnecessary barriers to participation.
9. Each person with a disability must be assessed and treated by the judge or tribunal panel as an individual so that his or her specific needs can be considered and appropriate action taken. Indeed, failure to do this may result in a decision being overturned on appeal.

<sup>2</sup> 'Facts and Figures 2018: disability in the UK': Papworth Trust (2018).

<sup>3</sup> Joint UKIM statement on UNCRPD examination (August 2017).

10. It is not a question of whether or not an individual meets the legal definition of disability. This chapter is concerned to ensure appropriate adjustments are made for any individuals who have a physical impairment which might interfere with their ability to have a full and fair hearing.
11. Adjustments should be made provided they do not impinge on the fairness of the hearing or trial for both sides. The other party can be expected to cooperate.
12. The 'overriding objective' under the Civil Procedure Rules requires ensuring the parties are on an equal footing. This wording is wide enough to cover disability issues. Moreover, Article 13(1) of the UN Convention on the Rights of People with Disabilities 2006 says:  

'States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.'
13. The guidance in the Equal Treatment Bench Book regarding disability 'is important advice which every judge and every justice of the peace is under a duty to take into account when hearing a case involving people with one disability or another'.<sup>4</sup>
14. A former President of the Employment Appeal Tribunal has commented:  

'It is well known that those who have disabilities may suffer from social, attitudinal or environmental difficulties. There may be barriers to their achieving the rights to which as human beings they ought to be entitled. We therefore take the purpose of making an adjustment as being to overcome such barriers so far as access to court is concerned, in particular to enable a party to give the full and proper account that they would wish to give to the Tribunal, as best they can be helped to give it. We accept that practical guidance as to the way in which the court upon whom the duty to make adjustments for those purposes is placed should achieve this is given by the Equal Treatment Bench Book.'<sup>5</sup>

### ***Who do these considerations apply to?***

15. These considerations apply to everybody who is participating in, or may attend at, a hearing. A physical impairment/disability can impact upon the parties, the representatives of the parties, witnesses, observers, members of the jury, tribunal lay members, clerks and ushers, amongst others. It is important that focus is not on the parties alone, as supporting and ensuring engagement with the process is a much wider consideration than that. Consideration of adjustment ought to take place where a physical disability impairs any potential participant's engagement with the court/tribunal process.

<sup>4</sup> *R (on the application of King) v Isleworth Crown Court* [2001] All ER (D) 48 (Jan).

<sup>5</sup> *Rackham v NHS Professionals Ltd* UKEAT/0110/15.



### ***Difficulties the court process may pose for disabled people***

16. Disabled individuals may be affected in many different ways by the court process, some of which will be more visible than others.
17. Difficulties prior to the hearing, especially for disabled litigants in person, may include:
  - Difficulty reading or understanding paperwork.
  - Reduced stamina / reduced ability to cope with stress due to constant pain / health worries. Consequent difficulty coping with persistent requests for information from opposing solicitors (which are often seen or experienced as 'demands'), and difficulty complying with multiple orders and deadlines within a short time period.
  - Greater difficulty accessing voluntary sector advice due to mobility impairments; difficulty waiting in queues; hearing difficulty over the telephone.
18. Difficulties at a hearing may include:
  - Impaired mobility: affecting access to the building and to toilets; difficulty moving around the room.
  - Physical discomfort in the room: seating arrangements; handling of large trial bundles; pouring water if provided in large jugs; temperature.
  - Difficulty hearing the judge or advocates: noise when windows are open or from air conditioning and heating systems.
  - Tiredness and/or pain caused by the disability; limited concentration span.
  - Medication: side-effects; medication taken at the start of the day wearing off after a period of time; increased dosage with increased side-effects to get through the hearing.
  - The stress of the hearing may exacerbate symptoms.
  - Some disabilities make it impossible for a person to attend a hearing at all.

### ***Identifying an individual's needs***

#### **Necessary advance planning**

19. Ideally courts and tribunals should have systems for identifying at an early stage, well before the final hearing / trial whether any adjustments for disability will be required. Where there is a question on the standard claim form for the court in question, this should be checked by judges or case workers at an early stage and follow-up enquiries made where an issue is identified.
20. In criminal cases, the 'pro forma' form used by the court contains a 'special measures' box.
21. Where there is no question on the form, it would be good practice to ask as a matter of routine at any preliminary hearings, or plea and case management hearings, whether there are any special needs. As some individuals may feel uncomfortable discussing this, it is also important to give parties the opportunity

of writing in after the conclusion of the preliminary or plea and case management hearing.

22. Where a need for adjustments has come to a judge's attention, it is a good idea to liaise with the administration to ensure that requested adjustments are followed through, eg a note on file regarding communication in enlarged font; booking sign language interpreters well in advance of the hearing; booking accessible rooms.
23. These kinds of adjustment need to be decided upon in advance of the full hearing:
  - An accurate time estimate allowing for slower pace and/or more breaks and/or shortened days.
  - Any interpreters who need booking.
  - Any special room which needs booking.
  - Booking any intermediary.
  - Making arrangements for taking evidence by video link.
  - Any major constraints on cross-examination style so that advocates can be notified in advance. Also, if considered appropriate, so that cross-examination questions can be checked / translated by an intermediary in advance or in certain cases, shown to a witness in advance or even asked and answered in writing.

### **Consultation, case management and ground rules hearings**

24. The [Disability Glossary](#) contains a list of some of the most prevalent disabilities, with their common effects and suggested adjustments. However, the effects of an impairment can vary for each individual. It is therefore important not to guess or assume what adjustments an individual might need. Every individual is different. The person should be asked – he or she will be the best expert on his or her own needs.<sup>6</sup>
25. Where needs are complex, as well as asking individuals what adjustments would be helpful, it may also be necessary to ask them to provide an advisory letter from their GP or a consultant.
26. In criminal or family cases, or other cases where intermediaries are used, it may be appropriate to seek a report from an intermediary, and to invite the intermediary to the ground rules hearing.
27. The advice should then be discussed with all the parties present during a case management hearing or, in the case of criminal, family and certain other courts, a 'ground rules hearing'.
28. It does not matter whether there is an entire meeting dedicated to discussing the proposed adjustments or whether the discussion is part of a wider case management discussion. What matters is that the subject is fully explored.

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<sup>6</sup> The importance of consulting each individual and not generalising is emphasised by the former President of the EAT in *Rackham v NHS Professionals Ltd* UKEAT/0110/15.

29. Once arrangements for the hearing are made, they are not set in stone. It may subsequently become apparent that further adjustments are needed.
30. The specific procedure for appointment of intermediaries, the holding of 'ground rules hearings' and the taking of 'special measures' which applies in criminal, family and certain other courts, is set out briefly below (see '[Criminal court procedure – statutory measures](#)'), and in detail in [chapter 2 \(Children, Young People and Vulnerable Adults\)](#), which also refers to the Practice Direction 3AA supplementing the Family Procedure Rules 2010. Employment and other tribunals can gain additional ideas from these rules.<sup>7</sup>

### ***Adjustments for case preparation***

31. The following adjustments in the way pre-trial communication takes place may be appropriate:
  - Providing materials in a different format, eg enlarged font, Braille, online.
  - Avoiding making too many orders / giving too many instructions at once.
  - Avoiding setting too many different dates for various directions to be complied with.
  - Extending time-limits for taking action.
  - Holding preliminary hearings to resolve case preparation as opposed to written communications or telephone case management.
  - Allowing longer for case management / preliminary hearings.
  - Making necessary adjustments to any case management / preliminary hearings (room layout / interpreter etc). Many of the adjustments which would also be needed at a full hearing / trial may be necessary at preliminary hearings. This can be overlooked for preliminary hearings.
  - Not floating case management preliminary hearings. If several are listed together, taking the disabled person's preliminary / case management hearing first.
  - Holding telephone case management rather than requiring the disabled party to travel and attend.
  - Expediting the final hearing date.

### ***Adjustments for the hearing***

#### **General examples of adjustment**

32. The following are examples of possible adjustments for a hearing. Whether they are suitable will depend on the type of proceedings, the needs of the particular individual and whether fairness to each party is preserved.
33. For suggested adjustments in relation to particular impairments, see the [Disability Glossary](#).

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<sup>7</sup> *Rackham v NHS Professionals Ltd* UKEAT/0110/15.

34. HMCTS maintains a directory of disabled facilities available in courts and hearing centres. The keeping of such information will vary between courts and tribunals or judicial regions.
35. Where the venue is inaccessible, adjustments may entail:
  - Transferring the hearing to a venue nearer to the disabled party or one with better disabled access.
  - Conducting the hearing in a venue other than a court or tribunal room, eg a local hotel conference room, the party's home, a nursing home or hospital.<sup>8</sup>
  - Taking evidence by video link (accessible from a local / community facility) or telephone.<sup>9</sup>
  - Where all other options are unfeasible, considering whether the disabled person can give written evidence and answer questions in writing.
36. In exceptional cases, where a party or witness is unable to leave the home and a remote video or audio hearing is not feasible, a visit to an individual's home may be possible. Before ordering that any hearing should be conducted in this way, it should be discussed locally as there will be administrative considerations and there may well be practical implications for judicial colleagues.
37. Where the date or timing of the hearing causes difficulty, arrange for the witness to give evidence and be questioned by video link or telephone at some other time prior to the hearing.
38. Consider the layout of the room and whether this is likely to cause discomfort. This includes seating in the witness box and in the room before and after giving evidence; moving to and from the witness box; size and position of trial bundles; whether someone is able to pour his or her own water; closeness to sources of heat or light; closeness to other people; space to stretch legs. It may be appropriate to give a party adequate time prior to the commencement of the hearing to familiarise themselves with the room layout.
39. If a chair has been provided at the request of a disabled person, check it is of a suitable height and type.
40. As in all cases, check that fresh drinking water is available and the room is not too crowded, hot or cold.
41. Consider how to cope with the various types of equipment that a person may need to use in order to communicate. Allow for this being slower and more tiring than other forms of communication.
42. Adjust the order in which evidence is heard so that the disabled witness is not kept waiting longer than necessary or can give evidence while medication is at its most effective.
43. Be aware of the powers to prevent inappropriate questioning, and use those powers where appropriate.
44. Allow a carer to be present. Position a carer near to the disabled person. Have in mind that family carers may have difficulty finding someone else to take over

<sup>8</sup> *Ms B v An NHS Hospital Trust* [2002] EWHC 429.

<sup>9</sup> The 2008 Practice Direction also makes these suggestions.

the caring role. It helps if they can be given set times for the beginning and end of the hearing and, where childcare is an issue, timing during the school term may be preferable.

45. Look out for signs of stress, discomfort, fatigue or lack of concentration as the hearing progresses.
46. If a hearing needs to go part-heard or to be adjourned because of the need for adjustments, it is good practice to note on the file that this is the case and what adjustments will be required on the next occasion.

### **Breaks and shorter hours**

47. It may be necessary to adjust the timing, length or number of breaks, eg to allow for tiredness, shorter concentration spans, taking medication, moving physically, eating or drinking, going to the toilet.
48. It may be necessary to adjust the length of the day, starting later (eg to allow for medication or accessible travel) or finishing earlier (eg because of tiredness, medical appointments, avoiding rush hour travel).
49. Ideally, the need for an additional number of breaks, shorter days and/or a slower communication style will have been identified in advance, as this will extend the estimated length of the hearing. If insufficient time is allowed, there may be a temptation to cut necessary breaks or to speed up the process, which may cause the disabled person additional stress.
50. Although longer hearings do increase costs and may prevent allocation to the fast track in civil cases,<sup>10</sup> this has to be balanced against the need for adjustments to ensure a disabled person can participate as fully as possible.
51. As well as pre-arranging suitable timing of breaks, tell the disabled person that he or she can ask for a break whenever necessary. A pre-arranged signal (eg a lifted finger) would help preserve the individual's dignity.
52. There can sometimes be a temptation to cut breaks or extend hours in order to finish within the allotted time. This should be treated with great caution if the breaks and hours were initially considered reasonable and necessary. The disabled person should be consulted over whether he or she can manage, but there remains the risk that the person will feel unable to say no.

### **Communication**

53. Depending on the nature of the disability, it may be necessary for the judge, advocates and other court staff to adjust their communication style.
54. Ideally the subject of communication style would have been discussed at a ground rules or case management preliminary hearing, so that advocates are fore-warned. However, this may not have happened.
55. Adjustments may involve:
  - Proceeding at a slower pace.

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<sup>10</sup> Although the possibility that a trial might last longer than one day is not necessarily a conclusive reason for allocating or reallocating to the multi-track.

- Speaking to a witness through a signer or an interpreter.
  - Having a friend, representative or professional interpreter read out document extracts to a witness.
56. In more severe cases, there is scope for:
- Getting the questions ‘translated’ by an intermediary (in criminal, family or other courts where intermediaries are used).
  - Sending questions to the witness in advance.
  - Allowing the witness to provide written answers.
57. Where there is additionally a mental disability, see the parallel section in [chapter 4 \(Mental Disability\)](#). On this topic, it is useful to read the sections on ‘Adjustments to cross-examination’ and ‘questions likely to produce unreliable answers’ in relation to vulnerable witnesses in [chapter 2 \(Children, Young People and Vulnerable Adults\)](#).

## Representation

58. Guidance on McKenzie Friends and Lay Representatives is in [chapter 1](#).
59. To meet the needs of a disabled party, a judge may facilitate representation in a form which might not otherwise have been permitted.
60. It may be helpful to seek assistance as a friend from anyone present in court who clearly has the confidence of the party. This is not the same as allowing such a person to act as a representative in the proceedings; that person may be looked upon more as an interpreter. In some circumstances, a close family member may be best placed to assist.

## What if the individual does not raise the subject of disability?

61. In some cases, people might not tell the court or tribunal that they have a physical disability or that they are having any difficulties. This might be out of embarrassment, unassertiveness, not knowing the court is willing to make adjustments or fear that they will be taken less seriously. Litigants in person may be particularly unlikely to raise the matter.
62. At the start of the hearing, it is good practice to look around the room and consider whether everyone present can participate as required. If there is doubt, eg because a party or witness appears disabled, a simple enquiry can be made: ‘Are you comfortable sitting there?’, ‘Is everyone warm enough?’
63. The judge should therefore be alert to any indicators that adjustments might be required. In such situations, assistance should be offered tactfully and without suggesting the person has a disability. For example, ‘Would it help if we closed the window? It is rather noisy in here.’ Not ‘Are you hard of hearing?’

## Criminal court procedure – statutory measures

64. The above principles apply to criminal courts as much as to civil courts. In addition, there are specific statutory rules for vulnerable witnesses in criminal cases, which carry their own terminology.

65. Under the Youth Justice and Criminal Evidence Act 1999, 'vulnerable witnesses' in criminal proceedings (other than the defendant) are eligible for 'special measures'. A witness is eligible if the court considers that the quality of evidence given by the witness is likely to be diminished for a number of specified reasons, including that the witness has a physical disability or is suffering from a physical disorder.
66. The special measures must be applied for, and the court can make the following orders:
  - Screening witness from accused.
  - Evidence by live link.
  - Evidence given in private.
  - Removal of wigs and gowns.
  - A video recording of an interview of the witness to be admitted as evidence in chief and, where appropriate, cross-examination also to be recorded by video and admitted.
  - Provision of an appropriate device to enable communication of questions and answers, eg a computer, symbol board or toy, or provision of a sign-language interpreter.
  - Conducting examination of the witness through an intermediary. This can entail communicating questions to the witness; communicating the witness's answer; explaining the questions and answers as necessary so as to be understood.
67. Although these statutory rules do not apply to defendants, judges have a general power to make equivalent adjustments for disabled and vulnerable defendants, including the appointment of non-registered intermediaries.
68. In addition to these specified special measures, where a witness or defendant in a criminal case has a disability or vulnerability, a 'ground rules' hearing should be held to discuss in advance the steps needed for the hearing. If an intermediary has been appointed, he or she should be invited to attend.
69. Where there are vulnerable witnesses, 'ground rules' hearings should be held to plan conduct of the hearing.
70. These procedures, including use of intermediaries, can be adopted by certain other courts, particularly family courts, where there is a similar framework to that of the criminal courts.
71. For more detail of vulnerable witnesses, ground rules hearings, intermediaries and when they can be used, and special measures in practice including with disabled defendants, see [chapter 2 \(Children, Young People and Vulnerable Adults\)](#). For more detail in relation to mental disability, see [chapter 4 \(Mental Disability\)](#).

### ***Jury service and disability***

72. There will be occasions when a disabled person is called for jury service. Guidance is provided in section 9B of the Juries Act 1974 which states that it is for the judge to determine whether or not a person should act as a

- juror. The presumption is that he or she should so act unless the judge is of the opinion that the person will not, on account of disability, be capable of acting effectively as a juror, in which case that person should be discharged.
73. The statutory criteria for disqualification from jury service focuses on a person's lack of mental capacity<sup>11</sup> as defined in the Mental Health Act 2005. Physical disability is not, in and of itself, a barrier to jury service. Whether a physical impairment creates a barrier to jury service may depend in whole or in part on the nature of the particular criminal case for which the potential juror has been selected. The Court is under a duty to make reasonable adjustment for witnesses, defendants and jurors with disabilities. Adjustments such as wheelchair accessibility and fully functioning loop hearing systems are reasonably commonplace in courtrooms these days.
  74. The jury summons requests information on impairment or disability from potential jurors but that is often overlooked or missed until the potential juror is already at court and cannot be accommodated within the time frame for a trial. The judge must consider a disabled person's right to expect reasonable adjustments which might allow him or her to be an effective jury participant. The decision must be compatible with the defendant's right to a fair trial.
  75. In summer 2019, a profoundly deaf man participated as a juror in three trials at Blackfriars Crown Court. He did not require a sign interpreter to follow proceedings. He read subtitles from courtroom stenographers on an iPad and relied on lip-reading in deliberations with his fellow jurors.<sup>12</sup> There have also been some cases in which people who are blind have served on juries. As always, it is a question of considering the individual and how he or she communicates.
  76. In *Re Osman [1996] 1 Cr App R 126*, it was held that a person who is profoundly deaf and unable to follow the proceedings in court, or the deliberations in the jury room, without the assistance of an interpreter in sign language should be discharged from jury service pursuant to section 9B because such a person could not act effectively as a juror and it would be an unacceptable irregularity in the proceedings for the interpreter to retire with the jury to the jury room. The same reasoning might apply if a person called for jury service requires the full-time attendance of a carer. In a case in Liverpool, a disabled person's carer was allowed to sit near to this person in the courtroom but when it came to retiring the carer remained outside the jury room and the other members of the jury attended to their colleague's needs.
  77. The fundamental problem appears to be not just the presence of a thirteenth person in the jury room, but that it might amount to a breach of the statutory prohibition on disclosing jury deliberations<sup>13</sup> because that thirteenth person is not a member of the jury.

<sup>11</sup> Section 1 of the Juries Act and Schedule 1 defines who is disqualified from jury service and includes a person who lacks capacity within the meaning of the Mental Health Act 2005.

<sup>12</sup> 'Subtitles help deaf juror past '13<sup>th</sup> stranger' court rules': Guardian (28 August 2019).

<sup>13</sup> Section 20D Juries Act 1974 creates a criminal offence intentionally to disclose information regarding jury deliberations in proceedings.



## ***Acceptable terminology***

### **How to discuss someone's possible needs in court**

78. When discussing someone's possible needs in court:
- Do not begin with any assumptions beyond those that are clearly justified by what is immediately and incontrovertibly evident.
  - The person involved should be addressed directly and in a normal manner unless and until it is clear that some other approach should be adopted.
  - Talk directly to the disabled person even if there is an interpreter, carer or personal assistant. Face this person if you can – with lip-reading this is particularly important.
  - Focus on the individual rather than on any impairment. This can be done by asking what is needed rather than asking about the nature and extent of the impairment, eg 'Do you need assistance to read this?' rather than 'Is your sight impaired?'
  - If the condition is known, or disclosed, remember that within any condition there may be varying levels of impairment, so a general knowledge of the condition and its effects may be inadequate to deal with the particular individual appropriately, although it is a start.
79. People vary in their sensitivity about disclosing their impairment and those with disabilities are often reluctant to 'make a fuss about them', so any questioning needs to be sensitive. The disabled person may be embarrassed or self-conscious, but a judge needs to be aware of how the person is coping so as to ensure that further steps are taken as and when required. This must be ascertained without appearing patronising.
80. Where a condition may require regular breaks to rest or use the lavatory for example, indicate how the disabled person will indicate the need for a break to avoid them appearing to need to 'ask permission' on each occasion.
81. Avoid disclosure of medical histories where possible.

### **The social model v the medical model of disability**

82. There are two ways of perceiving disability: the medical model and the social model. Many disabled people prefer the social model and would expect a judge to be aware of the difference.
83. The medical model says that a person is disabled by their impairments and focuses on the individual's inability to carry out certain tasks. The social model says that disability is caused by the way society is organised. For example, the medical model says that a wheelchair user is unable to access a building with steps but no ramp because he or she is unable to climb stairs. The social model says that the person is prevented from using the building because it has no ramp.
84. The UN Convention on the Rights of People with Disabilities 2006 tends towards the social model with this definition:

‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’

85. Similarly, reference toward a social model concept can be seen in the Disability Rights Commission Employment Code of Practice 2004, which provided statutory guidance for the now repealed Disability Discrimination Act 1995:

‘The concept of discrimination in the Act reflects an understanding that functional limitations arising from disabled people’s impairments do not inevitably restrict their ability to participate fully in society. Rather than the limitations of an impairment, it is often environmental factors (such as the structure of a building, or an employer’s working practices) which unnecessarily lead to these social restrictions. It is as important to consider which aspects of employment and occupation create difficulties for a disabled person as it is to understand the particular nature of an individual’s disability.’<sup>14</sup>

86. There are different views within the disabled community as to whether a person should be referred to as a ‘disabled person’ or a ‘person with a disability’. The former formulation, although unpopular at one stage, may now fit better with the social model (ie ‘disabled by society’).

## Use of terms

87. Some Acts of Parliament, particularly older ones, use terminology that would now be considered out of date and in some cases inappropriate. Judicial office-holders will continue to work with those statutory definitions and tests until such time as the legislation is updated. Whilst legal findings must continue to be phrased within the technical definitions, this does not justify the wider use of language that may offend and judges should be encouraged to converse in appropriate terms.
88. The terms impairment and disability are frequently treated as if they mean the same thing. Strictly-speaking, they do not. For example, a person born with just one kidney clearly has impairment, but he or she has no disability from it unless that kidney is not functioning.
89. A disability is not the same as an illness.
90. There are expressions and terms which should not be used as they may cause offence. Avoid:
- Referring to ‘the disabled’.
  - ‘Normal’ when referring to people who are not disabled. Avoid ‘able-bodied’ – use instead ‘non-disabled’.
  - Using negative terms such as:
    - ‘suffers from’ – use instead ‘has’, ‘experiences’ or other more neutral terminology

<sup>14</sup> Employment Code of Practice, Disability Rights Commission (2004)

- ‘attacks’ (as in epileptic attacks; migraine attacks) – use instead ‘episodes’.
- Talking about people as if they are medical conditions: eg ‘an epileptic’ – use instead ‘person with epilepsy’.
- Referring to someone as ‘handicapped’ – use instead ‘disabled person’.
- ‘Wheelchair bound’, ‘confined to a wheelchair’ or ‘in a wheelchair’ – use instead ‘wheelchair user’.
- ‘The blind’ – use instead ‘blind people’, ‘people who are visually impaired’ or ‘partially sighted’.
- ‘The deaf’ – use instead ‘deaf people’ or ‘people with hearing loss’. It is sometimes appropriate to be more precise, eg ‘deaf without speech’, ‘pre-lingually deaf’.
- As a general term, ‘sensory impairment’ is acceptable.

### **The legal definition of ‘disability’**

91. ‘Disability’ is defined differently in various statutes and international instruments. It is also treated differently in the UK for the purposes of discrimination under the Equality Act 2010 and in relation to eligibility for social security benefits.
92. As already stated, irrespective of whether a party or witness meets any particular legal definition, this chapter is concerned to ensure reasonable adjustments are made for individuals who have an impairment which might interfere with their ability to have a full and fair hearing.
93. The Equality Act 2010 prohibits discrimination in relation to disability. ‘Disability’ carries a specific definition in the Act. See the Equality Act 2010 appendix for an [overview](#) of the Equality Act 2010 and for more detail of the application of the Equality Act 2010 to [disability](#).

### **References and resources**

Click on the references below to go to the source referred to. Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link. References are listed in alphabetical order.

#### **References**

[‘Disability Rights in the UK – Updated submission to the UN Committee on the Rights of Persons with Disabilities in advance of the public examination of the UK’s implementation of the UN CRPD’](#): UK Independent Mechanism (July 2017).

[‘Facts and Figures 2018: disability in the UK’](#): Papworth Trust (2018).

[‘Subtitles help deaf juror past ‘13th stranger’ court rules’](#): Guardian (28 August 2019).

## Cases

Cases were relevant as at the date of publication.

[\*AM \(Afghanistan\) v Secretary of State for the Home Department\*](#) [2017] EWCA Civ 1123

[\*Ms B v An NHS Hospital Trust\*](#) [2002] EWHC 429

*R (on the application of King) v Isleworth Crown Court* [2001] All ER (D) 48 (Jan)

[\*Rackham v NHS Professionals Ltd\*](#) UKEAT/0110/15

## Practice Directions, Guidance Notes and Conventions

[‘Child, Vulnerable Adult and Sensitive Witnesses Practice Direction’](#): Senior President of Tribunals (2008).

[‘The Equality Act 2010: The impact on disabled people’](#): House of Lords Select Committee on the Equality Act 2010 and Disability (2016).

[‘Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance’](#).

[UN Convention on the Rights of People with Disabilities 2006](#)

## Chapter 4 Mental Disability

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### **Contents**

#### **Overview**

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#### **Related content in other chapters**

[Physical Disability](#) (chapter 3)

[Capacity \(Mental\)](#) (chapter 5)

[Disability Glossary: Impairments and Reasonable Adjustments](#) (appendix)

Note: the Glossary contains a list of different impairments, where it is possible to click straight through to the relevant impairment.

## Overview

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### What is mental disability?

Mental disability is a broad concept which includes:

- Mental ill health eg depression, anxiety, personality disorder.
- Learning disabilities as well as developmental disorders / neurodiverse conditions such as autism and 'specific learning difficulties' such as dyslexia.
- Brain injury / damage.

These different areas are fundamentally different and should not be confused.

Much mental disability is not visible, or is visible only in some contexts. This can lead to misunderstandings.

Even before the Covid-19 pandemic, research suggests 1 in 4 adults has experienced a diagnosable mental health condition in any given year.

Mental ill health is high amongst certain groups, eg those who have been subjected to hate crime, refugees and asylum seekers, victims of modern slavery, veterans and women who have been subjected to domestic violence or sexual abuse. This can be caused by various factors. People in these groups suffer multiple disadvantage.

Some people have both physical and mental disabilities. [Chapter 3](#) contains information on how to accommodate physical disability. It is feared that the economic and social effects of Covid-19 will considerably increase the prevalence of mental ill health.

### Why this chapter matters

Mental disability should be considered in the same way as physical disability when it does not render a person incapable of participating in the judicial process. Judges should identify its implications in the court or tribunal setting and understand what should be done to compensate for areas of disadvantage without prejudicing other parties.

The advice in the Equal Treatment Bench Book regarding disability 'is important advice which every judge and every justice of the peace is under a duty to take into account'.<sup>1</sup> Failure to make reasonable adjustments could lead to a case being overturned on appeal.

### Difficulties the court process may pose for mentally disabled people

Disabled individuals may be affected in many different ways by the court process, some of which will be more visible than others.

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<sup>1</sup> *R (on the application of King) v Isleworth Crown Court* [2001] All ER (D) 48 (Jan).

Difficulty in case preparation might include difficulty understanding communication; stress with deadlines and multiple orders; greater difficulty accessing voluntary sector advice.

Difficulty during the hearing might include problems with concentration; communication; and tiredness. Common stressors are time pressure; interruptions; prolonged concentration; unfamiliar rules and dress; feelings of not being listened to or believed; loss of control.

### **Adjustments for case preparation**

Depending on the individual's needs, adjustments during case preparation might include: clarity in lay-out and wording of correspondence; increased face-to-face case management preliminary hearings or, if preferred, by telephone; staggering any orders or instructions plus longer time-scales for compliance; giving explicit instructions; expediting the final hearing and advance planning.

### **Adjustments for the hearing**

Again, depending on the individual's needs, adjustments for the trial / hearing might include:

- Adjusting the timing, length or number of breaks and the length of the day.
- Adjusting the order in which evidence is heard / the timing of the disabled person's evidence.
- Avoiding the temptation to extend hours or to cut needed breaks in order to finish within the allotted time.
- Accommodating a carer.
- Facilitating representation in a form which might not otherwise have been permitted.

There are numerous adjustments to facilitate communication which can and should be made by the judge and advocates, eg length of cross-examination; language used; style of questions. In some situations, it is necessary for written questions to be supplied in advance or to go through an intermediary.

Advocates do not always have the necessary experience or understanding to know how to question appropriately a witness with a mental impairment. A judge should be ready, as necessary, to ask advocates to rephrase their cross-examination, to interject when there is clear potential for misunderstanding, and to rephrase questions for the witness.

The [Disability Glossary](#) contains a list of some of the most prevalent disabilities, with their common effects and suggested adjustments. However, the effects of an impairment vary for each individual. It is therefore important not to guess or assume what adjustments an individual might need.

### **What if the individual has not / does not raise the subject**

In some cases, people might not tell the court or tribunal that they have a mental health issue or that they are having any difficulties. Unrepresented parties may be particularly unlikely to draw attention to these.

Judges are not expected to diagnose mental disability but they should be alert to possible indicators, eg the person lacks energy; is fidgety; is very emotional, often incongruously; appears uninterested / disengaged, and avoids eye contact (though the latter can be culturally based); unclear speech; inappropriate interruptions; inappropriate dress, disinhibition, and the person is overly suggestible.

MIND recommends various formulations for sensitively asking a person in such situations about their condition. These are listed in the body of this chapter.

### **Criminal court procedure – statutory measures**

The above principles apply to criminal courts as much as to civil courts. In addition, there are specific statutory rules allowing ‘special measures’ for ‘vulnerable witnesses’ in criminal cases. These have also been adopted in family courts.

Adjustments and ‘special measures’ for the hearing should usually be discussed at a preliminary hearing or, where ‘special measures’ apply, at a ‘ground rules’ hearing.

‘Intermediaries’ can be appointed to facilitate communication in criminal and family cases.

### **Mental health: defendants and the criminal justice system**

Adult prisoners experience a much higher rate of mental health conditions than the general population. Many defendants will not have informed the criminal justice system that they have a mental disability. There are various ways a judge can explore this possibility.

Some courts have Mental Health Liaison and Diversion Services which can help with diagnosis, adjustments and support needs.

The National Audit Office says that being in prison can exacerbate poor mental health and well-being. Prisoners whose mental health needs are not addressed may be more likely to reoffend.

Decisions on bail and sentencing can be affected by offenders’ perceived mental health. It is estimated that at least 40% of offenders on Community Orders have a diagnosable mental health condition, yet Mental Health Treatment Requirements have been little used. The Prison Reform Trust recommends these be given greater consideration. MHTRs can where appropriate be made in tandem with alcohol or drugs treatment requirements.

It is important that offenders are able to participate in the hearing, to understand witnesses’ evidence against them and understand their sentence and the consequences of not complying with a community order.

### **Veterans**

Reports differ as to whether veterans are more or less likely than comparable age groups in the general population to experience common mental health problems such as depression and anxiety. It is not a significant difference in any event. Veterans are, however, twice as likely as civilians to experience alcohol problems.

Mental and related health problems amongst veterans and family members are often aggravated or associated with social care needs including debt, housing and employment.



Many former service personnel who find themselves involved with the criminal justice system have mental health problems. Social isolation and disconnection/adaptation disorders in civilian life are a more common explanation of behaviour than PTSD.

Knowledge on the part of criminal justice professionals as to the needs of former service personnel is patchy. There is scope for additional sentencing options and support through mental health services, substance misuse services or service charities.

### **Acceptable terminology**

There are two ways of perceiving disability: the medical model and the social model. Most disabled people prefer the social model (ie that they are 'disabled' by social barriers) and would expect a judge to be aware of the difference.

There are expressions and terms which should not be used as they may cause offence.

### **The Equality Act 2010**

Discrimination in relation to disability is unlawful under the Equality Act 2010. The Act carries its own definition of 'disability'.

### **Mental Capacity**

See [chapter 5](#).

## ***What is mental disability?***

1. In this chapter, 'mental disability' is taken to encompass:
  - Mental ill health.
  - Learning disabilities / developmental disorders / neurodiverse conditions.
  - Brain injury / damage.
2. There are fundamental differences between these conditions, and they should not be confused.
3. The degree of disability in each individual's case will vary enormously and only in a small number of cases will it mean there is a lack of mental capacity. 'Capacity' is addressed in [chapter 5](#).
4. There are a range of mental health conditions, eg depression / anxiety, post-traumatic stress syndrome, obsessive compulsive disorder, personality disorders, eating disorders, schizophrenia, bipolar disorder.
5. Other mental impairments or neurodiverse conditions include autism, learning disabilities, and 'specific learning difficulties' such as dyslexia.
6. Much mental disability is not visible, or is visible only in some contexts. This can lead to misunderstandings.
7. Some people have multiple disabilities, including both mental and physical disabilities. Physical health problems significantly increase the risk of poor mental health and vice versa.

## **Prevalence of mental health difficulties**

8. People can become mentally ill through their life experiences, their genetic background or a combination of the two. Many respond to medical treatment and can recover from their symptoms over a period of time. Mental ill health can come and go over a lifetime.
9. There is a growth in empirical research which links ACE or 'Adverse Childhood Experiences' to adult related illness. Research in the United States evaluated the relationship between ten categories of adversity in childhood and a myriad of health outcomes in adulthood, such as increased risk of depression, suicide, alcoholism, drug abuse, smoking, physical inactivity, severe obesity, sexually transmitted disease, unintentional injuries, heart disease, lung disease, liver disease, and multiple types of cancer.
10. The British Psychological Society has indicated that experience of traumatic events in childhood can have a profound adverse impact on brain development leading to both physical and behavioural changes as the child tries to adapt to environmental stressors. If trauma (such as domestic violence) occurs over a prolonged period, it can contribute to physical and mental health problems over life, making children more vulnerable to difficulties with cognition such as problems with attention and focus in both early and later childhood. As such

ACE's are increasingly forming part of public health campaigns due to the lasting effects that such experiences can have upon the individual.<sup>2</sup>

11. Even before the Coronavirus pandemic, research suggested that the collective mental health of the UK population was deteriorating and levels of good mental health were relatively low.<sup>3</sup> 1 in 4 adults had experienced at least one diagnosable mental health problem in any given year. Over 4.5 million adults had a diagnosis of depression in 2017/8, which is around 10% of all adults registered with a GP.<sup>4</sup> In 2017, 65% of people surveyed said they had experienced a mental health problem at some time in their life.<sup>5</sup> More women than men appear to be affected by anxiety and depression, and young women have emerged as a high-risk group. It is feared that the economic and social effects of Covid-19 will considerably increase the prevalence of mental ill health.
12. Adults in the poorest fifth of income distribution are much more likely to be at risk of developing mental ill health than those on average incomes. There is a close link between unemployment, debt, and mental ill health – particularly depression and anxiety. The ability of people to cope with their mental health issues is reduced by worry over money, jobs and benefits.<sup>6</sup>
13. In turn, poverty and unemployment is particularly high for those who have a mental disability, with nearly 2.1 million people with a mental disability not in work.<sup>7</sup>
14. A number of studies indicate 10-15% of new mothers will experience post-natal depression. The figure may even be as large as 30% as it may largely go unreported.
15. Mental ill health is high amongst certain groups, eg those who have been subjected to hate crime, refugees and asylum seekers, victims of modern slavery, and women who have been subjected to domestic violence or sexual abuse. People in these groups suffer multiple disadvantage, which is discussed further in the relevant chapters.
16. Severe mental illness (schizophrenia, bi-polar affective disorder or psychoses) affects 0.9% of the population. On average people who have severe mental illness have a reduced life expectancy of between 15 – 20 years.<sup>8</sup> This is exacerbated further by the correlation between severe mental illness and substance misuse, 40% of people with psychosis will misuse substances at some point in their life.<sup>9</sup>
17. Black, Bangladeshi, Pakistani and mixed ethnic groups are all at significantly greater risk of detention under the Mental Health Act and more likely to be

<sup>2</sup> 'Adverse Childhood Experiences and their association with chronic disease and health service use in the Welsh adult population': Public Health Wales NHS Trust. (2016).

<sup>3</sup> 'Adult Psychiatric Morbidity Survey: Survey of Mental Health and Wellbeing, 2014': NHS Digital (29 September.2016); Surviving or Thriving? The state of the UK's mental health. Mental Health Foundation (2017).

<sup>4</sup> NHS England; 'NICEimpact mental health': National Institute for Health and Care Excellence (March 2019).

<sup>5</sup> Surviving or Thriving? The state of the UK's mental health. Mental Health Foundation. (2017).

<sup>6</sup> MIND Facts and Figures.

<sup>7</sup> 'UK Poverty 2019/20': Joseph Rowntree Foundation.

<sup>8</sup> 'NICEimpact mental health': National Institute for Health and Care Excellence (March 2019).

<sup>9</sup> 'NICEimpact mental health': National Institute for Health and Care Excellence (March 2019).

subject to repeat detentions.<sup>10</sup> The King's Fund identifies social inequality and deprivation to be core ingredients behind such disparities and cites the following as barriers to mental health provision: language, cultural insensitivity and fewer GPs per head in socially deprived areas with proportionately lower rates of admission to elective care.<sup>11</sup>

18. Different cultures have different approaches to mental health. Not all cultures will use diagnoses and treatments which are common in Western countries. In some cultures, a mental health diagnosis stigmatises a whole family and not just an individual, affecting employment prospects and social standing.<sup>12</sup>

### ***Why this chapter matters***

19. Mental disability should be considered in the same way as physical disability when it does not render a person incapable of participating in the judicial process. Judges should identify its implications in the court or tribunal setting and understand what should be done to compensate for areas of disadvantage without prejudicing other parties.
20. Each person with a disability must be treated by the judge or tribunal panel as an individual so that their specific needs can be considered and appropriate action taken. Indeed, failure to do this may result in a decision being overturned on appeal.
21. It is not a question of being 'kind and sympathetic' towards a disabled person. That is patronising. It is important that litigants, defendants and witnesses with mental disabilities are able to participate fully in the process of justice. Making reasonable adjustments or accommodating the needs of disabled people is not a form of favouritism or bias towards disabled people, but may be necessary to help provide a level playing field.
22. Adjustments should be made provided they do not impinge on the fairness of the hearing or trial for both sides. The other party can normally be expected to cooperate.
23. The 'overriding objective' under the Civil Procedure Rules requires ensuring the parties are on an equal footing. This wording is wide enough to cover disability issues. Moreover, Article 13(1) of the UN Convention on the Rights of People with Disabilities 2006 says:  

'States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.'
24. The advice in the Equal Treatment Bench Book regarding disability 'is important advice which every judge and every justice of the peace is under a duty to take

<sup>10</sup> 'Mental Health Act Statistics, Annual Figures, England 2018-2019': NHS Digital (29 October 2019).

<sup>11</sup> 'What are health inequalities?' The King's Fund (18 February 2020).

<sup>12</sup> 'Perceived barriers to accessing mental health services among black and minority ethnic (BME) communities: a qualitative study in South East England': Memon and others. *BMJ Open* (2016).

into account when hearing a case involving people with one disability or another'.<sup>13</sup>

25. A former President of the Employment Appeal Tribunal has commented:

'It is well known that those who have disabilities may suffer from social, attitudinal or environmental difficulties. There may be barriers to their achieving the rights to which as human beings they ought to be entitled. We therefore take the purpose of making an adjustment as being to overcome such barriers so far as access to court is concerned, in particular to enable a party to give the full and proper account that they would wish to give to the Tribunal, as best they can be helped to give it. We accept that practical guidance as to the way in which the court upon whom the duty to make adjustments for those purposes is placed should achieve this is given by the Equal Treatment Bench Book.'<sup>14</sup>

### ***Difficulties the court process may pose for mentally disabled people***

26. Disabled individuals may be affected in many different ways by the court process, some of which will be more visible than others. Although parts of this chapter speak in the general, it is important not to presume how a disabled individual may or may not be affected during the court process but to assess how that individual is actually affected.

27. Difficulties prior to the hearing, especially for disabled litigants in person, may include:

- Difficulty reading or understanding paperwork.
- Difficulty coping with stressful or confusing situations: demands for information from opposing solicitors; multiple Orders and deadlines within a short time period.
- Greater difficulty accessing voluntary sector advice due to difficulty communicating and understanding advice over the telephone; difficulty generating the motivation to find an advice source.

28. Difficulties at a hearing, especially for litigants in person with mental health disability, may include:

- Communication difficulties. Difficulty absorbing information; understanding what is being asked; providing focused answers; explaining.
- Difficulty focusing; limited concentration span.
- In certain cases, auditory / visual hallucinations.
- Medication: side-effects; medication taken at the start of the day wearing off after a period of time; increased dosage with increased side-effects to get through the hearing.
- Stress caused by the proceedings themselves; anxiety; unfamiliar environment.
- Some disabilities make it impossible for a person to attend a hearing at all.

<sup>13</sup> *R (on the application of King) v Isleworth Crown Court* [2001] All ER (D) 48 (Jan).

<sup>14</sup> *Rackham v NHS Professionals Ltd* UKEAT/0110/15.

29. MIND identifies these features of a court process which commonly trigger mental distress:<sup>15</sup>

- Noise.
- Interruptions.
- Too many people or conversations.
- Over-stimulation or sensory overload.
- Being given lots of (new) information.
- Being asked to concentrate – including reading, writing and talking (especially for long periods).
- Time pressures, demands and deadlines.
- Long sessions (interviews, meetings and court sittings).
- Unfamiliar dress and unknown rules.
- Presence of technology such as CCTV that may provoke mistrust or paranoia.
- Change of arrangements or personnel.
- Authority figures and official procedures.
- Questioning or interrogation.
- Feelings of not being listened to or believed.
- Loss of control or choices, feeling excluded from decision-making.
- Feeling of being pushed, rushed or hushed.
- Shocks and sudden changes.

30. Difficulties after the hearing such as compliance with appeal deadlines may also need to be taken into account.<sup>16</sup>

### ***Identifying an individual's needs***

#### **Necessary advance planning**

31. Ideally courts and tribunals should have systems for identifying at an early stage and before the final hearing / trial whether any adjustments for disability will be required. Where there is a question on the standard claim form for the court in question, this should be checked by judges or case workers at an early stage and follow-up enquiries made where an issue is identified.
32. In criminal cases, the 'pro forma' form used by the court contains a 'special measures' box.

<sup>15</sup> 'Achieving justice for defendants and witnesses with mental distress: A mental health toolkit for prosecutors and advocates.' (MIND).

<sup>16</sup> See for example *J&K and another* [2019] EWCA Civ 5.

33. Where there is no question on the form, it would be good practice to ask as a matter of routine at any preliminary hearings, or plea and case management hearings whether there are any special needs.
34. These kinds of adjustments need to be decided upon in advance of the full hearing so that necessary arrangements can be made.
  - Making an accurate time estimate which allows for slower pace and/or more breaks and/or shortened days.
  - Any special room which needs booking.
  - Booking any intermediary.
  - Making arrangements for taking evidence by telephone or video link.
  - Any major constraints on cross-examination style so that advocates can be notified in advance. Also, if considered appropriate, so that cross-examination questions can be checked / translated by an intermediary in advance or in certain cases, shown to a witness in advance or even asked and answered in writing in advance.

### **Consultation, case management and ground rules hearings**

35. The [Disability Glossary](#) contains a list of some disabilities, with common effects and suggested adjustments. However, most impairments have a range of symptoms of varying severity which might or might not affect a particular individual. It is therefore important not to guess or assume what adjustments an individual might need. Every individual is different. The person should be asked.
36. Where needs are complex, as well as asking individuals what adjustments would be helpful, it may also be necessary to ask them to provide an advisory letter from their GP or a consultant. However, it should be noted that there is a frequent interplay between social exclusion and mental illness. Many GP surgeries will charge an individual a fee for letters to be written, so careful thought should be given as to whether such a request may exacerbate existing anxiety / mental ill health. Following changes to the GDPR, all patients are now entitled to access their medical records for free<sup>17</sup> and a print-out of the relevant records may sometimes provide sufficient evidence.
37. In criminal or family cases or other cases where intermediaries are used, it may be appropriate to seek a report from an intermediary and to invite the intermediary to the ground rules hearing.
38. The advice should then be discussed with all the parties present during a case management hearing or, in the case of criminal, family and certain other courts, a 'ground rules hearing'.
39. It does not matter whether there is an entire meeting dedicated to discussing the proposed adjustments or whether the discussion is part of a wider case management discussion. What matters is that the subject is fully explored.

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<sup>17</sup> 'Access to health records' BMA.

40. Once arrangements for the hearing are made, they should be kept under review. It may subsequently become apparent that further adjustments are needed.
41. The specific procedure for appointment of intermediaries, the holding of 'ground rules hearings' and the taking of 'special measures' which applies in criminal, family and certain other courts, is set out briefly below (see '[Criminal court procedure – statutory measures](#)'), and in detail in [chapter 2 \(Children, Young People and Vulnerable Adults\)](#), which also refers to the new Practice Direction 3AA supplementing the Family Procedure Rules 2010.
42. Tribunals can gain additional ideas from the rules applied in the criminal sphere.<sup>18</sup>
43. If the disabled individual is speaking English as a second or third language, there may be additional barriers to communication, which may in turn affect the nature of the adjustment under consideration. This includes witnesses or parties whose first language is Welsh, who may struggle with certain English words, or who may not be fluent in reading or writing Welsh, and so prefer the spoken form. Chapter 8 discusses [various aspects of language communication](#) at greater length.

### ***Adjustments for case preparation***

44. The following adjustments in the way pre-trial communication takes place may be appropriate according to the needs of the individual in question:
  - Simplifying wording of correspondence or court orders, if necessary departing from standard forms.
  - Providing documents / guidance leaflets in Easy Read format if available. Many of these are used in the criminal justice system.
  - When composing letters, these adjustments may help for many learning / developmental disabilities:
    - Short sentences and simple punctuation.
    - Use uncomplicated language.
    - Avoiding all jargon.
    - Using 'you' and 'we' rather than third person.
    - Writing rather than spelling numbers.
    - Using bullet points for key points.
    - Using sub-headings and allowing white space between sections.
    - Using larger print, clear typeface, greater spacing, coloured paper.
    - Using photos / drawings / concrete symbols to support text.
    - Being careful about loss of formatting on emails.
  - Where written or telephone communication is difficult, confusing or stressful, holding additional case management preliminary hearings.

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<sup>18</sup> *Rackham v NHS Professionals Ltd* UKEAT/0110/15.



- Being more explicit with instructions, ie stating what appears to be obvious (eg precisely to whom documents should be sent; explaining that 'send to the respondent' means 'send to the respondent's solicitor' if the respondent is represented.)
- Avoiding referring to parties by their status, eg 'claimant', 'respondent', 'appellant', 'party', 'counsel', and using their actual names.
- Avoiding making too many orders or giving too many instructions and tasks at once, or which are to be completed at one time.
- Extending time-limits for taking action.
- Allowing longer for case management / preliminary hearings.
- Making necessary adjustments to any case management / preliminary hearings (eg a suitable room). Many of the adjustments which would be needed at a full hearing / trial may be necessary at preliminary hearings, but can be overlooked at that stage.
- Ensuring case management preliminary hearings have a fixed start time, to avoid exacerbating any underlying stresses that person may have. If several are listed together, taking the disabled person's preliminary / case management hearing first.
- Holding telephone case management rather than requiring the disabled party to travel and attend.
- Expediting the final hearing date.
- Bearing in mind that mental ill health might affect an individual's attitude towards and ability to participate in forms of mediation.

## ***Adjustments for the hearing***

### **General examples of adjustment**

45. The following are examples of possible adjustments for a hearing. Whether they are suitable will depend on the type of proceedings, the needs of the particular individual and whether fairness to each party is preserved.
46. For suggested adjustments in relation to particular impairments, see the [Disability Glossary](#).
47. It may not be suitable for a disabled witness to attend the hearing and give evidence at all. The 'Child, Vulnerable Adult and Sensitive Witnesses Practice Direction'<sup>19</sup> applicable to the First Tier and Upper Tribunal says that a vulnerable witness will only be required to attend as a witness and give evidence at a hearing, where the tribunal determines that the evidence is necessary to enable the fair hearing of the case, and that their welfare would not be prejudiced by doing so. In deciding this, the tribunal should have regard to all the available evidence and the representations of the parties.

<sup>19</sup> 'Child, Vulnerable Adult and Sensitive Witnesses Practice Direction': Senior President of Tribunals (2008). It is intended to update this in the near future. *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123 provides guidance regarding the general approach to vulnerable witnesses in asylum claims.

48. If travel to or attendance at the venue creates a major difficulty, adjustments may entail:
  - Conducting the hearing in a venue other than a court or tribunal room, eg a local hotel conference room, a nursing home or hospital.<sup>20</sup> The witness may be better able to give evidence in a familiar environment.
  - Taking evidence by video link (accessible from a local / community facility) or telephone.<sup>21</sup>
  - Where all other options are unfeasible, considering whether the disabled person can give written evidence and answer questions in writing.
49. In exceptional cases, where a party or witness is unable to leave the home and a remote video or audio hearing is not feasible, a visit to an individual's home may be possible. Before ordering that any hearing should be conducted in this way, it should be discussed locally as there will be administrative considerations and there may well be practical implications for judicial colleagues.
50. Where the date or timing of the hearing causes difficulty, arrange for the witness to give evidence and be questioned by video link or telephone at some other time prior to the hearing.
51. Consider the layout of the room and whether this is likely to cause anxiety, making any necessary adjustments. Consider moving down from the dais to make proceedings less formal.
52. As in all cases, check that fresh drinking water is available and the room is not too crowded, hot or cold. Try to avoid background noise during the hearing, eg a clerk using a printer, loud air-conditioning or a room next to a noisy corridor.
53. Adjust the order in which evidence is heard so that the disabled witness is not kept waiting longer than necessary or can give evidence while medication is at its most effective.
54. If the disabled person is one of the parties, and his or her mental health is likely to deteriorate over the course of a multi-day hearing, it may be best that he or she gives evidence first. On the other hand, if he or she is a litigant in person, who will have to be able to conduct some form of cross-examination, it may be better if the other side's witnesses go first: it will not always be critical that the individual is cross-examined on his or her own witness statement.<sup>22</sup>
55. Be aware of the powers to prevent inappropriate questioning, and use them where appropriate.
56. Allow a carer to be present. Position a carer near to the disabled person. Have in mind that family carers may have difficulty finding someone else to take over the caring role. It helps if they can be given set times for the beginning and end of the hearing and, where childcare is an issue, timing during the school term may be preferable.

<sup>20</sup> As in *Ms B v An NHS Hospital Trust* [2002] EWHC 429.

<sup>21</sup> The 2008 Practice Direction also makes these suggestions.

<sup>22</sup> For example, see an employment tribunal case, *Shui v University of Manchester and others* UKEAT/2360/16.

57. Restrict the number of people attending the hearing and/or restrict reporting where appropriate.<sup>23</sup>
58. Explain and introduce every person within the hearing room.
59. Look out for signs of stress, discomfort, fatigue or lack of concentration as the hearing progresses.
60. If a hearing needs to go part-heard or to be adjourned because of the need for adjustments, it is good practice to note on the file that this is the case and what adjustments will be required on the next occasion.

### **Breaks and shorter hours**

61. It may be necessary to adjust the timing, length or number of breaks, eg to allow for tiredness, shorter concentration spans, anxiety and relief from stress, taking medication, receiving out of court explanation eg via an intermediary.
62. It may be necessary to adjust the length of the day, starting later (eg to allow for medication or accessible travel) or finishing earlier (eg because of tiredness, medical appointments, avoiding rush hour travel).
63. Ideally, the need for an additional number of breaks, shorter days and/or a slower communication style will have been identified in advance, as this will extend the estimated length of the hearing. If insufficient time is allowed, there may be a temptation to cut necessary breaks or to speed up the process, which may cause the disabled person additional stress.
64. Although longer hearings do increase costs and may prevent allocation to the fast track in civil cases,<sup>24</sup> this has to be balanced against the need for adjustments to ensure a disabled person can participate as fully as possible.
65. As well as breaks which have been pre-arranged at suitable times, tell the disabled person that he or she can ask for a break whenever necessary.
66. There can sometimes be a temptation to cut breaks or extend hours in order to finish within the allotted time. This should be treated with great caution if the breaks and hours were initially considered reasonable and necessary. The disabled person should be consulted over whether he or she can manage, but there remains the risk that the person will feel unable to say no and/or that the person is suggestible or feels under pressure and agrees to proceed because he or she believes that this is necessary.

### **Communication**

67. Depending on the nature of the disability, it may be necessary for the judge, advocates and other court staff to adjust their communication style. This is a difficult skill for all involved. Long experience of questioning witnesses with, eg, learning difficulties, does not mean that an advocate does it well.

<sup>23</sup> *SC v The United Kingdom* 60958/00 [2004] ECHR 263 endorses this option. There are various cases about the balance of human rights when restricting reporting in various courts.

<sup>24</sup> Although the possibility that a trial might last longer than one day is not necessarily a conclusive reason for allocating or reallocating to the multi-track.

68. Ideally the subject of communication style would have been discussed at a ground rules or case management preliminary hearing, so that the judge and advocates are fore-warned. However, this may not have happened.
69. Suitable adjustments by the judge may involve:
  - Using the person's name and ensuring he or she is paying attention before speaking to him or her.
  - Explaining in simple language and short sentences what will happen during the hearing / trial. Idiomatic language should be avoided.
  - Ensuring court documents are accessible / readable and offering any necessary support with reading / understanding them.
  - Allowing a self-representing litigant more time to take notes.
  - Allowing extra breaks. People with comprehension difficulties will tire more easily. These need to be complete breaks, and not breaks used as explanation time.
70. Do not assume that because a person has difficulty in communicating, that he or she has difficulty understanding what is said. On the other hand, an ability to speak with apparent fluency may disguise difficulties in understanding.
71. Check understanding by asking the person to repeat back what he or she thinks has been said. Do not ask, 'Do you understand?' People might wrongly believe they have understood or be reluctant to admit they have not.
72. Always ensure that witnesses are treated with due respect and are not ridiculed if they are unable to understand the way questions are being asked.

### **Adjustments to cross-examination**

73. Judges have a duty to intervene to ensure vulnerable witnesses give evidence as best they can. Adjustments to cross-examination, if thought appropriate by the court, may involve:<sup>25</sup>
  - Allowing a witness to give evidence behind a screen so as to focus.
  - Allowing a party acting in person to give evidence from the advocate's table, rather than having to move to a witness table or stand.
  - Imposing time-limits on cross-examination.
  - Advising advocates that they need not 'put' their case in cross-examination.
74. Do not keep repeating questions as this may suggest that the answers are not believed and by itself encourage a change. The same question can be asked at a later stage to check that consistent answers are being given.
75. Assumptions should not be made about lifestyle and usual timing of activity.
76. Witnesses should be allowed to tell their own story in their own way.

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<sup>25</sup> *R v Cokesix Lubemba; R v JP* [2014] EWCA Crim 2064.

## 77. Encourage advocates to:

- Proceed at a slower pace. Allow extra thinking time to assimilate and answer questions.
- Signpost when moving to new topics ('I am now going to ask you about ...').
- Break down questions into short separate elements.
- Avoid:
  - Idiomatic language.
  - Tag questions.
  - Hypothetical or abstract questions.
  - Questions which suggest the answer.

## 78. In more severe cases, there is scope for:

- Sending questions to the witness in advance.
- Getting the questions 'translated' by an intermediary (in criminal, family or other courts where intermediaries are used).
- Allowing the witness to provide written answers.

79. Some people with mental disabilities are especially sensitive to negative emotion and may be suggestible. They may respond to rough or persistent questioning by trying to please the questioner. Others may respond with tearfulness or panic and be traumatised by the legal process of cross-examination. For responses to be reliable, questions should be kept simple and non-threatening.

80. Advocates do not always have the necessary experience or understanding to know how to question a witness with a mental impairment appropriately. A judge should be ready to, as necessary, ask advocates to rephrase their cross-examination, interject when there is clear potential for misunderstanding, and rephrase questions for the witness.

81. On this topic, it is useful to read the section on 'limits on cross-examination' and 'questions likely to produce unreliable answers' in relation to vulnerable witnesses in [chapter 2 \(Children, Young People and Vulnerable Adults\)](#).

## Memory

82. A witness with a mental disability may have difficulty reconstructing events in chronological order. Difficulty in remembering things is also associated with depression. Further, memory can be affected by some types of medication. It may be an error of law not to make reasonable adjustments in facilitating the giving of evidence for those who have memory loss.<sup>26</sup>

83. Memory problems may just affect the level of detail or precision, not the reliability or credibility of the testimony as a whole.

<sup>26</sup> See *JE v SSWP (PIP)* [2020] UKUT 17 (AAC) concerning an adult with an acquired brain injury, memory loss, fatigue and lack of insight into his condition.

## Representation

84. Guidance on McKenzie Friends and Lay Representatives is in [chapter 1](#).
85. To meet the needs of a disabled party, a judge may facilitate representation in a form which might not otherwise have been permitted.
86. It may be helpful to seek assistance as a friend from anyone present in court who clearly has the confidence of the party. This is not the same as allowing such a person to act as a representative in the proceedings; that person may be looked upon as more in the role of an interpreter. Sometimes it may only be a close family member who is able to assist.

## What if the individual does not raise the subject of disability?

87. In some cases, people might not tell the court or tribunal that they have a mental health issue or that they are having any difficulties. This might be because of the stigma attached to mental health, not knowing the court is willing to make adjustments or fear they will be taken less seriously. They may not themselves recognise that they have a difficulty. Unrepresented parties may be particularly unlikely to raise the matter.
88. Judges are not expected to make diagnoses of mental health conditions. It can be difficult to tell whether a person has a mental health difficulty or whether he or she is simply stressed and uncomfortable as a result of being in court. Nevertheless, judges should be alert to any indicators that adjustments might be required.
89. A person might appear disrespectful, difficult, inconsistent or untruthful, but these impressions might be erroneous if they have a mental health condition. Alcohol or drug use could make the behaviour worse. The Prison Reform Trust says the following behaviour might indicate a person has a mental health condition:
  - Avoiding eye contact.
  - Lacking in energy; appearing very slow, almost 'switched off' and empty.
  - Being very restless, fidgety, breathing heavily and sweating.
  - Being very emotional and crying.
  - Talking very negatively about him or herself.
  - Appearing flamboyant and speaking very highly of him or herself.
  - Laughing incongruously.
  - Finding it difficult to answer questions quickly or succinctly with yes / no answers.
  - Speaking very quickly and jumping into conversations when he or she has not been asked a question.
  - Not making sense when he or she talks; muddled or disordered speech.
  - Looking around the room, appearing not to be not listening.
  - Forgetting what has just been said, or what he or she was saying.

- Talking to him or herself or appearing distracted.
  - Turning up in court dressed inappropriately or being unkempt in appearance.
90. MIND suggests these ways of asking about mental distress (as appropriate):<sup>27</sup>
- ‘You appear to be distressed by this situation. Is there anything which would help reduce your anxiety?’
  - You seem to be distressed by this situation. Is there anything you would like to tell us about your situation? Is there anything we can do to help?’
  - ‘I would like to ask you if you are experiencing any mental distress or have a mental health condition. If you want to tell me, ‘Say yes’. If you feel unable to tell me or you do not have a mental health condition, say ‘no comment’.’
91. Ways to establish the mental health of a defendant in criminal proceedings where there is reason for concern are set out below in the section ‘Mental health: defendants and the criminal justice system’.

### **Criminal court procedure – statutory measures**

92. The above principles apply to criminal courts as much as to civil courts. In addition, there are specific statutory rules for vulnerable witnesses in criminal cases, which carry their own terminology.
93. Under the Youth Justice and Criminal Evidence Act 1999, vulnerable witnesses in criminal proceedings (other than the accused) are eligible for ‘special measures’. A witness is eligible if the court considers that the quality of evidence given by the witness is likely to be diminished for a number of specified reasons, including that the witness suffers from mental disorder within the meaning of the Mental Health Act 1983, or otherwise has a significant impairment of intelligence and social functioning.
94. The special measures must be applied for and ordered by the court. They are:
- Screening witness from the accused.
  - Evidence by live link.
  - Evidence given in private.
  - Removal of wigs and gowns.
  - A video recording of an interview of the witness to be admitted as evidence in chief.
  - Provision of an appropriate advice to enable communication of questions and answers, eg a picture board.
  - Conducting examination of the witness through an intermediary. This can entail communicating questions to the witness; communicating the witness’s answer; explaining the questions and answers as necessary so as to be understood.

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<sup>27</sup> ‘Achieving justice for defendants and witnesses with mental distress: A mental health toolkit for prosecutors and advocates.’ (MIND).

95. Although these statutory rules do not apply to defendants, judges have a general power to make equivalent adjustments for disabled defendants and non-registered intermediaries can be appointed.
96. In addition to these specified special measures, where a witness or defendant in a criminal case has a disability, a 'ground rules' hearing should be held to discuss in advance the steps needed for the hearing. If an intermediary has been appointed, he or she should be invited to attend.
97. Where there are vulnerable witnesses, 'ground rules' hearings should be held to plan conduct of the hearing.
98. These procedures, including use of intermediaries, can be adopted by certain other courts, particularly family courts.
99. For more detail of vulnerable witnesses, ground rules hearings, intermediaries and when they can be used, special measures in practice including with disabled defendants, see [chapter 2, \(Children, Young People and Vulnerable Adults\)](#).

### ***Mental disability and remote hearings***

100. Judges should carefully consider whether remote hearings are suitable for parties or defendants with cognitive impairments, mental ill health or who are neurodiverse, eg those on the autistic spectrum or who are dyslexic.<sup>28</sup> It is possible that aspects of their disability are particularly unsuited to a remote format, eg if they:
  - Have learning disabilities or other communication needs.
  - Rely on visual cues to assist understanding.
  - Have a short attention span.
  - Feel reluctant to speak up.
  - Have extreme anxiety (although conversely, this can be a reasonable adjustment for some people, who fear coming into court).
101. The Equality and Human Rights Commission has drawn attention to difficulties with remote hearings in the context of the criminal justice system.<sup>29</sup> However, these points of principle also apply to all types of remote hearing.<sup>30</sup>

Bear in mind that:

  - It is harder to identify if someone is confused, disengaged or unable to pay attention if they appear only as a small figure on screen.
  - Poor sound and image quality is hard for everyone, but can cause particular difficulties for those who are struggling to follow or participate.

<sup>28</sup> See for example, *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583.

<sup>29</sup> 'Inclusive justice: a system designed for all. Interim evidence report. Video hearings and their impact on effective participation': EHRC (22 April 2020).

<sup>30</sup> The Court of Appeal considered the EHRC guidance in a family case: *S (Vulnerable Parent: Intermediary)* [2020] EWCA Civ 763.



- It can be particularly confusing or distressing for the individual to be unable to see the whole courtroom and everyone in it.
- The individual may be more isolated than if appearing in court and may find it harder to communicate with legal advisers.
- Video hearings make it harder to identify a mental disability if it has not already been flagged up.

102. If a remote hearing is unavoidable, it may help to:

- (in appropriate jurisdictions) Get an assessment from an intermediary as to whether the individual can participate fully in a remote hearing and what adjustments might enable this. Go on to appoint an intermediary to assist during the hearing if needed.<sup>31</sup>
- Hold a prior case management hearing to familiarise the individual with the on-screen picture and process and to discuss necessary adjustments.
- Check whether the individual will be alone or will have access to support.
- Alleviate any anxieties in advance, eg about when there will be breaks, what happens if there is a loss of connection, what happens if there is an unavoidable personal interruption at home.
- Consider the display screen and where the platform allows for choice, consider which faces should show on screen and in what size image.
- For some individuals, it may help to pin certain faces to the screen rather than have the screen jump around to whoever is speaking.
- Where on-screen distractions may be problematic, consider asking those who are not speaking for any length of time to switch off their camera.
- Introduce everyone at the outset.
- Proceed slowly and check more regularly than usual that the individual is following.
- Agree a signal by which an individual can indicate they do not understand or wish to speak, eg holding up an agreed object. Otherwise, a delay in recognising that someone wants to speak can lead to a cumulative loss of understanding by that person.
- If there is any temporary loss of sound or image quality, ensure that important information is repeated.
- Breaks may need to be longer than usual where an individual is getting advice from a representative or assistance from an intermediary. Explanation may take longer where individuals are communicating remotely, and the usual rest time also needs to be built in.
- Where it is hard to estimate how long a break will be needed, consider how individuals (or their representatives) can let the judge know that they are ready to return from the break.

<sup>31</sup> *S (Vulnerable Parent: Intermediary)* [2020] EWCA Civ 763.

## ***Mental health: defendants and the criminal justice system***

### **Prisoners and mental health**

103. Research in prisons has shown that adult prisoners experience a much higher rate of mental health conditions than the general population.<sup>32</sup> For example:

- 66% of prisoners have a personality disorder compared to 5% of the general population.
- 45% of prisoners have a mood disorder such as depression or anxiety compared to 14% of the general population.
- 8% of prisoners have psychosis compared to 0.5% of the general population.
- Around half or more of prisoners may have had some degree of traumatic brain injury.<sup>33</sup>
- It is thought that a notable proportion of prisoners have learning disabilities, but historically these have not been clearly identified due to the failure of most prisons to carry out routine screening of all prisoners.<sup>34</sup>

104. Women are far more likely than men to suffer either anxiety and depression or psychosis. Children both on community orders and in prison have a far higher rate of mental health conditions than other children.

105. In a 2017 report on 'Mental Health in Prisons', the National Audit Office said that complex social and personal issues such as a history of unemployment, substance misuse or trauma are more common among the prison population, and that being in prison can exacerbate poor mental health and well-being. Prisoners are less able to manage their mental health because most aspects of their day-to-day life are controlled by the prison. Many prisoners also move in and out of prison, or between prisons, which makes the job of providing healthcare more difficult. Prisoners whose mental health needs are not addressed may be more likely to reoffend. The NAO found:

- Rates of self-inflicted deaths and self-harm have risen significantly in the last five years (since 2012), suggesting that mental health and well-being in prison have declined.
- The prison system is under considerable pressure, making it more difficult to manage prisoners' mental well-being, though government has set out a reform programme to address this.
- While clinical care is broadly judged to be good, there are weaknesses in the system for identifying prisoners who need mental health services.

<sup>32</sup> 'Mental health and learning disabilities in the criminal courts: Information for magistrates, district judges and court staff': McConnell and Talbot. (The Prison Reform Trust and Rethink Mental Illness. 2013).

<sup>33</sup> 'Traumatic Brain Injury in the Prison Population': HMPPS (Oct 2019).

<sup>34</sup> 'A joint inspection of the treatment of offenders with learning disabilities within the criminal justice system': HM Inspectorate of Probation (March 2015).

## Ways to find out whether the defendant has a mental health condition

106. Judges need to be aware if mental health is an issue, both so that all reasonable adjustments can be made, and in order to make the most appropriate disposal decision. Either because of the stigma attached or because of lack of self-awareness, many defendants will not have informed the criminal justice system that they have a mental disability.<sup>35</sup>
107. The increased use of video hearings makes it harder for courts to identify whether a defendant has a cognitive impairment, mental ill-health or a neurodiverse condition.<sup>36</sup>
108. As mentioned in [paragraph 89](#) of this chapter, there are various behaviours which may alert a judge to the possibility that an individual has a mental disability. If concerned, a judge can obtain further information in a number of ways, eg:
  - Information from the pre-court briefing. If an ‘appropriate adult’ was present, this would be an indicator. However, the police may not have recognised that the person had possible mental health difficulties.
  - By asking the defendant. Although some defendants will be reluctant or unable to say, others will be willing to offer information. Any such discussion should be carried out calmly and sensitively and not in open court.
  - From the defendant’s advocate. However, an advocate will not necessarily have been trained to recognise mental health difficulties if not directly informed by the defendant.
  - Community mental health services.
  - Liaison and diversion services.
  - Medical reports. These can be requested by the judge at a defendant’s first appearance in court and at any point during court proceedings, under various provisions.

## Mental Health Liaison and Diversion Services

109. Some police custody suites and some courts have Mental Health Liaison and Diversion (L&D) Services available on certain days. These services will be staffed by qualified healthcare professionals with expertise in the areas of mental health and learning disability. Their role includes helping police and courts identify defendants with possible mental health conditions, and providing information to members of the judiciary and court staff concerning defendants’ support needs and possible reasonable adjustments.
110. In England, screening of people in custody by L&D professionals for pre-existing conditions and, in some cases, assessing communication needs is becoming more systematic, and the information is increasingly being passed onto the

<sup>35</sup> ‘Inclusive justice: a system designed for all. Findings and Recommendations’: EHRC (June 2020).

<sup>36</sup> ‘Inclusive justice: a system designed for all. Interim evidence report. Video hearings and their impact on effective participation’: EHRC (22 April 2020).

courts. L&D services are not widespread in Wales where no funding is available.<sup>37</sup>

## Bail and remand decisions

111. Research has shown that due to the difficulties courts face in obtaining full and accurate information about defendants' needs, there is significant overuse of custodial remand for the purpose of facilitating psychiatric assessments.<sup>38</sup>
112. Prison can be wrongly viewed as a speedy and reliable place of safety for vulnerable individuals. Liaison and Diversion Services should be able to help obtain timely information about defendants' support needs, including referrals for support while defendants await subsequent court appearances.
113. Where bail is granted subject to residence at 'approved premises', these need to be suitable for the particular defendant.

## The trial

114. A recent publication by the Equality and Human Rights Commission described the criminal justice system as a 'maze of processes and procedures woven with complicated language (which) means few people understand how to find their way through. For those who are disabled or have mental health conditions, it can be especially difficult'.
115. The research showed that defendants with a cognitive impairment, mental health condition and/or neurodiverse condition struggled to understand the language used. Many of those surveyed said they did not understand everything they were charged with and understood only some or none of what the judge said during their hearings.<sup>39</sup>
116. Under Article 6 of the European Convention on Human Rights a defendant has the right to 'effective participation' in his or her trial, which includes the right to hear and follow proceedings, which includes:<sup>40</sup>
  - Being informed clearly and in detail, and in language which he or she can understand, of the nature and cause of the accusation against him or her.
  - Having a broad understanding of the trial process and what is at stake.
  - Being able to understand the general thrust of what is said in court.
  - Being able to understand what is said by the prosecution witness and able to point out to his or her own lawyers any statement with which he or she disagrees.
117. Potential [adjustments for the hearing](#) are set out earlier in this chapter, including adapting 'special measures' usually available for witnesses.
118. It will in certain circumstances be necessary to explain to the jury that a witness's demeanour may be indicative of a short attention span due to a

<sup>37</sup> 'Inclusive justice: a system designed for all. Findings and Recommendations': EHRC (June 2020).

<sup>38</sup> For a discussion of this, see 'Mental health and learning disabilities in the criminal courts: Information for magistrates, district judges and court staff': McConnell and Talbot (The Prison Reform Trust and Rethink Mental Illness. 2013).

<sup>39</sup> 'Inclusive justice: a system designed for all. Findings and Recommendations': EHRC (June 2020).

<sup>40</sup> *SC v The United Kingdom* 60958/00 [2004] ECHR 263.

mental health condition as opposed to bad behaviour or a 'couldn't care less' attitude.

119. Intermediaries will sometimes be necessary to ensure the defendant can participate effectively in proceedings and will receive a fair trial. More detail on intermediaries is set out in [chapter 2, from paragraph 95 onwards](#).

## Sentencing

120. Sentencing options may be affected by the mental health of the defendant or any learning disability. Where it is known or suspected that an offender has a mental health condition or learning disability, judges should seek further information to inform their sentencing decisions. This can include pre-sentence and medical reports, Liaison and Diversion intervention, and reports from Community Mental Health organisations.
121. It is permissible to take into account the current conditions in prison arising from Covid-19 protection measures, when deciding whether to suspend a sentence.<sup>41</sup> For example, the likely impact of a custodial sentence could be heavier if the offender is likely to be confined to a cell for much longer periods than usual. This may be even more so for offenders with mental ill health or impairment.
122. Bear in mind that certain groups have specialist needs, eg [refugees](#), [victims of trafficking](#), [certain black and minority ethnic people](#), women who have been subjected to domestic violence, and [veterans](#).
123. When deciding on a sentence, it is relevant to consider the offender's mental health or disability. The Sentencing Guidelines on Seriousness state that mental illness or disability is a factor which can indicate significantly lower culpability.<sup>42</sup> On 1 October 2020, the Sentencing Council issued a new Guideline on 'Sentencing offenders with mental disorders, developmental disorders or neurological impairments'. The Guideline states that:
- In assessing whether the impairment or disorder has any impact on sentencing, the approach should always be individualistic.
  - Some mental disorders can fluctuate so that an offender's state during proceedings may not be representative of their condition at the time of the offence.
  - Be careful not to make assumptions. Many disorders and impairments are not easily recognisable.
  - Offenders may be unaware or unwilling to accept they have an impairment or disorder.
  - Do not necessarily draw an adverse inference because someone has not previously been formally diagnosed or willing to disclose an impairment.
  - It is not uncommon for people to have a number of different impairments (this is known as co-morbidity').

<sup>41</sup> *R v Manning* [2020] EWCA Crim 592.

<sup>42</sup> 'Overarching Principles: Seriousness': Sentencing Guidelines Council.

- Differences of expert opinion and classification are common. A formal diagnosis is not always required, but if it is, a report from a suitably qualified expert will be necessary.
  - It is important that courts are aware of relevant cultural, ethnicity and gender considerations within a mental health context.
  - People from black, Asian and minority ethnic communities may be more likely to experience stigma attached to a mental health concern, may be more likely to have experienced difficulty in accessing mental health services, more likely to be treated under a section of the Mental Health Act, and more likely to have entered mental health services via the courts and police than primary care.
  - Female offenders are more likely to have underlying mental health needs. The impact on women from black, Asian and minority ethnic communities is therefore likely to be higher.
  - Refugees may be more likely to experience mental health problems than the general population.
124. The Sentencing Council also sets out the relevance of ‘mental disorder’ to the defendant’s culpability in a number of its other Guidelines.<sup>43</sup> In some circumstances, this may place a sentence on ‘the very cusp of’ that which is capable of being suspended, in which case courts must ensure the fullest possible evidence is before them prior to considering the appropriate sentence.<sup>44</sup>
125. Where a non-custodial disposal is deemed appropriate, bear in mind the support needs of the offender, eg:
- Are the requirements of a community order realistic? If not, are you setting the defendant up to fail or reoffend? It may be worth inviting a member of the Liaison and Diversion team to be present at the sentence hearing so as to establish what support is in place or available and how a defendant will best be managed in the community. Local circumstances can vary.
  - If a low-income offender with learning difficulties is given a fine, what extra support will they need to manage their finances? Does the offender understand the consequences of default?
126. There are three treatment-based requirements which can be made as part of a Community Order: a Drug Rehabilitation Requirement; an Alcohol Treatment Requirement and a Mental Health Treatment Requirement (‘MHTR’).
127. It is estimated that at least 40% of offenders on Community Orders have a diagnosable mental health condition, yet MHTRs remain little used. The Prison Reform Trust recommends these be given greater consideration.
128. A MHTR can be made where the court is satisfied: (a) that the mental condition of the offender is such as requires and may be susceptible to treatment but is not such as to warrant the making of a hospital or guardianship order; (b) that

<sup>43</sup> See for example the Assault Guidelines, the Arson/Criminal Damage Guidelines, the Child Cruelty Guideline and the Guidelines for Drug Offences.

<sup>44</sup> *R v Montaut* [2019] EWCA Crim 2252.

arrangements for treatment have been made; (c) that the offender has expressed willingness to comply).

129. MHTRs are intended as an option for offenders with low to medium mental health problems (including low-level depression and anxiety) which are assessed as treatable in the community, and whose offending behaviour may be positively affected by such a route. They are attractive because they enable offenders to engage in treatment and have community support whilst also serving a sentence, potentially improving health outcomes and reducing the risk of reoffending.
130. MHTRs can where appropriate be made in tandem with alcohol or drugs treatment requirements.
131. In making these decisions, it is helpful to be aware of local services which can support an offender.<sup>45</sup>
132. It is important to ensure offenders understand their sentence and what will happen if they reoffend or breach the terms of their license or supervision.<sup>46</sup> Bearing in mind the EHRC research referred to above as to how little defendants with mental impairments understood what was being said in court, adjustments could include:
  - Using clear and unambiguous language.
  - Putting the key points in writing in an accessible way, eg in 'Easy Read' format.
  - Having the intermediary present in court when sentencing is done.
  - Having a member of Liaison and Diversion Services / probation in court when sentencing.

## **Veterans**

### **Mental health**

133. To be a veteran you only have to have served for one day in the regular or reserve forces. There are 2.35 million veterans in England and Wales.
134. It is hard to access accurately the prevalence of mental health needs amongst veterans because of variable methods used in different studies and the fact that different age and occupational groups tend to be affected differently.<sup>47</sup> The overall pattern is one of similar or slightly worse levels of mental ill health than the general population. The vast majority of military personnel do not experience mental health problems during or after service. But those who do, may have specific needs and require particular mental health services.

<sup>45</sup> 'Community Sentence Treatment Requirements Protocol – Process evaluation report': Department of Health & Social Care (June 2019) provides an interesting analysis of a new protocol trialled in five areas between November 2017 and January 2018.

<sup>46</sup> 'Sentencing offenders with mental disorders, developmental disorders or neurological impairments': Sentencing Council Guideline (1 Oct 2020).

<sup>47</sup> 'Call to mind: A framework for action. Findings from the review of veterans and family members mental and related health needs assessments - Final Report (October 2015).

135. Following the conclusion of their service, some people leaving the Armed Forces experience family breakdown, homelessness, mental health problems and substance misuse. This is often attributed by the media to Post Traumatic Stress Disorder ('PTSD'), but this should only be properly diagnosed by a medical expert.
136. The research is inconsistent as to whether rates of PTSD are notably higher amongst service personnel or ex-service personnel than in the civilian population. This may in part be due to the failure to distinguish between different groups of personnel. On one of the most recent surveys, PTSD rates were highest amongst ex-service regulars (7.4% and 9.4% of those who had deployed), compared with 4.4% of the civilian population.<sup>48</sup> As well as the experience of combat itself, this may be the result of a variety of factors such as predisposition prior to joining the forces because of childhood experiences and difficulties adjusting to civilian life after leaving service.
137. Reports differ as to whether veterans are more or less likely to experience common mental health problems, eg depression and anxiety than comparable age groups in the general population, but it is not in any event a significant difference.
138. Veterans are almost twice as likely to experience alcohol problems as those in the general population.
139. There is likely to be an association between physical health problems such as musculoskeletal problems, chronic pain and unspecific symptoms and the experience of common mental health problems and/or alcohol and drug use.
140. The mental health needs of veterans' families are often overlooked.
141. Mental and related health problems amongst veterans and family members are often aggravated or associated with social care needs including debt, housing and employment. Exposure to combat and post deployment mental health problems have been found to be risk factors for violence both inside and outside the family environment.<sup>49</sup>

### **The cause of veterans' mental health difficulties**

142. It is difficult to establish with certainty if a mental health condition is caused by military service; whether it would have occurred anyway and whether service mitigated, aggravated or made no difference to it.
143. Pre-service vulnerabilities play a part in subsequent incidence and prevalence of mental health and related problems including early childhood deprivation, poor educational attainment and parental neglect or abuse.
144. As with other members of society, those who have served in the Armed Forces can be expected to experience periods of poor mental health irrespective of their service. For a few, the evidence shows that poor mental health is caused by the experiences they have had during their service.

<sup>48</sup> 'The Mental health of the UK Armed Forces': King's Centre for Military Health Research: Briefing Note (Sept 2018). See also 'Mental health outcomes at the end of the British involvement in the Iraq and Afghanistan conflicts: A cohort study': Stevelink and others. British Journal of Psychiatry (2018).

<sup>49</sup> 'Post-deployment family violence among UK military personnel': Kwan and others. Psychological Medicine (2017).



145. There is a certain amount of evidence to suggest that adjustment disorders and identity issues are a need of ex-service personnel within the criminal justice system. Offenders have often experienced social isolation after leaving the armed services and have had problems adjusting to life outside the military, feeling part of neither the civilian nor military community.<sup>50</sup>
146. Despite increasingly bespoke mental health service provision for military veterans there is often a reluctance to seek help or treatment because:<sup>51</sup>
- They do not want to admit what they see as ‘weakness’.
  - The stigma associated with getting help for mental health issues is particularly acute. However, ‘anti-stigma’ campaigns in recent years have been successful in challenging these perceptions.
  - They believe civilians do not understand military life.
  - They are unaware of the availability of services or have unrealistic expectations of waiting times and what can be offered.
147. Access to services can be problematic for veterans as they often present with multiple problems, eg mental health and alcohol issues. They may also present with a complex range of behavioural problems that do not fit service access criteria, eg anger and excessive or problematic alcohol use combined with social care problems.
148. Difficulties can be compounded by the fact that veterans and service personnel often move home, thus finding it difficult to access primary and secondary healthcare. Medical records may not have been passed from one doctor to another.

### **Veterans and the criminal justice system**

149. It is estimated that roughly 3.5% of the prison population are veterans, although some commentators have suggested that this is in fact as high as 17%.<sup>52</sup> Many former service personnel who find themselves involved with the criminal justice system have mental health problems.
150. Studies suggest that veterans in contact with the UK criminal justice system (in custody and under community supervision):
- Are more likely to have qualifications and the experience of secure employment than those who had not served in the armed forces.
  - Have similar practical needs, eg for accommodation and in relation to financial issues.
  - Have lower needs in relation to drug addiction.
  - Are more likely to have experienced (often multiple and co-existing) mental health issues, harmful or hazardous drinking, and physical health problems.

<sup>50</sup> ‘The needs of ex-service personnel in the criminal justice system: a rapid evidence assessment’: Lyne and Packham (MOJ 2014).

<sup>51</sup> ‘Stigma and barriers to care in service leavers with mental health problems’ KCMHR (2017).

<sup>52</sup> ‘Guidance: Ex-armed service personnel in prison and on probation’ (15 May 2019).

- Present with anxieties over identity, stigma and loss of a sense of belonging. Social isolation and disconnection/adaptation disorders in civilian life are a more common explanation of behaviour than PTSD.<sup>53</sup>

151. The Phillips' Review<sup>54</sup> found knowledge on the part of criminal justice professionals as to the needs of former service personnel to be patchy. Some offenders felt professionals had taken their service background and mental health into account, whilst others spoke of negative experiences where they perceived that one or both of these factors had been held against them.
152. Appropriate support settings may well involve mental health services, substance misuse services or service charities. Additional sentencing options may be available due to bespoke statutory and 3rd sector services covering health, housing, finance, employment, etc.

### **The Armed Forces Covenant**

153. The Armed Forces Covenant is a promise from the nation that those who serve or have served, and their families, are treated fairly. Veterans are entitled to priority access to NHS care, subject to clinical need.
154. The government has said the mental health and wellbeing of service personnel, whether regulars or reservists, their families and veterans is a priority.

### ***Acceptable terminology***

#### **How to discuss someone's possible needs in court**

155. Do not begin with any assumptions beyond those that are clearly justified by what is immediately and incontrovertibly evident.
156. The person involved should be addressed directly and in a normal manner unless and until it is clear that some other approach should be adopted.
157. Talk directly to the disabled person even if there is an interpreter, carer or personal assistant.
158. If the condition is known, or disclosed, remember that within any condition there are varying levels of impairment, so a general knowledge of the condition and its effects, while a good start, may be inadequate to deal with the particular individual appropriately.
159. People vary in their sensitivity about disclosing their impairment and those with mental health conditions are often reluctant to accept and admit them, so any questioning needs to be sensitively done.
160. Where a condition may require regular breaks, indicate how the disabled person is to indicate the need for a break to avoid the person appearing to need to 'ask permission' on each occasion.
161. Avoid disclosure of medical histories where possible.

<sup>53</sup> 'Guidance: Ex-armed service personnel in prison and on probation' (15 May 2019).

<sup>54</sup> 'Former Members of the Armed Forces and the Criminal Justice System: A Review on behalf of the Secretary of State': Stephen Phillips QC MP (2014).

## The social model v the medical model of disability

162. It is important to understand that there are two different models of disability: the medical model and the social model. Most disabled people prefer the social model.
163. The medical model says that a person is disabled by their impairments and focuses on the individual's inability to carry out certain tasks. The social model says that disability is caused by the way society is organised. For example, the medical model says that a wheelchair user is unable to access a building with steps but no ramp because he or she is unable to climb stairs. The social model says that the person is prevented from using the building because it has no ramp.
164. The UN Convention on the Rights of People with Disabilities 2006 tends towards the social model with this definition:
- ‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’
165. There are different views within the disabled community as to whether a person should be referred to as a ‘disabled person’ or a ‘person with a disability’. The former formulation, although unpopular at one stage, may now fit better with the social model (ie ‘disabled by society’).

## Use of terms

166. Some Acts of Parliament, particularly older ones, use terminology that would now be considered out of date and in some cases inappropriate. Judicial office-holders will continue to work with those statutory definitions and tests until such time as the legislation is updated. Whilst legal findings must continue to be phrased within the technical definitions, this does not justify the wider use of language that may offend and judges should be encouraged to converse in appropriate terms.
167. There are expressions and terms which should not be used as they may cause offence. Avoid:
- Comparisons with ‘normal’ and referring to ‘the disabled’ as if they were a distinct class.
  - Using negative terms such as ‘suffers from’ – use instead ‘has’, ‘experiences’ or other more neutral terminology
  - Talking about people as if they are medical conditions: eg ‘a dyslexic’ – use instead ‘person with dyslexia’.
  - Referring to someone as ‘handicapped’ – use instead ‘disabled person’.
  - ‘Mental handicap’ – use instead ‘learning disability or disabilities’ or ‘learning difficulties’ (the latter not to be confused with ‘specific learning difficulties’). Some people now dislike the term ‘learning disability’, although it is still widely used including as a diagnostic tool.

- ‘Mental illness’ – use instead ‘mental health issues’ or ‘mental health condition’ or ‘mental ill health’.
- Some cultural minorities will refer to poor ‘emotional’ health or well-being rather than poor ‘mental’ health.
- ‘Mental capacity’ is a very specific phrase which has a technical legal meaning. The subject is addressed in [chapter 5](#).

### **The legal definition of ‘disability’**

168. ‘Disability’ is defined differently in various statutes and international instruments. It is also treated differently in the UK for the purposes of discrimination under the Equality Act 2010 and in relation to eligibility for social security benefits.
169. The term ‘mental disorder’ is defined by section 1(2) of the Mental Health Act 1983 as ‘any disorder or disability of the mind’. For the purposes of the Act a person with a learning disability is not be considered by reason of that disability to be suffering from mental disorder ‘...unless that disability is associated with abnormally aggressive or seriously irresponsible conduct on his part’ – section 1(2)(A). This definition is exclusive to the compulsory detention procedure, but is sometimes used as guidance for wider purposes. Dependence on alcohol or drugs is not (per se) considered to be a disorder or disability of the mind – section 1(3).
170. For the purpose of this chapter, it is not important whether a party or witness meets any particular legal definition. The chapter is concerned to ensure reasonable adjustments are made for individuals who have an impairment which might interfere with their ability to have a full and fair hearing.

### ***The Equality Act 2010***

171. The Equality Act 2010 prohibits discrimination in relation to disability. ‘Disability’ carries a specific definition in the Act. See the Equality Act 2010 appendix for an [overview](#) of the Equality Act 2010 and for more detail of the application of the Equality Act 2010 to [disability](#) including mental disability.

### ***References and resources***

Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link. Within the thematic groupings, references are listed in alphabetical order (discounting the first ‘the’ or ‘a’).

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[J & K and another](#) [2019] EWCA Civ 5

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[Ms B v An NHS Hospital Trust](#) [2002] EWHC 429

*R (on the application of King) v Isleworth Crown Court* [2001] All ER (D) 48 (Jan)

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[\*S \(Vulnerable Parent: Intermediary\)\*](#) [2020] EWCA Civ 763

[\*SC v The United Kingdom 60958/00\*](#) [2004] ECHR 263

[\*SB \(Vulnerable adult: credibility\) Ghana\*](#) [2019] UKUT 00398

[\*Shui v University of Manchester and others\*](#) UKEAT/2360/16

## **Conventions**

[UN Convention on the Rights of People with Disabilities 2006](#)

## Chapter 5 Capacity (Mental)

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#### **Related content in other chapters**

[Physical Disability](#) (chapter 3)

[Mental Disability](#) (chapter 4)

[Disability Glossary: Impairments and Reasonable Adjustments](#) (appendix)

Note: the Glossary contains a list of different impairments, where it is possible to click straight through to the relevant impairment.



## Overview

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed via a listing of all the main topics on the contents page for this chapter.

The legal system relies on the assumption that people are capable of making, and thus being responsible for, their own decisions and actions. It is therefore necessary to be able to recognise a lack of mental capacity when it exists, and to cope with the legal implications.

False impressions of lack of capacity can be caused by communication difficulties or a person's physical appearance.

There is no standard test of capacity for all purposes. Where doubt is raised as to mental capacity, the question to ask is not, 'Is he (or she) capable?', but rather, 'Is he (or she) incapable of this particular act or decision at the present time?'.

When seeking opinions about capacity, bear in mind that different professions apply different criteria.

Legal tests vary according to the particular transaction or act involved, but generally relate to the matters which the individual is required to understand.

There is a presumption that an adult is capable, though this may be rebutted by a specific finding of incapacity. When there is good reason for cause for concern and legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity.

It may be necessary to determine the issue of capacity at a separate hearing.

The Mental Capacity Act 2005 (MCA) establishes a comprehensive statutory framework, setting out how decisions should be made by and on behalf of those whose capacity to make their own decisions is in doubt. There is also a Mental Capacity Act Code of Practice.

The Court of Protection has to deal with the entire range of decision-making on behalf of incapacitated adults.

A party who is incapable of conducting the particular proceedings must have a representative ('litigation friend') to do so, whether bringing the proceedings or defending them. Power to appoint litigation friends in tribunals is not generally set out in explicit terms as it is in the CPR. Nevertheless, recent cases have stated that immigration, employment and it would seem by extension, other tribunals, can do so as part of their general case management powers.

## **Criteria for assessing capacity**

1. This chapter deals specifically with mental capacity. Where an individual has a mental disability, but does not lack capacity, see [chapter 4](#).
2. The legal system relies on the assumption that people are capable of making, and thus being responsible for, their own decisions and actions. It is therefore necessary to be able to recognise a lack of mental capacity (or 'incapacity') when it exists, and to cope with the legal implications.
3. A standard test of capacity for all purposes would be over-simplistic and discriminatory. Most individuals have some level of capacity and this should be identified and respected. For example, the test of capacity to drive is clearly different from that to get married, and the capacity required to sign a will, differs from that for a lasting power of attorney.
4. There are three possible approaches to the question of mental incapacity:
  - *Outcome-assessed*  
Determined by the content of the decision (eg if it is illogical or foolish, the maker must lack capacity). This approach is flawed because we are all entitled to be eccentric, and a judgment as to what is foolish is subjective.
  - *Status-assessed*  
Judged according to the status of the individual such as age (eg over 90 years), a medical diagnosis (eg senile dementia) or place of residence (eg being in a mental hospital). Apart from in the case of children, this approach was abandoned long ago (at one time women lacked 'capacity'). Detention under the Mental Health Act 1983 does not necessarily deprive the patient of decision-making capacity.
  - *Understanding-assessed*  
This assesses the ability of the individual to understand the nature and effect of the particular decision and to act on that understanding. A test based on understanding is generally appropriate, although the outcome of decisions, or the individual's status, may result in capacity being questioned and the appropriate test should then be applied.
5. Appearances can be deceptive:
  - It is not unusual for communication difficulties to create a false impression of lack of mental capacity.
  - A person's appearance, perhaps the consequence of physical disabilities, can create an impression of lack of mental capacity which is not justified.
  - Observance of the conventions of society, or communication skills, can disguise lack of capacity (eg a learnt behaviour pattern).

## **The approach of different professions**

6. When making assessments, different professions apply different criteria.
  - The medical profession is concerned with diagnosis and prognosis, and health authorities are increasingly being relieved of the responsibility to care

for those with mental disabilities who do not respond to conventional medical treatment.

- Care professionals classify people according to their degree of independence, which involves consideration of levels of competence in performing skills such as eating, dressing, communicating and interacting socially.
  - The lawyer is concerned with legal capacity, namely whether the individual is capable of making a reasoned and informed decision, and able to communicate that decision.
7. Such differences of approach should be borne in mind when seeking opinions about capacity. A multi-disciplinary approach is usually best in difficult or disputed cases, and assessment should not then be left entirely to the doctor. A lawyer who gathers evidence, and expert opinion from a variety of sources, may be in the best position to make an evaluation of capacity. In disputed cases, determining capacity is the role of the court.

### ***Assessment of capacity***

8. Legal tests vary according to the particular transaction or act involved, but generally relate to the matters which the individual is required to understand. It has been stated (in regard to medical treatment, though the test is no doubt universal) that the individual must be able to (a) understand and retain information and (b) weigh that information in the balance to arrive at a choice.<sup>1</sup>

### **Presumption of capacity**

9. There is a presumption that an adult is capable, though this may be rebutted by a specific finding of incapacity.
- If a person is proved incapable of entering into contracts generally, the law may presume such condition to continue until it is proved to have ceased, although there may be a lucid interval.
  - If an act and the manner in which it was carried out are rational, there is a strong presumption that the individual was mentally capable at the time.
  - Eccentricity of behaviour is not necessarily a sign of incapacity, and care should be exercised before any assumption is made.

### **Determining capacity**

10. Where doubt is raised as to mental capacity, the question to ask is not, 'Is he (or she) capable?' or even, 'Is he (or she) incapable?', but rather, 'Is he (or she) incapable of this particular act or decision at the present time?'.
11. It may be necessary to determine the issue of capacity at a separate hearing. Note in particular that:
- Capacity is an issue of fact, though it is necessary to identify and apply the appropriate legal definition or test.

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<sup>1</sup> *Re MB* [1997] 2 FCR 541, CA, Butler-Sloss LJ.

- Capacity depends upon understanding rather than wisdom, so the quality of the decision is irrelevant as long as a person understands what he or she is deciding.
- Capacity must be judged for the individual in respect of the particular transaction or decision at the time it was taken or is to be taken. In cases where a person's capacity may fluctuate, it is likely that the need to review the assessment of capacity will arise more frequently.
- In legal proceedings, a judge makes the determination, not as medical expert but as a lay person and on the basis of evidence not only from doctors but also from those who know the individual.

## **Evidence**

12. General reputation is not admissible in evidence, but the treatment by friends and family of a person alleged to lack mental capacity may be admissible. Evidence of conduct at other times is admissible, and the general pattern of life of the individual may be of great weight, although it is the state of mind at the time of the decision that is material.
13. Medical evidence is admissible and usually important, but it must be considered whether the opinion of a medical witness as to capacity has been formed on sufficient information and on the basis of the correct legal test.
14. A person alleged to lack capacity should be given the opportunity to make representations unless the issue is beyond doubt. If present capacity is the issue, it will generally be desirable for the judge to see and attempt to converse with this person before making a decision. However, the courts have emphasised that judges should be slow to form a view as to capacity without the benefit of any external expertise, because of the seriousness of the consequences for the person.<sup>2</sup>

## **Implications**

15. In general terms, lack of capacity will mean that the person is (or was) not capable of entering into the particular contract, and therefore that any contract purportedly entered into is not binding if the other party was aware of the lack of capacity. In a more specific context, it may be a will or a lasting power of attorney that is not valid.
16. Different tests will be imposed when considering the responsibility of an individual (eg in negligence). The criminal law imposes its own requirements and the approach to capacity outlined here will be less relevant, although issues of capacity still arise in the course of criminal proceedings (eg is the accused fit to plead? Does the accused have capacity to participate effectively in a trial?).

## **Guidance**

17. Helpful guidance is given in 'Assessment of Mental Capacity: Guidance for Doctors and Lawyers', published jointly by the Law Society and BMA (4th edition, 2015).

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<sup>2</sup> *Baker Tilly v Makar* [2013] EWHC 759 (QB).

## ***The Mental Capacity Act 2005***

### **Background and overview**

18. Prior to the implementation of the Mental Capacity Act 2005 ('MCA') on 1 October 2007 procedures for delegation of decision-making powers comprised:
  - *Agency* – eg a bank mandate or ordinary power of attorney.
  - *Specific* – eg an appointee for state benefits or litigation friend for court proceedings.
  - *Statutory* – the jurisdiction of the (former) Court of Protection and enduring powers of attorney.
  - *Trusts* – either a bare trust or settlement.
19. Each had its own limitations and normal agency methods do not survive a loss of capacity. But these procedures all related to financial decisions and there were no procedures available for other types of decision, (ie personal welfare or healthcare).
20. The MCA establishes a comprehensive statutory framework, setting out how decisions should be made by and on behalf of those whose capacity to make their own decisions is in doubt. It also clarifies what actions can be taken by others involved in the care and medical treatment of people lacking capacity.
21. The framework provides a hierarchy of processes, extending from informal day-to-day care, to decision-making requiring formal powers, and ultimately to court decisions. An individual can anticipate future lack of capacity by completing a lasting power of attorney for either financial affairs or personal welfare decisions (which includes health care). Failing this, the Court of Protection now has jurisdiction to make declarations or decisions or to appoint a deputy to make decisions on the incapacitated person's behalf.
22. The common law relating to 'advance refusals of (medical) treatment' is also placed on a statutory footing and there is a new offence of 'ill-treatment and neglect' on the part of carers, donees of lasting powers of attorney, and deputies.
23. The provisions of the MCA apply in general only to people lacking capacity who are aged 16 years or over, but the property and financial affairs jurisdiction may be exercised in relation to a child who will lack capacity into adulthood.
24. There is a Mental Capacity Act Code of Practice (updated 12 January 2016) which provides guidance for the courts, professionals and those concerned with the welfare of mentally incapacitated adults and a Public Guardian is appointed to supervise and promote the new jurisdiction.<sup>3</sup>

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<sup>3</sup> In early 2019, there was a Call for Evidence on revising the Code, but at the time of writing, this has not resulted in any amendment.

## Fundamental principles

25. Section 1 sets out five guiding principles designed to emphasise the underlying ethos of the MCA:

- A decision-specific approach to capacity based on understanding and the ability to make and communicate a decision.
- Adults are presumed to have capacity, so unjustified assumptions are outlawed and there is a 'balance of probabilities' approach.
- Individuals should be helped to make their own decisions with simple explanations. They should not be treated as lacking capacity merely because they make unwise decisions.
- There must be participation in decision-making and consultation with others.
- A 'least restrictive' approach is to be applied to intervention.

## The concept of 'incapacity' under the MCA

26. Section 2(1) sets out the definition of a person who lacks capacity:

'A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'

27. This is a two-stage test, because it must be established first, that there is an impairment of, or disturbance in the functioning of, the person's mind or brain (the diagnostic criteria); and secondly, that the impairment or disturbance is sufficient to render the person incapable of making that particular decision. Capacity is thus decision-specific, but it does not matter whether the impairment or disturbance is permanent or temporary.

28. Section 3 provides that a person is unable to make a decision if unable to:

- understand the information relevant to the decision,
- retain that information,
- use or weigh that information as part of the process of making the decision, or
- communicate his or her decision (whether by talking, using sign language or any other means).

29. Explanations must be provided in ways that are appropriate to the person's circumstances.

## The concept of 'best interests' under the MCA

30. Where it is necessary to decide for the purpose of the MCA whether an action is in a person's 'best interests', all relevant circumstances must be considered. However, the MCA sets out in section 4 a checklist of factors aimed at identifying those issues most relevant to the individual who lacks capacity (as opposed to the decision-maker or any other persons). Not all the factors in the checklist will be relevant to all types of decisions or actions and the weight accorded to them will vary according to the circumstances. There is no ranking

of priority in this checklist but one or more of the factors may be of 'magnetic'<sup>4</sup> importance to that individual whose capacity is being assessed. The factors must be considered if only to be disregarded as irrelevant to that particular situation. They include:

- Whether the person will at some time have the required capacity.
- Encouraging the person to participate in the decision.
- The person's past and present wishes and feelings.
- The beliefs and values that would be likely to influence the person's decision.
- The views of others who should be consulted.

## Decision-making

31. There are two areas of decision-making, namely personal welfare (which includes healthcare), and property and affairs. There are then progressive levels of decision-making:

- A person acting informally under section 5 which may be regarded as a general authority regarding personal welfare (although in reality it is a statutory defence).
- A person expending the individual's money to pay for 'necessary' goods and services under section 6 (or pledging his credit under section 7).
- An attorney under a lasting power of attorney (or the former enduring power of attorney).
- The Court of Protection making decisions or declarations.
- A deputy appointed by that Court.

## The public bodies created by the MCA

### *Court of Protection*

32. The Court of Protection is a very different body to its predecessor of the same name. It is a Superior Court of Record administered by HMCTS with full status to deal with the entire range of decision-making on behalf of incapacitated adults. It takes over the financial jurisdiction of its predecessor and extends this to personal welfare (which includes health care) decisions thus absorbing the previous declaratory jurisdiction of the Family Division.
33. Most uncontested applications are dealt with 'on paper' by authorised officers or district judges at the Court's principal office in London but applications relating to incapacitated persons who live outside London which require hearings are transferred to regional hubs so that they may be dealt with by nominated district judges or circuit judges sitting in regional hearing centres. The Court of Protection Rules 2017, which draw on the CPR, supplemented by certain pilot Practice Directions, promote active case management.

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<sup>4</sup> *Crossley v Crossley* [2007] EWCA Civ 1491; [2008] 1 FLR 1467 paragraph 15.

*Public Guardian*

34. The Public Guardian has a statutory appointment with an office and staff known as the Office of the Public Guardian ('OPG'). This role is both administrative and supervisory and there are five key functions:

- To maintain a register of lasting powers of attorney (and the former enduring powers that still remain valid).
- To maintain a register of deputies.
- To supervise and receive security from deputies.
- To receive reports from and hear representations about attorneys and deputies.
- To provide reports to the Court of Protection and arrange reports from visitors.

**The jurisdiction under the MCA**

35. The MCA has created a wider range of cases and a consequent increase in the volume of cases. A previously unmet need has emerged and there is a new variety of outcomes. The Court of Protection and the OPG have attained greater prominence with a wider influence, but there is a constant struggle to maintain the balance between protection and empowerment of these potentially vulnerable people.

36. The jurisdiction under the MCA has a considerable potential to affect the lives of all citizens and their families in the future. In terms of the judicial role, the following implications may be identified:

- Enduring powers of attorney previously executed are still effective, but since 1 October 2007 only lasting powers of attorney may be completed, and registration of these does not signify a lack of capacity, as it is a procedural requirement.
- The Court of Protection is now able to deal in accessible local courts with the full range of decision-making on behalf of adults who lack capacity.
- Serious medical treatment decisions are now dealt with by Family Division judges sitting as Tier 3 judges in the Court of Protection.
- There is a closer working relationship between the Court of Protection and the civil and family courts, with nominated judges becoming a resource for other judges when they encounter mental capacity issues.
- Cases in the civil and family courts involving a significant mental capacity element may be transferred to a suitable nominated judge as a 'specialist' and a nominated judge may sit in a dual jurisdiction.
- A discrete body of law has developed in regard to the assessment of capacity with a more professional approach towards decision-making issues.
- The inherent jurisdiction of the High Court continues to exist for vulnerable adults who are found to lack capacity for reasons not within the MCA.



## **Civil and family proceedings – procedure**

### **The procedural rules**

37. Before the Mental Capacity Act 2005 ('MCA') came into force, special procedures applied in respect of proceedings by and against a 'person under disability' (as defined). These ensured that a representative was appointed, that compromises and settlements of claims were approved by the court, and that there was supervision of any money recovered. The rules dealt with proceedings involving children (variously described as 'minors' and 'infants') and 'patients' as parties. Both categories were and still are deemed incapable of conducting their own proceedings, the former due to age and the latter due to personal factors other than age (old age by itself is not a barrier to conducting proceedings). We are concerned here only with adults.
38. The expression 'person under disability' is no longer used and, following implementation of the MCA, a person should not be stigmatised as a 'patient'. This term has been replaced by 'protected party' and a new definition introduced. The procedures are now to be found in the following rules:
  - Civil Procedure Rules 1998 (CPR), Part 21.
  - Family Procedure Rules 2010 (FPR), Part 15.
  - Insolvency (England and Wales) Rules 2016,<sup>5</sup> Chapter 4, Sub-division C.

### **Protected party**

39. Following the MCA, the term 'patient' has been replaced in the CPR and FPR by 'protected party', the definition of which is:
 

'a party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings.'
40. Section 2 of the MCA provides that:
 

'... a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'
41. Section 3 then amplifies 'unable to make a decision.' This thus becomes a two stage test: (i) is there is an impairment of, or disturbance in the functioning of, the person's mind or brain, and (ii) is this sufficient to render the person incapable of conducting the proceedings?

### **Assessment of capacity**

42. Courts should always investigate the question of capacity at any stage of the proceedings when there is any reason to suspect that it may be absent. This is important because, if lack of capacity is not recognised, any proceedings may be of no effect, although the civil and family rules do provide some discretion in this respect – see CPR rule 21.3(2) and (4) and FPR rule 15.3. Those rules assume the court knows whether a party is a protected party and do not make any specific provision as to how an issue as to capacity is to be dealt with.

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<sup>5</sup> Rule 12.23 Insolvency (England and Wales) Rules 2016.

43. The presumption of capacity is important and ensures proper respect for personal autonomy, Courts should not allow arguments about litigation capacity to be used unscrupulously. However, when there is good reason for cause for concern and legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity.<sup>6</sup>
44. Solicitors acting for a party may have little experience of such matters and may make false assumptions of capacity on the basis of factors that do not relate to the individual's actual understanding. Even where the issue does not seem to be contentious, a judge who is responsible for case management may require the assistance of an expert's report. This may be a pre-existing report or one commissioned for the purpose. Whilst medical evidence has traditionally been sought from a psychiatrist, if the party has learning difficulties, a psychologist, especially if of an appropriate speciality, may be better qualified. Such opinion is merely part of the evidence and the factual evidence of a carer or social worker may also be relevant and even more persuasive. Caution should be exercised when seeking evidence from general medical practitioners, as most will have little knowledge of mental capacity and the various legal tests that apply. If a general practitioner is the only available option, the appropriate test should be spelt out, and it should be explained that different tests apply to different types of decision.
45. In case of dispute, capacity is a question of fact for the court to decide on the balance of probabilities, with a presumption of capacity. Evidence should be admitted not only from those who can express an opinion as experts, but also those who know the individual.
46. Guidance has been given in the case of *Masterman-Lister v Brutton & Co and Jewell & Home Counties Dairies*:<sup>7</sup>
- ‘... the test to be applied ... is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a ... litigation friend.’
47. According to this decision the mental abilities required include the ability to:
- recognise a problem, obtain and receive, understand and retain relevant information, including advice,
  - weigh the information (including that derived from advice) in the balance in reaching a decision; and then
  - communicate that decision.
48. The Supreme Court in *Dunhill v Burgin*<sup>8</sup> placed a gloss upon the test by emphasising that the focus must be on the individual's capacity to understand

<sup>6</sup> See for example *Royal Bank of Scotland PLC v ABI* UKEAT/0266/18 and UKEAT/0187/18. Although an employment tribunal case, it illustrates the point.

<sup>7</sup> [2002] EWCA Civ 1889.

<sup>8</sup> [2014] UKSC 18.

the claim or cause of action they in fact have, rather than on their capacity to conduct the claim as formulated by their lawyers. This might be thought to raise the bar substantially in terms of the level of functional ability required.

49. Where there are practical difficulties in obtaining medical evidence, the Official Solicitor may be contacted, although doing so should be a measure of last resort and all other options should be explored. as the Official Solicitor is over-burdened and has limited resources. Because of this, involving the Official Solicitor will also result in delay to the process.

### **A protected party's representative (litigation friend)**

50. A party who is incapable of conducting the particular proceedings must have a representative to do so, whether bringing the proceedings or defending them. The term for this representative is a 'litigation friend' (it was previously 'next friend', if bringing the proceedings, or 'guardian ad litem', if responding). Any doubt about capacity should be resolved as a preliminary issue before proceedings are allowed to continue.
51. The procedure for the appointment is to be found in CPR Part 21 and FPR Part 15. The litigation friend will need to sign a Certificate of Suitability and, if the protected party is a claimant, or pursuing a counterclaim as a defendant, give an undertaking as to costs, unless authorised by the Court of Protection to conduct the litigation. Although the rules do not so provide, a protected party should be notified of proceedings and given an opportunity to express views unless totally incapable.
52. Where a party is legally represented, care should be taken by the legal representative to select a litigation friend who has no actual or potential conflict of interest with the protected party. The selection is subject to judicial scrutiny and if the proposed litigation friend is considered unsuitable<sup>9</sup> by the judge then the appointment will be refused. Where there is no suitable person willing and able to act, the Official Solicitor will consider accepting appointment, but generally wishes to have provision for payment of his or her costs. If a party already has a deputy appointed by the Court of Protection because he or she lacks capacity to manage financial affairs, but a litigation friend is also required because the party lacks capacity to conduct the particular litigation, the deputy may also be appointed litigation friend if suitable.
53. Where a party is not represented, it is for the judge to investigate or consider if that person has capacity to conduct that litigation, as a matter of priority. Concerns as to capacity to litigate may have arisen from material in the court papers or from that party's behaviour. However, embarking upon such investigation requires caution and sensitivity as there could be many reasons for unusual behaviour in court. It might be worthwhile asking if the party has a friend or family member that they would wish to bring to court with them to the next hearing. Information may be able to be obtained in this way as to that party's involvement with any professionals such as a social worker, community psychiatric nurse or a treating clinician. This is if the party is unable or unwilling to offer information themselves.

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<sup>9</sup> CPR 21.7(1)(a) & (3) and FPR 15.7(1)(a) & (3).

54. If the other party has legal representation, it is appropriate to seek their assistance, because of their duty to assist the court. This will further the progress of the case and ought not to cause any professional conflict because if the issue of capacity is not addressed and it later transpires that the person concerned lacks capacity any step taken before the protected party has a litigation friend will have no effect unless the court orders otherwise.<sup>10</sup>
55. The statutory presumption under section 1(2) Mental Capacity Act 2005 is that the party has capacity, and the judge must not assume otherwise. In most cases, the court will require medical evidence from a clinician to displace the presumption of capacity. If this evidence cannot be obtained by other means, eg by someone on behalf of the person concerned or another party, this may well entail the judge writing to the person's clinician setting out what matters need to be considered and addressed by the clinician. The judge should provide the clinician with copies of any court orders. When any medical evidence is received, this must be considered by the judge at a hearing. If the evidence satisfies the judge that the party does not have capacity, that finding should be recorded, and a litigation friend should be appointed. Again, if the party is not represented, the judge will have to identify a suitable person to appoint. That person has to agree to act. The judge will need to explain what a litigation friend's obligations to the party would be, and the possible costs 'risks' if the party is a claimant and the claimant was to lose. There are particular forms<sup>11</sup> that need to be completed for the court file by any appointed litigation friend.
56. If all possibilities have been considered and there is no suitable person to be a litigation friend, the judge may make an order inviting the Official Solicitor to act as litigation friend. This will involve some delay to the litigation, as the Official Solicitor's office will only act if its legal costs of representation are provided for or secured. Legal Aid may be available, but this is entirely dependent on the nature of the dispute and the means of the party.
57. There are a number of resources<sup>12</sup> to assist the judge and parties should the issue of a party's capacity to conduct litigation arise during the course of any case. Capacity issues are not limited to the start of any case, and judges and parties should keep the issue of a party's capacity under constant review throughout the duration of any case.
58. There is no requirement in the CPR or the FPR for a solicitor to act on behalf of a protected party whose proceedings are being conducted by a litigation friend. Nevertheless, in a complex or high value case the court may consider that the litigation friend who acts without a solicitor is not 'suitable'. As the appointment is to 'conduct proceedings ... on behalf' of the protected party, subject to the provisions of the rules, any act which in the ordinary conduct of any proceedings is required or authorised to be done by a party shall or may be done by the litigation friend. Unless the litigation friend is also a deputy (formerly a receiver) appointed by the Court of Protection or an attorney under a lasting or registered enduring power of attorney, he or she will have no status in regard to the affairs

<sup>10</sup> CPR 21.3(4) and FPR 15.3(3).

<sup>11</sup> Certificate of Suitability.

<sup>12</sup> 'Capacity to Litigate in Proceedings Involving Children': Family Justice Council (April 2018) - whilst this concerns children, there are draft orders and letters which may be of assistance; Law Society Practice Note 2 (July 2015).

of the protected party outside the proceedings in which he or she is appointed. It follows that if money is awarded to a protected party, the litigation friend has no authority to receive or expend that money.

59. Any settlement or compromise will have to be approved by the court under CPR rule 21.10 and any money awarded may only be dealt with pursuant to the directions of the court under CPR rule 21.11. Where significant sums are involved it will be necessary for the litigation friend or some other suitable person to apply to the Court of Protection for the appointment of a property and affairs deputy unless there is an attorney under a lasting or registered enduring power of attorney. There may be circumstances where the trial judge will need to contact a judge nominated to sit in the Court of Protection for guidance or for transfer of the case to that judge, or order a stay of the proceedings pending an application to that Court.

### **Procedural consequences of being a protected party**

60. The consequences of being a protected party tend to be dealt with as a procedural matter, although they may be fundamental to the proceedings. The decision as to whether proceedings are commenced, how they are conducted and whether they are settled may depend upon the identity of the litigation friend, yet there is little guidance as to how the litigation friend should be selected or act.
61. References to the concept of acting in the person's 'best interests' are commonly made, with little understanding of what the phrase actually means. It is instructive to consider the interpretation in the MCA, which includes considering the protected party's views, if ascertainable. Judges cannot simply leave an unfettered discretion to the litigation friend, and should satisfy themselves on these matters during the course of the proceedings. The need for any settlement or compromise to be judicially approved underlines this role.

### **Injunctions**

62. An injunction can be granted against a protected party, but only if he or she understands the proceedings and the nature and requirements of the injunction.<sup>13</sup> This is because the tests of capacity to litigate and capacity to comply with an injunction are different.<sup>14</sup>

### ***Litigation friends in tribunals***

63. Power to appoint litigation friends in tribunals is not generally set out in explicit terms as it is in the CPR. Nevertheless, recent cases have stated that immigration, employment<sup>15</sup> and it would seem by extension, other tribunals, can do so as part of their general case management powers. The Tribunal Procedure Committee has been asked as a matter of urgency to consider rules for defining the way issues of capacity and the appointment of litigation friends

<sup>13</sup> *Wookey v Wookey* [1991] 3 All ER 365.

<sup>14</sup> *P v P (Contempt of Court: Mental Capacity)* [1999] The Times, 21 July, CA.

<sup>15</sup> *Jhuti v Royal Mail Group* UKEAT/0061-62/17.

should be dealt with.<sup>16</sup> At the time of writing, this reconsideration of the Rules is still awaited.

64. At present, whilst the Civil Procedure Rules do not specifically apply to tribunals, they do offer relevant guidance. The appointment of a litigation friend, where capacity is an issue, is permissible under the tribunal's case management powers. Where there is a 'good cause for concern'<sup>17</sup> that a party might lack capacity to conduct litigation, a medical assessment should be ordered (as explained in paragraph 43 above). There are no defined circumstances that may highlight such concerns but, for example, the way in which a party is presenting themselves may give rise to grounds for doubting decision-making capacity. The purpose of an assessment of capacity to litigate in tribunals is to determine the conditions in which litigation may proceed. It does not bring the litigation to an end.

### **Technical terms**

65. For those unfamiliar with this very technical area, a brief explanation of the following terms may be of assistance:
- **Appointee** – Someone appointed under Social Security Regulations to claim and collect social security benefits or pensions on behalf of a person who lacks capacity to manage their own benefits. An appointee is permitted to use the money claimed to meet the person's needs. Appointees are not appointed by the Court but by application to the DWP. In many cases the relevant officer of a local authority will undertake this role.
  - **Deputy** – Someone appointed by the Court of Protection with ongoing legal authority, as prescribed by the Court, to make decisions on behalf of a person who lacks capacity to make particular decisions as set out in section 16(2) of the Mental Capacity Act 2005. There are two kinds of deputy – a deputy for property and affairs, and a deputy for personal welfare (those appointed in the latter category are significantly fewer).
  - **Power of attorney** – Someone appointed under either a Lasting Power of Attorney (LPA) or an Enduring Power of Attorney (EPA), who has the legal right to make decisions within the scope of their authority on behalf of the person (the donor) who made the Power of Attorney. Lasting Powers of Attorney were created by the Mental Capacity Act 2005. Enduring Powers of Attorney, made before the Act came into force on 1 October 2007, are still valid.
  - **Litigation friend** – A person appointed by the court to conduct legal proceedings on behalf of, and in the name of, someone who lacks capacity to conduct the litigation or to instruct a lawyer themselves. There is no presumption that someone who is an appointee, deputy, or who holds a power of attorney, will be appointed a litigation friend, even if a litigation

<sup>16</sup> *AM (Afghanistan) v (1) SSHD (2) Lord Chancellor (Intervener)* [2017] EWCA Civ 1123; *R (on the application of C) v (1) FTT (2) Tribunal Procedure Committee (3) Lord Chancellor* [2016] EWHC 707 (Admin); *Jhuti v (1) Royal Mail Group Ltd (2) The Law Society (Intervener) (3) Secretary of State for Business, Energy and Industrial Strategy (Intervener)* UKEAT/0061-62/17.

<sup>17</sup> *Royal Bank of Scotland PLC v AB* UKEAT/0266 at page 16.

friend is needed because a judge is satisfied that the party does not have power to conduct the particular litigation.

- Official Solicitor – The Official Solicitor provides legal services for vulnerable persons, or in the interests of achieving justice. He or she represents adults who lack capacity to conduct litigation in county court or High Court proceedings in England and Wales, and in the Court of Protection.

## References and resources

Click on the references below to go to the source referred to. Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link. References are listed in alphabetical order within topics.

## References

'Assessment of Mental Capacity: Guidance for Doctors and Lawyers' (Law Society and BMA, 4th edition, 2015).

['Capacity to Litigate in Proceedings Involving Children'](#): Family Justice Council (April 2018).

[Mental Capacity Act Code of Practice \(2016 update\) plus further guidance.](#)

## Cases

Cases were relevant as at the date of publication.

[AM \(Afghanistan\) v. SSHD](#) [2017] EWCA Civ 1123

*Baker Tilly v Makar* [2013] EWHC 759 (QB)

*C, R (on the application of) v. FTT Procedure Committee, the Lord Chancellor* [2016] EWHC 707 (Admin)

[Crossley v Crossley](#) [2007] EWCA Civ 1491; [2008] 1 FLR 1467

[Dunhill v Burgin](#) [2014] UKSC 18

[Jhuti v \(1\) Royal Mail Group Ltd \(2\) The Law Society \(Intervener\) \(3\) Secretary of State for Business, Energy and Industrial Strategy \(Intervener\)](#) UKEAT/0061-62/17

[Royal Bank of Scotland PLC v AB](#) UKEAT/0266/18

[Masterman-Lister v Brutton & Co and Jewell & Home Counties Dairies](#) [2002] EWCA Civ 1889

*P v P (Contempt of Court: Mental Capacity)* [1999] The Times, 21 July, CA

[Re MB](#) [1997] 2 FCR 541, CA

*Wookey v Wookey* [1991] 3 All ER 365

## **Other**

The Official Solicitor  
Victory House, 30–34 Kingsway, London WC2B 6EX,  
DX 141423 Bloomsbury 7  
tel 020 3681 2750.

[www.gov.uk/government/organisations/official-solicitor-and-public-trustee/about](http://www.gov.uk/government/organisations/official-solicitor-and-public-trustee/about)



## Chapter 6 Gender

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#### **Related content in other chapters**

Further themes potentially relevant to minority ethnic women are contained in [chapter 8 \(Racism, Cultural/Ethnic Differences, Antisemitism and Islamophobia\)](#).

## Overview

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### Gender disadvantage and stereotyping

Women remain disadvantaged in many public and private areas of their life; they are under-represented in the judiciary, in parliament and in senior positions across a range of jobs; and there is still a substantial pay gap between men and women.

Stereotypes and assumptions about women's lives can lead to unlawful discrimination.

Factors such as ethnicity, social class, sexual orientation, disability status and age affect women's experience and the types of disadvantage to which they might be subject. Black, Asian and other minority ethnic women ('BAME') often face double disadvantage arising from a combination of their ethnicity and gender. Assumptions should not be made that all women's experiences are the same.

Of course, men can suffer from gender discrimination too. This chapter reflects the reality that this is rarer.

### Caring

Women are still the primary carers of children. In 2019, 75% of women with dependent children worked compared with 92.6% of fathers, but they were still twice as likely to do domestic chores on getting home and to be the first port of call when childcare broke down. Most mothers in employment worked part-time until the youngest child was aged 11 – 15.

Many women also provide unpaid care by looking after an ill, older or disabled family member, friend or partner.

Women are more likely to give up work in order to care, often leading to loss of income, career progression, pension and long-term financial security.

Parents with dependent children may have childcare responsibilities which make conventional court / tribunal sitting hours difficult or impossible. It may not be easy to find an alternative carer, particularly for lone parents or those from socially excluded families. Such responsibilities should be accommodated as far as reasonably possible.

### Pregnancy, maternity leave and breastfeeding

Research by the former Equal Opportunities Commission and more recently by the Equality and Human Rights Commission with the Department of Business, Innovation & Skills has shown high and persistent levels of discrimination against pregnant women and new mothers in the workplace.

A woman who is heavily pregnant or has just given birth should not be expected to attend a court or tribunal unless she feels able to do so. Pregnant women or new mothers should be assisted to participate in the court process, whether as parties, witnesses or representatives. If required, changes to start and finish times should be

permitted as well as breaks for breastfeeding or expressing, and ideally access to a private room if desired.

A hearing should not be conducted in the presence of a child unless the judge is satisfied that it is appropriate in all the circumstances for the child to see and hear the proceedings.

### **Menopause**

Despite increased publicity over the last couple of years, the menopause often remains a taboo subject in the workplace.

The length and intensity of symptoms vary between women from very mild to very significant, so no assumptions should be made based solely on someone's age. Physical and mental symptoms which might impact on a court appearance can include hot flushes, urinary problems, heavy periods, sleep disturbance, fatigue, headaches, lack of concentration, memory problems, palpitations, anxiety and mood swings.

Adjustments to the hearing could include ensuring the room has working air conditioning or open windows, cold water, easy access to toilet facilities and frequent breaks.

A woman experiencing debilitating menopausal symptoms may be too embarrassed to tell the court that she needs it to make adjustments for her. Judges need to be alert to subtle indicators and suggest adjustments without drawing attention to the possible reason.

### **Sexual harassment**

Sexual harassment remains a problem for women both in and outside work.

According to a survey, 85% of women aged 18–24 have experienced unwanted sexual attention in public places and 45% have experienced unwanted sexual touching.

52% of women in a 2016 TUC poll had experienced some form of sexual harassment at work.

### **Domestic violence and abuse**

Women can be subject to domestic and gender-based violence, some of which is evident and overt; some which is less so, such as coercive control, which has a profound and pervasive impact on a woman's autonomy and well-being.

In the year ended March 2019, an estimated 1.6 million women and 786,000 men experienced domestic abuse.

Women are far more likely than men to be killed by a partner, ex-partner or family member. Over the last ten years, an average of 82 women a year have been killed by a partner or ex-partner.

Many victims of domestic violence withdraw their support for police charges against their abusers. This can be because of the level of fear and control exerted by the perpetrator or because of lack of sufficient response or support from agencies.

Domestic abuse appears to have worsened during the Covid-19 pandemic and attendant restrictions.

Of all violence, domestic violence has the highest rate of repeat victimisation.

There are a number of significant practical and psychological reasons why women do not leave dangerous partners, including a potentially higher risk to their safety.

The Serious Crime Act 2015 created a new offence of 'controlling or coercive behaviour in intimate or familial relationships'. The Home Office Statutory Guidance Framework gives examples.

The Domestic Abuse Bill creates new protections and introduces statutory special measures for court hearings.

### **Sexual offences**

Rape complainants may be reluctant to report crime because they fear that they will be blamed for the attack.

Sexual and rape offences are vastly underreported and where complainants do go to the police, cases often have to be dropped, in part because the victims do not support further action.

Research suggests that deployment of rape myths remains a key part of defence strategy.

Judges hearing serious sexual offence cases must give specific directions to juries, particularly in relation to stereotypes, as laid out in the Crown Court Compendium. Better guidance to jurors would be particularly helpful in relation to whether someone is likely to be raped by someone they know, and whether a rape complainant is likely to show emotion when giving evidence about the rape.

Courts should use the various tools enshrined in common law, statute, the procedural rules and art 6 of the ECHR, which are available to ensure women can feel safe in participating in the justice process and are protected against unjustified, intrusive questioning.

### **Social media**

The impact of social media on women's lives is profound. Although it can be a positive experience for many women, women are particularly vulnerable to online harassment, exploitation, manipulation and intimidation. Judges need to appreciate the central role that social media plays in the lives of many women, with its own set of norms and values which may be unfamiliar to judges.

### **Women as offenders**

The UK has one of the highest rates of women's imprisonment in Western Europe. Both gender and ethnicity have an impact on sentencing decisions and outcomes. Black women are about 29% more likely than white women to be sentenced to custody at Crown Court, especially in relation to certain offences.

Women are also more likely than men to be remanded in custody and then not receive a custodial sentence.

Women's offending can be linked to underlying mental health needs, drug and alcohol problems, coercive relationships, financial difficulties and debt. Black, Asian and minority ethnic women are more likely to have been living in a deprived area, more likely to be subject to poverty, more likely to have experienced care and to

have been excluded from school. Although women comprise 5% of those in prison, they account for 18% of self-harm incidents.

The impact of imprisonment on women, more than half of whom have themselves been victims of serious crime, is especially damaging and their outcomes are worse than men's. Only 9.4% of women released from prison sentences of less than 12 months have positive employment outcomes compared to 26.2% of men. Even short sentences of 3 – 6 months can cause women to lose their accommodation.

BAME women are more likely to experience isolation when in prison leading to increased levels of depression, whilst at the same time they may be less likely to seek help from health care staff.

Women are much more likely to be primary carers, with children far more directly affected by a prison sentence as a result. The family impact of custodial sentencing is particularly acute for black mothers as almost a quarter of black households in the UK are headed by a lone parent. The impact is also acute in Wales, where currently there are no women's prisons. This affects the maintenance of relationships, and means fewer visits being made by children to see their mothers. The existence of dependent children is a factor relevant to sentencing and whether a community order should be preferred to a custodial sentence.

In June 2018, the Ministry of Justice launched a 'Female Offender Strategy'. The strategy notes that custody is particularly damaging for women and that good community management can in many cases be far more effective.

### Acceptable terminology

Using acceptable terminology avoids offending parties and witnesses and gives them confidence they will receive a fair hearing. For example:

- Adult women should not be referred to as 'girls'.
- Women should be asked whether they wish to be called 'Ms' or 'Mrs', and it should not be assumed that 'Ms' equates with 'Miss'.
- An unidentified person, eg a doctor, manager or judge, should not be automatically referred to as 'he' (nor, in a female dominated profession, referred to as 'she').

### The Equality Act 2010

Sex discrimination is unlawful under the Equality Act 2010.

## ***Gender disadvantage and stereotyping***

1. Women remain disadvantaged in many public and private areas of their life. They are under-represented in the judiciary,<sup>1</sup> in parliament (34% in 2020<sup>2</sup>) and in senior positions across a range of jobs.
2. Gender inequality is reflected in traditional ideas about, and expectations of, the roles of women and men. Though they have shifted over time, the assumptions and stereotypes that underpin those ideas are often very deeply rooted. It is common to assume that a woman will have children, look after them and take a break from paid work or work part-time to accommodate the family. However, such assumptions and stereotypes can, and often do, have the effect of seriously disadvantaging women and may be discriminatory, with the effect of preventing women from accessing opportunities and experiences open to men.
3. Factors such as ethnicity, social class, sexual orientation, disability status and age affect women's experience and the types of disadvantage to which they might be subject. Black, Asian and other minority ethnic ('BAME') women often face double disadvantage arising from a combination of their ethnicity and gender. Assumptions should not be made that all women's experiences are the same.
4. Of course, men can suffer from gender discrimination too. This chapter reflects the reality that this is rarer.

## ***Employment***

### **Employment rates**

5. In the last quarter of 2019, 72.4% of all women of working age were in paid work compared to 80.6% of men.<sup>3</sup> This figure varies notably according to ethnicity.
6. Over the last 40 years, employment rates for women have been rising, whilst men's have been falling. However, men still have consistently higher employment rates than women, and women are still less likely to progress up the career ladder into high paying senior roles.

### **The Gender Pay Gap**

7. The gender pay gap is just over 17%. It becomes much wider when women are in their 40s, when many are returning to work after childcare breaks.<sup>4</sup>
8. Occupation segregation is one of the main causes of the gender pay gap. Women's employment is concentrated in certain occupations which are often the lowest paid: cleaning, catering, caring, cashiering and clerical work.<sup>5</sup>

<sup>1</sup> 'Diversity of the judiciary: Legal professions, new appointments and current post-holders 2020 statistics': MOJ.

<sup>2</sup> 'Women in Parliament and Government': House of Commons Library Research Briefing (25 February 2020).

<sup>3</sup> 'Women and the Economy': House of Commons Library Briefing Paper (4 March 2020).

<sup>4</sup> 'Women and the Economy': House of Commons Library Briefing Paper (4 March 2020).

<sup>5</sup> Equal Pay Portal: Gender pay gap.

Many high paying sectors disproportionately comprise male workers, eg managers and senior officials, and workers in skilled trade occupations.<sup>6</sup>

9. Another factor is that a much higher proportion of women work part-time. Part-time jobs tend to have a lower hourly rate of pay.
10. Women are more likely than men to accept lower pay in favour of a shorter commute. This appears to be because of caring responsibilities and unpaid work. This contributes to the overall gender pay gap.<sup>7</sup>
11. Progress has been made in female representation at company board level. In 2019, there were 32.4% of women on FTSE 100 boards, and 29.6% on FTSE 250 boards.<sup>8</sup> However, women made up only 6% of CEOs of FTSE 100 companies. None of these CEOs were women of colour.<sup>9</sup>
12. In an effort to tackle the issue, gender pay gap reporting was introduced in 2017. Employers with 250 or more employees now have to publish statutory calculations every year, showing how large the pay gap is between their male and female employees.<sup>10</sup> Gender pay gap figures reported in April 2019, showed that 77% of organisations paid women less than men.<sup>11</sup> Due to the Covid-19 pandemic, employers were not required to report in April 2020.

## **BAME women in employment**

13. There has been a large increase in the number of black, Asian and minority ethnic ('BAME') workers in employment in Great Britain since 2010. However, employment levels still vary widely between men and women. In 2018, Pakistani and Bangladeshi women had inactivity rates of 56%, compared to 21% for men of the same ethnicity.<sup>12</sup> The inactivity rate for all women from a minority ethnic group was 26% compared to 17% for men.

## **Caring**

### **Carers of children**

14. Women are still the primary carers of children, either as single parents (nine out of ten single parents are women<sup>13</sup>), or as a couple.
15. In 2019, 75% of women with dependent children worked compared with 92.6% of fathers. Most mothers in employment worked part-time until the youngest child was aged 11 – 15.<sup>14</sup> Working mothers are still twice as likely to be the first

<sup>6</sup> There is a great deal of evidence of this. Recently, see 'Men dominate jobs offering highest pay': The Times (20 April 2020).

<sup>7</sup> Office National Statistics 2019.

<sup>8</sup> 'Hampton-Alexander Review - FTSE Women Leaders' (Nov 2019).

<sup>9</sup> As described in 'Sex and Power 2020': Fawcett (Jan 2020).

<sup>10</sup> Equality Act 2010 (Gender Pay Gap Information) Regulations 2017. The government maintains a 'Gender pay gap service' website where data can be searched.

<sup>11</sup> According to a CIPD analysis of the official figures.

<sup>12</sup> 'Ethnicity facts and figures': GOV.UK. 'Economic inactivity' means out of work and not looking for a job.

<sup>13</sup> Office for National Statistics.

<sup>14</sup> 'Families and the labour market, UK: 2019': Office for National Statistics (24 Oct 2019); 'Working and workless households in the UK. April to June 2019': Office for National Statistics.

port of call when childcare breaks down and are twice as likely to do domestic chores as soon as they get home.<sup>15</sup>

16. There is evidence that the Covid-19 pandemic has had disproportionate impact on working mothers' hours and employment because of difficulties accessing childcare. Many mothers have lost their usual nursery or childminder, have lost childcare provided by school breakfast clubs and do not have their usual support from friends and family. There are fears that this may have a long-term effect on advances women have made in employment.
17. This pattern, and the stereotype of women as child carers, also disadvantages men. Men in the UK are spending more time with their children, or are wanting to do so. Though over 90% of expectant fathers take time off work around their child's birth,<sup>16</sup> new rights to shared parental leave introduced in 2015 are vastly underutilised. Men still work the longest hours in the EU and significantly more men than women with dependent children work full time.

### **Caring for elderly and disabled dependants**

18. Many women provide unpaid care by looking after an ill, older or disabled family member, friend or partner. Drawing from the last census in 2011, Carers UK estimate that 6.5 million people are carers, and that figure is rising. Of those, 58% are female, with women making up 73% of the people receiving Carer's Allowance for caring for 35 hours or more a week.
19. Caring tends to affect men and women at different times. Women are much more likely to care in middle age, and are more likely to be sandwich carers (combining eldercare and childcare), which makes the reconciliation of work and family life twice as difficult.
20. Women are more likely to give up work in order to care, often leading to loss of income, career progression, pension and long-term financial security.
21. The imbalance reduces amongst older carers. Men are slightly more likely to provide care than women amongst retired people – many caring for their partners.

### **Accommodating different sitting hours and breaks**

22. Women and men who have dependent children may have childcare responsibilities which make sitting hours difficult or impossible. It may not be easy to find an alternative carer to fit in with court hearings and court hours. Such responsibilities should be accommodated as far as reasonably possible.
23. Assumptions should not be made that a man with dependent children or relatives does not have a real need to meet caring responsibilities, eg picking up children from school, or caring for a sick child or relative.

<sup>15</sup> 'Cash or Carry? Fathers combining work and care in the UK': Fatherhood Institute (December 2017).

<sup>16</sup> Written submission from Professor Margaret O'Brien (FWP0044) (March 2017).



24. Lone parents, or those from socially excluded households, may have particular difficulty in finding alternative childcare, being without either the networks of family or friends or the ability to pay for help which others take for granted.<sup>17</sup>
25. The interests of justice are unlikely to be served by a witness or party being late or distracted because of worries over childcare. With sensible listing and case management, caring responsibilities should be readily accommodated.

## ***Pregnancy, maternity leave and breastfeeding***

### **Discrimination at work**

26. Despite the fact that any unfavourable treatment of a woman for a reason related to her pregnancy, pregnancy-related sickness absence or maternity leave is unlawful discrimination, this is still widespread.
27. In 2016, the then Department for Business, Innovation and Skills ('BIS') and the Equality and Human Rights Commission published the findings of their jointly commissioned research into pregnancy and maternity discrimination in the UK. While the research showed evidence of good employer attitudes towards, and treatment of, new and expectant mothers, there were also some negative results. One of the most striking findings was that discrimination had increased since similar research by the Equal Opportunities Commission in 2005, with more women now being made redundant or feeling forced to leave their job than a decade ago. Another was that more than three quarters of the women surveyed had experienced a negative or potentially discriminatory experience as a result of their pregnancy or maternity.<sup>18</sup>
28. A 2018 survey<sup>19</sup> by the EHRC showed:
  - 36% of private sector employers agree that it is reasonable during recruitment to ask women about their plans to have children in the future.
  - Six in ten employers agree that a woman should have to disclose whether she is pregnant during the recruitment process.
  - Almost half of employers agree it is reasonable during the recruitment process to ask women if they have young children.

### **Adjustments for pregnant or breastfeeding women in courts and tribunals**

29. Consideration should always be given to accommodating pregnant women and new and breastfeeding mothers in any proceedings, whether they are parties, witnesses or representatives. This may require sensitive listings, start and finish times, and breaks during the proceedings, sometimes resulting in a case going part-heard.

<sup>17</sup> See [chapter 11 \(Social Exclusion\)](#).

<sup>18</sup> 'Pregnancy and maternity-related discrimination and disadvantage: experience of employers' and 'Pregnancy and maternity-related discrimination and disadvantage: experience of mothers': EHRC and BIS (2016); 'Pregnancy and Maternity Discrimination': House of Commons Women and Equalities Select Committee (2016).

<sup>19</sup> 'Employer views towards pregnant women and new mothers': YouGov survey for EHRC (9 Feb 2018).

30. A woman who is heavily pregnant or has just given birth should not be expected to attend a court or tribunal unless she feels able to do so. Although every woman is different, this is likely to apply at least to the month before the birth and at least two months after the birth. This period would be longer if there were complications at birth. Even a telephone hearing may be too difficult if the woman is looking after the baby on her own. This may mean that a hearing has to be adjourned.
31. Breaks should be allowed for breastfeeding or expressing milk, having checked with the mother as to the best timing. Ideally, use of a private room should be made available if desired.
32. It may be possible to conduct a hearing with a baby or child in the court, provided the baby or child is not disrupting the hearing, eg by crying or making a noise. However, a hearing should not be conducted in the presence of a child unless the judge is satisfied that it is appropriate in all the circumstances for the child to see and hear the proceedings. Children under the age of 14 are not permitted in the public gallery or courtroom of a magistrates or crown court (other than as a defendant or witness), unless the court specifically allows them to be present. For example, it may not be appropriate where there may be information that might cause the child distress, anxiety or other harm.

## **Menopause**

33. Despite increased publicity over the last couple of years, the menopause often remains a taboo subject in the workplace, with few workplace policies covering the subject, and many women leaving their jobs because they cannot get the adjustments they need or do not feel able to ask. There is also evidence that where women do raise the matter, they can frequently be met with embarrassment, ignorance, inappropriate humour and sometimes hostility.
34. In a 2017 survey by TUC Wales, 88% of women who had experienced the menopause said that they felt it affected working life.<sup>20</sup> This was echoed more recently in BMA research, where 90% of doctors who had experienced the menopause said symptoms had impacted their working lives. A significant number had reduced their hours, left management roles or intended to leave medicine altogether, despite enjoying their careers, because of the difficulties they faced when going through menopause.<sup>21</sup>
35. The menopause usually occurs between the ages of 45 and 55, but it can happen much earlier, and can typically last around four years. There is also a period of hormonal change leading up to the menopause known as the perimenopause.
36. The length and intensity of symptoms vary between women from very mild to very significant so no assumptions should be made based solely on someone's age. Physical and mental symptoms which might impact on a court appearance can include hot flushes, urinary problems, heavy periods, sleep disturbance, fatigue, headaches, lack of concentration, memory problems, palpitations, anxiety and mood swings.

<sup>20</sup> 'The menopause: a workplace issue' Wales TUC (2017).

<sup>21</sup> 'Challenging the culture on menopause for working doctors' BMA (2020).

37. Adjustments to the hearing could therefore include ensuring the room has working air conditioning or open windows, cold water, easy access to toilet facilities and frequent breaks. The fact that a witness is sweating and goes red, or appears over-anxious, emotional or vague in her evidence may be attributable in certain cases to menopausal symptoms rather than anything to do with the case or the content of her evidence.
38. A woman experiencing debilitating menopausal symptoms may be too embarrassed to tell the court that she needs adjustments. It can happen, for example, that a witness or juror passes a message via a clerk to the judge. Judges need to be alert to subtle indicators, eg someone looking very hot or fanning themselves, losing concentration or becoming immediately weepy. None of these signs may be anything to do with the menopause, and that does not matter. A good rule of thumb generally is to make no assumptions, but if someone looks uncomfortable for any reason, to explore what adjustments might be of assistance. Rather than identifying why you are asking, it is sufficient to say, for example, 'It is rather hot in here. Would it help to open the window?'

### ***Sexual harassment***

39. Sexual harassment remains a problem for women both in and outside work. It is defined in the Equality Act 2010 as 'unwanted conduct that has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment'. It covers any form of unwanted verbal, non-verbal or physical conduct of a sexual nature and any less favourable treatment on the ground that the person had rejected or submitted to unwanted conduct.
40. On International Women's Day (8 March) 2016, the End Violence Against Women Coalition published a survey of British women's experience of sexual harassment in public places. It found that 85% of women aged 18–24 had experienced unwanted sexual attention in public places, and 45% had experienced unwanted sexual touching.
41. In 2015, Girlguiding UK found that 75% of girls and young women said anxiety about potentially experiencing sexual harassment affected their lives.
42. In 2016, the TUC reported that:<sup>22</sup>
- More than half of all women polled had experienced some form of sexual harassment at work.
  - 35% of women had heard comments of a sexual nature being made about other women in the workplace.
  - 32% of women had been subject to unwelcome jokes of a sexual nature.
  - 28% of women had been subject to comments of a sexual nature about their body or clothes.
  - Nearly one quarter of women had experienced unwanted touching (such as a hand on the knee or lower back).

<sup>22</sup> 'Still just a bit of banter? Sexual harassment in the workplace in 2016': TUC.

- One fifth of women had experienced unwanted sexual advances.
  - More than one in ten women reported experiencing unwanted sexual touching or attempts to kiss them.
  - In nine out of ten cases, the perpetrator was a male colleague, with nearly one in five reporting that their direct manager or someone else with direct authority over them was the perpetrator.
  - Four out of five women did not report the sexual harassment to their employer. Many employees who suffer harassment are reluctant to complain because of the fear that they may lose their job as a result of complaining.
43. A 2020 TUC poll did show that things are changing. Seven in ten people thought the #MeToo movement has enabled more women to discuss and report sexual harassment.<sup>23</sup>

## ***Domestic violence and abuse***

### **Domestic violence and abuse**

44. The government defines domestic violence and abuse as: ‘Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass but is not limited to the following types of abuse: psychological, physical, sexual, financial, emotional.’ The definition, which is not a legal definition, goes on to define controlling and coercive behaviour. It includes so called ‘honour-based violence’, Female Genital Mutilation (FGM) and forced marriage.<sup>24</sup>
45. As we explain further in the [‘Acceptable terminology’ section](#) below, the term ‘victim’ is disliked, and even considered offensive, by many who have been subjected to domestic abuse or sexual offences, because it implies a degree of passivity. The term ‘survivor’ is often preferred. The use of ‘victim’ in this chapter reflects its use in many of the statistics and official reports.
46. According to the Crime Survey for England and Wales, in the year ending March 2019, an estimated 1.6 million women and 786,000 men experienced domestic abuse. Police recorded 746,219 domestic-abuse-related crimes, which was a significant increase from the previous year, possibly because of improved recording by the police and increased reporting by survivors. Where the CPS prosecuted, over three-quarters resulted in a conviction, the vast majority of perpetrators having pleaded guilty.<sup>25</sup>
47. In the year ended March 2018, only 17.3 % of victims of partner abuse (a sub-category of domestic abuse) reported it to the police.<sup>26</sup>
48. Women are far more likely than men to be killed by a partner, ex-partner or family member. Almost half of women killed in the year ended March 2019,

<sup>23</sup> TUC Poll 10/02/2020.

<sup>24</sup> This cross-government definition was published in September 2012. In Wales, the definition of domestic abuse is in section 24 Domestic Abuse and Sexual Violence (Wales) Act 2015. The current Domestic Abuse Bill will bring in a statutory definition.

<sup>25</sup> ‘Domestic abuse in England and Wales overview: November 2019’: ONS.

<sup>26</sup> ‘Partner abuse in detail, England and Wales: year ending March 2018’: ONS.

were victims of a domestic homicide. Over the last ten years, an average of 82 women a year have been killed by a partner or ex-partner. By contrast, in the year ended March 2019, in only 16 cases was the suspected killer of a man a partner or ex-partner.<sup>27</sup>

49. Figures from 34 out of England's 39 police forces in 2016 showed that more than 160,000 victims of domestic violence in England had withdrawn their support for charges against their abusers after police had determined crimes had taken place, a number that had increased by almost 40% compared with the previous 12 months.<sup>28</sup> In the year ended March 2019, 53% of non-convictions were because of victim-related issues including retractions, non-attendance at court, or where the evidence of the complainant did not support the case.<sup>29</sup>
50. The Office for National Statistics observes that victims may not want to be involved in the prosecution for a number of reasons, eg because of the level of fear and control exerted by the perpetrator or because of lack of sufficient response or support from agencies.<sup>30</sup>
51. Of all violence, domestic violence has the highest rate of repeat victimisation,<sup>31</sup> with nearly half of victims being victimised twice or more, and almost one in four being victimised three or more times.
52. Numerous sources report that domestic abuse has worsened during the Covid-19 pandemic, while at the same time, survivors have had fewer escape routes and restricted access to support. After the lockdown in March 2020, there was a 50% increase in calls to the national Domestic Abuse helpline and a 400% increase in website traffic of Domestic Abuse support services. Conversely, some police forces have reported a drop in calls and some specialist support services have reported a decrease in black, Asian and minority ethnic women who prefer to access them in person via community links.
53. Survivors report that the virus itself and restrictions designed to fight it have given perpetrators new tools for coercion, manipulation and inducing fear.<sup>32</sup> Between 23 March and 12 April 2020, there were 14 domestic abuse killings of women and two of children.<sup>33</sup>
54. Disabled women were already twice as likely to be subjected to domestic abuse, and research suggests this also worsened during the pandemic.<sup>34</sup>

<sup>27</sup> 'Homicide in England and Wales: year ending March 2019': ONS.

<sup>28</sup> We are unable to find more recent statistics on this point.

<sup>29</sup> 'Domestic abuse and the criminal justice system, England and Wales: November 2019': ONS.

<sup>30</sup> 'Domestic abuse and the criminal justice system, England and Wales: November 2019': ONS.

<sup>31</sup> There are several sources for this, including 'The nature of violent crime in England and Wales: year ending March 2018': ONS.

<sup>32</sup> 'A Perfect Storm – The impact of the Covid-19 pandemic on domestic abuse survivors and the services supporting them': Women's Aid (2020).

<sup>33</sup> According to 'Counting Dead Women', as reported to MPs by Dame Vera Baird QC, the victims' commissioner for England and Wales.

<sup>34</sup> 'A Perfect Storm – The impact of the Covid-19 pandemic on domestic abuse survivors and the services supporting them': Women's Aid (2020).

55. The Domestic Abuse Bill 2019 – 2021<sup>35</sup> provides a statutory definition of domestic abuse and establishes a Domestic Abuse Commissioner as a statutory officer holder. This will create Domestic Abuse Protection Orders which the courts can make of their own motion. Any breach will be punishable with imprisonment up to a maximum of five years. The Act will also require Local Authorities to provide support and refuge for the victims of domestic abuse and give priority to their social housing needs.
56. Where domestic abuse is alleged in criminal, civil or family cases, special measures will automatically be available.<sup>36</sup> There is more detail of the special measures regime in [chapter 2](#).
57. The government has also consulted on whether any measures can be introduced to support victims of domestic abuse when they are at work.
58. At the time of writing (19 February 2021), the Court of Appeal's decision in *Re H-N and Others (children) (domestic abuse: finding of fact hearings)* is awaited, which may affect some of the content of this chapter.

## Coercive Control

59. The Serious Crime Act 2015 (section 76) created a new offence of 'controlling or coercive behaviour in intimate or familial relationships'. This offence is constituted by behaviour on the part of the perpetrator which takes place 'repeatedly or continuously' and has a 'serious effect' on the victim.
60. Controlling or coercive behaviour does not relate to a single incident. It is a purposeful pattern of behaviour which takes place over time in order for one individual to exert power, control or coercion over another through a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour. It can be a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.<sup>37</sup>
61. The Home Office Statutory Guidance Framework<sup>38</sup> gives examples of coercive conduct as:
 

'The perpetrator may limit space for action and exhibit a story of ownership and entitlement over the victim. Such behaviours might include:

  - Isolating a person from their friends and family.
  - Depriving them of their basic needs.
  - Monitoring their time.

<sup>35</sup> As at February 2021, the Bill is in the House of Lords. Progress can be tracked at <https://services.parliament.uk/bills/2019-21/domesticabuse.html>

<sup>36</sup> See clauses 60-62 for exact rules.

<sup>37</sup> In *R v Challen* [2019] EWCA Crim 916, the CA overturned a murder conviction and ordered a retrial on the basis of new evidence that Mrs Challen was suffering a mental disorder at the time of the killing in a context where she had been subjected to coercive control.

<sup>38</sup> 'Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework': Home Office (December 2015).

- Monitoring a person via online communication tools or using spyware.
  - Taking control over aspects of their everyday life, such as where they can go, who they can see, what to wear and when they can sleep.
  - Depriving them of access to support services, such as specialist support or medical services.
  - Repeatedly putting them down such as telling them they are worthless.
  - Enforcing rules and activity which humiliate, degrade or dehumanise the victim.
  - Forcing the victim to take part in criminal activity such as shoplifting, neglect or abuse of children to encourage self-blame and prevent disclosure to authorities.
  - Financial abuse including control of finances, such as only allowing a person a punitive allowance.
  - Threats to hurt or kill.
  - Threats to a child.
  - Threats to reveal or publish private information (eg threatening to 'out' someone).
  - Assault.
  - Criminal damage (such as destruction of household goods).
  - Rape.
  - Preventing a person from having access to transport or from working.'
62. Controlling or coercive behaviour does not only happen in the home. The victim can be monitored by phone or social media from a distance, and can be made to fear violence on at least two occasions or to adapt their everyday behaviour as a result of serious alarm or distress.
63. The Family Court at High Court level has observed that coercive control requires an evaluation of a pattern of behaviour in which the significance of isolated incidents can only truly be understood in the context of a much wider picture.<sup>39</sup>
64. There are a number of significant reasons why women do not leave dangerous partners. Survivors can be at a higher risk when they leave violent partners. There are other ties to homes, including identity, family, money and status which operate as strong motivators for staying in a violent relationship. There can be complex psychological reasons at play; an important factor is often the erosion of self-esteem and self-worth to the point of believing that the violent behaviour was justified, with the woman blaming herself for the violence that she has suffered.
65. Women with uncertain immigration status have no recourse to public funds so they are not eligible for the protection provided by refuges and may be forced to stay within an abusive relationship.

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<sup>39</sup> *F v M* [2021] EWFC 4. This judgment contains useful observations on such cases.

66. Religious, cultural and social factors may be relevant. For example:
- In some communities a woman leaving her abusive husband may be at risk of reprisals or even of being killed by her own or her husband's family for bringing 'shame' onto the family or community.
  - Someone who marries from within their extended family may be particularly vulnerable, lack family support and feel pressured to stay. Speaking little or no English means an abused person may struggle to access support.
  - Concern about the impact upon children of moving away from their home, school or community or the loss of a support network for the woman or her children with disabilities or special needs may mean particular hardship, isolation and the possibility that similar support may never be found in the area she moves to.
67. Although it is less common, men can also be subjected to coercive control which is no less serious.

### ***Female Genital Mutilation***

68. Female genital mutilation ('FGM') is the partial or total removal of external female genitalia for non-medical reasons. It's also known as female circumcision or cutting. The NSPCC reports that there are an estimated 137,000 women and girls affected by FGM in England and Wales.
69. The World Health Organisation reported in February 2020 that more than 200 million girls and women alive today have been cut in 30 countries in Africa, the Middle East and Asia where FGM is concentrated.
70. Religious, social or cultural reasons are sometimes given for FGM. However, FGM is child abuse, it is dangerous, and since 2003 it has been a criminal offence (Female Genital Mutilation Act 2003).
71. There are no medical reasons to carry out FGM. It does not enhance fertility, and it does not make childbirth safer. It is used to control female sexuality and can cause severe and long-lasting damage to physical and emotional health.
72. On 31 October 2015, a new duty was introduced<sup>40</sup> that requires health and social care professionals and teachers to report 'known' cases of FGM. It requires these professionals to make a report to the police if, in the course of their professional duties, they:
- are informed by a girl under 18 that an act of FGM has been carried out on her, or
  - observe physical signs which appear to show that an act of FGM has been carried out on a girl under 18 and have no reason to believe that the act was necessary for the girl's physical or mental health or for purposes connected with labour or birth.
73. FGM protection orders can be made under Schedule 2 to the Female Genital Mutilation Act 2003, which may contain '(a) such prohibitions, restriction or requirements, and (b) such other terms, as the court considers appropriate'. The

<sup>40</sup> Female Genital Mutilation Act 2003, s5B. See also government Guidance: Mandatory reporting of female genital mutilation: procedural information'.



terms of an FGM protection order may, in particular, relate to conduct outside England and Wales as well as (or instead of) conduct within England and Wales. The emphasis must be on protecting the girl from this type of harm. An order can be made either on application or of the court's own motion in any connected family or criminal proceedings.<sup>41</sup>

## **Sexual offences**

### **Who is affected?**

74. According to the Crime Survey for England and Wales, an estimated 700,000 adults aged 16 to 59 years had experienced sexual assault in the 12 months prior to March 2018, with nearly four times as many women as men affected. This is similar in number to a decade ago save for a small increase in cases of unwanted touching and indecent exposure.
75. The figure for the number of men who had been assaulted was an increase on the previous year. In March 2019, the government published its first-ever position statement on male victims of crimes within the context of the strategy on ending violence against women and girls.<sup>42</sup> The position statement recognises that harmful gender norms, shame or honour, and stereotypes of masculinity and sexuality can act as barriers for male victims and survivors to seek support and can impact on reporting.'
76. The police recorded 150,847 sexual offences in the year ending March 2018. The majority of victims were female (84%). Young people were also disproportionately affected (females aged 10 – 24 and males aged 5 – 19).<sup>43</sup>
77. The number of police recorded sexual offences has almost tripled since the year ending March 2013. One explanation might be that the increase largely reflects improvements in how police record these crimes and an increased willingness of victims to come forward. Nevertheless, fewer than one in five people who had been raped or sexually assaulted, reported it to the police. The most common reasons were embarrassment, thinking the police could not help or fearing the experience would be humiliating.
78. In half of the reported sexual offences cases, the case was not a strong enough case for the offence to continue in the criminal justice system, or the victim or offender could not be traced.
79. The number of charges for sexual offences decreased from 17,571 in the year ending March 2016 to 14,071 in the year ending March 2018. The decline in the number of charge outcomes may be due to resource pressures and an increase in digital evidence which has increased the complexity of evidence gathering, with offences occurring more than 12 months before being recorded by the police potentially taking longer to investigate before outcome. The proportion of

<sup>41</sup> For a recent example, see *Re X (Female Genital Mutilation Protection Order No. 2)* [2019] EWHC 1990 (Fam).

<sup>42</sup> 'Position statement on male victims of crimes considered in the cross-Government strategy on ending Violence Against Women and Girls (VAWG)': HM Government (March 2019).

<sup>43</sup> Home Office Data Hub.

cases where the victim did not support further action increased from 25% to 32% in the same period.<sup>44</sup>

80. Rape accounted for around one in three of police recorded sexual offences in the year ending March 2018. Approximately one third of rape offences against females were suspected to be committed by a partner or ex-partner.
81. In the year ended March 2020, there were 55,000 reports of rape to the police, though only 1,867 cases were charged. The proportion of people who withdrew their support for their case to progress steadily increased from 25% in 2015/16 to 41% in 2019/20.<sup>45</sup>
82. The rape conviction rate for young men (aged 18 – 24) is around one third, which is consistently less than for other men (aged 25 – 59). Research indicates jurors are less willing to convict young defendants of rape for fear of the consequences that a ‘rapist’ label will have on their future.<sup>46</sup>
83. In a 2020 survey by the Victims’ Commissioner, the most important reason for survivors not reporting a rape to the police was thinking they would be disbelieved.<sup>47</sup>
84. It has long been recognised that there is a risk of jurors being consciously or unconsciously influenced by myths about rape which circulate in society. Differently constructed research projects have reached different conclusions on this.<sup>48</sup> The research variously suggests:
  - Rape myths may be deployed at trial.
  - Where a juror believes in rape myths, this is more likely to lead to a ‘not guilty’ verdict than personal characteristics such as age, gender, education or parental status.<sup>49</sup>
  - The seriousness of the trial process including the directions of the judge may help dispel previously held myths.<sup>50</sup>
85. There are two areas where better guidance for jurors would be helpful. These are:<sup>51</sup>
  - Whether someone is more likely to be raped by someone they know than by a stranger. 31% of jurors in recent research by Professor Thomas were

<sup>44</sup> ‘Sexual offending: victimisation and the path through the criminal justice system: ONS (Dec 2018).

<sup>45</sup> ‘Crime outcomes in England and Wales 2019-2020’: Home Office; ‘Survey finds rape victims have lost faith in the justice system’: Victims’ Commissioner (20 October 2020).

<sup>46</sup> Based on figures released by CPS to Ann Coffey MP. Widely reported, initially in the Guardian 23/9/2018.

<sup>47</sup> ‘Rape survivors and the criminal justice system’: Molina and Poppleton. Victim’s Commissioner (Oct 2020).

<sup>48</sup> Most recently, see ‘The 21<sup>st</sup> century jury: contempt, bias and the impact of jury service’: Cheryl Thomas. Criminal Law Review 2020, 11, 97-1011 – this summarises findings which will be published in 2021, and ‘Rape myths and misconceptions’: Booth, Willmott, Boduszek. The Law Society Gazette (21 Dec 2018); ‘An Examination of the Relationship between Juror Attitudes, Psychological Constructs, and Verdict Decisions within Rape Trials (Doctoral thesis)’: Willmott. University of Huddersfield (2018).

<sup>49</sup> Based on Willmott research (‘Rape myths and misconceptions’: Booth, Willmott, Boduszek) with simulated juries.

<sup>50</sup> Based on the Thomas research with real juries (above) – our emphasis on role of Judge.

<sup>51</sup> According to the Thomas research.

unsure of this. Official statistics show 87% of rapes are committed by someone known to the victim.

- Whether a rape complainant will necessarily be emotional when giving evidence about the rape. 43% of jurors in the same research said they would expect a complainant to be very emotional when giving evidence about the rape, and 35% were uncertain. Research has confirmed that the amount of emotion displayed by a rape victim can vary substantially, with some victims showing visible fear, anxiety or anger, and others masking their feelings with composed or subdued behaviour.
86. An observational study in late 2010 found that rape mythology was still heavily used by defence Counsel in trials.<sup>52</sup> The study identifies and comments on a wide range of myths regarding what one would expect to happen before, during and after. These were found to include myths that:
- Rape complainants are commonly liars. However, the CPS has pointed out that it has had occasion to prosecute very few complainants for making false allegations.
  - If the complainant has previously alleged a different rape, that suggests she is now lying. However, evidence suggests that victims of rape or sexual assault have often had that experience previously.
  - Rape is an easy allegation to make. It is well-established that it is not at all easy to make an allegation of rape and most rapes are not in fact reported to the police.
  - Rape by a former partner or husband is not really rape.
  - Sex offenders are different from ordinary people.
  - Kissing is consent.
  - The complainant's clothing may precipitate rape.
  - Lack of injury or torn clothes means there was no rape.
  - The absence of immediate complaint means it did not occur. In fact, rape victims rarely report to the police immediately, many never report it to the police at all, and some are reluctant to mention it to anyone.
87. The study also identified use of myths around the relevance of sexual history and what should be expected of post rape behaviour and demeanour in court. Genuine victims are expected to do all they can to escape from their attacker, to preserve the evidence as a prelude to telling the police, to demonstrate appropriate emotion when reporting the matter and in court. However, the trauma of the event may affect individuals in different ways.
88. Moreover, the expectation that genuine victims will always employ avoidance or resistance strategies fails to account for the fact that:
- Victims are often terrified that struggle will lead to injury or death.
  - The paralysing effect of fear on the ability to shout or get away.
  - The strength differential between men and women.

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<sup>52</sup> 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study': Temkin, Gray, Barrett (2016).

89. At trial, the use of rape mythology can be challenged by prosecution witnesses and Counsel, but this does not always happen. The need for judges to give appropriate directions to the jury to counter the risk of stereotypes and assumptions has been increasingly acknowledged by the Court of Appeal in recent years. This is dealt with in some detail in the Crown Court Compendium.<sup>53</sup> Professor Thomas's research (above) also indicates two areas where it may be particularly important to give guidance.
90. In the previously mentioned survey by the Victims' Commissioner,<sup>54</sup> well over three quarters of those who went to court felt cross-examination had been traumatising. Overall survivors wanted to be treated sensitively, fairly and respectfully. They wanted criminal justice professionals to better understand trauma. In the majority of cases, survivors did feel treated fairly and respectfully by the judge, and it was helpful where the judge recognised their anxiety prior to giving evidence. In terms of special measures, there was a general desire to be protected from the eyes of the public gallery when giving evidence or when evidence was given by video link. Delays in concluding the trials caused stress, and many identified a need for better communication in terms of someone clearly explaining the process and verdict.
91. A judge will not hear a serious sexual offence case unless he or she has been approved to do so and attended specialist training. Family judges hearing allegations of sexual abuse also receive training.

### **Ensuring safe participation in the judicial process**

92. There are tools available at common law, in statute, in the Family, Criminal and Civil Procedure Rules and Directions, in tribunal rules and as enshrined in the European Convention of Human Rights to ensure women can feel safe in participating in the justice process and are protected against unjustified intrusive questioning. Courts should use these tools as appropriate, bearing in mind that Article 6 of the European Convention requires – as a component of the broader concept of a fair trial – that each party must be afforded a reasonable opportunity to present their case and there must be a fair balance between the parties.
93. The Advocate's Gateway Toolkits<sup>55</sup> are designed to ensure safe participation in the judicial process and provide advocates with general good practice guidance when preparing to question vulnerable witnesses. They have been endorsed by the Lord Chief Justice as best practice.<sup>56</sup> Judges are encouraged to ensure that advocates use these Toolkits in appropriate cases.<sup>57</sup>

### ***Special measures in criminal hearings***

94. Consideration should always be given to using the court's general and special powers to effect a fair hearing where the case involves allegations of sexual

<sup>53</sup> See summary of the law together with examples of what a Judge might say to the jury, in the Crown Court Compendium, Part I, section 20.1 (December 2020).

<sup>54</sup> 'Rape survivors and the criminal justice system': Molina and Poppleton. Victim's Commissioner (Oct 2020).

<sup>55</sup> Available via [theadvocatesgateway.org](http://theadvocatesgateway.org)

<sup>56</sup> *R v Lubemba* [2014] EWCA Crim 2064.

<sup>57</sup> Criminal Practice Directions [2015] EWCA Crim 1567, 3D.7.

harassment or violence. These include the ‘special measures’ introduced by the Youth Justice and Criminal Evidence Act 1999 (allowing evidence to be given by television link, by DVD, video recording or behind a screen; pre-recorded cross-examination of young and vulnerable witnesses and allowing hearings in private in certain circumstances). Further information can be found in [chapter 2 \(Children, Young People and Vulnerable Witnesses\)](#).

95. There are automatic reporting restrictions in criminal proceedings, and where an allegation of rape or of other specified sexual offences is made, no matter relating to the complainant shall be included in any publication if it is likely to lead to their identification. The circumstances in which anonymity can be lifted are very limited (Sexual Offences (Amendment) Act 1992).

#### *Participation directions in family proceedings*

96. In the family courts, rule 3A and practice direction 3AA<sup>58</sup> allow for the use of screens, video link, using a device to communicate, and for questioning to be undertaken with an intermediary. Further information can be found in [chapter 2 \(Children, Young People and Vulnerable Witnesses\)](#).
97. Family cases are ordinarily held in private and with anonymity orders in place. In criminal courts, a defendant is not permitted to cross-examine a complainant in a case involving a sexual offence or in specified cases where there is a child complainant / witness. The court also has powers to prevent cross-examination if appropriate in other situations.<sup>59</sup> This is primarily because evidence might be impeded. However, there is no such rule in the family court.<sup>60</sup> As many alleged perpetrators of abuse are now unrepresented,<sup>61</sup> the family court increasingly needs to decide how alleged perpetrators can challenge the evidence of a complainant without potentially intimidating him or her. Practice Direction 12J of the Family Procedure Rules, states that ‘the fact-finding hearing or other hearing can be an inquisitorial (or investigative) process, which at all times must protect the interests of all involved’.
98. One way to avoid direct questions is for the judge to ask the alleged perpetrator to prepare written questions in advance. Questions can be checked for appropriateness and then asked either by the judge or the solicitor for the child.

#### *Evidence via video link, anonymity, in civil proceedings*

99. In the context of civil proceedings, there is a general discretion under the Civil Procedure Rules to permit evidence to be given by video link.<sup>62</sup> Though the usual rule is that hearings will be in public except in certain classes of case, the civil courts also have power to hold hearings in private if it is considered necessary in the interests of justice.<sup>63</sup> In addition, a court may order that the

<sup>58</sup> Family Procedure Rules 2010.

<sup>59</sup> Youth Justice and Criminal Evidence Act 1999, sections 34 – 36.

<sup>60</sup> The Domestic Abuse Bill, once enacted, will provide for automatic special measures in domestic abuse cases.

<sup>61</sup> HMCTS Figures for the first six months of 2019 reveal that in 27,111 private law family cases in 56.57% of cases the applicant was unrepresented and in 78.46% the respondent was unrepresented.

<sup>62</sup> Civil Procedure Rule (CPR) rule 32.3; Practice Direction 32, Annex 3; *Rowland v Brock* [2002] 4 All ER 370, Newman J.

<sup>63</sup> CPR rule 39.2(3)(g).

identity of any party or witness must not be disclosed if it considers it necessary in order to protect the interests of that party or witness.<sup>64</sup>

100. The specific rule permitting video evidence in the Civil Procedure Rules is itself based on the requirements of the 'overriding objective' under CPR rule 1.1, ie to ensure that parties are placed on an equal footing.
101. Tribunals also have powers to regulate their own procedures for taking evidence and ensuring anonymity where appropriate. For example, rule 50 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 contains similar provisions on anonymity which can be used in appropriate cases, eg, where the claim concerns sexual harassment or offences.

## ***Social media***

102. Social media networking sites such as Facebook, Instagram, Twitter, Snapchat, Whatsapp, TikTok are an integral part of most people's lives. It cannot be assumed that their impact is limited to the younger generation. Both women and men are prolific users of social media: statistics from 2018 show that 86% of women in the UK with access to the internet use social networking sites, as do 74% of men.
103. According to various studies, men and women use social media differently. Women are more likely to use social networking sites to make connections and stay in touch with family or friends. Men, by contrast, often use social media to perform research, gather relevant contacts and build influence.
104. Social networking has proved to be a force for good by enabling people faced with isolation, exclusion and oppression to inform, communicate and support one other. It has been crucial to the success of many progressive social and political movements world-wide.
105. However for younger women in particular, social media can be a source of huge pressure and anxiety, impacting on body image and confidence. Social media has developed norms of behaviour, the significance of which may not be readily apparent. For example, the importance attached by most teenage girls to the number of 'likes' and number of 'followers' that they attract and the consequent effect upon their feelings of self-worth if those numbers are low, should not be underestimated.
106. Social networking has been beset by the profoundly anti-social behaviours of online abuse. This entails the use of the internet or any other electronic means to direct abusive, unwanted and offensive behaviour at an individual or group and cyber stalking, which can take a range of forms, including:
  - Hacking into, monitoring and controlling social media (such as Facebook or Twitter) accounts.
  - 'Gaslighting': a form of psychological manipulation which aims to make the recipient doubt their own perceptions and memories; trying to convince someone they are wrong when they are not; in extreme cases, used as a form of control.

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<sup>64</sup> CPR rule 39.2(4).

- 'Sextortion': the use of images or videos of sexual acts to extort money.
  - Revenge porn: usually following the breakup of a couple, the electronic publication or distribution of sexually explicit material (principally images) of one or both of the couple, the material having originally been provided consensually for private use.
  - 'Virtual mobbing' and 'dog-piling', which involve encouraging 'virtual mobs' to harass individuals and incite hatred.
  - 'Trolling': sending abusive, menacing or upsetting messages or threats on social networks, email and chatrooms.
  - Spreading lies or personal information about the person online.
  - Creating fake accounts, hijacking and stealing online identities.
  - Posting 'photoshopped' images of persons on a social media platform.
  - 'Baiting', or humiliating peers online, by labelling them as sexually promiscuous.
  - Unwanted indirect contact with a person that may be threatening or menacing, such as posting images of that person's children or workplace on a social media site.
  - 'Spamming': where offenders send victims multiple junk email or viruses.
107. The All-Party Parliamentary Group on Domestic Violence, in its Recommendations Report on Online Abuse,<sup>65</sup> reported that as well as often being racist and homophobic in nature, online abuse is a gendered issue, disproportionately affecting women and girls.
108. Research consistently shows that women are subjected to more bullying, abuse, hateful language and threats online than men. Violence against women and girls is increasingly perpetrated online – both through specific, online crimes (such as image-based sexual abuse and 'sextortion') and through the use of technology to perpetrate 'traditional' crimes. For example, perpetrators can use technology as a vehicle to stalk and harass – behaviour which is persistent, unwanted and causes fear to victims, is known as 'cyberstalking'.<sup>66</sup>
109. Online abuse does not exist in isolation in the 'virtual world'. Online abuse does not exist in isolation in the 'virtual world'. Women who are frequently harassed, abused and stalked online by their partners or ex-partners also often experience domestic abuse offline. This online abuse and harassment usually forms part of a pattern of coercive and controlling behaviour – which can encompass physical abuse, emotional and psychological abuse, financial abuse and sexual abuse.
110. A Women's Aid survey of survivors of domestic abuse in 2015<sup>67</sup> found that 85% had experienced online abuse during or after a relationship as part of a pattern also experienced off-line during their relationship. Technology has delivered

<sup>65</sup> 'Tackling domestic abuse in a digital age: A Recommendations Report on Online Abuse by the All-Party Parliamentary Group on Domestic Violence': APPG and Women's Aid (February 2017).

<sup>66</sup> 'Tackling domestic abuse in a digital age: A Recommendations Report on Online Abuse by the All-Party Parliamentary Group on Domestic Violence': APPG and Women's Aid (February 2017).

<sup>67</sup> 'Tackling domestic abuse in a digital age: A Recommendations Report on Online Abuse by the All-Party Parliamentary Group on Domestic Violence': APPG and Women's Aid (February 2017).

dangerous new mechanisms for control. Perpetrators can now use geolocation software and spyware for surveillance, monitoring and tracking a victim's movements. Nearly a third of survivors surveyed by Women's Aid have experienced the use of spyware or GPS locators on their phone or computer by a partner or ex-partner. Recent convictions under the relatively new coercive control offence show that perpetrators use digital technology to monitor victims, and perpetrate insidious control through social media and online activity.

111. These and other online behaviours such as grooming and harassment can amount to criminal offences.
112. Harassment, malicious communications, stalking, threatening violence and incitement are all crimes, and have been so for a long time. The Communications Act 2003 created an offence of 'sending, or causing to be sent, by means of a public electronic communications network, a message or other matter that is grossly offensive or of an indecent, obscene or menacing character'. More recently, section 33 of the Criminal Justice and Courts Act 2015 makes it an offence to 'share private sexual photographs or films with the intent to cause distress'. The Protection from Harassment Act 1997 also provides for civil remedies in the form of injunctions and damages to protect a person from harassment. Judges should be alive to other protective orders which may be sought such as non-molestation orders, domestic violence protection orders, and sexual harm prevention orders.
113. The DPP has published guidelines on prosecuting cases involving communications sent via social media, which lays out the various possible offences relating to different sorts of conduct.

## ***Women as offenders***

### **Who is in prison?**

114. Baroness Hale DBE said in her 2005 Longford Trust Lecture:  

'It is now well recognised that a misplaced conception of equality has resulted in some very unequal treatment for the women and girls who appear before the criminal justice system. Simply put, a male-ordered world has applied to them its perceptions of the appropriate treatment for male offenders.... The criminal justice system could ... ask itself whether it is indeed unjust to women.'
115. As is stated in the Introduction to this Bench Book, true equal treatment may not always mean treating everyone in the same way. Treating people fairly requires awareness and understanding of their different circumstances, so that that steps can be taken, where appropriate, to redress any inequality arising from difference or disadvantage. The previous life experiences of women offenders, their reasons for offending, their offending patterns, the impact of custodial sentences on themselves and their dependants, and the long-term effect of prison sentences all tend to differ between men and women.
116. The women's prison population in England and Wales more than doubled between 1995 and 2010 – from under 2,000 women to over 4,000 at any one time. As at 27 March 2020, there were 3,641 women in prison, about 5% of the total prison population in the UK.



117. On average, female offenders commit less serious offences than male offenders, often committing non-violent low-level but persistent offences such as shoplifting.<sup>68</sup> Between 2007 and 2017, 130 women (compared to 27 men) were sentenced to prison for their children's truancy.<sup>69</sup> Most women entering prison have committed a non-violent offence (82% in 2018<sup>70</sup>).
118. 22% of women in prison have no previous convictions, compared to 14% of men.<sup>71</sup> Women are far more likely than men to serve short sentences. Over three-quarters of female offenders in 2017 received sentences under 12 months, and, 57% received sentences up to and including three months.<sup>72</sup> In 2018, 62% of custodial sentences for women were for six months or less.<sup>73</sup>
119. Women are also more likely to be remanded in custody. In 2017, 43% of women entering prison did so on remand, less than half of whom went on to receive a prison sentence.<sup>74</sup>
120. Women's offending is commonly linked to underlying mental health needs, drug and alcohol problems, coercive relationships, financial difficulties and debt:<sup>75</sup>
- Figures from Liaison and Diversion services showed that 69% of adult females in police custody in 2017 had mental health needs.
  - About half of female prisoners are identified as suffering from anxiety and depression, more than double the rate identified in men.
  - 46% of female prisoners have reported having attempted suicide at some point in their life, compared with 21% of male prisoners and 6% in the general population.<sup>76</sup>
  - Over half of female prisoners, twice as many as male prisoners, report having experienced emotional, physical or sexual abuse as a child.
  - At least half of women in prison identify as being victims of domestic violence compared with men.<sup>77</sup>

<sup>68</sup> 'Female offender Strategy': MOJ (June 2018).

<sup>69</sup> 'Why focus on reducing women's imprisonment? England and Wales Fact Sheet April 2019': Prison Reform Trust.

<sup>70</sup> 'Why focus on reducing women's imprisonment?': Prison Reform Trust (2017).

<sup>71</sup> Ministry of Justice (2018) Offender management statistics, cited in 'Why focus on reducing women's imprisonment? England and Wales Fact Sheet April 2019': Prison Reform Trust.

<sup>72</sup> 'Statistics on Women and the Criminal Justice System 2017': MOJ; Criminal Justice system statistics: MOJ (2018).

<sup>73</sup> 'Bromley Briefings' Prison Reform Trust (citing MOJ statistics on Prison Reception for 2018).

<sup>74</sup> 'Why focus on reducing women's imprisonment? England and Wales Fact Sheet April 2019': Prison Reform Trust.

<sup>75</sup> The following statistics are taken from 'Why focus on reducing women's imprisonment? England and Wales Fact Sheet April 2019' Prison Reform Trust, which in turn compiles latest research on various issues in the period 2012 – 2018.

<sup>76</sup> This was researched in 2013. We have seen no more recent statistics on this point, nor anything to suggest the pattern has changed.

<sup>77</sup> House of Commons written question 174009 (9 October 2018).

- Approximately 48% of women in prison have committed an offence in order to support someone else's drug habit<sup>78</sup> more than double the 22% of men who reported the same.
- 39% of women said they needed help supporting a drug problem on entry to prison and 24% said they had a problem with alcohol.<sup>79</sup>
- 31% of female prisoners have spent time in local authority care.

## The impact of imprisonment on women

121. Custody can exacerbate mental ill health, heighten vulnerability, and increase the risk of self-harm and suicide. Although women make up approximately 5% of the prison population, they accounted for 18% of all self-harm incidents in the year ending September 2019. From 2010 – 2020, there were 100 deaths of women within prison, 37 of which were self-inflicted.<sup>80</sup> 17% of self-harm incidents by women in prison in 2017 were carried out by those held on remand.<sup>81</sup>
122. The impact of imprisonment on women, more than half of whom have themselves been victims of serious crime, is especially damaging and their outcomes are often worse than men's. Many women have neither a home nor a job to go to on release. 38% of women were released from prison in 2018-19 without settled accommodation. Compared to 26.2% of men, 9.4% of women released from prison sentences of less than 12 months had positive employment outcomes.<sup>82</sup>
123. Women have particular difficulties with accommodation as a result of entering prison. Even short sentences or periods on remand can lead to unpaid rent or loss of housing benefit. Short sentences of six months or less are therefore long enough to lose accommodation, but often too short to gain another home. Women serving short sentences rarely have access to the support provided to those serving longer sentences, making it hard to resolve housing problems and sustain tenancies.<sup>83</sup> It is harder for women to get rehoused than men because they tend to be imprisoned further from home, thus losing eligibility for assistance from local housing organisations<sup>84</sup> or the local connection which is often required for local authority rehousing. If they are accepted as eligible for rehousing by the local authority, housing shortages mean they might be rehoused a long way outside their existing community, losing support networks on their release.<sup>85</sup> Lack of housing in turn reduces the chances of finding employment and increases the chance of reoffending.

<sup>78</sup> 'Gender differences in substance misuse and mental health amongst prisoners': Light, M. et al MOJ (2013) cited in 'Why focus on reducing women's imprisonment? England and Wales Fact Sheet April 2019': Prison Reform Trust.

<sup>79</sup> Statistics on Women and the Criminal justice System 2017. Ministry of Justice (2018).

<sup>80</sup> 'Deaths in Women's Prisons' – summary of MOJ statistics by Inquest.

<sup>81</sup> Safety in Custody Statistics. Ministry of Justice (2018).

<sup>82</sup> 'Why focus on reducing women's imprisonment?': Prison Reform Trust (2017).

<sup>83</sup> 'Home Truths: Housing for Women in the Criminal Justice System': Prison Reform Trust (Sept 2016).

<sup>84</sup> This is a particular problem for Welsh women held in prisons in England.

<sup>85</sup> 'Home Truths: Housing for Women in the Criminal Justice System': Prison Reform Trust (Sept 2016).

124. Community orders can fulfil the purposes of sentencing. In particular, they can have the effect of restricting the offender's liberty while providing punishment in the community, rehabilitation for the offender, and/or ensuring that the offender engages in reparative activities. Custody should not be imposed where a community order could provide sufficient restriction on an offender's liberty (by way of punishment) while addressing the rehabilitation of the offender to prevent future crime.<sup>86</sup> The Sentencing Council's Definitive Guideline 2015 on Theft Offences (February 2016), for example, says that community orders with drug rehabilitation, alcohol treatment or mental health treatment requirements (as applicable) may be a proper alternative to a short or moderate custodial sentence where there is sufficient prospect of success and, in the case of mental health difficulties, detention under a hospital order is not warranted.
125. Research suggests that women released from prison are twice as likely to reoffend as a comparable cohort of women given community orders.<sup>87</sup> Over 70% of women who have served a sentence of less than 12 months have reoffended.<sup>88</sup> The National Offender Management Service (now HM Prison and Probation Service) says it supports the reduction of the number of women sentenced to custodial sentences in appropriate cases by developing robust community sentences tailored to the needs of the individual women.<sup>89</sup>
126. Alternatively, if a prison sentence is necessary, strong personal mitigation or a realistic prospect of rehabilitation might suggest it is appropriate to suspend the sentence.<sup>90</sup>
127. There is also power to defer passing sentence for up to 6 months under the Powers of the Criminal Courts (Sentencing) Act 2000, e.g. to allow an offender to undergo addiction or mental health treatment prior to sentencing.
128. In June 2018, the MOJ launched a 'Female Offender Strategy' – a wide-ranging scheme aimed at keeping women out of prison through early intervention, partnership working, rehabilitative support and fewer women serving short custodial sentences. HMPPS Wales and the Welsh Government are working jointly to consider both the devolved and the non-devolved landscape to deliver appropriate provision for Welsh women.<sup>91</sup>
129. The strategy notes that custody is particularly damaging for women and that good community management can in many cases be far more effective. It expresses a view that short custodial sentences should be viewed as a last resort. Decisions on sentencing nevertheless remain the province of judges and magistrates.

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<sup>86</sup> Sentencing Council Definitive Guideline: 'Imposition of Community and Custodial Sentences'. Applicable to sentences given on or after 1 February 2017.

<sup>87</sup> The impact of prison for women on the edge: paying the price for wrong decisions': Hedderman & Jolliffe. (2015).

<sup>88</sup> 'Female Offender Strategy': MOJ (June 2018).

<sup>89</sup> National Offender Management Service Annual Report and Accounts (2016-7).

<sup>90</sup> Sentencing Council Definitive Guideline: 'Imposition of Community and Custodial Sentences'. Applicable to sentences given on or after 1 February 2017.

<sup>91</sup> 'Female Offender Strategy': MOJ (June 2018).

## Dependants and primary carers

130. The existence of dependent children is a factor relevant to sentencing.<sup>92</sup> Sentencing guidelines say being a sole or primary carer for dependent relatives can be a mitigating factor. It is therefore important that courts are informed of the defendant's domestic circumstances and determine sentence following the steps in *R v Rosie Lee Petherick*.<sup>93</sup> Indeed, where the offender is on the cusp of custody and there would be an impact on dependants which would make custody disproportionate, a community order should be imposed rather than a custodial sentence.<sup>94</sup>
131. Sentencing defendants with dependent children or other relatives also engages their right to family life under article 8 of the European Convention on Human Rights, as well as the article 8 rights of those dependants. Imprisonment interferes with, often severely, those rights. In such cases, it is appropriate to ask whether the interference is proportionate giving the various factors including the purpose of sentencing.<sup>95</sup>
132. It is not sufficient to say that the offender should have considered the impact on the children before committing the offence. The court has an independent responsibility to consider the dependants' rights.
133. Women are much more likely to be primary carers,<sup>96</sup> with children far more directly affected by a prison sentence as a result. A fifth of women prisoners are lone parents<sup>97</sup> and around 17,200 children are separated from their mothers by imprisonment every year. Only 9% of children whose mothers are in prison are cared for by their fathers in their mother's absence, and only 5% remain in their own home while she is imprisoned. By contrast, most children with an imprisoned father remain with their mother.<sup>98</sup>
134. Women tend to be imprisoned further from home than men, due to the small number and geographical spread of women's prisons. On average, women are imprisoned 64 miles away from home. In Wales, currently there are no women's prisons. This affects the maintenance of relationships, and means fewer visits being made by children to see their mothers. This in turn is likely to increase the chances of reoffending.<sup>99</sup>
135. The family impact of custodial sentencing is particularly acute for black mothers as almost a quarter of black African and black Caribbean families households in the UK are headed by a lone parent, compared with just over 10% of white families and 8.8% of Asian households.<sup>100</sup>

<sup>92</sup> *R v Rosie Lee Petherick* [2012] EWCA Crim 2214.

<sup>93</sup> [2012] EWCA Crim 2214.

<sup>94</sup> Sentencing Council Definitive Guideline: 'Imposition of Community and Custodial Sentences'. Applicable to sentences given on or after 1 February 2017.

<sup>95</sup> *R v Rosie Lee Petherick* [2012] EWCA Crim 2214.

<sup>96</sup> See section on 'Caring' above.

<sup>97</sup> 'What about me? The impact on children when mothers are involved in the criminal justice system': Sarah Beresford. Prison Reform Trust (2018).

<sup>98</sup> 'Sentencing of Mothers: Improving the sentencing process and outcomes for women with dependent children': Prison Reform Trust discussion paper (2015).

<sup>99</sup> Prison Reform Trust.

<sup>100</sup> 'Ethnicity Facts and Figures Website': GOV.UK - Families and households (2019).

136. International standards for women offenders are set out in the 'United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules)', adopted in July 2010. Rule 64 states:
- 'Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.'

### **Black, Asian and minority ethnic women offenders**

137. A report by Jane Cox and Katharine Sacks-Jones; 'Double disadvantage' The experiences of Black, Asian and Minority Ethnic women in the criminal justice system' April 2017, which was commissioned by the Lammy Review, the independent review of the treatment of, and outcomes for, BAME individuals in the Criminal Justice System, highlighted the additional disadvantages faced by women offenders from BAME communities.
138. See '[BAME women and the criminal justice system](#)' in chapter 8 (Racism, Cultural/Ethnic Differences, Antisemitism and Islamophobia) for more on the Lammy Review, BAME women and the criminal justice system.
139. 20% of female prisoners are BAME, compared to 14% of the general population. Within this wider group, some groups of women are particularly overrepresented, most notably black or black British women who in 2017, for example, made up 8.9% of female prisoners, compared to 3% of the general population in England and Wales. Ministry of Justice analysis shows that black women are about 29% more likely than white women to be remanded in custody at the Crown Court and 25% more likely to receive a custodial sentence. Asian women were 51% more likely than white women to plead not guilty at Crown Court, which may lead to longer sentences if convicted. Once in custody, Asian women and their families may receive extra stigma from their community.<sup>101</sup>
140. The government commissioned Corston Report in 2007 highlighted the fact that that BAME women were 'more likely to be living in a deprived area, more likely to be subject to poverty, have experienced care and been excluded from school. They are also more likely to be remanded in custody than white offenders and their disadvantages continue in the criminal justice system where they are further marginalised. These women face the same barriers in accessing services to help them alter their lives and in resettlement on release from prison as white women, but they are further disadvantaged by racial discrimination, stigma, isolation, cultural differences, language barriers and lack of employment skills.'
141. HM Inspectorate of Prisons also noted that BAME women are more likely to experience isolation when in prison, leading to increased levels of depression, whilst at the same time they may be less likely to seek help from health care staff.

<sup>101</sup> 'Counted Out: Black, Asian and minority ethnic women in the criminal justice system': Prison Reform Trust (2017).

142. The report raised significant concerns about insufficient access to translators for women who do not speak English fluently, combined with a legal process which was confusing and jargon-loaded. See chapter 8 for more on [Communicating Interculturally](#), whether speaking in English or through Interpreters.
143. There is evidence that some foreign national women in prison may have been trafficked and coerced into offending, but they are too terrified to disclose this for fear of retaliation.<sup>102</sup> See chapter 7 for more on [Modern Slavery](#).

### **Guidelines and standards for the treatment of women offenders**

144. The following guidelines and standards apply:

- United Nations Rules for the Treatment of Women Prisoners and non-Custodial Measures for Women Offenders (The Bangkok Rules).
- The Prison Service 'Gender Specific Standards' provide guidance on the various stages of custody and consider the needs of different women – such as young and older women, BAME women, foreign national women, women with disabilities, women serving a life sentence and women with children.
- The public sector gender equality duty applies to prisons, probation services and court staff.

### ***Marriage and divorce***

145. A civil marriage or partnership must take place at a register (registry) office or venue approved by the local authority. Whilst a religious marriage may take place in a church, mosque, temple or other place of worship, the relationship will not be legally recognised unless the place of worship is either Anglican or registered by the Registrar General for marriage. Divorce is similarly only legally recognised if it complies with legislation.
146. There are different cultural approaches to divorce:
- There are many different views on the acceptability of divorce in different cultures.
  - In some religions, a woman cannot get a religious divorce unless her husband agrees. Therefore, although a woman might be able to get a civil divorce under the law in England and Wales, if her husband refuses a religious divorce, in practical terms she cannot remarry in her community.
  - An opposite difficulty may occur where a divorce is granted by the religious authorities, but has not been effected under civil law. The individuals might remarry under religious law, believing they are free to do so. This could lead to a situation where, eg, a man is married to one woman under civil law and another under religious law. This can cause complexities regarding the rights of the respective women.
  - In some communities, difficulties arise on divorce when the couple discovers that their religious ceremony was not legally recognised, as their place of marriage was not registered. Women in particular, more frequently the financially weaker spouse, are likely to lose out if their rights on divorce are

<sup>102</sup> 'Why focus on reducing women's imprisonment?': Prison Reform Trust (February 2017).

only those of a former cohabitee, not a former wife. A woman may not even have realised until this point that she was not married according to civil law.<sup>103</sup>

147. However, there are also occasions where a religious court can resolve the divorce and related issues between the parties appropriately, and a civil court, though not required to follow the religious ruling, might voluntarily decide to be guided by it. In a 2013 case,<sup>104</sup> Mr. Justice Baker in the High Court adjourned a divorce hearing and agreed to endorse the parties' proposal to refer their disputes to a process of arbitration before the New York Beth Din, once he was satisfied about the principles and approach adopted by the rabbinical authorities. The process was successful, but Baker J stressed that the outcome, although likely to carry considerable weight with the court, would not have been binding and would not preclude either party from pursuing applications to his court in respect of any of the matters in issue. He emphasised that the court gives respect to all religious practices and beliefs, '[b]ut that respect does not oblige the court to depart from the welfare principle because...the welfare principle is sufficiently broad and flexible to accommodate many cultural and religious practices.'

### **Acceptable terminology**

148. Use of acceptable terminology helps to maintain the confidence of users and observers of the court system. There is rarely one rule which will be acceptable to everyone, but the following guidelines are generally representative.
- Adult women should not be referred to as 'girls'. Instead use 'women' or, if on the borderline between child and adult, 'young women'.
  - Women should be referred to as 'women' and not 'ladies' unless in a context where both 'ladies and gentlemen' is used. Some women of an older generation, or in certain regions, may consider 'lady' more polite than 'woman', but on the whole, women would find 'lady' patronising in a context where men are referred to as 'men'.
  - Where relevant to refer to age, do not say 'old woman'; 'older woman' is preferred terminology.
  - Women should be asked how they would like to be addressed, eg as 'Ms', 'Mrs' or 'Miss'. Do not assume that 'Ms' is interchangeable with 'Miss' or that either mean a woman is unmarried.
  - Do not assume that a woman is using her husband's surname. Many women prefer to keep their single name. Moreover, in some cultural naming systems, married women do not as a matter of practice carry the same family name as their husband. (See '[Names and naming systems](#)' for more on different naming systems.)

<sup>103</sup> For the practical effect, see *Her Majesty's Attorney General and (1) Akhter (2) Khan and others* [2020] EWCA Civ 122.

<sup>104</sup> *Re AI and MT* [2013] EWHC 100 (Fam).

- When referring to as yet unidentified people such as other judges, doctors, nurses, social workers etc, state 'he or she' (or 'they') for the pronoun – do not always use 'he', nor in female-dominated professions, use 'she'.
- Use gender-neutral language where possible, eg 'business person' not 'businessman', 'postal operative' not 'postman', 'flight attendant' not 'air hostess', 'chair' not 'chairman'.
- It is almost never acceptable to comment on an individual's looks, appearance, or fragrance, or whether s/he has a nice smile.
- In the context of violence against women, some people object to the term 'victim' as it can imply passivity and helplessness. They may prefer the word 'survivor', which can convey resilience. Another and different objection to the word 'victim' is that it implies the individual has indeed been subjected to the alleged violence, whereas in some contexts, that may not yet have been proved. Qualifying this, by saying 'alleged victim', then sounds like insensitivity. It is difficult to avoid the word 'victim' altogether because it is used in some of the statutory language and guidance, as well as by the government and police in reference to victim support schemes. Ideally, preferable language might be 'a person bringing a complaint of sexual assault' or 'complainant' or, if proved, 'a person who was sexually assaulted'.

## ***The Equality Act 2010***

149. The Equality Act 2010 prohibits discrimination in relation to 'sex'. This means being a man or being a woman. See the Equality Act 2010 appendix for an [overview](#) of the Equality Act 2010 and for more detail of the application of the Equality Act 2010 to [sex](#).

## ***References and resources***

Click on the references below to go to the source referred to. Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link. Within the thematic groupings, references are in alphabetical order (discounting the first 'the' or 'a').

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[\*R v Lubemba\*](#) [2014] EWCA Crim 2064

[\*R v Montaut\*](#) [2019] EWCA Crim 2252

[\*R v Rosie Lee Petherick\*](#) [2012] EWCA Crim 2214

[\*Re X \(Female Genital Mutilation Protection Order No. 2\)\*](#) [2019] EWHC 1990 (Fam)

## Other

[United Nations Rules for the Treatment of Women Prisoners and non-Custodial Measures for Women Offenders \(The Bangkok Rules\)](#)

## Chapter 7 Modern Slavery

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## Overview

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed via a listing of all the main topics on the contents page for this chapter.

Increasing attention is being paid to victims of modern slavery. In August 2017, the National Crime Agency said there are potentially tens of thousands of victims of modern slavery in the UK. Modern slavery occurs across industries and is often not readily apparent to the public.

The Modern Slavery Act 2015 codified and strengthened the criminal law defining slavery, servitude and forced and compulsory labour in line with the European Convention on Human Rights. It outlawed a range of human trafficking offences.

The courts now also have extensive powers to make Slavery and Trafficking Reparation and Prevention Orders, to compensate victims and curtail the activities of defendants.

Section 45 introduces a statutory defence to most crimes where the defendant has been compelled to commit the crime through slavery or trafficking. Where the section 45 defence is relied on it is a matter of fact for the jury to decide whether the defendant was a victim of trafficking.

Various government agencies are tasked with implementing effective anti-modern slavery initiatives such as the Independent Anti-Slavery Commissioner and the Gangmasters and Labour Abuse Authority.

A National Referral Mechanism was established in the UK to protect victims. It enables potential victims of modern slavery to receive safe accommodation whilst an assessment is made of whether they are a victim of trafficking or slavery. Potential victims have been reported from numerous countries, most commonly the UK, Albania, Vietnam, China and India (in that order).

Victims of modern slavery are likely to be vulnerable witnesses, considerably damaged by their experiences and wary of authority figures. Patience as well as sensitivity will be required.

Witnesses may be particularly susceptible to overbearing cross-examination, which risks both unnecessary distress and humiliation of the witness, and worthless answers, or silence. Protected questioning techniques may be appropriate. Examples are given in the full chapter.

Other relevant chapters in the Equal Treatment Bench Book might be (as applicable):

- [‘Migrants, refugees and asylum seekers’](#) in chapter 8.
- [‘Communicating with speakers of English as a second or third language’](#) in chapter 8.
- [‘Language interpreters’](#) in chapter 8.
- [‘Communicating intercultural’](#) in chapter 8.
- Where there are mental health difficulties, [chapter 4 \(Mental Disability\)](#).

## ***What is modern slavery?***

1. Increasing attention is being paid to victims of modern slavery. Figures are higher than previously thought. In August 2017, the National Crime Agency said there are potentially tens of thousands of victims of modern slavery in the UK. Globally, the ILO estimated 21 million in 2012, and the Global Slavery Index estimates there are 45,800,000 living in slavery today.
2. Modern slavery occurs across industries from recycling plants, factories and building sites to agriculture, hotels to boat building as well as car washing, nail bars, domestic service and cannabis farms, and is often not readily apparent:  
  
‘As you go about your normal daily life and as you’re engaged in a legitimate economy accessing goods and services, there is a growing and a good chance you will come across a victim who has been exploited in one of those different sectors.’<sup>1</sup>
3. Victims are usually vulnerable – whether because of homelessness, financial desperation, immigration status, learning difficulties, or drug and alcohol problems – making them more prone to exploitation.
4. Slavery and trafficking can occur in various ways, from individual cases such as domestic servants being trafficked by individual families, to serious organised international crime gangs seeking to control the labour supply to legitimate businesses.
5. Psychological imprisonment can be just as effective as visible handcuffs but much harder to identify. Removal of identity documents and mobile phones, denial of contact with friends and family, refusing to allow the victim out unaccompanied, and threats to family and friends, are for example effective tools in control and coercion, but invisible to outsiders. Another technique is to ensure that an enslaved person signs legal documents facilitating their stay in the UK and acknowledging receipt of wages which they have not received, when that person has no free choice about whether to sign or not and the document may not be in a language which they can read.
6. Most of the victims of labour exploitation are male, whereas sexual exploitation accounts for the highest number of female victims, often with ancillary exploitation as domestic labour or drug supply. It is almost certain that such crimes are underreported, particularly where the victims are male.<sup>2</sup>

## ***Protection of victims and compensation***

7. The Modern Slavery Act 2015 codified and strengthened the criminal law defining slavery, servitude and forced and compulsory labour in line with Article 4 of the European Convention of Human Rights. It outlawed a range of human trafficking offences for work, marriage and organ transplanting. Human trafficking occurs where force, fraud, coercion or deception is used to recruit, transport or receive an individual for exploitation – whether within the UK or cross-border. The UK has also adopted and is bound by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2003 (the Palermo Protocol), the Council of Europe Convention on

<sup>1</sup> National Crime Agency, reported in the Guardian, 11.8.17.

<sup>2</sup> ‘National Strategic Assessment of Serious and Organised Crime’: National Crime Agency (2020).

action against Trafficking in Human Beings 2005 CETS 197 and EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.

8. The courts now also have extensive powers to make Slavery and Trafficking Reparation and Prevention Orders, to compensate victims and curtail the activities of defendants. Section 45 introduces a statutory defence to most crimes where the defendant has been compelled to commit the crime through slavery or trafficking. In appropriate cases, judges and prosecutors should be alive to the possibility of a section 45 defence. Where the defence is raised, it is a question of fact for the jury to decide if the defendant is a victim of trafficking or slavery.<sup>3</sup> Since section 45 filled a previous lacuna in the law to protect victims of trafficking, it is no longer necessary to consider if the continued prosecution is an abuse of process as the jury is tasked with the decision and previous authority to the contrary is to be considered with great caution. An important decision of the Court of Appeal in this area which should be consulted if such a question arises is *R v O*,<sup>4</sup> where a conviction ten years old, was successfully overturned on appeal out of time.
9. A National Referral Mechanism (NRM) was established in the UK in 2009 to give effect to the Palermo Protocol to identify and protect victims. It is part of the Home Office. It enables potential victims of trafficking to receive safe accommodation whilst an assessment is made by a 'Competent Authority'.<sup>5</sup> The Competent Authority first decides whether there are reasonable grounds for considering a person is a victim of trafficking, and then makes a 'conclusive grounds' decision.
10. In *R v S*,<sup>6</sup> a conclusive grounds decision by the Home Office under the NRM that S was a victim of trafficking was relied on to vacate a guilty plea on appeal, over 16 months late. The conclusive grounds decision was regarded as fresh evidence emerging after the guilty plea. S, a Vietnamese national, had been found at a cannabis growing factory.
11. In the context of immigration appeals the FTT is not bound by an NRM decision as it is for the FTT to make its own findings of fact.<sup>7</sup>
12. In 2019, 10,627 potential victims were referred to the NRM, of whom 4,550 were children. In the year to March 2020, police in England and Wales recorded 7,779 modern slavery offences – a 59% increase on the previous year.<sup>8</sup>
13. 36% of NRM referrals in 2019 concerned labour exploitation, whilst 22% concerned sexual exploitation. Potential victims had 125 different nationalities, most commonly UK, Albanian, Vietnamese, Chinese and Indian nationals (in that order).<sup>9</sup>

<sup>3</sup> *R v DS* [2020] EWCA Crim 285.

<sup>4</sup> [2019] EWCA Crim 1389.

<sup>5</sup> *R v Joseph* [2017] EWCA Crim 36 at paras 15 – 16 provide a useful description of the structure.

<sup>6</sup> [2020] EWCA Crim 785.

<sup>7</sup> *MS(Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9.

<sup>8</sup> '2020 UK Annual Report on Modern Slavery' (Oct 2020).

<sup>9</sup> '2020 UK Annual Report on Modern Slavery' (Oct 2020).



14. Courts and Tribunals are not a first responder able to refer a potential victim to the Home Office or UKBA under the National Referral Mechanism, but they can direct parties to the appropriate authorities.<sup>10</sup>
15. Commercial organisations with a worldwide turnover of at least £36 million (which includes the turnover of subsidiary undertakings) must prepare an annual slavery and human trafficking statement for each financial year (section 54 Modern Slavery Act 2015). The organisation must include the steps it has taken to ensure that human trafficking is not taking place in any of its supply chains and in any part of its own business, or it must make a statement that it has taken no such steps.
16. Various government agencies are tasked with implementing effective anti-modern slavery initiatives - the Independent Anti-Slavery Commissioner, the Gangmasters and Labour Abuse Authority and the Director of Labour Market Enforcement as well as the national minimum wage unit of HMRC and Employment Agencies Standards Inspectorate, all of which have helpful websites. The Home Office has produced detailed guidance for its frontline staff on how to identify potential victims.<sup>11</sup>

### ***Help with court process***

17. Victims of modern slavery are likely to be vulnerable witnesses, considerably damaged by their experiences and wary of authority figures. They will often have a profound sense of powerlessness and worthlessness inculcated in them by those holding them in thrall. Patience as well as sensitivity will be required. Particular concerns may include repercussions to themselves or to family members, along with shame and guilt about their situation. They often experience a form of 'Stockholm syndrome', having been groomed by those who control them to accept their condition of modern slavery.
18. Whilst it will often be necessary to make findings about whether the individual has been coerced or willingly agreed to, for example, commit a crime or perform the work, the questioning must be carefully worded to enable the witness to give their best evidence. The Haughey review of the Modern Slavery Act recommended that ground rules hearings and the Advocate's Gateway for vulnerable witnesses should be used in slavery cases as they are in sexual offences cases.<sup>12</sup>
19. Witnesses may be particularly susceptible to overbearing cross-examination, which risks both unnecessary distress and humiliation of the witness, and worthless answers, or silence. Protected questioning techniques may be appropriate, such as:
  - No repeated questions.
  - Short, single-strand questions, ie one matter raised in the question at a time.
  - Giving structure to the questions.

<sup>10</sup> Details of the National Referral Mechanism are available at [www.gov.uk/government/collections/modern-slavery](http://www.gov.uk/government/collections/modern-slavery)

<sup>11</sup> 'Victims of Modern Slavery – Frontline Staff Guidance v3': Home Office (Mar 2016).

<sup>12</sup> See chapter 2 regarding adjustments for vulnerable witnesses.

- Focused questions on the matters in dispute.
  - Reduction in the use of leading questions.
  - Reduction in the use of tag questions.
20. If the individual has mental health difficulties, make the necessary adjustments (see [chapter 4 \(Mental Disability\)](#)).
  21. If applicable, read the section on '[Migrants, refugees and asylum seekers](#)' in chapter 8.
  22. For guidance on speaking English with a person who uses English as a second or third language, see '[Communicating with speakers of English as a second or third language](#)' in chapter 8. For use of foreign interpreters, see '[Language interpreters](#)' in chapter 8. Also bear in mind, if the individual has a different cultural background, that he or she may have a different cultural way of communicating (see '[Communicating intercultural](#)' in Chapter 8).
  23. Where interpreters are needed, there can be additional sensitivities. Some ethnic or national communities are small and a victim of modern slavery may show signs of being uncomfortable when conversing about their experiences because of concerns about privacy or repercussions. If trafficking gangs are known to be at work within their community, the victim may be in fear.
  24. Claims can be brought in employment tribunals and other civil courts for any torts committed during the period of exploitation and breach of employment rights. Failure to pay minimum wage, sometimes for many years, can amount to a very substantial sum of money. See for example *Ajayi v (1) Abu (2) Abu*<sup>13</sup> where a Nigerian woman assisted with legal representation by the Anti Trafficking and Labour Exploitation Unit successfully claimed a long period of unpaid minimum wage, in a case where the defence alleged that the person either was paid properly or did not have to be. It was held that the victim had been kept in 'oppressive servitude', including economically.
  25. The above judgment also contains an initial section detailing the special measures which the judge arranged for the court hearing, and the legal basis for them in a civil case. In that instance, separate court entrances and waiting areas were provided for the claim and defence teams, a witness screen and avoidance of direct sight-lines between the defendants and the victim were used, and extensive oral evidence was heard about the living conditions and manner of treatment of the claimant. The claimant at a later hearing was awarded damages by way of payment under the minimum wage legislation and general and special damages arising from a claim in harassment.<sup>14</sup>

<sup>13</sup> [2017] EWHC 1946.

<sup>14</sup> *Ajayi v (1) Abu (2) Abu* [2017] EWHC 3098.

## References and resources

Click on the references below to go to the source referred to. Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link. References are in alphabetical order (discounting the first 'the' or 'a'). Cases were relevant as at the date of publication.

### References

[‘2020 UK Annual Report on Modern Slavery’](#) (Oct 2020)

[‘Human Trafficking, Smuggling and Slavery’](#): CPS Legal Guidance (April 2020).

[Independent Anti-Slavery Commissioner](#)

[The Modern Slavery Act Review](#) (Haughey, 2016).

[‘Modern Slavery in the UK: March 2020’](#): ONS.

[‘Modern slavery and human trafficking’](#): National Crime Agency.

[National Referral Mechanism.](#)

[‘National Strategic Assessment of Serious and Organised Crime’](#): National Crime Agency (2020).

[‘Victims of Modern Slavery – Frontline Staff Guidance v3’](#): Home Office (July 2020).

### Cases

[Ajayi v \(1\) Abu \(2\) Abu](#) [2017] EWHC 1946

[Ajayi v \(1\) Abu \(2\) Abu](#) [2017] EWHC 3098

*MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9

*R v DS* [2020] EWCA Crim 285

[R v Joseph](#) [2017] EWCA Criminal 36

[R v O](#) [2019] EWCA Crim 1389

[R v S](#) [2020] EWCA Crim 785

## Chapter 8 Racism, Cultural/Ethnic Differences Antisemitism and Islamophobia

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#### **Related content in other chapters**

Further themes potentially relevant to minority ethnic women are contained in [chapter 6 \(Gender\)](#).

## **Overview**

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### **Social and economic inequality**

Social awareness of the ethnically and culturally diverse communities served by the courts, including their experiences of racism and disadvantage, will assist a judge in understanding those participating in the justice system.

Members of minority ethnic groups experience disadvantage associated with their ethnicity in many areas of life. However, there is considerable diversity within communities and not everyone within an ethnic group will experience disadvantage in the same way.

It is important to avoid thinking in terms of stereotypes based on perceived characteristics associated with a particular ethnic group. Just because the majority of members of an ethnic group have certain characteristics or views does not mean all members of the group have those characteristics or views.

### **Black perspectives**

55% of minority ethnic people in Britain feel nothing has improved in their lifetime as regards levels of racism. Compared with white people, far more people from black, Asian and minority ethnic communities experience rudeness from strangers, being treated like a potential shoplifter, and being mistaken for a member of staff in a restaurant or shop. Large numbers have experienced racial abuse and someone assuming they are not British purely because of their ethnicity.

### **Gypsies, Travellers and Roma**

Gypsies, Roma and Travellers face numerous barriers in accessing health and other services.

Trust is low between Gypsy, Traveller and Roma communities and public authorities. It is necessary to build confidence. Terminology is important.

There is a misconception that all Travellers move around.

### **Migrants, refugees and asylum-seekers**

Asylum seekers and refugees are among the most vulnerable groups within our society. They have higher rates of mental health difficulties than are usually found within the general population.

As well as pre-migration trauma, asylum seekers suffer as a result of the loss of the support of family and friends, social isolation, loss of status, culture shock, uncertainty, racism, hostility (eg. from the local population and press), housing difficulties, poverty and loss of choice and control. The process of seeking asylum adds further stress.

New migrants may well have different experiences and understandings of the role of courts. Refugees and asylum seekers may have had traumatic experiences of the administration (or otherwise) of the rule of law in their own countries.

### **Communicating interculturality**

Language and cultural barriers, coupled with poor or inaccurate information about the process, have been identified as the critical barriers to people using courts and tribunals.

Different cultures have different communication styles. These can affect how some people are understood in formal hearings, even when they are speaking relatively fluently in English, and even when they can operate bi-culturally at work or socially.

Cultural differences can lead to misunderstandings in court without anyone realising they are happening, for example:

- East Asian parties and witnesses will be conscious of saving face (both their own and the judge's). This may lead them to say they understand when they do not in order to 'not hold things up'.
- Certain South Asian witnesses when answering a question will adopt a 'narrative style', providing lengthy context first, before arriving at the 'point'
- Different cultures may display emotion differently.

When speaking with a person who is using English as a second language, there are ways of speaking English which make it easier to understand. This is not simply a matter of speaking 'plain English'.

### **Language interpreters**

When speaking through interpreters, it is important to remember that languages differ in terms of their grammar; words with no direct translation; a lack of matching concepts; and different levels of explicitness.

Interpreting can be made simpler where judges and advocates use English in the ways recommended for communicating directly with those speaking English as a second language.

The interpreter's job is to convey the full meaning of what is said to each speaker. It is important not to assume that an interpreter is mistranslating or having a supplementary discussion simply because the translation uses more words than those being translated.

### **The right to speak Welsh**

Welsh is an official language in Wales and Welsh speakers are entitled as of right to use Welsh in court in Wales, without any suggestion that this is a concession or a nuisance or any kind of favouritism. Interpreters are booked through the Welsh Language Unit and conduct simultaneous interpretation.

Bilingual Welsh/English speakers may nevertheless feel Welsh is their stronger language. Code-switching (from one language to the other) is common with many bilingual speakers including Welsh/English bilinguals.

## Names and naming systems

Court and tribunal hearings usually begin with introductions by name. For a party or witness with an unfamiliar 'foreign name', the way a judge reacts to it can symbolise an attitude towards their other cultural differences. Judges should not avoid saying names because they are difficult to pronounce. It may be better to try - and then to apologise for mispronouncing.

In Wales, where the names of places and institutions may additionally arise, every effort should be made also to get the pronunciation of these correct.

Naming systems differ greatly around the world:

- It is best to ask for a person's 'full name' and then to ask how they would like to be addressed.
- Avoid terms like 'First name', 'Second name', 'Middle name', 'Forename', 'Surname' and 'Christian name'. 'Family name' (for 'surname') and 'given name' or 'personal name' (for 'first name') are better.
- In many naming systems, family members do not share the same surname. In other systems, certain surnames are very common.

## The criminal justice system

The government-commissioned Lammy Review into the treatment of black and Asian minority ethnic ('BAME') people in the criminal justice system was published in September 2017.

The Lammy Report states that, as well as being subjected proportionally to significantly more arrests, BAME men and women are more likely than their white counterparts to be committed for trial at the Crown Court and more likely to be remanded in custody.

The Report says there is a high level of distrust in the criminal justice system amongst the BAME population. Part of this is caused by lack of diversity amongst those making important decisions. However, transparency and clear explanations of court process and sentencing decisions are almost as important in building trust.

There remains an over-representation of ethnic minorities within the criminal justice system and disparities in aspects of their treatment.

Disproportionality in the youth justice system has not improved since Lammy. The Magistrates' Association has made a series of recommendations to help fairness and build trust.

Within some BAME groups, attitudes to offending within families and communities, arising from varying cultural or religious beliefs, may result in an additional stigma where offenders are women and put strain on family relationships.

The impact of custodial sentences is particularly acute for black African and black Caribbean families as they are far more likely to be headed by a lone parent.

Many black women say they do not feel their circumstances have been properly understood at the hearing. Together with confusion about the process and court jargon, this leads to a sense of injustice.



### **Care and family courts**

In care proceedings, if judges do not engage with the detail of diverse cultural contexts, minority ethnic parents are likely to feel they have not been heard and understood.

### **Anti-Muslim Racism: Islamophobia**

The volume of anti-Muslim hate crime has risen steadily in recent years. The Muslim Council of Britain ('MCB') says the vast majority of Muslims know someone who has been the target of hate crime. It says that Muslim women are particular targets. The psychological impact of hate crime on the Muslim community has been severe.

In addition to overt hate crime, Muslims feel it has become more socially acceptable amongst British people to express anti-Muslim attitudes. For some, this makes it difficult to be a Muslim in Britain. Nevertheless, the vast majority of Muslims feel a strong sense of loyalty and personal belonging to Britain. The overwhelming majority show positive orientations both towards their own ethnic culture and towards integration into British society.

### **Antisemitism**

Police-recorded anti-Semitic hate crime has also increased dramatically in recent years, creating an increased feeling of insecurity amongst many British Jewish people.

The British government has agreed to adopt the 'working definition' of antisemitism of the International Holocaust Remembrance Alliance.

Israel is important to the identity of most British Jewish people, although many disapprove of the policies of the current Israeli government.

The House of Commons' Home Affairs Committee, as part of its recommendations in its Report into 'Antisemitism in the UK' (October 2016) says word 'Zionist' as a term of abuse has no place in a civilised society. It has been tarnished by its repeated use in antisemitic and aggressive contexts.

### **Acceptable terminology**

Using acceptable terminology when discussing aspects of identity or matters of racism and prejudice avoids offending parties and witnesses and gives them confidence they will receive a fair hearing.

The collective description, 'black, Asian and minority ethnic', and particularly the acronym 'BAME' is increasingly unpopular amongst those to whom it is intended to refer. One difficulty is that it does not differentiate between people with rich and diverse backgrounds, and who have been subjected to different life experiences and patterns of discrimination. Nevertheless, it has been used in this chapter because it is the prevailing term used in most of the research reports.

A person's ethnicity should not be referred to unless relevant. If it is relevant, it is usually best to ask the person concerned how they would wish to be identified, described or addressed.



### **The Equality Act 2010**

Discrimination in relation to 'race' (colour, nationality, national or ethnic origin, and descent) is unlawful under the Equality Act 2010.

## ***Avoiding stereotypes and holding confidence***

1. Experience of racism or similar disadvantage in any one sector of society will have an impact on perceptions about the administration of justice as a whole. An appearance before a court cannot be isolated from other social experiences.
2. Surveys show there is a perception amongst some minority ethnic communities that the criminal justice system is not fair and just. Evidence that some of the concerns underlying those perceptions may be well-founded is explored later in this chapter.
3. There is, therefore, a particular need for judges to demonstrate fairness in carrying out their responsibilities in order to build confidence in the justice system amongst all ethnic groups. This requires an awareness of the way in which a judge's own actions might affect perceptions of and confidence in the working of the justice system. In a recent poll, 47% of BAME respondents felt that the justice system has a culture of racism.<sup>1</sup> Knowledge and information about what happens outside court can help judges to ensure that what happens inside is fair and seen to be fair.
4. There are twin obligations on the judiciary: to avoid thinking in terms of negative stereotypes about individuals based on presumed characteristics of a group, and to meet any particular needs which individuals may have in order to participate in the court process on a fair and equal basis.
5. This chapter gives information about the experience and perceptions of people from various minority ethnic groups. In relation to someone who arrives in court self-conscious about their cultural difference or distrustful of the legal system, it is about gaining their confidence by being able to demonstrate a sensitivity to people's varying social experience.
6. The information in the chapter gives a general context which should be supplemented by local circumstances and the particular facts relevant to the case and the individuals before the court.
7. Some of the available statistical material is set out below, in order to indicate the sorts of disadvantages experienced by certain minority groups within the justice system and more broadly. It is important to note that there is considerable diversity between and within communities and accordingly not everyone within the same ethnic group will experience disadvantage in the same way or at all.
8. Where it is necessary in this chapter and in the Equal Treatment Bench Book to refer to discrimination collectively, we have tended to use the phrase 'black, Asian and Minority ethnic' people. We do this partly because it is the term currently in most frequent use for public discourse, and partly because the majority of research reports on which we have relied use that term. However, we are aware that many people from black, Asian and Minority ethnic communities dislike the term and especially the acronym 'BAME', and do not use it to describe themselves. There is further discussion of this in the [Acceptable terminology](#) section below.

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<sup>1</sup> 'ITV Has Britain Changed Poll'. Number Cruncher. Based on interviews in July 2020.

9. It is also important to avoid perceiving or thinking in stereotypes based on perceived characteristics associated with a particular ethnic group. Even where it is generally true that most members of an ethnic group share certain characteristics, experiences or views, it does not mean that every member of the group has those characteristics, experiences or views.

## ***Social and economic inequality***

### **Introduction**

10. According to the 2011 census, 80.5% of the population living in England and Wales, and 45% of London residents, identify as white British. Over half of people with Pakistani and Bangladeshi background were born in the UK. Of the 13% of residents of England and Wales who were born outside the UK, just over half arrived in the previous 10 years. 12% of households with at least two people have household members of different ethnic groups.
11. In the 2013 British Social Attitudes survey, 27% of those asked described themselves as 'a little prejudiced' towards people of other races, with a further 3% admitting they were 'very prejudiced'.<sup>2</sup> In recent years, research repeatedly indicates strongly negative attitudes amongst the white population towards immigrants, refugees, Muslims, Gypsies and Travellers.<sup>3</sup>
12. Well over half of both white and minority ethnic people believe there is a fair amount or a great deal of racism in Britain today and that it has not got any better over their lifetime. In Wales, only 18% of BAME people think there is not much racism in Britain and 43% consider there is a great deal.<sup>4</sup>
13. There has been a rise in hate crime in recent years targeting all visible minority ethnic and religious communities including instances where the attacker wrongly believes an individual forms part of a particular group. The experience of those of South Asian origin since the 9/11 and 7/7 attacks is a specific example of this.
14. In key areas of life such as education, health, housing, employment and pay, there is evidence of significant disadvantage experienced by the majority of minority ethnic groups compared with the white British population. However, there are widespread variations, both between different communities, and between individuals within communities. It is important always to consider the individual in context and not to apply stereotypes.
15. There are many reasons for these high levels of disadvantage, including lower socio-economic status, multiple disadvantage and, in some cases, discrimination in employment and services.
16. The Equality and Human Rights Commission ('EHRC') has a statutory obligation to report to parliament on the progress society is making towards equality, human rights and good relations. Except where indicated otherwise, the following statistics in this section on social and economic inequality are

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<sup>2</sup> '30 years of British Social Attitudes – self-reported racial prejudice data'. Publ. NatCen Social Research.

<sup>3</sup> For example, see various British Social Attitudes Surveys; 'Is Britain Fairer? The State of Equality and Human Rights' (2015).

<sup>4</sup> 'ITV Has Britain Changed Poll'. Number Cruncher. Based on interviews in July 2020.

largely derived from the government's Race Disparity Audit,<sup>5</sup> its 'Ethnicity Facts and Figures' website and periodic EHRC reviews.<sup>6</sup>

## Education

17. There are multiple causes of under-achievement in school, none of which necessarily apply in a particular case or to a particular community. However, lower socio-economic status is often a key factor, sometimes involving lower parental expectations or lesser engagement by parents in schooling. There is a sizeable gap in educational attainment between disadvantaged white pupils and those from better off households, and attainment for black Caribbean pupils is very low overall. Negative stereotyping by teachers as to likely parental expectations and misreading culturally determined behaviour by children can also be a factor.
18. In 2017/18, school exclusions in England continued to be noticeably higher for African / Caribbean/ black children and those of mixed ethnicity than for white children.<sup>7</sup>
19. In addition to having very high exclusion rates, Gypsy and Traveller children have the lowest attendance rate of any minority ethnic group. They also report high levels of bullying and racial abuse<sup>8</sup>. The disproportionate rates of bullying, exclusion and low attainment apply in both Wales and England.<sup>9</sup>

## Employment and earnings

20. Although employment rates of black, Asian and minority ethnic ('BAME') men and women have increasingly caught up with white men and women over the past 16 years, unemployment rates prior to Covid-19 were still significantly higher for people from all minority ethnic groups when compared with white people. In every region in England and Wales, unemployment rates in 2018 were lower for white people than for all other ethnic groups combined. Around 1 in 12 people from a black, Bangladeshi, Pakistani or mixed background were unemployed, compared with 1 in 25 white British people. Pakistani and Bangladeshi people were more likely to be in low-skilled low paid occupations, and to be self-employed.
21. Minority ethnic women are clustered in a narrow range of jobs. The most notable clustering for black African and Caribbean women is in health and care, including nursing auxiliary and care assistant positions, which tend to be the lowest paid of such jobs. Pakistani and Bangladeshi women are over three times more likely to be unemployed than white women.
22. African / Caribbean / black people are underrepresented at senior levels of management in both the private sector and the public sector.

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<sup>5</sup> 'Race Disparity Audit – Summary findings from the Ethnicity Facts and Figures Website': Cabinet Office (October 2017).

<sup>6</sup> Starting with 'How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review': EHRC (2010).

<sup>7</sup> This pattern is not replicated in the statistics available from Wales for 2015/6.

<sup>8</sup> 'Gypsies and Travellers. House of Commons Briefing Paper 08083' Cromarty. (May 2018). See also the section on [Gypsies, Travellers and Roma](#).

<sup>9</sup> 'Provision for secondary school-aged Gypsy, Roma and Traveller pupils': Estyn.(April 2019); Ethnicity Facts and Figures website.

23. Black men and women experienced some of the largest falls in full-time employment in the period 2006–08 to 2013.
24. On many Gypsy and Traveller sites, only a small minority of households are engaged in paid work. The 2011 Census found that Gypsy or Irish Traveller was the ethnic group with the lowest employment rates and highest levels of economic inactivity. Of those who were economically active, Gypsies and Irish Travellers were more likely to be unemployed (20%) and self-employed (25%) than the general population in England and Wales. Anecdotal and qualitative evidence, on the other hand, indicates that historically, Gypsies and Travellers have made little use of Jobcentre Plus services, and may have a cultural bias against claiming out-of-work benefits.<sup>10</sup>
25. Research in late 2016 / early 2017, showed that black (African, Caribbean and black British) workers with no qualifications were paid 5% less than their white peers. Black school-leavers with GCSEs earned 12% less; those with A-levels earned 10% less; those with degrees earned 14% less; and those with higher education certificates and diplomas, faced a 20% pay gap.<sup>11</sup>
26. This pattern has continued over time. Compared with white workers with identical characteristics and doing the same types of job, research in December 2018<sup>12</sup> showed:
  - Pakistani and Bangladeshi male non-graduates were paid £1.91 less per hour.
  - Black male non-graduates were paid £1.31 less per hour.
  - The shortfall for female non-graduates, while less, was still significant.Despite the rapid increase in the proportion of BAME graduates in recent decades:
  - Black male graduates faced an average shortfall of £3.90 an hour.
  - Pakistani and Bangladeshi male graduates faced a shortfall of £2.67 an hour.
  - Black female graduates faced a shortfall of £1.62 an hour.
27. The government carried out a consultation from October 2018 – January 2019 into how mandatory ethnicity pay reporting should be introduced. At the time of writing, the results have not been announced.

## Poverty and home ownership

28. In 2011/13, a higher proportion of households headed by someone who was black or Pakistani / Bangladeshi lived in substandard housing, compared with those households headed by someone who was white.

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<sup>10</sup> 'Gypsies and Travellers. House of Commons Briefing Paper 08083' Cromarty. (May 2018). See also the section below on [Gypsies, Travellers and Roma](#).

<sup>11</sup> TUC Press Release 14.8.17 based on ONS Labour Force Survey figures from Q2 2016 – Q1 2017.

<sup>12</sup> 'Black and ethnic minority workers face a £3.2bn annual pay penalty': Resolution Foundation (Dec 2018).

29. As at 2017, there were large differences in typical household incomes:<sup>13</sup>
- 58% of white British families owned their own home compared with about one in four Bangladeshi, black, and other white (primarily European) families.
  - After taking housing costs into account, the disposable income gap between typical white British households and Bangladeshi households was £9,800 a year. Pakistani and black African families also fell substantially behind typical white British families.
30. 1 in 4 children from families of Asian background and 1 in 5 children from black families are in persistent poverty compared with 1 in 10 children from white British families. Black, Pakistani and Bangladeshi people are more likely to live in areas of deprivation.

## Health

31. Evidence suggests that Pakistani and Bangladeshi groups are more likely to report 'poor' health than average; more likely to experience poor mental health;<sup>14</sup> more likely to report a disability or limiting long-term illness, and more likely to find it hard to access and communicate with their GPs than other groups. Muslim people also tend to report worse health than average.
32. Bad health also particularly affects Gypsies and Travellers, many of whom remain unregistered with GPs. The life expectancy of Gypsies and Travellers is below that of people from other ethnic groups. A range of factors, such as poor accommodation, discrimination, poor health literacy, and a lack of cultural awareness and understanding by health professionals of Gypsy and Traveller health and social needs, are thought to create barriers to accessing healthcare.<sup>15</sup>
33. There is a lower level of access to palliative and end of life care services for minority ethnic people when compared with white British people.<sup>16</sup>
34. [Refugees and asylum seekers](#) are particularly vulnerable to physical and mental health difficulties because of their experiences prior to arriving in the UK.
35. Muslims may be susceptible to depression as a result of [Islamophobia](#).

## Impact of the Covid-19 pandemic

36. Black, Asian and minority ethnic ('BAME') groups have been harder hit by the Covid-19 pandemic than others, exacerbating existing inequalities. When measured for spring 2020, after adjusting for region, socio-demographic and household characteristics, people of black ethnic background of all ages were

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<sup>13</sup> 'Diverse Outcomes. Living standards by ethnicity': Resolution Foundation Briefing (2017). Statistics on the Ethnicity Facts and Figures website for the three years ending 2017/8 show a similar pattern.

<sup>14</sup> See chapter 4, paragraph 17.

<sup>15</sup> 'Gypsies and Travellers. House of Commons Briefing Paper 08083' Cromarty. (May 2018). See also the section on [Gypsies, Travellers and Roma](#).

<sup>16</sup> 'Is Britain Fairer? The State of Equality and Human Rights' (2015).

twice as likely to die as white people. Men of Bangladeshi, Pakistani and Indian ethnic background also had significantly higher risk of death.<sup>17</sup>

37. Many BAME people have lost friends and family to the disease and nearly all are experiencing the impact of the disease on their communities with significant social, physical and mental health impacts and complications. There is concern that the economic impacts on BAME groups are likely to be very long term and severe.<sup>18</sup>
38. The cause of the unequal health impact on BAME communities is complex and still under research. It is thought likely to result from a range of overlapping factors including social and economic inequality, working disproportionately in front-line and high-risk occupations, prevalence of certain health conditions which increase the severity of the disease, and racism.<sup>19</sup> In a Birmingham study, patients from regions of highest air pollution, poor housing quality and household overcrowding deprivation were at increased risk of intensive care admission and death. Patients of BAME ethnicity were more likely to come from such areas.<sup>20</sup>
39. Early indicators suggest that Covid-19 has been not just a health crisis for BAME people, but also a social and economic crisis:<sup>21</sup>
  - BAME people were more likely than white people to have received a positive test result or experienced symptoms, and five times as likely to have been hospitalised.
  - 19% of people of African Caribbean backgrounds personally knew someone who had died with the virus.
  - In terms of risk factors, BAME people were more likely to be living in larger households and in households with fewer rooms than occupants; more likely to be classed as key workers (the women even more so); more likely to be working outside of their home; more likely to be working in health and social care; and much more likely to report that they had not been given adequate PPE.
  - Bangladeshi and black African people were more likely to report loss of income since Covid-19 (43% and 38% respectively) compared with white (22%) and black Caribbean people (21%),
  - BAME people were consistently less likely than white people to have heard of the UK government's financial support measures.

<sup>17</sup> 'Coronavirus (COVID-19) related deaths by ethnic group, England and Wales: 2 March 2020 to 15 May 2020' ONS 19 June 2020.

<sup>18</sup> 'Beyond the data: Understanding the impact of COVID-19 on BAME groups': Public Health England (June 2020).

<sup>19</sup> 'Beyond the data: Understanding the impact of COVID-19 on BAME groups': Public Health England (June 2020).

<sup>20</sup> 'To what extent are social determinants of health, including household overcrowding, air pollution and housing quality deprivation, modulators of presentation, ICU admission and outcomes among patients with SARS-COV-2 infection in an urban catchment area in Birmingham, United Kingdom?': Soltan and others. Research Square. University of Birmingham (July 2020).

<sup>21</sup> 'Over-Exposed and Under-Protected – The devastating impact of Covid-19 on Black and Minority Ethnic Communities in Great Britain': Runnymede Trust (Aug 2020).

- The sectors and jobs most affected by the pandemic (eg transport, restaurants and hotels) have a higher than average proportion of BAME workers.<sup>22</sup>
40. Amongst these communities, there is deep dismay, anger, loss and fear about the emerging data and realities showing BAME groups being harder hit by the Covid-19 pandemic than others.<sup>23</sup> BAME children and young people are showing significantly higher levels of suicidal thoughts, self-harm, depression and anxiety compared with their white counterparts.<sup>24</sup> In June 2020, the Equality and Human Rights Commission announced an inquiry into the impact of coronavirus on ethnic minorities.

### ***Black perspectives***

41. It is necessary to understand the experiences and perspectives that black, Asian and minority ethnic ('BAME') people bring with them to the courts. Distrust amongst many has roots in many decades of social disadvantage and discrimination. In a recent poll, 55% of minority ethnic people felt nothing had improved in their lifetime. The majority of those felt the level of racism in Britain had actually got worse.<sup>25</sup>
42. In the criminal justice arena, the 1981 Scarman report was followed by the 1999 MacPherson report, which was followed by the 2017 Lammy report. More recently, there is ongoing evidence of disproportionate stop and search of young black men.
43. People from these communities may see their own experiences in this social context and bring that viewpoint to court.

### **Discrimination and day-to-day experiences**

44. According to a large-scale poll in December 2018<sup>26</sup>, in the previous year:
- 41% of black, Asian and minority ethnic ('BAME') respondents had experienced someone assuming they were not British on the basis of their ethnicity.
  - 32% of BAME respondents compared with 15% of white respondents had been mistaken for a member of staff in a restaurant, shop or hotel in the last year.
  - 31% of BAME respondents compared with 10% of white respondents had been treated like a potential shoplifter within the last year, when in fact they had not done anything.

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<sup>22</sup> 'Coronavirus: Impact on the labour market': House of Commons Library Briefing Paper 8898 (17 July 2020).

<sup>23</sup> 'Beyond the data: Understanding the impact of COVID-19 on BAME groups': Public Health England (June 2020).

<sup>24</sup> 'How Covid-19 is Affecting the Mental Health of Young People in the BAME Community': Kooth (11 June 2020).

<sup>25</sup> 'ITV Has Britain Changed Poll'. Number Cruncher. Based on interviews in July 2020.

<sup>26</sup> 'Bias in Britain': ICM Poll for the Guardian (December 2018).



- 48% of BAME respondents had occasionally or regularly been mistaken for someone else of the same background.<sup>27</sup>
- 36% of BAME respondents as opposed to 23% of white respondents said a stranger had been rude to them in public in the last year.
- 44% of BAME respondents had heard someone use racist language in their presence within the last year; 29% had been personally racially abused and 10% had been confused with someone of the same ethnicity within the last week.

45. In controlled experiments:

- A person named 'Muhammad' received eight positive replies to enquiries about online advertisements for rooms to rent compared with every ten positive replies received by 'David'.<sup>28</sup>
- Minority ethnic applicants with identical resumés needed to send 60% more job applications in order to receive as many call backs as the majority group.<sup>29</sup>

## Windrush

46. The Windrush Scandal came to public attention in April 2018, but it had been taking place for many years before that with a still unknown number of people affected. The Windrush generation (or their ascendant relatives) entered the UK from the Caribbean between 1948 and 1973. They had the right of abode in the UK under the Immigration Act 1971 but they were not given any confirmatory documents and the Home Office did not keep accurate records.
47. The Windrush generation fell victim to a set of measures introduced by successive governments aimed at making life as difficult as possible for people with no legal status in the UK as an encouragement to leave. The issue became acute from 2014, when policies designed to combat illegal migration (known as the 'hostile environment' or latterly 'compliant environment') denied people access to work, housing and services. Members of the Windrush generation who could not prove their legal status faced very significant detriment in relation to access to housing, work, access to NHS care, and in some cases in their detention and removal from the UK and separation from family.<sup>30</sup>
48. In March 2020, an independent review commissioned by the Home Office was published.<sup>31</sup> The review found that hundreds, and possibly thousands, of people had been affected, directly or indirectly, turning their lives upside down and doing sometimes irreparable damage. The review referred to an institutional ignorance and thoughtlessness towards the issue of race and the history of the Windrush generation, as well as a lack of empathy for individuals and some instances of the use of dehumanising jargon and clichés.

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<sup>27</sup> Which can have serious consequences. See eg *Date v Ministry of Defence*. ET 3200974/2018.

<sup>28</sup> 'Bias in Britain' ICM Poll for the Guardian (December 2018).

<sup>29</sup> 'Are employers in Britain discriminating against ethnic minorities': GEMM Project. Centre for Social Investigation, Nuffield College (January 2019).

<sup>30</sup> 'Windrush Lessons Learned Review': Williams (19 March 2020).

<sup>31</sup> 'Windrush Lessons Learned Review': Williams (19 March 2020).

49. The government published the review immediately, apologising for the actions of successive governments. Concerns now centre on delays and complexities in accessing the compensation scheme.
50. In an assessment under section 31 of the Equality Act 2006, the EHRC found the Home Office was in breach of the Public Sector Equality Duty in understanding the impact on the Windrush generation and their descendants when developing, implementing and monitoring the hostile environment policy agenda.<sup>32</sup>

### ***Gypsies, Travellers and Roma***

51. Historically there has been a lack of robust data. 'Gypsy or Irish Traveller' was included under the category of 'White' for the first time in the 2011 National Census. 58,000 people identified themselves under that category. It is widely thought that the figure is inaccurate with estimates ranging from 82,000 to 300,000.
52. As with many other groups there are different interpretations of who is a Traveller. The Roma people are a distinct ethnic group originating from central eastern Europe. It can be offensive to some Roma communities to describe them as Gypsies. Towards the end of the 20<sup>th</sup> century there has been considerable migration of Roma from Eastern Europe to the west because of persecution. Within the UK some Travellers identify as Irish, Scottish, English or Welsh Travellers. In addition, there are 'New Age Travellers' and occupational travellers such as fairground showmen and waterway travellers.
53. Roma and Irish Travellers have been held to form distinct racial groups for the purposes of the Equality Act 2010.
54. Roma have their own unique oral language, Romanes (Romani). The oral language is not as extensive or complex as English. In addition, Roma are not used to talking about emotions and may not have the vocabulary to express themselves. Health is a matter that many people are reluctant to talk about, especially mental health and experiences of domestic violence or rape. This is also the case for Gypsy, Roma and Traveller people, many of whom prefer to keep discussion of such issues within the household.<sup>33</sup>
55. Romanes is commonly the first language many Roma adopt, followed by the language of the country where they were born and brought up, which is often Eastern Europe. This can mean English is the third language for many Roma people. There is also no written version of Romanes and as a result, many Roma have difficulty reading and writing other languages.
56. There are very few Roma interpreters. Anecdotally there is concern that information is not interpreted correctly and some report discrimination from interpreters.
57. It is a misconception that all Travellers move around. Whilst 24% live in caravans, the remainder live in bricks and mortar accommodation, mostly in social housing. Twice yearly snapshots by Local Authorities reveal that the number of traveller caravans increased from 8,000 in 1979 to 22,000 in 2017. In

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<sup>32</sup> 'Public Sector Equality Duty assessment of hostile environment policies': EHRC (November 2020).

<sup>33</sup> See also The Roma Community: NHS England leaflet. Roma Support Group (Feb 2016).

2017, 29% were on public sites, 54% on private sites, 10% on unauthorised sites owned by travellers and 7% on unauthorised sites not owned by travellers.<sup>34</sup>

58. Travellers have poor health compared with the general population with higher rates of mortality, morbidity, long-term health issues, low child immunisation levels and a higher prevalence of anxiety and depression. The mean average age of travellers in 2011 was 26 years as compared with 39 years in the general population. Male Irish travellers in Ireland have a suicide rate 6.6 times higher than the national population. In the Thames Valley there is a 100-fold excess risk of measles. Maternal death rates are the highest of any ethnic group. Gypsies, Roma and Travellers face numerous barriers in accessing health services, including not being able to register with a GP (which requires proof of identity and address), poor literacy skills, fear of discrimination, and overreliance on Accident and Emergency Services.<sup>35</sup>
59. Travellers have a higher proportion of lone parent families, have a higher rate of caring for other relatives and are less economically active. Children in the Gypsy, Roma and Traveller ethnic group have lower educational attainment rates and highest level of exclusions.<sup>36</sup> School curricula rarely, if ever, touch on Traveller culture and heritage.
60. In 2014 in a survey of the British population 50% of those asked reported having an unfavourable view of Roma; 77% of Travellers reported experiencing hate speech or hate crime and the same number say they hide their ethnicity to avoid hate crime.
61. As well as overt levels of harassment and discrimination, Gypsy, Roma and Traveller communities face considerable disadvantage in their interaction with public services due to indirect discrimination and structural barriers.<sup>37</sup>
62. In June 2019, the government launched a national strategy<sup>38</sup> to tackle entrenched inequality and to improve the lives of Gypsy, Roma and Traveller communities. Prior to that, the Welsh Government produced an action plan focusing on devolved issues.<sup>39</sup>

### **Gypsy, Traveller and Roma communities and Covid-19**

63. Gypsy, Roma and Traveller communities have been particularly vulnerable to the Covid-19 pandemic due to their health inequalities and frequent difficulty in social-distancing or self-isolating due to confined and communal households, and restricted living conditions on many sites. During lockdown and ongoing restrictions, some families have lost access to basic amenities such as running water, adequate sanitation and refuse disposal. Leisure centres, petrol station

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<sup>34</sup> 'Gypsies and Travellers. House of Commons Briefing Paper 08083': Cromarty (May 2018).

<sup>35</sup> 'Is England Fairer?': EHRC (2018) and 'Is Wales Fairer?': EHRC (2018). See also 'No room at the inn: How easy is it for nomadic Gypsies and Travellers to access primary care? Friends Families and Travellers' (2019).

<sup>36</sup> 'Is England Fairer?': EHRC (2018) and 'Is Wales Fairer?': EHRC (2018).

<sup>37</sup> 'Tackling inequalities faced by Gypsy, Roma and Traveller communities'. House of Commons Women and Equalities Committee. (March 2019).

<sup>38</sup> <https://www.gov.uk/government/news/new-national-strategy-to-tackle-gypsy-roma-and-traveller-inequalities>

<sup>39</sup> 'Enabling Gypsies, Roma and Travellers' (June 2018).

toilets and other places relied on for water and cleaning purposes have been closed. The number of businesses no longer accepting cash poses difficulty for those without bank accounts.

64. Children have struggled with school closures because of lack of equipment to access online teaching and parents with limited education having difficulty providing home-education.

### Help with the court process

65. Trust is low between Gypsy, Traveller and Roma communities and public authorities due to historic and ongoing discrimination. In addition, low levels of literacy, of English language-skills (in some cases) and of ability to negotiate a complex legal system can cause substantial difficulties in bringing court cases.<sup>40</sup> The following steps may help build confidence:

- Be careful about terminology. Ask individuals how they would like to describe themselves. Some people from the Gypsy, Traveller and Roma communities find the term 'gypsy' offensive, whereas others are proud to use that term.
- Explain court processes particularly carefully at all stages.
- Make good eye contact with Roma witnesses, even if it is necessary to take notes.
- Be sensitive to the possibility that individuals may have low literacy levels and may need adjustments such as explaining court processes orally and reading out documents.
- For guidance see '[Communication with a person who is using English as a second or third language](#)'.
- Where a language interpreter is needed for an individual from the Roma community, check carefully which language is required. Be especially alert to the possibility that meaning is lost in translation. Judges should ensure that they and other court users express themselves clearly and simply as a starting point; repeat and recheck key points using different words. For general guidance where a language interpreter is used see '[Language interpreters](#)'.
- Be careful not to unconsciously apply negative stereotypes about gypsies and travellers.
- Be sensitive when requiring evidence on personal matters and explain its relevance.
- Bear in mind where relevant that a party or witness's cultural context may be different and unfamiliar. As with other people from different cultures, making fact-findings on the basis of what is inherently probable can be misleading.<sup>41</sup>

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<sup>40</sup> 'Tackling inequalities faced by Gypsy, Roma and Traveller communities': House of Commons Women and Equalities Committee. (March 2019).

<sup>41</sup> *UA v HMRC (TC)* [2019] UKUT 113 (AAC); *VMcC v SSWP (IS)* [2018] UKUT 63 (AAC).

## ***Migrants, refugees and asylum-seekers***

### **Definitions and overview**

66. The term 'migrants' usually refers to people who leave one country to live in another. People migrate for a range of reasons including to work, to study and to escape from oppression. Some migrants are transitory or seasonal, staying in another country only for a period of time. Others have moved permanently.
67. In the UK, many migrants have become part of settled minority ethnic communities and will often have British citizenship. Newer migrants are an increasingly diverse group, coming from almost every nation in the world, within and outside the EU.
68. The UN Refugee Convention defines a 'refugee' as someone who, 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country'. A refugee is a person who has been granted asylum.
69. 'Asylum seekers' are people who have arrived in a country and asked for asylum, but have not yet received a decision as to whether or not they may remain as a refugee.
70. In 2019, the UK received 44,255 first-time asylum applications. This was 7.22% of all asylum claims made in the EU that year. Germany, Spain and France each received almost three times as many asylum applications as the UK.<sup>42</sup>
71. Asylum seekers are not allowed to work or claim benefits in the UK. If they have no money and nowhere to stay, they can apply for accommodation and a small cash allowance. There can be long delays in the Home Office making the initial decision on their case.
72. If asylum seekers are granted refugee status, they have 28 days to find accommodation and apply for mainstream benefits before they are evicted from asylum accommodation. Many refugees become homeless at this stage.

### **Vulnerability and mental health issues**

73. The effect of the Covid-19 pandemic has been severe on those migrants whose immigration status allows them to work, but prevents them from accessing many benefits if laid off.
74. Negative perceptions of migrants, refugees and asylum-seekers are fuelled by parts of the press and some political debate.
75. Asylum seekers and refugees are among the most vulnerable groups within our society,<sup>43</sup> often with complex health and social care needs. The great majority of asylum-seekers have fled countries ravaged by war and human rights abuses.

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<sup>42</sup> EUROSTAT Statistics explained.

<sup>43</sup> The following findings draw from 'Briefing statement: The health needs of Asylum seekers' (Faculty of Public Health) (2007); and 'Mental health implications of detaining asylum seekers: systematic review': Robjant, Hassan, Katona. The British Journal of Psychiatry (Mar 2009).

They have often been separated from their family. Many have undergone a perilous journey to reach the UK.

76. A number have faced imprisonment, torture or rape prior to fleeing, as well as witnessing the consequences of societal breakdown in their home country.
77. As well as pre-migration trauma, asylum seekers suffer as a result of the loss of support of family and friends, social isolation, loss of status, culture shock, uncertainty, racism, hostility, (eg from the local population and press), housing difficulties, poverty and loss of choice and control.
78. The process of seeking asylum in Western countries and stressful legal processes place additional demands on people.
79. For some, the effects of the Covid-19 pandemic and lockdown measures has triggered traumatic memories of captivity or self-confinement, leading to an increase in trauma symptoms.<sup>44</sup>
80. Asylum seekers who are detained in the host country experience further and more specific stress from the detention process itself and the detention centre environment, which may adversely affect their mental health status. Sources of stress include insecurity, loss of liberty, uncertainty regarding return to country of origin, social isolation, abuse from staff, riots, forceful removal, hunger strikes and self-harm.
81. As a result of these factors, asylum seekers and refugees have higher rates of mental health difficulties than are usually found within the general population. Depression and anxiety are common. Post-traumatic stress disorder is greatly underestimated and underdiagnosed. For cultural reasons, mental illness may not be expressed or may manifest as physical complaints. Stigma may also be attached to mental ill-health. Furthermore, Western psychological concepts are not universally applicable to asylum seekers who come from different cultures.<sup>45</sup>
82. For more detail on the experience of lesbian, gay, bisexual asylum seekers, see [chapter 10](#) and regarding trans asylum seekers, see [chapter 12](#).

### **Help with the court process**

83. Newly arrived migrants may well have different experiences and understandings of the role of courts. They may not trust a court. Refugees and asylum seekers may have had traumatic experiences of the administration of the law in their own countries. They may have come from countries where the accused in a criminal court does not necessarily enjoy the presumption of innocence. In their country of origin there may have been corruption among judges and/or judges may not generally be regarded as being independent of the government or other state authorities like the prosecution or police. These steps may help judges establish trust and confidence:

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<sup>44</sup> 'The Courts, Tribunals and the Covid-19 Public Health Crisis. Interim recommendations on safeguarding vulnerable people in the context of remote international protection and human trafficking/modern slavery legal casework': The Helen Bamber Foundation and Freedom From Torture (May 2020).

<sup>45</sup> 'Briefing statement: The health needs of Asylum seekers' (Faculty of Public Health) (2007).

- It will be particularly important to explain the process, what will happen, the court's powers and the opportunities which the individual will have to explain his or her case.
- Through the course of the hearing, carefully monitor that the individual understands the process and feels included in it.
- If a defendant waives a right, a judge needs to ensure it is done knowingly, not because the defendant assumes exercising rights is futile.
- Bear in mind intercultural ways of [communication](#).
- For further guidance as applicable, see '[Communication with a person who is using English as a second or third language](#)' and '[Language interpreters](#)', both within this chapter.
- If the individual has mental health difficulties, make the necessary adjustments (see [chapter 4](#)). This may require particular sensitivity. Bear in mind that such difficulties may not have been diagnosed and that the individual may be unwilling to admit them.
- Be aware that individuals' experiences may have affected their self-confidence so that they appear to consent, eg to proceeding unrepresented or having a remote hearing, even if this is contrary to their best interests.<sup>46</sup>
- Remember that remote hearings will often be unsuitable because of:
  - Lack of confidential and private space.
  - Lack of access to technology, phone credits, WiFi/Mobile data of sufficient quality.
  - Lack of visual clues, use of more focused and closed questions and difficulty interpreting silences can cause barriers in remote hearings and in remote interviews with their own legal representatives.
  - As a result of their experiences, possible fear of disclosing sensitive information to interpreters from their own community, especially interpreters they cannot see clearly.
  - Reduced access during partial and full lockdowns to support-services for help with distress caused by the hearing.<sup>47</sup>

## ***Communicating interculturallly***

### **Communication with witnesses from different cultures**

84. This section is about witnesses attending a hearing conducted in English, but who do not themselves speak English as a first language. For example, their

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<sup>46</sup> 'The Courts, Tribunals and the Covid-19 Public Health Crisis. Interim recommendations on safeguarding vulnerable people in the context of remote international protection and human trafficking/modern slavery legal casework': The Helen Bamber Foundation and Freedom From Torture (May 2020).

<sup>47</sup> 'The Courts, Tribunals and the Covid-19 Public Health Crisis. Interim recommendations on safeguarding vulnerable people in the context of remote international protection and human trafficking/modern slavery legal casework': The Helen Bamber Foundation and Freedom From Torture (May 2020).



first language might be Spanish, Cantonese or Polish. For a discussion of the specific rights and needs of Welsh-speakers, see [‘The right to speak Welsh’](#) below.

85. Language and cultural barriers, coupled with poor or inaccurate information about the process, have been identified as critical barriers to people using the tribunal system. This may also apply in the courts.<sup>48</sup>
86. Different cultures have different communication styles. These differences may still apply when a foreign-born person has learned to speak English fluently or where a person who speaks English as a mother tongue comes from a cultural minority.
87. Assumptions should not be made about whether these differences apply to a particular individual. Many people of different backgrounds are able to operate completely bi-culturally. Moreover, there is a large range of personality and behavioural difference within every culture. Having said that, it is important to bear in mind that an individual’s communication style will be a result of both cultural patterns and the structure of their mother tongue.
88. The greater the gap of cultural difference in a verbal exchange, the greater the risk that a native-English speaker’s customary process of inferring meanings and intentions will break down - even with good will on both sides, and when English is being spoken with fluency by all parties. A judge needs to be aware of this risk, and to help clarify meaning where necessary.
89. In some cultures, particularly from East Asia, the concept of ‘saving face’ is fundamental.<sup>49</sup> This goes beyond the sense of ‘saving face’ in UK society. An individual may be concerned to save both his or her own face, but also the face of judges and representatives. This desire will be particularly acute if there are others from the individual’s own cultural background in the room.
90. It is particularly important in terms of saving face:
  - Not to ask ‘Do you understand?’ The individual may well say ‘yes’ even when they do not understand simply to save the face of the judge if a ‘no’ might imply that the judge has not explained clearly.
  - To soften any negative or critical comments if possible. It can help to generalise, eg ‘Many people have difficulty writing a witness statement’, or to give an indirect example by apparently talking about someone else.
  - Not to say, ‘You are not making yourself clear’. This entails loss of face by drawing attention to lack of fluency or clarity in the speaker’s use of English.
91. It is important to be aware that there are culturally different ways of structuring answers to questions. This creates a risk of failing to grasp what a witness is saying, or of wrongly considering a witness to be evasive, or of cutting off a witness prematurely. For example, native speakers of English expect to make their most relevant point in reply to a question first, and give any needed

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<sup>48</sup> ‘Tribunals for diverse users’: Genn and others (DCA research series 1/06. 2006). E-learning modules (2019) on intercultural communication, interpreters and naming systems are available on the judicial intranet.

<sup>49</sup> There are many sources for this, including for example, ‘Crosstalk and Culture in Sino-American Communication’: Young (1994) and ‘Business Success in the Asian Century’: Byrne (2013).



background detail afterwards. However, speakers of South Asian languages would be accustomed to providing the background detail first as context, then coming on to make their most relevant point of reply at the end.<sup>50</sup> Narrative style, built around conveying facts and information in story-making form, is an integral part of literacy in Indian culture.<sup>51</sup> A native English speaker may impatiently interrupt, and so miss their key point, or incorrectly perceive them as being long-winded or even evasive.

92. These are other key differences to bear in mind in the way that languages are spoken in different cultures:

- Low context / high context: the degree to which meaning is stated explicitly in the words used, as opposed to meaning being left implicitly to be read or inferred between the lines.
- Directness / indirectness of style in answering questions, expressing disagreement, or making an argument.
- Ways of seeking to argue persuasively: quietly concise or impassioned and verbose.
- Ways of indicating engagement in a topic: low key / animated.
- Formal, impersonal, guarded in manner / informal, chatty in manner.
- Turn-taking: when to speak; whether to interrupt; how to indicate one has something to say or ask; whether to wait until invited to speak.
- Use of silence in replies: as a mode of respect (a token of thoughtful consideration of the question), or as uncertainty in needing mentally to 'translate' the question and to formulate a reply in another language.
- Emotion: For some cultures, expressing emotion overtly is a cultural norm. For others, restraint is the norm, especially in public. As well as this, emotions may be expressed differently facially in different social environments.<sup>52</sup>
- Parties may demonstrate emotion differently, both when telling their story during evidence and when arguing their case. For example, in one study, African Caribbean tribunal users expressed concern that they were culturally more likely to express emotion in a legal setting, which might have an adverse effect on how they were perceived.<sup>53</sup>
- Body language: the degree to which intended meaning is carried non-verbally, by gesture or manner. In addition, the meaning of certain body language is not universal. For example, in some cultures a smile could be a signal of suppressed negative emotions like loss of face, disappointment, or even anger, rather than of being pleased. The meaning and appropriateness of eye contact varies from culture to culture. Lack of eye contact can appear

<sup>50</sup> 'Crosstalk: An introduction to cross-cultural communication': Gumperz, Jupp, Roberts. Ed. Twitchin. BBC TV Continuing Education & Training Department (1990); 'How different are we?': FitzGerald (2003).

<sup>51</sup> Professor Rukmini Nair, Professor of Linguistics, Delhi University.

<sup>52</sup> 'Facial expressions of emotion are not culturally universal': Jack, Garrod, Yub, Caldarac, Schyns. Stanford University. (2012.); 'Emotions across Languages and Cultures': A. Wierzbicka.

<sup>53</sup> 'Tribunals for diverse users': Genn and others (DCA research series 1/06. 2006).

evasive, bored or disrespectful by some cultures, but indicative of respect by others.

- Different ways of expressing politeness. See for example the difference between [Welsh and English](#).
  - Different attitudes towards time: whether punctuality matters; whether use of time for building relationship is prioritised over the importance of 'getting things done' ('time is money').
93. A different cultural script can cause particular difficulties. This means differing cultural assumptions about the purpose and 'normal' steps ie, 'procedural rituals', of conventionalised, formal interactions such as tribunal or court hearings, or about the role and powers of a judge or legal representative. For example:
- The level of proactivity expected of parties in a court process might vary.
  - Terms like 'compromise', 'fairness', 'mediation' could have different connotations in different cultures.
  - A party may have different ideas about what courts are for. For example, in the past, recently arrived Somali people associated going to court with receiving punishment; for them, going to court would be a typically terrifying experience signifying harsh and arbitrary treatment.<sup>54</sup>
  - A defendant may come from a country where it is not assumed that an accused person is innocent until proved guilty.

### **Communication with speakers of English as a second or third language**

94. According to the 2011 Census, 4.2 million people living in England and Wales had a main language other than English or Welsh. The most common main language other than English or Welsh was Polish, followed by Punjabi<sup>55</sup> and Urdu (0.5%) and Bengali and Gujarati (0.4%).
95. The Annual Population Survey for the year ended 31 March 2020 reported that 28.3% of people in Wales aged three and over were able to speak Welsh. 16.1% reported that they spoke Welsh daily.
96. This section concerns people who are using English as a second or third learned language.
97. If a judge needs to enquire about someone's level of fluency in English, the best formulation is to ask 'Is English your first language or are you using it as a second or third language?', rather than 'Are you a native-English speaker' which may be misunderstood.
98. Many parties, witnesses and even representatives, who do not speak English as a first language but use it socially and at work, feel able to appear in court without an interpreter. Nevertheless they may be at a disadvantage when seeking to ask or answer questions and argue their case in the formal and artificial setting of a court hearing.

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<sup>54</sup> 'Tribunals for diverse users': Genn and others (DCA research series 1/06. 2006).

<sup>55</sup> Some people argue this should be spelt 'Panjabi'.

99. The level of an individual's spoken English will vary greatly and assumptions cannot be made. Some individuals will have lived in the UK for a long time and will have achieved a high degree of fluency. On the other hand, it can be easy to over-estimate an individual's ability to cope with language as used in court and under the stress of proceedings. The fact that an individual can communicate perfectly well in their work context may not be a reliable guide to how well he or she can communicate in court. Equally, a person may appear entirely fluent at the start of a hearing, but the level of their fluency may reduce when overtaken by emotions or stress, as may happen under cross-examination.
100. Speaking English clearly to a person who is using it as a second or third language requires care to use 'plain English', and to clarify legal jargon, but this may not be sufficient to meet their communication needs in court. They may bring culturally different social assumptions, behaviours and expectations, as well as a 'speech style' (ie accent and manner of talking in English) influenced by a 'mother-tongue' or a dialect whose grammatical structures and intonation patterns are very different from English. As adult learners of English they may be well versed in vocabulary, but not fully aware of how the way words are spoken and used alters meanings in English. Such linguistic differences create difficulties in both the presentation and the evaluation of verbal evidence.
101. It is likely to be easier for someone who does not speak English as a first language to understand if the judge and advocates:
- Allow more time, and offer more breaks during intensive periods of the case.
  - Speak slightly slower, at a steady pace and with clearly articulated consonants. Speaking louder does not help.
  - Make small (but not excessive or unnatural) pauses where a comma or full stop would appear in written English.
  - Use short sentences and avoid compound sentences with sub-clauses.
  - Deal with only one subject / idea in a sentence.
  - Do not ask two questions in a single sentence.
  - Use verbal signposts ('I am going to make 3 points now') and signal topic changes ('I am now going to talk about ...').
  - Frequently summarise.
  - Take care in using hypothetical questions and statements as some languages do not use these forms.
  - Ask questions by using question words and sentence structures rather than by adding intonation to a statement.
  - Avoid idioms. These may be taken literally or simply not understood.
  - Avoid humour, sarcasm, irony, puns and rhetorical asides. These are rarely a good idea in a court setting, and travel particularly badly across cultures.
  - When setting out procedure, go through the steps in sequence, and do not make any back references or add any commentary.

- Be ready to explain jargon, legalese and terms referring to status and roles in an organisation.
  - Make direct requests rather than use UK politeness forms which tend to be very indirect, often using complex grammar. 'Please speak louder' is clearer than 'I wonder if I could trouble you to speak louder' or 'I am finding it difficult to hear what you are saying'.
  - Take particular care when a person is being cross-examined on a document in English or when you are asking your own questions of a witness in relation to a document. What may be obvious to you on the basis of language may take a while for a witness to appreciate. The fact that the witness may take time should not lead to an inference that they are being evasive in the face of what to you may seem to be clear language.
102. It is usually advisable to avoid the following complex grammatical usages which may be unfamiliar or confusing:
- Elisions ('I'll, you'll, won't, don't').
  - Passive verbs. ('Send this in by next week' is clearer than 'this must be sent in by next week'.)
  - Double negatives. ('The evidence is conclusive' is clearer than 'The evidence is not inconclusive'.)
  - Using pronouns to repeat a noun (ie, 'he' 'she' 'it' 'they'). It is usually better to repeat the noun itself. ('Did Alice go to the house? What did Alice do next?') Pronouns may confuse people, especially those whose first language does not use pronouns in the same way (eg Chinese languages), or which (eg Hindi) lacks articles ('the' and 'a') or has quite different ways of expressing this idea.
  - 'Would' and 'should'. These are ambiguous terms which often do not have exact equivalents in other languages. 'Should' can mean a moral obligation, an expectation or ideal preference, a compulsory social obligation, or advice. Instead of saying, 'What you should do now is send in a witness statement', it is best to say simply 'The next step is for you to send in a witness statement'.
  - Negative formulation in questions like 'Don't you think that ...?', 'So you have no objection to ...?'. Languages differ in what they mean by the answer 'yes' or 'no' to these questions. Non-native speakers of English may reply to the opinion/intention of the interrogator, not to the facts of the question. For example, 'I assume you didn't intend to do it?' - reply in UK: 'no' (= I didn't), but in other languages: 'yes' (= that's a correct assumption).
  - Negative tag questions eg, 'You don't mind if we take a break now, do you?' These are difficult for non-native speakers to answer, and they may say 'Yes' when they mean 'No, I don't mind'. It is clearer to ask, 'Shall we take a break?'
  - Certain styles of cross-examination designed to elicit an admission or put pressure on a witness can be linguistically confusing. 'Did x happen?' is clearer than, 'So you will accept x did not happen, won't you?'. 'Is that correct?' is clearer than the ambiguous 'That's right, isn't it?'

- Forms of legalese used in cross-examination, eg 'With due/deepest respect' (indicating strong disagreement or meaning, 'That is not true'); 'If I could just make my point' (meaning 'Please do not interrupt me').

### **Checking understanding**

103. It is useful regularly to summarise and paraphrase what the individual has said, especially at important points, to check that no misunderstanding is building up. ('So am I correct that you mean .....?')
104. If uncertain whether someone has misunderstood a term or phrase, rather than repeating what has been said using the same words, it is better to reformulate and rephrase.
105. When clarifying meaning, go on explain what you are trying to achieve, eg 'What I am saying is that you must write your witness statement in date order. The reason for this is that it is easier for the court to understand your story.'
106. It is unreliable to ask, 'Do you understand?' The person may incorrectly think they do understand, or may say 'yes' even though they do not understand, because they feel embarrassed or intimidated or do not want to disappoint you when you are being helpful or, in certain cultures, to save their face or your face (see paragraphs 89 and 90 above).
107. Instead of asking 'Do you understand?', it is more reliable to ask the person to feed back to you their understanding of any important points.

### ***Language interpreters***

#### **Is an interpreter necessary?**

108. Although judges are not involved in making arrangements for interpreters, it is important that they are fully aware of potential difficulties experienced by witnesses who may have only a limited ability to speak and understand English, and the interpretation facilities available and the arrangements for securing them.
109. When giving evidence, people for whom English is not a first language may not always fully understand what they are being asked. It is one thing to know the basics of a language and to be able to communicate when shopping or working. It is quite another matter having to appear in court, understand questions, and give evidence. It should also be remembered that many minority ethnic people prefer to speak their mother tongue at home. Similarly, Welsh speakers may be relatively fluent in English but still feel more comfortable speaking Welsh, eg in relation to legal or technical terms.<sup>56</sup> Judges should therefore be alert to different language needs, and should not assume, simply because a witness has lived in the UK for many years, that he or she does not require an interpreter.
110. Situations may arise where the judge has to take a proactive role, and make some effort to clarify and resolve the extent of any language difficulty faced by a witness. It is part of the judge's function to check everyone understands each

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<sup>56</sup> See '[The right to speak Welsh](#)', below.

other so as to ensure a fair hearing. If a judge hearing a case considers that an interpreter is required, an adjournment should be granted for that purpose.

111. It can happen that an interpreter was not arranged in advance or that an interpreter who has been booked, does not arrive. It may be tempting for everyone involved to continue without an interpreter in that situation if the party or witness says they can manage in English. Judges should exercise caution about accepting such reassurances. Ultimately it is the judge's responsibility to ensure that there is a fair hearing.
112. Sometimes a party or witness has asked for an interpreter, but in practice communicates in English during the hearing. This does not mean the interpreter was not needed. The witness may be anxious to communicate directly as far as possible, but have an interpreter present to assist when understanding breaks down.
113. Some people also 'code-switch' as they talk, switching unconsciously between languages as they search for the most natural way to express themselves for the point they are making. They should not be stopped from doing this.

### **Interpretation and cultural difference**

114. Judges need to ensure that where there is an interpreter, there is no reduction in a party or witness's participation in the hearing, willingness to speak, understanding of questions, and overall ability to put his or her case.
115. Practice regarding how to book interpreters varies across different courts and tribunals. Judges should be familiar with the rules in their own jurisdiction. For the right to a Welsh interpreter, the special booking system and particular considerations, see '[The right to speak Welsh](#)', below.
116. In hearings which involve parties or witnesses who speak little or no English, judges need to be skilful in clarifying meaning between cultures, adjusting their own mode of talk as necessary to ensure that the chances of accurate interpretation are maximised.
117. An interpreter has a difficult job. Languages do not operate in ways which identically match each other. They can differ in grammatical structure, vocabulary, the meaning of certain abstract concepts, and in how much is directly spoken as opposed to understood between the lines. The interpreter's job is to transfer as nearly as possible the meaning of what is said by each side, not merely to translate words and phrases literally, which can create a false impression.
118. English, like all other languages, is not a 'neutral', culture-free language: it is freighted with embedded cultural assumptions. It is important to read this section together with the section on '[Communicating interculturally](#)' in this chapter.

### **Practical arrangements in court**

119. Where applicable, ensure that the interpreter speaks the correct dialect of the language in question and that the witness and interpreter can communicate properly. It may be tempting when an interpreter arrives with the wrong dialect to ask whether the witness can manage anyway. A witness may feel under

pressure to agree when in fact there could be a considerable loss of understanding.

120. Plan an appropriate seating position with the interpreter. Facial expressions and gestures can often contribute to the meaning of what is said. The interpreter should therefore be able to see all speaking participants, and his/her position should also indicate his/her role as neutral and impartial.
121. Introduce the interpreter, or allow the interpreter to introduce him/herself. Then introduce yourself, with the interpreter confirming what you say.
122. In explaining court procedures to all participants, do not forget to include the ground rules on how the interpreter will work.
123. Interpreting is a taxing job. No interpreter can go on too long. Consider requests to have frequent breaks and allow sufficient recovery time. It is good practice to agree frequency and timing of breaks with the interpreter in advance.
124. Allow the interpreter to take notes.

### **How to communicate through an interpreter**

125. Address the witness directly, using first and second person ('I' and 'you'), and look at him or her rather than the interpreter. It may be important to monitor small non-verbal signals as they speak.
126. Use a slower pace in your speech style, matching your speed of delivery to the interpreter's speed of interpretation.
127. Pause after every 2-3 sentences. Ensure you do this at the end of a sentence – not in the middle. Many languages order the words of a sentence in a different way from English, so it is necessary for interpreters to hear the whole sentence before they can translate it properly.
128. It is not good practice to tell the interpreter that an aside or something unimportant need not be translated. This can make the witness feel excluded and even distrustful.
129. Intervene to take control if several people start talking at once, or speak in rapid succession (since this makes interpretation impossible).

### **Translation difficulties**

130. Many of the adjustments to speech and questioning which a judge or advocate would make when speaking to a witness for whom English is not a first language, would also be helpful when using an interpreter. See '[Communication with speakers of English as a second or third language](#)' for details.
131. Be very clear in handling proper names and numerals / figures, and explain acronyms each time you use them. Remember that the approach to pronouncing acronyms may also vary between languages, eg English pronounces 'www' by repeating the letter 'w' three times, whereas Welsh says 'triple w' ('*w triphlyg*').
132. Avoid legal jargon or, where this is unavoidable, explain the concept in plain English which the interpreter can translate. Words such as 'adjourn', 'detriment', 'remedy' 'mitigation' 'witness statement' could all cause difficulty as well as more obvious jargon such as 'hearsay', 'burden of proof', 'tort'.

133. Many words in English do not have exact single-term equivalents in many other languages: these include words for culturally varying concepts such as 'fair', 'reasonable', 'evidence', 'impartial', 'commitment', 'bias' 'compromise', 'mediation', 'depression', 'opportunity', 'efficiency', 'liability'. As a result, an interpreter may need to use longer phrases or sentences to convey the speaker's full meaning across a cultural divide.
134. Conventions of advocacy such as tag questions and negative questions are difficult to translate linguistically and are likely to be doubly confusing when going through an interpreter.
135. Some witnesses are not fully literate in their own mother-tongue. They may be unable to process the grammatical structure of the questions being put - in particular, the complexity of multi-levelled sequences of subordinate clauses. To assist communication, a judge may need to suggest that advocates break down their questions into simple short sentences, and to make their points, one sentence at a time.
136. It is difficult to interpret fine distinctions, and these may be hard for the witness to understand. Such points need to be stated very clearly and built up slowly.
137. If you notice the interpreter apparently making untranslated exchanges with a party, call attention to this, and seek an explanation. This may be entirely legitimate, eg there is no exact match between the two languages, such that more words and alternative formulations need to be used and clarified between the witness and the interpreter. On the other hand, it might be because the interpreter has unacceptably crossed a line and become involved in further discussion with the witness, eg about the wisdom of an answer.
138. Some interpreters are concerned to convey to the court any emotion which the witness conveys indirectly in making their answer. This is difficult to do. It is not the interpreter's role to try to 'act out' the emotional dimension, but they may seek to indicate/transmit the upset via tone and pauses as well as by the meaning of words. Judges need to be alert to this.

### **Interpreters and remote hearings**

139. Interpreting in remote hearings is particularly difficult for these reasons:
  - Interpreter and witness are able to see less body language, so there are fewer non-verbal cues to help them understand each other.
  - Conversely, face-to-face interaction on video platforms is particularly concentrated. Where the party or witness is from a small community, they may have intensified concerns about discussing matters through an interpreter using this medium.
  - Simultaneous interpretation will not be practical on most platforms.
  - Overlapping speech will not be possible. The interpretation could very easily fall behind.
  - Interpreters may be unfamiliar with the particular jargon applicable to technology and the conduct of remote hearings or may be familiar with the words but not how they translate.



- The particular interpreter may be unpractised at working in video remote hearings, with the specific difficulties that arise including time-lapses caused by broadband speeds.
- Particular difficulties with Welsh/English translation are explained in the section on '[The right to speak Welsh](#)', below.

140. Some steps which may help are to:

- Ensure the individual requiring the interpreter is able to understand the process for joining the remote meeting, which may require understanding instructions given on-screen or by automated voices in English or Welsh.
- Allow more time.
- Have increased breaks.
- Ensure that everyone who speaks does so in small portions, pausing for the interpreter to interpret.
- At the outset, agree a protocol for how the interpreter should indicate that he or she would like to speak. Ensure interpreter and person being interpreted both feel comfortable to say if they are not keeping up.

### **Informal interpreters**

141. Judges should be alert to the fact that it is not uncommon for litigants who do not use English as a first language to regularly use their relatives (often children or close relatives who have grown up in the UK) as intermediaries when they communicate with others.
142. Often, such litigants have a good level of spoken English but use their children/relatives as informal interpreters in day to day life and in particular when dealing with official persons or bodies.
143. Although such informal interpreters cannot serve as a substitute for accredited interpreters in relation to evidence, Judges should be sympathetic to allowing a litigant to be accompanied by such a person who can assist them in understanding what is being said and to act as an intermediary.
144. That is not to say that such persons can act effectively as the advocate for the litigant. The litigant must conduct their own case but allowing informal interpretation where points of difficulty in language and understanding may arise can assist both the Court and the parties. Such persons can also provide a level of support and reassurance to the litigant.

### ***The right to speak Welsh***

145. Welsh is an official language within one geographical part of the single jurisdiction of England and Wales. Welsh speakers are entitled as of right to use their first language or their language of choice before courts and tribunals in their native country.
146. The Welsh Language Act 1993 provides the right for any party or witness to speak Welsh in legal proceedings in Wales (criminal, civil and tribunal hearings). People do not always realise that the Welsh Language Act does not

provide the right to have the full hearing in Welsh. Nevertheless, in some situations a case can progress in Welsh where all parties are bilingual.

147. As soon as it is known that the Welsh language is to be used at a hearing, details should be provided to HMCTS' Welsh Language Unit by e-mailing [welsh.language.unit.manager@hmcts.gsi.gov.uk](mailto:welsh.language.unit.manager@hmcts.gsi.gov.uk) who will arrange a Welsh interpreter from an accredited list. HMCTS is responsible for paying the interpreter's fees. The Welsh Language Liaison Judge should also be informed.
148. HMCTS has adopted the principle that in the conduct of public business and the administration of justice in Wales, it will treat the Welsh and English languages on a basis of equality. The Welsh Language Scheme, first launched in 2013, sets out how that will be put into effect during the period of the scheme, so that the whole process, including administrative support, will eventually be provided on a bilingual basis. For details, see 'Cynllun Iaith Gymraeg 2018-2021': Gwasanaeth Llysoedd a Thribiwnlysoedd EM; Welsh Language Scheme 2018-2021': HMCTS'. The section on 'Using Welsh in legal proceedings' sets out how the scheme currently works in practice in different courts and tribunals.
149. It is important to remember that individuals in Wales do have this entitlement to speak in Welsh. It should not be regarded as a concession or as a nuisance or any kind of favouritism, and that impression should not be given to those participating. As well as the official status of the Welsh language in Wales, there may be subtle linguistic reasons not apparent to a purely English-speaker why even a bilingual Welsh/English speaker may feel more comfortable speaking Welsh in court. A Welsh-speaker may also need to switch between English and Welsh, eg when using legal or technical language. There is more discussion of this below.

### **Bilingual speakers' choice of language in court**

150. Almost all Welsh speakers in Wales are also able to speak English fluently. However, this does not mean that they are equally comfortable in using both languages. To be treated equally with English speakers, therefore, they need to be able to participate in the language in which they are most 'at home'.
151. It should not be assumed that a bilingual speaker who wishes to speak Welsh is being awkward or deliberately obtuse or trying to make a political point. There are good reasons why a Welsh speaker may be anxious about speaking English in a hearing, eg:
- Because he or she is worried about using English in a legal context, with legal jargon, given the important implications entailed in a court case.
  - Because some Welsh words have more than one possible English translation, and an individual fears that, when speaking at speed and under pressure, he or she may select the wrong English word.
  - Because under emotion and stress, the Welsh words come far more naturally to the person. Research indicates that bilingual people tend to revert automatically to one of their languages when expressing emotion, (although this may or may not be their 'first' language).
  - Where technical language will be required in a case, if the person only knows the Welsh terms. A growing number of children and young people

from English-speaking homes receive their education through the medium of Welsh. Particularly in mathematics and scientific subjects, where the terminology is removed from the vocabulary used in the family and socially, they may be unaware of the corresponding English terms even when otherwise more fluent in English.

152. Having said that, someone who chooses to speak Welsh, may only recognise certain legal or technical words if spoken in English. For example, the words for jury ('rheithgor') and bail ('mechnïaeth') are rather formal words which are sometimes not understood by defendants, and an interpreter will need to use the English term, while otherwise speaking in Welsh. Indeed, if the hearing is conducted in Welsh, the judge should also use language with which the witness or party is familiar, including using the occasional English word for a formal term, if that is more likely to be recognised.
153. Courts and tribunals need to recognise that people who are bilingual regularly switch from one language to another, expressing themselves in the terms which most readily come to mind. This 'code-switching' is quite normal and a person should be made to feel relaxed about speaking that way, so that he or she can communicate most effectively. A judge should not insist that someone speak exclusively Welsh or exclusively English, even where an interpreter has been requested and is being used.
154. Conversely, it is important to be aware that people whose first language is Welsh, may nevertheless opt to speak in English because they are less than confident about using Welsh in a legal setting.
155. In some cases, Welsh speakers may be embarrassed by their lack of knowledge of technical Welsh terms and therefore reluctant to use the language in contexts which may expose that fact. This can affect professionals in technical fields as much as lay members of the public. This sometimes arises with vocabulary in technical fields where English has traditionally been the language of discourse.
156. There is no recognised body in Wales responsible for standardising terms, so it can also happen that Welsh speakers use an English word because they are unsure of the 'correct' Welsh version. For example, there are at least three Welsh versions of the English term 'Youth Offending Team / Service'.
157. There is nothing strange in someone wanting to give their evidence in Welsh, but asking for the judgment and other documents at the end of the case to be provided in English. Some mother-tongue Welsh-speakers may not be strong in written Welsh.
158. Young children who live in Welsh-speaking homes and who attend Welsh-medium schools may be unaccustomed to using the English language altogether. Given the needs of young children generally within the judicial process, their ability to use their first language assumes very great importance.

### **Welsh / English interpreters**

159. Because of these different nuances in the Welsh and English vocabulary of bilingual speakers, it would be a good idea to allow a short period at the start of a hearing for the interpreter to speak to the person and establish the appropriate register.

160. Usually an interpreter will only be required to interpret the person's evidence from Welsh to English. The individual will often be happy to have the questions posed in English and not translated. There are several reasons why people may prefer the questions to remain in English if they feel they have sufficient understanding, eg they do not want the risk of any slight error which can always occur in translation, or they feel it will enable the proceedings to run more smoothly and create slightly less of a barrier between them and the court.
161. If the person does not feel his or her English is sufficient to understand everything else said in the hearing, interpretation will also be provided from English to Welsh. In this instance, the Welsh Language Unit is likely to book two interpreters as interpretation will be very tiring.
162. Provided it is satisfied there is a genuine need, the Welsh Language Unit will translate documents used in evidence, whether from Welsh to English or English to Welsh.
163. Welsh interpretation supplied via the Welsh Language Unit for the courts and tribunals will be simultaneous, and interpreters have to pass practical exams to get accredited. Formal simultaneous interpretation uses technology, ie headsets, mics and transmitters. Sometimes, such as in Caernarfon Crown Court, there is a dedicated glass booth for the interpreter, but usually not. The interpreter and anyone who wants to hear the translation will have a headset.
164. This mode of interpretation contrasts with sequential interpretation and each requires different skills. Interpreters provided for other languages go through the MOJ's language contract, have a different accreditation scheme, and usually operate sequentially.
165. At the time of writing, the video platforms commonly used by judges do not have the technology for simultaneous interpretation, although the position on this may change. There are two possibilities, neither of which is ideal:
- The interpreter watches the proceedings on, for example, CVP, and at the same time speaks the translation into a BT Meet Me call.
  - The interpreter does sequential interpretation. The problem with this is that it is unusual in Welsh public life and it requires a different skill set, eg knowing how to handle situations when participants speak at length without pausing.
166. For general guidance on how to use interpreters effectively, see the section on ['Language Interpreters'](#) above.

### **Distribution of Welsh speakers and standard Welsh**

167. It is widely known that the greatest concentration of Welsh speakers as a percentage of the total population is to be found in north-west Wales. However, the greatest number of Welsh speakers numerically is actually to be found in the south-east. It should not be assumed that it is only in certain parts of Wales that Welsh is greatly used.
168. While there may be some differences in vocabulary and accent between different parts of Wales, it is a myth that there is no general standard any more than regional dialects in England affect the existence of standard English. The translation of the Bible into Welsh during the reign of Elizabeth I provided a common standard for written Welsh, and the arrival of the broadcaster S4C has

done much the same for spoken Welsh over the last four decades. Thus the Welsh equivalent of the standard described in England as ‘the King’s English’ is ‘Cymraeg y Beibl’ – ‘the Welsh of the Bible’; and some speak of the equivalent of the standard form known as ‘BBC English’ as now S4C Welsh.

### **Welsh influence when speaking English**

169. It is not uncommon to find that Welsh speakers use the grammar and syntax of Welsh when expressing themselves in English. It is even more common for those who have learned Welsh as adults to use English grammatical and syntactical structures when expressing themselves in Welsh.
170. In some parts of Wales, people who are not Welsh speaking employ Welsh idioms when speaking English. For instance, whereas in English one buys a ticket to travel, the Welsh idiom is ‘codi tocyn’– literally ‘to raise a ticket’. The idiom ‘raise a ticket’ in English is widely used in parts of Wales by persons who do not speak Welsh.
171. Welsh, like some other languages, achieves politeness and avoids undue familiarity in communication by the use of the second person plural, in Welsh ‘chi’ rather than the singular ‘ti’ which is used when addressing the Deity, children, close friends and animals. English, on the other hand, relies on the deployment of polite expressions. A Welsh speaker may, for instance, rely on the polite form of address in making a request rather than inserting ‘please’ in the utterance. In translation, this distinction may be lost and therefore the speech may appear rude. It is known that some Welsh speakers construct very formal requests when speaking or writing English and then unthinkingly omit ‘please’ without any intention of failing in politeness.
172. Another difference in expression as between Welsh and English involves the use of the word ‘Yes’. In Welsh, a positive response is made by answering the particular question asked using the same verb. In English, this can appear formal or even slightly stilted: ‘Did you?’, ‘I did’, rather than simply ‘Yes’. Again, Welsh speakers frequently respond in this way when using English.

### ***Names and naming systems***

#### **Respect for names**

173. Names are important to people’s sense of identity. They can indicate an individual’s national, linguistic, religious and family roots. In a recent poll, 27% of black, Asian and minority ethnic (‘BAME’) respondents said they regularly had their name mispronounced or changed without being asked.<sup>57</sup>
174. Court and tribunal hearings usually begin with introductions by name. For a party or witness with a ‘foreign name’, the way a judge or member of court staff reacts to it can symbolise an attitude towards their other cultural differences: it is an important first step towards gaining and holding their confidence that these will not prove a disadvantage in court.
175. If a name is difficult to pronounce, it is tempting to avoid saying it out of embarrassment. This is not best practice. The individual may notice the

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<sup>57</sup> ITV Has Britain Changed Poll’: Number Cruncher. Based on interviews in July 2020.

omission and wrongly interpret it to mean dismissiveness or disrespect. It is best to try to pronounce the name, ask for guidance, and remember to apologise if unable to get it right.

176. Confusion can arise if a recent immigrant, knowing their name is unusual in the UK, tries to be helpful by giving their name differently to different front-line staff on different occasions. They may select out parts of their name, or give spellings or transliterations from another alphabet, according to how they are asked, or according to what they assume the person asking will find easiest. Some outdated computerised record systems can also create inaccurate records by imposing only the format of the naming system most familiar in the UK.
177. People in religious marriages unrecognised by England and Wales, and who have not entered a recognised civil marriage, may nevertheless wish to be known as 'husband and wife' (as opposed to 'partners') and the woman may wish to be called 'Mrs'. Indeed, the concept of a committed relationship outside marriage may be unfamiliar to those from certain societies.
178. Where a hearing takes place in Wales, whether conducted in the English or Welsh language, it is very important that Welsh personal names, place names and the names of institutions are pronounced correctly. Failing to get the pronunciation right could reduce the confidence of court users in the court's authority. If unfamiliar with Welsh pronunciation, it is a good idea to look in advance for the key names likely to arise, check their pronunciation with a colleague and write the words down phonetically for their own reference.

## **Naming systems**

179. In the English naming convention:

- Everyone has a personal (or 'given') name and a family name ('surname').
- The personal/given name comes first; family name/surname last.
- Surnames are gender-neutral, handed down in families through generations.
- In formal situations people give 'first' and 'last' names, or title and last name.
- Some have one or more 'middle names', usually regarded as less important.
- Most personal / given (or 'first names') are recognisably either male or female.

180. Many people in Wales use the English naming system. However, it has become common in Wales for people to revert to the traditional Welsh naming system of adding the father's given name to one's own given name after 'ap', eg lolo ap Dafydd (lolo, son of Dafydd). Such a person would usually be addressed as Mr ap Dafydd (though it is always best to ask.)

181. In the traditions of other cultures:

- A family name may come first, not last.
- There may be no family name at all: no-one in a family shares a name.
- A title may come after the name, not before it; and sometimes as part of the name.

- People may have a religious name, which is spoken and written either as a first or second word of their name, and which must never be used on its own.
- Names carry meanings, eg after a god/saint/feature of nature; or (especially in East Asia) auspiciously to minimise misfortune from astrological influences at time of birth.

182. In view of these differences, the best way to ask someone's name is to:

- Demonstrate respect and politeness when asking for the person's name.
- Avoid terms like 'First name', 'Second name', 'Middle name', 'Forename', 'Surname' and, especially, 'Christian name'.
- First ask, 'What is your full name, please?'
- To find out what in the English naming system is known as a 'surname', ask for their 'family name'.
- To find out what in the English naming system is known as a 'first name', ask their 'personal name' or 'given name'.

183. It may then be useful to ask, 'What do you want me / us to call you?' If the individual does not speak English as a first language, avoid complex conditional verbs such as 'What would you like me to call you?'

184. For examples of specific naming systems:

- [African Caribbean](#)
- [Chinese and Korean](#)
- [Filipino](#)
- [Greek](#)
- [Indian Hindu](#)
- [Indonesian](#)
- [Nigerian](#)
- [Sikh](#)
- [Somali](#)
- [South Asian Muslim](#)
- [Sri Lankan](#) (Tamil and Sinhalese)
- [Turkish](#)
- [Vietnamese](#)

## ***The criminal justice system***

### **BAME individuals and the criminal justice system**

185. Black, Asian and Minority Ethnic ('BAME') individuals are over-represented in the criminal justice system. In January 2016, the government asked the Rt Hon David Lammy MP to lead an independent review, sponsored by MoJ, to

investigate the treatment and outcomes of BAME individuals within the criminal justice system in England and Wales. The final report was published in September 2017.<sup>58</sup>

186. MOJ research<sup>59</sup> feeding into the review, made these findings:

- Black men were 3 times more likely to be arrested than white men; black women were twice as likely to be arrested as white women. The criminal justice system then added a degree of notable disproportionality at subsequent stages, though not to the same degree as at the arrest stage.
- BAME men and women were disproportionately more likely than their white counterparts to be committed for trial at the Crown Court. For black young males, this was just under 60% more likely. For Asian young males, it was just less than 2.5 times more likely.
- All adult BAME groups were more likely than the white group to be remanded in custody at the Crown Court.
- There was no disproportionality against BAME defendants in CPS charging decisions and conviction at Crown Court. This may be because those matters would be determined by rules of evidence and a degree of institutional oversight as opposed to subjective decisions by individuals which can be influenced by elements of unconscious racial bias.

187. Some key findings in the Lammy Review relevant to the courts were these:

- Although only 14% of the population, BAME individuals made up 25% of adult prisoners and 41% of under 18s in custody.
- In both the youth and adult systems, there was no single explanation for the disproportionate representation of BAME groups.
- Overall, youth offending had fallen considerably over the last decade, but less so amongst BAME young people in each of the categories of offending, reoffending and going into custody.
- BAME defendants were consistently more likely than white defendants to plead not guilty in court. Plea decisions are an important factor in the disproportionate make-up of the prison system, since admitting guilt can result in community punishment rather than custody.
- Sentencing decisions need greater scrutiny, but judges must also be equipped with the information they need. Pre-sentence reports may be particularly important for shedding light on individuals from cultural backgrounds unfamiliar to the judge. This was vital considering the gap between the difference in backgrounds – both in social class and ethnicity – between the magistrates, judges and many of those offenders who come before them. The Review said judges have received guidance discouraging them from using PSRs altogether for some offences which includes drug

<sup>58</sup> 'The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System'.

<sup>59</sup> 'Black, Asian and Minority Ethnic disproportionality in the Criminal Justice System in England and Wales': Uhrig, MOJ analytical services (2016).



offences, precisely the area where sentencing discrepancy has been identified.

- Parenting orders for young offenders of all ethnicities were now very little used. Rather than give up on them altogether, they should be well-evidenced and well-designed, developing new alternatives if necessary.
  - BAME youths were less likely than the white group to be identified on reception at prison as having health, educational or mental health problems. This may indicate unidentified needs and could have a knock-on effect on the services and support made available to them. There was evidence of similar patterns with adults, eg because BAME individuals are less likely to have accessed mental healthcare in the community.
188. The Lammy Review identified lack of trust of BAME offenders as a major difficulty, increasing the chances of reoffending, and increasing the likelihood of pleading not guilty (or changing their plea to guilty at a late stage) because of a belief that they would get a fairer hearing from a jury than from magistrates.
189. 51% of UK-born BAME people (not just offenders) believe that the criminal justice system discriminates against particular groups or individuals.
190. The Lammy Review believed a key reason for lack of trust was the absence of diversity among those making important decisions in every part of the criminal justice system, including amongst the judiciary. There was a gulf between the backgrounds of defendants and judges. 20% of defendants who appeared in court in 2016 were from BAME backgrounds, compared with 11% of magistrates and 7% of court judges (10% of those under 60).<sup>60</sup>
191. The Review noted that other factors contributing to lack of trust were failure to understand what is happening in court and failure to understand the basis of sentencing decisions:
- Many BAME prisoners harbour grievances about their sentences because they know others who they believe have committed similar offences, but who have received quite different sentences.
  - The system should do much more to ensure that offenders understand why they have been given the sentences they have. This includes clear explanations by judges in their sentencing remarks, bearing in mind that this is the only time the offender is given a full formal explanation for the sentence; and a new system whereby sentencing remarks are published in audio and written form.
  - Many BAME young adults feel ‘distanced’ in court, as the case seems to happen around them, without them being much involved. Many do not understand much of what is said in their own cases.
  - In general, there is a responsibility for judges to ensure that all those in court understand what is going on and believe that they are being treated fairly. The Lammy Review said many judges already do this, using plain language

<sup>60</sup> As at 1 April 2020, 13% of magistrates, 8% of court judges and 12% of tribunal judges identified as BAME. Note this figure includes judges who do not sit in criminal courts. ‘Diversity of the judiciary: Legal professions, new appointments and current post-holders 2020 statistics’: Ministry of Justice (17 September 2020).

not legal jargon and taking care to ensure that victims, witnesses and defendants all understand how a trial will proceed, which decisions have been taken, and why. However, more could be done to ensure that justice is not just done, but is seen to be done.

192. In February 2020, the MOJ published a detailed report itemising work done on each of the Lammy recommendations. It recognised that there remains an over-representation of minority ethnic people within the criminal justice system and disparities in aspects of their treatment. For example, BAME groups continue to be more likely to be remanded in custody at the Crown Court and remain considerably less likely to plead guilty, so ending up with longer than average sentence lengths if found guilty.<sup>61</sup>
193. Over the last ten years, average custodial sentence length has risen far more steeply for BAME offenders than others. As of March 2020, the size of the BAME prison population remains disproportionate (BAME people comprised roughly 16% of the general population, but 27% of the total prison population).<sup>62</sup>

### **Stop and Search**

194. Between April 2019 and March 2020, there were six stop and searches for every 1000 white people compared with 15 per 1000 Asian people and 54 per 1000 black people.<sup>63</sup>
195. This is a long-standing pattern. Between 2009/10 and 2018/9 the Black African, Black Caribbean and Other Black groups consistently had the highest stop and search rates.
196. During lockdown in the Spring of 2020, young men aged 18 – 34 from BAME backgrounds were issued with fixed penalty notices ('FPNs') for breaching public health regulations at roughly twice the rate of young white men. Generally per 10,000 population, FPNs were issued at the rate of 4.7 for Asian people and 4.6 for black people compared with 2.5 for white people. This varied across police forces, with some numbers too low to be statistically significant. Nevertheless, despite the complexity, the Chair of the National Police Chiefs' Council said it was a concern to see this disparity. He said each force would be looking carefully at the figures to assess any risk of conscious or unconscious bias and to minimise disproportionate impact wherever possible.<sup>64</sup>

### **BAME women and the criminal justice system**

197. As part of the Lammy review, a report was commissioned into the experiences of BAME women. "Double disadvantage": the experiences of black, Asian and Minority Ethnic women in the criminal justice system': Cox and Sacks-Jones (April 2017). This made the following findings:

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<sup>61</sup> 'Tackling racial disparity in the criminal justice system: 2020 update includes progress reporting to the Lammy Review into the treatment of, and outcomes for Black, Asian and Minority Ethnic individuals in the Criminal Justice System': MOJ. (Feb 2020); 'Statistics on Race and the Criminal Justice System': MOJ. (28 November 2019).

<sup>62</sup> 'Ethnicity and the criminal justice system: What does recent data say on over-representation?': Yasin and Sturge. House of Commons Library (2 October 2020).

<sup>63</sup> 'Stop and search data tables: Police powers and procedures, 2019/20': Home Office (27 October 2020).

<sup>64</sup> Analysis of Coronavirus fines published. National Police Chiefs' Council. 27 July 2020.

- Many BAME women found the legal process confusing and jargon-loaded.
- If they did not speak English as a first language, insufficient access to interpreters throughout the process was a further significant barrier to their experience of the criminal justice system.
- For women from some BAME groups, attitudes to offending within families and communities, arising from cultural or religious beliefs, may result in an additional stigma and strain on family relationships.
- The impact of custodial sentences on their family (particularly the care of children and elderly relatives) was extensive and far-reaching.
- The family impact of custodial sentences was particularly acute for black mothers as far more black African and black Caribbean families in the UK are headed by a lone parent, compared with white families and Asian families. Since the Lammy Review, a second Farmer Review has flagged up the general importance of enabling female offenders to maintain positive family relationships. The Review states the importance of implementing its recommendations with an eye to equality and not treating women from different minorities as a homogeneous group.<sup>65</sup> Chapter 6 has more detail about [women as offenders](#), the [impact of imprisonment on women](#) generally and on [BAME women and the criminal justice system](#).
- For many women, the feeling that they did not have their stories and circumstances properly considered during their trial, and the fact that they were confused by the process and their options, underpinned a sense of injustice and mistrust in the system.
- The women who had been tried by jury raised concerns about the gender, ethnic and age make-up of their juries, and in particular that they were dominated by older, white males. They felt that older men, who were not of their ethnic background, would have less understanding about their lives and pressures and may also be subconsciously biased against them.

## The youth justice system

198. The proportion of BAME children in the youth justice system is almost double what it was ten years ago. In that period, first-time entrants to the youth justice system from a white background have reduced by 88%, whereas first-time entrants from a Black background have doubled from 8 – 16%. As of May 2020, 51.9% of children held in custody were from BAME backgrounds. MPs on the House of Commons Justice Select Committee looking into the youth justice system have commented on this with concern.<sup>66</sup>
199. There are thought to be various causes for this disproportionality, including a greater likelihood of custody for black and Asian children for comparable proven offences, and challenges for the criminal justice system in diverting BAME children from court. In addition, BAME children are disproportionately remanded

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<sup>65</sup> 'The Importance of Strengthening Female Offenders' Family and other Relationships to Prevent Reoffending and reduce Intergenerational Crime': Lord Farmer. MOJ. (June 2019).

<sup>66</sup> 'Children and Young People in Custody (Part 1): Entry into the youth justice system': MPs on the House of Commons Justice Select Committee (12 November 2020).

to custody, and some of the children remanded to custody, will not then go on to receive a custodial sentence.<sup>67</sup>

200. There is also disproportionate representation of children from Gypsy, Roma or Traveller background – in 2017/18, 11% of children in secure training centres and 6% of those in young offender institutions identified as from Gypsy, Roma or Traveller background compared with 0.01% in the population as a whole.<sup>68</sup>

201. Inherent mistrust of the system and consequent failure to engage with police investigations leads to black, Asian and minority ethnic young people losing out on opportunities to be given out of court disposals or to give explanations which would result in no further action being taken. Some go unrepresented because they believe duty solicitors work for the police.<sup>69</sup>

202. The Magistrates' Association recommends:<sup>70</sup>

- Recognising that lack of trust may affect engagement with the court process including the behaviour of the defendant in court and use of 'no comment'.
- Building trust by explaining court processes and treating the defendant with respect.
- Where individuals are labelled as gang members in PSRs, asking for supporting evidence.
- Scrutinising evidence in relation to potential biases by other agencies made earlier in the process or language used in court.
- Being aware of one's own potential for unconscious bias in decision-making. Media reporting encourages seeing young black people purely as a risk and not recognising vulnerability.

203. A useful approach may also involve:<sup>71</sup>

- Understanding that some BAME children have been exploited through practices of modern slavery. Avoiding terminology which suggests habitual criminality by children who have themselves been exploited or coerced into committing criminal acts.
- Understanding why young defendants may not raise the statutory defence in section 45 of the Modern Slavery Act 2015 and be cautious about using the National Referral Mechanism for fear of being labelled a 'grass'. Considering raising whether the section 45 defence is applicable at pre-trial hearings for all cases involving children where the defence has not already raised it.
- In London, understanding why the particular defendant is on the Metropolitan Police Gangs Matrix and appreciating the difference between

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<sup>67</sup> 'Children and Young People in Custody (Part 1): Entry into the youth justice system': MPs on the House of Commons Justice Select Committee (12 November 2020).

<sup>68</sup> 'Children in Custody 2017-18': HM Inspectorate of Prisons, Youth Justice Board (2019). (The statistics used the term 'BME'.)

<sup>69</sup> 'Roundtable Report: Disproportionality in the youth justice system': Gammon and Easton. Magistrates Association. (2019).

<sup>70</sup> 'Roundtable Report: Disproportionality in the youth justice system': Gammon and Easton. Magistrates Association. (2019).

<sup>71</sup> 'Roundtable Report: Disproportionality in the youth justice system': Gammon and Easton. Magistrates Association. (2019).

intelligence and information.<sup>72</sup> The Matrix is an intelligence tool to identify people believed to be gang members and their risk as victims of violence, and to others.<sup>73</sup>

### **Gypsies, Travellers and Roma and the criminal justice system**

204. Travellers are over-represented in the criminal justice system. Travellers form 0.1% of the British population. The Prison Service has only recently started to have a 'Traveller' option in its data system. Of those asked in Prison Inspections if they identified as Gypsy, Roma or Traveller, 5% said that they did. They are more likely to report health and substance misuse problems in prison. They have poorer outcomes with less support, hampered with a lack of knowledge about these problems. They are more likely than prisoners from other communities to report concerns about their safety. Some studies suggest they might be more likely to be in custody because of lack of a home address or fears they will abscond.<sup>74</sup> This is often based on misconceptions about where people from those communities live.
205. Low literacy levels amongst Gypsy, Roma and Traveller prisoners reduces their access to healthcare, education, housing and employment services in prison, as these tend to be requested through a written form. Access to services and employment post-release in the community also often relies on a considerable level of literacy.<sup>75</sup>

### **Care and family courts**

206. Multi faith, multi-cultural and multi-ethnic communities make special demands on judges and others in the family justice system. Balancing respect for different approaches to parenting within potentially diverse cultural norms and, at the same time, aiming to protect all children from parental maltreatment is a difficult task.<sup>76</sup> It is also important to hold the confidence of the parents that they have had a fair hearing.
207. Relatively newly-arrived parents may originate from countries with a corrupt state apparatus or no welfare or legal system, or where the state has no involvement in defining adequate parenting. This can cause suspicion or bewilderment at the process, affect how the parent's story is told and affect how parents respond to agencies including their own solicitors.
208. For some parents (newly arrived and second/third generation black and Asian British) notions of pride and honour are important in understanding their views.

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<sup>72</sup> In this context, information can be described as raw data, whereas intelligence is the product of the analysis of information by others.

<sup>73</sup> The Metropolitan Police provide an online explanation of the 'Gangs Violence Matrix'.

<sup>74</sup> 'People in prison: Gypsies, Romany and Travellers': HM Inspectorate of Prisons. (Feb.2014); 'Tackling racial disparity in the criminal justice system: 2020 update includes progress reporting to the Lammy Review into the treatment of, and outcomes for Black, Asian and Minority Ethnic individuals in the Criminal Justice System. MOJ (Feb 2020).

<sup>75</sup> 'Tackling inequalities faced by Gypsy, Roma and Traveller communities': House of Commons Women and Equalities Committee. (March 2019).

<sup>76</sup> 'Minority ethnic parents, their solicitors and child protection litigation': Brophy, Jhutti-Johal and McDonald (DCA 2005). This section is derived in part from observations in this report.

Courts are associated with crime and punishment, and attendance is a source of shame and damage to the reputation of families.

209. In order to make a fair assessment, it is important for the court and any assessor or other expert to understand cultural issues where these have affected a parent's attitude or behaviour.
210. If judges do not engage with the detail of diverse cultural contexts, it is likely to make minority ethnic parents feel they have not been heard and understood.
211. Where English or Welsh is spoken as a second or third language or interpreters are used, particular care needs to be exercised over accurate translation of witness statements and interpretation of oral evidence. For example, where domestic violence is under discussion, there are English words with slightly different connotations eg slap, beat, hit, punch) which may not translate word for word. Welsh also has a variety of words for striking someone, including 'bonclust' (clip around the ear). The witness's own language may not have precise translations, or the witness (or indeed the interpreter) may not understand the difference between the various English / Welsh words.
212. In the light of this, it is particularly important for judges:
- To explain the procedure and its purpose.
  - Make the parents feel welcomed in court and listened to.
  - Fully engage with different cultural perspectives when these are put forward and seek feedback of the key points in order to check understanding of each point.<sup>77</sup>
  - If it becomes clear that a cultural way of thinking or mode of behaviour is at play, ensure it is explored, even if it has not been put forward by the party's representative or addressed by the assessor.
  - If a decision has been made despite cultural points that have been made, explain the reasoning.
  - For guidance on speaking English to witnesses using it as a second language, see '[Communication with speakers of English as a second or third language](#)' and through interpreters, see '[Language interpreters](#)'.
  - Be alert to any discriminatory or culturally insensitive behaviour by the local authority.<sup>78</sup>

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<sup>77</sup> See *UA v HMRC (TC)* [2019] UKUT 113 (AAC), where the first tier tribunal had failed to take into account cultural matters.

<sup>78</sup> For example, note the observations of the county court in *Re X, Y and Z children (treatment of a family of African heritage)* [2014] EWCC B75 (CC). See also *Mander & Mander v Royal Borough of Windsor and Maidenhead & Adopt Berkshire* [2019] EWFC B64, (not allowed to adopt due to their race).

## ***Anti-Muslim Racism: Islamophobia***

### **What is Islamophobia?**

213. There is some debate amongst academics as to whether the term 'Islamophobia' is out-dated and narrow in its strict meaning, and whether 'anti-Muslim racism' is more accurate.
214. In practice, the term 'Islamophobia' has come to be used by many within and outside the Muslim community to mean anti-Muslim racism in its broadest sense. While most obviously it refers to hate crime which is targeted towards Muslims, it can be extended to cover all attitudes and actions that lead to discriminatory outcomes for Muslim citizens.
215. Following widespread consultation, the All Party-Parliamentary Group on British Muslims ('APPG') concluded that the term 'Islamophobia' should continue to be used. It has gained traction in private and public spheres and is the term of choice among most British Muslims to describe their experience. The APPG recommended adopting the following definition:
- 'Islamophobia is rooted in racism and is a type of racism that targets expressions of Muslimness or perceived Muslimness'.<sup>79</sup>
216. The Muslim Council of Britain ('MCB') welcomed the definition and added three essential principles:
- Islamophobia is a form of racism.
  - Islamophobia is more than just anti-Muslim hatred or bigotry.
  - Islamophobia does not incorporate criticism of Islam as a faith, but some people may hide behind 'criticism of Islam' when engaging in Islamophobia.
217. A former director of Runnymede Trust<sup>80</sup> has identified the key elements of Islamophobia as follows:
- Negativity and hostility in the media and the blogosphere, in the publications of certain think tanks and influence-leaders, and the speeches and policy proposals of certain political leaders, both mainstream and marginal.
  - Hate crimes on the streets against both persons and property, damage to cultural centres, and desecration of Muslim cemeteries and religious buildings.
  - Harassment, abuse and rudeness in public places.
  - Unlawful discrimination in employment practices and the provision of services.
  - Non-recognition of Muslim identities and concerns, and removal of Muslim symbols in public space.

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<sup>79</sup> 'Islamophobia defined: Report on the inquiry into a working definition of Islamophobia/Anti-Muslim Hatred': APPG. (November 2018). The Report contains a variety of thoughtful and differing inputs. Although views differ, the definition has been adopted by several major political parties and councils.

<sup>80</sup> 'Islamophobia or anti-Muslim racism – or what? – concepts and terms revisited': Richardson (2012, revised 2013).

218. According to evidence reported in the Leveson Inquiry, four of the five most common discourses used about Muslims in the British press associate Islam/Muslims with threats, problems or in opposition to dominant British values. Between 2000 and 2008, references in the press to radical Muslims outnumbered references to moderate Muslims by 17 to one.

### **Negative attitudes towards Muslims**

219. Some Muslims feel Islamophobia has become an acceptable prejudice in Britain. In 2011, Baroness Warsi said it had become normal and socially acceptable among many British people to express anti-Muslim prejudice. Matters do not appear to be improving. In October 2018, nearly half of those polled said Britain is getting less tolerant of Muslims.<sup>81</sup>
220. 62% of British people in 2013 believed that Britain will begin to lose its identity if more Muslims come to live in UK (up from 48% in 2003). 70% felt most white people would mind if a relative married a Muslim person, and 44% admitted they would themselves object.<sup>82</sup> On average, people think that Muslims make up 17% of the population, whereas the reality is that they comprise less than 5%.<sup>83</sup>
221. Polls of British attitudes suggest that terrorist attacks perpetrated in the name of Islam have created an increased hostility towards the religion itself and in turn, towards Muslim people.
222. In a YouGov Poll in 2017, 41% of British citizens agreed with the statement 'Islam is an intolerant religion'.<sup>84</sup> In a 2015 poll which specifically distinguished the religion as a whole from Islamic fundamentalism 56% thought that Islam was a 'major' or 'some' threat to Western liberal democracy.
223. 60% of British people agreed that most British Muslims were 'peaceful, law-abiding citizens who deplore terror attacks in the name of Islam'. However, 15% agreed with the statement that 'a large proportion of British Muslims feel no sense of loyalty to this country' and are prepared to 'condone or even carry out acts of terrorism'. 26% of British people feel ordinary Muslims needed to apologise when people claiming to be acting on behalf of Islam commit terrorist acts.<sup>85</sup>
224. Those findings contrast with views expressed by Muslims themselves, which show a strong sense of loyalty and personal belonging to Britain. The overwhelming majority show positive orientations both towards their own ethnic culture and towards integration into British society.<sup>86</sup>
225. These feelings are not immune to the attitudes of others towards them. Those who are consistently told that they are 'not British' are less likely to feel that they are.<sup>87</sup>

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<sup>81</sup> MEND Islamophobia Poll conducted by Com Res (Oct 2018).

<sup>82</sup> British Social Attitudes Survey (2013).

<sup>83</sup> YouGov poll (Jan 2015).

<sup>84</sup> 'Counting religion in Britain' (May 2017).

<sup>85</sup> YouGov poll (Jan 2015).

<sup>86</sup> Numerous polls, including ComRes poll for the BBC (2015); 'Has multiculturalism utterly failed? Not really' Heath and Demireva, based on the 2010 Ethnic Minority British Election Survey.

<sup>87</sup> Runnymede Trust.



## Muslim hate crime

226. Research shows the prevalence of Islamophobic hate crime across England and Wales.<sup>88</sup> The figures spike after major negative events linked to Muslims, and also did so following the Brexit referendum, but it is not confined to these periods.
227. The volume of Islamophobic hate crime recorded by the Metropolitan Police has risen steadily from 343 cases in the year ending March 2013 to 1260 in the year ending 2017. In 2018/9, there were 3,530 police-recorded Muslim hate crimes in England and Wales.<sup>89</sup>
228. According to the Muslim Council of Britain ('MCB') in its submission to the Home Affairs Select Committee on Hate Crime, despite the growth in reported hate crime against Muslims, the official figures are understood to be a significant underestimate of the scale of the problem. The MCB says that the prevalence of Islamophobia has reached a point where the vast majority of Muslims know someone who has experienced a hate crime. It says Muslim women seem to be particularly targeted, apparently as they are more easily identifiable as Muslims due to the wearing of a headscarf.<sup>90</sup>

## Economic disadvantage and discrimination

229. Muslims experience the greatest economic disadvantages of any faith group in UK society. According to the Social Mobility Commission,<sup>91</sup> young Muslims living in the UK face an enormous social mobility challenge and are being held back from reaching their full potential at every stage of their lives.
230. Nearly half of the Muslim population live in the 10% most deprived local authority districts. This has implications for access to resources, school attainment, progression to higher education, and the availability of jobs, including those at postgraduate or managerial levels. These inequalities vary by region, with the Midlands experiencing the largest margin of inequality and the South the smallest.
231. Muslim people disproportionately live in social housing, or find themselves in temporary accommodation. Far more live in privately rented accommodation, and far fewer own their own property, than the remainder of the population.<sup>92</sup>
232. At school, young Muslims report that teachers often have stereotypical or low expectations of them. They say that the services available to them are not enough to fill a parental gap, particularly if parents were educated in a different system, were less able to support them in their studies or lacked the capital,

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<sup>88</sup> Various sources including the Muslim Council of Britain's submission to Home Affairs Select Committee on Hate Crime and its Violent Consequences (2016); 'We Fear for our Lives: Online and offline experiences of anti-Muslim hostility' Awan & Zempi (2015); Metropolitan Police Statistics; 'Islamophobia. Still a challenge for us all. A 20<sup>th</sup> anniversary report': ed. Elahi & Khan. Runnymede (Nov 2017).

<sup>89</sup> 'Hate Crime, England and Wales, 2018/19'. Home Office. Oct 2019.

<sup>90</sup> Muslim Council of Britain's submission to Home Affairs Select Committee on Hate Crime and its Violent Consequences (2016).

<sup>91</sup> 'Young Muslims in the UK face enormous social mobility barriers': Social Mobility Commission Press Release (7 September 2017).

<sup>92</sup> 'Fairness not Favours': Muslim Council of Britain (2015).

knowledge or access to social networks to help their children make informed choices.<sup>93</sup>

233. According to the Social Mobility Commission, young Muslims feel their transition into the labour market is then hampered by discrimination in the recruitment process. Once in work, young Muslims feel that racism, discrimination and lack of cultural awareness in the workplace has impacted on their career development and progression. Some report feeling obliged to defend their faith with workplace colleagues in the face of negative discourses in the media. Many Muslim women feel that wearing the headscarf at work is an additional visual marker of difference which leads to further discrimination.
234. Unemployment is a critical issue for the British Muslim community. While there are pockets of prosperity, over 20% of Muslims between the ages of 16-74 have never worked, as compared with 4% of the population overall. Muslims have the highest economic inactivity rates of all groups.<sup>94</sup>
235. While a variety of social factors explain this discrepancy, there is consistent evidence that discrimination is a significant factor.<sup>95</sup>
236. Muslim women are far more likely to be unemployed than white Christian or Hindu women, even when they have the same educational level and language skills.<sup>96</sup>

## Impact

237. Because of cultural differences and various forms of discrimination, many young Muslims feel they must work 'ten times as hard' as non-Muslims just to get the same opportunities.<sup>97</sup>
238. 46% of Muslims feel that prejudice against Islam makes it difficult being Muslim in Britain.<sup>98</sup> Young Muslims worry about being different and are unsure about whether getting on is compatible with their identity as Muslims. Some respond by asserting their Muslim identity; others feel pressure to hide their Muslim identity and so avoid the issue that way.<sup>99</sup>
239. Race equality programmes have often failed to pay attention to the specific features and consequences of intolerance towards Muslims.<sup>100</sup>

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<sup>93</sup> 'Young Muslims in the UK face enormous social mobility barriers': Social Mobility Commission Press Release(7 September 2017).

<sup>94</sup> Fairness not Favours': Muslim Council of Britain (2015).

<sup>95</sup> 'British Muslims face worst job discrimination of any minority group, according to research': Independent (2014); 'Bristol Muslims 'facing job discrimination": BBC (2013).

<sup>96</sup> 'British Muslim women 71% more likely to be unemployed due to workplace discrimination': Independent (2015).

<sup>97</sup> 'Young Muslims in the UK face enormous social mobility barriers': Social Mobility Commission Press Release (7 September 2017).

<sup>98</sup> ComRes, 2015, BBC Radio 4 Today Muslim Poll (25 February 2015).

<sup>99</sup> 'Young Muslims in the UK face enormous social mobility barriers': Social Mobility Commission Press Release (7 September 2017).

<sup>100</sup> 'Islamophobia or anti-Muslim racism – or what? – concepts and terms revisited': The Insted Consultancy (2012).

240. The perception within many Muslim communities is that in spite of rhetoric from decision makers, practical steps to combat extremism focus on Muslims rather than those committing hate crimes against Muslims.<sup>101</sup>

241. With regard to the impact of hate crime:<sup>102</sup>

- Muslim people describe living in fear and insecurity because of the possibility of online threats materialising in the ‘real world’. They are fearful for themselves and for their family.
- Victims of both online and offline anti-Muslim crime suffer from depression, emotional stress, anxiety and fear. They fear and expect further attacks. This can create fear to leave the house and even steps to look less visibly Muslim. There is a sense of rejection from wider society. Experiences of anti-Muslim hate crime have long-lasting effects for victims including making them afraid to engage with other communities and feeling like social outcasts.
- It is felt that the victims of online anti-Muslim hate crime remain less ‘visible’ in the criminal justice system.

242. It is not only Muslims who are victims of Islamophobia. There are those from other minority ethnic groups who are wrongly perceived to be Muslim. For example, there is evidence that Sikh people wearing turbans and Sikh men with beards have been subjected to hate crimes aimed at Muslims.

### **Treatment of Muslims in Court**

243. Given the above experiences, Muslim people might arrive at court uncertain and anxious about how they are perceived by the court and whether they will get a fair hearing.

244. It is important to avoid applying any stereotyped assumptions, eg about the attitudes, allegiances, level of education etc to particular Muslim individuals.

245. As in all cases, it is important to demonstrate respect for cultural difference. This includes:

- Taking trouble to get a person’s name right. For details, see [‘Names and naming systems’](#).
- Showing understanding regarding correct practice on taking the oath. For details, see [‘Islam’](#) in the Glossary of Religions.
- Showing awareness of fasting practice if the hearing takes place during Ramadan and making any necessary adjustments, eg offering additional breaks. For more detail, see [‘Islam’](#) in the Glossary of Religions.
- Showing understanding of any issues regarding times when a Muslim person cannot attend court, eg because of an important holy day, or

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<sup>101</sup> Muslim Council of Britain’s submission to Home Affairs Select Committee on Hate Crime and its Violent Consequences (2016).

<sup>102</sup> ‘We Fear for our Lives: Online and offline experiences of anti-Muslim hostility’ Awan & Zempi (2015); ‘Islamophobia. Still a challenge for us all. A 20<sup>th</sup> anniversary report’: ed. Elahi & Khan. Runnymede (Nov 2017).

because they need time off or facilities to pray. For more detail, see '[Islam](#)' in the Glossary of Religions.

- Not making any unnecessary objections regarding dress code. Regarding wearing a full face veil, see further comments in [chapter 9](#).

## **Antisemitism**

### **Stereotyping and hate crime**

246. Approximately 270,000 Jewish people live in the UK, the fifth largest Jewish population in the world and the second largest in Europe.
247. Reported rates of antisemitism have risen in the UK since 2000. 30% of people answering a poll in 2020 considered that Jewish people faced quite a lot or a great deal of prejudice or discrimination in modern Britain.<sup>103</sup>
248. The Community Security Trust, a charity which monitors antisemitism, said in 2017, 'Antisemitism is having an increasing impact on the lives of British Jews and the hatred and anger that lies behind it is spreading'. For the year 2019, it recorded a record number of antisemitic hate crimes, the fourth consecutive year in which the annual record was exceeded. Those subjected to the incidents come from the whole spectrum of the Jewish community, from Orthodox to Liberal to secular.<sup>104</sup>
249. 80% of reported incidents involved abusive behaviour and there were 157 physical assaults. There was a large increase in online incidents, particularly using social media. This included the use of social media as a tool for a coordinated campaign of antisemitic harassment and threats against a Jewish public figure.<sup>105</sup> In addition, an average of 170,000 Google searches are made per year in the UK with approximately 10% involving violent language or intentions.<sup>106</sup>
250. The Community Security Trust notes that while some of the increase in numbers might be due to improved reporting of incidents, it is likely that antisemitic incidents are significantly under-reported. Indeed, an EU survey found that only 21% of British Jewish people who had experienced antisemitic harassment over the previous five years had reported it to the police or any other organisation.<sup>107</sup>
251. Police records also show an increase in antisemitic hate crimes. From 2013-2014 to 2014-2015 there was a 97% increase in police-recorded antisemitic hate crime compared with a 26% increase across all hate crime categories.<sup>108</sup> 18% of all police-recorded religious hate crimes were against Jewish people, the most commonly targeted religious group proportionate to their numbers in

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<sup>103</sup> 'ITV Has Britain Changed Poll'. Number Cruncher. Based on interviews in July 2020.

<sup>104</sup> 'Antisemitic Incidents report 2019': Community Security Trust. The increase is notwithstanding the fact that the CST records a campaign against a single individual as only one incident.

<sup>105</sup> 'Antisemitic Incidents report 2019': Community Security Trust (2020).

<sup>106</sup> 'Hidden Hate: What Google searches tell us about antisemitism today': Stephens-Davidowitz, Community Security Trust (2019).

<sup>107</sup> 'Experiences and perceptions of antisemitism, Second survey on discrimination and hate crime against Jews in the EU': Luxembourg Publications office of the European Union (2018).

<sup>108</sup> 'Antisemitism in the UK': House of Commons' Home Affairs Committee Report (2016).

the population.<sup>109</sup> In recent years, there has also been an upsurge in violent attacks against Jewish people across Europe.

252. A poll of British people conducted by YouGov in January 2015<sup>110</sup> found that nearly half of those questioned believed in at least one of four antisemitic stereotypes presented to them. 25% believed Jewish people chase money more than other people. 17% felt Jewish people thought they were better than other people and had too much power in the media, 11% claimed Jewish people were not as honest in business as other people, and one in eight of those surveyed believed that Jewish people use the Holocaust as a means of gaining sympathy. The CST found conspiracy theories were present in 20% of incidents in 2019.
253. In July 2017, the Sunday Times (Irish edition) published an article by a columnist suggesting two female Jewish BBC presenters were paid more because they were Jewish, and that Jewish people were 'not generally noted for selling their talent at the lowest possible price'. Following adverse publicity, the newspaper removed the article off-line, apologised and the columnist was dismissed.
254. Reports establish there may be an increased insecurity among many British Jewish people. In October 2016, the House of Commons' Home Affairs Committee published a Report into 'Antisemitism in the UK'. The Committee concluded:

'Although the UK remains one of the least antisemitic countries in Europe...the stark increase in potentially antisemitic views between 2014 and 2015 is a trend that will concern many. There is a real risk that the UK is moving in the wrong direction on antisemitism, in contrast to many other countries in Western Europe.'

### **A working definition of antisemitism**

255. Antisemitism is a form of racism in the widest sense, but it is not the same. It has its own history and features. It has a variety of forms and levels.
256. In May 2016, together with 30 other member countries, the British government agreed to adopt the 'working definition' of antisemitism of the International Holocaust Remembrance Alliance ('IHRA'). The definition, is as follows:
- 'Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.'
257. The IHRA gives these contemporary examples:
- Calling for, aiding, or justifying the killing or harming of Jewish people in the name of a radical ideology or an extremist view of religion.
  - Making mendacious, dehumanising, demonising, or stereotypical allegations about Jewish people as such or the power of Jewish people as collective - such as, especially but not exclusively, the myth about a world Jewish

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<sup>109</sup> 'Hate Crime, England and Wales, 2018/19.' Home Office. Oct 2019.

<sup>110</sup> 'Annual Antisemitism Barometer: 2015 Full Report': Campaign Against Antisemitism.

conspiracy or of Jewish people controlling the media, economy, government or other societal institutions.

- Accusing Jewish people as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jewish people.
  - Denying the fact, scope, mechanisms (eg gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).
  - Accusing the Jewish people as a people, or Israel as a state, of inventing or exaggerating the Holocaust [see below for example].
  - Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jewish people worldwide, than to the interests of their own nations.
  - Denying the Jewish people their right to self-determination, eg by claiming that the existence of a State of Israel is a racist endeavour.
  - Applying double standards by requiring of Israel a behaviour not expected or demanded of any other democratic nation.
  - Using the symbols and images associated with classic antisemitism (eg claims of Jewish people killing Jesus or blood libel) to characterise Israel or Israelis.
  - Drawing comparisons of contemporary Israeli policy to that of the Nazis.
  - Holding Jewish people collectively responsible for actions of the state of Israel.
258. The IHRA adds 'However, criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic'.
259. The House of Commons' Home Affairs Committee Report into 'Antisemitism in the UK' (October 2016) recommended that the IHRA definition, with two additional caveats, be formally adopted by the British Government. The two caveats were:
- It is not antisemitic to criticise the Government of Israel, without additional evidence to suggest antisemitic intent.
  - It is not antisemitic to hold the Israeli Government to the same standards as other liberal democracies, or to take a particular interest in the Israeli Government's policies or actions, without additional evidence to suggest antisemitic intent.
260. In its Response to the Committee Report in December 2016, the government said these caveats are unnecessary because 'references within the definition stating that criticism of Israel similar to that levelled against any other country cannot be regarded as antisemitic' are sufficient to ensure freedom of speech'.
261. The government said it believes that the definition is a useful tool for criminal justice agencies and other public bodies to use to understand how antisemitism manifests itself in the 21st century.

### **‘Zionism’ as a term**

262. The relationship between British Jewish people and their feelings about Israel is complex.
263. According to a study by City University, the vast majority of Jewish people feel Israel plays a part in their Jewish identity and believe in its right to continue to exist as a Jewish state. However, there are divergent views on matters such as where the borders should lie, the expansion of settlements, the establishment of a Palestinian State so as to create a two-state solution, and the policies of the current Israeli Government. About 70% disagree with the Israeli Government’s approach to peace and favour a two-state solution. Nevertheless, they feel that - in the context of conflicts around the world - double-standards are applied in the level of condemnation of Israel.<sup>111</sup>
264. As a result of these divergent views, British Jewish people may find it difficult to answer if asked whether they are a ‘Zionist’. In addition, the term ‘Zionism’ has come to have very negative connotations. The Home Affairs Committee made these recommendations in its report:

‘Zionism’ as a concept remains a valid topic for academic and political debate, both within and outside Israel. The word ‘Zionist’ (or worse, ‘Zio’) as a term of abuse, however, has no place in a civilised society. It has been tarnished by its repeated use in antisemitic and aggressive contexts. Antisemites frequently use the word ‘Zionist’ when they are in fact referring to Jews, whether in Israel or elsewhere. Those claiming to be “anti-Zionist, not antisemitic” should do so in the knowledge that 59% of British Jewish people consider themselves to be Zionists. If these individuals genuinely mean only to criticise the policies of the Government of Israel, and have no intention to offend British Jewish people, they should criticise “the Israeli Government”, and not “Zionists”. For the purposes of criminal or disciplinary investigations, use of the words ‘Zionist’ or ‘Zio’ in an accusatory or abusive context should be considered inflammatory and potentially antisemitic. This should be communicated by the Government and political parties to those responsible for determining whether or not an incident should be regarded as antisemitic.’

For use of the wording ‘Jewish person/people’ as opposed to ‘a Jew/Jews’, see [‘Acceptable terminology’ \(paragraph 286\)](#) within this chapter.

### ***Acceptable terminology***

#### **Why terminology matters**

265. It will sometimes be relevant to identify or describe a person’s ethnicity. Where it is relevant, some care needs to be taken to ensure that appropriate terms are used. Where a person’s ethnicity is irrelevant, it should not be referred to at all.
266. Where judges are unsure about how to identify or describe a person’s ethnicity or how to address a person from a minority ethnic group, they should ask the person concerned how they would wish to be identified, described or addressed.

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<sup>111</sup> See eg ‘The Attitudes of British Jews towards Israel’ by Miller et al, City University (2015).

267. Using acceptable terminology avoids offending the relevant party or witness and helps give confidence that they will receive a fair hearing.

### Terms relevant to identity

268. Language is constantly evolving, and acceptable terminology describing minority ethnic people has developed as a way of avoiding offence to minorities and developing sensitivity among the majority. It is important that unacceptable language is not used. This is not about so called 'political correctness', rather it is part of society's response to the need to recognise and respect diversity and equality.
269. Language that was formerly used to describe a person's ethnicity is sometimes no longer acceptable. It should be noted that there can be differences in opinion over some terms, so whilst some words are clearly unacceptable, for others there may not be any one correct answer about whether the term is right or wrong. Some guidance is provided below.
270. **Black:** It is now generally considered acceptable to use the term 'black' to describe people of African-Caribbean or sub-Saharan African descent. People of South Asian descent may or may not describe themselves as 'black': there may be a different view between older and younger generations. This term should only be used as an adjective, eg 'a black person', not as a noun ('a Black'). There are different views on whether the terms 'black' and therefore 'white' should be written with a capital letter, and this can vary in the research reports. Often it depends on whether the terms are being used in a political context and, indeed, who is encompassed by 'black'. For consistency in this chapter, we have used small letters.
271. **Non-white:** It is not acceptable to describe black people or black and Asian people generally as 'non-white'. That is defining people by what they are not. In the UK, it is defining them by reference to the white majority.
272. **West Indian / Afro-Caribbean / African Caribbean / African:** The term 'West Indian' was formerly used as a phrase to describe the first generation of post-World War 2 settlers from the West Indies and, in particular, many older people from that community will so describe themselves. Whilst the term 'West Indian' would not always give offence, it is inappropriate to use it unless the individual concerned identifies himself or herself in this way.
273. The term 'African Caribbean' is the term now much more widely accepted. It has largely replaced the earlier term, 'Afro-Caribbean'. As with 'West Indian', this might be used as a self-description by some people, but may be seen as old-fashioned and even offensive by others.
274. 'African Caribbean' does not refer to all people of West Indian origin, some of whom are white or of Asian extraction.
275. The term 'African' is often acceptable and may be used in self-identification, although most people of African origin are likely to refer to their country of origin in national terms (such as 'Nigerian' or 'Ghanaian').
276. Young people born in Britain may choose not to use any of these designations and will often describe themselves as 'black' or 'black British'.



277. **Asian:** 'Asian' is a collective term which has been applied in Britain to people from the Indian sub-continent. In practice, people from the Indian sub-continent tend to identify themselves in terms of one or more of the following:
- Their national origin ('Indian', 'Pakistani', 'Bangladeshi').
  - Their region of origin ('Gujarati', 'Punjabi', 'Bengali').
  - Their religion ('Muslim', 'Hindu', 'Sikh').
278. The term 'Asian' can be appropriate when the exact ethnic origin of the person is unknown or as a collective reference to people from the Indian sub-continent. The more specific terms of South East Asian (eg Singapore, Indonesia), Far East Asian (eg China, Japan, Korea), East African Asian (eg Uganda, Tanzania) or South Asian (eg Bangladesh, India, Pakistan, Sri Lanka) may be preferred.
279. Young people of South Asian origin born in Britain often accept the same identities and designations as their parents. This is by no means always the case, and some prefer to describe themselves as 'black' or as 'British Asian' as a symbol of solidarity in the face of racial discrimination.
280. People from South East Asia and the Far East tend not to be referred to, or self-refer, as 'Asian' in the UK. Normally they would refer to their specific country of origin, eg Vietnamese, Malaysian, Chinese. The term 'oriental' should be avoided as it would usually be seen as offensive.
281. **Mixed race / Mixed or Dual heritage/ Mixed parentage / Dual parentage:** The term 'mixed race' is widely used and is considered acceptable by some, though not by others. More acceptable terms are usually 'mixed heritage' or 'mixed / dual parentage'. 'Half-caste' is generally considered offensive and should be avoided. The term 'multi-racial' is only used in relation to diverse communities.
282. **Ethnic minorities / Minority ethnic / BME (Black and Minority Ethnic) / BAME (Black, Asian and Minority Ethnic):** The terms 'ethnic minority' and 'minority ethnic' are widely used and are generally acceptable as the broadest terms to encompass all those groups who are seen, and who see themselves, as distinct from the majority in terms of ethnic or cultural identity. 'Minority ethnic' is broader than 'black minority ethnic' or the problematical term, 'visible minorities' (problematical as it may imply that there are invisible minorities), and brings in such groups as Greek and Turkish Cypriots or Gypsy Travellers. Originally the term 'ethnic minority' was used, but it is now generally considered more appropriate to use the term 'minority ethnic' because, in relation to the first formulation, the majority group also has ethnicity.
283. A minority ethnic person should not be referred to purely as an 'ethnic person'. Nor should the term of 'ethnic communities' be used to describe minority ethnic communities. Every individual and community has an ethnicity. A minority ethnic person should not be referred to as a noun, ie 'an Ethnic' or a 'Minority Ethnic'.
284. At the time of writing, 'BAME' – either pronounced by the letters, or more recently as a word (rhyming with 'name') – is the phrase used most frequently in the UK. However, some people object to being described as a 'BAME' individual (BAME being a collective designation which obscures their particular cultural heritage) or even worse, by an acronym. There is also a difficulty in that the 'A' in 'BAME' can be misunderstood to mean 'and' as opposed to 'Asian'. In

a recent poll, 42% of minority ethnic respondents did not identify with the term BAME. Only 24% did identify with the term and find it useful.<sup>112</sup>

285. **People of colour / coloured:** The term 'people of colour' tends to be used more in the USA than in the UK, although it has been adopted more frequently in the last few years in the UK. 'Coloured' is offensive and must be avoided. A person of the older white generation in the UK may feel that they are being polite by using the word 'coloured' rather than 'black', but that is an extremely outdated view and not acceptable in any way. 'Brown' (as a reference to South Asian people) should also be avoided.
286. **Jewish people:** It is better to say 'Jewish person' or 'Jewish people' than 'Jews' or, worse, 'a Jew'. Although some Jewish people will not mind the collective reference to 'Jews', others will feel the terms 'Jew' and 'Jews' have been used with hostility over the years and now potentially carry negative connotations. In this chapter, we have used the word 'Jews' only where directly quoting other (non-hostile) sources.
287. **Immigrant / asylum seeker / refugee:** The terms 'immigrant', 'asylum seeker' and 'refugee' should only be used where such terms are factually correct in connection with the particular individual. Even then, 'immigrant' should be used with caution, as it can sound exclusionary, especially for a person who has lived in the UK for a long time or who has gained British nationality. The words 'immigrant' or 'second generation immigrant' should never be used to describe a BAME person who was born in the UK.
288. **British / English:** 'British' and 'English' are acceptable terms in themselves, but they should be used in an inclusive sense to refer to all ethnic groups and not simply to denote white people. The word 'English' should not be used where what is meant is 'British'.
289. **Welsh:** If in Wales, a reference to 'Welsh people' should not mean only those who speak Welsh. A Welsh person, who speaks only English, is still Welsh. It would be wrong, for example, to describe a witness who gives evidence in Welsh as 'the Welsh witness', which may be taken to mean that others are somehow not Welsh. Unlike the English language, the Welsh language has different words for 'Welsh' in the sense of the language ('Cymraeg') and 'Welsh' in the sense of 'of Wales' ('Cymreig'). This can lead to misunderstandings or even offence in translation.

### Terms for discussing racism, discrimination and prejudice

290. Many people feel the use by private and public institutions of collective terms such as 'BAME', 'minority ethnic people' and 'people of colour' has the effect of obscuring important differences in the life chances and experiences of discrimination of numerous groups, as well as merging together a variety of rich cultural heritages. On the other hand, in certain contexts it can also be important to be inclusive and to identify more general patterns of experience.
291. Another difficulty with such terms concerns who is covered by 'ethnic minority/minority ethnic'? Does it cover Irish people? Jewish people? Gypsies,

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<sup>112</sup> 'ITV Has Britain Changed Poll'. Number Cruncher. Based on interviews in July 2020.

Roma and/or Travellers? White Europeans who are not British? There is no consensus on this and people self-define differently.

292. Terminology for discussing racism, discrimination and prejudice has also evolved over the years. Even now, there is no consistent understanding as to the meaning of different terms. A critical factor in holding confidence is for judges to be able to demonstrate, where relevant, their understanding that racism and discriminatory actions are not limited to situations where there is personal prejudice.
293. 'Racial prejudice' generally refers to holding a preconceived opinion or attitude towards a person because of characteristics wrongly or rightly associated with their ethnic group, usually in terms of a negative group stereotype.
294. 'Racial Discrimination' generally refers to disadvantageous treatment of a person, directly or indirectly because of their ethnicity. There are very specific definitions of direct discrimination and indirect discrimination in the [Equality Act 2010](#). It is not necessary for the discriminator to be personally prejudiced or consciously aware that he or she is treating a person less favourably because of their ethnicity.
295. 'Racism' is a term defined more by effects / outcomes than by motives: A racist action, or a person who acts in a racist way, is not necessarily racially prejudiced. However, the term is often used to describe a combination of conscious or unconscious prejudice and power to implement action which leads, however unintentionally, to disproportionate disadvantage for BAME people. People who use the term 'racist' to describe the actions of others may or may not mean that the other person is personally prejudiced.
296. 'Unconscious bias' is a term now widely used in many workplaces as a way of drawing attention to the effects of unwitting stereotypical thinking about BAME people. It omits certain ways that racism can operate systemically.
297. 'Institutional racism' is another term which is variously understood. Some people use it simply to describe an organisation where many people, especially those in power, have prejudiced attitudes. Others use it to describe an organisation where people, whatever their attitude, act in a racist way. Its deeper meaning is an organisation which has a set of values, operating procedures, and priorities which, however unintended, lead to outcomes that disadvantage many minority ethnic people.

### ***The Equality Act 2010***

298. The Equality Act 2010 prohibits discrimination in relation to 'race'. This means colour, nationality, national origin, ethnic origin and decent. See the Equality Act 2010 appendix for an [overview](#) of the Equality Act 2010 and for more detail of the application of the Equality Act 2010 to ['race'](#).

### ***References and resources***

Click on the references below to go to the source referred to. Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link. Within the thematic groupings, references are

in alphabetical order within topics (discounting the first 'the' or 'a'). Cases were relevant as at the date of publication.

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## Chapter 9 Religion

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## Overview

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### The diversity of religious practice

The richness and diversity of the religions in the UK cannot be overstated. It is important to be respectful of other people's religions and the impact they may have on their lifestyles, belief systems, work and interaction with the justice system.

Each religion has many nuances. Adherents may change over their lifetimes as to the degree with which they follow their religion and its many varieties. Some people may have links to a religion for reasons connected with culture and ethnicity. Some may have a tenuous link with their faith, but would feel bound by respect or family tradition in, say, observing a festival.

Judges should not fall into the trap of making assumptions based on their knowledge of friends or work colleagues as to another person's religious observance.

### Adjustments to the court process

A requirement of a religion may mean proceedings need to be conducted in a certain way, eg breaks, adjusted hours and order of witnesses, to allow for fasting and its impact on metabolism, the need to undertake prayer during the day, Sabbaths starting at sunset, and religious holy days; or following a bereavement, where a religious faith encourages swift funeral ceremonies and extended periods of mourning.

Where a hearing is listed on a date on which an important religious festival occurs, a party or witness may have major difficulty in attending. As well as their own religious belief, individuals can be subjected to intense family and cultural pressures. While ultimately it is a matter for judicial discretion, serious consideration should be given to responding positively to requests to alter the date.

Similarly, some faiths observe their weekly Sabbath from sunset (or before) on Friday until sunset on Saturday, and work or other activity is not permitted during this period. In winter months sunset may be as early as mid-afternoon. This can usually be accommodated by starting earlier and having shorter breaks.

In practical terms it should be remembered that if a particular ethnic group is associated with a particular religion, it may not be possible to obtain a court approved interpreter if potential interpreters are also observing their holy day.

### Remote hearings

When considering 'remote' hearings involving live cameras, judges may want to consider and address any concerns about modesty and privacy that form part of a person's religious faith. Filming of those participating in a hearing, particularly where members of the press or public may seek access to such images, may need to be addressed in discussion with the parties and their representatives.

A witness can take a religious oath without having a religious book available.

## **Religious dress and wearing the veil**

If this issue arises, it is recommended that the section on this topic in the full chapter is read and considered.

## **Oaths, affirmations and declarations**

The Oaths Act 1978 permits witnesses the choice of swearing an oath or making a solemn affirmation. The term 'affirmation' should be explained when offering witnesses the choice.

The purpose of the oath is to ensure that the witness makes a solemn declaration to tell the truth. The degree to which witnesses consider their conscience bound by the procedure is the criterion of validity.

Witnesses and jurors who choose to affirm or swear an oath must be treated with respect and sensitivity.

Individuals should be offered their choice of religious book. If it is unavailable, apology should be made. Witnesses / jurors should not be pressurised into taking an oath on the wrong religious book. They should be offered the choice of taking a religious oath without the religious book or affirming if they would prefer. The important point is that they feel bound by the oath or affirmation as the case may be.

Assumptions should not be made that individuals of certain minority ethnic background are likely to want to swear on particular holy books.

Some orthodox religious believers may choose to affirm because they believe that swearing an oath is not a procedure to be undertaken in a non-religious context such as court proceedings.

More detail of religious practices, including on taking the oath, is available in the [Glossary of Religions \(religious practices and oath taking requirements\)](#) in the appendix, or use one of the links below to go direct to a particular section:

- [The Baha'i Faith](#)
- [Buddhism](#)
- [Christianity](#)
- [Hinduism](#)
- [Indigenous traditions](#)
- [Islam](#)
- [Jainism](#)
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- [Rastafarianism](#)
- [Sikhi or Sikhism](#)

- [Taoism](#)
- [Zoroastrianism](#)

### [The Equality Act 2010](#)

Discrimination in relation to religion is unlawful under the Equality Act 2010.

### ***The diversity of religious practice***

1. It is important to be respectful of other people's religions and the impact they may have on their beliefs, work, lifestyles and interaction with the justice system. Some religions have their own private or state funded faith schools.
2. The richness and diversity of the religions in the UK cannot be overstated. A quick browse through the [Glossary of Religions](#) might prompt further fruitful research.
3. The Glossary can only offer overall guidelines and each religion has many nuances. Adherents may change over their lifetimes as to the degree with which they observe the practices of their religion and its many varieties. Some may have only a tenuous link with their faith, but feel bound by respect, social pressures or family tradition in, for example, observing a festival.
4. Judges should not fall into the trap of making assumptions based on their knowledge of friends or work colleagues as to another person's religious observance.
5. Judges may also want to consider the impact of diversity in religious practices over marriage. A couple may have entered a religious marriage, which is not recognised under the law of England and Wales, and not entered a legally recognised civil marriage. The lack of legal status of the marriage may not affect the genuineness of the relationship or the extent to which the couple regard themselves as married. A judge should respect the titles which a couple uses (eg 'Mr' or 'Mrs' and 'husband' or 'wife,' as opposed to 'partner'). Indeed, someone from some countries outside the UK may have no concept of a committed relationship outside marriage and may not understand the word 'partner' if used in court.

### ***Adjustments to the court process***

6. There are many different people who attend court so that the judge should have an awareness of the needs of court staff, professional representatives, jurors, law enforcement officers as well as ordinary citizens. Adjustments are likely to be made for all at one time or another.
7. A requirement of a religion may mean proceedings need to be conducted in a certain way. Fasting (and its impact on metabolism), the need to undertake purification rituals during the day, prayers at regular intervals, Sabbaths and religious holy days and oaths are just a few of the observances that may have to be considered. Breaks, adjustment of hours and to the order of events may be appropriate. Adjustments may also be required following a bereavement, where a religious faith encourages swift funeral ceremonies and extended periods of mourning.
8. Many religious faiths incorporate elements of fasting, to a greater or lesser extent. A fasting day is sometimes so holy, that it is also not permitted to work or come into court (eg Yom Kippur). However, where it is permitted to attend court while fasting, the impact needs to be considered.
  - Periods of fasting can often be for many hours and for lengthy periods. This can be challenging, eg during the 29 – 30 days of Ramadan, particularly

when it falls during longer days in May to June, which may mean no food or drink (including water) for up to 18 hours each day.

- Fasting may not just mean abstaining from food and drink, but may also mean getting up very early for pre-dawn meals and eating late in the evening with family and friends, or late night prayers, all of which may impact on tiredness and concentration in court.
  - Court and tribunal users may ask for changes to attendance times during a hearing; for a shorter lunch break, or to be allowed to leave on time to join family and friends in breaking their fast. They may also ask for hearings to be avoided in particularly holy periods of a festival, eg during Yom Kippur, which starts early the previous evening, or the last ten days of Ramadan.
9. The UK is often said to be a multi-cultural and multi-faith society. That said, there is an established Anglican Church in England (though not in Wales) and hearings may, generally, not take place on two Christian festivals, Christmas Day and Good Friday, or on Sundays. People of other faiths do not have this automatic protection. Where a hearing is listed on a date on which an important religious festival occurs, a party or witness may have major difficulty in attending. As well as their own religious belief, individuals can be subjected to intense family, social and cultural pressures. While ultimately it is a matter for judicial discretion, serious consideration should be given to responding positively to requests to alter the date.
  10. Similarly, some faiths observe their weekly Sabbath from sunset (or before) on Friday until sunset on Saturday, and work or other activity is not permitted during this period. In winter months, sunset may be as early as mid-afternoon and individuals will need time to travel home. Depending on the length of the case and the person affected, this can often be accommodated by scheduling, changing the order in which witnesses are called, or by starting earlier and taking shorter breaks over the course of a hearing.
  11. In practical terms it should be remembered that if a particular minority ethnic group is associated with a particular religion, it may not be possible to obtain a court-approved interpreter if potential interpreters are also observing their holy day.
  12. For more detail of the practices of different religions and how they might impinge on court practice, use the links below to access the relevant religion in the Glossary of Religions:
    - [The Baha'i Faith](#)
    - [Buddhism](#)
    - [Christianity](#)
    - [Hinduism](#)
    - [Indigenous traditions](#)
    - [Islam](#)
    - [Jainism](#)
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- [Judaism](#)
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- [Non-religious beliefs and non-belief](#)
- [Paganism](#)
- [Rastafarianism](#)
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## ***Religious dress and wearing the veil***

### **Wearing the veil in court: introduction**

13. This is a very sensitive issue and, of course, only very general guidance can be given. Some judges at first instance, in both courts and tribunals, have had occasion in recent years to deal with this issue. It remains very much a matter of judicial discretion unless and until an appellate court gives guidance. That discretion will, to some extent, be fact dependent and jurisdiction dependent and what may be appropriate in one situation may not be appropriate in another.
14. Some Muslim women cover their head and upper body in the presence of adult males outside their immediate family. They do so for a variety of reasons and, in nearly all cases, leave their face visible. This part does not deal with that scenario.
15. The *niqab* is a full head covering with only eyes visible, worn by few women in the UK. The *burqa* is worn by an even smaller group and no part of the head or face is visible. For the purposes of this part, the term *veils* will encompass both practices.
16. There are differing schools on whether the wearing of the veil is mandatory and there is much debate. Judges should not arbitrate or seek to resolve doctrinal conflict, both as a matter of principle and since secular courts are ill-equipped for the task. The right to freedom of religion, on the other hand, is not an absolute one.

### **Wearing the veil in court: non-criminal cases**

17. A judge can ask anyone giving evidence to take off her veil whilst she gives that evidence, but only if a fair trial requires it. It requires a balancing exercise. It should be done only if the judge reasonably believes it necessary in the interests of justice and only after reflection on whether, in the context, effective evidence could be given without removal.
18. In any jurisdiction such an issue should be addressed at a pre-trial directions hearing or, at the latest, at the outset of the hearing. A short adjournment might enable the woman concerned to reflect and, perhaps, seek advice.
19. The identity of a witness or party can be established in private by a female member of staff without requiring removal of the veil in the courtroom.

20. Where removal is felt essential a judge must consider arrangements to minimise discomfort or concern, such as limited screening, restricting the number of observers in the courtroom and prohibiting any visual image of the individual being created on the basis of her courtroom appearance.
21. Science and a growing understanding indicates the difficulties with, and the possible fallibility of, evaluation of credibility from appearance and demeanour in the somewhat artificial and sometimes stressful circumstances of the courtroom. Scepticism about the supposed judicial capacity in deciding credibility from the appearance and demeanour of a witness is not new.

### **Wearing the veil in court: criminal cases**

22. Any issue regarding wearing the veil in court should be addressed, ideally, at a pre-trial directions hearing.
23. It should be remembered that the identity of a witness, appellant or defendant can be established in private by a female member of staff without requiring removal of the veil in the courtroom. Care should be taken in the case of a defendant to establish her identity at each session, in private, by a female member of staff.
24. As for those giving evidence, justification for removal of the veil requires close scrutiny. Judges should be particularly careful to point out that its wearing might impair the court's ability to evaluate the reliability and credibility of the wearer's evidence; jurors might assess what is said in ways that include looking at an individual's face and demeanour.
25. Where removal is felt essential a judge must consider arrangements to minimise discomfort or concern, such as limited screening, restricting the number of observers in the courtroom and prohibiting any visual image of the individual being created on the basis of her courtroom appearance.
26. In jury trials, a judge might accede, for instance, to a defendant being veiled in court save for when she gives evidence.

### **Remote hearings**

27. When considering 'remote' hearings involving live cameras, judges may want to consider and address any concerns about modesty and privacy that form part of a person's religious faith. Filming of those participating in a hearing, particularly where members of the press or public may seek access to such images, may need to be addressed in discussion with the parties and their representatives.
28. A witness who is participating remotely from his or her home, may wish to take a religious oath, but not have the relevant religious book available. This should be permitted (see ['Covid-19 and handling holy books'](#) below).

### **Oaths, affirmations and declarations**

#### **What makes an oath or affirmation binding**

29. The Oaths Act 1978 makes provision for the forms in which oaths may be administered and states that a solemn affirmation shall have the same force and effect as an oath. In today's multi-cultural society everyone, whatever their



religion or belief, should be treated with respect when making affirmations, declarations or swearing oaths.

30. In Wales, a person is entitled to take the oath or affirm in Welsh and, if he or she does so, there is no requirement to repeat the same oath or affirmation in English. A person may take the oath or affirm in Welsh even if he or she is giving evidence in English. The Welsh wording is a direct translation. Welsh language oath and affirmation cards should be readily available as well as Welsh and English language Bibles. If the cards are mislaid, the Welsh Language Unit can email electronic versions almost by return (email: [welsh.language.unit.manager@justice.gov.uk](mailto:welsh.language.unit.manager@justice.gov.uk)).
31. Oaths are administered in employment tribunals, but in most other tribunals (as opposed to courts), they are not.
32. The most common wording of the oath is:  

**'I swear by [substitute Almighty God/Name of God (such as Allah) or the name of the holy book] that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.'**
33. The most common wording for making an affirmation is:  

**'I do solemnly, sincerely and truly declare and affirm that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.'**
34. As a matter of good practice:
  - The important question of whether to affirm or swear an oath should be presented to all concerned as a solemn choice between two procedures which are equally valid in legal terms.
  - The primary consideration should be what binds the conscience of the individual.
  - One should not assume that an individual from a particular community or ethnic background will automatically prefer to swear an oath rather than affirm, or vice versa.
35. Guidance was given by Lord Lane C.J. in the case of *Kemble*:<sup>1</sup>  

'We take the view that the question of whether the administration of an oath is lawful does not depend upon what may be the considerable intricacies of the particular religion which is adhered to by the witness. It concerns two matters and two matters only in our judgement. First of all, is the oath an oath which appears to the court to be binding on the conscience of the witness? And if so, secondly, and more importantly, is it an oath which the witness himself considers to be binding upon his conscience?'
36. In *Kemble*, a Muslim witness in the criminal trial had previously sworn an oath on the New Testament, although in the Court of Appeal the same witness swore an oath on the Qur'an. He told the Court of Appeal on oath that he considered himself conscience-bound by the oath he made at the trial. He added that he would still have considered the oath to be binding on his conscience whether he had taken it upon the Qur'an, the Bible or the Torah. The Court of Appeal

<sup>1</sup> *R. v. Kemble* [1990] 91 Cr. App. R. 178.

accepted his evidence, finding that he considered all those books to be holy books, and thus that he was conscience-bound by his oath. This is despite the fact that evidence was received in that case that an oath taken by a Muslim is only binding if taken on the Qur'an.

37. In the courtroom, the emphasis is upon receiving testimony and determining the credibility of the witness on the basis of his or her binding oath or affirmation.
38. Assumptions should not be made that a religious individual who chooses to affirm has done so because he or she does not intend to tell the truth. Some orthodox religious believers may choose to affirm because their religion states that they should not swear an oath as a matter of principle, or in case they give a wrong answer on oath inadvertently, or because they believe that swearing an oath on a religious book is not an appropriate procedure to be undertaken in a non-religious context such as court proceedings. Indeed, parliament originally introduced the possibility of affirmation to cater for Quakers and other particularly religious Christians. Only later was it extended to atheists.

### **Holy books and ritual purity**

39. Different faith traditions place varying emphases upon their holy books in the context of their belief system. Many faith traditions are oral, or not based on scripture, while others, such as Hinduism or Jainism revere a number of scriptures; and for yet others, there is only one central text. For all, their holy books must be handled with respect and sensitivity.
40. Certain faith traditions insist that anyone handling a holy book or scripture be in a state of ritual purity.
41. Ritual purity may be achieved by performing ablutions involving the use of water.
42. A witness may indicate the need to perform ablutions by referring to the 'need to wash' or may specify a need 'to wash their hands/face/feet'. An opportunity to use a washroom for this purpose should be given to the witness.
43. In certain religious traditions, women who are menstruating or recovering from childbirth cannot obtain ritual purity and may prefer to affirm rather than handle their holy book.
44. It is good practice for holy books to remain covered in a separate cloth when not in use, and when being handled by court staff, so as to avoid causing possible offence. Needless to say, all handling of holy books should be with the utmost respect, and no holy book should be put on the floor or thrown down.
45. Other practices:
  - Hindu and Sikh witnesses may wish to remove their shoes.
  - Jewish, Muslim, Rastafarian, Sikh or other witnesses may wish to cover their heads when taking the oath. They should not be asked to remove *head coverings* in court. See '[Religious dress and wearing the veil](#)' for more details regarding wearing the veil.
  - Hindu witnesses may wish to bow before the holy book with folded hands before or after taking the oath.

- Witnesses may prefer that the book is only touched by the right hand.
46. These practices should be accommodated where possible, to enable such witnesses to consider themselves most conscience-bound to tell the truth.
  47. See '[Covid-19 and handling holy books](#)' where there are difficulties handling holy books because of Covid-19 precautions in court or because of remote hearings.

### **Asking people how they would like to take the oath**

48. Court staff should present witnesses and jurors with a choice of two equally valid procedures before they come into court: making an affirmation or swearing an oath.
49. Witnesses do not always understand the meaning of the word 'affirm'. This should be explained rather than waiting for the individual to ask.
50. It is important to do this before the witness / juror comes into the courtroom so that there is time to search for the appropriate religious book if it has gone missing from the tribunal or courtroom.
51. If they wish to swear an oath, witnesses should be informed about the availability of different holy books in court and invited to identify the holy book on which they wish to swear the oath. They should not be persuaded to swear an oath on the New Testament for the sake of convenience.
52. If the requested holy book is not available, the individual should not be persuaded to swear the oath on a different religious book which court staff think is sufficiently similar. It is good practice to apologise and to offer the witness the opportunity of swearing the oath without the religious book (see paragraphs 55-59 below) or affirming, even if he or she is initially willing to swear an oath on the holy book of another religion. The important point is that the individual can choose and feels bound by the oath or affirmation (as the case may be).
53. No assumptions should be made that an individual from a particular community or ethnic background will automatically prefer to swear an oath rather than affirm, or vice versa.
54. For more detailed consideration regarding the practices of different faith traditions generally and in relation to taking oaths, use the links below:
  - [The Baha'i Faith](#)
  - [Buddhism](#)
  - [Christianity](#)
  - [Hinduism](#)
  - [Indigenous traditions](#)
  - [Islam](#)
  - [Jainism](#)
  - [Jehovah's Witnesses](#)
  - [Judaism](#)

- [Mormonism](#)
- [Non-religious beliefs and non-belief](#)
- [Paganism](#)
- [Rastafarianism](#)
- [Sikhi or Sikhism](#)
- [Taoism](#)
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## Covid-19 and handling holy books

55. The advice during the coronavirus crisis is to avoid touching religious books in the courtroom. Insisting that people affirm instead of taking the oath because of this denies them the right to manifest their religion or belief.
56. We would suggest that it is not necessary to touch a religious book when taking a religious oath. Although it is conventional in England and Wales to ask Christian and Jewish witnesses who wish to take a religious oath to hold the New Testament or Old Testament (respectively) in their uplifted hand,<sup>2</sup> it is also permissible under statute to adopt the Scottish form of oath, which simply requires an uplifted hand.<sup>3</sup> In the case of other faiths, the oath can be administered ‘in any lawful manner’<sup>4</sup> and, therefore, the issue of touching books does not arise.
57. The over-riding principles are that the court considers the oath binding on the conscience of the witness and, importantly, so does the taker.<sup>5</sup> A failure to strictly comply with the words or, for example, not holding the Old or New Testament would, in any event, not invalidate the oath.<sup>6</sup>
58. Similar issues may arise in remote hearings if witnesses do not have the relevant holy book at home. We would suggest that the oath can still be taken even if the holy book is not physically present.
59. In practical terms, we suggest that where the holy book is unavailable, judges could say to the witness words to the effect: ‘We are in Covid times. Are you content to take the oath in the Scottish form, which means you do not need to hold the holy book in your hand?’ If the witness agrees, after he or she has taken the oath, the judge could ask, ‘Do you feel bound by the oath?’. In such situations, it may also be a good idea to ask every witness after they have taken the oath or affirmed whether they feel bound, so it does not give the impression that any individual is being singled out.

<sup>2</sup> Oaths Act 1978, section 1.

<sup>3</sup> Oaths Act 1978, section 3.

<sup>4</sup> Oaths Act 1978, section 1(3).

<sup>5</sup> *R v Kemble* [1990] 1 WLR 1111, see above at para 35.

<sup>6</sup> *R v Chapman* [1980] Crim LR 42 CA.

## Oaths for different roles

60. In every case the appropriate form of oath or affirmation precedes the words set out below.

### *Witnesses*

‘...that the evidence which I shall give shall be the truth, the whole truth and nothing but the truth.’

‘...that I shall answer truthfully any questions which the court may ask of me.’

### *Children*

The form of oath for any child or young person aged 14 to 17 years commences ‘I promise by...’. The evidence of a child aged under 14 years is given unsworn.

### *Jurors*

‘...that I will faithfully try the defendant(s) and give a true verdict (true verdicts) according to the evidence.’

‘...that I will faithfully try the defendant(s) whether the defendant is under some disability so that s/he cannot be tried and give a true verdict according to the evidence.’

‘...that I will faithfully try the defendant(s) whether the defendant stands mute of malice or by the visitation of God (whether s/he is able to plead) (whether s/he is sane or not and of sufficient intellect to comprehend the proceedings) and give a true verdict according to the evidence.’

‘...that I will diligently inquire into the death of XXX and make findings of fact and come to a true conclusion according to the evidence.’

### *Interpreters*

‘...that I will well and faithfully interpret and true explanation make of all such matters and things as shall be required of me according to the best of my skill and understanding.’

## Relevant provisions of the Oaths Act 1978

‘1.

(1) Any oath may be administered and taken in England, Wales or Northern Ireland in the following manner:

The person taking the oath shall hold the New Testament, or in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words ‘I swear by Almighty God that...’ followed by the words of the oath prescribed by law.

(2) The officer shall (unless the person about to take the oath voluntarily objects thereto, or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question.

(3) In the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any lawful manner.

- (4) In this section an officer means any person duly authorised to administer oaths.
3. If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further questions.
- 4.
- (1) In any case in which an oath may lawfully be and has been administered to any person, if it has been administered in a form and manner other than that prescribed by law, he is bound by it if it has been administered in such form and with such ceremonies as he may have declared to be binding.
- (2) Where an oath has been duly administered and taken, the fact that the person to whom it was administered had, at the time of taking it, no religious belief, shall not for any purpose affect the validity of the oath.
- 5.
- (1) Any person who objects to being sworn shall be permitted to make his solemn affirmation instead of taking an oath.
- (2) Subsection (1) above shall apply in relation to a person to whom it is not reasonably practicable without inconvenience or delay to administer an oath in the manner appropriate to his religious belief as it applies in relation to a person objecting to be sworn.
- (3) A person who may be permitted under subsection (2) above to make his solemn affirmation may also be required to do so.
- (4) A solemn affirmation shall be of the same force and effect as an oath.'

### ***The Equality Act 2010***

61. The Equality Act 2010 prohibits discrimination in relation to religion. See the Equality Act 2010 appendix for an [overview](#) of the Equality Act 2010 and for more detail of the application of the Equality Act 2010 to [religion](#).

### ***References and resources***

Click on the references below to go to the source referred to. Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link.

### **Cases**

Cases were relevant as at the date of publication.

*R v Chapman* [1980] Crim LR 42 CA

[R v Kemble](#) [1990] 1 WLR 1111; [1990] 3 All ER

## Chapter 10 Sexual Orientation

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## Overview

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### What do we mean by 'sexual orientation'?

'Sexual orientation' is an umbrella term that encompasses sexual identity, attraction and behaviour. It may change over time and in different contexts. Sexual orientation is not a choice. Human sexuality is a wide spectrum ranging from the exclusively heterosexual, through varieties of bisexuality to the exclusively gay. Some people resist labelling, and decline to be identified as being of any particular or fixed sexuality.

The term 'LGBT' (or 'LGBT+') is commonly used when referring generically to people in the gay community ('LGB' – lesbian, gay, bisexual) together with those in the trans community. However, sexual orientation should not be confused with gender identity (see [chapter 12](#)).

### Discrimination against LGB people

There is a history of profound discrimination against LGB people in the UK. While enormous strides in equality have been made in recent years, with the gradual repealing of discriminatory laws, the legalising of same-sex marriage in England, Scotland and Wales, and an increased public acceptance of same-sex relationships, bullying, hate crime, discrimination and stereotyping still persist.

### Workplace experiences

In a 2017 TUC survey of 5,000 LGBT workers, 39% reported that they had been harassed or discriminated against. 62% had heard homophobic or biphobic remarks or jokes directed to others at work and 20% had been outed against their will. Over half said that their experience of workplace harassment or discrimination had had a negative effect on their mental health. In a 2019 TUC survey of 1,000 LGBT workers, 68% had experienced at least one type of sexual harassment at work and 12% of women reported being seriously sexually assaulted or raped at work. For many LGB people, unequal treatment in their daily lives is an ever-present expectation.

### Hate Crime

Levels of homophobic hate crime have increased and black, Asian and minority ethnic individuals are particularly targeted. It is heavily underreported.

### Coming out

Many LGB people face a daily dilemma: whether to 'come out' or to keep their orientation hidden and face accusations of a lack of candour.

Many LGB people are deeply fearful of the consequences of 'coming out' and the risk of personal rejection by family, friends and work colleagues.



Whether or not someone chooses to 'come out', they may feel a constant pressure to 'edit' the way they present themselves, eg whether they hold their partner's hand in public, and this can take a mental and emotional toll.

Judges should be aware that fear of being 'outed' in court may place additional burdens on LGB parties, witnesses and victims of crime. Judges should restrain any intrusive questioning about the sexuality of a witness or party unless it is strictly relevant to real issues in the case.

### **Family rights**

Same-sex marriage has been lawful since 2014; civil partnerships were introduced in 2004 for same-sex couples and extended to opposite-sex couples at the end of 2019.

Extensive psychological research has demonstrated that children brought up by same-sex parents do equally as well as those brought up by heterosexual parents in terms of emotional well-being, sexual responsibility, academic achievement and avoidance of crime.

### **LGB asylum seekers**

In 72 countries, same-sex relationships are illegal and can lead to lengthy prison sentences. In 12, the death penalty applies.

People who face persecution on the basis of their real or perceived sexual orientation can claim asylum in Britain. For a variety of reasons including damaging stereotyping, applicants for asylum on this basis may have difficulty in proving their sexual orientation.

There is substantial evidence that LGB asylum seekers are particularly vulnerable while held in detention, experiencing discrimination, harassment and violence from other detainees and members of staff. Following detention, many experience long-lasting effects on their mental health.

### **HIV positive people and AIDS**

It is wrong to assume that having AIDS or being HIV positive is indicative of 'homosexual activity'. Globally, it is heterosexual activity that is responsible for most new HIV infections. Medical advances mean many earlier fears about HIV and AIDS are now out-of-date.

### **Lesbian, gay and bisexual people and crime**

Since 1 October 2012, people in England and Wales with convictions and cautions for acts which are no longer unlawful, can apply to the Home Office to have these removed from their criminal records.

Past offences directed at private consensual sex between men have been repealed.

An extremely offensive perception links being gay with paedophilia. The empirical research does not show that gay or bisexual men are any more likely than heterosexual men to molest children.

### **Acceptable terminology**

Using acceptable terminology avoids offending parties and witnesses and gives them confidence that they will receive a fair hearing. The term 'homosexual' is outdated and may be found offensive. For more detail, see the full chapter.

A person's sexual orientation should not be referred to unless relevant. If it is relevant, it is usually best to ask the person concerned how they would wish to be identified, described or addressed.

### **The Equality Act 2010**

Discrimination in relation to sexual orientation is unlawful under the Equality Act 2010.

## ***What do we mean by ‘sexual orientation’?***

1. ‘Sexual orientation’ is an umbrella term that encompasses sexual identity, attraction and behaviour. It may change over time and in different contexts.<sup>1</sup> Sexual orientation is not a choice. The social activities, relationships, interests, occupations, political beliefs and financial circumstances of lesbian, gay and bisexual (‘LGB’) people will be as diverse and unpredictable as those of their heterosexual counterparts. Their sexual orientation is but one facet of their identities and their lives.
2. In 2018, there were an estimated 1.2 million people aged 16 and over who identified as LGB. Proportions in the population were similar in England and Wales, and younger people were far more likely to identify themselves as LGB.<sup>2</sup> Although there has been an increase in the number of people willing to identify as LGB, the full numbers are still difficult to assess, because many people do not choose publicly to identify themselves.
3. It should also be noted that there is a wide spectrum of human sexuality, ranging from the exclusively heterosexual, through varieties of bisexuality to the exclusively gay. Additionally, some people resist labelling, and decline to be identified as being of any particular or fixed sexuality, eg asexual or pansexual people. All this makes an accurate estimate of numbers extremely difficult, although there is little doubt that, with more accepting public attitudes, the number of people willing to be identified as gay, lesbian or bisexual, is increasing.
4. Sexual orientation should not be confused with gender identity. Gender identity refers to who you are, whilst sexual orientation refers to who you are sexually attracted to. However, many in the gay community and in the trans community have shared similar experiences in terms of discrimination and have joined forces in raising issues. The term ‘LGBT’ (or LGBT+) is commonly used when referring generically to people in both groups. This is discussed further below (see [‘Acceptable terminology’](#)). However, for the purposes of the Equal Treatment Bench Book, the particular issues facing each group have been considered in separate chapters. For this reason, the term ‘LGB’ is used in this chapter, save where citing report data where research did not differentiate between LGB and trans people, in which case ‘LGBT’ is used.

## ***Discrimination against LGB people***

5. There is a historical background of deep, widespread, entrenched and unchallenged discrimination against lesbian, gay and bisexual people in the UK. It is worth noting that:
  - Same sex sexual activity between men in England and Wales was only decriminalised in 1967.<sup>3</sup>

<sup>1</sup> This useful definition is used in ‘Sexual orientation, UK: 2018’ Office for National Statistics (6 March 2020).

<sup>2</sup> ‘Sexual orientation, UK: 2018’: Office for National Statistics (6 March 2020).

<sup>3</sup> Sexual Offences Act 1967.

- Male homosexuality was only decriminalised in Northern Ireland in 1982.<sup>4</sup>
  - It took until 2000 for the age of consent for same sex sexual activity between men to be equalised with the age of consent for heterosexual and lesbian/gay female sexual activity.<sup>5</sup>
  - Gay men and women were precluded from a military career until the European Court of Human Rights decision in *Smith and Grady v UK* (1999) 29 EHRR 493.
  - It was not until 2003 that severe criminal prohibitions on homosexual behaviour in public were removed.<sup>6</sup>
  - Section 28 of the Local Government Act 1988 was passed, prohibiting local authorities from intentionally 'promoting homosexuality' and 'promoting the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship'. This was not repealed until 2003.
  - Non-discrimination legislation did not cover sexual orientation, until the Framework Directive 2000/78/EC was passed on 1 October 2000, and the Employment Equality (Sexual Orientation) Regulations 2003 were brought into force.
  - The Equality Act 2010 now provides protections from discrimination in employment, provision of services, public functions, disposal of premises and education. However, there is still a significant limitation in that it does not prohibit sexual orientation harassment protection in the context of education, provision of services, public functions and disposal and management of premises.<sup>7</sup>
6. Enormous strides in equality have been made in recent years, with the gradual repealing of discriminatory laws and the legalising of same-sex marriage in England, Scotland and Wales. The 2019 British Social Attitudes Survey (no. 36) indicated an increasing general acceptance of same-sex relationships, 66% seeing nothing wrong at all, compared with 17% in 1983.
7. Despite these advances, bullying, hate crime, discrimination and stereotyping still persist, and have an impact on LGB people. Research shows that many LGB people are less satisfied with their life than the general UK population.<sup>8</sup> They still endure poor treatment while using public services and going about their lives, whether in their local shop, gym, school or place of worship. In one poll, 13% said they had been discriminated against when visiting a café, bar or nightclub.<sup>9</sup>

<sup>4</sup> Order in Council, the Homosexual Offences (Northern Ireland) Order 1982; in force from 8 December 1982.

<sup>5</sup> Sexual Offences (Amendment) Act 2000.

<sup>6</sup> Sexual Offences Act 2003.

<sup>7</sup> Equality Act 2010, sections 29(8) and 33(6).

<sup>8</sup> 'National LGBT Survey. Research report': Government Equalities Office (July 2018).

<sup>9</sup> 'LGBT in Britain – Hate Crime and Discrimination': Stonewall (2017).

8. According to a national survey in 2018:<sup>10</sup>
  - More than two thirds of LGB respondents avoided holding hands with a same-sex partner for fear of a negative reaction from others.
  - Nearly a quarter of LGB respondents had experienced verbal harassment or hurtful comments from someone they did not live with in the previous 12 months. 5% had been subjected to violence or threats of violence. However, more than nine in ten of even the most serious incidents went unreported, often because respondents thought nothing would change or because 'it happens all the time'.
  - 7% of LGB respondents had been offered or had undergone conversion or reparative therapy in an attempt to 'cure' them.
  - 21% of LGB respondents had accessed mental health services in the 12 months preceding the survey.
9. It is often remarked that young people are much more accepting and supportive of LGB identities, but this does not appear to be supported by experience in schools. In its 2017 'School Report', Stonewall reported some improvement in the level of bullying of gay children at school over the previous 10 years and an increase in the willingness of schools to take on the issues. Nevertheless, more than half of gay pupils were still bullied for being gay, and the use of homophobic language at school was still prevalent.
10. In 'Unhealthy Attitudes – the treatment of LGBT people within health and social care services', Stonewall reported that a quarter of patient-facing staff had heard colleagues make negative remarks about LGB people over the previous five years, and a quarter of LGB staff felt they had personally been bullied or treated badly by colleagues because of their sexual orientation.
11. In the report, Stonewall says there is extensive research showing the relevance of sexual orientation to physical and mental health, including higher levels of depression and anxiety. There is also evidence of assumptions made by health and social care workers about the sexual health and practices of LGB people. Despite this, 57% of health and social care staff (social workers, nurses, mental health workers etc) said they did not feel a person's sexual orientation was relevant to their health needs, and 10% said they did not feel confident to meet the specific needs of LGB patients and service-users.
12. For many LGB people, therefore, unequal treatment in their daily lives is an ever-present expectation.
13. The coronavirus pandemic with its lockdown and periodic restrictions has had a particularly damaging effect on LGB people. Research shows a high level of mental ill health, caused by an increase in hate crime, isolation, a reduction in peer group support, and in some cases being required to stay at home with homophobic families.<sup>11</sup>

<sup>10</sup> 'National LGBT Survey. Research report': Government Equalities Office (July 2018). The Report gives separate as well as combined statistics for LGB (in the widest sense) and trans respondents.

<sup>11</sup> 'Hidden Figures: The Impact of the Covid-19 Pandemic on LGBT Communities': LGBT Foundation (May 2020); 'The mental health and experiences of discrimination of LGBTQ+ people during the COVID-19 pandemic: Initial findings from the Queerantime Study': Kneale and Bécare: EPPI-Centre,

## **Workplace experiences**

14. According to a 2014 report by the Economic and Social Research Council,<sup>12</sup> LGB people were over twice as likely to be bullied at work compared with heterosexual colleagues, leading to significantly higher levels of physical and mental ill health. The form of bullying and discrimination was often linked to their sexuality, with many reporting examples of intrusive, sexualised and intimidating behaviour. The negative behaviours which LGB people found hardest to deal with were being asked intrusive or pushy questions about their private life; being sent intimidating text messages, emails or photos by work colleagues; and being excluded from social activities with work colleagues.
15. Presumptions about heterosexuality sometimes forced LGB people to disclose their identity. Others were assumed to be LGB because of their dress, physical features or mannerisms. Stereotyping could be used as a form of harassment and it could also affect allocation of work tasks and roles, with potential career implications. In some cases, not conforming to stereotypes led to suspicion or harassment.
16. A survey of 5,000 unionised and non-unionised workers for the TUC in early 2017<sup>13</sup> found that:
  - 39% of respondents said they had been harassed or discriminated against by a colleague, 29% by a manager and 14% by a client or patient.
  - 62% had heard homophobic or biphobic remarks or jokes directed to others at work, while 28% had had such comments directed at themselves.
  - Only half of respondents were 'out' (open about their sexuality) to everyone at work. The vast majority were out to at least some people at work, except for 20% of young people and 22% of workers on zero-hours contracts, who were not out to anyone, presumably because of job insecurity. Bisexual workers often chose not to come out, as it was easier for them not to do so, and to go along with colleagues' assumptions.
  - 20% of LGB respondents had been outed against their will.
  - Broadly half of LGB respondents said that their experience of workplace harassment or discrimination had had a negative effect on their mental health.
  - While the picture emerging was generally bleak, the research also indicated some positive experiences.
17. In a 2019 TUC survey<sup>14</sup> of 1,000 LGBT workers, around seven out of ten LGBT workers experienced at least one type of sexual harassment at work and almost one in eight LGBT women reported being seriously sexually assaulted or raped at work. Black, Asian and minority ethnic LGBT women were more likely to

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UCL Institute of Education, University College London and School of Education and Social Work, University of Sussex (August 2020).

<sup>12</sup> 'The ups and downs of LGBs workplace experiences: discrimination, bullying and harassment of lesbian, gay and bisexual employees in Britain': Hoel, Lewis and Einarsdottir. Manchester Business School and Plymouth University (2014).

<sup>13</sup> 'The Cost of Being Out at Work: LGBT+ workers' experiences of harassment and discrimination': TUC (2017).

<sup>14</sup> 'Sexual harassment of LGBT people in the workplace': TUC (April 2019).

experience sexual assault and more likely to be subjected to very serious sexual assault or rape.

## ***Hate Crime***

18. According to Stonewall's 2017 survey into homophobic hate crime,<sup>15</sup> the prevalence of hate crime towards LGBT people has increased significantly since its 2013 survey.<sup>16</sup> The increase is partly attributed to greater awareness of hate crime and efforts to improve its recording, but it also reflects a general increase in hate crime across society.
19. The survey showed that one in six LGB people (16%), had experienced a hate crime or incident due to their sexual orientation in the previous 12 months. Black, Asian and minority ethnic people were disproportionately affected.
20. Underreporting remained a major issue. Four in five people experiencing incidents did not report them to the police, often because they feared that it would not be taken seriously.
21. 7% of LGB people did not feel safe where they lived and 26% avoided particular streets because they did not feel safe there as a LGB person. Meanwhile, online abuse was endemic. 7% of LGB people had experienced homophobic or biphobic abuse directed towards them personally in the month preceding the report.
22. In the year ended March 2020, ie the year leading up to the national lockdown due to Covid-19, LGB people were more likely to have experienced crime than heterosexual people.<sup>17</sup>

## ***Coming out***

### **Openness about sexual orientation**

23. Many LGB people face a daily dilemma – whether to ‘come out’ and be open as to their sexual orientation, risking bigotry, prejudice, discrimination and the adverse judgements of others, or whether to keep their sexuality hidden and face accusations of covering-up, dishonesty and a lack of candour.
24. Workplace research<sup>18</sup> shows that although most LGB people would like to find the right time and place to ‘come out’, having established some rapport and trust, frequently it does not happen that way. People may be prompted to reveal their sexuality in reaction to homophobic remarks, or because they realise suspicions have been raised and want to keep control. Other reasons might be because they want to confide in someone about problems in their personal relationship, or they want to rebuff unwelcome advances, or they are inadvertently ‘outed’ by LGB friends. Very often, ‘coming out’ at work is the

<sup>15</sup> ‘LGBT in Britain – Hate Crime and Discrimination’: Stonewall. (2017). Where possible, we have quoted statistics for LGB respondents specifically.

<sup>16</sup> ‘Homophobic Hate Crime: The Gay British Crime Survey 2013’: Stonewall. (2013).

<sup>17</sup> ‘Crime in England and Wales: year ending March 2020’: ONS (17 July 2020).

<sup>18</sup> For example, see ‘The ups and downs of LGBs workplace experiences: discrimination, bullying and harassment of lesbian, gay and bisexual employees in Britain’: Hoel, Lewis and Einarsdottir. Manchester Business School and Plymouth University (2014).

result of colleagues asking questions and reaching their own conclusions. It is a process which happens over time.

25. Even where LGB people are happy to be open about their sexual orientation, they will find they repeatedly have to deal with the experience of 'coming out' – with the constant uncertainty as to what reception they will receive – as they meet different people and work in different places. Whether or not someone chooses to 'come out', they may feel a constant pressure to 'edit' the way they present themselves, eg whether they hold their partner's hand in public, and this can take a mental and emotional toll.
26. It is sometimes asked 'Why do they have to say they are gay, why not keep this a private personal matter?' Amongst the answers are that:
  - Heterosexual people are constantly 'outing' themselves to colleagues, eg by referring to 'my husband/ wife / girlfriend / boyfriend'. All that many LGB people want is to do the same.
  - Many say that coming out is a liberating experience which removes stress and allows full participation in the workplace etc.

### **Being 'outed' in court**

27. Judges should be alert to restrain any intrusive questioning about the sexuality of a witness or party unless it is strictly relevant to real issues in the case.
28. In certain types of case, it may be superficially relevant to know someone's sexual orientation, but actually not be necessary, eg someone can bring a case for harassment under the Equality Act 2010 based on the perpetrator's perception (whether or not correct) of their sexual orientation.
29. Many LGB people are deeply fearful of the consequences of 'coming out', or of being 'outed' in an unfamiliar, uncomfortable setting, or one they may deem unsafe. For many, the fear is of potential personal rejection by family, friends and work colleagues. Employment can be lost, families devastated and relationships damaged by unnecessary and prurient court reporting. Courts and tribunals should be aware that these factors may place additional burdens on LGB parties, witnesses and victims of crime, and should consider what measures might be available to counteract them.

### ***Family rights***

#### **Marriage and divorce**

30. Same-sex marriage has been legal in England and Wales since 13 March 2014, in Scotland since 16 December 2014 and in Northern Ireland, since 13 January 2020. Same-sex couples can marry in civil ceremonies or, where the religious organisation has opted-in, in religious ceremonies. It is not permitted to have a same-sex marriage in an Anglican Church in England and Wales (although the Scottish Episcopal Church has now relaxed the absolute ban on such ceremonies). The Church is continuing to debate its policies on these matters.
31. Civil partnership was introduced by the Civil Partnership Act 2004, which granted civil partners equal rights to opposite-sex married couples in many areas. It is still possible for same-sex couples to enter a civil partnership instead



of marriage. In addition, civil partners can convert their civil partnership into a marriage by a simple procedure. As of 31 December 2019, opposite-sex couples can also enter a civil partnership. Civil partners have access to the same tax benefits, pensions and inheritance arrangements, while enjoying similar benefits, rights and entitlements to those for married couples.<sup>19</sup>

32. If an individual wishes to take the name of their spouse or civil partner, a Deed Poll is unnecessary. As with opposite-sex marriages, the individual need only send a copy of the marriage or civil partnership certificate to the relevant offices where records need to be updated, eg DVLA, passport and benefits offices. For same-sex couples, deciding whether to change names and if so, whose name to share, may be emotionally problematic given the lack of historic social convention.
33. If they wish to end their relationship, married same-sex couples can get divorced in the same way as married opposite-sex couples. Civil partnerships can be 'dissolved', which is a similar process.
34. In July 2017, the Supreme Court ruled that same-sex married couples have the same entitlement to survivors' pensions as opposite-sex married couples.<sup>20</sup>

## Children

35. Extensive psychological research has demonstrated that children brought up by lesbian or gay parents do equally as well as those brought up by heterosexual parents in terms of emotional well-being, sexual responsibility, academic achievement and avoidance of crime. There is no body of respectable research which points convincingly to any other conclusion.<sup>21</sup>
36. Single LGBT people and same-sex couples (even if not married or in a civil partnership) can adopt.<sup>22</sup> However unmarried couples, whether gay or heterosexual, must show that they are living as partners in an enduring family relationship.<sup>23</sup>

## Attitudes towards break down of previous opposite-sex marriage

37. It sometimes happens that, having entered an opposite-sex marriage, possibly because of social pressures to marry, a man or woman subsequently identifies as LGB, and the marriage breaks down. For the reasons given above in relation to adoption it would be wrong for a judge to make any value judgements based

<sup>19</sup> The Civil Partnership (Opposite-sex Couples) Regulations 2019, SI 2019/1458; *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary)* [2018] UKSC 32.

<sup>20</sup> For detail, see *Walker v Innospec Ltd and others* [2017] UKSC 47.

<sup>21</sup> For example, see 'Marriage of Same-Sex Couples – 2006 Position Statement Canadian Psychological Association'; 'Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families - A literature review prepared for the Australian Psychological Society': Short and others; 'Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief': Manning and others (2014); 'What does the scholarly research say about the well-being of children with gay or lesbian parents?': What we know, Cornell University (updated Dec 2017); 'There is no harm caused by same-sex parenting. Studies suggesting otherwise are skewed': Hewitt. *Guardian* (12 September 2017); 'School Outcomes of Children Raised by Same-Sex Parents: Evidence from Administrative Panel Data': Mazreka and others (28 September 2020).

<sup>22</sup> Introduced by the Adoption and Children Act 2002, which came into force on 30 December 2005.

<sup>23</sup> Adoption and Children Act 2002, section 144(4)(b).

on the sexual orientation of the parties. The heterosexual party may feel superior, or that the fault or blame lies with the LGB party by virtue of their sexual orientation, but such notions are misplaced.

### ***LGB asylum seekers***

38. In 72 countries, same-sex relationships are illegal and can lead to lengthy prison sentences, including 12 where the death penalty applies. There can be persecution even if the law is not enforced. In some other countries, although homosexuality is not technically illegal, levels of persecution and discrimination are high.<sup>24</sup>
39. People who face persecution on the basis of their real or perceived sexual orientation can claim asylum in Britain.
40. One difficulty such individuals may face is if there is insufficient reliable country-specific information on persecution of LGB people.<sup>25</sup> This can be because certain human rights groups see the subject as taboo or fear persecution themselves if they document the issue. In some countries deemed safe by the Home Office, LGB people may still suffer persecution.
41. In addition, applicants for asylum on this basis may have difficulty in proving their sexual orientation. In its 2008 report 'Fit for purpose yet?', the Independent Asylum Commission discussed particular credibility problems faced by LGB people, eg:
  - They may have delayed claiming asylum on this basis until late in the day because:
    - They were initially unaware that persecution due to sexual orientation was a ground for seeking asylum.
    - They found it difficult to 'come out' to immigration officials and interpreters, especially those from the same community.
    - While held in detention, they may have hidden their sexual orientation for fear of abuse.<sup>26</sup>
  - In some cases, interpreters have not correctly identified the gender of people being referred to, eg in one case, when a female asylum-seeker talked about her girlfriend, the interpreter persistently referred to the girlfriend as 'he'.<sup>27</sup>
  - It can be difficult (especially when in detention) to obtain witness statements from supporting witnesses, who themselves fear persecution for their association with a LGB person.<sup>28</sup>
42. A report by the Independent Chief Inspector of Borders and Immigration in 2014,<sup>29</sup> expressed concern that a proportion of detention interviews revealed

<sup>24</sup> 'Map of Countries that criminalise LGBT people': Human Dignity Trust.

<sup>25</sup> 'Fit for purpose yet?': Independent Asylum Commission (2008).

<sup>26</sup> 'No safe refuge – Experiences of LGBT asylum seekers in detention': Stonewall (2016).

<sup>27</sup> 'No safe refuge – Experiences of LGBT asylum seekers in detention': Stonewall (2016).

<sup>28</sup> 'No safe refuge – Experiences of LGBT asylum seekers in detention': Stonewall (2016).

<sup>29</sup> 'An investigation into the Home Office's handling of Asylum Claims made on the grounds of Sexual Orientation': Independent Chief Inspector of Borders and Immigration. (2014).

underlying stereotyping. It cautioned against applying misleading stereotypes as to appearance or way of life, eg:

- Assuming that lesbians project a masculine appearance, so a woman who looks 'too feminine' cannot be a lesbian.
  - Assuming that gay men will dress flamboyantly or in a feminine manner.
  - Assuming that a LGB person would attend gay bars or rallies, or would 'reach out' to others in the LGB community. Such assumptions might impact on those coming to terms with their sexuality or those who had decided not to express it openly in the UK eg for religious reasons or those who had no inclination to attend bars or participate in large organised events.
43. Other, often culturally loaded, misconceptions might be that someone cannot be LGB because:
- They keep in touch with their grandchildren.
  - They do not have any anxiety or inner conflict about being gay.
  - They do not experience a sophisticated internal conflict with their religious beliefs.<sup>30</sup>
  - They have not had short-term relationships.
  - They cannot describe their emotional journey to realising their identity. Ability to identify these milestones is a very Western concept. LGB people from countries which repress expression of different forms of sexual orientation, or which have a collective social orientation, are unlikely to have seen matters that way.<sup>31</sup>
44. People are different. Like their heterosexual counterparts, not every LGB person likes socialising, pubs, dating apps, social media etc. Some will be introverted and shy and may struggle to make friends and/or meet partners. There will be differences between LGB women and men, those who are transgender or non-binary, and those who are of differing cultures and religions.
45. It is important for judges not to make stereotypical assumptions or receive evidence which may be similarly tainted. Like any other type of person, some LGB people may conform to stereotypes and others may not, and may well find such stereotypes offensive. Some people are very private, some are not. It is important to treat every person individually.
46. There is substantial evidence that LGB asylum seekers are particularly vulnerable while held in detention, experiencing discrimination, harassment and violence from other detainees and members of staff.<sup>32</sup> Following detention, there are often long-lasting effects on mental health.

<sup>30</sup> 'Still Falling Short – The standard of Home Office decision-making in asylum claims based on sexual orientation and gender identity': UK Lesbian & Gay Immigration Group (July 2018).

<sup>31</sup> 'Still Falling Short – The standard of Home Office decision-making in asylum claims based on sexual orientation and gender identity': UK Lesbian & Gay Immigration Group (July 2018).

<sup>32</sup> 'No safe refuge – Experiences of LGBT asylum seekers in detention': Stonewall (2016).

47. For more detail on the mental vulnerability of asylum seekers generally and their particular needs in court, see '[Migrants, refugees and asylum seekers](#)' in chapter 8.<sup>33</sup>

### ***HIV positive people and AIDS***

48. It is wrong to assume that having AIDS or being HIV positive is indicative of 'homosexual activity'. Worldwide, heterosexual activity is responsible for most new HIV infections. Intravenous drug abuse is another very common cause. According to the Terrence Higgins Trust, of 4,139 people diagnosed with HIV in the UK in 2019, only 41% were gay or bisexual men.<sup>34</sup> HIV treatment can prevent a person developing the symptoms of AIDS indefinitely. Such treatment is available in the UK to all HIV positive people. Without such treatment the symptoms of AIDS are likely to develop. Pre- and Post Exposure Prophylaxis ('PrEP/PEP') medications are now widely available in the UK which have an established if varying record of success preventing the contraction and/or development of HIV/AIDS.
49. The pace of medical progress has dramatically changed and lengthened the lives of HIV positive people in those countries able to afford the cost of treatment. This means that old ideas need to be re-thought in the light of new medical facts. Unfortunately, the fear and stigmatisation resulting from an out-of-date understanding of the issues can be very damaging to HIV positive people.
50. For more detail on HIV and AIDS, and associated misconceptions, see '[HIV and AIDS](#)' in the Disability Glossary.

### ***LGB people and crime***

51. From 1967, in England and Wales sex between adult men over 21 in private ceased being illegal (1980 in Scotland and 1982 in Northern Ireland). In 1994, the age of consent was reduced to 18, and in 2001, to 16. The Sexual Offences Act 2003 repealed the offences of gross indecency and buggery from May 2004. Lesbian and bisexual women have never been specifically subjected to the criminal law, although there were some prosecutions for indecent assault in the past.
52. Since 1 October 2012, people in England and Wales with convictions and cautions for acts which are no longer unlawful, can apply to the Home Office to have these offences removed from their criminal records.
53. There is no evidence that being gay implies a propensity to commit any particular type of crime. An extremely offensive perception links being gay with paedophilia. The empirical research does not show that gay or bisexual men are any more likely than heterosexual men to molest children. This is not to argue that homosexual and bisexual men never molest children. But there is no scientific basis for asserting that they are more likely than heterosexual men to

<sup>33</sup> With thanks to Allan Briddock, Counsel, for his input into this section on LGB Asylum Seekers.

<sup>34</sup> 'HIV statistics': Terrence Higgins Trust.

do so. Indeed, many child molesters cannot be characterized as having an adult sexual orientation at all; they are fixated on children.<sup>35</sup>

### ***Acceptable terminology***

54. It will rarely be necessary to ask about the sexual orientation of a party or witness. Where it is strictly relevant to the issues in the case, some care needs to be taken to ensure that appropriate terms are used. Using acceptable and up-to-date terminology avoids offending the relevant party or witness and gives confidence that they will receive a fair hearing.
55. Different people prefer different terms, and the person should always be asked how they would like to be referred to if it is unclear.
56. In general, the following terminology is considered acceptable:
  - A gay man. The word 'homosexual' sounds old-fashioned and it carries echoes of discriminatory attitudes and practices in the past.
  - A lesbian or a gay woman. Some lesbians are very happy to be referred to as 'gay'. Others do not like to be called 'gay' because they have a distinct identity from gay men.
  - A bisexual person.
  - Collectively, 'Lesbian, gay and bisexual people' (or 'LGB' for short). Although the issue of sexual orientation is an entirely different issue from that of gender identity, the wider 'LGBT' or 'LGBT+' formulation is now commonly adopted to emphasise the diversity of sexual and gender identity based cultures. The Equal Treatment Bench Book uses the term 'LGB' in this chapter as we are addressing the issues specific to sexual orientation. There is a separate chapter (chapter 12) concerned primarily with trans identity.
57. The following terms are not acceptable:
  - Gays / a gay.
  - Homosexuals / a homosexual.
  - Dyke; queer. Such terms may be used by gay people themselves, but should not be used by judges or (generally) by heterosexual people.
58. Ideas about acceptable language are changing rapidly, and the term 'queer' is rapidly gaining accepted use as an umbrella term for those who are not narrowly heterosexual and not cisgender (ie identifying with their birth gender). Stonewall advises that the term 'queer' has been reclaimed by young people in particular who do not identify with traditional categories around sexual orientation and/or gender identity. It has also become associated with various arts and cultural movements around the world, and it has entered academic discourse. Nevertheless, it is still considered derogatory by some people in the LGBT communities, and it is therefore to be avoided by judges.

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<sup>35</sup> This conclusion from extensive research summarised in 'Facts about Homosexuality and Child Molestation': Prof. G. Herek.

59. Judges may hear the term ‘questioning’. This refers to the questioning of one’s gender, sexual orientation or gender identity. ‘Q’ can sometimes be added to the term LGBT (ie ‘LGBTQ’) to denote queer or questioning. Others may use the term ‘LGBT+’ or ‘LGBTIQ’ (the ‘I’ standing for ‘intersex’) to represent the full range of identities. Finally, LGBTQIA adds ‘A’ for ‘asexual’. Some people say that the ‘A’ can also stand for (heterosexual/cisgender) ‘allies’, but that is not fully accepted.

### ***The Equality Act 2010***

60. The Equality Act 2010 prohibits discrimination in relation to sexual orientation. There have been a number of cases where gay discrimination for religious reasons in the public sphere has been held unlawful. See the Equality Act 2010 appendix for an [overview](#) of the Equality Act 2010 and for more detail of the application of the Equality Act 2010 to [sexual orientation](#).

### ***References and resources***

Click on the references below to go to the source referred to. Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link. References are listed in alphabetical order (discounting the first ‘the’ or ‘a’).

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## Chapter 11 Social Exclusion and Poverty

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## Overview

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### Why this chapter matters

A disproportionate number of those drawn into the justice system are from socially excluded backgrounds, but judges rarely are. There will be understanding gaps to be bridged on both sides.

### The concept of social exclusion

Roughly 14 million people in the UK are living in poverty including four million children. Many cannot afford adequate housing and will struggle to meet unexpected expenses and/or engage in common social activities such as visiting family or friends in hospital, celebrating important events such as family birthdays, and having a hobby or leisure activity.

There is a regional variation in levels of deprivation across England and Wales. Certain groups are also disproportionately affected. People in black, Asian and minority ethnic families are two to three times more likely to be in persistent poverty than people in white families. 48% of children in lone parent households are estimated to be in poverty.

‘Social exclusion’ refers not only to poverty, but to economic or social disadvantage, including an inability to participate in key activities in society such as paid or unpaid work, consumption (ie purchasing power), social interaction and political engagement.

It is caused by complex chains of cause and effect including economic trends, family background, peer group effects, individual personality and health issues. There is a growing association between Adverse Childhood Experiences (ACEs) and social exclusion. In addition, some people may be discriminated against because of gender, ethnicity, religion, language, disability or sexual orientation.

### Low earnings and income

The statutory national minimum wage is set at an hourly rate lower than the independently calculated living wage. Low as these rates are, there is considerable evidence of some employers paying less.

There is an increased earnings gap. Even where the minimum wage is paid, pay has taken the brunt of the 2008 recession.

Despite the impression given in some press coverage, subsistence benefit rates are low. In addition, delayed payments or reclaimed overpayments of benefit create severe financial pressures.

Reliance on benefits creates pressures especially when moving into and out of employment. The so-called ‘poverty traps’ make the move into work difficult.

Many people struggle to open bank accounts or secure loans at reasonable interest.

Life on a low income for extended periods is hard. Attempting to 'make ends meet' through a combination of the benefit system and low paid or informal work is challenging. Parents often have 'to go without', in order to buy basic food and clothing for their children.

### **Work insecurity amongst the low paid**

Many people on low incomes do not receive the full range of employment benefits even if they are entitled to them.

1 in 5 workers work in conditions where they could lose their jobs suddenly. Zero-hour contracts, where workers have no guarantee of any hours, are common.

Lack of security in work and low pay creates problems maintaining income while dealing with emergencies whether relating to children, illness or a court or tribunal hearing.

### **Housing**

Over the past 20 years, there has been a large expansion in private renting with high rents eating increasingly heavily into renters' earnings. Nearly half of private renters experience stress and anxiety as a result of housing concerns.

### **Health**

There are health inequalities associated with deprivation, affecting both physical disability and mental ill health (see chapters 3 and 4).

### **Social exclusion and Covid-19**

Research consistently indicates that the pandemic has impacted disproportionately on those in deepest poverty in terms of employment, education and health effects.

### **Family**

Work problems or unemployment, financial pressures and lack of social support networks, all aspects of social exclusion, are significant factors in family breakdown. The child support system may be an additional source of difficulty.

### **'Looked after' children**

Children who are or were in care are now referred to as 'looked after' children. Entry into the care system will have followed problems or trauma within the family unit. Such difficult early issues may resonate throughout life, with effects on educational attainment, mental ill health and attitudes to authority figures.

### **Lack of choice and control**

Socially excluded people may have recurrent contact with state bureaucracy, and the elements of choice and personal control taken for granted by people with resources are missing.

Some of these relationships with the state can be positive, but there is a fear factor for many. This may affect views on authority figures, including judges.

Socially excluded people are used to having important decisions about their lives made by others. This lack of personal autonomy is a feature of social exclusion that

those outside it may struggle to understand. It may lead to a lack of independence of thought which may be construed as apathy or a lack of ability, but this needs to be looked at in context.

A failure to attend a hearing, for example, may be due to a chaotic lifestyle, but it may also be linked to the fact that many important decisions in that person's life, such as entitlement to benefit or contact with children through Social Services, are made without their active input.

### **Poor educational attainment and literacy**

Low self-esteem arising from lack of educational qualifications and low literacy levels has a major impact on the choice, effectiveness and persistence of people's behaviours across a range of settings and is a particular problem amongst many socially excluded people.

### **Difficulties which the court process may pose**

A disproportionate number of those appearing before courts and tribunals are from socially excluded backgrounds. This may affect:

- Ability to access professional advice.
- Presentation or non-attendance.
- Concerns about time off hourly paid work / collection or care of children.
- Anxiety about what to wear.
- Ability to understand evidence or procedures.
- Response to authority figures including the judge.
- Response to cross-examination or questions from the bench.
- Ability to access technology, if attending remotely.
- Ability to lodge paperwork digitally, if attending remotely.
- Ability to access a suitable private place to give evidence, if attending remotely.

### **Help with the court process**

To help redress the inequality, procedural fairness is key. It is important to:

- Put people at ease.
- Adopt simple language and avoid jargon.
- Read out and explain documents.
- Check understanding regularly by asking individuals to feed back what they have understood.
- Consider practical matters such as timing of hearings, so as to assist with work or school commitments.
- In remote hearings, check that the participant can hear everyone and understand who is in attendance.

- Also check that the person has available any relevant documentation, and (where a litigant in person) that he or she has not sent anything in to HMCTS shortly before the hearing date.
- Check if the person is expecting any interruptions and provide reassurance that a brief break can be arranged.
- During case preparation, write in simple English and if necessary, hold more face-to-face case management hearings.

### **Literacy and the court process**

If a litigant raises literacy difficulties or if the judge suspects these, the matter should be dealt with sensitively and in a low-key manner.

Various steps can be taken to assist the individual, including reading out passages in documents before asking a question, and allowing them to provide a recorded witness statement where appropriate.

### **Social exclusion and remote hearings**

Usual considerations apply, but it is worth bearing in mind these factors:

- Do not assume access to technology or a quiet space at home.
- Take particular care to ensure understanding and participation.
- Make no assumptions about a party or witness from their home background or dress.

### **Criminal justice: sentencing**

Sentences, although necessary and justified as to punishment, deterrence or to reflect severity, may create or exacerbate social exclusion for offenders, eg:

- Custodial sentences can cause termination of tenancies, difficulties obtaining future employment, detachment from positive social networks, and adverse effects on children.
- Community orders can be difficult to comply with for people with chaotic lives and can interfere with employment.
- Fines can add to debt and adversely impact on those supported by the individual.

## ***Why this chapter matters***

1. A disproportionate number of those drawn into the justice system are from socially excluded backgrounds, but judges rarely are. There will be understanding gaps to be bridged on both sides. For a judge to play his or her part it is necessary to have some knowledge of how processes of social exclusion operate.
2. The matters set out in this chapter do not suggest that people at risk of social exclusion should be treated more favourably than others, but that, in relation to procedural aspects in all cases, and, where legally possible in relation to discretionary matters, judges should take into account the likely impact on an individual's life chances and the effect upon any dependants both immediately and in the longer term.

## ***The concept of social exclusion***

### **The concept**

3. There is no legal definition of social exclusion; it refers to a situation of economic or social disadvantage that includes, but is broader than, concepts like poverty or deprivation. Most users of the term incorporate an inability to participate in key activities in society, which might include:
  - Production – being able to contribute to society through paid or unpaid work.
  - Consumption – being able to purchase goods and services which are customary in society.
  - Social interaction – having access to emotional support, being able to socialise with friends, having avenues for cultural expression.
  - Political engagement – experiencing a degree of individual autonomy and understanding the democratic process as a means of having a say in local or national decision making.
4. Research indicates more than one in five people in the UK, roughly 14 million people, are living in poverty.<sup>1</sup> This includes four million children. Many cannot afford adequate housing and will struggle to meet unexpected expenses and/or engage in common social activities such as visiting family or friends in hospital, celebrating important events such as family birthdays, and having a hobby or leisure activity. A further 2.5 million people are only 10% above the poverty line and live in precarious and unpredictable economic circumstances.
5. In extreme cases, individuals may be victims of modern slavery. See [chapter 7](#) for more details.

### **Causes of social exclusion**

6. Complex chains of cause and effect lead to social exclusion. Experiencing exclusion from one cause is associated with an increased likelihood of

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<sup>1</sup> 'UK Poverty 2019/2020': Joseph Rowntree Foundation; 'Measuring Poverty 2020': Social Metrics Commission (July 2020).

experiencing exclusion from other causes, either simultaneously or at some point in the future. Risk factors include:

- A disadvantaged childhood.
  - Having low or no educational qualifications.
  - Being in poor health or having a disability.
  - Living on a low income.
  - Having inadequate housing.
  - Being a member of a group which is discriminated against.
  - Suffering from an adverse childhood experience ('ACE') in childhood.
7. There is no evidence of a fixed 'stock' of socially excluded individuals who are cut off from mainstream society over the long term (sometimes referred to as an 'underclass'). Rather, social exclusion is a matter of degree, and individuals move from being more to less excluded, and vice versa, over time.
  8. An aspect of people's exclusion may be due to, or exacerbated by, discrimination because of gender, ethnicity, religion, language, disability or sexual orientation. These issues are covered elsewhere in this book.

### **How poverty is measured**

9. There is no single measure of poverty.<sup>2</sup> Historically many commentators such as the Joseph Rowntree Foundation ('JRF') have measured poverty by looking at an individual's income after housing costs and comparing it with median income. In September 2018, the Social Metrics Commission ('SMC') introduced a comprehensive new measure which looks at families within the same household rather than individuals (since families tend to share resources), and takes into account all sources of income after tax (whether earnings or benefits), liquid assets, inescapable family specific recurring costs (eg housing, childcare) and the inescapable extra costs of disability.
10. The SMC sets the poverty line as any family with 55% or less of the available resources of a median UK family.<sup>3</sup> This brings the number of people it estimates as in poverty into line with the number given under government estimates. The SMC definition is supported by the JRF and has now been adopted by the Department for Work and Pensions ('DWP') as part of its approach towards statistical analysis.
11. In light of the different interpretations of poverty, the statistics in this chapter may vary dependent upon which definition of poverty has been adopted. Both the JRF and the SMC are in agreement as to the prevalence of poverty, its effects and causes. As such any divergence in statistics does not alter the core conclusions.<sup>4</sup>

<sup>2</sup> See, for example, the Joseph Rowntree Foundation discussion on its website, 'What is Poverty'. The Full Fact website has a useful guide to the various approaches in 'Poverty in the UK: a guide to the facts and figures: (27 September 2019).

<sup>3</sup> 'Measuring Poverty 2020': Social Metrics Commission (July 2020).

<sup>4</sup> JRF has actively supported the SMC definition, but has not at the time of writing imported it into its own statistics.

## Deep and persistent poverty

12. 7% of the population (4.5 million people) are assessed by the SMC as being in 'persistent poverty',<sup>5</sup> which is defined as having been in poverty in at least two out of the three preceding years including at present.
13. The SMC has also introduced concepts of 'deep poverty' and 'deep persistent poverty' which are measures to gauge the depth of poverty for specific families. Deep poverty is defined as being more than 50% below the poverty line and deep persistent poverty describes someone who has been in deep poverty for two out of the past three years. An estimated 2.4 million people are in deep and persistent poverty according to the SMC report published in July 2020.<sup>6</sup>
14. The JRF says that even before the Covid-19 pandemic, destitution was rapidly growing in scale and intensity. Defining destitution as lack of access to essentials (shelter, food, heating, lighting, clothing and basic toiletries) and extremely low or no income, the JRC says over one million UK households comprising 2.4 million people (including 550,000 children) experienced destitution at some point in 2019.<sup>7</sup>

## Variation across England and Wales

15. Wales has had a consistently high rate of poverty over the past 20 years, currently 23%.<sup>8</sup>
16. The drivers of rising poverty across Wales are reductions in working-age benefits, rising living costs (particularly for housing) and poor opportunities for work. The poverty rate for disabled people in Wales is the highest in the UK, with 39% of disabled people in poverty compared with 22% of non-disabled people.<sup>9</sup>
17. In England, post-industrial areas and coastal towns are the most deprived and therefore socially excluded areas having regard to the seven indices that constitute the definition of social deprivation: income, employment, education, health, crime and barriers to housing and living environment.<sup>10</sup>
18. London has 29% of its population living in poverty, which is compounded by high levels of private rent. 40% of people living in London are in deep poverty, which is above the UK average of 31%.<sup>11</sup>
19. London's rates of poverty are followed by the North East (26%), Yorkshire and Humber (24%) and the West Midlands (24%). The North East has 31% unemployment amongst working age adults – the highest rate in the country.<sup>12</sup>
20. The East, South East and the South West of England have the lowest rates of poverty, standing at 18%, but there are some English regions disproportionately

<sup>5</sup> 'UK Poverty 2018': Joseph Rowntree Foundation.

<sup>6</sup> 'Measuring Poverty 2020': Social Metrics Commission (July 2020).

<sup>7</sup> 'Destitution in the UK 2020' Joseph Rowntree Foundation (Dec 2020).

<sup>8</sup> SMC statistics July 2020; 'Poverty in Wales 2020': JRF Briefing.

<sup>9</sup> 'Poverty in Wales 2018': JRF Briefing.

<sup>10</sup> 'The English Indices of Poverty 2019': Ministry of Housing, Communities and Local Government (Sept 2019).

<sup>11</sup> 'UK Poverty 2019/20': Joseph Rowntree Foundation.

<sup>12</sup> 'UK Poverty 2019/20': Joseph Rowntree Foundation.



affected by poverty, eg coastal resorts such as Jaywick near Clacton-on-Sea and Blackpool.<sup>13</sup>

21. Insofar as multiple indices of deprivation are concerned Middlesbrough, Liverpool, Knowsley, Kingston upon Hull and Manchester are the local authorities with the highest proportions of neighbourhoods in poverty in England.
22. All local authorities have experienced an increase in indices of deprivation since 2004 albeit London authorities have seen a general decrease in deprivation between 2015 and 2019.<sup>14</sup>

### **Poverty amongst pensioners**

23. There was a dramatic reduction in poverty for pensioners between 1997/98 – 2012/13, driven by increasing income from private pensions and increases in benefits. Since then, poverty has gradually increased amongst some pension-aged people. The Joseph Rowntree Foundation estimated that by 2016/17, 16% of pensioners lived in poverty, with worrying underlying trends.<sup>15</sup>
24. Over the last 20 years, there has been a large increase in the proportion of people retiring with a private pension, very often with another adult in the family also receiving a private pension. But this has not been the case to the same degree for those on low incomes. Poverty rates among pensioners who own their own homes are low and have changed very little over the last decade. The rise in pensioner poverty has been primarily driven by increases amongst those who rent.<sup>16</sup>
25. The state retirement pension is subject to a ‘triple-lock’ guarantee whereby the amount paid is the higher of three different scales. There has been speculation that this triple-lock is vulnerable in a post-Covid environment which will exacerbate poverty levels within this group.

### **Poverty amongst black, Asian and minority ethnic communities**

26. 39% of people in families living with a head of household who is Asian / Asian British are in poverty and 46% of people in families where the household head is Black / African / Caribbean or Black British are in poverty. By contrast, 19% of people in families living with a white head of household are in poverty. People in black, Asian and minority ethnic families are two to three times as likely to be in persistent poverty as people in white families. There is more detail about social and economic inequality in [chapter 8](#).<sup>17</sup>

### **Child poverty**

27. Child poverty has risen since 2011, the 2008 recession and the resulting budget cuts having reversed progress since 1997. Poverty, housing and health during the first years of a child’s life affect his or her development just as much as

<sup>13</sup> ‘Measuring Poverty 2020’: Social Metrics Commission (July 2020).

<sup>14</sup> ‘Poverty in Wales 2018’: JRF Briefing.

<sup>15</sup> ‘UK Poverty 2018’: Joseph Rowntree Foundation.

<sup>16</sup> ‘UK Poverty 2018’: Joseph Rowntree Foundation.

<sup>17</sup> ‘Measuring Poverty 2020’: Social Metrics Commission (July 2020).

education.<sup>18</sup> 26% of children from working families are now judged to be in poverty.<sup>19</sup>

28. Housing costs have grown much faster for less well-off families, as they have faced rising private rents and cannot afford to buy.<sup>20</sup>
29. For working-age families, poverty rates are higher in every area of the UK for people in lone parent families compared with couple families with children. As many as 48% of children in lone parent households are estimated to be in poverty. This is driven by disproportionate concentration in low-paid work and the high cost of housing when the same space is needed as for a couple family. Lone parents feel insecurity across many aspects of their lives and speak of 'dehumanising' work, feeling trapped 'in a never-ending circle' by the benefits system and feeling 'stuck' in unaffordable or insecure housing with no alternative.<sup>21</sup>
30. There is a growing association between Adverse Childhood Experiences (ACEs) and social exclusion (for more information see [chapter 4](#)). ACEs are increasingly the focus of public health campaigns, eg by Public Health Wales.<sup>22</sup> Children who suffer ACEs (domestic violence being one such example) are at risk of poorer health outcomes, which in turn produces social and economic gaps. People with ACEs are more likely to under-perform in school, develop high-risk behaviours, and be on lower incomes. Deprivation, health, and social factors are closely related and perpetuate an inter-generational cycle of adversity.<sup>23</sup>

## ***Low earnings and income***

### **The statutory minimum wage**

31. There is a statutory minimum wage set by the government for different age groups, based on recommendations by the Low Pay Commission. Many commentators believe the rate is too low.
32. The 'real' living wage, set by the Living Wage Foundation, is a voluntary accreditation scheme for employers. Created before the adoption of the term 'living wage' into the statutory minimum wage legislation in April 2016, the real living wage is calculated according to the cost of living based on a basket of household goods and services. It is currently calculated by the Resolution Foundation.
33. The statutory minimum wage rates and the real Living Wage rates go up annually.
34. For 2019/20, the real 'UK living wage' (outside London) was assessed at £9.30/hour, and the 'London living wage' (including Greater London) at

<sup>18</sup> 'Time for change: An assessment of government policies on social mobility 1997 to 2017': Social Mobility Commission (2017).

<sup>19</sup> Social Metrics Commission.

<sup>20</sup> 'UK Poverty 2019/20': Joseph Rowntree Foundation.

<sup>21</sup> 'UK Poverty 2018' and 'UK Poverty 2019/20': Joseph Rowntree Foundation.

<sup>22</sup> 'Responding to Adverse Child Experiences': Public Health Wales and Bangor Institute for Health and Medical Research (2019).

<sup>23</sup> 'ACEs FAQs': Gloucestershire Healthy Living and Learning.

£10.75/hour.<sup>24</sup> This can be compared with the hourly statutory minimum wage in the year starting April 2020, ie for those aged 25 above, £8.72 (this being the statutory living wage); for those aged 21 – 24, £8.20; for those aged 18 – 20, £6.45; for those under 18, £4.55; and for apprentices, £4.15.

35. Low as these rates are, there is considerable evidence of some employers paying less.<sup>25</sup> In April 2019, 425,000 employees aged 16+ were known to be paid below national minimum wage guidelines.<sup>26</sup>

## Low pay

36. The number of people falling below the minimum standards of the day has doubled since 1983.<sup>27</sup> The income and wealth divide has also become more acute. Between 1997 and 2017 the bottom fifth of households saw their incomes increase by just over £10 per week, compared to a rise of just over £300 per week for the top fifth.<sup>28</sup>
37. Whilst the minimum wage has largely eliminated extreme low pay, earnings took the brunt of the impact of the 2008 recession. In July 2019, despite recent growth, earnings in real terms were still less than prior to the 2008 recession.<sup>29</sup> A survey by the TUC in August 2017, when earnings were less than in 2019, highlighted the impact of low pay:<sup>30</sup>
- 1 in 5 people in the UK were on low pay and reliant on in-work benefits.
  - 1 in 8 workers were skipping meals to make ends meet.
  - Close to half of workers were worried about meeting basic household expenses, such as food, transport and energy.
  - 1 in 6 workers had left the heating off when it was cold to save on energy bills.
  - The same number had pawned something in the last year because they were short of money.
  - 1 in 4 said they would be unable to pay an unexpected £500 bill.
38. Of the 14.4 million people living in poverty in the UK in 2018/19, 63.2% were households who were in some form of employment and 20% were households in full-time employment.<sup>31</sup>

<sup>24</sup> 'What is the real living wage?': Living Wage Foundation.

<sup>25</sup> Employers used to be 'named and shamed' on regular BEIS press releases published on GOV.UK, but during 2019, the scheme was suspended.

<sup>26</sup> 'Low and High Pay in the UK: 2019': ONS.

<sup>27</sup> 1983 survey Breadline Britain.

<sup>28</sup> Time for change: An assessment of government policies on social mobility 1997 to 2017': Social Mobility Commission (2017). The following statistics are also taken from a GQR poll of working individuals for the TUC.

<sup>29</sup> 'Average weekly earnings in Great Britain: July 2019': ONS.

<sup>30</sup> '1 in 8 workers are skipping meals to make ends meet' TUC mega poll (7 September 2017).

<sup>31</sup> 'Measuring Poverty 2020': Social Metrics Commission (July 2020) – 2018/19 being the latest statistics available in that report.

39. Nearly 2.5 million people were less than 10% above the poverty line, and vulnerable to small changes in their financial situation which could push them into poverty.<sup>32</sup>
40. Financial exclusion hits hardest when there is a shortfall of income to meet one-off costs for emergencies. This affects those on the poverty line and those only just above it. The 2013 report 'The impoverishment of the UK' highlighted the difficulties that unexpected expenses might have on a given household.<sup>33</sup> At that time (and the more recent reports by the Social Metrics Commission and Joseph Rowntree Foundation do not indicate any improvement):
  - 16.5 million people could not pay unexpected costs of £500.
  - 14 million could not save £20 per month for 'rainy days'.
  - 12 million could not afford household insurance.
  - Many struggled to open bank accounts or secure loans at reasonable interest. Although pay-day loans are better regulated than previously, the new difficulties obtaining them may result in the use of loan sharks.
  - Fuel costs including heat and light had risen by 234% since 2000<sup>34</sup> and other elements that had risen faster than overall average costs, childcare, social rents, public transport, were particularly applicable to those on low incomes.

## Benefit Income

41. Despite the impression given in some press coverage, subsistence benefit rates are low. As at October 2020, weekly Jobseeker's Allowance was up to £74.35 (up to £58.90 if aged under 25). Employment and Support Allowance (paid to those not able to work through ill health) was up to £74.35 per week if able to get back into work in the future (or up to £113.55 otherwise). Universal Credit, which is gradually replacing these individual benefits provided a standard monthly allowance (which might include housing costs) to a single person of £323.22 (£256.77 if aged under 25) prior to the Covid-19 pandemic. During the pandemic, these rates were immediately increased to £409.89 (£342.72 if aged under 25). There may be extra sums paid for housing costs and if the individual cannot work because of a disability.<sup>35</sup>
42. Those in receipt of subsistence benefits will not be funding basic housing costs. The spare room subsidy (often referred to as the bedroom tax) limits the amount of housing benefit payable and mortgage interest payments are also highly restricted.
43. Council tax benefit used to exist for those on low income, eg for many pensioners. However, under recent welfare reforms, many are expected to contribute to this or fully cover it, although it is something of a postcode lottery.<sup>36</sup>

<sup>32</sup> 'Measuring Poverty 2020': Social Metrics Commission (July 2020).

<sup>33</sup> 'The Impoverishment of the UK': PSE UK (2013).

<sup>34</sup> 'The Impoverishment of the UK': PSE UK (2013).

<sup>35</sup> Figures taken from GOV.UK website. This is only a general overview.

<sup>36</sup> GOV.UK gives a generic description of how to apply for a Council tax reduction. See also 'Families on the brink: welfare reform in London': CPAG (June 2014).

44. The benefit cap limits household benefit income to £20,000 p.a. (£23,000 p.a. in London) for couples or for single parents living with their children. This is likely to affect about 80,000 households, of which 72% are single parent families and 79% have at least one child under five.<sup>37</sup>

### **Life on low income**

45. Life on a low income for extended periods is hard. Attempting to 'make ends meet' through a combination of the benefit system and low paid or informal work is challenging. Budgeting for clothing and footwear, for children in particular, is a pressure, and parents may deprive themselves to find enough money.
46. Reliance on benefits creates pressures especially when moving into and out of employment. The so-called 'poverty traps' make the move into work difficult.
47. Delayed payments or overpayments of benefit (ie those not perceived as overpayments by the claimant or Department at the time, but later claimed back) create severe financial pressures. Delayed payments appear to have been a particular issue with Universal Credit. Some 21% of new claimants received their full first payment late, according to a report from the National Audit Office, which also found claimants have had to wait an average of four weeks on top of the mandatory five-week waiting period for their first payment.<sup>38</sup>

### ***Work insecurity amongst the low paid***

48. Many people on low incomes, whether in the formal or informal labour market, are paid by the hour and do not receive the full range of employment benefits even if they are entitled to them.
49. Even before the pandemic, one in five workers worked in conditions where they could lose their jobs suddenly.<sup>39</sup> Zero-hour contracts, where workers have no guarantee of any hours, are common, particularly in low paid sectors such as care and hospitality.
50. The rise of the so-called 'gig economy' has led to an increase in insecure (sometimes described as 'flexible') patterns of work, where people are (often wrongly) treated as self-employed, rather than having the status of 'workers'. This deprives them of basic employment rights such as paid holiday, entitlement to the national minimum wage, statutory sick pay or maternity/paternity leave.<sup>40</sup> Instances have been reported where couriers have been required to pay money to their 'employer' if they are off sick.
51. Lack of security in work and low pay creates problems in maintaining income while dealing with emergencies whether relating to children, illness or a court or tribunal hearing.

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<sup>37</sup> DWP statistics: Benefit Cap: number of households capped to February 2017. The Cap remains the same as at October 2020 – see GOV.UK website.

<sup>38</sup> 'Rolling out Universal Credit': National Audit Office (June 2018).

<sup>39</sup> 'Insecure Work': TUC (8 August 2020).

<sup>40</sup> Cases on this have included, *Uber BV and others v Aslam and others* [2021] UKSC 5, *Addison Lee Ltd v Lange* UKEAT/0037/18 and *Dewhurst v CitySprint Ltd* ET/220251/2016.

52. Although unemployment is associated with poor health, and good quality jobs can bring health benefits, there is evidence that transitioning from unemployment to poor quality jobs increases stress-related ill health.<sup>41</sup>

## **Housing**

53. There has been a large increase in the private renting of homes compared with home ownership over the past 20 years (though more so in England than Wales). At the same time, private rents have gone up enormously, taking up a large proportion of renters' pay. Immediately before the coronavirus lockdown, private sector rents in England were as high as they had ever been.<sup>42</sup>
54. Research by Shelter in January 2020 showed that in the previous year, nearly half of all private renters had experienced stress and anxiety as a direct result of housing concerns. 24% said it had made them feel physically sick or ill and had negatively affected their eating; a third said it had kept them awake at night and that it had left them feeling hopeless.<sup>43</sup>
55. Concealed households have become more common particularly in less well-off households. A concealed household is where an adult (aged 20-34) is living either with parents or grandparents. There are estimated to be 3.8 million adults living in concealed households, over half of whom are from the bottom 20% in terms of income. This increases the likelihood of overcrowding which in turn impacts upon educational prospects for others in the household as well as contributing towards health and social welfare problems. This trend is attributed to housing costs especially those in the private rented sector.<sup>44</sup>

## **Health**

56. There are health inequalities associated with deprivation, including infant death, obesity, other physical disability, and the risk of mental ill health. The health gap between rich and poor has widened since 2010 which is reflected in large differentials in mortality rates.<sup>45</sup>
57. Social factors such as education, housing, employment and working conditions and poverty all affect life expectancy by influencing lifestyles. The rate of increase in life expectancy has dramatically slowed down since 2010, almost grinding to a halt. Although it is hard to draw firm conclusions, it is highly plausible that 'austerity' is the cause in that it affects such factors. Quality of care for older people by pressurised social services may also affect life expectancy.<sup>46</sup>

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<sup>41</sup> 'Re-employment, job quality, health and allostatic load biomarkers: prospective evidence from the UK Household Longitudinal Study': Tarani Chandola and Nan Zhang (2017).

<sup>42</sup> 'Private rental market summary statistics in England: April 2019 to March 2020': ONS; 'Housing costs and poverty: private rents compared to local earnings' JRF (18 Feb 2018).

<sup>43</sup> 'Two million renters in England made ill by housing worries': Shelter (Jan 2020).

<sup>44</sup> 'UK Poverty 2019/20': Joseph Rowntree Foundation.

<sup>45</sup> 'What are Health Inequalities?': The King's Fund.

<sup>46</sup> This analysis according to Sir Michael Marmot, director of the Institute of Health Equity at UCL (July 2017).

58. Poverty is especially high among families where there is an adult who is disabled, at nearly 33%. If there is also a disabled child, the poverty rate is 40% – more than twice the rate where there is no disability.<sup>47</sup>
59. Over 25% of working-age carers have a higher rate of poverty than those with no caring responsibilities.<sup>48</sup>
60. Alongside the strains of managing on a low income the lack of control over one's life may contribute to the greater levels of stress and depression which is found among socially excluded people.
61. The consequences of poor health may manifest themselves in physical or mental disability for which reasonable adjustments may need to be made by the court or tribunal (see [chapter 3 \(Physical Disability\)](#) and [chapter 4 \(Mental Disability\)](#)).

### ***Social exclusion and Covid-19***

62. Research in March – May 2020 showed that the largest employment impacts of the pandemic were experienced by those in deepest poverty. Nearly two-thirds of those employed before Covid who were already in deep poverty had lost their jobs or been furloughed or their hours had been cut. This compared with 20% of those above the poverty line who had similar negative effects.<sup>49</sup>
63. This is particularly worrying because over the last 20 years, the incidence of deep poverty has been rising, and it is employment which has enabled such families to move closer to or above the poverty line. Pay cuts, reduced hours and job losses could lead to a significant increase in poverty overall, as those just above the poverty line fall below it and into deep poverty.<sup>50</sup>
64. Whilst there may be multi-factorial causes for the regional variations of mortality associated with Covid-19, the early statistical analysis shows a far higher prevalence of mortality in socially deprived wards within the UK. On 12 June 2020, the Office for National Statistics said the most deprived neighbourhoods in England had a rate of 128.3 deaths per 100,000 people, compared with 58.8 in the least deprived areas. There were equivalent results for Wales where the most deprived fifth of the population had a rate of 109.5 deaths per 100,000 population. This was almost twice as high as the least deprived areas where it was 57.5 deaths per 100,000 population.<sup>51</sup>
65. Health conditions such as obesity, diabetes, COPD and heart disease (some of the underlying conditions associated with poor recovery from Covid-19) are statistically far more prevalent in areas of social deprivation. In London, for example, there is a 78% difference in obesity rates between the most and least socially deprived areas.<sup>52</sup>

<sup>47</sup> 'Nearly half of everyone in poverty is either a disabled person or lives with a disabled person': Joseph Rowntree Foundation (7 Feb 2020).

<sup>48</sup> 'UK Poverty 2019/20': Joseph Rowntree Foundation.

<sup>49</sup> 'Measuring Poverty 2020': Social Metrics Commission (July 2020).

<sup>50</sup> 'Measuring Poverty 2020': Social Metrics Commission (July 2020).

<sup>51</sup> 'Deaths involving COVID-19 by local area and socioeconomic deprivation: deaths occurring between 1 March and 31 May 2020.': ONS (12 June 2020).

<sup>52</sup> 'Health inequalities: Income deprivation and north/south divides': Baker. House of Commons Library (22 Jan 2019).

66. A Food Standards Agency research report for April – July 2020, showed there was a significant increase in foodbank usage, with 20% saying it was because they were on furlough, and 25% that it was because they had lost their job. Food insecurity was on the rise in the UK prior to Covid-19, the probability of low-income adults being food insecure rising from 27.7% in 2004 to 45.8% in 2016. The pandemic worsened insecurity for those who were already missing meals or compromising nutritional quality and tipped people who were ‘just managing’ into insecurity as income reduced and the cost of food increased. Many were skipping meals, compromising on food safety (use-by dates, food intolerances), and narrowing their diet towards cheap carbohydrates, with negative effects on physical and mental health.<sup>53</sup>
67. The Children’s Commissioner has expressed concern about the impact on the so-called attainment gap of time out of school during the national lockdown for Covid-19.<sup>54</sup>

## ***Family***

68. Whilst less settled family lives are widespread across society, they are more frequently found and are often more extreme amongst socially excluded populations. Work problems or unemployment, financial pressures and lack of social support networks, all aspects of social exclusion, are significant factors in family breakdown.
69. The child support system may be an additional source of difficulty, bringing parents into contact with the tribunal system to appeal the decisions of the authority<sup>55</sup> that decides both upon the amount of maintenance and enforcement. This has been characterised as lacking fitness for purpose. The error rate and bureaucracy have created both practical financial and emotional problems for parents since its inception in 1991. Recent reforms are largely predicated upon parental agreement; ideal where it occurs, but frequently an unrealistic aspiration.

## ***‘Looked after’ children***

70. Children who are or were in care are now referred to as ‘looked after children’. That a person before a court or tribunal is or has been a looked after child, or has a looked after child, indicates past or present significant problems, some of which may be attributed to that situation. Within the prison population, for example, there is significant over-representation of looked after children.<sup>56</sup>
71. Entry into the care system will have followed problems or trauma within the family unit, perhaps illness or death of the caring parent, domestic abuse, either of the child directly or within the family leading to an unstable or dangerous environment, or drug and/or alcohol problems which create a chaotic lifestyle for dependent children.

<sup>53</sup> ‘The lived experience of food insecurity under Covid-19’: Bright Harbour Collective Report for the Food Standards Agency (July 2020); ‘The Covid-19 consumer research’: Food Standards Agency (August 2020).

<sup>54</sup> ‘Tackling the disadvantage gap during the Covid-19 crisis’: Children’s Commissioner (April 2020).

<sup>55</sup> The original Child Support Agency has been ‘rebranded’ twice due to perceived public difficulties with its performance.

<sup>56</sup> ‘Guidance: Care leavers in Prison and Probation’: HMP&PS (12 August 2019).



72. Many enter care because they have been abused or neglected. These experiences can leave children with complex emotional and mental health needs, which can increase their risk of experiencing a range of poor outcomes including vulnerability to abuse.<sup>57</sup>
73. Such difficult early issues may resonate throughout life, with effects on educational attainment, mental health and attitudes to authority figures.<sup>58</sup>

## ***Lack of choice and control***

### **Lack of autonomy**

74. Socially excluded people may have recurrent contact with state bureaucracy, and the elements of choice and personal control taken for granted by people with resources are missing. DWP and housing officers, community workers, social workers, probation officers and advice workers are amongst the many people some socially excluded individuals come across on a weekly or even daily basis, on top of what judges may expect in their own lives by way of contact with health visitors, teachers, the police and others. Some of these relationships can be positive, but there is a fear factor for many. This may affect views on authority figures including judges.
75. Socially excluded people may be reliant on this array of individuals who evaluate, adjudicate upon and censure many aspects of their lives. They are also used to having important decisions about their lives made by others.
76. This lack of personal autonomy is a feature of social exclusion that those outside it may struggle to understand. It may lead to a lack of independence of thought which can be construed as apathy or a lack of ability, but this needs to be looked at in context.

### **Lack of participation in the legal process**

77. A failure to attend a hearing, for example, may be due to a chaotic lifestyle, but may also be linked to the fact that many important decisions in that person's life, eg entitlement to benefit, are made without their active input. As a result, they may lack what judges presume to be a natural wish to come along and put one's case.

## ***Poor educational attainment and literacy***

78. This is a characteristic strongly associated with social exclusion. Disadvantaged children are 17.3% more likely to fail to reach school readiness at age 5 than their better-off peers. Two-thirds of disadvantaged children do not get five good

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<sup>57</sup> 'Achieving emotional wellbeing for looked after children: a whole system approach': Bazalgette, Rahilly and Trevelyan. NSPCC (2015); 'What works in preventing and treating poor mental health in looked after children?': Luke, Sinclair, Woolgar, and Sebba. NSPCC and the Rees Centre, University of Oxford (2014).

<sup>58</sup> For an aid to understanding a child's developmental journey, see 'Decision making within a Child's Timeframe: An overview of current research evidence for family justice professionals concerning child development and the impact of maltreatment': Brown and Ward. The Childhood Wellbeing Research Centre (2013).

GCSEs at age 16.<sup>59</sup> A large proportion of the UK population continues to have very low literacy levels.

79. According to the Literacy Trust, 'One in six people in the UK struggle to read and write.' This is particularly so amongst the prison population in comparison to the general population. Newspapers such as The Sun and increasingly government authorised websites are pitched to reflect the average, deemed to be a reading age of about 8-9.<sup>60</sup> Tackling and understanding documents in legal proceedings will be a problem for many.
80. As well as the significant effect that lack of educational qualifications has on the ability to get decently paid work and to manage in a society that requires functional literacy, this may be a factor that contributes to low self-esteem, something shown to have a major impact on the choice, effectiveness and persistence of people's behaviours across a range of settings and which is a particular problem amongst many socially excluded people.

### ***Difficulties which the court process may pose***

#### **Unfamiliar norms**

81. What judges might perceive as social and educational norms, as well as the rules and formalities of the legal process, in relation to language, dress, communication, procedure and behaviour may be not be known, understood or shared by everyone. Sensitivity is required both to avoid unconscious prejudice and to allow individuals the best opportunity to make their case.
82. Judges may be seen as just another in the long list of authority figures getting involved with someone's life, and there may be mistrust. This could result in frustration leading to anger for some individuals. Judges need to understand that this response may be borne not out of a lack of respect for the law, but out of the helplessness stemming from lack of choice and control.

#### **The courtroom**

83. Many people find courts or tribunals to be intimidating places and this can be exacerbated by issues such as dress and appearance. This may be especially so for people who lack confidence in a formal environment.
84. Although some tribunals and courts are relatively informal, the very fact of entering a legal setting may cause the person appearing before them to be worried and anxious.
85. One practical problem of a court or tribunal hearing is anxiety about what to wear. As mentioned above, a report from 2013 indicated that about 5.5 million adults go without essential clothing, a definition which includes, as well as a winter coat and shoes, clothing appropriate for a job interview (or, it might be thought, attending court).<sup>61</sup>

<sup>59</sup> 'Time for change: An assessment of government policies on social mobility 1997 to 2017': Social Mobility Commission (June 2017).

<sup>60</sup> GOV.UK tells people to write for a nine year old reading age.

<sup>61</sup> 'The impoverishment of the UK - PSE UK first results: Living standards': PSE UK (2013).

## **Legal knowledge and advice**

86. People on a low income, or whose social network does not include professionals, are less likely than those in a more privileged position to gain access to timely legal advice and representation. This is an increasingly pressing issue for the justice system in the light of legal aid reforms.
87. People may come to a court or tribunal not really knowing why they are there, or what the potential outcomes are. Even where it is their own case they may have only a hazy understanding of what it is about, particularly if they have been advised by an organisation at an early stage, which was unable to follow the case through to a conclusion, a common situation following cuts in funding.

## **Documents**

88. It is possible that individuals may have low levels of general literacy, as explained above.
89. In addition, it cannot be assumed that the individual defendant or litigant is able to understand legal documents. Even where care has been taken to avoid 'legalese', these may be daunting to read simply by virtue of their importance, and problems of understanding may not be confined to the written word.

## **Communication difficulties**

90. Explanations or comments from lawyers and judges may not be properly understood. Equally, individuals may not be used to expressing themselves publicly or with strangers, and may struggle to get their point across.
91. This may lead to miscommunication, discussion at cross purposes, and frustration and annoyance for all involved, judges included. Judges must be alive to this, and be prepared to adjust or ameliorate their approach as often as is required.

## **Attendance**

92. Low paid low status workers may well find it difficult to get time off work to attend hearings or may experience loss of pay when doing so.
93. A lone parent may have difficulties in attending court at certain times, such as school holidays or drop-off and pick-up times. This will be more of a problem in socially excluded households, which are without either the networks of family or friends or the ability to pay for help which others (including judges) may take for granted.

## ***Help with the court process***

94. There may be a predisposition to feel unfairly treated and misunderstood among some socially excluded people, since this is often their experience of dealings with authority.
95. Judges may be able to prevent this by ensuring procedural fairness, by active listening and attention to problems during the hearing, and by explaining their decisions in terms which are easily understood, and which show that they have taken all the circumstances into account. A failure to do these things may not

only amount to a failure to facilitate proper participation in the hearing, but may serve to further entrench alienation from authority.

96. The following steps may well assist in the provision of a fair hearing:

- Where possible, work around difficulties with childcare or getting time off work when listing hearings or deciding upon the order of witnesses.
- Put people at ease. This helps them express themselves, and as such, contributes to a fair hearing.
- If someone has kept their coat on, for example, this may be because they are self-conscious about inappropriate clothing underneath. They can be invited to remove their coat or keep it on, whichever feels most comfortable.
- Clarify the level of understanding, and where appropriate, give a clear explanation as to the powers and duties of the judge/panel. It is so important that everything said is understood on all sides that time taken to check understanding is rarely wasted.
- There is really no point in asking 'Do you understand?' The answer is all too likely to be 'Yes', given that no one likes to feel stupid or reveal ignorance or risk holding up progress.
- Reflective listening, the regular summarising by the judge of what he or she has understood, and asking the individual to tell the judge what he or she has understood are better strategies.
- Be ready to repeat explanations in different ways and to reformulate complex questions put in cross-examination if the witness might not have adequately understood.
- Where appropriate, ensure that documents are read out to the witness/party and their content explained.
- In case preparation where the individual is a litigant in person, ensure that written communications are in plain English and without jargon. Consider holding additional case management hearings so that a face-to-face explanation can be given, the individual can ask questions and understanding can be checked.
- Many of the suggestions in [chapter 1](#) for assisting litigants in person will also be of assistance with socially excluded witnesses and parties.

### ***Literacy and the court process***

97. Depending on the type of case, and whether an individual is represented, a party's inability to read and write may cause particular difficulties in preparing cases and attending hearings, eg:

- Understanding the content of court letters which require preparatory steps.
- Communicating to the court any difficulties with compliance.
- Understanding and absorbing particulars and documents provided by the other side.

- At the hearing itself, understanding and remembering the content of documents which are referred to.
- Being unable to take notes to help remember what has been said earlier in the hearing.
- Difficulty cross-examining a witness without pre-prepared notes as an aide memoire or being able to read the witness's witness statement or refer to documents on the spot.

98. It may help for case preparation:

- To hold one or more case management discussions rather than rely on communication on paper.
- To hold an early case management discussion in person or by telephone.
- To allow audio recording of such discussion.
- To allow more time for the individual to provide any required particulars and to read disclosed documents, so he or she has time to find assistance.
- To suggest the individual provides any required further particulars by audio or video recording, which could be made on a mobile phone and sent in as an audio or video file (although check the person is able to operate such technology).
- A witness statement could also be provided this way. The individual can be given the necessary form of words to say at the start or end of the recording to confirm it is a 'statement of truth'. At the hearing itself, the recording can be played and the witness asked to swear that it is true.

99. During the hearing, it may help:

- If documents are referred to in court, to ensure the relevant passage plus important context is read out, eg by the legal representative, the judge or any friend or voluntary sector organisation such as Support Through Court.
- To check whether the person has had the opportunity to become familiar with the contents of any documents on which they are being questioned prior to the hearing.
- If not – or with any other new document – to consider a break so that the document can be read to the person outside the courtroom if he or she is with someone who can assist.
- If the individual provides a written statement, to check whether they are familiar with its detailed contents and agree with it. It may also be helpful to read out each paragraph and check they agree.
- Prior to any cross-examination on such a witness statement, to ensure the relevant passage is read out before the question.
- To keep the amount of information read out at one time in reasonable bounds. Although the person may have developed a stronger memory, it is still advisable to deal with questions and information in manageable chunks. Equally, it may help to ensure there is not complex questioning by reference

to what is written in a number of detailed documents, or that such questioning is broken down into careful stages.

- If the person is a litigant in person, to allow him or her to make an audio recording of the proceedings. It may also help to allow additional breaks when needed to listen to the recording as the person will not be able to consult their notes.

The above assumes the person has been open about their difficulties. Even if this is the case, they may be embarrassed, and adaptations should be made in a sensitive and low-key manner. If the individual has not raised the issue, but there are reasons for the judge to suspect he or she may have difficulties, it would still be possible to ask in a neutral way whether several of the above steps might be helpful.

### ***Social exclusion and remote hearings***

100. Appendix E on [Remote Hearings](#) makes suggestions for handling remote hearings. The following extracts are specifically relevant to this chapter:

- Do not assume access to technology or limitless broadband. There is a disparity of such access and of access to the internet according to socio-economic factors, age and disability.
- A remote hearing taking place at home might occur alongside distractions which inhibit giving evidence, such as overcrowding: parties may not have a quiet private room, and there may be demands on their attention from pets, partner, children.
- The consequences and pressures of Covid-19 may relegate the importance of legal proceedings – attendance at a food bank might be of more immediate concern than a court hearing.
- Enquire as to the needs of those appearing, so that you can work out accommodations and manage the hearing accordingly.
- Establish at the outset whether there will be any unavoidable interruptions which those who are the only adult in the home may be worrying about, eg deliveries; important incoming phone calls; childcare issues.
- Spell out the approach to the hearing so that the parties understand what is expected of them at each stage.
- Carefully monitor throughout that everyone is present in the hearing and able to follow. People may briefly drop in and out without the judge realising and may not be sufficiently assertive to tell the judge that has happened.
- Try to establish a person's level of understanding by asking if they have the document/letter/court order then, using language that is 'user friendly', see if they can explain what paragraph X means.
- Make no assumptions about people's behaviour. It may be different to what one would expect in court: they are at home. They may not dress smartly. They may be more relaxed; alternatively, they may feel worried because a process which comes inside their home feels like an invasion of their personal space. They may be sitting somewhere apparently unsuitable, but it

may be the only place that they have; alternatively, they may be sharing space with another household member who needs it for work.

- Be careful not to make unconscious assumptions about individuals from the appearance of their home surroundings. Conversely, where judges are working from home be conscious that parties may make assumptions about the judge from what they see. Social barriers between judges and parties may appear exaggerated by everyone appearing in their own homes. Keep your background neutral.
- Many do not have the resources to navigate/download e-bundles.
- Allow more time for breaks and do not be tempted to extend hours to get hearings completed. This will be exhausting for everyone, and may be particularly problematic for litigants in person, those speaking English as a second language and people with a range of mental or physical impairments who find the process particularly tiring.

### ***Criminal justice: sentencing***

101. In the criminal sphere, judges have statutory duties in respect of the imposition of sentences. Although necessary and justified as to punishment, deterrence or to reflect severity, the sentence may create or exacerbate social exclusion for offenders. Sentencing can have the following effects.

#### ***Custodial sentences***

102. For those with precarious employment or low educational qualifications, a custodial sentence can reduce the chance of subsequent lawful employment to almost zero. In turn, lack of employment is likely to contribute to an increased reoffending rate. Reoffending rates have been found to be higher for offenders on supervised release from short term custody than for a matched group who had received a community order or a suspended sentence.<sup>62</sup>
103. Tenancies may be terminated, creating a risk of a period of homelessness on release from prison.
104. Any supportive relationships or social networks the offender had in the community may be replaced by connections among the prison population (sometimes referred to as negative social capital). Certain criminal offences may leave a defendant's family vulnerable to physical or verbal attack.
105. Lone parents are over-represented among those at risk of social exclusion; custodial sentences for this group are likely to impact adversely on the children whatever alternative arrangements are made for their care. The Sentencing Council's 'General guideline: overarching principles' recognises that where a defendant is a sole or primary carer, this is a factor which a court should have particular regard to when sentencing, especially where the offender is on the cusp of custody and where imprisonment would be disproportionate to the aims

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<sup>62</sup> 'The Impact of short custodial sentences, community orders and suspended sentence orders on reoffending': MOJ (2019).

of sentencing.<sup>63</sup> For the impact of imprisonment on women as well as on dependent children, see [chapter 6](#).

### *Community sentences and treatment orders*

106. Non-custodial sentences can also have a negative impact on the chances of retaining employment. Socially excluded people often have complex and even chaotic lives which can make it difficult to attend regularly as directed.

### *Financial penalties/repayments of benefit*

107. Self-evidently, the impact of a £100 fine is greater for someone whose weekly income is £60 than for someone whose weekly income is £600. The offender will also be required to pay a surcharge (used to fund victim services).<sup>64</sup>
108. The majority of people on low incomes have no savings or access to cheap credit, neither are they likely to be assisted by friends or family.<sup>65</sup>
109. The addition of fines to existing debt carries the risk of engagement in further criminal activity to 'solve' the problem.
110. Financial hardship is likely to affect not only the offender but also any children or other dependants. There may be profound effects of a failure to meet other financial commitments such as rent, utility bills or child support payments.

### *Possession orders*

111. Where possession orders for residential accommodation are made, the risk of homelessness, loss of assets and potential impact on children should be taken into account.
112. Possession orders made as a result of the commission of criminal offences such as drug dealing can impact other occupants of the premises and neighbours.
113. Timing may be important to give an opportunity for other arrangements to be made or to take account of impending events (eg childbirth).
114. The impact of any decision on the property owner should also, of course, be considered.

## **References and resources**

Click on the references below to go to the source referred to. Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link. The following references are in alphabetical order (discounting the first 'the' or 'a').

<sup>63</sup> In *R v Montaut* [2019] EWCA Crim 2252, consideration is given to cases which are 'on the very cusp' of that which is capable of being suspended.

<sup>64</sup> This came into force in 2007 and the amount has increased over time.

<sup>65</sup> 'Measuring Poverty 2020': Social Metrics Commission (July 2020).



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[Uber BV and others v Aslam and others](#) [2021]UKSC 5

## Chapter 12 Trans People

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## Overview

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### Who are trans people?

Trans, transgender or transgendered are umbrella terms often used to describe many different people who cross the conventional boundaries of gender.

Not all people who have adopted a social or legal gender different from their birth gender will be happy to be referred to as 'trans' without checking it is appropriate. For example, if they transitioned as a child and have spent their adult life as a wife and mother, they may feel treated as inauthentic if referred to as trans against their will during a hearing.

The term 'transgender' is commonly associated with those people whose gender identity does not correspond to the gender assigned to them at birth, and who identify with the opposite gender. Such people may or may not live in accordance with their gender identity, some may wish to do so in future and some will have long since transitioned so that their gender history is a minor footnote in their life history. The Gender Recognition Act 2004 applies to a narrow group of people who wish to change their legally assigned gender on their birth certificate.

The Equality Act 2010 refers to a protected characteristic of 'gender reassignment' and uses the term 'transsexual', which is now widely considered to be out-of-date and stigmatising.

Sometimes people who identify with no particular gender or who are gender-fluid may also refer to themselves as 'trans' or 'transgender'. The gender landscape is rapidly changing, as is the terminology in the field.

It is important to respect a person's gender identity by using appropriate terms of address, names and pronouns. Everyone is entitled to respect for their gender identity, private life and personal dignity. In this chapter, where we have needed to use an umbrella term, we have generally used 'trans' or 'transgender' in its broadest sense.

### Transitioning

Where a person has decided to live permanently in an acquired gender, the process of gender reassignment is usually called 'transitioning', ie transitioning from one gender to another. It is in part a social process and does not necessarily entail any medical process.

### Discrimination, harassment and violence experienced by people who do not conform to perceived gender norms

Awareness, knowledge and acceptance of trans people has greatly increased over the last decade. Unfortunately, however, there remains a certain mistrust of non-conventional gender appearance and behaviour, and many transgender people experience social isolation and/or face prejudice, discrimination, harassment and violence in their daily lives.

Many trans people avoid being open about their gender identity for fear of a negative reaction from others. This applies in all contexts, but particularly when out in public because of safety issues.

Social isolation, social stigma and transphobia can have serious effects on trans people's mental and physical health. Research shows that levels of self-harm and suicide ideation among young trans people and trans adults are much higher than for other people. The coronavirus pandemic with attendant restrictions has had a particularly damaging effect on the mental health of trans people.

Workplace bullying can be a daily occurrence, whether intentional or not. Many trans people would prefer to leave a job than incur the emotional cost of going to an employment tribunal.

### **Treatment of trans people in court**

It should be possible to recognise a person's gender identity and their present name for nearly all court and tribunal purposes, regardless of whether they have obtained legal recognition of their gender by way of a Gender Recognition Certificate.

A person's gender at birth or their transgender history should not be disclosed unless it is necessary and relevant to the particular legal proceedings.

The Gender Recognition Act 2004 (section 22) explicitly prohibits disclosure of such 'protected information' where a person has applied for, or obtained, a Gender Recognition Certificate. It makes a specific exception where disclosure is for the purpose of proceedings before a court or tribunal, but this exception should be interpreted narrowly. For more detail on section 22, see '[Disclosure of protected information under section 22 of the Gender Recognition Act](#)'.

In the rare circumstances where it is necessary in the proceedings to disclose a person's previous name and transgender history, the court may consider making reporting restrictions to prevent the disclosure of this information more widely or directing a private hearing.

### **Trans people as victims of crime**

There is a high level of transphobic hate crime, which is believed to be greatly underreported.

People may be apprehensive about coming to court, and particularly the risk of possible disclosure of their medical history with long-term consequences.

### **Trans offenders**

Trans people are likely to be highly apprehensive about being sentenced to a term of imprisonment because of concerns about safety and also about access to any medically necessary hormonal support.

A Ministry of Justice/NOMS policy on 'The Care and Management of Individuals who are Transgender' (reissued 27 January 2020) applies to prisons and providers of probation services. The policy is concerned to protect the rights and welfare of trans prisoners as well as those of others around them. Pre-Sentence Report ('PSR') writers must consider requesting a full adjournment for the preparation of a PSR where offenders disclose that they are transgender.

## **Gender identity and rights of asylum seekers**

Approximately 50 countries recognise transgender people's rights to have their gender identity legally recognised. In many countries, trans people are excluded by society, and may face widespread discrimination, prosecution, harassment and violence.

People who face persecution on the basis of their gender identity can claim asylum in Britain. For a variety of reasons, many applicants for asylum on this basis have difficulty in proving that they are transgender.

There is substantial evidence that trans asylum seekers are particularly vulnerable while held in detention, experiencing discrimination, harassment and violence from other detainees and members of staff. In addition, the transitioning process may be halted. Following detention, many experience long-lasting effects on their mental health.

## **Gender Recognition Act 2004**

The Gender Recognition Act 2004 ('GRA') enables transgender people to change their legal gender by applying to the Gender Recognition Panel for a Gender Recognition Certificate ('GRC'). Certain legal and medical criteria must be satisfied.

A person who has been issued with a full GRC is entitled to be recognised in the gender stated on their certificate for all purposes including marriage and can obtain a new birth certificate.

For a variety of reasons many transgender people do not apply for a GRC. Some feel that legal recognition is not necessary for their day-to-day living, and some do not want to go down the medical route required by the GRA, in terms of obtaining a medical diagnosis of 'gender dysphoria'.

The GRA is now regarded as out of date by some people because, eg it does not accommodate people who have a permanent non-binary gender or are gender fluid.

## **Information about medical diagnosis and medical treatment**

The Gender Recognition Act 2004 requires a person to be diagnosed with 'gender dysphoria' in order to apply for legal recognition of their gender. Internationally, diagnostic criteria and terminology have moved away from pathologising definitions.

As previously stated, not all trans people wish to undergo gender reassignment surgery (also called gender confirmation surgery). For those that do, it may involve a number of surgeries over time.

## **Acceptable terminology**

Using acceptable terminology avoids offending parties and witnesses and gives them confidence they will receive a fair hearing. As stated above, most individuals will find the terms 'transgender' and 'trans' acceptable. However, many people who have completed a gender transition may not (or may no longer) regard themselves as trans, but simply as (for example) a man or as a woman. Others will be happy to talk about their trans history. It is advisable to read the section on acceptable terminology in the full chapter for further guidance.

### **Equality Act 2010**

The Equality Act 2010 appears to be limited in its explicit protection for trans people, in that the protected characteristic is defined as gender reassignment. However, its full interpretation and scope has not yet been tested in the appellate courts.

## ***Why it is important to understand this issue***

1. People who identify with a gender which differs from their legal gender, or who have adopted a new legal gender, or who identify with no particular gender sometimes face discrimination, stigma or violence in their everyday lives. This can mean that they are less likely to report crime or press charges, and they may be apprehensive about coming to court, whether as an offender, witness or victim. Some people may be particularly concerned about their previous name and gender assigned at birth being unnecessarily revealed in court. They may also be worried about receiving negative attention from the public and the press.
2. The question of terminology is, as with many areas, problematic. It should not be assumed that particular terms are appropriate without asking the person concerned. So as to have a term which can be used here in a wide sense to refer to anyone whose gender identity differs from that which doctors assigned to them at birth, the term 'trans' is used. It does not imply that such a term is always acceptable, but it is used as shorthand in this chapter.

## ***Who are trans people?***

3. Sometimes people who identify with a gender which is different from that which they were assigned at birth refer to themselves, (in addition to being, say, 'a man' or 'a woman'), as also being a 'trans', 'transgender' or 'transgendered' person. Some people object to some or all of those terms. When these terms are used, it is as a broad umbrella to describe a wide variety of people who cross the conventional boundaries of gender. It may be terminology that people will use only in certain circumstances or in certain company.
4. It is important to appreciate that not all people who have adopted a social or legal gender different from their birth gender will be happy to be referred to as 'transgender' or 'transgendered' and the term should not be imposed on them without checking that it is appropriate, since it may be understood as an attempt to categorise a person as a 'third gender' against their will or to treat them as in some sense a less than authentic man or woman as the case may be. For example a person who transitioned as a child and who has married and spent her adult life as a wife and mother may reject such a label and feel a sense of being 'othered' if a judge or those taking part in a hearing impose such a term.
5. The terms 'transgender' or 'transgendered' tend to be used to describe those people whose gender identity does not correspond to the gender assigned to them at birth, and who identify with what is socially termed the 'opposite' gender. Such people may or may not live in accordance with their gender identity, some may wish to do so in future and some will have long since transitioned so that their gender history is a minor footnote in their life history.
6. The Gender Recognition Act 2004 ('GRA') applies to a narrow group of people who have a desire to change their legally assigned gender on their birth certificates so that they are legally to be treated as being of their 'acquired' gender, and to do so they must satisfy a mix of legal and medical criteria which are discussed elsewhere in this section. The Equality Act 2010 covers the protected characteristic of 'gender reassignment' and describes people with that protected characteristic as 'transsexual'. See the '[Gender reassignment](#)' section in Appendix A on the Equality Act 2010 for a discussion of the scope of this



concept. However, it should always be borne in mind that by no means all people who identify with a gender other than their birth gender have a desire to take legal steps or medical ones.

7. Sometimes people who identify with no particular gender or who are gender-fluid may also refer to themselves as 'trans' or 'transgender'. The gender landscape is rapidly changing, as is the terminology in the field. The broader meaning of 'trans' or 'transgender' can be used to encompass a wide range of gender identities and experiences which fall outside the traditional gender binary (ie categorising people exclusively as male or female). For example, increasing numbers of people identify as 'non-binary' (ie they feel neither male nor female, and may associate with elements of both or neither gender), 'a-gender' (literally 'without gender'), 'genderqueer' (a broad term increasingly popular among young people who do not identify with traditional gender categories, and often associated with a political rejection or radical subversion of conventional gender categories) and as 'gender fluid' (fluctuating between genders). Some people cross-dress on an occasional or full-time basis, some identify as 'transvestites', some of whom may also consider themselves transgender. UK law presently makes express provision only for those who wish to reassign their gender so as to adopt their acquired gender, whether from female to male or vice versa. See also '[Acceptable terminology](#)' within this chapter.
8. Despite its use in the Equality Act 2010, the term 'transsexual' is widely considered to be out-of-date and stigmatising, as it is associated with a medicalised approach, which has historically pathologised transgender people by considering them to be mentally unwell or personality disordered. It is generally preferable to use the term which the person concerned is comfortable with – if it is necessary to the legal proceedings to refer to the issue at all.
9. It should go without saying that all people deserve to be treated fairly, and with respect for their private life and personal dignity, irrespective of their gender or gender history. It is important to be alive to the fact that the gender history of a person may be something which an opponent litigant may seek to use in order to place pressure on them, such as by deliberately pleading a gender history or former names when there is no legal necessity to do so, or for example pointedly referring to a 'trans' man as 'she' in public documents.
10. For many people the fact that they are 'transgendered' or have in the past acquired a new gender from that assigned at birth is not something which they think about on a day to day basis, and it should never be assumed that such people are in any sense in the midst of a 'process' or have any particular concerns about gender.

### ***Transitioning***

11. Where a person has decided to live permanently in an acquired gender, the process of gender reassignment is usually called 'transitioning', ie transitioning from one gender to another. Some people may seek legal recognition of their gender identity under the Gender Recognition Act 2004; others may not.

12. Transitioning is in part a social process, including change of name. It does not necessarily entail any medical process, though for some people, it may also include hormone treatment and gender reassignment surgery.
13. Some people are comfortable about being 'out' and about being transgender or having a history of reassigning their gender, and may explicitly identify themselves, for example, as a 'trans man', a 'trans woman' or as 'non-binary'. There are no hard and fast rules. Many people who have transitioned from one gender to another would not give any thought to the fact that they are (and may have been for many years) known to others as a man or as a woman, as the case may be, and would be surprised to find others discussing the issue.

### ***Gender versus sexuality***

14. It is misguided to make any assumptions as to the sexual orientation of people based on their gender, and that applies as much to people who have transitioned historically from one gender to another as it does to any other person. Gender identity refers to who you are, whilst sexual orientation refers to who you are sexually attracted to. For example, a man who was legally assigned as female at birth but who acquires a new legal gender as a teenager may identify as gay (oriented towards other men) or straight (heterosexual), or bisexual.

### ***Discrimination, harassment and violence experienced by people who do not conform to perceived gender norms***

15. Awareness, knowledge and acceptance of gender-variant people such as those who are transgendered or gender-fluid has greatly increased over the last decade. Unfortunately, however, there remains a certain mistrust of non-conventional gender appearance and behaviour and many people experience social isolation and/or face prejudice, discrimination, harassment and violence in their daily lives – in schools and places of further education, in the workplace, and whilst being customers and service users. Some people experience rejection from families, work colleagues and friends. Some experience job or home loss, financial problems and difficulties in personal relationships.
16. Many trans people avoid being open about their gender identity for fear of a negative reaction from others. This applies in all contexts, but particularly when out in public because of safety issues. There is often concern about online privacy, perpetuated by a fear of being 'outed' online and having no control over the content shared.<sup>1</sup>
17. A survey for the TUC of over 5,000 LGBT employees in the first half of 2017 found that almost half of transgender respondents had experienced bullying or harassment at work and that 30% had had their transgender status disclosed against their will. A 2017 ACAS research paper confirmed that workplace bullying is common and that many staff identified as transgendered experience it on a daily basis. The ACAS report also found that the level of bullying may be higher than other rates of bullying related to, for example, sexual orientation, and that transgender staff may look for another job rather than endure the costs and emotional labour of going to tribunal or court. The limited protection of the

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<sup>1</sup> 'National LGBT Survey. Research Report': GEO (July 2018).

Equality Act 2010, which only covers those who are undergoing or have undergone (or who are perceived to be undergoing or to have undergone) gender reassignment, means non-transitioning, non-binary or otherwise gender non-conforming people are particularly vulnerable.<sup>2</sup>

18. In a poll of 1,000 employers across a variety of industries in June 2018, one in three employers admitted they were less likely to hire a transgender person and 43% were unsure if they would.<sup>3</sup>
19. Social isolation, social stigma and transphobia can have serious effects on transgendered people's mental and physical health. Research shows that levels of self-harm and suicide ideation among young trans people and trans adults are much higher than for cisgender people (those whose gender identity corresponds to the gender assigned to them at birth).<sup>4</sup>
20. The coronavirus pandemic with its lockdown and periodic restrictions has had a particularly damaging effect on trans people. Research shows a high level of mental ill health, caused by increased discrimination and hate crime, isolation and reduction in peer group support, in some cases being required to stay at home with transphobic families, and reduction in access to specialised medical or advice services.<sup>5</sup>

### ***Treatment of trans people in court***

21. It should be possible to recognise a person's gender identity and their present name for nearly all court and tribunal purposes, regardless of whether they have obtained legal recognition of their gender by way of a Gender Recognition Certificate. See '[Acceptable terminology](#)' within this chapter regarding the use of someone's birth name.
22. A person's gender at birth or their transgender history should not be disclosed unless it is necessary and relevant to the particular legal proceedings. Where a person has applied for or obtained a Gender Recognition Certificate, section 22 of the Gender Recognition Act 2004 specifically applies to such disclosure. Further details on this important issue are set out in the next section.
23. Disclosure of gender assigned at birth may be essential, but this will be rare. It will normally be possible to accept a person's legal gender, or their gender identity, for court and tribunal purposes without further inquiry. It is unusual for a person's gender to be an issue in a case or for their old name to be an essential legal requirement unless there is a dispute about it. Further inquiries may not

<sup>2</sup> 'The Cost of Being Out at Work: LGBT+ workers' experiences of harassment and discrimination': TUC (2017); 'Supporting trans employees in the workplace': ACAS Research paper (04/17).

<sup>3</sup> 'Transphobia rife among UK employers as 1 in 3 won't hire a transgender person': Crossland Solicitors (18 June 2018).

<sup>4</sup> 'Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination' (Whittle et al 2007); see also 'Self-harming thoughts and behaviors in a group of children and adolescents with gender dysphoria': Skagerberg et al (2013) and 'Suicide risk in the UK trans population and the role of gender transition in decreasing suicidal ideation and suicide attempt': Bailey, Ellis and McNeil (2014).

<sup>5</sup> 'Hidden Figures: The Impact of the Covid-19 Pandemic on LGBT Communities': LGBT Foundation (May 2020); 'The mental health and experiences of discrimination of LGBTQ+ people during the COVID-19 pandemic: Initial findings from the Queerantime Study': Kneale and Bécare: EPPI-Centre, UCL Institute of Education, University College London and School of Education and Social Work, University of Sussex (August 2020).

only be intrusive and offensive, but could breach rights under article 8 of the European Convention on Human Rights (respect for private life), which arguably means that the disclosure would need to be relevant and necessary for the proper disposal of the legal proceedings.

24. Where appropriate in the interests of the administration of justice, the court may consider making reporting restrictions under section 4 of the Contempt of Court Act 1981 to prevent the disclosure of a transgender person's previous name and transgender history, or it may direct a private hearing. Since the Gender Recognition Act 2004 provides legal protection against disclosure of gender history for people who have made an application under the Act and those who have reassigned their gender,<sup>6</sup> waiver of that protection in public court proceedings – which once dispensed with may mean the person cannot practicably re-gain it – should be treated as a serious step. See for example in the context of the publication of Deed Polls by the court, the judgment in *W, F, C and D (minors) (Name changes disclosing gender reassignment and other matters) (Rev 1)*<sup>7</sup> which is also relevant to the potential permanent consequences of 'outing' by the court if not strictly necessary, especially in the case of children, but also potentially adults.
25. It is inappropriate to enquire about someone's medical history, including their anatomical status, unless it is legally relevant to the case at hand. If it becomes relevant, the issue should be handled with utmost sensitivity and respect for the person's private life. Again, a private hearing might be directed.
26. Fundamental principles of equality and acceptance of diversity demand that no prejudice or difference in treatment is accorded to a person due to their appearance, including their manner of dress. Any person's gender expression and choice of clothing should be respected unless there is an affront to public decency or a clear intention to insult the judicial process. This applies equally to transgender and cisgender people.

### ***Disclosure of protected information under section 22 of the Gender Recognition Act***

27. Where a person has applied for, or obtained a Gender Recognition Certificate, section 22 of the Gender Recognition Act 2004 ('GRA') makes it an offence for someone who has obtained 'protected information' in an official capacity to disclose that information to any other person. Protected information is information about a person's application for legal recognition of their 'acquired gender' (as gender identity is referred to in the GRA) or, if they have legal recognition, their transgender history. There are a number of exceptions to section 22, one of which, section 22(4)(e), is that it is not an offence to disclose protected information if the disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal. This affords judicial protection. However, there also appears to be a policy intention behind section 22, ie that disclosure is permissible only if made for the purpose of court proceedings. That is to say, only where it is relevant to the fundamental purpose of the proceedings themselves.

<sup>6</sup> Gender Recognition Act 2004, s22(2).

<sup>7</sup> [2020] EWHC 279 (QB) (12 February 2020).

28. There are obvious instances when disclosure will be made for this purpose, eg for the recovery of a debt incurred in the previous name / gender. A person's transgender history may also be a relevant and important issue in divorce or family proceedings, or as the background to an offence of violence against that person. In these instances, disclosure is legitimate and necessary. However, judges should be aware of the sensitivities, and exercise extreme caution about 'outing' someone where their gender is not relevant to the specific issues in the case.
29. Sir James Munby (then President of the Family Division of the High Court) issued the following useful statement:<sup>8</sup>
- 'The facts of the individual cases in which the disclosure question will arise are likely to vary widely. In some instances it will be relevant to the issues to know that an individual has a transgender history. In others it will be entirely irrelevant. Disclosure should not [be] permitted in those cases where it is unnecessary and irrelevant to the issues. There is a need for judges to be aware of and astute to the issues.'

### ***Trans people as victims of crime***

30. Many transgender people avoid contact with the criminal justice system. Reasons transgender people give for not reporting crime include fear of exposing their transgender history, embarrassment, lack of confidence that the police will treat their complaint seriously, and lack of confidence that the police will treat them fairly and appropriately.<sup>9</sup>
31. According to the Crime Survey for England and Wales, trans people were twice as likely as others to be a victim of crime (excluding fraud) in the year ending March 2020.<sup>10</sup>
32. Research in 2017 found that over 40% of trans people had experienced a hate crime or incident because of their gender identity in the previous 12 months. This includes verbal abuse, threatening behaviour, physical and sexual assault. 26% of those polled said they had experienced transphobic online abuse directed towards them personally in the previous month, and 44% said they avoided certain streets because they did not feel safe as a trans person.<sup>11</sup>
33. Hate crimes may be on the basis of the fact that someone is (or is thought to be) a trans person, or sometimes because perpetrators may be prejudiced against gay or lesbian people and may incorrectly assume that a trans person is also gay or lesbian,<sup>12</sup> so that the form of the crime presents itself as a crime focussing on sexual orientation.

<sup>8</sup> Cited in 'Report on Transgender Equality 2016': Women and Equalities Select Committee (2016) at para 80.

<sup>9</sup> For a summary of relevant research in this field, see 'Trans Research Review for the Equality and Human Rights Commission': Mitchell and Howarth (2009); 'The Hate Crime Report: Homophobia, Biphobia and Transphobia in the UK': Galop (2016); National LGBT Survey. Research Report: GEO (July 2018).

<sup>10</sup> Reported in 'Crime in England and Wales: year ending March 2020': ONS (17 July 2020).

<sup>11</sup> 'LGBT in Britain – Hate Crime and Discrimination': Stonewall (2017).

<sup>12</sup> 'LGBT in Britain – Hate Crime and Discrimination': Stonewall (2017).

34. The number of reported transphobic hate crimes trebled between 2012 and 2015 and has continued to increase. Even so, transphobic hate crime is widely believed to be greatly underreported. Some of those who do report hate crimes say they have not felt supported by the police or believe they have experienced further discrimination.<sup>13</sup>
35. It is impossible to know if the above reflects an increase in transphobic hate crime (possibly linked to the increased profile of trans people in the media and society generally and/or negative responses to civil rights protections for trans people), or an increase in the reporting of such crime. The Women and Equalities Committee Report on Transgender Equality<sup>14</sup> referred to concerns within the transgender community about 'inappropriate outing' in court and stressed the importance of building transgender people's confidence in the criminal justice system.
36. In addition to possible outing, trans people may well be apprehensive about attending court or even nervous about making the journey to court if they are at risk of encountering abuse in public on the way. Some may be particularly concerned that their gender and possible medical history will be unnecessarily revealed in court with long-term consequences.
37. Section 146 of the Criminal Justice Act 2003 (as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012) provides for sentences to be aggravated for any offence partly or wholly motivated by hostility towards the victim on the grounds that the victim was (or was presumed to be) a trans person.<sup>15</sup> The Act also provides for a 30-year starting point for murders motivated by hostility towards the victim on the grounds of being trans.<sup>16</sup>

## ***Trans offenders***

### **Prison policy requirements**

38. It is estimated that there were 163 trans prisoners in 2019, an increase on 139 recorded in 2018. However, prisoners who have already transitioned and have a full Gender Recognition Certificate are excluded from the datasets.<sup>17</sup>
39. Trans people are likely to be highly apprehensive about being sentenced to a term of imprisonment as a result of concerns over safety and over the availability of any medically necessary hormonal support if they are taking hormones to maintain or alter their outward gender characteristics. After a series of events highlighted problems with previous practice, a revised Ministry of Justice / NOMS<sup>18</sup> policy on 'The Care and Management of Transgender Offenders'<sup>19</sup> came into force on 1 January 2017. This has been replaced by 'The

<sup>13</sup> For a summary of research in this field, see 'Trans Research Review for the Equality and Human Rights Commission': Mitchell and Howarth (2009); 'The Hate Crime Report: Homophobia, Biphobia and Transphobia in the UK': Galop (2016); 'LGBT in Britain – Trans report': Stonewall (2018).

<sup>14</sup> 'Report on Transgender Equality 2016': Women and Equalities Select Committee (2016).

<sup>15</sup> See also the Crown Prosecution Service's 'Guidance on Prosecuting Cases of Homophobic, Biphobic and Transphobic Hate Crime' (2017).

<sup>16</sup> Section 65(9) LASPO 2012 which amends paragraph 5(2)(g) of Schedule 21 of s.146 CJA 2003.

<sup>17</sup> 'HM Prison and Probation Service Offender Equalities Annual Report 2018/2019': Ministry of Justice (Nov 2019).

<sup>18</sup> NOMS is now HMPPS.

<sup>19</sup> PSI 17/2016; PI 16/2016 (now cancelled).

Care and Management of Individuals who are Transgender' (reissued 27 January 2020).<sup>20</sup>

40. This policy contains detailed mandatory requirements and broader guidance on the care and management of trans offenders in the community and in custody (whether they are on remand or have been sentenced). It applies to providers of probation services and prisons.
41. The policy states that 'primary focus is on individuals who express a consistent desire to live permanently in the gender with which they identify, and which is opposite to the biological sex gender assigned to them at birth', but it also applies to those who identify as transgender but do not seek to acquire a new gender, including those who are intersex; who 'do not identify with a gender (non-binary); have an inconsistent gender identity (gender fluid) and are cross dressers (transvestite)'.
42. The policy is concerned to protect the rights and welfare of trans prisoners as well as those of others around them. It explains the process for allocating a trans person within the prison estate. It also states that pre-sentence report ('PSR') writers must consider requesting a full adjournment for the preparation of a PSR where an offender discloses that they are transgender.

### ***Gender identity and rights of asylum seekers***

43. Approximately 50 countries recognise trans people's rights to have their gender identity legally recognised. In many countries, trans people are excluded by society, and may face widespread discrimination, prosecution, harassment and violence.
44. People who face persecution on the basis of their gender identity can claim asylum in Britain. One difficulty trans asylum seekers may face is lack of reliable country-specific information on persecution of people on the basis of gender identity.<sup>21</sup> This can be because certain human rights groups see the subject as taboo, or fear persecution themselves if they document the issue. Similarly, it can be difficult (especially when in detention) to obtain witness statements from supporting witnesses, who themselves fear persecution for their association with a trans person.<sup>22</sup>
45. It is often the case that societies confuse gender identity with sexuality and hence stigmatise trans people on the assumption they are gay or lesbian, especially where to be non-heterosexual is a crime or socially stigmatised.
46. There are a number of further reasons why trans asylum seekers may have difficulty in proving their trans history or gender identity as a basis for the application.<sup>23</sup> They may have previously suppressed their gender identity and tried to conform to social expectations (as indeed has been common in the UK). Indeed, in some countries of origin, it may not be socially, medically or legally

<sup>20</sup> 'The Care and Management of Individuals who are Transgender': MOJ and HMP&PS (reissued 27 January 2020).

<sup>21</sup> 'Fit for purpose yet?': Independent Asylum Commission (2008).

<sup>22</sup> 'No safe refuge – Experiences of LGBT asylum seekers in detention': Stonewall (2016).

<sup>23</sup> 'Fit for purpose yet?': Independent Asylum Commission (2008); 'No safe refuge – Experiences of LGBT asylum seekers in detention': Stonewall (2016). See also the UK Border Agency Instruction: 'Gender Identity Issues in the Asylum Claim'.

possible to transition, so producing evidence of transitioning is impossible. Once in the UK, they may have found it difficult to tell immigration officials and interpreters about their status, especially those from the same community. While in detention, they may have hidden their gender identity for fear of abuse.

47. There is substantial evidence that trans asylum seekers are particularly vulnerable while held in detention, experiencing discrimination, harassment and violence from other detainees and members of staff.<sup>24</sup> Moreover, detainees often cannot continue their transition while in detention, which directly affects their physical and mental well-being, for example if they do not have access to continued appropriate hormone replacement and hence start to develop gender characteristics contrary to their gender identity. Following detention, there are often long-lasting effects on mental health. A Detention Services Order 11/2012: 'Care and Management of Transsexuals Detainees' (version 2.1, June 2015) gives official guidance on the care, management and treatment of 'transsexual' detainees.
48. For more detail on the mental vulnerability of asylum seekers generally and their particular needs in court, see '[Migrants, refugees and asylum seekers](#)' in chapter 8.

### ***Gender Recognition Act 2004***

49. The Gender Recognition Act 2004 ('GRA') enables transgender people to change their legal gender by applying to the Gender Recognition Panel for a Gender Recognition Certificate ('GRC'). The Gender Recognition Panel is a judicial body, comprising legal and medical members. Since the GRA came into force on 4 April 2005, over 5,500 people have been granted a GRC.
50. The Panel must grant the application for a GRC if it is satisfied that the applicant has or has had 'gender dysphoria' (see '[Information on medical diagnosis and medical treatment](#)' below), has lived in the 'acquired gender' (as gender identity is referred to in the GRA) for two years, intends to continue to live in the acquired gender for the rest of their lives and complies with certain evidential and medical requirements.
51. Gender reassignment surgery (also called gender confirmation surgery) is not a pre-requisite to the grant of a GRC, although the GRA requires evidence to be submitted to the Panel of any surgery which has been carried out or is planned. Gender reassignment surgery is major surgery, carrying the usual risks associated with such surgery, and there are sometimes medical reasons as to why surgery has not been, or cannot be carried out. Funding problems may also be a reason for delay in surgery, but sometimes it is a matter of choice. Within the trans community, the perceived, underlying expectation of surgery is controversial, as is the level of detail the GRA requires.
52. It is now 15 years since the GRA came into force, and in that time medical advances and changes in social attitudes have been significant, to the extent that the Act is now regarded by some as out of date; for example, it does not accommodate people who have a permanent non-binary gender, or are gender fluid, and even if they meet the GRA's requirements, for a variety of reasons many transgender people do not apply for a GRC. Some feel that legal

<sup>24</sup> 'No safe refuge – Experiences of LGBT asylum seekers in detention': Stonewall (2016).



recognition is not necessary for their day-to-day living. Some do not want to go down the medical route required by the GRA, in terms of obtaining a medical diagnosis of 'gender dysphoria'.

53. Following a government consultation on how to reform the GRA, it has been decided not to do so.<sup>25</sup>
54. A person who has been issued with a full GRC is entitled to be recognised in the gender stated on their certificate for all purposes (section 9), and those whose birth was recorded in the UK, may use their GRC to obtain a new birth certificate. It does not affect their status as the mother or father of a child: in *R (McConnell and YY) v Registrar General*<sup>26</sup> the Court of Appeal upheld a ruling by the President of the Family Division, Sir Andrew McFarlane, that a trans man who, following the grant of a GRC became pregnant and gave birth, should be recorded on the child's birth certificate as the mother, and not the father.
55. Before the Marriage (Same Sex Couples) Act 2013, applicants were required to divorce their spouse before they were entitled to a full GRC. Many people did not want to take this step because their marriage had accommodated their gender transition. Now, a person can apply for a GRC and remain married, (ie in a same-sex marriage), subject to their spouse's consent. However, at present, applicants who are in a civil partnership must dissolve their civil partnership in order to obtain a full GRC, since the Civil Partnership Act 2004 does not permit civil partnerships between opposite sex couples. People in that position would have the option of converting their civil partnership into a marriage.
56. Although the application for a GRC involves a fee, fee waivers are available for many applicants.

### ***Information about medical diagnosis and medical treatment***

57. Recent years have witnessed an international movement away from pathologising definitions, and a recognition that the distress some transgender people feel is not necessarily inherent in being transgender, but arises as a result of a culture that may stigmatise people who do not conform to gender norms. Nonetheless, definitions are still important from a legal perspective.
58. As noted above, the Gender Recognition Act 2004 requires a person to be diagnosed with 'gender dysphoria' in order to apply for legal recognition of their gender. The GRA (section 25) defines 'gender dysphoria' as 'the disorder variously referred to as gender dysphoria, gender identity disorder and transsexualism'. These terms are ceasing to have any practical purpose under the international diagnostic criteria, which are updated over the years to accommodate shifts in medical and social thinking.
59. The 'International Classification of Diseases and Mental Disorders' (ICD-10) has an entry for 'transsexualism' (which comes under the ICD chapter on 'gender identity disorders'). Since that classification, however, there has been debate over whether gender dysphoria should be classified as a disorder, and the most

<sup>25</sup> 'Reform of the Gender Recognition Act 2004: government consultation' (3 July 2018); 'Written Ministerial Statement: Response to Gender Recognition Act (2004) consultation' (22 September 2020).

<sup>26</sup> [2020] EWCA Civ 559.

recent classification, ICD-11, removes it from the chapter on Gender Identity Disorders and places it under the chapter concerned with Conditions Relating to Sexual Health. The term 'gender dysphoria' is replaced by 'gender incongruence'. The new classification does not formally come into use until 1 January 2022; however, it is already influencing the tone of medical reports from gender identity clinics.

60. The internationally influential American Psychiatric Association 'Diagnostic Statistical Manual of Mental Disorders' (DSM-V) has replaced the diagnostic term 'gender identity disorder' with 'gender dysphoria'. It explains that the diagnosis involves 'a difference between one's experienced / expressed gender and assigned gender, and significant distress or problems functioning'. It lasts at least six months and is demonstrated by at least two of the following:
  - A marked incongruence between one's experienced/ expressed gender and primary and/or secondary sex characteristics.
  - A strong desire to be rid of one's primary and/or secondary sex characteristics.
  - A strong desire for the primary and/or secondary sex characteristics of the other gender.
  - A strong desire to be of the other gender.
  - A strong desire to be treated as the other gender.
  - A strong conviction that one has the typical feelings and reactions of the other gender.
61. The latest version of the World Professional Association for Transgender Health's (WPATH's) 'Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People' (Version 7) also emphasises that being transsexual, transgender, or gender non-conforming is a matter of diversity, not pathology. The WPATH 'Standards of Care' usefully distinguishes gender non-conformity from gender dysphoria as follows:
 

'Gender non-conformity refers to the extent to which a person's gender identity, role, or expression differs from the cultural norms prescribed for people of a particular sex. Gender dysphoria refers to discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth (and the associated gender role and/or primary and secondary sex characteristics). Only some gender non-conforming people experience gender dysphoria at some point in their lives. Treatment is available to assist people with such distress to explore their gender identity and find a gender role that is comfortable for them.'
62. The way forward for trans people will vary. The process of medical gender reassignment is complex and requires great personal determination. As we have said, not all trans people wish to undergo gender reassignment surgery (also called gender confirmation surgery). But for those that do, the surgical stage is usually part of a sequence of events and processes that are intended to help the person's physical identity match their inner sense of gender identity, including cross-sex hormone therapy. Whilst it is common to refer to gender

reassignment surgery in the singular, it may involve a number of surgeries over time.

63. Trans people will not be eligible for surgery under the NHS unless they have lived in accordance with their gender identity at least a year.<sup>27</sup> The availability of funding varies throughout the UK and the waiting times for a first appointment at a NHS Gender Identity Clinic are long. This is a cause of concern within the trans community.

### ***Acceptable terminology***

64. Terminology is rapidly changing in this area, and where it is necessary to refer to someone's transgender identity at all, they should always be consulted about their preferred terminology.
65. Where relevant, many people will find it acceptable to be described as a 'trans person' or a 'transgender person'. Others may prefer to describe themselves more specifically as, eg, 'gender fluid' or 'non-binary'. Others will be surprised that there is any question of them being referred to other than simply as male or female according to how they live their lives.
66. Despite its use in current legislation, the term 'transsexual' is widely considered to be out-of-date, and it is offensive to many transgender people, as is the use of 'transgender' as a noun (eg 'he is a transgender').
67. Where one encounters the term, a 'transgendered woman' (or more commonly, a 'trans woman') is a reference to acquired or social gender, ie 'trans woman' refers to someone who was registered at birth as male, but identifies as a woman, and may have transitioned from male to female. A 'transgender man' (or more commonly, a 'trans man') refers to a person who identifies as male but was assigned female at birth (and who may have transitioned from female to male). However, as already stated, it may not be necessary or appropriate to refer to the person's gender history, or indeed their present gender status, at all. Following transition, many people may wish to be identified simply as a woman or as a man (as applicable).
68. The term 'cisgender' or 'cis' is often used to describe people whose gender identity corresponds to the sex assigned to them at birth. Here again, the terminology may or may not be appropriate depending on how the person who is the object of the description wishes to be referred to, especially if it is a term they have not encountered or have not had explained to them. 'Cisgender' has its origin in the Latin prefix 'cis' which means 'on this side of' and the term is drawn from the common usage of cis- and trans- in stereochemistry to refer to otherwise identical chemicals, ie isomers, which have mirror image structures (with components on one side rather than the other but chemically the same). Thus, where the term is acceptable, a cis-woman would be someone whose self-identified gender is on the same 'side' as her gender assigned by doctors at birth based on physical characteristics.
69. Nowadays it is generally inappropriate to refer to someone as a 'pre-operative' or 'post-operative' trans person, as this description assumes gender reassignment surgery and focuses on anatomy, rather than gender identity. One

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<sup>27</sup> [NHS: Treatment Gender Dysphoria](#).

should also never make assumptions that someone has or has not undertaken any form of surgery.

70. Some trans people do not like the phrase 'gender reassignment' as they believe they are simply confirming their correct gender from birth. Hence they prefer the term 'gender confirmation'.
71. 'Deadnaming' is a term used where a trans person, in the course of transitioning or having transitioned, is called by their birth name, or when their birth name is otherwise referred to, instead of their chosen name. This is highly disrespectful and may well be inhibiting and possibly humiliating to a witness, since it amounts to a reference to what may be sensitive part of their social or medical history. If done in public in court, it may also deprive them of the confidentiality protections of the Gender Recognition Act 2004 (by placing their gender reassignment in the public domain permanently).
72. Be alert to issues about how someone prefers to be addressed: showing respect for a person's gender identity includes using appropriate titles (Mr/Ms) and personal pronouns (he/him/his; she/her/hers). Some trans people prefer gender neutral terminology (Mx/they/them/theirs), which should be accommodated if that is known.
73. Enquiries as to which personal pronouns/modes of address are preferred, although well-meaning, may be misinterpreted. Most of the time people, whether trans or not, make it clear what if any gender they identify as, by using commonplace gender cues such as name or by adopting dress commonly associated with a gender. If the individual has not already made it clear, then unless the issue comes as a surprise, it may best be addressed prior to the hearing, if necessary by the judge asking a clerk to enquire and perhaps suggesting to the clerk a form of words that might sensitively be used.
74. Although different identities are involved, transgender people and lesbian, gay and bisexual people often campaign together about discrimination, and it is common to hear the collective term, 'LGBT'. Many research papers also look collectively into issues of discrimination against these groups. The term 'LGBT' is sometimes extended by adding Q (queer or questioning), A (asexual), I (intersex) or more generically, simply a +.

### ***The Equality Act 2010***

75. The Equality Act 2010 prohibits discrimination in relation to 'gender reassignment'. The full interpretation and scope of the protection for trans people has not yet been tested in the appellate courts. See the Equality Act 2010 appendix for an [overview](#) of the Equality Act 2010 and for more detail of the application of the Equality Act 2010 to [gender reassignment](#).

### ***References and resources***

Click on the references below to go to the source referred to. Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link. References are in alphabetical order (discounting the first 'the' or 'a').

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## Cases

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[W, F, C and D \(minors\)\(Name changes disclosing gender reassignment and other matters\) \(Rev 1\)](#) [2020] EWHC 279 (QB) (12 February 2020)

## Other

[Information on Applying for a Gender Recognition Certificate.](#)

## Appendix A The Equality Act 2010

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### Overview

1. The following is an introduction to the Equality Act 2010 ('EqA') for those who rarely encounter it in their day-to-day judicial work. It is not intended to be relied on in making decisions.

### The legislation

2. The Equality Act 2010 identifies nine 'protected characteristics', or specific aspects of our humanity, which are intrinsic to an individual's dignity and autonomy: part of our equal worth as human beings.
3. The EqA prohibits discrimination in relation to the protected characteristics of age, disability, gender reassignment, being married or a civil partner, pregnancy and maternity, race, religion or belief, sex, and sexual orientation. For more detail on the meaning of each of these, see '[The different protected characteristics and examples of discrimination](#)'.
4. The EqA consolidated and updated legislation which previously dealt separately with the protected characteristics. Case law decided under the previous legislation continues to be applied under the EqA where the legislative provisions had not been changed.
5. The EqA must be interpreted consistently with relevant provisions of the EU Treaty and related EU Directives. In some instances, UK legislation was passed prior to the relevant EU Directive and gives additional rights. EU case law is decided by the European Court of Justice or, as it is now known, the Court of Justice of the European Union.
6. There is a growing body of protection from discrimination derived from the European Convention of Human Rights, which is influencing developments at EU level.<sup>1</sup>
7. The government has suggested that equality law, including that set out in the EU Directives and case law, will be incorporated into UK law post-Brexit, and that has been provided for by sections 2-7 of the European Union (Withdrawal) Act 2018. However, the Supreme Court and the High Court of Justiciary will not be bound by any post-exit EU case law on areas of retained law, and the normal rules relating to departing from previous decisions will apply.

### The Commission and Codes

8. The Equality and Human Rights Commission is an independent statutory body with a remit to fight discrimination and promote equality of opportunity. It replaced the previous Commission for Racial Equality, Equal Opportunities Commission and Disability Rights Commission, and has a wider remit.

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<sup>1</sup> For a useful guide on developments at EU level and under the ECHR see the Fundamental Rights Agency's '[Handbook on European Non-discrimination law](#)' (2018).

9. The EHRC has issued various Codes of Practice including on:
  - Employment.<sup>2</sup>
  - Services, Public Functions and Associations.<sup>3</sup>
10. Although the Codes do not have legal force in themselves, tribunals and courts must take relevant provisions into account.
11. The Codes give numerous illustrative examples of unlawful discrimination, some of which are repeated in this appendix.

### **The definition of discrimination**

12. There are four main types of discrimination which apply to all the protected characteristics (except pregnancy and maternity, which are dealt with slightly differently).

#### *Direct discrimination*

13. Direct discrimination is based on the premise that like should be treated alike. This is rooted in the idea of formal equality. This requires people to be treated consistently.
14. Under section 13, direct discrimination means less favourable treatment because of a protected characteristic. It is useful to look at the way the alleged discriminator treats the claimant, compared with how he or she treats or would treat a 'comparator', ie another individual in similar circumstances who does not have the relevant protected characteristic. It is not necessary to point to an actual comparator. A hypothetical comparison can be made.

For example, an employer fails to promote an employee because she is a woman. If she had been a man with the same qualifications and experience, the employer would have promoted her.

15. It is useful evidence if the employer goes on to promote a man to the same vacancy, if the man has fewer qualifications and less experience. However, it is not necessary to prove a man has been appointed instead. It is possible that the employer promotes no one at that time. Nevertheless, other evidence suggests the woman would have been appointed had she been a man.
16. Usually direct discrimination is because of the protected characteristic of the person subjected to the discrimination, but it can also include:
  - Discrimination because of someone else's protected characteristic, eg a landlord refuses to let a property to a young white man because he attends the viewing with a friend wearing traditional Muslim dress.
  - Discrimination because of a false perception that someone has a certain protected characteristic, eg a judge of Iraqi origin, unlike her colleagues, is not invited to the cathedral court service at the start of the legal year because she is assumed to be Muslim. In fact, she is not Muslim, but she is perceived as such, and treated less favourably because of this perception.

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<sup>2</sup> [Code published 2011](#) (with its 31 March 2014 supplement).

<sup>3</sup> [Code published 2011](#) (with its 31 March 2014 supplement).



17. Direct discrimination may be conscious or unconscious. The motive for the treatment is legally irrelevant (though it can be evidentially useful). There cannot be a 'good', 'benevolent' or commercially justifiable reason for directly discriminating.
18. There is no justification defence available to direct discrimination, except in relation to direct age discrimination. However, there are a number of exceptions in the Equality Act 2010 where direct discrimination is permitted.
19. Generally speaking, the EqA is symmetrical. Although discrimination legislation was brought in because of evidence of discrimination against certain groups, the legal prohibition is of discrimination against anyone because of their protected characteristics. For example, it is unlawful to discriminate against someone because of their sex, whether male or female; because of their race or nationality, whether black, white, British or non-British; because of their age, whether young or old. The only exception is in relation to disability, where it is not prohibited to discriminate against a person because he or she is not disabled. This facilitates positive action for disabled people. Certain positive action is also permitted in relation to pregnancy and maternity.

### *Indirect discrimination*

20. Direct discrimination seeks to ensure there is no different or less favourable treatment of people because of personal characteristics such as race, sex, age etc. However, treating everyone the same does not always ensure true equality. Because of structural disadvantages in our society, people with particular characteristics might find themselves disadvantaged even by apparently 'neutral' treatment. The law of indirect discrimination is designed to remove those structural disadvantages. It is not – as it is so often misunderstood to be – any form of favoured treatment. This is often termed a form of 'substantive' equality. The idea being that there are differences among people with different characteristics, and equality in substance can only be truly achieved by recognising that people with different characteristics have different starting positions.
21. It should also be remembered that an indirectly discriminatory practice is not unlawful if it can be objectively justified.
22. Under section 19 of the Equality Act ('EqA'), indirect discrimination occurs where:
  - a defendant/respondent applies a provision, criterion or practice ('PCP') to the claimant,
  - which puts – or would put – the claimant at a particular disadvantage, and
  - which puts – or would put – others sharing the claimant's relevant protected characteristic at a particular disadvantage, and
  - which the defendant/respondent cannot justify by showing it is a proportionate means of achieving a legitimate aim.
23. It is not necessary for everyone sharing the relevant protected characteristic to be at a disadvantage or potential disadvantage. Nor does it matter that certain people without the relevant protected characteristic would also be

disadvantaged by the PCP in question. But it needs to be clear that the PCP does/would particularly affect those with the protected characteristic.

24. The two stage justification defence is important. The alleged discriminator must show (i) that he or she has a legitimate aim, and (ii) that applying the PCP is a proportionate means of achieving that legitimate aim. The court must follow a structured approach to this proportionality test in that:
- The aim must be sufficiently important to justify the measure which disadvantages some groups.
  - The measures designed to meet the objective must be rationally connected to that aim.
  - The means must be no more than is necessary to accomplish the objective.
  - The interests of the affected individual and the wider community must be fairly balanced.
25. Indirect discrimination has been used successfully to challenge prohibition of wearing of cultural and religious artefacts, such as a cross or bangle (Kara) in schools and workplaces, and dress codes such as a ban on corn rows or dreadlocks, veils and turbans. It has frequently been used to obtain rights for part-time workers who are predominantly female (although protection of part-time workers has, to a certain extent, been improved by the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000).

### *Victimisation*

26. The law on victimisation is intended to protect those who want to speak out against discrimination, and to ensure that they feel able to do so. It is protection against further negative treatment for challenging discrimination in some way.
27. Under section 27 of the Equality Act ('EqA'), it is victimisation to subject a person to a detriment because he or she has done a 'protected act' or because it is believed he or she has done or may do a protected act.
28. A protected act is:
- Bringing proceedings under the EqA 2010.
  - Giving evidence or information in connection with proceedings under the EqA 2010.
  - Doing any other thing for the purposes or in connection with the EqA 2010.
  - Making an allegation that someone has contravened the EqA 2010.
  - Making or seeking a relevant pay disclosure at work.
29. Protected acts could include making oral allegations of discrimination; writing letters of complaint alleging discrimination; approaching the EHRC; taking out a discrimination grievance at work.

For example, a magistrate makes a complaint of race discrimination against another magistrate. When she makes enquiries about applying to sit in the youth court, she is told that her application will probably fail. If this is because of her complaint about her fellow magistrate, it is likely to constitute unlawful victimisation.

30. The allegations do not have to be true, but making a false allegation in bad faith is not a protected act.
31. The claimant need not have the relevant protected characteristic. The protection extends to those speaking out on behalf of and/or supporting others who have been discriminated against.

For example, a white person complains to the doorman that he is excluding black people from a night club. As a result, the white person is himself refused entry from the club. (This would also be direct discrimination.)

32. One useful indicator of victimisation is if the claimant has been treated differently before and after doing the protected act in similar circumstances. However, other evidence can also prove victimisation.

### *Harassment*

33. Harassment for the purposes of the EqA 2010 has a quite different definition to the Protection from Harassment Act 1997. Under section 26 of the EqA 2010, harassment occurs where:
  - a person engages in unwanted conduct related to a protected characteristic,
  - which has the purpose or effect of
  - violating the claimant's dignity or subjecting the claimant to an intimidating, hostile, degrading, humiliating or offensive environment.
34. Where the conduct did not have that purpose, each of the following must be taken into account in deciding whether it had that effect:
  - The claimant's perception.
  - The other circumstances of the case.
  - Whether it is reasonable for the conduct to have that effect.
35. Harassment under the EqA 2010 is often focussed on a course of conduct. However, a one-off act can also amount to harassment, eg a hostile and offensive remark. Suggesting to a female Asian employee that she might be 'married off in India' was found to constitute unlawful harassment in the employment sphere.
36. Unwanted conduct of a sexual nature which has the same degrading purpose or effect as above is also a form of harassment, regardless of any protected characteristic. Less favourable treatment because the victim has either submitted or refused to submit to sexual harassment or harassment related to sex or gender reassignment also amounts to harassment.
37. Importantly, protection from harassment is not limited to people who have the relevant characteristic. For example, unwanted conduct related to being female, such as posters with images of scantily dressed women, could have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for a male.
38. In the County Court jurisdictions discussed below, there is no protection against harassment on grounds of sexual orientation or religion and belief (nor, in

relation to schools, gender reassignment); but what may colloquially be described as harassment can often amount to direct discrimination in law.

For example, racist abuse is, by its very nature less favourable treatment because of race. It is also intrinsically related to race and is likely to be unwanted and have the purpose or effect of violating the recipient's dignity.

### *Disability discrimination only*

39. In relation to disability discrimination only, there are also these definitions:

- Discrimination arising from disability.
- Failure to make reasonable adjustments.
- Prohibition on pre-employment health / disability enquiries.

40. For examples of discrimination in relation to each of the protected characteristics, see '[The different protected characteristics and examples of discrimination](#)'.

## **Contexts within the jurisdiction of the EqA**

### *The workplace*

41. Discrimination in the workplace is generally prohibited by Part 5 of the Equality Act 2010.
42. Alongside the forms of discrimination described above, Part 5 also provides for sex equality in relation to pay (often termed 'equal pay'). A sex equality clause is implied into employment contracts to provide equal pay and terms and conditions between men and women who perform the same or comparable work, or work of equal value.
43. Employment is widely defined to encompass workers, office holders and all but the genuinely self-employed. Volunteers are outside the scope of protection, unless they have a contract personally to do work or are engaged in work experience or vocational training placements. Job applicants are covered as well as former employees where the discrimination arises out of and is closely connected to the employment relationship. There is no minimum length of service requirement.
44. Jurisdiction under Part 5 is conferred on Employment Tribunals, but the civil courts may also hear equal pay claims in some circumstances.

### *Services and public functions*

45. Part 3 of the EqA covers the provision of services, goods and facilities to the public, or a section of the public, whether for payment or not.

For example, it covers services provided by hotels, restaurants, pubs, banks, solicitors and accountants, shops, hospitals, public utilities (gas, electricity, water), government departments, local authorities and some charities and voluntary agencies.

46. Age under 18 is not a protected characteristic in relation to the provision of services and public functions. Part 3 also does not apply to marriage and civil partnership.

47. The type of conduct covered is wide-ranging: not only in relation to the provision or non-provision of the service, but also the quality, manner, terms of provision, termination of the service and any other detriment. A detriment can be by act or omission. The test is whether the claimant reasonably considered him or herself to be at disadvantage, and is subject to a de minimus rule.
48. Whilst the 'judicial function' is exempt from the prohibition on discrimination in the exercise of public functions, this exemption is likely to be limited to the core, adjudicative and listing functions. Ancillary functions, eg training, mentoring, conducting appraisals, managerial or committee functions and conduct towards colleagues or court staff will not be exempt.
49. Jurisdiction under Part 3 is conferred on the County and High Court.

### *Premises*

50. There is wide protection in the housing field set out in Part 4 of the EqA. Protection generally applies in relation to 'disposals' and management, and covers decisions on such matters as whether to dispose of the premises, the terms of disposal, grants of permission and treatment of occupiers including evictions.
51. Protection in this context does not apply in respect of the characteristics of age, marriage or civil partnership.

### *Education*

52. The coverage extends to schools, further and higher education and general qualifications bodies. Once again it is wide ranging, including in relation to admissions and exclusions, terms of provision and other detrimental treatment.
53. In relation to schools, protection does not apply in respect of age, marriage or civil partnership discrimination.

### *Associations*

54. The provisions regarding scope are complex and are set out in Part 7. Broadly, the EqA applies to any association of twenty-five or more members which has rules about how to become a member, including a genuine selection process.  
  
For example, this may include organisations such as sports clubs, clubs for people with particular interests, the Rotary Club, Scouts and Guides, and organisations established to promote the interests of their members.
55. Single characteristic associations are permitted by schedule 16, eg the Garrick Club's prohibition on women members, so long as that characteristic is not colour and the association is not a political party.
56. Where a club or association does not restrict membership under the exemption, it is unlawful to provide a different level of facilities or different tiers of membership rights by reference to a protected characteristic.  
  
For example, it would be unlawful to exclude women golf club members from the bar in the clubhouse, or not to allow women members to stand for election as chair of the golf club.

57. Special provisions apply in relation to political parties, in particular with regard to single-sex shortlists.
58. Once again the protection afforded is wide ranging and extends to admissions, terms of membership, benefits and services, expulsions, and other detrimental treatment.

### *Transport and building regulations*

59. In Part 12, there are specific regulations governing transport matters, such as wheelchair-accessible vehicles in the licensed taxi trade and rail vehicle accessibility with a penalty regime, with a right of appeal to the County Court.
60. Specific building regulations concerning accessibility are enforced through local authority and planning authorities and the Secretary of State.

## **Exceptions**

61. There are a number of important exceptions in the Equality Act 2010. For example, charities may provide assistance exclusively to the elderly, to women, or to those from a particular community, but are prohibited from treating people differently because of colour (as opposed to ethnic or national origins).
62. Specific exceptions include gender-affected sporting activity, and single sex communal accommodation.
63. In some circumstances there are exceptions for religious organisations in relation to discrimination in respect of sexual orientation.
64. Only some broad areas of protection are outlined in this appendix. The detail of the precise scope of the EqA is outside the remit of the Equal Treatment Bench Book.

## **Remedies**

65. The County Court has power to grant any remedy which could be granted by the High Court in proceedings for tort or on a judicial review claim. Compensation for injury to feelings may be awarded, assessed in three bands, depending on the extent to which the claimant's feelings have been injured, and in appropriate cases may include aggravated and exemplary damages, and damages for personal injury.

## **Public sector equality duty**

66. The public sector equality duty ('PSED') was first introduced to address institutional racism following the Stephen Lawrence inquiry, in order to tackle  
  
    'the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture and ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people.'<sup>4</sup>

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<sup>4</sup> ['The Stephen Lawrence Inquiry, Report of an inquiry by Sir William MacPherson of Cluny \(The MacPherson Report\)'](#): Chapter 6.

67. The PSED to eliminate discrimination, harassment, victimisation and any other prohibited conduct covers every protected characteristic, whilst the additional duties of advancing equality of opportunity and fostering good relations apply to all the 'relevant' characteristics apart from marriage and civil partnership. The aim is to ensure that equality issues are considered early, and to improve the strategic decision-making process. In spite of 40 years of individual anti-discrimination rights, inequality remains stubbornly persistent.
68. Under section 149, a public sector authority must, in the exercise of its functions, have due regard to the need to:
  - Eliminate discrimination, harassment, victimisation, and any other conduct that is prohibited under the Equality Act 2010.
  - Advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it.
  - Foster good relations between people who share a relevant protected characteristic and those who do not share it.
69. As well as this general duty, England, Wales and Scotland each have specific duties. In England, authorities must publish annual information to demonstrate their compliance with the general PSED. They must also publish one or more specific and measurable equality objectives, and renew these every four years.
70. In Wales, there are more detailed requirements which include producing and regularly reviewing written equality objectives; comprehensive monitoring; and publishing equality impact assessments.
71. The PSED applies to public authorities and hybrid authorities – ie those who are not a public authority, but who exercise public functions, in the exercise of those functions.
72. As an example, the PSED could lead an academy school to review its anti-bullying strategy to ensure that it addresses the issue of homophobic bullying, with the aim of fostering good relations, and in particular tackling prejudice against gay and lesbian people.
73. Breach of the PSED is actionable by judicial review. The EHRC also has power to issue compliance notices.

## ***The different protected characteristics and examples of discrimination***

74. The following sub-sections give more detail on the meaning of each protected characteristic, and the application of the definitions of discrimination in that particular context.

[Age](#)

[Disability](#)

[Gender reassignment](#)

[Being married or a civil partner](#)

[Pregnancy and maternity](#)

[Race](#)

[Religion or belief](#)

[Sex](#)

[Sexual orientation](#)



## Age

1. For an overview of the Equality Act 2010 ('EqA'), including the basic definitions, the different jurisdictions and the public sector equality duty, see ['Overview'](#) at the start of this appendix.

### Meaning of 'age'

2. Under section 5 of the EqA, the protected characteristic of 'age' does not refer to any particular age or age group. Subject to certain exceptions in specific contexts, people are equally protected against discrimination because they are younger or older. An 'age group' is a group of people defined by reference to a particular age or a range of ages, or a cohort such as 'baby boomers' or 'millennials'.
3. Age groups may be linked to physical appearance, such as the terms 'grey-haired' or 'youthful'.
4. Age under 18 is not a protected characteristic under certain parts of the EqA, eg in relation to discrimination in services and public functions, and in schools. There are also numerous specific exceptions where age discrimination is permitted.

### Age discrimination

#### *Direct discrimination*

5. The full definition of direct discrimination is set out in the Equality Act Overview above. It is direct age discrimination to treat a person less favourably because of age. This is usually their own age.  
  
For example, an older person is refused admission to a gym or a nightclub simply because of her age, but a younger person would have been admitted.
6. The definition also covers treating someone less favourably because of their perceived age, or the age of someone else.
7. Unlike all other forms of direct discrimination, direct age discrimination can potentially be justified. The treatment is not direct age discrimination if the alleged discriminator can show that the action taken is a proportionate means of achieving a legitimate aim. The legitimate aim needed to justify direct age discrimination differs from that involved in justifying indirect discrimination in that the aim must be of a public interest nature.  
  
For example, the Department of Health invites women aged 25-49 for a cervical screening test every three years, whereas women aged 50-64 are invited every five years. The health service is likely to be able to objectively justify offering more regular screening to the younger age group, as this can be seen as a proportionate response to statistical evidence that this group is at the greatest risk of developing cervical cancer.<sup>5</sup>
8. It is direct age discrimination to force someone to retire at a particular age, unless the employer can prove this is a proportionate means of achieving a

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<sup>5</sup> This and other examples of age discrimination given here are taken from 'Equality Act 2010: Banning Age Discrimination in Services': GEO (2012).

legitimate aim. Often the legitimate aim put forward in such cases relates to enabling an intergenerational workforce, that is dismissing older workers to open up opportunities for younger workers, or to protect the dignity of the worker, as dismissing for having reached retirement age prevents the need to performance manage and interrogate the competency of individuals who have worked for an employer for a significant period of time. Both have been accepted as legitimate aims for the purposes of justifying direct age discrimination. However, the legitimate aim still needs to be proportionate.

### *Indirect discrimination*

9. The full definition of indirect discrimination is set out in the Equality Act Overview above. It is indirect age discrimination unjustifiably to apply a provision, criterion or practice which puts someone of a certain age group at a particular disadvantage, and which puts or would put others of the same group at that disadvantage.

For example, an optician allows payment for glasses by instalments, but restricts eligibility to those in work. The optician's practice applies to everyone, but puts workers over retirement age at a disadvantage.

10. It is not unlawful indirect discrimination if the employer/service provider etc can show the provision, criterion or practice is a proportionate means of achieving a legitimate aim.
11. Provisions, criteria and practices which might have a particular adverse effect on older people could include:
  - Requirements for easy use and knowledge of IT.
  - Certain physical requirements, eg to be able to run at a certain speed.
  - Failure to accommodate time needed for caring for adult relatives.
12. Provisions, criteria and practices which might have a particular adverse effect on younger people could include:
  - Requirements for minimum length of employment or types of work experience.
  - An employer recruiting a driver says candidates must have been holding a driving licence for at least five years.

### *Victimisation*

13. The full definition of victimisation is set out in the Equality Act Overview above. It is unlawful to subject someone to a detriment because he or she has, in good faith, complained or raised issues about age discrimination in some way.

For example, a customer has arranged to give evidence as a witness in an age discrimination court case against a service provider. The service provider threatens not to serve that customer in future if he goes ahead with giving evidence.

### *Harassment examples*

14. The full definition of harassment is set out in the Equality Act Overview above. It is harassment to engage in unwanted conduct related to age, which has the

purpose or effect of violating a person's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment.

For example, a computer salesperson makes assumptions about an older person's ability to use a computer, and makes repeated offensive and humiliating remarks and jokes about this in front of other people.

## Disability

1. For an overview of the Equality Act 2010 ('EqA'), including the basic definitions, the different jurisdictions and the public sector equality duty, see ['Overview'](#) at the start of this appendix.

### Meaning of 'disability'

2. The definition of disability under the EqA is extremely wide. It covers far more people than many realise. It also tends to have wider scope than definitions used in other contexts, eg access to disability benefits.
3. The definition can be found in section 6 and Schedule 1 of the EqA, and there is very useful statutory 'Guidance on matters to be taken into account in determining questions relating to the definition of disability'.
4. People with cancer, multiple sclerosis or HIV infection, and those registered as blind or sight impaired, are deemed disabled.
5. Apart from those groups, a person is disabled under section 6 of the EqA (read with Schedule 1) if:
  - he or she has a physical or mental impairment, and
  - the impairment has a substantial (ie not minor or trivial) and long-term (at least 12 months, or for the rest of the person's life, if less) adverse effect on the person's ability to carry out normal day-to-day activities.
6. People with progressive conditions are considered disabled as soon as their impairment has some effect even if the effect is not yet substantial, provided it is likely to become substantial. This ensures individuals are protected from pre-emptive treatment before a condition worsens.
7. If steps are being taken to treat or correct the adverse effect, or if an aid is used, the test is the likely adverse effect without such treatment or aid. For example, if a person wears a hearing aid, the test is the level of the person's hearing if not using the aid. The only exception is glasses, where a person's sight is assessed when wearing glasses or lenses.
8. Certain specified conditions, such as alcoholism and voyeurism are excluded.
9. The United Nations Convention on the Rights of Persons with Disabilities is directly applicable in the UK and provides that 'persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.
10. Discrimination because of past disabilities is also covered.

### Disability discrimination

#### *Direct discrimination*

11. The full definition of direct discrimination is set out in the Equality Act Overview above. It is direct discrimination to treat a person less favourably because of disability. This is usually their own disability.

For example, a disabled man with a chronic heart condition is a member of a golf club. He asks whether he can join the club's tournament team, but is told his game is not good enough. Another club member with the same golf handicap as him, who doesn't have this disability, is selected for the team.

12. It is also direct discrimination to treat someone less favourably because of someone else's disability.

For example, if an employer allowed a secretary to leave at 4 pm to look after her (non-disabled) child, but did not allow another secretary to leave at 4 pm to look after her disabled child because of assumptions that the disabled child would be more demanding of her mother's work time.

13. The definition also covers treating someone less favourably because of their perceived disability.

### *Indirect discrimination*

14. Under the Disability Discrimination Act 1995 there was no protection against indirect disability discrimination. However, the Equality Act 2010 introduced this form of protection.

15. The full definition of indirect discrimination is set out in the Equality Act Overview above. It is indirect disability discrimination unjustifiably to apply a provision, criterion or practice which puts a disabled person at a particular disadvantage, and which puts or would put others of the same group at that disadvantage.

For example, a practice of applying strict attendance requirements when considering whether to impose a warning or disciplinary action, may put a person with a disability at a disadvantage where he or she takes more time off work for matters relating to his or her disability.

16. It is not unlawful indirect discrimination if the employer/service provider etc can show the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

### *Victimisation*

17. The full definition of victimisation is set out in the Equality Act Overview above. It is unlawful to subject someone to a detriment because he or she has, in good faith, complained or raised issues about disability discrimination in some way.

For example, a businesswoman with hearing loss complains to the head office of a large hotel chain that she was unable to access the conference rooms of one of the hotels because there was no induction loop. When she tries to book a room a few weeks later, she is told none are available, but that is not in fact true. The real reason is that the hotel is upset about her complaint.

### *Harassment*

18. The full definition of harassment is set out in the Equality Act Overview above. It is harassment to engage in unwanted conduct related to disability, which has the purpose or effect of violating a person's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment.

For example, a party of adults with learning difficulties have a meal in a restaurant accompanied by their support workers. Some of the restaurant staff make fun of the party with gestures and silently mimicking them.

19. The unwanted conduct can refer to someone else's disability. In the above example, the support workers can also bring a claim for harassment if the conduct of the staff has spoilt their meal by creating a degrading and humiliating environment in the restaurant for them as well as for the adults they support.

### *Special forms of disability discrimination*

20. The EqA recognises that more than formal equality is required to enable disabled people to participate as fully as possible in society. As well as the definitions of discrimination applicable to the other protected characteristics, there are two additional definitions:
  - Failure to make reasonable adjustments.
  - Discrimination arising out of disability.

### *Failure to make reasonable adjustments (EqA section 20)*

21. Reasonable adjustments may be required to assist a disabled person who, because of his or her disability, is placed at a substantial disadvantage in comparison to others without that disability. The idea is that the employer, service provider, transport provider etc should take reasonable steps, at no cost to the disabled person, to avoid or remove the disadvantage.
22. The duty may be triggered when an employer / service or transport provider etc knows – or can reasonably be expected to have known – that a person has a disability and needs an adjustment. Outside the employment arena, there is also an 'anticipatory duty', eg a service provider should make reasonable adjustments in anticipation of the needs of disabled customers. The precise framing of the reasonable adjustment duty depends on the area of discrimination (employment, services, education etc).
23. Adjustments can include, for example:
  - Adaptations or modifications to premises (eg entrance ramps, handrails, uncluttered corridors, lifts, power-assisted doors).
  - Adapted equipment, especially IT software.
  - Suitable furniture.
  - Materials provided in alternative format.
  - Accessible websites.
  - Provision of sign language or other interpreters.
  - Staff assistance.
  - Changing required hours of attendance or the time when services are provided.
24. What is a reasonable step depends on the circumstances. The following are some of the factors which might be taken into account when considering what is reasonable:

- Whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the services in question.
  - The extent to which it is practicable for the service provider to take the steps.
  - The financial and other costs of making the adjustment.
  - The extent of any disruption which taking the steps would cause.
  - The extent of the service provider's financial and other resources.
  - The amount of any resources already spent on making adjustments.
  - The availability of financial or other assistance.
25. The House of Lords Select Committee on the Equality Act 2010 and Disability said that even where there was awareness of the duty to make reasonable adjustments, understanding was often poor, including amongst disabled people themselves. Many problems had occurred because of poor understanding about the nature of the anticipatory duty, particularly among service providers. A significant problem was the failure to appreciate that adjustments may require what looks like more favourable treatment. Understanding was also particularly low in respect of 'hidden disabilities'.<sup>6</sup>

*Discrimination arising from Disability ('DAFD') (section 15)*

26. It is discrimination to treat someone unfavourably because of something arising in consequence of their disability. The focus in this type of discrimination is on treatment that has happened because of something which is causally linked to the disability – rather than because of the disability itself, which is the focus of direct disability discrimination.

For example, an employee is dismissed because she has a poor sickness absence record. The reason she has a poor record is because of sickness caused by her disability.

27. It is not unlawful if the discriminator can show the treatment is a proportionate means of achieving a legitimate aim.

For example, the employee's disability was leading to absences at a very high level which could no longer be accommodated.

28. This justification defence is unlikely to succeed if there are reasonable adjustments which should have been made.

For example, an employee is demoted because he makes too many data entry errors on the computer. The reason he makes the errors is because he cannot clearly see the screen as a result of his visual impairment. If the employer had made the reasonable adjustment of installing adapted software, the employee would not have made the errors.

29. DAFD is quite different from direct discrimination, because it is irrelevant that the employer or service provider etc would have treated other, non-disabled people, the same way. Section 15 uses the phrase 'unfavourable treatment'

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<sup>6</sup> '[The Equality Act 2010: The impact on disabled people](#)': House of Lords Select Committee on the Equality Act 2010 and Disability (2016).

rather than 'less favourable treatment' (which is used for direct discrimination), and this removes the need for comparison with another person. For example:

- A restaurant refuses to allow a visually impaired customer to bring in her guide dog. It is irrelevant that the restaurant does not allow any customers to bring dogs onto the premises. The reason this particular customer has a dog is because of her disability.
- A disabled person is refused service at a bar because he is slurring his words, as a result of having had a stroke. It is irrelevant whether other potential customers would be refused service if they slurred their words. The reason this particular individual slurs his words is because of his disability.



## Gender reassignment

1. For an overview of the Equality Act 2010 ('EqA'), including the basic definitions, the different jurisdictions and the public sector equality duty, see ['Overview'](#) at the start of this appendix.

### Meaning of 'gender reassignment'

2. Under section 7 of the EqA, a person has the protected characteristic of 'gender reassignment' if the person is undergoing, proposing to undergo or has undergone a process (or part of a process) for the purpose of reassigning their sex by changing physiological or other attributes of sex.
3. There is no need for the person to be under medical supervision or to have a gender recognition certificate.
4. The EqA calls a person who has the protected characteristic of gender reassignment, a 'transsexual person'. As explained in chapter 12, this term is now old-fashioned, limited in its meaning, and generally considered unacceptable. Preferred terms are 'trans' or 'transgender' people. We use both of these terms in the Bench Book.

## Gender reassignment discrimination

### *Direct discrimination*

5. The full definition of direct discrimination is set out in the Equality Act Overview above. It is direct discrimination to treat a person less favourably because of gender reassignment.

For example, as a result of complaints from other customers, a health spa apologetically tells a trans woman that she will not be allowed to use the spa again.

### *Time off at work*

6. It is discrimination to treat a worker's time off for gender reassignment less favourably than a routine sickness absence would have been treated. It is also discrimination unreasonably to treat it less favourably than absence for some other cause, eg paid or unpaid leave.

### *Indirect discrimination*

7. The full definition of indirect discrimination is set out in the Equality Act Overview above. It is indirect gender reassignment discrimination unjustifiably to apply a provision, criterion or practice which puts those who have undergone, intend to undergo, or are undergoing gender reassignment at a particular disadvantage, and which puts or would put others undergoing gender reassignment etc at that disadvantage.

For example, a health authority decides not to fund breast implants. A person undergoing gender reassignment may consider this essential to make her look more feminine.

8. It is not unlawful indirect discrimination if the employer/service provider etc can show the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

### *Victimisation*

9. The full definition of victimisation is set out in the Equality Act Overview above. It is unlawful to subject someone to a detriment because he or she has, in good faith, complained or raised issues about gender reassignment discrimination in some way.

For example, an employee complains to management that his colleagues are making lewd comments about his proposed gender reassignment. His manager decides the situation is too difficult or 'sensitive' to manage and makes the employee redundant on some pretext.

### *Harassment*

10. The full definition of harassment is set out in the Equality Act Overview above. It is harassment to engage in unwanted conduct related to gender reassignment, which has the purpose or effect of violating a person's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment.

For example, a hotel receptionist repeatedly refers to a trans woman as 'sir' and 'he' whenever she uses reception, despite her objections. This creates a degrading, humiliating and offensive environment for her.

11. Unwanted conduct because of rejection of or submission to gender reassignment harassment is also unlawful.

### *Discrimination against trans workers who are not undergoing gender reassignment*

12. There is a wide range of people who would describe themselves as trans or transgender, non-binary or gender fluid, but who have not undergone, and do not propose to undergo, gender reassignment in the sense of a permanent change from one social presentation of their gender to another. It is uncertain whether they would have the protected characteristic of 'gender reassignment' and therefore whether they would gain the protection under section 7, except perhaps on the basis that they were (wrongly) perceived as having undergone or proposing to undergo gender reassignment. The same might apply to people who cross-dress from time to time.
13. It is arguable, though untested, that individuals in these categories could also claim sex discrimination.
14. It is also possible that the concept of 'gender reassignment' in the Equality Act is not limited to where an individual undergoes reassignment from a single sex to its opposite. Again, this is untested in the appeal courts. However, an employment tribunal has said that Parliament intended gender reassignment to be a spectrum moving away from birth sex, and that a person could be at any point on that spectrum, not necessarily ending up at the opposite sex.<sup>7</sup>

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<sup>7</sup> [Taylor v Jaguar Land Rover Limited Employment Tribunal Case No: 1304471/2018](#) at paragraph 178. A first instance decision of the employment tribunal.

15. Intersex people are not explicitly protected by the Equality Act, but must not be discriminated against because of their sex or perceived sex.

## **Being married or a civil partner**

1. For an overview of the Equality Act 2010 ('EqA'), including the basic definitions, the different jurisdictions and the public sector equality duty, see '[Overview](#)' at the start of this appendix.
2. Under section 8 of the EqA, a person has the protected characteristic of 'marriage and civil partnership' if the person is married or is a civil partner. It does not extend to those engaged to be married, living with someone as a couple (though not married or a civil partner), single or divorced.
3. Broadly speaking, outside the context of work, discrimination, harassment and victimisation by reference to marital/civil partnership status is not prohibited.

## Pregnancy and maternity

1. For an overview of the Equality Act 2010 ('EqA'), including the different jurisdictions and the public sector equality duty, see '[Overview](#)' at the start of this appendix.

### Meaning of pregnancy and maternity

2. A woman has the protected characteristic of pregnancy if she is pregnant (and, in the case of IVF treatment when the fertilised egg is transferred to her uterus).
3. A woman has maternity status for 26 weeks after the birth of a living child or after a still-birth (ie after 24 weeks of pregnancy).
4. After the 26-week period there is also protection in relation to breastfeeding.

### Pregnancy and maternity discrimination

5. In non-work cases, section 17 says it is unlawful to treat a woman unfavourably because:
  - She is or has been pregnant.
  - She has given birth, and the treatment is within 26 weeks of having given birth.
  - She is breastfeeding, and the treatment is within 26 weeks of having given birth.
6. In employment cases, it is slightly different. Section 18 says it is unlawful to treat a woman unfavourably:
  - During her protected period, because of her pregnancy or because of a pregnancy-related illness. The protected period is at the end of her statutory maternity leave or if she returns sooner, or if she is only entitled to two weeks' compulsory leave, at the end of those two weeks.
  - Because she is on the two weeks' compulsory maternity leave.
  - Because she is taking, has taken or seeks to take statutory maternity leave (up to 12 months).
7. As the test is 'unfavourable' treatment, not 'less favourable' treatment, it is not necessary to compare the woman's treatment with the treatment of another person who is not pregnant or who has not given birth.

For example:

- A building society refuses a woman a mortgage because she is pregnant and it assumes she will be unable to meet the mortgage repayments after the child is born.
  - A club which organises salsa evenings deletes a woman from its list because it assumes she will not want to attend while she is pregnant.
  - A woman is asked to leave a hotel restaurant because she is breastfeeding her baby and some of the other customers declare themselves offended.
8. A man cannot complain of sex discrimination, comparing himself with a woman who is getting special treatment in connection with pregnancy or childbirth.

For example, a department store could provide a rest room for women who are pregnant or breastfeeding. A man cannot complain of sex discrimination because there is no rest area for men.

9. The indirect discrimination provisions do not apply to the protected characteristic of pregnancy and maternity (although such conduct may be covered in any event as indirect sex discrimination).
10. Harassment related to pregnancy or maternity is not covered as such by the EqA, but it could be claimed as sex-related harassment.

## Race

1. For an overview of the Equality Act 2010 ('EqA'), including the basic definitions, the different jurisdictions and the public sector equality duty, see '[Overview](#)' at the start of this appendix.

### Meaning of race

2. Under section 9 of the EqA, the protected characteristic of 'race' includes colour, nationality and ethnic or national origins. It can also comprise more than one distinct racial group.
3. Colour, nationality, and national origin are self-explanatory. Ethnic origin received consideration by the then House of Lords in *Mandla v Dowell Lee*,<sup>8</sup> where Lord Fraser defined ethnic origin in the following way:

'For a group to constitute an ethnic group in the sense of the 1976 Act, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant: (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups.'

Jewish people, Sikhs, Roma and Irish Travellers, amongst others, have been found to be ethnic groups.

4. After several consultations and a lengthy debate, the government decided that caste discrimination should not be explicitly included by regulations into the meaning of 'race'. Some commentators believe 'caste' is already included, since it comes within the concept of 'descent', which the case law has established is covered. This will depend on the factual circumstances.

### Race discrimination

#### *Direct discrimination*

5. The full definition of direct discrimination is set out in the Equality Act Overview above. It is direct race discrimination to treat a person less favourably because of race. Usually this means the person's own race.

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<sup>8</sup> [1982] UKHL 7

For example, after a young black man has arrived late three times on a 10-week IT training course, a business college tells him that if he arrives late again, he will be thrown off the course, because he is disturbing the concentration of other students. When white students arrive late, nothing is said.

6. The definition includes treating someone less favourably because of their perceived race or the race of someone else.

For example, a British man is not allowed into a nightclub because he has come with two Polish friends.

### *Indirect discrimination*

7. The full definition of indirect discrimination is set out in the Equality Act Overview above.
8. It is indirect race discrimination unjustifiably to apply a provision, criterion or practice which puts someone of a certain race at a particular disadvantage, and which puts or would put others of the same race at that disadvantage.

For example, an employer requires applicants for a kitchen job as sous chef to complete an application form in their own hand-writing. This is particularly difficult for applicants from Egypt who not only speak English as a second language, but whose own language has different letters.

9. It is not unlawful indirect discrimination if the employer / service provider etc can show the provision, criterion or practice is a proportionate means of achieving a legitimate aim.
10. Provisions, criteria and practices which might have particular adverse effect on people not born in the UK could include:
- Requirements for a high-level of competence in written or spoken English.
  - Minimum length of residency requirements.
11. Other provisions, criteria and practices which could lead to indirect race discrimination if unjustified could include:
- Requirements for word of mouth recommendations.
  - Requirements to live or not live in certain areas.

### *Victimisation*

12. The full definition of victimisation is set out in the Equality Act Overview above. It is unlawful to subject someone to a detriment because he or she has, in good faith, complained or raised issues about race discrimination in some way.

For example, a French person writes to the chief executive of a local authority complaining about rudeness by the dustbin collectors when she had asked them about rubbish collections. She says she thought they were treating her that way because she is French. The complaint is passed on to the bin collectors and the following week she finds rubbish tipped all over her front lawn.

### *Harassment*

13. The full definition of harassment is set out in the Equality Act Overview above. It is harassment to engage in unwanted conduct related to race, which has the



purpose or effect of violating a person's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment.

For example, a black hospital patient overhears hospital staff making racist 'jokes'. Even though they are not directed at the patient, they are unwanted conduct related to race which has the effect of creating an offensive environment for him. A white patient who also overhears the 'jokes' might equally find that they create an offensive environment for her, and she could also claim harassment.

## Religion or belief

1. For an overview of the Equality Act 2010 ('EqA'), including the basic definitions, the different jurisdictions and the public sector equality duty, see '[Overview](#)' at the start of this appendix.

### Meaning of religion or belief

2. Under section 10 of the EqA, the protected characteristic of 'religion' means any religion or lack of religion. 'Belief' means any religious or philosophical belief or lack of belief.
3. A philosophical belief must be a belief (rather than an opinion or viewpoint) as to a weighty and substantial aspect of human life, which is genuinely held that attains a certain level of cogency, seriousness, cohesion and importance, and is worthy of respect in a democratic society.

### Religion or belief discrimination

#### *Direct discrimination*

4. The full definition of direct discrimination is set out in the Equality Act Overview above. It is direct religion or belief discrimination to treat a person less favourably because of religion or belief, or lack of religion or belief. This includes treating someone less favourably because of their perceived religion or belief or because of the religion or belief of someone else.

For example, a train guard asks a young man of South Asian background to get off the train because he looks as if he is Muslim and is carrying a rucksack, which makes some of the passengers fear he is a terrorist.

#### *Indirect discrimination*

5. The full definition of indirect discrimination is set out in the Equality Act Overview above. It is indirect religion or belief discrimination unjustifiably to apply a provision, criterion or practice which puts someone of a certain religion or belief at a particular disadvantage, and which puts or would put others with the same religion or belief at that disadvantage.

For example, a particular training session is held between 6 and 8 pm on a Friday evening. This places those following some religions at a particular disadvantage if they need to be at home or a place of worship before dark.

6. It is not unlawful indirect discrimination if the employer / service provider etc can show the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

For example, there have been a number of cases where the requirement to provide certain services, eg sexual counselling, civil partnership, same-sex marriage, to gay service users has caused particular difficulty for people due to their religious beliefs. The case law has consistently said that if indirect discrimination is involved, it is nevertheless justifiable, because it is wrong to discriminate against gay people in the provision of public services. This is discussed further in the sub-section on [sexual orientation discrimination](#).

7. Provisions, criteria and practices which might have particular adverse effect on people of a certain religion could include:
  - Holding important events or surgeries, or requiring service, at times when individuals of certain religions have their Sabbath or important religious holidays.
  - Refusal of prayer breaks.
  - Dress requirements.
8. It is important to remember that it is not everyone who needs to be put at a disadvantage by the provision, criterion or practice in question. In the context of religion in particular, this point can be forgotten. While certain requirements will be problematic for those who are more conservative in their beliefs and practices, they will not prove a difficulty for others. Nevertheless, such requirements could still be found to put those of that religion at a 'particular disadvantage'.

### *Victimisation*

9. The full definition of victimisation is set out in the Equality Act Overview above. It is unlawful to subject someone to a detriment because he or she has, in good faith, complained or raised issues about religion or belief discrimination in some way.

For example, a client of an accountants' firm complains to the senior partner that stereotypical antisemitic remarks were made by a certain accountant when the client visited for advice. As a result, the senior partner writes to the client, telling him that he may be happier going to a different firm.

### *Harassment*

10. The full definition of harassment is set out in the Equality Act Overview above. It is harassment to engage in unwanted conduct related to religion or belief, which has the purpose or effect of violating a person's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment.

For example, when a Muslim woman wearing a Hijab (head scarf) gets on a bus, the bus driver says to her, 'I hate your black face, I hate your accent, I hate your headscarf, you f...king terrorist.'<sup>9</sup>

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<sup>9</sup> This example is reported in '[We fear for our lives: Off-line and online experiences of anti-Muslim hostility](#)': Awan and Zempi (2015).

## Sex

1. For an overview of the Equality Act 2010 ('EqA'), including the basic definitions, the different jurisdictions and the public sector equality duty, see '[Overview](#)' at the start of this appendix.

## Meaning of sex

2. Under section 11 of the EqA, the protected characteristic of 'sex' refers to a woman or to a man.

## Sex discrimination

### *Direct discrimination*

3. The full definition of direct discrimination is set out in the Equality Act Overview above. It is direct sex discrimination to treat a person less favourably because of sex. This includes treating someone less favourably because of their perceived sex, or the sex of someone else.
4. Direct sex discrimination is often a result of stereotyping.  
For example, a solicitors' firm offers male clients the opportunity to attend football matches at the Emirates stadium, but assumes female clients will not be interested.

### *Indirect discrimination*

5. The full definition of indirect discrimination is set out in the Equality Act Overview above.
6. It is indirect sex discrimination unjustifiably to apply a provision, criterion or practice which puts a woman at a particular disadvantage, and which puts or would put other women at that disadvantage. (Equally, it would be indirect sex discrimination to apply a provision, criterion or practice which put a man at a particular disadvantage and would put other men at that disadvantage.)  
For example, a local council holds its consultation meetings on a weekday evening. This can be more difficult for women to attend because of childcare responsibilities when their children are home from school.
7. It is not unlawful indirect discrimination if the employer / service provider etc can show the provision, criterion or practice is a proportionate means of achieving a legitimate aim.
8. Provisions, criteria and practices which might have particular adverse effect on women could include:
  - Requirements to work hours, or at locations, which would interfere with childcare, eg full-time, certain start and finish times, overtime, on variable rotas, especially at short notice.
  - Offering services only at times, or at distant locations, which interfere with childcare responsibilities.

### *Victimisation*

9. The full definition of victimisation is set out in the Equality Act Overview above. It is unlawful to subject someone to a detriment because he or she has, in good faith, complained or raised issues about sex discrimination in some way.

For example, a customer gives evidence for a bank employee who is bringing a sex discrimination claim against the local branch of that bank. Shortly afterwards, that customer is refused an overdraft facility by the local bank manager.

### *Harassment*

10. The full definition of harassment is set out in the Equality Act Overview above. It is harassment to engage in unwanted conduct related to sex or of a sexual nature, which has the purpose or effect of violating a person's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment. Unwanted conduct because of rejection or submission to the conduct is also unlawful.

## **Sexual orientation**

1. For an overview of the Equality Act 2010 ('EqA'), including the basic definitions, the different jurisdictions and the public sector equality duty, see '[Overview](#)' at the start of this appendix.

## **Meaning of sexual orientation**

2. Under section 12 of the EqA, the protected characteristic of 'sexual orientation' means orientation towards people of the same sex or people of the opposite sex or both.

## **Sexual orientation discrimination**

### *Direct discrimination*

3. The full definition of direct discrimination is set out in the Equality Act Overview above. It is direct sexual orientation discrimination to treat a person less favourably because of sexual orientation.

For example, a bed and breakfast owner insists that a lesbian couple have separate single rooms when they had booked a double room, even though a double room is available.

4. The definition includes treating someone less favourably because of their perceived sexual orientation, or because of the sexual orientation of someone else.

For example, a boy's application to join his local football club is rejected because his parents are a lesbian couple.

### *Indirect discrimination*

5. The full definition of indirect discrimination is set out in the Equality Act Overview above. It is indirect sexual orientation discrimination unjustifiably to apply a provision, criterion or practice which puts someone of a certain sexual orientation at a particular disadvantage, and which puts or would put others of the same sexual orientation at that disadvantage.

For example, a pub only allows pairs of people to enter a pub if one is male and one is female.

6. It is not unlawful indirect discrimination if the employer can show the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

### *Victimisation*

7. The full definition of victimisation is set out in the Equality Act Overview above. It is unlawful to subject someone to a detriment because he or she has, in good faith, complained or raised issues about sexual orientation discrimination in some way.

For example, a gay man sues a publican for discrimination because she makes persistent derogatory remarks to other customers about his sexuality. As a result, the publican bars him from the pub altogether.

### *Harassment*

8. The full definition of harassment is set out in the Equality Act Overview above. It is harassment to engage in unwanted conduct related to sexual orientation, which has the purpose or effect of violating a person's dignity or subjecting them to an intimidating, hostile, degrading, humiliating or offensive environment.

For example, a lesbian candidate is subjected to homophobic innuendo and banter during her interview to become a partner in a solicitors' firm.

9. It can also be harassment to subject a person to homophobic banter and name-calling even though it is known that the person is not gay.

### *Sexual orientation and religious belief*

10. There is sometimes a perceived conflict between the protection afforded by the EqA to those with the protected characteristics of religion or belief and sexual orientation. In practice, the courts have consistently upheld the right of people not to be discriminated against because of their sexual orientation.

11. In *Ladele v London Borough of Islington* [2009] EWCA Civ 1357, a Christian registrar was threatened with dismissal because she refused to perform civil partnership ceremonies because of her religious belief that marriage should be a union of one man and one woman. Rejecting her claims, the Court of Appeal said:

'Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished.'

Mrs Ladele's application to the ECHR failed in January 2013.

12. In *Bull v Hall* [2013] SC 73, Mr and Mrs Hall (who were Christians) refused to honour a booking for a double room in their hotel when they discovered the customers were gay and in a civil partnership. This was because of their religious belief. The Supreme Court upheld the county court's finding of direct and indirect sexual orientation discrimination against the customers. It said the purpose of the legislation was to ensure that gay people had the same rights as heterosexuals in access to goods and services. Parliament had made specific exceptions for religious organisations and ministers of religion, but it had deliberately not inserted a conscientious objection exception.

Regarding the European Convention on Human Rights, although the right to religious freedom is one of the foundations of a democratic society, it can be limited in order to protect the rights of others. Sexual orientation is a core part of

a person's identity and therefore very weighty reasons are required to allow discrimination on grounds of sexual orientation.

13. In *Lee v McArthur and Ashers Baking Company Ltd* [2018] UKSC 49, [2018] IRLR 1116, Christian directors of a bakery in Northern Ireland refused to accept an order for a cake with the words 'support gay marriage' on top. The Supreme Court found no sexual orientation discrimination against Mr Lee because he was gay. It said the reason for refusing to supply the cake was not because of Mr Lee's sexual orientation or because he was assumed to associate with gay people, but simply because the bakery did not agree with the message on the cake. The McArthurs had employed and served gay people in the past.



## Appendix B Disability Glossary: Impairments and reasonable adjustments

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### *Introduction*

The following is an alphabetical list of some of the more common forms of impairment or disability. It is not possible to include everything. The fact that a disability is not listed here does not mean it is any less important than any other.

If an impairment or disability is not listed in this glossary, a useful starting point is to google the name of the impairment '+ organisation'. That usually shows the names of specialist organisations which provide specialist information.

This Glossary does not purport to give a medical diagnosis or listing of symptoms. It is derived from information available on sources such as NHS Choices or specialist disability organisations. The Glossary is intended only to provide an initial introduction, highlighting potential areas of difficulty in court proceedings where adjustments might be needed.

The purpose of the Glossary is not to provide a basis for deciding:

- Whether an individual meets the definition of 'disability' under the Equality Act 2010. Detail of the definition of disability under the Equality Act 2010 can be found in the [Equality Act 2010 appendix](#).
- To what extent someone has a health condition and function is affected, as required for disability-related social security benefits.

The Glossary provides suggestions of possible adjustments during legal proceedings, but whether these are suitable depends on the circumstances of the case; consideration must be given to the needs of the individual and may need to include the impact on the other side in some cases.

The best source of information and advice on needed adjustments is usually the person with the disability. The person concerned should not be patronised, of course, and should always be treated with dignity and respect.

Certain conditions are commonly associated with other conditions, and an individual may have more than one impairment or disability at the same time. Again, the individual is the best guide to his or her needs.

Sometimes it is difficult to think of suitable adjustments, but it is still important to be aware of, and duly sensitive to, the difficulties a person is contending with.

For suggested adjustments in relation to any of the following, click on the name:

[Acquired brain injury](#)

[Agoraphobia](#)

[Arm, hand or shoulder impairment](#)

[Arthritis](#)

[Attention Deficit Hyperactivity Disorder \('ADHD'\)](#)

[Albinism](#)

[Alzheimer's Disease](#)

[Autism Spectrum Condition](#)

[Back impairment](#)

[Bronchitis](#)

[Cerebral palsy](#)

[Cerebral vascular accident \('CVA'\)](#)

[Chronic Fatigue Syndrome \('CFS'\)](#)

[Chronic obstructive pulmonary disease \('COPD'\)](#)

[Crohn's disease](#)

[Depression](#)

[Diabetes](#)

[Dissociation](#)

[Down's Syndrome](#)

[Dyslexia](#)

[Dyspraxia/Developmental Co-ordination Disorder](#)

[Eating Disorders](#)

[Emphysema](#)

[Epilepsy](#)

[Fibromyalgia](#)

[Hallucinations](#)

[Hearing Loss and Deafness](#)

[Heart disease](#)

[HIV and AIDS](#)

[Incontinence](#)

[Inflammatory bowel disease](#)

[Laryngectomy](#)

[Learning disability](#)

[Lupus – lupus erythematosus \('SLE'\)](#)

[Mental ill health](#)

[Migraine](#)

[Mobility impairment](#)

[Motor neurone disease](#)

[Multiple Sclerosis \('MS'\)](#)

[Myalgic Encephalomyelitis \('ME'\)](#)

[Obesity](#)

[Panic attacks and panic disorder](#)

[Parkinson's disease](#)

[Pathological demand avoidance \('PDA'\)](#)

[Persecutory delusions](#)

[Raynaud's](#)

[Repetitive strain injury \('RSI'\)](#)

[Sickle Cell Disease](#)

[Specific learning difficulties](#)

[Spina bifida and hydrocephalus](#)

[Spinal cord injury](#)

[Stammering](#)

[Stroke](#)

[Ulcerative colitis](#)

[Visual impairment](#)

[Visual stress](#)

## ***Acquired brain injury***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Acquired brain injury?**

Acquired brain injury is a non-progressive injury to the brain which is acquired after birth. Trauma is just one cause. It can result from a variety of causes such as stroke, brain tumour, infections such as meningitis, or metabolic conditions such as severe hypoglycaemia (low blood sugar).

The consequences can vary enormously between individuals and range from cognitive impairment to behavioural and mood changes in addition to physical problems such as seizures, incontinence and headaches.

The cognitive effects of a brain injury affect the way a person thinks, learns and remembers. There may be problems with memory, the ability to concentrate and pay attention to more than one task at a time, particularly when tired or under stress, speed of processing information, including understanding fast speech, difficulties in planning and problem solving and with language skills.

Emotional and behavioural effects may result in agitation, anger and irritability, lack of awareness and insight, impulsivity, depression and anxiety.

The initial period after the trauma can show rapid improvement from a very low base. However, after one or two years, the rate of improvement is likely to slow down and eventually will hit a ceiling.

When a person is recovering well, they can appear deceptively able to communicate and cope. Processing new information, environment and travel routes, let alone concentrating on questions and formulating answers, will be exhausting. If pushed too far, the brain will simply go blank and 'switch off'.

For more information, see the website for Headway, the brain injury association at [www.headway.org.uk](http://www.headway.org.uk).

### **Reasonable adjustments**

Adjustments, depending on the severity of the injury, could include:

- Delaying the hearing if the person is still at the rapid improvement stage.
- Taking breaks at very regular intervals, especially while the person is giving evidence – eg every 20 – 30 minutes.
- Shortening the day.
- Allowing late start times and early finish times to avoid rush hour travel or choosing a venue close to the person's home.
- Ensuring the room is quiet and without distractions.
- Speaking slowly and clearly.
- Making one point at a time in short sentences.
- Allowing time to process information and respond.

- Some individuals may use Makaton signs and symbols to communicate. See [Makaton in the 'Learning disability' section](#) of this appendix for more detail.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Agoraphobia***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Agoraphobia?**

Agoraphobia is a complex phobia which can manifest itself in several different ways and with greatly varying severity. Most commonly it entails fear of travelling away from a person's 'safe' place (usually their home), but it is often linked to fear of being trapped somewhere (similar to claustrophobia). A person with agoraphobia may fear being far from home or leaving home altogether or fear unfamiliar routes and places, wide open spaces, crowded places, confined spaces such as trains or lifts, standing in long lines, or being left alone. When in a feared place, the person is liable to experience a panic attack, with severe physical symptoms (palpitations, chest or stomach pain, headache, fast breathing). The person may become anxious even thinking about going to such places and will tend to avoid them.

### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- A hearing room on the ground floor.
- Changing the venue to a location closer to the person's home or even conducting the hearing in his or her home.
- Taking evidence by video link to a home computer eg SKYPE.
- Accepting sworn written evidence.
- Limiting the number of people who can attend in the courtroom.
- Allowing a companion to sit next to the person.
- Allowing the person to sit near a door.
- Indicating the person can have an immediate break whenever required.

For more detail on panic attacks, see entry for '[Panic attacks and panic disorder](#)' in this Glossary.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

### ***Arm, hand or shoulder impairment***

For the purpose of this Glossary, see '[Introduction](#)'.

Arm, hand and shoulder impairments are very common and have a variety of causes, including Arthritis, frozen shoulder, injury and RSI.

RSI (Repetitive Strain Injury) is an umbrella term for a range of painful conditions affecting the musculoskeletal system. Common symptoms are pain, loss of grip, loss of movement, muscle weakness or spasm, numbness, sensation of cold, burning sensation, pins and needles. RSI is a progressive condition. It is very important to recognise symptoms early and take remedial action.

### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- When swearing the witness in, not asking the person to take hold of the oath card and any religious book.
- A suitable chair.
- Regular breaks and shorter days.
- Seating the individual in a position where he or she can look at the judge and advocates without twisting.
- Assistance with opening doors.
- Assistance with manoeuvring hearing bundles and turning pages.
- Assistance pouring water.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## **Arthritis**

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Arthritis?**

Arthritis is a leading form of disability and affects many people of all ages.

Arthritis primarily affects areas in and around the joints, eg in hands, knees and hips. By far the most common form is osteoarthritis, a degenerative joint disease. Rheumatoid arthritis is one of the most disabling types, where the joints become inflamed. [Lupus](#) is also a serious disorder, which mainly affects young women, particularly those of African Caribbean origin. Gout affects small joints, especially the big toe. Ankylosing spondylitis affects the spine.

Arthritis can cause difficulty standing, walking, sitting, lifting, reaching, making repetitive movements, dressing, taking a bath, gripping things, opening packages etc.

### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- Not requiring the person to stand when a judge enters the room or the court rises.
- More frequent breaks.
- Assistance with manoeuvring trial bundles.
- Assistance pouring water.
- When swearing the witness in, not asking the person to take hold of the oath card and any religious book.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## **Attention Deficit Hyperactivity Disorder (ADHD)**

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

## **What is ADHD?**

The definition of ADHD (and hyperkinetic disorder) is based on three main behaviours which are typically present from before the age of seven years and may continue into adulthood. These are inattentiveness, impulsiveness and hyperactivity.

It is thought that hyperactivity reduces with adulthood, but inattentiveness increases.

ADHD has been called attention deficit disorder (ADD) in the past and this term is still occasionally used for those individuals where there is less hyperactivity, but the term is no longer formally used.

Some experts believe the following symptoms are typical of ADHD in adults:

- Carelessness and lack of attention to detail.
- Continually starting new tasks before completing old ones.
- Poor organisational skills.
- Inability to focus or prioritise.
- Forgetfulness.
- Continually misplacing things.
- Restlessness and edginess.
- Difficulty keeping quiet and speaking out of turn. Blurting out responses and often interrupting others.
- Mood swings, irritability and quick temper.
- Extreme impatience.
- Inability to deal with stress.

The consequence of inability to focus can be that as a person is listening to a judge explain procedure or trying to focus on cross-examination questions, entirely different thoughts on an entirely different subject uncontrollably interpose.

## **Reasonable adjustments**

In case preparation prior to the hearing, especially with a litigant in person reasonable adjustments might include:

- Giving one case management instruction or Order at a time, not several at once.
- Spelling out in writing what actions need to be taken.
- Not asking the person to provide over-complex particulars and schedules.

Where appropriate, adjustments for the hearing may include:

- Speaking, asking questions and giving information in short sentences.
- Allowing pauses for the person to process what has been said and respond.
- Readiness to calmly repeat instructions and questions.
- For a litigant in person, frequent summing up of the current stage of court process and what is expected.



- Choosing a room with minimal outside noise and reducing distractions within the room.
- Increased short breaks to refocus.
- In severe cases, allow the person to provide written answers to written questions.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Albinism***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is albinism?**

Albinism is a rare inherited condition. People with albinism have a reduced amount of melanin or none at all. It occurs in all ethnic groups throughout the world. People often have very pale hair and eyes, but this varies according to the type of albinism, the amount of melanin someone's body produces and the usual pigmentation of the person's ethnic group.

There are two main forms of albinism: Ocular Albinism, which only affects the eyes, and Oculocutaneous Albinism, which also affects skin and hair. The reduced melanin can cause eye problems uncorrectable by glasses and many people have low vision. Most people with albinism have photophobia (sensitivity to light) and nystagmus. Eye problems caused by albinism are generally stable and do not get worse with age.

Many people need to take extra precautions against the sun to protect very fair skin, wearing sun hats, darker glasses and sun block when going out.

### **Nystagmus**

Nystagmus involves a person's eyes moving involuntarily from side to side or up and down or around. The eyes appear to flicker or wobble, although sometimes this is not visible to others. The person's brain will have adapted so that they do not see the world as constantly moving. However, nystagmus is associated with very poor vision.

Vision varies during the day and is affected by tiredness, stress and unfamiliar surroundings. Many people have a 'null point', which is a position where their eyesight is best. This can involve sitting to one side of a screen or holding their head at a particular angle. Many people can read small print if it is close to their eyes and at the right angle, but a visual magnifier may be helpful. Computer screens are useful for some people, but cannot be tolerated at all by others. People may be slow

readers because of the extra time needed to scan the print, and they are likely to tire more easily than others because of the additional effort involved in looking at things. Maintaining eye contact may be difficult.

### **Social effects, discrimination and persecution**

The adverse social effects of albinism can be severe because of its rarity. In the UK, it is estimated that it affects roughly one in 17,000 people. Children may be bullied at school and never have the supportive experience of meeting anyone else who looks like them. In certain communities, particularly those of non-white ethnic groups, the person's paternity may be wrongly questioned.

As well as all this, in many countries, albinism is heavily stigmatised, with quite horrific dehumanising myths, superstitions and practices.<sup>1</sup>

In June 2015, the UN Human Rights Council appointed an Independent Expert on human rights for people with albinism. The UN said this:

‘Persons with albinism are a unique group whose human rights issues have generally gone unnoticed for centuries; the result being deeply engraved stigma, discrimination and violence against them across various countries. The complexity and uniqueness of the condition means that their experiences significantly and simultaneously touch on several human rights issues including, but not limited to, discrimination based on colour, discrimination based on disability, special needs in terms of access to education and enjoyment of the highest standards of health, harmful traditional practices, violence including killings and ritual attacks, trade and trafficking of body parts for witchcraft purposes, infanticide and abandonment of children.’

### **Reasonable adjustments**

In relation to photosensitivity:

- Make any helpful adjustments to lighting / blinds.
- Allow the person to wear dark glasses and/or a peaked cap, including when giving evidence.
- Avoid remote video hearings if looking at computer screens causes difficulty.

In relation to nystagmus, bear in mind that:

- It can get worse with tiredness or stress. Frequent breaks and a reasonable length to the day should be considered.
- It may involve the individual turning their head in order to see documents or people. Consult the person regarding room lay-out and helping with reading or positioning of documents.
- Unconscious assumptions should not be made that the individual is untrustworthy because of the movement of their eyes or lack of eye contact. If relevant, advise a jury of this.

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<sup>1</sup> See for example the website of the ‘Standing voice’ organisation. These issues sometimes arise in asylum cases, eg *MI & Anor v Secretary of State for the Home Department* [2014] EWCA Civ 826 and *JA (child – risk of persecution) Nigeria* [2016] UKUT 00560 (IAC).

The [visual impairment entry](#) in this glossary contains further suggestions for adjustments.

### **Acceptable terminology**

Some people find the term ‘albino’ extremely offensive and they feel that it has the quality of a racial slur. Others dislike it because it is associated with name-calling and bullying as a child. Although some people may find the term acceptable and have even reclaimed it as a positive word, for most in the albinism community it is better to talk about ‘a person with albinism’. As with other impairments, it is best to listen to the terminology the person chooses to use, and to ask if necessary.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

### ***Alzheimer’s Disease***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See ‘[Introduction](#)’ within this Glossary.

### **What is Alzheimer’s?**

This is the most common form of dementia. The most commonly encountered symptoms of this progressive disease involve lapses of memory, difficulty in finding the correct words for everyday objects and mood swings.

In its later stages, the disease can also involve a loss of inhibitions, with individuals adopting an unsettling behaviour pattern such as becoming lost, undressing in public or making inappropriate sexual advances.

Perhaps the behaviour that is most likely to affect court or tribunal appearances is that of repetition. This may take the form of repetitive questioning, phrases or movements and other repetitive behaviour. The stress of a court or tribunal environment may produce a catastrophic reaction, when the person becomes extremely upset or distressed. The majority of individuals with Alzheimer’s are over 60 years of age. They may also be affected by some of the common infirmities associated with old age.

### **Reasonable adjustments**

Depending on the circumstances, these adjustments may be helpful at the hearing:

- Recording (on video, audio or in sworn written form) evidence at a time when the person is lucid.

- Giving evidence through an intermediary.
- Allowing a close relative or carer to accompany the individual.
- Where the person is unable to give clear evidence, seeking the necessary evidence from other appropriate sources.

If the person experiences hallucinations, see entry for '[Hallucinations](#)' in this Glossary.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Autism Spectrum Condition***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is autism?**

Autism, including Asperger syndrome is a lifelong developmental disability affecting how people communicate with others and sense the world around them. It is estimated that 1.1% of people in the UK are on the autistic spectrum.

Autism is a spectrum condition and although autistic people will share certain characteristics, everyone will be different. To have a diagnosis of autism a person will have difficulties with social communication and integration, and will demonstrate restricted, repetitive patterns of behaviour, interests, or activities.

Many autistic people will have difficulties with the following areas, although this is not a definitive list:

- Literal interpretation of language.
- Unclear, vague and ambiguous instructions.
- Unwritten rules.
- Unexpected and sudden change.
- Hypothetical thinking – specifically the ability to accurately interpret and make a decision based on something that has not yet happened.
- Hypersensitivity to lights, noise, temperature and/or touch.

Many autistic people are methodical and logical and demonstrate strengths in the areas of problem-solving, attention to detail, and creative thinking. Despite this,

according to the National Autistic Society, only 16% of autistic people are in full-time employment and 43% have said they have left or lost a job because of their condition.

Historically, concepts such as 'high-functioning' and 'low functioning' autism have been used. However, thinking in these terms can be unhelpful as an autistic person who is 'high functioning' may still have high support needs in different situations, specifically unfamiliar high stress situations such as tribunals.

Many people have never had their autism diagnosed. This is partly due to the levels of autism awareness and understanding in society and amongst health professionals. Many people will not have been diagnosed as a child over 15 years ago.

## **Diagnosis**

It is not uncommon for people to be diagnosed with autism later in life following events such as redundancy or pending retirement, when the stresses trigger anxiety and demonstrably autistic behaviour. It is extremely common for women to be misdiagnosed or not diagnosed at all. This is most likely due to the fact that women are better able to mask or 'hide' their autism and will often mimic others.

In addition, people may have been brought up in other countries where tests for autism are less advanced or where there is a great deal of stigma attached to autism, so that it is rarely admitted.

## **Difficulties with the legal process<sup>2</sup>**

Autistic parties and witnesses, depending on the nature of their autism, may have these difficulties in court:

- Sensory overload, eg due to lights (which can appear excessively strong or strobing), noise (a quiet fan can sound like an aeroplane flying overhead), temperature (can feel heat or cold more intensely than others).
- Difficulty answering hypothetical questions. This includes difficulty with a question such as 'What adjustments would you find helpful?' An autistic person may be unable to envisage how he or she would feel if certain adjustments were made.
- Difficulty with chronology and time-scales.
- Expectations (settlement vs admission of discrimination).
- Settlement discussion and mediation is difficult. An autistic person will find it difficult to imagine how much he or she would like to settle for because it is too hypothetical to be answered.
- Any lack of continuity, eg with legal representation / judge / environment.
- Unwritten rules:
  - When is it appropriate to speak?
  - What language should be used when addressing the judge?

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<sup>2</sup> Difficulties with the court process have been identified with the assistance of the National Autistic Society's training team.

Anxiety will most likely be the overriding difficulty an autistic person will face in court. This will affect a person's ability to use communication strategies. As a result:

- The person's body language and non-verbal communication may come across as aggressive.
- Their voice may become louder and they may shout.
- They may use stimming to self-regulate anxiety. ('Stimming' is fidgeting, flapping, scratching, picking, humming, coughing – these are coping mechanisms.)
- They may be visibly distressed and start crying.

## **Reasonable adjustments**

The following steps may be helpful but every autistic person is different. Always ask the individual.

### *Prior to the hearing*

- Give very explicit instructions on all case management directions, including precise details regarding who documents should be sent to and when.
- Try to keep the same judge in all preliminary hearings.
- Explain in advance what the hearing procedure will be like. Send a written timetable.
- Explain that the person can visit the hearing venue in advance to have a look around and/or send a photograph. Describe arrangements on arriving at the venue for checking in with reception, finding the waiting room, being called to the courtroom etc.
- To avoid anxiety looking for a private waiting/conference room on the day, reserve one in advance for use by the autistic person rather than the general waiting room. Tell the individual that this will be arranged.
- Ask other side to prepare a simple chronology, ideally with certain dates (possibly accompanied by photographs) which are personal to the individual as reference points.

### *During the hearing*

- Explain at the outset in detail the hearing procedure including length and timing of breaks.
- Give regular breaks, eg 10 minutes after every 40 minutes in court to prevent anxiety escalating and other symptoms developing as a result.
- Seating: ask where the person would like to sit. Often they will prefer to sit near a door, (so there is an 'escape route').
- Prevent people going in and out the room or moving behind the individual.
- Switch off lights, fans and heaters with any humming sound, however quiet. If lights cannot be switched off, allow the person to wear sunglasses or a hat. Use window blinds.

In relation to communication:

- Prior to the hearing, get the other party to prepare and send to the person a clear and uncontroversial chronology.
- Give precise instructions, setting out apparently obvious follow-up steps (eg 'Write out your statement, then photocopy it and send a copy to the respondents' solicitor, ie (name and address) by first class post').
- Give reasons for any order or rule.
- Establish rules at the outset. If for example, the person interjects at an inappropriate time, either stop this the first time it happens and explain why, or allow it to continue throughout. Inconsistency is confusing.
- Avoid figurative communication, eg 'take a seat'. Better is 'sit down please'.
- Do not rely on intonation, gesture, facial expression or context to convey meaning.
- Avoid hypothetical questions, both regarding the substance of the person's evidence and regarding court procedure.
- Avoid legal or management jargon.
- Allow individual to write witness statement / give evidence out of chronological order; help with dates by showing a pre-prepared chronology.
- Tell the individual he or she need not make direct eye contact. 'I don't expect eye contact. Look wherever you need to look to make you feel comfortable and concentrate.'
- Many people with autism have had a lifetime of difficulties interacting with others which can negatively impact on their self-worth and self-esteem. Be patient, consistent and wherever possible positive.

Watch out for signs of heightened anxiety, eg:

- The individual starts to speak louder and more formally, and dropping their contractions (eg saying 'did not' instead of 'didn't').
- The person might start swearing.
- The person starts 'stimming'.

Consider intermediaries

- Criminal and family courts, and certain other courts, can seek the assistance of an 'intermediary' where there is communication difficulty. For more detail, see the section on '[Criminal court procedure – statutory measures](#)' in chapter 4 (Mental Disability).
- In the matter of *Re C (No.2) (Children: Welfare)* [2020] EWFC B36, a court successfully allowed creative reasonable adjustments recommended by an intermediary for a witness with autism. Cross-examination was conducted by presenting the witness with written questions in the witness box and letting her type answers in real time; the answers being read out loud before moving on; and

the witness wearing headphones playing white noise to minimise external stimuli and distractions.

### **Acceptable terminology**

Many autistic people would prefer to be referred to as ‘autistic people’ rather than ‘people with autism’. However, individuals should always be asked which they would prefer.

It is better to refer to ‘autistic spectrum condition’ than ‘autistic spectrum disorder’, which might carry negative connotations.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
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See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

### **Back impairment**

For the purpose of this Glossary, see ‘[Introduction](#)’.

Although back pain is widespread, it is extremely variable in its severity and duration.

### **Reasonable adjustments**

Where appropriate and depending on the severity, adjustments for the hearing may include:

- A suitable chair.
- Regular breaks and shorter days.
- Allowing the person to stand up and even walk around at the back of the courtroom when not giving evidence personally.
- Seating the individual in a position where he or she can look at the judge and advocates without twisting.
- Assistance with manoeuvring hearing bundles.
- Assistance pouring water.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)



- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Bronchitis***

For this, please see '[chronic obstructive pulmonary disease](#)'.

## ***Cerebral palsy***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Cerebral palsy?**

This is defined as a persistent disorder of movement and posture, as the result of one or more non-progressive abnormalities in the brain before its growth and development are complete. It is generally caused by insufficient oxygen getting to the brain at birth but can be caused by toxins or genetic factors.

People with cerebral palsy may experience a wide spectrum of disorders of movement, posture and communication problems, as well as hearing and sight difficulties. It is frequently associated with epilepsy. In some cases, their speech cannot be readily understood and a speech and language therapist or someone familiar with the speech patterns of the individual may be needed to interpret responses. A communication aid, such as a speech synthesiser or word board, may be required.

Individuals with cerebral palsy may have had limited social experience, particularly those with learning disabilities and severe physical disabilities.

### **Reasonable adjustments**

The necessary adjustments will depend on the nature of any physical or mental impairment (see list of impairments and disabilities at the start of this Glossary).

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Cerebral vascular accident (CVA) – commonly called ‘stroke’***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See [‘Introduction’](#) within this Glossary.

### **What is CVA?**

A CVA is caused by a clot or haemorrhage in an area of the brain which can affect an apparently previously healthy individual in many different ways. These can include weakness or paralysis of an arm and/or leg on one side of the body, twisting of the face, loss of balance, disturbance of vision, difficulty in swallowing, disturbance of speech, difficulty in understanding and in using appropriate words, and loss of control of the bladder and/or bowels. Recovery from the effects of a stroke varies enormously between individuals.

For some individuals, communication can be a great problem and can take the form of not being able to pronounce words, remember the correct word or put them in the right context or order. Individuals may also be unable to understand what is being said.

Stress and fatigue can make all symptoms worse.

### **Reasonable adjustments**

The necessary adjustments will depend on the nature and severity of any physical or mental impairment, including related to incontinence, mobility, visual impairment. Adjustments to communication style and cross-examination as used with dyslexia or learning disability may be useful (see [list of impairments and disabilities](#) at the start of this Glossary).

Some individuals require a carer to help with interpretation. The individual needs to be treated with dignity and respect despite physically embarrassing circumstances.

Some individuals may use Makaton signs and symbols to communicate. See Makaton in the ‘Learning disability’ section of this appendix for more detail.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Chronic Fatigue Syndrome (‘CFS’)***

For this, please see [‘Myalgic Encephalomyelitis \(‘ME’\)](#).

## ***Chronic obstructive pulmonary disease (COPD)***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is COPD?**

COPD is common and is an umbrella term for people with chronic bronchitis, emphysema or both. It is progressive and non-reversible. It is usually caused by smoking and the commonest symptoms are cough, wheeze and breathlessness.

Individuals may need to use inhalers at regular intervals to relieve discomfort, particularly if under stress. Inhalers take a little time to work and some can cause palpitations (a sensation of the heart beating fast) and slight dizziness, so a short break may be needed. Those individuals with severe symptoms or end stage COPD may use portable oxygen which is delivered through little tubes under the nostrils or via a face mask.

### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include a slower pace during cross-examination and more frequent breaks.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

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## ***Crohn's disease***

For this, please see '[Inflammatory bowel disease](#)'.

## ***Depression***

For this, please see '[Mental ill health](#)'.

## ***Diabetes***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is diabetes?**

Diabetes is a condition that causes blood sugar to become too high. There are two main types of diabetes, referred to as Type 1 and Type 2. Type 2 diabetes is the more common and is associated with increasing age and obesity. The mainstay of

treatment is diet and exercise but tablets and eventually even insulin injections may be required to treat it. Type 1 diabetes tends to occur in younger people and it is associated with a lack of insulin. It is sometimes called insulin dependent diabetes as without insulin these individuals would die. The amount of medication or insulin taken will vary with each individual.

It may be necessary for a diabetic person to test their blood sugar level as frequently as every two hours. Occasionally it is difficult to achieve a perfect balance, and the blood sugar levels may fall below the normal level. The person concerned then has what is called a hypoglycaemic attack or hypo. These symptoms commonly include palpitations and profuse sweating, as well as a display of irritability. In extreme cases, the speech may become slurred and the individual may appear drunk. A hypo develops quickly and is treated by taking sugar in order to restore the blood sugar levels as fast as possible. Most people with diabetes carry some form of sugar on them for this purpose (glucose tablets, fizzy drinks or chocolate). Some carry a small bottle of gel (Glucogel) which can be squeezed into the side of the mouth and which acts immediately. If extra sugar is not taken quickly, loss of consciousness can occur and, in those circumstances an ambulance should be called immediately.

Diabetes can be a cause of long-term complications, such as visual impairment or blindness, or physical disability resulting from damage to the nerves or amputation of part of the lower limbs.

### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- Allowing reliable fixed breaks for blood testing and injecting.
- Allowing the person to have food and drink while in court and giving evidence.
- Agreeing a suitable time for the lunch break.
- Ensuring the day does not overrun and unexpectedly interfere with timing for the evening meal.

Click on the following links for general ideas as to:

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- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
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### ***Dissociation***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

## **What is Dissociation?**

This is a way that the mind copes with too much stress and may result in the person experiencing dissociation feeling detached from their body and the world around them. The experience can last from hours right up to months at a time.

Dissociation can be experienced in many different ways. These are just some examples:

- A person may be unable to remember information about themselves or there may be gaps where they cannot remember what happened.
- A person may feel the world around them is foggy or unreal.
- A person may feel as if they are observing their emotions from outside.
- A person may feel disconnected from parts of their body or feel unsure about boundaries with other people.
- A person may switch between different parts of their personality, use different names or feel their identity shifting at different times.

Dissociation can be experienced as a result of trauma, as a deliberate way of calming down or focussing on an issue, as a symptom of a mental health problem or as a side effect of alcohol or medication. People who have regular experiences of dissociation may be diagnosed with a dissociative disorder.

Many people with dissociative disorders have other mental health problems too. They may have problems with movement, sensation, seizures and periods of memory loss. Some people may feel uncertain who they are and have different identities.

The fact that someone has a dissociative disorder may not be immediately apparent in a court or tribunal setting as some people with these symptoms may try to keep them hidden from others.

Someone with dissociation may not respond as you would expect. You should ask them what would help them, but should be aware that they may not know or be able to explain. Find out if there are any triggers that bring on their dissociative experiences, so that these can be avoided as far as possible. Where someone has been diagnosed with a disorder, specialist medical evidence may be necessary to help decide how evidence can be given.

## **Reasonable adjustments**

Depending on the circumstances, these adjustments may be helpful at the hearing:

- Recording (on video, audio or in sworn written form) evidence at a time when the person is not experiencing dissociation.
- Giving evidence with the assistance of an intermediary.
- Allowing a close relative or carer to accompany the individual.
- Allowing the person to give evidence in several different identities.
- Where the person is unable to give clear evidence, seeking the necessary evidence from other appropriate sources.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
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## ***Down's Syndrome***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Down's Syndrome?**

Down's Syndrome is a common genetic disorder. The condition is associated with learning disability ranging from severe to those with an IQ marginally 'below normal'. Individuals may not be able to understand court proceedings without simple explanations and, possibly, the use of diagrams.

### **Reasonable adjustments**

Individuals may be accompanied by a close relative or carer used to interpreting their needs, as communication abilities vary widely.

Adjustments as for people with [learning disability](#) may be useful.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Dyslexia***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Dyslexia?**

Dyslexia is the most common of a family of related conditions known as [Specific Learning Difficulties](#).

Dyslexia often manifests itself as a difficulty with reading, writing and spelling. The core challenges, however, are the rapid processing of language-based information and weaknesses in the short-term and working memory.

By adulthood many dyslexic people have equipped themselves with an array of coping strategies, diverting some of their energy and ability into the operation of these systems, and thereby leaving themselves few extra resources to call upon when they have to deal with situations that fall within their areas of weakness. As a result of these difficulties, inconsistencies and inaccuracies may occur in their evidence.

Difficulties include associated with Specific Learning Difficulties ('SpLD') including Dyslexia include:

- A weak short-term memory.
- Mistakes with routine information, eg giving the names of their children.
- Difficulty remembering what they have just said.
- A poor working memory - this shows itself as the inability to:
  - Retain information without notes.
  - Hold on to several pieces of information at the same time.
  - Listen and take notes.
  - Cope with compound questions.
  - Difficulty carrying out three instructions in sequence.
- Inefficient processing of information which could relate to written texts, oral responses or listening skills – there may be a delay between hearing something, then understanding it, and then responding to it.
- Difficulty presenting information in a logical sequential way.
- Difficulty writing letters and reports.
- Difficulty distinguishing important information from unimportant details.
- Word-finding problems, lack of precision in speech, misunderstandings and misinterpretations.
- Difficulty with unfamiliar words and technical terminology.
- Lateness in acquiring reading and writing skills – even though these may become adequate there are residual problems, such as the struggle to extract the sense from written material and an inability to scan or skim through text.
- Problems retaining sequences of numbers or letters and muddling left and right.
- Poor time management with particular difficulties estimating the passage of time or how long a task will take.
- Chronic disorganisation; frequently losing things.
- Heightened sensitivity to noise or visual stimuli and difficulty screening out background noise or visual stimuli.
- Overloud speech or murmuring.
- Difficulty finding the way to and then navigating around an unfamiliar building.

- For some people, [Visual Stress](#).

Some people with SpLDs have come to rely so heavily on technology for many aspects of their daily lives that they feel quite disabled when they are not allowed to use it, for example in court.

Others report that they experience mental overload and are unable to recall what has transpired or the outcome of the hearing so they may need, yet cannot always obtain or afford, a transcript.

### **Impact of SpLDs in a court setting**

The following problem areas are reported by people with SpLDs who have experience of court or tribunal proceedings:

- A build up of stress, due to long delays at the hearing.
- Impossibility of following the cut and thrust of court exchanges.
- Difficulty coping with oblique, implied and compound questions.
- Failure to grasp nuances, allusions and metaphorical language.
- Difficulties giving accurate answers relating to dates, times or place names.
- Problems providing consistent information on sequences of actions.
- Inability to find the place in a mass of documentation, as directed.
- Impossibility of assimilating any new documentation at short notice.
- Coping with a room full of strangers in unfamiliar settings.
- Maintaining concentration and focus, mental overload.
- Feelings of panic, resulting in the urge to provide any answer in order to get the proceedings over with as quickly as possible.
- Anxiety that use of inappropriate tone may create a misleading impression.
- An experience of sensory overload from the lights, bustle and distractions.

People with SpLDs will be concerned about how their behaviour might be perceived: inconsistencies could imply untruthfulness. Failure to grasp the point of a question could come across as evasive. Lack of eye contact could be misinterpreted as being 'shifty' and an over-loud voice might be regarded as aggressive. The overriding worry is that a loss of credibility occurs when they do not 'perform' as expected.

Communication skills are often poor in people with SpLDs. They may miss the point, go off on a tangent, appear garrulous and imprecise or find that words fail them altogether so that they are unable to proceed. Despite their efforts they may only respond to the last part of a question or may unintentionally mislead the court through incorrect word usage.

### **Reasonable adjustments**

#### *Prior to the hearing*

Where appropriate, adjustments prior to the hearing may entail:



- Where case management directions are given orally at a case management preliminary hearing, following up immediately with all instructions clearly in writing.
- Putting any written instructions in plain English.
- Staggering instructions and Orders.
- Not expecting the individual to formulate complex further particulars, schedules of loss, Scott schedules etc. Asking for information in bite sizes.
- Clear formatting on correspondence: font size at least 12, clear typeface, greater spacing, sometimes coloured paper (often yellow, but the particular colour might matter). Beware loss of formatting on emails. A trial bundle for the hearing might also need to be copied onto coloured paper or sometimes a tinted cellulose sheet can be used as an overlay.
- Electronic communication helps those who rely on speech recognition software.
- Reminders of time-limits and dates of preliminary hearings.
- Providing clear directions to the venue, with local landmarks and public transport details. Providing a contact phone number and a point of contact on arrival.

#### *During the hearing*

Adjustments during the hearing may entail:

- Regular short breaks to help sustain concentration.
- Explanations and instructions given slowly and clearly.
- Providing a ruler on the witness stand, as an aid to focused reading.
- Dealing with heating and lighting if hypersensitivity is an issue.
- Patience – accepting the individual will provide unimportant detail together with important points; waiting for the person to process a question and respond.
- Adjustments to cross-examination style including:
  - Questions asked singly.
  - Thinking time allowed to assimilate information and produce a considered response.
  - Not asking the person to read through large parts of a document and comment on it.
  - Providing questions in advance of the hearing.
- If ‘mental overload’ has been reached and the individual is unable to participate in the process, he or she will need to be given sufficient time to recover.

It is of paramount importance that adults with SpLDs are reassured that:

- They may seek clarification at any stage by asking for a question to be repeated or re-phrasing it to check understanding.
- They can take their time when considering responses and can inform the judge when they are no longer able to maintain concentration.

- Misunderstandings on their part will not be treated as evasiveness and inconsistencies will not be regarded as indications of untruthfulness.
- They are not expected to rely on their memory alone for details of dates, times locations and sequences of events.
- They will not be expected to skim through and absorb new documentation or locate specific pieces of information in the court bundle.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Dyspraxia/Developmental Co-ordination Disorder***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Dyspraxia?**

Dyspraxia is part of a family of conditions known as [Specific Learning Difficulties](#). [Dyslexia](#) is often present at the same time.

Dyspraxia is an impairment or immaturity of the organisation of movement. Associated with this may be problems of planning and executing actions. This is evident when working with language tasks as well as in practical spheres such as organisation and multi-tasking. People with dyspraxia may be slow and hesitant, poorly co-ordinated with poor posture and balance, even giving the impression that they could be drunk. They can appear anxious, easily distracted and have difficulty with social interaction and judging how to behave in company. Finding their way to an unfamiliar venue may be challenging.

There may also be problems with the following:

**Speech and language:** speech may be unclear, due to poor control of mouth muscles; pace and volume of speech may also be affected.

**Communication:** including incorrect perceptions and difficulty conveying ideas; laborious, immature and awkward handwriting.

**Social skills:** difficulties include judging socially acceptable behaviour, understanding others' needs, a tendency to take things literally.

**Short term memory, sequencing skills:** weaknesses in these areas affect organisational ability, decision making, retrieving information from the mind 'on the spot'.

**Time management:** poor understanding of time or the urgency of situations.

**Managing change and new routines:** people with dyspraxia lack the flexibility and the ability to re-organise and re-schedule tasks.

Dyspraxia also affects sensory integration, with the result that it may be difficult coping in a busy environment with too much sensory stimulation; there may be a feeling of being overwhelmed by the complexity of information and tasks that have to be processed simultaneously. A tendency to react to all stimuli without discrimination leads to 'overload' and, in some cases, hypersensitivity to noise, touch and light.

## **Reasonable adjustments**

For more detail of potential difficulties in court and ideas for adjustments, see [Dyslexia](#).

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
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## ***Eating Disorders***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What are Eating Disorders?**

Eating disorders are characterised by an abnormal attitude to food, which causes someone to change their eating habits and behaviour. The physical effects of an eating disorder can sometimes be fatal. Eating disorders are often associated with low self-esteem, depression, anxiety, alcohol misuse and self-harm. Food is one of the many mediums through which anxiety, depression and obsessive compulsive disorders can express themselves.

An eating disorder is a medical diagnosis based on a person's eating patterns, their BMI (body mass index) and various medical tests. There are several kinds of eating disorder, of which the most well-known are:

- Anorexia Nervosa. This is where a person tries to keep their weight as low as possible, eg by starving themselves or excessive exercise.
- Bulimia. This is where a person goes through periods of binge eating and then makes themselves sick or uses laxatives to lose weight.

- Binge eating disorder. This is where a person feels compelled to overeat large amounts of food in a short period of time, even beyond the point where they are full and it is making them feel ill.
- Until recently, there was also a classification of 'EDNOS' (Eating disorders not otherwise specified), ie an eating disorder which does not precisely fit into these categories. EDNOS are no less serious than other types of eating disorder.

It is estimated that over 750,000 people in the UK have an eating disorder. Eating disorders can affect people of any age or sex, although there are certain patterns. Anorexia tends to appear at the age of 16 – 17, and affects about 1 in 250 females and 1 in 2000 males. Bulimia tends to appear at ages 18 – 19 and is 2 – 3 times more common than Anorexia. About 90% of those affected are females. Binge eating disorder affects males and females equally, and tends to appear when people are in their 30s.

Stereotyped views about who gets eating disorders can lead to it being undiagnosed or people not seeking help. Common misconceptions are that:

- Eating disorders are more common amongst white people than others. In fact, research has shown the illnesses are just as common, if not more so, amongst black, Asian and minority ethnic people. In the three years up to 2019/20, hospital admissions for eating disorders rose by 31% for white people and 53% for minority ethnic people, including 216% for black African people.
- Less affluent people are less likely to develop eating disorders. In fact, disorders occur at similar rates across all levels of income and education.
- Older people and men never get eating disorders. While less common, they may still get this illness.

Causes are usually more complex than social pressures to be thin. They include mental health issues, anxiety disorder, having an obsessive personality, emotional or sexual abuse, genetic factors, a family history of eating disorders or depression, difficult relationships, work pressures to be thin (eg models and ballet dancers) and stressful situations.

There is evidence that eating disorders are perceived by the general public as being self-inflicted, that these individuals should easily be able to pull themselves together, and that they have only themselves to blame for their illness. This shows a misunderstanding as to the true nature of the illness. The stigma itself adds a further layer of difficulty for those affected.

Eating disorders tend to dominate people's lives. Often they cannot think of anything else. Many people have hidden their eating disorder for years, either not admitting it to themselves, or feeling ashamed and fearing that others will not believe them or realise how serious it is.

Treatment usually involves various types of psychological therapy as well as a tailored nutrition plan. Recovery takes a long time and relapses are common. Individuals can start to look better physically, but their mental health might not improve at the same rate. A person might be discharged from hospital when their BMI is normal, for example, but this can be very dangerous, because the real issue is mental illness.

High levels of stress can set back someone's recovery.

A party or witness in the tribunal might feel tired, appear uninterested in the proceedings, and find it difficult to concentrate. They may also have anxiety or depression.

## **Reasonable adjustments**

Adjustments during the hearing may entail:

- Frequent breaks.
- Lunch at an agreed time.
- Avoiding comments about the person's weight or appearance, however positive or intended to be supportive ('You look fine to me'; 'You look well').
- Some of the adjustments suggested in the section on '[Mental ill health](#)' might be helpful if that is a factor.

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## ***Emphysema***

For this, please see '[chronic obstructive pulmonary disease](#)'.

## ***Epilepsy***

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## **What is Epilepsy?**

Epilepsy is a neurological disorder characterised by epileptic seizures. There are many different types of seizure and each person will experience epilepsy in a way that is unique to them as it depends on which area of the brain is affected. During a seizure some individuals may completely black out, whilst others experience a number of unusual sensations or movements with or without a state of altered consciousness. Seizures affecting the frontal lobe for example can be associated with what appears to be disinhibited inappropriate behaviours.

Seizures can last for a few seconds (petit-mal or absence seizures) or a few minutes (grand-mal or tonic-clonic seizures). The former can occur hundreds, or even thousands, of times a day and cause the individual to stop what they are doing, stare, blink or look vague before carrying on. The latter causes unconsciousness and possibly some body stiffness and twitching; upon coming round, there will be a

period of drowsiness, confusion and headaches. In both cases individuals will have no recall of what has happened.

Medication is successful in controlling seizures in about 70% of cases. Learning disabilities and epilepsy co-exist frequently.

Seizures can impair the memory of past events. Allowance may need to be made for this difficulty, particularly if a recent seizure has occurred.

Stress can provoke seizures in some individuals and, therefore, the stress of a court or tribunal environment may have an adverse effect on a person with epilepsy.

### **Non-epileptic seizures**

Non-epileptic seizures can appear superficially the same as epileptic seizures, but they have a different cause, which might be physiological or psychogenic (caused by mental or emotional processes). There are various other names which may be used including 'dissociative seizures' and 'non-epileptic attack disorder' ('NEAD').

### **What to do if someone has a tonic-clonic seizure (ie with convulsions)**

According to NHS Choices, it is important:

- To protect them from injury by removing any potentially harmful objects nearby and cushioning their head in your arms.
- Not to restrain them or attempt to move them unless they are in immediate danger.
- Not to put anything in their mouth.
- To stay calm and comfort them until they have fully recovered.
- When the convulsions have stopped, put them into the recovery position (lying on their side) until fully recovered.

### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- Providing a safe chair, ie with arm rests and not on casters.
- Attempting to reduce the stress of the courtroom environment.
- If photo-sensitivity (or flashing lights or fluorescent strip lighting) are an issue, keeping the lights off or changing room or venue.

### **Acceptable terminology**

- Do not refer to a person as 'an epileptic'. Use instead 'person with epilepsy'.
- Terms such as 'epileptic attack' or 'epileptic fit' are best avoided because of their negative connotations and potential inaccuracy – a 'fit' implies a convulsive seizure, which may not be the case. It is better to refer to a 'seizure' which describes the variety of experiences of people with epilepsy.

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## ***Fibromyalgia***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Fibromyalgia?**

Fibromyalgia describes a long-term condition characterised by widespread and variable pain all over the body. The exact cause is unknown, though one of the main theories is that there are changes in the way the central nervous system processes pain messages.

It is hard to know how many people are affected by the condition, because it is difficult to diagnose, with symptoms similar to other conditions. Nevertheless, it is thought to be relatively common, affecting perhaps 1 in 20 people to some degree.

Symptoms vary from person to person and can fluctuate according to factors such as stress and changes in the weather.

The main symptoms are:

- Widespread continuous pain, which can fluctuate in intensity, and be worse in certain parts of the body at different times, eg back or neck. The pain might be an ache, burning sensation, or sharp and stabbing.
- Extreme sensitivity, eg a very light touch can be painful, or pain from, say, stubbing a toe, will last much longer than usual. There may also be sensitivity to other things, eg bright lights.
- Stiffness and muscle spasm, especially after being in the same position for a long time.
- Profound fatigue, which can range from mild tiredness to sudden onset 'flu-like' exhaustion, when the individual cannot do anything at all.
- Poor sleep quality.
- Headaches and migraines caused by the above factors.
- Cognitive problems ('fibro-fog'), eg
  - Difficulty remembering things.
  - Limited concentration.
  - Slow or confused speech.

Other symptoms which people with fibromyalgia sometimes develop include:

- Dizziness.

- Clumsiness.
- Restless legs syndrome.
- Anxiety and depression.
- Irritable Bowel Syndrome.

Most medical experts agree that Fibromyalgia and Chronic Fatigue Syndrome (CFS) – also known as Myalgic Encephalomyelitis - are similar and probably related disorders, although views differ as to how closely they are related and even whether they are the same thing. Some people feel very strongly that there is no relationship. It is not the role of this Bench Book to resolve this issue. The key point is that pain appears to be the predominant symptom of Fibromyalgia, whereas tiredness is the predominant symptom of CFS. For more detail of CFS, see entry for '[Myalgic Encephalomyelitis \('ME'\) / Chronic Fatigue Syndrome](#)' in this Glossary.

## **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- Regular breaks.
- Late starts or shortened days.
- Rearranging the order of giving evidence to avoid times when exhaustion or pain is particularly bad.
- Assistance with lifting and turning pages of the trial bundle.
- If there are cognitive difficulties, adopting a slow pace during cross-examination.

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## **Hallucinations**

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What are Hallucinations?**

Hallucinations include where a person sees, hears, smells or feels things which do not exist outside their mind.

Hallucinations can occur with schizophrenia, bipolar disorder, dementia, Alzheimer's, Parkinson's disease, Charles Bonnet Syndrome (an eye condition), as well as a



consequence of illegal drug use, alcohol withdrawal, extreme tiredness or recent bereavement.

Hearing voices is a recognised symptom of schizophrenia, bipolar disorder and dementia. Visual hallucinations are also common with schizophrenia and with Parkinson's disease.

People describe auditory hallucinations as being as if someone is standing next to you. The voice can be critical, positive or neutral; it can give commands; and it can engage you in conversation. People also describe experiencing thoughts entering their mind from somewhere outside themselves.

An individual experiencing a hallucination may be afraid or confused.

### **Reasonable adjustments**

It is to be hoped that the possibility of hallucinations will have been identified at a case management preliminary hearing / ground rules hearing prior to the full hearing / trial, and advice taken from the individual, possibly an Intermediary (in courts where the procedure is available) and from the individual's doctor as to what adjustments should be made.

During the hearing, if it becomes apparent that a witness or party is experiencing hallucinations, it will be necessary to consider whether it is possible to continue, and whether the individual can sufficiently focus on the proceedings. There is a risk that the person may start answering all questions with a 'yes' to bring the proceedings swiftly to an end.

If the individual is able to continue:

- Adopt a calm manner.
- Focus on one question at a time.
- Do not hurry the person. Repeat questions if necessary.
- Allow evidence to be given behind screens to help focus the individual.

If a person is too distracted to be able to give evidence orally, consider:

- Arranging for them to give evidence at another time.
- Using an Intermediary (in courts where these are used).
- Taking evidence in written form.

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## ***Hearing Loss and Deafness***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Hearing Loss?**

Hearing loss or deafness is common. Action on Hearing Loss (formerly the Royal National Institute for the Deaf) estimates that there are 11 million people in the UK with some form of hearing loss.

Some people will want to be referred to as hard of hearing or as having a hearing impairment or hearing loss. Others do not consider deafness to be an impairment or a disability, and prefer the term 'deaf' or even 'Deaf' (with a capital D) to denote affiliation to the Deaf community.

The term 'deafened' means someone who has become profoundly deaf in adult life.

The level of deafness is measured as 'mild', 'moderate', 'severe' or 'profound' by reference to the quietest sound measured in decibels that a person can hear. The quietest sounds that can be heard by people with mild deafness are 25-39dB; for people with moderate deafness it is 40-69dB; for people who are severely deaf, it is 70-94 dB; and for those who are profoundly deaf, it is more than 95dB. As a reference point, an aeroplane taking off is about 140dB; a loud rock band is around 100-120dB; a motorbike about 100dB; normal conversation around 60-65 dB; and leaves rustling, about 10dB.

People with mild deafness will find it difficult to follow speech in noisy situations. People with moderate hearing loss may need to use hearing aids. Severely or profoundly deaf people may use a combination of hearing aids, lipreading and BSL (British Sign Language). Background noise is very stressful for anyone who is hard of hearing.

Action on Hearing Loss estimates 6.7 million people would benefit from hearing aids, but on average people wait 10 years before seeking help with hearing loss.

Deafness also affects the extent to which people can use their voices particularly in those who are born deaf or who become deaf before speech is established (often referred to as pre-lingual deafness). This may result in speech which is difficult to follow. This can lead to an emotional state of social isolation. Deaf people may appear to be blunter or more demonstrative than hearing people and demonstrative gestures should not be misinterpreted as over-theatrical or as signs of rudeness.

### **Communication methods**

- Hearing rooms should be fitted with an induction loop, which should also be fitted in the reception areas. These may enable a deaf person to hear better or to lipread with some background support.
- A Speech to Text reporter / Palentypist types phonetically what is said in the courtroom, which appears in normal spelling on the screen of the deaf person in real time.

- Lipspeakers are trained hearing people who repeat what a speaker is saying without using their voice so that lipreaders can lipread them. They are mainly used by deafened people.
- British Sign Language (BSL) is the indigenous language of people in Great Britain who were born deaf or who became deaf early in life. It has its own syntax and grammar. Do not assume that someone who uses BSL can read documents, as English may not be their first language. Although some deaf people are fully bilingual in BSL and spoken English, others are not. Most deaf people can read and write English to some extent, but may have difficulty with complex grammar and less common words.

There is no universal sign language. There are many different national sign languages, eg American Sign Language (ASL) and Irish Sign Language (ISL). BSL and ASL only have about 30% identical signs. ISL is more similar to French Sign Language than to BSL. There is even regional variation within BSL, rather like regional dialects in spoken English. When booking an interpreter, it is important to check which country's sign language the deaf person requires.

Real names will be spelt out.

- Sign Supported English (SSE) is used by some deaf people for whom BSL is not the first language. It is not an independent language but uses English word order and grammar with BSL manual signs.
- Makaton is similar to SSE except that signs or symbols are used only for key words to support speech. Makaton is unlikely to be used unless the person also has a cognitive difficulty. More detail is set out in the section on [Learning Disability](#).
- Deafblind interpreters can be used where a person has both hearing and vision loss. Usually this relies on spelling out words on a person's palm.

## Reasonable adjustments

### *Prior to the hearing*

In advance of the hearing, it is necessary to check the person's preferred method of communication. Remember that anything said in open court will need to be interpreted. As appropriate:

- Select a quiet room with good lighting.
- Check that the induction loop is working.
- Make bookings made of any sign interpreter (in the correct language), lipspeaker or palantypist.

### *During the hearing*

- Check the room layout with the deaf person. He or she needs to sit with good sight lines to all speakers and light on their faces. Decide where any interpreter or signer will sit. No one should sit with their back to the window unless a curtain/blind is closed, since this will make their faces hard to see.
- During the day, light may change. Be ready to move people's positions.

- If a signer is used, try to create a 'triangle' between the judge/panel, the signer and the deaf person.
- Where there is an interpreter, lipspeaker or palantypist, or even where the deaf person is relying on his or her own lipreading skills, allow extra breaks as these activities are intense and tiring.
- Multiple adjustments will be necessary if more than one person in the room needs an interpreter.

Lipreading by the deaf person is very tiring and much of it is guesswork. As many words look similar on the lips, context is a very important clue.

Do not assume the person is following what is being said because they smile and nod. They may be being polite. Check understanding by asking the person to repeat back what has been said.

Speaking in the following way will make it easier for the deaf person to lipread:

- Attract the deaf person's attention before starting to speak.
- Make the subject of the sentence as clear as possible.
- Use full sentences rather than short phrases – they are easier to understand.
- Face the deaf person and keep the mouth clear. Make good eye contact.
- One to two metres is optimum distance for lipreading.
- Speak at a steady rhythm. Too fast or slow distorts lip movements.
- Do not shout. It distorts the face and looks angry.
- Where necessary, rephrase sentences. Some words are easier to lipread than others.
- Allow the person time to process what is being said.
- Be ready to write things down.
- Use natural hand-gestures, but exaggerated ones can be distracting.
- Modify language for people who went deaf before fully learning speech. Their English vocabulary may be less than it would otherwise be.

When communication is through a BSL interpreter:

- Always look at the deaf person when speaking or listening to the reply through the interpreter.
- Speak to the deaf person ('you'), do not speak to the interpreter and about the deaf person ('he' or 'she').
- Although BSL interpretation is almost simultaneous, the interpreter needs to wait for the end of the spoken sentence, so there is some time lag. Speak at a steady pace. A very slow sentence is difficult to interpret. Speaking very fast is difficult to keep up with.
- Pause slightly every one or two sentences. Otherwise the slight delay caused by the interpretation can mean the deaf person loses opportunities to interject and ask questions.

- Remember that a person who became deaf before learning spoken English will not have had full access to information from the media. They may have a different understanding of the world around them from that of the judge or advocate and assumptions cannot be made.
- Pre-lingually deaf people may have very limited ability to understand written English, especially if it is complex.
- On a hearing longer than a few hours, it is likely two interpreters will be needed to alternate, as interpreting is very tiring.

#### Structure of BSL:

- BSL is an entirely different language with a different structure. Many ordinary words and concepts will have no direct translation.
- Avoid jargon and keep spoken sentences simple. Be prepared to give the interpreter different or more explicit explanations of certain words and concepts, so that they can be translated.
- It is useful to provide the interpreter with a list of jargon and key concepts (eg 'mitigation', 'settlement') in advance.
- Do not be surprised if the interpretation takes longer or less time than what was said in English. That is because of the differences in how the languages work. The Advocate's Gateway gives these examples:<sup>3</sup>
  - 'Did you open the window?' – there are different signs for opening a casement window and a sash window.
  - 'Did you use the stairs?' – there are different signs for going upstairs and going downstairs.
  - 'Did he have a weapon?' – there is no general word for 'weapon', only separate words for knife, gun etc.

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### **Heart disease**

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<sup>3</sup> The Advocate's Gateway: 'Planning to question someone who is deaf' (Toolkit 11; 1 January 2018).

## What is Heart Disease?

Heart disease can affect any part of the heart but it predominantly affects the heart muscle, the heart valves or the blood vessels of the heart. Examples of heart disease include congenital heart disease, cardiomyopathy (a disease of the heart muscle) and coronary artery disease. Angina is the symptom of central chest pain which sometimes radiates into the arm or jaw and is caused by too little blood flowing to the heart because of a narrowing of the coronary blood vessels (also called ischaemic heart disease). A heart attack (also called a myocardial infarction) is caused by a complete blockage of one of the coronary arteries leading to the death of heart muscle. High blood pressure (hypertension) in isolation causes no symptoms unless very high but it can eventually lead to heart disease. Heart failure is a term used when the heart struggles to work as an efficient pump causing symptoms of breathlessness, fatigue and ankle swelling.

## Reasonable adjustments

Activity or stressful situations can aggravate angina and shortness of breath, and individuals may need to use a GTN spray or tablets which they put under their tongue. GTN widens blood vessels, thereby causing a drop in blood pressure. After use, a break may be needed as it can temporarily cause palpitations, dizziness, light-headedness or headache.

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## *HIV and AIDS*

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## What are HIV and AIDS?

The terms HIV ((human immunodeficiency virus) and AIDS (Acquired Immune Deficiency Syndrome) are often use synonymously. This is wrong; they do not mean the same thing. HIV is a virus which attacks the immune system and weakens the body's ability to fight infections. AIDS is the final stage of HIV infection when the body can no longer fight certain infections and diseases such as TB or cancer.

The National AIDS Trust ([nat.org.uk](http://nat.org.uk)) found that some people including judges are not aware of the difference between HIV and AIDS and are not aware of medical developments over the last ten years which enable those who are HIV positive to lead normal lives. Some myth busters are set out below:

- An individual cannot be infected by 'AIDS'.
- There is no cure for HIV, but treatment can keep the virus under control and the immune system healthy. Treatment with anti-retrovirals does not merely alleviate symptoms but it restores and maintains the immune system, suppresses the replication of HIV in the body and often enables the individual to live a long and relatively normal life. AIDS-related illness has become much less common in the UK due to advancements in HIV treatments. Anti-retrovirals can be associated with side effects such as fatigue, depression, nightmares and diarrhoea.
- HIV can now be treated with Atripla which is the first 'one pill daily' regime licensed for the treatment of HIV.
- Research shows that HIV-positive individuals on effective anti-retroviral therapy (with a suppressed viral load for six months) and without sexually transmitted infections are sexually non-infectious.
- There are common misconceptions about how HIV is passed between people. It is transmitted through infected blood, semen, vaginal fluids or breast milk.
- It cannot be passed on through kissing or touching, biting, coughing or spitting, breathing the same air, and is not transmitted via toilet seats, swimming pools, water fountains or shared eating utensils. There is no reason for others not to use the same witness chair or touch the same holy book or trial bundle as used by a previous witness who is HIV-positive.

### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- Increased breaks and shorter days.
- Availability of water.
- Easy access to toilets.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

### **Incontinence**

See '[Introduction](#)' for the purpose of this Glossary.



## **What is Incontinence?**

An inability to control natural functions, or a need to rely on bags and pads, may be suggested by fidgety behaviour, inattention and a general unease. Stress can make matters considerably worse and cause embarrassment.

## **Reasonable adjustments**

Depending on the circumstances, adjustments may include:

- Regular breaks plus a pre-agreed signal for the person to indicate when they would like an immediate break.
- Selecting a courtroom close to accessible toilets.
- Choosing a court venue close to the person's home to avoid travelling.
- In extreme cases, taking evidence by video link.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Inflammatory bowel disease***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

## **What is inflammatory bowel disease?**

This is a term which covers Crohn's disease and ulcerative colitis which are both chronic inflammatory conditions of the bowel. Crohn's disease affects the entire gut from mouth to anus whereas ulcerative colitis just affects the large intestine. Both can cause abdominal pain, bloody diarrhoea and general ill health such as fatigue. The conditions are characterised by episodic flare ups and although effective treatment is available many people follow a chronic course culminating in surgical removal of the diseased bowel. A type of arthritis can also be associated with both types of inflammatory bowel disease. General ill-health, the frequency and urgency of bowel action and nagging abdominal pains may sometimes lead to short temper, anxiety and despondency.

Irritable bowel syndrome ('IBS') is a different condition altogether and not within the heading of IBD. However, certain symptoms are similar, eg a need to rush to the toilet. It is more common, but far less serious.



## Reasonable adjustments

Depending on the circumstances, adjustments may include:

- Regular breaks plus a pre-agreed signal for the person to indicate when they would like an immediate break.
- Selecting a courtroom close to accessible toilets.
- Choosing a court venue close to the person's home to avoid travelling.
- In extreme cases, taking evidence by video link.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## Laryngectomy

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### What is a Laryngectomy?

Laryngectomy is the removal of the larynx (voice box), usually as a result of cancer.

Individuals have to relearn how to speak and this process usually starts within a few days of the operation. There are three main ways of assisting with speech: a voice prosthesis or tracheo-oesophageal puncture, oesophageal speech or an electrolarynx.

## Reasonable adjustments

Where appropriate, adjustments for the hearing may include:

- Keeping questions and answers to a minimum.
- Making writing facilities available.
- Allowing evidence to be given in written form prior to the hearing.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)

- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Learning disability***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Learning Disability?**

People with learning disability (some prefer to say “learning difficulties”) are one of the most marginalised groups in society.

Learning disability is not a mental illness. It is a life-long condition acquired before, during or soon after birth, which affects intellectual development. The World Health Organisation defines learning disability as “a state of arrested or incomplete development of mind”, entailing a significant impairment of intellectual functioning or adaptive/social functioning. As with most disabilities, learning disability can be mild, moderate or severe.

People with learning disability generally find it harder to understand and remember new or complicated information, to generalise any learning to new situations, and to learn new skills, whether practical or social, eg communication or self-care. Some people may have difficulty speaking or be unable to read. Those with more severe difficulties may need help in getting dressed or making a cup of tea.

Learning disability must not be confused with the similarly named '[specific learning difficulties](#)' such as dyslexia.

### **Reasonable adjustments**

The Advocate's Gateway: 'Planning to question someone with a Learning Disability' (Toolkit 4, Nov 2015) is particularly useful and worth reading in detail. It provides the basis for the following suggestions.

Reasonable adjustments for the hearing may include:

- Facilitating a visit to the tribunal or court prior to the hearing.
- Enabling practice with live links or screens.
- Where applicable, exploring whether or not wigs and gowns are desirable.
- Arranging for an intermediary or a neutral supporter.
- At the hearing, the judge and representatives should make introductions and establish a rapport.
- Explaining that the court does not know what happened and it is the person's role to answer questions and tell the court what they know.
- Telling the person to say if they do not understand the question or know the answer. Periodically reminding the person of this. Possibly giving them a cue card to hold up if they do not understand.

- The person may not realise they have not understood, or may be unwilling to say so. Therefore watch for signs of misunderstanding. Never ask, 'Do you understand?' Instead ask the person to explain in their own words what has just been said to them.
- In a criminal case, allowing the person to refresh their memory by re-watching the DVD, listening to it or reading a transcript as preferred. Not requiring the person to review it again with the jury.

Where there is sensitivity to background noise or movement:

- Choosing a room away from background noise.
- Repeating questions.
- Using screens to reduce visual distractions.
- Allowing evidence from a live link room (although this may create other communication difficulties).

The judge is under a duty to control the evidence and intervene to ensure vulnerable witnesses give evidence the best they can. If necessary, this may include putting limits on cross-examination and even stopping the opposing representative putting their case to the person.<sup>4</sup> Helpful practice on questioning the individual may include:

- Using the person's preferred first name.
- Following a logical order.
- Signalling changes of topic.
- Using plain English, the simplest form of words, and avoiding jargon.
- Keeping questions short with a simple structure.
- Avoiding double negatives, the passive form, questions put in the form of statements which rely on intonation, tagged questions, questions requiring a yes or no response, closed questions giving only two options for the answer.
- Checking understanding of crucial words. For example, what the word 'touch' conveys to the person (it may mean only with hands).
- Adjusting the pace to suit the individual. A slower pace may be necessary to allow thinking time, but too slow a pace may cause the person to lose concentration or lose the thread of what is being asked.
- Allowing communication aids, eg symbols, pictures, photos.
- Allowing written or verbal answers through an intermediary.

The individual may be very suggestible and anxious to please. It is important that judges and advocates do not do anything which might be interpreted (or misinterpreted) as implying an answer was wrong, eg by facial expression or nodding or shaking the head, or by repeating a question, even reformulated. If the person's answer was unclear, it is important to explain that the reason for repeating the question is purely for clarity. The person should not be explicitly accused of lying.

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<sup>4</sup> *R v Cokesix Lubemba; R v JP* [2014] EWCA Crim 2064.

### *Breaks and tiredness*

It is important to watch for signs that the person is overloaded and give breaks immediately. The individual may say they do not need a break, when in fact they do, purely to get their evidence over with. Note that early signs of loss of concentration may not be obvious over a video link, and people in the room with the person may need to give an indication.

The following might be signs of stress:

- Falling silent.
- Answering questions with a series of 'I don't know' and 'I can't remember'.
- Agreeing with everything – to bring questioning to an end.
- Inappropriate laughter.
- Pulling their hair, tapping their legs etc.

### *Evaluating evidence*

It is important properly to take into account a witness's learning disability when making adverse findings on credibility. Expert medical evidence may be critical in explaining why the witness cannot give a consistent version of events. It may well be appropriate to give more weight to objective evidence over the credibility of a witness's oral evidence where he or she has learning disability, and in some circumstances, to dispense with the oral evidence altogether.<sup>5</sup>

### *Intermediaries*

Criminal and family courts, and certain other courts, can seek the assistance of an 'intermediary' where there is communication difficulty. In tribunals, informal facilitation can be allowed or, in rare cases, an intermediary may be possible.<sup>6</sup> For more detail of intermediaries, see the section on '[Criminal court procedure – statutory measures](#)' in chapter 4 (Mental Disability).

### *Makaton*

Makaton is a language programme which enables people with communication difficulties to express themselves independently. It combines signs, symbols and speech to provide multiple ways for someone to communicate. The use of signs can support people who have unclear or no speech. Symbols can help those who have limited speech and cannot or prefer not to sign. The advantage of signs is that they are less transient than speech or signs and can remain in view as a reminder of what has been said.

Makaton may be used by children or adults who, for example, have learning disabilities, hearing impairment, physical disability, head injuries, stroke or dementia.

There are eight stages of Makaton vocabulary. There is a basic 'Core Vocabulary' of roughly 450 day-to-day concepts. Individuals may or may not have gone on to learn a more extensive and abstract 'Resource Vocabulary' of roughly 14,000 concepts. There is a sign and symbol for each word. Makaton signs are devised from gestures

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<sup>5</sup> *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123.

<sup>6</sup> *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123.

used in the sign language of the relevant country. So, in the UK, Makaton draws gestures from British Sign Language, but follows the spoken word order of grammatical English.

Makaton is accompanied by speech as far as possible for the individual. It uses signs and symbols for key words. It differs from Signed English, where every word is signed in English grammatical order, and Sign Supported English (SSE) which is fully spoken in English grammatical order with many words signed.

If the person can only communicate through Makaton, a person trained in Makaton (a licenced 'Makaton tutor') would be required to interpret. It is important to avoid jargon and bear in mind that the person's vocabulary may be limited. Sentences should be kept short and clear.

More information on Makaton is available at [www.makaton.org](http://www.makaton.org).

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Lupus – Systemic lupus erythematosus (SLE)***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Lupus?**

Lupus is a complex and poorly understood condition. It is an 'autoimmune' condition, ie caused by problems with the immune system. There are various types of SLE. When the term 'lupus' is used, it is normally to refer to the most severe type.

The symptoms of SLE can range from mild to life-threatening. The most common are fatigue, joint pain, particularly in hands and feet, which can be worse in the morning, and rashes. There is a large range of other potential symptoms, including high blood pressure ('hypertension'), migraine, Raynaud's disease, seizures, depression and memory loss.

Antiphospholipid Syndrome ('APS') is another autoimmune disorder which is common in people with lupus. It causes the blood to become sticky, increasing the risk of blood clots. Treatment is usually with blood thinning medication, eg aspirin or warfarin. Risk factors for thrombosis must also be addressed including high blood pressure.

## Reasonable adjustments

Appropriate adjustments will depend on the nature and severity of symptoms. Stress is inherent in the nature of litigation, but where it is particularly important to reduce stress eg because of hypertension, the following measures may help:

- Expediting the final hearing date and avoiding delays.
- Keeping the length of the final hearing as short as possible.
- Allowing the person to give evidence first, to 'get it over with'.
- Allowing additional breaks and shorter days.
- Keeping the tone of cross-examination calm.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## Mental ill health

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### What is mental ill health?

According to MIND, approximately one in four people in the UK have a diagnosable mental health condition in any given year. These often become chronic and severe and lead to considerable disability. Many of these conditions are made worse by stress.

Mental health disorders cover a broad spectrum of conditions such as depression, anxiety, post-traumatic stress disorder, obsessive compulsive disorder, eating disorder, bipolar disorder (which used to be known as manic depression), and schizophrenia. People diagnosed as having mental health problems may have feelings or behave in ways which are distressing to themselves or others. They may have hallucinations (especially visual or auditory), delusions and thought disorders.

It is a myth that people with mental health problems are dangerous and violent; they are far more likely to harm themselves than other people.

The effect of going to court and tribunal could cause the individual to go blank, panic or cry. In the most extreme cases, a court appearance for certain individuals could be extremely harmful, causing them to take their own life.

Most mental health problems are likely to have an effect on giving evidence as a witness in a court or tribunal. Because of the variety of patterns of behaviour, and

their impact on the veracity of the evidence, this is a situation where the judge needs to make a particularly careful assessment of the individual and how best to deal with them in giving evidence. Many people with mental health problems are reliant on a caring and stable environment for maintaining their stability and can easily be thrown off balance by medication changes or sudden distressing experiences. They are highly sensitive and need special care and protection to feel safe. Their medication may lead to embarrassing side effects (eg sweating or tics).

MIND points out that the impact of mental distress on function may be separate from the issue of credibility and reliability of evidence. Although someone with schizophrenia may be hearing voices and therefore find it difficult to concentrate, this does not have an automatic bearing on the believability or consistency of their testimony.

## **Reasonable adjustments**

### *Prior to the hearing*

In the case preparation prior to the hearing, especially if it is a litigant in person, adjustments may include:

- Expediting the final hearing.
- Conversely, allowing a postponement if there is medical evidence that the person is not fit on a particular occasion to attend court.
- Taking a more hands on approach to case management as opposed to leaving it to the parties to work together, which can lead to tension.
- Holding more case management preliminary hearings if it helps to support the person through case preparation rather than become engaged in lengthy correspondence to the tribunal.
- Giving staggered instructions and Orders rather than overwhelming the person with too many things to do at once.
- Allowing the person longer to comply with Orders.
- Periodically summing up the state of play in terms of case preparation in a letter to both parties.

### *During the hearing*

Depending on the circumstances and seriousness of the person's condition, adjustments during the hearing may include:

- Confirming understanding of the process and expressing willingness to answer questions and explain.
- Regular breaks.
- Changing the order of witnesses so that the person need not wait before giving evidence.
- In some instances, a person becomes progressively unwell as the hearing goes on. It helps to obtain their evidence and deal with the most important opposition evidence during the early part of the hearing.

- Demonstrating empathy and understanding, particularly if the individual becomes agitated. Providing reassurance and keeping the courtroom calm.
- Consider seating arrangements and avoiding too many opposition witnesses sitting directly behind the person.
- Speaking slowly and allowing extra time for the individual to answer.
- Agreeing modification to cross-examination style:
  - Advising representatives that the opposing case need not be ‘put’ in cross-examination.
  - Setting limits to the time for cross-examination.
  - Telling the opposing advocate to ask open questions (what did you do next?) as opposed to tag questions, or other questioning style which could appear accusatory.
  - Putting questions through the judge.
- In severe circumstances, allow evidence to be given before the hearing by video link or in the form of written question and answer, or written submissions to be provided.
- Consider restricting the number of people in the room and whether to make a restricted reporting order, subject to the usual considerations of open justice.

If the individual experiences hallucinations, see entry for ‘[Hallucinations](#)’ in this Glossary.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Migraine***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See ‘[Introduction](#)’ within this Glossary.

### **What is Migraine?**

Migraine is among the three most prevalent health conditions in the world. It affects considerably more women than men. In a 2002 report, the World Health Organisation ranked migraine amongst the world’s top 20 disabling conditions. Yet migraine frequently is not taken seriously.



Migraines are not ordinary headaches. Migraine is a condition of recurring headaches of a particular kind. There are often other symptoms, eg sensitivity to light and noise, eyesight changes, lethargy and nausea. About 15% of people with migraine get migraine with “aura”, ie neurological symptoms such as changes in sight (zigzags, dark spots etc), disturbances to speech and hearing or, more rarely, partial paralysis. Migraine attacks usually last one or two days.

A particular difficulty with migraines is their unpredictability. At the end of one day in court, an individual may have no idea that he or she will be unable to function the next morning. On other occasions, a person may sense the first symptoms at the end of one day and be able to alert everyone.

In some cases, the person will simply be unable to get out of bed, in which case all that can be done is for no hearing to go ahead that day. In other cases, the person will be able to struggle into court with the help of medication, but may well lack animation and feel drained of energy, nauseous, sensitive to light and noise, and find difficulty concentrating.

### **Reasonable adjustments**

Depending on the situation, helpful adjustments while someone has a migraine might be:

- Reducing the length of the day.
- Rearranging the order of giving or hearing evidence, so that the individual can give evidence before the migraine gets worse or carry out the least taxing tasks while it is at its height.
- Some strong medication is very effective but only for short period. Arranging proceedings around those optimum periods.
- Allowing the person longer to process information.
- Reducing the detail and complexity of information given or questions asked in one go. Conveying one idea at a time.
- Allowing the person to drink or nibble food in court. This can reduce nausea for some people, but be unappealing to others.
- More breaks for rest may be helpful, although the person may feel just as bad during breaks.
- Reduce lighting in the courtroom and ask everyone to avoid sudden and loud noise.

Adjustments which reduce the likelihood of triggering a migraine might also be helpful. It is necessary to consult the individual on these, but common triggers which might bear on the courtroom environment or scheduling include excessive heat, dry air heating systems, missing or delayed meals, mild dehydration, suddenly reducing caffeine intake, changed sleep patterns, stress, and for women, monthly hormonal changes. These might suggest:

- Agreeing a suitable time for lunch break and not over-running.
- Ensuring water is available. Allowing a person to have a cup of coffee.
- Avoiding lengthening the day beyond normal court hours in order to finish.
- Choosing a suitable courtroom with reasonable heating.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Mobility impairment***

See '[Introduction](#)' for the purpose of this Glossary.

### **What is mobility impairment?**

Mobility impairment can be due to leg or foot impairment, general muscular weakness, illness or injury. People may not need an aid or may use an aid some or all of the time, eg a stick, crutches or a wheelchair. Depending on the reason for the mobility impairment, a person may also have other impairments. A wheelchair user may have full, partial or no use of his/her upper limbs.

It is very important not to touch the person or a person's wheelchair or other aid without their consent. People report that it is a regular occurrence that strangers move their wheelchair without asking, and sometimes without speaking to them at all. This is an intrusion on someone's personal space. Even if meant well, it can startle or injure the person because of their underlying condition; it can be humiliating and patronising; and it can make someone feel like a piece of luggage. The lack of control can also be very frightening.

### **Reasonable adjustments**

Depending on the nature of the impairment, adjustments could include:

- Accessible entrance to venue.
- Accessible route to hearing room.
- Not requiring the person to stand when a judge enters the room or the court rises.
- Accessible routes within the hearing room, to and from the witness box.
- Appropriate seating arrangements in the hearing room.
- For wheelchair users, positioning of the person while giving evidence with good sight lines to the judge and advocates.
- If needed, assistance with trial bundles and pouring water.
- Allowing a carer or amanuensis to assist.
- Accessible toilets.
- Ensuring the hearing does not finish late so as to clash with rush hour if the individual is using public transport.
- Safe procedures for exiting if there is a fire and lifts cannot be used.

## Acceptable terminology

Do not say that someone is ‘wheelchair bound’ or ‘confined to a wheelchair’ or ‘in a wheelchair’. It is better to say that someone ‘uses a wheelchair’ or is a ‘wheelchair user’.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## Motor neurone disease

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See ‘[Introduction](#)’ within this Glossary.

### What is Motor neurone disease?

This is a rare progressive degenerative disease affecting specialised nerve cells called the motor neurones causing the muscles to waste away. In the vast majority of cases, intellect and memory remain intact. Motor neurones control important muscle activity such as walking, speaking, breathing and swallowing. The classic symptoms of the disease in its early stages include stumbling, weakened grip, muscle cramps and a hoarse voice which can sound extremely slurred. Inappropriate or excessive laughing or crying can also occur, conditions over which the individual has no control. This is called emotional lability. The individual may also suffer with excess involuntary yawning or drooling. At an advanced stage, there will be a loss of function of the limbs and a weakness and wasting of the muscles of the trunk and neck. Eventually there is total body paralysis and significant breathing difficulties. Such a condition will lead individuals to eventual total dependence on others. Fatigue is common, especially if much effort has to be put into communication.

## Reasonable adjustments

Depending on the level of impairment, adjustments could include:

- Expedited listing of the final hearing.
- More breaks and shorter hearing days.
- Accessible entrance to venue.
- Accessible route to hearing room.
- Accessible routes within the hearing room, to and from the witness box.

- Appropriate seating arrangements in the hearing room.
- When swearing the witness in, not asking the person to take hold of the oath card and any religious book.
- For wheelchair users, positioning of the person while giving evidence with good sight lines to the judge and advocates.
- Assistance with trial bundles and pouring water.
- Accessible toilets.
- Safe procedures for exiting if there is a fire and lifts cannot be used.
- Keeping questions and answers to a minimum.
- Making writing facilities available.
- Allowing evidence to be given in written form prior to the hearing.
- Conducting the hearing by video link.
- Conducting the hearing at the person's home.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Multiple sclerosis (MS)***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is MS?**

Multiple sclerosis is a disease affecting nerves in the brain and spinal cord causing problems with muscle movement, balance and vision. Thus there can be visual damage where the optical nerves are affected and movement can be restricted where parts of the brain or motor nerves are affected. MS affecting the sensory nerves can result in numbness or tingling. There are different types of MS affecting individuals in very different ways. The most common type is the relapsing-remitting type with periods when they are symptom-free. Some people with this diagnosis have one short-lived episode and are then symptom-free whereas others with the secondary progressive type can deteriorate rapidly. Fatigue is a very common symptom.

As the symptoms vary widely, the court or tribunal should be made aware of the individual's specific needs so that any extra aids or assistance can be organised.

## Reasonable adjustments

Where appropriate, adjustments for the hearing may include:

- Frequent breaks, eg to rest or go to the toilet.
- Shorter days.
- Available water.
- In some cases, extreme heat can cause a relapse so the use of a fan or air conditioning in the courtroom during summer would be beneficial.

If mobility impaired:

- Accessible entrance to venue.
- Accessible route to hearing room.
- Accessible routes within the hearing room, to and from the witness box.
- Appropriate seating arrangements in the hearing room.
- For wheelchair users, positioning of the person while giving evidence with good sight lines to the judge and advocates.
- Not requiring the person to stand when a judge enters the room or the court rises.
- If needed, assistance with trial bundles and pouring water.
- Accessible toilets.
- Safe procedures for exiting if there is a fire and lifts cannot be used.

If visually impaired, see '[Visual impairment](#)'.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Myalgic Encephalomyelitis ('ME') / Chronic Fatigue Syndrome***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is ME?**

ME / Chronic Fatigue Syndrome is a relatively common illness of unknown cause, classified by the WHO as a neurological disease. It is characterised by debilitating fatigue which can be triggered by minimal activity. It comprises a variety of symptoms including malaise, headaches, sleep disturbances, difficulty with

concentration and muscle pain. A person's symptoms may fluctuate in intensity and severity and there is also great variability in the symptoms and their severity between different individuals. Those severely affected may become wheelchair users.

Many people with ME/CFS suffer with limited mental stamina, impaired concentration and short-term memory, difficulties with information processing and word retrieval, hypersensitivity to light and noise.

Although people with ME may not appear unwell, travel to a tribunal or court venue will have been taxing and sitting in an ordinary chair is often uncomfortable.

## **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- More breaks and shorter days.
- Starting later in the morning.
- A supportive chair.
- Adjustments to communication and cross-examination style.
- Low light levels and a calm quiet atmosphere.

If mobility impaired:

- Accessible entrance to venue.
- Accessible route to hearing room.
- Accessible routes within the hearing room, to and from the witness box.
- Appropriate seating arrangements in the hearing room.
- For wheelchair users, positioning of the person while giving evidence with good sight lines to the judge and advocates.
- If needed, assistance with trial bundles and pouring water.
- Accessible toilets.
- Safe procedures for exiting if there is a fire and lifts cannot be used.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## **Obesity**

Note that this is an introductory overview for the purpose of considering reasonable adjustments. It also notes evidence regarding the type of discrimination which people

may face in relation to their obesity. It should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is obesity?**

Obesity has no consistent definition, but in most cases a person's BMI (body mass index) is a good indicator. This is the ratio of height to weight. It can be misleading where someone has a lot of muscle. A BMI of 25-29.9 is considered overweight and 30 – 39.9 is considered obese.

Levels of obesity in the population have increased considerably over the last 20 years. It is now estimated that one in four adults in the UK are obese. It is an increasing problem because of modern lifestyles, with the availability of fast food, office-bound jobs and lack of exercise. It can also be caused by a specific health problem such as an underactive thyroid or an eating disorder.

Obesity commonly causes physical problems such as difficulty walking, running and exercising; fatigue; breathlessness; increased sweating; poor sleep; and pain in the knees and back.

It can also lead to a number of serious health conditions including type 2 diabetes, asthma, sleep apnoea, gastro-oesophageal reflux disease, osteoarthritis, gallstones, liver and kidney disease, high cholesterol and blood pressure, and certain types of cancer.

In addition, obesity often leads to low self-esteem, feelings of isolation and depression.

### **Discrimination against obese people**

There is considerable evidence of discrimination against obese people in health provision and in the workplace.<sup>7</sup> Discrimination in recruitment, promotion and pay arises from a variety of negative stereotypes:

- Assumptions that obese people will have medical issues.
- Fear that they will project the wrong image of the organisation in customer-facing roles.
- False ideas that obese people are lazy, less competent, and less likely to have leadership potential.

There is also workplace harassment and bullying.

Research suggests that organisations are not tackling obesity stereotyping and discrimination when tackling other equality issues.

#### *The law*

Obesity can cause health problems which in themselves would be regarded as a disability. Whether obese individuals would wish for obesity itself to be classed as a

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<sup>7</sup> 'Disability discrimination and obesity : the big questions?': Flint, Stuart and Snook (2015) at <http://shura.shu.ac.uk/10873/>

Obesity research: Fattism is the last bastion of employee discrimination' (Personnel Today 2005) at [www.personneltoday.com/hr/obesity-research-fattism-is-the-last-bastion-of-employee-discrimination/](http://www.personneltoday.com/hr/obesity-research-fattism-is-the-last-bastion-of-employee-discrimination/)



disability probably varies. Applying the social model of obesity, one would say that society disables obese people by discriminating against them.

The Equality Act 2010 does not prohibit discrimination because of obesity as such. For that reason, obese individuals have been forced to bring claims under the heading of disability discrimination to gain the protection of the Act. This artificial approach has caused difficulties under the Equality Act 2010 which prefers to focus on the likely disabilities which an obese person might have rather than stating the obesity is in itself a disability.

The relevant EU Directive (2000/78) also does not explicitly cover obesity. Applying the definition of disability in its case law, the Court of Justice of the European Union says that if 'under given circumstances, the obesity of the worker concerned entails a limitation which results in particular from physical, mental or psychological impairments that in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, obesity can be covered by the concept of 'disability' within the meaning of Directive 2000/78'.

### *Juries*

Research suggests that jurors' decisions can be affected by matters such as race, sex and appearance. A US study amongst simulated jurors found that they were significantly more likely to find an obese woman guilty than a lean woman on the same facts. No difference was shown in regard to male defendants.<sup>8</sup>

## **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- Provision of a large ergonomic chair.
- Comfortable chair witness table arrangements.
- Ensuring the hearing does not finish late, leading to rush hour travel if the individual is using public transport.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

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<sup>8</sup> ['The influence of a defendant's body weight on perceptions of guilt'](#) Schvey, Pugh and others (2013).



## ***Panic attacks and panic disorder***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What are panic attacks and panic disorder?**

Everyone experiences feelings of anxiety and panic at some time during their life. It should not be forgotten that attending a court or tribunal is stressful for most people. The term 'panic attack' can be a misnomer. Some people use it simply to mean they are feeling highly anxious. But a true 'panic attack' is a real event.

It is a sudden episode where the sufferer experiences intense psychological and physical symptoms. They may feel an overwhelming sense of fear and anxiety accompanied by nausea, sweating, breathlessness, trembling and palpitations or chest pain. They may feel that they are about to die. They may hyperventilate to the extent that they will lose consciousness. At least 1 person in 10 in the UK experiences occasional panic attacks which are triggered by a stressful event.

However about 1 in 100 people suffer with panic disorder, experiencing repeated, often unprovoked panic attacks. For panic disorder to be diagnosed there must be evidence of panic attacks but not everyone who has panic attacks suffers with panic disorder.

One of the difficulties is that these attacks may last for a few minutes or, very rarely, a few hours, during which time the individual will find it difficult to concentrate and may be incoherent. The individual may be on medication or may have other methods of controlling their problem. The judge will need to discuss the issue with the individual to decide whether a break would assist the situation.

### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- Any steps which can reduce panic triggers. This requires discussion with the individual.
- Allowing the person to sit near the door so they feel they have an easy exit route.
- A pre-arranged signal to indicate need for an immediate break.
- In serious cases, giving evidence from home or another familiar venue by video link.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Parkinson's disease***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Parkinson's disease?**

This disease occurs when the brain no longer produces enough of a substance called dopamine which is necessary for movement. It does not occur only in older people; the average age of diagnosis is 56. Symptoms vary from person to person but the classic triad is tremor, especially in the hands, slowness of movement (bradykinesia) and muscle stiffness or rigidity. Fatigue, drooling, constrained handwriting and softness of voice are typical. Over half the people with Parkinson's develop depression and many develop cognitive impairment which in some is severe. Bradykinesia may cause a lack of facial expression and occasionally a person can become totally 'frozen'. Side effects of medication can include confusion and in some cases can cause problems with impulsive and compulsive behaviours.

### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- Increased breaks.
- Assistance with manoeuvring the trial bundle.
- Assistance pouring water.
- When swearing the witness in, not asking the person to take hold of the oath card and any religious book.

If mobility impaired:

- Accessible entrance to venue.
- Accessible route to hearing room.
- Accessible routes within the hearing room, to and from the witness box.
- Appropriate seating arrangements in the hearing room.
- For wheelchair users, positioning of the person while giving evidence with good sight lines to the judge and advocates.
- If needed, assistance with trial bundles and pouring water.
- Accessible toilets.
- Safe procedures for exiting if there is a fire and lifts cannot be used.

If the individual experiences hallucinations, see entry for '[Hallucinations](#)' in this Glossary.

If the person has depression see entry for '[Mental ill health](#)' in this Glossary.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)

- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

### ***Pathological demand avoidance (PDA)***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Pathological demand avoidance?**

Pathological demand avoidance ('PDA') is used to describe people whose main characteristic is avoiding everyday demands and expectations to an extreme extent. People have a need for control that is often anxiety related. The term was first used in the 1980s, but research is limited. It is considered by some to be a profile within the autism spectrum, but it requires a very different approach, as people with a PDA profile do not usually respond to structure and routine.

'Demands' of various kinds are all pervasive in life. Different people will perceive demands differently. As well as obvious direct demands, someone may have difficulty with:

- Smaller implied demands within larger explicit demands, eg the demand of going to work includes within it the demands of travelling to work, paying the fare on the bus, sitting next to someone you do not know etc.
- Time and timekeeping demands, which are often added to the substantive demand.
- Advance planning. As the date for carrying out the 'plan' approaches, anxiety increases.
- Expectations.
- Praise, because this carries an indirect expectation that the approved action will be carried out on another occasion.

Someone may also have difficulty with internal demands, including:

- The person's expectations of themselves.
- The person's own feelings and desires, including feelings about socialising, special occasions, pursuing hobbies.
- Bodily demands, eg hunger and thirst; needing the toilet.

As well as resisting the ordinary demands of life, a distinctive feature of PDA is the use of social strategies to avoid demands. This can start with excuses such as illness, tiredness, lack of time etc, but escalate if the demands persist.

The PDA Society says there is a hierarchy of avoidance approaches as anxiety mounts, and that understanding this hierarchy is key when thinking about effective

ways to help. The hierarchy starts with someone who is calm and able, and moves on to:

- Attempts to distract (changing the subject or engaging in interesting conversation); making excuses for non-compliance; and delaying tactics.
- Physical incapacity; reduction of meaningful conversation; withdrawal into fantasy.
- Taking control; complete compliance but with later breakdown.
- Panic: agitation; aggression; shut down; running away; self-harm.

Other significant features of PDA include intolerance of uncertainty, excessive mood swings and impulsivity; and displaying obsessive behaviour often focused on other people. Sensory overload can also be a factor.

PDA is a hidden disability. People can be confident and engaging when feeling secure and in control, but controlling and dominating, especially when they feel anxious. It is important to understand that the demand avoidance is not a matter of choice. Even if they have agreed to undertake a task, they may find they are unable to do it in practice.

Demand avoidance may also have an irrational quality. Many demands are avoided simply because they are a demand, not because of the nature of the demand. For some people, the expectation leads to a feeling of lack of control and panic. Sometimes there can be a dramatic reaction to what is a tiny request.

PDA is a lifelong condition, although the level of avoidance can vary from time to time depending on the person's general state of mind and health.

Demand avoidance alone is not necessarily indicative of Pathological Demand Avoidance and may relate to physical or mental health or a personality condition.

### **Difficulties with the legal process**

The legal process is full of direct and indirect demands, which the individual may not have anticipated when they started the case. For example:

- Requirements to comply with Orders for case preparation.
- Deadlines and time-constraints, in addition to the demand of the task itself.
- Requirements to attend court at particular times and to follow the appropriate procedure.
- Being required to speak in turn.
- Being required to answer direct questions.
- Being required to make decisions or choose between numerous options. (Too many possibilities can sometimes lead to options paralysis.)

### **Reasonable adjustments**

The court process, with its multiple procedures and uncertainty of outcome is inherently problematic for someone with PDA and reasonable adjustments will be difficult. However, the following steps may be helpful for some people:

- Reducing uncertainty in so far as that is possible by explaining what the court process will be in advance and as the case progresses.
- Explaining the reasons for various steps and requests.
- Not giving someone too many tasks to do at the same time.
- Where possible, making demands more indirect. Delivering demands politely and flexibly with some scope for the individual to decide exactly how they comply.
- Explaining the reason behind deadlines.
- Where possible, without prejudicing the preparation of the case or the other party, giving the individual some autonomy and flexibility regarding exactly how and when they undertake required preparatory steps.
- Regular breaks during the hearing and a quiet space.
- Understanding that the person is not deliberately refusing to do something, but is simply unable to do it, may help with communication and solutions.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

### ***Persecutory delusions***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What are persecutory delusions?**

Paranoia consists of unfounded beliefs that other people intend harm to the individual. Paranoid thoughts can also be described as delusions. There is a range of severity of paranoia within the general population. The most severe form consists of persecutory delusions, where the ideas are held with strong conviction and no amount of facts or reason can shake the person's thinking. This is a form of psychosis.

Examples of delusions might be someone's belief that:

- Others are using hints and double meanings to threaten them.
- They are at risk of being killed or physically harmed.
- Others are trying to take their money or possessions.
- Others are deliberately trying to upset them.

- Their thoughts or actions are being interfered with by others or that the government is targeting them.

A person may have these thoughts all the time, or only occasionally when under stress. The delusions may be extremely distressing, or the person may have come to terms with them to a relative degree. Delusions may impact on someone's whole life, or may not impact on their everyday life at all, eg because they relate only to one individual who they rarely encounter.

In *Sullivan v Bury Street Capital Ltd*,<sup>9</sup> for example, the claimant, following a split with a Ukrainian girlfriend, developed paranoid delusions that he was being followed and stalked by a Russian gang. Although he retained this belief for over four years, it only caused him substantial concern and affected his day-to-day functioning for a period of months in 2013 and again in 2017. The latter occasion was triggered by stress over renegotiation of his remuneration package.

Persecutory delusions are a common feature of severe mental illnesses such as delusional disorder, schizophrenia and bipolar disorder. They can sometimes be a sign of another condition, eg dementia, epilepsy or drug intoxication.

Many people with persecutory delusions also have depression or anxiety.

## Reasonable adjustments

It would be wrong to disregard a person's evidence simply because they have been diagnosed as suffering from persecutory delusions. Individuals vary greatly in the extent of their persecutory delusions and how it might affect their evidence. If someone has a very specific delusion, limited for example to a particular individual who is not central to the case, their evidence may be entirely reliable on other matters. It is more difficult where the person's delusions extend to most aspects of their life.

Rather than disregard the person's evidence, we would suggest that it is looked at in the round, when compared with other available evidence, including the probability of what the individual is saying.

In terms of responding to the delusion itself:

- Do not dispute the delusion with the individual.
- Listen to the person and feed back what you have heard. Do not simply say, 'I have heard what you say'. This will not convince the person that they have been listened to. It is better to summarise and repeat back what the person told you, eg 'I understand that you feel you are being stalked by a Russian gang and that this is very distressing for you'. This acts as an affirmation, helping someone feel respected and understood.
- Focus the person on what is verifiably real/concrete. Redirect them to relevant areas of evidence which do not appear to be the subject of delusions.

If the individual starts to include the judge in their paranoia:

- Do not become defensive or engage with the delusion. For example, if asked whether you are working for the State rather than answering, 'I am not working

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<sup>9</sup> UKEAT/0317/19.

for the State', it is better to say, 'I understand that you feel I am working for the State' and seek to redirect the discussion.

- Do not attempt to shift the delusion by logical argument. Everything that is said to that individual is likely to be seen through the filter of the delusion(s).
- Be particularly careful how you express yourself both in your body language and what you are saying. Again, everything will be seen through that filter.
- It is better to demonstrate neutrality by your actions.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## **Raynaud's**

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Raynaud's?**

Raynaud's phenomenon or disease is a common condition affecting blood supply to certain parts of the body, especially fingers and toes. It occurs when a person's blood vessels go into a temporary spasm, which can last for a few minutes to several hours. It will be difficult to use fingers if they are affected. It is usually triggered by cold, anxiety or stress.

### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- Ensuring the room is warm and not seating the person next to a cold airstream.
- If the room is insufficiently warm, regular breaks.
- Allowing the person to dress warmly and wear a hat, scarf or gloves in the courtroom.
- Assistance manoeuvring the trial bundle if fingers are affected.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)

- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

### ***Repetitive strain injury (RSI)***

For this, please see '[Arm, hand or shoulder impairment](#)'.

### ***Sickle Cell Disease***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

#### **What is Sickle Cell Disease?**

Sickle cell disease is the name for a set of inherited conditions which affect red blood cells. The most serious is sickle cell anaemia. About 15,000 people in the UK have sickle cell. It mainly affects people with African or Caribbean family background, although it is also found in people who originate in Asia, the Middle East or the Mediterranean.

The main effects of sickle cell disease are anaemia, which causes tiredness and shortness of breath; an increased risk of serious infections; and episodes of pain known as "sickle cell crises" when small blood vessels become blocked. A sickle cell crisis can cause mild to severe pain in one part of the body. It is usually controllable at home with over the counter or prescribed pain killers, and warm pads, but in severe cases, hospital may be necessary. A crisis can last up to a week. Many people only have one bad crisis a year, but some people have them much more often, even every few weeks. The triggers are unclear, but dehydration, stress, strenuous exercise and bad weather may be factors.

Treatment needs to be lifelong, and most people need to take antibiotics every day. A sickle cell crisis can be treated with over the counter painkillers, though sometimes something stronger including morphine is required. It helps prevent crises to drink plenty of fluids, keep warm and avoid sudden temperature changes.

People with sickle cell disease are at risk of serious complications including stroke. If anaemia is particularly severe, treatment with hydrocarbamide or even blood transfusions may be necessary.

#### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include:

- Access to water.
- Well-heated environment.
- Regular breaks.
- Allowing the worker to sit down.

Click on the following links for general ideas as to:



- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Specific Learning Difficulties***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What are Specific Learning Difficulties?**

Specific learning difficulties are a family of inter-related neurological conditions affecting 10% of the population to a lesser or greater extent.

'Specific learning difficulties' is sometimes used as an umbrella term to cover dyslexia, dyspraxia/ developmental co-ordination disorder, dyscalculia and attention deficit (hyperactivity) disorder.

Specific learning difficulties typically affect some areas of functioning, while others remain unaffected. They must not be confused with the term '[learning disability](#)', which affects all areas of daily living and correlate with low intelligence.

Many people with specific learning difficulties show signs of more than one profile and some develop a mental illness as well (typically depression or anxiety).

Some of the reasonable adjustments required for people with mental disabilities may also be appropriate for those with specific learning difficulties but other more specific adjustments may be required.

For detail of possible difficulties in court and reasonable adjustments, see

- [Dyslexia](#)
- [Dyspraxia](#)
- [Attention Deficit Hyperactivity Disorder](#)

## ***Spina bifida and hydrocephalus***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Spina Bifida?**

Spina bifida is a term used to describe specific congenital abnormalities affecting the spine and central nervous system. There are three different types of spina bifida: spina bifida occulta, spina bifida meningocele and spina bifida myelomeningocele. Disability associated with the different types is highly variable

from no symptoms with spina bifida occulta to severe symptoms with myelomeningocele.

Spina bifida myelomeningocele is what is usually referred to by the term 'spina bifida'. It can result in partial or total paralysis of the lower limbs accompanied by incontinence.

People with this kind of spina bifida will often have learning disability caused by hydrocephalus (water on the brain). This can result in impaired speech, memory problems, short attention span, problems with organisational skills, visual problems, problems with physical co-ordination and epilepsy.

### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include, if mobility impaired:

- Accessible entrance to venue.
- Accessible route to hearing room.
- Accessible routes within the hearing room, to and from the witness box.
- Appropriate seating arrangements in the hearing room.
- For wheelchair users, positioning of the person while giving evidence with good sight lines to the judge and advocates.
- If needed, assistance with trial bundles and pouring water.
- Accessible toilets.
- Safe procedures for exiting if there is a fire and lifts cannot be used.

If incontinence is an issue:

- Regular breaks plus a pre-agreed signal for the person to indicate when they would like an immediate break.
- Selecting a courtroom close to accessible toilets.
- Choosing a court venue close to the person's home to avoid travelling.
- In extreme cases, taking evidence by video link.

If the person has learning disability, see entry for '[Learning disability](#)' in this Glossary.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Spinal cord injury***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Spinal cord injury?**

Spinal cord injuries are very variable depending on whether they are complete or incomplete. Some incomplete injuries will allow almost complete recovery. Other severe spinal injuries can result in complete paralysis below the point of injury and in addition may have medical complications such as bladder and bowel dysfunction and increased susceptibility to respiratory and heart problems.

Some people with tetraplegia may have impaired breathing and may be ventilator-dependent. They can shrug their shoulders and they have neck motion which permits the operation of specially adapted power wheelchairs and equipment such as phones and lap tops. They may use other environmental control units with mouth control (sip and puff) voice activation, chin control, head control, eyebrow control or eye blink.

Frequent complications are pressure sores and spasticity of the limbs so individuals may fidget a great deal, mainly to relieve pressure on the skin. Whilst most individuals are wheelchair users, many are independent.

### **Reasonable adjustments**

Where appropriate, adjustments for the hearing may include, if mobility impaired:

- Accessible entrance to venue.
- Accessible route to hearing room.
- Accessible routes within the hearing room, to and from the witness box.
- Appropriate seating arrangements in the hearing room.
- For wheelchair users, positioning of the person while giving evidence with good sight lines to the judge and advocates.
- If needed, assistance with trial bundles and pouring water.
- Accessible toilets.
- Safe procedures for exiting if there is a fire and lifts cannot be used.

If bladder or bowel dysfunction is an issue:

- Regular breaks plus a pre-agreed signal for the person to indicate when they would like an immediate break.
- Selecting a courtroom close to accessible toilets.
- Choosing a court venue close to the person's home to avoid travelling.
- In extreme cases, taking evidence by video link.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)

- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## ***Stammering***

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is stammering?<sup>10</sup>**

Stammering (sometimes referred to as stuttering) is a neurological condition which causes a person to repeat, prolong or block on sounds and words when speaking. The most common type of stammering starts in early childhood when speech and language skills are developing. At least 8% of children will start stammering, but roughly two in three children will stop stammering at some stage.

Acquired or late-onset stammering is relatively rare and occurs in adults and older children. It can be caused by various factors including a head injury, stroke, progressive neurological condition, trauma or as a side-effect to certain drugs or medicines. Sometimes the cause is unclear.

It is estimated that stammering affects about 1 in 100 adults, with men being three to four times more likely to stammer than women.

A person may have times when they stammer and times when they speak fairly fluently. Stammering varies in severity from person to person. As explained below, it may also be difficult to know to what extent an individual is working hard to hide a stammer.

As most people who stammer are affected from an early age, the impact of other people's responses may have caused lifelong feelings of fear, shame and humiliation. This can leave many who stammer going to extraordinary lengths to change what they want to say or to avoid speaking altogether. Some people who stammer can hide it completely, even from those closest to them, and can appear fluent. This is referred to as 'covert' or 'hidden' stammering.

Stammering in adults and children can be accompanied by secondary behaviours caused by the increased physical effort involved in speaking or by the act of trying not to stammer, to avoid ridicule or other negative social consequences. These behaviours can include bodily tension and involuntary face, head or body movements such as quivering lips, blinking eyes, tapping fingers, grimacing and stamping feet. People might change words; use filler words such as 'um', 'eh', 'you know', 'actually', etc, or avoid certain words they usually stammer on. Hesitation in speech can make it seem as though a person is thinking about what to say next

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<sup>10</sup> This glossary entry has been written with the assistance of the British Stammering Association ('Stamma').

rather than struggling to talk. People might claim to forget what they want to say when they are having trouble, or change the style of their speech to prevent stammering, eg by speaking very slowly or softly. They may also talk very fast. Someone who stammers may also avoid eye contact for fear of seeing negative reactions to their stammering.

### **Difficulties with the legal process**

Parties and witnesses with stammers, depending on the individual, may have the following difficulties in court. Many of these difficulties will apply whether the individual is open about their stammer or trying to hide it.

Although stammering is not due to nervousness, its effect can make people who stammer more nervous about situations where they will have to speak, especially in public, in front of a group of people or to an authority figure such as a judge. Someone may stammer more because of anxiety about time pressures or the stress of the case itself.

It can be wrongly assumed, purely from the way someone with a stammer speaks or from the secondary behaviours described above, that he or she is nervous, unintelligent, untruthful or deceitful.

The following specific difficulties may arise:

- Particular nervousness about the proceedings.
- Difficulty interjecting or answering questions with sufficient speed, eg when representing themselves or when being cross-examined.
- When giving evidence, someone might change words or phrases simply to get words out. So in answer to a 'yes or no' question, a witness might change 'no' to something more complicated. These changes can mean that wording sounds convoluted or artificial.
- In order to avoid having to say certain words, an individual may choose different words even at the risk of distorting their meaning.
- People may also try to reduce what they say. They may not give full answers or they may not present their argument fully. Indeed, they may decide not to give evidence or not to pursue or defend a case because of the effort, mental stress and potential humiliation involved in having to present or talk.
- It may be hard for a judge to know to what extent an individual is doing any of the above, because a stammer may seem minimal when in fact the individual is working hard not to stammer.
- Efforts to find alternative ways to give evidence and in some cases, to hide a stammer, is mentally exhausting.

These difficulties and anxieties may result in a LIP or witness with a stammer:

- Not putting forward their view when asked regarding procedural matters.
- Not asking questions when they do not understand.
- Missing their 'turn' to speak.
- Not putting forward their whole legal argument.

- Not giving all their evidence.
- Expressing themselves in an apparently artificial or equivocal way.
- Making changes to words which unintentionally change their meaning or give the appearance of inconsistency.

There is also a risk that judge or jury may be influenced, even unconsciously, in assessing the reliability of the individual's evidence because of speech patterns and behaviours which are exclusively due to the person's impairment, eg:

- Slowness of speech.
- Long pauses before starting to speak.
- Apparent hesitancy or uncertainty.
- Apparently indirect or evasive answers.
- Avoidance of eye contact.
- Extreme nervousness.

Research (in the context of language interpreters)<sup>11</sup> has found that English jurors tend to believe witnesses who have what linguists call 'powerful' rather than 'powerless' speech style. 'Powerless' style involves hesitations with pauses, 'um', 'well', and intonation that conveys uncertainty. It also involves hedges such as 'I think / you know / sort of'. This clearly also has implications for the way a person with a stammer might speak.

## **Reasonable adjustments**

Where appropriate, adjustments at the hearing may include:

- Steps to reduce the person's anxiety, since that in itself may make them stammer more and encourage avoidance measures.
- Reassurance that the person should take their time to say what they want to say, and that extra time will be allowed.
- Ensuring that time is given after a question from judge or opposing representative for the person to answer.
- Controlling turn-taking. Rather than generally ask for each party's views on a point, come to each party in turn. If asking the other party first, reassure the person that you will then come to them.
- Not relying on the individual to intervene and to ask if they do not understand the proceedings or a question. Regularly checking with them directly and waiting for the reply. Checking for small non-verbal indicators that the person may want to speak (intake of breath, raising a hand etc).
- Allowing the person to answer a question in their own way. As long as they cover the ground, not forcing them to 'answer the question', because this may involve them having to use words and sounds which they are trying to avoid.
- If necessary, allowing the person to give written evidence.

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<sup>11</sup> 'The discourse of Court Interpreting': Sandra Beatriz Hale, John Benjamins Publishing (2004).

- Ensuring there is no background noise requiring the person to raise their voice.
- Reducing self-consciousness and anxiety by:
  - Allowing evidence to be given over a video platform or from behind a screen. If using video link, be aware that time lags from the technology added to the person's hesitation can create extra difficulties and require extra care and patience.
  - Minimise the number of people in court.
- It may help for taking the oath if the clerk or user says the words at the same time as the witness. Many people who stammer find that speaking in unison with someone else makes them stammer less, as it can reduce self-consciousness.
- Not relying on demeanour / mode of expression such as apparent hesitation, pauses, avoidance of eye contact.
- Being cautious about drawing adverse inferences from unusual or round-about use of words.
- In a criminal case, briefing the jury in advance regarding how an individual's stammer might affect their evidence and to be cautious about drawing adverse conclusions from such factors.
- Considering intermediaries. Criminal and family courts, and certain other courts, can seek the assistance of an 'intermediary' where there is communication difficulty. For more detail, see the section on '[Criminal court procedure – statutory measures](#)' in chapter 4 (Mental Disability).

When talking to the individual, Stamma advises:

- Do not show any sign of being uncomfortable because of their stammer. This can make someone feel embarrassed or ashamed and worsen their stammer.
- Put someone at ease by using patience, maintaining natural eye contact, and showing encouraging non-verbal signals such as the occasional nod of the head.
- Do not complete someone's sentence for them. This can feel disempowering and humiliating, as well as frustrating if the sentence is incorrectly completed, because the speaker then needs to start again.
- Do not interrupt or speak over someone, even if they are struggling. Allow them to find their own solution.
- If you miss something, ask the person to repeat it, just as you would with any party or witness.
- Do not tell the person to 'slow down', 'take a breath' or 'relax'.
- People who stammer usually find it hard to say their own name. Never ask, 'Did you forget your name?'. Usually it should be possible for the judge to say the person's name and ask if it is correct.
- Ideally avoid conducting telephone hearings as this is particularly difficult. If necessary, wait carefully for someone to start speaking. Initial silence does not mean they are not there.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## **Stroke**

For this, please see '[Cerebral vascular accident \(CVA\)](#)'.

## **Ulcerative colitis**

For this, please see '[Inflammatory bowel disease](#)'.

## **Visual impairment**

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is visual impairment?**

As many as two million people in the UK may be living with some degree of visual impairment. Most cases are caused by ageing.

Visual impairment is defined as sight loss that cannot be corrected using glasses or contact lenses. People can choose to register as 'sight impaired' (previously 'partially sighted') or 'severely sight impaired' (previously 'blind').

Visual impairment can take many forms. For example, some people with impaired vision can see enough to read slowly and hesitantly, though they may have difficulty crossing the road.

## **Reasonable adjustments**

### *Prior to the hearing*

In case preparation prior to the hearing, reasonable adjustments may include:

- Sending documents and correspondence:
  - In Braille.
  - By audio tape.
  - In larger font with a plain typeface and spacing between words.
  - Printed on tinted paper. This is often yellow, but sometimes the precise colour matters.
  - In WORD format attached to an email so that the person can enlarge / change typeface themselves, or use text-to-speech software.



- Discussing necessary arrangements for any preliminary hearing and the final hearing.

*During the hearing*

During the hearing, depending on the circumstances, adjustments may involve:

- Arranging for the person to be met at reception and guided to the waiting room; shown where the toilets are; and guided from the waiting room to the courtroom, and in reverse.
- Explaining the layout of the room.
- Checking where the person might find it easiest to sit and make any helpful adjustments to lighting / blinds.
- Assisting the person to find their way to and from the witness box and pouring water for them.
- Each speaker identifying themselves to the person in introductions at the outset and before they speak, every time there is a change of speaker.
- Ensuring documents in the trial bundle are available in a format which the person can access. Where tinted paper is required for the trial bundle, a tinted cellulose sheet may also work as a filter.
- When the person is referred to documents, arranging for these to be read out (by the judge, the questioner or by an assistant) in small excerpts.
- Accommodating any personal assistant or support worker.
- If a guide dog is accompanying the visually impaired person, it must be allowed to enter the hearing room and have access to water and be allowed to have a short comfort break at regular intervals.

If applicable, see glossary entries for:

- [Albinism](#)
- [Visual stress](#)

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## **Visual stress**

Note that this is an introductory overview for the purpose of considering reasonable adjustments, and should not be relied on as a medical analysis. See '[Introduction](#)' within this Glossary.

### **What is Visual stress?**

The term 'visual stress' describes a cluster of difficulties with reading owing to visual perceptual dysfunction. It is often described as a 'discomfort with reading'. The condition is associated with dyslexia (and, to a lesser extent, dyspraxia), migraines and epilepsy.

In its more extreme form, it is marked by sensitivity to bright light caused by the glare from white paper. Words may appear to move around on the page, or become blurred and distorted.

Common symptoms also include frequently losing the place, omitting and misreading words, together with fatigue and/or headaches when reading.

### **Reasonable adjustments**

Treatment with coloured overlays can usually alleviate the effects to some extent. In addition the following points of good practice are helpful: use of tinted paper, adequate spacing, left justification of text, font size no less than point 12 and avoidance of capitalisation for whole words and phrase.

At the hearing, it may be necessary to:

- Allow the person longer to find their place in documents.
- Allow the person more time to read documents.
- Have excerpts from documents read out to the person by someone else.

Click on the following links for general ideas as to:

- [Adjustments for case preparation](#) (physical disability)
- [Adjustments for the hearing](#) (physical disability)
- [Adjustments for case preparation](#) (mental disability)
- [Adjustments for the hearing](#) (mental disability), including adjustments to communication and cross-examination.

See also [chapter 3](#) (physical disability) and [chapter 4](#) (mental disability) generally and for an overall approach.

## Appendix C Naming Systems

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The following gives some key features of traditional naming systems in various societies. These are only a small selection: the purpose is to illustrate their wide variety. Nor is this a definitive guide to the naming systems of those societies which we have mentioned. The variation and permutations within each country are generally very wide. Moreover, in the UK, people may well have adopted a more Westernised naming format, in only certain, or all contexts.

Judges may want to consider the context of why naming systems are important. For example, if it is to address the person by their preferred name, in the case of uncertainty, it is usually best to check with the individual. Remember also that the order of a name may have been switched around inadvertently in correspondence or on forms, or spelling may have changed in translation.

Judges should be cautious about assuming or doubting family connections based on speculation about names. Many languages and cultures contain frequently occurring names. There are also different cultural traditions about the assumption of names on marriage, and as to which names are passed down the generations.

If there is a dispute about someone's claimed identity or their relationship to other family members, this is likely to have been identified earlier in the proceedings as an issue in the case and specialist evidence may be needed, for which this Appendix is no substitute.

[African Caribbean](#)

[Chinese and Korean](#)

[Filipino](#)

[Greek](#)

[Indian Hindu](#)

[Indonesian](#)

[Nigerian](#)

[Sikh](#)

[Somali](#)

[South Asian Muslim](#)

[Sri Lankan \(Tamil and Sinhalese\)](#)

[Turkish](#)

[Vietnamese](#)

## ***African Caribbean***

Many African-Caribbean names reflect the time of slavery when people from Africa were 're-named' in English after their slave masters. In our generation some have reverted to names with West African language roots as a statement of cultural self-assertion. In this case, a young person might have adopted a different name from that of their parents.

## ***Chinese and Korean***

In the traditional Chinese system, most people's name is made of three characters, with the family name first [Mao Tse Tung = Chairman Mao; Deng Xiao Ping = Mr Deng; Xi Jin Ping = President Xi] usually followed by a two-character personal/given name, such that when transliterated into English, the characters comprise three words but make only two names.

Of the roughly 100 family names currently used in China, just 19 are used by 56% of the population (thus there are millions of 'Mr Li', for example); in South Korea three family names (eg 'Park', 'Kim') are shared by 50% of the population; and in Vietnam only about 25 family names are used. This immediately shows why in East Asia the two-word personal/given name is crucial for identification.

To ascertain the personal name of a Chinese person relatively new to the UK, it is inept to ask, 'What is your first name?' Their first name, as given by their parents, is what in UK is called 'surname'; and their personal name (conventionally 'first name' in England) comprises two characters - ie, two words, but a single name. There is no 'middle name'. A two-character personal name such as Siow Loong (meaning 'small dragon') is a compound name which cannot be shortened to Siow alone. Depending how they are asked, Chinese people may defer to English expectations by stating their name in the (what is for them) 'wrong order', ie, putting their family name last and/or conflating their two word given/personal name into one English word, or (more typically in Taiwan) inserting a hyphen.

Confusion can arise in the UK when a name is taken down differently either in word-order or in spelling (eg transliterating the sound of the Chinese character as 'Li', 'Lee', 'Lea' or 'Leigh'). It happens too, that in China, teachers often propose a supplementary English name to pupils who are starting to learn English. Thus, Jiang Wen Ying might adopt 'Wendy'; then later, as an adult trying to be helpful in Britain, she might give her name to an English receptionist in two words as 'Wendy Jiang' (juxtaposing the family name to last), but a few moments later give it to a British Chinese receptionist in three words as 'Jiang Wen Ying'. There are often many variations in the spelling of Chinese names, and nicknames are often used instead of full names.

In general, Chinese names do not differentiate masculine and feminine: it is not possible to tell the gender of a person from their name.

## ***Filipino***

In the Philippines, naming systems are truly various. The Spanish heritage of the Philippines continues to influence Filipino naming conventions. Many have Catholic Christian Spanish-derived names (eg 'de los Santos', 'de la Cruz'), while many others have Chinese-derived family names. A name like 'Tiu-Laurel' shows that a man comes from an immigrant Chinese ancestor, and shows the name of that

ancestor's godparent on receiving Christian baptism. In mainly Muslim areas of southern Philippines, Arabic-based names tend to reflect holy places and prophets (eg Hassan or Haradji). Since promulgation of a Family Code in 1987, Filipinos have been strongly influenced by American styles, including adopting invented nicknames. Most Filipino children take the mother's family name (surname) as their middle name, followed by their father's as their family name; on marriage women commonly add the family name of their husband to their own with a hyphen. It is also common to have more than one personal, as opposed to family, name.

### ***Greek***

In the traditional Greek system, most people have two names. Some family names have a masculine and feminine form, eg some males may use the masculine form of their mother's family name. Some women use their husband's last name as a surname; some use their husband's first name instead - but the male name is changed to the female form, for example the wife of Mr Marcos is Mrs Markou, and the wife of Andreas is Mrs Androu. Some women may also adopt the feminine form of their husband's personal name as a middle name. Names (given and family) can often be abbreviated, eg the family name: 'Papachristodouloupoulos' may be abbreviated to 'Pappas'.

### ***Indian Hindu***

In India, in the traditional Hindu system people have three names: personal, complementary and family. The family name is not used when talking to people. Many Indian women do not have 'family names' at all on the conventional English model. To serve as a 'family name' in the UK, many on arrival used their father's given name or the name of the village their family emigrated from. Personal names (eg Ranjit) can be both male and female.

### ***Indonesian***

The variety of different ethnic groups in Indonesia, each with its own culture, customs and language, makes it difficult to provide general guidance about naming conventions. In some parts of Indonesia, people use only one name (eg 'Suharto' or 'Amiruddin'): this incorporates the information carried elsewhere by a family and given name.

### ***Nigerian***

Nigeria has hundreds of different ethnic groups, the three largest being Yoruba, Igbo/Ibo and Hausa. In Ibo and Yoruba-speaking regions of Nigeria, people have several personal names – each given by different members of the family – and sometimes up to 9 or 10. Those of Christian faith may use a Nigerian personal name together with an 'English' personal name. Some personal names are not gender-specific; many names contain compounds, which, if they are lengthy, are abbreviated; and people may have Western 'nicknames.' Hausa names are heavily influenced by Islam, with variations in transliteration and spelling.

### ***Sikh***

In the Sikh naming system, it was religious practice not to use a family name at all, because of their association with the caste system, which was rejected by Sikhism.

The religion's founder Guru Nanak taught that all men and women are equally valued by (the single) God: Sikhs later came to symbolise that equality by adding the religious title Kaur for women (= 'princess' in Punjabi,<sup>1</sup> to reflect that in God's eyes, all women are princesses), and the religious title Singh (= 'lion') for men, positioned as the second word when giving their name. In India family names are associated with the concept of caste, something which Sikhism rejects because of its emphasis on human equality. As a result, some Sikhs choose to use Singh or Kaur instead of their inherited family name. In the UK, some Sikh men and women decided to go along with Singh or Kaur serving as a 'family name' ever since it was (wrongly) recorded that way when they or their parents first arrived, or when they started work here. Even if a woman in the UK does not mind being called Mrs Kaur, her husband or son can never be Mr Kaur. Apart from their second-placed religious name, most Sikh names are used for both men and women. Many Sikhs in the UK do use their family names and may simply abbreviate Singh or Kaur to S. or K. as a 'middle initial' or they may not use it at all.

### ***Somali***

In the traditional Somali system, all have a personal name which comes first, followed by their father's personal name, then their paternal grandfather's personal name...and so on. Women retain their own names on marriage – thus there is no last name linking a married couple or their child. Some Somalis deploy their father's or their husband's second or third name as a 'surname' for Western bureaucratic purposes. Nicknames are commonly used.

### ***South Asian Muslim***

In the traditional South Asian Muslim system (ie, Pakistan, Bangladesh, India), there was no family name shared between men and women: in that system which some still maintain, all names are either male or female. Many have now adopted the British system, whereby members of a family unit will have identical surnames.

Many men have a religious name (Mohammed, Allah or -Ullah) which usually comes first (except for -Ullah, the form of Allah which follows another name). This is regarded as a blessing, reflecting the devotional approach of Islam: it is regarded as the most important and it should not be used alone to refer to an individual.

Everyone has a personal/given name. Even where a man also has the name 'Mohammed', he will normally use his other given name at home and within his own community. However, a man may choose to use the name 'Mohammed' as a first name elsewhere – as with people all over the world, individuals often adapt their names to fit in with Western naming systems when they live in the UK.

'Mohammed' (to give one spelling) may be spelt in different ways in English. Each variation signals information regarding the person's country of origin; whether they are Sunni or Shia; and their mother-tongue.

Women, by Islamic tradition take their father's name. Upon marriage, women are not required to take their husband's name, but many will do so.

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<sup>1</sup> Some people argue this should be spelt 'Panjabi'.

## ***Sri Lankan (Tamil and Sinhalese)***

The differences between Sinhalese and Tamil naming conventions reflect the different languages and cultural traditions of the two ethnic groups.

### **Sinhalese**

In the Sinhalese naming system, three names may be used: a house or 'clan' name (often ending in 'ge') which is unchanged regardless of gender, but may be dropped by more urbanised communities; a personal or given name; and last, a family name, which may be used less frequently in more rural areas. On marriage, women may adopt their husbands' family names, but retain their clan names. Children typically adopt their fathers' family and clan names.

Some common family names are derived from Portuguese family names, due to historic colonialism, and as in other cultures, there are more common family names.

### **Tamil**

There are traditionally no family names, with many people adopting their fathers' personal names in front of their own personal names. Women may adopt their husbands' personal names in place of their fathers' personal names on marriage. As in other cultures, nicknames may be used, which may have no apparent similarity to a personal name. There are notable regional variations, with some regions of Sri Lanka having place names used in addition to the father's personal name and the individual personal name.

### ***Turkish***

Family names have been used in Turkey since the 1930s. Before this, the traditional practice was for wives and children to take their husband's/father's personal name as a last name. This is still used by many of the population of Northern Cyprus.

It is important to note that there are significant regional variations, which reflect the different cultures within Turkey, including those who speak Arabic, as well as those of Kurdish ethnic origin, who may adopt Kurdish naming conventions.

### ***Vietnamese***

As in many other cultures, a large number of people share a relatively small number of family names. The naming convention typically adopted is someone's family name, followed by their middle and personal name, although some people may not have a middle name, and some may adopt the Western order of names. Personal names may not be gender-specific. Middle names may be gender-specific and passed down within families.

## **Appendix D Glossary of Religions: Religious Practices and Oath Taking Requirements**

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The following is a glossary of the many forms of religion followed in the UK. Any religion which is omitted is no less important than any of those included. Moreover, it is recognised that different denominations of Christianity may see themselves as falling under that overarching term to varying extents. No disrespect is meant by the way in which we have chosen to make the classification. We recognise that there are different views.

[The Baha'i Faith](#)

[Buddhism](#)

[Christianity](#)

[Hinduism](#)

[Indigenous traditions](#)

[Islam](#)

[Jainism](#)

[Jehovah's Witnesses](#)

[Judaism](#)

[Mormonism](#)

[Non-religious beliefs and non-belief](#)

[Paganism](#)

[Rastafarianism](#)

[Sikhi or Sikhism](#)

[Taoism](#)

[Zoroastrianism](#)



## ***The Baha'i faith***

### **Some important points**

The Baha'i faith is based on the teachings of Baha'u'llah (1917-92) who was born in Iran. The faith is well established across the world. Local leaders are elected annually. Monasticism, the priesthood and mendicancy are prohibited.

The faith is strongly rooted in non-violence and adherents have remained defenceless even when attacked. There are 4 million Baha'is around the world. They do not drink or take alcohol and all are regarded as teachers and are expected to spread the faith. Their holy month is from 2nd to 20th March, during which fasting takes place. Other holy days through the year (there are 19 months in their calendar) include days for fasting and not working.

Women are treated equally and, indeed, if family finances are tight, preference is to be given to girls over boys for education because they will become mothers. Sex outside marriage is frowned upon, as are remaining single and divorcing. Baha'is may marry anyone outside their faith. Obedience to one's government is encouraged.

Baha'is believe in the unity of God and the equal rights of all men, women, and races. Their primary duty is to search for the truth. The harmony of science and religion are essential for the pacification and orderly progress of human society.

Cremation is prohibited as the body should decompose naturally and burial should take place no more than one hour's journey from the place of death.

### **Taking the oath**

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Bahai's may choose either to affirm or, possibly, swear an oath. For the Bahai's, their word is their bond.
- The holy book containing the teachings of their Guide is called the Kitabi-Aqdas.

## ***Buddhism***

### **Some important points**

Buddhism was founded in the 6th century before the Common Era by an Indian princeling named Siddharta in the clan Gotama, later known as Shakyamuni, the Buddha (or 'enlightened one' or 'awakened one'). It spread throughout Asia and is now present throughout the world.

There are two main strands, **Theravada** (the way of the elders) predominately in SE Asia; and **Mahayana** (the great vehicle) elsewhere. Zen or meditation is predominant in Japan while there are specific developments in China and Tibet.

The cultural, regional and doctrinal differences between the many million adherents from a wide range of ethnic and other groupings means that no assumptions can be made.

In Buddhism there is no God but there is the Emptiness or Void, which is the essence of all things but has no form. Buddhists believe that the human mind is a creative centre with the capacity to change and grow with experience.

Buddhists believe in four noble truths:

- In a world of time and space no one experiences total satisfaction, nothing lasts, and the happiest moments vanish.
- People suffer and become possessive. They are never satisfied, crave more. Greed and hatred divide nations and cause war.
- Such negative feelings should be rooted out.
- Rooting out occurs when people think differently and follow eight ways to clarity.

The eight ways to clarity are: understanding; thinking; speech; action; work; effort; mindfulness and concentration.

Buddhists promise not to harm any living thing; not to take what is not given; not to live in an excitable state; not to say unkind things; and not to take drugs or alcohol.

The Holy Scripture is known as either the Tipitaka or Triptaka, and there are slightly different versions of the texts. There are various holy days. Meditation is practised. Marriage is highly respected.

Funeral rites are important, as is the deceased's state of mind. The principles of Karma say that the quality of rebirth in the next life will depend on the person's actions in this life. Those who are enlightened attain Nirvana and are released from the cycle of life and death.

### **Taking the oath**

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Buddhists may choose either to affirm or, possibly, swear an oath.
- Any form of declaration for Buddhists which starts 'I declare in the presence of Buddha that...' is erroneous and should be discontinued.
- Tibetan Buddhists who wish to swear an oath, should be asked to state the form of oath which they regard as binding on their conscience. (In Tibetan practice, oaths are normally taken in front of a picture of a deity or a photograph of the Dalai Lama or any Lama of the witness's practice.) Sometimes such a witness will take an oath by elevating a religious textbook above their head and swearing by it. If a witness does not stipulate such a practice and does not have the appropriate book with them, they should affirm.

## ***Christianity***

### **Some important points**

Christianity is the largest faith group in the UK, with numerous sub-divisions. It is the religion practised by the largest number of minority communities. No assumptions should be made about the cultural and 'racial' homogeneity of Christians.

Public worship is conducted in a wide variety of settings ranging from very small groups of people with no formal leadership to very large congregations with formal rituals.

The main Christian churches in the UK are:

- The Church of England, or Anglican Church, with sister churches in Wales, Ireland and Scotland. The Church of England, a branch of the Protestant movement, was established in 1534 and its supreme Governor is the reigning monarch. It has a special place in English society, being established by law with many unique privileges such as automatic representation in the House of Lords. The commencement of the Legal Year is marked in most cities with a service at a Church of England place of worship.
- The Catholic Church. The majority of Catholics belong to the Western (Latin) Rite, although a small minority belong to other Rites (Maronite, Byzantine, Armenian, Syriac, Coptic, etc). Although the Eastern Orthodox Churches – Greek, Russian, Serbian – are not in communion with the Catholic Church, they share the same core doctrine and sacraments.
- Other ecclesial communities, including Baptist churches, the Methodist church, the Seventh Day Adventist church, the United Reformed church, the Pentecostalist churches (the Elim church, the New Testament Church of God, the Church of the God of Prophecy, the Assemblies of God), the Society of Friends (Quakers).

Most Christians hold the following core beliefs:

- There is one God (thought of in most churches as comprising three persons – Father, Son and Holy Spirit), who created men and women in his own image and likeness, endowing each with an immortal soul and the powers of reason and free will.
- As a response to human beings' misuse of their freedom through disobedience ('sin'), God put on earth Jesus Christ (thought of as God the Son made man), who most Christians believe was born of the Virgin Mary, and who suffered death by crucifixion under Pontius Pilate in order to redeem human sinfulness, before rising from the dead and ascending to heaven.
- Jesus' followers established a Church to teach in His name, and through its sacraments to allow the attainment of eternal life in heaven.
- Many believe that Christ will come again at the end of time to judge men and women, rewarding the faithful with eternal life.

Jesus was born a Jew and was believed by his early followers to be the Messiah foretold in Jewish scriptures. Christianity shares many traditions and teachings with Judaism. Islam regards Jesus as among the prophets and venerates his mother Mary.

Christianity spread rapidly from the Middle East to Europe in the early centuries after Jesus' death, particularly after it was adopted by the Emperor, Constantine, as the official religion of the Roman Empire.

Easter, Christianity's holiest day commemorating Jesus's resurrection from the dead, may be celebrated on different days, depending on the denomination and the calendar it uses.

Sunday is a 'day of rest' for most Christians. However, for members of the 'Seventh Day Adventists' church, Saturday is their holy day – a day for church attendance and meditation, and a day when most would not watch television or listen to the radio. (About 85% of British Adventists are of African-Caribbean heritage.).

There are many differences of beliefs and practices: care should be taken to avoid making assumptions and risking offence by presuming that all Christians behave or believe in a particular way.

### **Taking the oath**

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Christians may choose to swear an oath or affirm.
- Their holy scripture is the Bible; most usually the part that is known as the New Testament will suffice. However, there are many versions of the Holy book, the Bible, and a common error is to ask a person to swear an oath on a version of the Bible that they do not accept.
- Some Christians consider it profane to swear on their Holy Book.
- Quakers are likely to wish to affirm, rather than swear on the bible.

### **Hinduism**

#### **Some important points**

Hinduism is the world's third largest religion. It can trace its roots back to its origins in India at least 5000 years ago. Whilst predominant in India and SE Asia it can be found all over the world. 'Hindu' is a corruption of 'Shindu' the old name for the river Indus.

In common with many other religions Hinduism has many diverse strands. No assumptions can be made about a cultural or 'racial' homogeneity. It is a profoundly rich and diverse religion that equips the believer to view the entire universe: the 'eternal way' is known as the **Sanatana-dharma**.

The religion is based on a complex mythology with no founder, but also worship of the Supreme Being the Absolute and Infinite **Brahman**.

The first principle of self-determination of the Supreme Being is the personal God or **Ishvara** who has three aspects: **Brahma** (not to be confused with Brahman) – the Creator; **Vishnu** – the Preserver; and **Shiva** – the Transformer; the collective trinity being known as the **Trimurti**.

There are many deities and while different Hindus will worship different gods their worship is to the one ultimate reality **Brahman**. Central to the doctrine is the concept of **karma** whereby each soul is destined for multiple births and rebirths and the transmigration of the soul from mineral to vegetable to animal and then human states. Depending on one's **karma** of the cosmic chain of action and reaction the breaking of the cycle may be achieved by liberation or **moksha**.

The caste or class system or **varna** has four varnas being:

- **Brahmin**: priests, teachers and preachers
- **Kshatriyas**: kings, governors, warriors, soldiers
- **Vaishyas**: merchants, craftsmen, businessmen, artisans, agriculturists and cattle herders
- **Shudras**: labourers and service providers.

Worship takes place in the home, the Temple on pilgrimage and on a variety of holy days and festivals. Dietary observations are very variable but beef is normally avoided. Many do not consume stimulants such as tobacco, alcohol, tea and coffee. The three main rites of passage are birth, marriage and death. Arranged marriages with the exchange of 'gifts' are common, dowries now being illegal in India with UK Hindus following suit. UK courts are sometimes involved in the redistribution of a couple's wealth if a marriage breaks down.

### **Taking the oath**

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Hindus may choose to affirm or swear an oath.
- There are many Hindu scriptures but the 'holy book' is the **Bhagavad Gita** simply called the **Gita** upon which Hindus will swear the oath.
- The Bhagavad Gita may be kept in a covered cloth, the suggested colour of which is red.
- Questions of taking steps for ritual purity may arise.

### ***Indigenous traditions***

#### **Some important points**

There are too many customs and traditions from around the world to be able to summarise or to set out in even the briefest of details.

In addition to pursuing a particular tradition or custom a person may also practise another faith such as Christianity or Islam. Beliefs may be related to the natural world in its countless manifestations with ancestors, the seasons and festivals all playing their part.

Many are based on oral traditions and so there may not be holy books or scriptures. The rites of passage will vary enormously.

### **Taking the oath**

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- People from indigenous traditions may choose to affirm or swear an oath.
- Many people from Africa, Native Americans, and Aboriginal people from Australia maintain their own traditional religious heritage. Making affirmations would be in line with this heritage.

- Some also follow other faith traditions as well, in which case they may choose to swear an oath on a holy book.

## **Islam**

### **Some important points**

Islam is the youngest of the Abrahamic religions. It regards Muhammad, its founder (570 – 632 CE) as the last in a long line of prophets from Adam, through Abraham, Moses and Jesus. **Allah** is the same God as is worshipped by Jews and Christians.

Muslims believe that the **Qur'an** was revealed by God, word for word. It is in Arabic. The five pillars of Islam are: **Shahadah** – Belief; **Salat** – to pray five times a day; **Zakat** – to give alms to those in need; **Saum** – to fast in the month of Ramadan; and **Hajj** – to make the pilgrimage to Mecca.

In addition to the **Qur'an** the second most important source of authority are the sayings, deeds and prescriptions of Muhammad known as the **Sunnah** which together with the **Qur'an** forms the basis of **Shariah** law. There are four schools of **Shariah** law followed by the majority **Sunni** and another followed by the minority **Shia** population of Islam. In common with other legal jurisdictions, there are a wide range of scholars and practitioners with differing interpretations.

In addition to regular daily prayers, there are days of observance and festivals. In particular there are purification rituals that have to be carried out before prayer and swearing an oath.

Islam follows the lunar calendar so that the holy month of Ramadan varies from year to year. Moreover it depends on the first sighting of the new moon, which may depend on where it is observed. Therefore, the predicted commencement of Ramadan is likely to be within a 48 hour or so timeframe, although the exact start date cannot be confirmed until the last minute. There is usually a fairly good indication in the preceding days. This will have an impact of the availability of those who wish to observe its commencement.

During Ramadan, many Muslims do not eat or drink during the day, having one meal just before sunrise and an evening meal ('iftar') after sunset. Special prayers are read in the mosque after sunset and those who are able are encouraged to attend. Ramadan in the summer months can be particularly challenging with hot weather and long days. Fasting and lack of sleep can impact on energy and concentration in court. The holy month ends with festivities on **Eid al-Fitr**. This should not be confused with the other Eid, **Eid al-Adha** which happens later in the year.

Dietary requirements prohibit the consumption of pork and alcohol. **Halal** means 'permissible' and haram means prohibited so that animals that are lawfully slaughtered in accordance with Islamic rules is known as **halal**.

God's nature is said to have two attributes, the feminine **al-Jamal** and masculine **al-Jalal** so that men and women embody the different attributes of God. Whilst gender differentiation is strongly marked the religion allows both genders to participate in all spheres of life.

There are various rites of passage. Divorce in accordance with **Shariah** law may have implications for UK law. Funerals should take place within 24 hours of death. Some sects have very austere funeral rites with varying periods of mourning.

Some Muslim men and women will wear a head covering for religious reasons. They should not be asked to remove it in court. See '[Religious dress and wearing the veil](#)' for more details regarding wearing the veil.

### Taking the oath

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Muslims may choose to affirm or swear an oath.
- Muslims' holy book is known as the Qur'an.
- The Qur'an should be kept in a covered cloth, and the suggested colour is green.
- Questions of taking steps for ritual purity may arise.
- Women who are menstruating and others in a state of ritual impurity may not want to touch the Qur'an and may wish to take another oath or affirm.
- Do not assume that all Muslim witnesses in a trial will want to take identical oaths.
- No book or object must be placed on top of the Qur'an in any circumstances. This includes when it is stored in a cupboard.

## Jainism

### Some important points

Jainism is a religious tradition based in India and is older than Buddhism, but much smaller in size than Hinduism. One of its hallmarks is an ascetic ideal. Monks, nuns, laymen and laywomen, make up a fourfold society. Ascetics may not travel by vehicle so only the laity will be found in the UK.

**Shvetambara** ascetic monks and nuns wear white clothing. **Digambara** monks renounce all clothing. Time is considered eternal and the central teaching is that individuals can transcend human limitations by ascetic practices.

All Jain practices involve ascetic rigour and the concept of **ahimsa**, which means non-injury to others. Some carry a broom to gently sweep away living creatures that might otherwise be trodden upon. All are vegetarian, and some avoid those plants that contain seeds or are root plants, so as to avoid killing the entire plant.

Many Jains seek a path of renunciation and non-aggression.

There are a number of holy days and festivals that are determined by the lunar calendar.

Whilst there are parallels between Jainism and Hinduism it would be a mistake to conflate the two religions and their practices.

### Taking the oath

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Jains may choose either to affirm or, possibly, swear an oath.

- Since there are many different groupings, no single text can be specified, but some may choose to swear an oath on a text such as the Kalpa Sutra. Care should be taken to understand which text or oath is appropriate.
- Sometimes a witness will swear an oath by elevating a holy scripture above their head and swearing by it. If a witness does not stipulate such a practice and does not have the appropriate text in court, they should affirm.
- Questions of taking steps for ritual purity may arise.

## ***Jehovah's Witnesses***

### **Some important points**

Jehovah's Witnesses are members of a worldwide religious community.

Individuals appearing before the court or tribunal will call themselves 'Christian'. However, in a number of ways they are different from other religious groups that are called Christian. It is not for judges to resolve these doctrinal distinctions.

The movement traces its modern foundation to a Bible Study Group in the late 19<sup>th</sup> century CE in the United States, who believed that Jesus would take his chosen followers to heaven to rule with him in 1914. They now teach that the Kingdom of God was set up in heaven and 'the last days of this system of things' began at that time.

They believe that the Bible is inspired by God and true. However whereas many Christians believe that Jesus is not only the son of God but is also part of the Trinity comprising God the Father, God the Son and God the Holy Ghost, Jehovah's Witnesses regard him only as the son of God who they call **Jehovah**. Their role is to preach the good news of the Kingdom of God to all nations.

Jehovah's Witnesses, unlike many Christians, do not believe that the soul is immortal. They believe that the Earth will last forever and that almost everyone, living or dead, who accepts Jesus will live there. However, 144,000 chosen people will be led by Jesus to Heaven.

When the body dies, so does the soul, which is in a state of unconsciousness from which believers hold it will awaken when Jesus returns.

Jehovah's Witnesses observe Jesus's words that 'My Kingdom is not part of this world.' As a consequence, they do not take part in politics, military service or sing national anthems.

They refuse to give or receive blood transfusions, which can bring them into conflict with the law if they decline to give parental consent for a child who is prescribed a transfusion. They regard all people as equal irrespective of race or gender.

They have no clergy because each member is witness to the faith. They are governed by a President and Directors, and they go from door to door spreading the word. They hold regular bible meetings in their places of worship, called Kingdom Halls, and/or homes.

They do not celebrate birthdays, Christmas or Easter, because these are not provided for in the Bible. Children are unlikely to participate in school worship, clubs or other activities.



Witnesses undergo baptism by total immersion when they are old enough to understand and wish to take that step.

### **Taking the oath**

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- It is a matter of individual conscience whether Jehovah's Witnesses choose to take a religious oath invoking the name of God or prefer to affirm instead.

## ***Judaism***

### **Some important points**

Judaism is the oldest of the Abrahamic religions. It has been present in the UK since the early middle ages. British Jewish people are either **Ashkenazi** (from central and eastern Europe) or, less commonly, **Sephardi** (from the Iberian Peninsula, North Africa and the Middle East).

The Jewish community is very diverse ranging from ultra-Orthodox to Progressive Judaism. Moreover, some Jewish people will feel a strong Jewish identity and will identify with the Jewish community on a cultural basis, without being very religious.

Orthodox Jewish people believe that the **Torah** was inspired by God word for word. It comprises the five books of Moses. These are supplemented by the books of the Prophets and other Jewish writings.

Judaism recognises that the world is scarred. The scriptures foretell that a Messiah or Anointed One will bring peace and harmony to the world. Over the centuries a number of people have claimed to be the Messiah.

**Rabbis** (who may also be women in Progressive or Liberal Judaism) are the spiritual leaders.

The **Beth Din** is the Court of Jewish Law that will give rulings on issues such as divorce and private law matters.

In certain sections of the Orthodox community, there are different dress codes for both men and women. Jewish men will wear a head covering (**Kippah / Yarmulke**) during prayer, and some Orthodox men will wear one all the time.

The Sabbath (**Shabbat / Shabbos**) commences one hour before sunset on Friday and until sunset on Saturday. It is a day of worship and rest and, as a general rule, activities such as cooking, work and business are prohibited. Orthodox Jewish people will usually go to synagogue (**Shul**). Use of public transport and driving on the Sabbath is generally forbidden in the Orthodox community, although there are differing views on whether limited driving is permitted, eg to attend synagogue.

There are various major festival days, when no work can be done and minor festival days when some activities are permitted. The most important days, which are observed by the vast majority of Jewish people, are Yom Kippur (Day of Atonement) and Rosh Hashanah (New Year). Yom Kippur is an extremely serious and holy day of fasting, which begins at sundown the previous evening. New Year is celebrated the evening before and for one or two days. Few Jewish people who follow their religion or culture to any extent will be prepared to work or go to court on these days.

Depending on the tradition, prayers and synagogue services may be conducted in Hebrew and/or English.

Dietary rules and observances vary enormously but as a general rule the consumption of meat from pigs, shellfish, game and domesticated animals is prohibited as is the mixing of meat and milk.

There are various rites of passage, the most well-known being the circumcision of boys at eight days, the **bar mitzvah** or coming of responsibility ceremony for boys aged 13, with similar ceremonies, depending on the tradition, for girls.

Marriage is important and, depending on the tradition, a divorce or **Get** may take place in the **Beth Din**, which will be recognised by Jewish but not UK law.

Funerals take place usually within 24 hours of death. It is common for Jewish mourners to 'sit Shivah' for seven days following the burial; the first three days are particularly intense. During Shivah, first-degree relatives (son, daughter, brother, sister, father, mother, and spouse) take an almost complete break from the routines of everyday life with a prohibition on working and doing business. The mourners will usually sit together in one of their homes and receive visits from friends and relatives, who drop in and out, as well as saying prayers at specific times.

In some traditions, more general mourning practices can last up to one year.

It is almost impossible to separate Judaism as a religion from the history and horrors of exile, ghettoisation, persecution and attempts to exterminate Jews from the dawn of the religion to present times.

For the subject of 'Antisemitism', see [chapter 8](#).

## **Taking the oath**

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Jewish people may choose to affirm or swear an oath.
- Oaths are sworn on the **Torah / Pentateuch** (the first 5 books of the bible) or on the Hebrew Bible (which will contain these). Sometimes the Hebrew Bible is referred to as the Old Testament, although strictly speaking the latter might refer to something slightly different.
- The Hebrew Bible may be kept in a covered cloth, the suggested colour of which is black.
- Questions of taking steps for ritual purity may arise.
- Some Jewish people will decline to swear on the Torah in a non-religious context.
- If wearing a head covering, Jewish people should not be asked to remove it in court.

## **Mormonism**

### **Some important points**

The Church of Jesus Christ of Latter-day Saints is known as the Mormon Church.

Individuals appearing before the court or tribunal might or might not regard themselves as a 'Christian' depending on what they understand that term to encompass. Mormons share certain beliefs with Christians, but are also different in a number of ways. It is not for judges to resolve these doctrinal distinctions.

The movement was founded by Joseph Smith in America in 1830 CE. He said that an angel, Moroni, appeared to him and told him where to find a book, written in Hebrew. Smith found the Book of Mormon and translated it into English. It revealed how two of the tribes of the Israelites journeyed to South America 4000 years ago and that Jesus, on his resurrection, also went to South America and established a period of peace. However that was destroyed by sin, and in a great battle the good people were killed.

Smith preached about his revelations but met considerable hostility in Illinois. He was imprisoned and when the jail was attacked he was killed. Brigham Young was appointed to take over. The Mormons continued to face persecution so Young led his people on an arduous trek to Salt Lake City in Utah. The Mormons built their city and eventually Utah was admitted as the 45th State of America in 1896. The Mormons have since been able to live in peace.

All Mormons are Saints and become Saints around the age of eight when they are baptized by total immersion. They believe that it is God's plan for them to work hard, civilise the wilderness and prepare for the return of Jesus. They are expected to do missionary work.

Mormons do not take tea, coffee, alcohol or tobacco. They dance and sing. They have simple services. They believe in retrospective baptism so that those who have died are also baptised. Very large records of ancestors and forebears are kept in vaults.

Marriage is very important to Mormons, for only those who are married can enter heaven. They also believe in life before birth, so that they are encouraged to produce as many children as possible for those souls waiting to be born. Although some have practised polygamy, they will now observe the laws of where they live.

### **Taking the oath**

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Mormons may wish to take an oath on the Book of Mormon. If it is unavailable, they may be willing to take an oath on the bible.

### ***Non-religious beliefs and non-belief***

#### **Some important points**

In the 2011 census 25% of the population described itself as non-religious.

**Atheism** is the absence of belief in God.

**Agnosticism** in the truest sense holds that we cannot know everything, so that the question as to whether God exists can never be answered. In the popular use of the term, agnostics neither believe nor disbelieve that God exists.

Belief or non-belief in religion should not be confused with having, or not having, a moral compass.

**Secularism** holds that there should be a strict separation of the State and religion and that people of different religions and beliefs are equal before the law and should have no special privileges.

**Humanism** is an approach based on humanity and reason and that explanations for what takes place in the universe can be explained by science and reason. It is an active philosophy and not a negative response to religion. By definition Humanists are either Atheists or Agnostics.

### **Taking the oath**

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Those who hold no religious belief or who hold a non-religious belief are likely to affirm.

### ***Paganism***

#### **Some important points**

Paganism in its innumerable forms predates many religions. The word Pagan comes from the Latin *paganus* meaning 'rustic or rural'. Over time it has been given other meanings and often in a pejorative context.

It has been argued that Paganism only became a religion in the UK when the natural ebbs and flows of the seasons and nature that had been celebrated needed to be more formalised as a religion in a response to other religions introduced from the continent. In its current manifestations it is sometimes referred to as Neopaganism.

Paganism is estimated to have anything from 50,000 to 200,000 followers in the UK. It can be pantheistic, polytheistic, animistic or monotheistic. Most modern Pagans believe in the divinity of the natural world.

Some Pagans believe in the Supreme Being and/or a sub-group of deities or divine emanations. It is said that some folklore traditions that pre-date Christianity have their roots in Pagan beliefs.

Pagans are sometimes wrongly stereotyped as Satanists or Hedonists.

There has been a revival of interest in Paganism following the Romantic period of the 19th century. Some groups derive their rituals and celebrations from a wide range of sources such as early Romano-Greek Hellenic traditions, Norse, Germanic and Celtic traditions and Druidism.

Worship takes many forms with festivals coinciding with the rhythms of nature including the Summer and Winter Solstices and the Spring and Vernal Equinoxes.

There is an umbrella Pagan Federation that supports the many different strands.

There are Pagan Prison Chaplains working alongside the traditional chaplaincy teams in prisons.

## Taking the oath

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- There is a pagan oath which may be used in courts and tribunals: 'I swear, by all that I hold sacred, that the evidence I give shall be the truth, the whole truth, and nothing but the truth'.
- The oath need not be sworn on any religious book.

## Rastafarianism

### Some important points

The religious movement has political undercurrents of protest against slavery and the repression of black people. It draws on historical parallels with the exiles of the Jewish people.

The movement was inspired by Marcus Garvey (1897-1940) in Jamaica who promoted a Back to Africa movement in the 1930s. It was also inspired by the coronation of Haile Selassie I as Emperor of Ethiopia in 1930. His pre-coronation name was **Ras** (Prince) of the **Tafari** family. He is regarded as **Jah** the true God.

Rastafarian beliefs are based on the Bible. They accept some of the laws of the country where they live but not all. One said 'I and I obey God's law, basic human truths and rights; not the law of the Queen of England.' Inevitably this can sometimes cause conflict with law enforcement bodies in the UK.

For Rastafarians there is no God outside them, God is within them, hence use of the phrase, 'I and I'. As a consequence the righteous cannot die, but will be reincarnated.

Rastafarians believe that when the 12 tribes of Israel were scattered, the spirit of the Lord went into Ethiopia, so that they became the chosen people, then to be scattered throughout Africa. When Africans were enslaved and sent to the Americas those places were seen as places of exile, **Babylon**, after the city where the Israelites were imprisoned. Jamaicans were encouraged to migrate to the UK to undertake work, but were not welcomed, so the UK became another **Babylon**. Rastafarians seek salvation by a return to Ethiopia or Africa, so escaping the white-dominated western world.

**Reggae** is inseparable from Rastafarianism, its rhythms and words reflecting their culture and the language of slavery. Rasta colours are red, to represent the blood of martyrs and slaves, yellow for the religion and Jamaica and green for Ethiopia.

**Ital** means food that is natural and clean so many Rastafarians are vegetarians with strict dietary rules. Cannabis or **Ganja** (the herb) is smoked and regarded as a sacrament. Beliefs include that hair should not be cut and is often worn in dreadlocks. It should be covered by a cap, except during prayer and spiritual gatherings.

The Rastafarian year is based on the Ethiopian calendar, which commencing on 11th September with 13 months, one of which has only 6 days. There are specific holy days largely related to Haile Selassie and Ethiopia.

## Taking the oath

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Rastafarians may choose either to affirm or, possibly, swear an oath.
- A suitable holy book is the Bible; most usually the part that is known as the New Testament will suffice.
- Rastafarians should not be asked to remove their head coverings in court.

## *Sikhi or Sikhism*

### Some important points

The UK is home to the largest Sikh community outside India. It was founded in the Punjab, from where most Sikhs originate. The Punjab province originally spanned parts of what is now India and Pakistan.

The religion was founded in the 15th century by Guru Nanak. Sikhs believe in:

- One God.
- The teachings of the ten spiritual masters – Gurus.
- The holy book the **Guru Granth Sahib**, as having the function of the living Guru.
- The salvation and liberation from the cycle of reincarnation is achieved by meditation and service to others.

The sacrament of **amrit** or ceremonial benediction is received at the **Gurdwara** (temple) and the concept of pure Sikhs, both male and female, the **Khalsa** is manifested by the 5 Ks:

- **Kesh**: Uncut hair.
- **Kanga**: Comb to keep the hair in order and symbolising cleanliness.
- **Kara**: A steel bangle worn on the right arm symbolising the bond with Guru and the brotherhood of Khalsa.
- **Kacha or Kachhedra**: a type of undergarment symbolising discipline, self-restraint and chastity.
- **Kirpan**: a sword, usually now a very small ceremonial one, representing power, dignity, independence and fearlessness.

As part of the initiation into Khalsa men are given the name **Singh** (lion) and women **Kaur** (princess). Typically Sikhs will have a personal name, usually not gender specific, their religious name and a family name, hence Manjit Singh Dillon or Manjit Kaur Dhillon. The fact that personal names are gender neutral emphasises equality between the sexes. See '[Sikh](#)' entry in the Naming Systems appendix for more detail.

Worship takes place at the Gurdwara with ritual purification ceremonies. There are a number of holy days and festivals with many lasting for three days.

Many Sikhs are vegetarian, but if not will choose not to eat Halal or Kosher meat. Strictly observant Sikhs will not take tobacco, alcohol, tea or coffee.



On death the body is washed, dressed in new clothes and cremated, the closest male relative usually starting the cremation.

### **Holy books and scriptures**

The most important Sikh holy scripture is the **Guru Granth Sahib**, a very large collection of readings and hymns written by the Gurus of Sikhism and various saints (bhagats), some of whom were Hindus and Muslims. All Sikh scriptures are written in the Gurmakhi script.

The Sikh holy scriptures are also referred to as the Guru's word (gurbani) and are treated with utmost respect. The Guru Granth Sahib is always kept in a clean silk cloth and is placed on a small bed (manji sahib) on a dais below a canopy. In many gurdwaras, the scriptures are kept on the floor above, thus in an elevated position, while the floor below is used for social functions.

The **Sunder Gutka**, an extract from the Guru Granth Sahib, has been considered the appropriate form of a Sikh holy book to be used in courts in the UK. This convention seems to avoid difficulties over the rules regarding the handling of the Guru Granth Sahib outside a Gurdwara by persons who are not qualified or authorised to do so.

### **Taking the oath**

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Sikhs may choose to affirm or swear an oath.
- The Sunder Gutka may be suitable for the purposes of swearing an oath in court proceedings.
- The Sunder Gutka should be kept in a covered cloth, the suggested colour of which is orange or yellow.
- It is not appropriate to present the sacred Sikh Scriptures (Aad Sri Guru Granth Sahib Ji and the Shri Guru Granth Sahib Ji) to Sikhs for the purpose of swearing oaths. The Sikh Council UK advises that their storage and use in a court is highly offensive and hurtful to Sikhs.
- Questions of taking steps for ritual purity may arise.
- Sikhs should not be asked to remove their head coverings in court.
- The form the Oath may take when sworn by a Sikh (taken on the Sunder Gutka) is: 'I swear according to the Sunder Gutka (or by Almighty God) that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.'
- The form of the oath which stipulates swearing by the 'Waheguru' is not recommended since Sikhs believe in swearing an oath before God.

### ***Taoism***

#### **Some important points**

Most Taoists in the UK are from China. In common with other religions there is a wide difference of practices. Taoism is a belief system and many follow the

teachings of Confucius. It is not incompatible for Taoists also to practise other faiths such as Buddhism or Christianity.

The principal text is **Tao Te Ching** (The Way and the Truth) written around 500 BCE. It outlines the Way setting out man and his place in the universe. **Wu wei** is the fundamental principle of not offending the laws of nature. The forces of nature should be revered.

**Yin Yang** the symbol of Taoism emphasises the relativity of all values and the dimensions of polarity. Everything has opposite dimensions: positive/negative; dark/light; active/passive; male/female.

There are various religious festivals and observances mostly centred on the Chinese calendar and New Year. Yin and Yang influence dietary observations such as balancing the heating and cooling effects of prepared food. Some will observe a vegan diet at specific times.

The family is the most important and central unit, with rituals centred on birth, marriage and death. The latter two can be particularly elaborate. The family will typically have its own altar, a shrine to ancestors and the use of flowers, paper-money and other talismans during ceremonies.

The centuries old practice of taking an oath which involves breaking a saucer has largely been discredited because of its association with similar oaths taken during Triad secret initiation ceremonies so is probably best avoided.

### **Taking the oath**

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Taoists may choose either to affirm or, possibly, swear an oath.
- Many Taoists in the UK are members of the Chinese community and many of them would also consider themselves to be adherents of Confucianism.
- Both Taoism and Confucianism permit the membership of and participation in the communal practices of other faith communities, so many may also be Buddhists/Christians/Muslims.
- The Taoist holy book is the Tao Te Ching, although those who are also practising other faith traditions may choose to swear upon another holy book.

## **Zoroastrianism**

### **Some important points**

Zoroastrianism is an ancient religion based upon the teachings of **Zarathushtra** (1400-1200 BCE) who lived in Iran before the advent of writing.

Most live in Iran. Those who migrated to India are known as Parsees. There has been a presence in the UK and elsewhere since the early 1800s.

The popularity of the religion has changed over the years following conquests and other upheavals.

Zarathushtra taught divine revelations that there was one eternal God, **Ahura Mazda** who created the world so that the forces of good could reign over the evil spirit



**Angra Mainyu.** The seven Holy Immortals or **Amesha Spentas** protect the seven creations of Sky, Earth, Water, Plants, Cattle, Man and Fire.

There will be a great battle between good and evil when good will triumph and the Last Judgement will take place. The aim is to overcome the forces of evil with divine aid.

Prayers are said five times a day in front of a sacred fire representing the Truth and the presence of the Divine. Ritual purification is observed. There is a long oral tradition but the sayings were written down in 5th or 6th century CE in the **Avesta**. There is a collection of hymns known as the **Avestan**.

There are seven religious festivals, each lasting five days.

There are no dietary rules except to avoid consuming anything that is intrinsically evil.

There is a naming ceremony, and a ceremony for boys and girls who come of age. Marriage is strongly encouraged.

The ceremonies surrounding death are very important when great emphasis is placed on the elimination of negative forces. Corpses were traditionally wrapped in shrouds and left on biers in walled enclosures to be picked clean by vultures and for the bones to be purified by the Sun. However in modern times electrical cremation or burial in cement coffins has been accepted.

### **Taking the oath**

- For an overview of practices on taking the oath, see '[Oaths, affirmations and declarations](#)' in chapter 9.
- Zoroastrians may choose either to affirm, or possibly swear an oath.
- Their holy book is known as the Avesta.

## Appendix E Remote Hearings

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### *What is a remote hearing?*

1. Giving evidence or conducting hearings ‘remotely’ refers to the use of video platforms such as Teams, Zoom, Skype and Cloud Video Platform (‘CVP’), or audio platforms, such as telephone conferencing on BT Meet Me.
2. Prior to the Covid-19 pandemic, courts and tribunals would occasionally hear evidence from individual witnesses by video link or, less commonly, telephone, when they were unable to attend because based abroad or because of adjustments made for vulnerability. In certain regions and jurisdictions, it was also common to deal with straightforward case management hearings over the telephone, to avoid parties and representatives having to travel long distances, and to reduce legal costs for the parties.
3. In the criminal justice system, video links were often used for remand and interim hearings. In addition, vulnerable witnesses could video record their evidence as part of the statutory special measures scheme.<sup>1</sup>
4. After a national lock-down in spring 2020 resulting from the Covid-19 pandemic, fully remote hearings were rapidly introduced for appropriate cases to ensure that justice did not grind entirely to a halt. Fully and partly remote hearings are likely to continue for some time, as the ongoing restrictions affect available court space and the ability of certain participants to attend.
5. In a fully remote hearing, all participants attend remotely, including judges, parties, witnesses, representatives and observers. In partially remote or ‘hybrid’ hearings, one or more participant might attend remotely, whilst the other attendees may be in physical attendance in a court or tribunal room. There are various permutations with particular considerations of fairness which might arise in each case.
6. New technology has been developed and acquired at speed, and judges, representatives and parties have had to learn very fast how to access such technology. Judges need to be careful that their understandable focus on managing the technological challenges does not distract them from the equally challenging task of ensuring procedural fairness in this largely new medium. A different judicial skill set is required for remote hearings.
7. As we state in the introduction to the Equal Treatment Bench Book, effective communication underlies the entire legal process: ensuring that everyone involved understands and is understood. Otherwise the legal process will be impeded or derailed.
8. The interim guidance issued by the Equal Treatment Bench Book, ‘Good Practice for Remote Hearings,’ remains valid. This Appendix expands on it. There are also specialist sections on considerations relevant to remote hearings in certain of the other chapters.

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<sup>1</sup> See chapter 2.

### ***Potential advantages of remote evidence or hearings***

9. In some situations, a fully or partially remote hearing may be a desirable adjustment for a party or witness, eg where an individual:
  - Is intimidated by court surroundings, eg because of an anxiety disorder or autism.
  - Finds it difficult to travel because of a physical disability, eg which makes travelling excessively tiring or public transport difficult to use.
  - Is afraid to be in the same building as another party or witness, eg in a case of sexual harassment or domestic abuse.
  - Is shielding and is vulnerable, or fearful of contact with other people.
10. In addition, [chapter 2](#) explains the use of video links as a special measure for vulnerable witnesses.

### ***Potential difficulties with remote evidence or hearings***

#### **Difficulties arising from socio-economic factors**

11. Parties and witnesses may be instructed by the court to attend in a quiet room with no distractions, but this may not be possible. Not everyone has a large house with a suitable quiet room. People may live in small or over-crowded accommodation. There may be unmanageable demands on their attention from their children, partner or even pets.
12. People may also be inhibited from giving evidence at home because:
  - They have previously withheld information from other adults in the household.
  - They are being subjected to domestic violence or coercive control. Indeed, the fact that a remote hearing has been fixed at home may be used by a partner as a tool to exercise coercive control.<sup>2</sup>
  - The content of evidence/questions would be inappropriate for children to hear. There may be no other adult to care for the children because of pandemic restrictions.
13. Privacy can also be difficult for those in shared accommodation, eg refugees, those who have fled domestic abuse, or parties whose relationship has broken down but who, for financial reasons, are still sharing accommodation.
14. Do not assume access to technology and the internet: there is a disparity of such access based upon socio-economic factors, age and disability. People may not have sufficient phone credit, WiFi or data allowance to participate. They may not have been able to charge their phone fully.<sup>3</sup>

<sup>2</sup> 'Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings': Family Justice Council (Nov 2020) discusses these concerns and the possibility of using a platform where background can be blurred or, if appropriate, allowing cameras to be switched off or joining by audio only.

<sup>3</sup> 'Remote hearings in the family justice system: a rapid consultation' Ryan and others. Nuffield Family Justice Observatory (2020).

15. If a litigant in person does not have the appropriate technology, this should not be used as a barrier for him or her to overcome. It is for the court to adapt. People should not be required to hire or borrow equipment, or make formal applications to adjourn any remote hearing which was fixed without prior consultation.
16. For represented parties, communication between lawyers and clients may depend on lay parties having access to multiple devices and good standards of written and IT (information technology) comprehension.

### **Difficulties for disabled people**

17. Remote hearings can cause additional difficulties for parties and witnesses with cognitive impairments, mental ill health or who are neurodiverse. These can affect people in different ways including, relevantly:
  - Having a short attention span.
  - Being reluctant to speak up.
  - Having extreme anxiety.
  - Inability to control impulses or thoughts.
18. In the context of the criminal justice system (see below), the Equality and Human Rights Commission has said that a video hearing is not suitable for many people with these impairments.
19. It is important always to ask individuals if they feel comfortable with a remote hearing and what adjustments may help, but bear in mind that in some cases, the very nature of their impairment may make them acquiescent when the format is in reality unsuitable for them.
20. Examples of difficulties which may arise for people with mental impairments are:
  - Attending court can be particularly tiring anyway for someone with certain mental impairments. The additional concentration required for a remote hearing may make this even more exhausting.
  - A person with severe anxiety may feel even more worried about managing technology.
  - A person with severe dyslexia might find it difficult to operate the technology, process the additional information at speed, and maintain attention.<sup>4</sup>
  - Inability to see the whole 'room' and everyone who is at the hearing can cause anxiety for those with a mental health or neurodiverse condition.
  - An autistic person may experience sensory overload from having to stare at a computer screen for prolonged periods.
  - A sudden loss of contact by a party 'dropping out' of a hearing can be immensely stressful for participants who may believe that it is in some way their fault or that the judge blames them in some way for this.

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<sup>4</sup> See for example, *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583.

- It can be much harder for a judge to identify that a party or witness has mental ill health, where this has not been disclosed.
  - See also '[Mental disability – remote hearings](#)' in chapter 4.
21. Remote hearings can also pose difficulties for some people with physical disabilities, eg:
- Longer periods sitting in one position with poor posture.
  - Specific difficulties for those with sensory impairments. Even temporary or minor loss of sound or visual quality may exclude individuals with hearing or visual impairments.

### **Difficulties for people without English as a first language**

22. Remote hearings can cause additional difficulties for people from different cultural backgrounds or who are speaking English as a second or third language, eg:
- There is the increased cognitive load of thinking about operating technology as well as language.
  - Use of technological vocabulary, eg mute, mic, remote, bandwidth, reception.
  - Minor loss of sound level or distortion may make it harder for the individual to catch or guess the English word.
  - There are fewer visual cues to assist understanding.
  - Cultural differences in turn-taking style may become even more acute over this artificial medium, with those whose style is to wait before speaking, finding it particularly difficult to indicate they want to speak.
23. Where interpreters are used, unless they are in the same location as the person needing interpretation, difficulties may include:
- Interpretation cannot be simultaneous over most video platforms if the interpreter is at a different location or socially distanced in the same location. It can only be consecutive. This will take longer and requires more organisation procedurally.
  - The interpreter and witness have fewer visual clues to help them understand each other.
  - It is harder for a judge to notice if an interpreter is getting lost, and harder for an interpreter to jump in and say if someone is speaking too fast or not pausing at correct intervals. The interpreter cannot easily deploy non-verbal means of slowing down speakers, such as gestures and eye contact.
  - In a physical courtroom, the interpreter usually sits next to witnesses as they give evidence. This serves as a visual reminder to everyone that communication must pass through the interpreter and they should slow down and pause regularly. In virtual hearings, there is not the same visual reminder.

- Interpretation is tiring anyway, requiring a high degree of concentration and very strong short-term memory. Sitting in front of a screen for prolonged periods can tire interpreters and weaken concentration.
  - For more detail, see chapter 8 '[Interpreters and remote hearings](#)'.
24. Remote hearings are likely to pose difficulties for newly arrived migrants – see chapter 8, '[Help with the court process](#)'.

### **Concerns over unauthorised recording**

25. Certain individuals may find it disturbing to appear 'on film' for a variety of reasons, eg:
- Concern that someone, whether a hearing participant or member of the public, may make and use an unauthorised audio or video recording. This may be feared particularly by those whose cases concern domestic abuse or by asylum seekers from oppressive regimes.
  - For religious reasons, some people might object to a video-recording being made. This appears to be rare in the context of a court appearance, but could arise eg some Amish people do not allow personal photographs.
  - Requiring a Muslim woman to remove the veil is problematic in any context (see chap 9 '[Religious dress and wearing the veil](#)'), but is likely to be particularly unacceptable over a live broadcast which could be viewed by anyone and even filmed without permission.

### **Additional difficulties in family cases**

26. Rapport between judge and parents is particularly important in many family cases concerning the care of children where judges seek to encourage or warn parents. This is harder to establish over a remote medium. Decisions such as to remove children into care require a humane and empathetic approach, which is harder to convey over a video platform or telephone. Parents joining from home may be alone, without any immediate source of support.
27. Represented parents appearing as a small picture on screen are likely to feel even more marginalised than when sitting at the back of a court. There are fewer opportunities for their representative to explain what is happening and it is harder for them to interrupt and say they cannot follow.
28. In domestic abuse cases, it is possible that the remote process can itself be used as a coercive control tactic. In some cases, there is a high risk that the alleged perpetrator will circulate audio, film or photographs of the court hearing, potentially in edited form.<sup>5</sup>

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<sup>5</sup> The concerns in this section are identified in 'Remote hearings in the family justice system: a rapid consultation' Ryan and others. Nuffield Family Justice Observatory (2020); 'Remote hearings in the family justice system: reflections and experiences. Follow-up consultation': Nuffield Family Justice Observatory (Sept 2020); and 'Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings': Family Justice Council (Nov 2020).

### ***Deciding whether to hold a remote hearing***

29. It is ultimately a balancing exercise for the judge as to whether or not a particular hearing should proceed remotely, but it is very important to listen to the views of the parties and their representatives.<sup>6</sup>
30. Some difficulties can be overcome by:
  - Offering a private and quiet room away from the party's home, eg at court, in a local authority facility, at a solicitor's office.
  - Arranging for at least one member of a party's legal team to accompany the party, while observing social distancing.
  - Establishing an additional route of communication directly between a party and his or her lawyer during the hearing, eg telephone, a messaging service, or email. However, bear in mind that for some parties it may be difficult to participate on a remote platform and operate a further piece of technology such as WhatsApp at the same time.
31. It is necessary to be very careful if arranging a 'hybrid' hearing that the arrangements are not procedurally unfair. For example, requiring parties to attend the courtroom in person if their legal representative can only attend remotely is likely to be unfair.<sup>7</sup> It may also be unsatisfactory for one side to attend in person while the other side attends remotely.
32. It will often be advisable to hold a case management discussion to decide whether holding a remote hearing can fairly proceed and what measures might be needed. This may be necessary even in cases which might otherwise appear straightforward.
33. In complex cases, agreeing a written case plan with the input of the parties and any representatives as to how the remote hearing will be handled is likely to be useful.<sup>8</sup>

### ***Fixing the hearing***

34. When fixing hearings, allow more time. Virtual hearings take longer, because of technical difficulties, slower communication, and the need for more breaks due to the increased concentration required as well as often unsuitable seating arrangements and posture.
35. Give clear instructions to parties and ensure they are passed on to witnesses. Do not rely on individuals understanding pro forma HMCTS or judicial guidance for joining the remote hearing. Those living alone may not have assistance, and there is still a barrier in admitting to reading difficulties.
36. Where relations between the parties are particularly sensitive, think about the order in which the judge, representatives and parties join and leave the meeting. It is not satisfactory, for example, for an individual alleging domestic abuse to be left waiting on a phone line with the alleged perpetrator until the judge joins.

<sup>6</sup> The President of the Family Division set out factors to be taken into account in the context of family cases in *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583.

<sup>7</sup> For example, see *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583.

<sup>8</sup> *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583.

One option is for a member of court staff to initiate the hearing and remain online until the judge has joined.<sup>9</sup>

37. If an interpreter is required and will join online, ensure the individual requiring the interpreter understands how to get online themselves. For example, a person joining a telephone conference will not at that stage have access to the interpreter and may not understand automated instructions such as 'press the hash key'.
38. Tell parties well in advance of the technology which will be used, so that they can prepare and indicate any problems.
39. Remember that changing the date or time of the hearing at short notice may cause extra difficulty with arrangements made for access to technology or support, or to avoid interruptions.
40. Make careful arrangements regarding documents. Electronic documents are hard to look at without a second screen and impossible on a mobile phone. Litigants in person and witnesses are likely to need a hard copy bundle. It should also be emphasised to litigants in person that they will be unable to 'bring' documents along on the day. They must supply an electronic copy in advance or make arrangements to get a hard copy to, eg, solicitors on the other side who will be able to turn it into an electronic copy.

## ***Handling a remote hearing***

### **Opening remarks**

41. Parties representing themselves are likely to be particularly anxious at the start of a remote hearing because they may be worrying about the technology as well as the hearing itself. The following steps at the outset may help put parties and witnesses at ease:
  - Introduce everyone in the 'room'. Explain how and when they will appear on screen. This is particularly important to reduce anxiety for people with certain mental impairments or neurodiverse conditions.
  - Provide reassurance about technology. Check everyone can clearly hear and see what is happening. Just because the judge's own reception is satisfactory, or the judge can follow events where reception is poor, does not mean that others feel comfortable.
  - Tell everyone that they must immediately say if they experience any loss of reception, and should not feel embarrassed or inhibited. Explain the risk of the IT failing altogether and what should be done if the link fails.
42. Explain procedure, including:
  - The order of events and when breaks will be taken.
  - When people will have a chance to speak.
  - How individuals should indicate that they wish to speak at other times.

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<sup>9</sup> 'Remote hearings in the family justice system: a rapid consultation' Ryan and others. Nuffield Family Justice Observatory (2020); 'Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings': Family Justice Council (Nov 2020).



- The importance of not speaking over other people and the reason.
  - How documents will be referred to.
43. Check whether a litigant in person is using a mobile phone, tablet or full laptop/desktop. The smaller the person's screen, the more the judge will have to ensure he or she can read documents and feel involved throughout the hearing.
44. Particularly where there might be a risk or fear of a party taking still photographs or screen grabs of the hearing or creating a recording, repeat the warning at the outset that none of these must be done and that to do so would be a contempt of court with serious consequences.
45. Check for any particular needs and anxieties:
- Check whether any adjustments are needed, eg breaks, speaking more slowly, reading out documents, shorter days.
  - Ask whether there will be any unavoidable interruptions as those who are the only adult in the home may be worrying about these, eg deliveries; important incoming phone calls; childcare issues. Where possible, give reassurance that the hearing can be paused briefly while the matter is dealt with. This will reduce the witness's stress and enable him or her to give better evidence.
  - Where, eg in private family hearings, parties have received a stern warning that no one else must be in the room, they may be afraid to let the judge know if a child runs in unexpectedly. Reassure them at the outset that they simply need to unmute and let the judge know this has happened.
  - Check there is a way that represented parties can give instructions during the hearing and how to request any necessary pauses in the proceedings to enable this. As already stated, it can be difficult for lay parties to concentrate on the remote hearing platform and manage an alternative channel of communication with their legal representative at the same time. Short breaks may be needed.
46. Remember that many lay people do not have the resources to download or navigate electronic bundles. Where relevant, this warrants exploration at the start of a hearing. If a litigant in person has not served documents in electronic form prior to the hearing despite directions to do so, do not assume that is deliberately disobeying an order.

### **Conducting the hearing itself**

47. Carefully monitor that everyone is present throughout the hearing. People may briefly drop in and out without the judge realising and may not be sufficiently assertive to tell the judge that has happened.
48. Constantly check that litigants in person, parties and witnesses are following and understanding what is happening. It is easy for someone to lose the thread because of a distraction, temporary loss of sound quality, or speedy moving around electronic bundles. This will be harder for judges to notice when only seeing someone's face, or when they are themselves focusing on or navigating around electronic bundles.

49. Although it is generally necessary for everyone to mute themselves when not speaking to avoid background noise, be aware that this means the judge cannot hear the normal feedback people give to each other to indicate they are listening. It will be harder for a judge to know when a party is disengaged.
50. It is always important with litigants in person to ensure they do not feel excluded by legal or procedural discussions between judge and the representative on the other side. This is even more important with a remote hearing where they may feel their presence is scarcely noticed. It may help to regularly come to them first for comments, having explained to the other side why this is being done.
51. Litigants in person easily get left behind when documents are referred to. Check at the outset whether they have a hard copy of the bundle or electronic. Either way, the judge will not be able to see if they have not found the page, so check each time that they have done so before any representative on the other side rushes on with questions or representations.
52. Conversation does not 'flow' in a video hearing as it might face to face. Expect stress from parties who want to have their say but it is all taking 'so long'. Explain, monitor and control turn-taking.
53. Remember that lay parties need to understand what is happening as it happens, rather than waiting for an explanation afterwards, even where they are professionally represented:<sup>10</sup>
  - It is always important for judges to speak in ways that lay parties and observers can understand, but this is particularly crucial in remote hearings where parties have less opportunity to communicate with their representatives to ask for an explanation.
  - It is easy to forget that parties are present if they only appear in a thumbnail image at the foot of a screen or have even switched off their camera, eg to avoid being seen by an abusive partner.
  - Referring at frequent intervals to lay parties will help them feel heard, eg 'As Mrs Brown will realise ...', 'I appreciate that Ms K, who is attending today, feels ...'
54. Make sure the lay parties understand the outcome of the hearing.
55. Both telephone hearings and video hearings require focus and concentration from the judge, the advocates the parties and any witnesses. Take more frequent and regular breaks.
56. Do not be tempted to extend hours to get hearings completed. This will be exhausting for everyone, and may be particularly problematic for litigants in person, those speaking English as a second language, and people with a range of mental or physical impairments, many of whom might find the additional effort required by the process particularly tiring.
57. Remember that people in difficulty may say they are willing to continue, out of a sense of deference, unassertiveness or anxiety to get the hearing over with,

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<sup>10</sup> 'Understanding Courts – A report by JUSTICE' (2019) makes recommendations for improving the understanding of the court process by lay users. See also 'Remote hearings in the family justice system: a rapid consultation' Ryan and others. Nuffield Family Justice Observatory (2020).

when in reality their ability to give or absorb evidence has become impaired by tiredness.

58. Where a party or witness is speaking English as a second or third language, thought must be given to reliable ways of assisting and checking understanding. The '[communicating interculturality](#)' section in chapter 8 gives general guidance on communicating with those who do not speak English as a second language.
59. Where interpreters are used:
  - Establish at the outset how and when the interpretation will be carried out.
  - Ascertain how often they will need breaks.
  - Ensure they are not marginalised.
  - Give them confidence at the outset to express difficulties with reception or process.
  - Control the length and pace of speakers whom the interpreter must interpret – the interpreter may find it hard to interrupt or indicate by body language when he or she is having difficulty.
  - See the sections in chapter 8 on '[language interpreters](#)' and '[the right to speak Welsh](#)' for general guidance on working with interpreters.
60. Be careful about muting someone who is demonstrating signs of distress. This can make the person feel further excluded and exacerbate any mental health condition.
61. Empathy is harder to express over the telephone or a video platform. It may be particularly important to allow individuals time to express their concerns and to feed back to them afterwards the key points they have made, so they know they have been heard.
62. Beware unconscious assumptions:
  - Be careful not to make unconscious assumptions about individuals from their home surroundings, behaviour or dress. It may be different to what one would expect in court: they are at home. They may not dress smartly. They may be more relaxed; alternatively, they may feel worried because a process which comes inside their home feels like an invasion of their personal space. They may be sitting somewhere apparently unsuitable, but it may be the only place that they have; alternatively, they may be sharing space with another household member who needs it for work.
  - Conversely, where judges are working from home be conscious that parties may make assumptions about the judge from what they see. Social barriers between judges and parties may appear exaggerated by everyone appearing in their own homes. The judge should keep their own background neutral.
  - Remember that represented parties are more likely to have had the benefit of legal advice regarding how they should present themselves at home, including how they should dress, where they should sit and how their surroundings should appear. Unrepresented parties may not have had this

guidance, and judges should not assume disrespect by manner of address or what is being worn in the comfort and privacy of their home environment.

63. A witness may wish to take a religious oath but not have a holy book because they are at home or they may be unable safely to touch it if in court at this time. They should be allowed the choice of taking the oath without the book or affirming. Taking oaths is discussed further in [chapter 9](#).

### **Particular difficulties with telephone hearings**

64. It can be hard to identify who is talking. Ask speakers to identify themselves each time they speak (unless it is obvious).
65. Litigants in person may be reluctant to ‘interrupt’, and uncertain how to indicate they want to speak over a non-visual platform. Judges can establish a turn-taking protocol at the outset and should regularly check with the litigant in person that he or she is following and has no questions.
66. Those on a telephone are relying solely on the tenor of the voice because they have no visual cues from the judge or the other party. Judges should seek to avoid any tension in their voice which may signify impatience to such a person.
67. It is difficult for a judge to identify a build-up of distress before a party breaks down.
68. Empathy is particularly hard to convey over the phone. As previously suggested, just listening and feeding back the key points the person has made can be enough.
69. The judge has to take particularly active steps to monitor that everyone remains present, is following the proceedings, looking at any relevant documents, feels able to speak, feels they are being listened to, and is not distressed.

### ***The criminal justice system***

70. There appears to be a disproportionate number of defendants in the criminal justice system with mental impairments compared with the general population.<sup>11</sup>
71. In its interim Inquiry report, ‘Inclusive justice: a system designed for all’,<sup>12</sup> the Equality and Human Rights Commission (‘EHRC’) looked at the potential impact of using video hearings where defendants have a mental impairment. The EHRC Inquiry focussed specifically on the existing practice of holding remand and interim hearings by video link, but many of its findings have equal application to all hearings, whether criminal or civil.
72. Defendants have a right to effectively participate in their hearings, which means being able to understand what is happening and communicate. Difficulties posed by video hearings for those who are neurodiverse or with a mental impairment include:
- Defendants not having a full view of the court or knowing who is present.

<sup>11</sup> See for example [chapter 4, ‘Prisoners and mental health’](#).

<sup>12</sup> ‘Inclusive justice: a system designed for all. Interim evidence report - Video hearings and their impact on effective participation’ EHRC (April 2020).

- It being harder for advocates and court to identify that the defendant has a mental impairment and might need adjustments.
- Greater difficulty in establishing trust and rapport because of the missing human element.
- Greater scope for misunderstanding people and behaviours.

73. The EHRC concluded that:

- For many defendants with a cognitive impairment, mental health condition and/or neurodiverse condition, a video hearing is not suitable.
- In a few cases, for those experiencing high levels of stress or anxiety when attending court, a video hearing might be a helpful adjustment provided the individual has support with them in the room where they are.
- All frontline professionals including police and judges, should give greater consideration to identifying people for whom video hearings would be unsuitable. Only one defendant in the sample interviewed by the EHRC had been given the choice whether to attend by video link or in person.

## **References and resources**

Click on the references below to go to the source referred to. Links were valid at the date of publishing this edition of the Equal Treatment Bench Book, but it is possible documents have since been moved or updated. If a document is not linked, this is because we are unable to find the link. References are in alphabetical order (discounting the first 'the' or 'a').

## **References**

[‘The Courts, Tribunals and the Covid-19 Public Health Crisis. Interim recommendations on safeguarding vulnerable people in the context of remote international protection and human trafficking/modern slavery legal casework.’](#): The Helen Bamber Foundation and Freedom From Torture (May 2020).

[‘The Family Court and COVID 19. The Road Ahead’](#): Sir Andrew McFarlane, President of the Family Division (9 June 2020).

[‘Inclusive justice: a system designed for all. Interim evidence report – Video hearings and their impact on effective participation’](#): EHRC (April 2020).

[‘Good Practice for Remote Hearings’](#): Judicial College (May 2020).

[‘Remote hearings in the family justice system: a rapid consultation’](#): Ryan and others. Nuffield Family Justice Observatory (2020).

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[‘Report and recommendations – The impact of COVID-19 measures on the civil justice system’](#): Byrom and others. Civil Justice Council and Legal Education Foundation. (May 2020).

[‘Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings’](#): Family Justice Council (Nov 2020).

## **Cases**

Cases were relevant as at the date of publication.

[Re A \(Children\) \(Remote Hearing: Care and Placement Orders\)](#) [2020] EWCA Civ 583

[Re B \(Children\) \(Remote Hearing: Interim Care Order\)](#) [2020] EWCA (Civ) 584.

## **Advocate’s Gateway**

Advocate’s Gateway Toolkit 9: [‘Planning to question someone using a remote link’](#) (2017).

## Appendix F Chapter Overviews

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### *Chapter 1 Litigants in Person and Lay Representatives*

#### Overview

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

#### Litigants in person ('LIPs')

'Litigant in person' ('LIP') is the term used by courts and tribunals to describe individuals who exercise their right to conduct legal proceedings on their own behalf. When speaking to such individuals, it would usually be better to use a non-technical term, such as 'a person without a representative'.

There are a number of reasons why individuals may choose to represent themselves rather than instruct a lawyer. Many do not qualify for public funding, either financially or because of the nature of their case. Some cannot afford a solicitor or even distrust lawyers. Others believe that they will be better at putting their own case across.

The number of litigants in person has risen significantly in recent years, and is likely to continue doing so as a result of financial constraints and the consequences of the Legal Aid reforms.

#### The courts' duty to LIPs

Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.

The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.

Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal.

All too often, litigants in person are regarded as the problem. On the contrary, they are not in themselves 'a problem'; the problem lies with a system which has not developed with a focus on unrepresented litigants.

#### Common procedural misunderstandings in case preparation

LIPs vary in their social and educational background, and in their aptitude for litigation. However, experience shows that certain issues frequently arise. The difficulties faced by litigants in person stem from their lack of knowledge of the law and court or tribunal procedure. The procedure is so familiar to lawyers and judges, that they often do not realise the extent of a LIP's misunderstandings.

The court's aim is to ensure that litigants in person understand what is going on and what is expected of them at all stages of the proceedings

LIPs may have additional difficulties, eg because they are not fluent in English, because they have a disability, or because they come from a socially excluded background. There is more detail about these difficulties in chapters 5, 3, 4 and 9.

The key is to maintain a balance between assisting, and understanding what the litigant in person requires, while protecting their represented opponent against the problems that can be caused by the litigant in person's lack of legal and procedural knowledge.

This chapter looks in detail at each stage of case preparation and at common misunderstandings which LIPs demonstrate, and gives suggestions as to how judges can best handle these. For example, it helps to:

- Explain the importance of evidence from documents and witnesses in proving facts, and that they must be brought on the day.
- Explain what documents are considered 'relevant' for the duty of disclosure.
- Explain the difference between disclosure and trial bundles. Explain how a trial bundle is put together.
- Where possible, not to ask LIPs to provide excessively complicated written particulars of their case.
- Explain how to structure a witness statement and what it should cover. Explain that the LIP is also a witness and will need a witness statement.

### **Difficulties at the hearing and how to help**

This chapter also looks at common difficulties at the final hearing and how to assist. For example, it is helpful for the judge to:

- Explain basic rules and procedure at the start of the hearing.
- Help the LIP formulate questions when cross-examining opposition witnesses once it is clear what the LIP is trying to ask.
- Ask the advocate on the other side to give closing submissions first, so that the LIP sees how this is done. Reassure the LIP that he or she is not expected to replicate the advocate's style.

Litigants in person often believe that, because they are aggrieved in some way, they automatically have a good case. When explaining, if necessary, that they have no case, bear in mind that this will come as a great disappointment to a litigant, who will have been waiting for his or her day in court for some time.

### **Criminal cases**

Where a defendant wishes to dispense with representation, give guidance as to its value. If – notwithstanding this – the defendant decides to represent him or herself, the judge must explain the process and ensure proper control over the proceedings is maintained.



### **Jargon and legalese**

One of the greatest barriers to participation for non-legal users and observers of courts and tribunals is the language used by the legal system. This language has become so embedded that it is hard to notice when it is being used.

Technical terms and artificial and legalistic use of language should be avoided or, if that is not possible, explained. Examples are given in the full chapter.

### **Assistance and representation from lay representatives**

In most tribunals, litigants can freely choose to be helped or represented by non-lawyers. The position is different in civil courts and family proceedings, where a litigant requires permission from the court to receive assistance or even be represented by a person without rights of audience.

In a climate where legal aid is difficult to obtain and lawyers may be beyond a litigant's means, the McKenzie friend and lay representatives make a significant contribution to access to justice. The judge has to identify those situations where such support is beneficial and distinguish circumstances where it should not be allowed. Guidance is set out in the main body of the chapter.

## **Chapter 2 Children, Young People and Vulnerable Adults**

### **Overview**

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### **Who is covered by this chapter?**

Witnesses and parties may be ‘vulnerable’ in court as a result of various factors, and reasonable adjustments need to be made. Although touching on the wider powers to make adjustments, much of this chapter focuses on the statutory regime in criminal cases for taking ‘special measures’ for ‘vulnerable’ witnesses. Those are defined as witnesses who are under 18, have a disability, or where various other factors apply.

Family courts have increasingly adopted the regime of ‘special measures’ by way of ‘participation directions’, and certain other courts and tribunals have derived ideas and guidance to adopt within their own general procedures.

Where reasonable adjustments for disabled people are required, the starting point would be [chapter 3 \(Physical Disability\)](#), [chapter 4 \(Mental Disability\)](#) and the [Disability Glossary](#) in the appendix. If criminal proceedings are involved, this chapter would also be important. Mental Capacity is addressed in [chapter 5](#).

### **The rights of young and vulnerable witnesses to effective participation**

Accommodating a vulnerable person’s needs (as required by case law, the Equality Act 2010, the European Convention on Human Rights, the UN Convention on the Rights of the Child, the UN Convention on the Rights of Persons with Disabilities) requires the court or tribunal to adopt a flexible approach in order to deal with cases justly.

Child witnesses and defendants have been shown to experience much higher levels of communication difficulty in the justice system than was previously recognised.

This is also likely to be the case for vulnerable adult witnesses and the elderly. There also is a strong case for a distinct approach to the treatment of young adults in the criminal justice system. The House of Commons Justice Committee in its report, ‘The treatment of young adults in the criminal justice system’, says that dealing effectively with young adults while the brain is still developing is crucial for them in making successful transitions to a crime-free adulthood.

Children and vulnerable adults under stress can function at a lower level, making it harder for them to remember accurately and think clearly, and affecting their mental health.

### **The duty to safeguard children and vulnerable adults**

Courts and tribunals have safeguarding responsibilities in respect of children and vulnerable adults. The exercise of judicial discretion often has a safeguarding dimension.

The judiciary should be alert to vulnerability, even if not previously flagged up. Indicators may arise, for example, from someone’s demeanour and language;

age; the circumstances of the alleged offence; a child being ‘looked after’ by the local authority; or because a witness comes from a group with moral or religious proscriptions on speaking about sexual activities.

### **Competence**

All witnesses, regardless of age, are presumed competent. It is recognised that the age of the witness is not determinative of their ability to give truthful and accurate evidence. Competence is not judged by comprehension, and a judge should ensure questions are put in such a way that the individual witness can understand them.

### **Expedited time-scales and active case management**

It is a judge’s responsibility to ensure that all parties and witnesses are able to give their best evidence. Therefore particular thought has to be given to the special measures and other steps that can be taken to achieve this. Decisions about how procedures should be adapted should be made as early as possible.

Trial management powers should be exercised to the full where a vulnerable witness or defendant is involved. A trial date involving a young or vulnerable adult witness should only be changed in exceptional circumstances. The capacity of a vulnerable witness is likely to deteriorate if there is delay.

It is important to schedule a ‘clean start’ to the evidence of vulnerable witnesses as their evidence is also likely to deteriorate if they are kept waiting. There are practical suggestions in the full chapter to help achieve this.

### **Special measures participation directions and related adjustments**

All courts and tribunals have a general duty to ensure a fair hearing which will include making reasonable adjustments where necessary to assist a party or witness to give evidence.

The statutory regime for certain ‘special measures’ in criminal proceedings and ‘participation directions’ in family cases includes giving evidence behind screens, pre-recorded, or by live video link; the appointment of intermediaries and the holding of ground rules hearings.

The witness’s or guardian / carer’s opinion of the most appropriate special measures should be accommodated. Witnesses are likely to give better evidence if they choose how it is given.

Judges and magistrates should ask for relevant information if not provided, (in the case of vulnerable prosecution witnesses, by the police and Witness Care Units). Information relevant to reasonable adjustments may also be provided by parents or guardians, social workers or other professional assessments.

The President of the Family Division has stated repeatedly since 2014 that the family justice system lags behind the criminal justice system in the practices and procedures available to support vulnerable parties and witnesses.

### **Intermediaries**

Intermediaries are communication specialists whose main responsibility is to enable complete, coherent and accurate communication with the witness. They are officers of the court.

Intermediaries write an assessment report, attend pre-trial meetings, and can attend the hearing itself, either for the duration of the vulnerable person's cross-examination or, if needed to ensure full participation and comprehension, throughout.

Their use should be considered by parties at an early stage so that assessments do not delay proceedings. Any resulting applications should be made in good time.

Intermediaries are not always available, and the court may need to consider how best to adapt its procedure and language to ensure effective participation with the assistance of other tools.

Although the decision whether to use an intermediary is ultimately the judge's, it is important to remember that the extent of communication difficulties can sometimes be hidden, and that despite best intentions, advocates do not necessarily have the required expertise either to diagnose difficulty, or to adapt their questioning.

### **Ground rules hearings**

A ground rules hearing is the opportunity for the trial judge and advocates to plan any adaptations to questioning and/or the conduct of the hearing that may be necessary to facilitate the evidence of a vulnerable person. Where an intermediary is appointed, the purpose of the hearing is 'to establish how questions should be put to help the witness understand them and how the intermediary will alert the court if the witness has not understood or needs a break'.

In section 28 proceedings (special measure involving pre-recorded cross-examination) a ground rules hearing form has been developed and is in use in every case.

### **Adjustments to cross-examination**

If justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy may be necessary. There is strong support from the higher courts for detailed constraints on the length, tone and wording of cross-examination where required. Appropriate explanations should be given to the jury. Practical guidelines are in the full chapter.

Judges and magistrates also need to consider how to communicate clearly with and reduce the anxiety of the vulnerable witness.

## **Chapter 3 Physical Disability**

### **Overview**

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### **Why this chapter matters**

Disabled individuals may be affected in many different ways by the court process, some visibly, others invisibly.

Adjustments should be made provided they do not impinge on the fairness of the hearing or trial for both sides.

Each person with a disability must be assessed and treated by the judge or tribunal panel as an individual so that his or her specific needs can be considered and appropriate action taken. It is crucial to be aware that what is perceived as the same or similar impairment, may well have a different impact upon different individuals. Failure to do this may result in a decision being overturned on appeal.

The guidance in the Equal Treatment Bench Book regarding disability ‘is important advice which every judge and every justice of the peace is under a duty to take into account’.<sup>1</sup>

This chapter concerns physical disability. However, physical health problems significantly increase the risk of poor mental health. [Chapter 4](#) contains information on how to recognise and accommodate mental disability.

### **Who do these considerations apply to?**

A physical impairment/disability can impact upon the parties, the representatives of the parties, witnesses, observers, members of the jury, tribunal lay members, clerks and ushers, amongst others. Consideration of adjustment ought to take place where a physical disability impairs any potential participant’s engagement with the court/tribunal process.

### **Identifying an individual’s needs**

Ideally courts and tribunals should have systems for identifying at an early stage, well before the final hearing / trial, whether any adjustments for disability will be required.

Certain kinds of adjustment need to be decided upon in advance of the full hearing, eg selecting appropriate venue and room; booking interpreters and intermediaries; arranging evidence by video link; planning constraints on cross-examination style.

### **Adjustments for case preparation**

Making adjustments in the way pre-trial case preparation takes place is sometimes overlooked. It could include: format of materials; extension of time-limits; staggered

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<sup>1</sup> *R (on the application of King) v Isleworth Crown Court* [2001] All ER (D) 48 (Jan).

orders; additional preliminary hearings, in person or by telephone as appropriate; expediting the final hearing date.

### **Adjustments for the hearing**

Adjustments for the trial / hearing might include:

- Adjusting the timing, length or number of breaks and the length of the day.
- Avoiding the temptation to extend hours or to cut needed breaks in order to finish within the allotted time.
- Adjusting the order in which evidence is heard / the timing of the disabled person's evidence.
- Adapting communication style (although this is more frequently an issue with mental disability – [see chapter 4](#)).
- Facilitating representation in a form which might not otherwise have been permitted.

The [Disability Glossary](#) contains a list of some of the most prevalent disabilities, with their common effects and suggested adjustments. However, the effects of an impairment vary for each individual. It is therefore important not to guess or assume what adjustments an individual might need. Communication with the person concerned is key to understanding what adjustments are needed for that individual. Not only does this ensure that appropriate adjustments are considered, but it also helps protect the dignity of the person concerned.

### **Criminal court procedure – statutory measures**

The above principles apply to criminal courts as much as to civil courts. In addition, there are specific statutory rules allowing 'special measures' for 'vulnerable witnesses' in criminal cases. These have been adopted to some extent in family courts.

Adjustments and 'special measures' for the hearing should usually be discussed at a preliminary hearing or, where 'special measures' apply, at a 'ground rules' hearing.

'Intermediaries' can be appointed to facilitate communication in criminal and family cases.

### **What if the individual does not raise the subject of disability?**

In some cases, people might not tell the court or tribunal that they have a physical disability or that they are having difficulties. The judge should therefore be alert to any indicators that adjustments might be required. In such situations, assistance should be offered tactfully, not overtly suggesting the person has a disability.

### **Acceptable terminology**

There are two ways of perceiving disability: the medical model and the social model. Many disabled people prefer the social model (ie that they are 'disabled' by social barriers) and would expect a judge to be aware of the difference.

There are expressions and terms which should not be used as they may cause offence.

### **The Equality Act 2010**

Discrimination in relation to disability is unlawful under the Equality Act 2010. The Act carries its own definition of 'disability'.

## **Chapter 4 Mental Disability**

### **Overview**

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### **What is mental disability?**

Mental disability is a broad concept which includes:

- Mental ill health eg depression, anxiety, personality disorder.
- Learning disabilities as well as developmental disorders / neurodiverse conditions such as autism and 'specific learning difficulties' such as dyslexia.
- Brain injury / damage.

These different areas are fundamentally different and should not be confused.

Much mental disability is not visible, or is visible only in some contexts. This can lead to misunderstandings.

Even before the Covid-19 pandemic, research suggests 1 in 4 adults has experienced a diagnosable mental health condition in any given year.

Mental ill health is high amongst certain groups, eg those who have been subjected to hate crime, refugees and asylum seekers, victims of modern slavery, veterans and women who have been subjected to domestic violence or sexual abuse. This can be caused by various factors. People in these groups suffer multiple disadvantage.

Some people have both physical and mental disabilities. [Chapter 3](#) contains information on how to accommodate physical disability. It is feared that the economic and social effects of Covid-19 will considerably increase the prevalence of mental ill health.

### **Why this chapter matters**

Mental disability should be considered in the same way as physical disability when it does not render a person incapable of participating in the judicial process. Judges should identify its implications in the court or tribunal setting and understand what should be done to compensate for areas of disadvantage without prejudicing other parties.

The advice in the Equal Treatment Bench Book regarding disability 'is important advice which every judge and every justice of the peace is under a duty to take into account'.<sup>2</sup> Failure to make reasonable adjustments could lead to a case being overturned on appeal.

### **Difficulties the court process may pose for mentally disabled people**

Disabled individuals may be affected in many different ways by the court process, some of which will be more visible than others.

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<sup>2</sup> *R (on the application of King) v Isleworth Crown Court* [2001] All ER (D) 48 (Jan).



Difficulty in case preparation might include difficulty understanding communication; stress with deadlines and multiple orders; greater difficulty accessing voluntary sector advice.

Difficulty during the hearing might include problems with concentration; communication; and tiredness. Common stressors are time pressure; interruptions; prolonged concentration; unfamiliar rules and dress; feelings of not being listened to or believed; loss of control.

### **Adjustments for case preparation**

Depending on the individual's needs, adjustments during case preparation might include: clarity in lay-out and wording of correspondence; increased face-to-face case management preliminary hearings or, if preferred, by telephone; staggering any orders or instructions plus longer time-scales for compliance; giving explicit instructions; expediting the final hearing and advance planning.

### **Adjustments for the hearing**

Again, depending on the individual's needs, adjustments for the trial / hearing might include:

- Adjusting the timing, length or number of breaks and the length of the day.
- Adjusting the order in which evidence is heard / the timing of the disabled person's evidence.
- Avoiding the temptation to extend hours or to cut needed breaks in order to finish within the allotted time.
- Accommodating a carer.
- Facilitating representation in a form which might not otherwise have been permitted.

There are numerous adjustments to facilitate communication which can and should be made by the judge and advocates, eg length of cross-examination; language used; style of questions. In some situations, it is necessary for written questions to be supplied in advance or to go through an intermediary.

Advocates do not always have the necessary experience or understanding to know how to question appropriately a witness with a mental impairment. A judge should be ready, as necessary, to ask advocates to rephrase their cross-examination, to interject when there is clear potential for misunderstanding, and to rephrase questions for the witness.

The [Disability Glossary](#) contains a list of some of the most prevalent disabilities, with their common effects and suggested adjustments. However, the effects of an impairment vary for each individual. It is therefore important not to guess or assume what adjustments an individual might need.

### **What if the individual has not / does not raise the subject**

In some cases, people might not tell the court or tribunal that they have a mental health issue or that they are having any difficulties. Unrepresented parties may be particularly unlikely to draw attention to these.

Judges are not expected to diagnose mental disability but they should be alert to possible indicators, eg the person lacks energy; is fidgety; is very emotional, often incongruously; appears uninterested / disengaged, and avoids eye contact (though the latter can be culturally based); unclear speech; inappropriate interruptions; inappropriate dress, disinhibition, and the person is overly suggestible.

MIND recommends various formulations for sensitively asking a person in such situations about their condition. These are listed in the body of this chapter.

### **Criminal court procedure – statutory measures**

The above principles apply to criminal courts as much as to civil courts. In addition, there are specific statutory rules allowing 'special measures' for 'vulnerable witnesses' in criminal cases. These have also been adopted in family courts.

Adjustments and 'special measures' for the hearing should usually be discussed at a preliminary hearing or, where 'special measures' apply, at a 'ground rules' hearing.

'Intermediaries' can be appointed to facilitate communication in criminal and family cases.

### **Mental health: defendants and the criminal justice system**

Adult prisoners experience a much higher rate of mental health conditions than the general population. Many defendants will not have informed the criminal justice system that they have a mental disability. There are various ways a judge can explore this possibility.

Some courts have Mental Health Liaison and Diversion Services which can help with diagnosis, adjustments and support needs.

The National Audit Office says that being in prison can exacerbate poor mental health and well-being. Prisoners whose mental health needs are not addressed may be more likely to reoffend.

Decisions on bail and sentencing can be affected by offenders' perceived mental health. It is estimated that at least 40% of offenders on Community Orders have a diagnosable mental health condition, yet Mental Health Treatment Requirements have been little used. The Prison Reform Trust recommends these be given greater consideration. MHTRs can where appropriate be made in tandem with alcohol or drugs treatment requirements.

It is important that offenders are able to participate in the hearing, to understand witnesses' evidence against them and understand their sentence and the consequences of not complying with a community order.

### **Veterans**

Reports differ as to whether veterans are more or less likely than comparable age groups in the general population to experience common mental health problems such as depression and anxiety. It is not a significant difference in any event. Veterans are, however, twice as likely as civilians to experience alcohol problems.

Mental and related health problems amongst veterans and family members are often aggravated or associated with social care needs including debt, housing and employment.

Many former service personnel who find themselves involved with the criminal justice system have mental health problems. Social isolation and disconnection/adaptation disorders in civilian life are a more common explanation of behaviour than PTSD.

Knowledge on the part of criminal justice professionals as to the needs of former service personnel is patchy. There is scope for additional sentencing options and support through mental health services, substance misuse services or service charities.

### **Acceptable terminology**

There are two ways of perceiving disability: the medical model and the social model. Most disabled people prefer the social model (ie that they are 'disabled' by social barriers) and would expect a judge to be aware of the difference.

There are expressions and terms which should not be used as they may cause offence.

### **The Equality Act 2010**

Discrimination in relation to disability is unlawful under the Equality Act 2010. The Act carries its own definition of 'disability'.

### **Mental Capacity**

See [chapter 5](#).

## ***Chapter 5 Capacity (Mental)***

### **Overview**

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed via a listing of all the main topics on the contents page for this chapter.

The legal system relies on the assumption that people are capable of making, and thus being responsible for, their own decisions and actions. It is therefore necessary to be able to recognise a lack of mental capacity when it exists, and to cope with the legal implications.

False impressions of lack of capacity can be caused by communication difficulties or a person's physical appearance.

There is no standard test of capacity for all purposes. Where doubt is raised as to mental capacity, the question to ask is not, 'Is he (or she) capable?', but rather, 'Is he (or she) incapable of this particular act or decision at the present time?'.

When seeking opinions about capacity, bear in mind that different professions apply different criteria.

Legal tests vary according to the particular transaction or act involved, but generally relate to the matters which the individual is required to understand.

There is a presumption that an adult is capable, though this may be rebutted by a specific finding of incapacity. When there is good reason for cause for concern and legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity.

It may be necessary to determine the issue of capacity at a separate hearing.

The Mental Capacity Act 2005 (MCA) establishes a comprehensive statutory framework, setting out how decisions should be made by and on behalf of those whose capacity to make their own decisions is in doubt. There is also a Mental Capacity Act Code of Practice.

The Court of Protection has to deal with the entire range of decision-making on behalf of incapacitated adults.

A party who is incapable of conducting the particular proceedings must have a representative ('litigation friend') to do so, whether bringing the proceedings or defending them. Power to appoint litigation friends in tribunals is not generally set out in explicit terms as it is in the CPR. Nevertheless, recent cases have stated that immigration, employment and it would seem by extension, other tribunals, can do so as part of their general case management powers.

## **Chapter 6 Gender**

### **Overview**

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### **Gender disadvantage and stereotyping**

Women remain disadvantaged in many public and private areas of their life; they are under-represented in the judiciary, in parliament and in senior positions across a range of jobs; and there is still a substantial pay gap between men and women.

Stereotypes and assumptions about women's lives can lead to unlawful discrimination.

Factors such as ethnicity, social class, sexual orientation, disability status and age affect women's experience and the types of disadvantage to which they might be subject. Black, Asian and other minority ethnic women ('BAME') often face double disadvantage arising from a combination of their ethnicity and gender. Assumptions should not be made that all women's experiences are the same.

Of course, men can suffer from gender discrimination too. This chapter reflects the reality that this is rarer.

### **Caring**

Women are still the primary carers of children. In 2019, 75% of women with dependent children worked compared with 92.6% of fathers, but they were still twice as likely to do domestic chores on getting home and to be the first port of call when childcare broke down. Most mothers in employment worked part-time until the youngest child was aged 11 – 15.

Many women also provide unpaid care by looking after an ill, older or disabled family member, friend or partner.

Women are more likely to give up work in order to care, often leading to loss of income, career progression, pension and long-term financial security.

Parents with dependent children may have childcare responsibilities which make conventional court / tribunal sitting hours difficult or impossible. It may not be easy to find an alternative carer, particularly for lone parents or those from socially excluded families. Such responsibilities should be accommodated as far as reasonably possible.

### **Pregnancy, maternity leave and breastfeeding**

Research by the former Equal Opportunities Commission and more recently by the Equality and Human Rights Commission with the Department of Business, Innovation & Skills has shown high and persistent levels of discrimination against pregnant women and new mothers in the workplace.

A woman who is heavily pregnant or has just given birth should not be expected to attend a court or tribunal unless she feels able to do so. Pregnant women or new

mothers should be assisted to participate in the court process, whether as parties, witnesses or representatives. If required, changes to start and finish times should be permitted as well as breaks for breastfeeding or expressing, and ideally access to a private room if desired.

A hearing should not be conducted in the presence of a child unless the judge is satisfied that it is appropriate in all the circumstances for the child to see and hear the proceedings.

### **Menopause**

Despite increased publicity over the last couple of years, the menopause often remains a taboo subject in the workplace.

The length and intensity of symptoms vary between women from very mild to very significant, so no assumptions should be made based solely on someone's age. Physical and mental symptoms which might impact on a court appearance can include hot flushes, urinary problems, heavy periods, sleep disturbance, fatigue, headaches, lack of concentration, memory problems, palpitations, anxiety and mood swings.

Adjustments to the hearing could include ensuring the room has working air conditioning or open windows, cold water, easy access to toilet facilities and frequent breaks.

A woman experiencing debilitating menopausal symptoms may be too embarrassed to tell the court that she needs it to make adjustments for her. Judges need to be alert to subtle indicators and suggest adjustments without drawing attention to the possible reason.

### **Sexual harassment**

Sexual harassment remains a problem for women both in and outside work.

According to a survey, 85% of women aged 18–24 have experienced unwanted sexual attention in public places and 45% have experienced unwanted sexual touching.

52% of women in a 2016 TUC poll had experienced some form of sexual harassment at work.

### **Domestic violence and abuse**

Women can be subject to domestic and gender-based violence, some of which is evident and overt; some which is less so, such as coercive control, which has a profound and pervasive impact on a woman's autonomy and well-being.

In the year ended March 2019, an estimated 1.6 million women and 786,000 men experienced domestic abuse.

Women are far more likely than men to be killed by a partner, ex-partner or family member. Over the last ten years, an average of 82 women a year have been killed by a partner or ex-partner.

Many victims of domestic violence withdraw their support for police charges against their abusers. This can be because of the level of fear and control exerted by the perpetrator or because of lack of sufficient response or support from agencies.

Domestic abuse appears to have worsened during the Covid-19 pandemic and attendant restrictions.

Of all violence, domestic violence has the highest rate of repeat victimisation.

There are a number of significant practical and psychological reasons why women do not leave dangerous partners, including a potentially higher risk to their safety.

The Serious Crime Act 2015 created a new offence of 'controlling or coercive behaviour in intimate or familial relationships'. The Home Office Statutory Guidance Framework gives examples.

The Domestic Abuse Bill creates new protections and introduces statutory special measures for court hearings.

### **Sexual offences**

Rape complainants may be reluctant to report crime because they fear that they will be blamed for the attack.

Sexual and rape offences are vastly underreported and where complainants do go to the police, cases often have to be dropped, in part because the victims do not support further action.

Research suggests that deployment of rape myths remains a key part of defence strategy.

Judges hearing serious sexual offence cases must give specific directions to juries, particularly in relation to stereotypes, as laid out in the Crown Court Compendium. Better guidance to jurors would be particularly helpful in relation to whether someone is likely to be raped by someone they know, and whether a rape complainant is likely to show emotion when giving evidence about the rape.

Courts should use the various tools enshrined in common law, statute, the procedural rules and art 6 of the ECHR, which are available to ensure women can feel safe in participating in the justice process and are protected against unjustified, intrusive questioning.

### **Social media**

The impact of social media on women's lives is profound. Although it can be a positive experience for many women, women are particularly vulnerable to online harassment, exploitation, manipulation and intimidation. Judges need to appreciate the central role that social media plays in the lives of many women, with its own set of norms and values which may be unfamiliar to judges.

### **Women as offenders**

The UK has one of the highest rates of women's imprisonment in Western Europe. Both gender and ethnicity have an impact on sentencing decisions and outcomes. Black women are about 29% more likely than white women to be sentenced to custody at Crown Court, especially in relation to certain offences.

Women are also more likely than men to be remanded in custody and then not receive a custodial sentence.

Women's offending can be linked to underlying mental health needs, drug and alcohol problems, coercive relationships, financial difficulties and debt. Black, Asian

and minority ethnic women are more likely to have been living in a deprived area, more likely to be subject to poverty, more likely to have experienced care and to have been excluded from school. Although women comprise 5% of those in prison, they account for 18% of self-harm incidents.

The impact of imprisonment on women, more than half of whom have themselves been victims of serious crime, is especially damaging and their outcomes are worse than men's. Only 9.4% of women released from prison sentences of less than 12 months have positive employment outcomes compared to 26.2% of men. Even short sentences of 3 – 6 months can cause women to lose their accommodation.

BAME women are more likely to experience isolation when in prison leading to increased levels of depression, whilst at the same time they may be less likely to seek help from health care staff.

Women are much more likely to be primary carers, with children far more directly affected by a prison sentence as a result. The family impact of custodial sentencing is particularly acute for black mothers as almost a quarter of black households in the UK are headed by a lone parent. The impact is also acute in Wales, where currently there are no women's prisons. This affects the maintenance of relationships, and means fewer visits being made by children to see their mothers. The existence of dependent children is a factor relevant to sentencing and whether a community order should be preferred to a custodial sentence.

In June 2018, the Ministry of Justice launched a 'Female Offender Strategy'. The strategy notes that custody is particularly damaging for women and that good community management can in many cases be far more effective.

### **Acceptable terminology**

Using acceptable terminology avoids offending parties and witnesses and gives them confidence they will receive a fair hearing. For example:

- Adult women should not be referred to as 'girls'.
- Women should be asked whether they wish to be called 'Ms' or 'Mrs', and it should not be assumed that 'Ms' equates with 'Miss'.
- An unidentified person, eg a doctor, manager or judge, should not be automatically referred to as 'he' (nor, in a female dominated profession, referred to as 'she').

### **The Equality Act 2010**

Sex discrimination is unlawful under the Equality Act 2010.



## **Chapter 7 Modern Slavery**

### **Overview**

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed via a listing of all the main topics on the contents page for this chapter.

Increasing attention is being paid to victims of modern slavery. In August 2017, the National Crime Agency said there are potentially tens of thousands of victims of modern slavery in the UK. Modern slavery occurs across industries and is often not readily apparent to the public.

The Modern Slavery Act 2015 codified and strengthened the criminal law defining slavery, servitude and forced and compulsory labour in line with the European Convention on Human Rights. It outlawed a range of human trafficking offences.

The courts now also have extensive powers to make Slavery and Trafficking Reparation and Prevention Orders, to compensate victims and curtail the activities of defendants.

Section 45 introduces a statutory defence to most crimes where the defendant has been compelled to commit the crime through slavery or trafficking. Where the section 45 defence is relied on it is a matter of fact for the jury to decide whether the defendant was a victim of trafficking.

Various government agencies are tasked with implementing effective anti-modern slavery initiatives such as the Independent Anti-Slavery Commissioner and the Gangmasters and Labour Abuse Authority.

A National Referral Mechanism was established in the UK to protect victims. It enables potential victims of modern slavery to receive safe accommodation whilst an assessment is made of whether they are a victim of trafficking or slavery. Potential victims have been reported from numerous countries, most commonly the UK, Albania, Vietnam, China and India (in that order).

Victims of modern slavery are likely to be vulnerable witnesses, considerably damaged by their experiences and wary of authority figures. Patience as well as sensitivity will be required.

Witnesses may be particularly susceptible to overbearing cross-examination, which risks both unnecessary distress and humiliation of the witness, and worthless answers, or silence. Protected questioning techniques may be appropriate. Examples are given in the full chapter.

Other relevant chapters in the Equal Treatment Bench Book might be (as applicable):

- [‘Migrants, refugees and asylum seekers’](#) in chapter 8.
- [‘Communicating with speakers of English as a second or third language’](#) in chapter 8.
- [‘Language interpreters’](#) in chapter 8.
- [‘Communicating intercultural’](#) in chapter 8.
- Where there are mental health difficulties, [chapter 4 \(Mental Disability\)](#).

## ***Chapter 8 Racism, Cultural/Ethnic Differences Antisemitism and Islamophobia***

### **Overview**

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### **Social and economic inequality**

Social awareness of the ethnically and culturally diverse communities served by the courts, including their experiences of racism and disadvantage, will assist a judge in understanding those participating in the justice system.

Members of minority ethnic groups experience disadvantage associated with their ethnicity in many areas of life. However, there is considerable diversity within communities and not everyone within an ethnic group will experience disadvantage in the same way.

It is important to avoid thinking in terms of stereotypes based on perceived characteristics associated with a particular ethnic group. Just because the majority of members of an ethnic group have certain characteristics or views does not mean all members of the group have those characteristics or views.

### **Black perspectives**

55% of minority ethnic people in Britain feel nothing has improved in their lifetime as regards levels of racism. Compared with white people, far more people from black, Asian and minority ethnic communities experience rudeness from strangers, being treated like a potential shoplifter, and being mistaken for a member of staff in a restaurant or shop. Large numbers have experienced racial abuse and someone assuming they are not British purely because of their ethnicity.

### **Gypsies, Travellers and Roma**

Gypsies, Roma and Travellers face numerous barriers in accessing health and other services.

Trust is low between Gypsy, Traveller and Roma communities and public authorities. It is necessary to build confidence. Terminology is important.

There is a misconception that all Travellers move around.

### **Migrants, refugees and asylum-seekers**

Asylum seekers and refugees are among the most vulnerable groups within our society. They have higher rates of mental health difficulties than are usually found within the general population.

As well as pre-migration trauma, asylum seekers suffer as a result of the loss of the support of family and friends, social isolation, loss of status, culture shock, uncertainty, racism, hostility (eg. from the local population and press), housing difficulties, poverty and loss of choice and control. The process of seeking asylum adds further stress.

New migrants may well have different experiences and understandings of the role of courts. Refugees and asylum seekers may have had traumatic experiences of the administration (or otherwise) of the rule of law in their own countries.

### **Communicating interculturality**

Language and cultural barriers, coupled with poor or inaccurate information about the process, have been identified as the critical barriers to people using courts and tribunals.

Different cultures have different communication styles. These can affect how some people are understood in formal hearings, even when they are speaking relatively fluently in English, and even when they can operate bi-culturally at work or socially.

Cultural differences can lead to misunderstandings in court without anyone realising they are happening, for example:

- East Asian parties and witnesses will be conscious of saving face (both their own and the judge's). This may lead them to say they understand when they do not in order to 'not hold things up'.
- Certain South Asian witnesses when answering a question will adopt a 'narrative style', providing lengthy context first, before arriving at the 'point'
- Different cultures may display emotion differently.

When speaking with a person who is using English as a second language, there are ways of speaking English which make it easier to understand. This is not simply a matter of speaking 'plain English'.

### **Language interpreters**

When speaking through interpreters, it is important to remember that languages differ in terms of their grammar; words with no direct translation; a lack of matching concepts; and different levels of explicitness.

Interpreting can be made simpler where judges and advocates use English in the ways recommended for communicating directly with those speaking English as a second language.

The interpreters' job is to convey the full meaning of what is said to each speaker. It is important not to assume that an interpreter is mistranslating or having a supplementary discussion simply because the translation uses more words than those being translated.

### **The right to speak Welsh**

Welsh is an official language in Wales and Welsh speakers are entitled as of right to use Welsh in court in Wales, without any suggestion that this is a concession or a nuisance or any kind of favouritism. Interpreters are booked through the Welsh Language Unit and conduct simultaneous interpretation.

Bilingual Welsh/English speakers may nevertheless feel Welsh is their stronger language. Code-switching (from one language to the other) is common with many bilingual speakers including Welsh/English bilinguals.

## Names and naming systems

Court and tribunal hearings usually begin with introductions by name. For a party or witness with an unfamiliar 'foreign name', the way a judge reacts to it can symbolise an attitude towards their other cultural differences. Judges should not avoid saying names because they are difficult to pronounce. It may be better to try - and then to apologise for mispronouncing.

In Wales, where the names of places and institutions may additionally arise, every effort should be made also to get the pronunciation of these correct.

Naming systems differ greatly around the world:

- It is best to ask for a person's 'full name' and then to ask how they would like to be addressed.
- Avoid terms like 'First name', 'Second name', 'Middle name', 'Forename', 'Surname' and 'Christian name'. 'Family name' (for 'surname') and 'given name' or 'personal name' (for 'first name') are better.
- In many naming systems, family members do not share the same surname. In other systems, certain surnames are very common.

## The criminal justice system

The government-commissioned Lammy Review into the treatment of black and Asian minority ethnic ('BAME') people in the criminal justice system was published in September 2017.

The Lammy Report states that, as well as being subjected proportionally to significantly more arrests, BAME men and women are more likely than their white counterparts to be committed for trial at the Crown Court and more likely to be remanded in custody.

The Report says there is a high level of distrust in the criminal justice system amongst the BAME population. Part of this is caused by lack of diversity amongst those making important decisions. However, transparency and clear explanations of court process and sentencing decisions are almost as important in building trust.

There remains an over-representation of ethnic minorities within the criminal justice system and disparities in aspects of their treatment.

Disproportionality in the youth justice system has not improved since Lammy. The Magistrates' Association has made a series of recommendations to help fairness and build trust.

Within some BAME groups, attitudes to offending within families and communities, arising from varying cultural or religious beliefs, may result in an additional stigma where offenders are women and put strain on family relationships.

The impact of custodial sentences is particularly acute for black African and black Caribbean families as they are far more likely to be headed by a lone parent.

Many black women say they do not feel their circumstances have been properly understood at the hearing. Together with confusion about the process and court jargon, this leads to a sense of injustice.

### **Care and family courts**

In care proceedings, if judges do not engage with the detail of diverse cultural contexts, minority ethnic parents are likely to feel they have not been heard and understood.

### **Anti-Muslim Racism: Islamophobia**

The volume of anti-Muslim hate crime has risen steadily in recent years. The Muslim Council of Britain ('MCB') says the vast majority of Muslims know someone who has been the target of hate crime. It says that Muslim women are particular targets. The psychological impact of hate crime on the Muslim community has been severe.

In addition to overt hate crime, Muslims feel it has become more socially acceptable amongst British people to express anti-Muslim attitudes. For some, this makes it difficult to be a Muslim in Britain. Nevertheless, the vast majority of Muslims feel a strong sense of loyalty and personal belonging to Britain. The overwhelming majority show positive orientations both towards their own ethnic culture and towards integration into British society.

### **Antisemitism**

Police-recorded anti-Semitic hate crime has also increased dramatically in recent years, creating an increased feeling of insecurity amongst many British Jewish people.

The British government has agreed to adopt the 'working definition' of antisemitism of the International Holocaust Remembrance Alliance.

Israel is important to the identity of most British Jewish people, although many disapprove of the policies of the current Israeli government.

The House of Commons' Home Affairs Committee, as part of its recommendations in its Report into 'Antisemitism in the UK' (October 2016) says word 'Zionist' as a term of abuse has no place in a civilised society. It has been tarnished by its repeated use in antisemitic and aggressive contexts.

### **Acceptable terminology**

Using acceptable terminology when discussing aspects of identity or matters of racism and prejudice avoids offending parties and witnesses and gives them confidence they will receive a fair hearing.

The collective description, 'black, Asian and minority ethnic', and particularly the acronym 'BAME' is increasingly unpopular amongst those to whom it is intended to refer. One difficulty is that it does not differentiate between people with rich and diverse backgrounds, and who have been subjected to different life experiences and patterns of discrimination. Nevertheless, it has been used in this chapter because it is the prevailing term used in most of the research reports.

A person's ethnicity should not be referred to unless relevant. If it is relevant, it is usually best to ask the person concerned how they would wish to be identified, described or addressed.

### **The Equality Act 2010**

Discrimination in relation to 'race' (colour, nationality, national or ethnic origin, and descent) is unlawful under the Equality Act 2010.

## **Chapter 9 Religion**

### **Overview**

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### **The diversity of religious practice**

The richness and diversity of the religions in the UK cannot be overstated. It is important to be respectful of other people's religions and the impact they may have on their lifestyles, belief systems, work and interaction with the justice system.

Each religion has many nuances. Adherents may change over their lifetimes as to the degree with which they follow their religion and its many varieties. Some people may have links to a religion for reasons connected with culture and ethnicity. Some may have a tenuous link with their faith, but would feel bound by respect or family tradition in, say, observing a festival.

Judges should not fall into the trap of making assumptions based on their knowledge of friends or work colleagues as to another person's religious observance.

### **Adjustments to the court process**

A requirement of a religion may mean proceedings need to be conducted in a certain way, eg breaks, adjusted hours and order of witnesses, to allow for fasting and its impact on metabolism, the need to undertake prayer during the day, Sabbaths starting at sunset, and religious holy days; or following a bereavement, where a religious faith encourages swift funeral ceremonies and extended periods of mourning.

Where a hearing is listed on a date on which an important religious festival occurs, a party or witness may have major difficulty in attending. As well as their own religious belief, individuals can be subjected to intense family and cultural pressures. While ultimately it is a matter for judicial discretion, serious consideration should be given to responding positively to requests to alter the date.

Similarly, some faiths observe their weekly Sabbath from sunset (or before) on Friday until sunset on Saturday, and work or other activity is not permitted during this period. In winter months sunset may be as early as mid-afternoon. This can usually be accommodated by starting earlier and having shorter breaks.

In practical terms it should be remembered that if a particular ethnic group is associated with a particular religion, it may not be possible to obtain a court approved interpreter if potential interpreters are also observing their holy day.

### **Remote hearings**

When considering 'remote' hearings involving live cameras, judges may want to consider and address any concerns about modesty and privacy that form part of a person's religious faith. Filming of those participating in a hearing, particularly where members of the press or public may seek access to such images, may need to be addressed in discussion with the parties and their representatives.

A witness can take a religious oath without having a religious book available.



## **Religious dress and wearing the veil**

If this issue arises, it is recommended that the section on this topic in the full chapter is read and considered.

## **Oaths, affirmations and declarations**

The Oaths Act 1978 permits witnesses the choice of swearing an oath or making a solemn affirmation. The term 'affirmation' should be explained when offering witnesses the choice.

The purpose of the oath is to ensure that the witness makes a solemn declaration to tell the truth. The degree to which witnesses consider their conscience bound by the procedure is the criterion of validity.

Witnesses and jurors who choose to affirm or swear an oath must be treated with respect and sensitivity.

Individuals should be offered their choice of religious book. If it is unavailable, apology should be made. Witnesses / jurors should not be pressurised into taking an oath on the wrong religious book. They should be offered the choice of taking a religious oath without the religious book or affirming if they would prefer. The important point is that they feel bound by the oath or affirmation as the case may be.

Assumptions should not be made that individuals of certain minority ethnic background are likely to want to swear on particular holy books.

Some orthodox religious believers may choose to affirm because they believe that swearing an oath is not a procedure to be undertaken in a non-religious context such as court proceedings.

More detail of religious practices, including on taking the oath, is available in the [Glossary of Religions \(religious practices and oath taking requirements\)](#) in the appendix, or use one of the links below to go direct to a particular section:

- [The Baha'i Faith](#)
- [Buddhism](#)
- [Christianity](#)
- [Hinduism](#)
- [Indigenous traditions](#)
- [Islam](#)
- [Jainism](#)
- [Jehovah's Witnesses](#)
- [Judaism](#)
- [Mormonism](#)
- [Non-religious beliefs and non-belief](#)
- [Paganism](#)
- [Rastafarianism](#)
- [Sikhi or Sikhism](#)



- [Taoism](#)
- [Zoroastrianism](#)

### [The Equality Act 2010](#)

Discrimination in relation to religion is unlawful under the Equality Act 2010.

## **Chapter 10 Sexual Orientation**

### **Overview**

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### **What do we mean by 'sexual orientation'?**

'Sexual orientation' is an umbrella term that encompasses sexual identity, attraction and behaviour. It may change over time and in different contexts. Sexual orientation is not a choice. Human sexuality is a wide spectrum ranging from the exclusively heterosexual, through varieties of bisexuality to the exclusively gay. Some people resist labelling, and decline to be identified as being of any particular or fixed sexuality.

The term 'LGBT' (or 'LGBT+') is commonly used when referring generically to people in the gay community ('LGB' – lesbian, gay, bisexual) together with those in the trans community. However, sexual orientation should not be confused with gender identity (see [chapter 12](#)).

### **Discrimination against LGB people**

There is a history of profound discrimination against LGB people in the UK. While enormous strides in equality have been made in recent years, with the gradual repealing of discriminatory laws, the legalising of same-sex marriage in England, Scotland and Wales, and an increased public acceptance of same-sex relationships, bullying, hate crime, discrimination and stereotyping still persist.

### **Workplace experiences**

In a 2017 TUC survey of 5,000 LGBT workers, 39% reported that they had been harassed or discriminated against. 62% had heard homophobic or biphobic remarks or jokes directed to others at work and 20% had been outed against their will. Over half said that their experience of workplace harassment or discrimination had had a negative effect on their mental health. In a 2019 TUC survey of 1,000 LGBT workers, 68% had experienced at least one type of sexual harassment at work and 12% of women reported being seriously sexually assaulted or raped at work. For many LGB people, unequal treatment in their daily lives is an ever-present expectation.

### **Hate Crime**

Levels of homophobic hate crime have increased and black, Asian and minority ethnic individuals are particularly targeted. It is heavily underreported.

### **Coming out**

Many LGB people face a daily dilemma: whether to 'come out' or to keep their orientation hidden and face accusations of a lack of candour.

Many LGB people are deeply fearful of the consequences of 'coming out' and the risk of personal rejection by family, friends and work colleagues.

Whether or not someone chooses to 'come out', they may feel a constant pressure to 'edit' the way they present themselves, eg whether they hold their partner's hand in public, and this can take a mental and emotional toll.

Judges should be aware that fear of being 'outed' in court may place additional burdens on LGB parties, witnesses and victims of crime. Judges should restrain any intrusive questioning about the sexuality of a witness or party unless it is strictly relevant to real issues in the case.

### **Family rights**

Same-sex marriage has been lawful since 2014; civil partnerships were introduced in 2004 for same-sex couples and extended to opposite-sex couples at the end of 2019.

Extensive psychological research has demonstrated that children brought up by same-sex parents do equally as well as those brought up by heterosexual parents in terms of emotional well-being, sexual responsibility, academic achievement and avoidance of crime.

### **LGB asylum seekers**

In 72 countries, same-sex relationships are illegal and can lead to lengthy prison sentences. In 12, the death penalty applies.

People who face persecution on the basis of their real or perceived sexual orientation can claim asylum in Britain. For a variety of reasons including damaging stereotyping, applicants for asylum on this basis may have difficulty in proving their sexual orientation.

There is substantial evidence that LGB asylum seekers are particularly vulnerable while held in detention, experiencing discrimination, harassment and violence from other detainees and members of staff. Following detention, many experience long-lasting effects on their mental health.

### **HIV positive people and AIDS**

It is wrong to assume that having AIDS or being HIV positive is indicative of 'homosexual activity'. Globally, it is heterosexual activity that is responsible for most new HIV infections. Medical advances mean many earlier fears about HIV and AIDS are now out-of-date.

### **Lesbian, gay and bisexual people and crime**

Since 1 October 2012, people in England and Wales with convictions and cautions for acts which are no longer unlawful, can apply to the Home Office to have these removed from their criminal records.

Past offences directed at private consensual sex between men have been repealed.

An extremely offensive perception links being gay with paedophilia. The empirical research does not show that gay or bisexual men are any more likely than heterosexual men to molest children.

### **Acceptable terminology**

Using acceptable terminology avoids offending parties and witnesses and gives them confidence that they will receive a fair hearing. The term 'homosexual' is outdated and may be found offensive. For more detail, see the full chapter.

A person's sexual orientation should not be referred to unless relevant. If it is relevant, it is usually best to ask the person concerned how they would wish to be identified, described or addressed.

### **The Equality Act 2010**

Discrimination in relation to sexual orientation is unlawful under the Equality Act 2010.

## ***Chapter 11 Social Exclusion and Poverty***

### **Overview**

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### **Why this chapter matters**

A disproportionate number of those drawn into the justice system are from socially excluded backgrounds, but judges rarely are. There will be understanding gaps to be bridged on both sides.

### **The concept of social exclusion**

Roughly 14 million people in the UK are living in poverty including four million children. Many cannot afford adequate housing and will struggle to meet unexpected expenses and/or engage in common social activities such as visiting family or friends in hospital, celebrating important events such as family birthdays, and having a hobby or leisure activity.

There is a regional variation in levels of deprivation across England and Wales. Certain groups are also disproportionately affected. People in black, Asian and minority ethnic families are two to three times more likely to be in persistent poverty than people in white families. 48% of children in lone parent households are estimated to be in poverty.

‘Social exclusion’ refers not only to poverty, but to economic or social disadvantage, including an inability to participate in key activities in society such as paid or unpaid work, consumption (ie purchasing power), social interaction and political engagement.

It is caused by complex chains of cause and effect including economic trends, family background, peer group effects, individual personality and health issues. There is a growing association between Adverse Childhood Experiences (ACEs) and social exclusion. In addition, some people may be discriminated against because of gender, ethnicity, religion, language, disability or sexual orientation.

### **Low earnings and income**

The statutory national minimum wage is set at an hourly rate lower than the independently calculated living wage. Low as these rates are, there is considerable evidence of some employers paying less.

There is an increased earnings gap. Even where the minimum wage is paid, pay has taken the brunt of the 2008 recession.

Despite the impression given in some press coverage, subsistence benefit rates are low. In addition, delayed payments or reclaimed overpayments of benefit create severe financial pressures.

Reliance on benefits creates pressures especially when moving into and out of employment. The so-called ‘poverty traps’ make the move into work difficult.

Many people struggle to open bank accounts or secure loans at reasonable interest.

Life on a low income for extended periods is hard. Attempting to 'make ends meet' through a combination of the benefit system and low paid or informal work is challenging. Parents often have 'to go without', in order to buy basic food and clothing for their children.

### **Work insecurity amongst the low paid**

Many people on low incomes do not receive the full range of employment benefits even if they are entitled to them.

1 in 5 workers work in conditions where they could lose their jobs suddenly. Zero-hour contracts, where workers have no guarantee of any hours, are common.

Lack of security in work and low pay creates problems maintaining income while dealing with emergencies whether relating to children, illness or a court or tribunal hearing.

### **Housing**

Over the past 20 years, there has been a large expansion in private renting with high rents eating increasingly heavily into renters' earnings. Nearly half of private renters experience stress and anxiety as a result of housing concerns.

### **Health**

There are health inequalities associated with deprivation, affecting both physical disability and mental ill health (see chapters 3 and 4).

### **Social exclusion and Covid-19**

Research consistently indicates that the pandemic has impacted disproportionately on those in deepest poverty in terms of employment, education and health effects.

### **Family**

Work problems or unemployment, financial pressures and lack of social support networks, all aspects of social exclusion, are significant factors in family breakdown. The child support system may be an additional source of difficulty.

### **'Looked after' children**

Children who are or were in care are now referred to as 'looked after' children. Entry into the care system will have followed problems or trauma within the family unit. Such difficult early issues may resonate throughout life, with effects on educational attainment, mental ill health and attitudes to authority figures.

### **Lack of choice and control**

Socially excluded people may have recurrent contact with state bureaucracy, and the elements of choice and personal control taken for granted by people with resources are missing.

Some of these relationships with the state can be positive, but there is a fear factor for many. This may affect views on authority figures, including judges.

Socially excluded people are used to having important decisions about their lives made by others. This lack of personal autonomy is a feature of social exclusion that those outside it may struggle to understand. It may lead to a lack of independence of thought which may be construed as apathy or a lack of ability, but this needs to be looked at in context.

A failure to attend a hearing, for example, may be due to a chaotic lifestyle, but it may also be linked to the fact that many important decisions in that person's life, such as entitlement to benefit or contact with children through Social Services, are made without their active input.

### **Poor educational attainment and literacy**

Low self-esteem arising from lack of educational qualifications and low literacy levels has a major impact on the choice, effectiveness and persistence of people's behaviours across a range of settings and is a particular problem amongst many socially excluded people.

### **Difficulties which the court process may pose**

A disproportionate number of those appearing before courts and tribunals are from socially excluded backgrounds. This may affect:

- Ability to access professional advice.
- Presentation or non-attendance.
- Concerns about time off hourly paid work / collection or care of children.
- Anxiety about what to wear.
- Ability to understand evidence or procedures.
- Response to authority figures including the judge.
- Response to cross-examination or questions from the bench.
- Ability to access technology, if attending remotely.
- Ability to lodge paperwork digitally, if attending remotely.
- Ability to access a suitable private place to give evidence, if attending remotely.

### **Help with the court process**

To help redress the inequality, procedural fairness is key. It is important to:

- Put people at ease.
- Adopt simple language and avoid jargon.
- Read out and explain documents.
- Check understanding regularly by asking individuals to feed back what they have understood.
- Consider practical matters such as timing of hearings, so as to assist with work or school commitments.
- In remote hearings, check that the participant can hear everyone and understand who is in attendance.

- Also check that the person has available any relevant documentation, and (where a litigant in person) that he or she has not sent anything in to HMCTS shortly before the hearing date.
- Check if the person is expecting any interruptions and provide reassurance that a brief break can be arranged.
- During case preparation, write in simple English and if necessary, hold more face-to-face case management hearings.

### **Literacy and the court process**

If a litigant raises literacy difficulties or if the judge suspects these, the matter should be dealt with sensitively and in a low-key manner.

Various steps can be taken to assist the individual, including reading out passages in documents before asking a question, and allowing them to provide a recorded witness statement where appropriate.

### **Social exclusion and remote hearings**

Usual considerations apply, but it is worth bearing in mind these factors:

- Do not assume access to technology or a quiet space at home.
- Take particular care to ensure understanding and participation.
- Make no assumptions about a party or witness from their home background or dress.

### **Criminal justice: sentencing**

Sentences, although necessary and justified as to punishment, deterrence or to reflect severity, may create or exacerbate social exclusion for offenders, eg:

- Custodial sentences can cause termination of tenancies, difficulties obtaining future employment, detachment from positive social networks, and adverse effects on children.
- Community orders can be difficult to comply with for people with chaotic lives and can interfere with employment.
- Fines can add to debt and adversely impact on those supported by the individual.



## **Chapter 12 Trans People**

### **Overview**

The following is a brief overview of the key points of this chapter. Each topic is addressed more fully, with more practical examples, in the full chapter. Individual subjects can be accessed directly on the links here or, via a listing of all the main topics on the contents page for this chapter.

### **Who are trans people?**

Trans, transgender or transgendered are umbrella terms often used to describe many different people who cross the conventional boundaries of gender.

Not all people who have adopted a social or legal gender different from their birth gender will be happy to be referred to as 'trans' without checking it is appropriate. For example, if they transitioned as a child and have spent their adult life as a wife and mother, they may feel treated as inauthentic if referred to as trans against their will during a hearing.

The term 'transgender' is commonly associated with those people whose gender identity does not correspond to the gender assigned to them at birth, and who identify with the opposite gender. Such people may or may not live in accordance with their gender identity, some may wish to do so in future and some will have long since transitioned so that their gender history is a minor footnote in their life history. The Gender Recognition Act 2004 applies to a narrow group of people who wish to change their legally assigned gender on their birth certificate.

The Equality Act 2010 refers to a protected characteristic of 'gender reassignment' and uses the term 'transsexual', which is now widely considered to be out-of-date and stigmatising.

Sometimes people who identify with no particular gender or who are gender-fluid may also refer to themselves as 'trans' or 'transgender'. The gender landscape is rapidly changing, as is the terminology in the field.

It is important to respect a person's gender identity by using appropriate terms of address, names and pronouns. Everyone is entitled to respect for their gender identity, private life and personal dignity. In this chapter, where we have needed to use an umbrella term, we have generally used 'trans' or 'transgender' in its broadest sense.

### **Transitioning**

Where a person has decided to live permanently in an acquired gender, the process of gender reassignment is usually called 'transitioning', ie transitioning from one gender to another. It is in part a social process and does not necessarily entail any medical process.

### **Discrimination, harassment and violence experienced by people who do not conform to perceived gender norms**

Awareness, knowledge and acceptance of trans people has greatly increased over the last decade. Unfortunately, however, there remains a certain mistrust of non-conventional gender appearance and behaviour, and many transgender people

experience social isolation and/or face prejudice, discrimination, harassment and violence in their daily lives.

Many trans people avoid being open about their gender identity for fear of a negative reaction from others. This applies in all contexts, but particularly when out in public because of safety issues.

Social isolation, social stigma and transphobia can have serious effects on trans people's mental and physical health. Research shows that levels of self-harm and suicide ideation among young trans people and trans adults are much higher than for other people. The coronavirus pandemic with attendant restrictions has had a particularly damaging effect on the mental health of trans people.

Workplace bullying can be a daily occurrence, whether intentional or not. Many trans people would prefer to leave a job than incur the emotional cost of going to an employment tribunal.

### **Treatment of trans people in court**

It should be possible to recognise a person's gender identity and their present name for nearly all court and tribunal purposes, regardless of whether they have obtained legal recognition of their gender by way of a Gender Recognition Certificate.

A person's gender at birth or their transgender history should not be disclosed unless it is necessary and relevant to the particular legal proceedings.

The Gender Recognition Act 2004 (section 22) explicitly prohibits disclosure of such 'protected information' where a person has applied for, or obtained, a Gender Recognition Certificate. It makes a specific exception where disclosure is for the purpose of proceedings before a court or tribunal, but this exception should be interpreted narrowly. For more detail on section 22, see '[Disclosure of protected information under section 22 of the Gender Recognition Act](#)'.

In the rare circumstances where it is necessary in the proceedings to disclose a person's previous name and transgender history, the court may consider making reporting restrictions to prevent the disclosure of this information more widely or directing a private hearing.

### **Trans people as victims of crime**

There is a high level of transphobic hate crime, which is believed to be greatly underreported.

People may be apprehensive about coming to court, and particularly the risk of possible disclosure of their medical history with long-term consequences.

### **Trans offenders**

Trans people are likely to be highly apprehensive about being sentenced to a term of imprisonment because of concerns about safety and also about access to any medically necessary hormonal support.

A Ministry of Justice/NOMS policy on 'The Care and Management of Individuals who are Transgender' (reissued 27 January 2020) applies to prisons and providers of probation services. The policy is concerned to protect the rights and welfare of trans prisoners as well as those of others around them. Pre-Sentence Report ('PSR')

writers must consider requesting a full adjournment for the preparation of a PSR where offenders disclose that they are transgender.

### **Gender identity and rights of asylum seekers**

Approximately 50 countries recognise transgender people's rights to have their gender identity legally recognised. In many countries, trans people are excluded by society, and may face widespread discrimination, prosecution, harassment and violence.

People who face persecution on the basis of their gender identity can claim asylum in Britain. For a variety of reasons, many applicants for asylum on this basis have difficulty in proving that they are transgender.

There is substantial evidence that trans asylum seekers are particularly vulnerable while held in detention, experiencing discrimination, harassment and violence from other detainees and members of staff. In addition, the transitioning process may be halted. Following detention, many experience long-lasting effects on their mental health.

### **Gender Recognition Act 2004**

The Gender Recognition Act 2004 ('GRA') enables transgender people to change their legal gender by applying to the Gender Recognition Panel for a Gender Recognition Certificate ('GRC'). Certain legal and medical criteria must be satisfied.

A person who has been issued with a full GRC is entitled to be recognised in the gender stated on their certificate for all purposes including marriage and can obtain a new birth certificate.

For a variety of reasons many transgender people do not apply for a GRC. Some feel that legal recognition is not necessary for their day-to-day living, and some do not want to go down the medical route required by the GRA, in terms of obtaining a medical diagnosis of 'gender dysphoria'.

The GRA is now regarded as out of date by some people because, eg it does not accommodate people who have a permanent non-binary gender or are gender fluid.

### **Information about medical diagnosis and medical treatment**

The Gender Recognition Act 2004 requires a person to be diagnosed with 'gender dysphoria' in order to apply for legal recognition of their gender. Internationally, diagnostic criteria and terminology have moved away from pathologising definitions.

As previously stated, not all trans people wish to undergo gender reassignment surgery (also called gender confirmation surgery). For those that do, it may involve a number of surgeries over time.

### **Acceptable terminology**

Using acceptable terminology avoids offending parties and witnesses and gives them confidence they will receive a fair hearing. As stated above, most individuals will find the terms 'transgender' and 'trans' acceptable. However, many people who have completed a gender transition may not (or may no longer) regard themselves as trans, but simply as (for example) a man or as a woman. Others will be happy to

talk about their trans history. It is advisable to read the section on acceptable terminology in the full chapter for further guidance.

### **Equality Act 2010**

The Equality Act 2010 appears to be limited in its explicit protection for trans people, in that the protected characteristic is defined as gender reassignment. However, its full interpretation and scope has not yet been tested in the appellate courts.

## Appendix G Contributors to past editions

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The Equal Treatment Bench Book has evolved over many years and through the contributions of numerous judicial office holders in all jurisdictions.

As well as the contributions of those listed in our [acknowledgements for this 2021 edition](#) of the Equal Treatment Bench Book, we would like to recognise the contributions of the following to past editions.

Thanks to (as they then were):

Mrs Justice Geraldine Andrews

Her Honour Judge Sally Cahill, QC

Regional Tribunal Judge Jeremy Bennett, President of the Gender Recognition Panel

Employment Judge Christa Christensen, Judicial College Director of Training (Tribunals)

His Honour Martin Dancey

Her Honour Judge Jennifer Eady, QC

Robyn Emerton, JP

His Honour Judge Andrew Hatton, Judicial College Director of Training (Courts)

Regional Tribunal Judge Hugh Howard

District Judge David Kitson (Magistrates' Courts)

Designated First-Tier Tribunal Judge John Manuell

District Judge (Magistrates' Courts) Naomi Redhouse

Senior Coroner Penny Schofield

District Judge Chris Simmonds

Employment Judge Joanna Wade

Equal acknowledgment is due to all those contributors to editions prior to 2018.

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