



JUDICIAL  
COLLEGE

# Equal Treatment Bench Book

2013

**Amendments to the 2013 edition, introduced September 2015**

The following sections have been updated:

- Hinduism
- Secularism

## Foreword

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Dear Colleagues,

I am pleased to tell you that the Judicial College's Equal Treatment Bench Book, a guide for judges, magistrates and all other judicial office holders, has been revised and updated.

The Equality Act 2010, which strengthened and harmonised all our anti-discrimination laws and created important new duties and rights, has been in force for about three years. Moreover, 2012 saw the introduction of an Equality and Diversity policy for all judicial office holders in England and Wales<sup>1</sup>. The Equal Treatment Bench Book has been revised to reflect these and other recent developments.

Although aspects of the guidance may seem familiar, and some of its general principles are well-known, the messages it contains are worth reiterating. Fair treatment is a fundamental principle embedded in the judicial oath, and it is therefore a vital judicial responsibility. 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 work covers some of the important aspects of fair treatment about which we should all be aware. It also makes some suggestions as to steps that judges may wish to take, in different situations, to ensure that there is fairness for all those involved in the justice process.

We hope that you find it both helpful and informative.

I should like to express my gratitude to the following, who have contributed to the revision:

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Yours sincerely

Lady Justice Hallett

Chairman of the Judicial College

November 2013

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<sup>1</sup> And reserved tribunals' judiciary operating in Scotland and Northern Ireland



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# 1. Equality Act 2010

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## Key points

- The statutory torts prohibiting discrimination and related conduct are now codified in the Equality Act 2010 which is now in force.
  - The Equality Act 2010 sets out a clear framework for all forms of discrimination – both direct and indirect discrimination and victimisation and harassment. In addition there are obligations to make reasonable adjustments for disabled people and disabled people have the right not to be treated unfavourably because of something arising in consequence of their disability, unless it can be justified.
  - The Equality Act 2010 encompasses the range of intrinsic aspects of human dignity, known as protected characteristics: age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation.
  - The contexts in which discrimination and other conduct is prohibited by reference to a protected characteristic is also set out comprehensively in the Equality Act 2010 – from housing, to education, employment and services and public functions.
  - Consideration of equality issues are also brought into the heart of public sector decision making processes by the Public Sector Equality Duty which seeks to tackle institutionalised discrimination that can be hard to challenge through individual rights based litigation.
1. The *Equality Act 2010* - heralded as the single most significant development in equality law for 40 years - is now in force. The Act not only harmonises and consolidates previous anti-discrimination legislation; it also strengthens legal rights to equality and increases the range of unlawful acts of discrimination outside the employment field. In addition it places a new set of statutory equality duties on public authorities. The equality duty (s.149) requires public authorities, in the exercise of their public functions, to have due regard to eliminate prohibited discrimination, harassment and victimisation; to advance equality of opportunity; and to foster good relations between different groups of people.
  2. The Equality Act's purpose was to replace a mass of disparate mass of legislation with more uniform, accessible and comprehensive rights. It has already succeeded in setting standards and raising awareness of rights to equality, the importance of tackling discrimination and the role of the public sector in achieving equality.
  3. 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, e.g. training, mentoring, conducting appraisals, managerial or committee functions and conduct towards colleagues or court staff will not be exempt<sup>2</sup>.
  4. This chapter is intended as an introduction to the concepts and framework of the Equality Act 2010. Whilst there are other statutory provisions – such as the Mental

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<sup>2</sup> See *Engel v Joint Committee for Parking and Traffic Regulations Outside London (PATROL) 0520/12 EAT 13* May 2013.

Capacity Act 2005 and the special measures provisions for vulnerable witnesses - that address issues of equality which are discussed in other chapters, it is the Equality Act 2010 which sets out the statutory torts of discrimination, victimisation and harassment. There are also statutory codes of practice<sup>3</sup> which are wordy but helpful.

5. A claim under the Equality Act will have three components:
  - a. It will allege that the discrimination occurred in a proscribed **context and manner** bringing the matter within the jurisdiction of a court or tribunal – for example jurisdiction for discrimination in the workplace is conferred on Employment Tribunals.
  - b. It will identify the particular alleged type of **prohibited conduct**, such as direct discrimination or failure to make reasonable adjustments for a disabled person.
  - c. It will complain of such conduct by reference to a **protected characteristic**.

### ***Protected characteristics***

6. The Equality Act identifies nine protected characteristics, or specific aspects of our humanity, which are intrinsic to an individual's dignity and autonomy: part of our equal worth as human beings.
7. The protected characteristics are:
  - a. **Age.** Age is a protected characteristic and the concept includes "age group", that is, a group of persons defined by reference to a particular age or a range of ages, or cohort such as "baby boomers". Age groups may be linked to physical appearance, such as terms 'grey-haired' or 'youthful'.
  - b. **Disability.** A person has a disability if he or she has (1) a physical or mental impairment which (2) has a substantial and (3) long-term adverse effect on (4) his or her ability to carry out normal day-to-day activities, which is to be considered in interaction with the various barriers which may hinder their full and effective participation in society on an equal basis with others. The definition will include those with such an impairment for 12 months or more unlike, for example a short term illness or a condition where the effects are minor or trivial. The definition is important since a person must establish that he or she is a disabled person to access protection under the disability strand of the Act.

There are detailed provisions in Schedule 1 to the Act as well as statutory guidance on matters to be taken into account in establishing whether a person is disabled within the meaning of the Act. The United Nations Convention on the Rights of Persons with Disabilities is directly applicable in the UK and provides that "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their

<sup>3</sup> *EHRC Code of Practice on Employment (2011), EHRC Code of Practice on Services, Public Functions and Associations (2011), EHRC Code of Practice on Equal Pay (2011), statutory Guidance on matters to be taken into account in determining disability, and the pre-existing EHRC Disability Discrimination Act 1995 revised Code of Practice: trade organisations, qualifications bodies and general qualifications bodies 2008* remains in force. See [www.equalityhumanrights.com](http://www.equalityhumanrights.com)

full and effective participation in society on an equal basis with others”<sup>4</sup>. The *cause* of the impairment is irrelevant and may even be unidentified, as long as the evidence demonstrates that the impairment exists. Certain specified conditions are deemed disabilities, such as HIV and cancer, whilst others such as alcoholism and voyeurism are excluded. Progressive and fluctuating conditions are considered as disabling if they are likely to become so in the future.

Past disabilities are also covered.

- c. **Gender reassignment.** Gender reassignment is moving from one's birth sex to the preferred gender. A *transsexual* person is a person who has the protected characteristic of gender reassignment.

This characteristic covers those proposing to undergo or undergoing a process, as well as those who have done so. There is no need for the person to be under medical supervision or to have a gender recognition certificate.

- d. **Marital or civil partnership status.** 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. However broadly speaking, outside the context of work, discrimination, harassment and victimisation by reference to marital/civil partnership status is not prohibited.
- e. **Pregnancy and maternity.** A woman has the protected characteristic of pregnancy if she is pregnant (and, in the case of IVF treatment when the fertilized egg is transferred to her uterus), and maternity status until 26 weeks after the birth of a living child, or a still birth (after 24 weeks of pregnancy). After the 26 week period there is also protection in relation to breast-feeding.
- f. **Race.** The protected characteristic of race is defined as including colour; nationality; and ethnic or national origins. The non-exhaustive definition may also extend to other characteristics, such as caste<sup>5</sup>, and may comprise two or more distinct racial groups – such as East African Asian.
- g. **Religion.** Religion means any religion and a reference to religion includes a reference to a lack of religion. Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief. A religion need not be mainstream or well known to gain protection as a religion. However, it must have a clear structure and belief system. Denominations or sects within religions, such as Methodists within Christianity or Sunnis within Islam, may be considered a religion.
- 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.
- h. **Sex.** In relation to the protected characteristic of sex, a reference to a person who has a particular protected characteristic is a reference to a man or to a woman.

<sup>4</sup> Article 1

<sup>5</sup> The Equality Act 2010 confers regulation making power to the Secretary of State to outlaw caste discrimination, which have not yet been utilised.

- i. **Sexual orientation.** The protected characteristic of sexual orientation means a person's sexual orientation towards persons of the same, or opposite, or both sexes.

### ***Types of discrimination and other prohibited conduct as defined in the Act***

#### **Direct Discrimination**

8. Direct discrimination is less favourable treatment of someone 'because' of a protected characteristic. It may be helpful to make a comparison with the treatment of any actual comparator identified by the Claimant and/or a hypothetical comparator, although it follows that if a person has been treated less favourably because of a protected characteristic they would have been treated differently if they did not have that protected characteristic and were, for example, of a different race.
9. Motive is irrelevant in considering whether there has been direct discrimination - it is necessary to address simply the question of the factual criteria that determined the decision made by the alleged discriminator.
10. The definition covers cases where the Claimant has the protected characteristic, but is also intended to apply where the Claimant is *perceived* to have it, or is treated less favourably because of an *association* with someone else who has it. For example 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 Muslim'. In fact she is not Muslim, but is perceived as such and treated less favourably because of this perception.
11. Direct discrimination, if found, ordinarily cannot be justified. However, uniquely, direct discrimination on grounds of age is open to the justification that the treatment was a 'proportionate means of achieving a legitimate aim'. For example, to dismiss an employee because she or he has reached 70 is self-evidently treatment because of age. If however the employer can prove, for example, that the purpose was to facilitate access to employment for younger workers, or to preserve the older worker from the indignity of poor performance procedures, they may establish a legitimate aim. If the employer can also prove that the decision to compulsorily retire the employee was both an appropriate and necessary way of avoiding such humiliation or achieving inter-generational fairness, then they will have justified the treatment and it will not amount to unlawful direct age discrimination.
12. Less favourable treatment of the non-disabled – in other words, positive discrimination in favour of the disabled – is not unlawful.

#### **Indirect discrimination**

13. The aim of indirect discrimination is to address hidden and/or inadvertent discrimination, where there is a discriminatory outcome, without direct discrimination. It is where unjustified practices provisions or criteria disadvantage a group with a protected characteristic compared to a group which does not have this characteristic. There are four elements of the definition. The Claimant must show:
  - a. that the Defendant has applied, or would apply, a provision, criterion or practice (PCP) regardless of the protected characteristic relied upon; but

- b. which puts, or would put, persons who share the Claimant's characteristic at a particular disadvantage; and
  - c. which puts, or would put, the Claimant at that disadvantage.
  - d. If so, the claim is made out, subject to a justification defence: that the PCP is a proportionate means of achieving a legitimate aim. In order for the PCP to be a proportionate means of achieving a legitimate aim, it must correspond to a 'real need' and be an 'appropriate' means of achieving the objective pursued and 'necessary' to that end. The court must follow a structured approach to this proportionality test in that:
    - i. the aim must be sufficiently important to justify the measure which disadvantages some groups,
    - ii. the measures designed to meet the objective must be rationally connected to that aim,
    - iii. the means must be no more than is necessary to accomplish the objective, and
    - iv. the interests of the affected individual and the wider community must be fairly balanced.
14. Indirect discrimination has been used successfully to challenge the prohibition of the wearing of cultural and religious artefacts, such as a cross or bangle (Kara) in schools and workplaces, and dress codes such as a ban on corn rows or dreadlocks, veils and turbans and used to obtain rights for part-time workers who are predominantly female.
15. Cost alone is not sufficient to justify indirect discrimination.
16. For example a rule is made that a particular training session will be held between 6 and 8 p.m. on a Friday evening. Although the rule is applied across the workplace, it places those of some religions at a particular disadvantage if they need to be at home or a place of worship before dark. The training organisers would be required to demonstrate that the indirectly discriminatory timing of this particular session was a proportionate means of achieving the legitimate aim of training on this topic.
17. Indirect discrimination now applies in disability cases to disabled persons, which it did not under the previous legislation.
18. Indirect discrimination only protects persons with a protected characteristic, not those who are or perceived as having, or are associated with a person with a protected characteristic. For example, a family member and carer for a disabled person who is unable to work an employer's shift pattern, will not be able to claim indirect discrimination by reference to the disability strand of the Equality Act 2010.
19. Indirect discrimination does not apply to pregnancy/maternity per se, but is likely to amount to indirect sex discrimination.

## Harassment

20. Harassment for the purposes of the *Equality Act 2010* has a quite different definition to the *Protection from Harassment Act 1997*. It is defined as conduct that is
- a. unwanted; and

- b. *related to* a protected characteristic; and
  - c. has the *purpose or effect*
  - d. of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.
21. In determining the effect of the conduct, the Claimant's perception must be taken into account as well as whether it is reasonable to view the conduct as having that effect. A one off incident may be sufficient – for example suggesting to a female Asian employee that she might be “married off in India” was found to constitute unlawful harassment in the employment sphere. Since the test is whether the conduct is *related to* a protected characteristic it is a less strict causation test than direct discrimination. It includes, for example homophobic banter and innuendo made to a work colleague when the perpetrators knew that their colleague was not gay. Homophobic banter in the mistaken belief that someone was gay would also fall within the definition of harassment.
22. 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.
23. 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 could 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***

24. Special provisions govern the different forms of disability discrimination. The *Equality Act 2010* recognises that more than formal equality is required to enable disabled people to participate as fully as possible in society. As acknowledged in the UN Convention on the Rights of Persons with Disabilities, it can be the interaction with various barriers in society that hinder the full and effective participation of disabled people on an equal basis with others.<sup>6</sup> In addition to protection from direct and indirect discrimination, reasonable adjustments may be required to assist a disabled person who, because of his or her disability, is placed at a substantial disadvantage in comparison to others without that disability (s.20). These may be, for example, by adaptations or modifications to premises, physical features or different arrangements, such as sitting times or provision of a sign language interpreter, or provision of an auxiliary aid or service.
25. The gist of the duty is that it is to take reasonable steps, at no cost to the disabled person, to avoid the disadvantage or provide the aid or service.

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<sup>6</sup> Article 1

26. The responsibility, when it arises, is to take such steps as it is reasonable, in all the circumstances of the case, to have to take in order to make adjustments. The Act does not specify that any particular factors should be taken into account. What is a reasonable step depends on all the circumstances of the case. The following are some of the factors which might be taken into account when considering what is reasonable:
- a. whether taking any particular steps would be effective in overcoming the substantial disadvantage that disabled people face in accessing the services in question;
  - b. the extent to which it is practicable for the service provider to take the steps;
  - c. the financial and other costs of making the adjustment;
  - d. the extent of any disruption which taking the steps would cause;
  - e. the extent of the service provider's financial and other resources;
  - f. the amount of any resources already spent on making adjustments; and
  - g. the availability of financial or other assistance.
27. The precise framing of the reasonable adjustment duty is modified according to the particular context in which the claim arises - for example if it occurs in the workplace or in the sphere of education. The *Equality Act 2010* has different schedules which set out the details relevant to each context.
28. Unlawful discrimination may also occur if a disabled person is treated unfavourably because of something arising in consequence of his or her disability, which cannot be shown to be a proportionate means of achieving a legitimate aim provided the defendant knew or ought reasonably to have known that the person was disabled. (s.15). For example, a disabled person is refused service at a bar because they are slurring their words, as a result of having had a stroke. In these circumstances, the disabled person has been treated unfavourably because of something arising as a consequence of their disability. It is not direct discrimination since the reason for the treatment is the slurring of words, not because of disability per se, and it is therefore irrelevant whether other potential customers would be refused service if they slurred their words. This will amount to discrimination arising from disability, unless it can be justified or the bar manager did not know or could not reasonably be expected to know the person was disabled.
29. There does not need to be a direct causal link between the disability and the unfavourable treatment. Discrimination arising from disability only requires the disabled person to show s/he has experienced unfavourable treatment because of something connected with his or her disability: there must be a connection between whatever led to the unfavourable treatment, such as the slurring of words, and the disability. If the person is slurring his or her words because of drinking too much and it is unconnected with any disability, the landlord's refusal to serve more drinks will not arise in consequence of the disability.
30. If the defendant fails to make reasonable adjustments which would have prevented or minimised the unfavourable treatment, it will be difficult for A to show the treatment was objectively justified. However, making reasonable adjustments does not mean

there is no discrimination arising from disability. In practice, it is often appropriate to consider whether there is any breach of the duty to make reasonable adjustments before considering s15.

### **Victimisation**

31. Victimisation is detrimental treatment because of a 'protected act' (or the belief that the claimant has done or may do a protected act).
32. Protected acts include making allegations of breach of the *Equality Act 2010*, bringing proceedings under it, or giving evidence or information in connection with such proceedings. The allegations do not have to be true, but making a false allegation in bad faith is not a protected act.
33. For example a magistrate makes a complaint of race discrimination against another magistrate. When she makes enquiries about applying to sit in the youth court she is told that her application will probably fail. If this is because of her complaint about her fellow magistrate, it is likely to constitute unlawful victimisation.
34. The claimant need not have the protected characteristic, but only to have engaged in a protected act: e.g. a white person complains to the doorman for excluding black people from a night club and is himself then refused entry from the club.

### **Pregnancy/maternity discrimination**

35. Less favourable treatment of a woman because she is breast-feeding is specifically deemed to be such treatment on grounds of sex.
36. It is also discrimination to treat a woman unfavourably because of a pregnancy and, for twenty-six weeks after a birth, because she has given birth or is breastfeeding.

### ***Contexts falling with the jurisdiction of the Equality Act 2010***

37. Discrimination is prohibited in the contexts and circumstances specified in the *Equality Act 2010*.
38. However, there are a number of important general exceptions and some exceptions specific to the particular context. For example charities may provide assistance only to the elderly or women, or those from a particular community, but are prohibited from treating people differently because of colour (although discriminating on ethnic or national origins would be permissible). Specific exceptions include gender-affected sporting activity, and single sex communal accommodation. In some circumstances there are exceptions for religious organisations in relation to discrimination in respect of sexual orientation. The broad areas of protection are outlined below, but the detail of the precise scope of the *Equality Act 2010* is outside the remit of this chapter.

### **The workplace**

39. Discrimination in the workplace is generally prohibited by Part 5 of the *Equality Act 2010*. 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 and work of equal value.

40. Employment is widely defined to encompass workers and office holders and all but the genuinely self-employed, but volunteers are outside the scope of protection. Job applicants are covered as well as former employees where the discrimination arises out of and is closely connected to the employment relationship.
41. Jurisdiction 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 of the *Equality Act 2010* covers the provision of services to the public or a section of the public, whether for payment or not. It also covers providers of goods and facilities and those undertaking non-service public functions. For example, a restaurant cannot refuse to serve diners because they are Asian and a bank may need to make reasonable adjustments to its buildings to enable access to wheelchair user customers.
43. The types of conduct covered are wide-ranging: not only in relation to the provision or non-provision of the service, but also the quality, manner, terms of provision, termination of the service and any other detriment. A detriment can be by act or omission. The test is whether the claimant reasonably considered him or herself to be at disadvantage and is subject to a de minimus rule.
44. There is no protection by reference to age for those under 18.
45. Jurisdiction is conferred on the county and high court.

### **Premises**

46. There is wide protection in the housing field set out in Part 4. 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.
47. Protection in this context does not apply in respect of the characteristic of age.

### **Education**

48. 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.
49. In relation to schools, protection does not apply in respect of age discrimination.

### **Associations**

50. The provisions regarding scope are complex and are set out in Part 7. Broadly, the *Equality Act 2010* applies to any association of twenty-five or more members which has selective admission rules. However, single characteristic associations are permitted by schedule 16, for example the Garrick Club's prohibition on women members, so long as that characteristic is not colour and the association is not a political party.

51. Where a club or association does not restrict membership under the exemption, it is nonetheless unlawful to provide a different level of facilities or different tiers of membership rights by reference to a protected characteristic. So it would thus be unlawful to exclude women golf club members from the bar in the clubhouse or not allow women members to stand for election as chair of the golf club.
52. Special provisions apply in relation to political parties, in particular with regard to single-sex shortlists.
53. Once again the protection afforded is wide ranging and extends to admissions, terms of membership, in relation to benefits and services, expulsions and other detrimental treatment.

### ***Transport and building regulations***

54. 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.
55. Specific building regulations concerning accessibility are enforced through local authority and planning authorities and the Secretary of State.

### ***Remedies***

56. The County Court has power to grant any remedy which could be granted by the High Court in proceedings for tort or on a judicial review claim. Compensation for injury to feelings may be awarded, assessed in three bands, depending on the extent to which the Claimant's feelings have been injured, and in appropriate cases may include aggravated and exemplary damages.

### ***Public Sector Equality Duty***

57. The public sector equality duty was first introduced to address institutional racism following the Stephen Lawrence inquiry in order to tackle 'the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture and ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness, and racist stereotyping which disadvantage minority ethnic people.'<sup>7</sup>
58. It now covers every protected characteristic 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 – from the small number of women in UK board rooms, to the educational performance of African-Caribbean boys, to low levels of participation of disabled people in the workplace. When making decisions of a strategic nature about how to exercise their functions, the Public Sector Equality Duty (PSED) requires public authorities to have due regard to three needs:

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<sup>7</sup> *The Stephen Lawrence Inquiry, Report of an inquiry by Sir William MacPherson of Cluny (The MacPherson Report)*: Chapter 6. The Stationery Office. February 1999. Retrieved 6 January 2011.

- a. to eliminate discrimination, harassment and victimisation and any other conduct prohibited by the Equality Act 2010;
- b. to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; and
- c. to foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The duty applies to public authorities and hybrid authorities – a person who is not a public authority but who exercises public functions, in the exercise of those functions. For example the duty 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.

Public authorities also have specific duties imposed upon them pursuant to statutory instrument, which in England are to publish equality objectives at least every four years and information to demonstrate compliance with the duty at least annually, with more specific obligations in each of Wales and Scotland by devolved power.

Breach of the PSED is actionable by judicial review and there is a statutory code of practice published by the Equality and Human Rights Commission

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## 2. Judgecraft

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### *Introduction*

1. Judgecraft is the art of judging. It encompasses everything that you will not find in a book on law, evidence or procedure. Judgecraft is about how we do the job and fair treatment and equality are at the heart of it. Most judicial office-holders understand these concepts very well so this introductory chapter does not seek to lecture or patronise, simply to inform, assist and guide.
2. There is of course plenty of other guidance, the most compelling of which is the judicial oath:  
“...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.”
3. In a lecture given in September 1993 Lord Bingham attempted a modern paraphrase, never bettered:  
“A judge must free himself of prejudice and partiality and so conduct himself, in court and out of it, as to give no ground for doubting his ability and willingness to decide cases coming before him solely on their legal and factual merits, as they appear to him in the exercise of an objective, independent and impartial judgment.”
4. The Guide to Judicial Conduct has now been updated to March 2013. The Guide is wide-ranging but at its heart are the six core judicial ‘values’ derived from the Bangalore Principles of Judicial Conduct, namely independence, impartiality, integrity, propriety, ensuring equality of treatment, and competence and diligence<sup>8</sup>.
5. The Guide includes the Equality and Diversity Policy for the Judiciary, published by the Lord Chief Justice and the Senior President of Tribunals in October 2012. This comprises a Dignity at Work statement and a brief guide to the Equality Act 2010. These recognise that the principles of fair treatment and equality are fundamental to the judicial role and apply both in and outside the court or tribunal.
6. By their very nature, however, these documents provide only generic guidance. The following sections deal briefly with aspects of judgecraft 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. Understanding means understanding the evidence, the materials, the meaning of questions and the answers to them.
9. If someone remains silent it does not necessarily mean that they understand; it may equally well mean that they do not understand, that they are unable to understand,

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<sup>8</sup> Guide to Judicial Conduct (March 2013)

that they feel intimidated or inadequate, that they are too inarticulate to speak up, or that they are otherwise unable to communicate properly.

10. It is possible to test understanding by asking a supplementary question or reiterating what you understand the position to be and asking if the party or witness agrees.
11. Litigants in person may not have the courage to test the understanding of others or to admit that they do not fully understand a point.
12. 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.
13. Effective communication requires an awareness of 'where a person is coming from' in terms of background, culture and special needs, and of the potential impact of those factors on the person's participation in the proceedings; it applies to witnesses, advocates, members of the court or tribunal staff and even members of the public who intervene when they should not.
14. Try to put yourself in the position of those appearing before you; 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 likely result is that they will not give a good account of themselves and the court or tribunal should 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.
15. 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.
16. Lay people do not understand legal jargon and technical terms ("disclosure", "directions", "application for permission to apply"), so keep language as simple as possible and give clear explanations where required.
17. Inappropriate language or behaviour is likely to result in the perception of unfairness (even where there is none), loss of authority, loss of confidence in the system and the giving of offence.
18. A thoughtless comment, throw away remark, unwise joke or even a facial expression may confirm or create an impression of prejudice; it is how others interpret your words or actions that matters, particularly in a situation where they will be acutely sensitive to both.

### ***Demonstrating fairness***

19. Fair treatment does not mean treating everyone in the same way: it means treating people equally in comparable situations. For example, a litigant in person with little understanding of law and procedure is not in a comparable situation to a QC. It is substantive equality that counts.
20. When parties do not get what they would like or expect, it is particularly important that they feel they were fairly treated, fully heard and fully understood.

21. People who have difficulty coping with the language or procedures of the court or tribunal, and are perhaps less engaging litigants as a result, are entitled to justice in the same way as those who know how to use the legal system to their advantage; any disadvantage that a person faces in society should not be reinforced by the legal system.
22. Judicial office-holders should be able to 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.
23. The sooner the disadvantage is identified, the easier it is to remedy it; where possible, 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; for example, 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 witnesses can and should be considered.
24. Litigants in person should not be seen as an unwelcome problem for the court or tribunal; you may not be able to assist them with their case but you can ensure they have every reasonable opportunity to present it.
25. The disadvantage to litigants from poor representation is a challenging issue; consider how the representative can be managed to assist them to represent their client effectively.
26. People who are socially and economically disadvantaged may well assume that they will also be at a disadvantage when they appear in a court or tribunal.
27. Those at a particular disadvantage may include people from minority ethnic communities, those from minority faith communities, those who do not speak or understand the language of the court or tribunal, individuals with disabilities (physical, mental or sensory), women, children, older people, those whose sexual orientation is not heterosexual, trans-gender people, those who have been trafficked and those who through poverty or any other reason are socially or economically marginalised.
28. It is for judicial office-holders to ensure that all these can participate fully in the proceedings; you can display an understanding of difference and difficulties with a well-timed and sensitive intervention where appropriate.
29. Recognising and eliminating prejudices, including your 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 our own.
30. Unconscious prejudice – demonstrating prejudice without realising it – is more difficult to tackle and may be the result of ignorance or lack of awareness.
31. Ignorance of the cultures, beliefs and disadvantages of others encourages prejudice; it is for judicial office-holders 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 short cuts which are often grossly inaccurate, generate misleading perceptions and can cause you to make a mistake; it is important not to:
- a. assume that, because people meet particular criteria (e.g. they are of South Asian origin or wheelchair users), they will behave in a particular way or have particular limitations;
  - b. attach labels to people (e.g. learning disabled or youths) and then use the label to undermine their rights (e.g. assume they are incapable of giving evidence or that they will lie or be disrespectful).

### ***Complaints***

33. Judicial office-holders are accountable for their behaviour and those who do not take the trouble to avoid or prevent insensitive behaviour in the court or tribunal are vulnerable to complaints. The function of the Office for Judicial Complaints is to deal with complaints about the personal conduct of judicial office-holders.

### 3. Social exclusion and poverty

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#### *Key points*

- A disproportionate number of those appearing before courts and tribunals are from socially excluded backgrounds.
- This may lead to problems in accessing the limited professional advice which is available, and affect the way individuals present and understand evidence, and how they respond to cross-examination or questions from the bench.
- A lack of educational attainment and poverty are intrinsically linked, and both will be relevant in many spheres where there is judicial intervention.

#### *Social exclusion*

1. There is evidence that a disproportionate number of persons drawn into the justice system are from what may be described as socially excluded backgrounds. At the same time, those who operate that system – judges and lawyers – are rarely from such backgrounds. It is necessary therefore to attempt to bridge any knowledge and understanding gaps between judges and those who appear before them.

#### *The concept of social exclusion*

2. The term ‘social exclusion’ refers to a situation of economic or social disadvantage. It incorporates, but is broader than, concepts like poverty or deprivation, and includes disadvantage which arises from discrimination, ill health or lack of education, as well as that which arises from a lack of material resources.
3. An understanding of social exclusion is relevant to the administration of justice because many individuals drawn into all aspects of the justice system will come from socially excluded backgrounds. The obvious areas are in the criminal and family courts and in tribunals, particularly but not exclusively those dealing with social welfare law. To understand the circumstances which have led to each individual case it is necessary to have some understanding of how processes of social exclusion operate.
4. Importantly the social exclusion experienced by those who come before us may affect the way that people respond to authority figures, as well as how they present and understand evidence.
5. In the criminal sphere, sentences may create or exacerbate social exclusion for offenders. The sentences may be necessary and justified, but it is important to understand the full implications, which may include the addition of fines to existing debt and the real risk of the socially excluded person engaging in further criminal activity to ‘solve’ the problem.
6. There is no legal definition of social exclusion. A range of definitions is used by academics and politicians, according to their disciplinary and ideological perspectives. However, there are a number of core features which most definitions share. However, for practical purposes, an individual who is unable to participate in key activities in society is socially excluded.

7. Key activities might include:
  - a. consumption – being able to purchase goods and services which are customary in that society;
  - b. production – being able to contribute to society, whether through paid or unpaid work;
  - c. social interaction – having access to emotional support, being able to socialise with friends, having avenues for cultural expression;
  - d. political engagement – experiencing a degree of individual autonomy, being able to take collective action, having a say in local or national decision-making.
8. Social exclusion is a matter of degree, rather than a dichotomy between ‘us’ and ‘them’.
9. Complex chains of cause and effect lead to social exclusion. The causes operate at many levels: individual personality, family background, neighbourhood or peer group effects, the local economy and services, national policy and economic systems, and international and global trends.
10. Given the breadth of the term social exclusion, it is difficult to quantify how many people in the UK are affected, but recent research<sup>9</sup> has indicated that 18 million people cannot afford adequate housing conditions, and 12 million are too poor to engage in common social activities thought necessary by the majority, essentially the ability to visit family or friends in hospital, to celebrate important events such as family birthdays and to have a hobby.
11. Experiencing exclusion in one respect is associated with an increased likelihood of experiencing exclusion in other respects, either simultaneously or at some point in the future.
12. There is no evidence of a fixed ‘stock’ of socially excluded individuals, cut off from mainstream society over the long term (sometimes referred to as an ‘underclass’). Rather, individuals move from being more to less excluded, and vice versa, over time.
13. Risk factors include having had a disadvantaged childhood, having low or no educational qualifications, being in poor health, living on a low income, having inadequate housing and being a member of a group that is discriminated against.

### ***Some facts***

14. Relative income poverty is growing. This classification is based upon people being unable to reach an acceptable standard of living as defined by the general public<sup>10</sup>. Survey evidence shows that the number of people falling below the minimum standards of the day has doubled since 1983<sup>11</sup>.

<sup>9</sup> *The Impoverishment of the UK* (March 2013)

[http://www.poverty.ac.uk/system/files/attachments/The\\_Impoverishment\\_of\\_the\\_UK\\_PSE\\_UK\\_first\\_results\\_summary\\_report\\_March\\_28.pdf](http://www.poverty.ac.uk/system/files/attachments/The_Impoverishment_of_the_UK_PSE_UK_first_results_summary_report_March_28.pdf)

<sup>10</sup> JRF (Joseph Rowntree Foundation) *Inspiring Social Change* (June 2013)

<sup>11</sup> 1983 Breadline Britain

15. The poorest 10% of the population receive more than one-fifth of their gross household income from means tested benefits. This benefit-reliant group comprises 8.3 million people in 3.8 million households, including 3 million children.<sup>12</sup>
16. Despite the impression given in some press coverage on the topic, means-tested subsistence benefit rates are low. Weekly Job Seekers Allowance is £56.80 for those under 25 and £71.70 for others. Employment and Support Allowance (paid to those not able to work through ill health) ranges from £101.15 to £106.50 depending upon the severity of the disability. Although those in receipt of subsistence means-tested benefits will not be funding their basic housing costs (Housing Benefit will be available to cover rent payments up to a capped limit, and for home owners mortgage interest is payable up to a cap of £100,000) other costs associated with heat and light remain, and fuel costs including these have more than doubled (risen by 234%) since 2000<sup>13</sup>.
17. Council tax used to be covered by benefit for those on means-tested benefits and those who have low income, for example many pensioners. However, recent welfare reform has made the payment of this something of a post code lottery and many will now be expected to contribute to or cover this expense.
18. Around 13 million people in the UK were living in households below the low-income threshold of 60% median income. This is around a fifth (22%) of the population<sup>14</sup>.
19. At 30%, disabled adults are twice as likely to live in low-income households as non-disabled adults. (Refer to the section on disability for further information as to these aspects).

## Health

20. Health inequalities associated with class, income or deprivation are pervasive and can be found in all aspects of health, from infant death to the risk of mental ill-health. The limited information on progress over time (infant death, low birth weight) shows no sign that they are shrinking.

## ***Characteristics of social exclusion***

21. In order to understand social exclusion within the justice system it is important to be aware of the wider context of people's lives and the ways that different aspects may impact on their experience of the legal process. The next sections try to highlight some characteristics of socially excluded lives and consider their potential impact. However it is important not to perceive socially excluded populations as a homogenous 'underclass' with a wholly alternative set of norms, values and behaviours from those of mainstream society. Whilst some commentators attempt to paint this picture, there is no persuasive evidence for it.

<sup>12</sup> JRF publication *ibid*

<sup>13</sup> *The Impoverishment of the UK* (March 2013) (*ibid*)

<sup>14</sup> 'Squeezed Britain' The Resolution Foundation (2013)

## Low income

22. The realities and practicalities of life on a low income for extended periods can be very hard. Attempting to 'make ends meet' through a combination of the benefit system and low paid inflexible and informal work is challenging. Reliance on benefit creates great pressures especially when moving into and out of employment. For some, so-called 'poverty traps' make the move into work a very difficult one to take; for others, late payments or over payments of benefit (which may not be perceived as overpayments at the time, but are later claimed back) create financial pressures with severe knock-on effects.
- a. Certain elements that have risen faster than overall average costs – childcare, social rents, public transport food and energy – are particularly applicable to those on low incomes.
  - b. Many people on low incomes, whether in the formal or informal labour market, are paid by the hour and do not receive the full range of employment benefits even if they are entitled to them.
  - c. Lack of flexibility in their work creates problems maintaining their income while dealing with emergencies, whether relating to children, illness or a court or tribunal hearing.
  - d. One practical problem of a court or tribunal hearing is the anxiety as to whether they have something appropriate to wear; about 5.5 million adults go without essential clothing, a definition which includes, as well as a winter coat and shoes, clothing appropriate for a job interview.

## Financial exclusion

23. This hits hardest when there is a shortfall of income to meet one-off costs for emergencies<sup>15</sup>.
- a. 16.5 million people cannot pay unexpected costs of £500.
  - b. 14 million cannot save £20 per month for 'rainy days'.
  - c. 12 million cannot afford household insurance. Many struggle to open bank accounts or secure loans at reasonable interest.
  - d. 21%, some 18 million people, borrowed in the year to March 2013 to pay day-to-day living expenses. For this people are often reliant on very high-interest lenders on the high-street or via loan sharks or pay-day loans; the majority of these are rolled over from month to month despite massive APRs and penalty clauses as recent press coverage and Parliamentary interest has highlighted.

## Separated parents

24. For many the child support system is an additional source of difficulty. This brings them into contact with the tribunal system to appeal the decisions of the Agency<sup>16</sup>

<sup>15</sup> *The Impoverishment of the UK* (March 2013) (ibid)

<sup>16</sup> The original Child Support Agency has been 'rebranded' twice due to perceived public difficulties with its performance

that decides both upon the amount of maintenance and enforcement which has been characterised by a lack of fitness for purpose; the error rate and bureaucracy have created both practical financial and emotional problems for parents since its inception in 1991.

### **Lack of choice and control**

25. Socially excluded people may have constant contact with state bureaucracy. Housing officers, DWP officers, community workers, social workers, health visitors, probation officers and advice workers are amongst the many people who some socially excluded individuals come across on a weekly or even daily basis, on top of what we may expect in our own lives by way of contact with teachers, the police and others. Some of these relationships can be positive but there is also a fear factor for many.
26. This may affect views on authority figures such as judges. Additionally the elements of choice and personal control, taken for granted by people with resources, are missing.
27. Socially excluded people may be reliant on this array of individuals who evaluate, adjudicate upon and consequently sanction (or censure) many aspects of their lives. They are also used to having important decisions about their lives made by others.
28. 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 position needs to be looked at in context.
29. A failure to attend a hearing, for example, may be due to a chaotic lifestyle but it may also be linked to the fact that many important decisions in that person's life, such as entitlement to benefit or contact with children through Social Services, are made without their active input, and they may lack what, as judges, we feel is the natural wish to come along and put their case.

### **Family life**

30. Whilst less settled family lives are widespread across society, they are more frequently found and often more extreme amongst socially excluded populations.
31. Within the prison population, for example, there is a significant over-representation of those who were in care (now referred to as 'looked after children').
32. Their entry into the care system will have followed problems or trauma within the family unit. Common reasons for admission to care include illness or death of the caring parent, abuse, either of the child directly or domestic violence within the family leading to an unstable or dangerous environment, and drug or alcohol problems which create a chaotic lifestyle for dependent children. Care, whilst securing a safe environment may mean separation from siblings or the wider family.
33. These difficult early issues may resonate throughout life.
34. These matters, alongside the strains of managing on a low income, and the lack of control over one's life, may contribute to the greater levels of stress and depression which is found among socially excluded people.

## Education

35. The lack of a good education is a characteristic strongly associated with social exclusion; a large proportion of the UK population continues to have very low literacy levels.
  - a. According to the Literacy Trust: 'One in six people in the UK struggle to read and write.' This feeds into very low education levels, particularly amongst the prison population in comparison to the general population.
  - b. Newspapers such as *The Sun* are aimed at a reading age of around eight. Tackling and understanding documents in legal proceedings, however hard we try to use plain and simple English, will be a problem for many.
36. As well as the significant effect that lack of educational qualifications has on the ability to get decently paid work and to manage in a society that requires certain levels of functional literacy, this may be one of the factors that contributes to low self-esteem, which has been shown to have a major impact on the choice, effectiveness and persistence of people's behaviours across a range of settings, and has been shown to be a particular problem amongst many people who might be described as socially excluded.

## Discrimination

37. In many instances, a major aspect of people's exclusion may be due to, or exacerbated by, discrimination on the grounds of ethnicity, religion, language, disability or sexuality. These issues are covered elsewhere in this Bench Book.

## ***Social exclusion and the justice system***

38. Although it is beyond the scope of this book to determine why, or the extent to which, these factors bring individuals into contact with the justice system, their implications for the actual process are substantial.
39. It is necessary to understand that the social and educational norms, as well as the rules and formalities of the legal process in connection with aspects of language, dress, communication, procedure and behaviour may be not be known, understood or shared by everyone; knowledge and skills should not be assumed. Sensitivity is required to both avoid unconscious prejudice and allow the individual the best opportunity to make their case.
  - a. For those in hourly-paid employment, time out to attend a tribunal or court – especially if there are delays – may be particularly stressful, as people may be concerned about missing necessary work, thus exacerbating their financial situation. They may need to pick their children up from school yet be unable to pay for or rely on help from others; the networks which might be assumed by many of us on the basis of our own experience are often absent where people are socially excluded.
  - b. Judges and the legal process may be seen as just another in the long list of authority figures getting involved with someone's life, and there may be a fundamental mistrust. This can have many implications, but could result in

frustration leading to anger for some individuals. Judges need to understand that this response may not be borne out of a lack of respect for the law, but out of the helplessness stemming from lack of choice and control.

- c. Research has shown that many people find courts or tribunals to be intimidating places and this can be exacerbated by issues such as dress. This may be especially so for people who may lack confidence in a formal environment. Attempts to put people at ease are an important part of allowing them to express themselves, and as such part of a fair hearing. Whilst many tribunals adopt a significantly less formal approach to courts, the actual environment may be unknown to the person appearing, and the thought of a legal setting of any sort may engender worry about the event and therefore similar anxiety.
- d. 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, high quality legal advice and representation. This will affect the presentation of their case in court. This is likely to be an increasingly pressing issue for the justice system as a whole when the impact of the recent legal aid reforms is known.
- e. Where paper work has been provided that should have been seen prior to or during a hearing it cannot be assumed that the individual defendant or litigant is able to understand it, even if English appears to be their first language. It is hard for lawyers to understand the limited literacy levels of the majority, but the vocabulary and syntax in 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. Bearing this in mind it is easy to see that legal documents, even where care has been taken to avoid 'legalese', may be complicated; they may also be daunting to read simply by virtue of their importance.

**40. Problems of understanding may not be confined to the written word.**

- a. Explanations or comments from lawyers and judges, especially if using legalistic language, may not be properly understood. Individuals may not be used to expressing themselves publicly or with strangers, and may struggle to get their point across. All of this may lead to miscommunication, discussion at cross purposes, frustration and annoyance for all involved, judges included. It is so important that everything said is understood on all sides that time taken to check understanding is rarely wasted. Reflective listening, the summarising by the judge of what they have understood, is a useful strategy.
- b. People may come to a court or tribunal not really understanding why they are there. In some tribunals, even where it is their own appeal, they may only have a hazy understanding of what the case is about, particularly if they have been advised to appeal by an organisation that they consulted at an early stage for advice, but which has not been able to follow the case through to a conclusion, a common situation following cuts in funding.

***Decisions of the court or tribunal***

41. Within the courts there are clearly cases where it is necessary or desirable for individuals who have been convicted of a crime to be sent to prison and excluded from society. Sentencing may have other objectives, such as punishment, deterrence or redress for the injured party. Whatever the intention, it is important to consider the impact sentencing may have on the social exclusion of the offender and on others.
42. In tribunal cases, in particular those which restrict access to welfare benefits or to funded housing there is similar impact; although discretion in the judge may be restricted, the potential social exclusionary impact of a decision may need to be considered in relation to aspects of the hearing which bear upon Article 6 rights.

**Custodial sentences**

43. For those with already precarious employment and/or low educational qualifications, a custodial sentence can reduce the chance of subsequent legal employment to almost zero.
44. Private or social housing tenancies may be terminated, creating a risk of a period of homelessness on release from prison.
45. Any supportive relationships or social networks the offender had in the community at large may break down and be replaced by connections among the prison population (sometimes referred to as negative social capital).
46. Lone parents are over-represented among those at risk of social exclusion; custodial sentences for this group are likely to have significant adverse impacts on the children, whatever alternative arrangements are made for their care.

**Community sentences and treatment orders**

47. Non-custodial sentences can also have a negative impact on the chances of retaining employment. Again, this impact is likely to be magnified by a lack of educational qualifications or an already disrupted work history.
48. In addition, people at risk of social exclusion often have complex and even chaotic lives, as a result of juggling the demands of living on a low income and negotiating with a range of different service providers and authorities. This can make it more difficult to keep appointments or attend regularly.

**Financial penalties/overpayments of benefit**

49. 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 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.
50. Attempting to pay fines, legal costs, compensation or overpayments from limited resources can result in problematic levels of debt, a failure to meet other financial commitments such as rent (resulting in a risk of homelessness), utility bills (with the attendant risk of disconnection), or child support payments (increasing child poverty).

51. Payment may also create pressure to acquire resources by illegal means. Financial hardship is likely to affect not only the offender but also any children or other dependants.

### **Possession orders**

52. Where possession orders for residential accommodation are made, the risk of subsequent homelessness, loss of assets and potential impact on children should be taken into account.
53. Timing may also be important, to give maximum opportunity for other arrangements to be made, or to take account of other impending events in the individuals life (e.g. childbirth).
54. The impact of any decision on the property owner should also, of course, be taken into account.

### **Public views**

55. Research has indicated that the majority of people share similar fundamental views about justice and consider that those who have committed an offence or erroneously received state funding should be punished, or required to repay money wrongfully received. However, this belief in the justice system depends on a perception of having been fairly treated. As discussed in the previous section, this requires that the process is perceived to be fair and transparent. It also requires that the person feels they have been judged fairly and that the decision is proportionate.

### **Conclusions**

56. There may be a predisposition to feel unfairly treated and misunderstood among some people at risk of social exclusion, since this is often their experience of dealings with authority in the past. Judges may be in a position to prevent this perception by active listening and attention to problems during the hearing, and by explaining their decisions fully and carefully, in terms which are easily understood and which show that they have taken into account all the circumstances; a failure to do these things may serve only to further entrench alienation from authority.
57. The argument in this section has not been that people at risk of social exclusion should be treated more favourably than others, but that, in relation to procedural aspects in all cases, and, where legally possible in relation to discretionary matters, judges should take into account the likely impact on an individual's life chances and the effect upon the lives of any dependants both immediately and in the longer term.

## 4. Litigants in Person

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### *Key points*

#### **The 'litigant in person'**

In March 2013 the Master of the Rolls issued a Practice Guidance<sup>17</sup> which determined that the term 'Litigant in Person' should continue to be the sole term used to describe individuals who exercise their right to conduct legal proceedings on their own behalf. The Practice Guidance applies to all proceedings in all criminal, civil and family courts (though not curiously to tribunal proceedings), For the purposes of clarity, the term 'litigant in person' (as opposed to 'self-represented litigant' or 'unrepresented party') is used in this chapter in line with the Practice Guidance both to those appearing unrepresented in courts and also in tribunals. The term encompasses those preparing a case for trial or hearing, those conducting their own case at a trial or hearing and those wishing to enforce a judgment or to appeal.

- Most litigants in person are stressed and worried, operating in an alien environment in what for them is a foreign language. They are trying to grasp concepts of law and procedure about which they may be totally ignorant.
- They may well be experiencing feelings of fear, ignorance, frustration, bewilderment and disadvantage, especially if appearing against a represented party. The outcome of the case may have a profound effect and long-term consequences upon their life.
- They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.

#### **Role of the judge**

- Judges must be aware of the feelings and difficulties experienced by litigants in person and be ready and able to help them, especially if a represented party is being oppressive or aggressive.
- Maintaining patience and an even-handed approach is also important where the litigant in person is being oppressive or aggressive towards another party or its representative or towards the court or tribunal. The judge should, however, remain understanding so far as possible as to what might lie behind their behaviour.
- Maintaining a balance between assisting and understanding what the litigant in person requires, while protecting their represented opponent against the problems that can be caused by the litigant in person's lack of legal and procedural knowledge, is the key.

#### **Introduction**

1. There are a number of reasons why individuals may choose to represent themselves rather than instruct a lawyer.
2. Many do not qualify for public funding, either financially or because of the nature of their case.

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<sup>17</sup> *Practice Guidance (Terminology for Litigants in Person)* 11 March 2013 [2013] 2 All ER 624

3. Some cannot afford a solicitor and even distrust lawyers.
4. Others believe that they will be better at putting their own case across.
5. In December 2012, following a discussion at the Judges' Council about the implications of the expected rise in the number of litigants in person after the implementation of the Government's Legal Aid Reforms on 1 April 2013<sup>18</sup>, a Judicial Working Group<sup>19</sup> was formed under the chairmanship of Mr Justice Hickinbottom to consider this issue in the context of the civil and family courts, and the tribunals.
6. The report of the Judicial Working Group was published in July 2013.<sup>20</sup> The report contains a number of recommendations. These include the training of judicial office-holders on dealing with litigants in person and the provision of coherent, effective and up to date guidance. Two examples of such guidance are annexed to the report, namely draft guidance for judges conducting civil proceedings prepared by His Honour Judge Bailey<sup>21</sup> and draft guidance for family judges prepared by Alison Russell QC<sup>22</sup>.
7. This chapter aims to identify the difficulties faced (and caused) by litigants in person 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. This chapter should be read in conjunction with the draft guidance annexed to the report of the Judicial Working Group.
8. Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal which is concerned to adjudicate in proceedings in which that person is a party. But on the whole those who exercise this personal right find that they are operating in an alien environment. The courts and tribunals have not always been receptive to their needs.
9. 'All too often the litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists'.

*Lord Woolf, Access to Justice, Interim Report June 1995*

10. '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*

11. Litigants in person are likely to experience feelings of fear, ignorance, anger, frustration and bewilderment. They will feel at a profound disadvantage, despite the fact that the outcome may have a profound effect with long-term consequences for their lives. 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.

<sup>18</sup> *Legal Aid, Sentencing and Punishment of Offenders Act 2012*

<sup>19</sup> The Judicial Working Group on Litigants in Person

<sup>20</sup> The report is available at [http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/lip\\_2013.pdf](http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/lip_2013.pdf)

<sup>21</sup> Annex A

<sup>22</sup> Annex B

**Disadvantages faced**

12. The disadvantages faced by litigants in person stem from their lack of knowledge of the law and court or tribunal procedure. For many their perception of the court or tribunal environment will be based on what they have seen on the television and in films. They tend to:
  - a. be unfamiliar with the language and specialist vocabulary of legal proceedings;
  - b. have little knowledge of the procedures involved and find it difficult to apply the rules even if they do read them;
  - c. lack objectivity and emotional distance from their case;
  - d. be unskilled in advocacy and unable to undertake cross-examination or test the evidence of an opponent;
  - e. be ill-informed about the presentation of evidence;
  - f. 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.
13. All these factors have an adverse effect on the preparation and presentation of their case. Equally, there are other litigants in person who are familiar with the requirements of the process.

**Numbers**

14. The numbers of litigants in person have risen significantly in recent years. Financial constraints and the consequences of the Legal Aid reforms will, inevitably, increase the numbers even further.
15. The small claims procedure in the county court is designed specifically to assist the public to pursue claims without recourse to legal representation and has created a huge increase in the number of litigants in person. The vast majority of defended civil actions in the county court are dealt with under this procedure. With effect from 1 April 2013 the small claims jurisdiction was increased (subject to certain exceptions in personal injury cases) from claims of up to £5,000, to claims of up to £10,000. Public funding has never been available for small claims.
16. One of the consequences of the Legal Aid, Sentencing and Offenders Act 2012 is that public funding in civil and family cases is now available in only exceptional circumstances.
17. Litigants in person also appear with increasing frequency in the Court of Appeal in criminal, civil and family cases. Some have represented themselves at first instance. Others, having had lawyers appear for them in the court below, take their own cases on appeal, often through a withdrawal of public funding after the first instance hearing.
18. The great majority of people appearing in tribunals are unrepresented.

**Ways to help**

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

***Particular areas of difficulty***

21. Litigants in person may face a daunting range of problems of both knowledge and understanding.

**Language**

22. English or Welsh may not be the first language of the litigant in person in the courts and tribunals of England and Wales and they may have particular difficulties with written English or Welsh. Any papers received from the court or tribunal from the other side may need to be translated. The court or tribunal may need to adjourn in order to ensure that a mutually acceptable interpreter can attend the proceedings to explain to the litigant in person in their own language what is taking place, and to assist in the translation of evidence and submissions.
23. It is worth noting that there are free tools available on the internet that provide instant translations, free of charge, in most languages – see, for example, [www.google.com/language\\_tools](http://www.google.com/language_tools), though these will not adequately take the place of an interpreter/intermediary where one is needed.

**Intellectual range**

24. Litigants in person come from a variety of social and educational backgrounds. Some may have difficulty with reading, writing and spelling. Judges should:
  - a. be sensitive to literacy problems and be prepared where possible to offer short adjournments to allow a litigant more time to read or to ask anyone accompanying the litigant to help them to read and understand documents;
  - b. exercise and be seen to exercise considerable patience when litigants in person demonstrate their scant knowledge of law and procedure;
  - c. not interrupt, engage in dialogue, indicate a preliminary view or cut short an argument in the same way that they might with a qualified lawyer.
25. Litigants in person often believe that because they are aggrieved in some way they automatically have a good case. When explaining that there is no case, bear in mind

that this will come as a great disappointment to a litigant who will have waited for their day in court for some time.

### **Information**

26. Some litigants in person are unaware of the explanatory leaflets available at the court or of the lists of advice agencies. Citizens Advice may be able to offer assistance with case preparation.<sup>23</sup>
27. Many litigants in person believe that court or tribunal staff are there to give legal advice. Under the Courts Charter court staff can only give information on how a case may be pursued; they cannot give legal advice under any circumstances. This may have to be explained to a litigant in person.

### ***Before the court or tribunal appearance***

#### **Statements of case and witness statements**

28. Litigants in person may make basic errors in the preparation of civil cases in courts or tribunals by:
  - a. failing to choose the best cause of action or defence;
  - b. overlooking limitation periods;
  - c. not appreciating that they are witnesses in their own cases;
  - d. failing to file or serve their own witness statements in advance of trial (and not understanding that in consequence they may not be able to give evidence).
29. The potentially considerable impact on litigants in person of the reforms to the Civil Procedure Rules (effective from 1 April 2013) has been acknowledged in the report of the Judicial Working Group in the following terms:
  - a. '3.34 One of the twin philosophies underpinning the reforms to the Civil Procedure Rules (CPR) is the need to enforce compliance with rules, practice directions and orders. The overriding objective in CPR 1.1 and the rule governing relief from sanctions in CPR 3.9 have been amended to embed this objective.'
  - b. '3.35 Judges are being encouraged to be rigorous and robust in their application of the rules, emulating the experience of Singapore; and such an approach needs to be uniformly applied to all parties, whether represented or not.<sup>24</sup> Courts will expect compliance and will be slow to grant relief in the event of a default.'
  - c. '3.36 The challenge is, therefore, to ensure that litigants in person are made fully aware of what is required of them in order that they are able to meet those requirements; and are made equally aware of the likely consequences of non-compliance.'

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<sup>23</sup> The Citizens Advice Bureau estimates that as a result of the Legal Aid reforms local advice and community based services will lose over 77% of their public funding.

<sup>24</sup> As stressed by the Court of Appeal in *Tinkler v Elliott*, [2012] EWCA Civ 1289 at [32]

**Directions and court orders**

30. Litigants in person often do not understand pre-hearing directions (in particular those imposing time deadlines and ‘unless orders’) or the effect of court or tribunal orders so:
  - a. ensure that they leave a directions hearing appreciating exactly what is required of them;
  - b. involve them in the process of giving those directions (e.g. asking them how much time they need to take a particular step and why) so that they realise that the directions relate to the conduct of their own case;
  - c. explain fully the precise meaning of any particular direction or court order.
31. Sometimes litigants in person believe that if the other side has failed to comply with such directions then that in itself is evidence in support of their own case, or 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, therefore, concerning a failure to comply with a direction should be carefully explained.

**Documentary evidence**

32. A common problem is lack of understanding about the use and application of documents and bundles. Experience shows that litigants in person:
  - a. tend not to make sufficient use of documentary or photographic evidence in their cases;
  - b. fail to appreciate the need for maps and plans of any location relevant to the case.
33. Case management hearings represent an opportunity to give guidance on these matters.

**Disclosure of documents**

34. The duty to disclose documents is frequently neglected by litigants in person
  - a. Some will have little or no appreciation that they should adopt a ‘cards on the table’ approach. Consequently there can be delay, either because of the need to adjourn or because the judge or the other side requires time at the hearing to read recently disclosed documents.
  - b. When a pre-trial or case management hearing takes place, a short clear explanation of the duty of disclosure and the test as to whether or not a document needs to be disclosed helps both parties and the court in terms of time saved.

**Preparing bundles**

35. Many litigants in person do not have access to office facilities and have difficulties in photocopying documents, preparing bundles and typing witness statements. They have little concept of the need for documents to be in chronological order and paginated. Clear explanations as to what is required at case management hearings should help with this. However, putting the case back is often the sensible course to take, in the event of litigants coming to court with their bundles in other than proper order.

### Producing documents

36. All too often litigants in person do not bring relevant documents with them to the hearing. The court or tribunal is faced with the comment: 'I can produce it – it is at home', but it is then too late and an adjournment is likely to be expensive and will usually be refused.
37. The party should have been warned in advance not only to disclose relevant documents to the other side but to bring the originals to the hearing.

### **Sources of law**

38. Most litigants in person do not have access to legal textbooks or libraries where such textbooks are available and may not be able to down-load information from a legal website. In some circumstances it will be sensible to let an individual, accompanied by a member of the court or tribunal staff, have access to the court or tribunal library (where it exists) or to a particular book.
39. Sometimes litigants in person do not understand the role of case law and are confused by the fact that the judge or tribunal appears to be referring to someone else's case.
  - a. A brief explanation of the doctrine of precedent will enable a litigant in person to appreciate what is going on and why.
  - b. A represented party's lawyer should be told to produce any authorities to be relied on at the latest at the outset of a hearing and preferably, if there has been a case management hearing at which appropriate directions can be given, in advance of the hearing.
  - c. A litigant in person must be given proper opportunity to read such authorities and make submissions in relation to them.

### **Live evidence**

40. Judges are often told: 'All you have to do is to ring Mr X and he will confirm what I am saying.' When it is explained that this is not possible, litigants in person may become aggrieved and fail to understand that it is for them to prove their case.
  - a. They should be informed at an early stage that they must prove what they say by witness evidence so may need to approach witnesses in advance and ask them to come to court.
  - b. The need for expert evidence should also be explained and the fact that no party can call an expert witness unless permission has been given by the court, generally in advance.
41. When there is an application to adjourn, bear in mind that litigants in person may genuinely not have realised just how important the attendance of such witnesses is. If the application is refused a clear explanation should be given.

### **Adjournments**

42. Litigants in person may not appreciate the need to obtain an adjournment if a hearing date presents them with difficulties.

- a. It is a common misconception that it is sufficient to write to the court or tribunal without consulting the other side, merely asking for the case to be put off to another date, or that no more than a day's notice of such a request is required
- b. Conversely, litigants in person may find it difficult to understand why cases need to be adjourned if they over-run because of the way in which they or others have presented their cases, or why their cases have not started at the time at which they were listed.

### **Guilty pleas**

43. At the plea stage, where an unrepresented defendant pleads guilty, take great care to ensure that the defendant understands the elements of the offence with which they are charged, especially if there is, on the face of it, potential evidence suggesting that the defendant may have a defence to the charge.

### ***The hearing***

44. The judge is a facilitator of justice and may need to assist the litigant in person in ways that are not appropriate for a party who has employed skilled legal advisers and an experienced advocate. This may include:
  - a. attempting to elicit the extent of the understanding of that party at the outset and giving explanations in everyday language;
  - b. making clear in advance the difference between justice and a just trial on the evidence (i.e. that the case will be decided on the basis of the evidence presented and the truthfulness and accuracy of the witnesses called).

### **Explanations by the judge**

45. Basic conventions and rules need to be stated at the start of a hearing.
  - a. The judge's name and the correct mode of address should be clarified.
  - b. Individuals present need to be introduced and their roles explained.
  - c. Mobile phones must be switched off, or at least in silent mode.
  - d. A litigant in person who does not understand something or has a problem with any aspect of the case should be told to inform the judge immediately so that the problem can be addressed.
  - e. The purpose of the hearing and the particular matter or issue on which a decision is to be made must be clearly stated.
  - f. A party may take notes but the law forbids the making of personal tape-recordings (without the express consent of the judge)..
  - g. If the litigant in person needs a short break for personal reasons, they only have to ask.
  - h. The golden rule is that only one person may speak at a time and each side will have a full opportunity to present its case.

### **Particular difficulties**

46. Difficulties often arise for litigants in person in getting to the court, being nervous and incoherent, coping with the jargon used and forms of address. All these issues are addressed in the section on children and vulnerable adults and those on disability.

### Purpose of hearing

47. The purpose of a particular hearing may not be understood. For example, the hearing of an application to set aside a judgment may be thought to be one in which the full merits of the case will be argued. The procedure following a successful application should be clearly explained, such as the need to serve the proceedings on the defendant, for a full defence to be filed and directions which may be given thereafter so that the parties know what is going to happen next.

### The judge's role

48. It can be hard to strike a balance in assisting a litigant in person in an adversarial system. A litigant in person may easily get the impression that the judge does not pay sufficient attention to them or their case, especially if the other side is represented and the judge asks the advocate on the other side to summarise the issues between the parties.
- a. Explain the judge's role during the hearing.
  - b. If you are doing something which might be perceived to be unfair or controversial in the mind of the litigant in person, explain precisely what you are doing and why.
  - c. Adopt to the extent necessary an inquisitorial role to enable the litigant in person fully to present their case (but not in such a way as to appear to give the litigant in person an undue advantage).

### The real issues

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

### Compromise

51. Litigants in person may not know how to compromise or even that they are allowed to speak to the other side with a view to trying to reach a compromise.
- a. Tell them, particularly in civil proceedings, that the role of the court is dispute resolution – explanations as to forms of alternative dispute resolution (ADR) may be appropriate.

- b. Ask them whether they have tried to resolve their differences by negotiation and, if possible, spell out the best and worst possible outcomes at the outset. This can lead to movement away from the idea that to negotiate is a sign of weakness.
- c. Remind them to tell the court in advance if their case has been settled.

### **Advocacy**

52. Often litigants in person phrase questions wrongly and some find it hard not to make a statement when they should be cross-examining. Explain the difference between evidence and submissions, and help them put across a point in question form.
53. Litigants in person frequently have difficulty in understanding that merely because there is a different version of events to 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 true as an accusation of lying. Be ready to explain that this is not automatically so.
54. Where one party is represented, invite this advocate to make final submissions first, so that a litigant in person can see how it should be done.

### **Criminal cases**

55. Under Article 6(3) of the European Convention of Human Rights (Sch 1, Human Rights Act 1998), everyone charged with a criminal offence has the right to defend him or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance, to be given it free where the interests of justice so require.
56. Those who dispense with legal assistance do so usually because they decline to accept the advice which they have been given, whether as to plea or the conduct of the trial. This, a defendant is entitled to do. However, guidance as to the value of representation may persuade such defendants that they are better advised to retain their representatives. If a defendant decides, notwithstanding advice and guidance, to represent his or herself, then the judge must explain the process and ensure proper control over the proceedings is maintained.

### Cross-examination

57. 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:
  - a. Always ask the defendant whether they wish to call any witnesses.
  - b. Be ready to restrain unnecessary, intimidating or humiliating cross-examination.
  - c. Be prepared to discuss the course of proceedings with the defendant in the absence of the jury before they embark on any cross-examination.
  - d. Note the statutory prohibitions on cross-examination by an unrepresented defendant.

## Conduct of the defence

58. Paragraph IV.44.5 of the Consolidated Criminal Practice Direction 2011 puts a duty on a judge to address an unrepresented defendant at the conclusion of the evidence for the prosecution and in the presence of the jury as follows:

‘You have heard the evidence against you. Now is the time for you to make your defence. You may give evidence on oath, and be cross-examined like any other witness. If you do not give evidence or, having been sworn, without good cause refuse to answer any question the jury may draw such inferences as appear proper. That means they may hold it against you. You may also call any witness or witnesses whom you have arranged to attend court. Afterwards you may also, if you wish, address the jury by arguing your case from the dock. But you cannot at that stage give evidence. Do you now intend to give evidence?’

### Summing up

59. In the course of summing up a case to a jury in which the defendant is unrepresented, tell the jury that it was always open to defendants to represent themselves and that the jury should bear in mind the difficulty for defendants in properly presenting their case. In some cases, such comments may be more appropriate at the outset.

### Adjournments

60. Sometimes a defendant in a criminal case becomes an unrepresented party during the case either by reason of the defendant’s representatives withdrawing or because they are dismissed by the defendant.
- a. Bear in mind that you may exercise your discretion in deciding whether or not to grant an adjournment to enable fresh legal representatives to be instructed.
  - b. That decision should be based on what is in the interests of justice having regard to the interests of the witnesses, the public and the defendant, the stage reached in the trial and the likely ability of the defendant to conduct the defence case properly.
  - c. Bear in mind also the duty to warn a defendant against any course that might not be in that defendant’s best interests, but if the defendant decides to go on alone, allow them to do so.

## ***Assistance, representation and ‘McKenzie friends’***

61. The term ‘McKenzie friend’<sup>25</sup> refers to an individual (whether lawyer or not) who assists in presenting the case in a courtroom by taking notes, quietly making suggestions or

<sup>25</sup> The term ‘McKenzie Friend’ derives from *McKenzie v McKenzie* [1971] P 33, a decision by the Court of Appeal. Levine McKenzie, a petitioner in divorce proceedings, lodged an appeal on the basis that the trial judge had denied him the opportunity to receive limited assistance from an Australian barrister, Ian Hanger, who was not qualified to practice in the UK. The judge ruled that Mr Hanger must sit in the public gallery during the hearing, and that he could only advise Mr McKenzie during 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.

<sup>25</sup> Paragraph 1(2) of schedule 3 to the Legal Services Act 2007.

giving advice. The role differs from that of advocate in that the McKenzie friend does not address the court or examine any witnesses and is generally permitted at trials or full hearings although the 'friend' may not be permitted to perform that role if unsuitable (e.g. someone who is pursuing their own or an unsuitable agenda). It may be less appropriate to allow such assistance in private (chambers) hearings because the judge generally then provides more assistance to a litigant in person.

62. A McKenzie friend may not act as the agent of the litigant in relation to the proceedings nor manage the case outside court (e.g. by signing court documents). A party to civil or family proceedings may wish to be assisted by a 'friend' at a hearing or even represented by a person without rights of audience. In several tribunals, lay and unqualified representatives may represent people in, for example, Employment Tribunals.
63. In a climate where legal aid is virtually unobtainable and lawyers disproportionately expensive, the McKenzie friend and lay representatives make a significant contribution to access to justice. But reported cases tend to concentrate upon reasons why they should not be allowed rather than circumstances where they may be of assistance to a party and the court. The judge has to identify those situations where such support is beneficial and distinguish circumstances where it should not be allowed.
64. 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.<sup>26</sup> This is set out in full below.
  - 1) This Guidance applies to civil and family proceedings in the Court of Appeal (Civil Division), the High Court of Justice, the County Courts and the Family Proceedings Court in the Magistrates' Courts.<sup>27</sup> It is issued as guidance (**not** as a Practice Direction) by the Master of the Rolls, as Head of Civil Justice, and the President of the Family Division, as Head of Family Justice. It is intended to remind courts and litigants of the principles set out in the authorities and supersedes the guidance contained in *Practice Note (Family Courts: McKenzie Friends) (No 2) [2008] 1 WLR 2757*, which is now withdrawn.<sup>28</sup> It is issued in light of the increase in litigants-in-person (litigants) in all levels of the civil and family courts.

<sup>26</sup> [2010] 1 WLR 1881

<sup>27</sup> References to the judge or court should be read where proceedings are taking place under the Family Proceedings Courts (Matrimonial Proceedings etc) Rules 1991, as a reference to a justices' clerk or assistant justices' clerk who is specifically authorised by a justices' clerk to exercise the functions of the court at the relevant hearing. Where they are taking place under the Family Proceedings Courts (Childrens Act 1989) Rules 1991 they should be read consistently with the provisions of those Rules, specifically rule 16A(5A).

<sup>28</sup> *R v Leicester City Justices, ex p Barrow* [1991] 260; *Chauhan v Chauhan* [1997] 2FCR 206, CA; *R v Bow County Court, ex p Pelling* [1999] 1 WLR 1807; *Attorney-General v Purvis* [2003] EWHC 3190 (Admin); *Clarkson v Gilbert* [2000] CP Rep 58; *Uhbi (t/a United Building & Plumbing Contractors) v Kajla* [2002] EWCA Civ 628; *Re O (Children) (Hearing in Private: Assistance)* [2005] EWCA Civ 759, [2005] 3 WLR 1191; *Westland Helicopters Ltd v Sheikh Salah Al-Hejailan (No 2)* [2004] EWHC 1688 (Comm), [2004] 2 Lloyd's Rep 535; *Agassi v Robinson (Inspector of Taxes) (No 2)* [2005] EWCA Civ 1507, [2006] 1 WLR 2126; *Re N (A Child) (McKenzie Friend: Rights of Audience)* Practice Note [2008] EWHC 2042 (Fam), [2008] 1 WLR 2743.

**The Right to Reasonable Assistance**

- 2) Litigants have the right to have reasonable assistance from a layperson, sometimes called a McKenzie Friend (MF). Litigants assisted by MFs remain litigants-in-person. MFs have no independent right to provide assistance. They have no right to act as advocates or to carry out the conduct of litigation.

**What McKenzie Friends may do**

- 3) MFs may: i) provide moral support for litigants; ii) take notes; iii) help with case papers; iv) quietly give advice on any aspect of the conduct of the case.

**What McKenzie Friends may not do**

- 4) MFs may not: i) act as the litigants' agent in relation to the proceedings; ii) manage litigants' cases outside court, for example by signing court documents; or iii) address the court, make oral submissions or examine witnesses.

**Exercising the Right to Reasonable Assistance**

- 5) While litigants ordinarily have a right to receive reasonable assistance from MFs the court retains the power to refuse to permit such assistance. The court may do so where it is satisfied that, in that case, the interests of justice and fairness do not require the litigant to receive such assistance.
- 6) A litigant who wishes to exercise this right should inform the judge as soon as possible indicating who the MF will be. The proposed MF should produce a short curriculum vitae or other statement setting out relevant experience, confirming that he or she has no interest in the case and understands the MF's role and the duty of confidentiality.
- 7) If the court considers that there might be grounds for circumscribing the right to receive such assistance, or a party objects to the presence of, or assistance given by a MF, it is not for the litigant to justify the exercise of the right. It is for the court or the objecting party to provide sufficient reasons why the litigant should not receive such assistance.
- 8) When considering whether to circumscribe the right to assistance or refuse a MF permission to attend the right to a fair trial is engaged. The matter should be considered carefully. The litigant should be given a reasonable opportunity to argue the point. The proposed MF should not be excluded from that hearing and should normally be allowed to help the litigant.
- 9) Where proceedings are in *closed court*, i.e. the hearing is in chambers, is in private, or the proceedings relate to a child, the litigant is required to justify the MF's presence in court. The presumption in favour of permitting a MF to attend such hearings, and thereby enable litigants to exercise the right to assistance, is a strong one.
- 10) The court may refuse to allow a litigant to exercise the right to receive assistance at the start of a hearing. The court can also circumscribe the right during the course of a hearing. It may be refused at the start of a hearing or later circumscribed where the court forms the view that a MF may give, has given, or is giving, assistance which impedes the efficient administration of justice. However,

the court should also consider whether a firm and unequivocal warning to the litigant and/or MF might suffice in the first instance.

- 11) A decision by the court not to curtail assistance from a MF should be regarded as final, save on the ground of subsequent misconduct by the MF or on the ground that the MF's continuing presence will impede the efficient administration of justice. In such event the court should give a short judgment setting out the reasons why it has curtailed the right to assistance. Litigants may appeal such decisions. MFs have no standing to do so.
- 12) The following factors should not be taken to justify the court refusing to permit a litigant receiving such assistance:
  - (i) The case or application is simple or straightforward, or is, for instance, a directions or case management hearing.
  - (ii) The litigant appears capable of conducting the case without assistance.
  - (iii) The litigant is unrepresented through choice.
  - (iv) The other party is not represented.
  - (v) The proposed MF belongs to an organisation that promotes a particular cause.
  - (vi) The proceedings are confidential and the court papers contain sensitive information relating to a family's affairs.
- 13) A litigant may be denied the assistance of a MF because its provision might undermine or has undermined the efficient administration of justice. Examples of circumstances where this might arise are: i) the assistance is being provided for an improper purpose; ii) the assistance is unreasonable in nature or degree; iii) the MF is subject to a civil proceedings order or a civil restraint order; iv) the MF is using the litigant as a puppet; v) the MF is directly or indirectly conducting the litigation; vi) the court is not satisfied that the MF fully understands the duty of confidentiality.
- 14) Where a litigant is receiving assistance from a MF in care proceedings, the court should consider the MF's attendance at any advocates' meetings directed by the court, and, with regard to cases commenced after 1.4.08, consider directions in accordance with paragraph 13.2 of the Practice Direction Guide to Case Management in Public Law Proceedings.<sup>29</sup>
- 15) Litigants are permitted to communicate any information, including filed evidence, relating to the proceedings to MFs for the purpose of obtaining advice or assistance in relation to the proceedings.
- 16) Legal representatives should ensure that documents are served on litigants in good time to enable them to seek assistance regarding their content from MFs in advance of any hearing or advocates' meeting.

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<sup>29</sup> The *Practice Direction Guide to Case Management in Public Law Proceedings* dated April 2008 was replaced by *Practice Direction 12A – Public Law Proceedings Guide to Case Management : April 2010* which supplements Part 12 of the Family Procedure Rules 2010. On 6 June 2013 the President of the Family Division also issued a Pilot Practice Direction 12A (Public Law Outline).

- 17) The High Court can, under its inherent jurisdiction, impose a civil restraint order on MFs who repeatedly act in ways that undermine the efficient administration of justice.

### Rights of audience and rights to conduct litigation

- 18) MFs do **not** have a right of audience or a right to conduct litigation. It is a criminal offence to exercise rights of audience or to conduct litigation unless properly qualified and authorised to do so by an appropriate regulatory body or, in the case of an otherwise unqualified or unauthorised individual (i.e. a lay individual including a MF), the court grants such rights on a case-by-case basis.<sup>30</sup>
- 19) Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a MF. This is because a person exercising such rights must ordinarily be properly trained, be under professional discipline (including an obligation to insure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection of all parties to litigation and are essential to the proper administration of justice.
- 20) Any application for a right of audience or a right to conduct litigation to be granted to any lay person should therefore be considered very carefully. The court should only be prepared to grant such rights where there is good reason to do so taking into account all the circumstances of the case, which are likely to vary greatly. Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience.
- 21) Examples of the type of special circumstances which have been held to justify the grant of a right of audience to a lay person, including a MF, are: i) that person is a close relative of the litigant; ii) health problems preclude the litigant from addressing the court, or conducting litigation, and the litigant cannot afford to pay for a qualified legal representative; iii) the litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings.
- 22) It is for the litigant to persuade the court that the circumstances of the case are such that it is in the interests of justice for the court to grant a lay person a right of audience or a right to conduct litigation.
- 23) The grant of a right of audience or a right to conduct litigation to lay persons who hold themselves out as professional advocates or professional MFs or who seek to exercise such rights on a regular basis, whether for reward or not, will however **only** be granted in exceptional circumstances. To do otherwise would tend to subvert the will of Parliament.
- 24) If a litigant wants a lay person to be granted a right of audience, an application must be made at the start of the hearing. If a right to conduct litigation is sought such an application must be made at the earliest possible time and must be made, in any event, before the lay person does anything which amounts to the conduct of litigation. It is for litigants to persuade the court, on a case-by-case basis, that the grant of such rights is justified.

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<sup>30</sup> Legal Services Act 2007, ss 12–19 and Sch 3.

- 25) Rights of audience and the right to conduct litigation are separate rights. The grant of one right to a lay person does not mean that a grant of the other right has been made. If both rights are sought their grant must be applied for individually and justified separately.
- 26) Having granted either a right of audience or a right to conduct litigation, the court has the power to remove either right. The grant of such rights in one set of proceedings cannot be relied on as a precedent supporting their grant in future proceedings.

### **Remuneration**

- 27) Litigants can enter into lawful agreements to pay fees to MFs for the provision of reasonable assistance in court or out of court by, for instance, carrying out clerical or mechanical activities, such as photocopying documents, preparing bundles, delivering documents to opposing parties or the court, or the provision of legal advice in connection with court proceedings. Such fees cannot be lawfully recovered from the opposing party.
- 28) Fees said to be incurred by MFs for carrying out the conduct of litigation, where the court has not granted such a right, cannot lawfully be recovered from either the litigant for whom they carry out such work or the opposing party.
- 29) Fees said to be incurred by MFs for carrying out the conduct of litigation after the court has granted such a right are in principle recoverable from the litigant for whom the work is carried out. Such fees cannot be lawfully recovered from the opposing party.
- 30) Fees said to be incurred by MFs for exercising a right of audience following the grant of such a right by the court are in principle recoverable from the litigant on whose behalf the right is exercised. Such fees are also recoverable, in principle, from the opposing party as a recoverable disbursement: CPR 48.6(2) and 48(6)(3)(ii).

### **Personal Support Unit & Citizen's Advice Bureau**

- 31) Litigants should also be aware of the services provided by local Personal Support Units and Citizens' Advice Bureaux. The PSU at the Royal Courts of Justice in London can be contacted on 020 7947 7701, by email at <mailto://cbps@bello.co.uk> or at the enquiry desk. The CAB at the Royal Courts of Justice in London can be contacted on 020 7947 6564 or at the enquiry desk.

### **Rights of audience**

65. Rights of audience are governed by Part 3 of the Legal Services Act 2007 which came into force on 1 January 2010. The current position is helpfully summarised in the report of the Judicial Working Group on Litigants in Person in the following terms:

6.5 Where the litigant in person wishes a lay person to conduct the litigation, or act as their advocate, different issues arise. The rights to conduct litigation and to act as an advocate are governed by the Legal Services Act 2007. Under that Act, both rights are restricted to professional lawyers whose professional body authorises them to act as advocates. Other than litigants in person themselves (who are the

- subject of a specific exemption), under the Parliamentary scheme lay persons can neither conduct litigation nor act as advocates for litigants in person; nor has a litigant in person any right to receive such assistance or to authorise such a lay person to act in such a way under a power of attorney.<sup>31</sup>
- 6.6 However, prior to statutory intervention in this field, the court had inherent power to allow any individual to act as an advocate before it in relation to a particular case. That power is maintained in the 2007 Act, by exempting the rigorous requirements of the statutory scheme for “a person who has a right of audience granted by that court in relation to those proceedings”.<sup>32</sup>
- 6.7 Nevertheless, as it is clear from the 2007 Act and its predecessors that Parliament wishes, ordinarily, to restrict the right to act as an advocate to professionals, the courts have adopted a cautious approach to allowing lay assistants to be advocates in any case, although they have in practice been more flexible since the advent of the CPR.
- 6.8 Generally, the practice has been that where it will be beneficial to the fair and just determination of a case to have a lay person conduct a hearing on behalf of a litigant in person, then the right is granted in the interests of justice. However, there has in recent years been a substantial increase in “professional” lay advocates who, without the requisite training or regulation of a professional lawyer, seek to act as advocates for litigants in person in court on the payment of a fee. Some of these representatives charge fees which are similar if not more than those of a professional lawyer. Some are unable effectively to represent the litigant. Some are positively disruptive to the proceedings.
- 6.9 The courts have a similar power to allow lay persons to conduct litigation for litigants in person. Although, undoubtedly, litigants in person, without doubt, often have assistance in preparing their case, the power to allow a lay person to conduct litigation is very infrequently exercised, for obvious good reason; such individuals are not legally trained, they owe no obligations derived from professional regulation, and they do not owe any obligation to the court.<sup>33</sup> These requirements are generally essential for the protection of other parties and to the proper administration of justice.
- 6.10 The representation of those acting in person has developed differently in the tribunal system, where the statutory constraints do not apply. Generally, lay representatives are far more frequent, often speaking for and even acting for an individual. These lay representatives are often from a charity or other voluntary organisation, which provide a vital resource to individuals in the tribunal system who would otherwise be without any support in often technical areas.
66. The following helpful guidance as to the practical approach to applications by litigants in person to be allowed a lay advocate, including information a court may require to enable it to make a properly informed decision on whether to grant a lay person the

<sup>31</sup> *Gregory & Another v Turner & Another* [2003] 1 WLR 1149

<sup>32</sup> Paragraph 1(2) of schedule 3 to the Legal Services Act 2007.

<sup>33</sup> This has been underlined by the Court of Appeal’s recent decision in *Re H (Children)* [2012].EWCA Civ 1797

right to speak, is set out in the judgment of Mr Justice Hickinbottom in *Graham v Eltham Conservative & Unionist Club and Ors*<sup>34</sup> :

31. In exercising the discretion to grant a lay person the right of audience, the authorities stress the need for the courts to respect the will of Parliament, which is that, ordinarily, leaving aside litigants in person who have a right to represent themselves, advocates will be restricted to those who are subject to the statutory scheme of regulation (*Clarkson v Gilbert* [2000] 2 FLR 839, *D v S* especially at page 728F per Lord Woolf MR, and *Paragon Finance plc v Noueri* (Practice Note) [2001] EWCA Civ 1402; [2001] 1 WLR 2357 at [53] and following per Brooke LJ). The intention of Parliament is firm and clear. Section 1(1) of the 2007 Act sets out a series of ‘statutory objectives’ which includes ensuring that those conducting advocacy adhere to various ‘professional principles’, maintained by the rigours of the regulatory scheme for which the Act provides, and without which it is considered lay individuals should not ordinarily be allowed to be advocates for others, appoint [*sic*] also emphasised by the Practice Guidance (at paragraph 19). This strength of this interest and will is enforced by (i) legislative provisions allowing lay representation in types of claim in which such representation is considered appropriate, e.g. in small claims in the county court (section 11 of the 1990 Act which is unaffected by the 2007 Act, and the Lay Representatives (Rights of Audience) Order 1999 (SI 1999 No 1225), and (ii) the fact that to do any act in purported exercise of a right of audience when none has been conferred is both a contempt of court and a criminal offence (see sections 14-17 of the 2007 Act).
32. Consequently, it has been said by the higher courts that “the discretion to grant rights of audience to individuals who did not meet the stringent requirements of the Act should only be exercised in exceptional circumstances”, and, in particular, “the courts should pause long before granting rights to individuals who [make] a practice of seeking to represent otherwise unrepresented litigants” (*Paragon Finance* at [54] per Brooke LJ, paraphrasing comments of Lord Woolf in *D v S*). In *D v S*, Lord Woolf indicated (at page 728F) that it would be “monstrously inappropriate” and totally out of accord with the spirit of the legislation habitually to allow lay advocates. The Practice Guidance, in more measured terms, states that: “Courts should be slow to grant an application from a litigant for a right of audience... to any lay person.... Any application... should... be considered very carefully.... Such grants should not be extended to lay persons automatically or without due consideration. They should not be granted for mere convenience.”
33. Of course, in line with the overriding objective of dealing with cases justly (CPR Rule 1.1), the court will be more open to exercising its discretion and granting a right of audience in a particular case when it is persuaded it will be of assistance to the case as a whole if a litigant in person were to have someone who is not an authorised advocate to speak for him or her. That will especially be so if the litigant in person is vulnerable, unacquainted with legal proceedings or suffering from particular anxiety about the case he or she is conducting. As a result, courts have in practice become more flexible about allowing litigants in person to have assistance at a hearing. In particular, they do not infrequently allow a relative or friend to speak on a party’s

<sup>34</sup> [2013] EWHC 979 (QB)

behalf. Often, that relative or friend is well-attuned to the party's case and wishes, and puts the matter more articulately and coherently than the party could himself or herself. As a result, the hearing can become more focused, more efficient and shorter. Such flexibility has become more important as the result of legal aid reforms (including those in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, effective from 1 April 2013), which have resulted in a very substantial reduction in those entitled to public assistance and hence a substantial increase in litigants in person who now appear before the courts.

34. However, even though the legal world has in many ways moved on since the time of the authorities to which I have referred, in my view, as those authorities and the Practice Guidance stress, due deference to the will of Parliament, and general caution, are still required.
35. Therefore, as required by the Practice Guidance (paragraph 24), without undue formality, when a litigant in person wishes to be heard by way of a lay advocate, he should make an appropriate application to the court at the first inter partes hearing. The application should be made by the litigant in person, and not by the person who he or she wishes to be the advocate: although, often, in practice that other person may in fact be heard on the application. The application should be inter partes, to enable any opponent who may have objections to raise them. Generally, once the right to appear as an advocate has been given to lay person, that right will extend to all hearings in that claim, unless specifically directed otherwise or the right is revoked. The court may always revoke the right, any decision to revoke being informed by the same principles that apply to the grant of the right. It may, for example, be appropriate to revoke the right if, contrary to hopes and expectations, the lay advocate proves unhelpful or even positively disruptive.
36. The authorities and Practice Guidance provide little assistance with regard to how the court's discretion should be exercised; and this is an area in respect of which the Head of Civil Justice may wish to consider giving further guidance in due course.
37. However, in the meantime, it seems to me that at any application, to put the court into a position to make an informed decision, the court will wish to be provided [*sic*] with information as to (i) the relationship, if any, between the litigant in person and the proposed advocate, including whether the relationship is a commercial one; (ii) the reasons why the litigant wishes the proposed advocate to speak on his behalf, including any particular difficulties the litigant in person might have in presenting his own case; (iii) the experience, if any, the proposed advocate has had in presenting cases to a court; and (iv) any court orders that might be relevant to the appropriateness of the proposed advocate (e.g. orders made against him or her acting in person or as an advocate in previous proceedings, including any orders restraining him or her from conducting litigation or from acting as an advocate). Given the importance of the role of advocate, there is a duty of frankness on both the litigant in person and the proposed advocate in relation to these issues. Such enquiries will usually take only a short time, but they are essential to ensure that proper respect is given to the principle that, ordinarily, advocates should be restricted to regulated advocates and litigants in person.

38. As with the exercise of any power, whether a lay person is given the right to be an advocate in a particular case or for a particular hearing will depend upon all of the circumstances. However, as I have indicated, given the overriding objective, the court will take particular account of the extent to which allowing the individual to speak will assist the fair and just disposal of the case. The Practice Guidance stresses (at paragraph 22) that the burden of showing that it is in the interests of justice for a lay person to be granted the right to be an advocate at a hearing lies upon the litigant who wishes him to do so. It will only be granted in ‘special circumstances’. Paragraph 21 of the Practice Guidance gives examples of the type of special circumstances which in the past have been held to justify the grant of a right of audience to a lay person, as follows: (i) that person is a close relative of the litigant; (ii) health problems which preclude the litigant from addressing the court or from conducting litigation, and the litigant cannot afford to pay for professional representation, and (iii) the litigant is relatively inarticulate and prompting by that person may unnecessarily prolong the proceedings. Those examples are helpful in indicating the sort of exceptional circumstances in which a grant will be made. The Guidance makes clear that those who represent litigants professionally or regularly will only be granted the right in “exceptional circumstances” (paragraph 23).

### Small Claims

67. Under section 11 of the Courts and Legal Services Act 1990 the Lord Chancellor authorised the Lay Representatives [Rights of Audience] Order 1999.<sup>35</sup> This is also set out in CPR 27 PD 3.2 (2). This Order survives the 2007 Act coming into force. It authorises lay representatives to appear in small claims. It provides that a lay representative may not exercise any right of audience (1) where the party fails to attend the hearing, (2) at any stage after judgment, or (3) on any appeal. The court has discretion to hear a lay representative even in any of these circumstances but granting a right to appear in an excluded case would require reasons. A lay representative exercising this right may be restricted if unruly, misleads the court or demonstrates unsuitability.

### Housing Authority Officers and Employees of Arms Length Management Organisations [ALMOs]

68. Sections 60 and 60A of the County Courts Act 1984 give a right of audience, where proceedings are brought by a local authority, to an authorised officer of that authority. This is restricted to housing claims in the County Court.

69. Employees of ALMOs do not fall under these sections. They now come within s.191 of the 2007 Act. Section 191 (3) defines the specific housing proceedings and appearance is only allowed before a District Judge. An employee must have written authorisation to appear. The employee has a right of audience and a right to conduct litigation.

<sup>35</sup> SI 1999/1225

## Companies

70. An employee may represent the company at a fast-track or multi-track interlocutory or final hearing, provided the employee has been authorised by the company to appear and the court gives permission : CPR 39.6
71. Guidance as to the exercise of this power is set out in CPR PD 39A 5.3. There would have to be good reason to refuse. A decision to allow or refuse should be recorded in writing.
72. This does not apply to small claims, any officer or employee may represent the company on a small claim: CPR 27 PD 3.2 (4).

## Official Receivers

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

## European Lawyers

74. Paragraph 1 of Schedule 3 to the Legal Services Act 2007 is expressed as being 'subject to paragraph 7'. Paragraph 7 states that a European lawyer [as defined by the European Communities [Services of Lawyers] Order 1978<sup>36</sup> is an exempt person 'for the purposes of carrying on an activity which is a reserved legal activity'.

## Official Solicitor

75. 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.
76. He usually becomes formally involved when appointed by the Court, and may act as his own solicitor, or instruct a private firm of solicitors to act for him.

## Representing adults who lack capacity

77. An order directing the Official Solicitor to act as a legal representative in a civil court for a protected party will either be made with his prior consent or only take effect if his consent is obtained.
78. Before the Official Solicitor will agree to act on behalf of a protected party in proceedings three requirements must be met:
  - a. Evidence that the adult lacks capacity (this does not of course apply in the case of a child).
  - b. There must be nobody else suitable and willing to act.  
The Official Solicitor is the litigation friend of last resort so he can only act where there is no one else suitable and willing to act. It is better for a person who knows

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<sup>36</sup> SI 1978/1910

the protected party, such as a relative or friend, to act as litigation friend.  
Therefore all possible candidates should be considered and approached if suitable.

- c. Cover for the Official Solicitor's costs.  
The Official Solicitor does not charge for acting as litigation friend, but does require funding for the costs of instructing solicitors to act in the litigation, or for his own charges where he also acts as solicitor. The Official Solicitor is not funded to subsidise private litigation and will only consent to act in a particular case if his costs are guaranteed from the outset. Where the Official Solicitor is asked to act for a defendant and there is no other method of funding his costs of obtaining legal representation, he will require an undertaking from the claimant to meet his costs.

### **Contacting the Official Solicitor**

Enquiries and requests for assistance are frequently made by the judiciary and members of the legal profession. The Official Solicitor can be contacted at:

81 Chancery Lane  
London WC2A 1DD

DX 0012 London/Chancery Lane WC2

Tel.: 020 7911 7127 Fax.: 020 7911 7105

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

## 5. Children and vulnerable adults

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### **Key points**

- Accommodating a vulnerable person's needs (as required by case law, the Equality Act 2010, the European Convention on Human Rights, the UN Convention on the Rights of the Child, the UN Convention on the Rights of Persons with Disabilities and the European Directive establishing minimum standards on the rights, support and protection of victims of crime) requires the court or tribunal to adopt a more flexible approach.
- Courts have safeguarding responsibilities in respect of children and vulnerable adults. The exercise of judicial discretion often has a safeguarding dimension.
- The Inspectorates have highlighted local practices in respect of vulnerable witnesses which fail to comply with existing national, evidence-based policies.
- All witnesses, regardless of age, are presumed competent.
- Children and defendants have been shown to experience much higher levels of communication difficulty in the justice system than was previously recognised. This is also likely to be the case for vulnerable adult witnesses and the elderly.
- Children and vulnerable adults under stress can function at a lower level, making it harder for them to remember accurately and think clearly.
- The judiciary should be alert to vulnerability, even if not previously flagged up. Indicators may arise, for example, from someone's demeanour and language; age; the circumstances of the alleged offence; a child being 'looked after' by the local authority; or because a witness comes from a group with moral or religious proscriptions on speaking about sexual activities.
- 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.
- Judges and magistrates should ask for relevant information, if not provided (in the case of vulnerable prosecution witnesses, by the police and Witness Care Units); information may also be provided by parents or guardians, social workers or other professional assessments.

### **1 Overarching principles**

34. 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 tribunal hearings with a vulnerable witness, party or litigant in person. *Practice Direction 12A – Public Law Proceedings Guide to Case Management*, provides that the court will 'identify any special measures such as the need for access for the disabled or provision for vulnerable witnesses' (para 15.3(7) 2010). The Supreme Court has ruled that the family court may hear evidence from children in certain circumstances: 'There are things that the court can do [to facilitate the child's evidence] but they are not things that it is used to doing at present' (*Re W* [2010] UKSC 12) and has considered adaptations to enable a vulnerable adult witness to give evidence (*In the matter of A (A Child)* [2012] UKSC 60).

## A flexible approach to facilitate best evidence

35. Courts and tribunals are expected to adapt normal trial procedure to facilitate the effective participation of witnesses, defendants and litigants:
- giving effect to section 20 of the Equality Act 2010 by making reasonable adjustments to remove barriers for people with disabilities
- taking 'every reasonable step to facilitate the participation of any person, including the defendant' in preparation for trial (Rule 3.8(4)(b), Criminal Procedure (Amendment) Rules 2012).
36. In the 2013 Toulmin Lecture, the 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" (*Half a Century of Change: The Evidence of Child Victims*, King's College London).
37. These principles have also 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' (Lord Chief Justice, para 29, *R v Cox* [2012] EWCA Crim 549; see also *R v B* [2010] EWCA Crim 4).  
 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' (Lord Justice Thorpe, para 21, *In the Matter of M (A Child)* [2012] EWCA Civ 1905). 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.
38. Decisions about how procedures should be adapted should be made as early as possible.

### Examples of a more flexible approach

- Helping vulnerable witnesses to begin cross-examination while they are fresh by not requiring them to watch their DVD interview at the same time as the jury. There is no legal requirement to do so. Watching at a different time has the advantage that breaks can be taken as needed. It is the police's responsibility to arrange this, with the permission of the court. An intermediary may need to be present but should not be the person designated to record anything said at the viewing (section 4.51 '*Achieving Best Evidence in Criminal Proceedings*' March 2011, Ministry of Justice <http://www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/achieving-best-evidence-criminal-proceedings.pdf>). If it is appropriate to swear the witness, do so just before cross-examination, asking if (s)he has watched the DVD and if its contents are 'true', in words tailored to the witness's understanding.

- 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 court room (para 29A.2, Criminal Practice Directions 2013).
  - Letting witnesses write and draw to clarify answers.
  - Permitting witnesses unable to give evidence (e.g. 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.
39. Flexible arrangements in respect of children include:
- moving the prosecution and defence advocates to the live link room for cross-examination of a five-year-old who struggled to communicate across the live link at a practice session. The Registered Intermediary recommended this solution and the judge ruled that the live link room was an extension of the courtroom
  - allowing children to briefly pause cross-examination to relieve their stress, without leaving the live link room, 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
  - allowing a fearful eight-year-old 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
  - scheduling children with learning disabilities to give evidence for short periods, with breaks, in the morning over several days.
40. Flexible arrangements in respect of vulnerable adult witnesses include:
- allocating a female judge and counsel to a trial with a witness who refused to speak to a man about the alleged offence
  - 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
  - letting a man with autism spectrum disorder give evidence wearing a lion’s tail, his ‘comfort object’ in daily life
  - 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

- the judge's appointment of an advocate with relevant experience for a young woman who refused to testify in a sexual assault case, to advise her about the consequences of not giving evidence. The witness was persuaded to proceed and was allowed to pause her testimony to speak to the advocate, on condition that she did not discuss her evidence.

41. Flexible arrangements in respect of vulnerable defendants include:

- 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)
- permitting an intermediary to work alongside a defendant in the dock to help him to understand proceedings
- 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 (*R v Cox* [2012] EWCA Crim 549)
- agreeing that a defendant with mental health issues be given brief pauses during cross-examination to manage his emotional state and remain calm enough to respond to questions
- allowing a defendant with autism to have quiet, calming objects in the dock to help him to pay attention.

### **Safeguarding children and vulnerable adults**

42. Safeguarding is defined as 'the action we take to promote the welfare of children and protect them from harm' and the key principles that should underpin them (*Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children* HM Government 2013). Some aspects of safeguarding policy have been extended to protect vulnerable adults (e.g. requiring those supervising them to have an enhanced criminal record check: section 115(4), Police Act 1997). The safeguarding of a vulnerable adult as a witness in family proceedings is discussed in *A (A Child)* [2012] UKSC 60.

43. Individuals may have devastating experiences at court as a result of an accumulation of procedural failures and the way they are questioned. In safeguarding and other thematic reports on children, victims and vulnerable witnesses, the Inspectorates highlight the risk of secondary abuse from the criminal court process. For example, a 2012 report stressed that victims and witnesses, particularly those who are young and vulnerable: 'continue to be adversely affected by an absence of real focus on their needs... the [CJS] system itself appears to be unable to maintain a consistent and acceptable level of care as cases pass through it' (HM CPS Inspectorate and HM Inspectorate of Constabulary, *Joint inspection report on the experience of young victims and witnesses in the CJS*).

44. The Inspectorates have recommended that courts' existing safeguarding policy and practice be brought together into 'overarching strategies'. A safeguarding policy for court staff (addressing, for example, listing strategy and the need for ushers working with vulnerable witnesses to have police checks) is in draft but has not yet been published.

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

45. Judges and magistrates have a role in safeguarding vulnerable people at court in ways which further the overriding objective and do not interfere with judicial independence.
46. The Government's safeguarding policy *Working together to safeguard children* (2013) 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.
47. Ways in which to discharge this responsibility include:
- being alert to safeguarding concerns when dealing with a child (or vulnerable adult) and addressing them through effective planning and proactive enquiries
  - ensuring that a named individual has responsibility for the vulnerable person's welfare at the hearing, with a line of communication to alert you to difficulties. 'Traditional hierarchies' tend to hinder communication in complex organised activities (Gawande, *The Checklist Manifesto* 2009)
  - having contingency plans (e.g. regarding the timing of the vulnerable witness's evidence) if things go wrong in ways affecting the witness's welfare.
48. Safeguarding concerns should not be over-ridden because of pressures arising elsewhere in the justice system process. For example, despite clear policy to the contrary, some witnesses are still advised not to seek pre-trial therapy because of fears that it could jeopardise the prosecution. Reaffirm the correct position when the question arises: whether the witness should seek pre-trial therapy is not a decision for the police, prosecutor or court, and the best interests of the witness are the paramount consideration (*Provision of therapy for child witnesses prior to a criminal trial* and *Provision of therapy for vulnerable or intimidated adult witnesses prior to a criminal trial*, CPS, Department of Health and Home Office 2001).
49. Safeguarding is most at risk when responsibilities are unclear and there is a breakdown of communication. For example, when:
- two teenage witnesses, known to be confined to wheelchairs, spent all day at court without any hoist being provided to enable them to use a toilet
  - a judge was notified of the propensity for self-harming of a witness produced from custody but security personnel were unaware. The witness self-harmed during a break while in the cells and was unable to complete his evidence
  - a child was left alone in the live link room over the lunch period for 75 minutes, without food or support.

## Competency

50. Competence is assumed if a witness of any age is capable of giving intelligible testimony (section 53, *Youth Justice and Criminal Evidence Act 1999*). This may require the assistance of an intermediary (see below). The test does not require the witness to understand every question or 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 (*R v B* [2010] EWCA Crim 4).
51. Even if competency 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. However, when there is material indicating that the witness satisfies the competency test (such as an 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’ (*R v F* [2013] EWCA Crim 424).
52. In that case, the problem of communicative competence was not that of the witness but of the questioners: the court found that ‘the problem arose over an issue of ability to communicate with H in a non-leading way, rather than an issue of H’s comprehension and thus her competence... what was intended to be a test of competency was seriously flawed’.

## 2 Active case management from first appearance

53. See also:
  - Criminal Practice Directions Section 3A, Case management (2013)
  - The Advocate’s Gateway ([www.theadvocatesgateway.org](http://www.theadvocatesgateway.org)) case management toolkit
  - Judicial College *Bench Checklist: Young Witness Cases* (2012)
  - Practice Direction 12A, *Public Law Proceedings Guide to Case Management*, incorporating the Public Law Outline (2010). This addresses parallel care and criminal proceedings (PD12A para 3.9). Disclosure of criminal material to family courts is addressed in CPS online policy.

## Timetabling

54. Trial management powers should be exercised to the full where a vulnerable witness or defendant is involved. For example, despite many policies to give young witness cases priority, studies show that these cases usually take longer than the national average to reach trial. This may also apply to other cases involving vulnerable people, who are often more adversely affected by delay, both in terms of their recall and their emotional well-being. Timetabling is therefore an issue that impacts upon best evidence and safeguarding. Further, the Inspectorates warn that police and Witness Care Unit needs assessments are often inadequate, with a detrimental effect in

criminal cases which progress to trial. Be alert to the possibility that needs have not been considered or identified and ask for information to be updated if necessary.

55. Schedule responses and make orders as necessary at the first appearance in magistrates' court or preliminary hearing or plea and case management hearing in the Crown Court:
- Prioritise vulnerable witness cases (section 4.83, *'Achieving Best Evidence in Criminal Proceedings'* March 2011, Ministry of Justice). Delay in a case involving a child complainant should be kept to an 'irreducible minimum' (*R v B* [2010] EWCA Crim 4).
  - Obtain availability dates not just for witnesses but for any intermediary or named supporter, and dates to avoid for exams or other important events.
  - Fix 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 was given before her school examinations started.
  - If necessary, fix the courtroom for a live link trial. In an intermediary case, plasma screens will give a better view of intermediary/ witness interaction.
  - Timetable any editing of the DVD interview, allowing time for the witness to see the edited version. Consider the need for a transcript. 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/ PII hearings are made and dealt with at an early stage.
  - Address special measures and any other necessary modifications to 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 magistrates' court and 14 days in the Crown Court, a late application should not be rejected solely because it is made out of time.

### Avoiding adjournments

56. 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 indicates that at least one-third of young witness trials are adjourned, many of them more than once. This can have a detrimental impact upon witness recall and emotional well-being as well as on the fairness of outcomes.
57. 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.

58. If postponement is unavoidable, a trial involving a vulnerable witness should be re-listed in the shortest possible time.

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

59. The capacity of a vulnerable witness to give evidence is likely to deteriorate if they are kept waiting. 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 testimony. Problems result from:

- the judge having to deal with other matters first. *The Consolidated Criminal Practice Direction* states firmly that 'on no account' should short hearings be listed that may delay the start or continuation of a trial (*Annex F, Listing, section 5.4(f), 2010*). 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. Other ways to avoid confrontation should be; e.g. a judge ordered the defendants to be seated in the dock for ten minutes at the start and end of each court day to ensure that young witnesses could enter and leave the building calmly
- discussions which do not, in the end, result in a guilty plea.

60. 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. It is good practice to schedule the start of a vulnerable witness trial in the afternoon (enabling the trial judge to deal with any outstanding issues), with the first vulnerable witness listed promptly at the start of the second day (with further directions for other vulnerable witnesses). Even if the court has to rise early, it is a small price to pay to maximise the quality of evidence of the vulnerable witness the next morning. If there is any risk that their evidence will not start on time, they should be advised to wait on standby. It is vital 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 (Rule 3(10)(d), Criminal Procedure Rules 2012). As a general rule, a young child will lose concentration after about 15 minutes, whether or not this becomes obvious
- schedule a ground rules hearing. If deferred until the day of the witness's testimony, ensure that the hearing does not add to the witness's waiting time

- 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. It is up to you whether to accompany the advocates but it can be a useful opportunity 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.

### **3 Effective use of special measures**

61. This section discusses ways to ensure that special measures and related directions achieve their objective of helping the witness to give evidence.

#### **Avoiding confrontation**

62. Standard 23, Witness Charter (2008) requires the court to have separate waiting areas and advises that vulnerable or intimidated witnesses may be allowed to wait on standby near the court. Nevertheless, standby arrangements are under-used and at many courts, it is quite common for prosecution witnesses to encounter defendants in or around the building. Enquire about the effectiveness of procedures to keep them separate at your court, including whether vulnerable witnesses are able to use an alternative entrance.

#### Remote live links

63. The Inspectorates recommend greater use of remote live links where there is a risk of confrontation (Ministry of Justice Live Links Protocol; section 4.6, 'Registered Intermediaries in Action' 2011; Parts C1, C2, Application for a Special Measures Direction). Many courts can now connect to other court buildings; some have 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.

#### Screens

64. 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, (s)he should be behind the screen before the defendant and members of the public are seated and leave at a different time during adjournments.

#### **Witness views about special measures**

65. Emphasis is now given to the witness's viewpoint because witnesses are likely to give better evidence when they choose how it is given. Thus, witnesses eligible for special measures and not wishing to be seen by the defendant may prefer screens. A young witness (or one over 18 to whom sections 21 or 22 Youth Justice and Criminal Evidence Act 1999 apply) may wish to opt out of the primary rule (recorded evidence-in-chief and live link) and secondary requirement (screens) (section 100 Coroners and Justice Act 2009).

### Perceptions about the impact of technology on case outcomes

66. 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 (see overview, Hoyano and Keenan, 'Child Abuse: Law and Policy Across Boundaries' 2010).
  - Ellison and Munro's study 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 ('Special measures in rape trials: Exploring the impact of screens, live links and video-recorded evidence on mock juror deliberation' 2012).
67. However, the size of jurors' TV screens may make a difference to outcomes. In an unpublished exercise, the (then) Resident Judge of Liverpool Crown Court monitored the outcomes of vulnerable witness trials: those in which large plasma screens were used had a higher rate of conviction than those where the jury watched outdated small TV screens. Ellison and Munro's study used a large, 50 inch plasma screen. They acknowledged that small screens in real courtrooms may 'adversely affect jurors' assessments' in ways not evidenced in their study.

### Witness entitlement to practise on the live link

68. Witnesses are entitled to practise speaking and listening on the live link (Standard 17, Witness Charter 2008) and should be shown screens in place. However, not all witnesses are offered a familiarisation visit; some cannot attend because of restricted hours for court visits; and some courts do not allow witnesses to practise on the live link. Every court should facilitate such practice sessions. This is essential to help identify whether use of the live link interferes significantly with the quality of witness communication.
69. 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 senior magistrate should ensure there is a uniform policy at each court, and should tend to support the taking of photographs for this purpose (subject to whatever restrictions are considered appropriate, having regard to court security requirements).

### Emotional support

70. 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 (section 102, Coroners and Justice Act 2009, amending section 24, Youth Justice and Criminal Evidence Act 1999; part C3, Application for a special measures direction)
  - this can be anyone who is not a party/ has no detailed knowledge of evidence; ideally, the person preparing the witness for court. Others may be appropriate.

71. However, some courts continue to prefer witnesses in the live link room to be accompanied only by the usher, rather than also by a named supporter. Ushers cannot offer emotional support to the witness and receive 'negligible' appropriate training (HM CPS Inspectorate and HM Inspectorate of Constabulary, 'Joint inspection report on the experience of young victims and witnesses in the criminal justice system' 2012).

### **Refreshing witness memory**

72. Witnesses who give recorded evidence in chief are also entitled to refresh their memory before trial but many who make a DVD statement are not given the opportunity. The first viewing is often distressing or distracting and should be scheduled before the day of testimony (the witness need not watch the DVD at the same time as the jury – see page 2 above). Decisions about how, when and where refreshing should take place should be made on a case-by-case basis. There is a risk that a viewing combined with the court familiarisation visit will result in 'information overload'. For more detailed guidance, see section 29C, Criminal Practice Directions 2013). The Inspectorates recommend that memory refreshing be the subject of a clear local inter-agency agreement.
73. Arrangements should be judicially led. Someone (usually a police officer, not an intermediary) should be designated to take a note and report to the judge if anything is said. In the case of a very young child, it may be appropriate to record the viewing. If the DVD is ruled inadmissible, identify an alternative method of refreshing.

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

74. See also:
- The Advocate's Gateway ([www.theadvocatesgateway.org](http://www.theadvocatesgateway.org)) 'Intermediaries' section (Registered Intermediaries for prosecution and defence witnesses, and non-registered intermediaries for defendants).
  - The toolkit 'Effective participation of young defendants' on the same website, which describes the appointment process for non-registered intermediaries; Annex A lists ways in which these have been used in the pre-trial period and at trial.

### The function

75. Intermediaries are one of the statutory special measures for prosecution and defence witnesses (section 29, Youth Justice and Criminal Evidence Act 1999). They are communication specialists whose primary responsibility is to enable complete, coherent and accurate communication (section 16). They are expected to prevent miscommunication from arising and 'actively to intervene when miscommunication may or is likely to have occurred or to be occurring' (*R v Cox* [2012] EWCA Crim 549).
76. Intermediaries can assist the judiciary to monitor the questioning of vulnerable witnesses and defendants but responsibility to control questioning remains with the judge or magistrates. Intermediaries are impartial, neutral officers of the court. They are not expert witnesses. Their assessment reports are valued as a guide to how questioning can best be adapted to the individual's needs. In addition, advocates may request intermediary advice ahead of trial about adapting their questions. Where the

assessment indicates that some restrictions on cross-examination may be necessary, some judges review specific questions in advance with the intermediary.

77. Registered Intermediaries for prosecution and defence witnesses are appointed through the Ministry of Justice Witness Intermediary Scheme involving regulation, police checks, accreditation training, support and standards for matching skills to witness needs (see 'Registered Intermediary Procedural Guidance Manual' Ministry of Justice, 2012) For the use of intermediaries for defendants, see below.

#### When appointment should be considered

78. The Inspectorates highlight poor levels of awareness about the benefits of intermediary use. For example, intermediaries appointed post-interview often find that a written statement has been taken from witnesses who do not understand them and cannot read them. Sometimes this has necessitated taking another statement. Even where no application for a Registered Intermediary has been made, you may always request assessment of a vulnerable prosecution or defence witness whose communication needs may have been overlooked (section 19(1)(b), Youth Justice and Criminal Evidence Act 1999).
79. 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. A deaf person should always be assessed by an expert in deafness and/or a suitably qualified and experienced intermediary.

#### If the application is contested

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

Intermediaries in family cases

81. Intermediaries have occasionally been appointed by family courts and their use is discussed in Family Justice Council 'Guidelines in relation to children giving evidence in family proceedings' (2011). The Ministry of Justice will provide a Registered Intermediary only where there is a direct link to a criminal case in which the witness is involved and where one has already been provided through the Witness Intermediary Scheme. This is justified on the basis of continuity of care for the witness who already has rapport with the intermediary. Even in these circumstances, assistance will only be provided where the intermediary used in the criminal case is available and where there is no impact on availability of intermediaries for witnesses covered by section 29.

Non-registered intermediaries for vulnerable defendants

82. Section 104, Coroners and Justice Act 2009 creates a new section 33BA, Youth Justice and Criminal Evidence Act 1999, providing an intermediary to an eligible defendant while giving evidence. This has not been implemented. However, courts have exercised their inherent discretion to appoint intermediaries for a vulnerable defendant's testimony, or for the whole trial (*R (AS) v Great Yarmouth Youth Court* [2011] EWHC 2059 (Admin)). In a trial which lasted 12 weeks, the judge appointed two non-registered intermediaries who took turns to attend.
83. Any intermediary appointed to assist a defendant is considered to be 'non-registered' even though the individual carrying out this role may be a Registered Intermediary in respect of witnesses.
84. Non-registered intermediary appointments are not routine:
- Adapting the trial process may be sufficient where the trial judge conducts proceedings 'with appropriate and necessary caution' (*R v Cox* [2012] EWCA Crim 549).
  - However, 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' (Recorder of Leeds, *R v GP and 4 Others* (2012) T20120409, 'Guidance for future applications'). Appointment of an intermediary by itself may not be a sufficient adjustment: in *R v Jordan Dixon* [2013] EWCA 465 an intermediary was appointed to assist a vulnerable defendant during the trial, but failures to hold a ground rules hearing and to modify the language used during the proceedings were described as 'regrettable' by the Court of Appeal.
  - Even where a judge concludes that he has a common law power to direct the appointment of an intermediary, the direction will be ineffective if no intermediary can be identified for whom funding would be available (*R v Cox* [2012] EWCA Crim 549).
85. The Legal Services Commission pays for a non-registered intermediary's assessment and pre-trial involvement, subject to prior authority; his or her attendance at trial is paid for by HM Courts and Tribunals Service (agreement between the Legal Services Commission, Ministry of Justice and HM Courts and Tribunals Service). The matching

service for Registered Intermediaries run by the Ministry of Justice and National Crime Agency cannot assist in obtaining a non-registered intermediary.

### Communication aids

86. Intermediaries can also assist in recommending appropriate communication aids. Courts have permitted a wide range (e.g. pen and paper, models, picture cards, signal boards, visual timetables, human figure drawings and technology) to augment or replace oral testimony. Aids have helped improve the quality of evidence and given access to justice to some witnesses previously excluded. Intermediaries will, with the approval of the court:
- advise on the selection of appropriate aids e.g. a body map for a witness asked to clarify intimate touching (for an example of a gender neutral child body outline, see <http://lexiconlimited.co.uk/body-outline>). The failure to ask a non-verbal witness to identify body parts by reference to pictures was criticised in *R v F* [2013] EWCA Crim 424
  - develop aids specifically tailored to the needs of the witness and the advocate's questions (e.g. development of a visual timeline to support questions about several incidents over time).

### ***4 Ground rules hearings: planning to question someone with communication needs***

87. See also:
- Criminal Practice Directions Section 3E, Ground rules hearings to plan the questioning of a vulnerable witness or defendant (2013)
  - The Advocate's Gateway toolkit on 'Ground rules hearings' and others addressing a range of communication issues ([www.theadvocatesgateway.org](http://www.theadvocatesgateway.org))
  - Family Justice Council 'Guidelines in relation to children giving evidence in family proceedings' (2011).

### **A key ingredient of trial management**

88. Judicial interventions in questioning can be minimised if the approach to questioning is discussed at a ground rules hearing before the witness's testimony and ground rules are agreed and adhered to. 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. The ground rules hearing is the opportunity for the trial judge and advocates to plan any adaptations to questioning that may be necessary to facilitate the evidence of a vulnerable person. Where an intermediary is appointed, the purpose of the hearing is 'to establish how questions should be put to help the witness understand them and how the intermediary will alert the court if the witness has not understood or needs a break' (part F.1, Application for a special measures direction).
89. Judges and magistrates have a paramount duty to control questioning, as required by the overriding objective. Witness testimony must be adduced as effectively and fairly

as possible. You are encouraged 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.

### **When to hold a ground rules hearing**

90. Ground rules hearings should take place in the presence of the trial judge or magistrates, advocates and intermediary, if any. The hearings are:

- *mandatory* in all intermediary trials, and they remain vital even where participants have previously worked with an intermediary, as arrangements need to be agreed that are specific to the individual before the court. The intermediary must be present but need not take the oath
- *good practice* in all young witness cases and other cases with a vulnerable witness or vulnerable defendant with communication needs
- *desirable* before the day of the witness's testimony, where possible, giving advocates more time to adapt their questions and ensuring the witness can be prepared on the basis of agreed special measures
- *also appropriate* where the defendant is unrepresented. Sections 34 to 40, Youth Justice and Criminal Evidence Act 1999 prohibit unrepresented defendants from cross-examining young witnesses for certain offences and give a wider discretion to judges to prohibit cross-examination of witnesses by unrepresented defendants in other circumstances. Section 105, Coroners and Justice Act 2009 extends section 35, preventing cross-examination by an accused in person of a 'protected witness' i.e. under the age of 18.

### **Topics for discussion**

#### Third party material

91. It is within the judge's powers to require the advocate to explain to the jury the nature of the defence and to justify why questions arising from third party material are being asked, before such questions are asked.
92. A witness who does not anticipate being asked questions arising from third party disclosure 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. Consideration should be given to the place in cross-examination when questions about third party material should be put to the witness.

### Limits on cross-examination

93. The ground rules hearing should consider whether a departure may be necessary from normal cross-examination practice in which leading questions are asked, 'putting the case' to the witness. 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' (*R v Wills* [2011] EWCA Crim 1938). It has endorsed limitation of cross-examination in certain circumstances, including requiring advocates to:

- ask direct, not leading, questions (*R v Edwards* [2011] EWCA Crim 3028)
- 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 (*Wills*, above). In this way, failure to cross-examine in such circumstances is not taken as tacit acceptance of the witness's evidence.

### Limits on cross-examination

94. The ground rules hearing should consider whether a departure may be necessary from normal cross-examination relevant to their client's case, without repeating the questioning that has already taken place on behalf of the other defendant(s).

95. Where limitations on questioning are 'necessary and appropriate' *Wills* stated that:

- the limits must be clearly defined
- the judge should explain them to the jury and the reasons for them
- 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 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 when that occurs and prevent further questioning that does not comply with the ground rules settled upon in advance.

### Limiting the length of cross-examination

96. Judges are fully entitled to impose reasonable time limits on cross-examination (Rule 3(10)d, [Criminal Procedure Rules 2013](#)). They are expected to challenge unrealistic estimates in the plea and case management hearing questionnaire and to keep duration under review at trial. The judge may direct that some matters be dealt with briefly in just a few questions. Duration of cross-examination must not exceed what the vulnerable witness can reasonably cope with, taking account of his or her age/ intellectual development, with a total of two hours as the norm and half a court day at the outside. The witness's needs may require questioning to take place over more than one day.

### Questions likely to produce unreliable answers

97. The ground rules hearing must discuss questions likely to cause difficulty for the individual witness. Cross-examination techniques such as complex vocabulary and syntax and leading, multi-part questions have been demonstrated to mislead and confuse ordinary adult witnesses, undermining the accuracy and completeness of their evidence (*Exploring the influence of courtroom questioning and pre-trial preparation on adult witness accuracy* Ellison and Wheatcroft, 2010). Questions proving particularly problematic for children and adult witnesses with communication needs include the following:

- *'Tag' questions* (e.g. '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' (*Half a Century of Change: The Evidence of Child Victims*, 2013 Toulmin Lecture, King's College London). By analogy, tag questions should also be avoided with adults whose intellectual development equates to that of a child or young person. More direct questions should be put: e.g. '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 e.g. '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'.
- *'Do you remember...?' questions*. These are complex, particularly where the witness is asked, not about an event, but about what (s)he told someone else.
- *Questions containing negatives*, which are harder to uncode. Judges are usually alert to double negatives but difficulties can arise from single negatives, negative forms (e.g. '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* (e.g. 'I'm going to jog your memory') and the *present tense* (e.g. '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 (s)he is lying are likely to cause the witness serious distress. They do not serve any proper evidential purpose and should not be permitted.

### Information for the jury

98. The ground rules hearing should discuss 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* [2011] EWCA Crim 3028, the judge 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."
99. When intermediaries are appointed to facilitate communication of witnesses or defendants at Crown Court, it is customary for the judge to explain their presence to the jury. The intermediary may also be asked to explain to the jury his or her role and qualifications and the purpose of any communication aids. An example of a judicial direction to the jury is as follows:  
 "Members of the jury, you will see two people [in the live link room/dock]. One is the witness [or defendant]. The other, Mrs. X, is there to assist the court; the technical term for her position is an "intermediary". The witness suffers from learning difficulties. Because of this I have ruled, following representations from both the prosecution and the defence, that there should be an intermediary to assist communication. An intermediary is not an expert and does not give evidence. She is an independent person, a communication specialist here to assist with two-way communication in court. She will only intervene if a communication issue is identified. Questions will be short, simple and straightforward and it is likely we will take breaks. I must stress that giving evidence with an intermediary to assist communication is perfectly normal in a case such as this. It must not in any way be considered by you as prejudicial to the accused". [Additionally, in the case of an intermediary appointed to assist a defendant throughout the trial: "All this is in order to enable the defendant to understand fully the evidence in this case and the proceedings".]

### Trial practice note of boundaries

100. The Advocacy Training Council recommends that advocates create a trial practice note of boundaries, with an indication that all parties expect the judge to ensure agreed ground rules are complied with ('Raising the Bar' 2011, an approach endorsed in *R v Wills* [2011] EWCA Crim 1938).

## 5 Reporting restrictions

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

- *'Reporting restrictions: children and young people as victims, witnesses and defendants'*. These are set out in CPS online policy. Section 39, Children and Young Persons Act 1933 and enable courts to restrict reporting the identity of victims, witnesses and defendants under 18 in magistrates' courts and the Crown Court. Section 44 requires all courts to have regard to the welfare of such children. The child's welfare is likely to favour a restriction on publication.
- *Press Association, R (on the application of) v Cambridge Crown Court* [2012] EWCA Crim 2434. The Court of Appeal allowed an appeal against a trial judge's imposition of an indefinite prohibition on the publication of "anything relating to the name of the defendant which could lead to the identification of the complainant [an adult rape victim] which could have serious consequences for the course of justice". The Lord Chief Justice said that it was for the press to decide how appropriately to report the case so as to ensure the anonymity of the complainant. However:  
"the judge is entitled to express concerns as to the possible consequences of publication, and indeed to engage in a discussion with representatives of the press present in court about these issues, whether on his own initiative, or in a response to a request from them. The judge is in charge of the court, and if he thinks it appropriate to offer comment, we anticipate that a responsible editor would carefully consider it before deciding what should be published. The essential point is that whatever discussions may take place, the judicial observations cannot constitute an order binding on the editor or the reporter".
- *Reporting on Court Cases involving Sexual Offence'* (Press Complaints Commission 2011). This warns editors to take account of information about the case that is already in the public domain in order to avoid 'jigsaw identification' of the victim. The guidance includes examples of where publication of such information led to a complaint being made and upheld.
- *The Family Courts: Media Access & Reporting* (President of the Family Division, Judicial College and Society of Editors 2011). This summarises the current position.
- *The views of children and young people regarding media access to the family courts* (Children's Commissioner for England 2010). This found that 96 per cent of children who had been involved in family proceedings would have been unwilling to talk to a clinician if advised that a reporter might be in court. The report expressed concern that family courts may be faced with making difficult decisions with incomplete evidence from children and limited or no information from clinicians about children's wishes and feelings.

## **6 At trial**

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

102. Take account of the person's actual arrival time at court and ask to be updated about the time they have waited and the impact of any delay on him or her.
103. Confirm the timetable and that the following checks have already been made:
  - All directions are in place and the person's needs are catered for.
  - The equipment is working and if a DVD is to be used, that it is compatible with equipment in the courtroom where the trial is listed.
  - In the case of a vulnerable witness, that the defendant cannot be seen over live link (checked before the witness enters the live link room).
104. 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**

105. 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, e.g. 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" (but witnesses may not ask for a break even if needed, to get things over with).
  - "Tell me if you have a problem. I can always see you over the live link even when you can't see me." (Some witnesses fail to tell the judge about a problem because they cannot see the judge and believe the judge cannot see them. Giving the witness a coloured 'signal' card in the live link room may help them to indicate a problem or the need for a break).

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

73. Ensure that someone using the live link can always see the questioner's face.
74. Do not allow the witness to give his or her address aloud without good reason.

75. 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.
76. 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.
77. Prevent questioning that lacks relevance or is repetitive, oppressive or intimidating.
78. Where ground rules on cross-examination are necessary, you have a duty 'to ensure that limitations are complied with'. Give relevant directions to the jury at the time when the failure to comply occurs (*R v Wills* [2011] EWCA Crim 1938).
79. If the advocate is unable or unwilling to adapt his or her questions appropriately despite repeated interventions, some judges exercise their duty to ensure directions are complied with by taking over and asking the advocate's questions in a simplified way.
80. 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.

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

81. Judges and magistrates should request 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.

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## 6. Physical Disability Overview

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### *Key points*

- Disability has two key elements. The first is the limitation imposed upon the individual by reason of their physical, mental or sensory impairment. This is the medical model of disability. The second is the disadvantage or difficulty which society imposes on the individual in their environment, essentially the lack of adjustment that may allow the disabled person to access the same facilities as those without disability. This is the social model of disability. The UN Convention of the Rights of People with Disabilities 2006 defines persons with disabilities as including those who have long term physical, mental, intellectual or sensory impairments which, in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.<sup>37</sup>
- Any disadvantage that a disabled person has in society should not be reinforced by the legal system; the individual who cannot cope with the facilities and procedures of the courts or tribunals is as entitled to justice as those without this disadvantage.
- It is not simply a question of judges being polite and understanding when faced with people whose disabilities are clearly apparent. All members of the judiciary should be able to recognise disabilities when they exist, identify the implications, know what powers they have to compensate for the resulting disadvantage and understand how to use these powers without causing prejudice to other parties.
- If any of the parties, witnesses or advocates involved in court or tribunal proceedings has a disability which may impair their ability to participate, it is important that this is identified at as early a stage as possible. Steps can then be taken to ensure that any hearings take place in accessible rooms and suitable facilities are available.
- A litigant in civil or family proceedings is treated in a different manner under the court rules only in the case of legal incapacity. The procedures then ensure that a representative is appointed, compromises and settlements are approved by the court, and there is supervision of money recovered. There will be other cases, however, before courts and tribunals in which disability manifests itself as a hurdle for a litigant that requires compensatory treatment. It is those matters that are covered in this section.

In addition to this Bench Book the reader will find assistance at [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org) which is an important resource on all aspects of dealing with disability and other vulnerabilities.

### *Introduction*

1. The intention of *Disability* is to provide practical information that may be used when considering the needs of individuals with a wide range of disabilities and impairments, both obvious and hidden, physical and mental. The aim is to enable litigants, defendants and witnesses (and, where appropriate, advocates, jurors and others involved in the court process) with disabilities to participate fully in the process of

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<sup>37</sup> Article 1. UNCRPD entered into force on 3 May 2008 and both UK and the EU are signatories to the Convention. [www.un.org/disabilities](http://www.un.org/disabilities)

justice. Making reasonable adjustments or accommodating the needs of disabled people is not a form of favouritism or bias towards disabled people but may be necessary to help provide a level playing field by giving disabled people the opportunity to participate in court and tribunal hearings in whatever capacity. Disabled people need to be given the opportunity to express themselves properly and, if a witness, to give their evidence to the court or tribunal. To achieve this aim each person with a disability must be assessed and treated by the judge or tribunal panel as an individual so that their specific needs can be considered and appropriate action taken. Failure to do this may result in a decision being overturned on appeal.

2. The advice in the *Equal Treatment Bench Book* as regards dealing with parties to proceedings with disabilities is important advice which every judge and justice is under a duty to take into account when dealing with such parties.  
*R (on the application of King) v Isleworth Crown Court [2001] All ER (D) 48 (Jan), CA*
3. Any need for an adjustment to court or tribunal procedure can usually be assessed quite quickly but the judge must balance this against the need for a fair trial to ensure that justice is done to both sides.

### **Incidence of disability**

4. The incidence of disability may be more frequent than is generally imagined and many people have more than one disability. A report by the Papworth Trust<sup>38</sup> showed that:
  - a. 10.4 million people have a long-term illness, health problem or disability – this includes 770,000 children under 16
  - b. Only 17% are born with disabilities – most are acquired later in life.
  - c. Some two million people have significant sight loss
  - d. Most impairment is invisible – less than 8% of disabled people use a wheelchair, approximately 750,000 in the UK
  - e. 1.5 million have learning difficulties – 3 in 100. About 20% are severe.
  - f. 1 in 5 adults in the UK is functionally illiterate meaning they could not, for example, use a telephone directory or internet search engine.
  - g. 1 in 200 people have diagnosed psychoses – for example schizophrenia
  - h. 1 in 6 have diagnosed neurosis – anxiety/depression.
5. It must be understood that, although in recent years mental health problems bear less stigma than they once had, there will be those who may not wish to acknowledge the problem.

### **Empowering disabled people**

6. We now adopt a social model of disability which sees the problem as arising from the barriers constructed by society rather than in the physical or mental impairment of the individual – the so-called medical model. Thus, to the wheelchair user the problem is that the building has steps but no ramp and to the hearing-impaired person the

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<sup>38</sup> Disability in the UK 2011

problem is that the venue does not have the loop system. The UN Convention of the Rights of People with Disabilities 2006, which is binding on UK courts and tribunals, defines persons with disabilities as including those who have long term physical, mental, intellectual or sensory impairments which, in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

7. 'Care in the community' policies mean that more people with serious disabilities encounter the justice system in one form or another and with cut-backs in public funding fewer have a solicitor or welfare rights representative to assist them. This points to an increased role for those sitting in judgement, who may need to take positive steps to ameliorate the effects of the disability. It is helpful to remember that it is the strongest case that should win, not the strongest litigant.

### A general approach

8. A start is for the judge or tribunal panel to look around the court or tribunal room and consider whether everyone present can participate as required. If there is doubt, such as where a party or witness is elderly or otherwise disabled, a simple enquiry can be made directly or through an usher: 'Are you comfortable sitting there?' 'Can you see/hear?' 'Are you warm enough?' It should be made clear that it is acceptable for anyone present to say if a problem develops during the hearing.
9. Simply to have shown concern by asking questions will have reassured the person of whom enquiry is made that they are a full participant in the proceedings and established positive expectations that justice is to be done. It also sends the message to others present that this is not a person who may be sidelined. If a negative answer is received it may be possible to resolve the problem by taking relatively simple measures such as moving the person to a different position. When a chair is provided for a disabled person it is important to ensure that this is of a suitable height and type; the anxiety that often accompanies participation in the legal process should not be made worse by physical discomfort.
10. In his article *Equal Access to Justice for Disabled People*, District Judge Ashton highlights a positive approach to people with disabilities or impairments:  
*It is not sufficient to ensure that wheelchair users can gain access to the courtroom; physical disabilities come in many other forms. Defective vision, hearing impairment and speech defects may all affect an individual's ability to participate in the proceedings unless compensated for by a sympathetic approach and the use of available aids.*
11. He goes on to refer specifically to the issues surrounding the obtaining of evidence from those with mental impairment who are themselves the victims of crimes, and the concern in the criminal justice system at the apparent inability to punish those who mistreat those with learning disabilities because of the problems in hearing and accepting their evidence. His words remain a touchstone:  
*A simple assessment of someone's ability to take an oath in the witness box and face a confrontation in a courtroom is no longer an acceptable approach to the protection of those with such disabilities; all available evidence should be evaluated and a learning disabled witness treated with the same care as a child, an individual approach being tailored to the specific need or needs identified.*

### **A positive approach**

12. Do not begin with any assumptions beyond those that are clearly justified by what is immediately and incontrovertibly evident. The person involved should be addressed directly and in a normal manner unless and until it is clear that some other approach should be adopted. Then enquire as to special needs rather than the nature of the disability: 'Do you need assistance to read this?' rather than 'Is your sight impaired?' Ascertain as far as possible what functions are affected so that you can decide what adjustments need to be made. If the condition is known, or disclosed do 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.
13. People vary in their sensitivity about disclosing their impairment and those with disabilities are often reluctant to 'make a fuss about them', so any questioning needs to be sensitive. The disabled person may be embarrassed or self-conscious, yet the judiciary needs to be aware of how they are coping if we are to ensure that further steps are taken as and when required. We must ascertain this without appearing patronising.

### **Witnesses or Parties**

14. A person's physical and mental health may influence their experience as a witness or their ability to participate as a party. Whilst discussions often focus upon learning disabilities, physical impairment and mental health problems may also make it difficult for some people to participate or give evidence. These conditions are not mutually exclusive. Physical and intellectual disabilities can be associated, such as may occur with an acquired brain injury where motor skills are also affected, or where there are known co-morbidities such as learning disability and epilepsy. Additionally physical disability may be accompanied by mental illness; for example, reactive depression. A witness who has more than one condition is likely to be especially vulnerable.

### **Approach to potential Disability issues**

15. Enquire as to what is needed rather than the nature and extent of the impairment.
16. Talk directly to the disabled person even if there is an interpreter, carer or personal assistant and face this person if you can – with lip-reading this is particularly important.
17. Avoid disclosure of medical histories where possible.
18. Where a condition may require regular breaks to rest or use the lavatory for example, indicate how the disabled person will indicate the need for a break to avoid them appearing to need to 'ask permission' on each occasion.

### **Terminology**

19. In recommending the terminology to be used in relation to disability, it is important to acknowledge that 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.

20. A disability is not the same as an illness. It is a personal quality in the same way, for example, as is being tall, White, Black or short-sighted.
21. The terms impairment and disability are frequently treated as if they mean the same thing, but 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.
22. It may be necessary to distinguish these differential aspects of an illness or condition. It is suggested that a correct use of some common terms is as in paragraph 29.
23. An individual may have impairment, a condition, an illness or disorder; this may result in a disability which comprises:
  - a. The functional or practical limitation imposed upon the individual by reason of their physical, mental or sensory impairment, or a combination of those, and
  - b. The disadvantage which this imposes on an individual in their environment.
24. If the disability is of a sufficient degree the individual may be treated as legally incapacitated (or incompetent) and this may be due to:
  - a. Mental incapacity, or
  - b. Physical inability, or
  - c. Both.
25. Handicap is an outmoded term and its use is to be avoided.
26. There are a variety of definitions or tests that may be used in different contexts and it may be important in a legal context to identify the appropriate one. For example in a county court claim of disability discrimination the definition is contained in the Equality Act 2010.

### **Use of terms**

27. To use terms as labels, especially in the wrong context, is stigmatising and demeaning to the persons concerned. It also leads to assumptions that may be false, or just stereotyping.
28. There is not, however, agreement as to all use of terminology. For example, the phrase 'person with a disability' is the choice of some organisations because it emphasises the person rather than the disability, but 'disabled person' was preferred by the Disability Rights Commission because it reflects the social model of the person who is disabled by society.
29. There are expressions and terms which should not be used as they may cause offence
  - a. Avoid:
    - i. Comparisons with 'normal' and referring to 'the disabled' as if they were a distinct class;
    - ii. Referring to someone as 'handicapped' – use instead 'disabled person';

- iii. Talking about people as if they are medical conditions: ‘epileptic’ or ‘arthritic’ – use instead ‘person with epilepsy’.
- b. Terms to avoid:
  - i. ‘wheelchair bound’ – use instead ‘wheelchair user’;
  - ii. ‘suffers from’ – use instead ‘has’ or other more neutral terminology;
  - iii. ‘mental handicap’ – use instead ‘learning disabilities’ or ‘learning difficulties’;
  - iv. ‘mental illness’ – use instead ‘mental health issues’ or ‘mental health problem’;
  - v. ‘the blind’ – use instead ‘blind people’ or ‘people who are visually impaired’;
  - vi. ‘the deaf’ – use instead ‘deaf people’ or ‘people who are hearing impaired’.
- c. Other Terms to use:
  - i. ‘physical disability’, ‘sensory impairments’, ‘partially sighted’, ‘visually impaired’
  - ii. ‘deaf without speech’, ‘pre-lingually deaf’, ‘hearing impaired’.

### ***Trial management and disability***

30. Trial management is concerned with how a hearing may best be managed where a party, witness, defendant, juror or advocate has a disability which might become a consideration. It is based on common sense and common courtesy which should in any event, be applied to the management of the hearing. More detailed guidance on steps that must or can be taken is offered in the following chapters. HMCTS administration has experience and some expertise as to facilities which may be necessary and their availability; ask your venue manager.
31. The overall aim must be to ensure that no disability amounts to a handicap to the attainment of justice. The person who has difficulty in coping with the facilities and procedures of the courts is as entitled to justice as those who know how to use the legal system to their advantage. There are many potential sources of discrimination and not being heard or being misunderstood by the judge is as discriminatory as an inability to access a court or tribunal building.
32. There is a Practice Direction for Tribunals issued by the Senior President of Tribunals in November 2008. It is discussed below.

### **Key elements for people with disabilities**

33. Likely to need more time – so a longer time estimate may be required for a hearing
34. May not be able to hear, read, be understood or fully comprehend what is taking place.
35. May be using up much of their energy to cope with the disability and therefore tire more easily.
36. The stress of attending may exacerbate symptoms
37. Some disabilities may make it impossible to attend a hearing at all.

### **Pre-hearing planning**

38. Although those with disabilities are frequently encountered in the legal process there has historically been a tendency to treat each instance as a 'one-off' and there is no co-ordinated approach.
39. Making any special arrangements in advance will save time and, as importantly embarrassment at the hearing. There is scope in both the civil, criminal and tribunal processes to identify at an early stage whether anyone involved has special needs. The forms completed by the parties should make enquiry so that the administration know when facilities to accommodate disabilities are required and the judiciary must be alert to when special directions are needed. Advisers should be encouraged to tell the court or tribunal that a litigant or witness has particular requirements.
40. It is often easy to compensate for a disability, but in some instances special facilities or procedures are needed which require advance planning or specialist knowledge. Accessibility consultants should be available for this purpose. If in doubt as to what is required, ask the disabled person directly and in advance to indicate what may assist their participation. This will not only ensure a more just outcome but also result in more efficient use of time.

### **Criminal proceedings**

41. In criminal cases the preliminary hearing or the plea and case management hearing is the best place to address potential problems. The 'pro-forma' form used by the court contains a dedicated 'special measures' box in which parties can identify and address such questions, giving an indication of what support would be useful. It is at this stage that the provisions of the Youth Justice and Criminal Evidence Act 1999 should be considered and appropriate directions given in anticipation (e.g. 'Special measures' directions).

### **Civil justice in both courts and tribunals**

42. Proceedings are governed by the overriding objective of enabling the court or tribunal to deal with cases justly. The details of the overriding objective vary according to the jurisdiction but usually includes:
  - a. Ensuring that the parties are on an equal footing
  - b. Saving expense
  - c. Dealing with cases in ways which are proportionate to the issues involved, importance of the case, complexity of the issues and financial position of each party;
  - d. Ensuring that cases are dealt with expeditiously and fairly;
  - e. Allotting to cases an appropriate share of available resources.
43. The court or tribunal must seek to give effect to the overriding objective and the parties are required to help. Instead of leaving them to progress litigation, the judge now acts as 'case manager', often adopting an interventionist role. This may include encouraging the parties to co-operate, deciding how the issues can best be resolved and fixing timetables. In addition court hearings should be dealt with without the need for the parties to attend at court if possible.

44. As the intention is to ensure that the parties are on an equal footing there is much of potential benefit to people with disabilities or other disadvantages. Whilst there is no specific mention of a duty to address the personal needs of litigants and the emphasis may appear to be upon financial inequality, the overriding objective is wide enough to encompass disability issues and the judge in managing cases should take these into account.

### **Implications**

45. The best outcome is for any special needs to be identified at the preliminary stages and for procedures to meet any difficulties or disadvantage to be in place at the commencement of the hearing. The court or tribunal staff should check with any person with a disclosed disability (or their solicitor or other representative) what is required, or whether what is being proposed is appropriate. Often attending court or a tribunal venue can impose considerable stress on a person with a disability and consideration should be given to the number of pre-trial hearings which are held and how these might be managed or limited. This may especially apply in family cases where reviews are held more frequently than in other forms of litigation. Options now available include telephone conferences or the use of video links. Consideration should be given as to whether a disabled person might access a video link from a local/community facility. HMCTS should be able to investigate on the direction of the judge.

### **The hearing**

46. Measures which can be taken at the hearing to ensure that vulnerable litigants and witnesses are fairly heard have two main aims:
  - a. To reduce the fear and trauma of attending;
  - b. To ensure that the quality of evidence is preserved as far as possible.
47. Listed in the box below are some general points. They are only broad indications owing to the need to treat each person as an individual. It is important to be aware of the impact of the proceedings generally on the person with the disability. This means looking out for signs of stress, discomfort, fatigue or lack of concentration. If possible, though within the confines of the need to be fair to both sides and the requirements of a fair trial, action should be taken to alleviate the situation after an enquiry of the person with a disability. Support cannot be forced on people however, and it must be borne in mind that a person with a disability may refuse an offer of assistance.

### **Measures that can be taken at the hearing**

48. Position a carer near to the disabled person
49. Have frequent breaks. Concentration may be impaired or there may be a need to eat or drink more frequently perhaps to restore blood sugar levels or take medication and then allow time for this to work. Ask if a person with physical disability needs a period of movement to relieve discomfort.
50. Ensure that those with mental health problems or learning disabilities have things explained to them slowly or more than once. They may be particularly nervous and under stress.

51. Consider the order in which evidence is heard so that they are not kept waiting longer than necessary.
52. If applicable, it may be helpful if wigs and gowns are removed.
53. Consider the layout of the room and whether this is likely to cause discomfort.
54. Permit a person with visual impairment to be accompanied by a guide dog. Remember that the dog will need a 'comfort break', water and perhaps a walk.
55. Consider the stress placed on persons with a hearing impairment of concentrating and communicating in a different environment through an interpreter, and the length of time that it is reasonable to expect a signing interpreter to work without a break, generally considered to be about 20 minutes owing to the physical nature of this form of interpretation.
56. Consider how to cope with the various types of equipment that a person may need to use in order to communicate. This may be slower and more tiring than other forms of communication.
57. Be aware of the powers to prevent inappropriate questioning, and use them where appropriate.
58. Ensure that fresh drinking water is available and the room is not too crowded or stuffy.

### **Adjournments**

59. If a hearing before a court or tribunal needs to go part heard or be adjourned as a result of the need to make reasonable adjustments for a person with a disability, it is good practice to record that this is the reason for the extended hearing or adjournment and ensure their availability prior to the recommencement of the case.

### **Jurors and disability**

60. There will be occasions when a disabled person is called for jury service. Guidance is provided in s.9B of the Juries Act 1974 which states that it is for the judge to determine whether or not a person should act as a juror. The presumption is that 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.
61. There have been many cases in which persons who are blind have served on juries. In *Re Osman [1996] 1 Cr App R 126*, it was held that a person who is profoundly deaf and unable to follow the proceedings in court, or 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 and it would be an incurable irregularity in the proceedings for the interpreter to retire with the jury to the jury room. The same reasoning might apply if a person called for jury service required the full-time attendance of a carer. In a case in Liverpool, a disabled person's carer was allowed to sit near to this person in the courtroom but when it came to retiring the carer remained outside the jury room and the other members of the jury attended to their colleague's needs.

62. The fundamental problem appears to be the presence of a thirteenth person in the jury room, because no evidence has ever been presented that a deaf juror is less able to assess the demeanour of a witness. Legislation may be required to overcome this obstacle. There has as yet been no challenge under the Equality Act 2010 or UN Convention on the Rights of Persons with Disabilities.

### ***The statutory environment***

63. The main statutory provisions directly bearing upon disability in the courtroom are:
- a. the Equality Act 2010 (the EA);
  - b. the Human Rights Act 1998 (the HRA);
  - c. the Youth Justice and Criminal Evidence Act 1999.
64. See below for a more detailed description of the legislation regulating discrimination against disabled people.

### **The Equality Act duties: compliance by HMCTS**

65. Whilst the core judicial functions are exempted administration of Courts and Tribunal venues will, as under the *Disability Discrimination Act 1995* (repealed by the *Equality Act 2010*), require compliance as to the provision of appropriate facilities, and legal action may follow failure in that regard. However it is the role of the judiciary to assist the administration to comply with its legal obligations.
66. Those issues are really outside the purview of this book, as most judicial office holders will not be concerned with the practical aspects.
67. Irrespective of any statutory obligation the ethos of this volume is that the legal process over which the judiciary has control or influence should as far as possible assist those in a position of vulnerability to access justice equally with others in society.

### Equality Act Claims dealt with by the courts

68. Most civil claims are dealt with in the county courts because of the level of damages. Employment tribunals deal with the cases that arise in an employment context.
69. There has been a successful claim against HM Courts Service where a judge proceeded with a hearing after a party complained that the loop system did not work and he could not hear. Other practical examples include that it may be an unlawful act not to provide an interpreter for a deaf witness or large print or Braille if requested for a person whose sight is impaired.
70. Through these cases, judges are becoming aware of the realities of life for people with disabilities and the standards that are being set are open to critical comment in the public domain.

### **The Human Rights Act 1998 (the HRA)**

71. The HRA has also had an impact on both the work of the courts and tribunals and the way in which they are conducted. It provides considerable support for litigants with disabilities and this is likely to produce many new arguments and challenges to the traditional ways of doing things. UK law, whenever possible, is to be interpreted in a

way that is compatible with the rights contained in the European Convention on Human Rights. In addition, under s.6 of the HRA, it is unlawful for a public authority to act in a way which is incompatible with the Convention.

72. Article 14 of the Convention prohibits discrimination in the enjoyment of all other rights on any ground.
73. The right to a fair trial contained in Article 6 is likely to have the single largest impact in the area of disability and the administration of justice. It is in this context that awareness of the issues which disability may raise in the management of a trial becomes important. Proceedings have not only to be fair, but to be seen to be fair by all concerned.
74. In so far as is possible the UK law also has to read in accordance with the UN Convention of the Rights of Persons with Disabilities which aims to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

### **The Youth Justice and Criminal Evidence Act 1999**

75. Part 11 of this Act deals with the giving of evidence or information for the purposes of criminal proceedings and makes provision for 'special measures' to be taken in respect of 'eligible witnesses' who are defined as witnesses the quality of whose evidence is likely to be diminished by reason of defined circumstances. These circumstances are:
  - a. That the witness:
    - i. Suffers from mental disorder within the meaning of the Mental Health Act 1983, or
    - ii. Otherwise has a significant impairment of intelligence and social functioning;
  - b. that the witness has a physical disability or is suffering from a physical disorder.
76. The 'special measures' which may be taken include:
  - a. The giving of evidence by means of a live link or by means of a video recording;
  - b. The examination of a witness through an interpreter or other person approved by the court as an 'intermediary';
  - c. the provision of such device as the court considers appropriate with a view to enabling questions or answers to be communicated to or by the witness despite any disability, disorder or other impairment which the witness has or suffers from.

### **Tribunals**

77. The Senior President of Tribunals issued a Practice Direction in 2008<sup>39</sup>, applying to the First Tier and Upper Tribunal in respect of child, vulnerable adult and sensitive witnesses, children being those under 18, the vulnerable adult definition being that set out in the *Safeguarding Vulnerable Groups Act 2006*, and sensitive witnesses being defined as an adult witness where the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection

<sup>39</sup> Child, Vulnerable Adult and Sensitive Witness Practice Direction (2008)

with giving evidence in the case. A witness falling within any category 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 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.

78. It may be possible to adopt these measures in some other types of proceedings.

## Physical disability

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### *Key points*

- Physical disabilities come in many forms.
- Any physical disability may affect the ability of the individual to participate in a court hearing whether as litigant, defendant, juror witness or advocate.
- The judge is responsible for the conduct of the hearing and should ensure, so far as is possible within the constraints of the law and the environment, that those with physical impairments are able to participate to the full extent required of them whilst avoiding prejudice to other parties. If environmental constraints are severely restricting participation alternatives may need to be sought; this is discussed elsewhere.

### *Introduction*

1. Physical disability may comprise impaired mobility and dexterity, sensory impairment (poor sight or hearing) or impaired ability to communicate. Any associated pain may be aggravated by the stress of the proceedings. There are many chronic and degenerative conditions that affect, in particular, elderly people.

### **Implications for the hearing**

2. The ability of an individual to participate in court or tribunal proceedings may be affected in many ways.
  - a. Impaired mobility may make it difficult to enter the building or cope in a particular hearing room.
  - b. Impaired hearing makes it difficult to identify what is going on.
  - c. Impaired vision may make it difficult to read documents or identify who is speaking.
  - d. Communication limitations may prevent others from understanding the individual.
  - e. Limited concentration spans or the need for regular medication may make regular breaks appropriate.
  - f. Some disabilities may make it impossible for a disabled person to attend at all. In extreme circumstances the Court or Tribunal may convene at their home or a hospital<sup>40</sup>
3. Steps should be taken at an early stage to ensure that suitable adjustments to the normal arrangements are made so as to avoid an adjournment when the impairment becomes apparent. Not all of these adjustments can be made by the administration and in some instances directions will be required from a judge. Ideally the forms used and enquiries made would provide a specific opportunity for parties to disclose any relevant disability at an early stage but this is not always the case.

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<sup>40</sup> Re B (Consent to Treatment:Capacity) 2002 EWHC 429

## **Vulnerability of witnesses**

4. Witnesses with physical disabilities will feel vulnerable in various ways.
  - a. Pain, discomfort and stress.
    - i. This may well be increased by the pressures of court or tribunal procedures and the need to concentrate for long periods.
  - b. An unfamiliar environment.
    - i. The need to adjust to the hearing environment and the public nature of the proceedings may have an adverse effect.
  - c. Fatigue.
    - i. Trying to cope with impairment in a new situation can be stressful and tiring.

## **Information**

5. HMCTS maintains a directory of disabled facilities available in courts and hearing centres. Reference may be made to this at a court or tribunal office. The keeping of such information will vary between courts and tribunals or judicial regions; your court manager or judicial leader will be able to assist as to how it may be accessed.

## **Practical measures**

6. When the situation is understood there are many imaginative ways in which steps may be taken to cope with a physical or sensory impairment. Examples are set out below but not all will apply to criminal trials, and care must be taken with party and party proceedings particularly in the family context that a fair trial is not compromised by the hearing being perceived to be on territory which is not neutral. Domiciliary hearings also create a Health and Safety risk, which may need assessing. In some tribunals<sup>41</sup> the decision to direct a domiciliary hearing is referred to a District Tribunal Judge, who has management responsibility.

## **Steps that can be taken**

7. Facilitation by video link may be possible
8. Transfer the case to a venue in the area where the disabled party resides or to a venue with better disabled access or arrange for it to take place other than in a court or tribunal room, perhaps the litigant's home or a nursing home.
9. Be aware of the problems for a person using a wheelchair if they are constantly required to look up.
10. Ensure that there are facilities for the hearing impaired, in particular the loop system where it may assist, or a signer in the correct sign language. BSL may not assist where the deaf person has not been brought up with English; even American Sign Language is different.

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<sup>41</sup> SCS where that person will be able to access health and safety advice and information as to other local facilities which may be preferable, eg a doctor's surgery.

11. Permit a carer to be present.
12. Facilitate representation in a form that might not otherwise have been permitted.
13. Produce all documents in large print or Braille. A direction may be given at an early stage in the proceedings that any documents or communications be sent to the disabled party in a large font produced on a word-processor or after enlargement on a photocopier.
14. Allow a longer time estimate, shorter hearings or more frequent breaks.
15. Arrange for the evidence of a disabled witness to be taken prior to the hearing or by telephone or video link.
16. Introduce yourself to a person who has a visual impairment and make sure they understand the layout of the hearing room and where everyone is sitting.
17. If the person has a speech or language impairment, concentrate on what they are saying and try not to guess what they want to say. If necessary, ask them to repeat the sentence and then repeat what you understand to gain confirmation.

## **Place of hearing**

### Access

18. Clearly it is sensible to ensure that any hearing takes place at a venue to which the parties and any witnesses (or advocates) can gain access. This should not overlook, where necessary, the ability of such persons to park a vehicle and be conveyed to and enter the building. Difficult journeys and the need to stay overnight should also be taken into account, and such factors may dictate timing, or that the hearing take place in the locality of an elderly, infirm or disabled party or witness.

### Facilities

19. The facility to accommodate the individual in the hearing room itself is also important and it may be necessary to reposition people in the room. A party using a wheelchair will feel marginalised if not able to see everyone in the room and will suffer prejudice if not able to reach documents and make notes.

### Attendance by non-parties

20. A physically disabled person who is neither a party nor a witness may wish to attend a particular hearing, perhaps involving a member of the family or a friend, but be unable to gain access to the usual venue. If a party to the proceedings has not raised the matter with a view to transfer to an accessible venue, it may be that a direct approach to the judge should receive consideration, although the parties' views should be sought.

### Carers

21. 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 child care is an issue, timing during the school term may be preferable.

## Need to attend a hearing

22. In civil proceedings the court now controls the issues on which it requires evidence and the way that evidence is given (see Civil Procedure Rules). A statement or pleading verified by a 'statement of truth' may be treated as evidence of the facts stated if it has been duly served on the other parties. It may only be necessary for the party or witness to attend a hearing to give evidence if cross-examination is required. It follows that the court may take into account the disability or infirmity of a potential witness when deciding whether oral evidence is required from that source. See also the Senior President of Tribunals direction to Tribunals in relation to the treatment of child and vulnerable adults referred to above.

## Taking evidence elsewhere

23. Where it appears necessary for the purposes of justice, the court may order the examination on oath of any person at any place in England and Wales (CPR r.34.8–34.12 or in family proceedings RSC Order 39 r.1 and CCR Order 20 r.13 as well as Rule 24.7 Family Procedure Rules 2010). This procedure, which is known as taking depositions, allows the evidence of a party or witness who is unable to attend the trial to be taken in advance and, if necessary, elsewhere. The person being examined can, if necessary, be assisted by an interpreter. The power is discretionary but an order will usually be made (and is often made by consent) where the witness:
- a. Is too old to attend a trial;
  - b. Is so ill or infirm that there is no prospect of being able to attend the trial;
  - c. might die before the trial.
24. It follows that when a witness is too infirm to attend the hearing, arrangements may be made for that person's evidence to be taken in advance in a manner that suits the circumstances. This could be in a local court before the district judge, or in the individual's own home or a nursing home before an independent solicitor appointed for the purpose. There should be little difficulty in arranging this because there are many fee paid tribunal judges or deputy district judges who practise as solicitors throughout the country and one could be appointed for the purpose, although professional fees would have to be paid.

## Communication

### Facilities

25. Some hearing rooms have the loop system for hearing impaired people. Persons who have a hearing impairment may be better able to cope at a hearing in the judge's chambers rather than a large courtroom. Background noise can exacerbate hearing problems so it may be necessary to consider changing rooms.

### Time estimates

26. It is often the case that any hearing must proceed at a slower pace, or with more regular adjournments, when a person with disabilities is involved. The need for regular medication or attention to bodily functions, or shorter concentration spans,

may alone dictate this. Examples of treatment may be testing blood sugar for someone with diabetes, using an inhaler in COPD or a GTN spray to combat angina. The latter two may result in some dizziness for a short period after being administered. Not only should the modified pace be recognised by all concerned during the hearing, but the advance recognition of a signal to be used by the person affected when a break is required will preserve their dignity. Longer time estimates should be allowed in advance so that sufficient time is available. A balance should be maintained because this increases costs and may deny allocation to the fast track in civil proceedings. In all cases the overriding objective will be the touchstone.

### Interpreters

27. The legal system is adept in the use of foreign language interpreters, but additional consideration needs to be given when there is some other form of communication difficulty. Sign language interpreting, for example, can be very physical, and these interpreters will require regular breaks. Judges should be alert to the use of new methods of communicating through a computer. The shortage of trained interpreters and Palantypists for deaf litigants makes it necessary to book them well in advance of a hearing, and directions given if adjourning should reflect this. Useful examples and approaches appear in the Medical Glossary.
28. It is not impossible to contemplate a situation where an elderly person who was competent to give evidence could neither read an affidavit nor hear it being read, and other methods of communication should then be investigated such as whether close family members are able to understand the person and explain matters to them. See paragraph 31.

### **Representation**

29. Parties with sensory impairments or physical disabilities who are not legally represented may need to be supported when presenting their cases. Tribunals are generally more flexible than the courts in this regard and in many there is an absolute right to be represented by any person of the party's choosing.

### **McKenzie friends**

30. During a hearing of civil or family proceedings any person may accompany an unrepresented party as a friend to take notes, quietly make suggestions and give advice, but this does not extend to acting as an advocate. The 'friend' can be excluded if unsuitable, such as someone pursuing their own or an unsuitable agenda.
31. Where a party is elderly, disabled or inarticulate it is always open to the judge to seek assistance from any such person present in court who clearly has the confidence of the party. This is not the same as allowing such a person to act as a representative in the proceedings; that person may be looked upon more in the light of an interpreter and where the disability or disadvantage does not fall into a recognised category it may only be a close family member who is able to assist.

### **Lay representatives**

32. These are permitted in most tribunals. There will generally be written confirmation of the party's wish that the lay person act for them. If the party is present oral assent may be given.
33. It may be appropriate for parties who have difficulty representing themselves to be permitted to have their case conducted by a representative of their choice. This person may have no right of audience in a court, but the judge may confer such right, although only in exceptional cases in the absence of the party. In the 'small claims' track under the Civil Procedure Rules a lay representative has a right of audience in the presence of the party. The important point is to ensure that the party desires the representative to be heard and that the representative is acting in the best interests of the party – there are those who seek to pursue their own agenda.
34. For further guidance on unrepresented parties, see the section on Litigants in Person.

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## Glossary: Disability

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### ***Acquired brain injury***

This 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.

Cognitive effects– these affect the way a person thinks, learns and remembers. There may be problems with memory, the ability to concentrate and to 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.

For more information, see the website for Headway, the brain injury association at [www.headway.org.uk](http://www.headway.org.uk).

### ***Attention Deficit Hyperactivity Disorder (ADHD)***

The definition of ADHD (and hyperkinetic disorder) is based on maladaptively high levels of three main behaviours which are typically present from before the age of seven years and may continue into adulthood.

**Inattention/distractibility** difficulty focusing on tasks or listening for a sustained period of time and becoming easily distracted by external stimuli or one's own thoughts.

**Impulsivity** a lack of inhibition which could show itself as the need for instant gratification, blurting out inappropriate comments, interrupting excessively or having difficulty awaiting turn, together with erratic and unpredictable behaviour. Traits also include failing to foresee outcomes of one's actions and lack of forward planning.

**Hyperactivity** comprising excessive activity – both physical and mental.

Common characteristics also include failing to pay attention to detail, not listening when spoken to; failure to respond to feedback; having difficulty organising tasks and activities; difficulty getting started on or finishing tasks; frequently losing or forgetting things; fidgeting and moving around incessantly; often talking excessively or intruding on others.

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.

### ***Alzheimer's Disease***

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 are over 60 years of age and may also be affected by some of the common infirmities associated with old age. A close relative or carer is likely to accompany the individual.

### ***Autistic Spectrum Disorder (ASD)***

Autistic Spectrum Disorder (ASD) is used as an umbrella term for a range of life-long neurodevelopmental disabilities and includes people with a range of diagnoses such as autism, Asperger Syndrome, and pervasive developmental disorder. Asperger syndrome is currently distinguished by an absence of specific language delay and general intellectual skills in the normal range. The number of males affected far outnumbers females.

People with autistic spectrum disorders have difficulty in three key areas:

1. Poor communication skills: including difficulty understanding instructions or retelling an incident; words and phrases may be taken literally such as “keep your ear to the ground”.
2. Impaired social skills: difficulty understanding socially acceptable behaviour and taking account of the needs of others, little or no empathy, inability to ‘read’ body language.
3. Inflexible thinking: difficulty coping with change, over-reliance on routines difficulty following rules (except those they have adopted, which will be followed unswervingly).

One result of this way of thinking is that people with ASD are not good at creating, telling and sticking to lies. Some people with ASD have difficulty in sensory perception; this might affect their sense of touch, smell, vision, hearing, proprioception (the ability to sense the position and location and orientation and movement of the body and its parts) and vestibular (balance and body posture) sensations. The unusual behaviours seen in autism, such as aversion to textures, motor planning difficulties and self-stimulatory behaviour are due to difficulties in sensory perception. Lack of eye contact is common. More seriously, an obsessive interest may lead them into trouble.

People with Asperger Syndrome do not have the accompanying learning difficulties often associated with autism; their speech may be fluent and they may have learned to largely conceal their problems. However social interaction always remains very challenging and they live with a very high level of stress. Being slow to process spoken information, they may produce a panic reaction when pushed to respond, such as verbal or even physical abuse. Individuals with ASD will require frequent breaks and the services of a specialist (such as a mentor trained by the National Autistic Society) to facilitate communication. Closed questions are easier to cope with than open ones but questions written and submitted in advance would be even better.

***Cerebral palsy***

This is defined as a persistent disorder of movement and posture, as the result of one or more non-progressive abnormalities in the brain before its growth and development are complete. It is generally caused by insufficient oxygen getting to the brain at birth but can be caused by toxins or genetic factors.

People with cerebral palsy may experience a wide spectrum of disorders of movement, posture and communication problems, as well as hearing and sight difficulties. It is frequently associated with epilepsy. In some cases, their speech cannot be readily understood and a speech and language therapist or someone familiar with the speech patterns of the individual may be needed to interpret responses. A communication aid, such as a speech synthesiser or word board, may be required.

Individuals with cerebral palsy may have had limited access to the community, particularly those with learning disabilities and severe physical disabilities, and it is important to take that into account when evidence is being given. Those with learning difficulties can become easily confused with complex questions and any simplification of proceedings is an advantage. Fatigue will affect concentration and the co-ordination of movement, so frequent breaks may be required.

***Cerebral vascular accident (CVA) – commonly called a 'stroke'***

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. Frequent short breaks should be taken, especially when incontinence is a problem. Some individuals require a wheelchair and others may need a carer. Carers may need to help with interpretation. The individual needs to be treated with dignity and respect despite physically embarrassing circumstances.

***Chronic obstructive pulmonary disease (COPD)***

COPD is common and is an umbrella term for people with chronic bronchitis, emphysema or both. It is progressive and non-reversible (unlike asthma). It is usually caused by smoking and the commonest symptoms are cough, wheeze and breathlessness.

Individuals may need to use inhalers at regular intervals to relieve discomfort, particularly if under stress. Inhalers take a little time to work and some can cause palpitations (a sensation of the heart beating fast) and slight dizziness so a short break may be needed. Those individuals with severe symptoms or end stage COPD may use portable oxygen which is delivered through little tubes under the nostrils or via a face mask.

## ***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 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 the diabetic person in the court or tribunal 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.

## ***Down's syndrome***

Down's syndrome is a common genetic disorder. The condition is associated with learning disabilities which range from severe to those with a 'below normal' IQ and individuals may not be able to understand court proceedings without simple explanations and, possibly, the use of diagrams. Individuals may be accompanied by a close relative or carer used to interpreting needs, as communication abilities vary widely.

## ***Dyscalculia***

Dyscalculia is an inability to understand simple number concepts and to gain basic number skills. Research indicates that this is due to a deficit in the cognitive system that deals with numerical representation. There are likely to be difficulties dealing with numbers at very elementary levels and consequently with learning number facts and procedures, telling the time and dealing with money and financial matters.

Dyscalculia may exist independently as a specific cognitive deficit, or it may co-exist with other Specific Learning Difficulties. Numerical processing is complex and the deficits of dyslexia and dyspraxia (short term memory, sequential abilities, retrieval of basic facts, language processing, speed of processing and visual spatial ability) commonly affect the acquisition of numeracy skills.

## ***Dyslexia***

Dyslexia often manifests itself as a difficulty with reading, writing and spelling. Even where literacy skills have been mastered, problems remain with skimming through or scanning over text and retaining what has been read. Spelling is likely to remain erratic.

The core challenges, however, are the rapid processing of language-based information and weaknesses in the short-term and working memory. Questions should therefore be asked singly, and thinking time allowed to assimilate the information and produce a considered response. Associated problem areas are organisation, time management, visual perception (see Visual Stress), sequencing ideas, retrieving words efficiently, sustaining attention, and numeracy. 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, but thereby leaving themselves few extra resources to call upon when they have to deal with situations that fall within their areas of weakness. Inconsistencies and inaccuracies may occur in their evidence and they would benefit from receiving questions in advance. Short breaks would also be justifiable.

Dyslexia can also be linked to a range of skills including innovative thinking, entrepreneurship, creativity and high-level visual spatial abilities.

## ***Dyspraxia/Developmental Co-ordination Disorder***

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, over-sensitivity to noise, touch and light.

Receiving likely topics for cross examination in advance would be helpful, together with clear directions, a contact phone number and a point of contact on arrival.

### ***Epilepsy***

Epilepsy is a tendency to have seizures (fits). 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 the area of the brain 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 causes the individual to stop what they are doing, stare, blink or look vague before carrying on. The latter causes unconsciousness and, upon coming around, a period of drowsiness, confusion and headaches. In both cases individuals will have no recall of what has happened. Absences can occur hundreds or thousands of times a day. Medication is successful in controlling seizures in about 70% of cases but some types of epilepsies, particularly those associated with congenital defects and learning disabilities, may be refractory to treatment. 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.

### ***Hearing Impairment***

Hearing impairment or deafness is common. Action on Hearing Loss (formerly the Royal National Institute for the Deaf) estimates that there are more than 10 million people in the UK with some form of hearing loss.

The level of deafness is defined as 'mild', 'moderate', 'severe' or 'profound' and is defined by the quietest sound measured in decibels that can be heard. The quietest sounds that can be heard by people with mild deafness are 25-39dB, for people with moderate deafness it is 40-69dB. It is 70-94 dB for people who are severely deaf and more than 95dB for those who are profoundly deaf. To give you an idea of how loud everyday sounds are: an aeroplane taking off is about 140dB; a loud rock band is around 100-120dB; a motorbike about 100dB; normal conversation around 60-65 dB; and leaves rustling about 10dB.

Those 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 BSL (British Sign Language).

Deafness also affects the extent to which people can use their voices particularly in those who are born with a hearing impairment or become deaf before speech is established (often referred to as pre-lingual deafness) and may result in speech which is difficult to follow. It 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. Background noise is very stressful for a person who is hard of hearing.

Hearing rooms should be fitted with an induction loop, which should also be fitted in the reception areas. The use of sign interpreters, lipspeakers and palantypists, along with a combination of communication methods such as hearing aids should all be considered. It should be remembered that anything said in open court will need to be interpreted.

British Sign Language (BSL) is the indigenous language of people in Great Britain who were born deaf or who became deaf early in life. It has its own syntax and grammar, so do not assume that someone who uses BSL can read documents as English may not be their first language. 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 with BSL manual signs. Lipspeakers are trained hearing people who repeat what a speaker is saying without using their voice so that lipreaders can lipread them. They are mainly used by deafened people. Palantype is a speech-to-text system that gives a word for-word record of what is being said using a phonetic keyboard.

### ***Heart disease***

Heart disease can affect any part of the heart but 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 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. Activity or stressful situations can aggravate angina and shortness of breath, and individuals may need to use a GTN spray or tablets which they put under their tongue. After use a short break may be needed as it can cause palpitations and headache.

### ***HIV and AIDS***

People living with HIV (human immunodeficiency virus) often face multiple forms of discrimination as HIV is over-represented in the gay and bisexual community and amongst Black Africans. However, the majority of prosecutions for the reckless transmission of HIV have concerned heterosexual transmission. Worldwide the number of people infected with HIV exceeds 33 million.

### **Meaning of the terms HIV and AIDS**

The terms HIV 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 TB or cancer.

The National AIDS Trust ([nat.org.uk](http://nat.org.uk)) found that some people including judges are not aware of the difference between HIV and AIDS and are not aware of medical developments over the last ten years which enable those who are HIV positive to lead normal lives. Some myth busters are set out below:

- An individual cannot be infected by 'AIDS'.
- There is no cure for HIV but treatment can keep the virus under control and the immune system healthy. Treatment with anti-retrovirals does not merely alleviate symptoms but it restores and maintains the immune system, suppresses the replication of HIV in the body and often enables the individual to live a long and relatively normal life. AIDS-related illness has become much less common in the UK due to advancements in HIV treatments. Anti-retrovirals can be associated with side effects such as fatigue, depression, nightmares and diarrhoea.
- HIV can now be treated with Atripla which is the first 'one pill daily' regime licensed for the treatment of HIV.
- Research shows that HIV-positive individuals on effective anti-retroviral therapy (with a suppressed viral load for six months) and without sexually transmitted infections are sexually non-infectious.
- There are common misconceptions about how HIV is passed between people. It is transmitted through infected blood, semen, vaginal fluids or breast milk.
- It cannot be passed on through kissing or touching, biting coughing or spitting and is not transmitted via toilet seats or swimming pools.

### ***Incontinence***

The inability to control natural functions or 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. Arrangements could usefully be made for the individual to give an agreed signal when a break is required.

### ***Inflammatory bowel disease***

This is a term which covers Crohn's disease and ulcerative colitis which are both chronic inflammatory conditions of the bowel. Crohn's disease affects the entire gut from mouth to anus whereas ulcerative colitis just affects the large intestine. Both can cause abdominal pain, bloody diarrhoea and general ill health such as fatigue. The conditions are characterised by episodic flare ups and although effective treatment is available many people follow a chronic course culminating in surgical removal of the diseased bowel. A type of arthritis can also be associated with both types of inflammatory bowel disease. General ill-health, the frequency and urgency of bowel action and nagging abdominal pains may sometimes lead to short temper, anxiety and despondency. It would, therefore, be necessary for a pre-arranged signal to be agreed with the court or tribunal officials if an urgent trip to the toilet was necessary.

**Laryngectomy**

Laryngectomy is the removal of the larynx (voice box), usually as a result of cancer.

Individuals have to relearn how to speak and this process usually starts within a few days of the operation. There are three main ways of assisting with speech: a voice prosthesis or tracheo-oesophageal puncture, oesophageal speech or an electrolarynx.

It may be easier at a hearing if questions and answers are kept to a minimum and, if necessary, for writing facilities to be made available.

**Mental health problems**

One in four people in the course of a year have mental health problems. 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, bipolar disorder (which used to be known as manic depression), post-traumatic stress disorder, anxiety 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, 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 commit suicide. Most mental health problems are likely to have an effect on giving evidence as a witness in a court or tribunal. Because of the variety of patterns of behaviour, and their impact on the veracity of the evidence, this is a situation where the judge needs to make a particularly careful assessment of the individual and how best to deal with them in giving evidence. Many people with mental health problems are reliant on a caring and stable environment for maintaining their stability and can easily be thrown off balance by medication changes or sudden distressing experiences. They are highly sensitive and need special care and protection to feel safe. Their medication may lead to embarrassing side effects (e.g. sweating or tics).

**Motor neurone disease**

This is a rare progressive degenerative disease affecting specialised nerve cells called the motor neurones causing the muscles to waste away. In the vast majority of cases, intellect and memory remain intact. Motor neurones control important muscle activity such as walking, speaking, breathing and swallowing. The classic symptoms of the disease in its early stages include stumbling, weakened grip, muscle cramps and a hoarse voice which can sound extremely slurred. Inappropriate or excessive laughing or crying can also occur, conditions over which the individual has no control. This is called emotional lability. The individual may also suffer with excess involuntary yawning or drooling. At an advanced stage, there will be a loss of function of the limbs and a weakness and wasting of the muscles of the trunk and neck. Eventually there is total body paralysis and significant breathing difficulties. Such a condition will lead individuals to eventual total dependence on others. Fatigue is common, especially if much effort has to be put into communication.

***Multiple sclerosis (MS)***

This 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.

An individual who is required to go to a court or tribunal will need frequent breaks. 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. If not a wheelchair user, an individual may need somewhere to sit down and rest. 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.

Visits to the toilet may need to be frequent and drinks of water should be available.

***Myalgic Encephalomyelitis/Chronic Fatigue Syndrome***

This is a relatively common illness of unknown cause, classified by the WHO as a neurological disease. It comprises a variety of symptoms including fatigue, 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. It is characterised by debilitating fatigue which can be triggered by minimal activity. Those severely affected may be wheel-chair users. Many people with ME/CFS suffer with impaired concentration and short-term memory, difficulties with information processing and word retrieval, hypersensitivity to light and noise. Although people with ME may not appear unwell, travel to a tribunal or court venue will have been taxing and sitting in an ordinary chair is often uncomfortable. Limited mental stamina will also be a factor when participating in proceedings; breaks may be necessary to restore concentration.

***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.

A panic attack is a sudden episode where the sufferer experiences intense psychological and physical symptoms. They may feel an overwhelming sense of fear and anxiety accompanied by nausea, sweating, breathlessness, trembling and palpitations or chest pain. They may feel that they are going to die. They may hyperventilate to the extent that they will lose consciousness. At least 1 person in 10 in the UK experiences occasional panic attacks which are triggered by a stressful event.

However about 1 in 100 people suffer with panic disorder and have repeated, often unprovoked panic attacks. For panic disorder to be diagnosed there must be evidence of panic attacks but not everyone who has panic attacks suffers with panic disorder.

One of the difficulties is that these attacks may last for a few minutes or, very rarely, a few hours, during which time the individual will find it difficult to concentrate and may be incoherent. The individual may be on medication or may have other methods of controlling their problem. The judge will need to discuss the issue with the individual to decide whether a break would assist the situation.

### ***Parkinson's disease***

This disease results 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 of 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. Breaks may be necessary during a courtroom or tribunal appearance.

### ***Spina bifida and hydrocephalus***

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 none in spina bifida occulta to massive in myelomeningocele, which is the most severe. This can result in partial or total paralysis of the lower limbs accompanied by incontinence. Most people born with this type will have hydrocephalus (water on the brain). This excess fluid can cause damage to the brain and so a shunt is inserted to divert the fluid into the abdomen.

Many people born with hydrocephalus have permanent brain damage which causes: learning disabilities, impaired speech, memory problems, short attention span, problems with organisational skills, visual problems, problems with physical co-ordination and epilepsy.

The evidence of brain impairment lies in slow thought processes and delay in answering questions. Memory processes may take longer to record information, so that statements and facts have to be repeated. There may be a great eagerness to please and agree, which may lead to incorrect decisions being made.

There may be a tendency to take things absolutely literally, so that statements and questions must be clear and unambiguous. Despite a seemingly confident flow of speech, responses may not necessarily be by way of original thought. Change can provoke considerable stress for some individuals.

### ***Spinal cord injury***

Spinal cord injuries are very variable depending on whether they are complete or incomplete. Some incomplete injuries will allow almost complete recovery. Other severe spinal injuries can result in complete paralysis below the point of injury and in addition may

have medical complications such as bladder and bowel dysfunction and increased susceptibility to respiratory and heart problems.

Some people with tetraplegia may have impaired breathing and may be ventilator-dependent. They can shrug their shoulders and they have neck motion which permits the operation of specially adapted power wheelchairs and equipment such as phones and lap tops. They may use other environmental control units with mouth control (sip and puff) voice activation, chin control, head control, eyebrow control or eye blink.

Frequent complications are pressure sores and spasticity of the limbs so individuals may fidget a great deal, mainly to relieve pressure on the skin. Whilst most individuals are wheelchair users, many are independent. Prearranged signals reduce embarrassment where a break is required.

### **Stroke**

See under *Cerebral vascular accidents* (above).

### **Disabilities caused by Thalidomide**

The main impairments caused by Thalidomide affected the limbs. The most severe is a condition called phocomelia where the long bones of some or all of the limbs are misshapen and where the hands and feet arise almost on the trunk. Some individuals with lower limb disabilities may be wheelchair users. Some individuals have hearing or visual impairments.

### **Visual impairment**

As many as two million people in the UK may be living with some degree of visual impairment and most cases are caused by ageing.

Visual impairment is defined as sight loss that cannot be corrected using glasses or contact lenses. There are two categories:

- Partially sighted or sight impaired.
- Severe sight impairment (blindness). A definition of blindness is when a person is so blind that they cannot do any work for which eyesight is essential.

Some people with impaired vision can see enough to read slowly and hesitantly, though they may have difficulty crossing the road.

The appropriate method of communicating with a visually impaired person in a court or tribunal room should be established at the outset. Various methods are available, including Braille, large print, audio tape, screen readers and disk. It is good practice for persons when speaking to identify themselves. On arrival at a hearing, the layout of the room should be explained. If a guide dog is accompanying the visually impaired person it must be allowed to enter the hearing room and have access to water and be allowed to have a short comfort break at regular intervals. Many people may also come with a personal assistant or support worker.

***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. 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.

## 7. Mental disabilities, specific learning difficulties and mental capacity

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### *Mental disabilities*

#### Key points

- A mental disability may arise due to mental ill-health, learning disability or brain damage.
- Only mental incapacity will generally have legal significance in civil, family and tribunal hearings. Lack of mental capacity may also be significant in criminal proceedings (i.e. whether the accused is fit to plead) and sentencing options may be affected by the mental state of the defendant.
- Adjustments to court and tribunal procedures may be required to accommodate the needs of persons with these mental disabilities whether as witnesses, parties in civil/family/tribunals proceedings or defendants in criminal proceedings.
- Judges are responsible for the conduct of hearings and should ensure that people with mental disabilities can participate to the fullest extent possible whilst avoiding prejudice to other parties.

#### Introduction

1. Mental disability should be considered in the same way as physical disability when it does not render a person incapable of playing their part. Judges should be able to recognize the existence of a mental disability if not informed of it, identify its implications in the court or tribunal setting and understand what should be done to compensate for areas of disadvantage without prejudicing other parties.
2. In practice, it can be much more difficult to understand the problems experienced by the individual in accessing the courts or tribunals or participating in the proceedings, although a general enquiry may be made in case reasonable adjustments are required. This may lead to erroneous perceptions, such as that the person is being awkward or untruthful and inconsistent. In fact, the problem may come down to a difficulty in communication or understanding.

#### Categories of mental disability

3. A mental disability may arise due to:
  - a. mental ill-health;
  - b. learning disability; or
  - c. brain damage.
4. There are fundamental differences between these conditions. Being diagnosed as being within one or more of them does not necessarily result in lack of mental capacity. For example, not everyone with cerebral palsy will lack capacity to make decisions and an individual may be sectioned under the Mental Health Act yet not a 'protected party' (see below under *Mental capacity*) because the criteria are different.

### Mental ill-health

5. People can become mentally ill through their life experiences, their genetic background or a combination of the two. Most respond to medical treatment and recover from their symptoms with the right treatment. Mental ill-health takes many forms including neurosis (a functional derangement, e.g. phobias) and psychosis (a severe mental derangement involving the whole personality, e.g. paranoia, schizophrenia). There are increasing numbers of elderly people who are medically classified as having an acquired organic brain syndrome, such as dementia, caused by Alzheimer's disease or vascular disease.

### Learning disability

6. People can be learning disabled when they have a brain that will not develop or function normally. There is no cure, although education and training, coupled with a disability awareness culture, assists them to become independent members of society able to fulfil their personal potential. The causes are varied and in many cases unknown, but fall into the following general categories.

#### *Genetic*

7. The best-known example is Down's Syndrome but there are many others. Medical intervention at an early stage may assist and the right adjustments in educational methods and adult working life can enable individuals to use their abilities more fully.

#### *External causes*

8. These include maternal disease (e.g. German measles), toxins (substances taken during pregnancy, vaccine damage or food allergies) and trauma (birth injury or accident in childhood).

#### *Non-specific*

9. The largest category comprises conditions whose causes have not yet been recognised. These are people at the lower end of the normal range of intelligence, but many are near the borderline and may not require any great amount of specialist services, and some go unrecognised. Environmental and social factors may play a part.
10. Until recently, identification tended to be based upon level of intelligence as identified by the IQ score (intelligence quotient). Such assessment is of little use to care workers who prefer to classify people according to their degree of independence, which involves consideration of levels of competence in performing skills such as eating, dressing, communication and social skills. Nor should it be relied upon by lawyers who wish to establish whether the individual lacks capacity (see below).

### Brain injury

11. The third general category is those who have brain injury (see Glossary). Their care and treatment differs from that for adults with a mental health problem or learning disability. Traumatic or acquired brain injury is caused at least initially by outside force, but includes the complications which can follow, such as damage caused by lack of oxygen and rising pressure and swelling in the brain. Road traffic accidents account

for half of all head injuries, with domestic and industrial accidents, sports and recreation making up the other half.

12. The physical, observable effects of brain injury may be limited; many people, particularly children and young people, will not experience any physical consequences. However, damage to the frontal lobe of the brain may give rise to impairments of various cognitive functions that may need particular accommodation in the context of courts and tribunals because of problems related to memory, concentration, and understanding fast speech, among other things. Damage caused during the developmental years (e.g. during childbirth) is generally classified as a learning disability.

### **Terminology**

13. Words used by society to describe mental conditions or limitations have changed in their usage and meaning since the early Acts of Parliament intended to protect the individuals involved. For this reason, terms such as moron, idiot and imbecile are no longer used by the caring professions and are not acceptable in modern society. There is a constant search for appropriate terms that do not carry a judgmental stigma, but there has been no consistency in the terminology adopted.

### Learning disability

14. In England and Wales the legal term for this condition used to be 'mental subnormality' and later 'mental handicap', whereas in Scotland it was 'mental deficiency' and in the USA 'mental retardation'. 'Learning disability' or 'learning difficulties' and 'intellectual impairment' are increasingly being used. In an educational context the expression 'learning difficulties' is more often used.
15. There are many voluntary groups that concentrate upon particular types of learning disability and it is convenient (and reassuring to the parents) to identify an impairment by means of a name or 'label' which is immediately recognised by the public and enables people to offer the most appropriate support. It is therefore helpful to be aware of the more common names, although they may not represent a precise medical classification and have no legal significance. Identified medical conditions include Down's Syndrome, cerebral palsy, autism, hydrocephalus and the effects of meningitis and encephalitis (see the Glossary). Some children are referred to as being 'hyper-active' although this condition frequently subsides as they grow up. Each identified condition exhibits its own features, whether these are in the form of behavioural or physical manifestations – most of us can identify a child with Down's Syndrome.

### Mental disorder

16. The term mental disorder is defined by the Mental Health Act 1983 s. 1 (2) as 'any disorder or disability of the mind'. For the purposes of the Act a person with a learning disability is not be considered by reason of that disability suffering from mental disorder ....'unless that disability is associated with abnormally aggressive or seriously irresponsible conduct on his part' s 1(2) (A). Although this definition is exclusive to the compulsory detention procedure, it does provide useful guidance for wider purposes.

17. Dependence on alcohol or drugs is not (per se) considered to be a disorder or disability of the mind s. 1 (3).

### **The conduct of court and tribunal hearings**

18. Most solicitors are unlikely to provide documentation on the needs of a client with a mental disability, together with information on how the symptoms are likely to disadvantage him or her. Hearing management aims to recognise and accommodate any aspects of disability that could place the affected individual at an unfair disadvantage so a general enquiry could be part of the routine.

#### Pre-hearing planning

19. If a disability is indicated on court or tribunal pro-formas both the administration and the judiciary should act on this information, requesting further documentation or arranging a directions hearing to consider requirements arising out of special needs. There may be a duty to make reasonable adjustments under the Equality Act 2010
20. Rather than making assumptions based on generic information or knowledge of previous cases, decisions concerning case and hearing management should address the particular needs of the individual concerned insofar as these are reasonable. The individual should be consulted or given an opportunity to express their needs. Expert evidence may be required.

#### Practical measures

21. In some instances the impairment will comprise a combination of mental and physical disabilities. Both should then be addressed, separately or together, as appropriate.

#### *Place of trial*

22. The need to arrange for evidence to be taken by depositions or for the trial to take place other than in a courtroom may be less evident as access is unlikely to be a problem, although the individual may be better able to give evidence in a familiar environment. A longer time estimate may be required because of the need to take evidence more slowly and with more breaks.

#### *Communication*

23. A modified approach may be required when seeking to obtain reliable evidence from a person with mental health problems, especially those who are mentally frail, and the judge will wish to control any form of harassment by an over-zealous advocate. It is necessary to ascertain whether any communication difficulties are the result of mental impairment or caused by physical limitations which can be overcome by the use of physical aids or other techniques. An interpreter may be able to assist with strange or distorted speech.

#### *Facilities*

24. The environment may be unsuitable to the individual for reasons that are not apparent (e.g. certain kinds of lighting can affect those with epilepsy). Appropriate changes may then need to be made.

### *Rights of audience*

25. It is difficult for almost anyone to represent themselves in court or tribunal hearing and if a person has a learning disability or mental health condition that is worsened by stress, for example, then it becomes much more difficult. Representing oneself may be inadvisable for people with mental disabilities, so the difficulties of doing so should be made clear and information on legal advice provided. If the individual still decides to go ahead, clear written guidelines should be provided on court and tribunal procedures and terminology. The presence of a McKenzie friend in civil or family proceedings or an independent mental health advocate in a tribunal should be encouraged in order to help locate information, prompt as necessary during the questioning of witnesses and provide the opportunity for brief discussion of issues as they arise. A more tolerant approach to the use of a lay representative may assist.

### **Witnesses with mental disability**

#### Evidence

26. In civil, tribunal and family proceedings evidence may only be given by an individual who is considered by the judge to be competent to give evidence. There is no reason to assume that a witness who has a learning disability or mental health condition is not competent to give evidence. There may be some instances across the range of mental disabilities where a particular witness may have difficulty recalling or recounting information.
27. Evidence may be admitted as to the capacity of the witness in general terms, but not as to the likelihood of the witness being able to give a truthful account. Unlike criminal proceedings, the oath is not obligatory so there is no requirement of ability to understand the nature and consequences of taking the oath. Much may depend upon the approach of the individual judge, and this may depend upon understanding of mental disability, tolerance and prejudices. Witness Intermediaries may also assist; this service is no longer restricted to criminal cases but a fee may be charged in family and civil cases.

#### Vulnerability

28. Health and abilities can affect people's experience of contacts with the justice process and their performance as witnesses. Research has identified the following three main areas of personal functioning which can be affected by mental impairment or learning disabilities.

#### *Memory*

29. This may take the form of taking longer to absorb, comprehend and recall information. Recall of details such as chronological order may be particularly affected and recall of significant events may be blocked if they were traumatic. Questions may need to be repeated or rephrased.

#### *Communication skills*

30. Having a limited vocabulary results in remembering things in pictures rather than words, leading to difficulties in understanding and answering questions. There may

also be difficulty in explaining things in a way other people find easy to follow, or understanding subtleties of language or social etiquette.

*Response to perceived aggression*

31. 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.

Taking evidence from a witness with a mental disability

32. Speak more slowly where appropriate, allow pauses for assimilation, use simple words and sentences, and do not go on too long without a break.
33. Avoid 'yes/no' answers and questions suggesting the answer or containing a choice of answers which may not include the correct one.
34. Do not keep repeating questions as this may suggest that the answers are not believed and by itself encourage a change, but the same question may be asked at a later stage to check that consistent answers are being given.
35. Deal with issues in chronological order and do not move to new topics without explanation (e.g. "can we now talk about") or ask abstract questions (e.g. ask "was it after breakfast" rather than "was it after 9.00 am").
36. Do not make assumptions about timing and lifestyles – a tag to link the question may be helpful (e.g. a TV programme or phone call).
37. Allow a witness to tell their own story and do not ignore information which does not fit in with assumptions as there may be a valid explanation for any apparent confusion (e.g. the witness may be telling the correct story but using one or more words in a different context at a different level of understanding).
38. Advocates often do not have the necessary understanding of particular mental impairments (e.g. learning disabilities) to formulate questions in a way that the witness can understand – it may be necessary to explain something more than once using simple language.
39. Always ensure that witnesses are treated with due respect and are not ridiculed if they are unable to understand the way questions are being asked.

MIND's report *Achieving justice for victims and witnesses with mental distress*

[[www.mind.org.uk/assets/0000/9950/Prosecutors\\_\\_toolkit.pdf](http://www.mind.org.uk/assets/0000/9950/Prosecutors__toolkit.pdf)] sets out suggestions including use of screens to help witnesses to focus, allowing companions in the witness box, removal of wigs and gowns and taking regular breaks.

## ***Specific Learning Difficulties (SpLDs)***

### **Key points**

- Specific learning difficulties such as dyslexia are a family of related conditions and must not be confused with learning disabilities which affect all areas of daily living and correlate with low intelligence.
- Many people with specific learning difficulties show signs of more than one profile and some develop a mental illness as well (typically depression or anxiety).
- Some of the reasonable adjustments required for people with mental disabilities may also be appropriate for those with specific learning difficulties but other more specific adjustments may be required.

### **Overview of SpLDs**

40. These are a family of inter-related neurological conditions affecting 10% of the population to a lesser or greater extent. The word 'specific' is useful because it conveys the fact that only some areas of functioning are affected, whereas other areas operate normally.

### Terminology

41. Specific learning difficulties is generally used as an umbrella term to cover dyslexia, dyspraxia/ developmental co-ordination disorder, dyscalculia and attention deficit (hyperactivity) disorder. Dyslexia is the best known; it was initially referred to as 'word blindness' but has implications beyond literacy.
42. In the more positive climate of recent years, people with SpLDs now tend to refer to themselves as having 'specific learning differences'. Some adults regard a label containing the word 'learning' as inappropriate since they are no longer in school or college and favour 'processing differences' or neuro-diversity.

### Causes

43. SpLDs are congenital, largely heritable conditions which may affect the development of a range of cognitive, motor and attentional skills. They are life-long in their effects and characterised by weaknesses in key areas of functioning which contrast with normal or above-average abilities in unaffected areas. Some people are unaware that they have a recognised condition and struggle without understanding the underlying reason for their problems. Acquired dyslexia following brain injury, trauma or infection is far less common than developmental dyslexia and will generally be documented following medical assessments. However psychologists or suitably qualified tutors are appropriate to supply documentation on developmental dyslexia.

### Characteristics

44. The brains of people with SpLDs operate differently from those of the rest of the population and show anatomical differences in some cases. This difference often manifests itself as an unexpected combination of competence and incompetence. In the case of dyslexia areas of skill can include creative thinking and intuitive understanding of how things work, good spatial skills and entrepreneurship.

45. The overall profile of difficulties varies considerably from person to person as does the extent to which they are affected. Only those who experience a substantial and long-term adverse effect are covered by the disability discrimination provisions of the Equality Act 2010, but the needs of many more should be considered in the conduct of court proceedings.
46. Since a number of key problem areas are associated with more than one SpLD it is now good practice not to consider these conditions in isolation but to be aware of the possible overlap. The range of difficulties include:
  - a. a weak short-term memory;
  - b. a poor working memory - this shows itself as the inability to hold on to several pieces of information at the same time;
  - c. poor organisation and time management with particular difficulties estimating the passage of time;
  - d. inefficient processing of information which could relate to written texts, oral responses or listening skills – there may be a delay between hearing something and understanding it;
  - e. difficulty presenting information in a logical sequential way;
  - f. word-finding problems, lack of precision in speech, misunderstandings and misinterpretations;
  - g. 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;
  - h. problems retaining sequences of numbers or letters and muddling left and right;
  - i. limited awareness of the consequences of their speech or actions – this relates in particular to people with attention deficit (hyperactivity) disorder.
47. In addition to the above, many people with SpLDs experience visual stress. Symptoms include continually losing their place, perceived distortions when reading so that the letters appear to move or become blurred, and a dazzling glare from white paper.
48. Autistic characteristics can co-exist with SpLDs, whilst Asperger Syndrome requires particular consideration due to acute difficulties with social interaction, which are not always apparent.

#### Coping strategies

49. By adulthood most individuals with SpLDs have developed an array of compensatory and coping strategies which require sustained effort and energy. These are likely to break down in stressful situations, leaving the individual struggling to process spoken or written language (e.g. an individual with dyslexia may appear completely incompetent in situations of stress).
50. Some people with SpLDs have come to rely so heavily on technology for many aspects of their daily lives that they feel quite disabled when they are not allowed to use it, for example in court. Others report that they experience mental overload and are unable

to recall what has transpired or the outcome of the hearing so they may need, yet cannot always obtain or afford, a transcript.

## **Impact of SpLDs in a court setting**

### Problems encountered

51. The following problem areas are reported by people with SpLDs who have experience of court or tribunal proceedings:
  - a. a build up of stress, due to long delays at the hearing;
  - b. impossibility of following the cut and thrust of court exchanges;
  - c. difficulty coping with oblique, implied and compound questions;
  - d. failure to grasp nuances, allusions and metaphorical language;
  - e. difficulties giving accurate answers relating to dates, times or place names;
  - f. problems providing consistent information on sequences of actions;
  - g. inability to find the place in a mass of documentation, as directed;
  - h. impossibility of assimilating any new documentation at short notice;
  - i. coping with a room full of strangers in unfamiliar settings;
  - j. maintaining concentration and focus, mental overload;
  - k. feelings of panic, resulting in the urge to provide any answer in order to get the proceedings over with as quickly as possible;
  - l. anxiety that use of inappropriate tone may create a misleading impression;
  - m. an experience of sensory overload from the lights, bustle and distractions – this is a major factor for people with Asperger Syndrome.
52. People with SpLDs will be concerned about how their behaviour might be perceived: inconsistencies could imply untruthfulness; failure to grasp the point of a question could come across as evasive; lack of eye contact could be misinterpreted as being 'shifty' and an over-loud voice might be regarded as aggressive. The overriding worry is that a loss of credibility occurs when they do not 'perform' as expected.
53. Communication skills are often poor in people with SpLDs. They may miss the point, go off on a tangent, appear garrulous and imprecise or find that words fail them altogether so that they are unable to proceed. Despite their efforts they may only respond to the last part of a question or may unintentionally mislead the court through incorrect word usage.

### Taking evidence from adults with SpLDs

54. The reasonable adjustments required for people with mental disabilities may also be relevant for those with SpLDs but other more specific adjustments may be required. It is of paramount importance that adults with SpLDs are reassured that:
  - a. they may seek clarification at any stage by asking for a question to be repeated or re-phrasing it to check understanding;

- b. they can take their time when considering responses and can inform the judge when they are no longer able to maintain concentration;
  - c. misunderstandings on their part will not be treated as evasiveness and inconsistencies will not be regarded as indications of untruthfulness;
  - d. they are not expected to rely on their memory alone for details of dates, times locations and sequences of events;
  - e. they will not be expected to skim through and absorb new documentation or locate specific pieces of information in the court bundle.
55. In some cases lighting and temperature will be an issue. Some people will also encounter visual stress and be unable to read easily (if at all) from black text on a white background. Once 'mental overload' has been reached the individual is unable to participate in the process and requires an opportunity to recover. In order to cope with these types of problems, advocates and judges must show patience, understanding and flexibility.
56. Written communication should be in plain English and font size should be at least 12 point. Court and tribunal location details should include local landmarks, public transport information and a contact phone number. Electronic communication helps those who rely on speech recognition software.

## ***Mental Capacity***

### **Key points**

- An adult who lacks mental capacity (in the legal sense) will not be able to make decisions that others should act upon, so may be unable to enter into contracts, administer their own affairs, conduct litigation or even choose their own lifestyle.
- There is no universal test of mental capacity – the legal test to be applied relates to the decision made or to be made.
- Capacity depends upon the individual's understanding rather than status or the outcome of any decisions made.
- Capacity is a question of fact to be determined by the court on all the available evidence of which the views of a doctor as an expert only comprise a part.
- Court rules identify parties who are incapable of conducting litigation without a representative.

### **Introduction**

57. The legal system relies on the assumption that people are capable of making, and thus 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.
58. Whilst at first glance it might seem convenient if people could be legally categorised as either capable or incapable according to a simple test based upon a general assessment, this is over simplistic and would be inappropriate. The test of capacity to

drive is clearly different from that to get married, and the capacity required to sign a will differs from that for an enduring power of attorney. It would be discriminatory to apply a standard test for all purposes, as most individuals have some level of capacity and this should be identified and respected.

## Approaches

59. There are three possible approaches to the question of mental incapacity:

a. Outcome

Determined by the content of the decision (e.g. if it is illogical or foolish the maker must lack capacity). This approach is flawed because we are all entitled to be eccentric and a judgment as to what is foolish is subjective.

b. Status

Judged according to the status of the individual such as age (e.g. over 90 years), a medical diagnosis (e.g. senile dementia) or place of residence (e.g. being in a mental hospital). Except in the case of children this approach was abandoned long ago (at one time women lacked capacity). Detention under the Mental Health Act 1983 does not necessarily deprive the patient of decision-making capacity.

c. Understanding

The ability of the individual to understand the nature and effect of the particular decision and to act on that understanding is assessed. A test based on understanding is generally appropriate, although the outcome of decisions or the individual's status may result in capacity being questioned and the appropriate test should then be applied.

## Appearance

60. Whilst the law is concerned with what is going on in the mind, society tends to be concerned with the outward manifestations but we should never make assumptions based on appearance.

a. The difference between ability and capacity must be recognised, as it is not unusual for communication difficulties to create a false impression of lack of mental capacity.

b. A person's appearance (perhaps the consequence of physical disabilities) can create an impression of lack of mental capacity which is not justified.

c. Observance of the conventions of society or communication skills can disguise lack of capacity (e.g. a learnt behaviour pattern).

## Criteria

61. When making assessments different professions apply different criteria.

a. The medical profession is concerned with diagnosis and prognosis, and health authorities are increasingly being relieved of the responsibility to care for those with mental disabilities who do not respond to conventional medical treatment.

- b. Care professionals classify people according to their degree of independence, which involves consideration of levels of competence in performing skills such as eating, dressing, communication and social skills.
  - c. The lawyer is concerned with legal capacity, namely whether the individual is capable of making a reasoned and informed decision, and able to communicate that decision.
62. This should be borne in mind when seeking opinions about capacity. A multi-disciplinary approach is usually best in difficult or disputed cases, and the assessment should not then be left entirely to the doctor. A lawyer who gathers evidence and expert opinion from a variety of sources may be in the best position to make an assessment of capacity, and in disputed cases that is the role of the court.

### ***Assessment of capacity***

63. Legal tests vary according to the particular transaction or act involved, but generally relate to the matters which the individual is required to understand. It has been stated (in regard to medical treatment, though the test is no doubt universal) that the individual must be able to (a) understand and retain information and (b) weigh that information in the balance to arrive at a choice (per Butler-Sloss LJ in *Re MB* [1997] 2 FCR 541, CA).

### **Presumptions**

64. There is a presumption that an adult is capable but this may be rebutted by a specific finding of incapacity.
- a. If a person is proved incapable of entering into contracts generally, the law may presume such condition to continue until it is proved to have ceased, although there may be a lucid interval.
  - b. If an act and the manner in which it was carried out are rational, there is a strong presumption that the individual was mentally capable at the time.
  - c. Eccentricity of behaviour is not necessarily a sign of incapacity and care should be exercised before any assumption is made.

### **Determining capacity**

65. Where doubt is raised as to mental capacity the question to ask is not 'Is he (or she) capable?' or even 'Is he (or she) incapable?' but rather 'Is he (or she) incapable of this particular act or decision at the present time?' It may be necessary to determine the issue of capacity at a separate hearing. Note in particular that:
- a. Capacity is an issue of fact, though it is necessary to identify and apply the appropriate legal definition or test.
  - b. 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.
  - c. Capacity must be judged for the individual in respect of the particular decision or transaction at the time it was taken or is to be taken.

- d. In legal proceedings, a judge makes the determination, not as medical expert but as a lay person influenced by personal observation and on the basis of evidence not only from doctors but also from those who know the individual.

### **Evidence**

66. General reputation is not admissible in evidence, but the treatment by friends and family of a person alleged to lack mental capacity may be admissible. Evidence of conduct at other times is admissible, and the general pattern of life of the individual may be of great weight, although it is the state of mind at the time of the decision that is material.
67. 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.
68. A person alleged to lack capacity should be given the opportunity to make representations unless the issue is beyond doubt, and 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.

### **Implications**

69. In general terms, lack of capacity will mean that the person is (or was) not capable of entering into the particular contract and therefore that any contract purportedly entered into is not binding if the other party was aware of the lack of capacity. In a more specific context, it may be a will or an enduring power of attorney that is not valid.
70. Different tests will be imposed when considering the responsibility of an individual (e.g. in negligence). The criminal law imposes its own requirements and the approach to capacity outlined here will be less relevant, although issues of capacity still arise in the course of criminal proceedings (e.g. is the accused fit to plead?).

### **Guidance**

71. Helpful guidance is given in *Assessment of Mental Capacity: Guidance for Doctors and Lawyers* published jointly by the Law Society and BMA (3rd edition, 2009).

### ***Civil and family proceedings - procedure***

#### **Rules**

72. For many years special procedures have applied in respect of proceedings by and against a 'person under disability' (as defined). These ensured that a representative was appointed, compromises and settlements of claims were approved by the court, and there was supervision of any money recovered. The rules dealt with proceedings involving children (variously described as 'minors' and 'infants') and 'patients' as parties. Both categories are deemed incapable of conducting their own proceedings, the former due to age and the latter due to personal factors other than age (old age by itself is not a barrier to conducting proceedings). We are only concerned here with adults.

73. The expression 'person under disability' is no longer used and, following implementation of the new mental capacity jurisdiction, a person should not be stigmatised as a 'patient' so the term has been replaced by 'protected party' and a new definition introduced. The procedures are now to be found in the following rules:
- a. Civil Procedure Rules 1998 (CPR), Part 21;
  - b. Family Procedure Rules 2010 (FPR), Part 15;
  - c. Insolvency Rules 1986, Part 7, Chapter 7.

### **Patient/protected party**

#### Old definition

74. The term 'patient' was defined in the former rules as:  
'a person who by reason of mental disorder within the meaning of the Mental Health Act 1983 is incapable of managing and administering his property and affairs'.
75. A similar definition was used to establish the jurisdiction of the 'old' Court of Protection to administer the property and affairs of 'patients' (i.e. under Part VII of the Mental Health Act 1983).
76. This was a three stage test: (i) did the party have a mental disorder (the term is widely defined and the threshold not high); (ii) was the party incapable; (iii) was the incapacity due to the mental disorder? The need for a 'mental disorder' acted as a screening process to exclude mere eccentricity and the effect of alcohol or drugs, but the term remains widely defined. Whilst incapacity by itself might result in a transaction being unenforceable, it was only when it was by reason of mental disorder that the law took away personal powers and enabled these to be delegated. A diagnosis of mental disorder was required, but this did not necessarily result in a finding of incapacity – an assessment of capacity still had to be made.
77. Recognising that tests of capacity are decision specific, the Court of Appeal held that the rule should be read as 'incapable of managing the proceedings' (i.e. giving instructions for the conduct of the proceedings) in *Masterman-Lister v Brutton & Co and Jewell & Home Counties Dairies* [2002] EWCA Civ 1889.

#### New definition

78. Following the Mental Capacity Act 2005, the term in the CPR and FPR has changed to protected party and the definition has become:  
'a party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings.'
79. Section 2 of the 2005 Act provides that:  
'... a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'
80. Section 3 then amplifies 'unable to make a decision.' This thus becomes a two stage test: (i) is there is an impairment of, or disturbance in the functioning of, the person's mind or brain, and (ii) is this sufficient to render the person incapable of conducting the proceedings?

## Implications

### Assessment of capacity

81. Courts should always investigate the question of capacity whenever there is any reason to suspect that it may be absent. This is important, because if the condition is not recognised any proceedings may be of no effect although the civil and family rules do provide some discretion in this respect – see CPR r.21.3(2) and (4) and FPR r.15.3). Those rules assume that you know whether a party is a protected party and do not make any specific provision as to how an issue as to capacity is to be dealt with.
82. The solicitors acting for the parties may have little experience of such matters and may make false assumptions 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 district judge who is responsible for case management will require the assistance of an expert's report. This may be a pre-existing report or one commissioned for the purpose. It no longer needs to be by a medical practitioner but could, where appropriate (e.g where there is a learning disability), be a clinical psychologist. The judge may be assisted by seeing the person alleged to lack capacity.
83. 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.
84. Guidance has been given in the Masterman-Lister case (see above):  
'... 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.'
85. According to this decision the mental abilities required include the ability to:
  - a. recognise a problem, obtain and receive, understand and retain relevant information, including advice;
  - b. weigh the information (including that derived from advice) in the balance in reaching a decision; and then
  - c. communicate that decision.
86. The Official Solicitor may be referred to where assistance is not available from any other source (see [www.officialsolicitor.gov.uk/](http://www.officialsolicitor.gov.uk/))

### Need for a representative

87. 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 now 'litigation friend' but was previously 'next friend', if bringing the proceedings, or 'guardian ad litem', if responding. Any doubt should be

resolved as a preliminary issue before proceedings are allowed to continue. There is no procedure for the appointment of a litigation friend in the magistrates' court for family proceedings and when this requirement may arise the case should be transferred up to the county court.

### Conduct of the proceedings

88. The representative potentially has the rights of audience of an unrepresented party but in a substantial claim may not be regarded as suitable if he does not instruct a lawyer. The duty of the representative was defined by a Practice Direction to the CPR (since removed) as:  
'... fairly and competently to conduct proceedings on behalf of (the) patient. He must have no interest in the proceedings adverse to that of the... patient and all steps and decisions he takes in the proceedings must be taken for the benefit of the... patient.'
89. Any settlement or compromise will have to be approved by the court under the CPR and any money awarded may only be dealt with pursuant to the directions of the court. The appointment only relates to the proceedings and the representative has no authority as such outside those proceedings. Where significant sums are involved it will be necessary for the representative or some other suitable person to apply to the Court of Protection unless there is an attorney under a registered enduring or lasting power of attorney. There may be circumstances where the trial judge will need to contact the Court of Protection for guidance or stay the proceedings pending an application to that Court.

### **Appointment**

90. The procedure for the appointment is to be found in CPR Part 21 and FPR Part 15. The representative will need to sign a Certificate of Suitability and 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.
91. Care should be taken to select a representative who has no actual or potential conflict of interest with the protected party. Where there is no suitable person willing and able to act, the Official Solicitor will consider accepting appointment but generally wishes to have provision for payment of his costs.

### **Injunctions**

92. An injunction can be granted against a protected party, but only if he or she understands the proceedings and the nature and requirements of the injunction – *Wookey v Wookey* [1991] 3 All ER 365. This is because the tests of capacity to litigate and to comply with an injunction are different – see *P v P (Contempt of court: Mental capacity)* [1999] The Times, 21 July, CA.

### **Consequences**

93. 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 representative, yet there is little guidance as to how this representative should be selected or act.

94. Phrases such as ‘best interests’ are commonly used with little understanding of what they actually mean. It is instructive to consider the interpretation in the Mental Capacity Act 2005 which includes considering the person’s views, if ascertainable. Judges cannot simply leave an unfettered discretion to the representative 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.

### ***Decision making and mental incapacity***

#### **Background**

95. For many years procedures for delegation of decision-making powers have comprised:
- a. *Agency* – e.g. a bank mandate or ordinary power of attorney.
  - b. *Specific* – e.g. an appointee for state benefits or litigation friend for court proceedings.
  - c. *Statutory* – the jurisdiction of the (former) Court of Protection and enduring powers of attorney.
  - d. *Trusts* – either a bare trust or settlement.
96. Each has its own limitations and normal agency methods do not survive a loss of capacity. But these procedures all relate to financial decisions and there were no procedures available for other types of decision (i.e. personal welfare or healthcare).

#### **The mental capacity jurisdiction**

##### Overview

97. The Mental Capacity Act 2005 (implemented on 1 October 2007) establishes a comprehensive statutory framework, setting out how decisions should be made by and on behalf of those whose capacity to make their own decisions is in doubt. It also clarifies what actions can be taken by others involved in the care and medical treatment of people lacking capacity.
98. 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 new Court of Protection has jurisdiction to make declarations or decisions or to appoint a deputy to make decisions on the incapacitated person’s behalf.
99. The common law relating to ‘advance refusals of (medical) treatment’ is also placed on a statutory footing and there is a new offence of ‘ill-treatment and neglect’ on the part of carers, donees of lasting powers of attorney and deputies.

100. The Act's provisions 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.
101. A *Code of Practice* provides guidance for the courts, professionals and those concerned with the welfare of mentally incapacitated adults and a Public Guardian is appointed to supervise and promote the new jurisdiction. The Code is available with further guidance at [www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act](http://www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act).

### Fundamental principles

102. There are five underlying principles:
1. A decision-specific approach to capacity based on understanding and the ability to make and communicate a decision.
  2. Adults are presumed to have capacity so unjustified assumptions are outlawed and there is a 'balance of probabilities' approach.
  3. Individuals should be helped to make their own decisions with simple explanations, and they may make unwise decisions.
  4. There must be participation in decision-making and consultation with others.
  5. A 'least restrictive' approach is to be applied to intervention.

### **Key concepts**

103. There are two new concepts that apply for the purposes of this Act, namely a definition of incapacity and clarification of best interests (the basis on which decisions must be made).

### Incapacity

104. 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.'
105. This is a two-stage test, because it must be established first, that there is an impairment of, or disturbance in the functioning of, the person's mind or brain (the diagnostic criteria); and secondly, that the impairment or disturbance is sufficient to render the person incapable of making that particular decision. Capacity is thus decision-specific but it does not matter whether the impairment or disturbance is permanent or temporary.
106. Section 3 provides that a person is unable to make a decision if unable to:
- a. understand the information relevant to the decision,
  - b. retain that information,
  - c. use or weigh that information as part of the process of making the decision, or

- d. communicate his decision (whether by talking, using sign language or any other means).

107. Explanations must be provided in ways that are appropriate to the person's circumstances.

### Best interests

108. All relevant circumstances must be considered when deciding what is in a person's best interests, but the Act sets out in section 4 a checklist of factors aimed at identifying those issues most relevant to the individual who lacks capacity (as opposed to the decision-maker or any other persons). Not all the factors in the checklist will be relevant to all types of decisions or actions and the weight accorded to them will vary according to the circumstances, but they must still be considered if only to be disregarded as irrelevant to that particular situation. They include:

- a. whether the person will at some time have the required capacity,
- b. encouraging the person to participate in the decision,
- c. the person's past and present wishes and feelings,
- d. the beliefs and values that would be likely to influence the person's decision,
- e. the views of others who should be consulted.

### **Decision-making**

109. There are two areas of decision-making, namely personal welfare (which includes healthcare) and property and affairs. There are then progressive levels of decision-making:

- a. A person acting informally under section 5 which may be regarded as a general authority regarding personal welfare (although in reality it is a statutory defence).
- b. A person expending the individual's money to pay for 'necessary' goods and services under section 6 (or pledging his credit under section 7).
- c. An attorney under a lasting power of attorney (or the former enduring power of attorney).
- d. The Court of Protection making decisions or declarations.
- e. A deputy appointed by that Court.

### **The new public bodies**

#### Court of Protection

110. The new Court of Protection is a very different body to its predecessor of the same name. It is a Superior Court of Record administered by HMCTS with full status to deal with the entire range of decision-making on behalf of incapacitated adults. It takes over the financial jurisdiction of the existing Court of Protection and extends this to personal welfare (which includes health care) decisions thus absorbing the existing declaratory jurisdiction of the Family Division.

111. Most applications are dealt with 'on paper' by district judges at the Court's principle office in London but hearings may be either there or before nominated district judges

sitting in regional courts, with nominated circuit judges and High Court judges hearing the more important cases and appeals. The new Court of Protection Rules 2007 promote active case management drawing on the Civil Procedure Rules 1998.

### Public Guardian

112. The Public Guardian has a statutory appointment with an office and staff known as the Office of the Public Guardian (OPG). The new role is both administrative and supervisory and there are five key functions:
- a. To maintain a register of lasting powers of attorney (and the former enduring powers that still remain valid).
  - b. To maintain a register of deputies.
  - c. To supervise and receive security from deputies.
  - d. To receive reports from and hear representations about attorneys and deputies.
  - e. To provide reports to the Court and arrange reports from visitors.

### **The new jurisdiction**

113. There is a wider range of cases under the new jurisdiction and a consequent increase in the volume of cases. The unmet need has emerged and there is a new variety of outcomes. The Court and the Office of the Public Guardian have attained greater prominence with a wider influence, but there is a constant struggle to maintain the balance between protection and empowerment of these potentially vulnerable people.
114. At a personal level this new jurisdiction has a considerable potential to affect all our lives and those of our families in the future. We may need to have recourse to it! In terms of our judicial role the following implications may be identified:
- a. Enduring powers of attorney previously executed are still effective but since 1 October 2007 only lasting powers of attorney may be completed and registration of these does not point towards lack of capacity.
  - b. The new Court of Protection is able to deal with the full range of decision-making on behalf of adults who lack capacity in accessible local courts.
  - c. Serious medical treatment decisions are now dealt with by Family Division Judges in the Court of Protection under the statutory jurisdiction.
  - d. 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.
  - e. Cases in the county 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.
  - f. A discrete body of law is developing in regard to the assessment of capacity with a more professional approach towards decision-making issues.
  - g. The inherent jurisdiction of the High Court continues to exist for vulnerable adults who are found to lack capacity for reasons not within the Mental Capacity Act 2005.

## 8. Gender reassignment

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### *Key points*

- Transgender people, whether they are pre or post-operative trans people or trans people who do not intend to have surgery, should be referred to in their preferred or acquired gender. They should not be addressed as if they remained in the gender that was assigned to them at birth.
- In cases where disclosure of birth gender is not essential this should be omitted; it should be possible in such cases to accept the person's chosen gender identity for nearly all court and tribunal purposes.
- 'Acquired gender' is the description used in the GRA to indicate the transition from the gender assigned to a person at birth to that person's affirmed gender.
- A history of non-fetishistic transvestite dressing, often from early childhood, forms part of the diagnostic criteria of primary gender dysphoria, but this is not to equate transgender people with transvestites.
- It is unlikely that a transvestite who cross-dresses in private and sometimes in public will cross-dress in court. However, this may not always be the case and a desire or need to cross-dress may still be a relevant and important issue, for example, in divorce or family proceedings, or as the background to an offence of violence against that person.
- Section 146 of the Criminal Justice Act 2003 now provides for sentences to be aggravated for any offence motivated by hostility towards the victim on the grounds that the victim was (or was presumed to be) a transgender person.
- Fundamental principles of equality and acceptance of diversity demand that no difference in treatment is accorded to trans people or transvestites due to their manner of dress since choice of clothing, whether or not it arises through an inescapable emotional need, should be respectfully tolerated unless there is an affront to public decency or a clear intention to insult the judicial process.
- It is misguided and potentially misleading to make any assumptions as to the sexual orientation of transvestites or transgender people, which can vary across the whole spectrum of sexuality.
- Many trans people will avoid contact with the criminal justice system, including making reports to the police or pressing charges.
- Press for Change's website [www.pfc.org.uk](http://www.pfc.org.uk) and the website of the Gender Identity Research and Education Society [www.gires.org.uk](http://www.gires.org.uk) have information about equality issues relating to trans people.

### *Introduction*

1. Transsexual people, also known as transgender or trans people, suffer from a medical condition known as gender dysphoria, Gender Identity Disorder being the formal diagnosis. It has a classification in the International Classification of Diseases-10 (ICD-10), which defines transsexualism as being:

"A desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex."

2. There is some controversy over whether gender dysphoria should be classified as a disorder and the new version of the Diagnostic Statistical Manual of Mental Disorders (DSM) will replace the diagnostic term Gender Identity Disorder with the term Gender Dysphoria. According to the 7<sup>th</sup> version of the World Professional Association for Transgender Health's Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People, being transsexual, transgender, or gender nonconforming is a matter of diversity, not pathology.
3. Following treatment, which may involve cross-sex hormone therapy and, in some cases, gender confirmation, surgery, (referred to in the Gender Recognition Act 2004 as treatment for the purpose of modifying sexual characteristics) many transsexual people are strongly of the view that they no longer suffer from gender dysphoria, the treatment having been successful.
4. Gender reassignment is a protected characteristic under the Equality Act 2010, which states:

'A person has the protected characteristic of gender reassignment if the person is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.'
6. There is no requirement for a trans person to have undergone any medical treatment to be covered by the protected characteristic of gender reassignment, nor does a trans person have to be proposing to undergo, be undergoing or have undergone any process of physiological change.
7. As well as prohibiting discrimination because of a person's gender identity in most circumstances, the Equality Act 2010 also prohibits discrimination because a person associates with a trans person or is perceived to be a trans person.

### ***The process of gender reassignment***

8. The process of gender reassignment is complex and requires great personal determination.
9. Not all trans people undergo gender confirmation surgery, but for those that do, the surgical stage is part of a longer and larger sequence of events and processes that are intended to help the person's physical identity match their inner sense of gender identity.
10. Feminising/masculinising hormone therapy is the administration of oestrogens and/or anti-androgens to trans women and the administration of androgens to trans men, in order to produce changes that make them look and/or feel more like people of their preferred gender. These take the form of tablets, patches or injections and the individual will need to take these hormones for the rest of their life.

11. The transition process, which will usually involve a period of living continuously in a gender role that is congruent with the trans person's gender identity, is known within the trans community as 'transitioning'. A trans person will not be eligible for surgery unless they have lived continuously in a gender role that is congruent with their gender identity for at least a year. In many cases a period of two years is required. This period is sometimes referred to as the 'Real Life Experience' / 'Real Life Test', although these terms are somewhat controversial within the trans community.
12. Gender confirmation surgery for a trans woman (i.e. a male to female trans person, which is the greater number of trans people) typically involves penectomy (removal of the penis) and orchidectomy (removal of the testes) together with the fashioning of a neo-vagina from the scrotal material. Additional surgery may take place for more cosmetic changes, such as breast enhancement, tracheal shave to reduce the size of the Adam's apple, and shortening the vocal chords to raise pitch. Facial reconstruction may also be available. The latter procedures will tend to be privately funded.
13. For a trans man (i.e. a female to male trans person) the initial surgery tends to be mastectomy (removal of the breasts). Total hysterectomy (removal of the womb) is not universal. Surgery for trans men may also involve salpingo-oophorectomy (removal of the fallopian tubes and ovaries). Phalloplasty (the creation of a penis) is a difficult operation with a guarded prognosis. Many trans men prefer to have the creation of a micro-penis for urination, and do not pursue full phalloplasty.

### ***The Gender Recognition Act 2004***

14. The Gender Recognition Act (GRA) 2004 came into force on 4 April 2005. It creates a framework for the legal recognition of transgender people in their reassigned sex. The Act was the response to the judgment delivered at Strasbourg on 11 July 2002 in the case of *Christine Goodwin v. the United Kingdom* (application no. 28957/95) in which the European Court of Human Rights held unanimously that there had been violations of Ms Goodwin's Article 8 (right to respect for private and family life) and Article 12 (right to marry) of the European Convention on Human Rights. They found that the UK Government had a positive obligation under international law to secure the Convention rights and freedoms for trans people and had to rectify these ongoing breaches.
15. The GRA provides for the grant of a Gender Recognition Certificate (GRC), and for the decision to be made by a judicial body, the Gender Recognition Panel.
16. The Gender Recognition Panel comprises judges and medical members, and determines applications for a GRC under the GRA.
17. The public website for the Gender Recognition Panel is at [www.grp.gov.uk](http://www.grp.gov.uk).
18. The GRA permits a person of either gender to make an application for a GRC on the basis of living in their acquired gender or having changed gender under the law of a country or territory outside the UK.
19. The Panel must grant the application if satisfied that the applicant has or has had gender dysphoria, has lived in the acquired gender throughout the period of two years ending with the date on which the application is made, intends to continue to live in the acquired gender until death and complies with certain evidential and medical requirements.

20. It is worth emphasising at this point that gender confirmation surgery, as outlined above, is not a pre-requisite to the grant of a GRC. The Panel will be told why surgery has not been undergone or is not planned.
21. There are sometimes medical reasons as to why surgery has not been, or cannot be carried out. Gender confirmation surgery is major surgery which carries the usual risks associated with that. A person's physical condition may preclude safe general anaesthesia or otherwise contra-indicate surgery.
22. Funding problems may be a reason for delay in surgery; the availability of funding under the National Health Service, and indeed preliminary assessment and treatment, varies throughout the UK.
23. Not all trans people will apply for a Gender Recognition Certificate for a variety of reasons, including that entitlement to a certificate, in the case of a person who is married or in a civil partnership, will depend upon them first divorcing their spouse/dissolving their civil partnership. Many transgender people do not want to take this step because their relationship with their spouse/civil partner has accommodated and transcended the gender transition.
24. For those applicants for a GRC who are married or in civil partnerships, on satisfaction of the usual criteria the Panel will issue an interim certificate, which is limited in time and purpose. It enables an application for a divorce/dissolution to be made within six months of the grant of the Interim Certificate, which becomes a ground for divorce of itself. The Family Court will then convert the Interim Certificate into a full GRC.
25. A person who has been issued with a full GRC is entitled to marry in their acquired gender and their acquired gender becomes their gender for all purposes save that, under the GRA it does not affect their status as the mother or father of a child born prior to the grant of the GRC (section 12).
26. If a trans prisoner has been granted a GRC, that person will be accommodated in a prison appropriate for people of their acquired gender.
27. The fact that a person does not have a Gender Recognition Certificate should not be assumed to mean that they are not a trans person; they are entitled to respect and legal protection as appropriate in the gender role in which they are living.
28. The GRA states that it is an offence for a person who has acquired protected information in an official capacity about a person's application for a GRC to disclose that information to any other person. The GRA outlines a number of circumstances in which it would not be an offence to disclose the information, including, among others, that the information does not enable the individual to be recognised, that the individual has agreed to the disclosure of the information, that the disclosure is in accordance with the order of a court or tribunal, or that the disclosure is for the purpose of preventing or investigating crime. This important issue is dealt with further below.

### ***Legal requirements conflicting with individual interests***

29. When courts and tribunals come into contact with transsexual people, the requirements of the law may conflict with the needs and interests of the person involved.

30. Section 22 of the GRA makes it an offence for a person who has obtained “protected information” in an official capacity to disclose that information to any other person. Protected information is information about a person’s application for legal recognition of their acquired gender or, if they have legal recognition, their gender history.
31. There are a number of exceptions to section 22, one of which (s22(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.
32. In the case of a trans person, disclosure of birth gender may be essential but this will be rare. It will usually be possible to accept a person’s acquired gender for court and tribunal purposes without further inquiry which may not only be intrusive and offensive, but could breach Article 8 rights which arguably mean that the disclosure would need to be relevant and necessary for the proper disposal of the legal proceedings.
33. The policy intention behind S22 appears to have been that disclosure would only be permissible if made for the purpose of court proceedings; that is to say not as a generality within proceedings but as relevant to the fundamental purpose of the proceedings themselves. There are obvious instances when it will be made for this purpose e.g. for the recovery of a debt incurred in the previous name/gender, and, in those instances, disclosure is legitimate and necessary, however judges should be aware of the sensitivities and of ‘outing’ someone where their gender is not relevant to the issue in the case.

### **Guidelines**

34. The Association of Chief Police Officers (ACPO) recognises that dealing with transgender (and transvestite) people can raise difficult and sensitive issues. It has therefore adopted guidelines, which it has circulated to all forces in England and Wales. These guidelines may be usefully adapted to provide sound advice to all involved in the administration of justice. The main points are:
  - a. Everyone must be treated fairly and with respect for their personal dignity.
  - b. Where there is a question relating to a person’s gender, the person should be asked what gender they consider themselves to be, and what gender they would prefer to be treated as. In this respect, wherever possible, a person should be treated, identified and addressed in accordance with their wishes. (Thus a transgender offender may be more appropriately searched by an officer of the opposite gender to that shown on the transgender person’s birth certificate.)
  - c. Transgender people should not be accommodated or dealt with in a manner that is fundamentally inconsistent with their chosen gender identity.
  - d. No-one should be put in a situation where they may face hostility or ridicule.
35. The NOMS has a Prison Service Order in relation to the management, treatment and care of prisoners who have or have had gender dysphoria, which uses similar criteria, designed to respect the dignity and privacy of the transsexual prisoner as far as is possible within that difficult context.

***Difficulties and social stigma***

36. Since the coming into force of the Gender Recognition Act 2004 on 4 April 2005 more than 8,000 people in Britain have successfully established that they have changed their sex, some many years ago. People continue to transition between the genders and most of them blend invisibly into society in their acquired gender.
37. Whilst acceptance is improving with the understanding that gender nonconformity is an internationally recognised human phenomenon, the personal difficulties associated with gender reassignment are still huge.
38. There remains a certain mistrust of non-conventional gender behaviour generally, and, unfortunately, many trans people experience social isolation and/or discrimination. Social stigma, although lessening and now the subject of legislation under the Equality Act 2010, takes many forms, from experiencing personal violence in the home and in public arenas, to job or home loss, financial difficulties, loss of contact with families and communities, and to difficulties in personal relationships. There is a 'trans community', which is highly web-savvy, and internet information abounds. Trans people, therefore, have access to support and advice from other members of the trans community, as well as information about the difficulties that a person may face when transitioning to a gender role that is congruent with their gender identity. The process of gender reassignment must be understood against that background, and a level of respect accorded to this difficult decision.

## 9. Ethnicity, inequality and justice

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### *Key points*

- Ethnic minorities experience disadvantage associated with their ethnicity in all areas of life.
- The experience of disadvantage differs with not all ethnic minority groups experiencing disadvantage in all areas or to the same extent.
- There is considerable diversity within communities and accordingly not everyone within the same ethnic group will experience disadvantage in the same way.
- The disadvantage experienced by ethnic minorities is reflected in their treatment within the criminal justice system.
- Awareness of the communities served by the courts, including the commonplace experiences of racism and disadvantage, will assist a judge in understanding those participating in the justice system.
- It is important to avoid stereotypes based on perceived characteristics associated with a particular ethnic group. Just because the majority of members of an ethnic group have certain characteristics or views does not mean all members of the group have those characteristics or views.

### *Introduction*

1. The justice system is vital for ensuring a safe environment for everyone and for the resolving of disputes in an orderly way. Where the public, or a section of it, lacks confidence in the system, this may lead to a reduction in the reporting of crime or the provision of assistance to the police and courts, and may militate against the orderly resolution of disputes.
2. There is a perception amongst some communities that the criminal justice system is not fair and just. There is evidence that some of the concerns underlying those perceptions may be well-founded, as is explored in this chapter.
3. Further, the experience of racism or disadvantage in one sector of society will have an impact on perceptions about the administration of justice as a whole. An appearance before a court cannot be isolated from other social experiences.
4. There is, then, a particular need for judges to demonstrate fairness in the carrying out of their responsibilities if confidence in the justice system is to be maintained and promoted amongst all ethnic groups. This requires an awareness of the way in which our own actions might affect perceptions of, and confidence in, parts of the justice system. Knowledge and information about what happens outside court can help judges to ensure that what happens inside is fair and seen to be fair.
5. Some of the available statistical material is set out below to provide an introduction to the sorts of disadvantages experienced by certain minority groups within the justice system and more broadly. It is important to note that there is considerable diversity within communities and accordingly not everyone within the same ethnic group will experience disadvantage in the same way.

6. It is also important to avoid stereotypes based on perceived characteristics associated with a particular ethnic group. Just because the majority of members of an ethnic group have certain characteristics, experiences or views does not mean all members of the group have those characteristics, experiences or views.

### ***Statistical background***

7. This section contains some background facts and statistics about different ethnic minority communities and in particular the disadvantages which they experience. To summarise those facts:
- a. There is much variation between ethnic minority groups in relation to social and economic disadvantage.
  - b. Looked after children are disproportionately from ethnic minority groups.
  - c. In education, GCSE attainment levels are highest for pupils of Chinese and Indian ethnic origin, and lowest for those of Gypsy/Roma and Irish Traveller heritages.
  - d. In the labour market, all Britain's ethnic minority groups experience an 'ethnic penalty'; they are more likely to experience unemployment, and this is likely to be partly the result of racial discrimination.
  - e. Minority ethnic groups experience significant wealth inequality, and some ethnic groups are more likely to have low household incomes and live in substandard or overcrowded homes.
  - f. Crime and criminal justice experiences are also significantly different between ethnic groups.
  - g. People from certain minority groups are more likely to be subject to stop and search, arrest and imprisonment, and Black people have very much higher rates of arrest.
  - h. Ethnic minority groups are under-represented in most professions working within the justice system. This under-representation is particularly marked in the judiciary.

### ***The population***

8. Most residents of England and Wales belong to the White ethnic group (86 per cent, 48.2 million), and the majority of these belong to the White British group (80 per cent of the total population, 45.1 million). In London, 45 per cent (3.7 million) out of 8.2 million usual residents are White British.<sup>42</sup>
9. Twelve per cent (2.0 million) of households with at least two people have partners or household members of different ethnic groups, a three percentage point increase on 2001 (nine per cent, 1.4 million).<sup>43</sup>
10. Of the 13 per cent (7.5 million) of residents of England and Wales who were born outside of the UK, just over half (3.8 million) arrived in the last 10 years.<sup>44</sup>

<sup>42</sup> 2011 Census: Key statistics for England and Wales, March 2011 (Dec 2012, ONS) Statistical Bulletin.

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

11. The number of residents who state that their religion is Christian is fewer than in 2001. The size of this group decreased 13 percentage points to 59 per cent (33.2 million) in 2011 from 72 per cent (37.3 million) in 2001. The size of the group who stated that they had no religious affiliation increased by 10 percentage points from 15 per cent (7.7 million) in 2001 to 25 per cent (14.1 million) in 2011.<sup>45</sup>

### ***Attitudes and prejudice***

12. When the public is explicitly asked about prejudice, they feel that there is greater racial and religious prejudice nowadays, compared with the recent past. In 2001, two in every five people in England and Wales believed there was more racial prejudice in Britain than there had been five years previously. The view that there was more racial prejudice than five years ago increased to almost half (48%) in 2005, and to more than half (56%) in 2008.<sup>46</sup> This is so notwithstanding that there is much greater mixing between communities.<sup>47</sup>
13. Attitudes towards Muslim people appear to be particularly negative. The British social attitudes survey in 2010 indicates that the general public holds more negative attitudes towards Muslim people than people of any other faith (55% of people said that they would be concerned by the construction of a large mosque in their community, while only 15% would be similarly concerned by a large church).<sup>48</sup>
14. Research reveals negative perceptions of immigrants and asylum seekers. There is particular hostility towards illegal or undocumented immigrants. The overall level of negative attitudes is increasing with one survey revealing that the proportion of people who strongly agreed or tended to agree that there are 'too many immigrants' in the UK increased from 61% in 1997 to 70% in 2009.<sup>49</sup>
15. Gypsies and Travellers are often the subject of suspicion and disapproval, sometimes exacerbated by inaccurate media reporting.<sup>50</sup>

### ***Inequalities in social and economic life***

16. In key areas of life, such as education, housing, and employment, there is evidence that significant disadvantage is experienced by certain ethnic minorities. There is, however, a diversity of experience, and it is not possible to speak of a singular ethnic minority experience: there are widespread variations within the ethnic minority population.

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<sup>45</sup> Ibid.

<sup>46</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review* (2011) EHRC: 32 available at [http://www.equalityhumanrights.com/uploaded\\_files/triennial\\_review/how\\_fair\\_is\\_britain\\_-\\_complete\\_report.pdf](http://www.equalityhumanrights.com/uploaded_files/triennial_review/how_fair_is_britain_-_complete_report.pdf). Internal references removed.

<sup>47</sup> *2011 Census: Key statistics for England and Wales, March 2011* (Dec 2012, ONS) Statistical Bulletin.

<sup>48</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review* (2011) EHRC: 33. Internal references removed.

<sup>49</sup> Ibid. Internal references removed.

<sup>50</sup> Ibid, 35. Internal references removed.

## Looked-after children and adoption

17. As at March 2009, there were 60,900 children looked after by a local authority and for nearly two-thirds this was because of abuse or neglect.<sup>51</sup> Looked after children were disproportionately likely to come from ethnic minority groups, with only 73% being White British.
18. Of the 3300 children adopted in 2009, 82% were white, 12% were of mixed ethnic origin, 3% were Black, 2% were Asian, and 1% were from other ethnic groups.
19. Looked-after children in England experience low educational performance, with just 15% getting 5 GCSEs A\*–C. Looked-after children are four times as likely to be permanently excluded from school as their peers; twice as likely to be convicted or subject to a final warning or reprimand from the police; four times as likely to be unemployed at the end of Year 11; and ten times as likely to have a statement of Special Educational Needs (SEN).<sup>52</sup>

## Education

20. In England, there are a large differences between ethnic groups in the percentage of pupils achieving 5+ good GCSEs including English and Maths:
  - a. A high proportion of Chinese (72%) and Indian (67%) pupils achieved 5+ good GCSEs in 2009.
  - b. The proportion of Bangladeshi, Black African and White British pupils was close to the average (of 51%).
  - c. Black Caribbean and Pakistani students fell below the average at 39% and 43% respectively;
  - d. Gypsy and Traveller children are well below the average with only 9% of children from these groups achieving this level.<sup>53</sup> Irish Traveller and Gypsy/Roma are the only ethnic groups whose performance has deteriorated sharply in recent years, dropping from 42% and 23% of pupils respectively getting 5 GCSEs A\*–C in 2003, to just 16% and 14% in 2007.<sup>54</sup>
  - e. Girls outperform boys across all ethnic minority groups.<sup>55</sup>
21. There are multiple reasons for educational advantage and disadvantage. Lower socio-economic status is a key factor in explaining low educational attainment, perhaps because of lower parental aspirations<sup>56</sup> and less parental engagement with schools

<sup>51</sup> DCSF (2009) *Children Looked after in England (Including Adoption and Care Leavers) Year Ending 31 March 2009*. SFR 25/2009. London: DCSF.

<sup>52</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review* (2011) EHR: 314. Internal references removed.

<sup>53</sup> *Ibid*, 332-3. Internal references removed. Some care needs to be taken with these comparisons because of the low number of eligible Gypsy and Traveller pupils.

<sup>54</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review* (2011) EHR: 313. Internal references removed.

<sup>55</sup> *Ibid*, 333. Internal references removed.

<sup>56</sup> Strand, S. (2008) *Minority Ethnic Pupils in the Longitudinal Study of Young People in England: Extension Report on Performance in Public Examinations at Age 16*. Dcsf Rb029. London: DCSF. See too, *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review* (2011) EHR: 300.

and the education process.<sup>57</sup> This may be compounded in disadvantaged areas where some minority ethnic pupils (of Indian, Pakistani, Bangladeshi, and to a lesser extent Black origin) attend more ethnically segregated schools than would be expected by their representation in local neighbourhoods, thus forming a large concentration in the school with average or below-average attainment.<sup>58</sup>

22. There is also evidence of stereotyping, with teachers making assumptions about parental expectations. There is evidence, for example, that teachers' assume that 'Chinese culture' equates to high parental expectations, pro-school attitudes, and stable family structures, leading to high teacher expectations which have been linked to educational attainment.<sup>59</sup> Conversely, teachers may misread Somali pupils' cultural practices, such as looking down when spoken to by adults as a sign of respect and deference, as defiant and disrespectful<sup>60</sup> and so make negative assumptions about such pupils. They may also be overly concerned with South Asian Muslim boys' presumed fundamentalist beliefs, patriarchal orientation, and self-segregation, whilst seeing South Asian girls as passive and oppressed.<sup>61</sup>
23. When many of these factors and others are taken into account, it seems that White British children of low socio-economic status and Black Caribbean and Black African pupils from high socio-economic status homes are underachieving.<sup>62</sup> White working class children may believe themselves to be educationally worthless,<sup>63</sup> and there is some indication that Black pupils are allocated to the lower Foundation set in Maths and English, which removes the possibilities of high grades and educational success at GCSE.<sup>64</sup>

### School exclusions

24. There are significant differences in the rates of school exclusions.
25. Mixed White/Black Caribbean pupils were 2.5 times more likely to be excluded than average, with a permanent exclusion rate of 25 per 10,000 pupils. Pupils from Other Black households were twice as likely to be permanently excluded, with a rate of 20 per 10,000 pupils.

<sup>57</sup> Ball, S. (2003) *Class Strategies and the Educational Market: The Middle-Classes and Social Advantage*. London: Routledge; Lupton, R. (2003) *Schools in Disadvantaged Areas: Recognising Context and Raising Quality Case Paper 76*. London: Centre for the Analysis of Social Exclusion.

<sup>58</sup> Johnston, R., Wilson, D. and Burgess, S. (2004) *School Segregation in Multiethnic England*, *Ethnicities* 4 (2): 237-265.

<sup>59</sup> Archer, L. and Francis, B. (2005) *They Never Go Off the Rails Like Other Ethnic Groups: Teachers' Constructions of British Chinese Pupils' Gender Identities and Approaches to Learning*, *British Journal of Sociology of Education* 26 (2): 165-182.

<sup>60</sup> Howarth, C. (2004) *Re-Presentation and Resistance in the Context of School Exclusion: Reasons to Be Critical*, *Journal of Community & Applied Social Psychology* 14 (5): 356-377.

<sup>61</sup> Crozier, G. and Davies, J. (2008) *'The Trouble Is They Don't Mix': Self-Segregation or Enforced Exclusion?*, *Race Ethnicity Education* 11 (3): 285-301.

<sup>62</sup> (2008) *Minority Ethnic Pupils in the Longitudinal Study of Young People in England: Extension Report on Performance in Public Examinations at Age 16. Dcsf Rb029*. London: DCSF.

<sup>63</sup> Reay, D. (2009) *Making Sense of White Working Class Education Underachievement*, in K. P. Sveinsson (eds.) *Who Cares About the White Working Class?*, London: Runnymede Trust.

<sup>64</sup> Gillborn, D. (2008) *Racism and Education: Coincidence or Conspiracy*. London: Routledge.

26. The highest rates of permanent exclusions among ethnic minority groups were found among Black Caribbean pupils (30 per 10,000 pupils), pupils from Irish Traveller backgrounds (30 per 10,000 pupils) and Gypsy/Roma pupils (who had the highest rate at 38 per 10,000 pupils). Taken together these rates are between 3–4 times the overall exclusion rate.<sup>65</sup>
27. In addition to having very high exclusion rates, Gypsy and Traveller children have the lowest attendance rate of any ethnic minority group, at around 75% in England. In Scotland, it has been estimated that only 20% of Gypsy and Traveller children of secondary school age regularly attend school (and this percentage may be even lower in more remote areas).<sup>66</sup>

### Higher education

28. The proportion of ethnic minority students in higher education has been rising fairly steadily over the last decade and that increase has been experienced by all ethnic minority groups, with the largest increase being among Black students.<sup>67</sup>
29. However, students from some ethnic minority groups are far less likely to leave university with a first or upper second class degree than others. In 2008/09 White students were most likely to achieve this level with nearly seven in ten (67%) White students leaving with a first or upper second class degree, compared to fewer than four in ten Black students (38%).<sup>68</sup>

### Adult educational achievement and literacy

30. There are different levels of literacy and educational achievement amongst adults as between ethnic groups.
31. Most differences in basic skills between ethnic groups disappear when those for whom English is not a first language are excluded from the pool for comparison, indicating that much of the difference is attributable to the fact that a significant number of people in ethnic minority groups speak English as an additional language. However, the exception to this is in the case of those in Black or Asian groups. There is a strong correlation between being in a Black or Asian ethnic group and having poorer literacy skills, in particular for women.
32. Black men are more likely to lack basic numeracy skills than any other ethnic groups.<sup>69</sup> With the exception of Black Caribbean/Black African women, ethnic minority people over the age of 45 appear less likely to reach functional literacy.<sup>70</sup>

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<sup>65</sup> Although some care is needed in using these estimates owing to the possible under-recording of pupils from the Gypsy/Roma and Irish Traveller groups, and the small population sizes: *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review* (2011) EHRC: 313. Internal references removed.

<sup>66</sup> Ibid.

<sup>67</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review* (2011) EHRC: 344. Internal references removed.

<sup>68</sup> Ibid.

<sup>69</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review* (2011) EHRC: 355. Internal references removed.

<sup>70</sup> Ibid.

33. One study in 2004 found that 21% of men and 9% of women from the Gypsy and Traveller communities could not read at all, and 14% of men and women could not write anything.<sup>71</sup>
34. In most ethnic minority groups women are more likely to have no qualifications than men. Substantial groups of Black Caribbean and Mixed White women have no qualifications. Other Mixed groups also have large groups of women without qualifications. Far higher proportions of Bangladeshi and Pakistani men in these groups have no qualifications compared to men in all other ethnic groups and nearly a quarter of women have no qualifications.<sup>72</sup>

## Employment

35. Although employment disadvantage is experienced differently across ethnic groups, all ethnic minorities experience some disadvantage.
36. Unemployment rates remain higher for all ethnic minority groups with Pakistani and Bangladeshi men experiencing the lowest levels of employment amongst men and Bangladeshi and Pakistani women showing exceptionally low levels of employment.<sup>73</sup>
37. The low levels of employment amongst Bangladeshi and Pakistani women, which corresponds to a similar picture for Muslim women, includes those who are British-born. It is not clear whether this reflects personal choice, cultural pressures, discrimination or lack of opportunities. Even comparing those with degrees, Pakistani and Bangladeshi women are 11 percentage points less likely to be employed than White British women.<sup>74</sup>
38. Some research indicates, too, that on many Gypsy and Traveller sites, only a small minority of households are engaged in paid work. The evidence points towards a strong preference for male self-employment with women tending not to work outside the home though sometimes engaging in traditional 'craft' work (some evidence suggests that married women with children in school are beginning to enter employment).<sup>75</sup>
39. Conversely, Black Caribbean women are more likely than any other group of women to work full-time (though less likely than average to work part-time).<sup>76</sup>
40. As amongst those employed, there is significant occupational segregation. Distinct 'occupational clustering' occurs with the most extreme examples including the following:
  - a. 24% of Pakistani men are transport drivers (mainly taxi drivers) in their main jobs

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<sup>71</sup> Ibid.

<sup>72</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 356. Internal references removed.

<sup>73</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 401. Internal references removed.

<sup>74</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 402. Internal references removed.

<sup>75</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 403-4. Internal references removed.

<sup>76</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 403. Internal references removed.

- b. 17% of Chinese men are chefs
  - c. 9% of Indian men work in ICT professions
  - d. 8% of Africans work in elementary security occupations (often security guards).
41. A disproportionate number of Pakistani men are also self-employed (21%).
  42. Ethnic minority women are clustered in a narrow range of jobs. For Black African and Caribbean women, the most notable occupational clustering is associated with healthcare and related personal services occupations. These include nursing auxiliaries and care assistant positions that tend to be less well paid than other healthcare-related jobs.<sup>77</sup>
  43. Ethnic minorities experience a 'pay penalty'. In 2004–07 White British women experienced a pay gap of 16%. However, this rose to 21% for Black African women and 26% for Pakistani women with Chinese and Pakistani Muslim women experiencing the largest penalties.
  44. In the same time period, Muslim men, whether Bangladeshi or Pakistani, earned less than might be expected given their qualifications, age and occupation, by 13% and 21% respectively. Black male graduates earn 24% less than White British male graduates.<sup>78</sup>

## Health

45. Some ethnic minority groups are more likely to experience poor health. Evidence suggests that Pakistani and Bangladeshi groups are more likely to report 'poor' health than average; more likely to experience poor mental health; more likely to report a disability or limiting long-term illness, and more likely to find it hard to access and communicate with their GPs than other groups. Muslim people also tend to report worse health than average.<sup>79</sup>
46. Gypsies and Travellers report high levels of 'poor' health.<sup>80</sup>
47. Asylum seekers and refugees have particular health difficulties because of the impact of relocation and possible past experience of trauma.<sup>81</sup>
48. Research has suggested that there may be an association between harassment and poor mental health. Some evidence suggests that Gypsies and Travellers and asylum seekers, who are perhaps more likely than other groups to face hostility and misunderstanding, are all more likely to experience poor mental health.<sup>82</sup>

<sup>77</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 428. Internal references removed.

<sup>78</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 416. Internal references removed.

<sup>79</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 250. Internal references removed.

<sup>80</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 264. Internal references removed.

<sup>81</sup> *Ibid.*

<sup>82</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 250, 261–264. Internal references removed.

## Economic inequality

49. Minority ethnic groups experience significant wealth inequality.<sup>83</sup>
50. Some ethnic minority groups experience much worse outcomes than average. These are even worse than might be expected, taking into account differences in age structures, educational attainments and other factors. People of Indian origin are more likely to have low household income than White people, despite the fact that a small proportion of Indians earn low hourly wages and they have higher than average educational attainments. More than half of Pakistani and Bangladeshi adults live in poverty.<sup>84</sup> Gypsies and Travellers are also at higher risk of poverty.<sup>85</sup> Asian and Black households are also several times more likely than White British households to live in overcrowded or substandard homes.<sup>86</sup>
51. Asylum seekers are at particular risk of real abject poverty because they are not allowed to work while waiting for their cases to be determined. If at risk of becoming destitute in the meantime, they can apply for minimal subsistence which, if they qualify, may cover housing and cash support at around 70% of benefit levels.<sup>87</sup> Accordingly, they will usually live on very low incomes.

## New migrant communities

52. In the UK, many migrants have British citizenship and have become part of settled ethnic minority communities. Newer migrants are an increasingly diverse group, coming from almost every nation in the world. They include: those from EU states; those from outside the EU; asylum seekers; refugees; spouses/fiancé(e)s and civil partners; overseas students; British nationals returning from living abroad; and irregular migrants including visa and asylum seekers and clandestine entrants. The latter groups are likely to be concentrated in the informal labour market earning very low wages.<sup>88</sup>
53. There are also a significant number of trafficked immigrants<sup>89</sup> whose formal status will be unlawful making them especially vulnerable. In 2010, research commissioned by the Association of Chief Police Officers (ACPO) estimated that of the 17,000 migrant women involved in off-street prostitution in England and Wales 2,600 had been trafficked, whilst a further 9,600 were vulnerable to trafficking. The majority of the women were from China and South East Asia with around 400 from Eastern Europe.<sup>90</sup>

<sup>83</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 460.

<sup>84</sup> *Ibid.*

<sup>85</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 484.

<sup>86</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 460.

<sup>87</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHR: 484–5. Internal references removed.

<sup>88</sup> Rutter, J. and Lattore, M. (2009) *Migration, Migrants and Inequality*, in J. Hills, T. Sefton and K. Stewart (eds.) *Towards a More Equal Society? New Labour, Poverty, Inequality and Exclusion*, Bristol: Policy Press.

<sup>89</sup> *Human Trafficking: Practical Guidance (2013)* Home Office.

<sup>90</sup> *'Setting the Record': The Trafficking of migrant women in the England and Wales off-street prostitution sector. Project Acumen*, K. Jackson, J. Jeffery and G. Adamson (2010) ACPO.

54. Total long-term immigration to the UK has fallen over the recent past (leading to a reduction in rates of net migration). The total number of citizens from EU Accession countries who immigrated to the UK has decreased significantly over the recent period and there has also been a significant decrease in the number of citizens from New Commonwealth countries immigrating to the UK. The latter decrease is as a result of fewer New Commonwealth citizens arriving to study in the UK.<sup>91</sup>
55. However, study continues to be the most common reason for migrating to the UK.<sup>92</sup>
56. In the past migrants have mostly settled into urban areas, but this generation of migrants can be found in suburban and rural areas too. Of UK-born heads of households, 74% were owner-occupiers, 17% were in social housing and 7% rented privately. Among the foreign-born, 64% rented privately, 11% were in social housing and 17% were owner-occupiers.<sup>93</sup>
57. Among legal migrants, proportionately more of the foreign-born have a higher-level qualification than the UK-born population, but the foreign born also have higher proportions of those who are completely unqualified. Poor levels of English are more commonly found among those born in Poland, Bangladesh, Sri Lanka, Somalia, Turkey, Iraq and Slovakia.<sup>94</sup>
58. More than 3000 children arrive in the UK alone every year seeking asylum. Although there have been improvements in recent years, for many of the children and young people, the process of claiming asylum is a very frightening and bewildering experience.<sup>95</sup>

## ***Ethnicity, crime and criminal justice***

### **Perception and victims of crime**

59. Racist and religiously aggravated attacks are a persistent phenomenon in British life.<sup>96</sup> People from ethnic minority backgrounds are roughly twice as likely as White people to report being worried about violent crime.<sup>97</sup> People who are not Christian are roughly ten times more likely to report being attacked or harassed because of their faith than Christian people.<sup>98</sup>
60. Findings from the 2009/10 British Crime Survey interviews with children showed that a higher proportion of children in the Black and Minority Ethnic group reported that they avoided travelling on buses because they were worried about their safety and using a mobile phone in public all or most of the time as compared to the White group.<sup>99</sup>

<sup>91</sup> *Migration Statistics Quarterly Report, February 2013 (Feb 2013)* Office of National Statistics.

<sup>92</sup> Ibid.

<sup>93</sup> Rutter, J. and Lattore, M. (2009) *Social Housing Allocation and Immigrant Communities*. London: IPPR.

<sup>94</sup> Rutter, J. and Lattore, M. (2009) *Migration, Migrants and Inequality*, in J. Hills, T. Sefton and K. Stewart (eds.) *Towards a More Equal Society? New Labour, Poverty, Inequality and Exclusion*, Bristol: Policy Press.

<sup>95</sup> *Unaccompanied Children* The Children's Society, available at <http://www.childrenssociety.org.uk/what-we-do/policy-and-lobbying/young-refugees-and-migrants/unaccompanied-children>.

<sup>96</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHRC: 190.

<sup>97</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHRC: 242.

<sup>98</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHRC: 190.

<sup>99</sup> *Statistics on Race and the Criminal Justice System 2010 A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991 (Oct 2011)* Ministry of Justice: 23. Internal references removed.

61. Fear of police harassment and concern that complaints against the police will not be taken seriously is greater among ethnic minorities. There is evidence from smaller-scale studies that Gypsies and Travellers have only limited confidence in the system's ability to protect them.<sup>100</sup>
62. A survey of Gypsies and Travellers in Devon found that half of respondents had experienced racism. Out of 121 Gypsies and Travellers surveyed in the West of England, 58 had experienced harassment and intimidation. Such studies consistently find that Gypsies and Travellers downplay their experiences, and that they do not expect assistance from the authorities; many see harassment and racism as inevitable.<sup>101</sup>

### Criminal justice

63. Evidence suggests that an individual's ethnic group is not significantly associated with an increased or a reduced likelihood of offending.<sup>102</sup> However, at every point in the criminal justice system certain minority groups experience harsher outcomes.
64. Black people make up between 2–3% of the population. However, they constituted 15% of those who were stopped by the police in 2008/09. Other ethnic minority groups were also over-represented.
65. Further, between 2006/07 and 2009/10, the proportions of Stop and Searches for the Black and Asian groups increased (from 22% and 9% to 33% and 16% respectively).<sup>103</sup>
66. Gypsies and Travellers have experienced blanket raids of their sites on the basis of unfounded allegations by local communities. The police have power to remove and destroy vehicles if directions are not followed and this means that most leave voluntarily when served notice, but then lack access to legal processes to challenge the direction. This means that Travellers are often forced out of their homes by default.<sup>104</sup>
67. Across England and Wales as a whole, there were more arrests per 1,000 population for each of the Black and Minority Ethnic groups (except for Chinese or Other) than for people of White ethnicity. There were 84 arrests per 1,000 population for the Black group compared with 26 arrests per 1,000 population for the White group, 29 per 1,000 for the Asian group and 59 per 1,000 for those from a Mixed ethnic background. Per 1,000 population, Black persons were arrested 3.3 times more than White people, and those from the Mixed ethnic group 2.3 times more.<sup>105</sup> This data is best understood as evidence of whom the police suspect of committing crime.<sup>106</sup>

<sup>100</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHRC: 124. Internal references removed.

<sup>101</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHRC: 231.

<sup>102</sup> *Statistics on Race and the Criminal Justice System 2010 A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991 (Oct 2011)* Ministry of Justice: 44.

<sup>103</sup> *Statistics on Race and the Criminal Justice System 2010 A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991 (Oct 2011)* Ministry of Justice: 14.

<sup>104</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHRC: 136.

<sup>105</sup> *Statistics on Race and the Criminal Justice System 2010 A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991 (Oct 2011)* Ministry of Justice: 46.

<sup>106</sup> *Statistics on Race and the Criminal Justice System 2010 A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991 (Oct 2011)* Ministry of Justice: 44.

68. A higher percentage of those in the Black and Minority Ethnic groups were sentenced to immediate custody for indictable offences than in the White group in 2010 (White 23%, Black 27%, Asian 29% and Other 42%). In 2010, the highest average custodial sentence length for those given determinate sentences for indictable offences was recorded for the Black ethnic group, at 20.8 months, followed by the Asian and Other groups with averages of 19.9 months and 19.7 months respectively. The lowest average custodial sentence length was recorded for the White group at 14.9 months.<sup>107</sup>
69. A higher percentage of those in the BME groups were sentenced to immediate custody for indictable offences than in the White group in 2010 (White 23%, Black 27%, Asian 29% and Other 42%). In 2010, the highest average custodial sentence length for those given determinate sentences for indictable offences was recorded for the Black ethnic group, at 20.8 months, followed by the Asian and Other groups with averages of 19.9 months and 19.7 months respectively. The lowest average custodial sentence length was recorded for the White group at 14.9 months.<sup>108</sup>
70. On average, five times more Black people than White people in England and Wales are imprisoned.<sup>109</sup>

### Those who work in the criminal justice system

71. There is significant underrepresentation of certain minority groups in some parts of the main criminal justice agencies (police, CPS, Judiciary, NOMS and Probation). Ethnic minorities are most underrepresented in the police (4.8%) and most well represented in the CPS (14.9%).
72. As at 1<sup>st</sup> April 2012, there are no ethnic minority judges in the Supreme Court or Court of Appeal. Only 4.5% of the High Court bench is from an ethnic minority and only 1.7% of Circuit Judges and 2.8% of District Judges (Magistrates) are from an ethnic minority.<sup>110</sup>
73. Only 4.86% of Queen's Counsel are from a Black or Minority Ethnic group (though ethnic minorities are better represented amongst non-Queen's Counsel barristers).<sup>111</sup>
74. Amongst solicitors, Black and Minority Ethnic groups are better represented, accounting for 11.1% of solicitors.<sup>112</sup>

<sup>107</sup> *Statistics on Race and the Criminal Justice System 2010 A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991 (Oct 2011)* Ministry of Justice: 52. As with the proportion sentenced to immediate custody, these findings should be treated with caution as there are a number of factors which could affect sentence length including the mix of crimes committed, the seriousness of the offences and the plea entered.

<sup>108</sup> *Statistics on Race and the Criminal Justice System 2010 A Ministry of Justice publication under Section 95 of the Criminal Justice Act 1991 (Oct 2011)* Ministry of Justice: 52. As with the proportion sentenced to immediate custody, these findings should be treated with caution as there are a number of factors which could affect sentence length including the mix of crimes committed, the seriousness of the offences and the plea entered.

<sup>109</sup> *How Fair is Britain: Equality, Human Rights and Good Relations in 2010: The First Triennial Review (2011)* EHRC: 162.

<sup>110</sup> *Courts Diversity Statistics (Sept 2012)* available at <http://www.judiciary.gov.uk/publications-and-reports/statistics/diversity-stats-and-gen-overview>.

<sup>111</sup> *Demographic Profile of the Bar*, Bar Council, available at <http://www.barcouncil.org.uk/about-the-bar/facts-and-figures/statistics/>

<sup>112</sup> *Diversity Profile of the Profession: A Short Synopsis (May 2011)* Law Society: 9, available at [www.lawsociety.org.uk/advice/.../diversity-profile-of-the-profession/](http://www.lawsociety.org.uk/advice/.../diversity-profile-of-the-profession/)

## The Equality Act 2010

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### Key points

- The Equality Act 2010 defines ‘race’ broadly, to cover colour, ethnicity, nationality and ethnic and national origins.
- The Equality Act 2010 does not outlaw discrimination in the exercising of judicial functions but it does outlaw discrimination in the exercising of public functions and in the provision of services and so will apply to those working within the justice system whilst carrying out other functions.
- The Equality Act 2010 creates a new Public Sector Equality Duty which imposes duties on those exercising public functions to have due regard to the need to achieve certain specified equality objectives.

### ‘Race’

1. Section 9 of the Equality Act 2010 defines ‘race’ as including: colour; nationality; ethnic or national origins. The fact that a racial group comprises two or more distinct racial groups does not prevent it from constituting a particular racial group.<sup>113</sup> This means that a person who describes themselves as Black African will fall within a racial group so described.
2. As can be seen, ‘race’ is treated as embracing a number of specific characteristics.
3. ‘Colour’ is self-explanatory as a matter of fact. The concept of ‘colour’, however, has come to describe a collection of characteristics and is not merely to describe a singular physical characteristic and the comparing of skin complexion (as one tribunal once did<sup>114</sup>) is neither required and nor is it appropriate.
4. ‘Nationality’ is in essence a legal status. Nationality is a broader concept than citizenship in British law.<sup>115</sup>
5. ‘National’ origins, conversely, refers to ‘identifiable elements, both historically and geographically, which at least at some point in time reveals the existence of a nation’.<sup>116</sup> Discrimination against Scottish people and English people, as such, is discrimination on the grounds of national origins. The same reasoning would apply equally to discrimination against Welsh<sup>117</sup> people and against (Northern) Irish people.
6. ‘Ethnicity’ has been given a broad meaning by the courts. The classic test for determining whether any group constitutes an ‘ethnic group’ is found in *Mandla (Sewa Singh) v Dowell Lee*.<sup>118</sup> According to Lord Fraser, for a group to constitute an ethnic group, it must regard ‘itself, and be regarded by others, as a distinct community by

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<sup>113</sup> Section 9(4).

<sup>114</sup> See appeal decision in *X H Diem (known as Anita Ho) v Crystal Services Plc [2005] UKEAT/0398/05*.

<sup>115</sup> L Fransman, *Fransman’s British Nationality Law* (3rd edn, 2011, Bloomsbury Professional). It should be noted that many exceptions apply to the prohibitions against nationality-based discrimination under the Equality Act 2010.

<sup>116</sup> *Northern Joint Police Board v Power [1997] IRLR*, para 9.

<sup>117</sup> *Gwynedd CC v Jones [1986] ICR 833, 836F*.

<sup>118</sup> *Mandla (Sewa Singh) v Dowell Lee [1983] 2 AC 548*.

virtue of certain characteristics'.<sup>119</sup> Some of these characteristics are essential, whilst others are not, but one or more of them will commonly be found, and the existence of these will help to distinguish the group from the surrounding community. According to Lord Fraser, the conditions which are 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 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. A group defined by reference to enough of these characteristics would be capable of including converts, for example persons who marry into the group, and of excluding apostates.

7. Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then s/he is, for the purposes of the Act, a member.<sup>120</sup> Thus membership of an 'ethnic' group may be acquired (as in conversion) and this depends upon a high degree of subjectivity so that a sense of belonging may be adequate.
8. Jews,<sup>121</sup> Sikhs,<sup>122</sup> Romany Gypsies,<sup>123</sup> European Roma,<sup>124</sup> and Irish Travellers<sup>125</sup> have all been held to constitute distinct ethnic groups.
9. As to 'Gypsies', the Court of Appeal has held that they constitute an ethnic group when defined in the narrow sense of Romany Gypsies because of their shared history, geographical origin, distinct customs, and language.<sup>126</sup>
10. The Equality Act 2010 permits an amendment by order to be made to the definition of 'race' so as to make 'caste' an aspect of 'race'.<sup>127</sup> No order has yet been made.

### **'Discrimination' and the unlawful acts**

11. The concept of "discrimination" under the Equality Act 2010 is a wide one. It covers,
  - a. Direct discrimination;<sup>128</sup>

<sup>119</sup> Mandla, 562E, per Lord Fraser.

<sup>120</sup> Mandla, 562E–562H, per Lord Fraser.

<sup>121</sup> *Seide v Gillette Industries Limited* [1980] IRLR 427; *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2009] UKSC 15; [2010] 2 AC 728.

<sup>122</sup> *Mandla (Sewa Singh) v Dowell Lee* [1983] 2 AC 548.

<sup>123</sup> *Commission for Racial Equality v Dutton* [1989] IRLR 8, CA.

<sup>124</sup> *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening)* [2004] UKHL 55; [2005] 2 AC 1.

<sup>125</sup> *O'Leary v Allied Domecq Inns Limited*, CL 950275, July 2000, Central London County Court (unreported).

Indeed Irish travellers are expressly recognized as a racial group (when defined as 'the Irish traveller community') within the Race Relations (Northern Ireland) Order 1997 SI No 869, NI6 which implements the RRA in Northern Ireland.

<sup>126</sup> *Commission for Racial Equality v Dutton* [1989] IRLR 8.

<sup>127</sup> Section 9(5)(a).

<sup>128</sup> Section 13. Section 14 'combined discrimination: dual characteristics' is also a form of prohibited conduct but it has not been brought into force and it is expected that it will be repealed.

- b. Discrimination arising from disability;<sup>129</sup>
  - c. Gender reassignment discrimination: cases of absence from work;<sup>130</sup>
  - d. Pregnancy and maternity discrimination: non-work cases;<sup>131</sup>
  - e. Pregnancy and maternity discrimination: work cases;<sup>132</sup>
  - f. Indirect discrimination;<sup>133</sup>
  - g. Failure to comply with a duty to make reasonable adjustments.<sup>134</sup>
12. 'Other prohibited conduct'<sup>135</sup> comprises 'harassment'<sup>136</sup> and 'victimization.'<sup>137</sup>
13. The unlawful acts under the *Equality Act 2010* outlaw the forms of prohibited conduct just mentioned. The unlawful acts outlaw these forms of prohibited conduct in the provision of services and in the exercising of public functions.<sup>138</sup>
14. The unlawful acts exclude judicial functions from their reach.<sup>139</sup> However, functions which are not strictly judicial, including those undertaken by the courts' administration, will fall within these unlawful acts and so judges should be aware of them.

### **Public Sector Equality Duty**

15. The *Equality Act 2010* introduces a new Public Sector Equality Duty.<sup>140</sup> More limited (but similarly structured) duties were found in the anti-discrimination enactments that preceded the *Equality Act 2010*.
16. The origins of the Public Sector Equality Duty can be seen in the Macpherson Report which followed the Inquiry into the death of Stephen Lawrence and so it has particular resonance to the justice system and the work of judges. The significant and multifarious disadvantages that ethnic minorities experience in the justice system was described by the Macpherson Report as constituting 'institutional racism', that is: '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 behaviours which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantages minority ethnic people'.<sup>141</sup>
17. The purpose of the Public Sector Equality Duty is to create a strong, effective, and enforceable legal obligation which places equality at the heart of a public authority's

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<sup>129</sup> Section 15.

<sup>130</sup> Section 16.

<sup>131</sup> Section 17.

<sup>132</sup> Section 18.

<sup>133</sup> Section 19.

<sup>134</sup> Section 21, though this falls under the separate heading, 'adjustments for disabled persons'.

<sup>135</sup> See heading to sections 26 and 27.

<sup>136</sup> Section 26.

<sup>137</sup> Section 27.

<sup>138</sup> Section 29.

<sup>139</sup> Schedule 3, para 3.

<sup>140</sup> Section 29.

<sup>141</sup> *Stephen Lawrence Inquiry Report*, Sir William Macpherson, 1999, Cm 4262-I, para 6.34.

- decision making,<sup>142</sup> so, amongst other things, as to address these institutional forms of discrimination.
18. Under the heading 'Advancing of Equality', section 149(1) of the *Equality Act 2010* enacts the Public Sector Equality Duty. It provides that:  
 'A public authority must, in the exercise of its functions, have due regard to the need to—  
 (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;  
 (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;  
 (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.'
  19. The Duty applies to all the protected characteristics under the *Equality Act 2010*,<sup>143</sup> including 'race'.
  20. Each limb of the duty is explained further under section 149 of the *Equality Act 2010*. 'Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it'<sup>144</sup> involves having due regard, in particular:  
 'to the need to (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; (b) take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it; (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low'.<sup>145</sup>  
 'Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it'<sup>146</sup> requires having due regard, in particular, "to the need to (a) tackle prejudice, and (b) promote understanding".<sup>147</sup>

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<sup>142</sup> See Speech of Mike O'Brien, Parliamentary Under-Secretary of State for the Home Department, HC Standing Committee D, 2 May 2000 in addressing the Race Equality Duty which provided the model for the Public Sector Equality Duty: "The Bill is one of the most significant steps that the Government will take on race equality in Britain, and is probably the biggest step taken since the Race Relations Act [1976]. The Bill will create a positive duty on all public authorities to promote race equality. It will be a major change in law. The Government sees this new duty as a way of trying to eliminate discrimination in public services, not only in the internal organisational structure of public authorities but in the delivery of services to ethnic minorities. In considering any new element of Government policy, a Minister must consider the implications for ethnic minorities and race equality generally. The public services must recognise that it is no good simply paying lip-service to race equality: they must ensure that race equality is at the heart of their organisation's considerations when providing services—it should be part of the mainstream of policy consideration. The new duty will be a significant step forward. Equality is important in the delivery of services to all the people of this country and should be pursued in a way that is consistent with our belief that we must become a successful multiracial society."

<sup>143</sup> Except marriage and civil partnership, save in respect of the first limb; see section 149(7) for the 'relevant characteristics' for the purpose of section 149(1)(b) and (c).

<sup>144</sup> Section 149(1)(b).

<sup>145</sup> Section 149(3).

<sup>146</sup> Section 149(1)(c).

<sup>147</sup> Section 149(5).

21. The three limbs of the duty require separate consideration. Whilst advancing equality of opportunity 'will be assisted by... [it] is not the same thing as, the elimination of discrimination... [T]he [advancing] of equality of opportunity is concerned with issues of substantive equality and requires a more penetrating consideration than merely asking whether there has been a breach of the principle of non-discrimination.'<sup>148</sup> Similarly, *fostering good relations* will involve discrete attention and may require very different actions. Accordingly, the fact that a decision is proved to be lawful does not relieve a public authority from the duty to have due regard to the other equality objectives.<sup>149</sup>
22. Discharging the Public Sector Equality Duty requires that 'due regard' is given to the equality objectives. 'Due regard' means 'proportionate regard', or that which is appropriate in all the circumstances.<sup>150</sup>
23. Accordingly, the greater the impact (positively or negatively) that any decision or the exercise of any function may have, the greater the weight must be given to the equality objectives; 'in a case where large numbers of vulnerable people, many of whom fall within one or more of the protected groups, are affected, the due regard necessary is very high.'<sup>151</sup>
24. As the case law has made clear, the substance of the duty must be conscientiously had regard to if the duty is to be properly discharged. For this purpose, relevant materials must be analysed in the context of the duty<sup>152</sup> with a 'conscious directing of the mind to the obligations'.<sup>153</sup>
25. As with the unlawful acts, the Public Sector Equality Duty does not apply to judicial functions or a function exercised on behalf of, or on the instructions of, a person exercising a judicial function.<sup>154</sup> A reference to a judicial function includes a reference to a judicial function conferred on a person other than a court of tribunal.<sup>155</sup>
26. However, as with the unlawful acts, the Public Sector Equality Duty will apply to, amongst other things, functions exercised by the courts' administration. In some circumstances, the question whether a party or other person has complied with the Duty may be relevant to a judge when deciding what action to take in relation to a case.

<sup>148</sup> *R (Baker) v Secretary of State for Communities and Local Government and LB Bromley* [2008] EWCA Civ 141; [2008] LGR 239, para 30, per Dyson LJ; see, too, *Pieretti v London Borough of Enfield* [2010] EWCA Civ 1104; [2010] EqLR 312, para 31.

<sup>149</sup> See, for example, *Hereward & Foster LLP & Anor v Legal Services Commission* [2010] EWHC 3370; [2011] EqLR 150.

<sup>150</sup> *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141; [2008] LGR 239, para 31, per Dyson LJ; *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin); [2009] PTSR 1506, para 82, per Aikens LJ.

<sup>151</sup> *R (Hajrula) v London Councils* [2011] EWHC 448 (Admin); [2011] EqLR 613, para 69, per Calvert-Smith J.

<sup>152</sup> *R (Harris) v LB Haringey* [2010] EWCA Civ 703, para 40, per Pill LJ.

<sup>153</sup> *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin), para 74.

<sup>154</sup> Sch 18, para 3(1).

<sup>155</sup> Sch 18, para 3(2).

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## Use of Language

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### *Key points*

- It will sometimes be necessary to identify or describe a person's ethnicity. Where it is not relevant, it should not be referred to at all.
- Where it is relevant then some care needs to be taken to ensure that appropriate terms are used.
- Where a judge is unsure about how to identify or describe a person's ethnicity or how to address a person, she should ask the person concerned how they would wish to be identified, described or addressed.

### *Introduction*

27. It will sometimes be relevant to identify or describe a person's ethnicity. Where it is relevant then some care needs to be taken to ensure that appropriate terms are used. Where a person's ethnicity is irrelevant there will be no need to refer to it at all.
28. Where a judge is unsure about how to identify or describe a person's ethnicity or how to address a person, she should ask the person concerned how they would wish to be identified, described or addressed. Some guidance is provided below as to appropriate terms.

### *Terms*

29. The English language is constantly evolving, and acceptable terminology describing ethnic minorities has developed as a way of avoiding offence and developing sensitivity. It is important that unacceptable language is not used. This is not about so called "political correctness", rather it is part of society's response to the need to recognise and respect diversity and equality.
30. Language that was formerly used to describe a person's race is sometimes no longer acceptable. It should be noted that there can be differences in opinion over some terms, so whilst some words are clearly unacceptable, for others there may not be any one correct answer about whether the term is right or wrong. Some guidance is provided below.
31. **Black:** It is now considered acceptable to use the term "Black" to describe people of Caribbean or African descent.
32. **West Indian / African Caribbean / African:** The term "West Indian" was formerly used as a phrase to describe the first generation of settlers from the West Indies and, in particular, many older people from that community will so describe themselves. Whilst the term "West Indian" would not always give offence, it is inappropriate to use it unless the individual concerned identifies himself or herself in this way.  
  
The term "African Caribbean" is now much more widely used, especially in official and academic documents. Where a person's ethnic origin is relevant, that term is both appropriate and acceptable. It does not, however, refer to all people of West Indian origin, some of whom are White or of Asian extraction.

The term “African” is often acceptable and may be used in self-identification, although many of African origin will refer to their country of origin in national terms such as Nigerian or Ghanaian.

Young people born in Britain today may choose not to use any of these designations.

33. **Asian:** “Asian” is a collective term which has been applied in Britain to people from the Indian sub-continent and other parts of Asia, such as Indonesia. In practice, people from the Indian sub-continent may not consider themselves to be “Asian”. People tend to identify themselves in terms of one or more of the following:
- a. Their national origin (“Indian”, “Pakistani”, “Bangladeshi”).
  - b. Their region of origin (“Gujarati”, “Punjabi”, “Bengali”).
  - c. Their religion (“Muslim”, “Hindu”, “Sikh”).

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, Far East Asian or South Asian may be preferred.

Young people of South Asian origin born in Britain often accept the same identities and designations as their parents. This is by no means always the case, and some now may prefer to describe themselves as “Black” or as “British Asian”.

34. **Mixed race/Mixed heritage:** The term “mixed race” is widely used and is considered acceptable by some and not by others. Another term which may be better is “mixed heritage”. The term “multi-racial” is only used in relation to communities.
35. **Ethnic minorities/Minority ethnic:** The terms “ethnic minority” and “minority ethnic” are widely used and are generally acceptable as the broadest terms to encompass all those groups who see themselves to be distinct from the majority in terms of ethnic or cultural identity. This term is clearly broader than “Black minority ethnic” or the problematical “visible minorities” (problematical as it may imply that there are invisible minorities), and brings in such groups as Greek and Turkish Cypriots or Gypsy Travellers.

## Interpreters

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### *Key points*

- Judges do not have a role in arranging for interpreters. However, they must take care to ensure that potential difficulties in the use of English are identified and addressed.
- A functional ability to speak English in day-to-day life may not be sufficient to understand or speak English sufficiently well as to understand and answer questions in court.
- There are now standardized arrangements in place for securing the assistance of interpreters.

### *Judges' role*

36. 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.<sup>156</sup>
37. 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 minorities prefer to speak their mother tongue 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 he or she does not require an interpreter.
38. 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 assess an individual's fluency and comprehension. If a judge hearing a case considers that an interpreter is required, an adjournment should be granted for that purpose.
39. A judge may also wish to check whether the interpreter and the accused or witness are indeed able to communicate, and to confirm that there are no cultural dialect or language difficulties that would preclude the interpreter from interpreting.

### *Interpreters in Criminal Proceedings*

40. On 30 January 2012 courts and tribunals across England and Wales started using a new interpreter service through a single agency, Applied Language Solutions.
41. A National Agreement on Arrangements for the Use of Interpreters provides clear and detailed guidance for all agencies on the procedures to follow at each stage of the criminal justice process where an interpreter may be required.<sup>157</sup>

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<sup>156</sup> As to which, see <http://www.justice.gov.uk/courts/interpreter-guidance>.

<sup>157</sup> National Agreement for the Use of Interpreters and National Agreement 2011 rider; see, <http://www.justice.gov.uk/courts/interpreter-guidance>.

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## ***Interpreters in Civil and Family Proceedings***

### **Deaf and Hearing impaired Litigants**

42. Her Majesty's Courts & Tribunals Service will meet the reasonable costs of interpreters for deaf and hearing-impaired litigants for hearings in civil and family proceedings.
43. Many people have a friend or relative who usually translate for them. If the deaf person wants such a person to interpret for them, they will need to ask for permission from the judge. The judge must be satisfied that the friend or relative can exactly interpret what is being said to the court and what the court is saying to the deaf person.
44. Unless the relative or friend has a recognised qualification in relaying information between deaf and hearing people, it may be better to use a qualified interpreter who will understand the limits of an interpreter's role.
45. If an interpreter is needed, the court will make arrangements for an interpreter to attend.

### **Foreign language interpreters**

46. Court staff will also arrange for language interpreters needed for civil and family hearings in certain circumstances where cases involve:
  - a. **Committal cases** Her Majesty's Courts & Tribunals Service has a legal obligation under the Human Rights Act to provide language interpreters. They will ensure that anyone attending a committal case has the free assistance of an interpreter if s/he cannot understand or speak the language used in court.
  - b. **Domestic Violence and cases involving children** Because of the sensitivity of these cases, Her Majesty's Courts & Tribunals Service has agreed that it will provide an interpreter if required. This is irrespective of whether solicitors are involved or public funding is available.
  - c. **Non-committal cases** Her Majesty's Courts & Tribunals Service will provide an interpreter if that is the only way that a litigant can take part in a hearing. The relevant circumstances are where the person:
    - i. Cannot speak or understand the language of the court well enough to take part in the hearing
    - ii. Cannot get public funding.
    - iii. Cannot afford to privately fund an interpreter, and has no family member, or friend, who can attend to interpret for them and who is acceptable to the court.
47. If the case is publicly funded, Community Legal Service funding may be available. If the case is privately funded, parties have to supply their own interpreters.

### ***Welsh Language***

48. The Welsh Language Act 1993 provides the right for any party to speak Welsh in legal proceedings in Wales (criminal, civil and tribunals hearings).

49. As soon as it is known that the Welsh language is to be used at a hearing details should be provided to HMCTS' Welsh Language Unit by e-mailing [welsh.language.unit.manager@hmcts.gsi.gov.uk](mailto:welsh.language.unit.manager@hmcts.gsi.gov.uk) who will arrange a Welsh interpreter from the list of those who have successfully sat examinations in simultaneous interpretation. Her Majesty's Courts & Tribunals Service is responsible for paying the interpreter's fees.

## 10. Discrimination on the basis of belief or non-belief

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### **Key points**

- Awareness of a person's beliefs – including non-belief in any religious tradition – is integral to being aware of equal treatment issues.
- Realising that a judge and other court or tribunal personnel take notice of matters relating to an individual's belief system helps create an atmosphere of trust and reduces alienation.
- No assumptions should be made about what constitutes a religious belief or practice or what type of accommodation might be required; and avoid assumptions in relation to an individual based solely on dress or appearance.
- Religious and other beliefs, or non-belief, are often a fundamental aspect of a person's identity.

### **Religion and belief (including non-belief) discrimination**

1. The *Equality Act 2010* regulates direct and indirect discrimination on the grounds of religion or belief (including non-belief), harassment on the grounds of religion and belief and victimisation. The *Equality Act 2010* also regulates religion and belief discrimination outside the employment field.

### **Religious diversity**

2. The UK is a diverse society with people of many beliefs and some with none. Many people do not believe in God. Some practise religious observances outside the boundaries of traditional world religions (e.g. pagans). Others abide by sets of beliefs that are not religious in nature, for example secularists and humanists.

### **National or ethnic origin, race, colour and religion**

3. The prohibition against religious discrimination may overlap with prohibitions against unlawful discrimination based on national or ethnic origin, race and colour where a particular religion is strongly associated with, or perceived to be associated with a particular racial or other group. The inter-relationship between these protected characteristics can be complex.
  - a. Ethnic groups are often multi-religious. Indians, for example, may be Hindus, Muslims, Sikhs, Christians or members of other belief systems or may have no religion or belief.
  - b. Religious practice can cut across ethnic groups, for example Muslims can be Albanian, Bangladeshi, Bosnian, Chinese, Indian, Indonesian, Iraqi, Malaysian, Nigerian, Pakistani, Somali, Turkish, English, Irish, Scottish or Welsh.
  - c. Ethnic and religious identities can also coincide: both Jews and Sikhs are recognised as ethnic groups under the Equality Act 2010.
  - d. A large minority of British people of all ethnic groups have no religious belief. Some adopt non-religious life stances, such as humanism or secularism.

**Internal diversity**

4. To add to the complexity, each religion and belief has a considerable internal diversity of traditions, practices, cultures and languages.
  - a. There are many variations within minority religions and beliefs, and many varieties of non-belief, just as there are within Christianity.
  - b. The religious practices of members of some minority ethnic communities may include practices and views characteristic of their area of origin but not necessarily intrinsic to the teaching of their specific religion; cultural and religious traditions may be closely interwoven in complex ways. Thus, although we speak of distinct religions and faith communities, there are often overlaps.
  - c. Many Africans, for instance, may be Muslim or Christian, but they also live in a distinctly African cultural manner.
  - d. The same is true of people from South Asia, where different religions co-exist, and where differing practices have developed over time. Cultural differences within any one group may also involve distinctions on the basis of age, gender and social status. Individuals may also differ in their adherence to and practise of their religious beliefs.

**Systems of belief and non-belief in the UK**

5. For information in relation to some of the main belief systems present in the UK, please see [Appendix 1](#).

**Sincerity of belief**

6. Quite often in the hearing room context we will come across individuals who claim that a particular practice is essential to their faith. Whether it is or not may be too difficult to determine and is not for us to decide. What is within our jurisdiction is the question of credibility and we may in certain circumstances be required to determine whether a particular belief is genuinely held and the extent to which a particular individual is bound by what they say is essential to their religious practice. However, because the definition of religion is broad and protects beliefs and practices with which judges and others may be unfamiliar, judges should ordinarily assume that an individual's request for religious accommodation is based on a sincerely-held religious belief. If, there is an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, it may be justifiable to seek additional supporting information. Always have in mind that as judges, of course, we strive to fulfil our judicial oath to do right and ensure justice to all, irrespective of an individual's protected characteristics including religion or belief.

***Systems of belief and non-belief in England and Wales***

7. In the 2011 census, 59.3% of respondents (33.2 million) stated their religion as Christian [2001 census: 71.6% of respondents (37 million)], whilst 25.1% (14.1 million) stated they have no religion [2001 census: 15.5% (9.1 million)] and a further 7.2% (4 million) did not respond to the question [2001 census: 7.3% (4.2 million)]. Some 4.8% (2.7 million) [2001 census: 3.8% (1.5 million)] give their religion as Muslim, making this the most

common religion after Christianity. Some 12.4% (1 million) [2001 census: 8.5%] of London's population give their religion as Muslim; 5% (410,000) [2001 census: 4.1%] are Hindus and 1.8% (147,000) [2001 census: 2.1%] are Jewish. It can be observed that:

- a. Christians remain the largest single group by far (nearly 6 out of 10 people).
- b. The second largest group is of those professing no religious belief. It is also worth noting that over 7% of the population did not respond to the question, whether from a position of non-religious belief or for other reasons.

### ***Discrimination on the basis of belief or non-belief***

8. Discrimination on the basis of belief or non-belief contributes to the marginalisation and social exclusion of groups and individuals, and ranges from violence and bullying to prejudice against a person because of their actual or perceived belief or non-belief. Prejudice also manifests itself in the signals sent out, intentionally or not, in the way in which the needs of a person are ignored or overlooked, for example when accessing public services. The risk of unemployment also varies significantly according to religious identity.

### **The Equality Act 2010**

9. Religion or belief is a protected characteristic under the *Equality Act 2010*. Under this Act:
  - a. Religion means any religion and a reference to religion includes a reference to a lack of religion.
  - b. Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
10. The Equality Act 2010 makes it unlawful to discriminate directly or indirectly, to harass or to victimise people because of the protected characteristic of religion or belief. This includes harassment or victimisation because of perceived religious belief or non-belief or because of an association with someone who holds a particular religious belief or non-belief. The Equality Act prohibits discrimination in employment, and the provision of goods, services and facilities.
11. The Equality Act 2010 also requires that public bodies, must, in the exercise of their functions, have due regard to the need to eliminate prohibited discrimination, advance equality of opportunity, and foster good relations between persons who share a relevant protected characteristic and persons who do not share it. Courts and tribunals are public authorities for these purposes, although the exercise of 'judicial functions' is an excluded function of the Act for these purposes.

### **Direct and indirect discrimination**

12. Direct discrimination, treating a person less favourably because of their beliefs or non-belief, can arise where actions and attitudes are based on assumptions and stereotypes.

- a. A faith community or belief group may be seen as a single monolithic block, static and unresponsive to new realities rather than as diverse, with internal differences, debates and developments.
  - b. A faith community or belief group may be seen as having aims or values that differ from those held by the wider community, rather than as being interdependent with the wider community and sharing common values and aims.
13. Direct discrimination can also arise where actions and attitudes are based on assumptions and stereotypes, whether positive or negative, about members or non-members of a particular faith or belief group, rather than based on evidence about the particular individual. For example, a Muslim woman wearing a head-scarf may be seen as oppressed and forced to wear it, whereas a Sikh man wearing a turban may not be seen in the same way.
  14. It is equally important to avoid treating everyone the same irrespective of their individual belief or group identity. Awareness of the needs of different faith groups, as well as of the existence of a significant group with non-religious beliefs or no beliefs, is important if diversity and difference is to be respected and accommodated.

### **Northern Ireland legislation**

15. The Northern Ireland Act 1998 contains similar provisions to those contained in the Equality Act 2010.

### **The Human Rights Act and the ECHR**

16. The Human Rights Act 1998 and the European Convention on Human Rights (the ECHR) provide two means of protecting religious rights: Article 9, the right to freedom of thought, conscience and religion; and Article 14, the right not to be discriminated against in the enjoyment of Convention rights on grounds that include religion and belief. There are two aspects to the protection afforded by Article 9: absolute protection for the right to freedom of thought and belief; and qualified protection for the right to manifest religion, which can be restricted where it is necessary and proportionate to do so to protect the rights of others.

## Oaths, affirmations and declarations

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### *Key points*

- The purpose of administering an oath or affirmation to a witness is to ensure that the witness makes a solemn declaration to tell the truth.
- The *Oaths Act 1978* permits witnesses the choice of swearing an oath or making a solemn affirmation.
- The degree to which a witness considers their conscience bound by the procedure is the criterion of validity.
- The contents of this chapter should assist all judiciary and tribunal judges in:
  - ensuring that sworn testimony meets all the requirements of the *Oaths Act 1978*;
  - ensuring that the needs of all court users and witnesses are met with regard to their religion or belief when giving sworn evidence or making declarations; and
  - that witnesses who choose to affirm or swear an oath are treated with respect and sensitivity.

### *Introduction*

1. The *Oaths Act 1978* makes provision for the forms in which oaths may be administered and states that a solemn affirmation shall have the same force and effect as an oath. In today's multi-cultural society everyone, whatever their religion or belief, should be treated with respect when making affirmations, declarations or swearing oaths.
2. 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.'**
3. 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.'**
4. As a matter of good practice:
  - a. 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;
  - b. the primary consideration should be what binds the conscience of the individual;
  - c. 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.

5. Guidance was given in the case of Kemble:

‘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** (NB most tribunals do not administer an oath) 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?**’  
(Lord Lane C.J. in *R. v. Kemble* [1990] 91 Cr. App. R. 178)

In this case 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 in Islamic jurisprudence an oath taken by a Muslim is only binding if taken on the Qur’an.

6. In the courtroom the emphasis is upon receiving testimony and determining the credibility of the witness on the basis of his or her binding oath or affirmation. Some orthodox religious believers may choose to affirm because they believe that swearing an oath is not a procedure to be undertaken in a non-religious context such as court proceedings.

### **Holy books**

7. 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 one central text only. For all, their holy books must be handled with respect and sensitivity.

### **Ritual purity**

8. Certain faith traditions insist that anyone handling a holy book or scripture be in a state of ritual purity.
9. Ritual purity may be achieved by performing ablutions involving the use of water.
10. 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.
11. 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.
12. It is for this reason that it is good practice for holy books to remain covered in a separate cloth when not in use and when being handled by court staff so as to avoid

causing possible offence. Needless to say, all handling of holy books should be with the utmost respect, and no holy book should be put on the floor or thrown down.

13. Other practices:
  - a. Hindu and Sikh witnesses may wish to remove their shoes.
  - b. 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.
  - c. Hindu witnesses may wish to bow before the holy book with folded hands before or after taking the oath.
  - d. Witnesses may prefer that the book is only touched by the right hand.
14. These practices should be accommodated where possible, to enable such witnesses to consider themselves most conscience-bound to tell the truth.
15. Particular care is required if a witness indicates a preference to swear an oath on a holy book of another faith because their holy book is not available in court. It may be preferable in such circumstances, for the witness to affirm.

### **Good practice by court staff**

16. Witnesses and jurors should be presented with a choice of two equally valid procedures of making an affirmation or swearing an oath by court staff, before they come into court.
17. If they wish to swear an oath, witnesses should be informed about the availability of different holy books in court. They should not be persuaded to swear an oath on the New Testament for the sake of convenience.
18. If they indicate a preference to swear an oath, witnesses and jurors should be invited to identify the holy book on which they wish to swear an oath.
19. If a particular holy book is not available, it is good practice for the witness to be invited to affirm, even if they are willing to swear an oath on the holy book of another religion.
20. 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.

For more detailed consideration regarding the practices of different faith traditions please see [Appendix 2](#).

### ***Other forms of oath taken in court***

**Note:** In every case the appropriate form of oath or affirmation (as set out in Appendix 2) precedes the words set out below.

#### **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.’

### **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.’

### **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.’

### **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.

### ***Relevant provisions of the Oaths Act 1978***

‘A1. (1) Any oath may be administered and taken in England, Wales or Northern Ireland in the following manner:

The person taking the oath shall hold the New Testament, or in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words ‘I swear by Almighty God that...’ followed by the words of the oath prescribed by law.

(2) The officer shall (unless the person about to take the oath voluntarily objects thereto, or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question.

(3) In the case of a person who is neither a Christian nor a Jew, the oath shall be administered in any lawful manner.

(4) In this section an officer means any person duly authorised to administer oaths.

3. If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further questions.

4. (1) In any case in which an oath may lawfully be and has been administered to any person, if it has been administered in a form and manner other than that prescribed by law, he is bound by it if it has been administered in such form and with such ceremonies as he may have declared to be binding.

(2) Where an oath has been duly administered and taken, the fact that the person to whom it was administered had, at the time of taking it, no religious belief, shall not for any purpose affect the validity of the oath.

5. (1) Any person who objects to being sworn shall be permitted to make his solemn affirmation instead of taking an oath.
- (2) Subsection (1) above shall apply in relation to a person to whom it is not reasonably practicable without inconvenience or delay to administer an oath in the manner appropriate to his religious belief as it applies in relation to a person objecting to be sworn.
- (3) A person who may be permitted under subsection (2) above to make his solemn affirmation may also be required to do so.
- (4) A solemn affirmation shall be of the same force and effect as an oath.'

## Religious dress

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1. A person's religion or belief can influence the way they dress and present themselves in public. In most instances this will present few, if any, issues for judges.
2. While there are other examples of religious items of clothing (the Jewish skullcap – the kippah or yarmulke – is one; the Sikh turban another), the issue of religious dress is one that is most likely to arise in relation to the niqab, or full veil, sometimes worn by Muslim women. As the niqab involves the full covering of the face, the judge may have to consider if any steps are required to ensure effective participation and a fair hearing, both for the woman wearing the niqab and other participants in the proceedings. This is a difficult and sensitive matter about which guidance will soon be published in the form of a Practice Direction by the Lord Chief Justice. The Bench Book will be updated at that time.
3. Some useful guidance on the background to and religious significance of the wearing of different styles of Muslim headscarf can be found at [http://news.bbc.co.uk/1/hi/world/middle\\_east/5411320.stm](http://news.bbc.co.uk/1/hi/world/middle_east/5411320.stm).

## Appendix 1 – Different belief systems

### *The Baha'i faith*

#### Key points

- The Baha'i faith is based upon the teachings of Baha'u'llah (1817–92) who was born in Iran.
- Members of the Baha'i faith can be found all over the world, but the largest communities are in South Asia, Africa, Latin America, and the Pacific Islands.
- The Baha'i community established its presence in the UK, Europe and the USA as early as the 1890s.

#### Introduction

The Baha'i community in the UK is long-standing with many originating from Iran as well as indigenous ethnic English Baha'is. The origins of the Baha'i faith in Iran date back to the nineteenth century, when Baha'u'llah and subsequently his son 'Abdu'l-Baha promulgated the Baha'i faith. Baha'u'llah was considered the promised saviour for all humankind and presaged by the 'Bab', an Iranian who broke away from Shi'a Islam and heralded the Baha'i faith in 1844. The last 24 years of Baha'u'llah's life were spent in exile in Palestine, resulting in the Baha'i World Centre now being situated in Haifa, Israel.

After his passing in 1921 'Abdu'l-Baha's grandson, Shoghi Effendi (1899–1957), was made the Guardian of the Baha'i Faith. Shoghi Effendi was also instrumental in spreading the teachings of Baha'u'llah around the world and was responsible for translating his writings into English. After Shoghi Effendi's passing there was no further successor and so in 1963, following Baha'u'llah's written guidance, the Baha'i National Assemblies elected the first Universal House of Justice which now governs Baha'i affairs.

#### Beliefs and practices

- Baha'is uphold the unity of God, the unity of His prophets, and the oneness of the entire human race, with the view that it is necessary and inevitable that all humankind will be united.
- The primary duty of the Baha'is is to search after truth, and the harmony of science and religion is considered a foremost agency for the pacification and orderly progress of human society.
- The principles of equal rights and opportunities for all races, men and women, and compulsory education for all are insisted upon.
- The institutions of monasticism, priesthood and mendicancy are prohibited.
- Monogamy is prescribed and divorce discouraged. The strict obedience to one's government is encouraged.
- The main practices are prayer, meditation and fasting.

- Prayer is encouraged and one is obliged to say prayers daily, including the recitation of one of three obligatory prayers, the shortest of which is to be said between noon and sunset, and other prayers recommended by Baha'u'llah.
  - Baha'is are encouraged to meditate upon a passage of scripture twice daily, in the morning and evening, with the emphasis placed upon meditating in a qualitative manner.
  - Fasting is observed for 19 days in the year from the 2 March to 20 March. The fast is from sunrise to sunset. Pregnant women, the sick and elderly are exempt from fasting.
- Pilgrimage to the Shrines of Baha'u'llah in Acre and the Bab in Haifa (both of which are in Israel) and the resting place of Shoghi Effendi (in England) is encouraged.

### Holy books and scriptures

The writings of Baha'u'llah and his son 'Abdu'l-Baha, and the Bab are considered divinely inspired scripture. One of the main texts by Baha'u'llah, of which there are over a hundred volumes, is called the Kitab'i- Aqdas. The writings of Shoghi Effendi are considered infallible commentaries on Baha'i scriptures.

- The Baha'i witness or jury member will probably choose to affirm, since for Baha'is their word is their bond.
- If a Baha'i chooses to swear an oath it would most likely be on the Kitab'i –Aqdas.

### Central practices and days of observance

Apart from the daily prayers, which are said in private, communal activities are organised by local assemblies, the members of whom are elected annually. Communal gatherings are held at private homes or at rented halls in locations where a Baha'i centre is not established. Baha'i Houses of Worship are at present limited to one on each continent and are open to the public for the worship of God. The Baha'i calendar comprises 19 months, each of 19 days. The first day of each Baha'i month is celebrated by a local communal gathering when participants recite prayers and read holy scriptures, discuss community matters, and finally enjoy food together.

On special Festival/Holy Days particular devotional scriptures are set aside for the occasion and sermons may be said. The Festival/Holy Days are as follows:

- **Feast of Ridvan** (Declaration of Baha'u'llah, 21 April – 2 May) and it is recommended that work is suspended on the first, ninth and 12th days of Ridvan.
- **Fasting season of 'Ala** (2 March – 20 March) ending with the feast of **Naw-Ruz** (meaning New Day) on 21 March, also considered the commencement of the new year, when it is also recommended that work be suspended.
- **Anniversary of the Declaration of the Bab** (23 May) when it is also recommended that work be suspended. This day also coincides with the **Birth of 'Abdu'l-Baha**.
- **Birth of Baha'u'llah** (12 November) when it is also recommended that work be suspended.
- **Birth of the Bab** (20 October) when it is also recommended that work be suspended.

- **Ascension of Baha'u'llah** (29 May) when it is also recommended that work be suspended.
- **Martyrdom of the Bab** (9 July) when it is also recommended that work be suspended.
- **Ascension of 'Abdu'l-Baha** (28 November).

### **Dietary rules and taboos**

Intoxicating drugs and alcohol are prohibited.

### **Rites of passage**

Babies are born Baha'i and there may be a naming ceremony celebrating the birth of the child.

Marriage is a strongly encouraged institution amongst Baha'is and considered the only legitimate framework within which to enjoy sexual freedom. Only monogamous marriages are permitted and in order to preserve social cohesion the consent of all parents of the bride and groom must be sought before marriage.

The marriage ceremony has no set ritual aspect, except the exchange of the marriage vow by the couple before witnesses: "We will all, verily, abide by the Will of God."

Local marriage customs can be followed, but the amount of dowries exchanged is fixed.

Divorce is strongly discouraged and several conditions must be met before it is permitted, such as a year's separation, during which efforts at reconciliation are made.

Funerals should be carried out 'with dignity and honour' since death marks the passage from this life to the next phase of existence. Cremation is prohibited since, in accordance with the laws of nature, the body should be allowed to decompose naturally. Burial of the body must take place in a location no further than one hour's journey from the place of death.

Special prayers are recited at the funeral and subsequently for the benefit of the deceased. For those who die without having made a will, there are recommendations for the division of wealth.

## ***Buddhism***

### **Key points**

- The Buddhist community in the UK is very diverse: with members from the Indian subcontinent, China, Japan and the whole of South East Asia. There are also many of ethnic European origin who practice Buddhism.
- The cultural, regional and distinct doctrinal differences between adherents demand that no assumptions can be made.

### **Introduction**

Buddhism was founded by the historical figure, Shakyamuni – the **Buddha** (the enlightened or awakened one) – in the sixth century BC in Northern India. There are two main strands of Buddhism with variations of thought and practice within them. These are:

- **Theravada** ('the way of the elders') is the predominant form of Buddhism in Sri Lanka, Burma, Thailand, Laos and Cambodia. This school can also be referred to as Hinayana (the 'small vehicle').
- **Mahayana** ('the great vehicle') is the most widespread of the Buddhist schools and is predominant in Mongolia, Korea, and Vietnam. The developments in China followed a specific course given the nature and history of the country, and in Japan the Zen ('meditation') form of **Mahayana** Buddhism is predominant. Tibetan Buddhism has also followed a specific course.

### **Beliefs and practices**

In the UK today there are a significant number of Buddhists, from Sri Lanka, Burma, Thailand, Indo-China and other South East Asian countries, India, Sikkim, Bhutan, Nepal, Tibet, Mongolia and other parts of Central Asia, as well as China, Korea and Japan. The faith group includes many ethnic Europeans as well.

Buddhism is a way of enlightenment from the cycle of rebirth and death (**Samsara**); life is considered impermanent and characterised by suffering. The path to achieving enlightenment involves three essential components, known as the 'Three Jewels':

1. Submission to the Buddha.
2. The teachings of the Buddha (**Dhamma**).
3. The Buddhist community (the **Sangha**) comprising monks and nuns and the laity, who rely on each other.

Taking 'refuge' in these 'Three Jewels' by reciting a formula to that effect is the means by which a person is acknowledged to be a follower of Buddhism. The philosophy can be summarised by the doctrine of the 'noble eightfold path', often symbolised as a wheel with eight spokes:

1. right understanding
2. right thought
3. right speech
4. right action
5. right livelihood
6. right effort
7. right mindfulness
8. right concentration.

A lay Buddhist is supposed to live by five principles, apart from seeking refuge in the Buddha, the Dhamma and the Sangha. These are to abstain from killing, stealing, sexual misconduct, false speech and alcohol and drug abuse, which impair mindfulness and concentration. The two parts of the Buddhist Sangha, the laity and the monks and nuns, are considered interdependent. The lay Buddhists provide food, clothing and a place to live, while the monks and nuns give advice and provide the laity with a chance to acquire merit (another sense of Dhamma) through their help.

## Holy books and scriptures

All the schools of Buddhism refer to the same canon of scripture:

- **Tipitaka** (in Pali, for the **Theravada** school),
- or the **Tripitaka** (in Sanskrit, for the **Mahayana** school).

These are slightly different versions of the same original text, in three major sections, based on different aspects of the Buddha's teachings. The many languages spoken by Buddhists in the UK reflect their ethnic diversity as a community.

- Most Buddhists will readily affirm and are unlikely to wish to swear an oath. In the past, court staff have been instructed to administer a form of declaration to Buddhists which starts 'I declare in the presence of Buddha that...' This form of declaration is wrong and unacceptable to Buddhists and should not be used.
- A Tibetan Buddhist who wishes to take an oath in a court should be asked to state the form of oath which they will regard as binding on their conscience. (In Tibetan practice, oaths are normally taken in front of a picture of a deity, a photograph of the Dalai Lama or any Lama of the witness's practice, if taken at all.) Sometimes such a witness will take an oath by elevating a religious textbook such as the Tipitaka above their head and swearing by it. If such a witness does not stipulate such a practice and does not have the appropriate book with them, they should affirm.

## Central practices and days of observance

Particular festivals may depend on the national origins of a person and certain celebrations may prevent a person from appearing in court on a particular day.

**Meditation** is the central practice in Buddhism.

**Buddhist temples** may be simple Zen Buddhist meditation halls or ornate Tibetan Buddhist temples of great splendour. In the UK, they may be purpose-built structures like the Peace Pagoda in Milton Keynes, or simply a shrine room in a residential house, often with incense holders, flowers and candles. Most Buddhists will have a small shrine in their home in addition to worshipping in a temple as well. Buddhists remove their shoes as a mark of respect when they go into a temple. They sometimes prostrate before the image of the Buddha, make offerings of flowers, light and incense, and they may recite sacred scriptures. Monks and nuns wear distinctive robes in particular colours, which indicate their allegiance to any one of the different traditions of Buddhism.

**Major religious festivals – Theravada and Mahayana.** Buddhists abide by a lunar calendar so that festival dates vary from year to year, although the **Zen** Buddhists have a fixed calendar. Most festivals commemorate the birth, life, teachings and enlightenment of the Buddha.

For the **Theravadin Buddhists**:

- **Magha Puja** is usually late February.
- **Vaisakha Puja** or Buddha Day, usually the full moon day in May commemorates the birth, enlightenment and passing of the Buddha.
- **Asalha Puja**, the celebration of the Buddha's first sermon, usually in July, marks the beginning of the three-month rain retreat, during which monks and nuns traditionally

have to remain in one place. Another important festival marks the last day of this rain retreat (**Pavarana** or **Sangha Day**), usually in October.

For the **Mahayana Buddhists** every new moon day is **Shakyamuni Buddha Day**, and on every full moon day there are celebrations of the Buddha, his Enlightenment and his Passing (**Parinirvana**).

The **Zen** calendar is not lunar and includes the following special dates:

- 15 February The Buddha's passing (**Parinirvana**)
- 8 April The Buddha's birthday
- 3 October **Bodhidharma's Day** (Day of the first Patriarch in China)
- 8 December The Buddha's Enlightenment

### **Dietary rules**

Buddhism emphasises the avoidance of intentional killing, based on the principle of non-violence (**Ahimsa**). Thus, many Buddhists are total vegetarians, although some allow themselves fish or eggs. The principle of 'right livelihood' excludes trading in flesh and Buddhists may avoid working as butchers or fishermen.

### **Rites of passage**

Although no special ceremonies are prescribed and traditions vary from country to country, many involve the participation of monks.

**Birth.** At the time of birth, monks may be invited to the home to chant texts from Buddhist scriptures and the baby may be taken to the temple for a **naming ceremony**.

**Ordination.** Depending upon the ethnic origin, for some Buddhists **temporary ordination** is often a feature of a boy's or young man's life until and if he decides to become a 'householder' which is considered acceptable (although some Buddhist communities frown upon this). After a short, fairly simple ordination ceremony, when the young boy becomes a novice monk, he is taught some meditation practices and is symbolically clothed. Young girls are not temporarily ordained as nuns in the same way, although they may realise a vocation to become nuns during adulthood.

**Marriage** is a highly respected institution in Buddhism, since the lay community is obviously needed to support the monks and nuns. Arranged marriages are customary in many Buddhist communities. At Buddhist marriage ceremonies, monks do not officiate as such, but are invited to attend for the benedictions they may bestow.

**Funeral rituals** are important and a person's state of mind at the time of death is considered crucial to determine the quality of the next life. Buddhists follow different national and local customs for burial or cremation and other rites. In accordance with the principles of **Kamma (Karma** in sanskrit), Buddhists believe that the quality of rebirth in the next life depends upon one's actions in this one, and the intentions with which those actions were performed. Persons enlightened during this life are liberated – they attain **Nibbana (Nirvana** in sanskrit) and so are released from the cycle of rebirth and death (**Samsara**).

Thus, when a person is about to die, there is an attempt to focus the mind on higher truths, and monks may often be invited to come and chant at that time.

## **Christianity**

### **Key points**

- Christianity is the largest faith group in the UK with the greatest number of subdivisions.
- It is the religion practised by the widest variety of minority communities.
- Assumptions about the cultural and ‘racial’ homogeneity of Christian worshippers need to be put aside.
- Not everyone shares the same understanding of Christianity and its creeds and ethical requirements (e.g. as regards marriage, war and other matters).

### **Introduction**

The form and practice of Christian faith and worship amongst minority communities is as varied as the communities themselves. The reality of Christian worship in the UK encompasses all races, genders, people with all types of disabilities and peoples of all sexual orientations. Christianity first came to Britain soon after the followers of Christ established themselves in the Mediterranean (with St Augustine of Canterbury in the sixth century reconnecting British Christians with continental Europe), and is said to have taken root in Ireland by 390 CE, and in Scotland by the end of the sixth century CE. Christian communities in England, Wales and Scotland all have very different national characters. The growth of Black, Pentecostal and independent evangelical churches in the UK has been a marked development in recent times.

### **Beliefs and practices**

The religion was founded by those who believed that Jesus of Nazareth was Christ (from the Greek: Christos a translation of the Messiah) the Messiah (generally translated as Redeemer) as prophesied by what is referred to as the ‘Old’ Testament in the Bible. The distinctive Christian claim being that Christ is God incarnate. Christianity is the second of the three Abrahamic or Semitic religions (tracing their origins to the prophet Abraham): Judaism, Christianity and Islam.

As the teachings of Christ focused on the Spirit and not the Law, there tends to be less emphasis upon matters of ritual observance, or religious rules and regulations in the daily life of the Christian than for Jews and Muslims (although this would be less applicable to traditional Roman Catholics or Orthodox Christians). However the theological elaboration of Christian doctrine is a far-ranging and complex story, and every stream within Christianity has its own rites and rituals. The importance of history for the development of Christianity should never be underestimated. Christianity derives much from the rich fabric of history: the separation between the ‘East’ and the ‘West’, and the Reformation, giving us the three main branches of Christianity we see today.

The Roman emperor Constantine in 313 CE, and again in 380 CE, the Roman emperor Theodosius declared Christianity the official religion of the Roman Empire. In 1054 the first major division between the Eastern and Western churches took place. A series of political, theological and devotional developments culminated in the Reformation, where a third ‘branch’ arose within Christianity as a result of a division between churches which claim unity with Rome (the Roman Catholic Church) and what became known as Protestantism.

Protestantism has taken many different forms, from Episcopalian (e.g. the Church of England, the Church in Wales) through to the Presbyterian churches (Church of Scotland, United Reformed Church). From a global perspective, Northern Europe and America are broadly Protestant with significant Catholic and Orthodox populations; North America has a majority Protestant population with an influential Roman Catholic presence; Southern Europe and Latin America are broadly Roman Catholic; and the African Continent and the Pacific region have a mixture of denominational allegiance.

There is a division between the **Trinitarian** (those who believe the doctrine of the **Trinity**, that the one God comprises the three persons of Father, Son and the Holy Ghost), denominations which include Anglicans, Roman Catholics, Methodists, Orthodox, Presbyterian and the Reformed Churches, (the majority denominations within Christianity) and the **non-Trinitarian** denominations which include Jehovah's Witnesses, Mormons and Unitarians.

Trinitarian Christians can be roughly divided into Roman Catholic (and a number of Eastern rite churches who adhere to unity with the Pope); Reformed/Protestant (from Anglican to Presbyterian and Pentecostal); Orthodox (a large and loose confederation of churches in union with Patriarchs in the East and Middle East including a vast diaspora throughout the world and growing Orthodox communities in the UK). A number of churches sometimes called 'Oriental Orthodox', including the Coptic (Egyptian), Ethiopian, Eritrean, Armenian and Syrian Churches, along with churches of very ancient foundation in South India, have some historic disputes over theology with the Greek and Russian Orthodox Churches. Though these 'Oriental Orthodox' churches share a theology, they are themselves autonomous, as are the Greek and Russian Orthodox Churches.

### **Holy books and scriptures**

The Bible is the main text comprising both the 'Old' Testament (also referred to as the Jewish Scriptures) and the 'New' Testament. Roman Catholics and Orthodox Christians also recognise the Apocrypha as having the authority of Holy Scriptures.

The *Oaths Act 1978*: 'The person taking the oath shall hold the New Testament, or in the case of a Jew, the Old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words "I swear by Almighty God that..." followed by the words of the oath prescribed by law.'

The Quaker (or Moravian) witness would most probably affirm and it could take the following form: 'I being one of the people called Quakers (United Brethren called Moravians) 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.'

There are also a number of Christians from Evangelical denominations who might prefer to affirm rather than swear oaths.

### **Central practices and days of observance**

The communal worship of Christians, often referred to, especially by Catholics and Orthodox, as the **Liturgy**, takes place in church, and the particular day set aside for this is normally Sunday. The form that the main **service** takes varies according to each denomination. The most common elements for all Christians are readings from the Bible, the recitation of prayers, including the Lord's Prayer (the short prayer taught by Jesus to his

disciples and the most universal prayer across all the Christian denominations) and the singing of Hymns, as well as a sermon or homily (moral exhortation or instruction), or the exposition of biblical texts.

The central sacrament (a term meaning a corporate event of focal symbolic significance) is the commemoration of **Christ's Last Supper** taken the night before his **Crucifixion**, in which Christ took bread and wine ('Jesus took bread, and blessed it ...and said, Take, eat, this is my body, And he took the cup and...saying Drink ye all of it For this is my blood...' Matthew 26:26, Mark 14:22, Luke 22:19) and asked his disciples to repeat this meal in his memory. The significance of this meal, and in particular the sharing of the bread and wine, is profound in all the Christian denominations and is known variously as **Mass**, **Holy Communion**, **The Lord's Supper**, and the **Holy Eucharist**.

The meanings attributed to this rite are manifold, and the frequency with which a Christian partakes in it varies also, but unlike the sacraments associated with birth, marriage and death, this rite is repeated and through that repetition, the believer's faith is deepened. Treating the bread and wine with disrespect is, for any Christian, a serious insult to their faith. Orthodox, Roman Catholics, and Anglican Christians usually celebrate a **Eucharist** (Greek, meaning 'thanksgiving') with bread and wine, known to the Orthodox as the **Liturgy** (Greek, meaning 'service'), Catholics as **Mass** and to Anglicans and Reformed as **The Lord's Supper**, **Holy Communion** or **Eucharist**. Many reformed churches (Presbyterian, Methodist) celebrate the Eucharist less often and their usual Sunday worship may be hymns, readings and a sermon.

In the Eastern/Orthodox Church, Christians stand to receive the **Eucharist**; in the Roman Catholic and Anglican, they kneel or stand; in other denominations they sit. In some churches sweet potatoes and honey are substituted for the bread and wine (such as in the three million strong Kimbanguist Church in Zaire); in others, such as the Society of Friends (Quakers) there are no specific sacramental acts, as the emphasis is on the continual inner action of the Spirit. The Salvation Army also does not practice sacramental worship.

The major festivals or commemorative days for the various traditions among the Anglican, Roman Catholic and Orthodox denominations are:

- **Epiphany** usually falling on 6 January (also known as Holy Epiphany in the Orthodox Church). In the Western Church it commemorates the manifestation of Christ to the Magi (the three wise men from the East who came to pay homage to the infant Jesus) and in the Eastern Church, the baptism of Christ by St. John the Baptist.
- **Lent** is the period leading up to Good Friday and the Easter weekend. It falls sometime in March/April according to calculations based on the lunar calendar. The period may be observed by abstentions and other ascetic practices as well as dietary restrictions of some kind (such as abstaining from meat), and some Roman Catholics observe the period of Lent by fasting from food during the daylight hours, and abstaining from meat on Fridays during Lent. Orthodox Christians also have fasts during Lent. **Ash Wednesday** marks the first day of Lent for Western Christians, and is known as such from the practice of the first Christians to place ash on their heads. The day before is known as Shrove Tuesday (which does not have any religious significance) on which people traditionally made their confession and used up food generally forbidden in Lent (hence Pancake Tuesday).

- **Palm Sunday** (sometimes called **Passion Sunday**) is the Sunday before Easter commemorating Christ's triumphal entry into Jerusalem when branches of palm leaves were strewn onto the ground welcoming Jesus into the city.
- **Maundy Thursday** (the day before Good Friday) commemorating Christ's Last Supper with his disciples where he shared bread and wine. Maundy stands for *Mandatum Novum* – new commandment: 'A new commandment I give unto you, that you love one another...' (John 13:34).
- **Good Friday** and **Easter Sunday** which fall sometime in March/April according to calculations based on the lunar calendar are the most important dates in the Christian calendar. Good Friday commemorates the crucifixion of Christ. Easter Sunday celebrates **The Resurrection of Christ** from His tomb.
- **Ascension Day** is the fortieth day after Easter when the Ascension of Christ into Heaven is celebrated.
- **Pentecost** occurring on **Whit Sunday** commemorates the descent of the **Holy Ghost/Spirit** on the Apostles of Christ, and for many Christians is 'the birthday of the Church'.
- **Corpus Christi**, a festival in honour of the Eucharist observed on the Thursday after Trinity Sunday (the Sunday after Whit Sunday).
- **The Feast of the Transfiguration** (6 August) when Christ appeared to three of his disciples on Mount Tabor with Moses and Elias, dazzlingly changed in appearance, and the disciples heard a voice from Heaven ('This is my Son: hear him' Mark 9:2).
- **Assumption/Dormition of the Holy Mother of God** (Orthodox and Roman Catholic) celebrated on 15 August; the taking up of the Blessed Virgin Mary (her body and soul), mother of Christ, into Heaven after her earthly life had ended.
- **Advent Sunday** is the first of the last four Sundays (the period known as **Advent**) before Christmas (usually the last Sunday in November).
- **The Feast of the Immaculate Conception** (8 December) celebrating the fact that according to Roman Catholic theology, the Virgin Mary, mother of Christ was conceived without any stain of original sin.
- **Christmas Day** (25 December) celebrates the birth of Christ (some Eastern Christians calculate this according to other calendars).

### **Dietary rules**

There are generally no restrictions for reformed Christians. Orthodox and Roman Catholics observe the period of Lent with fasting and Orthodox also may have other fast periods. Catholic and Orthodox may also refrain from eating meat on certain days, such as Fridays, to commemorate the crucifixion of Jesus. Roman Catholics may also fast before major festivals and Communion. Orthodox Christians may fast from meat, dairy and olive oil products on Wednesdays and Fridays.

## Rites of passage

Many churches have **sacraments** – sacred rites they believe to be instituted by Christ or with his authority. The number varies. Roman Catholics have seven (Baptism, Eucharist, Confirmation, Ordination to Ministry, Marriage, Confession, Extreme Unction (Last Rites)). Many others restrict the term ‘sacrament’ to two rites only (Baptism and Eucharist). Other churches, like Quakers, have no analogous rites and celebrate neither Eucharist nor Ordination.

**Baptism:** an initiatory rite – often called **Christening** - which involves the sprinkling of water or immersion in water signifying that the subject is cleansed of sin and constituted as a member of the Church, traditionally performed for newborn and very young children though some denominations treat it as a rite exclusively for adults to signify their initiation and commitment to the faith.

**Confirmation and first Holy Communion:** an important ceremony normally performed with children and young adults to allow them to reaffirm the baptism that they received as infants. It is a rite that can involve the anointing of oil, possibly along with the laying on of hands by a bishop.

**A Christian marriage ceremony** celebrated in Church is recognised in civil law as a valid marriage ceremony and obviates the need for the observance of a civil marriage in a registry office, provided the appropriate legal notices have been given.

The recognition of a Christian marriage ceremony in civil law does not mean that all Christian denominations equate civil law with their theological principles. Roman Catholics do not admit the possibility of divorce, and so do not recognise the dissolution of marriage according to civil law. This has many consequences for those wishing to retain their affiliation to the Roman Catholic Church upon divorce and if seeking to remarry. Divorcees in other denominations may also face certain obstacles or requirements if seeking to remarry in Church since marriage is considered an indissoluble life-long union.

**Penance/making of confession:** the confession of sins to Christ with the priest as a witness and the absolution from those sins. This rite is mostly recognised by Roman Catholics and Orthodox but many Anglicans also observe it.

**Ordination:** qualifying those ordained as priests/ deacons/ ministers to teach the faith and administer the sacraments. Every Christian denomination regards ministry as a function of great dignity, but also one of service. For Catholics, Orthodox and many Anglicans ministers are ‘set apart’ by a sacred rite of ordination to serve them and have three levels of ‘major holy orders’: deacon, priest and bishop.

Presbyterian church ministers are also ordained but there is only one level of ordination. The admission of women to ordained ministry happened as early as 1925 in Hong Kong among Anglicans. Women are increasingly important in ordained ministry in many churches. The Roman Catholic Church and many Orthodox churches only allow men to be ordained to the levels of deacon or beyond. The minister usually has a special status within the church’s own law, or **canon law** and many ministers may believe their first duty when conflict arises between civil and canon law is to the canon law. In England, the canon law of the Church of England has a unique status as part of the law of the land.

Ministry in some Black or Independent churches may be less formalised with no particular formal ordination service, or they may recognise **Pastors** as being the key minister. This

does not mean the community treat them with any less respect. Most ministers undertake some form of training, both theological and pastoral for their role.

Many churches – mostly Orthodox, Roman Catholic and Anglican – have communities of women and men, bound by vows, to a life of service. These are known as **religious communities** or **orders**. Some may be monastic orders within which members remain secluded, leading a life of contemplative prayer and work. Other communities engage in service from teaching to nursing and social care. These communities or orders have distinctive customs deriving from a **rule** governing how members live and a **habit** or form of dress. Members may take a religious name which is different from their birth names.

**Extreme Unction:** the sick, especially those close to death, are anointed with oil by a priest as prayers are said.

**Burial:** traditionally Christians are buried, and the interment is preceded by a service in Church (normally accompanied by a service of Mass or Eucharist for Catholics, Orthodox and many Anglicans). However Roman Catholics and Protestants may also be cremated.

## **Hinduism**<sup>158</sup>

### **Key points**

- Hinduism is one of the world's most ancient systems of religious practice tracing back at least 5,000 years.
- Founded in India, most of its adherents originate from there, although there are significant Hindu communities in Mauritius, the Caribbean, South East Asia, and the Pacific Islands as well as a number of ethnic UK people who follow the tenets of Hinduism.
- Assumptions about the cultural and 'racial' homogeneity of Hindu worshippers must be put aside as the divisions and sub-groups within Hinduism are very diverse.

### **Introduction**

While Hinduism is the dominant religion in India, Nepal, Sri Lanka and a major religion in Trinidad, Guyana, Bali, Mauritius, and Fiji and other islands in the Pacific basin, there are more than 800,000 [2011 census] Hindus living in Britain, mainly in and around London and in the large cities of the Midlands. Many British Hindus originate from the Indian states of Gujarat and Punjab, although some have come to Britain via East Africa.

Members of such communities may speak Gujarati or Punjabi. Other Hindu communities in the UK are comprised of Hindus from various parts of the Indian subcontinent (including Bengalis, Tamils and Marathis) and the countries listed above.

### **Beliefs and practices**

A profoundly rich and diverse religion that equips the believer with a total all-encompassing lens through which to view the entire universe: the way is known as the **sanatana-dharma:** the 'eternal way'.

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<sup>158</sup> This section on Hinduism was revised in September 2015.

Based on a complex mythology there is no founder as such, but the acknowledgement and worship of the Supreme Being – the Absolute and Infinite **Brahman** – is basic for all.

The first principle of self-determination of this Supreme Being is the personal God or **Ishvara** who is seen as having three aspects: the Creator (**Brahmâ** – to be distinguished from Brahman), the Preserver (**Vishnu**) and the Transformer (**Shiva**). This trinity is known as the **Trimurti**. The feminine consorts of the **Trimurti**, the **Shaktis**, comprise the dynamic feminine aspect of the manifestation of the personal God.

Thus in Hinduism, feminine and masculine qualities are each acknowledged as intrinsically valuable. Gender segregation is considered a necessary adjunct of the differentiation between the two qualities, but gender oppression is considered a distortion of the concepts of Hinduism. Male and female saints and gurus are both offered equal reverence.

The second of the **Trimurti** (trinity), **Vishnu**, is said to have come to earth nine times in order to preserve the religion and mankind. He is expected a tenth time. Each incarnation of **Vishnu** is known as an **Avatara** and amongst them are the Lord **Krishna**, the Lord **Rama**, the **Buddha** (as understood within Hinduism) and the last incarnation to come will be the **Kalki Avatara**.

Broadly speaking, the main division in terms of worship and current Hindu practice now is between those who follow the path of **Vishnu (Vaishnavites)** and those who follow the path of **Shiva (Shaivites)**. However, unsurprisingly in a religion so ancient, there are now many sub-divisions and sects, and a plethora of deities (**ishta devata**) representing different aspects of the Divine Principle who are now worshipped by the vast majority of Hindus. Most Hindus insist that their worship of one or other of the deities is nothing but the worship of the one ultimate reality, **Brahman**.

However central to all Hindu doctrines and modes of worship are the inter-related concepts of transmigration or re-incarnation and of **karma**. Each soul is destined to multiple births and rebirths (through the elaborate cosmic cycles of time) and the transmigration of souls from mineral, vegetable and animal states to the human state (from which there is the possibility of breaking free from this cycle and achieving liberation – **moksha**) is dependent upon one's **karma**. **Karma** is the cosmic chain of action and reaction – the inescapable law of cause and effect which manifests on every plane of existence – which could be compared to the saying of Christ 'as ye sow so shall ye reap'.

The guidance enabling the soul to navigate the cycles of transmigration is the law of right action: **dharma**. The doctrine of **dharma** is laid out in the scriptures and embodied in the lives of the saints and sages of Hinduism.

In the human state, the duties made incumbent by **dharma** depend upon the four stages of life:

1. youth and celibacy – **brahmacharya**,
2. marriage/householder – **uparkarvana/grihastha**,
3. state of retreat – **vaisthika/vanaprastha**,
4. total renunciation – **brahamatpura/sannyasi**.

The caste system evolved over many centuries and was originally based on division of labour, similar to the present day socio-economic class system in the UK. The class system is

a model of social order that first occurs in ancient Hindu texts and which gradually evolved into a caste system. Early references relate to '**varna**' or a class system are mentioned in the Rig Veda, the most ancient Indian text c1500 BCE.

Traditionally 'varna' of the individual segmented duties according to orientation and vocation. As taught by the **Bhagavad Gita**, the fulfilment of those duties (according to varna) was a way to overcome one's class and other **karmic** limitations and to 'achieve the spiritual perfection'.

The four varnas are:

**Brahmin:** priests, teachers, and preachers

**Kshatriyas:** kings, governors, warriors and soldiers

**Vaishyas:** merchants, craftsmen, businessmen, artisans, agriculturists and cattle herders

**Shudras:** labourers and service providers.

**Dharma** refers to a person's responsibility regarding class (**varna**) and stage of life (**ashram**), and so is called **varnashrama-dharma**. The term **jat** or tribe/clan indicates the social origin of a person, of which there are numerous possibilities, within each caste.

Ancient Hindu texts indicate that caste was not rigid and there was movement between the castes. Over the centuries the class system became rigid partly because Brahmins and Kshatriyas wished to maintain their position of power, financial security and status quo. Traditions and skills were also passed down from father to son and from generation to generation. Hence one was borne into a caste.

The **Daalit** ('oppressed') are not from within the four groupings. They were termed **harijan**' or servants of God by Gandhi and many revered Hindu saints are from amongst this group.

Article 15 of The Indian Constitution formally prohibits caste discrimination. A quota system for people classified as Scheduled Castes and Scheduled Tribes to be fast tracked into schools, colleges and public sector jobs has existed for over 50 years in India, with a view to breaking down caste barriers and redressing the imbalance in society.

The caste system is gradually being broken down and caste is now a social indicator, often used for arranged marriages, and for social organisations for all faith communities from India whether Hindu, Jain or Sikh.

The Hindu communities in the UK may or may not choose to organise themselves according to such social groupings. Certainly current understanding of **jat** is that it no longer rigidly delineates anything, although it may act as an indicator of social background (clan, tribe, region) in India.

### **Holy books and scriptures**

There are two levels of scripture in Hinduism as opposed to one central text, all of which provide guidance and knowledge. All the scriptures are in the ancient language of Sanskrit, which is not commonly spoken or written. **Shruti** means hearing, and is considered revealed knowledge of divine origin. **Smriti** is text which is remembered, and is authored by humans in response to, and inspired by Shruti.

The first level is considered direct revelation (**Shruti**) comprising the **Vedas** (having been recorded about 1500 BC), the **Samhitas**, the **Brahmanas**, the **Aranyakas**, the **Upanishads** and

the **Bhagavad Gita** which, paradoxically, is located as a text within the second level of scripture the **Smriti**. Amongst the **Smriti** are the **Vedangas**, the **Sutras**, the **Shastras**, the **Puranas** (including the **Bhagavatam**), and the two great epics – the **Mahabharata** and the **Ramayana**.

The **Bhagavad Gita** (sometimes simply called **Gita**) a book within the **Mahabharata** is a dialogue between the Lord **Krishna** and the warrior **Arjuna** and is considered direct revelation. The **Bhagavad Gita** or **Gita** is the holy book used to swear an oath by in the courtroom context.

The Gita is always held in the right hand, the witness may, in addition, hold it aloft their heads as is customary in many Eastern traditions. The witness may also wish to perform ablutions to achieve a state of ritual purity.

The oath can take the form: ‘I swear by the Gita that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.’

### Central practices and days of observance

Hindu religious worship (**puja**) may take place in the home or in the temple (**mandir**), with the contemplation of images (**murtis**) of chosen deities. Temple worship may be individual or communal, the latter particularly on the occasion of certain festivals. Most Hindus will have a space set aside in their homes for **puja** which is sacred to them, where shoes are removed.

Temple worship (**arti**) is normally led by a priest and follows a certain pattern that is repeated in other Hindu rituals. Before religious ceremonies or worship, purification of the ritual space and of the participants takes place through ritual cleansing. This is maintained and so, for example, shoes are removed when one enters such a ritual space.

Before worship at the temple, and on prescribed days, individuals may observe fasts and carefully decorate the room or temple with flowers, and light incense, and special lamps.

Items may also be offered to a particular deity or deities in circular motion, while devotional hymns (**bhajans**) are sung and auspicious hymns or formulae (**mantras**) are recited, perhaps to the accompaniment of musical instruments (**kirtan**). On special occasions, as for major life cycle rituals, a fire sacrifice (**havan**) may be performed, but this is a matter of local custom and practice, depending on which ritual traditions people follow. The worship is completed by the distribution of blessed food (**prasad**), usually some form of sweets, and by putting some special powder or mark on the forehead. Traditional Hindu women may also mark their married status by red powder in the parting of their hair (**sindhur**) according also to local custom. Married Hindu women may also wear a red spot (**bindi**) on their forehead at other times, which is often said to be for good luck but now may be worn as a fashion adornment. Traditional women may often avoid wearing black or white as they are the colours associated with death, and so it may be that an older woman wearing white is a widow. Other jewellery such as bangles, gold necklaces with dark beads (**mangalsutra**) may also be traditionally significant. However, nowadays much of the jewellery and adornment is simply fashionable and may have no religious significance, although it may signify a particular social status.

Astrological sciences (revealed in the **Vedanga**) determine auspicious days for weddings and other events, and also help ascertain the compatibility of prospective spouses prior to marriage.

Pilgrimages are an important element in Hinduism and are encouraged especially at festival times. Hindus celebrate several major festivals according to a lunar calendar, so that the

dates vary slightly from year to year. Throughout the year, the following festivals may be important but others, impossible to list here, are also of great importance depending on local traditions and affiliations:

- **Shivratri:** the birth festival of Lord **Shiva** held some time in February/March.
- **Holi:** the Hindu spring festival in March/April, which is also a time of harvest and around which there are many ancient legends. Bonfires are lit, even in Britain, and people throw coloured water and bright powders over each other.
- **Ramnavami:** the birthday celebrations in honour of Lord **Rama** in late spring.
- **Raksha Bandhan:** this is celebrated in August and emphasises the mutual bonds between brothers and sisters, but is not confined to blood relations.
- **Janmashtami:** this important festival in August/September celebrates the birth of Lord **Krishna** and is of special importance to the Hare Krishna groups of Hindus.
- **Navratri** and **Dashera:** celebrations of the Mother Goddess and the triumph of good over evil, held in October. **Navratri** ('nine nights') involves nine nights of folk dancing and worship, while **Dashera** ('the tenth day') is the final day of these celebrations and can be considered an auspicious day for starting new businesses.
- **Diwali/Diwali** or **Dipavali:** **This is the main festival, and** follows soon after Dashera in October/November. It marks the end of the Hindu year. It is called the 'festival of lights', when homes are ceremoniously illuminated with candles and small oil lamps (**divas**), friends are visited, presents are exchanged and new clothes are worn. **Diwali** is linked to removing ignorance through knowledge, learning to distinguish between right and wrong, and is connected with stories of **Rama** and **Sita** from the epic **Ramayana**. The day after **Diwali**, sometimes called **Annakuta**, marks the Hindu New Year when temple offerings of sweets and special food items are made.

### **Dietary rules and taboos**

The permissibility and purity of certain foods is an important aspect of Hindu practice and as diverse as all the strands within Hinduism. Intoxicating or harmful foods will be avoided.

Many Hindus are not strictly opposed to eating meat, but will only consume it occasionally. Those who eat meat regularly will normally avoid beef. However, because eating meat and fish involves killing life, many Hindus are vegetarian and may even avoid eggs.

Often devout Hindus will also avoid eating onions and garlic. Many Hindus do not smoke tobacco or drink alcohol and sometimes avoid stimulants such as tea and coffee. Drinking and smoking is not allowed in any temple.

### **Rites of passage**

The major rites of passage for Hindus today are birth, marriage and death, although at least 40 separate Hindu traditions can be cited concerning the four stages of life mentioned earlier.

**Birth** involves ritual impurity for mother and baby, and the naming of a new-born baby may be delayed for about ten days or so for that reason. The choice of an auspicious name is very important and is considered to influence a person throughout their life.

The **sacred thread ceremony (upanayana)** heralds the start of a young Hindu boy's period of formal education and may take place at the age of eight years. This ritual had more or less fallen into disuse but is now being revived, even in the UK. It involves the tying of a special thread, which the boy will drape over his left shoulder and will thereafter always wear. After this ritual, he will learn details about Hindu beliefs and customs, the performance of rituals and how to prepare for being a householder (**uparkarvana/grihastha**). Young people who are not initiated in such a way may find that part of the preparations for the marriage ceremony involves a small ritual that symbolically enacts the same rite of passage.

**Marriage** is a major Hindu rite of passage and there are many elaborate rituals and customs to ensure blessings for the couple. Hinduism views marriage as a sacrament to be celebrated as a solemn contract before divine witnesses, often symbolised by the ritual fire at weddings. The union of the couple and the two families within their social network is given much importance. Traditionally, pre-marital relationships were discouraged. Marriage is valued as the key institution in society and is treated in idealised terms as a life-long union and an indissoluble sacrament. Divorce was relatively uncommon and was considered a violation of ideal norms, with divorced women being stigmatised and, in turn, remarriage being frowned upon. However, both divorce and remarriage are now acceptable within the Hindu society.

The Hindu marriage ceremony itself involves complex rituals including a fire ceremony (with many variations according to traditional and regional custom) to ensure benediction for the couple.

Traditionally marriages are arranged between families. An arranged marriage is distinctly different to a forced marriage. The families arrange an introduction and both parties get to see and agree to a marriage. If the parties do not like each other, then they are not generally forced into marriage. In UK nowadays partners often select their own spouses, and intercaste and mixed marriages are just as commonplace and acceptable.

Current practice and custom in most of the Indian sub-continent (distinctly separate from religious obligation) tends to attach great importance to the complex exchange of gifts between the families to formalise the marriage. Gifts will normally be given to the bride by her parents, but there have been cases where the groom's family have demanded (or at least expected) all kinds of financial benefits from the marriage, and this has led to instances of abuse.

Dowry or Dahej is not specific to the Hindu religion and is prohibited in India under the Dowry Prohibition Act 1961, and amendment legislation 1986.

Despite the passing of the *Dowry Prohibition Act 1961* in India and amendment legislation (1986), the giving of and demand for dowries has been hard to eradicate in India as it continues under the guise of the exchange of wedding gifts, which can of course play a positive role in the marriage proceedings. The customs of Indian communities resident in the UK have followed suit. However, where abuse does take place and acrimonious divorce proceedings follow, in the UK conventional ancillary relief proceedings have been instituted to secure the return of marriage gifts (dowry). Conventional English case law has been cited in civil proceedings, to establish the intention of the donor of the gift in order to determine ownership of it. Relevant Indian authorities have also been cited to determine the presumption of ownership in various cases.

**Funeral** rituals are viewed from the perspective of the transmigration of the souls, so there are many rituals to ensure the smooth passage and future well-being of the departed. A priest may be called upon to lead rituals at the home of the deceased before the body is taken to the crematorium, where further brief rituals may be performed, often by the eldest son of the deceased.

As soon as possible after the cremation, the ashes are ritually sprinkled into flowing water. In India, this would preferably be done in the River Ganges, but British Hindus have begun to use local rivers, often near the sea, for this purpose. Hindus remember the deceased in special rituals once a year and perform the **shraddha** ceremony by offering sesame seeds, other auspicious substances and water to the deceased, especially during the fortnight in autumn preceding **Dashera**.

### ***Indigenous traditions***

#### **Key points**

- Customs and traditions vary according to the regional and tribal communities of the different regions ranging from Africa to Australia, and incorporating Polynesia and parts of the American continent.
- Adherence to these customs and traditions does not prevent any individual from also practising any other faith such as Christianity or Islam.
- Not everyone shares the same understanding about these traditions and their origins.

#### **Introduction**

Individuals who come from regions where indigenous faith traditions are still practised have a long-established presence in the UK. Many of these individuals also adhere to other religious practices.

#### **Beliefs and practices**

Indigenous traditions are characterised by their reliance on orality, on the concept of time as the ever-present now, and their attachment to their physical surroundings, to the place in which they find themselves. Life is seen as one continuum of past, present and future, subject to the higher forces of nature. Individuals are tied to their ancestors, the customs of the locality and their immediate environment, with the recognition of responsibilities to future generations and to a transcendent power.

Great importance is attached to filial and tribal relationships, and to the key phenomena of nature: the earth, rivers, trees, plants and animals. The acknowledgement of ancestors plays a large role in worship and in relation to festivals. The tradition:

... turns not on worship but on identification, a 'participation in', and acting out of, archetypal paradigms...

Smith, H., 1991, *The World's Religions*, San Francisco, Harper Collins

## **Holy books and scriptures**

Knowledge of the traditions and customs are passed on through oral tradition: the knowledge and focus of the individual in court will be the ‘reference point’.

- Many peoples from Africa, Native Americans, and Aboriginal peoples from Australia maintain their own traditional religious heritage. Making affirmations would be in line with this heritage.
- Some also follow other faith traditions, in which case they may choose to swear an oath on a holy scripture.

## **Central practices and days of observance/dietary rules**

These will all depend on the regional origin of the individual and what other faith, if any, they have adopted.

## **Rites of passage**

All the rituals related to birth, marriage and death vary enormously depending upon the region and other faith identities of the individuals concerned.

Although many African marriages may be polygamous, this is not obligatory. If at the time of the marriage ceremony there were no other spouses, an African marriage ceremony performed abroad may be recognised in the UK.

According to the *Private International Law (Miscellaneous Provisions) Act 1995* a marriage conducted abroad, in a customary African and legally valid manner, which may therefore mean a potentially polygamous manner, is not void if at its inception neither party has any spouse additional to the other. In particular, section 5(1) of the 1995 Act reads: ‘A marriage entered into outside England and Wales between parties neither of whom is already married is not void under the law of England and Wales on the ground that it is entered into under a law which permits polygamy and that either party is domiciled in England and Wales.’ This is so provided that the marriage conducted abroad conforms to the essential requirements of the place of celebration of the marriage.

Section 5(2) of the 1995 Act reads: ‘This section does not affect the determination of the validity of a marriage by reference to the law of another country to the extent that it falls to be determined in accordance with the rules of private international law.’

## **Islam**

### **Key points**

- Islam is the youngest of the Semitic or Abrahamic religions.
- The British Muslim community in the UK is extremely diverse with members who are from ethnic English, Welsh, Irish backgrounds and are born Muslim, as well as those who have entered Islam later in their lives. The cultural origins of other British Muslims span from Albania to Africa, the Middle East to Malaysia and from Poland to Pakistan.
- The cultural diversity of the Muslim community in the UK reflects the many different trends and tendencies within the religion as a whole.

- Assumptions about the cultural and ‘racial’ homogeneity of Muslim worshippers should be put aside.
- Not everyone shares the same understanding about Islam and its creeds.

## Introduction

The Muslim community in the UK is long-standing with sailors from the Yemen, Gujarat and other Muslim nations, known as the ‘lascars’ establishing communities in the sea ports of Liverpool, Cardiff, Southampton and other port towns over 300 years ago. By the end of the nineteenth century Muslim intellectual groups were well-established in Britain, comprising such figures as William Henry Quilliam, Lord Headley, and Marmaduke Pickthall, whose translation of the **Qur’an** into English is still amongst the most consulted and popular translations.

British Muslims have thus always comprised a wide spectrum of cultural and ethnic groups ranging from European to South East Asian. However, as a result of migration encouraged in the 1950s, the majority of Muslims in the UK are of South Asian descent and the rest (in decreasing numerical proportions) from the Middle East (including North Africa), Africa and Europe.

The historical origins of the Islamic faith are in the ancient cities of Mecca and Medina on the western coast of the Arabian Peninsula, where the Prophet of Islam, Muhammad (570–632 CE), founded the religion. Islam spread rapidly, and at different periods encompassed the entire region now known as the Middle East, Central Asia, the Near East, extending from the Balkans and Spain in the west, to China and the Far East, and from the Volga in the north to Sub-Saharan Africa.

## Beliefs and practices

The religion founded by the prophet Muhammad is based on the central belief in the oneness of God (called **Allah** in Arabic), who the religion states is the same God of Abraham, Moses and Jesus, Muhammad being the last in the line of these prophets beginning with Adam. This testimony to the oneness of God and to the prophethood of Muhammad comprises the defining tenet of the faith (known in Arabic as the **shahada**) and must be declared in order to convert to Islam.

Muslims believe the **Qur’an** was revealed by God, word for word, and thus accord it absolute authority in determining religious practice, morality, and the law. As the language of the **Qur’an** is Arabic, all of the essential religious terms are in the Arabic language.

The **Qur’an** also explicitly refers to other religions and implicitly to prophets other than those of Semitic monotheism:

‘Truly those who believe, and the Jews, and the Christians, and the Sabeans – whoever believeth in God and the Last Day and performeth virtuous deeds – surely their reward is with their Lord, and no fear shall come upon them, neither shall they grieve.’ (2: 62)

‘Verily We have sent Messengers before thee [O Muhammad]. About some of them have We told thee, and about some We have not told thee...’ (40:78)

The essential religious obligations known as the ‘five pillars’ are:

1. the attestation of the shahada or testimony of belief in the one God and the prophethood of Muhammad;
2. the five daily prayers (**salat**): at first light, midday, afternoon, sunset and night time, which may be said individually in any suitable place, or in congregation at fixed times in a mosque. The inner meaning of this rite is given as the permanent attachment to divine reality;
3. the practice of fasting every day from first light to sunset in the month of **Ramadan**. The fast involves abstinence from all food, drink and sexual activity. The inner meaning of this practice being detachment from the body and the ego;
4. the obligatory, annual payment of alms (**zakat**) of one fortieth of one's fixed assets to the poor. The inner meaning of this practice being detachment from the world;
5. finally, if one is able (depending upon finances, age and health), there is the duty to perform the prescribed pilgrimage to Mecca (**Hajj**). The inner meaning of this pilgrimage is to return to one's inner centre, the **Ka'ba**, the cube shaped shrine in Mecca, being the external symbol of the heart.

God's nature is considered to have two attributes, the feminine (**al-Jamal**) and the masculine (**al-Jalal**), which are considered equal, necessary and complementary, although this is not something that would be taken for granted by most orthodox Muslims. Both attributes are then differentiated into several dimensions, the totality of which comprise all of God's qualities. Thus in Islam, women and men embody the different attributes of God, and individual characters comprise reflected configurations of these divine qualities. In social terms, gender differentiation is strongly marked, but the religion itself in fact allows both sexes to participate in all spheres of communal life (e.g. one of the woman companions of the prophet Muhammad, Nusaybah, fought alongside him on the battlefield).

The current stereotypes of Muslim women should be placed in the context of Islamic history. The Prophet's first wife (the first woman to enter Islam) came to know of him as her employee in her business as a wealthy and successful merchant. Throughout the course of Islamic history women have participated in all spheres of civic life, but during the course of the eighteenth and nineteenth centuries the place of women was deemed to be at home, in parallel with the trends in Northern Europe, and gender segregation was increasingly and unfairly enforced. Currently, in many Muslim societies women are in the process of reclaiming their religious heritage.

### **Holy books and scriptures**

The central text is the **Qur'an**, which is considered the final, unaltered and unalterable word of God. The Hebrew Pentateuch is also regarded as revealed scripture as are the Psalms, whilst the Gospels are regarded as divinely inspired, not divinely revealed. The second most important source of authority in Islam is the canon of the recorded sayings and normative practices prescribed by the Prophet Muhammad (known as the **Sunnah**).

The **Qur'an** and **Sunnah** together provide the basis for the **Shariah** or body of Islamic laws, which provides guidance for Muslims on all matters of private and public concern.

The **Shariah** thus comprises both:

- a set of rules governing the individual's relationship with God, defined in terms of religious practice (the five pillars) which are non-negotiable, but vary in detail

between five established schools of law. The **Sunni** majority Muslim population adhering to any one of the four schools of law (**Maliki, Hanafi, Hanbali, Shafi'i**) and the minority **Shia** population adhering to the fifth; and

- a body of rules governing corporate relations which are flexible and open to change according to the principles of a highly developed jurisprudence.

British Muslims may adhere to any one of the five schools of law and, like any religious community, the level of knowledge and awareness of religious principles is not consistent among individuals.

Muslims consider oaths on the **Qur'an** as binding. As the Word of God, Muslims do not touch the Qur'anic script unless in a state of ritual purity which involves the performance of ablutions. The **Qur'an** may be handled by someone not in a state of ritual purity if it is kept in a covered cloth, according to some schools of law, but the book must never be handled carelessly. However, menstruating women and others who are in a state of ritual impurity may be reluctant even to touch the **Qur'an**, let alone swear an oath upon it, and for this reason they may prefer to affirm.

In the case of *R v Kemble [1990] 91 Cr App R 178*, the Court of Appeal laid down the minimum requirements of the law and made it clear that the only duty of a court is to consider whether the witness is taking an oath which appears to the court to be binding on the witness's conscience and, if so, whether it is an oath which the witness himself considers to be binding on his conscience. In this case, 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 in Islamic jurisprudence an oath taken by a Muslim is only binding if taken on the **Qur'an**.

Because of the complexity of Islamic jurisprudential doctrines, in a trial where there are several Muslim witnesses it would be good practice to ensure witnesses are given a choice between oaths sworn on the **Qur'an** or affirmations, rather than permit the possibility of oaths being taken on different holy books by different Muslim witnesses. As Muslims are obliged to cover their heads and dress modestly at all times, it may be that a particular witness not so dressed would wish to cover themselves appropriately in court if swearing an oath on the **Qur'an**; however a failure to do so would not invalidate the degree to which a person considers themselves bound by their oath. The issue of head covering and dress is sensitive. Many Muslims prefer to interpret the guidelines exhorting modesty in a strict manner, despite the diversity of dress codes in different Muslim cultures.

Witnesses who choose to cover themselves should not be asked to remove their clothing in court as this would be considered extremely oppressive and possibly amount to an abuse of the right to freedom of religious practice.

## Central practices and days of observance

While the mosque is the main place of communal worship, prayers may be said in any appropriate location.

The prayers involve the recitation of verses from the **Qur'an** whilst performing a series of movements such as standing, bowing, prostrating and remaining seated, with the aim of encouraging the corresponding attitudes of moral rectitude, gratitude, submission and humility.

Apart from the obligation to pray five times daily, the mid-day prayer on Fridays is considered a special opportunity to participate in communal prayers. These congregational prayers do not have to take place in a mosque, but do require sufficient people to make a 'congregation', that is, at least two.

Women can participate in all religious activities and the earliest traditions relate how women would attend the mosque and ask questions of the prophet Muhammad at public gatherings.

Islamic religious festivals are celebrated in accordance with a strictly lunar calendar so that every lunar year the dates of the month go back by approximately ten days; thus a given lunar date will return to the same date of the Gregorian calendar every 33 years.

Each lunar month lasts for 28–30 days, and a year is usually 354 days, so no fixed dates can be given for festivals.

The Islamic day is counted from evening to evening and all festivals therefore begin in the evening before the day of the festival. The Islamic calendar commences with the year in which the prophet Muhammad migrated from Mecca to Medina in order to escape persecution. The names of the months in the Islamic calendar date from pre-Islamic times. The major festivals and commemorations are as follows:

- **Ramadan.** This month (the dates vary each year) is considered as an opportunity to intensify religious practice and enhance one's consciousness of God's presence. Every adult and physically capable Muslim is obliged to fast from first light to sunset for the duration of this month. During the hours of fasting Muslims are obliged to abstain from food, drink, sexual activity (and also smoking). Women who are menstruating, recovering from childbirth and nursing mothers are exempt from fasting, as are the elderly, the sick and travellers. The last ten days in Ramadan are considered especially auspicious as the prophet Muhammad received the first revelation of the **Qur'an** in the last ten days of Ramadan. Many Muslims will spend the last ten nights of Ramadan in worship in addition to fasting during the day.
- **Eid ul-Fitr** commemorates the end of Ramadan. Special prayers are recited at the mosque and families and friends pay each other visits to enjoy celebratory meals. New garments are worn and gifts exchanged. In Muslim countries three days of festivities ensue which are also public holidays.
- **Hajj** is the obligatory pilgrimage to the **Ka'ba** and it is performed in the month named after the pilgrimage (two months after the month of Ramadan). The pilgrimage is performed during the course of three days and consists of various rites such as the circumambulation of the **Ka'ba** and the visit to the mount of Arafat, near Mecca. The performance of the pilgrimage is deemed to be purificatory. On the third and final day an animal is sacrificed and the meat distributed. The performance of this rite

coincides with the date that the prophet Abraham is believed to have offered up his son in sacrifice to God, symbolising the intention to make the ultimate sacrifice.

- **Eid ul-Adha or Eid ul-Kabeer** marks the completion of the Hajj pilgrimage and three days of festivities ensue which are public holidays in Muslim countries.
- **Muharram** is the first month of the Islamic lunar year, and traditionally there was a fast recommended on the tenth day. However, within decades of the death of the prophet Muhammad, his grandson and many members of his family were slaughtered on the tenth day of the month, at a place called Kerbala (now situated in Iraq) where they had been besieged for ten days without food and water. The Shia Muslims commemorate the martyrdom of the Prophet's family with special rituals throughout the month of Muharram, but especially the first ten days.
- **Milad un-Nabi** is the celebration of the prophet Muhammad's birthday. This occasion is often marked by a day of prayer, devotional chanting and festivities in honour of the Prophet.

### **Dietary rules**

Muslim dietary rules specify foods that are permissible (**halal**) and those that are prohibited (**haram**). As a general rule, all food which contains pork, and all drink which contains alcohol, is prohibited. The extent to which such rules are observed varies according to the individual's level of religious adherence.

The process by which an animal is lawfully slaughtered entails: first, its ritual consecration to God; then the use of a sharp knife, to avoid inflicting pain; and finally, the draining away of all the blood of the animal. The meat of the animal is thus rendered **halal**.

### **Rites of passage**

For a Muslim, each and every activity – from the act of eating to the pronouncing of a marriage contract – should commence with the pronouncement of a formula in Arabic which consecrates the act in the name of God the Most Merciful, the Most Compassionate (**Bismi'Llahi-al-Rahmani- al-Rahim**).

According to the Shariah, a Muslim is a person born of either a Muslim mother or father.

At birth the call to prayer, which contains the shahada (or testimony of the oneness of God and the prophethood of Muhammad) is pronounced in the baby's ear and this is said to confirm that Islam is the religion of the child.

Some Muslim cultures perform a naming ceremony for the child known as the **aqiqah**, and this feast takes place 40 days after the birth of the child, and the meat of an animal is distributed among family, friends and the poor.

Muslim boys should be circumcised. The age at which the boy undergoes the operation varies from culture to culture.

The Shariah does not prescribe what has been called 'female circumcision' or 'female genital mutilation'. This ritual predates the advent of Islam in many cultures of Africa and the Middle East and is therefore strictly cultural and not religious.

The **Sunnah** or Prophetic norm emphasises the importance of marriage in Islam. The Sunnah emphasises the right to sexual fulfilment for both women and men, and marriage is seen as the only legitimate framework within which sexuality can be expressed. Under very strict conditions, a Muslim man may marry up to four wives and current estimates are that fewer than 2% of Muslim marriages are polygamous.

### **Muslim marriage and divorce and the interface with UK civil law**

A Muslim marriage is known as a **nikah** or **aqd** which takes the form of a contract between the bride and groom, which they must enter into freely. The groom has to provide a sum of money for the contract to be valid, and this can be any sum agreed between the parties. This is known as the **mahr** and has sometimes been incorrectly referred to as the dowry. This belongs to the wife who can demand it any time. The contract should be witnessed by two competent witnesses. The contract entails certain rights and obligations for both parties.

**Divorce.** Islam has always recognised the possibility of terminating a marriage contract. A husband can do so using various procedures and the divorce is known as **talaq**. In addition a wife has the right to dissolve the marriage contract on her own initiative, in which case she is required to inform a Muslim judge (known as a **Qadi**). This right to divorce could be stipulated in the marriage contract; if it is not so stipulated, the parties can negotiate the wife's release from the marriage contract, and this procedure is known as a **khulla**, whereby the wife must pay a certain amount of money, most often the amount of money (mahr) she received from her husband. The marriage can also be dissolved by the wife in certain instances which do not require her to pay anything, but does require the intervention of a Muslim judge; for example, when deserted by her husband judicial intervention is required to make a formal declaration that the husband is missing, or when the husband is impotent, a formal declaration to that effect is required. The dissolution of the marriage contract is called a **faskh of nikah**, and this can also be declared when the husband causes the wife harm. The category of harm is very broad and includes a husband's refusal to consider the marriage at an end.

To avoid the difficulty faced by Muslim women in the UK who do not have the means to request the intervention of Muslim judges to dissolve their marriage contracts, Muslim community groups have formed organisations comprising individuals trained in Islamic jurisprudence to act as a Muslim judge would and to facilitate the procedures available to Muslims to dissolve their marriages. The oldest and most well-established of such organisations is the Muslim Law Shariah Council (based in West London). It has an express policy of not making any decisions which could be seen to conflict with English and Welsh family law, for example, with regard to financial or child custody matters. However, they do offer advice and arbitration/mediation skills facilities in such areas, since the **Qur'an** expressly endorses arbitration and mediation of family disputes.

The *Divorce (Religious Marriages Act) 2002* currently specifically applies to Jewish communities. Since Islamic law facilitates the means by which either party can dissolve a marriage contract, the intervention of the UK civil law has been deemed unnecessary. However, as Muslim marriages and divorces conducted abroad are recognised, the vast majority of the Muslim community in the UK, and at times their UK civil law legal advisers, become confused. The *Private International Law (Miscellaneous Provisions) Act 1995* recognises those marriages conducted abroad in an Islamic (and potentially polygamous)

manner if the marriage was legally valid in the country where the ceremony was performed and at the inception of the marriage neither party was married to another.

As to divorces according to the Shariah outside the UK, the relevant legislation is section 46 of the *Family Law Act 1986*. Divorce proceedings abroad are recognised. The crucial term is ‘proceedings’ that take place where ‘either party is habitually resident’, ‘domiciled’ or a ‘national’ in that country.

According to the facts of *Quazi v Quazi [1980] AC 744*, the House of Lords recognised an Islamic divorce as obtained by proceedings, where it had been obtained according to the *Muslim Family Laws Ordinance 1961* of Pakistan. The procedure in that case involved the husband pronouncing **talaq** in order to terminate the marriage, and giving notice to the Council and to the wife.

This procedure must be distinguished from the **bare talaq** that jurisprudence in this country has been keen to classify as ‘other than proceedings’. Therefore, a divorce according to Islamic law that takes place outside of the UK may be recognised as valid in the UK, provided that there were some ‘proceedings’ giving spouses adequate notice and an opportunity to respond.

**Children.** Islamic law respects the principle of the best interests of the child. On divorce, young children (normally under seven years old) should stay with the mother, although the father is expected to provide maintenance and retains guardianship. The custody of older children can be with either the father or the mother and both have the right to claim custody depending on the rights of the child.

For further information contact The Muslim Law (Shariah) Council (Tel: 020 8992 6636).

**Funerals.** Prior to the funeral, ritual ablutions are performed on the body of the deceased by a person of the same sex, usually drawn from family members. The body is wrapped in a white shroud. Burial takes place as soon as possible after death, often within 24 hours. The funeral prayers are simple. The body is laid on its right side, with the head facing Mecca. Recitation of the **Qur’an** (ideally the whole of the **Qur’an**) in Arabic is part of the mourning ritual. The **Shariah** prescribes three days of mourning, but some Muslim cultures often extend this period to 40 days. At the end of this period, the mourners invite friends and relatives to a recitation of the **Qur’an** followed by a meal. Bodies are never buried within a place of worship.

## ***Jainism***

### **Key points**

- Jainism is a religious tradition based in India, older than Buddhism but smaller in size than Hinduism.
- The Jain community in the UK comprises a number of groupings who place differing emphases on the scriptures they adhere to but follow the same basic philosophy.
- The community is distinctly divided into ascetics and lay, males and females, as a fourfold society. Since the ascetics are not allowed to use any vehicles for travel, only laity is to be found in countries outside India.

## Introduction

The Jain community in the UK is long-standing with many originating from the state of Gujarat in north-west India. The origins of contemporary Jainism in India date back to 599 BCE when the commonly acknowledged 24th and last teacher of this era, according to the Jains, Vardhamana Mahavira was born. He abandoned his life as a prince at the age of 30 years to live life as a roving mendicant detaching himself from all worldly possessions and renouncing all comforts. After some 12 years he attained omniscient knowledge of the universe and absolute detachment from worldly desire and he began imparting his wisdom. By the end of his life in 527 BCE it is said that he had several hundred thousand followers. Thereafter his senior disciples continued his teachings and a division between (broadly speaking) northern and western practices and southern and central practices arose. This was most markedly characterised by the division, which endures, between the **Shvetambaras** (mostly in the north) and **Digambaras** (mostly in the south). A most particularly apparent distinction in their ascetic practices is that the **Shvetambara** monks and nuns wear white clothing and the **Digambara** monks renounce all clothes and remain naked. Now, in addition, there is a significantly large lay Jain community also seeking a path of renunciation and non-aggression.

## Beliefs and practices

Time is considered eternal in cyclical terms, with each cycle divided into two halves of ascent and descent; the scriptural definition of time is indecipherable in years. The Jains believe that 24 teachers take birth in each half-cycle and there have already been 24 teachers, the **Tirthankaras**, in the current descending cycle, the last of whom was Vardhamana Mahavira.

The central teaching is that individuals can transcend human limitations by means of ascetic practices.

Each and every thing is either **jiva** (knowing) or **ajiva** (non-knowing, such as material). The human soul, as all souls in whatever embodiment, is jiva, and is prevented from realising its pure jiva state by the attachment of ajiva through the doctrine of **karma** (the Law of Causality extended to its subtlest level and infinite potentiality which must be transcended in order to achieve total liberation from the cycle of birth and rebirth). All that is ajiva (non-jiva) can be transcended by detachment including physical detachment through ascetic practices. All Jain practices involve ascetic rigour so that, for example, upon entering the monastic state a **Digambara** monk will give up all possessions and clothing but will be given a 'broom' of peacock feathers and a bowl, and a **Shvetambara** will be given three pieces of cloth, a begging bowl, a staff and a 'broom' of wool. Variations are to be found in some sects.

Another key concept is that of **ahimsa** which means 'non-injury' to any other. This includes any element of aggression or consumption, which explains the monastic Jain practice of carrying a small broom to gently brush away all living creatures before unwittingly stepping on them when walking or moving to be seated. Likewise, practising Jains will observe a vegetarian diet.

The path to liberation consists of 14 stages and upon entering the fourth stage one is able to lead a life of piety, and only upon becoming a monk or nun does one enter the fifth and sixth stages. Jains who are lay observers of the path may also follow ascetic practices, but they also participate in communal activities such as temple worship, where devotional practices are

observed. Images of the Teacher (**Tirthankara**) are revered with votive offerings and the singing of litanies. Pilgrimages to holy sites and shrines are also undertaken.

### **Holy books and scriptures**

The canon of Jain literature comprises early scriptures, later texts in Sanskrit and more modern 'manuals' of practice and discipline. The **Shvetambara** and **Digambara** literature is distinct.

The Jain witness or jury member 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**. Sometimes such a witness will swear an oath by elevating a holy scripture above their head and swearing by it. If such a witness does not stipulate such a practice and/or does not have the appropriate text in court, they should affirm.

Questions of ritual purity may arise.

### **Central practices and days of observance**

Apart from temple worship, as outlined above, the lay community and the monks share a period of retreat in the rainy season, when the monks cease their travels to different centres. In the rainy season, the two elements of the Jain community participate in sessions where the monks teach and worship with the lay members who may also use this period to perform retreats and keep fasts.

Pilgrimages are an important feature of Jainism and are encouraged, especially at festival times. Jains celebrate several major festivals according to a lunar calendar, so that the dates vary slightly from year to year. Throughout the year, the festivals commemorate and celebrate the major events of the lives of the **Tirthankaras** and other Jain saints. All are impossible to list here, but include:

- **The birth date of Vardhamana Mahavira** in March/April.
- **The death/liberation of Vardhamana Mahavira** in October/November, which coincides with the Hindu festival of Diwali/Deepavali.
- **The rainy season retreat known as Paryushana** held some time in August/September.
- **Monthly fast days** are also regularly observed, timed according to the waxing/waning of the moon.

### **Dietary rules and taboos**

The permissibility and purity of certain foods is an important aspect of Jain practise. Intoxicating or harmful foods will be avoided. All practising Jains are vegetarian, including the avoidance of eggs and fish, because of their belief in **ahimsa** (non-injury). The more orthodox practise also avoids use of root vegetables such as onions, potatoes, carrots and garlic, as well as fruits and vegetables with many seeds such as figs and aubergines, because Jains avoid foods whose production kills the entire plant, harms microscopic organisms, or destroys the germs of future life (seeds).

## Rites of passage

The major rites of passage for Jains who are not monks/nuns are to some extent parallel with those of the Hindus in terms of birth and marriage rituals, but since the ‘manuals’ on ascetic practice are quite detailed about the process of detachment from this world, whereby vows are taken, fasts and sexual continence observed, and ultimately the abandonment of all householder activities, many community rituals can not assume the same dimensions as for the Hindu community.

All Jains will be cremated, with the very important distinction from Hindus that they do not perform the ‘shraddha’ ceremony commemorating death since they do not believe in the possibility of transfer of merit from the progeny to the departed soul which is the purpose of this Hindu ceremony.

## Judaism

### Key points

- Judaism is the oldest of the Semitic or Abrahamic religions.
- The Jewish community in the UK has been present since the early Middle Ages.
- British Jews can either be **Ashkenazi** (from Central and Eastern Europe), the majority, or **Sephardi** from the Iberian peninsula, North Africa and the Middle East.
- The UK Jewish community of 252,000 is extremely diverse, and can be divided between ultra Orthodox Jews and various Progressive groups.

### Introduction

The Jewish community in the UK has a well-studied historical presence. They were expelled by Edward I in 1290, but were readmitted to England towards the end of the seventeenth century. British Jews come from both the **Sephardi** and **Ashkenazi** communities. The **Sephardi** came originally from the Iberian peninsula, North Africa and the Middle East, and have been in England since the seventeenth century. Most British Jews today belong to the **Ashkenazi** communities originating from Central and Eastern Europe who came here as a result of Russian pogroms in the late nineteenth century and Nazi persecution during the 1930s and 1940s.

Although most Jews speak English, Hebrew and Yiddish are also in use. Hebrew is the main language of worship and many children learn it in synagogue-based classes (**cheder**) or in denominational schools. Yiddish is generally spoken among older **Ashkenazi** Jews and is a mixture of medieval German, Polish and Russian, but using the Hebrew alphabet.

Jews qualify as an ‘ethnic group’ as defined by the *Race Relations Act 1976*, see *Seide v Gillette Industries Ltd [1980] IRLR 427*. The essential characteristics are a long shared history, distinguishing it from others, and the memory of it; and a cultural tradition of their own, including family customs.

## Beliefs and practices

As a religious community of about 252,000 people in the UK, living mainly in the large conurbations, Jews are split into Orthodox and various Progressive groups, stemming from a movement known also as Reform Judaism.

Orthodox Jews believe the **Torah** was revealed by God, word for word, and thus accord the Bible and its rabbinical interpretations full authority in determining law, life, and religious practice.

Adherents of Reform Judaism believe that the **Torah** was inspired by God, but regard it as open to revision and are in favour of reforms in changing times.

There are a large number of different shades of affiliation within the Jewish community, ranging from ultra Orthodox (Hasidim, haredim) to secular non-affiliated Jews. This is reflected in the wide spectrum of both religious practice and cultural observance and identity within the community.

Central Jewish concepts focus on the belief in one God, who created the world, extending justice and compassion to all. While God's ways can be known, it is believed that His ultimate essence is unknowable. The main elements of Jewish belief are as follows:

- The **Torah** is the revelation of God's words to Moses on Mount Sinai. The **Torah** contains Divine teaching amongst which are the five books of Moses (also known as the Pentateuch) including the 613 commandments (**mitzvot**) which enable Jews to sanctify their daily life: 'For I am the LORD your G-d: ye shall therefore sanctify yourselves and ye shall be holy...' Leviticus 11:44. These commandments cover all aspects of life, dealing with questions of ethics, spirituality, the Sabbath, festivals, dietary rules and many other matters. Among Orthodox Jews in particular, study of the **Torah** and practice of its commandments is treated as central to religious life.
- The belief that God's compassion permits the atonement of sin is central to the Jewish faith.
- The traditional hope in the establishment of God's kingdom on earth is tied to a belief in the coming of a Messiah. Meanwhile, man's duty is to work for the betterment of society.
- The role of women, especially mothers, is considered very important in Jewish life because of their role in the preservation of Jewish customs and values, particularly with regard to festivals and celebrations. In Progressive Judaism, men and women play an equal part in religious ceremonies and women can become **rabbis** – spiritual leaders of the community.

## Holy books and Jewish law

Judaism is derived from Jewish scriptures as interpreted by the rabbis. The three main Scriptures (the **Tanakh**) are:

- the **Torah** – the five books of Moses also known as the **Pentateuch**,
- the **Nevi'im** – the books of the Prophets,
- the **Ketuvim** – the 'Writings' including inter alia, the **Psalms, Proverbs, Ecclesiastes. Halacha**, the Jewish Law, through which the practice in Jewish life is governed, is a

codification of the **Mishna** and the **Talmud**, and the rabbis' commentaries thereon and is applied in rulings by the **Beth Din**, the Court of Jewish Law.

Jews may approach the **Beth Din** for rulings on issues such as divorce, conversion to Judaism, or as a court of arbitration in other private law matters.

Male Jews may wish to cover their heads when taking the oath, but this is not a requirement of the Oaths Act 1978 and failure to cover the head should not be regarded as an indication of untruthfulness. Jewish law regards the act of taking an oath or affirmation as equally binding whether or not the head is covered. Jews who wish to cover their heads at all times should not be considered disrespectful of the court.

The Act requires that Jews take the oath on the Torah, also known as the Hebrew Bible or 'Old Testament'. However, many very Orthodox Jews do not think it appropriate to swear oaths upon the Torah in a non-religious context. Such a witness should be permitted to affirm without any consideration that their credibility has been compromised. Ultra Orthodox men may not wish to take the book from the hands of a woman to whom they are not married, and a female usher may wish simply to set the book down for the witness to pick up.

While most Jews wear western dress, devout men tend to keep their head covered at all times, either with a skull cap or a hat. Orthodox male Jews, mainly of the **Hasidic** tradition, wear dark clothes, wide-brimmed hats, long coats, beards and side locks. The practice of covering their head at all times should be permitted and not considered disrespectful of the court.

Orthodox women, observe rules of modest dress and may not wear sleeveless garments or trousers, and married women also tend to cover their hair at all times, often with a wig, if not a hat or other covering. It is not appropriate for an Orthodox Jewish woman to shake hands with an adult male or in any way to be touched by an adult male or vice versa, except within the immediate family.

### **Central practices and days of observance**

While the synagogue is the main place of communal worship, this can take place anywhere, for example on special occasions at home. It is not necessary that a rabbi should lead communal prayers.

There are three daily prayers:

1. the morning service (**shacharit**). During shacharit, but not on **Shabbat** or festival days, phylacteries (**tephilin** – a small black box containing holy scriptures) may be worn (held in place by straps) on the forehead and arm, particularly by male Orthodox Jews over the age of 13 years, or by married men only, or even by some women in Progressive communities;
2. the afternoon service (**mincha**);
3. the evening service (**maariv or arvit**).

Among Orthodox Jews, certain communal prayers can only be said among a properly constituted community (**minyan**), or when at least ten Jewish males are present. The entire service in an Orthodox synagogue would be in Hebrew, apart from the rabbi's sermon and a prayer for the Royal Family.

In many Reform or Liberal congregations, more English may be used. Most synagogues have a pulpit from where the rabbi preaches and a cantor usually leads the congregational prayers. In an Orthodox synagogue, men and women sit separately.

The Sabbath (or Shabbat) is central to the organisation of Jewish life. It begins about an hour before dusk on Friday evening and ends at nightfall on Saturday. It is a day of worship and rest, with special synagogue services and public readings of the Torah, prayers and special meals spent with the family. As a general rule, Jews are forbidden from engaging in any activities considered as work (which includes travelling, writing, cooking, and transacting any form of business – including, of course, going to court).

Recitations from other scriptures may also be conducted on Shabbat morning and on festival days. After Shabbat and festival services, a special prayer called **kiddush** is said. It proclaims the holiness of the Shabbat and of key festivals and is also recited before meals over a cup of wine. In practice, the various Jewish groupings interpret these rules differently and, as a general rule, there is much variation in the degree of observance of the rules of the Sabbath. An Orthodox Jew must stop travel before the Sabbath or Festival begins. A request for a court to accommodate this need on a Friday or Festival eve in winter, when the Sabbath can begin as early as 3.30pm, should be granted. Court hours can be adjusted accordingly.

On Monday and Thursday mornings, on Shabbat mornings and afternoons and on festival days, a portion of the handwritten Torah scroll (**Sefer Torah**) is read. Such readings take place from a raised platform in the centre of the synagogue. The Torah scroll has an honoured place in worship. It is kept inside a velvet cover and is housed in the Holy Ark (**Aron Kodesh**) behind an embroidered curtain with an everlasting light hung in front of it. Jewish religious festivals are celebrated in accordance with a combined lunar and solar calendar in a 19-year cycle. Each month has 29 or 30 days, and a year is usually 354 days, so no fixed dates can be given for festivals, although those dates are given a year in advance and judges should have reference to them when listing cases. The Jewish day goes from evening to evening and all festivals therefore begin in the evening before the day of the festival. No work may be done on festival days. The Jewish year appears on documents, for example marriage contracts (**ketuba**) and on gravestones; so, for example, the year 2000 CE was the Jewish year 5760/61.

Major festivals are:

- **Pesach** (Passover, March/April) consists of eight days and commemorates the exodus of the Jews from Egypt. The home ceremony centres on the first two nights around the special **seder** meal in which the story of the exodus of the Jews from Egypt is retold. The house is thoroughly cleaned and dishes are changed to remove all traces of leavened food (**chametz**). No such foods are consumed, instead people eat unleavened bread (**matza**) and foods prepared specifically for that period.
- **Shavuot** (Pentecost, May/June) is a festival of two days commemorating the receiving of the Torah on Mount Sinai by Moses, and no work is done on these days.
- **Rosh Hashana** (September/October) consists of two days which begin the New Year and which determine the year ahead. No matter how secular, a Jew is likely to celebrate Rosh Hashana and Yom Kippur.

- **Yom Kippur** is a fast day devoted to prayer and worship commemorated ten days after the New Year, beginning at dusk and lasting till nightfall the following day.
- **Sukkot** (Tabernacles, September/October): this festival of seven days commemorates the wandering of the Jews in the wilderness between Egypt and Canaan. Temporary structures (**sukkot**) are built by some families onto the side of houses and some families eat in them. This festival is followed by celebrations of the completion and re-commencement of the annual cycle of readings from the Torah.

Minor festivals, which do not involve restrictions on working, include:

- **Chanukah** (in December), a festival of eight days commemorating the re-dedication of the Second Temple in Jerusalem by the Maccabees in approximately 168 BCE (with one of the eight-candle **menorah** being lit every night, until the last night when all eight burn, accompanied by the singing of hymns and benedictions). Now a very popular festival.
- **Purim** (February/March), a day commemorating the saving of the Jews of the Persian Empire.
- **Tisha Be'av** (July/August), a fast day to remember the destruction of the First Temple in 586 BCE and of the Second Temple in 70 CE.

### Dietary rules

The Jewish dietary rules are known as **kashrut**. The extent to which such rules are observed varies according to the individual's level of religious adherence.

Animals, birds and fish, if permitted, are **kosher**. Food which contains **treif** (i.e. non-kosher) particles, or has been cooked amongst products from forbidden animals, is unacceptable. Forbidden foods include all products from pigs, shellfish, game and any domesticated animals.

For permitted meat to be **kosher**, it must have been slaughtered and prepared by a qualified person (**shocket**). Slaughter according to Jewish law (**shechita**) involves draining the blood from the animal as completely as possible by slitting its throat according to prescribed rules to minimise suffering. There is a prohibition against consuming blood, so meat may be processed and further **koshered** by soaking and salting, and sometimes by broiling. The mixing of milk foods with meat foods is prohibited. Separate sets of kitchen utensils, crockery and cutlery are used and a time lapse between eating meat and milk foods is practised. Fruit and vegetables are all acceptable and can be eaten with either milk or meat. As with all other aspects of the religion, there is a wide variation in practice in relation to the observance of the rules of Kashrut.

### Rites of passage

According to the Halacha, a Jew is a person born of a mother who was born Jewish or has converted to Judaism.

Male Jews are normally circumcised when they are eight days old, in a ceremony called **brit mila**, carried out by a trained circumciser (**mohel**), usually in the home and with family and friends present. The boy is given a Hebrew name during this ceremony. There is no equivalent ceremony for girls, but a naming ceremony is conducted in the synagogue. In the

Orthodox tradition, much importance is given to ritual bathing (**mikveh**) before marriage, after menstruation and after childbirth, in order to achieve spiritual purity.

At the age of 13 years, a male Jew assumes a position of responsibility in the community marked by an important ceremony called the **bar mitzvah**. This involves the boy being called to the Torah and reading in Hebrew from the Torah, usually during the Shabbat morning service. After the service, the boy's family may provide a kiddush (which consists of drinks and snacks). Presents are given to the boy and there may be a party for family and friends. Progressive Jews may also hold a **bat mitzvah** for 13-year-old girls in the same form. Some Orthodox girls celebrate a bat mitzvah at the age of 12 years, the traditional coming of age for girls, while others may participate in a communal **bat chayil** ceremony, usually held at the age of 13.

Marriage is of fundamental importance in Jewish life given the central place of the family in Jewish ritual and custom.

The concept of a Jewish marriage is in accordance with 'the laws of Moses and Israel' and takes the form of a contract freely entered into by the bride and groom, and evidenced by a document (**Ketubah**) which sets out the rights, obligations and intentions of the parties, and is executed before two valid witnesses.

**Divorce.** Judaism has always recognised that a marriage may break down and provides a method for its dissolution. A Jewish divorce is known as a **Get**. It is not an order of the court, nor is it dependent upon fault on the part of either party. What is required is the mutual consent of both parties to carry out the Get procedure: just as a marriage contract can only be entered into by mutual consent, so the dissolution of that contract should be effected by mutual consent.

**The Get procedure.** The Jewish divorce takes effect when the Get document is freely given by the husband and freely accepted by the wife. It has to be specially written in Hebrew and Aramaic by a qualified scribe and signed by two competent witnesses. It is then handed over by the husband, or his proxy, to the wife usually at the premises of the Beth Din, a religious court, under the supervisor of a religious judge (**Dayan**) or a designated rabbi. Under the *Marriage Act 1836* and followed in all subsequent Acts, the civil law expressly recognises a Jewish religious marriage (provided that notice to the Registrar has been given) so that a religious ceremony constitutes both a religious and a civil bond. Yet in dissolving that dual bond the law only requires the civil bond to be revoked, leaving intact the religious bond which means that for a religious Jew the marriage 'limps on'.

**Result of a failure to obtain a Get.** Without a Get the parties may not remarry according to Orthodox religious law. If a husband refuses to give his wife a Get she is known as an **Agunah** or chained wife. If she ignores the prohibition and purports to enter into a second union:

- she is deemed by religious law to be living in adultery
- she is forbidden to marry the person with whom she has committed adultery, even if her husband subsequently gives her a Get;
- any child born to her as a result of the second union will be religiously illegitimate (a **mamzer**) and will suffer serious disability under religious law.

If a wife refuses to accept her husband's Get he is known as an **Agun**. However, he does not suffer from all these disadvantages.

To alleviate the hardship suffered by Jewish men and women in these circumstances, the court in any civil proceedings may decline to make absolute a decree nisi of divorce according to section 10A of the MCA 1973 which has now been implemented under the *Divorce (Religious Marriages Act) 2002*. This allows the court to order that a decree nisi is not to be made absolute until a declaration is made by both parties that they have taken such steps as are required to dissolve the marriage in accordance with the religious laws of the Jews.

In an attempt to alleviate the hardship caused to an Agun and/or Agunah, the Office of the Chief Rabbi invites a couple prior to marriage to sign an extension to the Ketubah whereby they agreed to consult a Beth Din when difficulties arise in the marriage – a Prenuptial Agreement or PNA. Judicial opinion may be divided on the enforceability of PNAs in general. However the Chief Rabbi's PNA can be of important evidential value as it demonstrates that the parties always intended to regulate their relationships according to Jewish religious law.

The court may also take into account that the wife is still a wife according to religious law and not an ex-wife when considering the level of maintenance, property adjustments, etc.

Consider an order for contempt if the terms of the PNA have been incorporated into a court order.

When the credibility of the parties is an issue in any relevant proceedings, including cases involving children, take into account that a spouse who is in breach of the terms of an undertaking may not be considered trustworthy.

For further information contact: Get Advisory Service, Jewish Marriage Council on 020 8203 6311.

**Funerals.** Prior to the funeral, the body of the deceased is washed and prepared by a person of the same sex, drawn from a voluntary group of members of each synagogue (**chevra kadisha**). The body is wrapped in a white linen shroud and a man may be wrapped in his own prayer shawl (**tallit**). Burial takes place as soon as possible after death, often within 24 hours. The funeral service is simple and dignified, the **cadet** prayer is said by the mourners and a eulogy is generally delivered.

The four stages of ritual mourning are:

1. the time between death and the funeral;
2. the week of mourning (**shiva**) when the mourners stay at home and sit on low stools to receive visitors;
3. a further period of 23 days when life gradually returns to normal; and
4. a period of less intense mourning lasting until the end of the year following the death.

Kaddish prayers are said in the synagogue during the 11 months following the death and on the anniversary of the death, and there is a special ceremony for setting the tombstone.

## ***Non-religious beliefs and non-belief***

### **Key points**

- In the 2011 Census, 25.1% of the population described itself as non-religious.

- Explicit non-belief dates from the 10th century.
- While there is no one body that represents this diverse group of people, there are organizations, such as the British Humanist Association and National Secular Society, whose primary beliefs are laid out below.

Explicit non-belief in the UK became common only in the 19th century, encouraged first by growing understanding of geology and then by Darwinism. Earlier freethinkers had tried to rationalise their beliefs (Unitarianism was a staging post to unbelief for some congregations), and religion had been severely questioned by 18th century Enlightenment philosophers like David Hume and the deist Thomas Paine. Legal and social constraints, however, made religious unorthodoxy, let alone atheism, potentially dangerous. The secularist movement began in the mid-19th century and this was followed by the emergence of freethinking rationalism and the ethical movement that is the forerunner of modern Humanism.

A distinction can be drawn between those who simply reject religious belief or who lead their lives without reference to it, and those who explicitly adopt a non-religious philosophy of life, such as Humanism, that provides its own answers to the 'ultimate questions' that are addressed by religion.

The following are brief descriptions of some of the different groups of non-belief and non-religious belief.

### **Atheism and agnosticism**

Atheism is the absence of belief in God. Atheists are people who do not believe in God or other spiritual beings.

An agnostic in the original sense of the word is a person who thinks that we can't ever know about anything other than the natural world, and therefore that the question as to whether God exists or not is one that can never be answered. Agnostics, in the popular sense, are people who have doubts about the existence of God. They don't believe that God exists, but they don't believe that God doesn't exist, either.

### **Reasons for non-belief**

People are non-believers for many reasons, among them:

- Atheism is their chosen philosophy.
- They have reached an atheist position after careful study and consideration.
- They find insufficient evidence to support any religion.
- They think that religious discourse is nonsensical.
- They once had a religion and have lost faith in it.
- They live in a non-religious culture.
- Religion doesn't interest them or seem relevant to their lives.
- They see no need for religious explanation.
- They see religion as having caused a lot of harm in the world.
- They cannot believe in a god who allows so much suffering.

Many find scientific explanations of the existence of the universe and of life satisfactory and see no need or utility in invoking a god. They believe that human beings can devise suitable moral codes to live by without the aid of a god or scriptures.

Most people who identify as atheists do not consider atheism to be a religion or belief system. There are many atheist philosophical systems and they are no less intellectually adequate than other systems of belief: the one thing they have in common is non-belief in god(s). Atheists are no less moral (or immoral) than those holding a specific religious belief. In practical terms atheists often have the same or very similar values and follow the same moral code as religious people, but they arrive at their decisions about what is right or wrong without any help from the idea of a God or from religious texts.

### **Secularism<sup>159</sup>**

Secularism involves two basic propositions. The first is the strict separation of the state from religious institutions. The second is that people of different religions and beliefs are equal before the law. A secular state would be one where:

- There is no established state religion
- Everyone is equal before the law, regardless of religion, belief or non-belief
- The judicial process is not hindered or replaced by religious codes or processes
- Freedom of expression is not restricted by religious considerations
- Religion plays no role in state-funded education, whether through religious affiliation of schools, curriculum setting, organised worship, religious instruction, pupil selection or employment practices
- The state does not express religious beliefs or preferences and does not intervene in the setting of religious doctrine
- There is freedom of belief, non-belief and to renounce or change religion
- Public and publicly-funded service provision does not discriminate on grounds of religion, belief or non-belief
- Individuals and groups are neither accorded privilege nor disadvantaged because of their religion, belief or non-belief.

### **Humanism**

- Humanism is an approach to life based on humanity and reason.
- Humanists recognise that moral values are based in human nature, but that in making moral judgements we need to interpret our widely shared values by the use of knowledge, reason and experience. Humanists make decisions after considering the available evidence and assessing the likely outcomes of actions, not by reference to any dogma or sacred text.

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<sup>159</sup> This section on Secularism was revised in September 2015.

- Humanists see the provisional explanations of life and the universe provided by science and the use of reason as the best available. They think it folly to turn to other sources – such as religion or superstition – for answers to unanswered questions.
- Humanists are therefore atheists or agnostics – but Humanism is an active philosophy in its own right, not just a negative response to religion.
- Humanists believe that we can and should seek to make the best of the one life we have by creating meaning and purpose for ourselves. One consequence is that humanists see it as their responsibility to make life as good as possible for everyone – including future generations. They strongly support individual human rights and freedoms – but believe equally in the importance of individual responsibility, social cooperation and mutual respect. They seek a society in which people with fundamentally different beliefs can cooperate, with shared institutions, laws and government that are neutral between different belief groups.
- Humanists endeavour to live their lives to the full, finding inspiration in the diversity of human culture and achievement and in the richness of the natural world, and finding fulfilment in the arts and sciences, physical recreation and endeavour and in the pleasures of human interaction, affection and love.

## ***Rastafarianism***

### **Key points**

- The Rastafarian religious movement has definite political undercurrents of protest against the slavery and repression of all Black people.
- As a religious movement, many components are taken from Christianity, Judaism, Hinduism and African Traditions.

### **Beliefs and practices**

A movement inspired by Marcus Mosiah Garvey (1897–1940), who promoted the Universal Negro Improvement Association in the 1920s and spearheaded the Back to Africa movement during the 1930s. It is also inspired by the accession to the throne of Haile Selassie I as the Emperor of Ethiopia under his pre-coronation name of **Ras** (prince) **Tafari**, who is considered to be a divine Messiah and the saviour of all Black people. The term **Rastafari** dates from the coronation of Haile Selassie in 1930.

Marcus Garvey's initiatives aimed to raise self-awareness and self-respect among Black people in Jamaica and the USA, encouraging pride in their African heritage. Consequently, the various groupings which constitute the Rastafari rejected European-oriented cultural denominations and Christian revivalist religions, developing their own identity whilst awaiting redemption. Today they are a world-wide movement.

Rastafarians began migration to the UK from Jamaica in the late 1950s and 1960s. Many links have been maintained with the Caribbean and the original Jamaican movement through Rastafari music and literature, as well as charismatic figures such as Bob Marley. The Rastafari religious movement has links with Christianity and Judaism. Some of its principles are very close to those of Hinduism and various African traditions. It may be

considered an eclectic religious movement and the two central beliefs are that Haile Selassie, as Ras Tafari, is the true and living God (**Jah**), and that salvation for Black people is only through return to Africa.

Rastafarians support their beliefs by reference to numerous biblical texts which they interpret as confirming that God is Black. They regard Jah both as a transcendent deity and as present in all men. Their language, based on Jamaican patois, uses many special words and tries to capture this unity of man with Jah by the term 'I and I'. Since Jah is seen as the God of life, Rastafarians do not accept that the righteous can die and they believe in reincarnation.

The second key element of Rastafarian belief relates to salvation, which can only be realised by Black people through their return to Africa, the Black Zion, after liberation from the evils of the White-dominated western world, which is frequently referred to as Babylon. Africa is regarded as a spiritual focus, a true home, heaven on earth, and Rastafarians regard Black people as the true Jews and chosen people of God.

There are no fixed rules of practice or belief on other matters. Rastafarians are guided by reference to the culture and traditions of Ethiopia, and emphasise the ethos of peace and love, truth and right action.

Common to most belief systems, men and women are assigned gender-specific roles.

While women are not discouraged from pursuing careers outside the home, their highest role is seen as that of wife and mother.

### **Holy books and scriptures**

The official religion of Ethiopia since AD 330 has been Christianity and Rastafarians in consequence study the Bible, especially the Old Testament and the Book of Revelation in the New Testament. They recognise all 87 books of the Bible, including the Apocrypha and the Book of Enoch, as opposed to the 66 books of the authorised version used by many Christian churches. Today the Rastafarian movement consists of several strands, and includes persons of other than African descent.

A Rastafarian may choose to swear an oath on the Bible (the Hebrew Bible or 'New Testament') or they may prefer to affirm.

### **Central practices and days of observance**

There is no centralised, hierarchical structure of a Rastafarian 'church'. Instead there are several Rastafarian organisations, such as the Ethiopian Orthodox Church, the Ethiopian World Federation, the Universal Black Improvement Organisation, the Twelve Tribes of Israel and the Rastafarian Universal Zion.

Only a small proportion of Rastafarians in the UK are formally affiliated to any of these or other groups, and Rastafari theology and religious practice varies widely as a result. There are no specifically designated places of worship – people normally meet in their homes, where long sessions of discussion, debate and argument ('reasoning') are held. However more formal groups such as the Ethiopian World Federation will designate specific sites and certain office holders or chaplains will lead the spiritual part of the proceedings.

Singing and drumming, especially reggae music, are important ways of communicating the ethos of the movement.

Controversially, smoking cannabis or **ganja** ('the herb') is considered an important part of Rastafarian religious practice and is treated as a sacrament. Ganja is seen as natural and as God's gift and Rastafarians seek to legitimise its use by reference to biblical texts (Hebrews, chapter 6, verse 7) – 'Land that drinks in the rain often falling on it and that produces a crop useful to those for whom it is farmed receives the blessing of God.' (NIV Bible).

One element of Rastafarian dress code is for men (**brethrens**) and women (**sistrens**) not to cut their hair but to wear it in long locks, known as **dreadlocks**. Many Rastafari men wear distinctive caps (**tams**) made of knitted material, leather or cloth, often in the traditional colours (red, gold, green and black) of the Ethiopian flag or the national colours of Jamaica (gold, green and black). These colours have symbolic meaning: red for the blood shed in the historical struggle of Rastafarians; gold for faith, prosperity and sunshine; green for the land and its produce; and black symbolising the colour of the people.

On certain occasions, such as prayer meetings and spiritual gatherings, Rastafarians uncover their heads. Some Rastafarians wear African-style dress, thus explicitly marking their allegiance to an African-rooted tradition. This is also symbolised by medallions of Ras Tafari, the lion, the imperial symbol of the Ethiopian throne, representing strength and power. Crosses are worn as symbols of the burden of life.

The case of *Dawkins v Crown Suppliers (1989)* held that a Rastafarian cannot be refused employment because of his refusal to cut his hair (dreadlocks).

The issue of hair covering is particularly sensitive and increasingly minority ethnic groups will seek equal treatment about the need to maintain head covering at all times, including in a court, according to their religious custom.

The Rastafarian year is based on the Ethiopian calendar, which begins a new year on 11 September and has 13 months, the last of which has only six days. Important celebrations are:

- the Ethiopian Christmas (7 January) which is not a celebration of the birth of Jesus but an acknowledgement of his life and works;
- Ethiopian Constitution Day (16 July) commemorates the granting of Ethiopia's first Constitution by Emperor Haile Selassie in 1931;
- the birthday of Emperor Haile Selassie I (23 July), one of the holiest days of the year. It is marked as a day of celebrations, prayer readings, prophecy and spiritual gatherings, and Rastafarians will refrain from attending work on that day;
- the birthday of Marcus Garvey (17 August) is marked in a similar way and is given virtually the same importance;
- Ethiopian New Year's Day (11 September) is celebrated with singing, dancing, drumming and prayer;
- the Anniversary of the coronation of Haile Selassie I (2 November) is also treated as one of the holiest days of the year and is celebrated with drumming, hymns and prayer.

### **Dietary rules**

Out of reverence for the laws of nature, most Rastafarians are vegetarian and will be concerned to eat only natural or organic food, and to avoid polluting the earth with unnatural substances and chemicals. Pork is prohibited, not only because of biblical

injunctions against it but also because of assumptions about the animal's susceptibility to disease. Many Rastafarians do not drink alcohol.

### **Rites of passage**

Rastafarian children are blessed by the elders and perhaps a congregation with drumming, chanting and prayers.

Following the Rastafarian interpretation of the Bible (Mark, chapter 12, verses 19–25), Rastafarians do not perform any formal marriage ceremony, but a man and a woman who cohabit are automatically treated as husband and wife by the community, and fidelity is considered very important.

Since there is no belief in death as such, and Rastafarians view life as eternal, moving from one generation to the next through spiritual and genealogical inheritance, there are no special ceremonies on death, or following death. Many Rastafarians will follow the customs of the communities in which they reside.

## **Sikhism**

### **Key points**

- The UK is home to the largest Sikh community outside India.
- The religion was founded in the Punjab region of India, and so the vast majority of its adherents originate from that region.
- Sikh communities migrated to many parts of the world, principally East Africa, the UK and Canada. There are now a small minority of ethnic English followers of Sikhism.
- As there are now many different sub-groups within the Sikh community, it cannot be assumed that everyone shares the same understanding about Sikhism and its creeds.

### **Beliefs and practices**

The religion was founded in the fifteenth century by Guru Nanak, who was born of Hindu parents but proceeded to establish a new religion, emphasising that the lowest is equal to the highest in race, creed, political rights and religious hopes, and in that way emphasising freedom from the caste system and gender inequality as they were present in India at the time.

Sikhs are recognised as an ethnic group under the Race Relations Act 1976 as stated in the case of *Mandla v Dowell Lee [1983] 2 AC 548*.

The essential characteristics are a long shared history, distinguishing it from others, and the memory of it; and a cultural tradition of their own, including family customs.

Sikhs believe:

- in the one God, whose divine name is constantly recalled and meditated upon;
- in the ten spiritual masters (Gurus) and their teachings;
- in acceptance of the Sikh Holy Book, the **Guru Granth Sahib**, as having the function of a living Guru;

- that salvation and liberation from the cycle of reincarnation is attained through meditation and service to other people.

A tenth of a Sikh's personal wealth and income (**daswandh**) is supposed to be given to people in need.

The tenth and final Guru, Gobind Singh established the sacrament of **amrit** which is a ceremonial benediction received at the Sikh temple (known as a **gurdwara**) and also the concept of the Pure Sikhs (both male and female, the **Khalsa**) who are identified by the **Five Ks** which remain until death and are never removed except by the wearer or if medically necessary. For example, Sikh motorcyclists are exempted from wearing crash helmets if they wear turbans (section 1 of the *Motor-Cycle Crash Helmets (Religious Exemption) Act 1976*).

The degree of adherence to the wearing of the 'Five Ks' varies between individuals but comprises:

1. **kesh**: uncut long hair, tied in a knot, and kept under a turban for men and often a scarf for women, which symbolises obedience, acceptance of God's will and humility;
2. **kanga**: a wooden comb to keep the hair in order, symbolising cleanliness;
3. **kara**: a steel bangle worn on the right arm, symbolising the bond with the Guru and the brotherhood of the Khalsa;
4. **kachha** or **kachhedra**: a type of undergarment, symbolising discipline, self-restraint and chastity;
5. **kirpan**: a sword, now usually small and ceremonial, worn as an emblem of power and dignity, symbolising independence and fearlessness.

As part of initiation into the Khalsa, men were given the name **Singh** (lion) and women the name **Kaur** (Princess). It is now common practice (although by no means obligatory) for these designations to be included as a middle name, not necessarily with any initiation into the Khalsa. Commonly, a Sikh name may involve three components: a personal name (usually not gender specific), followed by the religious gender designation, and then a family name/surname. For example: Manjit Singh Dhillon (male); Manjit Kaur Dhillon (female).

### Holy books and scriptures

The most important Sikh holy scripture is the **Guru Granth Sahib**, a very large collection of readings and hymns written by the Gurus of Sikhism and various saints (**bhagats**), some of whom were Hindus and Muslims. All Sikh scriptures are written in the **Gurmakhi** script.

The Sikh holy scriptures are also referred to as the Guru's word (**gurbani**) and are treated with utmost respect. The **Guru Granth Sahib** is always kept in a clean silk cloth and is placed on a small bed (**manji sahib**) on a dais below a canopy. In many gurdwaras, the scriptures are kept on the floor above, thus in an elevated position, while the floor below is used for social functions.

The **Sunder Gutka**, an extract from the Guru Granth Sahib, has been considered the appropriate form of a Sikh holy book to be used in courts in the UK. This convention seems to avoid difficulties over the rules regarding the handling of the Guru Granth Sahib outside a gurdwara by persons who are not qualified or authorised to do so.

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.’

### **Central practices and days of observance**

Sikhs may worship at home or in their temple known as a gurdwara. Each gurdwara may be recognised by the **nishan sahib**, a tall flag-pole draped in saffron cloth and a saffron flag bearing the Sikh emblem in black or navy blue. The nishan sahib is never lowered except when it is renewed, which takes place once a year in an important ceremony.

In the UK, it has become conventional in most gurdwaras that communal prayers are held on Sundays. Almost all acts of worship are preceded by ritual bathing as great emphasis is placed on ritual purity.

The gurdwara is a bare room with no images or seats. Sikhs will remove their shoes when entering and men not wearing turbans will cover their heads as a mark of respect for the Guru Granth Sahib. Worshippers walk towards the dais, make their offerings, bow to the ground with folded hands and then move back to sit on the floor cross-legged. In most gurdwaras, women sit separately from the men, together with their children.

Sikh women play an active role in all activities in the Sikh temple although there may be separate spaces set aside for women. Gender segregation is considered positive, and unfair gender discrimination is not permitted. The fact that Sikh personal names are gender neutral is considered a valuable indicator of the intrinsic equality between the sexes.

A typical Sikh service consists of hymn singing (**kirtan**), a discourse on the divine name, followed by a concluding communal prayer (**ardas**) and a random reading of the Guru Granth Sahib which is considered to reveal the will of God. The service concludes with the eating of holy blessed food (**karah prashad**), normally followed by a communal meal (**langar**), both of which symbolise fraternity and equality. Such meals are often prepared by a large number of people and it is considered meritorious to engage in such community service.

Sikh religious festivals are broadly timed according to a lunar calendar and therefore vary slightly from year to year. **Vaisakhi**, celebrated on 13 April, is the only festival held on a fixed date, the day of the founding of the Khalsa by Guru Gobind Singh in 1699.

All major Sikh festivals are celebrated over three days and involve a continuous recitation of the entire Guru Granth Sahib. Such festivals commemorate events around the Gurus and the establishment of the Sikh religion and they include:

- The birthday of Guru Gobind Singh, the tenth Guru, celebrated in January/February.
- **Hola Mohalla**, a three-day festival in February/March, has a military emphasis and demonstrates the art of self-defence.
- The first installation of the Guru Granth Sahib by Guru Gobind Singh in Nanded, three days before his death in 1708, is celebrated in August.
- Guru Nanak’s birthday is celebrated over three days in October/November.
- The Sikh festival of **Diwali** (October/November) celebrates the release from captivity of the sixth Guru, Guru Har Gobind.

## **Dietary rules**

Many Sikhs are vegetarian. Sikhs may choose not to eat meat from animals killed according to the ritual method observed by the Muslims and Jews (**halal** or **kosher**) meat.

Strictly observant Sikhs will not smoke tobacco or drink alcohol in any form, and they may also abstain from drinking tea and coffee.

## **Rites of passage**

The **Janam Sanskar** or naming ceremony takes place in the home or at the gurdwara as soon as possible after birth, and involves opening the Guru Granth Sahib at random, and the first letter of the hymn on the top of the left-hand page indicates the letter to begin the name of the baby.

A Sikh may be initiated into the **Khalsa** at any time and thereafter is obliged to wear the 'Five Ks', and observe a strict diet.

The marriage ceremony, **anand karaj**, the 'ceremony of bliss', will take place, as far as possible, in the gurdwara, and certainly at any rate in the presence of the divine witness of the Guru Granth Sahib. The Sikh marriage ceremony includes a reading from the Guru Granth Sahib and a sermon from the officiating priest on the duties of marriage. The bride is then given away by her parents and the spouses are joined together by a cloth or scarf and walk four times, clockwise, around the Guru Granth Sahib. The ceremony concludes with collective prayers and is followed by a wedding feast.

At the time of death, reading and recitation of parts of the Guru Granth Sahib is recommended and friends and relatives may gather at the bedside of a dying person for that purpose. After death, the body is washed and dressed in new clothes by a priest or relative, and is then taken for cremation as soon as possible. Sikhs are always cremated – even stillborn children. Normally, the son or closest male relative starts the cremation.

On the following day, the ashes will be ceremonially sprinkled into flowing water. During the days and nights after the funeral, all the adult members of the family will attend a complete reading and recitation of the Guru Granth Sahib.

## ***Taoism***

### **Key points**

- Most Taoists in the UK are of Chinese origin.
- Taoism is a belief system which enables its adherents to also participate in other faith traditions.
- Confucianism is a guiding philosophy to which many Taoists also subscribe.
- For Taoists it is not contradictory to practise Buddhism, Christianity or any other faith.
- The Chinese community in this country is very diverse – no assumptions about the cultural and 'racial' homogeneity of Taoist and Chinese worshippers should be made.

- Not all Chinese share the same understanding about Taoism since this also depends upon which region they originate from (provinces in mainland China, Hong Kong, South East Asia).

## Introduction

Most Taoists in the UK are members of the Chinese community, although many of them would also consider themselves to be adherents of Confucian philosophy (also termed Confucianism). Both Taoism and Confucianism constitute a total moral outlook which permits the membership of and participation in the communal practices of other faith communities. Taoism is considered a belief system whilst Confucianism is often termed a guiding philosophy and the two are considered entirely compatible with other belief systems such as Buddhism, Christianity and Islam. This innate metaphysical subtlety is one of the distinctive features of the Chinese approach to religion.

The Chinese community in the UK is diverse consisting of those who came from Hong Kong in the 1950s and 1960s whilst more recently other Chinese have come from South East Asia and from mainland China. Needless to say there are many Buddhists in China, as well as a significant number of Christians (mostly from Hong Kong), whilst China also has one of the largest Muslim populations in the world. Although most Chinese will be able to read the common written Mandarin alphabet, there are many different spoken dialects of both Cantonese and Mandarin.

Although the practice of religion was discouraged and at times suppressed in the People's Republic of China, many Taoists were able to maintain their beliefs although they may not have been able to practise the rites formally, so that it may have appeared as if many people from mainland China did not practise any religion. This accounts for why much religious doctrine and knowledge of traditions survives as an oral record only.

Political developments have enabled more Chinese from the mainland to be rather more forthcoming about their religious commitments.

## Beliefs and practices, holy books and scriptures

The principal text of the Taoists is the **Tao Te Ching** (The Way and Its Virtue) and this is attributed to Lao Tzu (c 500 BCE) who is considered to be the founder of Taoism. The text is considered the basis of what is known as religious Taoism and also philosophical Taoism.

The Way (the Tao) concerns Man and his place within the universe. The Tao is the all-embracing principle before heaven and earth: it causes everything to arise, yet it acts not. **Wu wei**, the fundamental principle of non-action or non-interference with the laws of nature is central to the practice of Taoism. The power of the Tao is that which makes all phenomena what they are. The forces of nature and indeed mountains, rivers, trees and all such aspects of Nature are revered as sacred.

The **Yin Yang** 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 (and so a framework to understand all gender relations is provided). This understanding provides the basis for comprehending all forces of the body, the workings of the mind and ultimately life and death.

The popular manifestations of ritual practice (sometimes referred to as ‘popular Taoism’) emphasise the importance of paying homage to chosen deities (representing different dimensions of the principles of the **Tao**) and to ancestors and deceased elders in order to encourage the forces of health, happiness and prosperity. This most commonly involves the establishment of an altar and placing statues or images of the deities and photographs upon it or nearby. Most often one or three deities will be chosen, often the ones most appropriate to the home or to the business if the altar is also placed there. In addition, there are also various traditions in China, which involve the display of small statues of deities in homes or businesses.

In the past, court staff have been instructed to administer a form of declaration to Chinese witnesses in a ceremony which involves the breaking of a saucer. This ceremony, instituted in the Imperial Courts of China many centuries ago, is very rarely practised today in courts of law, although it is said to be practised by the Triads during their secret initiation ceremonies. It is probably because of this association that Chinese today do not ask or choose to take an oath in this manner. It should therefore not be used.

Taoists should be given the choice to affirm or, if they adhere to another faith tradition, to swear an oath. For example, there are more than 50 Chinese Christian congregations in cities and major towns in the UK, and they may prefer to swear an oath on the Bible.

### **Central practices and days of observance**

Apart from personal daily devotions, temple worship is led by priests, some of whom may be celibate and resident at the temple. The temples may be dedicated to one, three or five deities, and chanting of sacred formulae is conducted morning and evening. There is usually an altar, maybe in front of images or statues of the chosen deities, and chanting will take place facing it. In addition, regular lessons on the teachings of Lao Tzu may also take place at the temple.

On the first and 15th day of every lunar month a vegan (no animal, dairy or fish products) meal, prepared by the worshippers themselves, will be served to all devotees in order to participate in a ritual cleansing and purificatory rite. Commemorations of the birthdays of certain deities are also observed by a vegan diet for the day.

Taoist festivals are based on a lunar calendar and an annual cycle and symbolise both the passing of the year in terms of the ripening, harvesting and storing of crops as well as passing through the life cycle. Many of these festivals are more concerned with the practice of popular Taoism, and the major ones are outlined below.

- The winter solstice, which coincides with the Gregorian calendar date of the 21 December, is the day by which one's age is measured. Special sweetmeats are prepared for the occasion, such as glutinous rice balls and placed on the altar as offerings.
- A major Chinese festival is the **Chinese New Year**, linked to the lunar calendar and it falls usually in January or February as the first day of the first lunar month. This is the major public holiday of the year in Hong Kong and China, but most Chinese in the UK prepare a special New Year's Eve dinner to which family and friends are invited, and continue to work the next day, if it falls mid-week, transferring any celebrations to a nearby weekend. Celebrations are family-oriented, though nowadays many Chinese community centres in the UK organise local festivities.

- The first full moon of the first month is also celebrated by a procession of lanterns.
- Other festival days during the year include the **Ching Ming** (the grave-sweeping festival) usually in March when graves are swept and then possibly covered over with talismanic tiles exhorting blessings for the departed.
- The **Dragon Boat** festival usually takes place in the fifth lunar month and commemorates the virtues of veracity, loyalty and heroism, by remembering how dragon boats were sent out to the sea to deflect sharks from the body of the honourable warrior who preferred to drown himself rather than manifest disloyalty.
- The commemoration of the **Hungry Ghosts** takes place in the seventh lunar month for a period of 15 days when many devotions and sacrifices are offered up for the spirits whose positive and negative elements have not been integrated in order for them to be released into the next realm.
- The **Autumn Lantern** festival celebrating the harvest takes place on the 15th day of the eighth lunar moon.

### **Dietary rules**

Great attention is paid to the differing Yin and Yang (for example ‘cooling’ and ‘heating’ effects) qualities of all foods to consume them in a balanced manner. Practising Taoists will observe the vegan fasts mentioned above on the first and 15th day of every lunar month. Otherwise, there are no restrictions as such. However Taoists who also conform to other traditions will observe the appropriate rules such as vegetarian Buddhist-Taoists.

### **Rites of passage**

These depend on the national and cultural origin of the Taoists in question, for example, whether they are from mainland China or South East Asia, but they focus on the main life-cycle events. Many rituals have developed into a sort of ‘popular’ Chinese Taoism/Buddhism.

The family is one of the most central units in popular Chinese understanding. All aspects of birth, marriage and death are surrounded by ritual, but many may not be followed in the UK.

At the time of birth (and for a period of confinement, usually for one month afterwards) women are encouraged to rest and given specially prepared nutritious foods to eat.

Marriage customs may be very elaborate with proceedings being divided into six phases, beginning with the proposal, and continuing with the engagement, procession of bride’s dowry, bridal procession, marriage vows, and the wedding breakfast. Marriages are important community events, joining together two families. A priest may be invited to invoke blessings upon the couple, or the couple may visit the temple and a simple ceremony take place there. The bride and groom may kneel before the groom’s parents and offer tea sweetened by dates to their relatives. Gifts are often given in red envelopes to the married couple (and are also given at Chinese New Year: strictly, they should be given to unmarried children by their married relatives and friends). Traditional wedding gowns (**kwans**) are red, that being the colour for good luck. White is also worn to represent purity, and many brides now wear western bridal dresses, sometimes changing to a kwan during the wedding celebrations.

Funeral rites are often extensive and may combine Taoist and Buddhist elements. Ritual ablutions are performed over the deceased and layers of paper money (for the bank of

merits in hell) and talismans may be placed over the dead body to protect it from harmful influences in the next realm. Paper money and paper houses may be burned. Flowers, wreaths, incense, and a special ancestor shrine may be presented during the funeral rite. Customs vary as to whether the deceased is interred or cremated. Close relatives will be wearing black, and others black and white. A willow branch symbolising the soul of the deceased may be carried back to the family altar. There may be a gathering of the family and mourners on the seventh, 49th or 100th day after the funeral, and there may be a commemoration ritual after the first and third years following the death. A priest may be invited to invoke blessings upon the dead on these occasions.

## **Zoroastrianism**

### **Key points**

- Zoroastrianism is an ancient religion based upon the teachings of Zarathushtra (1400–1200 BCE) who lived in Iran before the advent of writing.
- The Zoroastrian community now generally comprises those from Iran and those who settled in India, known as the Parsees.
- Members of both communities have a long-established presence in the UK, Europe and the USA from as early as the 1800s.

### **Introduction**

Zoroastrianism spread east from the steppes of Asia Minor to the valley of the Oxus river. It was the state religion of two Persian empires, the first of Cyrus the Great (550–531 BCE) and the second of the Sasanians. It was only some 300 years after the Arab conquest of Iran that Zoroastrianism became a minority faith. Towards the end of 800 CE, a group of Zoroastrians decided to settle in the Indian state of Gujarat in search of religious freedom, and this community became known as the Parsees, who subsequently also established themselves in the Indian capital of Mumbai (Bombay). The community in Iran, known in Iran as the Zartushtis, is mostly settled around the region of Yazd, although a significant number live in Tehran. Today Zoroastrians are settled worldwide.

### **Beliefs and practices**

Born into a line of hereditary priests, Zarathushtra experienced a set of divine revelations after being compelled to meditate on the violence and injustice he witnessed. He was given to understand there to be one eternal God, **Ahura Mazda**, who created the world in order for the forces of good to reign over the evil spirit **Angra Mainyu** (and his evil forces the daevas). The forces of good that challenge the evil are the seven **Amesha Spentas**, or Holy Immortals. Through these forces, Ahura Mazda acts to overcome evil.

Each good force protects one of the seven creations of Sky, Earth, Water, Plants, Cattle, Man and Fire.

All of life and creation is to engage in a struggle to overcome the forces of evil, to promote goodness and bring about the salvation of all. The advent of the Saviour, the **Saoshyant** (born of the seed of a prophet and a virgin) will save the world, which by that time will have become totally wretched. After a great battle of the good and evil forces, at which the good

will triumph, the Last Judgement will take place, and the saved will rejoice everlastingly in the presence of the Ahura Mazda, and eventually they will be joined by the damned who will have undergone a period of purification.

The life aim of a Zoroastrian is to overcome the forces of evil with divine aid: all is comprised in the guiding aphorism of 'good intention, good speech, good action'. From this an all-pervasive ethical code has been established.

The main practice is prayer performed in front of the sacred fire which is always kept aflame:

- Prayers are said five times a day (at sunrise, noon, sunset, midnight and dawn).
- Prayers are performed whilst standing and reciting verses from the holy scriptures, and a sacred thread (**kusti**) which is always worn three times around the waist and across the sacred shirt, is unwound and then re-knotted (evoking the ancient origins of the word religion which comes from the Latin, ligare, to bind/tie oneself to the Divine).

### **Holy books and scriptures**

The Zoroastrian religion has a long oral tradition, but eventually, the sayings of Zarathushtra were recorded in a collection of holy texts known as the **Avesta**, and written in the language of **Avestan** in the fifth or sixth century CE. Some hymns in the Avesta, known as the **Gathas** are known to have been composed by Zarathushtra. The extant Avesta comprises the Gathas, liturgies, and prayers. Later religious texts are in Persian, Gujarati and English.

- Zoroastrians may choose either to affirm, or possibly swear an oath.
- Their holy scriptures are known as the Avesta.
- Considerations of ritual purity may arise.

### **Central practices and days of observance**

The rites of prayer are performed in front of the sacred fire, representing the Truth and sacred presence of the Divine, and there are many sacred fire temples. Practices vary amongst different communities and families; some choose to visit the temple regularly, others pray at home more often before their own fire.

Great emphasis is placed on ritual purity and so access to the temple or being present during Zoroastrian devotions may be dependent upon that.

Incense is offered to the sacred fire and gifts of money given to the priests, and care is always taken in kindling and maintaining the fire.

Pilgrimages to sacred fire temples, special sources of water or sacred mountains take place regularly.

There are seven major festivals celebrating the different seasons of the year and the seven creations. They now comprise five days of celebration each, the most important being the first day:

- **Naw Ruz** (the New Day). The New Year and the first day of Spring, 21 March. The festival goes on till 26 March. The associated creation is Fire and the associated holy immortal, Righteousness.

- **Maidhyoizaremaya** (Mid-Spring). 30 April – 4 May. The associated creation is Sky and the associated holy immortal, Dominion.
- **Maidhyoishema** (Mid-Summer). 29 June – 3 July. The associated creation is Water and the associated holy immortal, Wholeness.
- **Paitishahya** (Autumn Harvest (bringing in the corn)). 12–16 September. The associated creation is Earth and the associated holy immortal, Devotion.
- **Ayathrima** (Homecoming of the Herds). 12–16 October. The associated creation is Plants and the associated holy immortal, Immortality.
- **Maidhyairya** (Mid-Winter). 31 December – 4 January. The associated creation is Cattle and the associated holy immortal, Good Intent.
- **Farvadigan** or **Mukta** (All Souls). 16–20 March. The associated creation is Man and the associated holy spirit of Ahura Mazda Himself.

### **Dietary rules and taboos**

There are no specific dietary restrictions except to avoid anything that is intrinsically evil.

### **Rites of passage**

There may be a simple naming ceremony celebrating the birth of the child, and in some very orthodox families the mother may be segregated for 40 days out of concern for ritual purity. A coming of age, known amongst the Iranians as **sedra-pushun** (putting on the sacred shirt) and amongst the Parsees as **naojote** (new birth), is celebrated for both girls and boys. The young person prepares themselves by learning the kusti prayers, and then on the appointed day bathes, and drinks some consecrated liquid before putting on a new shirt. A priest may then invest them with the kusti, and general rejoicing and festivities follow with the giving of presents and enjoying special food.

Marriage is a strongly encouraged institution, and there are many popular customs. The marriage ceremony has certain prescribed ritual aspects. Prior to the ceremony the couple perform ritual ablutions and wear new garments. The priest consecrates the marriage by pronouncing sacred formulae in Avestan in front of the couple and witnesses. The ceremonies upon death are very important, since for the Zoroastrian (as in life) at death great emphasis is placed on the elimination of negative forces. Since Man comprises the seven elements aforementioned, the negative elements emanating from death must be purified by not being absorbed into the earth by burial, nor by polluting the air with cremation, but being reabsorbed into the life process. Corpses are simply enshrouded and carried on metal biers to walled enclosures on designated heights (hills or mountains) or more commonly a stone tower (**dakhma**) and there left to be consumed by vultures and for the bones to be purified by the Sun. However, in modern times, electrical cremations or burial in cement coffins have been adopted as suitable alternatives. The funeral should take place as quickly as possible and prayers are said for the deceased for three days. On the fourth day special meritorious acts are offered up for the benefit of the deceased. For the first year, there may be monthly commemorations and thereafter annual commemorations at the Mukta or Farvardigan, All Souls festival between 16 and 20 March.



## Appendix 2 - Practices of different faith traditions

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The Baha'i Faith, Buddhism, Christianity, Hinduism, Indigenous traditions, Islam, Jainism, Judaism, Rastafarianism, Sikhism, Taoism and Zoroastrianism, as well as a description of some systems of non-religious belief, such as secularism and humanism, and non-belief, that is, atheism and agnosticism.

Each of the religious entries follows a set format for the sake of clarity, but in fact not all religions place the same emphasis on each of the dimensions of faith as laid out in Appendix 3. Some religions place a central importance upon one scripture, such as Christianity, Islam and Judaism. Others revere a number of scriptures equally, such as Hinduism and Jainism, whilst others are not so scripture-based, such as the Indigenous traditions. For some faith traditions, rites of passage are central (e.g. Christianity, Judaism and Zoroastrianism) whilst for others rites of passage (apart from birth and death) are culturally important rather than spiritually significant (e.g. Hinduism, Islam, Jainism and Taoism). For some (e.g. Christianity and Sikhism) communal rites and places of worship are central to religious practice. For others, whilst communal worship is important (e.g. the attendance of Friday congregational prayers at a mosque for Muslims), the performance of the daily prayers is more significant to determine the degree of faith adherence. In some religions there are variations, such as Zoroastrianism, where the emphasis varies according to different branches of the religion. For others, individual prayer and communal worship play equivalent roles.

For some faith traditions, ritual purity, which may or may not be connected with gender as such, is very significant (e.g. Hinduism, Jainism, Judaism, Islam, and Zoroastrianism), whilst for others it plays no part.

### ***Baha'is***

- May choose either to affirm or, possibly, swear an oath. For the Bahai their word is their bond.
- The holy book containing the teachings of their Guide is called the *Kitabi-Aqdas*.

### ***Buddhists***

- May choose either to affirm or, possibly, swear an oath.
- A 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, a photograph of the Dalai Lama or any Lama of the witness's practice, if taken at all.) 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.

### ***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.

### ***Hindus***

- May choose to affirm or swear an oath.
- Of their many holy scriptures, the Bhagavad Gita is considered suitable for the purposes of swearing oaths.
- The Bhagavad Gita may be kept in a covered cloth, the suggested colour of which is red.
- Questions of ritual purity may arise.

### ***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.

### ***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. 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 ritual purity may arise.

### ***Jews***

- May choose to affirm or swear an oath.
- Their holy book is known as the Hebrew Bible or the Pentateuch sometimes also referred to as the Old Testament.
- The Hebrew Bible may be kept in a covered cloth, the suggested colour of which is black.
- Jews should not be asked to remove their head coverings in court.
- Questions of ritual purity may arise.

### ***Muslims***

- May choose to affirm or swear an oath.
- Their 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 ritual purity may arise.

### ***Moravians***

- 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.

### ***Quakers***

- May choose to affirm; they may not swear an oath.
- A suitable holy book is the Bible; most usually the part that is known as the New Testament will suffice.

### ***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.

### ***Sikhs***

- May choose to affirm or swear an oath.
- Their holy book is known as the Guru Granth Sahib, and a portion of it known as 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.
- Sikhs should not be asked to remove their head coverings in court.
- The form of the oath which stipulates swearing by the 'Waheguru' is not recommended since Sikhs believe in swearing an oath before God.
- Questions of ritual purity may arise.

### ***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.

### ***Zoroastrians***

- May choose either to affirm, or possibly swear an oath.
- Their holy book is known as the Avesta.

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## 11. Gender equality

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### *Key points*

- Women remain disadvantaged in many public and private areas of their life; they are underrepresented in the judiciary, in Parliament and in senior positions across a range of jobs; and there is still a substantial pay gap between men and women.
- Stereotypes and assumptions about women's lives can lead to unlawful discrimination.
- Factors such as ethnicity, social class, sexual orientation, disability status and age affect women's experience and the types of disadvantage to which they might be subject; assumptions should not be made that all women's experiences are the same.
- Discrimination is often unconscious and based on a person's own experience and perceptions; it is important to be aware of the wide diversity of women's experiences.
- Women may have particular difficulties participating in the justice system, for example, because of child care issues, and courts may need to consider adjustments to enable women to participate fully.
- Women's experiences as victims, witnesses and offenders are in many respects different to those of men.
- As judges, we can go some way to ensuring that women have confidence in the justice process and that their interests are properly and appropriately protected.
- Of course, men can suffer from gender discrimination too; this section reflects the reality that this is rarer.

### *Introduction*

1. This chapter contains information about:
  - a. gender stereotyping;
  - b. women in education and employment;
  - c. women as carers;
  - d. pregnant women and mothers;
  - e. sexual harassment and violence against women;
  - f. women as offenders;
  - g. women in the court or tribunal room;
  - h. marriage.

### *Gender stereotyping*

2. Gender inequality is reflected in traditional ideas about the roles of women and men and, though they have shifted over time, the assumptions and stereotypes that underpin those ideas are often very deeply rooted. Thus, it is common to assume that a woman will have children, look after them and take a break from paid work or work

part-time to accommodate the family. However, such assumptions and stereotypes can and often do have the effect of seriously disadvantaging women and may be discriminatory.

3. As Baroness Hale said in *R (European Roma Rights Centre) v Immigration Officer, Prague Airport* in 2004:

“The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping. Even if, for example, most women are less strong than most men, it must not be assumed that the individual woman who has applied for the job does not have the strength to do it... If strength is a qualification, all applicants should be required to demonstrate that they qualify.”
4. Common stereotypical assumptions often applied to all women and men are that:
  - a. men, not women, are the main earners in the family;
  - b. women are primary carers of children;
  - c. women with children will be less committed to their work; they may not return from maternity leave or will want to work part-time;
  - d. men are best suited to heavy, physical jobs; women to caring jobs;
  - e. men will not want to take time off work to care for children;
  - f. women are physically weaker than men;
  - g. women are better carers than men;
  - h. female judges are more appropriate for family cases than male judges and male judges are more appropriate for heavy criminal cases.
5. Such assumptions should not be made about all women (or men) even though they may be true about many or even most women (or men).
6. However, statistics about practices which disadvantage women in particular, compared to men, may be relevant to establish indirect sex discrimination. Indirect discrimination is where there is an unjustified practice or policy that particularly disadvantages one gender as well as disadvantaging the individual claimant. Indirect discrimination recognises the need to make an adjustment for individuals who are disadvantaged because of characteristics associated with their gender (or race, age, disability) the aim being to put men and women (and different racial groups and disabled people) on an equal footing. Thus, evidence that more women work part-time is relevant to show that a requirement to work full-time is likely to disadvantage more women. If not justified in any particular case this would be indirect sex discrimination. This must be distinguished from unfounded assumptions that a particular woman will want to work part-time.

## ***Education and employment***

### **Education**

7. A government report in 2007, *Gender and education: the evidence on pupils in England* found that:
  - a. Considerations of social class and ethnicity alongside gender helps to identify which children are ‘underachieving’.
  - b. Since 1988, on the threshold measure of 5+ A\*–C GCSEs, a significant gender gap in favour of girls has emerged. Girls tend to do better in the majority of GCSE subjects; they are more likely to take arts, languages and humanities and boys are more likely to take geography, PE and IT.
  - c. Girls are more likely to stay on in full-time education at age 16 (82% of girls and 72% of boys).
  - d. Ethnicity is also a more important factor than gender. Black Caribbean and Black Other boys are the least likely of any ethnic group to achieve 5+ A\*–C GCSE passes, but Black Caribbean and Black Other girls are not disadvantaged to the same extent.
  - e. White British free school meals boys are a group with particularly low attainment.
  - f. 70% of children with identified Special Educational Needs are boys.
  - g. Boys are nine times as likely as girls to be identified with autistic spectrum disorder.
  - h. Boys are four times as likely as girls to be identified as having a behavioural, emotional and social difficulty (BESD); gender is a better predictor than social class and ethnicity of being classified as having BESD.
  - i. Boys account for 80% of permanent exclusions and three-quarters of fixed-term exclusions, though there has been an increase in permanent exclusions of girls (from 16% to 21%). Pupils receiving free school meals are three times more likely to be excluded.
  - j. Girls are more likely than boys to have been the victim of psychological bullying whilst boys are more likely than girls to have been the victim of physical bullying.
  - k. Boys are more likely to have committed a criminal offence (33% compared to 21%).
  - l. Women make up over 80% of full-time regular teachers and 90% of primary teachers, but only 30% of secondary head teachers and 64% of primary head teachers.
8. Under the **gender equality duty** local authorities and all maintained schools in the UK, as well as city academies, city technology colleges and pupil referral units have a general duty to:
  - a. eliminate unlawful sex discrimination and harassment;
  - b. promote equality of opportunity between men and women.
9. There is also a specific duty to publish a gender equality scheme showing how the local authority intends to fulfil its duties and setting out its gender equality objectives. Guidance from the Equal Opportunities Commission (now the EHRC) points out that

men and women are not starting from an equal footing and that identical treatment will not always be appropriate. It says that schools can help address the gender pay gap and job segregation that exists beyond the school itself by implementing initiatives to counter gender stereotyped attitudes to jobs and careers among pupils and parents.

## Employment

10. Around 45% of the UK workforce are women and 70% of all women of working age are in paid work (though this figure varies according to ethnicity so that 71% of white women, 64% of African Caribbean women, 60% of Indian women and 20% of Bangladeshi women, are in paid work).
11. In 2013 a report by PricewaterhouseCoopers (PwC), the 'Women in Work Index' ranked the UK 18th of 27 OECD (Organisation for Economic Co-operation and Development) countries in five areas of 'female economic empowerment' such as pay equality, the female unemployment rate, and the proportion of women working full-time. The figures were from 2011, the latest year for which comparable data was available.
12. PwC compared the figures for 2011 with the same data for 2007 and 2000 and found UK women had slipped down the table – a result of rising female unemployment, above-average pay inequality, and fewer full-time employment opportunities, although the pay gap itself at 18.4% had narrowed a little.
13. Occupation segregation is one of the main causes of the gender pay gap. Women's employment is highly concentrated in certain occupations and those occupations which are female-dominated are often the lowest paid. In addition, women are still underrepresented in the high paid jobs within occupations. The Government Equalities Office is encouraging companies to implement the results of the *Women on Boards* review, published by Lord Davies in February 2011. The review recommended that UK listed companies in the FTSE 100 should have a minimum 25% female board member representation by 2015. It also recommended that FTSE 350 companies should set their own challenging targets.

## Ethnic minority women

14. A study by the Equal Opportunities Commission (EOC) in 2007, *Moving on Up?*, found that:
  - a. The employment rate for the population overall is 73% compared to the ethnic minority employment rate of 61%. For female ethnic minorities the employment rate is 52.8%.
  - b. 35.5% of ethnic minority women work part-time compared to 41.5% of White women.
  - c. The unemployment rate for all groups is 5.7%; for ethnic minorities it was 10.7%. Two-thirds of Pakistani and Bangladeshi women are economically inactive.
  - d. Ethnic minority women are more likely to work in the public sector (33.6%) compared to 16.7% for ethnic minority men.
  - e. Once in employment minority ethnic women are as successful as White women in reaching a higher occupational level which indicates that their labour market disadvantage applies mainly to finding work.

## Carers

15. Women are still the primary carers of children. However, some 73% of women with children work and 53% of women with children under five work. They nevertheless spend three times as much time as men on caring for children. This pattern and the stereotype of women as child carers, however, disadvantages men as well. Men in the UK are spending more time with their children now and want to have more time with them, but they also work the longest hours in the EU. Labour Market Statistics show that in the second quarter of 2011, 82 per cent of men with dependent children compared to 30 per cent of women with dependent children were working full time. Only 6 per cent of fathers with dependent children compared to 37 per cent of mothers were working part time.

## Caring for elderly and disabled dependants

16. According to Carers UK ([www.carersuk.org](http://www.carersuk.org)) one in eight adults (around 6 million people) in the UK provide unpaid care for partners, relatives or friends in need of help because they are ill, frail or disabled. Some 3.9 million carers are of working age.
17. 58% of carers are women and 42% are men.
18. 80% of carers are of working age.
19. 1.5 million carers combine full-time paid employment with unpaid care – 58% of these working carers are men.
20. 662,000 carers are employed part-time; of these 89% are women.
21. One in three carers is not able to return to work because the right alternative care is not available. One in five gives up work to care; this is often associated with loss of income, pension and long-term financial security. This is a loss both to employees and employers.
22. Carers working more than 20 hours per week are clustered in lower level jobs.
23. There are a number of employees who are caring for both children and adults in need of care, which makes the reconciliation of work and family life twice as difficult.
24. A high proportion of young Pakistani and Bangladeshi men and women combine paid work and unpaid care.

## Recommendation

- Account may need to be taken of a person's caring responsibilities when listing cases. For example, it may not be easy to find an alternative carer to fit in with the court hearing and court hours and it may be necessary to adjust the court or tribunal hours to accommodate a carer's needs.

## ***Pregnancy, maternity leave and breastfeeding***

25. Despite the fact that any unfavourable treatment of a woman for a reason related to her pregnancy, pregnancy-related sickness absence or maternity leave is unlawful discrimination, this is still widespread and is a major factor in the gender pay gap.

26. *Greater expectations*, the EOC's investigation into pregnancy discrimination in 2005 has shown that:
- a. A million pregnant women are likely to experience discrimination at work over the next five years, if current trends continue.
  - b. Each year almost half of the 440,000 pregnant women in Great Britain experience some form of disadvantage at work, simply for being pregnant or taking maternity leave.
27. *Research* published by IPPR in 2013 *Who's breadwinning? Working mothers and the new face of family support* has found that:
- a. Whilst almost one in three mothers is now the primary breadwinner in the family (up 80% from 1998) there is a very clear persistence of gender discrepancies at home as they still shoulder the majority of household tasks;
  - b. Despite this an average mother earns 26 per cent less than an average father.

Recommendation: adjustments for pregnant women in courts and tribunals

- Consideration should always be given to accommodating pregnant women and new and breastfeeding mothers in any proceedings in whatever capacity they are taking part, whether as parties, witnesses or representatives. This may require sensitive listings and breaks during the proceedings, which may sometimes mean that a case goes part-heard.
- Where possible, the requirements of a woman who may be breastfeeding should be accommodated in any case management decisions.
- 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 would apply at least to the month before the birth and at least two months after the birth, though this period would be longer if there were complications at birth. Even a telephone hearing may be too difficult if the woman is looking after the baby on her own. This may mean that a hearing has to be adjourned.
- Breaks should be allowed for breastfeeding.
- It may be possible to conduct a hearing with a baby or child in the court provided the baby or child is not disrupting the hearing, by, for example, crying or making a noise. However, a hearing should not be conducted in the presence of a child unless the judge is satisfied that it is appropriate in all the circumstances for the child to see and hear the proceedings. For example, it may not be appropriate where there may be information that might cause the child distress, anxiety or other harm.

***Sexual harassment and violence against women***

28. Sexual harassment remains a problem for women both at and outside work. It is 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 victim had rejected or

submitted to unwanted conduct. It sometimes leads to a woman suffering from anxiety or depression.

29. It is difficult to put a figure on the extent of sexual harassment inside the workplace or outside, because it often goes unreported. Many employees who suffer harassment are reluctant to complain because of the fear that they may lose their job as a result of complaining.

### Domestic violence

30. The government defines domestic violence as: ‘Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.’ It includes so called ‘honour based violence’, female genital mutilation (FGM) and forced marriage.
31. Statistics on domestic violence (see for example the websites of Women’s Aid and gov.uk) reveals that:
- a. In 2012 around 1.2 million women suffered domestic abuse, over 400,000 women were sexually assaulted, 70,000 women were raped and thousands more were stalked.
  - b. Fewer than 1 in 4 people who suffer abuse at the hands of their partner - and only around 1 in 10 women who experience serious sexual assault - report it to the police.
  - c. Of all violence, domestic violence has the highest rate of repeat victimisation, with nearly half of victims being victimised twice or more and almost one in four being victimised three or more times.
  - d. Domestic violence accounts for 16% of all reported violent crimes.
  - e. 44% of women killed were killed by a current or ex-partner. On average, two women in England and Wales are killed every week by a current or former male partner
  - f. There has been a **65% increase** in number of domestic violence **prosecutions** between 2005/6 and 2010/11 and a corresponding 99% increase in number of defendants convicted. Despite this, domestic violence **conviction rates** in the five years to 2011 stood at just **6.5% of incidents reported to police** – though a much higher proportion of around **70% of those charged**.
  - g. Over 75% of 11–12 year old boys thought it was acceptable that men hit women if they make them angry and more boys than girls, of all ages, believe that some women deserve to be hit according to a report by F. Mignuolo in 2007 on the Gender Equality duty and schools (see [www.schools-out.org.uk](http://www.schools-out.org.uk)).
32. There are a number of significant reasons why women do not leave dangerous partners, including safety; for example survivors can be at a higher risk when they leave violent partners. There are other ties to homes including identity, family, money and status which operate as strong motivators for staying in a violent relationship. Women with uncertain immigration status have no recourse to public funds so are not eligible for the protection provided by refuges and may be forced to stay within an abusive relationship.

33. Religious, cultural and social factors may be relevant. For example:
  - a. In some communities a woman leaving her abusive husband may be at risk of reprisals or even being killed by her own or her husband's family for bringing 'shame' onto the family or community.
  - b. The loss of a support network for survivors 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.

#### Recommendation - the judge's role

- The courts and judiciary have an important role to play in conveying to the public that domestic violence will not be tolerated and sending out a message that abuse and violence in an intimate relationship is a serious matter and is unacceptable. Children are also affected. Not only are many traumatised by what they witness, there is also a strong connection between domestic violence, sexual violence and child abuse. Whilst most victims of domestic violence are women, men and partners in same-sex relationships might also be victims of domestic violence and should be treated similarly. Insofar as possible, gender neutral language should be used to describe domestic violence without losing sight of the fact that the reality is that some of the most physically violent incidents are committed by men on female partners or ex-partners.
- The Sentencing Council has produced definitive guidelines in relation to cases involving domestic violence and breach of a protective order. (The guidelines are available on <http://www.sentencing-guidelines.gov.uk> or from

The Sentencing Council for England and Wales  
 The Royal Courts of Justice  
 East Block, Room EB16  
 The Strand  
 London WC2A 2LL

Telephone: 020 7071 5793

#### **Sexual offences**

34. The Ministry of Justice Statistical Bulletin in January 2013 reported that an annual average of 404,000 woman and 72,000 men are the victims of sexual offences.
35. There are an estimated 85,000 female victims of rape or sexual assault by penetration every year in the UK (12,000 men). Since the age of 16 some 5% of women in the UK have been raped and 20% have experienced other sexual offences such as sexual threats, unwanted touching or indecent exposure.
36. Only 15% of serious sexual offences against people over 16 are reported to the police.
37. Overall just under two thirds of all cases prosecuted as sexual assault result in a conviction and those convicted of rape almost all received a custodial sentence.
38. A Home Office Survey in 2009 found that one in four respondents believe that a woman is partially responsible if she is raped or sexually assaulted when she is drunk

or using drugs. Some 10% felt she should be partly held responsible if walking alone at night. Rape complainants may be reluctant to report crime because they fear that they will be blamed for the attack (because of what they were wearing or the amount they had drunk).

## Myths

39. *A genuine victim will report rape at once.* The Court of Appeal has recently confirmed that juries can be told that delay can be down to trauma after the rape.
40. *False allegations of rape are common.* There is no reliable evidence that more false complaints are made in rape cases than in other serious crimes.
41. *Most rapes are committed by strangers.* In 90% of cases rapists are known to the victim: a partner or former partner, friend, colleague, acquaintance or professional.
42. Rape victims should put up a fight and show signs of struggle, and a victim will sustain genital injuries. Not all victims resist, many fearing the consequences. Many women freeze.
43. *Consent to sex can be assumed from dress, flirting, drink.* Juries could be told that if a man flashed his bulging wallet around in a pub and then had it stolen, no one would say that the person who stole it was not really a thief.
44. *Stranger rape is more traumatic than rape by a known person.* Sexual assault is a traumatic experience whoever the perpetrator and sometimes more traumatic if a breach of trust is involved.

## Recommendation – the judge’s role

- A judge will not hear a serious sexual offence case unless he or she has attended specialist training. The materials are available to judges via the JSB training website.

## *Special measures*

- 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 1999* (allowing evidence to be given by television link, by DVD, video recording or behind a screen; and allowing hearings in private in certain circumstances). As far as criminal proceedings are concerned, where an allegation of rape or of other specified sexual offences is made, no matter relating to the complainant shall be included in any publication if it is likely to lead to their identification. The circumstances in which anonymity can be lifted are very limited (*Sexual Offences (Amendment) Act 1992*).

## *Evidence via video link, anonymity*

- In the context of civil proceedings, the courts have power to permit evidence to be given by video link (r.32.3 Civil Procedure Rule (CPR) and Practice Direction 32, Annex 3). Rule 32.3 CPR provides a general discretion (without limits) to permit evidence to be given by video link (*Rowland v Brock* [2002] 4 AQL ER 370, Newman J). Though the usual rule is that hearings will be in public (r.39.2 CPR), 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 (r.39.2(3)(g) CPR and see Practice Direction 39, paras 1.1–1.10). 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 (r.39.(2)4 CPR).

- The specific rule permitting video evidence in the Civil Procedure Rules (r.32.3 CPR) is itself based on the requirements of the ‘overriding objective’ under r1.1 CPR, namely to ensure that parties are placed on an equal footing. The relevant parts of the duty to deal with a case justly in accordance with the overriding objective as contained in the 2001 Regulations are framed in identical terms to those contained in r.1.1 CPR.

### ***Women as offenders***

45. Baroness Hale DBE said in her 2005 Longford Trust Lecture:

“It is now well recognised that a misplaced conception of equality has resulted in some very unequal treatment for the women and girls who appear before the criminal justice system. Simply put, a male-ordered world has applied to them its perceptions of the appropriate treatment for male offenders.... The criminal justice system could ... ask itself whether it is indeed unjust to women.”

### **Statistics from the Prison Reform Trust website**

**([www.prisonreformtrust.org.uk/women](http://www.prisonreformtrust.org.uk/women)):**

46. Women represent about 5% of the overall prison population.
47. The number of women in prison in England and Wales stood at 4,141 in November 2012, and a total of 10,024 women were received into prison in the 12 months to September 2012.
48. From 2000–2010, the women’s prison population increased by 27%.
49. Most of the rise in the female prison population can be explained by a significant increase in the severity of sentences. In 1996, 10% of women convicted of an indictable offence were sent to prison, in 2010 14% were.
50. The proportion of women prisoners under sentence aged 40 and over has risen from 18% in 2002 to 28% in 2009.
51. Women are ten times more likely than men to self-harm in prison.
52. One in four women in prison has spent time in local authority care as a child.
53. Nearly 40% of women in prison left school before the age of 16 years, almost one in 10 were aged 13 or younger.
54. 30% of women were permanently excluded from school.
55. Over half the women in prison report having suffered domestic violence and one in three has experienced sexual abuse.
56. Nearly half of women prisoners surveyed for a Ministry of Justice study (48%) reported having committed offences to support someone else’s drug use, compared to only just over one-fifth of male prisoners (22%).

57. 19% of women were not in permanent accommodation before entering custody and 10% of women were sleeping rough.
58. 8.4% of women released from prison sentences of less than 12 months had positive employment outcomes compared to 27.3 per cent of men

### Recommendations

- The Sentencing Guidelines provide that:  
Sentencers must be made aware of the differential impact sentencing decisions have on women and men including caring responsibilities for children or elders; the impact of imprisonment on mental and emotional well-being; and the disproportionate impact that incarceration has on offenders who have caring responsibilities if they are imprisoned a long distance from home.
- The Prison Service **Gender Specific Standards** (GSS) provide guidance on the various stages of custody and consider the needs of different women – such as young and older women, BME women, foreign national women, women with disabilities, women serving a life sentence and women with children.
- There is evidence that a significant proportion of foreign national women in prison may have been trafficked and coerced into offending but women are too terrified to disclose this for fear of retaliation.
- International standards for women offenders are set out in the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), adopted in July 2010.
- The public sector gender equality duty applies to prisons, probation services and court staff.

### *Accommodating different sitting hours and breaks*

- Women should not be disadvantaged if they have recently given birth, are breastfeeding or caring for children. Women who are breastfeeding will need to have a suitable place to nurse and adequate breaks to do so. We should, in exercising our case management functions, have proper regard to this in deciding sitting hours and even, as appropriate, location. Similarly, women and men who have dependent children may have child care responsibilities which make conventional sitting hours difficult or impossible for them. Such responsibilities should be accommodated as far as possible. It is unlikely to help in the achievement of justice if a witness or party is late or distracted by reason of concern over child care. With sensible listing and case management such responsibilities should be readily accommodated.

### *Language*

- A woman's marital status will usually be quite irrelevant to the issues before us. However, courtesy is an important way of ensuring that participants in the justice process feel fairly treated and it is important therefore to check with any witness how they wish to be addressed. We should not assume that a married or unmarried woman would prefer to be called Mrs or Miss – many may prefer the neutral 'Ms'. Accordingly, it is best to ask a woman how she wishes to be addressed, i.e. rather than the more intrusive (and irrelevant) "Are you married?"

- In the use of language, we can unconsciously convey assumptions about gender roles which might be offensive or disconcerting to participants who do not match those roles (e.g. ‘postman’; ‘chairman’ rather than ‘postal worker’ or ‘chair’). Insofar as possible therefore we should take care to use gender neutral language: ‘they’ (rather than ‘he’ or ‘she’); ‘them’ (rather than ‘him’ or ‘her’).

### *Protecting women*

- As has been described above, there are tools available at common law, in statute, in the Civil Procedure Rules, tribunal rules and as enshrined in the European Convention of Human Rights to ensure women can feel safe in participating in the justice process and are protected against unjustified intrusive questioning. We should use these tools as appropriate, bearing in mind that Article 6 of the European Convention requires – as a component of the broader concept of a fair trial – that each party must be afforded a reasonable opportunity to present their case under conditions which do not place them at a substantial disadvantage vis-à-vis their opponent (see *De Haes and Gijssels v Belgium* 1998 25 EHHR 1, para. 53).

### ***Marriage and divorce***

59. It is unlawful under the *Equality Act* to discriminate against someone because they are married or in a civil partnership.
60. A civil marriage or partnership must take place at a register office or venue approved by the local authority. Whilst a religious marriage may take place in a church, mosque, temple or other place of worship, the relationship will not be legally recognised unless the place of worship is either Anglican or registered by the registrar general for marriage. Divorce is similarly only legally recognised if it complies with legislation.
  - a. There are of course many different views on the acceptability of divorce in different cultures.
  - b. The media regularly comments on the apparent inequality between men and women, with women finding it more difficult to divorce than men under both Sharia and Orthodox Jewish law, for example.
  - c. In some communities difficulties arise on divorce when the couple discovers that their religious ceremony was not legally recognized as their place of marriage was not registered.
61. Recently in the High Court, Mr. Justice Baker, adjourned a hearing and agreed to endorse the parties' proposal to refer their disputes to a process of arbitration before the New York *Beth Din* once he was satisfied about the principles and approach adopted by the rabbinical authorities. The process was successful but Baker J stressed that the outcome, although likely to carry considerable weight with the court, would not have been binding and would not preclude either party from pursuing applications to his court in respect of any of the matters in issue. He emphasized that the court gives respect to all religious practices and beliefs, '[b]ut that respect does not oblige the court to depart from the welfare principle because...the welfare principle is sufficiently broad and flexible to accommodate many cultural and religious practices.' (Re AI and MT [2013] EWHC 100 (Fam)).
62. The media reported the case widely as opening up a possibility that 'divorces settled by religious courts including Sharia are a step closer to being allowed under British law'.

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## 12. Sexual orientation

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### *Key points*

- Sexual orientation is just one of many facets of a person's identity and lesbian, gay and bisexual (LGB) people are as diverse as the community as a whole.
- The definition of 'lesbian', 'gay', 'bisexuality' and 'heterosexuality' is better expressed as 'sexual orientation towards people', rather than 'sexual attraction to'. This reflects the fact that people build committed, stable relationships and does not focus purely on sexual activity.
- Most LGB people feel that their sexual orientation is unalterable – just as most heterosexuals do.
- 'Gay' is increasingly used as a generic term to describe LGB people in preference to 'homosexual'.
- Same-sex relationships are not necessarily the same as heterosexual ones. Courts and tribunals should be careful not to judge same-sex relationships according to the principles of heterosexual married life. In any case, families, whether heterosexual or gay, that do not conform to the traditional model are an increasingly common social reality. Same-sex couples can enter into civil partnerships and can, as a matter of law, constitute an enduring family relationship.
- Objective mainstream research shows that children brought up by LGB parents do equally as well as those brought up by heterosexual parents.
- Some people wrongly assume that being lesbian or gay is related to paedophile desire. It is not.
- Lesbian, gay and bisexual people continue to go in constant fear of unequal treatment in their daily lives. Discrimination by the justice system, when it happens, confirms the expectations of many LGB people.
- When dealing with any apparent lack of candour, courts and tribunals should remember that being gay or lesbian is an individual experience that may have led to fear and concealment; many gay people fear to engage with the justice system as they may be 'outed' in open court with serious consequences for their family life and their relationships in the community, not to mention their safety.
- There is no one "gay community" but growing up gay involves profound feelings of isolation and the discovery of a gay community means the discovery of a refuge in a hostile world. Research has shown that bisexual people suffer particular problems in being excluded from both heterosexual and gay communities.
- No reputable medical opinion now suggests that 'homosexuality' is a catchable or pathological condition or that boys or girls can be seduced into being gay.
- Stonewall which works to achieve equality and justice for LGB people has a website containing a great deal of useful information: [www.stonewall.org.uk](http://www.stonewall.org.uk)

### ***Lesbian, gay and bisexual people – introduction and language***

1. The lifestyles, 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.
2. It is extremely difficult to calculate the number of lesbians, gay men and bisexuals in England and Wales. The government and Stonewall agree that a reasonable estimate is that 5–7% of the population is gay. In his opinion in *Grant v South-West Trains (Case C249/96)*, in the European Court of Justice, Advocate General Elmer estimated that there were 35 million LGB people within the European Union.
3. It should also be noted that human sexuality is a complete spectrum ranging from the exclusively heterosexual, through varieties of bisexuality to the exclusively gay. Additionally, some people resist labelling, and decline to be identified as being of any particular or fixed sexuality. All this makes an estimate of numbers extremely difficult although there is little doubt that, with more tolerant public attitudes, the number of people willing to be identified as gay, lesbian or bisexual, is increasing.
4. To be stereotyped on the basis of sexual orientation is just as offensive as to be stereotyped on the basis of colour. Consequently, judicial decision-makers need to be aware of the harm done to people, and to the reputation of the judicial system, by stereotypical assumptions and homespun theories around the issue of being lesbian, gay or bisexual.
5. Judges should be alert to restrain any intrusive questioning of the sexuality of a witness, a litigant, an applicant or a defendant unless it is strictly relevant to real issues in the case. In fact it is rarely necessary to ask what a litigant's sexual orientation is, and if it becomes necessary they should be asked to self-define.
6. Different people prefer different terms but in general it is acceptable to use the following:
  - lesbian, gay and bisexual people (for short, 'LGB people'; sometimes the term 'LGBT' is used meaning lesbian, gay, bisexual and transgender people)
  - a woman who is lesbian/a lesbian/a gay woman
  - a gay man
  - a bisexual person
7. Terms that are not acceptable are:
  - a homosexual
  - a gay
  - some lesbians do not like to be called 'gay' because they have a distinct identity from gay men although many are very happy with that
  - dyke/queer, etc. – some of these derogatory terms may be used with irony by gay people themselves but should not be used by judges or (generally) by heterosexual people.

8. Lesbian, gay and bisexual people face a daily dilemma – whether to be open as to their sexual orientation, and risk bigotry, prejudice, discrimination and the adverse judgements of others, or keep the issue hidden and face accusations of cover-up, dishonesty and a lack of candour. Many are deeply fearful of the consequences of ‘coming out’. For many, the fear is of potential personal rejection by family, friends and colleagues. Employment can be lost, families devastated and relationships damaged by unnecessary and prurient court reporting. Courts and tribunals should be aware that these factors may place additional burdens on gay and lesbian witnesses and victims, and should consider what measures might be available to counteract them.
9. It is sometimes asked “Why do they have to say they are gay, why not keep this a private personal matter?” Amongst the answers are that:
  - heterosexual people are constantly outing themselves to colleagues referring to “my husband/ wife” etc, all LGB people want is to do the same;
  - many say that coming out is a liberating experience which removes stress and allows full participation in the workplace etc.

### ***Perceptions of prejudice***

10. There is an historical background of deep, widespread, entrenched and unchallenged discrimination against LGB people and male homosexuality was only decriminalised in Northern Ireland in 1980. Polling by Stonewall in 2012-13 shows that 800,000 people in the British work force have witnessed physical homophobic bullying at work in the past five years; 98% of secondary school pupils who identify as gay regularly hear homophobic language; and there are 20,000 homophobic crimes still being committed in this country every year.
11. For LGB people, therefore, unequal treatment in their daily lives is an ever-present expectation. Discrimination by the justice system, when it happens, comes as no surprise and reinforces a belief that nothing will ever change. Further, parties, jurors and witnesses may assume that their lifestyle and sexuality will be judged adversely.
12. It is often remarked that young people are much more tolerant and understanding of LGB people. But the reported experience of gay people is that this tolerance or understanding does not manifest itself in schools and – unless informed by education and intelligent thought – such apparent tolerance on the part of the over-18s can be somewhat superficial (see *The Teachers’ Report*, Stonewall, 2009).

### ***The legal recognition of same-sex relationships***

13. A ‘civil partnership’ is a relationship between two people of the same sex which is formed when they register as civil partners of each other. The Civil Partnership Act 2004 also broadened the definition of families so that for almost all purposes same-sex couples are treated as equivalent to opposite-sex couples and civil partners are treated as equivalent to married partners. It provides for ‘divorce’ (known as ‘dissolution’) in much the same ways as for marriage; amends laws relating to children, the succession of tenancies, wills and inheritance, pensions, social security, child support, taxation and domestic violence to provide the same-sex partners with much the same rights as heterosexual partners.

14. The Marriage (Same Sex Couples) Act received Royal Assent in July 2013 allowing the first same-sex marriages to be performed in the summer of 2014. When s.9 of that Act comes into force it will grant anyone who is registered in a civil partnership the ability to convert that partnership into a marriage.
15. At the committee stage in February 2013 Ben Summerskill, CEO of Stonewall, was asked about the importance of the Bill to gay people given that the civil partnership legislation has conferred pretty much the same rights as marriage already. He said:  
“First, we are alive to the fact that there are now an increasing number of lesbian and gay people, particularly younger ones, who want their family structures to be described in exactly the same way as everyone else’s. For those who have children, that is particularly important. Secondly, many people rather hoped when civil partnerships were introduced that they would lead to lesbian, gay and bisexual people being treated in the public space in exactly the same way as others.....We have come to the view that until people are treated in exactly the same way legislatively, there is a risk that .... distinctions will continue to be made. .... some of the language we have heard in the public space in recent weeks and months comparing gay people in long-term relationships to abortionists, to bestialists and to paedophiles has rather galvanised the view of a lot of gay people that it is time that this distinction was eroded.”
16. The wording of the civil partnership contract and the civil marriage contract are pretty much the same. The legislation will enable same sex marriages on religious premises but will not require this. Civil partners will be entitled to convert their partnership to a marriage.

### ***Family issues***

17. Extensive psychological research has demonstrated that children brought up by lesbian or gay parents do equally as well as those brought up by heterosexual parents in terms of emotional well-being, sexual responsibility, academic achievement and avoidance of crime. There is no body of respectable research which points convincingly to any other conclusion.

### **Children born to same-sex couples through donor insemination**

18. The Human Fertilisation and Embryology Act 2008 applies to both same-sex and heterosexual couples who conceive using donor sperm or embryos. The Act brought civil partners into line with married couples, and same-sex couples not in a civil partnership in line with unmarried couples. Same-sex couples, including civil partners, are legally recognised as parents of children conceived during their relationship from the moment of conception without the need for either to apply to adopt the child, giving same-sex couples the same rights to parenthood as heterosexual couples when registering their child's birth.
19. Fertility clinics are no longer required to consider the 'need for a father' before granting treatment; now clinics are only required to consider the need for 'supportive parenting'.

## **Adoption**

20. In the Adoption and Children Act 2002 there is provision for same-sex couples to adopt. It is not necessary for the couple to have registered their partnership. Unmarried couples, however, whether gay or heterosexual, must show that they are living as partners in an enduring family relationship (section 144(4)).
21. In *McClintock v Department of Constitutional Affairs UKEAT/0223/07*, Mr McClintock, a Justice of the Peace, resigned from membership of the Family Panel because the Department of Constitutional Affairs refused to relieve him of the duty to officiate in cases in which he might have to place children for adoption, fostering or care with civil partners or same-sex partners. The EAT upheld a tribunal's decision that Mr McClintock had not suffered direct or indirect discrimination or harassment on grounds of his religion or belief (the Employment Equality (Religion or Belief) Regulations 2003).
22. The basis on which Mr McClintock had asked to be excused was that children were being treated as part of an unacceptable social experiment. He had not made it clear that his objection was founded on any conscientious or religious convictions. In any event, the EAT upheld the tribunal's finding that the requirement for Mr McClintock to uphold the judicial oath to apply the law 'without fear or favour' was justified.

## **Residence and contact**

23. One of the central legal concepts in lesbian and gay parenting is parental responsibility. In England and Wales it is defined in the Children Act 1989 as 'all the rights, duties, powers, responsibilities and authority which by law a parent has in relation to the child and his property'. It is the starting point for recognition as a parent under the law. Some gay men can obtain parental responsibility by agreement with the mother but many gay parents have to go to court to obtain an order (see [www.stonewall.org.uk/at\\_home/parenting\\_and\\_www.rightsofwomen.org.uk](http://www.stonewall.org.uk/at_home/parenting_and_www.rightsofwomen.org.uk) for further information).

## **Divorce**

24. It sometimes happens that, after succumbing to social pressure to marry, a man or woman faces up to the fact that they are gay, and the marriage breaks down. For the reasons given above in relation to adoption it would be wrong for a judge to make any value judgements based on the sexuality of the parties. The heterosexual party may feel superior, or that the fault or blame lies with the gay or lesbian party by virtue of their sexuality, but such notions are misplaced.

## **Employment**

25. The Equality Act 2010 outlaws employment discrimination on the grounds of sexual orientation. Discrimination can be direct, indirect victimisation or harassment. There is no need to for person suffering discrimination to be gay or perceived as gay and indeed no need for the judge to ask what the victim's sexual orientation is. The test is whether that person has suffered a disadvantage on grounds of sexual orientation.

26. Sir Stephen Sedley in the Court of Appeal stated:

“Sexual orientation is not an either/or affair. Some people are bisexual; some are asexual; some, including heterosexuals, have unusual interests and proclivities. All of these may desire to keep their orientation to themselves but still be vulnerable to harassment by people who know or sense what their orientation is.”

*English v Thomas Sanderson Blinds Ltd [2009] IRLR 206, CA*

27. There is sometimes a perceived conflict between the protection afforded by the Equality Act to those with the protected characteristics of religion or belief and sexual orientation. In *Ladele v London Borough of Islington [2009]* the Court of Appeal rejected an appeal by a registrar who had refused to perform civil partnership ceremonies against a finding that she had not been discriminated against on grounds of her Christian religion. Lord Neuberger held:

“...Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her religion; and Islington's requirement in no way prevented her from worshipping as she wished.”

Mrs Ladele's application to the ECHR failed in January 2013.

28. In 2011 the Court of Appeal considered a discrimination claim brought by a gay man partly on the grounds that a colleague had “outed” him; she was found to have believed that he was openly gay. LJ Elias said that it would:

“[make] a mockery of discrimination law to impose liability in these circumstances. A defendant would be liable for discrimination for doing something which the claimant had reasonably led him or her to believe would not cause the claimant concern...” *Grant v HM Land Registry [2011]*

Such situations are fact specific but judges should not assume that an innocent allusion to a colleague's sexual orientation in neutral language is unlawful.

29. Rights to time off work to care for children, for example paternity, parental and adoption leave and the right to time off for dependants are available to gay people.
30. See the Stonewall website (<http://www.stonewall.org.uk/workplace>) for resources, research and guides, including an employer handbook and an employee toolkit. There is also information on [www.gov.uk](http://www.gov.uk)

### **Facilities and services**

31. The Equality Act 2010 outlaws discrimination and harassment in the provision of all goods, facilities and services This includes healthcare (GPs cannot turn you away for being gay or refuse lesbian, gay or bisexual people treatments they would offer to anyone else) housing (in the past some councils have refused to recognise homophobic bullying as a

good reason to re-house a person or evict their neighbours), in education (if a school fails to take anti-gay bullying seriously or refuses a place to someone because they might be gay) and the exercising of public authority functions. Hotels and B&Bs cannot refuse double rooms to same-sex couples (see *Black & Morgan v Wilkinson* [2013] EWCA 820 where the Court of Appeal refused an appeal by a Christian bed and breakfast owner who had refused a bed to a gay couple, but granted her leave to apply to the Supreme Court). Restaurants should not ask gay couples to leave simply for holding hands.

### ***Lesbian, gay and bisexual people and crime***

32. From 1967 in England and Wales homosexual acts between adults with no other persons present became legal (1980 in Scotland and 1982 in Northern Ireland). Under the Sexual Offences Act 2003 there is an offence applicable to all persons regardless of their sexual orientation of 'sexual activity in a public lavatory'; this is all that remains of the 1967 reference to 'other persons present'. From 2000 the age of consent for gay men has been 16. Lesbians have never subject to the criminal law. Consensual homosexual act between adults remain illegal in about 36% of the countries of the world.
33. There is no evidence that being gay implies a propensity to commit any particular type of crime. A common and extremely offensive stereotype links being gay with paedophilia. Most sexual abuse of children happens in the home, is committed by someone the child knows well, and is not gender specific. There is absolutely no evidence that gay men are more likely to abuse children than heterosexual men.
34. Lesbian, gay and bisexual people are often the victims of crime. Stonewall's 2008 survey found that:
  - One in five lesbian and gay people had experienced a homophobic hate crime or incident in the last three years, one in eight had been a victim in the last year; three in four of those experiencing hate crimes or incidents did not report them to the police. Seven in ten did not report hate crimes or incidents to anyone.
  - One in six experiencing homophobic hate incidents in the last three years experienced a physical assault.
  - Eight per cent of all black and minority ethnic lesbian and gay people have experienced a physical assault as a homophobic hate incident, compared to 4% of all lesbian and gay people. One in six lesbian and gay people have been insulted and harassed in the last three years because they are gay.
35. By virtue of s.146 of the Criminal Justice Act 2003, where the court is considering the seriousness of an offence committed by a person who demonstrated hostility based on sexual orientation (or presumed sexual orientation), or where the offence is motivated (wholly or partly) by hostility towards persons who are of a particular sexual orientation, then the court must treat such hostility as an aggravating factor, and it is immaterial whether or not the offender's hostility was also based, to any extent, on any other factor.
36. However, there is no free-standing offence of homophobic hate crime so perpetrators cannot be charged with a specific offence of homophobically motivated harassment, unlike perpetrators of racially and religiously motivated hate crimes who can be charged with racially or religiously aggravated harassment or assault.

## **Immigration**

37. Issues around sexual orientation arise in two broad areas, namely same-sex relationships, where one party is an overseas national seeking permission to enter or remain in the UK with a view to settlement, and lesbian, gay, transgender and transvestite asylum seekers.
38. Those entering the UK for the purpose of entering into a civil partnership or with the intention “to live permanently with the other” are treated exactly the same as heterosexual people entering to marry or cohabit. Home Office approval may be required.
39. Those who claim to be refugees with a well-founded fear of being persecuted under Article 1A2 of the 1951 United Nations Convention relating to the status of refugees (The Refugee Convention) by reason of their sexual orientation or who fear gender-related harm may put their case on the basis that they are ‘members of a particular social group’, Paragraphs 295A–295G of HC 395 as amended by HC 538. They may also argue that they have a well-founded fear by reason of their political opinion, or for any of the other reasons set out in Article 1A2 of the Refugee Convention.
40. There is very little information on which countries condone human rights abuses based on sexual orientation (see Amnesty International’s *Crimes of hate, conspiracy of silence: torture and ill-treatment based on sexual identity* (2001)). Another problem is that in some countries deemed safe by the Home Office, LGB and transgender people may still suffer persecution.
41. An applicant may also have difficulty in proving their sexual orientation. In its report *Fit for purpose yet?* published in 2008, the Independent Asylum Commission discussed particular credibility problems faced by LGB and transgender people, for example (a) they may have led an apparently heterosexual family life in their home country or (b) they may have delayed coming out to immigration officials and interpreters until late in the day, the fear of disclosure being mistaken for ‘changing their story’.

## **HIV positive people and AIDS**

42. It is wrong to assume that AIDS and HIV positive status are indicative of ‘homosexual activity’. Worldwide, heterosexual activity is responsible for most new HIV infections. Intravenous drug abuse is another very common cause. The Terrence Higgins Trust (tth.org.uk) reports that there are now nearly as many African people living in the UK diagnosed with HIV as there are gay men, though the majority of new infections continue to be amongst gay men.
43. HIV treatment can prevent a person developing the symptoms of AIDS indefinitely. Such treatment is available in the UK to all HIV positive people. Without such treatment the symptoms of AIDS are likely to develop.
44. The pace of medical progress has dramatically changed and lengthened the lives of HIV positive people in those countries able to afford the cost of treatment. This means that old ideas need to be re-thought in the light of new medical facts. Unfortunately, the fear and stigmatisation resulting from an out-of-date understanding of the issues can be very damaging to HIV positive people. Discrimination towards, or harassment of, a gay HIV positive person is likely to be unlawful both on grounds of disability and sexual orientation.

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