Judicial Institute for Scotland

Equal Treatment Bench Book

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Contents

Introduction

Being a judge, whether in a court or tribunal, requires a multitude of skills. In addition to knowledge of substantive law and procedure (sometimes over a variety of subject areas), a judge must have a range of other skills to deal adeptly with people from all walks of society often with their own challenges or human frailties. This bench book assists judges to obey the terms of the judicial oath in delivering justice. The bench book provides a reference point allowing judges to understand an ever-changing society. It is hoped the bench book will encourage reflection for all who read it. We all hold prejudices or assumptions as to "types" of people or certain issues. To treat people fairly, it is necessary to acknowledge one's own prejudices and any conscious or subconscious bias that may have been formed over the issues in question.

How a person is treated in a court or tribunal room may well affect their perception of not just the individual outcome of their case but of the wider justice system. Treating everyone with courtesy and respect is not only required, but also much more likely to result in a calmer and more authoritative atmosphere, and a better understanding of both the decision and the reasons for the decision.

It is right not only to treat people fairly but, on occasion, to ensure fairness by treating some people differently for reasons of equality, diversity or otherwise.

Judges should be aware that often those appearing before them will have more than one issue to consider. For example, persons with a learning disability will have communication needs to consider and may also be vulnerable due to their status as a complainer of domestic violence. Someone from a minority ethnic background who does not speak English as their first language may also have a disability to factor in. The important point is to respectfully enquire and take time to consciously understand the needs of the person beyond any stereotypes.

It is likely that throughout the day in a busy court a number of persons are likely to have additional needs. It is ultimately the judge's role to ensure the proceedings are fair and that there is effective participation as required.

Organising issues into chapters is not straightforward and there is inevitably overlap. We have tried to flag these where possible. We have tried not to deal with the substantive law unless it was impossible to explain an issue without doing so.

Where we refer to case law such as Employment Tribunal decisions, these cases are not necessarily binding on another court or tribunal but are cited to give an illustration of the issue in practice.

The bench book does not have an index, but it is broken down into chapters and each chapter has hyperlinked headings. In addition, there are hyperlinks to cases and statute.

To view the citations in this bench book, users are required to be logged into LINETS and have both WESTLAW and LEXIS Library open and running before accessing citations.

Given this is a dynamic area, it is likely that some of the information in the bench book will quickly be out of date, although not the requirement to treat everyone with courtesy and dignity. We have endeavoured to state the law correctly as at **31 May 2024**, but due to a delay in publishing we have tried to reflect any obvious changes to the law up to **15 September 2024**.

While we reference research findings and reports from various individuals and organisations, this does not imply endorsement of the findings or the individuals or organisations themselves. We recognise the limitations of all research, regardless of its apparent reliability, and acknowledge that society evolves rapidly, leading to new evidence and alternative perspectives. Likewise, those who assisted the editors in drafting this bench book should not be assumed to endorse or agree with all views expressed within it. The bench book will be reviewed and updated on a regular basis to take account both of changes in the law and the changing cultural and social landscape in Scotland.

Sheriff Matheson and Sheriff McCartney

3 April 2025

Acknowledgements

There is a short guide to the Equality Act 2010 contained in this bench book, and we are extremely grateful to Employment Judge Muriel Robison for writing this section and for her assistance later in the process.

We are grateful to all the organisations and their respective representatives who gave up valuable time to assist us with this work. A list of organisations who were contacted is provided in Appendix C.

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Much of the work in this bench book is derived from earlier editions written by Sheriff Crowe (now happily retired) which we wish to acknowledge.

Equality Act 2010

Contents

1. Introduction

The Equality Act 2010 (the 2010 Act) sets out rights and duties intended to prohibit discrimination and to promote equality not only in the workplace but also in the provision of services, the performance of public functions, in access to premises, in education and in the conduct of private associations. The 2010 Act includes provisions placing duties on public bodies, which are anticipatory rather than reactive, and permitting positive action.

The 2010 Act seeks to prohibit discrimination on nine specific grounds, called protected characteristics, as defined in part 2, chapter 1, namely age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

Part 2, chapter 2 of the 2010 Act defines and regulates different types of prohibited conduct, namely direct discrimination, indirect discrimination, harassment and

victimisation; two additional forms of prohibited conduct apply to the protected characteristic of disability only, namely the failure to make reasonable adjustments and discrimination arising from disability.

Part 8 of the 2010 Act deals with ancillary forms of prohibited conduct relating to relationships which have ended, instructing and aiding contraventions of certain parts of the Act.

This chapter provides an overview of the protected characteristics, the definitions and scope of prohibited conduct, as well as the public sector equality duty and positive action provisions.

For further reading, consult Blackstone's Guide to the Equality Act (OUP, 2021). Hepple, Equality: The Legal Framework (OUP, 2014), although dated, provides an excellent narrative about the Act, and for detail, again dated, Monaghan on Equality Law (OUP, 2013) is also recommended. For up-to-date detail, consult IDS Handbooks on Discrimination at Work, Disability, Maternity and Parental Rights and Atypical Workers (Sweet and Maxwell). For practical guidance, consult the Codes of Practice issued by the Equality and Human Rights Commission.

2. Protected characteristics

Age

Age is defined by reference to a person's age group (section 5 of the 2010 Act). An age group can be either a particular age or a range of ages, such as "persons over 40", or an undefined range such as "middle-aged". Unlike other protected characteristics, age is not binary, but a continuum which changes over time.

Disability

A person has the protected characteristic of disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities (section 6 of the 2010 Act). A physical or mental impairment includes things such as sensory impairments, learning disabilities, mental health conditions and mental impairments such as autism and dyslexia. Formal medical diagnosis is not necessary, but a person must

show substantial (more than minor or trivial) and long-term (lasting 12 months of more) adverse effect on their ability to carry out day-to-day activities. The impact of the impairment will be assessed as if the person was not receiving medical treatment or using auxiliary aids. Protection is extended to people who do not have a disability in certain limited circumstances, such as when a person is perceived to have a disability or is associated with a person who has a disability, for instance if they are a carer, and they may then be protected against harassment or victimisation.

Gender reassignment

A person who is undergoing, has undergone or intends to undergo a process or part of a process to reassign their sex by changing physiological or other attributes of sex has the protected characteristic of gender reassignment (section 7 of the 2010 Act). Protection is not predicated on having a gender recognition certificate. Gender reassignment is a personal not a medical process, and no medical intervention is required for protection. Although the Act refers to people who have the protected characteristic of gender reassignment as "transsexuals", that terminology is outdated in day-to-day life. Generally, the term now used is "trans" or "transgender". Protection does not extend to those holding other gender identities, such as non-binary, or to those who cross-dress for reasons not related to gender reassignment (although there may be protection if they are perceived to be transgender).

There are additional protections for transgender people; if they are absent from work because of gender reassignment, it is unlawful to treat them less favourably than they would be treated if they were absent due to an illness or injury (section 16 of the 2010 Act).

Marriage and civil partnership

A person has the protected characteristic of marriage and civil partnership if they are married or in a civil partnership (section 8 of the 2010 Act). This protection does not apply to those who are single or cohabiting, nor those who are engaged, widowed, or divorced, or to those who have had their civil partnership dissolved, so it does not protect people from marital status discrimination. It can be relied on to establish only direct or indirect discrimination in the context of employment.

Pregnancy and maternity

There is no definition of pregnancy and maternity in chapter 1; the scope of protection is limited to direct discrimination, not indirect (although victimisation could be argued), and it does not extend to harassment either. Nor does it apply to discrimination based on association or perception (although that may well be sex discrimination which could be used as the basis of such a claim, as it could be for harassment).

The protection simplifies the evidential requirements because no comparator is required, and where it is established that treatment was because of pregnancy or maternity, no defence can be relied on. There are separate provisions relating to pregnancy and maternity discrimination in the work and non-work context. A person discriminates against a woman if they treat her unfavourably because of her pregnancy or for reasons related to that or taking maternity leave in the protected period, that is until any maternity leave ends, or for non-work cases for 26 weeks after the birth (see sections 17 and 18 of the 2010 Act).

Race

The protected characteristic of race includes colour, nationality and ethnic or national origins, and potentially caste (section 9 of the 2010 Act). Protection is established by reference to a person's "racial group". A group could comprise two or more distinct racial groups, for example it could be Scottish and British, or both Pakistani and Scottish, and indeed the group does not need to be named, so there would be protection for those in the non-EU group.

Ethnic or national origins refers to such things as community background, descent, or heritage, for example Roma background or Chinese heritage. The two terms overlap but are not interchangeable; for instance, the English and the Scots have been regarded as having shared national origins without being ethnic groups (*British Airways v Boyce* 2001 SC 510).

A person's nationality must be distinguished from their national origins, which is defined by the state of which they are a citizen or subject (although they may overlap). As to ethnic group, this must have a long shared history and a cultural tradition of its own, and may have a common language, literature, religion and/or

geographical origin or be a minority or oppressed group (*Mandla v Dowell Lee* [1983] 2 AC 548). Sikhs, Jews, Romany Gypsies and Scottish Travellers have been held to meet these requirements, but not Muslims or Rastafarians.

Religion or belief

The protected characteristic of religion means any religion and includes a lack of religion. Belief means any religious or philosophical belief and includes a lack of belief (section 10 of the 2010 Act). Neither religion nor belief is given any detailed definition in the Act. However, the concept of religion is broad, going beyond the well-known religions, so long as the belief is sincerely held by an individual and intrinsic to their faith. Denominations and sects may amount to a religion in themselves.

Humanism, agnosticism and atheism are philosophical beliefs, but the definition extends wider than that, to include, for example, a belief that climate change is human caused and a commitment to animal rights. A philosophical belief must have sufficient impact on the person that it affects how they live their life or perceive the world in order to be protected. To qualify, it must:

> i) be genuinely held;
>
> ii) be a belief, not an opinion or viewpoint based on the present state of information available;
>
> iii) relate to a weighty and substantial aspect of human life and behaviour;
>
> iv) attain a certain level of cogency, seriousness, cohesion and importance; and
>
> v) be worthy of respect in a democratic society, not incompatible with human dignity, and not in conflict with the fundamental rights of others (*Grainger Plc v Nicholson* [2010] ICR 360).

It has been held by an employment tribunal to encompass Scottish nationalism (*McElney v MOD* ET 2019) but not supporting Rangers Football Club (*McClung v Doosan Babcock* ET 2022).

Sex

Section 11 of the 2010 Act states that the reference to the protected characteristic of sex is a reference to a man or a woman. No further definitions of the terms "woman" or "female" or "man" or "male" are provided, beyond the provision that "woman" means a female of any age and "man" means a male of any age (see section 212(1)).

The term "sex" rather than gender is used throughout the 2010 Act, except for section 78 where reference is made to gender pay gap information. The term "sex" has been interpreted to address both discrimination because of biological sex as well as the social construction of gender (see dicta of Lord Justice Clerk in *Fair Play for Women Ltd v Register General for Scotland* 2022 SC 199).

Sexual orientation

The protected characteristic of sexual orientation means a person's orientation towards persons of the same sex, persons of the opposite sex or persons of either sex (section 12 of the 2010 Act). Therefore, it covers orientations which are gay, lesbian, bisexual or heterosexual. A person who manifests their sexual orientation through conduct or behaviour or other external indicators such as accent or physical appearance will be protected.

3. Prohibited conduct

Direct discrimination

Section 13 of the 2010 Act provides that a person discriminates against another directly if they treat them (or would treat them) less favourably than a person in the same or similar circumstances because of a protected characteristic. Direct discrimination cannot generally be justified, except where the protected characteristic is age. There are, however, several exceptions whereby direct discrimination is permitted. It will encompass discrimination by perception, where a person believes that another has a protected characteristic even if they do not, and discrimination by association, where a person is treated less favourably because they associate with someone with a protected characteristic.

Indirect discrimination

Section 19 of the 2010 Act provides that a person discriminates against another indirectly where they apply a policy, criterion or practice (PCP) to those who do not share the complainer's protected characteristic, which puts or would put those who share the complainer's protected characteristic at a particular disadvantage; and puts the complainer at that disadvantage. If a complainer can prove particular disadvantage, then the burden of proof will shift to the respondent to show that the PCP is a proportionate means of achieving a legitimate aim.

Harassment

Harassment will occur where a person engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating the complainer's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment (section 26(1) of the 2010 Act). This includes unwanted conduct of a sexual nature (section 26(2) of the 2010 Act). Where there is unwanted conduct which meets the definition, harassment will also occur where the person has rejected or submitted to the conduct, and as a result the person treats the complainer less favourably (section 26(3) of the 2010 Act).

Where the conduct has the proscribed purpose, then a complainer will succeed. If it has that effect, then the court or tribunal must take into account the perception of the complainer, whether it is reasonable for the conduct to have that effect, and the other circumstances of the case; that is both a subjective and objective test.

As there is no requirement for a comparator, the conduct simply needs to be "related to" the protected characteristic of sex, which is more extensive than conduct "because of" a protected characteristic (*English v Sanderson Blinds* [2009] 2 CMLR 18).

Conduct which is self-evidently offensive can amount to harassment even if the complainer has not expressly objected (see, for example, *Insitu Cleaning v Heads* [1995] IRLR 4 EAT) and a one-off incident or comment can amount to harassment (*Richmond Pharmacology v Dhaliwal* [2009] ICR 724).

Victimisation

A person victimises another if they subject them to a detriment because they have done, or believe they have done, a protected act (section 27 of the 2010 Act). The focus is not on the protected characteristic but rather on the complainer's conduct, which can be pursuing or giving evidence in relation to a claim under the 2010 Act, or anything else in connection with that Act. There may be more than one reason for any detriment suffered, and it is enough that the protected act had a significant influence on the outcome. There is no time limit within which the detriment must occur following the protected act, although a long gap may make it more difficult to prove the necessary causal link between the detriment and the protected act.

Discrimination arising from disability

Section 15 of the 2010 Act provides discrimination arising from disability will occur when a complainer is subject to unfavourable treatment because of something arising in consequence of disability. In contrast with direct discrimination, no comparator is required and the reason for the treatment is not the disability itself but something arising from, or in consequence of, the complainer's disability. For example, a complainer may be refused entry because they have an assistance dog, which is a consequence of their disability, but not because they are blind. A respondent will not be liable if they did not know, or could not reasonably be expected to know, that the complainer was disabled, or if the treatment can be objectively justified.

Duty to make reasonable adjustments

Section 20 of the 2010 Act creates a positive and proactive duty to make reasonable adjustments to alleviate substantial disadvantage suffered by disabled people. The duty to make reasonable adjustments arises when a disabled person is placed at a substantial disadvantage by the application of a provision, criterion or practice (PCP), by a physical feature or the non-provision of an auxiliary aid. A failure to take such steps as are reasonable to avoid the disadvantage amounts to discrimination.

In the employment context, the duty will only be triggered where the respondent knew or ought to have known both that the complainer was disabled and that they would be substantially disadvantaged by any failure to make adjustments. In relation

to services, public functions, associations and education, the duty is an anticipatory one which is owed to disabled people generally (although a provider is not expected to anticipate the needs of every individual who may use their service). In relation to premises, the duty only arises when a disabled person makes a request for an adjustment.

4. Other prohibited conduct

Discrimination or harassment which "arises out of and is closely connected to a relationship which used to exist" is unlawful (section 108 of the 2010 Act). This covers any former relationship, whether it is a complaint from a former employee (such as victimisation in relation to the provision of a reference: *Jessemey v Rowstock Ltd* [2014] 1 WLR 3615) or a former customer (who has been barred for previously claiming discrimination).

It is unlawful for a person to instruct someone, or to cause or induce someone, to discriminate against, harass or victimise another, or attempt to do so, or to help another do an unlawful act (section 111 of the 2010 Act). An example is where a GP instructed their receptionist not to register anyone with an Asian name (see EHRC Statutory Code of Practice).

It is also unlawful to knowingly help another to discriminate against, harass or victimise another person (section 112 of the 2010 Act).

5. Public sector equality duty

The public sector equality duty places positive duties on public authorities to take active steps to eliminate discrimination, to advance equality of opportunity and to foster good relations (section 149 of the 2010 Act).

There is a general duty imposed on all authorities which carry out public functions, and specific duties placed on listed public authorities.

The general duty is set out in section 149(1), which provides that:

> "A public authority must, in the exercise of its functions, have due regard to the need to (a) eliminate discrimination, harassment, victimisation and any other conduct which is prohibited under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not".

Courts and tribunals, in addition to (but not limited to) local councils and the police, are considered public authorities for these purposes, although the exercising of "judicial functions" or functions exercised on behalf of, or on the instructions of, a person exercising a judicial function are excluded from the duty (schedule 18, paragraph 3 to the 2010 Act).

Section 149(6) of the 2010 Act makes clear that complying with the duty might mean treating some people more favourably than others. This would include treating disabled people more favourably than non-disabled people and making reasonable adjustments for them, making use of exceptions which permit different treatment, and using the positive action provisions in sections 158 and 159 where they are available.

Public authorities which are listed in schedule 19 to the 2010 Act are subject to certain specific duties for the better fulfilment of the general duty. The specific duties imposed on listed Scottish public authorities are found in the Equality Act 2010 Specific Duties (Scotland) Regulations 2012 (see guidance published by the Equality and Human Rights Commission).

6. Positive action

Positive action intended to address disadvantages suffered by under-represented groups because of past discrimination is an exception to the non-discrimination principle (sections 158 and 159 of the 2010 Act).

The provisions are permissive, not prescriptive, which means that there is no obligation to undertake forms of positive action. Positive action is permitted in three situations: where action is a proportionate means of achieving a legitimate aim; in a

"tie-break" situation in recruitment and promotion; and in the selection of candidates by political parties.

Positive action permits action targeted at the protected groups which is a proportionate means of achieving certain stated aims, namely enabling or encouraging persons to overcome or minimise disadvantage, meeting the different needs of the protected group, and enabling or encouraging persons in the protected group to participate in an activity.

Action falling into one or more of these categories is permitted if a person reasonably thinks the protected groups will suffer disadvantage connected to their characteristic, where they have needs that are different from others and where participation in any activity by persons who have a protected characteristic is disproportionately low.

7. Enforcement

The Equality and Human Rights Commission ("EHRC") exists to promote the importance of equality and diversity with a view to eliminating unlawful discrimination in society. The EHRC also has powers to initiate proceedings in its own name as well as intervene in relevant litigation.

8. European Convention on Human Rights

The Human Rights Act 1998 reinforces protection against discrimination by public bodies in the United Kingdom. The 1998 Act gives domestic effect to the European Convention on Human Rights. Of particular relevance is Article 8 (right to respect for private and family life), Article 9 (right to religious freedom) and Article 14 (prohibition of discrimination). Section 6 requires that public authorities, including the judiciary, comply with the ECHR.

Race and ethnicity

Contents

1. Overview

This chapter covers issues of race and ethnicity that may be relevant in the court or tribunal setting. However, it will be appreciated that there are many different matters relating to a person's race or ethnicity that may crop up. It is impossible to cover every issue that may need to be considered, and judges will appreciate that the onus is on them to ensure a fair hearing that allows participation by all.

There may be cross-over between some aspects of this chapter and the chapter dealing with religion; and with other chapters, for example vulnerable persons, or more.

2. Introduction

The government-commissioned Lammy Review into the treatment of Black[1] and Asian minority ethnic ("BAME")[2] people in the criminal justice system was published in September 2017. The terms of reference related to England and Wales only, but the review contains useful information that Scottish judges may wish to draw upon.[3]

The final report concluded that there is a high level of distrust in the criminal justice system amongst the BAME population. Part of this is caused by lack of diversity amongst judges. However, transparency and clear explanations of court processes and sentencing decisions are almost as important in building trust. There remains an over-representation of persons from an ethnic minority background as accused persons within the criminal justice system, and disparities in aspects of their treatment. Disproportionality in the youth justice system was identified as a major problem in the report and has not improved since Lammy, according to a 2023 update undertaken by the Prison Reform Trust.

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[1] We understand there is an increasing trend to capitalise the words "Black" and "White". Whilst views vary, we are following the UK government's style in doing so: UK Government, "Writing about ethnicity" (updated October 2024) accessed 3 February 2025. We are not aware of Scottish Government guidance, but note the Scottish Government recommend statistics on ethnicity are collated using the same approach taken in the 2022 census: Scottish Government Equality, Inclusion and Human Rights Directorate, "Data collection and publication – ethnic group: guidance" (2 March 2022) accessed 3 February 2025. This is an issue where there may still be some debate.

[2] We are aware that many people from Black, Asian and minority ethnic communities dislike the term "BAME" and especially the acronym "BAME", and do not use it to describe themselves. The UK government's guidance, "Writing about ethnicity" (see above), notes that: "We do not use the terms BAME (Black, Asian and minority ethnic) and BME (Black and minority ethnic) because they emphasise certain ethnic minority groups (Asian and Black) and exclude others (Mixed, Other and White ethnic minority groups). The terms can also mask disparities between different ethnic groups and create misleading interpretations of data". "BAME" is the collective term used in the Lammy Review, hence its use here. This is a good example of how acceptable and preferable terminology can change. Judges should seek to keep abreast of changing terminology.

[3] There is insufficient information and analysis regarding race and the Scottish justice system: see Scottish Government Safer Communities Directorate, "Race and the justice system research audit: findings report" (16 March 2021) accessed 3 February 2025, which concluded: "This audit of recent research around race and the justice system in Scotland indicates that there is not a huge amount of qualitative or quantitative research available." See also: Scottish Government Safer Communities Directorate, "Cross Justice Working Group on Race Data and Evidence: terms of reference" (10 March 2021) accessed 3 February 2025.

A report, "Racial Bias and the Bench", published by the University of Manchester in November 2022, carried out a relatively small survey of legal professionals in England and Wales. Although not based on experience in Scotland, a number of respondents stated they had witnessed one or more judges acting in a racially biased way towards a defendant and others reported witnessing one or more judges acting in a racially biased way in their judicial rulings, summing up, sentencing, bail, comments and/or directions.

Jules Holroyd, writing for the Centre for Crime and Justice Studies, notes:[4]

> "Empirical psychology of the past few decades has again and again shown that the workings of our minds are not transparent to us, and that many of us harbour and are influenced by implicit biases. Perhaps it is impossible for us to avoid all of the many kinds of biases that we might be susceptible to; but we can decide where to focus efforts in trying to avoid bias. Some kinds of bias, such as implicit race biases, are particularly troubling. This sort of bias means that people who – sincerely – report that they are not racist, and that they are committed to fair and non-discriminatory treatment, might nonetheless harbour implicit race biases, and be influenced by these biases in the way they behave. These biases are described as 'implicit' because they are not easy to detect (we cannot easily check whether we have them or are influenced by them), and because they operate automatically, and outside the reach of direct control.
>
> The sorts of implicit racial biases that have been detected are varied, but there are robust findings that indicate that, in contemporary society, implicit race bias is pervasive. Some studies conducted by the psychologist Patricia Devine show that people tend to have more positive associations with white rather than Black people; other studies show that Black males are more readily associated with weapons; others that Black males are more strongly associated with danger and hostility than are white males. These associations

[4] Jules Holroyd, "Implicit Racial Bias and the Anatomy of Institutional Racism" (2015) 101 CJM 30.

influence behaviour, as the work of psychologists Jack Glaser and Jennifer Eberhardt has shown."

Against this background, judges should take care to examine their own actions and thinking with a view to guarding against racist attitudes and/or practices.

Judges need to be conscious of their own inherent biases. The authors of "Racial Bias and the Bench" (University of Manchester, November 2022) refer to research from the United States suggesting those who consider themselves not to be personally biased may act in more biased ways than those who start from understanding themselves to be actively biased and take conscious steps to counter that bias. The authors argue, "to assume that, for most judges, bias has already been overcome or was never present in the first place, simply risks further sedimenting bias". So, if this is correct, assuming a colour-blind position may risk the *status quo*, and thus continue racism that may exist in society, including in the justice system. Indeed, there is evidence to suggest that what is needed from the bench is proactive practice ("Making Black lives matter in the criminal justice system: A guide for antiracist lawyers" (Howard League for Penal Reform)).

It may be that it is not enough to show no racism; what is required instead is an anti-racist approach ("The antiracist court" (Counsel magazine, 2021)). The first step is to educate oneself to have a greater appreciation of the lived experience of those from minority ethnic backgrounds; thereafter, be ready to counter any assumptions that are being made because of a person's racial profile, and recognise that a courtroom, which may be an overwhelmingly White space, may be alienating for a person from another background.[5]

The Scottish Government published "Ethnicity in the Justice System" in April 2023, reporting that people from minority ethnic groups tend to have more positive views of the justice system than the national average; however, this changed when considering the fairness and treatment of those accused of a crime. Specifically, those from minority ethnic backgrounds had lower levels of confidence than the national average in the statements: "Allows all those accused of crime to get a fair

[5] Whilst a guide for those involved in the coroner's system, judges might be interested in the tips for coroners designed to help guard against bias: Inquest, "Achieving Racial Justice at Inquests: a practitioner's guide" (21 February 2024) 49, accessed 3 February 2025.

trial regardless of who they are" and "Treats those accused of crime as innocent until proven guilty".

A draft sentencing guideline for blackmail, kidnap and false imprisonment is under consideration by the Sentencing Council for England and Wales at the time of writing (consulted upon in early 2024); it acknowledges that Asian and Black offenders seem to receive longer sentences.[6] The consultation considers adding wording to the guideline to highlight this apparent disparity and to refer sentencers to their Equal Treatment Bench Book. It is yet to be determined if this wording will be adopted in the final version.

3. Current data on ethnicity

Scotland's last census took place in 2022. The results, published on 21 May 2024, reported that 12.9% of people in Scotland had a minority ethnic background. This was an increase from 8.2% in 2011. The largest groupings were Polish, Pakistani/Scottish Pakistani/British Pakistani, Irish, African/Scottish African/British African, Indian/Scottish Indian/British Indian, Chinese/Scottish Chinese/British Chinese, Arab/Scottish Arab/British Arab. There were also a number of persons who identified as "Other White", generally identifying themselves as from another European country. Separately, just over 1% of the population identified as mixed or multiple ethnic group.

[6] Sentencing Council for England and Wales, "Blackmail, kidnap and false imprisonment guidelines: consultation" (31 January 2024) accessed 3 February 2025. For Kidnap offences: White offenders between 2018 and 2022 received a lower average custodial sentence length (ACSL) of approximately 5 years 4 months versus either Asian or Black offenders who received 6 years 1 month and 7 years 9 months respectively. For false imprisonment offences: White offenders between 2018 and 2022 received a lower average custodial sentence length (ACSL) of approximately 4 years 1 month compared with Asian and Black offenders who received 5 years and 6 years 4 months respectively. For blackmail offences: a higher proportion of Black offenders (93 per cent) received immediate custody compared to White offenders (71 per cent). From 2018 to 2022, the ACSL was also higher for Asian offenders, compared with White offenders. Asian offenders received an ACSL of 3 years 6 months, versus 2 years 8 months for White offenders. The ACSL for Black offenders was only slightly higher than White offenders at 3 years 1 month.

4. Legal context

The Equality Act 2010 prohibits discrimination in relation to "race".[7] This means colour, nationality, ethnic or national origins.

It also imposes an equality duty on the public sector, which includes courts and tribunals (although the exercise of judicial functions is excluded).[8] Reference is made to chapter 1 which gives a short legal guide to the Equality Act:

> "Race, colour, nationality (including citizenship), or ethnic or national origins is a protected characteristic in terms of the Hate Crime and Public Order (Scotland) Act 2021. Broadly speaking, the Act provides that an offence can be aggravated by prejudice based on the victim's membership of a group defined by reference to a listed characteristic (age, disability, race (and related characteristics), religion, sexual orientation, transgender identity and variations in sex characteristics). It creates offences of stirring up hatred against a group of persons based on the group being defined by reference to the listed characteristics."

5. Using appropriate language

It would be impossible to list all the different races, ethnicities and cultural backgrounds of those who may be involved with the Scottish courts and tribunals. The clear overriding objective is for all persons to be treated fairly and equally. Sometimes to treat someone fairly you need to treat them differently; for example, by ensuring they have proceedings translated for them.

"Race" and "ethnicity" are two different concepts. The former is often used to describe a category of persons said to share physical traits, although this is controversial. Race is often now said to be a social construct; and the latter is used to

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[7] Equality Act 2010, s 9.

[8] Equality Act 2010, s 149; a public authority must have due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct prohibited by the Act; advance equality of opportunity; and foster good relations between those who share a protected characteristic and those who don't.

define large groups of people according to a common racial, national, tribal, religious, cultural, or linguistic background. "Ethnicity" is linked with cultural expression and identification.[9]

Where a person's ethnicity or race is irrelevant it should not be referred to. However, it will sometimes be relevant to identify or describe a person's ethnicity or race, for example, where cultural issues may be relevant to a child's proposed relocation. Where it is relevant, care must be taken to ensure that appropriate terminology is used. It is important to avoid causing offence and thereby give confidence that everyone will receive a fair hearing.

Where judges are unsure about how to identify or describe a person's race or ethnicity or how to address a person from a minority ethnic group, they should ask the person concerned how they wish to be identified, described or addressed. Language is constantly evolving, and it is important that unacceptable language is not used. This is not about so-called "political correctness"; rather, it is part of society's response to the need to recognise and respect diversity and equality.

Some terms that were used in the past are now outdated and unacceptable. They will cause offence. Some terms create a difference of opinion, with some viewing them as appropriate and others unacceptable. Please see terminology guide below.

Race/ethnicity and the justice system

The Scottish Government published a review of quantitative evidence relating to ethnicity in the justice system in Scotland: "Ethnicity in the Justice System" (Scottish Government, April 2023). Some of the findings include:

- It has long been estimated that the incarceration rate for people who identify as African, Caribbean, or Black, or from other ethnic groups is significantly higher than for people who identify as White.
- The vast majority who had contact with the police said the police had been polite (93%) and treated them fairly (86%); there were no significant differences by ethnicity.

[9] Erin Blakemore, "Race and ethnicity: How are they different?" (National Geographic, 22 February 2019) accessed 3 February 2025.

- Those from minority ethnic backgrounds were significantly less likely to say they know a lot or a fair amount about the Scottish criminal justice system.
- People from minority ethnic groups tend to have more confidence in the justice system than the national average, but they had lower confidence in these statements: "Allows all those accused of crimes to get a fair trial regardless of who they are" and "Treats those accused of crime as innocent until proven guilty".
- Race aggravated hate crimes make up most hate crimes reported to the police. People who identify as African, Caribbean or Black have a higher rate of victimisation than the national average.
- Overall, minority ethnic groups appear to be under-represented in justice organisations.
- Recognising the lack of data in Scotland, the Scottish Government has set up a Cross Justice Working Group on Race Data and Evidence. As part of their work, an overview of recent research and data was collated: "Ethnicity and justice in Scotland: overview of research 2023 to 2024" (February 2024).
- The research paper "Occasional Paper: Analysis of the ethnicity of individuals subject to hearings in Scottish courts" (Scottish Government, April 2023) relies on statistics collected by SCTS; it suggests that those from some minority ethnic backgrounds are over-represented in the court system and, although at lower risk of being convicted or imprisoned, might receive longer sentences. However, the research authors warn of caution, given the analysis was carried out using comparative data from the 2011 census, and the research did not take into account other factors such as age, socio-economic status, offence type or history. Further research is required.

Gypsies, Travellers and Roma

The terms "Gypsy" and "Travellers" are often used interchangeably, sometimes referred to as "Gypsy Travellers" or "Scottish Travellers". The term "Roma" refers to those from Eastern Europe with a gypsy or travelling background.[10] Gypsy Travellers

[10] "Gypsy Traveller" is used in this section to cover a broad group of people, although many within the group would refer to themselves using terms including Travellers, Scottish Travellers, Gypsy Travellers and Gypsy Traveller people. Used in a generic sense, it includes English Gypsies, Irish Travellers and European Roma. There are differences between these specific groups.

have been held to be a distinct racial group.[11] Whilst there is diversity within the broad grouping, generally the shared family ties together with the bonds of culture, tradition and heritage within their community are important, perhaps influencing a preference for working and living with others from the same background. Many Gypsy Travellers no longer travel continually, reflecting the lack of sites and spaces on the road, and the realities of modern life.[12]

There is a lack of comprehensive research on Gypsy Travellers' experiences in Scotland, but concerns have been raised by human rights groups as to discrimination and inequality in many areas of day-to-day life, including education, housing and cultural rights.[13] The Equality and Human Rights Commission authored a report in 2015 (dealing with England only) entitled: "England's most disadvantaged groups: Gypsies, Travellers and Roma." The title encapsulates the myriad disadvantages that members of this population may face. It is possible there are widespread racist attitudes to Gypsy Travellers.[14]

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[11] See *Mr K Maclennan v Gypsy Traveller Education and Information Project,* S/132721/2007, although travelling show people are not necessarily part of a distinct racial group. New age travellers are also unlikely to be part of a distinct racial group. Note it is an Employment Tribunal case.

[12] There is no need to move either continuously or part of the year to retain a gypsy identity: see *Smith v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC Civ 1391, at paragraph [65], which explained: "Romany Gypsy is an ethnicity: see *CRE v Dutton* [1989] 2 WLR 17; *Moore & Coates v Secretary of State for Communities and Local Government* [2015] EWHC 44 (Admin). The relevant defining feature of that ethnicity is not 'being nomadic': as the judgment in *Chapman*, at paragraphs [73] and [96] made plain, it is the act of living in caravans which is an integral part of the Gypsy/Traveller way of life. The aversion of Gypsies and Travellers to 'bricks and mortar' has been noted in numerous cases: see, for example, *Clarke v Secretary of State for the Environment, Transport and the Regions, upheld by this court at [2002] EWCA Civ 819; [2002] JPL 1365; [2002] JPL 552*, at paragraph [34]. As with any other ethnicity, an individual is either a Romany Gypsy or not; there is no in-between status here. Moreover, as was also emphasised in *Chapman*, at paragraph [96], the State has a positive obligation to facilitate the Gypsy way of life."

[13] See the Scottish Human Rights Commission, "Parallel Report to the United Nations Human Rights Committee on the 8th Examination of the United Kingdom of Great Britain and Northern Ireland under the International Covenant on Civil and Political Rights (ICCPR)" (4 February 2024) accessed 3 February 2025.

[14] See the Scottish Government, "Scottish Social Attitudes 2015: Attitudes to Government, the National Health Service, the Economy and Standard of Living" (17 March 2016) accessed 3 February 2025, which included questions on whether respondents would be happy with a Gypsy/Traveller as a primary school teacher (34% thought such a person unsuitable) and whether respondents would be happy if a close relative entered into a long-term relationship with a Gypsy/Traveller (31% said they would be unhappy). Further, Amnesty International, "Caught in the Headlines" (2012) accessed 3 February 2025, reported concerns about media reporting around gypsy travellers in Scotland.

Travellers, who form 0.1% of the British population, are over-represented in the English criminal justice system.[15] The Scottish Government have referred to gypsy travellers as "one of the most marginalised groups of people in Scotland" ("Improving the Lives of Scotland's Gypsy/Travellers 2: action plan 2024-2026" (2024)). Although the numbers of those identifying as gypsy or travellers in the 2022 census was small, the challenges faced by gypsy travellers has been specifically identified in this section given the Scottish Government's comments (judges may wish to note that it has been argued that the census in England and Wales has not properly captured figures for the gypsy, Roma and traveller population. It is not known if a similar argument might apply to Scotland). England and Wales has only recently started to have a "Traveller" option in its data system.[16] Of those asked in Prison Inspections if they identified as Gypsy, Roma or Traveller, 5% said that they did. They are more likely to report health and substance misuse problems in prison. They are more likely than prisoners from other communities to report concerns about their safety.

Some studies suggest members of this group might be more likely to be in custody because of lack of a home address or fears they will abscond.[17] This is often based on misconceptions about where people from these communities live. Low literacy levels amongst Gypsy, Roma and Traveller prisoners reduce their access to healthcare, education, housing and employment services in prison, as these tend to be requested through a written form. Access to services and employment post-release in the community also often relies on a considerable level of literacy.

6. Forms of address

Court and tribunal hearings usually begin with introductions by name. For a party or witness with a name a judge is not familiar with, the way a judge or member of court staff reacts to it can symbolise an attitude towards their other cultural differences: it

[15] The Equality and Human Rights Commission, "England's most disadvantaged groups: Gypsies, Travellers and Roma" (March 2016) accessed 3 February 2025.
[16] The Traveller Movement, "A Profile of Prisoners in the Adult Prison Estate" (1 September 2020) accessed 3 February 2025.
[17] HM Inspectorate of Prisons, "People in prison: Gypsies, Romany and Travellers" (February 2014) accessed 3 February 2025.

is an important first step towards gaining and holding confidence that these do not prove to be a disadvantage in court.

If a name is difficult to pronounce, it is tempting to avoid saying it out of embarrassment. This is not best practice. The individual may notice the omission and wrongly interpret it to mean dismissiveness or disrespect. Where in any doubt the best thing is to ask, rather than to make assumptions. A person should be asked for their full name, then, "What do you want me/us to call you?" If the individual does not speak English as a first language, avoid complex conditional verbs such as those contained in the question: "What would you like me to call you?" The question, "What is your Christian name?" should be avoided (as it refers to one distinct religion) and in any event may not be understood. It is best to try to pronounce the name, ask for guidance and remember to apologise if unable to get it right.

Confusion can arise if a person, knowing their name is unusual in the UK, tries to be helpful by giving their name differently to different front-line staff on separate occasions. They may select out parts of their name, or give spellings or transliterations from another alphabet, according to how they are asked or according to what they assume the person asking will find easiest. Some outdated computerised record systems can also create inaccurate records by imposing only the format of the naming system most familiar in the UK.

People in religious marriages not recognised in the UK, and who have not entered a recognised civil marriage, may nevertheless wish to be known as "husband and wife" (as opposed to "partners") and the woman may wish to be called "Mrs". Indeed, the concept of a committed relationship outside marriage may be unfamiliar to those from certain societies.

In some cultures, naming systems follow a different format to the Scottish. For example, the family name (in Scottish format the surname) may come first, a woman may not change her name on marriage, and a person may have a religious name only used in some situations. As stated above, the best thing to do is to seek guidance from the individual themselves. Some guidance about naming systems is provided in the Bench Book for England and Wales, save for Gaelic (dealt with below).

Gaelic names

It is important that Gaelic personal names, place names and the names of institutions are pronounced correctly, as with all names. Failing to get the pronunciation right could reduce the confidence of court users in the court's authority. If unfamiliar with Gaelic pronunciation, look in advance for the key names likely to arise, check their pronunciation with a Gaelic speaker and write the words down phonetically for your own reference.

The most common class of Gaelic surnames are patronymic and vary according to whether the bearer is male (for example MacDhòmhnaill – Mac = son "MacDonald") or female (for example NicDhòmhnaill – Nic = daughter "MacDonald") so, for example Catherine MacPhee is properly called in Gaelic Caitrìona Nic a' Phì.

It was once traditional for everyone living in a Gaelic-speaking district to have a local nickname describing their trade or a physical characteristic or trait and some of these may perpetuate. Sometimes people were named after the place they lived in last or were born in. If the person named was of a family long settled in the district, they would probably be named after their father.

Where a person's mother was a native married to an outsider, they may have been named after her. Thus, plain "John MacDonald" in English may also be spoken of as "Iain Mhurchaidh NicDhòmhnaill Alasdair." This means "John [son of] Murdo [son of] Donald [son of] Alasdair", a patronymic. The sole object of Gaelic surnames is to make the identity of the person spoken of as clear as possible by means of the name referring to whom or where the person "belongs". The practical result of all of this is that a person's legal name may be different to the name by which they are known in Gaelic; for example, James MacLeod may be known as "Seumas Neill" (literally "Neil's James") or "Seumas a Ghlinne" (a nickname - James of the Glen).

In addition, until the late 1980s/early 1990s some registrars did not fill in statutory records with Gaelic given names or spellings, which has resulted in people being universally known by one name but having another legal name, for example "Alasdair" would be "Alexander" or "Seonag" would be "Joan" on statutory records. Using the person's usual Gaelic name, rather than their registered name, if appropriate, confers respect on both the culture and the person.

Other cultural issues

- Sex offences: because of cultural or religious differences it may be very difficult for some witnesses from certain minority ethnic communities to give evidence due to, for example, the need to use certain words. Sensitivity to cultural norms should be shown.
- Racially motivated offences: sensitivity may be required if and when racist language is repeated in court as part of the evidence.
- Some people may be offended by foul language. The judge should consider whether to intervene after balancing the importance of having regard to sensitivities of individuals and the importance of achieving unambiguous evidence or justice. It may be sufficient to reassure the witness that the court is in the habit of hearing such evidence.
- Some people may not understand the relevance of identifying the accused in court. Pointing may be considered rude in some cultures, but there are other ways of identification. If a veil is being worn see section on this.
- Some people may not, because of their cultural or religious norms, wish to shake hands with a member of the opposite sex or, for example, have a bar officer of the opposite sex fix a lapel microphone to their clothing.
- Some people may, because of their cultural or religious norms, avoid direct eye contact. They are not being "shifty" merely habitually reserved. This will naturally be exacerbated if the subject matter would be regarded as inherently embarrassing or immodest, such as a sexual matter.
- In some cultures, particularly East Asia (for example China, Japan, Taiwan) the concept of "saving face" is fundamental. It goes beyond what would be the norm in Scotland. Such an individual may also be concerned to save the face of, for example, the judge or agent. This desire will be particularly acute if there are others from the same cultural background present. This can lead to various issues. For example, the response to the question, "Do you understand?" is likely to be "yes", even when there is no understanding, as to admit that might imply that the judge has not explained clearly.
- In some cultures, it is customary to give background detail as context when answering a question. This can lead to an impression of being long-winded, or even evasive, and can lead to interruptions due to impatience, thus missing the key point.

- Pre-court written materials should be available in a range of formats and in different languages. For example, the SCTS document, "About the Scottish Courts and Tribunals Service" is available in eight different languages.

These are simply examples. Judges should take care to appreciate that there may be differences in language and body language and their use in distinct cultures, and the need to make allowances for this.

Interpreters

Although judges are not involved in making arrangements for interpreters, it is important that they are fully aware of potential difficulties experienced by court users who may have only a limited ability to speak and understand English, and the interpretation facilities available and the arrangements for securing them.[18] Practice regarding how to book interpreters varies across different courts and tribunals. Judges should be familiar with the rules in their own jurisdiction.

Judges need to ensure that where there is an interpreter, there is no reduction in a party or witness's participation in the hearing, willingness to speak, understanding of questions and overall ability to put their case. It is an essential part of a judge's function to ensure there is a fair hearing.

When giving evidence, people for whom English is not a first language may not always fully understand what they are being asked. It is one thing to know the basics of a language and to be able to communicate when shopping or working. It is quite another matter having to appear in court, understand questions, and potentially give evidence. It should also be remembered that many minority ethnic people prefer to speak their mother tongue at home. Similarly, Gaelic speakers may be relatively fluent in English but still feel more comfortable speaking Gaelic, for example, in relation to legal or technical terms. Judges should therefore be alert to different language needs and should not assume, simply because a witness has lived in the UK for many years, that they do not require an interpreter.

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[18]See SCTS Staff Guidance: "2021 Contract Framework for the Provision of Interpreting, Translation and Transcription Services" (updated October 2022) accessed 3 February 2025. It should be noted from paragraph 1.1 that the contract extends to accused persons and civil party litigants, thus no issue of funding should arise in these circumstances.

It can happen that an interpreter was not arranged in advance, or that an interpreter who has been booked does not arrive. It may be tempting for everyone involved to continue without an interpreter in that situation if the party or witness says they can manage in English. Judges should exercise caution about accepting such reassurances.

An interpreter has a difficult job. Languages do not operate in ways which identically match each other. They can differ in grammatical structure, vocabulary, the meaning of certain abstract concepts, and in how much is directly spoken as opposed to understood between the lines. The interpreter's job is to transfer as closely as possible the meaning of what is said by each side, not merely to translate words and phrases literally, which can create a false impression. For example, "The panel makes no plea" is unlikely to have a direct translation and the interpreter will require to convey the meaning of this, which may take more words and/or time.

Practical arrangements in court

- Dialects. Where applicable, ensure that the interpreter speaks the correct dialect of the language in question and that the witness and interpreter can communicate properly. It may be tempting when an interpreter arrives with the wrong dialect to ask whether the witness can manage anyway. A witness may feel under pressure to agree when in fact there could be a considerable loss of understanding.
- Layout. Plan an appropriate seating position with the interpreter, paying particular attention to, for example, the need for them to be seen on a remote screen. Facial expressions and gestures can often contribute to the meaning of what is said. The interpreter should, therefore, be able to see all speaking participants, and their position should also indicate their role as neutral and impartial.
- Breaks. Interpreting is a taxing job. No interpreter can go on too long. Consider requests to have frequent breaks and allow sufficient recovery time. It is good practice to agree frequency and timing of breaks with the interpreter in advance.
- Notes. Allow the interpreter to take notes if they wish to.

- Pace. Ensure everyone speaks at a slower pace and pauses, if necessary, for translation to be completed. It may be necessary to remind agents of this more than once. Everything said in court should be translated.
- Language. Encourage the use of simple, short sentences. Take care to allow time for concepts for which there may be no direct translation to be explained, for example, "You will be released on bail."
- Form. The use of an interpreter should not alter the form of any question. For example, judges should ensure that agents do not address the interpreter, rather than the witness. For example, "Can you ask him how old he is?" is improper; the question should be, "How old are you?" addressed to the witness and translated by the interpreter.
- All or nothing. Sometimes, if a person has some degree of English language skill, they wish to only have parts of the evidence or questions interpreted. This approach is likely to cause confusion and muddle matters. It may be difficult to pick up when someone is not following, leading to the risk that parts of the evidence have not been understood.

If an interpreter is necessary, a hearing in person may well be preferable to a remote hearing, as overlapping speech, which often happens in a remote hearing, will make the interpreter's job impossible. There are other difficulties for an interpreter in a virtual hearing, such as a reduced ability to take visual cues. Such matters should be considered if a remote hearing is being asked for.

Current terminology

Judges should take care to keep up to date with terminology, to avoid using words that may seem innocuous, but which have connotations, especially to certain groups. For example, "Eskimo" was a term in common usage in the past, but as its origins refer to perceived behaviour it is now thought to be trivializing of the group's culture. Rather, the term "Inuit" should now be used. This is just one example of the way language usage can change.

In addition, someone from a different culture or background may use a phrase that we would consider outdated in Scotland, but which may yet be acceptable in other countries or cultures. For example, the term "coloured" may still be in acceptable use in some parts of South Africa, whilst unacceptable in Scotland.

It will be impossible to keep fully appraised of all the nuances of language use across the world, and polite enquiry may have to be made of a witness or other court user if their language seems outmoded. The following information is offered regarding current Scottish acceptable terminology:

Black[19]	It is now generally considered acceptable to use the term "Black" to describe people of African-Caribbean or sub-Saharan African descent, although some argue caution.[20] People of South Asian descent may or may not describe themselves as "Black": there may be a different view between older and younger generations. Please also note that you may wish to capitalise this.
Non-White	It is not acceptable to describe Black people or Black and Asian people generally as "non-White". That is defining people by what they are not.
West Indian/Afro-Caribbean/African Caribbean	The term "West Indian" was formerly used as a phrase to describe the first generation of post-World War 2 settlers from the West Indies and, in particular, many older people from that community will so describe themselves. Whilst the term "West Indian" would not always give offence, it is inappropriate to use unless the individual concerned identifies themselves in this way. The term "African Caribbean" is the term now much more widely accepted. It has largely replaced the earlier term "Afro-Caribbean". As with "West Indian", this might be used as a self-description by some people but may be seen as old-fashioned and even offensive by others. "African Caribbean" does not refer to all people of West Indian origin, some of whom are White or of Asian extraction. Young people born in Britain may choose

[19] For capitalisation of "Black" see footnote 1.

[20] For example, the genetic scientist, Adam Rutherford, notes from a scientific point of view that, "Black is not a taxonomic term that usefully describes the genomic, phenotypic or geographic variation seen in Black people…" (Adam Rutherford, "How to Argue With a Racist: History, Science, Race and Reality" (1st edn, Weidenfeld and Nicolson, 2020)).

	not to use any of these designations and will often describe themselves as “Black” or “Black British” or simply as “British”.
African	The term “African” might be used in self-identification, although most people of African origin are likely to refer to their country of origin in national terms (such as “Nigerian” or “Ghanaian”). It should be appreciated that Africa is an immense continent containing more than 50 countries, multiple languages, cultures and diversity, and lumping everyone from that continent together may be inappropriate and cause offence. Young people born in Britain may choose not to use any of these designations and will often describe themselves as “Black” or “Black British” or simply as “British”.
Asian	This is a collective term which has been applied in Britain to people from the Indian sub-continent. In practice, people from the Indian sub-continent tend to identify themselves in terms of one or more of the following: • Their national origin (“Indian”, “Pakistani”, “Bangladeshi”). • Their region of origin (“Gujarati”, “Punjabi”, “Bengali”). • Their religion (“Muslim”, “Hindu”, “Sikh”). The term “Asian” can be appropriate when the exact ethnic origin of the person is unknown or as a collective reference to people from the Indian sub-continent. The more specific terms of Southeast Asian (for example Singapore, Indonesia), East Asian (for example China, Japan, Korea), East African Asian (for example Uganda, Tanzania) or South Asian (for example Bangladesh, India, Pakistan, Sri Lanka) may be preferred. Young people of South Asian origin born in Britain often accept the same identities and designations as their parents. This is by no means always the case, and some prefer to describe themselves as “Black” or as “British Asian” as a symbol of solidarity in the face of racial discrimination.

	People from Southeast Asia and the Far East tend not to be referred to, or self-refer, as "Asian" in the UK. Normally they would refer to their specific country of origin, for example Vietnamese, Malaysian, Chinese. The term "oriental" should be avoided as it would usually be seen as offensive.
Mixed race/ Mixed or dual heritage/Mixed parentage/Dual parentage	The term "mixed race" is widely used and is considered acceptable by some, though not by others. More acceptable terms are usually "mixed heritage" or "mixed/dual parentage". "Half-caste" is generally considered offensive and should be avoided. The term "multi-racial" is only used in relation to diverse communities.
Ethnic minorities/ Minority ethnic/BME (Black and Minority Ethnic)/BAME (Black, Asian and Minority Ethnic):	The terms "ethnic minority" and "minority ethnic" are widely used and are generally acceptable as the broadest terms to encompass all those groups who are seen, and who see themselves, as distinct from the majority in terms of ethnic or cultural identity. "Minority ethnic" is broader than "Black minority ethnic" or the problematic term "visible minorities" (problematic as it may imply that there are invisible minorities) and brings in such groups as Greek and Turkish Cypriots or Gypsy Travellers. Originally the term "ethnic minority" was used, but it is now generally considered more appropriate to use the term "minority ethnic" because, in relation to the first formulation, the majority group also has ethnicity. A minority ethnic person should not be referred to purely as an "ethnic person". Nor should the term of "ethnic communities" be used to describe minority ethnic communities. Every individual and community has an ethnicity. A minority ethnic person should not be referred to as a noun, ie "an Ethnic" or "a Minority Ethnic".
"BAME"	Black, Asian, and Minority Ethnic, either pronounced by the letters, or more recently as a word (rhyming with "name") – is the phrase used most frequently in the UK. However, some people object to being described as a "BAME" individual

	(BAME being a collective designation which obscures their particular cultural heritage) or even worse, by an acronym. There is also a difficulty in that the "A" in "BAME" can be misunderstood to mean "and" as opposed to "Asian". In a 2020 poll, 42% of minority ethnic respondents did not identify with the term BAME. Only 24% did identify with the term and thought it useful. Since then, the term has become even more unpopular because of its generality and vagueness. The Scottish Government no longer use the term "BAME" and instead use "minority ethnic (ME)", explaining that the term "minority ethnic" was more inclusive of all persons belonging to ME communities.
People of colour/coloured:	The term "people of colour" tends to be used more in the USA than in the UK, although it has been adopted more frequently in the last few years in the UK. "Coloured" is offensive and must be avoided in the UK. A person of the older White generation in the UK may feel that they are being polite by using the word "coloured" rather than "Black", but that is an extremely outdated view and not acceptable in any way. "Brown" (as a reference to South Asian people) should also be avoided.
Jewish people	It is better to say "Jewish person" or "Jewish people" than "Jews" or, worse, "a Jew". Although some Jewish people will not mind the collective reference to "Jews", others will feel the terms "Jew" and "Jews" have been used with hostility over the years and now potentially carry negative connotations.
Immigrant/ people seeking asylum/refugee	The terms "immigrant", "people seeking asylum" and "refugee" should only be used where such terms are factually correct in connection with the particular individual. Even then, "immigrant" should be used with caution, as it can sound exclusionary, especially for a person who has lived in the UK for a long time or who has gained British nationality. The words "immigrant" or "second generation immigrant"

	should never be used to describe a Black, Asian or minority ethnic person who was born in the UK. “Person seeking asylum” is now preferred to “asylum-seeker” as it is more humanising.
British/Scottish	“British” and “Scottish” are acceptable terms in themselves, but they should be used in an inclusive sense to refer to all ethnic groups and not simply to denote White people.
Gaelic	It would be wrong, for example, to describe a witness who gives evidence in Gaelic as “the Gaelic witness”, instead use “the witness who spoke in Gaelic or who used Gaelic”.

Religion and beliefs

Contents

1. Overview

This chapter concerns how a court or tribunal should take account of any religious or other beliefs, although in many circumstances such beliefs or religious practices will not be relevant to the case. As is emphasised throughout the chapter, there are many different religions and belief-led practices, and judges will need to be aware of this to ensure that individual preferences are accommodated where appropriate.

2. Introduction

The 2022 Scottish census had 13 different religions and beliefs as options. A sizeable percentage (51.1%, up from 36.7% in 2011) of respondents said they had no religion. Thereafter, 20.4% identified Church of Scotland as their religion. Roman Catholic (13.3%) and other Christian religions (5.1%) were the next largest groups, followed by 2.2% who were Muslim, with Hindu (0.55%), Buddhists (0.28%) and Sikhs (0.2%) being the next three largest groups. A small number, around 6000 (0.11%) people in Scotland identified as Jewish, with 0.23% of people coming from other (unspecified) religions with smaller numbers than this. Even on this cursory examination, it is clear that there is a rich diversity of faiths and beliefs in Scotland. All of these different beliefs and religions should be respected by the court or tribunal. Judicial office holders should aim to ensure that the observance of religious practices is not impeded by the court.

3. Nuances of religious practice

It is important that judicial office holders do not make assumptions about a person because of their religion; for example, some followers of a particular faith may observe some customs not followed by others. A person's level of adherence or commitment to their religion may alter during different times in their life. An individual may not consider themselves as particularly religious, yet may celebrate a major event in accordance with a particular religion. For example, the 51.12% who say they have no religion may still wish to celebrate Christmas; some people are culturally religious but non-practising.

4. Legal context

The Equality Act 2010, section 10, prohibits discrimination in relation to "religion" (which includes lack of religion), or belief, meaning any religious or philosophical belief (which includes a lack of belief).

The meaning of "religion" and "belief" is broad; consistent with Article 9 of the European Convention on Human Rights (which guarantees freedom of thought,

conscience, and religion). There may be many philosophical beliefs that are covered by the Act, including atheism[21] and, for example, humanism[22] or ethical veganism.[23]

In *McClung v Doosan Babock* ET 2022, the Employment Tribunal, sitting in Glasgow, had to decide if being a supporter of Rangers Football Club was a philosophical belief. In deciding that it was not, the tribunal judge looked at five criteria found in previous cases, and in the Equality and Human Rights Commission Code of Practice on Employment (paragraphs 2.55 to 2.59), and determined that they were not all met.

These same five criteria (known as "the Grainger criteria" had been considered in *Casamitjana* (see footnote 23) and are:

- Is the belief genuinely held?
- Is this a belief, not an opinion or viewpoint?
- Does this concern a weighty and substantial aspect of human life and behaviour?
- Does the potential belief attain a certain level of cogency, seriousness, cohesion and importance?
- Is the belief worthy of respect in a democratic society and compatible with human dignity and not in conflict with the fundamental rights of others?

Recent thinking on such matters is illustrated in the Employment Appeal Tribunal case of *Maya Forstater v CGD Europe and others* EAT 2021. It concerned the appellant's belief that sex is biologically immutable and that it is fundamentally important rather than "gender, gender identity or gender expression". Maya Forstater would not accept in any circumstances that a trans woman is a woman or that a trans man is a man: those were her beliefs on the matter. The EAT examined previous authorities and analysed the law, before concluding that the appellant's views did fall within the scope of section 10, and were therefore a philosophical belief:

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[21] 2010 Act, s 10(1): "reference to religion includes lack of religion".
[22] See, for example: Government Equalities Office, "Equality Act 2010: What Do I Need to Know? A Quick Start Guide on Religion or Belief Discrimination in Service Provision for Voluntary and Community Organisations" (September 2010) accessed 4 February 2025, page 4, that makes clear humanism would be considered a philosophical belief.
[23] As decided in *Casamitjana v The League Against Cruel Sports* [2020] ET 3331129/2018.

"Religion or perceived religious affiliation[24] is a protected characteristic in terms of the Hate Crime and Public Order (Scotland) Act 2021. Broadly speaking, the Act provides that an offence can be aggravated by prejudice based on the victim's membership of a group defined by reference to a listed characteristic (age, disability, race (and related characteristics), religion, sexual orientation, transgender identity and variations in sex characteristics). It creates offences of stirring up hatred against a group of persons based on the group being defined by reference to the listed characteristics."

5. Impact of religion and beliefs in courts and tribunals

Judges should take care to identify any changes that need to be made to accommodate a religious requirement or someone holding particular philosophical beliefs; for example, a break may be required due to a need to pray at a particular time of day or a need to ensure a date is not assigned on a date significant to a participant's religion. It should be remembered that Christian events such as Easter and Christmas lead to public holidays, but that this is not so for other faiths; as a result, the court or tribunal may need to ensure that dates important to another faith are avoided in a particular case. In addition, it should be remembered that some faiths observe their Sabbath on, for example, a Friday from sunset, and scheduling court business for such times may need to be avoided. Adjustments may be needed to accommodate fasting, which may have an impact on a person's ability to attend court at particular times and on their ability to concentrate in court.

Major religious festivals happen throughout the year for different religions. For more detail of the practices of different religions and how they might impinge on court practice, use the links below to access the relevant religion in the Glossary of

[24] Hate Crime and Public Order (Scotland) Act 2021, s 11 defines a group defined by reference to religion as a group defined by reference to: (a) religious belief or lack of religious belief, (b) membership of or adherence to a church or religious organisation, (c) support for the culture or traditions of a church or religious organisation, (d) participation in activities associated with such a culture or such traditions.

Religions from the England and Wales Bench Book (Appendix D). In greatly abridged terms, detailing the six largest religions in Scotland only, these are as follows:

Christian

Good Friday: changes each year, for example 29 March 2024, 18 April 2025.

Easter Sunday: changes each year and is two days after the above.

Christmas Day: 25 December each year.

Sunday may be viewed as a "day of rest", although for members of the "Seventh Day Adventists" Church, Saturday is their holy day.

Muslim

Ramadan month begins on a different day each year, for example 10 March 2024, 28 February 2025.

Eid-ul-Fitr: changes each year, for example 9 April 2024, 30 March 2025.

Eid-ul-Adha: changes each year, for example 16 June 2024, 6 June 2025.

Ashura: changes each year, for example 16 July 2024, 5 July 2025.

Fasting during the month of Ramadan is common, meaning no eating or drinking between sunrise and sunset. This can impact on energy and concentration, and may affect the ability to attend court. Funerals should take place within 24 hours of death. Purification rituals may require to be followed before taking an oath. Religious head coverings may be worn. See religious dress section.

Hindu

Krishna Janmashtami: changes each year, for example 26 August 2024, 15 August 2025.

Diwali: changes each year, for example 1 November 2024, 20 October 2025.

Arranged marriages with the exchange of "gifts" are common.

Buddhist

Wesak (Buddha Day): changes each year, for example 23 May 2024, 12 May 2025.

Sikh

Vaisakhi/Baisakhi: Sikh New Year is celebrated on 13 or 14 April each year.

Bandi Chor Divas: changes each year, for example 1 November 2024, 20 October 2025.

Guru Nanak Dev: changes each year, for example 15 November 2024, 5 November 2025.

Guru Gobind Singh: changes each year, for example 17 January 2024, 6 January and 27 December 2025.

There are a number of holy days, some lasting three days. A Sikh turban should not be removed for court. A Sikh kirpan (sword) is permitted in court: see religious dress section.

Jewish

Yom Kippur: changes each year, for example 11 and 12 October 2024, 1 and 2 October 2025.

Rosh Hashanah: changes each year, for example 2 to 4 October 2024, 22 to 24 September 2025.

Passover: changes each year, for example 22 to 24 April and 28 to 30 April 2024, and 12 to 14 and 18 to 20 April 2025.

Orthodox Jewish men may wear a head covering (kippah/yarmulke). Sabbath commences one hour before sunset on Friday until sunset on Saturday, which may inhibit the ability to attend court on Friday afternoon during winter. It should be noted that use of public transport and driving may need to be avoided during this time. No work (or court attendance) would be countenanced by most Jewish people on Yom Kippur or Rosh Hashanah. Funerals usually take place within 24 hours of

death, but it is also common for Jewish mourners to "sit Shivah" for seven days following burial, the first three days being particularly intense.

Generally, differing religious beliefs may also result in specific attitudes to marriage, which attitudes may differ from those familiar to a particular judge. For example, some couples may have had a religious marriage that has not been recognised or registered in terms of Scots law, but nevertheless regard themselves as husband and wife. Some religions may not recognise anything less than marriage as a committed relationship and may not, for example, use the word "partner" to refer to a person in a committed relationship.

6. Oaths, affirmations and declarations

The Oaths Act 1978 permits witnesses the choice of swearing an oath or of affirming. It may need to be explained to a witness that the difference is that an oath is a religious promise to tell the truth, sometimes while touching a holy book, while an affirmation is a non-religious solemn promise to tell the truth. Both have the same legal effect. Whilst the practice in Scotland is that the oath is generally taken without the use of a holy book, that does not prevent a witness from requesting such a book to take the oath. It should be noted that religious books may not be available, for example, in some hearing centres.[25]

If a particular religious book is not available, an apology should be extended. The individual should then be given the option of swearing without the book or of affirming. Section 5(2) of the Oaths Act 1978 enables the court, where it is not reasonably practicable without inconvenience or delay to administer the oath in accordance with an individual's religious belief, to administer the affirmation. It is expected that this provision would only be relied upon in the most exceptional circumstances, in the face of an individual who would rather swear a religious oath, where all other options had been considered and ruled impracticable.

[25] Oaths Act 1978, s 5(4): A solemn affirmation shall be of the same force and effect as an oath.

Putting a witness on oath or administering an affirmation is not uniform practice in all tribunals, but the judge or legal member may choose to administer this in some tribunals.

Some religions, for example those of the Muslim faith, may wish to have a religious book present before they take an oath on it. There are particular requirements for the handling of some religious texts and great care should be taken to ensure these are respected. Details of these can be found at Appendix D of the England and Wales Bench Book.

There should be no assumption that an individual who is otherwise religious, yet chose to affirm rather than take the oath, is doing so as they don't intend to tell the truth.[26] Similarly, there should be no assumption that a witness will swear an oath, rather than affirm. The question: "Do you wish to swear or to affirm to tell the truth?" makes it clear that both are of equal validity. Judges should ensure that bar officers or other court staff speaking to witnesses or jurors offer both options.

Some witnesses may wish to observe a particular practice when they take the oath. For example, a Hindu or Sikh witness may wish to remove their shoes. Witnesses of Jewish, Muslim, Rastafarian or Sikh faith may wish to cover their head when taking the oath. Such religious head coverings are permissible in court and court staff should not ask that religious head coverings be removed. Such practices should be accommodated insofar as possible, to enable a witness to consider themselves conscience-bound to tell the truth.

The oath should be administered by asking the witness to raise their right hand and repeat the words of the oath after the judicial office holder. If the witness affirms there is no need to have them raise their hand. Normally the judicial office holder and witness would stand to take the oath or to affirm, but this is often not appropriate if the judge or witness is appearing on a TV screen, as standing up takes their face "off camera". The words of the oaths for different religions are contained in Appendix A - forms of oath.

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[26] In *R v Saddiq* [2010] EWCA Crim 1962, by suggesting to a defendant that he may feel that his evidence would have greater weight if he swore on the Koran, the judge had manifested apparent bias.

7. Religious dress

Some religions prescribe particular clothing for their adherents. For example, Buddhist monks require to wear robes, usually yellow; Orthodox Jewish men will wear the kippah, a thin, rounded skullcap. Neither of these examples is likely to require adjustment in a court or tribunal setting. One main example of religious dress that is likely to require an exercise of judicial discretion is the Muslim veil (see below). Another is the Sikh kirpan: a dagger with a curved single edged blade, prescribed as part of Sikh religious uniform. An agreement has been reached between the Sikh community and SCTS which enables the kirpan to be brought into court.[27] It should be noted that there may be exceptional circumstances where this will not be possible and judges should carefully consider such circumstances, should they be thought to arise.

8. Wearing the veil

There are three kinds of head covering sometimes worn by Muslim women. Their purpose is to cover the face and upper body from males outside of their own household. These headscarves are seen as a sign of modesty and a symbol of religious faith by those who wear them. The hijab is a headscarf that usually covers the head and neck but leaves the face clear. The niqab is a veil for the face that usually covers the mouth and nose but leaves the area around the eyes clear. The burka is a one-piece veil that covers the whole body and face, often just leaving a mesh screen to see through. It is these last two veils that may require consideration in the court or tribunal setting.

It is obvious that this is a sensitive issue, and judges should avoid engaging in any debate on religious doctrine, for example, as to whether the veil is mandatory. Religion is a protected characteristic in terms of the Equality Act, but the right to religion is not absolute.

[27] The SCTS policy can be seen here: "Wearing a Kirpan" accessed 4 February 2025.

The issue may arise where it is considered that a fair trial requires the removal of the veil. Ideally, in either a civil, criminal or tribunal context this is an issue that should be flagged up by parties at a hearing prior to evidence being led.

The issue was considered by Judge Murphy in the Crown Court in England in 2013 in *R v D* and it was anticipated that guidance would be issued thereafter. This did not happen, but general principles are clear from the decision of Judge Murphy.[28]

A lecture titled "Religious dress" (2019) examining the pertinent issues has been delivered by Lady Hale, President of the Supreme Court, and would be useful reading for any judge faced with this issue.

Judges should ensure they consider the following matters:

- That the identity of a witness or party can be verified by a female member of court staff in private. This may alleviate the need for the removal of the veil in court.
- That the decision to order removal of the veil is a highly sensitive one, which should receive anxious scrutiny. Where it is required, other arrangements must be considered in order to minimise the time that the veil is removed for and to minimise the number of male observers. For example, can partial screens be used? Can an order be made prohibiting the creation or publication of any image of the woman with her veil removed? Can the requirement to remove a veil be restricted to the time when evidence is being given?[29]
- The reason for removal of the veil, namely that the fact finder or finders involved may wish to look at an individual's face and demeanour in order to assist them in assessing credibility, should likely be explained to the woman concerned. If removal is not ordered it may nevertheless be appropriate to

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[28] At paragraphs [80] to [83]; adopt the least restrictive approach necessary to conduct the proceedings fairly; the question of identification must be dealt with in open court whenever it arises; in general, a defendant is free to wear the niqab during trial but the consequences of doing so must be explained, along with the fact that she may not be able to do so whilst giving evidence and during some parts of the trial; the defendant should have the opportunity to take advice and the court should do everything possible to alleviate any discomfort, for example such as the use of screens.

[29] *C (Children) (Radicalisation: Fact-Finding)* [2016] EWHC 3087 (Fam), at paragraph 34: "I heard extensive oral evidence from the parents. The mother, co-operatively, agreed to remove the traditional niqab for her evidence so that I could see her face and assess her in the witness box. She was screened from other males in court, save for her counsel."

explain to those present in court that wearing the veil may have an impact on the court's ability to assess the credibility and reliability of the wearer, particularly where that may be an issue in the case.[30]

- It may be appropriate to allow time for the woman to take advice on the removal of the veil.
- Even in remote hearings these issues may arise, particularly where the press or public may have access to the images.

9. Dealing sensitively with religious tensions in court

There continue to be long-standing, often bitter, religious tensions in Scotland. Whether between Protestants and Catholics, Jews and Muslims, different sects of the same religion (for example Shia and Sunni) or any other group, judges and tribunals should ensure they are sensitive to these and that they do not inflame them by careless use of language or otherwise.

Terms that may appear innocuous might in fact have different connotations. For example, the phrase "sold down the river", which might seem inoffensive, may be seen as racist due to its connection with and roots in the transatlantic slave trade.

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[30] *AAN (Anonymity Direction Made) v The Secretary of State for the Home Department* [2014] UKUT 102 (IAC), (determination and reasons): "(1) Where the face of a party or witness is substantially covered by a veil or other form of attire, it is incumbent on the Tribunal to strike the balance between the rights of the person concerned, the administration of justice and the principle of open justice. The Tribunal will consider options which should, simultaneously, facilitate its task of assessing the strength and quality of the evidence, while respecting as fully as possible the rights and religious beliefs of the person concerned. (2) Such measures may include the following: (a) A sensitive enquiry about whether the cover can be removed, in whole or in part. (b) Where appropriate, a short adjournment to enable the person concerned to reflect and, perhaps, seek guidance or advice. (c) The adoption of limited screening of the person and/or minimising the courtroom audience. (This is not designed to operate as an exhaustive list.) (3) In cases where a Tribunal considers that the maintenance of the cover might impair its ability to properly assess the person's evidence, and, therefore, could have adverse consequences for the appellant, the Tribunal must ventilate this concern. (4) Issues of religious attire and symbols must be handled by tribunals with tact and sensitivity."

Careful use of language is necessary and keeping up to date with terminology is important.

It is suggested that in any case where there are relevant religious aspects, judges take time and care to consider their use of language. It may be preferable that a short break is taken to prepare, for example, an *ex tempore* judgment or a sentencing statement in order to reflect on appropriate language to express their decision.

10. Religious discrimination/hate crime

As with any hate crime, where a crime is aggravated by religious hatred, the court must explain why the sentence is different from what the court would have imposed if the offence was not so aggravated, or the reasons for there being no difference.[31]

It is recognised that any religion or set of beliefs can be a target of unacceptable abuse. The fact that the following sections deal with two religions only is not intended to suggest otherwise.

Islamophobia

There is no single recognised definition of the term in the UK, despite various attempts to agree a definition.[32] The All Party-Parliamentary Group on British Muslims ("APPG") concluded that the term "Islamophobia" should continue to be used, recommending using the following definition:[33]

> "Islamophobia is rooted in racism and is a type of racism that targets expressions of Muslimness or perceived Muslimness."

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[31] Criminal Justice (Scotland) Act 2003, s 74. For offences before 1 April 2024: Hate Crime and Public Order (Scotland) Act 2021, s 2.
[32] In 2017, Lord Bourne stated that no single definition was endorsed by the UK Government, nor did he accept that there was a need for a definitive one: HL Deb 17 October 2017, vol 785, col 487.
[33] All Party Parliamentary Group on British Muslims, "Islamaphobia Defined: The Inquiry into a Working Definition of Islamophobia" (27 November 2018) accessed 4 February 2025. See also, evidence from Omar Khan, the Director of the Runnymede Trust, presented to the All Parliamentary Group on British Muslims on the issue of Islamophobia and related blog post explaining some of the controversies around a definition of Islamophobia, both accessed 4 February 2025.

75% of Muslims say that Islamophobia is a regular or everyday issue in Scottish society, and most say that women are more likely to encounter it than men.[34]

Judges should be aware of such racism and discrimination. Given these experiences, Muslim people may arrive at court uncertain and anxious as to whether they will get a fair hearing. Judicial office holders should be live to the discrimination that may exist so that it is alleviated in the court or tribunal setting.

Anti-semitism

The Jewish community in Scotland is said by the 2022 census to number about 6000. This is thought to be an underestimate with informal research within the community noting that many Jews do not identify as such on the census, for a variety of reasons. In May 2016, the British government agreed to adopt the "working definition" of antisemitism of the International Holocaust Remembrance Alliance ("IHRA"). This was adopted by the Scottish Government in June 2017 also. The definition is as follows:

> "Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities."

Historically it has been reported that there are low levels of anti-Semitic crime in Scotland, but this appears to be on the increase.[35] This may be because of events in Israel and Gaza at the time of writing in early 2024 and/or because of a confusion in terminology: Judaism is a religion and cultural identity that has evolved over millennia, while Zionism is a political ideology centred on the establishment and

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[34] Peter Hopkins, "Report of the inquiry into Islamophobia in Scotland by the Cross-Party Group on Tackling Islamophobia: 2023 Update" (The Scottish Parliament Cross Party Group on Challenging Racial and Religious Prejudice) (28 October 2023) accessed 4 February 2025. See also, the Group's initial report (29 June 2021) accessed 4 February 2025; in particular, the evidence received on the extent of abuse experienced. Judges will also note the same report highlighted a lack of confidence in the justice system by some participants (at page 25).

[35] Ephraim Borowski, "Scotland's Jews: Community and Political Challenges" (Jerusalem Center for Security and Foreign Affairs (JCFA), 4 March 2010) accessed 4 February 2025.

preservation of a Jewish state in Israel. In addition, the term “Zionism” has come to have very negative connotations and its use should be avoided, if possible.

Again, because of anti-Semitic attitudes Jewish people may arrive at court anxious as to whether they will receive a fair hearing. Judicial office holders should be live to the discrimination that may exist so as to ensure that it is alleviated in the court or tribunal setting.

Physical disabilities, mental disabilities and/or those with issues of mental capacity

Contents

1. Overview

Physical disability, mental disability and issues of mental capacity are three very different things. The reason that they are grouped together in this one chapter is that they may require similar types of consideration by a court or tribunal, such as reasonable adjustments.

There is likely to be crossover between this chapter and others. For example, a person with a disability may be a vulnerable person as a result.

2. Duty to take account of disabilities

The court has a duty to make reasonable adjustments and, in terms of Part 3 of the Equality Act 2010, it is unlawful to discriminate against persons with a disability in the provision of access to courts.[36]

Accommodating a person with disabilities (as required by case law, the Equality Act 2010, the European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities) requires the court or tribunal to adopt a flexible approach in order to deal with cases justly. The United Nations Convention on the Rights of Persons with Disabilities outlines, in articles 12 and 13,[37] the need for States to ensure equal recognition before the law and effective access to justice. The Scottish Government has committed to incorporating this into Scots law, insofar as possible, but it is not currently incorporated.[38]

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[36] See also, Public Sector Bodies (Websites and Mobile Applications) (No 2) Accessibility Regulations 2018, which apply to digital environments, for example email communications.

[37] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) ("ECHR" hereon), art 13(1): "States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages."

[38] The Scottish Government, "Fairer Scotland for disabled people: progress report" (22 March 2021) accessed 4 February 2025.

The duty also requires anticipation of the needs of persons with disabilities for reasonable adjustments. Adjustments should be made provided they do not impinge on the fairness of the hearing or trial for both sides. They may be necessary for the parties, the representatives of the parties, witnesses, observers, members of the jury, tribunal lay members, clerks and bar officers, amongst others.

Each person with a disability must be assessed and treated by the judge or tribunal panel as an individual so that their specific needs can be considered, and appropriate action taken. What is needed by one person may be quite different to what is needed by another, even where they are perceived to have the same or a similar impairment. The effect(s) on the individual person, rather than the condition, is the important thing.

Mental disability should be considered in the same way as physical disability when it does not render a person incapable of participating in the judicial process. Again, judges need to identify the implications in the court or tribunal setting and make provision to compensate for areas of disadvantage if this can be done without prejudicing other parties.

An example of this taking place occurred in the High Court in London, where special adjustments were reportedly agreed to help the "self-proclaimed inventor of bitcoin" cope with cross-examination. The measures reportedly included use of a LiveNote screen and pen and paper to write down questions. Risk of emotional dysregulation was also drawn to the attention of the court.[39]

People with disabilities are thought to experience much higher levels of communication difficulty in the justice system than was previously recognised. In 2019, the Equality and Human Rights Commission launched an inquiry to understand the experiences of disabled accused in the UK criminal justice system. They found the following:

- The justice system is not designed around the needs and abilities of disabled people, and reforms in England and Wales risked further reducing participation.

[39] Michael Cross, "Emotional dysregulation alert in bitcoin identity trial" (The Law Society Gazette, 6 February 2024) accessed 4 February 2025.

- Impairments that may require adjustments are not always identified – this is a barrier to effective participation.
- Adjustments are not always made for disabled people because information about their impairments is not passed on.
- The existing framework to provide adjustments to secure effective participation for disabled defendants and accused people is inadequate.
- Legal professionals do not consistently have the guidance or training they need to be able to recognise impairments, their impact, or how adjustments can be made.

Individuals may have an inability to understand or communicate well in court and may also be keen to hide this for a range of reasons. As a disability may not be visible or declared, it may be best to assume that there is a communication issue to be addressed, rather than the other way round.

Judges should check there are no barriers to effective communication at an early stage. To check understanding do not do this by asking the question: "Do you understand?" This is likely to elicit a positive answer, which may be false. Instead, an individual should be asked to explain what they have understood in their own words, and then be given the time and support to do so. Providing sufficient time is an especially important consideration for most disabilities.

It is not a question of being "kind and sympathetic" towards a disabled person. That would be patronising. Rather, it is important that litigants, accused and witnesses with disabilities can participate fully in the process of justice. Making reasonable adjustments or accommodating the needs of disabled people is not a form of favouritism or bias towards disabled people but may be necessary to help provide a level playing field. Persons without disabilities may lack insight into the inequalities that those with disabilities face. Continual reflection and acknowledgement of this may be necessary to ensure equality. See, for example, the opinion of the court in *Eric Hamilton v GHA*.[40]

[40] In *Hamilton v GHA* [2020] UT37, Sheriff Fleming, sitting in the Upper Tribunal, granted an appeal on the basis that the First-tier Tribunal had failed to take reasonable steps to ensure that Mr Hamilton, who had mental health difficulties, could participate in the hearing.

"Disability"[41] is a protected characteristic in terms of the Hate Crime and Public Order (Scotland) Act 2021. Broadly speaking, the Act provides that an offence can be aggravated by prejudice based on the victim's membership of a group defined by reference to a listed characteristic (age, disability, race (and related characteristics), religion, sexual orientation, transgender identity and variations in sex characteristics). It creates offences of stirring up hatred against a group of persons based on the group being defined by reference to the listed characteristics.

The Disability Commissioner (Scotland) Bill 2024 aims to establish a Disability Commissioner for Scotland. The Commissioner's primary purpose will be to promote and safeguard the rights of disabled people. If it becomes law, the Commissioner will have the power to undertake investigations into service providers, such as the SCTS.

The Learning Disabilities, Autism and Neurodivergence Bill was consulted upon in early 2024. Part of the proposals of the Bill are for mandatory training on disability awareness, neurodivergence and learning disabilities for public-facing staff in public services. Consideration is also being given to data collection, inclusive communication, independent advocacy and diversion from prosecution; all as they relate to persons under the auspices of the Bill in the justice system.

3. The social model and the medical model[42]

Disability can be perceived in two ways: using the medical model or the social model. Many disabled people prefer the social model and would expect a judge to know the difference.

The medical model focuses on disability being a health condition dealt with by medical personnel who treat disabled people for their "problem" which is in need of being fixed or cured. It is about the person's inability to do certain things; for example, a wheelchair user cannot get into a building as they cannot climb stairs.

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[41] Section 11 defines this as "a physical or mental impairment of any kind".
[42] See SCOPE, "Social model of disability" accessed 4 February 2025, for the perspective of a charity seeking equality for persons with disabilities.

The social model argues disability is caused by the way society is organised; for example, the wheelchair user is prevented from accessing a building as society has failed to ensure there is a ramp or lift. In this model, the implication is that physical, attitudinal and communication barriers must change to enable disabled people to participate in society on an equal basis.

4. Defining physical disability

The Scottish Health Survey (SHeS) in 2017 estimated that 32% of adults and 10% of children had a long-term condition or a limiting illness. Some people have more than one disability. The prevalence of disability increases with age. About 17% of people with disabilities are born with them - the majority are acquired later in life.

Physical disability manifests in many ways, for example compromised mobility, dexterity, motor skills, ability to lift, sensory impairment, continence, circulation and stamina. Severe or chronic pain can affect ability to concentrate or attend court for lengthy periods. Most impairments are invisible, or visible only in some circumstances, for example chronic back pain, fibromyalgia, diabetes, sleep disorder, renal failure, epilepsy, chronic fatigue syndrome, hearing loss, some visual impairment and many mental impairments. The fact that symptoms are invisible can lead to misunderstandings and biases.

Some people have multiple disabilities, including both mental and physical. Physical health problems significantly increase the risk of poor mental health and vice versa. Around 30% of people with a long-term physical health condition also have poor mental health, mainly depression and anxiety.

Disabled people suffer many disadvantages, for example, in the labour market, are more likely to live in poor housing and face a higher risk of poverty. On average, their day-to-day living costs are 25% higher than for others because of expenditure on basics such as mobility aids, care, and transport. Disability hate crime appears to be on the rise.

The term “disabled person” is currently usually preferred to “person with disabilities” but see below.

The Equality Act 2010 defines the term "disability" in section 6(1) as: a physical or mental impairment that has a substantial and long-term adverse effect on the ability to carry out normal day-to-day activities.

5. Defining mental disability

"Mental disability" can take many forms, for example, mental ill health, learning disabilities, developmental disorders, neurodiverse conditions, and brain injury or damage.[43]

There are major differences between these conditions and they should not be confused. The degree of disability in each individual's case will vary enormously and only in a small number of cases will it mean there is a lack of mental capacity. "Capacity" is addressed below.

Other mental impairments or neurodiverse conditions include autism, learning disabilities and "specific learning difficulties" such as dyslexia or dyspraxia.[44]

Much mental disability is not visible or is visible only in some contexts. This can lead to misunderstanding. Some people have multiple disabilities, including both mental and physical disabilities. Physical health problems significantly increase the risk of poor mental health and vice versa.

The prevalence of mental ill health is high. It is suggested that about one in four adults in the general population have some form of mental ill health, and this is likely to be considerably higher among those coming to courts and tribunals.

"Mental disorder" is defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 as any mental illness, personality disorder or learning disability.

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[43] There are a range of mental health conditions, for example depression, anxiety, post-traumatic stress disorder, obsessive compulsive disorder, personality disorders, eating disorders, schizophrenia, bipolar disorder.

[44] Some individuals with neurodiversities may not consider themselves to have a disability and may view their condition simply as a neurological difference.

6. Defining mental capacity

The legal system relies on the assumption that people are capable of making and thus being responsible for their own decisions and actions. When this is not the case due to a lack of mental capacity, it must be recognised and acted upon.

A person's communication difficulties or physical appearance can, on the one hand, make one doubt their capacity when no issue exists; and, on the other, false impressions that someone has capacity can be given. There is no standard test of capacity, and where doubt is raised the question to ask is not, "Are they capable?" but rather, "Are they incapable of this particular act or decision at the present time?" Capacity in decision-making is time-specific and decision-specific. A person may have a mental disorder but still have capacity.[45]

There is a presumption that an adult is capable, though this may be rebutted by a specific finding of incapacity. When there is good reason for cause or concern and legitimate doubt as to capacity to litigate, the presumption cannot be used to avoid taking responsibility for assessing and determining capacity, if necessary, at a separate hearing. It may also have to be borne in mind that capacity can fluctuate and be dependent on many factors.

"Mental disorder" is defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 as any mental illness, personality disorder or learning disability.

[45] *S v M* [2024] SLT (SAC) 1. In this case, which considers the appointment of a curator *ad litem* to a defender with a mental disorder (mild learning disability), there was a medical opinion that the defender had capacity to instruct a solicitor, to understand the case and to communicate her views. The SAC agreed that the sheriff's decision not to appoint a curator against this background, notwithstanding the fact that the defender had a "mental disorder" was correct.

7. What kinds of things may cause a difficulty?

Judges should be live to a wide variety of potential issues, some of which may render a person vulnerable (see chapter on vulnerable persons), such as:

- Illiteracy, slow reading or difficulty in understanding paperwork whether due to disability or not;
- Reduced mobility leading to a need for more frequent breaks and/or longer breaks, for example, as more time is needed to reach a disabled toilet or to access a café on a different floor;
- Vision or hearing difficulties;
- The need to stand for the oath;
- Wheelchair access to, for example, a witness box or jury box;
- Auditory or visual hallucinations;
- The effects of medication taken in the morning wearing off later in the day;
- An inability to cope with a new and different environment which becomes overpowering;
- A problem with concentration, especially over prolonged periods;
- Being given lots of new information;
- Feelings of not being listened to or believed;
- Unfamiliar dress and rules; and/or
- Becoming tired more quickly than may be expected.

8. How to ascertain what adjustments may need to be made

Judges are directed to the "Disability Glossary" in the England and Wales Bench Book for guidance. The glossary is in Appendix B, commencing on page 244.

In the criminal sphere, the party citing a witness or representing a party should alert the court to any additional requirement as early as possible. Any such requirement or necessary adjustment should be the subject of a discussion at the intermediate diet

or first diet. The Crown Victim Information and Advice Service (VIA) is there to assist any "victim" requiring additional support.

In the civil and tribunals sphere, a polite enquiry may need to be made of parties and/or their representatives. Judges should not assume that agents have considered any necessary adjustments, and this specific enquiry should be made; such checks should also be made with unrepresented parties.

It is good practice to ask about the nature of and steps needed to address a disability, rather than the extent of the disability. For example, rather than saying, "Are you deaf?" ask, "Might you need help to hear what is said in court?" then, "We have a hearing loop system/amplifying headphones/etc. that you could try to see if they assist."

It is important that the subject of proposed adjustments is fully explored. An example of the type of reasonable adjustments may be:

- Providing written materials in a different format, for example, large font, Braille, simplified language etc.
- The avoidance of jargon and use of simple language.
- The use of name of parties, rather than their status, for example "Mr Jones", rather than "the pursuer's solicitor".
- Extending time-limits within which things are to be done.
- Holding remote hearings rather than requiring a disabled person to travel to court, or not holding remote hearings if a neurodivergent person finds things difficult to follow on a screen.
- Avoiding giving too many instructions at the one time.
- Conducting a hearing in a room that is accessible.
- Altering the layout of a hearing room.
- Considering how it can be ensured that a disabled person is not kept waiting for long.
- Considering whether a carer should be present.
- Restricting the number of people who are present in the courtroom/ restricting reporting.
- Considering whether more frequent breaks, a shorter day or different start and finish times are needed.

- Considering whether a slower pace is needed, and in some cases whether written questions should be provided (which will be generally required for a witness under 12 in a criminal trial).[46]
- Allowing more time for notes to be taken.
- Allowing access to an assistance dog.[47]
- Providing an interpreter. If this is required, ensure that the interpreter holds the correct qualifications. For example, it is suggested that only an interpreter on the register maintained by the Scottish Association for the Deaf should be instructed, where required.[48]

It should be noted that a failure to properly consider and make reasonable adjustments by the court or tribunal may be an error of law, leading to a successful appeal.[49]

9. What if no-one raises the subject of disability?

Some individuals may not tell you that they have a disability, whether due to, for example, embarrassment, timidity or a lack of knowledge that reasonable adjustments can be made.

In relation to mental health, it can be difficult to know whether a person has a mental health difficulty or is just, for example, finding attendance at court stressful or is anxious about the underlying subject matter.

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[46] High Court of Justiciary Practice Note (No 1) 2019.
[47] See the Equality and Human Rights Commission, "Assistance dogs: A guide for businesses and service providers" (updated 20 December 2024) accessed 4 February 2025: it would normally be unlawful to refuse to allow access to an assistance dog.
[48] Macphail's Sheriff Court Practice (4th edn, W Green, 2022), at paragraph 16.66: "except in emergencies, only an interpreter on the register of interpreters maintained by the Scottish Association for the Deaf should be instructed as an interpreter for a deaf witness."
[49] In *JE v SSWP (PIP)* [2020] UKUT 17 (AAC), the judge erred in law by failing to facilitate the claimant's giving of evidence. There were no appropriate adjustments put in place and it was conceded this constituted an error in law. The appellant had a severe cognitive impairment secondary to brain damage.

It is essential for judges to ensure that everyone in their court or tribunal can participate effectively, and thus to be alert to the fact that assistance may require to be offered. Again, this should be done without suggesting that a person has a disability. For example: "It is noisy in here, would it help if we closed the window?" rather than: "Are you deaf?"; or "Shall I read that for you?" rather than: "Can you not read?"

In relation to mental distress, an example could be: "You appear anxious. Is there anything which would help reduce your anxiety?" or "I would like to ask if you have a mental health condition. If you want to tell me, say 'yes', but it's also ok to say 'no comment' if you don't want to tell me or if you don't have a mental health condition."

10. Vulnerable witnesses

It may be that an individual with a physical or mental disability, involved as a party or witness in a case, is a "vulnerable witness" in terms of the appropriate legislation. Please see the vulnerable persons chapter.

11. Adults with incapacity

The substantive law relating to applications for guardianship under the Adults with Incapacity (Scotland) Act 2000 is outwith the scope of this bench book. However, judges should be aware of recent suggestions by a practitioner of alleged breaches of fundamental rights of elderly and disabled people.[50] Article 5(1) of ECHR is the right to liberty and security. This is of potential relevance to those with disabilities who, for example, the state seeks to detain in specialist units.[51]

In *Aberdeenshire Council v SF* [2024] EWCOP 10, the English Court of Protection considered whether to recognise and enforce a guardianship order granted at Aberdeen Sheriff Court resulting in a deprivation of the adult's liberty. The court

[50] Adrian Ward, "Release on licence conditions challenged" (2024) Mental Capacity Report: Scotland (140) 2 accessed 4 February 2025.
[51] *London Borough of Hillingdon v Neary & Anor* [2011] EWCOP 1377.

refused to do so, deciding the order had failed to uphold the adult's fundamental human rights. The English court criticised the lack of opportunity for the adult's views to be provided to and considered by the Scottish court, and the length of time (7 years) over which the order would apply (considered to be too long).

12. Curators *ad litem*/appropriate adult

In criminal matters, a person who is unable to understand what is happening, or to communicate effectively with the police owing to a mental disorder, may not consent to being interviewed by the police without having a solicitor present.[52] In addition, a constable must ensure intimation is made to a person the purpose of whom is to support that person, and requiring them to provide that support, often known as "an appropriate adult".[53] Part 6, chapter 2 of the Criminal Justice (Scotland) Act 2016 concerns the support for vulnerable persons by an appropriate adult.[54]

In civil matters, where a party to litigation may be a person with a mental illness or someone who has an issue with their mental capacity the appointment of a curator *ad litem* may be appropriate. Such appointment is mandatory where that party is the defender to a family action,[55] although this was considered by the Sheriff Appeal Court to require a purposive interpretation.[56] The purpose of the rule was twofold: to protect the interests of the defender; and to ensure that a defender who is not incapable of instructing a solicitor is permitted to do so.

In other civil matters, the matter will be discretionary for the court, applying the test of whether justice in the particular circumstances of the case demands it.[57]

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[52] Criminal Justice (Scotland) Act 2016, s 33.
[53] Ibid s 42.
[54] Ibid ss 98-106.
[55] Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, Rule 33.16.
[56] *S v M* 2024 SLT (SAC) 1: Sheriff Principal Dowdalls considered a case where by the time the court considered appointing a curator *ad litem* to the defender, there was medical opinion that the defender had the capacity to instruct a solicitor and had done so. She discerned that a curator was not required in these circumstances.
[57] See Macphail, ibid, paragraphs 4.29-4.34.

13. Jury service and disability

Persons over the age of 71 can be excused from jury service as a right if they wish to be.[58] Persons can also apply to be excused on the grounds of ill health or physical disability, accompanied by a medical certificate.[59]

Otherwise, there is a duty on the court to seek to make reasonable adjustments to allow people to participate in jury service. Lord Matthews's 2018 Report, "Enabling Jury Service"[60] makes it clear that the court must balance the expectation of a potential juror to undertake their civic duty with the obligation to ensure the accused receives a fair trial.

This may involve the court considering the nature of the evidence to be led. If there is to be "essential" CCTV evidence, for example, that may create difficulties if a potential juror is blind. Similarly, if there is to be audio played then a deaf juror may be able to have that interpreted by a BSL interpreter, but if the intonation of the voice is important then problems may arise.

SCTS has made a commitment to having wheelchair access to at least one jury box in each sheriff court, where that is possible; and, where it is not, it is suggested that a wheelchair user on the jury be seated as close as possible to the other jurors.[61] The report also made it clear that a large number of people in Scotland have hearing loss: about 40% of over 40s, 60% of over 60s and 90% of over 90s.[62] In recognition of this it also recommended that hearing loop systems be fitted to jury rooms to assist communication during deliberations.

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[58] Law Reform (Miscellaneous Provisions) (Scotland) Act 1980, sch 1 group F.
[59] See SCTS Guide to Jury Service, "Eligibility and Applying for Excusal" accessed 4 February 2025.
[60] This report partly came about following the court's failure to accommodate a blind person who wished to serve as a juror.
[61] Paragraph 4.8 of the 2018 report, supra.
[62] Paragraph 4.10 of the 2018 report, supra.

14. Questioning of witnesses with disabilities

The Advocate's Gateway offers Toolkits designed to assist those preparing to question persons with additional needs. These exist for persons with autism, persons with a learning disability, persons with "hidden disabilities", someone who has a hearing impairment and someone with a suspected or diagnosed mental health disorder.

They make clear that "advocates must adapt to the witness, not the other way round."[63] The individual "kits" are useful sources of further information about each of these topics and the considerations that may apply when such a person is giving evidence in court. See also the list of issues to consider when taking evidence from vulnerable witnesses.

15. Describing some particular common mental disabilities/illnesses

A person with a mental disability may require reasonable adjustments to be made for their needs in the same way as a person with a physical disability.

Judges should take care not to confuse those with additional support needs due to a learning disability that is life-long and enduring and those with a different mental health disorder, which may be transient.

A person with learning disabilities may be limited in their ability to learn, understand and communicate, take care of their personal needs, and develop their social skills. A briefing paper prepared by the Equality and Human Rights Commission entitled "Experiences of People with a Learning Disability in the Scottish Criminal Justice System", published in June 2017, makes worrying reading. It highlights little improvement over recent years in addressing the challenges and disadvantage faced by accused/convicted persons with learning disabilities.

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[63] Lady Justice Hallett in *R v Lubemba; R v JP* [2014] EWCA Crim 2064, at paragraph 45.

Learning disability	This should be distinguished from specific learning difficulties, such as language impairment, dyslexia, dyspraxia, ADHD and other conditions which occur independent of intellectual impairment. Specific learning difficulties may affect language and communication skills, memory and concentration.
Autistic Spectrum Disorder (ASD)	This is a lifelong neurodevelopmental condition. It is described as a spectrum disorder or condition because, although all people with ASD share certain significant difficulties in communication, social interaction, imagination and flexible thinking, these affect each person differently. A person may have good expressive language skills and vocabulary, which masks poor understanding. They may have difficulty interpreting the communication signals of others causing them considerable anxiety and confusion and may have inflexible interests in highly specific topics. Just over 1% of the population in Scotland are estimated to be on the autistic spectrum. People with ASD seem to be over-represented in the criminal justice system as victims and witnesses, and as alleged perpetrators, due to risk factors such as social naivety, repetitive interests, elevated levels of anxiety, difficulties in predicting consequences and diminished insight into what others think. A small study from Cambridge suggests these persons are not given adequate support in the criminal justice system.[64] People with learning disabilities or ASD have a higher incidence of other mental illness.[65]
Schizophrenia	This is a psychotic illness often characterised by delusions, auditory or visual hallucinations, thought disorder and

[64] Rachel Slavny-Cross and others, "Autism and the Criminal Justice System: An Analysis of 93 Cases" (2022) 15(5) Autism Research 904-914 accessed 4 February 2025.
[65] Ibid.

	paranoia, as well as changes in emotions and behaviour, such as apathy, withdrawal, irritability or over-excitement.
Bipolar affective disorder	This is also a psychotic condition involving extreme changes in mood, from severe depression to mania with regular moods in between. Symptoms can include impaired concentration, delusions, grandiose thinking, acting irrationally, talking rapidly and increased irritability.
Depression and anxiety	These are two of the more common mental illnesses but can affect someone's day-to-day functioning. They can cause distortion in perception and thinking, and affect a person's ability to process information and communicate. Changes in mood can lead to feelings of hopelessness, worthlessness or guilt, self-harm or suicidal thinking.
Post-traumatic stress disorder (PTSD)	This is related to other forms of anxiety disorder but has been caused by exposure to a traumatic event(s) and can lead to flashbacks, psychological distress and physical anxiety responses, as well as impacting on everyday living. Complex PTSD has many similar symptoms, but often includes difficulties in relating to others and in managing emotions.
Acquired brain injury	This can result from a variety of causes including road traffic accidents, assaults, domestic and industrial accidents, and substance abuse. It can affect cognitive functioning, communication, memory, concentration and emotional stability.
Personality disorder	This occurs where an individual's personal characteristics or traits cause regular and long-term problems in the way they cope with life, interact with others and how they respond to events emotionally. These characteristics are present from adolescence and young adulthood, and persist in different settings. There are many diverse types of personality disorder each with distinctive features. These can include lack of emotion, extreme fear of rejection, reckless and impulsive

	behaviour, attention-seeking behaviour, self-harm, lack of trust in others and pseudo-hallucinations, such as hearing voices.
Dementia	This is an umbrella term for a set of signs and symptoms which indicate there may be changes in the functioning of the brain. The most common types of dementia are Alzheimer's, vascular, Lewy Body and temporal frontal lobe dementia. Dementia can cause a progressive decline in cognitive ability, memory, personality, behaviour and ability to do everyday activities. Specific forms of dementia cause specific deficits, for example frontal temporal lobe dementia affects problem-solving and judgement and can lead to impulsive and socially disinhibited behaviour.
Comorbid conditions/dual diagnosis	Dependence on alcohol or drugs is not considered to be a mental disorder but many people with mental illness may also have substance abuse problems. Some people may have a dual diagnosis. Drug addiction is increasingly being treated as a health issue.
Intersex/disorders of sex development	Judges should be aware that a very small number of babies are born each year who have differences in sexual development. This is referred to as intersex or DSD (disorders or differences of sex development). There may be controversial issues around those terms. Intersex is seen by some people as an inappropriate term, on the basis that those having such issues have one sex, but a disorder or difference in development of that sex. It is a medical issue, where a baby's development might present as one sex at birth but develop through puberty with traits of the other sex. It can cause several physical and psychological issues throughout life, sometimes requiring ongoing medical interventions.[66] References to sexual differences is found as a

[66] See NHS Guide on "Differences in Sex Development" accessed 4 February 2025.

protected characteristic in terms of the Hate Crime and Public Order (Scotland) Act 2021.[67]

16. Terminology

There are different views in the disabled community as to whether the best term is "disabled person" or "person with a disability", with some strong proponents in each category. It will be best to take the lead from the person themselves, if their disability needs to be referred to.

As in many areas there are now outdated terms, which may cause offence. Judges should avoid:[68]

- "the disabled"
- "normal" or "able-bodied" to refer to non-disabled; rather use "non-disabled"
- negative terms such as "suffers from"; rather use "has", "experiences" or similar neutral terminology
- "handicapped"; rather use "disabled", or "person with a disability"
- "wheelchair bound", "confined to a wheelchair" or "in a wheelchair"; rather use "wheelchair user"
- "the blind"; use instead "blind people" or "people who are visually impaired" or "partially sighted"
- "the deaf"; use instead "deaf people" or "people with hearing loss", or something more precise, for example "pre-lingually deaf" and consider capitalising "Deaf"[69]

[67] s 11(8): "A person is a member of a group defined by reference to variations in sex characteristics if the person is born with physical and biological sex characteristics which, taken as a whole, are neither—(a) those typically associated with males, nor (b) those typically associated with females, and references to variations in sex characteristics are to be construed accordingly."
[68] As per UK Government Guidance, "Inclusive Language: Words to Use and Avoid When Writing about Disability" (updated 15 March 2021) accessed 4 February 2025.
[69] British Deaf Association, "What We Stand For" accessed 4 February 2025: "Our Board of Trustees are all Deaf (we use the capitalised 'D' to denote the fact that we have a separate language and culture and 80% of our staff are Deaf themselves)."

- "drug abuser" or "addict"; rather use "has a substance misuse disorder" or "has an addiction"[70]
- "suffers from"; instead use "has" or "experiences"
- "committed suicide"; instead use "died by suicide"[71]
- "mental illness"; instead use "mental ill health"[72]
- "Asperger Syndrome" is a diagnostic term for autism no longer in appropriate use due to Hans Asperger's work with the Nazis. It is now agreed that what was formerly referred to as Asperger's is part of the autism spectrum. The diagnosis was retired in 2019;[73] instead use "autism"

This list is not exclusive. We offer a link to the US resource, "Disability Language Style Guide". It can be difficult to keep up to date with terminology: judicial office holders will not cause offence if the person themselves is asked for input, which is then followed.

[70] National Institute on Drug Abuse, "Words Matter - Terms to Use and Avoid When Talking About Addiction" (29 November 2021) accessed 4 February 2025.
[71] Sally Spencer-Thomas, "Language Matters: Why We Don't Say 'Committed Suicide'" (IRMI, 15 September 2021) accessed 4 February 2025.
[72] Mental Health Foundation, "Talking about mental health" (updated 20 January 2022) accessed 4 February 2025.
[73] National Autistic Society, "Asperger syndrome (Asperger's)" accessed 4 February 2025.

Vulnerable persons

Contents

1. Overview

To a certain extent, it may be argued that every party who comes to court is vulnerable; that the very requirement to submit to the court process, over which you have little control, is daunting. However, this chapter is not intended to deal with the majority who are nervous about participating in court proceedings, but rather with

those who have a particular vulnerability. There is potential overlap with other chapters in this bench book which may also be relevant to vulnerable persons. Readers may wish to have regard, for example, to those dealing with children and young people, those dealing with physical and mental disabilities and/or those dealing with unrepresented parties.

2. Who does this chapter relate to?

Witnesses and parties may be "vulnerable" in a court or tribunal as a result of various factors, and reasonable adjustments may need to be made as a result. Vulnerability may be as a result of a person's disability, as a result of a lack of understanding as to the process or because of fear. These are just examples.

The judiciary should be alert to vulnerability, even if not previously flagged up. Indicators may arise, for example, from someone's demeanour and language; age; the circumstances of the alleged offence; a child being "looked after" by the local authority; because of the nature of allegations to be tested; or because a witness comes from a group with moral or religious proscriptions on speaking about certain matters.

There is a distinction between "reasonable adjustments" which require to be made to comply with the Equality Act, and common sense changes that may be made by a judge to promote effective participation in the court or tribunal room. The England and Wales Bench Book, at appendix B, page 244 onwards, has a list of examples of reasonable adjustments that might be considered in the former case. These are in terms of the duty under the Equality Act 2010 but may assist with wider thinking about the issue beyond where a participant has a protected characteristic.

"Reasonable adjustments" that may be required are many and varied. They will need to be considered where a vulnerable person has a protected characteristic and may also be usefully considered to assist any vulnerable participant.

Vulnerable witnesses in criminal proceedings are those described in section 271 of the Criminal Procedure (Scotland) Act 1995.[74] In civil proceedings, the definition is contained in section 11 of the Vulnerable Witnesses (Scotland) Act 2004.[75]

3. Expedited time scales

One of the repeated themes, in both civil and criminal courts and in tribunals, is the need to do everything possible to expedite time scales in cases involving vulnerable participants. Trial and case management powers should be exercised to the full where a vulnerable witness or accused is involved. A trial, proof or hearing date involving a young or vulnerable adult witness should only be changed in exceptional circumstances. It is thought that some vulnerable witnesses, for example children, will have reduced capacity to remember events if there is a delay but, in addition, delay is likely to exacerbate the stress of waiting for a trial or proof date. Complainers speak

[74] Section 271(1): "For the purposes of this Act, a person who is giving or is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings is a vulnerable witness if— (a) the person is under the age of 18 on the date of commencement of the proceedings in which the hearing is being or is to be held, (b) there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of— (i) mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or (ii) fear or distress in connection with giving evidence at the hearing, (c) the offence is alleged to have been committed against the person in proceedings for—(i) an offence listed in any of paragraphs 36 to 59ZL of Schedule 3 to the Sexual Offences Act 2003, (ii) an offence under section 22 of the Criminal Justice (Scotland) Act 2003 (traffic in prostitution etc.), (iii) an offence under section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (trafficking people for exploitation), (iiia) an offence of human trafficking (see section 1 of the Human Trafficking and Exploitation (Scotland) Act 2015), (iv) an offence the commission of which involves domestic abuse, or (v) an offence of stalking, or (d) there is considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings."

[75] Section 11(1): "For the purposes of this Part of this Act, a person who is giving or is to give evidence in or for the purposes of any civil proceedings is a vulnerable witness if— (a) the person is under the age of 18 on the date of commencement of the proceedings (such a vulnerable witness being referred to in this Part as a 'child witness') (b) where the person is not a child witness, there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of— (i) mental disorder (within the meaning of s 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or (ii) fear or distress in connection with giving evidence in the proceedings, or (c) the person is of such description or is a witness in such proceedings as the Scottish Ministers may by order subject to the affirmative procedure prescribe."

of their life being "on hold" during the period between the alleged event and the trial, and it may well be the same for other participants.

4. The rights of the vulnerable to effective participation

Accommodating a vulnerable person's needs (as required by case law, the Equality Act 2010, the European Convention on Human Rights, and the UN Convention on the Rights of Persons with Disabilities) requires the court or tribunal to adopt a flexible approach in order to deal with cases justly.

Vulnerable people are thought to experience much higher levels of communication difficulty in the justice system than was previously recognised. A Law Society of Scotland report published in 2019 noted:

> "Age, mental health, learning difficulties, communication problems and physical impairment are all readily identifiable terms that may trigger and allow an assessment of vulnerability to follow. These factors reflect the 'protected characteristics' as defined in the Equality Act 2010. These could provide a starting point for considering vulnerability, but the roundtable discussion highlighted that this alone may not fully address the issue. Attendees at the roundtable confirmed that there are no clear guidelines on what account and relevance should be placed on alcohol or substance abuse, fear, minority interests, Adverse Childhood Experience (ACE), distress and homelessness in establishing vulnerability."

Individuals may have an inability to understand or communicate in court but may also be keen to hide this in order to maintain bravado. When judges are checking understanding, it is not useful to do so by asking the question: "Do you understand?" This is likely to elicit a positive answer that may be false. Instead, an individual should be asked to explain what they have understood in their own words, and then be given the time and support to do so.

Historically, courts had common law powers to protect any vulnerable witness who would be disadvantaged by having to give evidence without adjustments (see

Hampson v HMA 2003 SCCR 13).[76] These powers remain in as much as all courts and tribunals have a general duty to ensure a fair hearing, which will include making adjustments where necessary to assist a party or witness to give evidence and thus have a fair hearing.

5. Special measures

The first statutory powers specifically relating to vulnerable witnesses were contained in the Vulnerable Witnesses (Scotland) Act 2004, which dealt with both civil and criminal cases, and which has been considerably amended and expanded upon subsequently.

In general terms, special measures are:[77]

- The use of a live TV link;
- The use of screens;
- The use of a supporter;
- Taking of evidence by commissioner;
- Giving evidence in chief in the form of a prior statement;
- Excluding the public during the taking of the evidence;
- Such other measures as may be prescribed by the Scottish Ministers in regulations; and
- The use of pre-recorded evidence instead of testifying in court for child and other vulnerable witnesses.[78]

6. Current legislative framework for vulnerable witnesses in criminal matters

Measures for child and vulnerable witnesses is an evolving area, with the Victims, Witnesses and Justice Reform (Scotland) Bill currently progressing through

[76] The Appeal Court makes it clear that common law powers subsist following the coming into force of vulnerable witness legislation, at paragraphs 13 and 14.
[77] Criminal Procedure (Scotland) Act 1995, s 271H.
[78] Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019.

Parliament and due to make more innovations in this field, for example by creating a Victims and Witnesses Commissioner for Scotland;[79] and by increasing the availability of special measures in civil proceedings.

In addition, there is an ongoing roll out of provisions in the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019, which introduced the right for children and vulnerable witnesses in the most serious criminal cases to have their evidence pre-recorded. The implementation plan can be found here.[80]

Currently, section 271A of the Criminal Procedure (Scotland) Act 1995 sets out the procedure to be followed by any party citing or intending to cite a child witness or deemed vulnerable witness. In usual circumstances, these notices should have been dealt with at or in advance of the preliminary hearing or first diet in solemn proceedings, having been lodged 14 or 7 days before the diet and 14 days before a summary trial (section 271A(13)).

A person is deemed to be a vulnerable witness entitled to special measures (section 271(5) of the Criminal Procedure (Scotland) Act 1995) if they are the complainer in a sexual, trafficking, domestic abuse or stalking case.

Other vulnerable witnesses are defined in section 271(1). Broadly speaking, a person is vulnerable if there is a significant risk of the quality of their evidence being diminished by reason of mental disorder, or fear or distress in connection with giving evidence at trial. There is also a "catch all" provision contained in section 271(1)(d): "where there is considered to be a significant risk of harm to the person by reason only of the fact that the person is giving or is to give evidence in the proceedings".

Closed court: section 271(1) and section 271HB - criminal

Section 271H(1)(ea) of the 1995 Act allows an additional special measure of having a closed court (ie excluding the public during the taking of evidence from the

[79] SP Bill 26 Victims, Witnesses and Justice Reform (Scotland) Bill [as introduced] Session 6 (2023). The Bill is currently at stage two so it is not possible to say if all of its provisions will pass the legislative process.
[80] The Scottish Government, "Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019: implementation plan" (updated 10 April 2024) accessed 4 February 2025.

vulnerable witness). Section 271HB details how this special measure is to operate. It provides that:

- Members or officers of the court;
- Parties to the court;
- Counsel or solicitors or other persons otherwise directly concerned in the case;
- *Bona fide* representatives of news gathering or reporting organisations; and
- Such other persons as the court may specially authorise to be present

should not be excluded from the court.

This special measure does not apply where the vulnerable witness is the accused (section 271F(8)).

Section 92(3) of the 1995 Act: "From the commencement of the leading of evidence in a trial for rape or the like the judge may, if he thinks fit, cause all persons other than the accused and counsel and solicitors to be removed from the courtroom." It will be observed that this section excludes a greater class of persons than those mentioned in section 271HB.

Ground rules hearings and commissions

Reference is made to chapter 8 of the Preliminary Hearings Bench Book, which deals with vulnerable witnesses and evidence on commission.

The Advocate's Gateway gives useful guidance on identifying vulnerability in witnesses (Toolkit 10), and on the questioning of witnesses with different types of vulnerability.

Reviewing special measures

Section 271D enables the court to change special measures at any stage of the proceedings, by ordering them, varying those already ordered or revoking them.

Closed court - civil

Some civil proceedings take place in private in terms of the applicable rules, for example adoptions or Child Welfare Hearings. Otherwise, the starting point is open

justice. It may be a breach of Article 10 rights and breach the longstanding commitment to open justice to close a court. It could also be subject to challenge based on the perceived lack of any mechanism for challenge before the making of such an order, to close the court. Judges should be aware that the media can have a legitimate interest not just in watching proceedings, but also in access to certain court documents.[81] SCTS staff have access to a media guide to assist them.[82]

Nevertheless, it is easy to conceive of circumstances where it may well be appropriate to close the court for short periods or particular points in a case; for example, in a divorce action where one of the parties alleges rape. That may mean the public (but not media representatives) are excluded for a period.

Meanwhile, reference is made to the ability to make reporting restrictions and the strict procedure for doing so. Particular reference is made to the need for a written motion and Form 48.1A in terms of Rule 48.1A of the Ordinary Cause Rules, as amended. There are similar Court of Session rules and Sheriff Appeal Court rules, see chapter on children and young people.

Tribunals

Much of what has been said in relation to court applies to tribunals.

Tribunal rules are likely to have been drawn up to allow tribunal judges to protect vulnerable persons and these require to be followed. The Upper Tribunal (in a benefits tribunal case, but one which has universal application) has held that children and vulnerable witnesses and parties have a right to special considerations when appearing before a tribunal and failure to have regard to these may constitute an error in law.[83]

In employment tribunals in England and Wales, there is Presidential Guidance in relation to vulnerable parties and witnesses (including children). The Immigration and Asylum Chamber have similar. The Guidance suggests "vulnerability" could be

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[81] Judicial Office for Scotland, "Protocol on the Recording and Broadcasting of Proceedings and the Use of Social Media" accessed 4 February 2025.
[82] It has been reported that there are often misunderstandings as to the media's ability to access court papers; see Judicial Office for Scotland, "Informing the Future of Open Justice in Scotland Event Report and Next Steps" (July 2024) accessed 4 February 2025.
[83] *AS v SSWP (PIP)* [2022] UKUT 24.

defined as where someone is likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case. The Guidance states that the tribunal and parties need to identify any party or witness who is a vulnerable person at the earliest possible stage of proceedings. They should also consider whether the quality of the evidence given by a party or witness is likely to be diminished by reason of vulnerability.[84]

7. Taking evidence, including from vulnerable persons

Vulnerabilities can arise due a multitude of factors: physical disability, mental health, learning disability, low educational attainment or poverty. Vulnerability can also arise from the nature of the allegations a witness is to speak to. This is particularly the case where there are allegations of sexual or domestic abuse (both in a civil and criminal context). There is, therefore, a crossover with the sections on domestic violence in the sex chapter and sexual violence in the same chapter.

Judges may find it useful to consider the terms of section 271 of the Criminal Procedure (Scotland) Act 1995. Even in a civil case, this might assist with providing a framework of factors, alerting a judge to a vulnerability or diminished quality of evidence. (The quality of evidence is defined in this section as the completeness, coherence, and accuracy of the evidence). The 1995 Act sets out factors such as being under 18, having a mental disorder, fear or distress as to giving evidence, being a complainer in a matter of alleged sexual offending, trafficking, domestic abuse, stalking. Other factors to be considered include the nature and circumstances of the alleged offence, the nature of the evidence the witness is likely to give, the relationship between the accused and the witness, the witness' age and maturity, any behaviour towards the witness by the accused or by their family members or associates. Factors particular to the witness should also be considered, including the social, cultural and ethnic origins of the witness, their sexual orientation, their

[84] The Scottish Government Justice Directorate, "Human trafficking" accessed 4 February 2025.

domestic and employment circumstances, their religious beliefs and political opinions, and any physical disability or impairments.

If a judge considers a witness is vulnerable, there may be formal steps that the judge should take depending on the setting, and whether in a tribunal or in a court. These may require the judge to make formal orders for measure for that witness' evidence, or to raise the issue with the parties. A judge will need to be alert to the necessity to review and revise the approach taken during the witness' evidence if it appears that the witness' evidence may be diminished due to their vulnerabilities.

In a criminal setting, judges are reminded about the line of cases setting out the need to control cross-examination, particularly in cases of sexual allegations (see, for example, *Begg or Dreghorn v HMA* 2015 SLT 602, *Donegan v HMA* 2019 JC 81 and *MacDonald v HMA* 2020 JC 244. Whilst such cases have arisen in trials concerning sexual allegations, they are definitive guidance on the standards of cross-examination and set out the clear obligation on the judge to control questioning. Attention is drawn to the court's words in paragraph 33 of *MacDonald v HMA,* supra.[85] See also *Docherty v PF Greenock* [2012] HCJAC 155, at paragraph 6 (arising in a summary trial concerning a non-sexual assault), *McLintock v PF Edinburgh* [2013] HCJAC 6, at paragraph 7 and *KP v HMA* [2017] HCJAC 57, at paragraph 19. It is clear such rules apply equally to all witnesses across a range of issues (and forums) and, in criminal matters, also to when the accused is giving evidence.

As such, judges should be alert as to whether the accused has particular vulnerabilities if giving evidence. In civil cases, vulnerable persons may include the parties themselves. As judges are not always told in advance of vulnerabilities, it may be necessary to slow or stop proceedings and make enquiries.

Matters to consider for all witnesses but particularly to be alert for in vulnerable witnesses:

- Cross-examination should test a witness' evidence, but should be "properly directed and focused" (*Begg or Dreghorn v HMA*, supra, at paragraph 38).

[85] "The importance of this to the proper administration of justice cannot be underestimated", at paragraph 33.

Irrelevant questions should be stopped (*MacDonald v HMA*, supra, at paragraph 47).

- The tone of questioning. Whilst difficult questions may need to be asked of witnesses, questioning should not be in a tone that suggests incredulity at an answer, or in a belligerent or hostile tone. Judges may need to remind agents/counsel that it is for the court/tribunal/jury to be the decision-maker, not the agent. In the same vein, judges should remember that their comments in courts are public (*Donegan v HMA*, supra, at paragraph 55).
- Cross-examination should not be insulting or intimidating to a witness (*Begg or Dreghorn v HMA*, supra, at paragraph 38). Judges can stop questioning that is "protracted, vexatious and unfeeling" (*Inch v Inch*, at page 998, quoted with approval in *Begg or Dreghorn v HMA*, supra, at paragraph 40).
- Judges should ensure any of their own questions, to clarify a matter or where a judge requires to intervene for a legitimate purpose, are appropriate in tone and content (*Donegan v HMA*, supra, at paragraph 54).
- The speed of questioning. Judges should be alert to the witness failing to keep up with questions. Questions should not be "fired" at witnesses. Many people require time to think before answering. Taking a moment or two to respond can reflect an individual's need for thinking time due to working memory or processing speed. It might also reflect that the questioning is on a difficult issue, rather than a credibility issue.
- A witness becoming confused if questions jump between topics. A less experienced agent may need gentle guidance to encourage a logical approach of chapters of evidence.
- Repeated questions. If questions are repeated, this suggests questioning is not properly directed or focussed (see above) and also raises an issue as to the length of cross-examination (see below). If there is a genuine misunderstanding over a witness' answer that justifies repeating a question or line of questions, judges may wish to intervene to clarify. A witness, particularly if struggling to articulate themselves, is likely to become frustrated at the same question being asked multiple times. They may not have the range of vocabulary to answer the question in a different way and become irritated at repeating the same answer.

- In the same vein, the length of questioning. Cross-examination should be focused. A judge can set down a time limit for questioning (*Begg or Dreghorn v HMA*, supra, at paragraph 40).
- A witness misunderstanding the question. The language used in many judicial settings is often alien to most people's lives. Likewise, language used by witnesses can be different to what many professionals use in their day to day lives. Judges should be alert to a witness who appears "at times to struggle to decipher the meaning of questions."[86]
- Sometimes agents/counsel can misunderstand what a witness has said (or what a witness might be trying to say but struggling to articulate). Often this leads to a line of questioning which may further confuse the witness. Again, judges should intervene when necessary.
- If it is necessary to ask a witness to leave the courtroom to deal with an objection, it is helpful to offer a few words of explanation to settle the witness; many witnesses think it is their fault that they are being asked to leave having said something "wrong".[87]
- Offer breaks when needed. Be wary of the witness who wishes to press on despite being clearly upset. It may be more useful for the judge to impose breaks in those circumstances even of just a few minutes at a time (and perhaps remaining on the bench/in the tribunal room depending on the circumstances). Alternatively, allowing a witness time to compose themselves might be sufficient, with the reassurance that a break can be taken if needed.
- The timing of a witness' evidence. Children and young persons should not generally be asked to give evidence late in the day, particularly outwith school hours. Separately, starting a vulnerable witness' evidence late on a Friday afternoon has been noted to cause issues for them.[88]
- Be aware of terms that might be used by young witnesses and children to describe their bodies: judges might find the Relationships, Sexual Health and Parenthood resource helpful. Whilst some topics within it have been criticised,

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[86] See Sharon Cowan, Eamon PH Keane, and Vanessa E Munro, "The Use of Sexual History Evidence and 'Sensitive Private Data' in Scottish Rape and Attempted Rape Trials" (2024) The University of Edinburgh Law School accessed 4 February 2025, at page 136, referring to a complainer in a rape case.
[87] See Sandy Brindley, "On the Periphery: Exploring effective participation as a means to address re-traumatisation of complainers of sexual crime in Scotland" (2024) Crim LR 5 305-324.
[88] Sandy Brindley, "Exploring Effective Participation for Complainers of Sexual Crime in Scotland" (2023) Glasgow Open Justice Working Paper (early online publication).

it provides resources for schools in teaching the terms "penis, vulva, nipples and bottom" to children in early years of primary school.

Judges must ensure that, whilst attending court may still be nerve-wracking, emotionally draining and might involve recounting a traumatic experience, the individual is treated in court with dignity and respect. A witness, whether the accused, a party or a complainer, should always be put in the position of being able to give their best evidence to the court.[89]

Trauma

It is essential that judges understand the impact of trauma on witnesses and accused persons and, importantly, understand the steps that judges should take to avoid witnesses and others to become more traumatised after court proceedings. The current draft of the Victims, Witnesses and Justice Reform (Scotland) Bill is likely to introduce some statutory provisions on trauma informed practice.[90] All judges should be familiar with the concepts of trauma set out in the Trauma Informed Judging Resource Kit. There is increasing scrutiny as to whether courts respect not only the rights of accused persons, but also witnesses. If judges fail to do so, it might result not only in a failure of justice in an individual case, but also a wider risk of the public failing to have confidence in the court system. In addition, whilst there are crossovers between trauma and domestic abuse or allegations of sexual assaults, the issue of trauma goes beyond those subject matters. Many civil cases involve traumatic events or vulnerable witnesses, such as personal injury, adoption or matters before tribunals.

It is important to give the witness as much predictability as possible around giving evidence. Simple information about the process should be provided. Psychologists advise that where a court provides a witness with choice or control over the situation, this can improve the witness' experience. Accordingly, a court should do so if the option exists. This recognises the lack of safety and control inherent in the

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[89] Final report from the Lord Justice Clerk's Review Group, "Improving the Management of Sexual Offence Cases" (March 2021) accessed 4 February 2025, at paragraph 3.29.

[90] Section 69 of the draft Bill: "… trauma-informed practice is a means of operating that recognises that a person may have experienced trauma, understand the effects which trauma may have on the person, and involved adapting processes and practices, based on that understanding of the effects of trauma, to seek to avoid, or minimise the risk of, exposing the person to any recurrence of past trauma, or further trauma."

traumatic events to be spoken to in evidence. Where the court or tribunal provides predictability and choice, this can help minimise the extent to which the feelings of lack of safety and control are prompted by the experience of giving evidence. For example, if a witness has been told that their evidence will start at a particular time, this should be adhered to.

Reference is made to the list in the section on taking evidence from vulnerable witnesses but also:

- Make eye contact with the witness on their entering the witness box/commission room, but bear in mind that in some cultures, eye contact is not routinely made.
- Use plain language, and a calm and welcoming tone.
- Discourage all in court from using legal jargon (which the toolkit notes can cause not just confusion but also disempowerment).
- If needed, provide reassurance or an explanation about the way special measures operate.
- Describe the likely progress of the court day, giving the witness the choice of sitting or standing and checking the witnesses understand that breaks can be provided.
- If evidence is to be lengthy, a scheduling of breaks throughout the day can help increase predictability.
- If there is an interruption, giving the witness an appropriately expressed explanation is a simple courtesy and reassurance.
- Ensure that questioning is straightforward, sequential and structured, making it easier for a witness to provide a coherent narrative.
- It may be appropriate to explain a rule of evidence which is restricting the way the witness can answer questions and, if necessary and appropriate, to translate unfamiliar legal language.
- Challenge agents or counsel who ask compound questions with more than one proposition.
- Ensure that witnesses are not insulted, belittled or intimidated. This, already, is an inherent judicial function, see *Dreghorn v HMA* [2015] SCCR 349 and the other points raised in the section on taking evidence from vulnerable persons above.

- Witnesses should not be rushed, should be given time to think and questions should not be expressed with a tone of suspicion or disbelief.
- Intervene when necessary to ensure that questioning is fair and appropriate, giving a witness confidence that their interests are respected and will be protected.

8. Domestic abuse

What is domestic abuse?

Judicial office holders will be aware of the increased knowledge and research surrounding different types of domestic abuse, which has most recently involved the bringing into force of the Domestic Abuse (Scotland) Act 2018. This expanded previous domestic abuse offences to include controlling behaviour, isolating behaviour and restricting behaviour, along with other types of behaviour. Traditionally "domestic abuse" had a narrower ambit, more directed towards physical assaults and verbally abusive behaviour, and this expansion reflects society's increased knowledge and understanding of the profound effects of inter-partner and inter-family abuse. Research findings published in 2023 about the 2018 Act make interesting reading.[91]

The findings show that complainers continue to feel that the most difficult thing to explain is psychological abuse. They also show the fact that many complainers themselves do not understand all the effects of abuse upon them or how the court process works; and consequently, they feel very vulnerable within it.

Separately, research suggests a lack of confidence from complainers in courts' sentencing on domestic abuse. Issues raised include whether remorse should be taken into account in sentencing, with some participants questioning if judges have

[91] The shifting understandings of domestic abuse: The Scottish Government Safer Communities Directorate, "Domestic abuse court experiences - perspectives of victims and witnesses" (10 January 2023) accessed 4 February 2025.

sufficient understanding of domestic abuse. There were also critical comments made as to what was perceived to be an inconsistent use of non-harassment orders.[92]

There are also issues of intersectionality with domestic abuse.[93] The term "intersectionality" is used to describe how race, class, gender, and other individual characteristics may intersect and overlap with each other, increasing discrimination and/or oppression.[94]

Who is involved?

Domestic abuse can be perpetrated by anyone involved in a relationship, be they male or female. Such abuse can take place in all types of relationships, either in mixed or same sex relationships. Such abuse can also be against children in a family. However, most complainers in domestic violence and abuse cases are female.

In 2020-21, the clear majority (82%) of incidents of domestic abuse involved male accused (where it was known whether they were female or male). Of these, 80% involved a female complainer.[95] Smaller proportions of incidents involve female accused. In 2020-21, 16% of domestic abuse incidents involved a female accused and a male complainer, and 2% involved a female accused and a female complainer.

Judges will be aware of the need to treat complainers in criminal cases sensitively. There is an increasing understanding of the difficulties for complainers giving evidence, even with special measures such as screens or giving evidence remotely.[96]

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[92] See research report prepared for the consideration of the Scottish Sentencing Council: Nancy Lombard and Erin Rennie, "Exploring views on sentencing for domestic abuse in Scotland" (August 2024) accessed 4 February 2025.

[93] See Judicial Institute Briefing Paper, "Intersectionality in domestic abuse" (April 2020) accessed 4 February 2025.

[94] Intersectionality is a term coined by Kimberlé Crenshaw, an American academic, in the late 1980s. It describes how race, class, gender and other personal characteristics "intersect" with one another and overlap. She wanted to remind people that when thinking about equality, we need to think beyond unique attributes like skin colour and gender and recognise that humans often have more than one characteristic that is subject to discrimination or hostility. While a woman may experience sexism, a Black lesbian will be at risk of experiencing sexism, racism and homophobia.

[95] The Scottish Government Safer Communities Directorate, "Women in the justice system: evidence review" (26 January 2022) accessed 4 February 2025.

[96] The Scottish Government Safer Communities and Justice Directorates, "Domestic Abuse (Scotland) Act 2018 – interim reporting requirement" (10 January 2024) accessed 4 February 2025: "Going to court was reported as difficult and distressing by most research participants, and particularly

Complainers report the process as emotionally draining and are often concerned as to the adversarial nature of criminal cases.

Judges should also be live to the occasional need to intimate to, and hear from, a complainer. In *PF Falkirk v BM* [2023] SAC Crim 12, where the accused sought to recover the complainer's telephone records, the Sheriff Appeal Court held that the application engaged the complainer's Article 8 rights and should have been intimated to her. She should also have been informed of her right to be heard and the possibility of obtaining legal aid and an execution of service should have been lodged with the court. Various observations about the necessary specification in such an application and other procedures to be followed are also included. In civil cases, the question of at what stage intimation should be made to an individual whose Article 8 rights are affected by the recovery of sensitive records was considered in *East Renfrewshire Council v Wright* [2024] CSOH 70.

In respect of jury cases, judges are reminded:

- There is a standard direction to be given as part of the written directions at the beginning of the case on domestic abuse, found in Part C of the written directions; and
- Direction 3 in the Jury Manual, on delayed reporting, arises from the statutory framework for sexual assault cases but, as the Jury Manual notes, it may have a relevance to domestic abuse allegations under common law.

Effects of domestic abuse

The effects of such abuse can be wide-ranging and long-standing. They can include a change in a victim's personality or normal demeanour, at worst leading to suicidal ideation and major psychological effects. It may be thought that a victim in such circumstances can or should just leave the relationship. There are many reasons why this can be more difficult than may at first appear.

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intimidating for children. For some victims, it was reported that going to court could be empowering and provide a sense of closure. Overall, special measures were welcomed although some research participants said they were not always seamlessly implemented or tailored to individual needs."

Danger and fear can be a major factor. 41% of women killed by a partner or former partner in England, Wales and Northern Ireland had left or taken steps to leave. 81% of these were killed in their own home (or one shared with the perpetrator).[97]

Isolation can be another main reason: abusive men often sever or weaken the woman's connections with friends and family, so they have nowhere to turn for help. Trauma and low confidence, shame, embarrassment and denial, along with practical reasons, may also have a role to play.

It will be appreciated that all of these effects are likely to leave complainers in such cases in a fearful and vulnerable state, requiring patience and understanding in the court or tribunal setting.

Adjustments that may be required

One crucial thing to ensure is that the alleged perpetrator of domestic abuse and the complainer do not come into contact with each other in advance of or during proceedings, unless or until any necessary provisions for this situation have been considered by the court or tribunal.

In criminal cases, a complainer will be entitled to special measures (see above) and this should have been contemplated and resolved in advance of any trial. In addition, members of court staff should have tried and tested procedures for ensuring that Crown witnesses and vulnerable witnesses do not come into contact with accused persons.

However, in civil cases the position may be more difficult. Any such issues should be explored as early as possible in the case, particularly given the requirement for parties to now personally attend an Initial Case Management Hearing in all family cases. Section 8 of the Children (Scotland) Act 2020 gives the court additional powers to order the use of special measures for vulnerable parties. This section is not yet in force, but it is anticipated it may come into force during 2025. Importantly, such an order can be made whether or not it has been applied for by a party. In short, where the party would be classed as a vulnerable witness, the court must order special measures. And where the party may be distressed by attending or participating in

[97] The Femicide Census 2020 report, accessed 4 February 2025.

hearings, and this would be reduced by the use of a special measure, and such a measure would not give rise to a significant risk of prejudice in the case, then the court may order the use of such a measure.

Although this provision relates to family actions, care should be taken in all types of civil proceedings, whatever the subject matter or type of hearing. Not all agents will give the court advance notice of bail conditions or of the possible impact on a party if they were to encounter an alleged abuser. Judges need to be alert to the issue and carefully consider how best to manage it. Child welfare hearings can pose particular difficulties. Judges may need to think about staggered hearings with only one party in the court room at a time or the use of screens. Whilst virtual hearings may initially appear attractive to get round some difficulties of having both parties physically present at a child welfare hearing, such hearings may raise other issues.[98] Section 4 of the Children (Scotland) Act 2020 is not yet in force at the time of writing. When it comes into force, it will authorise the court to prohibit the parties conducting their own case in children's hearing referrals, or residence/contact proceedings; with the attendant requirement to appoint a solicitor from a register established under the Act to represent the party. The position, in the meantime, is considered further in the chapter on unrepresented parties.

Judges dealing with family cases should be aware of recent academic research raising the issue as to whether the importance of domestic abuse allegations is sufficiently understood in family cases,[99] and criticism of judicial handling of such cases.[100] Judges may wish to consider if the issues around allegations of domestic

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[98] See the Scottish Woman's Aid's Response to the Scottish Civil Justice Council's consultation on rules covering the modes of attendance at court hearings, raising concerns as to digital poverty issues, woman feeling isolated by being remote from their legal representatives and privacy concerns about joining from home.

[99] Professor Michelle Burman and others, "Domestic Abuse and Child Contact: The Interface Between Criminal and Civil Proceedings" (The Scottish Centre for Crime and Justice Research and the Scottish Civil Justice Hub, 28 February 2023) accessed 4 February 2025.

[100] See Dr Nancy Lombard, Dr Katy Proctor and Dr Nel Whiting, "Domestic Abuse (Scotland) Act 2018 and the Criminal Justice System Women's experiences two years in; the emerging findings" (Glasgow Caledonian University, January 2022) accessed 4 February 2025, page 42: "Sheriffs need to be fully trained and a new modern sweep is needed as the few I have dealt with during this ordeal have been older, set in their ways and in my opinion have no clue about the struggles that are real out there." See also, C Houghton and others, "Domestic Abuse Court Experiences Research: the perspectives of victims and witnesses in Scotland" (The Scottish Government Safer Communities Directorate, September 2022) accessed 4 February 2025; from a small study of 22 women who had given evidence

abuse are sufficiently focussed at an initial child welfare hearing, making such orders as required to address any lack of specification, for example ordering previous convictions to be produced, copies of pending complaints or indictments, or adjustment or amendment of the pleadings so matters are properly pled.[101]

Further information available on the Judicial Hub includes two toolkits:

- Domestic Abuse Resource Kit, including a useful e-book on vulnerable witnesses; and
- Trauma Informed Judging Resource Kit.

Other resources that may be useful for judges include:

- Briefing Paper: Vulnerable Witnesses (Scotland) Act 2004 (now of some vintage).
- Briefing Paper: Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019.
- Contempt of Court Toolkit (but judges are asked to note that as it has not been updated for some time caution should be exercised) but reference should also be made to the section on vulnerable persons.
- The issue of compensation orders in criminal cases is considered in Briefing Paper: The Victims and Witnesses (Scotland) Act 2014.

See also the sections on taking evidence from vulnerable witnesses and trauma.

Reluctant complainers and contempt

Most judges will be familiar with complainers in domestic abuse cases who called the police at the time of an alleged offence, but who do not wish to give evidence about it in court. This may present as an alleged inability to remember what happened, as a

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in court: "A few participants reported that the procurator fiscal or sheriff intervened, due to their treatment by the defence during cross-examination. While these interventions were welcomed, there was a strong sense across many participants that such interventions were not as frequent or as robust as they felt they should have been." A similar comment was made about the behaviour of the accused in court and the response of the court.

[101] Ordinary Cause Rule 33.22A (4)(a) allows the sheriff to order such steps to be taken, make such order, if any, or order further procedure, as the sheriff thinks fit. Note also Ordinary Cause Rule 33.22A (6) which requires parties to provide sufficient information to the sheriff to enable the child welfare hearing to be conducted. For actions raised after 25 September 2023, reference is made to interim and full Case Management Hearings under chapter 33.36.

proclaimed desire not to be at court or as a substantial diminishment of what allegedly occurred in their evidence.

There can be complicated reasons for such a position. The witness may be fearful, they may have already reconciled with the accused, they may feel embarrassed or under extreme pressure. Often such feelings won't be assisted by the court also bringing pressure to bear, for example by threats to find the witness in contempt of court. It should not be assumed that a witness is wishing to be defiant or obstructive and judges should consider carefully before embarking down the route that may be entirely appropriate for a recalcitrant witness in a different type of case. It might be thought that the test for contempt, that is whether the person is in wilful defiance, is a high test.[102]

Complainers in domestic abuse cases and warrants to apprehend

It is understood that COPFS policy is that warrants to apprehend complainers in domestic cases will only be sought in exceptional circumstances.[103] If any such motion is made, judges are recommended to consider what information may be available on the vulnerability of the complainer and to consider the impact on any children in the household.

Non-harassment orders at the end of a criminal case

Judges are reminded of the need to consider the imposition of a non-harassment order at the end of any case where domestic abuse is found to have taken place. The

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[102] See *Scott v Dunn* [2015] SCCR 90 which suggests contempt of court is something to be used sparingly. The Judicial Hub has a Contempt of Court Toolkit available but judges are asked to note that as it has not been updated for some time, caution should be exercised.

[103] COPFS "recognises that in domestic abuse and sexual offence cases that there may be a number of different reasons why a complainer may become disengaged and fail to attend court. In these circumstances, prosecutors will give very careful consideration to each case on its own facts and circumstances and all relevant factors, including the vulnerability of the complainer and the nature and circumstances of the offending will be evaluated prior to a warrant being sought for the witness. Thereafter, following the granting of any warrant, COPFS will look to re-engage with the witness to explore the reasons surrounding the failure to attend and what support can be offered to the witness. It is anticipated that any decision to execute a warrant for the failure of a complainer in a domestic or sexual offences case will be exceptional and only following a review by a senior prosecutor" (email from COPFS dated 11 June 2024).

terms of the Domestic Abuse (Scotland) Act 2018 bring with them a presumption that such an order will be made, with an explanation required (and to be recorded in the court minute) in any case where an order is not made. Importantly, the order may also require to cover children. A Judicial Institute Briefing Paper covers this in detail.

9. Complainers and sexual assaults

Like domestic abuse, it is thought there is under-reporting of sexual assaults.[104]

Whilst it is always part of a judge's function to ensure that all participants in court proceedings are treated fairly and sensitively, this has particular resonance where there are allegations of a sexual assault. Most complainers report being unprepared for giving evidence.[105] Whilst some complainers speak of the trial process bringing a sense of closure, others say the process involved further trauma to the extent that complainers report being treated in an "inhuman" way.[106] See also the sections on taking evidence from vulnerable witnesses and trauma.

Judges will be aware of the obligation on the court in terms of section 274 of the Criminal Procedure (Scotland) 1995 Act, designed to protect complainers in sexual offence trials from inappropriate questioning about their sexual history and character. There is a useful toolkit, Applications under s275 of the CPSA 1995, on the Judicial Hub, together with guidance in chapter 9 of the Preliminary Hearings Bench Book. These give a framework to help consider any section 275 application.

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[104] The Scottish Government Justice and Safer Communities Directorates, "Scottish Crime and Justice Survey 2019/20: main findings" (16 March 2021) accessed 4 February 2025; page 188 suggests that only 22% of respondents reported a serious sexual assault to the police.

[105] Sandy Brindley, "Exploring Effective Participation for Complainers of Sexual Crime in Scotland" (2023) Glasgow Open Justice Working Paper (early online publication), which involved interviews with 20 women who had been involved in civil or criminal proceedings involving allegations of rape or sexual assault.

[106] See, for example, four complainers (Jennifer McCann, Hannah McLaughlan, Hannah Reid and Holly Prowse) who waived their right to anonymity to speak openly about their experiences as rape complainers in the trial of Logan Doig (Catriona Renton and Debbie Jackson, "Three women raped by same man team up to seek changes to court cases" (BBC News, 30 August 2023) accessed 4 February 2025).

Although the complainer must be told of the content of the section 275 application and be invited to comment or make objections to it before it is granted,[107] research suggests this is not being universally done.[108]

Points to note on sections 274 and 275 in practice:

- Ensure that the Crown can relay the complainer's views on the application, bearing in mind that simply because a complainer accepts the factual premise of the application does not mean it is relevant at common law or otherwise should be granted.
- Remember the terms of section 274: that "the **court** shall not admit or allow questioning…." (emphasis added). Whilst the Crown may object, it is the court's responsibility to control questions that fall foul of section 274, whether or not the Crown object.
- Careful preparation is essential to enable a judge to appropriately intervene and be alert to the live issues in the case.[109] It is necessary to be familiar with the papers in advance, including the indictment or complaint, any special defence, the minutes, any section 275 application and the decision on it, the vulnerable witness application, written questions if ordered, the joint minute, any prior statements, any police interview with the accused, and productions for both sides.
- In the sheriff court, where commissions are rarer, practitioners may not be so familiar with the obligations of section 274. It can be useful to remind both the Crown and the defence of its terms at an early stage.

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[107] *RR v HMA* 2021 JC 167. There is a proposed reform in the Victims, Witnesses and Justice Reform (Scotland) Bill 2023 which would introduce a statutory obligation for a complainer to be informed of a s 275 application and which would provide legal aid for representation for the hearing, and some appeal rights.

[108] See Sharon Cowan, Eamon PH Keane, and Vanessa E Munro, "The Use of Sexual History Evidence and 'Sensitive Private Data' in Scottish Rape and Attempted Rape Trials" (2024) The University of Edinburgh Law School accessed 4 February 2025, at page 83, which found that, in a sample of 20 cases, views were not sought in 7 of the cases and made criticism of the recording and detail of such views.

[109] See, for example, *CH v HMA* 2021 JC 45 concerning an alleged rape, where it was the Crown's position that the complainer was intoxicated to the extent of being unable to consent. In paragraph 3, the court explained, "in that state of affairs, the issues for trial are very straightforward: (1) was the complainer so drunk as to be incapable of giving consent; and (2) did the appellant have sexual intercourse with her while she was in that state. Anything which does not bear upon these two issues is irrelevant."

- Again, particularly in the sheriff court, many practitioners may not be so familiar with the culture arising from a trauma-informed practice. It may be useful to raise this at an early stage. It can be useful to direct practitioners to the High Court practice notes on vulnerable witnesses and, if appropriate, to direct written questions that are made available in advance.

Similarly in relation to applications for recovery of medical, phone or other records relating to the complainer, guidance is available in the section of common law applications for disclosure in chapter 3 of the Preliminary Hearings Bench Book. In civil cases, the stage when intimation should be made to an individual whose Article 8 rights are affected by the recovery of sensitive records, was considered in *East Renfrewshire Council v Wright* [2024] CSOH 70.

Rape myths

In 2023, the Jury Manual was amended to include material for juries on rape myths. The general written direction is to be given at the start of the trial and may have to be amended to cover the specific charges before the jury. Direction 2 deals with consent, direction 3 with delay in reporting, direction 4 with the absence of physical resistance and force, direction 5 with prior inconsistent statements and direction 6 with a background of domestic abuse (also a written direction given at the start of the trial) and direction 7 with a complainer's reaction to being questioned. As is noted in the Jury Manual, and by Lady Dorrian's Review Group on "Improving the Management of Sexual Offence Cases", there is much to be said for giving the relevant directions both in the introductory remarks at the start of the trial or otherwise as soon as the point arises. If giving rape myths directions during evidence, it may be wise to remind the jury that these will be matters to be considered by them when they come to consider their verdict and after having heard all the evidence, speeches and the judge's further directions.

The background is that research from 2019 from mock jury deliberations found evidence of false assumptions, including as to how a rape victim "should" react and that lack of physical resistance is indicative of consent.[110] Following this research, one

[110] James Chalmers, Fiona Leverick and Vanessa E Munro, "The Provenance of What is Proven: Exploring (Mock) Deliberation in Scottish Rape Trials" (2019) Scottish Jury Research Working Paper accessed 4 February 2025.

of the researchers concluded that, "there is overwhelming evidence that rape myths affect the way in which jurors evaluate evidence in rape myth cases…"[111]

In addition, Lady Dorrian's Review Group recommended that steps should be taken to improve jury involvement in sexual offences cases, including a pilot programme to communicate information to juries on rape myths and stereotypes, together with the current statutory directions to address rape and sexual assault stereotypes.

Judges should:

- Ensure the jury directions on rape and sexual offences are appropriately used, including the written directions at the commencement of the trial together with (as required) those for charging the jury.

The Judicial Hub has a number of resources available on sexual offences, including:

- Taking Evidence by Commissioner (resource kit section of hub); and
- Section in the Jury Manual on Addressing rape and sexual offence myths and stereotypes.

Some specific measures that judges may wish to consider include some words around explaining why a legal objection has arisen (arising from the fact that complainers appear to perceive that this is their "fault" for something they have said in their evidence). Other measures might include consideration of when a witness' evidence is taken,[112] intervening early at inappropriate questions[113] or at behaviour of the accused in court (even if that behaviour might not be clear cut, but may be open to different interpretations, with particular care to take a neutral tone in such circumstances).

Recent research also suggests that it is important to complainers to have a clear understanding of the sentence imposed, and the reasons for it. The research also highlights the importance, for at least some complainers, of being able to attend the

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[111] Fiona Leverick, "What Do We Know about Rape Myths and Juror Decision Making: An Evidence Review," (2019) Scottish Jury Research Working Paper accessed 4 February 2025.
[112] Sandy Brindley cites one example when a complainer's evidence was commenced at 3:45pm on a Friday afternoon. See footnote 105, page 9.
[113] Rape Crisis reported one case where a complainer felt demeaned after it was suggested to her that the complaint of sexual assault was nothing more than a "roll around in the hay".

sentencing hearing, but also the difficulties this might entail given the issues of the lack of special measures, the travel that may be involved and that observing the hearing remotely is not a standard mechanism offered.[114]

Judges are reminded to consider non-harassment orders where there is a conviction in a sexual case.

Whilst the directions for rape myths arise in a criminal context for jurors, judges may also find it helpful to refer to them when facing such factual matters in a summary or a civil context. If a party is unrepresented in a civil case with allegations of sexual abuse, please refer to the section on unrepresented parties.

Arrangements for vulnerable accused

The statutory scheme for special measures for an accused is different from that for witnesses and is limited to the accused giving evidence.[115] Some statutory provisions explicitly exclude the accused (for example section 271BZA regarding commissions). Section 271F sets out modifications to the provisions for vulnerable witnesses insofar as they apply to the accused giving evidence.

The absence of statutory provision for a vulnerable accused (outwith any evidence they may give) has been the subject of criticism.[116] Judges may wish to consider what other measures may be required, including breaks, the involvement of advocacy workers and intervening if it appears the accused is not following proceedings.[117] It is understood that in at least one case, a sheriff has allowed an advocacy worker to sit with an accused in the dock, with the purpose of ensuring the accused is following

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[114] See Research report prepared for the consideration of the Scottish Sentencing Council: Dr Oona Brooks-Hay, Michele Burman and Jenn Glinsk, "Victim-Survivor Views and Experience of Sentencing for Rape and other Sexual Offences" (May 2024) accessed 4 February 2025.
[115] Keane notes that it is possible at common law in Scotland for a court to permit a supporter to be present beyond the giving of evidence for the vulnerable accused, but criticises the absence of a statutory scheme to deal with matters such as an intermediary to assist some vulnerable accused from understanding: see Eamon Keane, "The vulnerable accused in Scotland: 'A fig for those by law protected'?" in Ed Johnstone and Sophie Marsh, "Contemporary Issues in Global Criminal Justice" (Rowman & Littlefield 2022) (author version) accessed 4 February 2025.
[116] Ibid.
[117] Judges may also be interested in the work of the Law Society of Scotland Criminal Law Committee on this issue: Law Society of Scotland, "Report – Vulnerable Accused Persons" (29 April 2019) accessed 4 February 2025. See also, Keane, supra.

the proceedings, and to highlight to the court if the accused is not. Such measures may allow an accused to participate in a trial.[118]

In England, there has been some use of intermediaries at stages in the justice process. An intermediary's role ranges from carrying out a communication assessment, advising the court/tribunal/police accordingly, and, in some cases, advising on draft questions.[119]

See also the section on child accused.

10. Modern slavery

The latest figures available from the Home Office show that there were 387 potential victims of modern slavery in Scotland.[120] This may well be an understatement, with many victims not being discovered. This can involve trafficking people into the UK and then sexually exploiting them or forcing them into labour. The most common nationalities of those identified as victims in the UK in 2022 were Albanian (27%), UK (25%) and Eritrean (7%), followed by Sudanese and Vietnamese.[121] The most common form of exploitation is labour exploitation, with the construction industry, agriculture, the sex industry, nail bars, car washes and cannabis farms all featuring.[122] Trafficking is an offence under the Human Trafficking and Exploitation (Scotland) Act 2015. That Act also covers slavery, servitude and forced or compulsory labour. The

[118] Judges may be interested to note that, on a Chatham House basis, some psychiatrists reported that in respect of patients who had been found to have committed an act following an examination of the facts felt in hindsight they could have participated in a trial if adjustments had been made. Whilst this is anecdotal and there does not appear to be any research on the issue, it may be that judges should encourage a discussion on what steps could be taken to allow an accused to effectively participate at trial (as discussed at "(Un)Reasonable Adjustments? The Experience of the Vulnerable Accused in Scotland" (15 February 2024), an event at Glasgow University, organised by lecturer Eamon Keane).
[119] See: Dr Brendan O'Mahony, Professor Rebecca Milne and Dr Kevin Smith, "The use of Intermediaries (communication specialists) at Parole Board Oral Hearings in England and Wales" (Defending Vulnerability, 23 May 2024) accessed 4 February 2025.
[120] The Scottish Government Justice Directorate, "Human trafficking" accessed 4 February 2025.
[121] Sophie Blanchard, "Victims of Modern Slavery in the UK 2022" (University of Hull, 11 May 2023) accessed 4 February 2025.
[122] National Crime Agency, "Modern slavery and human trafficking" accessed 4 February 2025.

offence is aggravated if committed against a child or if committed by a public official.

Section 8 of the Act places an obligation on the Lord Advocate to make and publish instructions on the prosecution of individuals who have been the victim of human trafficking or exploitation, in recognition of their particular vulnerabilities.

A National Referral Mechanism has been created to enable potential victims to be housed and supported while an assessment is made as to whether they are a victim of trafficking or slavery. It is understood that the mechanism is currently backlogged, and delays may occur as a result.

It is important to note that such victims are likely to be vulnerable witnesses, who may have been damaged by their experiences and may be anxious around displays of authority. Sensitivity and patience may be required when dealing with such individuals. It must be borne in mind that an underlying vulnerability, such as a learning difficulty or drug problem, may be the reason they have been prone to exploitation in the first place.

The Modern Slavery Act 2015 is mainly applicable in England and Wales, but some parts do apply in Scotland. In a 2016 review of the Act by barrister Caroline Haughey, the author recommended all victims of such offences should be treated as vulnerable, with the same Advocate's Gateway questioning protocols that apply to victims of sexual offences being applied to them.

11. Poverty

There are a number of different ways to measure or define poverty, including relative poverty,[123] absolute poverty,[124] and persistent poverty.[125]

Successive Scottish Governments have legislated by setting targets for the reduction of child poverty in Scotland by 2030 (see the Child Poverty (Scotland) Act 2017), using four methods to measure progress. These are: the number of children in relative poverty, the numbers in absolute poverty, the numbers in persistent poverty and those in low income and material deprivation combined. Additionally, the Scottish Government also estimates levels of food insecurity,[126] a metric closely associated with poverty.

The latest data from the Scottish Government suggests that just under one quarter of children (24%), 21% of adults of working age and 15% of pensioners live in relative poverty in Scotland.[127] Many working age adults and children live in poverty although they are part of a household with an adult in paid work. The risk of poverty is uneven across population grounds with, for example, higher rates of poverty among single parent households.[128] Charities report that following COVID and the cost of living crisis, demands on services such as foodbanks have increased. Living in

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[123] Relative poverty is defined as a measure of whether the lowest-income households are keeping pace with middle income households across the UK. It is often used to capture trends in poverty rates. The Scottish Government definition for this, and the other measurements of poverty are available here: the Scottish Government, "Poverty and Income Inequality in Scotland 2019-22" (23 March 2023) accessed 4 February 2025.

[124] Absolute poverty is the measure of whether the incomes of the poorest households are keeping pace with inflation; supra.

[125] Persistent poverty is where someone has been in poverty for three of the last four years. Combined low income and material deprivation is defined as when a child lives in a household whose equivalised net income for the year is less than 70% of the median equivalised net household income for the year, and experiences material deprivation in the year; supra.

[126] Food insecurity considers data on matters including whether a household has sufficient food, about food running out, whether the food is balanced and whether adults in that household skipped meals; supra.

[127] The Scottish Government, "Poverty and Income Inequality in Scotland 2020-23" (21 March 2024) accessed 4 February 2025.

[128] See, for example, One Parent Family Scotland, "Living Without a Lifeline" (2022) accessed 4 February 2025 at page 19, where just over 40% of participants reported finding it extremely difficult or could no longer afford food.

poverty is associated with lower life expectancy and poor health outcomes, lower educational attainment and risks of involvement in the criminal justice system.[129] A campaigning charity, the Child Poverty Action Group, has published "Poverty in Scotland 2021: Towards A 2030 Without Poverty" which describes trends and key issues.

Some common myths about poverty include that it is only families without an adult working that suffer poverty (often those in poverty are in work) or that those in poverty are lazy (many in poverty have a physical or mental disability impairing ability to work, or young children with difficulties over childcare). Rather, the underlying causes of poverty are complex, connected to matters such as the availability of types of work in the labour market, low level of skills and education, and social factors such as lone parenting and disability.[130]

There are links between low attendance or attainment at school and poverty in later life.[131] This is likely to be particularly acute post-COVID, given the levels of absenteeism in schools.[132]

There is a link between poverty and those involved with the criminal justice system, whether as an accused or as a witness,[133] although judges should be careful to note

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[129] The Edinburgh Study, one of the largest in Scotland, tracked 4,300 young people aged around 12, looking at early offending behaviour. Its follow up in late 2019 onwards tracked those persons aged 35. Whilst the researchers were only able to follow up a much smaller group at aged 35, they concluded that, "There is a strong inter-relationship between offending, justice contact and poverty in the teenage years and early adulthood. Poverty during childhood and adolescence is directly related to involvement in youth violence, which results in police charges and youth justice supervision, which in turn predicts poverty in adulthood." Lesley McAra and Susan McVie, "Causes and Impact of Offending and Criminal Justice Pathways: Follow-up of the Edinburgh Study Cohort at Age 35" (Report to the Nuffield Foundation, March 2022) accessed 4 February 2025 at page 8.

[130] Academics have argued that whilst children in poverty are often seen as lacking ambition, instead they should be seen as having expectations and constraints inherent to their circumstances rather than freedom of choice: Ralf St Clair and Amanda Benjamin, "Performing desires: the dilemma of aspirations and educational attainment" (2011) 37(3) British Educational Research Journal 501-517.

[131] Markus Klein and Edward Sosu, "School Attendance and the Poverty-related Attainment Gap" (University of Strathclyde Blog) accessed 4 February 2025.

[132] It is thought around 40% of secondary school pupils in Scotland have an attendance of less than 90%. See Commission on School Reform, "Absent Minds: Attendance and Absence Scotland's Schools" (October 2023) accessed 4 February 2025; see also The Scottish Government Learning Directorate, "School attendance and absence statistics" (19 March 2021) accessed 4 February 2025 which suggest 32.5% of children across all school ages in Scotland are absent for more than 10% of lessons.

[133] The nature of the link, and the causal effect of poverty on offending (as opposed to issues such as ACEs) are the subject of academic debate; see, for example, Babak Jahanshahi, Kath Murray and Susan

that for some crimes, such as domestic abuse, there does not appear to be a link with poverty levels. In 2021/22 Scottish Government statistics showed that 33% of people arriving at prison came from the 10% most deprived areas in the country.[134]

Judges should be careful not to stigmatise those in poverty. Often those in poverty will try to conceal it, particularly young people at school who may be aware of costs of school trips and other extras, such as non-uniform days. Sensitivity should be used, particularly in family cases.

12. Literacy and numeracy

An annual summary of attainment and school leaver destinations is published by the Scottish Government. A small number of pupils leave school with no qualifications (2.2%) but most (96%) leave with one or more passes at SCQF Level 4. It should be noted that SCQF Level 5 is broadly considered equivalent to what was previously known as Standard Grades or O-Grades, generally sat by pupils in S4 of secondary school. Table 8 of the summary shows stark differences in local authority areas, ranging from 3.8% of pupils in East Renfrewshire leaving school with a qualification lower than an SCQF Level 5, compared with 21.4% of pupils in East Lothian. In addition, the Scottish Government published data that estimates attainment in reading, writing, listening and talking, and literacy and numeracy by primaries 1, 4, 7 and in third year of secondary school.

Looking at the population as a whole, one report has estimated that just under 10% of the population in Scotland have low or no qualifications, defined as whether they have a qualification at SCQF level 4 or above.[135] Four local authority areas had higher percentages, that is to say more people with low attainment: West Dunbartonshire at

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McVie, "ACEs, places and inequality: Understanding the effects of adverse childhood experiences and poverty on offending in childhood" (2021) 62(3) British Journal of Criminology accessed 4 February 2025.

[134] The Scottish Government, "The Vision for Justice in Scotland" (8 February 2022) accessed 4 February 2025.

[135] For the period of January to December 2020, it was estimated that 9.7% (324,700) of the population in Scotland aged 16 to 64 years old have low or no qualifications at SCQF level 4 or below: The Scottish Government Chief Economist Directorate, "Scotland's Labour Market: People, Places and Regions - Statistics from the Annual Population Survey 2020/21" (29 September 2021) accessed 4 February 2025.

15.8%, Inverclyde and North Lanarkshire both at 14.6% and Glasgow City at 13.5%. At the other end of scale, around 1 in 3 adults have a degree level qualification in Scotland, but with stark local variations, ranging between 50% of adults in Edinburgh, but only 21.7% in West Dunbartonshire. The 2022 census captured some broad education statistics: just over 750,000 adults in Scotland responded to say they have no qualifications, from a response of 4,548,589 of adults over 16 years of age.

Academics have been critical of the data available. Professor Lindsay Paterson of Edinburgh University has argued that a SCQF level 4 qualification is not necessarily a qualification in numeracy or literacy. He points out that someone without a maths or English qualification at SCQF level 4 but with a qualification in, for example, woodwork at that level, would not be counted as having low or no qualifications but may still struggle with understanding.[136] With that in mind, it might be argued that little is known about the literacy and numeracy rates in Scotland.[137]

13. Communication

It is extremely likely that many cases in a court or tribunal will involve persons with additional communication needs. There are a disproportionate number of persons with a learning disability within the criminal justice system.[138] There is some evidence suggesting that those with a communication difficulty are more likely to reoffend.[139] It has been suggested that as many as 50% of prisoners have problems with

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[136] Information provided by Professor Paterson, 11 January 2024. He notes that Scotland has not participated in an OECD survey on adult skills, which measures adults' proficiency in literacy, numeracy and problem solving; see The OEDC Survey of Adult Skills (PIAAC).

[137] The Scottish Government have confirmed that there is no specific data on qualifications solely on literacy and numeracy rates for the population as a whole.

[138] It is thought that 7% of people in contact with the criminal justice system have a learning disability in England and Wales, compared with only 2% of the general population: Jacqui Learoyd and Karen Bryan, "Working with Adults with Communication Difficulties in the Criminal Justice System" (1st edn Routledge, 2023), at page 19. No specific figures appear to be available for Scotland. See also Maxine Winstanley, Roger T Webb and Gina Conti-Ramsden, "Developmental language disorders and risk of recidivism among young offenders" (2021) 62(4) J Child Psychol Psychiatry 396-403 accessed 4 February 2025, which surveyed 145 young offenders finding 60% of the ground had a development language difficulty. None of the young offenders had previously been diagnosed with any language difficulty.

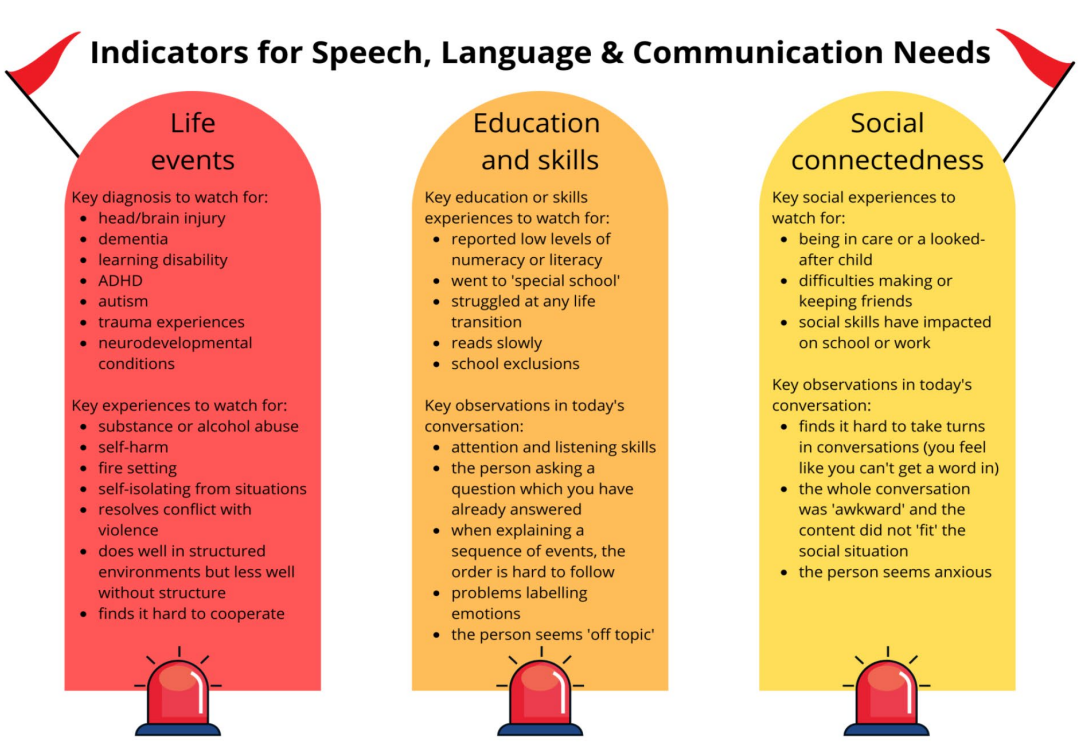
[139] From the survey of 145 young offenders supra, the offending rate with those with a development language difficulty was 62% compared with 25% of young offenders without such language difficulties.

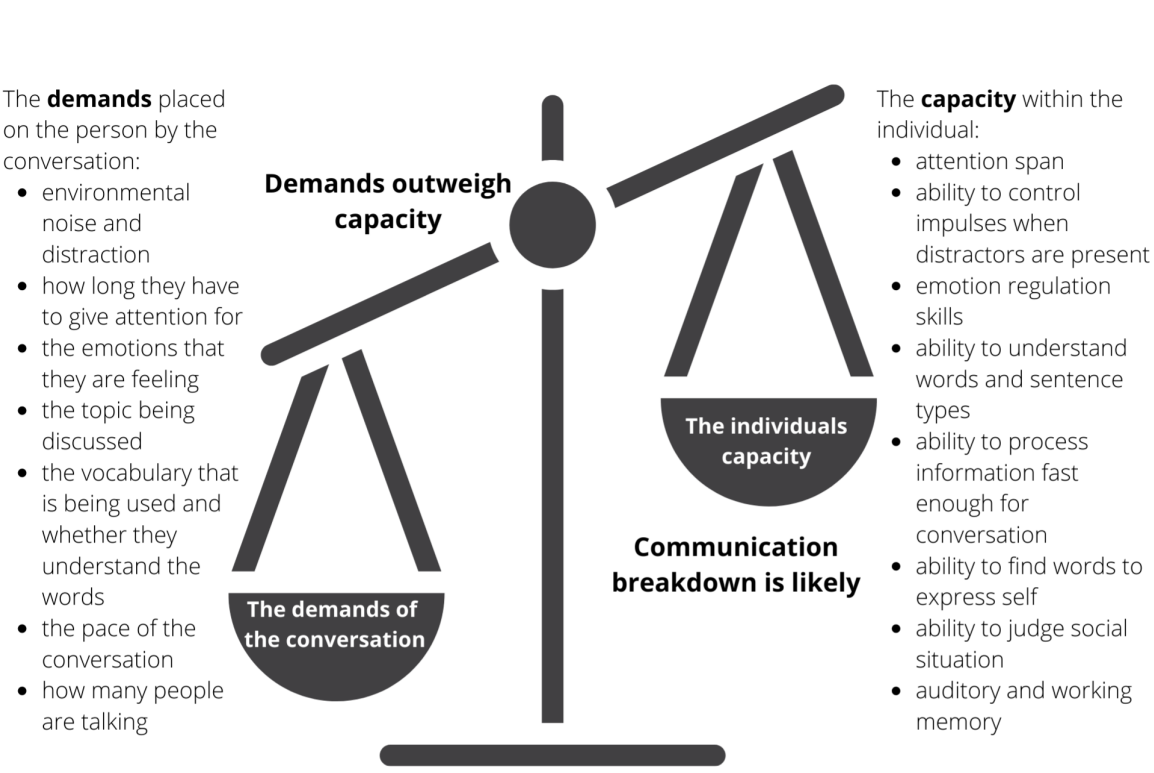
language,[140] 40% of people in prison aged over 55 have a cognitive impairment which may impact on their communication[141] and as many as 20% of people attending court have a learning disability.[142]

It is thought that people with a communication difficulty are often skilled at hiding it,[143] leading to many communication issues being undiagnosed.

The following diagrams are a useful explanation of the type of indicators that may suggest a speech or language communication need (and are reproduced with the kind permission of Jacqui Learoyd).

[140] Learoyd and Bryan, (footnote 138), at page 189, quoting research by Morken, Jones and Helland from 2021.
[141] Ibid, page 189, quoting a study by Combalbert from 2016.
[142] Ibid, page 189, quoting Brown 2022.
[143] Ibid, page 189 explains this.





Dr Susan McCool, a speech and language therapist, has produced a ten top tips checklist for best practice for working with those with speech and language

difficulties.[144] It is provided below. As it is not a specific list for judges, not all the tips in it will be relevant. However, it might assist with a better understanding of the way professionals should overcome barriers for those with communication issues.

Technology is transforming the tools available to assist communication. "Talking mats"[145] is a visual communication framework which supports people with communication difficulties to express their feelings and views. It has been developed by speech and language therapists and may assist in reducing anxiety and supporting people to express how they really feel.

14. Remote witnesses/evidence by link

Judges will likely require to operate the in-court equipment for connecting with a vulnerable witness. Once used a few times, the operating of the equipment is relatively straightforward. Judges may wish to familiarise themselves with it before using it for the first time. It is important that the judge makes agents aware of the short delay whilst the camera swings to the correct position.

Eye contact with the remote witness is made by looking at the camera, not the monitor where the witness should appear. It may be appropriate to explain this to parties, to avoid any suggestion of discourtesy.

If there is an objection for which the witness should be excluded, good practice is to return the camera to the judge, explain there is a short legal matter to be dealt with and that the camera will be switched off for a short period. It is important that the witness sees the judge when this is explained.

Care should also be taken not to put the camera on "over view" at any stage if there are issues with the witness seeing the accused or other persons present in the court

[144] Taken from Dr Susan McCool, "Working with Child and Adolescent Mental Health, The Central Role of Language and Communication" (1st edn, Speechmark, 2023).
[145] TalkingMats, "What is a Talking Mat?"

Children and young people

Contents

1. Overview

The intention of this chapter is to provide judges with information that will be relevant on any occasion that you are dealing with a child, whether as an accused or as a witness. There are crossovers with other chapters, particularly vulnerable persons, but also perhaps others.

2. Introduction

A child/young person (and/or vulnerable adult) is likely to be unfamiliar with a court environment and will find it daunting. However, this can vary. At one end, you may be faced with a very apprehensive child, who cannot engage with the court due to their anxiety. At the other end, you may have a resilient, confident young person who is unfazed, or even enthusiastic, about being at court. The job of the judge is to try to become attuned to individual reactions and to try to alleviate anxiety and maximise participation as much as possible. In general terms, a court or tribunal will have a duty to safeguard any child, and to minimise delay in any proceedings involving children.[146]

On 16 July 2024, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 came into force and incorporated the UNCRC into Scottish law. Section 6 thereof makes it unlawful for a public authority to act or fail to act "in connection with a relevant function" in a way which is incompatible with UNCRC requirements. Various Articles of the Convention have obvious relevance to the Scottish Courts. For example, article 3 (need to prioritise the best interests of the child), article 9 (children must not be separated from their parents against their will unless in their best interests), article 12 (right to express views and respect for those views), article 16 (right to privacy) and article 40 (right to be treated with dignity and respect as child accused, right to a fair trial that takes account of age and to legal assistance). Further analysis is contained within this chapter.

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[146] See, for example, Glasgow and Strathkelvin Practice Note (No 2) 2021, at paragraph 1.1, which deals with Children's Referrals.

There is recognition in the justice system that many children, young persons and vulnerable adults encountering it may be victims of trauma. The Scottish Government produced a Knowledge and Skills Framework for use by those working with victims and witnesses in May 2023 in acknowledgement of this. Childhood trauma may be caused by something that does not seem so serious to an adult. It can have a long-lasting effect on people's lives.[147]

In this evolving area there is now recognition that the brain may not reach full maturity until the age of 25 or later in some. The Scottish Sentencing Council published a literature review: "The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts" (2020). It concluded that the immaturity of cognitive regions of the brain along with over activation of emotion and reward-related regions contributes to adolescents finding it difficult to think rationally and critically before making complex decisions. The authors noted that brain development may not be complete until between approximately 25 and 30 years of age.

Adverse Childhood Experiences and their life-long impact are now becoming better understood and are the subject of judicial training. The British Journal of Criminology (2022, 62, 751–772) published an article about the relationship between ACEs and a range of negative outcomes, including offending, in September 2021, which makes interesting reading. It concludes that ACEs play a significant role in explaining involvement in childhood offending. See the Trauma Informed Judging Resource Kit and the sections on taking evidence from vulnerable witnesses and witnesses who may have experienced trauma.

3. Who does this chapter relate to?

"Child"

Different legislation defines a "child" in different ways. Most commonly, section 307(1) of the Criminal Procedure (Scotland) Act 1995 refers to the definition at section 199 of the Children's Hearings (Scotland) Act 2011. Broadly speaking, this

[147] The Scottish Government Mental Health Directorate, "Psychological trauma and adversity including ACEs (adverse childhood experiences)" (updated 22 October 2024) accessed 5 February 2025.

defines "child" as a person under 16 years of age or a person under 18 years of age who is subject to a compulsory supervision order.

Readers should, however, note the terms of the Children (Care and Justice) (Scotland) Act 2024. This is due to amend section 199 of the 2011 Act so as to define "child" as a person under the age of 18, having the practical effect of treating all under 18s as children in the criminal justice system, including for the purposes of reporting restrictions. At the time of writing this amendment, it is NOT in force and is not anticipated to take effect until late 2025/early 2026 (save as it relates to detention in a YOI, which came into force on 28 August 2024). Care requires to be taken about this as it is understood that some online resources are erroneously suggesting that this change is already in force.

On 16 July 2024, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 came into force and incorporated the UNCRC into Scottish law. The UNCRC applies to all persons under the age of 18. As section 6 thereof makes it unlawful for a public authority to act or fail to act "in connection with a relevant function" in a way which is incompatible with UNCRC requirements, it is suggested that judges treat those under the age of 18 as "children".[148]

By contrast, the Children (Scotland) Act 1995 defines "child" at section 1(2) as a person under 16 or, for the purposes of the parental responsibility of guidance, as a person under 18.

Age, in the context of being a vulnerable child witness, is dealt with at section 271 of the Criminal Procedure (Scotland) Act 1995, referring to a person under the age of 18 at the commencement of the proceedings. In the context of civil proceedings, it is the same, by virtue of section 11(1) of the Vulnerable Witnesses (Scotland) Act 2004, as amended by section 22 of the Victims and Witnesses (Scotland) Act 2014.

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[148] *PF, Dundee v JH and LL and Commissioner for Children and Young People in Scotland* [2025] HCJAC 2: in this case the Appeal Court decerned that when making prosecutorial decisions, the Lord Advocate was carrying out a relevant function for the purposes of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, Part 2, section 6(2), and had to act compatibly with the requirements of the Convention on the Rights of the Child 1989 (United Nations). The Crown had not acted unlawfully by virtue of section 6(1) in deciding to prosecute two 17-year-olds in the public interest.

Section 50 of the Criminal Procedure (Scotland) Act 1995 relates to children under 14 years of age and restricts their presence in court. It also requires certain steps to be taken, as outlined below.

The Scottish Sentencing Council guideline on the sentencing of young people, which came into force on 26 January 2022, applies to persons under the age of 25 when they plead or are found guilty.

4. Expedited time scales

One of the repeated themes in both the civil and criminal sphere, and in tribunals, is the need to do everything possible to expedite time scales in cases involving children. Trial and case management powers should be exercised to their fullest extent where a child is involved. A trial, proof or hearing date involving a child witness should only be delayed in exceptional circumstances. The capacity of any witness to remember is likely to deteriorate if there is delay.[149]

The court, as a "public authority" in terms of section 6 of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 must be mindful of Article 40 of the UNCRC, which gives a child accused the right to "a fair trial that takes account of their age".

5. The rights of the young to effective participation[150]

The United Nations Convention on the Rights of the Child sets out a number of key principles, including:

- Article 3: The best interests of the child must be a primary consideration in all decisions and actions that affect children.

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[149] University of Birmingham, "Memory details fade over time, with only the main gist preserved" (Science Daily, 26 May 2021) accessed 5 February 2025.
[150] Children and Young People's Commissioner Scotland, "UNCRC Article 12" accessed 5 February 2025.

- Article 12: Every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously.
- Article 16: A right to privacy. No child shall be subjected to unlawful interference with his or her privacy, family, home or correspondence.
- Article 40: Every child accused of or convicted of crime has the right to be treated in a way that promotes their sense of dignity and worth, which takes account of their age and the desirability of their reintegration to society; and to have legal or other appropriate assistance (for example, through their parents); and to have the matter determined without delay.

These rights apply at all times, for example, during court proceedings, immigration proceedings, housing decisions or the child's day-to-day home life.

Accommodating a young person's needs (as required by case law and the UN Convention on the Rights of the Child) requires a court or tribunal to adopt a flexible approach in order to deal with cases justly.[151]

On 16 July 2024, the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 came into force and incorporated the UNCRC into Scottish law. The UNCRC applies to all persons under the age of 18. Following this, there are changes to the rules for children both as witnesses and as accused, dealt with below.

Child witnesses and accused have been shown to experience much higher levels of communication difficulty in the justice system than was previously recognised. It is estimated that about 60% of young people in court have communication needs, versus about 10% in the typical population.[152] Children and vulnerable adults under stress can function at a lower level, making it harder for them to remember accurately and think clearly. Stress can also affect their mental health.

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[151] Ibid. See also Children and Young People's Commissioner Scotland, "UNCRC Article 40" accessed 5 February 2025. Article 40 gives children and young people the right to get legal help and to be treated fairly if they are accused of breaking the law.
[152] Jasmine Wishart and Ann Hodson, "Are we getting through? Criminal justice communication" (Law Society of Scotland, 17 July 2023) accessed 5 February 2025.

These individuals may have an inability to understand or communicate well in court and may also be keen to hide this in order to maintain bravado. It is suggested that judges check understanding. It is not useful to do this by asking the question: "Do you understand?" This is likely to elicit a positive answer, which may well be false. Instead, an individual should be asked to explain what they have understood in their own words; and then be given the time and support to do so.

There also is a strong case for a distinct approach to the treatment of young adults in the criminal justice system. The Scottish Government in its document, "Youth justice - early and effective intervention: core elements - framework", published in June 2021, suggested that a mechanism was required to support children who came to the attention of the police for offending.

6. Vulnerability of the adolescent

A 16 or 17 year old may look like an adult, talk like an adult and want to behave like an adult, but may nevertheless need the protection of the court and special consideration. By virtue of their age and resulting cognitive and emotional immaturity, they may be vulnerable in the court setting (and indeed elsewhere). A calmer and less distressed adolescent will be better able to cope with their attendance at court.

Court can present as particularly alien and threatening to persons in this age range for various reasons:

- The court appearance is likely to follow a negative experience, setting up anxious expectation;
- It is likely to involve recounting or reconsidering a difficult or traumatic experience; or
- It may involve having to give evidence about someone known to the adolescent and perhaps either loved or feared (or both) by them.

Individuals in this age group are very likely to have the communication difficulties outlined in the vulnerable persons chapter.

Coping strategies for those in this age group are not as well developed as those in adults. Common coping strategies in this age group may include:

- Avoidance: in which they become silent and refuse to engage. This may present as defiance. This may be part of an attempt to distance themselves from the emotion of the event and may present as a lack of emotion or upset, when in fact it is the opposite.
- Oppositionality: in which they become belligerent and possibly rude in order to try to avoid questioning and regain some control. This is a particularly common coping strategy for children with a history of abuse or neglect.
- Communication issues are likely to arise for any child witness. Reference is made to other sections of this book. There may be a specific tendency to overestimate the verbal ability of a young person in this age category due to their physical appearance, but the presence of mental health difficulties is being increasingly identified in this age range.[153] Adolescents can be particularly impacted by embarrassment and may be very reluctant to ask for clarification of questions or instructions. They may also be more suggestible than an adult and have less ability to store and retrieve memories than an adult.

7. General considerations applying to a child in the criminal court

Criminal proceedings

All proceedings involving children

In terms of chapter 6 of the Act of Adjournal (Criminal Procedural Rules) 1996, there are duties on the court in any proceedings involving children. Whenever a child is participating in proceedings, the court must keep the child informed as to what is happening in simple language suitable to the child's understanding. If a child is unrepresented, a parent or guardian may assist the child in conducting their defence. Where a child appears as an accused on a summary complaint, there are obligations

[153] See, for example, Hannah Chu-Han Huang and Dennis Ougrina, "Impact of the COVID-19 pandemic on child and adolescent mental health services" (2021) 7(5) BJPsych Open 145. For younger children at the early years stage, see the Royal College of Speech and Language Therapists, "RCSLT Scotland survey: children's communication difficulties increase since COVID" (9 January 2023) accessed 5 February 2025.

to explain the charge in simple language, and if the court finds the offence has been committed, obligations to obtain information on the child (including listening to a parent, guardian or relative in some circumstances). Similar (and additional) considerations apply following the incorporation of the UNCRC into Scots law (see section 5, supra).

Presence in court by children and young people

Section 50 of the Criminal Procedure (Scotland) Act 1995 relates to children under 14. It provides that no child should be present in court during proceedings against any other person, unless their presence is required as a witness or otherwise for the purposes of justice or if the court consents. There is an exemption for babies ("infant in arms").

Parent/guardian attendance needed

Section 42 of the same Act deals with the prosecution of children, and provides the requirement for their parent or guardian to attend court with them, subject to certain restrictions contained therein.

Need to prevent association between any child accused and an adult

Section 42(9) is important and provides:

> "Any child ... being conveyed to or from any criminal court, or waiting before or after attendance in such court, shall be prevented from associating with an adult (not being a relative) who is charged with any offence other than an offence with which the child is jointly charged".

It will be important for judges to ensure that court staff are alert to this, and that thought is given to its implementation.

Need to have regard to the welfare of a child

Similarly, section 50(6) provides:

> "Every court in dealing with a child who is brought before it as an offender shall have regard to the welfare of the child and shall in a proper case take steps for removing him from undesirable surroundings."

This may mean that a child offender must be dealt with in a court "uncontaminated" by adult offenders (see reference to section 142 below), or perhaps in private, or at the beginning of the roll with the court closed. Certainly, no "child" should be dealt with without proper consideration being given to such matters.

Remand and committal of children and young persons

Different rules apply to the remand and sentencing of persons under 21 years of age in terms of section 51 of the 1995 Act, recently amended by the Children (Care and Justice) (Scotland) Act 2024. That section now provides that where a court remands or commits for trial a person under 18 then the court shall commit the person to the local authority, to be detained in secure accommodation if required by the court, or any other place of safety if secure accommodation is not specified. Between the age of 18 and 21 they may be detained in prison or a YOI.

Judges will be aware of the shortage of secure places in Scotland and the rest of the UK. Under the previous statutory framework, that had resulted historically in some young people being detained in a YOI rather than secure accommodation.

Summary proceedings against children

Section 142 of the 1995 Act requires the sheriff to sit either in a different building or room from normal or on a different day, except where a co-accused is not a child.

8. Child as a witness - special measures

Common law powers

Historically, the court had common law powers to protect any vulnerable witness who would be disadvantaged by having to give evidence in the normal way (see *Hampson v HMA* 2003 SCCR 13).[154] These powers remain in as much as all courts and tribunals have a general duty to ensure a fair hearing, which will include making adjustments where necessary to assist a party or witness to give evidence, although they have largely been overtaken by statute.

[154]At paragraphs [13] and [14], the Appeal Court make it clear that common law powers subsist following the coming into force of vulnerable witness legislation.

Tribunals

The statutory powers mentioned below do not apply to tribunals. Each of the tribunals will have their own different practice and procedure and reference to individual guidance notes should be made. For example, the Additional Support Needs Tribunal in the Health and Education Chamber has its own Presidential Guidance.

In employment tribunals, there is Presidential Guidance in relation to vulnerable parties and witnesses (including children). The Guidance suggests "vulnerability" could be defined as where someone is likely to suffer fear or distress in giving evidence because of their own circumstances or those relating to the case. The Guidance states that the tribunal and parties need to identify any party or witness who is a vulnerable person at the earliest possible stage of proceedings. They should also consider whether the quality of the evidence given by a party or witness is likely to be diminished by reason of vulnerability.[155]

Statutory powers

Special measures - criminal

Measures for child and vulnerable witnesses is an evolving area, with the Victims, Witnesses and Justice Reform (Scotland) Bill currently progressing through Parliament and due to make more innovations in this field. It is not the intention of this section to exhaustively cover special measures, as this could be a book in its own right. Reference should be made to the appropriate resources on the Judicial Hub.

Section 271A of the Criminal Procedure (Scotland) Act sets out the procedure to be followed by any party citing or intending to cite a child witness or deemed vulnerable witness. In usual circumstances, these notices should have been dealt with at or in advance of the preliminary hearing or first diet in solemn proceedings, having been lodged 14 or 7 days before respectively, and 14 days before a summary trial (section 271A(13A)).

[155] Employment Tribunals (England and Wales), "Presidential Guidance: Vulnerable parties and witnesses in Employment Tribunal proceedings" (22 April 2020) accessed 5 February 2025.

The aspiration of the Scottish Government is that child witnesses in all criminal cases will have their evidence recorded as early as possible and will no longer have to attend court. But we are not there yet. The current position is that different types of proceedings are subject to different regimes.

The first statutory powers specifically relating to child witnesses were contained in the Vulnerable Witnesses (Scotland) Act 2004, which has been subsequently amended and expanded upon. It inserted section 271 and section 271A into the Criminal Procedure (Scotland) Act 1995. Children are automatically entitled to such measures.

Special measures (section 271H of the 1995 Act) are:

- The use of a live TV link;
- The use of screens;
- The use of a supporter;
- Taking of evidence by commissioner;
- Giving evidence in chief in the form of a prior statement;
- Excluding the public during the taking of the evidence; and
- Such other measures as may be prescribed by the Scottish Ministers in regulations.

Children under 12 at the date of commencement of proceedings, where they are witnesses in certain cases, for example murder, were automatically entitled to further special provisions whereby their evidence shall generally be given from a remote location (section 271B). This has now been largely superseded - see below.

High court/solemn proceedings

The Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 came into force on 20 January 2020 and is incorporated into the Criminal Procedure (Scotland) Act 1995 as section 271BZA. This brought in additional special measures for all children in certain solemn cases requiring their evidence to be given in advance. In practice, this will either be done by the Crown relying on their previously recorded police interview, or Joint Investigative Interview, or by a Commission taking place.

Note that the default position is that the court **must** enable all the child witness' evidence to be given in advance of the hearing (unless the court is satisfied that an

exception is justified under section 271BZA(7) or (8)). This supersedes the previous provision, whereby they would have given their evidence from a remote location (section 271B).

The exception to this is if it is shown that this would significantly prejudice the fairness of the hearing or the interests of justice in the individual case, or that the child, who is over 12 years of age, wishes to give evidence in person and that would be in their best interests (section 271BZA(7) and (8)).

A link to the briefing paper for more details on the cases covered, procedure in such cases, ground rules hearings and commissions can be found here:

- Briefing paper: Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019.
- Memo from the Lord President regarding non-attendance at the commission of an accused on bail.
- Discussion paper by Lord Beckett/Lady Drummond dated 17 June 2024.
- Sample commission interlocutor.
- High Court of Justiciary Practice Note 1 of 2024: Taking the Evidence of a Vulnerable Witness by a Commissioner.
- High Court of Justiciary Practice Note 1 of 2019: Vulnerable and Child Witnesses: written questions.
- "Example Bad Questions".
- English case digest on questioning of child witnesses by HHJ Angela Rafferty.

Sheriff court/some solemn/summary proceedings

There is to be a phased rollout of commission hearings until the stage is reached that all children in all solemn and summary trials will have their evidence taken in advance by commission, unless where not in the interests of justice. This roll out has been substantially delayed by the COVID pandemic. The most recent expectation is contained in the Vulnerable Witnesses (Criminal Evidence) (Scotland) Act 2019 implementation plan.

Meanwhile, the Crown will largely dictate what special measures are sought. For example, should there be a recorded interview of the child, they may seek to proceed under section 271M (see below). In particularly sensitive matters, they may seek a commission in a sheriff court case (see above for guidance on such hearings.)

Use of a prior statement in criminal proceedings: section 271M

Section 271M applies where the special measure to be used is giving evidence in chief in the form of a prior statement. Prior statements can be used as the witness' evidence in chief in whole or part. A statement by a vulnerable witness is admissible as, or as part of, the witness' evidence in chief, without the witness being requested to adopt or otherwise speak to it. Most frequently, this will be done by a witness' video recorded interview being played in court. This may cause a problem if the child witness is then to be cross-examined, as the interview may have been recorded some time before and the child may not have a good memory of it, or of events. The court may need to be addressed on whether the child should have an opportunity to hear or view the recording before being cross-examined, bearing in mind the potential for re-traumatisation. When considering any such application, careful consideration should be given as to whether there is some other potentially less harmful way of achieving the same end. Some examples, relevant to English practice, are given in the Advocates Gateway Toolkit No. 6, at paragraphs 4.3 to 4.5.

Closed court: section 271H(1) and section 271HB

Section 271H(1)(ea) of the Criminal Procedure (Scotland) Act 1995, allows an additional special measure of having a closed court (ie excluding the public during the taking of evidence from the vulnerable witness). Section 271HB details how this special measure is to operate.

Those not to be excluded are:

- Members or officers of the court;
- Parties to the court;
- Counsel or solicitors or other persons otherwise directly concerned in the case;
- Bona fide representatives of news gathering or reporting organisations; or
- Such other persons as the court may specially authorise to be present.

This special measure does not apply where the vulnerable witness is the accused (section 271F(8)). In that event, where a child accused is called as a witness, the

provisions of section 50(3) of the Criminal Procedure (Scotland) Act 1995 may be used to exclude a greater class of persons.

Changing special measures

Section 271D enables the court to change special measures at any stage of the proceedings, by ordering them, varying those already ordered or revoking them.

Special measures - civil

Children are deemed vulnerable witnesses in terms of section 11 of the Vulnerable Witnesses (Scotland) Act 2004. As such there are statutory provisions for special measures applying to them. These provisions are:

- Evidence on commission in accordance with section 19;
- Live TV link in accordance with section 20;
- Use of a screen in accordance with section 21;
- Use of a supporter in accordance with section 22;
- Giving evidence by use of prior statement in section 22A (for children's referral proceedings only); and
- Such other measures as Scottish Ministers may prescribe under section 18.

Any party seeking to bring a child witness to court in civil proceedings should alert the court to this well in advance and lodge the necessary notice in terms of section 12(2). Such an application may simply be granted if unopposed, or a hearing fixed on it (OCR 45.1(1)(c) and RCS chapter 35A). At any pre-proof or case management hearing the judge should seek to explore any method whereby the evidence of the child witness can be taken without attendance at court. If it is contended that a child wishes to come to court and give evidence without special measures, this is something that the court should investigate, and if necessary, fix a hearing about (see *M v B* 2016 SLT (Sh Ct) 279).[156]

[156] Sheriff Craig Turnbull (as he then was) dealt with this case where the parties sought to have the children give evidence without the benefit of special measures. The relevant test was discussed.

9. When a child is coming to court

If and when a child witness is required to come to court, then an advance visit may assist. The Scottish Government has various guidance documents depending on whether the person is a child or a young person and depending on which type of proceedings they are involved in. The Scottish Children's Reporter Administration has some information on going to court as well as other resources for young people on its website. Some of the tribunals have information on their websites designed to be accessed by children and young people: for example, information from Additional Support Needs, part of the Health and Education Chamber of the First-tier Tribunal for Scotland.

The party citing a child witness to court is responsible for arranging the court visit. The witness service may be able to assist both before and after the visit.[157] Advance thought and consideration should be given to:

- Ways to ensure children are not exposed to any hostile persons or negative experiences on their way into court.
- Whether they may require to use a different entrance door; and
- Whether they may require to be met at the front door by a member of court staff.

Taking the evidence of a child

If a child is to give evidence, either in the court building or from a remote site, then special arrangements, such as the removal of wigs and gowns, should be canvassed in advance. Good communication with the witness must take place in advance in order to establish and assess the best provisions for the individual child. For example, some children may be expecting the lawyers and judge to have wigs and gowns, and be disappointed and unsettled if they do not.

There should be no attempt to ascertain if a child understands the difference between truth and lies (section 24 of the Vulnerable Witnesses (Scotland) Act 2004). All the court has to do is to check that the child understands the physical procedure

[157] Victim Support Scotland, "Our Court Service" accessed 5 February 2025.

of taking an oath or affirmation in court to tell the truth. For example: "I am going to ask you to swear a promise to tell the truth. We do that by both of us raising our right hands and by you repeating the words that I say. Are you alright to do that?"[158] If the court is satisfied, the oath or affirmation may be administered. Otherwise, the court has to obtain the child's promise to tell the truth (*Quinn v Lees* 1994 SCCR 159).[159]

Children aged 12 and over may be put on oath, but checking they understand the procedure may be necessary. Children aged 14 or over should normally be put on oath with no preliminary investigation. Children under 12 should not be placed on oath but should be asked to promise to tell the truth.[160]

Children often have difficulty projecting their voices, and judges and juries can become frustrated when they cannot hear the witness. Arrangements for electronic amplification can avoid or reduce this problem and should be considered in advance. Some courts offer "lapel" microphones, attached to the witness' clothing. Some courts offer headsets for amplification of sound picked up by microphones.

If a child is giving evidence in court, the judge might consider coming down from the bench and sitting at the same level as the child. It may, however, be felt that the judge should remain on the bench to maintain an overview of proceedings generally, and to be able to observe the behaviour and demeanour of all concerned. In a criminal trial, a vulnerable child witness may be better located somewhere other than the witness box, and thought should be given to this.

Judges should be aware of terms that might be used by young witnesses and children to describe their bodies: judges might find the Relationships, Sexual Health

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[158] Thomas D Lyon, "Assessing the Competency of Child Witnesses: Best Practice Informed by Psychology and Law" in Michael E Lamb and others (eds), "Children's Testimony: A Handbook of Psychological Research and Forensic Practice" (Wiley-Blackwell 2011); Research suggests that trying to ascertain whether a child knows the difference between truth and lies has little intrinsic value. However, eliciting a promise to tell the truth from a child increases honesty.

[159] The Appeal Court: Observed at page 161, that the rules of practice were not in doubt: a child under the age of twelve is not normally put on oath, but is admonished to tell the truth after the appropriate procedure has been carried out; a child who is aged 14 or more is normally put on oath and no question arises as to any preliminary procedure; where a child is between these ages the judge must satisfy himself that the child understands the nature of an oath, and unless he is so satisfied it is not appropriate to put a child under 14 on oath.

[160] See footnote 158 above.

and Parenthood resource helpful. Whilst some topics within it have been criticised, it provides resources for schools in teaching the terms "penis, vulva, nipples and bottom" to children in early years of primary school.

10. Child accused

There is a very useful 2023 publication, Children and Young People in Conflict with the Law: Policy, Practice and Legislation by the Children and Young People's Centre for Justice, that provides a great deal of useful information and analysis on this subject, in particular in paragraph 5.6 "A Child Appropriate Court Process".

The court must have regard to the welfare of the child accused and to the question of whether they should be removed from undesirable surroundings (section 50(6) of the Criminal Procedure (Scotland) Act 1995). In relation to this, it may be appropriate to grant an application to have a child psychiatrist or child psychologist present in court to monitor the wellbeing of a child giving evidence. The incorporation of the UNCRC into Scots law also places obligations on the court to promote the child's best interests and to ensure their participation and understanding in relation to any proceedings.

Where a child is an accused in a criminal trial, there should be thought given as to what special arrangements should be made for the child. Such arrangements may be made whether or not there are adult co-accused. The child may be permitted to sit beside their lawyer, rather than in the dock, and may simply move to another position (still at floor level) when giving evidence.

In such a trial, some years ago now, in Glasgow High Court, a table was placed in front of the dock. The two accused aged under 16 years sat at the table, accompanied by their solicitors. The judge and jury had a clear view of the children. The children's solicitors were able to help them to follow proceedings. The children's counsel sat separately at the bar of the court. All the child witnesses (including the two accused children) gave evidence seated at another table located in front of the jury box.

Frequent breaks are likely to be necessary and a child psychologist's recommendation in this regard may be needed. Although not applicable in Scotland,

a Practice Direction issued in England and Wales makes many useful suggestions where the accused is a child:

> "**Vulnerable defendants**
>
> 6.4.2 Where one or more defendants is young or otherwise vulnerable consideration should be given to the following matters:
>
> a. The need to sit in a court in which communication is more readily facilitated.
> b. An opportunity for a vulnerable defendant to visit the courtroom, out of court hours, before the hearing so that they can familiarise themselves with it. Where an intermediary is being used to help the defendant communicate, the intermediary should accompany the defendant on any pre-trial visit.
> c. If the defendant's use of the live link is being considered, they should have an opportunity to have a practice session.
> d. The opportunity (subject to security arrangements) for a young or otherwise vulnerable defendant to sit with family or other supporting adult in a place which permits easy, informal communication with their legal representatives. This is especially important where vulnerability arises by reason of age. The court should ensure that a suitable supporting adult is available throughout the course of the proceedings.
> e. The need to timetable the case to accommodate the defendant's ability to concentrate.
> f. The impact on the non-vulnerable defendants in a multi-handed trial.
> g. In the Crown Court, the judge should consider whether robes and wigs should be worn and should take account of the wishes of both a vulnerable defendant and any vulnerable witnesses.
> h. It is generally desirable that those responsible for the security of a vulnerable defendant who is in custody, especially if they are young, should not be in uniform, and that there should be no recognisable police presence in the courtroom save for good reason. [Based on English procedure rules: CrimPRC(23)90(b) 61].
> i. Some cases against vulnerable defendants attract widespread public or media interest. In any such case, the assistance of the police should be enlisted to avoid the defendant being exposed to intimidation,

vilification or abuse when attending the court. See further the Judicial College Guide on Press Reporting etc.

j. Where appropriate the defence will provide information about the defendant's welfare.

Vulnerable defendant at trial

6.4.3 Consideration must be given to the need to ensure, by any appropriate means, that the defendant can comprehend and participate effectively in the trial process.

6.4.5 The court should be prepared to consider restricting attendance by members of the public in the courtroom to a small number, perhaps limited to those with an immediate and direct interest in the outcome. The court should rule on any challenged claim to attend. However, facilities for reporting the proceedings (subject to any reporting restrictions) must be provided. The court may restrict the number of reporters attending in the courtroom to such number as is judged practicable and desirable. In ruling on any challenged claim to attend in the courtroom for the purpose of reporting, the court should be mindful of the public's general right to be informed about the administration of justice.

6.4.6 Where it has been decided to limit access to the courtroom, whether by reporters or generally, arrangements should be made for the proceedings to be relayed, audibly and if possible, visually, to another room in the same court complex to which the media and the public have access if it appears that there will be a need for such additional facilities. Those making use of such a facility should be reminded that it is to be treated as an extension of the courtroom and that they are required to conduct themselves accordingly."

If a child is an accused person, it will be advisable to arrange to have the case called over any Tannoy or public address system without using the name of the child accused, thus preserving anonymity.[161]

[161] This may not apply if press reporting restrictions have been lifted; see subheading 12 "Press reporting on children's cases".

11. Child witnesses generally

It is the duty of the court to ensure a fair hearing, and to protect the interests of a child witness consistent with that duty. A court must ensure that children are questioned appropriately. The court must disallow questioning that:

(1) Is irrelevant to the issue;
(2) Has no object other than to insult the witness;
(3) Is intended to or has the effect of harassing the witness;
(4) Has as its purpose the making of a comment rather than eliciting a fact; and
(5) Involves repetition of a question already answered. It is the duty of the practitioner appearing before the court to ensure that they treat everyone giving evidence with respect and courtesy.[162]

Practical tips:

- Simple language and clear instructions will assist in putting a child witness at ease and everyone should use these.
- A judge should be ready to explain procedural steps in simple words.
- If an objection is taken in the course of evidence necessitating submissions outwith the presence of the jury or the child witness, and the child has to leave court (or remain in the CCTV link room with a blank TV screen), the child should not be made to feel at fault in any way. It should be explained that a break is going to be taken for something to be chatted about, that the child has not done anything wrong and that the child will have to leave court (or wait in the CCTV link room) for a short time.
- If, in the course of evidence, a child obviously does not understand a word or a question, yet seems too shy to admit it, the judge might wish to intervene with an explanation of the word or an alternative phrase.

The extent to which a judge may personally intervene or offer reassurance to a child is a difficult and often contentious area. In *Black v Ruxton* 1998 SCCR 440,[163] it was

[162] The Law Society of Scotland, "Standards for solicitors" at paragraph 12 "Relations with the courts" accessed 5 February 2025.
[163] Lord Sutherland, at page 443.

alleged that the sheriff had advised a distressed child witness when she returned to court (after having broken down) that he was there to protect her and would stop the defence solicitor asking any distressing questions. Refusing the appeal, it was held *inter alia* that it is the duty of the court to protect witnesses against harassing questions, while at the same time allowing the defence properly to develop any appropriate line of cross-examination; that it was sometimes a fine line to draw, but that there was nothing wrong in the court telling a witness she would be protected in that way; and further, that looking at the matter objectively, a reasonable observer would not take the view that the sheriff had pre-judged the issue in any way.

In *McKie v HMA* 1997 SCCR 30, where a sheriff comforted a tearful 9-year-old witness by going over to her, whispering to her and comforting her, before gesturing for her carer to intervene, the appeal court observed "… it is perhaps unfortunate that [the sheriff] had not gestured to the carer to intervene at the beginning instead of intervening himself…".

12. Press reporting in cases involving children

Criminal

Section 47(1) of the Criminal Procedure (Scotland) Act 1995 prevents the press from identifying any child accused or witness, or from publishing particulars calculated to lead to their identification on any proceedings in a court (see *Frame v Aberdeen Journals Ltd* 2006 JC 40).[164]

Despite the default position in terms of section 47(3)(a), the restrictions do not apply where the child is concerned only as a witness and no accused is under 18. The court may, however, direct that the restrictions apply.

Section 47(3)(b) of the 1995 Act provides that the court may, at any stage of the proceedings, if satisfied that it is in the public interest to do so, dispense with the

[164] In that case, the newspaper published an article naming Luke Mitchell (aged 15) as the person arrested for the alleged murder of Jodi Jones. Although his arrest was pursuant to the granting of a petition warrant the article did not say that. The prosecution was for a contravention of s 47(1) and the paper argued that they were not reporting on "any proceedings in a court". The High Court agreed (paragraph 17).

restrictions in whole or in part. If the court chooses to do so, the court must specify the child in respect of whom the direction is made. This should be done in open court, duly recorded in any record of proceedings and authenticated by the clerk's signature. This was done by Lord Matthews following an application by the BBC in respect of a child accused, Aaron Campbell, who had been found guilty of murder.[165] Careful consideration should be given at a full hearing before taking this step.

See also sections 4(2) and 11 of the Contempt of Court Act 1981, which also apply to criminal cases; and are dealt with below. These provisions deal more generally with restrictions on publication, rather than specifically with children involved in the proceedings.

Judges should also note that the incorporation of the UNCRC into Scots law is likely to mean that Article 16 (the right to privacy for a child) will be a consideration.

Civil

It should be noted that the default position is for a ban on the identification of children involved in criminal proceedings as the accused or as a witness and for children involved in children's referral proceedings. No such default position exists in ordinary civil matters, unless the court grants an order under legislation mentioned below, or a child may be identified.

Section 46 of the Children and Young Persons (Scotland) Act 1937[166] as amended and extended (to television and radio broadcasts) by Schedule 20 to the Broadcasting Act 1990 provides that, if the court so directs, no newspaper, radio or television report should reveal the name, address or school or any particulars calculated to lead to the identification of a person under the age of 17 years

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[165] BBC News, "Alesha MacPhail murder: Judge lifts ban on naming killer Aaron Campbell" (22 February 2022) accessed 5 February 2025.

[166] S 46: "(1) In relation to any proceedings in any court … the court may direct that – no newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification of a person under the age of 17 years concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein; (a) no picture shall be published in any newspaper as being or including a picture of a person under the age of 17 years so concerned in the proceedings as aforesaid; except insofar (if at all) as may be permitted by the direction of the court. (2) Any person who publishes any matter in contravention of any such direction shall on summary conviction be liable in respect of each offence to a fine…"

concerned in the proceedings, and that no picture shall be published of a person under the age of 17 years so concerned in the proceedings; except insofar (if at all) as may be permitted by the direction of the court.

In terms of section 4(2) of the Contempt of Court Act 1981, the court may (in civil, but also in criminal cases):

> "where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in [legal proceedings being held in public], or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose".

It should be noted that this is an order for postponement, not for prohibition. The procedure for making such orders was considered in the judicial review case of *BBC, Petitioners* 2020 SLT 345,[167] which is important reading for any judge considering making such an order. The case wherein the reporting restriction had been made concerned proceedings brought by the grandparents of an infant child against the sole surviving parent. He was a convicted prisoner serving a lengthy sentence. The order had been made at the first hearing, but no reasons had been given. It was not an interim order, which it should have been. Lord Doherty said:

> "[33]. If the first respondent's concern was that the child should not be identified in media reports, it seems highly likely that there were less restrictive measures which he could have taken to achieve that outcome. For example, he could have made an order under section 46 of the Children and Young Persons (Scotland) Act 1937 prohibiting publication of any details which identified the child (the child is a person under the age of 17 'in respect of whom the proceedings are taken'); or he could have exercised the court's inherent common law power to withhold the child's name from the public in the proceedings and, ancillary to that, he could have given appropriate

[167] A court should specify why it was considering making such an order, why it was that reporting of the proceedings would give rise to a substantial and unacceptable risk to the administration of justice, and why no lesser measure would eliminate the risk.

directions using the power conferred by section 11 of the Contempt of Court Act 1981."

In terms of section 11 of the Contempt of Court Act 1981, the court may (in civil, but also in criminal cases):

> "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld."

An example of the latter order was that made in *HMA v Alexander Salmond* 2021 SLT 271, which became the subject of consideration in *HMA v Craig Murray* 2021 SLT 803.[168] It was also considered in *The Spectator Magazine, Applicant* 2021 SLT 271.[169] In that case, the journal applied to vary an order made by the court at common law and under section 11 in order to provide clarity as to whether the order applied to their reporting of evidence submitted to a Parliamentary Committee, which evidence may have allowed jigsaw identification of the complainers in the criminal case. The court makes some useful observations about the scope of such orders.

Judges should also note that the incorporation of the UNCRC into Scots law is likely to mean that Article 16 (the right to privacy for a child) will be a consideration.

It is also worth noting that section 1 of the Judicial Proceedings (Regulation of Reports) Act 1926[170] provides for restrictions on the reporting of indecent material, medical details, and some particulars from family actions in certain circumstances.

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[168] The court was seeking to protect material which was likely, objectively, to lead to identification of the complainers in allegations of sexual assault.

[169] Paragraph 16: "…in some cases the court considers it necessary to make a formal order at common law withholding the identity of the complainer from the public, with a section 11 order prohibiting publication of the complainer's identity or material likely to lead to their identification as a complainer in the case."

[170] S 1: "(1) It shall not be lawful to print or publish, or to cause or procure to be printed or published – (a) in relation to any judicial proceedings any indecent matter or indecent medical, surgical or physiological details being matter or details the publication of which would be calculated to injure public morals; (b) in relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, [or for the dissolution or annulment of a civil partnership or for the separation of civil partners], any particulars other than the following, that is to say:- (i) the names,

It should be noted that "open justice" is a significant principle. In *MH v Mental Health Tribunal for Scotland* 2019 SC 432,[171] Lord President Carloway held that the withholding of any information concerning civil cases pending before the court was an interference with the principle of open justice, which required that proceedings were heard and determined in public and that the public had access to judicial determinations, including the identity of parties; the court had power at common law to withhold information, including the names of parties, from its published opinions but should not do so other than in the most compelling circumstances.

Civil procedure when making reporting restrictions

Chapter 48 of the Sheriff Court Rules and chapter 102 of the Court of Session Rules concern reporting restrictions. Although not specifically relating to children or vulnerable persons they set out the procedure to be followed where the court is considering making a reporting restriction in terms of any of the above statutes.

The Lord President's guidance issued in 2015 (on restricting and anonymising opinions) and in 2023 (on the making of reporting restrictions) should be referred to.

It should be noted that in the sheriff court, in terms of Rule 48.2, the sheriff **must** first make an interim order and state the reasons why they are considering making an order. The same provision exists in Rule 102.2 of the Court of Session Rules.

More guidance can be found in the Judicial Communications Guide, which should be referred to.

Judges should therefore note that, by making such an interim order, they are alerting the press to the case as the making of an interim order is intimated to them by publication on the SCTS website. As such, in a case where there is no existing press interest, or in a court where there is normally no press attendance, such an order

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addresses and occupations of the parties and witnesses; (ii) a concise statement of the charges, defences and counter charges in support of which evidence has been given; (iii) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon; (iv) the summing-up of the judge and the finding of the jury (if any) and the judgment of the court and observations made by the judge in giving judgment: Provided that nothing in this part of this subsection shall be held to permit the publication of anything contrary to the provisions of paragraph (a) of this subsection…"

[171] Paragraphs 16 to 24 and 41 to 44.

may, in fact, be counterproductive in practice, although the making of an interim order or order may yet be the prudent course.

Children's hearings

In terms of section 44(1) of the Children (Scotland) Act 1995, publication of children's hearing matters, which is intended or likely to identify a child concerned in, or any other child connected (in any way) with, those proceedings or any address or school as being that of any such child is prohibited. Under section 44(2) it is an offence to publish such material.

Tribunals

Each tribunal has rules designed to protect vulnerable persons and children, for example rules 9 and 11 of the Mental Health Tribunal for Scotland (Practice and Procedure) (No 2) Rules 2005 were considered in *MH v Mental Health Tribunal for Scotland* ibid. Tribunal judges should also refer to any Presidential Guidance issued.

13. Appointment of curator *ad litem*/safeguarder

A curator *ad litem* is a guardian appointed by the court to protect the interests of a party lacking full capacity in a litigation. Such an appointment may be made at the court's discretion (see, for example, *Kirk v Scottish Gas Board* 1968 SC 328[172] and *Brianchon v Occidental Petroleum (Caledonia) Ltd* 1990 SLT 322),[173] and may be made by the court of its own motion (*Drummond's Trustees v Peel's Trustees* 1929 SC 484, at page 518).

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[172] In *Kirk v Scottish Gas Board* 1968 SC 328, a child raised an action for damages, her father having declined to do so. The Inner House decided that the court should appoint a curator *ad litem* to the child in these circumstances. "The object of [doing so] is to overcome his legal incapacity where the circumstances make it necessary in his interests," per Lord Guthrie, pages 330 and 331.

[173] Where the court appointed curators *ad litem* to two children whose father was killed in the Piper Alpha oil disaster as there may be a conflict of interest with their mother, who had raised the action as their tutrix.

A safeguarder is a person, normally with a relevant professional background in law, social work or teaching, appointed by the court to safeguard the interests of a child in children's referral proceedings. At present, this is arranged through the organisation: Children First.[174] This may result in a different individual dealing with a case at different stages of the process.

14. The views of children in civil proceedings and the Children (Scotland) Act 2020

Sections 1 to 3 of the Children (Scotland) Act 2020 amend the Children (Scotland) Act 1995 and other legislation to include flagship provisions for obtaining the views of children in residence, contact or other section 11 applications about them. These sections removes the legal presumption that only children over 12 have the capability of expressing their views and replace it with a presumption that applies to all children. The provisions are not yet in force, but may already involve judges seeking the views of many more children on many more occasions over the duration of an action than is presently the practice. The timetable for its implementation has been substantially affected by the COVID pandemic and it is understood at the time of writing that it may not be brought into force until after 2025.

Sections 4 to 8 of the Act create a new category of deemed vulnerable witnesses in children's referral cases and section 11 applications and insert a new section 11B into the Children (Scotland) Act 1995, authorising the court to order the use of special measures to reduce the distress to vulnerable parties that may be caused by attending or participating in hearings in relation to their children.

Section 18 of the Act inserts a new section 11E into the 1995 Act in relation to the privacy of information held about a child.

Section 20 introduces a new obligation to explain decisions to children, including interim decisions on a section 11 order, in a way the child can understand, unless the court is satisfied the child would not be capable of understanding the explanation or

[174] Children First, "Safeguarders Panel" accessed 5 February 2025.

it is not in the child's best interests to have an explanation or the location of the child is not known.

In relation both to obtaining the views of children and young people, and to explaining decisions to them, individual judges will have their own different approaches. It is suggested that, at minimum, thought be given to such arrangements. For example, where is a suitable place to meet a child? When? (It is likely that making sure they are not removed from school is important.) Will it be useful, for example, to have materials that they can draw with or play with while you talk? The primary objective is to put the child or young person at ease as much as possible and to obtain their views with as little distress and anxiety as possible being caused.

Although no longer recent (2008) and written prior to the conception of the 2020 Act, reference is made to two articles by former family law solicitor, now academic, Dr Lesley-Anne Barnes Macfarlane.[175] The latter of these gives views on inter alia how the views of a child may be taken. It also discusses the weight to give to a child's view and the extent to which the views should be treated confidentially. A video by Sheriff Alan Miller, which gives guidance, is also available on the Judicial Hub.

Judges should also note that the incorporation of the UNCRC into Scots law is likely to mean that Article 12 (the right to express a view, feeling or wish in all matters affecting them, and to have their views considered and taken seriously) will be a consideration.

[175] Lesley-Anne Barnes, "A child is, after all, a child: ascertaining the ability of children to express views in family proceedings" (2008) 18 SLT 121 and Lesley-Anne Barnes, Moral actors in their own right: consideration of the views of children in family proceedings" (2008) 21 SLT 139.

15. Referral to SCRA in criminal and civil proceedings

Sections 48 and 49 of the Criminal Procedure (Scotland) Act 1995 apply to children and referral to SCRA.

In terms of section 48, the court has the power to refer a child who has been the victim of certain offences, or who is or who is likely to become a member of the same household as the convicted perpetrator of such an offence, to the Principal Reporter and to certify that the offence is a ground established for the purposes of the Children's Hearings (Scotland) Act 2011. These offences are those under section 21 of the Children and Young Persons (Scotland) Act 1937, those listed in Schedule 1 of the Criminal Procedure (Scotland) Act 1995 and incest.

In terms of section 49 of the 1995 Act, where a child who is not already subject to supervision pleads guilty or is found guilty of an offence, instead of sentencing the court may remit the case to the Principal Reporter for disposal by a children's hearing, or may request the advice of the hearing. Where such a child is already subject to supervision the court shall request the Reporter to arrange a hearing in order that advice is provided - section 49(3).

Under Section 62 of the Children's Hearings (Scotland) Act 2011 a civil court dealing with a family action (an action listed in section 62(5)) may refer a matter to the Principal Reporter. This applies where, in the course of such proceedings, a court considers that a ground of referral (other than an offence by the child) may apply in relation to the child.

In this event, the court may refer the case to the Children's Reporter, and it is considered that it may well be good practice to do so. If the court does so, it must give the Reporter a statement, as referred to in sections 62(3) and (4). It is suggested that this be appended to the relevant interlocutor referring the matter.

16. Care experienced children

In 2018, "Who Cares? Scotland" reported on the "Criminalisation of Care Experienced People" in Scotland. They referred to statistics from 2015 showing that care leavers are overrepresented in Young Offender's Institutions, with a third of those surveyed in Polmont being care experienced, despite being 0.5% of the general population.

In 2020, "the promise Scotland" was published. This came from findings of Scotland's Independent Care Review, which found that corporate parenting was failing many children. It plans to reform the current care system in Scotland.

Care experienced people may have a high mistrust of authority and the courts and may be under supported. Judges should ensure such individuals are helped to understand court decisions and processes.

Judges should also note that the incorporation of the UNCRC into Scots law is likely to mean that various articles which deal specifically with care experienced children (for example, Articles 20 and 21 (and other articles) will be a consideration.

17. Terminology when dealing with children

Judges may wish to carefully consider language when describing the behaviour of children. The NSPCC note that calling the behaviour of children "attention seeking" is unhelpful when, in fact, the behaviour of the child is a way of the child expressing an unmet need. The NSPCC note that children may not have the language or opportunity to express what they need.

In addition, it is important to try to avoid terms that might be seen as negative or flippant, even if used by other professionals. For example, the term "high tariff child", can make it appear as if the child is a commodity. If others use such terms it can be helpful to ask them to define what they mean, and use that definition to describe the concept in a more respectful way. Similarly, "looked-after child" puts the focus on the people taking care of the child; "care-experienced" conveys what has happened to the child and may be preferred.

Sex

Contents

1. Overview

Discrimination in relation to sex exists in many areas of life, through a combination of direct discrimination, indirect discrimination and outdated stereotypes and attitudes.

It is important to recognise that discrimination can occur to both men and women (and against those who do not identify as either gender, see section on non-binary persons). In relation to discrimination against men, stereotypes can mean wrong (and sometimes dangerous) assumptions are made, such as whether a man could be a suitable carer to a young child, be the victim of domestic abuse or be subject to a sexual assault. Judges must guard against falling into such stereotypes and take care to treat each person as an individual. It is acknowledged that more women tend to be discriminated against than men. Notwithstanding that, much of the relevance of this chapter (for example, caring responsibilities) can apply to any individual.

Judges should also be aware of the issues as to using the terms "gender" and "sex" interchangeably.

2. Introduction

Despite long-standing legislation prohibiting discrimination, women still suffer inequality in many areas of life. A Gender Equality Index published in 2020, and updated in 2023, illustrates the range of inequality over areas including health, work and money.[176] In all categories, woman were not equal to men.[177] Women were most equal in the field of health, with more discrimination found around areas of economic inactivity due to caring responsibilities, and power (considering political,

[176] The Scottish Government, "Scotland's Gender Equality Index 2023" was first published in 2020. The index considers categories of work, money, time, knowledge, power and health. Domestic and sexual violence were excluded, as although both issues were acknowledged to affect women more than men, they were excluded as the goal is eradication of both rather than parity with men.
[177] The survey scores inequality between 1 and 100, where 100 is full equality. The 2023 survey showed an overall score of 79, up from the baseline of 72 in the first survey in 2020.

economic and social issues).[178] A Use of Time Survey from 2023 suggests women do more unpaid labour around the home than men.[179]

Gender stereotyping has increasingly been recognised from a young age, from toys[180] to the way that children are treated by carers. Research amongst childminders, nursery and primary teachers found that 64% of participants considered that gendered assumptions affect boys' ability to talk about their emotions, and 57% agreed that stereotypes limit the jobs girls feel they can do when older.[181]

3. Employment and pay

UK research in 2017 showed the median gender pay gap between men and women for full and part-time workers in 2016 was 18.1%, although the gap shrinks when comparing full-time employees.[182] The underlying reasons are complex, but include the predominance of temporary work and part-time working amongst women, often to fit with caring responsibilities, limiting the range of work available.[183] In a Scottish

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[178] See the Fawcett Society, "Gender Representation on Local Councils" (April 2023) accessed 5 February 2025 where according to their research, in the summer of 2022, only 36% of local councillors in the UK were female (35% in Scotland).

[179] The Scottish Government, "Online Time Use Survey" accessed 5 February 2023 estimated this at 2 hours 2 minutes for women per day and 1 hour 18 minutes per day for men.

[180] The Fawcett Society, "Unlimited Potential - Report of the Commission on Gender Stereotypes in Early Childhood" (December 2020) accessed 5 February 2025 page 13: "Evidence from experimental studies shows that gender differences in the colours that children like and the toys they prefer come about over time – they are not innate". See also the Cass Review, "Independent Review of Gender Identity Services for Children and Young People" (April 2024) accessed 5 February 2025, at paragraph 6.18 which states "A common assumption is that toy choice and other gender role behaviours are solely a result of social influences; for example, that boys will only be given trucks and girls will only be given dolls to play with. Although this is partially true, there is evidence for prenatal and postnatal hormonal influence on these behaviours, which will be discussed later."

[181] See the Fawcett Society report in footnote 180, at page 8. Whilst the report looked at the position of women, it is likely that boys and young men also receive similar messages regarding roles often seen as "female", such as caring.

[182] The gap for full-time employees only was smaller at 9.4%: the Equality and Human Rights Commission, "Research report 109: the gender pay gap" (15 August 2017) accessed 5 February 2025. More recently, the Office for National Statistics, "Gender pay gap in the UK: 2023" (1 November 2023) accessed 5 February 2025 indicated that this had fallen to 7.7% in 2023.

[183] Although interestingly, part-time work appears to affect men more than women, but overall has less of an impact on men, as far less men are in part-time employment; see the Equality and Human Rights Commission Research report ibid, paragraph 5.2.

context, the gap is around 10.1%[184] but jumps to 26% when comparing part-time work by women in comparison to full-time employment by men. Campaigning groups suggest the difference can be explained by the "systemic undervaluation of "women's work" which continues to be concentrated in low-paid, part-time jobs".[185]

There are duties on public bodies to report information about gender and pay.[186]

4. Caring and childcare

More women than men take on the responsibility for caring for young children, impacting on women's employment opportunities.[187] In addition to women being less likely to be in employment, when in employment they are more likely to work part-time when their children are under 8.[188]

Caring responsibilities for elderly or disabled family members still mainly fall on women.[189] Those responsibilities are likely to impact on women's ability to be financially self-sufficient, particularly in older age. More women than men report that caring responsibilities for sick or disabled relatives has led to them passing on opportunities in the workplace.[190]

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[184] From 2020 to 2021, there was a very slight narrowing of Scotland's gender pay gap from 10.4% to 10.1%.
[185] Close the Gap, "Gender Pay Gap Statistics" Working Paper (March 2022) accessed 5 February 2025.
[186] The Equality Act 2010 Specific Duties (Scotland) Regulations 2012 requires some public bodies to publish gender pay gap information, applying to public bodies with 20 or more staff since March 2016.
[187] Whilst 75.6% of mothers with dependent children were in work in 2021 (the highest figure recorded), this compares to 92.1% of men with dependent children: the Office for National Statistics, "Families and the Labour Market, UK: 2021" (22 July 2022) accessed 5 February 2025.
[188] Ibid page 8.
[189] Carers Scotland, "State of Caring: A snapshot of unpaid care in Scotland" (2019) accessed 5 February 2025, noted at page 5: "Caring is still often thought of as being part and parcel of women's lives and within families women are still most likely to be providing care and most likely to be providing more hours of care. Women make up the majority (59%), of carers and 27% of women aged 45 to 54 are providing unpaid care to someone with a disability or illness, or who is older." See also research by Carers UK suggesting that women are likely to be carers far earlier than men: Katherine Sellgren, "Half of women will be carers by the age of 46" (BBC News, 21 November 2021) accessed 5 February 2025.
[190] Carers Scotland, "State of Caring 2022: A picture of unpaid caring in Scotland" (7 November 2022) accessed 5 February 2025 at page 2, 83% of the respondents in the survey were female.

In practice:

- Judges will be alert to potential difficulties with a witness or party not attending court due to childcare difficulties, particularly if the hearing has been arranged at short notice. A remote hearing is unlikely to overcome difficulties in attending court due to lack of childcare, unless the judge can be assured that there are some arrangements to prevent the carer not having to both supervise or care for children and focus on the hearing at the same time.
- Excluding the issue of breastfeeding, there are prohibitions on children under the age of 14 being in a criminal court (other than an infant in arms),[191] but there are no similar general provisions for civil courts or tribunals. Judges may wish to take a similar approach on a case-by-case basis in civil hearings.
- If childcare is not available, perhaps where arrangements have fallen through or the hearing is at short notice, judges may wish to consider postponing the hearing.
- It may also be that a witness is only available for part of a day, such as during school hours.

5. Pregnancy and breastfeeding

Whilst discrimination due to pregnancy has been unlawful for decades,[192] problems remain. More than 10% of mothers reported being dismissed or made compulsorily redundant which they considered was connected to their pregnancy, with others reporting they were treated so poorly they felt they had no option but to resign. One in five reported harassment or negative comments either relating to pregnancy or

[191] The Criminal Procedure (Scotland) Act 1995, s 50(1) has a general prohibition on children under 14 years of age being in court, unless appearing as an accused, a witness or otherwise required for the purposes of justice, unless the court permits his presence. See also the chapter on children and young people.

[192] In 1992, the Court of Justice of the European Union interpreted European law to include pregnancy discrimination and, in 1995, the House of Lords in *Webb v Emo Air Cargo* [1995] 1 WLR 1454 interpreted the Sex Discrimination Act 1975 to include pregnancy discrimination.

around requests for flexible working. One in ten reported discouragement from attending antenatal appointments.[193]

In practice:

- Whilst many mothers do work up until their due date, judges should not assume that the last month of pregnancy and the first months after giving birth are suitable for women to attend court, either in person or remotely. Attendance on a remote basis is unlikely to overcome all the difficulties likely to arise.
- Care must be taken with proceedings where a mother has just recently given birth, such as child protection proceedings.
- Where a new mother is representing herself in CPO proceedings, she is likely to be vulnerable not just on account of being a party litigant but also given the emotional subject matter and the physical and emotional toll of having given birth.[194]
- Judges may wish to give additional time for the reading of papers (for example, where a CPO application has just been lodged).
- Additional time for submissions and breaks throughout the hearing might also be required.

The Breastfeeding etc. (Scotland) Act 2005 makes it a criminal offence to try and stop or prevent breastfeeding or bottle feeding in public. Court staff can be directed to the SCTS policy to assist them. Judges should also be alert to a witness, party or agent who needs time to express milk.

6. Menopause

In recent years there has been increasing awareness around the impact the menopause can have on individual women. For some, symptoms can be debilitating. From a survey,[195] common symptoms include trouble sleeping, anxiety, depression

[193] The Equality and Human Rights Commission, "Pregnancy and maternity discrimination research findings" (25 May 2018) accessed 5 February 2025.
[194] See NHS Guide on "Your Body After the Birth" accessed 5 February 2025.
[195] The Fawcett Society, "Menopause and the Workplace" (April 2022) accessed 5 February 2025. Just over 4,000 women took part in the survey.

and palpitations.[196] Research suggests that medical help does not always seem to be immediately beneficial.[197]

In practice:

- Judges should be aware of symptoms that might affect a woman's ability to appear as a witness or participate in court proceedings. These include a range of mental health problems, difficulties sleeping and, thus, tiredness, and brain fog.[198]
- Judges need to be alert to the fact that embarrassment might prevent a witness or party to the proceedings expressing such difficulty. The judiciary's own menopause policy has helped to draw attention to the need to have a positive culture to allow openness about such difficulties.[199]

7. Sexual harassment

From an STUC survey in March 2022, 45% of women reported experiencing sexual harassment at work. This appears to be most common in male dominated industries and in low paid work, which is often also precarious in nature (such as zero hours contracts).[200] However, sexual harassment can take place over any sector and

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[196] A list of frequently experienced symptoms is found in the Judiciary of Scotland, "Menopause Guide: A Guide for Judicial Office Holders" at page 3 accessed 5 February 2025.
[197] HRT does not appear to be routinely offered; the Fawcett Society report (see footnote 195) noted three in ten women report delays in diagnosis, 31% of women agreed or strongly agreed that it took many appointments for their GP to realise they were experiencing the menopause or perimenopause, rising to 45% among Black women and women from minority backgrounds, and 42% among women with five or more severe symptoms. Some women reported difficulties in obtaining HRT, with only 39% of women who spoke to a GP or nurse said they had been offered HRT once it was identified they were experiencing menopausal symptoms.
[198] 69% of respondents said they experience difficulties with anxiety or depression due to menopause, 84% experienced trouble sleeping and 73% experienced brain fog.
[199] The Menopause Guide for Judicial Office Holders (see footnote 196) at page 35 notes the importance of supportive culture from more senior judges: "It is important that you, as a senior judge, foster a culture where it is acceptable to discuss menopause."
[200] The Scottish Trade Union Congress, "Women's Committee Survey of Women in Scotland's Experiences of Sexual Harassment at Work Report" (March 2022) accessed 5 February 2025. It should be noted that the level of participation was 663 respondents. However, the Trade Union Congress, "Still just a bit of banter? Sexual harassment in the workplace in 2016" (2016) accessed 5 February 2025, with a participant level of 1,533 women, noted more than half (52%) of all women polled have experienced some form of sexual harassment, 28% of women have been subject to comments of a

demographic. One third of women reported experiencing sexual harassment in the last year. These included remarks with a sexual innuendo or comment, sexual jokes, uninvited and inappropriate commenting on body and appearance, leering, suggestive looks, unwanted sexual advances, and unwanted physical contact of a sexual nature.

Much sexual harassment appears to be unreported.[201] Many women have a fear of reporting such harassment if it involves someone in a position of authority to them, or if in a temporary job without security of employment.

8. Domestic violence

Whilst there is increased awareness of the prevalence of domestic abuse in Scotland,[202] official statistics are likely to underreport its extent.[203] Reasons for not reporting domestic abuse include concerns about being believed, concerns that a report would not assist the situation, and a hope the situation will change.[204]

Whilst most complainers of domestic abuse are female, domestic abuse can happen in any type of relationship and to every type of person. Judges are referred to the section on domestic abuse within the chapter on vulnerable persons.

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sexual nature about their body or clothes and nearly a quarter of women had experienced unwanted touching (such as a hand on the knee or lower back).

[201] Ibid, TUC report page 19.

[202] HM Inspectorate of Constabulary Scotland, "Thematic Inspection of Domestic Abuse: Analysis of survey exploring experiences of reporting domestic abuse to the police" (2023) accessed 5 February 2025 reports approximately 60,000 complaints of domestic abuse made each year to Police Scotland.

[203] The figure in the previous footnote is likely to underestimate the extent of domestic abuse. In a survey of complainers as part of the HMICS report *supra*, 73.1% of respondents said they made a report of domestic abuse after experiencing domestic abuse for over a year, with just under 25% of respondents reporting they had experienced domestic abuse for more than 9 years before reporting it (paragraph 23 on page 19). 71.3% of respondents had experienced domestic abuse not reported to the police (paragraph 24). It should be noted that the sample size was small (94 responses between May and June 2022). See also the Scottish Government Justice and Safer Communities Directorates, "Scottish Crime and Justice Survey 2019/20: main findings" (16 March 2021) accessed 5 February 2025 in which 16.5% of adults reported experiencing at least one incident of abuse by a partner.

[204] See paragraph 25 of the HMICS report referenced at footnote 202.

9. Complainers in sexual assaults

Whilst it is acknowledged most complainers in sexual assaults are female, given sexual assaults can happen to anyone, this topic is considered in the vulnerable persons chapter.

10. Female genital mutilation

Female genital mutilation is the practice of removing or injuring the whole or part of the female external genitalia for non-medical reasons. Victims are usually under the age of 15. It is associated with a host of medical complications such as difficulties in passing urine, bleeding, infections, and problems with childbirth. Whilst some say it is carried out for cultural reasons, the WHO note FGM is:

> "recognised internationally as a violation of the human rights of girls and women. It reflects deep-rooted inequality between the sexes and constitutes an extreme form of discrimination against girls and women. It is nearly always carried out by traditional practitioners on minors and is a violation of the rights of children."[205]

UNICEF estimate that 200 million women and girls have been subjected to the practice worldwide, in around 31 countries.[206]

Scotland introduced legislation in 2005 making it a criminal offence to carry out or have carried out FGM, either in Scotland or abroad.[207] There are no statistics available as to how many girls or women have been subjected to FGM in Scotland.[208] Research by the Scottish Refugee Council notes every local authority area has a

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[205] World Health Organisation, "Female genital mutilation" (31 January 2025) accessed 5 February 2025.
[206] UNICEF, "Female genital mutilation (FGM)" (updated March 2024) accessed 5 February 2025.
[207] Prohibition of Female Genital Mutilation (Scotland) Act 2005. The maximum penalty is 14 years.
[208] The Scottish Government, "Scotland's national action plan to prevent and eradicate FGM" (4 February 2016) accessed 5 February 2025 noted that "there are no clear and robust figures for the prevalence of FGM in Scotland because of the hidden nature of the crime".

settled population of those with roots from countries where FGM takes place.[209] That research calculated that, in 2012, the number of girls born in Scotland into such potentially affected communities was around 363.[210]

It is likely that anyone who is, or is suspected to be, a victim of FGM would require to be treated as a vulnerable witness and thought given to special measures (including reporting restrictions or a closed court), see section on special measures in vulnerable persons chapter.

11. Woman offenders

Women are far less likely to be involved in the criminal justice system as offenders as compared to men. Just less than 17% of those convicted of a crime are females.[211] Women are less likely to be involved in violent crime than men.[212] Women are less likely to be reconvicted than men, although that gap is narrowing.[213] Where convicted, the research suggests that women are disproportionally responsible for convictions in three areas: offences of "cruelty to and unnatural treatment of children" (71% of all convictions),[214] for "fraud" (34% of all convictions) and "drunkenness and other disorderly conduct" (32% of all convictions).[215] Women are

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[209] These are referred to as "potentially affected communities", recognising that not all with connections to countries where FGM happens will take part in such abuse.
[210] Helen Balliot and others, "Tackling Female Genital Mutilation in Scotland: A Scottish model of intervention" (carried out by the Scottish Refugee Council with the support of the London School of Hygiene and Tropical Medicine, December 2014) accessed 5 February 2025. The report noted research suggesting an increase in the diversity of populations settling in Scotland, in part due to asylum seekers being housed in Glasgow from 2000.
[211] The Scottish Government Safer Communities Directorate, "Women in the justice system: evidence review" (26 January 2022) accessed 5 February 2025, section 4.
[212] The majority of violent crimes in 2021/22 (80%) were carried out by male offenders only – a consistent finding over the years. A further 13% of incidents involved female offenders only, whilst in 6% of cases both males and females were responsible: the Scottish Government, "Scottish Crime and Justice Survey 2021/22: Main Findings" (28 November 2023) accessed 5 February 2025. The same pattern applies to homicides: 88% of all accused in 2022-23 were male Homicide in Scotland 2022-23; Scottish Government National Statistics Publication, "Homicide in Scotland 2022-23" (October 2023) accessed 5 February 2025.
[213] See footnote 211.
[214] Where the number of females convicted was 71% as opposed to 29% of convictions being of men; ibid.
[215] Ibid.

less likely than men to be in custody: generally women account for around 5% of the prison population on any given day.[216]

Despite the lower rate of custodial sentences, the impacts of such a sentence may have wide ramifications. Research suggests that children of mothers imprisoned are unlikely to remain in their family home.[217] The Scottish Prison Service Survey 2019 found 61% of women in prison are mothers of children under the age of 18.[218] If a child is to be taken into care because of a sentence imposed on a parent, whilst that has always been a factor a court would consider in sentencing, it is now specifically referred to in the Scottish Sentencing Council's sentencing guideline.[219] SPS have mother and baby units, allowing a baby to stay with its mother.[220] In the last ten years, around nine babies have resided in the mother and baby units in the SPS estate.[221]

The criminal justice system has adapted to the fact that most persons entering it are male. It is likely that women have dissimilar needs from men and distinct challenges.

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[216] For the year 2019/20, ibid at section 4.
[217] The Scottish Government Justice and Equality, Inclusion and Human Rights Directorates, "Women's Justice Leadership Panel: The Case for Gendered and Intersectional Approaches to Justice" (23 August 2023) accessed 5 February 2025 quoting Families Outside that only 5% of children whose mother is imprisoned remain in the family home, with only 9% being cared for by their fathers, although it was thought most children with a father in prison remained with their mother. Figures are not available from SPS, who advise, "data held on women entering custody, who were sole carers for their children, can be recorded within our case management processes should the female disclose this during discussion on admission. However, the data recorded is not held in a reportable format for us to provide exact figures on the number of women" (FOI response, 27 November 2023).
[218] The Scottish Prison Service, "Prison Survey 2019" (17th Series, 2019) accessed 5 February 2025, quoted in the Women's Justice Leadership Panel, ibid, page 11.
[219] The Scottish Sentencing Council, "The sentencing process: sentencing guideline" (effective from 22 September 2021) accessed 5 February 2025 page 16, Appendix C.
[220] SPS advise, "There are Mother and Baby provisions within HMP Stirling, HMYOI Grampian, as well as the community custodial units, Lilias and Bella. The SPS Mother and Baby Policy provides guidance ..... in accommodating pregnant women and mothers with babies in the community that may apply to reside in the MBU [Mother and Baby Unit]. Prior to entry to a MBU an assessment is carried out to consider age and stage and development of baby at the point of release. The accommodation within custody is not deemed suitable for the safety of toddlers, therefore the policy limits accommodation of babies to those aged 12 months or under, however the Governor can depart from policy should circumstances merit." (SPS FOI response, 27 November 2023). However, the policy for admission to a MBU appears to exclude all children on the Child Protection Register or subject to a supervision requirement. The Judicial Hub has two films available, produced by Community Justice Scotland and the Prison Reform Trust: Judicial Hub Resource Kit, "Safeguarding children when sentencing mothers".
[221] SPS FOI response, 12 January 2023.

It is also important that judges are conscious that women are not a homogenous group. A female appearing might also have mental health issues or a disability. Each characteristic needs to be considered cumulatively and/or separately as appropriate.[222]

There does not appear to be much information on the issue of race and female offenders in a Scottish context. Scottish Government research suggests that there are slightly more female than male offenders identifying as Asian, and fewer identifying as African, Caribbean or Black.[223] Research in England and Wales suggests that Black and ethnic minority women are more than twice as likely to be arrested than White women and are at more risk of imprisonment compared to White women.[224]

12. Sex workers

It is thought that sex work mainly involves females.[225] Whilst it is not known how many persons are involved in sex work in Scotland, estimates in the 1990s indicated high levels of street sex work in Glasgow compared to the rest of the UK.[226] Other studies previously estimated that 1400 women were involved in street sex working in Scotland. Whilst most studies are estimates, one academic thought street sex working might only account for a quarter of the number of sex workers operating.[227]

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[222] The Scottish Government Justice and Equality, Inclusion and Human Rights Directorates, "Women's Justice Leadership Panel: The Case for Gendered and Intersectional Approaches to Justice" (23 August 2023) accessed 5 February 2025 pages 36 and 37.
[223] The Scottish Government Safer Communities Directorate, "Women in the justice system: evidence review" (26 January 2022) accessed 5 February 2025, at paragraph 4.3.
[224] See The Ministry of Justice, "Women in the Criminal Justice System (CJS)" (an overview document referring to research from 2014 and 2015 - details of the research are not provided).
[225] See the Scottish Government Justice Directorate, "Exploring Available Knowledge and Evidence on Prostitution in Scotland via Practitioner-Based Interviews" (24 February 2017) accessed 5 February, Annex A. The term sex worker is used in this bench book, although the term prostitution is used widely by policy makers.
[226] The Scottish Government Expert Group report thought on-street sex working remained an issue in Glasgow, Edinburgh and Aberdeen, and to a lesser extent in Dundee.
[227] Jane Pitcher, "Impact of UK laws on indoor-based sex workers' safety and conditions of work" (2015) quoted in the 2017 report, supra (see footnote 225) in Annex A.

Given the difficulties of carrying out research in this area, accurate information on the extent of sex work is difficult to obtain.[228]

It is likely there are links between sex work and drug taking, and sex work and trafficking and forced labour.

The Scottish Government has recently announced a strategic approach, which aims to challenge demand for sex work, support those involved in sex working, treating them as victims of exploitation rather than perpetrators of crime, and to support those who wish to leave such work.[229] That includes a national hub, with links to local organisations.[230]

13. Trans

The holding of a Gender Recognition Certificate changes the individual's gender to their acquired gender.[231] A recent decision of the Inner House considering the interaction of the Equality Act 2010 and the Gender Recognition Act 2004 has been appealed to the UKSC.[232] Reference is made to the chapter on trans issues.

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[228] Non-street sex work is referred to as "indoor" sex working by academics and policy makers. That includes activities using technology such as webcams, although there is often a dispute as to what the definition of sex working is, and whether it includes work such as lap dancing.
[229] The Scottish Government Justice and Equality, Inclusion and Human Rights Directorates, "Prostitution - challenging and deterring men's demand: strategic approach" (6 February 2024) accessed 5 February 2025.
[230] See the Scottish Government, "Supporting women out of prostitution" (6 February 2024) accessed 5 February 2025. See list of organisations at Safer Scotland, "Commercial Sexual Exploitation" accessed 5 February 2025. In Glasgow, there is a specific service for women who have been trafficked for sexual exploitation: Glasgow City Council, "Trafficking Awareness Raising Alliance (TARA)" accessed 5 February 2025.
[231] Gender Recognition Act 2004, s 9(1) refers to both sex and gender: "[w]here a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man, and if it is the female gender, the person's sex becomes that of a woman)." There is specific provision in the Gender Recognition Act 2004 relating to the issuing of a GRC on matters such as an existing marriage or civil partnership, and benefits payments. Note that in terms of s 12, the person's status as a mother or father of a child is unchanged by the subsequent issuing of a GRC. There are some exemptions within the Equality Act 2010 relating specifically to the position of a GRC being issued: see sch 3, part 7.
[232] *For Women Scotland Ltd v Lord Advocate* 2022 SC 150. The case was heard by the UKSC in November 2024 and the opinion is pending.

14. Gender critical views

The holding of a gender critical view (that is around whether biological sex is immutable and cannot be changed) has been held to be a protected belief by the Employment Appeal Tribunal;[233] see further discussion on gender critical views in the chapter on trans persons, and in the chapter on religion and beliefs on protected beliefs more generally.

15. Marriage and divorce

Reference is made to the chapter on religion for consideration of some specific issues affecting women.

16. Disorders of sex development

Judges should also be aware that a very small number of people have differences or disorders in sex development. See section on DSD.

17. Terminology

Generally, the following pointers should be considered, although individual preferences will differ. We are grateful to the authors of the Equal Treatment Bench Book for England and Wales for much of this section.

- Refrain from referring to adult women as "girls" but rather refer to them as "women".
- "Ladies" can be seen as outdated[234] and should be avoided; "wee lassie" is likely to be seen as patronising.

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[233] See *Maya Forstater v CGD Europe and Others*: UKEAT/0105/20/JOJ.

[234] Some linguists point to the origins of lady compared to gentlemen, with lady being defined in an unhelpful stereotypical way connected to society's notions of female behaviour. See, for example, Debbie Cameron, "Call Me Woman" (debuk, 16 May 2015) accessed 5 February 2025.

- For that reason, judges may wish to refer to "Members of the jury" rather than "Ladies and gentlemen".[235]
- Many persons may wish to be addressed by a professional title such as "Dr" or "Professor".
- Otherwise check how a person would like to be addressed, for example as "Ms", "Mrs" or "Miss" or "Mx" (pronounced "mucks"). Do not assume that "Ms" is interchangeable with "Miss" or that either mean a woman is unmarried. Do not assume that a woman is using her husband's surname. Many women prefer to keep their own name. In some cultural naming systems, married women do not generally carry the same family name as their husband. (See "forms of address" for more on different naming systems).
- Consider gender neutral writing where possible. For example, use gender neutral descriptions of jobs where you can, for example firefighter, chair, police officer.[236]
- Be mindful that some feminists object to the use of language which does not acknowledge biological differences between men and women. Whilst some people may prefer referring to, for example, people who are pregnant, or people experiencing menopause, others may object to such terms.
- Avoid commenting on looks, appearances or fragrance.

[235] The other reason for doing so may be to avoid any difficulties with jurors who identify themselves as non-binary.
[236] Judges might find the publication by the Canadian Government of interest: Government of Canada, "Gender Inclusive Language" (Legistics, 27 February 2024) accessed 5 February 2025.

Trans persons and non-binary persons

Contents

1. Overview

This chapter covers trans and non-binary issues and explains gender critical views. This is an area which has become characterised by strong views, and sometimes a lack of respectful debate, often on social media. In the 2022 Scottish census, just

under 20,000 people described themselves as trans, or having a trans history (equating to 0.44% of the population over 16).[237]

2. Introduction

Someone who identifies as "trans" considers they have a different gender identity from their biological sex. Some organisations and individuals refer to "gender expression" rather than gender identity.

Some do not identify as one or other gender or identify as having a fluid gender identity. When someone does not identify as either gender that is generally referred to as "non-binary". Non-binary is not recognised in law as a separate category of gender or sex (for example, in that a birth certificate or passport must have a person's gender as either male or female).[238] However, non-binary persons are included within the definition of transgender identity for the purposes of the Hate Crime and Public Order (Scotland) Act 2021. Sometimes "trans" is used to include non-binary persons.

Trans and non-binary identities are separate from sexuality. Whilst some trans persons identify as gay (that is, will seek same-sex relationships as within their acquired gender identity), sexual orientation is a separate part of someone's identity. Sexual preferences are a different personal issue to gender identity (and are also two

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[237] The exact number was 19,990. The question included those who identify as non-binary (9,030 identified as non-binary). Most of those identifying as trans or having a trans history were between 16 to 34 (46.1% were 16 to 24 and 26% were 25 to 34).

[238] See *R (on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent)* [2023] AC 559. However, a non-binary identity could be protected under the Equality Act 2010 on particular facts; see the Employment Tribunal decision *Taylor v Jaguar Land Rover Limited* UKET 1304471/2018. The Scottish Government set up a Non-Binary People's Working Group, which reported in 2022, and made 35 recommendations. Those recommendations included data collection and reforms in areas including health care, sport and education. The group also recommended research on legal recognition of those who identify as non-binary: The Scottish Government Equality, Inclusion and Human Rights Directorate, "Non-Binary Equality Working Group: report and recommendations - March 2022" (13 July 2022) accessed 5 February 2025. The Scottish Government has accepted some of the recommendations: see the "Scottish Government Response" (13 July 2022) accessed 5 February 2025.

separate protected characteristics under the Equality Act 2010, being sexual orientation and gender reassignment).

A list of terms that might be used, or referred to, are found at the end of the chapter. Judges should note that some terms listed are controversial. As the Inner House has observed:

> "The issues which surround the whole subject of gender reassignment, gender identity, and gender recognition are difficult and sensitive. It is not always easy for the law to keep pace where societal attitudes and understandings are in a state of flux…"[239]

It is also an area where there can be intense scrutiny over the words and phrases used by judges.

It is also important to acknowledge what are called "gender critical views or beliefs". There are variations in what that phrase might mean to different individuals, but it essentially criticises the ability to change sex, it being argued that sex is a matter of biology rather than identity, and sex and gender cannot be conflated. Gender critical beliefs have been held to be protected under the Equality Act 2010.

Given the political debate around this issue, the fluctuating legal position and the emotive issues involved, care is required. If a judge does not refer to a person in accordance with their own chosen gender identity, there is a risk of failing to respect the protected characteristic of gender reassignment under the Equality Act 2010, and also of alienating that person from the court process. On the other hand, judges will be aware of high-profile cases with an accused identifying as trans (without a Gender Recognition Certificate). There have been sensitivities with complainers and others if a judge or others in the court refer to the accused using the accused's preferred pronouns. Ultimately, whilst judges should, if possible, accommodate individuals' wishes and preferences, where that does not impinge on the rights of others, there may be times where a judge must deal with matters in accordance with a person's legal sex.

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[239] *For Women Scotland v Scottish Ministers* 2024 SC 117, at paragraph 30.

Judges should note that if a person has a Gender Recognition Certificate, that has the effect of changing someone's gender.[240] In those circumstances, the person's gender before the court is that of the assigned gender (but see footnote 240 below).

3. A trans person and the law

The Gender Recognition Act 2004 was introduced as a result of a decision of the European Court of Human Rights.[241] Relatively small numbers of Gender Recognition Certificates (GRC) are issued each year.[242] The issuing of a GRC changes someone's gender to the acquired gender.[243] Whilst there has been the ability to apply for a GRC for some time, there are outstanding legal questions as to the interaction between the issuing of a GRC and the Equality Act 2010.[244] This section should be read with that in mind.

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[240] The UKSC has a case before it which raises how the law should treat someone who has a Gender Recognition Certificate, and the interaction with the Equality Act 2010. Pending the UKSC decision, judges should note that s 9(1) of the Gender Recognition Act 2004 refers to both sex and gender: "[w]here a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man, and if it is the female gender, the person's sex becomes that of a woman)."

[241] In short, a Gender Recognition Certificate changes someone's gender. The current law on Gender Recognition Certificates is governed by the Gender Recognition Act 2004, a UK Act introduced to respond to the European Court of Human Rights' decision in *Goodwin v UK* (2002) 35 EHRR 18. An application is put before the Gender Recognition Panel. There must be medical evidence of gender dysphoria, and the person must have lived in their proposed gender for 2 years and make a declaration of intent that they will live in their acquired gender for the rest of their life. Note that there are prohibitions in relation to disclosure of certain information around a Gender Recognition Certificate, with some exceptions including for certain legal matters; see Gender Recognition Act 2004, s 22.

[242] 443 applications in 2019/20 and 466 in 2020/21. Most applications are granted: 93.1% in 2019/20 and 95.6% in 2020/21; UK Government Guidance: "Gender Recognition Certificate: applications and outcomes" (29 June 2022) accessed 5 February 2025.

[243] Gender Recognition Act 2004, s 9(1) states that, "where a full gender recognition certificate is issued to a person, the person's gender becomes for all purposes the acquired gender (so that, if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman)."

[244] See footnote 240.

Not everyone who identifies as trans seeks treatment or applies to legally change their gender (by obtaining a GRC).[245] There may be many personal reasons for not doing so. Trans groups report the process as difficult to navigate, and intrusive. Someone without a GRC but identifying as trans will still have the protection offered by the Equality Act 2010 (so long as they can meet the protected characteristic of being an individual who is "proposing to undergo, is undergoing or has undergone a process or part of a process to reassign their sex"). Someone cannot apply for a GRC until they have lived in their acquired gender for two years.

Accordingly, that gives a period where a trans person is unable to legally change their gender but may present to the outside world as the other gender. That may be consistent, or it may fluctuate. It could be easier for a trans person to identify as their preferred gender in a supportive social situation than it is for them to appear as the other gender in their workplace or around certain people or situations. It may depend on context and how confident an individual feels. Those factors are likely to vary over time.

Accordingly, noting the requirement to have lived in the acquired gender for two years before an application can be made for a GRC, someone may present in court in the opposite gender to their birth sex. Such a person would not have the protection of a GRC (so accordingly their gender would be in accordance with their birth sex) but would be protected under the Equality Act 2010 under the protected characteristic of gender reassignment, and must not be subject to harassment, discrimination or victimisation.

More than one protected characteristic under the Equality Act 2010 can apply at any one time. An example might be someone protected under the characteristics of both race and disability. Someone identifying as trans might have the protection of both gender and trans. For example, if a trans person's biological sex is female, and they identify as male but without a GRC, it is likely that person will have both the protected characteristics of being female and of gender reassignment (so long as they can meet the protected characteristic for gender reassignment).

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[245] A 2018 UK Government consultation noted the differences between the numbers of persons identifying as trans and the number of GRCs issued, and concerns that the difference was because many found the process of obtaining a GRC too bureaucratic, intrusive and expensive.

If someone has, or is applying for a Gender Recognition Certificate, it is an offence for someone who has obtained that information in an official capacity (such as an employer or public official) to disclose it to others.[246] There are various exemptions, including disclosure by virtue of a court order, and disclosure for the purpose of preventing or investigating crime.[247]

Judges will be aware of the proposed changes in Scotland, set out in the Gender Recognition Reform (Scotland) Bill. The Bill, as passed by the Scottish Parliament, proposed various changes to the process, including altering the age at which a GRC could be applied for, shortening the period required to live in the acquired gender, and removing the need to have a diagnosis of gender dysphoria. The Bill was subsequently blocked by an order made by the UK Government and is unlikely to become law in the near future.[248]

Some of the definitions within the Equality Act 2010 have come before the courts in a number of cases.[249] As indicated, this includes (at the time of writing) a case before the UKSC.[250] Separately, the Equalities and Human Rights Commission has made recommendations to the UK Government on the issue of amendments to the Equality Act 2010 (relating to the definitions of "sex").[251] Accordingly this is a dynamic area of law.

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[246] Gender Recognition Act 2004, s 22.
[247] The list of exemptions is found in s 22(4) of the Gender Recognition Act 2004.
[248] The UK Government made an order under s 35 of the Scotland Act 1998. A challenge to that order was refused in the Outer House: see decision of Lady Haldane in the Outer House; *The Scottish Ministers* 2024 SC 173. The Scottish Government indicated it would not reclaim (appeal) that decision; "Scottish Government Response to the Section 35 Order Judicial Review" (20 December 2023) accessed 5 February 2025. The Bill does not become law unless the s 35 order is revoked.
[249] For example, *Fair Play for Women Ltd v Registrar General for Scotland* 2022 SC 199 and *For Women Scotland v The Scottish Ministers* 2024 SC 117.
[250] The Inner House granted permission to appeal to the UKSC in the case *For Women Scotland v The Scottish Ministers* *supra* (concerning guidance regarding representation on public bodies, and whether someone holding a GRC so that their acquired gender was female would also be protected in law under the protected characteristic of gender as a female) on the basis that the interaction between the Gender Recognition Act 2004 and the Equality Act 2010 involves points of law of general public importance. The case was heard by the UKSC in November 2024 and the Court's opinion is pending.
[251] See Equality and Human Rights Commission, "Clarifying the definition of 'sex' in the Equality Act" (4 April 2023) accessed 5 February 2025.

4. Non-binary persons

A non-binary identification is where a person does not identify as either male or female or may have a changing identification between the two. It is not known how many persons would identify themselves as non-binary in Scotland, although for the first time the 2022 census allowed participants to identity as non-binary.[252]

As previously set out, there is no legal recognition of non-binary as an alternative to male or female gender.[253] A high percentage of non-binary people report feeling their gender identity is not valid.[254]

The Employment Tribunal has found that a biological male transitioning, but unsure as to whether they would have a gender fluid or a female identity in the longer term, was nevertheless protected under the characteristic of gender reassignment.[255] Whilst this is not binding, and was based on the particular facts, it may be a helpful illustration of the issues.

"Transgender identity" in the Hate Crime and Public Order (Scotland) Act 2021 is defined to include non-binary identity.[256] Broadly speaking, the Act provides that an

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[252] See Scotland's Census, "Scotland's Census 2022: Sex Question Guidance" (updated 4 February 2025) accessed 5 February 2025. 9,033 people identified themselves as non-binary in the census. The response level to the census was lower than the previous Scottish census in 2011 (89% participation as opposed to 95% in 2011), and the English and Welsh census in 2021 (97% participation), BBC News, "Census: Scotland's Population Grew to Record High" (14 September 2023) accessed 5 February 2025. The wording of guidance or wording in the census was the subject of court action both in England and Wales and in Scotland.

[253] See *R (Castelluci) v The Gender Recognition Panel and the Minister for Women and Equalities* [2024] KB 995 where the Divisional Court in England held there was no power to issue a Gender Recognition Certificate recording gender as "non-binary". See also UKSC decision in R *(on the application of Elan-Cane) (Appellant) v Secretary of State for the Home Department (Respondent)* [2023] AC 559 regarding the recording of gender on a passport. See, however, footnote 263: a non-binary person is included within the definition regarding transgender identification for the purposes of the Hate Crime and Public Order (Scotland) Act 2021.

[254] 84% from a sample size of 895 in 2015: The Scottish Trans, Equality Network, "Non-binary people's experiences in the UK" (2016) accessed 5 February 2025.

[255] *Taylor v Jaguar Land Rover Limited* UKET 1304471/2018.

[256] Hate Crime and Public Order (Scotland) Act 2021, s 11(7) provides: "(7) A person is a member of a group defined by reference to transgender identity if the person is— (a) a female-to-male transgender person, (b) a male-to-female transgender person, (c) a non-binary person, (d) a person who cross-dresses, and references to transgender identity are to be construed accordingly."

offence can be aggravated by prejudice based on the victim's membership of a group defined by reference to a listed characteristic (age, disability, race (and related characteristics), religion, sexual orientation, transgender identity and variations in sex characteristics). It creates offences of stirring up hatred against a group of persons based on the group being defined by reference to the listed characteristics.

5. Gender/sex/biological identity

Whether the word "gender" is used, as opposed to "sex" or "biological sex", can be controversial. Many people, particularly younger people, use such phrases to describe someone's internal sense of their identity irrespective of the legal position.

6. Gender critical views

For some, gender is a social construct rather than a matter of biology. Others believe that biological sex is immutable and cannot be changed. These views are often referred to as "gender critical" views (although there can be a range of views within that description). Such views include that sex cannot be changed and is a matter of biology, that sex is distinct from gender identity and that single sex spaces/sports should not include those identifying as female if biologically male, whether or not the individual has a GRC assigning their gender as female.

Gender critical views have been recognised as a philosophical belief, and thus protected under the Equality Act 2010.[257]

[257] See decision of the Employment Tribunal in *Maya Forstater v CGD Europe and Others*: UKEAT/0105/20/JOJ.

7. Medical treatment for trans persons

Treatment is available on the NHS in Scotland for those wishing to change their gender, including for young people.[258] However, many persons who identify as trans do not seek medical treatment, some citing issues around accessing treatment.

Some trans people do not consider medical treatment is required. Medical treatment, such as hormone treatment, is not required to bring a trans person within the scope of the protected characteristic of gender reassignment under the Equality Act 2010 although a diagnosis of gender dysphoria is required to obtain a GRC.

8. Discrimination and hate crime

Trans persons report experiencing high levels of prejudice and discrimination. In a report by the Equalities Network on hate crime (across a number of sexuality and gender identity characteristics), trans persons reported the highest level of hate crime.[259]

Crown Office statistics suggest such crime (or the reporting of such crime) is on the rise. In 2021-22, there were 84 incidents reported with an aggravation of transgender identity, an increase of 87% on the previous year. The Crown Office noted this is, "the highest number of such charges reported since the legislation introducing this aggravation came into force in 2010."[260]

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[258] Treatment is available through NHS health boards; see the Scottish Government Population Health Directorate, "Gender identity healthcare protocol for Scotland" (3 September 2024) accessed 5 February 2025 which provides arrangements for the Sandyford Clinic to provide services to those under 18 from other health board areas. There have been criticisms by some over the waiting lists for such services. For further information, see the Scottish Government Chief Medical Officer Directorate, "Cass Review – implications for Scotland: findings report" (5 July 2024) accessed 5 February 2025.
[259] The number of persons identifying as trans that participated in the survey was relatively low, at 198 valid responses from 1,516 respondents: the Scottish Trans Equality Network, "Scottish LGBTI hate crime report 2017" (2017) accessed 5 February 2025. The percentage of participants reporting hate crime who participated in the survey was 65% for those identifying as lesbians, 66% for male gay respondents and 53% of bisexual respondents, although participation in the survey may not represent an even split of those identifying.
[260] Crown Office and Procurator Fiscal Service, "Hate Crime in Scotland, 2021-22" (14 June 2022) accessed 5 February 2025.

Judges are familiar with the concept of explaining in what way an aggravation is taken into account when sentencing.[261] Research suggests that an explanation as to how the aggravation has been taken into account may be important for the complainer to understand the sentence imposed.[262]

"Transgender identity"[263] is a protected characteristic in terms of the Hate Crime and Public Order (Scotland) Act 2021. Broadly speaking, the Act provides that an offence can be aggravated by prejudice based on the victim's membership of a group defined by reference to a listed characteristic (age, disability, race (and related characteristics), religion, sexual orientation, transgender identity and variations in sex characteristics). It creates offences of stirring up hatred against a group of persons based on the group being defined by reference to the listed characteristics.

9. Trans persons in a court or tribunal

Judges may wish to note the following points:

- The name and pronouns by which a person is referred to or called can be very important to a trans person. It might be seen as a sign of disrespect if someone does not refer to them by their chosen identity.
- Often the question of gender identity is not truly relevant to the issue at hand. For example, so long as there is no dispute about the identity of a witness, if a witness wishes to be referred by a male pronoun despite having a female appearance, that may not require any further questions by the court or tribunal. Accordingly, where someone's gender identity is not a material issue,

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[261] Ss 1 and 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009 requires a court to record the aggravation and take the aggravation into account when sentencing, explaining the reasons for the difference in sentencing taking account of the aggravation, or where there is no difference in sentencing, reasons why there is no difference.

[262] The Scottish Trans Equality Network, "Scottish LGBTI hate crime report 2017" (2017) accessed 5 February 2025 page 86 recommended that there was more transparency in sentencing, explaining how the prejudice aggravation had been taken into account to allow complainers to understand the sentence. Transparency is needed in sentencing, including clarification of the prejudice aggravation element.

[263] Hate Crime and Public Order (Scotland) Act 2021, s 11(7) provides: "(7) A person is a member of a group defined by reference to transgender identity if the person is— (a) a female-to-male transgender person, (b) a male-to-female transgender person, (c) a non-binary person, (d) a person who cross-dresses, and references to transgender identity are to be construed accordingly."

judges may wish to take the approach of accommodating those preferences without enquiry into, for example, the legal position.

- In evidential hearings, as with any collateral matter, take care to ensure matters do not stray beyond what is necessary to determine the issues that are relevant and in dispute.
- Judges should be alert to any attempts to "out" someone. In the limited number of cases where gender identification is relevant, the court should be alert to any questions that might be demeaning or insulting or interpreted as such, given the need for everyone in court to be treated with courtesy and dignity. If the question is relevant, judges should ask for it to be rephrased.
- If referring to someone in a way that goes against their own gender identity (in circumstances where the person has not legally changed their gender and name), be mindful of the risk of alienating them from the court process.
- Notwithstanding that, respecting someone's chosen gender identity must be balanced against the impact on others. Whilst the numbers of trans persons appearing in court as an accused person are likely to be small, difficult issues can arise, particularly in cases involving sexual allegations.
- In criminal trials, there may be a time lag between the alleged events and the trial. If so, and gender identification has altered in the intervening period, and is likely to feature in the case, encourage a joint minute agreeing the facts around the individual's gender identity, whether that is of a witness or the accused.[264] Such a joint minute might address any differences in physical appearance between the alleged events in question and the trial, and/or agree identification. That may avoid the issue of gender identification becoming a distraction.
- Consider an early discussion as to how someone should be referred to in court if the matter is likely to proceed to an evidential hearing. Some judges have found setting out the general expectation that the court will respect the chosen identity where possible (irrespective of the individual's legal position) has prevented the matter becoming a distraction at trial or proof.
- In some circumstances the court may have to consider the legal position of the accused's gender, particularly where others are affected. That might

[264] Judges may find it helpful to have note of the Crown Office and Procurator Fiscal policy; COPFS, "Guidance for prosecutors in relation to transgender accused" (updated 22 September 2014) accessed 5 February 2025.

include the ability of the press to understand any trans issue and accurately report the facts.

- The court should always put witnesses in the position of giving their best evidence. As in any case (for example, a fraud where an accused has used multiple identities), witnesses should give their evidence referring to the accused in the way they knew that person, including by the name they knew them as. Placing additional or artificial barriers on a witness is likely to detract from their ability to give best evidence. Accordingly, complainers giving evidence in trials should not be required to call an accused "she" if they knew the accused as a male;
- In sexual assault cases there is a likely to be heightened sensitivity, particularly when a female complainer knew the accused as a male and the male is now identifying as a female. Ensure that any such cases are properly case managed and consider a sentencing statement so that any remarks in court are more likely to be accurately reported.
- Some of the sensitivities and issues that may arise are dealt with by academic Claire O'Brien in this blog, which also highlights the international law dimension when considering offences of violence against women.

A guiding principle is likely to be that witnesses should always give their evidence without hindrance, and by referring to the accused as the person that was known to them.

10. Non-binary persons in court

Much of what has been said relative to trans persons in court may also apply to non-binary persons. Some additional points include:

- Many non-binary and trans people do not wish to use Mr/Mrs/Ms but use Mx as a gender-neutral alternative (pronounced "mucks"). Many people now identify their gender on emails (for example, him/he after their name) and use

gender-neutral terms (for example, they instead of I). There is no accepted one definition or use of gender-neutral terms.[265]

- A gender fluid person may identify as male in appearance on some occasions, and female on others.
- Judges may wish to refer to jurors as a collective using the term "Members of the jury" rather than "Ladies and gentlemen" (see also the sex chapter relative to this).

11. Trans persons in prison

The question of in which prison facility a person is held is not a matter for the judiciary but for the Scottish Prison Service (in a similar way to how the prison service might respond to a person's disability or other characteristic).[266]

The SPS policy considers individual cases, which may allow a trans person to be placed in a prison in accordance with the gender they identify with.[267]

12. Definitions

Some of these definitions are contested. Judges are given these definitions to assist their understanding should they be used in court. Accordingly, the inclusion of these definitions does not suggest that they should be used more widely, or that their meaning is settled.

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[265] See discursive article on BBC website: Avinash Chak, "Beyond 'He' and 'She': The rise of Non-Binary Pronouns" (BBC News, 7 December 2015) accessed 5 February 2025.

[266] It would only be a matter for the judiciary if there was a challenge to a decision made by the SPS before the court, such as a judicial review.

[267] The Scottish Prison Service, "SPS Policy for the Management of Transgender People in Custody" (December 2023) accessed 5 February 2025 page 2 states: "When a transgender person is admitted into custody, they should be considered on an individual basis as far as possible. However, if placing them in accommodation which accords with their affirmed gender gives rise to unacceptable risks that cannot be mitigated or this risk is as yet unknown, they will initially be located in an establishment that aligns with their sex assigned at birth. If a transgender woman meets the Violence Against Women and Girls (VAWG) criteria (see Annex 1…), they will be admitted to accommodation in the male estate."

Cis/cisgender	Used by trans groups and others to denote someone who is not transgender and identifies with their sex at birth. However, many women's groups object to this definition, noting they identify as females or as women.
Cross-dressing	The wearing of clothes, make-up or other accessories generally associated with the opposite gender; not now frequently used.
Deadname	The name that a trans person had in the other gender and no longer uses.
Gender dysphoria	A medical/clinical term referring to difficulties a person has where they identify as a different gender from their biological sex.
Gender expression	The way that someone might express themselves as masculine or feminine by clothing or behaviours.
Gender identity	Refers to an internal sense of gender and whether (irrespective of the legal position) someone identifies themselves as one or other gender, or a fluctuating gender, or no gender.
Gender reassignment	The legal term used in the Equality Act 2010 as a protected characteristic, but also used to refer to the process of someone changing their name, pronouns and living in their self-identified gender, including with legal recognition (without necessarily hormonal or surgical treatment).
Non-binary	Where someone identifies as either having a gender which is in-between or beyond the two categories of "man" and "woman" or fluctuating between "man" and "woman", or as having no gender, either permanently or some of the time.
Trans/transgender	Someone whose gender identity or gender expression does not fully correspond with the sex they were assigned at birth.

Trans man	A person who was assigned female at birth but has a male gender identity and therefore transitions to live as a man. Sometimes also referred to in the trans community as "person with a trans history".
Trans woman	A person who was assigned male at birth but has a female gender identity and therefore transitions to live as a woman. Sometimes also referred to in the trans community as "person with a trans history".
Transphobia	Prejudice or discrimination again trans persons.
Transitioning	The process that a trans person takes to live in the gender they now wish to. This might include medical interventions, such as hormone treatment and changing their gender legally, although others consider themselves transitioning without any such steps.
Transsexual	Used in the Equality Act 2006 to describe a person undergoing gender reassignment but has otherwise been largely replaced by "trans" and generally no longer used by the trans community.

Sexuality

Contents

1. Overview

This chapter covers sexuality.

The 2022 census asked a voluntary question on sexuality. From those who answered, 87.8% identified as straight or heterosexual. Another 4% identified as gay or lesbian, bisexual or having another sexual orientation (with the remaining participants not answering the question). Of note, from the 4% those identifying as gay/lesbian and bisexual were roughly equal (80,100 as gay/lesbian and 80,260 as bisexual).

A variety of terms are used in the chapter, such as "LGB", "LGBT", "LGBTI", and "LGBT+".[268] This is sometimes because, when referring to research, it is based on the way that participants in that research have been grouped, but also because different campaign groups and charities use terms slightly differently.

2. Introduction

Sexuality is defined as someone's sexual orientation, that is to whom they are attracted.[269] It is separate from gender identity. It can be fluid, changing during a person's lifetime. It can develop over time, sometimes depending on someone's upbringing and background. Sexuality does not determine personality or character; just as there is no "average" person, it is unhelpful to think of a "typical" or "normal" sexual orientation. As ever in society, assumptions should not be made about a person based on their sexual orientation or behaviour.

Many people, particularly those who are younger, resist attempts to "label" or name their sexual orientation. For others, it is an important part of life to have an identifiable community to associate with, or to openly identify as having a particular sexual orientation.

For some, sexuality is a more nuanced concept than heterosexuality or homosexuality. What is important is an attraction to a person because of who that person is, rather than because that person is of a particular gender or biological sex. In a YouGov survey, 57% of adults considered sexuality to be a sliding scale. This figure has generally been higher over time for 18-24 year olds.[270] Whilst definitions of sexuality might mean slightly different things to different respondents, the

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[268] The L stands for lesbian, G for gay, B for bisexual, I for intersex, T for trans and "+" as an umbrella term to include many gender and sexual identities.

[269] The census for England and Wales carried out in 2021 defined sexual orientation as "an umbrella term covering sexual identity, attraction, and behaviour." The Scottish census, carried out in 2022, did not have a single definition of sexual orientation but rather a list of options including an open text box.

[270] When asked the question "thinking about sexuality, which of the following comes closer to your view?" YouGov, "Do Brits Think Sexuality is a Scale?" accessed 5 February 2025 shows the response to this question since 2019, although from a reasonably small sample size of just over 2,000 respondents. At one point it was as high as 78% for 18-24 year olds.

numbers of persons identifying as bisexual are roughly similar to those identifying as gay/lesbian.[271]

A trawl through popular media reveals that many younger people resist labelling themselves. They will sometimes refer to themselves as "queer"[272] or "fluid", explaining they feel attraction to different genders and it is the person, not the gender or biological sex that is important. As some have explained "you like who you like". Accordingly, a younger generation may think differently around attraction than what has been traditionally understood.

This fluidity around sexuality may mean that some will not want to give themselves, or be given, a label of their sexuality. Rather, for some, the focus is on what the relationship is rather than a definition.

For judges, the starting point is that often a person's sexuality does not need to be discussed and is generally not relevant. If it is truly relevant, the best approach is to take care to understand the issue, and how a person would wish their sexuality to be referred to. If the issue is relevant, judges should be careful to ensure that matters do not stray beyond what is necessary to determine the issue or issues in the case. Judges should be alert to any attempts to "out" someone. In the limited number of cases where sexuality is relevant, be alert to any questions that might be demeaning or insulting or interpreted as such. If the question is truly germane to the resolution of the case before you but could be interpreted in an insulting or demeaning way, judges should intervene to require the question to be rephrased.

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[271] In the census for England and Wales in 2021, 1.54% of respondents in a voluntary question identified as gay or lesbian, 1.28% as bisexual and 89.37% as heterosexual. As it was a voluntary question, it may not be accurate over the population as a whole. See Office for National Statistics, "Sexual Orientation, England and Wales: Census 2021" (6 January 2023) accessed 5 February 2025. The term used in the Scottish census is sexual orientation. A question on sexual orientation was a question in the Scottish 2022 census. The census results are found in the overview section above. There was "no single definition of sexual orientation [was] provided for the term 'sexual orientation' ..... as cognitive testing revealed that all participants were able to answer the question, and almost all participants reported finding the question acceptable and clear." The Online Collection Instrument for Scotland's Census 2022 provided the following guidance: "Select only one response. If your answer is not listed, choose 'Other sexual orientation' and describe your sexual orientation. This question is voluntary. This means you only have to answer it if you want to."

[272] Judges should note the potential negative connotations of the use of the word "queer", discussed later.

3. Legal framework and history around sexual identity

In comparison to England and Wales, Scotland was much later in repealing the law criminalising relationships between two same sex adults, perhaps because of greater intolerance in Scotland to gay relationships.[273] Given the prohibition on male adults consenting to same-sex relationships was only changed in 1980 (and even then, by a backbench amendment to a piece of otherwise unrelated criminal legislation) there has been a historic legacy of prejudice around homosexuality.[274] As such, particularly amongst older members of society, being gay or lesbian may still be associated with notions of embarrassment, shame, or disapproval.

Civil partnership between two persons of the same gender has been available in Scotland since 2005[275] but marriage between two persons of the same gender was only introduced in 2014.[276]

Sexual orientation is a protected characteristic under the Equality Act 2010. That protection exists not just if someone identifies as heterosexual, gay, lesbian, or bisexual, but also over discrimination by perception (that is someone else thinks you have a particular sexual orientation, whether or not they are correct) and

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[273] A poll in 1957 found opposition in Scotland to the Wolfenden Report at 85%, as opposed to a similar poll in England at 51% opposition. The Wolfenden Report, which while recommending decriminalisation of gay relationships, still considered such relationships to be dangerous to individuals and wider society, containing many recommendations which would not be acceptable today. See David MacNicol, "Illegal to be Gay- Scotland's History" (BBC News, 27 July 2017) accessed 5 February 2025.

[274] There was no specific legislation criminalising physical relationships between two females, though it is thought that, at that time, such an act might be considered to be an indecent assault. The legal position in relation to male relationships was altered by an amendment proposed by Robin Cook, then a backbench MP in 1980 to the Criminal Justice (Scotland) Act 1980. For a historical narrative of the emergence of the gay rights movement in Scotland, see "The Sexual State: Sexuality and Scottish Governance 1950-80," Davidson and Davis, Edinburgh University Press, 2012.

[275] Civil Partnership Act 2004; civil partnerships can now also be between two persons of opposite gender.

[276] Marriage and Civil Partnership (Scotland) Act 2014, s 10; there are also regulations to make provision for existing civil partnerships to be further registered as a marriage.

discrimination by association (a connection to someone with a particular sexual orientation). Please see chapter on the Equality Act for a further discussion.

4. Young people

It is thought that young people tell others about their sexual orientation at a far younger age than previous generations.[277] The 2022 census in Scotland included 22,780 young people aged 16-19 who identified as gay or lesbian, bisexual or other sexual orientation.[278] It appears school can be a particularly difficult place for young people to be open about their sexuality.[279] Research from England suggests that young people felt that openness by pupils and staff was the single most important factor in a positive school experience, followed by a robust culture around bullying.[280] Young people in rural areas[281] are likely to face additional challenges.[282] Research suggests that those in rural areas are more likely to have a negative experience of being lesbian, gay or bisexual due to greater visibility, perceived homophobia, and religious influences.[283]

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[277] Note the term often used , "coming out" can now be seen as outdated and reflective of a particular attitude to same sex relationships.
[278] See Scotland's Census, "Scotland's Census 2022 – sexual orientation and trans status or history" (27 June 2024) accessed 5 February 2025 figure 6. Information on persons identifying as trans was collected separately and this figure solely related to those identifying as "gay or lesbian", "bisexual" or "other sexual orientation".
[279] See Lewis Clark and others, "Life as a Young LGBT+ Person Living in England 2021-2022: Final Report" (Sheffield Hallam University on behalf of Barnado's Positive Identities, March 2023) accessed 5 February 2025. Note that this was research on young people in respect of both sexuality and trans issues. Schooling appeared to be a theme of a particularly difficult issue (see for examples quotes on page 6).
[280] See Just Like Us, "Growing up LGBT+ The impact of school, home and coronavirus on LGBT+ young people" (June 2021) accessed 5 February 2025. The charity carried out a UK wide survey of 2,934 young persons across 375 schools in the UK. 1,140 of the participants identified as LGBT+ (defined as gay, bisexual, queer, asexual, pansexual or questioning, and/or those identifying as transgender).
[281] It should be noted that young people (taken as a group) in rural areas are more likely to feel isolated given the difficulties in transport and places to meet. See Jayne Glass, Claire Bynner and Chris Chapman, "Children and young people and rural poverty and social exclusion: A review of evidence" (commissioned by Children's Neighbourhoods and authored by Scotland's Rural College, November 2020) accessed 5 February 2025.
[282] See, for example, footnote 279 at page 32 quoting the difficulty of growing up in a small town.
[283] The Scottish Government, "Review of Equality Evidence in Rural Scotland" (13 February 2025) accessed 18 February 2025 at paragraphs 4.104 to 4.106, reporting on the experiences of adults.

5. Discrimination

A study in 2016 suggests that lesbian, gay, bisexual and trans persons face discrimination across a number of areas of life, often arising from heterosexism and heteronormativity (that is where services or provision assumes it will be used by a heterosexual person).[284] It also suggests that fears around discrimination lead to a reluctance to engage in public life, and/or use public services.[285]

6. Prejudice around HIV

No assumptions should be made about someone's sexuality simply because the person is HIV positive. Worldwide, it is now thought that many HIV infections are spread via heterosexual sex. HIV can also be passed from mother to baby, by contaminated needles (such as in drug use), by receiving infected blood or by healthcare workers suffering accidental needlestick injuries.

7. Hate crime

Abuse directed towards or motivated by someone's sexuality may be underreported.[286] A survey carried out in 2021 showed those identifying as part of the LBGT+ community experience high levels of abuse with 64% of respondents reporting violence or abuse relating to their identity.[287] A study in 2017 in Scotland

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[284] Nathan Hudson-Sharp and Hilary Metcalf, "Inequality Among Lesbian, Gay, Bisexual and Transgender Groups in the UK: A Review of Evidence" (National Institute of Economic and Social Research, July 2016) accessed 5 February 2025. It should be noted that this survey was wider than covering sexuality.

[285] See also LGBT Foundation, "Hidden Figures: LGBT Health Inequalities in the UK" (2020).

[286] Nathan Hudson-Sharp and Hilary Metcalf, "Inequality Among Lesbian, Gay, Bisexual and Transgender Groups in the UK: A Review of Evidence" ibid, noted evidence from previous reviews in 2011 and 2013 led to the conclusion that hate crime was "significantly under-reported", with the reasons including a fear of having to "come out" to a lack of faith in the criminal justice system, at paragraph 4.3.2. Again, this survey included trans persons so was wider than sexuality.

[287] The survey was carried out by Gallup a charity campaigning against abuse of LGBT+ persons, involving 1166 respondents. From the two-thirds (64%) of respondents that had experienced anti-LGBT+ violence or abuse, 9 in 10 had experienced verbal abuse, 3 in 10 had been subject to physical violence and 2 in 10 had experienced sexual violence (17%).

reported that 65% of lesbian respondents, 66% of gay male respondents and 53% of bisexual respondents had been a target of a hate crime at some point in their lives.[288] It appears unlikely that people suffer a one-off incident; 90% of respondents said they had been a target of hate crime two or more times, and nearly a third (30%) reported more than ten times. Only 37% of respondents thought the introduction of the statutory aggravation of prejudice relating to sexual orientation had helped them feel safer.[289] A review of existing evidence concluded that, "[t]he fear of hate crime was recognised to create considerable anxiety and worry, which can result in poor mental health, additional stress, hyper-vigilance, self-harm and suicide. LGB[290] people were identified to worry more about hate crime than any other minority groups."[291]

"Sexual orientation"[292] is a protected characteristic in terms of the Hate Crime and Public Order (Scotland) Act 2021. Broadly speaking, the Act provides that an offence can be aggravated by prejudice based on the victim's membership of a group defined by reference to a listed characteristic (age, disability, race (and related characteristics), religion, sexual orientation, transgender identity and variations in sex characteristics). It creates offences of stirring up hatred against a group of persons based on the group being defined by reference to the listed characteristics.

In 2021/22, 1,781 hate crimes around sexual orientation were reported to the Crown Office, with the number of cases increasing year-on-year.[293] It is likely that these numbers do not reflect the true picture and there is a high level of underreporting.[294]

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[288] "Scottish LGBTI Hate Crime report 2017" (Equality Network, 2017) accessed 5 February 2025.
[289] "Scottish LGBTI Hate Crime report 2017" (Equality Network, 2017) ibid; at the time of the report, the definition was based on aggravation of prejudice relating to sexual orientation in terms of s 2 of the Offences (Aggravation by Prejudice) (Scotland) Act 2009. Not all complainers identified as gay, lesbian or bisexual, and it was not a requirement of the Act.
[290] LGB stands for lesbian, gay and bisexual.
[291] Nathan Hudson-Sharp and Hilary Metcalf, "Inequality Among Lesbian, Gay, Bisexual and Transgender Groups in the UK: A Review of Evidence" ibid.
[292] Hate Crime and Public Order (Scotland) Act 2021, s 11 defines sexual orientation as, "a reference to sexual orientation towards (a) persons of the same sex, (b) persons of a different sex, or (c) both persons of the same sex and persons of a different sex."
[293] With the exception of 2014/15: "Hate Crime in Scotland, 2021-22" (COPFS, 2022), page 6. Proceedings were instigated for 84% of the reports made (page 6).
[294] "Scottish LGBTI Hate Crime report 2017" (Equality Network, 2017) ibid, reported only 19% of respondents reporting some or all of the incidents to the police, being either incidents directed to them or that they had witnessed, including online abuse and threats of being "outed".

Those living in rural areas may experience particular difficulties. In a survey, 62% believe that LGBT people outside of Scotland's big cities face more inequality.[295] 43% of the participants said they would not feel comfortable holding hands with their partner in public. As some rural communities may be more socially conservative (or perceived to be so) there may be social isolation and a lack of spaces where people can openly express their sexual identity. It can be more difficult to be anonymous in a rural area. There can be a lack of a supportive network in smaller communities.

Whilst many assume that younger persons are more open and tolerant of the range of sexualities that exist in society, surveys show that young gay people, and staff, still experience both discrimination and hate crimes in schools. Young people complain about the lack of support from schools, an absence of sexual education to cover LGB issues and a lack of action in school to tackle prejudiced behaviour.[296]

8. Assumptions made around sexual orientation

Judges should be careful not to make assumptions on how someone should appear or act, connected to their sexuality. Some common (and wrong) assumptions are:

- In gay men, a perceived feminine or "flamboyant" appearance or outlook. Whilst some gay men may choose to dress or act this way at times, it does not necessarily mean that they will always do so, and it is not "representative" of anything. It is not an indicator of sexuality, particularly given the more fluid view that some now have of both sexuality and gender identity.
- In gay women, a "butch" or a perceived less feminine appearance equates with a certain sexuality. Again, appearance is not linked to sexuality and no assumptions should be made.
- Assumptions and perceptions about a promiscuous lifestyle and sexuality. Such assumptions are likely to be offensive, given that such matters are individual.

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[295] "Further Out: The Scottish LGBT Rural Equality Report" (Equality Network, 2020), at page 25 in particular, accessed 5 February 2025. The survey was small scale as an online survey but with encouragement to participate at stalls and events across Scotland.
[296] "The Scottish LGBT Equality Report" (Equality Network, 2015), from page 38 in particular, accessed 5 February 2025.

- Assumptions about family life. There is no evidence that being raised in a gay or lesbian relationship or by a gay or lesbian single parent has any different outcomes for children, and gay or lesbian parents can do equally well in providing a loving stable home for children.[297] It is also insulting to make assumptions around the stability of a relationship based on sexuality.

Similarly, there are many misassumptions around breakdown of same-sex relationships. The reality is that same-sex relationships end for the same varied and myriads of reasons as any relationship.

9. Family law and sexual orientation

Family law has evolved to a perceived standard family unit, assuming a heterosexual relationship at its heart. As society has changed, so too has the diversity of families and family life. There are still areas of law that may be seen as not yet reflective of the modern reality of families, such as surrogacy.[298] Judges dealing with such cases should take a sensitive approach.[299]

10. Conversion therapy

There may be legislation around the issue of conversion therapy[300] introduced in Scotland in the coming years.[301]

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[297] Deni Mazrekaj, Mirjam M Fischer and Henny M W Bos, "Behavioral Outcomes of Children with Same-Sex Parents in The Netherlands" (2022) Int J Environ Res Public Health, 19, 5922, accessed 5 February 2025.

[298] In March 2023, the Scottish Law Commission published a Joint Report with the Law Commission of England and Wales, "Building Families Through Surrogacy: A New Law", recommending a new regulatory framework, accessed 5 February 2025.

[299] There is a useful summary of the evolution of the law and issues arising around same sex relationships in Elaine E Sutherland, "Child and Family Law" (3rd edn, W Green, 2022), at paragraphs 1-170 to 1-1209.

[300] For an explanation as to conversion therapy, see "What is conversion therapy and when will it be banned?" (BBC News, 2024) accessed 5 February 2025. Legislation has already been introduced into the UK Parliament for England and Wales: Conversion Therapy Prohibition (Sexual Orientation and Gender Identity) Bill.

[301] The Scottish Government made a commitment to introduce legislation before the end of 2023 (Ending Conversion Practices (2021)) and set up an expert working group which reported in October 2022 (Ending Conversion Practices).

11. Domestic abuse

Care should be taken to treat all relationships equally, no matter what the gender and sexual orientation of the individuals involved. Judges should consider the case, including the imposition of a non-harassment order, without preconceptions.[302]

When sentencing any offence with a prejudice aggravation, as a matter of law the court should make clear the way that the aggravation has been considered. In doing so, it may assist the complainer in understanding the basis and reasons for the sentence.[303]

12. Definitions and unacceptable language

For many, the following definitions may be controversial, disputed or mean slightly different things to different people. Accordingly, the list provided is not as legal definitions, but rather so that judges have a reference point, should such terms be used in proceedings before them.

This list is not comprehensive. If a term is used that judges are not familiar with, the best approach is to politely ask what the witness/party means by that term.

Asexual	This is a term many use to refer to someone who does not have sexual attraction or little sexual attraction towards either gender but may include those with limited romantic attractions. Someone who is asexual can still identify as gay, lesbian, bisexual, or straight. It is different from celibacy - someone who is celibate deliberately decides not to engage in sexual behaviours or attractions.

[302] Criminal Procedure (Scotland) Act 1995, s 234AZA.

[303] "Scottish LGBTI Hate Crime report 2017" (Equality Network, 2017) ibid, page 86. The report noted a high level of dissatisfaction by complainers (55% of respondents) with the sentences imposed, particularly around perceived leniency and the use of fines (see page 54). A non-harassment order can be considered in terms of s 234A of the Criminal Procedure (Scotland) Act 1995.

Allosexual	The opposite of asexual.
Bisexual	Where an individual is attracted to members of both sexes.
Butch	Whilst some in the lesbian, gay and bisexual community still use this term to describe someone who appears and dresses in a particularly masculine way, it has historically been an offensive term and should not be used.
Biphobic	A term used by some people to express prejudice or discrimination again bisexual people.
Femme	A term used by some in the lesbian, gay and bisexual community denoting someone who appears and dresses in a feminine way. But, again, it may be interpreted as offensive and should not be used.
Gay	Historically referred to a man in a sexual relationship with another man, but equally can refer to a woman attracted to other women (although some women prefer to use the term lesbian to describe themselves). Generally, now used instead of homosexual.
Homophobic	Prejudice or discrimination again lesbian and/or gay persons but can also be used to include prejudice against someone who identifies as bisexual.
Heterosexual/ straight	Refers to where a woman's romantic or physical attraction is to a man and vice versa.

Lesbian	Refers to a woman having a romantic or physical attraction to another woman; some women prefer the term gay.
Pansexual	Refers to someone whose sexuality and sexual attractions are neither defined nor limited by gender and sexual orientation.
Queer	Whilst some of the variations of the LGBT acronym prefer to use “queer”, this was historically an offensive term and should not be used. Recently, it has been used in the context of being “reclaimed” as a positive term in the gay/lesbian community and might be used in that sense.

Unrepresented parties

Contents

1. Overview

In contrast to tribunals, where unrepresented persons are often the norm, most parties are represented in courts. Given the divergence between the practice in courts and tribunals and that many parties in tribunals are unrepresented, this chapter is mainly aimed at dealing with party litigants in court.

2. Introduction

There is no general rule preventing natural persons representing themselves in tribunal or courts, in civil or criminal proceedings. A natural person may do so by choice, because of difficulties in obtaining legal aid or in obtaining a solicitor willing to act. Whatever the reason, "party litigants" (as they are generally referred to in Scotland) can face difficulties in presenting their case and do raise issues for the court.

Party litigants are unlikely to understand practical issues, including where to sit, when to sit or stand and how to address the court. They may not be able to express themselves orally or in writing or understand how to plead a relevant case. Many party litigants deal with examination of witnesses by making statements rather than asking questions. They are unlikely to understand the rules of evidence and may be surprised when told it is not good enough simply to say: "If you phone up Mr Smith, he will confirm what I have been saying".

Party litigants might not understand the need for expert evidence, or to have documentary and other productions lodged in court, copied to the opponent, and agreed or spoken to. They may not understand that a case may be dismissed as incompetent, irrelevant, or lacking in specification without a single word of evidence having been heard. Whilst some assistance on procedural issues can be given by clerks, that should not extend to legal advice.

Against that background, difficult questions arise as to the extent to which a party litigant should be guided by the judiciary or given dispensation for a failure to comply with the rules. The answer might depend on the judicial setting and the specific rules, the issue to be determined, the ability of the party appearing without representation to present their case, and the interests of their opponent.

3. Unrepresented parties in tribunal proceedings

In most tribunals, applicants and some respondents commonly represent themselves. Others have representation or support from lay representatives including welfare rights officers, family members, union representatives, the CAB or a university law clinic, depending on the tribunal and location.[304]

The Tribunals (Scotland) Act 2014 created a statutory framework for the First-tier Tribunals and an Upper Tribunal. There are six chambers of the First-tier Tribunal:

- the General Regulatory Chamber[305]
- the Health and Education Chamber[306]
- the Housing and Property Chamber[307]
- the Social Security Chamber[308]

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[304] As a general rule, tribunals tend not to have restricted rights of audience. In that respect, often there is no requirement for an application to allow a lay supporter or a lay representative, although, depending on the tribunal, there may be points when the tribunal will want to have clarity of when someone is speaking as a representative, and when someone is giving evidence.

[305] Currently hears appeals from decisions of the Office of the Charity Regulator and transport appeals (such as penalty charges, bus lane enforcement notices and low emission zone appeals). Most of its current work is transport appeals, often dealt with on the papers or by relatively short telephone hearings. It is likely to also acquire appeals in other areas, such as police and certain NHS appeals.

[306] Covering, particularly, appeals against what educational support is provided to a child under the Education (Additional Support for Learning) (Scotland) Act 2004 and disability discrimination in school education under the Equality Act 2010. The use of the term party litigant is avoided; the tribunal attempts to communicate in plain English wherever possible.

[307] Dealing with appeals regarding certain rent, repair and other housing matters, and also disputes regarding property factors; see "Who we are" (Housing and Property Chamber) accessed 5 February 2025.

[308] Dealing with certain benefit appeals; see "About Us" (Social Security Chamber) accessed 5 February 2025. Tribunal judges are referred to as convenors and use straight forward language wherever possible to encourage participation.

- the Tax Chamber[309]
- the Local Taxation Chamber[310]

In addition to the tribunals sitting within the structure created by the 2014 Act, the Mental Health Tribunal for Scotland, the Pensions Appeal Tribunal and the Lands Tribunal for Scotland hear a vast number of cases a year, administered by staff and clerks from SCTS.

Generally, tribunals use two approaches to encourage participation by unrepresented parties: the inquisitorial approach and the enabling approach.[311] Tribunal rules are generally drafted to enhance participation, particularly by unrepresented parties.[312] Such rules have an overriding objective. For example, the Housing and Property Chamber has an overriding objective to deal with proceedings "justly"[313] defined by several factors (including avoiding delay, seeking informality and flexibility, trying to achieve an equal footing and participation, and using the expertise of the tribunal).[314] Rules may require the tribunal to assist with the presentation of the case but without advocating the course parties should take.[315]

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[309] Hearing appeals on Lands and Buildings Transaction Tax and the Scottish Landfill Tax; see "About" (Tax Chamber) accessed 5 February 2025.
[310] Hearing appeals on various council tax, non-domestic rates and water charges; see "Local Taxation Chamber".
[311] See Edward Jacobs, "Tribunal Practice and Procedure" (4th edn, Legal Action Group, 2016), at paragraph 1.42, which explains that "the enabling approach is concerned with the attitude to the parties. The inquisitorial approach is concerned with the evidence and the issues. These approaches may require a greater degree of intervention by, and assistance from, the tribunal than is usual in the courts."
[312] By s 12 of the Tribunals (Scotland) Act 2014, the Lord President and the President of Tribunals must have regard to the need for proceedings before tribunals to be accessible and fair, and to be handled quickly and fairly. The Scottish Ministers must also have regard to such principles in respect of any regulations to be laid under the Act. The ethos means, for example, that all parties will tend to sit throughout the hearing rather than stand, the hearing room is less formal, and the judge will sit at the same level as the parties rather than on an elevated bench.
[313] The First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017, Rule 2. The MHTS has an overriding objective to handle cases "fairly, expeditiously and efficiently".
[314] Ibid, Rule 2.
[315] Ibid, Rule 2(2)(c).

Jacobs "Tribunal Practice and Procedure" contains a useful discussion as to how the role of tribunals differs from courts, and what concepts such as fairness mean in practice.[316]

4. Examples of good practice in tribunals

Given the diversity of practice within different tribunals, and the often well-established culture that each tribunal has in encouraging participation by unrepresented parties, the focus of this chapter is on unrepresented parties in court proceedings. However, it can be helpful for judges from other jurisdictions to understand common practice in tribunals.

Some examples include:

- The Mental Health Tribunal for Scotland is generally flexible on accommodating the preference of the patient in participating, which might be to speak themselves, to have their wishes and feelings articulated by someone else, to speak at the start or finish of the hearing, to leave during the evidence of another witness and so on.
- Case management – for example, in the Health and Education Chamber, there is a pre-hearing allowing for judicial case management.
- Utilising flexibility within the particular rules – in the Tax Chamber, where unrepresented parties frequently appear against Counsel, the order of presentation is sometimes reversed so that the unrepresented party is responding.
- Frequent breaks if required – in the Tax Chamber, consideration is given to having breaks every 90 minutes.
- In the Health and Education Chamber, there is awareness of the impact of noise and other sensory demands on young persons with additional support needs, and guidance is provided to tribunal members and witnesses to assist;
- In the Local Taxation Chamber, judges will tend to ask for technical valuation concepts to be explained in plain English.

[316] Edward Jacobs, "Tribunal Practice and Procedure", ibid, particularly chapters 1 and 3.

- In the Social Security Chamber, there is encouragement towards using open, neutral questions and the tribunal to show active listening throughout.

5. Party litigants in civil courts

Whilst this section is aimed at court proceedings, some parts may be relevant to tribunal judges.

Exceptions as to when natural individuals are not entitled to appear for themselves are set out in Macphail's Sheriff Court Practice (4th edn, W Green, 2022), at paragraph 4.139. As to whether children can represent themselves see Macphail paragraph 4.16 onwards and paragraph 4.139. Persons with a mental illness are also able to represent themselves, subject to having capacity to do so. See section on adults with incapacity within the chapter on physical and mental disabilities.

The ability of party litigants to present their case varies widely. Some have a degree of self-confidence and some knowledge of law and procedure. For many though, the prospect of appearing in court and presenting a case before a judge is daunting and frightening. It is more likely the party litigant will be confused, worried, nervous, and even scared. Often the substantive matter before the court concerns their home, family, or livelihood. They may have limitations with literacy or numeracy, or a disability, exacerbating difficulties. They are likely to suffer disadvantages compared with those represented by counsel or a solicitor. To allow for fairness, the judge needs to carefully consider the nature of those disadvantages and may need to take some steps to accommodate a party litigant, whilst maintaining a balance of fairness with the opponent's interests.[317]

So where does the balance lie? The following may assist:

[317] As noted, some rules of tribunals particularly require consideration of the position of an unrepresented party. In a court setting, Rule 1.4(2) of Schedule 1 of the Simple Procedure Rules states that: "The sheriff must ensure that parties who are not represented, or parties who do not have legal representation, are not unfairly disadvantaged."

- Beware of the temptation (at least in a court setting) to stray into offering legal advice.[318]
- Whilst you may make allowances for a party litigant, you should take care not to alter the balance of proceedings if those are otherwise in an adversarial setting.[319]
- When discussing procedural issues, care might be needed to avoid straying too much into the underlying substantive law. There is a balance to be struck which may depend on the case and forum (see for example: Rules 1.4(2) of the Simple Procedure Rule).
- The fact that a party is appearing for themselves can be taken account of when considering a failure to comply with a rule or order.[320] That means allowing some latitude, but such latitude must be balanced with any prejudice to the opponent.[321]
- The latitude allowed to a party litigant is unlikely to extend to allowing irrelevant submissions to be made, which would not be permitted by counsel or a solicitor. However, it may be necessary to allow a submission to be developed for a period before it can be judged to be irrelevant, given the party litigant may be nervous and unsure how to structure their submission.

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[318] The Inner House noted in *Wilson v North Lanarkshire Council and Board of Management of Motherwell College* [2014] CSIH 26, at paragraph 13: "It is not his function to give advice to a party as to how that party should present his case or what procedural steps he should seek to take." Note at paragraph 11, the Inner House limited the applicability of its words to this particular case, but judges may still find it helpful to consider parallels from the situation in *Wilson* to any particular issue arising before them.

[319] Ibid, at paragraph 6, the Inner House noted: "Although every latitude appears to have been given to Mr Wilson, litigation in our courts is adversarial and there are rules of procedure and evidence which apply to all parties."

[320] Ibid, at paragraph 13: "The fact that one party to a litigation is not legally represented does not absolve that party from the requirement to comply with the rules. Where the court has a discretion to excuse non-compliance with a rule, and where the failure is of a minor or peripheral nature or will result in little or no prejudice to the other party, it may be that the court will have regard to the lack of legal representation as a factor in the exercise of its discretion." For further consideration of the balance, see the English case of *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, at paragraph 18, where the UKSC said: "[t]he rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side…."

[321] *Royal Bank of Scotland PLC v Aslam* [2023] SAC (Civ) 20, at paragraph 15: "I recognise that more leeway will normally be afforded to a party litigant, but there is a limit to the leeway to be afforded."

- If required, make it clear that disrespectful or disruptive behaviour, whether to the court, witnesses, or the opponent's representatives, will not be permitted whether from a party representing themselves or a represented party.[322]
- Leaving the court room before the proceedings are concluded can be treated as a default and decree or orders granted in the party litigant's absent.[323]

6. General steps the court may wish to take

When a party litigant appears before you, it may be their first time in a court or tribunal room. Consider advising them of the following in simple and everyday language:

- Who the judge is, and how they should be addressed.
- Who the other persons in court are, and their respective functions.
- That the party litigant should stand when addressing the court or questioning a witness (using discretion where necessary, for example for disability or pregnancy).
- Explain parties have a full opportunity to present their case and not to interrupt when someone else is speaking. Often interruptions are due to the anxiety of wanting to get the story out rather than rudeness. Explain you will hear from each side in turn. Explain the importance of listening to the other side's submissions.

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[322] See Upper Tribunal decision, *Edinburgh Holiday & Party Lets Ltd v City of Edinburgh Council* [2023] UT 16, where the UT noted that a representative of a limited company had been abusive to the First Tier Tribunal. The hearing was adjourned and a further hearing assigned. The UT commented, at paragraph 34, that: "If a party chooses not to instruct a representative or cooperate with the tribunal, the FTS should resist behaviour that unnecessarily prolongs proceedings. If a representative is abusive, then the FTS should consider proceeding to make a decision without the benefit of hearing from that party". The specific rules for the forum may allow the decision maker to prevent a particular representative appearing.

[323] See *Royal Bank of Scotland PLC v Aslam* [2023] SAC (Civ) 20 ibid, at paragraph 14. The party litigant claimed to have left the court as he was overwhelmed. The Sheriff Appeal Court noted: "A party cannot simply choose to exit the proceedings because of dissatisfaction at the way matters are developing. His leaving was against a backdrop of his attempting to lodge adjustments, of a failure to provide hard copies of documents and recent previous attempts to discharge or adjourn proceedings. All of that was relevant context for the sheriff to assess the nature, extent and timing of Mr Aslam's behaviour. The sheriff was entitled to consider that there had been a default."

- Suggest notes are taken whilst the other side is addressing the court. Consider asking a court officer/clerk to offer a pen and paper, if the party litigant is unprepared.
- A brief explanation of what the purpose and focus of the hearing is, which may include its potential outcomes. Not everything needs to be explained but, for example, a party litigant will not understand the nature of a call over in a busy court. A few words of explanation might help to focus matters, for example, "I only want to know at this stage if xxx is still opposed/in dispute, and if it is, then I will hear arguments later this morning".
- Some solicitors, when appearing against a party litigant, are attuned to providing a summary of the issues and/or the case's history. The court may need to use its discretion, given that hearing firstly from the solicitor may give the wrong impression of bias against the party litigant, particularly if the party litigant is the pursuer, or it is their motion calling.
- Think about whether you can structure the hearing into discrete issues, and deal (and perhaps also rule) on each matter in turn.
- If a party litigant is giving evidence, consider allowing them to have a bullet point list of topics or chapters they wish to cover in their evidence, so long as it has been checked in advance and everyone has a copy.
- Ensure your decision is clearly communicated, whether the action is disposed of, or continued to a further hearing. If a proof or evidential hearing is assigned, consider what case management directions could be given to aid the running of that hearing. If a party litigant has no experience of a proof in court, it may be worth pointing out that most courts can be observed daily.
- Following proof, it can be helpful to focus a hearing on submissions by giving a suggested list of chapter headings relative to the disputed evidence, without prejudice to parties raising other matters.
- Prior to submissions, it might be helpful for the judge to enquire if parties are agreed on the applicable law that applies and its interpretation, particularly if the law is relatively straightforward.
- Allow a party litigant a short time to consider a new production, authority or information presented during a hearing. If authorities or productions are produced but not intimated in advance (such as at an interim hearing), the court may need to allow a party litigant time to absorb the document. That

may not mean the case being adjourned to another day; sometimes recalling the case later in the day is sufficient.

- If a party litigant is accompanied by a friend or colleague (even if not acting as lay representative or lay supporter), it might be appropriate to allow the party litigant a short opportunity to discuss the matter in private before responding to the court.
- If a case is being continued, consider whether a longer period is necessary than might be the case if it was solely agents or counsel involved. Although time limits should apply to both parties equally, in some circumstances, agents or counsel might have no objection to lodging, for example written submissions earlier than the party litigant, with the represented party being given time to respond to the party litigant's submissions at an oral hearing. That may assist in focusing matters.
- Party litigants are often confused when counsel or solicitors refer to authorities. They may not understand the relevance of what happened in someone else's case (as they may see it). Consider explaining in simple language the significance of decided cases as setting out the way in which a particular point of law should be interpreted or applied.
- A judge might wish to consider tape recording proceedings involving a party litigant which would not normally be tape recorded.

7. Settlement of the action and mediation

It should be remembered, particularly where there are party litigants on both sides, parties may not be aware that they can discuss settlement without compromising their ability to proceed with the action if settlement is not achieved. It can sometimes be helpful for the judge to focus parties on the potential for settlement. Judges will have their own form of words, but it can be useful to remind parties to factor in the amount of the claim, any offer/concession already made and, therefore, the amount now in dispute, and some reminder as to the likely amount of court time to hear the case in full. It can be useful to set this out and then allow a limited time for discussions.

Whilst mediation is not just suitable for cases involving party litigants, it might be helpful for judges to know that there are free mediation services in Scotland, some of

which operate remotely. The University of Strathclyde mediation clinic offers a free mediation service online and in person in most cases (other than family law and education cases involving additional support needs).[324] There are also mediation services offered by the University of Dundee, the University of St Andrews, and Robert Gordon University. Lothian and Borders is covered by the Edinburgh Sheriff Court Mediation Service.

8. Family cases

Family cases can often present particular difficulties for party litigants. Whilst there is increasing judicial case management, it is still an adversarial process in an emotive area of law. Matters that might assist include:

- As with any appropriate case, consider the appointment of a curator *ad litem* to the child. Where there is a party litigant on one or both sides, the court might need to consider the appointment of a curator to ensure it has the relevant information to make an informed decision in the child's best interests.
- Encouragement of a party litigant to use a lay supporter: Shared Parenting Scotland have a link service to match party litigants with a register of volunteers willing to act as such.[325]
- Shared Parenting Scotland have information available online, including guidance on pleadings.[326]

9. Civil telephone/video hearings

Dealing with a party litigant by telephone or video raises additional challenges. It is more difficult to read body language as to whether someone is following the proceedings, there can be accidental talking over one another or confusion over

[324] See "Law School Mediation Clinic" (University of Strathclyde) accessed 5 February 2025. It is understood the clinic is now offering "on the spot" mediation in some courts.
[325] See Court and Law (Shared Parenting Scotland), under heading, "Should I represent myself in court" accessed 5 February 2025.
[326] See "Representing Yourself in a Scottish Family Court" (Shared Parenting Scotland, 2025) accessed 23 April 2025.

which production is being referred to. All of these issues can affect fairness or perceptions of fairness, but are also likely to impact on the efficiency of the hearing.[327] If a party litigant does not have access to a laptop or desktop, additional problems can arise when using a mobile phone to join a virtual hearing.[328] There is also the risk of poor internet connections, causing parties to miss crucial words or parts of hearings. There can also be challenges around digital literacy and communicating verbally and non-verbally.[329] There is a potential for remote hearings to offer easier, more effective participation for certain groups of vulnerable court users (such as children and young people with additional needs, or parties who have experienced domestic abuse).[330]

Whilst court rules provide the default mechanism for procedural hearings is by virtual means,[331] that presumption does not apply if a party is unrepresented or there is an interpreter.[332] The court rules for both Court of Session and sheriff court allow a flexibility,[333] including a hybrid approach.[334]

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[327] See paragraph 85 of the Scottish Civil Justice Council's "Analysis of Responses to the Mode of Attendance consultation" (2022) accessed 5 February 2025.
[328] Ibid, paragraph 85 notes that the size of the screen means that shared documents are likely to be unreadable and it is also difficult to see others on screen.
[329] See findings of the Scottish Government: "Civil justice system - pandemic response: research findings" (Scottish Government, 3 August 2023) accessed 5 February 2025.
[330] Ibid.
[331] RCS 12C.2 and OCR 4A.2(1).
[332] RCS 12C.2(2) and OCR 4A.2(2).
[333] RCS 12C.3 and OCR 4A.3. Both sets of rules require the parties to be given an opportunity to make representations on the mode of hearing.
[334] RCS 12C.4 and OCR 4A.4. A consultation on the mode of attendance at civil court hearings was carried out by Scottish Civil Justice Council between 6 September and 15 November 2021. The consultation attracted a large number of responses from regular users of the civil justice system, including legal professionals, but acknowledged there may be a potential for bias given the lower rate of responses from the general public without a professional interest in the justice system. See also the "Civil justice system - pandemic response: research findings" ibid. That study researched the views of professionals (lawyers, clerks, judges, tribunal members) and parties on online procedural and substantive hearings in different types of civil action. It explored the advantages and disadvantages of remote hearings, technology issues and supporting court users as well as issues relating to formality, the rule of law and open justice. The study found that on many of the issues discussed, experiences differed – sometimes significantly, resulting in multiple perspectives with no clear consensus. The perceived advantages and disadvantages of remote hearings vary within different contexts and for different participants.

For party litigants, it would be important to understand the litigant's view, and whether any barriers would be presented by the court convening remotely.[335]

10. Language

With a party litigant, consider how best to:

- Comprehensively identify the issues early in the hearing, and seek agreement that those are the issues for that hearing.
- Speak in plain language.
- Define any technical or legal terms that must be used.
- Clearly explain your decision in a straightforward way. That does not need to extend to an explanation of the implications of that decision for the party litigant, given that such comments may stray into the judge giving legal advice.

11. Consider individual needs

As a judge must make reasonable adjustments under the Equality Act 2010, they will be concerned with any vulnerabilities or barriers to effective participation of a party (or witness). Without legal representation to explain what adjustments or other measures are required, the judge may have to probe to understand the issue.

Remember many disabilities or vulnerabilities cannot be seen. Take time to understand what the nature of the issue is said to be. Reference is made to the chapters on vulnerable persons and on physical and mental disabilities.

[335] There is a "User Guide to Webex" for sheriff court hearings on the SCTS website, and a number of guides for the sheriff court available: "Attending a virtual court" (SCTS), both accessed 5 February 2025.

12. Interpreters

A party litigant may need the services of an interpreter if they have little, or an imperfect, understanding of English. If in any doubt, it is suggested that it is best to err on the side of having an interpreter.

If an interpreter is used, their services should include translation of the hearing itself and any documents or productions. The general rule in civil courts is that the solicitor for the party requiring the interpreter would arrange for one (although that is not always the case – for example in referral proceedings). SCTS has contracts for interpreting, which includes both accused persons and civil party litigants, and thus no issue of funding should arise in these circumstances (see paragraph 1.1 of Interpreting Translation and Transcription).

Tribunals will generally provide an interpreter to any party who needs it.

Best practice for the use of an interpreter is found in the chapter on race.

13. Curators in court proceedings

If there is an issue as to a person's capacity in civil court proceedings, the rules on curators *ad litem* apply to party litigants as to any other litigant. It might be that if the opponent is represented, the court will be told of concerns. However, whether or not the opponent draws the court's attention to it, or if both parties are unrepresented, the judge needs to be alert to the issue of capacity. Ultimately (other than for defenders in family actions in the sheriff court), the test in a court setting is likely to be whether in the circumstances of the case, justice demands a curator to be appointed.[336]

In a family action in the sheriff court, the court must appoint a curator to a defender (see adults with incapacity section) with a mental disorder and order that curator to

[336] See Macphail, ibid, from paragraph 4.29. Helpful guidance on the duties of a curator and on expenses are given in paragraphs 4.30 to 4.33. See chapter 61 of RCS for appointment of a curator bonis.

obtain a report to address the issue of capacity.[337] The test remains the same whether or not the unrepresented party wishes to instruct a solicitor – the concern is whether the party can meaningfully instruct a solicitor, having understood the issues arising for such instructions and the implications of such instructions.

14. Evidential hearings and proofs

Sometimes unrepresented parties can adequately represent themselves at procedural hearings but struggle with evidential hearings, depending on the nature and formality of the evidential hearing. In a court context, it is generally wise to provide some explanation on the significance of a proof hearing and the preparation required in advance, with a clear order recorded in the interlocutor.

Matters that it might be helpful to raise include:

- The need to lodge and intimate productions and lists of witnesses within the timescales set out in the rules or the judge's order.
- Whether a shorthand writer is to be booked or how the recording of evidence is to be dealt with (if applicable).
- Whether productions can be agreed or if witnesses need to speak to productions, although care must be taken to avoid any appearance of giving advice as to which witnesses a party should cite. An enquiry as to whether productions can be agreed may be sufficient to open the matter for discussion.
- That witnesses generally need to attend court, and it is not usually sufficient to lodge a written statement only, unless the evidence is agreed.[338]

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[337] Although see *S v M* 2024 SLT (SAC) 1, where a sheriff refused to appoint a curator, having had sight of a pre-existing report that addressed the issue of capacity. The Sheriff Appeal Court took the position that OCR 33.16 was purposive, and accordingly the sheriff had not erred in relying on the recent medical report to refuse the motion.

[338] Note that the practice in tribunals can sometimes differ in that witness statements are often accepted. The position on affidavits is more complicated; see *Ferguson v Gregors and others* [2023] SAC (Civ) 24, *Accountant in Bankruptcy v Sieroslawski* 2024 SLT (SAC) 202 and Macphail, ibid, at paragraph 15.43. The position in children's hearings referrals may also differ; for example, see Sheriffdom of Lothian and Borders, Practice Note No 2, 2018, at paragraph 6.4 regarding hearsay statements in the absence of a witness.

- The need to prepare questions or lines of questioning for examination in chief and cross. Suggesting observing a proof court may be helpful.
- During proof, allowing the party litigant additional time to formulate their next question (that is taking the pace of the proceedings more slowly).

During a proof, it might be appropriate and helpful to the management of court time to offer party litigants some assistance in the presentation of their case, subject to any specific court rules (for example, simple procedure rules). Sometimes it is best not to interrupt a party litigant, as that might make them more nervous and insecure. However, it is sometimes helpful and necessary to gently interrupt to clarify a question or a submission. It can also be necessary where a party litigant is not approaching the questioning of a witness by formulating a clear question and waiting for an answer to that question. There might be circumstances in which it is both fair and required for a judge to ask some questions of witnesses to elicit or clarify evidence on a particular point, particularly where a witness is confused by questions. However, a judge should always intervene to control or stop inappropriately aggressive or offensive questioning of a witness.

What if a party litigant has failed to express a relevant case in the pleadings but there is some information before the court that suggests there may be a stateable case? Other than in simple procedure, there are no specific rules in a court setting to guide to what extent a judge should intervene where a party is unrepresented.[339] Does a judge have a duty, or are they even entitled, to assist the party litigant to develop and to express his or her case? Again, it may be a matter of fact and degree depending on the circumstances but, as always, bearing in mind the need to be fair to the other party. If a judge intends to do so, it must be clear that both sides have a proper opportunity to address the court on the correct test. That means it is vital to raise the issue in open court, and guard against any possibility of deciding on a point of which the other side has had no notice.[340]

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[339] Rule 1.4(2) of the simple rules states: "The sheriff must ensure that parties who are not represented, or parties who do not have legal representation, are not unfairly disadvantaged."

[340] See *Kay's Tutor v Ayrshire and Arran Health Board* 1986 SLT 435, at page 440F: "It is one thing for a judge to lend his assistance to a party litigant to present his case in evidence. That is entirely proper. It is quite another thing and wholly improper for a judge to neglect the principle of doing justice between the parties and of fairness to both parties by going further and giving a decision in favour of

If a party litigant has a case which appears to be plainly irrelevant, it is not thought there is a duty on a judge to offer suggestions as to how it might be made relevant. That is the outcome of an adversarial system of litigation; and there is no reason why a party litigant should be given advantages not available to a litigant who is professionally represented.

15. Affidavits

Often affidavits are lodged to form the entirety or bulk of a witness' evidence in chief in a court setting.[341] Such use of affidavits often helps to focus preparation some weeks in advance. That might seem attractive in that it means a party litigant has more time to prepare cross-examination for the other party's witnesses. However, such an order can present additional barriers for a party litigant.

Whilst it might be theoretically possible for a party litigant to employ a solicitor to notarise an affidavit for a fee, solicitors are likely to be cautious in accepting instructions. It is likely to draw the solicitor into discussions on the scope of the evidence to be covered. The solicitor will have no or little knowledge of the issues in dispute in the case. There might be a concern about the accuracy of an affidavit and who would prepare the draft. Ordering affidavits from a represented party, but not the party litigant or their witnesses can raise concerns as to equal treatment.

Affidavits are not always required by tribunals, who will often accept witness statements.

16. Court rules and party litigants

Party litigants are in a different position in terms of court rules. Both the Court of Session rules and Sheriff Court rules restrict or alter the position on matters such as borrowing productions and citation of witnesses.

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one party upon a ground of his own devising which has not been the subject of consideration and exploration at the proof, and of which the opposing party has had no notice whatever."

[341] In relation to the use of affidavits, see footnote 338 and Macphail, ibid, at paragraph 15.43 "Sheriff Court Practice" in relation to affidavit evidence and some of the issues that may arise.

17. Where there are allegations of abuse against the party litigant

In civil cases, if one or both sides are unrepresented and there are allegations of domestic or sexual abuse, the judge will have to consider carefully how to manage the case. The norms (and court rules) may have to be considered to avoid a complainer from coming into direct contact with an alleged abuser. For example, steps such as ordering parties to lodge a joint minute of admissions, or ordering to both attend a hearing in a busy court are likely to be problematic. Further, if a case proceeds to an evidential hearing, cross-examination by a party litigant of a vulnerable witness is likely to raise issues in general civil cases and in family cases, in the absence of the provisions of the Children (Scotland) Act 2020 applying (or not yet applying).[342]

In civil courts, by virtue of section 11 of the Vulnerable Witnesses (Scotland) Act 2004, a person is deemed to be a vulnerable witness in civil proceedings if they are either under the age of 18 (and, therefore, a child witness[343]), or there is a significant risk of the quality of a person's evidence being diminished by reason of a mental disorder, or fear or distress in connection with giving evidence in the proceedings. Section 11(2) sets out a range of circumstances to determine if someone is a vulnerable witness.

Civil proceedings are given a wide definition, to include ordinary actions and most children's referral matters calling in court (section 11(5)). It equally applies where the party is a vulnerable witness. That includes party litigants (section 16). Where a child is to be cited, the court must make an order considering whether any special measures are required.

In terms of section 18 of the 2004 Act, special measures can include taking evidence by a commissioner. That can include the judge appointing themselves as a

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[342] Criminal proceedings are dealt with separately here. Once the provisions of the Children (Scotland) Act 2020 are in force, for proceedings covered under the Act, a solicitor will be appointed to a party litigant for the taking of evidence where there is a vulnerable witness within the meaning of the Act. The commencement date for the Act is, at the time of writing, unknown.

[343] By the Vulnerable Witnesses (Scotland) Act 2004, s 11(1)(a).

commissioner.[344] Note that to avoid the alleged abuser directly questioning the vulnerable witness, any commission would need to proceed with interrogatories.[345] Where interrogatories are ordered, the court may wish to consider the witness' evidence in chief being given by way of an affidavit, available in good time to then allow the party litigant to draft questions, and to give time for those questions to be reviewed. The court may also wish to allow a procedure for additional questions to be submitted (depending on the answers to questions already allowed), perhaps during a break. Provision needs to be made to ensure the party litigant sees and hears all the evidence. Any commission must take account of other special measures allowed, such as a live link or screens.

Another option to consider is the appointment of a curator to the alleged abuser to carry out the cross-examination of a witness or witnesses. That may be problematic if there are issues of funding.

That still leaves difficult questions as to case management. Judges may need to consider how and when cases will call. Reference is made to the sections on trauma, on domestic abuse and on sexual allegations, and more generally on vulnerable witnesses.

18. The judgment or decision

Where a judgment or decision is given at the end of a hearing, care should be taken to express it in simple everyday language. If it is necessary to use technical legal terms, the meaning of them should be explained to the party litigant. If the decision requires the party litigant to do something (for example, to find caution for future expenses) that should be made clear. Depending on the forum and decision, the judge may also warn of the likely consequences of failure to comply.

In many tribunals, a written decision is given as a matter of course. If the decision is taken to *avizandum* in a court setting, the judge should explain what that means

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[344] For an example of a proof in the sheriff court where the sheriff appointed himself as commissioner, see *GM v MB* 2016 SLT (Sh Ct) 279.

[345] Interrogatories, that is the drafting of questions in advance of the commission, is considered in Macphail ibid, at paragraphs 15.31 and 15.32. For general guidance on the procedure for a commission in a civil action in the sheriff court, see Macphail ibid, from paragraph 15.18.

(perhaps that a written judgment will be issued at a later stage containing the decision and reasons).

In court, when a judge is delivering an *ex tempore* decision, it is important to speak at a speed that the party litigant can follow. It is usually helpful to attach a copy of the *ex tempore* decision to the interlocutor, and explain that will be available and that parties do not need to note every word.

19. Sources of help and guidance for a party litigant

Legal aid

Legal aid is still available in most areas of law in Scotland, although there are anecdotal reports of solicitors being reluctant to take such work in some legal and geographic areas.[346]

It is useful to understand the basics of the scheme of legal aid, as sometimes party litigants think that simply because, for example they are working they will not qualify. The Scottish Legal Aid Board (SLAB) has information on its website that party litigants can be directed to.[347]

There are three types of legal aid that might cover appearances before a civil court or tribunal:

Civil legal aid covers a wide range of courts and tribunals, including the Scottish Land Court, Lands Valuation Appeal Court, the Upper Tribunal for Scotland and the

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[346] See, for example, "Decline in civil legal aid a 'disaster' for islands" (Scottish Legal News, 2022) accessed 5 February 2025. It also appears it may be that fewer solicitors are willing to accept instructions in financial divorce cases funded by legal aid.

[347] The Scottish Legal Aid Board advise that their website has eligibility calculators to help people find out whether they would be eligible for the different types of legal aid available. If someone is unable to use the internet and they have questions on eligibility they can call the Financial Assessment Unit on 0131 560 2164. The website also has a "find a solicitor" tool which members of the public can use to help them find a solicitor. If further help is needed, SLAB advise the individual can call their Access Team on 0131 560 2132 and staff will provide the names and contact details of solicitor firms for them to contact. Of course, that does not guarantee the solicitor will have the capacity to accept instructions.

Employment Appeal Tribunal. Civil legal aid is, in theory, available for most civil proceedings except those exempt under the Legal Aid (Scotland) Act 1986.[348] In practice, the most common types of proceedings which are excluded are simplified divorce applications, petitions for the petitioner's sequestration, simple procedure actions for less than £3,000 and proceedings under the Debtors (Scotland) Act 1987 (although applications for time to pay directions are within the scope of legal aid).

Before an application can be granted, SLAB will assess whether the proceedings have probable cause, and it is reasonable that legal aid is granted.

The financial limits for legal aid are based on a calculation of disposal income, that is, after deduction of certain outgoings, such as mortgage payments, rent, aliment and others. The limits are changed year on year.[349] For capital, there is no upper limit on what a person can hold before being ineligible, but where a person holds capital above a certain limit, legal aid can be refused if SLAB considers the person can afford to proceed without the benefit of legal aid. That will depend on the nature of the proceedings, and to some degree the risk of expenses against that person.[350]

Legal aid is available to sole traders or individual partners in a partnership with a discrete claim or liability, but not to companies or the entity of a partnership.

The existence of a legal aid certificate provides a potential basis for an application to restrict any award of expenses against that individual.[351]

Advice and Assistance by Way of Representation ("ABWOR") covers appearances before many tribunals, including the Mental Health Tribunal for Scotland, certain Upper Tribunal cases involving reserved matters, a number of First Tier Tribunals both reserved and devolved such as the Immigration and Asylum Chamber and the Health and Education Chamber. It also covers certain contempt of court appearances.

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[348] See Legal Aid (Scotland) Act 1986, s 13(2) and, in particular, sch 2 to the 1986 Act which sets out the types of cases for which legal aid is not available. Civil legal aid is also available for many tribunals in Scotland, for example, much of the jurisdiction of the First-tier Tribunal for Scotland (Housing and Property Chamber) (see sch 2, paragraph 2A of the 1986 Act).
[349] Section 15 of the Legal Aid (Scotland) Act 1986 sets this as £26,239.
[350] Section 15, ibid, currently £13,017.
[351] See Legal Aid (Scotland) Act 1986, s 18(2) and Macphail, ibid, at paragraph 19.13.

The financial eligibility criteria for "Advice and Assistance" are more straightforward than for civil legal aid, assessed faster, without the same enquiries by SLAB.[352] The eligibility limits don't apply for certain proceedings, the most common being the Mental Health Tribunal for Scotland, custody appearances under section 17 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and section 5 of the Protection from Abuse (Scotland) Act 2001.

Children's legal aid covers matters under the Children (Scotland) Act 2011. It is available for adults and for children covering the range of hearings heard in the sheriff court.[353]

Law centres and other bodies

It is useful to have up to date knowledge of the sources of advice or representation in your area.

Law centres are generally funded by a mix of legal aid income and grant income, usually working in specific geographical areas or particular areas of law. A list of law centres is provided, but judges should be aware the list may quickly become out of date.

SLAB grants funds to voluntary organisations which provide representation. A list of organisations which are currently funded is on the SLAB website.[354] In addition, the Civil Legal Assistance Office offers direct advice and representation.

There are almost 60 Citizens Advice offices in Scotland. Most are staffed by volunteers and few offer representation in court. A list is available at Citizens Advice Scotland, and a national helpline offers the same service by phone. Information on debt and many consumer issues is available on their website.

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[352] SLAB advise that a solicitor can only provide advice and assistance if they have satisfied themselves that the client is eligible. The client is considered financially eligible if their disposable income and capital (and that of their spouse or partner) is within the limits set by the regulations. The limit for weekly disposable income is £245 maximum, with certain benefits being disregarded and, for capital, the limit is £1716, again with some deductions that can be made. Details are found within the SLAB "Keycard" (2024)

[353] For children's legal aid, see from SLAB: the children's eligibility estimator tool and the children's keycard here.

[354] See "Grant funding programmes" (SLAB).

Money Advice Scotland does not offer direct advice but has information on its website including a benefits calculator.

Consumer Advice Scotland offers advice on trading and consumer disputes, via information on its website, a live chat and a helpline. It does not offer representation.

Many universities now have law clinics, where advice and representation are offered by law students.

Written guidance

There is information available on the SCTS website under the menu tab "Taking Action".

Lay representative

In a court setting, a lay representative assumes the position of a solicitor or counsel in terms of directly presenting the case to the court. To be appointed, a written form must be lodged.[355] The test is whether it is in the interests of justice for the application to be granted.[356] It is a condition of appointment that no payment is made, directly or indirectly, to the lay representative. Directors of companies or LLPs can be allowed to represent their corporate entity via this route, and it is likely that partners can also represent the partnership as a lay representative in a similar way.[357] Questions might arise as to whether it is in the interests of justice for such an application to be granted if there is a conflict between the interests of the director and the legal entity, or between individual directors/partners of the business.

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[355] See ch 12B of the Rules of Court of Session and OCR 1A.2. In the sheriff court, an application can be made orally at a hearing, but must be accompanied by Form 1A.2. In the Court of Session, the motion and form (RCS 12B.2) should be lodged prior to the hearing at which it is proposed the lay representative is to appear, but if there are exceptional reasons why it could not have been lodged previously, it can be considered on the day of the hearing (RCS 12B.2 (3)). For simple procedure rules, see rule 2.4 of the Act of Sederunt (Simple Procedure) 2016. A lay representation form must be completed to allow a lay representative to appear in simple procedure.

[356] RCS 12B.2 (4) and in the sheriff court, OCR 1A.2 (3). See *Ahmed v Ahmed* [2024] CSIH 25 and *Aslam v Glasgow City Council* [2016] CSIH 78 regarding the appointment of former solicitors to the role.

[357] Note that there are limits to the hearings at which an organisation (not solely companies) can be represented in solemn matters by an officer bearer in criminal prosecutions ss 70(4) and (5) of the Criminal Procedure (Scotland) Act 1995.

If lay representation is permitted the court generally hears from the lay representative, unless there are circumstances where a judge might speak directly to the party (for example, a child welfare hearing).

In tribunals, lay representatives often appear with appellants and can be extremely knowledgeable and skilled in their own specialist area.[358]

Lay supporter

Party litigants may be unaware that they can apply to have a lay support person assist them in their case.[359] A lay supporter's role includes taking notes, helping order and arrange papers and quietly advising the litigant. Lay supporters may not receive remuneration for their work or address the court on the litigant's behalf.

Expenses and party litigants

Where a party litigant is successful in the course of litigation, an award of expenses can be made in their favour in the same way as if there had been legal representation.[360] A sheriff makes an award in the usual way, but at taxation the relevant rules set out what a party litigant can seek (often a maximum of two thirds of the sum which would be allowable to a solicitor under the appropriate table of fees[361]).

A party litigant with a decree may not realise that they are entitled to make a formal motion for expenses. It might be appropriate for the judge to ask if an award is sought.

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[358] For example, in social security appeals.

[359] Ordinary Cause Rule 1.3A, Summary Cause Rule 2.2, Summary Applications Rule 2.2A, Court of Session Rules Chapter 12A. In simple procedure rules, the term used is a courtroom supporter; see rule 2.5 of the Act of Sederunt (Simple Procedure) 2016. The English term McKenzie friend is sometimes used (*McKenzie v McKenzie* [1970] 3 WLR 472).

[360] But not to a practicing solicitor who has appeared on their own behalf or on behalf of their firm; see section on solicitors firms).

[361] In such a case, any such award of expenses will be governed by the provisions of the Litigants in Person (Costs and Expenses) Act 1975, extended to the Sheriff Appeal Court by The Litigants in Person (Costs and Expenses) (Sheriff Appeal Court) Order 2015 (SSI 2015/398) and see Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 (SSI 2019/75) amended by Act of Sederunt (Expenses of Party Litigants) 1983 (SI 1983/1438). Simple procedure rules are different – see the Civil Bench Book (Judicial Hub).

Solicitors firms

Where a practicing solicitor is representing their firm they are not acting as a party litigant, at least for the purposes of expenses (*Macbeth Currie & Co v Matthew* 1985 SLT (Sh Ct) 44).

Appeals

Whilst it is not suggested that a party litigant needs to be told of their right to appeal and the time limits that might apply (given that would cross into providing legal advice), it is understood sheriff clerks will usually provide basic information on appeals, where necessary.

This contrasts with many tribunals, where rules often require the right of appeal to be explained.

20. Unrepresented accused in criminal cases

Introduction

It is less common for persons to represent themselves in criminal cases although it does occur, particularly in JP courts. Legal Aid might not be available to that individual, [362] solicitors might withdraw or, for whatever reason, an accused person has decided to represent themselves. [363]

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[362] The financial test for legal aid, for both solemn and summary proceedings, is whether SLAB are satisfied that the individual cannot meet the expenses of the case without undue hardship to the person or their dependants (s 23A of the Legal Aid (Scotland) Act 1986 for solemn and s 24(1) for summary proceedings). There is also an interests of justice test in summary proceedings only (s 24(1)(b)). Legal aid is available automatically for identification parades (s 22(1)(a), in solemn and summary proceedings whilst remanded pending the application being determined by SLAB (s 22(1)(b) for solemn and s 22(1)(d) for summary so long as the plea is one of not guilty). Legal aid is also automatically available in initial proceedings commenced by an undertaking appearance (s 22(1)(c), in relation to accused who are unfit to appear (s 22(1)(da) and for an examination of facts (s 22(1)(db).

[363] Note that there are limits to the hearings at which an organisation can be represented in solemn matters by an officer bearer in criminal prosecutions; see ss 70(4) and (5) of the Criminal Procedure (Scotland) Act 1995.

Accused persons cannot represent themselves where charged with a sexual or domestic abuse offence, and the court can prevent it where there is a vulnerable witness, for further information, see chapter on vulnerable persons.

Legal aid can be granted by the court where the court is considering imprisonment or detention for someone who has not been sentenced to a period of custody before.[364]

If a solicitor withdraws from acting, usually a brief adjournment might be allowed to enable the accused to secure new representation, but it is not unknown for an accused person to "hire and fire" a succession of representatives. Given the impacts on witnesses and others, there will come a point when the interests of the Crown and the public require a trial to proceed with an accused being unrepresented.[365]

Whatever the reasons for an accused appearing themselves, the court has an obligation to consider what steps can be taken to ensure a fair trial, in terms of both common law and article 6(3)(c) of the ECHR.

Prohibition on accused representing themselves

It should be remembered that an accused cannot represent themselves in all cases. An accused is not allowed to do so in cases involving an allegation of domestic or sexual abuse, or in certain cases (for example murder, culpable homicide, assault, abduction), or where there is a child witness under 12 or where the court considers it is in the interests of a vulnerable witness for the accused to be represented.[366] The court must appoint a solicitor where the accused has not engaged one, has dismissed a solicitor, or the solicitor has withdrawn, unless the accused intends to engage another solicitor.

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[364] Legal Aid (Scotland) Act 1986, s 23(1)(b). The court must apply an undue hardship test as to whether the accused could otherwise meet the expenses of the case.
[365] For discussion on what constitutes sufficient opportunity, see *Venters v HMA* 1999 SLT 1345 (conviction quashed as trial judge failed to give accused sufficient opportunity to replace withdrawing counsel).
[366] Criminal Procedure (Scotland) Act 1995, regarding: domestic cases s 288DC; sexual cases s 288C; child witnesses under 12 s 288E; and vulnerable witnesses s 288F. Note the test regarding a vulnerable witness in s 288F(3).

A solicitor appointed by the court may not be dismissed by the accused, and is not obliged to comply with an instruction to dismiss counsel.[367] Provision is made where solicitors do not receive instructions, or receive irrational instructions.[368] The court has power to appoint an alternative solicitor, if satisfied the solicitor can no longer act, or if it is in the best interests of the accused to appoint an alternative solicitor.[369]

Some courts have a list of solicitors willing to act to accept appointments, where solicitors are appointed on a rota basis. It is understood that in some courts local faculties are currently unwilling to accept instructions for certain cases as part of a protest in relation to legal aid rates. If so, the Public Defence Solicitors' Office (PDSO) may be able to act.

Intermediate diet in case of unrepresented accused

The court can direct that intermediate diets involving unrepresented accused will call in court.[370] It is suggested that the court should direct the physical attendance of an unrepresented accused, given it may be the only opportunity prior to the trial to raise preparation with both sides.

The court will wish to ensure the accused is prepared for trial. Consider the following:

- Do they still have a copy of the complaint.
- Have they had sight of the disclosure and productions.
- Have arrangements been made for any defence witnesses to attend.
- Does the accused understand the implications of a decision to represent themselves? Do they understand the nature of cross-examination?

It is worth reminding the accused that trial courts can be observed – this may help to give a sense to an accused as to what is involved.

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[367] Criminal Procedure (Scotland) Act 1995, s 288D. This section applies to each of the categories of where a solicitor is appointed by the court.
[368] Where a solicitor can receive instructions, they must act on those instructions, but if they do not receive instructions, or receive inadequate or perverse instructions, they must act in the best interests of the accused, s 288D(4), ibid.
[369] Criminal Procedure (Scotland) Act 1995 s 288D(6), ibid.
[370] See Criminal Courts Criminal Courts Practice Note No 3 of 2022 "Summary Criminal Business in the sheriff courts: further provision regarding Intermediate Diets etc." at paragraphs 21 and 22.

CCTV may cause a particular issue. At an intermediate diet, the court should always be addressed on whether CCTV or phone footage is to be led by the Crown, but where the accused is unrepresented, the Crown should be able to explain that the accused has either viewed the CCTV or there is an arrangement in place.

There is no obligation on an unrepresented accused to agree evidence as applies to a represented accused in terms of section 257 of the 1995 Act,[371] although it is competent for an unrepresented accused to enter into a joint minute of admission.[372]

Unrepresented accused appearing from custody

Many sheriffs and JPs will be faced with unrepresented accused in courts sitting over bank holiday weekends. Some local faculties or solicitors are not presently attending as part of a boycott of certain types of work due to the level of payments involved (and perhaps also due to concerns over a work/life balance). SLAB advises that, prior to holiday custody courts, contact is made with the local solicitor due to be on duty to see if they intend to provide cover at those courts. For courts where no duty solicitors will be attending, the PDSO is asked by SLAB to provide cover.

It is understood that, at the time of writing, the duty solicitor from private firms will not appear in bank holiday courts in Dumbarton, Dumfries and Glasgow Sheriff Courts. In Edinburgh it is understood that some firms will appear.

When faced with an unrepresented accused appearing from custody, it may be helpful to consider the following:

- Ensure the clerk has checked the accused has been served with a copy of the complaint in good time before the accused is brought up.
- Remember that the accused may have literacy problems – does the complaint need to be read to them?
- Explain that the accused should stand whilst you are speaking to them.

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[371] Criminal Procedure (Scotland) Act 1995, s 257(2). It also applies where one accused in a multi-accused trial is unrepresented. See also paragraph 24-09.1 of Renton and Brown (Criminal Procedure, 6th edn). The provisions of s 258 (provisions re uncontroversial evidence) are not excluded by an accused being unrepresented.

[372] In terms of s 256(2) of the Criminal Procedure (Scotland) Act 1995, a joint minute can be signed by an accused if not legally represented. However, it is understood that Crown Office policy does not encourage the entering into a joint minute with an unrepresented accused.

- Explain the procedure – that a plea is tendered (in summary matters), and then you will decide either on sentence or on bail.
- Before taking the plea, check if the accused has read over the complaint and whether the accused wishes to tender a plea in the absence of legal advice (remembering the accused may have literacy difficulties).
- If there is some doubt about the accused's plea, particularly one of guilty, it may be the judge would wish to continue it without plea for legal advice to be given – see section on plea of guilty by unrepresented accused.
- Explain the issue of bail, and ascertain if bail is opposed by the Crown if applicable.
- If the matter of bail is for the court alone, or the court has doubts about bail irrespective of the Crown's position, ensure the court's position is clear to the accused.
- It may be easiest to ask the accused a series of questions in relation to the relevant factors for bail. Ensure this is done at a pace where the accused has time to think before answering or expand on the information.

Remember it may be daunting for an accused to appear in court themselves, particularly if they have a vulnerability due to age, mental health problems or lack of education. In addition, the accused is unlikely to have "prepared" or thought about the factors they wish to rely upon for bail. By way of illustration, it can take experienced solicitors some time to take the relevant information from an accused on their personal circumstances to put before the court on a bail application, and as such, the court will need to exercise patience.

If the court is unable to determine bail for an unrepresented accused, it may be necessary to continue the matter to the next custody court when representation will be available. This will be of no value where the accused appears alone because they have refused legal representation (and it is not one of the circumstances where the court must, or has discretion to, appoint a solicitor). In those circumstances, the court will have to make the best decision it can on the information available.

Disclosure for an unrepresented accused

It is understood that local practices vary, but unrepresented accused are generally given sight of the disclosure in either a police station, a local PF's office or in court,

on a supervised basis. It is understood that unrepresented accused can take notes on the disclosure but cannot take copies or photographs of it.

If CCTV is to be relied upon, the Crown has an obligation to allow an unrepresented accused to view it, perhaps in the local Fiscal's office.

Such arrangements mean an unrepresented accused is likely to only have had one opportunity to read the disclosure and will not have it in front of them during the trial. The sheriff or JP may wish to suggest:

- That an unrepresented accused has a further opportunity to refresh their memory as to the disclosure on the morning of the trial, perhaps during the call over or (if the matter is picked up at the intermediate diet) earlier by arrangement on the morning of the trial depending on volume.
- That the unrepresented accused has a copy of the disclosure before them during the trial, on the basis that it is returned before they leave the courtroom.

Plea of guilty by unrepresented accused

If an unrepresented accused tenders a plea of guilty, a judge will consider whether:

- The accused has a copy of the complaint and has both read it and understands it.
- The accused understands if there are any mandatory implications of a plea of guilty (such as a mandatory disqualification).
- There is a full understanding of the charge or charges.
- The accused is freely and truly acknowledging guilt, and it is not a plea of convenience.[373]

Trial with an unrepresented accused

If the matter is proceeding to trial, it may be appropriate (and helpful to the efficient running of the court) to:

[373] For a recent example of a refusal to allow withdraw of a guilty plea by an unrepresented accused, see *Giblin v PF Glasgow* 2024 SCCR 261, which sets out the authorities at paragraph 6.

- Briefly describe the order of questioning.
- The role of submissions at the end of the evidence.
- The ability to object to the admission of any evidence.
- The distinction between the Crown and the defence case.

It is usually easier for a judge to ensure a fair trial takes place if they know what the accused's position is. However, whilst a defence agent will understand the bounds of what information the court may not wish to know, an unrepresented accused will not. Accordingly, although fraught with difficulty, it can be helpful to the judge to ask some broad questions to understand the nature of the accused's position. Examples are if there is a statutory defence being relied upon, or, for example, the accused's position is one of mistaken identity. Some general questions at the start of the trial might elicit sufficient information for the court.

At the close of the Crown case, if the unrepresented accused does not make a motion of no case to answer where it could be merited, it might be appropriate for the trial judge to consider whether to invite them to do so, and to raise with the Crown the question of the sufficiency of the Crown evidence.

The accused should be asked whether they wish to give evidence personally.[374] It must be made clear there is no obligation to do so, but if so, they may be cross-examined. A judge should check if any defence witnesses are to be called. When all evidence has been led, the accused should be reminded that they will be given an opportunity to address the judge or the jury on the evidence.

In a jury trial, the judge has a responsibility to ensure that an unrepresented accused's position in relation to the evidence and the charges, as far as that can be determined, has been fairly and adequately put before the jury. That may have to be dealt with in the judge's charge to the jury.

A judge has a duty to ensure that the trial is overall conducted fairly. That might extend to a duty to intervene during the evidence to take points or objections which

[374] See Renton & Brown, paragraph 29-63, ibid. S 271F of the Criminal Procedure (Scotland) Act 1995 permits the use of some special measures for an accused whilst giving evidence and modifies the test for special measures otherwise found in s 271.

might have been made had the accused been represented by counsel or by a solicitor.[375]

Accordingly, some things to consider are:

- Any vulnerabilities of the accused at the outset, including (but not limited to) any matters falling within the Equality Act 2010.
- Explain the process in a straightforward way at the beginning and as needed throughout the trial.
- Ensure the accused has a copy of the complaint or indictment.
- Ensure the accused has seen the disclosure, including CCTV.
- Consider whether the accused should have a copy of the disclosure for the duration of the trial.
- Check if the accused has writing materials or wishes them.
- Explain the court's expectations of the accused (ie when they speak, how to draw to court's attention if they cannot hear etc.).

Criminal record of accused

If an unrepresented accused begins during a trial to ask questions or lead evidence which might permit the prosecutor to seek to disclose the accused's record, it is suggested the judge may wish to intervene to advise the accused of the possible consequences of continuing with that line of questioning or evidence.[376]

Protecting the interests of witnesses

Whether or not an accused is represented, it is now settled law that cross-examination should not stray beyond proper bounds.[377] Whilst solicitors and counsel should be acutely aware of their duty to the court and to witnesses, unrepresented accused may not, and may approach questioning of witnesses, particularly complainers, in an aggressive or offensive way. Such an approach must not be

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[375] See Renton and Brown, at paragraph 18.52.1, ibid, which states: "where an accused is defending himself the judge should assist him, and in particular should ensure that incompetent evidence to which the accused has taken no objection is not admitted", quoting *Bullock v HMA* 1999 SCCR 492.
[376] Criminal Procedure (Scotland) Act 1995, s 270.
[377] For cases as to what constitutes proper bounds of cross-examination, see *Begg or Dreghorn v HMA* 2015 SLT 602. See also chapter on vulnerable persons.

allowed by the court. Whilst there is a right to test the evidence by cross-examination, often such questioning, by its very nature, strays into collateral matters that would not, even if allowed, assist the court in determining the factual issues in dispute before it. A judge must be prepared to intervene to protect the interests of a complainer or other witness. Reference is made to the section on vulnerable witnesses which would apply more generally, whether or not there is a particular vulnerability to the witness.

Sentencing an unrepresented accused

In terms of section 204 of the Criminal Procedure (Scotland) Act 1995, a court cannot pass a sentence of imprisonment or detention (including for the failure to pay a fine) on an unrepresented accused unless the accused has had legal aid refused on the grounds of not being financially eligible,[378] or alternatively has been told of his right to apply for legal aid and has failed to do so.[379]

Legal aid can be refused by SLAB on two grounds – firstly that the expenses of the case cannot be met without undue hardship to the accused, and secondly that it is not in the interests of justice that legal aid be made available.[380] SLAB now takes the view that in the sheriff court, it is in the interests of justice for legal aid to be granted. Accordingly, if legal aid has been refused in a sheriff court case it is solely on the grounds of financial eligibility. However, in the JP court, it may be necessary for enquiries to be made as to the basis of refusal of legal aid.[381]

The court has the power to grant legal aid in summary proceedings to a person who has not previously had a sentence of imprisonment or detention, so long as the court is satisfied the cost of the case cannot be met without undue hardship to the accused or the accused's dependents.[382]

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[378] S 204(1)(a). See also paragraph 22-16 of Renton and Brown, ibid.
[379] S 204(1)(b). See also paragraph 22-16 of Renton and Brown, ibid.
[380] Legal Aid (Scotland) Act 1986, s 24(3).
[381] SLAB advise that if enquiries need to be made, SLAB's Criminal Applications Department can be contacted on 0131 560 2138 or criminalapplications@slab.org.uk.
[382] Legal Aid (Scotland) Act 1986, s 23.

Courts should bear in mind that sentencing guidelines may apply to the particular circumstances of an unrepresented accused and may have to probe to ensure that the court has sufficient information to sentence.[383]

Interpreters

Judges will want to carefully consider whether an unrepresented accused should have an interpreter, if English is not their first language.[384]

Best practice for the use of an interpreter is found in the section on interpreters within the race chapter.

Disruptive accused

If an unrepresented accused is so disruptive that the trial cannot take place in their presence, the court must appoint a solicitor to represent the accused's interests during their absence from court.[385]

Vexatious litigants

The Inner House can make a vexatious litigant order on the application of the Lord Advocate.[386] Such an order can prohibit that person from commencing civil proceedings (including in the sheriff court) without the permission of an Outer House judge, and/or, if the individual has ongoing litigation, require permission to be sought to take such steps as specified in the order.[387] An order can be for a specified period, or indefinite.[388] A list of persons against whom orders have been made is available on the SCTS website.[389]

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[383] For example, the list of factors in paragraph 15 of the Sentencing Young People Guideline (Scottish Sentencing Council) includes information on adverse childhood experiences, addiction and physical and mental health.
[384] See *Mikhailitchenko v Normand* 1993 SCCR 56.
[385] 1995 Act, s 153 as amended by 2010 Act s 14(5) (but see also s 150A which deals with circumstances where an accused has failed to appear at court).
[386] Courts Reform (Scotland) Act 2014, s 100.
[387] Ibid s 100(2).
[388] Ibid s 100(4).
[389] "Vexatious Litigants" (SCTS) accessed 5 February 2025.

Such declarations are made only infrequently (*Lord Advocate v B* 2012 SLT 541). It does not apply in circumstances where an individual is defending an action which has been raised against them.

Children's hearings appeals

Sheriffs will be aware of the power in terms of section 159 of the Children's Hearing (Scotland) Act 2011. If the sheriff considers an appeal against the decision of a children's hearing was frivolous or vexatious, the sheriff can make an order for the appellant to obtain leave to be permitted to lodge any further appeal against a compulsory supervision order (arising from any further children's hearings that may take place). Such an order will last for 12 months.

Freemen on the land and "Scottish sovereigns"

The term "freeman on the land" has been used in many English-speaking jurisdictions, including Canada, USA, New Zealand and Australia. In Scotland, they sometimes refer to themselves as "Scottish sovereigns". Persons who appear in court claiming they are a "freeman" on the land where they live; often, they will refuse to identify themselves. It does not appear to be an organised movement.[390] Individuals claim to be independent of the government and not bound by the applicable law of a country, asserting the only "true" law is their own idiosyncratic interpretation of common law. "Freemen on the land" also advocate schemes to avoid paying tax, arguing they have not entered into a contract to pay a particular tax,[391] and claim names are owned by the Crown, and they need permission to use a name.[392]

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[390] However, see blog post by Adam Wagner on UK Human Rights Blog which suggests that, at least abroad, "gurus" or movement leaders seem to take payment for "advice": "Freemen on the Land are 'parasites' peddling 'pseudo legal nonsense': Canadian judge fights back" (UK Human Rights Blog, 2012) accessed on 5 February 2025.

[391] See, for example, information on City of Bradford's website ("Freeman of the land - legality of Council Tax") regarding payment of council tax, noting: "If you have any concerns over the charging of Council Tax, please seek proper legal advice, rather than relying on internet sources or forum statements which may be incorrect or misleading" accessed 5 February 2025.

[392] The location of the billboards included Dundee; see Jon Kelly, "The mystery of the 'legal name fraud' billboards" (BBC News, 2016) accessed 5 February 2025.

Sometimes they attempt to appear as lay representatives.[393] Occupy protesters have also been reported as using similar tactics.[394]

None of the arguments presented by "freemen" have been judicially accepted.[395]

Some practical tips if a "freeman" appears in court include:

- "Freemen" often refuse to confirm their name. If someone refuses to confirm their identity, make it clear that the person cannot be viewed as being present in court.
- In civil cases, you may wish to make it clear that the absence of a party may lead to decree being granted or an action being dismissed, as appropriate.
- In criminal cases, if ordained or on bail, a warrant may be issued for their arrest if the person does not identify themselves.
- If someone is brought from custody and refuses to confirm their name to the clerk, it may be sufficient to check that those bringing the person from the cell area are satisfied they have brought the correct individual.
- If someone refuses to accept bail conditions which are reasonable and considered by the court to be necessary, it may be the individual has to be remanded. Judges may wish to have the case recall later, as it is not unknown for there to be a change of position later in the day.

In extreme circumstances, judges may require to consider if such individuals are in contempt of court.

21. List of law centres

- Castlemilk Law and Money Advice Centre
- Clan Childlaw

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[393] For an example in a criminal case, see "Sheriff refuses to let accused use Stuart Hill as 'power of attorney'" (The Shetland Times Ltd, 2023) accessed 5 February 2025.
[394] See Carl Gardner, "The law is not the enemy of protest but an essential tool of impartiality" (The Guardian, 2011) accessed 5 February 2025.
[395] See, for example, *Watson v Lord Advocate & others* [2013] GWD 19-378. Many of the authorities refer to *Meads v Meads* which, whilst a Canadian case, may be useful: *Meads v Meads* [2012] ABQB 571. See also the short article in "Freemen on the Land" (2013) 114(Dec) Civ PB 1-3.

- Dundee Law Centre
- Environmental Rights Centre for Scotland
- Ethnic Minorities Law Centre
- Fife Law Centre
- Govan Law Centre (also runs Govanhill Law Centre)
- JustRight Scotland
- Legal Services Agency
- Scottish Child Law Centre
- Scottish Women's Rights Centre
- Shelter Scotland Housing Law Service

Ten top tips: checklist for meetings with a person who has communication support needs

(This section has been reproduced from "Working with Child and Adolescent Mental Health, The Central Role of Language and Communication" with the kind permission of Dr Susan McCool)

This checklist guides practitioners to think about ten different ways in which the communication support they offer could potentially be enhanced, in face-to-face contacts with children and young people. This could be daily interactions or specific meetings. Practitioners may wish to use the Summary Table at the end of this resource to self-evaluate current practice, identify development goals, and monitor progress.

1. Prepare

Do I gather enough information about the person's communication support needs in advance of the meeting and prepare accordingly?

2. Predictability through structure

Does the person understand in advance the purpose of our meeting, its duration, and when any scheduled breaks will happen? Is there a clear plan for how events will unfold?

Do I ensure we stick to the plan wherever possible?

Do our meetings begin with a reminder of the plan?

Do I provide simple explanations for any deviations from the plan, and do I check that's ok?

Do our meetings end with an accessible re-cap?

Are next steps always made clear?

3. Comfort

Do I manage the environment to minimise the impact of sensory stressors such as noise, visual distraction, light, temperature, touch, and smell?

Do I ensure a private, comfortable space, if needed?

Do I schedule enough breaks - and does the person know when to expect them?

4. Social certainty

Does the person understand the purpose of the meeting in advance?

Can the person bring a supporter if they wish? If so, is each person introduced?

Do I avoid assumptions by providing clear explanations about how the system works?

Do I explain what my role is?

Do I make sure that we agree expectations about each participant's role and contribution to the meeting?

Do I set up a structure to make sure that we take care to avoid interruptions, and that one person speaks at a time before allowing someone else to speak?

5. Alert to fluctuating communication support needs

Do I expect that most children and young people with mental health vulnerabilities will have communication support needs?

Am I aware that significant communication support needs can occur, on a transient basis, even in people who do not typically have such needs, especially at times of stress or ill-health?

Do I anticipate that communication support needs can vary significantly in response to physiological, situational, and psychological variables, especially stress-related factors?

Am I alert to the range of signs and signals that indicate additional support for communication may be needed?

Do I minimise distractions and make sure I have the person's attention?

Do I use the person's name often, and make sure I maintain their attention?

Do I respond flexibly to changing individual needs?

6. Simplify language and concepts

Do I make sure that I use only clear, everyday words? Do I avoid jargon?

Do I avoid ambiguous language such as metaphor, inference, or irony?

Do I avoid sarcasm and other forms of linguistic humour, especially in moments of tension or stress?

Am I clear and direct in my communication, rather than falling back on "politeness conventions" such as using euphemisms or relying on implication?

Do I avoid acronyms or explain them if they come up?

Do I avoid complex grammatical constructions? For example, saying the relatively simple "First we'll look at your worry ladder then we'll look at your emotions chart" *instead* of saying "we'll look at your emotions chart after we look at your worry ladder".

Where possible, do I avoid conditional language? For example, utterances beginning with "assuming that..." or "supposing that..."

Do I use active voice rather than passive voice? For example, saying "Joe, the dietician, wrote a report" *rather than* "a report was written by Joe, the dietician".

Do I repeat key points in different ways?

7. Bite-sized chunks of language

Is my talk split up into small amounts that can be easily processed?

Do I emphasise key words?

Do I pause between each chunk of language?

8. Check communication is clear and effective

Am I aware that many children and young people understand less than I may think?

Do I anticipate that the person is unlikely to clearly signal any breakdown in their understanding?

Am I aware that the person may even go to considerable lengths to mask their lack of understanding?

Do I therefore check that my communication is effective, in a meaningful way?

Specifically, do I avoid simply asking "do you understand?"

Do I use simple visual scales (for example, emoticons expressing a range of certainty/confusion) to establish the person's level of understanding?

Do I encourage the person to seek clarification? Do I help them to find verbal and/or other ways to do this? Do I provide prompts for them to do so?

Do I ask the person to summarise key points in their own words or pictures (explaining that this lets me know I've been clear)? For example, do I say "tell me what I said" or "tell me what we've agreed to do"?

Do I ask what would make communication better, offering suggestions where appropriate?

9. Visual support alongside verbal communication

Is verbally conveyed meaning made tangible for the person by using visual support?

Is the level of visual support flexibly adjusted according to the person's preferences and fluctuating needs (for example, written labels, gestures, pictures, drawings, photographs)?

Where appropriate, is there visual support for what will happen in the meeting (for example, a visual schedule)?

Is there a visually supported record of what is discussed in the meeting (for example, visually supported conversations)?

To aid recall, is the person provided with take-home records of visual support used or developed in the meeting (for example, through photographs digitally captured and sent)?

10. Extra ways to get the message across:

Do I encourage the person to use means other than talking to help convey their thoughts, feelings, experiences, or preferences? For example, this may be through:

- Creating and/or simply sharing photographs, drawings, cartoons, or music;
- Sheets of emoticons or selections of feelings cards to support discussions of more abstract terms;
- Likert scales, rating scales, "ladders", "icebergs", "pyramids", "thermometers", and "traffic light" systems can be very useful to represent feelings and reactions, especially if their meaning is supported with pictures, symbols, and/or colour-coding;

- Timelines and flowcharts can help represent sequences of events or show cause and effect;
- Sorting symbols into categories can help (for example, things I'm confident about/not confident about/not sure);
- Having prompt cards available can make a difference in encouraging people to express that they don't understand or that they need help. Examples include: "I don't understand", "Say that again please", and "What does that mean?"

Communication support focus	Target for enhancement
Preparation for meetings	
Predictability through structure	
Comfort	
Social certainty	
Alert to fluctuating communication support needs	
Simplify language and concepts	
Bite-sized chunks of language	
Check communication is clear and effective	
Visual support alongside verbal communication	
Extra ways to get the message across	

Appendix A: Forms of oath

Contents

1. Introduction

An oath or affirmation must be taken in all courts where a witness is to give evidence.[396] An oath or affirmation is not generally taken in most tribunals, although it is in Employment Tribunals.

The law on oaths and affirmations is found in the Oaths Act 1978 (only part of which applies in Scotland) and in the Ordinary Cause Rules, rule 29.16, Forms G14 and G15,

[396] See Macphail, ibid, at paragraph 16.62.

the Rules of the Court of Session 1994, Form 36.10-A and the Criminal Procedure Rules 1996, Form 14.5-A.

Note that in England and Wales, Christian and Jewish religious oaths are taken by swearing on the relevant holy book, unlike in Scotland where the oath is taken by raising the right hand.

For oaths for children, see this section in the chapter on children and young persons.

2. Oath for witnesses

The standard form of oath in both civil and criminal proceedings is:

> "I swear by Almighty God that I will tell the truth, the whole truth, and nothing but the truth."

The witness is asked to raise their right hand when taking the oath, unless there is physical disability or other issue preventing them from doing so. The use of a bible or other religious book is not required.

It is often convenient to divide the words into four sections (to enable the witness to follow and to repeat accurately) thus:

> "I swear by Almighty God / that I will tell the truth / the whole truth / and nothing but the truth".

3. Affirmation for witnesses

The form of affirmation in both civil and criminal proceedings is:

> "I solemnly, sincerely and truly declare and affirm that I will tell the truth, the whole truth, and nothing but the truth".

A witness does not raise their hand when taking the affirmation.

It is often convenient to divide the words into four sections (to enable the witness to follow and to repeat accurately) thus:

"I solemnly, sincerely and truly declare and affirm / that I will tell the truth / the whole truth / and nothing but the truth".

It is important that taking an affirmation is seen as equal to the oath and given the same respect by the court and others.

4. Availability of holy books in the court

A selection of holy books in the court building, for witnesses who might wish to take the oath according to their religious beliefs, are available in all courthouses. These include:

- The Holy Bible
- The Hebrew Bible ie the Old Testament
- The Bhagavad Gita or "Gita" (Hindu Sacred Text)
- The Adi Granth (Sikh Sacred Text)
- The Holy Qur'an or "Koran" (Muslim Sacred Text)

Taking the standard oath does not require the use of the Bible or other holy book.

Judges, through clerks, should request replacements of the above holy books if required. If the court does not have the necessary holy book, the witness should be invited to affirm.[397]

Further information on the handling of holy books is available in the English and Welsh Equal Treatment Bench Book, Appendix D onwards, page 329 which gives information as to rituals that may be observed by those of the Jewish, Muslim, Rastafarian, Sikh, Hindi and other religions. Judges may wish to be aware of the requirements regarding the handling of such books, to ensure that court staff understand the sensitivities that may be involved in the carrying and handling of such books. In addition, there may be rituals that a witness will wish to observe regarding the book pertaining to their religion.

[397] Oaths Act 1978, s 5(2).

5. Refusal to take the oath or affirmation

The refusal of a witness to take the oath may involve issues of contempt and reference is made to the Contempt of Court Toolkit (but judges are asked to note that, as it has not been updated for some time, caution should be exercised). However, before considering dealing with the matters as a contempt, a judge may wish to make enquiries to ensure that the apparent refusal to take the oath (or affirm) is not due to a language, cognitive or other issue.

6. Different types of oath

The English and Welsh Bench Book has useful information on a number of religions and their oaths; see Appendix D at page 329 which has links for a number of religions should it arise.

7. Interpreters

Interpreter's oath – often best administered by a question to the interpreter, eliciting the response "I do" – Do you swear faithfully to perform the duties of interpreter in these proceedings?

Interpreter's affirmation – do you solemnly, sincerely and truly declare and affirm that you will faithfully perform the duties of interpreter in these proceedings?

8. Shorthand writers

In terms of OCR 29.18, reference is made to shorthand writers having taken an oath in connection with the sheriff court service generally. Similar provision is made at RCS 36.11 for the oath to be administered on appointment as a shorthand writer to the Court of Session. However, it may not be known whether companies supplying shorthand writers have made arrangements for their staff or contractors to take a general oath. There may also be civil proceedings where the evidence is recorded, but which do not fall under these rules. Accordingly, if evidence is to be recorded by

a shorthand writer, a judge may wish to enquire as to whether a general oath has been taken and if there is any doubt, administer an oath or affirmation.

Often best administered by a question to the shorthand writer, eliciting the response "I do".

Oath - do you swear faithfully to perform the duties of shorthand writer in these proceedings?

Affirmation – do you solemnly, sincerely and truly declare and affirm that you will faithfully perform the duties of shorthand writer in these proceedings?

9. Juror's oath

Jurors can either take the oath or affirm. It should be made clear to jurors that they have the choice. Usually, the clerk of court will ask jurors who wish to take the oath to rise and administer the oath collectively by asking jurors to raise their right hand and say, "I do". The wording of the oath is "Do you swear by Almighty God that you will well and truly try the accused and give a true verdict according to the evidence?"[398]

The clerk will then ask the remaining jurors, who wish to affirm, to rise. The taking of the affirmation is different, in that jurors repeat the full wording. The form of words to be used when affirming is set out in section 6(1) of the 1978 Act, which provides:

> Form of affirmation.
>
> 6(1) Subject to subsection (2) below, every affirmation shall be as follows:—
>
> "I, do solemnly, sincerely and truly declare and affirm," and then proceed with the words of the oath prescribed by law.

This wording is also found in Form 14.3-B in the Criminal Procedure Rules 1996; and Form 36.10-B in the Rules of the Court of Session 1994. Form 14.3.B states:

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[398] See Form 14.3-A in the Criminal Procedure Rules 1996; and Form 36.10-A in the Rules of the Court of Session 1994.

"*The juror to repeat after the clerk of court*: 'I, (*name*), do solemnly, sincerely and truly declare and affirm that I will well and truly try the accused and give a true verdict according to the evidence.'"

The inclusion of the "I" at the beginning of the sentence means that the practice in some courts has been to administer the affirmation individually to each juror, given the need for each juror to say their name in the appropriate place. This raises a concern that those seeking to affirm may feel they are being treated differently and it may appear discriminatory. To avoid this, it is suggested that the clerk is directed to administer the affirmation collectively, with each juror saying their own name.

10. Curators *ad litem*

The practice is that where curators *ad litem* are appointed for the first time, they are asked to take an oath before taking up their first appointment. The form of the oath might be best administered by a question to the curator, eliciting the response "I do":

"Do you swear faithfully to perform the duties of curator *ad litem* in any proceedings in which you are appointed?"

In a similar way, wording for an affirmation might be:

"Do you solemnly, sincerely and truly declare and affirm that you will faithfully perform the duties of curator *ad litem* in any proceedings in which you are appointed?"

11. Oaths re warrants

Where it is necessary to put a police officer on oath in connection with a warrant, the wording of the witness oath can be used, or a suggested variation thereon as circumstances require:

"I swear by Almighty God that the information I provide in this application is the truth / the whole truth / and nothing but the truth".

“I solemnly, sincerely and truly declare and affirm / that the information I provide in this application is the truth / the whole truth / and nothing but the truth“.

Appendix B: Interpreters

“It is generally the responsibility of SCTS to arrange interpreting services in courts and tribunals. The operating contract is produced below in the event that it assists judicial office holders to understand the scope of same.“

2021 CONTRACT FRAMEWORK FOR THE PROVISION OF

INTERPRETING, TRANSLATION AND TRANSCRIPTION SERVICES

STAFF GUIDANCE

CONTENTS

2021 CONTRACT FRAMEWORK FOR THE PROVISION OF INTERPRETING, TRANSLATION AND TRANSCRIPTION SERVICES

Section 1

Background

1.1 This contract for interpreting, translation and transcription services covers comprehensive spoken language interpreting services, and the transcription and translation from word documentation or electronic media into formats which meet the needs of accused persons and civil party litigants in Justice of the Peace Courts, Sheriff Courts and the High Court and Court of Session.

1.2 The interpreting service covers spoken language interpreting for accused persons and civil party litigants at any stage in the court proceedings. It is the responsibility of COPFS to provide interpreting services for all Crown witnesses and for defence agents to ensure an interpreter is in attendance for any defence witnesses.

1.3 Telephone interpreting services guidance can be found here

1.4 The contract does not cover British Sign Language interpreting services (see separate guidance on intranet), translation for publication purposes and English to English transcriptions services (established procedures via the Supreme Courts in place).

1.5 The translation and transcription service covers documents and tapes and other forms of electronic media in the course of case proceedings.

1.6 The contract commencement date is 12th November 2021 and runs for a period of 4 years until 11th November 2025.

1.7 There are **three** Contractors:

Ranked 1st – Global Connections (Scotland) Ltd
David Orr, Director
Global Connections (Scotland) Ltd
3rd Floor, 180 Hope Street
Glasgow, G2 2UE
Tel: 0141 352 5663 – Interpreting department
0141 352 5668 – Translation/ Transcription department
Email: interpreting@globalconnects.com

Ranked 2nd – Global Language Services Ltd

George Runciman, Managing Director
Global Language Services Ltd
Craig House, 64 Darnley Street
Glasgow
Tel: 0141 429 3429
Email: mail@globalglasgow.com

Ranked 3rd– DA Languages Ltd

Nick Clancy, Head of Operational Support
DA Language Services Ltd
Stratham House, Talbot Road, Stretford
Greater Manchester
M32 0FP
Tel: 0161 928 2533
Email: implementations@dalanguages.co.uk

1.8 Users **must** approach the first ranked Contractor in the first instance (in accordance with the contract and this guidance) and only if the first ranked Contractor is unable to meet the requirements satisfactorily then the user may approach the second or third ranked Contractor.

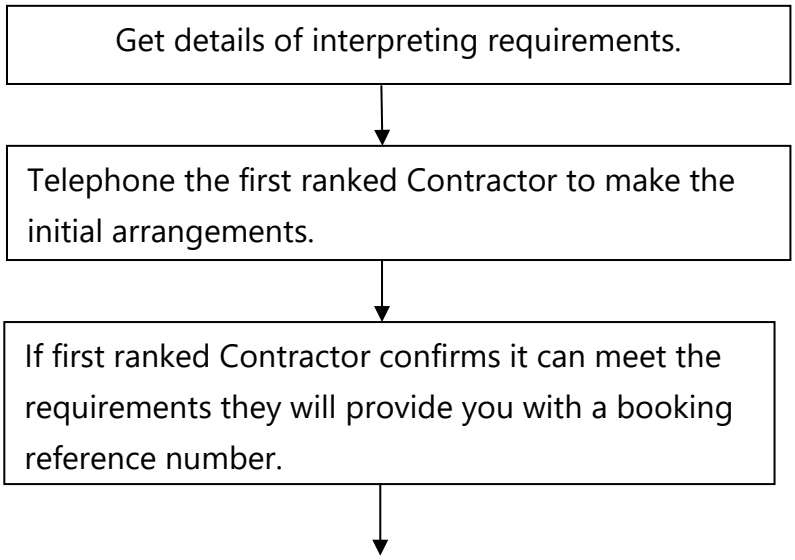
1.9 All SCTS requirements for spoken language interpreting, translation and transcription services should be obtained using this framework contract. No other interpreting agency should be contacted unless with the express permission of the Presiding Sheriff/Judge or the office manager.

Section 2

Quick Guide Flowchart

The following flowchart has been produced as a quick guide to arranging for the attendance of an interpreter at your court

1. Arranging an Interpreter for Court



2. Contractor Confirmation Form

The contractor will complete and send court a Contractor Confirmation Form – **Annex B** – with full details of the interpreter who has been assigned to the case.

3. Interpreter Attendance Form

File the Contractor Confirmation Form with the case papers so that the depute in court or other staff member has full details of the interpreter who is assigned to the case. **Any concerns regarding the suitability of the proposed interpreter should be brought to the attention of the Judge/Sheriff at the earliest opportunity**.

After the assignment, the interpreter will complete an Interpreter Attendance Form - **Annex C** - and leave a copy with the Sheriff.

4. Consolidated invoicing

The contractor will provide a consolidated invoice to SCTS which will be forwarded to all Sheriff Courts detailing spend on interpreters for the previous month. Sheriff Clerks should reconcile the costs against the Interpreter's Attendance forms received for that month.

Invoices should not be approved for payment unless accompanied by an Interpreter Attendance form. Any queries regarding the costs made against your local budget should be taken up with the contractor.

Section 3

Interpreting Services

3.1 There are 3 stages to instructing an interpreter for accused persons or civil party litigants in court proceedings:

1. Place order with ranked supplier;
2. Supplier confirms booking;
3. Confirmation of attendance by interpreter

Order Process

3.2 If an interpreter is required for court proceedings (to interpret for an accused person or a party litigant in civil proceedings) Scottish Courts and Tribunals Service is responsible for the provision of such an interpreter in all circumstances other than the initial appearance from custody, which is undertaken by Police Scotland on behalf of SCTS. In any other case when an interpreter is required, booking should be made at the earliest available opportunity to give the contractor maximum time to find a suitable interpreter to undertake the assignment. To book an interpreter you **must** approach the first ranked provider in the first instance –Global Connections (Scotland) Ltd

3.3 SCTS staff should contact the contractor by telephone in the first instance to inform them of the interpreting requirements. Confirmation should then be sent using the order form (annexed) and email to the relevant company.

3.4 Ensure you also inform the contractor of the type of case (i.e. summary/ solemn/ civil) and if criminal proceedings, the nature of the offence(s). If you are provided with additional information by the police/ PF in regards to dialect or specific religious/cultural considerations then this should also be passed onto the contractor.

3.5 The contractor is required to provide an interpreter who has:

- a Diploma in Public Service Interpreting (Scottish Legal Option) or (where DPSI is not available) an equivalent combination of relevant qualifications and court experience.
- recent experience of consecutive and simultaneous interpreting in the court context
- a valid certificate from Disclosure Scotland at least at standard level – or for complex or sensitive cases at enhanced level
- been sourced from within a 45 mile radius of the court location
- not previously been supplied to the police for the same case.

3.6 You should expect that interpreters selected by the contractor for assignments will be located within a 45 mile radius of the court location. If the contractor can only provide an interpreter out with the 45 mile radius the court has sole discretion to accept or refuse services from the interpreter proposed. Please see the section 6 on Travel and Subsistence for further information.

3.7 If the first ranked contractor cannot meet the requirements adequately then they should intimate this to you. You should then contact the second ranked provider (Global Languages). If the second ranked provider cannot meet the requirements adequately then they should intimate this to you. You should then contact the third ranked provider (DA Languages).

3.8 If you need to contact the 2nd or 3rd ranked contractor you must ask for the same requirements as per the 1st ranked contractor.

3.9 In exceptional circumstances where neither ranked provider can supply an interpreter that meets the required criteria you may use an alternative provider outwith the contract. These are listed in the word document below. You must also obtain approval from the presiding sheriff / judge or tribunal office holder prior to using the alternative provider(s) and must notify procurement@scotcourts.gov.uk as soon as possible. Please note, you are not required to seek permission from procurement, procurement only require to be made aware to allow them to monitor usage outwith the contract. (Updated July 2018). Whilst it is accepted that an

alternative provider may not be able to provide an exact cost of the job, court staff should consider asking the alternative provider for an estimate cost (especially if the interpreter is required to travel and requires accommodation)- court staff should consider asking for an estimate break down of the individual costs and present these to the presiding Sheriff/Judge or tribunal office holder prior to accepting the services.

Alternative Providers **– Annex F**

Contractor Confirmation

3.10 The contractor should give an initial indication – on the telephone - as to whether or not they can supply the interpreter required and advise you of any anticipated difficulty they may have in supplying all of the requirements. They should also supply you with a booking reference.

3.11 On receipt of the Interpreter Order Form - **Annex A** the contractor will then confirm by email if they can meet the requirements of the request and will forward you details of the assigned interpreter. You should ensure that you receive this Contractor Confirmation Form - **Annex B** which contains details of the interpreter to be assigned to the case.

3.12 The Contractor Confirmation Form should be printed off and placed with the case papers so that court staff have details of the interpreting assignment on the day.

3.13 A signed Code of Conduct for each interpreter; Glossary of Terms and General Briefing Note will be held by the contractor for issue to interpreters as required. **There will be no need for SCTS to issue these documents to every interpreter who attends at their court.**

Interpreter Attendance Form

3.14 Every interpreter who attends an assignment will be expected to complete an Interpreter Attendance Form - **Annex C** which gives details of travel to and from the assignment.

3.15 The interpreter must ensure that the Interpreter Attendance Form is completed following each assignment and a copy left with the clerk of court.

Section 4

Exception reporting

4.1 In any case where an issue has arisen in relation to the performance of an interpreter, an exception report **must** be completed and submitted to procurement@scotcourts.gov.uk without delay**.**

4.2 Issues which are likely to garner media attention should also be brought to the attention of Ken Miller, Head of Corporate Communications as soon as possible.

4.3 If a Contractor confirms your request but, at the last minute, advises that they can no longer supply the service which, in turn, forces you to approach another Contractor, please advise procurement@scotcourts.gov.uk who will record the details. All such information will be recorded and used for supplier performance reviews.

4.4 Exception reporting is crucial to our ongoing contract management and will assist with improving the service being provided to us throughout the lifetime of this contract.

Section 5

Troubleshooting

What to do if the contractor is unable to meet requirements

5.1 If the first ranked provider is unable to meet all of the requirements detailed in the interpreter order form but provides you with a written statement recommending an alternative interpreter, with details as to why the provider considers that interpreter to be suitable for your assignment, you may wish to consider this alternative further.

5.2 In any such instance the contractor MUST provide written details of the assigned interpreter's qualifications and experience and a written statement explaining why the contractor considers the interpreter suitable for the assignment. This will appear on page two of the Contractor Confirmation Form. You may wish to bring this information to the attention of the Judge/ Sheriff for consideration. The suitability of an interpreter to any particular case is a matter for the court.

5.3 Where there is any doubt as to the suitability of the suggested alternative, staff may wish to have a fuller discussion with the provider about the interpreting requirements of the case and how they can best be met.

5.4 If the court is not content with the alternative recommended by the first ranked provider they can opt to approach the second ranked provider to book an interpreter and thereafter the third ranked provider DA Languages Ltd.

5.5 It is the responsibility of the provider to provide an interpreter who has been assessed by them as suitable for the assignment in accordance with the minimum requirements outlined in the interpreter order form.

Section 6

Travel allowance

6.1 The Contractor will provide a face-to-face interpreter from within 45 miles of the location that the assignment is required. Wherever possible, local interpreters will be provided.

6.2 The Authority recognises that in exceptional circumstances an interpreter may be sourced from more than 45 miles of the location of the assignment. In these circumstances the Contractor will provide justification why that is the case for the Framework Public Body to review prior to confirming the order.

6.3 In circumstances where the Contractor can only provide an interpreter from more than 45 miles of the location of the assignment the Framework Public Body has sole discretion to accept or refuse services from the interpreter proposed.

6.4 Where the Framework Public Body accepts such an interpreter, the Framework Public Body will pay travel and subsistence costs.

6.5 Once it has been established and agreed that the journey is unavoidable, and prior to the journey being undertaken, the Framework Public Body must be content that that the most effective method of travel is selected from the following:

- public transport (including bus, rail, air and ferry)
- official allocated car if available
- hired car
- taxi hire
- privately owned motor vehicle

The aim is to use the most efficient, economic and environmentally sound means of travel, whilst minimising chargeable time. The Contractor must consider the range of fare options available. This should include special fare promotions, day returns, saver and season tickets and any other fares offers where their use does not impair the efficiency of the journey being undertaken. Low carbon transport is favoured.

6.6 The Framework Public Body must satisfy themselves that journey and means of travel are fair and reasonable before the journey is undertaken. If the journey is undertaken without prior approval from the Framework Public Body, or the means of travel used are different from what is agreed then travel and subsistence is unlikely to be paid.

Travel expenses

6.7 Travel and subsistence rates payable for journeys that meet the criteria below reflect the rates payable to public servants. Our expectation is that interpreters should receive the maximum of these rates where possible.

6.8 Travel by public transport is encouraged and will be paid at cost and on presentation of properly receipted invoices.

6.9 Only rail travel by Standard class will be paid, only air travel by Economy class will be paid.

6.10 Where travel by car is unavoidable, motor mileage rates will be paid consistent with the following rates;

Mileage Type	Rate
Motor Mileage Rate	£0.45 per mile
Passenger Supplement	£0.05 per passenger
Equipment Supplement	£0.02 per mile

6.11 Mileage will be paid for the total distance of the journey less the 45 miles each way. return)

6.12 Travel by air will be restricted to exceptional circumstances and must be agreed in advance with the Framework Public Body

6.13 Travel Time **will only be paid in the following circumstances** and must be agreed in advance with the Framework Public Body:

- Where the Contractor is required to source an interpreter from out with the 45 miles each way maximum distance **and** travel to and from that assignment exceeds 90 minutes each way
- Where an overnight stay is required to fulfil an assignment (travel time will be paid on the day of travel)

6.14 In both circumstances detailed at paragraph 6.13 above, travel time will be paid at 50% of the applicable hourly rate for the assignment and will be limited to the actual time spent travelling.

6.15 For the purposes of travel time, the point of origin for the journey will be the closest to the place of the assignment from either;

- the place of business of the Contractor;
- the home of the interpreter.

Subsistence

6.16 24 hour subsistence will only be paid **where all three** of the following circumstances apply and must be agreed in advance with the collaborative partner:

- Where an interpreter incurs costs for overnight accommodation;
- Where the Contractor is required to source an interpreter from outwith the 45 miles each way maximum distance;
- Travel to and from that assignment exceeds 90 minutes each way.

6.17 24 hour subsistence comprises the receipted cost of bed, breakfast and dinner up to a capped limit. The current capped limit is;

- £75.00 for Bed and breakfast;
- £23.50 for dinner.

6.18 Expenditure incurred on alcoholic drinks will not be reimbursed.

6.19 Claims for 24 hour subsistence must be supported by an original itemised receipt attached to the invoice. Claims that are not supported by an itemised original receipt attached to the invoice will not be reimbursed unless a satisfactory explanation is provided to the collaborative partner in writing.

6.20 The Authority recognises that in exceptional circumstances an interpreter may be unable to secure bed and breakfast costs within the capped limits. The interpreter involved must have made reasonable efforts to find suitable accommodation at the business venue within the capped limits. This includes having attempted to secure accommodation using the services of the Framework Public Bodies travel booking agent. In each instance where subsistence is likely to be incurred over the capped limits then prior approval of the Framework Public Body must be requested and approved. In these circumstances the Contractor will provide justification why that is the case for the Framework Public Body to review prior to confirming the order. In

such circumstances the Framework Public Body has sole discretion to accept or refuse services from the interpreter proposed.

Section 7

Cancellation Policy

7.1 Cancellation of a single day assignment shall be at no cost to the authority up to and including **24 hours** prior to the date and time that the assignment is due to commence. Where the Framework Public Body cancels an order with less than 24 hours' notice, cancellation fees will apply in accordance with the Cancellation Arrangements detailed in the pricing schedule.

7.2 Cancellation of a block booking/floating trial assignment shall be at no cost to the authority up to and including **48 hours** prior to the date and time that the assignment is due to commence. Where the Framework Public Body cancels an order with less than 48 hours' notice, cancellation fees will apply in accordance with the Cancellation Arrangements detailed in the pricing schedule.

7.3 Courts should notify the contractor at the earliest opportunity that a booking requires to be cancelled to avoid unnecessary fees.

7.4 If cancelling an interpreter, you should:

- Phone the agency in the first instance with the details required and take a note of the name of the person you are speaking to.
- Email agency to confirm cancellation.
- Copy of email should be stored with process as confirmation.

Section 8

Consolidated invoicing and reconciliation of costs

The contractor will provide Finance Unit with a monthly consolidated invoice detailing overall spend on interpreting, translating and transcription services. This invoice will then be broken down and distributed to individual courts. Sheriff Clerks should reconcile spend against their budget with the Interpreter Attendance Forms which should have been submitted after each assignment (along with any supporting receipts). Any discrepancy with the reconciliation should be directed to the contractor in the first instance. The following monthly invoice can then be adjusted to reflect any credit or debit.

A minimum 2 hour booking charge is applicable for interpreting services.

Section 9

Queries

9.1 If you have any queries in respect of this guidance please contact Operations Delivery business Unit at HQ (0131 444 3455) or email csenquiries@scotcourts.gov.uk For any queries regarding the guidance on Interpreter Exception Reporting email procurement@scotcourts.gov.uk

9.2 A full copy of the collaborative framework contract can be provided by Operations Delivery Business Unit upon request.

Section 10

Translation and Transcription services

10.1 The translation and transcription service covers documents and tapes and other forms of electronic media in the course of case proceedings.

10.2 The translation and transcription service includes;

- 10.2.1 Text to Text
- 10.2.2 Text to Braille – or other tactile or touch formats
- 10.2.3 Speech (audio) to text including tape recordings and other electronic media, audio
- 10.2.4 Video to text
- 10.2.5 Text to speech (audio) – including tape recordings and other electronic media, audio and video

10.3 Material that can be translated/transcribed can include but will not be limited to;

- 10.3.1 Court documentation
- 10.3.2 Correspondence and other court related documentation from EU and other Governments, their courts and prosecution authorities
- 10.3.3 Policy papers from EU and other Governments
- 10.3.4 Correspondence to and from customers and the general public, both within and outwith the UK
- 10.3.5 Forms and Leaflets
- 10.3.6 Posters

10.3.7 Press advertisements
10.3.8 Social work reports

10.4 Transcription services from English to English are not covered by this framework (see section 1.4). Further information on this service can be found on the T Drive at T: Transcriptions/Transcripts Instructions.

10.5 Only UK based translators and transcribers can undertake work under this framework.

10.6 Contractors should not charge more than once for the cost to translate standard text which has previously been translated. Contractors should also apply a discount for matched or repeated text to be translated/ transcribed. Any discount should be identified by the contractor at any early stage.

10.7 Contractors should deliver completed translations/ transcriptions no later than 10 calendar days from receipt of the letter of instruction. If a shorter timescale is required (see Annex E) then the contractor should deliver the document within the specified timescale.

10.8 To arrange a translation or a transcription you **must** first approach the contractor ranked 1st on the contract – Global Connections (Scotland) Ltd

10.9 It is advisable to contact the contractor by telephone in the first instance to inform them of the translation or transcription requirements. Follow this up by emailing/ posting a letter of instruction for translation/transcription **- an example is at Annex E – although you may wish to amend this letter to suit your particular requirements.**

10.10 If the first ranked contractor (Global Connections (Scotland) Ltd) cannot meet the requirements in full then you should contact the 2nd ranked provider Global Language Services Ltd and thereafter the third ranked provider DA Languages Ltd.

10.11 If you need to contact the 2nd or 3rd ranked contractor you must ask for the same requirements as per the 1st ranked contractor.

10.12 In exceptional circumstances where neither contractor can supply the requirements, please see Section 3.9 of this guidance.

Section 11

ANNEX A

Dear

INTERPRETER ORDER FORM

CASE AGAINST: «subj_name»
COURT ADDRESS: «court_name»
COURT DATE(s): «court_date»
COURT TIME: «court_time»
COURT DIET: «court_type»
COURT ACCOUNT CODE: 295 (+3 digit number)

I refer to the above case and would be grateful if you would supply an interpreter to cover the case on the date(s) referred to. The interpreter is required to assist (*insert name of accused or civil party litigant*). The interpreter should have;

1. the Diploma in Public Service Interpreting (Scottish Legal Option) or (where DPSI is not available) an equivalent combination of relevant qualifications and court experience.
2. recent experience of consecutive and simultaneous interpreting in the court context
3. a valid certificate from Disclosure Scotland at Standard Level (unless Enhanced specified by court).
4. The interpreter should be sourced from within a 45 mile radius of the court.
5. The interpreter has not previously been supplied to the police for the same case.

If you are unable to meet these requirements, I would be grateful if, in the first instance, you would contact this office to discuss the matter. In such circumstances I will require a statement in writing from you as to the qualifications and experience of an interpreter recommended by you, the basis of your assessment of the interpreter and as to why you consider the interpreter to be suitable for this assignment.

If you are able to meet these requirements I would be grateful if you would pass this letter to the interpreter identified by you and if it could be treated as a letter of instruction. Please ensure that you hold a copy of the signed code of conduct from the identified interpreter.

This order is placed in accordance with the terms and conditions of the contract awarded to you for the Provision of Interpreters and Interpreting Services, Tender Ref: 197720. Payment will be in accordance with these contract provisions.

Payment will be made in arrears, on completion of the work and submission of the monthly consolidated invoice to SCS Finance Dept. An attendance form must be completed by the Interpreter and a copy submitted to the clerk of court at the time of the assignment. We consider this to be an essential feature of our contract with you and will not pay the interpreter's fee until this form is completed and a copy passed to us.

For invoices purposes, the minimum two hour charge will apply to this booking.

I am grateful to you for your assistance. Please contact this office if you have any queries in relation to this matter.

Yours Faithfully

Sheriff Clerk Depute

Annex B

CONTRACTOR CONFIRMATION FORM
To: The Sheriff Clerk at:

Further to your request, I am pleased to confirm that we have booked an interpreter for the accused/civil party litigant in the following case:

Contractor Job Number	Please PRINT all details
SCS Case Reference	
PF reference no.	
Accused / Party Litigant name	
Date interpreter required	
Court requesting interpreter	
Language	
Are all interpreter order requirements met?	Yes/No – if "No" explain overleaf
Name of Interpreter	
Specify relevant qualifications/ membership of professional association	
Specify previous Court experience	
Date Disclosure Scotland was awarded	State if Standard/ Enhanced level?
Is interpreter travelling within 45 miles?	
Any Case specific requirements?	

Date Code of Conduct was signed	

From Contractor: Global Connections (Scotland) Ltd (or Global Language Services Ltd) (or DA Languages Ltd)
Date:

Page 2 of Contractor Confirmation Form – Annex B

Unable to meet any requirements.

The interpreter in this case does not fully meet the requirements sought. We consider the interpreter to be suitable for the assignment for the following reasons:

Global Connections (Scotland) Ltd/Global Language Services Ltd / DA Languages Ltd

Annex C

STYLE INTERPRETER ATTENDANCE FORM – FOR COMPLETION BY INTERPRETER or CONTRACTOR

Name of Interpreter	
Interpreting Contractor Name and Address:	
Address from which you travelled if different from above	
Contractor telephone number	

NAME/LOCATION OF COURT	
Name of accused/party litigant	
SCS case reference number	
Date attended at court *(Please use a separate form for each date)*	
Appointment start time	
Appointment end time	
Travel expenses (receipt(s) attached)	

Monitoring Comments

Please provide any comments feedback about the interpreting assignment – for example any issues arising or any concerns about the assignment – or any other useful points worth mentioning.

To ensure confidentiality please destroy all court documents carefully or pass them back to the Contractor or Sheriff Clerk for shredding.

Signed by interpreter: _____

Print Name: _____

Date: _____

Annex D

SCOTTISH COURTS AND TRIBUNALS SERVICE

INTERPRETING SERVICE EXCEPTION REPORT

COURT:	
Case Reference Number	
Date of Calling	
Accused	
Interpreting Agency	
Name of Interpreter	
Report:	
Clerk of Court :	
Contact Telephone Number :	

Completed report should be emailed to procurement@scotcourts.gov.uk

ANNEX E

EXAMPLE ONLY – PLEASE AMEND TO SUIT YOUR REQUIREMENTS

TRANSLATION/TRANSCRIPTION – LETTER OF INSTRUCTION

TO:

Global Connections (Scotland) Ltd
3rd Floor,
180 Hope Street,
Glasgow, G2 2UE
Tel: **0141 352 5668**
Email: **TBC**

Dear Sir Madam

CASE AGAINST *(INSERT NAME OF ACCUSED)*
(INSERT COURT)
(INSERT DATE AND TIME)
***(INSERT COPII REFERENCE NUMBER*)**

1. I refer to the above case and would be grateful if you would provide me with a translation/transcription (delete as appropriate) of the attached documentation.

2. I require the documentation to be translated into *(insert language)* and into the *(insert appropriate dialect)*. / I require *(insert details of item)* to be transcribed from *(insert format)* into *(insert format)*.

3. I require the translation/transcription by *(insert date)*.

4. The translator should have a Diploma in Translation and have been assessed by you to have the necessary skills and experience to undertake this particular assignment.

5. Please let me know if the translator requires any terminology to be explained or requires further briefing.

6. You should hold a signed copy of the Code of Conduct from the translator for this assignment.

7. I will require the translated documents to be provided to me in PDF format and to be emailed to me at my email address at *(insert email address)*.

8. I require my translated documents to be proof-read

9. Please note this document is confidential –you should ensure that the necessary standard of security applies to this assignment.

10. Please confirm by return e-mail

- if you are willing to accept this assignment
- that you have assessed the translator to have the appropriate qualifications and skills for this assignment
- that you hold a copy of the signed Code of Conduct from the assigned translator.

Yours faithfully

Sheriff Clerk Depute

ANNEX F

INTERPRETING COMPANIES
OUTWITH THE ITT COLLABORATIVE FRAMEWORK

Please note that the companies on this list should **only** be approached once all three ranked providers (1st ranked Global Connections, 2nd ranked Global Languages and 3rd ranked DA Languages Ltd) have confirmed that they **cannot** provide an interpreter who meets the required criteria.
You **must** also obtain approval from the presiding sheriff/judge or tribunal office holder prior to using the alternative provider(s) and **must** also notify Procurement (CentralPurchasing@scotcourts.gov.uk) as soon as possible as we require to monitor usage outwith the contract. Any queries regarding the contract or Interpreting more generally should be addressed to Operations Delivery Business Unit (csenquiries@scotcourts.gov.uk).

COMPANY	CONTACT DETAILS
ALPHA Translating and Interpreting Services Ltd	18 Haddington Place, Edinburgh EH7 4AF Tel: 0131 558 9003 Website: www.alphatrans.co.uk
Global Voices Ltd	Scion House, Innovation Park, Stirling FK9 4NF Tel: 0845 130 1170 Website: www.globalvoices.co.uk
Reaction Ltd	45 Frederick Street, Edinburgh EH2 1EP Tel: 0131 208 0043

If the three companies listed above **cannot** assist either, then included below are a few more contractors which are available under the RM1092 Language Services framework of which SCTS are also members:

1. Language Empire Ltd: **0330 202 0270**
2. Prestige Network Limited: **01635 866 888**
3. thebigword: **870 748 8000**

Appendix C: List of organisations

We have provided a list of organisations that engaged with us in the preparation of this update. We are grateful to them for their time. Not all were able to meet with us, but we are grateful for those who were able to give time to do so:

- Crown Office
- Victim Support Scotland
- Equality Network
- EHRC
- SCTS
- Scottish Government
- Scottish Government – Equality, Inclusion and Human Rights Directorate
- Rape Crisis Scotland
- Scottish Transgender Alliance
- Scottish Woman's Aid
- British Deaf Association Scotland
- Royal National Institute of Blind People
- Inter-Faith Scotland
- Children and Young People's Centre for Justice
- YouthLink Scotland
- Disability Equality Scotland
- For Women Scotland
- Relationships Scotland
- Shared Parenting Scotland
- Scottish Council of Jewish Communities
- Young Scot
- Who Cares? Scotland
- Humanist Society Scotland
- Muslim Council of Scotland
- Sikh Aid Scotland (formally known as Sikh Council of Scotland)
- National Autistic Society Scotland
- Scottish Minority Ethnic Woman's Network