

**BAR
STANDARDS
BOARD**

REGULATING BARRISTERS

**Professional Conduct Department
Thematic Review**

**Complaints Received From
Litigants in Person**

(or Self-Represented Litigants)

Contents

Executive Summary	3
Introduction.....	5
Background.....	5
Methodology	6
Review of Complaints from Litigants in Person.....	7
Background to complaints	7
Legal advice and legal knowledge	8
What are the complaints about?	10
Interaction with the Bar Standards Board	11
About the litigants in person	12
Conclusions & Recommendations.....	13
Annex A – Protected Characteristics of Litigant in Person Complainants	15

Executive Summary

- 0.1 This report is a thematic review by the Professional Conduct Department focusing on complaints received from members of the public representing themselves – known as litigants in person or self representing litigants – between 1 January 2011 and 31 March 2012. The emphasis is on providing an insight into the issues litigants in person raise regarding their interaction with barristers.
- 0.2 It has been well documented that reductions and changes in legal aid have directly led to more members of the public representing themselves in the courts and at tribunals. Correspondingly the number of complaints received by the BSB from litigants in person has increased substantially since January 2011. Between 1 January 2011 and 31 March 2012, we received 95 complaints from litigants in person alleging professional misconduct against barristers called to the Bar of England and Wales. For the purposes of this report, all 95 files have been reviewed by staff members of the PCD.
- 0.3 Set out below is a summary of the main statistical findings in relation to each section of the report:
- 0.4 **Background to complaints:** The complaints we received mostly related to civil matters and almost half related to County Court proceedings compared with 11% at the High Court and 18% at tribunals. We were able to identify 47% of complainants as claimants in proceedings compared with 41% identified as defendants.
- 0.5 **Legal advice:** We found evidence in 25% of cases showing that the complainant sought legal advice or support in connection with their litigation. From this it appears that the majority of litigants in person who go on to make complaints of professional misconduct are going into the litigation with nothing but their own legal research. Those complainants who did have legal support were less likely to make allegations of the opposing barrister misleading the court and less likely to display a misunderstanding of court process, a barrister's obligations to their client and the presentation of cases.
- 0.6 **Legal knowledge:** Overall, litigant in person complainants in 57% of cases demonstrated a lack of understanding of at least some part of the legal process. Typically this was their own responsibilities with regards to the litigation (35% of cases) – such as the service of papers – or the barrister's obligations to their client (34% of cases). There is a common misconception amongst litigants in person that the opposing barrister will be presenting all of the evidence and a neutral interpretation of the facts. Where the litigant in person has not understood the adversarial nature of the Courts, the likelihood of a complaint being made against the barrister increases.
- 0.7 **What are the complaints about?** The 95 complaints we received are dominated by allegations of barristers lying, which we term "misleading the court". This aspect is significantly over-represented compared with the average for all external complaints and

there is a direct parallel between these allegations and the misunderstandings as to the nature of court proceedings highlighted above. When complaints are made to us we are often unable to identify any professional misconduct in the barrister's behaviour – decisions have been made on 84 cases to date, with three (4%) referred to disciplinary action.

- 0.8 **Interaction with the Bar Standards Board:** In 43% of cases the complainant wanted us to do more than just consider the conduct of the barrister. Most commonly (32% of all cases) the complainant viewed the BSB as an alternative to the courts and expected us to be able to make decisions of law on cases. We consider that these misunderstandings can be addressed in our guidance documents; available to anyone thinking of making a complaint.
- 0.9 **About the litigants in person:** In agreement with the existing literature on litigants in person, we identified a small number of complainants as having been declared vexatious or subject to a Civil Restraint Order. However, for the BSB and the barristers subject to these complaints, a disproportionate amount of time is often taken on these cases. We also identified that 30% of complainants have given some indication of a disability. Again this is in alignment with published figures on litigants in person.
- 0.10 **Conclusions:** For us the key findings from this review are the degree to which litigants in person seem unprepared for their appearance at court/tribunal – which leads directly to complaints about the opposing barrister which show no evidence of a breach of the Code of Conduct – and the high proportion of complainants who expect the BSB to act outside of our jurisdiction and take their case further. We make the following recommendations to address these points:
- a. The BSB – led by the Strategy and Communications Team – should produce some general guidance concerning the role of the barrister as a legal representative that can be made publically available but in particular to organisations that provide assistance to litigants in person; as well as being used by the PCD when corresponding with potential complainants.
 - b. The information provided to all complainants prior to making a complaint should make clear the role of the BSB and the powers that we have. The BSB website and guidance notes for making a complaint should be reviewed and amended accordingly.
 - c. It must be reiterated that although we anticipate that the number of complaints from litigants in person will remain at the high level we currently receive, to date very few cases have shown any evidence of breaches of the Code of Conduct and therefore the conduct of barristers is not called into question. Nonetheless, barristers should be aware of the additional issues they are likely to encounter when facing a litigant in person.

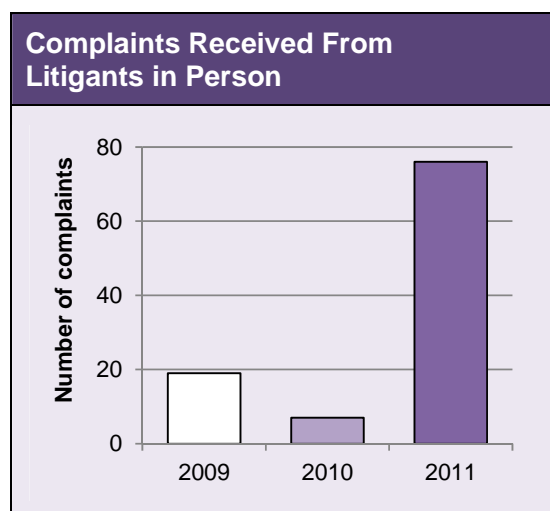
Introduction

- 1.1 The Professional Conduct Department (PCD) works under the authority of the Professional Conduct Committee (PCC). We investigate complaints and, where appropriate, assist the Committee in taking action against barristers who have breached the Code of Conduct.
- 1.2 This report is a thematic review focusing on complaints received from members of the public representing themselves – known as litigants in person or self representing litigants – between 1 January 2011 and 31 March 2012. The emphasis is on providing an insight into the issues litigants in person raise regarding their interaction with barristers.

Background

- 1.3 It has been well documented by, amongst others, the Civil Justice Council (CJC)¹ and the Personal Support Unit (PSU)² that reductions and changes in legal aid have directly led to more members of the public representing themselves in the courts and at tribunals. Correspondingly the number of complaints received by the BSB from litigants in person has increased substantially since January 2011.

- 1.4 In 2009 and 2010, we received a combined total of 26 complaints against barristers from litigants in person. In 2011 alone we received 76 complaints and allegations of professional misconduct from litigants in person now regularly comprise 25% of all of the complaints we receive. From our day to day work on these cases it has become clear to us that, by representing themselves in a legal system which in a number of respects is designed for lawyers, a number of litigants in person are not only finding it difficult to navigate their way through the litigation process – particularly in understanding the responsibilities of all those involved in the case – but also finding it difficult interacting with barristers both inside and outside of court.



- 1.5 While the CJC's recommendations address the paths through which self-representing litigants should gain "Access to Justice", barristers need to understand the issues they are likely to face when finding themselves opposing a lay person in court and here at the BSB

¹ Civil Justice Council (November 2011): "Access to Justice for Litigants in Person"

² Personal Support Unit (September 2011): "Annual Report 2010/11"

we must play our part in delivering the regulatory objectives set out in the Legal Services Act 2007. For the purposes of this report, the relevant regulatory objectives are:

- improving access to justice;
- protecting and promoting the interests of consumers; and
- increasing public understanding of citizens' legal rights and duties.

Methodology

- 1.6 Between 1 January 2011 and 31 March 2012, we received 95 complaints from litigants in person alleging professional misconduct against barristers called to the Bar of England and Wales. For the purposes of this report, all 95 files have been reviewed by staff members of the PCD.
- 1.7 Our files on each case contain all of the correspondence with the complainant – along with supporting documents – and, in cases where an investigation has been carried out, the comments of the barrister subject to the complaint. We prepared a review questionnaire against which the files were compared to ascertain the nature of the complaints and the expectations of the complainants with regards to what they expected us to do with their complaint.
- 1.8 This report is not intended to be a formal survey of the issues faced by litigants in person – such studies having already been completed – and we did not ask for any additional information from complainants in performing this review. As such, in some areas we have only been able to use information that has been explicitly stated on the file. Where, for example, the complainant has made no mention of whether or not they sought legal advice prior to the commencement of proceedings we have made no judgement either way. In addition, we deliberately avoided subjects that may have required a value judgement on our part – such as the standard of literacy of the complainants – as the PCD staff members are, for the most part, not qualified to carry out such an assessment.

Review of Complaints from Litigants in Person

2.1 The following sections outline our findings following our review of all 95 complaints received from litigants in person between 1 January 2011 and 31 March 2012.

Background to complaints

2.2 The complaints we received mostly related to civil matters with property, construction and planning most common at 20% (19) followed by employment at 15%. Family litigation resulted in 18% of all complaints. However, Table 1 shows that complaints are spread over many areas of law. The proportion of complaints relating to “other public and administrative law” was high with 13% of complaints but half of these were received from a single complainant – declared vexatious by the Court.

Table 1 Areas of law to which the complaints relate

Area of Law	Complaints	Percentage of Total
Crime	1	1.1%
Injury	3	3.2%
Wills, trusts and probate	4	4.2%
Conveyancing	1	1.1%
Family	17	17.9%
Property, construction and planning	19	20.0%
Employment (excluding injury at work)	14	14.7%
Immigration and nationality	0	0.0%
Consumer problems	2	2.1%
Welfare and benefits	1	1.1%
Civil liberties	3	3.2%
Intellectual property rights	1	1.1%
Other business affairs	3	3.2%
Other public and administrative law	12	12.6%
Other ³	13	13.7%
Not recorded	1	1.1%

2.3 Almost half of complaints (45%) originated from litigants representing themselves in the County Courts compared with 11% at the High Court and 18% at tribunals. For information, a Ministry of Justice literature review⁴ recorded that, for individual defendants

³ Examples include a housing dispute and a GMC tribunal

⁴ Ministry of Justice Research Summary 2/11 (June 2011): “*Litigants in person: a literature review*”

in civil cases, 28% of County Court cases and 17% of High Court cases involved at least one active party who was unrepresented throughout the life of their case.

- 2.4 The CJC review inferred that defendants would be more likely to be litigants in person than claimants – as whereas claimants usually have the option not to begin proceedings; many defendants have no option but to defend themselves. The complaints we received were no more likely to be from self-representing defendants (41%) than claimants (47%). It is interesting to note that the Ministry of Justice research summary mentioned above refers to some litigants in person believing that their cases were simple enough to be heard without using a lawyer and that the lack of representation negatively affected the outcomes of those cases.

Legal advice and legal knowledge

- 2.5 We reviewed each file to ascertain whether there was any evidence of the complainant seeking advice or assistance with their litigation. From the material supplied we also looked for any evidence that the complaint arose from a misunderstanding of the law or legal procedures.
- 2.6 We found evidence in 25% of cases showing that the complainant sought legal advice or support from a lawyer, Citizens Advice Bureau, law centre, Pro Bono unit or the Personal Support Unit (PSU) in connection with their litigation. In five cases the complainant obtained the assistance of a McKenzie Friend⁵. From this it appears that the majority of litigants in person who go on to make complaints of professional misconduct are going into the litigation with nothing but their own legal research.
- 2.7 Those complainants who did have such legal support were less likely to make allegations of the opposing barrister misleading the court (40% compared with 67% for complainants without any evidence of legal support) and less likely to display a misunderstanding of court process, a barrister's obligations to their client and the presentation of cases. Nonetheless, legal advice did not eliminate these factors entirely – it merely brought litigant in person complainants closer into line with our knowledge of complainants who are represented in court/tribunal by a barrister.
- 2.8 Overall, litigant in person complainants in 57% of cases demonstrated a lack of understanding of at least some part of the legal process. As Table 2 illustrates, most commonly (35%) this was what we have categorised as “their own responsibilities” with regards to the litigation – such as the service of papers or the identification of legally relevant facts. In some notable examples, we received complaints from litigants in person who were surprised to find that documents that they themselves sought to rely on in court

⁵ A McKenzie Friend is somebody who accompanies a litigant in person to a court hearing for the purpose of assisting in such matters as taking notes, helping to organise the documents, and quietly making suggestions – for example as to questions to put to a witness. A McKenzie Friend does not need to be legally qualified and has no right to address the court.

had not been submitted by the barrister on the other side. Similarly many complaints (34%) appear to derive essentially from an expectation that the opposing barrister will be providing a neutral interpretation of the facts; rather than focusing on evidence which supports his/her client's case. The CJC review records that: "PSU clients regularly report initial shock and anger on discovering that the Courts are adversarial, and seem impossible to fathom for lay people, when they had entered a legal system with an understanding that it was fair and just".

Table 2 Areas where litigants in person demonstrated misunderstandings

Areas of Misunderstanding	Complaints	Percentage of Total
Court process	31	32.6%
The law	22	23.2%
Barrister's obligations to his client	32	33.7%
The presentation of cases	18	18.9%
The role of the judge	14	14.7%
The role of the solicitor	7	7.4%
Their own responsibilities	33	34.7%

Case Study

A complaint about the conduct of an opposing barrister in a family dispute case was received by the BSB. The litigant in person complained that the barrister had misled and presented false evidence about the history of the case to the Court and in doing so had caused considerable stress and injury.

The Assessment Team of the PCD obtained a transcript of the court case which proved that the barrister had been performing his duties to his client and that the litigant in person had misunderstood the role of the opposing barrister. It was explained to the litigant in person that the role of the barrister is to protect their own clients' interests and that if a party disagrees with the facts presented in a case, it is the duty of that party, or the lawyer representing them, to put different evidence to the Court for the judge to make a decision on. With no evidence of a breach of the Code, the case was dismissed.

What are the complaints about?

2.9 The 95 complaints we received are dominated by allegations of barristers lying, which we term “misleading the court”. Table 3 compares the allegations made by litigants in person with the average for all external complaints⁶ received over the same period. Featuring in 60% of cases, “misleading the court” is significantly over-represented, as is “rudeness/misbehaviour in court”. The other two common allegations are in line with the average so are not unique to litigants in person.

Table 3 Allegations made against barristers by litigants in person

Aspect	Litigants in Person	All External Complaints
Misleading the Court	60.0%	31.4%
Discreditable/Dishonest Conduct	49.5%	47.9%
Rudeness/Misbehaviour in Court	17.9%	8.1%
Rudeness/Misbehaviour out of Court	11.6%	12.3%
Other	29.5%	39.8%

2.10 There is an obvious connection between “misleading the court” and “rudeness or misbehaviour in court” and the misunderstandings as to the nature of court proceedings highlighted above. Where litigants in person are not sufficiently prepared and knowledgeable about their role and an opposing barrister’s role in court – particularly the adversarial nature of proceedings – it is inevitable that an experienced and legally trained barrister can be perceived as acting unfairly. However, when such complaints are made to us we are often unable to identify any professional misconduct in the barrister’s behaviour.

2.11 Ultimately we have to make a decision as to whether or not to refer each complaint onto

Case Study

A litigant in person who had applied for a discharge of a Restraining Order, complained to the BSB about the barrister opposing the application. The litigant in person claimed that the barrister had deliberately misled the court by presenting false evidence.

When witness statements were taken it became apparent that the litigant in person had, in perceiving the barrister’s presentation of the case to be unfair, misunderstood the role of the opposing barrister. Moreover, it was discovered that the litigant in person had not objected to the history recounted by the opposing barrister at the time of the hearing. Consequently, the Professional Conduct Committee found that there was no realistic prospect of finding professional misconduct on the part of the barrister and dismissed the complaint.

⁶ We receive complaints about barristers from clients (via the Legal Ombudsman), members of the public, solicitors and other professionals and organisations.

an independent Disciplinary Tribunal. For the 95 complaints received from litigants in person, to date a decision has been made on 84 cases; with three (4%) referred to disciplinary action⁷. Across all external complaints the figure is 7% as generally very few external complaints exhibit both evidence of professional misconduct and are sufficiently serious to warrant a referral to disciplinary action.

- 2.12 So there is some evidence to show the complaints from litigants in person are less likely to be referred on to disciplinary action – although practically the proportions are as small as for any other group. However, the numbers of complaints received are much higher in areas such as misleading the court and (notwithstanding the one complaint that actually showed some evidence of a breach of the Code of Conduct) show fundamentally that litigants in person are perceiving misconduct in court or in tribunals where there is none.

Interaction with the Bar Standards Board

- 2.13 We reviewed each file for any evidence that the complainant wanted us to do more than just consider the conduct of the barrister. In 43% of cases the complainant's perception of the BSB was in some way inaccurate, as Table 4 shows. We were also able to identify that in many of these cases these were misunderstandings that could be addressed in our guidance documents; available to anyone thinking of making a complaint.

Table 4 Litigant in person complainants' perceptions of the Bar Standards Board

Perceptions of the Bar Standards Board	Complaints	Percentage of Total
viewed us as an alternative to the Courts	30	31.6%
viewed us as an appellate body	10	10.5%
expected us to be able to set aside judgement	13	13.7%
expected us to obtain evidence for further litigation/appeal	19	20.0%
expected us to be able to give legal advice	11	11.6%

- 2.14 Most commonly the complainant viewed the BSB as an alternative to the courts (32%) – expecting us to be able to make decisions of law on cases – or expected us to obtain evidence or make a decision with regards to the barrister's conduct which would aid their appeal against the Court's decision (20%). As a general rule, we must make it clear from the outset that the BSB's role is solely in determining, from the evidence provided, whether the barrister breached the Code of Conduct.

⁷ One complaint has been heard at a Disciplinary Tribunal to date, with charges of holding out and practising without a practising certificate upheld against the barrister subject to the complaint. The remaining two cases, relating to misleading the court and rudeness/misbehaviour out of court are ongoing.

2.15 In 71% of cases we had to request further information from the complainant prior to making any decision(s) as to whether there was any evidence of a breach of the Code. There is, however, no indication that litigants in person are any more likely to submit unsubstantiated or unclear complaints than a complainant who was represented in their proceedings. While our complaint form indicates that we require supporting evidence up front, we may need to make this clearer.

About the litigants in person

2.16 As this was not a formal survey, there is a limit to the characteristics of litigants in person who make complaints about barristers that we can draw from the files. Nonetheless there

Case Study

Following a failed compensation claim for a personal injury sustained at work, a litigant in person complained to the BSB that the opposing barrister had failed to disclose fundamental documents to the Court. The litigant in person further stated that at the time of the hearing he had not been aware of the Civil Procedure Rules and indicated that he thought the opposing barrister should have made him aware of them. The complainant expected the BSB to take the case forward. The Assessment Team found that as the barrister was not representing the litigant in person at the hearing, he did not have a duty to provide the litigant in person with legal advice. Moreover, the BSB is not an alternative to the Courts and is therefore not able to consider complaints that have already been, or should have been, tried by the Court. As no evidence of a potential breach of the Code of Conduct was found, the complaint was dismissed.

are some areas highlighted in the literature on litigants in person that we can also assess from our data.

2.17 **Legal prohibitions:** In a small number of cases we identified the complainants as having been declared vexatious by a High Court Judge or subject to a Civil Restraint Order. These applied to three complainants and their combined total of ten complaints. However, for the BSB and the barristers subject to these complaints, a disproportionate amount of time is often taken on these cases – which are typically unclear or unsupported and submitted purely to pursue litigation with no merit by other means. These results are in accordance with Moorhead and Sefton 2005⁸ who concluded that “Obsessive/difficult litigants were a very small minority of unrepresented litigants generally, but posed considerable problems for judges and court staff”.

2.18 **Disability:** On making their complaints, all complainants are asked to complete a monitoring form on their protected characteristics. From the file review it appears that significantly more litigants in person consider themselves to have a disability than the monitoring information alone would suggest. While not exhaustive (as beyond the monitoring form it is only where complainants have explicitly stated that they are disabled

⁸ DCA Research Series 2/05 (March 2005): “Unrepresented litigants in first instance proceedings”

that we would be able to tell), 30% of complainants have given some indication of a disability. This applies to 36% of all complaints received from litigants in person. Nine complainants made explicit reference to a mental health issue. The overall figures are in accordance with the CJC report which states at footnote 10 that 27% of PSU clients nationwide report that they have a serious health problem with 15% registered disabled.

- 2.19 **Internet Access:** Of the 82 individual complainants, 76% indicated that they have internet access. Considering this must be taken to be the minimum number this is broadly comparable with the national average. As a source of information, therefore, it should be considered that the internet is a suitable starting point for providing information to potential

Case Study

A litigant in person, who had received a professional warning from her regulatory body, made a judicial review application. The litigant in person then complained to the BSB about the conduct of the opposing barrister stating that the barrister had listed hearing dates without notification. Complaints to the BSB should normally be made within twelve months of the conduct complained of, but in this case a period of over two years had elapsed. By way of explanation, the litigant in person cited a disability which made it difficult for her to communicate. The BSB is committed to improving accessibility for all complainants and will make reasonable adjustments where needed. Evidence of her disability was requested but, despite several reminders and the extension of numerous deadlines, still no evidence was received four months later. As a result, the claims were unsubstantiated and the complaint dismissed.

complainants and litigants in person in general.

Conclusions & Recommendations

- 3.1 The number of complaints we receive from litigants in person alleging professional misconduct against barristers has increased substantially since January 2011 and with no indication that the number of members of public representing themselves will decrease in the near future, we should expect the trend to continue. This review has brought together our experiences in handling complaints from litigants in person to date.
- 3.2 There appeared to be a lack of understanding on the part of many litigants in person not only as to the legal process, the function and obligations of the lawyer on the other side and of the judge, but also their own responsibilities in the litigation process. To some extent this is understandable, particularly considering we only found evidence to suggest that 25% of complainants had sought legal advice or support in connection with their litigation. However, these misunderstandings are directly resulting in complaints of misleading the court and rudeness in court being made against barristers where no breach of the Code of Conduct has actually occurred.

- a. **Recommendation:** The BSB – led by the Strategy and Communications Team – should produce some general guidance concerning the role of the barrister as a legal representative that can be made publically available but in particular to organisations that provide assistance to litigants in person; as well as being used by the PCD when corresponding with potential complainants.
- 3.3 Many litigants in person appeared to have an unrealistic expectation of what the BSB could do for them. In many cases this appeared – at least in part – to arise from their lack of understanding of the legal process and the function and obligations of the court, but also in some cases there was evidence to suggest that complainants had attempted to use the BSB complaints process to pursue their litigation by another means or as a collateral attack on the outcome of their litigation.
 - a. **Recommendation:** The information provided to all complainants prior to making a complaint should make clear the role of the BSB and the powers that we have. The BSB website and guidance notes for making a complaint should be reviewed and amended accordingly.
- 3.4 While the number of complaints received from litigants in person now makes up a substantial proportion of all complaints received by us, it must be reiterated that in more than 95% of cases there was no evidence to suggest that the barristers in question breached the Code of Conduct in representing their clients. Nonetheless, we consider it worthwhile for barristers to understand the additional issues they are likely to encounter when facing a litigant in person in court or at a hearing and it may be that, along with this report and the guidance provided by the Civil Justice Council, we may want to consider the provision of additional training for the regulated community.

Sara Down
Head of Professional Conduct

Simon Lofthouse QC
Chair of the Professional Conduct Committee

October 2012

Annex A – Protected Characteristics of Litigant in Person Complainants

We ask all complainants to complete Equality Questionnaires when submitting their complaint(s) to enable us to monitor access to the services we provide. The questions are designed to gather data in relation to the characteristics protected by the law under the Equality Act 2010. For the period of time covered by this review the relevant protected characteristics are: disability, gender and race. Data collection for the other characteristics began part way through the review period.

Disability: "Do you consider yourself to be disabled as defined by the Equality Act?"	Complainants	Percentage of Total
Yes	13	15.9%
No	29	35.4%
Prefer not to say	2	2.4%
No Information	38	46.3%

Gender: "What is your gender?"	Complainants	Percentage of Total
Male	49	59.8%
Female	20	24.4%
Prefer not to say	0	0.0%
No Information	13	15.9%

Race: "Please choose <u>one</u> of the groups below to indicate your ethnic group"	Complainants	Percentage of Total
White		
English/Welsh/Scottish/Northern Irish/British	44	53.7%
Irish	0	0.0%
Gypsy or Irish Traveller	0	0.0%
Any other white background	3	3.7%
Mixed / multiple ethnic groups		
White and Black Caribbean	2	2.4%
White and Black African	1	1.2%
White and Asian	0	0.0%
Any other mixed/multiple ethnic background	0	0.0%
Asian / Asian British		
Indian	4	4.9%
Pakistani	1	1.2%
Bangladeshi	0	0.0%
Chinese	0	0.0%
Any other Asian background	3	3.7%
Black / African / Caribbean / Black British		
African	1	1.2%
Caribbean	0	0.0%
Any other Black/African/Caribbean background	0	0.0%
Other ethnic group		
Arab	0	0.0%
Any other ethnic group	1	1.2%
Prefer not to say	0	0.0%
No Information	22	26.8%