For further information please contact

Judicial Studies Board
9th Floor, Millbank Tower, Millbank, London SW1P 4QU

Tel: 020 7217 4708 Fax: 020 7217 4779
publications@jsb.gsi.gov.uk

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Judicial Studies Board

Fairness in courts and tribunals

A summary of the Equal Treatment Bench Book

Judicial Studies Board

Contents

Foreword

In September 1999, the Judicial Studies Board (JSB) published a booklet entitled *Race and the courts*, an easy-to-use companion to the guidance on race that had just been published as part of the JSB's new *Equal Treatment Bench Book.* The booklet provided a summary of the key points contained in the Bench Book and was extremely well received, particularly by lay magistrates and members of tribunals. Following enactment of a number of statutes by Parliament with respect to groups such as children and those with disabilities, the *Equal Treatment Bench Book* was extended to include coverage of these and other groups which might be at risk of unfair treatment. As a result, in October 2001, the JSB produced a second booklet entitled *Equality before the courts* to address the extended coverage of the Bench Book.

In May 2004 the *Equal Treatment Bench Book* was relaunched, following its revision, both to bring it up to date and to include additional guidance on areas such as religious discrimination. As a result of this, the two booklets have been revised and for ease of reference are now combined into this one single booklet. As with the two previous booklets, this one is not intended to replace the *Equal Treatment Bench Book* but rather to complement it by being a quick practical point of reference. Cross references to further information in the *Equal Treatment Bench Book* ('ETBB') are included throughout the text.

Although, as before, many of the general principles in this booklet may be familiar to you, I do hope that you continue to find it useful, particularly as the judiciary continues to be under ever increasing public scrutiny.

Mrs Justice Cox
JSB's Equal Treatment Advisory Committee
July 2004

EQUALITY AND JUSTICE

(see further Part 1, ETBB)

What can be done to tackle the existence, appearance or risk of discrimination in the courtroom? How can court and tribunal proceedings be fair and be seen to be fair? Those who administer justice must be aware of, and responsive to, the differences among people who come to court in any capacity, while remaining fair, independent and impartial. How can the judiciary meet this challenge?

This short guide, which complements the Judicial Studies Board's *Equal Treatment Bench Book (ETBB),* offers some pointers. This guide contains numerous cross-references to the Bench Book and is intended to be used as a quick, practical point of reference rather than as an alternative to it.

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.

Equality before courts and tribunals (see further Chapter 1.1, ETBB)

- Most people find an appearance before a court or tribunal to be a daunting experience and it is vital that justice is seen to be done.

- Ensuring fairness and equality of opportunity may mean providing special or different treatment.

- 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 particular disadvantage may include people from minority ethnic communities, from minority faith communities, individuals with disabilities (physical or mental), women, children, those whose sexual orientation is not heterosexual, and those who through poverty or for any other reason are socially or economically excluded.

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

- People who have difficulty coping with the language, procedures or facilities of courts or tribunals are equally entitled to fairness and justice.

Discrimination (see further Chapter 1.1, ETBB)

Discrimination can be:

- **Direct.** Where a person is treated less favourably on the grounds of race, colour, religion, gender, sexual orientation, ethnic or national origin, or disability, than others would be in similar circumstances.

- **Indirect.** Where a requirement is applied equally to all groups, but has a disproportionate effect on the members of one group because a considerably smaller number of members of that group can comply with it. This applies whether intentional or not.

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 understand behaviour in terms of their own familiar cultural conventions and by so doing may misinterpret or fail to understand those who are different.

Communicating fairness

(see further Chapter 1.2, ETBB)

- 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.

- 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. We 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. At worst, justice may be denied.

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

DO…

- get names and modes of address correct by asking parties how they wish to be addressed.
- make a point of obtaining, well in advance if possible, precise details of any disability or medical condition that a person appearing before you may have.
- allow more time for special arrangements, breaks, etc. to accommodate special needs at trial.
- give particular thought to the difficulties facing disabled people who attend court – prior planning will enable their various needs to be accommodated as far as possible.
- try to put yourself in the position of the individual – the stress of attending court should not be made worse unnecessarily through a failure to anticipate foreseeable problems.
- bear in mind the problems facing unrepresented parties.
- admit a child's evidence, unless the child is incapable of giving intelligible testimony.

- ensure that appropriate measures are taken to protect vulnerable witnesses, for instance children, those with mental or physical disabilities, or those who are afraid or distressed.
- be polite, courteous and patient at all times.
- make provision for oath taking in accordance with different belief systems.
- take the initiative to find out about different local cultures and faith communities.
- display an understanding of difference and difficulties with a well-timed and sensitive intervention where appropriate.

And in conjunction with administrators…

- encourage the availability of court documents and advance information in different local languages and alternative formats e.g. Braille, large print, audiotape, etc.
- encourage the provision of access to interpreters and signers.
- encourage the provision of appropriate facilities for all court users.
- help to promote a high standard of service to all court users.
- support the provision of posters and leaflets in English and local minority languages and in alternative formats, e.g. large print.

DON'T…

- underestimate the stress and worry faced by those appearing in court, particularly when the ordeal is compounded by an additional problem such as a disability or having to appear without professional representation.
- overlook the use – unconscious or otherwise – of gender-based, racist or 'homophobic' stereotyping as an evidential shortcut.
- allow advocates to attempt over-rigorous cross-examination of children or other vulnerable witnesses.
- use words that imply an evaluation of the sexes, however subtle – for instance, 'man and wife', girl (unless speaking of a child), 'businessmen'.

- use terms such as 'mental handicap', 'the disabled' – use instead 'learning disability'; 'people with disabilities'.
- allow anyone to be put in a position where they face hostility or ridicule.
- make assumptions based on stereotypes or misinformation.
- use offensive words or terminology.

Language (see further Chapter 1.2, ETBB)

- 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 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 generate 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.

However committed a judge may be to fairness and equality, they may still give the opposite impression by using inappropriate, dated or offensive language. There are no right answers. Language and ideas are living and developing all the time. Some words that were once acceptable no longer are. The following can be advanced with confidence.

British. Care should be taken to use the term 'British' in an inclusive sense, to include all citizens. Exclusionary use of the term as a synonym for White, English or Christian is unacceptable.

Minority ethnic/minority cultural/ minority faith/multi-faith. These terms for communities are now widely used and considered acceptable as the broadest terms to encompass all those groups who see themselves as distinct from the majority in terms of ethnicity, culture or faith. The term 'minority ethnic' has the advantage of making it clear that ethnicity is a component of all people's identity whether from the minority or majority. Reference to minority commu-nities 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.

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 invisible minorities.

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.

Race. Is often used in the specific context of delineating personal characteristics, such as physical appearance, which are permanent and non-changeable.

Ethnicity. Used to define those factors determined by nationality, culture and religion and therefore, to a limited extent, subject to the possibility of change.

Culture. Characterised by behaviour and attitudes, which although determined by upbringing and nationality are perceived as changeable.

Mixed-parentage/ dual-heritage/ mixed-race/half-caste. The term 'half-caste' is generally found offensive and should be avoided. The term 'mixed-parentage' is an accept-able term for those born to parents who are from a mixture of cultural and ethnic backgrounds, whilst the '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.

Coloured. An offensive term that should never be used.

Black. The term 'Black' has a positive meaning and is not used in the sense of the colour but as a term of reference. As a descriptive term, Black can refer to all people of Caribbean or African descent.

West Indian/African Caribbean/African. The term 'West Indian' may not necessarily give offence, but in most contexts it is inappropriate. Where it is desirable to specify geographical origin, use of the term 'African Caribbean' (as opposed to Afro-Caribbean) is both appropriate and acceptable. The term does not, however, refer to all people of Caribbean origin, some of whom are White or of Asian origin. Young people born in Britain will probably not use any of these designations, simply referring to themselves as Black where racial identity is relevant. However, increased interest among young Black people in their African cultural origins is resulting in a greater assertion of the African aspect of their identity, and the term 'African Caribbean' or 'Black Caribbean' is now more widely used in some circles. Likewise, the term 'African' is acceptable and may be used in self-identification, although many of those of African origin will refer to themselves in national terms as 'Nigerian', 'Ghanaian', etc.

Asian/Oriental/British Asian. People from the Indian sub-continent do not consider themselves to be 'Asians'; this term being only applied to them for the sake of convenience in Britain. People from the Indian sub-continent identify themselves rather in the following sets of terms: their national origin ('Bangladeshi', 'Indian', 'Pakistani'); their region of origin ('Bengali' 'Gujarati', 'Punjabi'); or their religion ('Hindu', 'Muslim', 'Sikh'). The term most appropriate to the context should be used; national, regional or religious.

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

Young people of South Asian origin born in the UK may accept the same identities as their parents. However, this is by no means always the case, and some may choose to assert themselves as 'Black' or 'British Asians', although the use of either of these phrases requires great sensitivity.

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 expression referring to 'second/third generation' immigrants is likely to cause offence.

Refugee/asylum seekers. The term 'refugee' refers to those people who have had to escape from persecution in their home country. These are 'asylum seekers' but the term is 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.

Unrepresented parties

(see further Chapter 1.3, ETBB)

There are various reasons why people choose to represent themselves, rather than instructing a lawyer. For many, it is because they do not qualify for Legal Services Commission funding. Whatever their reason for not employing a lawyer, unrepresented parties are likely to be particularly anxious. There may be much at stake, and yet they may be unaware of basic legal principles and court procedures. It is to be expected that they will be experiencing feelings of fear, ignorance, frustration, bewilderment and disadvantage, especially if appearing against a represented party. Judges and tribunal chairs must try to maintain a balance between assisting the unrepresented party and protecting their represented opponent from problems arising from the unrepresented party's lack of legal knowledge.

Problems that may face those without legal representation

Those who appear without legal representation may:

- lack understanding of legal terminology and specialist vocabulary.

- be ignorant of law and procedure and in some cases may have difficulty with reading and writing.
- have no experience of advocacy.
- lack objectivity.
- lack the ability to cross-examine or test evidence.
- not grasp the true issues of a case.
- have difficulty in marshalling facts.
- fail to understand court orders or directions, or their obligations to comply with pre-hearing directions.
- not appreciate the importance of documentary or photographic evidence, or the duty to disclose documents.
- misunderstand the purpose of a hearing.
- need court papers to be translated if English is not their first language.
- not have ready access to legal textbooks or libraries.

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

- who they are and how they should be addressed.
- who everybody else is, and their respective functions.
- that the unrepresented party should tell the judge immediately if they do not understand something.
- the purpose of the hearing and the issue which is to be decided.
- the rule that only one person at a time may speak and that each side will have a full opportunity to present its case.
- that a party may take notes (but not tape recordings).
- that if the unrepresented party would like a short break in the proceedings, they have only to ask.
- that the issue is decided on the evidence, documented and oral, before the court and nothing else.
- that mobile phones must be switched off, or at least in silent mode.

Cross-examination by the defendant

Throughout a trial, a judge must be ready to assist a claimant or defendant in the conduct of their case, particularly when they are examining or cross-examining witnesses and giving evidence. The judge should always ask whether they wish to call any witnesses, and should be ready to restrain any unnecessary, intimidating or humiliating cross-examination by an unrepresented defendant.

In criminal cases, for certain offences of assault, child cruelty or of a sexual nature, the Youth Justice and Criminal Evidence Act 1999 prohibits unrepresented defendants from cross-examining adult witnesses and child witnesses. The Act also gives courts the discretion to forbid such cross-examination in other types of case.

After the hearing, unrepresented parties often do not understand the outcome of the case or the reasons for it, especially if they have lost. A judge should always set out clearly the reasons for the decision. The judge should also explain the requirement to seek permission to appeal, if appropriate, and should 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.

Social exclusion

(see further Chapter 1.4)

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.

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.

RACE AND JUSTICE

(see further Part 2, ETBB)

The experience of racism in one sector of society may influence an individual’s perceptions about another sector, such as the administration of justice. If an individual or someone known to an individual has suffered racism at

school, from the police, from the health or social services or at work, then what happens in the courtroom will most probably be viewed with mistrust.

For most people, the administration of justice is about going to court, lawyers and judges. Whether it is a criminal or civil court or a tribunal will matter little from the point of view of racism or expectations of unfair treatment.

From the point of view of experiencing racism, it does not matter if you are the defendant, plaintiff, witness, respondent, juror, lawyer or judicial office holder.

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

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

Background statistics

Some statistics are given below to place into context comments about minority ethnic communities in the UK. (Further details can be found at www.statistics.gov.uk.)

UK population 58.7 million, of which:

- White 54.2 million (92%)
- South Asian or Asian British 2.3 million (4%)
- Black or Black British 1.1 million (2%)
- Mixed 0.7 million (1.2%)
- Chinese 0.2 million (0.4%)
- Other ethnic groups 0.2 million (0.4%)

Roma Gypsies and Irish Travellers are currently recognised as racial groups under the Race Relations (Amendment) Act; unfortunately whilst there are no official statistics various research studies indicate that this population is estimated to be around 300,000 (see further, section 1.5.8, ETBB).

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 of their case, as claimants in civil or family cases, as alleged criminals, and increasingly as victims of racist attacks.

Research also shows that:

- Pakistanis, Bangladeshis and Black Caribbeans experience significantly higher unemployment and lower earnings then White people.
- All minority ethnic groups, even those doing relatively well, are not doing as well as they should be given their education and other characteristics.
- 70% of all minority ethnic communities live in the 88 most deprived local authority areas.

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 of their case, as claimants in civil or family cases and increasingly as victims of racist attacks. In 2002, applications for asylum increased by 18% to 84,130. About 42% resulted in grants of asylum, exceptional leave to remain or allowed appeals

Minority ethnic communities before courts and tribunals

Since 1999, (the year in which the Stephen Lawrence Inquiry Report was published), a great deal has been achieved to ensure that the administration of justice in England and Wales is free of racism and discrimination. It is important however, to guard against complacency.

> Racism is an attack on the very notion of universal human rights. It systematically denies certain people their full human rights just because of their colour, race, ethnicity, descent (including caste) or national origin. It is an assault on a fundamental principle underlying the Universal declaration of Human Rights – that human rights are everyone's birthright and apply to all without distinction.
>
> *Racism and the administration of justice, Amnesty International 2001.*

Analysis of *British Crime Survey 2000* shows that people from minority ethnic communities are less confident that the criminal justice system respects the rights of, or treats fairly, people accused of committing a crime – although the concern appears to be directed more at the police than the courts. Only 52% of Black people felt that these rights were respected compared to 70% of White and 66% of Asian people. However, according to the same survey, Black and Asian people are more confident than White people that the system is effective in bringing people to justice and meeting the needs of victims of crime.

The Home Office's 2001 *Citizenship Survey* showed that people from minority ethnic groups were more likely than White respondents to say that they would be treated worse than people of other races when engaged with public authorities, the police, the CPS and the courts.

As victims

(see further Chapter 2.2, ETBB)

Successive British Crime Surveys, most recently in 2000, have shown that minority ethnic groups are more likely to be victims of crime for both household and personal offences.

- Judges need to be aware that minority communities are more at risk of crime in general as victims and that research has shown that the impact of racist crimes affects all victims more severely.
- It is valuable to make inquiries about measures that local victim support groups can take, and the national and local patterns of racist crime.
- Racially aggravated offences ought to be utilised as fully as possible to promote confidence and encourage the reporting of racist crime.

As suspects and offenders

(see further Chapter 2.2, ETBB)

Section 95 of the Criminal Justice Act 1991 in conjunction with the Race Relations (Amendment) Act 2000 introduced the wider collection of data detailing ethnicity. These statistics have shown consistent patterns of outcomes, as summed up in the Home Office publication *Race and the Criminal Justice System 2002.*

- People from minority ethnic groups are more likely to be stopped and searched by the police.
- In 2001/02, Black people were eight times more likely to be stopped and searched than White people, an increase over the previous year.
- Minority ethnic people were more likely to be arrested, and Black people were five times more likely to be arrested than any other group.
- Black people are less likely to be cautioned than either Asian or White people.
- People from minority ethnic communities were more likely to be remanded in custody.
- Those from minority ethnic communities are more likely to plead not guilty and more likely to be acquitted.
- Black people were less likely to be fined or discharged and more likely to receive a community sentence.
- Black defendants, dealt with by the Youth Justice Board, were more likely to be remanded in custody than White or Asian young people; in most areas they were more likely to be given Detention and Training Orders than White young people and less likely to be discharged or fined.

A report by Roger Hood, *Ethnic minorities and the criminal courts 2003* showed:

- 33% of Black defendants, 27% of Asian defendants and 29% of White defendants at Crown Court said their treatment had been unfair, as did 25% at magistrates' courts.
- Most complaints were about severity of sentence rather than the conduct or attitude of judges or magistrates.

- There were no complaints about racist remarks from the Bench.
- 38% of Black defendants at Crown Court, 34% of Asian defendants and 40% of White defendants said they would not expect to be treated fairly next time they came to court.
- However, at Magistrates' Courts 39% of Black defendants and 35% of Asian defendants said this, compared to 15% of White defendants – though only 9% said this was because of their racial origin.

This research suggests a substantial change for the better in perceptions of ethnic minorities of racial impartiality in the criminal courts. Several judges mentioned that attitudes have altered markedly in recent years and magistrates reported a substantial decline in the frequency of racially inappropriate remarks. Many lawyers also reported that racial bias or inappropriate language was becoming a thing of the past.

Ethnic Minorities and the Criminal Courts, Roger Hood, 2003

It must be clear when sentence is passed that the hearing and decision are free from racial stereotyping and bias.

In civil courts and tribunals

(see further Chapter 2.3, ETBB)

Statistical material and research concentrates overwhelmingly on race within the criminal justice system. Little is so far known about the effect on minority ethnic communities of other types of proceedings. Some factors that may be relevant here are:

- In family proceedings, a need for understanding of different family patterns and structures.
- Problems arising from subjective assessments of what constitutes a 'good parent'.
- Increase in the numbers of litigants in person, who may not understand vital procedures, e.g., the pre-action protocols under the Civil Procedure Rules and some of who may not have English as a first language.

More systematic monitoring of the work of courts and tribunals would ensure there is no improper discrimination and help courts and tribunals deal fairly and sensitively with all those appearing before them.

As practitioners

(see further Chapter 2.4, ETBB)

Steps that we can take to promote greater openness and equality in the justice system are:

- Making ourselves aware of the impact of the system on different communities and what it means for those coming to court, whether as claimants, victims, witnesses, representatives or suspects.
- Recognising the different impact of the system of justice on different groups.
- Effectively managing court and tribunal hearings to ensure that they are free from any form of discrimination.
- In the light of the Crime and Disorder Act 1988, being alert to possible racist motivations for crimes that may have been missed by the police or CPS.
- Helping to support appropriate community-based groups to become involved in providing support.

What therefore can judges do to demonstrate fairness and build confidence?

The basic principles can be expressed in a short list of **do's** and **don'ts:**

DO…

- treat everyone who comes to court with dignity and respect.
- remember that everyone has prejudices. Recognise and guard against your own.
- be well informed – being independent and impartial does not mean being isolated from issues which affect people from minority communities.
- remember that fair treatment involves taking account of difference.
- ask if in any doubt. A polite and well-intentioned inquiry about how to pronounce a name or about a particular religious belief or a language requirement will not be offensive when prompted by a genuine desire to get it right.

DON'T...

- assume that treating everyone in the same way is the same thing as treating everyone fairly. It would not be fair to treat a wheelchair user in the same way as someone who is able to walk, for example, by expecting him or her to climb stairs to reach a courtroom.

- make assumptions – all White people are not the same, nor are all Black, South Asian, Chinese or Middle Eastern people.

- project cultural stereotypes, for example, that all young Black people avoid eye contact. Most young Black and Asian people are second and third generation British born citizens and may be no different from any other teenager when faced with authority figures.

- perceive people from minorities as 'the problem' – the problem may lie in the working methods and traditions of some institutions, which may put some groups, such as women, people with disabilities or those from minority ethnic communities at a disadvantage.

RELIGIOUS DIVERSITY

(see further Part 3, ETBB)

- Awareness of a person's religion is an integral element of being aware of equal treatment issues.

- Taking notice of religious matters helps create an atmosphere of trust and reduces alienation.

The 2001 Census shows that 71.6% of respondents (37 million) stated their religion as Christian, while 15.5% (9.1 million) stated they had no religion and a further 7.3% (4.2 million) did not respond to the question. Some 3.1% of England's population and 0.7% of the Welsh population give their religion as Muslim, making this the most common religion after Christianity. Some 8.5% of London's population gave their religion as Muslim; 4.1% are Hindus and 2.1% Jewish.

When compared to the provision on race the law does not provide comprehensive protection from religious discrimination or incitement to religious hatred. The interrelationship between ethnicity and religion is complex. Ethnic groups are often multi-religious. Indians, for example, may be Hindus, Muslims, Sikhs, Christians or members of other belief systems. Religious practice can also cut across ethnic groups. Ethnic and religious identities can also coincide: both Jews and Sikhs are recognised as ethnic groups under the Race Relations (Amendment) Act.

To add to the complexity, each religion has a considerable internal diversity of traditions, movements, cultures and languages. There are many variations within minority religions, just as within Christianity, where Black-led churches have joined traditional Christian groups.

Oath taking

(see further Chapter 3.2, ETBB)

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

As a matter of good practice:

- The sensitive question of whether to affirm or swear an oath should be presented to all concerned as a solemn choice between two procedures, which are equally valid in legal terms.

- The primary consideration should be what binds the conscience of the individual, since detailed questions of theology cannot be resolved in the courtroom.

- One should not assume that an individual belonging to a minority community will automatically prefer to swear an oath rather than affirm.

- All faith traditions have differing practices with regard to court proceedings and these should be treated with respect.

- In many faith traditions the holy scripture is believed to contain the actual presence of Divinity and is accordingly revered.

- Requests to perform ritual ablutions before taking the oath should be treated sympathetically.

- Jewish, Hindu, Muslim and Sikh women may prefer to affirm if having to give evidence during menstruation or shortly after childbirth.

- Some witnesses may want to remove shoes or cover their heads or bow with folded arms whilst taking an oath in order to manifest respect to the presence of the Divine in their holy scripture.

- All holy books should be covered in cloth bags at all times. If in the process of oath-taking the book needs to be uncovered, this should be done by the witness rather than a member of court staff since questions of ritual impurity may arise.

Detailed guidance on the major religions likely to be encountered in England and Wales can be found in Appendix V of the ETBB.

Names and naming systems

Naming systems vary between minority groups and some are complex. More detailed information can be found in Appendix II of the ETBB. A few basic principles may, however, be stated:

- It is more important to ask people how they would like to be addressed, how to pronounce their name and how to spell it, rather than trying to learn all the different naming systems

- Ask for the full name: first, middle and last names. Do not ask for 'Christian' names or 'surname'.

- Do not address or record people by their religious or honorific titles only; see Appendix II of the ETBB for further details.

CHILDREN IN COURT

(see further Part 4, ETBB)

Court proceedings are traumatic experiences for children and we should be aware of their particular anxieties.

- Sensitive preparation of the child before court can minimise distress.

- Thorough case management can also alleviate anxiety for children.

- Some children, such as those from some cultural groups or those with disabilities may be more vulnerable.

The appearance in court of a child or young person – as victim, witness or defendant – requires particular procedures to be followed. A significant number of vulnerable witnesses are children, and there are various initiatives to protect them. It is important for the judicial office-holder to be conversant with these facilities. The testimony of the child must be adduced as effectively and fairly as possible. The judge must be satisfied as to the child's competence; this issue should be dealt with as early as possible in proceedings. Under the Youth Justice and Criminal Evidence Act 1999, a lack of competence in a witness is described as an inability to understand questions or to give answers which can be understood. Any hearing to determine competence shall be in the presence of the jury and may include expert evidence.

Children may be prone to particular anxieties in court which may include fear of the unknown, fear of retaliation or publicity, pressure to withdraw a complaint, fear of having to relate personal details before strangers, fear of having to see the defendant or of being sent to prison, or feelings of guilt connected with family breakdown. Adolescent witnesses are more likely to exhibit adverse psychological reactions to the stress of appearing in court than younger ones. It is very important for the judicial office-holder at a hearing to give the child directions on:

- The need to tell the truth.

- The importance of leaving nothing out when answering questions.

- The need to say so if the child does not understand a question.

- The importance of not guessing the answers to questions.

- The need to tell the judge if the child has any problem of any sort at any time during the hearing.

Judges should ensure that advocates do not attempt over-vigorous cross examination, and that they use language which is free of jargon and which is appropriate to the age of the child. Judicial vigilance is always necessary.

Special measures and children's evidence

(see further Chapter 4.4, ETBB)

The Criminal Justice Acts of 1988 and 1991 allowed children's evidence to be given via live TV link and later by previously recorded video. Provision for children's evidence to be given in special ways extends back to the Children and Young Persons Act 1933. The Youth Justice and Criminal Evidence Act 1999 has introduced further measures, which extend to children and young persons, as well as witnesses with mental or physical impairments or whose evidence is likely to be impaired by reason of fear or distress.

- Screens may shield witnesses.
- The court can be cleared so that evidence may be given in private.
- Evidence-in-chief, cross-examination and re-examination may all be carried out by video-recordings.
- Evidence may be given through an intermediary, who may also explain questions and answers to and from the witness, to enable them to be understood.
- The court can make available any device to aid communication with a witness with any disability.

A judge conducting a trial involving a video recording of an earlier interview should be thoroughly conversant with the Home Office 'Memorandum of Good Practice on Video Recorded Interviews with Child Witnesses for Criminal Proceedings', which provides guidance on how to conduct such interviews with children, including how to confine their answers to comply with the law of evidence. The Memorandum is of principal relevance to criminal proceedings, although its guidance is also of use in civil and family proceedings.

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

DISABILITY

(see further Part 5, ETBB)

Disability has two elements. The first is the limitation imposed upon the individual by reason of their physical, mental or sensory impairment. The second is the disadvantage which this imposes on the individual in their environment. Any disadvantage that a person with a disability is subject to should not be reinforced by the legal system. Everyone is entitled to justice, regardless of whether or not they are able to cope with the facilities and procedures of the courts.

It is not simply a question of judges being polite and understanding when faced with people whose disabilities are clearly apparent. All members of the judiciary should be able to recognise disabilities as they exist, identify the implications, know what powers they have to compensate for the resulting disadvantage and understand how to use these powers without causing prejudice to other parties.

If any of the parties, witnesses or advocates involved in court proceedings has a disability which might impair their ability to participate, it is important that this is identified as early as possible. Steps can then be taken to ensure that any hearings take place in accessible rooms and suitable facilities are available.

A litigant in civil or family proceedings is treated in a different manner under the court rules only in the case of incapacity. The procedures then ensure that a representative is appointed, compromises and settlements are approved by the court, and there is supervision of money recovered (see further Chapter 5.4, ETBB).

It is estimated that there are at least 8.5 million people who currently meet the definition of disabled person under the Disability Discrimination Act 1995. This provides that a 'disability' is any 'physical or mental impairment which has a substantial and long-term adverse effect on …normal day-to-day activities'. 'Disability' may for example relate to mobility, manual dexterity, physical co-ordination, incontinence, speech, hearing or sight, memory, and ability to concentrate learn or understand.

The Disability Discrimination Act 1995, Youth Justice and Criminal Evidence Act 1999 and Human Rights Act 1998 all impose on courts a duty to take account of disabilities. Courts must be able to accommodate the special needs of litigants, defendants and witnesses arising from disability.

Under the Disability Discrimination Act 1995 it is unlawful to discriminate against disabled persons in the provision of facilities and services. There is a duty on all service providers – including courts – to take reasonable steps to change any practice, which makes it impossible or unreasonably difficult for people with disabilities to make use of a service which they provide to other members of the public.

The Human Rights Act 1998 also provides support for litigants who are disabled, particularly in respects of the right to a fair trial. Awareness of the issues which a disability might raise in the management of a trial are important in this respect and special arrangement may have to be made with regard to:

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

Some types of disability

- **Alzheimer's disease** – a progressive disease predominantly affecting the elderly. It can take the form of lapses of memory and unsettling behaviour patterns. The stress of appearing in court can have a detrimental effect.
- **Autism** – a lifelong development disability which impedes the ability to communicate and to relate socially.
- **Cerebral palsy** – includes disorders of movement as well as posture and communication problems.
- **Cerebral vascular accidents** ('stroke') – symptoms can include weakness or paralysis, speech difficulties, loss of balance and incontinence.
- **Deafness** – this covers a range of hearing impairments. All courtrooms should be fitted with an induction loop. The use of sign language interpreters may be necessary.
- **Diabetes** – this can be controlled by medication, but symptoms can range from irritability to slurred speech and loss of consciousness.
- **Down's syndrome** – this is associated with a low IQ and varying communication difficulties.
- **Dyslexia** – may cause difficulty with information processing linked with short-term memory and visual co-ordination.
- **Epilepsy** – may cause seizures or fits, which may be brought on by the stress of a court appearance.
- **Incontinence** – this may arise in conjunction with other disabilities or in isolation, and may worsen with stress. Additional breaks in proceedings may have to be arranged.
- **Inflammatory bowel disease** – a pre-arranged signal for an urgent trip to the lavatory may be necessary.
- **Mental health problems** – these vary greatly and the judge will have to make a careful assessment of affected individuals and how to deal with them in the witness box.
- **Motor neurone disease** – a progressive degenerative disease with symptoms extending to loss of limb function and wasting of muscles.
- **Multiple sclerosis** – symptoms can include visual damage and restricted movement and individuals are likely to fatigue rapidly.
- **Spina bifida and hydrocephalus** – the range of mobility is wide, and individuals may have impaired brain function.

- **Thalidomide** – individuals are usually limb disabled; some have hearing impairment.

- **Visual impairment** – one of the commonest disabilities. The best method of communicating in court should be established at the outset.

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

Mental disability

(see further Chapter 5.3, ETBB)

A mental disability may arise due to mental ill health, learning disability or brain damage.

Adjustments to court procedures may be required to accommodate the needs of persons with mental disabilities whether as witnesses, litigants in civil/family proceedings or defendants in criminal proceedings.

Only mental incapacity (as distinct from the mere existence or a history of a mental disability) will generally have legal significance in civil and family matters.

Lack of mental capacity may also be significant in criminal prosecutions (i.e. is the accused fit to plead?) and sentencing options may be affected by the mental state of the defendant.

The judge is responsible for the conduct of the hearing and should ensure that people with mental disabilities can participate to the fullest extent possible whilst avoiding prejudice to other parties.

Mental incapacity

(see further Chapter 5.4, ETBB)

An adult who lacks mental capacity will not be able to make decisions that others should act upon. They will not be able to enter into contracts, administer their own affairs or conduct litigation.

There is a presumption that an adult is capable until the contrary is proved, but a specific finding of incapacity may rebut this. Lawyers must be able to recognise incapacity when it exists, and to cope with the legal implications.

The legal definition of mental capacity will differ for different purposes and the severity of the test and means of assessment may depend upon the nature and implications of the particular decision.

There is no universal test of capacity. Where doubt arises as to mental capacity, legal tests may vary according to the particular transaction or act involved.

It has been stated that the individual must be able to:

- understand and retain information, and

- weigh that information in the balance to arrive at a choice.

When making assessments, different professions apply different criteria:

- The medical profession is concerned with diagnosis and prognosis.

- Care workers classify people according to their degree of independence and competence in performing certain skills.

- The lawyer is concerned with whether the individual is capable of making a reasoned and informed decision and of communicating that decision.

GENDER

(see further Part 6, ETBB)

- Though women and girls compromise more than half the population, they remain disadvantaged in many areas of life.

- Stereotypes and assumptions about women's lives can unfairly impede them and might frequently undermine equality.

- Care must be taken to ensure that our own experiences and aspirations, as women or of women we know, are not taken as representative of the experiences of all women.

- Factors such as ethnicity, social class, disability status and age affect women's experience and the types of disadvantage to which they might be subject.

- Women may have particular difficulties participating in the justice system; for example, because of maternity or child care issues.

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

- Women are underrepresented in many areas of public life and amongst lawmakers, including the judiciary.

- As judges, we can go some way to ensuring that women have confidence in the justice process and that their interests are properly and appropriately protected.

There have been many positive changes in society regarding gender roles. Law-makers and law-enforcers have in the past, however, mostly been men and a male outlook can still prevail. The disadvantages that women can suffer range from inadequate recognition of their contribution to the home or society to an underestimation of the problems women face as a result of gender bias.

- 67 per cent of women are employed, as opposed to 78 per cent of men.

- Women's employment is more likely to be casual or part-time.

- 60 per cent of all primary carers for another adult are women.

Despite the increasing number of women in the workforce, they remain primarily responsible for unpaid domestic duties. The economic contribution of such labour can be undervalued, resulting in disadvantageous assessments of damages and liability in civil actions, including the settlement of property claims.

In court, women witnesses may feel patronised and disbelieved. A recent Home Office survey revealed that significant (most often disadvantageous) stereotyping exists in the manner in which women are sentenced. Sexual complainants, and those complaining of sexual harassment in discrimination cases, can suffer when there is over-rigorous cross-examination regarding their previous sexual history or where the assailant is known to them.

Domestic violence

(see further Chapter 6.1, ETBB)

Research commissioned by the Northern Ireland Office shows two out of every five serious assaults on women involve a current or former partner. Violent behaviour is often a means of coercion, control and reinforcement of power over the other partner in a relationship. The difficulty always stems from the fact that until allegations are proven, they remain as such.

- Two women are killed every week by their current or former partners.

- Domestic violence accounts for 25 per cent of all violent crime.

- One in four women experience domestic violence, which can escalate during pregnancy or when a woman attempts to leave her violent partner.

Recent guidance encourages the Crown Prosecution Service and courts to take into account the paramount need to ensure the safety of the woman and any children of the household, in particular by ensuring that their whereabouts are not revealed. When granting bail or an injunction, other factors to take into account are: any history of violence in the relationship, the seriousness of the allegations, the victim's injuries, the use of any weapon and whether the attack was planned, whether any subsequent threats have been made, and the effect on any children.

When appearing in court, there are analogies to be drawn with vulnerable witnesses, such as the possibility of intimidation, the need for escort to and from court, and the presence of supporters in court. Other specific measures should be considered, such as providing screens in court, allowing the giving of evidence by television link and the video recording of testimony. The consequences of leaving the perpetrator of the violence alone with the woman in any part of the building should be considered most sensitively. Domestic violence, particularly that occurring over a long period of time, can affect the ability to give coherent testimony. Much depends upon the quality of legal advice received, and whether there are innovative procedures in place, such as the use of Polaroid cameras in police stations.

An apparent inability to change or leave a violent situation should not be interpreted as an acceptance of the

violence, so as to render the woman responsible for the violence, or to serve to undermine a women's credibility.

Between a third and a half of all perpetrators of domestic violence also physically abuse children in their care. The effect of domestic violence upon children might include post-traumatic anxieties such as depression, anxiety, behavioural problems, and other psychosomatic symptoms. Readers are referred to Section 5 of the Report to the Lord Chancellor on the question of parental contact in cases where there is domestic violence, which contains guidelines for good practice in such cases, and can be found at www.dca.gov.uk/family/abflmr.htm

SEXUAL ORIENTATION

(see further Chapter 7.1, ETBB)

- A lesbian or gay man continue to live in fear of unequal treatment in their daily lives.

- When dealing with apparent lack of candour, courts and tribunals should remember that being a lesbian or gay man is an individual experience that may have led to fear and concealment.

- Sexual orientation is just one of the many facets of a person's identity. Being a lesbian or gay man is sometimes described as being as much an emotional orientation as a sexual one.

- Nearly all lesbians and gay men were brought up in a heterosexual home.

- Objective mainstream research shows that children brought up by lesbian or gay parents do equally well as those brought up by heterosexual parents.

- Most lesbians and gay men feel that their sexual orientation was there from birth and is unalterable – just as most heterosexuals do.

- Some scientific research claims a genetic determinant for sexual orientation, suggesting that sexuality is not chosen.

- Parliament has now recognised that a same-sex couple can, as a matter of law, constitute an enduring family relationship.

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

There is a historical background of widespread discrimination against homosexuals. Verbal abuse and physical violence are not infrequently directed against homosexuals, and discrimination in the workplace is not uncommon. Perceptions of prejudice by the gay and lesbian community extend to their experiences in court. There is no evidence that homosexuality implies a propensity to commit crime, nor is there an established link with paedophile orientation.

The Human Rights Act 1998 raises a number of issues relating to the equal treatment of lesbians and gay men, most particularly whether the respect for family life under Article 8 includes lesbian and gay couples. It will certainly be argued that the employees of public authorities cannot be dismissed on the grounds of sexuality, and this is likely to have implications both for the private sector and for the Employment Tribunal.

Concerns about undermining the institution of marriage assume that to promote the rights of one category of citizen necessarily undermines those of another.

Families that do not strictly conform to the traditional model are an increasingly common social reality. There is no evidence that children are excessively teased because their parents are unmarried, or even because their parents are lesbian or gay. Indeed, such children do equally well as those brought up by heterosexual parents in terms of emotional wellbeing, sexual responsibility, academic achievement and avoidance of crime.

It is misguided to:

- Attribute masculine characteristics to lesbians, or feminine characteristics to gay men.

- Make any assumptions as to the sexual orientation of transvestites or transsexuals. Where there is a question relating to a person's gender, the person should be asked what gender they consider themselves to be, and what gender they would prefer to be treated as.

- Assume that AIDS and HIV positive status are necessarily indicative of homosexual activity.

HIV treatment can prevent a person from developing the symptoms of AIDS indefinitely, but the fear and stigmatisation resulting from an out-of-date understanding of the issues can be very damaging. AIDS is becoming an outmoded concept in countries able to afford effective HIV treatments.