



JUDICIAL STUDIES
BOARD

Fairness in courts and tribunals - A summary of the Equal Treatment Bench book

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1.

Foreward

The Equality Act 2010 represents the single most significant development in equality law for the past 40 years. The Act consolidates existing statutory provision – previously spread disparately over various legislative measures – and thus seeks to harmonise all our discrimination laws, while at the same time creating important new duties and rights. This, the third edition of *Fairness in courts and tribunals*, has been updated to reflect those changes, and its publication timed to coincide with implementation of the main provisions of the Act.

Fairness in courts and tribunals is a short guide for judges, magistrates and all other judicial office holders, the aim of which is to provide a summary of the key points contained in the Judicial Studies Board's *Equal Treatment Bench*

Book, as revised and updated (available at www.judiciary.gov.uk). It is intended not to replace the Bench Book, but to provide a quick, easily accessible and practical point of reference to complement it.

Although aspects of the guidance may seem familiar, and some of its general principles are well-known, the messages it contains are worth reiterating. A number of sections have been updated. In particular, the sections at the beginning of the book on 'Social Awareness' and 'Discrimination' have been revised to reflect the extent and pace of social change, as well as some of the changes under the new Act.

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 guide summarises 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.

Mrs Justice Cox
JSB's Equal Treatment Advisory
Committee

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2.

Social awareness and demonstrating fairness

The responsibility for ensuring equality and fairness of treatment rests with everyone involved in the administration of justice. A claimant, defendant or other party or representative may not encounter a member of the judiciary until the final stages of their case, but may only think in terms of a single system - finer points about precisely who does what may be meaningless to that person. If anyone feels hard done by at any stage, it reflects on everyone who plays a part in that system.

In carrying out your judicial functions you will be sensitive to the fact that most people find an appearance before a court or tribunal to be a daunting experience and when they do not get what they would like or expect, it is particularly important that they feel they were

fairly treated and that they were fully heard and understood.

Just because someone remains silent does not mean that they necessarily understand, or that they feel that they have been adequately understood. It may just be that they feel too intimidated, too inadequate or too inarticulate to speak up.

People who are socially and economically disadvantaged in society may assume that they will be at a disadvantage when they appear before a court or tribunal.

Those at a disadvantage may include people from minority ethnic communities, from minority faith communities, disabled individuals (with either physical, mental or sensory impairments), women, children, older people, those

whose sexual orientation is not heterosexual, trans-gender people and those who through poverty or for any other reason are socially or economically marginalised.

People perceive the behaviour of others in terms of the cultural conventions with which they are most familiar. Our outlook is based on our own knowledge, experience and understanding and this may lead to misinterpretation or a failure to understand those who are different or have different needs.

Recognising and eliminating our prejudices is essential to prevent erroneous assumptions being made about the credibility or actions of those with backgrounds different from our own.

People who have difficulty coping with the language, procedures or facilities of courts or tribunals are as entitled to fairness and justice as those who know how to use the legal system to their advantage.

Effective communication is the bedrock of the legal process. It is vital that justice is both done and seen to be done.

2.1 – Demonstrating fairness – steps to take to ensure you demonstrate fairness:

- Ensure names and modes of address are correct by asking parties how they wish to be addressed. Ensure that names are correctly pronounced. If in doubt, ask.
- Ensure that language and terminology is appropriate and avoids offence.
- Take all practicable steps to ensure that everyone involved in proceedings understands and is understood or the process of law will be seriously impeded.

- Where possible, ensure information is obtained in advance of a hearing, about any disability or medical or other particular circumstance affecting a person appearing at the hearing so that individual needs can be accommodated. For example, the provision of access to interpreters, signers, large print, audiotape, oath-taking in accordance with a different belief system, more frequent breaks, special measures for vulnerable witnesses can and should be considered and arranged where appropriate.
- Check that all parties understand the material put before them, and the meaning of the questions asked and answers given during the course of the proceedings, otherwise the process of law is at best seriously impeded. At worst, justice may be denied.
- Allow additional time to accommodate particular individual needs or allow additional breaks.
- Give particular thought to the difficulties facing disabled people who attend court. Prior planning will help to ensure that their various needs are accommodated as far as is possible and reasonable.
- Try to put yourself in the position of the individual – the stress of attending court should not be made worse unnecessarily through a failure to anticipate foreseeable problems.
- Bear in mind the problems facing unrepresented parties. You may not be able to assist them with their case but you can ensure that they have every reasonable opportunity to present it.
- Admit a child's evidence (subject to the rules of admissibility), unless the child is incapable of giving intelligible testimony.
- Ensure that appropriate measures are taken to protect vulnerable witnesses and victims, for instance children, disabled people, or those who are afraid or distressed.

- Display an understanding of difference and difficulties with a well-timed and sensitive intervention where appropriate. Over-rigorous cross-examination of a child or other vulnerable witness should be stopped and no court user should be put in a position where they face hostility or ridicule.
- Ensure the availability of court documents and advance information in different local languages and alternative formats e.g. Braille, large print, audiotape, etc. where required.
- Be alert to the need for interpreters and signers and ensure that access to interpreters and signers is provided where necessary and reasonable.
- Make provision for oath taking in accordance with different belief systems (including non-religious belief systems) and non belief.
- Take the initiative to find out about different local cultures and faith communities for example, by contacting your local Diversity Community Relations Judge (DCRJ).
- Encourage the provision of appropriate facilities for all court users, particularly bearing in mind the requirement to make reasonable adjustments for disabled people.
- Be polite, courteous and patient at all times to all court users, members of staff and judicial colleagues.

3.

Discrimination law and the Equality Act 2010

Anti-discrimination law is a dynamic area of law and is constantly evolving and changing, both as a result of domestic legislation and case law, and as a consequence of European Union law which can affect the interpretation of domestic law and provides for directly effective rights and obligations in the UK.

The Equality Act 2010 consolidates and in some respects strengthens equality law and has (for England Wales) repealed and replaced most of the existing anti-discrimination legislation (including the Sex Discrimination Act 1975, the Race Relations Act 1976, the Disability Discrimination Act 1995, and the various Equality Regulations (including those enacted by way of domestic implementation of EU Directives)).

3.1 – Direct and indirect discrimination

The scope of protection against discrimination varies according to the personal characteristic that is protected and the activity concerned. In very broad terms, discrimination and other conduct is unlawful where it is:

- **Direct discrimination:** Where a person treats another less favourably (*because of* a protected characteristic), than they would treat others.
- **Indirect discrimination:** Where a provision, criterion or practice is applied equally to all groups, but which puts individuals with a particular protected characteristic at a particular disadvantage as compared to others.

- **Discrimination arising from disability:** Where a disabled person is unjustifiably treated unfavourably, not because the person has a disability, but because of something that arises in consequence of the disability.
 - **Harassment:*** Where a person's unwanted conduct (including conduct of a sexual nature) has the purpose or effect of violating another's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
 - **Victimisation:*** Where a person is subjected to a detriment because they have done or are believed to have done a 'protected act', that is something connected with discrimination law, for example acting as complainant or witness in relation to a complaint of discrimination
 - **Failure to comply with a duty to make reasonable adjustments:** Where a person fails to comply with such a duty - which includes a duty in appropriate cases to modify provisions, criteria or practices; avoid or adjust physical features (such as steps; floors; furnishing etc) and provide auxiliary aids - and this puts a disabled people at a substantial disadvantage in comparison with others.
- *Harassment and victimisation are not forms of discrimination, but they are prohibited conduct within the terms of the Act.
- Discrimination and harassment can relate to any one of the following protected characteristics:
- Age
 - Disability
 - Gender reassignment
 - Marriage and civil partnership
 - Pregnancy and maternity
 - Race
 - Religion or belief
 - Sex
 - Sexual orientation

In addition to the Equality Act 2010, the Human Rights Act 1998 incorporates in domestic law certain Convention rights relevant to equality and discrimination; in particular, Article 8 (right to private and family life), Article 9 (right to religious freedom), Article 14 (right to non-discrimination in the enjoyment of the substantive Convention rights). As public authorities, judges and judicial office holders are obliged (when exercising judicial functions) to act compatibly with Convention rights.

You should also be aware of the public sector equality duty under the Equality Act 2010 which requires certain public authorities to have proportionate regard to certain equality objectives, aimed at addressing inequality associated with all the protected characteristics (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief; sex and sexual orientation). Courts and tribunals are public authorities for these purposes although the exercising of “judicial functions” is excluded.

When listing cases, due regard should be given to the need to minimise difficulty for those with disabilities or caring responsibilities, for example, by taking account of the travel time, distance from the court, accessibility to the court and the need for additional breaks.

3.2 – Hate Crime

Hate Crime is any criminal offence that is motivated by the perpetrator’s prejudice, hostility or hatred based upon the victim’s perceived race, culture, faith, colour of skin, age, gender, sexual orientation, disability or other vulnerability. Criminal acts might include physical assault, damage to property, bullying, harassment, verbal abuse or insults, or offensive graffiti or letters.

A victim of Hate Crime does not have to be either a member of a minority group or someone who is generally considered to be a vulnerable person. For example, the friends of a person from a minority ethnic group, lesbian or refugee may be the victim of the crime because of

their association with them. In other cases, a person entirely unconnected with hate motivation may be the victim if the perpetrator is mistaken in perceiving an association.

4.

Age discrimination

Age discrimination exists in many areas of life and leads to personal hardship and injustice. These are examples of situations which arise as a matter of regularity: losing one's job because of one's age; being refused interest free credit, a new credit card or car insurance because of age; an organisation's attitude to older people may mean a lower quality service for those people; a doctor may refuse to refer a patient to a consultant because they are 'too old'.

Although age discrimination in employment and vocation is already unlawful, the Equality Act 2010 makes provision for age discrimination against those aged 18 or over to be prohibited in the provision of services and the exercising of public functions.

Under the Equality Act 2010 'age' is a protected characteristic by reference to which discrimination is unlawful (replacing similar provisions in the Employment Equality (Age) Regulations 2006). The reference to 'age' is a reference to a person belonging to a particular age group. An age group includes people of the same age and people of a particular range of ages. So for example, an age group would include 'over fifties' or 'twenty-one year olds'. A person aged twenty-one does not share the same characteristic of age with 'people in their forties'. However, a person aged twenty-one and people in their forties can share the characteristic of being in the "under fifty" age range.

You should avoid making assumptions based on person's age or your perception of their age, such as:

- A person is too old to learn new things or too young to be understood. This is unacceptable stereotyping. However, the sight, hearing and memory of some older people, such as those over 70, may deteriorate and if there is evidence of this, accommodation, where reasonable, should be made.
- All women in their 20's to 40's have children. Many do, but it would be wrong to assume that all will do so or, if they do, it will necessarily lead them to behave differently. On the other hand, adjustments may need to be made for parents with young children e.g. varying court times to allow for breastfeeding.

5.

Children and young people

Children may be more prone than adults to particular anxieties in court which may include fear of the unknown, fear of retaliation or publicity, pressure to withdraw a complaint, fear of having to relate personal details before strangers, fear of having to see the defendant or of being sent to prison, or feelings of guilt connected with family breakdown. Adolescent witnesses are more likely to exhibit adverse psychological reactions to the stress of appearing in court than younger ones.

- Court proceedings are traumatic experiences for children and you should be aware of their particular anxieties.
- Sensitive preparation of the child before court can minimise distress.
- Thorough case management can also alleviate anxiety for children. As part of your case management responsibility you should satisfy yourself about the adequacy of the practical arrangements being made to ensure that the child's experience of the court is as comfortable as possible. Information should always be provided to the court about the individual child's concentration span in order to timetable their evidence appropriately. The aim is to minimise waiting time and ensure that they give evidence while they are fresh, preferably at the start of the court day.
- Some children, such as those from some cultural groups or who are disabled, may be more vulnerable.

5.1 – Children appearing in court

The appearance in court of a child or young person – as victim, witness or defendant – requires particular procedures to be followed. A significant number of vulnerable witnesses are children, and there are various initiatives to protect them. It is important you are conversant with these facilities. The testimony of the child must be adduced as effectively and fairly as possible. Witnesses of whatever age are competent provided they are capable of giving intelligible testimony (this may require the assistance of an intermediary). You must be satisfied as to the child's competence; this issue should be dealt with as early as possible in proceedings. Under the Youth Justice and Criminal Evidence Act 1999, a lack of competence in a witness is described as an inability to understand questions or to give answers which can be understood. However, the witness need not understand every question or give a readily understood answer to every question. Any hearing to determine competence shall be in the presence of the jury and may include expert evidence.

Bear in mind that many children who experience problems with questioning do not feel able to tell the court. They may not ask for a break when they need one in order to 'get things over with'. As a general rule after half an hour a young child will be tired, whether or not this becomes obvious.

The proportion of children with communication needs in the general population is higher than previously recognised. The majority of young witnesses (across all age groups) experience communication difficulties while giving evidence, often because questioning is developmentally or otherwise inappropriate. Judges must discuss 'ground rules' for questioning before the child gives evidence when an intermediary is appointed and this is good practice in all young witness cases. Advocates are expected to adapt their questioning to enable young children to give the best evidence of which they are capable; formulate short, simple questions which put essential elements of the defendant's case to the witness; and inform the jury of aspects of evidence believed to undermine the

child's credibility, but not necessarily address them in detailed cross-examination of the child.

You should ensure that advocates do not attempt over-rigorous cross examination, and that the tenor, tone, language and duration of questioning is appropriate to the development age of the child and is free of jargon. 'Tag' questions e.g. "He didn't touch you (with his willy) did he?" take at least seven stages of reasoning to answer and should be avoided with children. Children need more time to process questions (for younger children, almost twice as much). A more direct question should therefore be put to the child e.g. 'Did he touch you?' 'How did he touch you?' However, rather than use the term "he", it is better that the name of the alleged perpetrator is used, as children may not always immediately connect "he" with a question previously put about a person.

Advocates need to speak slowly and give the child full opportunity to answer. This may mean that there are substantial pauses between the question and the answer. Advocates

should not be permitted to jump in during the pause as it can lead to the child becoming confused about what they are answering. Judicial vigilance is always necessary.

It is very important for you to explain to the child:

- The need to tell the truth.
- The importance of leaving nothing out when answering questions.
- The need to say so if they do not understand a question.
- The importance of not guessing the answers to questions.
- That they will not get into trouble if they do not know the answer to a question.
- That there will be breaks but that if they want a break they should say so.
- The need to tell you if they have any problem of any sort at any time during the hearing.

5.2 – Achieving Best Evidence, special measures and children's evidence

The Youth Justice and Criminal Evidence Act 1999 contains a range of special measures which extend to children and young persons, as well as witnesses with mental or physical impairments or whose evidence is likely to be impaired by reason of fear or distress.

When conducting a trial involving a video recording of an earlier interview you should be thoroughly conversant with the 'Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures' (Ministry of Justice, 2007 – update due in 2011).

Judges have absolute discretion as to whether or how to admit the evidence of children. The first question must be the potential relevance of what the child might have to say. Much will also depend on the age of the child and the nature of the case.

All young witnesses are entitled to use one or more special measures to facilitate their best evidence. Judges are expected to take account of the young person's wishes about their use. The options include:

- Evidence in chief by video recording.
- Cross-examination and re-examination by TV link (the provision for cross-examination of the child to be recorded pre-trial has not yet been implemented).
- Use of screens to shield witnesses who wish to give evidence in court (this may be used in combination with the TV link so that, if appropriate to the needs of the witness and circumstances of the case, the defendant can hear but not watch the witness give evidence).
- Clearing the court so that evidence may be given in private.
- You would usually dispense with the wearing of wigs and gowns while the child gives evidence, if this is the child's preference.

- Evidence given through an intermediary helps ensure that questions put to the witness and the witness's answers are understood (see also section 10 Interpreters, Intermediaries and Signing).
- Making available any device to aid communication with a witness with any disability.
- Appointing a supporter to accompany a child giving evidence in the TV link room (section 102 of the Coroners and Justice Act 2009, to be implemented early in 2011, makes this a statutory special measure and requires the court to take the witness's wishes into account).

6. Disability

Disability should be understood as comprising two elements. The first is the limitation imposed upon the individual by reason of their physical, mental or sensory impairment. The second is the disadvantage which the environment (whether socially or physically) imposes on the individual who has an impairment.

Any disadvantage that a disabled person is subject to should not be reinforced by the legal system. Everyone is entitled to justice, regardless of whether or not they are able to cope with the facilities and procedures of the courts.

You should consider the following:

- It is not simply a question of you being polite and understanding when faced with people whose impairments are clearly apparent.
- You should be able to recognise impairments as they exist, identify the implications, know what powers and duties you 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, jurors or advocates involved in court proceedings has an impairment which might adversely affect their ability to participate, it is important that you identify this as early as possible.
- Reasonable steps should then be taken to ensure that any hearings take place in accessible rooms, and that suitable facilities are available.

- A mental impairment may arise due to mental ill health, learning disability or brain damage. Adjustments to court procedures may be required to accommodate the needs of persons with mental impairments whether as advocates, jurors, witnesses, litigants in civil/family proceedings, defendants in criminal proceedings, or other court users.
- A litigant in civil or family proceedings is treated in a different manner under the court rules only in the case of incapacity (as distinct from the mere existence or a history of a mental impairment). The procedures then ensure that a representative is appointed, compromises and settlements are approved by the court, and there is supervision of money recovered (see under Mental Incapacity below).
- Lack of mental capacity may also be significant in criminal prosecutions (i.e. is the accused fit to plead?) and sentencing options may be affected by the mental condition of the defendant.
- You are responsible for the conduct of the hearing and should ensure that people with mental health conditions or impairments can participate to the fullest extent possible, whilst avoiding prejudice to other parties.
- Some people choose not to disclose their difficulty whilst others are unaware that this amounts to a disability.

- The Juries Act 1974 provides that it is for the Judge to determine whether or not a person should act as a juror. In the event of a disabled person being called for jury service, the presumption is that the person should so act unless you are of the opinion that the person will not, on account of their disability, be capable of acting effectively as a juror. The full-time attendance of a carer for a jury member would, however, pose difficulties because it would be an incurable irregularity for the carer to retire with the jury to the jury room.

The Equality Act 2010 provides that a 'disability' is any 'physical or mental impairment' which has 'a substantial and long-term adverse effect' on the person's 'ability to carry out normal day-to-day activities'.

6.1 – Making reasonable adjustments

The Equality Act 2010, Youth Justice and Criminal Evidence Act 1999 and Human Rights Act 1998 all impose on courts a duty to take account of disabilities and to make reasonable adjustments (referred to as 'special measures' under the YJCE) to accommodate the needs of disabled litigants, defendants, jurors and witnesses where they are put at a substantial disadvantage compared with non-disabled people, for example, by a particular court or tribunal policy or a feature of the court/tribunal premises.

There is a duty on all service providers and public authorities carrying out public functions, including courts and tribunals, to provide auxiliary aids or services, for example, the provision of information in accessible formats, or the provision of interpreters.

Although these duties do not generally extend to judges in the exercise of their judicial functions, you should ensure that you have

information about, and awareness of, the issues which a particular impairment might raise, in order to ensure effective management of a hearing. This is because any failure on the part of, for example, the court service to meet the duty, may have a knock on effect on the fairness of a hearing unless steps are taken to address that failure (for example, a notice of hearing or other documents are not provided in an accessible format). You should satisfy yourself that, where appropriate, reasonable adjustments have been made rather than leave it to the administrators.

In making any reasonable adjustments you may need to ensure that special arrangements are made with regard to:

- Memory and comprehension – form of questioning, courtroom procedures.
- Attention span and sensory overload - breaks to restore concentration.
- Mobility – access requirements; individuals may be unable to attend court; or access parts of the court.
- Communication – visual aids, speech interpreters.
- Those forms of disability where the person needs to eat or drink more frequently, take medication, or go to the lavatory at frequent intervals.
- The presence of carers or helpers may be necessary, perhaps even in the dock or witness box.
- The order in which evidence is heard – attending court can be even more stressful for disabled people than for others, so it might be helpful to timetable their part in the hearing so that they are not kept waiting.

6.2 – Some types of disability:

- **Alzheimer's disease** – a progressive disease predominantly affecting older people. It can take the form of lapses of memory and unsettling behaviour patterns. The stress of appearing in court can have a detrimental effect.
- **Attention Deficit (Hyperactivity) Disorder** – this condition is typified by inattention, distractibility and disorganisation. Behaviour can be unpredictable and impulsive, leading to the blurting out of inappropriate comments or excessive interrupting.
- **Autism** – a neuro-developmental disability which impedes the ability to communicate and to relate socially. Key features are unusual behaviours, inflexible thinking, hypersensitivity to noise, light or textures and generalised learning difficulties. The Autistic Spectrum includes Asperger Syndrome, in which the learning disability is not present. Characteristics include difficulties seeing others' points of view, dependence on routines, over-literal interpretations and obsessive interests in limited areas.
- **Cerebral palsy** – includes disorders of movement as well as posture and communication problems.
- **Cerebral vascular accidents ('stroke')** – symptoms can include weakness or paralysis, speech difficulties, loss of balance and incontinence.
- **Deafness** – this covers a range of hearing impairments. All courtrooms should be fitted with an induction loop. The use of sign language interpreters may be necessary.
- **Diabetes** – this can be controlled by medication, but symptoms can range from irritability to slurred speech and loss of consciousness. It may be necessary for the diabetic person in court to test their blood sugar level as frequently as every two hours.

- **Down's syndrome** – this is associated with some impairment of cognitive ability and varying communication difficulties.
- **Dyscalculia** – an inability to understand number concepts and gain basic number skills despite adequate intelligence. Difficulties will include time telling and matters relating to finance.
- **Dyslexia** – causes difficulty with language (both written and spoken), short-term memory, sequencing skills and structuring ideas. Coping strategies are severely undermined by stress. Allowances should be made for hesitations, inconsistencies, inaccuracies and misunderstandings.
- **Dyspraxia / Developmental Co-ordination Disorder** – can affect speech and language, social skills, time management, organisation, orientation and the ability to manage change. At times, sensory overload may impair functioning.
- **Epilepsy** – may cause seizures or fits, which may be brought on by the stress of a court appearance.
- **Incontinence** – this may arise in conjunction with other impairments or in isolation, and may worsen with stress. Additional breaks in proceedings may have to be arranged.
- **Inflammatory bowel disease** – a pre-arranged signal for an urgent trip to the lavatory may be necessary.
- **Mental health conditions** – these vary greatly and you may have to make a careful assessment of affected individuals and how to deal with them in the witness box.
- **Motor neurone disease** – a progressive degenerative disease with symptoms extending to loss of limb function and wasting of muscles.

- **Multiple sclerosis** – symptoms can include visual damage and restricted movement and individuals are likely to fatigue rapidly.
- **Myalgic Encephalomyelitis / Chronic Fatigue Syndrome** – symptoms include persistent fatigue, exhaustion after exercise (physical or mental), joint and muscle pain, headaches, sleep dysfunction and impaired concentration and memory.
- **Spina bifida and hydrocephalus** – the range of mobility is wide, and individuals may have impaired brain function.
- **Thalidomide** – individuals are usually limb impaired; some have hearing impairment.
- **Visual impairment** – one of the commonest disabilities. The best method of communicating in court should be established at the outset.
- **Visual Stress** – a visual processing anomaly, often associated with dyslexia, migraines and epilepsy. Symptoms include headaches and fatigue when reading, sensitivity to bright light leading to 'glare' from white paper, the perceived blurring or movement of print and frequently losing the place on a page.

6.3 – Mental Incapacity

An adult who lacks mental 'capacity' will not be able to make decisions, on those matters in respect of which they lack capacity that others should act upon. They will not be able to enter into contracts, administer their own affairs or conduct litigation.

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.

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 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.

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. 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.

There are two fundamental 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).

The Act defines a person who 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. This is a two-stage test. First, it must be established that there is an impairment of, or disturbance in the functioning of, the person's mind or brain (the diagnostic threshold); 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.

A person is unable to make a decision if they can't:

- Understand the information relevant to the decision.
- Retain that information.
- Use or weigh that information as part of the process of making the decision.
- Communicate their decision (whether by talking, using sign language or any other means).

Any decision made on behalf of a person who lacks capacity must be made in that person's best interests – a different concept from what the decision-maker thinks is best. The Act sets out a checklist of factors to be considered in deciding what is in a person's best interests, aimed at identifying those issues most relevant to that person.

7.

Domestic violence

Domestic violence is rarely a one-off incident, and may be a means of coercion, control and reinforcement of power over the other partner in a relationship.

Domestic violence occurs across society, regardless of age, gender, race, sexuality, wealth, and geography. It consists mainly of violence by men against women. Children are also affected. Not only are many traumatised by what they witness but 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 are also victims and should be treated similarly.

It can be difficult for victims and witnesses of domestic violence to give evidence in court because of family ties and loyalties. Many victims and witnesses withdraw their statements due to pressure, loyalty or concern about the effect that their evidence will have on personal ties, family relationships and children. The nature of the personal relationships involved may mean that it is easier for offenders to put pressure on victims and witnesses than in cases with a non-domestic context.

You 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, is unacceptable and will be treated by the law with the seriousness it merits.

You should consider:

- Using gender neutral language (in so far as is possible), to describe domestic violence without losing sight of the fact that the reality is that in general most physically violent incidents are committed by men on female partners or ex-partners.
- As paramount the need to ensure the safety of the victim and any children of the household, in particular by ensuring that their whereabouts are not revealed. When granting bail or an injunction, other factors to take into account are: any history of violence in the relationship; the seriousness of the allegations; the victim's injuries; the use of any weapon; whether the attack was planned; whether any subsequent threats have been made; the effect on any children; and continuing risk.
- The possibility of intimidation, the need for escort to and from court, and the presence of supporters in court.
- Whether victims and/or witnesses who withdraw their allegations or statements, should be required to attend court and give evidence by use of witness summons.
- Other specific measures such as providing screens in court, allowing the giving of evidence by television link and the video recording of testimony.
- The consequences of leaving the perpetrator of the violence alone with the victim in any part of the building. This should be considered most sensitively as domestic violence, particularly that occurring over a long period of time, can affect the ability to give coherent testimony.
- Assumptions should not be made about an apparent inability to change or leave a violent situation and this should not be interpreted as an acceptance of the violence, so as to render the victim responsible for the violence, or to serve to undermine a victim's credibility.

The Sentencing Council has produced definitive guidelines in relation to cases involving domestic violence and breach of a protective order.

8. Gender

Although women and girls comprise more than half the population, they remain disadvantaged in many areas of life. Stereotypes and assumptions about women's lives can unfairly impede them and might frequently undermine equality. Care must be taken to ensure that our own experiences and aspirations, as women or of women we know, are not taken as representative of the experiences of all women.

Factors such as ethnicity, social class, disability status and age affect women's experience and the types of disadvantage to which they might be subject. The position of and the independence of women may vary considerably depending on their family, culture and community.

Women may have particular difficulties participating in the justice

system; for example, because of maternity or childcare issues or because of the need to care for older or sick relatives, which falls disproportionately on them.

Women's experiences as victims, witnesses and offenders are in many respects different from those of men.

You should use the 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. 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 in relation to their opponent.

You can go some way to ensuring that women have confidence in the justice process and that their interests are properly and appropriately protected by:

- Ensuring that women are not disadvantaged, if they have recently given birth, are breastfeeding or caring for children, by providing breaks or other appropriate consideration.
- Considering whether it is necessary and appropriate to conduct a hearing with a baby or child in the court.
- A woman who is heavily pregnant or has just given birth should not be expected to attend a court or tribunal unless she feels able to do so. Although every woman is different this is likely to apply at least to the month before the birth and at least two months after the birth, though this period would be longer if there were complications at birth. Even a telephone hearing may be too difficult if a parent is looking after the baby on their own. This may mean that a hearing has to be adjourned.
- Exercising case management functions with proper regard to those with dependent children who may have childcare responsibilities which make conventional sitting hours difficult or impossible for them. Such responsibilities should be accommodated as far as possible.
- Checking with witnesses and advocates how they wish to be addressed. For example, it should not be assumed that a married or unmarried woman would prefer to be called Mrs or Miss – many may prefer the neutral 'Ms'. If in doubt, ask a woman how she wishes to be addressed, i.e. rather than the more intrusive (and irrelevant) 'Are you married?'

- Taking care in the use of language to avoid, often unconsciously conveying assumptions about gender roles which might be offensive or disconcerting.
- Avoiding stereotyping or assumptions about women and their roles. For example, there is no reason why a female judge would be more appropriate for family cases than a male judge, or vice versa.
- Particular care should be taken to ensure that sexual complainants in criminal cases, and those complaining of sexual harassment in discrimination cases, are not subjected to over-rigorous cross-examination regarding their previous sexual history.

9.

Gender reassignment

The Equality Act 2010 provides specific protection to transsexual people. A person has the protected characteristic of gender reassignment under the Act if they are undergoing, have undergone or are proposing to undergo a process (or part of a process) for the purposes of reassigning their sex. Transsexual people feel the deep conviction to present themselves in the appearance of the opposite sex to the sex they were assigned at birth. To reduce the conflict between their gender identity and physiological sex, they will go through the process of gender reassignment – which is a process to change one's sex by changing physiological and/or other attributes of sex, which includes aspects of gender such as first name, title, appearance, clothing, etc. Transition does not necessarily involve medical or surgical intervention.

The terms 'trans' or 'transgender' cover a wide range of people, beyond those explicitly protected by the Equality Act 2010, including people who cross dress or are transvestite, gender variant young people who wish to express their gender differently from that expected of someone of the sex they were assigned at birth, people who identify as androgyne, bigendered or agendered and anybody else who has a gender identity, or wishes to express their gender in a way which is different to that expected from someone of their birth sex. People who are not transsexual but who are wrongly thought by someone else to be transsexual are also protected from gender reassignment discrimination, as are people who are linked to or associated with a transsexual person.

It is misguided and potentially misleading to make any assumptions as to the sexual orientation of transgender or transvestite people. Transgender and transvestite people may be lesbian or gay or heterosexual. There are also basic differences within and between the transgender and transvestite experiences.

You should therefore consider the following:

- Everyone must be treated fairly and with respect for his or her personal dignity. Transgender people, which includes transsexual people, experience a gender identity at odds with their birth sex, and seek to reconcile this difference.
- Where there is a question relating to a person's gender, the person should be asked how they identify and treated accordingly. In this respect, wherever possible, a person should be treated, identified and addressed in accordance with their wishes.

- 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 apparent identity for nearly all court and tribunal purposes.
- Transgender people should not be accommodated or treated in a manner that is fundamentally inconsistent with their chosen gender identity.

- No-one should be put in a situation where they may face hostility or ridicule.

The Gender Recognition Act 2004 creates a framework for the legal recognition of transsexual people in their acquired gender, and permits a person of either gender to make an application for a 'Gender Recognition Certificate' on the basis of living permanently in their acquired gender or having changed their legal gender under the law of a country or territory outside the UK. The Act makes provision for a 'Gender Recognition Panel' to determine such an application. The

granting of a Gender Recognition Certificate is a judicial decision. It does not depend upon a transsexual person first having surgery, but a diagnosis of gender dysphoria is required. A gender-reassigned person who has been issued with a full Certificate by the Panel is to be treated in all respects in their acquired gender and so, for example, is entitled to marry in their acquired gender.

However, not all transsexual people will apply for a Gender Recognition Certificate. The fact that a person does not have a Gender Recognition Certificate should not be assumed to mean that they are not properly a transsexual person and entitled to respect and some legal protection from discrimination as appropriate in their acquired gender.

10.

Interpreters, intermediaries and signing

You have a duty to ensure a 'fair and public hearing'. This encompasses a duty to minimize or eliminate the impact of misunderstandings in communication, particularly where these arise in cases of vulnerability or disability. There is often much at stake and you will want to ensure that all parties have the opportunity to give the best evidence to the court.

Communication issues may arise from: lack of fluency in the English language; illiteracy; learning disabilities; hearing impairments; speech impairments; mental health conditions or impairments; children and young people giving evidence; and where vulnerable adults are participating in the court process.

In each case, it is important that the needs of the person with the communication issue are matched

with the appropriate intermediary, signer or interpreter where required. The use of intermediaries in all criminal courts is governed by s.29 Youth Justice and Criminal Evidence Act 1999 (brought into effect in 2008). Intermediaries enable witnesses who need any assistance with communicating clearly, to give evidence in court. They are trained and registered. Many are speech and language therapists, but other skills are needed as well and can be matched with the needs of the witness. Their function is to ensure that all questions asked of a witness and all answers given are understood in court. To assist in this, the intermediary will meet the witness before the trial and prepare a report to the court. This report should give you information about the specific difficulties the witness has and advice on how to assist the witness

to give the best evidence in court. 'Ground rules' for questioning must be discussed between the court, the advocates and the intermediary before the witness gives evidence, 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.

There is a range of people who can assist the court in this regard. For example: speech and language therapists; foreign language interpreters; signers (for British Sign Language, Sign Supported English, Signalong, Makaton, GESTUNO and Page Gorman); specially trained intermediaries for children; and specially trained intermediaries for vulnerable adults.

The person who has the communication issue (in whatever capacity they are giving evidence or as a party to proceedings) should decide whether or not they need an interpreter or an intermediary, and where appropriate, do so with the assistance of their lawyer.

The person asking for an interpreter may understand English and may appear to speak and understand it well under normal circumstances. Court proceedings are, however, usually outside most people's everyday experience. During the hearing, there may be legal jargon and terminology, complex issues to understand and with the additional stress of an appearance in court, a person may feel they will be able to communicate more effectively in a language other than English. Other people, such as those with speech or language needs, may have no other way of communicating with the court.

You should consider the following:

- Good planning is essential when using interpreters or intermediaries. Sufficient additional time may need to be allocated to a case where they are used. This could be twice as long as the hearing would otherwise take.

- Ensure the interpreter is familiar with the language and dialect of the person with interpretation needs. This may require additional conference time outside court.
- Where a foreign language interpreter is used, caution should be exercised if the language or dialect belongs to a small minority or community with a limited number of interpreters. The interpreter may have acted in a conflicting capacity or may not be impartial or otherwise appropriate.
- Ensure that the person with interpreting needs understands the role of the interpreter. Importantly, the interpreter is there to translate exactly what is said, and no more or less than that. The interpreter is not a helper, supporter, adviser, or representative and this should be clearly understood by all involved.
- There are serious dangers in allowing an advocate, friend, relative or family member to act as an interpreter or intermediary and whenever possible they should be professionally engaged from an approved list.
- Explain clearly to all parties, including the interpreter, what the procedure will be for asking questions, for the translation and for giving answers to the court.
- The same interpreter may not be appropriate for opposing parties.
- If the hearing is very long, two or more interpreters may be needed.
- Ensure that the interpreter can see and hear all parties as well as you and the advocates clearly. Reasonable adjustments and modifications can be made to the courtroom layout if necessary. If additional equipment is being used, such as a loop system, radio aid or Palentype machine, time may be needed to set it up and

ensure it is working and that the interpreter and person with interpreting needs are satisfied that it is effective.

- Ensure that the interpreter has a copy of an important document if it is referred to in questioning in the proceedings.
- All those involved in the proceedings may need to modify their language and communication when an interpreter is involved. Sentences should be clear, unambiguous, and avoid unnecessary legal jargon. You should speak slowly, with pauses, delivering lengthy statements or questions in bite size chunks, allowing sufficient time for the interpreter to do their job or for an answer to be given and interpreted.
- Ensure that advocates ask clear, precise questions, avoiding idioms or slang.
- Ensure advocates avoid asking multiple questions without pausing for an answer between each.
- Ensure questions are directed to the person with interpreting needs and not to the interpreter.
- Do not assume that because a question or statement is relatively short in English that the interpreter will take a similar time to translate it. Syntax, concepts and vocabulary vary enormously from one language to another. There may be no corresponding word and the interpreter may need to use several words to interpret one.
- Where a juror, party or other court user says 'I know this language and the interpreter is not interpreting correctly'; or 'the interpreter told the witness how to answer the question' you will need to be satisfied that the interpreter is communicating effectively and accurately. For minor problems and discrepancies, reiterating the rules and procedures should suffice with appropriate guidance to a jury.

- If the interpreter oversteps the boundary between facilitating communication and giving opinion, help or evidence, or is otherwise below standard, unfair or obstructive to the administration of justice, you should intervene and, if necessary, the interpreter should be replaced.

11.

Language and terminology

However committed you may be to fairness and equality, it is possible to give the opposite impression by using inappropriate, dated, offensive or overly technical terms and descriptions. Language is developing all the time and many people are genuinely not aware of the change of perception about terms which were acceptable some time ago, but are not acceptable or are less acceptable now.

You should consider:

- Careful and appropriate use of language and current terminology increases confidence in the judicial process.
- Those who are disadvantaged may be more sensitive to the insensitive use of terminology. For example, it is often helpful to ask the person themselves how they describe their status, as that is the description which will be most accurate and is least likely to offend them. If in doubt, always ask.
- People from minority ethnic communities or who are disabled may be described using adjectives such as Black, disabled, etc. For example 'Black people', 'disabled person', etc.
- Using legal language and terms with care. It may not be avoidable but ensure that those who are unfamiliar with the law fully understand the terms you are using.
- If in doubt, parties should be asked how they wish to be addressed in terms of race, ethnicity, disability etc.

Reference to the following list of terms and their use might be helpful, whilst **bearing in mind that acceptable terms are constantly developing and changing:**

- **B.A.M.E.** B.A.M.E is now commonly used when referring to groups consisting of, Black Asian and Minority Ethnic people.
- **Black.** The term 'Black' is generally understood as conveying a positive meaning and is not used in the sense of the colour, but as a term of reference. As a descriptive term, Black can refer to all people of Caribbean or African descent.
- **The Blind.** Use of the collective noun 'the blind' implies that all blind people have the same needs and problems, and reinforces their perceived separateness from the rest of society. Instead use 'blind people' or 'partially sighted people' (depending on which group) or 'visually impaired people'.
- **British.** Care should be taken to use the term 'British' in an inclusive sense, to include all citizens. Use of the term as a synonym for White, English or Christian is incorrect and unacceptable.
- **Coloured.** The description 'coloured' is generally regarded as an offensive term, that should never be used.
- **Cripple.** The label 'cripple' is offensive and should not be used in any circumstances. Use instead, 'disabled person' where relevant and appropriate.
- **Culture.** 'Culture' is characterised by behaviour and attitudes, which although determined by upbringing and nationality are perceived as changeable.

- **The Deaf.** Use of the collective noun 'the deaf' implies that all deaf people have the same needs and problems, and reinforces their perceived separateness from the rest of society. Instead use 'deaf people/hard of hearing people' (depending on which group) or 'hearing impaired people'.
- **Deaf and dumb.** The label 'deaf and dumb' is offensive and defines people by their disability. Use instead 'deaf without speech'.
- **The Disabled.** Use of the collective noun 'the disabled' implies that all disabled people have the same needs and problems, and reinforces their perceived separateness from the rest of society. Use instead, 'disabled people' or 'people with impairments'.
- **People with disabilities.** The term 'people with disabilities' implies that the disability is the impairment. Use instead, 'disabled people' or 'people with impairments'.
- **A Dyslexic, and autistic etc.** this suggests someone is defined solely by their condition. Instead refer to 'people with autism', 'someone with dyslexia' or 'with dyslexic difficulties'.
- **An Epileptic.** The label 'an epileptic' is offensive and defines people by their disability. Use instead, 'a person who has epilepsy'.
- **Ethnicity.** The term 'ethnicity' is used to define those factors determined by nationality, culture and religion and therefore, to a limited extent, subject to the possibility of change.
- **Handicapped.** The label 'handicapped' is offensive and should be avoided. Use instead, 'disabled'.

- **Immigrants.** The description of people of minority ethnic origin as 'immigrants' is highly inaccurate given the period of time the majority have been settled in the UK. Many minority ethnic people are born in the UK and are British. The term is exclusionary and liable to give offence. Except in reference to 'immigrants', in the strict technical sense all such terms should be avoided. Likewise any expression referring to 'second/third generation' immigrants is likely to cause offence.
- **Invalid.** The label 'invalid' is unacceptable and should be avoided. Use instead, 'disabled person'.
- **Mental handicap.** The label 'mental handicap' is offensive and defines people by their disability. Use instead, 'learning difficulties'.
- **Minority ethnic/minority cultural/minority faith/multi-faith.** These terms for communities are now widely used and considered acceptable as the broadest terms to encompass all those groups who see themselves as distinct from the majority in terms of ethnicity, culture or faith. The term 'minority ethnic' has the advantage of making it clear that ethnicity is a component of all people's identity whether from the minority or majority. Reference to minority communities, as 'ethnics' is a patronising, objectifying and offensive and is an expression which should certainly be avoided. It is for this reason, and for the sake of clarity, that the plural terms 'minorities ethnic' or 'minority ethnics' should also be avoided.

- **Mixed-parentage/dual-heritage/mixed-race/half-caste.** The term 'half-caste' is generally found offensive and should be avoided. The term 'mixed-parentage' is an acceptable term for those born to parents who are from a mixture of cultural and ethnic backgrounds, whilst the term 'dual heritage' may sometimes be used to describe children born of parents with two distinct backgrounds. The term 'mixed-race' may be considered slightly pejorative to the extent that it focuses upon the racial identity of the parents as opposed to other factors such as culture or ethnicity.
- **Oriental/Asian/British Asian.** People from the Indian sub-continent do not consider themselves to be 'Asians'; this term being only applied to them for the sake of convenience in Britain. People from the Indian sub-continent identify themselves rather in the following sets of terms: their national origin ('Bangladeshi',

'Indian', 'Pakistani'); their region of origin ('Bengali' 'Gujarati', 'Punjabi'); or their religion ('Hindu', 'Muslim', 'Sikh'). The term most appropriate to the context should be used; national, regional or religious.

The term 'Asian' may be acceptable in cases where the exact ethnic origin of the person is unknown. Strictly speaking, however, it would be more accurate to make a collective reference to people from the Indian sub-continent as being of South Asian origin, so as to distinguish them from those of South Eastern Asia (e.g. Malaysians and Vietnamese) and from the Far East (e.g. Hong Kong Chinese). The term 'Oriental' should be avoided as it is imprecise and may be considered racist or offensive.

Young people of South Asian origin born in the UK may accept the same identities as their parents. However, this is by no means always the case, and some may choose to assert

themselves as 'Black' or 'British Asians', although the use of either of these phrases requires great sensitivity.

- **People of colour.** The expression 'people of colour' is more popular in the USA, although it is occasionally used in the UK. It implies a status based on race (and may be offensive) and so should be avoided.
- **Race.** The term 'race' is often used in the specific context of, delineating personal characteristics, such as physical appearance, which are permanent and non-changeable. It is also used by the Equality Act 2010 to include colour; nationality and ethnic and national origins.
- **Refugee/asylum seekers.** The term 'refugee' refers to those people who have had to escape from persecution in their home country. These are 'asylum seekers' but the term is sometimes used pejoratively to refer to people who lack a
- genuine claim to asylum. Care must be taken when using these terms to ensure accuracy in factual or technical terms.
- **Retarded.** The label 'retarded' is offensive and defines people by their disability. Use instead, 'with learning difficulties'.
- **Roma/Gypsy/Traveller.** These groups are recognised as ethnic groups although no official statistics exist in relation to the size of the population. The term "gypsy" is generally regarded as pejorative; 'member of a travelling community' is likely to be acceptable, but care should be taken and assumptions avoided.
- **A Spastic.** The label 'a spastic' is offensive and defines people by their disability. Use instead, 'a person with cerebral palsy'.
- **Suffering from.** In terms of disability 'suffering from' is a negative descriptor. Use instead, 'living with' or 'has a disability'.

- **Victim of.** In terms of disability 'victim of' is a negative descriptor. Use instead, 'person with'.
- **Visible minorities.** The expression 'visible minorities' has become popular in the last few years as an acceptable term whose scope is wider than 'Black', but is itself problematic, as it seems to imply invisible minorities.
- **West Indian/African Caribbean/African.** The term 'West Indian' may not necessarily give offence, but in most contexts it is inappropriate. Where it is desirable to specify geographical origin, use of the term 'African Caribbean' (as opposed to Afro-Caribbean) is both appropriate and acceptable. The term does not, however, refer to all people of Caribbean origin, some of whom are White or of Asian origin. Young people born in Britain will probably not use any of these designations, simply referring to themselves as Black where racial identity is relevant. However, increased interest among young Black people in their African cultural origins is resulting in a greater assertion of the African aspect of their identity, and the term 'African Caribbean' or 'Black Caribbean' is now more widely used in some circles. Likewise, the term 'African' is acceptable and may be used in self-identification, although many of those of African origin will refer to themselves in national terms such as 'Nigerian', 'Ghanaian', etc.
- **Wheelchair bound/confined to a wheelchair.** This is a negative descriptor. Use instead, 'a wheelchair user' or 'a person who uses a wheelchair'.

12. Race

'Race' in discrimination law includes skin colour, nationality and ethnic or national origins. "Nationality" includes for example, being British, Australian or any other nation's citizen and refers, therefore, to a legal designation; 'ethnic or national origins' include for example, being from a Roma background or of Chinese heritage; and "a racial group" might comprise more than one 'racial group' so as to include, for example, 'black Britons' which would encompass those people who are both black and who are British citizens. There is often a close relationship between race and religion. The inter-relationship between race and religion is complex as discussed briefly in the section on Religion or Belief below.

It is fundamental to the stability of society that everyone should have confidence and trust in the institutions and agencies of justice. The judicial oath itself embodies the concept of fair treatment 'without fear or favour, affection or ill will'. However, there continues to be evidence of a lack of confidence in the justice system, particularly among people of minority ethnic origin. The task of ensuring, in terms of rights, remedies and treatment, that courts and tribunals are perceived as fair, continues to present judges and others who work in the administration of justice with a major challenge.

Your role is crucial in tackling race discrimination and promoting good race relations in all aspects of the administration of justice. There is a statutory obligation on public

authorities to do so. It is therefore essential that you promote greater equality and openness in the justice system by considering the following:

- The impact that your own actions may have on perceptions of and confidence in other parts of the justice system.
- Knowledge and information about what happens outside court can help you to ensure that what happens inside is fair and seen to be fair.
- You should be aware of new developments in equality legislation when managing a court or tribunal, both in terms of applying the law itself but also ensuring that equality legislation is not breached by any aspect of court or tribunal operations.
- The impact of the operation of justice is often greater on people from minority ethnic communities or backgrounds as is the wider impact of discrimination. This can lead to dissatisfaction with other parts of the justice system which may influence the perceptions and possible behaviour of people from minority ethnic backgrounds when they come to court. You should be aware of the impact of the system on different communities and what it means for those coming to court, whether as claimants, defendants, victims, witnesses, representatives or suspects.
- The wider responsibilities of case management involve a concerted effort to ensure that all processes are seen to be taking account of the varying dimensions of diversity. Fair treatment involves taking account of difference, as well as promoting equality.
- Being well informed of cultural, religious and philosophical beliefs amongst court users will enable you to make appropriate adjustments to accommodate individuals who have a different culture or religion from the majority. It may also inform certain decision making during

the judicial process. On the other hand, it is important to avoid stereotypes based on perceived characteristics associated with a particular racial/religious group. Just because the majority of a racial or religious group have certain characteristics or views does not mean that all members of the group have those characteristics or views.

- It is important to be careful of the language that is used so that it is accurate and does not cause offence; if in doubt it is best to ask an individual they wish to be addressed or to ask about a particular language requirement or religious belief.

The experience of racism in one sector of society may influence an individual's perceptions about the administration of justice. If an individual, or someone known to an individual, has suffered racism at school, from the police, from the health or social services, or at work, then what happens in the courtroom may be viewed with some mistrust and account needs to be taken of that.

For most people, the administration of justice is about going to court, lawyers and judges. Whether it is a criminal, or civil court, or a tribunal will matter little from the point of view of racism or expectations of unfair treatment. From the point of view of experiencing racism, it does not matter if you are the claimant, defendant or respondent, a witness, juror, lawyer, court official or judge.

12.1 – Institutional Racism

This was defined by the Stephen Lawrence Inquiry Report as '...the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture or ethnic origin. It can be seen or detected in processes, attitudes and behaviour which amount to discrimination through unwitting prejudice, ignorance, thoughtlessness and racist stereotyping which disadvantages minority ethnic people.' Institutional racism does not mean that all individuals in an organisation are racist, but that the organisation's structures and working methods may have an unfair outcome.

13.

Religion and/or belief

The inter-relationship between ethnicity and religion is complex. Ethnic groups are often multi-religious. Indians, for example, may be Hindus, Muslims, Sikhs, Christians or members of other belief systems; or they may have no belief at all. Religious practice can also cut across ethnic groups. Ethnic and religious identities can also coincide: both Jews and Sikhs are recognised as ethnic and racial groups.

To add to the complexity, each religion has a considerable internal diversity of traditions, movements, cultures and languages. There are many variations within both majority and minority religions, so that although we often speak of distinct religions and faith communities, there are often many overlaps.

A substantial minority of British people of all ethnic groups have no religious belief. Some adopt non-religious life stances or deeply held core beliefs such as atheism, humanism or secularism. These beliefs will be protected by the law as 'beliefs', just as with religious beliefs.

- Awareness of a person's religious or philosophical belief or non-belief is an integral element of being aware of fair treatment issues.
- Taking notice of religious matters helps create an atmosphere of trust and reduces alienation. For example, awareness of and sensitivity to religious holy days and their impact on court users will increase confidence in the judicial system.

- No assumptions should be made about an individual based solely on dress or appearance.
- Religious and other beliefs, or non-belief, are often a central element of a person's identity in discrimination law.
- The primary consideration should be what binds the conscience of the individual, since detailed questions of theology cannot be resolved in the courtroom.
- Do not assume that an individual belonging to a minority community or wearing some religious symbol of a particular religion will automatically prefer to swear an oath rather than affirm.

13.1 – Oath taking

The Oaths Act 1978 makes provisions for the forms in which oaths may be administered and states that a solemn affirmation shall be of the same force and effect as an oath. In today's multicultural society all citizens, whether or not they are members of faith traditions, should be treated sensitively when making affirmations, declarations or swearing oaths.

As a matter of good practice you should consider the following:

- The sensitive 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.
- All faith traditions have differing practices with regard to court proceedings and these should be treated with respect.
- In many faith traditions, the Holy Scripture is believed to contain the actual presence of Divinity and is accordingly revered.
- Requests to perform ritual ablutions before taking the oath should be treated sympathetically.

- Jewish, Hindu, Muslim and Sikh women may prefer to affirm if having to give evidence during menstruation or shortly after childbirth.
- Some witnesses may want to remove their shoes, or cover their heads, or bow with folded hands whilst taking an oath in order to manifest respect to the presence of the Divine in their holy scripture.
- All holy books should be covered in proper cloth bags at all times. If in the process of oath-taking the book needs to be uncovered, this should be done by the witness rather than a member of court staff since questions of ritual impurity may arise.
- It is more important to ask people how they would like to be addressed, how to pronounce their name and how to spell it, rather than trying to learn all the different naming systems.
- Ask for the full name: first, middle and last names. Do not ask for 'Christian' names or 'surname'.
- Do not address or record people by their religious or honorific titles only.

13.2 – Names and naming systems

A variety of naming systems are used among minority groups and some are complex. Although more detailed information can be in the Bench Book a few basic principles to bear in mind are:

13.3 – Religious dress in court

A person's religion or belief can influence the way they dress and present themselves in public, and for the most part such clothing will present few issues for you. There is room for diversity in court and in legal proceedings generally, and there should be a willingness to accommodate different practices and approaches to religious and cultural observance.

While there are other examples of religious items of clothing (the Jewish skullcap is one; the

Sikh turban another), the issue of religious dress is one that is most likely to arise in legal proceedings in relation to the niqab, or full veil, sometimes worn by Muslim women. As the niqab involves the full covering of the face, you 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.

For those Muslim women who choose to wear the niqab, it is an important element of their religious and cultural identity. To force a choice between that identity and the woman's involvement in the criminal, civil justice, or tribunal system (as advocate, witness, party, member of court staff or legal office-holder) may well have a significant impact on her sense of dignity and would likely serve to exclude and marginalise further women with limited visibility in courts and tribunals. This is of particular concern for a system of justice that must be, and must be seen to be, inclusive and representative of the whole community. While there

may be a diversity of opinions and debates between Muslims about the nature of dress required, for the judicial system the starting point should be respect for the choice made, and for each woman to decide on the extent and nature of the dress she adopts.

Any consideration concerning the wearing of the niqab should therefore be functional and appropriate to the circumstances of the particular case. The primary question is: what is the significance of seeing this woman's face to the judicial task that must be performed? How does the ability or not to observe her facial expressions impact on the court's decision-making, given her particular role in the proceedings? A distinction can be made between situations where this may be useful or important (for example, when assessing the evidence of a witness, particularly one whose evidence is in dispute), situations where it is essential (for example, for purposes of identification), and other situations where it may not be of any relevance (for example, for court clerks or

ushers or where formal evidence which is not disputed must be given by a witness).

- **Jurors.** If a challenge is made to a woman wearing the full veil as a member of a jury, you may wish to consider excusing her on the proviso that she may serve on another jury where no such challenge is made. Much will depend on the view of the parties to the particular case, but you must be satisfied that there is a genuine and legitimate basis for such a challenge, based on the particular circumstances of the case.
- **Victims or complainants.** It is important that people are not deterred from seeking justice or from getting a fair hearing as a result of exclusion from the court process. Where possible a woman wearing a veil should be permitted to give evidence, either in court in her veil, or with the assistance of screens, video links or, in appropriate cases, by clearing the public gallery if she is happy to remove her veil.

The most appropriate course will depend on the issues in the case. As with any consideration of permitted special measures, this is a point on which a decision should ideally be reached after discussion at a case management or preliminary hearing, rather than at a final hearing in open court. A short adjournment should be given to enable the woman concerned to seek guidance.

- **Witnesses or defendants.** Similarly, a sensitive request to remove a veil may be appropriate, but should follow careful thought as attending court itself is a daunting prospect for witnesses and may affect the quality of evidence given. The experience of many judges has shown that it is often possible to evaluate the evidence of a woman wearing a niqab, hence the need to give careful thought to whether the veil presents a true obstacle to achieving justice. Where identification is an issue, it must be dealt with appropriately and may require

the witness to make a choice between showing her face or not giving evidence. Again, special measures may be available to mitigate the difficulty.

- **Advocates.** The starting point should be that an advocate wearing a full veil should be permitted to appear wearing her veil. The interests of justice will be paramount and you may need to consider whether, in any particular circumstances which arise, the interests of justice are impeded by the fact that the advocate's face cannot be seen or (if this be so) the advocate cannot be heard clearly.

14.

Sexual orientation

To be stereotyped on the basis of sexual orientation is just as offensive as to be stereotyped on the basis of gender, race or colour. Consequently, you should be aware of the harm done to people, and to the reputation of the judicial system, by the making of stereotypical assumptions or reliance on prejudices around being lesbian, gay or bisexual.

You should consider the following:

- Be alert to restrain any intrusive questioning of the sexuality of a witness, a litigant 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 define it themselves.
- Care and sensitivity in the use of language and terminology will increase confidence in the process.
- 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 'LBGT' is used meaning lesbian, gay, bisexual and transgender people); a woman who is lesbian/a lesbian/gay woman; a gay or homosexual man; a bisexual person.
- Terms that are not acceptable are: a homosexual; a gay; some lesbians do not like to be called 'gay' because they have adopted a distinct identity from gay men although many are very

happy with that description; dyke/ queer, etc. – some of these derogatory terms may be used with irony by gay people themselves about themselves but you should not use them in court.

- Avoid attributing masculine characteristics to lesbians, or feminine characteristics to gay men.
- Avoid making assumptions as to the sexual orientation of transvestite or transsexual people. Where there is a question relating to a person's gender, the person should be asked to identify their own gender and how they wish to be identified.
- It is wrong to assume that AIDS and HIV positive status are indicative of same sex sexual activity. Furthermore, HIV treatment can prevent a person from developing the symptoms of AIDS indefinitely, but the fear and stigmatisation resulting from an out-of-date understanding of the issues can be very damaging.
- When dealing with apparent lack of candour, you should be aware that; sexual orientation may be an intensely personal matter for many people; and the prejudice, discrimination and persecution experienced by some people because of their sexual orientation (in some countries being lesbian, gay or bisexual is prohibited by law and in a few it carries the death penalty) may make them unwilling to speak openly about it, particularly in a formal setting such as a court or tribunal room.
- Most lesbians and gay men feel that their sexual orientation is not a choice they have made, but that it is as naturally inherent as it is for heterosexuals.
- Parliament has now recognised that a same-sex couple can, as a matter of law, constitute an enduring family relationship and that when a same-sex couple forms a civil partnership they are entitled to enjoy a relationship in all respects equivalent in law to marriage.

- Gay and lesbian couples do not necessarily conform to the same norms as many straight couples. Courts and tribunals should be careful not to judge same-sex relationships according to the principles of heterosexual married life. Families that do not conform to the traditional model are an increasingly common social reality.

15. Social exclusion

The term 'social exclusion' refers to the experience of economic or social disadvantage. It incorporates, but is broader than, the experience of 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.

A disproportionate number of those appearing before courts and tribunals have experienced social exclusion. This may affect the way individuals present and understand evidence, and how they respond to cross-examination.

Sensitivity is required to both avoid prejudice and allow the individual the best opportunity to make their case or give their best evidence.

You may wish to consider:

- For those in hourly-paid employment, time in court – especially if there are delays – may be particularly stressful, as people may be concerned about missing necessary work thus exacerbating a difficult financial situation, or needing to pick their children up from school, yet unable to pay for or rely on help from others.
- Anger or apparent disrespect for you, or court process 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.

- Attempts to put people at ease may be an important part of allowing them to express themselves fairly. 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 may affect the presentation of their case in court.
- Where paper work has been provided by the court or a party that an individual should have seen prior to, or during, the court appearance, it cannot be assumed that the individual is able to read or understand the contents, even if English appears to be their first language.
- Language problems may not be confined to the written word. Explanations or comments from lawyers or you 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.
- People may come to court not really understanding why they have been summoned. They may well have no clear idea of their rights. For example, if a free advocacy service exists, and the individual comes into court alone, before making assumptions based upon that, check that they have understood that the service was available and free, and that they have rejected it, or whether in fact they have not been made sufficiently aware of its availability.

16. Unrepresented parties

There are various reasons why people choose or are obliged to represent themselves, rather than instructing a lawyer. For many, it is because they do not qualify for Legal Services Commission funding which is becoming increasingly difficult to secure for various reasons.

Whatever their reason for not employing a lawyer, unrepresented parties are likely to be particularly anxious. There may be much at stake, and yet they may be unaware of basic legal principles and court procedures. It is to be expected that they will be experiencing feelings of fear, ignorance, frustration, bewilderment and disadvantage, especially if appearing against a represented party. You must try to maintain a balance between assisting the unrepresented party and protecting their represented

opponent from problems arising from the unrepresented party's lack of legal knowledge.

You will want to be aware that the majority of complainants to the Office of Judicial Complaints are litigants in person and many of the complaints arise due to a lack of understanding of the courts processes.

16.1 – Problems that may face those without legal representation

You will need to be aware that those who appear without legal representation may:

- Lack understanding of legal terminology and specialist vocabulary.

- Be ignorant of law and procedure and in some cases may have difficulty with reading and writing.
- Have no experience of advocacy or cross-examination, and so may be unable to test the evidence of their opponent.
- Lack objectivity and emotional distance from their case.
- Not grasp the true issues of a case or the relevance of law and regulations to their case.
- Have difficulty in marshalling facts.
- Need court papers to be translated if English is not their first language (in this regard it may be noted that there are free tools available on the internet that provide instant translations in most languages, but these cannot effectively take the place of an expert or an interpreter where such is necessary).
- Not have ready access to legal textbooks, libraries or the internet.
- Because of a disability, have difficulty participating in proceedings.

- Fail to understand court orders or directions, or their obligations to comply with pre-hearing directions.
- Not appreciate the importance of documentary or photographic evidence, or the duty to disclose documents.
- Misunderstand the purpose of a hearing.

At the hearing, you should explain to an unrepresented party:

- Why they are there and how [they, the judge and other parties] should be addressed.
- Who everybody else is, and their respective functions.
- That they should tell you immediately if they do not understand something.

- The purpose of the hearing and the issue which is to be decided.
- What the process is in a manner that they can understand.
- What is expected of them in ample time for them to comply.
- The rule that only one person at a time may speak and that each side will have a full opportunity to present its case.
- That a party may take notes (but not audio recordings).
- That if the unrepresented party would like a short break in the proceedings, they have only to ask.
- That the issue is decided on the written documentary evidence put before the court and what is said in court (oral evidence) and nothing else.
- That mobile phones must be switched off, or at least be put in silent mode.

Litigants with Specific Learning Difficulties, such as dyslexia, are particularly disadvantaged when trying to represent themselves.

16.2 – Cross-examination by the defendant/other unrepresented party

Throughout proceedings, you should:

- Be ready to assist an unrepresented claimant or defendant in the conduct of their case, particularly when they are examining or cross-examining witnesses and giving evidence.
- Be ready to restrain any unnecessary, intimidating or humiliating cross-examination by an unrepresented party.
- Always ask whether they wish to call any witnesses,

In criminal cases, for certain offences of assault, child cruelty or of a sexual nature, the Youth Justice and Criminal Evidence Act 1999,

prohibits unrepresented defendants from cross-examining adult witnesses and child witnesses. The Act also gives courts the discretion to forbid such cross-examination in other types of case.

After the hearing, unrepresented parties often do not understand the outcome of the case or the reasons for it, especially if they have lost. You should always:

- Set out clearly the reasons for the decision.
- Explain the requirement to seek permission to appeal, if appropriate.
- Tell the unrepresented party to consider their rights of appeal, but explain that the court cannot give any advice as to the exercise of those rights.

16.3 – Assistance and “McKenzie Friends”

The term ‘McKenzie Friend’ (MF) refers to an individual (whether a lawyer or not) who assists in

presenting a party’s case by taking notes, making suggestions or giving advice to the litigant. The MF is not an advocate and does not address the court or examine witnesses. Nevertheless, a MF can make a significant contribution to the fairness of the process, and should be allowed to assist a litigant in person unless you are satisfied that fairness and the interests of justice do not require it.

The presumption in favour of permitting a MF is a strong one; and in the event of objection, it is for the objecting party to rebut the presumption in favour of allowing the MF to assist. The proposed MF should ordinarily be permitted to assist the litigant to make the application for assistance.

The proposed MF should be encouraged to provide a short statement (in writing or orally) setting out relevant experience, confirming that they have no interest in the case and that they understand the role of a MF and the duty of confidentiality.

You may refuse to allow a MF to act or continue to act in that capacity where you form the view that the assistance the MF has given or may give, impedes the efficient administration of justice. However, you should consider whether a firm and unequivocal warning to the litigant and/or MF might suffice in the first instance. The reasons for any decision in this respect should be carefully and fully explained to the litigant and MF.

16.4 – Lay representatives

This term refers to people who have no advocacy rights but are granted a right of audience on behalf of a party in relation to proceedings before the court. The party must apply at the outset of a hearing if they wish an unqualified individual to be granted a right of audience; and it may be appropriate to grant such a right in appropriate circumstances, for example, where the litigant lacks means and their health makes it difficult to conduct the proceedings themselves.

17.

Vulnerable adults

Vulnerable adults are people aged 18 years or over who may be unable to take care of themselves, or protect themselves from harm or exploitation. This may be because they have a mental health condition, or are disabled, or elderly and frail or have some form of illness. Often there are overlapping areas of vulnerability such as illness and old age.

Whilst disability or age does not of itself render a person vulnerable, you need to be alert to and act upon any indicators which may be present, including the following:

- Communication, comprehension and/or speech difficulties.
- Responding inappropriately or inconsistently to questions.
- Unable to focus or having a short attention span.
- Inability to read/write, tell the time.
- Difficulty in remembering personal details and dates.
- Appearing very eager to please, or to repeat what you say.
- Appearing over excited/exuberant alternatively, uninterested/lethargic.
- Appearing confused by what is said or happening.
- Appearing withdrawn and hesitant.
- Appearing physically violent or aggressive.

- Expressing strange ideas.
- Appearing tearful, distressed, frail or unsteady.

Courts have an inherent jurisdiction to regulate their own proceedings and this includes assisting vulnerable adults when appearing in court either as witnesses or defendants.

They include:

- Arranging for them to visit the courtroom before the trial or hearing, so they can become familiar with it.
- Enlisting the support of the police to ensure that they are not exposed to intimidation, vilification or abuse when attending court.
- Holding the proceedings in a room in which all participants are on the same, or almost the same, level.

- Allowing the defendant to sit with members of their family and/or other supporting adults, and in a place where they can easily communicate with their legal representatives.

In addition, the court has specific legal powers, subject to certain criteria being met, to direct how criminal proceedings are dealt which include:

- Allowing vulnerable adults to give evidence by a live link rather than appearing in court.
- Allowing support from an intermediary where their ability to give evidence is limited.
- Removing robes and wigs in the crown court.
- Restricting attendance by members of the public, and reporters.

18. Further information

The Equal Treatment Advisory Committee (ETAC) of the Judicial Studies Board hopes that you find the information in this booklet useful. If you would like any advice about issues of fair treatment raised in this booklet or in the Equal Treatment Bench Book itself, then please contact ETAC at the JSB.

Tel: 020 3334 0706
Fax: 020 3334 0678

The Equal Treatment Bench Book can be found on the website for the Judiciary of England and Wales at:

www.judiciary.gov.uk/publications-and-reports/jsb-publications

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