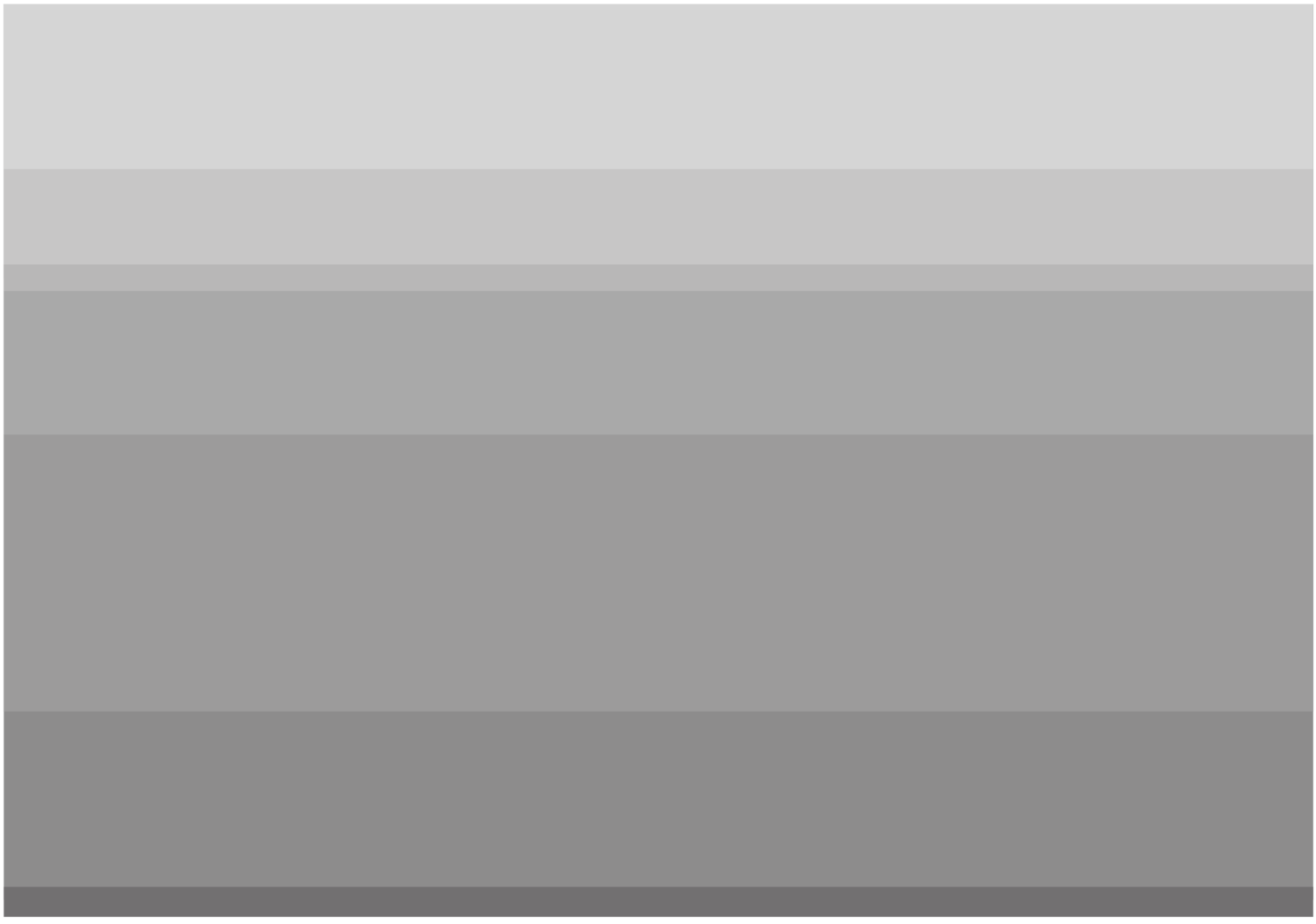
Judicial College

Equal Treatment Bench Book

July 2024 (May 2025 update)



The Equal Treatment Bench Book is regularly updated. In the event that you choose to print or download it, please be aware that it is subject to modification and improvement from time to time.

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Foreword

The Equal Treatment Bench Book (ETBB) is 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.

Since 2018 it has been published online and, whilst its focus is primarily aimed at all judicial office holders and is written by judges for judges, it has also come to be regarded as an invaluable resource for litigants in person and to many other people connected directly or indirectly with issues relating to equal treatment.

The ETBB is a living document, constantly updated and amended to reflect changing circumstances and to incorporate the most up-to-date legislation, cases and Practice Directions.

This most recent edition represents the first major revision for three years. It is the product of many months of dedicated and painstaking work by the editorial team, led by their Chair, District Judge Clare Hockney. They have my unending gratitude for all their hard work; work which is especially challenging in a year where there is to be a major review. I should also thank the small editorial team, who are constantly at the wheel doing the regular updates which mean that the user need never fear that they are using an “old edition” of the book.

Whilst the entire ETBB has been revised, significant revisions can be found in particular, in relation to capacity; sex (previously titled gender); race and ethnicity (previously titled racism, cultural/ethnic difference, antisemitism and Islamophobia); sexual orientation; social poverty; vulnerable witnesses; and trans people.

You will discover a new look with the current edition. The ETBB is not only fully updated, but it is also considerably shorter, concentrating on providing practical advice to judges for conducting fair hearings.

We believe that the slimmed-down version is more focused, user-friendly and, therefore, more relevant.

The new edition continues to focus on practical steps which help judges enable parties and witnesses to participate fully in the legal process and gives contextual details of people in different communities to guide judges’ communication and understanding of issues as they arise.

The ETBB is an essential resource for each and every judicial office holder. The Judicial College is proud to be able to publish this major revision providing, as it does, guidance to help each and every one of you to achieve good communication and to demonstrate fairness in every court or tribunal in which you may sit and which, together, will ensure that the interests of justice are served in relation to every individual who comes before us.

Once again, with my thanks to the editorial committee.

Eleanor King

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

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Preface

“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

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. Judges are expected to abide by this principle of fairness and be ever vigilant to ensure decisions are not influenced by their own personal biases, beliefs or perspectives. The Bench Book seeks to support and build on the inherent understanding that judges will have of fair treatment and equality. 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. 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 engage in legal proceedings in our courts and tribunals.
5. Judges will also wish to make reference to the "Guide to Judicial Conduct" (July 2023). 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.[1]
6. The Lady Chief Justice 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. Judges will also want to refer to the "Statement of Expected Behaviour" (January 2023), which reminds judges of the need to treat others fairly and respectfully, including staff and other judges, and to ensure no one is exposed to bias or prejudice. 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

7. 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. 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.

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1 Guide to Judicial Conduct (July 2023).

9. Understanding means understanding the evidence, the materials, the process, the meaning of questions and the answers to them.
10. If someone remains silent, it does not necessarily mean that they understand. It may equally mean that they feel intimidated or inadequate, or that they are unable to express their thoughts and ideas easily.
11. It may be possible for a judge to test understanding by asking a supplementary question or summarising what they understand 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.
12. Litigants in person (LIPs) may not feel confident to test the understanding of others or to admit that they do not fully understand a point.
13. 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.
14. Effective communication requires an awareness of "where a person is coming from" in terms of background, culture and additional 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.
15. 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.
16. 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.
17. Lay people may 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.
18. 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 taking of offence.
19. 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

20. Fair treatment does not mean treating everyone in the same way during court proceedings; it is about taking any necessary additional steps to aid participation and achieve best evidence. For example, an LIP with little understanding of law and procedure is not in a comparable situation to a King's Counsel (KC).

21. 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.

22. People who have difficulty coping with the language or procedures of the court or tribunal, and who 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.

23. 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.

24. The sooner the disadvantage is identified, the easier it is to remedy. 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.

25. LIPs 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.

26. 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.

27. 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.

28. Those at a particular disadvantage may include people from ethnic minority 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.

29. It is for judges to ensure that all these people 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.

30. 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.

31. A lack of understanding 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.

32. Stereotypes are simplistic mental shortcuts which are often inaccurate, generate misleading perceptions and can cause mistakes.

Diversity

33. Judicial diversity, in terms of ethnicity, sex, 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 gap in social background and life experience between the parties and the judges making decisions. Efforts have been made in recent years to increase diversity as set out in the Judicial Diversity and Inclusion Strategy. A Judicial Diversity Committee supports the Lady Chief Justice (LCJ) in her statutory duty to encourage judicial diversity. The Diversity and Community Relations Judges and the Diversity and Community Relations Magistrates work to bridge the gap between the judiciary and the communities that they serve.

34. 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

35. 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.

36. In each section, judges will find recommended terms, because some terms may now be outdated/informal. Judges understand the importance of being precise and careful with language and these recommended terms are generally considered the most up to date in a legal/formal/professional context.

Chapter 1: Litigants in person and lay representatives

Contents

Why this chapter matters

Litigants in person (LIPs)

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Ways to help

Particular areas of difficulty

Common procedural misunderstandings in case preparation

Compromise

Difficulties at the hearing and how to help

Criminal cases

Jargon and legalese

Assistance and representation from lay representatives

Related content in other chapters

- See chapter 2 (Children, young people and vulnerable adults).

Why this chapter matters

37. The number of litigants in person (LIPs) has risen significantly in recent years and is likely to continue doing so due to financial constraints and the consequences of Legal Aid reforms. Public funding in civil, some family cases, and in tribunals, is now only available in exceptional circumstances. Judges are increasingly dealing with LIPs in courts and tribunals.

38. This chapter aims to identify the challenges 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. There are also significant differences between criminal and civil procedure.

39. 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 always important to remember that every LIP is unique and will likely have different and varying levels of need. It is for courts and tribunals in each individual case to decide what is the fairest, most appropriate and practical approach. However, this will usually be informed through discussion with the LIP.

40. This chapter is specifically about LIPs and lay representatives. However, court processes need to be understood by all users, including parties who have legal representation, defendants, witnesses and jurors.[2]

Litigants in person (LIPs)

41. LIP is the term used in courts and tribunals to describe individuals who exercise their right to conduct legal proceedings on their own behalf (other terms used are “self-represented litigant” or “unrepresented party”). When speaking to such individuals, it would usually be better to use a non-technical term, such as “a person without a representative”.

42. There are several 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 may even distrust lawyers. Others believe that they will be better at putting their own case across.

43. Most 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 LIPs. Public funding has never been available for small claims. The great majority of people appearing in tribunals are also unrepresented.

The courts’ duty to LIPs

44. 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 in which that person is a party.

45. In certain cases (where there is alleged domestic or sexual abuse), an LIP is prohibited from cross-examining an alleged victim. This is detailed in chapter 2.

46. LIPs may be stressed and worried: they are operating in an alien environment which uses language that is often unfamiliar to them. They are often trying to grasp concepts of law and procedure, about which they may have no knowledge. They may well be experiencing

[2] Understanding Courts – A report by JUSTICE (2019) makes recommendations for improving the understanding of the court process by lay users.

feelings of fear, ignorance, frustration, anger, confusion and disadvantage, especially if appearing against a represented party.

47. 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. This can affect the way an LIP behaves in presenting their case.

Difficulties faced by LIPs

48. It is often these challenges that lead to commentators referring to LIPs as a problem in the system:

> "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".)

49. In 2013, a judicial working party chaired by Hickinbottom J summed up the position as follows:

> "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."

50. There is no typical LIP, and they will come from a diverse range of social and educational backgrounds. Some may be very skilled at representing themselves. An LIP's knowledge, aptitude and general attitude towards the proceedings are largely unknown quantities at the outset of the hearing.

51. The challenges faced by LIPs often stem from their lack of knowledge of the law and court or tribunal procedure. 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 up on them.
- 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.

52. All these factors have an adverse effect on the preparation and presentation of their case.

Ways to help

53. The aim is to ensure that LIPs understand what is going on and what is expected of them at all stages of the proceedings. 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 needs.

Holding the confidence of both sides

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

55. 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.

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

57. 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

58. Some LIPs are unaware of the explanatory leaflets available at the court, or of the lists of advice agencies. For example:
    - Citizens Advice has an informative online information system, and local Citizens Advice offices may be able to help with case preparation.
    - Advicenow also has a useful collation of resources on its "Going to court or tribunal" website page.
    - Many universities maintain legal advice centres, which see university students researching the legal issue and providing a letter of advice.
    - HMCTS' National Digital Support Service (NDSS) offers help to prospective and current litigants in completing applications and responses online. It ensures no one is disadvantaged or excluded through the digitalisation of services.

59. 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.

60. 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 an LIP.

Particular areas of difficulty

Language

61. 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 LIP, and they may have difficulty 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.

62. 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 interculturally" and "Interpreters" in chapter 8. Those sections consider communication with witnesses, but difficulties are likely to become more acute when a person is also presenting their own case, without any representative to mediate cultural and linguistic understanding.

Mental disability

63. LIPs with certain mental disabilities may have difficulty presenting their case and giving evidence for a variety of reasons. Difficulties faced by witnesses with disabilities are likely to be exacerbated where the individual is representing themselves. For details of potential needs and adjustments, see chapter 4 (Mental disability).

Social and educational background

64. LIPs 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 an 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.

65. 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 and poverty).

Common procedural misunderstandings in case preparation

66. The following sets out common areas of difficulty that many may recognise from their own cases. Before presenting suggestions of approaches that may help, it is important to note procedures vary in the different jurisdictions as well as between criminal and civil cases. Some of the suggestions will not apply to tribunals.

Statements of case/Pleadings and limitation periods

67. LIPs 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.
- Overlooking limitation periods, and not understanding the relevant law and evidence required for an application to extend time.
- Thinking that an automated or clerical acceptance of their claim form and processing of their case means that it is accepted and that any applicable time limit has been complied with.
- Believing 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". It may be necessary to explain the difference between the two.

Case management: understanding directions and court orders

68. Where pre-hearing directions are given in writing, LIPs may lack the skill set to do it correctly or may not understand what is required.

69. Case management hearings 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

70. In conducting case management hearings, it is useful to:

- Make any necessary reasonable adjustments at the start, if the LIP is disabled (see "Adjustments for case preparation" in chapter 3 (Physical disability) and chapter 4 (Mental disability).
- 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 LIPs 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 them to feed back what they must now do and on what date, rather than asking, "Do you understand?".
- 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 can 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.
- Similarly, if English is not the LIP's first language, check whether an interpreter is necessary. Even if not, see the sections on "Communicating interculturally" and "Interpreters" in chapter 8. These considerations do not only apply to the final hearing/trial.

General difficulties in case management and how to help

71. As well as the areas set out under sub-headings below, LIPs frequently have these difficulties:
    - **Who to send information and documents to, and in what form:** An instruction apparently as 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 can be extremely difficult. As a result, when ordered to provide particulars, LIPs tend to either miss the deadline, avoid the task altogether or do it incorrectly – 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. 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 an 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 may take longer to carry out tasks than represented parties because of unfamiliarity with the process and uncertainty about 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 several steps at once or in close succession, this can feel overwhelming. It is particularly challenging for an LIP with a mental disability, or whose first language is not English, or if they have any learning disability such as dyslexia.
  - How to help: Where a sequence of directions is set out in writing, whether or not following a case management hearing, create a mini table with date/who does the action/what the action is, by way of a summary. Where there is serious difficulty, eg due to mental disability, 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

72. Given the greater emphasis in the current Civil Procedure Rules on enforcement of rules and orders, it is crucial that LIPs understand both what is required of them and the consequences of non-compliance.

73. LIPs do not necessarily realise that court orders are more than aspirational. They may also fail to understand that if they do not comply with an order, they are at risk of being struck out.

74. 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 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

75. The duty to disclose documents is frequently neglected by LIPs:

- 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.

76. Late disclosure of relevant documents can cause delays at the hearing and, in extreme cases, adjournment. When a pre-trial or case management hearing 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

77. LIPs 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.
- Many LIPs find it difficult to understand the difference between disclosure and collating documents for the trial bundle. It may need 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.

78. The archaic term "trial bundle" adds to confusion. It should be explained that this simply means a tagged or lever-arch file of documents (or an electronic bundle).

79. 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.
- 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.
- Set a timescale 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, an LIP is still likely to need a hard copy as well as the 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.

Witnesses and witness statements

80. LIPs sometimes do not realise they will have to give evidence themselves and must therefore provide a witness statement.

81. 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, LIPs 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.

82. LIPs might not know what a witness statement is and should be given some guidance on how to structure a witness statement and its approximate length.

83. 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).

84. 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.

85. If an LIP applies to adjourn to call a witness, bear in mind that they 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

86. LIPs 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.

87. 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.

88. 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.

89. 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

90. It can be helpful to direct a represented party to send the LIP a short and easily accessible document setting out their legal arguments and any case law they seek to rely on. This enables the LIP to appear at a hearing with at least some advance warning and understanding of legal principles/case law that may be raised.

91. Sometimes LIPs do not understand the role of case law, so it can help to:

- Briefly explain the doctrine of precedent to enable an 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 sets a legal rule that also applies to your case."

Compromise

92. LIPs face many potential difficulties in relation to compromise and negotiated settlements:

- They may not realise it is possible or how to go about it.
- 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 the way to negotiations.
- They may not have had access to advice on the merits or value of their claim.
- 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.

93. 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.
- Suggest they get 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.
- 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

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

- Introduce those present. Explain their roles, and how the judge should be addressed.
- Explain the procedure and timing of the day.
- Ensure mobile phones are switched off.

- Inform the LIP that they should ask for clarification if anything is unclear and request breaks if they require them.
- Clearly state the purpose of the hearing and issue(s) to be decided.
- Explain that a party may take notes, but the law forbids the making of audio or video recordings (without the express consent of the judge).
- Only one person may speak at a time. Each side will have a full opportunity to present its case.

95. The judge may need to assist the LIP in ways that would not be appropriate if a party was represented. This may include:
    - Ascertaining the LIP's level of understanding at the outset.
    - Not engaging in a legalistic discussion with a legal representative which might feel unfair and make the LIP feel excluded. When discussing matters with a legally represented party and an LIP is present, then plain English should be used to ensure that both parties feel engaged and understand what is being discussed. This will avoid any feelings of exclusion and unfairness by the LIP.
    - 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.[3]
    - When hearing submissions at any stage, allowing the LIP to conclude their prepared submission rather than asking questions as they naturally arise. It helps to save relevant questions until the end of the prepared submission.
96. For the particular difficulties which an LIP may encounter in a remote video hearing, see appendix E (Remote hearings).

Advocacy

97. If an LIP does not know where to start in cross-examining an opposing witness, it may be helpful to suggest that they prepare by reading through the latter's witness statement and marking the parts of evidence they do not agree with.
98. When trying to cross-examine opposition witnesses, LIPs 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.
99. It should be explained to the LIP that once the judge has understood the point they are getting at, they can assist them to put it in question form. 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.

[3] *Serafin v Malkiewicz and others* [2020] UKSC 23.

100. 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 if they have failed to do so. The significance of an 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 an LIP will accidentally omit to put points, especially if they give evidence second in the case, greater care should be taken with releasing opposition witnesses after they have given evidence.
101. 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.
102. At the end of their evidence, LIPs should be asked if they have said everything they need to, and they should be reminded that this is their last opportunity to give evidence.
103. Where one party is represented, invite the represented party to make final submissions first, so that the LIP can see how it should be done. If there is time, allow the LIP a break to compose their final submissions.
104. LIPs are likely to be unfamiliar with the word "submissions" and daunted if the judge uses 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.
105. 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 their side's interests. They should be reminded of this.

Giving judgment (the decision)

106. 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.
107. 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 be accessible.
108. Another possibility in appropriate cases is starting the judgment with a short and clear accessible summary.[4] Certain websites have tools which can help test text for accessibility.

Criminal cases

Useful guidance materials

109. In relation to Crown Court proceedings, there is extensive guidance on unrepresented defendants in the Crown Court Compendium – July 2024 (April 2025 update), chapter 3 Trial management, 3-5. This document should be consulted for additional information beyond that set out in this chapter.
110. 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

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

the Criminal Procedure Rules (see, in particular, r.2.12 and r.24.14). In particular, it should be noted that a legal adviser has an obligation to assist an unrepresented defendant.

Guilty pleas

111. The Plea and Trial Preparation Hearing (PTPH) 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. 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.[5]

112. 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

113. Under Article 6(3) of the European Convention of Human Rights (Schedule 1, Human Rights Act 1998), everyone charged with a criminal offence has the right to defend themselves in person or through legal assistance of their own choosing or, if they have not sufficient means to pay for legal assistance, to be given it free where the interests of justice so require.

114. 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.[6]

115. 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. A defendant is entitled to do this. 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 themself, 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 place on their rights.[7]

Assistance during the trial

116. Throughout a trial, a judge must be ready to assist a defendant in the conduct of their case. This is particularly so when the defendant is examining or cross-examining witnesses and giving evidence.

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5 See Part 38.5 of the Criminal Procedure Rules.

6 The Criminal Legal Aid Manual (updated 23 March 2023) 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.

7 Sections 34, 35 and 36 Youth Justice and Criminal Evidence Act 1999, and Criminal Procedure Rules Part 23 apply.

117. The judge should provide an unrepresented defendant with a document that outlines the nature and order of proceedings. This sets out in writing the key questions that the judge will ask.[8]

Jargon and legalese

118. Where possible, avoid using legalese.

119. If the use of a technical term cannot be avoided, it should be explained, and the same will apply when a legal representative uses such a term. 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 their own (instead of "sitting alone").
- Amongst other things (instead of "inter alia").
- Evidence that is not allowed (instead of "inadmissible").

Assistance and representation from lay representatives

120. 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.

121. 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.

122. Permission is required whether such a person is described as a "McKenzie Friend" and whether or not they are 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.

123. Note also the importance of family members helping as informal interpreters (see "Informal interpreters" in chapter 8).

Lay representatives and tribunals

124. 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 their advocate at one or more hearings, or simply sit next to the litigant during the hearing and help.

125. With some tribunals, there is specific external regulation of representatives who charge fees in order to protect litigants. Lay companions or representatives will be of varying experience and competence. Some will be very experienced and need no assistance from the tribunal. On the other hand, a party may have been unable to afford competent professional advice or

[8] See the Crown Court Compendium (July 2024, April 2025 update) Part 1, ss.3-5, pp 3-16. This sets out extensive details and contains a specimen document to be given to the defendant.

unable to assess the experience of the individual they have 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 they were unrepresented, to the detriment of that party.

126. 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 an LIP.

The courts – "McKenzie Friends"

127. The term "McKenzie Friend"[9] refers to an individual who assists an unrepresented party in court by taking notes, quietly making suggestions or offering advice and guidance.

128. The judge's permission is required for a McKenzie Friend, although there is a presumption that such permission will be granted.[10]

129. The role differs from that of advocate in that the McKenzie Friend does not (but always subject to the judge's discretion in the specific case) address the court or examine any witnesses.

130. 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).

131. 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 their own name as representative of the litigant, or by signing court documents.

132. A person will not be permitted to perform the role of McKenzie Friend if unsuitable, eg if they have an interest in any financial outcome of the case.

133. 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.

Support Through Court and Citizens Advice

134. 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

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9 The term "McKenzie Friend" derives from *McKenzie v McKenzie* [1971] p33, 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 Hangar must sit in the public gallery during the hearing, and that he could only advise Mr McKenzie during 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.

10 See clause 7 of the "Practice Guidance (McKenzie Friends: Civil and Family Courts)".

what they want 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.

135. 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.

Rights of audience

136. 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 an LIP and assisting as a McKenzie Friend in the traditional sense.

137. 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 Civil Procedure Rules (CPR).

138. There is guidance on when a court might allow a lay representative.[11]

Small claims

139. Under s.11 Courts and Legal Services Act 1990 the Lord Chancellor authorised the Lay Representatives [Rights of Audience] Order 1999.[12] This is also set out in CPR Part 27 Practice Direction (PD) 27A para. 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 they are unruly, mislead the court or demonstrate unsuitability.

Housing authority officers and employees of arm's length management organisations (ALMOs)

140. Sections 60 and 60A 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.

141. 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 s.191 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.

11 See *Graham v Eltham Conservative & Unionist Club and Ors*, Hickinbottom J.
12 SI 1999/1225.

Companies

142. 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).

143. This does not apply to small claims. Any officer or employee may represent the company on a small claim (CPR Part 27 PD 3.2(4)).

Official Receivers

144. 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

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

146. The Official Solicitor usually becomes formally involved when appointed by the court, and may act as the person's own solicitor, or instruct a private firm of solicitors to act for them.

Representing adults who lack capacity

147. Mental incapacity is addressed in detail in chapter 5.

Chapter 2: Children, young people and vulnerable adults

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- Witnesses who are refugees or asylum seekers, or who do not speak English as a first language (see chapter 8).

- Witnesses who have been subjected to hate crime, eg because of their race, religion or sexual orientation (see chapter 8 and chapter 10 (Sexual orientation)).
- Witnesses who are unable to read or write or verbally communicate very well (see chapter 11 (Social exclusion and poverty)).

Why this chapter matters

1. 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. It is for judges to ensure that such people can fully participate in proceedings. Once vulnerability is identified it is for judges to ensure special measures/participation directions are made. This chapter sets out how judges can ensure that those parties and witnesses participate effectively and give their best evidence.
2. 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 (LIP).

The rights of young and vulnerable witnesses to effective participation

3. The need for swift adoption of remote hearings during the Covid-19 pandemic magnified difficulties faced by children and vulnerable adults in hearings. The ongoing use of remote hearings means that judges need to be alert to these issues and to mitigate them where possible. See appendix E regarding Remote hearings.
4. 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.
5. 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.
6. 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.[13] The Guidelines cover practical and procedural matters that should be considered at an early stage in the case.[14]
7. The effective participation in criminal proceedings by young and vulnerable defendants has been considered in a series of cases[15] 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 (EHRC) has expressed concerns about whether effective participation is working well in practice, particularly amongst adults with mental impairments.[16]

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13 "Guidelines in relation to children giving evidence in family proceedings": Working Party of the Family Justice Council (Dec 2011). See also "Guidelines for Judges Meeting Children who are Subject to Family Proceedings": Family Justice Council (April 2010).

14 Considered in *Re KP (a child)* [2014] EWCA Civ 554.

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

16 "Inclusive Justice: a system designed for all": EHRC (June 2020).

8. In criminal proceedings, the Criminal Procedure Rules (Part 18) and the Criminal Practice Directions 2023 (Part 6) set out the court's duties to adapt its process to assist the young and vulnerable witness and defendant.

9. The Sentencing Council in its "Sentencing children and young people – Definitive Guideline" and s.58 Sentencing Act 2020 make 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 s.44 Children and Young Persons Act 1933 applies to all young people before the court – whether witnesses or defendants.

10. 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. For further information on the lasting effects that adverse childhood experiences (ACE) can have on health, see chapter 4 (Mental disability).
    - 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.
    - The effect on children and young people of experiences of loss and neglect and/or abuse.

Vulnerability and who it covers in this chapter

11. 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, judges are required 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.

12. The criminal justice system defines as vulnerable those witnesses who are under 18, have a disability, or where various other factors apply (see below).

13. The Family Court assesses vulnerability based on a number of different factors which are likely to diminish a party or witness's ability to participate in the case.

14. 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 ground rules hearings) are well-established. However, it also deals with the Family Court's framework of participation directions, and notes that a similar framework for civil courts has more recently been put in place, and tribunals have derived ideas and guidance to adopt within their own general procedures. The approach in this chapter is also applicable to those with cognitive impairments, acquired brain injury and/or learning disabilities.

Vulnerability of young and adult offenders

15. The Youth Justice Board and Ministry of Justice, looking at children who had been sentenced in 2019 to 2020, found that the proportion of the total number of children assessed who had a speech, language and communication concern was 71%. More generally, the figures give an indication of the vulnerability and complex needs of these children.[17]

16. Evidence shows that both "looked after" children and young people, and ethnic minority children and young people, are overrepresented in the criminal justice system.[18] There is an ongoing inquiry into the youth justice system by the Justice Committee and, in the first report,[19] racial disproportionality was examined, with 51.9% of the youth custodial population being recorded as from ethnicities other than white. See also chapter 8.

17. As regards children sentenced in 2019 to 2020,[20] there were concerns on learning (education and training) in 68% of cases, substance misuse concerns in 76%, 46% of them had a care history, 72% were rated as having mental health concerns, 47% had physical health concerns and, overall, over half (57%) 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.)

18. The rate of mental ill-health is also high in adults in the criminal justice system. From a prison survey, 48% of men and 70% of women in prison have some form of mental health difficulty.[21]

19. In relation to young adults, the House of Commons Justice Committee[22] 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.

20. 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.

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

22. Beyond the criminal justice system, a report on pre-court needs and vulnerabilities of adults involved in family private law cases identified that there were higher levels of health service use, higher levels of mental health problems, higher known substance abuse, higher

17 "Assessing the needs of sentenced children in the Youth Justice System 2018/19": Youth Justice Board and Ministry of Justice (28 May 2020).
18 Paras. 1.16 and 1.18 "Overarching Principles – Sentencing Children and Young People: Definitive Guideline": Sentencing Council.
19 "Children and Young People in Custody (Part 1) Entry into the youth justice system": House of Commons Justice Committee Inquiry (12 November 2020).
20 "Assessing the needs of sentenced children in the Youth Justice System 2018/19": Youth Justice Board and Ministry of Justice (28 May 2020).
21 "A joint thematic inspection of the criminal justice journey for individuals with mental health needs and disorders": HMICFRS (November 2021).
22 "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).

numbers of episodes of self-harm, and much higher levels of exposure to domestic violence and abuse (all for both women and men) than those in the comparison group.[23]

23. The Equal Treatment Bench Book uses the term "vulnerability" as this reflects the statutory language, although recognises that many disabled people are unhappy with the use of such language, which is seen as inferring victimhood and a cry for others to take responsibility.[24]

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.[25] 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.
    - 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. This must recognise that adults sometimes have complex interpersonal relationships and may be ambivalent, unclear or unrealistic about their personal circumstances.[26]

Safeguarding in courts and tribunals

26. Individuals may have distressing experiences in 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 2022 report stressed[27] that the "prospect of waiting years for justice is likely to be traumatising for victims and their families and has a damaging impact on justice itself, making it more likely that victims will drop out of cases".

23 "Uncovering private family law: Adult characteristics and vulnerabilities (Wales)": Nuffield Family Justice Observatory (November 2021).
24 "Concerns regarding the use of the vulnerability concept in research on people with intellectual disability": Snipstad, British Journal of Learning Disabilities, Wiley Online Library (27 January 2021).
25 "Working together to safeguard children: A guide to inter-agency working to safeguard and promote the welfare of children": HM Government (2018).
26 Definition taken from the "Care and support statutory guidance": Department of Health (updated 5 October 2023).
27 "The impact of the Covid-19 pandemic on the criminal justice system – a progress report": Criminal Justice Joint Inspection (May 2022).

- Similarly, in 2021, it was found that as there is no common definition of mental health across the criminal justice system, there are inconsistencies in identification and needs are not met.[28]

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 in HMCTS" – March 2023.
    - "Customer Accessibility and Inclusion Reasonable Adjustment Guidance" – May 2022.
28. Other key documents setting out victims' and witnesses' rights are:
    - "Code of Practice for Victims of Crime in England and Wales (Victims' Code)".
    - "Witness Charter".

The judiciary's role in safeguarding

29. Judges and magistrates have a role in safeguarding vulnerable people at court in ways which further the overriding objective of dealing with cases justly and do not interfere with judicial independence.
30. 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.
31. 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 the judge to difficulties.
    - Requiring that a parent or guardian attends with a child or young person appearing before the court.[29]
    - Having contingency plans (eg regarding the timing of the vulnerable witness's evidence) if things go wrong in ways affecting the witness's welfare.
32. Safeguarding concerns should not be over-ridden because of pressures arising elsewhere in the justice system process. Whether the witness should seek pre-trial therapy is not a decision for the police, prosecutor or court; the best interests of the witness are the paramount consideration.[30] Crown Prosecution Service (CPS) Legal Guidance "Pre-Trial Therapy"[31] recognises that "fear of causing a criminal prosecution to fail has, in some instances, resulted in therapeutic support to victims being delayed until after the trial on the

28 "A joint thematic inspection of the criminal justice journey for individuals with mental health needs and disorders": Criminal Justice Joint Inspection (November 2021).
29 Section 34A Children and Young Persons Act 1933.
30 "Achieving Best Evidence in Criminal Proceedings": Ministry of Justice (January 2022) 4.63.
31 "Pre-Trial Therapy": CPS (26 May 2022).

basis that it might be argued that the treatment could have tainted the victim's evidence by interfering with the accuracy of their recall of the incident(s)." The Guidance says that "this fear is speculative and conflicts with the need to ensure that victims are able to receive, as soon as possible, effective treatment and therapeutic support to assist their recovery. This guidance is clear that therapy should not be delayed for any reason connected with a criminal investigation of prosecution".

33. The Victims and Prisoners Act 2024 includes clarification that any request from the police for therapy notes or other personal records of rape victims must be necessary and proportionate. The National Operating Model for Adult Rape Prosecution was introduced July 2023 by the CPS, alongside a national police model.

Specific difficulties faced in the justice system

34. 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.[32]

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

36. The April 2021 amendment to the Civil Procedure Rules (CPR) overriding objective made it clear that dealing with a case justly includes ensuring that parties can participate fully, and that parties and witnesses can give their best evidence. Civil Practice Direction (CPD) 1A supports the participation of vulnerable parties or witnesses.

37. Similarly, "Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings" (April 2020) draws on the criminal, family and civil frameworks to set out how adjustments could be made in the Employment Tribunal.

Competence

38. 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.[33] 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 processes have to be adapted to enable witnesses to give the best evidence of which they are capable.[34]

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32 Examples taken from the joint inspection report on the experience of young victims and witnesses in the criminal justice system.

33 Section 53 Youth Justice and Criminal Evidence Act 1999.

34 *R v B* [2010] EWCA Crim 4.

39. 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.

40. When there is material indicating that the witness satisfies the competency test (such as an achieving best evidence (ABE) 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.[35]

What we can do to help

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.[36] There are also duties to make adjustments to enable the full participation of disabled people.[37]

42. Lord Justice Carnwath (former Senior President of Tribunals (SPT)) issued the "Child, Vulnerable Adult and Sensitive Witnesses Practice Direction" in 2008, which applies to the First Tier and Upper Tribunal.[38] 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 appropriate skills or experience in facilitating the giving of evidence by a child, vulnerable adult or sensitive witness.

43. In a 2017 Court of Appeal asylum case,[39] Sir Ernest Ryder (former 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 and the joint Presidential Practice Guidance Note. 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 themselves and obtain effective access to justice without the appointment. For more detail on litigation friends, see chapter 5.

35 *R v F* [2013] EWCA Crim 424.
36 Rule 3.8(3)(b) Criminal Procedure Rules 2020, as amended.
37 See chapter 4 (Mental disability) for more detail.
38 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.
39 *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.

44. In the 2013 Toulmin Lecture, Lord Judge (former Lord Chief Justice), 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."[40]

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.[41]
- Where a judge did not follow Part 3A Family Procedure Rules (FPR) in relation to special measures by ordering a mother who alleged serious sexual abuse to give evidence from counsel's row instead of using screens, and where the judge also failed to give adequate reasons for the decision, those were serious procedural irregularities which would allow for an appeal to be granted.[42]
- 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".[43] 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 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 apparent, there should have been an adjournment for a cognitive assessment.[44]

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. Alongside the special measures provisions, the court has the power to prohibit the defendant from directly cross-examining a witness (in some cases there is an absolute prohibition) and to appoint a legal representative to act for them or represent their interests.[45]

48. There is a parallel framework for the Family Court, assisting parties and witnesses by way of "participation directions", and special measures are also now available in the civil courts. The prohibition of cross-examination in person in abuse cases has now been extended to the family and civil jurisdictions and there is statutory guidance about the role of qualified legal representatives appointed to conduct the cross-examination.

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40 "Half a Century of Change: The Evidence of Child Victims": King's College London.
41 Lord Chief Justice, para. 29, *R v Cox* [2012] EWCA Crim 549; see also *R v B* [2010] EWCA Crim 4.
42 *JH v MF* [2020] EWHC 86 (Fam).
43 Lord Justice Thorpe, para. 21, *In the Matter of M (A Child)* [2012] EWCA Civ 1905.
44 *N (a child)* [2019] EWCA Civ 1997.
45 Sections 34-38 Youth Justice and Criminal Evidence Act 1999.

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.[46]

50. In employment tribunals, there is Presidential Guidance in relation to vulnerable parties and witnesses (including children).[47] 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.

Expedited timescales and active case management

Rules and materials

51. The relevant procedural rules and useful materials for case management are:

- Part 1 CPR 1998.
- CPD 1A – Participation of Vulnerable Parties or Witnesses.
- Part 3 and Part 18 of the Criminal Procedure Rules (CrimPR).
- Criminal Practice Directions (Crim PD) 2023 as amended July 2024
  - 5 Trial management
  - 6 Vulnerable people and witness evidence.
- Part 1 and Part 13 Youth Defendants in the Crown Court (October 2023).
- Part 3A FPR 2010.
- PD 3AA (supplementing the FPR) – Vulnerable Persons: Participation in Proceedings and Giving Evidence.
- PD 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).[48]
- PD 12B (supplementing the FPR) – Child Arrangements Programme, especially PD 12B, para. 4, in relation to the child's involvement in proceedings.
- PD 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.

46 A Magistrates' Association document, at appendix A of the Judicial College Youth Court Bench Book.
47 "Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings" (April 2020).
48 The Protocol and Good Practice Model 2013 (and associated documents) can be accessed on the Judicial Intranet.

- "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.

Timetabling

52. Section 1(2) Children 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 wellbeing. Timetabling is therefore an issue that impacts upon best evidence and safeguarding.[49]

54. The Young Witness Protocol[50] 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 it has 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.[51]

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. Delay in a case involving a child complainant should be kept to an "irreducible minimum".[52]
    - 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 eight weeks from the date of plea.[53]

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49 "Falling short? A snapshot of young witness policy and practice": Plotnikov and Woolfson. NSPCC (Feb 2019).
50 "A Protocol between the National Police Chiefs' Council, the CPS and HMCTS to Expedite Cases Involving Witnesses under 10 Years" (2018).
51 CrimPD 2023, 5.15.
52 *R v B* [2010] EWCA Crim 4.
53 "A Protocol between the National Police Chiefs' Council, the CPS and HMCTS to Expedite Cases Involving Witnesses under 10 Years" (2018).

57. To ensure a fast timetable can be adhered to, pre-planning is necessary:

- Where s.28 Youth Justice and Criminal Evidence Act (YJCEA) 1999 applies, allowing vulnerable and intimidated witnesses to video record their cross-examination before the trial, the timetable set out in Part 6 CrimPD 2023 must be followed. Any delay or failures to comply with the orders made at the PTPH must be reported immediately to the judge and, if ordered, the parties must provide a weekly update on progress to the court.[54]
- 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 recorded interview, allowing time for the witness to see the edited version. 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.
- 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 have been 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 wellbeing 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?

[54] CrimPD 6.3.28.

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 they are 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. Criminal Practice Directions 2023 5.6.3 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. 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 10 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 finish 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.[55]
    - 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

[55] Rule 3.9(5)(b), Criminal Procedure Rules October 2020, as amended.

to the witness and not the other way round.[56] Control needs to be taken at the ground rules hearing to ensure that only those matters which are relevant are put. Not 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. Special measures are set out in ss.16-33 YJCEA 1999. Also applicable are Criminal Procedure Rules October 2020 (as amended), rr.18.8-18.13.[57] 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.
    - Adult complainants of sexual offences, or trafficking/exploitation offences, or domestic abuse.
    - A witness to a "relevant offence", currently defined to include homicide offences and other offences involving a firearm or knife.

68. 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.

56 *R v Lubemba* [2014] EWCA Crim 2064 – Hallett LJ at para. 45.
57 See also the Judicial College's Crown Court Compendium, Part 1, ss.3-6 on "Special Measures".

- 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 s.28.)
- Examination through an intermediary.
- Provision of aids to communication.
- Anonymity.[58]

Disapplying special measures

69. 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

70. 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. Victims of domestic abuse are now automatically deemed vulnerable.[59] 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.[60]

71. 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.
- 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.

58 Part 3, chapter 2 Coroners and Justice Act 2009.
59 Section 63 Domestic Abuse Act 2021. See “Domestic Violence and abuse” section in chapter 6 for more information on domestic abuse and on coercive control.
60 FPR 2010 rr.3A.5 and 3A.9.

- Any characteristic of the party or witness relevant to the participation directions.
- The nature and extent of any information before the court.

72. 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.
73. 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

74. Standard 14 of the Ministry of Justice (MOJ) Witness Charter[61] 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.

Screens

75. 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.
76. 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, they should be behind the screen before the defendant and members of the public are seated, and leave at a different time during adjournments.
77. 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 their supporters.

Evidence by live link

78. 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.

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61 "The Witness Charter: standards of care for witnesses in the criminal justice system": MOJ (December 2013). See also the "Code of Practice for Victims of Crime": MOJ (updated January 2024), known as the Victims' Code. The Victims and Prisoners Bill aims to "raise the profile and awareness of victims' entitlements".

79. A defendant may also have access to the live link for their own evidence or for the whole trial and no defence application is needed.[62] The principles to be applied are set out in Lord Burnett of Maldon's (former Lord Chief Justice) "Live Links in Criminal Courts – Guidance" (July 2022) with the emphasis on use for preliminary hearings.

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.[63]
- 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.[64]

81. See chapter 6 in relation to rape myths and the directions that should be given by judges to counter any presumptions.

Witness entitlement to practise on the live link

82. Witnesses who will be giving evidence by live link are entitled to practise speaking and listening on it[65] 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.

83. 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 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

84. 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.
- This can be anyone who is not a party/has no detailed knowledge of evidence; ideally, the person preparing the witness for court.

85. 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.

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62 Section 51 Criminal Justice Act 2003.
63 "Child Abuse: Law and Policy Across Boundaries": Hoyano and Keenan (2010).
64 Special measures in rape trials: "Exploring the impact of screens, live links and video-recorded evidence on mock juror deliberations": Ellison and Munro (2012).
65 "The Witness Charter: standards of care for witnesses in the criminal justice system": MOJ (December 2013), standard 11.

Flexible use of the live link

86. Examples of using the live link process flexibly include:

- 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.

87. 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.

88. 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.

89. 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

90. Witnesses who give recorded evidence-in-chief are entitled to refresh their memory before trial.

91. The first viewing is often distressing or distracting and should be scheduled before the day of testimony.

92. Vulnerable witnesses should not be required to watch 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 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 video. This is not the responsibility of the intermediary. These matters should be covered at the PTPH.[66]

93. If it is appropriate to swear the witness, do so just before cross-examination, asking if they have watched the video and if its contents are "true", in words tailored to the witness's understanding. 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".

94. Arrangements should be judicially led, and are likely to be determined at the PTPH. 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 video is ruled inadmissible, identify an alternative method of refreshing.

Intermediaries: facilitating complete, coherent and accurate communication

The function

95. Intermediaries are one of the statutory special measures for prosecution and defence witnesses in criminal cases.[67] They are communication specialists whose role is to enable complete, coherent and accurate communication with vulnerable witnesses.[68] They come from a variety of professional backgrounds such as speech and language therapy, teaching, nursing and social work. Many are self-employed and combine their work as an intermediary with another profession.

96. Intermediaries are impartial, neutral officers of the court. They are not expert witnesses. They facilitate two-way communication between justice system professionals and vulnerable witnesses/parties. They aim to improve the quality of evidence by ensuring 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. Intermediaries also attend pre-trial meetings and, where appropriate, can attend all or part of the hearing itself.

97. A review into the provision of registered intermediaries for children and vulnerable victims and witnesses[69] has found that intermediaries are invaluable in giving them a voice in the criminal justice system and providing them with equality of access to justice.

98. Registered intermediaries are also provided for Welsh-speaking vulnerable people. In circumstances 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 needs.

66 Section 4.53 "Achieving Best Evidence in Criminal Proceedings": MOJ (January 2022).

67 Section 29 YJCEA 1999. For the use of intermediaries for defendants (as opposed to witnesses), see CrimPR 18.23-18.25 and "Non-registered intermediaries for vulnerable defendants in criminal proceedings" below.

68 Section 16 YJCEA 1999.

69 "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).

Before the hearing

99. The need for an intermediary should be considered at the earliest stage in the proceedings possible, with resulting applications being made promptly. 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.

100. The intermediary will write an assessment report, indicating the witness's likely needs in court, including whether an intermediary will need to be present. Intermediaries' assessment reports are valued as a guide to how questioning can best be adapted to the individual's needs.

101. 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 adjustments to 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.

102. 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.

During the hearing

103. 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".[70]

104. 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 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.

105. In criminal cases, registered intermediaries for prosecution and defence witnesses are appointed through the MOJ Witness Intermediary Scheme involving regulation, DBS checks, accredited training, support and standards for matching skills to witness needs.[71]

106. For the use of intermediaries for defendants, see "Intermediaries for vulnerable defendants in criminal proceedings". The HMCTS Appointed Intermediary Service (HAIS) scheme provides intermediary support not only for defendants in criminal cases, but also for court users in family, civil and tribunal cases.

Should an intermediary be appointed?

107. The Criminal Justice Inspectorates in 2012 highlighted 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.[72]

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70 *R v Cox* [2012] EWCA Crim 549.
71 "The Registered Intermediary Procedural Guidance Manual": MOJ (2020).
72 "Joint inspection report on the experience of young victims and witnesses in the Criminal Justice System": HMCPSI and HMIC (2012).

108. 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.[73]

109. 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.

110. Whether young witnesses should have an intermediary assessment should be decided with care on an individual basis. The language comprehension of a young witness, no matter how advanced they appear, is likely to be less than that of an adult witness.

111. A deaf person should always be assessed by an expert in deafness and/or a suitably qualified and experienced intermediary.[74]

112. 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

113. 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. It is important to remember that the extent of communication needs can sometimes be hidden and 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 intermediary who has already assessed the witness's communication needs is able to alert the court to any problems or loss of concentration.

If the intermediary is not available on the day

114. 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.

73 Section 19(1)(b) YJCEA 1999.
74 "Working with Deaf People in the Criminal Justice System": MOJ (2020).

Intermediaries in family cases

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

116. Part 3A FPR 2010 now provides that the court must consider the following:

- 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.[75]
- 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.[76]
- There is now an assumption that where it is stated that a party or a witness is, or is at risk of, being a victim of domestic abuse carried out by a party, relative of another party or a witness in the proceedings, they are deemed to be vulnerable.[77]
- It is the duty of the court and of all parties to identify any party or witness who is vulnerable at the earliest possible stage of any family proceedings.[78]
- The factors to be taken into account when deciding whether it is necessary to make participation directions under r.3A.8 are set out at r.3A.7. They include:
  - For a party to participate in proceedings with the assistance of an intermediary.
  - For a party or witness to be questioned in court with the assistance of an intermediary – see the leading case of *Re M (A Child: Intermediaries)* [2025] EWCA Civ 440[79], which confirmed that the test for appointing an intermediary is set out in Part 3A FPR and PD 3AA. No additional gloss is needed and by following this framework, "the court will steer a path between the evils of procedural unfairness to a vulnerable person on the one hand, and waste of public resources on the other." Quite simply, "[t]he test for the appointment of an intermediary for any aspect of proceedings is that it is necessary to achieve a fair hearing." Recent guidance from the President of the Family Division (PFD) has now been amended in light of this case.[80]

117. "Practice Direction 3AA – Vulnerable persons: participation in proceedings and giving evidence" sets out the procedure and practice to be followed where rule 3A applies. See also the recent case of *Re M*.

118. 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".[81] 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

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75 Rule 3A.4 FPR 2010.
76 Rule 3A.5.
77 Rule 3A.2A.
78 FPR Part 1 and 3A. Practice Direction 3AA, para 1.3; *M (A Child)* [2021] EWHC 3225 (Fam).
79 *Re M (A Child: Intermediaries)* [2025] EWCA Civ 440
80 Practice Guidance by the PFD: "The use of Intermediaries, Lay Advocates and Cognitive Assessments in the Family Court" (Jan 2025). *Re M* made a correction to the approach to be taken to the instruction of intermediaries. Courts should no longer rely upon paras. 8, 10 and 12.
81 See "Practice Guidance by the PFD: The use of Intermediaries, Lay Advocates and Cognitive Assessments in the Family Court" (January 2025). The term "intermediary" in the Guidance also includes a "lay advocate".

is qualified and/or has experience in legal proceedings of assisting a party with an intellectual impairment or learning difficulty which compromises their ability to process and comprehend information.

119. 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, who is impartial, is on enabling communication between the court and the party, the focus of a lay advocate is directly to assist the party.

120. In *Re C (Lay Advocates)*,[82] 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 their solicitor out of court was, in cases benefitting from legal representation funded by civil legal aid, a matter for the Legal Aid Agency (LAA).

Intermediaries for vulnerable defendants in criminal proceedings

121. Section 104 Coroners and Justice Act 2009 inserts s.33BA YJCEA 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.[83] In one trial which lasted 12 weeks, the judge appointed two non-registered intermediaries who took turns to attend.

122. See CrimPR Part 18 and CrimPD 6.2.4 to 6.2.6 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 September 2019): "Intermediaries: step by step", Parts 7 and 8.

123. Intermediary provision for defendants in criminal cases is organised through HMCTS (the HAIS scheme).

124. 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, the court must appoint an intermediary to facilitate the defendant's effective participation in the trial where:

- Their ability is likely to be diminished by reason of age (if under 18), mental disorder, significant impairment of intelligence and social functioning, or a physical disability or disorder.
- The appointment is necessary to facilitate effective participation.[84]

125. If 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.[85]

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82 *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).

83 *R (AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin).

84 CrimPR 2010, 18.23.

85 *R v Biddle (Joseph)* [2019] EWCA Crim 86; *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).

126. An application for an intermediary therefore needs to be addressed carefully, on a case-by-case basis, with sensitivity and caution. It is important when making this assessment:
    - 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 they have 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 they 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.
127. Such 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".[86]
    - Appointment of an intermediary by itself may not in itself be a sufficient adjustment. In *R v Jordan Dixon*,[87] 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 they have 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.[88] It is then a matter for the court to adapt the trial to address the defendant's communication needs.[89]
    - In *R v Rashid*,[90] 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.
128. The services provided by approved intermediaries are mostly funded by HMCTS, with no charges or payments required by legal representatives. This is except for pre-hearing conferences in the Family Court. In these cases, legal representatives pay the invoices issued by the provider – and can then reclaim from the LAA, if applicable. If the service user is being supported through legal aid, whether the service is funded by HMCTS or not, there must be an application to the LAA for prior authority to incur disbursements. If a judge orders that HMCTS will fund a service not normally covered, the provider will be instructed to send their invoice to HMCTS.

86 Recorder of Leeds, *R v GP and 4 Others* (2012) T20120409, "Guidance for future applications".
87 [2013] EWCA 465.
88 *R v Cox* [2012] EWCA Crim 549.
89 CrimPD 2023, 6.2.7.
90 [2017] EWCA Crim 2.

Intermediaries in civil and tribunal cases

129. HMCTS now provides intermediary support for court users in civil courts and tribunals as well as Family Court. There are two types of approved service: approved organisations and approved individuals. Parties who are not legally represented can ask the court or tribunal for an intermediary. If approved by the judge, the court or tribunal will arrange the assessment. If a party is represented, the representative will have to make the arrangements. Details of this extended scheme are on the GOV.UK website.

130. CPD 1A sets out how the court should take steps, including consideration of the use of intermediaries, to ensure that parties and witnesses can give their best evidence. The court, with the assistance of the parties, should try to identify vulnerability of parties or witnesses at the earliest possible stage of proceedings and to consider whether a party's participation in the proceedings, or 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 directions as a result.

131. Generally, intermediaries are used less in tribunals than in criminal or family courts. Many tribunals are inquisitorial, adapted to aid participation, and some may even be able to draw on specialist members who are themselves communication experts. Tribunals are starting to develop their own guidance around the use of intermediaries.

132. A court or tribunal should consider ordering a ground rules hearing before a vulnerable person is to give evidence in order to decide what directions or "special measures", including the assistance of an intermediary, would be necessary.

Sources of other information about intermediaries

133. 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

134. 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.[91] Aids have helped improve the quality of evidence and given access to justice to some vulnerable witnesses who were previously excluded.

135. 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*.[92]
- 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.

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91 The Advocate's Gateway Toolkit 14: "Using communication aids in the criminal justice system".
92 [2013] EWCA Crim 424.

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

Ground rules hearings

Function of ground rules hearings

137. 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.

138. Where an intermediary is appointed, the purpose of the hearing is to establish how questions should be put to help the witness or defendant understand them and how the intermediary will alert the court if the witness has not understood or needs a break and for the court to give any other directions necessary for effective participation.[93]

139. 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.

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

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

142. 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.
- Always necessary in family cases where the court has decided that a vulnerable party, vulnerable witness or protected party should give evidence.[94]
- 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 YJCEA 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.

Topics for discussion at a ground rules hearing

143. A ground rules hearing should discuss, as relevant:[95]

- The general care of the witness.
- If, when and where the witness is to be shown their video evidence.

93 CrimPR 2020, 3.9.
94 Family PD 3AA 5.2 to 5.7.
95 *R v Lubemba*; *R v JP* [2014] EWCA 2064; CPR 3.9(7).

- 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 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.[96]

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. 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:

- CrimPR 3.9, CrimPD 2023 6.1.2 and 6.1.3.

[96] “Falling short? A snapshot of young witness policy and practice”: Plotnikov and Woolfson. NSPCC (Feb 2019).

- 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.
- 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.[97] 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."[98]
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".[99]
152. The Court of Appeal has endorsed limitation of cross-examination in certain circumstances, including requiring advocates to:
    - Ask direct, not leading, questions.[100]
    - 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.[101] 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.[102]

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97 *Serafin v Malkiewicz* [2020] UKSC 23. The judge's approach to questioning resulted in an LIP not receiving a fair trial.
98 *R v Lubemba; R v JP* [2014] EWCA 2064, para. 45.
99 *R v Wills* [2011] EWCA Crim 1938.
100 *R v Edwards* [2011] EWCA Crim 3028.
101 *R v Wills* [2011] EWCA Crim 1938.
102 The Advocate's Gateway Toolkits.

154. Where limitations on questioning are "necessary and appropriate":[103]
    - The limits must be clearly defined.
    - The judge should explain them to the jury and the reasons for them.[104]
    - 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.[105] They are expected to challenge unrealistic estimates in the PTPH 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 their 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.[106]

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.[107]

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 nine", or "I am going to ask you questions about what happened in the shed".

160. During questioning:
    - 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.

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103 *R v Wills* [2011] EWCA Crim 1938.
104 See guidance in *R v YGM* [2018] EWCA Crim 2458.
105 Rule 3(11)d Criminal Procedure Rules 2020.
106 "Exploring the influence of courtroom questioning and pre-trial preparation on adult witness accuracy": Ellison and Wheatcroft (2010).
107 "Advocacy for Vulnerable People and Children (Criminal Course). National Training Programme. The 20 Principles of Questioning": The Inns of Court College of Advocacy (2022).

- There should be no directive leading questions, also known as "tag" questions, which are both coercive and unnecessarily complex.[108] A directive leading question (eg "You are lying, aren't you?") has been found to elicit significantly less accurate responses than a non-directive leading question (eg "Are you lying?").[109] Closed leading questions, where the question suggests an answer, should also be strictly limited and the responses may be of limited evidential value. 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".[110] 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 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 they told someone else.

108 "Advocacy for Vulnerable People and Children (Criminal Course). National Training Programme. The 20 Principles of Questioning": The Inns of Court College of Advocacy (2022).
109 "Rethinking leading: the directive non-directive divide": Wheatcroft and others. University of Gloucestershire (2015).
110 "Half a Century of Change: The Evidence of Child Victims": Toulmin Lecture, King's College London (2013).

- Questions containing negatives, which are harder to decode. 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 they are lying is 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 and developments include:

    - Reporting Restrictions in the Criminal Courts September 2022. Section 45 YJCEA 1999 enables courts to restrict reporting the identity of victims, witnesses and defendants under 18 in magistrates’ courts and the Crown Court. Section 44 Children and Young Persons Act (CYPA) 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 YJCEA gives the criminal courts a power to grant life-long anonymity to victims and

witnesses under 18. Section 49 CYPA provides automatic anonymity in the youth court, except in limited circumstances. 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 the power to impose a discretionary reporting restriction under s.39 CYPA 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, Lord Judge, 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 is an area where the media have aligned their codes so that they adopt a common approach.[111]
- "The Family Courts: Media Access & Reporting" (PFD, Judicial College and Society of Editors 2011). This summarised the position and further guidance was issued by the PFD in October 2019.[112]
- In his report, "Confidence and Confidentiality: Transparency in the Family Courts" (28 October 2021), the PFD's main conclusion was that, subject to having very clear rules about maintaining the anonymity of children and family, accredited media representatives should be able to report publicly on what they see and hear in the Family Court. He acknowledged that the vast majority of children involved in these cases do not want to be identified and want to maintain their complete anonymity and they must be heard and respected. His view is that it is possible to maintain their privacy whilst operating a much more open justice system.
- As a result of the work on transparency, a reporting pilot took place in the Family Court, enabling certain accredited journalists and legal bloggers to attend and report on proceedings heard in pilot courts. This was rolled out to all Family Court Centres at the end of January 2025. For those courts not previously in the pilot, this will follow stepped arrangements, starting with public law cases, then private law cases and finally magistrates. Journalists and legal bloggers are able to report on what they see and hear in the Family Court if a transparency order is granted. The rules on what may or may not be reported in a particular case will be set out in a transparency order issued by the court. Each order will take the form of an injunction and reporters will be bound by its

111 Reporting Restrictions in the Criminal Courts, 5.10. IPSO Editors' Code of Practice; OFCOM Code; BBC Editorial Guidelines.

112 "President's Guidance: Guidance as to Reporting in the Family Courts" (3 October 2019).

terms. All reporting will be subject to the principle of anonymity in relation to children, family members and other specified parties, unless the court orders otherwise.

- In the Crown Court, in exceptional circumstances, a witness anonymity order can be made. Careful directions to the jury will need to be given in these cases.[113]

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 them.

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 recording 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.)
- "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.)

[113] Crown Court Compendium (2024), 3-8.

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 their 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. Where ground rules on cross-examination are necessary, judges 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.[114]

174. If the advocate is unable or unwilling to adapt their 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.

175. 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

176. 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*,[115] 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):

> "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."

177. 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 their role and qualifications and the purpose of any communication aids. Examples of a judicial explanation to the jury are as follows:[116]

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114 *R v Wills* [2011] EWCA Crim 1938.
115 [2011] EWCA Crim 3028.
116 Wording of examples taken from the Judicial College's Crown Court Compendium (2024), 3-7.

178. **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 them.
>
> 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."

179. **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.
>
> 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

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

- Using an easy language paragraph that summarises the decision; this is especially of benefit to litigants with learning disorders or to children.[117]
- For written judgments, there are tools online to make language simpler and which will assist judges to write for a person with low literacy skills.[118]
- 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.[119]
- In *Lancashire County Council v Mr A, Mr B, The Children*, Jackson J explained that the judgment was as short as possible so that the mother and older children could follow it.[120]

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117 Sir Peter Jackson's judgment in *Re A: Letter to a Young Person* [2017] EWFC 48.
118 Readability Test – WebFX.
119 Case No: SN17C00073 (27 March 2018).
120 [2016] EWFC 9 (4 February 2016).

- 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.[121]
- There is an example of using an accessible summary at the start of the judgment in "Giving judgment (the decision)" in chapter 1.

Further examples of adapting procedures (disability)

181. 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.
    - 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.[122]
    - 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.[123]

The importance of routine feedback

182. 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.

121 [2020] EWFC B40 (3 September 2020).
122 *R v Cox* [2012] EWCA Crim 549.
123 *In the matter of Re C (No.2) (Children: Welfare)* [2020] EWFC B36 (24 August 2020).

Chapter 3: Physical disability

Contents

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Identifying an individual's needs

Adjustments for case preparation

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The Equality Act 2010

Related content in other chapters

- Chapter 4 (Mental disability).
- Chapter 5 (Capacity (mental)).
- Appendix B (Disability glossary – impairments and reasonable adjustments).

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.

Why this chapter matters

1. "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 (EqA) 2010 and in relation to eligibility for social security benefits. Irrespective of whether a party or witness meets any particular legal definition, this chapter considers whether some form of adjustments should be made for individuals who have an impairment/disability which interferes with their ability to have a full and fair hearing.
2. Disabled individuals may be affected in many ways by the court process: some visibly, others invisibly. Whilst the duty to make reasonable adjustments under the EqA 2010[124] does not apply to the exercise of judicial functions, similar obligations may arise from other sources, such as: the courts and tribunals' overriding objective to deal with cases fairly and justly, from Article 6 read with Article 14 (right to a fair trial), from common law, and from Article 13 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD). Signatories of the UNCRPD must ensure effective access to justice for those with disabilities on an equal basis with others. Because there is no duty on a judge to make reasonable adjustments under the EqA 2010, the judge should not need to address the legal definition of disability in the EqA 2010 unless that is the nature of the proceedings that they are determining. Each person with a disability should be assessed and treated by the judge or tribunal panel as an individual so that their specific needs can be considered. Where an identified adjustment can be made, is straightforward to make, does not impinge on the fairness of the hearing for either side, or does not significantly increase the length of the hearing, it ought to be made. Indeed, failure to do this may result in a decision being overturned on appeal.
3. In cases where the adjustment is more demanding, whether because of cost or the implications on the trial process (eg the length of time the trial will take or the impact it will have on the other party's ability to challenge a witness's evidence), then a careful exercise of judgement is required. Where such a request may disadvantage another party, the court or tribunal should have regard to the views of the other party, and is likely to require the person requesting the adjustment/s to provide corroborative documentary evidence to support their request. Obligations to make adjustments are not without limits[125] and the right to a fair hearing applies to both parties. Any decision (accepting or rejecting the requested adjustments) should be clearly explained.
4. 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".[126]
5. As Langstaff J said:

> "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

124 Part 3 of Schedule 3 to the EqA 2010.
125 *Butler v Wilson Ltd* [2014] EAT 0354/12; *Rackham v NHS Professionals Ltd* [2015] EAT 0110/15; *Shui v University of Manchester* [2018] EAT 010/15.
126 *R (on the application of King) v Isleworth Crown Court* [2001] All ER (D) 48 (Jan).

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."[127]

What is physical disability?

6. Twenty four per cent of the UK population report having a disability.[128] Some people have more than one disability. The prevalence of disability increases greatly with age. This chapter (unless otherwise stated) uses the term "physical disability" to apply to anyone who has a physical impairment which, as a result, may call for some extra consideration to be given to their needs in the context of a court hearing. There is no requirement for a judge to decide whether a person qualifies as disabled under the EqA 2010. 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.

7. 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.

8. 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 37% of people with a long-term physical health condition also have mental ill health, mainly depression and anxiety.[129]

9. There is a 44% income gap between disabled people and non-disabled people. Disabled people are disadvantaged in the labour market, are more likely to live in poor housing and face a higher risk of poverty. Their day-to-day living costs can be much higher than for others because of expenditure on basics such as mobility aids, care and transport.

10. As explained in the "Recommended terminology" section below in this chapter, the term "disabled person" is currently usually preferred to "person with disabilities".

Difficulties the court process may pose

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

12. Difficulties prior to the hearing, especially for disabled litigants in person (LIPs), 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.

127 *Rackham v NHS Professionals Ltd* UKEAT/0110/15.
128 "UK disability statistics: Prevalence and life experiences": House of Commons Library (October 2024).
129 Comorbidity in mental and physical illness, Rai & Others, Resolution Foundation Survey (January 2023).

13. Difficulties at a hearing may include:
    - Impaired mobility: affecting ability to travel to court, access to the building or 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

14. 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.
15. In criminal cases, the standard Plea and Trial Preparation Hearing (PTPH) form used by the court contains a "special measures" box.
16. 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. Ideally, this should be done at the beginning of the hearing as it may be that an adjustment is needed at this hearing, too, to enable a person to participate.
17. 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.
18. These kinds of adjustment can be managed much more efficiently if they are identified, and steps are taken to implement them, in advance of the final hearing. This will also help avoid the need to consider them for the first time at the final hearing and avoid a possible postponement.
19. 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 to be booked.
    - Any special room which needs to be booked.
    - Booking an 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 reviewed by an intermediary in advance.

Consultation, case management and ground rules hearings

20. The Disability glossary contains a list of some of the most prevalent disabilities, with their common effects and suggested adjustments. This is general information only, as 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.[130]

21. Where needs are complex, or where they will have a significant impact on the trial process, as well as asking individuals what adjustments would be helpful, it may also be necessary to ask them to provide corroborative evidence from their GP or a consultant of the impact of their disability. In such cases it may be helpful, especially when dealing with an LIP, to explain to the litigant what information the court requires, and that this will need to be shared with the other party.

22. Where the focus of a hearing is to establish a litigant's needs and how they will be managed, the request for adjustments, together with any medical evidence provided, 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.

23. It does not usually matter whether there is an entire hearing 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.[131]

24. Once arrangements for the hearing are made, they are not set in stone. It may subsequently become apparent that further adjustments are needed or that previously identified adjustments are not needed. There are many reasons why needs change, including the fluctuating effects of some disabilities.

25. 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 Practice Direction 3AA supplementing the Family Procedure Rules 2010. Employment and other tribunals can gain additional ideas from these rules.[132] Judges should check for any jurisdiction-specific guidance which is increasingly common.[133]

Adjustments for case preparation

26. 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.

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130 The importance of consulting each individual and not generalising is emphasised by Langstaff J in *Rackham v NHS Professionals Ltd* UKEAT/0110/15.

131 *Anderson v Turning Pinty Eespro and others* [2019] ICR 1362.

132 *Rackham v NHS Professionals Ltd* UKEAT/0110/15.

133 An example is "Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings".

- 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 should not 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 all or part of the hearing by telephone or video.
- Expediting the final hearing date (if possible).

Adjustments for the hearing

General examples of adjustments

27. 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.
28. For suggested adjustments in relation to particular impairments, see the Disability glossary.
29. 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.
30. Where the venue is inaccessible, adjustments may entail:
    - Transferring the hearing to a venue nearer to the disabled party or to one with better disabled access.
    - Holding some or all of a hearing by video link (accessible from home or a local/ community facility) or telephone.
31. Other adjustments:
    - 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 their own water; closeness to sources of heat or light; closeness to other people. It may be appropriate to give a party adequate time prior to the commencement of the hearing to familiarise themselves with the room layout.
    - At the start of a hearing, a judge or clerk saying, "All rise if you are able to", to acknowledge a wheelchair user in court.
    - 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.

- 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.
- Be aware of the powers to prevent inappropriate questioning and use those powers where appropriate.
- 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.
- Look out for signs of stress, discomfort, fatigue or lack of concentration as the hearing progresses.
- 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

32. It may be necessary to adjust the timing, length or number of breaks (eg to allow for tiredness, a shorter concentration span, taking medication, moving physically, eating or drinking, going to the toilet).
33. 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).
34. 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.
35. As well as pre-arranging suitable timing of breaks, tell the disabled person that they can ask for a break whenever necessary. Some disabled people may feel uncomfortable asking for a break, so it may be helpful to have a pre-arranged signal (eg a lifted finger).
36. 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 caution if the breaks and hours were initially considered reasonable and necessary. The disabled person should be consulted over whether they can manage, but there remains the risk that the person will feel unable to say no.

Communication

37. Depending on the nature of the disability, it may be necessary for the judge, advocates and other court staff to adjust their communication style.
38. Ideally the subject of communication style would have been discussed at a ground rules or case management preliminary hearing, so that advocates are forewarned. However, this may not have happened.

39. Adjustments may involve:
    - Proceeding at a slower pace.
    - Speaking to a witness through a signer or an interpreter.
40. In more severe cases, there is scope for:
    - Appointing an intermediary to assist with communication (in criminal, family or other courts where intermediaries are used).
41. 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 "Questioning techniques to avoid" in relation to vulnerable witnesses in chapter 2 (Children, young people and vulnerable adults).

Representation

42. Guidance on McKenzie Friends and lay representatives is in chapter 1.
43. To meet the needs of a disabled party, a judge may facilitate representation in a form which might not otherwise have been permitted. For instance, lay representation.
44. It may be helpful to seek assistance from anyone present in court who clearly has the confidence of the party in a way that stops short of representation but still assists the disabled person with parts of the court process. For example, allowing a friend or family member to sit with the disabled person for support and allowing them to consult with each other.

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

45. In some cases, people might not tell the court or tribunal that they have a physical disability or that they are having any difficulties.
46. Many disabilities are not visible and may only become apparent during the hearing. The judge should therefore be alert to any indicators that adjustments might be required and sensitively raise this.

Criminal court procedure – statutory measures

47. 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.
48. Under the Youth Justice and Criminal Evidence Act (YJCEA) 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.
49. The special measures must be applied for, and the court can make the following orders:
    - Screening the 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 and, where appropriate, cross-examination also to be recorded by video and admitted.[134]
- 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.

50. 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.

51. 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, they should be invited to attend.

52. Where there are vulnerable witnesses, ground rules hearings should be held to plan conduct of the hearing.

53. 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.

54. 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

55. Disabled people are called for jury service on the same basis as non-disabled people. By s.9B Juries Act 1974, it is for the judge to determine whether or not a person should act as a juror. The presumption is that they 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.

56. The statutory criteria for disqualification from jury service focuses on a person's lack of mental capacity,[135] as defined in the Mental Capacity 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 adjustments for disabled witnesses, defendants and jurors. Adjustments such as wheelchair accessibility and fully functioning loop hearing systems are reasonably commonplace in courtrooms these days.

57. 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 timeframe for a trial. The judge must consider a disabled person's right to expect reasonable adjustments which might allow them to be an effective jury participant. The decision must be compatible with the defendant's right to a fair trial.

134 Section 27 and 28 YJCEA 1999.

135 Section 1 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 Capacity Act 2005.

58. By s.9C Juries Act 1974, when considering whether or not a person who is deaf should act as a juror, a judge must consider whether the assistance of a British Sign Language (BSL) interpreter would enable the prospective juror to act effectively as a juror (s.9C(2) Juries Act 1974). An interpreter appointed to assist a deaf juror may remain with the jury in the course of their deliberations for the purpose of assisting that juror to act effectively as a juror (s.9C(3) Juries Act 1974).[136] Section 9C is important not least because, in many cases, it reverses *Re Osman* [1996] 1 Cr App R 126, where 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 s.9B because such a person could not act effectively as a juror. That was because it was said to be an unacceptable irregularity in the proceedings for the interpreter to retire with the jury to the jury room.

59. It should be noted that s.9C is limited in its scope to assisting people who are deaf with BSL interpreters. That provision therefore does not deal with impairments other than deafness, nor with people who are deaf but not assisted by BSL (eg because they use a different sign language).

60. A new offence has been created[137] which makes it an offence for a BSL interpreter appointed under s.9C of these provisions to intentionally interfere in or influence the deliberations of the jury in court proceedings.

61. It should also be noted that a deaf juror will not **necessarily** require the assistance of an interpreter and the judge should therefore be careful not to make any assumptions. In 2019, a profoundly deaf man participated as a juror in three trials at Blackfriars Crown Court. He did not require an interpreter to follow proceedings. He read subtitles from courtroom stenographers on an iPad and relied on lip-reading in deliberations with his fellow jurors.[138]

Recommended terminology

How to discuss someone's possible needs in court

62. The person involved should be addressed directly and in a usual manner, unless it is clear that some other approach should be adopted. Judges should face this person if possible – with lip-reading this is particularly important.

63. 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?"

64. 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.

65. People vary in their sensitivity about disclosing their disability, so any questioning needs to be sensitive. Where a condition may require regular breaks, eg to rest or use the lavatory, agree how the disabled person can indicate the need for a break that minimises any embarrassment the person may feel when asking.

136 Section 9C was added to the Juries Act 1974 by the Police, Crime, Sentencing and Courts Act 2022.
137 Section 20 Juries Act 1974.
138 "Subtitles help deaf juror past '13th stranger' court rules": Guardian (28 August 2019).

Use of terms

66. There are different views 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, has been generally adopted by disability groups as it puts the focus on the barriers imposed by society. In other English-speaking countries, people prefer to use "people with disabilities". Disabled people do not always use the same language, and it is advisable to ask the person what term they prefer.

67. 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.

68. 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 they have no disability from it unless that kidney is not functioning.

69. A disability is not the same as an illness.

70. Use of recommended terminology helps to maintain the confidence of users and observers of the court system. Judges understand the importance of being precise/careful with language and these terms are generally considered most up to date in a legal/formal/professional context:

    - "non-disabled" rather than able-bodied/normal.
    - 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".

71. As a general term, "sensory impairment" is recommended.

The Equality Act 2010

The EqA 2010 prohibits discrimination in relation to disability in many ways (eg in work, in education, in the provision of public services and more). "Disability" carries a specific definition in the Act. See the Equality Act 2010 appendix for an overview of the EqA 2010 and for more detail of the application of the EqA 2010 to disability.

Chapter 4: Mental disability

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Mental disability and remote hearings

Mental health: defendants and the criminal justice system

Veterans

Recommended terminology

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> "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

139 Part 3 of Schedule 3 to the EqA 2010.
140 *Butler v Wilson Ltd* [2014] EAT 0354/12; *Rackham v NHS Professionals Ltd* [2015] EAT 0110/15; *Shui v University of Manchester* [2018] EAT 010/15.
141 *R (on the application of King) v Isleworth Crown Court* [2001] All ER (D) 48 (Jan).

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."[142]

What is mental disability?

6. Twenty four per cent of the UK population report having a disability.[143] Some people have more than one disability. The prevalence of disability increases greatly with age. There is no requirement for a judge to decide whether a person qualifies as disabled under the EqA 2010. This chapter (unless otherwise stated) uses the term "mental disability" to apply to anyone who has a mental impairment which, as a result, may call for some extra consideration to be given to their needs in the context of a court hearing.

7. In this chapter, "mental disability" is taken to encompass:

   - Mental ill health.
   - Learning disabilities, developmental disorders, neurodiverse conditions.
   - Brain injury (which may be acquired or from birth), brain damage.

8. There are fundamental differences between these conditions, and they should not be confused.

9. 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.

10. 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.

11. Other mental impairments or neurodiverse conditions include autistic spectrum condition (ASC), attention deficit hyperactivity disorder (ADHD), learning disabilities and "specific learning difficulties" such as dyslexia or dyspraxia.

12. 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 37% of people with a long-term physical health condition also have mental ill health, mainly depression and anxiety.[144]

13. There is a growth in research[145] which links adverse childhood experiences (ACE) to adult-related illness, such as an 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. The National Institute for Health & Care Research (NIHR) states that it is the most disadvantaged children in UK society who tend to suffer ACE.[146] They assert that nearly all children under local authority care or who have been adopted will experience ACE.

14. There is a 44% income gap between disabled people and non-disabled people.[147] Disabled people are disadvantaged in the labour market, are more likely to live in poor housing and

142 *Rackham v NHS Professionals Ltd* UKEAT/0110/15.
143 "UK disability statistics: Prevalence and life experiences": House of Commons Library (Oct 2024).
144 Comorbidity in mental and physical illness, Rai & Others.
145 Adverse Childhood Experiences (ACEs) and Attachment – Royal Manchester Children's Hospital (mft.nhs.uk).
146 Adverse childhood experiences – what support do children need? (nihr.ac.uk).
147 Resolution Foundation Survey, January 2023.

face a higher risk of poverty. Their day-to-day living costs can be much higher than for others because of expenditure on basics such as mobility aids, care and transport.

Difficulties the court process may pose

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

16. Difficulties prior to the hearing, especially for litigants in person (LIPs) with a mental health disability, 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 difficulty communicating and understanding advice; difficulty generating the motivation to find an advice source.

17. Difficulties at a hearing, especially for LIPs with a mental health disability, may include:

- Communication difficulties.
- Difficulty absorbing information or understanding what is being asked.
- Difficulty providing focused answers.
- Difficulty focusing due to a 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; 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.
- Some mental disorders can generate symptoms of aggression and agitation when a person with that condition is suffering from stress. There may also be a tendency to interrupt when others are speaking.
- Many people suffering from such disorders lack adequate insight into their disorder and the way they present.

18. The National Association for Mental Health (Mind) identifies these features of a court process which commonly trigger mental distress:[148]

- Noise.
- Interruptions.
- Too many people or conversations.
- Over-stimulation or sensory overload.
- Being given lots of (new) information.

[148] “Achieving justice for victims and witnesses with mental distress: A mental health toolkit for prosecutors and advocates”: Mind (2010).

- 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.
- Feelings of being pushed, rushed or hushed.
- Shocks and sudden changes.

19. Compliance with appeal deadlines due to mental health difficulties may also need to be taken into account.[149]

Identifying an individual's needs

Necessary advance planning

20. Ideally, courts and tribunals should have systems for identifying at an early stage and before the final hearing/trial whether any adjustments for a person's 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.
21. In criminal cases, the standard Plea and Trial Preparation Hearing (PTPH) used by the court contains a "special measures" box.
22. 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. Ideally, this should be done at the beginning of the hearing as it may be that an adjustment is needed at this hearing, too, to enable a person to participate.
23. 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.
24. These kinds of adjustments can be managed much more efficiently if they are identified and steps are taken to implement them in advance of the final hearing. This will also help avoid the need to consider them for the first time at the final hearing and avoid a possible postponement.
25. These kinds of adjustment need to be decided upon in advance of the full hearing:
    - Making an accurate time estimate which allows for slower pace and/or more breaks and/or shortened days.

149 *J & K and another* [2019] EWCA Civ 5.

- Any interpreters who need to be booked.
- Any special room which needs to be booked.
- Booking an 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 seen by an intermediary in advance.

Consultation, case management and ground rules hearings

26. The Disability glossary contains a list of some disabilities with common effects and suggested adjustments. This is general information only, as 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.[150]

27. Where needs are complex, or where they will have a significant impact on the trial process, as well as asking individuals what adjustments would be helpful, it may also be necessary to ask them to provide corroborative evidence from their GP or a consultant of the impact of their disability. In such cases it may be helpful, especially when dealing with an LIP, to explain to the litigant what information the court requires and that this will need to be shared with the other party.

28. In some cases, it may be appropriate to seek a report from an intermediary.

29. Where the focus of a hearing is to establish a litigant's needs and how they will be managed, the request for adjustments, together with any medical evidence provided, 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.

30. It does not usually matter whether there is an entire hearing 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.[151]

31. Once arrangements for the hearing are made, they are not set in stone. It may subsequently become apparent that further adjustments are needed or that previously identified adjustments are not needed. There are many reasons why needs change, including the fluctuating effects of some disabilities.

32. 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 Practice Direction 3AA supplementing the Family Procedure Rules 2010 and Practice Direction 1A supplementing the Civil Procedure Rules in relation to civil courts. Employment and other tribunals can gain additional ideas from these rules.[152] Judges should check for any jurisdiction-specific guidance which is increasingly common.[153]

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150 The importance of consulting each individual and not generalising is emphasised by Langstaff J in *Rackham v NHS Professionals Ltd* UKEAT/0110/15.

151 *Anderson v Turning Pinty Eespro and others* [2019] ICR 1362.

152 *Rackham v NHS Professionals Ltd* UKEAT/0110/15.

153 An example is "Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings".

33. If the disabled person 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. (See "Interpreters" in chapter 8.)

Adjustments for case preparation

34. 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.
35. These adjustments may help for many learning/developmental disabilities:
    - Using short sentences and simple punctuation.
    - Using uncomplicated language.
    - Avoiding all jargon.
    - Using "you" and "we" rather than third person.
    - Using figures instead of spelling out 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.
    - Using an easy language paragraph that summarises the decision. This is especially of benefit to litigants with learning disorders or to children.[154]
    - For written judgments, there are tools online to make language simpler and which will assist judges to write for a person with poor literacy.[155]
    - Where written or telephone communication is difficult, confusing or stressful, holding additional case management preliminary hearings.
    - 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 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 hearing times for case management/preliminary hearings.

154 Sir Peter Jackson's judgment in *Re A: Letter to a Young Person* [2017] EWFC 48.
155 Readability Test – WebFX.

- 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 or video 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 adjustments

36. The following are examples of adjustments for a hearing. Whether they are suitable will depend on the type of proceedings, the needs of the individual and whether fairness to each party is preserved.

37. For suggested adjustments in relation to particular impairments, see the Disability glossary.

38. It may not be suitable for a disabled witness to attend the hearing and give evidence at all. Most jurisdictions have Practice Directions dealing with vulnerable witnesses which judges should take into account. If travel to or attendance at the venue creates a major difficulty, adjustments may entail:
    - Holding some or all of a hearing by video link (accessible from home or a local community facility) or telephone.
    - Transferring the hearing to a venue nearer the disabled party.

39. Consider the layout of the room and whether this is likely to cause anxiety, making any necessary adjustments.

40. 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.

41. If the disabled person is one of the parties, and their mental health is likely to deteriorate over the course of a multi-day hearing, it may be best that they give evidence first. On the other hand, if they are an LIP, 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 their own witness statement.[156]

42. Be aware of the powers to prevent inappropriate questioning and use them where appropriate.

43. 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.

156 *Shui v University of Manchester and others* UKEAT/2360/16.

44. Restrict the number of people attending the hearing and/or restrict reporting where appropriate.[157] Give careful thought as to whether this is a case where reporting restrictions may be appropriate, whilst having careful regard to the requirements of "open justice" and transparency in your jurisdiction.
45. Explain and introduce every person within the hearing room.
46. Look out for signs of stress, discomfort, fatigue or lack of concentration as the hearing progresses.
47. 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

48. 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).
49. 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).
50. 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.
51. As well as breaks which have been pre-arranged at suitable times, tell the disabled person that they can ask for a break whenever necessary.

Communication

52. 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.
53. 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 forewarned. However, this may not have happened.
54. Suitable adjustments by the judge may involve:
    - Using the person's name and ensuring they are paying attention before speaking to them.
    - Explaining in simple language and short sentences what will happen during the hearing/trial. Idiomatic language should be avoided, especially for litigants with conditions such as autism.
    - Offering any necessary support with reading/understanding court documents.
    - Allowing a self-representing litigant more time to take notes. Allowing extra breaks. People with comprehension difficulties will tire more easily.

[157] *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.

- Do not assume that because a person has difficulty in communicating that they have a difficulty understanding what is said. On the other hand, an ability to speak with apparent fluency may disguise difficulties in understanding.
- Check understanding by asking the person to repeat back what they think has been said. Do not ask, “Do you understand?” People might wrongly believe they have understood or be reluctant to admit they have not.

Adjustments to cross-examination

55. 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:
    - 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 but ask direct or unambiguous questions.
    - Avoiding the (immediate) repetition of 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.
    - Avoiding making assumptions about lifestyle and usual timing of activity.
    - Allowing witnesses to tell their own story in their own way.

    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 or “legalese”.
    - Tag questions.
    - Hypothetical or abstract questions.
    - Questions which suggest the answer.

    In more severe cases, there is scope for appointing an intermediary to assist with communication.
56. 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.
57. 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, as necessary, to ask advocates to rephrase their cross-examination, interject when there is clear potential for misunderstanding, and rephrase questions for the witness.

58. On this topic, it is useful to read the sections on "Limiting the length of cross-examination" and "Questioning techniques to avoid" in relation to vulnerable witnesses in chapter 2 (Children, young people and vulnerable adults).

Memory

59. 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.[158]

60. Memory problems may just affect the level of detail or precision, not the reliability or credibility of the testimony as a whole.

Emotional support animals

61. There is a distinction between emotional support animals (ESAs) and assistance (service) dogs[159]. Assistance dogs are covered by the EqA 2010 as an auxiliary aid and are highly trained to carry out a range of necessary tasks to support a disabled person or a person with a long-term medical condition, eg guide/hearing dogs. Assistance dogs should always be admitted into court.

62. ESAs are not referenced in law, but where a refusal to permit them could impact on the fairness of the hearing, an application in advance of the hearing should be made to the relevant judge if the presence of an ESA would aid participation.

63. Where a request is made in advance to the trial/hearing judge, the judge would need to weigh up factors to consider whether the ESA should be permitted to ensure a fair hearing. The person making the request would be expected to explain how the ESA assists with the individual's mental health or psychological symptoms, and how it will aid their participation in the hearing. Usually there would be a medical or psychological report provided about their condition, and how the animal supports them. The person should also provide evidence of the training the animal has received, particularly for a dog, together with any certificates. They would need to provide confirmation that the animal will lie next to the owner, be on a lead (for a dog), or under the person's control; also, that the animal would not foul in the courtroom, jump up or wander freely. The other party's views should be obtained together with any objections, such as serious dog allergies, which should be taken into consideration when deciding whether to admit the ESA.

64. The judge might decide, having heard the relevant submissions, that the ESA is necessary, but that the person should give evidence remotely by live video with the ESA if it is not deemed appropriate for the ESA to be present in court. In some cases, it may be possible for the hearing itself to be remote or hybrid. In other cases, the judge may decide an in-person hearing is required, and that it is also necessary to exclude the ESA.

65. The judge will need to carefully balance up the competing rights to come to a decision. A pet that is untrained and meets no evidenced mental health need should generally not be permitted.

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158 *JE v SSWP (PIP)* [2020] UKUT 17 (AAC).

159 "Assistance dogs: A guide for all businesses": Equality and Human Rights Commission (EHRC).

Representation

66. Guidance on McKenzie Friends and lay representatives is in chapter 1.

67. To meet the needs of a disabled party, a judge may facilitate representation in a form which might not otherwise have been permitted.

68. It may be helpful to seek assistance from anyone present in court who clearly has the confidence of the party in a way that stops short of representation but still assists the disabled person with parts of the court process. For example, allowing a friend or family member to sit with the disabled person for support and allowing them to consult with each other.

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

69. 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.

70. 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 they are simply stressed and uncomfortable because of being in court. Nevertheless, judges should be alert to any indicators that adjustments might be required.

71. 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 themselves.
- Appearing flamboyant and speaking very highly of themselves.
- Laughing incongruously.
- Finding it difficult to answer questions quickly or succinctly with yes/no answers.
- Speaking very quickly and jumping into conversations when they have not been asked a question.
- Not making sense when they talk; muddled or disordered speech.
- Looking around the room, appearing not to be not listening.
- Forgetting what has just been said, or what they were saying.
- Talking to themselves or appearing distracted.
- Turning up in court dressed inappropriately, being unkempt in appearance or wearing clothing unsuitable for weather conditions.

72. Mind suggests these ways of asking about mental distress (as appropriate):[160]
    - "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?"
73. 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

74. 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.
75. Under the Youth Justice and Criminal Evidence Act (YJCEA) 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 under YJCEA the witness has a mental disorder within the meaning of the Mental Health Act 1983, or otherwise has a significant impairment of intelligence and social functioning.
76. The special measures must be applied for and ordered by the court. They are:
    - Screening the witness from the accused.
    - Evidence by live link.
    - Evidence given in private.
    - 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.[161]
    - Provision of an appropriate device 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.
77. 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.
78. 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, they should be invited to attend.
79. Where there are vulnerable witnesses, ground rules hearings should be held to plan conduct of the hearing.

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160 "Achieving justice for victims and witnesses with mental distress: A mental health toolkit for prosecutors and advocates": Mind (2010).

161 Sections 27 and 28 YJCEA 1999.

80. These procedures, including use of intermediaries, can be adopted by other courts and tribunals.

81. 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

82. Judges should carefully consider whether remote hearings are suitable for parties or defendants with cognitive impairments, mental ill health or who are neurodiverse. Some people will prefer remote hearings and might request them as an adjustment. 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).

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.
- 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.

Mental health: defendants and the criminal justice system

Ways to find out whether the defendant has a mental health condition

83. Judges need to be aware if mental health is an issue, both so that all reasonable adjustments can be made, and 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.[162]

84. 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.[163]

[162] "Inclusive justice: a system designed for all. Findings and recommendations": EHRC (June 2020).
[163] "Inclusive justice: a system designed for all. Interim evidence report. Video hearings and their impact on effective participation": EHRC (22 April 2020).

85. As mentioned in paragraph 71 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 several 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

86. 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.

87. 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 courts. L&D services are not widespread in Wales, where no funding is available.[164]

Bail and remand decisions

88. 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.[165]

89. Prison can be wrongly viewed as a speedy and reliable place of safety for vulnerable individuals. L&D Services should be able to help obtain timely information about defendants' support needs, including referrals for support while defendants await subsequent court appearances.

90. Where bail is granted subject to residence at "approved premises", these need to be suitable for the particular defendant.

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164 "Inclusive justice: a system designed for all. Findings and recommendations": EHRC (June 2020).

165 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).

The trial

91. A publication by the Equality and Human Rights Commission (EHRC) 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".

92. 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.[166]

93. Under Article 6 of the European Convention on Human Rights, a defendant has the right to "effective participation" in their trial, which includes the right to hear and follow proceedings, which includes:[167]

    - Being informed clearly and in detail, and in language which they can understand, of the nature and cause of the accusation against them.
    - 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 their own lawyers any statement with which they disagree.

94. Potential adjustments for the hearing are set out earlier in this chapter, including adapting "special measures" usually available for witnesses.

95. 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 mental health condition as opposed to bad behaviour or a "couldn't care less" attitude.

96. 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

97. 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, L&D intervention and reports from community mental health organisations.

98. 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.[168] 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.

166 "Inclusive justice: a system designed for all. Findings and recommendations": EHRC (June 2020).
167 *SC v The United Kingdom* 60958/00 [2004] ECHR 263.
168 "Overarching Principles: Seriousness": Sentencing Guidelines Council.

- 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 common for people to have several different impairments (this is known as "co-morbidity").
- 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 some ethnic minority 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, may be more likely to be treated under a section of the Mental Health Act, and may be 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.[169] The impact on women from ethnic minority communities is therefore likely to be higher.
- Refugees may be more likely to experience mental health problems such as Post Traumatic Stress Disorder (PTSD) than the general population.

99. The Sentencing Council also sets out the relevance of "mental disorder" to the defendant's culpability in a number of its other Guidelines.[170] 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.[171]

100. 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.[172] 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 L&D Services/Probation in court when sentencing.

169 "Safety in Custody Statistics, England and Wales: Deaths in Prison Custody to September 2024 Assault and Self-harm to June 2024": Ministry of Justice (October 2024). Self-harm rates are almost seven times higher than in the male estate.

170 See for example the Assault Guidelines, the Arson/Criminal Damage Guidelines, the Child Cruelty Guideline and the Guidelines for Drug Offences.

171 *R v Montaut* [2019] EWCA Crim 2252.

172 "Sentencing offenders with mental disorders, developmental disorders, or neurological impairments": Sentencing Council Guideline (1 October 2020).

Veterans

Mental health

101. To be a veteran you only must have served for one day in the regular or reserve forces. There are 2.35 million veterans in England and Wales.

102. It is hard to assess 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.[173] 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.

103. 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 PTSD, but this should only be properly diagnosed by a medical expert.

104. Despite increasingly bespoke mental health service provision for military veterans, there is often a reluctance to seek help or treatment because:[174]

- 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.

Veterans and the criminal justice system

105. It is estimated that 3.5% of the prison population are veterans, although some commentators have suggested that this is in fact as high as 17%.[175] Many former service personnel who find themselves involved with the criminal justice system have mental health problems.

106. 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 have 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.

173 "Call to mind: United Kingdom – Common Themes and Findings from Reviews of Veterans' and their Families' Mental and Related Health Needs in England, Northern Ireland, Scotland and Wales" (June 2017).
174 "Stigma and barriers to care in service leavers with mental health problems": KCMHR (2017).
175 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.[176]

Recommended terminology

How to discuss someone's possible needs in court

107. 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.
108. 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 may be inadequate to deal with the particular individual appropriately, although it is a good start.
109. People vary in their sensitivity about disclosing their disability, so any questioning needs to be sensitive. Where a condition may require regular breaks to rest or use the lavatory, for example, agree how the disabled person can indicate the need for a break that minimises any embarrassment the person may feel when asking. For example, by lifting a finger.
110. Avoid disclosure of medical histories, where possible.

Use of terms

111. There are different views 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, has been generally adopted by disability groups as it puts the focus on the barriers imposed by society. In other English-speaking countries, people prefer to use "people with disabilities". Disabled people do not always use the same language, and it is advisable to ask the person what term they prefer.
112. 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 or stigmatise, and judges should be encouraged to converse in appropriate terms.
113. 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 they have no disability from it unless that kidney is not functioning.
114. A disability is not the same as an illness.
115. There are expressions which are considered outdated and are not recommended in a professional setting:
    - 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.

[176] Guidance: Ex-armed service personnel in prison and on probation (15 May 2019).

- 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”.
- Using “committed suicide”, as this suggests a criminal act, or “successful suicide attempt” – use instead “died by suicide”.
- “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”.
- “Mental capacity” is a very specific phrase which has a technical legal meaning. The subject is addressed in chapter 5.
- Use the phrase “seizures”, which is more accurate rather than “fits”, “spells” or “attacks”.

The Equality Act 2010

The EqA 2010 prohibits discrimination in relation to disability in many ways (eg in work, in education, in the provision of public services and more). “Disability” carries a specific definition in the Act. See the Equality Act 2010 appendix for an overview of the EqA 2010 and for more detail of the application of the EqA 2010 to disability, including mental disability.

Chapter 5: Capacity (mental)

Contents

Why this chapter matters

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Assessment of capacity (to conduct litigation)

The Mental Capacity Act (MCA) 2005

Civil and family proceedings – procedure

Litigation friends in tribunals

Related content in other chapters

- Chapter 3 (Physical disability).
- Chapter 4 (Mental disability).
- Appendix B (Disability glossary – impairments and reasonable adjustments).

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

Why this chapter matters

1. This chapter will seek to provide a practical resource as to what to do, where to look for further guidance and suggest practical steps that should be considered where the capacity of a party to conduct litigation which is before a judge is called into question by that judge or another. The remainder of this chapter addresses capacity to conduct litigation in question, unless otherwise stated.
2. 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 Civil Procedure Rules (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.
3. This chapter deals specifically with mental capacity. Where an individual has a mental disability, but does not lack capacity, see chapter 4.

Criteria for assessing capacity (to conduct litigation)

4. The legal system relies on the assumption that people are capable of making, and therefore 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.
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 adopting others' communication skills, can disguise lack of capacity (eg a learned behaviour pattern).

Assessment of capacity (to conduct litigation)

6. The law gives a very specific definition of what it means to lack capacity for the purposes of the Mental Capacity Act (MCA) 2005. It is a legal test, and not a medical test, and is set down in s.2(1) MCA 2005, which 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 the brain".[177]
7. To apply the test, it can best be broken down into three questions:
   - Is the person able to make a decision?

   If they cannot:
   - Is there an impairment or disturbance in the functioning of the person's mind or brain?

[177] Referred to as the "core determinative provision" in *A Local Authority v JB* [2021] UKSC52, paragraph 65.

If so:

- Is the person's inability to make the decision because of the identified impairment or disturbance?[178]

Presumption of capacity

8. There is a presumption that an adult is capable, though this may be rebutted by a specific finding of incapacity.

9. Useful guidance on how to think about the presumption can be found in this passage from the judgment in *Royal Bank of Scotland Plc v AB*:[179]

> "The presumption of capacity is important; it ensures proper respect for personal autonomy by requiring any decision as to a lack of capacity to be based on evidence. Yet the section 1(2) presumption like any other, has logical limits. When there is good reason for cause for concern, where there is legitimate doubt as to capacity [to make the relevant decision], the presumption cannot be used to avoid taking responsibility for assessing and determining capacity. To do that would be to fail to respect personal autonomy in a different way."

10. The statement that "a person lacks capacity" is meaningless. Judges must ask themselves what is the actual decision this person is being required to make? For example, does this person have capacity to conduct and/or properly participate in these proceedings?

Determining capacity

11. Where doubt is raised as to mental capacity, the question to ask is not, "Are they capable?" or even, "Are they incapable?", but rather, "Are they incapable of this particular act or decision at the present time?".

12. 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.
- Capacity depends upon understanding rather than wisdom, so the quality of the decision is irrelevant, as long as a person understands what they are deciding. It may not be the decision that others might make in those circumstances.
- 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.

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178 See *A Local Authority v JB* [2021] UKSC 52: "It is necessary to start with the first question". The second question was, "Is there a clear causative nexus between the inability to make a decision as to that matter and the impairment or disturbance in the mind or brain?", paragraph 78.

179 15 [2020] UKEAT 0266/18/2702. The judgment relates to capacity to conduct proceedings before the Employment Tribunal, but the principles are of broader application.

Evidence

13. There must be sufficient evidence (expert or lay) to displace the presumption in favour of capacity. What evidence will be sufficient will depend on the facts of any case. Although it is the state of mind at the time of the decision that is material, you may have to rely on the evidence of friends and family. Evidence of conduct and actions at other times leading to the decision in question may be relevant to show when capacity was lost.

14. 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 identified earlier, in "Assessment of capacity (to conduct litigation)".

15. 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.[180]

16. Different legal thresholds will be imposed when considering the jurisdiction or forum in which that person is appearing. For example, in a civil court, in order to displace the presumption of capacity, the evidence must be sufficient on the balance of probabilities. 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 British Medical Association (BMA) (5th edition, published July 2022).

The Mental Capacity Act (MCA) 2005

Background and overview

18. It is useful to consider the MCA 2005 when faced with any case which raises issues as to capacity of an individual. The MCA establishes a 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.

19. 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.

[180] *Baker Tilly v Makar* [2013] EWHC 759 (QB).

20. 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.

21. There is a "Mental Capacity Act Code of Practice", which provides practical information and examples of how the MCA works. It 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 jurisdiction.[181]

Fundamental principles

22. 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

23. 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."

Capacity is thus decision-specific, but it does not matter whether the impairment or disturbance is permanent or temporary.

24. 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.
- Communicate their decision (whether by talking, using sign language or any other means).

25. Explanations must be provided in ways that are appropriate to the person's circumstances. This can include explanations in simple language, use of visual aids etc.

The concept of "best interests" under the MCA

26. 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, s.4 MCA sets out a checklist of factors aimed at identifying those issues most relevant to the individual

[181] A draft "Mental Capacity Act Code of Practice" has been consulted upon and published as a draft. It is not known at this time of writing when it will be formally issued. It would significantly update the existing MCA Code.

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"[182] 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.

The public bodies created by the MCA

Court of Protection

27. It is a Superior Court of Record with full status to deal with the entire range of decision-making on behalf of incapacitated adults.

28. Most uncontested applications are dealt with "on paper" by authorised officers or district judges at the Court's principal office in London. 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.

Public Guardian

29. 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

30. 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.

31. Serious medical treatment decisions are now dealt with by family division judges who sit as Tier 3 judges in the Court of Protection.

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182 *Crossley v Crossley* [2007] EWCA Civ 1491; [2008] 1 FLR 1467, paragraph 15.

32. 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.
33. 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. For the avoidance of doubt, this may well be in the absence of a Court of Protection claim having been issued but to use their expertise acquired by sitting in the Court of Protection jurisdiction.
34. 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

35. The procedures are now to be found in the following rules:
    - CPR Part 21.
    - Family Procedure Rules (FPR) Part 15 and associated Practice Directions 15A and 15B.
    - Insolvency (England and Wales) Rules 2016,[183] Chapter 4, Sub-division C – persons unable to manage own property and affairs.

Protected party

36. The terminology used in the CPR and FPR is a protected party who is:
    - "a party, or an intended party, who lacks capacity (within the meaning of the MCA 2005) to conduct the proceedings".
    - "a protected beneficiary" means a protected party who lacks capacity to manage and control any money recovered by them or on their behalf or for their benefit in the proceedings.

Assessment of capacity

37. Where doubt is raised as to a person's capacity, an assessment will need to be undertaken. This will unavoidably delay the progress of the case. However, there is no alternative, as proceeding in any case where capacity is in issue may render any step taken in proceedings invalid. Making an order or giving directions in that case may put that person at risk of not being able to comply or breaching such order as they simply do not understand the legal process, or consequences of non-compliance.
38. If legal representatives are engaged, then the party seeking to establish that their client does not have capacity will instruct a relevant professional to assess capacity.
39. However, there will be cases where there is no legal representative for the person who you are concerned may not have capacity.
40. 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

[183] Rule 12.23 to and including 12.26 Insolvency (England and Wales) Rules 2016.

capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity.[184]

41. 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 one of an appropriate speciality, may be better qualified.

42. 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. There is no specification in the Family Procedure Rules or Civil Procedure Rules (the Rules) that a medical report is required. Caution should be exercised when seeking evidence from general medical practitioners, as it cannot be assumed that they are familiar with the concepts of mental capacity and the test to apply. If a general practitioner is the only available option, the test should be spelt out, and it should be explained what decision the intended or protected party is to make.

43. 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.

44. Guidance has been given in the case of *Masterman-Lister v Brutton & Co and Jewell & Home Counties Dairies*:[185]

> "… 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."

45. 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.
- Communicate that decision.

46. The Supreme Court in *Dunhill v Burgin*[186] placed a gloss upon the test by emphasising that the focus must be on the individual's capacity to understand the claim or cause of action they in fact have, rather than on their capacity to conduct the claim as formulated by their lawyers.

47. The Court of Appeal in *Bailey v Warren*[187] had earlier stated that the individual would need to understand the funding of the proceedings and the chances of not succeeding, as well as

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184 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.

185 [2002] EWCA Civ 1889.

186 [2014] UKSC 18.

187 [2006] EWCA Civ 51, Lady Justice Arden, paragraph 126.

make the sort of decisions which arise in litigation. This would include capacity to give proper instructions for and to approve the particulars of claim.

48. 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 potentially significant delay to the process. Further, the Official Solicitor will require that there be security for their costs.

49. All of these considerations were addressed in the High Court case of *TB & KB & LH*, which is a useful summary of these various principles.[188]

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". 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[189] 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 their costs. If a party already has a deputy appointed by the Court of Protection because they lack 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. The fact that the person has a deputy for property and affairs may be relevant but is not the determinative factor in appointment. The suitability criteria identified at the start of this paragraph must be met.

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. If the party is unable or unwilling to offer information themselves, 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.

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

188 *TB & KB & LH* [2019] EWCOP 14.
189 CPR 21.7(1)(a) and CPR 21.7(3); and FPR 15.7(1)(a) and FPR 15.7(3).

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.[190]

55. The statutory presumption under s.1(2) MCA 2005 is that the party has capacity, and the judge must not assume otherwise. The judge may well decide, having explored alternative options, that medical evidence from a clinician is required 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[191] 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[192] 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, they will have no status in regard to the affairs of the protected party outside the proceedings in which they are 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.

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190 CPR 21.3(4) and FPR 15.3(3).

191 Certificate of Suitability.

192 "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; "Working with clients who may lack mental capacity": Law Society Guide (13 May 2022) – assists practitioners by identifying different considerations to take into account when making a will, or what to consider if a client loses capacity in giving instructions.

60. 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

61. 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.

62. 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

63. An injunction can be granted against a protected party, but only if they understand the proceedings and the nature and requirements of the injunction.[193] This is because the tests of capacity to litigate and capacity to comply with an injunction are different.[194]

Litigation friends in tribunals

64. 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[195] 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 to consider rules for defining the way issues of capacity and the appointment of litigation friends should be dealt with.[196] At the time of writing, this reconsideration of the Rules is still awaited.

65. At present, whilst the CPR 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"[197] that a party might lack capacity to conduct litigation, a medical assessment should be considered.[198] It will – and should – be a matter for the judge to determine in the circumstances of the case before them whether there is a need for medical evidence to enable them to determine whether an individual is a protected party. It should be borne in

193 *Wookey v Wookey* [1991] 3 All ER 365.
194 *P v P (Contempt of Court: Mental Capacity)* [1999] The Times, 21 July, CA.
195 *Jhuti v Royal Mail Group* UKEAT/0061-62/17.
196 *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.
197 *Royal Bank of Scotland PLC v AB* UKEAT/0266, page 16.
198 Stott v Leadec Limited UKEAT/0263/19/LA at [8g]. Ellenbogen J thought this would almost certainly require medical evidence.

mind that the CPR, FPR and Court of Protection Rules have no requirement for medical evidence. Guidance on the appointment of litigation friends has been published.[199]

66. 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. What amounts to "good cause" will always require careful consideration, and it is not a conclusion to be reached lightly. 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.

67. Where the CPR and FPR are prescriptive or detailed as to the process to be followed when considering appointing a litigation friend, they do not apply in tribunals, but they offer a valuable source of assistance.[200] Further, the use of form N235, the Certificate of Suitability of litigation friend used in civil proceedings, may be appropriate.

68. It is of note that the Official Solicitor, which acts as the litigation friend of last resort in many proceedings, has a power but not a duty to act as a litigation friend in the tribunal.[201]

199 "Joint Presidential Guidance No.1 of 2024: Appointment of litigation friends in the Upper Tribunal (Immigration and Asylum Chamber) and First-tier Tribunal (Immigration and Asylum Chamber)": Courts and Tribunals Judiciary (2024).

200 *R (JS and Ors) v SSHD (litigation friend – child)* [2019] UKUT 64 (IAC), para. 77.

201 Section 90(3A) Senior Courts Act 1981.

Chapter 6: Sex

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Why this chapter matters

1. Judges should be aware that women may face particular challenges when participating in the justice system (eg, because of childcare or eldercare issues, or if they are pregnant/have recently given birth), and courts may need to consider adjustments to enable women to fairly participate.
2. Women's experiences as victims, witnesses and offenders are in many respects different to those of men.
3. This chapter provides information regarding women and the criminal justice system. It provides guidance which sentencers are encouraged to take into account wherever applicable, to ensure that there is fairness for all involved in court proceedings.[202]
4. Whilst both men and women can experience domestic abuse and sexual violence, this is much more likely to affect women. It is important for judges to understand the challenges women might face during the court process and what judges can do to enable their participation. This chapter aims to provide practical guidance for judges around these issues.
5. Factors such as ethnicity, social class, sexual orientation, disability status and age affect women's experiences and the types of disadvantage to which they might be subject. Women from ethnic minority groups often face double disadvantage arising from a combination of their ethnicity and sex. But judges should not assume that all women's experiences are the same.
6. Men can suffer from sex discrimination too, and it should not be assumed that men do not have responsibilities towards children and elderly or disabled relatives. Nor should it be assumed that men have not experienced abuse or sexual violence.

Employment

Employment rates

7. The latest judicial statistics show that women are now well represented in the judiciary, particularly at tribunal and district judge level, where there are roughly equal numbers of male and female judges. Representation is lower higher up the judiciary and only 31% of High Court judges are women.[203]
8. Over the past 40 years, employment rates for women have generally been rising, whilst men's have been falling.[204] 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

9. The gender pay gap is just over 13%. It becomes much wider when women are in their 40s, when many are returning to work after childcare breaks.[205]

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202 See *R v Foster* [2023] EWCA Crim 1196 (18 October 2023).

203 "Diversity of the judiciary: Legal professions, new appointments and current post-holders – 2024 statistics": MOJ (2024).

204 See "Women and the UK economy": House of Commons Library (2025). The peak was 72.7% in December 2019 to February 2020.

205 ONS, Gender pay gap in the UK: 2022.

10. Occupation segregation is one of the main causes of the gender pay gap.[206] Women's employment is concentrated in certain occupations, which are often the lowest paid: cleaning, catering, caring, cashiering and clerical work.[207] Many high-paying sectors disproportionately comprise male workers, eg managers and senior officials, and workers in skilled trade occupations.[208]

Women from ethnic minority groups in employment

11. There has been a significant increase in the number of workers from ethnic minority groups in employment in Great Britain since 2010. However, employment levels still vary widely between men and women.[209] In 2021, Pakistani and Bangladeshi women had inactivity rates of 51%, compared to 20% for men of the same ethnicity. In every ethnic minority group, women were more likely to be economically inactive than men.[210] ("Economically inactive" means out of work and not looking for a job, that is, those not in paid employment.)

Caring

Carers of children

12. Women are still the primary carers of children, either as single parents (nine out of 10 single parents are women[211]), or as a couple.

13. Working mothers are still twice as likely to be the first port of call when childcare breaks down and are twice as likely to do domestic work as soon as they get home.

Caring for elderly and disabled dependants

14. Many women provide unpaid care by looking after an ill, older or disabled family member, friend or partner. Drawing from the last census in 2021, Carers UK estimates that five million people in England and Wales are unpaid carers. Although this is an overall decrease from the 2011 census, explained by fewer people providing lower levels of care, Carers UK reports a significant increase in the numbers providing higher levels of care, between 20 and 50 hours per week. Of those, 59% are female, with more than twice as many women than men receiving a carer's allowance for caring for 35 hours or more a week.[212] Caring tends to affect men and women at different times. Women are much more likely to care in their 30s, 40s and 50s, and are more likely to be "sandwich carers" (combining eldercare and childcare), which makes the reconciliation of work and family life twice as difficult.[213]

15. Women are more likely to become carers and to provide more hours of unpaid care than men. More women than men provide high-intensity care at ages when they would expect to be in paid work.[214]

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206 "Women and the UK economy": House of Commons Library (2025).
207 Equal Pay Portal, Gender pay gap.
208 ONS, How do the jobs men and women do affect the gender pay gap?
209 GOV.UK, Ethnicity facts and figures.
210 GOV.UK, Ethnicity facts and figures.
211 ONS, Families and households in the UK: 2022.
212 Carers UK, Key facts and figures about caring, and press release: Census 2021 data shows increase in substantial unpaid care in England and Wales.
213 See TUC, Women 7 times more likely than men to be out of work due to caring commitments (March 2023). The 2021 census indicated that females aged between 55 to 59 years provided the most unpaid care.
214 "State of Caring 2022: A snapshot of unpaid care in the UK": Carers UK (November 2022).

16. 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.[215]

Adjustments for those with caring responsibilities

17. Recognise that women are still the primary carers of children; that women care for ill, older or disabled relatives or friends; and that women often combine childcare and eldercare as well as part-time work.
18. It should not be assumed, however, that men do not have responsibilities towards children and elderly or disabled relatives.
19. 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, holding the hearing during school term time may be preferable, if this is possible.
20. There can sometimes be a temptation to extend hours in order to finish within the allotted time. Caution is required, as this could significantly impact on those with caring responsibilities. The interests of justice are unlikely to be served by a witness or party being late or distracted because of worries over childcare.
21. Assumptions should not be made that a man with dependent children or relatives does not have a real need to meet caring responsibilities, eg caring for a sick child or relative.
22. 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.[216]

Pregnancy, maternity leave and breastfeeding

Discrimination at work

23. 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 still occurs.
24. In 2016, the then Department for Business, Innovation and Skills (BIS) and the Equality and Human Rights Commission (EHRC) 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.[217]

Adjustments for those who are pregnant or breastfeeding

25. Consideration should always be given to accommodating pregnant women and new and breastfeeding mothers in any proceedings, whether they are parties or witnesses.

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215 See TUC, Women 7 times more likely than men to be out of work due to caring commitments (March 2023).
216 See chapter 11 (Social exclusion and poverty).
217 "Pregnancy and maternity discrimination research findings": EHRC (25 May 2018).

26. This may require sensitive listings, start and finish times, and breaks during the proceedings.

27. 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 video or 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. The Court of Appeal in *F (A Child: Adjournment)*[218] added these points, with a reminder that the touchstone for case management is justice:

    - A mother should not have to put forward medical reasons to justify her request to avoid such dates.
    - It is not a solution to suggest a mother attends by remote video from her own home. She is entitled to attend in person if she wants to and, in any event, even remote participation can be stressful and would need her full attention.
    - A general intention to allow breaks does not remedy the position if the hearing should not be taking place at all.
    - A "try it and see" approach is not appropriate in this type of situation.
    - Account needs to be given to a mother's anxiety at the prospect of having to participate.

28. 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.

29. It may be possible to conduct certain types of hearing with a baby or young child in the court (eg a short case management hearing), provided the baby or young child is not disrupting the hearing, eg by crying or making a noise. It is unlikely to be appropriate for a final hearing, particularly where the parent will be giving evidence, as the baby is likely to be a distraction. Further, 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.

30. There may be an option for pregnant women, new mothers and those who are breastfeeding to give evidence by video. This may, however, not be suitable if there is no one to assist with childcare and the child is in the same room, which may represent an inappropriate distraction.

Menopause

31. Despite increased publicity over the last couple of years, the menopause often remains a taboo subject in the workplace. A survey conducted by the Women and Equalities Committee in September 2021 found that most women experience menopause symptoms which also affect them negatively at work. However, most women do not tell anyone at work or seek adjustments, out of concerns for privacy and worrying about the reaction of others. Many workplaces do not have any policies and women do not always know how to seek support.[219]

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218 [2021] EWCA Civ 469.

219 "Menopause and the workplace survey results": Women and Equalities Committee (February 2022).

32. 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. Physical and mental symptoms can include hot flushes, urinary problems, heavy periods, sleep disturbance, fatigue, headaches, lack of concentration, memory problems, palpitations, anxiety and mood swings.

33. The Women and Equalities Committee reported that menopause symptoms can be exacerbated by work and stress caused by the work environment, including inability to control ventilation, temperature, light and noise, lack of access to toilets and having to wear synthetic or restrictive workwear. Their survey revealed that some women felt it necessary to cut back their hours, or miss out on or forego promotion or similar advancement opportunities, or felt forced to leave the workplace or were dismissed for reasons they believe were connected with menopause symptoms.[220]

Adjustments for those in menopause

34. Recognise that parties or witnesses may be experiencing menopausal symptoms, both physical and mental, or severe period pains, which may impact on the way they give evidence. There should, however, be no need to draw attention to that because adjustments which may alleviate the symptoms are likely to benefit all those in the courtroom.

35. Adjustments to the hearing could include ensuring the room has working air conditioning or open windows, the availability of cold water, easy access to toilet facilities and frequent breaks.

36. 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.

37. A woman experiencing debilitating menopausal symptoms may be too embarrassed to tell the court that she needs adjustments. Judges need to be alert to subtle indicators, eg someone looking very hot or fanning themselves, losing concentration or becoming immediately weepy.

38. None of these signs may be anything to do with the menopause, and that does not matter. Best practice is to make no assumptions, but if someone looks uncomfortable for any reason, to explore what adjustments might be of assistance.

Sexual harassment

39. Sexual harassment remains a problem for women both in and outside work. It is defined in the Equality Act (EqA) 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. A 2020 UK-wide survey[221] into respondents' experience of 15 sexual harassment behaviours focusing on the last 12 months, ranging from displays of pornographic or sexually offensive materials making a person feel uncomfortable, through to rape and/or attempted rape,

220 "Menopause and the workplace": Women and Equalities Committee (July 2022).

221 This survey, conducted in February 2020, commissioned by the Government Equalities Office to support research on the prevalence and location of incidents of sexual harassment, was designed to achieve a nationally representative sample by demographics such as age, gender, region, ethnicity and sexual orientation. There were 12,131 responses in total. Government Equalities Office, 2020 Sexual Harassment Survey.

reported that 43% experienced at least one sexual harassment behaviour. The same survey reported that 29% of women and 27% of men experienced some form of sexual harassment in the workplace.

41. A TUC poll also carried out in 2020 did show that things are changing. Seven in 10 people thought the #MeToo movement has enabled more women to discuss and report sexual harassment.[222]

Domestic violence and abuse

42. The Domestic Abuse Act 2021 defines domestic abuse as the behaviour of one person towards another which consists of any of the following: (a) physical or sexual abuse; (b) violent or threatening behaviour; (c) controlling or coercive behaviour; (d) economic abuse; (e) psychological, emotional or other abuse. It applies where each person is aged 16 or over and they are personally connected to each other, ie they are married or civil partners or have been in the past; they have agreed to get married or enter a civil partnership (whether or not that agreement has been terminated); they are or have been in an intimate personal relationship with each other; they each have or did have a parental relationship in relation to the same child; or they are relatives.[223] Statutory guidance provides detailed examples of possible abuse, including through the use of technology and social media where young people and teenagers are involved, and abuse by family members including so-called "honour based" abuse, female genital mutilation (FGM) and forced marriage.[224]

43. According to the Crime Survey for England and Wales, in the year ending March 2024, an estimated 1.6 million women and 712,000 men experienced domestic abuse. Police recorded 851,062 domestic abuse-related crimes. Where the CPS prosecuted, over three quarters resulted in a conviction, the vast majority of perpetrators having pleaded guilty.[225]

44. In the year ending March 2022, only 13.3% of victims of partner abuse (a sub-category of domestic abuse) reported it to the police.[226] Women are far more likely than men to be killed by a partner, ex-partner or family member.[227] In over half (54%) of female homicide victims (where the suspect was known), the suspect was their partner or ex-partner. Over the past 10 years, an average of 82 women each year have been killed by a partner or ex-partner. By contrast, in the year ending March 2019, in only 16 cases was the suspected killer of a man a partner or ex-partner.[228]

45. The Domestic Abuse Act 2021[229] (the Act) provides a statutory definition of domestic abuse (see paragraph 42, above) and establishes a domestic abuse commissioner as a statutory officer holder.

46. The Act also creates domestic abuse protection orders which, on implementation, the courts will be able to make of their own motion. Any breach will be punishable with imprisonment up to a maximum of five years. The Act requires local authorities to provide support and refuge for the victims of domestic abuse and give priority to their social housing needs.

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222 TUC, 7 in 10 say #MeToo has allowed people to be more open about sexual harassment, TUC poll reveals (10 February 2020).
223 Sections 1 and 2 Domestic Abuse Act 2021.
224 "Domestic Abuse: statutory guidance", paragraphs 92 to 97.
225 ONS, Domestic abuse in England and Wales overview: November 2024.
226 ONS, Partner abuse in detail, England and Wales: year ending March 2022.
227 MOJ, Women and the Criminal Justice System 2021.
228 ONS, Homicide in England and Wales: year ending March 2022.
229 Legislation.Gov.UK Domestic Abuse Act 2021.

47. Where domestic abuse is alleged in criminal, civil or family cases, special measures will automatically be available.[230] There is more detail of the special measures regime in chapter 2.

Coercive control

48. Section 76 Serious Crime Act 2015 created an 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.

49. 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.[231]

50. The offence allows for prosecution where the perpetrator and complainant have been "personally connected", recognising that behaviour can persist and often increases when a relationship ends, or where the victim no longer lives with the perpetrator.

51. Since the offence was introduced in December 2015, the volume of offences reported to the police has increased from 4,246 for year ending March 2017 to 41,626 for year ending March 2022[232] (98% of those prosecuted that year being male[233]).

52. The Family Court at High Court level, endorsed by the Court of Appeal in *Re H-N and Others (Children)(domestic abuse: findings of fact hearings)*, [234] 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. The Court of Appeal considered that the primary question in many cases where domestic abuse is alleged is likely to be "whether the evidence establishes an abusive pattern of coercive and/or controlling behaviour... irrespective of whether there are other more specific factual allegations to be determined." This question is important because of the impact that such a finding may have on the assessment of any risk involved in continuing contact.

53. There are a number of significant reasons why women do not leave dangerous partners. Victims can be at a higher risk when they leave violent partners. There are other ties to their 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

230 See sections 62-64.
231 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.
232 ONS, Domestic abuse prevalence and trends, England and Wales: year ending March 2022.
233 ONS, Domestic abuse and the criminal justice system (November 2022).
234 [2021] EWCA Civ 448. The Family Court case is *F v M* [2021] EWFC 4. This judgment contains useful observations on such cases. See also "Fact-finding hearings and domestic abuse in Private Law children proceedings – Guidance for Judges and Magistrates": Courts and Tribunals Judiciary (5 May 2022).

that the violent behaviour was justified, with the woman blaming herself for the violence that she has endured.[235]

54. 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.

55. 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.

56. Although it is less common, men can also be subjected to coercive control, which is no less serious.

57. The Home Office Statutory Guidance Framework[236] gives an extensive range of examples of behaviours that are within the range of controlling or coercive behaviour, including:

- Physical and sexual violence/abuse and violent behaviour.
- Emotional and psychological abuse.
- Controlling behaviours, such as controlling or monitoring the victim's daily activities and behaviour.
- Restrictive behaviours, such as withholding and/or destroying the victim's immigration documents.
- Threatening behaviours, such as threats of being placed in an institution against the victim's will.

58. 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.

Female genital mutilation

59. FGM is the partial or total removal of external female genitalia for non-medical reasons. It is also known as "female circumcision" or "cutting". Research published in 2015 reported that there were an estimated 137,000 women and girls affected by FGM in England and Wales.[237]

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235 See for example Women's Aid, Myths about domestic abuse.

236 See page 15 onwards, "Controlling or Coercive Behaviour: Statutory Guidance Framework": Home Office (April 2023).

237 "Prevalence of Female Genital Mutilation in England and Wales: National and local estimates": City University London (2016).

60. The World Health Organisation reported in January 2025 that more than 230 million girls and women alive today have been cut in 30 countries in Africa, the Middle East and Asia, where FGM is concentrated.[238]

61. Religious, social or cultural reasons are sometimes given for FGM. However, FGM is child abuse, and since 2003 it has been a criminal offence in the UK (Female Genital Mutilation Act 2003).

62. 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.[239]

63. Health and social care professionals and teachers have been required since 2015 to report "known" cases of FGM.[240] These professionals are required 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.
    - 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.

64. 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 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 is 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.[241]

Sexual offences

Who is affected?

65. According to the Crime Survey for England and Wales, an estimated 1.1 million adults aged 16 to 59 years had experienced sexual assault in the 12 months prior to March 2022, with nearly four times as many women as men affected. While there has been no significant change in the past two years, there has been a significant increase in estimated sexual assaults since the year ending March 2014.[242]

66. In May 2022, the government published an updated position statement on male victims of crimes within the context of the strategy on ending violence against women and girls.[243] The position statement recognises that harmful gender norms, shame or honour, and stereotypes of masculinity and sexuality, can act as barriers for male victims to seek support and can impact on reporting.

238 World Health Organisation, Female genital mutilation (January 2025).
239 World Health Organisation, Female genital mutilation (January 2025).
240 Female Genital Mutilation Act 2003, s5B. See also Government Guidance: "Mandatory reporting of female genital mutilation: procedural information" (updated January 2020).
241 For a recent example, see *Re X (Female Genital Mutilation Protection Order No. 2)* [2019] EWHC 1990 (Fam).
242 ONS, Sexual offences in England and Wales overview: year ending March 2022.
243 "Supporting male victims": HM Government (May 2022, updated August 2022).

Rape and assault by penetration

67. Latest figures from the Crime Survey for England and Wales report that of all sexual offences recorded by the police in the year ending December 2022, 35% (67,169) were rape offences. This is a 17% increase from 57,586 in the year ending March 2020. This increase is attributed to a number of factors, including the impact of high-profile incidents, media coverage, and campaigns on people's willingness to report both recent and historical incidents to the police, as well as a potential increase in the number of offences.[244]

68. While figures for prosecuting rape cases have always been low, there has been a sharp decrease since 2016 to 2017. In June 2021, it was reported that prosecutions and convictions had fallen by 59% and 47% respectively since 2015 to 2016.[245] In the year ending 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 to 2016, to 41% in 2019 to 2020.[246]

69. Research suggests that the criminal justice process is set up in a way which causes a worryingly high level of victims to disengage. Key reasons include: fear of giving evidence in court, the intimate nature of the investigation, a poor relationship between the victim and the police and lack of available support to help victims through the system. In addition, the average number of days taken from offence to completion has increased by 73% from 2011 to 2019. This prolonged delay increases trauma and prevents victims moving on with their lives.[247]

70. In a 2020 survey by the Victims' Commissioner, the most important reason for victims not reporting a rape to the police was thinking they would be disbelieved.[248]

71. 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.[249] 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 other factors, such as personal characteristics of age, gender, education or parental status.[250]

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244 ONS, Crime In England and Wales: year ending December 2022. For a subset of forces supplying data to the Home Office Data Hub, 21% of all sexual offences and 24% of rape offences in the year to December 2022 had taken place over a year prior to the incident being recorded (these figures exclude Devon and Cornwall Police).

245 "The end-to-end rape review report on findings and actions": HM Government (June 2021).

246 "Crime outcomes in England and Wales 2019-2020": Home Office (2020); "Survey finds rape victims have lost faith in the justice system": Victims' Commissioner (20 October 2020).

247 See "Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales – Research Report": MOJ (June 2021) and the accompanying action plan in, "The end-to-end rape review report on findings and actions": HM Government (June 2021).

248 "Rape survivors and the criminal justice system": Molina and Poppleton. Victims' Commissioner (Oct 2020).

249 Most recently, see "The 21st century jury: contempt, bias and the impact of jury service": Cheryl Thomas. Criminal Law Review 2020, 11, 97-1011 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).

250 Based on Willmott research ("Rape myths and misconceptions": Booth, Willmott, Boduszek) with simulated juries. See also Leverick, F, "What do we know about rape myths and juror decision-making", International Journal of Evidence and Proof, 2020, vol.24(3), 225-279, also based on studies of mock juries.

- The seriousness of the trial process, including the directions of the judge, may help dispel previously held myths.[251]

72. An observational study in late 2010 found that rape mythology was still heavily used by defence counsel in trials.[252] In 2019 research, over 80% of victim support respondents still felt that myths are used frequently in court. Fifty-nine per cent of those surveyed as well as 78% of police lead respondents reported that such myths were infrequently or never dispelled during the trials.[253] The 2010 study identifies and comments on a wide range of myths regarding what one would expect to happen before, during and after. The High Court in *Re A v B* drew family judges' attention to this chapter, indicating that those dealing with family cases may also find the paragraphs around myths relevant and helpful.[254] The 2010 study, and subsequent research referenced in the Law Commission's paper on the view of evidence in sexual offences,[255] found the range of myths and misconceptions to include the following, that:

- Rape complainants are commonly liars. However, the Crown Prosecution Service (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.

73. These studies 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.

74. Moreover, the expectation that genuine victims will always employ avoidance or resistance strategies fails to account for the fact that:

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251 Based on the Thomas research with real juries (above) – our emphasis on role of judge.

252 "Different Functions of Rape Myth Use in Court: Findings from a Trial Observation Study": Temkin, Gray, Barrett (2016).

253 For the "Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales – Research Report": MOJ (June 2021), section 9.3.

254 *Re A v B* [2022] EWHC 3089 (Fam) (Knowles J) 2 December 2022. Knowles J's approach was supported on appeal *A v B and another* [2023] EWCA Civ 360.

255 "Review of Evidence in Sexual Offences: A Background Paper": Law Commission (2022).

- 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.

75. 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.[256] The Director of Public Prosecutions (DPP) has issued a code for Crown Prosecutors on rape and sexual offences, setting out general principles which Crown Prosecutors should follow when they make decisions on which cases to prosecute, specifically chapter 4 dealing with "Tackling rape myths and stereotypes".[257]

76. Although it is generally accepted given research to date that "rape myths" exist in the community, there is no consensus on how pervasive these misconceptions are. Recent research has called into question the extent to which "rape myths" about the behaviours of the victim impact on the outcome. That research, consisting of a detailed analysis of all charges, pleas and outcomes in rape and other sexual offences in England and Wales from 2007 to 2021 (some 68,863 jury verdicts on rape charges), has recently been published.[258] The author concludes that, contrary to popular belief, juries are more likely to convict than acquit defendants on rape charges, following a similar pattern to the conviction rate for all sexual offences which has steadily increased over the 15 years in question. She adds that "the precipitous fall in rape charging from 2018 was part of the systemic fall in all charging during this period". She offers the view that "Knowing the truth about jury decision-making in rape cases is important for all complainants in rape cases, especially those complainants who may be reluctant to pursue a case through to trial because they incorrectly believe that juries are unwilling to convict in rape cases."

77. This research will no doubt be considered by the Law Commission, which launched an investigation on 17 December 2021 into evidence in prosecution of sexual offences at the request of the government. The terms of reference are "to review law, guidance and practice in prosecutions of sexual offences, and consider the need for reform in order to increase the understanding of consent and sexual harm and improve the treatment of victims while ensuring that accused persons receive a fair trial". The project will consider the current approach to addressing misconceptions during the trial process, including:

- The use of jury directions and juror education generally.
- The admission of expert evidence to counter misconceptions surrounding sexual offences.
- The admission of evidence of the complainant's sexual history.
- The admission of the complainant's medical and counselling records.
- Special measures for complainants during the trial.[259]

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256 Crown Court Compendium (2025) 20-1. For further discussion about whether rape myths affect jurors, see section 7.6 of "Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales – Research Report": MOJ (June 2021).

257 "Rape and Sexual Offences – Overview and index of 2021 updated guidance": CPS (2021, updated 2024).

258 Thomas, C: Juries, rape and sexual offences in the Crown Court 2007-2021, Crim.L.R., 2023, 3, 200-225.

259 Law Commission, Evidence in sexual offence prosecutions.

78. A consultation paper was issued on 23 May 2023, with a final report expected in summer 2025.[260]

79. A judge will not hear a serious sexual offence case unless they have been approved to do so and have attended specialist training. Family judges hearing allegations of sexual abuse also receive mandatory training.

Ensuring safe participation in the judicial process

80. There are tools available at common law, in statute, in the Family, Criminal and Civil Procedure Rules and Practice Directions, in tribunal rules and as enshrined in the European Convention of Human Rights (ECHR) 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 ECHR 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.

81. The Advocate's Gateway Toolkits[261] 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 were endorsed by Baron Thomas of Cwmgiedd (former Lord Chief Justice) as best practice.[262] Judges are encouraged to ensure that advocates use these toolkits in appropriate cases.[263]

Special measures in criminal hearings

82. 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 harassment or violence. These include the "special measures"' introduced by the Youth Justice and Criminal Evidence Act (YJCEA) 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). A report by the Victims' Commissioner looks at the use of different special measures in practice in rape cases, including which are thought to be most effective and which are underused.[264] Further information on special measures can be found in chapter 2 (Children, young people and vulnerable witnesses).

83. There are automatic reporting restrictions in criminal proceedings, and where an allegation of rape or of other specified sexual offence 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).[265]

260 "Evidence in sexual offence prosecutions": The Law Commission (2023).
261 Available via The Advocate's Gateway.
262 *R v Lubemba* [2014] EWCA Crim 2064.
263 Criminal Practice Directions (2023).
264 "Next steps for special measures: A review of the provision of special measures to vulnerable and intimidated witnesses": The Victims' Commissioner (May 2021).
265 See chapter 2, paragraph 67 and "Reporting Restrictions in the Criminal Courts": Judicial College (2022).

Participation directions in family proceedings

84. In the Family Court, rule 3A and Practice Direction 3AA[266] 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). Section 63 Domestic Abuse Act 2021 provides automatic eligibility for special measures in domestic abuse cases.

85. Family cases are ordinarily held in private and with anonymity orders in place, but are subject to the transparency project, so increasingly they are heard in public or partly in public. Judges need to consider who should be allowed to access the link (if there is one) to watch proceedings, and/or attend open court, which is often subject to an application.
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.[267] This is primarily because evidence might be impeded. As many alleged perpetrators of abuse are now unrepresented, the Family Court has had to decide how alleged perpetrators can challenge the evidence of a complainant without potentially intimidating them. Practice Direction 12J 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".[268] For cases issued on or after 21 July 2022, where there is evidence of domestic abuse, conviction or injunction, unrepresented parties are now banned from cross-examining each other.[269] In such cases, cross-examination will be done by a court-appointed legal professional, to ensure fairness for both sides.[270]

Participation in the Court of Protection

86. In the Court of Protection, judges deal with vulnerable parties who lack mental capacity to conduct proceedings. Fundamentally, the court is tasked with making decisions about people who are deemed unable to make those decisions for themselves ("protected party"). This is a jurisdiction where participation of the protected party is key not only through legal representation but the active involvement of that party.[271]

87. Considerations identified at paragraphs 80 and 81 equally apply in the Court of Protection. The application of the Civil Procedure Rules (CPR) and Family Procedure Rules (FPR) are directly imported into the Court of Protection Rules 2017.[272]

88. The judge can hold a hearing and receive evidence by whatever means will enable the protected party to engage with the process in a safe environment.[273] This can mean the protected party coming to court or being heard by video link. Very careful thought will be given by the court as to any practical matters which will need to be factored into such an attendance, such as the assistance of a family member, carer or social worker to ensure that they feel supported at the hearing.

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266 Family Procedure Rules 2010, Practice Direction 3AA - vulnerable persons: participation in proceedings and giving evidence.
267 Sections 34-36 YJCEA 1999.
268 Family Procedure Rules Practice Direction 12J – child arrangements & contact orders: domestic abuse and harm.
269 Practice Direction 3AB deals with the issue of direct cross-examination in cases involving allegations of domestic abuse.
270 Sections 65-66 Domestic Abuse Act 2021.
271 Court of Protection Rules 2017 1.2 and 13.3.
272 Court of Protection Rules 2017 2.5.
273 Court of Protection Rules 2017 3.1(2)(d); Practice Direction 10A para. 21 and Practice Direction 14A Annex 2.

89. The Court of Protection can undertake a judicial visit to meet with the protected party to enable them to feel heard by the judge. Guidance has been issued on this.[274]

90. Court of Protection cases are ordinarily held in public, but the court imposes restrictions in relation to the publication of information about the proceedings, including anonymising the party's name. There is a standard order which will need to be made before that hearing commences which is approved by the President of the Court of Protection.[275]

Evidence via video link, anonymity, in civil proceedings

91. In the context of civil proceedings, there is a general discretion under the CPR to permit evidence to be given by video link.[276] 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.[277] In addition, a court may order that the 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.[278]

92. The specific rule permitting video evidence in the CPR 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.

93. 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.

94. In the civil courts, Practice Direction 1A CPR[279] sets out a similar structure to that in the Family Court, allowing 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).

Social media

95. Social media networking sites and apps, such as Facebook, Instagram, X (formerly known as Twitter), Snapchat, WhatsApp and 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 2020 show that 93% of men and 91% of women use the internet,[280] and 72% of women and 69% of men use social networking sites.[281]

96. 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

274 "Judicial Visits to 'P'": England and Wales Court of Protection Decisions (10 February 2022).
275 Court of Protection Practice Direction 4C Court of Protection Rules 2017; Template Transparency Order
276 Civil Procedure Rule (CPR) rule 32.3; Practice Direction 32, Annex 3; *Rowland v Brock* [2002] 4 All ER 370, Newman J.
277 CPR rule 39.2(4).
278 CPR rule 39.2(3)(g).
279 Practice Direction 1A – participation of vulnerable parties or witnesses.
280 ONS, Internet access – households and individuals, 2020, data table 6.
281 ONS, Internet users UK, 2020, data table 2B.

and offensive behaviour at an individual or group, and cyberstalking, which can take a range of forms, including:[282]

- Hacking into, monitoring and controlling social media (such as Facebook or X) 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.
- "Sextortion": the use of images or videos of sexual acts to extort money.
- "Revenge porn": usually following the break-up 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": this involves encouraging "virtual mobs" to harass individuals and incite hatred.
- "Brigading": encouraging others to harass someone.
- "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.
- "Doxxing": making available personal information online.
- "Swatting": releasing personal information online and then making hoax calls to the police to implicate the swatting victim in serious crime.
- "Catfishing": creating a fictitious identity online to start a relationship.

97. Research consistently shows that women are subjected to more bullying, abuse, hateful language and threats online than men.[283] 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".[284]

98. A survey commissioned by the Victims' Commissioner to inform the debate around the Online Safety Bill 2023 reported that in 12 of the 21 categories of online abuse, women reported higher levels of victimisation. Abuses such as intimate image abuse, cyberstalking and cyberflashing were significantly more likely to be experienced by women.[285] The Online

282 See for example: "Online harassment and cyber bullying": House of Commons Library (2017).
283 See for example, Women's Aid, Online and digital abuse (2023).
284 "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).
285 "The Impact of Online Abuse: Hearing the Victims' Voice": Victims' Commissioner (June 2022).

Safety Bill has now been passed, which will require social media platforms to remove illegal content quickly or prevent it appearing in the first place.

99. 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, s.33 Criminal Justice and Courts Act 2015 makes it an offence to "share private sexual photographs or films with the intent to cause distress", extended by s.69 Domestic Abuse Act 2021 to include "threats to disclose private sexual photographs and films with intent to cause distress". Section 70(1) Domestic Abuse Act 2021 also inserted s.75A into the Serious Crime Act 2015 to create offences of non-fatal strangulation and non-fatal suffocation. 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 aware of other protective orders which may be sought, such as restraining orders, non-molestation orders, domestic violence protection orders, and sexual harm prevention orders.[286]

100. 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.[287]

Women as offenders

Who is in prison?

101. 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.

102. As at 30 June 2022, there were 3,353 women in prison, about 4% of the total prison population in England and Wales. That proportion has remained stable for the past five years, but in June 2022 was 18% lower than pre-pandemic levels.[288]

103. On average, female offenders commit less serious offences than male offenders, often committing non-violent, low-level but persistent offences such as shoplifting.[289] They are also overrepresented in prosecutions for specific offences, particularly non-police prosecutions. In the year ending June 2022, women accounted for 75% of those prosecuted for TV licence evasion,[290] 69% for truancy of a child and 58% for benefit fraud. Women sentenced for theft, summary non-motoring offences and miscellaneous crimes accounted for 58% of all women given custodial sentences of less than 12 months (compared with 47% of men).[291] Most women entering prison have committed a non-violent offence (72% in 2020).[292]

104. Twenty three per cent of women in prison have no previous convictions, compared to 14% of men. Women are far more likely than men to serve short sentences. Over 70% of sentences

286 Domestic abuse protection orders have come into force in pilot areas.
287 CPS, Social Media and other Electronic Communications.
288 MOJ, Prison population figures: 2022.
289 MOJ, Women and the Criminal Justice System 2021.
290 This offence accounted for 18% of all female prosecutions.
291 "Female Offender Strategy Delivery Plan 2022-25": MOJ (January 2023).
292 "Why focus on reducing women's imprisonment?": Prison Reform Trust (2021).

started in 2020 were for under 12 months, compared with 54% for men. In 2020, 58% of custodial sentences for women were for six months or less.[293]

105. In June 2022, 19% of women in prison, compared to 16% of men, were being held on remand. In 2021, over half of women (52%) remanded and tried by the magistrates' court didn't receive a custodial sentence. In the Crown Court, this figure was more than two in five (43%).[294]

106. Women's offending is commonly linked to underlying mental health needs, drug and alcohol problems, coercive relationships, financial difficulties and debt:[295]

- Seventy six per cent of women in prison report having mental health issues (compared with 51% of men).
- Forty six per cent 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.[296]
- Fifty three per cent of female prisoners, compared to 27% of male prisoners, report having experienced emotional, physical or sexual abuse as a child.
- It is estimated that nearly 60% of women who offend have experienced domestic abuse.[297]
- Approximately 48% of women in prison have committed an offence in order to support someone else's drug habit[298] – more than double the 22% of men who reported the same.
- Twenty five per cent of women report having a drug or alcohol problem on entry to prison (compared with 13% of men).[299]
- Thirty one per cent of female prisoners have spent time in local authority care.

The impact of imprisonment on women

107. Custody can exacerbate mental ill health, heighten vulnerability and increase the risk of self-harm and suicide. Rates of self-harm in women's prisons have risen by 20% in the past

293 Ministry of Justice, Offender management statistics, cited in "Why focus on reducing women's imprisonment?": Prison Reform Trust (2021).
294 "Why focus on reducing women's imprisonment?": Prison Reform Trust (August 2022).
295 The following statistics are taken from: "Why focus on reducing women's imprisonment?": Prison Reform Trust (August 2022), which in turn compiles latest research on various issues in the period to 2022.
296 This was researched in 2013. We have seen no more recent statistics on this point, nor anything to suggest the pattern has changed. The Prison Reform Trust reported in 2022 that 97 women have died in prison since 2011, 37 of which were self-inflicted. Note however, there were 86 self-inflected deaths in 2021, all of which occurred in the male estate. GOV.UK, Safety in custody statistics England and Wales – deaths in prison custody to December 2021 – Key Findings.
297 House of Commons written question 174009 (9 October 2018). Prison Reform Trust estimates that nearly 60% of women who offend have experienced domestic abuse, suggesting that the true figure is likely to be much higher, citing MOJ (2018), "Female Offender Strategy".
298 "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?": Prison Reform Trust (July 2021).
299 PRT August 2022, citing HM Chief Inspector of Prisons annual report, 2021-22.

decade[300] and by 7% in the year to March 2022.[301] Although women make up approximately 4% of the prison population, they accounted for 22% of all self-harm incidents in 2020.[302]

108. In 2021, the number of individuals who self-harmed per 1,000 prisoners was 350 for females and 135 for males. Compared to males, a higher proportion of females reported: self-declared mental health problems, physical disability, having drug and alcohol problems, money worries and housing worries.[303] Although the number of incidents in the female estate is smaller than in the male estate, the rate of self-harm per 1,000 prisoners is much higher. In the 12 months to December 2022, there were 39,124 incidents in the male estate compared with 16,140 in the female estate. However, the rate of self-harm was almost ten times higher in the female estate, with 5,035 incidents per 1,000 female prisoners and 507 incidents per 1,000 male prisoners.[304]

109. 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. Thirty six per cent of women were released from prison in the year to March 2021 without settled accommodation.[305] More than one in six were homeless and nearly one in 20 were sleeping rough on release. Compared to 10% of men, only 4% of women released from prison were in employment six weeks after release.[306] Half of women involved in the criminal justice system are claiming out-of-work benefits two years later, compared to 35% of men.[307]

110. 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. 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[308] 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. Lack of housing in turn reduces the chances of finding employment and increases the chance of reoffending.[309]

111. 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,

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300 Prison Reform Trust, July 2021, citing MOJ, Safety in Custody quarterly, Self-harm in prison custody 2004 to 2020.

301 GOV.UK, Safety in Custody quarterly: update to March 2022 (28 July 2022).

302 GOV.UK, Safety in Custody Statistics, England and Wales: Deaths in Prison Custody to December 2021, Assaults and Self-harm to September 2021 (updated 3 March 2023).

303 MOJ, Women and the Criminal Justice System – Offender Management.

304 GOV.UK, Safety in Custody Statistics, England and Wales – Self harm: 12 months to December 2022 (27 April 2023).

305 Other research published in August 2020 reported that more than half of the women prisoners surveyed had not settled home on release (Independent Monitoring Boards, Resettlement – a survey by Independent Monitoring Boards of women being released from prison).

306 MOJ, Community performance quarterly, update to March 2020, table 11, cited in, "Why focus on reducing women's imprisonment?": Prison Reform Trust (July 2021).

307 MOJ, Accredited official statistics: Women and the criminal justice system 2017 (29 November 2018).

308 This is a particular problem for Welsh women held in prisons in England.

309 "Home truths: housing for women in the criminal justice system": Prison Reform Trust (revised June 2018). See also Independent Monitoring Boards, Resettlement – a survey by Independent Monitoring Boards of women being released from prison.

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.[310] The Sentencing Council's "Theft Offences Definitive Guideline" (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.[311]

112. Research suggests that women released from prison are twice as likely to reoffend as a comparable cohort of women given community orders.[312] Over 70% of women who have served a sentence of less than 12 months have reoffended.[313] 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.[314]

113. 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.[315]

114. There is also power to defer passing sentence for up to six months under the powers of the Criminal Courts (Sentencing) Act 2000, eg to allow an offender to undergo addiction or mental health treatment prior to sentencing.

115. In June 2018, the Ministry of Justice (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.[316]

116. 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.

117. In January 2023, the MOJ published the "Female Offender Strategy Delivery Plan 2022-25", the stated aims of which are to reduce the number of women entering the criminal justice system, reoffending and serving short custodial sentences, with more managed successfully in the community and with better outcomes for women in custody and on release.[317]

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310 Sentencing Council Definitive Guideline: "Imposition of Community and Custodial Sentences". Applicable to sentences given on or after 1 February 2017.
311 Sentencing Council: "Theft Offences Definitive Guidelines".
312 "The impact of prison for women on the edge: paying the price for wrong decisions": Hedderman and Jolliffe (2015).
313 "Female Offender Strategy Delivery Plan 2022-25": MOJ (January 2023).
314 National Offender Management Service Annual Report and Accounts (2016-7).
315 Sentencing Council Definitive Guideline: "Imposition of Community and Custodial Sentences". Applicable to sentences given on or after 1 February 2017.
316 "Female Offender Strategy Delivery Plan 2022-25": MOJ (January 2023).
317 "Female Offender Strategy Delivery Plan 2022-25": MOJ (January 2023).

Dependants and primary carers

118. The existence of dependent children is a factor relevant to sentencing.[318] Sentencing guidelines say being a sole or primary carer for dependent relatives can be a mitigating factor.[319] 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* and that the interference with the defendant's Article 8 rights is proportionate.[320] 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.

119. Women are much more likely to be primary carers,[321] with children far more directly affected by a prison sentence as a result. A fifth of women prisoners are lone parents[322] and around 17,200 children are separated from their mothers by imprisonment every year.[323] 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.[324] Mothers experience significant emotional distress as a result of separation from their children, which prisons are generally not equipped to deal with.

120. 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 63 miles away from home.[325] 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. Prisoners who receive visits from family members are 31% less likely to reoffend than those who do not.[326]

121. 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.[327]

Women offenders from ethnic minority groups

122. The Lammy Review (September 2017) was an independent review of the treatment of, and outcomes for, ethnic minority individuals in the criminal justice system.[328] The Review commissioned a report which highlighted the additional disadvantages faced by women offenders from ethnic minority communities.[329]

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318 *R v Rosie Lee Petherick* [2012] EWCA Crim 2214.
319 See Sentencing Council Report on Sentencing and Response to Equalities Research.
320 [2012] EWCA Crim 2214.
321 See section on "Caring" above.
322 "What about me? The impact on children when mothers are involved in the criminal justice system": Sarah Beresford. Prison Reform Trust (2018).
323 Why focus on reducing women's imprisonment?": Prison Reform Trust (July 2021).
324 "Sentencing of Mothers: Improving the sentencing process and outcomes for women with dependent children": Prison Reform Trust discussion paper (2015).
325 "The importance of strengthening female offenders' family and other relationships to prevent reoffending and reduce intergenerational crime": MOJ, Lord Farmer (18 June 2019).
326 "Why focus on reducing women's imprisonment?": Prison Reform Trust (July 2021).
327 GOV.UK, Ethnicity facts and figures (2021 Census figures).
328 The Lammy Review (September 2017).
329 "'Double disadvantage': The experiences of Black, Asian and Minority Ethnic women in the criminal justice system": Cox and Sacks-Jones (April 2017).

123. See "Ethnic minority women and the criminal justice system" in chapter 8 (Race and ethnicity) for more on the Lammy Review, women from ethnic minority groups and the criminal justice system.

124. HM Inspectorate of Prisons noted that women from ethnic minority communities 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.

125. The report raised significant concerns about insufficient access to translators for women who do not speak English fluently, combined with a legal process which is confusing and jargon-loaded. See chapter 8 for more on "Communicating interculturally", whether speaking in English or through interpreters.

Guidelines and standards for the treatment of women offenders

126. 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).[330]
- 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, women from ethnic minority groups, foreign national women, disabled women, women serving a life sentence and women with children.
- The public sector gender equality duty applies to prisons, probation services and court staff.[331]

Marriage and divorce

127. 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, in general the relationship will not be legally recognised unless it takes place in a building of the Church of England or the Church in Wales or registered by the Registrar General for Marriage. Regulations have enabled civil marriage ceremonies to take place in the grounds of approved premises.[332] Religious marriages conducted in a place of worship cannot be held outdoors at present.[333]

128. The Civil Partnerships, Marriages and Deaths (Registration) Act 2019 amended the rules on registration and location of marriages from 4 May 2021. The Act changes the rules in regard to the registration of civil partnerships, permitted from 2014 for same sex couples, to include heterosexual couples.[334] It also reformed how marriages are registered, and allowed for the inclusion of the mother of each party to the marriage or civil partnership (previously it had only been the father).

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330 UNODC, The Bangkok Rules.
331 See, for example, MOJ, "Prisons Strategy White Paper, Overarching Equalities Statement".
332 The Marriage and Civil Partnerships (Approved Premises) Amendment Regulations 2021.
333 "Marriage Venues": House of Commons Library (30 November 2022).
334 This followed the decision of the Supreme Court in *R (On the application of Steinfield and Keidan) v Secretary of State for International Development*, where it was found that the Marriage (Same Sex Couples) Act 2013 discriminated against heterosexual couples in relation to civil partnerships.

Forced marriages

129. Forced marriage is a crime under s.121 Anti-social Behaviour Crime and Policing Act 2014. It is a form of abuse directed towards children and vulnerable adults who are forced into marriage against their will or made to marry before they are 18, even if there is no pressure or abuse. It disproportionately affects women and girls.

130. The government established the forced marriage unit (FMU) in 2005 to lead on its forced marriage policy, outreach and casework. The unit operates to support any individual both inside the UK and overseas, where consular assistance is provided to British nationals. In 2021, the FMU gave advice and support to 337 cases related to a possible forced marriage and/or possible FGM, and responded to 868 general enquiries.[335]

131. The government has published multi-agency statutory guidance on dealing with forced marriage.[336]

132. On 27 February 2023, the Marriage and Civil Partnership (Minimum Age) Act 2022 raised the minimum age of marriage in England and Wales to 18. Although 16 and 17 year olds had required parental consent to be married, this was stated to be an attempt to end coercive or abusive child marriages, which disproportionately affect a greater number of girls, usually married to older men. In England and Wales in 2018, 28 boys married under the age of 18, compared with 119 girls. In 2021, the FMU provided advice or support in 118 cases involving victims below 18 years of age. The courts have also issued 3,343 Forced Marriage Protection Orders between their introduction in 2008 and September 2022, which prevents someone from using threats, violence or emotional abuse as a way to force a person into marriage.

133. It is now a criminal offence to cause a child under the age of 18 to enter a marriage in any circumstances, without the need to prove that a form of coercion was used. This includes non-legally binding "traditional" ceremonies which would still be viewed as marriages by the parties and their families.[337] The act automatically recognises children who are married under 18 as victims of forced marriage.

Divorce

134. Like marriage, divorce is similarly only legally recognised if it complies with legislation.

135. There are different cultural approaches to divorce:

- 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, for example, 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

335 GOV.UK, Official Statistics: Forced Marriage Unit statistics 2021 (28 July 2022).
336 "The right to choose: government guidance on forced marriage": Home Office and Foreign, Commonwealth & Development Office (21 March 2022).
337 MOJ press release, Legal age of marriage in England and Wales rises to 18 (27 February 2023).

registered. Women, in particular, more frequently the financially weaker spouse, are likely to lose out if their rights on divorce are 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.[338]

Recommended terminology

136. Use of recommended terminology helps to maintain the confidence of users and observers of the court system. Judges understand the importance of being precise/careful with language and these terms are generally considered most up to date in a legal/formal/professional context.

137. "Women" for adult women rather than "girls", or, if on the borderline between child and adult, "young women".

138. Where relevant to refer to age, "older woman" rather than "old woman".

139. Ask women how they would like to be addressed, eg as "Ms", "Mrs" or "Miss". Do not just assume that "Ms" is interchangeable with "Miss" or that either mean a woman is unmarried.

140. Witnesses, both women and men, may prefer you to use their professional title, such as "Doctor" or "Professor".

141. 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.)

142. It is rarely relevant to comment on an individual's looks, or appearance.

143. 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.

The Equality Act 2010

The EqA 2010 prohibits discrimination in relation to "sex". This means being a man or being a woman. The Supreme Court [339] has determined that the terms "woman", "man" and "sex" in the EqA 2010 refer to a person's biological sex. Woman has always meant biological woman. Man has always meant biological man. Sex has always meant biological sex. See the Equality Act 2010 appendix for an overview of the EqA 2010 and more detail of the application of the EqA 2010 to "sex".

338 For the practical effect, see *HM Attorney General and (1) Akhter (2) Khan and others* [2020] EWCA Civ 122.
339 *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC16.

Chapter 7: Modern slavery

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Related content in other chapters

- "Communicating with speakers of English as a second or third language" in chapter 8.
- "Interpreters" in chapter 8.
- "Communicating interculturally" in chapter 8.
- Where there are mental health difficulties, chapter 4 (Mental disability).

Why this chapter matters

1. Victims of modern slavery are on the increase. Consequently, judges are more likely to encounter such people in court/tribunal hearings. Victims are likely to be vulnerable witnesses, considerably damaged by their experiences and wary of authority figures. Patience as well as sensitivity will be required.
2. 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 and this chapter helps by providing examples.

What is modern slavery?

3. Increasing attention is being paid to victims of modern slavery. There were 16,938 potential victims of modern slavery referred to the Home Office in 2022, representing a 33% increase compared to the preceding year (12,706).[340]
4. Modern slavery occurs across industries, from recycling plants, factories and building sites, to agriculture, hotels and boat building, as well as car washing, nail bars, domestic service and cannabis farms. It is often not readily apparent.
5. 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.
6. 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.
7. 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.
8. 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.[341]

Legal protection for victims

9. The Modern Slavery Act 2015 codified and strengthened the criminal law defining slavery, servitude and forced and compulsory labour in line with Article 4 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

340 "Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary 2022": Home Office (2 March 2023).
341 "National Strategic Assessment of Serious and Organised Crime": National Crime Agency (2020).

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 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.

10. 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.[342]

11. 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 s.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. Since s.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*,[343] where a conviction 10 years old was successfully overturned on appeal out of time.

12. 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. The "Competent Authority" was established in the Home Office as part of the NRM.

13. It enables potential victims of trafficking to receive safe accommodation whilst an assessment is made by a Competent Authority.[344] 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.

14. In *R v S*,[345] 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.

15. In the context of immigration appeals, the First Tier Tribunal (FTT) is not bound by an NRM decision as it is for the FTT to make its own findings of fact.[346]

16. In 2022, the NRM received 16,938 referrals of potential victims of modern slavery, which represents a 33% increase in referrals compared to the preceding year (12,706).

17. The most common nationalities of potential victims identified in the UK in 2022 were Albanian, UK and Eritrean (in that order).[347]

18. Courts and tribunals are not a first responder able to refer a potential victim to the Home Office or United Kingdom Border Agency (UKBA) under the NRM, but they can direct parties to the appropriate authorities.[348]

19. 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

342 Reparation orders, ss.8, 9 and 10; prevention orders, ss.14-22.
343 [2019] EWCA Crim 1389.
344 *R v Joseph* [2017] EWCA Crim 36 at paragraphs 15-16 provide a useful description of the structure.
345 [2020] EWCA Crim 785.
346 *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9.
347 "Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary 2022": Home Office (2 March 2023).
348 Details of the National Referral Mechanism are available at GOV.UK: Collection – Modern slavery.

trafficking statement for each financial year (s.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.

20. 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 statutory guidance on how to identify and support potential victims.[349]

Help with court process

21. 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.

22. 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.

23. 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.
    - Focused questions on the matters in dispute.
    - Reduction in the use of leading questions.
    - Reduction in the use of tag questions.

24. If the individual has mental health difficulties, make the necessary adjustments (see chapter 4 (Mental disability)).

25. 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 "Interpreters" in chapter 8. Also bear in mind, if the individual has a different cultural background, they may have a different cultural way of communicating (see "Communicating interculturally" in chapter 8).

26. 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

349 "Modern slavery: how to identify and support victims": Home Office (24 March 2020, updated 1 May 2025).

or repercussions. If trafficking gangs are known to be at work within their community, the victim may be in fear.

27. 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*,[350] 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.

28. 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.[351]

350 [2017] EWHC 1946.
351 *Ajayi v (1) Abu (2) Abu* [2017] EWHC 3098.

Chapter 8: Race and ethnicity

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- Further themes potentially relevant to ethnic minority women are contained in chapter 6 (Sex).

Why this chapter matters

1. This chapter gives information about the experience and perceptions of people from various ethnic minority groups. Whilst we cannot specifically address the particular issues each individual ethnic minority group might experience (due to the vast diversity of England and Wales), much of this guidance will generally be appropriate for individuals of various ethnic minority backgrounds.
2. Judges need to demonstrate fairness in carrying out their responsibilities in order to build confidence in the justice system amongst all ethnic minority groups. Awareness of the communities served by the courts and the challenges they face will assist a judge in understanding those participating in the justice system.
3. It is important to avoid stereotyping people based on perceived characteristics associated with a particular ethnic minority group. 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.
4. 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 experience before a court cannot be isolated from other social experiences.
5. 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.
6. Statistical information about the sorts of disadvantage experienced by certain ethnic minority groups can easily be misinterpreted or misunderstood. Though statistics can be valuable in revealing certain patterns and trends, their existence does not in itself always point to a clear cause that explains this pattern.
7. 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. Reporting race-related incidents is now encouraged by police forces. In the year ending March 2024, there were 98,799 racially motivated hate crimes recorded by the police in England and Wales.[352]

Race and the judiciary

9. Ethnic minority groups are still underrepresented in the judiciary, but numbers are increasing. In 2024, 31% of applicants for judicial appointments were from an ethnic minority background – twice the expected eligible pool of 15%. However, ethnic minority candidates were appointed in line with the expected eligible pool (for the second year running), making up 16% of recommendations for judicial appointments. Over a 10-year period between 2014 to 2024, there was a doubling in representation of Asian people to the judiciary; however, the proportion from black backgrounds has stayed the same at 1.4%,[353] which is around half of the eligible pool (2.9%).
10. The Equality Act (EqA) 2010 prohibits discrimination in relation to “race”, which means skin colour, nationality, national origin, ethnic origin, and descent. See the Equality Act 2010

[352] GOV.UK, Official Statistics: Hate crime, England and Wales, year ending March 2024 (10 October 2024).
[353] “Diversity Update”: Judicial Appointments Commission (February 2025).

appendix for an overview of the EqA 2010 and for more detail of the application of the EqA 2010 to "race".

Racism

11. Many believe that the reason ethnic minorities face ongoing disadvantage in many aspects of life is primarily because of institutional/systemic racism and historical injustices; others disagree with this analysis. Institutional racism was defined in the 1999 Macpherson report as: "The collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amounts to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people".[354]

12. In 2021, the government-commissioned Sewell report came to the conclusion that, "Put simply we no longer see a Britain where the system is deliberately rigged against ethnic minorities. The impediments and disparities do exist, they are varied, and ironically very few of them are directly to do with racism. Too often 'racism' is the catch-all explanation, and can be simply implicitly accepted rather than explicitly examined. The evidence shows that geography, family influence, socio-economic background, culture and religion have more significant impact on life chances than the existence of racism. That said, we take the reality of racism seriously and we do not deny that it is a real force in the UK."[355]

13. Numerous charities and activist groups, and some politicians, have criticised the report, emphatically disagreeing with its conclusions and pointing to statistics which they believe necessarily implicate racism as the primary factor. According to race equality thinktank Runnymede Trust, "The people involved in this Commission had no interest in genuinely discussing racism, but even this Government does not go as far as to say that we are post racial. The least the Commission could have done is acknowledge the very real suffering of Black and minority ethnic communities here in the UK."[356]

14. It is not the role of this Bench Book to form an opinion on the causes of any disadvantage, rather to set out differences to assist judges, and provide information to help them deal fairly with people from different ethnic minority backgrounds. As mentioned at the start, fair treatment is a fundamental principle embedded in the judicial oath and is, therefore, a vital judicial responsibility. Judges are expected to be ever vigilant to ensure decisions are not influenced by their own personal biases, beliefs or perspectives.

Ethnic groups[357]

15. In the last census (2021), 81.7% of the population in England and Wales was white, people from Asian ethnic groups made up the second largest percentage (9.3%), followed by black (4%), mixed (2.9%) and other (2.1%) ethnic groups.[358] This section is pulling from this data in relation to discrepancies in housing, employment, education and mental health.

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354 "The Stephen Lawrence Inquiry: Report of an inquiry by Sir William Macpherson": Home Office (24 February 1999).

355 "The report of the Commission on Race and Ethnic Disparities": Commission on Race and Ethnic Disparities (March 2021).

356 Runnymede Trust, Our statement regarding the report from the Commission on Race and Ethnic Disparities (March 2021).

357 ONS, Ethnic group, England and Wales: Census 2021. Whilst Jewish people and Sikhs are considered both as an ethnicity and a religion, within Judaism, there are different ethnic groups.

358 England and Wales: Census 2021 (published December 2022, updated May 2024).

Black, Black British, Caribbean or African ethnicity

16. It is necessary to be understanding towards the experiences and perspectives that many people from black backgrounds bring with them to the courts. Distrust amongst many has roots in many decades of social disadvantage and discrimination.

17. Black people are almost 3.5 times more likely to be detained under the Mental Health Act 1983 than white people.[359] The 2021 Census highlights that black people have lower rates of employment (69%) than the national average of 76%;[360] the highest unemployment for young people (aged 16 to 24) was amongst those identifying as Caribbean;[361] nearly half live in social housing; over half of parents are lone parents;[362] and 13.2% of black workers were in the least skilled type of occupation,[363] associated with lower economic circumstances (in comparison with 9.4% of the general population).[364]

Criminal justice system

18. Black people are the most overrepresented in the criminal justice system (they comprise 12% of the prison population but only 4% of the overall population).[365] In the year ending 31 March 2023, black people were 2.2 times as likely to be arrested as white people.[366] In the criminal justice arena, the 1981 Scarman report[367] concluded that racial disadvantage was a fact of British life and highlighted the need for urgent action to address racial disadvantage. This was followed by the 1999 Macpherson report,[368] which found that the Metropolitan Police was institutionally racist. This was followed by the 2017 Lammy report, which found evidence of racial bias in the criminal justice system. Finally, the 2021 Sewell report also found that ethnic minorities were overrepresented in the criminal justice system, with black people the most overrepresented.[369]

19. In England and Wales, there were 529,474 stop and searches undertaken in 2023. Of this, 5.9 white people, 1.1 Chinese people and 3.1 Indian people were stopped per 1,000 people, whereas higher numbers of Pakistani people were stopped, at 10.3; black people were stopped at the highest rates of 24.5 per 1,000 people. The Metropolitan Police undertook 33% of all stop and searches.[370]

20. The Sentencing Council's guidelines say, "there is evidence of a disparity in sentence outcomes" for drug-supplying offences, indicating "that a higher proportion of Black, Asian and Other ethnicity offenders receive an immediate custodial sentence than White offenders

359 GOV.UK, Detentions under the Mental Health Act (16 August 2024).
360 GOV.UK, Ethnicity facts and figures.
361 ONS, Ethnic Group differences in health, employment, education and housing shown in England and Wales' Census 2021.
362 ONS, Families in England and Wales: Census 2021.
363 GOV.UK, Ethnicity facts and figures: Employment by occupation (27 July 2022).
364 GOV.UK, Ethnicity facts and figures: Employment by occupation (27 July 2022).
365 "Statistics on Ethnicity and the Criminal Justice System, 2022": MOJ (updated 19 March 2024).
366 GOV.UK, Ethnicity facts and figures: Arrests (3 July 2024).
367 The Scarman report, following the 1981 Brixton riots, identified failures in police community liaison, confidence and trust in the police, police training and in the representation of ethnic minority groups in the police force.
368 The Macpherson report, following the racist murder of Stephen Lawrence, made 70 recommendations to eliminate racist prejudice, disadvantage and ensure fairness in all aspects of policing.
369 "The report of the Commission on Race and Ethnic Disparities": Commission on Race and Ethnic Disparities (March 2021).
370 GOV.UK, Ethnicity facts and figures: Stop and search (3 July 2024).

and that for Asian offenders, custodial sentence lengths have on average been longer than for White offenders."[371]

21. A correlation between race and less favourable outcomes is also identified in several other Sentencing Council guidelines:

- The Overarching Guideline on "Sentencing children and young people" says, at paragraph 1.18, that black and minority ethnic children are overrepresented in the youth justice system. Decisions about the welfare of a child must consider the particular factors that arise in the case of black and ethnic minority children.[372]
- The Overarching Guideline on "Sentencing offenders with mental disorders, developmental disorders, or neurological impairments", states at paragraph 5 that courts should take the cultural and ethnic background of offenders into account for a number of reasons, and notes that black people and people from ethnic minority backgrounds are more likely to enter mental health services via the courts or the police, rather than primary care.[373]
- The Guideline for "Firearms – possession of prohibited weapon" states that black and Asian defendants are more likely to receive an immediate custodial sentence than white defendants.[374]
- The Guideline for "Causing grievous bodily harm with intent to do grievous bodily harm/wounding with intent to do GBH" explains/states that for black and Asian offenders immediate custodial sentence lengths have on average been longer than for white, mixed white, mixed and Chinese or other ethnicity offenders.[375]

Windrush

22. The Windrush scandal came to public attention in April 2018, but its fallout had been taking place for many years before that, with a still unknown number of people affected. The Windrush generation 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.

23. After a tightening of immigration policy from 2012, members of the Windrush generation who could not prove their legal status faced very significant detriment in relation to access to housing, work and services (including NHS care), and in some cases even separation from family, detention and removal from the UK. In March 2020, an independent review commissioned by the Home Office (first published in 2018) was updated,[376] finding that hundreds, and possibly thousands, of people had been affected, directly or indirectly, and that this scandal had in many cases turned their lives upside down, and sometimes even done irreparable damage.

371 Sentencing Council: "Supplying or offering to supply a controlled drug/Possession of a controlled drug with intent to supply it to another".
372 Sentencing Council: "Sentencing children and young people".
373 Sentencing Council: "Sentencing offenders with mental disorders, developmental disorders, or neurological impairments".
374 Sentencing Council: "Firearms – possession of prohibited weapon".
376 Sentencing Council: "Causing grievous bodily harm with intent to do grievous bodily harm/Wounding with intent to do GBH".
376 "Windrush Lessons Learned Review": Wendy Williams (19 July 2018, updated 31 March 2020).

Asian or Asian British ethnicity

Pakistani

24. Pakistani people are three times more likely than white British people to live in the most deprived 10% of neighbourhoods,[377] and have the highest rates of unemployment of any ethnic group (11.1% compared to the general UK unemployment rate for the same period of 4.1%).[378] From the combined Pakistani and Bangladeshi ethnic group, 33.9% of workers were in elementary, sales and consumer services, or process, plants and machine operatives jobs (occupations associated with the lowest socio-economic circumstances).[379]

Bangladeshi

25. Those of Bangladeshi ethnicity generally have poorer health than would be expected for the average age of the group (27 years), and 39% are noted to live in overcrowded accommodation (more people in a household than the recommended number of bedrooms).[380] Sixty one per cent of Pakistani/Bangladeshi people aged between 16 to 64 work (compared with 82% of white people).[381]

Indian

26. Indian people are the least likely of all ethnic minority groups to live in the most deprived 10% of neighbourhoods.[382] People from this ethnic background had the lowest unemployment rates compared with all other ethnic minority groups at 4.9% (people from white ethnic backgrounds have the lowest rate of all at 3.3%).[383] A far higher percentage of Indian people live in their own home than for some other ethnic groups, with 71% living in a home owned by someone living at that address.[384] Those who identified as Indian are also most likely to have higher level qualifications, and have professional occupations such as doctors, teachers and lawyers (34%),[385] with nearly 40% in professional jobs.[386] Those of Indian ethnicity have lower rates of detention under the Mental Health Act than white people, and only slightly higher than people of Chinese ethnicity.[387]

Chinese

27. People who identify as Chinese have the lowest rate of detention for mental health (52 for every 100,000 people), compared with the black "other" group, which had the highest level (715 detentions for every 100,000 people).[388] Thirty four per cent of Chinese people are in

377 GOV.UK, Ethnicity facts and figures: People living in deprived neighbourhoods (16 June 2020).
378 "Unemployment by ethnic background": House of Commons Library (16 August 2024).
379 GOV.UK, Ethnicity facts and figures: Employment by occupation (27 July 2022).
380 ONS, Ethnic group differences in health, employment, education and housing shown in England and Wales' Census 2021 – the average number of people living in overcrowded accommodation is 1 in 10.
381 GOV.UK, Ethnicity facts and figures.
382 GOV.UK, Ethnicity facts and figures: People living in deprived neighbourhoods (16 June 2020).
383 "Unemployment by ethnic background": House of Commons Library (16 August 2024).
384 ONS, Ethnic group differences in health, employment, education and housing shown in England and Wales Census 2021.
385 ONS, Ethnic group differences in health, employment, education and housing shown in England and Wales Census 2021.
386 GOV.UK, Ethnicity facts and figures: Employment by occupation (27 July 2022).
387 GOV.UK, Detentions under the Mental Health Act (16 August 2024). Indian ethnicity 55 for every 100,000 people.
388 GOV.UK, Detentions under the Mental Health Act (16 August 2024).

professional occupations, with 54% having higher level qualifications; this ethnic group has a high number of students, at 24%.[389]

Muslims

28. Whilst Muslims are not themselves a race,[390] adults who identified with Muslim ethnic groups in the last census had the lowest employment rate compared to any other groups, with just under half (48.6%) of adults being employed. A primary reason could be attributed to the fact that only 37% of women are recorded as working, while the majority look after the home/family.[391] Amongst those who identified as Asian, Asian Welsh, or Asian British Muslim, the highest percentage in employment was of those of Indian ethnicity (57.5%), compared to the lowest amongst those who identified as Muslim Arab (40.3%).

Sikhs

29. Sikhs are considered an ethnic group under the EqA 2010, as well as a religious group.[392]

30. The 2021 Census identified that nearly 80% of Sikhs own their own home (compared with the average at 62%), that health was reported as better than the average, with nearly 85% of Sikhs reporting very good health (higher than the average at 82%), and that fewer identified as having a disability (10.7%, compared to the average of 17.5%). In terms of education, around a third of Sikhs have higher level qualifications. Seventy per cent of Sikhs aged 16 to 64 are employed (the national average is 70.9%), and 21.2% are in professional occupations.[393]

Jewish people

31. According to the 2021 Census, over 270,000 Jewish people live in the UK, comprising the fifth-largest Jewish population in the world, and the second largest in Europe.

32. Jewish people are considered an ethnic group under the EqA 2010, as well as a religious group.

33. 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."

34. The latest official figures show a 25% increase in general religious hate crimes, largely due to a rise in reported hate crimes against Jewish people, and to a lesser extent Muslims,[394] since the beginning of the Israel-Hamas conflict.[395] Last year there were 3,282 hate crimes against Jewish people, and 3,866 against Muslims, which represents 121 religious hate

389 ONS, Ethnic group differences in health, employment, education and housing shown in England and Wales Census 2021.
390 EqA 2010 defines race as comprising colour, nationality and national or ethnic origins.
391 ONS, Diversity in the labour market, England and Wales: Census 2021.
392 *Mandla v Dowell-Lee* [1983] 2 AC548.
393 ONS, Sikh identity, England and Wales: Census 2021.
394 The number of religiously motivated hate crimes targeting Muslims may be much higher than documented due to their reluctance to report incidents.
395 GOV.UK, Official Statistics: Hate crime, England and Wales, year ending March 2024 (10 October 2024).

crimes per 10,000 population targeting Jewish people, and 10 per 10,000 population targeting Muslims.

Gypsy, Roma and Traveller (GRT)

35. There is a general lack of understanding that GRT are considered ethnic groups and legally protected from discrimination along these lines.

36. Gypsies and Travellers report the poorest health compared to every other ethnic group, and 34% live in social housing.[396] Roma are also unlikely to own their own home; 75% live in private rented accommodation, compared to 20% of the general population (although this can be partially explained by the fact that the population is younger).

37. Gypsies and Travellers are the only ethnic groups whose educational performance has deteriorated in recent years; there are lower rates of school enrolment, and the highest rate of absence of any ethnic group.[397] They are also more likely than any other ethnic minority group to be permanently excluded from school.[398]

Help with the court process

38. Judges should be aware that individuals from the GRT community generally have low levels of trust in the state. They should also be sensitive to the possibility that as many as 40% of GRT individuals may have low or no literacy[399] and may therefore need adjustments, such as explaining the court process in more detail, and reading out court documents.

39. Lower educational standards and living in overcrowded accommodation are likely to impact on a person's ability to participate in the court process, such as: preparing a witness statement, obtaining necessary documents, or even appearing in a remote hearing. Limited finances may mean someone has less access to a computer and no facility to print documents. Judges should be sensitive to the fact that some with lower education levels and/or limited English may need more help to navigate through the court process; interpreters will be required in some cases.

40. However, judges should also be aware of the significant differences and levels of disadvantage or relative advantage between ethnic minority groups, and thus their different needs, to ensure a fair hearing.

Help with the court process for migrants, refugees and asylum seekers

41. For newly arrived migrants, refugees and asylum seekers, 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 their case. Remote hearings are less likely to be suitable because of the lack of confidential and private space coupled with more limited technology. Some may require adjustments for mental health difficulties. Judges should bear in mind that such difficulties may not have been diagnosed, and the individual may be unwilling to admit any mental health problems (see chapter 4 for possible adjustments). Asylum seekers and refugees are also likely to require interpreters. For further guidance as applicable, see "Communicating with speakers of English as a second or third language" and "Interpreters", both within this chapter.

396 Census 2021.
397 "Gypsies and travellers: educational outcomes": House of Commons Library (17 May 2024).
398 GOV.UK, Ethnicity facts and figures: Permanent exclusions (11 December 2024).
399 "Friends, Families & Travellers Annual Report" (2021).

The criminal justice system

Ethnic minorities and the criminal justice system

42. Ethnic minorities are overrepresented in the criminal justice system, forming 27% of the prison population, compared to 18% of the general population.[400]

43. In January 2016, the government asked the Rt Hon David Lammy MP to lead an independent review, sponsored by the Ministry of Justice (MOJ), to investigate the treatment and outcomes of ethnic minorities within the criminal justice system in England and Wales. The final report was published in September 2017, with David Lammy concluding that the review clearly shows that people from ethnic minority backgrounds "still face bias – including overt discrimination – in parts of the justice system".[401]

44. There have, however, been criticisms of the Lammy Review: that of failing to substantiate arguments that disparities between ethnic groups are explained by direct bias, rather than wider social and economic, or other factors. Some writers point out that crime is disproportionately committed by the young, and the ethnic minority and Muslim population is disproportionately young.[402] A recent report by the Policy Exchange argued, "The [Lammy] report is overly credulous in attributing disparities primarily to discrimination and systemic flaws, rather than considering alternative explanations – such as differences in the level of severity of offending across different ethnic groups".[403]

45. Some key findings in the Lammy Review relevant to the courts were:

- Although only 14% of the population are people from ethnic minority backgrounds, they make up 25% of adult prisoners, and 41% of under 18s in custody.
- Jury verdicts are not affected by ethnicity, and ethnic minority and white conviction rates are similar across a range of offence types, including with all-white juries.
- Ethnic disparities were noted in magistrates' verdicts, but there was a lack of reliable data on key issues, such as whether defendants pleaded "guilty" or "not guilty". The report recommended this lack of data was addressed.
- For acquisitive[404] violence and sexual offences, the review found no statistical link between ethnicity and the likelihood of receiving a prison sentence.
- Ethnic minority offenders were found to be given prison sentences at a statistically higher rate for drug offences than white offenders (240% higher). However, "the study could not account for the impact of aggravating and mitigating factors, or the possibility that BAME offenders may have been convicted of more serious drugs offences that their White counterparts."[405]

400 "UK prison population statistics": House of Commons Library (8 July 2024).
401 "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).
402 "Is there racial disparity in the criminal justice system? A review of the Lammy Review": Peter Cuthberson, Civitas (December 2017).
403 "Two-Tier Justice: Political accountability, the Sentencing Council and the limits of judicial independence": Policy Exchange (2025).
404 Crimes such as theft, robbery or fraud.
405 Lammy Review, page 35.

- Overall, youth offending had fallen considerably over the past decade, but less so amongst ethnic minority young people, in each of the categories of offending, reoffending and going into custody.[406]
- Ethnic minority 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.[407]

46. In February 2020, the MOJ published a detailed report itemising work done on each of the Lammy recommendations. It recognised that there remains an overrepresentation of ethnic minority people within the criminal justice system and disparities in aspects of their treatment. For example, ethnic minority 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.[408]

47. The latest reported figures (2022) show that, in general, ethnic minorities (excluding white minorities) still appear to be overrepresented at many stages of the criminal justice system, compared with the white ethnic group. The greatest disparity appears at the point of stop and search, alongside custodial remands and prison population.[409] Since 2018, white defendants have had consistently lower average custodial sentence lengths than all other ethnic groups combined for indictable offences.[410]

Ethnic minority women and the criminal justice system

48. As part of the Lammy Review, a report was commissioned into the experiences of ethnic minority women and the 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.

49. Since the Lammy Review, the 2017 Farmer Review[411] 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. Chapter 6 has more detail about women as offenders, the impact of imprisonment on women generally, and on ethnic minority women and the criminal justice system.

406 The Sewell report noted that involvement with gangs (which can relate to coercion/exploitation) shows up in 34% of black young people's pre-sentence reports, compared to 11% in Asian and other groups and 5% of white young people.

407 In 2022, black ethnic groups had the lowest guilty plea at 54%, compared to white ethnic groups at 68%. "Ethnicity and the Criminal Justice System 2022": MOJ (25 January 2024).

408 "Ethnicity and the criminal justice system: What does recent data say on over-representation?": Yasin and Sturge. House of Commons Library (2 October 2020).

409 "Ethnicity and the Criminal Justice System 2022": MOJ (25 January 2024).

410 "Ethnicity and the Criminal Justice System 2022": MOJ (25 January 2024).

411 "Importance of strengthening prisoners' family ties to prevent reoffending and reduce intergenerational crime": MOJ, Lord Farmer (10 August 2017).

The youth justice system

50. The National Audit Office found that 53% of children in custody were from ethnic minority groups.[412] The report proceeded to note that approximately 33% had a diagnosed mental disorder, and that many had learning difficulties.

51. HM Inspectorate of Probation published a report in October 2021,[413] finding that of those in the youth justice system:

- 60% of black or mixed ethnicity boys had been excluded from school.
- One third had been victims of exploitation.
- One third were subject to child protection or children in need processes.
- One quarter had a disability.
- The majority had dealt with adverse childhood experiences (see chapter 4 for more information).

52. The Inspectorate concluded that there was a disconnect in terms of creating a strategy to tackle the disproportionate number of black youths entering the criminal justice system.

53. The Magistrates' Association recommends:

- 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 pre-sentence reports, asking for supporting evidence.

Care and family courts

54. Judges dealing with family cases will need to delicately balance respect for different approaches to parenting within a diverse range of cultural norms and, at the same time, aim to protect all children from potential parental maltreatment.[414]

55. 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 affect how parents respond to agencies, including their own solicitors.

56. 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.

Communicating interculturally

57. This section is about witnesses attending a hearing conducted in English, but who do not themselves speak English as a first/native language. For a discussion of the specific rights and needs of Welsh-speakers, see "The right to speak Welsh" below.

412 "Children in custody: secure training centres and secure schools": MOJ (18 April 2022).
413 "The experiences of black and mixed heritage boys in the youth justice system: A thematic inspection by HM Inspectorate of Probation": HM Inspectorate of Probation (October 2021).
414 See *S and (1) F (2) M* [2025] EWHC 439 (Fam) – child enrolled in a boarding school in Ghana, wanted to return to the UK. Application refused. S's best interests to remain in Ghana.

58. 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.[415]

59. Different cultures have different communication styles. These differences may still apply both when a foreign-born person has learned to speak English fluently, and where a person who speaks English as a first language comes from a different cultural background. Judges may find it helpful to refer to chapter 1 (Litigants in person and lay representatives), for use of language and question style.

60. Assumptions should not be made about whether these differences will 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 first language.

61. 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.

62. In some cultures, particularly from East Asia, the concept of "saving face" is fundamental.[416] This goes beyond the sense of "saving face" in UK society. An individual may be concerned to save both their 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.

63. 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.

64. 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.

65. 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.

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415 Tribunals for diverse users: Genn and others (DCA research series 1/06. 2006).

416 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).

- 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.[417]
- 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.[418]
- 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 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.
- 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" and "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.[419]
  - A defendant may come from a country where it is not assumed that an accused person is innocent until proved guilty.

[417] "Facial expressions of emotion are not culturally universal": Jack, Garrod, Yub, Caldarac, Schyns. Stanford University (2012); "Emotions across Languages and Cultures": A. Wierzbicka.
[418] Tribunals for diverse users: Genn and others (DCA research series 1/06. 2006).
[419] Tribunals for diverse users: Genn and others (DCA research series 1/06. 2006).

Communicating with speakers of English as a second or third language

66. This section concerns people who are using English as a second or third learned language.

67. According to the 2021 Census, 91.1% (52.6 million) of people in the UK had English or Welsh as their main language; 4.1 million people living in England and Wales had a main language other than English or Welsh. The most common main language in the UK other than English or Welsh was Polish (612,000), followed by Romanian (472,000), Punjabi (291,000)[420] and Urdu (270,000).[421]

68. 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.

69. 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.

70. 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 they 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.

71. 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.

72. 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.

420 Some people argue this should be spelt "Panjabi".
421 ONS, Language, England and Wales: Census 2021.

- Use verbal signposts (“I am going to make three 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 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.

73. 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 (“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

74. It is useful to regularly summarise and paraphrase what the individual has said, especially at important points, to check that no misunderstanding is building up.
75. 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.
76. When clarifying meaning, go on to 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."
77. 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.

Interpreters

Is an interpreter necessary?

78. 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.
79. 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 ethnic minority people prefer to speak their first language at home. 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 they do not require an interpreter.
80. 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 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.
81. 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. This is especially true with virtual hearings, where technology can be unreliable and may require longer practice and preparation.

82. 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.

83. Witnesses who request an interpreter might also try to give some of their evidence in English without using the interpreter. Judges should be cautious about allowing a witness to answer some questions in English without using the interpreter, particularly where the credibility of the witness is likely to be at issue.

Interpretation and cultural difference

84. 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 their case.

85. 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".

86. 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.

87. 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 near 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.

88. 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

89. 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. Check at the beginning and at the end of evidence that the party has understood the interpreter.

90. 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 their position should also indicate their role as neutral and impartial.

91. Introduce the interpreter or allow the interpreter to introduce themselves. Then introduce yourself, with the interpreter confirming what you say.
92. In explaining court procedures to all participants, do not forget to include the ground rules on how the interpreter will work.
93. 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.
94. Allow the interpreter to take notes.

How to communicate through an interpreter

95. Address the witness directly, using first and second person ("I" and "you"), and look at them rather than the interpreter. It may be important to monitor small, non-verbal signals, as they speak.
96. Use a slower pace in your speech style, matching your speed of delivery to the interpreter's speed of interpretation.
97. Pause after every two or three 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.
98. 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.
99. Intervene to take control if several people start talking at once or speak in rapid succession (since this makes interpretation impossible).

Translation difficulties

100. 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 "Communicating with speakers of English as a second or third language" for details.
101. 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").
102. Avoid legal terms where possible, or, where this is unavoidable, explain the concept in plain language 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". Specific jurisdictions or chambers may use technical words that the interpreter may not understand. When introducing the interpreter, remind them to intervene if there is a term that they do not understand.
103. 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.

104. 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.
105. 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.
106. 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.
107. 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

108. 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 is now possible 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..
    - Welsh/English translation is explained in the section on "The right to speak Welsh", below. Trained Welsh interpreters are selected from an accredited list.
109. 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. This is common to all translation, regardless of language.
    - 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 they would like to speak. Ensure the interpreter and the person being interpreted both feel comfortable to say if they are not keeping up. Trained Welsh interpreters are selected from an accredited list.

Informal interpreters

110. 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.

111. 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.

112. 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.

113. 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

114. Welsh is one of the two official languages of Wales. Welsh speakers are entitled as of right to use their language of choice before courts and tribunals in their native country.

115. 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.

116. As soon as it is known that the Welsh language is to be used at a hearing, details should be emailed to HMCTS' Welsh Language Unit (welsh.language.unit.manager@hmcts.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.

117. 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.

118. Individuals in Wales have an 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

119. 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".

120. There are good reasons why a Welsh speaker may be anxious about speaking English in a hearing. Reasons for their choice of Welsh may include, for example:
    - Because they are 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, they 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.
121. 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 both the English and the Welsh terms, 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.
122. 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 they 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.
123. 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.
124. 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.
125. 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".
126. Some first-language Welsh speakers may not be strong in written Welsh and therefore request that the judgment and other documents are provided in English whilst having given their evidence in Welsh. This is particularly relevant where children and young people have the right to appeal.

127. 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

128. There are different nuances in the Welsh and English vocabulary of bilingual speakers; therefore, it is 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.

129. 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.

130. If the person does not feel their 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.

131. 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.

132. 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.

133. 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.

134. For general guidance on how to use interpreters effectively, see the section on "Interpreters" above.

Distribution of Welsh speakers and standard Welsh

135. 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. There are different dialects across Wales, but the accredited Welsh interpreter will be well versed in vocabulary and accent between different parts of Wales.

Welsh influence when speaking English

136. 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.

137. 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.

138. Welsh, like 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). 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.

139. Another difference in expression 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

140. Names are important to many people’s sense of identity, often indicating national, linguistic, religious and family roots. Court and tribunal hearings usually begin with introductions by name. For a party or witness with an unfamiliar 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.

141. Judges can find names of people from languages which are not their own difficult to pronounce. If in doubt, there are two possible approaches: either attempt a pronunciation and then check it is accurate, or ask the person first. In either case, an assertion of a desire to get it right and an apology for the error with genuine attempts not to repeat it are important.

142. People in religious, often Islamic, 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 women may wish to be called “Mrs”. Indeed, the concept of a committed relationship outside marriage may be unfamiliar to those from particular cultural backgrounds.

143. Where a hearing takes place in Wales, whether conducted in the English or Welsh language, it is 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 competence or 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 down the words phonetically for reference.

Naming systems

144. 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 names are recognisably male or female.

145. 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 Aled ap Dafydd (Aled, son of Dafydd). Such a person would usually be addressed as Mr ap Dafydd (though it is always best to ask).

146. 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 not be used on its own.
- Names carry significant meaning, eg after a god, saint, or feature of nature; or (especially in East Asia) auspiciously to minimise misfortune from astrological influences at time of birth.

147. In view of these differences, the best way to ask someone’s name is to:

- Avoid relative terms like “first name”, “second name”, “middle name”, “forename”, “surname” and “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 for their “personal name” or “given name”.
- It may then be useful to ask, “What do you want me/us to call you?” If the individual does not speak English fluently, avoid complex conditional verbs such as, “What would you like me to call you?”

148. For examples of specific naming systems:

- Afghan
- African Caribbean
- Chinese and Korean
- Filipino
- Greek
- Indian Hindu
- Indonesian
- Nigerian
- Sikh
- Somali

- South Asian Muslim
- Sri Lankan (Tamil and Sinhalese)
- Turkish
- Vietnamese

149. 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 abuse is under discussion, there are English words (eg “slap”, “beat”, “hit”, “punch”) which may not translate with the same connotations. Welsh, for example, 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.

150. In the light of this, it is particularly important for judges:

- To explain the procedure and its purpose.
- 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.[422]
- 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 “Communicating with speakers of English as a second or third language” and through interpreters, see “Interpreters”.
- Be alert to any discriminatory or culturally insensitive behaviour by the local authority.[423]

Recommended terminology

Why terminology matters

151. It will sometimes be relevant to identify or describe a person’s ethnicity. Where it is relevant, care should be taken to ensure that appropriate terms are used.

152. Where judges are unsure about how to identify or describe a person’s ethnicity, or how to address a person from an ethnic minority group, they should ask the person concerned.

153. Using recommended terminology reduces the likelihood of offending the relevant party or witness and helps give confidence that they will receive a respectful and fair hearing.

422 See *UA v HMRC (TC)* [2019] UKUT 113 (AAC), where the First-tier Tribunal had failed to take into account cultural matters.

423 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).

Terms relevant to identity

154. Language is constantly evolving, and recommended terminology helps judges identify terms which may now be considered outdated/informal, or even offensive.

155. Language that was formerly used to describe a person's ethnicity is sometimes no longer recommended. 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:

156. **BAME** or **BME:** These are generally no longer used because they do not differentiate between people with diverse backgrounds, and who have been subjected to different life experiences and patterns of discrimination, while emphasising certain ethnic-minority groups (Asian and black) and excluding other and white ethnic minorities. The term can create a misleading interpretation of data.

157. Where possible and relevant, we talk about the particular racial or ethnic group. Where this is not possible, we have used ethnic minority, or ethnic minority groups and people from ethnic minority backgrounds, rather than minority ethnic. This mirrors the language used by the Equality and Human Rights Commission, the last census, and generally by the government.

158. An ethnic minority person should not be referred to purely as an "ethnic person". Nor should the term of "ethnic communities" be used to describe ethnic minority communities, as every individual and community has an ethnicity. An ethnic minority person should not be referred to as a noun, ie "an ethnic".

159. **People of colour/coloured:** The term "people of colour" tends to be used more in the USA than in the UK. This term has been criticised as it blurs the separate identities of the groups it covers, and does not include white ethnic minority groups.

160. "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", however this is considered outdated and offensive. "Brown" (as a reference to South Asian people) should also be avoided.

161. **Black:** It is now generally recommended 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 different views 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 lower case letters, unless the group's name includes a geographical place, eg Asia, Indian or Black Caribbean.

162. **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 II settlers from the West Indies and, in particular, many older people from that community will describe themselves so. Whilst the term "West Indian" would not always give offence, it is inappropriate to use it unless the individual concerned identifies themselves in this way, as it is otherwise considered outdated.

163. "African Caribbean" is the term now much more widely accepted. It has largely replaced the earlier term "Afro-Caribbean". As with "West Indian", this may be used as a self-description by some people, but may be seen as outdated.

164. “African Caribbean” does not refer to all people of West Indian origin, some of whom are white or of Asian extraction.

165. 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”).

166. Young people born in Britain may choose not to use any of these designations and will often describe themselves as “black” or “black British”. This is the terminology used in the 2021 census.

167. **Asian:** “Asian” is a collective term which has been applied in Britain primarily in reference 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”).

168. 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.

169. 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 outdated and offensive.

170. **Mixed race/mixed or dual heritage/mixed parentage/dual parentage:** The term “mixed race” is still widely used and is considered acceptable by many, though not by some. Recommended terms are “person with a mixed ethnic background”, “mixed heritage” or “mixed/dual parentage”. “Half-caste” is generally considered offensive. The term “multi-racial” is only used in relation to diverse communities.

171. **Jewish people:** It is generally preferable to say “Jewish person” or “Jewish people”, as some feel the terms “(a/the) Jew” and “(the) Jews” have been used with hostility over the years. However, many Jewish people do not take issue with the term and readily use it to self-describe.

172. **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. Though some may identify as a “second-generation immigrant”, the term should not automatically be used to describe black, Asian or ethnic minority people born in the UK; and the term “immigrant” should not be used.

173. **Migrants:** This term usually refers to people who leave one country to live in another, especially to find work and better living conditions. Some migrants are transitory or seasonal, staying in another country only for a period of time. Others have moved permanently.

174. 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.

175. **Gypsy:** Some people from the GRT communities find the term “gypsy” offensive, whereas others are proud to use that term. Judges should ask the person how they identify.
176. **British/English:** “British” and “English” are used to refer to nationalities first and foremost, which include people of all ethnic groups.
177. **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 therefore not Welsh. Unlike the English language, the Welsh language has slightly different words for “Welsh” in the sense of the language (“Cymraeg”) and “Welsh” in the sense of “of Wales” (“Cymreig”). This could lead to misunderstandings in translation.

Chapter 9: Religion

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- Appendix D (Glossary of religions – religious practices and oath-taking requirements).

Why this chapter matters

1. This chapter seeks to inform judges about the various religious practices of those who may appear before courts and tribunals. The need to understand faiths and practices is particularly important, given the changes within UK society to which courts and tribunals need to respond. Judges should have an awareness of the needs of parties and witnesses appearing before them. In this chapter, judges will find guidance about the sort of adjustments that might be needed and general guidance around wearing the veil in court.
2. Religious hate crimes increased by 25% between 2023 to 2024, with proportionally Jewish people, followed by Muslim people, reporting the most hate crimes.[424] Muslim people accounted for 10 religious hate crimes per 10,000 of the population (38% of all reported religious hate crimes), whereas Jewish people accounted for 121 religious hate crimes per 10,000 of the population (33% of all reported religious hate crimes).
3. The term "Islamophobia" is used by some Muslims (and others) to refer to hate crime which is targeted towards Muslims. There is no single agreed definition of Islamophobia, or even agreement about whether the term is meaningful. The All-Party Parliamentary Group (APPG) on British Muslims proposed the following definition:

   > "Islamophobia is rooted in racism and is a type of racism that targets expressions of Muslimness or perceived Muslimness."[425]

4. This was not accepted by the previous government, with many contending that it is vague and could be a threat to free speech, and exacerbate existing divisions. Furthermore, Islam is multi-racial, and Muslims are not a race in line with the Equality Act (EqA) 2010's definition of race.[426]
5. In 2025, a new working group was established to provide the government with a working definition of Anti-Muslim Hatred/Islamophobia, aiming to balance experiences of Islamophobia with a commitment to freedom of thought and expression.[427]
6. Whilst Muslims are not a distinct ethnic group, unlawful discrimination against a person because they are Muslim would be captured under the EqA 2010 as religious discrimination.
7. Common practices and terms are explained in appendix D (Glossary of religions).

The diversity of religious practice

8. For the first time, in 2021, fewer than half of the population of England and Wales described themselves as Christian, while increasing numbers (over a third) described themselves as of "no religion".[428] The importance of understanding different religious practice is tied to access to justice, as people's practices may impact on every aspect of their lives, from work to interaction with the justice system.
9. 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

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424 GOV.UK, Official Statistics: Hate crime, England and Wales, year ending March 2024 (10 October 2024). The increase is attributed to a rise in hate crimes against Jewish people and to a lesser extent Muslims since the beginning of the Israel-Hamas conflict.

425 "Islamophobia defined: The inquiry into a working definition of Islamophobia": APPG on British Muslims (November 2018).

426 The EqA 2010 defines race as comprising colour, nationality and national or ethnic origins.

427 GOV.UK, Working Group on Anti-Muslim Hatred/Islamophobia Definition.

428 The Census 2021.

tenuous link with their faith but would feel bound by respect or family tradition in, say, observing a festival.

10. Judges may find it helpful to understand that some couples will only have entered into a religious marriage not recognised under the law of England and Wales, and not a legally recognised civil marriage. The couple is still likely to regard themselves as married and a judge should generally use the titles which a couple uses (eg “Mr” or “Mrs” and “husband” or “wife”, as opposed to “partner”). 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

11. 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.

12. 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).

13. In all cases it is important to demonstrate respect for religious differences:

- Show understanding of any issues regarding times when a religious person cannot attend court, eg because of an important holy day, or because they need time off or facilities to pray. For more detail, see appendix D (Glossary of religions).
- Take care to get a person’s name right. For details, see “Names and naming systems”.
- Show understanding regarding correct practice on taking the oath. 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 prefer. The important point is that they feel bound by the oath or affirmation. For details, see appendix D (Glossary of religions).
- Avoid making any unnecessary objections regarding dress code. (See “Religious dress and wearing the veil” below.)
- Consider changing the order in which witnesses are called or timings of hearings/breaks to accommodate faiths that observe their weekly Sabbath from sunset (or before) on Friday until sunset on Saturday (the period where work/activity is not permitted).

If a person is fasting, it is helpful to understand the following:

- Periods of fasting can often be for many hours and for lengthy periods, eg during the 29 to 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 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.
- Parties 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 10 days of Ramadan.

- It is worth noting that, if a particular ethnic minority 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.

14. 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 appendix D (Glossary of religions – religious practices and oath-taking requirements):

- 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

Religious dress and wearing the veil

Wearing the veil in court: introduction

15. 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. The issue may be particularly important where the hearing is "remote", with a person attending via video. It may be relevant to the correct identification of a participant in a hearing, the ability of participants to check understanding, to ask questions, and to assess answers. The sensitivity may become more acute, as members of the public increasingly ask to access remote hearings. Some Muslim women cover their head and upper body in the presence of adult males outside their immediate family and, in nearly all cases, leave their face visible.

16. 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.

17. A person’s right to manifest their religion or beliefs is not an absolute one.

Wearing the veil in court: non-criminal cases

18. A judge can ask anyone giving evidence to take off their veil whilst they give that evidence, if a fair trial requires it. This requires a balancing exercise, if the judge reasonably believes it necessary in the interests of justice.

19. In any jurisdiction, such an issue should ideally be addressed at a pre-trial directions hearing or, at the latest, at the outset of the hearing.

20. 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, if the hearing is not a remote one. In the event of a remote hearing, a solicitor, with professional obligations to the court or tribunal, if present in the same room as the witness or party, may be able to assist.

21. Where removal is felt necessary, a judge might want to consider restricting the number of observers in the courtroom/using partial screens.

22. Science and a growing understanding indicate 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

23. Any issue regarding wearing the veil in court should be addressed, ideally, at a pre-trial directions hearing.

24. 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 their identity at each session, in private, by a female member of staff.

25. 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.

26. Where removal is felt essential, a judge might want to consider restricting the number of observers in the courtroom/using partial screens.

27. In jury trials, a judge might decide to allow a defendant to wear a veil in court, save for when she gives evidence.

Oaths, affirmations and declarations

What makes an oath or affirmation binding

28. 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.

29. In Wales, a person is entitled to take the oath or affirm in Welsh and, if they do 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 they give 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 (welsh.language.unit.manager@justice.gov.uk) can email electronic versions almost by return.

30. Oaths are administered in employment tribunals, but in most other tribunals (as opposed to courts), they are not.

31. 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**."

32. 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.**"

33. 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.

34. Guidance was given by Lord Lane CJ in the case of *Kemble*:[429]

> "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?"

35. 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 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.

36. In the courtroom, the emphasis is upon receiving testimony and determining the credibility of the witness on the basis of their binding oath or affirmation.

37. Assumptions should not be made that a religious individual who chooses to affirm has done so because they do 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

[429] *R. v. Kemble* [1990] 91 Cr. App. R. 178.

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

38. 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.
39. Certain faith traditions insist that anyone handling a holy book or scripture be in a state of ritual purity.
40. Ritual purity may be achieved by performing ablutions involving the use of water.
41. 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.
42. 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.
43. All holy books should be handled with care and respect.
44. 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.
45. These practices should be accommodated where possible, to enable such witnesses to consider themselves most conscience-bound to tell the truth.

Asking people how they would like to take the oath

46. Court and tribunal 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.
47. Witnesses do not always understand the meaning of the word "affirm". This should be explained rather than waiting for the individual to ask.
48. It is important to do this before the witness/juror comes into the courtroom so that there is time to locate the appropriate religious book.
49. 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.
50. 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.

51. For more detailed consideration regarding the practices of different faith traditions generally, and in relation to taking oaths, use the appendix D (Glossary of religions) 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
- Zoroastrianism

Oaths for different roles

52. 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 [name] 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

53. In particular, the following:

Provision 1 – Manner of administration of oaths:

(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 Jewish person, 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 Jewish person, the oath shall be administered in any lawful manner.

(4) In this section, an officer means any person duly authorised to administer oaths.

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.

Provision 4 – Validity of oaths:

(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.

Provision 5 – Making of solemn affirmations:

(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.

Remote hearings and holy books

54. A witness who is participating remotely from their home may wish to take a religious oath, but not have the relevant religious book available. This should be permitted. The overriding principles are that the court considers the oath binding on the conscience of the witness and, importantly, so does the taker.[430] 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.[431]

The Equality Act 2010

The EqA 2010 prohibits discrimination in relation to religion. See the Equality Act 2010 appendix for an overview of the EqA 2010 and for more detail of the application of the EqA 2010 to religion.

[430] *R v Kemble* [1990] 1 WLR 1111, see above at para. 34.
[431] *R v Chapman* [1980] Crim LR 42 CA.

Chapter 10: Sexual orientation

Contents

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What do we mean by “sexual orientation”?

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The Equality Act 2010

Why this chapter matters

1. There is a history of discrimination against lesbian, gay and bisexual (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. Judges should also be aware that fear of being "outed" in court may place additional burdens on LGB parties, witnesses and victims of crime.
2. Some countries have the death penalty for same-sex relationships, and this chapter provides helpful guidance for judges dealing with asylum claims.

What do we mean by "sexual orientation"?

3. "Sexual orientation" refers to who you are sexually or romantically attracted to. Sexual orientation is not a choice. The social activities, relationships, interests, occupations, political beliefs and financial circumstances of 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.
4. In 2020, an estimated 3.1% of the UK population aged 16 and over identified as LGB. People aged 16 to 24 years continued to be the most likely to identify as LGB in 2020 (8%), reflecting an increasing trend for this age group since 2014; this breaks down to 2.7% identifying as gay or lesbian, and 5.3% identifying as bisexual.[432] Although there has been an increase in the number of people identifying as LGB, the full numbers are still difficult to assess, because many people do not choose publicly to identify themselves.
5. Sexual orientation should not be confused with gender identity. Gender identity refers to a feeling in relation to the self, whilst sexual orientation refers to who you are sexually/romantically attracted to.
6. The term "LGBT" (or "LGBT+") is commonly used when referring generically to people in both groups. This is discussed further below (see "Recommended 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

7. There is a historical background of widespread 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.[433]
    - Male homosexuality was only decriminalised in Northern Ireland in 1982.[434]
    - The age of consent for sexual activity between men was only equalised with the age of consent for heterosexual and lesbian/gay sexual activity in 2003.[435]

[432] ONS, Sexual orientation, UK: 2020 (25 May 2022).
[433] Sexual Offences Act 1967.
[434] Order in Council, the Homosexual Offences (Northern Ireland) Order 1982; in force from 8 December 1982.
[435] Sexual Offences (Amendment) Act 2000.

- 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.[436]
- Until 2003, local authorities were prohibited from intentionally "promoting homosexuality" and "promoting the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship" under s.28 Local Government Act 1988.
- 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 EqA 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.[437]

8. 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.

Hate crime

9. There was an 8% fall in sexual orientation hate crimes in the year ending March 2024 (22,839 reported offences), which is 13% lower than the year ending March 2022.[438]

Court hearings

10. 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.

11. 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 EqA 2010 based on the perpetrator's perception (whether or not correct) of their sexual orientation.

12. Some LGB people may be concerned about their sexual orientation being revealed in court. 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

13. 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

436 Sexual Offences Act 2003.
437 EqA 2010, ss.29(8) and 33(6).
438 GOV.UK, Official Statistics: Hate crime, England and Wales, year ending March 2024 (10 October 2024).

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).

14. 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.[439]

15. 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.

16. 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.

17. In July 2017, the Supreme Court ruled that same-sex married couples have the same entitlement to survivors' pensions as opposite-sex married couples.[440]

Children

18. 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 wellbeing, sexual responsibility, academic achievement and avoidance of crime. There is no body of respectable research which points convincingly to any other conclusion. Single LGBT people and same-sex couples (even if not married or in a civil partnership) can adopt.[441] However, unmarried couples (whether gay or heterosexual), must show that they are living as partners in an enduring family relationship.[442]

LGB asylum seekers

19. In 67 countries, same-sex relationships are illegal and can lead to lengthy prison sentences, including 11 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.[443]

20. People who face persecution on the basis of their real or perceived sexual orientation can claim asylum in Britain.

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439 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.

440 For detail, see *Walker v Innospec Ltd and others* [2017] UKSC 47.

441 Introduced by the Adoption and Children Act 2002, which came into force on 30 December 2005.

442 Adoption and Children Act 2002, s.144(4)(b).

443 Human Dignity Trust, Map of Countries that criminalise LGBT people [accessed 25 May 2023].

21. One difficulty such individuals may face is if there is insufficient reliable country-specific information on persecution of LGB people.[444]

22. In addition, applicants for asylum on this basis may have difficulty in proving their sexual orientation.

23. It is important for judges not to make stereotypical assumptions. Like any other type of person, some LGB people may conform to stereotypes and others may not, and they may well find such stereotypes offensive. Some people are very private, some are not. It is important to treat every person individually.

LGB people and crime

24. From 1967 in England and Wales, sex between adult men aged 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.

25. 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.

Recommended terminology

26. Where someone's sexuality is relevant to the issues in the case, care should be taken to ensure that appropriate terms are used.

27. Different people prefer different terms, and the person should be asked how they would like to be referred to if it is unclear. In general, the following terminology is recommended:

    - A gay man. The word "homosexual" may sound old-fashioned. Although, some gay men prefer to self-identify as homosexual.
    - A lesbian or a gay woman. Some lesbians are happy to be referred to as "gay". Others do not like to be called "gay" because they have a distinct identity from gay men. Some lesbians may also refer to themselves as homosexual or homosexual women.
    - 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 commonly used. 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.

28. Although the following terms may be used by gay people themselves, they should not be used by judges:

    - Gays/a gay.
    - Homosexuals/a homosexual.

[444] "Fit for purpose yet?": Independent Asylum Commission (2008).

- Dyke.
- Queer.

29. The term “queer” is widely used amongst certain demographics. Nevertheless, it is still considered derogatory by many people in the LGB communities, and it is therefore to be avoided by judges.

The Equality Act 2010

The EqA 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 EqA 2010 and for more detail of the application of the EqA 2010 to sexual orientation.

Chapter 11: Social exclusion and poverty

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Why this chapter matters

1. A disproportionate number of those drawn into the justice system are from socially excluded backgrounds. It is important that judges understand the causes, extent and implications of social exclusion and poverty. Socially excluded people may have recurrent contact with state bureaucracy. Some of these relationships with the state can be positive, but there can be a fear factor for many. This may affect views on authority figures, including judges.
2. This chapter identifies the difficulties and challenges that people from socially excluded backgrounds may face when dealing with the court process. It also sets out practical guidance for judges to help enable those from socially excluded backgrounds to fully and fairly participate in the court/tribunal process.

Causes of social exclusion

3. Several factors can lead to social exclusion. 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 that is discriminated against.
    - Suffering from an adverse childhood experience (ACE).
4. An aspect of people's exclusion may be due to, or exacerbated by, discrimination because of sex, gender reassignment, ethnicity, religion, language, disability or sexual orientation. These issues are covered elsewhere in this Bench Book.

Poverty levels in the UK

5. Department for Work and Pensions (DWP) data shows that around one in six people (13%) in the UK were in relative low income (relative poverty) before housing costs in 2021 to 2022. This rises to just over one in five people (17%) once housing costs are accounted for.[445]
6. The cost of living crisis is having a significant effect on poorer households.[446] Across the poorest fifth of families, the Joseph Rowntree Foundation (JRF) cost-of-living tracker in October 2022 reports that:
    - Around six in 10 low-income households are not able to afford an unexpected expense.
    - Over half are in arrears.
    - Around a quarter use credit to pay essential bills.
    - Over seven in 10 families are going without essentials.
    - Half of the poorest fifth of families say they have reduced spending on food for adults.
    - Around four in 10 families with children are spending less on food for their children.

445 "Poverty in the UK: Statistics": House of Commons Library (1 December 2023).
446 Joseph Rowntree Foundation, UK Poverty 2023: The essential guide to understanding poverty in the UK (26 January 2023).

- Half are already reducing the number of showers they take.
- Around six in 10 are heating their home less.

7. JRF reports that almost a fifth of poor households and over a quarter of households in receipt of Universal Credit experienced food insecurity in 2020 to 2021.
8. The latest full-year Trussell Trust data for 2023 to 2024 shows a much higher level use of food banks than before the pandemic.[447]

Child poverty in the UK

9. Child Poverty Action Group (CPAG) reports that:[448]
   - There were 4.2 million children living in poverty in the UK in 2021 to 2022. That is 29% of children, or nine in a classroom of 30. Forty four per cent of children living in lone-parent families are in poverty. Lone parents face a higher risk of poverty due to the lack of an additional earner, low rates of maintenance payments, gender inequality in employment and pay, and childcare costs.
   - Children from black and ethnic minority groups are more likely to be in poverty: 48% are now in poverty, compared with 25% of children in white British families.
   - Work does not provide a guaranteed route out of poverty in the UK. Seventy one per cent of children growing up in poverty live in a household where at least one person works.
   - Children in larger families are at a far greater risk of living in poverty, with 42% of children living in families with three or more children living in poverty.

   (All poverty figures are after housing costs.)

Who is in poverty?

10. Some groups are more likely than others to be disadvantaged. In 2016, the Equality and Human Rights Commission (EHRC) found that four groups of people were consistently the most disadvantaged and had fallen the furthest behind the rest of the population. These are:[449]
    - Gypsies, Roma and Travellers (GRT).
    - Homeless people.
    - People with learning disabilities.
    - Migrants, refugees and asylum seekers.

Poverty and ethnicity

11. There are huge variations in poverty rates by ethnicity. Before housing costs, people in households from a Bangladeshi or Pakistani ethnic group experienced the highest poverty rate, at 39% (23 percentage points higher than households from white ethnic groups) during the three-year period from 2019 to 2020 through to 2021 to 2022.

447 The Trussell Trust April 2023 – March 2024.
448 Child Poverty Action Group (CPAG) report 2023.
449 "England's most disadvantaged groups: Is England fairer? (2016) spotlight reports": EHRC (12 August 2021).

12. After housing costs, people in households from a Bangladeshi ethnic group experienced the highest poverty rate, at 53% (33 percentage points higher than households from white ethnic groups).
13. Twenty six per cent of people in households from a black ethnic group were in poverty before housing costs, and 40% were in poverty after housing costs.[450]

Regional poverty

14. Scotland has a lower rate of poverty (18%) than England (22%) and Wales (24%), and around the same rate as Northern Ireland (17%) (based on three-year averages of data).[451]
15. Wales has the highest poverty rate among the four nations, with almost one in four (24%) people in poverty.
16. The poverty rate in England for 2018 to 2021 was 22%, however this varied between different regions of England.
17. The latest three-year averages show north-east England had the highest poverty rate of all regions in 2018 to 2021, at 26%. This was broadly consistent with 2017 to 2020 (25%) and saw the North East surpass London, which had consistently had the highest poverty rate for two decades, principally due to very high housing costs. Yorkshire, Humberside and the West Midlands also have higher than average poverty rates, at 24% and 23% respectively. In these areas, higher poverty rates are driven by comparatively lower earnings, with a higher proportion of adults working in lower paid occupations, and higher rates of economic inactivity and unemployment among working-age adults.
18. The South West and east of England have among the lowest poverty rates in England at 19%, followed by the South East and East Midlands, at 20%, and the North West at 21%.
19. The proportion of people in relative low income before housing costs was highest in the West Midlands (22%) over the three-year period 2019 to 2020 to 2021 to 2022, and was lowest in the South East (14%), London (14%), and the east of England (14%). After housing costs are considered, the proportion was lowest in Northern Ireland (16%) and highest in the West Midlands (27%). A much higher proportion of people in London are in poverty, based on incomes after housing costs, because of the high cost of housing relative to other parts of the UK.

Poor educational attainment and literacy

20. This is a characteristic strongly associated with social exclusion.[452] The attainment gap between disadvantaged pupils and their peers has stopped closing for the first time in a decade.
21. Disadvantaged pupils in England are 18.1 months of learning behind their peers by the time they finish their GCSEs, the same gap as five years ago.
22. Researchers have identified the increasing proportion of disadvantaged children in persistent poverty as a contributory cause of the lack of progress with narrowing the disadvantage gap.
23. Disadvantaged young people and children living in poverty have been hardest hit by Covid-19 and could face consequences that affect them for years. When the pandemic hit in

450 "Poverty in the UK: Statistics": House of Commons Library (1 December 2023).
451 Joseph Rowntree Foundation, UK Poverty Rates by Region 2023.
452 Education Policy Institute, Education in England Annual Report: 2020.

March 2020, only 51% of households earning between £6,000 to £10,000 had home internet access, compared with 99% of households with an income over £40,000.

24. You are still 60% more likely to get a professional job if you come from a privileged, rather than working class, background.

25. For children there is a gap in young people's educational attainment by parental income across all stages of education. The Covid-19 pandemic generally widened the attainment gap between the most and least disadvantaged pupils in the UK. This is likely driven by the digital divide, differences in home learning environments and falling incomes.

26. 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 eight to nine years.[453] Tackling and understanding documents in legal proceedings will be a problem for many. Adults with poor literacy skills will be locked out of the job market and, as a parent, they won't be able to support their child's learning.

27. The lack of educational qualifications has a significant effect on the ability to get decently paid work and to manage in a society that requires functional literacy.

Health and poverty

28. Working-age adults living in poverty are more likely to suffer from poor health, more broadly. Evidence suggests low incomes are associated with symptoms of anxiety, such as lack of sleep, lacking energy and feelings of depression.

29. Poverty continues to affect life chances and outcomes, and the rate of deaths caused by Covid-19 was higher in the most-deprived than in the least-deprived areas in all nations of the UK. In England and Scotland, the death rate from Covid-19 in the most-deprived areas was more than twice as high as in the least-deprived areas.[454]

30. Poverty rates are higher among families where at least one member is disabled, compared to families where no one is disabled. In 2021 to 2022:

    - The proportion of people in relative low income before housing costs was 20% for families where someone is disabled, compared to 15% for people living in families where no one is disabled.
    - The rate of relative low income after housing costs was 27% for families where someone is disabled, and 19% for those where no one is disabled.
    - People living in families where someone is disabled comprised around 45% of the population in relative low income before housing costs, and 46% after housing costs, in 2021 to 2022. This compares to 38% of people across the total UK population living in families where someone is disabled. However, these figures take no account of the additional living costs that people with disabilities might have.
    - 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.[455]

[453] GOV.UK tells people to write for a nine-year-old reading age.
[454] GOV.UK, State of the Nation 2021: Social mobility and the pandemic (21 July 2021).
[455] The King's Fund, What are health inequalities? (17 June 2022).

31. Social factors such as education, housing, employment and working conditions and poverty all affect life expectancy by influencing lifestyles.

32. 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.[456]

33. The consequences of poor health may show 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)).

"Looked after" children

34. 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 overrepresentation of looked-after children.[457]

35. 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. See "adverse childhood experience (ACE)" in chapter 4.

36. 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.[458]

37. Such difficult early issues may resonate throughout life, with effects on educational attainment, mental health and attitudes to authority figures.[459]

Lack of choice and control

38. 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. Some of these relationships can be positive, but there is a fear factor for many. This may affect views on authority figures, including judges.

39. Socially excluded people may be reliant on these professionals in many aspects of their lives. They may also be used to having important decisions about their lives made by others.

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456 Nearly half of everyone in poverty is either a disabled person or lives with a disabled person: Joseph Rowntree Foundation (7 Feb 2020).

457 "Guidance: Care leavers in Prison and Probation": HMPPS (12 August 2019).

458 "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).

459 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).

40. 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

41. 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 benefits, 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 their case.

42. 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.

43. 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 may take for granted.

Unfamiliar norms

44. 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 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.

45. 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 out of the helplessness stemming from lack of choice and control, rather than a lack of respect for the law.

Difficulties which the court process may pose

46. As noted above, a disproportionate number of those appearing before courts and tribunals are from socially excluded backgrounds. This may affect their:

- 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 and the inability to afford appropriate clothing.
- Ability to understand evidence or procedures.
- Response to authority figures, including the judge.
- Response to cross-examination or questions from the bench/panel.
- 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

47. To help redress the inequality, procedural fairness is key. It is important to:

- Put people at ease. This helps them express themselves and, as such, contributes to a fair hearing. 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, to assist with work or school commitments. Where possible, work around difficulties with childcare or getting time off work when listing hearings or deciding upon the order of witnesses.
- 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 (LIP), that they have not sent anything in to HMCTS shortly before the hearing date.
- During case preparation, write in simple English.
- 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.
- There is little point in asking, “Do you understand?”. The answer is all too likely to be “Yes”, given that no one likes to feel stupid, reveal ignorance or risk holding up progress.
- Reflective listening, the regular summarising by the judge of what the person has understood, and asking the individual to tell the judge what they have 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.
- In case preparation where the individual is an LIP, 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 LIPs will also be of assistance with socially excluded witnesses and parties.

Legal knowledge and advice

48. 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 former legal aid reforms.

49. 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.

Literacy and the court process

50. 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.

51. 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.

52. 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.

53. 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.

54. 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 they have 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.

55. 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 they are 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.

56. 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 they 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

57. 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, a partner or children.
- 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 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.
- 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 LIPs, 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

58. 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

59. 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.[460]

60. Tenancies may be terminated, creating a risk of a period of homelessness on release from prison.

61. 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.

62. Lone parents are overrepresented 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 of sentencing.[461] For the impact of imprisonment on women as well as on dependent children, see chapter 6.

460 "The Impact of short custodial sentences, community orders and suspended sentence orders on reoffending": MOJ (2019).

461 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.

Community sentences and treatment orders

63. 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

64. 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).[462]

65. 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.[463]

66. The addition of fines to existing debt carries the risk of engagement in further criminal activity to "solve" the problem.

67. 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

68. 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.

69. 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.

70. Timing may be important to give an opportunity for other arrangements to be made or to take account of impending events (eg childbirth).

71. The impact of any decision on the property owner should also, of course, be considered.

[462] This came into force in 2007 and the amount has increased over time.
[463] "Measuring Poverty 2020": Social Metrics Commission (July 2020).

Chapter 12: Trans people

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Why this chapter matters

1. Whilst judges do not stray into the political arena, we are aware of topical issues and note that feelings around this area are strong. Our focus is however on obtaining best evidence in the proceedings before us. It is of the utmost importance that participants, whether the accused, witnesses or protagonists in a civil dispute, should be treated in a way that ensures they can put their case or evidence fairly.
2. People who have adopted a social or legal "gender identity" different from their biological sex may face discrimination in their everyday lives. This may 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.
3. There is not always clear consensus on the best terminology to use. It should not be assumed that particular terms are appropriate without asking the person concerned. That should be our starting point, and unless there is a reason not to, as in other contexts that we set out in this Bench Book, judges generally respect what someone prefers to be called.
4. Many trans advocacy groups suggest a distinction between gender and sex, with "sex" reflecting biology and "gender" representing the socially constructed aspect of man/womanhood. However, these terms are often used interchangeably in wider society as well as in law. A Gender Recognition Certificate (GRC), for example, changes one's legal sex for some legal purposes, but does not change an individual's legally recognised sex for the purposes of the Equality Act (EqA) 2010.[464]
5. We have used the term "biological sex", which is in line with the terminology used in the 2025 Supreme Court case.[465]

Who are trans people?

6. People who identify with a gender/sex which is different from their biological sex are most widely referred to as "trans" or "transgender".
7. The Gender Recognition Act (GRA) 2004 applies to those who have a desire to change their sex on their birth certificates, and to do so they must satisfy a mix of legal and medical criteria (although there is no requirement to have undergone any surgery). A GRC does not apply to the EqA 2010 (the Supreme Court determined that "woman" has always meant "biological woman", "man" has always meant "biological man", and "sex" has always meant "biological sex"), but does apply to some other areas of law, eg a GRC allows the person to marry in their acquired gender.
8. The EqA 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 (The Equality Act 2010) for a discussion of the scope of this concept. Some people who identify with a gender different to their biological sex do not take legal steps, or any medical ones.
9. Increasingly in recent years, "non-binary" has become a popular identification, though this is not a legally recognised social category.[466] Non-binary people often wish to be referred to by non-standard pronouns or by pronouns in a non-standard way; namely, "they" to refer to a singular person, which many people find linguistically confusing. Judges should exercise

464 *For Women Scotland v The Scottish Ministers* [2025] UKSC16.
465 See above.
466 See paragraph 171, *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC16. The definition of sex in the EqA 2010 makes clear that the concept of sex is binary.

their discretion whether to use these non-standard pronouns, rather than referring to the person's biological sex/gender, depending on whether they believe it will achieve best evidence. Witnesses should never be compelled to use these pronouns. See also "Recommended terminology" within this chapter.

10. UK law makes express provision only for those who wish to change or reassign their gender, from female to male or vice versa.[467]

11. Despite its use in the EqA 2010, the term "transsexual" is generally considered to be outdated, as it is associated with a medicalised approach. It is generally preferable for the judge to use the term which the person concerned is comfortable with (whilst balancing the needs of other court users to give their best evidence).

12. All people deserve to be treated fairly, and with respect for their private life and personal dignity, irrespective of their gender or transgender status.

Transitioning

13. Where a person has decided to live permanently in line with their gender identification, 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 GRA 2004; others may not.

14. Transitioning is partly a social process, typically including change of name. It does not necessarily entail any medical process, though for some people it may also include hormone treatment and gender/sex reassignment surgeries.

15. Some people are comfortable with being "out" about being trans and may explicitly identify themselves, for example, as a "trans man", a "trans woman" or as "non-binary". Others might wish to keep this aspect of their lives private.

Discrimination, harassment and violence experienced by people who do not conform to perceived gender norms

16. Awareness of transgender people, and/or generally, people who do not conform to gender norms, has greatly increased over the past decade. However, many still struggle with lack of support or acceptance from their families or local communities and may experience social isolation, discrimination and even violence in their everyday lives.

Treatment of trans people in court

17. Typically, it should be unproblematic for the judge to use the trans person's preferred name and pronouns ("he/she" or "they"), regardless of whether they have obtained a GRC.[468] However, where one side's case hinges on the recognition of the biological sex of the trans person as crucial, and the other side on the recognition of their chosen identification, judges need to be careful not to let the choice of gendered pronouns give an appearance of bias, or that there is a predetermined conclusion. If possible, using the individual's name instead of a pronoun where these pronouns are contested, or alternatively, the gender-neutral pronoun of "they" may help minimise offence towards, or the undermining of, an individual's personal

[467] *The King (on the application of Ryan Castelluci) and (1) Gender Recognition Panel (2) Minister for Women and Equalities* [2025] EWCA Civ 167.

[468] See *C (a Child) (Change of Given Name)* [2024] EWCA Civ 1582, appeal allowed in a case involving a child who identified as non-binary and wished to legally change their name to a gender-neutral name.

identification, while also not validating and giving it undue weight over the perceptions of others.

18. There will be other situations where the judge may decide not to use the trans person's preferred name/pronouns to ensure a witness can give best evidence, eg a female rape victim may find it incomprehensible if the judge and others in court refer to her biologically male attacker as "she". In the end, it is for the judge to ensure that a proper balance is struck between respecting how a trans person, as with any person, wishes to be addressed (within reason), and enabling a witness to give best evidence/recount events as accurately and truthfully as possible.

19. Witnesses should never be compelled to use the trans person's preferred pronouns. It should always be permitted for them to refer to a person how they presently understand or previously knew them (as in any case, eg a fraud where a defendant has used multiple identities). A victim of domestic abuse, sexual violence or assault by a trans person is particularly likely to describe the perpetrator in accordance with the victim's experience and perception of events. To do otherwise, and place additional or artificial barriers on a witness, is likely to detract from their ability to give best evidence.

20. A person's biological sex or their trans history should not normally need to be disclosed if it is not relevant to the legal proceedings. Where appropriate, in the interests of the administration of justice, the court may consider making reporting restrictions under s.4 Contempt of Court Act 1981, or a range of privacy orders under rule 49, The Employment Tribunal (Rules of Procedure) 2024 or other relevant Tribunal Rules, to prevent the disclosure of a trans person's previous name and trans history. Alternatively, it may direct that part or all the hearing be in private, subject to the need to balance competing convention rights. It is usually inappropriate to enquire about someone's medical history, including their anatomical status, unless it is relevant to the case. If it becomes relevant, the issue should be handled with sensitivity. Again, a private hearing might be directed, subject to considering competing convention rights.

21. 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/or 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 all people, whether trans or not.

Disclosure of protected information under s.22 Gender Recognition Act 2004

22. Where a person has applied for or obtained a GRC, s.22 GRA 2004 makes it an offence for someone who has obtained "protected information" in an official capacity to disclose that information to any other person. There are a number of exceptions to s.22, one of which, s.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.

Trans people as victims of crime

23. Some trans people may feel anxious about reporting crimes due to worries that they won't be treated fairly.

24. According to the Crime Survey for England and Wales, hate crimes against trans people fell by 2% in the year ending March 2024, to 4,780 offences.[469] Attitudes towards trans people are, however, noted to have become less accepting over the last three years.[470]

25. Section 66 Sentencing Act 2020 provides for the seriousness of an offence to be aggravated where the offence is partly or wholly motivated by hostility towards the victim on the grounds that the person was (or was presumed to be) a trans person. Schedule 21 Sentencing Act 2020 provides for a 30-year starting point for a murder motivated by hostility towards the victim on grounds of being trans.[471]

Trans offenders

Prison policy requirements

26. The number of trans prisoners rose to an estimated 230 in 2022, from 197 in 2021, and 163 in 2019. Of these, 168 self-identified as transgender women, 42 as transgender men, 13 as non-binary, and 7 self-identified in a different way or did not provide a response. In addition to these figures, there were 11 prisoners holding a GRC.[472]

27. Trans people are likely to be particularly worried about being sentenced to a term of imprisonment because of concerns over safety and over the availability of any medically prescribed hormonal support if they are taking hormones to maintain or alter their outward gender/sex characteristics. After a series of events highlighted problems with previous practice, a revised Ministry of Justice/National Offender Management Service (NOMS)[473] policy on "The Care and Management of Transgender Offenders"[474] came into force on 1 January 2017. This has been replaced by "The Care and Management of Individuals who are Transgender" (reissued January 2024) and updated with new operational guidance, following a policy announcement on 27 February 2023.[475]

28. The change to policy is a presumption that trans women, including those with GRCs, with birth genitalia and/or any sexual offence conviction or current charge should not be in the general women's estate. The current 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 trans.

29. The current policy is likely to be urgently reviewed following the decision of the Supreme Court that "... 'woman' always and only means a biological female of any age in section 212(1). It follows that a biological male of any age cannot fall within this definition; and 'woman' does not mean or sometimes mean or include a male of any age who holds a GRC".[476] In the context of single-sex services, the Supreme Court has made it clear that

469 GOV.UK, Official Statistics: Hate crime, England and Wales, year ending March 2024 (10 October 2024).
470 2023 British Attitudes Survey.
471 See also "Homophobic, Biphobic and Transphobic Hate Crime – Prosecution Guidance": Crown Prosecution Service (updated March 2022).
472 "HM Prison and Probation Service Offender Equalities Annual Report 2021 to 2022": Ministry of Justice (24 November 2022).
473 NOMS is now HMPPS.
474 PSI 17/2016; PI 16/2016 (now cancelled).
475 The updated guidance is from HM Prison and Probation Service (HMPPS).
476 *For Women Scotland v The Scottish Ministers* [2025] UKSC16, see paragraph 209.

there is no entitlement for anyone to use single-sex services intended for members of the opposite sex.

Gender identity and rights of asylum seekers

30. Approximately 50 countries afford legal recognition to a transgender person's "gender identity". However, in many countries, trans people are excluded by society, and may face widespread discrimination, prosecution, harassment and violence.

31. People who face persecution on the basis of their gender identity can claim asylum in Britain.

The Gender Recognition Act 2004

32. The GRA 2004 enables trans people to change their legal gender/sex on their birth certificate by applying to the Gender Recognition Panel for a GRC. The Gender Recognition Panel is a judicial body comprising legal and medical members. Since the GRA 2004 came into force on 4 April 2005, over 5,500 people have been granted a GRC.

33. The panel must grant the application for a GRC if it is satisfied that the applicant has or has had "gender dysphoria", has lived in the "acquired gender" (as gender identity is referred to in the GRA 2004) 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.

34. A GRC changes one's legal sex for some legal purposes, but does not change an individual's legally recognised sex for the purposes of the EqA 2010.[477] References to sex in the EqA 2010 are references to biological sex: references to men in the EqA 2010 are references to biological males, and references to women in the EqA 2010 are references to biological females. Those whose birth was recorded in the UK may, however, use their GRC to obtain a new birth certificate. A GRC does not affect their status as the mother or father of a child; in *R (McConnell and YY) v Registrar General*,[478] 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. A woman cannot become eligible for a male-line peerage by acquiring a GRC and a man cannot lose their eligibility. The effect of the GRA 2004 does not impose recognition of the acquired gender in private, non-legal contexts, and it cannot rewrite history.[479]

35. The outcome of the 2025 Supreme Court case[480] has not removed the protected characteristic of "gender reassignment": it is still unlawful to discriminate on the basis of gender reassignment in the provision of goods and services, employment and housing. However, those with a GRC are not entitled to access spaces, services and protections that they would not have been able to access without a GRC.[481]

36. 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

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477 *For Women Scotland v The Scottish Ministers* [2025] UKSC16.

478 [2020] EWCA Civ 559.

479 See *Forstater v CGD Europe and others* UKEAT/0105/20; [2021] IRLR 706 at paragraphs 97–99 for a legal summary on this point.

480 *For Women Scotland Ltd v The Scottish Ministers* [2025] UKSC16.

481 See An interim update on the practical implications of the UK Supreme Court judgment: Equality and Human Rights Commission (EHRC) (25 April 2025). For single-sex facilities, trans women (biological men) are not permitted to use women's facilities, and trans men (biological women) are not permitted to use men's facilities.

for a GRC and remain married or in a civil partnership, subject to their spouse/civil partner's consent.

37. The fee for obtaining a GRC is now a nominal one of £6.

Recommended terminology

38. 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 "non-binary".
39. Despite its use in current legislation, the term "transsexual" is generally considered to be outdated or potentially offensive to many trans people, as is the use of "transgender" as a noun (eg "he is a transgender").
40. A "trans woman" describes someone whose biological sex is male and who now identifies as a woman.
41. A "trans man" describes someone whose biological sex is female and who now identifies as a man.
42. The term "cisgender" or "cis" is sometimes used to describe people who are not transgender and are assumed to have a gender identity that matches their biological sex. Many people feel strongly that they do not wish to be described as "cisgender" or "cis".
43. Nowadays, it is generally inaccurate to refer to someone as a "pre-operative" or "post-operative" trans person, because many trans people do not wish to undergo any particular gender-reassignment surgery.
44. "Deadnaming" is a term used where a trans person, in the course of transitioning or having transitioned, is called by their birth name, or where their birth name is otherwise referred to, instead of their chosen name. In court, witnesses may refer to a person by their deadname if this is how they knew them.
45. Trans people, lesbian, gay and bisexual people are often referred to collectively as "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), "I" (intersex), "A" (asexual, a term used by people who do not experience sexual attraction); and/or, more generically, simply a "+".
46. "Gender critical" is a phrase which, broadly speaking, refers to a belief that sex is fundamentally immutable and binary. People who are gender critical do not believe that a person can change their sex.
47. Gender-critical beliefs are protected beliefs, even if they might offend or upset trans people (or others).[482]

The Equality Act 2010

The EqA 2010 prohibits discrimination in relation to "gender reassignment". See the Equality Act 2010 appendix for an overview of the EqA 2010 and for more detail of the application of the EqA 2010 to gender reassignment.

[482] *Forstater v CGD Europe and others* UKEAT/0105/20; [2021] IRLR 706. This is discussed in more detail in appendix A.

Appendix A: The Equality Act 2010

Overview

1. The following is an introduction to the Equality Act (EqA) 2010 for those who rarely encounter it in their day-to-day judicial work. It is not intended to be relied upon in making decisions.

The legislation

2. In broad terms, the overall scheme of the EqA 2010 is to:
   a. Identify "protected characteristics". These are age, disability, gender reassignment, being married or civil partnered, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.
   b. Define what discrimination and associated concepts like harassment and victimisation are.
   c. Define a range of circumstances in which it is unlawful to discriminate/harass/victimise people (eg in employment, education and housing).
   d. Define exceptions that make it lawful to behave in a way that would otherwise be made unlawful by the EqA 2010.
   e. To additionally define a public-sector equality duty. Whereas most of the act is concerned with individual rights, the public-sector equality duty has a much broader focus.
3. The EqA 2010 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 2010 where the legislative provisions have not been changed.
4. The EqA 2010 pre-dates Brexit and was one of the primary ways in which the UK implemented provisions of the EU Treaty and associated EU Directives related to equality. As such, the construction of the EqA 2010 has been fundamentally shaped by EU law and, in particular, by the case law of the Court of Justice of the European Union (CJEU).
5. The European Union (Withdrawal) Act 2018 essentially took a snapshot of EU law as it stood on 31 December 2020 ("IP completion day") and retained it as part of domestic law. The Retained EU Law (Revocation and Reform) Act 2023 came into force on 1st January 2024.

The Commission and codes

6. The Equality and Human Rights Commission (EHRC) 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.
7. The EHRC has issued various Codes of Practice, including on:
   - Employment.[483]
   - Services, public functions and associations.[484]

[483] Code published 4 September 2015.
[484] Code published 1 January 2011. An interim update on the practical implications of the UK Supreme Court judgment was published on 25 April 2025; a new comprehensive Code will be available, summer 2025.

8. Although the codes do not have legal force in themselves, tribunals and courts must take relevant provisions into account.

9. The codes give numerous illustrative examples of unlawful discrimination, some of which are repeated in this appendix.

The definition of discrimination

10. 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

11. Direct discrimination is based on the premise that people should not be treated differently **because of** a protected characteristic. This is rooted in the idea of formal equality.

12. Under s.13, direct discrimination means less favourable treatment because of a protected characteristic. It is necessary to look at the way the alleged discriminator treats the claimant, compared with how they treat or would treat a "comparator", ie another individual in materially the same circumstances who does not have the relevant protected characteristic. It is not necessary to point to an actual comparator. A hypothetical comparator can be used, that is, someone in like circumstances but who does not share the same protected characteristic(s).

    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.

13. 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.

14. 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.

15. Direct discrimination may be conscious or sub-conscious. 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.

16. 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 EqA 2010 where direct discrimination is permitted.

17. Generally speaking, the EqA 2010 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 exception is in relation to disability, where it is not prohibited to discriminate against a person because they are not disabled. This facilitates positive action for disabled people. Certain positive action is also permitted in relation to pregnancy and maternity.

Indirect discrimination

18. 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. For a variety of reasons, people with particular protected characteristics might find themselves disadvantaged, even by apparently "neutral" treatment. The law of indirect discrimination is designed to remove those disadvantages, save where they can be justified. Indirect discrimination is often termed a form of "substantive" equality. It is not – as it is sometimes misunderstood to be – a form of "positive discrimination". That is because it does not involve treating one group more favourably than another.
19. It should also be remembered that an indirectly discriminatory practice is not unlawful if it can be objectively justified.
20. Under s.19 EqA 2010, 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 objectively justified. A PCP is objectively justified if it is a proportionate means of achieving a legitimate aim.
21. 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.
22. The two-stage justification defence is important. The alleged discriminator must show (i) that they have 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.
23. 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 cornrows or dreadlocks, veils and turbans. It has

frequently been used to obtain rights to part-time work and 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

24. The law on victimisation is intended to protect those who want to speak up about discrimination. It is protection against negative treatment for referring to or challenging discrimination in some way.

25. Under s.27 EqA 2010, it is victimisation to subject a person to a detriment because they have done a "protected act" or because it is believed they have done, or may do, a protected act.

26. 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 of, 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.

27. 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, or partly because of, her complaint about her fellow magistrate, it is likely to constitute unlawful victimisation.

28. The allegations do not have to be true, but making a false allegation in bad faith is not a protected act.

29. 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 to the club.

Harassment

30. Harassment for the purposes of the EqA 2010 has a quite different definition to the Protection from Harassment Act 1997. Under s.26 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.

31. 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.

32. Harassment under the EqA 2010 is often focused 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.

33. 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.

34. 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.

35. 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

36. In relation to disability discrimination only, there are further types of discrimination:

    - Discrimination arising from disability.
    - Failure to make reasonable adjustments.

37. These are very important types of discrimination and are explained below: see "Special forms of disability discrimination".

Contexts within the jurisdiction of the EqA 2010

The workplace

38. Discrimination in the workplace is generally prohibited by Part 5 EqA 2010.

39. 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.

40. "Employment" is widely defined. Protection under Part 5 is not limited to employees, however, but includes others such as office holders and partners. 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. The protection is not limited to existing relationships. For example, job applicants are covered, as are former employees where the

discrimination arises out of, and is closely connected to, the employment relationship. There is no minimum length of service requirement.

41. 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

42. Part 3 EqA 2010 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.

43. 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.

44. 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 themselves to be at disadvantage, and is subject to a de minimis rule.

45. 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 is unlikely to be exempt.

46. Jurisdiction under Part 3 is conferred on the County Court and High Court for some immigration matters and for judicial review.

Premises

47. There is wide protection in the housing field set out in Part 4 EqA 2010. 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.

48. Protection in this context does not apply in respect of the characteristics of age, marriage or civil partnership.

Education

49. 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.

50. In relation to schools, protection does not apply in respect of age, marriage or civil partnership discrimination.

Associations

51. The provisions regarding scope are complex and are set out in Part 7. Broadly, the EqA 2010 applies to any association of 25 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.

52. Single characteristic associations are permitted by schedule 16 (eg the Garrick Club's former prohibition on women members), so long as that characteristic is not colour and the association is not a political party.

53. 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.

54. Special provisions apply in relation to political parties, in particular with regard to single-sex shortlists.

55. 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

56. 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.

57. Specific building regulations concerning accessibility are enforced through local authority and planning authorities and the Secretary of State.

Exceptions

58. There are a number of important exceptions in the EqA 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).

59. Specific exceptions include sex-affected sporting activity, and single-sex communal accommodation.

60. In some circumstances, there are exceptions for religious organisations in relation to discrimination in respect of sexual orientation.

61. Only some broad areas of protection are outlined in this appendix. The detail of the precise scope of the EqA 2010 is outside the remit of the Equal Treatment Bench Book.

Remedies

62. The Employment Tribunal has power to make a declaration as to the rights of the claimant and the respondent, to order the respondent to pay compensation to the claimant (including injury to feelings and personal injury damages) and to make appropriate recommendations.

63. The Special Educational Needs and Disability Tribunal has power to make a declaration, make appropriate recommendations and order reinstatement of a permanently excluded pupil. It has no power to award compensation.

64. The County Court has even wider powers. It may grant any remedy which could be granted by the High Court in proceedings for tort or on a judicial review claim.

Public sector equality duty

65. 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, or 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".[485]

66. 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.

67. Under s.149, a public 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 EqA 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.

68. As well as this general duty, England, Wales and Scotland each have specific duties. In England, certain public 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.

69. In Wales there are more detailed requirements, which include producing and regularly reviewing written equality objectives; comprehensive monitoring; and publishing equality impact assessments.

70. 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.

71. 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.

72. Breach of the PSED is actionable by judicial review. The EHRC also has power to issue compliance notices.

485 "The Stephen Lawrence Inquiry: Report of an inquiry by Sir William Macpherson": Home Office (24 February 1999), chapter 6.

The different protected characteristics and examples of discrimination

73. 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 EqA 2010, including the basic definitions, the different jurisdictions and the PSED, see "Overview" at the start of this appendix.

Meaning of "age"

2. Under s.5 EqA 2010, 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 2010, 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 EqA 2010 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 their 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.[486]

   For example, the Department of Health invites women aged 25 to 49 for a cervical screening test every three years, whereas women aged 50 to 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.[487]
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 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

[486] This important detail is not apparent on the face of the legislation but has been established through case law, including *Seldon v Clarkson Wright and Jakes* [2012] UKSC 16.

[487] This and other examples of age discrimination given here are taken from, "Equality Act 2010: Banning Age Discrimination in Services": GEO (2012).

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 EqA 2010 overview above. Subject to the defence of justification, it is indirect age discrimination to apply a PCP 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 people over retirement age at a disadvantage. This is unlawful discrimination unless the practice is justified.

10. There is a justification defence to indirect age discrimination. Indirect age discrimination is not unlawful if the employer/service provider etc can show the PCP is a proportionate means of achieving a legitimate aim.

11. PCPs which might have a particular adverse effect on older people could include:

    - Requirements for proficiency with 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. PCPs 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 who says that 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 EqA 2010 overview above. It is unlawful to subject someone to a detriment because they have, 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 EqA 2010 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 EqA 2010, including the basic definitions, the different jurisdictions and the PSED, see "Overview" at the start of this appendix.

Meaning of "disability"

2. The definition of disability under the EqA 2010 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 s.6 and schedule 1 EqA 2010, 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 s.6 EqA 2010 (read with schedule 1) if:
   - they have 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.
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. Discrimination because of past disabilities is also covered.
10. The Secretary of State has issued "Guidance on matters to be taken into account in determining questions relating to the definition of disability" which is essential reading for any judge/panel that needs to decide whether a person is disabled within the meaning of the EqA 2010.[488]

Disability discrimination

Direct discrimination

11. The full definition of direct discrimination is set out in the EqA 2010 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.

488 "Disability: Equality Act 2010 – Guidance on matters to be taken into account in determining questions relating to the definition of disability" (updated 8 March 2013).

12. It is also direct discrimination to treat someone less favourably because of someone else's disability.

    For example, if an employer allowed an accounts manager to leave at 4pm to look after her (non-disabled) child, but did not allow another accounts manager to leave at 4pm to look after her disabled child because of assumptions that the disabled child would be more demanding of their 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 EqA 2010 introduced this form of protection.

15. The full definition of indirect discrimination is set out in the EqA 2010 overview above. Subject to the defence of justification, it is indirect disability discrimination to apply a PCP 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, 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 they take more time off work for matters relating to their disability.

16. There is a justification defence to indirect disability discrimination. It is not unlawful indirect discrimination if the employer/service provider etc can show the PCP is a proportionate means of achieving a legitimate aim.

Victimisation

17. The full definition of victimisation is set out in the EqA 2010 overview above. It is unlawful to subject someone to a detriment because they have, 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 use 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 EqA 2010 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 by 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 2010 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 (s.20 EqA 2010)

21. Reasonable adjustments may be required to assist a disabled person who, because of their 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:
    - The extent to which taking any particular steps would or might 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 EqA 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".[489]

Discrimination arising from disability (DAFD) (s.15 EqA 2010)

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" 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.

489 "The Equality Act 2010: the impact on disabled people": House of Lords Select Committee on the Equality Act 2010 and Disability (24 March 2016).

Gender reassignment

1. For an overview of the EqA 2010, including the basic definitions, the different jurisdictions and the PSED, see "Overview" at the start of this appendix.

Meaning of "gender reassignment"

2. Under s.7 EqA 2010, 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 (GRC).
4. The EqA 2010 calls a person who has the protected characteristic of gender reassignment, a "transsexual person". As explained in chapter 12, many people consider this term outdated. Preferred terms are "trans" or "transgender" people. We use both of these terms in the Equal Treatment Bench Book.

Gender reassignment discrimination

Direct discrimination

5. The full definition of direct discrimination is set out in the EqA 2010 overview above. It is direct discrimination to treat a person less favourably because of gender reassignment.

   For example, if an employee informs their employer that they intend to spend the rest of their life living as the opposite sex and their employer alters their role against the person's wishes to avoid them having contact with clients, this would be direct gender reassignment discrimination.

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 to unreasonably 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 EqA 2010 overview above. Subject to the defence of justification, it is indirect gender reassignment discrimination to apply a PCP which puts someone who has undergone, intends to undergo, or is undergoing gender reassignment at a particular disadvantage, and which puts, or would put, others undergoing gender reassignment etc at that disadvantage.
8. There is a justification defence to indirect gender reassignment discrimination. It is not unlawful indirect discrimination if the employer/service provider etc can show the PCP is a proportionate means of achieving a legitimate aim.

Victimisation

9. The full definition of "victimisation" is set out in the EqA 2010 overview above. It is unlawful to subject someone to a detriment because they have, 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 EqA 2010 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 person has informed work colleagues they are transgender and a work colleague keeps asking them invasive questions about their anatomy, which they have made clear they do not want to talk about. This creates a degrading, humiliating and offensive environment for them.

11. Unwanted conduct because of rejection of, or submission to, gender reassignment harassment is also unlawful.

Gender-critical belief

12. In *Forstater v CGD Europe and others*, the Employment Appeal Tribunal (EAT) found that gender-critical beliefs are protected beliefs under the EqA 2010.[490] The Supreme Court recently approved of the reasoning, referring to "the comprehensive and impressive judgment".[491] The essence of Ms Forstater's belief was "that sex is biologically immutable": there "are only two sexes, male and female"; being a man or a woman is determined by sex, and not an internal sense of gender identity or by any particular "gender expression". She believed that it was not "incompatible to recognise that human beings cannot change sex whilst also protecting the human rights of people who identify as transgender".

13. The EAT noted there was evidence that the gender-critical belief is not unique to Ms Forstater but is widely shared, including amongst respected academics, and her belief that sex is immutable and binary is consistent with the law.

490 *Forstater v CDG Europe and others* UKEAT/0105/20; [2021] IRLR 706. More recently, see *Mackereth v The Department for Work and Pensions and another* [2022] EAT 99 and *Higgs v Farmor's School and The Archbishops' Council of the Church of England* [2025] EWCA Civ 109.

491 *Scotland v The Scottish Ministers* [2025] UKSC16 at para. 110, although this was not an issue being decided in this case.

Being married or a civil partner

1. For an overview of the EqA 2010, including the basic definitions, the different jurisdictions and the PSED, see "Overview" at the start of this appendix.
2. Under s.8 EqA 2010, 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 EqA 2010, including the basic definitions, the different jurisdictions and the PSED, 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, s.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 2010, but it could be claimed as sex-related harassment.

Race

1. For an overview of the EqA 2010, including the basic definitions, the different jurisdictions and the PSED, see "Overview" at the start of this appendix.

Meaning of race

2. Under s.9 EqA 2010, 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*,[492] where Lord Fraser defined ethnic origin in the following way:

> "For a group to constitute an ethnic group in the sense of the [Race Relations Act 1976], 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, Gypsies, Roma and 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 EqA 2010 overview above. It is direct race discrimination to treat a person less favourably because of race. Usually this means the person's own race.

   For example, after a young black man has arrived late three times on a 10-week IT training course, the 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.

[492] [1982] UKHL 7.

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 EqA 2010 overview above. Subject to the defence of justification, it is indirect race discrimination to apply a PCP 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 handwriting. This is particularly difficult for applicants from Egypt who not only speak English as a second language, but whose own language has different script.

8. There is a justification defence to indirect race discrimination. It is not unlawful indirect discrimination if the employer/service provider etc can show the PCP is a proportionate means of achieving a legitimate aim.

9. PCPs which might have particular adverse effect on people not born in the UK and so could lead to indirect race discrimination if unjustified include:

   - Requirements for a high level of competence in written or spoken English.
   - Minimum length of residency requirements.

10. Other PCPs 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

11. The full definition of victimisation is set out in the EqA 2010 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

12. The full definition of harassment is set out in the EqA 2010 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 EqA 2010, including the basic definitions, the different jurisdictions and the PSED, see "Overview" at the start of this appendix.

Meaning of religion or belief

2. Under s.10 EqA 2010, 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 EqA 2010 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 EqA 2010 overview above. Subject to the defence of justification, it is indirect race discrimination 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 6pm and 8pm 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. There is a justification defence to indirect religion and belief discrimination. It is not unlawful indirect discrimination if the employer/service provider etc can show the PCP is a proportionate means of achieving a legitimate aim.

7. PCPs 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 PCP in question. In the context of religion, in particular, it can be easy to forget this point. 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 EqA 2010 overview above. It is unlawful to subject someone to a detriment because they have, 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 EqA 2010 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.

Sex

1. For an overview of the EqA 2010, including the basic definitions, the different jurisdictions and the PSED, see "Overview" at the start of this appendix.

Meaning of sex

2. Section 11 EqA 2010 states that the reference to the protected characteristic of "sex" is a reference to a man or a woman. The Act states at s.212(1) that a woman means a "female of any age" and man means a "male of any age". The Supreme Court decided that the term "sex" refers to a person's biological sex; references to "women" are references to biological females and references to "men" are references to biological males.[493]

Direct discrimination

3. The full definition of direct discrimination is set out in the EqA 2010 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 EqA 2010 overview above.

6. Subject to the defence of justification, it is indirect sex discrimination to apply a PCP which puts someone of a sex at a particular disadvantage, and which puts, or would put, others with the same sex 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. There is a justification defence to indirect sex discrimination. It is not unlawful indirect discrimination if the employer/service provider etc can show the PCP is a proportionate means of achieving a legitimate aim.

8. PCPs which might have particular adverse effects 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 EqA 2010 overview above. It is unlawful to subject someone to a detriment because they have, in good faith, complained or raised issues about sex discrimination in some way.

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493 *For Women Scotland Ltd v The Scottish Ministers* UKSC 2024/0042 (16 April 2025).

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 EqA 2010 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 EqA 2010, including the basic definitions, the different jurisdictions and the PSED, see "Overview" at the start of this appendix.

Meaning of sexual orientation

2. Under s.12 EqA 2010, the protected characteristic of "sexual orientation" means orientation towards people of the same biological sex, or people of the opposite biological sex,[494] or both.

Sexual orientation discrimination

Direct discrimination

3. The full definition of direct discrimination is set out in the EqA 2010 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. A heterosexual couple would have been allowed a double room.

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 EqA 2010 overview above. It is indirect sexual orientation discrimination unjustifiably to apply a PCP 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 PCP is a proportionate means of achieving a legitimate aim.

Victimisation

7. The full definition of victimisation is set out in the EqA 2010 overview above. It is unlawful to subject someone to a detriment because they have, 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 EqA 2010 overview above. It is harassment to engage in unwanted conduct related to sexual orientation, which has the purpose or effect

[494] *Scotland v The Scottish Ministers* [2025] UKSC 16.

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 conflict between the protection afforded by the EqA 2010 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."

Ms 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 ECHR, 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

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 (EqA) 2010. Detail of the definition of disability under the EqA 2010 can be found in the Equality Act 2010 appendix.
- To what extent someone who 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 should be given to the needs of the individual and the affect any adjustments may have on the fairness of the hearing and the rights of others. The best source of information and advice on needed adjustments is usually the person with the disability.

It is best to listen to the terminology the person chooses to use for their impairment, and to ask if necessary.

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 their own needs.

Sometimes it is difficult to think of suitable adjustments, but it is still important to be aware of, and duly sensitive to, the barriers people face.

For suggested adjustments in relation to any of the following, select 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

Blindness and visual impairment

Bronchitis

Cancer

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 (MND)

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 (SpLD)

Spina bifida and hydrocephalus

Spinal cord injury

Stammering

Stroke

Ulcerative colitis

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.

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 to 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.

Select 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 their home.
- Taking evidence by video link to a home computer.
- 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 the entry for "Panic attacks and panic disorder" in this glossary.

Select 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

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.

Arm, hand and shoulder impairments are very common and have a variety of causes, including arthritis, frozen shoulder, injury and Repetitive Strain Injury (RSI).

RSI 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, a 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 they can look at the judge and advocates without twisting.
- Assistance with opening doors.
- Assistance with manoeuvring hearing bundles and turning pages.
- Assistance pouring water.

Select 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.
- Allowing somebody to stand up during the hearing if necessary.
- 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.

Select 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 is 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 (LIP), 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 an LIP, 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.

Select 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.[495]

[495] 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).

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 layout 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.

The "Visual impairment" entry in this glossary contains further suggestions for adjustments.

Recommended terminology

Some people find the term "albino" extremely offensive. 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.

Select 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 experiencing a period of lucidity.
- 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.

Select 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 often 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.

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[496]

Autistic parties and witnesses, depending on the nature of their autism, may have these difficulties in court:

[496] Difficulties with the court process have been identified with the assistance of the National Autistic Society’s training team.

- 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 they would feel if certain adjustments were made.
- Difficulty with chronology and timescales.
- Expectations (settlement vs admission of discrimination).
- Settlement discussion and mediation is difficult. An autistic person might find it difficult to imagine how much they 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?

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/speak too fast.
- 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. 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 the 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.
- 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". Use instead "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 the individual to write a witness statement/give evidence out of chronological order.
- Eye contact: explain "I don't expect eye contact. Look wherever you need to look to make you feel comfortable and concentrate."

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:

- Courts and tribunals 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.

Recommended 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.

Other relevant terminology:

- Neurodiversity: this covers the range of diverse neurotypes, including neurotypical people.
- Neurodivergent (ND): an umbrella term. There is no exact definition of who would be included within this term, but usually neurodivergent people would include, for example, autistic people, people with dyslexia, ADHD, or Tourette’s syndrome etc.
- Neurotypical: a neurotypical person is someone who is not neurodivergent.
- Allistic: an allistic person is someone who is not autistic (they may or may not be neurodivergent in other ways).

Select 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.

Back 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.

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 they can look at the judge and advocates without twisting.
- Assistance with manoeuvring hearing bundles.
- Assistance pouring water.

Select 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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Blindness and 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 blindness?

The word "blindness" is commonly used to describe total or near-total sight loss.

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 MS Word format attached to an email so that the person can enlarge/change typeface themselves or use text-to-speech software. Make sure any pictures have alternative text.
- Avoiding using tables as these can be difficult for screen readers.
- 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 making 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 person who is blind, or person with visual impairments, allowing the dog to enter the hearing room, have access to water and take a short comfort break at regular intervals.

If applicable, see glossary entries for:

- "Albinism"
- "Visual stress"

Select 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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Bronchitis

For this, please see "Chronic obstructive pulmonary disease (COPD)".

Cancer

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Cancer touches virtually every family – one in two people in the UK born after 1960 will be diagnosed with some form of cancer during their lifetime, and many of us will already have had personal experiences; if so, there may be a temptation to think that you "know how it works". Please try to avoid that. Not only do different cancers have different effects and require different treatments, but the impact of the diagnosis as well as the treatments is unique to the individual.

Treatments and side effects

Following, often quickly, from a devastating and unexpected diagnosis, is disease-specific treatment: surgery, radiation therapy or chemotherapy, stem cell or bone marrow transplant, hormone therapy, or a combination of these. Some treatments may be long term, with sessions scheduled at specific intervals, or reactively in response to the results or ongoing testing. Side effects include anaemia, nausea, vomiting, pain, insomnia and mood change. Regular rest is often the primary need.

The impact of cancer can last long after the immediate treatments. Surgeries can generate permanent changes to the body, including extensive scarring and loss of parts of the body, impacting adversely on a patient's self-esteem – even identity. In addition to psychological challenges, long-term medications may have a major impact on the body.

"Cancer fatigue" is a condition marked by extreme tiredness and inability to function due to lack of energy. It can be acute or chronic, and caused by the cancer itself or the treatment. Usually, fatigue gets better after treatment finishes, but for some people it may continue for months or even years.

Family support may not be guaranteed

The reactions of both patients and family members to the disease and treatment can be difficult to manage – initial relief at being offered treatment does not exclude upset and difficulty in accepting what has happened and its impact as time passes. The diagnosis may affect relationships with partners and carers who don't have the knowledge or skills to manage their own or their loved one's needs.

There are cultural variations in how a cancer diagnosis is received. Some communities or families treat cancer as a taboo subject: in some languages, there's not even a word for cancer. Such views might make it hard for a patient to vocalise concerns, or even to share their diagnosis with all family members. That can increase the associated psychological problems.

Difficulties with the legal process

The following difficulties may arise:

- Overwhelming tiredness and weakness caused by the effects of the cancer cells themselves and/or treatment.
- Difficulty remembering things or concentrating due to cancer fatigue.
- Loss of concentration due to anxiety when awaiting tests or diagnoses.
- Risks involved in travel because of exposure to potential infection, which can be more serious due to a weakened immune system.
- Difficulty attending court at all, eg due to pain or nausea, potentially without forewarning.
- Inability to attend due to medical appointments/treatment.

Reasonable adjustments

Where appropriate, adjustments for the hearing may include:

- Considering a remote hearing to avoid the need for travel or unnecessary exposure to infection in public spaces.
- If a remote hearing is not possible, considering listing at a venue more local to the person.

- Being understanding of requests to adjourn to attend medical treatment.
- Asking in advance what might assist at a hearing, whether remote or in person; eg whether there are times in the day when symptoms occur or when rest is likely to be needed.
- Asking, if the hearing is to be face to face, whether adjustments to the usual seating will be necessary (eg a chair with arms/adjustable height). Understanding the need to bring a pillow into the room or change position from time to time to cope with discomfort.
- Asking if there is a need to bring a drink or supplement into the hearing room and arranging for building security to be alerted to that possibility.

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Cerebral palsy

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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.

A person 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).

Select 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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Cerebral vascular accident (CVA) – commonly called "stroke"

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What is a 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 those related to incontinence, mobility and 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 regardless of the circumstances.

Some individuals may use Makaton signs and symbols to communicate. See "Makaton" in the learning disability section of this appendix for more detail.

Select the following links for general ideas as to:

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Chronic fatigue syndrome (CFS)

For this, please see "Myalgic encephalomyelitis (ME)".

Chronic obstructive pulmonary disease (COPD)

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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 coughing, wheezing 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.

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See also chapter 3 (Physical disability) and chapter 4 (Mental disability) generally, and for an overall approach.

Crohn's disease

For this, please see "Inflammatory bowel disease".

Depression

For this, please see "Mental ill health".

Diabetes

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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.

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Dissociation

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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 focusing 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.

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Down's syndrome

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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.

Select the following links for general ideas as to:

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Dyslexia

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What is dyslexia?

Dyslexia is the most common of a family of related conditions known as specific learning difficulties (SpLD).

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 associated with 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.
  - Carry 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 SpLD 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 SpLD in a court setting

The following problem areas are reported by people with SpLD 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 the use of inappropriate tone may create a misleading impression.

People with SpLD 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. Communication skills are often poor in people with SpLD. 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, they will need to be given sufficient time to recover.

It is important to reassure adults with SpLD 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.
- 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.

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- "Adjustments for case preparation" (mental disability).
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Dyspraxia/developmental co-ordination disorder

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What is dyspraxia?

Dyspraxia is part of a family of conditions known as specific learning difficulties (SpLD). 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".

Select 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.

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 body mass index (BMI) 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 and/or through 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 2,000 males. Bulimia tends to appear at ages 18-19 and is two to three 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 ethnic minorities. In the three years up to 2019 to 2020, hospital admissions for eating disorders rose by 31% for white people and 53% for ethnic minority 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.

Select the following links for general ideas as to:

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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 photosensitivity (or flashing lights or fluorescent strip lighting) is an issue, keeping the lights off or changing room or venue.

Recommended terminology

- Use “person with epilepsy”, rather than “an epileptic”.
- Terms such as “epileptic attack” or “epileptic fit” are best avoided because of 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

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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 one 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"), for example:
  - 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 (CFS)" 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.
- If there are cognitive difficulties, adopting a slow pace during cross-examination.

Select the following links for general ideas as to:

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Hallucinations

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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 being 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 – see chapter 2 (Children, young people and vulnerable adults).
- 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 70-94dB; and for those who are profoundly deaf, it is more than 95dB. As a reference point, an aeroplane taking off at 100 metres is about 130dB; a

loud rock band is around 100-120dB; a motorbike about 100dB; normal conversation around 60-65dB; 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, lip reading and British Sign Language (BSL). 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 lip read with some background support.
- New products may come onto the market which are more effective for a particular individual than a conventional hearing aid or loop. For example, an external microphone which connects wirelessly to a hearing aid and may take forms such as a clip-on microphone or a directional pen. We cannot refer to all products here. A witness may bring an aid with which a judge is unfamiliar. If it may impact on the hearing, the judge may need to enquire as to how it works, but this should be done in the spirit of constructive dialogue.
- A speech-to-text reporter/palantypist who types phonetically what is said in the courtroom, which appears in normal spelling on the screen of the deaf person in real time.
- Lip speakers are trained hearing people who repeat what a speaker is saying without using their voice so that lip readers can lip read them. They are mainly used by deafened people.
- 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 (FSL) 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.

  The British Sign Language Act 2022 received Royal Assent on 28 April 2022, recognising BSL as an official language of England, Wales and Scotland.

- 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 of any sign interpreter (in the correct language), lip speaker or palantypist.
- Allow more time for the hearing where an interpreter will be involved.
- If an LIP speaks BSL and has little or no English, consider how the court will communicate with him or her during case preparation. The individual may have to pay privately for signers to interpret court letters. This can be minimised by conducting most case preparation in case management meetings where BSL signers can be booked by the court. Rather than send the individual away to set out his or her case in writing, for example, consider whether it is possible to spend time eliciting it in person with a signer. If some paperwork and written tasks are inevitable, bunch these together at long intervals so the person does not have to repeatedly find a signer to interpret single items.
- Consider using the same judge on all pre-hearing communications for consistency of communication arrangements and style.
- Where the person has no spoken English, but only speaks BSL, consider whether it is sufficient to book BSL interpreters, or whether an intermediary report is required to check whether there is adequate communication and whether other measures are required to ensure engagement and participation in the hearing.

During the hearing

- Check the room layout with the deaf person. They need 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 hearing dog is accompanying the person, it must be allowed to enter the hearing room and have access to water and be allowed short comfort breaks at regular intervals.
- 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, lip speaker or palantypist, or even where the deaf person is relying on his or her own lip-reading 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.
- Lip reading 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 lip read:

- 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 lip reading.
- 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 lip read 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[497] gives these examples:
  - “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.

Remote hearings

- If a signer is to be used on a remote hearing, consider in advance the appropriate platform and arrangements. The deaf person and signer need to be able to see each other in a large enough on-screen window to view the signing. Platforms where the window only enlarges if someone is speaking are not suitable. The court may be able to set up a second video room where the deaf person and signer can permanently see each other full size.
- If the deaf person speaks little English, ensure joining instructions are very clear and that the signer is present on time. Bear in mind that it will be very hard to communicate the reason for any hold-ups at the start if the signer is not yet present or if there are problems joining.
- For hearings longer than about two hours, two signers will be required, just as they will for a hearing in the physical courtroom.
- For some people with hearing loss who speak English and are not relying on signing, it may be useful to activate any subtitle or caption facility on the video platform.

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497 The Advocate’s Gateway: Planning to question someone who is deaf (Toolkit 11; 1 January 2018).

Heart disease

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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 glyceryl trinitrate (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 headaches.

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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 used 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 tuberculosis (TB) or cancer.

The National AIDS Trust (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 past 10 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.
- 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.

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Incontinence

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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.

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Inflammatory bowel disease

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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 affects just 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 inflammatory bowel disease (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.

Select 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 tracheoesophageal 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.

Select 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", some prefer "learning-disabled people") 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 (WHO) 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 (SpLD)", such as dyslexia.

Reasonable adjustments

The Advocate's Gateway, Toolkit 4: "Planning to question someone with a learning disability" (November 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[498] 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.[499] 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.

Breaks and tiredness

It is important to watch for signs that the person is overloaded and then to 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.

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498 The Equal Treatment Bench Book uses the term "vulnerability" as this reflects the statutory language, although recognises that many disabled people are unhappy with the use of such language which is seen as inferring victimhood and a cry for others to take responsibility.

499 *R v Cokesix Lubemba; R v JP* [2014] EWCA Crim 2064.

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 they have a learning disability, and in some circumstances, to dispense with the oral evidence altogether.[500]

Intermediaries

Courts and tribunals can seek the assistance of an intermediary where there is a communication difficulty. For more detail, see chapter 2 (Children, young people and vulnerable adults).

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 symbols 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 impairment, 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 used in the sign language of the relevant country. So, in the UK, Makaton draws gestures from British Sign Language (BSL) 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.

Select 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.

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

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 the 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.

Select 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. 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 an LIP, adjustments may include:

- 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 styles 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.

If the individual experiences hallucinations, see entry for "Hallucinations" in this glossary.

Select 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 WHO 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 they 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 have 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 the 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.

Select 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

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 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.

Recommended terminology

Say “uses a wheelchair” or “wheelchair user” rather than “wheelchair bound”, “confined to a wheelchair” or “in a wheelchair”.

Select 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 (MND)

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 MND?

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 experience 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 full-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.

Select 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".

Select 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 (CFS)

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/CFS?

ME/CFS 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 have 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/CFS 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.

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.
- Accessible toilets.
- Safe procedures for exiting if there is a fire and lifts cannot be used.

Select 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 is 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.[501] 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 disability probably varies. Applying the social model of obesity, one would say that society disables obese people by discriminating against them.

The EqA 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 EqA 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.[502]

501 Disability discrimination and obesity: the big questions?: Flint, Stuart and Snook (2015). Personnel Today, Obesity research: Fattism is the last bastion of employee discrimination (2005).

502 "The influence of a defendant's body weight on perceptions of guilt": Schvey, Pugh and others (2013).

Reasonable adjustments

Where appropriate, adjustments for the hearing may include:

- Provision of a large ergonomic chair.
- Ensuring the hearing does not finish late, leading to rush-hour travel if the individual is using public transport.

Select 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.

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 person 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 one person in 10 in the UK experiences occasional panic attacks which are triggered by a stressful event.

However, about one in 100 people have a 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 has a 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 the need for an immediate break.
- In serious cases, giving evidence from home or another familiar venue by video link.

Select 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.

Select 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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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 PDA?

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 PDA 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.
- Explaining the reason behind deadlines.
- 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.

Select 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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Persecutory delusions

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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 fact 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*,[503] 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 having 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 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 in what you are saying. Again, everything will be seen through that filter.
- It is better to demonstrate neutrality by your actions.

Select the following links for general ideas as to:

- "Adjustments for case preparation" (physical disability).
- "Adjustments for the hearing" (physical disability).

[503] UKEAT/0317/19.

- "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

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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.

Select 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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Repetitive strain injury (RSI)

For this, please see "Arm, hand or shoulder impairment".

Sickle cell disease

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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 hydroxycarbamide 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 person to sit down.

Select the following links for general ideas as to:

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- “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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Specific learning difficulties (SpLD)

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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 should not be confused with the term "learning disability", which affects all areas of daily living and correlates 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 (ADHD)"

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.

Select 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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Spinal cord injury

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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 (paralysis affecting both arms and legs) 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 laptops. 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.

Select 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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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?[504]

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 stammering is relatively rare but can occur in adults and children. It can be caused by various factors including a head injury, stroke, progressive neurological condition, trauma or other conditions that affect brain function, or as a side-effect of certain drugs or medicines. Sometimes the cause is unclear.

It is estimated that about 1 in 100 adults stammer, 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 intensity from person to person. As explained in more detail below, some

[504] This glossary entry has been written with the assistance of the British Stammering Association ("Stamma").

people work hard to hide a stammer and it can be difficult to know to what extent this is happening.

As most people who stammer do so from an early age, the impact of unhelpful responses from other people 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. Covert stammering can mean that the person says what they feel **able** to say rather than what they actually **want** to say.

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. 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 listeners mistakenly believe that a person is thinking about what to say next rather than understand that the person is struggling to talk. Some people who stammer might claim to forget what they want to say when they are having difficulty speaking, or might change the style of their speech to prevent stammering, eg by speaking very slowly, softly or quickly.

Someone who stammers may also look away from the person they are talking to for fear of seeing negative reactions to their stammering or because they are focusing their attention on working through a moment of 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 stammers visibly and audibly or is working to hide or minimise 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.

Some listeners wrongly assume, purely from the way someone with a stammer speaks or from the secondary behaviours described above, that the speaker is nervous, unintelligent, untruthful or deceitful.

The following specific difficulties may arise:

- Particular nervousness about the proceedings.
- Remote hearings by video or telephone can be a problem for some people who stammer. For others, they may be easier than in-person hearings.
- Difficulty interjecting or answering questions at 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.
- Efforts to find alternative ways to give evidence and, in some cases, to hide a stammer, are mentally exhausting.
- 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 or not to show the stammer. As a result, the judge may mistakenly believe the impact of the person's stammer is insignificant.

These difficulties and anxieties may result in an 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 the 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.
- Stammering misinterpreted as hesitancy or uncertainty.
- The person's strategies to work through or around moments of stammering misinterpreted as indirect or evasive answers.
- Avoidance of eye contact.
- Extreme nervousness.

Reasonable adjustments

Where appropriate, adjustments at the hearing may include:

- Steps to reduce the person's anxiety, as this may make it easier for them to say what they want to say.
- 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 the 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.
- 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 a video link, be aware that time lags from the technology added to the person's stammering can create extra difficulties and require care and patience.
  - Minimising 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.
- Not relying on demeanour/mode of expression (such as apparent hesitation, pauses, avoidance of eye contact) as indicators of the person's state of mind.
- 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. For more detail, see chapter 2 (Children, young people and vulnerable adults).

When talking to the individual, Stamma advises:

- Do not show signs of any discomfort you might feel in response to the stammering. Such signs can make the person feel embarrassed or ashamed and reduce their willingness to speak.
- Put someone at ease by being patient, maintaining natural eye contact, and using encouraging non-verbal signals, such as the occasional nod of the head.
- Do not complete the person'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 (unless they have asked you to). 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 often find it hard to say their own name on demand. In these instances, the judge may say the person's name and ask if it is correct. This can apply to telephone and video hearings.
- When considering remote hearings, ask if the person would prefer these over in-person hearings, with regard to their stammer. It can be helpful to give them some description of an in-person hearing, including the likely number of people there and the degree of formality.
- If telephone hearings are necessary, give the person plenty of time to start speaking after each question. Initial silence does not mean they are not there.

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- "Adjustments for the hearing" (physical disability).
- "Adjustments for case preparation" (mental disability).
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Stroke

For this, please see "Cerebral vascular accident (CVA)".

Ulcerative colitis

For this, please see "Inflammatory bowel disease".

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 phrases.

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.

Select 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

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.

Afghan

African Caribbean

Chinese and Korean

Filipino

Greek

Indian Hindu

Indonesian

Nigerian

Sikh

Somali

South Asian Muslim

Sri Lankan (Tamil and Sinhalese)

Turkish

Vietnamese

Afghan

Afghan names traditionally consist of a personal name alone, without a middle or family name. The first name may be compound, consisting of two words, more typical for males, although many Afghans with contact with Western bureaucracy may adopt a family name. Where family names are adopted, they may be linked with tribal affiliations, places of origin (eg “Karzai”, from Karz in Kandahar) or ethnicity. Names may include a religious component and the written spelling of a name may vary on oral pronunciation or geographic region (eg Mohammad, Mohamed etc). There is a lack of standardised spelling also because of illiteracy, resulting in discrepancies through transcription into English.

African Caribbean

Many African-Caribbean names reflect the time of slavery when people from Africa were “renamed” in English after their slave masters. More recently, some have reverted to names with West-African language roots as a statement of cultural self-assertion. In this case, a person might have adopted a different name from that of their parents.

Chinese and Korean

In the traditional Chinese system, most people have a name 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” and “Lee”) 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 the UK is called a “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 sex 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 “Papachristodoulopoulos” 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 nine or 10. Those of Christian faith may use a Nigerian personal name together with an “English” personal name. Some personal names are not sex-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 (meaning "princess" in Punjabi,[505] to reflect that in God's eyes, all women are princesses), and the religious title "Singh" (meaning "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.

[505] 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 sex, 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 sex-specific. Middle names may be sex-specific and passed down within families.

Appendix D: Glossary of religions – religious practices and oath-taking requirements

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

The Baha'i Faith is based on the teachings of Baha'u'llah (1817 to 1892) 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 four million Baha'is around the world. They do not drink or take alcohol and all are regarded as teachers who are expected to spread the faith. Their holy month is from 2 March to 20 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 is 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.
- Baha'is may choose either to affirm or, possibly, swear an oath. For the Baha'is, their word is their bond.
- The holy book containing the teachings of their guide is called the Kitab-i-Aqdas.

Buddhism

Buddhism was founded in the 6th century before the Common Era (BCE) by an Indian princeling named Siddhartha in the clan Gautama, later known as Shakyamuni, the Buddha ("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 South East 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, and always 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 the 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 Tripitaka, 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

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

Hinduism is the world's third largest religion. It can trace its roots back to India at least 5,000 years ago. Whilst predominant in India and South East 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 has four "varnas":

- 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

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

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. The predicted commencement of Ramadan is likely to be within a 48-hour or so timeframe. This will have an impact on the availability of those who wish to observe its commencement. Fasting takes place between sunrise and sunset, which can be particularly onerous during the long days of June, when combined with the metabolic effects of heat. The end of Ramadan is celebrated by the feast of Eid ul-Fitr.

Dietary requirements prohibit the consumption or pork and alcohol. Halal means "permissible" and haram means "prohibited", so that animals that are lawfully slaughtered in accordance with Islamic rules are 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.

There are various rites of passage. 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 head coverings 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

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 four-fold society. Ascetics may not travel by vehicle, so only the laity will be found in the UK.

Shevtambara 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

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 19th 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 is 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, whom 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 sex.

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

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 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 and shellfish 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 also important to note that, as with Sikhism, being Jewish is a racial or ethnic identity, as well as a religious faith. This is relevant when considering the subject of antisemitism, which is a form of racism – 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 five 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

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.

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 4,000 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 baptised 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 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

In the 2021 Census, 37% 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 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

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

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 (1887 to 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.

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 commences on 11 September with 13 months, one of which has only six 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

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 10 spiritual masters – Gurus.
- The holy book, the Guru Granth Sahib**,** which has the function of the living Guru.
- The salvation and liberation from the cycle of reincarnation, which 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 five Ks:

- Kesh: Uncut hair.
- Kanga: Comb to keep the hair in order, 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 (meaning "lion") and women Kaur (meaning "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" in appendix C (Naming systems) for more detail. As with Judaism, Sikhism has also been recognised legally as an ethnicity or race (*Mandla v Dowell-Lee* [1982] UKHL 7), although, in contrast to Judaism, this remains the subject of some debate.

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 Gurmukhi 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

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

Zoroastrianism is an ancient religion based upon the teachings of Zarathushtra (1400 to 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 Judgment 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, since 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

What is a remote hearing?

1. Giving evidence or conducting hearings “remotely” refers to the use of video platforms such as MS Teams and Cloud Video Platform (CVP); or audio platforms, such as telephone conferencing.
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 they were 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.[506]
4. After a national lockdown 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. Since the lockdown ended, remote hearings have continued in many jurisdictions.
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 participants 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. 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.

Potential advantages of remote evidence or hearings

7. In some situations, a fully or partially remote hearing may be a desirable adjustment for a party or witness, for example 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.
8. In addition, chapter 2 explains the use of video links as a special measure for vulnerable witnesses.

[506] See chapter 2.

Potential difficulties with remote evidence or hearings

Difficulties arising from socio-economic factors

9. 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 overcrowded accommodation. There may be unmanageable demands on their attention from their children, partner or even pets.

10. 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.[507]
    - The content of evidence/questions would be inappropriate for children to hear. There may be no other adult to care for the children.

11. 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.

12. 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.[508]

13. 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

14. Remote hearings can cause additional difficulties for parties and witnesses with cognitive impairments, mental ill health or who are neurodiverse.

15. See "Mental disability and remote hearings" in chapter 4 for challenges people with mental disabilities might face in a remote or hybrid hearing.

16. 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.

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507 "Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings": Family Justice Council (November 2020) discusses these concerns and the possibility of using a platform where the background can be blurred or, if appropriate, allowing cameras to be switched off or joining by audio only.

508 "Remote hearings in the family justice system: a rapid consultation": Ryan and others. Nuffield Family Justice Observatory (May 2020).

Difficulties for people without English as a first language

17. See chapter 8 "Interpreters and remote hearings".
Remote hearings are likely to pose difficulties for newly arrived migrants – see chapter 8 "Help with the court process".

Concerns over unauthorised recording

18. Certain individuals may find it disturbing to appear "on film" for a variety of reasons, eg:

- Concern that someone, whether a participant in the hearing or a 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 chapter 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.

Deciding whether to hold a remote hearing

19. 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.[509]

20. 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.[510] It may also be unsatisfactory for one side to attend in person while the other side attends remotely.

Fixing the hearing

21. 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.

22. All jurisdictions which retain the option for remote hearings have developed administrative processes and case management orders to deal with the requirements of remote hearings, and reference should be made to those.

Handling a remote hearing

Opening remarks

23. 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:

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509 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.

510 For example, see *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583.

- 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 they should not feel embarrassed or inhibited. Explain the risk of the IT failing altogether and what should be done if the link fails.

24. 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.
    - The importance of not speaking over other people and the reason.
    - How documents will be referred to.
25. Check whether a litigant in person (LIP) is using a mobile phone, tablet or full laptop/desktop. The smaller the person’s screen, the more the judge will have to ensure they can read documents and feel involved throughout the hearing.
26. 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.
27. 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 them 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.
28. 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 an LIP 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

29. 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.

30. Constantly check that LIPs, 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.

31. 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.

32. It is always important with LIPs to ensure they do not feel excluded by legal or procedural discussions between the 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.

33. LIPs may easily get left behind when documents are referred to. Check at the outset whether they have an electronic or hard copy of the bundle. 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.

34. 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.

35. 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:[511]

    - 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.

36. Make sure the lay parties understand the outcome of the hearing.

37. 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.

38. Do not be tempted to extend hours to get hearings completed. This will be exhausting for everyone, and may be particularly problematic for LIPs, 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.

[511] "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 (May 2020).

39. 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, when in reality their ability to give or absorb evidence has become impaired by tiredness.
40. 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 interculturally" section in chapter 8 gives general guidance on communicating with those who do not speak English as a second language.
41. 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 they are in difficulty.
    - See the sections in chapter 8 on "Interpreters" and "The right to speak Welsh" for general guidance on working with interpreters.
42. 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.
43. 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.
44. See chapter 9, "Remote hearings and holy books", for taking oaths remotely.

Particular difficulties with telephone hearings

45. It can be hard to identify who is talking. Ask speakers to identify themselves each time they speak (unless it is obvious).
46. LIPs 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 LIP that they are following and have no questions.
47. 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.
48. It is difficult for a judge to identify a build-up of distress before a party breaks down.
49. 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.
50. 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

51. In its interim Inquiry Report, "Inclusive justice: a system designed for all",[512] 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 focused 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.

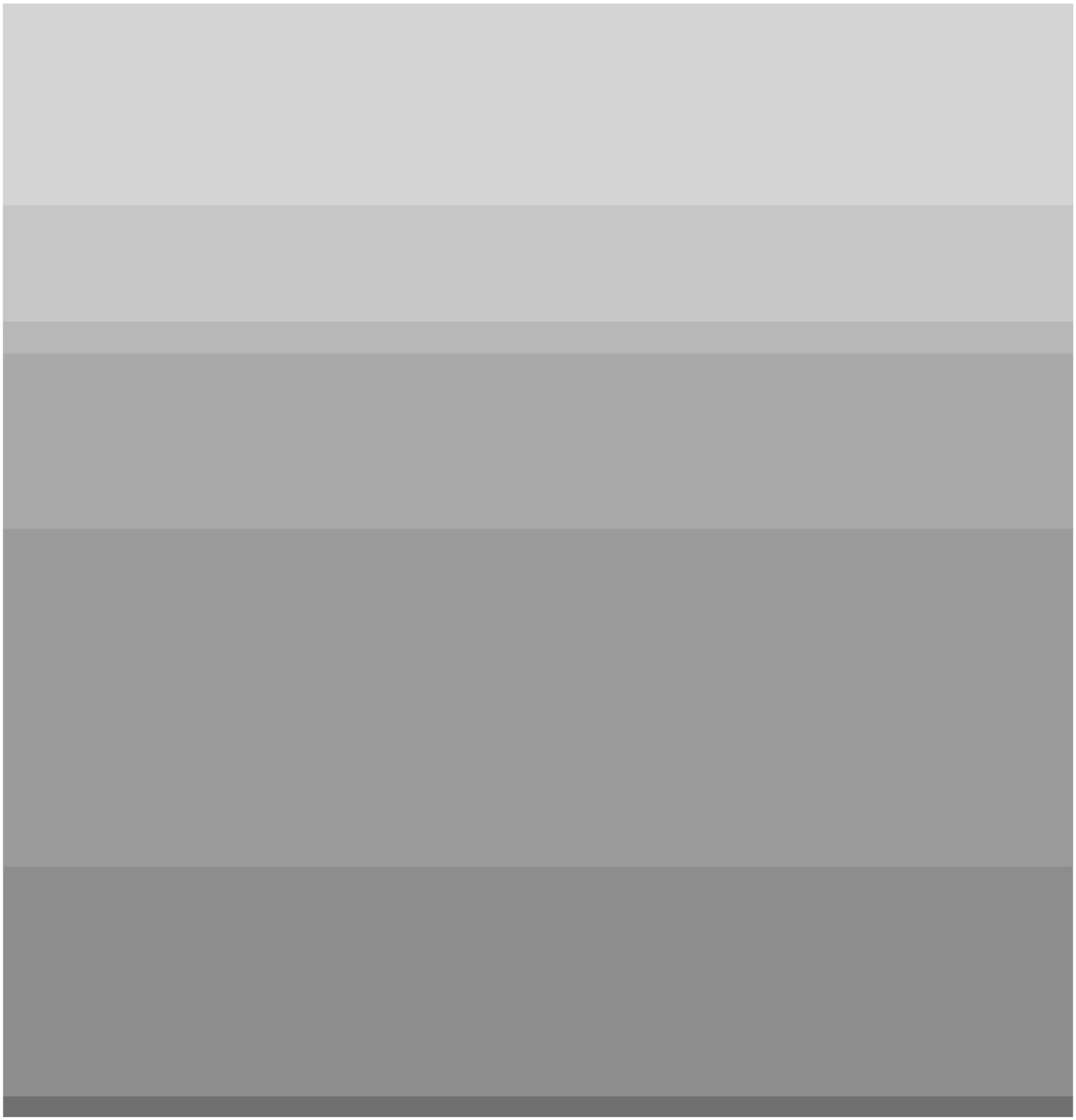
52. Defendants have a right to effectively participate in their hearings, which means being able to understand what is happening and communicate. Difficulties posed by video hearings for those who are neurodiverse or with a mental impairment include:

- Defendants not having a full view of the court or knowing who is present.
- 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.

53. 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 of whether to attend by video link or in person.

[512] "Inclusive justice: a system designed for all. Interim evidence report – Video hearings and their impact on effective participation": EHRC (April 2020).



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