

Chapter 1.1

Equality and justice

Key points

Equal access to justice

- Most people find an appearance before courts or tribunals to be a daunting experience.
- People who have difficulty coping with the language, procedures or facilities of courts or tribunals are equally entitled to fairness and justice.

Inequality

- 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 particular disadvantage may include people from minority ethnic communities, those minority faith communities, individuals with disabilities (physical or mental), women, children, those whose sexual orientation is not heterosexual, and those who through poverty or any other reason are socially or economically excluded.
- Just because someone remains silent does not mean that they necessarily understand, or that they feel they have been adequately understood. They may simply feel too intimidated, too inadequate or too inarticulate to speak up.
- Ensuring fairness and equality of opportunity may mean providing special or different treatment.

Judgecraft

- Effective communication is the bedrock of the legal process – everyone involved in proceedings must understand and be understood or the process of law will be seriously impeded. Judicial office-holders must reduce the impact of misunderstandings in communication.
- Unless all parties to proceedings accurately understand the material put before them, and the meaning of the questions asked and answers given during the course of the proceedings, the process of law is at best seriously impeded and at worst thrown seriously off course.

Discrimination

- Discrimination must not be permitted, whether direct or indirect. Recognising and curbing our prejudices is essential to prevent erroneous assumptions being made about the credibility of those with backgrounds different from our own.
- Most people 'read' behaviour in terms of their own familiar cultural conventions and in doing so can often misunderstand. Ethnocentrism – the use of one's own taken-for-granted cultural assumptions to (mis)interpret other people's behaviour – is a common human failing.

1.1.1 Introduction

The appearance of justice

How do the courts and tribunals appear to those who use these services?

- They appear 'unfriendly and inaccessible' according to Money Advice Trust.
- They 'engender fear and anxiety' according to the Institute of Consumer Affairs.

In a survey of the reactions of litigants it was found that:

With or without a lawyer, few lay people say that they feel at ease in this setting. Many litigants described in interviews how they were taken aback by their first sight of the courtroom and its formality ... The interviews were peppered with words like 'intimidating', 'daunting', 'frightening', 'terrifying', 'forbidding', and 'formidable' ...

Less than half of the unrepresented litigants ... said that they coped well in this setting and even those who were represented by counsel frequently said that they found the court appearance a daunting experience ... a few described how they had gone to pieces when they realised what was expected of them.

Professor John Baldwin, Monitoring the Rise of the Small Claims Limit.

Whilst some degree of structure and formality is required at all hearings, as judicial office-holders we should repeatedly ask ourselves whether the needs of the court or tribunal are taking priority over the needs of the people who appear before us. Is it fair and just that they always have to cope with our court or tribunal rather than us with them?

Disadvantages of individuals

Professor Baldwin's research looked at litigants as a whole. The above quote shows how courts appear to the typical litigant. Inevitably, it will be that much worse for those who start from a position of disadvantage whatever the reason. Much of that disadvantage may result from the prejudices of others. Disadvantage must not be allowed to become an obstacle to the attainment of justice.

The particular needs and issues faced by different groups who experience disadvantage in society are dealt with in detail in the principal chapters of this Bench Book. This introductory chapter considers the general judgecraft responsibilities that are owed to all who come before courts and tribunals.

Achieving justice

A person who cannot cope with the language, procedures or facilities of the court or tribunal is as entitled to justice as those who know how to use the legal system to their advantage. Any disadvantage that people face in society should not be reinforced by the legal system. ... It is the strongest case that should win, not the strongest litigant.

District Judge Gordon Ashton

Identifying situations in which an individual may be at a disadvantage because of some personal attribute of no direct relevance to the proceedings and taking the appropriate steps to ensure that there is no consequent obstacle to achieving justice is an important skill. This is all part of the art of judgecraft that may be performed during case management. Part of that skill lies in identifying situations of disadvantage at an early stage, and discreetly dealing with them without prejudicing other parties. They can arise at any time and in any type of case.

- Considering the needs of unrepresented parties is a useful starting point – they should not be seen as a problem for the court or tribunal. Whilst it may be desirable that skilled representation is available, there are many reasons why parties appear without representation (see Chapter 1.3 later). In the absence of an advocate (but even where one is present) the court or tribunal must communicate effectively with the party and pay due regard to their case.
- The ability to communicate effectively is not restricted to the parties in the case. As judicial office-holders we need to develop an awareness of 'where people are coming from'. Being aware of background, culture, special needs and concerns, and the potential impact of those things on a party or a witness' evidence or perceptions, will enable more effective communication. This applies to all who appear before courts or tribunals; including witnesses, advocates, the court or tribunal staff – and

even members of the public who may inappropriately seek to intervene in the process of justice.

- Sensitive appraisal of the situation and effective communication by the judicial office-holder is as important as the imposition of discipline backed by the force of the law. It may be best to give people the benefit of the doubt if their intervention is well-intentioned. To ensure a fair hearing the proceedings should be managed so as to identify any likely difficulties and importantly to find ways around them. This is a continuous task throughout the course of the proceedings because needs can and often do change as the result of, for example, tiredness or distress.

Perceptions of justice

It is a fundamental concept that 'justice must not only be done but be seen to be done'. This imposes positive obligations on judicial office-holders. It is no longer a question of what lawyers or those administering justice perceive – if a hearing is seen as having been unfair by those involved, directly or indirectly, or the public at large, then it has not been satisfactory:

Judges wield huge power over the rest of society. We therefore have a special responsibility to ensure that there can be no possible reasons to think us prejudiced and this entails a positive responsibility to demonstrate our fairness.

Lord Irvine of Lairg, Lord Chancellor, September 1999

We must not in our conduct of hearings give rise to perceptions of unfair treatment:

A racist incident is any incident which is perceived to be racist by the victim or any other person.

Report on the *Stephen Lawrence Inquiry*, February 1999

The quality of judicial decision making is crucial. Neutral application of legal rules is fundamental to high-quality judicial decision making. Decisions based on erroneous perceptions, interpretation or understanding may lead to faulty decisions and thus to substantive unfairness. Inappropriate language and behaviour is likely to give offence and result in a perception of unfairness, even if there is no substantive unfairness. This leads to a loss of authority and, importantly, loss of confidence in the judicial or tribunal system. Perceptions are important.

The judge or tribunal chair is manager of the hearing and should ensure that everyone who appears before the court or tribunal (or is entitled to appear but does not) has a fair hearing. This involves identifying the difficulties experienced by any party, whether due to lack of representation, ethnic origin, disability, gender, sexual orientation or any other cause, and finding ways to facilitate their passage through the court or tribunal process.

1.1.2 Inequality

An individual may suffer or perceive a lack of equality when appearing before a court or tribunal because of discrimination or a failure to compensate disadvantages.

Discrimination

Discrimination, actual or perceived, may be the result of prejudice, ignorance, thoughtlessness or stereotyping and may be institutionalised.

Direct discrimination occurs where, for example, a person is treated less favourably for some unjustifiable reason than others would be in similar circumstances. It could be on grounds of race, colour, religious belief, gender, ethnic or national origin, employment status, age or disability.

Indirect discrimination occurs where a requirement is applied equally to all groups, but has a disproportionate effect on the members of one group because a considerably smaller proportion of members of that group can comply with it.

Prejudices of the court or tribunal

We all have prejudices and it is best that these are identified and acknowledged. They should not be allowed to influence our judicial decisions. Unwitting (or unconscious) prejudice – demonstrating prejudice without realising it – is more difficult to tackle and may be the result of mere ignorance or lack of awareness.

A significant cause of perceived unfairness to ethnic minorities in the courts is a lack of judicial awareness of the mores of all those who come before them. Each of us comes from our particular section of the community, and has grown up with its customs, assumptions and traditions. A few have had the privilege of gaining insights into other cultures, whether through family or friendship. But I doubt that anyone here would affect real familiarity with each and every culture which together makes up our society.

The Equal Treatment Bench Book is not about political correctness nor preaching nor moralising. It is there to inform and assist judges.

Lord Irvine of Lairg, Lord Chancellor, September 1999

Ignorance

Ignorance of the cultures, beliefs and disadvantages of others encourages prejudice. It is best dispelled by greater awareness. To achieve justice, judicial office-holders must be informed and aware. They should at the very least make necessary enquiries.

Thoughtlessness

The thoughtless comment, throw away remark, unwise joke, use of inappropriate terminology or even a facial expression may confirm or create an impression of prejudice, whether justified or not. It may also create or reinforce stereotypes or encourage discrimination by influencing the way people act or respond to others. It is important to be mindful about how your comments, actions or reactions might be interpreted by others. Parties may be very anxious and the issues being determined may be of the utmost importance to them. They are likely to be very sensitised in these circumstances.

Stereotyping

Stereotypes can be positive, negative or neutral. They can act as a form of mental 'shortcut'. However, it is important to:

- avoid making assumptions that because people meet particular criteria (e.g. they are of South Asian origin or wheelchair users) they will behave in a particular way or have specific limitations;
- beware of attaching labels to people (e.g. learning disabled or youths) and then using them to take away people's rights (e.g. assuming that they are incapable of giving evidence, or that they will lie or be disrespectful);
- not use these mental shortcuts to fill evidential or knowledge gaps.

Equality of opportunity

Special needs

Some people, for a variety of reasons, find it difficult or impossible to:

- attend at a court,
- function in a courtroom,
- understand what is going on, or
- be understood by others.

As judicial office-holders we should demonstrate an awareness of the feelings and difficulties experienced by those appearing before us. Every effort should be made to help in an effective way whilst maintaining a balance between assisting and adjudicating to enable people to participate fully in the proceedings.

This aspect is of special relevance to people with disabilities, but may apply equally to others such as those who do not speak or understand the language of the court or

tribunal and need an interpreter, or those who cannot read or have difficulty understanding documents and need to have written material explained or presented in a different way. Failing to address these needs will lead to a sense of unfairness and is likely to affect the quality of decision making.

Special needs affecting those with disabilities are addressed in Part 5 Disability, but communication difficulties may arise for a variety of reasons and are considered throughout this Bench Book.

Fair treatment

It is important to emphasise that we are not concerned about *equal* treatment but about *fair* treatment. It is not sufficient to treat everyone in the same way – equal treatment may itself amount to discrimination:

... the applicant is different from other people to the extent that treating her like others is not only discrimination but brings about a violation of Article 3.

Judge Greve in *Price v UK*, ECHR (2001) 10 July (No. 33394/96)

Fair treatment means affording equal opportunity for the parties to achieve justice. This is emphasised in the judicial oath which states:

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

1.1.3 Judgecraft

The art of judgecraft is sought universally.

I was a judge for over four decades uninterruptedly and, while climbing the successive rungs of the ladder of courts of law, I learned to know and love more and more that ‘occupation’ (is it really an occupation?) which requires enthusiasm, modesty, patience and pride from those who take it up.

I learned that judging means caring to listen, trying to understand and being willing to decide.

I learned that judging does not mean judging ‘as usual’, in the monotonous and mechanical routine of a stream of cases that must be managed and, one day, are disposed of

I learned that in the act of judging we should always leave room for doubt and never leave room for ‘rumour’, ‘prejudice’ or ‘suspicion’.

I learned that we should always be considerate to a person who suffers, in his or her freedom, his or her reputation, his or her family and emotional life.

I learned that when appearing before an independent, free judge, a man or a woman should not feel humiliated prior to judgment.

I learned that a judge should only worry about the confidence and respect he must receive.

Such confidence and respect are our sole title of legitimacy.

I wish that the law of this country will always get the 'dignified' and 'loyal' judges it deserves.

Pierre Drai, *Emeritus Chief Justice of the Cour de Cassation*

The judge as facilitator

It is part of our role as judge or tribunal chair, with effective support from the staff, to ensure that *everyone* involved in the process – prosecutor and defendant, claimant/applicant and respondent, witnesses, jurors, advocates and judge – can fully play their part. The following may be of guidance.

Correspondence

Take into account that individuals can be disadvantaged by timing and postal delays if they do not have access to fax and e-mail facilities.

Getting to the court

Those unfamiliar with the court should be provided with clear directions explaining how to get to the court and practical guidance about transport, parking and delivery of documents together with advice about telephoning the court if there is any unexpected delay.

Nerves

It should be borne in mind that the court or tribunal process and atmosphere can be very unnerving for parties and witnesses. Thus they may appear belligerent, hostile and sometimes rude, or confused and emotional. It follows that they may not give a good account of the case to be tried and should be helped to feel more relaxed. If they find it difficult to speak coherently or marshal the facts in an orderly fashion, they should be advised to speak slowly and take their time. The more information and advice that can be available before the hearing, the more prepared and relaxed the party or witness will be.

Forms of address

Many participants in a hearing are concerned about how to address the judge or tribunal

chair/member. Others worry about where they should sit and when they should sit or stand. Concerns of this nature add to their confusion and anxiety but can readily be dispelled by a helpful introduction and tactful explanation.

Communication

It goes without saying that it is as important for the individuals before a court or tribunal to understand what is being said to them as it is for them to be understood.

Jargon

Lay persons may not understand court jargon or technical terms, such as 'questionnaires', 'directions' and 'disclosure'.

In an effort to overcome these difficulties, and to counteract the widely-held public perception that judges fail to appreciate the difficulty that ordinary people have in understanding the language of lawyers, it is advisable to keep language as simple as possible and to give clear explanations when required.

Misunderstanding

Sometimes one or both parties may be aware that they have not understood or been understood (or may be oblivious to the fact). It is possible to test understanding by asking a supplementary question, by reiterating or explaining what you understand the position to be, and checking to see if the party or witness agrees. Bear in mind, however, that unrepresented parties may not have the courage to test the understanding of others at the hearing or to admit that they do not fully understand a point.

Communication failures can have far-reaching consequences, especially in situations of social inequality.

Avoiding stereotypes. Evaluating behaviour with an awareness of the cultural context within which it was generated is rendered entirely counterproductive if one relies on simplistic short-cuts. Not only are stereotypical generalisations grossly inaccurate but the perceptions they generate are invariably as unhelpful as they are misleading.

Complaints

Judges and tribunal chairs are accountable for their behaviour and those who do not take the trouble to avoid or prevent insensitive behaviour in their courts or tribunals are vulnerable to complaints.

Chapter 1.2

Diversity

Key points

- The judicial process must be seen to be fair and must inspire the confidence of all who enter into it.
- Fairness is demonstrated by effective communication.
- All of us view the world from our own perspective, which is culturally conditioned.
- People with personal impairments or who are otherwise disadvantaged in society are entitled to a fair hearing.
- Our outlook is based on our own knowledge and understanding: there is a fine line between relying on this and resorting to stereotypes which can lead to injustice.

The contents of this chapter should assist judges in:

- communicating effectively with persons from diverse cultures and backgrounds;
- using interpreters to assist communication with persons whose first language is not English or who encounter other barriers in communication;
- understanding basic points about names and naming systems;
- being sensitive about the use of language and terminology.

1.2.1 Culturally sensitive communication

A judge must bear in mind that when he tries a case, he himself is on trial.

Philo, Special Laws, 1st Century CE

Although it may be thought that successful communication depends only upon understanding others, it is also necessary to understand ourselves: only then can we recognise any potential barriers.

Cultural diversity – not stereotypes

Divergences in attitudes are acceptable and the gaps are wider across different cultures. Attitudes to authority vary and our responses to them must take account of differences:

- looking down and lowering one's voice can be a sign of respect, but not every African-Caribbean or Chinese young male will conform to this stereotype;
- 'establishing your credentials' (by, for example, explaining one's reputation and standing) before answering a question may be a way of manifesting credibility in some cultures, but do not expect everyone from the Indian sub-continent to do this.

Be wary of making judgements on the basis of body language or tone of voice. Body language varies significantly and this is more apparent in the tense atmosphere of the courtroom.

- In some cultures gender norms are so pronounced that physical affection even between married couples or towards children will never take place in public, so do not be surprised if you see a Kurdish/Persian/Turkish/Arab man kiss the cheeks of his male colleague and yet only shake his wife's hand in public.
- Raised voices are not a sign of anger in every culture, nor are tears amongst men so unusual in others.

Generational migration and the scattering of families across continents entail different demands. For those who made England their home 50 years ago, going back and forth to their country of origin is not considered excessive. Their responsibilities may span continents and attending a funeral or tending to a sick relative hundreds of miles away is not exceptional.

Never underestimate the influence which our cultural background may have on our judgements and perceptions, no matter how open-minded we may consider ourselves to be. We should be well-informed about the differing realities of life for all peoples of diverse backgrounds. Some actions can never be condoned (such as sexual or physical abuse) but our general knowledge must not lead us to false conclusions: there is diversity within all minority groupings.

1.2.2 Language

Key points

- Careful use of language and current terms increases confidence in the judicial process.
- Those who are disadvantaged may be more sensitive to the insensitive use of terms.
- Owing to increasing sensitivity in our diverse society we cannot underestimate the importance of using the correct terms.
- Just as the legal process utilises a technical language, users of the court system are entitled to benefit from the enlightened use of terms which generates confidence in the judicial process.
- Our choice of language is an indication of our attitude: the importance of correct etiquette has never diminished, but an appropriate sensitivity to the outward form always commands respect, particularly from those who may hitherto have been excluded or neglected.
- People from minority ethnic communities or with disabilities should always be described as people: Black, disabled, etc. are adjectives and should always be used as such, as in 'Black person', 'disabled person', etc.

There may be differences of opinion over some terms, and the meanings of words change and may vary between different parts of the country. Appropriate terminology is therefore a subject in which there are not always unambiguously 'right answers'.

Appropriate terminology for people with disabilities is considered in Part 5, sections 5.1.3. and 5.3.1.

Gender stereotyping

In the use of language we can unconsciously convey assumptions about gender roles which might be offensive or disconcerting to participants who do not match those roles (e.g. 'postman' or 'fireman' rather than 'postal worker' or 'fire fighter').

Insofar as possible therefore we should take care to use gender neutral language: 'they' (rather than 'he or 'she'); 'them' (rather than 'him' or 'her').

Frequently used terms for minority ethnic communities

Black

The term 'Black', which at one time in Britain was felt to be derogatory, now has a **positive** meaning as a result of the political civil liberties movements in the 1960s and 1970s. To the extent that the term is used in its political/sociological context, it may be used to refer to all minority groups. However, as a descriptive term, Black can refer to all people of **Caribbean** or **African** descent.

Coloured

The once commonly used term 'coloured people' is now considered **offensive** as it assumes the inferiority of those who are not 'White' by focusing on the 'racial' origin of people.

People of colour

This expression is more popular in the USA, although it is occasionally used in the UK. It also implies a status based on racial (and therefore **inferior**) categories and so should be **avoided**.

Visible minorities

The expression 'visible minorities' has gained ground in the last few years as an acceptable term whose scope is wider than 'Black', but is itself **problematic**, as it seems to imply the existence of invisible minorities.

Minority ethnic/minority cultural/minority faith/multi-cultural/multi-faith

These terms for communities are now widely used and are considered **acceptable** as the broadest terms to encompass all those groups who see themselves as distinct from the majority in terms of ethnicity, culture, and faith identity. The terms encompass, for example, groups such as the Greek and Turkish Cypriots, Chinese, Irish.

The term 'minority ethnic' has the advantage of making 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** 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.

It is valuable to consider the **context** of the term used and to be specific: is it in terms of **ethnicity, culture** or **faith** that we wish to distinguish and why?

British

Care should be taken to use the term 'British' in an inclusive sense, so that it includes all inhabitants or citizens of our multi-ethnic, multicultural society. Exclusionary use of the term as a **synonym** for **White, English** or **Christian** is **unacceptable**.

Immigrants

The description of all people of minority ethnic origin as 'immigrants' is highly **inaccurate** given the period of time the majority have been settled in the UK. 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 expressions referring to 'second/third generation' immigrants is exclusionary and is likely to cause offence given the fact that these individuals are British citizens.

Refugees/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 that term is now associated with people without a genuine claim to be refugees, and is almost pejorative. Care must be taken when using these terms to ensure **accuracy** in **factual** or **technical** terms.

Race, ethnicity and culture

Race: is often used in the specific context of delineating personal characteristics, such as physical appearance which are permanent, non-changeable, and not a question of choice but how one is perceived.

Ethnicity: is used to define those factors which are determined by nationality, culture, and religion, and are therefore to a certain and limited extent subject to the possibility of change.

Culture: is more characterised by behaviour and attitudes which although determined by upbringing and nationality are perceived as changeable.

West Indian/African-Caribbean/African

The term 'West Indian', although used in the UK as a broadly inclusive term to describe the first generation of migrants who came to the UK in the 1940s and 1950s from the Caribbean, was not in use in the Caribbean islands, where island origin was and remains the criterion of identity. Those who came from the Caribbean Islands at that time still think of and often describe themselves as 'Jamaican' or 'Barbadian' and so on. The term 'West Indian' may not necessarily give offence, but in most contexts it is **inappropriate**. It may also be felt to have colonial overtones, and is better avoided unless people choose to actually identify themselves in this way.

The term 'African-Caribbean' (as opposed to **Afro-Caribbean**) is much more **widely used**, especially in official and academic documents, to refer to black people of Caribbean origin, although it is not generally used by Black people amongst themselves. Where it is desirable to specify geographical origin, use of this term 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. Therefore it is appropriate to describe them by this term (rather than to describe them as African-Caribbean or West Indian). 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 as 'Nigerian', 'Ghanaian', etc.

Asian/Oriental/British Asian

People from the **Indian sub-continent** do **not** consider themselves to be 'Asians'; this term being one 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 ('Indian', 'Pakistani', 'Bangladeshi'); their **region** of origin ('Gujarati', 'Punjabi', 'Bengali'); or their **religion** ('Muslim', 'Hindu', 'Sikh'). Just as for these minority community individuals themselves the term most appropriate to the context should be used; national, regional or religious.

However, 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 from 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.

Mixed-parentage/dual-heritage/mixed-race/half-caste

The term 'half-caste' is generally found **offensive** and should be avoided.

The term 'mixed parentage' connotes a **neutral** appraisal of the factual reality of being born to parents who are from a **mixture** of cultural and ethnic backgrounds, whilst '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.

1.2.3 Families and diversity

Key points

- The family unit is the cornerstone of most communities: for many minority communities the family is a key source of personal identity which allows for differentiation from the majority.
- Differences in outlook amongst all families will exist in a diverse society: assumptions about the make up of the family unit have to be put aside.
- No major religion condones abuse and the voices against any such abusive cultural practices from within the communities should be acknowledged and supported.
- Our cultural outlook is based on our own knowledge and understanding: there is a fine line between relying on this and resorting to stereotypes which can lead to injustice.

The following material should assist judges in:

- understanding the range of diversity within families;
- understanding the many factors that lead to differences;
- being sensitive about not making assumptions.

No such thing as the 'average' family

We do not have to think hard to understand that all families are unique. However, there are factors which lead to a shared understanding:

- socio-economic background, schooling and employment,
- racial and national identities,
- gender composition,
- religious framework,
- cultural outlook (e.g. secular or traditional).

The combination of all these variables contribute to people's understanding of what a 'family' is. The task of respecting the differences in lifestyle has to be understood from the starting point that for many of us the 'norm' is actually our understanding of the ethnic European White model of families. Statistics tell us that that 'norm' does not in fact exist. Families share tendencies but have idiosyncrasies as well.

A recent study (*Significant Harm: Child Protection Litigation in a Multi-Cultural Setting*, Brophy, Jhutti-Johal and Owen, DCA Research Series (2003)) comparing the harm and neglect suffered by children from different cultural backgrounds in England showed the following:

- No single cultural factor could be isolated as abusive; it is nearly always a combination of parenting failures which leads to intervention and nearly all parents immediately deny malpractice.
- Parenting difficulties involving the use of violence or ineffective behaviour control were found across the range of cultural backgrounds: but those parents shared characteristics such as socio-economic background in terms of employment, education and housing conditions, and suffered alcohol abuse or mental health problems.
- If families suffered as a result of racism in terms of employment, housing, etc. that could add to the problems they encountered as a family.
- Migration could cause extra hardship as families could be more isolated and fragmented, relying on 'outsiders' for support and being deprived of traditional family support.
- The capacity for positive changes in parenting skills relied upon intervention taking into account the cultural and moral framework of the family.

It would seem that sharing racial or ethnic backgrounds does not seem as important as differentiating families on the basis of traditional outlooks or more modern, secular lifestyles:

- Those with more traditional belief systems might be more inclined to resolve problems from within the family and less sympathetic to outside intervention.
- Those with more traditional belief systems are more receptive to change if there is an attempt to acknowledge and respect their differences.
- Those families with secular lifestyles have more in common with each other than those with similar ethnic backgrounds, for example, in the notions of discipline and child/individual autonomy.

Understanding cultural difference

Too often, when it comes to cultural aberrations such as forced marriages, female genital mutilation and 'honour' killings, it is assumed that such practices are the norm within certain communities and general conclusions are drawn about the attitudes within communities. No major religion condones any such practices.

- We should remember that there are many voices from within communities that challenge all such abhorrent practices and that those voices include the support of traditional leaders and religious authorities, since religious law prohibits such abusive practices. For example, male and female members of the Jordanian royal family, religious clerics and ordinary men and women all participated at a recent demonstration against 'honour' killings amongst the Negev tribes (resident in Jordan and Israel).
- It is important not to be prejudiced against traditional or religious tendencies *per se* but to support the forces that condemn such practices from within those communities as well as the external pressure groups.
- Victims of such abuse should not be patronised and assumed to be passive victims of traditional forces: they should be allowed to choose for themselves what elements of their culture or religion they wish to accept or reject.
- Violence against women and children is unfortunately a feature of all communities. Support has to be offered without demanding that victims reject everything about their identity which is 'different', religious or traditional.
- Arranged marriages, where parties are free to choose are not equivalent to forced marriages. The fact that abuses take place under the guise of religious duty is not acceptable for genuine religious authorities or adherents of the faith tradition.
- Female genital mutilation is not religiously acceptable. Again, cultural practices are so entrenched in some communities that religion is invoked as an authority when it is not.
- Honour killing or any homicide is not a religious norm, and all religions prohibit any such acts of murder. However, many religions actively discourage promiscuity, and the forces that do so are often traditional and carry religious sanction, but never permit homicide. The complex debates about rules concerning the application of the Shariah law concerning adultery should never obscure the fact that murder is not permissible or sanctioned.

Holidays resulting in child abduction or forced marriages

The problem of a dishonest intention is ubiquitous: it defies the boundaries of culture, religion or race. That is what we have to remember when dealing with cases where a party has acted dishonestly, not to draw conclusions assuming that:

- all trans- or cross-cultural divorces will lead to threats/acts of child abduction;
- all holidays to visit the country of the parent's origin are a ruse to entrap a man or woman into a forced marriage.

Assessing the credibility or honest intentions of any party that comes before the court is an individual question to be judged and not one that can be left to the operations of prejudice in favour of or against any individual.

Same-sex partnerships and family life

Recent changes in adoption law and trends in society generally express support for the recognition of same-sex partnerships and their families. The dangers in assuming all families comprise heterosexual couples are obvious and differences should be acknowledged (see further Chapter 7.1, section 7.1.6).

1.2.4 Interpreters and communication

Key points

- An interpreter may be necessary even if the witness is able to communicate in English/Welsh to some degree: the language employed in judicial proceedings is so specialised in comparison to communicating in adequate English/Welsh in order to get by on a daily basis.
- Common words may have different meanings according to the understanding of the speaker.
- Always establish that the interpreter speaks not only the language but the dialect of the witness.
- The same interpreter may no longer be appropriate for opposing parties.
- There are serious dangers in allowing an advocate, friend or family member to act as an interpreter and whenever possible the interpreter must be professionally engaged and ideally from an officially approved list.
- It should not be assumed that an interpreter can continue without regular breaks: it is a very demanding process if done correctly, so allow an opportunity to indicate when a break is needed.
- A party may need the assistance of an interpreter throughout the proceedings, beforehand when giving instructions and afterwards when receiving an explanation as to what has transpired. An interpreter or translation of documents may be required to understand the documentation in proceedings. Failure to ensure this could amount to a denial of justice.
- To the extent that it is difficult for those with learning difficulties or inadequate language skills to understand the language employed in the courtroom, all efforts should be made to communicate in a manner comprehensible to the parties before you.

The use of interpreters for people with disabilities is further considered in Chapter 5.2, section 5.2.2.

Reference should be made to Appendix I Interpreters at the end of this part for further information on interpreters.

1.2.5 Names and forms of address

Key points

- We are all sensitive about our names and titles or forms of address.
- In order to show respect be prepared to *ask* any person participating in the process how they would like to be addressed – do not make assumptions.
- Getting it right increases everyone's confidence in the judicial process.

Do:

- ask for the individual's full name and how it is spelt and pronounced – and how they wish to be addressed.
- appreciate that naming systems may be used in different ways by people according to their traditional conventions or by processes of adaptation to living in the UK.

But do not:

- ask for Christian names;
- assume that everyone will have a family name as in the ethnic UK naming system;
- abbreviate names, unless the person prefers to be addressed by their abbreviated name;
- assume – *ask!*

From childhood we are all aware of the importance of the correct pronunciation of our names and we expect an understanding of our titles. Members of all communities should benefit from the fulfilment of this simple expectation in our diverse society. In court and throughout the judicial process getting the forms of address right with regard to the judiciary, the lawyers, all the personnel and the public is vital in increasing confidence. In case of doubt, ask the individual directly how it is they would like to be addressed.

Reference should be made to Appendix II Names and forms of address at the end of this part for further information.

Chapter 1.3

Unrepresented parties

Key points

The 'litigant in person'

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

Role of the judge

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

1.3.1 Introduction

There are a number of reasons why individuals may choose to represent themselves rather than instruct a lawyer.

- Many do not qualify for public funding, either financially or because of the nature of their case.
- Some cannot afford a solicitor and even distrust lawyers.
- Others believe that they will be better at putting their own case across.

This section aims to identify the difficulties faced (and caused) by litigants in person before, during and after the litigation process, and to provide guidance to judges with a view to ensuring that both parties receive a fair hearing where one or both is not represented by a lawyer. This chapter supplements and should be read in conjunction with Chapter 1.1.

Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal which is concerned to adjudicate in proceedings in which that person is a party. But on the whole those who exercise this personal right find that they are operating in an alien environment. The courts and tribunals have not traditionally been receptive to their needs.

All too often the litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists.

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

It is curious that lay litigants have been regarded ... as problems, almost as nuisances for the court system. This has meant that the focus has generally been upon the difficulties that litigants in person pose for the courts rather than the other way around.

Prof. John Baldwin, *Monitoring the Rise of the Small Claims Limit*

Unrepresented parties are likely to experience feelings of fear, ignorance, anger, frustration and bewilderment. They will feel at a profound disadvantage, despite the fact that the outcome may have a profound effect and long-term consequences on their lives. The aim of the judge or tribunal chair should be to ensure that the parties leave with the sense that they have been listened to and had a fair hearing – whatever the outcome.

In what follows, the term 'unrepresented party' encompasses those preparing a case for trial, those conducting their own case at trial and those wishing to enforce a judgment or to appeal.

Disadvantages faced

The disadvantages faced by unrepresented parties stem from their lack of knowledge of the law and court procedure. For many their perception of the court environment will be based on what they have seen on the television and in films. They tend to:

- be unfamiliar with the language and specialist vocabulary of legal proceedings;
- have little knowledge of the procedures involved and find it difficult to apply the rules even if they do read them;
- lack objectivity and emotional distance from their case;
- be unskilled in advocacy and unable to undertake cross-examination or test the evidence of an opponent;
- be ill-informed about the presentation of evidence;
- be unable to understand the relevance of law and regulations to their own problem, or to know how to challenge a decision that they believe is wrong.

All these factors have an adverse effect on the preparation and presentation of their case. Equally, there are other unrepresented parties who are familiar with the requirements of the process.

Numbers

Increasing numbers of people are now also representing themselves in the civil and family courts.

The small claims procedure in the county court is designed specifically to assist the public to pursue claims without recourse to legal representation and has created a huge increase in the number of unrepresented parties. The vast majority of defended civil actions in the county court are dealt with under this procedure and it is a sign of its success that its jurisdiction was increased (subject to certain exceptions in personal injury cases) from claims of up to £1,000, to claims of up to £5,000. With the consent of the parties, cases of a certain type can encompass substantially greater claims. Public funding has never been available for small claims.

Unrepresented parties also appear with increasing frequency in the Court of Appeal in criminal, civil and family cases. Some have represented themselves at first instance. Others, having had lawyers appear for them in the court below, take their own cases on appeal, often through a withdrawal of public funding after the first instance hearing.

Ways to help

The aim is to ensure that unrepresented parties understand what is going on and what is expected of them at all stages of the proceedings – before, during and after any attendances at a hearing.

This means ensuring that:

- the process is (or has been) explained to them in a manner that they can understand;
- they have access to appropriate information (e.g. the rules, practice directions and guidelines – whether from publications or websites);
- they are informed about what is expected of them in ample time for them to comply;
- wherever possible they are given sufficient time according to their own needs.

1.3.2 Particular areas of difficulty

Those who are involved in legal proceedings without legal representation may face a daunting range of problems of both knowledge and understanding.

Language

English may not be the first language of the unrepresented party in the courts of England and Wales and they may have particular difficulties with written English. Any papers received from the court or from the other side may need to be translated. The court may need to adjourn in order to ensure that a mutually acceptable translator can attend the proceedings to explain to the unrepresented party in their own language what is taking place, and to assist in the translation of evidence and submissions.

It is worth noting that there are free tools available on the internet that provide instant translations, free of charge, in most languages – see, for example, www.google.com/language_tools.

Further guidance on the use of interpreters is included in Appendix 1 Interpreters at the end of this part.

Intellectual range

Unrepresented parties come from a variety of social and educational backgrounds. Some may have difficulty with reading, writing and spelling. Judges should:

- be sensitive to literacy problems and prepared where possible to offer short adjournments to allow a litigant more time to read or to ask anyone accompanying the litigant to help them to read and understand documents;
- exercise and be seen to exercise considerable patience when unrepresented parties demonstrate their scant knowledge of law and procedure;
- not interrupt, engage in dialogue, indicate a preliminary view or cut short an argument in the same way that they might with a qualified lawyer.

Unrepresented parties often believe that because they are aggrieved in some way they automatically have a good case. When explaining that there is no case, bear in mind that this will come as a great disappointment to a litigant who has waited for their day in court for some time.

Information

Some unrepresented parties are unaware of the explanatory leaflets available at the court or of the lists of advice agencies. Citizens Advice may be able to offer assistance with case preparation.

Many unrepresented parties believe that the court staff are there to give legal advice. Under the Courts Charter court staff can only give information on how a case may be pursued; they cannot give legal advice under any circumstances.

1.3.3 Before the court appearance

Statements of case and witness statements

Unrepresented parties may make basic errors in the preparation of civil cases by:

- failing to choose the best cause of action or defence;
- overlooking limitation periods;
- not appreciating that they are witnesses in their own cases;

- failing to file their own witness statements in advance of trial (and not understanding that in consequence they may not be able to give evidence).

The individual's level of knowledge should be taken into account in civil cases when deciding whether to make allowances for such failures. A flexible approach ought to be adopted where possible, even if this involves an adjournment.

Some of these problems are addressed in the Protocols of the Civil Procedure Rules (CPR). The Court Service has produced a new series of leaflets for unrepresented parties in the light of the CPR.

Directions and court orders

Unrepresented parties often do not understand pre-hearing directions (in particular those imposing time deadlines and 'unless orders') or the effect of court orders so:

- ensure that they leave a directions hearing appreciating exactly what is required of them;
- involve them in the process of giving those directions (e.g. asking them how much time they need to take a particular step and why) so that they realise that the directions relate to the conduct of their own case;
- explain fully the precise meaning of any particular direction or court order.

Sometimes they believe that if the other side has failed to comply with such directions, that in itself is evidence in support of their own case, or the opponent should be prevented from defending or proceeding further. They often feel upset at what they regard as an over-tolerant attitude by the courts to delays by solicitors.

Documentary evidence

A common problem is lack of understanding about the use and application of documents and bundles. Experience shows that unrepresented parties:

- tend not to make sufficient use of documentary or photographic evidence in their cases;
- fail to appreciate the need for maps and plans of any location relevant to the case.

Preliminary hearings represent an opportunity to give guidance on these matters.

Disclosure of documents

The duty to disclose documents is frequently neglected by unrepresented parties.

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

Preparing bundles

Many unrepresented parties do not have access to office facilities and have difficulties in photocopying documents, preparing bundles and typing witness statements. They have little concept of the need for documents to be in chronological order and paginated. Putting the case back is often the sensible course to take, in the event of litigants coming to court with their bundles in other than proper order.

Producing documents

All too often unrepresented parties do not bring relevant documents with them to the hearing. The court or tribunal is faced with the comment: 'I can produce it – it is at home', but it is then too late and an adjournment is likely to be expensive and will usually be refused.

The party should have been warned in advance not only to disclose relevant documents to the other side but to produce the originals at the hearing.

Sources of law

Most unrepresented parties do not have access to legal textbooks or libraries where such textbooks are available and may not be able to down-load information from a legal website. Why not let an individual, accompanied by a member of the court staff, have access to the court library or to a particular book?

Sometimes unrepresented parties do not understand the role of case law and are confused by the fact that the judge or tribunal appears to be referring to someone else's case.

- A brief explanation of the doctrine of precedent will enable an unrepresented party to appreciate what is going on and why.

- A represented party's lawyer should be told to produce any authorities to be relied on at the outset.
- An unrepresented party must be given proper opportunity to read such authorities and make submissions in relation to them.

Live evidence

Judges and tribunal chairs are often told: 'All you have to do is to ring Mr X and he will confirm what I am saying.' When it is explained that this is not possible, unrepresented parties may become aggrieved and fail to understand that it is for them to prove their case.

- They should be informed at an early stage that they must prove what they say by witness evidence so may need to approach witnesses in advance and ask them to come to court.
- The need for expert evidence should also be explained and the fact that no party can call an expert witness unless permission has been given by the court, generally in advance.

When there is an application to adjourn, bear in mind that unrepresented parties may genuinely not have realised just how important the attendance of such witnesses is. If the application is refused a clear explanation should be given.

Adjournments

Unrepresented parties may not appreciate the need to obtain an adjournment order if a hearing date presents them with difficulties.

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

Guilty pleas

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

1.3.4 The hearing

The judge or chair of a tribunal is a facilitator of justice and may need to assist the unrepresented party in ways that are not appropriate for a party who has employed skilled legal advisers and an experienced advocate. This may include:

- attempting to elicit the extent of the understanding of that party at the outset and giving explanations in everyday language;
- making clear in advance the difference between justice and a just trial on the evidence (i.e. that the case will be decided on the basis of the evidence presented and the truthfulness and accuracy of the witnesses called).

Explanations by the judge

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

- The judge's name and the correct mode of address should be clarified.
- Individuals present need to be introduced and their roles explained.
- Mobile phones must be switched off, or at least in silent mode.
- An unrepresented party who does not understand something or has a problem with any aspect of the case should be told to inform the judge immediately so that the problem can be addressed.
- The purpose of the hearing and the particular matter or issue on which a decision is to be made must be clearly stated.
- A party may take notes but the law forbids the making of personal tape-recordings.
- If the unrepresented party needs a short break for personal reasons, they only have to ask.
- The golden rule is that only one person may speak at a time and each side will have a full opportunity to present its case.

Particular difficulties

Difficulties often arise for unrepresented parties in getting to the court, being nervous and incoherent, coping with the jargon used and forms of address. All these issues are addressed in Chapter 1.1.

Purpose of hearing

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

The judge's role

It can be hard to strike a balance in assisting an unrepresented party in an adversarial system. An unrepresented party may easily get the impression that the judge does not pay sufficient attention to them or their case, especially if the other side is represented and the judge asks the advocate on the other side to summarise the issues between the parties.

- Explain the judge's role during the hearing.
- If you are doing something which might be perceived to be unfair or controversial in the mind of the unrepresented party, explain precisely what you are doing and why.
- Adopt to the extent necessary an inquisitorial role to enable the unrepresented party fully to present their case (but not in such a way as to appear to give the unrepresented party an undue advantage).

The real issues

Many unrepresented parties will not appreciate the real issues in the case. For example, a litigant might come to court believing that they are not liable under a contract because it is not in writing, or that they can win the case upon establishing that the defendant failed to care when the real issue in the case is whether or not the defendant's negligence caused the loss.

At the start of any hearing it is vital to identify and if possible establish agreement as to the issues to be tried so that all parties proceed on this basis. Time spent in this way can shorten the length of proceedings considerably.

Compromise

Unrepresented parties may not know how to compromise or even that they are allowed to speak to the other side with a view to trying to reach a compromise.

- Tell them, particularly in civil proceedings, that the role of the court is dispute resolution – explanations as to forms of alternative dispute resolution (ADR) may be appropriate.
- Ask them whether they have tried to resolve their differences by negotiation and, if possible, spell out the best and worst possible outcomes at the outset. This can lead to movement away from the idea that to negotiate is a sign of weakness.
- Remind them to tell the court in advance if their case has been settled.

Advocacy

Often unrepresented parties phrase questions wrongly and some find it hard not to make a statement when they should be cross-examining. Explain the difference between evidence and submissions, and help them put across a point in question form.

Unrepresented parties frequently have difficulty in understanding that merely because there is a different version of events to their own, this does not necessarily mean that the other side is lying. Similarly, they may construe any suggestion from the other side that their own version is not true as an accusation of lying. Be ready to explain that this is not automatically so.

Where one party is represented, invite this advocate to make final submissions first, so that an unrepresented party can see how it should be done.

Criminal cases

Under Article 6(3) of the European Convention of Human Rights, everyone charged with a criminal offence has the right to defend him or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance, to be given it free where the interests of justice so require.

Those who dispense with legal assistance do so, almost always, because they decline to accept the advice which they have been given, whether as to plea or the conduct of the trial. A firm hand almost always persuades such defendants that they are much better advised to retain their representatives. If this does not work the problem for the judge is to do with retaining control over the proceedings rather than sensitive explanation to the defendant of the rules of procedure and evidence.

Cross-examination

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

- always ask the defendant whether they wish to call any witnesses;
- be ready to restrain unnecessary, intimidating or humiliating cross-examination;
- be prepared to discuss the course of proceedings with the defendant in the absence of the jury before they embark on any cross-examination;
- note the statutory prohibitions on cross-examination by an unrepresented defendant.

Conduct of the defence

Paragraph 5 of the Practice Direction *Crown Court (Defendant's Evidence)* [1995] 2 Cr App R 192 puts a duty on a judge to address an unrepresented defendant at the conclusion of the evidence for the prosecution and in the presence of the jury as follows:

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

Summing up

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

Adjournments

Sometimes a defendant in a criminal case becomes an unrepresented party during the case either by reason of the defendant's representatives withdrawing or because they are dismissed by the defendant.

- Bear in mind that you may exercise your discretion in deciding whether or not to grant an adjournment to enable fresh legal representatives to be instructed.
- That decision should be based on what is in the interests of justice having regard to the interests of the witnesses, the public and the defendant, the stage reached in the trial and the likely ability of the defendant to conduct the defence case properly.
- Bear in mind also the duty to warn a defendant against any course that might not be in that defendant's best interests, but if the defendant decides to go on alone, allow them to do so.

1.3.5 Assistance and representation

A party to civil or family proceedings may wish to be assisted by a 'friend' at a hearing or even represented by a person without rights of audience.

In a climate where legal aid is virtually unobtainable and lawyers disproportionately expensive, the McKenzie friend and lay representative make a significant contribution to access to justice. But reported cases tend to concentrate upon reasons why they should not be allowed rather than circumstances where they may be of assistance to a party and the court. The judge has to identify those situations where such support is beneficial and distinguish circumstances where it should not be allowed.

In addition the need for a litigation friend must be recognised and this has changed with the introduction of a new mental capacity jurisdiction (see further Chapter 5.4, section 5.4.3).

'McKenzie friend'

This term refers to an individual (whether lawyer or not) who assists in presenting the case by taking notes, quietly making suggestions or giving advice. The role differs from that of advocate in that the McKenzie friend does not address the court or examine any witnesses and is generally permitted at trials or full hearings although the 'friend' can be excluded if unsuitable (e.g. someone who is pursuing their own or an unsuitable agenda). It may be less appropriate to allow such assistance in private (chambers) hearings because the judge generally then provides more assistance to an unrepresented party.

A McKenzie friend may not act as the agent of the litigant in relation to the proceedings nor manage the case outside court (eg. by signing court documents).

The Court of Appeal summarised the principles in *Paragon Finance plc v Noueiri* [2001] EWCA Civ 1402, [2001] 1 WLR 2357, as follows:

- A McKenzie friend had no right to act as such: the only right was that of the litigant to have reasonable assistance.
- A McKenzie friend was not entitled to address the court: if he did so, he would become an advocate and require the grant of a right of audience.
- As a general rule, a litigant in person who wished to have a McKenzie friend should be allowed to do so unless the judge was satisfied that fairness and the interests of justice did not so require. However, the court could prevent a McKenzie friend from continuing to act in that capacity where the assistance he gave impeded the efficient administration of justice.

See also *R v Bow County Court ex p Pelling* [1999] 1 WLR 1811 and *Re G (Chambers proceedings: next friend)* [1999] 2 FLR 59, CA.

A differently constituted Court of Appeal in *Re O (Children): Re W-R (A Child): Re W (Children)* [2005] EWCA Civ 759; [2005] 2 FLR 967 (Thorpe LJ, Wall LJ) has since offered this guidance in family proceedings:

- There is a strong presumption in favour of a litigant in person being allowed the assistance of a McKenzie friend. A request should not be refused without compelling reasons, even where the proceedings relate to a child and are being heard in private.
- The fact that the unrepresented party appears to be capable of conducting his case does not begin to outweigh the strong presumption in favour of allowing such assistance.
- The fact that a proposed McKenzie friend belongs to an organisation that promotes a particular cause is no reason for not allowing him to undertake the role.
- It was not for the litigant in person to justify his desire to have a McKenzie friend but for the objecting party to rebut the presumption in favour of allowing it.
- There is no justification for refusing to allow a McKenzie friend simply because it is a directions hearing.
- Proposed McKenzie friends should not be excluded from the courtroom or chambers whilst the application for assistance is being made.
- The proposed McKenzie friend should produce a short CV or statement about himself confirming that he has no interest in the case and understands his role and the duty of confidentiality.

In February 2005, the President of the Family Division produced guidance to judges in family proceedings and this was updated in April 2008. The latest guidance is reproduced in the following pages.

Rights of audience

The Courts and Legal Services Act 1990, sections 27 regulates the right to appear in court. General rights of audience (advocacy rights) are granted to duly qualified barristers or solicitors (and certain others) and employees of solicitors may appear at hearings 'in private'. In addition:

- the court may refuse to hear a person (for reasons which relate to him as an individual) who would otherwise have a right of audience but must give reasons;
- a court has a discretionary power to grant an unqualified person a right of audience in relation to particular proceedings before that court;
- special provision is made for *lay representatives* in the small claims track of the county court. There is a right of audience in the presence of the party at the hearing itself but the court may in its discretion hear a lay representative in the absence of the party - Civil Procedure Rules 1998, PD27 para 3.2; Lay Representatives (Right of Audience) Order 1999.

Lay representative

The term 'lay representative' relates to a person who does not possess advocacy rights and may not even be a lawyer, but to whom the court grants a right of audience on behalf of a party in relation to the proceedings before that court. The party must apply at the outset of a hearing if he wishes an unqualified individual to be granted a right of audience, and parties cannot consent to an unqualified person exercising a right of audience - *Clarkson v Gilbert* [2000] 2 FLR 839 (CA); *D v S (Rights of Audience)* [1997] 2 FCR 206; [1997] 1 FLR 724 (CA).

It may, however, be appropriate to grant a right of audience on a one-off basis (e.g. where a party is infirm and cannot afford the services of a lawyer). The following guidance was offered by Lord Woolf in *Clarkson v Gilbert & ors* (see above):

"Now that legal aid was not available as readily as it had been in the past, there were going to be situations where litigants were forced to bring proceedings in person when they would need assistance. ... litigants in person had to indicate why they needed some other person who was not qualified to act on their behalf. ... it would be for them to satisfy the court that that was appropriate. If somebody's health did not, or might not enable them to conduct proceedings themselves, and if they lacked means, those were the sort of circumstances that could justify a court

saying that they should have somebody who could act as an advocate on their behalf. ... the objections to someone setting themselves up as an unqualified advocate did not exist where a husband was merely seeking to assist his wife.”

But the party should still be present unless there is a justifiable reason for absence. It may even in some circumstances be helpful to a court or tribunal to recognise the representative as Neuberger J. pointed out in *Izzo v Philip Ross & Co (2001)* The Times, 9 August 2001:

“In some circumstances common sense and experience suggests that a relatively inarticulate and unknowledgeable litigant prompted at every turn results in the case taking far longer than if the friend speaks directly for him. Every time the court raises a point or puts a point to the litigant in person it has to be explained to the litigant which often takes longer than explaining it to his friend. Then the litigant has to have the answer explained to him by the friend, whereafter the litigant passes the answer to the court. This is a process which self-evidently prolongs the hearings and, like chinese whispers, is fraught with potential misunderstanding.”

Once the privilege has been granted it is difficult to withdraw it even if the representative turns out to be unsuitable. Problems arise where an unqualified person is seeking to provide general advocacy services, or appears to be pursuing a separate agenda. In *Paragon Finance plc v Noueiri* (see above) the Court of Appeal offered guidance:

- The discretion to grant rights of audience to individuals who did not meet the stringent requirements of the 1990 Act were only to be exercised in exceptional circumstances and after careful consideration.
- The courts had to consider carefully whether to grant rights to individuals who made a practice of seeking to represent otherwise unrepresented litigants.
- The person to be represented should normally justify the request and be present at the hearing when personal interests are involved.

Conducting litigation

There is a distinction between the conduct of litigation on behalf of a party and advocacy at hearings. The former relates to the claim form, statement of case and any applications made during the course of the hearing. A ‘statement of truth’ will generally be required to support such documents and must be signed by the party (or litigation friend) or the legal representative - CPR r.22.1(6)(a). Special provision is made in respect of companies – see PD 22 para 3 and r.39.6.

The Courts and Legal Services Act 1990, section 28 regulates the right to conduct litigations.

In *Paragon Finance plc v Noueiri* (see above) the Court of Appeal also offered the following guidance as to the right of an unqualified person to conduct litigation in the courts on behalf of a party:

- the existence of such right is determined solely in accordance with Part II of the 1990 Act;
- section 28(2)(c) permits a court to grant an otherwise unqualified person the right to conduct litigation in relation to particular proceedings and to remove that right if it is being abused;
- the grant of the right should be carried out having regard to the same considerations as the grant of a right of audience.

Attorneys

The court controls its own procedures and principles of agency do not apply, so a power of attorney cannot confer a right to conduct litigation or of audience - *Gregory v Turner, R (on application of Morris) v North Somerset Council* [2003] EWCA Civ 183; [2003] 1 WLR 1149 (CA).

Official Solicitor

The Official Solicitor represents parties to proceedings who are without capacity, deceased or unascertained when no other suitable person or agency is able and willing to do so. The purpose is to prevent a possible denial of justice and safeguard the welfare, property or status of the party.

He usually becomes formally involved when appointed by the Court, and may act as his own solicitor, or instruct a private firm of solicitors to act for him. The vision statement of the Official Solicitor's office is:

“. . . to be an organisation delivering high quality customer focused legal services for vulnerable persons, where those services need to be provided by the public sector . . .”

Enquiries are frequently made by the judiciary and members of the legal profession and the Official Solicitor can be contacted at:

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Representing adults who lack capacity

An order directing the Official Solicitor to act as a legal representative in a civil court for an incapacitated party will either be made with his prior consent or only take effect if his consent is obtained. The Official Solicitor needs to be satisfied that his involvement will be consistent with the *Vision Statement* and in appropriate cases he will also require security that his charges and expenses will be met before agreeing to act.

Assisting the civil courts

The Official Solicitor may also be called on to give confidential advice to judges, to instruct counsel to appear before a judge to assist the court as advocate to the court, or to investigate any matter on which the court needs a special report. A common enquiry requested is to ascertain the mental capacity of a party to proceedings before the court.

Guidance from the President's Office – McKenzie Friends

In the light of the growth of litigants in person in all levels of family court, the President issues this guidance, which supersedes that of 13th May 2005. [2005] Fam Law 405, and is to be regarded as a reminder that the attendance of a McKenzie friend will often be of advantage to the court in ensuring the litigant in person receives a fair hearing.

- A litigant who is not legally represented has the right to have reasonable assistance from a layperson, sometimes called a McKenzie Friend (“MF”). This is the case even where the proceedings relate to a child and are being heard in private.
- A litigant in person wishing to have the help of a MF should be allowed such help unless the judge is satisfied that fairness and the interests of justice do not so require. The presumption in favour of permitting a MF is a strong one.
- A litigant in person intending to make a request for the assistance of a MF should be encouraged to make the application as soon as possible indicating who the MF will be.
- It will be most helpful to the litigant in person and to the court if the particular MF is in a position to advise the litigant in person throughout the proceedings.
- A favourable decision by the court, allowing the assistance of a MF, should be regarded as final and not as something which another party can ask the court to revisit later, save on the ground of misconduct by the MF or on the ground that the MF’s continuing presence will impede the efficient administration of justice.
- When considering any request for the assistance of a MF, the Human Rights Act 1998 Sch 1 Part 1 Article 6 is engaged; the court should consider the matter judicially, allowing the litigant reasonable opportunity to develop the argument in favour of the request.
- The litigant in person should not be required to justify his desire to have a MF; in the event of objection, it is for the objecting party to rebut the presumption in favour of allowing the MF to attend.
- Factors which should not outweigh the presumption in favour of allowing the assistance of a MF include:
 - the fact that proceedings are confidential and that the court papers contain sensitive information relating to the family’s affairs

- the fact that the litigant in person appears to be capable of conducting the case without the assistance of a MF
 - the fact that the litigant in person is unrepresented through choice
 - the fact that the objecting party is not represented
 - the fact that the hearing is a directions hearing or case management hearing
 - the fact that a proposed MF belongs to an organisation that promotes a particular cause
- The proposed MF should not be excluded from the courtroom or chambers while the application for assistance is made, and the MF should ordinarily be allowed to assist the litigant in person to make the application.
 - The proposed MF should produce a short curriculum vitae or other statement setting out relevant experience and confirming that he/she has no interest in the case and understands the role of a MF and the duty of confidentiality.
 - If a court decides in the exercise of its discretion to refuse to allow a MF to assist the litigant in person, the reasons for the decision should be explained carefully and fully to both the litigant in person and the would-be MF.
 - The litigant may appeal that refusal, but the MF has no standing to do so.
 - The court may refuse to allow a MF to act or continue to act in that capacity where the judge forms the view that the assistance the MF has given, or may give, impedes the efficient administration of justice. However, the court should also consider whether a firm and unequivocal warning to the litigant and/or MF might suffice in the first instance.
 - Where permission has been given for a litigant in person to receive assistance from a MF in care proceedings, the court should consider the attendance of the MF at any Advocates' Meetings directed by the court, and, with regard to cases commenced after 1.4.08, consider directions in accordance with paragraph 13.2 of the Practice Direction. Guide to Case Management in Public Law Proceedings.
 - The litigant in person is permitted to communicate any information, including filed evidence, relating to the proceedings to the MF for the purpose of obtaining advice or assistance in relation to the proceedings
 - Legal representatives should ensure that documents are served on the litigant in person in good time to seek assistance regarding their content from the MF in advance of any hearing or advocates' meeting.

What a McKenzie Friend May Do

- Provide moral support for the litigant
- Take notes
- Help with case papers
- Quietly give advice on:
 - points of law or procedure;
 - issues that the litigant may wish to raise in court
 - questions the litigant may wish to ask witnesses.

What a McKenzie Friend May Not Do

- A MF has no right to act on behalf of a litigant in person. It is the right of the litigant who wishes to do so to have the assistance of a MF.
- A MF is not entitled to address the court, nor examine any witnesses. A MF who does so becomes an advocate and requires the grant of a right of audience.
- A MF may not act as the agent of the litigant in relation to the proceedings nor manage the litigant's case outside court, for example, by signing court documents.

Rights of Audience

- Sections 27 & 28 of the Courts and Legal Services Act 1990 govern exhaustively rights of audience and the right to conduct litigation. They provide the court with a discretionary power to grant lay individuals such rights.
- A court may grant an unqualified person a right of audience in exceptional circumstances and after careful consideration. If the litigant in person wishes the MF to be granted a right of audience or the right to conduct the litigation, an application must be made at the start of the hearing.

Personal Support Unit & Citizens' Advice Bureau

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

1.3.6 After the hearing

Having won or lost the case, the unrepresented party will need to understand what has happened and the options available or steps that can still be taken.

Explaining the decision

Unrepresented parties often do not understand the outcome of the case and the reasons for it. The following guidance is particularly important, therefore, if they have lost.

- Always set out clearly the reasons for the decision.
- If possible, provide an unrepresented party with a copy of the order before leaving the court.
- If judgment is reserved, or the order is to be sent on, tell the unrepresented party approximately when they can expect to hear further from the court and why there may be a delay.

Costs

Unrepresented parties are frequently unaware that they may recover costs, either from public funds in criminal matters or from the losing side in civil cases. If such party is entitled to costs but says nothing, consider drawing the question of costs to their attention, without offering advice, so that any relevant costs application can be made. If an application is made that an unrepresented party pays the costs, an explanation must be given with an opportunity to argue against this.

Appeal

Unless the unrepresented party has been wholly successful in the case, explain the requirement to seek leave to appeal, if applicable. 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.

Chapter 1.4

Social exclusion and poverty

Key points

Social exclusion

- A disproportionate number of those appearing before courts and tribunals are from socially excluded backgrounds.
- This may affect the way individuals present and understand evidence, and how they respond to cross-examination

Poverty

- Deprivation, unemployment and low literacy levels make the UK one of the most poverty-stricken countries among developed nations – only the Republic of Ireland and the USA suffer higher levels of poverty than the UK.
- The UK was ranked 14th – behind countries such as Germany, Japan and Australia – in the United Nations Development Programme poverty index.
- More than a fifth of UK adults are considered functionally illiterate while 13.5% were living below the poverty line – half the median personal disposable income.

(Report published by the UN in September 1998)

1.4.1 Social exclusion

A large proportion of socially excluded people come into contact with the justice system; indeed there is evidence that a disproportionate number of persons drawn into the justice system are from what may be described as socially excluded backgrounds. At the same time, those who operate the courts – judges and lawyers – are rarely from such backgrounds, and are by definition removed from the contemporary situation of socially excluded people. It is necessary therefore to attempt to bridge any knowledge and understanding gaps between judges and those in their courts.

1.4.2 The concept of social exclusion

The term 'social exclusion' refers to a situation of economic or social disadvantage. It incorporates, but is broader than, concepts like poverty or deprivation, and includes disadvantage which arises from discrimination, ill health or lack of education, as well as that which arises from a lack of material resources.

An understanding of social exclusion is relevant to the administration of justice in three ways.

1. Many individuals drawn into the justice system will come from socially excluded backgrounds. To understand the circumstances which have brought the case to court it is necessary to understand how processes of social exclusion operate.
2. The social exclusion experienced by those individuals may affect the way they present and understand evidence, and how they respond to cross-examination.
3. Sentences of the courts may create or exacerbate social exclusion for offenders. This may be intentional and justified, but it is as well to understand the full implications.

There is no legal definition of social exclusion. A range of definitions is used by academics and politicians, according to their disciplinary and ideological perspectives. However, there are a number of core features which most definitions share.

- An individual who is unable to participate in key activities in society is socially excluded. Key activities might include:
 - consumption – being able to purchase goods and services which are customary in that society;
 - production – being able to contribute to society, whether through paid or unpaid work;
 - social interaction – having access to emotional support, being able to socialise with friends, having avenues for cultural expression;
 - political engagement – experiencing a degree of individual autonomy, being able to take collective action, having a say in local or national decision making.
- Social exclusion is a matter of degree, rather than a dichotomy between 'us' and 'them'.
- Complex chains of cause and effect lead to social exclusion. The causes of social exclusion operate at many levels: individual personality, family background, neighbourhood or peer group effects, the local economy and services, national policy and economic systems, and international and global trends.

Given the breadth of the term social exclusion, it is difficult to quantify how many people in the UK are affected. Research has indicated that:

- Experiencing exclusion in one respect is associated with an increased likelihood of experiencing exclusion in other respects, either simultaneously or at some point in the future.
- There is no evidence of a fixed 'stock' of socially excluded individuals, cut off from mainstream society over the long term (sometimes referred to as an underclass). Rather, individuals move from being more to less excluded, and vice versa, over time.
- Risk factors include having had a disadvantaged childhood, having low or no educational qualifications, being in poor health, living on a low income, having inadequate housing and being a member of a group which is discriminated against.

1.4.3 Characteristics of social exclusion

In order to understand social exclusion in the courts it is important to be aware of the wider context of people's lives and the ways that different aspects may impact on their experience of court. The next sections try to highlight some characteristics of socially excluded lives and consider their potential impact. However it is important not to perceive socially excluded populations as a homogenous 'underclass' with a wholly alternative set of norms, values and behaviours from those of mainstream society. Whilst some commentators attempt to paint this picture, there is no evidence for it. The aim of this chapter is rather to alert judges to some of what *may* occur in court.

Low income

The realities and practicalities of life on a low income can be very hard for many people. Attempting to 'make ends meet' through a combination of the benefit system and low paid, inflexible and informal work is challenging. Reliance on benefit system rigidities and bureaucracies create great pressures especially when moving into and out of employment. For some, so-called 'poverty traps' make the move into work a very difficult one to take; for others, late payments or over-payments – later claimed back by the benefit office – create financial pressures with severe knock-on effects. Many people on low incomes, whether in the formal or informal labour market, are paid by the hour and do not receive the full range of employment benefits, even if they are entitled to them. They lack the flexibility in their work to maintain their income while dealing with emergencies whether relating to children, illness, a court appearance or anything else. Financial exclusion hits hardest when there is a shortfall of income or people need to meet one-off costs for emergencies and important goods and services. Many people struggle to open bank accounts, secure loans at reasonable interest or take out insurance

policies, and are reliant on very high-interest lenders, both high-street and loan sharks. For many parents the child support system is an additional source of great financial difficulties.

Poverty as it affects cases appearing in the county court is treated in more detail in section 1.4.6 later.

Lack of choice and control

Socially excluded people have a significant amount of contact with bureaucracies, officials and the state apparatus. Benefit workers, housing officers, community workers, social workers, health visitors, probation officers and advice workers are amongst the many people who some socially excluded individuals come across on a weekly or even daily basis, on top of teachers, the police and others. Some of these relationships can be positive, but the choice, agency and control taken for granted by people with resources are missing. Socially-excluded people are reliant on this array of individuals who evaluate, judge and consequently sanction (or censure) many aspects of their lives.

Family life

A lack of family stability is common amongst many socially excluded groups. Whilst less settled family lives are widespread across society, they are more frequently found and often more extreme amongst socially excluded populations. Amongst the prison population, 27% were in care at some point in childhood compared to 2% of the population as a whole (Social Exclusion Unit, *Reducing re-offending by ex-prisoners*, London: Crown Copyright (2002)). Very few of the prison population have ever been married; many are single parents, both women living with their children and men who are not. This is one element of the social isolation that many socially excluded people experience, and consequently lack the protection from, that those with more settled family lives may not experience. This, alongside the strains of managing on a low income, and the lack of control over one's life, may all contribute to the greater anxiety, stress and depression which is found among socially excluded people.

Education

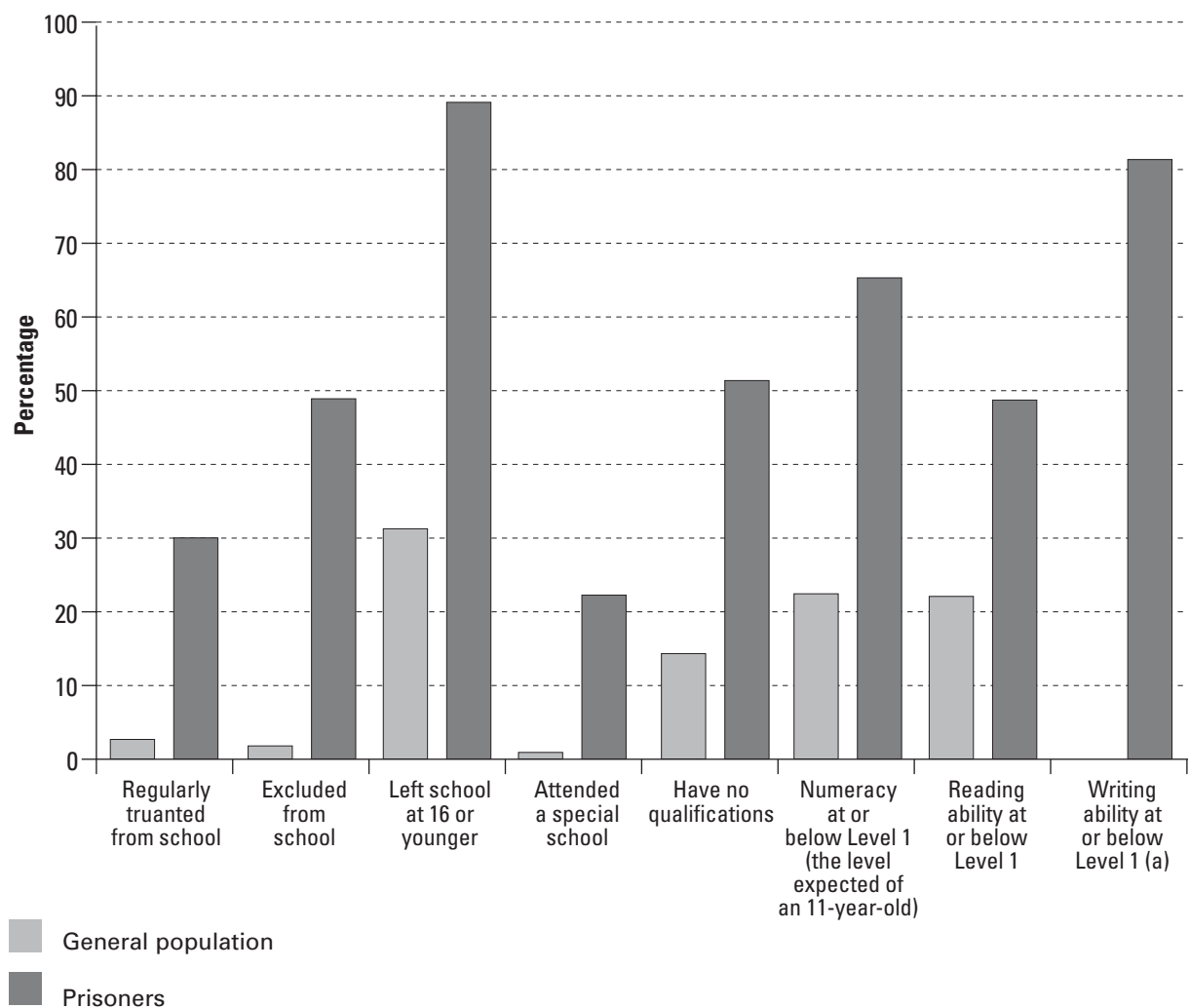
The lack of a good education is a characteristic strongly associated with social exclusion; a large proportion of the UK population continues to have very low literacy levels. According to the Literacy Trust 'eight million people are so poor at reading and writing that they cannot cope with the demands of modern life'. This feeds into very low education levels amongst the prison population in comparison to the general population, as shown in Figure 1. As well as the significant effect lack of education has on the ability to get decently paid work and to manage in a society that requires certain levels of functional literacy, this may be one of the factors that contributes to low levels of 'perceived self-efficacy' – a lack of belief in one's own ability to achieve a desired

outcome. This has been shown to have a major impact on the choice, effectiveness and persistence of people’s behaviours across a range of settings, and has been shown to be markedly lower amongst many people who might be described as socially excluded.

Discrimination

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

Figure 1 Education and the Prison Population



Source: Social Exclusion Unit, *Reducing re-offending by ex-prisoners*, London: Crown Copyright (2002).
 (a) No data for general population.

1.4.4 Social exclusion and the court

It is beyond the scope of this chapter to engage with the issues of how all of these factors are implicated in bringing individuals to court or to discuss how and whether any of these represent reasons for mitigation in any circumstances. However, their implications for the actual court process are substantial. In essence, it is necessary to understand the different educational and social norms that can be the experience of socially excluded people. Norms, rules and formalities of the court in connection with aspects of language, dress, communication, procedure and behaviour may be not be known, understood or shared by everyone; knowledge and skills should not be assumed. Sensitivity is required to both avoid prejudice and allow the individual the best opportunity to make their case.

- 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 their financial situation, or needing to pick their children up from school yet unable to pay for or rely on help from others.
- Judges and the court process may be seen as just another in the long list of individuals and authorities getting involved with someone’s life. This can have many implications, but could result in immense frustration leading to anger for some individuals. Judges need to understand that such a situation is not borne out of a lack of respect for the law, but out of the helplessness stemming from lack of choice and control.
- Research has shown that many people find courts intimidating places and this can be exacerbated by aspects of court such as dress. This may be especially so for people who experience social exclusion and who may lack confidence in such an environment. 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 will affect the presentation of their case in court.
- Where paper work has been provided by the court or claimant that an individual should have seen prior to, or during, the court appearance, it cannot be assumed that the individual is able to understand, even if English appears to be their first language.
- Language problems may not be confined to the written word. Explanations or comments from lawyers and judges, especially if using legalistic language, may not be properly understood. Individuals may not be used to expressing themselves

publicly or with strangers, and may struggle to get their point across. All of this may lead to miscommunication, discussion at cross purposes, frustration and annoyance for all parties. It is important that everything said is understood on all sides.

- People may come to court not really understanding why they have been summoned. They may well have no clear idea of their rights. A process which does not ensure that these preconditions have been met will be essentially prejudicial. For example, if a free advocacy service exists, and the individual comes into court alone, have they understood that the service was available and free, and rejected it, or have they not been sufficiently made aware of its availability?

1.4.5 Decisions of the court or tribunal

There are cases where it is necessary or desirable for individuals who have been convicted of a crime to be sent to prison and excluded from society. Sentencing may have other objectives, such as punishment, deterrence or redress for the injured party. Whatever the intention, it is important to consider the impact sentencing may have on the social exclusion of the offender and on others.

Custodial sentences

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

Community sentences and treatment orders

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

Financial penalties

Self-evidently, the impact of a £100 fine is greater for someone whose weekly income is £60 than for someone whose weekly income is £600. The majority of people on low incomes have no savings or access to cheap credit. Attempting to pay fines, legal costs or compensation from limited resources can result in problematic levels of debt, a failure to meet other financial commitments such as rent (resulting in a risk of homelessness), utility bills (with the attendant risk of disconnection), or child support payments (increasing child poverty). Payment may also create pressure to acquire resources by illegal means. Financial hardship is likely to affect not only the offender but also any children or other dependants.

Possession orders

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

Impact on citizenship

Research has indicated that the majority of people share similar fundamental views about justice and many of those who have committed an offence believe it is right that they should be punished. However, this belief in the justice system depends on a perception of having been fairly treated. As discussed in the previous section, this requires that the process is perceived to be fair and transparent. It also requires that the defendant feels they have been judged fairly and that the decision is proportionate. There may be a predisposition to feel unfairly treated and misunderstood among some people at risk of social exclusion, since this is often their experience of dealings with authority in the past. Judges may therefore need to explain their decisions more fully and more carefully, and show that they have taken into account the context of the offence. Remarks which demonstrate a lack of understanding of the circumstances of the defendant are not an effective way to admonish or prevent recurrences of the offence, but serve only to further entrench alienation from authority.

The argument in this section has not been that people at risk of social exclusion should be treated more leniently than others, but that, where possible, sentences should take into account the actual likely impact on an individual's life chances and the lives of any dependants, given the current circumstances of all affected. Both immediate and longer-term effects need to be considered.

1.4.6 Poverty and the county courts

The jurisdiction of the county courts touches on key aspects of ordinary people's lives: family disputes, money claims, problems about homes and local social disputes (e.g. neighbour nuisance and anti-social behaviour). These tend to be the things that 'really matter' to ordinary people.

This broad jurisdiction renders the county court a good 'barometer' of the strength or otherwise of the local economy. When increasing unemployment and other social changes cause financial problems for individuals locally, the number of claims brought in the local county court will increase. (The reverse is also true.) It is when the county courts are at their busiest, that it is almost commonplace to hear litigants (especially defendants) explaining to the judges that they 'can't afford to pay [the claimant]' or are just 'too poor' or otherwise 'can't cope'. This brings the county court judiciary into direct contact with those who are, at any particular time, among the poorest in the country.

Jan Luba QC in a lecture to the JSB's *Civil Court Induction Course*

The work in the county court

The volume and subject-matter of county court business is reported annually in judicial statistics. The main business lies in assisting unpaid creditors to recover monies from debtors:

- Nearly 86% of all the claims issued in 2002 were money claims and of the remainder, 85% were possession actions (most of which were triggered by non-payment of monies for rent or mortgage instalments).
- Over a third of the claims issued are for less than £1,000.
- About half of default money claims (i.e. 650,000) are issued by the Claims Production Centre in Northampton by 'corporate-litigators' – banks, credit and store card companies, and utility companies.
- Judges seldom see these debtors as most of this work is conducted by the administrative staff (or by district judges as 'box work') and most judgments are entered in default of any defence.
- The most commonly used instrument of enforcement is the warrant for execution against goods (over 1,000 distraints take place every working day).

Those cases that judges see are often the most intractable or difficult ones in which the person in default 'can't pay' (as distinct from 'won't pay') and in consequence faces a serious sanction – such as the loss of a home.

Key facts (2001–02 unless stated)

Income

- The most commonly used threshold of low income is 60% of median income. In 2001–02, before deducting housing costs, this equated to £187 per week for a couple with no children, £114 for a single person, £273 for a couple with two children and £200 for a lone parent with two children.
- 12.5 million people live on incomes below this income threshold.

Child poverty

- 2 million children live in workless households.
- 3.8 million children live in households below 60% of median income.

Work

- In 2003, there were 3.5 million people who wanted to be in paid work but were not.
- The number of long-term workless households has been consistently above 2 million since 1995 and shows no signs of falling.
- Nearly a half of all lone parents do not have paid work.

Low pay

- 1.25 million adults aged 22 to retirement were paid less than £4.50 per hour.

Source: www.poverty.org.uk

1.4.7 The scale of poverty in Britain

The best measures of 'poverty' compare the circumstances of the poorest with the circumstances of the population as a whole. Most recently this has been done by comparing:

- actual household income to average household income (official figures are published annually in *Households Below Average Incomes*); or
- household ownership of possessions with the possessions owned by the average household (see the work of the Joseph Rowntree Foundation).

On these indicators about 25% of the population could be described as 'poor' – see www.poverty.org.uk.

The benefits system

A weekly income is available to most people through *state benefits* which fall into three general categories:

1. *contributory benefits* – depend upon a qualifying contributions record;
2. *non-contributory benefits* – can be claimed if qualifying conditions are satisfied;
3. *welfare benefits* – payable if the claimant satisfies a means test.

Benefits may also be classified according to their purpose:

- some provide a replacement for earnings, such as the retirement pension for older people and contribution-based *jobseeker's allowance* (previously *unemployment benefit*) and incapacity benefit for those of working age;
- others provide an income for people whose ability to work is restricted due to disability (e.g. *severe disablement allowance* and *invalid care allowance*) or to meet the extra cost of disability (e.g. *disability living allowance* and *attendance allowance*);
- specific needs are dealt with by, for example, *maternity benefits* and *child benefits*;
- means-tested benefits are used as a top-up to other benefits and income so as to ensure that no-one falls below a particular level which may depend upon a crude assessment of needs.

Most of these benefits are now taxable for those whose income reaches the tax threshold. In one sense, there is no 'poverty' because means-tested benefits provide a 'baseline' of a minimum subsistence income below which no-one (with certain exceptions) should fall.

Means-tested benefits

The main 'safety net' means-tested benefit is now called:

- *Income Support* – for those not in full-time work; or
- income-based *Job Seeker's Allowance* (JSA) – for the unemployed seeking work. (Up-to-date figures can be found in the *Welfare Benefits and Tax Credits Handbook*, published by the Child Poverty Action Group – further details at www.cpag.org.uk.)

This provides a weekly cash sum to bring the financial resources of the household up to a minimum level and operates as a passport to some other benefits. Entitlement also qualifies the claimant and family members to help with NHS costs such as free prescriptions, dental treatment and eye tests. The benefit is assessed on the needs of a family living in the same household, including the claimant and any spouse or partner with whom the claimant is living 'as man and wife', and any dependent children. Either partner may claim.

- Savings or other capital in excess of (generally) £3,000 are deemed to produce an income and thus reduce the weekly amount; and capital in excess of a higher sum eliminates entitlement.
- There are different rates for single persons, couples and those with children and modest extra weekly amounts are added in cases of old age, disability and caring for others.
- The weekly income figures are intended to allow for purchase of all of the following: food; domestic fuel; cleaning; repair and replacement of clothing and footwear; normal travel costs; weekly laundry costs; miscellaneous household expenses such as toilet articles, cleaning materials, window cleaning; replacement of small household goods (e.g. crockery, cutlery, cooking utensils, light bulbs); and leisure and amenity items such as television licence, newspapers, confectionery and cigarettes.
- There is exemption from council tax but from the weekly benefit the claimant must pay their own water rates and budget for items of one-off expenditure (e.g. replacement furniture).

- Some extra may be paid to meet mortgage interest (unlikely for a second mortgage) but rent and other housing costs will usually be met in full by housing benefit.

Approximately 5 million Income Support/JSA claims are in payment to personal claimants at any one time. Dependent partners and children account for a further 3–5 million people.

Minimum income for those working

For those in work, protection against absolute poverty is provided by:

- the minimum wage (currently £4.20 per hour for adults); and
- a system of tax credits for disabled earners or those caring for children.

The objective is to keep the pay packet above the level that the employee experiences poverty.

1.4.8 Specific jurisdictions

When dealing with debt and housing cases in the county court the judge may have to deal with the 'poverty' of the defendant.

Debt

Around 1.5 million money claims are brought annually in the county court. Where liability to pay is established, the judge will be dealing with a defendant falling into one of four broad groups:

1. 'can't pay';
2. 'won't pay';
3. 'won't play' (i.e. will not respond to orders or otherwise participate in the court process); and
4. 'can't cope' (perhaps due to infirmity or mental or physical disability).

The court has ample powers to deal with the second and third groups. But what should be the approach to ensuring payment (of an amount lawfully due) when dealing with a defendant falling into the first or fourth group (or sometimes both)?

- Enquire if the defendant is receiving all potential capital and income with which to satisfy any indebtedness.
- If the problem is low-paid employment, the litigant may maximise their income through successfully claiming Working Families' Tax Credit or Disabled Person's Tax Credit (if the conditions for either are satisfied). The average tax credit awarded is worth over £70 per week.
- If the problem is non-employment, the litigant may be able to maximise their income from social security benefits, either by claiming unclaimed benefits or by having a re-assessment of any current benefits. They may not be presently getting the correct benefit or the correct amount. Arrears may be due and many benefits can be backdated or the benefit enhanced.

It may be best to adjourn proceedings (in appropriate cases) and direct the debtor to an appropriate source of advice and assistance.

Housing

Housing cases are generally possession claims and most of these arise from failure to pay money due – either mortgage instalments or rent. They are usually listed before the District Judge with very little time allocated to each case and reach the Circuit Judge only on appeal. (As to the grounds upon which the District Judge's decision may be reconsidered see CPR Part 52 Appeals.)

Mortgage repossession claims

- As over 70% of households live in owner-occupied homes, mortgage possession claims provide a pretty strong guide to local economic prosperity. Over 100,000 possession orders were made in 1990 but the figure for 2002 was less than 40,000 and more than half of those were 'suspended orders'. The number of actual repossessions by lenders is still running at over 20,000 per annum.
- The welfare state provides some assistance for homeowners who (usually through change of circumstances) find themselves unable to pay. Income Support/JSA can help with the mortgage interest and payments are made direct to the mortgage lender but the emphasis in recent years has been on mortgage borrowers taking out their own payment protection insurance. Accordingly, mortgages taken out from October 1995 attract no assistance for the first 39 weeks after claim (26 weeks for certain cases). Mortgages taken out before that date qualify for some help as early as 8 weeks.

- In a 'can't pay the mortgage' case it may be appropriate to adjourn the proceedings or suspend any order for possession on terms under section 36 of the Administration of Justice Act 1970. Where the non-payment is a temporary problem, there is a presumption in favour of the suspension of any possession order if the debtor can clear the arrears over the whole remaining term and can make the payments currently falling due: *Cheltenham & Gloucester Building Society v Norgan* [1996] 1 WLR 343, CA.
- Where the problems will not be so quickly resolved and the borrower plans to sell in order to clear the arrears, the court has a discretion to adjourn pending that sale: *Bristol & West Building Society v Ellis* (1996) 29 Housing Law Reports 282, CA.
- If the original loan was for less than £25,000 and the Consumer Credit Act 1974 applies, it may be possible to make a 'time order' under section 129, re-scheduling the whole debt due: *Southern & District Finance v Barnes* (1995) 27 Housing Law Reports 691, CA.
- Other ways of reducing the debt are explained in simple terms in *Rights Guide for Homeowners* available from the Child Poverty Action Group. More immediate help for the borrower is available from National Debtline by telephoning 0121 359 8501.

Public sector tenancy possession proceedings

- Over 2 million council and housing association tenants are in significant rent arrears at any one time. 'Rent arrears' is by far the most common ground relied upon in over 150,000 possession actions brought by such social landlords each year.
- The court must first be satisfied that the correct statutory procedures have been followed and that the conditions for possession to be granted are satisfied (Housing Act 1985 for secure tenants, Housing Act 1988 for assured tenants).
- The further restriction (which applies in most but not all arrears cases) that the court cannot grant possession except where to do so would be reasonable in 'all the circumstances', requires a consideration of the role of welfare benefits. Some judicial knowledge of the relevant benefit system will be expected:
 - *Housing Benefit* can pay up to 100% of rent (by 'rebate' to council tenants and as a cash allowance to housing association tenants although it can be paid direct) and can be backdated for 12 months.
 - *Income Support/JSA* is intended to cover other housing costs (e.g. service charges). The Benefits Agency can deduct from Income Support modest weekly amounts (currently £2.70 per week) for arrears of housing costs (such as rent) and pay them direct to the council or housing association landlord.

- Where available, the statutory power to adjourn the proceedings on terms (or, if a possession order has to be made, suspend the order on terms) ensures that dispossession need never result from temporary financial difficulty alone.
- An order for possession suspended over a long period can create difficulties (not least that any breach of the terms of the suspension will end the tenancy even if the defaulting tenant is not immediately evicted). In appropriate cases, the court can adjourn on terms: *Thompson v Elmbridge BC* (1987) 19 Housing Law Reports 536, CA.

Private sector tenancy possession proceedings

- About 20,000 private sector possession claims are started each year. In 2002 there were over 8,000 outright possession orders.
- Many claims involve an unanswerable entitlement to possession (where the defendant has no security of tenure at all) or are based on mandatory grounds which leave the judge very limited scope to delay repossession.
- The statutory criteria for the consideration of possession proceedings based on a discretionary ground for arrears of rent are similar to those for public sector tenancies.

Homelessness

Disputed homelessness decisions made by local authorities now come to the county court under section 204 of the Housing Act 1996. Some knowledge of the circumstances of poorer appellants, and the benefit system, will be needed in those cases which raise the issue whether there has been 'intentional homelessness' arising from previous failure to pay for housing.

1.4.9 Representation, advice and assistance

An objective of the system of public funding for legal services now contained in the Access to Justice Act 1999 is to ensure that those who cannot afford to pay for legal services nevertheless get the advice, assistance and representation that they need. The Community Legal Service (CLS) managed by the Legal Services Commission (LSC) should ensure that in every geographic area the poorest can have access to the appropriate level of legal help. A system of quality marks is intended to ensure good standards of service by CLS providers. The help available includes the following.

Legal help

Initial *Legal Help* is available from CLS contracted providers (solicitors and voluntary organisations) and can cover advice and assistance in respect of (almost) any matter of

law. The individual pays no contribution towards the cost if eligible by a means test which assesses income and disposable capital. There is automatic eligibility for those on Income Support or income-based Job Seeker's Allowance.

Help at court

Where proceedings have started and the CLS contractor is available at court to provide representation, but is not on the court record, the service is called *Help at Court*. If the litigant would probably qualify for *Legal Help* and has not yet received it, the judge could consider adjourning or postponing any hearing to allow such advice and other assistance to be obtained. Where the justice of the matter requires that the case proceeds, the judge could invite a CLS contract-holding solicitor (or other contract-holder) to assist the unassisted litigant under the *Help at Court* scheme:

As the application for *Legal Help* is made to the solicitor and not to the Commission, any solicitor on the court premises with a relevant contract can be asked to assist. However, there is no need for the solicitor who is to be asked to provide the *Help at Court* to be actually at court when the request is made. It will be open to the court to telephone any local solicitors with a *General Civil Contract* and ask if anyone is willing to attend.

ABWOR Granted within the precincts of the court [2000] 29 Focus 14.

Civil legal aid

Help with representation in the proceedings is available from any franchise-holding solicitor or not-for-profit agency under a *Certificate for Legal Representation* (subject to possible contributions and the statutory charge). There is a means test but automatic, and free, publicly funded representation is available to those on Income Support/income-based Job Seeker's Allowance subject to merits. If unsure whether the individual might be eligible, the free leaflet *A Practical Guide to Community Legal Service Funding* by the Legal Services Commission includes a self-assessment sheet.

If it is clear to the judge that what is needed is more than 'help', and it is most likely the defendant will need full representation, then the matter will have to be adjourned. For help in selecting an appropriate local solicitor the litigant can be directed to the Court Office where the *Community Legal Service Directory* is kept. That office can also usually give directions to the local Citizens Advice or Law Centre (if there is one).

A judge faced with a significant list of cases should always check with the court staff, or another judge, whether there is a court-based advice centre or a duty representation scheme to which unrepresented parties can be directed.

Chapter 1.5

Minority ethnic communities

1.5.1 Introduction

This chapter sets the context for subsequent chapters by providing some basic statistics about the minority ethnic populations in England and Wales today. However, while it focuses on minority ethnic communities it is important to consider the wider diversity framework so that good practice in one area can be developed in other areas.

Social diversity includes differences in linguistic, religious and cultural backgrounds, as well as issues of gender, sexuality and disability. Good race relations practice is good practice in general and includes greater awareness of the personal beliefs and lifestyles of individuals.

A system that positively welcomes diversity will be more effective in achieving justice through consent. If members of minorities have confidence in the system they will be more likely to use and abide by its processes. A system attuned to diversity will more easily be adapted to meet the needs of all users.

Background

There has been a long history of migration into the UK and Black people have been settled here since the sixteenth century. Today, the UK is even more rich and diverse with people from many countries making their contribution to the country. Although the 2001 census tells us that there are large minority communities in the major cities, it also shows that there are people from minority communities living in all parts of the country.

Since the *Stephen Lawrence Inquiry* report, there has been a wider recognition that treating everyone the same is not the same thing as treating everyone fairly. People have different needs – understanding and valuing diversity makes it more likely that these needs can be met by the justice process.

Equality legislation

A body of related equality legislation provides a strong framework for meeting diverse needs, and a summary of that legislation is included in Chapter 1.6.

In November 2003, the government announced the creation of a new body which will be responsible for this body of legislation, underlining the link between equality and human rights. The Commission for Equality and Human Rights (CEHR) will bring together the Commission for Racial Equality (CRE), the Equal Opportunities Commission (EOC) and the Disability Rights Commission (DRC), and it will also be responsible for the promotion of human rights.

1.5.2 Information from the 2001 Census

The 2001 Census introduced some new ethnicity categories: Irish (as part of the White group); Asian British and Black British; and a set of mixed categories for those of mixed origins. It also asked questions about religion and migration. It provides a comprehensive picture of the population and details for each local authority area are available online from the Office for National Statistics (www.statistics.gov.uk).

UK Population

Ethnic group	Numbers	Percentage
White	54,153,898	92.1
Mixed	677,117	1.2
Asian or Asian British		
Indian	1,053,411	1.8
Pakistani	747,285	1.3
Bangladeshi	283,063	0.5
Other Asian	247,664	0.4
Black or Black British		
Caribbean	565,876	1.0
African	485,277	0.8
Other Black	97,585	0.2
Chinese	247,403	0.4
Other Ethnic Group	230,616	0.4
Total population	58,789,194	100

The minority ethnic population in 2001 was 4.6 million, 7.9% of the total UK population.

Indians are the largest minority group, followed by Pakistanis, those of mixed ethnic backgrounds, Black Caribbeans, Black Africans and Bangladeshis.

Half of all minority ethnic people used the term Asian, and a quarter used the term Black. Some 15% of the minority ethnic population use the term 'mixed', with one-third of these being White and Black Caribbean. To a certain extent, the census categories failed to identify clearly those proportions of the minority community populations who are Turkish, Greek, Arab or Iranian, for example, and who therefore had to use the terms White or 'Other'.

Population of England by percentage of each ethnic group

Ethnic group	Percentage
White	
British	86.99
Irish	1.27
Other	2.66
Mixed	
White and Black Caribbean	0.47
White and Black African	0.16
White and Asian	0.37
Other Mixed	0.31
Asian or Asian British	
Indian	2.09
Pakistani	1.44
Bangladeshi	0.56
Other Asian	0.48
Black or Black British	
Caribbean	1.14
African	0.97
Other Black	0.19
Chinese	0.45
Other ethnic group	0.44
Total minority population	9.08
Total population	49,138,831
	100

Population of Wales by percentage of each ethnic group

Ethnic group	Percentage
White	
British	95.99
Irish	0.61
Other	1.28
Mixed	
White and Black Caribbean	0.21
White and Black African	0.08
White and Asian	0.17
Other Mixed	0.15
Asian or Asian British	
Indian	0.28
Pakistani	0.29
Bangladeshi	0.19
Other Asian	0.12
Black or Black British	
Caribbean	0.09
African	0.13
Other Black	0.03
Chinese	0.22
Other ethnic group	0.18
Total minority population	2.2
Total population 2,903,085	100

- The 2001 Census shows that minority ethnic communities made up 9% of England's population, compared to 2% each for Scotland and Wales and under 1% in Northern Ireland.
- Nearly 45% of minority ethnic people live in London, where they make up 29% of the population.
- 13% of the minority ethnic population lives in the West Midlands, 8% each in the South East and North West, and 7% in Yorkshire and the Humber region.

- Areas with the smallest minority populations were the North East and the South West with only 2% each.
- 78% of Black Africans and 61% of Black Caribbeans live in London as do 54% of Bangladeshis. Other groups are more dispersed.
- White Irish people make up 1.2% of the population of England and Wales with the largest Irish population in the London Borough of Brent, which has a 6.9% Irish population. The largest group of White Other people is found in Kensington and Chelsea where they form 25.3% of the population.
- The largest Bangladeshi population is found in the London Borough of Tower Hamlets where they form 33.4% of the population. Black Caribbeans form more than 10% of the populations of Lewisham, Lambeth, Brent and Hackney, and more 10% of the populations of Southwark, Newham, Lambeth and Hackney describe themselves as Black African.

1.5.3 Country of birth

- 87.4% of people living in England were born in England and a further 3.2% were born in the UK.
- Only 72.9% of Londoners were born in the UK.
- 97% of the population of Wales was born in the UK, 75% of them being born in Wales.
- 1.38% of the population of England and Wales were born in other EU countries and 6.63% were born outside the EU.
- 0.91% were born in the Republic of Ireland.

1.5.4 Age

Minority ethnic groups have a younger age structure than the White population, reflecting past migration patterns to a large extent.

55%	of the mixed group	were under 16
38%	of the Bangladeshi group	were under 16
19%	of the White group	were under 16

16%	of the White group	were over 65
9%	of Black Caribbeans	were over 65

1.5.5 Households

Asian households tended to be larger than those of other ethnic groups. Bangladeshi households had on average 4.7 people, Pakistani households 4.2 people, and Indians 3.3 people. Black Caribbean, Other Black and White households have about 2.3 people per house.

1.5.6 Social and economic findings

Income

- People from minority ethnic groups were more likely than White people to live in low-income households.
- 60% of Pakistanis and Bangladeshis, and 49% of Black non-Caribbean groups were living in low income housing.
- Minority ethnic groups have lower levels of household income than the White population.
- Pakistani and Bangladeshi households were heavily reliant on social security benefits and least likely to obtain income from earnings, reflecting their higher unemployment rate; they were also more reliant on earnings from self-employment than any other group.

Unemployment and the labour market

Unemployment rates were:

- 5% for White men;
- 7% for Indian men;
- 20% for Bangladeshi men;
- between two to three times higher than White men for all other ethnic groups.

Other unemployment facts are as follows:

- Unemployment among men under 25 was higher for all ethnic groups.
- 40% of young Bangladeshi men were unemployed.
- Between 25% to 31% of young Black African men, Pakistanis, Black Caribbeans and young men from mixed backgrounds were unemployed.
- 12% of young White men were unemployed.

- 4% of White women and 7% of Indian women were unemployed.
- 24% of Bangladeshi women were unemployed.
- From 9% to 16% of women in other ethnic minority grounds were unemployed.
- 22% of Pakistani and 19% of Chinese people were self-employed compared to one in ten White and under one in ten Black people.
- Over half of self-employed Pakistani people worked in the transport and communication industries compared to 7% overall.
- 71% of Chinese people worked in distribution, hotel and restaurant sectors compared to an average of 18% working in these areas.

A report from the Prime Minister's Strategy Unit (*Ethnic Minorities and the Labour Market*, March 2003), makes these points:

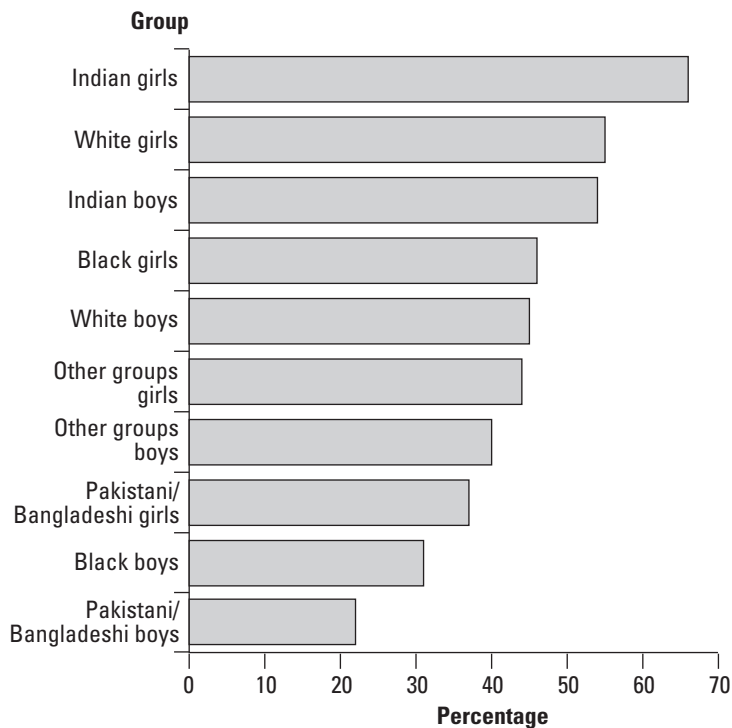
- Britain's ethnic minority population is increasingly important in the labour market.
- Indian and Chinese people are doing well and often out-performing White people in schools and in the labour market.
- Pakistanis, Bangladeshis and Black Caribbeans experience significantly higher unemployment and lower earnings than White people.
- All ethnic minority groups, even those doing relatively well, are not doing as well as they should be given their education and other characteristics.

The report showed that:

...economic integration is a vital component of broader social and civil integration. Action to improve the achievement of ethnic minorities can offer a double dividend of higher economic growth and stronger social cohesion.

Education

The bar chart below shows the proportion of boys and girls aged 16 who achieved five or more GCSEs at grades A–C in England and Wales in 1999.



School exclusions

- Black pupils were more likely to be permanently excluded from school than any other group.
- 40 in every 10,000 children in the 'Other Black' group and 38 in every 10,000 of Black Caribbean children were excluded, compared to 13 in every 10,000 White children and three in every 10,000 Indian children.

Higher qualifications

- Chinese, Indian, Black African and people in the Other Asian group were more likely than White people to have degrees or equivalent.
- Black Caribbean men were least likely to have degrees and among women, Pakistanis and Bangladeshis were least likely.

No qualifications

- 48% of Bangladeshi women and 40% of Bangladeshi men had no qualifications.
- 40% of Pakistani women and 27% of Pakistani men had no qualifications.

Health

- Asians were more likely than the general population to describe their health as bad or very bad.
- Bangladeshis had risk ratios of 3.9 for men and 3.3 for women compared to 1 for the general population.
- The risk ratio for Pakistani men was 2.9 and for women 3.6.
- Indian men had a risk ratio of 1.6 and women 2.6.
- Black Caribbean women had a risk ratio of 1.8.
- There was a higher risk of diabetes among all minority groups.

Migration

According to the Office for National Statistics, the first large-scale migration of people of minority ethnic origin was from the Caribbean soon after the end of World War Two. In the 1960s people arrived from India and Pakistan, in the 1970s people of African-Asian descent arrived as refugees from Uganda. Most Chinese and Bangladeshi people arrived during the 1980s and many Black Africans arrived in the 1980s and 1990s.

In 2001, 457,200 people migrated in to England and Wales and 279,800 migrated out. Of those migrating in, 18.2% were from other European Union countries, 41% were from Commonwealth countries and 60.6% were from other countries.

In December 2002, the Home Office published a summary of new research which suggests that migrants to the UK are making a strong and positive contribution to the economy (*Migrants in the UK, their characteristics and labour market outcomes and impacts*, Home Office Research Development and Statistics, Occasional Paper no 82, December 2002). Despite popular media mythology they do not take jobs away but rather bring a diversity of skills to the UK labour market. They do not increase unemployment among the domestic population.

Migrants make up about 8% of the UK population, coming from the EU (23%), Indian sub-continent (20%) Africa (19%) and the Americas (11%). Many have lived for many years in the UK and 47% have taken British nationality. However one-third arrived in the last ten years, with an increase in people coming from Eastern Europe.

1.5.7 Refugees and asylum seekers

Among those who migrate to the UK there are a growing number of refugees and asylum seekers who may come into contact with the administration of justice in various ways: as part of the adjudication process on their case; as claimants in civil or family cases; and, increasingly, as victims of crime.

- In 2002, there were 84,130 applications for asylum. The main countries of origin were Iraq, Zimbabwe, Afghanistan, Somalia and China. 35% of applications were from African nationals, 25% from Asian nationals, 22% from the Middle East and 16% from Europe. About 42% resulted in grants of asylum, exceptional leave to remain or allowed appeals.
- In 2003, there were 49,370 applications for asylum.

1.5.8 Roma and Travellers

In October 2003, the CRE launched a consultation on a new strategy for gypsies and travellers. The facts below are derived from this document.

Romany Gypsies and Irish Travellers are currently recognised as racial groups under the Race Relations Act 1976. There are other groups of travellers with ethnic or national origins that could come within the definition of a racial group.

There are no official figures on the size of this population, but according to the CRE various sources have estimated it as around 300,000. There is very little systematic monitoring of key areas that affect Roma and Travellers which makes it difficult to analyse their needs and experiences. At the same time, many gypsies and travellers have deep rooted fears about revealing their ethnic identity. The CRE has noted:

Hostile and racist attitudes towards Gypsies and Travellers are common amongst the general public. In a recent representative poll conducted by MORI, more than one third of respondents - which equates to about 14 million adults in England - admitted being prejudiced against Gypsies and Travellers.

Gypsies and Travellers Strategy, CRE (2002)

Other data revealed that the most disadvantaged group within the education system are Roma Gypsy children and children of Travellers of Irish Heritage (see *Raising the attainment of ethnic minority pupils*, Ofsted (1999)). For those who are enrolled in schools, the average attendance rate for Traveller pupils is around 75%, well below the national average and the lowest attendance profile of any minority ethnic group (see *Provision and support for Traveller pupils*, Ofsted (2003)).

In terms of poor healthcare, one indicator is that the mortality rate of Traveller children up to the age of ten has been found to be ten times that for the population as a whole. Only 10% of the Traveller population are over 40 years of age and only 1% are aged over 65.

The housing needs of Travellers and Roma Gypsies can be significantly different from that of the settled community. Research indicates that local authorities are reluctant to provide sites for fear of attracting more Travellers to their area. As a result there are an estimated 3,000 unauthorised sites (see Neier, *Local Authority Gypsy/Traveller Sites in England*, Office of the Deputy Prime Minister (2003)). Travellers come within the statutory definition of homelessness if they are without an authorised place to stop. Roma Gypsies and Travellers without permanent sites face considerable barriers in accessing health and education services, which is a major factor in their over-representation in nearly all indices of deprivation and social exclusion. Moreover, many Travellers still have extremely limited access to basic amenities such as running water, electricity and sanitation, including some of those living on serviced sites (see *Final Report of the Promoting Social Inclusion Working Group*, Belfast (2002) at www.newtsnni.gov.uk).

Criminal justice concerns include:

- high numbers of racist incidents;
- low level of trust in police handling of Gypsy and Traveller cases;
- concerns about sentencing and stop and search;
- disproportionate rates of deaths in custody;
- use of powers of eviction and lack of sensitivity in police handling of these cases;
- a tendency to label all Gypsies and Travellers as criminals.

1.5.9 Conclusion

This section gives a brief snapshot of the population of England and Wales. The 2001 Census and other National Statistics indicate that there remain higher levels of unemployment and social and economic disadvantage among minority ethnic communities.

There is no doubt that discrimination in the wider community plays a strong part in perpetuating this disadvantage. Social and economic factors can play a part in shaping the contact that minority communities will have with the justice system whether as victims, claimants, suspects or professional colleagues. As judges, we need to keep these factors in mind when managing our courts.

However there are also many more positive indicators, such as the recent Home Office research on the contribution made over many years to the economy and culture by those who bring their skills to the country, and the success of some groups at levels of higher education, the growth of minority-owned businesses and participation in democratic structures.

1.5.10 Sources and further information

Census 2001, *Key Statistics for local authorities in England and Wales*, Office for National Statistics (2003).

Population Trends, Office for National Statistics, Summer 2003, No 112.

Control of Immigration: statistics UK 2002, Office for National Statistics.

Asylum Statistics, UN (2002).

Chapter 1.6

Equality law

Key points

- Anti-discrimination law is a dynamic area of law and is changing rapidly.
- In the legislation, the scope of protection against discrimination varies according to the ground protected.
- 'Discrimination' is, broadly speaking, committed in three circumstances: that is by way of 'direct' discrimination; 'indirect' discrimination and 'victimisation'.
- There are a range of obligations on public authorities to address discrimination and equality of opportunity, which are set out in the various statutory frameworks.

1.6.1 Background

In Great Britain there is no freestanding equality guarantee at constitutional level or otherwise. Instead, discrimination is regulated by a series of legislative provisions that address discrimination on particular grounds. It would be impossible to set out all of the detail of the legislative provisions governing discrimination because they are so numerous.

A recent study concluded that: 'the first and most obvious defect of the present framework is that there is *too much law*. At present, there are no less than 30 relevant Acts, 38 Statutory Instruments, 11 Codes of Practice, and 12 EC Directives and Recommendations directly relevant to discrimination.' (*Equality: a New Framework*, Report of the Independent Review of the Enforcement of UK Anti-discrimination Legislation, Hepple QC, Coussey and Choudhury, the University of Cambridge Centre for Public Law and Judge Institute of Management Studies, Hart (2000)). To this can be added a new batch of laws, amongst other things, to protect against discrimination on previously unprotected grounds including sexual orientation and religion and belief.

European Community law

In addition to the domestic law, there is a vast amount of European Community law, both enactments and case law, which provide a relevant context for determining the scope of UK domestic law and its proper interpretation, as well as providing for directly-binding law in its own right. A comprehensive survey of European Community law insofar as it

addresses discrimination is outside the scope of this chapter, but some mention is made of it below where it is relevant to the main statutes described.

Constant change in law

It should always be borne in mind that anti-discrimination law is a dynamic area of law and is changing rapidly. The law as it is described below is accurate as at January 2004 and where changes are imminent and known they are mentioned.

1.6.2 Statutory Commissions

In addition to the regulation of discrimination on prohibited grounds as described below, three statutory Commissions have been established to address discrimination on particular grounds. These are the Commission for Racial Equality (CRE), the Equal Opportunities Commission (EOC) and the Disability Rights Commission (DRC). These are statutory bodies whose powers and duties, in very broad terms, are to work towards the elimination of discrimination and to promote equality of opportunity on the grounds of race, sex and disability respectively. They all have powers to fund litigation and their roles may on occasion become prominent in individual litigation supported by them.

There are certain procedural issues that may arise where the Commissions are involved: for example, in the case of complaints of race discrimination the limitation period is extended where an application for assistance has been made to the CRE (section 68(3) and section 66(4) of the Race Relations Act 1976). The Commissions also have power to take enforcement action under their own names in certain circumstances.

Proposed new commission

There are no Commissions or other statutory bodies established to deal with discrimination on the grounds of sexual orientation or religion or belief, at the time of writing. However, the government has announced the creation of a new Commission – the Commission for Equality and Human Rights (CEHR) – which will address equality and non-discrimination across all strands and will have a human rights remit.

1.6.3 Legislation regulating discrimination

Set out below are the main legislative provisions regulating discrimination. In broad terms, discrimination on prohibited grounds is outlawed in certain defined circumstances by each of the legislative schemes set out below. Importantly the scope of protection against discrimination varies according to the ground protected. Thus discrimination on racial grounds is outlawed in a very wide range of circumstances including in

employment, education, the provision of goods, services and facilities, and in housing, and by public bodies in the exercising of their public functions. Discrimination on the grounds of sexual orientation, on the other hand, is outlawed only in the context of employment, vocational training and related areas.

Definitions and terminology

The statutory frameworks created for regulating discrimination contain a self-contained set of definitions describing the prohibited grounds ('racial grounds', 'sexual orientation', etc.) and defining 'discrimination' for the purposes of its provisions. 'Discrimination' is, broadly speaking, committed in three circumstances:

1. by way of 'direct' discrimination;
2. 'indirect' discrimination; and
3. 'victimisation'.

There are subtle and important differences between the way each of these concepts is defined in each of the statutory frameworks set out below. However, by way of introduction the following broad terms apply:

- 'Direct discrimination' addresses differences in treatment on prohibited grounds – a person is directly discriminated against if they are less favourably treated on the grounds of their race, sex, etc.
- 'Indirect' discrimination addresses treatment which is the same but which has an adverse effect on a person by reason of their membership of one of the protected groups. A person is indirectly discriminated against if a practice or provision is applied to them which is applied equally to others but which is such that it subjects them to a disadvantage by reason of their membership of a protected group. For example, a requirement to work full-time imposed across the whole of a work force is formally speaking the same as equal treatment but such a requirement may have an adverse impact on women who are unable to comply with a policy of full-time working because of childcare obligations. Indirect discrimination is always capable of being 'justified' and thus of being lawful, but justification must always be proved in a particular case.
- 'Victimisation' is concerned not with protecting persons against less favourable treatment on the grounds of their sex, race, etc. but is concerned with protecting any person whatever their status where they have made a complaint of discrimination or supported a claimant in a claim of discrimination.

Disability discrimination defined

Disability discrimination law provides for a more complex set of protections. 'Discrimination' is differently defined and, in particular, protection against disability discrimination also requires that positive measures must be taken to accommodate disabled persons in certain circumstances. A simple requirement of equal treatment would not advance the position of disabled persons who are often faced with obstructions to engagement in civil society by reason of the practices or physical features adopted by organisations which can effectively bar them from enjoying life on equal terms, for example the construction of stairs at the entrance to a building or the absence of a door wide enough to accommodate a wheelchair. Disability law, therefore, imposes a positive obligation in certain circumstances upon a wide range of people to make adjustments both to policies, and in a wider range of circumstances from October 2004, to premises to accommodate disabled people (see section 1.6.6).

Other obligations

There is a range of other obligations, in particular on public authorities, to address discrimination and equality of opportunity which are set out in the various statutory frameworks.

1.6.4 Sex discrimination

The Sex Discrimination Act 1975 (the SDA) regulates discrimination on the grounds of sex, marital status and gender reassignment. Discrimination on the grounds of sex – that is as between men and women – is outlawed in a wide range of circumstances. In summary, direct and indirect discrimination and victimisation is prohibited in the field of employment and related areas, vocational training, education, goods, facilities and services, housing and in relation to other premises. Discrimination against a woman because she is pregnant or breastfeeding is treated as automatic sex discrimination for the purposes of the SDA. The SDA also establishes the EOC and gives it powers to take enforcement action in certain circumstances and to support individual litigants.

The Sex Discrimination (Gender Reassignment) Regulations 1999

The SDA also regulates direct and indirect discrimination against married persons (not unmarried persons) but only in relation to employment and related fields and in vocational training. Further, by reason of an amendment made by the Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102), the SDA now prohibits direct discrimination (only) on the ground that a person intends to undergo, is undergoing or has undergone gender reassignment. Such discrimination is only outlawed, however, in the employment and related fields, in the context of vocational training and in relation to barristers. The victimisation provisions apply equally to complainants who have taken

action in relation to gender reassignment and marital status discrimination as well as sex discrimination.

European Community measures

There has always been an emphasis in European Community law on equality as between men and women. Article 2 of the Treaty of Rome identifies the tasks of the Community as including the promotion of 'equality between men and women'. The Treaty itself makes provision for the achievement of equality in pay as between men and women (Article 141). There are important Directives enacted to give effect to these objectives, including Council Directive 76/207/EEC (now revised) 'on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions'. Pursuant to its powers to legislate in the field of health and safety for workers, the Community has legislated to provide minimum protection for pregnant workers, workers who have recently given birth and workers who are breastfeeding (Council Directive 92/85/EEC). There are a range of other European Community measures which are relevant to the field of equal treatment as between men and women.

The Equal Pay Act 1970

The Equal Pay Act 1970 (the EPA) came into force in 1975 and deems into every contract of employment an 'equality clause'. Such a clause has the effect that where a woman is employed on like work with a man in the same employment, on work rated as equivalent with that of a man in the same employment or on work of equal value to that of a man in the same employment, any term of her contract which is less favourable than a term of a similar kind to the man is to be treated as modified so as not to be less favourable. In other words, it ensures equality in pay and other employment-related benefits as between men and women.

The EPA is a complex piece of legislation and there is a very significant European Community law context which has added another layer of complexity to it. It covers equal pay only in relation to sex equality (such claims in the field of race and disability are dealt with under the RRA and the DDA). Equal pay is a core European Community law objective (Article 2 and Article 141 of the Treaty) and any proper consideration of the scope of the protection would have to survey European Community case law and legislation.

The 'principle of equal pay'

An important Directive has been enacted to give effect to the European Community's objective to promote equality between men and women and equal pay. Council Directive 75/117/EEC 'on the approximation of the laws of the member states relating to the application of the principle of equal pay for men and women' provides a framework for requiring member states to introduce into their national legal systems measures to give effect to the 'principle of equal pay'.

1.6.5 Race discrimination

The Race Relations Act 1976 (the RRA) was the third of a series of statutes addressing race discrimination. The first two Acts, the Race Relations Acts 1965 and 1968, were repealed and replaced with the 1976 Act, which provided more comprehensive coverage.

Important amendments

The RRA regulates direct and indirect discrimination and victimisation in all the fields covered by the SDA. In addition, the RRA outlaws discrimination by planning authorities in the exercising of their functions and, by reason of important amendments made by the Race Relations (Amendment) Act 2000, the RRA outlaws discrimination by public authorities in the carrying out of any of their functions. The amendment introducing the provision outlawing discrimination by public authorities followed the *Stephen Lawrence Inquiry* report which recommended, amongst other things, that 'the full force of the race relations legislation should apply to all police officers' (Recommendation 11). An exemption is made in respect of 'judicial acts' (section 19C(1)). However, given the breadth of the protection it has obvious impact for the justice process, including in the administrative and other arrangements made for the purposes of hearing cases and, equally importantly, in the policing and the carrying out of Crown Prosecution Service functions, amongst other things.

Further duties on public authorities

In addition, the amended RRA imposes a duty upon public authorities listed in the Schedule to the Act (and they include most of the main public authorities) to 'have due regard to the need (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity and good relations between persons of different racial groups' in carrying out their functions. Such duty extends to bodies concerned with the administration of justice such as the Law Commission, the Council on Tribunals, various Rules Committees, the Legal Services Commission and the Law Society.

By subordinate legislation specific duties are imposed on identified public authorities (and again they include most of the main public authorities) 'for the purpose of ensuring the better performance by those persons of their' general statutory duty.

New concepts including racial 'harassment'

In addition to domestic law there is now a relevant European Community law context for determining the scope of protection against race discrimination. A new Directive has been enacted (under the European Union's new powers to enact legislation against discrimination on a wider range of grounds in consequence of Article 13 of the Treaty of Rome). Council Directive 2000/43/EC 'implementing the principle of equal treatment between persons irrespective of racial or ethnic origin' introduces new concepts of race

discrimination (including by defining racial 'harassment') and provides protection against it in a wider range of circumstances than that provided for in domestic law. The UK has given effect to that Directive by implementing Regulations: the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626).

Nationality

Community law, of course, also protects against discrimination on the grounds of nationality as between (only) nationals of the European Community.

1.6.6 Disability discrimination

The Disability Discrimination Act 1995 (DDA) regulates discrimination against disabled persons. It follows quite a different model to that followed by the SDA and RRA and, in particular, gives a different meaning to discrimination.

Defining disability

'Disability' and 'disabled person' are defined by the DDA itself and by subordinate legislation and a Code of Practice. It should not be assumed that conventional concepts of 'disability' match the concept provided for by the DDA. A person might be 'disabled' for the purposes of the DDA without any visible impairment. Similarly, a person may have a visible 'impairment' but not be 'disabled' for the purposes of the DDA. The DDA has attracted much criticism for its complex approach to the defining of disability and it is likely that there will be changes soon (referred to below).

Defining discrimination

As to 'discrimination', the DDA defines discrimination as 'direct' but permits a defence of justification to such discrimination, unlike the SDA and the RRA. It also defines discrimination as occurring where 'adjustments' are not made by persons upon whom a duty is placed to make them in circumstances where any arrangements made or the physical features of premises put a disabled person under a particular disadvantage.

The DDA outlaws discrimination in the employment and related fields, in vocational training, in the provision of goods, facilities and services, in relation to housing and premises, and in education. 'Discrimination' is differently defined depending on the field of activity covered.

Victimisation

Victimisation is outlawed in much the same way as under the SDA and the RRA.

Future developments

In October 2004, certain provisions of the DDA come into force for the first time, including provision requiring a provider of goods, facilities or services to make adjustments to physical features of their premises to accommodate disabled persons. There is controversy over the question whether the broad duties to make 'adjustments' applies to the courts both in permitting access and in managing a hearing.

New primary legislation is also due to be enacted in 2004 to amend the meaning given to 'disability' and introduce new protection against discrimination in the field of transport, amongst other things. It is expected that a new statutory duty will be imposed upon public authorities to have due regard to the need to eliminate discrimination and promote equality of opportunity for disabled people.

European Community measures

The European Community has legislated for the first time in the field of disability in the employment and related fields by European Council Directive 2000/78/EC 'establishing a general framework for equal treatment in employment and occupation'. The Directive introduces new concepts of disability discrimination (including by defining 'harassment') and provides protection against it in a wider range of circumstances than that provided for in domestic law. Domestic effect has been given to that Directive by the Disability Discrimination Act 1995 (Amendment Regulations) 2003 (SI 2003/1673).

1.6.7 Sexual orientation discrimination

The Employment Equality (Sexual Orientation) Regulations 2003 (SI 2003/1661) outlaw direct and indirect sexual orientation discrimination, harassment on the grounds of sexual orientation and victimisation in the employment and related fields and in vocational training. The impetus for the Regulations derives from the Council Directive referred to above (2000/78/EC) 'establishing a general framework for equal treatment in employment and occupation' which required member states to introduce measures to give effect to the 'principle of equal treatment' prohibiting discrimination on grounds of, amongst other things, sexual orientation.

1.6.8 Religious discrimination

The Employment Equality (Religion or Belief) Regulations 2003 (SI 2003/1660) regulate direct and indirect discrimination on the grounds of religion or belief and victimisation. They also define harassment and outlaw it in prescribed circumstances. The Regulations outlaw discrimination in the employment and related fields and in vocational training. As with the Sexual Orientation Regulations above, the Religion and Belief Regulations give

effect to Directive 2000/78/EC which requires member states to, amongst other things, prohibit discrimination on the grounds of religion and belief in certain circumstances.

1.6.9 Enforcement

All of the above measures include self-contained provisions on limitation and enforcement, and a large number of exemptions and qualifications. In any particular case close regard would have to be paid to these.

1.6.10 Family friendly issues

In the context of employment, there is a package of measures designed to protect pregnant women against adverse treatment arising out of their pregnancy and there are now in place a range of measures addressing family friendly or flexible working patterns.

1.6.11 Age discrimination

Legislation on age discrimination will be enacted by 2006 to give effect to Directive 2000/78/EC which requires member states to prohibit unjustified age discrimination in certain circumstances.

1.6.12 Human rights

In addition to the specific anti-discrimination legislation, relevant provisions are now found in the Human Rights Act 1998 (HRA) which incorporates into domestic law certain Convention rights which are relevant to equality and discrimination, in particular, Articles 8, 9 and 14.

Article 8

Article 8 provides that: '(1) Everyone has the right to respect for his private and family life, his home and his correspondence.' Article 8(2) provides that such right might be interfered with by a public authority but only in certain prescribed circumstances. It is clear from both case law from the European Court of Human Rights and domestic case law that Article 8 is relevant to equality and discrimination. A broad meaning has been given to the expression 'private life' so that it includes a right to develop one's personality as well as one's right to create relationships with others. Sexuality is an element of private life, and has been recognised as such in a number of cases, so that discrimination on the grounds of sexual orientation will fall within the scope of Article 8.

Further, adverse treatment based on gender reassignment will again engage Article 8 and unless justified by Article 8(2) will violate it either by reason of the 'private life' protection or by reason of the 'family life' protection (when, for example, rights to marry are interfered with in consequence of a person's status as a transsexual).

Article 9

Article 9 provides that: '(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief in freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.' Article 9(2) makes it clear that whilst 'manifesting' one's religion is capable of being justified on prescribed grounds, the freedom to hold a religion or belief is absolute. This Convention right has obvious implications for religious freedom and interferences in the same.

Article 14

The Convention's only express equality guarantee is contained within Article 14 which provides that: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

Article 14 protects against discrimination in the enjoyment of the other substantive Convention rights. For Article 14 to become engaged, a person's complaint need only fall within the 'ambit' of one of the other Convention rights – it need not, by itself, violate one of them (see *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471). Thus, a complaint of discrimination in relation to the justice process is likely to fall within the ambit of Article 6 (the fair trial guarantees) even if the facts are not such that a substantive violation of Article 6 is made out. Thus Article 14 would be engaged and any discrimination, unless justified, would constitute a violation.

As can be seen, discrimination on a number of enumerated grounds is prohibited under Article 14, but so is discrimination on the grounds of 'other status' and accordingly the list is inclusive rather than exclusive. It has been held that 'other status' includes sexual orientation, so that whilst not expressly referred to in Article 14, complaints of sexual orientation discrimination would fall within its scope.

As public authorities we are obliged, in exercising our judicial and other relevant functions, to act compatibly with the Convention rights (section 6 of HRA).

Appendix I

Interpreters

The whole judicial process is reliant upon effective oral communication. Any failure in oral communication will strike deeply at the delivery of justice and may arise from:

- lack of fluency in the English/Welsh language;
- illiteracy;
- learning disabilities;
- hearing difficulties.

Interpreters can facilitate that process, provided their role is clearly understood and they have the required level of competency. The provision of an interpreter can only prevent miscarriages of justice if the skills of the interpreter are adequate. It is important that not only the same language, but also the correct regional dialect is spoken.

In the case of *R v Iqbal Begum*, an interpreter although ostensibly from the same region as the appellant failed to understand that the utterance by the appellant was not an admission of guilt but an admission that a mistake had taken place. That led to a guilty plea to murder being entered instead of a plea to manslaughter, a mistake that had devastating consequences.

Role of the interpreter

The role of any interpreter is to communicate questions to the witness and the witness's replies to the court or tribunal, not to seek to explain those questions or replies. Any attempt by the witness to obtain clarification of the question should also be translated. There are thus serious dangers in allowing an advocate, friend or family member to act as interpreter and, generally speaking, the interpreter should be professionally engaged.

Administering the oath

In the case of an affidavit an interpreter must be sworn by the officer taking the affidavit to interpret it truly, and the jurat should state that the interpreter was so sworn and did interpret the affidavit. An interpreter in court could swear an oath in the following terms whether the communication difficulty was due to language or some other cause:

I will well and faithfully interpret and true explanation make of all such matters and things as shall be required of me according to the best of my skill and understanding.

When is an interpreter needed?

In most cases, the need for an interpreter will be apparent to all concerned and will have been identified in advance of the hearing. In some cases, however, the need for an interpreter may only become apparent in court as it becomes clear that the party is unable to grasp the questions put to them. In cases where there is some doubt as to whether a witness is genuinely unable to understand the language spoken or is in fact evading the responsibility to answer questions it is better to remove any language barriers by ensuring the provision of interpreting services and let any lack of the witness' credibility manifest itself through the normal course of questioning. Where the interpreter is required to facilitate because English is not the primary spoken language of the witness all defendants should be provided with this service as of right. In addition, the capacity to get by in 'street-level' English does not amount to a sufficient grasp of the language to understand court proceedings.

Duration

A common complaint by those needing the services of an interpreter is that the facility is only provided whilst the individual is giving evidence. This may be all that can be expected from a publicly funded interpreter for a witness, although it may be necessary for the witness to be made aware of what is going on and the roles of different persons. However, note that:

- A party to the proceedings will need the assistance of an interpreter throughout the proceedings and also beforehand when giving instructions and afterwards when receiving an explanation as to what has transpired – failure to ensure this could amount to a denial of justice.
- It should not be assumed that an interpreter can continue without regular breaks and the court should facilitate the opportunity to indicate the need for a break.
- The same interpreter may no longer be appropriate for opposing parties.

Provision of an interpreter

A represented litigant will normally arrange their own interpreter and that for any witnesses, and the fees will be part of the costs of the proceedings, but the court will be concerned to ensure that the interpreter is independent and competent.

- Article 6 of the Human Rights Act 1998 (the right to a fair trial) specifically provides for free language interpreters in criminal trials (para. 3). It has been accepted by the Court Service that the provision of interpreters should be extended to family proceedings involving children, committals and domestic violence proceedings although the primary responsibility may still lie with the party. See *Cusani v UK* (2002) All ER (D) 139.
- Guidance has been given to court managers as to the circumstances in which the court will arrange and fund an interpreter, and there is a leaflet for court users. Any request should be sent through the court manager on the form provided to the Civil Projects Branch at the Court Service headquarters (fax: 020 7210 1685; tel: 0207 210 1766). Interpreters for deaf or hard of hearing court users will also be considered on the same basis for civil and family hearings. Each case will be considered individually and there is a limited budget.

Avoiding misunderstandings

It is necessary to ensure that any misunderstandings in communication are avoided. For example:

- Notions like 'common sense' in a jury address become problematical when there are parties from differing cultural backgrounds with their particular world views.
- Even the notion of time becomes relative as, for example, the 'evening' can mean something completely different to a Scottish person and to a Spanish person.
- Care should be taken when using idioms and phrases that have acquired different meanings as these are very difficult to translate and are sometimes even misunderstood. For example, the 1989 Bar vocational evidence exam question with reference to 'sleeping policemen' was failed by the vast majority of non ethnic-English students! It is always advisable in such instances to ensure that the witness (and interpreter) understands the question being put.

Language translations

It is now possible to obtain free translations from and to English in respect of most common languages from the internet.

Access the website www.google.com/language_tools and after typing (or pasting in) the text you may have it automatically translated to the desired language.

Appendix II

Names and forms of address

What follows are some very basic explanations of certain minority ethnic community naming systems, but all must be read with the proviso: *there is no homogeneity only tremendous diversity and no assumptions can be made.*

Construction of names

Naming systems generally reflect how family and community life is organised. Where groupings have been historically significant (as in much of Africa and Asia), names indicate membership of such groups. Where family and community life has traditionally had a less structured character (such as across most of Europe), personal and parental names tend to receive greater emphasis.

- Many members of minority ethnic communities continue to name their children according to the traditional naming systems which comprise their cultural heritage/identity.
- It cannot be assumed that everybody from that community will necessarily follow the same rules. Some members from minority ethnic groups may adapt their names to fit in with ethnic UK social conventions and official requirements.

Given below are:

- some examples of naming patterns from the various minority ethnic communities;
- some dos and don'ts of names and forms of address.

Construction of names

The ethnic UK context

- In the traditional ethnic UK naming system each person will have one or more personal names, followed by a surname/last name (often reflecting clans/origins – e.g. McKenzie/York – or occupation – e.g. Baker/Taylor).
- Most personal names are gender-specific. The surname/last name is normally also a family name, shared by all members of the immediate family.

- Traditionally, on marriage, a woman ceases to use her 'maiden' name and instead adopts her husband's family name, and the children of the marriage assume their father's last name. Unmarried couples may or may not adopt this course, and some women retain their maiden name for professional (but not family) purposes.

Main components: personal name(s) + last name/family name

Examples: Robert Frederick McKenzie; Elizabeth Marie Baker

African names

- Traditionally across sub-Saharan Africa, names would consist of personal names only. Each of the many peoples of Black Africa had their own naming practices and names indicated ethnic group and cultural background.
- Most personal names are gender-specific, but there may not have been 'surnames' or family names, as in modern Europe.
- These traditional naming practices have been transformed, on the one hand by religion and on the other by colonialism. The adoption of Christian or Muslim personal names has been widespread across Africa (varying according to the spheres of religious influence). Family names have also been introduced.

Main components: personal name(s) + last name/family name

Examples: Julius Nyerere; Kwame Nkrumah; Pauline Wanjiku Njuguna

Caribbean names

- As a result of colonialism and the influence of Christianity, the majority of African-Caribbeans may follow the ethnic UK naming pattern of personal name(s) and last name.
- In previous generations, greater use was made of Biblical names from the Old Testament.

Main components: personal name(s) + last name/family name

Examples: Moses John Joseph; Leroy Smith; Ruth Garfield

Chinese names

- Traditionally, the Chinese naming system consisted of a last name/family name followed by personal name(s).
- Most personal names are gender-specific. The importance of the family name is stressed by its being placed first in the sequence.
- Many British Chinese have adapted their names to follow the ethnic UK system. In addition to using their traditional Chinese names, many Chinese nowadays may also use a European personal name.

Main components: personal name(s) + last name/family name

Examples: Lan-Ying Cheung; Alison Wing; Wen-Zhi Man

Hindu names

- Generally, Hindu names have three components: a personal name, followed by a middle name, followed by a last name/family name.
- Some Hindus do not use a family name, and use personal and middle names only. Most personal names are gender-specific.
- Middle names can signify a gender designation such as Lal/Bhai (masculine) or Devi/Bhen (feminine).
- A Hindu woman usually takes her husband's last name/family name on marriage. Most Hindu names will follow the ethnic UK naming system.

Main components: first name(s) + gender designation + last name/family name

Examples: Vijay Lal Sharma = personal name (Vijay) + gender designation (Lal) + last name/family name (Sharma)

Jyoti Devi Chopra = personal name (Jyoti) + gender designation (Devi) + last name/family name (Chopra)

Indira Gandhi = personal name + last name/family name

Muslim names

- Muslim names vary considerably largely due to the vast cultural diversity of the adherents.
- The personal name may be a single word, or in itself comprise two words, in which case it would be incorrect to pronounce only one of the two. For example, in the name Abdul Rahman it would be incorrect to pronounce only Abdul or only Rahman.
- Most personal names are gender-specific. In all instances it is better to ask the individual how they would like to be addressed.
- In certain parts of the Indian subcontinent it is also common practice to have a middle name which designates a gender title like Begum/Bibi (feminine) or Miah/Agha (masculine). The last name/family name can often designate a clan (e.g. Khan) or derive from the father's first name (e.g. Habib).

Main components: personal name(s) + gender designation + last name/family name

Examples: Abdul Rahman Habib = personal name (Abdul Rahman) + last name/family name (Habib)

Aziz Ullah Baig = personal name (Aziz Ullah) + last name/family name (Baig)

Amina Bibi Khan = personal name + gender designation + last name/family name

Talal El-Alí = Talal (personal name) + El-Alí (last name/family name)

- A name may also be preceded by an honorific title such as:
- Hajji (masculine)/Hajja (feminine) (someone who has performed the obligatory pilgrimage); or
- Shaykh or Sayyed/Sayyeda or even the name Mohammed classifies as an honorific title;
- or the gender designation Bibi/Begum (female), Miah/Agha (male). (Note: these may be spelt differently according to transliteration conventions.)

Examples: Hajji Akbar Shah = honorific title (Hajji – masculine) + personal name (Akbar) + family/last name (Shah)

Sayyida Nusrat Mohammed Khan = honorific title (Sayyida – feminine) + personal name (Nusrat) + family/last name (Mohammed Khan)

Sikh names

- Most often Sikh names comprise a personal name, a (religious) gender designation and a last name/family name.
- In most cases Sikh personal names are gender-neutral and therefore gender can be designated by the addition of the male (religious) epithet 'Singh', or the female epithet 'Kaur', followed by the last name/family name, although this is by no means obligatory, and possibly becoming less common.

Main components: personal name + religious gender designation + last name/family name.

Examples: Manjit Singh Dhillon = personal name + male religious designation + family/last name

Manjit Kaur Dhillon = personal name + female religious designation + family/last name

or simply: Manjit Singh = personal name + family/last name