

# Equality before the Law Bench Book



*Judicial Commission of New South Wales*

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## Foreword

Anatole France once referred to the “majestic equality” of the law which forbade the rich, as well as the poor, to sleep under bridges, to beg in the streets and to steal bread. Over recent decades, legal systems throughout the world have come to recognise that both access to, and the delivery of, justice requires understanding of and sensitivity to the special requirements and disabilities of particular sections of the community.

In this respect, the operation of the legal system applies the traditional principle of Aristotelian ethics — that injustice inheres as much in treating unequals the same, as it does in treating equals differently.

Throughout the two decades of its existence, the Judicial Commission of New South Wales has addressed this issue in the conduct of its educational programs for all of the courts of New South Wales. The annual conferences of those courts have always featured one or more lectures on the particular needs of specific sections of the community, including each of those covered in this Bench Book. Over those years the Commission acquired a formidable body of background papers from a wide range of persons with expertise in the respective areas covered in this Bench Book. Nevertheless, there was a substantial task to be undertaken to integrate and update that material and to transform it into a Bench Book format.

The Advisory Committee, under the Chairmanship of Justice Margaret Beazley, and the principal researcher and author, Ms Anthea Lowe, have made a significant contribution to the administration of justice in the preparation of this Bench Book. I have no doubt that the Bench Book will prove of great significance for the judiciary for many years to come and will substantially enhance the ability of the courts to deliver equal justice according to law.

The Bench Book must, however, be regarded as a work in progress, which will need to be continually updated over time. The Judicial Commission welcomes any comments as to the scope and content of this Bench Book, with a view to ensuring that it effectively performs its important task in the administration of justice, for which it is designed.



The Honourable J J Spigelman AC

Chief Justice

June 2006

## Acknowledgements

### Judicial Officers and the Judicial Commission of NSW

This Bench Book was produced by the Judicial Commission of NSW at the request of Chief Justice Spigelman.

It was written by Anthea Lowe of Anthea Lowe and Associates under the guidance of an Advisory Committee of the Judicial Commission of NSW.

The Commission thanks all the members of the original (2005) Equality before the Law Bench Book Advisory Committee for the generous donation of their time, support, energy, expertise and diligent advice:

- The Honourable Justice Beazley (Chair)
- The Honourable Justice Basten
- The Honourable Justice Rothman
- Her Honour Judge Ainslie-Wallace
- His Honour Judge Norrish QC
- Her Honour Deputy Chief Magistrate Syme
- Her Honour Magistrate Orchiston
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- Dr Michael Dodson AM (Member of the Judicial Commission)
- Mr Ernie Schmatt PSM (Chief Executive, Judicial Commission)
- Ms Ruth Windeler (former Education Director, Judicial Commission)

### Community representatives

The following community representatives provided insightful guidance about earlier drafts of the Sections of the Bench Book relevant to their communities. While the final content of the Bench Book was determined by the Advisory Committee members, we wish to thank each of the following community representatives for their valuable contributions:

#### Section 2 — Aboriginal people

- Ms Sheryn Omeri, Research Solicitor, Aboriginal Legal Service (NSW/ACT) Limited
- Mr Terry Chenery, Director, Legal, Land & Culture, NSW, Department of Aboriginal Affairs (2009)
- Mr Brendan Thomas, Crime Prevention Division, NSW Police and Justice Department
- Dr Diana Eades, Adjunct Professor, University of New England (Update 8)

### Section 3 — People from culturally and linguistically diverse backgrounds

- Professor Sandra Hale, University of NSW (Interpreting and Translation) (Update 7)
- Mr Stepan Kerkyasharian AM, Chairperson, Community Relations Commission For a Multicultural NSW
- Mr Chandrasekaram Visakesa (Vissa), Senior Development Officer (Diversity Services), NSW Attorney General’s Department

### Section 4 — People with a particular religious affiliation

- Mr Stepan Kerkyasharian AM, Chairperson, Community Relations Commission For a Multicultural NSW
- The Reverend Canon Bruce McAteer, General Secretary, The Anglican Church of Australia General Synod Rev Dr Ann Wansbrough, Senior Policy Analyst, UnitingCare NSW/ACT
- Ms Marita Winters, Director, Catholic Communications Mr Graeme Lyall AM, Chairman, Buddhist Council of NSW Dr A Balasubramaniam, Chairman, Hindu Council of Australia
- Mr Nihal Agar, Chairman, Hindu Council of Australia Sheikh Fawaz Kamaz, Australian Federation of Islamic Councils Inc
- Mr Ali Roude OAM, Deputy Chairman, Islamic Council of New South Wales Inc
- Professor Timothy Lindsey, Deputy Director, Centre for the Study of Contemporary Islam, University of Melbourne Ms Candice Talberg, Public Affairs, NSW Jewish Board of Deputies

### Section 5 — People with disabilities

- Ms Julia Haraksin, Diversity Services, NSW Police and Justice Department Professor
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- Ms Meredith MacDonald, Executive Officer, Intellectual Disability Rights Service Inc
- Ms Janene Cootes, Executive Officer, Intellectual Disability Rights Service
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### Section 6 — Children and young people

- His Honour Magistrate Scott Mitchell, Senior Children’s Magistrate, St James Children’s Court
- Professor Anne Graham, Director, Centre for Children and Young People
- Mr Stephen Robertson, Director, Policy, NSW Commission for Children and Young People

- Mr James McDougall, Director, National Children’s & Youth Law Centre Associate
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### Section 7 — Women

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- Professor Regina Graycar, Professor of Law, The University of Sydney

### Section 8 — Lesbians, gay men and bisexuals

- Mr David Scamell, Co-convenor, Gay and Lesbian Rights Lobby
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### Section 9 — Sex and gender diverse people

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- Professor Stephen Parker, Senior Deputy Vice-Chancellor, Monash University
- The Honourable Justice Nicola Pain, Land and Environment Court of NSW (Update 6, 2011)

## Special Acknowledgment

This Bench Book was inspired by three influential publications:

- Judicial College, *Equal Treatment Bench Book*, November 2013, London, at <https://www.judiciary.gov.uk/publications/equal-treatment-bench-book/>, accessed 30 November 2017
- Supreme Court of Queensland, *Equal Treatment Benchbook*, 2016, 2nd edn, Supreme Court of Queensland Library, Brisbane, available at [http://www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/94054/s-etbb.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf), accessed 30 November 2017
- S Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts*, 2nd edn, 2008, AIJA, Victoria, accessed 30 November 2017

The Commission would like to acknowledge the role these publications played as a starting point, and as a source of information, for the *Equality before the Law Bench Book*.

## Disclaimer

The *Equality before the Law Bench Book* contains information prepared and collated by the Judicial Commission of NSW (the Commission).

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## Using this Bench Book

### The contents of this Bench Book

The information in this Bench Book covers the entire NSW court system — criminal and civil, and all levels of courts. It will also have application for Tribunals.

In order to avoid clumsy repetition, the word “court” is used to mean all NSW law courts, and the phrase “judicial officer” is used to mean all NSW judges, magistrates and members of the Industrial Relations Commission.

This Bench Book provides NSW judicial officers with:

- Statistics and information about the different values, cultures, lifestyles, socioeconomic disadvantage and/or potential barriers in relation to full and equitable participation in court proceedings for nine different groups of people.
- Guidance about how judicial officers might need to take account of this information in court — from the start to the conclusion of court proceedings. It provides guidance only and is not meant to be in any way prescriptive.

Section 1 explains why this information has been provided.

The groups covered in the following nine Sections are:

Section 2 — Aboriginal people

Section 3 — People from culturally and linguistically diverse backgrounds

Section 4 — People with a particular religious affiliation

- Section 5 — People with disabilities
- Section 6 — Children and young people
- Section 7 — Women
- Section 8 — Lesbians, gay men and bisexuals
- Section 9 — Sex and gender diverse people
- Section 10 — Self-represented parties

### **How to use this Bench Book**

The *Equality before the Law Bench Book*, or any Section of it, can be read in its entirety or dipped into as necessary — for example, when in court or during a break in court proceedings.

Each Section and sub-section has been written to “stand alone”. This means that there is a reasonable amount of repetition between the main nine Sections and within each Section.

To enable speedy access, there is a detailed Contents List at the front of each Section, and (in due course) an Index at the back of the Bench Book. In addition, liberal use has been made of bullet points and bold type throughout the Bench Book. Precise cross references (including hyperlinks for the “online” version) have been provided wherever appropriate.

Each Section starts with statistical and/or cultural information about the particular group. It then provides additional information and guidance about how to treat members of that group.

The additional information and guidance part of each Section is always entitled “Practical considerations”. The “Practical considerations” part of each Section follows, as closely as possible, the order in which you might need the information in court. To further enable speedy access, the practical guidance within the “Practical considerations” part of each Section has been placed in boxes.

As indicated at various points throughout the text, you may need to read or dip into more than one Section if you happen to be dealing with a person who comes from more than one group — for example, an Aboriginal person with a disability.

## Your feedback

The Judicial Commission of NSW welcomes your feedback on how we can improve the *Equality before the Law Bench Book*.

The Commission is particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific Sections of other Bench Books, discussion or research material.

Please send your comments, by mail, to:

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Section 11 contains a response sheet with contact details.

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# Equality before the law

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## 1.1 Equality before the law and discrimination

Equality before the law is a fundamental concept of our legal system.

All judicial officers take an oath to administer the law without fear, favour, affection or ill will.

Judicial officers must treat all parties fairly regardless of gender, ethnicity, disability, sexuality, age, religious affiliation, socio-economic background, size or nature of family, literacy level or any other such characteristic. Respect and courtesy should be the hallmarks of judicial conduct. Paternalistic or patronising attitudes have no place in the court room.

Equality before the law is sometimes misunderstood. It does not necessarily mean “same treatment”. As McHugh J succinctly explained:

discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different.<sup>1</sup>

Australia is a signatory to a number of UN Conventions relating to human rights, discrimination and the need to treat people fairly. These have been specifically enshrined in the following statutes: the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth), *Human Rights and Equal Opportunity Commission Act 1986* (Cth) and the *Anti-Discrimination Act 1977* (NSW).

Each of these statutes defines discrimination in similar terms to McHugh J’s definition (although in greater length). Discrimination is defined as including both direct and indirect discrimination. In general, the definition of direct discrimination coincides with the latter part of McHugh J’s observation, whereas the definition of indirect discrimination generally coincides with the former part of his comment.

Although these statutes do not apply to judicial officers in court, the professional expectation is that judicial officers will act without discrimination.

## 1.2 The diversity of the NSW population

The NSW population is one of the most diverse in Australia in relation to such characteristics as ethnicity, religious affiliation, sexuality, transgender(ed) status, disability, socio-economic background and household make up. For example:

- 2.5% are Aboriginal — see Section 2.
- 23.8% were born overseas, and 16.8% were born in a non-English speaking country — see Section 3.

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1 *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 402.

- 75% have a religious affiliation, and while 67.7% practise one of over a dozen different Christian denominations, 7.23% practise a non-Christian religion — see Section 4.
- 19% have a disability — physical, intellectual, or psychiatric — see Section 5.
- 15% of those whose first language is English have very poor literacy skills — see Section 5.
- 46.2% of family households living in occupied “private dwellings” consist of couple families with children. 36% of family households living in private dwellings consist of a couple only, and 16.1% consist of a one parent family. 22.8% of the population lives alone, and 3.5% live in group households<sup>2</sup> — see Section 6.
- In 2006, 13% of *individuals* had an income of less than \$600 per week, of which 55.6% were women; the median individual income was only \$461 per week; and 3.9% of *households* had an income of less than \$500 per week<sup>3</sup> — see Section 7.
- 8% to 11% are not exclusively heterosexual — see Section 8.
- A small minority have, or are seen to have, issues with their gender identity — see Section 9.

### 1.3 The importance of perception

Everyone who comes into contact with the court system (whether represented or self-represented) must not only be treated fairly and without discrimination, but also believe they are being treated fairly and without any form of discrimination — otherwise, public confidence in the judicial system will be compromised.<sup>4</sup>

### 1.4 Avoiding bias and stereotyping

To ensure equality before the law for all, judicial officers need to be conscious of any possible personal biases or prejudices about people from different backgrounds and actively seek to neutralise these.

Judicial officers need to ensure that they do not treat anyone as a stereotype, and/or make false assumptions about a particular individual based on what they believe most people from that individual’s group value, or based on how they believe most people from that individual’s group behave.

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2 Australian Bureau of Statistics, *Census 2006*, at [www.censusdata.abs.gov.au](http://www.censusdata.abs.gov.au) (accessed 8 May 2009).

3 Australian Bureau of Statistics, *Census 2006*, 2006 Census Tables: New South Wales, at [www.censusdata.abs.gov.au](http://www.censusdata.abs.gov.au) (accessed 8 May 2009).

4 A survey conducted in 2008 by the NSW Sentencing Council and the Bureau of Crime Statistics and Research found that the majority of NSW residents lack confidence in some aspects of the criminal justice system: see A Butler and K McFarlane, *Public Confidence in the NSW Criminal Justice System*, NSW Sentencing Council Monograph 2, Sydney, 2009.

Judicial officers need a reasonable understanding of the range of values, cultures, lifestyles and life experiences of people from different backgrounds, together with an understanding of the potential difficulties, barriers or inequities people from different backgrounds may face in relation to court proceedings.

There is little doubt that Indigenous people, transgender(ed) people, people with a disability, people from a non-English speaking background, lesbians, gay men, and women experience higher rates of social inequity, discrimination and disadvantage — for which see the relevant sections in this Bench Book.

In addition, people from disadvantaged backgrounds (no matter what other group they happen to belong to) have the greatest likelihood of being both a victim of personal crime, and/or of being involved in crime. For example:<sup>5</sup>

- Single mothers are three times more likely to be victims of personal crime than married mothers.
- Unemployed women are more likely to be victims of personal crime than employed women.
- There are higher rates of crime where there are higher rates of family dissolution, unemployment, renting versus home ownership, and/or residential instability.

While it is important to understand which groups are most likely to experience inequity, discrimination and/or disadvantage, every individual is the product of many different influences. Characteristics such as ethnicity, gender, religious affiliation, disability, sexuality and socio-economic background may or may not have a determining influence on any particular individual's values, life experience or behaviour. However, it *is* usual for such characteristics to have a compounding effect. For example, an Indigenous female with a disability is more likely to have experienced greater discrimination and disadvantage than a non-Indigenous female without a disability.<sup>6</sup>

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5 NSW Bureau of Crime Statistics and Research, “Trends and patterns in domestic violence assaults” (2005) 89 *Crime and Justice Bulletin* 8, accessed 29 May 2006.

6 For an example of a case that examines the interplay of two such characteristics (in this case, age and intellectual disability), see *R v AN* [2005] NSWCCA 239.

## 1.5 Providing for community and individual difference

All of the above means that judicial officers cannot treat everyone the same way if they wish to ensure equality before the law, as to do so could lead to a perception of unfairness and in some cases a legally wrong outcome.<sup>7</sup>

Rather, judicial officers may need to adapt the conduct of court proceedings to ensure that individuals can give their evidence as effectively as possible, receive a fair hearing and obtain an appropriate outcome, bearing in mind the particular individual's background and circumstances.

The types of different approaches that might be required range from the more obvious to the less obvious.

The more obvious examples include:

- Employing a different method and/or style of communication for those who need it — for example, for children and young people, people with no or poor English, people with a communication disability, or for some people who are representing themselves.
- Using a different form of oath for some people who practise a non-Christian religion.
- Allowing someone to present their evidence from a stretcher or hospital bed.

Less obvious examples include:

- Knowing and then using appropriate terminology so as not to cause either offence or the perception of discrimination.
- Not making false assumptions about the lifestyle of, for example, a lesbian or gay man.
- Being able to understand and where appropriate take account of the differing circumstances and needs of people with religious affiliations, people with child care responsibilities, children and young people, or people who have a particular type or form of disability — in relation to such matters as the timing and length of court appearances.

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7 This principle has been referred to as the principle of “substantive equality” — as, for example, cited by McHugh and Kirby JJ in *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92 at [202]: “‘Substantive equality’ directs attention to equality of outcome or to the reduction or elimination of barriers to participation in certain activities. It begins from the premise that ‘in order to treat some persons equally, we must treat them differently’”. See also the discussion in R Graycar and J Morgan, *The Hidden Gender of Law*, 2nd edn, 2002, The Federation Press, Leichhardt, NSW, pp 28–55; and in Australian Law Reform Commission, *Equality before the law: Justice for women*, 1994, ALRC Report No 69, Part I and II, Sydney, (accessed 18 July 2016).

- Being able to understand and take appropriate account of the impact of having a low income and/or a “high cost” disability.
- Being able to understand and take appropriate account of a culturally-specific practice that might have influenced a particular person’s behaviour in relation to the specific matter(s) before the court — for example, the importance of the concept of kinship in defining or shaping the attitudes, values and behaviour of many Indigenous people.

Sections 2–10 of this Bench Book provide information about community and individual differences and practical examples of how to take appropriate account of these differences.

Sections 2–10 cover the following groups of people:

- Section 2 — Aboriginal people.
- Section 3 — People from culturally and linguistically diverse backgrounds.
- Section 4 — People with a particular religious affiliation.
- Section 5 — People with disabilities.
- Section 6 — Children and young people.
- Section 7 — Women.
- Section 8 — Lesbians, gay men and bisexuals.
- Section 9 — Sex and gender diverse people.
- Section 10 — Self-represented parties.

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# Aboriginal people

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## 2.1 Some statistics

### ■ Population:<sup>1</sup>

- Over 172,600 (2.5%) of the 6.92 million residents of NSW are Aboriginal.
- NSW has more Aboriginal residents than any other Australian State or Territory.
- There are slightly more Aboriginal women (87,540) than men (85,080) resident in NSW.

### ■ Language:<sup>2</sup>

- Only 1,194 Aboriginal NSW residents speak an Aboriginal or Torres Strait Islander language at home.
- Only 65 Aboriginal NSW residents say they cannot speak English well; a further 27 Aboriginal NSW residents do not report the level of their English language proficiency.

### ■ Education:

- Aboriginal retention to Years 10, 11 and 12 steadily increased over the decade 2001–2011. Aboriginal retention rates remain considerably lower than those for non-Aboriginal school students but the disparity between the two groups is slowly lessening. Aboriginal students were still much less likely than non-Aboriginal students to progress to the final year of schooling in 2011.<sup>3</sup>
- Aboriginal NSW residents are less likely to have post-school qualifications than non-Aboriginal NSW residents — at 26% compared with 53%.<sup>4</sup>
- From 2008 to 2013, the gap (ie the difference between the proportions of Aboriginal and non-Aboriginal students achieving at or above the national minimum standard) in English literacy skills of school-aged children in year 3 has narrowed, falling 4.0 percentage points; in year 5 falling by 10.6 percentage points; in year 7 the gap has widened by 0.8-1.7 percentage points; in year 9 the gap has widened by 1.7 percentage points. From 2008 to 2013, numeracy rates did not improve in any year group.<sup>5</sup>

1 Australian Bureau of Statistics, *2011 Census*, at [www.censusdata.abs.gov.au](http://www.censusdata.abs.gov.au), accessed 29 November 2013.

2 Australian Bureau of Statistics, “Aboriginal and Torres Strait Islander Peoples (Aboriginal) Profile”, 2011, at [www.censusdata.abs.gov.au](http://www.censusdata.abs.gov.au), accessed 29 November 2013.

3 Australian Bureau of Statistics, *The Health and Welfare of Australia’s Aboriginal and Torres Strait Islander Peoples*, 2011, (Cat No IHW 42), at [www.abs.gov.au](http://www.abs.gov.au), accessed 29 November 2013.

4 *ibid.*

5 Based on the 2013 National Assessment Program: Literacy and Numeracy (NAPLAN) results in reading and writing for Aboriginal and non-Aboriginal students in years 3, 5, 7 and 9, at [www.nap.edu.au](http://www.nap.edu.au), accessed 18 December 2013. See also COAG Reform Council, “Indigenous Reform 2012-13: Five years of performance”, April 2014, pp 47-53, accessed 12 June 2014.

■ **Employment:**

- 14.6%<sup>6</sup> of Aboriginal people in NSW are unemployed compared with a national unemployment rate of 5.8%.<sup>7</sup>
- 5% of Aboriginal people in NSW are employed by the Community Development Employment Projects (CDEP) scheme.

**Note:** in non-remote locations the CDEP program has been extended until 30 June 2017.<sup>8</sup> However, from July 2013, the new Remote Jobs and Communities Program (RJCP) began providing reforms to employment, participation and community-development services in remote regions across Australia. The RJCP replaces the CDEP in remote areas.<sup>9</sup>

- Aboriginal people in NSW earn 55% of the income of non-Aboriginal people in NSW (\$550 per week compared with \$1,004 per week after adjusting for household size and composition).<sup>10</sup>

■ **Housing:**<sup>11</sup>

- 39% of Aboriginal NSW residents live in dwellings they own or are buying, compared with 69.5% of the total population.
- In remote areas of NSW, 43% of Aboriginal people live in rented dwellings provided by Aboriginal Housing Organisations, or in other community housing.
- The proportion of Aboriginal adults living in overcrowded homes is 9.1% compared to 4.3% for non-Aboriginal adults.<sup>12</sup>

■ **Health:**

- Aboriginal people are twice as likely to report their health as “fair” or “poor” than non-Aboriginal people — 28% compared to 14%; with NSW having a higher proportion than Australia — 32% compared with 28%.<sup>13</sup>
- Aboriginal people in non-remote areas of NSW are almost one-and-a-half times more likely to have a disability or long-term health condition than non-Aboriginal people — 59.6% compared with 39.6%.

6 Australian Bureau of Statistics, “Labour Force Survey” 2011 [www.abs.gov.au](http://www.abs.gov.au) accessed 21 February 2014.

7 Australian Bureau of Statistics, “Labour Force Commentary”, January 2014, at [www.abs.gov.au](http://www.abs.gov.au) accessed 21 February 2014.

8 See: <http://guidesacts.fahcsia.gov.au> accessed 27 February 2014.

9 See: [www.humanservices.gov.au](http://www.humanservices.gov.au), accessed 27 February 2014.

10 Australian Institute of Health and Welfare, “Aboriginal and Torres Strait Islander Health Performance Framework 2012 report: New South Wales”, p 74 at <http://aihw.gov.au>, accessed 8 April 2014.

11 *ibid*, p 61.

12 Australian Bureau of Statistics, National Aboriginal and Torres Strait Islander Social Survey, 2008 (ABS Cat No 4714.0) 2010, Canberra [www.abs.gov.au](http://www.abs.gov.au) accessed 4 December 2013.

13 Australian Institute of Health and Welfare, *above n 10*; Australian Bureau of Statistics, *ibid*, accessed 4 December 2013.

About 11% of Aboriginal people in non-remote areas of NSW have a profound or severe “core activity limitation”, meaning that they need assistance with one of self-care, mobility or communication.<sup>14</sup>

- The life expectancy of Aboriginal males in NSW is 9.3 years less than the life expectancy of non-Aboriginal males and 8.5 years less for females.<sup>15</sup>
- Aboriginal people are 10 times more likely to suffer hearing impairment than the general population, ie ear diseases and hearing loss.<sup>16</sup> In *R v Russell* (1995) 84 A Crim R 386 at 393, Kirby P noted that hearing loss is an endemic problem amongst Australian Aboriginals and noted the connection between hearing loss, Aboriginality and the criminal justice system.
- There were significant falls in Aboriginal infant mortality rates between 2006 and 2010 although Aboriginal infants are one-and-a-half times more likely to die than non-Aboriginal infants (6.5 per 1,000 live births, compared with 4.2). The median age at death was 49 years for Aboriginal males and 56 years for Aboriginal females, compared with 76 years for non-Aboriginal males and 82 years for non-Aboriginal females.<sup>17</sup>

■ **Violence:**

- While 2.5% of the NSW population is Aboriginal, 7% of victims of crime in NSW are Aboriginal, three times higher than the general population.<sup>18</sup>
- Aboriginal people are approximately 6 times more likely to be victims of *domestic* assault than non-Aboriginal people.<sup>19</sup>
- Aboriginal women are 6 times more likely than the average NSW woman to be a victim of domestic and family violence, and to suffer more serious injury.<sup>20</sup>
- Aboriginal women accounted for approximately 12.1% of all female homicide victims in NSW between January 2013 and December 2013,

14 Australian Institute of Health and Welfare, above n 10, pp 37–40, NATSSIS, 2008 at [www.abs.gov.au](http://www.abs.gov.au), accessed 9 April 2014.

15 Australian Bureau of Statistics, “Life Tables for Aboriginal and Torres Strait Islander Australians, 2010–2012”, at [www.abs.gov.au](http://www.abs.gov.au) accessed 4 December 2013.

16 [www.creativespirits.info/aboriginalculture/health/ear-health-and-hearing-loss](http://www.creativespirits.info/aboriginalculture/health/ear-health-and-hearing-loss).

17 Australian Institute of Health and Welfare, above n 10, p 72.

18 As at 30 June 2009; Australian Bureau of Statistics, “4510.0 – Recorded Crime – Victims, Australia, 2009” at [www.abs.gov.au](http://www.abs.gov.au), accessed 9 April 2014.

19 K Grech & M Burgess, “Trends and patterns in domestic violence assaults: 2001 to 2010” (2011) 61 *Crimes and Justice Statistics*.

20 *ibid*, p 8.

all (4 of 4 female Aboriginal victims) of whom were killed by intimate partners,<sup>21</sup> compared with 68% (19 of 28 female victims) of non-Aboriginal victims.<sup>22</sup>

- Aboriginal men are about 7 times more likely and Aboriginal women are 10 times more likely to be *domestic* assault offenders, than non-Aboriginal men and women.<sup>23</sup>
- 6.4% of suspects of sexual abuse and 6.7% of suspects of child sexual assault incidents were Aboriginal.<sup>24</sup>
- 9.8% of all NSW sexual abuse victims aged 15 years or younger were Aboriginal. Aboriginal children make up 4% of children in NSW.<sup>25</sup>
- The 2008 Wood Report noted that the “literature indicates that child sexual assault in Aboriginal communities is a complex problem that is interconnected with other aspects of Aboriginal disadvantage such as substance abuse, social and economic disadvantage, poor mental and physical health, and exposure to family violence”.<sup>26</sup>
- 70% of Aboriginal women in custody have been victims of child sexual assault.<sup>27</sup>
- Aboriginal women accounted for approximately 7.5% of all female homicide victims in NSW, 50% (2 of 4 female victims) of whom were killed by intimate partners, compared with 17% (8 of 47 female victims) of non-Aboriginal victims.<sup>28</sup>
- The rate of recorded domestic assault for Aboriginal women is more than six times higher than for non-Aboriginal women (3,275 per 100,000

21 An intimate partner includes spouse/partner, ex-spouse/ex-partner and boy/girlfriend (including ex-boy/girlfriend).

22 Statistics relate to the period between January and December 2013. Source: unpublished data supplied by the NSW Bureau of Crime Statistics and Research, June 2014, based on NSW Police data. Note: the reported relationship between the person of interest and victim is subject to high error rates and should be used with caution.

23 *ibid.*

24 Based on BOCSAR data for 2011 as reported in NSW Ombudsman, *Responding to child sexual assault in Aboriginal communities*, December 2012, p 83, at [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au), accessed 9 April 2014.

25 *ibid.*, p 85.

26 J Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services*, 2008, Vol 1, p 109, at [www.dpc.nsw.gov.au](http://www.dpc.nsw.gov.au), accessed 29 April 2014.

27 Aboriginal Justice Advisory Council, *Speak Out, Speak Strong, Inquiry into the needs of Aboriginal women in custody*, 2003, at [www.lawlink.nsw.gov.au/](http://www.lawlink.nsw.gov.au/), accessed 29 April 2014.

28 Statistics relate to the period between April 2008–March 2009. Source: unpublished data supplied by the NSW Bureau of Crime Statistics and Research, July 2009, based on NSW Police and NSW Criminal court data. (Note: relationship of person of interest to victim is subject to high error rates and should be used with caution.)

population compared to 544 per 100,000). Aboriginal male offending is more than seven times higher than non-Aboriginal male offending (2,760 per 100,000 population compared to 365 per 100,000).<sup>29</sup>

■ **Prosecutions, bail and imprisonment:**

- 8.4% of Aboriginal people appearing before the NSW Local Court appear on at least one offensive language or behaviour charge<sup>30</sup> — this represents almost 30.4% of such charges.<sup>31</sup>
- Aboriginal people were 6 times more likely than the NSW average to commit a murder, 8 times more likely to commit robbery, and 10 times more likely than the NSW average to be implicated in a motor vehicle theft.<sup>32</sup>
- Aboriginal defendants are more likely to be refused bail in NSW courts — 15.4% compared with 5.8% for non-Aboriginal defendants. Aboriginal defendants are also more likely to be refused bail due to already being in custody for a prior offence – 7.2% compared to 2.0% for non-Aboriginal defendants. Yet 37.7% of Aboriginal people who were remanded in custody after their bail was refused do not receive custodial sentences.<sup>33</sup>
- Aboriginal juveniles account for 51% of all juveniles in detention centres, and are imprisoned at a rate approximately 17 times that of the non-Aboriginal population.<sup>34</sup>
- In 2013, Aboriginal women accounted for 30.5% of the female prison population. Aboriginal men accounted for 23% of the male prison population. Overall, Aboriginal people remain grossly over-represented in NSW prisons. In 2013, the full-time Aboriginal prisoner population was

29 BOCSAR, “Trends and patterns in domestic violence assaults: 2001 to 2010”, *Crime and Justice Statistics*, Issue paper No 61, May 2011, p 8.

30 There has been a decrease in the proportion of Aboriginal offenders with an offensive language or behaviour charge since 2007 as a result of an increase in police proceeding against Aboriginal offenders by way of Criminal Infringement Notices for these offences, see “Review of the impact of Criminal Infringement Notices on Aboriginal communities”, accessed 18 July 2016.

31 Statistics relate to the period between January and December 2013. Source: unpublished data supplied by the NSW Bureau of Crime Statistics and Research, June 2014, based on NSW Local Court data.

32 Statistics relate to the period between January and December 2013. These calculations are based on ABS population data from *2011 Census of Population and Housing* (ABS 2011, Cat No. 2001.0) as this is the most recent population data collected for Aboriginal persons. Also, these figures are based on rates rather than solely on incident counts. Source: unpublished data supplied by the NSW Bureau of Crime Statistics and Research, June 2014, based on NSW police data.

33 Statistics relate to the period between January and December 2013. Source: unpublished data supplied by the NSW Bureau of Crime Statistics and Research, June 2014, based on NSW Local Court data.

34 Department of Juvenile Justice, “Young people in custody for 2012–2013”, accessed 18 July 2016.

23.6% of the prison population or 2,356 out of a total of 9,958 full-time inmates. This means that Aboriginal people are 10 times more likely to be incarcerated in NSW than non-Aboriginal people.<sup>35</sup>

- Between 2001 and 2011, the Aboriginal imprisonment rate rose by 51 per cent (nation-wide) compared to the non-Aboriginal rate of a 4% increase. In NSW, the rate of Aboriginal imprisonment increased by 28% from approximately 1,400 Aboriginal persons per 100,000 to 2,000 Aboriginal persons per 100,000. This contrasts with a static rate of approximately 170 non-Aboriginal persons per 100,000 for the same period.<sup>36</sup>
- Of the States and Territories, the Northern Territory and both Western and South Australia have higher Aboriginal prisoner rates than NSW.<sup>37</sup>
- In 2012, 20,094 distinct Aboriginal people appeared in a NSW court charged with a criminal offence (11.6% of the NSW Aboriginal population). Their court appearance rate is therefore 6.8 times higher than the NSW population as a whole — 119,774 people or 1.7% of the NSW population.<sup>38</sup>
- In 2012, across all NSW Criminal Courts (that is, Children’s, Local and Higher court jurisdictions) the number of Aboriginal people given a custodial sentence was 3,140 (or 1.8% of the Aboriginal population in NSW). This was 15 times higher than the overall rate of NSW people given a custodial sentence.<sup>39</sup>

[The next page is 2201]

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35 BOCSAR, Custody Statistics, accessed 9 April 2014.

36 D Weatherburn, *Arresting Incarceration: pathways out of Aboriginal imprisonment*, Aboriginal Studies Press, 2014, p 3; NSW Bureau of Crime Statistics and Research unpublished data.

37 Department of Corrective Services NSW, “Facts and Figures”, March 2013, accessed 18 July 2016.

38 Crime statistics obtained from NSW Bureau of Crime Statistics and Research, “NSW Criminal Courts Statistics 2012”, based on NSW Police and NSW Criminal court data.

39 *ibid.*

## 2.2 Some general information<sup>40</sup>

### 2.2.1 Aboriginal people, Torres Strait Islander people, Kooris, Murris and other groups<sup>41</sup>

- Australia has two Indigenous peoples with separate ethnic and cultural identities — Aboriginal people and Torres Strait Islander people.
- Indigenous people identify as either Aboriginal or Torres Strait Islander. A small number of people in NSW identify as both Aboriginal and Torres Strait Islander. This is a cultural identity based on self-identification and acceptance as an Aboriginal/Torres Strait Islander person within the relevant Indigenous community of origin.
- Many Aboriginal and Torres Strait Islander people in NSW have some non-Aboriginal/Torres Strait Islander ancestry.
- An increasing number of people who originally identified as non-Aboriginal, or who were previously unaware of their Aboriginal ancestry, **are proudly claiming their Aboriginal identity**, identifying themselves, and being accepted by the relevant Aboriginal/Torres Strait Islander community as Aboriginal and/or Torres Strait Islander.<sup>42</sup>
- It is deeply offensive to Aboriginal people to refer to them as half-caste or half-blood, full-caste or full-blood — see also 2.3.3.2.
- Most Indigenous people in NSW are Aboriginal, speak English or a form of English (Aboriginal English) and do not live traditional Aboriginal lives.
- Many Aboriginal people who come from NSW call themselves “Kooris”. “Koori” means “man”, or “people” in many of the hundreds of Aboriginal languages originally spoken in NSW.
- Some Aboriginal people who come from NSW (largely those living near the Queensland border) call themselves “Murris”, as this is the name used by Indigenous people in Queensland.
- Some Aboriginal people from NSW and others from interstate call themselves other names.<sup>43</sup>

40 Unless otherwise indicated, the information in 2.2 is drawn from the S Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts*, 2nd edn, 2008, AIJA, accessed 18 July 2016; and the Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, Supreme Court of Queensland Library, Brisbane, accessed 18 July 2016.

41 Some Aboriginal people who come from NSW call themselves other names, such as “Gooris” or “Murdis”. Aboriginal people resident in NSW who come from other parts of Australia may call themselves other names, depending on the part of Australia they come from. “Aboriginal” is used throughout this section to refer to the original people of NSW.

42 Australian Bureau of Statistics, above n 1.

43 See n 41.

- **ATSI** (an acronym for Aboriginal or Torres Strait Islander people) **is often used by government services**. Many Aboriginal people find this acronym offensive, particularly when used orally — see also 2.3.3.2.
- **Although most Aboriginal and Torres Strait Islander people in NSW do not live traditional lives and live in mainstream urban or regional country town environments, many live within largely Aboriginal communities** located within, near or on the edge of non-Aboriginal settlements. Note that many Aboriginal people originally inhabited the areas that are now cities or townships, and were forcibly relocated to the fringes of these areas, often into “missions” — see 2.2.2 below.

### 2.2.2 Cultural differences

Aboriginal people resident in NSW have many different tribal origins and/or influences which may dictate their specific kinship ties, allegiance to a particular part of the country, language and/or spiritual beliefs.

While it is important to note that not all Aboriginal people follow Aboriginal cultural “norms”, there are many features of Aboriginal culture and/or values that are common to many Aboriginal people, irrespective of their particular tribal origin.

**The main cultural differences and/or cultural value differences between many Aboriginal people and people from non-Aboriginal backgrounds can be grouped as follows:**

- **Impact of cultural losses and survival** — Many Aboriginal people regard the 200-year-old white settlement of Australia as an “illegal occupation” or “colonisation”. The concept of “reconciliation” is important to many Aboriginal people. Reconciliation involves an acceptance by the non-Aboriginal community of the way the Aboriginal community views the overall impact of colonisation. The many losses suffered by Aboriginal communities as a result of colonisation were recognised in the formal apology given on 13 February 2008 by then Prime Minister Rudd; this was but a part in the process of reconciliation. Reconciliation also involves the development of a treaty (as in some other countries) and land rights or self determination. Many Aboriginal (and non-Aboriginal) people believe that the statistics in 2.1 above are a direct result of the way in which the non-Aboriginal community has largely refused to respect the validity of Aboriginal people’s prior claim to the land and has, over the years, in their view, attempted to assimilate or destroy Aboriginal culture. In addition proximate factors which derive from these underlying factors such as drug and alcohol abuse, child neglect and abuse, poor school performance and unemployment, have been identified as directly contributing to these statistics. Aboriginal people are vastly

over-represented in the criminal justice system and this has been described as a “national disgrace”.<sup>44</sup> Connected to this, the police, government services and the law are frequently distrusted and/or seen as tools of oppression. For example, until relatively recently, many older Aboriginal people were moved from their own land and forced to live on church or government “missions” (often with people from different tribal groups) and/or made to work for no or minimal wages. Many (particularly light-skinned) children were “stolen” from their families so that they could be trained in how to speak English and live in non-Aboriginal ways. This was government practice up until 1969 and continued in some areas for some time after this. “Stolen” children were frequently physically, sexually, and/or emotionally abused and mistreated. Despite such practices, many Aboriginal cultural practices, values and ways of interrelating survived, but generally at great socio-economic cost — including, for example, high levels of poverty, unemployment, disease, illness and alcohol and drug abuse — as illustrated at 2.1 above.<sup>45</sup>

- **Collective, group-oriented identity** — Aboriginal culture is a much more collective and co-operative culture than, for example, the Anglo-Celtic Australian<sup>46</sup> relatively individualistic and stratified culture. Elders, not just one elder (that is, those considered to have wisdom, not necessarily the oldest), are charged with maintaining social, spiritual and cultural identity and cohesion.
- **Family and kinship ties are wider and stronger** — the family consists of the extended family often including distant family members (such as various levels of cousin). Family concerns are of primary importance, the nurturing of family and social networks is highly valued, and even distant family members are expected to look after one another.<sup>47</sup> Death or illness in the family generally takes priority over everything else. Children are seen as the responsibility of the extended family. Often “Aunts” (who may or may not be blood relatives), grandmothers, older sisters or cousins take on the role of the mother. (In

44 House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing, Report into Indigenous youth in the criminal justice system*, June 2011, at [2.5], [2.6]. For an overview of the impact of colonisation, see for example, P Dudgeon, H Milroy and R Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental and Health and Wellbeing Principles and Practice*, 2nd edn, Australian Government Department of Prime Minister and Cabinet, 2014, accessed 18 July 2016, Chapters 1, 6, 17, 30.

45 For more information about Aboriginal history, experience and interaction with the law since white settlement see, for example, the many books and articles written by Henry Reynolds and Chris Cunneen — for instance, C Cunneen, *The Impact of Crime Prevention on Aboriginal Communities*, 2001, at [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au), accessed 15 July 2009; and Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, at [www.humanrights.gov.au](http://www.humanrights.gov.au), accessed 15 July 2009.

46 The largest source of migration to Australia in the last 200 years has been from the UK and Ireland, creating a distinct Anglo-Celtic Australian culture. The term “Anglo-Celtic Australian” has been used throughout this section to refer to this culture or to Australians from UK or Irish backgrounds.

47 S Fryer-Smith, *Aboriginal Benchbook for Western Australian courts*, above n 40, p 3:9, 3.3.1.

this connection, note that older people who are not blood relations are often referred to as “Aunt” or “Aunty”, “Uncle” or “Unc” as a mark of respect). However, traditionally, children are also expected to make their own decisions from an early age.

- **Connection to the land is central** — Aboriginal people tend to have a very strong sense of relationship to the land of their particular ancestors, based on Aboriginal spiritual belief that land, or the spirits of ancestors living on that land, give life and strength. Their own part of the country may be referred to as “my country”, “country”, or even “Aboriginal nation”. Despite this, some Aboriginal people are much more mobile than many non-Aboriginal people. For example, they may move back and forth between their part of the country and the city for personal and/or employment reasons. However, they will almost always see their particular land as their home and place to return to. Mobility does not necessarily reflect a lack of community ties at any particular location.
- **Respect for Aboriginal spirituality and culture is important** — for example, “dreamtime” stories or for Torres Strait Islanders “Tagai” stories, ceremonies, song, art and dance. Aboriginal education involves learning Aboriginal cultural and spiritual ways as well as language. In some areas of NSW there has been a revival in the teaching and learning of local Aboriginal languages.
- **Individual material possessions are traditionally not highly prized** — family and spiritual matters are more important.<sup>48</sup> Traditionally, many material possessions, including the home, are seen as community resources with community ownership.
- **Social behaviour is often public** — rather than private. For example, as is common to many social events for Aboriginal and non-Aboriginal people alike, accompanying drinking can commonly occur in public rather than privately.<sup>49</sup> Aboriginal people tend to have a strong outdoor spirit. In addition, some Aboriginal people do not have the personal or financial resources to conduct social activities in private.
- **In many Aboriginal communities, references to deceased persons are taboo** — in these communities referring to the name of a deceased person or showing a picture of someone who is (recently) deceased can cause great distress. It is always best to check with local Aboriginal representatives what the practice in relation to this is in particular communities.
- **Different communication abilities and styles** — many Aboriginal people in NSW speak a form of Aboriginal English and have a different

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48 *ibid*, p 3:10, 3.3.1.

49 *ibid*, p 3:10, 3.3.1.

style of linguistic and body communication than non-Aboriginal people.<sup>50</sup> Traditionally, everyone has the right to speak and the right to listen, but listeners have the right to ignore speakers or to get up and leave. Consensus is important — but tends to be achieved without directly criticising other people’s proposals. Silence is highly valued. Eye contact may be minimal. Authority may be deferred to. In addition, as indicated in 2.1 above, many Aboriginal people have poor literacy skills, a relatively low level of education, and/or higher rates of the types of disabilities that require a different type of communication — for example hearing impairments, or alcohol and other drug abuse. For more about communication, see 2.3.3 below.

- **Status of women** — In pre-colonial Aboriginal societies, men and women performed well-understood roles — each having their important jobs to do, and their own set of cultural and spiritual practices.<sup>51</sup> Violence was not uncommon but was often governed by rules determined by responsibilities and obligations to kin and managed within a broader cultural context.

Colonisation has altered the social conditions in which people live their lives particularly with the introduction of alcohol and other drugs and changes to the spatial arrangements between groups. Today, Aboriginal people mostly live in larger aggregations where the kinds of balances which were achieved in smaller groups are now impossible to maintain and from which they are unable to escape. Housing shortages mean that today many Aboriginal people can be living in the same overcrowded house as those with whom they would traditionally not have been: for example; young men and old women, brothers and sisters, uncles and nieces. One result of these changes has been that the nature and level of violence towards women has changed for the worse.<sup>52</sup>

- **Impact of customary law** — Aboriginal customary law is integral to Aboriginal culture. For Aboriginal people customary law is an “all encompassing reality”.<sup>53</sup> It provides a means of dispute resolution, based on traditional spiritual beliefs and cultural traditions, including providing sanctions against those actions which are considered harmful to the community. It is much broader than corporal punishment and is a means of maintaining social order where local Aboriginal communities act to

50 See D Eades, *Aboriginal ways of using English*, Aboriginal Studies Press, Canberra, 2013; D Eades, “Communicating with Aboriginal people in NSW” (2008) 20(10) *Judicial Officers’ Bulletin* 85; D Eades, *Courtroom Talk and Neocolonial Control*, Mouton de Gruyter, Berlin, 2008; D Eades, “Telling and retelling your story in court: questions, assumptions and intercultural implications” (2008) 20 *Current Issues in Criminal Justice* 209.

51 F Gale, “Introduction”, in F Gale (ed), *Women’s Role in Aboriginal Society*, 3rd edn, 1978, Australian Institute of Aboriginal Studies, Canberra, p 1.

52 See L Behrendt, “Aboriginal women and the criminal justice system” (2002) 14(6) *Judicial Officers’ Bulletin* 41 at 42.

53 Kimberley Aboriginal Law and Culture Centre, *New Legend: A Story of Law and Culture and the Fight for Self-Determination in the Kimberley*, Fitzroy Crossing, Western Australia, 2006, p 15.

solve their own problems and resolve disputes. Many Aboriginal people are increasingly looking for ways of merging Australian law and legal processes with customary law in order to provide more effective and long-lasting ways of resolving problems, and also to ensure that Aboriginal offenders are not doubly punished — that is, via the courts system and customary law.<sup>54</sup> Circle sentencing has been a positive initiative in that it enables full Aboriginal input from Aboriginal Elders, provides a culturally appropriate way of discussing sanctions and therefore (some) self-determination, while at the same time meeting the requirements of Australian law in relation to the type of sentence imposed — for more on this see 2.3.6 below.

- **Racism and discrimination** — Most Aboriginal people have experienced racism and discrimination in relation to all forms of public interaction — for example, in connection with rental accommodation, most other types of services (government and private) and employment. Most will have had frequent experience of this. Very few, if any, will have had no such experience.<sup>55</sup>

This may make some Aboriginal people more likely to name a perceived problem, or a perceived difference in relation to how they are treated as being a form of racism or race discrimination. However, if you follow the guidance provided at 2.3, below, this should be less likely to occur.

### 2.2.3 The possible impact of these cultural differences in court

**Unless appropriate account is taken of the types of cultural differences listed in 2.2.2 above, and the statistics listed at 2.1 Aboriginal people may:**

- feel uncomfortable, resentful, fearful or overwhelmed
- feel offended by what occurs in court
- not be adequately understood, be able to get their point of view across and/or understand what is happening
- feel that an injustice has occurred
- in some cases be treated unfairly and/or unjustly.

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54 This information is drawn from B Thomas, *Strengthening Community Justice: Some issues in the recognition of Aboriginal Customary Law in New South Wales*, Aboriginal Justice Advisory Council Discussion Paper, (archived site) at <http://pandora.nla.gov.au/pan/25201/20080114-1107/customarylawDP.htm> accessed 15 July 2009. For further information about Aboriginal Customary Laws, see Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, ALRC Report No 31, 1986, Canberra, at [www.alrc.gov.au](http://www.alrc.gov.au), accessed 2 June 2014; M Dodson AM, “Customary law and the sentencing of Aboriginal offenders”, (2008) 20(5) *Judicial Officers’ Bulletin* 37; Law Reform Commission of Western Australia, *Aboriginal Customary Laws; The interaction of WA law with Aboriginal law and culture*, Project No 94, Final Report, Perth, 2006 at [www.lrc.justice.wa.gov.au](http://www.lrc.justice.wa.gov.au), accessed 2 June 2014.

55 See Annual Reports and other information published by the Anti-Discrimination Board of NSW and the Australian Human Rights and Equal Opportunity Commission.

**These problems are likely to be compounded if the person also happens to be female, a child or young person, lesbian, gay or bisexual, transgender(ed), a person with a disability, or if they practise a particular religion or are representing themselves — for which see the relevant other Section(s) in this bench book.**

**Section 2.3, following, provides additional information and practical guidance about ways of treating Aboriginal people during the court process, so as to reduce the likelihood of these problems occurring.**

The boxed areas provide the practical guidance.

[The next page is 2301]



## 2.3 Practical considerations

### 2.3.1 Pre-trial diversionary options

Many Aboriginal people feel that pre-trial diversionary options are not used as often as they could be, or as well as they could be — particularly given research that indicates that Aboriginal people are more likely than non-Aboriginal people to be arrested for relatively minor offences.<sup>56</sup>

Given this and the recommendations of the Royal Commission into Aboriginal Deaths in Custody to divert Aboriginal people from the courts system and imprisonment wherever possible, it is important that any locally available pre-trial diversionary options (for example, the Magistrates Early Referral Into Treatment (MERIT) program<sup>57</sup> are considered and used wherever appropriate.

#### Relevant considerations:

- ▣ **Find out what culturally appropriate diversionary programs and services are available locally.** If your court has an Aboriginal Client Service Specialist (ACSS), or your region has an Aboriginal Community Justice Group, they should be able to provide this. If the defendant is represented by the Aboriginal Legal Service, the solicitor appearing will be able to assist with advice as to diversionary programs and services. — see 2.4 below.
- ▣ **Always consider whether any such pre-trial diversionary option might be appropriate in the circumstances of the particular matter(s) before you.**
- ▣ **Consult with appropriate local Aboriginal community representatives about the appropriateness of using any such pre-trial diversionary option given the particular circumstances of the Aboriginal person before you.**

### 2.3.2 Bail

As indicated in 2.1 above, Aboriginal people appearing in NSW courts are more likely to be refused bail than non-Aboriginal people (15.4% Aboriginal people

<sup>56</sup> See statistics at 2.1 derived from the NSW Bureau of Crime Statistics and Research and the ABS.

<sup>57</sup> For more information about MERIT, plus other diversionary programs, see JIRS under “Services Directory” at [https://jirs.judcom.nsw.gov.au/menus/services\\_index.php](https://jirs.judcom.nsw.gov.au/menus/services_index.php), accessed 12 May 2014. For a list of national diversionary programs and analysis of these, see [www.healthinfonet.ecu.edu.au/population-groups/offender-health/programs-and-projects/diversion-programs](http://www.healthinfonet.ecu.edu.au/population-groups/offender-health/programs-and-projects/diversion-programs) and [www.aic.gov.au/en/criminal\\_justice\\_system/Aboriginaljustice/interventions/alternatives/diversion.aspx](http://www.aic.gov.au/en/criminal_justice_system/Aboriginaljustice/interventions/alternatives/diversion.aspx), accessed 12 May 2014.

refused bail compared with 5.8% non-Aboriginal people).<sup>58</sup> Conditions of bail can often have a disproportionately stringent impact on Aboriginal people as, particularly in rural areas, the conditions may conflict with family and cultural obligations. Where residence or banning conditions are a condition of bail, the person released on bail will not have access to support from the community in which he or she grew up.

**Relevant considerations** (in line with s 17 of the *Bail Act 2013*) “the unacceptable risk test”.<sup>59</sup>

- Aboriginal people must not be subjected to any more stringent tests in relation to bail, or any conditions attached to bail, than non-Aboriginal people. A bail condition can be imposed only for the purpose of mitigating an unacceptable risk.
- Paternalism is not appropriate.
- Irrespective of their housing status, Aboriginal people often have very close kinship and family ties to a particular location. Given Aboriginal kinship ties, it may also be less appropriate to attach a condition for an Aboriginal person that the person leave town, than it would be to do so for a non-Aboriginal person.
- Assess bail and bail conditions not just based on police views but also on the views of the defence and respected members of the local Aboriginal community and/or the Local Court Aboriginal Client Service Specialist (if there is one) about the particular person’s ties to the community and likelihood of absconding, and about culturally-appropriate options in relation to bail conditions. Community-based support, for example, might provide as viable an option as family-based support. For how to contact appropriate local Aboriginal representatives, see 2.4 below.
- Reporting and residential conditions need to be realistic and not unduly oppressive — for example, a condition banning residence in a particular

58 2012 data supplied by the NSW Bureau of Crime Statistics and Research, June 2014, based on NSW Police and NSW Criminal court data.

59 Judicial Commission of NSW, *Local Court Bench Book*, 1988—, Sydney, under “The Bail Act 2013”, commencing at [20-000] and particularly “The unacceptable risk test”, at [20-048].

town, or requiring court permission to change, may be ruled as unduly oppressive if there is a death in the defendant's family requiring their immediate attendance in that town.<sup>60</sup>

### 2.3.3 Language and communication

#### 2.3.3.1 Background information

Aboriginal people may face a number of difficulties in relation to aspects of language and communication in court proceedings. The work of Dr Diana Eades with Aboriginal speakers of English has shown how “linguistic factors can play a key role” in outcomes in the criminal justice process.<sup>61</sup> Aboriginal people may have:

- a lesser ability to speak and/or understand (standard) English. Many speak a form of Aboriginal English
- a different communication style, (for example, not making eye contact, use of silence preceding answers to questions), that makes it hard for others to adequately understand them, or means that they are wrongly assessed as, for example, evasive or dishonest
- a lower literacy or educational level than average
- a disability that requires using a communication aid or different technique — see section 5
- a better knowledge or higher appreciation of Aboriginal customary law than Australian law and legal processes.

It is critical that these matters are taken into account so as not to unfairly disadvantage the particular person. Just like everyone else, an Aboriginal person who appears in court needs to understand what is going on, be able to present their evidence in such a manner that it is adequately understood by everyone who needs to be able to assess it, and then have that evidence assessed in a fair and non-discriminatory manner.

<sup>60</sup> See, for example, *R v Bugmy* [2004] NSWCCA 258 where the Court of Criminal Appeal held that a condition imposed on the offender under a suspended sentence that he stay away from Wilcannia for two years unless with the permission of the judge was uncertain and unduly harsh.

<sup>61</sup> D Eades, *Aboriginal ways of using English*, above n 50, Ch 7. Dr Eades comments that the increasing awareness of Aboriginal ways of using English only sometimes results in more equal delivery of justice to Aboriginal people: at pp 118–119 and more research into this area is required.

**You may need to ensure that:**

- Everyone in court avoids any terminology or language that could be seen as either stereotyping or culturally offensive — see 2.3.3.2 below.
- Appropriate measures are taken to deal with those with a lesser ability to speak or understand standard English — see 2.3.3.4 below.
- Appropriate measures are taken to ensure that a person’s different communication style — non-verbal and/or linguistic — does not disadvantage them — see 2.3.3.3 and 2.3.3.4 below.
- Appropriate explanations are given about the court process — see 2.3.3.4 below.

**2.3.3.2 Terminology, descriptors and stereotyping or culturally offensive language**

It is important to use terminology and descriptors that do not cause offence and/or sound discriminatory to Aboriginal people.

**Relevant considerations:**

- Do not use ethnic identifiers (for example, “Aboriginal”, “Aborigine”, “Koori”) unless it is necessary to do so — that is, when the person’s Aboriginal ethnicity is relevant to the matter in hand.
- Where it is necessary to use an ethnic identifier, use the correct and appropriate term. For example:
  - Be as specific as possible — that is, use the term “Aboriginal person” or “Torres Strait Islander person”, as opposed to “Aborigine”, wherever possible.
  - Use the word “person” after the ethnic identifier, as opposed to saying “Aborigine” or “Torres Strait Islander” — unless the person uses one of those terms themselves and gives you permission to do the same.
  - Only use terms such as “Koori” or “Murri” when used by that person/ community themselves and they have given permission for you to use that term.
  - Capitalise all these terms — in the same way that you would capitalise “Australian” or “English”.
  - Do not use the acronym “ATSI” (either orally, or in writing) unless the relevant Aboriginal person/people are using the term themselves.
  - Never use terms such as “half-caste”, “half-blood”, “full-caste”, “fullblood” or “white Aboriginal person”. If it is relevant and necessary

to the particular matter(s) to refer to someone’s ancestry, instead say, for example, that they have an Aboriginal father and a non-Aboriginal mother.

- **Never use or allow terms such as “Abo”, “gin”, “coon” or “nigger” to be used** — these are always considered derogatory — **except when necessary evidentially.**
- Understand words used by Aboriginal people to describe others. The word “**mob**” as in “my mob” is often used by Aboriginal people to mean “my people” or “my social group of people”. Words like “**sis**” meaning “sister” and “Aunt”, “Auntie”, “Uncle” and “Unc” tend to be used much more loosely than within Anglo-Irish Australian culture — they tend to indicate closeness or respect rather than any particular blood relationship. The terms “blackfella” and “whitefella”, while commonly used among Aboriginal groups, should not generally be used by non-Aboriginal people, unless given permission to do so.
- ▣ Only use ethnic-based descriptions when relevant and not to the exclusion of other features. For example, it may be more or just as relevant to refer to a person’s occupation, rather than the fact that they are black.
- ▣ Do not use any form of discriminatory or discriminatory-sounding language. Treat everyone as an individual. Do not make statements that imply that all Aboriginal or Aboriginal people are the same, or likely to act in the same way. Never assume or imply that even what you suspect or know to be the majority way of behaving, thinking, and so on is the standard by which any individual Aboriginal person should be judged.
- ▣ As prescribed by law, intervene in an appropriate manner if others in court (for example, those conducting cross-examination) say anything that is, or could be understood as, discriminatory, stereotyping or culturally offensive. Note that s 41 of the *Evidence Act* 1995 (NSW) provides for the statutory control of improper cross-examination in both civil and criminal proceedings. Section 41 imposes an obligation on the court to disallow improper questions and is expressed in terms of a statutory duty whether or not objection is taken to a particular question (s 41(5)). A “disallowable question” is one which is misleading or confusing (s 41(1)(a)), unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive (s 41(1)(b)), is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate (s 41(1)(c)), or has no basis other than a stereotype (s 41(1)(d)). A question is not a “disallowable question” merely because it challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness (s 41(3)(a)) — or because the question requires the witness to discuss a subject

that could be considered distasteful to, or private by, the witness (s 41(3)(b)). Sections 26 and 29 of the *Evidence Act* also enable the court to control the manner and form of questioning of witnesses, and s 135(b) allows the court to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might be misleading or confusing.

### 2.3.3.3 Non-verbal communication — appearance, behaviour and body language

Most people, including jurors, are likely to, at least in part, assess a person's credibility or trustworthiness on their demeanour.

Yet, not only has demeanour been found to be a fallible indicator of veracity,<sup>62</sup> but also our appearance, behaviour and body language is all heavily culturally-determined. How an Aboriginal person appears and behaves in any particular situation is likely to be different from how an Anglo-Celtic Australian appears and behaves — and this may be even more marked in Aboriginal people who have had less contact with non-Aboriginal people.

This means that it is vital that no-one in the court allows any culturally-determined assumptions about what they believe looks trustworthy and what does not to unfairly mislead or influence their assessment of the credibility or trustworthiness of an Aboriginal person.

For many Aboriginal people, the traits that Anglo-Celtic Australians regard as indicative of dishonesty or evasiveness (for example, not making direct eye contact) can be the very traits that are the cultural “norm” and/or expected to be displayed in order to be seen as polite and appropriate and not be seen as rude or culturally inappropriate.

Just as there are sub-cultures within Anglo-Celtic Australian culture that observe different styles of appearance, behaviour and body language, and also individuals who do not fit any particular cultural norm, there are similar examples within Aboriginal cultures. So, it is also important not to assume that everyone who is Aboriginal will behave in the same way, or to assess Aboriginal people who do not seem to follow general Aboriginal patterns of behaviour as dishonest or lacking in credibility.

62 See for example, L Re, “Oral Evidence v Written Evidence: The Myth of the ‘Impressive Witness’” (1983) 57 ALJ 679; M Kirby, “Judging: Reflection on the Moment of Decision” (1999) 4 *The Judicial Review* 189 and 193–4; and Downes J, *Oral Evidence in Arbitration*, speech to the London Court of International Arbitration's Asia-Pacific Users' Council Symposium, Sydney, 14 February 2003, accessed 18 July 2016. Kirby J also addressed the fallibility of judicial assessment of credibility based on the appearance and demeanour of a witness in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588 at [89].

**Some differences in relation to Aboriginal appearance, behaviour and body language of which appropriate account may need to be taken, are:**<sup>63</sup>

- ▣ **Lack of direct eye contact/looking down or away** — for many Aboriginal people it is impolite and disrespectful to look someone direct in the eye — particularly if that person is in authority. It does not mean that they are dishonest or lacking in credibility. Phrases like “Please look at me when I’m speaking to you” are not appropriate in these situations.
- ▣ **Dress that appears eccentric or disrespectful** — many Aboriginal people have low income levels, so do not have the ability to “dress up” for court appearances in the same way as people who have a higher level of income.
- ▣ **Silence** — silence is a common and positively valued communication style in Aboriginal society. It often means the person wants to think, or to adjust to or become comfortable with a particular situation. For example, an Aboriginal young woman may not feel comfortable responding to questions about sexually related manners delivered by a man. A young Aboriginal person may not feel comfortable giving evidence against someone regarded as an Elder. However, it may also mean that the person does not have the authority to speak on the particular topic in the presence of a particular person, or is uncomfortable with the discussion, or does not support the proposition being put, or does not understand what is being asked and is too embarrassed to ask for clarification.<sup>64</sup> Aboriginal people may require a longer time to answer questions, and where there are prolonged periods of silence to try to establish the reason for the silence, without making any false assumptions about, for example, silence signifying guilt, evasiveness or lack of comprehension.<sup>65</sup> You may then need to take such measures as making sure the person fully understands what is going on and/or why the question is being asked; or excluding people

63 The information in this box is drawn from the S Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts*, 2nd edn, 2008, above n 40 Ch 5; and the Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, above n 40, Ch 9.6, which in turn are both largely drawn from the writings and research of Dr Diana Eades and information prepared for the NSW Department of Public Prosecutions by B Thomas and G Wallace. (See “Further Reading” at 2.5). See also Australasian Institute of Judicial Administration Inc, *Bench Book for Children Giving Evidence in Australian Courts*, 2009, at [2.11] at [www.aija.org.au](http://www.aija.org.au), accessed 26 May 2013.

64 Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 40.

65 Dr Diana Eades describes the Aboriginal tendency to “gratuitous concurrence” as a cultural trait that can be exploited or misunderstood in courtroom proceedings. Eades, *Aboriginal ways of using English*, above n 50, p 122.

from the courtroom in which the witness is giving evidence; or allowing the witness to give evidence in a remote room; or closing the court; or allowing an Aboriginal support person to be present.

- **Different gestures or sign language** — these are significant ways of communicating in traditional Aboriginal culture. For example, sign language is particularly important in hunting and mourning practices. However, many gestures are common to Aboriginal people throughout Australia – for example, two arms crossed over and held in front of the body (as if in handcuffs) means “policeman”.<sup>66</sup> More subtle gestures are also common, even among urban Aboriginal people — for example, eye movements, the head or lips may be used to indicate the direction of motion, or the location of a person or event being discussed. If there is any doubt about what a particular sign or gesture means, ask for its meaning rather than potentially ascribing the wrong meaning to it.
- **Different views about touching** — Aboriginal people commonly touch each other to initiate conversation or instead of conversation. However, uninvited touch by a non-Aboriginal person can be interpreted as a sign of aggression.<sup>67</sup>

All these factors may need to be taken into account whenever you make any assessment based on the demeanour of an Aboriginal person.

All these factors mean that you may need to alert the jury to the fact that any assessment they make based on an Aboriginal person’s demeanour must, if it is to be fair, take into account any relevant cultural differences in relation to demeanour. This may need to be noted early in the proceedings rather than waiting until you give your final directions to them — otherwise, their initial assessment of a particular person may be unfairly influenced by false assumptions, and may not be able to be easily changed by anything you say in your final directions to them.<sup>68</sup>

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66 S Fryer-Smith, *Aboriginal Benchbook for Western Australian courts*, above n 40, p 5:7, para 5.3.1, Supreme Court of Queensland, *Equal Treatment Benchbook*, n 40, p 113, citing Queensland Department of Justice and the Department of Aboriginal and Torres Strait Islander Policy, *Aboriginal English in the Courts*, GoPrint, Brisbane, 2000, at 8.

67 S Fryer-Smith, *ibid*, p 5:7 para 5.3.1.

68 Note the concerns of the NSWLRC in its *Jury Directions in Criminal Trials*, Report 136, 2013, p 110, where the Commission comments that “providing a generic set of directions at the commencement of the trial, when it is known that Aboriginal people will be giving evidence, may be inappropriate or unnecessary for the particular case ... More research is required to ensure that such directions are applied appropriately in individual cases. Indeed, there is a danger that such directions, if applied in cases where the circumstances do not require them, may be regarded as paternalistic or racist or potentially inimical to a fair trial”.

#### 2.3.3.4 Verbal communication — language level and style

There are varying levels of literacy and education among Aboriginal people in NSW. Many use a form of Aboriginal English. In addition, many Aboriginal people have culturally different communication styles.

Yet, just the same as anyone else who appears in court, an Aboriginal person needs to understand what is going on, the meaning of any questions asked of them, and to be sure that their evidence and replies to questions are adequately understood by the court.

**Additional needs connected with a disability** — For information about communication aids and techniques for Aboriginal people with a disability that affects their communication ability (for example, a hearing impairment, mental illness, alcohol or drug affected dementia or speech) — see Section 5 at 5.4.1 and 5.4.3. However, note that you may also need to use some of the additional Aboriginal-specific techniques described in this part — 2.3.3.4.

**Interpreters** — The vast majority of Aboriginal people resident in NSW speak English, or Aboriginal English. If there is any doubt about an Aboriginal person who speaks Aboriginal English understanding the questions being asked, or being adequately understood by non-Aboriginal people, an interpreter should be used. Note that there is significant criticism among Aboriginal people and non-Aboriginal people about the fact that Aboriginal interpreters are not used when they should be used, and the obvious difficulties (including inequitable and unjust outcomes) this causes.<sup>69</sup> For more about interpreters including when they are needed, how to book one and/or how to work with one — see 3.3.1.

<sup>69</sup> D Eades, *Aboriginal ways of using English*, above n 50; D Eades, “Aboriginal English in Courts” (1994) 1(4) *The Judicial Review* 367; D Eades, “Interpreting Aboriginal English in the legal system”, paper presented at the Proper True Talk National Forum, Alice Springs, October 1995, in Commonwealth Attorney-General’s Department, *Report of Proper True Talk National Forum: Towards a National Strategy for Interpreting in Aboriginal and Torres Strait Islander Languages*, 1996, Canberra, pp 57–68; D Eades, “Communicating with Aboriginal people in NSW” (2008) 20(10) *Judicial Officers’ Bulletin* 85; D Eades, *Courtroom Talk and Neocolonial Control*, Mouton de Gruyter, Berlin, 2008; D Eades, “Telling and retelling your story in court: questions, assumptions and intercultural implications” (2008) 20 *Current Issues in Criminal Justice* 209.

**Relevant considerations:**<sup>70</sup>

- **Carefully assess the particular person’s language and communication style** — for example, do not assume that every Aboriginal person will speak in Aboriginal English.
- **Take more time, if necessary.** Do not show any exasperation. Provide additional time, if necessary, for the person’s legal representative or court friend (relative or elder) to explain the proceedings to them. Consider whether it is appropriate to ask the litigant/witness to repeat their understanding of directions, orders etc.
- **Consider the cultural comfort level** (in relation to aspects such as shame and modesty) **of the person in relation to giving their particular evidence in open court, or in front of particular people.** In some cases, the person may need to have an Aboriginal support person (for example, a Local Court Aboriginal Client Services Specialist) with them (close by/within sight), or you may need to consider whether to close the court.
- **Be respectful** — for example:
  - Do not correct Aboriginal English — for example, do not correct any different usage of words, different verb tenses or omitted verbs or parts of verbs, changes in the order of words, or words beginning with a vowel which begin in ‘h’ in Standard English.
  - Note that some Aboriginal English words do not mean the same as English words — for example, “mob”, usually means “people”, “camp”, often means “live”, “kill”, may mean “hurt”, “deadly”, may mean “good”.
  - Seek clarification whenever you are unsure what a particular word or phrase means.
  - Do not try to speak in Aboriginal English.
  - Do not “talk down” to the person.
  - Do not be paternalistic.

<sup>70</sup> The information in this box is drawn from the S Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts*, above n 40, Ch 5; and the Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 40 Ch 9.

- **Speak in an ordinary tone of voice, at an ordinary volume, but speak clearly and slowly, using simple and direct English. For example:**
  - Use short, simple words or phrases — for example “about”, not “regarding” or “concerning”; “start”, not “commence”; “go”, not “proceed”; “to”, not “towards”; “I think you said/did...”, not “I put it to you that...”; **“It’s true, isn’t it”**, not “Is that not true?”.
  - Use short sentences and simple sentence structure — for example, active not passive speech (subject, verb and then object, not object, verb then subject) — for example, **“The dog bit you”**, not “You were bitten by the dog”.
  - Use simple verb tenses — the simplest, most definite or concrete verb tense possible with as few extra words as possible — for example, **“you say”**, not “you are saying”, **“she had”**, not “she had had”.
  - Avoid figurative speech — do not use phrases like “It’s clear as mud”.
  - Avoid double negatives — they are confusing.
  - Use concrete, rather than abstract, concepts.
  - Use legal jargon only when necessary, and if you do need to use it explain it in simple English. For example, no Latin words or phrases; prefer words and phrases like “law”, not “statute” or “legislation”; or “X will now ask you some questions”, not “X will now cross-examine you”, or “what you can tell us about ...”, not “your evidence”; or “against”, not “versus”.
- **Be careful about any references to deceased people (see 2.2.2 above).** Where making any such reference is unavoidable, you may need to warn Aboriginal people present that what you are about to say includes references to Aboriginal people who are deceased.
- **Carefully explain court processes and proceedings — using the simple and direct language explained above.** For example, you may need to explain what is meant by such things as bail, statement, affidavit, evidence, cross-examination, intent, not incriminating themselves, appeal; and give them permission to ask questions when at all unsure or confused. You may also need to make sure that any necessary written material is understood, and/or read out to them. It may also be appropriate to check that the person understands particular obligations, instructions, orders or procedures by asking them to tell you their understanding of what they must do.
- **In relation to questioning (including cross-examination):**
  - Note that Aboriginal people often pursue personal information in a roundabout way — gradually getting to a subject by building

an overall picture first. Personal questions are only asked when some understanding has been established. So, try to avoid direct questions. Instead, it is usually better to use an indirect approach and then give time for an answer — Instead of the direct question “Were you at that house?” try: a) hinting and waiting — for example, “I need to know whether you were at that house”. Or, b) framing a question as a statement — for example, “You were at that house?” Or, c) making a statement and waiting for confirmation or denial — for example, “It seems as if you were at that house”, or “Maybe you were at that house”.

- Avoid negative questions (“You didn’t do that, did you?”) — they can confuse.
  - Avoid “either/or” questions — they can confuse. Rather than “Were you at the house or the park?” ask “Were you at the house?”<sup>71</sup> “Were you at the park?”, and then wait for the answer.
  - Be careful of the person agreeing or saying “yes” when they do not mean to agree — they may be saying yes, in order to show that they are being obliging/amenable, or because they see the situation as hopeless or futile, or rather than admit they do not understand the question.
  - Be careful if the person is trying to repeat or is repeating the exact words and grammatical structure of the questioner — they may simply not have the English skills to give a more accurate or precise reply.
  - Be careful of silences — for more on this see the box at 2.3.3.3 above. Silences may also mean that it is not possible to answer the question with a certain member of the family present.
  - Be careful of “I don’t know” responses — they may not mean evasiveness, they may simply mean that this is not an appropriate way for them to provide the information. There may also be issues of shame or modesty involved. Try a different approach.
  - Vagueness about time, numbers or distances may simply be cultural. Aboriginal people may list or describe rather than numbering or quantifying; and may refer to physical, social or climatic events rather than using specific dates or times.
- As prescribed by law, intervene if anyone else in court says anything that appears difficult for the person to understand, or seems to be being

71 Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 40, p 123.

misunderstood, or is being demeaning, unnecessarily repetitive, unduly annoying, harassing, intimidating, offensive or stereotyping. Note: you have a mandatory duty under s 41 of the *Evidence Act* to disallow questions which are misleading or confusing (s 41(1)(a)), unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive (s 41(1)(b)), is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate (s 41(1)(c)), or has no basis other than a stereotype (s 41(1)(d)).<sup>72</sup>

- If appropriate, alert the jury to the fact that any assessment they make based on an Aboriginal person's communication style must, if it is to be fair, take into account any relevant cultural differences. This may need to be noted early in the proceedings rather than waiting until you give your final directions to them — otherwise, their initial assessment of a particular person may be unfairly influenced by false assumptions, and may not be able to be easily changed by anything you say in your final directions to them.
- Check the language of any prior confession against the language used by the particular Aboriginal person (and indeed assess any such confession more generally against the education level and cultural sophistication of the particular person).

#### 2.3.4 The impact of being Aboriginal on any behaviour relevant to the matter(s) before the court

**Any of the cultural differences listed at 2.2 above could (depending on the matter before the court) be a major influence on the way in which an Aboriginal person behaves, has behaved, or presents themselves, their expectations or their evidence in court.**

**Points to consider:**

- Have these types of differences in customs, values and/or life experience been an influencing factor in the matter(s) before the court?
- If so, where possible, you may need to take appropriate account of these influences. For example, you may need to decide whether Australian law allows you to take account of any such influences and, then, as appropriate and at the appropriate time in the proceedings, so

<sup>72</sup> See 2.3.3.2 above.

as to ensure that justice is done and seen to be done, explain why any such influences can/should be taken into account, or cannot/should not be taken into account. For example, you may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing — see 2.3.5.

- You may need to ensure that Aboriginal customs, values and lifestyle choices, are accorded respect rather than disrespect by everyone in court — while explaining and upholding NSW law where it conflicts with the particular custom, value or lifestyle choice. For example, as prescribed by law, this may mean intervening if cross-examination becomes disrespectful, or if it simply fails to take account of a relevant cultural difference.<sup>73</sup>
- If you are unsure how to assess the cultural appropriateness or otherwise of a particular behaviour, or unsure how best to deal with it to ensure justice is both done and seen to be done, you could ask the Aboriginal person's legal representative, Local Court Aboriginal Client Service Specialist, Aboriginal Witness Assistance Officer or a respected member of the relevant Aboriginal community to advise the court about this.
- Be careful not to let stereotyped views about Aboriginal people unfairly influence your (or others' assessment).
- Be mindful of the high levels of domestic violence and sexual assault within Aboriginal communities, and do not discount any such violence as being in some way culturally appropriate. It is not.
- On the other hand, the relatively high levels of alcohol and other drug abuse within some Aboriginal communities may mean you need to consider issues such as whether the person is fit to plead or be tried, whether they were capable of forming an intention at the time, and the validity of defences such as diminished responsibility, more frequently than for other groups — for more on this, see Section 5 at 5.3.2.

### 2.3.5 Directions to the jury — points to consider

As indicated at various points in 2.3 above, it is important that you ensure that the jury does not allow any ignorance of cultural difference, or any stereotyped or false assumptions about Aboriginal people to unfairly influence their judgment.

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<sup>73</sup> Section 41 *Evidence Act 1995*.

**In your final directions to the jury, you may need to remind them of any points in relation to these aspects that you alerted them to during the proceedings, and/or cover them for the first time now.**

This should be done in line with the *Criminal Trial Courts Bench Book*<sup>74</sup> or *Local Court Bench Book*<sup>75</sup> (as appropriate), and you should raise any such points with the parties' legal representatives first.

For example, you may need to provide specific guidance as follows:

- That the jury must try to avoid making stereotyped or false assumptions — and what is meant by this. For example, it may be a good idea to give them specific examples of stereotyping and explain that they must treat the particular Aboriginal person as an individual based on what they have heard or seen in court in relation to the specific person, rather than what they know or think they know about all or most Aboriginal people.
- On the other hand, that they also need to assess the particular person's evidence alongside what they have learned in court about the way in which Aboriginal people tend to behave, speak, and what they tend to value, as opposed to the way in which they themselves might act, or the way in which non-Aboriginal people are expected to act. In doing this, you may also need to provide guidance on any legal limitations that exist in relation to them taking account of any of these matters. You may also need to be more specific about the particular aspects of cultural difference that they need to pay attention to.

### 2.3.6 Sentencing, other decisions and judgment or decision writing — points to consider

**Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory.**<sup>76</sup>

**Points to consider:**

- An Aboriginal person referred to or specifically affected by your sentencing, decision(s) and/or written judgment or decision must be treated fairly and without discrimination. You may need to pay due

74 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2002—, Sydney, accessed 18 July 2016

75 Judicial Commission of NSW, *Local Court Bench Book*, 1988—, Sydney, at [www.judcom.nsw.gov.au/publications](http://www.judcom.nsw.gov.au/publications), accessed 13 May 2014.

76 See also Judicial Commission of NSW, *Sentencing Bench Book*, 2006—, Sydney at [2.200].

consideration to (and indeed specifically allude to) some of the points raised in the rest of 2.3 (including the points made in the box in 2.3.5 immediately above) that are relevant to the particular case.

- Whether to allow a victim impact statement to be read out in court. A victim impact statement may be received and considered by the court at any time after it convicts, but before it sentences, an offender.<sup>77</sup>
- It is also important to ensure that your sentencing, decision and/or written judgment:
  - Is not harsher than it would be if the person was not Aboriginal.
  - Is not paternalistic.
  - Takes account of the Royal Commission into Aboriginal Deaths in Custody recommendations to divert Aboriginal people away from detention/imprisonment if at all possible, and where detention is unavoidable, to detain/imprison the person as close to their community as possible — for example, you (or Circle Sentencing — see below), may be able to make use of a diversionary program through the Local Court MERIT program or other alcohol or drug programs imposed as a condition of a bond under the *Crimes Sentencing Procedure Act 1999*, a community service educational program (for example, an anger management program), an Intensive Correction Order, a community service order (preferably where the community service is done on behalf of the local Aboriginal community), or home detention. Home detention for example might be particularly appropriate for an Aboriginal woman with child care responsibilities. On the other hand, home detention may not be appropriate where the particular person lives in sub-standard housing. It may also be inappropriate for those for whom being outdoors is culturally critical.
  - Takes account of the fact that high levels of incarceration result in the institutionalisation of a large proportion of Aboriginal offenders and a lengthy term of imprisonment may be particularly harsh for an Aboriginal offender.<sup>78</sup>

77 See Pt 3, Div 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) entitled “Victim Impact Statements” and the Charter of Victims Rights (Pt 2 Div 2 *Victims Rights and Support Act 2013* which allows the victim access to information and assistance for the preparation of any such statement). Note that any such statement should be made available for the prisoner to read, but the offender must not be allowed to retain it: s 28(5) *Crimes (Sentencing Procedure) Act 1999*.

78 Principle G in *R v Fernando* (1992) 76 A Crim R 58; approved by the High Court in *Bugmy v The Queen* (2013) 87 ALJR 1022 at [39].

- Where relevant, takes account of the principles in relation to the sentencing of Aboriginal offenders that were first enunciated in 1992 by Wood J in *R v Fernando*<sup>79</sup> — see Appendix to this Section. It is necessary to point to material that establishes a background of social deprivation if *Fernando* factors are relied on in mitigation of sentence.<sup>80</sup>
- Takes account of any relevant evidence from local Aboriginal groups or elders — see 2.4 below, for how to contact relevant local Aboriginal groups/people.
- Where locally available, consider circle sentencing, the forum sentencing intervention program, and/or youth justice conferencing<sup>81</sup> for Children’s Court matters, and where appropriate — that is, where the Aboriginal person has admitted to the crime, wants to be referred to one of these processes, the crime is of a level appropriate to such an option, and the particular option is both available and likely to work for the particular offender. Circle sentencing and youth conferencing

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79 (1992) 76 A Crim R 58 at 62–63.

80 *Bugmy v The Queen* (2013) 87 ALJR 1022 at [41]. See also the judgment of Kirby P in *R v Russell* (1995) 84 A Crim R 386 at 392–394, where he discussed the implications for offending by young Aboriginal people of various health issues, particularly hearing disabilities, and the relevant literature on that topic. See also, *R v Henry* (1999) 46 NSWLR 346; at [10]–[11]; and Law Reform Commission of NSW, *Sentencing Aboriginal Offenders*, Report No 96, 2000, Ch 2, accessed 18 July 2016. For a useful overview of case law dealing with recognising Aboriginal disadvantage in sentencing, and the relationship between the objective and subjective character of offending, see S Norrish, “Sentencing Aboriginal offenders: not enough ‘judicial notice’?”, paper given to the Judicial Conference of Australia Colloquium, Sydney, 13 October 2013, at [www.jca.asn.au/past-colloquiums](http://www.jca.asn.au/past-colloquiums), accessed 27 May 2014.

81 See JIRS under “Services Directory” for contact information about Forum Sentencing and youth justice conferencing, at <https://jirs.judcom.nsw.gov.au>, accessed 13 May 2014.

can both be more in tune with Aboriginal cultural norms about how sanctions should be imposed in that they enable Aboriginal community discussion and involvement.<sup>82</sup>

- Note that circle sentencing tends to be effective only where the offender and the Aboriginal people conducting the circle sentencing are from the same tribal group, otherwise the public shaming and respect elements of circle sentencing are not likely to have the same effect. The Judicial Commission of NSW has produced a DVD for judicial officers, *Circle Sentencing in New South Wales* and may be viewed on the Commission's website at [www.judcom.nsw.gov.au/publications](http://www.judcom.nsw.gov.au/publications).<sup>83</sup>
- Takes account of the fact that some Aboriginal people may be punished according to customary law. "Aboriginal laws, customs and traditions continue to exist in Australia and, like the common law, they are dynamic"<sup>84</sup> and not restricted to rural communities.

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82 See D Dick, "Circle Sentencing of Aboriginal Offenders: Victims Have a Say" (2004) 7(1) *The Judicial Review* 57, and note its final words at 72:

Finally, I'll leave you with the words of one of the elders, I think they are quite significant. He said: "This is not white man's law anymore, it's the people's law".

See also Judge Nicholson SC, "Circle Sentencing is a Success" (2005) 17(6) *Judicial Officers' Bulletin* 47, Judicial Commission of NSW; R Lawrie, B Thomas, I Potas, J Smart and G Brignell, *Circle Sentencing in NSW: A review and evaluation*, 2003, Aboriginal Justice Advisory Council; L Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme*, 2000, New South Wales Bureau of Crime Statistics and Research, the NSW Attorney General's Department.

For a good summary of circle sentencing in Australia, see A Hennessy, "Aboriginal Sentencing Practices in Australia", paper presented at the International Society for Reform of the Criminal Law Conference, Brisbane, July 2006, at <http://archive.sclqld.org.au>, accessed 21 May 2009. See also E Marchetti and K Daly, "Aboriginal Courts and Justice Practices in Australia" (2004) 277 *Trends and Issues in crime and criminal justice*, Australian Institute of Criminology.

For an analysis of the impact of circle sentencing on recidivism, see J Fitzgerald, "Does circle sentencing reduce Aboriginal offending?" (2008) 115 *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research. Following the publication of the BOCSAR study, Dr Don Weatherburn urged the State Government to strengthen its commitment to resourcing the circle courts: "Circle Sentencing Evaluation", Media Release, 16 July 2008, at [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au), accessed 21 May 2009.

The Judicial Commission of NSW has produced a DVD for judicial officers, *Circle Sentencing in New South Wales*, Sydney, 2009, which explains what circle sentencing is and how it works. Please contact the Judicial Commission to obtain a copy or it may be viewed as a video clip on the Commission's website at [www.judcom.nsw.gov.au/publications](http://www.judcom.nsw.gov.au/publications).

83 Judicial Commission of NSW, *Circle Sentencing in New South Wales*, (DVD), Sydney, 2009.

84 NSW Law Reform Commission, *Sentencing Aboriginal Offenders*, Report 96, 2000, p 63.

While there is no formal recognition of customary law in NSW for sentencing purposes, a court can take into account “extra-curial punishment”, that is, “loss or detriment imposed on an offender by persons other than the sentencing court, for the purpose of punishing the offender for his [or her] offence or at least by reason of the offender having committed the offence”: *Silvano v R* (2008) 184 A Crim R 593 at [29]. The weight to be given to any extra-curial punishment will depend on all the circumstances of the case and in some cases, extra-judicial punishment attracts little or no weight. You may need to find out what sort of customary punishment (if any) is likely to be imposed, and then consider whether to order a different sentence in the light of this — so as to avoid unduly harsh (or double) punishment. On the other hand, you may also need to consider whether taking any such customary punishment into account could be seen as sanctioning unlawful behaviour.<sup>85</sup> Note that in sentencing for Commonwealth offences, cultural practices cannot be taken into account in mitigation or aggravation of the seriousness of criminal offending.<sup>86</sup>

- Takes account of the fact that Aboriginal people tend to have much lower incomes than non-Aboriginal people — so a specific level of fine for them will often mean considerably more than the same level of fine for others and may lead to licence disqualification for failure to pay a fine. Licence disqualification has a serious impact on rural and regional Aboriginal communities and many Aboriginal people convicted of driving while disqualified are disqualified for many years.<sup>87</sup>

85 See for example the Northern Territory CCA decisions of *R v Minor* (1992) 79 NTR 1; *Jadurin v R* (1982) 44 ALR 424. In relation to “extracurial” punishment and its relevance to sentencing, see *R v Allpass* (1993) 72 A Crim R 561 at 567; *R v Daetz* [2003] NSWCCA 216; *R v Holden* (unrep, 28/7/97, NSWCCA) at [5]. See also the *Sentencing Bench Book*, above n 76, at [10-520]. For further consideration of customary law and its relevance to Aboriginal persons, see NSW Law Reform Commission, *Sentencing Aboriginal Offenders*, Report 96, 2000, ch 3. Note that in sentencing for Commonwealth offences, cultural practices cannot be taken into account in mitigation or aggravation of the seriousness of criminal offending.

86 Section 16A(2A) *Crimes Act* 1914.

87 Note the NSW Government Committee on Law and Safety inquired into whether the laws on driver licence disqualification should be reformed and published its Final Report in November 2013 with recommendations to give the courts more discretion to impose disqualification periods that take account the circumstances of the offender’s case.

- Is written down at the time of sentencing (in as simple and direct English as possible), and then given to the defendant and/or their legal representative — so as to help ensure understanding and compliance.

[The next page is 2401]

## 2.4 Further information or help

- Interpreting and translating services — see 3.3.1.3.
- The following organisations can provide information or expertise about Aboriginal communities, their cultural or language differences or needs, and/or local Aboriginal groups, organisations and programs:
- The Local Court Aboriginal Client Services Specialist, and/or local Aboriginal Community Justice Group, and/or Elders within the relevant Aboriginal community.
- The Director of Public Prosecution’s Aboriginal Witness and Assistance Officers — Ph: (02) 9285 8646
- Victims’ Services’ Aboriginal Contact Line — telephone: 1800 019 123
- Aboriginal Legal Service (NSW/ACT) Limited — contact details: [www.alsnwsact.org.au](http://www.alsnwsact.org.au).

The following are the seven largest and geographically spread of the 24 offices around NSW:

### **Sydney**

Level 1, 619 Elizabeth Street  
Redfern NSW 2016  
Ph: (02) 8303 6600  
Fax: (02) 9319 2630

### **Grafton**

18–26 Victoria Street  
Grafton NSW 2460  
Ph: (02) 6640 1400  
Fax: (02) 6640 1410

### **Armidale**

117 Faulkner Street  
Armidale NSW 2350  
Ph: (02) 6772 5770  
Fax: (02) 6772 5771

### **Wollongong**

PO Box 191  
Wollongong East NSW 2520  
Ph: (02) 4225 7977  
Fax: (02) 4225 7979

### **Nowra**

89 Plunkett Street  
Nowra NSW 2541  
Ph: (02) 4422 3255  
Fax: (02) 4422 3256

### **Wagga Wagga**

19 Trail Street  
Wagga Wagga NSW 2650  
Ph: (02) 6921 9230  
Fax: (02) 6921 9340

### **Dubbo**

23–25 Carrington Avenue  
Dubbo NSW 2830  
Ph: (02) 6882 6966  
Fax: (02) 6882 0726

- NSW Native Title Services Ltd  
Suite 15/245 Chalmers Street  
Redfern NSW 2016  
Ph: (02) 9310 3188 or 1800 111 844  
For contextual information on Native Title Representative Bodies recognised under the Australian Commonwealth Government’s *Native Title Act 1993* (Cth), see: [www.ntrb.net](http://www.ntrb.net)

- NSW Aboriginal Land Council  
33 Argyle Street  
Parramatta NSW 2150  
PO Box 1125  
Parramatta NSW 2150  
Ph: (02) 9689 4444  
Fax: (02) 9687 1234  
[www.alc.org.au](http://www.alc.org.au)
- Aboriginal Medical Service  
36 Turner Street  
Redfern NSW 2016  
Ph: (02) 9319 3345
- Tranby Aboriginal College  
13 Mansfield Street  
Glebe NSW 2037  
Ph: (02) 9660 3444  
[www.tranby.edu.au](http://www.tranby.edu.au)
- Nearest University — particularly if it has an Aboriginal Unit.
- Local Aboriginal community organisations — such as an Aboriginal cultural centre, Aboriginal housing company (in most major country centres) and the Aboriginal Children’s Service.

[The next page is 2501]

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## 2.6 Your comments

The Judicial Commission of NSW welcomes your feedback on how we could improve the *Equality before the Law Bench Book*.

We would be particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific sections of other *Bench Books*, discussion or research material.

Section 11 contains information about how to send us your feedback.

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## Appendix — The *Fernando* principles<sup>88</sup>

The so called *Fernando* principles, which involve a thoughtful analysis of sentencing in relation to particular Aboriginal offenders, have a resonance beyond the jurisdiction of NSW courts. They are taken up, for instance, in the *Aboriginal Benchbook for Western Australian Courts*,<sup>89</sup> as principles relevant to sentencing in that State.

The eight principles involved were first expressed in 1992, in the NSW Court of Criminal Appeal case of *R v Fernando*,<sup>90</sup> and are as follows:

- (A) The same sentencing principles are to be applied in every case irrespective of the identity of a particular offender or his membership of an ethnic or other group but that does not mean that the sentencing court should ignore those facts which exist only by reason of the offenders' membership of such a group.
- (B) The relevance of the Aboriginality of an offender is not necessarily to mitigate punishment but rather to explain or throw light on the particular offence and the circumstances of the offender.
- (C) It is proper for the court to recognise that the problems of alcohol abuse and violence which to a very significant degree go hand in hand within Aboriginal communities are very real ones and their cure requires more subtle remedies than the criminal law can provide by way of imprisonment.
- (D) Notwithstanding the absence of any real body of evidence demonstrating that the imposition of significant terms of imprisonment provides any effective deterrent in either discouraging the abuse of alcohol by members of the Aboriginal society or their resort to violence when heavily affected by it, the courts must be very careful in the pursuit of their sentencing policies to not thereby deprive Aboriginals of the protection which it is assumed punishment provides. In short, a belief cannot be allowed to go about that serious violence by drunken persons within their society are treated by the law as occurrences of little moment.
- (E) While drunkenness is not normally an excuse or mitigating factor, where the abuse of alcohol by the person standing for sentence reflects the

88 This Appendix was written by His Honour Judge Stephen Norrish QC, District Court of NSW. It has been updated by Judicial Commission staff. See also The Hon S Rothman AM, "The impact of Bugmy and Munda on sentencing Aboriginal and other offenders" (2014) 26 *Judicial Officers' Bulletin* 17 and Judicial Commission, *Sentencing Bench Book*, Special Bulletin No 4, October 2013.

89 Australasian Institute of Judicial Administration (AIJA), *Aboriginal Bench Book for Western Australian Courts*, above n 40.

90 (1992) 76 A Crim R 58 at 62–63 per Wood J. They were further explained in *R v Hickey* (unrep, 27/9/94, NSWCCA); *Stone v R* (1995) 84 A Crim R 218 at 221–223; *R v Ceissman* (2001) 160 FLR 252; [2001] NSWCCA 73, especially at [29]–[33]; *R v Pitt* [2001] NSWCCA 156 at [19]–[21] and repeated in *R v Fernando* [2002] NSWCCA 28 at [64]–[67], per Spigelman CJ.

socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor. This involves the realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self-image, absence of education and work opportunity and other demoralising factors have placed heavy stresses on them, reinforcing their resort to alcohol and compounding its worst effects.

- (F) That in sentencing persons of Aboriginal descent the court must avoid any hint of racism, paternalism or collective guilt yet must nevertheless assess realistically the objective seriousness of the crime within its local setting and by reference to the particular subjective circumstances of the offender.
- (G) That in sentencing an Aborigine who has come from a deprived background or is otherwise disadvantaged by reason of social or economic factors or who has little experience of European ways, a lengthy term of imprisonment may be particularly, even unduly, harsh when served in an environment which is foreign to him and which is dominated by inmates and prison officers of European background with little understanding of his culture and society or his own personality.
- (H) That in every sentencing exercise, while it is important to ensure that the punishment fits the crime and not to lose sight of the objective seriousness of the offence in the midst of what might otherwise be attractive subjective circumstances, full weight must be given to the competing public interest to rehabilitation of the offender and the avoidance of recidivism on his part.

In *R v Welsh*,<sup>91</sup> Hidden J further observed that:

Only the most myopic in this community would deny that much of the contact of Aboriginal people with the criminal law can be traced to their dispossession and the breakdown of their culture. The high incidence of imprisonment of Aboriginal people, and the often deleterious and sometimes tragic effects it has upon them, are of justifiable concern to the community: *R v Russell* (1995) 84 A Crim R 386, per Kirby P at 391–2. To recognise that background in an appropriate case for the purpose of sentence is neither discriminatory nor paternalistic.

### Post *Fernando*

In 2013, the High Court considered the issue of sentencing Aboriginal offenders in *Bugmy v The Queen* (2013) 87 ALJR 1022 and *Munda v Western Australia* (2013) 87 ALJR 1035.

The appellant in *Bugmy* came from a deprived background, having grown up in Wilcannia in a community where alcohol abuse and violence was commonplace.

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<sup>91</sup> (unrep, 14/11/97, NSWSC) at 10.

He was sentenced to an overall sentence of 6 years, 3 months for assaulting a correctional officer. The primary sentencing judge had applied the *Fernando* principles and the subsequent judgment of the Court of Criminal Appeal in *Kennedy v R* [2010] NSWCCA 260. Simpson J in *Kennedy* at [53] commented that *Fernando* was not about sentencing Aborigines but about the recognition of social disadvantage, regardless of the offender's ethnicity, that frequently precedes the commission of a crime. Simpson J also commented that social deprivation, resulting from alcohol consumption (or otherwise) is not confined to remote or rural communities (at [57]).<sup>92</sup>

On appeal to the NSWCCA,<sup>93</sup> the prosecution argued that the sentencing judge had given too much weight to the *Fernando* propositions. The CCA said at [25] that “with the passage of time, the extent to which social deprivation in a person's youth and background can be taken into account must diminish. This is particularly so when the passage of time has included substantial offending”. The CCA resented the appellant to a lengthier term.

On appeal to the High Court, the appellant took issue with this, and submitted that NSW courts should take into account “the unique circumstances of all Aboriginal offenders as relevant to the moral culpability of an individual Aboriginal offender” as well as the high rate of incarceration of Aborigines: at [28]. The High Court rejected this submission as this approach was contrary to individualised justice. The High Court distinguished the Canadian decisions and Canadian legislative principles the appellant relied on: at [36]. The High Court held that a sentencing court should not apply a different method of analysis for Aboriginal offenders in NSW than for non-Aboriginal offenders: at [36].

The High Court nonetheless confirmed at [37] that: “An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence.” The court approved the comments of Simpson J in *Kennedy* about the impact of social disadvantage as correctly explaining “the significance of the statements in *Fernando*” (at [37]). The court said that propositions (C) and (E) in *Fernando* addressed the significance of intoxication at the time of the offence. Intoxication is not usually a matter that mitigates an offender's conduct but the propositions recognise that where an offender's abuse of alcohol reflects the environment in which he or she was raised, it should be taken into account as a mitigating factor: at [38]. The High Court also confirmed that proposition (G) in *Fernando* recognises that a lengthy term of imprisonment might be particularly burdensome

92 See the earlier decisions of the NSWCCA in *R v Morgan* (2003) 57 NSWLR 533 at [21]–[22] and *R v Newman* (2004) 145 A Crim R 361 at [66], [68] which suggested the *Fernando* principles are confined to persons who come from remote areas.

93 *R v Bugmy* [2012] NSWCCA 223.

for an Aboriginal offender. The court said at [39] that in each of these respects, the propositions conform with Brennan J's statement of sentencing principle in *Neal v The Queen* (1982) 149 CLR 305 at 326 that the same sentencing principles are to be applied irrespective of the offender's membership of an ethnic or other group but a court can take into account facts that exist only by reason of the offender's membership of such a group.

The High Court also rejected the submission in the CCA appeal that a background of social deprivation diminishes over time. The court said at [43]–[44]:

The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.

Because the effects of profound childhood deprivation do not diminish with the passage of time and repeated offending, it is right to speak of giving "full weight" to an offender's deprived background in every sentencing decision. However, this is not to suggest, as the appellant's submissions were apt to do, that an offender's deprived background has the same (mitigatory) relevance for all of the purposes of punishment. Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult ... An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.

The majority in *Munda v Western Australia*, a judgment handed down the same day as *Bugmy v The Queen*, dealt with the circumstances of social disadvantage at [50]–[60]. The majority said at [53]:

Mitigating factors must be given appropriate weight, but they must not be allowed "to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence." It would be contrary to the principle stated by Brennan J in *Neal* to accept that Aboriginal offending is to be viewed systemically as less serious than offending by persons of other ethnicities. To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. It would be quite inconsistent with the statement of principle in *Neal* to act upon a kind of racial stereotyping which diminishes the dignity of individual offenders by consigning them, by reason of their race and place of residence, to a category of persons who are less capable than others of decent behaviour. Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.

When sentencing Aboriginal offenders, judicial officers need to ensure that the material before them in relation to the individual offender provides evidence of a socially deprived background. The High Court commented at [41] of *Bugmy*:

In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background.

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# People from culturally and linguistically diverse backgrounds

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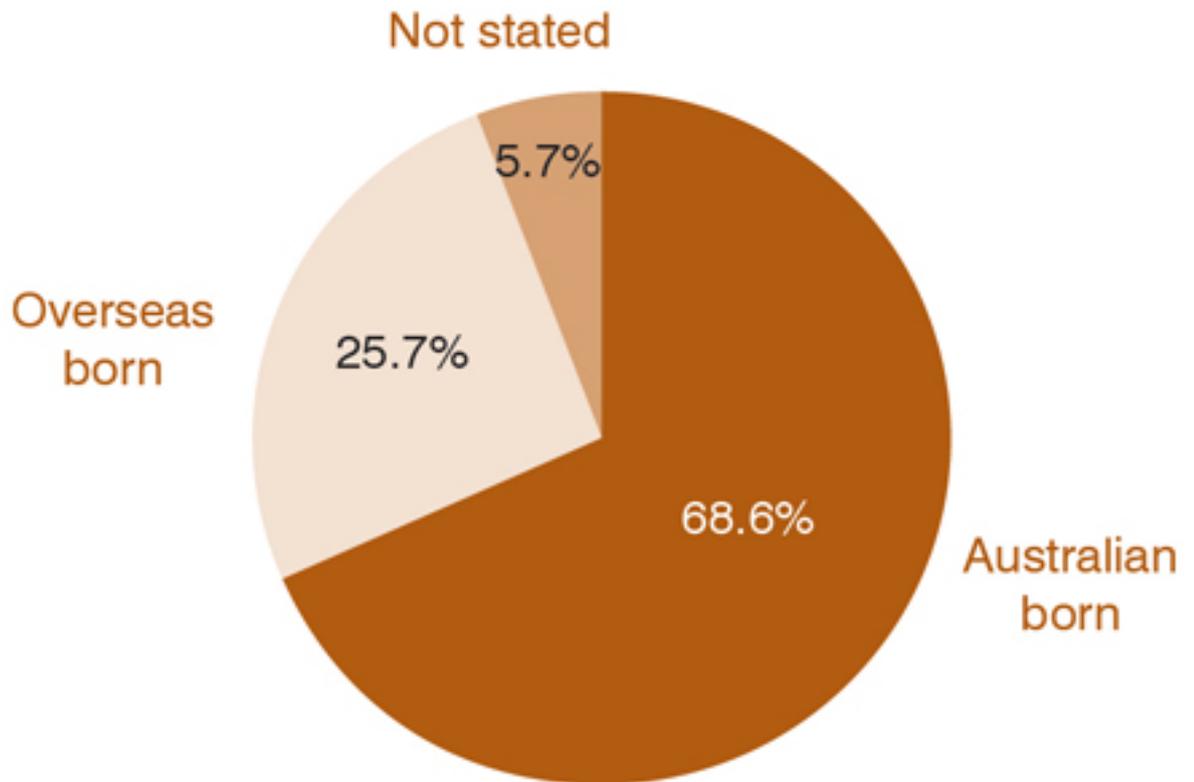
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### 3.1 Some statistics<sup>1</sup>

- **Population** — The NSW population according to the 2016<sup>2</sup> census was 7.48 million residents, a 8.1% increase from the 2011 census. However, the NSW population at the end of the 2016 September quarter rose to 7.79 million.<sup>3</sup>
- Figure 3.1 shows the breakdown of Australian born and overseas born NSW residents using figures from the 2016 census:

**Figure 3.1 — Australian born and overseas born NSW residents: 2016 census figures**



1 Unless otherwise indicated, the statistics in 3.1 are drawn from the NSW Government's Trade and Investment website at [www.business.nsw.gov.au](http://www.business.nsw.gov.au), first accessed 15 May 2013, the Australian Bureau of Statistics (ABS) website at [www.censusdata.abs.gov.au/census\\_services/getproduct/census/2011/quickstat/1](http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/1); accessed 15 May 2013 Department of Immigration and Border Protection, *The people of Australia: statistics from the 2011 census*, 2014, at [www.border.gov.au/ReportsandPublications/Documents/research/people-australia-2013-statistics.pdf](http://www.border.gov.au/ReportsandPublications/Documents/research/people-australia-2013-statistics.pdf), accessed 4 June 2015, particularly Table 2 (All states and territories compared).

2 It is anticipated that the next census will be held in 2021.

3 ABS, *Australian Demographic Statistics*, Dec 2016, ABS cat no 3101.0, released 27.6.17 at [www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0](http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0), accessed 19 September 2017.

- Of the 2.06 million of those born overseas 1.56 million were born in a *non-main* English speaking country (NMESC).<sup>4</sup>
- Approximately 27.5% of those born overseas were born in mainly English-speaking countries (MESC)<sup>5</sup> (498,480) — predominantly in the UK, South Africa and New Zealand, but also in other English-speaking countries such as Hong Kong, India and the Philippines. Many English-speaking countries have values, customs, laws and legal systems that are similar (although not identical) to those in Australia.
- Of the total NSW population, 17.9% (1.56 million) were born in a NMESC. Around one in five of these NSW residents had only arrived in Australia within the previous five years. These people were born in 45 different countries, most of which have values and customs that are different from those in Australia, and nearly all of which have laws and legal systems that are very different from those in Australia.
- One in four of those born in a NMESC were born in China, India and Vietnam. Table 3.1 ranks NMESC birthplaces according to the percentage of the NSW population born there:

**Table 3.1 — NSW residents born in non-English country birthplaces: 2016 census figures**

Birthplace	Number of NSW residents	% of NSW population
China (excluding SARs and Taiwan)	234,508	3.1
India	143,459	1.9
Philippines	86,749	1.1
Vietnam	84,130	1.2
Lebanon	57,381	0.8
South Korea	51,816	0.7
Italy	49,476	0.7
South Africa	43,058	0.6

- The overseas birthplace countries listed above showing the greatest increase between 2006 and 2011 were China, India, the Philippines and Vietnam.

4 Non-main English speaking country (NMESC) excludes people born in Australia, New Zealand, United Kingdom, Ireland, South Africa, United States of America and Canada.

5 “Main English speaking countries” (MESC) are identified in ABS, *Australian Standard Classification of Countries for Social Statistics (ASCCSS)*, ABS cat no 1269.0 to include Australia, New Zealand, United Kingdom, Ireland, South Africa, United States of America and Canada.

■ **Language spoken:**

- 25.2% (1.88 million) of NSW residents speak a language other than English at home.
- Between 6.0% and 40.0% (depending on the age range), of those who do so, cannot speak English very well, or cannot speak English at all. Those most likely to be in this situation are migrants from South East Asian countries such as China and Vietnam. However, it should be noted that even those who do speak English reasonably well may need an interpreter in a court situation. For more on this see 3.3.1 below.

- **Place of residence** — Sydney is recognised internationally as one of the most culturally and ethnically diverse cities in the world. The majority of people born in NESCS live in specific areas of Sydney, as do those who cannot speak English at all or who cannot speak it well (1.7 million). Most of these non-English or poor English speakers live in the local government areas of Fairfield (20.4%), Canterbury (14.7%), Bankstown (11.0%), Liverpool (8.7%), Parramatta (9.0%), Blacktown (4.7%), Auburn (18.7%) or Rockdale (8.7%).<sup>6</sup> In general, a much smaller percentage of the local population outside Sydney was born in a NESCS than in Sydney, and the same can be said for those who cannot speak English well or at all. However, it should be noted that Wollongong local government area has the eleventh highest number of people who cannot speak English well or at all.

■ **Ancestry or ethnic background:**

- 65.5% (4.89 million) of NSW residents are Australian born. Of those born in Australia:
  - 45.4% (3.39 million) have both parents Australian born
  - 6.1% (458,394) have their father overseas born
  - 4.3% (325,182) have their mother overseas born
  - 37% (2.76 million) have both parents born overseas.
- This means that 47.4% (3.1 million) of NSW residents have recent, overseas ancestry, that is, at least one of their parents was born overseas
- It also means that 9.73% (728,434) of the total NSW population (7.48 million) are Australian born with at least one parent born overseas.

- **Religion** — The religious affiliations of people born overseas or with recent overseas ancestry, whether from MESC or NMESC are various and do not necessarily match the dominant religion within the particular overseas country. For more information about religious affiliation — see Section 4.

<sup>6</sup> Department of Immigration and Border Protection, *The people of Australia: statistics from the 2011 census*, 2014, at [www.border.gov.au/ReportsandPublications/Documents/research/people-australia-2013-statistics.pdf](http://www.border.gov.au/ReportsandPublications/Documents/research/people-australia-2013-statistics.pdf), accessed 4 June 2015, particularly chart 12 (Local government areas with highest number who speak English now well or not at all).

■ **Socio-economic status:**

- The unemployment rate for people born overseas is slightly higher than the rate for people born in Australia. However, the gap between the Australian born unemployment rate and the migrant employment rate reduces when the general unemployment rate goes down. In Australia, in 2013, the unemployment rate was 6.0% for both overseas and Australian born people.<sup>7</sup> However, this is an aggregated statistic. Newly arrived migrants and those from non-English speaking backgrounds (NESB) have higher unemployment rates than those who have been here longer and those who come from English-speaking countries. Interestingly, the gap between the Australian born unemployment rate and the migrant unemployment rate widens the higher the educational qualification of the migrant — presumably to do with the difficulty of getting overseas qualifications recognised and race discrimination within recruitment and selection practices. However, recent migrants who had obtained a non-school qualification before arrival had a lower unemployment rate than those who had not (13.4% and 23.6% respectively).<sup>8</sup>
  - Migrants, and particularly those from NESB, often take at least one generation to establish themselves at the same professional level as where they came from — due to a combination of the delays caused by migrating and resettling, their lesser ability to speak English and negotiate a different culture, the difficulty in getting their overseas qualifications recognised, and some race discrimination in recruitment and selection processes.
- **Crime** — within some sections of the community there is a perception (sometimes fed by the media) that members of some migrant groups are more likely to resort to crime than other groups. However, research indicates that the statistics about ethnicity and crime rarely take into account social and economic variables. In other words, social disadvantage would appear to be the main influencing factor in relation to propensity to crime, not ethnicity.<sup>9</sup> For example:
- In relation to the so called “gang warfare” between different ethnic gangs, the then Ethnic Affairs Commission of NSW concluded that such gang conflict tends to be of a “territorial” rather than a “racial” nature, and that

7 OECD, Data, Migration, native-born unemployment and foreign-born unemployment at <https://data.oecd.org/migration/native-born-unemployment.htm#indicator-chart> and <https://data.oecd.org/migration/foreign-born-unemployment.htm#indicator-chart>, accessed 9 June 2015.

8 ABS, Characteristics of recent migrants, Australia, Nov 2016, ABS cat no 6250.0 at [www.abs.gov.au/ausstats/abs@.nsf/mf/6250.0](http://www.abs.gov.au/ausstats/abs@.nsf/mf/6250.0), Table 3, accessed 19 September 2017.

9 S Mukherjee, “Ethnicity and Crime”, *Trends and Issues in Crime and Criminal Justice No 117*, May 1999, Australian Institute of Criminology, at [www.aic.gov.au](http://www.aic.gov.au), accessed 6 Nov 2012; S Poynting, G Noble, P Tabar, Middle Eastern appearances: “Ethnic gangs, moral panic and media framing” (2001) 34 *Australian and New Zealand Journal of Criminology* 67.

participation in such gangs tends to be no different for ethnic minority youth than for Australian youth. The more important influences would appear to be poverty and marginalisation.<sup>10</sup>

- Australian Bureau of Statistics figures<sup>11</sup> reveal that of the NSW prison population in 2016 of 12,629 inmates, 9693 were Australian born (76.7%) and the remainder (2936) came from the following countries:

**Table 3.2 — NSW prison population: 2016 figures**

Country of birth	NSW prison population	Total NSW population
Outside Australia	23.2% – 2936 inmates	25.7%
United Kingdom	156 inmates	3.3%
New Zealand	326 inmates	1.7%
China (excluding SAR and Taiwan)	206 inmates	2.3%
Vietnam	311 inmates	1.0%
Italy	26 inmates	0.7%
Lebanon	157 inmates	0.8%
Philippines	68 inmates	1.0%
India	35 inmates	1.4%
Greece	21 inmates	0.5%
Germany	30 inmates	0.4%
Fiji	90 inmates	0.5%
Iraq	89 inmates	0.4%
Malaysia	47 inmates	0.4%
USA	41 inmates	0.2%
Samoa	51 inmates	0.1%
Tonga	29 inmates	0.0%
South Africa	22 inmates	0.3%
Turkey	29 inmates	0.2%

This indicates that of the overseas born groups listed above, those born in the UK, Vietnam, China, New Zealand and Lebanon are over-represented in the prison population.

<sup>10</sup> Ethnic Affairs Commission of NSW, *Not a single problem: Not a single solution: Report to the Premier & Minister for Ethnic Affairs on the recent clashes between youth in Bankstown & Marrickville*, 1986, at 3.

<sup>11</sup> Australian Bureau of Statistics, 4517.0 — Prisoners in Australia, NSW, 8 December 2016, at <http://www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0>, accessed 9 November 2017.

- In 2011–2012, 25% (90 out of 353) of juveniles in detention in NSW came from a culturally and linguistically diverse (CALD) background. While not all of them are necessarily from a non-English speaking background, representation of these populations in detention is much higher than in the broader population.

**Note:** the number and percentage has increased since 2009 but this is due to the change in the way the Department of Juvenile Justice counts culturally and linguistically diverse (CALD). Also note that approximately two-thirds of CALD young people were born in Australia or New Zealand, over half speak English at home, and over 10.0% of their parents were born in Australia or New Zealand.<sup>12</sup>

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12 Unpublished data supplied by the Department of Juvenile Justice, 16 May 2013.

## 3.2 Some information

### 3.2.1 Cultural differences

- **Each ethnic and/or non-English speaking culture has its own set of cultural “norms”.**
- **Each ethnic and/or non-English speaking culture (just like the mainstream English speaking Australian culture) also contains its own set of variances and sub-cultures** — for example, there is not just one Vietnamese or Lebanese cultural “norm”.
- **Each ethnic and/or non-English speaking group has also generally deviated from at least some of the cultural norms found in their home country** — due to the impact of the (for many, extremely difficult) migration and settlement experience and then acculturation to living in Australia.
- **It is also important to note that not all members of particular ethnic and non-English speaking groups follow the cultural norms for their group.**
- **However, there are some common cultural differences between people from many ethnic and/or non-English speaking backgrounds and people from mainstream English speaking backgrounds that are likely to influence:**
  - The way in which people from different ethnic and migrant backgrounds present themselves and behave in court.
  - The way in which they perceive justice to have been done or not done.
  - The way in which justice actually is or is not done. For example, justice may not have been done if false assumptions have been made about a person from an ethnic or migrant background based on how a mainstream English speaking Australian would behave.

### 3.2.2 Examples of common cultural differences

The common cultural differences between people from many different ethnic groups and/or non-English speaking backgrounds and people from mainstream English speaking backgrounds can be grouped as follows:

- **Different naming systems and modes of address** — see 3.3.2.1 below.
- **Differences in family make-up and in how individual members of the family are perceived and treated** — see 3.3.6.2 below.
- **Different styles of behaviour and appearance, and allied with this, frequently different customs about how men and women and sometimes children should behave and be treated, and/or different customs about how people in authority should behave and be treated, and/or different customs about such things as marriage, property ownership and inheritance** — see 3.3.4.2 and 3.3.6.2 below.

- **Different communication styles (linguistic and body language), combined in many cases with a lesser ability, or even complete inability to speak and/ or understand (Australian) English.**

**Note:** also that an individual's ability to communicate in English is often reduced in situations of stress — such as court appearances.

**Note:** also that if someone is fluent in English, it does not necessarily mean that they follow all or even most common mainstream Australian cultural norms or idioms — see 3.3.1 and 3.3.5 below.

- **Different understanding and experiences of how legal and court systems work and what they are capable of, and often a much lesser (and sometimes complete lack of ) understanding of the Australian legal and court system than the mainstream English speaking community.** Many come from countries that use completely different systems — for example, an inquisitorial system or have experienced an extremely repressive dictatorial or corrupt and in their view unjust system. They may not have had any basic idea about the Australian jury system, cross-examination, what can and cannot be said in evidence, the importance of intent, and what bail represents and means. They may have very good reasons to fear everything to do with the legal and court system and particular reason to fear the type of questioning that can occur under strenuous cross-examination. They may be survivors of torture and trauma, which would make the court experience particularly terrifying — see 3.3.5.5 below.
- **Different customs between the generations** — those from younger generations are more likely to adhere to (or want to adhere to) mainstream English speaking Australian customs and values than those from older generations — see 3.3.6.1 below.
- **People from non-English speaking backgrounds are much more likely to have experienced racism and race discrimination in Australia than people from mainstream English speaking backgrounds.**<sup>13</sup> This may make some of them more likely to name *any* perceived problem, or *any* perceived difference from their own cultural norm(s) as being a form of racism or race discrimination, even when it is not. However, if you follow the guidance provided in Section 3.3, following, this should be less likely to occur.

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<sup>13</sup> See statistics and information contained in the Annual Reports of the Anti-Discrimination Board of NSW, at [www.lawlink.nsw.gov.au/adb](http://www.lawlink.nsw.gov.au/adb), accessed 16 May 2013.

### 3.2.3 The possible impact of these cultural differences in court

**Unless appropriate account is taken of the types of cultural differences listed in 3.2.2 above, people from different ethnic and migrant backgrounds may:**

- Feel uncomfortable, fearful or overwhelmed.
- Feel offended by what occurs in court.
- Not understand what is happening or be able to get their point of view across and be adequately understood.
- Feel that an injustice has occurred.
- In some cases be treated unfairly and/or unjustly.

**These problems are likely to be compounded if the person also happens to be female, a child or young person, lesbian, gay or bisexual, transgender(ed), a person with a disability, or if they practise a particular religion or are representing themselves — see the relevant other Section(s).**

**Note:** that s 13A of the *Court Security Act 2005* provides that court security staff may require a person to remove face coverings for the purposes of identification unless the person has “special justification” which includes a legitimate medical reason. Face coverings are defined as an item of clothing, helmet, mask or any other thing that prevents a person’s face from being seen. The court security officer must ensure the person’s privacy when viewing the person’s face if the person has asked for privacy.<sup>14</sup>

**Section 3.3, following, provides additional information and practical guidance about ways of treating people from different ethnic and/or non-English speaking backgrounds during the court process, so as to reduce the likelihood of these problems occurring.**

The boxed areas provide the practical guidance.

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<sup>14</sup> Premier’s Memorandum M2012-01 *Policy on Identity and Full Face Coverings for NSW Public Sector Agencies and the policy on Identity and Full Face Coverings*, developed by the then Community Relations Commission (now Multicultural NSW), addresses the need for laws that allow for the identification of people in certain circumstances. The *Identification Legislation Amendment Act 2011* amended the *Law Enforcement (Powers and Responsibilities) Act 2002*, the *Court Security Act 2005* and the *Oaths Act 1900* to permit particular officers to require, in certain circumstances, the removal of a face covering.



### 3.3 Practical considerations<sup>15</sup>

#### 3.3.1 The need for an interpreter or translator

##### 3.3.1.1 When to use the services of an interpreter or translator

An **interpreter** is someone who interprets speech orally — for example, they may interpret what is being said in court to any party or witness to the proceedings.

A **translator** is someone who translates written texts, documents and other recorded information — for example, business letters or a taped videoconference.<sup>16</sup>

In many cases, an appropriate interpreter or the appropriate level of translation will already have been arranged by the time the person appears in court or the document is used in court — by the solicitor or barrister who is acting on behalf of or calling the particular person to court, or who is using the particular document.

However, there will be times when this has not happened and the court will need to assess the need for an interpreter or translator.

**A right of a witness to give evidence through an interpreter has been given statutory recognition in s 30 *Evidence Act 1995*.**

A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

Whether an interpreter will be used is a matter for the discretion of the court.

Under Article 14(3) of the International Covenant on Civil and Political Rights, a person facing criminal charges has the right to the free assistance of an interpreter if he or she “cannot understand the language of the court”. Australia has signed and ratified this convention.

**Since July 1998, it has been NSW Government policy for NSW Government agencies to fund the provision of language services (that is, interpreters and translated materials) when dealing with clients, in order to provide all clients with access to Government services.** This is consistent with the multicultural

15 Much of the information in 3.3 is sourced from the Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, Supreme Court of Queensland Library, Brisbane, at [www.courts.qld.gov.au/information-for-lawyers/benchbooks-and-ucpr-bulletin](http://www.courts.qld.gov.au/information-for-lawyers/benchbooks-and-ucpr-bulletin), accessed 15 May 2013; Chapter 6; the National Accreditation Authority for Translators and Interpreters (NAATI) website at [www.naati.com.au](http://www.naati.com.au) and *NAATI Concise Guide for Working with Interpreters and Translators*, 2003.

16 *NAATI Concise Guide for Working with Interpreters and Translators*, *ibid* p 2. Supreme Court of Queensland, *Equal Treatment Benchbook*, *ibid* p 62.

principles included in s 3 of the *Multicultural NSW Act 2000*, and NSW having a comprehensive multicultural program to ensure their implementation (the *Multicultural NSW Act 2000*). This program, the Multicultural Policies and Services Program (MPSP) is overseen by Multicultural NSW.<sup>17</sup>

Section 30 of the *Evidence Act 1995* (NSW) provides:

There are many decisions where the provision of an interpreter has been discussed and then stressed as being critical wherever there is any possibility that to not provide one would disadvantage a party or their right to a fair trial. In the High Court’s decision in *Re East; Ex parte Ngyuyen* Kirby J said that:

where a trial would be unfair because of the absence of an interpreter, it is the duty of the judicial officer to endeavour to ensure that an interpreter is provided.<sup>18</sup>

The Australian Law Reform Commission has also said that the provision of an interpreter “is necessary to put a non-English speaking defendant in the same position as an English-speaking one, so far as it is possible to do so”.<sup>19</sup>

**In summary, s 30 of the *Evidence Act 1995* (NSW), combined with relevant case law, means a judicial officer, should err on the side of caution.** It is best to:

- Make sure that an appropriate level of interpreter is provided wherever it appears that a particular person’s inability to fully understand or adequately communicate in English might impact on their ability to get a fair hearing. This may become apparent *after* someone has started to give evidence.
- Generally allow an interpreter to be provided if a particular person, or their legal representative, asks for one — unless you are firmly of the view that this is unnecessary given your judgment of the level of the person’s English communication and the information they need to provide and/or be questioned on.
- If the person asks for an interpreter, it is most likely that they will need one. Very few people will fake the need for an interpreter to gain advantage.

17 Premier’s Memorandum M2011-06, *Language Services Provision in Multicultural NSW*, issued in February 2011. The program was overseen by the then Community Relations Commission, which was later renamed Multicultural NSW.

18 (1998) 196 CLR 354 at [82]–[83]. See also the Queensland decision of *R v Johnson* (1987) 25 A Crim R 433 and the NSW decision of *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75 at 75–77.

19 Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC Report No 57, 1992, Canberra at [3.33], at [www.alrc.gov.au](http://www.alrc.gov.au), accessed 9 July 2014.

- ▣ If a document in a language other than English is at all important to the proceedings, ensure that it is professionally translated by an accredited translator at the appropriate level and that the translation is made available to all relevant parties.
- ▣ Always ask for the highest qualified interpreter/translator in the relevant language. NAATI professional accreditation and formal training are the optimum combination, although this may not be available for all languages.
- ▣ If a document in English needs to be understood by someone whose English is inadequate for this, there are two options:
  1. If the document is relatively simple, give a copy to the interpreter to read and subsequently perform a sight translation for the benefit of the non-English speaker. Inform the interpreter that they have permission to ask you questions or to consult dictionaries if needed.
  2. If the document is complex, the proceedings may need to be adjourned in order to obtain a translation by an accredited translator.

#### 3.3.1.2 Level of interpreter or translator to employ

**In general only interpreters and translators accredited by the National Accreditation Authority for Translators and Interpreters (NAATI) and only those accredited at the appropriate level for the particular type of interpreting and/or translation necessary should be employed.**<sup>20</sup> Preferably, practitioners who are also formally trained should be given preference over those who are only accredited. Not all practitioners are accredited and/or trained at the appropriate level for both interpreting and translation. Using the services of an unaccredited or inappropriately accredited practitioner can hinder communication in court and lead to a successful appeal and/or retrial if the trial is found to be unfair. The NSW Court of Criminal Appeal ordered a new trial in *R v Saraya*<sup>21</sup> because “the deficiencies in interpretation were such that the appellant was unable to give an effective account of the facts vital to his defence”.

<sup>20</sup> See NAATI’s online directory for a list of accredited translators and interpreters, at [www.naati.com.au](http://www.naati.com.au), accessed 15 May 2013.

<sup>21</sup> (1993) 70 A Crim R 515 at 516 per Badgery-Parker J.

**Note:** that NAATI does not test for all new and emerging languages and has no specification of level of proficiency for these. However NAATI can formally recognise a new and emerging language.<sup>22</sup>

**There are several techniques of interpreting:**<sup>23</sup>

- **Dialogue interpreting** involves interpretation of conversations and interviews between two or more people who do not share the same language. The interpreter listens first to short segments before interpreting them. The interpreter may take notes.
- **Consecutive interpreting** is when the interpreter listens to larger segments, taking notes while listening, and then interprets while the speaker pauses.
- **Simultaneous interpreting** is interpreting while listening to the source language, ie, speaking while listening to the ongoing statement. Thus the interpretation lags a few seconds behind the speaker ... In settings such as business negotiations and court cases, whispered simultaneous interpreting or chuchotage is practised to keep one party informed of the proceedings.
- **Sign language interpreting** — see Section 5.
- **Sight translation** involves transferring the meaning of the written text by oral delivery (reading in one language, relaying message orally in another language). An interpreter may be asked to provide sight translation of short documents.

The minimum NAATI accreditation level should be the Interpreter/Translator level (previously Level 3) and interpreters with formal training should be given preference.

Paraprofessionals Interpreters and translators (previously known as Level 2) are not considered competent to work in court, and therefore should only be used as a last resort. In some emerging communities however they are the only interpreters available. Their use should be monitored very carefully; ensuring non-complex language with minimal jargon, short sentences and very clear definitions are used.

In many courts, due to the significant numbers of people who use specific languages, courts have arranged to have interpreters from common languages at

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22 Recognition is an award in a totally separate category from accreditation. It is granted only in languages for which NAATI does not test and it has no specification of level of proficiency. Recognition does not have equal status to accreditation, because NAATI has not had the opportunity to testify by formal assessment to a particular standard of performance. It is, in fact, intended to be an acknowledgment that, at the time of the award, the candidate has had recent and regular experience as a translator and/or interpreter, but no level of proficiency is specified. Source: [www.naati.com.au/at-recognition.html](http://www.naati.com.au/at-recognition.html), accessed 14 May 2009.

23 National Accreditation Authority for Translators and Interpreters, *NAATI Concise Guide for Working with Interpreters and Translators*, n 15, see also the Supreme Court of Queensland, *Equal Treatment Benchbook*, n 15.

the courthouse all day to assist anyone. For example, Liverpool Local Court has an Arabic interpreter at the courthouse every Tuesday. Use of these lists greatly assists with the efficiency of the court and promotes equitable access to the justice system.

The suppliers of interpreters and translators (see 3.3.1.3 below) can advise which level would be the most appropriate for a particular situation.

**Most NAATI accredited translators and interpreters belong to a professional body** — the Australian Institute of Interpreters and Translators Incorporated (AUSIT). Members have to abide by AUSIT’s Code of Ethics based on eight principles: professional conduct, confidentiality, competence, impartiality, accuracy, employment, professional development and professional solidarity.<sup>24</sup>

**Note:** that NAATI accreditation does not require practitioners to be formally trained. It is advisable to give preference to those practitioners who, in addition to their NAATI accreditation, also hold a university degree or a TAFE advanced diploma in interpreting and/or translation.

It will greatly assist interpreters of any level to perform at a higher standard if they are briefed prior to any assignment. This may include a summary of the case in which they will be required to interpret, if possible, or at the very least, some information from the judicial officer at the commencement of their interpreting job. Interpreters should also be made aware that they are allowed to ask questions to seek clarification if needed in order for them to render accurate interpretations.<sup>25</sup>

**It may also be important to consider** — given the subject matter, any cultural considerations and the need to get the best possible evidence with as little difficulty as possible — **whether to specifically ask for a male or female interpreter** (for example in matters where the person may feel culturally uncomfortable having someone of the opposite sex interpret for them — such as matters relating to sexual activity, sexual assault or domestic violence), **and/or for someone from the person’s own ethnic and/ or religious background** (in order to minimise cultural discomfort and any concerns about possible misinterpretation) — for example, a Serbian Serbo-Croatian speaker as opposed to a Croatian Serbo-Croatian speaker.

**And it is important to work out precisely what language, or in some cases dialect of a particular language, the interpreter needs to speak.** This means

24 The Code of Ethics and a register of members are available on the AUSIT website at [www.ausit.org](http://www.ausit.org), accessed 14 May 2009; see also the Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 15, pp 64–65.

25 S Hale, “Helping interpreters to truly and faithfully interpret the evidence: the importance of briefing and preparation materials” (2013) 37(3) *Aust Bar Rev* 307.

care may need to be taken to establish in what country or region they learned their particular language — for example, do they speak European, Brazilian or African Portuguese?

### 3.3.1.3 Guidelines for magistrates and judges when working with interpreters in court<sup>26</sup>

- ▣ Ask interpreters to introduce themselves and state their level of NAATI accreditation and their formal qualifications (eg Degree or TAFE qualification in Interpreting).
- ▣ Ask them if they have worked in court before. If not, explain their role: “To interpret everything faithfully and impartially in the first/second grammatical person”.
- ▣ Remember that interpreting faithfully does not mean interpreting “literally” — word-for-word translating normally produce nonsensical renditions.
- ▣ Ask them what resources they will be accessing in court (eg online glossaries and dictionaries can now be accessed on smart phones and tablets. Interpreters may need to consult them at different stages of the hearing or trial).
- ▣ Tell the interpreter to feel free to seek clarification when needed, seek leave to consult a dictionary or to ask for repetitions. (NB It is a sign of a good interpreter to take such actions when needed, to ensure accuracy of interpretation).
- ▣ Explain the interpreter’s role to the witness/defendant/accused/jury.
- ▣ Ask the interpreter when s/he would like to take their breaks — ideally breaks should be provided at least every 45 minutes (Interpreting requires a very high cognitive load and is mentally very taxing).
- ▣ Ensure that the interpreter is comfortable and is provided with a chair, a jug of water and glass, a table to lean on to take notes and a place to put their belongings (such as a bag and umbrella).
- ▣ Instruct lawyers and witnesses to speak clearly and at a reasonable pace, and to pause after each complete concept to allow the interpreter to interpret (NB If you cannot remember the question in full or understand its full meaning, it is very likely the interpreter will not either).

<sup>26</sup> The guidelines have been developed by Professor Sandra Hale of the UNSW, Editor of *Translation & Interpreting*, the international journal of translation and interpreting services research, [www.trans-int.org](http://www.trans-int.org), accessed 16 May 2013. For more information on interpreting issues, refer to S Hale, Interpreter policies, practices and protocols in Australian courts and tribunals: a national survey, AIJA, 2011, at [www.aija.org.au/online/Pub%20no89.pdf](http://www.aija.org.au/online/Pub%20no89.pdf), accessed 16 May 2013.

- If there is anything to be read out, provide the interpreter with a copy of it so s/he can follow. If it is a difficult text, give him or her time to read through it first.
- Stop any overlapping speech or any attempts from lawyers or witnesses to interrupt the interpreter while s/he is interpreting.
- Do not assume that the witness will understand legal jargon when interpreted into their language. Interpreters must interpret accurately, and cannot simplify the text or explain legal concepts. If there are no direct equivalents, the interpreter may ask for an explanation which can then be interpreted.
- Interpreters are required to interpret vulgar language, including expletives.
- Interpreters are required to interpret everything for the defendant or accused, to make them linguistically present. This includes the questions and answers during evidence, any objections, legal arguments and other witness testimonies. The consecutive mode will be used when interpreting questions and answers. The whispering simultaneous mode (aka chuchotage) will be used for all other instances (if the interpreter is trained in this mode of interpreting).
- If anyone questions the interpreter's rendition, do not take their criticism at face value. Bilinguals who are not trained interpreters often overestimate their competence. Compare qualifications and give the interpreter the opportunity to respond to the criticism.

#### 3.3.1.4 Suppliers of interpreters and translators

There are two main suppliers of NAATI-accredited interpreters and translators in NSW:

- **Multicultural NSW** — face to face interpreting services are provided 24 hours a day, 7 days a week for 100 different languages and dialects.

**Note:** that they have a contract with courts to provide interpreters in *criminal* matters, domestic violence and sexual assault cases free of charge — Ph 1300 651 500.

- **The Translating and Interpreting Service (TIS National) run by the Commonwealth Department of Immigration and Border Protection** — provides telephone interpreting services 24 hours a day, 7 days a week, on-site interpreters and a document translation service for over 160 languages and dialects — Ph 131 450.

There are also independent interpreters or translators. If any of these are employed, you need to check that they are NAATI accredited and that their accreditation is of a sufficient level — see 3.3.1.2.

### 3.3.1.5 Who pays for an interpreter or translator

In criminal cases, Multicultural NSW will provide an interpreter free of charge — under their contract with courts.

In civil cases each party is generally responsible for paying for any interpreters or translators they require for themselves or their witnesses, however, at the end of the trial the successful party may ask to recover any interpreter/translator costs as part of their costs submission. If the court considers the costs would create a hardship, it may order that an interpreter be provided for the hearing. Interpreter costs have become a particular issue in cases where the parties have been ordered to participate in an ADR conference. A poor command of English significantly disadvantages a person's ability to participate in the ADR.

### 3.3.1.6 Working with an interpreter

#### **To ensure the best way to work with an interpreter:**

- **Establish the ground rules** — the interpreter is required to be impartial and is only there to interpret what all the parties present say.
- **Make the interpreter take an oath or affirmation** — see Section 4.4.2.
- **Give the interpreter regular breaks (every 30 to 45 minutes) and ensure they have a glass of water and a suitable place to sit** — this helps ensure they can maintain their concentration. It has been shown that an interpreter's skill level declines before they perceive that they are tired. A competent interpreter cannot perform competently if their basic working conditions are not provided.
- **Establish which technique of interpretation is going to be used** — for example, consecutive or simultaneous — see 3.3.1.2 above.
- **Ensure that the interpreter understands that they must try their best (within the confines of the particular community language they are interpreting from or into) to convey the meaning of what is said, not just what the person is saying, but how they are saying it — that is, to convey not just the words being used, but also if possible any nuances of meaning as well as the style and manner of speech being used.** They must not, for example, change the person's language or communication style into a style that they think sounds better in English. For example, "I only saw the little blade that, I mean like, it was shiny, that's all and that ..." is very different from "I just saw the shiny blade of the knife".<sup>27</sup> If the former was what was said or

<sup>27</sup> S Hale, *The discourse of court interpreting*, John Benjamins Publishing Company, Amsterdam and Philadelphia, 2004.

conveyed then that is what you want to hear, not the latter statement. It is important that they do not wittingly or unwittingly either upgrade or downgrade a particular person's evidence, (educational) level or style of language.<sup>28</sup>

- ▣ **Check with the interpreter what needs they have** — in relation to such things as the speed and amount of speech to be interpreted at any one time.
- ▣ **Ensure the interpreter does not block anyone's line of vision to the person whose speech is being interpreted.**
- ▣ **Speak (and ensure everyone else speaks) to the person themselves, not to the interpreter** (except when the interpreter personally asks for clarification).
- ▣ **Speak directly to the person who is being interpreted using “you” and “I” (and ensure everyone else does the same)** — for example, “I want to know why you ...”, not “Please try to find out why he/she ...”, not “Can you ask her/him why he/she ...”.
- ▣ **Ensure the person whose speech is being interpreted speaks to the person they are providing the information for**, not to the interpreter.
- ▣ **Ensure everyone speaks in simple and direct English, avoid technical terms and jargon if possible (see 3.3.5.3 below), and speak slowly enough and in short enough chunks for the interpreter to be able to do their job as well as possible.**<sup>29</sup> Ask the interpreter to let you know if they are having difficulty with any of this — so that you can intervene if necessary.

**You should expect an interpreter to:**

- ▣ **Ask questions of you and/or the person they are interpreting for whenever they need to clarify that person's exact meaning** — for example, in Russian, the same word is used to mean both “hand” and “arm”.
- ▣ **Not necessarily use an exact “word for word” interpretation** — for example, the interpreter may not be able to convey the exact nuance, meaning or language style being used unless they use different words from the original words used. Different languages follow different grammatical rules, which make literal translation almost

28 Example given by Professor Sandra Hale, “Interpreters in the courtroom”, *The Law Report*, 16 September 2008, at [www.abc.net.au/rn/lawreport/stories/2008/2364837.htm](http://www.abc.net.au/rn/lawreport/stories/2008/2364837.htm), accessed 16 June 2009.

29 See s 26 of the *Evidence Act 1995* (NSW), dealing with the court's control over questioning of witnesses.

always impossible. In addition to this, there are also semantic and pragmatic differences that need to be bridged in the interpretation. For example, some languages do not use the question form for polite requests as English does (eg could you please tell the court what happened?), instead some languages use the imperative (eg tell the court what happened). Often an interpreter will need to make these type of changes in order to be accurate.<sup>30</sup>

- **Speak as if they are the person they are interpreting for** — that is, they will use “I”, not “he” or “she”, when interpreting.
- **Within the rules listed in this box, generally interpret everything that they and the person they are interpreting for say.** There should not be any non-interpreted lengthy exchanges between the interpreter and the person they are interpreting. When the non-English speaking defendant/accused is not giving evidence, the interpreter will be simultaneously whispering to the defendant/accused what the other parties are saying in the court in order to make him/her linguistically present.
- **Remain neutral, and follow all the principles in AUSIT’s Code of Ethics** — see the end of 3.3.1.2 above.

**It is also important to note that it is much harder to make accurate assessments in relation to the demeanour and language style or language level of a witness when their speech is being interpreted, especially when hiring an untrained interpreter. Interpreters who have received legal interpreting training will maintain the same style as the original, including hesitant speech, tone of voice and force of delivery. You may need to alert the jury to this fact relatively early on, so that they are not unfairly influenced.**

If counsel or any witness is required to read from a written text, ensure that the interpreter has access to the written text so s/he can do a sight translation of it. It is impossible to interpret from a read text aloud without having the copy of it to refer to.

### 3.3.1.7 The provision of accredited interpreters and accredited translations *before* court proceedings start

It is important to check (at the relevant point in the proceedings), whether, in the lead up to the court proceedings, all relevant parties have had any

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30 S Hale, “The challenges of court interpreting: intricacies, responsibilities and ramifications” (2007) 32(4) *Alternative Law Journal*, pp 198-202.

necessary access to interpreters and/or translated documents such as statements and affidavits, that it is critical for them to have understood before signing, or to have been able to read in advance and/or adequately understand.

### 3.3.2 Modes of address

#### 3.3.2.1 Different naming systems

Some ethnic groups have very different naming systems from the generally gender-specific “first” or “given” name, then middle name, then family name system used by mainstream English speaking Australians.

For example, they may:

- Reverse the order of names and thus start with their family name and end with their given name — for example, Chinese and Vietnamese.
- Not have a family name at all — for example, Icelanders.
- Not often use their family name when referring to someone else — for example, Russians tend to use their given name and middle name only — the middle name being a name that indicates their father’s given name.
- Have particular words in their names, or prefixes or suffixes attached to one of their names that indicate such things as:<sup>31</sup>
  - Gender — for example, in general the Vietnamese names of “Van” for men and “Thi” for women.
  - Marital status — for example, “Achi” after some Indian women’s names indicating that she is married.
  - Son of, or daughter of — for example the Muslim prefix “Ibn” meaning “son of”, or the Jewish “Ben” meaning son of; or the initial in the middle of some Indian names that indicates who they are the son of; or the suffix “ova” or “ovic” at the end of a Russian’s middle name that represents the name of their father followed by “ova” for women or “ovic” for males.
  - Father of, or mother of — for example the Muslim “Abu” (meaning father of); and the Muslim “Ummul” (meaning mother of).
  - Spanish speakers may use both their paternal and maternal surnames, with the paternal name appearing first eg. Juan Lopez Garcia (Lopez being the paternal surname and Garcia the maternal surname).

However, not all members of each particular ethnic or religious group will follow the cultural norm for their group. And many have either completely

<sup>31</sup> Examples cited sourced from author’s personal knowledge and the Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 15, pp 79–81.

adopted the mainstream-Australian naming system, or use alternative names that fit the mainstream-Australian naming system when they deal with Australian bureaucracy.

Some ethnic names are very difficult for English speaking monolingual Australians to pronounce. Or, the original language may be tonal. In tonal languages each word has a marker that indicates whether the tone of each word should be rising, falling, even, etc and therefore how it should be pronounced. Unfortunately, there is no easy way of indicating this in English.

### 3.3.2.2 The mode of address and/or naming system to use

Some people from some ethnic backgrounds may expect and prefer to be addressed very formally when in a formal situation such as a court, or when addressed by someone younger than themselves, or when addressed by someone of the opposite gender – for example, they may prefer to be addressed as Mr/Ms/Mrs given name, or Mr/Ms/Mrs family name. Others may prefer to be addressed by their given name only. Others (for example, Filipinos) may only know each other by a nickname that bears little resemblance to the person’s actual name, and be happy for you to use the same nickname.

**In order not to either give offence or get confused, you and others in the court may need to:**

- ▣ **Ask the person’s legal representative (where they have one) how a particular person wishes to be addressed, and if necessary how to pronounce their name(s), and then do as instructed.** If you ask the person directly they may be uncomfortable at having to pronounce their name or their preferred form of address, and/or may just agree to whatever the judicial officer suggests despite their unease with that suggestion.
- ▣ **Use the phrase “given name”** rather than “Christian name”.
- ▣ **Use the phrase “family name”,** rather than “surname”.
- ▣ **Where necessary, clarify what each part of a particular person’s names represents** — that is, whether it is a given name, nickname, family name, etc.
- ▣ **When someone refers to someone else from their own ethnic background by that person’s name, check what each part of the name they are using represents** (that is, whether it comprises a given name, family name, and so on), **and then check whether you and others in the court can use the same naming system**, or whether you need to use a more formal naming system.
- ▣ **When someone avoids referring to someone else from their own or even another ethnic background by name, check whether this is customary.** For example, Vietnamese people will tend to avoid

mentioning the name of anyone who is senior in age or status as to do so would be seen as impolite and insolent. “It is common for Vietnamese not to know each other’s names, even though they may have known each other for many years and have a close relationship.”<sup>32</sup>

### 3.3.3 Oaths and affirmations — see Section 4.4.2

See Section 4.4.2 for information on oaths and affirmations, as any differences that may be required in relation to oaths and affirmations will be largely dependent on a person’s religious affiliation or lack of religious affiliation, rather than their ethnic background.

**Note:** however, that s 34 of the *Oaths Act* 1900 provides that a person witnessing a statutory declaration or affidavit must see the face of the person making the declaration or affidavit to identify the person. Therefore, the witness may request a person who is seeking to make a statutory declaration or affidavit to remove so much of any face covering worn by the person as prevents the authorised witness from seeing the person’s face. A “face covering” is defined as an item of clothing, helmet, mask or any other thing worn by a person that prevents their face from being seen.<sup>33</sup>

### 3.3.4 Appearance, behaviour and body language

#### 3.3.4.1 Background information

- **It is commonly known that most people, including jurors, are likely to, at least in part, assess a person’s credibility or trustworthiness on their demeanour.**
- **Yet, not only has demeanour been found to be an unreliable indicator of veracity,<sup>34</sup> but also our appearance, behaviour and body language are all heavily culturally-determined.** For example, how a Chinese person appears and behaves in any particular situation is likely to be different from how a mainstream-English speaking Australian appears and behaves.
- **This means that it is vital that no-one in the court allows any culturally-determined assumptions about what they believe looks**

32 D Tran, “Vietnamese community” (2002) 5(4) *TJR* 359 at p 362.

33 See s 3 (the definition of “face covering”) of the *Law Enforcement (Powers and Responsibilities) Act* 2002.

34 See for example, L Re, “Oral Evidence v Written Evidence: The Myth of the ‘Impressive Witness’” (1983) 57 *ALJ* 679; M Kirby, “Judging: Reflection on the Moment of Decision” (1999) 4 *TJR* 189 at 193–4; and Downes J, “Oral Evidence in Arbitration”, speech to the London Court of International Arbitration’s Asia-Pacific Users’ Council Symposium, Sydney, 14 February 2003, at [www.aat.gov.au](http://www.aat.gov.au), accessed 15 May 2013. Kirby J also addressed this theme in a judicial context in *State Rail Authority of NSW v Earthline Constructions Pty Ltd (in liq)* (1999) 160 *ALR* 588.

**trustworthy and what does not to unfairly mislead or influence their assessment of the credibility or trustworthiness of a person from an ethnic or migrant background.**

- **For many people from ethnic or migrant backgrounds, the traits that mainstream-English Australians regard as indicative of dishonesty or evasiveness (for example, not looking in the eye) are the very traits that are the cultural “norm” and/or expected to be displayed in order to be seen as polite and appropriate and not be seen as rude or culturally inappropriate.**
- **Just as there are sub-cultures within mainstream-English speaking Australian culture that observe different styles of appearance, behaviour and body language, and also individuals who do not fit any particular cultural norm, there are similar examples within any other culture.** So, it is also important not to assume that everyone born, for example, in Vietnam will behave in the same way, or to assess people from a Vietnamese background who do not seem to follow general Vietnamese patterns of behaviour as dishonest or lacking in credibility.

#### 3.3.4.2 Examples of differences and ways in which you may need to take account of them

- **Some differences in appearance, behaviour and body language that you may need to take account of are:**
  - **No direct eye contact with a questioner, or someone in authority, or someone of a different gender** — it may simply be the expected cultural norm for people from that particular ethnic background to not make direct eye contact or to keep their eyes downcast, and therefore bear no relation to the honesty or credibility of the particular person. For example, it would generally be considered culturally inappropriate for Vietnamese people and women from most other South East Asian backgrounds to make direct eye contact.
  - **Dress that appears eccentric** — this may or may not be eccentric for someone of that culture. It may also be the particular person’s view of what people are supposed to wear in an Australian court. See also Section 4.4.3 in relation to religious dress and how to deal with issues arising from this.
  - **Hand, finger and other gestures and movements, such as eye movements and head nods, head shakes, a lowered head or bowing** — may not necessarily mean the same as they mean in the mainstream English speaking Australian culture, or they may not be used at all, or they may not be used as frequently by mainstream English speaking Australians. For example, people from some ethnic

backgrounds (for example, Italians) tend to talk with their hands more than mainstream English speaking Australians; various types of bows or hands held together as though praying in the Christian tradition may be used in place of the handshake (for example, by those from South East Asian backgrounds); heads may be held in a downward position with eyes downcast to indicate the culturally appropriate form of submissiveness expected from women towards men or from anyone towards those in authority or in a higher “caste” or social level (for example, by those from South East Asian or Indian backgrounds; and some groups tend to nod/ shake their head for “yes” and “no” in the opposite way to mainstream English speaking Australians (for example, Bulgarians and Greeks).

**If any particular gesture or movement is different, more regular or less frequent than you would expect, or seems to contradict what is being said, or in any way seems incomprehensible yet possibly significant, you should ask for its meaning rather than potentially ascribe the wrong meaning to it.**

- **Connected to this, certain forms of touching, gestures and/or body movements that are seen as acceptable within mainstream English speaking Australian culture may be seen as threatening, rude or culturally unacceptable within some ethnic cultures. And/or those that are considered unacceptable within mainstream English speaking culture may be seen as acceptable or even expected within another culture** — for more on this see 3.3.5.4 below.
- **Silence or seeming to avoid answering a particular question** — may not mean dishonesty or evasiveness. For example, it may point to a lack of understanding about what is going on or expected of the particular person; or it may mean that the person cannot answer such a question because it is considered too personal or intimate; or it may mean that the person considers that it should not be answered in front of someone in authority or in front of a particular family member; or that it should not be answered in front of someone of the opposite gender. **In order to deal with this issue fairly and appropriately, you may need to take such measures as making sure the person fully understands what is going on and/or why the question is being asked; or excluding people from the courtroom while**

**the witness is giving evidence; or allowing the witness to give evidence remotely; or closing the court; or allowing a support person to attend.<sup>35</sup>**

### 3.3.5 Verbal communication

#### 3.3.5.1 Background information

People from ethnic backgrounds and particularly those from non-English speaking backgrounds may face a number of difficulties in relation to aspects of verbal communication in court proceedings.

For example, as indicated earlier in this Section, they may have:

- A lesser ability or a complete inability to speak and/or understand (Australian) English.
- A different communication style that makes it hard for others to adequately understand them, or means that they are wrongly assessed as, for example, evasive or dishonest.
- A different understanding of how legal and court systems work and what they are capable of, and often little if no understanding of the Australian legal and court system. Many come from countries using completely different systems—for example, an inquisitorial system or have experienced an extremely repressive dictatorial or corrupt and in their view unjust system. They may not have any understanding of the jury system, cross-examination, what can and cannot be said in evidence, the importance of intent, what bail represents and means, etc. They may well have very good reasons to fear everything to do with the legal and court system and particular reason to fear the type of questioning that can occur under strenuous cross-examination. They may be survivors of torture and trauma thus making the court experience particularly terrifying.

It is critical that these matters are taken into account so as not to unfairly disadvantage the particular person. Just like everyone else, a person from an ethnic or migrant background who appears in court needs to understand what is going on, be able to present their evidence in such a manner that it is adequately understood by everyone who needs to be able to assess it, and then have that evidence assessed in a fair and non-discriminatory manner.

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<sup>35</sup> Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 15, p 76.

**You may need to ensure that:**

- Everyone in court avoids any language that could be seen as either stereotyping or culturally offensive — see 3.3.5.2.
- Appropriate measures are taken to assist people with a lesser ability or inability to speak or understand English — see 3.3.5.3.
- Appropriate measures are taken to ensure that a person’s different communication style does not disadvantage them — see 3.3.5.4.
- Appropriate explanations in plain English and/or through an interpreter are given about the court process — see 3.3.5.5.

**3.3.5.2 Avoid stereotyping and/or culturally offensive language****Points to consider:**

- **Do not use ethnic identifiers (for example, “of Middle Eastern background”, a “Turkish youth”) unless it is necessary to do so** — that is, when that person’s ethnicity is relevant to the matter before the court.
- **Where it is necessary to use an ethnic identifier, use the correct and appropriate term, and do not confuse ethnic identifiers with religious identifiers.** For instance, it is best not to use the general terms “Asian” or “South East Asian” but instead identify the person’s particular country of birth or previous residence — for example, “Thai” or “from Thailand”. While many people in Australia imply that the terms Arab and Muslim are interchangeable, it is important to be accurate. As indicated in Section 4 Muslims come from a large variety of different ethnic backgrounds, and there are many Arabs who practise non-Muslim religions, just as not all people of Irish background are Catholic.
- **Use ethnic-based descriptors only when relevant** and do not generally use them as the sole descriptor. For example, a person’s occupation may be just as, or even more, relevant than the colour of their skin.
- **Do not use any form of discriminatory or discriminatory-sounding language. Treat everyone as an individual. Do not make statements that imply that all those from a particular ethnic or migrant background are the same, or likely to act in the same way.**

Never assume or imply that even what you suspect or know to be the majority way of behaving, thinking, etc for a particular ethnic or migrant group, is the norm against which any individual member of that group should be judged.

- **Use the signifier “Australian” accurately.** “Australian” should only be used to identify nationality not to identify ethnic background. Australians are from both Anglo-Celtic backgrounds and non-Anglo-Celtic backgrounds. If it is important to the matter being discussed to identify an Australian’s ethnic background, it is generally best to use a term that describes both — for example, an “Italian Australian”, or an “Australian born in England”. But always check with the person concerned that the term you are using is acceptable to them. You might then need to make it clear that you are using the person’s own descriptor, not necessarily the descriptor you would prefer to use.<sup>36</sup>
- **Do not assume that someone from a non-English speaking background or who does not look Anglo-Celtic will be unable to speak English well or at all, be unable to understand the court processes, be unfamiliar with mainstream English speaking Australian customs and values.** Australia has been a multi-cultural country for many years and their families may have been living in Australia for generations.
- **Be aware that for some cultures, some words may be much more offensive than they are for mainstream English speaking Australians.** For example, the words “bugger” and “bastard” are words bandied around quite casually by some mainstream English speaking Australians often with no thought as to their literal meaning, but people from the United States could be offended.

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36 Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 15, p 77.

- As prescribed by law, intervene in an appropriate manner if others in court (for example, those conducting cross-examination) say anything that is, or could be understood as, stereotyping or culturally offensive.<sup>37</sup>

### 3.3.5.3 Take appropriate measures to accommodate those with a lesser ability or inability to speak or understand English

**Note:** that an individual’s ability to communicate in English is often reduced in situations of stress — such as court appearances.

**Note:** also that some people may be more able to understand English than to speak it, or more able to speak it than understand it.

**Note:** also that someone who appears to speak perfect English may still find the language used in court or by lawyers very difficult to follow.

#### Points to consider:

- **Use the services of an appropriate level of interpreter or translator when necessary. Err on the side of caution if one is required and give preference, when possible, to formally trained practitioners** — for more about this see 3.3.1 above.
- **Be patient.** For example, you may need to allow more time for the person’s legal representative to explain the proceedings to their client.
- **Speak in an ordinary tone of voice at an ordinary volume, but speak clearly and slowly, using simple and direct English** — for example:
  - **Use legal jargon only when necessary, and if you do need to use it be aware that you may need to explain it.** For example, avoid

<sup>37</sup> Note that s 41 of the *Evidence Act* 1995 (NSW) provides for the statutory control of improper cross-examination in both civil and criminal proceedings. The section is in line with the terms of the repealed s 275A of the *Criminal Procedure Act* 1986, rather than the common law position. Section 41 imposes an obligation on the court to disallow a “disallowable question” and is expressed in terms of a statutory duty whether or not objection is taken to a particular question (s 41(5)). A “disallowable question” is one which is misleading or confusing (s 41(1)(a)), unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive (s 41(1)(b)), is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate (s 41(1)(c)), or has no basis other than a stereotype (s 41(1)(d)). A question is not a “disallowable question” merely because it challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness (s 41(3)(a)) – or because the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness (s 41(3)(b)). Sections 26 and 29 of the *Evidence Act* also enable the court to control the manner and form of questioning of witnesses, and s 135(b) allows the court to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might be misleading or confusing.

Latin words or phrases; prefer words and phrases like **“law”**, not **“statute”** or **“legislation”**; or **“X will now ask you some questions”**, not **“X will now cross-examine you”**; or **“what you can tell us about ...”**, not **“your evidence”**; or **“against”**, not **“versus”**.

- **In general, use the words or phrases someone is likely to have learned first** — for example **“about”**, not **“regarding”** or **“concerning”**; **“start”**, not **“commence”**; **“go”**, not **“proceed”**; **“to”**, not **“towards”**.
- **Do not assume people understand simple words used within the legal context such as “enter into a bond”**. Many consider a bond an amount of money paid for example, for accommodation.
- **Use active, not passive, speech (subject, verb and then object, not object, verb then subject)** — for example, **“The dog bit you”**, not **“You were bitten by the dog”**.
- **Use short sentences.**
- **Avoid “double negatives”**. Use **“single negatives”** instead — for example, **“Did he tell you not to do this?”**, instead of **“Didn’t he tell you not to do this?”**.
- **Avoid contractions** — for example, use **“should not”**, not **“shouldn’t”**, **“cannot”**, not **“can’t”**, **“will not”**, not **“won’t”**, **“she is”**, not **“she’s”**, **“they will”**, not **“they’ll”**.
- **Note: that some community languages have far fewer verb tenses than English** — prefer the simplest, most definite or concrete verb tense possible with as few extra words as possible — for example, **“you say”**, not **“you are saying”**, **“she had”**, not **“she had had”**.
- **Avoid Australian English idioms and words** — even recent arrivals from the UK may not understand them, and note that many other migrants learned English originally not Australian English. **For example, don’t use Australian shortenings of words** — **“vegetables”**, not **“vegies”**. **Don’t use Australian colloquialisms or Australian (sporting and other such) analogies** — for example, use **“difficult”** not **“sticky wicket”**.
- **Ask one question at a time.**
- **Make sure you (and others in the court) have fully understood what the person is saying:**
  - Clarify anything that could have more than one meaning.
  - Clarify anything where an unusual word, verb tense, etc, is being used.

- But always do this without demeaning that person — be careful about the words you use and your tone of voice. Do not, for example, show that you are exasperated.
- ▣ **You may need to intervene if anyone else in court says anything that appears difficult for the person to understand, or seems to be being misunderstood. If necessary, you may need to rephrase the sentence or question yourself.**<sup>38</sup>

#### 3.3.5.4 Take appropriate measures to accommodate those with a different style of communication

##### Background information

People from culturally and linguistically diverse backgrounds (whether English speaking or non-English speaking) may also have a different style of communication that is an inherent part of their culture and/or linguistic custom. They may display this difference when speaking in English, as well as when speaking in their own language via an interpreter.

##### Examples of different styles of communication

##### People from non-English speaking backgrounds may:

- **Use a much more roundabout style**, for example, gradually building a picture before finally getting to the point that a mainstream English speaker would have started with — for example, Latin American Spanish speakers tend to do this.
- **Talk much more slowly** (for example, some black Africans tend to do this), or **much more quickly** (for example, Latin American Spanish speakers tend to do this).
- **Use much less powerful sounding speech — that is, with many more hesitations, silences, hedges** (“I think”, “it seems like”, “sort of”, “actually”) **and/or terms of politeness** (sir, madam, please). Native English speakers tend to do this when they are from less powerful sub-groups or have a lesser level of formal education. People from non-English speaking backgrounds may do this even if they are from relatively powerful sub-groups within their culture and/or are highly educated. **See also 3.3.4.2 above in relation to silence and/or apparent avoidance in answering the question.**

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38 *ibid.*

- **Talk more quietly or more submissively.** This is often more pronounced in women than men, although men may also do it — for example, Thai women are generally expected to speak softly in order not to appear over-assertive and unfeminine. However, in many South East Asian cultures quiet modes of speaking are generally seen as polite for both men and women.
- **Prefer to agree with whatever is being put to them, or to come up with some form of compromise, rather than to openly disagree with whatever is being put to them — even when they do disagree.** Some people who do this may try to indicate that they would prefer to come back to that subject later, others may not. For example, in Japan and in some South East Asian and African cultures it is generally “considered impolite to flatly disagree with a questioner”.<sup>39</sup> Japanese people, however, will tend to indicate that they’d like to return to the subject later on.
- **Use more, fewer or different hand gestures and body movements, and/or find the gestures and body movements used by mainstream English speaking Australians threatening, rude, or culturally unacceptable, to the extent that they retreat into silence or become unable to continue with their evidence** — see 3.3.4 above for more about some of these differences. For example, it is generally considered culturally unacceptable for people from Thailand to touch someone else’s head. Some cultures are lower touch cultures than the mainstream-English speaking Australian culture — for example, in China and Vietnam even married couples would not generally kiss or hold hands in public. Whereas other cultures tend to be higher touch cultures (for example, Italian), or use touch to signify something different — for example, in Indonesia two men will often hold hands as a sign of friendship, not as a sign that they are gay partners.

#### Ways in which you may need to take account of these different styles of communication

**It is easy to see how someone who uses any, or in some cases, several of the different communication styles outlined immediately above could be wrongly assessed as being at best evasive, and at worst, lacking in credibility or dishonest. Yet any such assessment could be completely unjust.**

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39 Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 15, p 75.

*Points to consider:*

- ▣ **Listen to and watch the particular style of communication of anyone from a migrant or non-English speaking background (whether speaking in English, or speaking through an interpreter — or at least one who is doing their job properly — see 3.3.1.6 above).**
- ▣ **Check if their style consistently displays any or indeed several of the styles listed above, and also check if the person is showing any signs of unease or discomfort with what is being asked of them or with how it is being asked** (for example, silence, evasiveness, shock, trembling, quieter and quieter voice or blushing).
- ▣ **Bear in mind that not everyone from a particular ethnic or migrant background will follow the cultural norms for their particular background.** Some will have adopted more mainstream-English speaking Australian norms of behaving. Others may never have followed some or all of the cultural norms within their own culture.
- ▣ **If someone is consistently displaying one or more of these different styles of communication or showing signs of discomfort with what is going on,** try to determine whether what you are seeing and hearing is the culturally appropriate way of behaving for someone of that background, or whether it is indicative of evasiveness or dishonesty. Ask the person's legal representative (if they have one), or ask the person themselves, or through their interpreter. But note that it may be hard to get the information you need from the person themselves as they may not feel it is their place to inform you, or understand why you need the information, or be reluctant to give you the information for some other reason culturally appropriate to them. Note that an interpreter is not an advocate or counsellor and should not be asked to provide advice or an opinion or any other assistance beyond an interpretation.<sup>40</sup>
- ▣ **If you determine that what is being displayed is culturally appropriate for someone from that background, you may need to:**
  - **Be patient and try to ensure there are not too many interruptions.**
  - **As prescribed by law, ensure that any cross-examination does not pay undue or unfair attention to any of these behaviours, and that, where at all possible, it is conducted in a manner that**

40 Multicultural NSW, "Requesting and working with interpreters", Fact Sheets, [www.crc.nsw.gov.au/services/language\\_services/fact\\_sheets](http://www.crc.nsw.gov.au/services/language_services/fact_sheets), accessed 3 June 2015.

**is culturally appropriate for that person**<sup>41</sup> — for example, without any gestures that are threatening to that person, in a quieter or less threatening tone of voice, without approaching as close, with no touching of them by anyone else, or with no need for them to touch someone else.

- **Find other ways of getting the information you need.** For example, you may need to get the question rephrased, or presented less intimately or less threateningly. Or you may need to take such measures as making sure the person fully understands what is going on and/or why the question is being asked; or excluding people from the courtroom in which they are giving evidence; or allowing them to give evidence remotely; or closing the court; or allowing a support person to attend.<sup>42</sup>
- **If appropriate, alert the jury to the fact that any assessment they make based on the communication style of a person from an ethnic or migrant background must, if it is to be fair, take into account any relevant cultural or linguistic differences in relation to this. This may need to be noted early in the proceedings rather than waiting until you give your final directions to them** — otherwise, their initial assessment of a particular person may be unfairly influenced by false assumptions, and may not be able to be easily changed by anything you say in your final directions to them.
- **You may also need to intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any particular cultural difference in appearance, behaviour or body language.**<sup>43</sup>

### 3.3.5.5 Explain court proceedings adequately

People who come from countries with completely different legal and/or court systems are likely to find the Australian legal and court system confusing, incomprehensible and/or even threatening.

41 above n 35.

42 Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 15, p 76.

43 above n 35.

**To ensure that they are not disadvantaged in any way and also that you get the information you need, you may need to explain (and maybe at several points) what is happening and why — for example you may need to:**

- ▣ Explain how the court tries to be as fair as possible.
- ▣ Explain the basic steps involved and the rationale for each step (at least as far as they are concerned) at the start of each particular step.
- ▣ Explain what the court needs from them and why. Explain how they will be giving their evidence and the rationale for this.
- ▣ Explain what is meant by such things as bail, statement, affidavit, evidence, cross-examination, intent, not incriminating themselves and appeal.
- ▣ Give them permission to ask questions when at all unsure or confused.
- ▣ Stop the proceedings more frequently and provide either a break and/or explanation. Provide more time than usual for their legal representative to explain the proceedings to them. If the person is self-represented, see also Section 10.

### **3.3.6 The impact of different customs and values in relation to such matters as family composition and roles within the family, gender, marriage, property ownership and inheritance**

#### **3.3.6.1 Background information**

- **Each ethnic culture has its own customs and values** in relation to such things as family composition, the role of the family versus the individual, individual roles within the family, gender roles, marriage, property ownership and inheritance.
- **Often these customs and values are heavily influenced by the particular religious affiliation of that ethnic group or sub-group.** For more on religious affiliations, see Section 4.
- **These sets of customs and values can be slightly different or very different from mainstream English speaking Australian cultural norms.**
- **Just as there are sub-cultures within mainstream English speaking Australian culture that have slightly or completely different customs and values about these fundamental aspects, and also families or individuals who do not seem to fit any particular cultural norm, there are similar examples within any other culture.** So, it is important not to assume that everyone who is, for example, Arabic will adhere to a similar set of values or

customs, or even to assume that everyone born, for example, in Lebanon will adhere to the same customs and values, or even to assume that all Christian Lebanese people will adhere to the same set of customs and values.

- **In addition, many people from ethnic and migrant backgrounds have varied their customs and values from those in their home country**, in order, for example, to adapt to having a smaller family here, or to adapt to mainstream English speaking Australian customs and values, or because they are now in families comprising members from different ethnic backgrounds. In the reverse, some older generations within ethnic communities may hold fast to customs and values that have in fact shifted in their own home countries.
- **There may also be considerable inter-generational conflict as younger generations move away from the customs and values of their parents' generation.**
- **Similarly there may be considerable conflict or problems within mixed race families** — for example, disinheritance, inability to negotiate differences of opinion about fundamental aspects of custom and values, vulnerability of one partner due to their lesser level of English or not having any of their own birth family members in Australia.

### 3.3.6.2 Examples of different customs and values<sup>44</sup>

**Please note that the ethno-specific examples given in this Section are examples only. They are not all-inclusive.**

**In addition, as indicated in the previous Section, it is important not to stereotype. It would be incorrect to assume that every member of a cited ethnic group follows the particular practice listed below.**

- **In almost all ethnic cultures, the family is regarded as central and one of the most important parts of upholding the particular group's traditions and culture.**
- **In many ethnic cultures the family comes before the individual**, for example, in South East Asian cultures, many Indian sub-continent cultures, many Arabic cultures, some Southern European cultures, many African cultures and most South Pacific Islander cultures. For example:<sup>45</sup>

In many Chinese and Vietnamese families, hierarchical structure and Confucian values require members of the family to act according to their

<sup>44</sup> Much of the information in 3.3.6.2 is sourced from the Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 15.

<sup>45</sup> *ibid*, p 40.

roles in the family (that is, as father, mother, brother, sister, aunt, uncle, etc); their individuality is subsumed within the family unit. This is reflected in the language, where most family members have a title indicating their position in the family (eg Anh Hai (Vietnamese) — eldest brother/brother number two). Many decisions, whether related to vocation, marriage, study or recreation are made collectively by the family, rather than the individual.

This concept of the family before the individual may even extend to the “collective” or social group needing to come before the individual. For example, in Asian cultures that follow Confucian values, the good feeling of the group is seen as paramount which means that no-one should ever assert their individuality at the expense of the benefit or equanimity of the rest of the group.

- **Larger families and extended family networks.** The family in many non-Northern European cultures is often much broader than the mainstream-English speaking Australian concept of the nuclear family of parents and children. The extended family may include aunts, uncles, siblings, nieces, nephews, cousins, grandparents, grandchildren and even in-laws and their families. Marriage and other such religious and cultural rituals may also be used to expand the family networks even further, drawing in people such as the best man or woman at a marriage, or a sponsor at a baptism.<sup>46</sup>

For example, for Greeks the best man at weddings or the sponsor at a child’s baptism (“Koumparos”) is considered a *spiritual relative* and enters lasting and binding commitments; the sponsor of “Kivrelis” (the ritual performed through the rite of circumcision) becomes a part of the family of the young male and assumes duties related to the education and wellbeing of the young man. The Vietnamese consider in-laws as additional extended family, from whom emotional and financial support can be expected.

There may also be strong obligations to overseas family members including the need to send money overseas, the need to sponsor family members into Australia, and the need to arrange marriages between people resident in Australia and people currently resident in the country of origin.

- **A much greater sense of the male as head of the family, with women taking more subordinate roles than men and maybe not allowed or expected to own or even jointly own property or inherit family assets.** For example, a much more dominant role is generally given to men in most Arabic cultures, some African cultures and some South East Asian cultures. **Although there are also some cultures which are, or have been, matriarchal** (where women have taken the dominant role) — for example, in Kerala in Southern India. **And others where women’s matrimonial property rights are legally**

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46 *ibid*, p 41.

**protected** — for example, Sri Lankan Tamils. **The sons in the families of some cultures may also have specifically defined roles.** For example, in the Tamil culture, it is the eldest brother's role to earn and provide the dowry for the younger sisters.

- **Different courtship and marriage customs** — including arranged marriages where the partner may be sought from overseas not just from within Australia (common in Indian and Bangladeshi cultures), a dowry needing to be provided by the family of the bride (common in some sub-continent Indian cultures), overseas polygamous marriages (common in some Arabic cultures and some sub-Saharan African cultures), and/or a very strong push to marry within the particular ethnic group (common in many ethnic cultures). In many families from ethnic or migrant backgrounds, the choice of marriage partner is a family not a personal decision (common in sub-continent Indian cultures, South East Asian, some African cultures and some Arabic cultures). For some of these families, marriage outside the community or family's wishes could lead to exclusion from the family and/or community.
- **In some instances, less tolerant views about such things as de facto relationships, having children outside a marriage, abortion, and/or homosexuality** — this is generally particularly the case for sub-Saharan African cultures, many Pacific Islander cultures, sub-Indian continent cultures and Arabic cultures, but is even more generally the case where the religion (or denomination or branch of religion) practised by the particular family group is not tolerant of such things — see Section 4.
- **Grandparents frequently live with and are cared for by a member of the family** — for example, this is often the case in Greek, Vietnamese, African and Chinese families. Different cultures assign the caring responsibility to different members of the family: in many South East Asian cultures it is the eldest son who is expected to care for aged parents, whereas in Greek families it is the female members of the family who are expected to care for aged parents.

**Allied to the stronger concept of family, there may be stronger “concepts of family honour and shame”<sup>47</sup>** which may act as a significant means of control and rationale for why members of particular ethnic groups act as they do. For instance:<sup>48</sup>

Chinese families' concept of honour (face) translates into being self sufficient as a unit, rarely seeking help outside the bounds of the family. Family honour relates to reputation, premarital virginity and adherence to moral values. Deviation from the relevant values and standards not only brings shame to the family but also affects the future and marriage prospects of young women.

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47 *ibid*, p 40.

48 *ibid*, p 41.

These concepts also impact on whether family members attend court to support an individual facing a court sentence, for instance, in Chinese and Vietnamese families:<sup>49</sup>

The honour of the family as a whole is threatened by the individual's transgression and therefore, family members may not be present not because they do not support the individual but because it is too shameful to do so publicly.

- **More extreme differences in behaviour and/or appearance between different levels, classes or “castes”.** For example, South East Asian and sub-continent Indian cultures tend to be much more hierarchical and expect juniors to defer to seniors in workplaces in a much more structured and rigid way.

### 3.3.6.3 Ways in which you may need to take account of these customs and value differences

**Any of the differences listed above could (depending on the matter before the court) be a major influence on the way in which a migrant or person from an ethnic background behaves, has behaved, or presents themselves, their expectations or their evidence in court.**

**Points to consider:**

- **Have these types of differences in customs and values been an influencing factor in the matter(s) before the court? If so, where possible, you may need to take appropriate account of any such influences.** For example, you may need to decide whether Australian law allows you to take account of any such influences and, then, as appropriate and at the appropriate time in the proceedings, so as to ensure that justice is done and seen to be done, explain why any such influences can/should be taken into account, or cannot/should not be taken into account. For example, you may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing — see 3.3.8 below.
- **The cultural customs or values of a particular person need to be accorded respect rather than disrespect by everyone in court —** while explaining and upholding NSW law where it conflicts with the

49 *ibid.*

particular custom(s) or value(s). For example, as prescribed by law, this may mean intervening if cross-examination becomes disrespectful, or if it simply fails to take account of a relevant cultural difference.<sup>50</sup>

- **The non-attendance of family members in court does not necessarily signify a lack of family support for that person.** There may be cultural reasons for their absence. You may need to ensure that any such family influence does not unfairly influence your or anyone else's assessment of that person.
- **If you are unsure whether a particular behaviour is the result of an adherence to a particular set of cultural customs or values, or unsure how best to deal with it to ensure justice is both done and seen to be done** — either ask the person's legal representative (if they have one), or ask the person themselves, or through their interpreter (if they have one). But note that it may be hard to get the information you need from the person themselves as they may not feel it is their place to inform you, or they may not understand why you need the information, or they may be reluctant to give you the information for some other reason that is culturally appropriate to them.

**Note:** Note that an interpreter is not an advocate or counsellor and should not be asked to provide advice or an opinion or any other assistance beyond an interpretation.<sup>51</sup>

### 3.3.7 Directions to the jury — points to consider

As indicated at various points in 3.3 above, it is important that you ensure that the jury does not allow any ignorance of cultural difference, or any stereotyped or false assumptions about people from particular ethnic or migrant backgrounds to unfairly influence their judgment.

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<sup>50</sup> above n 37.

<sup>51</sup> Multicultural NSW, "Requesting and working with interpreters", Fact Sheets, [www.crc.nsw.gov.au/services/language\\_services/fact\\_sheets](http://www.crc.nsw.gov.au/services/language_services/fact_sheets), accessed 3 June 2015.

**In your final directions to the jury, you may need to remind them of any points in relation to these aspects that you alerted them to during the proceedings, and/or cover them for the first time now.**

**This should be done in line with the *Criminal Trial Courts Bench Book*,<sup>52</sup> or the *Local Courts Bench Book*<sup>53</sup> (as appropriate) and you should raise any such points with the parties' legal representatives first.**

**For example, you may need to provide specific guidance as follows:**

- ▣ **That they must try to avoid making stereotyped or false assumptions** — and what is meant by this. For example, it may be a good idea to give them specific examples of racial stereotyping and explain that they must treat each person as an individual based on what they have heard or seen in court in relation to the specific person, rather than what they know or think they know about all or most people of that person's particular background. It may also be a good idea to give them specific examples of making culturally-determined false assumptions — for example, that it would be false and legally unfair to conclude that anyone who follows a particular cultural norm that happens to conflict with what mainstream-English speaking Australians tend to believe (for example that women should be submissive or subordinate to men), is therefore a bad person or untrustworthy or lacking in credibility.
- ▣ **On the other hand, that they also need to assess the particular person's evidence alongside what they have learned in court about the way in which people from that background tend to behave, speak, and what they tend to value**, as opposed to the way in which they themselves might act, or the way in which mainstream English speaking Australians are expected to act. In doing this you may also need to provide guidance on any legal limitations that exist in relation to them taking account of any of these matters. And you may also need to be more specific about the particular aspects of cultural difference that they need to pay attention to.

52 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2nd edn, 2002 at <https://jirs.judcom.nsw.gov.au>, accessed 16 May 2015, and [www.judcom.nsw.gov.au](http://www.judcom.nsw.gov.au).

53 Judicial Commission of NSW, *Local Courts Bench Book*, 1988 at <https://jirs.judcom.nsw.gov.au> and [www.judcom.nsw.gov.au](http://www.judcom.nsw.gov.au), accessed 16 May 2013.

### 3.3.8 Sentencing, other decisions and judgment or decision writing — points to consider

**Your sentencing, other decision(s) and/or written judgment or decision must be fair and non-discriminatory.**<sup>54</sup>

**Points to consider:**

- **In order to ensure that any person from an ethnic or migrant background referred to or specifically affected by your sentencing, decision(s) and/ or written judgment or decision also considers it/them to be fair and non-discriminatory, you may need to pay due consideration to (and indeed specifically allude to) any of the points raised in the rest of 3.3 (including the points made in the box in 3.3.7 immediately above) that are relevant to the particular case.**
- **Whether to allow a victim impact statement to be read out in court.**<sup>55</sup>
- **Bear in mind that many people from migrant and ethnic backgrounds have a lower income level than the equivalent “class” of people not from those backgrounds — so, a specific level of fine for them will often mean considerably more than the same level of fine for others.**
- **To help ensure understanding and compliance, it may be appropriate to write down your judgment/decision at the time of sentencing (in as simple and direct English as possible), and then give it to the defendant and/or their legal representative.**

[The next page is 3401]

54 See also Judicial Commission of NSW, *Sentencing Bench Book*, 2006, “Race and ethnicity” at [10-470] at [www.judcom.nsw.gov.au](http://www.judcom.nsw.gov.au), accessed 16 May 2013, and *R v Henry* (1999) 46 NSWLR 346 at [10]–[11].

55 See Pt 3, Div 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the Charter of Victims Rights (which allows the victim access to information and assistance for the preparation of any such statement). Note that any such statement should be made available for the prisoner to read, but the prisoner must not be allowed to retain it.

### 3.4 Further information or help

- **Interpreting and translating services** — see 3.3.1.3 above.
- **The following NSW government agency can provide further information or expertise about migrant or ethnic communities and their cultural or language differences or needs**, and also about other appropriate community agencies, individuals, and/or written material, as necessary.

#### **Multicultural NSW**

PO Box A2618  
Sydney South NSW 1235  
Ph: (02) 8255 6767  
Fax: (02) 8255 6868  
[www.crc.nsw.gov.au](http://www.crc.nsw.gov.au)

#### **Translating and Interpreting Service (TIS National)**

Ph: 131 450  
[www.tisnational.gov.au](http://www.tisnational.gov.au)

#### **Cultural Advice**

Local agencies such as a Migrant Resource Centre, or an ethno-specific cultural organisation may also be useful sources of further information.

#### **Judicial Council on Cultural Diversity**

PO Box 1895  
Canberra ACT 2600  
Ph: (02) 6162 0361  
Email: [secretariat@jccd.org](mailto:secretariat@jccd.org)  
[www.jccd.org.au](http://www.jccd.org.au)

[The next page is 3501]



### 3.5 Further reading

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Australian Law Reform Commission, *Multiculturalism and the law*, ALRC Report No 57, 1992, Canberra, at [www.alrc.gov.au/report-57](http://www.alrc.gov.au/report-57), accessed 17 July 2014.

J Downes, “Oral Evidence in Arbitration”, speech to the London Court of International Arbitration’s Asia-Pacific Users’ Council Symposium, Sydney, 14 February 2003, at [www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/oral.htm](http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/oral.htm), accessed 15 May 2013.

Ethnic Affairs Commission of New South Wales, *Not a single problem: Not a single solution: Report to the Premier & Minister for Ethnic Affairs on the recent clashes between youth in Bankstown & Marrickville*, 1986.

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### 3.6 Your comments

The Judicial Commission of NSW welcomes your feedback on how we could improve the *Equality before the Law Bench Book*.

We would be particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific Sections of other Bench Books, discussion or research material.

Section 11 contains information about how to send us your feedback.

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# People with a particular religious affiliation

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## 4.1 Some statistics<sup>1</sup>

Table 4.1 shows the numeric breakdown of religious affiliations of the NSW population (7.48 million) and the percentage of the 2016 NSW population represented by each group.

**Table 4.1 — Religious affiliation of NSW population**

Religious affiliation	Number of NSW residents	% of NSW population
Christian	4,127,783	55.2%
Muslim (practising Islam)	267,659	3.6%
Buddhist	207,956	2.8%
Hindu	181,402	2.4%
Jewish (practising Judaism)	36,901	0.5%
Other religions	38,799	0.5%
No religious affiliation	1,879,562	25.1%
Not declared/Inadequately described	684,969	9.2%
<b>Total NSW population</b>	<b>7,480,228</b>	

- **Of the 64.5% (4.46 million) who are Christian, in descending order of affiliation:**
  - 1.82 million (24.1% of the population) are **Catholic** — 98.1% of whom are Western Catholic, with the rest practising such denominations as Maronite Catholic, Melkite Catholic and Ukrainian Catholic.
  - 1.16 million (15.5% of the population) are **Anglican**.
  - 217,258 (2.9% of the population) are **Uniting Church**.
  - 188,330 (2.4% of the population) are **Presbyterian**.
  - 128,544 (1.7% of the population) are **Greek Orthodox**.
  - 94,647 (1.3% of the population) are **Baptist**.
  - 77,402 (1.0% of the population) are **Pentecostal**.
  - 20,450 (0.3% of the population) are **Lutheran**.
  - 33,015 (0.4% of the population) are **Maronite Catholic**.
  - 22,723 (0.2% of the population) are **Jehovah’s Witnesses**.

<sup>1</sup> Unless otherwise indicated, the statistics in 4.1 are drawn from the Australian Bureau of Statistics, *2016 Census*, at [www.censusdata.abs.gov.au/census\\_services/getproduct/census/2016/quickstat/1RNSW?opendocument](http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/1RNSW?opendocument), accessed 6 November 2017.

- 15,219 (0.2% of the population) are **Salvation Army**.
- 22,659 (0.3% of the population) are **Seventh Day Adventist**.
- And the remainder practise such religions as **Latter-day Saints (Mormons) and Churches of Christ**.
- **Of the 0.6% (45,823) who practice a wide range of other religions, the most popular is Sikhism.**
- **The religious affiliations of people born overseas or with recent overseas ancestry, whether from English-speaking countries or non-English speaking countries, are various and do not necessarily match the dominant religion within the particular overseas country.** For example, Australians of Southeast Asian ancestry may be Buddhists, Christians, Hindus or Muslims. People of different ethnic backgrounds may have similar religious affiliations, for example, a practicing Muslim may be of African, Asian, European, Middle Eastern or Indigenous origin.<sup>2</sup>
- **There is also generally a wide diversity within religious groups dependent on such things as cultural factors and/or doctrinal differences. It is important not to make assumptions or stereotype.**<sup>3</sup> For example:
  - Many religions include people for whom their religion is *the* critical defining factor in their values and the way they behave plus people for whom their religion is of a less significant defining influence or importance.
  - Many religions also include a range of doctrinal differences, from the orthodox or fundamentalist (strict adherence to very specific religious rules) to a more relaxed attitude.

[The next page is 4201]

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2 Supreme Court of Queensland, *Equal Treatment Benchbook*, 2016, Supreme Court of Queensland Library, Brisbane, p 25, at [www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/94054/s-etbb.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf), accessed 24 November 2017.

3 *ibid.*

## 4.2 Some information<sup>4</sup>

This Section provides a brief overview of the beliefs and court-relevant practices of the five most common religions in NSW — in the order in which they are most commonly practised.

**As indicated in 4.1 above, some people who practise one of these five religions will *not* accept everything described below as conforming to their own beliefs.** However, the information has been confirmed by representatives of the particular religion as representing a mainstream understanding of that religion.

### 4.2.1 Christianity

As indicated at 4.1 above, there is a wide variety of Christian denominations or traditions practised in NSW. People who practise Christianity come from a wide variety of ethnic origins.

The annual dating system used in Australia has its origins in Christianity — BC (before Christ) and AD (*Anno Domini*, literally “in the year of the Lord”, meaning in the years since the birth of Christ). Almost all public holidays in Australia derive from the Christian calendar of festivals, as does the, until recent, notion of not working on Sundays.

Many Christian denominations contain strands ranging from liberal to conservative.

#### 4.2.1.1 Main beliefs

Christians believe Jesus Christ is the son of God, and God and mankind were reconciled through the death and resurrection of Jesus Christ.<sup>5</sup>

Many Christians believe in the ethical principles listed in the Ten Commandments, given to Moses by God on Mount Sinai:

1. To have no other God besides God
2. To make no idols

<sup>4</sup> The information in 4.2 is drawn from Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, 2nd edn, 2002, and the Supreme Court of Queensland, *Equal Treatment Benchbook*, 2016, Supreme Court of Queensland Library, Brisbane. The information has also been confirmed by representatives of the religions discussed.

<sup>5</sup> Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, *ibid*, p 32.

3. Not to misuse the name of God
4. To keep the Sabbath holy
5. To honour one's parents
6. Not to commit murder
7. Not to commit adultery
8. Not to commit theft
9. Not to give false evidence
10. Not to be covetous

There are no particular dietary requirements in most Christian denominations. However, Seventh Day Adventists are expected to be vegetarian and not drink alcohol. Fasting may occur during Lent — the 40 days leading up to Easter/the Resurrection of Jesus Christ. Some Christians may fast at times other than Lent.

#### 4.2.1.2 Holy books and scriptures

The most important holy book is the Bible. It is made up of the “Old Testament” and the “New Testament” both of which are collections of sacred writings. The various Christian denominations ascribe differing levels of importance to each Testament. The Old Testament is essentially shared with Judaism. The New Testament contains the gospels (or good news) about Jesus Christ.

#### 4.2.1.3 Religious leaders

Christian religious leaders have various names depending on the type of Christianity being followed — for example, priest for Catholics and Orthodox Eastern European Christian denominations, minister for most of the other Christian denominations. They are responsible for conducting religious services and providing religious instruction and guidance.

There are strong leadership hierarchies in most Christian denominations with essentially many levels of ordained priests or ministers, with various titles, headed, for example, by the Pope in Catholicism and the relevant country's Primate in Anglicanism. In some Christian denominations (for example, the Uniting Church) both ordained and non-ordained people can hold any role in the church leadership.

In some Christian denominations there are groups of religious sisters (or nuns) and religious brothers (or monks) who live relatively cloistered lives. Others live and work in the community, usually doing various forms of charitable type work.

#### 4.2.1.4 Forms of worship and festivals

Christians tend to pray congregationally in a church of their particular Christian denomination — on Sundays and on religious festivals. Church services vary

between denominations from highly ritualised with the relevant leaders dressed in religious garments to much less ritualised, with religious leaders wearing a clerical collar or a cross pinned onto a shirt as the only sign of their religious leadership, or wearing no particular distinguishing dress.

There are some Christian festivals that are celebrated by all Christian denominations, although they may be celebrated at slightly different times (for example, the Eastern European orthodox calendar runs approximately 14 days later than the standard Australian calendar).

There are many other festivals that have more or less significance depending on the particular Christian denomination. For example, some have many different saints' days and some pay more attention to religious events, such as the Assumption of the Virgin Mary.

#### 4.2.1.5 Relevant practices

**The following are the practices of most impact in court situations:**

- **Status of women** — Women generally have an equal status in Christian denominations. However, only some Christian denominations allow female religious leaders. For example, Catholicism does not allow women to be priests.
- **Touching** — there are no particular taboos on touching. Although note that there are some Christian denominations that forbid some forms of medical treatments — for example, Jehovah's Witnesses will refuse blood transfusions and all other forms of treatment involving the use of donations from others.
- **Dress** — Priests and other ministers tend to wear some form of distinguishing religious dress, ranging from a full gown, to a clerical collar, or even a cross on a shirt collar. Some wear no distinguishing religious dress at all. Religious sisters (or nuns) and religious brothers (or monks) tend to wear less distinguishing religious dress than they used to, although those in enclosed orders are more likely to wear gowns or habits. Many Christians wear a cross around their neck.
- **Worship and festival times** — see 4.2.1.4 above.

#### 4.2.2 Buddhism

The Buddhist community in NSW can be divided into two groups:

1. "Ethnic" Buddhists — people born in a Buddhist family; and
2. "Western" Buddhists — people who have chosen to become Buddhists.<sup>6</sup>

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<sup>6</sup> Supreme Court of Queensland, *Equal Treatment Benchbook*, 2016, see n 2, p 25.

Most Buddhists in NSW are “ethnic” Buddhists. There are two main Buddhist traditions: and

1. “Theravada” — which has its roots in Sri Lanka and Southeast Asia;
2. “Mahayana” — which is prevalent in China, Japan, Tibet, Nepal, Mongolia, Korea, Taiwan, Vietnam, Bhutan and India.<sup>7</sup>

Both traditions agree about the key beliefs and practices outlined below.

#### 4.2.2.1 Main beliefs

Buddhism is founded on the teachings of Siddhartha Gautama, “the Buddha” or “the Enlightened One”, who was born in 563BC near the present India-Nepal border. The Buddha realised all phenomena in life are impermanent and that the principal cause of suffering is the illusion of the substantial and enduring self. People will become wise, compassionate and kind, and greed, hatred and delusion will disappear, once they are freed from the illusion of self.<sup>8</sup>

The Buddha’s enlightenment resulted in the four Noble Truths:

1. That there is suffering.
2. That suffering has a cause.
3. That suffering has an end.
4. That there is a path that leads to the end of suffering.<sup>9</sup>

The Eightfold Noble Path enables Buddhists to follow tenets of morality, concentration in mind and wisdom:<sup>10</sup>

- Morality is based upon the Five Precepts — not to destroy life, not to steal, not to commit improper sexual behaviour, not to lie or slander, and to refrain from alcohol and drugs which will distort the mind.
- Concentration requires effort and mindfulness in all activities.
- Wisdom requires understanding and thoughtfulness in relation to the Buddha’s teachings.

Buddhists do not believe in taking life; however they are not required to be vegetarians, which is at the individual’s discretion.<sup>11</sup>

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7 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 23; Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 26.

8 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 22.

9 *ibid.*

10 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 26.

11 *ibid.*

#### 4.2.2.2 Holy books and scriptures

There are numerous holy scriptures associated with the various forms of Buddhism. They are collectively known as the “Tripitaka” or Three Baskets, consisting of “Vinaya Pitaka” or monastic rules, the “Sutra Pitaka” or sermons and the “Abhidharma Pitaka” or higher philosophy.

The teachings of the Buddha are collectively known as the “Dharma” in Sanskrit, (or the “Dhamma” in Pali), often translated as “the path”.<sup>12</sup> Buddhism is not based on reverence for holy books, but rather than study, the emphasis is on the practice of teachings.

#### 4.2.2.3 Religious leaders

Monks, nuns and some lay people are regarded as spiritual leaders. Buddhist monks and nuns should always be addressed as “Venerable” or “Reverend”, never as “Mr” or “Miss”. This does not apply to persons guilty of murder or sexual offences as they are no longer considered to be monks or nuns and are prohibited from re-ordaining.

#### 4.2.2.4 Forms of worship and festivals

Buddhists commonly practise meditation in the early mornings and evenings with a combination of chanting, prostration or silence.

Meditation does not need to be done in a Buddhist Temple, however many temples do offer services weekly and at festivals.<sup>13</sup>

The main Buddhist festival is called “Vesak” — the date of the Buddha’s birth, liberation or enlightenment and his passing away. The actual date varies within Asian cultures but usually coincides with the Full Moon of May.

Individuals may go into reclusive retreat, at which point they must have no contact with anyone.

#### 4.2.2.5 Relevant practices

**The following are the practices of most impact in court situations:**

- **Status of women** — Women have an equal status in Buddhism.
- **Bowing** — Bowing with hands clasped in a prayer-like gesture (or sometimes with both hands folded over their heart) shows honour and respect, and is the proper way of greeting monks and people in authority.<sup>14</sup>

<sup>12</sup> Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 27.

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*; Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 27.

- **No direct eye contact** — Monks from Cambodia, Sri Lanka, Thailand, Laos and Burma must not usually look directly at a member of the opposite sex.<sup>15</sup> They often shield their face with a fan to avoid this. This practice applies to Vietnamese nuns as well. There is no such rule for lay Buddhists — see Section 3 for cultural rules about this.
- **Touching** — Never touch a monk or nun on the head.<sup>16</sup> Theravadin monks should never be touched by a female. They cannot give or receive any item directly from or to the hand of a female. The item should be placed in front of them for them to pick up. This rule does not generally apply to monks and nuns of the Mahayana tradition. Some cultures have sensitivities to touching people of the opposite sex.
- **Dress** — Monks and nuns must wear robes at all time. However, novices may be allowed to wear casual clothes at times. Robes vary in colour and may be maroon, saffron, grey, brown, yellow or black. The different colours reflect the country in which individuals took their monastic vows.<sup>17</sup> Monks and nuns either shave their heads or have very short hair. Lay Buddhists may wear medallions, prayer beads and/or coloured strings around their wrists or necks.<sup>18</sup>
- **Worship and festival times** — see 4.2.2.4 above.

### 4.2.3 Islam

The definition of “Islam” in Arabic means “submission” and refers to the submission to “Allah”, the Arabic word for “God”.<sup>19</sup>

It is incorrect to use the term “Muhammadanism” which suggests the worship of Muhammad<sup>20</sup> which is considered forbidden. Islam places great emphasis on pure monotheism, and the idea of the “indivisibility” of God.

There are nearly 1.6 billion Muslims from many races, nationalities and cultures throughout the world. There are:<sup>21</sup>

- 1.3 billion Asian Muslims
- 520 million African Muslims
- 56 million European Muslims

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15 *ibid.*

16 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 27.

17 *ibid* p 24.

18 *ibid.*

19 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 27.

20 *ibid.*

21 Muslim Population Worldwide, at <[www.muslimpopulation.com](http://www.muslimpopulation.com)>, accessed 24 November 2017.

- 7.61 million North American Muslims
- 2.45 million South American Muslims
- 79.5 million Turkish Muslims
- 0.54 million Oceania Muslims.

Muslims in Australia come from over 70 different countries and are therefore ethnically and culturally diverse.<sup>22</sup> The largest Muslim ethnic groups in Australia are Lebanese and Turkish. Most Muslims in Australia were born in Australia and the vast majority are Australian citizens.

There are two main groups within Islam:

1. **Sunni**; and
2. **Shi’a**.

In most Muslim populations, the Sunni are the majority.<sup>23</sup> The exceptions are in Iran and Iraq, where the Shi’a form the majority.

Historically the two groups differed over the successor to Muhammad and leadership of the Muslim community (the “Imam”): the Shi’ites believe the leader should be descended from Muhammad; whereas the Sunnis elect their leader from those who are pious and able to do the job effectively.<sup>24</sup> Today, however, the main difference between these groups stem from the different cultures and traditions the two groups have developed over the centuries.

There is another approach to Islam, known as **Sufism**. It is an approach typified by a range of different mystical attitudes, values and practices, not a particular school or sect, so it can be found among many different “branches” of Islam. There have also been identifiable Sufi groups at different times and in different places.

#### 4.2.3.1 Main beliefs

Muslims believe in one unitary and omnipotent God — “Allah” (which literally means “God” in Arabic). The ultimate purpose of humanity is submission to Allah in every aspect of life including faith, family, peace, love and work.<sup>25</sup> Islam is strongly monotheistic and abhors both the attribution of divinity to any human and the notion that Allah might be divisible.

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22 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 28.

23 *ibid*.

24 *ibid*.

25 *ibid*, p 27.

Islam teaches that prophets are sent by Allah to correct moral and spiritual behaviour. The prophets are human, but they provide an example for individuals and nations to follow.<sup>26</sup>

Muslims believe that there have been many prophets (including Abraham, Moses and Jesus, among others) but that the final prophet was Muhammad, and that the Qur'an is the final revelation of God.

A belief in six Articles of Faith<sup>27</sup> is a requirement of every Muslim — that is, a belief in:

1. One, unique, incomparable God (Allah).
2. All the angels.
3. All the Prophets and messengers of Allah, including Adam, Noah, Abraham, Moses, David and Jesus.
4. All revealed books/scriptures of Allah.
5. The Day of Resurrection and the Day of Judgment.
6. Fate and Predestination.

The Five Pillars<sup>28</sup> (or duties) of Islam are regarded as central to the life of the Islamic community:

1. The profession of faith (Al-Shadah) — “There is no God but Allah and Muhammad is his Prophet.”
2. The five daily prayers.
3. To pay alms to the poor (“zakat”). There are complex rules about how much, when and how alms should be given.
4. Fasting in the month of Ramadan.
5. The pilgrimage to Mecca (“hajj”), for all able-bodied Muslims, at least once, where reasonably possible.

The teachings of Islam are anti-violence. Muslims must not initiate violence or commit violence. However, if a Muslim individual, the Islamic religion or Islamic community is threatened, Muslims have a right to “jihad” (to struggle or strive) in

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26 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 50.

27 For further information, see Al-Muhajabah, Introduction to Islamic Monotheism, at [www.muhababah.com/tawhid.htm](http://www.muhababah.com/tawhid.htm), accessed 24 November 2017.

28 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 50. For further information, see Islami City, *The Five Pillars of Islam*, at [www.islamicity.com/mosque/pillars.shtml](http://www.islamicity.com/mosque/pillars.shtml), accessed 24 November 2017. See also Judicial College (UK), *Equal Treatment Benchbook*, 2013, 2nd edn, London, at <https://www.judiciary.gov.uk/publications/equal-treatment-bench-book/>, accessed 24 November 2017.

self defence. Jihad can encompass spiritual, intellectual, theological, literary and, if necessary, physical forms. The personal or inner struggle is the most significant, as it reflects the quest for perfection of self.

Muslims are forbidden to eat certain animals and their products such as carrion and in particular, any pork product, except in life threatening situations. Animals that can be eaten are sheep, cattle, poultry, camel, goat and seafood but only when they have been slaughtered in a humane way in the name of God. Muslims must avoid toxins and harmful products including drugs and alcohol. Food that fits the approved criteria and/or has been prepared in the approved way is called “Halal” food.

See under 4.2.3.4 for rules about fasting.

#### 4.2.3.2 Holy books and scriptures

The Holy **Qur’an** is considered the final, unaltered and unalterable word of Allah,<sup>29</sup> as conveyed to Muhammad by the angel Gabriel and transmitted to his followers by Muhammad. Questioning it is viewed as a very grave error.

The Qur’an is seen as a universal guidebook. It includes some material that can be described as “codes of conduct on morality, nutrition, modes of dress, marriage and relationships, business and finance, crime and punishment, laws and government”.<sup>30</sup>

Much of it, however, relates to theology and metaphysics.

The “Sunna” comprises the “hadith”, which are thousands of recorded teachings and practices of the Prophet Muhammad, and are the second most important source of authority in Islam.<sup>31</sup> There is a dispute as to which hadith are reliable and which are not.

The Qur’an and Sunna together provide the primary sources for the “**Shari’ah**” (meaning “the way”). This is a body of Islamic law comprising 1,400 years of highly sophisticated legal scholarship.

#### 4.2.3.3 Religious leaders

There is no priesthood or institutionalised universal “church” for most Muslims. For example, there are no “ordained” priests or leaders comparable to Bishops or the Pope in terms of authority within Sunni Islam. Religious leadership is usually consensual and authority is often informal and typically limited to a given group or community. “Alim” (singular) or “Ulama” (plural) are religious scholars who

29 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 29.

30 *ibid.*

31 *ibid.*

fulfil a similar role to priests in many other religions, but they are appointed by their own community, large or small. “Ustaz” or “Ustadz” means a “teacher”, usually an alim. “Imam” means leader and generally refers to a qualified religious leader (usually an alim) who leads the five daily prayers in the mosque. An Imam typically has extensive knowledge of the Islamic faith and is generally a respected person in the Muslim community.

#### 4.2.3.4 Forms of worship and festivals

Muslims pray five times a day — in the morning before sunrise, midday, afternoon, after sunset and at night. These are obligatory prayers for all adults starting from the age of puberty, which determines adulthood, with exceptions for those who are ill or women who are menstruating. It is necessary to wash thoroughly before prayer (performs ablutions), and prayers must be conducted in a clean area. During prayer, Muslims stand, bow and prostrate on the ground with their face towards the Ka’ba — a building located in the Grand Mosque in Mecca. Prayers are congregational and generally performed in a mosque — but can be performed individually, if necessary, at any clean and respectable place. A formal call to prayer is usually made from a minaret (tower) of a mosque, where congregational prayers are conducted, however the call to prayer can be made individually in any setting.

Muslim men pray at the mosque on Friday at midday, where a special congregational prayer and a sermon are delivered by the Imam. Women may choose, but are not obliged, to attend.<sup>32</sup>

There are two main festivals in Islam. They can occur at any time during the calendar year:

- **Eid-ul-Fitr** (breaking of the fast) — which signifies the end of the month of fasting called “**Ramadan**”. Ramadan is the ninth month on the lunar calendar.<sup>33</sup> It is the month during which the Qu’ran was revealed to the Prophet Muhammad. Muslims must fast, abstain from drinking alcohol, smoking, sexual relations, gossip, slander and activity which may harm another person, for 29 to 30 days.<sup>34</sup> The aim is to advance oneself spiritually, to consider the needs and difficult struggles of others and to develop oneself so as to become the best example for the rest of humanity.
- **Eid-ul-Adha** (the feast of sacrifice) — which commemorates the sacrificing of a sheep by the prophet Ibrahim (Abraham). A Muslim sacrifices a sheep

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32 *ibid*, p 30.

33 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 30; Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 51.

34 *ibid*.

and shares it with the poor, neighbours and friends on that day.<sup>35</sup> The great pilgrimage to Mecca in Saudi Arabia is also observed at this time when Muslims from all over the world congregate to perform the obligations of the pilgrimage.

#### 4.2.3.5 Relevant practices

**The following are the practices of most impact in court situations:**

- **Status of women** — Men and women have equal, but not identical, rights and responsibilities. The head of the household is the father or, in his absence, the eldest son; and in most Muslim societies only men can be religious leaders.<sup>36</sup> In many Muslim communities women are regarded in a way that is often seen as discriminatory by non-Muslims.
- **Touching** — The left hand is seen as unclean and should not generally be used to touch a holy book, or to greet a person. Many Muslims also prefer not to shake the hand of or touch someone of the opposite sex, although this is not the case for all Muslim cultures. Fathers, brothers, uncles, grandfathers and father-in-laws may, however, touch a woman to whom they are closely related, that is, basically a woman to whom it would be considered unlawful for them to marry by reasons of kinship. Husbands are also exempted, of course.
- **Dress** — Islam prescribes a modest dress code for both men and women. This code stems from a prohibition on exposing parts of the body known as the “aurat”. The meaning of “aurat” is not universally agreed among Muslims and so there is no clear agreement on specifics of what constitutes “modest” dress. Generally, loose-fitting, non-transparent clothing and the covering of hair are requirements for women. There is diversity of opinion regarding the hijab (scarf or veil). Some Muslims believe women must cover their faces and heads, while others believe only the hair and head needs to be covered. There are also Muslims who believe it is not an Islamic requirement for women to wear veils.<sup>37</sup> Views on wearing or not wearing the hijab may be determined by cultural and ethnic background as much as by religious conviction or theory. In Australia, many Muslim women choose to wear a type of hijab, but usually the type that covers the head and hair only. Few wear the “burqa” (full veil covering the entire face but leaving a grill for the eyes). Women who wear the hijab tend to do so in order not to display or expose their physical attractions

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35 *ibid.*

36 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 54–55.

37 *ibid.*

to strangers and/or so as to maintain a moral dignity. Women who wear a covering are not allowed to remove the part of the covering that covers their hair and body in public.<sup>38</sup>

- **Face covering** — In 2011, NSW police were given new powers to require removal of face coverings for identification purposes.<sup>39</sup> Where a police officer requires a person to provide identification, the police officer may require the person to remove any face covering to see the person's face.<sup>40</sup> If the person does not remove their face covering, the police officer must warn the person that he or she is required by law to comply with the requirement to remove the face covering.<sup>41</sup> Failure to remove the face covering after this warning is an offence unless the person has “special justification” for not removing it.<sup>42</sup> A person has special justification only if there is a legitimate medical reason for keeping the covering in place; cultural or religious reasons are not sufficient.<sup>43</sup> Note there is no power for police to forcibly remove the face covering if the wearer refuses to do so.<sup>44</sup>
- **Worship and festival times** — see 4.2.3.4 above

#### 4.2.4 Hinduism

Hinduism is one of the oldest religions in the world. Different communities in India have practised and evolved it over thousands of years.

Hinduism is almost exclusively practised by people of Indian origin. Although note that there are many other religions practised in India as well — for example, Sikhism, Buddhism, Islam and Christianity.

Hindus believe that their religion is a continuous process — without beginning or end — preceding the existence of this earth and other worlds beyond.<sup>45</sup> Hinduism is sometimes called “Sanatan Dharma” — the Eternal Religion.

Hinduism is unique as a religion, as it has no single founder and no single book. It is based on the divine revelations contained in the ancient holy books called the Vedas. Hinduism has a number of denominations and therefore, there are

38 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 55.

39 *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), Pt 3, Div 4, ss 19A–19C.

40 LEPRA, s 19A(1); NSW Police Handbook, 2017, p 172, at [www.police.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0009/197469/NSW\\_Police\\_Handbook.pdf](http://www.police.nsw.gov.au/__data/assets/pdf_file/0009/197469/NSW_Police_Handbook.pdf), accessed 6 November 2017.

41 LEPRA, s 203(1).

42 LEPRA, s 19B(1).

43 LEPRA, s 19B(2).

44 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 38, p 55.

45 *ibid.*

variations in religious practices amongst its followers. For example, the Hindus of North India may have some practices that are not followed by those from Sri Lanka, and vice versa.

The major tenets of Hinduism are:<sup>46</sup>

- “karma” the law of cause and effect
- reincarnation
- non-violence
- tolerance of differences within itself and towards other religions
- many manifestations of reality or God
- an omnipresent God who resides in the heart of every living being, thus all human beings are potentially divine and the aim of life is to realise this divinity within.

Hindus believe that there may be many manifestations of the one universal reality or God.<sup>47</sup>

#### 4.2.4.1 Main beliefs

The Hindu ethical code is exemplified by a saying: “‘Punya’ (virtue or good) is doing good to others; and ‘Papa’ (sin or evil) is harming others.”

Hindu scriptures give universal moral and ethical principles applicable to all sections of society. Designated as Samanya Dharma or common virtues, the list comprises Ahimsa (non violence), Satya (speaking the truth), Asteya (non stealing), Daya (compassion), Dana (giving gifts), Titiksha (forbearance), Vinaya (humility), Indriyanigraha (restraining the senses), Santi (keeping the mind at peace), Saucha (purity of body), Tapas (austerity) and Bhakti (devotion to God).<sup>48</sup> In addition, Kshama (forgiveness), Dhriti (steadfastness), Aarjava (honesty), Mitahara (moderation in diet).

The word “Om” is used in Hindu worship and is composed of three Sanskrit letters, “a”, “u” and “m”, which represent the Trinity of energies: “Brahma” the creator; “Vishnu” the preserver; and “Shiva” the destroyer. “Om” is recited before any chant, and Hindus believe it invigorates the body. The symbol for “Om” represents the universe.<sup>49</sup>

46 ibid.

47 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 40.

48 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 32.

49 ibid, p 31.

Hindus do not believe in taking life, and traditionally most are vegetarian. Australian Hindus have relaxed the rules relating to food and many are only vegetarians during Hindu festivals. Eating beef is strictly forbidden, and this rule extends to any cooking utensils which may have been used in cooking beef.<sup>50</sup>

Hindus often fast on the eleventh day of the Hindu calendar month and may also fast for a number days during the year.

#### 4.2.4.2 Holy books and scriptures

There are numerous Hindu holy books. The “Vedas” are the oldest and are written in Sanskrit. The Vedas are a treasure house of information on spiritual, material and social doctrine. The four Vedas are Rigveda, Yajurveda, Samveda and Atharvaveda. The Upanishads are the explanations of Vedas in a simple and practical form.

The “Laws of Manu” contain 2685 verses of instruction.<sup>51</sup>

Other holy texts are:<sup>52</sup>

- The “Ramayana” an epic that contains the life and deeds of Sri Rama.
- The “Mahabharata” an epic that contains the lives of the Princes Pandavas and Kauravas and Lord Krishna. The “Bhagavadgita” a most popular scripture from the “Mahabharata” narrates a dialogue between Lord Sri Krishna and the warrior, Arjuna, on a battlefield. The central message of Bhagavadgita is that the soul is immortal and that one should discharge one’s duty with total selfless dedication.

#### 4.2.4.3 Religious leaders

There are two aspects of the Hindu religious leadership:

1. Ritualistic — mainly male Hindu priests conduct prayers in the temples and various religious ceremonies and rites. Some temples have female priests.
2. Spiritual — there are both male and female holy persons of great wisdom, acquired through their devotion, dedication and austere living. The male spiritual person is called a “Swami” or a “Guru”. The female spiritual person is called a “Mataji” or “Sanyasini” or “Pravarajika”. They are revered because they provide religious discourses and guidance.

Hindu religious facilities are managed by leaders of the local community.

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50 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 42.

51 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 32.

52 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, pp 32–33.

#### 4.2.4.4 Forms of worship and festivals

Hindus are encouraged to pray at dawn and dusk, but the actual time is not critical.<sup>53</sup>

Most Hindus worship at least once a day at sunrise. Worship times at Hindu Temples are generally in the morning and evening.

Hindus must wash thoroughly and change their clothes before praying.<sup>54</sup>

Hindus also have shrines or designated rooms for worship at home, with pictures or small icons where an oil lamp and incense are burnt.<sup>55</sup>

Hindu festivals are based on the lunar calendar, the main festivals are:<sup>56</sup>

- Makar Sankranti in January
- Holi in February/March
- Sivaratri in March (whole night vigil)
- Ramnavami in April
- Krishna Janmastmi in August/September
- Navratri in September/October (10 day festival) and
- Deepavali in October/November.

#### 4.2.4.5 Relevant practices

**The following are the practices of most impact in court situations:**

- **Status of women** — In general, women have an equal status to men. However, Hindu women usually prefer to have a male relative with them when dealing with anyone in authority.<sup>57</sup>
- **Touching** — A greeting in the form of “Namaste” is the most common practice. It suggests a respect from one soul to another soul. Body contact is avoided, not as a taboo, but as a cultural preference.
- **Dress** — Hindu women put on glass bangles when they get married and do not remove them until their husband dies, at which point they are ceremoniously shattered. Breaking or removing these bangles is considered an extremely bad

53 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 43.

54 *ibid*

55 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 33.

56 *ibid*.

57 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 46.

omen and would greatly distress a Hindu woman.<sup>58</sup> Married women also wear a “Mangal sutra” or “thali” on a chain (which looks like a nugget) at all times. They also wear a red dot on their forehead.<sup>59</sup> Some Hindus wear a sacred thread around their bodies, passing diagonally across their body from the shoulder to about waist level. This is put on at an important religious ceremony and must never be removed.<sup>60</sup> Men of one particular Hindu sect (Swami Narayan) may wear a necklace. Some Hindus wear a religious talisman on a chain as a protection from evil action by others. Traditional clothing is worn when participating in worship or religious festivals.<sup>61</sup>

- **Worship and festival times** — see 4.2.4.4 above.

## 4.2.5 Judaism

Judaism is one of the world’s oldest religions.

Any person whose mother was a Jew is considered to be Jewish. However, progressive communities also accept descent through the father if the child is being brought up as a Jew. Conversion to Judaism is possible after a rigorous course of instruction. People usually convert to Judaism to ally themselves with the family they are marrying into or have married into.

In Australia, there are many different Jewish congregations ranging from progressive to ultra-orthodox traditions.

Jewish people believe in a single God who created the universe and continues to govern it. Moses received the Ten Commandments and the “Torah” from God on Mt Sinai. The Torah revealed the way God wished to be served, the basic principles of Judaism and instructions on how Jews should live.

### 4.2.5.1 Main beliefs

Judaism is based upon thirteen principles of faith:

1. God created all things.
2. There is only one God.
3. God has no bodily form.
4. God is eternal.
5. We must pray only to God.
6. All the words of the prophets are true.

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58 *ibid.*

59 *ibid.*, p 43.

60 *ibid.*

61 *ibid.*

7. Moses was the greatest of the prophets.
8. The Torah we have is the same that was given to Moses.
9. The Torah will never change.
10. God knows human deeds and thoughts.
11. God rewards good and punishes evil.
12. The Messiah will come to redeem Israel and the world.
13. There will be a resurrection of the dead.

However, the more progressive Jewish traditions may dispute many of these principles.

The “Sabbath”, or “Shabbat”, is a holy day for Jews and extends from sunset on Friday to sunset on Saturday.<sup>62</sup> Observing the Sabbath involves attending synagogue services on Friday evenings and family gatherings at home. Observant Jews are not allowed to work on the Sabbath or perform many non-arduous secular activities.

“Kashrut” (from the Hebrew meaning fit, proper or correct) states which foods can be eaten and how food is to be prepared. For example, meat (the flesh of birds and mammals) cannot be eaten with dairy. Separate utensils must be used for meat, as opposed to dairy. “Kosher” describes food prepared according to these standards.<sup>63</sup>

Observant Jews eat only Kosher food. For example:

- Certain animals must not be eaten — including, the flesh, organs, eggs and milk of pork, birds of prey, insects and shellfish.
- The permitted animals, birds and fish must be killed in accordance with Jewish law. This involves slaughtering by a qualified person in a manner that is as pain free as possible. Certain parts of permitted animals must not be eaten.<sup>64</sup>

#### 4.2.5.2 Holy books and scriptures

“Mitzvot” are the 613 commandments that are contained in the “Torah” (the five Books of Moses), and include the Ten Commandments. The mitzvot have been expanded through interpretations by Jewish spiritual leaders. Jewish law (“Halakhah”) is comprised of the Torah and the interpretations and covers theology, ethics, marriage, food, clothing, education, work and holy days.<sup>65</sup>

62 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 35.

63 *ibid*, p 35.

64 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 36.

65 *ibid*, p 35.

#### 4.2.5.3 Religious leaders

In Orthodox Judaism, only men can become rabbis; whereas Liberal and progressive Jews allow women to become rabbis and cantors.<sup>66</sup>

The rabbi's authority comes from extensive study, and a rabbi is considered to be a teacher, rather than an anointed priest. A cantor is used to read the Torah, as few modern Jews can read the poetic Hebrew.<sup>67</sup>

#### 4.2.5.4 Forms of worship and festivals

Observant Jews pray three times a day — morning, afternoon and evening — although spontaneous prayer may be offered at any time. Most Jews manage to fit these prayer times into their normal work schedule.

However, Sabbath and festival observance require special arrangements and consideration.

As indicated earlier, the holy day for Jews (when praying is most important) extends from sunset on Friday to sunset on Saturday.

Sabbath and festival worship is performed congregationally in a synagogue, where prayer takes place facing Jerusalem. In an Orthodox synagogue men and women are separated — the women sit upstairs or behind a partition or grille — and services are conducted by males in Hebrew. In liberal and progressive synagogues, men and women sit together.

The most important festivals are:

- Pessach (Passover) — lasts eight days and marks the deliverance of the Israelites from slavery in Egypt — usually in March or April.
- Shavu'ot (Pentecost) — celebrates God's giving of the Torah on Mount Sinai to the Jewish people always held 50 days after Passover — usually falls in May or June.
- Rosh Hashanah (New Year) — the anniversary of the creation of the world — usually in September or October.
- Yom Kippur (Day of Atonement) — a 25 hour fast and period of abstinence, spent largely in prayers for forgiveness. Yom Kippur is the holiest day in the Jewish year — usually in September or October.
- Succot (Tabernacles) — recalls the journey of the Jews through the desert on the way to the Promised Land — held 5 days after Yom Kippur and lasts seven days — usually held around October.

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66 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 62.

67 *ibid.*

#### 4.2.5.5 Relevant practices

**The following are the practices of most impact in court situations:**

- **Status of women** — in Orthodox Judaism women have no formal role in liturgy. But the fact that being a Jew is determined through the matriarchal line is an important factor in family relationships.
- **Touching** — Handshaking is generally considered appropriate and acceptable. However, ultra-Orthodox or “Hasidic” Jews avoid all physical contact with non-family members of the opposite sex. They also limit other forms of association and conversation with them.
- **Dress** — Some Jewish men wear a “kippah” or “yarmulke” (religious skullcap) at all times. This is associated with the concept of reverence to God. Others wear the skullcap only during the Sabbath and on festivals. For reasons of integration some Jewish men wear a hat rather than a “kippah” or “yarmulke”. Observant men also wear an undergarment with fringes on its corners; these fringes are sometimes worn in a visible manner. Many observant married women keep their hair covered with a hat or scarf. Ultra-Orthodox or “Hasidic” male Jews wear black, large hats, long “earlock” hair and beards.
- **Worship and festival times** — see 4.2.5.4 above.

#### 4.2.6 Other religions

For some practical information on Baha’i and Sikhism, see *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, 2nd edition, Australasian Police Multicultural Advisory Bureau.

Otherwise, see 4.4.

[The next page is 4301]



### 4.3 The possible impact of religious affiliations in court

**Appropriate account should be taken of the relevant religious affiliation of those attending court, people practising religions (particularly if they come from orthodox or conservative traditions within their religion), otherwise people may:**

- feel uncomfortable, resentful or offended by what occurs in court
- feel that an injustice has occurred
- in some cases be treated unfairly and/or unjustly.

**It should also be noted that members of religions with the most obvious dress differences, or the most deviation from the more common forms of Christianity practised in Australia, tend to be discriminated against on religious or ethno-religious grounds much more frequently than other people.<sup>68</sup> This may make some of them more likely to name *any* perceived problem, or any perceived difference in treatment as being a form of religious discrimination, even when it is not. However, if you follow the guidance provided in 4.4, this should be less likely to occur.**

**These problems are likely to be compounded if the person also happens to be from an ethnic or migrant background, female, a child or young person, lesbian, gay or bisexual, transgender(ed), a person with a disability, or is representing themselves — see the relevant other Section(s).**

Section 4.4, **following, provides additional background information and practical guidance** about ways of treating people with various types of religious affiliation during the court process, so as to reduce the likelihood of these problems occurring.

The boxed areas provide the practical guidance.

[The next page is 4401]

<sup>68</sup> See statistics and information contained in the Annual Reports of the Anti-Discrimination Board of NSW, at [www.antidiscrimination.justice.nsw.gov.au/about-us/annual-reports](http://www.antidiscrimination.justice.nsw.gov.au/about-us/annual-reports), accessed 24 November 2017.



## 4.4 Practical considerations

### 4.4.1 4.4.1 Modes of address for religious leaders

#### Points to consider:

- In most cases, religious leaders should be addressed by their particular religious leadership title followed, in most cases, by their family name.
- However, to avoid offence, it is best to ask the particular religious leader what mode of address they would prefer.

### 4.4.2 Oaths and affirmations

Anyone who has the necessary competence to present evidence in a court (including interpreters — see 3.3.1.5) must first be “sworn” in — as a means of ensuring that what they are about to say will be truthful. This can be done in the form of an oath or an affirmation. It is the person’s choice which they take.<sup>69</sup> “The sensitive question of whether to affirm or swear an oath should be presented to all concerned as a solemn choice between two procedures which are equally valid in legal terms.”<sup>70</sup>

The legality of administering an oath depends upon two matters:<sup>71</sup>

1. Whether the oath appears to the court to be binding on the witness’s conscience;<sup>72</sup>
2. If so, whether the witness considers it to be binding on his or her conscience.<sup>73</sup>

It is irrelevant whether the witness observes a particular religion.

#### This means that:

- In most cases, the standard oath (“I swear by Almighty God that the evidence I shall give will be the truth, the whole truth and nothing but the truth”, or for interpreters — “I swear by Almighty God that I will well and truly interpret the evidence that will be given and do all other matters

<sup>69</sup> *Evidence Act* 1995 (NSW), ss 21–23.

<sup>70</sup> Judicial College (UK), *Equal Treatment Benchbook*, London, 2013 at 3–8, see 3.2.1.

<sup>71</sup> Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 51.

<sup>72</sup> *Omychund v Barker* (1744) 1 Atk 21; 26 ER 15.

<sup>73</sup> *R v Kemble* (1990) 91 Cr App R 178 at 180.

and things that are required of me in this case to the best of my ability”<sup>74</sup> **will only be suitable for those who are Christians and who are happy to take an oath.** It has been customary in some courts (although it is not essential and has generally stopped being the practice in most courts)<sup>75</sup> for any person taking this oath to hold a copy of the Bible in their hand as they take the oath.

- **Some Christian witnesses such as Quakers (the Society of Friends), Moravians and Separatists, prefer to make affirmations** because they believe a religious oath sets a double standard of truthfulness, whereas they are duty-bound to tell the truth in all facets of life.<sup>76</sup>
- **For those who have no religion, or who do not wish to take an oath,<sup>77</sup> the standard affirmation makes no reference to religion** — “I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth”, or for interpreters — “I solemnly and sincerely declare and affirm that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.”<sup>78</sup>
- **For those who practise other religions and who wish to take an oath it will almost always be possible to adapt the oath so that it fits with their religion, by substituting the name of their God(s) into the standard oath.**<sup>79</sup>

Their appropriate holy book should be available as required — although, note that Muslims usually do not swear on the Qu’ran as this might be seen by many as idolatrous. It is not essential that a religious text be used in taking an oath and it has generally stopped being the practice in most courts.<sup>80</sup>

Section 24A of the *Evidence Act* 1995 (NSW) provides that a person may take an oath even if the person’s religious or spiritual beliefs do not include a belief in the existence of a God. Section 24A provides

74 *Evidence Act* 1995 (NSW), Sch 1.

75 *Evidence Act* 1995 (NSW), s 24.

76 Supreme Court of Queensland, *Equal Treatment Bench Book*, see n 2, p 59, citing the Victoria Parliament Law Reform Committee, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community* Melbourne, Government Printer, October 2002 at 121.

77 *Oaths Act* 1900 (NSW), s 13.

78 *Evidence Act* 1995 (NSW), Sch 1.

79 *Evidence Act* 1995 (NSW), Sch 1.

80 *Evidence Act* 1995 (NSW), s 24.

that any such oath may be in the form prescribed by regulations. Unfortunately, as yet, there are no prescribed regulations. This means that, for example, Buddhists and Hindus (who would generally expect to swear an oath in accordance with their particular holy book/scriptures as opposed to a God or Gods) will need to use the standard affirmation instead.<sup>81</sup>

- **In most cases, the person’s legal representative or person calling the particular witness will have found out whether the person wishes to be sworn in on the basis of their religion or not.** This should also ensure that the appropriate holy book is available if particularly required by that person. In other cases, the court may need to determine whether the person wishes to be sworn in on the basis of their religion or not. In which case, note that:
  - **Some witnesses may not realise that they are able to swear to tell the truth in a way which is appropriate for them,** and if not guided about this may simply agree to take the standard oath, with or without the Bible.
  - **It is always best to state that it is important that the witness swears to tell the truth in the way that will be most meaningful.** And that, for example, if they practise a particular religion that believes in a God or Gods, swearing to tell the truth in line with their religion (that is taking an oath) may be the most meaningful for them. If they reply that they want to swear to tell the truth in line with their religion, you will need to ask what religion they practise, and then if necessary, substitute the appropriate God or Gods — see 4.2 above.
  - **It is always important to respect the wishes of the particular person in their choice of whether to take an oath or make an affirmation.**
- **It is also important *not* to assume that someone who refuses, or is unable, to take an oath is any less likely to tell the truth than someone who chooses to make an affirmation that makes no reference to religion.**

#### 4.4.3 Appearance, behaviour and body language

As indicated in the relevant Sections above, there are a number of different religious practices in relation to these aspects.

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81 *Evidence Act 1995 (NSW)*, s 24A.

**Points to consider:**

- **Dress** — No-one should ever be asked to remove their religious dress in open court — even when it might appear necessary, for example, to check the extent of someone’s injury. Where it is necessary to see under someone’s religious dress, it will be necessary to check with that person, or with someone who can advise you of the appropriate religious practice, what can be done. For example, it may be possible to have someone of the same gender check this in a private room, or to go to your chambers with an additional support person agreed to by all concerned. If someone is wearing a hat in court it is always wise to check whether there is a religious reason for this, rather than immediately asking them to remove it.
- **Disrespectful behaviour in court** — It is a punishable offence for a person to intentionally engage in disrespectful behaviour in any NSW court. This includes an accused person, defendant, party to, or person called to give evidence in proceedings before the court. The offence was introduced to bridge the gap between contempt and community expectations of behaviour in court.<sup>82</sup> The offence refers to behaviour which is disrespectful to the court or the judge presiding over the proceedings (according to established court practice and convention). The offender may be fined or face 14 days imprisonment if found guilty of the offence. The new offence does not affect any power with respect to contempt. Proceedings for contempt may be brought in respect of behaviour that constitutes a “disrespectful behaviour” offence, but a person cannot be prosecuted for both contempt and the offence for essentially the same behaviour.<sup>83</sup>
- **No direct eye contact** — as indicated above, there are some religions for which it is taboo for some people to look (particularly the opposite sex) direct in the eye. For these people, not looking someone in the eye will not necessarily have anything to do with their honesty or credibility.
- **Touching/standing too close** — many religions have rules that members of the opposite sex who are not family members are not allowed to touch each other, or in some cases, stand too close to each other.

82 Second Reading Speech, Courts Legislation Amendment (Disrespectful Behaviour) Bill 2016, NSW, Legislative Council, *Debates*, 11 May 2016, p 9.

83 See *Supreme Court Act 1970* (NSW), s 131; *District Court Act 1973* (NSW), s 200A; *Local Court Act 2007* (NSW), s 24A; *Coroners Act 2009* (NSW), s 103A. *Land and Environment Court Act 1979*, s 67A.

- **If you are unsure whether a particular behaviour trait is to be expected within a particular religion, or unsure how best to deal with it to ensure justice is both done and seen to be done** — either ask the person’s legal representative (if they have one), or ask the person themselves, or consider whether the court needs to obtain “expert” advice from someone who has expert knowledge about the particular religion. Note that it may be hard to get the information you need from the person themselves as they may not feel it is their place to inform you, or they may not understand why you need the information, or they may be reluctant to give you the information for some other reason that is religiously or culturally appropriate to them.
- **All or some of these differences in appearance, behaviour and body language may need to be taken into account whenever you make any assessment based on the demeanour of a person with a particular religious affiliation.**
- **If appropriate, you may also need to alert the jury to the fact that any assessment they make based on the demeanour of a person with a particular religious affiliation must, if it is to be fair, take into account any relevant religious difference. This may need to be noted early in the proceedings rather than waiting until you give your final directions to them** — otherwise, their initial assessment of a particular person may be unfairly influenced by false assumptions, and may not be able to be easily changed by anything you say in your final directions to them.
- **As prescribed by law, you may also need to intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any particular religious difference in appearance, behaviour or body language.**<sup>84</sup>

84 Note that s 41 of the *Evidence Act* 1995 imposes an obligation on the court to disallow a question if the court regards it as a “disallowable question” and is expressed in terms of a statutory duty whether or not objection is taken to a particular question: s 41(5). A “disallowable question” is one which is misleading or confusing (s 41(1)(a)), unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive (ss 41(1)(b)), is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate (s 41(1)(c)), or has no basis other than a stereotype: s 41(1)(d). A question is not a “disallowable question” merely because it challenges the truthfulness of the witness or the consistency or accuracy of any statement made by the witness (s 41(3)(a)) — or because the question requires the witness to discuss a subject that could be considered distasteful to, or private by, the witness: s 41(3)(b). Sections 26 and 29 of the *Evidence Act* also enable the court to control the manner and form of questioning of witnesses, and s 135(b) allows the court to exclude evidence if its probative value is substantially outweighed by the danger that the evidence might be misleading or confusing.

#### 4.4.4 Language

**Points to consider:**

- **Use the appropriate language to describe any God(s) or religious values or practice. For example, always use “the” before any reference to the Buddha or the Dharma/Dhamma.** There must be no blasphemy or apparent blasphemy.
- **Do not use any form of discriminatory or discriminatory-sounding language** — Be careful not to describe a religious practice as immoral or irrational, even when it is unlawful in NSW. For example, it would be inappropriate to state that it is immoral to follow a religious practice that denies a particular form of medical treatment. In the case where that belief extends to the treatment of a child, for example, the court may have jurisdiction to make an order contrary to the practice. In such a case, the court should explain its decision on the basis of its jurisdiction, rather than engaging in discussion of the morality or otherwise of the belief.
- **Be careful not to generalise about a particular religion.** As is evident from 4.2 above, most, if not all, religions have many approaches and forms.
- **Treat everyone as an individual, and do not make statements that imply that all those from a particular religious background are the same, or likely to act in the same way.** Never assume or imply that even what you suspect or know to be the majority way of behaving or thinking for a particular religious group, is the standard by which any individual member of that group should be judged.
- **Be aware that for many who practise a religion, some words, concepts, values and ways of living may be much more problematic than for those who are not so orthodox about their religion, or for those who do not practise any religion.** For example, the word “bugger” is a word bandied around quite casually by some Anglo-Celtic Australians often with no thought as to its literal meaning. In most religions, homosexuality and/or “practising” homosexuals or lesbians are considered unacceptable at best and sinful at worst — see also Section 8.1, under “Views of others”.

#### 4.4.5 The impact of religious values on behaviour relevant to the matter(s) before the court

In most cases, a person’s religion will have a certain amount of, if not critical, influence on their values, and therefore on how they behave.

In other words, any of the values implied within the descriptions of the various religions listed above could (depending on the matter before the court) be a major influence on the way in which a person who practises that religion behaves, has behaved, or presents themselves, their expectations or their evidence in court.

**Points to consider:**

- ▣ **Be careful not to let personal views about a particular religion’s views or practice** (for example, its apparent attitude to the role of women, or the type and nature of its worship) unfairly influence your (or others’) assessment.
- ▣ **Have the particular person’s religious values or practices been an influencing factor in the matter(s) before the court?** Note for example, that in most religions homosexuality and/or “practising” homosexuals or lesbians are considered unacceptable at best and sinful at worst. In many religions sex before marriage is unacceptable and/or sinful. Although, be careful not to generalise about a particular religion and to check the particular person’s own religious values and practices.
- ▣ **If so, where possible, you may need to take appropriate account of these influences.** For example, you may need to decide whether the law allows you to take account of any such influences and, then, as appropriate and at the appropriate time in the proceedings, so as to ensure that justice is done and seen to be done, explain why any such influences can/should be taken into account, or cannot/should not be taken into account. And you may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing — see 4.4.8.
- ▣ **The religious values and practices of a particular person need to be accorded respect rather than disrespect by everyone in court** — while explaining and upholding Australian law where it conflicts with the particular value(s) or practice(s). For example, as prescribed by law, this may mean intervening if cross-examination becomes disrespectful, or if it simply fails to take account of a relevant religious difference.<sup>85</sup>
- ▣ **If you are unsure whether a particular behaviour is the result of an adherence to a particular religion, or unsure how best to deal with it to ensure justice is both done and seen to be done** — either ask the person’s legal representative (if they have one), or ask the person themselves. But note that it may be hard to get the information you

85 see n 84.

need from the person themselves as they may not feel it is their place to inform you, or they may not understand why you need the information, or they may be reluctant to give you the information for some other reason that is religiously or culturally appropriate to them.

#### 4.4.6 Appropriate breaks for prayer and/or religious festivals

As indicated above, court times and holidays are generally more suited to those who practise any form of Christianity than those who practise a non-Christian religion.

**If requested, wherever possible:**

- Make the appropriate allowances for those who need to pray at certain times of the day (for example, Muslims) — that is, have a break in proceedings.
- Make the appropriate allowances for relevant holy days of the week and not insist that someone be called to give evidence on that day, or when they are meant to be at their place of religious worship.
- Make the appropriate allowances for (particularly important) religious festivals and not insist that someone be called to give evidence during such times.

#### 4.4.7 Directions to the jury — points to consider

As indicated at various points in 4.4, above, it is important that you ensure that the jury does not allow any ignorance of religious difference, or stereotyped or false assumptions about people practising (or not practising) a particular religion to unfairly influence their judgment.

**In your final directions to the jury, you may need to remind them of any points in relation to these aspects that you alerted them to during the proceedings, and/or cover them for the first time now.**

**This should be done in line with the *Criminal Trial Courts Bench Book*<sup>86</sup> or *Local Courts Bench Book*<sup>87</sup> (as appropriate), and you should raise any such points with the parties' legal representatives first.**

86 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, 2002–, Sydney, at <www.judcom.nsw.gov.au>, accessed 24 November 2017.

87 Judicial Commission of New South Wales, *Local Court Bench Book*, 1988–, Sydney, at <www.judcom.nsw.gov.au>, accessed 24 November 2017.

**For example, you may need to provide specific guidance as follows:**

- **That they must try to avoid making stereotyped or false assumptions** — and what is meant by this. For example, it may be wise to give them specific examples of religious stereotyping (for example, that all Muslims are violent towards non-Muslims). It may also be wise to give them specific examples of making false assumptions based on their own religious practice or lack of it — for example, that it would be false and legally unfair to conclude that anyone who follows a particular religious norm that happens to conflict with their religious or other values (for example that people of the opposite sex should not generally touch each other in public), is therefore a strange person, untrustworthy or lacking in credibility.

**On the other hand, that they also need to assess the particular person’s evidence alongside what they have learned in court about the way in which people from that religious background tend to behave, speak, and what they tend to value**, as opposed to the way in which they themselves might act, or the way in which people from their own religion are expected to act. In doing this, you may also need to provide guidance on any legal limitations that exist in relation to them taking full account of any of these matters. And you may also need to be more specific about the particular religious aspects that they need to pay attention to.

#### **4.4.8 Sentencing, other decisions and judgment or decision writing — points to consider**

**Your sentencing, decision(s) and/or written judgment or decision must be just in each individual case and consistent, and preferably be considered to be fair and non-discriminatory by everyone affected, or referred to, irrespective of their religion or lack of religion.<sup>88</sup>**

**Points to consider:**

- **In order to ensure that any person with a religious affiliation referred to or specifically affected by your sentencing, decision(s) and/or written judgment or decision also considers it/them**

88 See also Judicial Commission of New South Wales, *Sentencing Bench Book*, 2006, Sydney and *R v Henry* (1999) 46 NSWLR 346; [1999] NSWCCA 111 at [10]–[11].

**to be fair and non-discriminatory, you may need to pay due consideration to (and indeed specifically allude to) any of the points raised in the rest of 4.4 (including the points made in the box in 4.4.7 immediately above) that are relevant to the particular case.**<sup>89</sup>

- **Whether to allow a victim impact statement to be read out in court.**
- **Be particularly careful when dealing with any matter directly related to a particular religion** — for example, a development application for an Islamic place of worship or educational facility — to ensure that the matter is, and is seen to be, assessed in a similar way to the way in which the matter would have been assessed if it were related to a Christian religion — while, at the same time, and only if appropriate, taking fair and reasonable account of any proven, different requirements that relate to the particular religion.

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<sup>89</sup> See Pt 3, Div 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the Charter of Victims Rights (which allows the victim access to information and assistance for the preparation of any such statement). Note that any such statement should be made available for the prisoner to read, but the prisoner must not be allowed to retain it.

## 4.5 Further information or help

The following organisations can provide further information or expertise about the five most common religions briefly described in this Section. This information is current as of November 2017:

### Christianity

#### **NSW Ecumenical Council**

— includes 16 Christian denominations

Level 7, 379 Kent Street

Sydney NSW 1230

Ph: (02) 9299 2215

Fax: (02) 9262 4514

[www.nswec.org.au](http://www.nswec.org.au)

#### **Catholic Archdiocese of Sydney**

Catholic Communications

Level 15, 133 Liverpool Street

Sydney NSW 2000

Ph: (02) 9390 5318

Fax: (02) 9390 5306

[www.sydney.catholic.org](http://www.sydney.catholic.org)

#### **Anglican Church Diocese of Sydney**

Suite 4, Level 5

189 Kent Street

Sydney NSW 2000

Ph: (02) 8267 2700

Fax: (02) 8267 2727

Email: [gsoffice@anglican.org.au](mailto:gsoffice@anglican.org.au)

[www.anglican.org.au](http://www.anglican.org.au)

#### **Uniting Church of Australia — NSW/ACT Synod**

222 Pitt Street

Sydney NSW 2000

PO Box A2178

Sydney South NSW 1235

Ph: (02) 8267 4300

Fax: (02) 9261 4359

[www.nswact.uca.org.au](http://www.nswact.uca.org.au)

#### **Presbyterian Church of Australia**

168 Chalmers Street

Surry Hills NSW 2010

Ph: (02) 9690 9333 or 1300 773 774

Email: [general@pcnsw.org.au](mailto:general@pcnsw.org.au)

[www.pcnsw.org.au](http://www.pcnsw.org.au)

**Greek Orthodox — Archdiocesan District of NSW and ACT**

242 Cleveland Street  
Redfern NSW 2016  
Ph: (02) 9690 6100  
Fax: (02) 9698 5368  
Email: [webmaster@greekorthodox.org.au](mailto:webmaster@greekorthodox.org.au)  
[www.greekorthodox.org.au](http://www.greekorthodox.org.au)

**Pentecostal****Apostolic Church Australia**

National Administration Office  
28/20 Enterprise Drive  
Bundoora Vic 3083  
Ph: (03) 6466 7999  
Email: [admin@apostolic.org.au](mailto:admin@apostolic.org.au)  
[www.apostolic.org.au](http://www.apostolic.org.au)

**Australian Christian Churches**

State Office  
Unit 408 (Level 4)  
12 Century Circuit  
Baulkham Hills NSW 2153  
Ph (02) 9894 1555  
Fax (02) 9894 1552  
[www.nswacc.org.au](http://www.nswacc.org.au)

**Lutheran Church — NSW & District**

PO Box 3056  
Rhodes NSW 2138  
Ph: (02) 9736 2366  
Fax: (02) 9736 1155  
[www.lcansw.org.au](http://www.lcansw.org.au)

**Jehovah's Witnesses**

12–14 Zouch Road  
Denham Court NSW 2565  
Ph: (02) 9829 5600  
[www.jw.org](http://www.jw.org)

## Salvation Army

### The Salvation Army

Australian Eastern Territory  
261-265 Chalmers Street  
Redfern NSW 2016  
Ph: (02) 9264 1711  
[www.salvos.org.au](http://www.salvos.org.au)

## Seventh-Day Adventist Church

Greater Sydney Conference  
4 Cambridge Street  
Epping NSW 2121  
Ph: (02) 9868 6522  
Fax: (02) 9868 6533  
Email: [sydney@adventist.org.au](mailto:sydney@adventist.org.au)  
[www.adventist.org.au](http://www.adventist.org.au)

## Buddhism

### Buddhist Council of NSW

25/56-62 Chandos Street  
St Leonards NSW 2065  
Ph: (02) 9969 8893  
Fax: (02) 9966 8897  
[www.buddhistcouncil.org](http://www.buddhistcouncil.org)

## Islam

### Muslims Australia

932 Bourke Street  
Zetland NSW 2017  
Ph: (02) 9319 6733  
Fax: (02) 9319 0159  
Email: [admin@muslimsaustralia.com.au](mailto:admin@muslimsaustralia.com.au)  
[www.muslimsaustralia.com.au](http://www.muslimsaustralia.com.au)

### Islamic Council of NSW

405 Waterloo Road  
Chullora NSW 2190  
Ph: (02) 9742 5752  
Fax: (02) 9742 5665  
[www.icnsw.org.au](http://www.icnsw.org.au)

## Hinduism

### Hindu Council of Australia

17 The Crescent  
Homebush NSW 2140  
Ph: (02) 8208 9810  
Fax: (02) 9746 8944  
[www.hinducouncil.com.au](http://www.hinducouncil.com.au)

### **Judaism**

#### **NSW Jewish Board of Deputies**

Level 2, 146 Darlinghurst Road  
Darlinghurst NSW 2010  
Ph: (02) 9360 1600  
Fax: (02) 9331 4712  
Email: [mail@nswjbd.com](mailto:mail@nswjbd.com)  
[www.nswjbd.org](http://www.nswjbd.org)

The following NSW government agency can provide information about the appropriate religious organisation(s) for any other religion.

#### **Multicultural NSW**

PO Box 618  
Parramatta NSW 2124  
Ph: (02) 8255 6767  
Email: [contact@multicultural.nsw.gov.au](mailto:contact@multicultural.nsw.gov.au)  
[www.multicultural.nsw.gov.au](http://www.multicultural.nsw.gov.au)

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## 4.6 Further reading

Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, 2nd edn, 2002.

Australian Bureau of Statistics, *2016 Census*, at [www.abs.gov.au](http://www.abs.gov.au), accessed 24 November 2017.

Multicultural NSW, at [www.multicultural.nsw.gov.au/home](http://www.multicultural.nsw.gov.au/home), accessed 24 November 2017.

Judicial College (UK), *Equal Treatment Benchbook*, 2013, 2nd edn, London, at <https://www.judiciary.gov.uk/publications/equal-treatment-benchbook/>, accessed 24 November 2017.

Supreme Court of Queensland, *Equal Treatment Bench Book*, 2016, Brisbane, at [www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/94054/s-etbb.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf), accessed 24 November 2017.

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## 4.7 Your comments

The Judicial Commission of NSW welcomes your feedback on how we could improve the *Equality before the Law Bench Book*.

We would be particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific Sections of other Bench Books, discussion or research material.

Section 11 contains information about how to send us your feedback.

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# People with disabilities

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## 5.1 Defining disability and some statistics

“Disability” is defined for the purposes of the *Anti-Discrimination Act 1977* (NSW) in s 4 as:

- (a) total or partial loss of a person’s bodily or mental functions or of a part of a person’s body, or
- (b) the presence in a person’s body of organisms causing or capable of causing disease or illness, or
- (c) the malfunction, malformation or disfigurement of a part of a person’s body, or
- (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or
- (e) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

The term “disability” as used in this chapter refers to physical, intellectual, psychiatric disabilities, and behavioural disorders, which give rise to impairments, limitations or restrictions on activities that have lasted or are likely to last for at least six months.<sup>1</sup>

Statistics reveal the following about people with disabilities who are resident in NSW:<sup>2</sup>

### ■ Numbers of people with disabilities:

- Of the 7.80 million residents of NSW, 1.37 million (18.34%) have a disability — almost one in five. This is similar to the Australia-wide statistics where of 23.401 million Australians, 4.3 million have a disability (18.3%).<sup>3</sup>
- In NSW, overall by age, the figure is equal with 18.2% of women and men having a disability. Differences between the sexes grew in older age groups (75 years and over) particularly where there was a profound or severe core activity limitation (55.2% for females; 48.6% for males).

1 Australian Bureau of Statistics (ABS) Survey, *Disability, Ageing and Carers*, 2015 (ABS Cat No 4430.0) 2015, at [www.abs.gov.au/ausstats/abs@.nsf/mf/4430.0](http://www.abs.gov.au/ausstats/abs@.nsf/mf/4430.0) under the heading “Disability – Key Findings”. Problem behaviour is a symptom of a disorder and may also be indicative of a problematic environment, for example, com.

2 Unless otherwise indicated, the statistics in 5.1 are drawn from Australian Bureau of Statistics (ABS) Survey, *Disability, Ageing and Carers*, 2015 (ABS Cat No 4430.0) 2015, at [www.abs.gov.au/ausstats/abs@.nsf/mf/4430.0](http://www.abs.gov.au/ausstats/abs@.nsf/mf/4430.0), which includes the data cubes for tables in NSW (released 12 January 2017), accessed 20 September 2017.

3 *ibid.*

- Older people (aged 65 years and older) with a disability number 600,800 in NSW (43.7% of all people with a disability in NSW).

- **Types of disability:**

- 78.1% of people in NSW with disabilities have a physical condition (including acquired brain injury, arthritis, asthma, multiple sclerosis, spinal cord injury, stroke).
- 20.3% of people in NSW with disabilities have “mental or behavioural disorders”.
- 5.89% of people with disabilities in NSW have an intellectual disability
- 7.38% of the NSW population with disabilities have psychoses and mood affective disorders (including dementia, depression).
- In 2015, the estimated number of people living with HIV infection in NSW was 17,945 (92% male; 6.4% female), and Australia-wide was 25,313 (89.0% male; 11.1% female).<sup>5</sup>
- Up to 45% of the Australian population report having experienced a mental disorder (including depression, anxiety and substance abuse) at some time in their lifetime. The incidence of mental disorder is highest among people aged 16–24.<sup>6</sup> See 5.2.2.6.
- Disability rate in NSW for people who speak a language other than English is 14.9% as opposed to English-speaking people with disabilities at 18.3%.
- Approximately 17–18% of Australians aged 15–74 have very poor English prose and document literacy skills.<sup>7</sup> This percentage is higher for those with English as a second language (34%). They can be expected to experience considerable difficulties in using many of the printed materials that are encountered in daily life.<sup>8</sup> (Although not generally counted as a disability by people with disabilities, poor literacy skills are dealt with in this section, as they can often be managed using some of the communication skills techniques listed in 5.4.3.)

4 “Mental or behavioural disorders” is a phrase used in the ABS Survey *Disability, Ageing and Carers* data cube tables (NSW) from which these statistics are drawn — see n 1.

5 The Kirby Institute, *HIV, viral hepatitis and sexually transmissible infections in Australia*, Annual Surveillance Report 2016, The Kirby Institute, University of NSW, 2016, p 118, Table 6.11.

6 See Department of Health, *The mental health of Australians 2: report on the 2007 national survey of mental health and wellbeing*, 2009 at [www.health.gov.au/internet/main/publishing.nsf/Content/A24556C814804A99CA257BF0001CAC45/\\$File/mhaust2.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/A24556C814804A99CA257BF0001CAC45/$File/mhaust2.pdf), accessed 20 September 2017.

7 An example of prose literacy is the ability to read a newspaper while document literacy includes the ability to use a train timetable: Australian Bureau of Statistics, Programme for the International Assessment of Adult Competencies, Australia, (ABS Cat. No 4228.0) 2011–12 at [www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4228.0](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4228.0), accessed 20 September 2017.

8 *ibid.*

■ **Level of disability:**

- About 444,200 of the NSW population (5.93%) have profound or severe core activity limitations (32.4% of people with disabilities), which restrict<sup>9</sup> their everyday activities in relation to self-care, mobility, communication, schooling and/or employment.
- 640,900 of the NSW population (46.7% of people with disabilities) have moderate or mild core activity limitations.
- 618,000 of the NSW population (45.1% of people with disabilities) are restricted in relation to schooling or employment.
- 309,000 of the NSW population (22.53% of people with disabilities) require mobility assistance. Of these, 218,200 (15.92% of people with disabilities) use a mobility aid.

■ **Care, assistance and support:**<sup>10</sup>

- 278,700 of the NSW population with disabilities have a primary carer (20.2% of people with disabilities). The range of carers included partners of the recipient of care (38.8%), the child of the recipient (28.4%) or the parent of the recipient (21.9%). Figures concerning the reliance on outside help included the use of a range of organised services — 43.7% were satisfied with the services available to assist with the caring role while 24.2% did not know the range of services available.
- Women do most of the caring — numbering 190,900 in NSW (representing 68.4% of primary carers) while men numbered 87,800 (31.5% of primary carers).
- 33% of primary carers in NSW and 29.7% of other carers have disabilities themselves.

■ **Accommodation:**

- 90.8% of people with disabilities in NSW live in a private dwelling, with 9.1% living alone.
- 0.8% of people with disabilities live in a non-private dwelling, such as accommodation where care is provided.

9 “Restrict” is the term used in the ABS Survey *Disability, Ageing and Carers*, from which these statistics are drawn — see n 1.

10 For statistics concerning the impact of the National Disability Insurance Scheme (NDIS) for people with a disability in NSW: see <https://www.ndis.gov.au/medias/documents/h3c/h01/8805637750814/nsw-Dashboard-30sep.pdf>, accessed 23 November 2017.

### ■ **Employment and income:**

- People aged between 15 and 64 years (people of working age) with disability in NSW have under unemployment rates (8.5%) than people without a disability (4.6%).
- People in NSW of working age with a disability have lower participation rates (50.6%) than people without a disability (80.5%).
- The median gross weekly personal income of people of working age with a disability is slightly under half that of people without a disability (49.5%).<sup>11</sup>
- Of the 2.99 million Australians living in poverty, 620,600 people (as at 2014) with a disability are living below the poverty line of 50% of median household income (27.4%).<sup>12</sup>
- 55% of people with disabilities are reliant on a government pension or benefit as their main source of income.
- People with a medium level of disability require an extra 40% of income to cover the extra costs associated with their disability; people with a severe level of disability require an extra 69.3% of income to cover the extra costs associated with their disability.<sup>13</sup>

### ■ **Education:**

- 24.1% of people in NSW with disabilities aged 15 years and over have completed year 12 or equivalent, compared to 72% of people without disabilities.<sup>14</sup>
- 11.7% of people in NSW with disabilities aged 15 years and over hold a bachelor degree or above, compared with 26.4% of people without disabilities.
- 59.25% of primary and secondary school students in support classes in mainstream Government schools in NSW demonstrate a range of intellectual disability. The top two categories are mild intellectual disability (22.6%) and moderate or severe intellectual disability (19.3%).<sup>15</sup>

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11 \$428 for all people with reported disability in 2015 compared to \$863 for no reported disability: ABS Survey *Disability, Ageing and Carers*, 2015, see n 1 above, Table 8.1 of the NSW data cube.

12 Australian Council of Social Service, *Poverty in Australia* 2016, 5th ed (2016), report originally released in October 2012, p 29, accessed 22 September 2017.

13 Drawn from P Saunders, *Disability, poverty and hardship in Australia*, presentation to the Social Policy Research Centre Seminar Program, 11 October 2005.

14 <https://data.cese.nsw.gov.au/data/dataset/year-12-estimated-completion-rates>, accessed 26 September 2017.

15 NSW Department of Education and Training, *Statistical Bulletin; Schools and Students: 2015 Statistical Bulletin*, at [www.cese.nsw.gov.au/images/stories/PDF/2015\\_Statistical\\_Bulletin\\_v8.pdf](http://www.cese.nsw.gov.au/images/stories/PDF/2015_Statistical_Bulletin_v8.pdf), accessed 23 November 2017.

■ **Crime:**

- People with intellectual disabilities are “significantly overrepresented” in the criminal justice system.<sup>16</sup>
- 54% of female prison inmates and 46% of male prison inmates reported a disability or illness that had impacted on their health for six months or more.<sup>17</sup>
- In the same survey, a staggering 35% of female prison inmates and 52% of male prison inmates reported head injuries resulting in an episode of unconsciousness or “blacking out”.
- 54% of female prison inmates and 47% of male prison inmates had been assessed or treated by a doctor or a psychiatrist at some time in the past as having a mental health problem. Of these, 20% of women and 15% of men had been admitted to a psychiatric unit or hospital.<sup>18</sup>
- Depression, anxiety and drug dependence were three of the most common self-reported mental health conditions.

2009 NSW IHS Diagnosis*	Men		Women	
	Frequency	% Cases	Frequency	% Cases
Depression	259	33.1	86	44.8
Drug dependence	158	20.2	49	25.5
Anxiety	175	22.3	65	33.9
Alcohol Dependence	100	12.8	19	10.0
ADD/ADHD	93	11.8	6	3.1
Schizophrenia	69	8.8	17	8.9
Personality disorder	70	9.0	29	15.3
Manic Depressive Psychosis	65	8.3	24	12.6 <sup>19</sup>

\* Respondents could report more than one condition.

16 NSW Ombudsman, *Supporting people with an intellectual disability in the criminal justice system*, Progress Report, 2008, p iv.

17 D Indig, L Topp, B Ross, et al, *2009 NSW Inmate Health Survey: Key Findings Report*, Justice Health, Sydney, 2010, p 16, at [www.justicehealth.nsw.gov.au/about-us/publications/2009-ihs-report.pdf](http://www.justicehealth.nsw.gov.au/about-us/publications/2009-ihs-report.pdf), accessed 16 July 2014.

18 *ibid*, p 17. An earlier study of defendants in criminal proceedings in the NSW Local Court found over 50% of defendants surveyed reported receiving one or more blows to the head resulting in a dazed or confused state without losing consciousness, see C Jones and S Crawford, “The Psychosocial Needs of NSW Court Defendants” (2007) 108 *Crime and Justice Bulletin* 5.

19 *ibid*, p 135.

19 *ibid*, p 135.

- A 2008 study of young offenders on community orders found that 42% of young offenders were functioning in the borderline range of intellectual function or lower.<sup>20</sup> Twelve per cent had a “culture fair” IQ range that fell in the intellectually disabled range.<sup>21</sup> Eight per cent had scores on both the WASI and WIAT-II-A that fell within the ID range.<sup>22</sup>
- Theft and road traffic/motor vehicle regulatory offences are the most common offences (40%) committed by a group of people with acquired brain injury according to a report that came out in 2011.<sup>23</sup> Public order offences were the second most common offences (12%) and acts intended to cause injury were at 10%.
- **Discrimination:**<sup>24</sup>
  - During 2015–2016, 37% of claims were lodged under the *Disability Discrimination Act 1992* (Cth). These complaints were the most common type of discrimination claimed at the Australian Human Rights Commission. During the 2013–2014 period, disability discrimination was the most common type of complaint received by the Anti-Discrimination Board of NSW amounting to 27.9% of all complaints.<sup>25</sup>

The United Nations Convention on the Rights of Persons with Disabilities and the National Disability Strategy will be taken into consideration when NSW legislation is drafted, updated and/or reviewed: s 4 of the NSW Disability Inclusion Action Plan 2015–2018.<sup>26</sup>

[The next page is 5201]

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- 20 D T Kenny & P Nelson, *Young offenders on community orders: Health, welfare and criminogenic needs*, Sydney University Press, Sydney, 2008. D T Kenny “Young offenders with an intellectual disability in the criminal justice system” (2012) 24 *JOB* 35.
- 21 Culture fair IQs are calculated using the Full Scale IQs of young offenders from an English-speaking background, and the Performance (non-verbal) IQs of Indigenous and CALD young offenders.
- 22 Wechsler Abbreviated Scale of Intelligence (WASI) and Wechsler Individual Achievement Test-II Abbreviated (WIAT-II-A).
- 23 L Dowse, et al *People with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System: Impact of Acquired Brain Injury*, April 2011 at [www.biansw.org.au/images/stories/BIA\\_BIANSW\\_People\\_with\\_Mental\\_Health\\_Disorders\\_and\\_Cognitive\\_Disabilities\\_in\\_the\\_Criminal\\_Justice\\_System\\_Report.pdf](http://www.biansw.org.au/images/stories/BIA_BIANSW_People_with_Mental_Health_Disorders_and_Cognitive_Disabilities_in_the_Criminal_Justice_System_Report.pdf), accessed 2 September 2014.
- 24 See Appendix 3, Annual Report 2015–2016 of the Australian Human Rights Commission, at [www.humanrights.gov.au/sites/default/files/document/publication/ahrc\\_annual\\_report\\_2015-16.pdf](http://www.humanrights.gov.au/sites/default/files/document/publication/ahrc_annual_report_2015-16.pdf), accessed 26 September 2017. A breakdown of complaint statistics were not provided in the Annual Report 2016–2017, published 10 September 2017.
- 25 [www.antidiscrimination.justice.nsw.gov.au/Pages/adb1\\_resources/adb1\\_statistics/stats13-14.aspx](http://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_resources/adb1_statistics/stats13-14.aspx)
- 26 NSW Disability Inclusion Action Plan 2015–2018 at [www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds\\_people\\_disab/ds\\_people\\_disab.aspx](http://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_people_disab/ds_people_disab.aspx), accessed 23 November 2017.

## 5.2 Some general information

### 5.2.1 Background information

**There are many different types of disabilities** — all of which can be grouped and sub-grouped in any number of ways. We have chosen to group them as follows:

- **Physical disability** — including deafness or hearing impairments, blindness or visual impairments, mobility disabilities, and other forms of physical differences in the body or its functioning.
- **Intellectual disability** — including difficulty learning and understanding things.
- **Brain injury** — which may result in physical disabilities and/or cognitive disabilities.
- **Psychiatric disability** — including mental illness, and/or behavioural disorders.
- **Drug or alcohol dependence** — in some cases, this may have led to other types of disabilities — for example, alcohol-related dementia. Korsakoff's syndrome and Wernicke/Korsakoff syndrome are particular forms of alcohol related brain injury which may be related to alcohol related dementia.<sup>27</sup>
- **Reading and/or writing difficulties** — including poor literacy skills and dyslexia. (Although not generally counted as a disability by people with disabilities, reading and/or writing difficulties are listed in this section, as they can often be managed using some of the communication skills techniques listed at 5.4.3).

Each of these disabilities (apart from drug or alcohol dependence, and reading or writing difficulties) is described at 5.2.2.

#### **Range of disabilities:**

- Some people with disabilities have one disability only, some have more than one disability within the same grouping listed above, and others have more than one disability from two or more of the groupings listed above.
- No two people with the same type of disability are alike in relation to their disability or their abilities. Every type of disability affects people in different ways. A disability may range from having a minor impact on how a person conducts their life to having a profound impact.
- Some disabilities are permanent, some are temporary, some are episodic.

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<sup>27</sup> See information on different forms of dementia listed on Alzheimer's Australia website, at [www.fightdementia.org.au/](http://www.fightdementia.org.au/), accessed 11 July 2014.

- Some disabilities are obvious and some are hidden.
- However, many people with disabilities require some form of equipment, procedural considerations and/or communication adjustment(s) to be made if they are to be able to interact effectively in relation to court proceedings.

**It is important to note that, in many cases, the precise name or type of a particular person's disability or disabilities will not be relevant in court.** Much more important will be the need to accurately and appropriately determine whether that person requires any form of adjustment to be made, and if so, what type and level of adjustment.

## 5.2.2 Descriptions of the main types of disabilities<sup>28</sup>

### 5.2.2.1 Physical disabilities — excluding deafness, hearing impairments, blindness and visual impairments

A physical disability may have existed since birth or it could have resulted from accident, illness, or injury.

A physical disability may be mild, moderate or severe in terms of the way in which it affects the person's life.

A person with a physical disability may need to use some sort of equipment for assistance with mobility. A person with a physical disability may have lost a limb or, because of the shape or size of their body, or because of a disease or illness, require slight adaptations to be made to enable them to participate fully in society.

**Some common physical disabilities are:**

- **Quadriplegia** — Complete or partial loss of function (movement or sensation) in the trunk, lower limbs and upper limbs. Generally, this has resulted from damage high in the spinal column — for example, the neck.
- **Paraplegia** — Complete or partial loss of function (movement or sensation) in the trunk and lower limbs. Generally, this has resulted from damage lower in the spinal column — for example, below the neck.
- **Cerebral Palsy** — A disorder of movement and posture due to a defect or lesion on the immature brain. Cerebral Palsy can cause stiffness of muscles, erratic movement of muscles or tremors, a loss of balance, and possibly speech impairments. A person with Cerebral Palsy may have other disabilities

<sup>28</sup> The information in 5.2.2 is drawn from *Disability awareness program — creating access to our courts*, by kind permission of the National Judicial College of Australia and the NSW Department of Justice.

including sensory impairment, epilepsy, and/or intellectual disability. But do not assume that a person with Cerebral Palsy has another disability. There are many people with Cerebral Palsy who do not have an intellectual disability.

- **Epilepsy** — A disorder of the brain function that, if untreated, results in seizures. Seizures are disturbances within specific areas of the brain that cause loss of control of one or more aspects of bodily activity. Seizures can be provoked by flashing lights, physical activity, stress, low blood sugar, high caffeine intake and lack of sleep.
- **Arthritis** — A generic term for 150 different diseases that affect the joints of the body. The main types of arthritis are osteoarthritis, rheumatoid arthritis and gout. Common symptoms include pain, swelling and stiffness in one or more of the joints. Two out of three people with arthritis are under the age of 65.
- **There are many other physical disabilities** — including amputations, scarring, asthma, cystic fibrosis, muscular dystrophy, kidney disease, liver disease, cardiopulmonary disease (heart problems), diabetes, HIV/AIDS, cancer, illnesses and other diseases.

#### 5.2.2.2 Deafness and hearing impairments

- **Deafness** — complete, or almost complete, inability to hear. People who are deaf rely on their vision to assist them to communicate, and use a variety of ways to communicate — including Australian sign language (Auslan), lip reading, writing and expressive speech. Many people who are deaf regard deafness as a culture rather than as a disability. Deaf culture includes areas such as art, language, sport and history.
- **Deafblindness** — a loss of vision *and* hearing. Most people with deafblindness have some residual hearing and/or sight. Deafblindness varies with each person — for example, a person may be hard of hearing and totally blind, or profoundly deaf and partially sighted, or have nearly complete or complete loss of both senses.
- **Hearing impairment** — A person who has a hearing impairment has a partial hearing loss. The hearing loss may be mild, moderate, or severe. A person who has a hearing impairment will usually prefer to rely as much as possible on their available hearing with the assistance of hearing aids or assistive listening devices. They may use a hearing aid, lip reading and speech to communicate. Note that hearing aids do not necessarily restore a person's hearing to the capacity of a person without a hearing impairment, and for some people hearing aids are not helpful. Many people who have hearing impairments regard their impairment as a disability.

#### 5.2.2.3 Blindness and visual impairments

- **Blindness** — a complete, or almost complete, loss of vision. People who are blind vary in their ability to see. Some may be able to perceive light, shadow and/or shapes; others see nothing at all. People who are blind may use a guide

dog, a white cane (the international symbol of vision impairment), or a laser sensor or pathfinder. People who are blind may read using Braille, computer assisted technology and/or audio tapes.

- **Colour Blindness** — an inability to distinguish between colours. Some people with colour blindness only have difficulty distinguishing between the colours red and green, whereas others see the world in black, white and grey.
- **Deafblindness** — see 5.2.2.2.
- **Visual Impairment/Low Vision** — a partial loss of vision that is *not* correctable by wearing glasses and that therefore affects the performance of daily tasks.

#### 5.2.2.4 Intellectual disabilities

Intellectual disability is defined in terms of an individual’s level of intellectual (cognitive) functioning as assessed by qualified psychologists using recognised psychometric tests of intelligence, tests of adaptive functioning, and assessment of ability to perform a range of cognitive, social and behavioural tasks required for independent living. In lay terms, intellectual disability refers to a slowness to learn and process information.<sup>29</sup>

Deficits in adaptive behaviour refer to limitations in such areas as communication, social skills and ability to live independently.

An intellectual disability is permanent. It is not a sickness, cannot be cured and is not medically treatable. People are born with an intellectual disability. It may be detected in childhood or it may not be detected until later in life.

There are various types and degrees of intellectual disability. One of the more common causes of intellectual disability is Down syndrome.

People with an intellectual disability can, and do, learn a wide range of skills throughout their lives. The effects of an intellectual disability (for example, difficulties in learning and development) can be minimised through appropriate levels of support, early intervention and educational opportunities.

Importantly, and contrary to some of the extreme misconceptions that may be held about people with intellectual disabilities, they are *not* compulsive liars (see also “Capacity to give evidence” at 5.3.1); are not either asexual or extremely promiscuous (applied particularly to women); and *do* feel emotion and pain.

Depending on the person, a person with an intellectual disability may:

- Take longer to absorb information.
- Have difficulty understanding questions, abstract concepts or instructions.

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<sup>29</sup> D T Kenny, above n 18, p 35.

- Have difficulty with reading and writing.
- Have difficulty with numbers and other measures such as money, time and dates.
- Have a short attention span and be easily distracted.
- Have difficulty with short and/or long term memory.
- Find it difficult to maintain eye contact.
- Find it difficult to adapt to new environments and situations.
- Find it difficult to plan ahead or solve problems.
- Find communication over the phone difficult.
- Have difficulty expressing their needs.

#### 5.2.2.5 Acquired Brain Injury (ABI)

Acquired brain injury is an injury to the brain that results in changes or deterioration in a person's cognitive, physical, emotional and/or independent functioning. People may have an acquired brain injury as a consequence of a trauma (for example, a car accident), stroke, infection, neurological disease (dementia), tumour, hypoxia and/or substance abuse.

Disability resulting from an acquired brain injury can be temporary or permanent and can be mild, moderate or severe. It is rarely assisted by medication. Every brain injury is different. Two injuries may appear to be similar but the outcomes can be vastly different. Brain injury may result in a physical disability only, or in a personality or thinking process change only, or in a combination of physical and cognitive disabilities. Acquired brain injury may result in:

- memory loss
- lack of concentration
- lack of motivation
- tiredness
- difficulty with abstract thinking
- behavioural disinhibition resulting in inappropriate behaviour
- mood swings
- agitation and frustration.

#### 5.2.2.6 Psychiatric disabilities

A psychiatric disability is a condition that impairs a person's mental functioning. Psychiatric disability may be long-term, but is often temporary and/or episodic. Long-term psychiatric disability and the drugs used to control it do affect cognitive ability, especially in schizophrenia spectrum disorders and schizo-affective disorder, where there is often marked cognitive impairment, particularly in executive function.

Psychiatric disability is generally characterised by the presence of any one or more of the following symptoms or signs:

- irrational behaviour that may be sustained or episodic and may indicate that the person is having delusions or hallucinations, including hearing voices
- serious disorder of thoughts
- paranoia
- mood swings of great elation or
- excitement and depression
- inappropriate dress, speech, expressed emotions, behaviour and/or ideas.

**Some of the most common psychiatric disorders are:**

- **Schizophrenia spectrum disorders** — a confusion or disturbance of a person’s thinking processes — including delusions, hallucinations and/or hearing voices, disordered thinking and speech, abnormal motor behaviour and negative symptoms such as lethargy, anhedonia (an inability to feel pleasure) and flat affect (ie diminished emotional expression). Schizophrenia is *not* a “split personality”, or “multiple personality disorder”. Multiple personality disorder is a very rare condition. Importantly, and contrary to popular opinion, people with schizophrenia are *not* generally dangerous or violent when receiving appropriate treatment.
- **Bipolar disorder** — this used to be called “manic depressive illness”. There are two sub-classifications of this disorder — Bipolar I Disorder and Bipolar II Disorder. Bipolar I Disorder involves the experience of both manic episodes (feelings of elation, grandiosity, decreased need for sleep and a flight of ideas) and major depressive episodes. Bipolar II is diagnosed when there is hypomania (mood and energy elevation, with mild impairment of judgement and insight) and major depression.
- **Depressive disorders** — is a group of mood disorders that include major depressive disorder, major depressive episode and persistent dysthymia (also known as neurotic depression) — all characterised by sad, empty and irritable moods, together with cognitive and somatic changes that affect a person’s ability to cope with daily life.
- **Anxiety disorders** — is a group of mood disorders that result in intense feelings of apprehension, tension and/or fear without a discernible cause and that seriously affect a person’s ability to cope with daily life. Anxiety can take the form of a specific phobia or more pervasive forms such as generalised anxiety disorder, social anxiety and agoraphobia — which is a fear of real or anticipated exposure in a wide range of situations including both open and enclosed spaces. Panic attacks may occur in the full range of anxiety disorders but are not a separate mental disorder.
- **Obsessive-Compulsive Disorder (OCD)** — a disorder that is characterised by the experience of obsessions, compulsions and other body-focused

repetitive behaviours, and is now coded<sup>30</sup> with body dysmorphic disorder (BDD) (a body image disorder), hair-pulling disorder (trichotillomania) and compulsive skin-picking disorder (CSP).

- **Hoarding Disorder** — a disorder that is characterised by a persistent sense of distress at discarding possessions. One of the prominent features of the disorder is a feeling of indecisiveness and difficulties with procrastination.

#### 5.2.2.7 Human immunodeficiency virus (HIV)<sup>31</sup>

Human immunodeficiency virus (HIV) is a virus that damages the body’s immune system and makes a person more vulnerable to infections, certain cancers and other disorders, including:

- dementia
- viral infections affecting the central nervous system
- fungal and parasitic infections
- neuropathy
- anxiety disorders and depression.

Infections associated with severe immunodeficiency caused by HIV are known as “opportunistic infections” because they take advantage of a weakened immune system.

HIV can progress to AIDS (acquired immune deficiency syndrome). The two terms cannot be used interchangeably because although they relate to the same disease progression, they refer to discrete diagnoses.

HIV can be present in blood, semen, pre-ejaculatory fluid, anal mucus, vaginal secretions and breast milk of an HIV-positive person. A person can only become infected if one of these enters his or her blood stream. In Australia, the two main ways in which infection occurs are during unprotected sex and by sharing needles/syringes. Other ways in which infection can occur include:

- tattooing and other procedures that involve unsterile cutting or piercing
- transmission by an HIV-positive woman to her baby during pregnancy, birth or during breastfeeding

30 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th edn, 2013, pp 257 and ff.

31 Information in this section is sourced from J Grierson, M Pitts and R Koelmeyer, *HIV futures seven: the health and wellbeing of HIV positive people in Australia*, Monograph Series No 88, Australian Research Centre in Sex, Health and Society, La Trobe University, May 2013, pp v–vii, at [www.latrobe.edu.au/\\_\\_data/assets/pdf\\_file/0007/546037/HIV-Futures-Seven-Report.pdf](http://www.latrobe.edu.au/__data/assets/pdf_file/0007/546037/HIV-Futures-Seven-Report.pdf), accessed 8 April 2015; Australian Federation of AIDS Organisations, *HIV media guide*, “The facts about HIV”, at [www.hivmediaguide.org.au/facts-about-hiv](http://www.hivmediaguide.org.au/facts-about-hiv), accessed 24 April 2015; NSW Health Factsheet, *HIV*, at [www.health.nsw.gov.au/Infectious/factsheets/Pages/HIV\\_AIDS.aspx](http://www.health.nsw.gov.au/Infectious/factsheets/Pages/HIV_AIDS.aspx), accessed 7 April 2015; UNAIDS, *Judging the epidemic: a judicial handbook on HIV, human rights and the law*, 2013, pp 9–13, 51, 125–140, at [www.unaids.org/sites/default/files/media\\_asset/201305\\_Judging-epidemic\\_en\\_0.pdf](http://www.unaids.org/sites/default/files/media_asset/201305_Judging-epidemic_en_0.pdf), accessed 8 April 2015.

- workplace exposure to body fluids (eg, “needlestick” injuries)
- through contaminated blood supplies (for transfusions and other blood products); though in Australia, the blood supply is regarded as safe.

With the effective antiretroviral therapy now available in Australia, AIDS diagnoses are uncommon and people who seek treatment early generally have a life expectancy similar to that of their HIV-negative counterparts. If untreated, most people with HIV develop signs of HIV-related illness within 5 to 10 years.

HIV remains an incurable infection and the treatments can have side effects, including fatigue, loss of appetite, nausea, diarrhoea, aches, neurologic problems, skin problems, loss of bone density, lipodystrophy, sexual difficulties, cardiac effects, liver toxicity and others. Some people may also develop resistance to certain treatments, which can limit the efficacy and range of treatment options available to that person.

#### 5.2.2.8 Fetal Alcohol Spectrum Disorders (FASD)

Fetal Alcohol Spectrum Disorders are experienced by individuals who have been exposed prenatally to alcohol.<sup>32</sup> This is an umbrella term that captures those individuals who have a unique range of physical, intellectual and behavioural disabilities. Individuals with this type of disorder may display specific facial anomalies, growth retardation, organ damage, hearing difficulties and vision problems, as well as the following behaviours:

- difficulty remembering. Children with FASD are 87 times more likely to have problems with memory than those without FASD.<sup>33</sup>
- difficulty controlling their impulses

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32 FASD is referred to as a physical brain-based condition by the National Organisation for Fetal Alcohol Spectrum Disorders (NOFASD) Australia, [www.nofasd.org.au](http://www.nofasd.org.au), accessed 3 September 2014. The status of FASD as a disability has been addressed in several reports. The House of Representatives, Standing Committee on Social Policy and Legal Affairs, *FASD: The Hidden Harm — Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders*, Nov 2012, recommended that the Commonwealth Government include FASD in the List of Recognised Disabilities (recommendation 18). Although support and services for FASD-affected children could be provided by including FASD in the List of Recognised Disabilities, and in the Better Start for Children with a Disability initiative (FaHCSIA 2013), it was noted that services are available according to the level of functional impairment and do not depend on a formal diagnosis of FASD: Australian Institute of Health and Welfare: MR Bonello, L Hilder and EA Sullivan, *Fetal alcohol spectrum disorders: strategies to address information gaps*, Cat no PER 67, 2014, p 1. A Commonwealth Action Plan to reduce the impact of fetal alcohol spectrum disorders (FASD) 2013-14 to 2016-17 has been drawn up by the Australian Government to reduce the incidence of FASD across Australia. See also Foundation for Alcohol Research & Education, *The Australian Fetal Alcohol Spectrum Disorders Action Plan 2013-2016* at [www.fare.org.au/wp-content/uploads/2011/07/FARE-FASD-Plan.pdf](http://www.fare.org.au/wp-content/uploads/2011/07/FARE-FASD-Plan.pdf), accessed 12 May 2015.

33 Advice from Professor Jane Latimer, The George Institute for Global Health, Australia, March 2015.

- difficulty planning and organising their actions
- difficulty showing empathy
- difficulty taking responsibility for their actions
- difficulty controlling their frustration and anger
- difficulty identifying the consequences of their actions
- find it hard to withstand social pressure.<sup>34</sup>

#### 5.2.2.9 Dealing with the media

It is important to be aware of the presence of media in the courtroom and the reporting of court decisions in the news. Courts are often a source of news items for media outlets.

In some circumstances, it may be appropriate to seek advice from your media liaison officer, or to control the amount and detail of information in judgments. For instance, where the circumstances disclose facts which may be “sensationalised” by media, a detailed factual description of events might be capable of reinforcing stereotypes of those who have a mental illness.

For further advice and information, see *Mental Illness & Suicide in the Media: A Mindframe Resource for Courts*.<sup>35</sup> This is a resource booklet funded by the federal Government. The booklet was developed by the Hunter Institute of Mental Health and advised by a panel of mental health experts. The booklet’s objective is to destigmatise mental illness and to encourage media reporting about mental illness consistent with best practice guidelines.

#### 5.2.3 Terminology<sup>36</sup>

Within the disability movement, there have been several changes over the years to the terms people with disabilities prefer to be used to describe people with disabilities.

It is preferable to emphasise the person rather than the disability. People with a disability are people first who happen to have a disability. Terms such as “suffer”, “stricken with”, “victim” or “challenged” are also *not* generally appreciated. Most

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34 The Senate, Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013, pp 36–37.

35 Hunter Institute of Mental Health, *Mental Illness & Suicide in the Media: A Mindframe Resource for Courts*, Australian Government Department of Health, 2008, at [www.mindframe-media.info/\\_\\_data/assets/pdf\\_file/0018/6048/Courts-Resource-Book.pdf](http://www.mindframe-media.info/__data/assets/pdf_file/0018/6048/Courts-Resource-Book.pdf), accessed 11 July 2014.

36 The information in 5.2.3 is drawn from *Disability awareness program — creating access to our courts*, by kind permission of the National Judicial College of Australia and the NSW Department of Justice.

people with disabilities prefer to talk about what they *can* do, not what they may be unable to do, and indeed, to talk about the additional activities many of them might be able to do if we as a community made some (often simple) adjustments.

The way language is used can have a profound impact on people with disabilities. Language can have the effect of stereotyping, depersonalising, humiliating or discriminating against people with disabilities. Language can result in a person with a disability feeling respected and worthwhile or disregarded and marginalised. People with disabilities, like everyone else, want to be treated as valued members of society. Terms such as “crazy”, “mental”, “retard(ed)”, “slow” or “defective” are not accurate terms for people with disabilities and are no longer used — except in a derogatory way.

The term “disabled” is also not liked because it has negative connotations in that it reflects a sense of being “not able”, “not working” or “broken down”. It is also untrue, in that most people with disabilities are able to do a range of things. Many people with disabilities have full lives, including working, having a family, playing sport and community involvement.

When referring to a person with a disability, always remember that people with disabilities are **people first**. The fact that a person has a disability is secondary to the fact that they are a person. Also note that to keep referring to a person’s disability has the effect of giving the disability greater importance than the person.

#### Some examples of appropriate and inappropriate terminology

Use	Do not use
<b>A person with a disability</b>	Disabled/handicapped (person), invalid
<b>People with disabilities</b>	The disabled, the handicapped, invalids
<b>A person with a psychiatric disability, or a person with a mental illness</b>	Mad, crazy, mental
<b>A person with Down syndrome</b>	Mongol, mongoloid
<b>A person with Cerebral Palsy</b>	Spastic, sufferer of/someone who suffers from Cerebral Palsy
<b>A person with an intellectual disability</b>	Mental retard, mentally retarded, retard
<b>A person who has epilepsy</b>	Epileptic
<b>A person of short stature</b>	Dwarf
<b>A person who has ... (specify the actual deformity)</b>	A deformed person
<b>A person in a coma/who is unconscious</b>	A vegetable/in a vegetative state
<b>A person who is deaf, or a person who has a hearing impairment</b>	Deaf person, hearing impaired
<b>A person who uses a wheelchair</b>	A person confined to a wheelchair

Some examples of appropriate and inappropriate terminology	
Use	Do not use
<b>Seizure</b>	Fit, spell, attack
<b>Accessible Toilet/ Entry/ Parking</b>	Disabled Toilet/Entry/Parking (because disabled as an adjective is seen as meaning that it's not working).
<b>A person who has ... (specify the disability)</b>	Stricken, suffers from, challenged, victim

#### 5.2.4 Examples of the barriers for people with disabilities in relation to court proceedings

The barriers for people with disabilities in relation to court proceedings — whether as a juror, support person, witness or accused — obviously depend on the type and severity of the particular person's disabilities.

There are numerous barriers to the full participation of people with disabilities — unless some appropriate adjustment or adjustments are made. A few examples follow.

- **For people with physical disabilities:**
  - Inaccessible venue or courtroom facilities (for example, stairs not lifts, narrow doors, high buttons/handles/counters, an inaccessible witness box, slippery floors, no nearby parking, steep inclines, heavy doors, round or hard to grip door knobs).
  - Inability to sit or stand in the same position either at all or beyond a particular time and/or fatigue.
  - Communication barriers related to deafness or hearing impairment, blindness or visual impairment, or a speech impairment.
- **For people with intellectual disabilities:**
  - Communication barriers — the language used is too complex, fast or abstract, and/or the proceedings are too lengthy.
  - Fatigue.
- **For people with an acquired brain injury:**
  - Any one or more of the barriers listed in the preceding two points, plus their communication barriers may be exacerbated by, for example, being unable to concentrate and/or process information easily, memory difficulties, and/or by having disinhibited behaviour.
- **For people with Fetal Alcohol Spectrum Disorder:**
  - Any one or more of the barriers listed in the first two points, plus behavioural disabilities.
  - Difficulty in understanding the court process.

- Diminished competency and capacity to fully grasp the severity of the situation.
- A potential to make false confessions without understanding the legal consequences of such an act.
- **For people with psychiatric disabilities or behaviour differences:**
  - Communication barriers — for example, they may be easily distracted, very jumbled, severely distressed/anxious/frightened, manic, delusory and/or aggressive or angry.

These problems are likely to be compounded if the person also happens to be Indigenous, from an ethnic or migrant background, female, a child or young person, lesbian, gay or bisexual, transgender(ed), or if they practise a particular religion or are representing themselves — see the relevant other section(s).

## 5.2.5 Making adjustments for people with disabilities

### 5.2.5.1 Reasonable adjustments

Many of the barriers listed in 5.2.4 can be substantially mitigated (and in some cases, completely mitigated) if the court makes appropriate adjustments.

Failure to make reasonable adjustments for the person with a disability may amount to discrimination pursuant to the *Disability Discrimination Act 1992* (Cth). An adjustment is “reasonable” if it does not cause unjustifiable hardship to the person making it.<sup>37</sup>

If such adjustments are not made, people with disabilities and/or any carers are likely to:

- not be able to participate fully, adequately, or at all in court proceedings
- feel uncomfortable, fearful or overwhelmed
- feel resentful or offended by what occurs in court
- not understand what is happening and/or be able to get their point of view across and be adequately understood
- feel that an injustice has occurred
- in some cases be treated with less respect, unfairly and/or unjustly when compared with other people.

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<sup>37</sup> See ss 4, 5 and 6 of the *Disability Discrimination Act 1992* (Cth). Section 14 provides that the Act binds the Crown in right of each of the States.

### 5.2.5.2 Assistance animals

An assistance animal or service dog is an animal trained to alleviate the effect of the person's disability and to meet the standards of hygiene and behaviour appropriate to an animal in a public place, or an animal that is accredited as an assistance animal under a State or Territory law or by a prescribed animal training organisation.<sup>38</sup> These animals are trained to assist people with disabilities by accomplishing multiple tasks, such as retrieving items, activating light switches, opening and closing doors and many other tasks specific to the needs of each individual. These animals increase the independence and self-esteem of the individual and are trained to support their owner in their home and community environments. They are trained to travel on public transport and to support their owner in public settings.

Assistance animals are used not only by people who are blind or vision-impaired, but also by a range of other people with disabilities, including people who are deaf or hearing impaired, people who experience epileptic seizures, people with mental illness and people with physical disabilities.

Under s 59 of the *Companion Animals Act 1998* (NSW) and s 9 of the *Disability Discrimination Act 1992* (Cth) there is no distinction between assistance animals, service dogs and guide dogs. A person with a disability is generally entitled to be accompanied by an assistance animal in a public place.<sup>39</sup>

**Section 5.4 provides additional information and practical guidance** about ways of making appropriate adjustments for and treating people with disabilities so as to reduce the likelihood of these problems occurring and help ensure that a just outcome is achieved.

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38 *Disability Discrimination Act 1992* (Cth), s 9. No training organisations have yet been prescribed.

39 See ss 59–60 of the *Companion Animals Act 1998* (NSW). The *Disability Discrimination Act 1992* (Cth) also makes it unlawful to discriminate against a person because they are accompanied by an assistance animal (s 9(2) and (4)), but s 54A provides that it is not unlawful for the discriminator to discriminate against the person with the disability on the ground of the disability if the discriminator reasonably suspects that the assistance animal has an infectious disease and the discrimination is reasonably necessary to protect public health or the health of other animals. Section 7A of the *Court Security Act 2005* provides that a security officer may refuse a person entry to court premises or may require a person to leave the court premises if that person is in possession of an animal. However, s 7A does not apply to an assistance animal that is being used by a person with a disability.



## 5.3 Legal capacity

### 5.3.1 Capacity to give evidence

In most cases, people with disabilities will have the legal capacity to give sworn evidence in the same way as anyone else<sup>40</sup> — as long as, where required, appropriate adjustments are made so that evidence can be successfully communicated.<sup>41</sup> For the types of adjustments that may need to be made see 5.4.1.

People with intellectual disabilities may be vulnerable to prejudicial assessments of their competence, reliability and credibility if judicial officers and juries have preconceived views regarding a person with an intellectual disability. For example, they may fail to attach adequate weight to the evidence provided because they doubt that the person with intellectual disability fully understands their obligation to tell the truth. In addition, people with an intellectual disability are vulnerable to having their evidence discredited in court because of behavioural and communication issues associated with their disability.

It may be necessary for some people with disabilities (in particular those with severe intellectual disabilities) to give unsworn evidence. A person with disabilities is presumed competent to give unsworn evidence if the court has told the person the matters mentioned in s 13(5) of the *Evidence Act 1995* (NSW) including that it is important to tell the truth.<sup>42</sup>

Research suggests that, contrary to public perception, most people with intellectual disabilities are no different from the general population in their ability to give *reliable* evidence — *as long as* communication techniques are used that are appropriate for the particular person<sup>43</sup> — see 5.4.3.4. In some cases, however, a psychologist’s assessment may be required in order to adequately assess a particular person’s ability to give evidence, help the court to understand the person’s characteristics and demeanour and/ or how best to communicate with them in court.

### 5.3.2 Criminal responsibility

Some people with intellectual disabilities and/or psychiatric disabilities may (because of the level and nature of their disability) be unfit to plead and/or be unfit to be tried, or be found not guilty by reason of mental illness. For the

40 *Evidence Act 1995* (NSW), s 13.

41 See for example, s 31 of the *Evidence Act 1995* (NSW), in relation to deaf and mute witnesses and Pt 6 of the *Criminal Procedure Act 1986* (NSW), in relation to the giving of evidence by vulnerable persons. A vulnerable person is defined to mean a child or a cognitively impaired person.

42 *Evidence Act 1995* (NSW), s 13(4)–(5).

43 M Kebbell et al, “Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?” (2004) 9 *Legal and Criminological Psychology* 23 at 24.

procedures to be used in such cases including the orders that can be made and how to refer such matters to the Mental Health Review Tribunal, see the *Criminal Trial Courts Bench Book* under “Trial instructions R–Z — Unfitness” at [4-300]ff and “Procedure for fitness to be tried and mental illness cases” at [10-700].<sup>44</sup> At the Local Court level, a magistrate may need to hold an inquiry to determine whether the person is mentally ill and/or developmentally disabled, and if determined as such, make an appropriate order for assessment, treatment, or discharge — for the procedures to be used in such cases see the *Local Court Bench Book* under “Mental Health”.<sup>45</sup>

Given the number of people in prison with intellectual and psychiatric disabilities (see statistics at 5.1), it is important that these provisions are used, where appropriate, because in some cases the stigma of raising the existence of a mental illness or a developmental disability may mean that, unless the court intervenes at an earlier stage, a person may end up unjustly convicted and/or sentenced. On the other hand, it is also important to ensure that they are not used when they should not be.

Some people with intellectual disabilities are not capable of forming an intention. This means they may have a defence of “substantial impairment by abnormality of mind”, enabling a murder charge to be reduced to a manslaughter charge.<sup>46</sup>

Some people may also have a similar defence for a range of criminal allegations in that they were temporarily incapable of forming an intention at the particular time — due for example, to intoxication — see the *Criminal Trial Courts Bench Book* under “Trial instructions H–Q — Intoxication”,<sup>47</sup> “Trial instructions H–Q — Intention”,<sup>48</sup> and “Defences”.<sup>49</sup>

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44 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, Sydney, 2002–, at [www.judcom.nsw.gov.au/publications/benchbks/criminal/unfitness.html](http://www.judcom.nsw.gov.au/publications/benchbks/criminal/unfitness.html), [4–300] and [10-700], accessed 21 July 2014. See also D Howard and A Johnson, “Procedure for fitness to be tried and mental illness cases in the Criminal Trial Courts bench Book” (2015) 27 *Judicial Officers’ Bulletin* 15.

45 Judicial Commission of NSW, *Local Court Bench Book*, Sydney, 1988–, at [www.judcom.nsw.gov.au/publications/benchbks/local/mental\\_health\\_forensic\\_provisions\\_act.html](http://www.judcom.nsw.gov.au/publications/benchbks/local/mental_health_forensic_provisions_act.html), [35-000], accessed 21 July 2014. See also T Gotsis, H Donnelly “Diverting mentally disordered offenders in the NSW Local Court”, Research Monograph 31, Judicial Commission of NSW, Sydney, 2008.

46 *Crimes Act 1900* (NSW), s 23A. See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* at [6-100].

47 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, at [3-250]ff, see n 44.

48 *ibid*, at [3-200]ff.

49 *ibid*, at [6-000]ff.

## 5.4 Practical considerations

### 5.4.1 Adjustments that may need to be considered *before* the proceedings start, or at the time a person with a disability *first* appears in court

Many people with disabilities need adjustments to be made in order for them to be able to give evidence effectively. Some of these may take some discussion to work out exactly what is required, and then some time to organise.

Hopefully, the court will have advance notice of any such possible needs from the person themselves, their support person or carer, or their legal representative. At other times, the court may not find out a person's needs until they appear.

#### The main considerations to take into account are:

- ▣ **Flexibility is required** to ensure that as many people with disabilities as possible are able to give their evidence or act as jurors.<sup>50</sup>
- ▣ **In general, and particularly for people with physical disabilities, the court should first investigate the option(s) *closest* to providing the usual court experience.** But, sometimes, due to the nature of the particular person's needs, the court may need to make more significant adjustments that will result in providing a court experience that is different from usual, while still ensuring that all the necessary legal conditions are met.
- ▣ **In all cases, it is critical that the court finds out precisely what barriers (if any) the particular person with a disability faces in attending court and/or giving their evidence, and then discusses with them** (either directly, or via their support person or carer, or their legal representative) **what needs they have and how these could best be met. However, note that some people** (and particularly people from some ethnic and Indigenous backgrounds) **may be reluctant to identify as having a disability, and/or find direct questions related to any disability intrusive**, in which case the court may need to take a more confidential or discreet approach to finding out that person's needs (if any).
- ▣ **Never make assumptions** about what may or may not be the needs of a particular person with a disability.

<sup>50</sup> For some examples of adjustments see NSW Law Reform Commission, *Blind or Deaf Jurors*, Report No 114, 2006, at [www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report\\_114.pdf](http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/report_114.pdf), accessed 21 July 2014; and, ss 30 and 31 of the *Evidence Act* 1995 (NSW) which provide for interpreters and for appropriate allowance to be made for deaf and mute witnesses.

- **Some examples of adjustments that may need to be made and that are within the court’s power to make are listed below.**
- **While in some cases, providing these adjustments might delay the start or continuation of proceedings, and/or cost money to provide, this needs to be balanced against the particular person’s right to be able to give their evidence effectively and/or act as a juror.**
- **Some examples of adjustments that may need to be made are:**
  - **moving the court** — to a more accessible courtroom or venue — including, for example, a particular person’s home or hospital room
  - **changing the physical layout of the court** — for example, allowing a witness to present their evidence from the bar table, or from a stretcher
  - **providing assistance with physical entry to the court**
  - **allowing a person to have prior access to the court** — in order to familiarise themselves with it
  - **providing an “infra-red assistive hearing device” (a “hearing loop”)**<sup>51</sup>
  - **allowing evidence to be received by phone, and maybe using a telephone typewriter (TTY) in place of a normal phone**<sup>52</sup>
  - **making sure an Auslan (Australian Sign Language) interpreter**<sup>53</sup> **is available, and/or that a person can use their support person effectively as an interpreter** — that is, to help them give their evidence<sup>54</sup>
  - **making sure that any guide, hearing or assistance animal used to assist a person with a disability is allowed into the court and allowed to remain with the person**<sup>55</sup>

51 See the Department of Justice website page “People with Disabilities” at [www.lawlink.nsw.gov.au/Lawlink/Corporate/ll\\_corporate.nsf/pages/attorney\\_generals\\_department\\_supporting\\_disabilities](http://www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/pages/attorney_generals_department_supporting_disabilities), accessed 21 July 2014, which provides information about how to get one.

52 *ibid.*

53 Auslan interpreters can be booked via the Deaf Education Network (the education division of the Deaf Society of NSW) or Multicultural NSW — see 5.5 for contact details. For criminal matters, courts have a contract with the CRC to provide Auslan interpreters free of charge.

54 Section 306ZK of the *Criminal Procedure Act 1986* (NSW) provides that vulnerable persons have a right to choose a support person of their own choice, and that that person may act as an interpreter by assisting them to give their evidence. A vulnerable person is defined in s 306M as a child or a cognitively impaired person.

55 See ss 59–60 of the *Companion Animals Act 1998* (NSW) and s 54A of the *Disability Discrimination Act 1992* (Cth) — see n 39.

- **allowing someone to have a support person with them at all times — close by and within their sight**<sup>56</sup>
- **making use of the Mental Health Liaison Officer** — if there is one attached to your court
- **providing a computer/technology assisted communication device, or allowing someone to use their own** — for example, a lightwriter to type in their evidence and have it relayed to the court in speech form, or real-time closed captioning for a person who is deaf. It is often best if the person can bring their own device and work with the court's technology staff to make it work in the courtroom, as this will ensure for example that any synthesised voice is appropriate to their gender, and that the person is familiar with the technology
- **allowing people to use symbol boards or other such communication aids**
- **allowing closed-circuit television (CCTV) or similar technology, and/ or screens to be used, and/or closing the court** (as often used for receiving a child or young person's evidence) **for those for whom it is too overwhelming or frightening to appear openly in court** — see 6.3.3 for further information about CCTV and similar technology, screens, etc. and for the directions you may need to give to juries early on in the proceedings about their use<sup>57</sup>
- **being flexible and/or more precise with the timing of listings, and/or the timing of starting and/or finishing receiving a particular person's evidence** — for example, in order to fit with a particular person's requirements in relation to eating, medication, treatment, transport and other such needs
- **having more frequent breaks** — see 5.4.4

56 For information provided by the Department of Justice to support vulnerable persons (including people with disabilities) about going to court and the role of a support person, see [www.victimsservices.lawlink.nsw.gov.au/vss/vs\\_specificneeds1.html](http://www.victimsservices.lawlink.nsw.gov.au/vss/vs_specificneeds1.html), accessed 21 July 2014. Note that the Criminal Justice Support Network (CJSN) of the Intellectual Disability Rights Service (IDRS) provides and advises support people for people with an intellectual disability who are witnesses or defendants in a criminal matter — see 5.5 and resources at [www.idrs.org.au/home/index.php#sthash.x7f7OVst.OBcCOiqv.dpbs](http://www.idrs.org.au/home/index.php#sthash.x7f7OVst.OBcCOiqv.dpbs), accessed 21 July 2014.

57 See *Guidelines for Remote Witness Facilities* (revised and reissued in 2014) at [www.victimsservices.lawlink.nsw.gov.au/vss/vs\\_service\\_providers/vs\\_remote\\_guidelines.html?s=1001](http://www.victimsservices.lawlink.nsw.gov.au/vss/vs_service_providers/vs_remote_guidelines.html?s=1001), accessed 21 July 2014.

- making sure that any documents critical to a person with a disability’s court appearance needs are provided in advance in a format that is appropriate for them, and/or that they can be read to them and signed.<sup>58</sup>
- the Diversity Services section of the Department of Justice can provide further information or advice about how to meet the needs of a particular person with a disability — see 5.5.

#### 5.4.2 Oaths, affirmations and declarations

##### Points to consider:

- In most cases, people with disabilities will be able to take an oath or affirmation in the same way as anyone else as long as, in some cases, the appropriate adjustments are made so that they can successfully communicate their evidence — see 5.4.1 and 5.4.3.
- Whether a person with a disability takes an oath or an affirmation and the type of oath or affirmation they should take will largely depend on their religious affiliation or lack of religious affiliation — see 4.4.2.
- It may be necessary for some people with disabilities (in particular those with severe intellectual disabilities) to give unsworn evidence — provided the court has told the person the matters listed in s 13(5) of the *Evidence Act* 1995 (NSW) including that it is important to tell the truth. If this seems necessary, you should follow the boxed

58 For more information about different formats that may be needed, see Judicial Commission of NSW, *Disabilities information*, 2001, at [https://jirs.judcom.nsw.gov.au/services/disabilities\\_information.pdf](https://jirs.judcom.nsw.gov.au/services/disabilities_information.pdf), accessed 21 July 2014; the *Disabilities information* was adapted from *ACCESSLink — A Guide to Flexible Service Delivery*, published by the Disability Unit of the then NSW Attorney General’s Department in 2001; or the NSW Department of Justice internal “infolink” website and the “ACCESSLink” menu.

guidance given in 6.3.2, but make sure that you do not “talk down” to the person — they are not a child. For more information about how to communicate with a person with an intellectual disability, see 5.4.3.4.

- **If you are unsure about the capacity of a particular person with a disability to give even unsworn evidence you may need to consider requesting an educational psychologist’s assessment.**

### 5.4.3 Language and communication<sup>59</sup>

#### 5.4.3.1 Initial considerations

Just the same as anyone else who appears in court, a person with a disability needs to understand what is going on, the meaning of any questions asked of them, and to be sure that their evidence and replies to questions are adequately understood by the court.

It is also critical that people with disabilities are treated with the same respect as anyone else.

As indicated in 5.4.1, some people with disabilities will need some form of communication aid or interpreter to be made available for them to be able to communicate their evidence and/or hear what is being said by others. They may also need some adjustments to be made in the level or style of language used, and/or the manner in which they are given information about what is going on.

Some people who do not need a communication aid or interpreter may also need adjustments to be made in the level or style of language used and/or the manner in which they are given information about what is going on.

#### 5.4.3.2 General communication guidance

##### Points to consider:

- **Use the appropriate disability language and terminology** — see 5.2.3.
- **Use an appropriate communication aid or interpreter (see 5.4.1) and explain to any jury the reason for its/their use, and that they must not discount the person’s evidence** because of the manner in which it is communicated.<sup>60</sup>

<sup>59</sup> Much of the information in 5.4.3 is drawn from *Disability awareness program — creating access to our courts*, by kind permission of the National Judicial College of Australia and the NSW Department of Justice; and Judicial Commission of NSW, *Disabilities information*, 2001, *ibid*.

<sup>60</sup> In relation to witnesses who are deaf or mute see also s 31 of the *Evidence Act 1995* (NSW).

- **Do not use any language that is discriminatory or sounds discriminatory** — for example — “Could you explain to the court what you did step by step ...” is better than “How could anyone with your disability ...?”
- **Do not “talk down” to a person with a disability** as though they are a child.
- **Talk to the person themselves, not their support person<sup>61</sup> or interpreter** — for guidance on working with an interpreter, see 3.3.1.5.
- **Do not assume (or in any way appear to assume) that a person with a disability who has some communication adjustment need is intellectually any less capable** than someone who has no such need.
- **Do not refer to a person’s disability unless this is relevant** to assessing their communication (or other accessibility) needs, and/or to the matters before the court.
- **Whenever a person with a disability appears to be having difficulty in communicating their evidence or in understanding what is required of them, double-check** directly with them (or their support person or legal representative, if appropriate) **whether there is anything that could be provided to assist them** — for example, a higher volume or a reader.
- **Check whether the person is experiencing any discomfort or difficulty in delivering their evidence that the court might be able to help alleviate** in any way at all.
- **Use a level of language and style of communication appropriate to the needs of the particular person with a disability** — see 5.4.3.3.

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61 For information provided by the Department of Justice for people with cognitive disabilities who have to go to court, see 5.5; n 56.

- **As prescribed by law, intervene if, for example, cross-examination appears to be breaking any of the above points.**<sup>62</sup>
- **Follow the points given in 5.4.3.3 to 5.4.3.6 as relevant.**

#### 5.4.3.3 Level and style of language to suit particular needs

- **People with physical disabilities** — you may need to adjust the level of your language in order to communicate effectively with some people with physical disabilities — see 5.4.3.4.
- **People with intellectual disabilities** — you will almost always need to adjust both the level *and* the style of your language in order to be able to communicate effectively with a person with an intellectual disability. For some techniques, see 5.4.3.5.
- **People with an acquired brain injury** — you may need to adjust the style *and/or* the level of your language in order to be able to communicate effectively with most people with an acquired brain injury. It is important to ascertain whether the brain injury affected receptive or expressive language. For some techniques, see 5.4.3.6.
- **People with psychiatric disabilities or behaviour differences** — you may need to adjust the style *and/or* the level of your language to be able to communicate effectively with some people with psychiatric disabilities or behaviour differences. For some techniques see 5.4.3.7.
- **People with fetal alcohol spectrum disorders** — you may need to adjust the style *and/or* the level of your language to communicate with some people with fetal alcohol spectrum disorders. Such individuals may be affected by physical, intellectual *and/or* behavioural disabilities — see 5.4.3.4, 5.4.3.5 and 5.4.3.7.

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62 Note that pursuant to s 41 of the *Evidence Act 1995* (NSW) improper questions must be disallowed (for example, misleading or confusing, or unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive questions). The section (s 41(2)(b)) specifically refers to the need to take account of the witness’s “mental, intellectual or physical disability”. Sections 26 and 29(1) of the *Evidence Act 1995* provides for the court’s control over the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows for the exclusion of any evidence that is misleading or confusing.

#### 5.4.3.4 Communication techniques for people with physical disabilities

**Points to consider:**

- **For a person who is deaf or hearing impaired** — you (and others in court) may need to simply ensure that your mouth is uncovered, or your volume is loud enough.<sup>63</sup>
- **For a person who is blind or has a visual impairment** — you (and others in court) may need to specifically identify items you are talking about, rather than pointing at them, or referring to them as “this” or “that” item.
- **For a person with a speech impairment** — you (and others in court) may simply need to be patient, and listen carefully until you are able to more easily understand them. The adjustment isn’t usually for the listener to alter their speech, but rather, a willingness to listen to “different types” of speech and be patient.
- **For a person using communication equipment** — you (and others in court) may need to adjust how you speak to suit the technology needs of the equipment being used to facilitate communication with, for example, a person with a speech impairment. The person using any such equipment should be able to tell you if there is anything you need to do to make communication work better.
- **But note that it is always best to ask if you think there might be any special communication style needs for a person with a physical disability** — in case they think they do not need to tell you, or for some reason do not want to volunteer the information.
- **You may also need to intervene if others in court are not directing their questions in an appropriate manner<sup>64</sup>** — as prescribed under s 41 of the *Evidence Act 1995* (NSW).

63 The Deaf Society of NSW maintains a website with legal information in Auslan for people who are deaf or hearing impaired, including information on going to court. See [http://deafsociety NSW.org.au/auslan\\_resources/page/legal](http://deafsociety NSW.org.au/auslan_resources/page/legal), accessed 21 July 2014.

64 Note ss 26, 29(1), 41 and 135(b) of the *Evidence Act 1995* (NSW), see n 62.

### 5.4.3.5 Communication techniques for people with intellectual disabilities

#### Points to consider:

- ▣ **Note that many people do not want to acknowledge or admit they have an intellectual disability, so they may feign understanding.**
- ▣ **Always talk directly to the person, not to a friend or family member, a carer or support person<sup>65</sup> — the support person will tell you if they think the person does not understand.**
- ▣ **Slow down your speech to a pace that is easy to follow.**
- ▣ **Use language that is as simple and direct as possible. But, do not “talk down” to a person with an intellectual disability — they are not a child. For example:**
  - **Use the words or phrases we tend to learn first** — for example “**about**”, not “regarding” or “concerning”; “**start**”, not “commence”; “**go**”, not “proceed”; “**to**”, not “towards”; “**I think you said/did ...**”, not “I put it you that ...”; “**It’s true, isn’t it**”, not “Is that not true?”
  - **Give preference to short, one or two syllable words.**
  - **Avoid words with more than one meaning.**
  - **Use active, not passive, speech (subject, verb and then object, not object, verb then subject)** — for example, “**The dog bit you**”, not “You were bitten by the dog”.
  - **Use short sentences containing one concept only.**
  - **Avoid “double negatives”. Use single negatives instead** — for example, “**Did he tell you not to do this?**”, not “Didn’t he tell you not to do this?”.
  - **Use simple verb tenses** — the simplest, most definite or concrete verb tense possible with as few extra words as possible — for example, “**you say**”, not “you are saying”, “**she had**”, not “she had had”.
  - **Avoid hypothetical questions, be direct instead** — “**Do you want a break?**”, not “If you think that you might like a break, let me know”.
  - **Use concrete, not abstract, concepts.**
  - **Use legal jargon only when necessary**, and if you do need to use it explain it in plain English. For example, provide plain

<sup>65</sup> For information provided by the Department of Justice for people with cognitive disabilities who have to go to court: see 5.5 n 44..

English explanations of words and phrases such as affidavit, affirmation, arbitration, bail, bond, cross-examination, evidence, legislation, probationary period, writ of execution, seizure, PSO, statute, rescission. Never use Latin words or phrases. Use words and phrases like “**law**”, not “statute” or “legislation”; or “**X will now ask you some questions**”, not “X will now cross-examine you”; or “**What you can tell us about ...**”, not “your evidence”; and “**against**”, not “versus”.

- ▣ **Explain what they must do and why, and what is happening carefully and patiently, in short amounts, using simple, direct, non-legal language. Then ask them to tell you what they must do, or what is happening in their own words** — so that you can ensure they understand. **If necessary, give the explanation in a different way.**
- ▣ **Consider allowing the evidence to be given in narrative form** — so as to avoid the person getting muddled and distracted by a series of questions.<sup>66</sup>
- ▣ **Ask questions one at a time.**
- ▣ **Use open-ended questions — avoid leading questions, and avoid questions soliciting a “yes/no” answer.**
- ▣ **Watch for “pleasing” behaviour** — the person may try to give you the answers he/she thinks you want.
- ▣ **Do not rush them, or appear impatient, and try not to interrupt** — allow extra time for answers.
- ▣ **Try not to direct or pressure them** — or, they may change their answer to “please” you or to enable a quick exit.
- ▣ **Keep questioning as short as possible — watch for emotional or information overload** — take breaks if necessary.
- ▣ **Make sure they can understand any written material they need to understand** — it may need to be in large print, in simple direct language, and/or read out to them and/or translated into simple, direct language. Be aware that some people with an intellectual disability may pretend to read.

66 See *Evidence Act 1995 (NSW)*, s 29 and NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* (Report No 80), see n 12.

- ▣ **Allow additional time for the person’s legal representative to explain the proceedings to them.**
- ▣ **As prescribed by law, intervene whenever others (for example, during cross-examination) do not follow these points** — establish these points as the “ground rules” for cross-examination, if necessary.<sup>67</sup>
- ▣ **Check the language of any prior confession against the language used by the particular person** (and indeed assess any such confession more generally against the intellectual ability of the particular person).

#### 5.4.3.6 Communication techniques for people with an acquired brain injury

##### Points to consider:

- ▣ **Each person with an acquired brain injury is different and is therefore likely to have their own set of communication needs** — depending, of course, on how, and how seriously, the injury has affected their ability to process information and/or communicate it. Ascertain whether the brain injury primarily affected receptive or expressive language. For example, some people with aphasia (a class of language disorder caused by a dysfunction in the brain) can understand what is being said to them but cannot respond verbally.
- ▣ **Some may need a support person to interpret for them. Others may need to be listened to for a while** until you understand what they are saying, and then asked to repeat anything you do not understand.
- ▣ **Always be calm, patient and respectful** — no matter how unexpectedly the person behaves. Ignore any disinhibited behaviour if possible. Otherwise ask them to stop it and explain why you are doing this.
- ▣ **If they appear confused, or appear to be having difficulties with concentration, remembering or processing information:**
  - speak more slowly
  - explain what you intend to do so there are no surprises
  - make sure they have understood what you are asking them to do — get them to repeat this in their own words

<sup>67</sup> Note ss 26, 29(1), 41 and 135(b) of the *Evidence Act 1995* (NSW), see n 62.

- use simple, direct non-legal language — as explained at 5.4.3.4
- use some or all of the other techniques listed at 5.4.3.4, as necessary.
- **If their words or thoughts are jumbled:**
  - be patient — they may believe they are speaking normally and may be trying very hard to be understood
  - assist them by picking out key words that are relevant to your purpose, one at a time — for example, “money” and then ask them what they remember about the money. Keep doing this key word by key word.
- **If necessary, allow additional time for the person’s legal representative to explain proceedings to them.**
- **Make sure they can understand any written material they need to understand** — it may need to be in large print, in simple direct language, and/or read out to them and/or translated into simple, direct language.
- **As prescribed by law, intervene if others (for example, during cross-examination) are not following these points** — establish these points as the “ground rules” for cross-examination, if necessary.<sup>68</sup>

#### 5.4.3.7 Communication techniques for people with psychiatric disabilities or behaviour differences

##### **Points to consider:**

- **What you need to do, if anything, will depend on the behaviour the person is presenting.** For example, their words or thoughts may be jumbled, they may be finding it hard to concentrate or appear disinterested, or they may be angry, aggressive, highly anxious, paranoid and/or delusional. The behaviour may be temporary, episodic or relatively regular. It may be due to a diagnosed psychiatric disability

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<sup>68</sup> Note ss 26, 29(1), 41 and 135(b) of the *Evidence Act 1995* (NSW), see n 62.

or dementia, an undisclosed acquired brain injury, an undisclosed intellectual disability, and/or they may be affected by alcohol or drugs (either prescribed or illicit).

- ▣ **Unless it's relevant to the matter(s) before you, it really does not matter what the disability is or its aetiology.** Note also that many people do not want to acknowledge or admit they have any memory or cognitive disabilities, so they will feign understanding.
- ▣ **Ask the person the best way to assist them in understanding and remembering.**
- ▣ **For accused persons in summary matters, consider if it would be useful to make use of the court Mental Health Liaison Officer** — if there is one attached to your court, **or alternatively the Statewide Community Court Liaison Service** — see 5.5.
- ▣ **You may also need to ask questions to try to find out if it would be better to delay taking their evidence** until, for example, the behavioural effect of any medication or drug or alcohol use has worn off or kicked in (as appropriate). The following techniques may help.
- ▣ **If their words or thoughts are jumbled, or they appear confused, or appear to be having difficulties with concentration, remembering or processing information** — follow the relevant points in 5.4.3.5.
- ▣ **If they are aggressive (that is directing their anger at you or others personally, making abusive statements, or threatening violence or self-harm):**
  - remain calm
  - summarise the problem
  - set ground rules: “I will listen to your concerns but I need you to ...”
  - focus on why they are there
  - explain your reasons behind your actions or decisions
  - call security if anyone is threatened.
- ▣ **If they are highly anxious or paranoid:**
  - allow them to attend the court prior to the proceedings to familiarise themselves with it, and check out every part of it
  - explain the purpose of any microphones, tape recording and video cameras, etc, at the beginning of the hearing
  - explain the roles of everyone in the courtroom
  - speak calmly and slowly.
- ▣ **If they are delusional:**
  - do not argue with them about the delusion, as this could only inflame the situation — the delusions are very real to them

- acknowledge their stated delusion but make your reality clear — for example, “I understand you believe you are X ... but it is not real to me.”
- gently focus them on their reason for attendance
- explain the reasons behind your actions — if necessary, call a break.
- **As prescribed by law, intervene if others (for example, during cross-examination) are not following these points** — establish these points as the “ground rules” for cross-examination, if necessary.<sup>69</sup>

#### 5.4.4 Breaks and adjournments

##### Points to consider:

- **Some people with disabilities (and/or their carers, support people or interpreters, or guide dogs), may need more frequent breaks** — for example, to be able to eat/drink, go to the toilet, take medication, get back their concentration, become less anxious, and/or move from the one position.
- **You may also need to adjourn proceedings** — in order to move to another courtroom, take evidence elsewhere, get an interpreter or support person, get particular technological equipment, and/or allow for someone’s transport, illness or disability needs.
- **While it is critical to minimise delays, it is also critical to ensure adequate and sufficient breaks for these purposes** — otherwise, the particular person may not be able to give their evidence (or act as a juror) effectively.
- **It is a good idea to specifically give a person with a disability, and any support person, interpreter or carer, permission to ask for a break** if they need one, and then to give them a break when they do ask.
- **But, as they will not always ask, you also need to watch for signs that a break might be needed** — for example, wandering concentration, stress and/or discomfort and insert a break wherever appropriate.
- **It is also a good idea to use any breaks to make sure there is sufficient water available on the witness stand, and elsewhere** — many people who are taking medications need to drink water frequently.

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<sup>69</sup> See n 64.

### 5.4.5 The possible impact of a person’s disability or disabilities on any behaviour relevant to the matter(s) before the court

#### Points to consider:

- ▣ **Has the nature of a particular person’s disability or disabilities had any influence on the matter(s) before the court? If so, where possible, take appropriate account of any such influence.** For example, you may need to decide whether the law allows you to take account of any such influence and, then, as appropriate and at the appropriate time in the proceedings, so as to ensure that justice is done and seen to be done, explain why any such influence can/should be taken into account, or cannot/should not be taken into account. For example, you may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing — see 5.4.6 and 5.4.7.
- ▣ **Ensure that the person with a disability is, however, being treated as an individual and with respect — for example, as prescribed by law, you may need to intervene if any stereotyped views or assumptions about people with disabilities, or people with particular types of disabilities, appear to be unfairly behind any questioning.**<sup>70</sup>
- ▣ In some cases, it may be appropriate for you to make orders to protect the confidentiality of a person with a disability, such as an HIV-infected offender or complainant, including orders:
  - closing the courtroom to the public
  - prohibiting publication of the details of the matter
  - requiring the use of pseudonyms for parties and excluding any other identifying information.<sup>71</sup>

70 See n 64.

71 A court may make orders under its inherent jurisdiction: *Court Suppression and Non-publications Orders Act 2010*, s 8; *Civil and Administrative Tribunal Act 2013*, s 64. See Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, above n 40, “Closed court, suppression and non-publication orders” at [1-349] and Judicial Commission of NSW, *Civil Trials Bench Book*, 2007–, “Closed court, suppression and non-publication orders” at [1-0400]. See also [www.afao.org.au/library/hiv-australia/volume-8/number-4/HIV-disclosure-in-court#.VUbCz5N3Dqo](http://www.afao.org.au/library/hiv-australia/volume-8/number-4/HIV-disclosure-in-court#.VUbCz5N3Dqo), accessed 4 May 2015.

### 5.4.6 Directions to the jury — points to consider

**As indicated at various points in 5.4, it is important that you ensure that the jury does not allow any ignorance of people with disabilities, or any stereotyped or false assumptions about people with disabilities or the manner by which a particular person’s evidence was presented to unfairly influence their judgment.**

**This should be done in line with the *Criminal Trial Courts Bench Book*<sup>72</sup> or *Local Courts Bench Book*<sup>73</sup> (as appropriate), and you should raise any such points with the parties’ legal representatives first.**

**For example, you may need to provide specific guidance as follows:**

- Caution them against making any false assumptions about the evidence of people with disabilities, or particular types of disabilities. For example, it is a misperception that people infected with HIV bear moral responsibility for their conditions because they engage in morally reprehensible behaviours (for instance, drug use or sex work). There may also be a misperception that HIV and AIDS are life threatening-conditions (but see 5.2.2.7).<sup>74</sup>
- Remind them of any directions you made earlier in the proceedings in relation to how they must treat evidence that was presented using a communication aid, interpreter/support person, or via CCTV/behind a screen, etc — see 5.4.3.2.
- Draw their attention to any evidence presented in court about the particular person’s capacities — for example, in relation to intention or intent, and any defences they may have), the actual evidence presented by the person, any conflicting evidence presented by others, and how they should relate these matters to the points they need to decide.

72 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, see n 56.

73 Judicial Commission of NSW, *Local Court Bench Book*, see n 45.

74 See [www.avert.org/hiv-aids-stigma-and-discrimination.htm](http://www.avert.org/hiv-aids-stigma-and-discrimination.htm), accessed 8 April 2015. See also The Hon M Kirby AC CMG, “HIV/AIDS — implications for law & the judiciary”, paper presented at Fiji Law Society 50th Anniversary Convention, 27 May 2006, Sigatoka, Fiji Islands, at [www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj\\_27may06a.pdf](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/kirbyj/kirbyj_27may06a.pdf), accessed 23 April 2015.

### 5.4.7 Sentencing, other decisions and judgment or decision writing — points to consider

**Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory and preferably be seen to be so by all those it involves — for example, any person with a disability and any carer(s).<sup>75</sup>**

**Points to consider:**

- **In order to ensure that any person with a disability referred to or specifically affected by your sentencing, decision(s) and/or written judgment or decision also considers it/them to be fair and non-discriminatory, you may need to pay due consideration to (and indeed specifically allude to) some of the points raised in the rest of 5.4 (including the points made in 5.4.6) and in 5.3 that are relevant to the particular case.**

- **Whether to allow a victim impact statement to be read out in court.<sup>76</sup>**

**Note that many people with disabilities struggle financially because of the barriers against full or adequately remunerated employment and/or the financial costs associated with their disability — so a specific level of fine for them will often mean considerably more than the same level of fine for others.**

- **In reaching your sentencing decision, you may be asked to take into account the fact that an offender’s medical condition will make custody more burdensome.<sup>77</sup> For example, an HIV-infected prisoner may find imprisonment more burdensome because he or she has a greater**

75 See also Judicial Commission of NSW, *Sentencing Bench Book*, Sydney, 2006–, particularly the commentary on the *Mental Health (Forensic Provisions) Act 1990* (NSW) at [90-000]ff, at [https://jirs.judcom.nsw.gov.au/benchbks/sentencing/mental\\_health.html](https://jirs.judcom.nsw.gov.au/benchbks/sentencing/mental_health.html), accessed 22 July 2014. Further, in relation to people with psychiatric and/or intellectual disabilities, see S Traynor, “Sentencing mentally disordered offenders: the causal link” (2002) 23 *Sentencing Trends and Issues*, Judicial Commission of NSW, Sydney; T Gotsis, H Donnelly “Diverting mentally disordered offenders in the NSW Local Court”, Research Monograph 31, Judicial Commission of NSW, Sydney, 2008; *Veen (No 2) v The Queen* (1988) 164 CLR 465; *R v Engert* (1995) 84 A Crim R 67 at 69; *R v Israil* [2002] NSWCCA 255 at [18]–[27].

76 See Pt 3, Div 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the Charter of Victims Rights (at Pt 2, Div 2 of the *Victims Rights and Support Act 2013*), which allows the victim access to information and assistance for the preparation of any such statement.

77 Judicial Commission of NSW, *Sentencing Bench Book*, 2006–, “Subjective matters taken into account (cf s 21A(1))”, at [10-450]. *R v Smith* (1987) 44 SASR 587; *R v Penalosa-Munoz* (2004) 143 A Crim R 594 at [14].

risk of contracting opportunistic infections, or may suffer side effects from particular drug regimes that are difficult to manage in a prison environment.<sup>78</sup>

- **Ensure you do not under-value the financial costs associated with any particular person’s disability in relation to such matters as compensation, property division and inheritance** — see 5.1 under “Employment and income”.
- **Ensure that any person with a disability who has particular communication needs and is affected by your sentencing, decision or judgment is told of the outcome in a manner appropriate to their communication need** — see 5.4.3. For example, it may be appropriate for it to be written down at the time of sentencing (in as simple and direct English as possible), and then given to the person and/or their legal representative — so as to help ensure understanding and compliance.

[The next page is 5501]

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78 D Puls and J Wong, *HIV/AIDS sentencing kit*, 3rd edn, HIV/AIDS Legal Centre NSW, 2004, pp 12–14.

## 5.5 Further information or help

- **Information and advice about accommodating the needs of a particular person with a disability:**
  - **Department of Justice (NSW)**, “Discrimination Disability” — under “LawAccess NSW”, “Human Rights”.
  - **Diversity Services — Department of Justice (NSW)**  
Ph: (02) 8688 7507  
Email: [diversity\\_services@justice.nsw.gov.au](mailto:diversity_services@justice.nsw.gov.au)  
Web: [www.justice.nsw.gov.au/diversityservices](http://www.justice.nsw.gov.au/diversityservices)
- **Auslan interpreter:**
  - **Multicultural NSW** — note that for criminal matters, courts have a contract with the Multicultural NSW to provide Auslan interpreters free of charge — Ph: (02) 8255 6767  
Email: [contact@multicultural.nsw.gov.au](mailto:contact@multicultural.nsw.gov.au)  
Web: [www.multicultural.nsw.gov.au](http://www.multicultural.nsw.gov.au)
  - **Deaf Society of NSW**  
Ph: (02) 8833 3600  
TTY (02) 8833 3691  
Email: [info@deafsociety.com](mailto:info@deafsociety.com)  
Web: <http://deafsocietynsw.org.au/>
- **General information and advice about people with disabilities:**
  - **Justice Health and Forensic Mental Health Network**  
PO Box 150, Matraville NSW 2036  
Ph: (02) 9700 3000  
Fax: (02) 9700 3493  
Email: [jhadmin@justicehealth.nsw.gov.au](mailto:jhadmin@justicehealth.nsw.gov.au)  
Web: [www.justicehealth.nsw.gov.au](http://www.justicehealth.nsw.gov.au)
  - **Australian Centre for Disability Law**  
PO Box 989  
Strawberry Hills NSW 2012  
Ph: (02) 9370 3135 or 1800 800 708  
Fax: (02) 9370 3131  
TTY: (02) 9211 5549  
Email: [advice@disabilitylaw.org.au](mailto:advice@disabilitylaw.org.au)  
Web: [www.disabilitylaw.org.au](http://www.disabilitylaw.org.au)

- **Disability Council NSW**  
Level 4, 223–229 Liverpool Road, Ashfield NSW 2131  
Phone/TTY: (02) 8879 9100  
Fax: (02) 8879 9177  
Email: DisabilityCouncil@facs.nsw.gov.au  
Web: www.disabilitycouncil.nsw.gov.au  
National Relay Service (NRS): 1800 555 660  
TTY: 1800 555 630
- **People With Disability Australia**  
PO Box 666  
Strawberry Hills NSW 2012  
Ph: (02) 9370 3100  
Freecall: 1800 422 015  
TTY: (02) 9318 2138  
Fax: (02) 9318 1372  
Email: pwd@pwd.org.au  
Web: www.pwd.org.au
- **Multicultural Disability Advocacy Association of NSW**  
PO Box 884  
Granville NSW 2142  
Ph: (02) 9891 6400  
Freecall: 1800 629 072  
Fax: (02) 9897 9402  
Email: mdaa@mdaa.org.au  
Web: https://mdaa.org.au
- **More specific information and advice about people with particular types of disabilities:**

### Brain injury

- **Synapse Brain Injury Association of NSW**  
Suite 102, Level 1, 3 Carlingford Road  
Epping NSW 2121  
Freecall: 1800 673 074  
Fax: (02) 9868 5619  
Web: www.synapse.org.au

## Psychiatric disability or behaviour disorder

### – **Dementia Australia**

PO Box 6042 North Ryde  
Private Boxes NSW 2113  
Ph: (02) 9805 0100  
Gibson-Denney Centre  
Building 21, Macquarie Hospital Campus  
Cnr Coxs & Norton Roads  
North Ryde NSW 2113  
Tel: 02 9805 0100  
Fax: 02 8875 4665  
Email: [nsw.admin@dementia.org.au](mailto:nsw.admin@dementia.org.au)  
Web: [www.dementia.org.au](http://www.dementia.org.au)

### – **The Mental Health Liaison Officer**

– if there is one attached to your court, or alternatively:

#### **Statewide Community and Court Liaison Service (SCCLS)**

Ph: (02) 9700 2175  
Web: [www.justicehealth.nsw.gov.au](http://www.justicehealth.nsw.gov.au)

### – **Mental Health Coordinating Council**

PO Box 668 Rozelle NSW 2039  
Ph: (02) 9555 8388  
Fax: (02) 9810 8145  
Ground Floor  
Building 125  
Corner Church and Glover Street  
Lilyfield, NSW 2040  
Email: [info@mhcc.org.au](mailto:info@mhcc.org.au)  
Web: [www.mhcc.org.au](http://www.mhcc.org.au)

### – **Mental Health Advocacy Service**

Level 4, 74–76 Burwood Road  
Burwood NSW 2134  
Ph: (02) 9745 4277  
TTY: (02) 9747 0214  
Web: [www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au)

- **WayAhead Mental Health Association of NSW**  
Level 5, 80 William Street  
Woolloomooloo NSW 2011  
Ph: (02) 9339 6000  
Mental Health Support Line: 1300 794 991  
Anxiety Disorders Line: 1300 794 992  
Fax: (02) 9339 6066  
Email: [info@wayahead.org.au](mailto:info@wayahead.org.au)  
Web: [wayahead.org.au](http://wayahead.org.au)
- **Transcultural Mental Health Centre**  
Building 53 Cumberland Hospital Campus  
5 Fleet Street  
North Parramatta NSW 2151  
Ph: (02) 9912 3850  
Clinical Consultation Service and Assessment (02) 9912 3851  
Freecall: 1800 648 911  
Fax: (02) 9840 4180  
Email: [tmhc@health.nsw.gov.au](mailto:tmhc@health.nsw.gov.au)  
Web: [www.dhi.health.nsw.gov.au/tmhc/](http://www.dhi.health.nsw.gov.au/tmhc/)
- **Centre for Rural and Remote Mental Health**  
c/o Bloomfield Hospital,  
Forest Road, Orange NSW 2800  
Ph: (02) 6363 8444  
Fax: (02) 6361 2457  
Email: [crrmh@newcastle.edu.au](mailto:crrmh@newcastle.edu.au)  
Web: [www.crrmh.com.au](http://www.crrmh.com.au)

### **Intellectual disability**

- **NSW Council for Intellectual Disability**  
Level 2, 418A Elizabeth Street  
Surry Hills NSW 2010  
Ph: (02) 9211 1611  
Freecall: 1800 424 065  
Email: [info@nswcid.org.au](mailto:info@nswcid.org.au)  
Web: [www.nswcid.org.au](http://www.nswcid.org.au)

- **Intellectual Disability Rights Service Inc**  
Suite 2C, 199 Regent Street  
Redfern NSW 2016  
PO Box 3347  
Redfern NSW 2016  
Ph: (02) 9318 0144  
Freecall: 1800 666 611 (NSW areas outside Sydney)  
Fax: (02) 9318 2887  
Email: [info@idrs.org.au](mailto:info@idrs.org.au)  
Web: [www.idrs.org.au](http://www.idrs.org.au)
  
- **Criminal Justice Support Network (CJSN)** (operated by the Intellectual Disability Rights Service (IDRS)) — provides trained court support people for people with an intellectual disability who are defendants or witnesses in criminal matters — in Sydney, Southern NSW and the Hunter region. Also provides advice for others acting as such support people  
Ph: 1300 665 908 (9 am–10 pm, 7 days per week for persons with a disability in police custody)  
General support phone: (02) 9318 0144
  
- **Self Advocacy Sydney Inc**  
Suite 200, Level 2  
30-32 Campbell Street  
Blacktown NSW 2148  
Ph: (02) 9622 3005  
Fax: (02) 9622 6030  
Email: [info@sasinc.com.au](mailto:info@sasinc.com.au)  
Web: [www.sasinc.com.au](http://www.sasinc.com.au)

### Physical disability

- **Deaf Society of NSW**  
Suite 401, 4/69 Phillip Street  
Parramatta NSW 2150  
PO Box 1300  
Parramatta 2124  
Ph: (02) 8833 3600  
TTY: (02) 8833 3691  
Fax: (02) 8833 3699

- **Self Help for Hard of Hearing (SHHH) Australia**  
Room 26  
Hillview Community Health Centre  
1334 Pacific Highway  
Turrumurra NSW 2074  
Ph: (02) 9144 7586  
TTY: (02) 9144 7586  
Fax: (02) 9144 3936  
Web: [www.shhhaust.org](http://www.shhhaust.org)
- **Vision Australia (NSW Office)**  
Level 7, 128 Marsden Street Parramatta NSW 2150  
Ph: 1300 847 466 (ask for the Parramatta office)  
Fax: 1300 847 329  
Email: [info@visionaustralia.org](mailto:info@visionaustralia.org)  
Web: [www.visionaustralia.org](http://www.visionaustralia.org)
- **Guide Dogs NSW/ACT**  
2–4 Thomas Street  
Chatswood NSW 2067  
PO Box 1965  
North Sydney NSW 2059  
Ph: (02) 9412 9300  
Fax: (02) 9412 9388  
Email: [chatswood@guidedogs.com.au](mailto:chatswood@guidedogs.com.au)  
Web: [www.guidedogs.com.au](http://www.guidedogs.com.au)
- **Blind Citizens Australia, NSW Branch**  
Ph: (02) 9745 4588  
Email: [sydney@bca.org.au](mailto:sydney@bca.org.au)  
Web: [www.bca.org.au](http://www.bca.org.au)
- **Physical Disability Council of NSW**  
3/184 Glebe Point Road, Glebe NSW 2037  
Ph: (02) 9552 1606  
Freecall: 1800 688 831  
Email: [admin@pdcnsw.org.au](mailto:admin@pdcnsw.org.au)  
Web: [www.pdcnsw.org.au](http://www.pdcnsw.org.au)
- **Spinal Cord Injuries Australia Ltd**  
1 Jennifer Street  
Little Bay NSW 2036  
PO Box 397, Matraville NSW 2036  
Ph: (02) 9661 8855  
Freecall: 1800 819 775  
Email: [info@scia.org.au](mailto:info@scia.org.au)  
Web: [scia.org.au/](http://scia.org.au/)

- **Northcott Disability Services**  
1 Fennell Street North Parramatta NSW 2151  
Freecall: 1800 190 635  
Email: northcott@northcott.com.au  
Web: www.northcott.com.au
- **Paraplegic and Quadraplegic Assoc of NSW (ParaQuad NSW)**  
6 Holker Street Newington NSW 2127  
Ph: (02) 8741 5600  
Fax: (02) 8741 5650  
Web: www.paraquad.org.au
- **Multiple Sclerosis Limited (MS)**  
Level 26 Northpoint  
100 Miller Street  
North Sydney NSW 2060  
Tel: 1800 042 138  
Email: msconnect@ms.org.au  
Web: www.ms.org.au
- **ACON (AIDS Council of NSW)**  
414 Elizabeth Street  
Sydney NSW 2010  
Ph: (02) 9206 2000  
Fax: (02) 9206 2134  
Freecall: 1800 063 060  
Email: acon@acon.org.au  
Web: www.acon.org.au
- **HIV/AIDS Legal Centre Inc (NSW)**  
414 Elizabeth Street  
Surry Hills NSW 2010  
Tel: (02) 9206 2060  
Fax: (02) 9206 2053  
Web: halc.org.au
- **Australian Federation of AIDS Organisations (AFAO)**  
Level 1, 222 King St (Sydney office)  
Newtown NSW 2042  
Tel: (02) 9557 9399  
Web: www.afao.org.au

- **Joint United Nations Programme on HIV/AIDS (UNAIDS)**  
20, Avenue Appia  
CH-1211 Geneva 27  
Switzerland  
Tel: +41 22 791 36 66  
Fax: +41 22 791 4187  
Email: [aidsinfo@unaids.org](mailto:aidsinfo@unaids.org)  
Web: [www.unaids.org](http://www.unaids.org)
  
- **The Kirby Institute**  
Level 6, High Street, Wallace Wurth Building  
UNSW Australia  
Kensington NSW 2052  
Telephone: (02) 9385 0900  
Fax: (02) 9385 0920  
Email: [recpt@kirby.unsw.edu.au](mailto:recpt@kirby.unsw.edu.au)  
Web: <http://kirby.unsw.edu.au/>

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## 5.6 Further reading

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## 5.7 Your comments

We welcome your feedback on how we could improve the Bench Book.

We would be particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific sections of other Bench Books, discussion or research material.

Section 11 contains information about how to send us your feedback.

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# Children and young people

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## 6.1 Some information

### 6.1.1 Definitions<sup>1</sup>

Legally, a “child” is generally defined as a person who is under the age of 18 years.<sup>2</sup> The *Children (Criminal Proceedings) Act* 1987 (NSW) (s 3), the *Bail Act* 2013 (NSW) (s 4), the *Young Offenders Act* 1997 (NSW) (s 4),<sup>3</sup> the *Children (Community Service Orders) Act* 1987 (s 3) and the *Children (Detention Centres) Act* 1987 (s 3) all define a child as under the age of 18 years.<sup>4</sup> However, for the purposes of the *Children and Young Persons (Care and Protection) Act* 1998 (NSW) (s 3) a distinction is made between a “child” — a person under 16<sup>5</sup> and a “young person” — a person who is aged 16 or 17. For the purposes of the *Crimes (Domestic and Personal Violence) Act* 2007 (NSW), a “child” is defined in s 3 as under the age of 16 years.

Other Acts make special provision for young people up to the age of 21. For example, under s 19 of the *Children (Criminal Proceedings) Act*, a young person who is under 21 when charged before the court with an indictable offence but who was under 18 at the time of the offence, subject to some exceptions, may be sentenced to serve any term of imprisonment in a juvenile detention facility rather than an adult gaol.

Similarly, the scheme under the *Young Offenders Act*, which provides an alternative process to court proceedings through the use of youth justice conferences, cautions and warnings, is available to a young person under the age of 21 years when dealt with, provided he or she was a child at the time of the offence.<sup>6</sup>

Because “child” is not a descriptor that is generally acceptable to older children, the term “children and young people” or “child and young person” is used below to include anyone under 18 — unless otherwise stated.

### 6.1.2 The capacities of children and young people

Children and young people face particular difficulties in our adversarial system — whether appearing as witnesses or as alleged offenders largely because of a

1 RJR Levesque, “Childhood as a legal status” in GB Melton et al (eds), *The Sage handbook of child research*, Sage Publishing, 2014, p 38.

2 This is in line with the definition of a child as a person under the age of 18 in the United Nations Convention on the Rights of the Child, which Australia ratified in 1990 — unless national laws recognise the age of majority earlier.

3 Which defines “child” as “a person who is of or over the age of 10 years [age of criminal responsibility] and under the age of 18 years”.

4 Under the uniform evidence legislation, “child” is defined as “a child of any age”. For example, the *Evidence Act* 1995 (NSW), s 3, Dictionary, Pt 1.

5 Except for the purposes of Ch 13 (children’s employment).

6 *Young Offenders Act* 1997 (NSW), s 7A.

mismatch between their capacities and the adult-oriented court environment and processes.<sup>7</sup> If these difficulties are not taken into account, the evidence that the court obtains from them may be of poorer quality and less complete.<sup>8</sup>

**The main points to note about the capacities of children and young people in relation to court appearances are that:**

- Children and young people are not adults, and depending on their age and development:<sup>9</sup>
- their ability to understand language, concepts, the meaning behind events and court processes differs from that of adults.<sup>10</sup>
- their ability to communicate their evidence is generally different from that of adults because of:
  - differences in the way they understand the world, especially time, context, and causality
  - differences in what aspects of past events they remember and how they recall and report them<sup>11</sup>
  - their greater dependence on context for comprehending language and concepts
  - their less developed capacity to sequence events and report them in order

7 D Kenny, “The adolescent brain: implications for understanding young offenders” (2016) 28 *Judicial Officers Bulletin* 23; P Johnstone, “Criminal matters — the grey matter between right and wrong: neurobiology and young offending” paper presented at Children’s Legal Service Conference, 11 October 2014, Sydney, published in Judicial Commission of NSW, *Children’s Court Handbook* at [5-0140]; see also “Piaget’s stages of cognitive development” at [1-0075] and M Allerton, “Apart from shortness, vegophobia and addiction to technology, how are children different?” at [1-0100].

8 K McWilliams et al, “Children as witnesses” in Melton et al (eds), above n 1, p 285.

9 Center on the Developing Child, “Core concepts in the science of early childhood development”, *Brief*, 2009; ME Lamb, LC Malloy and DJ La Rody, “Setting realistic expectations: developmental characteristics, capacities and limitations” in ME Lamb et al (eds), *Children’s testimony: a handbook of psychological research and forensic practice*, 2nd edn, Wiley-Blackwell, 2011, p 15; N Bala, A Evans and E Bala, “Hearing the voices of children in Canada’s criminal justice system: recognising capacity and facilitating testimony” (2010) 22(1) *Child and Family Law Quarterly* 21; K Richards, “What makes juvenile offenders different from adult offenders”, *Trends & Issues in crime and criminal justice*, No 409, Australian Institute of Criminology (AIC), February 2011; Judicial Commission of NSW, *Children’s Court of NSW Handbook*, 2013–.

10 DJ Miller et al, “Prolonged myelination in human neocortical evolution” (2012) 109(41) *Proceedings of the National Academy of Science USA* 16480; BC Partridge, “The mature minor: some critical psychological reflections on the empirical bases” (2013) 38(3) *Journal of Medicine and Philosophy* 283.

11 For a useful discussion about children’s memory, see DJ La Rooy, LC Malloy and ME Lamb, “The development of memory in childhood” in ME Lamb et al (eds), *Children’s testimony: a handbook of psychological research and forensic practice*, 2nd edn, Wiley-Blackwell, 2011; P Bauer and R Fivush, *The Wiley handbook on the development of children’s memory*, Wiley, 2013, Vol 2; G Monahan and L Young (eds), *Children and the law in Australia*, Lexis Nexis, 2008; ME Pipe et al, “Recent research on children’s testimony about experiences and witnessed events” (2004) 24 *Developmental Review* 440. See also Law Society of NSW, *Representation Principles for Children’s Lawyers*, 4th edn, 2014.

- differences in their understanding of vocabulary and grammar, especially personal pronouns and referents (for example, “here”, “there”, “how” and “then”)
  - their shorter attention span especially under stress
  - the fact that by the time they appear in court their developmental age (or stage of development) may have altered substantially (which will affect how they present their evidence and how they are viewed by those in court)
  - their relative lack of power in an adult world. For example, a child may be subject to implied or express family or peer pressure to give or not to give evidence.<sup>12</sup>
- Children’s and young people’s comprehension and communication abilities can vary considerably, even among children of the same age, depending on their background and experiences.
  - Children’s and young people’s ability to give cogent evidence is significantly affected by stress and anxiety, and by the way they are treated in court.
  - Adolescents may have more difficulty dealing with the emotional impact of court proceedings than younger children, especially in relation to child sexual assault allegations. They may also have more negative attitudes to the legal system as a result of testifying before, especially if they have had to do so more than once.<sup>13</sup>
  - Children and young people facing criminal charges are likely to have significant difficulties in presenting their evidence adequately — because many come from disadvantaged socio-economic and educational backgrounds and a significant proportion have intellectual, physical and mental health problems. They may also have experienced physical and emotional abuse and

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12 Department of Attorney General WA, *Equality Before the Law Bench Book*, Children and young people”, at [5.2.2].

13 JA Quas et al, “Childhood sexual assault victims: long-term outcomes after testifying in criminal court” (2005) 70(2) *Monographs of the Society for Research in Child Development* 1.

neglect, or sexual abuse. In addition, some will have come to the attention of the police because of homelessness, or because they are working as prostitutes to pay for their drug and/or alcohol addiction.<sup>14</sup>

See “Fetal alcohol spectrum disorders” in Section 5, **People with disabilities** at 5.2.2.8.

### 6.1.3 Examples of difficulties experienced by children and young people when appearing before court<sup>15</sup>

There is a considerable body of research both in Australia and overseas demonstrating the difficulties faced by children and young people in giving evidence.<sup>16</sup>

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- 14 See, for example, M Marien, “Cross-over kids — childhood and adolescent abuse and neglect and juvenile offending” (2012) 11(1) *TJR* 97; K Richards, “Children’s exposure to domestic violence in Australia”, *Trends and Issues in crime and criminal justice*, No 409, AIC, June 2011; P Murphy et al, *A strategic review of the NSW juvenile justice system, Report for the Minister for Juvenile Justice*, Noetic Solutions Pty Ltd, Manuka, 2010; J Cashmore, “The link between child maltreatment and adolescent offending: systems neglect of adolescents” (2011) 89 *Family Matters* 31; K McFarlane, “From care to custody: young women in out-of-home care in the criminal justice system” (2010) 22(2) *CICJ* 345; J Delima and G Vimpani, “The neurobiological effects of childhood maltreatment: an often overlooked narrative related to the long-term effects of early childhood trauma?” (2011) 89 *Family Matters* 42; Center on the Developing Child, “The science of neglect, *InBrief*, 2013; M Allerton, “Young people in NSW juvenile justice custody” (2004) 16(7) *JOB* 49; A Stewart, S Dennison and E Waterson, “Pathways from child maltreatment to juvenile offending”, *Trends & issues in crime and criminal justice*, No 241, AIC, 2002; D Indig et al, 2009 NSW young people in custody health survey: full report, Justice Health and Juvenile Justice, Sydney, 2011.
- 15 The information in this Section is drawn from the following main sources — J Cashmore, “Child sexual assault in court”, presentation to the Local Courts Conference, September 2005, Sydney; J Cashmore and L Trimboli, *An evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot*, NSW Bureau of Crime Statistics and Research (BOCSAR), 2005; HL Westcott and M Page, “Cross-examination, sexual abuse and child witness identity” (2002) 11(3) *Child Abuse Review* 133 at 137–152; Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, Ch 13; Australian Law Reform Commission (ALRC) and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, (ALRC) Report No 84, 1997; Quas et al, above n 13; and GS Goodman et al, “Testifying in criminal court: emotional effects on child sexual assault victims” (1992) 57(5) *Monographs of the Society for Research in Child Development* 1. See also Judicial College (UK) *Bench checklist: young witness cases*, 2012; Permanent Judicial Commission on Justice for Children, New York State, *Tools for engaging children in their court proceedings, a guide for judges, advocates and child welfare professionals*, 2008.
- 16 See for example Lamb et al, above n 11; and Quas et al, above n 13, J Cashmore “Child witnesses: the judicial role” (2007) 8(2) *TJR* 281; L Sas, “The interaction between children’s developmental capabilities and the courtroom environment: the impact on testimonial competency” Research Report, November 2002, Department of Justice, Canada, also published in the Judicial Commission of NSW, *Sexual Assault Trials Handbook*, 2007–, at [7-460].

**The main difficulties which can jeopardise the reliability and comprehensiveness of their evidence include:**

- **Long delays in getting to court** — delays exacerbate children’s and young people’s stress and adversely affect their memory of events.
- **Long waits at court** — often in an environment that is not child or young-person friendly, resulting in increased stress, boredom, tiredness and restlessness. These delays are often due to preliminary legal argument, equipment failures and court schedules.
- **Formal and intimidating court environment and procedures that take little or insufficient account of a child’s or young person’s needs** — including their need for breaks to allow them to rest, go to the toilet or get a drink.
- **Having to confront the accused** — even when children and young people use CCTV or video link, they sometimes come face to face with the accused or his or her supporters in the court precincts, causing distress and intimidation.
- **Having to repeat their story over and over again** — frustration and incomprehension about why they need to keep doing this increases their stress and decreases their willingness to answer questions. Some children may have told their story many times before they get to court.
- **Incomprehensible processes and procedures** — for example, they may not understand what the court is trying to do, why they have to answer the same questions again (questions they may have already answered many times before they got to the court), what can and cannot be said in evidence, the importance of intent and what bail means.
- **Complex language** — this may cause children and young people to respond with many more “I don’t know”, silences, or to present confused or contradictory evidence.<sup>17</sup>
- **Confrontational questioning** — if children and young people are intimidated, they may “shut down” and become unable to respond, or become distressed and break down.
- **The presence or absence of their parent(s) or guardian(s)** — while some children will be helped by having their parent(s) or guardian(s) present, others will feel inhibited by their presence.

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<sup>17</sup> R Zajac, S O’Neill, H Hayne, “Disorder in the courtroom? Child witnesses under cross-examination” (2012) 32 *Developmental Review* 181.

#### 6.1.4 The impact of these difficulties

**Many of the difficulties listed in 6.1.3 can be substantially mitigated if appropriate measures are taken by the court to be sensitive and responsive to the needs of children and young people.**

**If appropriate measures are not taken, it is likely that children, young people and their parents or guardians will:**

- Not feel safe or secure enough to testify to the best of their abilities.
- Not understand the court’s needs or questions to enable them to give their evidence adequately.
- Feel that they have been treated unfairly or an injustice has occurred.
- In some cases be treated unfairly and/or unjustly.

**These problems are likely to be compounded if the child or young person also happens to be Aboriginal, from a culturally and linguistically diverse background, female, lesbian, gay or bisexual, sex or gender diverse, is a child or young person with a disability, or if they practise a particular religion or are representing themselves — see the relevant other Section(s) on these groups in the Bench Book.**

**Section 6.3, below, provides additional information and practical guidance about ways of treating children and young people so as to reduce the likelihood of these problems occurring and help ensure that a just outcome is achieved.**

The boxed areas provide the practical guidance.

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## 6.2 Legal status in relation to court processes

### 6.2.1 Competence to give evidence<sup>18</sup>

Competence is the capacity of a child or young person to function as a witness. The rules for children and young people in relation to their capacity to give evidence are no different from those for adults. Sections 12 and 13(6) of the *Evidence Act 1995* create a statutory presumption of competence to give unsworn or sworn evidence. The presumption is only displaced where the court is satisfied on the balance of probabilities (s 142 of the *Evidence Act*) of the contrary: *The Queen v GW*.<sup>19</sup> The *Evidence Act* does not give primacy to sworn evidence; it is neutral in its treatment of the weight that may be accorded to evidence whether it is sworn or unsworn: *The Queen v GW*.<sup>20</sup>

A child or young person must satisfy the general test of competence to give sworn or unsworn evidence as follows:

- A child or young person is competent to give evidence about a fact unless proven to the contrary that he or she does not have the capacity:
  - (a) to understand a question about the fact, or
  - (b) to give an answer that can be understood to a question about the fact, and that incapacity cannot be overcome.<sup>21</sup>

A child or young person who is not competent to give evidence in relation to one fact nevertheless may be competent to give evidence about other facts.<sup>22</sup> The Australian Law Reform Commission stated that this flexible approach is intended to allow the court to hear evidence from a witness on certain matters but exclude evidence about matters they are not competent to deal with.<sup>23</sup>

- *Sworn evidence*

A child or young person is competent to give *sworn* evidence if they have the capacity to understand that they are under an obligation to give truthful evidence: s 13(3). A question to the child: “Do you know why it’s important to tell the truth?” by itself was held to be insufficient in *MK v R*<sup>24</sup> to ascertain the child complainant’s understanding of the test in s 13(3). The court held in *MK v R* that some further testing of the child witness’ understanding of the

18 TD Lyon, “Assessing the competency of child witnesses: best practice informed by psychology and law” in ME Lamb et al (eds), above, n 11; R Marchant, “How young is too young? The evidence of children under five in the criminal justice system” (2013) 22(6) *Child Abuse Review* 432.

19 (2016) 90 ALJR 407 at [14].

20 (2016) 90 ALJR 407 at [46].

21 *Evidence Act 1995*, s 13(1).

22 Section 13(2); *RJ v R* (2010) 208 A Crim R 174 at [18].

23 ALRC, *Uniform evidence law*, ALRC Report 102, 2005 at [4.73].

24 [2014] NSWCCA 274 at [69].

obligation to give truthful evidence should have been carried out by the use of simple and concrete terminology, such as that described in *R v RAG*.<sup>25</sup> It is necessary to be satisfied that a child does not have the requisite capacity under s 13(3) to give sworn evidence before instructing the child pursuant to s 13(5) and admitting evidence as unsworn.<sup>26</sup>

■ *Unsworn evidence*

A child is presumed competent to give *unsworn* evidence about a fact if the court has told the child:

- (a) that it is important to tell the truth, and
- (b) that the child may be asked questions that he or she does not know, or cannot remember, the answer to, and that the child should tell the court if this occurs, and
- (c) that the child may be asked questions that suggest certain statements are true or untrue and that the child should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that the child believes are untrue.<sup>27</sup>

The above may be too difficult for a child if it is merely paraphrased, and could be simply rephrased as follows:

- (a) “It is important to tell the truth.”
- (b) (i) “If you are asked a question and you don’t know the answer then you should say ‘I don’t know’.”
- (ii) “If you are asked a question and you can’t remember the answer then you should say ‘I can’t remember’.”
- (iii) “It does not matter if you do not know an answer or cannot remember something. The important thing is that you tell the truth.” and
- (c) “If someone asks you a question that you don’t agree with, you can say you don’t agree with it because it is not true.”<sup>28</sup>

The court need not direct the prospective witness in a particular form but must give effect to the terms of s 13(5)(a)–(c).<sup>29</sup> Where a witness is a young child, there

25 [2006] NSWCCA 343 at [26].

26 *The Queen v GW* (2016) 90 ALJR 407 at [28].

27 Section 13(5).

28 Based on J Cashmore, Judicial Commission of NSW, “Managing child witnesses”, Local Court of NSW Magistrates’ Orientation Program, June 2009, Sydney.

29 *SH v R* (2012) 83 NSWLR 258 at [22].

is no requirement to direct the jury to take into account the differences between sworn and unsworn evidence in assessing the reliability of unsworn evidence.<sup>30</sup> It is up to the court to determine the weight to be given to unsworn evidence.<sup>31</sup>

For more on this, see the *Criminal Trial Courts Bench Book*<sup>32</sup> and 6.3.2 below.

### 6.2.2 Criminal responsibility

The law conclusively presumes that a child under 10 years cannot be guilty of an offence.<sup>33</sup> For those aged between 10 and 14, the prosecution must rebut the common law presumption of “doli incapax” or criminal incapacity and prove beyond reasonable doubt that the child or young person understood that what they were doing was wrong.<sup>34</sup>

For those aged 10 years or more at the time the crime was allegedly committed, the court must have regard to the principle that “children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance”.<sup>35</sup>

### 6.2.3 Compellability

The rules about compellability in relation to a child or young person giving evidence in criminal proceedings about a parent who is a defendant are the same as those for compellability between spouses or de facto partners.<sup>36</sup>

Under the *Children and Young Persons (Care and Protection) Act 1998*, s 96(3) a child or young person is not required to give evidence in the Children’s Court.<sup>37</sup>

### 6.2.4 Requirement to obtain the views of children and young people

Whenever the outcome of a matter will have an impact on a particular child or young person or their interests, it is important to try to obtain the views of that child or young person. It is also required by law in various proceedings and available in criminal proceedings to child victims by way of a victim impact

30 *The Queen v GW* (2016) 90 ALJR 407 at [56].

31 ALRC Report 102, above n 23, at [4.60].

32 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2002—, Sydney, under “Trial Procedure — Child witness/accused” at [1–100]ff.

33 *Children (Criminal Proceedings) Act 1987* (NSW), s 5; *Crimes Act 1914* (Cth), s 4M; Criminal Code (Cth), s 7.1.

34 For proceedings involving Commonwealth offences by children this presumption is codified. See *Crimes Act 1914* (Cth), s 4N; Criminal Code (Cth), s 7.2.

35 *Children (Criminal Proceedings) Act 1987*, s 6(b).

36 *Evidence Act 1995* (NSW), s 18.

37 Although s 96(4) of the *Children and Young Persons (Care and Protection) Act 1998* provides that the Children’s Court may require a parent of the child or young person who is the subject of the proceedings who is himself or herself a child or young person to give evidence in the Children’s Court. See also Children’s Court Rule 2000, r 26.

statement.<sup>38</sup> Both the *Crimes (Sentencing Procedure) Act 1999* and the common law require a sentencing court to have regard to the effect of the crime on a victim.<sup>39</sup> Article 12 of the UN Convention on the Rights of the Child requires that children or young people who are capable of forming their own views have the right to express those views freely in all matters affecting them, and that they must be provided with the opportunity to be heard in any judicial and administrative proceedings affecting them, either directly, or through a representative.

**In criminal matters**, where a child or young person is the defendant, s 6(a) of the *Children (Criminal Proceedings) Act 1987* (NSW) reflects this principle in stating that “children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them”.

**In care and protection matters**, s 10(1) and (2) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) reflects this principle even more cogently:

- (1) To ensure that a child or young person is able to participate in decisions made under or pursuant to this Act that have a significant impact on his or her life, the Secretary is responsible for providing the child or young person with the following:
  - (a) adequate information, in a manner and language that he or she can understand, concerning the decisions to be made, the reasons for the Department’s intervention, the ways in which the child or young person can participate in decision-making and any relevant complaint mechanisms,
  - (b) the opportunity to express his or her views freely, according to his or her abilities,
  - (c) any assistance that is necessary for the child or young person to express those views,
  - (d) information as to how his or her views will be recorded and taken into account,
  - (e) information about the outcome of any decision concerning the child or young person and a full explanation of the reasons for the decision,
  - (f) an opportunity to respond to a decision made under this Act concerning the child or young person.
- (2) In the application of this principle, due regard must be had to the age and developmental capacity of the child or young person.

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38 *Crimes (Sentencing Procedure) Act 1999*, Div 2, Pt 3 and *Children (Criminal Proceedings) Act 1987*, s 33C(2) provide for victim impact statements in criminal proceedings.

39 *Porter v R* [2008] NSWCCA 145 at [54]; *Siganto v The Queen* (1998) 194 CLR 656 at [29]; *Crimes Sentencing Procedure Act 1999*, ss 3A(g) and Pt 3, Div 2 (victim impact statements).

For more information about what needs to be taken into account and the procedures to be followed in relation to care proceedings — see the *Local Courts Bench Book* — under “Children’s Court — Care and Protection Jurisdiction”.<sup>40</sup>

[The next page is 6301]

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40 Judicial Commission of NSW, *Local Courts Bench Book*, 1988, under “Children’s Court — care and protection jurisdiction” at [47-000]ff; Judicial Commission of NSW, *Children’s Court of NSW Resource Handbook*, 2013–, under “Care and protection matters — practice and procedure”, at [2-0100]ff.



## 6.3 Practical considerations<sup>41</sup>

### 6.3.1 Minimise delays

It is important to try to keep any delays in cases involving a child or young person (as either a witness or alleged offender) to a minimum — so as to reduce the stress on the child or young person and enhance the chances of obtaining the best possible evidence.

In child protection proceedings, it is important to minimise unnecessary adjournments and delays to provide speedy resolution of a child's status, as far as possible.

**There are some delays that will not be within your capacity to minimise. But there are some you may be able to minimise.**

**Points to consider:**

- ▣ Use an effective case management system involving pre-trial procedures and hearings to help minimise the need for pleas and rulings during the trial itself.<sup>42</sup>
- ▣ Determine the procedures for children and young people giving their evidence as part of the pre-trial case management process — see 6.3.3 below. Ensure that any requirements for CCTV and other special measures are noted early and booked in time.
- ▣ Weigh up any requests for adjournments against the fact that any adjournment is likely to have an adverse effect on the child's or young person's ability to give evidence.
- ▣ Keep any adjournments granted to the minimum time period possible.
- ▣ Take into account any travel and accommodation requirements for children and young people and their families to travel to the court, as well as any major events in the child's or young person's life, for example, HSC examinations, holidays, significant sporting or cultural events.

41 See also Department of AG (WA), *Equality before the Law Bench Book*, 2009; Judicial College (England and Wales), *Equal Treatment Bench Book*, 2013, Ch 5, "Children and vulnerable adults"; Judicial College (England and Wales), *Bench Checklist: Young Witness Cases*, 2012.

42 Note that s 56 of the *Civil Procedure Act 2005* requires that the court manage proceedings in conformity with the overriding purpose set out in that section and in accordance with the objects set out in s 57. In deciding whether to make an order or direction for the management of proceedings, the court must seek to act in accordance with the dictates of justice: s 58. For further information about effective case management practices in relation to children and young persons, see R Ellis, "Judicial Activism in Child Sexual Assault Cases", *Sexual Assault Trials Handbook*, Judicial Commission of NSW, 2007–, at [7-120].

- Ensure that an appropriate support person is available in accordance with the child's or young person's wishes (even where CCTV is being used — see 6.3.3.2 below).
- Ensure that a child or young person is not kept waiting for long periods at court before they give their evidence — this is particularly important if the court does not have a separate waiting space for children and young people that is specially designed to be child/young person-friendly (that is, with suitable distractions, appropriate décor and a support person or people present).

### 6.3.2 Oaths, affirmations and declarations

Children and young people who are competent to give evidence can be sworn in if they understand that in giving evidence they are under an obligation to tell the truth.<sup>43</sup> Whether a child or young person takes an oath or an affirmation and the type of oath or affirmation they should take will largely depend on their religious affiliation or lack of religious affiliation — see 4.4.2.

Most children and young people will be able to give unsworn evidence if they do not give sworn evidence. Competence to give unsworn evidence is presumed unless proven to the contrary that the child or young person does not have the capacity to understand a question about a fact or to give an answer that can be understood to a question about a fact.<sup>44</sup> A child or young person who is incapable of giving evidence in relation to one fact may nevertheless be competent to give evidence about other facts. The court must tell the child or young person giving unsworn evidence the specific matters listed in s 13(5) *Evidence Act* (see above at 6.2.1) including that it is important to tell the truth.

<sup>43</sup> *Evidence Act*, s 13(3). Note, for proceedings commenced prior to 1 January 2009, the former version of s 13 applies to child witnesses. Note, a child may not understand the meaning of the word “obligation” but understands what it means in effect. Some further testing of the child witness' understanding of the obligation to give truthful evidence may need to be conducted by the use of simple and concrete terminology: *MK v R* [2014] NSWCCA 274 at [69], applying *R v RAG* [2006] NSWCCA 343 at [25]–[27], [43]–[45].

<sup>44</sup> *Evidence Act* 1995, s 13(1).

**Research shows that in general:**<sup>45</sup>

Children as young as 4 or 5 recognise deliberately false statements as lies.

Children up to the age of 11 or so tend to be more stringent than adults in their assessment of what constitutes a lie — for example, they may describe incorrect guesses and exaggerations as lies.

Children often expect to be found out if they lie and to be punished for doing so. They know that it is generally hard for them to look innocent when they are lying. (In fact, adults are better at telling whether a child is lying than at telling whether an adult is lying.) Young children may also have a greatly exaggerated view of what will happen to them if they lie in court, believing that they will go to gaol if they lie in court.

One of the main reasons why children and young people lie is to avoid trouble, rather than to create it — for example, they may have been pressured by the alleged offender to keep a secret, or they may want to protect someone they love or to avoid shame, embarrassment or guilt about, for example, something sexual.

It is hard for a child to explain the conceptual difference between the truth and a lie (in fact, it is hard for some adults to do this too) — so, asking them to do this will not generally help the court to be satisfied that they understand the difference.

**Given the above information, and in line with the relevant court Bench Book, you may need to:**

▣ **Assess the particular child or young person’s capacity to understand a question and give an answer that can be understood.**

Try to put the child or young person at ease and settle them into the question-answer mode with a few simple (see 6.3.4.1) questions about their favourite pastimes, one at a time, from the bench, until satisfied about their competence to give evidence. You might ask the following questions:

- “How old are you?”
- “When is your birthday?”
- “What class are you in?”

<sup>45</sup> See J Cashmore, “Child Witnesses” in G Monahan and L Young, *Children and the law in Australia*, Lexis Nexis, Sydney, 2008, and the articles cited therein. See also J Cashmore, “Child witnesses: the judicial role” (2007) 8(2) *TJR* 281 and other articles in the Judicial Commission of NSW, *Sexual Assault Trials Handbook*, 2007—; and J Cashmore and P Parkinson, “The competency of children to give evidence” (1991) 3(1) *JOB* 1. See also the Australasian Institute of Judicial Administration Inc (AIJA), *Bench Book for Children Giving Evidence in Australian Courts*, 2009, (updated September 2012 and February 2015), at [2.10.1]–[2.10.8] and [5.8]–[5.9].

- “What is the name of your teacher?”
- “Do you play any sports?”
- “What sports do you play?”
- “Do you have a favourite TV show?”
- “Do you know you are going to be asked some questions today about something from awhile ago?”<sup>46</sup>
- ▣ **Consider whether any incapacity can be overcome — for example with the use of alternative communication needs or technology.**
- ▣ **Consider whether a witness intermediary may be appointed to assist the parties and the court to communicate and explain questions and answers of child complainants in a trial for a prescribed sexual offence.** The Child Sexual Offence Evidence Pilot operates at the Downing Centre District Court and Newcastle District Court (from 4 April 2016). The Court may appoint a witness intermediary where appropriate either on application of either party or of its own motion in accordance with the provisions of Sch 2, Pt 29, Div 2, cl 89 of the *Criminal Procedure Act* 1989.
- ▣ **Assess a witness’ competence to give sworn evidence** — this will involve assessing whether the child or young person has the capacity to understand that he or she is under an obligation to give truthful evidence.<sup>47</sup> **The child or young person must be able to appreciate the nature of the duty to tell the truth:**<sup>48</sup>
- ▣ **Do NOT ask hypothetical or abstract questions about truth or lies. In particular, do NOT ask whether you, the judicial officer, are telling a lie — for example, “If I said X, would I be telling the truth or a lie?” as this requires the child to say that you, a judicial officer, are lying.**
- ▣ **It may be necessary to ask a few extra questions** as a child or young person may be shy or have misunderstood your question.
  - **Explain in simple terms, the importance of telling the truth** — for example, “It is very important that you tell the truth when you are asked questions by anybody in court today.”

46 J Cashmore, above n 28; Cashmore and Parkinson, above n 45.

47 See *Pease v R* [2009] NSWCCA 136 at [11] and *R v Suarwata* [2008] ACTSC 140 which deal with the need for the court to satisfy itself as to a person’s understanding of the nature of the obligation to tell the truth.

48 ALRC Report 102, above n 23, at [4.38]. See also the questions and answers put by the Crown to the child witness in *R v RAG* [2006] NSWCCA 343 at [22].

- **Finally, ask the child or young person to tell you/the court that they will tell the truth** — for example, you might say “So can you please say to me now ‘I will tell the court what happened. I will not make anything up or leave anything out’.”<sup>49</sup>
- If the child or young person is competent to give sworn evidence, you may need to assess their understanding of the importance of an oath or affirmation — and if they appear to understand, to use the appropriate oath or affirmation (see 4.4.2).
- **You must tell a child or young person who is competent to give unsworn evidence the matters listed in s 13(1) *Evidence Act*.** These matters could be rephrased as follows:
  1. “It is important to tell the truth”
  2. (i) “If you are asked a question and you don’t know the answer then you should say ‘I don’t know.’”
    - (ii) “If you are asked a question and you can’t remember the answer then you should say ‘I can’t remember.’”
    - (iii) “It does not matter if you do not know an answer or cannot remember something. The important thing is that you tell the truth.” and
  3. “If someone asks you a question that you don’t agree with, you can say you don’t agree with it because it is not true.”<sup>50</sup>

### 6.3.3 Alternative ways to obtain a child or young person’s evidence

The *Criminal Procedure Act* 1986, Pt 6, Ch 6, which applies to children and young people under 16 at the time the evidence is given, prescribes alternative ways to obtain a child’s or young person’s evidence. These provisions apply to “vulnerable persons” defined as “a child or cognitively impaired person”: s 306M. These alternative arrangements are intended to make the process less stressful for child witnesses and to improve the quality of their evidence. Audio-taped or video-taped recordings of the investigative interviews preserve verbatim the child’s early report of events after disclosure and increase the accuracy and completeness of the child’s statement and the questions they were asked. They may help also to overcome some of the difficulties associated with the

49 See ALRC Report 102, above n 23, at [4.45] adopting the advice of the Home Office (UK) and others, *Achieving best evidence in criminal proceedings: guidance for vulnerable or intimidated witnesses, including children* (2002), Vol 2, [5.22].

50 J Cashmore, above, n 28.

long delays between complaint and determination. Video-recordings have an additional benefit over audio-recordings by showing how the child presented at that time.

#### 6.3.3.1 Video and/or sound recordings of previous representations <sup>51</sup>

The use of video-technology allows a pre-recorded video-tape or audio-tape of the child's or young person's investigative interview to be presented as all or part of their evidence-in-chief.

This is allowed where the child or young person was under 16 at the time the recording was made. The recording may be admitted no matter what age the child or young person who made the recording is at the time of the hearing.<sup>52</sup>

The child or young person must not be present in, or be visible or audible to the court by closed-circuit television or by means of any similar technology, while the court is viewing or hearing the recording — unless they choose to be so.<sup>53</sup> But if the child or young person is not the accused person, they must be available for cross-examination or re-examination.<sup>54</sup>

The accused party and their legal representative(s) must have been given prior opportunity to view/hear the recording, and, in criminal cases, must have been told of the prosecution's intention to rely on it.<sup>55</sup>

Any such recording must not be used if the court orders that to use it would be contrary to the interests of justice.

The Child Sexual Offence Evidence Pilot Scheme, operating at the District Court, Downing Centre and Newcastle District Court, provides that the evidence (including evidence in cross-examination and re-examination) of a child under 16 who is a complainant in an indictable proceeding in relation to a prescribed sexual offence must be given at a pre-recorded hearing in the absence of the jury (if any) unless there is a contrary court order. Evidence may also be given with respect to a prescribed sexual offence in a pre-recorded evidence hearing by a child under 18. The pilot scheme operates for three years from 31 March 2016. District Court Criminal Practice Note 11 specifies procedures to be followed at the Downing Centre District Court.<sup>56</sup>

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51 *Criminal Procedure Act* 1986, ss 306R–306Z; and see also *Criminal Trial Courts Bench Book*, above n 31, under “1.Trial Procedure — Child Witness/Accused” commencing at [1-100] and [1-362]. For guidelines as to the appropriate procedure where a complainant gives evidence by way of the playing of a pre-recorded interview, see *R v NZ* (2005) 63 NSWLR 628.

52 *Criminal Procedure Act* 1986, s 306U(2).

53 *Criminal Procedure Act* 1986, s 306U(1).

54 *Criminal Procedure Act* 1986, s 306U(3).

55 *Criminal Procedure Act* 1986, s 306V(2); *Criminal Procedure Regulation* 2017, r 17.

56 *Criminal Procedure Act* 1986, Sch 2, Pt 29, cll 81–94 provides for the pilot. See also Judicial Commission, *Sexual Assault Trials Handbook*, at [10-260].

### 6.3.3.2 Closed-circuit television (CCTV) or “live link”<sup>57</sup>

Closed-circuit television (CCTV) or “live link” allows children and young people to testify from a separate room or remote facility away from the courtroom.

A child or young person has a right to give evidence by CCTV in any proceedings related to victims’ compensation, apprehended violence orders, personal assault offences or child protection prohibition orders, where the child or young person was under 16 at the time of the incident(s) or when the charges were laid, although there are some restrictions for accused children in the Children’s Court.<sup>58</sup>

It is up to the child or young person to decide whether they want to give their evidence this way, or in some other way — unless the court orders that to give evidence by CCTV would be contrary to the interests of justice.<sup>59</sup>

The court can order that a court officer, interpreter and/or support person be present with the child or young person — that is, at the location of the CCTV (which may be outside the court building).

If CCTV facilities are not available at the particular court, or a child or young person declines to make use of them — see 6.3.3.3 below.

### 6.3.3.3 Additional arrangements

- **In accordance with s 291 of the *Criminal Procedure Act 1986* (NSW), the court should be closed while the complainant or sexual offence witness in proceedings for prescribed sexual offences matters is giving evidence, whether or not the child complainant or witness is present in the court room or giving evidence via CCTV.**
- **If CCTV facilities are not available at the particular court, the court may adjourn the proceeding to a court that does have CCTV facilities.**<sup>60</sup> If a child or young person declines to give evidence by these means, the court must provide alternative arrangements to restrict the contact (including visual contact) between the child and any other people in the court — unless the

57 *Criminal Procedure Act 1986*, ss 306ZA–306ZI; and see also *Criminal Trial Courts Bench Book*, above n 32, [1-362]ff.

58 *Criminal Procedure Act 1986*, ss 306ZA, 306ZC; and *Criminal Trial Courts Bench Book*, above n 32 at [1-362]. Under ss 306ZB(2), the provisions apply to a child who is 16 or more but less than 18 years of age at the time evidence is given provided the child was under 16 years of age when charged for the personal assault offence. The *Crimes Act 1914* (Cth), Pt IAD, Div 4 (ss 15YI–15YL) apply to children under 18 where the proceedings are for a Commonwealth sexual offence.

59 *Criminal Procedure Act 1986*, s 306ZB(5).

60 *Criminal Procedure Act 1986*, s 306ZF; and see also *Criminal Trial Courts Bench Book*, above, n 32 at [1-362].

child or young person chooses not to have any such arrangements made.<sup>61</sup> Alternative arrangements could include using screens, and/or changing seating arrangements to restrict the line of vision between the child and others.

- **A child or young person is entitled to have a support person of their choice present while they give evidence — irrespective of whether they do or do not use CCTV.**<sup>62</sup> This is generally allowed in any criminal proceeding, and in any proceedings related to sexual offences, victims' compensation, apprehended violence orders, personal assault or care and protection. The support person should be allowed to be near the child/young person and/or within their sight.
- **Note also that a court may make a direction, on its own motion or on the application of a party that called the witness, that the witness give evidence in narrative form** — this may be the best approach for some child or young person witnesses.<sup>63</sup>
- **Witness intermediaries (also called children's champions in the legislation) may be appointed to assist the parties and the court to communicate and explain questions and answers of child complainants** in accordance with the Child Sexual Offence Evidence Pilot. The pilot scheme commenced at the District Court, Downing Centre and Newcastle District Court on 4 April 2016.<sup>64</sup> The pilot scheme will operate for 3 years from 31 March 2016. Witness intermediaries are officers of the court. For more information, see *Sexual Assault Trials Handbook* at [7-250].

#### 6.3.3.4 Managing the manner in which a child or young person gives evidence

##### Points to consider:

- **Ensure that all of the alternative options listed above at 6.3.3.1 to 6.3.3.3 (and the fact that they are not mutually exclusive) have been properly and fully explored by the appropriate legal representative with the particular child or young person.**
- **Ensure that if the child or young person elects to give all or any of their evidence in court, the alternative options of screens and seating changes have also been fully explored by the appropriate legal representative with the particular child or young person.**
- **Similarly, ensure that any child or young person who appears to be electing to give their evidence in court is spoken to by**

61 *Criminal Procedure Act* 1986, s 306ZH.

62 *Criminal Procedure Act* 1986, ss 294C(1); 306ZK(2); *Children and Young Persons (Care and Protection) Act* 1998, s 102; and see also *Criminal Trial Courts Bench Book*, above, n 32 at [1–368].

63 *Evidence Act* 1995 (NSW), s 29(2).

64 *Criminal Procedure Act* 1986, Sch 2, Pt 29, cll 81-94 provides for the pilot.

**the appropriate legal representative and understands the possible difficulties they may face in doing so.** If any such child or young person becomes distressed doing this, the alternative options may need to be explored with them again.

- **Ensure that where CCTV is being used, it is used in a way that is as effective as possible** — follow the guidance in the NSW Attorney General’s Department of NSW’s publication *Remote Witness Video Facilities Operational Guidelines for Judicial Officers*,<sup>65</sup> and note that there are similar guidelines for sheriff’s/court officers attending the witness room, support persons attending the witness room, and legal representatives, as well as a system setup checklist.
- Note also that the actual location of the remote witness room must remain confidential for the protection of the child or young person.
- **Ensure that any jury is properly warned about how to evaluate any evidence presented non-directly** — in line with the appropriate legislative jury warning provisions — see ss 306X and 306ZI of the *Criminal Procedure Act 1986*. Note that jurors are informed by the court about the reasons for using CCTV, videotaped investigative interviews and pre-recorded evidence.<sup>66</sup>

#### 6.3.4 Language and communication

Procedural fairness and the integrity of the court process demand that all witnesses understand what is going on, and the meaning of any questions they are asked. They also need to know that their evidence and responses to questions need to be understood by the court.

The level and style of language, any explanations about what is going on, and any cross-examination must be appropriate to the developmental age and understanding of the particular child or young person. It is easy for those who are familiar with the court and the language used there to underestimate how intimidating a court can be for those who are unfamiliar with its language and procedures. The Children’s Court of NSW has developed a quick reference guide to help court staff communicate with children in the criminal jurisdiction. The guide gives examples of alternate definitions/explanations which may be used when explaining complex legal terms to children.<sup>67</sup>

<sup>65</sup> These are reproduced in the *Criminal Trial Courts Bench Book*, above n 32, at [10-670].

<sup>66</sup> See also *Criminal Trial Courts Bench Book*, above, n 32 at [1-366].

<sup>67</sup> NSW Courts and Tribunal Services, “Explaining legal terms to children: quick reference guide”, accessed 29 June 2016.

#### 6.3.4.1 Explain court proceedings and processes adequately

Several pieces of legislation specifically require you to explain court proceedings and processes to ensure that the child understands the proceedings.<sup>68</sup> It also makes sense to do so to ensure that the court can get the best possible evidence from the child or young person.

##### **Points to consider — you may need to:**

- ▣ **Explain how everyone in the court tries to be as fair as possible to them and everyone else involved.**
- ▣ **Explain what the court needs from them and why** — at the start of each different step they are involved in.
- ▣ **Explain what is meant by such things as bail, statement, affidavit, evidence, cross-examination, intent, not incriminating themselves, appeal** — as they are mentioned.
- ▣ **Give them permission to ask questions when they are unsure or confused. Explicit, age-appropriate actions should be taken to ensure children and young people feel confident it is safe to ask any question they want regarding the process. For example, you could say: “Please feel free to ask any question you wish and I will do my best to answer this. You will not get into trouble, no matter what question you ask.”**
- ▣ **Allow extra time for their legal representative to explain proceedings to them.**
- ▣ **Do all this using simple and direct language** — as outlined in 6.3.4.2 below. See also the Appendix to this section for a recommended script for use in hearings with child witnesses.

<sup>68</sup> See for example, *Children (Criminal Proceedings) Act 1987* (NSW), s 12; *Children and Young Persons (Care and Protection) Act 1998* (NSW), ss 10, 95; see also *Criminal Trial Courts Bench Book*, above n 32 at [1–180].

### 6.3.4.2 Level and style of language

**Use language that is as simple and direct as possible.<sup>69</sup> For example:**

- **Use the words or phrases the child or young person is likely to have learned first** — for example “**about**”, not “regarding” or “concerning”; “**start**”, not “commence”; “**go**”, not “proceed”; “**to**”, not “towards”.
- **Avoid words and phrases which beg agreement** — for example, “It’s true, isn’t it?” and “Is that not true?”.
- **Avoid jargon** — for example, “I put it to you that ...”. Children may not even recognise that this is a question, and may be non-responsive.
- **Avoid terms such as “my friend” and “argument”** which have a particular meaning in legal terminology that is easily misconstrued by children and young people.
- **Use active, not passive speech (subject, verb and then object, not object, verb then subject)** — for example, “The dog bit you”, not “You were bitten by the dog”.
- **Use short sentences, and if asking questions, ask only one at a time.**
- **Avoid “double negatives”. Use single negatives instead** — for example, “**Did he tell you not to do this?**”, not “Didn’t he tell you not to do this?”.
- **Use simple verb tenses** — the simplest, most definite or concrete verb tense possible with as few extra words as possible — for example, “**you say**”, not “you are saying”, “**she had**”, not “she had had”.
- **Avoid hypothetical questions, be direct instead** — “**Do you want a break?**”, not “If you think that you might like a break, let me know”.
- **Use concrete, not abstract, concepts.**
- **Use legal jargon only when necessary**, and if you do need to use it, explain it in simple English. For example, no Latin words or phrases; prefer words and phrases like “**law**”, not “statute” or “legislation”; or “**X**

<sup>69</sup> See A G Walker, J Kenniston, S Inada & C Caldwell, *Handbook on questioning children: a linguistic perspective*, 3rd edn, American Bar Association, 2014.

**will now ask you some questions**", not "X will now cross-examine you"; or **"what you can tell us about ..."**, not "your evidence"; or **"against"**, not "versus".

- **But do not "talk down" to a child or young person** — try to use a language style that's appropriate to the particular child's or young person's developmental age.

### 6.3.5 Cross-examination<sup>70</sup>

Cross-examination is generally seen by children and young people as the hardest part of the court process. It is often conducted using complex language and leading questions and in a style which is confronting and intimidating. Children and young people find it very distressing to have their motives misconstrued and to be accused of lying.

While it is important that a child's or young person's evidence is properly tested, it is also important that over-zealous cross-examination does not intimidate the witness "into silence, lead to contradictions in their responses and produce emotional disorganization and distress".<sup>71</sup> Research has consistently shown that many of the strategies which lawyers use to cross-examine children are

70 P Bowden, T Henning and D Plater, "Balancing fairness to victims, society and defendants in the cross-examination of vulnerable witnesses: an impossible triangulation" [2014] 37(3) *MULR* 539; A Cossins, "Cross-examining the child complainant: rights, innovations and unfounded fears in the Australian context" in JR Spencer and ME Lamb (eds), *Children and cross-examination: time to change the rules?*, Hart Publishing, 2012; A Cossins, "Cross-examination in child sexual assault trials: evidentiary safeguard or opportunity to confuse?" [2009] 33(1) *MULR* 68; R Zajac and P Cannan, "Cross-examination of sexual assault complainants: a developmental comparison" (2009) 16 (Supplement 1) *Psychiatry, Psychology and Law* S36.

71 CA Carter, BL Bottoms and M Levine, "Linguistic, social and emotional influences on the accuracy of children's reports" (1996) 20 *Law and Human Behaviour* 335; L Sas, *The interaction between children's developmental capabilities and the courtroom environment: the impact on testimonial competency*, Research Report (RR02-6e), November 2002, Department of Justice, Canada, also published in the Judicial Commission of NSW, *Sexual Assault Trials Handbook*, at [7-460]. See also S Andrews, M Lamb & T Lyon, "Question types, responsiveness and self-contradictions when prosecutors and defense attorneys question alleged victims of child sexual abuse" (2015) 25 *Applied Cognitive Psychology*, 253; R Zajac, S O'Neill, H Hayne, "Disorder in the courtroom? Child witnesses under cross-examination" (2012) 32 *Developmental Review* 181.

“stress-inducing, developmentally inappropriate, suggestive and evidentially unsafe.”<sup>72</sup> One barrister, for example, described the cross-examination technique he uses with children to intimidate children:

You want them to sweat a bit ... My technique is to ... extend the time for cross-examination ... you're deliberately making it as long as possible ... Tactically you want to put them under as much pressure as possible. I want them to crack.<sup>73</sup>

Research also shows that many children and young people feel that they were unable to get their evidence across in court because of the way they were questioned — because they were confused by the language and the framing of the questions, were cut off or interrupted, and told “just answer the question asked”. Restrictions on the admissibility of some evidence — where, for example, there are other defendants or complainants in separate but related trials — can also mean that children or young people can find it very difficult to answer questions out of their proper context.

Note that where the accused or defendant is not represented by an Australian legal practitioner in criminal proceeding in any court, or a civil proceeding arising from the commission of a personal assault offence, a child witness (other than the accused or the defendant) is to be examined in chief, cross-examined or re-examined by a person appointed by the court instead of by the accused or the defendant.<sup>74</sup>

#### 6.3.5.1 Improper cross-examination<sup>75</sup>

Section 41 of the *Evidence Act 1995* (NSW) provides for the statutory control of improper cross-examination in both civil and criminal proceedings. Section 41 imposes an obligation on the court to disallow a “disallowable question” and is expressed in terms of a statutory duty whether or not objection is taken to a particular question (s 41(5)). The section specifically refers to the need to take account of the witness’s age and level of maturity and understanding (s 41(2)(a)). Sections 26 and 29(1) of the *Evidence Act 1995* also enable you to control the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows you to exclude any evidence that might be misleading or confusing.

A line of cross-examination may be rejected by applying s 41: “Judges play an important role in protecting complainants from unnecessary, inappropriate and irrelevant questioning by or on behalf of an accused. That role is perfectly

72 E Henderson, “Persuading and controlling: the theory of cross-examination in relation to children” in H Westcott, G Davies and R Bull (eds), *Children’s testimony: a handbook of psychological research and forensic practice*, John Wiley & Sons, 2002, p 279.

73 *ibid.*

74 *Criminal Procedure Act 1986*, s 306ZL.

75 See also *Criminal Trial Courts Bench Book*, above n 32 at [1-340].

consistent with the requirements of a fair trial, which requirements do not involve treating the criminal justice system as if it were a forensic game in which every accused is entitled to some kind of sporting chance”.<sup>76</sup>

The careful exercise of s 41 and the proper control of the cross-examination of child witnesses is “a matter which requires careful consideration, and vigilance to intervene when questions are put that are age inappropriate, or overly complex (involving for example double negatives), or unduly offensive or aggressive”.<sup>77</sup>

**Some “ground rules” for cross-examination of children and young people:**

- **Given the particular difficulties faced by children and young people under cross-examination, it may be a good idea to set some specific “ground rules” for cross-examination before it starts, and then to set the tone by intervening when these are breached** — in line with s 41 of the *Evidence Act* 1995 (NSW).<sup>78</sup>
- The ground rules could be, for example, that cross-examination must:
  - Be **developmentally appropriate** for the (developmental) age of the particular child or young person — while it is the duty of the prosecution to be alert to and object to inappropriate questioning, research indicates that the court cannot rely on this to happen.
  - Use **simple and direct language without “talking down” to the child or young person** — see 6.3.4.1.
  - **Be conducted one question at a time, allowing time for the child or young person to answer.**
  - Be conducted **patiently and without interruption, allowing some flexibility about the admissibility of evidence** (for example, hearsay evidence) — as long as this does not unfairly impact on the accused. Interruptions should happen only if they are necessary at that moment for legal or clarification reasons.

76 *R v TA* (2003) 57 NSWLR 444 per Spigelman CJ at [8].

77 Wood CJ at CL, *Child Witnesses -- Best Practice for Courts*, Australasian Institute of Judicial Training, 30 July 2004, District Court of NSW.

78 See P Johnson, “Controlling unreasonable cross-examination” (2009) 21(4) *JOB* 29; *Criminal Trial Courts Bench Book*, above n 26, at [1–340]ff; L Babb, “What does s 41 of the Evidence Act mean to you as a judicial officer”, *Sexual Assault Trials Handbook*, at [7-000]. For proceedings in the Children’s Court, see ss 107(2) (offensive and scandalous questions) and (3) (oppressive or repetitive cross-examination) of the *Children and Young Persons (Care and Protection) Act* 1998. Also under s 107(1), a Children’s Magistrate may examine and cross-examine a witness in any proceedings to such extent as the Children’s Magistrate thinks proper for the purpose of eliciting information relevant to the exercise of the Children’s Court’s powers.

- **Not be intimidating** — for example, no threatening hand or finger movements, no shouting or raised voice, no badgering, mocking, condescending or sarcastic comments.
- **Not be repetitive** — questions that are the same should not be repeated (using the same or different words) unless it is clear that the child or young person has not understood the question, or has given a different answer to that given previously (for example, in their pre-recorded JIRT interview). Children and young people may give a different answer to the same or similar question for several reasons: they may assume that the first answer was wrong or somehow unsatisfactory; they may have focused on a different word in the question, and therefore offer extra information or they may respond differently when they are older if there has been some considerable delay since they gave the earlier evidence.
- **Be respectful and understanding of the developmental and social constraints that might have affected a child or young person’s actions or lack of them** — for example, the child or young person should not be blamed for taking action or not taking action when it was not within their developmental or social capacity to do so.
- Be as **brief** as possible — see also 6.3.6 below.
- **Some signs to watch for are** — evasiveness, an increasing number of “I don’t know”s, silence/stopping answering altogether, hyperventilation, confused answers, trying harder and harder to find an answer they think might be wanted, or complete break down. These signs indicate that the child or young person may be “tuning out” or distressed and that some judicial intervention is necessary. This may include re-phrasing the question yourself, clarifying the answer with the child or young person yourself, asking the lawyer to adjust their language level, or tone or calling a break.

### 6.3.6 Regular breaks

#### Points to consider:

- **Children and young people generally have a shorter attention span than adults, and are likely to find court appearances considerably more stressful than adults do.**
- **While it is critical to minimise delays (see 6.3.1), it is also important to ensure sufficient breaks** — particularly during cross-examination.

- **It is a good idea to specifically tell a child or young person (and their support person) when you intend to take a break, and at the same time state that they can ask for an earlier break if the child or young person wants or needs one.**
- **While some children and young people (or their support person) may ask for a break if specifically given permission to do so, some will not ask.** So it is important to watch for signs of wandering concentration and/or stress and call a break.
- **More and increasingly frequent breaks are likely to be needed during cross-examination because it is more stressful.** A half to one hour of cross-examination is probably the limit for any one period of cross-examination without a break. These periods should be reduced the longer the cross-examination continues, and the younger the child.

### 6.3.7 Jury directions — points to consider

Section 165A of the *Evidence Act 1995* restricts the warning a judge can make to a jury about children’s evidence generally, and about a particular child’s or young person’s evidence, as follows. These provisions expressly prohibit a warning about unreliability “solely on account of the age of the child”:

165A Warnings in relation to children’s evidence:

- (1) A judge in any proceeding in which evidence is given by a child before a jury must not do any of the following:
  - (a) warn the jury, or suggest to the jury, that children as a class are unreliable witnesses,
  - (b) warn the jury, or suggest to the jury, that the evidence of children as a class is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults,
  - (c) give a warning, or suggestion to the jury, about the unreliability of the particular child’s evidence solely on account of the age of the child,
  - (d) in the case of a criminal proceeding—give a general warning to the jury of the danger of convicting on the uncorroborated evidence of a witness who is a child.
- (2) Subsection (1) does not prevent the judge, at the request of a party, from:
  - (a) informing the jury that the evidence of the particular child may be unreliable and the reasons why it may be unreliable, and
  - (b) warning or informing the jury of the need for caution in determining whether to accept the evidence of the particular child and the weight to be given to it.

If the party has satisfied the court that there are circumstances (other than solely the age of the child) particular to the child that affect the reliability of the child's evidence and that warrant the giving of a warning or the information.

- (3) This section does not affect any other power of a judge to give a warning to, or to inform, the jury.

Section 165(6) provides that:

- (6) Subsection (2) does not permit a judge to warn or inform a jury in proceedings before it in which a child gives evidence that the reliability of the child's evidence may be affected by the age of the child. Any such warning or information may be given only in accordance with section 165A(2) and (3).

**As indicated in 6.3, it is important that the jury does not allow any ignorance of children or young persons, or any stereotyped or false assumptions about children or young people or the manner by which a particular child's or young person's evidence was presented to unfairly influence their judgment.**

**This should be done in line with the *Criminal Trial Courts Bench Book*<sup>79</sup> (as appropriate), and you should generally raise any such points with the parties' legal representatives first.**

**You should follow s 165A of the *Evidence Act 1995* — see above.**

**In addition, you may need to:**

- ▣ **Caution the jury against making any false assumptions about children's and young people's evidence generally, or the particular child's or young person's evidence.**
- ▣ **Remind the jury of any directions you made earlier in the proceedings in relation to how they must treat evidence that was presented via a recording, or CCTV — see 6.3.3.**
- ▣ **Draw the jury's attention to any evidence presented in court about the particular child or young person's developmental age and**

<sup>79</sup> *Criminal Trial Courts Bench Book*, above n 32, at [1–135] and [1–140].

capacities, the actual evidence presented by the child or young person, any conflicting evidence presented by others, and how they should relate these matters to the points they need to decide.

### 6.3.8 Sentencing, other decisions and judgment or decision writing — points to consider

Your sentencing, other decision(s) and/or written judgment or decision must be just, individualised and consistent, non-discriminatory and seen to be so by all involved — for example, the child, young person and/or their parent(s) or guardian(s).<sup>80</sup>

Points to consider:

- In order to ensure that any child or young person referred to or specifically affected by your sentencing, other decision(s) and/or written judgment or decision also considers it/them to be fair and non-discriminatory, (and/or their parent or guardian does so), you may need to pay due consideration to (and indeed specifically allude to) some of the points raised in the rest of 6.3 (including the points made in the box in 6.3.7 immediately above) that are relevant to the particular case.
- Whether to allow a victim impact statement to be read out in court.<sup>81</sup>
- In cases involving a child or young person as an alleged offender, in line with the *Children’s (Criminal Proceedings) Act 1987* and relevant Bench Book, consider the various options<sup>82</sup> — for example, whether to:
  - remit to the Children’s Court for sentencing

80 See also Judicial Commission of NSW, *Sentencing Bench Book*, 2006—, at [2–200] and *R v Henry* (1999) 46 NSWLR 346 at [9]–[10].

81 See the *Crimes (Sentencing Procedure) Act 1999* (NSW), Pt 3, Div 2, s 30A; *Crimes (Sentencing Procedure) Regulation 2017* (NSW), cl 10; *Victims Rights and Support Act 2013* (NSW), s 6; and the “Charter of rights of victims of crime” (which allows the victim access to information and assistance for the preparation of any such statement). Note that any such statement should be made available for the offender to read, but the offender must not be allowed to retain it. A victim is entitled to read out their VIS via closed-circuit television if he or she was entitled to give evidence that way during the trial: ss 30A(3), (4). See *Sentencing Bench Book*, above n 79, at [12-790]ff.

82 *Children’s Court of NSW Resource Handbook*, above, n 40 at [6-0150]ff; MS King, “Therapeutic jurisprudence, child complainants and the concept of a fair trial” (2008) 32 *CLJ* 303.

- refer to Youth Justice Conferencing<sup>83</sup> or the Koori Court pilot.<sup>84</sup>
- dismiss with a caution
- release on a good behaviour bond
- impose a fine
- release on a good behaviour bond plus a fine
- release on probation
- make a community service order<sup>85</sup>
- proceed by way of a suspended sentence.
- make a control order resulting in detention in a juvenile justice centre or adult prison.

**You will also need to decide whether or not to record a conviction.<sup>86</sup>**

You also need to bear in mind the principles of s 6(b)–(e) of the *Children (Criminal Proceedings) Act 1987* (NSW):

- (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance.
- (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption.

83 *Young Offenders Act 1997* (NSW), Pt 5, and *Young Offenders Regulations 2016*. Youth Justice Conferencing, for those who have admitted guilt and agree to it, is proving an effective means of reducing recidivism — see, for example, N Smith, D Weatherburn, “Youth Justice Conferences versus Children’s Court: A comparison of re-offending”, *Crime and Justice Bulletin*, No 160, BOCSAR, February 2012.

Note also that in Youth Conferencing the members of the group follow the same guiding principles about the range of available sentences as any other court. See JIRS under “Services Directory” for contact information.

84 S Duncombe, “NSW Youth Koori Court Pilot Program commences” (2015) 27(2) *JOB* 11.

85 *Children (Community Services Orders) Act 1987* (NSW), s 5.

86 See *Children (Criminal Proceedings) Act 1987* (NSW), s 14(1)(a) which provides that a court “shall not, in respect of any offence, proceed to, or record such a finding as, a conviction in relation to a child who is under the age of 16 years”. See also *Young Offenders Act 1997*, ss 17 and 33.

(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

- **If you decide to order the child or young person to pay compensation (or a fine)**, consider the child's or young person's actual capacity to pay the compensation or fine.<sup>87</sup>
- **Ensure that you tell any child or young person affected by your sentencing, other decisions or judgment what the sentence, decision and/or judgment is in such a way that they can understand what it means for them.** It is a good idea to check what their understanding of it is. It may also be appropriate to write it down at the time of sentencing (in as simple and direct English as possible), and then give it to the child or young person and/or their legal representative — so as to help ensure understanding and compliance.
- Judicious judicial intervention can make a significant difference to how children and young people experience court. The judicial officer can help by explaining court processes to the child; monitoring the child's understanding and responses and clarifying questions; controlling the tone of cross-examination; monitoring the child's state and comfort; modelling a child-sensitive approach.

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<sup>87</sup> See *Children (Criminal Proceedings) Act 1987* (NSW), ss 24, and 33(1AA).

## 6.4 Further information or help

The following agencies can provide further information about children and young people and the issues that may affect them when they are involved in legal proceedings:

### **Advocate for Children and Young People**

Level 2, 407 Elizabeth Street  
Surry Hills NSW 2010  
Ph: (02) 9286 7231  
Fax: (02) 9286 7267  
Email: [acyp@acyp.nsw.gov.au](mailto:acyp@acyp.nsw.gov.au)  
[www.acyp.nsw.gov.au/publications/law-and-justice](http://www.acyp.nsw.gov.au/publications/law-and-justice)

### **Department of Family and Community Services (FACS)**

#### **Head Office**

4–6 Cavill Avenue  
Ashfield NSW 2131  
Ph: (02) 9716 2222  
Fax: (02) 9716 2999  
[www.community.nsw.gov.au](http://www.community.nsw.gov.au)

### **Children’s Court Clinic**

2 George Street (cnr O’Connell Street)  
Parramatta NSW 2124  
DX 8257  
Locked Bag 4001  
Westmead NSW 2145  
Ph: (02) 8688 1530  
Fax: (02) 8688 1520  
Email: [schn-childrenscourtclinic@health.nsw.gov.au](mailto:schn-childrenscourtclinic@health.nsw.gov.au)

### **Juvenile Justice NSW**

Level 2, Henry Deane Building  
20 Lee Street  
Sydney NSW 2000  
GPO Box 31  
Sydney NSW 2001  
Ph: (02) 8346 1333  
Fax: (02) 8346 1560  
[juvenilejustice@djj.nsw.gov.au](mailto:juvenilejustice@djj.nsw.gov.au)

**National Children’s and Youth Law Centre**

Law Building

First Floor

University of NSW 2052

Ph: (02) 9385 9588

Fax: (02) 9385 9589

Email: [admin@ncylc.org.au](mailto:admin@ncylc.org.au)

[www.ncylc.org.au](http://www.ncylc.org.au)

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## 6.5 Further reading

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Australasian Institute of Judicial Administration Inc, *Bench Book for Children Giving Evidence in Australian Courts*, 2nd edn, 2015.

Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process*, ALRC Report No 84, Australian Government Publishing Service, 1997.

CA Carter, BL Bottoms and M Levine, “Linguistic, social and emotional influences on the accuracy of children’s reports” (1996) 20 *Law and Human Behaviour* 335–358.

J Cashmore, “Child witnesses” in G Monahan and L Young, *Children and the law in Australia*, Lexis Nexis, Sydney, 2008, and the articles cited therein.

J Cashmore, “Child witnesses: the judicial role” (2007) 8(2) *TJR* 281 and other articles in the Judicial Commission of NSW, *Sexual Assault Trials Handbook*, 2007—.

J Cashmore and P Parkinson, “Judicial conversations with children in parenting disputes: the views of Australian judges” (2007) 21 *International Journal of Law, Policy and the Family* 160.

J Cashmore and P Parkinson, “The competency of children to give evidence” (1991) 3(1) *JOB* 1.

J Cashmore and L Trimboli, *An evaluation of the NSW child sexual assault specialist jurisdiction pilot*, 2005, NSW Bureau of Crime Statistics and Research, Sydney.

R Ellis, “Judicial activism in child sexual assault cases”, Judicial Commission of NSW, *Sexual Assault Trials Handbook*, 2007—, Sydney.

GS Goodman et al, “Testifying in criminal court: emotional effects on child sexual assault victims” (1992) 57(5) *Monographs of the Society for Research in Child Development* 1.

E Henderson, “Persuading and controlling: the theory of cross-examination in relation to children” in H Westcott, G Davies and R Bull (eds), *Children’s testimony: a handbook of psychological research and forensic practice*, John Wiley & Sons, 2002, pp 279–293.

P Johnson, “Controlling unreasonable cross-examination” (2009) 21(4) *JOB* 29.

Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, 2002—, Sydney, under “Child witness/accused”, at [1–100]ff and “Evidence given by alternative means” at [1-360]ff.

ME Lamb et al (eds), *Children’s testimony: a handbook of psychological research and forensic practice*, 2nd edn, Wiley-Blackwell, 2011.

Law Society of NSW, *Representation principles for children's lawyers*, 4th edn, 2014, Sydney.

Judicial Commission of NSW, *Sentencing Bench Book*, 2006—, Sydney, [15-000].

Judicial Commission of NSW, *Sexual Assault Trials Handbook*, 2007—, Sydney.

M Powell, M Garry and N Brewer, "Eyewitness testimony" in I Freckleton and H Selby (eds) *Expert evidence*, 2nd edn, Thomson Reuters, 2013.

JA Quas et al, "Childhood sexual assault victims: long-term outcomes after testifying in criminal court" (2005) 70(2) *Monographs of the Society for Research in Child Development* 1.

L Sas, "The interaction between children's developmental capabilities and the courtroom environment: the impact on testimonial competency", paper presented at the Canadian Judicial Council Seminar, November 2002.

R Shackel, "Overcoming misconceptions in the courtroom on how children disclose sexual abuse" (2011) 23(4) *JOB* 29.

Supreme Court of Queensland, *Equal Treatment Benchbook*, Ch 13.

L Trimboli, *An evaluation of the NSW Youth Justice Conferencing Scheme*, New South Wales Bureau of Crime Statistics and Research, Attorney General's Department of NSW, 2000.

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R Zajac, S O'Neill, H Hayne, "Disorder in the courtroom? Child witnesses under cross-examination" (2012) 32 *Developmental Review* 181.

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## 6.6 Your comments

The Judicial Commission of NSW welcomes your feedback on how we could improve the *Equality before the Law Bench Book*.

We would be particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific Sections of other Bench Books, discussion or research material.

Section 11 contains information about how to send us your feedback.

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## Appendix — Recommended script for use in special hearings with children or cognitively impaired witnesses<sup>88</sup>

**Judge:** Hello (name of witness), can you hear me?

Can you see me?

My name is Judge ..... and I am in charge here today. You can call me Judge if you want to say something to me.

Are you comfortable on that seat?

Do you have a drink (and/or any other requirement)?

In the room with you is Mr/Ms ..... (tipstaff/associate) or (first name). His/her job is to help me at your end because you are in a different room to me.

Also in the room with you is ..... (support person) who is there to be with you while you give your evidence.

In the court room with me are some other people even though you cannot see them. You have probably met one of them before - the prosecutor, Mr/Ms .....  
.....

I will ask the prosecutor to stand in front of the camera. Can you see him/her now? He/she will ask you questions soon.

There is another lawyer who will ask you questions later, Mr/Ms .....

I will ask him/her to stand. Can you see him/her now?

(To witness) ....., you have come to court today to:

- tell what happened to you
- give evidence/answer questions about ...
- tell what you know about ...

Does your teacher have rules in your classroom?

What are some of those rules?

Do you play any sport? Tell me about that.

What are some of the rules in that sport?

Now I want to talk to you about being in court.

Do you remember that we just talked about some rules in the classroom/in sport? If the child says no, remind them of the rules they talked about.

Well, in court there are some rules as well.

<sup>88</sup> Adapted with permission from Australasian Institute of Judicial Administration, *Bench Book for children giving evidence in Australian courts*, 2015.

A very important rule is that you tell the truth when you answer questions.

Will you tell the truth here in court?

Do you promise not to tell lies in court?

*Now I want to talk to you about some other rules in court.*

I will try to make sure the questions you are asked by the lawyers are not too hard.

If you *do not know* the answer, that is fine/ok/all right.

Just say “I don’t know”.

If you *do not understand* the question/if you do not know what the question means, that is fine/ok/all right.

Just say “I don’t understand/I don’t know what that means.”

### **Version for younger children**

The lawyers might say things and ask you if those things are true.

They might also say things and ask you if those things are *not* true.

If you think what is said is true, you should say it is true.

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# Women

For additional information in relation to women or men who are transgender(ed) or transsexual (that is, who were originally living as the opposite gender) — see Section 9.

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## 7.1 Some statistics

### 7.1.1 Population

- According to the 2011 Census:<sup>1</sup>
  - There were slightly more females resident in NSW than males: 3.5 million females (50.7%), compared with 3.4 million males (49.3%).
  - There were slightly more Aboriginal females resident in NSW than males: 87,540 Aboriginal females (50.7%), compared with 85,080 Aboriginal males (49.3%).
  - Most NSW females (2.2 million) lived in the Greater Sydney region.
  - Almost a third (31.4%) of NSW females were born overseas. The top five overseas countries of birth were England, China, New Zealand, India and the Philippines.
  - Half of NSW females were in a registered marriage and 8.3% of people in NSW were in a de facto marriage.

### 7.1.2 Employment

- As at January 2013:<sup>2</sup>
  - Almost twice as many males in NSW (1.7 million) worked full time, compared with females (0.9 million).
  - The participation rate for females in NSW was 56.9%, compared with 70.1% for males.
  - More females in NSW (0.75 million) worked part-time than men (0.3 million)<sup>3</sup>
  - 45% of females working in NSW were employed on a part-time basis, compared with 17% of males. By comparison, in 2012, 41% of females working in NSW were employed on a part-time basis, compared with 15% of males.<sup>4</sup>
- In 2010, 28% of NSW females were employed on a casual basis, compared with 21% of males.<sup>5</sup>

1 Australian Bureau of Statistics (ABS), *2011 Census*, Canberra, 2012, at [www.censusdata.abs.gov.au](http://www.censusdata.abs.gov.au), accessed 4 April 2013.

2 ABS, *Labour force, Australia, Jan 2013*, Canberra, ABS cat no 6202.0, January 2013, p 10, at [www.abs.gov.au](http://www.abs.gov.au), accessed 4 April 2013.

3 *ibid.*

4 NSW, Department of Family and Community Services, Women NSW, *Women in NSW 2012*, Report, Sydney, p 67, at [www.women.nsw.gov.au](http://www.women.nsw.gov.au), accessed 4 April 2013.

5 *ibid.*

- As at November 2012, NSW female workers had a higher rate of underemployment than males — 9.5% compared with 5.3%. The labour force underutilisation rate (unemployed and underemployed persons expressed as a proportion of workforce) for females was higher than males — 13.9% compared with 10.5%.<sup>6</sup>
- In September 2012, of the just over 6 million people in Australia aged 15 years and over who were not in the labour force (representing 33% of the population), 60% were women.<sup>7</sup>
- **Gender pay gap:**
  - As at November 2012, the weekly gender wage gap for people working full-time ordinary hours in NSW was 16% (an increase of two percentage points from November 2011): NSW females working full-time ordinary hours each earned an average of \$1,246, compared with males, who earned \$1,486 each week.<sup>8</sup>
  - In 2012, the median full-time starting salaries for graduates in Australia were \$55,000 for males (up from \$52,000 in 2011), compared with \$50,000 for females (no change from 2011). For postgraduate salaries the gap for starting salaries was more substantial, with females earning 85% of male salaries.<sup>9</sup>
  - In 2010, the gender pay gap for the NSW public service was 6.7%.<sup>10</sup>

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6 ABS, *Labour force, Australia, Jan 2013*, Canberra, ABS cat no 6202.0, January 2013, p 26, at [www.abs.gov.au](http://www.abs.gov.au), accessed 4 April 2013.

7 ABS, *Persons not in the labour force, Australia, September 2012*, Canberra, ABS cat no 6302.0, March 2013, at [www.abs.gov.au](http://www.abs.gov.au), accessed 4 April 2013.

8 ABS, *Average weekly earnings, Australia, Canberra, ABS cat no 6302.0, November 2012*, Table 11A, Average weekly earnings, New South Wales (dollars) — trend, at [www.abs.gov.au](http://www.abs.gov.au), accessed 13 March 2013; *Women in NSW 2012*, above n 4, p 76. See also S Baldwin et al, *Profile of women's employment in NSW: trends and issues*, Final Report, Prepared for the Office for Women's Policy NSW Department of Premier and Cabinet, 25 November 2010 (Revised August 2011), at [www.women.nsw.gov.au/publications/profile\\_of\\_womens\\_employment\\_in\\_nsw](http://www.women.nsw.gov.au/publications/profile_of_womens_employment_in_nsw), accessed 4 April 2013.

9 Workplace Gender Equality Agency, *GradStats – starting salaries*, January 2013, at [www.wgea.gov.au](http://www.wgea.gov.au), p 1, accessed 4 April 2013.

10 NSW, *Pay equity audit report 2011 public sector workforce*, at <http://sydney.edu.au>, accessed 4 April 2013.

- **Superannuation:**

In 2009–2010:<sup>11</sup>

- although women live longer and have longer retirements to fund, women held around 37% of total superannuation account balances, compared with men who held 63%
- the average account balance was \$40,475 for women and \$71,645 for men.

- **Unpaid domestic work:**

- Women’s unpaid contribution to household work and child care activities is often under-valued in relation to such matters as personal injury compensation, succession law, and in commercial contexts (for example, in disputes about signing of guarantees).<sup>12</sup>
- Between 1992 and 2006 women assumed a greater role in the workplace. Despite this, they spent around the same amount of time on household work in 2006 as they had in 1992. While men were doing slightly more household work than in the past, women still did around 1.8 times as much as men in 2006, compared with twice as much in 1992. While men took on a greater role with child care than in the past, in 2006 women on average spent more than two and a half times as long caring for children as men did.<sup>13</sup>
- As at 2010, full-time women workers in NSW with dependants spent on average 17 hours per week doing unpaid housework, compared with men who spent on average 7 hours per week. Full-time working mothers in NSW spent on average 15 hours per week looking after children, compared with full-time working fathers who spent on average 10 hours per week.<sup>14</sup>

### 7.1.3 Education

- In May 2012, nationally more males (4.2 million) than females (4.1 million) aged 15–64 years had a non-school qualification. A higher proportion of males (22%) than females (13%) reported their level of highest educational

11 Association of Superannuation Funds of Australia Limited, *Average super balances boosted despite volatile economy*, media release, 19 September 2011, at [www.superannuation.asn.au/media-release-19september-2011](http://www.superannuation.asn.au/media-release-19september-2011), accessed 23 April 2013; J Collett, “How to make it super for women”, *Busselton — Dunsborough Mail*, 23 April 2013, at [www.busseltonmail.com.au](http://www.busseltonmail.com.au), accessed 24 April 2013.

12 R Graycar and J Morgan, *The hidden gender of law*, 2nd ed, 2002, The Federation Press, Annandale pp 303–327, and empirical research referred to therein.

13 ABS, *Trends in household work*, Australian Social Trends, ABS cat no 4102.0, Canberra, 2009, at [www.ausstats.abs.gov.au](http://www.ausstats.abs.gov.au), accessed 4 April 2013.

14 *Women in NSW 2012*, above n 4, p 69, citing Melbourne Institute of Applied Economic and Social Research, *The household, income and labour dynamics in Australia (HILDA) survey*, Wave 10, 2010, at [www.melbourneinstitute.com/hilda/](http://www.melbourneinstitute.com/hilda/), accessed 4 April 2013.

attainment as Certificate III or IV. However, a higher proportion of females (27%) than males (24%) had obtained a bachelor degree or higher qualification.<sup>15</sup>

- In 2012, nationally women held the majority of bachelor degrees (54.7%), while more men than women have postgraduate degrees (52.8% are held by men).<sup>16</sup>

#### 7.1.4 Female victims

- **General:**

- Insufficient account is taken of the realities of the female experience of sexual assault and domestic violence, and women are assessed from the male standpoint of what a “reasonable man” would have done rather than what a reasonable woman would have done given the circumstances.<sup>17</sup>

- **Domestic violence:**

- As a significant proportion of domestic violence incidents go unreported, it is difficult to gauge the full extent of domestic violence. Less than half of respondents to a 2008–2009 Australian Bureau of Statistics survey had reported the domestic assault to police.<sup>18</sup> There is some suggestion that the underreporting could be as low as one in three.<sup>19</sup>
- The number of female domestic violence victims remained stable over the six years to 2010–2011 (around 20,000 per year).<sup>20</sup>
- In 2010, females were more likely to be victims of a domestic assault in NSW than males (69.2% compared with 30.8%). The disparity is greater for younger females (18–24 years).<sup>21</sup>
- In 2010, males were more likely than females to be the offenders in both domestic (82.1% compared with 17.9%) and non-domestic assault (75.6% compared with 24.4%).<sup>22</sup>

15 ABS, *Education and work*, ABS cat no 6227.0, Canberra, 2012, at [www.abs.gov.au](http://www.abs.gov.au), accessed 4 April 2013.

16 Workplace Gender Equality Agency, *GradStats — starting salaries*, January 2013, at [www.wgea.gov.au](http://www.wgea.gov.au), p 4, accessed 4 April 2013.

17 Graycar and Morgan, above n 12.

18 NSW, Legislative Council, Standing Committee on Social Issues (Chair: N Blair), *Domestic violence trends and issues in NSW*, Report No 46, August 2012, p 8, at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au), accessed 4 April 2013.

19 *ibid.* See also ABS, *Personal safety survey 2005*, ABS cat no 4906.9, Canberra, 2006, pp 8, 21, at [www.ausstats.abs.gov.au](http://www.ausstats.abs.gov.au), accessed 4 April 2013.

20 NSW, Department of Family and Community Services, Women NSW, *Women in NSW 2012 — safety and access to justice, Fact Sheet No 6, August 2012, p 1.*

21 K Grech and M Burgess, *Trends and patterns in domestic violence assaults: 2001–2010*, Issue Paper No 61, NSW Bureau of Crime Statistics and Research (BOCSAR), Sydney, 2011, p 6, at [www.bocsar.nsw.gov.au](http://www.bocsar.nsw.gov.au), accessed 4 April 2013.

22 *ibid.*, p 7.

- In 2010, almost half (48.3%) of all domestic assaults involved a female partner and a male offender who were in a partner relationship.<sup>23</sup>
- In 2010, Indigenous women were vastly over-represented as victims of domestic assault. The rate of domestic assault for Indigenous women was more than six times higher than for non-Indigenous women.<sup>24</sup>
- **Domestic homicide:**
  - Between January 2003 and June 2008:<sup>25</sup>
    - 53% (115 of 215) of domestic violence homicide victims were female<sup>26</sup>
    - intimate partner homicide accounted for 61% of female domestic homicides, compared with 23% of male domestic homicides<sup>27</sup>
    - while Aboriginal people comprise around 2% of the total NSW population, over 9% of domestic violence homicide victims were recorded as Aboriginal<sup>28</sup>
    - 77% (160) domestic violence offenders were male.<sup>29</sup>
  - In 2007–2008, two-thirds of female domestic homicide victims in NSW, and over half (54%) of all female homicide victims in NSW, were killed by a current or former intimate partner. By comparison, 25% of male domestic homicide victims and 8% of male homicide victims overall were killed by a current or former intimate partner.<sup>30</sup>
- **Sexual assault:**
  - Women are nearly five times more likely to be sexually assaulted than men.<sup>31</sup>
  - As with domestic violence, a significant proportion of sexual assaults are never reported (61%).<sup>32</sup>

23 *ibid.* See also ABS, *Recorded Crime — Victims*, Australia, 2011, ABS cat no 4501.0, Canberra, 2013, at [www.abs.gov.au](http://www.abs.gov.au), accessed 4 April 2013.

24 *ibid.*, p 8.

25 C Ringland and L Rodwell, *Domestic homicide in NSW, January 2003 — June 2008*, Issue Paper No 42, BOCSAR, Sydney, 2009, at [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au), accessed 4 April 2013.

26 *ibid.*, p 4.

27 *ibid.*, p 5.

28 *ibid.*

29 *ibid.*, p 6.

30 Attorney General and Justice (NSW), *Domestic Violence Death Review Team, Annual report 2010–2011*, Sydney, 2011, pp 11, 13 and Figure 4, at [www.coroners.lawlink.nsw.gov.au](http://www.coroners.lawlink.nsw.gov.au), accessed 4 April 2013.

31 *Women in NSW 2012*, above n 4, p 122. See also Graycar and Morgan, above n 12.

32 *Women in NSW 2012*, above n 4, p 120.

- In 2011, there were 6,001 victims of sexual assault in NSW of whom 5,007 were female. Of these, 10% were victimised by a partner.<sup>33</sup>
- In 2009–2010, 98% of NSW adult offenders convicted of sexual assault were male.<sup>34</sup>

### 7.1.5 Female offenders<sup>35</sup>

- There are significantly fewer female offenders in NSW than male offenders: just over one-fifth of NSW offenders (21%) in 2011–2012 were female.<sup>36</sup>
- In the 10-year period to June 2009:
  - Female offenders were most likely to shoplift (15.0%), commit non-domestic (8.6%) and domestic violence assault (5.1%), fraud (7.2%) and possess/use drugs (6.6%), compared with male offenders who were most likely to commit domestic violence assault (8.1%) and non-domestic violence assault (7.1%), possess/use drugs (8.0%), maliciously damage property (7.0%) and offensive behaviour (4.9%).<sup>37</sup>
  - The number of females offending in NSW increased by 15%, while the number of males offending remained statistically stable.<sup>38</sup>
  - The number of juvenile female offenders increased by more than a third, compared with juvenile males (less than 10%).<sup>39</sup>
  - The nature of female offending has changed with females and juvenile females committing more violent crimes than they did 10 years ago.<sup>40</sup>

33 ABS, *Recorded crime — victims*, Australia, 2011, ABS cat no 4501.0, Canberra, 2013, at [www.abs.gov.au](http://www.abs.gov.au), accessed 4 April 2013.

34 *Women in NSW 2012*, above n 4, p 122.

35 Further information about facilities and programs for women in custody in NSW will be available on the Judicial Commission of NSW's Services Directory at <https://jirs.judcom.nsw.gov.au>.

For a discussion of women's offending pathways, see Corrective Services NSW, *Final submission to the NSW Law Reform Commission Review of the Crimes (Sentencing Procedure) Act 1999*, October 2012, at [www.correctiveservices.nsw.gov.au](http://www.correctiveservices.nsw.gov.au), accessed 4 April 2013; M Segrave and B Carlton, "Women, trauma, criminalisation and imprisonment ..." (2010) 22(2) *CICJ* 287; M Stathopoulos et al, "Addressing women's victimisation histories in custodial settings", ACSSA Issues, No 13, 2012, at [www.aifs.gov.au](http://www.aifs.gov.au), accessed 4 April 2013; JA Warner, *Women and crime: a reference handbook*, ABC-CLIO, California, 2012, pp 37ff; SS Simpson, JL Yahner, L Dugan, "Understanding S L women's pathways to jail: analysing the lives of incarcerated women" (2008) 41(1) *ANZJ Crim* 84; L Forsythe and K Adams, *Mental health, drug use and crime: does gender matter?*, Trends & Issues in Crime and Criminal Justice, No 384, November 2009, Australian Institute of Criminology, Canberra, at [www.aic.gov.au](http://www.aic.gov.au), accessed 4 April 2013.

36 ABS, *Recorded crime — offenders*, 2011–12, ABS cat no 4519.0, Canberra, March 2013, at [www.abs.gov.au](http://www.abs.gov.au), accessed 4 April 2013.

37 J Holmes, "Female offending: has there been an increase?", *Crime and Justice Statistics*, Issue Paper No 46, April 2010, BOCSAR, p 3, at [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au), accessed 4 June 2014.

38 *ibid.*

39 *ibid.*, p 10.

40 *ibid.*

- At the end of June 2012 there were 638 women in NSW correctional centres, representing just under 7% of the total inmate population. Of these, almost a third (189 or 29.6%) identified as Aboriginal.<sup>41</sup>
- In 2012, the median aggregate sentence length (nationally) for adult female prisoners was 24.2 months, compared with 39.9 months for adult male prisoners.<sup>42</sup>
- In 2010–2011, 22.5% of full-time female inmates were born outside Australia, with the largest birth country represented being Vietnam, accounting for 7.7%.<sup>43</sup>
- In 2012, 37.7% of female prisoners had been imprisoned previously, compared with 52.8% of male prisoners.<sup>44</sup>
- Of women in custody in 2009:
  - 49.2% were mothers of children aged 16 or under<sup>45</sup>
  - 44.9% had experienced domestic violence or abuse as an adult,<sup>46</sup> and 65.8% had been involved in at least one violent relationship<sup>47</sup>
  - 39.8% consumed alcohol in a hazardous or harmful way in the year prior to incarceration, with 15.7% showing signs of dependent drinking<sup>48</sup>
  - 77.8% had used an illicit drug and 52.4% had injected drugs<sup>49</sup>
  - 19.5% had been admitted to a psychiatric unit or hospital,<sup>50</sup> and 27.2% had attempted suicide<sup>51</sup>

41 [https://correctiveservices.nsw.gov.au/offender-management/offender-services-and-programs/womenoffenders/\\_nocache](https://correctiveservices.nsw.gov.au/offender-management/offender-services-and-programs/womenoffenders/_nocache), accessed 4 April 2013. For trends in the gender of the inmate population from 1982–2012, see S Corben, *NSW inmate census 2012: summary of characteristics*, Statistical Publication No 39, Corrective Services NSW, December 2012, pp 68–69, at [www.correctiveservices.nsw.gov.au](http://www.correctiveservices.nsw.gov.au), accessed 4 April 2013. For a discussion of Indigenous female offenders and prisoners, see L Bartels, *Indigenous women's offending patterns: a literature review*, AIC Reports, Research and Public Policy Series, No 107, 2010, at [www.aic.gov.au/documents](http://www.aic.gov.au/documents), accessed 8 April 2013.

42 ABS, *Gender indicators, Australia, Jan 2013*, ABS cat no 4125.0, Canberra, 2013, at [www.abs.gov.au](http://www.abs.gov.au), accessed 4 April 2013.

43 Corrective Services NSW, Corporate Research, Evaluation & Statistics, *Female offenders: a statistical profile*, 4th edn, December 2011, at [www.correctiveservices.nsw.gov.au](http://www.correctiveservices.nsw.gov.au), accessed 4 April 2013.

44 ABS, *Prisoners in Australia, 2012*, ABS cat no 4517, Canberra, December 2012, p 42, at [www.abs.gov.au](http://www.abs.gov.au), accessed 4 April 2013.

45 D Indig et al, *2009 NSW inmate health survey: key findings report*, Justice Health (NSW), Sydney, 2010, p 39, at [www.justicehealth.nsw.gov.au](http://www.justicehealth.nsw.gov.au), accessed 4 April 2013.

46 *ibid*, p 70.

47 *ibid*, p 131.

48 *ibid*, p 103.

49 *ibid*, pp 107, 111.

50 *ibid*, p 137.

51 *ibid*, p 141.

- 44.7% left school prior to completing year 10 at an average age of 14.5 years<sup>52</sup>
  - 32.2% were in care before the age of 16<sup>53</sup>
  - 67.3% were unemployed in the six months prior to incarceration; and of these, 24.6% had been unemployed for 10 or more years.<sup>54</sup>
- **Sentencing:**<sup>55</sup>
- In 2010, the most common penalties imposed on female offenders by the NSW Local Court were fines (43.1%), s 9 bonds (17.5%) and s 10 bonds (14.6%), compared with male offenders: fines (49%), s 9 bonds (16.3%) and s 10 bonds (9.6%).<sup>56</sup>
  - In 2010, the most common penalties imposed on female offenders by the NSW higher courts (District and Supreme Courts) in 2010 were full-time imprisonment (52.4%), suspended sentence (25.3%) and s 9 bonds (15.9%), compared with male offenders: full-time imprisonment (72.0%); suspended sentences (16.6%) and s 9 bonds (6.2%).<sup>57</sup>
- While there has been limited empirical research in Australia of disparities in sentencing outcomes for female and male offenders, it appears that female offenders fare better in criminal prosecutions. Female offenders are less likely than male offenders to be prosecuted if detected, stand a greater chance of acquittal if charged, are more likely to be leniently sentenced if convicted and usually serve less time once imprisoned.<sup>58</sup>

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52 *ibid*, pp 32–33.

53 *ibid*, p 30.

54 *ibid*, p 34.

55 See also NSW Law Reform Commission (NSWLRC), *Special categories of offenders*, Sentencing Question Paper 11, July 2012, pp 11–13, at [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au), accessed 5 April 2013. For a discussion of the issues relating to the sentencing of Indigenous female offenders, see L Bartels, Indigenous Justice Clearinghouse, *Sentencing of Indigenous women*, Brief 14, November 2012, at [www.indigenousjustice.gov.au](http://www.indigenousjustice.gov.au), accessed 5 April 2013.

56 Unpublished data from the Judicial Commission of NSW; *Crimes (Sentencing Procedure) Act* 1999, ss 9–10. These figures are overall figures and do not take into account the effect of sentencing factors on the penalties imposed. These figures also include offenders ordered to enter a recognizance under the *Crimes Act* 1914 (Cth), s 20(1)(a), and offenders discharged without proceeding to conviction under s 19B.

57 Unpublished data from the Judicial Commission of NSW, *Crimes (Sentencing Procedure) Act*, s 12. These figures are overall figures and do not take into account the effect of sentencing factors on the penalties imposed. These figures also include offenders who were released forthwith on recognizance under the *Crimes Act* 1914, s 20(1)(b).

58 Research in both South Australia and Victorian has found gender differences in sentencing outcomes (with female offenders receiving more lenient penalties) and each explore the reasons for sentencing disparities: S Jeffries and CEW Bond, “Sex and sentencing disparity in South Australia’s higher courts” (2010) 22(1) *CICJ* 81; Sentencing Advisory Council (Vic), *Gender differences in sentencing outcomes*, July 2010, at [www.sentencingcouncil.vic.gov.au](http://www.sentencingcouncil.vic.gov.au), accessed 5 April 2013. See also *Sentencing: State and Federal law in Victoria*, Submission made to the Senate Standing Committee, Gender Bias and the Judiciary.

### 7.1.6 Legal aid

- Due to the relative funding priorities given to criminal matters over family and civil matters, the vast majority of Legal Aid clients are men. Overall and consistently with previous years, in the period 2011–2012, only 26% of Legal Aid clients in NSW were female.<sup>59</sup>

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<sup>59</sup> Women’s Legal Services NSW, *Submission to the Committee on the Elimination of Discrimination against Women*, “General discussion on access to justice”, 1 February 2013, p 4, at [www2.ohchr.org](http://www2.ohchr.org), accessed 5 April 2013, citing Legal Aid NSW, *Annual report 2011–2012*, p 10, at [www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au), accessed 5 April 2013.



## 7.2 Some information

### 7.2.1 Gender, gender inequality and gender bias in court

The statistics in 7.1 above, while relatively general, demonstrate considerable gender inequality within NSW. Women tend to fare worse than men in relation to their employment status, income level, the amount of unpaid household work and childcare activities they engage in, the type and nature of violence committed against them, and in relation to some legal proceedings.

It is also the experience of the Judicial Commission of NSW and other complaint bodies that many more women than men complain of gender bias in relation to the legal system and legal proceedings.

It is true that not all women fare badly in comparison to men, or feel discriminated against in comparison with men. However, the general existence of gender inequality or bias in our society means that, for many women, unless appropriate account is taken of the examples of potential gender bias listed at 7.2.2 below, a woman may:

- feel uncomfortable, resentful or offended by what occurs in court
- feel that an injustice has occurred
- in some cases be treated unfairly and/or unjustly.

**These problems are likely to be compounded if the woman also happens to be Indigenous, from a culturally and linguistically diverse background, lesbian or bisexual, transgender(ed), a person with a disability, or if she practises a particular religion, or is representing herself — see the appropriate other Section(s) of this Bench Book.**

Section 7.3, below, provides additional information and practical guidance about ways of treating women so as to reduce the likelihood of these problems occurring.

The boxed areas provide practical guidance.

### 7.2.2 Examples of possible gender bias, or a perception of gender bias, in relation to court proceedings

No judicial officer would consciously discriminate against women (or men). However, it is relatively easy to act unconsciously in a way that causes offence to women generally, or to a particular woman, or that *is* (or is *perceived as*) discriminatory or gender biased.

**Some examples of situations where gender bias could occur, or be perceived to occur, are:**

- **Using language and terminology carelessly and/or inappropriately** — that is, using language, statements or comments that create, or could create, a perception of gender bias — see 7.3.2 below.
- **Assessing a woman against how a man would have acted or felt in that situation** — see 7.3.3 below.
- **Assessing a woman against how a “normal” woman ought to behave** — see 7.3.3 below.
- **Showing a lack of understanding of the nature of domestic violence or sexual assault, and/or of the impact of domestic violence or sexual assault on women** — see 7.3.3.2 below.
- **Showing a lack of understanding of the value of household work and child care activities** — see 7.3.6 below.
- **Not taking appropriate account of the statistical differences between men and women in relation to such matters as income level, household work and child care activities** — see 7.1 above and 7.3.6 below.
- **Implying that a woman makes a less credible witness than a man** — see 7.3.2 and 7.3.5 below.

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## 7.3 Practical considerations<sup>60</sup>

### 7.3.1 Modes of address

**Points to consider** (and note that many of these points apply to female lawyers and jurors, not just to female litigants and witnesses):

- **Check what title a woman prefers and then use the title she chooses** — without making any negative comment, or asking questions about her marital status — unless such questions are relevant to the matter(s) before the court.
- **Address women using the same level of name as you address men in the court** — for example, do not address women by their first names if you are addressing men as Mr X.
- **Do not make any negative comment about a married woman’s choice not to use her husband’s name, or to use a hyphenated family name** consisting of both her original family name and her husband’s family name.

### 7.3.2 Language and terminology

**Points to consider** (and note that many of these points apply to female lawyers and jurors, not just to female litigants and witnesses):

- **Use the same level of word when describing both women and men** — that is, “**women**”, when you are using “men”, “**ladies**”, when you are using “gentlemen”, “**girls**”, when you are using “boys”.
- **Use words that sound as though they include women as well as men (when you are intending to include both) rather than words that by the sound of them exclude women** — for example, “**chair**”, or “**chairperson**”, not “chairman”; “**foreperson**” of jury rather than “foreman”.
- **Use words for occupations that include both women and men, not words that refer only to women** — for example, “**barperson**”, not “barmaid”, “**steward**”, not “stewardess”.

<sup>60</sup> Many of these practical considerations have been informed by A Ainslie-Wallace, “Gender awareness”, paper presented to the following conferences — National Judicial Orientation Program, 6–10 August 2000, Brighton-le-Sands; National Judicial Orientation Program, 21–25 October 2001, Brighton-le-Sands; and NSW Land and Environment Court, 2001 Annual Conference, 11–12 October 2001, Hunter Valley.

- **Do not use a gender descriptor unless relevant to the matter(s) before the court** — for example, “pilot”, not “female pilot”.
- **Include women in statements when women are present and should be included** — for example, say “Please sit down ladies and gentlemen”, not “Please sit down gentlemen”.
- **Do not assume or imply that a woman is of a lesser status than a man** — for example, do not state, imply or assume that a woman should not be at the Bar table, or that a woman at the Bar table is not as senior a lawyer as the men there; do not state, imply or assume that a woman cannot be as qualified as (or even higher qualified) than a man to give expert evidence on anything — even on an area that has traditionally been regarded as a male area; do not imply that a woman makes a less credible witness than a woman.
- **Do not comment on a woman’s dress or appearance**, particularly when you are making no such comments about any of the men in court — **unless relevant to the matter(s) before the court.**
- **Do not refer to a woman by her physical appearance unless relevant to the matter(s) before the court** — for example, do not say “pretty young woman”, say “young woman”. Inappropriate references to a woman’s physical appearance could lead to a successful appeal on the basis of denial of a fair trial.<sup>61</sup>
- **Do not use (or allow to be used) any form of discriminatory or discriminatory-sounding language, even when it is meant as a joke<sup>62</sup>** — for example, do not state or imply, that, for example, women tend to exaggerate (implying that their evidence is less credible), all women are nurturing, women like to shop more than men, women are gossips, men cannot control their sexual urges, it is a woman’s job to look after the children or home, a woman’s career is not as important

61 See, for example, the United States Supreme Court case of *State v Pace* (1994) 447 SE 2d 186, in which a criminal conviction was reversed on appeal due to the trial judge’s comments about the defendant’s lawyer being “a pretty girl”, “a nice girl” and “young”. The Supreme Court stated that: “prejudice to the defendant is evidence on the record since his attorney’s credibility was crucial to his defence of alibi. These remarks undermined counsel’s ability to effectively represent her client and constituted reversible error”.

62 Note that s 41 of the *Evidence Act* 1995 provides that you must (even if no objection is taken by counsel) disallow improper questions or inform a witness that they need not be answered. Examples of improper questions include: humiliating questions; questions that are put in a tone that is belittling, insulting or otherwise inappropriate; and questions that have no basis other than a stereotype based on sex, race, culture or ethnicity, age or mental, intellectual or physical disability. Sections 26 and 29(1) of the *Evidence Act* also enable you to control the manner and form of questioning of witnesses, and s 135(b) allows you to exclude any evidence that is misleading or confusing.

as a man's, the women jurors in particular might like to finish early in order that they can shop/prepare food for their family, the men jurors in particular might like to finish early so that they can watch a particular game, race or program.

- **Treat every woman as an individual, and do not make statements that imply that all women are the same or that all women are likely to act in the same way.** Never assume or imply that even what you suspect or know to be the majority way of behaving and thinking for women, is the standard by which any individual woman should be judged.
- **Carefully explain any legal concept that sounds like it only includes women — and/or change it so that it does include women — for example, the concept of the “reasonable man” — for more on this see also 7.3.3.1 below.**

### 7.3.3 The impact of gender on any behaviour relevant to the matter(s) before the court

#### 7.3.3.1 General considerations

##### Points to consider:

- **Do not judge, or appear to judge, a particular woman by the way you or society thinks women are supposed to, or ought to behave —** there is no right or wrong behaviour for women as opposed to men, only behaviour that is lawful/illegal or unlawful/illegal for people of both genders. Be careful not to make any statements that imply that women (or men) should act in a particular way.
- **Do not compare a woman's behaviour with the way a man would have behaved. Women's and men's experiences and feelings and therefore actions or inactions in relation to similar situations might be (and often are) different for very valid reasons —** for example, unequal income levels, unequal strength or unequal power. It is important to try to understand the reality, and then to demonstrate an understanding of the reality from a woman's (and the particular woman's) perspective.
- **For similar reasons, be careful about applying and/or using the concept of the “reasonable man” —** it is potentially inaccurate or unfair when applied to a woman, and using such a concept could easily sound to others like it excludes women. A more appropriate term would be the “reasonable person”.
- **Has the fact of being a woman as opposed to a man been an influencing factor in the matter(s) before the court? If so, where**

**possible, you may need to take appropriate account of these influences.** For example, you may need to decide whether the law allows you to take account of any such influences and, then, as necessary and at the appropriate time in the proceedings, so as to ensure that justice is done and seen to be done, explain why any such influences can/should be taken into account, or cannot/should not be taken into account. You may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing — see 7.3.5 and 7.3.6 below.

- **As prescribed by law, intervene if, for example, any cross-examination appears to be stereotyping and/or unfairly alluding to a woman’s gender.**<sup>63</sup>

### 7.3.3.2 Domestic violence matters and sexual assault matters

#### Points to consider

- **Develop and demonstrate an understanding of the nature of family and domestic violence and its impact on women.**<sup>64</sup>
- **Develop and demonstrate an understanding of the nature of sexual assault and its impact on women.**<sup>65</sup>
- **Do not repeat in court any of the unfounded assumptions and myths about domestic violence or sexual assault. Instead, cite the facts based on accurate statistics and research** — for example:
  - It is not easy for a woman to leave a violent man<sup>66</sup> — it takes considerable emotional and practical resources for an abused and frightened woman to do this — particularly if there are children involved.

<sup>63</sup> *ibid.*

<sup>64</sup> A considerable amount of material has been written on domestic violence from the woman’s perspective and the failure of the justice system to deal with it appropriately — see for example, Graycar and Morgan, above n 12, pp 303–379.

<sup>65</sup> Australian Law Reform Commission (ALRC) and NSWLRC, *Family violence: a national legal response*, ARLC Final Report 114, NSWLRC Final Report 128, 2010, Vol 2, Pt G, at [www.alrc.gov.au](http://www.alrc.gov.au), accessed 8 April 2013; Department for Women (NSW), *Heroines of fortitude: the experiences of women in court as victims of sexual assault*, Sydney, 1996.

<sup>66</sup> S Meyer, “Why women stay: a theoretical examination of rational choice and moral reasoning in the context of intimate partner violence” (2012) 45(2) *ANZJ Crim* 179; Australian Domestic & Family Violence Clearinghouse, *Staying/leaving: barriers to ending violent relationships*, Fast Facts No 7, July 2012, at [www.adfvc.unsw.edu.au](http://www.adfvc.unsw.edu.au), accessed 8 April 2013, and references referred to therein.

Many who do leave or threaten to leave are coerced into returning or staying by threats or further violence from their partner. There are often insufficient support and protection structures to enable a woman to either leave or leave safely. This can be even more difficult for Indigenous women (see Section 2), women from culturally and linguistically diverse backgrounds (see Section 3) and women with disabilities (see Section 2).

Yet, statistically, the most dangerous time for a woman in a violent relationship is at separation or after leaving the relationship.

- **When a woman says “no” she does not mean “yes”<sup>67</sup>** — she means “no”, in much the same way as a man means “no” when he says “no” to unwanted sexual advances from a woman or a man.
- **It is no more acceptable for a man to resort to sexual assault or violence than it is for a woman to do so.**
- Women can be sexually assaulted by a friend or spouse. **Of all women who are sexually assaulted, most are sexually assaulted by someone they know**, not a stranger.
- **Women do not ask to be assaulted or raped.** It is no more acceptable for a man to assault a woman because he felt she was acting, behaving or dressing in a manner that was “asking for it”, than it is for a man or woman to rob a man for asking for it by walking through a park at night wearing an expensive suit and carrying an expensive briefcase.
- **Women who are sexually assaulted react in many different ways<sup>68</sup>** — there is no standard way to react or behave.

67 See the widely publicised and criticised decision by Bollen J in the South Australian case of *R v Johns* (Supreme Court, SA No. SCCRM/91/452, 26 August 1992), including the comment that “a measure of rougher than usual handling” may be used by a man to obtain his wife’s “consent” to sex. See now *Question of Law Reserved On Acquittal Pursuant to Section 350(1A) Criminal Law Consolidation Act (No 1 of 1993)* (1993) 59 SASR 214; *Family violence: a national legal response*, above n 65, Pt G; ALRC, *Equality before the law: justice for women*, ALRC Report No 69, 1994, Pt 1, at [www.alrc.gov.au](http://www.alrc.gov.au), accessed 8 April 2013; ALRC, *Equality before the law: women’s equality*, ALRC Report No 69, Pt 2, 1994, at [www.alrc.gov.au](http://www.alrc.gov.au), accessed 13 April 2013; Vic Health, *Two steps forward, one step back: community attitudes to violence against women*, Report, 2006, [www.vichealth.vic.gov.au](http://www.vichealth.vic.gov.au), accessed 2 June 2014.

68 Under the *Criminal Procedure Act* 1986, ss 295–306, a person is entitled to object to the production of a protected confidence (counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence) on the ground that it is privileged. However, the primary protected confider can consent to disclosure. See also *KS v Veitch (No 2)* (2012) 84 NSWLR 172.

- **Lesbians and bisexual women can be violently and sexually abused by their partners too** — see Section 8.
- **Do not dismiss or undervalue the impact of domestic violence or sexual assault on a woman.** In this connection, note that a woman who is a prostitute is no less harmed by sexual assault or violence than any other citizen.<sup>69</sup>
- **Be aware of the widespread criticism in relation to the use of the defence of provocation** — consider, for example, whether it is more acceptable for a man to hit or kill his partner (or partner’s lover) because she has “driven” him to it by, for example, having a lover, “nagging” or not having food prepared, than it is for a work colleague to hit or kill another colleague for being “driven” to it by, for example, being at the wrong end of favouritism, bullied, unfairly or humiliatingly criticised.<sup>70</sup>
- **Consider the difficulties for a woman in presenting evidence about domestic violence or sexual assault in our adversarial system** — in much the same way as for a child presenting evidence about child sexual abuse (see Section 6), she may have to come face to face with her alleged attacker and be prepared to have her reputation attacked by the defendant and his legal representative(s). You may, for example, need to consider whether, in the circumstances of any particular case, it would be appropriate to allow the woman to give her

69 See *R v Leary* (unrep, 8/10/93, NSWCCA) in which Kirby J approved the statement made in the NSW District Court that “prostitutes, male or female, were entitled to the same protection of the law as any other citizen. They have their human dignity and their privacy and ought not unconsensually to have that invaded by fellow citizens”. His Honour expressly declined to follow *Hakopian v R* (unrep, 11/12/91, VicCCA) in which the Crown abandoned its appeal in relation to the observation of the judge at first instance that “the likely psychological effect on the victim [a prostitute] of the forced oral intercourse and indecent assault is much less a factor in this case and lessens the gravity of the offences”. The principle espoused by Kirby J was affirmed in *R v Villar* [2004] NSWCCA 302 per Grove J, Simpson and Howie JJ agreeing, at [155]. See also B Sullivan, “Rape, prostitution and consent” (2007) 40(2) *ANZJ Crim* 127.

70 See NSW, Legislative Council, *The partial defence of provocation*, Final Report, 23 April 2013, at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au), accessed 26 April 2013. See also submissions made to the NSW, Legislative Council, *Partial defence of provocation (inquiry)*, at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au), accessed 8 April 2013; L Roth and L Blayden, *Provocation and self-defence in intimate partner and sexual advance homicides*, NSW Parliamentary Research Service, Briefing Paper No 5/2012, August 2012, at [www.parliament.nsw.gov.au](http://www.parliament.nsw.gov.au), accessed 8 April 2013; E Sheehy, J Stubbs and J Tolmie (a), “Defences to homicide for battered women: a comparative analysis of laws in Australia, Canada and New Zealand” (2012) 34(3) *Syd LR* 469, at <http://sydney.edu.au/>, accessed 8 April 2013; *Family violence: a national legal response*, above n 65, Vol 1, Ch 14, pp 653–654, Recommendations 14.1–14.5; K Fitz-Gibbon, “Provocation in New South Wales: the need for abolition” (2012) 45(2) *ANZJ Crim* 194; B McSherry, “It’s a man’s world: claims of provocation and automatism in ‘intimate’ homicides” (2005) 29 *MULR* 905.71

evidence and/or be cross-examined via one or more of the alternative means specifically allowed for in relation to children (see Section 6.3.3), and/or whether to close the court or allow for the presentation of evidence in narrative form. There are protective procedural provisions in the *Criminal Procedure Act 1986*, which apply to complainants and sexual assault witnesses in prescribed sexual offence proceedings.<sup>71</sup>

- **When a woman is permitted to present her evidence using alternative means, you should ensure that any jury is properly directed at the point that this happens** about why the woman is presenting her evidence this way, and that this does not mean they should give it any less (or any more) weight than if it was presented in the usual way.<sup>72</sup> **You may also need to intervene if the defendant or their legal representative tries to suggest that evidence presented in this way should be given less weight.**
- **As prescribed by law, intervene if, for example, any cross-examination seems to be unfairly based on any false**

71 These include:

- (a) The evidence of such witnesses must be taken in camera (that is, in a closed court) unless these witnesses consent to an open court or the court is so requested and finds special reasons in the interests of justice that require the court to be open: s 291.
- (b) These witnesses cannot be examined in chief, cross-examined or re-examined by an unrepresented accused, but may only be examined by a person appointed by the court: s 294A(2).
- (c) These witnesses may choose to give evidence by means of closed circuit television (CCTV) or other technology: s 294B(3)(a), or by use of alternative arrangements made to restrict contact, including visual contact, between the complainant and the accused including the use of screens or planned seating arrangements: s 294B(3)(b).
- (d) These witnesses are entitled to have a support person(s) present when giving evidence whether the evidence is given by means of CCTV or orally in court and whether or not the evidence is heard in camera: s 294C.

Where the Court of Criminal Appeal orders a retrial in an appeal against a conviction for a prescribed sexual offence, the recorded original evidence of the complainant is admissible in the new trial proceedings: s 306B; *PGM (No 2) v R* [2012] NSWCCA 261. Note also that it is possible for a party to apply for any witness to give evidence in narrative form — this may be the best approach for some women in sexual assault or domestic violence matters: *Evidence Act 1995* (NSW), s 29. Further, the *Court Suppression and Non-publication Orders Act 2010* (effective 1 July 2011) confers broad powers on courts to make suppression or non-publication orders: s 7. See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2nd edn, 2002–, “Evidence given by alternative means” at [1-360]ff, “Self-represented accused” at [1-840]ff; *Sexual Assault Trials Handbook*, 2007–, “Trial procedure” at [1-100]ff; *Local Courts Bench Book*, 1988–, “Non-publication and suppression orders” at [87-300]ff.

72 *Criminal Procedure Act*, s 294B(7).

**assumptions or myths about domestic violence or sexual assault — including any presentation of a woman’s past sexual history or sexual reputation in sexual assault matters.<sup>73</sup>**

### 7.3.3.3 Long-term or repeated abuse as a contributory factor to violence, and “battered woman syndrome”

A few women respond to long-term or repeated domestic abuse, assault or threats by their partner by assaulting, or in very rare cases, killing,<sup>74</sup> their partner.

In this situation, evidence of what has been termed “battered woman syndrome” has been used to bolster defences such as provocation,<sup>75</sup> self defence (or excessive self-defence)<sup>76</sup> and duress<sup>77</sup> by providing the court with an insight into the effects of long-term, repeated domestic violence on a woman’s reactions to threats, provocation and physical or mental cruelty from her partner.<sup>78</sup>

[T]he syndrome is not itself a defence but it has the potential to assist decisionmakers better to understand the circumstances preceding a woman’s eruption into lethal violence, it may remove sources of misunderstanding that might make decision-makers inappropriately suspicious of a woman’s account of her relationship and it may give some insight into what was happening in the woman’s thought processes when she had resort to lethal force.<sup>79</sup>

Evidence of battered woman syndrome may also be used:

- by way of mitigation in sentencing<sup>80</sup>

73 See *Criminal Procedure Act*, s 293, as to the inadmissibility of evidence about sexual reputation and sexual experience. See also *Family violence: a national legal response*, above n 65, Ch 27, at [www.alrc.gov.au/publications/](http://www.alrc.gov.au/publications/), accessed 3 April 2013. Note that there remains considerable criticism about the inappropriate presentation and admission into evidence of a woman’s sexual history (for example, alleged promiscuity, lesbianism, virginity) in sexual assault cases — see Graycar and Morgan, above n 12, pp 356–364. Note also *Evidence Act*, s 41.

74 For more information, see J Morgan, *Who kills whom and why: looking beyond legal categories*, Occasional Paper, Victorian Law Reform Commission (VLRC), Melbourne, 2002, at [www.lawreform.vic.gov.au](http://www.lawreform.vic.gov.au), accessed 8 April 2013.

75 Sheehy, Stubbs and Tolmie (a), above n 70, at 482, 486–487; E Sheehy, J Stubbs and J Tolmie (b), “Battered women charged with homicide in Australia, Canada and New Zealand: how do they fare?” (2012) 45(3) *ANZJ Crim* 383 at 394.

76 *ibid*; for example, *R v Osland* [1998] 2 VR 636 and *Osland v R* (1998) 197 CLR 316. See also M McMahon, “Homicide, self-defence and the (inchoate) criminology of battered women” (2013) 37 *Crim LJ* 79; J Stubbs and J Tolmie, “Battered women charged with homicide: advancing the interests of Indigenous women” (2008) 41(1) *ANZJ Crim* 138.

77 For example, *R v O’Brien* [2003] NSWCCA 121 at [43]–[43]; *R v Runjanjic* (1991) 56 SASR 114.

78 Sheehy, Stubbs and Tolmie (a), above n 70. See also *R v Hamid* (2006) 164 A Crim R 179 at [76].

79 I Freckleton and H Selby, *Expert evidence* (online), Thomson Reuters, Pyrmont, 2012, at [10.35.100].

80 For example, *R v Yeoman* [2003] NSWSC 194.

- as a factor to be considered in the exercise of prosecutorial discretion<sup>81</sup>
- to bolster defences in other cases (for example, social security frauds, armed robbery and shoplifting)
- to assess a woman’s state of mind in custody disputes, civil actions and where a battered woman is charged as a criminal accomplice.<sup>82</sup>

There is considerable controversy about the wisdom of using “battered woman syndrome” to support a defence argument.<sup>83</sup> The main concern is that the use of the notion of a “syndrome” pathologises the woman in question, rather than simply focusing on the circumstances in which the offence occurred and whether (in the context of the defence of self defence) her actions were reasonable.<sup>84</sup>

It is also worth noting Kirby’s J’s citation, with approval, of the remarks of L’HeureuxDube J in the Canadian Supreme Court:

The legal inquiry into the moral culpability of a woman who is, for instance, claiming self-defence must focus on the reasonableness of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman and her entitlement to claim that she is suffering from “battered woman syndrome”.<sup>85</sup>

This statement appears to accord with the criticism of the use of the term “battered woman syndrome”, in that it suggests an approach of looking at the reasonableness or otherwise of the woman’s actions, given the particular circumstances, as opposed to establishing the woman’s irrationality or the existence of a medical or psychiatric “syndrome” at the time.

**Points to consider:**

- **Do not use the term “battered woman syndrome” unless it is used by the defence.**
- **Understand, and demonstrate an understanding of, the impact of long-term and repeated abuse, assault and threats on a woman**

81 Sheehy, Stubbs and Tolmie (b) above n 75, at 387–388.

82 Z Craven, *Battered woman syndrome*, Australian Domestic & Family Violence Clearinghouse Topic Paper, 2003, pp 5–6, at [www.adfvc.unsw.edu.au](http://www.adfvc.unsw.edu.au), accessed 8 April 2013.

83 Some of these criticisms are set out in VLRC, *Defences to homicide*, Final Report, 2004, p 170; see also Freckleton and H Selby, above n 79, at [10.35.170], [10.35.172]; *Osland v R* (1998) 197 CLR 316 per Kirby J at [164]–[166].

84 See, for example, Graycar and Morgan, above n 12, pp 438–440; Stubbs and Tolmie, above n 75, at 153–154; “Falling short of the challenge? A comparative assessment of the Australian use of expert evidence on the battered woman syndrome” (1999) 23 *MULR* 709; R Bradfield, “Understanding the battered woman who kills her violent partner — the admissibility of expert evidence in Australia” (2002) 9(2) *Psychiatry, Psychology and the Law* 177.

85 *R v Mallot* (1998) 155 DLR (4th) 513, cited in *Osland v R* (1998) 197 CLR 316 at 376.

**by her partner** — it is very different to be subjected to such behaviour long-term from a partner than to be subjected to one act of violence from a stranger.

- **Issues of duress, provocation and/or self-defence should be carefully considered in the light of the considerable amount of research about long-term domestic violence and its impact on women, as opposed to considering them in the light of case law about male responses to one-off acts of violence.** Women in this situation generally do not assault in response to an assault that is happening at the particular moment, they hit back in response to an ongoing and repeated situation.
- **In this connection, note that the threat posed to a woman by an abusive partner is rarely momentary, it is ongoing and continual.**

#### 7.3.4 Timings of proceedings, breaks and adjournments

- **As indicated in 7.1 above, many women have the main responsibility for child care.**
- **They also tend to be the main carers for other relatives** — such as those with disabilities<sup>86</sup> and those who are elderly.
- **Given the lack of childcare facilities in courts, you may need to take these factors into account when considering the start and finish times on any particular day, the dates of hearings, adjournment dates, and the need for adjournments or breaks** — for example, to allow a witness or juror to check that any necessary care arrangements are in place.

#### 7.3.5 Directions to the jury — points to consider

**As indicated at various points in 7.3, it is important that you ensure that the jury does not allow any stereotyped or false assumptions**

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86 See Section 5.1.

about women, domestic violence, sexual assault or the manner by which a particular woman’s evidence was presented, to unfairly influence their judgment.

This should be done in line with the *Criminal Trial Courts Bench Book*<sup>87</sup> and you should raise any such points with the parties’ legal representatives first.

For example, you may need to provide specific guidance as follows:

- **Caution them against making any false assumptions about the credibility of female witnesses** as opposed to male witnesses.
- **Explain that they must try to avoid making stereotyped or false assumptions** — about women’s behaviour generally, a particular woman’s behaviour, or, if appropriate, about the nature and impact of either domestic violence or sexual assault. Instead they must carefully consider the particular evidence presented.
- **If appropriate, explain what needs to be taken into account in relation to long-term abuse** of a woman by her partner and the defences of duress, provocation and/or self defence.<sup>88</sup>
- **If appropriate, explain that they must not make misplaced comparisons with how a man would have behaved** — and that, instead, they should make any such comparisons to how a “reasonable woman” would have behaved in the light of what they have been told about the particular circumstances.
- **Remind them of any directions you made earlier in the proceedings in relation to how they must treat evidence that was presented in any alternative manner** — see 7.3.3.2 above.

### 7.3.6 Sentencing, other decisions and judgment or decision writing — points to consider

**Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory to (and preferably be considered**

87 *Criminal Trial Courts Bench Book*, above n 71. See also “Checklist of jury directions” and “Resource materials for important directions on summing-up” in *Sexual Assault Trials Handbook*, 2007–, above n 71, at [3-000] and [4-000].

88 *ibid*, “Duress” at [6-150], “Provocation” at [6-400] and “Self-defence” at [6-450].

**to be fair and non-discriminatory by) any woman affected by or referred to in your sentencing, decision and/or written judgment or decision.<sup>89</sup>**

**Points to consider:**

- **In order to ensure that any woman referred to or specifically affected by your sentencing, decision(s) and/or written judgment or decision also considers it/them to be fair and non-discriminatory, you may need to pay due consideration to (and indeed specifically allude to) any of the points raised in the rest of 7.3 (including the points made in the box in 7.3.5 immediately above) that are relevant to the particular case.**
- **Whether to allow a victim impact statement to be read out in court.<sup>90</sup>**
- **Bear in mind that:**
  - **Women tend to have lower income levels than men** — so a specific level of fine for them will often mean considerably more than the same level of fine for a man.
  - **Women may find community service orders harder to comply with than men given their generally greater proportion of household work and childcare activities** — consideration may need to be given to the hours to be served and the location in which the order is to be served.
  - **It is important not to undervalue women’s unpaid household duties and childcare activities in relation to such matters as personal injury compensation and property division.<sup>91</sup>**

89 As to sentencing principles generally see *Sentencing Bench Book*, 2006–, above n 71. For example, “The relevance of the attitude of the victim — vengeance or forgiveness” at [12-850] and “Factors relevant to the seriousness of an offence” at [18-715]. As to the restrictions of the power of the courts to make home detention orders in sexual assault and domestic violence proceedings see *Crimes (Sentencing Procedure) Act*, ss 76–77, and the *Sentencing Bench Book* at [4-050]. Note that where the conviction is for a “domestic violence offence”, the court must make an apprehended violence order whether or not an application for such an order had been made: *Crimes (Domestic and Personal Violence) Act* 2007, s 39(1). Prior to conviction, the court may need to make an interim apprehended violence order if such an order is not already in place: s 40.

90 See the *Crimes (Sentencing Procedure) Act*, Pt 3, Div 2; *Sentencing Bench Book*, above n 71, at “Victims and victim impact statements” at [12-790]. See also the Charter of Victims Rights (which allows the victim access to information and assistance for the preparation of any such statement); M Young, “The Charter of Victims Rights: supporting individuals in the criminal justice system” (2012) 24(6) *JOB* 43; and H Donnelly, “Assessing the harm to the victim in sentencing proceeding” (2012) 24(6) *JOB* 45.

91 See, for example, research cited in Graycar and Morgan, above n 12, pp 102–109.

- **It is important to ensure that the financial as well as the non-financial assets of male and female partners are dealt with fairly in relation to all forms of property division.**<sup>92</sup>
- Note that female offenders are less likely than male offenders to be guilty of violent crimes (see 7.1 above), so it may be appropriate (depending on the nature of the offence) to consider imposing a non-custodial sentence or possibly home detention or an intensive correction order in respect of a woman who is the primary child carer.
- **On the other hand, it is also important not to be paternalistic and, for example, give a woman a more favourable sentence than you would give a man in materially similar circumstances.**
- ▣ **Effect of a mother’s incarceration on children**
  - **While the children of male prisoners are usually cared for by their female partner, research shows that the children of female prisoners are frequently cared for by temporary carers — this impacts much more negatively on their children.**<sup>93</sup>
  - **Attachment research shows that separation of children from their primary caregivers before three years of age can have deleterious effects on the quality of their attachment to their mothers** — which in turn is strongly associated with compromised psychological development that may reverberate throughout life. Prior to age three, infants experience heightened periods of separation anxiety and stranger anxiety. Separations during these stages of development are associated with behavioural problems

<sup>92</sup> *ibid.*

<sup>93</sup> A Symonds, “Children of prisoners” (2009) 21(3) *JOB* 24; E Stanley and S Byrne, “Mothers in prison: coping with separation from children”, paper presented at the Women in Corrections: Staff and Clients Conference, convened by the Australian Institute of Criminology in conjunction with the Department for Correctional Services (SA), 31 October–1 November 2000, Adelaide, at [http://aic.gov.au/media\\_library](http://aic.gov.au/media_library), accessed 8 April 2013; Office for Women, Queensland, *Women and the Criminal Code*, Taskforce report, 2000, Ch 10, citing Home Office Research and Statistics Directorate, Research Findings No 38, 1997 at 2, at [www.communities.qld.gov.au](http://www.communities.qld.gov.au), accessed 8 April 2013; Corrective Services NSW, above n 35, pp 20–22; A Larson, “Gendering criminal law: sentencing a mothering person with dependent children to a term of imprisonment”, *Australian Journal of Gender and Law*, 2012, Vol 1, at <https://genderandlaw.murdoch.edu.au>, accessed 26 March 2013.

in the short term and in the longer term impaired mental health, and social and occupational functioning. The younger the age of separation, the greater the emotional trauma experienced.<sup>94</sup>

- **Separations or disruptions to the attachment between a mother and her child before three years of age can have major negative consequences for the child's subsequent development that may reach into adulthood.** Failure to develop secure attachment through high quality parent-child relationships in early life also has a significant impact on later mental health and illness.<sup>95</sup>

[The next page is 7401]

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94 D Kenny, *Meeting the needs of children of incarcerated mothers: the application of attachment theory to policy and programming*, Consultant Report prepared for the Department of Corrective Services (NSW), October 2012, p 2, at [www.correctiveservices.nsw.gov.au](http://www.correctiveservices.nsw.gov.au), accessed 2 June 2014.

95 *ibid*, p 5.

## 7.4 Further information or help

- **For further information about gender inequity, gender bias and women,** it is probably best to start with the following seminal text — R Graycar and J Morgan, *The hidden gender of law*, 2nd edn, 2002, The Federation Press, Leichhardt, NSW.
- **The following community organisations specialise in providing legal advice and assistance to women only and may therefore be able to provide additional or specialised information:**

### **Women’s Legal Services NSW**

PO Box 206, Lidcombe NSW 1825

Ph: (02) 8745 6900 (Administration)

(02) 8745 6988 or 1800 801 501 (Women’s Legal Contact Line)

(02) 8745 6999 or 1800 810 784 (Domestic Violence Legal Advice Line)

(02) 8745 6977 or 1800 639 784 (Indigenous Women’s Legal Contact Line)

Fax: (02) 9749 4433

[www.womenslegalnsw.asn.au](http://www.womenslegalnsw.asn.au)

### **Community Legal Centres (NSW)**

Suite 805, Level 8, 28 Foveaux Street

Surry Hills NSW 2010

Ph: (02) 9212 7333

Fax: (02) 9212 7332

Email: [clcnsw@clc.net.au](mailto:clcnsw@clc.net.au)

[www.clcnsw.org.au](http://www.clcnsw.org.au)

### **Wirringa Baiya Aboriginal Women’s Legal Centre**

Cnr Marrickville and Livingstone Rds Marrickville NSW

PO Box 785 Marrickville NSW 1475

Ph: (02) 9569 3847

Freecall: 1800 686 587 (NSW only)

Fax: (02) 9569 4210

Email: [leonie\\_mason@clc.net.au](mailto:leonie_mason@clc.net.au)

[www.wirringabaiya.org.au](http://www.wirringabaiya.org.au)

- **See also:**

### **Australian Domestic & Family Violence Clearinghouse**

University of New South Wales

Sydney NSW 2052

Ph: (02) 9385 2990 or 1800 75 33 82

Fax: (02) 9385 2993

[www.austdvclearinghouse.unsw.edu.au](http://www.austdvclearinghouse.unsw.edu.au)

**Australian Centre for the Study of Sexual Assault**

Level 20, 485 La Trobe Street  
Melbourne VIC 3000 Australia  
Ph: (03) 9214 7888  
Fax: (03) 9214 7839  
[www.aifs.gov.au/acssa](http://www.aifs.gov.au/acssa)

**Corrective Services NSW (Women offenders)**

GPO Box 31  
Sydney NSW 2001  
Telephone: (02) 8346 1333  
Facsimile: (02) 8346 1205  
[www.correctiveservices.nsw.gov.au/programs/women-offenders](http://www.correctiveservices.nsw.gov.au/programs/women-offenders)

**Family & Community Services NSW, Domestic violence website**

[www.domesticviolence.nsw.gov.au](http://www.domesticviolence.nsw.gov.au)

**Victim Services, Attorney General & Justice****Safety and protection generally**

[www.lawlink.nsw.gov.au/lawlink/victimsservices/ll\\_vs.nsf/pages/VS\\_safetyandprotection](http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_safetyandprotection)

**Domestic violence**

[www.lawlink.nsw.gov.au/lawlink/victimsservices/ll\\_vs.nsf/pages/VS\\_specificcrimes1](http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_specificcrimes1)

**Sexual assault**

[www.lawlink.nsw.gov.au/lawlink/victimsservices/ll\\_vs.nsf/pages/VS\\_specificcrimes2](http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_specificcrimes2)

**DVD for victims going to court**

Justice Journey — Information for victims of crime about going to court in NSW (DVD), 2012: [www.lawlink.nsw.gov.au/lawlink/victimsservices/ll\\_vs.nsf/pages/VS\\_publicationscourt](http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_publicationscourt)

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## 7.5 Further reading

### Violence against women

Judicial Commission of NSW, *Local Courts Bench Book*, 1988–; “Apprehended violence orders” at [25-000].

Judicial Commission of NSW, *Sentencing Bench Book*, 2006– “Particular types of personal violence” at [50-130].

S Indyk, H Donnelly and J Keane, *Partial defences to murder in New South Wales 1990–2004*, Monograph 28, Judicial Commission of NSW, 2006.

D L McMillan, *But he says he loves me*, Allen & Unwin, Sydney, 2007.

D L McMillan and A David, “The domestic violence dynamic” (2006) 18(10) *JOB* 81.

S Meyer, “Why women stay: a theoretical examination of rational choice and moral reasoning in the context of intimate partner violence” (2012) 45(2) *ANZJ Crim* 179.

G Sheehan and B Smyth, “Spousal violence and post-separation financial outcomes” (2000) 14 *AJFL* 102.

RA Sculler, BM McKimmie and T Janz, “The impact of expert testimony in trials of battered women who kill” (2004) 11(1) *Psychiatry, Psychology and the Law* 1.

JJ Spigelman, “Violence against women: the dimensions of fear and culture” (2010) 84 *ALJ* 372.

J Stubbs and J Tolmie, “Falling short of the challenge? A comparative assessment of the Australian use of expert evidence on the battered woman syndrome” (1999) 23 *MULR* 709.

### Female offending

M Cain and A Howe (eds), *Women, crime and social harm: towards a criminology for the global age*, Hart Publishing, Oxford, 2008.

M Segrave and B Carlton, “Women, trauma, criminalisation and imprisonment ...” (2010) 22(2) *CICJ* 287.

M Stathopoulos et al, *Addressing women’s victimisation histories in custodial settings*, ACSSA Issues, No 13, 2012, at [www.aifs.gov.au](http://www.aifs.gov.au), accessed 26 March 2013.

J A Warner, *Women and crime: a reference handbook*, ABC-CLIO, California, 2012, Ch 2: “Problems, controversies and solutions.”

### Sentencing of females

P Gallagher, P Poletti and I MacKinnell, *Sentencing disparity and the gender of juvenile offenders*, Research Monograph 16, Judicial Commission of NSW, Sydney, 1997.

C Hedderman and L Gelsthorpe, *Understanding the sentencing of women*, Home Office Research Study 170, Home Office Research and Statistics Directorate (UK), 1997, at <http://webarchive.nationalarchives.gov.uk>, accessed 26 March 2013.

P Poletti, “Sentencing female offenders in New South Wales”, *Sentencing Trends*, No 20, Judicial Commission of NSW, Sydney, 2000.

**Other**

Anti-Discrimination Board of NSW, *Annual reports*, at [www.lawlink.nsw.gov.au](http://www.lawlink.nsw.gov.au) accessed 10 April 2013.

G Sheehan and J Hughes, *Division of matrimonial property in Australia*, Research Paper No 25, Australian Institute of Family Studies, March 2001.

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## 7.6 Your comments

The Judicial Commission of NSW welcomes your feedback on how we could improve the Equality before the Law Bench Book.

We would be particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific Sections of other Bench Books, discussion or research material.

Section 11 contains information about how to send us your feedback.

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# Lesbians, gay men and bisexuals

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## 8.1 Some statistics<sup>1</sup>

- **Proportion of the population** — There are few reliable statistics on the number of lesbians, gay men and/or bisexuals resident in NSW. In 2014, the Australian Bureau of Statistics conducted its General Social Survey and people were asked about their sexual orientation in the survey for the first time. Over half a million people or 3% of the adult population identifies as gay, lesbian or other. Identification as gay, lesbian or “other” varied by age with the high rates in younger age groups.<sup>2</sup>
- **Views of others** — There is scant credible evidence on how society views lesbians, gay men and bisexuals. The Human Rights Commission states that “LGBTIQ people in Australia still experience discrimination, harassment and hostility in many parts of everyday life; in public, at work and study, accessing health and other services”. However, attitudes appear to be changing. In November 2017, the Federal Government held the Australian Marriage Law Postal Survey which canvassed attitudes of voters towards amending the *Marriage Act 1961* (Cth) by asking the question, “Should the law be changed to allow same-sex couples to marry?”. A “yes” or “no” answer was required. The survey returned a 61.6% Yes vote. This result has been heralded as a major breakthrough for LGBTIQ rights in Australia. On 9 December 2017, the main amendments to the *Marriage Act 1961* (Cth) by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* commenced to legalise same-sex marriage in Australia.<sup>3</sup>
- **Discrimination** — Despite the existence of anti-discrimination protection under NSW anti-discrimination law since 1982,<sup>4</sup> there is little doubt that lesbians, gay men and bisexuals are discriminated against more

1 Unless otherwise indicated, these statistics are drawn from information on the Gay and Lesbian Rights Lobby’s website, at [www.glr.org.au](http://www.glr.org.au), accessed 26 September 2017, and from information on the Gay and Lesbian Counseling Service’s website, at [www.twenty10.org.au/](http://www.twenty10.org.au/), accessed 26 September 2017.

2 Australian Bureau of Statistics, General Social Survey, 2014 (ABS Cat No 4159.0), Canberra at [www.abs.gov.au/ausstats/abs@.nsf/4159.0main+features12014](http://www.abs.gov.au/ausstats/abs@.nsf/4159.0main+features12014), accessed 13 November 2017.

3 Schedule 1, Pts 1 and 2 of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* commenced on 9 December 2017.

4 *Anti-Discrimination Act 1977* (NSW), Pt 4C, assented 12 December 1982. From 1 August 2013 it became unlawful to discriminate against a person on the basis of sexual orientation, gender identity and intersex status under the *Sex Discrimination Act 1984* (Cth). Protections for same-sex relationships were also introduced in 2008 (*Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth)) and in 2013 with the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). The *Sex Discrimination Act 1984* (Cth) makes it unlawful for people to be treated unfairly because of their: sex; gender identity; intersex status; sexual orientation and marital or relationship status (including same-sex de facto couples). These protections apply to lesbian, gay, bisexual, transgender, gender diverse and intersex people. A complaint mechanism is available through the Australian Human Rights Commission if anyone has been discriminated against on the basis of their sexuality or gender status.

than heterosexuals. In 2013, the federal Parliament amended the *Sex Discrimination Act 1984* (Cth) by inserting s 5A Discrimination on the ground of sexual orientation.<sup>5</sup>

This provision makes it unlawful to discriminate against a person on the basis of sexual orientation under federal law. In addition, same-sex couples are also protected from discrimination under the amended definition of “marital or relationship status” which incorporates the definition from s 2F of the *Acts Interpretation Act 1901* (Cth).

These amendments<sup>6</sup> seek to bridge the gap in coverage between the States and territories and the Commonwealth, and introduce more inclusive definitions with the addition of the new ground of intersex status.<sup>7</sup>

Some lesbians and gay men feel that it is easier to be bisexual than to be exclusively lesbian or gay, in that it is easier for bisexuals to “pass” as heterosexual and avoid being discriminated against in the workplace. For example, nearly 60% report being discriminated against at work because of their sexuality.<sup>8</sup> Discrimination has a negative effect on the health and productivity of bisexuals and statistics show that bisexuals are at increased of mental health problems, including depression, anxiety disorders, self-harm and suicide, due to discrimination and abuse.<sup>9</sup> They are more likely to be diagnosed and treated for mental disorder or anxiety and have higher levels of psychological distress.<sup>10</sup>

- **Verbal abuse, intimidation and violence** — Lesbians, gay men, and bisexuals experience much greater levels of verbal abuse and violence than

5 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013*, assent 28 June 2013.

6 Second Reading Speech, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Commonwealth, House of Representatives, *Debates*, 21 March 2013, p 2893.

7 Australian Human Rights Commission, New protection against discrimination on the basis of sexual orientation, gender identity and intersex status at [www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/projects/new-protection](http://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/projects/new-protection), accessed 26 September 2017.

8 Australian Centre for Lesbian and Gay Research, *The pink ceiling is too low — Workplace experiences of lesbians, gay men and transgendered people*, 1999, p 28, available to order from <http://sydney.edu.au/arts/centres/aclgr/publications.html>, accessed 8 February 2011. For broader information see, for example, the considerable amount of information on the Gay and Lesbian Rights Lobby’s website available, at <http://glrl.org.au>, accessed 8 February 2011; Anti-Discrimination Board of NSW, *What is lesbian discrimination?*, 1990; Anti-Discrimination Board of NSW, *Skool’s out*, 2002, at [www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/vwFiles/SkoolsOut.pdf/\\$file/SkoolsOut.pdf](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/SkoolsOut.pdf/$file/SkoolsOut.pdf), and Annual Reports of the Anti-Discrimination Board of NSW, at [www.lawlink.nsw.gov.au/adb](http://www.lawlink.nsw.gov.au/adb), accessed 8 February 2011.

9 W Leonard, et al, *Private Lives 2: The Second National Survey of the Health and Wellbeing of GLBT Australians*, Australian Research Centre in Sex, Health & Society, at [www.glvh.org.au/files/PrivateLives2Report.pdf](http://www.glvh.org.au/files/PrivateLives2Report.pdf), accessed 27 November 2017.

10 National LGBTI Health Alliance, *The Mental Health of Lesbian, Gay, Bisexual, Transgender and Intersex People in Australia*, 2016, p 6, at <http://lgbtihealth.org.au/statistics/>, accessed 27 November 2017.

heterosexuals. A 2003 survey of 600 lesbians and gay men in NSW found that 85% reported experiencing some form of anti-lesbian/gay abuse, intimidation or violence, 56% having occurred in the previous 12 months.<sup>11</sup> This percentage has not reduced from earlier surveys. Gay bashings and even murders have at times been a form of sport among largely young men in at least the inner parts of Sydney.

Many lesbians, gay men and bisexuals remain reluctant to report verbal abuse or violence for a variety of reasons, including fear of a homophobic response, fear of “outing” themselves, fear of a distressing investigation process, a belief that little can be done, and concerns about privacy and security.<sup>12</sup>

In the past, the use of the so-called “homosexual advance defence” and “homosexual panic defence”<sup>13</sup> as a mitigating factor in relation to violent behaviour towards someone who is or was perceived to be homosexual was used as a defence of provocations, but has since been largely removed as a result of legal reform. In NSW, there is a partial defence of extreme provocation under s 23 *Crimes Act* 1900, commenced 13 June 2014. However, s 23(3) provides that conduct of the deceased (ie, the person killed as a result

11 NSW Attorney General’s Department, *You shouldn’t have to hide to be safe — A report on homophobic hostilities and violence against gay men and lesbians in NSW*, 2003, p 2, at [www.lawlink.nsw.gov.au/lawlink/cpd/ll\\_cpd.nsf/pages/CPD\\_glb\\_publications](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/pages/CPD_glb_publications), accessed 8 February 2011; see also Gay and Lesbian Rights Lobby, *Streetwatch Report*, 1990; Anti-Discrimination Board of NSW, *Final Report of the Streetwatch Implementation Advisory Committee*, 1994; and J Sandroussi and S Thompson, *Out of the Blue: Police Survey of Violence and Harassment against Gay Men and Lesbians*, 1995, New South Wales Police Service.

12 NSW Attorney General’s Department, *You shouldn’t have to hide to be safe — A report on homophobic hostilities and violence against gay men and lesbians in NSW*, see n 8, pp xi, 23.

13 Although no such defence exists at law, the term “homosexual advance defence” is used to describe those “cases in which criminal defendants have claimed they acted either in self-defence or under provocation when committing acts of violence against homosexual men who had made sexual advances towards them”: J Keane, *Sentenced Homicides in New South Wales, 1994–2001*, Research Monograph 23, 2004, Judicial Commission of NSW, Sydney, p 98. The term “homosexual panic defence” is used to describe the uncontrollably violent response of a person to a homosexual advance and operates as “some form of insanity or diminished capacity defence”: Criminal Law Review Division, *Homosexual Advance Defence: Final Report of the Working Party*, 1998, Sydney, para 2.2, at [www.lawlink.nsw.gov.au/lawlink/clrd/ll\\_clrd.nsf/pages/CLRD\\_had](http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_had), accessed 8 February 2011. As to the pre-13 June 2014 position see: *Green v The Queen* (1997) 191 CLR 334. In this case, the High Court “upheld the view that the defence of provocation may be available to a person who kills in response to a non-violent homosexual advance”: Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 7, p 254 — but see Kirby J’s powerful dissenting view in this case and similar comments by McPherson JA in *R v Irving* [2004] QCA 305. See also I Potas, “Sexuality-related hate crime”, (2004) 16(3) *Judicial Officers’ Bulletin* 18.

of the alleged provocation) does not constitute extreme provocation if: (a) the conduct was only a non-violent sexual advance to the accused. See **Notes — extreme provocation** at [6-444] *Criminal Trials Court Bench Book*.<sup>14</sup>

- **Family support** — Some have lost touch with their families and/or previous friends after “coming out” as lesbian or gay. Some young lesbians and gay men leave school (see under “education” below) and home because of their feelings of lack of support. Some of these young people end up living on the streets, and/or as prostitutes, and/or abusing alcohol or drugs.
- **Suicide attempts and ideation and self harm of young people** — National statistics show that 16% of LGBTIQ young people reported that they had attempted suicide with those who experience abuse and harassment even more likely to make a suicide attempt. Equally, 15.4% of LGBTIQ young people reported that they had current thoughts of suicide in the last 2 weeks. 33% reported having self-harmed and 41% had thoughts of harming themselves.<sup>15</sup> 15.7% of lesbian, gay and bisexuals report current suicidal ideation (thoughts)<sup>16</sup> with the average age of a first suicide attempt being 16 years.<sup>17</sup>
- **“Coming out” as lesbian or gay** — Some people take much longer to “come out” as lesbian or gay than others. Some never fully “come out”. Some have had heterosexual relationships before coming out. Others have never had any heterosexual sexual experience. There is no right or wrong way to come out, it is important to do it in a way that you choose and in a way that you feel comfortable.
- **Self-censorship** — Because of the discrimination that lesbians, gay men and bisexuals experience, many lesbians and gay men are not completely open or

14 The *Crimes Amendment (Provocation) Act 2014* repealed s 23 of the *Crimes Act 1900* and substituted what is described as “extreme provocation”. These legislative changes were introduced following the Legislative Council’s Select Committee on the Partial Defence of Provocation which “unanimously recommended retaining but significantly restricting the partial defence ... to ensure that it could not be used in cases where the provocation claimed was infidelity, leaving a relationship or a non-violent sexual advance”. Section 23(2) provides an act is done in response to extreme provocation if and only if: (a) the accused acted in response to conduct of the deceased towards or affecting the accused; and (b) the conduct of the deceased is a serious indictable offence (punishable by 5 years imprisonment or more); and (c) the deceased’s conduct caused the accused to lose self-control; and (d) the deceased’s conduct could have caused an ordinary person to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased. Section 23(3) excludes conduct from being provocative if the conduct was a non-violent sexual advance to the accused, or the accused incited the conduct in order to provide an excuse to use violence against the deceased. The provocative conduct does not need to occur immediately before the act causing death: s 23(4).

15 National LGBTI Health Alliance, Snapshot of Mental health and suicide prevention statistics for LGBTI people, July 2016, at <http://lgbtihealth.org.au/wp-content/uploads/2016/07/SNAPSHOT-Mental-Health-and-Suicide-Prevention-Outcomes-for-LGBTI-people-and-communities.pdf>, accessed 2 November 2017.

16 Pitts, M et al (2006) Private lives: A report on the wellbeing of GLBTI Australians, Latrobe University, Melbourne.

17 Nicholas J and J Howard (1998) Better dead than gay? Depression, suicide ideation and attempt among a sample of gay and straight-identified males aged 18–24, *Youth Studies Australia*, 17(4): 28–33.

“out” about their sexuality. They adopt a practice of self-censorship in at least some part of their everyday life — for example, they may limit discussion of weekend activities and change the pronoun when referring to a partner or lover, or never hold hands in public.<sup>18</sup> This is likely to be even more the case in a formal setting such as a court. Some lesbians and gay men choose not to live with their (sometimes long-term) partner through fear of public exposure, and some live together but do not identify as living in a same sex relationship.<sup>19</sup> However, anecdotal evidence suggests that this is much less the case than it used to be. And note that some choose not to live together simply because they do not want to live together.

- **Education** — Those who started to “come out” at school, or who were recognised by other students as different, may not have been able to reach their full educational potential.<sup>20</sup>

There are connections between early school leaving, poor educational attainment and homophobic bullying.<sup>21</sup>

In a Northern Irish study, over two-thirds of the young people who left school earlier than they would have preferred had experienced homophobic bullying and 65% of those who had achieved low results had also been bullied.<sup>22</sup>

- **Income level** People in same-sex couple relationships were more likely than those in opposite sex relationships to have higher personal incomes. (see Section 7)

In 40% of male same-sex couples and 35% of female same-sex couples both partners earned \$1,000 or more a week; more than twice the proportion of opposite-sex couples (17%).

Consequently, same-sex couples were more likely to fall into the higher household income brackets.<sup>23</sup>

18 A Chapman, “Sexuality and Workplace Oppression” (1995) 20 *Melbourne University Law Review* 311 at 315; Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 7, p 247.

19 There was an Australia-wide increase of 32% of same-sex couples identifying as such since 2006 representing 1% of all couples in Australia. In the 15 years between 1996 and 2011, the number of same-sex couples more than tripled: *Couples in Australia, 4102.0 — Australian Social Trends*, July 2013, at [www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10July+2013](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10July+2013), accessed 27 September 2017. In the 15 years between 1996 and 2011, the number of same-sex couples more than tripled.

20 See for example, Anti-Discrimination Board of NSW, *Skool’s out*, see n 6.

21 Formative evaluation of the NSW Proud Schools Pilot: Stage 2, Final Report, Department of Education and Communities, 2014.

22 Toolkit for Teachers, Dealing with Homophobia bullying in Scottish Schools, Learning and Teaching Scotland, (undated), at [www.lgbtyouth.org.uk/files/documents/Toolkitforteachers.pdf](http://www.lgbtyouth.org.uk/files/documents/Toolkitforteachers.pdf), accessed 27 November 2017.

23 Australian Bureau of Statistics, *Australian Social Trends (ABS Cat No 4102.0)*, July 2013 at [www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+features10July+2013#](http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+features10July+2013#), accessed 26 September 2017.

- **Children** — Lesbians and gay men are less likely to be parents or live with children than heterosexuals. However, an increasing number of gay male and lesbian individuals and couples live with children — these children may be from previous heterosexual relationships, foster children, children born through surrogacy arrangements, co-parenting arrangements, or children born using artificial or self-insemination.<sup>24</sup> The 2011 Census counted 6,300 children living in same-sex couple families, up from 3,400 in 2001. Children in these same-sex couple families account for only one in a thousand of all children in couple families (0.1%).<sup>25</sup>

The vast majority of these children (86%) were in female same-sex couple families.<sup>26</sup>

- **In all other respects** — Lesbians, gay men and bisexuals are as diverse as heterosexuals in relation to their level of education, employment status, religious affiliation, ethnic or migrant background, whether or not they have a partner or indulge in sexual activity at all, levels of domestic violence, mental and physical health, criminality etc. Their sexuality is simply one (albeit important) facet of their make up.

[The next page is 8201]

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24 See for example, J Millbank, *Meet the parents: A review of the research on lesbian and gay families*, Gay and Lesbian Rights Lobby, 2002, at <http://glrl.org.au>, accessed 8 February 2010. The *2006 Census* reports that only 1.0% of couples with children are same sex couples, at [www.abs.gov.au/](http://www.abs.gov.au/), accessed 18 February 2011.

25 R Graycar and J Morgan, *The Hidden Gender of Law*, 2nd edn, 2002, The Federation Press, Leichhardt, NSW, p 89.

26 *Ibid.*

## 8.2 Some information

### 8.2.1 Common misconceptions

There are many false assumptions made about lesbians, gay men and bisexuals. Some of the most common are:

- **You can tell if someone is lesbian or gay (and possibly if they are bisexual) because they look and/or behave more like people of the opposite sex, or in a “gay” way** — Assumptions should not be made about a person’s sexuality based on their actions, appearance or behaviour. People who are lesbian, gay, bisexual and heterosexual behave in different ways, some of which don’t fit within the stereotypical idea of how a person of that sexuality should act.
- **In lesbian and gay male couples, one is more masculine and takes the traditional male role and the other is more feminine and takes the traditional female role** — The form of lesbian and gay male couple relationships is as varied as the form of heterosexual couple relationships. Some couples have loving, mutually supportive and life-long relationships. Other relationships can be short-term, destructive, and/or domestically violent.<sup>27</sup>
- **Gay men are more likely to sexually abuse children or youths** — Children and young people who are sexually abused are most commonly abused by an adult of the opposite sex. There is no research evidence that homosexual men are any more likely to sexually abuse boys aged under 18 than heterosexual men are likely to sexually abuse girls aged under 18.<sup>28</sup> In addition, men who sexually abuse boys aged under 18 “are not necessarily homosexual. They are sexually attracted to children”.<sup>29</sup>
- **Homosexuality breeds homosexuality/lesbianism and gay men make bad parents** — There is absolutely no evidence that gay or lesbian parents produce greater numbers of gay/lesbian children than heterosexual parents. Most gay

27 There is limited data on the incidence of domestic violence in same sex relationships but it has been observed that it is a “major issue”: see research collected in C Chan, “Domestic violence in gay and lesbian relationships”, Australian Domestic and Family Violence Clearing House, 2005, at [www.adfvc.unsw.edu.au](http://www.adfvc.unsw.edu.au), accessed 10 February 2011. The Inner City Legal Centre now operates the Safe Relationships Project, which is a court assistance scheme for people in same sex relationships, transgender people and intersex people who have experienced domestic violence. Information about same sex domestic violence is also available at “Another Closet”: <http://ssdv.acon.org.au> and “Fairs Fair” at [http://ssdv.acon.org.au/providerinfo/documents/SSDV\\_A4report.pdf](http://ssdv.acon.org.au/providerinfo/documents/SSDV_A4report.pdf), accessed 17 February 2011.

28 MR Stevenson, “Public policy, homosexuality and the sexual coercion of children” (2000) 12(4) *Journal of Psychology & Human Sexuality*, 1–19; see also statistics cited and fully referenced in an article on the website of the National Gay and Lesbian Task Force (USA): S Cahill and K Jones, “Child Sexual Abuse and Homosexuality”, (2002) at [www.pinktherapy.com/downloadables\\_new/youth/Child\\_Sexual\\_Abuse\\_&\\_Homosexuality.pdf](http://www.pinktherapy.com/downloadables_new/youth/Child_Sexual_Abuse_&_Homosexuality.pdf), accessed 18 February 2011.

29 B Adair, “Child Sexual Assault” (1996) 8(5) *Judicial Officers’ Bulletin* 33 at 33.

men, lesbians and bisexuals have heterosexual parents. There is also no discernible difference between the children who live with one or two lesbian or gay male parent(s) and the children who live with one or two heterosexual parent(s) in relation to such things as the children's level of happiness, social adjustment, satisfaction with life and/or moral or cognitive development. In addition, lesbian mothers are generally "more concerned than heterosexual women that their children should have contact with men and positive male role models".<sup>30</sup>

- **Lesbians, gay men and bisexuals could choose to be heterosexual** — While it is true that a few make an active decision not to have heterosexual relationships, most feel that their lesbianism, homosexuality or bisexuality was there from birth, and is not something they can change. There is some research evidence that sexuality may be biologically determined.<sup>31</sup>
- **People who call themselves bisexual are really gay or lesbian but do not want or dare to describe themselves as such, or they are really heterosexual but just like the idea of describing themselves as capable of having sexual relationships with anyone** — Bisexuals "live their lives in a diverse range of ways, including remaining single, marrying, and having a same sex partner. They may engage in sexual activity with partners of the same sex, the opposite sex or partners of both sexes"<sup>32</sup> — at the same time or sequentially. They are therefore too diverse to categorise in either of these ways.
- **Same sex relationships do not have the same significance as heterosexual relationships** — Same sex relationships have the same significance to each partner (and any children living with the couple) as heterosexual relationships (and families) do to heterosexuals. To accord them less significance because they are same sex, do not fit the "norm", or do not match the way heterosexuals arrange their everyday life is unfair and discriminatory. Note also that same sex parents tend to share all parenting activities and parenting decisions in much the same way as heterosexual couples (although, as noted in 8.1 above, they tend to share the actual work more equitably). This happens despite the fact that only one parent is the biological parent — see 8.3.2.

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30 J Millbank, *Meet the parents: A review of the research on lesbian and gay families*, Gay and Lesbian Rights Lobby, 2002, p 7, at <http://grrl.org.au>, accessed 9 February 2011.

31 Judicial Studies Board, *Equal Treatment Bench Book*, see n 2, Section 7.1.

32 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 7, p 250.

## 8.2.2 Explanations and terminology

### 8.2.2.1 Homosexuality and homosexual

**“Homosexuality”** is used to describe both lesbian and gay male sexuality — that is, as a term for people who are sexually and emotionally attracted to people of the same sex.

**“Homosexual”** is used as either an adjective or a noun to refer to both a lesbian and a gay man.

However, many lesbians regard both these words as male and exclusive of women. Some gay men prefer to use “gay man”, “gay male”, or “gay” — see 8.2.2.2.

“LGBTIQ refers collectively to people who are lesbian, gay, bisexual, trans, intersex and/or queer.

### 8.2.2.2 Gay

**“Gay”** is used to describe both lesbians and gay men. While technically an adjective, it is often used as a noun as well — particularly when used in the plural — “gays”.

Again, some lesbians prefer the term lesbian instead.

The term **“gay man”** is the closest match for the term “lesbian”.

### 8.2.2.3 Lesbianism and lesbian

**“Lesbianism”** (as opposed to “homosexuality”) and **“lesbian”** as opposed to “homosexual” or “gay”, are preferred by many women who are sexually and emotionally attracted to women.

### 8.2.2.4 Coming out, out, outed and closeted

**“Coming out”** is used to describe the process of being able to openly describe oneself as lesbian or gay and then live openly, or relatively openly, as lesbian or gay. All forms of the verb are used depending on the tense required.

Someone who has **“come out”** may be described as **“out”**.

Lesbians and gay men who have “come out” are sometimes said to have come **“out of the closet”**.

Those who are not open about their sexuality are described as **“in the closet”** or **“closeted”**.

People who are closeted are sometimes **“outed”** (that is, publicly named as lesbian or gay) — usually by others who wish to embarrass them, shame them or for political purposes.

#### 8.2.2.5 Same sex relationships

A lesbian or gay male relationship.

#### 8.2.2.6 Homophobia and lesbophobia

“**Homophobia**” (literally fear of homosexuals/homosexuality) describes the inability of others to tolerate lesbians and gays and accept that they should be treated fairly and their different needs allowed for. It embraces discriminatory views and actions.

“**Lesbophobia**” is preferred by some lesbians when describing homophobia towards lesbians.

#### 8.2.2.7 Queer and queer-identifying

Some (particularly younger) gay men, lesbians and bisexuals use “queer”, and/or “**queer-identifying**”, as both nouns and adjectives, to describe anyone who is not completely heterosexual.

These words are often used as including transgendered people, despite the fact that being transgendered has nothing to do with sexuality — see Section 9.

#### 8.2.2.8 Bisexuality and bisexual

“**Bisexuality**” describes the sexuality of people who are sexually and emotionally attracted to members of both sexes.

“**Bisexual**” is used (as a noun and adjectivally) to describe people who are sexually and emotionally attracted to members of both sexes.

#### 8.2.2.9 Straight and bent

Lesbians, gay men and bisexuals often use “straight” to describe heterosexuals, and its opposite “bent” to describe themselves. It is generally not appropriate to use “bent” unless you are lesbian, gay, or bisexual, or have been given specific permission to use the particular term.

#### 8.2.2.10 Other terms

Other terms used to describe lesbians and gay men, such as “dyke”, “lemon”, “leso”, “poof”, “poofter”, “fag”, “faggot”, “camp”, “fairy”, “butch”, “queen” and “femme” are generally not appropriate to use unless you are lesbian or gay, or have been given specific permission to use the particular term. Indeed, many are considered derogatory when used outside gay male and/or lesbian communities.

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## 8.3 Legal recognition

### 8.3.1 Age of consent

The age of consent in NSW is now the same for everyone, whether heterosexual, bisexual, lesbian or gay — that is, 16 years.<sup>33</sup>

### 8.3.2 Same sex relationships

The definition of “marriage” in the *Marriage Act* 1961 (Cth) has until recently excluded same sex unions. After the success of the “Yes” campaign in the Australian Marriage Postal Survey, on 9 December 2017, the main amendments to the *Marriage Act* 1961 (Cth) by the *Marriage Amendment (Definition and Religious Freedoms) Act* 2017 commenced to legalise same-sex marriage:<sup>34</sup> see 8.1 for further discussion of the Australian Marriage Postal Survey.

Previously, s 88EA of the *Marriage Act* did not recognise a union solemnised in a foreign country between: (a) a man and another man; or (b) a woman and another woman. Section 88EA was repealed by the *Marriage Amendment (Definition and Religious Freedoms) Act* 2017.<sup>35</sup>

Same sex couples who live together as de facto couple enjoy many of the same rights as heterosexual de facto couples. However:

- Those who live apart generally do not have the same rights, despite the fact that it is more common for same sex couples to choose not to live together — sometimes for fear of being recognised as lesbian or gay. For example, the *Health Insurance Act* 1973 (Cth) requires that for a person to be recognised as a spouse, they must not live, on a permanent basis, separately and apart from that person.
- To gain access to some of these rights, same sex couples must provide significant proof that they are in a de facto relationship. They may need to

33 *Crimes Act* 1900 (NSW), s 66C.

34 Schedule 1, Pts 1 and 2 of the *Marriage Amendment (Definition and Religious Freedoms) Act* 2017 commenced on 9 December 2017.

35 Schedule 1, Pt 1, cl 58, *ibid*.

provide evidence of living and child care arrangements, sexual relationship, finances, ownership of property, commitment to a shared life and the reputation and public aspects of the relationship.<sup>36</sup>

- Same sex couples who are parenting can both be recognised as legal parents in some circumstances. For example, a lesbian couple who plan and conceive a child together can both be recognised as parents on a child's birth certificate in NSW.<sup>37</sup> The *Family Law Act* (Cth) recognises same sex couples as parents.<sup>38</sup>
- To access IVF treatment or reproductive technologies through Medicare, a woman must be diagnosed as “medically infertile”. Medicare rebates for these types of treatments are unavailable to a woman who has no pre-existing fertility condition. This means women in same sex relationships who have no infertility condition would be unable to access benefits to conceive a child. Medicare rebates are also not available for surrogacy arrangements.
- Same sex couples may also need to prove they are in a de facto relationship to be able to make care and treatment decisions on behalf of a partner; to be listed as a spouse on a death certificate and be involved in funeral planning and to be provided for under an estate when the partner dies without leaving a will.<sup>39</sup>

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36 *Family Law Act* 1975 (Cth), s 4AA(2).

37 *Births, Deaths and Marriages Registration Act* 1995 (NSW), arising from amendments made by the *Miscellaneous Acts Amendment (Same Sex Relationships) Act* 2008 (NSW), commenced 22 September 2008.

38 Section 18 as amended by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act* 2008 (No 144, 2008). This Act amended about 85 Commonwealth laws to take account of same sex relationships and give same sex couples in a de facto relationship or registered relationship the same rights as de facto opposite sex couples.

39 H Robert and F Kelly, The legal benefits married couples have that de facto couples do not, La Trobe University, 21 September 2017.

## 8.4 The possible impact of a person’s lesbianism, homosexuality or bisexuality in court

The discrimination and abuse that many lesbians, gay men and bisexuals have experienced (often many times) may make some of them more likely to name *any* perceived problem, or any perceived difference in treatment as being a form of sexuality discrimination, even when it is not. However, if you follow the guidance provided in 8.5, below, this should be less likely to occur.

In addition, unless appropriate account is taken of any needs specific to their sexuality, lesbians, gay men and bisexuals are likely to:

- Feel uncomfortable, resentful or offended by what occurs in court.
- Feel that an injustice has occurred.
- In some cases be treated unfairly and/or unjustly.

These problems are likely to be compounded if the person also happens to be Indigenous, from an ethnic or migrant background, a young person, female, transgender(ed), a person with a disability, or if they practise a particular religion, or are representing themselves — see the relevant other Section(s).

Section 8.5, **following, provides additional information and practical guidance** about ways of treating lesbians, gay men and bisexuals, so as to reduce the likelihood of these problems occurring.

The boxed areas provide the practical guidance.

[The next page is 8501]



## 8.5 Practical considerations

### 8.5.1 Appearance and behaviour

**Lesbians, gay men and bisexuals must be accorded the same dignity and respect as anyone else.**

**Points to consider:**

- **Be sensitive to the fact that the style of dress (or haircut, make up or lack of make up) of a particular lesbian, gay man or bisexual may or may not accord with the general community's view of how someone of their gender should dress or look.** No discomfort should be shown with any style that is more common in someone of the opposite sex, or with any style that might be seen as the stereotypical presentation of someone who is lesbian or gay (for example, excessively camp, femme or feminine or excessively butch or masculine).
- **Be sensitive to the fact that the behaviour traits of a particular lesbian, gay man or bisexual may or may not accord with the general community's views about how someone of their gender should behave.** Again, no discomfort should be shown with any behaviour that is more common in someone of the opposite sex's gender, or with any behaviour that might be seen as the stereotypical presentation of someone who is lesbian or gay (for example, excessively camp, femme or feminine or excessively butch or masculine).

- **Apologise if an initial mistake has been made about the gender of a particular gay man, lesbian or bisexual.**
- **As prescribed by law, intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any particular allegedly sexuality determined difference in appearance or behaviour.<sup>40</sup>**

## 8.5.2 Language and terminology

### Points to consider:

- **Use sexuality descriptors only when relevant to the matter before the court, and then use only those that are both accurate and acceptable to the particular lesbian, gay man or bisexual.** For example, it is generally best to use “lesbian”, “gay man”, “homosexual” or “homosexual man” as opposed to “gay lady/woman”, or “gay”. But it is always best to check with the particular person first — see also 8.2.2 above.
- **Use the word “partner” to describe the person a lesbian, gay man or bisexual is (or was) in a relationship with, or “lover” to describe the person they are (or were) having a short-term affair with.**
- **Do not use any form of discriminatory or discriminatory-sounding language** — for example, do not state or imply, or allow others to state or imply, that all gay men are sexually promiscuous, or all lesbians hate men.<sup>41</sup>
- **Treat everyone as an individual, and do not make statements that imply that all those who are lesbian, gay male or bisexual are the same, or likely to act in the same way.** Never assume or imply that

40 Note that s 41 of the *Evidence Act 1995* (NSW) provides that a judicial officer must disallow improper questions (for example, misleading or confusing, or unduly annoying, harassing, intimidating, offensive, humiliating or repetitive) questions and also provides that questions must not be put to a witness in a “manner or tone that is belittling, insulting or otherwise inappropriate” or “has no basis other than a stereotype (for example, a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability)”. Sections 26 and 29(1) of the *Evidence Act 1995* also enables the court to control the way in which witnesses are questioned, the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows you to exclude any evidence that is unfairly prejudicial to a party or is misleading or confusing.

41 *ibid.*

the way you think the majority of lesbians, gay men or bisexuals behave or think is the standard by which any individual member of that group should be judged.

### 8.5.3 The impact of a person’s lesbianism, homosexuality or bisexuality on any behaviour relevant to the matter(s) before the court

#### Points to consider:

- **Be sensitive to the fact that evasiveness about personal life and activities may simply be a reluctance to “come out” in court.** You may need to intervene if any such questioning is unnecessary or irrelevant, or consider whether it would be best to close the court.
- **Do not let stereotyped views about lesbianism, homosexuality or bisexuality unfairly influence your (or others’ assessment).** For example, you may need to:
  - **As prescribed by law, intervene if any of the common misconceptions listed in 8.2.1 appear to be unfairly behind any questioning.**<sup>42</sup>
  - **Be mindful of the fact that lesbians, gay men and bisexuals can be victims of domestic and intimate partner violence, in just the same way that heterosexuals can.** A national demographic and health and wellbeing survey found significant levels of intimate partner violence in LGBTIQ communities.<sup>43</sup> Note that “Battered Spouse Syndrome” (see Section 7.3.3.3) “has successfully been relied upon by a gay man who killed his partner of 14 years to reduce a charge of murder to manslaughter, and as a mitigating factor in sentencing”.<sup>44</sup>
  - **Be mindful of the widespread criticism within gay male and lesbian communities and general controversy about the use of the “homosexual advance defence” and “homosexual panic defence”** — see 8.1 above under “Verbal abuse, intimidation and

42 *ibid.*

43 M Campo and S Tayton, *Intimate partner violence in lesbian, gay, bisexual, trans, intersex and queer communities*, 2015, at <https://aifs.gov.au/cfca/publications/intimate-partner-violence-lgbtqi-communities>, accessed 27 November 2017.

44 Supreme Court of Queensland, *Equal Treatment Benchbook*, 2016, see n 18, p 253, citing *R v McEwen* (unrep, WASC, 18/3/96) and CJ Simone, “Kill(er) man was a battered wife: The application of battered woman syndrome to homosexual defendants: *The Queen v McEwen*” (1997) 19 Sydney Law Review 230 at 235.

violence.” However, this defence has not been available in NSW since 13 June 2014. Section 23(3) excludes conduct from being provocative if the conduct was a non-violent sexual advance to the accused, or the accused incited the conduct in order to provide an excuse to use violence against the deceased.<sup>45</sup>

- **Assess a same sex relationship appropriately — while many are similar to heterosexual relationships, many are not, and each relationship** (just like those of heterosexual couples), is different. For example, many gay male couples allow sexual activity outside the relationship. A same sex couple who live apart might have as strong a relationship as a conventional heterosexual couple. Financial and other such arrangements vary from couple to couple, just as they do with heterosexual couples. But (as indicated in 8.1 above) childcare activities and household duties tend to be more equitably shared than for heterosexual couples.
- **As prescribed by law, intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any particular allegedly sexuality-determined difference.**<sup>46</sup>
- **Has the fact that the person is lesbian, gay male or bisexual, together with any difficulties they might have experienced as a result, been an influencing factor in the matter(s) before the court? If so, where possible, you may need to take appropriate account of these influences.** For example, you may need to decide whether the law allows you to take account of any such influences and, then, as necessary and at the appropriate time in the proceedings, so as to ensure that justice is done and seen to be done, explain why any such influences can/should be taken into account, or cannot/should not be taken into account. And, for example, you may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing — see 8.5.4 and 8.5.5.

#### 8.5.4 Directions to the jury — points to consider

As indicated at various points in 8.5, it is important that you ensure that the jury does not allow any ignorance of lesbianism, homosexuality or bisexuality, or stereotyped or false assumptions about lesbians, gay men or bisexuals to unfairly influence their judgment.

<sup>45</sup> *Criminal Trial Courts Bench Book*, [6-440].

<sup>46</sup> See n 45.

**In your final directions to the jury, you may need to remind them of any points in relation to these aspects that you alerted them to during the proceedings, and/or cover them for the first time now.**

**This should be done in line with the *Criminal Trial Courts Bench Book*<sup>47</sup> or *Local Courts Bench Book* (as appropriate), and you should raise any such points with the parties' legal representatives first.<sup>48</sup>**

**For example, you may need to provide specific guidance as follows:**

- **That they must try to avoid making stereotyped or false assumptions** – and what is meant by this. For example, you may need to specifically remind them that while the particular lesbian's, gay man's or bisexual's behaviour and/or sexuality may not accord with behaviour they themselves regard as morally acceptable, they must “remember that this is a court of law and not a court of morals”.<sup>49</sup> And then direct them to the specific questions they must decide. And finally explain that they must decide the matter(s) on the issues without prejudice to anyone.
- **On the other hand, that they may also need to assess the particular person's evidence alongside what they have learned in court about the way in which lesbians, gay men and bisexuals often have to (or feel they have to) live their lives** as opposed to the way in which they themselves might act. In doing this you may also need to provide guidance on any legal limitations that exist in relation to them taking full account of any of these matters. And you may also need to be more specific about the particular sexuality aspects that they need to pay attention to.

### 8.5.5 Sentencing, other decisions and judgment or decision writing — points to consider

**Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory to (and preferably be considered**

47 Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, 2002, Sydney, at [www.judcom.nsw.gov.au/publications/benchbks/criminal](http://www.judcom.nsw.gov.au/publications/benchbks/criminal), accessed 9 February 2011.

48 Judicial Commission of New South Wales, *Local Courts Bench Book*, 1988, Sydney.

49 The “Court of Morals” Direction, NSW Criminal Law Review Division, *Homosexual Advance Defence: Final Report of the Working Party*, 1998, para 6.12, cited in Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 18, p 253.

**to be fair and non-discriminatory by), any lesbian, gay man or bisexual affected by or referred to in your sentencing, decision and/or written judgment or decision.<sup>50</sup>**

**Points to consider:**

- **In order to ensure that any lesbian, gay man or bisexual referred to or specifically affected by your sentencing, decision(s) and/or written judgment or decision also considers it/them to be fair and nondiscriminatory, you may need to pay due consideration to (and indeed specifically allude to) any of the points raised in the rest of 8.5 (including the points made in the box in 8.5.4 immediately above) that are relevant to the particular case.**
- **Whether to allow a victim impact statement to be read out in court.<sup>51</sup>**

A victim may be able to read out a prepared victim impact statement in court at any time after an offender has been convicted but cannot be read out after sentencing. You may allow a member of the immediate family or other representative of the victim to read out the whole or any part of the statement to the court.<sup>52</sup>

Do not under-value the significance of a same sex relationship, or non-biological parent-to-child connection, in relation to such matters as compensation, property division and inheritance.

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50 See also Judicial Commission of New South Wales, *Sentencing Bench Book*, 2006, Sydney, at [1-000], see [www.judcom.nsw.gov.au/publications/benchbks/sentencing](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing), and *R v Henry* (1999) 46 NSWLR 346 at [10]–[11].

51 See Div 2, Pt 3 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the Charter of Victims Rights (which allows the victim access to information and assistance for the preparation of any such statement). Note that any such statement should be made available for the prisoner to read, but the prisoner must not be allowed to retain it.

52 *Crimes (Sentencing Procedure) Act 1999*, s 30A.

## 8.6 Further information or help

Organisations that can provide information or expertise about lesbianism, homosexuality or bisexuality or related issues, are:

### **NSW Gay & Lesbian Rights Lobby**

[www.glr.org.au](http://www.glr.org.au)

#### **Convenors**

Email: [convenors@glr.org.au](mailto:convenors@glr.org.au)

### **Inner City Legal Centre**

(Includes Gay and Lesbian Advice Service)

#### **Street Address:**

Basement, Kings Cross Library

50-52 Darlinghurst Rd

Kings Cross NSW 2011

#### **Postal Address:**

PO Box 25

Potts Point NSW 1335

Phone: 02 9332 1966

Fax: 02 9360 5941

Web: [www.iclc.org.au](http://www.iclc.org.au)

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## 8.7 Further reading

Australian Bureau of Statistics, *Year Book Australia*, 2012, ABS Cat No 1301.0, 2012, Canberra.

Australian Bureau of Statistics, *Couples in Australia, 4102.0 — Australian Social Trends*, March 2014, at [www.abs.gov.au/socialtrends](http://www.abs.gov.au/socialtrends), accessed 30 October 2017.

Anti-Discrimination Board of NSW, *Annual Reports*, at [www.antidiscrimination.justice.nsw.gov.au/about-us/annual-reports](http://www.antidiscrimination.justice.nsw.gov.au/about-us/annual-reports), accessed 23 November 2017.

Australian Centre for Lesbian and Gay Research, *The pink ceiling is too low — Workplace experiences of lesbians, gay men and transgendered people*, 1999.

Australian Medical Association, *AMA Position Statement: Sexual Diversity and Gender Identity*, 2002, citing AF Jorm, AE Korten et al “Sexual Orientation and Mental health: Results from a community survey of young and middle-aged adults” (2002) 180 *British Journal of Psychiatry* at 423–427.

M Flood and C Hamilton, *Mapping homophobia in Australia*, Australia Institute Webpaper, 2005, at [www.glhv.org.au/files/aust\\_inst\\_homophobia\\_paper.pdf](http://www.glhv.org.au/files/aust_inst_homophobia_paper.pdf), accessed 23 November 2017.

Twenty10 incorporating Gay and Lesbian Counselling Service’s website, at [www.twenty10.org.au](http://www.twenty10.org.au), accessed 27 October 2017.

Gay and Lesbian Rights Lobby’s website, at <http://glrl.org.au>, accessed 23 November 2017.

R Graycar and J Morgan, *The Hidden Gender of Law*, 2nd ed, 2002, The Federation Press, Leichhardt, NSW.

Inner City Legal Centre, “Talking turkey: a legal guide for lesbian, gay, bisexual, transgender, intersex and queer parents and donors in New South Wales”, 2015, at [www.iclc.org.au/talking-turkey/](http://www.iclc.org.au/talking-turkey/), accessed 23 November 2017.

Judicial Studies Board, *Equal Treatment Bench Book*, 3rd edn, 2013, London, Pt 12, “Sexual orientation”, at <https://www.judiciary.gov.uk/wp-content/uploads/2013/11/12-sexual-orientation.pdf>, accessed 23 November 2017.

J Millbank, Meet the parents: *A review of the research on lesbian and gay families*, Gay and Lesbian Rights Lobby, 2002, at [www.gaylawnet.com/ezone/parenting/MeettheParents.pdf](http://www.gaylawnet.com/ezone/parenting/MeettheParents.pdf), accessed 23 November 2017.

NSW Attorney General’s Department, *You shouldn’t have to hide to be safe — A report on homophobic hostilities and violence against gay men and lesbians in NSW*, 2003.

NSW Attorney General’s Department, *Understanding your Legal Rights: A Guide for Lesbians and Gay Men in NSW*, 2009, at [www.illawarraqinfo.com/Understand\\_Your\\_Legal\\_Rights\\_09.pdf](http://www.illawarraqinfo.com/Understand_Your_Legal_Rights_09.pdf), accessed 23 November 2017.

MR Stevenson, “Public Policy, homosexuality and the sexual coercion of children” (2000) 12(4) *Journal of Psychology & Human Sexuality* 1–19.

CJ Simone, “Kill(er) man was a battered wife: The application of battered woman syndrome to homosexual defendants: *The Queen v McEwen*” (1997) 19 *Sydney Law Review* 230 at 235.

Supreme Court of Queensland, *Equal Treatment Benchbook*, 2016, Supreme Court of Queensland Library, Brisbane, Chapter 15, “Gender Identity and Sexual Orientation”, at [www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/94054/s-etbb.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf), accessed 23 November 2017.

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## 8.8 Your comments

The Judicial Commission of NSW welcomes your feedback on how we could improve the Equality before the Law Bench Book.

We would be particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific Sections of other Bench Books, discussion or research material.

Section 11 contains information about how to send us your feedback.

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# Sex and gender diverse people

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## 9.1 Some statistics<sup>1</sup>

- **There are no reliable statistics on the number of NSW residents who have or might be perceived as having issues with their gender identity.** For example, there are no reliable statistics on the number of NSW residents who:
  - Would actively like to change their gender identity or who have changed their gender identity.<sup>2</sup>
  - Cross-dress but have no wish to change their gender identity.
  - Were born with a combination of male and female characteristics, that are not wholly male or female, that may be both male or female, or neither male or female (intersex) and either have changed or want to change or don't want to change the sex identity they were assigned.
- **The general community, however, is starting to recognise the existence of greater numbers of people who have, or might be perceived as having, gender identity issues** as they become more open about their desires and needs, and as Australian society, government services and the law slowly adapt to their needs.
- **There are no reliable statistics on whether the majority of transgender or trans people are male to female (MtF) or female to male (FtM).**<sup>3</sup> Most members of the general community are less aware of people who have changed or wish to change from the female to male gender, than vice versa — partly because it is often easier for women who change their gender identity to male to “pass” as male (that is, to not be recognised as originally female), than vice versa.
- **The frequency of intersex in the NSW population is unknown but generally expected to be similar to that in other countries.** Researchers estimate that as many as 4% of the population could be affected by some form of intersexuality but it is more likely to be around 1%.<sup>4</sup>

1 Unless otherwise indicated, the information in 9.1 is drawn from The Gender Centre's website, at [www.gendercentre.org.au](http://www.gendercentre.org.au), accessed 2 November 2017. The Gender Centre is a community or non-government organisation based in Sydney which is funded by the NSW Department of Human Services, Community Services under the Specialist Homeless Service program and supported by the NSW Department of Health to provide support services to people facing gender identity issues.

2 “Data from smaller countries in Europe with access to total population statistics and referrals suggest that roughly 1 per 30,000 adult males and 1 per 100,000 adult females seek sex gender reassignment surgery” — American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*, 4th edn, Text Revision, American Psychiatric Association, Washington, DC, 308.9. Note that these statistics only identify those who seek a sex affirmation procedure and therefore indicate a much lower incidence than the reality. These figures are under constant revision. According to information received from The Gender Centre, the population trend is towards parity for MtF and FtM change — see n 1.

3 Although, see n 2.

4 “Intersexuality 101”, Kits and Factsheet, The Gender Centre Inc, at [www.gendercentre.org.au/kits.htm](http://www.gendercentre.org.au/kits.htm), accessed 2 November 2017.

- **Despite the 1996 introduction of some protections against discrimination on transgender grounds under NSW anti-discrimination law,<sup>5</sup> there is little doubt that people with, or perceived as having, gender issues are some of the most discriminated against and marginalised people in Australian society.<sup>6</sup>** Our gender is a fundamental part of who we are. Many people regard gender as a fixed matter. The majority of the trans community also see their gender as a fixed matter. For the majority of trans people, once their bodies conform to their own innate understanding of gender they are then happy to live for all intents and purposes as that gender. Those who act against that norm sometimes have a very difficult time in accepting their own gender identity needs and in being accepted by others. People who wish to surgically change their bodies to conform with their innate gender also have to go through an extensive and lengthy process before this is allowed to occur.
- **As a result:**
  - **Approximately 10% are unemployed<sup>7</sup>** — which may mean that this community experiences much greater than average levels of poverty. According to an American study, transgender people are nearly four times more likely to live in extreme poverty and were twice as likely to be unemployed compared to the general population.<sup>8</sup> The Human Rights and Equal Opportunity Commission have stated that people who are transsexual or transgender have an unemployment rate of 9.1 per cent; more than twice the national average.<sup>9</sup>
  - **Of those who are employed** — many have felt the need to (or have felt forced to) change jobs during or following their gender identity change, or are working in jobs below their capacity, or are in marginal occupations, such as prostitution.

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5 *Anti-Discrimination Act 1977* (NSW), ss 38A–38T. The Australian Human Rights Commission released a Discussion Paper in October 2010 and announced a consultation into federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity. In 2013, the Federal Government amended the *Sex Discrimination Act 1984* (Cth) with the introduction of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) which added protections for gender identity (s 5B) and intersex status (s 5C).

6 See, for example, J Irwin, Australian Centre for Lesbian and Gay Research, *The pink ceiling is too low — Workplace experiences of lesbians, gay men and transgender people*, 1999, Australian Centre For Lesbian and Gay Research, University of Sydney, at [http://glrl.org.au/images/stories/the\\_pink\\_ceiling\\_is\\_too\\_low.pdf](http://glrl.org.au/images/stories/the_pink_ceiling_is_too_low.pdf), accessed 16 February 2011.

7 However, according to Elizabeth Riley, General Manager, Gender Centre some studies undertaken may not be statistically reliable, but supported a much higher figure of 60%. She confirmed that anecdotal information collected in 2011 from The Gender Centre about their clients supports this figure.

8 JM Grant, L Mottet, et al (2011) *Injustice at every turn: A report of the National Transgender Discrimination Survey*, Washington: The National Gay and Lesbian Task Force and the National Center for Transgender Equality.

9 *Queer Rights At Work*, Queer Rights At Work Conference, Brisbane, 20 June 2008, Graeme Innes AM, Human Rights Commissioner, Human Rights and Equal Opportunity Commission.

- **Many have lost touch with their families and/or previous friends** — in the process of expressing their desired gender identity, although others, for example, have kept and are actively supported by the same partner throughout their gender identity change, and/or have maintained or managed to re-establish their family relationships.
- **Many have been victims of violence** — There is limited Australian research that records the level of domestic and family violence in LGBTIQ relationships.<sup>10</sup> However, a number of international and local studies suggest that the general patterns and levels of domestic violence in LGBTIQ relationships are about the same as in heterosexual relationships. Aspects of LGBTIQ violence include threatening to “out” the person as a method of control; not allowing the person to form relationships and seek support within the LGBTIQ community and a feeling of embarrassment about the abuse leading to limited reporting to police or health professionals.<sup>11</sup> Yet many persons with gender identity issues are “reluctant to report violence directed against them due to a number of factors, including low expectations of arrest, the trauma of reporting, and a widespread, shared experience of negative police attitudes”.<sup>12</sup>
- **Many (although by no means all) did not achieve their full potential during their schooling** — Same sex attracted and gender diverse young people suffer high levels of verbal and physical abuse in the community, with the most common place of abuse (80%) being at school.<sup>13</sup> Gender diverse young people may also be experiencing high levels of anxiety and depression. This has a profound impact on their well-being, attendance and educational outcomes.<sup>14</sup>
- **Many have experienced, or continue to experience, greater than average levels of depression, drug and alcohol abuse and general ill health, and, as a result, there are relatively high levels of criminality within this community.**<sup>15</sup> Gender diverse and transgender individuals

10 lesbian, gay, bisexual, trans, intersex and queer

11 *Another Closet*, publication of the Inner City Legal Centre, LGBTIQ, domestic violence interagency; ACON, p 13, at [www.anothercloset.com.au](http://www.anothercloset.com.au), accessed 2 November 2017.

12 Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, Supreme Court of Queensland Library, Brisbane, p 252, at [www.courts.qld.gov.au/The\\_Equal\\_Treatment\\_Bench\\_Book/S-ETBB.pdf](http://www.courts.qld.gov.au/The_Equal_Treatment_Bench_Book/S-ETBB.pdf), accessed 16 February 2011.

13 L Hillier, et al (2010) *Writing themselves in 3*, La Trobe University, Melbourne.

14 Supporting same sex attracted, intersex and gender diverse students, Policy paper, Department for Education and Child Development, South Australian Government, at <https://www.decd.sa.gov.au/sites/g/files/net691/f/supporting-same-sex-attracted-intersex-and-gender-diverse-students-policy.pdf>, accessed 2 November 2017.

15 According to an American study, sexual minorities were disproportionately incarcerated: 9.3% of men in prison, 6.2% of men in jail, 42.1% of women in prison, and 35.7% of women in jail were sexual minorities. See IH Meyer et al, “Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012” (2017) 107(2) *American Journal of Public Health* 234.

are more likely to experience mental health conditions than the general population. Research has found that gender diverse and transgender young people were four times as likely as the cisgender young people to experience significant depressive symptoms (41% compared to 12%). Despite these high levels of depression, research has also found that amongst transgender and gender diverse people there is a reluctance to seek medical advice and assistance.<sup>16</sup>

- **Almost all (if not all) will have been discriminated against** — often many times, by employers and/or various types of service providers, so are much more likely to be sensitive to this possibility. This may make some of them more likely to name any perceived problem, or any perceived difference in treatment from the way in which they think people born as male or female would have been treated as being a form of transgender discrimination — even when it is not. However, if you follow the guidance provided in 9.5, below, this should be less likely to occur. Bullying and violence at work is a major issue for a significant number of LGBTI people. A report found that 90% of those identifying as gender diverse had experienced some form of discriminatory behaviour in the workplace.<sup>17</sup> Transgender people report that they commonly experience discrimination in the workplace, including in both gaining and maintaining employment.<sup>18</sup>

[The next page is 9201]

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16 E Smith, et al (2014). *From Blues to Rainbows: Mental health and wellbeing of gender diverse and transgender young people in Australia*. Melbourne: The Australian Research Centre in Sex, Health, and Society.

17 PwC, *LGBTI perspectives on workplace inclusion*, 2016, p 5, at <https://www.pwc.com.au/publications/pdf/workplace-inclusion-survey-jun16.pdf>, accessed 29 November 2017.

18 M Couch, et al, *Tranznation: A report on the health and wellbeing of transgendered people in Australia and New Zealand*, 2007.

## 9.2 Some information

### 9.2.1 Common misconceptions<sup>19</sup>

There are many false assumptions made about people who have gender identity issues or who are perceived as having gender identity issues. Some of the most common are that:

- **The desire for a change in gender identity is related to or even based on sexual preference or sexuality, and that if only the person could come to terms with their sexuality they would not need to change their gender identity** — Gender identity is very different from sexuality. Some people who change their gender were previously homosexual, some were previously heterosexual and some were previously bisexual. Once they change or move towards changing their gender identity, some keep their original sexual preference towards people of a particular gender, or towards people of both genders, and some change their preference. For example, a person who has changed their identity from male to female may be attracted to men and identify as heterosexual, or they may be attracted to women and identify as lesbian. And, the majority of gay men and lesbians do not have any issues with their gender identity — see Section 8 for more about this.
- **All those with gender identity issues wish to medically and surgically change their gender** — While this is true of some, it is not true of all. Some choose to use only some of the medical and surgical changes available — for example, they may choose to take hormones, but not undergo any surgical changes. Some are medically unable to make use of medical and/or surgical options. Some cannot afford surgery or have religious or philosophical convictions against it, and some simply choose not to do anything medical or surgical.
- **All those with gender identity issues identify so strongly with their chosen gender identity that they behave and dress in a way that represents the more extreme masculine end of the male spectrum of dress and behaviour for those who have chosen to identify as or change to male, or the more extreme feminine end of the female spectrum of dress and behaviour for those who have chosen to identify as or change to female** — In fact, a person assigned a male gender who now identifies as female might or might not dress in an ultra-feminine style, and vice versa. Often there is a progression towards an appearance that coincides more closely with the general community's view of the relevant person's age, socio-economic status and occupation.
- **There is something mentally wrong with people who wish to change their gender identity** — There is increasing medical and research evidence that

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<sup>19</sup> The information in 9.2.1 is drawn from The Gender Centre's website, at <[www.gendercentre.org.au](http://www.gendercentre.org.au)>, accessed 16 February 2011.

there is a biological basis for many people’s innate gender identity conflicting with their assigned gender.<sup>20</sup> Given the huge repercussions for every aspect of their life, no-one takes the decision to change their gender identity lightly. For some, this will be a decision starting to form, or actually taken, in childhood or adolescence. For others, this will be a decision taken much later in life, once they realise that it is no longer possible for them to live a life that is at odds with their innate identity.

## 9.2.2 Explanations and terminology<sup>21</sup>

### 9.2.2.1 Transgender and transsexual

Section 38A of the *Anti-Discrimination Act 1977* (NSW) uses the term “**transgender**” to refer to anyone:

- (a) who identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex, or
  - (b) who has identified as a member of the opposite sex by living as a member of the opposite sex, or
  - (c) who, being of indeterminate sex, identifies as a member of a particular sex by living as a member of that sex,
- and includes a reference to the person being thought of as a transgender person, whether the person is or was, in fact a transgender person.

This definition does not include people who cross-dress — unless they live or seek to live as a member of the gender whose clothes they are dressing in.

The Gender Centre notes that the legislative definition has limitations and that the “transgender community itself allows for a far more multi-coloured umbrella definition that is inclusive of anyone who transgresses gender norms”.<sup>22</sup>

The term “**transsexual**” is generally used to refer to only those people who are undergoing or have undergone a medical and surgical “**gender transition**” or “**sex change**.”

### 9.2.2.2 Intersex

“**Intersex**” replaces previous inaccurate and stigmatising terms such as “hermaphrodite” and “pseudo hermaphrodite”. Intersex people are not intersexual, intersexed and do not have intersexuality.

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20 Note the debate about definitions of sex and gender diversity at 4.1 of Australian Human Rights Commission, “Sex Files: the legal recognition of sex in documents and government records”, 2009, at [www.humanrights.gov.au/genderdiversity/sex\\_files2009.html](http://www.humanrights.gov.au/genderdiversity/sex_files2009.html), accessed 16 February 2011.

21 The information in 9.2.2 is largely drawn from The Gender Centre’s website, see n 19.

22 Gender Centre website, “Kits and Fact Sheets”, at <https://gendercentre.org.au/resources/kits-fact-sheets/family-friends>, accessed 29 November 2017.

Intersex refers to people who have congenital hormonal, physical or genetic differences that are neither wholly male or female, both male and female at once, or neither male nor female. In other words, intersex refers to an individual at birth who is not “unambiguously male or female”.<sup>23</sup>

Intersex includes a wide variety of diagnoses although the diagnosis by itself does not necessarily indicate intersex. The most common underlying diagnosis that may lead to intersex are congenital adrenal hyperplasia (CAH), androgen insensitivity syndrome (AIS) and Klinefelter syndrome (XXX).

Intersex people are generally male or female, living as men or women who are comfortable with their gender. It is uncommon for an intersex person to reject the sex they were assigned at birth however there is a significant number who do.

Intersex births are often seen as presenting parents with a dilemma that can only be resolved with medical intervention that often means genital surgery. Most surgery conducted on intersex newborns is not life preserving, rather it is cosmetic and an attempt to provide parents with an apparently normal child. Long-term consequences of these interventions are not well documented.<sup>24</sup>

#### 9.2.2.3 Male-to-female (MtF) and female-to-male (FtM)

**Male-to-female** (and its abbreviation **MtF**), and **female-to-male** (and its abbreviation **FtM**), are used to describe the gender direction that a trans or transsexual person has taken, or wants to take.

The terms “**male-to-female transgender person**” or “**male-to-female transsexual person**”, and “**female-to-male transgender person**” or “**female-to-male transsexual person**” are the best terms to use when describing the direction of a person’s gender identity change or desire for change.

However, those with legal recognition of their gender (see 9.3) may wish to be described as “**female**” or “**male**” instead of “male-to-female”, or “female-to-male”.

#### 9.2.2.4 Cross-dressing and transvestism

The term “**Transvestite**” describes a person who cross-dresses rather than someone who believes that their gender identity is different to their assigned gender.

23 *Kevin v Attorney-General* (Cth) [2001] Fam CA 1074; (2001) 165 FLR 404 at [224].

24 The information in 9.2.2.2 is drawn from the Organisation Intersex Australia’s website, at <<https://oii.org.au/18106/what-is-intersex>>, accessed 2 November 2017 and from The Gender Centre’s website, see n 19; Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, Supreme Court of Queensland Library, Brisbane, p 252; for information about intersexuality and the gender assigned early in life, see *Kevin v Attorney-General* (Cth) [2001] particularly at [209]–[273], above n 23.

Some people cross-dress only in private or only on stage. However some do so more widely than this and may, for example, appear in court in cross-dress.<sup>25</sup>

Some cross-dressers are gay or lesbian and some are heterosexual.

#### 9.2.2.5 Other terms

Other terms used to describe trans people (for example, “tranny” or “trannies”, “gender-bender”, “butch”, “drag queen”, “she-man”, “she-male”, “tomboy”) are very derogatory terms even within the trans community. “Tranny” is a frequently used term amongst drag-queens (usually gay men) and there is contention between the community over the use of this term.

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<sup>25</sup> Supreme Court of Queensland, *Equal Treatment Benchbook*, 2nd edn, see n 12, p 188.

### 9.3 Legal gender identity

In NSW, trans people may be legally recognised in terms of their affirmed gender upon application for alteration of the record of their sex in the registration of their birth (s 32B). Alternatively, a person may apply to register a change of sex (s 32DA).<sup>26</sup> However, NSW anti-discrimination law gives them the right to not be discriminated against in relation to employment and many types of service provision, which in many instances will mean that, for all practical purposes, they should be treated in public interactions as possessing the gender they identify with — including being able to use the toilets of their chosen gender.<sup>27</sup>

The landmark case of *Kevin v Attorney-General (Cth)*<sup>28</sup> (“*Re Kevin*”) and the subsequent appeal proceedings before the Full Court of the Family Court of Australia<sup>29</sup> decided that a female-to-male (FtM) “transsexual” (as the term was used in the judgment) was a man within the meaning of s 46(1) of the *Marriage Act* and s 43 of the *Family Law Act* at the time of the marriage, and that he was therefore legally entitled to marry a woman. In July 2013, the Federal Government issued guidelines on the recognition of sex and gender. These guidelines recognise “that individuals may identify and be recognised within the community as a gender other than the sex they were assigned at birth or during infancy, or as a gender which is not exclusively male or female.”<sup>30</sup> These guidelines outline how sex and gender should be recognised and be reflected in personal records held by Australian Government departments and agencies.<sup>31</sup>

[The next page is 9401]

26 *Births, Deaths and Marriages Registration Act* 1995 (NSW), ss 32B and 32DA.

27 Anti-Discrimination Board of NSW, *Transgender discrimination — Your rights*, fact sheet, at <[www.lawlink.nsw.gov.au/lawlink/adb/ll\\_adb.nsf/pages/adb\\_transgender](http://www.lawlink.nsw.gov.au/lawlink/adb/ll_adb.nsf/pages/adb_transgender)>, accessed 16 February 2011.

28 [2001] Fam CA 1074; (2001) 165 FLR 404.

29 *Attorney-General (Cth) v Kevin* [2003] Fam CA 94; (2003) 172 FLR 300.

30 Australian Government Guidelines on the Recognition of Sex and Gender, July 2013, at <https://www.ag.gov.au/publications/documents/australiangovernmentguidelinesontherecognitionofsexandgender/australiangovernmentguidelinesontherecognitionofsexandgender.pdf>, accessed 2 November 2017.

31 For a discussion of *Kevin v Attorney-General (Cth)* by the lawyer who appeared for Kevin, see R Wallbank, “Neglected Communities — The Legal Environment Following *Re Kevin*: New Perceptions And Strategies”, speech presented at Parliament House, 25 February 2003, at <[www.gendercentre.org.au/neglected2.htm](http://www.gendercentre.org.au/neglected2.htm)>, accessed 16 February 2011.



## 9.4 The possible impact of gender identity issues in court

Unless appropriate account is taken of any gender identity needs of those attending court, trans people are likely to:

- Feel uncomfortable, resentful or offended by what occurs in court.
- Feel that an injustice has occurred.
- In some cases be treated unfairly and/or unjustly.

**These problems are likely to be compounded if the person also happens to be Indigenous, from an ethnic or migrant background, a young person, gay or lesbian, female, a person with a disability, or if they practise a particular religion or are representing themselves — see the relevant other Section(s).**

**Section 9.5, following, provides additional information and practical guidance** about ways of treating trans people, so as to reduce the likelihood of these problems occurring.

The boxed areas provide the practical guidance.

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## 9.5 Practical considerations

### 9.5.1 Mode of address and gender to use

**It may not always be immediately clear** (and in many cases will also not be legally relevant) **whether a particular person is legally recognised as the gender of their choice.**

**It can also be easy to make a mistake about a trans person's identity of choice**, given that he or she may not always look, dress or behave in a manner that fits with the general community's view about how people of that gender should look, behave or dress.

**Points to consider:**

- **Always address a trans or intersex person (whether transsexual, transgender, intersex or cross-dresser) using the name, gender-specific title (Ms, Mr) and gender they wish to use.**
- **If there is any doubt about the gender identity used by the particular person, sensitively ask what name and mode of address they want the court to use.**
- **Apologise if an initial mistake has been made about a person's gender identity.**
- **Once established, use the agreed gender or sex terminology (he or she, her or his, male female intersex) throughout the court proceedings.**
- **Ensure that the person is treated throughout the proceedings as a person of the gender or sex they identify with — see also 9.5.4.**
- **Ensure that any originally assigned sexual identity is only revealed or discussed where relevant to the proceedings. — In other words, unless absolutely necessary, a person's gender or sex and any description of their gender should be based on self-identification.<sup>32</sup>**

### 9.5.2 Appearance and behaviour

**Trans and intersex people must be accorded the same dignity and respect as anyone else.**

**Points to consider:**

- **Be sensitive to the fact that a trans and intersex person's style of dress may or may not accord with the general community's**

<sup>32</sup> Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, see n 12, p 251.

**view of how someone of that gender or sex should dress.** No discomfort should be shown with the person’s chosen dress style. A trans and intersex person (including a cross-dresser) should be allowed to present their evidence in whichever gender or sex’s dress they are wearing.

- **Be sensitive to the fact that a trans and intersex person’s behaviour traits may or may not accord with the general community’s views about how someone of that gender or sex should behave.** No discomfort should be shown with any behaviour that is more common in someone of the person’s chosen gender or sexual identity (or indeed more common in someone of the person’s originally assigned sex) than is comfortable for others.
- **Be aware that you may need to ensure that the jury understands the need for such sensitivity *early* in the proceedings rather than waiting until you give your final directions to them** — otherwise, their initial assessment of a particular person may be unfairly influenced by false assumptions, and may not be able to be easily changed by anything you say in your final directions to them — see also 9.5.5.
- **As prescribed by law, intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any particular (allegedly) gender or sex-determined difference in appearance or behaviour.**<sup>33</sup>

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33 Note that s 41 of the *Evidence Act 1995* (NSW) provides that a judicial officer must disallow improper questions (for example, misleading or confusing, or unduly annoying, harassing, intimidating, offensive, humiliating or repetitive) questions, and also provides that questions must not be put to a witness in a “manner or tone that is belittling, insulting or otherwise inappropriate” or “has no basis other than a stereotype (for example, a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability)”. Sections 26 and 29(1) of the *Evidence Act 1995* also enable the court to control the way in which witnesses are questioned and the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows you to exclude any evidence that is unfairly prejudicial to a party or is misleading or confusing.

### 9.5.3 Language and terminology

**Points to consider:**

- **Use sex or gender identity descriptors only when relevant to the matter before the court, and then use only those that are both accurate and acceptable to the particular trans person** — see 9.2.2 and 9.5.1.
- **Do not use any form of discriminatory or discriminatory-sounding language** — for example, do not state or imply, that a transsexual or intersex is not a real woman or man.<sup>34</sup>
- **Treat everyone as an individual, and do not make statements that imply that all those with (or perceived as having) a particular gender identity issue, are the same, or likely to act in the same way.** Never assume or imply that even what you suspect or know to be the majority way of behaving, or thinking for a particular transgender group, is the standard by which any individual member of that group should be judged.

### 9.5.4 The impact of gender identity issues on any behaviour relevant to the matter(s) before the court

**As indicated in 9.1, people who are trans or intersex have often had many more difficult issues to contend with than the average person.**

**Points to consider:**

- **Treat a trans or intersex person, wherever legally possible, as someone of the gender or sex they identify with throughout the proceedings.** In this connection, note, for example, that the definition of the word “vagina” includes “a surgically constructed vagina”.<sup>35</sup>
- **Be careful not to let stereotyped views about trans or intersex people unfairly influence your (or others’) assessment.** For example, as prescribed by law, you may need to intervene if any of the common misconceptions listed in 9.2.1 appear to be unfairly behind any questioning.<sup>36</sup>

34 *ibid.*

35 *Crimes Act 1900 (NSW)*, s 61H.

36 See n 33.

- **Ensure that any values and practices that appear to be related to a person’s trans or intersex status are accorded respect by everyone in court** — while explaining and upholding the law where it conflicts with the particular value(s) or practice(s). For example, this may mean intervening if cross-examination becomes disrespectful, or if it fails to take into account a relevant gender or sexual identity difference.<sup>37</sup>
- **Has the fact that the person is transgender or intersex, together with any difficulties they might have experienced as a result of this, been an influencing factor in the matter(s) before the court? If so, where possible, take appropriate account of these influences.** For example, you may need to decide whether the law allows you to take account of any such influences and, then, as necessary and at the appropriate time in the proceedings, so as to ensure that justice is done and seen to be done, explain why any such influences can/should be taken into account, or cannot/should not be taken into account. And, for example, you may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing — see 9.5.5 and 9.5.6.

### 9.5.5 Directions to the jury — points to consider

As indicated at various points in 9.5, it is important that you ensure that the jury does not allow any ignorance of gender or sexual identity issues, or stereotyped or false assumptions about trans or intersex people to unfairly influence their judgment.

**In your final directions to the jury, you may need to remind them of any points in relation to these aspects that you alerted them to during the proceedings, and/or cover them for the first time now.**

**This should be done in line with the *Criminal Trial Courts Bench Book*<sup>38</sup> or *Local Courts Bench Book*<sup>39</sup> (as appropriate), and you should raise any such points with the parties’ legal representatives first.**

<sup>37</sup> *ibid.*

<sup>38</sup> Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book*, 2002–, Sydney, at <[www.judcom.nsw.gov.au/publications/benchbks/criminal](http://www.judcom.nsw.gov.au/publications/benchbks/criminal)>, accessed 16 February 2011.

<sup>39</sup> Judicial Commission of New South Wales, *Local Courts Bench Book*, 1988–, Sydney, at <[www.judcom.nsw.gov.au/publications/benchbks/local](http://www.judcom.nsw.gov.au/publications/benchbks/local)>, accessed 16 February 2011.

**For example, you may need to provide specific guidance as follows:**

- **That they must try to avoid making stereotyped or false assumptions** — and what is meant by this. For example, you may need to specifically remind them that while the trans or intersex person’s behaviour and/or gender or sexual identity may not accord with behaviour they themselves regard as morally acceptable, they must “remember that this is a court of law and not a court of morals”.<sup>40</sup> And then direct them to the specific questions they must decide. And finally explain that they must decide the matter(s) on the issues without prejudice to anyone.

**On the other hand, that they may also need to assess the particular person’s evidence alongside what they have learned in court about the way in which trans or intersex people often have to live their lives** as opposed to the way in which they themselves might act. In doing this you may also need to provide guidance on any legal limitations that exist in relation to them taking full account of any of these matters. And you may also need to be more specific about the particular gender or sexual identity aspects that they need to pay attention to.

### 9.5.6 Sentencing, other decisions and judgment or decision writing — points to consider

**Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory to (and preferably be considered to be fair and non-discriminatory by), any trans or intersex person affected by or referred to in your sentencing, decision and/or written judgment or decision.**<sup>41</sup>

**Points to consider:**

- **In order to ensure that any intersex or transgender(ed) person referred to or specifically affected by your sentencing, decision(s) and/or written judgment or decision also considers it/them**

40 The “Court of Morals” Direction, NSW Criminal Law Review Division, *Homosexual Advance Defence: Final Report of the Working Party*, 1998, para 6.11, at [www.justice.nsw.gov.au/justicepolicy/Documents/homosexualadvancedefence1998.doc](http://www.justice.nsw.gov.au/justicepolicy/Documents/homosexualadvancedefence1998.doc), accessed 5 December 2017.

41 See also Judicial Commission of New South Wales, *Sentencing Bench Book*, 2006, Sydney, “Sentencing procedures generally” at [9-700], at [www.judcom.nsw.gov.au/publications/benchbks/sentencing/toc-sentencing\\_procedures\\_generally.html](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/toc-sentencing_procedures_generally.html), accessed 29 November 2017 and *R v Henry* (1999) NSWLR 346 at [10]–[11].

**to be fair and nondiscriminatory, you may need to pay due consideration to (and indeed specifically allude to) any of the points raised in the rest of 9.5 (including the points made in the box in 9.5.5) that are relevant to the particular case.**

- **Reading a victim impact statement in court. A victim may be able to read out a prepared victim impact statement in court at any time after an offender has been convicted but cannot be read out after sentencing. You may allow a member of the immediate family or other representative of the victim to read out the whole or any part of the statement to the court.**<sup>42</sup>
- **Bear in mind that:**
  - **Many trans or intersex people live in poverty** — so a specific level of fine for any such trans or intersex person will often mean considerably more than the same level of fine for someone who does not live in poverty.
  - **Trans or intersex people who are sent to prison face particular difficulties because of the way their gender or sexual identity is perceived by other inmates.** In general, the practice of the NSW Department of Corrective Services is to send all those who fit the NSW Anti-discrimination law definition of a “transgender person” (see 9.2.2.1) to the prison of the gender they identify with. This means that in general only those who are cross-dressers who do not identify with the gender they cross-dress in will be sent to the prison of their originally assigned sex. In practice, most trans or intersex people end up in solitary confinement for their own protection.
  - When considering incarceration, sex appropriate accommodation must be taken into account. Intersex people because of their physical differences might be vulnerable to abuse and victimisation in both male and female facilities.

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42 *Crimes (Sentencing Procedure) Act* 1999, s 30A. See Pt 3, Div 2 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) and the Charter of Victims Rights (which allows the victim access to information and assistance for the preparation of any such statement). Note that any such statement should be made available for the prisoner to read, but the prisoner must not be allowed to retain it.

## 9.6 Further information or help

**The following community organisations, funded by the Department of Family & Community Services and supported by the NSW Department of Health, can provide further information or expertise about sex or gender identity, and also about other appropriate organisations, individuals, and/or written material, as necessary.**

### **The Gender Centre**

41-43 Parramatta Rd  
PO Box 266  
Annandale NSW 2038  
Ph: (02) 9519 7599  
Fax: (02) 9519 8200  
[www.gendercentre.org.au](http://www.gendercentre.org.au)

### **Inner City Legal Centre**

(includes Transgender and Intersex Legal Advice Service)  
Basement, Kings Cross Library  
50–52 Darlinghurst Rd  
Kings Cross NSW 2011  
PO Box 25  
Potts Point NSW 1335  
Phone: 1800 244 481  
Fax 02 9360 5941  
[www.iclc.org.au](http://www.iclc.org.au)

### **Organisation Intersex International Australia**

PO Box 46  
Newtown NSW 2042

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## 9.7 Further reading

American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV), 4th edn, Text Revision, American Psychiatric Association, Washington, DC, 2000.

Australian Human Rights Commission, “Sex Files: the legal recognition of sex in documents and government records”, 2009, at [www.humanrights.gov.au/genderdiversity/sex\\_files2009.html](http://www.humanrights.gov.au/genderdiversity/sex_files2009.html), accessed 29 November 2017.

The Gender Centre’s website, at [www.gendercentre.org.au](http://www.gendercentre.org.au), accessed 29 November 2017.

Supreme Court of Queensland, *Equal Treatment Benchbook*, 2nd edn, 2016, Supreme Court of Queensland Library, Brisbane, Chapter 15, “Gender identity and sexual orientation” at [www.courts.qld.gov.au/\\_\\_data/assets/pdf\\_file/0004/94054/s-etbb.pdf](http://www.courts.qld.gov.au/__data/assets/pdf_file/0004/94054/s-etbb.pdf), accessed 29 November 2017.

Judicial College (UK), *Equal Treatment Bench Book*, 2013, Chapter 8, “Gender reassignment” at [www.judiciary.gov.uk/publications/equal-treatment-bench-book/](http://www.judiciary.gov.uk/publications/equal-treatment-bench-book/), accessed 29 November 2017.

Australian Research Centre in Sex, Health & Society, *Tranznation: A report on the health and wellbeing of transgendered people in Australia and New Zealand*, 2007, at [www.glhv.org.au/files/Tranznation\\_Report.pdf](http://www.glhv.org.au/files/Tranznation_Report.pdf), accessed 29 November 2017.

Young and Well Cooperative Research Centre, *Growing up queer: Issues facing young Australians who are gender variant and sexuality diverse*, 2014, at [www.glhv.org.au/files/Growing\\_Up\\_Queer2014.pdf](http://www.glhv.org.au/files/Growing_Up_Queer2014.pdf), accessed 29 November 2017.

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## 9.8 Your comments

The Judicial Commission of NSW welcomes your feedback on how we could improve the *Equality before the Law Bench Book*.

We would be particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific Sections of other Bench Books, discussion or research material.

Section 11 contains information about how to send us your feedback.

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# Self-represented parties

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## 10.1 Some information<sup>1</sup>

- **Right to self-represent** — Common law provides that everyone has the right to represent themselves in court in both civil and criminal matters — unless they have been ruled as vexatious.<sup>2</sup> However, s 294A of the *Criminal Procedure Act 1986* (NSW) prevents a self-represented person who is the accused in sexual offence proceedings from personally cross-examining the complainant.<sup>3</sup>
- **Duty of the court** — The court has a duty to give persons who represent themselves a fair hearing, and it may be appropriate for the court to give some assistance to such persons in order to fulfill that duty. The court hearing a case between an unrepresented litigant and another party, however, cannot give assistance to the unrepresented litigant in such a way as to conflict with its role as an impartial adjudicator.<sup>4</sup>
- **Numbers of self-represented parties** — While there are no firm figures across all NSW courts, in 2008, 39.48% of parties in the NSW Local Court had no legal representation.<sup>5</sup> Self-represented parties may be the applicant, respondent or the accused.
- **Why people choose to represent themselves** — There are many reasons why people choose to represent themselves. For example, they:
  - may have been refused legal aid or presume they are ineligible
  - may not be able to afford legal representation
  - may have been told by lawyers that their case had no merit, but believe that it does have merit
  - may have been perceived by lawyers as in some way too “difficult” (for example, they are unable to speak English or to communicate well or sufficiently logically)
  - may not trust lawyers
  - may believe they are the best person to put their case across

1 Much of the information in Section 10.1 is drawn from Judicial Studies Board, *Equal Treatment Bench Book*, London, updated 2008, Ch 1.3, at <www.judiciary.gov.uk>, accessed 4 June 2014; and Supreme Court of Queensland, *Equal Treatment Benchbook*, Supreme Court of Queensland Library, Brisbane, 2005, Ch 12, at <www.courts.qld.gov.au>, accessed 4 June 2014; and E Richardson, *Self-represented parties: A trial management guide for the judiciary*, County Court of Victoria, Melbourne, 2004.

2 See *Vexatious Proceedings Act 2008* (NSW), s 8.

3 If the self-represented person is the accused in sexual offence proceedings, see n 24.

4 *Reisner v Bratt* [2004] NSWCA 22 at [4]–[6]; *Malouf v Malouf* (2006) 65 NSWLR 449 at [94].

5 NSW Bureau of Crime Statistics and Research, “New South Wales Criminal Court Statistics 2009”, 2010, at <www.lawlink.nsw.gov.au/lawlink/bocsar/ll\_bocsar.nsf/vwFiles/CCS09.pdf/\$file/CCS09.pdf>, accessed 2 February 2011.

- may have withdrawn instructions from their lawyer relatively recently and not had time to find alternative representation
- may represent themselves for part of the court proceedings and engage a lawyer only for the part they consider (or have been advised) to be most important or critical.
- **Difficulties faced by self-represented parties** — People who represent themselves — whether in potentially winnable cases or in cases that were hopeless from the start — come from all types of socio-economic and educational backgrounds. Whatever their literacy or educational level, whatever the type of matter, and to some extent however informal the court is supposed to be, they are likely to face considerable barriers in presenting their case — particularly if they are the accused or the other party is represented. For example, they:
  - may not understand the complexities of relevant legislation and case law
  - may not fully understand legal language
  - may not be able to accurately assess the merits of their case
  - may not fully understand the purpose of the proceedings and/or the interlocutory steps in the proceedings
  - may not fully understand and/or be able to properly apply the court rules — for example, what they must file when, the rules of evidence and cross-examination
  - may not have emotional objectivity or distance, and be overly passionate about their case
  - may not be skilled in advocacy and able to adequately test an opponent's evidence, or cross-examine effectively
  - may, as a result of many or all of these issues, be feeling anxious, frightened, frustrated, and/or bewildered. The case may also be impacting, or starting to impact, on their emotional and/or physical health.

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## 10.2 The impact of self-represented parties on the court

The difficulties faced by self-represented parties in turn lead to difficulties for the court. For example:

- The proper processes are unlikely to have been followed.
- It may be much harder (and might take longer than usual) to get to the essence of what the case is about.
- The required evidence may not be presented at all, or may be presented inadequately.
- It will almost always be necessary for the judicial officer to intervene much more than usual.
- Finding the appropriate balance between intervention and neutrality can be difficult.
- It is more difficult for the other party and/or the prosecution to deal with an unrepresented party than a represented party.
- Some unrepresented parties will be querulant.<sup>6</sup>

**These difficulties are likely to be compounded if both parties are self-represented.**

Self-represented parties must be given the chance to present their case as positively as they can, in the same way as represented parties are given that chance.

**Unless ways are found to minimise the difficulties that self-represented parties face and the consequential difficulties faced by the court, self-represented parties are likely to:**

- feel overwhelmed
- feel uncomfortable, resentful or offended by what occurs in court
- not understand what is happening or be able to get their point of view across and/or be adequately understood
- feel that an injustice has occurred
- in some cases be treated unfairly and/or unjustly.

These difficulties may be compounded if the self-represented party also happens to be a person from a non-English speaking or migrant background, Indigenous, transgender(ed), gay, lesbian or bisexual, or a person with a disability, or they practise a particular religion — see the relevant other Section(s).

<sup>6</sup> For a definition of querulant, see G Lester, “The vexatious litigant”, (2005) 17(3) *Judicial Officers’ Bulletin* 17.

**On the other hand, the court has to show neutrality in any measures it takes to enable the self-represented person to present their case, and for example, deal appropriately with any self-represented person who does not follow directions and/or is clearly vexatious.** Otherwise, it is the other party who is likely to feel that an injustice has occurred, or in some cases be treated unfairly or unjustly.

**Section 10.3, following, provides additional information and practical guidance about ways of treating a self-represented party** during the court process, so as to reduce the likelihood of these problems occurring.

The boxed areas provide the practical guidance.

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## 10.3 Practical considerations<sup>7</sup>

### 10.3.1 Before the court appearance

Many of the difficulties self-represented parties both face and cause can be minimised with good pre-court preparation. The court may be able to assist in this at the same time as ensuring that there are no problems in relation to neutrality.

**The judicial officer (for example, in any directions or other type of pre-hearing) may need to consider the following points, when relevant and/or appropriate:**

- ▣ **Do any or all of the following for a self-represented party using simple and direct, non-legal language** — for information on the rules of simple, direct and non-legal language see, for example, 2.3.3.4, 3.3.5.3 or 5.4.3.3.
- ▣ **Ask the Registrar to check with the Supreme Court that they are not already on the list of vexatious litigants.**<sup>8</sup>
- ▣ **Check whether there is any possibility of resolving the matter via negotiation or mediation** (by the court or externally) and, where relevant, make the appropriate directions to attend. If this is an option and is happening externally to the court, ensure that they know that they must tell the court immediately if the matter settles so that any court date(s) can be given to someone else.
- ▣ **Check whether they understand what any orders made by the court at a directions hearing require them to do and by when.**
- ▣ **Check whether they have exhausted the possibilities of getting legal representation** — via legal aid, a community legal centre, a pro bono scheme,<sup>9</sup> or a lawyer (and that they know how to access these).

<sup>7</sup> Unless otherwise indicated, the information in Section 10.3 is drawn from Judicial Studies Board, *Equal Treatment Bench Book*, London, updated 2009, at <[www.judiciary.gov.uk](http://www.judiciary.gov.uk)>, accessed 4 June 2014; Supreme Court of Queensland, *Equal Treatment Benchbook*, Supreme Court of Queensland Library, Brisbane, 2005, Ch 12, at <[www.courts.qld.gov.au/The\\_Equal\\_Treatment\\_Bench\\_Book/S-ETBB.pdf](http://www.courts.qld.gov.au/The_Equal_Treatment_Bench_Book/S-ETBB.pdf)>, accessed 2 February 2011; and the Honourable Justice TH Smith, Supreme Court of Victoria, “Possible guidelines for the trial of litigation involving unrepresented parties” in Australian Institute of Judicial Administration Inc, *Litigants in person management plans: Issues for courts and tribunals*, Victoria, 2001, Appendix 2, at <[www.aija.org.au/Litigant/LIPREP1.pdf](http://www.aija.org.au/Litigant/LIPREP1.pdf)>, accessed 2 February 2011.

<sup>8</sup> See *Vexatious Proceedings Act*, Pt 2.

<sup>9</sup> For more information on each of these free sources of legal representation, see Judicial Commission of NSW, *Pro bono schemes in NSW*, Sydney, 2004; State Library’s Legal Information Access Centre at <[www.legalanswers.sl.nsw.gov.au/advice/alpha\\_advice\\_list.html](http://www.legalanswers.sl.nsw.gov.au/advice/alpha_advice_list.html)>, accessed 2 February 2011; and LawAccess at <[www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au)>, accessed 28 April 2015.

The District and Supreme Courts may refer unrepresented litigants to the court Registrar for referral to a barrister or solicitor on the court's Pro Bono Panel under Div 9, Pt 7 of the Uniform Civil Procedure Rules. In doing this, the court may take into account the litigant's means and capacity to obtain legal assistance, the nature and complexity of the proceedings, and any other matter the court considers appropriate.

- **Refer them to written and verbal explanatory information about the court and its processes and/or references to appropriate organisations and/ or their websites** — for example, the State Library's **Legal Information Access Centre** — at: <[www.legalanswers.sl.nsw.gov.au/advice/alpha\\_advice\\_list.html](http://www.legalanswers.sl.nsw.gov.au/advice/alpha_advice_list.html)> and **LawAccess** — at: <[www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au)>
- **In the Local Court, refer them to the Deputy Registrar and in other courts, refer them to the Registrar, or other court officer for assistance and advice. The Deputy Registrar may, for example, be able to:**
  - **Provide them with a list of appropriate avenues for legal representation.**
  - **Provide them with written and verbal explanatory information about the court and its processes and/or references to appropriate organisations and/or their websites.**
  - **If appropriate, provide information about applying to use a “McKenzie friend”<sup>10</sup> or lay advocate, and how either might help.** Leave is not required for a McKenzie friend. However, the court has a discretion at any stage to refuse to allow the assistance of a McKenzie friend if it considers their assistance is not in the interests of justice.<sup>11</sup> Leave is required for a lay advocate to appear on behalf of an unrepresented party and will only be granted in exceptional circumstances.<sup>12</sup> For both McKenzie friends and lay advocates, matters to consider include: the complexity of the case; any genuine difficulties the self-represented party has in presenting or preparing their case; any risks resulting from reduced professional accountability and duties to the court; and the public interest in effective, efficient and expeditious disposal of litigation. Greater judicial caution in allowing a McKenzie friend or lay advocate to

10 A “McKenzie friend” attends the hearing and is able to sit with the self-represented party, take notes, quietly make suggestions and give advice: *McKenzie v McKenzie* [1971] P 33.

11 *Smith v R* (1985) 159 CLR 532; *Re Shaw* (2001) 127 A Crim R 440.

12 *Damjanovic v Maley* (2002) 55 NSWLR 149; *Portelli v Goh* [2002] NSWSC 997.

appear should be exercised in criminal proceedings.<sup>13</sup> An application seeking leave for a lay advocate to appear should be made before the hearing.<sup>14</sup>

- **Ensure they understand the nature of the test or standard of proof the court will use in deciding their case** — that is, “balance of probabilities”, or “beyond reasonable doubt”.
- **Ensure they understand what is and is not allowed in court in relation to evidence, and what is and is not allowed in relation to expert witnesses.**
- **Ensure they understand what they must file with the court and/or the other party before the court proceedings start, how to do this, how many copies to provide, the page numbering system to use, and the date by which they must do this.**
- **Ensure they understand who and what they need to bring with them when they come to court** — for example witnesses, any original documentary evidence including copies for the court and the other party.
- **Ensure they understand how to subpoena documents from the other party or a third party, and the court process for gaining access to documents once subpoenaed. They may also need to be informed of other pre-trial matters that may arise, and the process for putting on or responding to a notice of motion.**
- **See “Unrepresented litigants and lay advisors” at [1-0800] in the *Civil Trials Bench Book, 2007*, Judicial Commission of NSW, Sydney.**

### 10.3.2 At the start of the court proceedings

A self-represented party will not generally know how court proceedings run, who does what and in what order, and what they are allowed and not allowed to do in presenting their case or in testing the other party’s evidence.

It is therefore a good idea, at the start of the proceedings, to set the scene and the ground rules in relation to the process that will be followed, so as to help minimise delays and problems later on.

<sup>13</sup> *Re B* (1981) 2 NSWLR 372, *R v Smith* (1982) 2 NSWLR 608.

<sup>14</sup> *Teese v State Bank of New South Wales* [2002] NSWCA 219.

**Note that the *Criminal Trial Courts Bench Book*<sup>15</sup> provides specific directions in relation to what to say at the start of criminal proceedings when the accused person is self-represented.<sup>16</sup>**

**In addition, and in all other cases, you may need to explain — in simple and direct, non-legal language** (for information on the rules of simple, direct and non-legal language see, for example 2.3.3.4, 3.3.5.3 or 5.4.3.3):

- **The basic conventions** — for example:
  - Who is in the court and their names and roles.
  - How to address the judicial officer(s) and the other party or their legal representative(s).
  - The need to ensure mobile phones are off or in silent mode.
  - That they can take notes but cannot record the proceedings and how to get access to any court recording of the proceedings.
  - The conventional order of proceedings including when their witnesses will be required. This may involve explaining the distinction between evidence and submissions.
  - To ask you if they do not understand anything or need a break.
  - That each side will get a full opportunity to present their case, but that only one person can speak at a time and that everyone must behave with politeness and respect.
- **The purpose of the proceedings** — for example, whether the full case or merits of the case are being looked at, or whether something narrower is being looked at (for example, a dismissal application), and if necessary, explain why only a narrower issue is being looked at. It should be made clear what orders they are seeking or what orders are being sought against them.
- **Your role** — that is, to make sure everyone is able to present their evidence as fairly and effectively as possible, but to stay neutral and not favour either side, and then to decide the case.<sup>17</sup> You might also wish to explain that you may well ask more questions than you do usually in

15 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2002, Sydney, “Self-represented accused” at [1-000]ff, accessed 2 February 2011.

16 See also Judicial Commission of NSW, *Civil Trials Bench Book*, 2007, Sydney, “Unrepresented litigants and lay advisers” at [1-0800]ff, accessed 2 February 2011.

17 “The restraints upon judicial intervention stemming from the adversary tradition are not relevantly qualified merely because one of the litigants is self-represented.”: *Malouf v Malouf* (2006) 65 NSWLR 449 at [94].

order to check that you understand the self-represented party's case, and that if any such question concerns the other party in relation to you remaining neutral they should say so at the time.

- **What the central issues are that are being looked at/decided in these proceedings** — and why anything else they thought was going to be dealt with cannot be dealt with — and then gain agreement with the parties that these are the only issues that will be dealt with. It may be necessary to ensure that they are aware of the distinctions between issues of fact and law, understand the finality of orders already made and are aware of the bounds of the judicial officer's discretion to grant relief.
- **The order of events** — who does what when, and the points at which they will get their opportunity to present/say what they need to present/say.

**It may also be useful to check:**

- **(Again) whether negotiation or mediation is appropriate instead.**
- **That they have filed the necessary statements and documentary evidence (and that the other party has received copies of these), and received any documents they issued a subpoena for.**
- **That they have their witnesses and any other documentary evidence there.**
- **That if they wish to rely on any pre-prepared statements the other side has an opportunity to see them first so that any issues of admissibility can be canvassed at the appropriate time.**

**Note that you may need to exercise a greater degree of flexibility than you would in the case of a represented party** if some of these issues have not been dealt with properly — bearing in mind the self-represented party's likely lack of legal process knowledge and understanding.

**You may need to adjourn the proceedings** until any of these issues are dealt with properly.

**In jury trials, it may also be important to ensure that the jury is not unduly influenced (either in favour of or against a person) simply because they are representing themselves.** You may therefore need to explain that there are many reasons why people choose to represent themselves and that they must not use the fact that X is representing themselves to influence them one way or the other. It is the evidence presented by both sides that they need to listen to carefully and make a decision about, not whether it was, or was not, presented by a legal representative, see 10.3.3.4.

### 10.3.3 As the court proceedings progress

#### 10.3.3.1 The self-represented party's evidence

It is important that the self-represented party is able to present their evidence as effectively as they can, otherwise they may lose their case, not because they had no case, but simply because it was poorly presented and/or led to everyone being too frustrated or confused to be able to listen effectively and/or understand what the self-represented party was trying to present.

In civil proceedings, s 56(3) of the *Civil Procedure Act* 2005 imposes a duty upon a party and its legal representatives, when opposed by an unrepresented litigant, to assist the court to understand and give full and fair consideration to the submissions of the litigant in person and to refer the court to evidence in the proceedings that is relevant to the submissions. That duty is accentuated where the party is a substantial institution accustomed to litigating cases, often against unrepresented litigants.<sup>18</sup>

It is therefore a good idea to explain the ground rules set out in 10.3.2 before the self-represented party starts to present their case.<sup>19</sup> Doing this may help ensure that the self-represented party presents only the evidence needed, adheres to the rules of evidence, and presents their case in the best possible light.

You may also need to intervene whenever they seem to be struggling, or the court is not getting what it needs to be able to determine the matter(s) before it. You will need to do this without showing any partiality and without advocating or appearing to advocate on behalf of the self-represented person. A useful list of guidelines for judges in the context of civil proceedings has been set out by the Honourable Justice TH Smith of the Supreme Court of Victoria.<sup>20</sup> A number of cases have also looked at the bounds of judicial intervention in both criminal and civil cases, see *R v Zorad*,<sup>21</sup> *R v Mercer*<sup>22</sup>, *Burwood Municipal Council v Harvey*<sup>23</sup> and *Minogue v Human Rights and Equal Opportunity Commission*.<sup>24</sup>

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18 *Serobian v Commonwealth Bank of Australia* [2010] NSWCA 181 at [41], [42].

19 See n 13.

20 Hon Justice TH Smith, Supreme Court of Victoria, “Possible guidelines for the trial of litigation involving unrepresented parties” in Australian Institute of Judicial Administration, *Litigants in person management plans: Issues for courts and tribunals*, Victoria, 2001, Appendix 2, at <www.aija.org.au>, accessed 7 February 2011. See also Judicial Commission of NSW, *Civil Trials Bench Book*, 2007–, Sydney, accessed 7 February 2011 at [1–0820].

21 (1990) 19 NSWLR 91.

22 (1993) 67 A Crim R 91.

23 (1995) 86 LGERA 389.

24 (1999) 166 ALR 129.

**For example, using simple and direct, non-legal language,** (for information on the rules of simple, direct and non-legal language see, for example 2.3.3.4, 3.3.5.3 or 5.4.3.3), **and in a neutrally informative (as opposed to advisory or leading) manner, you may need to:**

- **Explain to the self-represented person that it is their turn to present their case and how they must do this — for example, you may need, in a step by step manner, to:**
  - State that this is their opportunity to prove that their version of events/ side of the story is correct.
  - Explain what test or standard of proof the court will use to decide their case — that is, “balance of probabilities”, or “beyond reasonable doubt”, and also where the onus of proof lies (that is, whether the law says that it is they who specifically need to prove their case, or the other side who needs to do this). Explain how the standard of proof applies to specific facts and the overall case put forward.
  - Explain that this means they must make sure the court hears or sees all their evidence (that is, all the facts and information they have that they think proves their case). However, they must not say what they think all these facts and information mean or add up to at this stage — they will get a chance to do that at the end of the proceedings/day in what is called their “final submission”. **Although, for those who are defending themselves in a criminal trial, it will also be important to explain that they have the legal right to remain silent.**
  - Explain that most people present their case by first giving their own evidence — that is, by saying/showing what they personally saw or heard happen, or did, once they have given their own evidence, they bring in their witnesses one by one, so that the witnesses can give their evidence (say/show what they saw or heard happen, or did). Explain the purpose of giving sworn evidence, the procedure for taking an oath or affirmation, and the obligation it entails.
  - Explain in basic terms what is allowed to be said/shown in evidence and what is not — paying particular attention to the fact that they can generally only say what they themselves directly saw or heard happen, not what someone else has told them they saw or heard.
- **Make sure they give their own evidence in a way that follows the rules and allows the court to understand what their evidence is — for example:**
  - Ask them to move from the bar table to the witness stand, explain why this is necessary, and then swear them in and get their name and contact details entered into the record. For information about oaths and affirmations, see 4.4.2.

- If they have a written statement and it is admissible, get it admitted into evidence in the usual way and confirm with them that it is a true and accurate record.
  - Say that they only need to say anything more if they have more evidence than they have put in their statement, or wish to correct a mistake, or clarify something in the written statement.
  - If they do have anything more to say, or have no written statement, suggest that they give their evidence by telling their story of what they personally know happened, starting from the first thing that happened and then the next thing, etc.
  - Intervene only when necessary and always neutrally — for example, you may need to intervene if you need to clarify what they are saying, they seem to have deviated from the point or from what the court is able to look at, they are presenting something inadmissible, they are presenting their evidence out of sequence, they are referring to documents that may need to be admitted into evidence, or they are taking up an inordinate amount of the court's time.<sup>25</sup> If you do intervene, always explain why you are intervening, bearing in mind that the other party needs to be sure you are remaining neutral, and then ask whatever (brief) question(s) you need to ask to keep the matter going as efficiently and effectively as possible.
- ▣ **Explain that the other party may now want to question them about what they have said/shown** — and that they should answer their questions truthfully.
  - ▣ **As prescribed by law, intervene if the other party appears to be asking unfair or inappropriate questions** — given that the

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25 Section 135(b) of the *Evidence Act* 1995 (NSW) provides a general discretion to exclude evidence that is misleading or confusing. Inordinate delay may be dealt with by reference to s 69 of the *Criminal Procedure Act* 1986, s 135(c) of the *Evidence Act* and/or r 2.3(n) of the Uniform Civil Procedure Rules 2005.

self-represented party may not be fully aware of the rules about this. However, be careful to do so in a way that is neutral and always explain why you are intervening in a careful and non-provocative manner.<sup>26</sup>

- ▣ **Once cross-examination has finished, ask them if they want to add anything more to their own evidence based on their answers in response to cross-examination (for example, to clarify any of the answers they just gave) and then let them do so** — intervening, as necessary, as you did before. They should also be made aware that they can seek leave to add any new information that has not arisen.
- ▣ **If they neglect to clarify or explain something that you think needs factual clarification or explanation, ask them a neutral question designed to elucidate the facts** — for example, “X asked you if ... You answered ... This appears to contradict what you said earlier. Can you explain this?” However, always explain why you need to do this, so that both the self-represented party and the other party can understand your motive and your neutrality.
- ▣ **If the self-represented party has introduced new or altered evidence, allow the other party to ask any final questions in the usual manner, intervening as necessary, as before.**
- ▣ **Ask them to move back to the bar table and call their witnesses one by one in whichever order they think will best tell their story/explain their case to the court.**
- ▣ **Make sure they present their witnesses’ evidence in a way that follows the rules and allows the court to understand what the person’s evidence is** — for example, you may need to:
  - Remind them of the rules about what can and cannot be said/told.
  - Swear in witnesses as usual and then yourself get the witnesses’ names and details entered into the court record.
  - Ensure any written statement, if admissible, is admitted in evidence and explain that the self-represented person needs to confirm with

---

<sup>26</sup> Note also that s 41 of the *Evidence Act 1995* requires you to disallow improper questions (for example, misleading or confusing, or unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive) questions. The section also provides that questions must not be put to a witness in a “manner or tone that is belittling, insulting or otherwise inappropriate” or “has no basis other than a stereotype (for example, a stereotype based on the witness’s sex, race, culture, ethnicity, age or mental, intellectual or physical disability)”. The duty imposed on the court under this section applies whether or not an objection is raised to a particular question: s 41(5). Sections 26 and 29(1) of the *Evidence Act 1995* also enable you to control the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows you to exclude any evidence that is misleading or confusing.

the witness that their statement is true and accurate. The witness should be given the opportunity to correct the written statement if it is not true and accurate. Then suggest that they only need to ask any questions of the witness if in their view that witness has anything to say that was not in their statement and that will help prove their case.

- If the witness does have more to say, or gave their evidence orally, suggest that it is best to ask their witness short questions, one by one, in a way that will get the witness' story from them — starting from the beginning of their story. However, explain that they must not ask leading questions (ones where they are effectively telling the witness how to answer), and they must not ask questions that the witness is not qualified to answer.
- Intervene only when necessary — that is, in the same manner as for the self-represented person's own evidence — see above.
- ▣ **Explain that the other party may now want to question their witness about what they have said/shown** — and that the witness should just answer the questions truthfully. Intervene as necessary, as before.
- ▣ **Once the cross-examination is finished, ask the self-represented party if they want to ask their witness anything more (for example, to give more information or clarify any of the answers they just gave) and then let them do so** — intervening as necessary, as you did before.
- ▣ **If they neglect to ask their witness something that you think needs clarification or explanation, ask the witness a neutral, fact-elucidating type of question yourself.** However, always explain why you need to do this, so that both the self-represented party and the other party can understand your motive and your neutrality.
- ▣ **If the witness has introduced new evidence or altered their evidence, allow the other party to ask any final questions in the usual manner** — intervene as necessary, as before.
- ▣ **Explain what is going to happen next** — for example, that it is now the other party's turn to present their evidence, or it is now time for each party to give their final submissions.

- **In rare cases, you may need to consider referring them to the Supreme Court for that court to decide whether they are a vexatious litigant.**<sup>27</sup>

### 10.3.3.2 Testing the other party's evidence

A self-represented party is unlikely to be able to determine issues of admissibility or to be able to test the other party's or their witnesses' evidence via cross-examination as well as a legal representative.

In all fairness, therefore, you may need to intervene whenever:

- There might be an issue of admissibility — for example, to stop leading questions or questions that the witness is not qualified to answer.
- The self-represented party is not picking up on an aspect of the other party's evidence that requires testing.
- The self-represented party is using cross-examination to ventilate about irrelevant matters or in an unfair manner.

You will need to do this without showing any partiality and without advocating, or appearing to advocate, on behalf of the self-represented person.

**Using simple and direct, non-legal language,** (for information on the rules of simple, direct and non-legal language see, for example 2.3.3.4, 3.3.5.3 or 5.4.3.3, **and in a neutrally informative (as opposed to advisory or leading) manner, you may need to:**

- **Explain the rules and method by which the other party must present their side of the case.** For example, it may be useful to say

<sup>27</sup> Section 8(1) of the *Vexatious Proceedings Act* provides that a court may make a vexatious proceedings order “in relation to a person if the court is satisfied that:

- (a) the person has frequently instituted or conducted vexatious proceedings in Australia, or
- (b) the person, acting in concert with a person who is subject to a vexatious proceedings order or who is referred to in paragraph (a), has instituted or conducted vexatious proceedings in Australia”.

The order may be made on the court's own motion or on application by the Attorney General (NSW), the Solicitor General, the appropriate registrar for the court, a person against or in relation to whom another person has instituted or conducted vexatious proceedings, or a person who, in the opinion of the court, has a sufficient interest in the matter: s 8(4).

Pursuant to s 13, if a vexatious proceedings order is made prohibiting a person from instituting proceedings then the person may not institute proceedings of the kind to which the order relates without the court's leave under s 16.

that the other party now has to present their side of the case using the same rules and method as they themselves had to follow when they presented their side of the case — for example, no leading questions and no questions that the person is not qualified to answer.

- **Explain that the self-represented person will get their chance to ask questions of the other party later** — so they should not generally interrupt or say anything while the other party or any of their witnesses is presenting their story/case, even if they think the person has got it wrong or is telling lies. However, explain that they can interrupt whenever they think the other party or one of their witnesses is saying something that breaks the rules (for example, a leading question) and that you will then decide whether the other party has to stop presenting that way or can continue presenting that way.
- **Intervene if the self-represented party does not seem to be picking up on something that might be inadmissible, but otherwise let them present their evidence without intervention** — if you do intervene, explain why you are doing so, and do so in a non-provocative way, so that the other party does not have any cause to think that you are being partial.
- **Before asking the self-represented person to start any cross-examination, explain the purpose of cross-examination** (that is to test the other party's evidence or to put the self-represented person's version of the events to them, not to give opinions about why it's wrong or inaccurate the time for giving their opinions is at the end of the proceedings, not now), **what questions they can and cannot ask, and that it is best to ask short questions one at a time, and that they must be polite and respectful and not hector the witness. You might also wish to try to limit their cross-examination to a**

**certain amount of time. Note that if the self-represented person is the accused in sexual offence proceedings, they are prohibited from personally cross-examining the complainant.<sup>28</sup>**

- ▣ **As prescribed by law, intervene if their cross-examination is for example, off the point, not assisting in testing the evidence, disallowable, incomprehensible to the witness, not being appropriately answered or unfair<sup>29</sup>— and, for example, explain why the question cannot be asked, why it's not helping to test the evidence, help rephrase the question for them, or explain how it must be answered. However, always do this in a way that shows you are being neutral.**
- ▣ **Explain the purposes of re-examination including the right to object if new evidence is adduced.**
- ▣ **Generally only ask your own questions of the other party and their witnesses after cross-examination by the self-represented party, and only when you need to clarify any particular point, or are unclear about the validity of their evidence.** However, always explain why you are doing this to ensure that both parties understand that you are being neutral and simply trying to clarify what is being said.

### 10.3.3.3 Final submissions

A self-represented party has the same right to present final submissions as anyone else. However, in order to do this effectively, they may need some guidance about the process.

<sup>28</sup> In prescribed sexual offences, a self-represented accused party is not allowed to personally cross-examine the complainant. Instead, the law states that the court can appoint someone else to ask the questions the accused person wants asked, who must then do this without providing any legal advice to the accused person, and as long as the judge rules that the questions are permissible. The jury must be told about this procedure, and the accused must be given an opportunity to make submissions about the proposed procedure. See *Criminal Procedure Act* 1986, s 294A, and the Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2002, Sydney, “Self-represented Accused” at [1-020]–[1-025], accessed 2 February 2011, However, note that as yet, no such people have been appointed. In the absence of legal aid or a “McKenzie friend”, you may need to seek advice from the appropriate senior member of your court about what to do. For a critical examination of s 294A, see BT Sully, “Section 294A *Criminal Procedure Act* — Unrepresented accused in sexual offence proceedings”, paper presented at the Cross-jurisdictional Seminar, Judicial Commission of NSW, Sydney, 8 March 2006.

<sup>29</sup> See, n 22.

**Using simple and direct, non-legal language**, (for information on the rules of simple, direct and non-legal language see, for example 2.3.3.4, 3.3.5.3 or 5.4.3.3, **and in a neutrally informative (as opposed to advisory or leading) manner, you may need to:**

- **Explain the purpose of final submissions** — that is, to summarise why they believe that the case should be decided in their favour.
- **Explain again what test or standard of proof the court will use to decide their case** — that is, “balance of probabilities” or “beyond reasonable doubt”.
- **Explain that this is their chance to tell the court why they think they have proved/shown that their version of events/side of the story meets this test** — that is, what precise parts of their own, their witnesses’ and/or their documentary evidence proves/shows this, and why the court should believe or prefer their evidence over the other party’s evidence. They might therefore also want to explain what they see as the problems with the other party’s evidence. If appropriate, they should tell the court what they think the outcome of the case should be/what they want from the court — as precisely as they can.
- **Generally allow them to make their final submissions without interruption** — unless they are breaking any court rules or legal requirement, or you need to ask a question to clarify the meaning of any part of submission.
- **Explain that the other party is allowed to do the same** — that is, explain why they think they have proved their case, and the problems they see in the self-represented party’s case, and that the self-represented person must not interrupt the other party as they do this.
- **If you are not giving your decision or full decision now, explain precisely when you will give a decision or when they will be notified about the decision, whether they will be required to attend and in what form they will receive it** — If appropriate, explain by what date they must get their final submissions into the court in writing and how many copies to provide.

#### 10.3.3.4 Directions to the jury — points to consider

**It is important that you ensure that the jury does not allow any issues they might have about people representing themselves to unfairly influence their judgment.**

**This should be done in line with the *Criminal Trial Courts Bench Book*<sup>30</sup> or *Local Courts Bench Book*<sup>31</sup> (as appropriate), and you should raise any such points with the parties' legal representatives first.**

**For example, you may need to provide specific guidance as follows:**

- ▣ **Alert them to, or remind them of, the fact that there are many reasons why people choose to represent themselves** and that they must not use the fact that X did so to influence them one way or the other.
- ▣ **In a sexual offence matter, remind them why the self-represented accused person was not themselves allowed to cross-examine the complainant**, and explain that this fact must not affect the way in which they view the evidence.
- ▣ **Alert them to any of the points listed in the “Directions to the jury” parts of any other appropriate Section of this Bench Book** — if, for example, the self-represented person is Indigenous, from an ethnic or migrant background, has a particular religious affiliation, is a person with a disability, lesbian, gay, bisexual or transgender(ed).

30 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2002–, Sydney, accessed 2 February 2011.

31 Judicial Commission of NSW, *Local Courts Bench Book*, 1988–, Sydney, accessed 2 February 2011.

### 10.3.4 Sentencing, other decisions and judgment or decision writing — points to consider

**Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory and preferably be seen by both the self-represented party and any represented party to be so.<sup>32</sup>**

**Points to consider:**

- Ensure that the fact that one or both of the parties was self-represented does not unfairly influence your sentence, decision and/or written judgment.
- Consider whether it is appropriate to refer to the fact of self-representation, and/or to the difficulties that self-representation caused the self-represented person, the other party and/or the court.
- In rare cases, consider referring the matter to the Attorney General for consideration as to whether he should refer the matter to the Supreme Court for that court to decide whether the self-represented person is a vexatious litigant.<sup>33</sup>
- Ensure that the self-represented person is told of the outcome in a way in which they can understand the sentence, decision and/or judgment and what it means for them,<sup>34</sup> and if unhappy with it, are referred to the appropriate source(s) of advice or assistance about any avenues they might have for appeal.

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32 See also Judicial Commission of NSW, *Sentencing Bench Book*, 2006, Sydney, accessed 2 February 2011; and *R v Henry* (1999) 46 NSWLR 346; [1999] NSWCCA 111 at [10]–[11].

33 *Vexatious Proceedings Act*, s 8(6). See also <[www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_vexlitstable](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_vexlitstable)>, accessed 2 February 2011.

34 Use simple and direct, non-legal language to do this — for information on the rules of simple, direct and non-legal language see, for example, 2.3.3.4, 3.3.5.3 or 5.4.3.3.

## 10.4 Further information or help

For information on free sources of legal information, advice or representation, see:

- **Judicial Commission of New South Wales, *Pro Bono Schemes in NSW***, 2004, Sydney.
- **Court-based information and assistance:**
  - **District Court and Supreme Court pro bono assistance** — An unrepresented litigant may apply for legal assistance under the Uniform Civil Procedure Rules, Div 9, Pt 7. If someone has obtained this type of assistance within the last three years, a judge must be satisfied that there are exceptional circumstances that justify another referral. A referral is not intended to be a substitute for Legal Aid. The court or judge may refer an unrepresented litigant in need of legal assistance to a registrar for referral to a barrister or solicitor on the Court’s Pro Bono Panel. Contact the Registry of the relevant court. Further information is available on the website of the Supreme Court of NSW, “Pro bono legal help”, at [www.supremecourt.justice.nsw.gov.au/supremecourt/probono.html](http://www.supremecourt.justice.nsw.gov.au/supremecourt/probono.html), accessed 20 April 2015.
  - The **District Court** website has information for self-represented litigants, at [www.districtcourt.justice.nsw.gov.au/Pages/facilities\\_support/legal\\_advice/legal\\_advice.aspx](http://www.districtcourt.justice.nsw.gov.au/Pages/facilities_support/legal_advice/legal_advice.aspx), accessed 20 April 2015. This provides information and links to LawAccess NSW, a free government telephone service; the LawAssist website; the Legal Information Access Centre; Legal Aid NSW; Women’s Legal Services; Community Legal Centres; and Legal services for Aboriginal people.
  - The **Supreme Court** website has information for self-represented litigants at [www.supremecourt.justice.nsw.gov.au/supremecourt/sco2\\_what\\_to\\_expect/sco2\\_representingyourself.html](http://www.supremecourt.justice.nsw.gov.au/supremecourt/sco2_what_to_expect/sco2_representingyourself.html), accessed 20 April 2015.
- **Schemes of Professional Bodies:**
  - **Law Society of New South Wales Pro Bono Scheme** — This scheme offers legal assistance to eligible members of the public who cannot afford a solicitor. People who think they may qualify for assistance can inquire at one of these agencies: Law Access (Ph: 1300 888 529); community legal centres; legal advice centres; private legal practices; welfare agencies; the Legal Aid Commission.
    - Pro Bono Solicitor — Law Society of New South Wales**
    - 170 Phillip Street
    - Sydney NSW 2000
    - Ph: (02) 9296 0333
    - Fax: (02) 9231 5809
    - [www.lawsociety.com.au](http://www.lawsociety.com.au)
- **New South Wales Bar Association Legal Assistance Referral Scheme** — The NSW Bar Association has a Legal Assistance Referral Scheme, which

aims to provide legal assistance for free or at reduced rates to people who would otherwise not be able to obtain legal assistance without suffering severe financial hardship.

**The New South Wales Bar Association**

174 Phillip Street  
Sydney NSW 2000  
Ph: (02) 9232 4055  
Fax: (02) 9221 1149  
[www.nswbar.asn.au](http://www.nswbar.asn.au)

- **LawAccess NSW** — A call centre (phone toll-free 1300 888 529) run by the NSW Attorney General's Department. It provides 24-hour access to recorded information on many legal topics and business-hour access to operators who can individually assist with enquiries on legal matters, including assessment of eligibility for pro bono assistance. Internet access to information concerning courts, tribunals and other agencies and services of the Attorney General's Department is available at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au), accessed 8 February 2011
- **Legal Aid Commission of NSW** — provides free legal advice and grants legal aid for matters in specified areas of the law. Applicants are assessed on their financial means; the merits of the case; and whether they meet Legal Aid policy guidelines. Applicants must fill out a Legal Aid Application Form, available from an Legal Aid office, from duty lawyers at local courts or by phoning LawAccess NSW on 1300 888 529 or from their website at [www.lawaccess.nsw.gov.au](http://www.lawaccess.nsw.gov.au), accessed 8 February 2011

**Legal Aid Commission of NSW**

323 Castlereagh Street  
Sydney NSW 2000  
Ph: (02) 9219 5000  
[www.legalaid.nsw.gov.au/asp/index.asp](http://www.legalaid.nsw.gov.au/asp/index.asp)

- **Community Legal Centres** — non-profit community organisations that provide free legal advice, information and referrals on a range of issues. Some provide generalist assistance and some provide specialist advice.

**State Office, Combined Community Legal Centres Group (NSW) Ltd**

Suite 3B, Briad House  
491–493 Elizabeth Street  
Surry Hills NSW 2010  
Ph: (02) 9318 2355  
Fax: (02) 9318 2863  
[www.nswclc.org.au](http://www.nswclc.org.au)

- **State Library of New South Wales, Legal Information Access Centre**, available at [www.liac.sl.nsw.gov.au](http://www.liac.sl.nsw.gov.au), accessed 20 April 2015

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## 10.5 Further reading

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## 10.6 Your comments

The Judicial Commission of NSW welcomes your feedback on how we could improve the *Equality before the Law Bench Book*.

We would be particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific Sections of other Bench Books, discussion or research material.

Section 11 contains information about how to send us your feedback.

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In addition, you may discover errors, or wish to add further references to legislation, case law, specific Sections of other Bench Books, discussion or research material.

You can use the following proforma to send us your comments or simply forward them to us — by email or mail:

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