Equality before the Law Bench Book
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
Equality Before the Law Bench Book international award

We are pleased to announce that the Association for Continuing Legal Education (ACLEA) has awarded the Judicial Commission one of only 10 annual awards granted to competitors representing more than 300 organisations.

An Award for Outstanding Achievement was given to the Commission for the Equality Before the Law Bench Book in the Public Interest category.

ACLEA members are professionals in the fields of continuing legal education and legal publishing. Its annual ACLEA’s Best Awards are highly competitive and winning projects represent the highest level of achievement for the staff and volunteers involved.

ACLEA formally presented the award at the Annual Meeting of ACLEA in Chicago, IL on 30 July 2019.
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
- Dr Judy Cashmore AO (Member of the Judicial Commission)
- 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)
Dr Michael Robertson, Clinical Associate, Professor Centre for Values, Ethics & Law in Medicine, School of Public Health, University of Sydney (Update 15, reviewer of material on intergenerational trauma)

Section 3 — People from culturally and linguistically diverse backgrounds
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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
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Ms Meredith MacDonald, Executive Officer, Intellectual Disability Rights Service Inc
Ms Janene Cootes, Executive Officer, Intellectual Disability Rights Service
Ms Fyfe Strachan (Update 6, 2011)
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- 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
- Professor Judith Cashmore AO, University of Sydney (Update 5, 2009; Update 10, 2016; Update 12, 2018)
- Mr Hugh Donnelly, Director, Research and Sentencing, Judicial Commission of NSW (Update 10, 2016)
- Ms Pierrette Mizzi, Manager, Research and Sentencing, Judicial Commission of NSW (Update 5, 2009)
- Dr Jenny Bargen, University of Sydney (Update 10, 2016)

Section 7 — Women
- Ms Philippa Davis, Principal Solicitor, Women’s Legal Service NSW
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- Professor Simon Rice, OAM, Kim Santow Chair of Law and Social Justice, University of Sydney

Section 8 — Lesbians, gay men and bisexuals
- Mr David Scamell, Co-convenor, Gay and Lesbian Rights Lobby
- Ms Pat McDonough, Solicitor, Inner City Legal Centre
- Ms Yasmin Hunter, Solicitor Inner City Legal Centre (Update 6, 2011)

Section 9 — Gender diverse people and people born with diverse sex characteristics
- Ms Elizabeth Riley, General Manager, The Gender Centre
- Ms Pat McDonough, Solicitor, Inner City Legal Centre
- Ms Gina Wilson, Organisation Intersex Australia (Update 6, 2011)
- Mr Phinn Borg, Executive Director, The Gender Centre (Update 11, 2017)
- Ms Eloise Brook, Director, The Gender Centre (Update 11, 2017)
- Mr Morgan Carpenter, Co-executive Director, Intersex Human Rights Australia (Update 13, 2019)
Section 10 — Self-represented parties
- Professor Stephen Parker, Senior Deputy Vice-Chancellor, Monash University
- The Honourable Justice Nicola Pain, Land and Environment Court of NSW (Update 6, 2011)

Section 11 — Older People
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- Mr Richard McCullagh, Solicitor, Patrick McHugh & Co Pty Ltd
- Ms Jennifer Smythe, Assistant Principal Solicitor, Seniors Rights Service, Sydney

Special Acknowledgment
This Bench Book was inspired by three influential publications:

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).

The Commission does not warrant or represent that the information contained within this publication is free from errors or omissions. The Equality before the Law Bench Book is considered to be correct as at the date of publication, however changes in circumstances after the time of issue may impact the accuracy and reliability of the information within.

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Release 15: December 2019, Section 2 updated
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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 10 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
Section 11 — Older people

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:

Editor — Equality before the Law Bench Book  
Judicial Commission of NSW  
GPO Box 3634 Sydney NSW 2001  
or email, to: equalitybb@judcom.nsw.gov.au

Section 13 contains a response sheet with contact details.
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Providing for community and individual difference in court proceedings

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Section 1

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 or favour, affection or ill will: *Oaths Act*, Sch 4.

Judicial officers are required to 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.\(^1\)

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), *Australian Human Rights 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 indiscrimination. 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 and in accordance with their judicial oath.

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\(^1\) *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 402.
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 status, disability, socio-economic background and household make up. Based on the last census in 2016 (unless otherwise stated), for example:

- 2.9% are Aboriginal — see Section 2.
- 27.6% were born overseas, and 4.5% of NSW residents reported that they spoke English not well or not at all — see Section 3.
- 75% have a religious affiliation, and while 60.7% 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.
- 45.7% of family households consist of couple families with children. 36.6% of family households consist of a couple only, and 16% consist of a one parent family. 82.2% of single parents were female.  
- In 2016, 19.7% of households had a household income of less than $650 per week; the median individual income was $664 per week — see Section 7.
- In 2014, around 3% of the adult population identified as gay, lesbian or “other” — see Section 8.
- A small minority have, or are seen to have, issues with their gender identity or are born with diverse sex characteristics — see Section 9.
- In 2016, 16% of the population in NSW, or 1,217,261 people, were aged 65 and older (out of total population of 7,739,274) — see Section 11.
- More than 888,000 people, or 13% of the NSW population live in poverty, with children, single women, Aboriginal and Torres Strait Islander people and those with a disability the most likely to be living in economic disadvantage.  

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3 ibid.
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.6

1.4 Avoiding bias and stereotyping

To ensure equality before the law for all, judicial officers need to be aware of the possibility of conscious and unconscious 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 or appear.

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 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:7

- Three quarters of domestic assault victims were women or children.
- Indigenous women are vastly over-represented as victims of domestic assault.
- Older victims, those who were married and victims of assaults that did not involve weapons or serious injury were less likely to report to police.
- There are higher rates of victims and reporting of domestic assault in the most disadvantaged socio-economic areas, based on income, education and employment characteristics.

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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.8

1.4.1 Unconscious bias

Unconscious bias is more prevalent than conscious prejudice and often incompatible with one’s conscious values. Certain scenarios can activate unconscious attitudes and beliefs. For example, biases may be more prevalent when multi-tasking or working under time pressure.9

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.

The demeanour and appearance of a witness is an aspect of the judicial decision making process of assessing credibility.10 However, the pitfalls of this process have been noted judicially and extra-judicially.11 One concern is the impact of unconscious bias in considering a witness’s demeanour. Judicial officers are cautioned “to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events”.12 In many cultures, eye contact may be considered disrespectful or rude so a witness’s lack of eye contact in proceedings is not a reliable indicator of their credibility.

The application of the rule of law does not accommodate unconscious biases which, by definition, unknowingly, and irrelevently, affect cognitive processes and decisions. The rule of law assumes, rather, a forensic process, leading to an impartial decision, in which all concerned have recourse to known and impersonal objective standards and criteria for the application of the law and for the decision of a case.13

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8 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.
10 CSR Ltd v Della Maddalena (2006) 80 ALJR 458 at [180].
12 Fox v Percy (2003) 214 CLR 118 at [31].
In recent years, there has been significant research into how mental short cuts, known as heuristics, affect the way decisions are made. Researchers have considered how implicit bias (sometimes called unconscious or unintended bias) can affect decision-making. Implicit bias may affect an individual’s understanding, actions and decisions in an unconscious manner, and operate without the individual’s awareness or intentional control. Seminal research by psychologists, Daniel Kahneman and Amos Tversky, identify two systems of thinking (intuitive or fast thinking; and conscious or slow thinking) and examine the biases (or systematic errors) of intuitive thinking. Intuitive thinking suppresses doubt and ambiguity in order to quickly assemble coherent interpretations. Conscious thinking, on the other hand, accommodates doubt and incompatible possibilities in the process of deliberation.  

It is important to note that biases, conscious or unconscious, are not limited to ethnicity and race. Though racial bias and discrimination is well documented, biases may exist toward any social group. One’s age, gender, gender identity, physical abilities, religion, sexual orientation, weight, and many other characteristics are subject to bias.

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.

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.

14 Implicit bias, National Domestic and Family Violence Bench Book, AIJA at [5.10].

15 This principle has been referred to as the principle of “substantive equality” — as, for example, cited by McHugh and Kirby JJ in Purvis v NSW (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).
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.
- 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 2–11 of this Bench Book provide information about community and individual differences and practical examples of how to take appropriate account of these differences.

Sections 2–11 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.
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Section 2

Aboriginal people

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2.3.9 After Fernando

2.4 Further information or help

2.5 Further reading

2.6 Your comments
2.1 Some statistics

- **Population:**
  - Based on the last census, the estimated resident population of NSW Aboriginal people was 265,685 (3.4%) of the total 7.73 million residents of NSW. By 2026, the NSW Aboriginal population is expected to grow to 282,962.
  - More than 68% of Aboriginal people live in NSW, Queensland and Victoria while Western Australia and the Northern Territory contribute only 22% of the national Aboriginal population.

- **Language:**
  - Only 1% of 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 Year 12 steadily increased over the decade 2006–2016, from 32% to 47% across Australia. 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 2016.
  - Aboriginal people aged 20 to 64 years who did not have post-school qualifications decreased from 58% to 50% between 2011 and 2016.
  - From 2008 to 2018, the gap (ie the difference between the proportions of Aboriginal and non-Aboriginal students achieving at or above the national
minimum standard) in reading for school-aged children in year 3 has narrowed, falling 4.2 percentage points; in year 5 falling by 4.5 percentage points. For numeracy students in year 5 the gap has narrowed by 6.3 percentage points. From 2016 to 2017, numeracy and reading rates did not significantly improve in any year group.\(^8\)

– In 2018, a lower proportion of Aboriginal students achieved the national minimum standard than non-Aboriginal students in reading and numeracy in all years assessed (Year 3, 5, 7, and 9). In year 3, 8.5% of Indigenous students were below the national minimum standard in reading as against 1.6% of non-indigenous students, and this gap was greater with 16.8% of Year 9 Indigenous students falling below the minimum standard as opposed to 3.2% of non-indigenous students.\(^9\)

**Employment:**

– In 2016, 46% of Aboriginal adults in NSW (15 years and over) were employed, compared with 59% of non-Aboriginal people.\(^10\)

– In 2016, the unemployment rate in NSW for Aboriginal and non-Aboriginal people was 15% and 6% of the total labour force, respectively. Unemployment amongst Aboriginal people was highest for 18-24 year olds, at 24%.\(^11\)

– The Community Development Program (CDP), which commenced on 1 March 2019 funded by the 2018–19 Federal Budget, provides remote employment and community development services. The revised program has introduced flexible hours, reduced participation hours up to 20 hours per week, established a capital investment fund, changed the provider payment model, and subsidised 1,000 new jobs for CDP participants.\(^12\)

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8 Based on the 2017 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, accessed 31 May 2018.


11 ibid.

– There are about 35,000 CDP participants in Australia and 83% are Indigenous. As a condition of income support, remote area participants must engage in up to 25 hours of work for the dole, five days a week.¹³

– In 2014-15, the median weekly household income for Aboriginal households in NSW was $550, compared with $850 for non-Aboriginal households.¹⁴

### Housing:¹⁵

– 34% of Aboriginal NSW residents live in dwellings they own or are buying, compared with 67% of the total population.

– In NSW, 64% of Aboriginal people live in rented dwellings compared to 30% of non-Aboriginal people. In NSW 18% of Aboriginal people rented through Aboriginal Housing Organisations, or in other community housing.

– In NSW the proportion of Aboriginal adults living in overcrowded homes is 14% compared to 7% for non-Aboriginal adults.¹⁶

### Care and protection

– Between 1910 and 1969, official government policies moved from “protection”, which saw Aboriginal people placed in missions and reserves, to assimilation. These policies led to the forced removal of generations of Aboriginal children from their families. These children, known as the Stolen Generations, and their families inherited a legacy of trauma and loss documented in the 1997 *Bringing them Home Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander children from their families*.¹⁷ See below at 2.2.2. It has been estimated that more than 6,200 Aboriginal children in NSW were removed in this period.¹⁸

– In NSW as at 30 June 2018, Aboriginal children were placed in out-of-home care at 11 times the rate for non-Aboriginal children (6,766 children).¹⁹

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¹⁶ ibid, p 70.
Aboriginal children out of 17,387 children). Nationally, in 2017–18, 65% of Aboriginal children were placed with relatives/kin, with other Aboriginal caregivers, or in Aboriginal residential care. These informal arrangements do and will have multiple effects on the relative/kin caregivers, including financial, physical and mental health.

- **Health:**
  - Aboriginal people are twice as likely to report their health as “fair” or “poor” than non-Aboriginal people — 31% compared to 14%; with NSW having a higher proportion than Australia — 32% compared with 31%.
  - Aboriginal people in NSW are almost one-and-a-half times more likely to have a disability or long-term health condition than non-Aboriginal people — 53% compared with 29%.
  - About 6.6% of Aboriginal people in NSW need assistance with self-care, mobility or communication.
  - The leading causes of mortality and morbidity in Aboriginal people are coronary heart disease, anxiety disorders and diabetes, with coronary heart disease the leading disease outcome attributable to tobacco use.
  - There is increasing recognition of the impact of trans or intergenerational trauma on Aboriginal people as causative of poor physical and mental health outcomes. See 2.2.2 below.
  - The life expectancy of Aboriginal males in NSW is 8.6 years less than the life expectancy of non-Aboriginal males and 7.8 years less for females. In remote areas, life expectancy for Aboriginal men is 65.9 and women 69.6 years.
  - Aboriginal people are 10 times more likely to suffer hearing impairment than the general population, ie ear diseases and hearing loss. 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.

– Between 2015 and 2017, Aboriginal infant mortality was 4.5 per 1,000 for Aboriginal infants, compared with 3.1 per 1,000 for non-Aboriginal infants.\(^\text{25}\)

### Violence:

– There is increasing recognition in the law and justice sector of the impact of trans and intergenerational trauma on Aboriginal people as causative of disproportionate interactions in the criminal justice system. See 2.2.2 below.

– Between 2017 and 2018, Aboriginal victims of assault increased in NSW (up 4% of 171 victims) to 4,445 victims.\(^\text{26}\)

– In 2018, there were more female Aboriginal victims of assault than male victims. 2,764 females (62%) compared to 1,671 males in NSW.\(^\text{27}\)

– Aboriginal women accounted for approximately 7.6% of all female homicide victims in NSW between 2014 and 2018. Just over three-fifths (8 of 13 female Aboriginal victims) of whom were killed by intimate partners,\(^\text{28}\) compared with 44.1% (64 of 145 female victims) of non-Aboriginal victims.\(^\text{29}\)

– Aboriginal men are about 8 times more likely and Aboriginal women are 9 times more likely to be domestic assault offenders, than non-Aboriginal men and women.\(^\text{30}\)

– 11% of alleged offenders of sexual assault and child sexual assault offences were Aboriginal.\(^\text{31}\)


\(^{27}\) ibid.

\(^{28}\) An intimate partner includes spouse/partner, ex-spouse/ex-partner and boy/girlfriend (including ex-boy/girlfriend).

\(^{29}\) Statistics relate to the period between 2014 and 2018. Source: unpublished data supplied by the NSW Bureau of Crime Statistics and Research, June 2018, 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.

\(^{30}\) ibid.

\(^{31}\) Based on unpublished BOCSAR data for 2017 provided in June 2018.
- 11.8% of all NSW sexual abuse victims below 15 were Aboriginal. Aboriginal children make up 4% of children in NSW.

- 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”. Trauma therapists and leading researchers such as Jenny Atkinson et al consider that these indicia of Aboriginal disadvantage which manifest as inter and transgenerational trauma are symptoms of Aboriginal post-colonial history (see further 2.2.2.).

- Aboriginal women are almost five times more likely than non-Aboriginal women to be victims of domestic assault (2,071 per 100,000 population compared to 434 per 100,000). Aboriginal male offending is almost eight times higher than non-Aboriginal male offending (2,800 per 100,000 population compared to 359 per 100,000).

- **Prosecutions, bail and imprisonment:**

  - 3.9% of Aboriginal people appearing before the NSW Local Court appear on at least one offensive language or behaviour charge — this represents almost 35.6% of such charges.

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37 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.
38 Statistics relate to the period of 2018. Source: unpublished data supplied by the NSW Bureau of Crime Statistics and Research, June 2019, based on NSW Local Court data.
Aboriginal people were 4 times more likely than the NSW average to commit a murder, 10 times more likely to commit robbery, and 12 times more likely than the NSW average to be implicated in a motor vehicle theft.  

Aboriginal defendants are more likely to be refused bail in NSW courts — 14.5% compared with 6.9% for non-Aboriginal defendants. Aboriginal defendants are also more likely to be refused bail due to already being in custody for a prior offence — 9% compared to 3% for non-Aboriginal defendants. Yet 32.9% of Aboriginal people who were remanded in custody after their bail was refused do not receive custodial sentences.

Aboriginal juveniles account for 48% of all juveniles in detention centres, and are imprisoned at a rate approximately 17 times that of the non-Aboriginal population.

In December 2018, Aboriginal women accounted for 33.1% of the adult female prison population. Aboriginal men accounted for 24% of the adult male prison population. Overall, Aboriginal people remain grossly over-represented in NSW prisons. The full-time Aboriginal prisoner population was 24.5% of the prison population or 3,232 out of a total of 13,165 full-time inmates. This means that Aboriginal people are approximately 10 times more likely to be incarcerated in NSW than non-Aboriginal people.

Between 2008 and 2018, the Aboriginal imprisonment rate rose by 45% (nation-wide) compared to the non-Aboriginal rate of a 29% increase. In NSW, the rate of Aboriginal imprisonment increased by 32% from approximately 1,600 Aboriginal persons per 100,000 to 2,137 Aboriginal persons per 100,000. This contrasts with a rate change of 162 to 184 for non-Aboriginal persons per 100,000 for the same period.

As at 30 June 2018, Aboriginal imprisonment rates in the Northern Territory (84%), Western Australia (39%) and Queensland (31%) are higher than NSW (24%). South Australia (24%), Victoria (9%), the ACT (22%) and Tasmania (19%) are lower.

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39 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.

40 Statistics relate to the period between January and December 2017. Source: unpublished data supplied by the NSW Bureau of Crime Statistics and Research, June 2014, based on NSW Local Court data.


43 ibid.

– In 2018, there were 28,456 appearances by Aboriginal people in NSW courts charged with a criminal offence. Their court appearance rate is therefore 7 times higher than the NSW population as a whole — 140,080 people.\footnote{45}

– In 2018, across all NSW Criminal Courts (that is, Children’s, Local and Higher court jurisdictions) the number of Aboriginal people given a custodial sentence was 5,335. This was approximately 13 times higher than the overall rate of NSW people given a custodial sentence.\footnote{46}

\footnote{45 n 42, above.}
\footnote{46 ibid.}
2.2 Some general information

2.2.1 Aboriginal people, Torres Strait Islander people, Kooris, Murris and other groups

- 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 identifying as Aboriginal, and being accepted by the relevant Aboriginal/Torres Strait Islander community as Aboriginal and/or Torres Strait Islander.
- 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).
- Many Aboriginal people, including Aboriginal people who otherwise reside in urban centers, continue to acknowledge and observe traditional laws and customs, and undertake traditional activities.
- 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.

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48 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.

49 Australian Bureau of Statistics, above n 1.
Some Aboriginal people from NSW and others from interstate call themselves other names.\(^50\)

**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 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. Any suggestion that urban dwelling Aboriginal people are somehow less Aboriginal than “traditional” Aboriginal people is offensive and unhelpful.

In *Love v Commonwealth of Australia* [2020] HCA 3, the High Court held by majority in separate reasons that an Aboriginal Australian, despite their place of birth, cannot be considered an alien under s 51(xix) of the *Constitution*: at [81]; [284]; [398]; [458]. Edelman J reasoned that the powerful spiritual and cultural connection that Aboriginal people have with the land, and the “religious relationship” with the defined territory of Australia, can be an underlying basis for membership of political community independent of citizenship legislation: at [450], [466].

### 2.2.2 Intergenerational/transgenerational trauma

*Understanding intergenerational and transgenerational trauma*

Multiple government inquiries in the last three decades have acknowledged that the legacy of historic dispossession and dislocation from country, culture and family has had ongoing harmful physical, mental and socio-economic effects.\(^51\) This legacy is increasingly acknowledged and characterised in medico-legal literature and government policy as inter or transgenerational trauma.

Trauma may be acquired or inherited cumulatively and transmitted by an individual and/or collectively by a group. Genetic, physiological, behavioural and psychological factors are considered when making a medical or psychological diagnosis of trauma.\(^52\) The primary or distal cause of trauma for Aboriginal people

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50 See n 48.


was colonisation and attendant practices including massacres, dislocation to stations and missions, government policies that forcibly removed children from their families, often into servitude and sexual abuse. Secondary to this have been the individual and collective losses of many Aboriginal people due to racism, prejudice, poverty and genetic poor health. Loss of connection to land is acknowledged as permanent and intergenerational. This loss continues to be manifested in serious negative health outcomes including post-traumatic stress disorder, depression, anxiety, a lack of or loss of self-esteem, suicide, self-destructive behaviours including drug and alcohol abuse, and changes in molecular processes. Recent research has found an accumulating amount of evidence of an enduring effect of trauma exposure to be passed to offspring transgenerationally via the epigenetic inheritance mechanism of DNA methylation alterations which has the capacity to change the expression of genes and the metabolome. Many Aboriginal (and non-Aboriginal) people consider that the statistics in 2.1 above are a direct result of intergenerational trauma and 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. Proximate 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 Australia in the criminal justice system and this has been described as a “national disgrace”.

Connected to this, the police, government services and the law are frequently distrusted and/or seen as tools of oppression. For example, under protectionist policies, Aboriginal people were moved from their own land and forced to live on church or government “missions” (often with people from different tribal

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53 For information and a visual map of known massacre sites in Australia compiled by the University of Newcastle Colonial Frontier Massacres Project team, see https://c21ch.newcastle.edu.au/colonialmassacres/, accessed 17 October 2019. There are 250 known sites in Australia currently mapped.

54 Northern Territory v Griffiths [2019] HCA 7 at [230].

55 Epigenetics refers to the process by which gene expression is inhibited or enhanced, i.e. switched on or off. DNA methylation is the attachment of methyl groups to the DNA molecule. When methyl groups are attached to the promoter, they typically act to repress gene transcription: N Youssef, L Lockwood, et al, “The effects of trauma, with or without PTSD, on the transgenerational DNA methylation alterations in human offsprings” (2018) 8 Brain Sci 83 at www.ncbi.nlm.nih.gov/pmc/articles/PMC5977074/, accessed 17 June 2019. See also A Kuffer, A Maereker and A Burri, “Transgenerational effects of PTSD of traumatic stress: do telomeres reach across the generations?”, (2014) Journal of Trauma & Treatment, accessed 17 June 2019.

56 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.
groups) and/or made to work for no or minimal wages. Under assimilationist policies (1910-1969), 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, as illustrated at 2.1 above.  

**Having a trauma-informed approach**

The efficacy of a trauma-informed approach to working with Aboriginal people is increasingly being recognised in the legal and justice context. Therapeutic jurisprudence, for example, assumes that a person appearing as a defendant in court proceedings will have complex trauma and that trauma is a primary cause for their offending behaviour.

Government policy is beginning to acknowledge the critical importance of healing from intergenerational trauma. For example, the NSW Government has included healing as a key priority in its Aboriginal Affairs plan. While many Aboriginal people regard white settlement of Australia as an “illegal occupation” or colonisation, the concept of “reconciliation” is important. The goal of reconciliation was the culmination of the 1991 *Royal Commission into Aboriginal Deaths in Custody*. Volume 5, Part G, entitled “Towards Reconciliation”, recognised that mechanisms had to be put in place to achieve this goal. These included recognition of the underlying cultural, social and legal factors which have a bearing on Aboriginal deaths in custody; mechanisms by which the diverse needs of Aboriginal people for land can be achieved; and mechanisms whereby recognition can be given to the past injustices and continuing inequality experienced by Aboriginal people. Recommendation 339 was that “all political leaders and their parties recognise that reconciliation between the Aboriginal and non-Aboriginal communities in Australia must be achieved if community division, discord and injustice to Aboriginal people are to be avoided” and that “political leaders use their best endeavours to ensure bi-partisan public support for the process of reconciliation and that the urgency and necessity of

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57 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; 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, above, n 17.


the process be acknowledged”. Reconciliation involves an acceptance by the non-Aboriginal community of the way the Aboriginal community views the overall impact of colonisation, or truth-telling. 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 and in then Prime Minister Paul Keating’s Redfern speech on 10 December 1992.

The 2017 National Constitutional Convention formulated the “Uluru Statement from the Heart”. This has called for two reforms: 1) a constitutionally enshrined First Nations voice to federal Parliament and 2) a Makarrata Commission to oversee agreement-making between First Nations people with federal and State Governments and to provide a forum for truth telling about history. 60

Truth telling is seen as essential to acknowledging the wrongs of the past and creating a path for reconciliation.

2.2.3 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 values that are common to many Aboriginal people, irrespective of their particular tribal origin.

The main cultural and value differences between many Aboriginal people and people from non-Aboriginal backgrounds can be grouped as follows.

- **Collective, group-oriented identity** — Aboriginal culture is a much more collective and co-operative culture than, for example, the Anglo-Celtic Australian 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

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61 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.
are expected to look after one another.62 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 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 have a very strong sense of relationship to the land of their ancestors, based on Aboriginal spiritual belief that land is “mother” and the spirits of ancestors living on that land, give life and strength. This connection is articulated in the 2017 “Uluru Statement from the Heart” which describes First Nations people’s enduring sovereignty as a “spiritual notion” based on an ancestral tie between the land or “mother nature” and the First Nations people born there.63 An Aboriginal person may refer to land as “my country”, “country”, or “Aboriginal nation”. Living in an urban area away from “country” does not necessarily reflect a lack of community ties to country. See *Northern Territory v Griffiths*64 for a description of the lay and anthropological evidence of connection to the land and the effects, under Aboriginal laws and customs, when country is harmed.

- **Respect for Aboriginal spirituality and culture is important** — for example, “dreaming” 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. The *Aboriginal Languages Act 2017* (NSW) was assented to on 24 October 2017, however is not yet in force. This Act has two main purposes: to establish the Aboriginal Languages Trust to “provide a focussed, coordinated and sustained effort in relation to Aboriginal language activities at local, regional and State levels”, and to develop a strategic plan for the growth and nurturing of Aboriginal languages.

- **Individual material possessions are traditionally not highly prized** — family and spiritual matters are more important.65 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, many social events for Aboriginal and non-Aboriginal people alike, may commonly

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63 Uluru Statement from the Heart, 2017, above n 59.
64 [2019] HCA 7 at [230].
65 above, n 47, p 3:10.
occur in public rather than privately. Aboriginal people have a strong outdoor spirit, a sense of connection to country and of community versus the family unit. 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.

- **Experience of “sorry business”** — Aboriginal people from a young age will be exposed to familial and community deaths proportionately more than people from Anglo-Celtic backgrounds. “Sorry business” refers to the cultural practices and protocols associated with death.

- **Different communication abilities and styles** — many Aboriginal people in NSW speak a form of Aboriginal English and have a different style of linguistic and body communication than non-Aboriginal people. 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. 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 altered the social conditions in which people live their lives particularly with the introduction of alcohol, tobacco and other drugs and

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66 ibid.
changes to 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.70

- **Impact of customary law** — Aboriginal customary law is integral to Aboriginal culture. For Aboriginal people customary law is an “all encompassing reality”.71 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 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.72 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, prejudice and discrimination** — Most Aboriginal people have experienced racism, prejudice and discrimination in relation to all forms of public interaction — for example, in connection with rental accommodation,

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70 See L Behrendt, “Aboriginal women and the criminal justice system” (2002) 14(6) JOB 41 at 42.
types of services (government and private) and employment and interactions with police. Most will have had frequent experience of this. Very few, if any, will have had no such experience.73

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.

2.2.4 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.

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.

2.2.5 National framework to improve accessibility to Australian courts for Aboriginal and Torres Strait islander women and migrant and refugee women

The Judicial Council on Cultural Diversity (JCCD) has developed a national framework for both Aboriginal and Torres Strait Islander women and migrant and refugee women to improve access to justice, particularly in the context of family violence and family breakdown.

73 See ALRC, Pathways to justice — inquiry into the incarceration rate of Aboriginal and Torres Strait Islander people, above n 51, at [6.1]. See also, Annual Reports and other information published by the Anti-Discrimination Board of NSW and the Australian Human Rights and Equal Opportunity Commission.
This framework is a national approach to improving access to justice and achieving equality before the law for Aboriginal and Torres Strait Islander women and migrant and refugee women, providing an opportunity for Australian courts to build on existing efforts to respond to the particular challenges and barriers that may affect Aboriginal and Torres Strait Islander women and migrant and refugee women in their interaction with the court system. The framework is focussed on adapting court policies, procedures and resources, rather than the content of the law, and enables cultural considerations for diverse court users.

In developing this national framework of best practice guidelines and resources to be used across Australian courts, the JCCD drew on the recommendations and findings of its two consultation reports — *The Path to Justice: Access to Justice for Aboriginal and Torres Strait Islander Women* and *The Path to Justice: Access to Justice for Migrant and Refugee Women*. Particular reference should be made to the suggestions at pp 7-21 of the Framework, available at https://jccd.org.au/wp-content/uploads/2017/09/JCCD_National_Framework.pdf.

### 2.2.6 Justice reinvestment and the OCHRE plan

#### Justice reinvestment

Justice reinvestment (JR) is a policy solution to address the over incarceration of Aboriginal and Torres Strait Islander peoples in Australia. The ALRC Pathways to Justice Inquiry recommended that governments provide support to establish an independent justice reinvestment body. The purposes of JR are to promote the reinvestment of resources from the criminal justice system to community-led, place-based initiatives that address the causes of crime and incarceration. The policy has its origins in the United States and is directed to government and community-driven investment in localised early intervention, prevention and diversionary solutions to reduce crime, build local capacity and strengthen communities.

Just Reinvest NSW was formed in 2013 as an independent, not for profit, membership-based organisation. Just Reinvest NSW began working with the Bourke community in 2013. The Maranguka Justice Reinvestment Project is the first major JR pilot in Australia. KPMG conducted an impact assessment of

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the pilot in November 2018 and found improvements in family strength, youth development and adult empowerment, with estimated savings to the criminal justice system of $3.1 million.\textsuperscript{77}

Further information about the project may be found on the Just Reinvest NSW website.\textsuperscript{78}

**OCHRE plan: a NSW Government strategy**

OCHRE is an acronym for Opportunity, Choice, Healing, Responsibility, Empowerment. OCHRE, the NSW Government’s plan for Aboriginal affairs, commenced on 5 April 2013. OCHRE consists of various initiatives with the aim of supporting Aboriginal communities to improve their education and employment outcomes and enhance service accountability to support these goals. The initiatives include Healing, Local Decision Making, Connected Communities, Aboriginal Languages and Culture Nests, Opportunity Hubs, Aboriginal Economic Prosperity Framework and Solution Brokerage. Local Decision Making recognises that Aboriginal communities need to be directly involved in developing and implementing decisions and service delivery tailored for their community needs. The Healing initiative formally recognises the need for healing intergenerational trauma from the legacy of colonisation and commits to advance the dialogue on healing with Aboriginal communities.\textsuperscript{79}

The NSW Ombudsman evaluated the implementation and progress of the OCHRE plan in 2019 and published a report. The Ombudsman has recommended that the OCHRE plan continue and be strengthened, identifying its success in improving school attendance and engagement, and enhancing pathways to further study, training or jobs in the communities it has been operative.\textsuperscript{80}


2.3 Practical considerations

2.3.1 Diversionary options

Aboriginal people are disproportionately represented in NSW prisons (reflecting national trends) and are more likely than non-Aboriginal people to be arrested for relatively minor offences.81

Given this, and recommendations of the 1991 *Royal Commission into Aboriginal Deaths in Custody* and the 2018 *Pathways to Justice — Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133) to divert Aboriginal people from the courts system and imprisonment wherever possible, it is important that any locally available pre-trial diversionary options are considered and used where appropriate as a condition of bail or a s 11 *Crimes (Sentencing Procedure) Act* 1999 adjournment. Available alternatives to custody should also be considered where appropriate (see 2.3.6 below).82 For further information about non-custodial alternatives, see the *Sentencing Bench Book* at [4-400] and the Aboriginal Services Unit fact sheets.83

For young Aboriginal people (children under the age of 18), the Youth Koori Court sits in Parramatta and Surry Hills. The court operates under a deferred sentence model (s 33(1)(c2) *Children (Criminal Proceedings) Act* 1987) to provide direct case work and cultural support through an Action and Support Plan over 6–12 months prior to sentence. The young person will have his or her efforts taken into account on sentence as this directly affects the assessment of their rehabilitation prospects.84

Relevant considerations:

- Refer to JIRS “Diversionary Programs” to find out which 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 (ACJG), they should also be able to provide this. ACJGs are representative groups of respected Aboriginal community members and service providers who meet with justice agencies to develop solutions to crime offending problems in their communities. If the defendant is represented

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81 See statistics at 2.1 derived from the NSW Bureau of Crime Statistics and Research and the ABS.

82 For more information about MERIT, and other diversionary programs, see JIRS under “Diversionary Programs”. For a list of national diversionary programs and analysis of these, see www.aihw.gov.au/getmedia/0422b2d9-dd3f-41a2-aa8e-e13a9e9afca/ctgc-rs24.pdf.aspx?inline=true, accessed 22 October 2019.


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 diversionary option or alternative to custody 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 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 (14.5% Aboriginal people refused bail compared with 6.9% non-Aboriginal people).\(^{85}\) Aboriginal defendants are also more likely to be refused bail due to already being in custody for a prior offence — 9% compared to 3% for non-Aboriginal defendants. 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 the *Bail Act 2013*).\(^{86}\)

- 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.

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85 2018 data supplied by the NSW Bureau of Crime Statistics and Research, Reference: sr18-16315, June 2019, based on NSW Police and NSW criminal court data.

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 a viable 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 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.87

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.88 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

87 See, for example, *R v Bugmy* [2004] NSWCCA 258 where the NSWCCA 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.

88 D Eades, *Aboriginal ways of using English*, above n 66, 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. See also D Eades, “Communicating the right to silence to Aboriginal suspects: lessons from Western Australia v Gibson” (2018) 28 *JJA* 4.
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.

### 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.

### Points to consider:

- Do not use ethnic identifiers (for example, “Aboriginal”, “Aboriginal”, “Koori”, “Indigenous”) 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 “Aboriginal person”, 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** — the use of such words are 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 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 Torres Strait Islander 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, 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. Great care must be exercised in making demeanour findings, particularly where a witness is from a different cultural or ethnic background to that with which the trial judge is familiar, see: Goodrich Aerospace Pty Ltd v Arsic (2006) 66 NSWLR 186 at [21]–[27].

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.

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

- **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. (The

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average time between one person speaking and someone responding in most western cultures is ¾ of a second. In Aboriginal cultures, the time between one person speaking and another responding can be on average as long as seven (7) seconds.) 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.\(^{91}\) Aboriginal people may take longer to answer questions, and where there are prolonged periods of silence, every effort ought to be made to try to establish the reason for the silence, without making assumptions about, for example, silence signifying guilt, evasiveness or lack of comprehension.\(^{92}\) 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 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”.\(^{93}\) 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.

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91 Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 47.

92 Dr Diana Eades describes the Aboriginal tendency to “gratuitous concurrence” as a cultural trait that can be exploited or misunderstood in courtroom proceedings. D Eades, *Aboriginal ways of using English*, above n 66, p 122.

93 S Fryer-Smith, *Aboriginal Benchbook for Western Australian courts*, above n 47, p 5:7, para 5.3.1, Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 47, 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.
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.\footnote{S Fryer-Smith, ibid, p 5:7, para 5.3.1.}

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.\footnote{Note the concerns of the NSWLRC in its \textit{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.

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. For more about interpreters including when they are needed, how to book one and/or how to work with one — see 3.3.1.

**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.

**Relevant considerations:**

- 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.** Never show any impatience. 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.

- **Take additional, short adjournments if necessary.**

- **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.

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97 The information in this box is drawn from the S Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts*, above n 47, Ch 5; and the Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 47, Ch 9.
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.

Speak in an ordinary tone of voice, at an ordinary volume, but speak clearly and slowly, using short and plain English. For example:

- Use direct and short 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”.

2133
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?” “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.

98 Supreme Court of Queensland, Equal Treatment Benchbook, above n 47, p 123.
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 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)).

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).

99 See 2.3.3.2 above.
2.3.4 The impact of being Aboriginal on any behaviour relevant to the matter(s) before the court

Any of the factors 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:

- It may be helpful to acknowledge and understand the impact of intergenerational trauma on court participants as this may lead to more successful interactions and outcomes. Courts that do not practice trauma-informed decision making may inadvertently increase the level of trauma that people experience. A therapeutic justice approach adopts the paradigm: “what’s happened to the defendant?” rather than “what is wrong with the defendant?”.

- 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 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.

- 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


101 Section 41 Evidence Act 1995.
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 5.3.2.102

### 2.3.5 Aboriginal burial rights and estate distribution orders

#### Aboriginal burial rights

There is no standard approach or hard and fast rule that can be formulated and applied when determining a burial dispute regarding an intestate deceased Aboriginal person. In such cases, the court will exercise its inherent jurisdiction and consider the factual considerations balanced with common law principles and practical considerations, as well as cultural, spiritual and religious factors of importance: State of SA v Smith (2014) 119 SASR 247 at [34]; White v Williams (2019) 99 NSWLR 539 at [15]–[27].

The received view at common law is that there is no property in a dead body; no person is entitled to ownership of a deceased’s remains. It is usually accepted that, where a deceased has left a will, the executor of the estate has the right to arrange for the burial of the body. Where there is no named executor or no will, the person who is entitled to take out letters of administration of the estate with or without a will annexed has the right to arrange for burial: State of SA v Smith at [22]. White v Williams (2019) 99 NSWLR 539 involved an urgent application

102 Note that s 23A(3) Crimes Act 1900 provides that the effects of “self-induced intoxication”, as defined in s 428A Crimes Act 1900, are to be disregarded for the purpose of determining whether the accused, by reason of this section, is not liable to be convicted of murder.
for a declaration that a person could make burial arrangements for an Aboriginal deceased who had died intestate, where there were competing claims about where he should be buried.

Referring to *State of SA v Smith* (2014) 119 SASR 247, the court identified four main considerations that could assist in the resolution of the dispute:

1. who might be entitled to take out letters of administration
2. any Aboriginal cultural matters and concerns
3. the deceased’s own wishes and
4. the wishes of any living close relatives.

The wishes of the deceased’s children in *White v Williams* carried very great weight, particularly in the context where their mother expressed the importance of visiting their father’s grave for the purpose of grieving and mourning: at [26].

**Estate distribution orders**

Part 4.4 of the *Succession Act 2006* (NSW) provides for the distribution of an intestate Aboriginal person’s estate.

Section 101 of the *Succession Act* defines an Indigenous person as a person who:

(a) is of Aboriginal or Torres Strait Islander descent, and

(b) identifies as an Aboriginal person or Torres Strait Islander, and

(c) is accepted as an Aboriginal person by an Aboriginal community or as a Torres Strait Islander by a Torres Strait Islander community.

The personal representative of an Indigenous intestate, or a person claiming to be entitled to share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged, may apply to the Supreme Court for a distribution order: s 133(1).

An application for a distribution order must be accompanied by a scheme for distribution of the estate in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged: s 133(2).

In formulating the terms of the order, the court must have regard to the scheme for distribution submitted by the applicant (s 133(3)(a)), and the laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged: s 133(3)(b). The “laws, customs, traditions and practices” are those relating to distribution of an intestate estate. They are not a set of positivist rules but a general understanding within a community of rights and obligations of an individual living, and dying, in the community. Their content must be determined relative to the particular circumstances of the Indigenous intestate and the community or group to which he or she belonged: *Re Estate Wilson, Deceased* (2017) 93 NSWLR 119 at [140]–[143], [151]; *Re Estate Jerrard, Deceased* (2018) 97 NSWLR 1106 at [9], [20]–[22].

The legislative policy and purpose underpinning Pt 4.4 of the *Succession Act* support the view that the Indigenous
concept of “family” is an important, if not decisive, element of determining “the laws, customs, traditions and practices” of an Indigenous community or group: *Re Estate Wilson* at [152]. The concept of “family” may differ radically from the general concept of “family” relationships upon which Pt 4.2 and Pt 4.3 of the *Succession Act* are predicated. The object of Pt 4.4 is to do what is just and equitable in the particular circumstances of an individual case to accommodate such factors in the administration of an Indigenous intestate estate: *Re Estate Jerrard, Deceased* at [9], [20]–[22].

Expert evidence may be used to prove laws, customs, traditions and practices but is not always required: *Re Estate Wilson* at [154]–[155]. However, as a matter of general practice, applications under Pt 4.4 should, whenever possible, “include evidence from one or more senior members of the intestate’s community or group, or evidence prepared or endorsed by a Local Aboriginal Land Council” as to the customary law governing succession, the deceased’s Indigenous status; the Indigenous community or group the deceased “belonged” to; where the applicant is not the personal representative of an Indigenous intestate, the basis of the applicant’s claim to be entitled to share in the estate under customary law; the identity of other potential claimants; and the proposed scheme for distribution of the estate: *Estate of Mark Edward Tighe* [2018] NSWSC 163 at [10]; [30]–[36].

The court is not bound to accept evidence of “traditional customary lore” nor evidence characterised as “expert”. In each case, the court is obliged, in all the circumstances, to exercise an independent judgment upon its assessment of the materiality and probative value of the evidence available on questions the court is to determine. If the court is not satisfied about the existence, or content, of “the laws, customs, traditions and practices of the Indigenous community or group to which [an] intestate belonged” the only course ultimately open to it may be to order that an application for a distribution order be dismissed: *Re Estate Jerrard, Deceased* at [95]. In a numerically small Indigenous community there is significant probative value in the fact that Elders, other members and official representatives of the community agree upon a formulation of “traditional customary lore” (which has no competing formulation of traditional customary law or practice advanced against it), in circumstances in which substantial notice of these proceedings has been given to the community as a whole. In making a finding about “the laws, customs, traditions and practices” of an Indigenous community the court should generally endeavour to listen to the voices of the community — not uncritically, but empathetically: *Re Estate Jerrard, Deceased* at [97].

The court may not make an order unless satisfied that the terms of the order are, in all the circumstances, just and equitable: s 134(4). The jurisdiction is “essentially equitable in character”: *Re Estate Wilson* at [136]; *Estate of Mark Edward Tighe* at [58]; *Re Estate Jerrard, Deceased* at [108]. Consideration of what is “just and equitable” is not confined to “the laws, customs, traditions and practices” of a particular Indigenous community. Section 134(4) serves as a safeguard against abuses of process, and requires the court to consider the broader
public interest in the due administration of estates generally: Re Estate Jerrard, Deceased at [105]–[107], [113]–[115]. It has been suggested extra-curially that for a distribution order to work effectively, its operation should not be limited by a narrow interpretation of the grounds necessary to enliven the court’s jurisdiction, in particular the concept of an indigenous person, the concept of an “Indigenous community or group”, the concept of “belonging” to “an Indigenous community or group” and the concept of the “laws, customs, traditions and practices” of an Indigenous community or group.¹⁰³

2.3.6 Guidance 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.

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.

This should be done in line with the Criminal Trial Courts Bench Book¹⁰⁴ or Local Court Bench Book¹⁰⁵ (as appropriate), and you should raise any such points with the parties’ legal representatives first.

For example, you may consider providing specific guidance as follows:

- That the jury 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.

2.3.7 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.106

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 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.

- Regarding a victim impact statement for proceedings commenced before 27 May 2019, whether to allow a VIS 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.107 For proceedings commenced on or after 27 May 2019, the court must consider a VIS which has been tendered after it convicts, but before it sentences, an offender.

- It is also important to ensure that your sentencing, decision and/or written judgment:
  - Is not harsher than it would be if the person were not Aboriginal.
  - Is not paternalistic.
  - Takes account of the Royal Commission (into Aboriginal Deaths in Custody (1991) and Pathways to Justice -- Inquiry (Report 133)) into the incarceration rate of Aboriginal and Torres Strait

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106 See also Judicial Commission of NSW, Sentencing Bench Book, 2006—, Sydney at [2-200].
107 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 to the offender’s legal representative to read, or the court may provide supervised access to an unrepresented offender. The offender must not be allowed to retain, copy, disseminate or transmit images of the statement : s 30G Crimes (Sentencing Procedure) Act 1999.
Islander Peoples) 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 bail or 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.  

- 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*¹⁰⁸ and affirmed in *Bugmy v The Queen*¹¹⁰ — see Appendix to this Section. It is necessary to point to material that establishes a background of social deprivation if circumstances of profound deprivation are relied on in mitigation of sentence.

- The Aboriginal Legal Service, Public Defenders Office, Legal Aid NSW, Just Reinvest NSW and UNSW have published the “Bar Book Project”. The project aims to build a body of material regarding the social disadvantage and deprivation of Aboriginal communities to assist legal practitioners in the preparation and presentation of evidence to establish the application of the *Bugmy* principles. See further Appendix with reference to the *Fernando* principles and *Bugmy v The Queen* (2013) 249 CLR 571. This is an online resource.

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¹⁰⁸ 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].


¹¹⁰ (2013) 249 CLR 571.
hosted on the Public Defenders website\textsuperscript{111} and freely available for judicial officers and the legal profession to use.\textsuperscript{112} To date, the following chapters have been published:

- Fetal Alcohol Spectrum Disorders (FASD)
- Exposure to domestic and family violence
- Parental incarceration
- Hearing impairment
- Out-of-home care
- Childhood sexual abuse
- Early exposure to alcohol and other drug abuse
- Interrupted school attendance and multiple suspensions
- Acquired brain injury
- 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 and/or youth justice conferencing\textsuperscript{113} 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 can both be more in


\textsuperscript{113} See JIRS under “Diversionary Programs” for contact information.
tune with Aboriginal cultural norms about how sanctions should be imposed in that they enable Aboriginal community discussion and involvement.¹¹⁴

– 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 video 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.¹¹⁵

– 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”¹¹⁶ and not restricted to rural communities. 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

¹¹⁴ See D Dick, “Circle Sentencing of Aboriginal Offenders: Victims Have a Say” (2004) 7(1) TJR 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) JOB 47, Judicial Commission of NSW; R Lawrie, et al, Circle Sentencing in NSW: A review and evaluation, 2003, Aboriginal Justice Advisory Council; L Trimbo, 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.


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.¹¹⁷ Note that in sentencing for Commonwealth offences, cultural practices cannot be taken into account in mitigation or aggravation of the seriousness of criminal offending.¹¹⁸

- 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.¹¹⁹

- 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.


¹¹⁸ Section 16A(2A) *Crimes Act* 1914.

¹¹⁹ The Work and Development Order (WDO) scheme is a fine reduction program for disadvantaged people. It allows eligible people to reduce their fine debt by undertaking unpaid work, courses, treatment programs and other activities with an approved organisation or registered health practitioner. For more information about WDO’s, and other diversionary programs, see JIRS under “Diversionary Programs”.
2.3.8 **The Fernando principles**\(^{120}\)

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*,\(^ {121}\) 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*,\(^ {122}\) 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 Aboriginal people 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

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\(^{120}\) The *Fernando* principles 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 JOB 17 and Judicial Commission, *Sentencing Bench Book*, Special Bulletin No 4, October 2013.

\(^{121}\) S Fryer-Smith, *Aboriginal Bench Book for Western Australian Courts*, above n 47.

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 Aboriginal person 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,123 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.

2.3.9 After Fernando

A number of NSW Supreme Court and NSWCCA decisions confined the application of the Fernando principles to Aboriginal people who came from

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123 (unrep, 14/11/97, NSWSC) at 10.
remote areas: see for example *R v Morgan* (2003) 57 NSWLR 533 at [21]–[22] and *R v Newman* (2004) 145 A Crim R 361 at [66], [68]. However, in 2013, the High Court considered the issue of sentencing Aboriginal offenders in *Bugmy v The Queen* (2013) 249 CLR 571 and *Munda v WA* (2013) 249 CLR 600.

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

On appeal to the NSWCCA, 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 resentedenced 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*

\[124\] 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.

\[125\] *R v Bugmy* [2012] NSWCCA 223.
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 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 WA, 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.

It is not necessary to require a causal link between a background of social deprivation and abuse and the offending behaviour as a necessary condition to permit mitigation of sentence: *R v Irwin* [2019] NSWCCA 113 at [116]. As stated by Gageler J in *Bugmy* at [56], the effects of social deprivation and its weight in the sentencing exercise is a matter for individual assessment: *Irwin* at [116]–[117].
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:
- Aboriginal Client and Community Support Officers (employed by the NSW Department of Justice), and/or local Aboriginal Community Justice Group, and/or Elders within the relevant Aboriginal community. Contact the Aboriginal Services Unit on (02) 8688 7755.
- Office of the Director of Public Prosecution’s Aboriginal Witness and Assistance Officers — Ph: (02) 9285 8646
- Victims’ Services’ Aboriginal Contact Line — Ph: 1800 019 123
- Aboriginal Legal Service (NSW/ACT) Ltd — contact details: www.alsnswact.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

- **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) 6932 7200
  Fax: (02) 6921 9340

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

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

- **Armidale**
  128 Dangar 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

- NSW Native Title Services Ltd
  Level 1, 44-70 Rosehill Street
  Redfern NSW 2016
  Ph: (02) 9310 3188 or 1800 111 844
- NSW Aboriginal Land Council
  33 Argyle Street
  Parramatta NSW 2150
  PO Box 1125
  Parramatta NSW 2150
  Ph: (02) 9689 4444
  Fax: (02) 9687 1234
  http://alc.org.au

- Aboriginal Medical Service
  36 Turner Street
  Redfern NSW 2016
  Ph: (02) 9319 5823
  web: https://amsredfern.org.au/contact/

- Tranby Aboriginal College
  13 Mansfield Street
  Glebe NSW 2037
  Ph: (02) 9660 3444
  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.
2.5 Further reading


Australian Law Reform Commission, Pathways to Justice — Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples, ALRC Report 133, 2018, accessed 22 October 2019.


D Eades, “Communicating the right to silence to Aboriginal suspects: lessons from Western Australia v Gibson” (2018) 28 JJA 4.


Judicial Council on Cultural Diversity, “National framework to improve accessibility to Australian courts for Aboriginal and Torres Strait Islander women and migrant and refugee women”, accessed 22 October 2019.


B Thomas, *Diverting Aboriginal Adults from the justice system*, Aboriginal Justice Advisory Council.


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 13 contains information about how to send us your feedback.
People from culturally and linguistically diverse backgrounds

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3.1 Some statistics

- **Population** — The NSW population according to the 2016 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.³

  - Figure 3.1 shows the breakdown of Australian born and overseas born NSW residents using figures from the 2016 census:

    ![Figure 3.1: Breakdown of Australian born and overseas born residents](image)

    - Of the 2.06 million of those born overseas 1.56 million were born in a *non-main* English speaking country (NMESC).⁴
    - Approximately 27.5% of those born overseas were born in mainly English-speaking countries (MESC)⁵ (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

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


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 (ASCSCS)*, ABS cat no 1269.0 to include Australia, New Zealand, United Kingdom, Ireland, South Africa, United States of America and Canada.
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>
<thead>
<tr>
<th>Birthplace</th>
<th>Number of NSW residents</th>
<th>% of NSW population</th>
</tr>
</thead>
<tbody>
<tr>
<td>China (excluding SARs and Taiwan)</td>
<td>234,508</td>
<td>3.1</td>
</tr>
<tr>
<td>India</td>
<td>143,459</td>
<td>1.9</td>
</tr>
<tr>
<td>Philippines</td>
<td>86,749</td>
<td>1.1</td>
</tr>
<tr>
<td>Vietnam</td>
<td>84,130</td>
<td>1.2</td>
</tr>
<tr>
<td>Lebanon</td>
<td>57,381</td>
<td>0.8</td>
</tr>
<tr>
<td>South Korea</td>
<td>51,816</td>
<td>0.7</td>
</tr>
<tr>
<td>Italy</td>
<td>49,476</td>
<td>0.7</td>
</tr>
<tr>
<td>South Africa</td>
<td>43,058</td>
<td>0.6</td>
</tr>
</tbody>
</table>

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

- **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 NESC 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.
In general, a much smaller percentage of the local population outside Sydney was born in a NESC 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.

**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. 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.

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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).  

- 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. 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 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.

  - Australian Bureau of Statistics figures reveal that of the NSW prison population in 2016 of 12,629 inmates, 9693 were Australian born (76.7%) and the remainder (2765) came from the following countries:


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

<table>
<thead>
<tr>
<th>Country of birth</th>
<th>NSW prison population</th>
<th>Total NSW population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outside Australia</td>
<td>21% – 2765 inmates</td>
<td>27.6%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1.3% – 156 inmates</td>
<td>3.6%</td>
</tr>
<tr>
<td>New Zealand</td>
<td>2.6% – 326 inmates</td>
<td>1.6%</td>
</tr>
<tr>
<td>China (excluding SAR and Taiwan)</td>
<td>1.7% – 206 inmates</td>
<td>3.1%</td>
</tr>
<tr>
<td>Vietnam</td>
<td>2.5% – 311 inmates</td>
<td>1.1%</td>
</tr>
<tr>
<td>Italy</td>
<td>0.2% – 26 inmates</td>
<td>0.7%</td>
</tr>
<tr>
<td>Lebanon</td>
<td>1.2% – 157 inmates</td>
<td>0.8%</td>
</tr>
<tr>
<td>Philippines</td>
<td>0.5% – 68 inmates</td>
<td>1.2%</td>
</tr>
<tr>
<td>India</td>
<td>0.3% – 35 inmates</td>
<td>1.9%</td>
</tr>
<tr>
<td>Greece</td>
<td>0.2% – 21 inmates</td>
<td>0.4%</td>
</tr>
<tr>
<td>Germany</td>
<td>0.2% – 30 inmates</td>
<td>0.4%</td>
</tr>
<tr>
<td>Fiji</td>
<td>0.7% – 90 inmates</td>
<td>0.5%</td>
</tr>
<tr>
<td>Iraq</td>
<td>0.7% – 89 inmates</td>
<td>0.5%</td>
</tr>
<tr>
<td>Malaysia</td>
<td>0.4% – 47 inmates</td>
<td>0.4%</td>
</tr>
<tr>
<td>USA</td>
<td>0.3% – 41 inmates</td>
<td>0.4%</td>
</tr>
<tr>
<td>Samoa</td>
<td>0.4% – 51 inmates</td>
<td>0.1%</td>
</tr>
<tr>
<td>Tonga</td>
<td>0.2% – 29 inmates</td>
<td>0.2%</td>
</tr>
<tr>
<td>South Africa</td>
<td>0.2% – 22 inmates</td>
<td>0.6%</td>
</tr>
<tr>
<td>Turkey</td>
<td>0.2% – 29 inmates</td>
<td>0.2%</td>
</tr>
</tbody>
</table>

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

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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.\textsuperscript{14}

\textsuperscript{14} 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. 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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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” (s 13A(4)) 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.16

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.

16 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\textsuperscript{17}

3.3.1 The need for an interpreter or translator

3.3.1.1 Assessing 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 in one language (the source language) to another language (the target language) — for example, business letters, a taped videoconference, covert recordings obtained under warrant.\textsuperscript{18}

In many cases, an appropriately credentialed 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. The Judicial Council on Cultural Diversity (JCCD) produced a resource in 2017, \textit{Recommended national standards for working with interpreters in courts and Tribunals}. The resource recommends that if a party or witness in court has difficulties understanding or speaking in English at any point, or if the person asks for an interpreter, the judicial officer should stop proceedings and arrange for an interpreter to be present. The recommended standards suggest that the judicial officer apply a four-part test to assess the need for an interpreter outlined in Annexure 4 of the resource.\textsuperscript{19}

\footnotesize


\textsuperscript{19} JCCD, ibid at p 117.
While there is no specific “right” to an interpreter, procedural fairness requires that the language needs of court users be accommodated. Various statutory provisions allow for the use of an interpreter, for example, s 30 of the Evidence Act (NSW) 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.

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 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.20

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.

An accused in a criminal trial in NSW has a right not to be tried unfairly, usually expressed as a right to a fair trial. 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 inRe East; Ex parte Nguyen 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.21

The JCCD National Standards for Working with Interpreters in Courts and Tribunals summarises the statutory and common law sources of the “right” to an interpreter in civil and criminal proceedings.22

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22 Above n 17 at p 94.
In summary, s 30 of the Evidence Act 1995 (NSW), combined with relevant case law and the JCCD National standards for working with interpreters in courts and tribunals, means a judicial officer, should err on the side of caution. It is best to:

- Make sure that an appropriately credentialed 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. Explain the role of an interpreter and ask the party or witness if they need an interpreter using an open question (for example, “What do you think about asking an interpreter to help us?” or “What do you want to do?”).

- 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. In assessing the need for an interpreter, it may be helpful to refer to the four-part test in the JCCD resource.

- 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.

- If a document in a language other than English is at all important to the proceedings, ensure that it is professionally translated by a certified 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 certification 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.

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23 This question is derived from the JCCD, Recommended national standards for working with interpreters in courts and tribunals, above n 17, p 117 and ff.
2. If the document is complex, the proceedings may need to be adjourned in order to obtain a translation by a certified translator.

3.3.1.2 Recommended national standards for working with interpreters in courts and tribunals

In 2017, the Judicial Council on Cultural Diversity (JCCD) produced the *Recommended national standards for working with interpreters in courts and tribunals*[^24] to establish recommended and optimal practices for working with interpreters, with the aim of improving access to justice and procedural fairness. This resource has been recommended by the Council of Chief Justices. The recommended standards for courts centre on steps than can be taken from an institutional perspective, to ensure better working with interpreters, including:

- provision of information to the public about the availability of interpreters
- facilitation of training for judicial officers and court staff on the Recommended Standards and working with interpreters
- assessing the need for an interpreter
- coordination and engagement of interpreters by the court
- court budget for interpreters
- appropriate support for interpreters
- provision of professional development to interpreters on the Recommended Standards; and
- adoption of the Model Rules to give effect to the proposed standards.

3.3.1.3 Level of interpreter or translator to employ

In general only interpreters and translators certified by the National Accreditation Authority for Translators and Interpreters (NAATI) and only those certified at the appropriate level for the particular type of interpreting and/or translation necessary should be engaged.[^25] Preferably, practitioners who are also formally trained should be given preference over those who are only certified. Not all practitioners are certified and/or trained at the appropriate level for both interpreting and translation. Using the services of a non-certified

[^24]: This publication may be found at the JCCD website at http://jccd.org.au/publications, accessed 20 March 2018. See also a summary of the publication in (2018) 30 *JOB* 36.

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* because “the deficiencies in interpretation were such that the appellant was unable to give an effective account of the facts vital to his defence”.

**Note:** that NAATI does not test for all new and emerging languages and has no specification of level of proficiency for these. However NAATI does issue a Recognised Practising Interpreter (or Translator) credential in these circumstances. Anyone holding a Recognised Practising credential has had to demonstrate social and ethical competency as well as work experience and is still subject to continuing professional development and professional conduct obligations.

There are several techniques of interpreting:

- **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.

As part of the new certification system, NAATI will introduce a new certification, Certified Specialist Interpreter (Legal). Until the introduction of

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27 Recognised Practising is an award in a totally separate category from certification. It is granted only in languages for which NAATI does not test and it has no specification of level of proficiency. Recognised Practising does not have equal status to certification, 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, accessed 5 June 2018.
this in mid-2019, the minimum NAATI certification type should be Certified Interpreter (previously Professional or Level 3) and interpreters with formal training should be given preference. Certified Provisional Interpreters (previously known as Paraprofessional or 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 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 3.3.1.4 below) can advise which level would be the most appropriate for a particular situation.

Most NAATI certified 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.29

Note: that NAATI certification generally requires practitioners to be formally trained but this can vary, based on the language. It is advisable to give preference to those practitioners who, in addition to their NAATI credential, 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.30

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 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?

3.3.1.4 Guidelines for magistrates and judges when working with interpreters in court

- Ask interpreters to introduce themselves and state their credentials including NAATI certification and 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”.
- Consider whether and to what extent the interpreter should be briefed on the matter prior to proceedings commencing. If so, allow sufficient time for interpreter to become familiar with the material.
- 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.

31 The guidelines have been developed by Professor Sandra Hale of the UNSW. Refer also to the JCCD, *Recommended national standards for working with interpreters in courts and tribunals*, above n 17, “Guidelines for judicial officers”, pp 12-13.
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).

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 competent in this mode of interpreting).

If anyone questions the interpreter’s rendition, do not take their criticism at face value. Bilinguals who are not certified interpreters often overestimate their competence. Compare qualifications and give the interpreter the opportunity to respond to the criticism.

3.3.1.5 Suppliers of interpreters and translators

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

- **Multicultural NSW** — face to face interpreting services are provided 24 hours a day, 7 days a week for 104 different languages and dialects including Auslan (Australian sign language).
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 Home Affairs — 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 engaged, you need to check that they hold appropriate NAATI certification — see 3.3.1.2.

3.3.1.6 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.

3.3.1.7 Working with an interpreter

To ensure the best way to work with an interpreter:

- As a general rule, courts should provide adequate and appropriate working conditions and remuneration to support interpreters in the performance of their duties to the best of their ability. The JCCD resource Recommended standards for working with interpreters in courts and tribunals provides guidance for courts and judicial officers working with interpreters in civil and criminal proceedings.32
- Establish the ground rules — the interpreter is required to be impartial and is only there to interpret what all the parties present say.

32 JCCD, Recommended standards for working with interpreters in courts and tribunals, Standard 9.1, above n 17, p 9.
- **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. See Standards 9.1–9.9 of the *Recommended standards for working with interpreters in courts and tribunals*.

- **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”. If the former was what was said or 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.

- **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).

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- 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. 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 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.

- 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

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

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.

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3.3.1.8 **The provision of certified interpreters and certified 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 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:37

- 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 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.

37 Examples cited sourced from author’s personal knowledge and the Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 17, pp 79–81.
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.”

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.\(^{39}\)

### 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,\(^{40}\) 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 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.

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\(^{39}\) See s 3 (the definition of “face covering”) of the Law Enforcement (Powers and Responsibilities) Act 2002.

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.41

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.

41 Supreme Court of Queensland, Equal Treatment Benchbook, above n 17, p 76.
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.

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.  

- 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 banded 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.

- 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.

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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.

42 Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 17, p 77.

43 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.
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 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.**

### 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.

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44 ibid.
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.

- **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”45. 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

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45 Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 17, p 75.
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.

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. 46

- 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 is culturally appropriate for that person 47 — 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. 48
  - 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.

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47 above n 41.

48 Supreme Court of Queensland, Equal Treatment Benchbook, above n 17, p 76.
– 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.49

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.

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.

49 above n 41.
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, disinheriance, 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

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:

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

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50 Much of the information in 3.3.6.2 is sourced from the Supreme Court of Queensland, Equal Treatment Benchbook, above n 17.

51 ibid, p 40.
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.52

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 “Kivrelik” (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 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.

52 ibid, p 41.
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”53 which may act as a significant means of control and rationale for why members of particular ethnic groups act as they do. For instance:54

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.

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:55

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.

53 ibid, p 40.
54 ibid, p 41.
55 ibid.
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 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.

- 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

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56 above n 43.
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.57

### 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.

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,*“or the Local Courts Bench Book” (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

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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.

### 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.\(^{60}\)

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.\(^{61}\)

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\(^{61}\) 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.
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.
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

**Translating and Interpreting Service (TIS National)**
Ph: 131 450
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.or
www.jccd.org.au
3.5 Further reading


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.
People with a particular religious affiliation

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### 4.1 Some statistics

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**

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

- 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**.

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– 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.²

- 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.³ 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.


³ ibid.
4.2 **Some information**

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.¹

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
3. Not to misuse the name of God

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¹ 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.

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.⁶

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⁶ 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.7

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.8

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.9

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

- 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.11

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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 ibid.
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”.\textsuperscript{12} 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.\textsuperscript{13}

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.\textsuperscript{14}

\textsuperscript{12} Supreme Court of Queensland, \textit{Equal Treatment Benchbook}, see n 2, p 27.
\textsuperscript{13} ibid.
\textsuperscript{14} ibid; Australasian Police Multicultural Advisory Bureau, \textit{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. 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. 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. 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.

- **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”.

It is incorrect to use the term “Muhammadanism” which suggests the worship of Muhammad 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:

- 1.3 billion Asian Muslims
- 520 million African Muslims
- 56 million European Muslims
- 7.61 million North American Muslims

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15 ibid.
17 ibid p 24.
18 ibid.
19 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 27.
20 ibid.
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. 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. 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. 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. Islam is strongly monotheistic and abhors both the attribution of divinity to any human and the notion that Allah might be divisible.

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.
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 Faith27 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 Pillars28 (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 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’\textsuperscript{an} is considered the final, unaltered and unalterable word of
Allah,\textsuperscript{29} 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”.\textsuperscript{30}

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.\textsuperscript{31} 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
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

\textsuperscript{29} Supreme Court of Queensland, \textit{Equal Treatment Benchbook}, see n 2, p 29.
\textsuperscript{30} ibid.
\textsuperscript{31} ibid.
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.  

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. 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. 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 and shares it with the poor, neighbours and friends on that day. The great

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32 ibid, p 30.
34 ibid.
35 ibid.
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 Australian National Imams Council (ANIC) has issued an “Explanatory Note on the Judicial Process and Participation of Muslims”\(^{36}\) to give practical guidance on the etiquette and behaviours that Australian Muslims should observe when engaging in court processes. The note provides information for judicial officers on Islamic practices as they relate to matters which may be raised in connection with Muslims participating in court processes. The note has been described as “a powerful statement by the leadership of Islam in Australia concerning the approach to judicial proceedings”.\(^{37}\) In \(R v Alou\) the offender’s lack of respect for the court touched on the issue of contrition and remorse and his prospects of rehabilitation.\(^{38}\)

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.\(^ {39}\) 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

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36 The note can be downloaded from the ANIC website at www.anic.org.au, accessed 17 May 2018.
37 \(R v Alou\) (No 4) [2018] NSWSC 221 at [237]–[238] per Johnson J.
38 ibid at [236].
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. There are various types of headwear for women. The **hijab** is a general term for a modest dress code and also specifies a scarf that cover the hair (the face is exposed). A **chador** is a full body cloak. A **khimar** covers the hair, neck and shoulders, but the face is visible. A **niqab** is a veil that covers the face showing only the eyes. The NSW Court of Appeal held in *Elzahed v NSW* [2018] NSWCA 103 at [32] there was no unfairness in the trial judge dismissing an application a witness (a Muslim woman) made to give evidence wearing a niqab. The trial judge ruled that her judicial ability to assess the witnesses’ reliability and credibility would be impeded if the witnesses’ face was covered by a niqab. The Court of Appeal found the trial judge did not make an error in making this decision and dismissed the appeal (at [33]). 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 wear the hijab. Few wear the **burqa** (full face and body veil with a mesh grill for the eyes). Women who wear the hijab tend to do so in order not to display or expose their physical attractions 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.  

**Face covering** — Section 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” (s 13A(4)) 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. NSW police are also empowered to require removal of face coverings for identification purposes. Note the Court of Appeal’s decision in *Elzahed v NSW* [2018] NSWCA 103 that a trial judge did not make an error in ruling that a witness could not give evidence with her face covered by a niqab as this would impede the judge’s ability to assess the witnesses’ reliability and credibility.  

**Standing in court and bowing to the judicial officer** — No prohibitions or restraints on a Muslim prevent them from standing up or lowering their head as a mark of respect to a judicial officer. The ANIC has issued an “Explanatory

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41 *Law Enforcement (Powers and Responsibilities) Act* 2002 (LEPRA), Pt 3, Div 4, ss 19A–19C.
Note on the Judicial Process and Participation of Muslims” to give practical
guidance on the etiquette and behaviours that Australian Muslims should
observe when engaging in court processes.

- **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.\(^{42}\) 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
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:\(^{43}\)

- “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.\(^{44}\)

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\(^{42}\) ibid.

\(^{43}\) ibid.

\(^{44}\) Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for
Operational Police and Emergency Services*, see n 4, p 40.
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). 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.

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.

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.

Other holy texts are:

- 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

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45 Supreme Court of Queensland, Equal Treatment Benchbook, see n 2, p 32.
46 ibid, p 31.
47 Australasian Police Multicultural Advisory Bureau, A Practical Reference to Religious Diversity for Operational Police and Emergency Services, see n 4, p 42.
48 Supreme Court of Queensland, Equal Treatment Benchbook, see n 2, p 32.
49 Supreme Court of Queensland, Equal Treatment Benchbook, see n 2, pp 32–33.
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.

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. 50

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. 51

Hindus also have shrines or designated rooms for worship at home, with pictures
or small icons where an oil lamp and incense are burnt. 52

Hindu festivals are based on the lunar calendar, the main festivals are: 53

- Makar Sankranti in January
- Holi in February/March
- Sivaratri in March (whole night vigil)
- Ramnavami in April

50 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for
Operational Police and Emergency Services*, see n 4, p 43.
51 ibid
52 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 33.
53 ibid.
- 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.\(^\text{54}\)

- **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 omen and would greatly distress a Hindu woman.\(^\text{55}\) 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.\(^\text{56}\) 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.\(^\text{57}\) 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.\(^\text{58}\)

- **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

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\(^{54}\) Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, see n 4, p 46.

\(^{55}\) ibid.

\(^{56}\) ibid, p 43.

\(^{57}\) ibid.

\(^{58}\) ibid.
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.
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.
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.\(^{59}\) 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

59 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 35.
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.\(^{60}\)

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.\(^{61}\)

\(4.2.5.2\) 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.\(^{62}\)

\(4.2.5.3\) Religious leaders

In Orthodox Judaism, only men can become rabbis; whereas Liberal and progressive Jews allow women to become rabbis and cantors.\(^{63}\)

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.\(^{64}\)

\(4.2.5.4\) 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.

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\(^{60}\) ibid, p 35.

\(^{61}\) Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 2, p 36.

\(^{62}\) ibid, p 35.


\(^{64}\) ibid.
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.

### 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


Otherwise, see 4.4.
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. 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.

4.4 Practical considerations

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.66 “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.”67

The legality of administering an oath depends upon two matters:68

1. Whether the oath appears to the court to be binding on the witness’s conscience;69
2. If so, whether the witness considers it to be binding on his or her conscience.70

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 and things that are required of me in this case to the best of my ability")\textsuperscript{71} 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)\textsuperscript{72} 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.\textsuperscript{73}

- For those who have no religion, or who do not wish to take an oath,\textsuperscript{74} 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.”\textsuperscript{75}

- 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.\textsuperscript{76}

Their appropriate holy book should be available as required. 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. The “Explanatory Note on the Judicial Process and Participation of Muslims” issued by the Australian National Imams Council suggests a procedure for administering an oath upon the Holy Quran.\textsuperscript{77}

\textsuperscript{71} Evidence Act 1995 (NSW), Sch 1.
\textsuperscript{72} Evidence Act 1995 (NSW), s 24.
\textsuperscript{73} 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.
\textsuperscript{74} Oaths Act 1900 (NSW), s 13.
\textsuperscript{75} Evidence Act 1995 (NSW), Sch 1.
\textsuperscript{76} Evidence Act 1995 (NSW), Sch 1.
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 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.\(^79\)

- **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.**

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

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

**Points to consider:**

- **Dress** — No-one should ever be asked to remove their religious dress in open court. If 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. Section 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” (s 13A(4)) which includes a legitimate medical reason: see above at 4.2.3.5. Accommodation could be made for a witness or party to give evidence by alternative means, for example, from behind a screen. The Court of Appeal found in *Elzahed v NSW* [2018] NSWCA 103 that a trial judge did not make an error in ruling that a witness could not give evidence with her face covered by a niqab as this would impede the judge’s ability to assess the witnesses’ reliability and credibility.

- **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. 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

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behaviour that constitutes a “disrespectful behaviour” offence, but a person cannot be prosecuted for both contempt and the offence for essentially the same behaviour.\textsuperscript{81}

- **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.

- **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.

\textsuperscript{81} *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.
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.\(^{82}\)

### 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**

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\(^{82}\) 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.
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. 83

- **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 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.

83 see n 82.
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.

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**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* or *Local Courts Bench Book* (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 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.

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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.  

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 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.

- 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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87 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

**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

**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  
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

**Presbyterian Church of Australia**  
168 Chalmers Street  
Surry Hills NSW 2010  
Ph: (02) 9690 9333 or 1300 773 774  
Email: general@pcnsw.org.au  
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
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
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

Lutheran Church — NSW & District
PO Box 3056
Rhodes NSW 2138
Ph: (02) 9736 2366
Fax: (02) 9736 1155
www.lcansw.org.au

Jehovah’s Witnesses
12–14 Zouch Road
Denham Court NSW 2565
Ph: (02) 9829 5600
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

**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
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

**Islam**

**Muslims Australia**
932 Bourke Street
Zetland NSW 2017
Ph: (02) 9319 6733
Fax: (02) 9319 0159
Email: admin@muslimsaustralia.com.au
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

**Hinduism**

**Hindu Council of Australia**
17 The Crescent
Homebush NSW 2140
Ph: (02) 8208 9810
Fax: (02) 9746 8944
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
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
www.multicultural.nsw.gov.au
4.6 Further reading


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.
Section 5

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.¹

Statistics reveal the following about people with disabilities who are resident in NSW:²

- **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%).³
  - 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).

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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 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.


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).
- 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. 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. 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. (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.)

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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.
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, 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 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:

- 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.

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9 “Restrict” is the term used in the ABS Survey Disability, Ageing and Carers, from which these statistics are drawn — see n 1.

• **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%).
  - 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%).
  - 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.

• **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.
  - 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%).

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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.
- **Crime:**
  - People with intellectual disabilities are “significantly overrepresented” in the criminal justice system.\(^{16}\)
  - 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.\(^{17}\)
  - 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.\(^{18}\)
  - Depression, anxiety and drug dependence were three of the most common self-reported mental health conditions.

<table>
<thead>
<tr>
<th>Diagnosis*</th>
<th>Men</th>
<th>Women</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Frequency</td>
<td>% Cases</td>
</tr>
<tr>
<td>Depression</td>
<td>259</td>
<td>33.1</td>
</tr>
<tr>
<td>Drug dependence</td>
<td>158</td>
<td>20.2</td>
</tr>
<tr>
<td>Anxiety</td>
<td>175</td>
<td>22.3</td>
</tr>
<tr>
<td>Alcohol Dependence</td>
<td>100</td>
<td>12.8</td>
</tr>
<tr>
<td>ADD/ADHD</td>
<td>93</td>
<td>11.8</td>
</tr>
<tr>
<td>Schizophrenia</td>
<td>69</td>
<td>8.8</td>
</tr>
<tr>
<td>Personality disorder</td>
<td>70</td>
<td>9.0</td>
</tr>
<tr>
<td>Manic Depressive</td>
<td>65</td>
<td>8.3</td>
</tr>
</tbody>
</table>

* Respondents could report more than one condition.


\(^{18}\) 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.
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.20 Twelve per cent had a “culture fair” IQ range that fell in the intellectually disabled range.21 Eight per cent had scores on both the WASI and WIAT-II-A that fell within the ID range.22

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 2011.23 Public order offences were the second most common offences (12%) and acts intended to cause injury were at 10%.

**Discrimination:**24

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.25

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 2015–2018.26

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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).


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 Wenicke/Korsakoff syndrome are particular forms of alcohol related brain injury which may be related to alcohol related dementia.\(^{27}\)
- **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.

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

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.

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28 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.\(^\text{29}\)

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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\(^\text{29}\) 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\(^{30}\) 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)\(^{31}\)

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.

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\(^{30}\) American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 5th edn, 2013, pp 257 and ff.

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 bloodstream. 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
- 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. This is an umbrella term that captures those individuals who have a unique range of physical, intellectual and behavioural

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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, 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, accessed 12 May 2015.
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.\(^{33}\)
- difficulty controlling their impulses
- 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.\(^{34}\)

There is growing awareness of the prevalence and impacts of fetal alcohol spectrum disorders (FASD) in Australia. Neuro-developmental impairments due to FASD can predispose young people to interactions with the law. A Western Australian prevalence study of 99 young people in youth detention (93% male and 74% Aboriginal) found that 88 young people (89%) had at least one domain of severe neuro-developmental impairment, and 36 were diagnosed with FASD, a prevalence of 36%. The study highlights the vulnerability of young people, particularly Aboriginal youth, within the justice system and their significant need for improved diagnosis to identify their strengths and difficulties, and to guide and improve their rehabilitation.\(^{35}\)

In *LCM v State of Western Australia* (2016) 262 A Crim R 1, the West Australian Court of Appeal considered the medical condition of fetal alcohol spectrum disorder (FASD) and how it is relevant in sentencing proceedings. The court recognised that FASD is a mental impairment and as such engaged sentencing principles relating to an individual offender’s mental condition: *LCM v State of Western Australia* at [121]. See *Sentencing Bench Book* at [10-450].

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.

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\(^{33}\) Advice from Professor Jane Latimer, The George Institute for Global Health, Australia, March 2015.

\(^{34}\) The Senate, Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013, pp 36–37.

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. 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

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 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.

37 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.
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.

<table>
<thead>
<tr>
<th>Use</th>
<th>Do not use</th>
</tr>
</thead>
<tbody>
<tr>
<td>A person with a disability</td>
<td>Disabled/handicapped (person), invalid</td>
</tr>
<tr>
<td>People with disabilities</td>
<td>The disabled, the handicapped, invalids</td>
</tr>
<tr>
<td>A person with a psychiatric disability,</td>
<td>Mad, crazy, mental</td>
</tr>
<tr>
<td>or a person with a mental illness</td>
<td></td>
</tr>
<tr>
<td>A person with Down syndrome</td>
<td>Mongol, mongoloid</td>
</tr>
<tr>
<td>A person with Cerebral Palsy</td>
<td>Spastic, sufferer of/someone who suffers from Cerebral Palsy</td>
</tr>
<tr>
<td>A person with an intellectual disability</td>
<td>Mental retard, mentally retarded, retard</td>
</tr>
<tr>
<td>A person who has epilepsy</td>
<td>Epileptic</td>
</tr>
<tr>
<td>A person of short stature</td>
<td>Dwarf</td>
</tr>
<tr>
<td>A person who has … (specify the actual</td>
<td>A deformed person</td>
</tr>
<tr>
<td>deformity)</td>
<td></td>
</tr>
<tr>
<td>A person in a coma/who is unconscious</td>
<td>A vegetable/in a vegetative state</td>
</tr>
<tr>
<td>A person who is deaf, or a person who</td>
<td>Deaf person, hearing impaired</td>
</tr>
<tr>
<td>has a hearing impairment</td>
<td></td>
</tr>
<tr>
<td>A person who uses a wheelchair</td>
<td>A person confined to a wheelchair</td>
</tr>
<tr>
<td>Seizure</td>
<td>Fit, spell, attack</td>
</tr>
<tr>
<td>Accessible Toilet/ Entry/ Parking</td>
<td>Disabled Toilet/Entry/Parking (because disabled as an adjective is seen as meaning that it’s not working).</td>
</tr>
<tr>
<td>A person who has … (specify the disability)</td>
<td>Stricken, suffers from, challenged, victim</td>
</tr>
</tbody>
</table>

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.\(^{38}\)

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.

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.\(^{39}\) 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.

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\(^{38}\) 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.

\(^{39}\) Disability Discrimination Act 1992 (Cth), s 9. No training organisations have yet been prescribed.
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.  

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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40 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 — as long as, where required, appropriate adjustments are made so that evidence can be successfully communicated. 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.

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 — 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

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41 Evidence Act 1995 (NSW), s 13.
42 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.
43 Evidence Act 1995 (NSW), s 13(4)–(5).
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 [4-325]. 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”.  

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.

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”, “Trial instructions H–Q — Intention”, and “Defences”.


47 *Crimes Act* 1900 (NSW), s 23A. See also Judicial Commission of NSW, *Criminal Trial Courts Bench Book* at [6-100].


49 ibid, at [3-200]ff.

50 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.51

- 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.

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”)

- allowing evidence to be received by phone, and maybe using a telephone typewriter (TTY) in place of a normal phone

- making sure an Auslan (Australian Sign Language) interpreter is available, and/or that a person can use their support person effectively as an interpreter — that is, to help them give their evidence.

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, accessed 21 July 2014, which provides information about how to get one.

Auslan interpreters can be booked via 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. The JCCD Resource, Recommended national standards for working with interpreters in courts and tribunals, provides helpful advice for working with interpreters including Auslan interpreters.

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.
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\textsuperscript{56}

allowing someone to have a support person with them at all times — close by and within their sight\textsuperscript{57}

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\textsuperscript{58}

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

\textsuperscript{56} See ss 59–60 of the Companion Animals Act 1998 (NSW) and s 54A of the Disability Discrimination Act 1992 (Cth) — see n 40.

\textsuperscript{57} 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, 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?stash.x777OVst.OBeCOiqv.dpbs, accessed 21 July 2014.

– having more frequent breaks — see 5.4.4
– 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.59

- 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 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.

59 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, 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.
5.4.3 Language and communication

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.61
- 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 …?”

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60 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.

61 In relation to witnesses who are deaf or mute see also s 31 of the Evidence Act 1995 (NSW).
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 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.

As prescribed by law, intervene if, for example, cross-examination appears to be breaking any of the above points.

Follow the points given in 5.4.3.3 to 5.4.3.6 as relevant.

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62 For information provided by the Department of Justice for people with cognitive disabilities who have to go to court, see 5.5; n 57.

63 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.
5.4.3.3 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.

5.4.3.4 Communication techniques for people with physical disabilities

<table>
<thead>
<tr>
<th>Points to consider:</th>
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<tbody>
<tr>
<td><strong>For a person who is deaf or hearing impaired</strong> — you (and others in court) may need to simply ensure that your mouth is uncovered, or your volume is loud enough.(^4)</td>
</tr>
<tr>
<td><strong>For a person who is blind or has a visual impairment</strong> — 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.</td>
</tr>
<tr>
<td><strong>For a person with a speech impairment</strong> — you (and others in court) may simply need to be patient, and listen carefully until you are able</td>
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</tbody>
</table>

\(^4\) 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://deafsocietynsw.org.au/auslan_resources/page/legal, accessed 21July 2014.
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** — as prescribed under s 41 of the *Evidence Act 1995 (NSW)*.

### 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 — 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?”

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65 Note ss 26, 29(1), 41 and 135(b) of the *Evidence Act 1995 (NSW)*, see n 63.
66 For information provided by the Department of Justice for people with cognitive disabilities who have to go to court: see 5.5 n 44.
– 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 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.\(^6^7\)

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\(^{67}\) 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.
- 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.
- 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.
- 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.

68 Note ss 26, 29(1), 41 and 135(b) of the Evidence Act 1995 (NSW), see n 63.
— 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
  - 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.69

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 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.

69 Note ss 26, 29(1), 41 and 135(b) of the Evidence Act 1995 (NSW), see n 63.
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.  

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70 See n 65.
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.

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.71

- **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.72

### 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* or *Local Courts Bench Book* (as appropriate), and you should raise any such points with the parties’ legal representatives first.

71 See n 65.
73 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, see n 57.
74 Judicial Commission of NSW, *Local Court Bench Book*, see n 46.
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).

- 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.

### 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).

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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.\(^77\)

> 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.\(^78\) For example, an HIV-infected prisoner may find imprisonment more burdensome because he or she has a greater risk of contracting opportunistic infections, or may suffer side effects from particular drug regimes that are difficult to manage in a prison environment.\(^79\)

- 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.

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77 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.


(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.
5.5 Further information or help

- Information and advice about accommodating the needs of a particular person with a disability:
  - Diversity Services — Department of Justice (NSW)
    Ph: (02) 8688 7507
    Email: diversity_services@justice.nsw.gov.au

- 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
    Web: www.multicultural.nsw.gov.au
  - Deaf Society of NSW
    Ph: (02) 8833 3600
    TTY (02) 8833 3691
    Email: info@deafsociety.com

- 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
    Web: 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: adviceline@disabilitylaw.org.au
    Web: 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
  Web: 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

- **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
  Web: 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
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
Web: 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

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
Web: 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
Web: 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
  Web: 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
  Web: www.sasinc.com.au

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**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
  Turramurra NSW 2074
  Ph: (02) 9144 7586
  TTY: (02) 9144 7586
  Fax: (02) 9144 3936
  Web: 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
  Web: 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
  Web: www.guide.dogs.com.au

- **Blind Citizens Australia, NSW Branch**
  Ph: (02) 9745 4588
  Email: sydney@bca.org.au
  Web: 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
  Web: 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
  Web: 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
  Web: 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
  Web: http://kirby.unsw.edu.au/
5.6 **Further reading**


Department of Family and Community Services NSW, Operational Performance Directorate, Ageing, Disability and Home Care, *People with intellectual and other cognitive disability in the criminal justice system*, Final 1.0, December 2012, at, accessed 2 September 2014.


Judicial Commission of NSW, Civil Trials Bench Book, 2007–.

Judicial Commission of NSW, Criminal Trial Courts Bench Book, 2nd edn, 2002–.

Judicial Commission of NSW, Sentencing Bench Book, 2006–.


The Senate, Legal and Constitutional Affairs References Committee, Value of a justice reinvestment approach to criminal justice in Australia, June 2013.

Dealing with the media


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.
Section 6

Children and young people

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6.1 Some information

6.1.1 Definitions

Legally, a “child” is generally defined as a person who is under the age of 18 years. The Children (Criminal Proceedings) Act 1987 (NSW) (s 3), the Bail Act 2013 (NSW) (s 4), the Young Offenders Act 1997 (NSW) (s 4), 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. 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 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.

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
mismatch between their capacities and the adult-oriented court environment and processes.\(^7\) If these difficulties are not taken into account, the evidence that the court obtains from them may be of poorer quality and less complete.\(^8\)

**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:\(^9\)
  - their ability to understand language, concepts, the meaning behind events and court processes differs from that of adults.\(^10\)
- 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\(^11\)
  - their greater dependence on context for comprehending language and concepts
  - their less developed capacity to sequence events and report them in order

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8 K McWilliams et al, “Children as witnesses” in Melton et al (eds), above n 1, p 285.


– 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.12

- 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.13
- 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

12 Department of Attorney General WA, *Equality Before the Law Bench Book, Children and young people*, at [5.2.2].
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. 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

There is a considerable body of research both in Australia and overseas
demonstrating the difficulties faced by children and young people in giving
evidence.

14 See, for example, M Marien, “Cross-over kids — childhood and adolescent abuse and neglect and juvenile
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) CJCJ 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

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
and child witness identity” (2002) 11(3) Child Abuse Review 133 at 137–152; Supreme Court of Queensland,
Equivalent 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 knows”, silences, or to present confused or contradictory evidence.\(^{17}\)

- **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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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.
6.2 Legal status in relation to court processes

6.2.1 Competence to give evidence

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. 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.

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.

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. 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.

- 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 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
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*.\(^{25}\) 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.\(^{26}\)

- **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.\(^{27}\)

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.”

(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.”\(^{28}\)

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).\(^{29}\) 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.\textsuperscript{30} It is up to the court to determine the weight to be given to unsworn evidence.\textsuperscript{31}

For more on this, see the \textit{Criminal Trial Courts Bench Book}\textsuperscript{32} and 6.3.2 below.

\textbf{6.2.2 Criminal responsibility}

The law conclusively presumes that a child under 10 years cannot be guilty of an offence.\textsuperscript{33} 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.\textsuperscript{34}

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”.\textsuperscript{35}

\textbf{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.\textsuperscript{36}

Under the \textit{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.\textsuperscript{37}

\textbf{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

\textsuperscript{30} \textit{The Queen v GW} (2016) 90 ALJR 407 at [56].
\textsuperscript{31} ALRC Report 102, above n 23, at [4.60].
\textsuperscript{33} \textit{Children (Criminal Proceedings) Act 1987} (NSW), s 5; \textit{Crimes Act 1914} (Cth), s 4M; \textit{Criminal Code (Cth)}, s 7.1.
\textsuperscript{34} For proceedings involving Commonwealth offences by children this presumption is codified. See \textit{Crimes Act 1914} (Cth), s 4N; \textit{Criminal Code (Cth)}, s 7.2.
\textsuperscript{35} \textit{Children (Criminal Proceedings) Act 1987}, s 6(b).
\textsuperscript{36} \textit{Evidence Act 1995} (NSW), s 18.
\textsuperscript{37} Although s 96(4) of the \textit{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.\(^{38}\) 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.\(^{39}\) 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”.  

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6.3 Practical considerations

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.\[41\]
- 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.

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\[42\] 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. 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. 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 is it important to tell the truth.

43 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].

44 Evidence Act 1995, s 13(1).
Research shows that in general: 45

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.

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**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?”

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– “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?”

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.  

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 Stuarwata [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’.”

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.”

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


50 J Cashmore, above, n 28.
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 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

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.

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. But if the child or young person is not the accused person, they must be available for cross-examination or re-examination.

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.

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

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.
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.\(^{56}\)

6.3.3.2 Closed-circuit television (CCTV) or “live link”\(^{57}\)

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.\(^{58}\)

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.\(^{59}\)

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

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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).
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.** 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 child or young person chooses not to have any such arrangements made. 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.** 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.

- **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. 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].

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60 *Criminal Procedure Act* 1986, s 306ZF; and see also *Criminal Trial Courts Bench Book*, above, n 32 at [1–362].
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, cl 81-94 provides for the pilot.
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 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,* 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.  

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65 These are reproduced in the *Criminal Trial Courts Bench Book,* above n 32, at [10-670].

66 See also *Criminal Trial Courts Bench Book,* above, n 32 at [1–366].
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.67

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.68 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

68 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].
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.

6.3.4.2 Level and style of language

Use language that is as simple and direct as possible." 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 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

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”. Research has consistently shown that many of the strategies which lawyers use to cross-examine children are


“stress-inducing, developmentally inappropriate, suggestive and evidentially unsafe.”

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.

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.

6.3.5.1 Improper cross-examination

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

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”.  

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”.  

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).**  

- 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.

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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]; 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 knows”, 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” (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 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.

79  Criminal Trial Courts Bench Book, above n 32, at [1–135] and [1–140].
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).^80

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.^81

- 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^82 — for example, whether to:
  - remit to the Children’s Court for sentencing

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^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.

— refer to Youth Justice Conferencing or refer to the Youth Koori Court program. For young Aboriginal people (children under the age of 18), the Youth Koori Court sits in Parramatta and Surry Hills. The court operates under a deferred sentence model (s 33(1)(c2) Children (Criminal Proceedings) Act 1987) to provide direct case work and cultural support through an Action and Support Plan over 6-12 months prior to sentence. The young person will have his or her efforts taken into account on sentence as this directly affects the assessment of their rehabilitation prospects.

— 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
— 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.

83 Young Offenders Act 1997 (NSW), Pt 5, and Young Offenders Regulation 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.


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.
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.
- **(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.** 87

- **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.

87 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

**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

**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

**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
6.5 Further reading


TD Lyon and AD Evans, “Young children’s understanding that promising guarantees performance: The effects of age and maltreatment” (2014) 38 Law and Human Behavior 162.


Supreme Court of Queensland, Equal Treatment Benchbook, Ch 13.


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.
Appendix — Recommended script for use in hearings with children or cognitively impaired witnesses

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?
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 will be with you while you answer questions.
In the court room with me are some other people even though you might not be able to 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 ……………
(To child) ……..…., you have come to court today to:
■ (if complainant) talk about what happened to you
■ (if witness) tell the court what you know about …

Before we start, there are some rules about how things happen in court.
Does your teacher have rules in your classroom?*
OR Do you play any sport? Tell me about that.

What are some of the rules in that sport?*

Note: * Very young children and children with expressive language difficulties may have difficulty describing or explaining the rules. It may be best to provide examples.

Do you have a rule at school or pre-school or child care, for example: no running in the hallway? OR eg “no play outside without a hat in summer?”

88 Originally adapted with permission from Australasian Institute of Judicial Administration, Bench Book for children giving evidence in Australian courts, 2015; revised in 2018 by Professor J Cashmore drawing on experience of the pilot witness intermediary program which commenced at the District Court in March 2016.
Now I want to talk to you about being in court.

Well, in court there are some rules as well.

A very important rule at court is that you tell the truth when you answer questions.

Do you promise to tell the truth, and no lies, in court today?

Now I want to talk to you about some other rules in court.

I will try to make sure the questions the lawyers ask you 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.”

The lawyers might say something and ask you if it is true or not true (or for older children – if you agree or disagree).

- If you think something is true, say “It is true” (or “I agree”).
- If you think something is not true, say “It is not true” (or “I disagree”).

There is a need to exercise some caution about using examples with questions which require the child to tell the judge that the judge is telling a lie.

Better to say “if someone said… would” rather than “If I said…” if using an example (ie it is better not to use “If I say your shirt is red, do you agree or disagree?”).
For additional information in relation to women or men who are transgender or transsexual (that is, who were originally living as the opposite gender) — see Section 9.

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7.1 Introduction

The focus of this section is on the issues that may arise for women in their interactions with the justice system. Statistics reported in this section show that women experience inequality and disadvantage which arise because of their sex and gender characteristics. It should not be assumed that all women’s experiences are the same. Being female is only one of many personal characteristics: gender inequality and sex discrimination can intersect with other factors that are also associated with unequal treatment or disadvantage. Some of these characteristics are the subject of other sections in this Bench Book, including being Aboriginal [see Section 2], having CALD status [see Section 3], having a disability [see Section 5], having LGBTQI status [see Section 8] and [Section 9] and being an older person [see Section 11]. When these characteristics intersect, vulnerability and disadvantage can be compounded, for example, in the increased risk of older, single women to homelessness.

The intersection of gender and race is a problem that confronts Aboriginal women and is manifested in a lived experience of racism and sexism. “Women’s Business” is a term that refers to distinct cultural practice and ceremony, where Aboriginal women are the custodians of special knowledge and practice holding significant /immense “religious” and spiritual power and authority.

It can also be the case that particular issues only arise when these factors occur in combination, such as the difficulty which may arise for Aboriginal and Torres Strait Islander women in legal proceedings which relate to traditional “women’s business” which cannot be disclosed to men.

While there are ways in which men are disadvantaged by the existing inequality between the sexes, such as the mindsets which inhibit taking up of parental leave by men, this section acknowledges that gender inequality is generally to

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1 When this section was first published in 2006, two sources were important to its drafting. To the extent that these foundations remain in place following the 2020 update, they are acknowledged: in relation to identifying the relevance of gender; R Graycar and J Morgan, The hidden gender of law, 2nd edn, Federation Press, 2002; informing the practical considerations; 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.
2 C Thomas and J Selfe, Aboriginal Women and the Law, NSW Women’s Coordination Unit, 1993.
3 Men’s and Women’s Business: In Aboriginal and Torres Strait Islander culture there are customs and practices that are performed by men and women separately. This gender-specific practice is often referred to as Men’s and Women’s Business. These practices have very strict rules. Men’s and Women’s Business includes matters relating to health, wellbeing, religious ceremony and maintenance of significant geographic sites and differs from community to community. Topics discussed during Men and Women’s Business can differ between communities: see Australian Government Department of The Prime Minister and Cabinet, Communicating with Aboriginal and Torres Strait Islander Audiences, 2016, p 8 at https://pmc.gov.au/resource-centre/indigenous-affairs/communicating-aboriginal-and-torres-strait-islander-audiences, accessed 13 August 2020.
the detriment of women. Similarly, it is acknowledged that men do experience domestic violence and women do perpetrate it.\(^5\) However, statistically, the prevalence of domestic violence against women is such that its occurrence needs to be approached with an understanding of its gendered nature. Likewise sexual harassment is usually perpetrated by men to the detriment of women although it is acknowledged that men can also be victims.

It is true that not all individual women fare badly in comparison to men, or feel discriminated against in comparison with men. However, the general existence of gender inequality, sex discrimination or bias in our society means that, for many women, unless appropriate account is taken of the examples of potential gender bias listed, 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.

See 7.7 Practical considerations for examples of how a judicial officer can take appropriate account of these factors in court proceedings.

**Use of terminology in this section**

While the terms “sex” and “gender” are often used interchangeably, it is important to note their distinctions. The word “sex” is usually used to refer to the anatomical and physiological differences between male and female at birth. “Gender”, as defined by the World Health Organization (WHO), refers to the “socially constructed characteristics of women and men, such as norms, roles, and relationships of and between groups of women and men. It varies from society to society and can be changed”.\(^6\) A person’s sex will usually be the same as their gender but that should not be assumed. It is a person’s chosen presentation — their gender identity — that is to be acknowledged and respected. Note that there is a wide range of gender identities (a gender spectrum) that includes the binary model of male and female. For discussion of particular issues in relation to women and men who are transgender or transsexual (ie, who were originally living as the opposite gender) as well as gender diverse and intersex people, see Section 9. For the purposes of this section, the terms “male”, “female”, “women” and “men” are used according to the context.

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\(^5\) Women are injured more often and more severely in domestic violence incidents than men, and are more likely to be killed by an intimate partner. In that respect, the domestic homicide gender gap paints a stark picture: an analysis of 152 intimate partner homicides in Australia in the four years to June 2014 found the majority — 80 per cent — involved a male killing his female partner. Of those men, almost all — 93 per cent — had been the primary abuser in their relationship. Just two of the 28 women who killed male partners had been the primary abuser prior to the homicide: see S Swan, et al, "A review of research on women's use of violence with male intimate partners" (2008) 23(3) *Violence Vict* 301.

It is noted that the *Anti-Discrimination Act* 1977 (NSW) prohibits discrimination on the basis of “sex” and of being “transgender”. The Act binds the Crown in right of NSW, but operates only in relation to prescribed areas of activity, such as employment and the provision of goods and services.

### 7.1.1 Population demographics: a snapshot

In 2018, the population of NSW had a slight majority of female residents (3,794 million, 50.7%) compared with male residents (3,686 million, 49.3%). Of those female residents:

- most live in the Greater Sydney region (2.4 million)
- just under 109,000 are Aboriginal, comprising 50.3% of the total Aboriginal population of NSW
- almost a third were born overseas (30.1%) as compared to 29.2% men
- of those who are 15 years of age and over: 47.2% are in a registered marriage; 43.7% are not married; and 9.1% are in a de facto relationship
- 15,000 were experiencing homelessness on Census night in 2016 (along with 22,500 males)
- over 255,000 are the lone parent in their household (82.2% of the 311,000 lone parent families).

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7 *Anti-Discrimination Act* 1977, Pt 3.
8 ibid, Pt 3A.
9 ibid, s 5.
11 ibid.
12 ibid.
16 ABS, *Census of Population and Housing: Reflecting Australia — Stories from the Census*, 2016 — Snapshot of Australia, Table 16, Sex of Lone Parent and State and Territory of Enumeration, Count of lone parent families. The proportion is effectively unchanged since 2011, although the numbers have increased: 82.2% (just under 256,000) in 2016 (just under 256,000) compared with 82.7% (just over 181,000) in 2011.
7.2 **Socio-economic factors and gender disadvantage**

The socio-economic data set out below demonstrates ways in which gender inequality exists in NSW. Despite making up a slight majority of the population, women tend to have lower status and fewer resources in various domains.

In summary, despite the fact that proportionately more women in NSW attain higher levels of qualification than men (see 7.2.1), women work fewer hours in paid work and do more of society’s unpaid caring and domestic work than men (see 7.2.1.4). They are paid less from the beginning of their careers (see 7.2.1.1), end up with smaller superannuation balances, and are at a higher risk of poverty in retirement than men. Women also experience more sexual harassment, more sexual violence and more domestic violence than men do (see 7.3 and 7.5.2).

These “interconnected burdens” over the course of a lifetime produce economic disadvantage to women. In 2017, the Sex Discrimination Commissioner found during community consultations that, although these factors are usually framed as individual women’s “choices”, it becomes apparent that the roles that individuals play are shaped by structural discrimination, gendered stereotypes and unconscious bias that are inherent within apparently neutral systems. Those conversations captured:

- the endurance of gender stereotypes in the Australian community and the “acceptance of the impact of inappropriate behaviour as a norm”
- that structural and systemic barriers to gender equality are reinforced by negative and discriminatory gender stereotypes
- that a “key” barrier to gender equality is the “acceptance of a degree of ‘everyday sexism’ as harmless”.

There is a consistent association found between higher levels of violence against women and lower levels of gender equality in both public life and personal relationships. There are sections of the Australian community that think that discrimination and inequality are no longer issues. The Sex Discrimination

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18 ibid, pp 9, 27, 34.
19 ibid, p 34.
Commissioner has observed that generational change alone will not eliminate reported problematic attitudes towards women given the results of the survey the subject of the report.\textsuperscript{21}

**7.2.1 Education and employment**

*More women attain higher levels of education*

- As of May 2019, 7.9% of females in NSW in the age range of 15 to 74 years reported obtaining a postgraduate degree (as opposed to 7.2% of males).\textsuperscript{22}
- In the NSW population, as at May 2019, a higher proportion of males (20.5%) than females (11.5%) reported their level of highest educational attainment as Certificate III/IV. A higher proportion of females (32.3%) than males (29.1%) have a highest attainment level of Bachelor or higher.\textsuperscript{23}

*Despite making up almost half the paid workforce, overall, fewer women than men work full-time and almost twice the number of women work part-time than do men*

Accordingly, this means that female workers as a group are less embedded in the workforce than male workers. This weaker connection to the workforce experienced by women as a group appears more apparent when casual employment, under-employment and people not in the labour force are also considered.\textsuperscript{24} These workers have less security at times of economic hardship, including the major disruptions to the economy that have occurred following the severe bushfire season of 2019-20 and the COVID-19 virus which emerged in 2020.\textsuperscript{25}

\textsuperscript{21} AHRC, above n 17, p 35, citing research including Victorian Police survey and Our Watch Survey in 2015 that showed that one in six 12–24 year olds believe “women should know their place” and that more than a quarter believed that “male verbal harassment” and “pressure for sex towards females” were “normal” behaviours.


\textsuperscript{23} ibid.


Based on data prior to the impact of COVID-19:

- Overall, almost half of employed persons in Australia are women\(^\text{26}\) and the proportion in NSW is very similar.\(^\text{27}\) Australia lags behind countries including Canada, the UK and New Zealand in women’s full-time employment.\(^\text{28}\) The gender breakdown of participation rates, and full-time versus part-time work reveals an important difference.

- In NSW, as of December 2019:\(^\text{29}\)
  - 46.8% of employed persons are female (1.939 million), of whom 57% (1.108 million) work full-time and 43% (0.834 million) work part-time.
  - 53.2% of employed persons are male (2.206 million), of whom 81% (1.784 million) work full-time and 19% (0.419 million) work part-time.

- Breaking the workforce into full-time and part-time workers:
  - of the full-time workers in NSW, 61.7% are male (1.784 million) and 38.3% are female (1.108 million). The gender ratio roughly approaches 2 male workers to 1 female worker.
  - of the part-time workers, 33.4% are male (0.419 million) and 66.6% female (0.834 million), a ratio of 1 male worker to 2 female workers.

- Not only are women over-represented in part-time work, only a very small proportion of those women are working at management level (6.4%).\(^\text{30}\)

- In 2016, 27.6% of NSW females were employed on a casual basis, compared with 22.3% of males.\(^\text{31}\) More female workers in NSW (188,400) were

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\(^{29}\) Based on participation rates of 60.3% for females and 71% for males where there are 4.145 million persons employed: ABS, above n 27.

\(^{30}\) M Reddy, above n 28.

\(^{31}\) Women NSW, above n 13, at p 16.
underemployed than male workers (154,000),\textsuperscript{32} and of the NSW population aged over 15 years who were not in the labour force, women make up almost 60%.

- Within families with children under 12, 44% of mothers work part-time compared to 5% of fathers.\textsuperscript{34}

7.2.1.1 Gender pay gap in wages and superannuation

The “gender pay gap” is an internationally established measure of the position of women in the economy in comparison to men. It is the result of the social and economic factors that combine to reduce women’s earning capacity over their lifetime.\textsuperscript{35} There is a gender pay gap between the average weekly income for full-time ordinary hours of men and women. The impact can be seen in women’s lower take-home income and lower superannuation balances. The gender pay gap measures the difference between the average earnings of women and men in the workforce.

**Wages**

- As at May 2019 in NSW, the average weekly wage for people working full-time ordinary hours was $1,507.40 for females, compared with $1,765 for males.\textsuperscript{36} The discrepancy can be expressed as a weekly gender wage gap of 15% (ie on average, women earn $257.60 per week less than men).\textsuperscript{37} The national gender pay gap is approximately the same at 13.9%.\textsuperscript{38}


\textsuperscript{33} In February 2019, 918,300 males and 1,296,000 females in NSW were not in the labour force: Australian Bureau of Statistics (ABS), Table 21.1 — Populations by State or Territory of usual residence in Participation, Job reach and mobility, Australia, Feb 2019, cat. 6226.0, Canberra, July 2019 at www.abs.gov.au/ausstats/abs@.nsf/mf/6226.0, accessed 19 February 2020.


The wage differential between men and women is apparent from the outset of careers: women graduates start out earning less in 15 of 19 key industries.\(^{39}\)

The median full-time starting salary for graduates in Australia was $2,000 more for males than females in 2015, with an overall gender pay gap of 3.6%.\(^{40}\) In the NSW public service, the gender pay gap increased from $252 in 2017 to $949 in 2018 in favour of men based on median salary by gender.\(^{41}\)

Average total income over 40 years across men and women with and without children has been estimated as follows:\(^{42}\)

- men without children: $2 million
- men with children: $2.5 million
- women without children: $1.9 million
- women with children: $1.3 million.

The gender pay gap deprives the Australian economy of potentially billions of dollars in gross domestic product (GDP) and affects men and women on the basis of gender.\(^{43}\) The three key factors causing the gender pay gap have been identified and weighted according to causality by KPMG:\(^{44}\)

- workplace discrimination (see 7.2.1.3): 39%
- care, family and workforce participation (see 7.2.1.4): 39%
- occupation and industrial segregation (see 7.2.1.3): 17%

Superannuation

There is also a gender gap in superannuation. Australian women live longer on average than Australian men\(^{45}\) but they have less invested in superannuation, a

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42 G Dent, above n 34.
43 KPMG, above n 35 at p 12.
44 ibid at p 7.
45 “Life expectancy in Australia has reached record highs with a boy born today expected to live to 80.7 years and a girl to 84.9 years. Around 50 years ago (1965-67), life expectancy at birth in Australia was 67.6 years for males and 74.2 years for females, a gap of 6.6 years. The gap has now narrowed to 4.2 years in 2016-2018”, from ABS media release to *Life Tables, States, Territories and Australia, 2016-2018* cat 3302.0.55.001 at www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbyCatalogue/AF546E30F9A0B803CA2580580015DA6A?OpenDocument, accessed 11 March 2020. See also 11.1.6 Care and assistance in Older Persons section.
situation that is slowly improving. In 2016-17, the average balance for males was around $146,420 (58.1% of superannuation assets) and females $114,350 (41.9%).

- At age 25, the average woman has 9.1% less in her superannuation than the average man of the same age. The gap at age 39 increases to 24.6%, reaching 40.4% for average workers aged 55 to 59. As at March 2020, superannuation is not paid to those earning less than $450 per month. Given the rates of casual and part-time roles that women work, this primarily impacts women. Similarly, there is no statutory requirement for superannuation to be paid during periods of unpaid or paid parental leave, which is primarily taken by women.

- The COVID-19 pandemic will have a long-term impact on superannuation balances, due to market behaviour and the economic measure introduced allowing access to a limited amount of superannuation funds in 2020.

7.2.1.2 Cumulative economic disadvantage

Cumulative economic disadvantage leads to poverty and homelessness in retirement

In retirement, women are at greater risk of poverty than men, and older, single women have been identified as a growing cohort of people living in poverty. Poverty in retirement is the result of women’s cumulative experiences of economic disadvantage over their lifespan. Those experiences are the “result of interconnected burdens” such as those discussed above (more part-time/casual


50 Senate Economics References Committee, above n 46, p 13.

work, lower superannuation balances, gender pay gap, gender segregated work, career interruptions, workplace discrimination and undertaking most unpaid domestic and care work) as well as financial hardship arising through events such as domestic violence, sexual harassment and divorce.\textsuperscript{52}

Between 2011 and 2016, women aged 55 years and over were the fastest growing cohort of homeless Australians (31%).\textsuperscript{53} The 2016 Census estimated that 6,866 older women were homeless, with a further 5,820 older women living in marginal housing and may be at risk of homelessness.\textsuperscript{54}

These figures reveal that in NSW, there were 2,186 women who were homeless, with 29\% of those women living in severely over-crowded dwellings.\textsuperscript{55} Women experiencing homelessness often stay with friends or family, live in severely crowded dwellings, under the threat of violence or are physically hiding. Due to the hidden nature of women’s homelessness and the statistical methods used to count homelessness, it is recognised that these figures understate the true extent of the issue, particularly for women experiencing family or domestic violence, or Aboriginal and Torres Strait Islander women.\textsuperscript{56}

7.2.1.3 Occupational segregation and workplace discrimination

\textit{Workplace discrimination is experienced twice as much by working mothers as working fathers}

In 2014, one in two mothers (49\%) experienced discrimination in the workplace at some point during pregnancy, parental leave, or on return to work. More than one in four fathers and partners (27\%) also experienced discrimination in the workplace related to parental leave and return to work.\textsuperscript{57} Only 4\% reported


Groups most likely to experience pregnancy-related discrimination include young mothers (18-24 years), single mothers and mothers with disabilities. Casual workers are more likely to report experiencing discrimination than mothers on permanent/ongoing or fixed-term contracts. Over 80% of mothers who experienced discrimination also experienced a negative impact as a result, such as to their mental health or finances.

Many industries have unequal gender composition, and even when there is greater participation from women, all have pay gaps in favour of men.

Occupational segregation, or gender segregation, refers to the way in which some professions and industries tend to be male-dominated and others female-dominated. The male-dominated industries tend to be better paid and enjoy higher social status. The female-dominated professions tend to be aligned with caring, such as nursing and teaching and generally have lower pay rates and less job security than male dominated industries. In Australia in 2019, there are more women than men in:

- health care and social assistance (80% women: 20% men, with a 16% pay gap in favour of men),
- education and training (63% women: 37% men, with a 9% pay gap in favour of men) and
- retail (58% women: 42% men, with a 16% pay gap in favour of men).

Men dominate jobs in industries including construction, information media and communications, and mining. The gender composition is closer to equal in financial and insurance industries (55% women: 45% men) and arts (51% women: 49% men), however there are pay gaps in favour of men of 29% and 20% respectively. None of the industries has an overall pay gap in favour of women.

The metaphor of the “glass ceiling” is used to convey the persisting difficulty for women to achieve the highest positions in organisations. In 2019, only one in four executive leadership teams in the top 200 listed companies in Australia included women. Men occupy 87% of “line roles” in these teams. Line roles are typically the pathway to CEO appointment.

In the Australian legal profession in 2020, women make up the greater proportion of graduates and the profession overall, but are only a small proportion of

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60 ibid.
62 ibid.
63 M Reddy, above n 28.
practitioners who are partners in firms or at the bar. The degree to which power is shared between women and men in the profession does not reflect their levels of participation. It has been suggested that the model of the ideal lawyer and the concept of merit are based on a gendered stereotype of a professional who is completely available to the demands of his working life, in part because he has a wife at home to tend to other responsibilities. In reality, few men, let alone women, have lives that conform to that persistent stereotype. 64

A second glass metaphor describes a structural gender inequality in female-dominated industries and workplaces. By virtue of the “glass escalator”, men in these environments tend to be paid more and be promoted faster than women. 65 Consequences of these imbalances include women’s economic disadvantage, a lack of diversity within industries 66 and a failure to cater for the needs of the whole population. 67

Gender discrimination, or a lack of gender diversity, in the workplace is not always about deliberate exclusion on the basis of gender, but can be the product of “unconscious bias” 68

Gender bias has been identified as a significant issue in the creation of inequality, for example, in employment and promotion decisions in the workplace. 68 While it may be explicit, it can also be implicit, hidden or unconscious.

67 Faculty of Business and Economics at University of Melbourne, Episode 4: “His and Hers” Jobs, Women are the business at https://fbe.unimelb.edu.au/__data/assets/pdf_file/0003/3335466/Women-are-the-Business-Episode-4-Industry-Segregation.pdf, accessed 10 April 2020, transcript at p 4. The example given in the transcript is the consequence of crash test dummies being based on the average size of men, so that women (who are, on average, smaller) were more severely injured in circumstances perceived as safe based on those crash test dummy results. The gender bias that underpins data collection is explored in C Criado Perez, Invisible Women: exposing data bias in a world designed for men, Vintage Publishing, 2019.
Unconscious gender bias can be understood as the “unintentional and automatic mental associations based on gender, stemming from traditions, norms, values, culture and/or experience”.

Workplace policies and awareness training are commonly used to mitigate unconscious bias, given the impact a lack of diversity can have in terms of workplace participation, productivity and economic performance for organisations and more broadly.

It should not be assumed that the legal and judicial professions are unaffected by unconscious bias.

7.2.1.4 Caring, domestic work and the mental load

Women’s careers are more likely to be interrupted by carer responsibilities that can also lead to long-term reduced wage growth, including the uptake of parental leave

Career interruptions impact career progression. They can be connected to shorter tenure in roles, lower levels of experience, depreciation of skills or missed opportunities for skill development. Caring for children or other family members is a key factor in time spent out of the workforce for women. The incidence of career interruption for this reason is “gendered and highly persistent”. Women account for 93.5% of primary parental leave in the non-public sector.

On returning to work from parental leave, women may experience a “motherhood penalty”, that is, status, opportunity and pay may be lower than before the interruption. The otherwise unexplained motherhood wage penalty in Australia has been quantified at about 5% for one child and 9% for two or more children, emerging over time through reduced wage growth.

Older women may also need to leave the workforce due to carer responsibilities for adult children with higher support needs, elderly relatives and “baby-sitting/child-care” arrangements: see Older People at 11.1.6 Care and assistance and 11.1.7 Grandparents.

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71 KPMG, above n 35.
72 ibid.
73 M Reddy, above n 28.
74 “Calculating the gender pay gap”, above n 37 at p 27.
Women spend more time than men on unpaid domestic work than the men with whom they are partnered, independent of paid employment

The “typical” Australian woman spends five to 14 hours per week doing unpaid domestic housework, compared to less than five hours per week for the “typical” Australian man, based on 2016 Census data.76 In couples without children, the overall time spent in paid and unpaid work for males and females correlates to income. Once there are dependent children, however, where the male and female earn approximately the same, or there is a “female-breadwinner”, the female spends more overall time in paid and unpaid (housework and childcare) work. This pattern of time spent by gender did not change between 2002–2004 and 2015–2017.77

Regardless of employment status, the time women spend in housework increases when a heterosexual couple starts to cohabit, and the gap between men’s and women’s time widens further when couples have children. 78 Women undertake 72% of all unpaid work in Australia. The monetary value of unpaid work has been estimated at $650.1 billion, the equivalent to 50.6% of gross domestic product (GDP).79 If monetised, unpaid childcare in Australia would be the single largest sector in the economy — three times larger than the financial and insurance services industry which is the largest in the formal economy — and the second largest sector would be unpaid caring.80

In the context of the COVID-19 pandemic in 2020, social commentators have observed that women’s paid jobs in heterosexual households may be sacrificed in order to preserve the men’s employment, given that women already earn less and


spend more time on unpaid carer work than men. This would maximise household income for the duration of the social distancing measures but may also further entrench traditional gender roles and undercut progress towards gender equality and the long term economic independence and financial security of women.\textsuperscript{81}

*The experience of carrying out paid and unpaid work: multi-tasking and the “mental load”*

While time spent in housework and childcare activities is quantifiable, it should be noted that there is mental and psychological labour involved in taking responsibility for a household’s activities and arrangements. This is sometimes referred to as the “mental load”, and as women spend more time than men on housework and childcare-related activities, they are also equivalently experiencing the mental load.\textsuperscript{82}

*Parental leave and flexible working: expectations that women take leave and work flexibly and men do not*

It has been argued that “until men are as free to leave the workplace as women are to enter it”, gender equity will not have been achieved.\textsuperscript{83} Statistics about the division between paid and unpaid work in families match traditional gender stereotypes in Australia when considering:

- “stay at home dads” are part of only a very small percentage of Australian families in 2016 (5%), increasing only 1% since 1991\textsuperscript{84}
- uptake of the federal government’s paid parental leave scheme between 2010 and 2019 is not dissimilar. Of over 1.24 million parents who received the payments, 99.5% were women.\textsuperscript{85}

Only one in four men take parental leave\textsuperscript{86} and fathers staying at work is a leading cause of the pay gap.\textsuperscript{87} Factors that may explain this discrepancy include the

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\textsuperscript{84} G Dent, above n 34.

\textsuperscript{85} ibid.


\textsuperscript{87} ibid.
strength of internalised gender stereotypes that define men’s identity in terms of work and the way in which workplaces may lag (or be perceived to lag) in making flexibility as accessible for men as for women. This is consistent with research that identifies gender stereotypes and discrimination as significant in explaining the gender pay gap.

7.2.1.5 Rural, regional and remote women

Living in rural, regional and remote (RRR) areas is not a prescribed attribute of a person for purposes of the Anti-Discrimination Act and therefore is not a legal ground of discrimination in the way that age, ethnicity, disability and other personal factors are. However, these environments can raise specific issues for women that should be noted given that a quarter of NSW women live outside of Greater Sydney.

Economic inequality, domestic violence and caring responsibilities significantly affect women in RRR areas. Women across Australia also face particular housing challenges due to the structural barriers such as lack of pay equity, gender inequality and interrupted or limited earning capacity due to primary caring responsibilities mentioned above. Women are more likely to experience economic insecurity as a result of relationship breakdown, separation and divorce, and they are more likely to reach retirement with much lower superannuation balances than men. Research found that one in eight women living on low to moderate incomes in regional Australia had been homeless in the past five years.

First Nations women, young women, women living with a disability, older women, culturally and linguistically diverse women and people working in essential services such as health and social care (the majority of whom are women), are particularly vulnerable to homelessness.

89 KPMG, above n 35, p 28.
92 YWCA National Housing Report, ibid.
93 ibid, p 4.
Workplace participation rates in RRR areas are lower for women than men (66.8% for men and 56.5% for women). Women’s unpaid roles in family businesses in these settings also potentially undermine their financial security by leaving them without entitlements or superannuation.

Women report that the presence of negative attitudes and everyday sexism can be amplified in more isolated RRR environments and it can be more difficult to speak up or escape when sexual harassment, discrimination or violence occurs and where a police station may be located some distance away and/or there are fewer numbers of police officers. Women also report that there is a “high tolerance of sexism and discrimination against women working in traditionally male-dominated industries like agriculture and mining”.

Transitioning economies and natural disasters can increase the effects of pre-existing inequalities and discrimination on women in RRR areas.

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96 ibid at pp 6 and 13.

97 ibid at p 13.

98 ibid at p 14. Recent and ongoing events of these kinds include the NSW drought that started in 2017, the 2019-20 bushfire season. As of April 2020, approximately 70% of NSW continues to be in drought or drought-affected condition: see https://edis.dpi.nsw.gov.au/ accessed 15 April 2020. The 2019-20 bushfire season, referred to as “Black Summer”, has been frequently described as “unprecedented” in scale. See, for example, Australian Academy of Science, “The Australian bushfires and why they are unprecedented”, 3 February 2020, at www.science.org.au/news-and-events/news-and-media-releases/australian-bushfires-why-they-are-unprecedented, accessed 18 April 2020. The greater isolation and vulnerability to coercive control and domestic abuse that some women experience in RRR areas may also be exacerbated by the social distancing and quarantine responses to the COVID-19 global pandemic.
7.3 Sexual harassment

Sexual harassment is unwelcome sexual behaviour that makes — or that would reasonably be expected to make — a woman feel offended, humiliated or intimidated.\(^9\) It is unlawful in certain areas of public life.\(^{100}\) Sexual harassment is a form of gender-based violence.\(^{101}\) (See 7.5 below for further discussion of violence against women.)

In 1984, the Australian Government enacted the *Sex Discrimination Act* 1984, which specifically prohibited sexual harassment at work and established the role of Australia’s Sex Discrimination Commissioner. However, 35 years on, in a landmark report, the Sex Discrimination Commissioner reports that the rate of change has been disappointingly slow. Australia now lags behind other countries in preventing and responding to sexual harassment.\(^{102}\)

The report found that:

- women were more likely than men to have been sexually harassed in the workplace in the last five years (39% of women compared with 26% of men), and made up almost three in five (58%) of victims of workplace sexual harassment in the past five years.\(^{103}\)
- people aged 18–29 or 30–39 years (45% and 37% respectively) were more likely than those in other age groups to have been sexually harassed in the workplace in the past five years.\(^{104}\)
- 53% of First Nations people compared to 32% of non-First Nations people reported harassment.\(^{105}\)
- 79% reported that one or more of the harassers was male.\(^{106}\)

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100 Such as employment, education, provision of goods, services and accommodation, land dealings, sport, and State laws and programs: *Anti-Discrimination Act* 1977 (NSW), Pt 2A.


104 ibid.

105 ibid at p 28.

106 ibid at p 33.
In the legal profession, it has been reported that:

- 71% of the 242 of respondents to the Women Lawyers Association of NSW 2019 survey for the legal profession reported being sexually harassed, but only 18% had made a formal complaint.\(^{107}\)

- In 2018, 47% of Australian female respondents to the International Bar Association survey reported experiencing sexual harassment at work.\(^{108}\)

The most common forms of sexually harassing behaviour were sexually suggestive comments or jokes and intrusive questions about one’s private life or physical appearance. Other forms included:

- repeated invitations to go on dates or requests or pressure for sex
- sexually explicit pictures, posters or gifts
- intimidating or threatening behaviours such as inappropriate staring or leering, sexual gestures, indecent exposure, or being followed, watched or someone loitering nearby
- inappropriate physical contact, such as unwelcome touching, hugging, cornering or kissing
- actual or attempted rape or sexual assault
- sexual harassment involving the use of technology, including sexually explicit emails, SMS or social media, indecent phone calls, repeated or inappropriate advances online, or sharing or threatening to share intimate images or film without consent.\(^{109}\)

Workplaces where there is a higher risk of experiencing sexual harassment include those that:

- are male-dominated because of gender ratio, over-representation of men in senior leadership roles, the nature of work being considered “non-traditional” for women, and a masculine workplace culture, or
- involve high level of contact with third parties eg customers, clients or patients, or
- are organised according to a hierarchical structure.\(^{110}\)


\(^{109}\) AHRC, above n 102, pp 17–18.

\(^{110}\) ibid.
7.3.1 Sexual harassment and the judiciary

It cannot be assumed that judicial officers will not sexually harass their staff or colleagues by reason of their judicial office. While specific data on complaints to the NSW Judicial Commission about judicial sexual harassment is unavailable, this should not lead to the conclusion that the problem does not exist. As workplace sexual harassment is enabled by power disparities,\(^\text{111}\) reporting of sexual harassment by judicial officers is arguably under-reported and if reported, not acted on for fear of repercussions for a complainant.\(^\text{112}\)

The American Judges Association Court Review suggested in 2018 that “despite the stringent codes of conduct that bind judges and judicial employees, employment within the judiciary (and particularly within judicial chambers) has all of the hallmarks of a workplace environment that makes harassment more likely, and that makes speaking up against harassment nearly impossible”.\(^\text{113}\)

Factors that were cited as contributing to this issue include:\(^\text{114}\)

- power of judges over employees
- strict hierarchical structures in which an employee has a single supervisor
- autonomy of judicial chambers
- isolation of judicial chambers
- significant turnover in staff, with new clerks joining every year or two
- leadership that is frequently male dominated
- unique requirements of confidentiality, and
- strong desires to avoid any public disclosure of wrongdoing in the interests of maintaining public confidence.

In the wake of allegations against a former High Court justice made public in June 2020, the Chief Justice of Australia, the Honourable Susan Kiefel AC, stated that:\(^\text{115}\)

> [t]here is no place for sexual harassment in any workplace. [The High Court has] strengthened our policies and training to make clear the importance of a respectful workplace at the Court and we have made sure there is both support and confidential avenues for complaint if anything like this were to happen again.

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\(^{111}\) AHRC, above n 102, p 18.

\(^{112}\) K Nomchong, “Sexual harassment and the judiciary” (2020) 32 JOB 55 at 56.


\(^{114}\) ibid.

The Supreme Court of NSW in June 2020 published the “Supreme Court Policy on Inappropriate Workplace Conduct”.\(^\text{116}\) This policy is designed to clarify the process as it applies to judges and judicial staff in the court and provide additional avenues for a person to raise an issue. The NSW Attorney General also ordered a review into the way that NSW courts and tribunals handle complaints of sexual harassment.\(^\text{117}\)


\(^{117}\) The review has not been finalised as at 14 September 2020.
7.4 Intersectional discrimination

The Australian Human Rights Commission has defined intersectional discrimination as “discrimination on the basis of a combination of attributes”, such as gender, race, disability, age, sexual orientation, gender identity, intersex status or socio-economic status.\(^{118}\) Australian discrimination law frameworks, by contrast, are based on discrimination which is experienced as a result of only one of a specific selection of attributes at a time.\(^ {119}\)

When different bases of discrimination overlap or intersect, vulnerability and disadvantage related to each attribute can be cumulative. This can be seen, for example, in the greater vulnerability of older, single women to homelessness.\(^ {120}\) Intersectional discrimination can also occur in particular ways that only arise when these attributes occur in combination, such as the difficulties which may arise for First Nations women in legal proceedings which relate to traditional “women’s business” which cannot be disclosed to men.\(^ {121}\) Women can be left without adequate support when the intersecting nature of their experiences is not acknowledged, for instance, women with diverse sexual orientations, transgender and gender diverse women and intersex women can find there are insufficient inclusive services to help them recover from violence\(^ {122}\): see also Section 8 and Section 9.

Some further instances of intersectional discrimination experienced by women are described below.

**Women with disabilities: see also Section 5**

- Women with disabilities are 40% more likely than women without disabilities to be victims of domestic violence.\(^ {123}\)

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118 AHRC, above n 17 at p 11. The term “intersectionality” was first coined in 1989 by Kimberley Crenshaw in “Mapping the Margins” (1991) 43 Stanford Law Review 124, as an analytical framework to challenge structural power in the context of racism and to describe the racialising of gender and the gendering of race as invisible to discrimination law. Note that Crenshaw herself feels the term has been co-opted to mean something other than its original intent: see A Whittaker, “So white, so what” (2020) Meanjin 50.


120 “*A husband is not a retirement plan*”, above n 46, p 13.

121 Supreme Court of Queensland, above n 4, p 169.


- Over 25% of women with a disability have experienced sexual violence, compared with 15% of women without a disability.\textsuperscript{124}
- When living in group homes, women experiencing violence cannot choose with whom they live.\textsuperscript{125}
- Beyond physical, sexual and economic abuse, women recount humiliation by family members, invasion of privacy and lack of consultation in decision-making in relation to reproductive rights.\textsuperscript{126}

\textit{Older women: see also Section 11}

- Older women are significantly more likely than older men to be victims of elder abuse.\textsuperscript{127}
- Sexual assault of women over 65 occurs in a wide range of contexts including by partners, family members and service providers, including in nursing homes, on whom they may rely on for general care, health care and intimate care.\textsuperscript{128}

\textit{Women from migrant and refugee backgrounds: see also Section 3}

- Women from migrant and refugee backgrounds are dealing with the complex interaction of cultural values and immigration status. They are less likely to report harassment or violence and may lack local networks or knowledge of Australian law to help achieve safety from violent situations.\textsuperscript{129}
- These women report fear that reporting violence would impact future visas and future work opportunities.\textsuperscript{130}

\textit{LGBTIQA+ people: see also Section 8}

- Women who identify as lesbian, bisexual, and mainly heterosexual were twice as likely to report physical abuse by a partner as compared to women who identified as exclusively heterosexual (24%, 29%, and 22%, versus 12%, respectively).\textsuperscript{131}

\textsuperscript{125} AHRC, \textit{A conversation in gender equality}, above n 17 at p 16.
\textsuperscript{126} ibid.
\textsuperscript{129} AHRC, \textit{A conversation in gender equality}, above n 17 at p 16.
\textsuperscript{130} ibid, p 17.
\textsuperscript{131} L Szalacha et al, \textit{Mental health, sexual identity, and interpersonal violence: findings from the Australian longitudinal women’s health study}, BMC Women’s Health, 2017, 17:94.
First Nations women: see also Section 2

- The life expectancy of First Nations women in NSW is 7.8 years less than the life expectancy of non-First Nations women. In remote areas, life expectancy for First Nations women is 69.6 years. 132
- The maternal mortality ratio for First Nations women between 2012 and 2017 was more than three times higher than for non-First Nations women. 133
- First Nations women are 3.4 times more likely to experience sexual assault than non-First Nations women 134 and are almost five times more likely than non-Aboriginal women to be victims of domestic assault (2,071 per 100,000 population compared to 434 per 100,000 in 2018). 135
- First Nations women and children are part of a community impacted by inter-generational trauma of previous Stolen Generations (see [2.2.2]). First Nations children are over-represented in out-of-home care. Aboriginal women in situations of family violence are the most acutely affected of all low-income women in relation to potential removal of their children: if they stay with the perpetrator, they are at risk having their children removed for being a "non-protective parent, and if they leave but cannot find or fund suitable housing (which is in short supply), the risk is allegations of neglect. 136

The Judicial Council on Cultural Diversity has produced the National framework to improve accessibility to Australian courts for Aboriginal and Torres Strait Islander women and migrant and refugee women (“the JCCD framework”) as a court-level response to intersectional discrimination. The JCCD framework is designed to create a “national approach to improving access to justice and equality before the law for Aboriginal and Torres Strait Islander women and migrant and refugee women.” It focuses on “court policies, procedures and resources of the courts, not the content of the law”. 137

137 JCCD, ibid at p 4.
While acknowledging that not all women have the same experiences, the framework aims to create a “system that caters to the needs of the most disadvantaged” because that “will cater to all using the system”. It recognises that “an understanding of gendered inequality and gendered violence is integral to ensuring that judicial officers and courts can respond appropriately to the needs of women appearing before them in family violence matters and recognise the difficulties women may face in engaging with the justice system”. In terms of specific intersectional discrimination, the JCCD framework also acknowledges that First Nations women “may have a legacy of trauma and may have experienced a lifetime of institutional discrimination, making them reluctant to engage with the justice system” and that many “carry significant fears that reporting violence will mean that authorities will remove children”. Further, migrant and refugee women may be affected by the “potentially adverse impact of pre-arrival experiences, such as persecution at the hands of authorities, as well as contemporary pressures around financial dependence and immigration status” and that these factors may affect a woman’s responses to court processes and personnel.

Points to consider


Take up learning opportunities like the Cultural Diversity E-Learning course referenced in the JCCD framework. This is also found on the Judicial Commission’s website at https://elearning.judcom.nsw.gov.au/.

Developed under the auspices of the Judicial Council on Cultural Diversity, and produced by the Judicial Commission of NSW, the program draws on a number of resources, including the Family Court of Australia’s highly regarded online cultural competency training course and the Judicial Commission’s Equality Before the Law Bench Book. The course also contains a number of links to external resources if you wish to expand your knowledge on a particular topic. There are nine modules in total and each module takes between 10 to 20 minutes to complete.

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138 ibid.
139 ibid at p 6.
140 ibid.
141 ibid.
7.5 Violence against women

7.5.1 Terminology and statistics

According to Art 1 of the United Nations Declaration on the Elimination of Violence against Women 1993:

Violence against women is any act of gender-based violence that causes or could cause physical, sexual or psychological harm or suffering to women, including threats of harm or coercion, in public or in private life.¹⁴³

Various terms are used in different contexts to capture abuse occurring within personal relationships.

“Domestic violence” can be understood as “a set of violent or intimidating behaviours usually perpetrated by current or former intimate partners, where a partner aims to exert power and control over the other, through fear”.¹⁴⁴ It can include physical, sexual, emotional, psychological and financial abuse and violence. Violence includes attempted or threatened violence.¹⁴⁵ Emotional abuse can include controlling or preventing a person from having contact with friends and family; constant insults, shouting or verbal abuse intended to humiliate; using lies to turn the victim’s children against them; and, threatening to take children away.¹⁴⁶

The term “domestic abuse” is being increasingly preferred in the literature because it takes the emphasis away from violence in its physical form. It is inclusive of the range of forms abuse can take, whether or not physical violence is also present.¹⁴⁷ However, “domestic violence” is the term used in NSW case law and legislation.¹⁴⁸

“Coercive control”: There has previously been a tendency to understand domestic violence or abuse as a single incident of (usually physically) violent behaviour, even if occurring multiple times. By contrast, coercive control refers to “a pattern of domination that includes tactics to isolate, degrade, exploit

¹⁴⁶ Some examples of behaviours used to define the concept of emotional abuse are found in ABS, 4906.0 — Personal safety, ibid.
¹⁴⁸ See for example Crimes (Domestic and Personal Violence) Act 2007 (NSW), ss 4 and 5.
and control them, as well as to frighten them or hurt them physically”.

It is through the framework of coercive control that an eight-stage progression towards domestic homicide has recently been identified. There are laws that criminalise coercive control in jurisdictions in the United Kingdom, but there is no such offence in any Australian jurisdiction.

The term “domestic violence offence” is used in the legislation that regulates the system of apprehended violence orders in NSW. The legislation addresses a broad range of relevant “domestic” relationships in which violence may occur and covers offences of physical violence as well as offences, “the commission of which is intended to coerce or control the person against whom it is committed or to cause that person to be intimidated or fearful (or both)”: s 11(1)(c) of the Crimes (Domestic and Personal Violence) Act 2007. Paragraph (c) has been seen as important because it highlights “the centrality of coercion and control in domestic violence … [illustrating] that domestic violence is about exercises of power, in which physical violence is but one manifestation”.

“Family violence” is used in some states and in family law. It is “violent or intimidating behaviours against a person, perpetrated by a family member including a current or previous spouse or domestic partner”. It is also the term that is often preferred as more culturally appropriate in First Nations communities. The term “intimate partner violence” relates to the “violent or intimidating behaviours” “perpetrated by a current or cohabiting partner, boyfriend, girlfriend or date”, as opposed to a relative or kin. These violent and intimidating behaviours towards women are not solely confined to intimate or domestic contexts. Women are also subject to violence from strangers. See also Sexual harassment at 7.3.


151 Some Australian States have or are considering this, most recently in response to the domestic violence-related deaths of a woman and her children in Queensland in early 2020. See P McGorrery and M McMahon, Criminalising coercive control, Springer Books, 2020.

152 Crimes (Domestic and Personal Violence) Act 2007 (NSW), s 11.


154 ibid.

155 AIHW, Family, domestic and sexual violence in Australia: continuing the national story, above n 144, p 17.

156 A Olsen and R Lovett, Existing knowledge, practice and responses to violence against women in Australian Indigenous communities: state of knowledge paper, ANROWS, 2016, p 1. See also “family violence” in AIHW, above n 144, p 17.

157 ibid.
Practical consideration: debunking myths about domestic/family violence

Evidence-based facts and research should always be used to inform understanding about domestic/family violence, counter myths about it and prevent their perpetuation to the extent relevant in the courtroom. It is not easy for a woman to leave a violent person — it takes considerable emotional and practical resources for an abused and frightened woman to do this — particularly if there are children involved.

Many who do leave or threaten to leave are coerced into returning or staying by threats, further violence from their partner, and/or withdrawal of financial support. 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 First Nations 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.

For example, high profile or "celebrity" cases of domestic violence are often reported in the media and therefore attract much commentary on social media. If a "celebrity" victim of domestic violence withdraws or alters their evidence, this one case tends to overshadow the many thousands of other cases of domestic violence and perpetuate the myth that "women often make up stories" or change them for financial gain or for motives connected to family law issues. False claims about family violence are extremely rare. It has been reported that 80% of women who experience violence from a current partner do not contact the police about it. Women who do make a complaint may change their evidence due to a number of reasons — fear, threats, further violence, pressure from family and/or friends, shame, guilt, fear that her partner will lose his job and the ramifications for the family.

Each case must be considered on the evidence presented in court. The coercive dynamics of domestic violence may be a matter of judicial notice.

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A victim of coercive control usually does not feel comfortable making full disclosure of her circumstances until she feels safe to do so and may change her evidence for this reason.\(^{160}\)

**Practical tip: National Domestic and Family Violence Bench Book is a helpful online resource**

In response to the Australian Law Reform Commission and NSW Law Reform Commission recommendations, the *National Domestic and Family Violence Bench Book* has been created to complement the initiatives under the National Plan to Reduce Violence Against Women and their Children 2009-2021 (“National Plan”): see https://dfvbenchbook.aija.org.au/contents.

The bench book is designed to assist the “education and training of judicial officers so as to promote best practice and improve consistency in judicial decision-making and court experiences for victims in cases involving domestic and family violence across Australia.”

See, for example, for matters in relation to ensuring a fair hearing and safety: https://dfvbenchbook.aija.org.au/fair-hearing-and-safety/.

Research demonstrates that domestic violence increases with events such as natural or financial disasters over which perpetrators have no control\(^ {161}\) and spikes with particular events, such as the grand final games of the various codes of football\(^ {162}\).

**Key statistics\(^ {163}\)**

In NSW in 2017:\(^ {164}\)
- there was a total of 60,371 incidents of assault reported to police. Females were the victim in 47.9% (31,490) of the reported incidents. However, the

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\(^{160}\) Section 144(2) *Evidence Act* allows a judge to acquire common knowledge or knowledge sourced in an authoritative document in any way that the judge thinks fit. A court (including a jury, if there is one) must take such knowledge into account (s 144(3)); S McDermott, manager, Domestic and Family Violence Team, NSW Police, reported in J Baird, “Exercise extreme caution when celebrity abuse cases end up in the media”, Sydney Morning Herald, 25 July 2020 at www.smh.com.au/national/exercise-extreme-caution-when-celebrity-abuse-cases-end-up-in-the-media-20200723-p55ex6.html, accessed 27 July 2020.


\(^{164}\) Women NSW, above n 13, p 13.
majority (66.3%) of the reported assaults against females were perpetrated by someone with whom they were currently, or had previously been, in a domestic relationship. 165

- most domestic assault victims who reported to police were female (68.3%), and most perpetrators male (79.4%)166
- most domestic homicide victims were female (17 out of 27, 63%)167
- more females than males were repeat victims of assault related to domestic violence168
- the rate of females who were the victim of actual bodily harm or grievous bodily harm because of domestic violence was 1.8 times the rate of males169
- females were hospitalised 5.7 times more than men because of violence their spouse or domestic partner had perpetrated (in 2016-17)170
- Aboriginal females were victims of domestic violence assault at a rate of 4.6 times that of non-Aboriginal females171
- most people being protected under an Apprehended Domestic Violence Order were female (2.3 times the rate of males)172
- over 70% of women in custody in NSW in 2015 had been involved in at least one abusive relationship (27.6% of men). 11.7% of men and 40% of women had been involved in more than one violent relationship173
- a higher proportion of women in custody surveyed had experienced each of three specified forms of sexual violence (immobilisation, threats of violence and acts of violence)
- women’s physical violence is more likely than men’s violence to be motivated by self-defense and fear, whereas men’s physical violence is more likely than women’s to be driven by control motives.174
- Almost all (99%, or 1.6 million) female victims of violence from a current or previous cohabiting partner experienced violence from a male partner. Less than 1.4% of female victims said they experienced violence from a female partner (23,100 victims). For male victims of partner

165 ibid at 63.
166 ibid.
167 ibid.
168 ibid at 66.
169 ibid at 65.
170 ibid at 67.
171 ibid at 62.
172 ibid at 80.
173 ibid at 72.
174 S Swan, above n 5.
violence, the overwhelming majority (96%, or 524,000 victims) reported that they experienced violence from a female partner. A further 5% (29,600) experienced violence from a male partner.175

- Trend data relating to domestic violence in NSW shows that in the 24 months prior to December 2019 there was a 5% increase in incidents of recorded domestic violence related assaults (29,710 over 12 months to December 2018 and 31,187 over 12 months to December 2019)176 and a 12.4% increase in AVO breaches due to an increase in domestic violence related breaches.177

It is unclear whether the increase in recorded domestic violence incidents is because of increased reporting or increased offending.178

- Women’s Domestic Violence Court Advocacy Services, funded by Legal Aid NSW, assisted more than 51,000 women through 117 local courts in 2019.179

The 12% increase on the previous year came from referrals from police and the number of apprehended domestic violence orders sought at local courts. As with recorded crime, it is not clear whether the increase reflects an increase in incidence or reporting.180

Nationally, nearly 1 in 4 Australian women (23.0%) has experienced physical or sexual violence by a current or former intimate partner since age 15.181 The proportion of women who experienced partner violence (in the previous 12 months) is relatively stable (1.5% in 2005, 1.7% in 2016).182 The proportion of men who experienced violence has increased to 0.8% in 2016 from 0.4%.183

177 ibid.
180 ibid.
183 ibid.
Domestic violence-related homicides

There were 1683 homicide deaths in total in NSW between July 2000 and June 2019 (1127 males, 555 females, 1 transgender person). Of these:

- 31% occurred in a context of domestic violence (ie 530 deaths: 272 women, 155 men and 103 children)
- 57% of homicides with a female victim were domestic violence (DV) related
- 19% of homicides with a male victim were DV related
- 292 people were intimate partner (IP) homicide victims ie they were killed by a current or former intimate partner in the context of domestic violence
- IP homicides make up 55% of DV related homicides
- 80% of IP homicide victims were women (234 women, 58 men). Female victims ranged from 15 to 80 years of age
- 36% of women were killed by a former intimate partner. Of these, 2/3 had ended the relationship within three months of being killed
- 14% of women (32) and 26% of men (15) killed identified as Aboriginal. The First Nations population is approximately 3% of the total NSW population, meaning Aboriginal people are highly overrepresented as IP homicide victims.
- 84% of men killed by a female intimate partner had been the primary DV abuser in the relationship. All 7 men killed by a male intimate partner had been the primary DV victim in the relationship.

291 perpetrators (239 men (82%), 52 women (19%)) killed the 292 victims

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185 The term “domestic violence related death” includes examination of not only domestic violence homicides, but also domestic violence related suicides, as well as where fatal accidents are caused by domestic violence:
186 ibid at p xv.
187 ibid at p xv.
188 ibid at p xv.
189 ibid at p xv.
190 ibid.
191 ibid.
192 ibid.
193 ibid at p 10.
194 ibid.
195 ibid at p xvi.
196 ibid at p 8.
187 people were relative / kin homicide victims ie killed by a relative/kin in a context of domestic violence (84 adults and 103 children under 18 years)\(^{197}\)
- 57% of adult victims were men and 43% were women
- 58% of adult victims were the primary DV victim in the relationship with the relative/kin who killed them
- 14% of adult victims identified as Aboriginal
- 96 perpetrators (62 men (65%), 34 women (35%)) killed the 103 child homicide victims\(^{198}\)
- 82 perpetrators (68 men (83%), 14 women (17%)) killed the 84 adult homicide victims\(^{199}\)

### 7.5.2 Cultural and social attitudes to domestic violence

As with sexual assault, while both men and women can be perpetrators and/or victims of domestic violence, the “overwhelming majority of violence and abuse is perpetrated by men against women”.\(^{200}\) Being a woman is the biggest risk factor for becoming a victim of sexual assault and/or domestic and family violence.\(^{201}\) Societal attitudes towards domestic violence can serve as a barometer for social tolerance of violence and concomitantly, the prevalence of domestic violence. Negative or uninformed attitudes to gender equality have been identified as key to a lack of understanding about domestic violence.\(^{202}\) The National Community Attitudes Survey 2017 (NCAS 2017)\(^{203}\) found that the best predictors of a person’s attitude towards violence against women are their level of support for gender equality, their understanding of violence against women, their level of prejudice towards others, and their level of support for violence in general.\(^{204}\)

\(^{197}\) ibid at p xvi.
\(^{198}\) ibid at p 14.
\(^{199}\) ibid at p 17.
\(^{201}\) ibid at p 26.
Further, although most Australians understand violence as constituting a continuum of behaviours, they are more likely to recognise obvious physical violence and forced sex than emotional, social and financial forms of abuse and control as forms of violence against women. Among people born in non-main-English-speaking countries (N-MESCs), a “concerning” minority tend to blame victims and excuse perpetrators of violence against women, are two-and-a-half times more likely than people in the Australian-born sample to agree that “domestic violence can be excused if it results from people getting so angry that they temporarily lose control” and are two-and-a-half times more likely to agree that “domestic violence is a private matter to be handled in the family.”

Gender equality underpins the National Plan to Reduce Violence Against Women and their Children 2010-2022 (“National Plan”) and accompanying four action plans, as well as the “Change the Story” framework.

Reducing domestic violence prevalence

The first focus of the National Plan is strongly on prevention. It aims to look to the long term, build respectful relationships and work to increase gender equality to prevent violence from occurring in the first place. It also focuses on holding perpetrators accountable and encouraging behaviour change.

Further strategies have been identified by research to reduce domestic violence offending in Australia, include targeting male perpetrated violence; reducing violence in Indigenous communities; and reducing repeat offending, particularly among prolific offenders.

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205 ibid, p 8.
207 National Plan, above, n 203.
208 above n 203, p 17.
Points to consider
In relation to domestic violence offences, be aware that judicial language influences societal values and behaviours as an adjunct to the exercise of judicial discretion in sentencing and other decisions. Language is power and judicial officers wield significant social power with respect to discussing, naming and representing domestic violence. This power ensures judicial discourses echo through media representation and reflect social understandings of domestic violence. In this regard:

- In court, or in your reasons for sentence, reject statements that locate the cause of domestic violence outside the offender, such as that drugs or alcohol “cause” domestic violence homicide.
- Reject statements that blame the person experiencing the violence for what has happened to them.
- Encourage perpetrator accountability. For example, reflecting what the research shows to be usually the case, rather than describing a perpetrator as having “lost control”, or “snapping”, the actions of a man who uses violence need to be reframed as an attempt to maintain control. Similarly, rather than being “motivated by jealousy”, the language concerning a man who uses violence needs to be reframed as their belief that they had lost possession or control over their partner. See *R v Hosseini Amraei* for a good example of a judge holding a perpetrator accountable for his violence (in the context of sentencing for domestic homicide).

7.5.3 Coercive control
Coercive control is “an ongoing system of control, in which the abusive partner seeks to override their partner’s autonomy and destroy their sense of self. The end game — whether the perpetrator knowingly sets out to achieve it — is to make their partner entirely subordinate and to control. To do this, they isolate, micro-manage, humiliate, degrade, surveil, gaslight and create an environment of confusion, contradict and extreme threat.”

Coercive control has the effect of isolating the victim, depriving them of independence and their sense of safety. It makes victims constantly fearful,
hyper-vigilant, confused, and puts them in a state of “mental dislocation”, constantly doubting themselves.\textsuperscript{212} It is sometimes called “intimate terrorism”\textsuperscript{213} and some victims have described it as the “worst part” of their experience of domestic violence.\textsuperscript{214}

Common behaviours by perpetrators of coercive control against their victim include:\textsuperscript{215}

- isolating their victim from friends and family, eg controlling and preventing access to them, andconvincing their victim that their loved ones hate them\textsuperscript{216}
- depriving their victim of basic needs, eg access to food
- monitoring of their victim’s time
- controlling of everyday life, including where their victim can go, who they can see, what they wear, when they sleep, what they eat, whether they can work
- controlling finances and/or deliberately incurring debts in their victim’s name
- monitoring and/or surveillance through mobile phones and online communication tools, spyware or other technology — see technology-facilitated abuse below at 7.5.4
- depriving access to support services, eg medical services
- repeatedly using put-downs, eg calling their victim worthless
- humiliating, degrading or dehumanising their victim (eg urinating on their victim)\textsuperscript{217}
- making threats (eg to kill their victim, themselves, their children or pets)\textsuperscript{218} or intimidation
- gaslighting, ie emotionally abusing and manipulating “forcing them to question their thoughts, memories, and the events occurring around them.”\textsuperscript{219}

\begin{footnotes}
\item[212] This “mental dislocation” has been described by Amnesty International as “torture”: J Hill, ibid.
\item[214] J Hill, above n 211. See also H Gleeson, ibid.
\item[215] Unless otherwise specified, this list is adapted from Women’s Aid UK webpage, “What is coercive control?” at www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control/, accessed 3 May 2020.
\item[218] ibid.
\end{footnotes}
Examples of gaslighting include trivialising people’s feelings, reporting that others are talking about the person behind their back, saying things that are later denied, hiding things and denying knowledge of where they are, insisting on things that are not true. 220

- reinforcing traditional gender roles 221
- where there are children, turning children against the other parent 222

Coercive control may also accompany physical and sexual violence. It generally occurs incrementally over time, so it can be difficult for victims to recognise that it is happening. 223 It is difficult and dangerous to leave situations of coercive control and domestic violence.

An eight-stage progression through coercive control to intimate partner homicide has been identified. 224 This research highlights the extent to which such homicides are planned and that they may be the first acts of physical violence.

7.5.4 Technology-facilitated abuse

Technology can be used to perpetrate violence that occurs both online and offline

“Technology-facilitated abuse” is “a form of domestic violence in which abusers control, stalk and harass their victims using technology”. 225 The term includes behaviours such as:

- sending abusive text messages or emails
- making continuous threatening phone calls
- spying on and monitoring victims through the use of tracking systems
- abusing victims through social media sites
- sharing intimate images of someone without their consent (also known as image-based abuse or “revenge porn”); and
- using technology to control or manipulate home appliances, locks and other connected devices. 226

220 ibid.
221 ibid n 216.
222 ibid.
224 J Monckton-Smith, above n 150.
226 ibid.
Specific examples of harassing and abusive behaviours that are enabled by technology include: 227

- **trolling**: when an anonymous user abuses or harasses others for fun, and enjoys the upset reactions their comments provoke

- **cyber abuse**: abuse that can be sexist, misogynistic, racist, homophobic or transphobic from users who want to humiliate or punish their targets, arising from anger or hatred (and in that sense, similar but distinguishable from trolling)

- **cyberstalking**: a form of cyber abuse which may include “false accusations, abusive comments, attempts to smear reputation, threats of physical or sexual violence or repeated unwanted sexual requests”. It can also include “monitoring, identity theft and gathering of information that may be used to threaten, embarrass or harass”. It is often accompanied by real time or offline stalking

- **image-based abuse** (also known as **revenge porn** or **sextortion**): the sharing, or threat to share, of an “intimate” image or video without the person’s consent, primarily using mobile phones. “Sexting” usually refers to sending implicit or explicit messages of sexual desire or intent, often with images of the sender in varying degrees of undress. 228 It is an offence when intimate images are intentionally or recklessly recorded without the knowledge and/or consent of the person; or if they are intentionally or recklessly distributed without consent; or if there is a threat to record or distribute the intimate images. 229 Material is an “intimate” image if the material depicts, or appears to depict: a person’s genital or anal area, whether covered or bare; breasts of a female/transgender/ intersex person; private activity, such as dressing, using the bathroom, washing/bathing; sexual activity.

- **fake accounts and impersonation**: fake accounts are set up in the name of real people and used to abuse, bully, harass, monitor or damage the reputation of those targeted people and/or others. Romance scams based on fake accounts are sometimes used by organised crime to trick people into giving money and buying gifts

- **doxing**: when personal details are shared or published online, potentially inviting offensive comments, unwanted calls, contact or visits from strangers

228 M Bromberg, “The devil you know is not better — the non-consensual distribution of intimate images and sentencing, (2020) 44 Crim LJ 173.
229 Sections 91Q and 91R, Crimes Act 1900 (NSW).
230 Section 91N, Crimes Act 1900; See also s 9B, Enhancing Online Safety Act 2015 (Cth).
- **swatting**: when an abuser makes a hoax call to emergency services so responders will attend a person’s home address eg falsely reporting a bomb threat, hostage scenario, or a mental health emergency

- **defamatory comments**: comments made online with the intention of causing harm to the reputation of a person or their business

- **virtual mobbing** and **dog-piling**: when online users are encouraged en masse to incite hatred and harass individuals

- **baiting**: humiliating people online by labelling them as sexually promiscuous

- **spamming**: sending multiple junk email or viruses to others

Text messages, Facebook, and GPS tracking of smartphones are the most common means of harassment and abuse in situations of domestic violence.

*Online abuse and harassment is gendered: women experience more of it in all forms and predominantly from men.*

Women and girls are more likely to be targets of online abuse in all its forms. Although both men and women experience online harassment and abuse, women are more likely to experience sexual harassment online. Men are harassed and abused online by other men and women in equal proportion. Women are harassed and abused online almost exclusively by men.

Domestic violence sector practitioners have identified that women of culturally and linguistically diverse (CALD) backgrounds, women of Aboriginal backgrounds and women with disabilities are at particular risk from technology-facilitated abuse. Additionally, particular risk of online harassment has been self-reported by women with diverse sexual orientations, transgender women, gender diverse women, intersex women and women from CALD backgrounds.

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231 ibid.


233 ibid.

234 ibid.


237 ibid.


239 ibid.

240 D Woodlock, above n 235.
communities. Women who advocate on women’s rights issues (including family and domestic violence and sexual harassment) or who are deemed to be feminist are also frequent targets of this form of harassment.\textsuperscript{241}

\textit{Parliamentary inquiry into family, domestic and sexual violence}

On 4 June 2020, the Commonwealth House Standing Committee on Social Policy and Legal Affairs adopted an inquiry into family, domestic and sexual violence to shine a light on the scourge of family, domestic, and sexual violence, and to examine how governments and the community can prevent violence against women and their children, and to better support those most at risk. The Terms of Reference\textsuperscript{242} include the experiences of all women, including First Nations women, rural women, culturally and linguistically diverse women, LGBTQI women, women with a disability, and women on temporary visas.

\subsection*{7.5.5 Female genital mutilation/cutting (FGM/C)}

The World Health Organisation defines FGM/C as “the partial or total removal of the external genitalia, or other injury to the female genital organs for non-medical reasons”.\textsuperscript{243} FGM/C is a collective term that describes a range of interventions that vary in severity and in their potential health consequences. No religious scripts prescribe the practice, with religious leaders taking various positions from promotion to contributing to its elimination. In most societies where it is practiced, it is considered a socio-cultural tradition.\textsuperscript{244}

The Australian Institute of Health and Welfare has estimated that about 53,000 women and girls currently living in Australia but born elsewhere have undergone FGM/C. There were 477 hospitalisations recorded in Australia from 2015-16 to 2017-18, where FGM/C was an additional diagnosis.\textsuperscript{245} The health problems reported included problems with urination, painful periods, genital inflammation and irritation, sexual and fertility problems, chronic pain and psychological problems.\textsuperscript{246} As FGM/C is a deeply ingrained expectation in some cultures, families living in Australia can feel pressure from extended family either here or in their country of origin to have their daughters undergo FGM/C.

\begin{itemize}
\item[\textsuperscript{241}] AHRC, above n 17, p 17.
\item[\textsuperscript{246}] ibid, p 10.
\end{itemize}
All States and Territories of Australia prohibit female genital mutilation both within their jurisdictions and extraterritorially and it is a criminal offence to remove a child from Australia, or to assist, whether overtly or tacitly, in such a removal for the purpose of submitting her to any form of female genital mutilation overseas.247

Section 45 of the Crimes Act 1900 (NSW) came into effect on 1 May 1995. In an appeal to the High Court concerning the proper construction of s 45(1)(a) of the Act, a majority held that the term “otherwise mutilates” in s 45(1)(a) does not bear its ordinary meaning, but has an extended meaning that takes account of the context of female genital mutilation, and which encompasses the cutting or nicking of the clitoris of a female child. The purpose of s 45, evident from the heading to the provision and the extrinsic materials, is to criminalise the practice of female genital mutilation in its various forms: The Queen v A2; The Queen v Magennis; The Queens v Vaziri.248 A majority also held that the term “clitoris” in s 45(1)(a) is to be construed broadly, having regard to the context and purpose of s 45.249

Some evidence suggests that the risk of girls in Australia undergoing FGM/C is small due to factors such as cultural change after migration, changing community attitudes and Australian prevention initiatives.250 The general lack of evidence of FGM/C occurring in Australia or being arranged from Australia (except for a small number of reported cases) could be seen as evidential support for this view. However, because the practice is criminalised in Australia, it is possible that it is continuing within some families in secret.251

7.5.6 Sexual assault

Prevalence

In NSW in 2019, there were 11,009 recorded victims of sexual assault. Four in five victims were female and over a quarter (29%) of these women were between 15 and 19 years of age.252 Most assaults took place at a residential location (62%)
and less than 1% involved the use of a weapon.\textsuperscript{253} The rate of sexual assault recorded by NSW Police has been increasing with an average annual rate of 9.4% over the two years to June 2020.\textsuperscript{254}

Sexual assault offenders in NSW reached the highest recorded number in the time series (2,415) increasing by 3% since the previous year.\textsuperscript{255} Sexual assault and domestic violence are often inter-related. In 2018, 75% of all sexual assault victims knew the offender.\textsuperscript{256} The term “intimate partner sexual violence” is sometimes used to specifically describe the perpetration of sexual acts without consent:\textsuperscript{257} see also Domestic violence at 7.5.2.

Like domestic violence, sexual assault is under-reported. In 2018-2019 only 28% of persons who experienced sexual assault had their incident reported to the police.\textsuperscript{258}

**Sexual Assault Communications Privilege**

The sexual assault communications privilege is a statutory right contained in Ch 6 Pt 5 Div 2 of the *Criminal Procedure Act* 1986 (CPA). The privilege recognises that there is a public interest in preserving the confidentiality of counselling records of sexual assault victims and so seeks to protect the confidentiality of sexual assault victims’ confidential records so victims are not further harmed in court proceedings or discouraged from reporting crimes, seeking counselling or feeling forced to choose between the two. The privilege aims to limit the production and adduction of protected confidences made by, to or about a victim or alleged victim of a sexual assault.

A “protected confidence” means “a counselling communication that is made by, to or about a victim or alleged victim of a sexual assault offence” (CPA, s 296(1)). The privilege does not just apply to counselling records of the complainant in relation to the sexual assault, but to any counselling of a client who has been sexually assaulted, or counselling that may have occurred prior to the sexual assault.

The definition of a counsellor for the purposes of the sexual assault communications privilege is broad: someone who has “undertaken training or

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\textsuperscript{253} ibid.


\textsuperscript{256} ABS, above n 252.


study or has experience that is relevant to the process of counselling persons who have suffered harm” and they may be either paid or unpaid for that role (CPA, s 296(5)).

The range of records that can be protected by the privilege are diverse and include records from sexual assault services, health centres, drug and alcohol services, youth services, mental health services, records from the Department of Education and Communities, Department of Family and Communities and Justice Services, hospital records, doctors’ records, counsellors in private practice and others.

If a party is seeking to subpoena a protected confidence, they must be granted the court’s leave to do so.

### Points to consider

**Sexual assault communications privilege**

In sexual assault trials, there are special provisions associated with the production and admissibility of counselling communications involving victims, or alleged victims, of sexual assault. These are found in Ch 6, Pt 5, Div 2 of the *Criminal Procedure Act 1986*. See further *Sexual Assault Trials Handbook* [9-000]ff and *Criminal Trial Courts Bench Book* [1-895]ff.

### Whether to allow a victim impact statement to be read out in court

See *Crimes (Sentencing Procedure) Act*, Pt 3, Div 2; *Sentencing Bench Book*, “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) at [www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_victims/VS_victimsrightscharter2.aspx](http://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_victims/VS_victimsrightscharter2.aspx), accessed 5 February 2020;
- M Young, “The Charter of Victims Rights: supporting individuals in the criminal justice system” (2012) 24(6) *JOB* 43; and
Consent law reforms

In mid-2018, the NSWLRC was asked to undertake an enquiry to review and report on consent and knowledge of consent in relation to sexual assault offences with particular reference to s 61HE (formerly s 61HA) of the Crimes Act 1900. Draft proposals published in October 2019 included: suggested changes to the structure and language of provisions; the introduction of new interpretive principles; clarification of the meaning of “consent” and of the law on knowledge of consent; a list of circumstances in which a person “does not consent”; and new jury directions to avoid common misconceptions about consent and sexual offending causing injustice or misunderstanding. The directions are proposed to be available in trials involving offences to which s 61HE Crimes Act 1900 currently applies.\(^{259}\)

7.6 Women and criminal law

7.6.1 Female offenders

- Social and economic dependence, linked to violent and abusive relationships and addiction, often characterises the contact of women with the criminal justice system.\(^{260}\)

- Around 70 to 90% of women in custody have experienced violence and abuse and women become trapped in cycles of abuse and imprisonment.\(^{261}\)

- There is growing evidence that at least half of female perpetrated domestic violence occurs in circumstances where the women are the person most in need of protection, but have been misidentified as an aggressor.\(^{262}\)

- There are significantly fewer female offenders in NSW than male offenders: 23% of NSW offenders proceeded against by police in 2018–2019 were female.\(^{263}\)

- 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 consistent with previous years, in the period 2018–2019, only 28.5% of Legal Aid clients in NSW were female.\(^{264}\)

- First Nations women are over-represented in the NSW prison population: almost a third of women prisoners are First Nations, despite the First Nations people making up less than 3% of the Australian population.\(^{265}\)

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As at March 2020, there were 942 adult women in custody, 305 of whom were First Nations. As at June 2020, there were 831 adult women in custody, 266 of whom were First Nations.  

The gender breakdown of the most serious offences committed by inmates in full-time custody in NSW in 2018 was as follows:

- acts intended to cause injury: 2,863 men (22.6% of male prison population); 220 women (20.5% of female prison population)
- illicit drug offences: 2,161 men (17.1%); 203 women (19%)
- sexual assault and related offences: 1,793 men (14.1%); 31 women (2.9%)
- offences against justice procedures: 1,160 men (9.2%); 102 women (9.5%)
- fraud, deception and related offences: 271 men (2.1%); 96 women (9%)

The gender breakdown of security level for inmates in full-time custody (convicted and unconvicted) in NSW in 2018 was as follows:

- maximum security: 19.6% (570) male inmates, 1.6% (6) of female inmates
- medium security: 37.2% (1,118) male inmates, 9.6% (36) of female inmates
- minimum security: 40.3% (1,211) male inmates, 76.3% (287) of female inmates

In 2018, a higher percentage of women than men in full-time custody had sentences of less than two years.

Experience of mental health of women in custody:

A higher proportion of women (54.9%) had received some form of psychiatric care prior to their current period of incarceration than men (48.8%).

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266 BOCSAR, New South Wales Custody Statistics — Quarterly Update, March 2020, at 2.1.17 Adult Custody Profile (Total Female and Indigenous Female rows), and BOCSAR, New South Wales Custody Statistics — Quarterly Update, June 2020 at https://bocsar.nsw.gov.au/Publications/custody/NSW_Custody_Statistics_Jun2020.pdf, accessed 1 September 2020. Although the impact of COVID-19 on incarceration rates appears to have decreased numbers, the percentage of First nations women remains the same at 32%.


268 ibid at p 25.

269 ibid.

Women were more likely to report a diagnosis for all the mental disorders canvassed, with the exceptions of psychosis, ADD/ADHD, and developmental disorders.\textsuperscript{271}

A higher proportion of women reported:
- having experienced suicidal ideation (43.3\% of women, 29.6\% of men)
- having engaged in self-harming behaviour (24.6\% of women, 10.9\% of men).\textsuperscript{272}

A history of mental health diagnosis was acknowledged by almost half of participants, of which the most common reported were:
- depression (61.2\% of women, 36.4\% of men)
- anxiety (51\% of women, 23\% of men)
- drug abuse or dependence (30.6\% of women, 19.6\% of men).\textsuperscript{273}

**Childhood experiences of women in custody**\textsuperscript{274}

A higher proportion of women (23.9\% of the prison population) than men reported they had been placed in care at some time before the age of 16 (13.6\%). The median age that women reported being placed into care was age 10 years, compared with nine years for men.

Most women in custody have complex histories of sexual and physical violence starting in childhood.\textsuperscript{275} The rates of previous victimisation are highest for First Nations women, with some studies suggesting that up to 90\% of First Nations women are survivors of family and other violence.\textsuperscript{276}

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\textsuperscript{271} ibid, p 83.
\textsuperscript{272} ibid.
\textsuperscript{273} ibid at p 5.
\textsuperscript{274} ibid at p 24.
Education experiences of women in custody

- The same trend in school leaving appeared for men and women: very few had received no schooling at all but a majority had left at year 10 or earlier.
- The median number of high schools attended (3) was the same for men and women.
- A considerably higher proportion of men (42%) had been expelled than women (27.9%).

Employment status of women in custody in 2015 in 30 days prior to incarceration

A much higher proportion of men (48.2%) than women (26.1%) were employed in the 30 days prior to their incarceration. Of those, a higher proportion of employed men (69%) were in full-time employment than employed women (50.5%).

- Unemployed: 52.0% males, 38.8% females
- Unable to work: 20.7% males, 13.3% females.

7.6.2 Sentencing

7.6.2.1 Impact of imprisonment

Effect of a mother’s incarceration on children

The majority of women in custody are mothers. More women than men in custody were the primary carer of their children immediately prior to their incarceration, but the majority of women in custody did not have their children in their care at the time of their arrest.

While the children of male prisoners are usually cared for by their mother, research shows that the children of female prisoners are frequently cared for by temporary carers which impacts much more negatively on their children. It also means that contact between children and mothers or primary carers in custody is less frequent and more disrupted.

277 ibid at p 26.
278 ibid at p 27.
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 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.\textsuperscript{280}

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.\textsuperscript{281}

Parental incarceration can significantly impact children’s development, behaviour, education and risk of engagement with the child protection and/or criminal justice systems, particularly for First Nations children.\textsuperscript{282}

There is also evidence that women who participate in programs that allow their children to live with them in custody are less likely to return to prison than mothers who are separated from their children.\textsuperscript{283} The Corrective Services NSW Mothers and Children’s Program has a residential program called Jacaranda Cottages based at Emu Plains Correctional Centre, where children up to school age can live with their mothers or primary carers.\textsuperscript{284}


\textsuperscript{281} ibid at p 5.


\textsuperscript{283} University of Melbourne School of Health Sciences, Save the Children Australia Centre for Child Wellbeing and the Vanderbilt University Peabody Research Institute, Literature review of prison-based mothers and children program, p 3 at http://assets.justice.vic.gov.au/corrections/resources/b5ef4e77-10e5-4a27-bbfd-9a5c3e9ed899/mothersandchildren_programs.pdf, accessed 31 August 2020.

Points to consider

The potential relevance of evidence of the incarceration of an offender's mother, father or caregiver in sentencing proceedings includes an assessment of moral culpability; moderating the weight to be given to general deterrence; and determining the weight to be given to specific deterrence and protection of the community.

7.6.2.2 Alternatives to imprisonment

Information about diversionary facilities and programs and alternatives to incarceration for women in NSW is available on the Judicial Commission of NSW’s JIRS site under the Diversionary Programs menu at https://jirs.judcom.nsw.gov.au/menus/services_index.php. See also Sentencing Bench Book at [3-500]ff.

The most common penalties imposed on female offenders by the NSW Local Court were fines (36.2%), Conditional Release Orders without conviction (19.3%) and Community Correction Orders (17.2%), compared with male offenders; fines (39.4%), Conditional Release Orders without conviction (13.5%), and Community Correction Orders (18.3%).


286 See also the NSW Department for Communities & Justice website, Programs for Women at www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/programs/women-offenders/women-programs.aspx, accessed 2 September 2020.
Points to consider

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. See above at 7.2.1.1 for data on the gender pay gap.

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 may be appropriate (depending on the nature of the offence) to consider imposing a non-custodial sentence in respect of a woman who is the primary caregiver or pregnant. See Sentencing Bench Book at [3-500]ff “Community-based orders”.
7.7 Practical considerations

Some particular points to consider in relation to women in the context of legal proceedings include:

**Timing of proceedings, breaks and adjournments**

- **Caring responsibilities should be accommodated as much as possible.** Women often have significant responsibilities as carers, often for their children or elderly parents. It may be difficult to arrange childcare and/or respite care, making conventional court sitting hours extremely difficult. 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, allow a witness or juror to check that any necessary care arrangements are in place.

- **Consideration should always be given to accommodating pregnant women and new and breastfeeding mothers** in any proceedings, whether they are parties, witnesses or representatives. This may require sensitive listings, start and finish times, and breaks during the proceedings, which may sometimes result in a case going part-heard.

**Ensuring safe participation in proceedings**

- **Section 294B of the Criminal Procedure Act 1986 provides for evidence given via CCTV and other alternative arrangements** in respect of a “prescribed sexual offence”. The protections afforded to complainants extend to witnesses against whom an accused person is alleged to have committed a sexual offence: s 294D. See further Criminal Trial Courts Bench Book, Evidence given by alternative means at [1-360]ff, and Closed court, suppression and non-publication orders at [1-349].

- **In domestic violence proceedings**, there are special provisions in place to enable a recorded video or audio statement of a domestic violence complainant to be admissible as evidence in chief in criminal proceedings for domestic violence offences and in concurrent or related proceedings for applications for apprehended domestic violence orders under the Crimes (Domestic and Personal Violence) Act 2007. The recorded video or audio statement may also be used in committal and summary proceedings instead of a written statement. See further Local Court Bench Book at [8-000]ff.
Other considerations in proceedings, in your sentencing decision and in judgment writing

- **Avoid mutualising language.** For instance, avoid terms such as “violent relationship”, “stormy relationship”, “turbulent relationship”, “volatile relationship” or “rocky relationship” to describe relationships where there is a clear victim and an abuser. Avoid also naming violence as “conflict.” The effect of these terms is that the violence is never appropriately or clearly articulated, and the victim is blamed for remaining with the abuser. This also has a flow on effect in terms of the way society discusses domestic violence and condemns all women who do not leave.

- **Avoid gendered stereotypes** and do not resort to stereotyped moral judgments about the victim’s conduct. Rather, reinforce that violence against women is unacceptable, and reinforce the inadequacy or unacceptability of the offender’s explanations for their violence.

- Recognise that domestic violence is more than physical violence and includes other forms of abuse such as control, coercive behaviours, stalking, psychological violence, spiritual abuse, financial abuse and verbal abuse.\(^\text{287}\)

- **If circumstances require, in the context of directions to the jury, explain what needs to be taken into account in relation to the long-term abuse** of a woman by her partner and the defences of duress\(^\text{288}\) and/or self defence\(^\text{289}\) and/or the partial defence of extreme provocation. Note, for offences occurring on or after 13 June 2014, the *Crimes Amendment (Provocation) Act* 2014 repealed s 23 *Crimes Act* 1900 and substituted the partial defence of what is described as “extreme provocation”. This was introduced following the Legislative Council’s Select Committee on the Partial Defence of Provocation which “unanimously recommended retaining but significantly restricting...”

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287 E Buxton-Namisnyk and A Butler, above n 153 at p 56. See also E Buxton-Namisnyk and A Butler, “Judicial discourse versus domestic violence death review: an Australian case study” in A Howe and D Alaattinoglu (ed), *Contesting femicide: feminism and the power of law revisited*, Routledge, 2018, pp 99-105. The authors here highlight the disjuncture between the ways in which a dataset of 103 intimate partner femicides in NSW are discussed in sentencing remarks compared with the more inquisitorial investigation of those cases by the DvdRT. The authors find that while the harm of domestic violence is underestimated in judicial discourse, meaning that femicide is not identified as a “foreseeable fatal conclusion to a pattern of behaviour”, there is also evidence that this is changing.

288 See further *Criminal Trial Courts Bench Book* at [6-150] **Duress**.

289 ibid at [6-450].
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” (Second Reading Speech, Hansard, Legislative Council, 5 March 2014, p 27034).

- Women who are sexually assaulted react in many different ways—there is no standard way to react or behave. For example, a person who may “freeze” out of fear and is unable to communicate, does not consent.

- 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. You must intervene if the defendant or their legal representative tries to suggest that evidence presented in this way should be given less weight.

- You must, for example, disallow a question in cross-examination that is based on any false 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. Note that s 293, Criminal Procedure Act prohibits evidence about the complainant’s sexual reputation and sexual experience. Section 293 was designed to exclude, to a significant degree, cross-examination concerning a complainant’s sexual activity or experience with only limited exceptions. A five-judge bench decision of the NSW Court of Criminal Appeal held in Jackmain (a pseudonym)

290 See further Criminal Trial Courts Bench Book at [6-440].
292 Criminal Procedure Act, s 294B(7).
293 Criminal Procedure Act, s 293 and Evidence Act, s 41(1)(d).
$\nu R^{294}$ that s 293 is to be construed widely as it part of a suite of provisions enacted to protect complainants in sexual assault cases to the greatest extent possible.$^{294}$

- Take 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 7.2 above (socio-economic factors) and 7.6.2 (sentencing, alternatives).

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294 [2020] NSWCCA 150 at [15]. Note that a further appeal has been made to the High Court on this issue.

295 ibid at [24]; [233]; [239]; [246]–[247]. Other protective provisions include the requirement that proceedings must be held in camera when the complainant gives evidence (Criminal Procedure Act, s 291), the prohibition on an unrepresented accused cross-examining the complainant (s 294A), the right of the complainant to give evidence away from the court of trial (s 294B) and the right to a support person (s 294C). In civil proceedings, s 41, 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.
## 7.8 Further information or help

The following organisations can provide a range of crisis support, legal advice, information and expertise about women.

<table>
<thead>
<tr>
<th>Name of organisation and contact details</th>
<th>Description</th>
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| **Australian Institute of Family Studies (AIFS)**  
Level 4, 40 City Road, Southbank VIC 3000  
Ph: (03) 9214 7888  
Fax: (03) 9214 7839  
Web: aifs.gov.au | The AIFS is the Australian Government’s key research body in the area of family wellbeing. Particular research expertise areas include violence and families, and work and families. |
| **Australia’s National Research Organisation for Women’s Safety (ANROWS)**  
PO Box Q389, Queen Victoria Building NSW 1230  
Ph: (02) 8374 4000  
Email: enquiries@anrows.org.au  
Web: www.anrows.org.au | ANROWS is a not-for-profit independent national research organisation. It was established by the Commonwealth and all State and Territory governments as an initiative of Australia’s National Plan to Reduce Violence against Women and their Children 2010-2022. Its purpose is to produce, disseminate and assist in applying evidence for policy and practice addressing violence against women and their children. |
| **Department of Communities and Justice Crisis lines**  
Web: www.facs.nsw.gov.au/about/contact/helplines  
Domestic Violence Line: 1800 656 463  
Link2home Homelessness: 1800 152 152  
Child Protection Helpline: 13 2111  
Web: www.facs.nsw.gov.au/families/Protecting-kids/reporting-child-at-risk/should-i-call | Domestic Violence Line is the NSW telephone crisis counselling and referral service for women, including transgender women. Link2home is the statewide homelessness information and referral telephone service. The Child Protection Helpline is for any member of the community, including mandatory reporters, who suspects, on reasonable grounds, that a child or young person is at risk of significant harm. These crisis lines are open 24 hours, 7 days a week. |
| **Department of Communities and Justice Corrective Services NSW**  
GPO Box 31, Sydney NSW 2001  
Ph: (02) 8346 1333  
Fax: (02) 8346 1205  
Web: www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/programs/women-offenders/women-offenders.aspx | Corrective Services has a program for female offenders. Arrangements for female offenders include women’s centres; female-only units and female-designated beds within facilities; residential programs and facilities and transitional centres. |
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<th>Name of organisation and contact details</th>
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<td><strong>Department of Communities and Justice</strong>&lt;br&gt;<strong>LawAccess NSW</strong>&lt;br&gt;Law Access: 1300 888 529&lt;br&gt;Web: <a href="http://www.lawaccess.nsw.gov.au">www.lawaccess.nsw.gov.au</a></td>
<td>LawAccess NSW is a free government telephone service that provides legal information, advice and referrals for people who have a legal problem in NSW.&lt;br&gt;Open business hours: Monday to Friday, 9am to 5pm (excluding public holidays)</td>
</tr>
<tr>
<td><strong>Department of Communities and Justice</strong>&lt;br&gt;<strong>Victim Services</strong>&lt;br&gt;Victims Access Line (VAL): 1800 633 063&lt;br&gt;Aboriginal Contact Line: 1800 019 123&lt;br&gt;Web: <a href="http://www.victimsservices.justice.nsw.gov.au">www.victimsservices.justice.nsw.gov.au</a></td>
<td>VAL is the single-entry point for victims of crime in NSW to access services including: victims support service; approved counsellors; restitution; specialist victims support service; child sexual offence evidence program; redress; and families and friends of missing persons. The Aboriginal Contact Line is a confidential enquiry line for Aboriginal victims of crime who would like information on victims’ rights, how to access counselling and financial assistance.&lt;br&gt;Open business hours: Monday to Friday, 9am to 5pm (excluding public holidays)</td>
</tr>
<tr>
<td><strong>Family Violence Law Help</strong>&lt;br&gt;Web: familyviolencelaw.gov.au</td>
<td>The Family Violence Law Help website provides information for people affected by domestic and family violence. It is by National Legal Aid, which represents the directors of the eight state and territory legal aid commissions in Australia, and funded by the Commonwealth Attorney-General’s Department.</td>
</tr>
<tr>
<td><strong>Legal Aid NSW</strong>&lt;br&gt;Client referrals and enquiries: <a href="mailto:sacps@legalaid.nsw.gov.au">sacps@legalaid.nsw.gov.au</a></td>
<td>The Sexual Assault Communications Privilege Service (SACPS) is a victims’ legal service that helps protect the privacy of counselling notes and other confidential therapeutic records in criminal proceedings involving sexual offences. They support sexual assault victims to claim the privilege when their confidential records are subpoenaed.</td>
</tr>
<tr>
<td><strong>National Family Violence Prevention Legal Services (FVPLS)</strong>&lt;br&gt;National Family Violence Prevention Legal Services Secretariat&lt;br&gt;C/o Djirra, 292 Hoddle Street, Abbotsford VIC 3067&lt;br&gt;Ph: (03) 9244 3333&lt;br&gt;Email: <a href="mailto:secretariat@fvpls.org">secretariat@fvpls.org</a>&lt;br&gt;Web: <a href="http://www.nationalfvpls.org">www.nationalfvpls.org</a>&lt;br&gt;Individual locations:&lt;br&gt;Web: <a href="http://www.nationalfvpls.org/Where-We-Are.php">www.nationalfvpls.org/Where-We-Are.php</a>&lt;br&gt;Web: <a href="http://www.nationalfvpls.org/Contact-Us.php">www.nationalfvpls.org/Contact-Us.php</a></td>
<td>The FVPLS Program provides specialist, culturally safe legal services and supports to Aboriginal and Torres Strait Islander victim/survivors of family violence across Australia. There are 13 FVPLSs servicing 31 areas located in rural and remote locations around Australia.&lt;br&gt;&lt;br&gt;<strong>National Family Violence Prevention Legal Services Forum</strong> is the national peak body for First Nations survivors of family violence and sexual assault. It is comprised of the service organisations under the FVPLS Program.</td>
</tr>
<tr>
<td>Name of organisation and contact details</td>
<td>Description</td>
</tr>
<tr>
<td>----------------------------------------</td>
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</tbody>
</table>
| **National Sexual Assault, Family & Domestic Violence Counselling Line**  
1800 RESPECT (1800 737 732)  
Web: 1800respect.org.au | For any Australian who has experienced, or is at risk of, family and domestic violence and/or sexual assault.  
Open 24 hours, 7 days a week. |
| **Our Watch**  
GPO Box 24229, Melbourne VIC 3001  
Web: ourwatch.org.au | **Our Watch** states that it is a national leader in the primary prevention of violence against women and their children in Australia. **Change the story** is the national framework created by Our Watch for a consistent and integrated approach to preventing violence against women and their children in Australia. The website includes various tools, resources and publications. |
| **Rape & Domestic Violence Services Australia**  
NSW Rape Crisis: 1800 424 017  
Sexual Assault Counselling Australia: 1800 211 028  
Web: www.rape-dvservices.org.au | Telephone and online counselling services for anyone affected by sexual assault in NSW. Open 24 hours, 7 days a week. |
| **Redfern Legal Centre (RLC): Financial Abuse Legal Service NSW**  
73 Pitt Street, Redfern NSW 2016  
Ph: 0481 730 344  
Web: rlc.org.au/our-services/financial-abuse-legal-service | **RLC’s Financial Abuse Legal Service** provides free, confidential legal information and advice to people in intimate partner relationships who have experienced financial abuse. |
| **Wirringa Baiya Aboriginal Women’s Legal Centre**  
Addison Road Community Centre  
Building 13, 142 Addison Road, Marrickville NSW 2204  
PO Box 785 Marrickville NSW 2204  
Ph: (02) 9569 3847 or 1800 686 587  
Fax: (02) 9569 4210  
Email: info@wirringabaiya.org.au  
Web: www.wirringabaiya.org.au | **Wirringa Baiya** is a State-wide community legal centre for Aboriginal and Torres Strait Islander women, children and youth. It has a focus on issues relating to violence.  
See website for opening hours. |
### Women’s Legal Service NSW

PO Box 206, Lidcombe NSW 1825  
Ph: (02) 8745 6900 (Administration)  
Women’s Legal Advice Line:  
(02) 8745 6988 or 1800 801 501  
Domestic Violence Legal Advice Line:  
(02) 8745 6999 or 1800 810 784  
First Nations Women’s Legal Contact Line:  
(02) 8745 6977 or 1800 639 784  
Working Women’s Legal Service: online form  
Fax: (02) 9749 4433  
Email: reception@wlsnsw.org.au  
Web: wlsnsw.org.au

#### Women’s Legal Service NSW

Women’s Legal Service NSW is a community legal centre providing women across NSW with a range of free legal services. The **Women’s Legal Advice Line** provides free confidential legal information, advice and referrals for women with a focus on family law, domestic violence, parenting issues and sexual assault. The **Domestic Violence Legal Advice Line** provides free confidential legal information, advice and referrals for women with a focus on domestic violence and Apprehended Domestic Violence Orders. The **First Nations Women’s Legal Contact Line** provides legal help for Aboriginal and Torres Strait Islander women with family law, child protection and domestic and family violence. The **Working Women’s Legal Service** provides help in relation to sexual harassment and discrimination on grounds including: pregnancy; caring and/or family responsibilities; and, being a woman.

See website for opening hours.

A State-wide peak body for women’s specialist services advocating for women’s safety in the context of domestic and family violence through systemic reform and cultural change.

### Women’s Safety NSW

PO Box K278, Haymarket NSW 1240  
**Ph:** 0474 779 847  
(for media, policy practice and law reform)  
Web: www.womensssafetynsw.org.au

#### Women’s Safety NSW

A State-wide peak body for women’s specialist services advocating for women’s safety in the context of domestic and family violence through systemic reform and cultural change.
7.9 Further reading

**Articles**


**Books**


**Bench and bar books**


**Government reports**


**News reports**


**Research papers and reports**


Australia’s National Research Organisation for Women’s Safety, *Are we there yet? Australians’ attitudes towards violence against women & gender equality,*


K Webster et al, *Australians’ attitudes to violence against women and gender equality: findings from the 2017 national community attitudes towards violence against women Survey (NCAS)*, Research report 03/2018,


7.10 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.
Lesbians, gay men and bisexuals

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8.1 Some statistics

- 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.

- 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.

- Discrimination — Despite the existence of anti-discrimination protection under NSW anti-discrimination law since 1982, there is little doubt that lesbians, gay men and bisexuals are discriminated against more
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.5

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 amendments6 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.7

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.8 Discrimination has a negative effect on the health and productivity of bisexuals and statistics show that bisexuals are at increased risk of mental health problems, including depression, anxiety disorders, self-harm and suicide, due to discrimination and abuse.9 They are more likely to be diagnosed and treated for mental disorder or anxiety and have higher levels of psychological distress.10

- **Verbal abuse, intimidation and violence** — Lesbians, gay men, and bisexuals experience much greater levels of verbal abuse and violence than

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5 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act* 2013, assent 28 June 2013.
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. 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.

In the past, the use of the so-called “homosexual advance defence” and “homosexual panic defence” 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 of the deceased’s poisonous conduct) will not be a defence.
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.  

- **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. 15

  15.7% of lesbian, gay and bisexuals report current suicidal ideation (thoughts)\(^\text{16}\) with the average age of a first suicide attempt being 16 years.  

- **“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

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\(^{14}\) 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).


“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.\(^\text{18}\) 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.\(^\text{19}\) 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.\(^\text{20}\)

There are connections between early school leaving, poor educational attainment and homophobic bullying.\(^\text{21}\)

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.\(^\text{22}\)

- **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.\(^\text{23}\)


\(^{19}\) 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, 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.


- **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.\(^{24}\) 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%).\(^{25}\)

The vast majority of these children (86%) were in female same-sex couple families.\(^{26}\)

- **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.

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\(^{26}\) 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.27

- **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 18.28 In addition, men who sexually abuse boys aged under 18 “are not necessarily homosexual. They are sexually attracted to children”.29

- **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

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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>, 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.ac on.org.au/providerinfo/documents/SSDV_A4report.pdf, accessed 17 February 2011.


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”.30

- **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.31

- **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”32 — 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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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.
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.\footnote{Crimes Act 1900 (NSW), s 66C.}

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:\footnote{Schedule 1, Pts 1 and 2 of the Marriage Amendment (Definition and Religious Freedoms) Act 2017 commenced on 9 December 2017.} 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.\footnote{Schedule 1, Pt 1, cl 58, ibid.}

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
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.  

- 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.\footnote{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.} The Family Law Act (Cth) recognises same sex couples as parents.\footnote{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.}

- 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.\footnote{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.
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.40

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.41

- 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.**
  - **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. Note that “Battered Spouse Syndrome “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”.

  - **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 violence.” However, this defence has not been available in NSW.

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42 ibid.


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.
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.\footnote{Criminal Trial Courts Bench Book, [6-440].}

- **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.**\footnote{See n 45.}

- 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.
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* or *Local Courts Bench Book* (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, 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”. 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.

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### 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 fair and non-discriminatory to) the other party, the accused, the complainant and the public at large.

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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.

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.

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.

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.


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.glrl.org.au
**Convenors**
Email: convenors@glrl.org.au

**Inner City Legal Centre**
(Includes Gay and Lesbian Advice Service)
**Street Address:**
Basement, Kings Cross Library
50-52 Darlington 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
8.7 Further reading


Australian Centre for Lesbian and Gay Research, *The pink ceiling is too low — Workplace experiences of lesbians, gay men and transgendered people*, 1999.


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.


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.

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.
Gender diverse people and people born with diverse sex characteristics

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9.1 Introduction

“Intersex and transgender people are different, their needs are different, and the discrimination they face is different. Both of these communities often face discrimination and it is important our laws reflect their different needs.”

For this reason, this section separates some issues affecting gender diverse people, and those issues faced by people born with diverse sex characteristics (intersex people).

9.1.1 Explanations and terminology — 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”.

“Transsexual” is an older term for people whose gender identities don’t match the sex that was assigned at birth and who desire and/or seek to transition to bring their bodies into alignment with their gender identities. Some people find this term offensive, others do not. Unlike transgender, transsexual is not an umbrella term.

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1 Ms Roslyn Dundas, MLA, ACT Parliament, Media release following the amendment to the *Legislation Act 2001* (ACT).
2 The information in 9.1.1 is drawn from The Gender Centre’s website, at www.gendercentre.org.au, accessed 3 April 2019.
9.1.2 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 transition that a transgender or transsexual person has taken, or wants to undertake to affirm their gender.

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 a person who is transitioning.

However, those with legal recognition of their gender (see 9.5) may wish to be described as “female” or “male” instead of “male-to-female”, or “female-to-male”.

9.1.3 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.

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.\(^5\)

Some cross-dressers are gay or lesbian and some are heterosexual.

9.1.4 Other terms

Other terms used to describe transgender people (for example, “tranny” or “trannies”, “gender-bender”, “butch”, “drag queen”, “she-man”, “she-male”, “tomboy”) are extremely derogatory terms.

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\(^5\) Supreme Court of Queensland, *Equal Treatment Benchbook*, 2nd edn, p 188.
9.2 Transgender and transsexual people

9.2.1 Some information

- In *Tien-Lao and Tien-Lao* [2018] FamCA 953, the Family Court stated at [29]: “…it is now accepted that gender is not a binary construct: either male or female … The concept of gender is fluid and contemporary understanding of the fluidity means that gender differences are now better regarded as lying along a continuum, rather than presenting a polarising election between two stark alternatives.”

- **There are no reliable statistics on the number of NSW residents who have had issues with their gender identity.** For example, there are no reliable statistics on the number of NSW residents who:
  - Suffer gender dysphoria as a consequence of not identifying with their biological sex and therefore need to change their gender identity or who have changed their gender identity
  - Cross-dress but have no wish to change their gender identity.

- **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 transsexual people are male to female (MtF) or female to male (FtM).** 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.

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6 The information in 9.2 is drawn from The Gender Centre’s website, at www.gendercentre.org.au, accessed 3 April 2019.

7 “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-V)*, 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.

8 Although see n 7, above.
Some protections against discrimination on transgender grounds were introduced in 1996 under NSW anti-discrimination law. However people with, or perceived as having, gender issues are some of the most discriminated against and marginalised people in Australian society. Many people regard gender as a fixed matter. The majority of the transgender community also see their gender as a fixed matter. For the majority of transgender people, once their bodies conform to their own innate understanding of gender, they are then happy to live for all intents and purposes with 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 have to go through extensive and lengthy medical and administrative processes.

As a result:

- Approximately 10% of transgender people are unemployed — 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. 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.

- 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 less than optimal occupations.

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9 *Anti-Discrimination Act* 1977 (NSW), Pt 3A. 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).

10 See, for example, J Irwin, “The pink ceiling is too low — Workplace experiences of lesbians, gay men and transgender people”, Australian Centre For Lesbian and Gay Research, University of Sydney, 1999.

11 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.


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 LGBTQ relationships. However, transgender individuals may suffer from an even greater burden of intimate partner violence than gay or lesbian individuals. Transgender victims of intimate partner violence are more likely to experience threats or intimidation, harassment and police violence within intimate partner violence, including use of offensive pronouns such as “it” to refer to the transgender partner and ridicule regarding their body or appearance. Other aspects of LGBTQ violence include threatening to “out” the person as a method of control; not allowing the person to form relationships and seek support within the LGBTQ community and a feeling of embarrassment about the abuse leading to limited reporting to police or health professionals. 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.”

Many (although by no means all) did not achieve their full potential during their schooling — Same sex attracted, transgender 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. Gender diverse young people usually experience high levels of anxiety and depression. This has a profound impact on their well-being, attendance and educational outcomes.

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.

16 Supreme Court of Queensland, Equal Treatment Benchbook, 2005, Supreme Court of Queensland Library, Brisbane, p 252.
17 L Hillier et al, Writing themselves in 3, 2010, La Trobe University, Melbourne.
within this community. Gender diverse and transgender individuals 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.20

- **Compared to the general population, transgender people are more likely to have thoughts of suicide**, specifically those aged 18 and over are nearly 11 times more likely.21

- **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 9.6, below, this should be less likely to occur. Bullying and violence at work is a major issue for a significant number of LGBT people. A report found that 90% of those identifying as gender diverse had experienced some form of discriminatory behaviour in the workplace.22 Transgender people report that they commonly experience discrimination in the workplace, including in both gaining and maintaining employment.23

- In *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490 at [2], [46], the High Court recognised that there may be genders other than “male” and “female” and that the NSW BDM has the power to register someone’s sex as “non-specific”.

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19 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.


9.2.2 Common misconceptions regarding gender diversity

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 there is a biological basis for many people’s innate gender identity conflicting

24 The information in 9.2.2 is drawn from The Gender Centre’s website, at www.gendercentre.org.au, accessed 4 April 2019.
with their assigned gender. 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.

9.3 Intersex population

According to the UN and a range of human rights institutions, “intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies.”

“Intersex status” is defined separately from gender identity in s 4 of the Sex Discrimination Act 1984, recognising that intersex relates to an individual's biology. Intersexuality occurs in many species, including humans, and it represents a range of genetic, chromosomal and hormonal circumstances.

Intersex variations may be regarded by medicine and in the Family Court’s welfare jurisdiction as “sexual development disorders” or “disorders of sex development”, while the law may regard intersex people as “hermaphrodites” or members of a third sex, and so disregard the person’s lifelong legal sex. These contradictions are the subject of criticism and debate, with increasing attention by human rights institutions to the ways that intersex people are treated by medicine and law.

There are at least 40 different intersex variations. Intersex traits can be identified early in life, such as in infancy, but also at puberty, or later in life such as when trying to conceive a child, or prenatally through the use of genetic screening technologies. Relevant diagnostic classifications include androgen insensitivity syndrome, Klinefelter syndrome, congenital adrenal hyperplasia (with XX sex chromosomes), 5-alpha reductase deficiency, 17-beta hydroxysteroid dehydrogenase 3 deficiency, gonadal dysgenesis, and others. This means that intersex people have diverse sex classifications, gender identities and gender expressions.

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.

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29 Tien-Lao & Tien-Lao [2018] FamCA 953 at [53] and [55].
9.3.1 Common misconceptions regarding intersex persons

Intersex status is not about sexual orientation, nor gender identity. There are as diverse a range of sexual orientations and gender identities as non-intersex people. Intersex people have non-heteronormative bodies. Intersex bodies do not meet societal expectations. Cultural, familial and medical attitudes govern which sex is assigned. Surgical and other medical interventions are made to ensure people conform to those norms and to erase intersex differences.

In Australia, some people born with variations in sex characteristics may be subject to medical interventions without themselves providing informed consent. It has been reported that this may be done where there is no medical need — for example, it may take place to conform to ideas about what male and female bodies should look like.

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. Given that some people with genital ambiguity do not require medical treatment in order to be healthy and thrive, experts are developing guidelines regarding sex assignment at birth. Intersex activists and experts have spent at least 25 years disclosing and bringing to light strong evidence against unconsented and unnecessary medical interventions on intersex people. Long-term consequences of these interventions are not well documented.

The frequency of intersex in the NSW population is unknown but generally expected to be similar to that in other countries. Between 0.5 and 1.7% of people may have intersex traits. Numbers are vague, not only due to diagnostic

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32 ibid.
34 ibid.
challenges and the growing impact of genetic selection, but also stigma. Disclosed by a doctor to a parent or an individual, an “exact diagnosis is lacking in 10 to 80% of the cases”. A 2015 Australian study showed that people born with atypical sex characteristics (intersex) are both less well educated than the general population, and better educated. Bullying, developmental delays and medical interventions during puberty can adversely impact school participation. However, a high proportion of individuals succeed in higher education.

**Compared to the general population people with an intersex variation are more likely to have thoughts of suicide.** For many intersex people, there is also a negative impact on wellbeing as a result of having undergone medical interventions including a traumatising or unwanted surgery, beginning hormone therapies and feeling emotionally impacted and unlike themselves.

NSW anti-discrimination law includes intersex people under the transgender umbrella, providing the right to not be discriminated against in relation to employment and many types of service provision. It is important to reiterate that most intersex people identify with sex assigned at birth, while some do not. The important thing to remember is that intersex people are not the same

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38 ibid.


40 ibid.


42 ibid.

43 **Anti-Discrimination Act 1977 (NSW), Pt 3A.** 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).

as transgender or transsexual, but the term describes natural biological traits or variations that lie between “male” and “female”. Intersex is always congenital and can originate from genetic, chromosomal or hormonal variations.45

45 The gender identities of intersex people may match sexes assigned at birth, or may not. As with transgender persons, intersex persons can suffer “misgendering”, a failure to acknowledge the validity of individuals’ gender identities. Uniquely, intersex people also face failures to acknowledge the validity of sexes assigned at birth. See further M Carpenter, “The human rights of intersex people addressing harmful practise and rhetoric of change”, (2016) 24 (47) Reproductive Health Matters 74.
9.4 Legal gender identity

In NSW, transgender people (and intersex people if the person requires a change of gender) 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 of the Births, Deaths and Marriages Registration Act 1995). Alternatively, a person may apply to register a change of sex (s 32DA).

The landmark case of Kevin v Attorney-General (Cth)77 (“Re Kevin”) and the subsequent appeal proceedings before the Full Court of the Family Court of Australia48 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.49 These guidelines outline how sex and gender should be recognised and be reflected in personal records held by Australian Government departments and agencies.50

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46 Births, Deaths and Marriages Registration Act 1995 (NSW), ss 32B and 32DA.
9.5 **The possible impact of gender identity issues in court**

Unless appropriate account is taken of any gender identity needs of those attending court, gender diverse 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 9.7, following, provides additional information and practical guidance about ways of treating gender diverse people, so as to reduce the likelihood of these problems occurring.

The boxed areas provide the practical guidance.
9.6 Practical considerations

9.6.1 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 transgender 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 transgender person (whether transgender, transsexual 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) 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 9.6.3.
- 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.\(^\text{51}\)

9.6.2 Appearance and behaviour

Gender diverse people must be accorded the same dignity and respect as anyone else.

Points to consider:

- Be sensitive to the fact that a person’s style of dress may or may not accord with the general community’s view of how someone of

\(^{51}\) Supreme Court of Queensland, Equal Treatment Benchbook, 2005, p 251.
that gender or sex should dress. No discomfort should be shown with the person’s chosen dress style. A transgender 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 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.

- 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.52

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52 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.
9.6.3 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 transgender person — see 9.2.2 and 9.5.

- Do not use any form of discriminatory or discriminatory-sounding language — for example, do not state or imply, that a transgender or intersex person is not a real woman or man.\(^\text{53}\)

- 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.

9.6.4 The impact on any behaviour relevant to the matter(s) before the court

As indicated in 9.2, people who are transgender or transsexual have often had many more difficult issues to contend with than the average person.

Points to consider:

- Treat a transgender or transsexual 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”.\(^\text{54}\)

- Be careful not to let stereotyped views about gender diverse 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 9.2.2 and 9.3.1 appear to be unfairly behind any questioning.\(^\text{55}\)

\(^{53}\) ibid.

\(^{54}\) Crimes Act 1900 (NSW), s 61HA.

\(^{55}\) See above, n 51.
Ensure that any values and practices that appear to be related to a person’s transgender 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.56

Has the fact that the person is transgender, 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 9.6.5 and 9.6.6.

9.6.5 Directions to the jury — points to consider

As indicated at various points in 9.6, 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 gender diverse 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 Book57 or Local Courts Bench Book58 (as appropriate), and you should raise any such points with the parties’ legal representatives first.

56 ibid.
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 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”, and then direct them to the specific questions they must decide. 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 transgender 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. You may also need to be more specific about the particular gender or sexual identity aspects to which they need to pay attention.

### 9.6.6 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 transgender or intersex person affected by or referred to in your sentencing, decision and/or written judgment or decision.60

**Points to consider:**

- In order to ensure that any transgender or intersex person referred to or specifically affected by your sentencing, decision(s) and/or

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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 9.6 (including the points made in the box in 9.6.5) 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.\(^{61}\)

- Bear in mind that:
  - Research has demonstrated that a disproportionate number of transgender people experience poorer mental health outcomes, directly related to experiences of stigma, prejudice, discrimination and abuse: see *R v Evie Amati* [2019] NSWDC 3, where it was noted at [43]: “…there is evidence of a history of mental illness including depression, major depressive episode, substance induced depression, self-harm, suicidal and homicidal ideation and gender dysphoria, and thus the principles in the *DPP (Cth) v De La Rosa* (2010) 79 NSWLR 1 at [177] are applicable.”
  
  - Transgender people who are sent to prison may 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 9.1.1) 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 transgender people end up in solitary confinement for their own protection.

  - The current situation in NSW may be complicated by the application in a policy on transgender and intersex detainees of different standards for “recognised transgender persons” who have had a change in sex marker recognised by the State government, and

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\(^{61}\) *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.
who “must be treated as a member of the sex recorded on their identification documents” (Justice and Corrective Services NSW 2017). This status cannot apply to intersex persons who have no desire to change sex marker assigned at birth.

- **When considering incarceration**, sex appropriate accommodation must be taken into account. People with observable variations in sex characteristics may face harassment and stigma in places of detention, and may be vulnerable to harm: see also *R v Worrall* [2010] NSWSC 593.

- Many jurisdictions have introduced policies in relation to intersex people in detention within the context of policies in relation to transgender people. However, these have significant limitations. Policy frameworks predicated on matters of identity and self-identification are not likely to be sufficiently aware of the needs of people with intersex variations who use different language to terms associated with matters of identity, or the needs of people who have different self-conceptions, or no knowledge of their trait. Irrespective of an individual’s terminological preferences and awareness of their characteristics, individuals may still be vulnerable to harm due to their physical characteristics.

- **Many transgender and intersex people live in poverty** — so a specific level of fine for any such transgender or intersex person will often mean considerably more than the same level of fine for someone who does not live in poverty.

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63 ibid.
64 ibid.
9.7 **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

**Inner City Legal Centre**  
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

An intersex non-government organisation, whose work focuses on intersex human rights, bodily autonomy and self-determination, and on evidence-based, patient-directed healthcare:

**Intersex Human Rights Australia Ltd (IHRA)**  
PO Box 46  
Newtown NSW 2042  
email: info@ihra.org.au
9.8 Further reading


9.9 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.
Section 10

Self-represented parties

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10.1 Some information

- **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.\(^1\) Note, s 294A of the *Criminal Procedure Act* 1986 (NSW) prevents a self-represented person who is the accused in a prescribed sexual offence proceeding, or where a witness in the proceedings is vulnerable (s 306ZL(2)) from personally cross-examining the complainant.\(^3\)

- **Duty of the court** — The court has a duty, in both civil and criminal matters, 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.\(^5\)

- **Numbers of self-represented parties** — Data about the number of self-represented parties (SRP) is collected inconsistently across jurisdictions. In the 2009 Access to Justice Report,\(^6\) the committee urged that the federal, State and territory courts report publicly on the numbers of SRPs and their matters.\(^7\) Since the NSW Court of Appeal commenced keeping statistics on representation status in 2014, an average of about 20% of matters commenced in that court have at least one party who is unrepresented, or about seven a month.\(^8\) A SRP 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\(^9\)

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2 See ss 36(1) and 37(2) *Criminal Procedure Act* 1986 (NSW) and UCPR r 7.1.
3 See *Vexatious Proceedings Act* 2008 (NSW), s 8.
4 If the self-represented person is the accused in sexual offence proceedings, see n 42.
7 ibid, recommendation 17.
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

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 have an impact, or start to impact, on their emotional and/or physical health.
Comprehensive data is lacking but it has been noted that outcomes for SRPs are not as good as for those with representation.\textsuperscript{10} For example, a SRP may lose the opportunity for diversion and early intervention programs for first offenders and young people.\textsuperscript{11}

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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.\(^{12}\)

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).

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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.
10.3 Practical considerations

10.3.1 Before the court appearance

Many of the difficulties self-represented parties (SRP) 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 SRP 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 the SRP is not on the list of vexatious litigants.

- Check whether there is any possibility in a civil matter 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 the SRP knows 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 the SRP understands that if the court makes orders at a directions hearing, they know what they are required to do and the timetable. In Nobarani v Mariconte (2018) 92 ALJR 806 the High Court allowed an appeal and remitted the matter for a new trial as the self-represented appellant was denied procedural fairness due to the way the judge had conducted the directions hearing. The trial judge made no directions for the taking of any steps, or filing or service of any documents by the appellant. The appellant was therefore denied the opportunity to cross-examine a significant witness, locate another witness and call an expert witness.

- Check whether the SRP has exhausted the possibility of obtaining legal representation — via legal aid, a community legal centre, a pro

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14 See Vexatious Proceedings Act, Pt 2.
bono scheme, or a lawyer (and that they know how to access these). 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.

- In a criminal trial, consider adjourning the matter for a few days to give the accused the opportunity to find new lawyers, apply for legal aid or reconsider his or her position about his or her lawyers. If after every avenue has been explored and the accused remains unrepresented, and the accused is indigent, you should consider whether the trial is likely to be unfair if the accused is forced to proceed unrepresented: *Dietrich v The Queen* (1992) 177 CLR 292. Representation of the accused by competent counsel is not only a requirement of a fair trial at law, but is also essential to efficiency: *R v Munshizada; R v Danishyar; R v Baines (No 2)* [2019] NSWSC 834 at [40].

- Refer the SRP 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 information booklet “Representing yourself in Civil proceedings in the Supreme Court of NSW”, the State Library’s Legal Information Access Centre — at: <www.legalanswers.sl.nsw.gov.au/advice/alpha_advice_list.html> and LawAccess — at: <www.lawaccess.nsw.gov.au>.

- If appropriate, provide information about applying to use a “McKenzie friend” 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. Leave is required for a lay advocate to appear on behalf of an unrepresented person.

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16 See also Judicial Commission, *Criminal Trial Courts Bench Book*, “Self-represented accused” at [1-810].


18 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.

of an unrepresented party and will only be granted in exceptional circumstances. 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 appear should be exercised in criminal proceedings. An application seeking leave for a lay advocate to appear should be made before the hearing. See also “Unrepresented litigants and lay advisors” at [1-0800] in the Civil Trials Bench Book, Judicial Commission of NSW, Sydney.

- In the Local Court, refer the SRP to the Deputy Registrar. 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.

- 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. You may need to ask the SRP what steps they have taken to ensure any witnesses they intend to call attend court.

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.

An accused in a criminal trial should be provided with a daily transcript. An order form and fee waiver form should be organised through the Court Registry prior to the trial.

10.3.2 At the start of 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. The duty to ensure a fair trial or proceeding to an unrepresented criminal defendant is greater than that owed to a civil litigant.23

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. If an accused in a criminal trial is determined to appear for themselves, you should ensure that they have all of the material upon which the Crown relies before the trial begins.

If the accused in a trial wishes to rely on an alibi, an enquiry should be made as to whether an alibi notice has been served.24

Note that the Criminal Trial Courts Bench Book25 provides specific directions in relation to what to say at the start of criminal proceedings when the accused person is self-represented.26

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.

23 See Jeray v Blue Mountains City Council (No 2) [2010] NSWCA 367 at [56].
24 Section 150, Criminal Procedure Act 1986.
Section 10 — Self-represented parties

- 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.

Where should the unrepresented person sit in a criminal trial? Unless there are security concerns, the unrepresented person in a criminal matter would normally sit at the bar table so that their unrepresented status is not given undue prominence.27

10.3.3 The trial judge’s role28

- Your role — that is, to make sure everyone is able to present their evidence as fairly and effectively as possible, to stay neutral and not favour either side, and then to decide the case.29

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28 An excellent example of the trial judges role is set out in L Flannery, ibid at [62]–[73].
29 “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].
You might also wish to explain that you may well ask more questions than you do usually in 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 the SRP has 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 the SRP has their witnesses and any other documentary evidence there.

- That if the SRP wishes 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 SRP’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.

Ensure that the SRP has understood the proceedings and had adequate opportunity to “vindicate” his or her rights. This may require
you to explain the consequences of the SRP making an application for an adjourment or recusal, for example, in civil proceedings, in terms of costs and potential future proceedings.\footnote{Jeray v Blue Mountains City Council (No 2) [2010] NSWCA 367. See also Downes v Maxwell Richard Rhys & Co Pty Ltd (in liq) (2014) 46 VR 283, in which procedural fairness was not afforded due to the trial judge’s failure to warn the unrepresented parties that their failure to give evidence could give rise to a Jones v Dunkel inference.}

\textbf{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 10.3.4.4.

\section*{10.3.4 As the court proceedings progress}

\subsection*{10.3.4.1 The self-represented party’s evidence}

It is important that the SRP 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.\footnote{as occurred in JE v Secretary, Department of FaCS [2019] NSWCA 162, where the NSW Court of Appeal held at [64] the unrepresented appellant failed to identify any error in the trial judge’s decision to dismiss her damages proceedings against the respondent.}

In civil proceedings, s 56(3) of the \textit{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.\footnote{Serobian v Commonwealth Bank of Australia [2010] NSWCA 181 at [41], [42].}
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.\textsuperscript{33} 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.\textsuperscript{34} A number of cases have also looked at the bounds of judicial intervention in both criminal and civil cases, see \textit{R v Zorad},\textsuperscript{35} \textit{R v Mercer} \textsuperscript{36}, \textit{Burwood Municipal Council v Harvey}\textsuperscript{37} and \textit{Minogue v Human Rights and Equal Opportunity Commission}.\textsuperscript{38}

\begin{quote}
\textbf{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), \textbf{and in a neutrally informative (as opposed to advisory or leading) manner, you may need to:}

- Explain to the SRP 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
\end{quote}

\textsuperscript{33} See n 35.
\textsuperscript{35} (1990) 19 NSWLR 91.
\textsuperscript{36} (1993) 67 A Crim R 91.
\textsuperscript{37} (1995) 86 LGERA 389.
\textsuperscript{38} (1999) 166 ALR 129.
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 the SRP gives their own evidence in a way that follows procedural 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. 39 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 SRP 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. 40

- **Once cross-examination has finished, ask the SRP 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 SRP and the other party can understand your motive and your neutrality.

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39 Section 135(b) of the Evidence Act 1995 (NSW) provides a general discretion to exclude evidence that is misleading or confusing. See also case management in s 69 of the Criminal Procedure Act 1986, and r 2.3(n) of the Uniform Civil Procedure Rules 2005.

40 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.
If the SRP 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 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 SRP 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.41

10.3.4.2 Testing the other party’s evidence

A SRP 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 competently 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 SRP is not picking up on an aspect of the other party’s evidence that requires testing.
- The SRP 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 SRP.

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41 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.
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 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 SRP 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 SRP 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 SRP 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.42

- 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 unfair43— 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.

- Use of intermediary — if the party is a self-represented accused in a prescribed sexual offence proceeding, an intermediary should be appointed if the complainant is to be cross examined.44

- 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.

42 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, Sydney, “Self-represented Accused” at [1-800]–[1-890], accessed 11 September 2019. 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.

43 See, n 36.

44 Criminal Procedure Act 1986, s 294A.
10.3.4.3 Final submissions

There is a discretionary practice that the Crown not give a closing address in cases where an accused is unrepresented. If, however, you do decide to exercise your discretion to allow the Crown to address, you should explain the situation to the accused and read to him or her the relevant parts of the Criminal Trial Courts Bench Book at [1-820] so that they understand they can address, what they can say, what they cannot say.

A SRP 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.

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 SRP’s case, and that the SRP 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

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45 See further MS v R [2017] NSWCCA 252 at [68].
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.

10.3.4.4 Guidance to the jury — points to consider

It is important that you ensure that the jury does not allow any concerns 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 or Local Courts Bench Book (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 First Nations, from a culturally or linguistically diverse background, has a particular religious affiliation, is a person with a disability, or who is lesbian, gay, bisexual, transgender or intersex (if relevant).

46 above, n 25.
47 above, n 26.
10.4 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 SRP and any represented party to be so.\(^4\)

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 SRP, 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 SRP is a vexatious litigant.\(^5\)
- Ensure that the SRP 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,\(^6\) 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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\(^5\) *Vexatious Proceedings Act*, s 8(6).

\(^6\) 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.
10.5 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**, 2019, Sydney. This brochure is published on JIRS under the “General Resources” menu on the left-hand bar.

- **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/Pages/sco2_facilitiessupport/probono.aspx, accessed 26 August 2019.
  
  - 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, accessed 26 August 2019. 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.
  

- **Schemes of Professional Bodies:**
  - **Law Society of New South Wales Pro Bono Scheme** — The Law Society’s Pro Bono Scheme can put eligible members in contact with law firms willing to provide their legal services for free or for reduced fees. This assistance can include legal advice, help with preparing documentation and representation in court.

  **Pro Bono Solicitor — Law Society of New South Wales**
  170 Phillip Street
  Sydney NSW 2000
  Ph: (02) 9296 0333
  Fax: (02) 9231 5809
**New South Wales Bar Association Legal Assistance Referral Scheme** — The NSW Bar Association has a Legal Assistance Referral Scheme. When deciding whether to provide assistance, the NSW Bar Association considers a number of factors including the applicant’s financial resources, whether they have been refused legal aid or assistance elsewhere and the prospects of success of the case. Matters relating to cases such as personal injury, medical negligence, a neighbourhood dispute or an apprehended violence matter (AVO) are not included in the scheme.

**The New South Wales Bar Association**

Selbourne Chambers  
B/174 Phillip Street  
Sydney NSW 2000  
Ph: (02) 9232 4055  
Fax: (02) 9221 1149  
www.nswbar.asn.au

**The New South Wales Bar Association Duty Barrister Scheme** — The Duty Barrister Scheme is an initiative of the NSW Bar Association. They have been introduced to particular Local Courts to help people who cannot afford a lawyer, who do not qualify for legal aid and who have a matter before the court on the day. The duty barrister can provide legal advice and argue the case in court.

**The New South Wales Bar Association**

Selbourne Chambers  
B/174 Phillip Street  
Sydney NSW 2000  
Ph: (02) 9232 4055  
Fax: (02) 9221 1149  
Email: enquiries@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, accessed 11 September 2019.

**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, accessed 26 August 2019.

**Legal Aid Commission of NSW**

323 Castlereagh Street  
Sydney NSW 2000  
Ph: (02) 9219 5000  

- **Community Legal Centres** — Community Legal Centres are independent non-government organisations that provide free legal advice, information and referrals on a range of issues. Of the nearly 40 community legal centres in NSW, some provide generalist assistance and some provide specialist advice (see www.clcnsw.org.au for their locations).

**Community Legal Centres NSW**

Suite 805, Level 8  
28 Foveaux Street  
Surry Hills NSW 2010  
Ph: 02 9212 7333  
Fax: 02 9212 7332  
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10.6 Further reading


M Castles, “Barriers to unbundled legal services in Australia: canvassing reforms to better manage self-represented litigants in courts and in practice”, (2016) 25 JJA 237.


10.7 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 13 contains information about how to send us your feedback.
Older people

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Introduction

The concept of “older person” is not statutorily defined, unlike a “child” who is legally defined by age criteria.\(^1\) For the purposes of this chapter, we have used Australian Bureau of Statistics (ABS) taxonomy, which groups people into population age cohorts, and differentiates between “15–64”, “65 years and over” and “85 years and over”. People over 65 are generally classified as “older” for ABS purposes.\(^2\) Very old persons are 85 years and older. All references are to chronological age, rather than reflecting an individual’s physiological and functional state.\(^3\)

The life expectancy for Aboriginal people is about 20 years less than the rest of the Australian population. Aboriginal Australians account for only one-half of one per cent (0.5%) of people 65 years and older.\(^4\) Ageing can occur at a younger age and be more debilitating.\(^5\)

Older people are therefore an extremely diverse group, as this term often refers to people up to 25 years apart in age. Differences in education, health, geographic isolation, mobility and cultural and linguistic background can make a vast difference between those at 65 and those at 85. In many cases, ageing issues also reflect those faced by people with disabilities 5.1 and age can exacerbate issues faced by those with ethnic or migrant backgrounds Chapter 3.1 and Aboriginal people Chapter 2.1.

The Commonwealth government has identified demographic trends which indicate that between 2010 and 2050, the 65 to 85 year cohort is expected to double and the 85 plus cohort is expected to more than quadruple from 0.4 million people today to 1.8 million people in 2050.\(^6\)

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1 Legally, a “child” is generally defined as a person under the age of 18 years: see 6.1.1.
2 This is also the age reference for “older” used by the Australian Institute of Health and Welfare (AIHW) and incorporated into the Terms of Reference for House of Representatives Standing Committee on Legal and Constitutional Affairs: Parliament of Australia, Older People and the Law, Terms of Reference, 2007. In an earlier Australian Law Reform Commission Inquiry into barriers to work for older Australians, the Terms of Reference defined “older persons” as anyone over the age of 45 years, which is consistent with the ABS definition of “mature age worker”; ALRC, Access all ages — older workers and Commonwealth laws, Report No 120, 2013.
3 For a discussion on the differences between chronological and physiological differences, see for example, H Foo et al, “The many ages of man — diverse approaches to assessing ageing-related biological and psychological measures and their relationship to chronological age” (2019) 32(2) Current Opinion in Psychiatry 130.
It is important not to make assumptions about the capacity of an older person based on their age. Ageist attitudes, in other words, stereotyping someone on the basis of their age, is regarded as one of the main contributing factors to various forms of exploitation, abuse and neglect of some older people.\(^7\)

Older people are not a homogenous group and therefore it is important not to stereotype an “older” person as frail and feeble, or lacking mental capacity.

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11.1 Some information

11.1.1 Population

- In 2016, 16% of the population in NSW, or 1,217,261 people, were aged 65 and older (out of total population of 7,739,274). This reflects national trends where 15% (3.7 million) Australians were aged 65 and over. This proportion is projected to grow steadily over the coming decades.\(^8\)

- In NSW, 537,240 people were 75 and older and 166,065 people were 85 and older. The proportion of people in NSW aged 75 and older is more than the 0-4 age group (500,970) and those over 65 years (1,217,261) nearly outnumber those in the 0-14 age group (1,452,958).\(^9\) Nationally, 56% of older people are between the ages of 65 and 74.\(^10\)

- Demographic projections show that by 2020 approximately 20% of NSW population will be aged over 65.\(^11\)

- In terms of cultural diversity, NSW was the most popular State or Territory to live in 2016 (2,072,454 people or 34% of the overseas-born population).\(^12\)

- In NSW in the year ending 30 June 2018, the percentage of people aged over 85 years increased by 1.9%, compared to the national average of 2.2%.\(^13\) The proportion of Aboriginal and Torres Strait Islander people aged 65+ was considerably smaller than for non-Aboriginal people (4.8% compared to 16%).\(^14\)

- Compared to other States and Territories, NSW has received a relatively small increase in people aged 85 years and over (1.9%), compared to the Northern Territory (6.1%), WA (3.6%) and Victoria (2.6%).\(^15\)

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8 AIHW, *Older Australia at a glance*, above n 4.


10 ibid.


14 ibid.

15 ibid.
11.1.2 Education

The level of education often impacts a person’s ability to understand and access the legal system. This includes their ability to access technology (see further 11.4.1 Barriers — Access to justice).

- In NSW in 1925, there were only 34 high schools, increasing to 184 by 1960 and 397 high schools by 2005.\(^{16}\)
- This helps explain national trends that those in the 65–74 years age group were more likely to have a non-school qualification than those over 85 (46% and 27% respectively) and were also more likely to have completed year 12 equivalency (37% and 25%).\(^ {17}\)
- Whether they were in the work force or not, older people with higher levels of education were more likely to have a higher personal median income. Older people with a non-school qualification were twice as likely to still be in the labour force as those without (20% and 9.9% respectively).\(^ {18}\)

11.1.3 Employment

- Australians are increasingly working to older ages. The work status of those aged over 50 in NSW varies significantly between age cohorts. Two-thirds (64%) of those aged 50–60 are currently employed, whereas over half (61%) of 61–69 year olds are retired. Of those aged 70–79, 90% are retired and 8% are working.\(^ {19}\)
- More than half of all employed older people in NSW worked part-time.\(^ {20}\) No longer wanting to work is the most common reason those over 60 have chosen to retire, particularly among retirees in their 70s (48%). Declining physical capability was also an issue for a quarter of 61-69 and 70-79 year olds (24% and 23% respectively). Almost one in five (17%) of those who are still working in their 70s do not intend to retire, significantly more than the other two age cohorts.\(^ {21}\)

\(^{17}\) ibid.
\(^{20}\) ibid.
Ageism in the workplace presents a greater fear among those in their 50s and 60s. In NSW, over one-third (37%) of workers in their 50s think the attitudes of their employers towards old people will prevent them from working as long as they would like to. In comparison, few (10%) in their 70s believe this to be a likely scenario.\(^22\)

27% of those aged over 50 years experienced a form of age discrimination in the past two years. Of this percentage, 33% were completely discouraged from looking for employment as a result of the discrimination.\(^23\)

### 11.1.3.1 Volunteering and unpaid work

- In NSW, two in five (39%) older people participate in volunteering activities, with those in their 70s being significantly more likely to do so.\(^24\)
- Over half (51%) are volunteering for welfare and community organisations. Motivating factors are to do something worthwhile (76%), to help others and the community (74%) and personal satisfaction (69%).\(^25\)
- Nearly one in five (19%) older people were engaged in unpaid childcare for a child (under 15 years) who was not their own. Between 2006 and 2016, women aged 65–74 years experienced the greatest increase in this area (18% to 22%).\(^26\)
- Grandparents provided care for 18% of all children aged 0-11 years.\(^27\)

### 11.1.4 Income

A person’s earning capacity generally increases with age, however falls sharply after 64 years of age.

- In NSW, the work status of those aged over 50 varies significantly between age cohorts. Two thirds (64%) of those in their 50s are currently employed, whereas a similar proportion (63%) of those in their 70s are retired. Half (51%) of those in their 60s are retired and one third (32%) are working.\(^28\)
- Access to superannuation to supplement the age pension has become increasingly prevalent. In 1997, 12% of retired Australians aged 45 and over stated that superannuation was their main source of income, compared

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22 ibid, p 18.
24 NSW Dept of Family and Community Services, above n 19, p 6.
25 ibid.
28 NSW Dept of Family and Community Services, above n 19.
with 25% in 2016–17. However, as compulsory superannuation only began in the 1980s, older people have not yet fully benefited from the scheme: the proportion of people aged 70 and over in 2007 who had never had superannuation coverage was 41% for males and 75% for females.

- 96% of low and 88% of middle wealth retiree households (households where the reference person was 65+ and not in the labour force) source their income from government pensions and allowances. However, 66% of high wealth retiree households receive income from other sources (ie superannuation).

11.1.5 Health

Life expectancy for older people is increasing, however with this has come an increase in the expected years of life with medical issues or a disability.

- The leading cause of death for all older Australians nationally was coronary heart disease — 51,600 deaths between 2014 and 2016, followed by dementia and Alzheimer’s disease (37,400 deaths), cerebrovascular disease (29,800), chronic obstructive pulmonary disease (19,500) and lung cancer (19,200). Dementia and Alzheimer’s disease featured as the second leading cause of death among people aged 75 and older.

- Long-term health conditions most frequently reported were eyesight problems (81%), arthritis (48%), hypertension (41%) other circulatory diseases (33%) and hearing problems (33%).

- 63% of older people in NSW rate their mental health as very healthy, although only 32% rate their physical health the same.

- Dementia affects 10% of people in NSW aged over 65 years and 31% of people aged over 85 years.

- Studies consistently show that people with dementia have an increased risk of death due to complications and causes directly or indirectly related to dementia. Between 2014–2016, 10% of deaths of people in NSW aged 65 and over were due to dementia, with the number of deaths increasing with age, although there was a decline in deaths due to dementia for people aged 95 years and over.

29 ibid.
32 ibid.
33 NSW Dept of Family and Community Services, above n 19, at p 5.
35 ibid.
In NSW, the highest age-specific suicide rate is in men aged 85 years or older (37.6 per 100,000). Comparatively this rate is significantly lower for women aged 85 and older (6.5 per 100,000) and men aged 65-69 (16.4 per 100,000).  

Given the older prison population, and the fact that there is a 10-year differential between overall health of prisoners and that of the general population, older prisoners are more likely to experience premature ageing disease and disability, including dementia. There are other risk factors, both before and after incarceration that increase their risk, such as post-traumatic stress disorder, drug and alcohol abuse, low socio-economic status and inadequate access to health care.

A number of medical and socio-economic conditions may impact on the cognitive ability of an older person, and may be permanent or temporary. Reference should be made to 5.2.5 — Making adjustments for people with disabilities.

Health, income and accommodation can be linked. The sometimes precarious nature of renting in the private rental market, where no social housing is available, has more profound negative impacts on the health and quality of life of older people than the general population. This is due, in part, to the relatively large amount of time older people spend inside their home. It is especially so for those with a disability (including a disability such as dementia) or other health and mobility issues. Older people have a greater likelihood of ill health, disability, widowhood and living alone, in addition to low incomes. See further 11.1.8 — Accommodation and living arrangements.

When referring to an older person with a disability, always remember that they are people first. It is important to determine whether that person requires any type of adjustment to be made to accommodate them.

11.1.6 Care and assistance

- As people age, they are more likely to require assistance with everyday activities such as household chores, transport and health care tasks, although the proportion of older people with a disability decreased from 2012 to 2015. In NSW in 2015, there were a total of 857,200 carers (12% of population). Nationally, nearly 1 in 5 (18.4%) of older people were carers in 2015. Of this percentage, 37% were a primary carer; 86% of older primary carers were caring for a spouse or partner. 39

- Over the next 30 years, in NSW the number of carers is projected to rise by 57% while the number of aged people needing care will rise by 160%.40

- The proportion of older people who use aged care (which includes home support, home care packages and residential care) increases markedly as they age. Around 1.3% of 70-year-olds use home care or residential care; this compares to around 15% of 85-year-olds and 50% of 95-year-olds. These services cost around $20 billion each year.41 The current expected wait times for approved home care packages is generally 12+ months.42

- In 2009, 25.6% of older people fell at least once in the last 12 months.43

- Alongside population growth, in NSW the number of older people with a diagnosable mental illness is projected to increase from approximately 190,000 in 2016 to 260,000 in 2026.44

- As of 2016, 87% of older people living in non-private dwellings reported a need for assistance (ie for mobility, communication or self-care).45

- Older people received 79% of all Home and Community Care Services in NSW in 2002–2003 (commonly domestic assistance, transport, home care service assessment and home meal services).46

- Participation in unpaid carer roles affects an older person’s capacity to remain in paid work. As of 2015, 41.5% of older primary carers in NSW spent an

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39 ABS, Disability, ageing and carers, Australia: summary of findings, 2015, cat no 4430.0.
41 D Tune, Legislated review of aged care 2017, Department of Health, 2017, pp 7 and 23. This review was undertaken to determine the effect of the Australian Government’s Aged Care (Living Longer Living Better) Act 2013.
45 ABS, Disability, ageing and carers, above n 39.
46 ABS, Older people, NSW, above n 20.
average of 40 hours or more per week in a caring role. One in eight older carers who were not in the labour force reported the main reason for leaving work was to commence a caring role.\(^4^7\)

### 11.1.7 Grandparents

*Grandparents as parents — Child Care and Protection and the Family Law Act*

- In 2017, 17,387 children in NSW were in formal out-of-home care (nationally 45,756). Of those, 51% were in relative/kinship care. The majority of children in relative/kinship care at 30 June 2017 were placed with grandparents (52%), 20% were placed with an aunt/uncle, and 17% in a non-familial relationship.\(^4^8\)

- Of these numbers, 95% of children in out-of-home care were also on care and protection orders. It is important to note that these statistics relate only to formal kinship care, and do not include unofficial kinship care where the care of children has been arranged by the family without involvement of child protection or welfare authorities. Maternal grandmothers are the most frequent caregivers of children in out-of-home care.\(^4^9\)

- At 30 June 2017, 6,766 Aboriginal children in NSW (out of 17,387) were in out-of-home care (11 times the rate for non-Aboriginal children). Across Australia, in 2017–18, 65% of Aboriginal children were placed with relatives/kin, with other Aboriginal caregivers, or in Aboriginal residential care. These informal arrangements will have multiple effects on the grandparent caregiver, including financial, physical and mental health.\(^5^0\)

- All these figures exclude “baby-sitting/child-care” arrangements undertaken by grandparents for their working children.

- There are no current statistics on the number of parenting orders under the *Family Law Act* 1975 that have been dealt with by the Family Court. Available cases suggest that it is unusual to see intervention by grandparents and circumstances are generally confined to those cases which see grandparents fulfilling roles which parental absence (such as death of a parent or incarceration), illness or dysfunction.\(^5^1\) In parenting orders, grandparents will

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\(^{47}\) ibid.  
have reasonable prospects of success only when they are opposing everyone else and there are cogent, child-focused reasons referenced to in s 60B(2) of the *Family Law Act* for doing so.\(^{52}\)

- Many grandparents-as-parents in informal arrangements may need to cease their employment to look after their grandchildren or use their retirement savings to provide for their grandchildren.\(^{53}\)

### 11.1.8 Accommodation and living arrangements

- In NSW, the majority (71\%) of individuals in their 60s currently live in a detached freestanding house. Nearly a fifth (19\%) rent their home, and 17\% still have a mortgage. The vast majority (80\%) of 70-79 year olds live in a detached house. A similar proportion (84\%) own their homes outright, with only 7\% renting. Around three-quarters (76\%) of those over 80 live in a detached (freestanding) house. The majority (86\%) own their property outright and almost two-thirds (63\%) have been living in their current property for more than 20 years. Nearly one in 10 (9\%) are residing in a retirement village.\(^{54}\)

- Of the 60–79 year cohort in NSW, 24\% are interested in living in a retirement village in the future. Nearly one in 10 (9\%) of those aged over 80 currently reside in a retirement village.\(^{55}\)

- The quantity of public, community and Aboriginal housing is not keeping pace with increases in population. In NSW during April 2018, there were 55,949 on the waiting list for social housing, with wait times of a decade across much of the State. Older people are particularly vulnerable in the private rental market as they age. The current age for prioritisation (80 years) does not acknowledge the inherent risks to this group.\(^{56}\)

- In NSW, there was an estimated 15,126 people aged 50 and over who were currently living in marginal, temporary or improvised housing on census night in 2016. A report from the Australian Institute of Health and Welfare also indicated that people aged 55 or older experiencing housing insecurity is increasing rapidly with a 3-fold increase compared to the general population in the year to 2016–2017.\(^{57}\)

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\(^{52}\) ibid.

\(^{53}\) AIHW, above n 48.


\(^{55}\) ibid.


Coinciding with the increase in family accommodation agreements is an increase in instances of elder financial abuse in relation to family accommodation agreements. In 2016–17 the NSW Elder Abuse Helpline and Resource Unit received 1800 calls, of which 39% were related to financial abuse and 58% were related to psychological abuse, which often co-occurs with financial abuse.\textsuperscript{58} See further 11.2.3 — Succession/financial abuse.

\section*{11.1.9 Rural, regional and remote areas}

- Older people living in rural areas have the same information needs as those in urban areas, however access to information sources and services will differ because of the difficulties of travelling and the barriers of distance and time. This is particularly true for those living in remote areas.

- The health of older people in rural and remote areas is generally poorer than that of older people living in metropolitan areas. Poorer health outcomes in rural and remote areas may be due to a range of factors, including a level of disadvantage related to education and employment opportunities, income and access to health services.\textsuperscript{59}

- Overall, the more remote the area in which you live, the poorer your health status.

- Twelve of the 20 least advantaged federal electoral divisions and 36 of the 40 poorest areas of Australia are classified as rural or remote.\textsuperscript{60}

- Factors such as social isolation, fewer economic means to plan for retirement, and limited access to transport, residential and community care, medical and preventive health care means that many rural older people are coping with these consequences by themselves.\textsuperscript{61}

- There is particular difficulty in attracting and retaining health and other professionals in rural, regional and remote areas, and the costs of constructing and operating facilities in remote areas can be prohibitive.

- Access to transport is a key issue for older people, particularly in remote areas. Many older people do not have their own vehicle, whether because of disability or other impediments to their driving long distances, such as cost. Public transport is often non-existent, inconvenient or too expensive.\textsuperscript{62}

\begin{itemize}
\item \textsuperscript{58} Legislative Council, General Purpose Standing Committee No 2, \textit{Elder abuse in New South Wales}, Parliament of NSW Report 44 (Final report), 2016, p 102.
\item \textsuperscript{61} National Rural Health Alliance & Aged and Community Services Australia, \textit{Older people and aged care in rural, regional and remote Australia}, Discussion paper, 2004.
\item \textsuperscript{62} ibid, p 19.
\end{itemize}
It is generally recognised that the risk of loneliness in old age is higher among migrant and refugee populations, people with same-sex attraction or gender dysphoria and people living in rural and remote areas.\(^6^3\)

While Australians of all backgrounds reside in the different regions across Australia, the Indigenous population has a much greater concentration in the more remote areas.\(^6^4\)

Old age dependency ratios are higher in inner regional areas, reflecting trends for many Australians to leave major cities on retirement.\(^6^5\)

### 11.1.10 Gender

Gender significantly affects experiences of ageing. Women have a longer life expectancy than men, but older women have relatively lower incomes and fewer assets than men.\(^6^6\) Contributing factors to this include lower average weekly ordinary time earnings for women (a 14.1% “gender pay gap” at February 2019), as well as career breaks to undertake unpaid care work.\(^6^7\)

Women tend to have lower superannuation balances and retirement payouts than men.\(^6^8\) Approximately 60% of women aged 65–69 in 2009–2010 had no superannuation.\(^6^9\) Women also make up a greater proportion of age pension recipients. At June 2013, women comprised 55.6% of recipients. Of these, 60.8% received the full rate of age pension. At June 2013, women comprised 55.6% of recipients. Of these, 60.8% received the full rate of age pension.\(^7^0\)

Stereotypes such as the man being the provider and protector of the family, and social and cultural norms that require men to show strength and resilience

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\(^6^5\) ibid.


\(^6^8\) R Clare, *Developments in the level and distribution of retirement savings*, Research Paper, Association of Superannuation Funds of Australia, 2011 at p 3. This is likely to continue to be the case for older women for some time into the future: Men aged 55–64 in 2013–14 had a much higher average superannuation balance than women the same age: $321,993 compared with $180,013: ABS, *Gender indicators, Australia*, February 2016: Economic Security, cat no 4125.0.

\(^6^9\) Clare, above n 68, p 3.

can dissuade men from acknowledging, seeking help or reporting abuse. Even when men do report abuse, there are not always adequate services to support them, as many family crisis centres are women-only services. Older men are also more likely to be socially isolated than women.  

### 11.1.11 Sex and gender diversity

Many older lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) Australians have faced a lifetime of discrimination and abuse and they fear this will continue. There is little data on the LGBTQI community among older people. According to the Census in 2016, there were around 23,700 male same-sex couples and 23,000 female same-sex couples.

- Overall, only 5% of people in same-sex couples were aged 65 or over, compared with 20% of people in opposite-sex couples.
- People who have diverse sexualities, relationships, bodies and genders face particular issues as they age, and they face specific barriers to accessing aged care. For the first time, the 2016 Census allowed a choice of “other” in response to the question reporting sex in a way not limited to male or female. Approximately 1300 people chose to report their gender identity in this way. The most common identities provided were transgender, another gender and non-binary. Just under 6% of people who responded “other” were aged 65 and over, and this proportion is likely an underrepresentation due to the decreasing preference for online forms with age. It is important to note that a person who may have intersex characteristics generally identifies themselves as either male or female: see further Chapter 9 at 9.3.1.

### 11.1.12 Digital confidence

Among older Australians, those aged 50 to 69 are significantly more engaged with technology, understand its purpose and potential value. Those aged 70 and over

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75 ibid.
are more digitally disengaged, citing lack of trust, confidence, skills and personal relevance. Older Australians generally use the internet to research about goods they would like to purchase, use internet banking, pay bills online and search for information about government services.⁷⁶

- While more than nine in 10 people aged 15–54 are internet users, the number drops to eight in 10 of those aged 55–64 years, and to under six in 10 of those over 65 years.⁷⁷

- In NSW, four in five (79%) people in their 70s feel they do not struggle keeping up with technology, although it is significantly more than those in their 50s (96%) and 60s (96%). 34% of those with a high school education (compared with 22% with a university education) feel they have struggled to keep up with technology.⁷⁸

- 42% of 50–69 year olds have high digital literacy. Only 21% of 70+ age group have high digital literacy.⁷⁹

- According to the ABS, 43% of internet users aged 65 and over accessed the internet to engage with social media in the three months to June 2015. This compares to 72% for the national population aged 15 and over.⁸⁰ 88% of use of social media is Facebook.

- In Australia, 15% of older internet users accessed government services, health and medical information online.

- An estimated 1,000,000 adult Australians (6%) have never accessed the internet (as at June 2015). Older Australians account for the majority of this group — 71% of offline adults fall into the age group of 65 and over. Factors contributing to these figures include: living in country areas, being out of employment, having no tertiary education, having a lower income and are single/not married. 61% of these “offline” older people are women.⁸¹

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⁷⁹ ibid.


Research in 2011 by the Australian Research Council Centre of Excellence for Creative Industries and Innovation found the key barriers preventing those over 65 from using the internet were a lack of skills, confusion by technology, and concerns about security and viruses.\textsuperscript{\textit{82}}

11.2 Elder Abuse

The problem and prevalence of elder abuse was recognised in Australia and overseas in the late 1980s. However, it was not until 2016 that the NSW Government inquired into elder abuse to develop a policy, legal and service framework to address the issue.83 The Australian Law Reform Commission completed an inquiry in 2017.84 Like other forms of abuse, abuse of older people occurs in institutional and domestic settings.

Elder abuse is generally described as “a single or repeated act, or lack of action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person”.85 While prevalence data in Australia is limited, estimates regarding the occurrence of elder abuse in NSW range from one in 20 people or 5%86 and nationally from 2% to 6% of the older population.87 This compares with reported rates of up to 14% internationally in high and middle income countries.88 These approximations are believed to underestimate the true extent of abuse in older populations.89

Internationally, five categories of elder abuse are recognised.90 These are:

1. **Physical abuse**: Non-accidental acts that result in physical pain, injury or physical coercion.
2. **Sexual abuse**: Unwanted sexual acts, including sexual contact, rape, language or exploitative behaviours, where the older person’s consent is not obtained, or where consent was obtained through coercion.
3. **Financial abuse**: Illegal use, improper use or mismanagement of a person’s money, property or financial resources by a person with whom they have a relationship implying trust without the person’s knowledge or consent.
4. **Psychological/emotional abuse**: Inflicting mental stress through actions and threats that cause fear or violence, isolation, deprivation or feelings of

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83 Legislative Council, General Purpose Standing Committee No 2, above n 58.
85 As defined by the World Health Organisation; adopted by the *NSW interagency policy on preventing and responding to elder abuse*, p 5 and the Legislative Council, General Purpose Standing Committee No 2, above n 58, p 5.
86 ibid, p 7.
shame and powerlessness. These behaviours — both verbal and nonverbal — are designed to intimidate and are characterised by repeated patterns of behaviour over time, and are intended to maintain a hold of fear over a person. Examples include treating an older person as if they were a child, preventing access to services and emotional blackmail.

5. **Intentional and unintentional neglect**: Failure of a carer or responsible person to provide life necessities, such as adequate food, shelter, clothing, medical or dental care, as well as the refusal to permit others to provide appropriate care (also known as abandonment).

The Australian Network for the Prevention of Elder Abuse recognises a sixth category of social abuse, which includes the forced isolation of older people, with the sometimes additional effect of hiding abuse from outside scrutiny and restricting or stopping social contact with others, including attendance at social activities.  

Psychological and financial abuse are the most common types of reported abuse, although one study suggests that neglect could be as high as 20% among women in the older age group. Frequently more than one type of abuse is suffered by the same person.

Elder abuse is underreported due to a range of internal and systemic barriers including family loyalty; fear of possible consequences/retribution; cognitive and/or physical barriers; lack of knowledge about access to support services or options; cultural, religious or generational barriers to seeking support; and literacy or language barriers: see further 11.4.1.

Elder abuse commonly occurs where the older person is dependent on another person for their daily needs.

Research indicates women are more often victims of elder abuse than men, and this is disproportionate to the number of older women in the community. Data collected by helplines in Australia indicates that approximately 70% of elder abuse victims are women, although some research shows no significant difference in the rates men and women experience abuse, and older men were more likely to be victims of abandonment. Rates of abuse tend to increase with age.

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91 See R Kaspiew, R Carlson and H Rhodes, *Elder abuse: understanding issues, frameworks and responses*, Research report 35, AIFS, Report to the Attorney-General’s Department, 2015, p 5. See also Legislative Council, General Purpose Standing Committee No 2, above n 58, pp 8, 10.


93 Legislative Council, General Purpose Standing Committee No 2, above n 58, p 121.

Intergenerational abuse within the family is thought to be the most common form of elder abuse — notably by adult children, but also by the older person’s spouse or partner. Family violence exhibits similar dynamics. This is defined in s 4AB of the *Family Law Act 1975* (Cth) as meaning “violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family or causes the family member to be fearful”.

Risk factors in relation to being abused include:

- dependence
- significant disability or poor physical health
- mental disorders (such as depression)
- low income or socio-economic status
- cognitive impairment
- general inability to voice needs, and
- social isolation.

Risk factors for committing abuse include:

- depression
- the toll of caregiving on the health and wellbeing of the carer
- substance abuse/ alcohol and drug misuse
- financial, emotional and relational dependence on the older person, and
- a history of intergenerational abuse within families.\(^95\)

In Aboriginal communities, perceptions about and experiences of elder abuse are complicated by family and community networks, cultural expectations relating to kinship structures, cultural values of sharing and reciprocity, and the extent to which grandparents, particularly grandmothers, are called upon to care for grandchildren.\(^96\)

For some older culturally and linguistically diverse (CALD) people, limited English skills may contribute to social isolation, increase dependence on family members, and in turn increase vulnerability to exploitation and abuse.\(^97\)

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\(^95\) WHO, *World report on ageing and health*, 2015, table 3.1; Legislative Council General Purpose Standing Committee No 2, above n 58, p 8.

\(^96\) Legislative Council General Purpose Standing Committee No 2, above n 58, p 10. See also Office of the Public Advocate (WA), *Mistreatment of older people in aboriginal communities*’ project: an investigation into elder abuse in aboriginal communities, 2005, p 25.

\(^97\) Legislative Council General Purpose Standing Committee No 2, above n 58, p 10; R Kaspiew, R Carson and H Rhoades, *Elder abuse: understanding issues, frameworks and responses*, above n 91, p 5.
people from CALD backgrounds are not homogenous, however in general, they have poorer socio-economic status compared with Anglo-Australians, and risk having differing cultural practices and norms which may lead to lack of understanding of and barriers to using services.\(^8\)

Older lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) people may experience abuse related to their sexual orientation or gender identity. For example, an LGBTQI older person may be abused or exploited by use of threats to “out” a person. Abuse may be motivated by hostility towards a person’s sexual orientation or gender identity. Additionally, older LGBTQI people have a higher exposure to other risk factors for abuse: for example, they have a higher likelihood of diagnosis of treatment for a “mental disorder” or major depression than the general population of older people.\(^9\) They may also be at increased risk of social isolation, which may increase their vulnerability to abuse.

In the context of family violence, it has been suggested that in rural and regional areas, issues such as social and geographic isolation, limited access to support and legal services, as well as complex financial arrangements and pressures, including limited employment opportunities, may heighten vulnerability and shape the experience of violence.\(^10\)

People with cognitive impairment or other forms of disability have been identified as being more vulnerable to experiencing elder abuse. Where a person has a disability, this will often be correlated with other risk factors, such as the need for support and assistance, as well as an increased likelihood of social isolation and lower socio-economic resources.\(^11\)

Generally speaking, Australian State and Territory laws do not provide specific offences against older persons. However a range of types of conduct, which might be described as “elder abuse”, are covered in all jurisdictions under offence provisions relating to personal violence and property offences. These include assault, sexual offences, kidnap and detain offences, and property and financial offences. The Law Council of Australia noted that “elder abuse” is rarely prosecuted under existing provisions.\(^12\)

Some jurisdictions have offences for neglect,\(^13\) although these are rarely utilised in respect of older people. These offences are generally framed as “failing to

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98 AIHW, *Older Australia at a glance*, above n 4.
103 For example *Crimes Act 1900* (NSW), s 44.
provide necessaries or necessities of life, including adequate food, clothing, shelter and medical care”. There are also comprehensive family violence frameworks in all jurisdictions that provide for quasi-criminal, protective responses to abuse of older people in domestic settings.\textsuperscript{104}

In their critique of legal responses to elder abuse, Harbinson et al\textsuperscript{105} observe:

constructions of ageing that view older people as frail and vulnerable have led to a focus on providing legal remedies for mentally incapacitated older people, without the clear understanding that most older people are not mentally incapacitated.

In response to a number of reviews and inquiries highlighting the need for better safeguards for abuse, neglect and exploitation, the NSW government enacted the \textit{Ageing and Disability Commissioner Act} 2019. The Act establishes a Commissioner, responsible for responding to abuse, neglect and exploitation of people with disability and the elderly in home and community settings. Its main functions include:\textsuperscript{106}

- Receiving, triaging and investigating allegations of abuse, neglect and exploitation.
- Providing support to vulnerable adults and their families and carers during and following an investigation
- Reporting and making recommendations to government on related systemic issues.
- Raising community awareness — including how to prevent, identify and respond to matters.
- Administering the Official Community Visitors program in relation to disability services and assisted boarding houses.

The Ageing and Disability Commissioner officially commenced on 1 July 2019.

\textbf{11.2.1 Abuse and neglect in residential care}

\textit{Generally}

There is no comprehensive data available on the prevalence of abuse of people in residential aged care. On 30 June 2018, there were 180,923 people receiving

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\textsuperscript{105} J Harbinson et al, “Understanding ‘Elder abuse and neglect’: a critique of assumptions underpinning responses to the mistreatment and neglect of older people” (2012) 24(2) \textit{Journal of Elder Abuse and Neglect} 88.
\end{flushleft}
Abuse may be committed by paid staff, other residents in residential care settings, or family members or friends. Recent media focus on cases of abuse by paid staff in residential care facilities has brought this issue to public attention. The Commonwealth Government announced the terms of reference for the Royal Commission into Aged Care Quality and Safety on 9 October 2018. See further at https://agedcare.health.gov.au/royal-commission-into-aged-care-quality-and-safety. The Royal Commission interim report is due to be delivered by 31 October 2019, and its final report no later than 30 April 2020.

There is data available on numbers of alleged or suspected “reportable” assaults in residential aged care notified to the Commonwealth Department of Health each year. However, as the Department has noted, this information “reflects the number of reports made by providers … and does not reflect the number of substantiated allegations”. Reportable assaults also capture a more narrow range of conduct than what may be described as elder abuse.

Under the Aged Care Act 1997 (Cth), providers of residential aged care must report to the police and to the Department of Health, incidents of alleged or suspected reportable assaults within 24 hours of the allegation, or when the approved provider starts to suspect that a reportable assault has occurred: s 63-1AA(2). A “reportable assault” is defined to mean an unlawful sexual contact, unreasonable use of force or assault inflicted on a resident of an aged care home: s 63-1AA(9).

The requirement to report does not apply if the approved provider meets the conditions detailed in principle 53 of the Accountability Principles 2014, that is, if the provider determines within 24 hours that the assault was as a result of resident-to-resident aggression and that the alleged offender has previously been assessed with a cognitive impairment, and that a behaviour management plan has been put in place within 24 hours of the allegation or start of suspicion of a reportable assault: s 63-1AA(3).

Restriction on movement (including chemical sedation and inappropriate use of drugs), visitation and neglect of older persons in care which may amount to elder abuse are not captured by this legislation.

108 The Commonwealth Dept of Health reports that more than 5,000 submissions have been received from aged care consumers, families, carers, aged care workers, health professionals and providers which led to the decision to establish a Royal Commission: at https://agedcare.health.gov.au/royal-commission-into-aged-care-quality-and-safety, accessed 20 February 2019.
110 Dept of Health Submission 113 noted in ALRC, Elder abuse, DP 83, above, n 104, p 199.
**Sexual abuse in residential care**

In 2012, the Department of Health and Ageing (Cth) received notification of 378 alleged unlawful sexual contacts occurring in residential aged care facilities across Australia.\(^{111}\) Reports of sexual assault in aged care settings are often dismissed or not appropriately followed up due to procedural difficulties experienced, particularly where the victim is suffering from a cognitive or communicative impairment, mental illness or physical disability.\(^{112}\)

### 11.2.2 Family violence

For many older people, domestic violence has been considered a “family matter” in which police would rarely intervene, and has not historically been treated as a criminal offence. Given these preconceived views, and the fact that the *Crimes (Domestic and Personal Violence) Act* 2007 envisages that AVOs can be made following formal application or as a consequence of a person being charged, older people may be unaware or unwilling to apply for an ADVO or APVO. Like all cases of family violence, the matter may be complicated by fear of losing their home or income, intergenerational violence, and dependency on adult children to provide care.\(^{113}\)

Older people may seek protection from family violence under the *Crimes (Domestic and Personal Violence) Act* 2007 (NSW). The *Justice Legislation Amendment Act (No 3)* 2018 amended the *Crimes (Domestic and Personal Violence) Act* 2007 by inserting s 5A to provide that a personal violence offence by a paid carer against a dependant is treated as a domestic violence offence and an ADVO may be made for the dependant’s protection. However, a personal violence offence committed by a dependant against a paid carer is not a domestic violence offence. The paid carer may still apply for an apprehended personal violence order against the dependant.

Under s 27 of the Act, it is mandatory for police to apply for an ADVO if the police officer suspects or believes that a domestic violence offence or stalking or intimidation offence has been or is likely to be committed. The effect of s 5A is that this continues to be the case where a paid carer is alleged to have committed a domestic violence offence against a dependant, but it will no longer be mandatory where it is alleged that a dependant has committed a domestic violence offence against a paid carer. These amendments commenced 17 December 2018.

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111 R Mann et al, *Norma’s project. A research study into the sexual assault of older women in Australia*, Australian Research Centre in Sex, Health and Society, Monograph series No 98, La Trobe University, Melbourne, 2014, p 6.
112 H Clarkand and B Fileborn, *Responding to women’s experiences of sexual assault in institutional and care settings*, Australian Centre for the Study of Sexual Assault, AIFS, Wrap No 10, 2011.
The vulnerable witness provision may apply to an older person in APVO and ADVO proceedings if the older person is cognitively impaired. Section 306ZB of the Criminal Procedure Act 1986 (NSW) permits a vulnerable person to give evidence in apprehended violence proceedings by CCTV, unless he or she is the defendant. A “vulnerable person” is a child or cognitively impaired person: s 306M(1). Refer to [22-100] of the Local Court Bench Book in relation to procedures for evidence from vulnerable persons — Div 4, Pt 6, Ch 6 Criminal Procedure Act 1986 applies to proceedings in relation to the making, variation or revocation of AVOs: s 306ZA.

11.2.3 Succession/financial/capacity abuse

This is the most reported form of elder abuse, regarded as vastly unreported. Financial abuse is regarded as the “illegal use, improper use or mismanagement of an older person’s money, financial resources, property or assets without the person’s knowledge or consent”. It includes misuse of powers of attorney by spending an older person’s money in ways not in their best interests or for personal gain; coercing an older person to become a guarantor; promising care in exchange for money or property then not providing this; and pressuring an older person to take out a loan which is not for their benefit. The NSW Government inquiry and ALRC inquiry viewed financial abuse of older people as “a widespread and increasing problem” with “inheritance impatience” often being a factor in such cases.

In 2016–2017, the NSW Elder Abuse Helpline and Resource Unit received 1800 calls, 39% of which were related to financial abuse and 58% were related to psychological abuse, which often co-occurs with financial abuse.

Section 49 of the Powers of Attorney Act 2003 (NSW) provides that it is an offence if an attorney acts after the principal has terminated the enduring power of attorney appointment. There is a maximum penalty of imprisonment of 5 years. However, this is of limited use in elder abuse situations, where the misuse usually occurs while the power is still in effect.

In some circumstances, offences such as fraud, deceptive conduct/obtain benefit by deception, stealing and other property-related offences are available to prosecute abuse of older people’s estates and finances.

114 Legislative Council, General Purpose Standing Committee No 2, above n 58, p 77.
116 Critchlow, above n 113, at 77-78.
117 Legislative Council, General Purpose Standing Committee No 2, above n 58, p 34; ALRC, Elder abuse, above n 104, p 34.
118 Legislative Council, General Purpose Standing Committee No 2, above n 58, p 102.
Presumption of advancement

Coinciding with the increase in family accommodation agreements (such as granny flats or an agreement to allow a parent to reside in the premises with adult children), is an increase in instances of elder financial abuse in relation to family accommodation agreements.\textsuperscript{119}

Such agreements are usually undocumented and, if they sour, may lead to disputes and litigation if the parent has made a financial contribution to the acquisition or improvement of property.

Such litigation usually involves the defendant seeking to rely on the presumption of advancement. The law presumes that, in certain circumstances, where person A has purchased property in the name of person B, they intended to make a gift to person B. To rebut the presumption, the purchaser must lead evidence of their actual intention which is inconsistent with the application of the presumption (ie evidence that, at the time of the purchase, the purchaser did not intend for the property to be a gift). The onus is on the purchaser to prove this evidence on the balance of probabilities. The evidence must relate to the purchaser's intention at the time of the purchase. It will not be sufficient to show that the purchaser subsequently had a change of heart.

In \textit{Spink v Flourentzou}\textsuperscript{120} the court held that the presumption of advancement should only arise where all the joint recipients of the money or property are in a relationship with the payer that is of a category that gives rise to the presumption: at [308]. In this case, the presumption did not arise because one of the recipients was the son-in-law. The court ordered that the plaintiff was entitled to the return of her contribution to the acquisition and renovation of the property, plus interest, secured by an equitable charge over the property: at [293].

Capacity abuse

In NSW, the Office of the Legal Services Commission dealt with 35 “capacity complaints”\textsuperscript{121} (that is, lawyers failing to identify warning signs of potentially impaired capacity, acting when client capacity was clearly impaired, not seeking appropriate medical input on client decision-making capacity) between 2011 and 2015. By 2016, the number of capacity complaints was 1.2% of all written complaints received, rising from 0.4% in 2012.

Guardianship and financial management orders may be sought from the NSW Civil and Administrative Tribunal as a way of addressing financial abuse of an older person with capacity issues.

\textsuperscript{119} ibid.
\textsuperscript{120} [2019] NSWSC 256.
\textsuperscript{121} L Barry, “Capacity and vulnerability: how lawyers assess the legal capacity of older clients” (2017) 25 \textit{JLM} 267.
The demographic reality of an ageing population means that the likelihood of challenges to wills on the ground of testamentary capacity is increasing.\textsuperscript{122} Where there is doubt about a person’s capacity, the transaction is always in some danger of being attacked unless it can be shown that the action was a free will action of the elderly person.\textsuperscript{123} This is most readily demonstrated by the older person obtaining adequate, competent and relevant independent legal advice (well) prior to the impugned transaction.\textsuperscript{124}

The Law Society of NSW publication “When a client’s mental capacity is in doubt: a practical guide for solicitors”\textsuperscript{125} provides some guidelines for solicitors to assist in the assessment of capacity when taking instructions.

In \textit{Ryan v Dalton} [2017] NSWSC 1007 at [107], the court made a number of observations for dealing with the “increasing number” of challenges to testamentary capacity. Kunc J, noting the ALRC recommendation 8-1,\textsuperscript{126} and bearing in mind matters such as elder abuse in probate matters, undue influence and testamentary capacity suggested:

It seems to me that the following is at least a starting point for dealing with this increasingly prevalent issue:

1. The client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.

2. A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.

3. In all cases, instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way? The questions and answers should be carefully recorded in a file note.

4. In case of anyone:
   (a) over 70;
   (b) being cared for by someone;
   (c) who resides in a nursing home or similar facility; or
   (d) about whom for any reason the solicitor might have concern about capacity;

   the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as

\textsuperscript{122} \textit{Ryan v Dalton} [2017] NSWSC 1007 at [101].
\textsuperscript{123} \textit{Badman v Drake} [2008] NSWSC 1366 at [76].
\textsuperscript{126} ALRC, \textit{Elder abuse}, above n 84.
a result of any diagnosis, behaviour, medication or the like. Again, full file notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.

5. Where there is any doubt about a client’s capacity, then the process set out in sub-paragraph (3) above should be repeated when presenting the draft will to the client for execution. The practice of simply reading the provisions to a client and seeking his or her assent should be avoided.

The NSW Court of Appeal found that a solicitor should have ceased to act on being instructed by a wife attorney to transfer a farm in the sole name of her husband to her four daughters for $1.00 when the solicitor knew that (a) the husband had now lost capacity (b) the transaction was improvident (c) the transaction was inconsistent with the husband’s will which left the farm to his son and (d) he acted for both parties. Though the land had by now been registered in the daughters’ names, the court found that the equity could be traced with the result that the daughters were obliged to account for the loss to the now deceased husband’s estate.  

See further 11.5.1 — Legal capacity.

A solicitor acting for an incapable client (the husband) in a matter of estate planning should have declined to act on the instructions from the client’s agent (the wife). The instructions were inconsistent with a will that post-dated an agreement that the wife said was the reason for her instructions.

In failing to critically examine the husband’s testamentary intentions and their consistency with the wife’s instructions, the solicitor breached his duty of care owed to the beneficiary (the son), and the breach caused the beneficiary’s loss, being the transfer to his sisters of a farm which he otherwise would have received under his father’s will. *McFee v Reilly* [2018] NSWCA 322

An 87-year-old lady sought to recover property which she once owned. The transaction was set aside for equitable fraud and undue influence. The defendants were ordered to pay equitable compensation plus interest. *Badman v Drake* [2008] NSWSC 1366

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127 *McFee v Reilly* [2018] NSWCA 322.
11.3 Older persons and crime

11.3.1 Prosecuting crimes committed against older persons

Generally speaking, Australian State and Territory laws do not provide specific offences against older persons. Although the Constitution contains certain heads of power which may provide a basis for the Commonwealth to legislate on matters for “ageing”, none specifically enables the Commonwealth to legislate or otherwise provide for protection against elder abuse. However, types of conduct which might be described as “elder abuse” are covered in all jurisdictions under offence provisions relating to personal violence and property offences. These include assault, sexual offences, kidnap and detain offences, intimidation and harassment, property and financial offences, fraud and theft offences. In its submission to the ALRC inquiry, the Law Council of Australia noted that “elder abuse” is rarely prosecuted under existing provisions. General neglect offences exist in all State and Territory jurisdictions although these are rarely utilised in respect of older people. Neglect is a Table 1 offence in NSW (ie indictable offence to be dealt with summarily) under s 44 of the Crimes Act if a person “who is under a legal duty to provide another person with the necessities of life and … who without reasonable excuse, intentionally or recklessly fails to provide that person with the necessities of life, is guilty of an offence if the failure causes a danger of death or causes serious injury”. The offence has a maximum penalty of five years and requires proof of a legal duty and causation. All State and Territory jurisdictions also have comprehensive family violence frameworks that provide for quasi-criminal, protective responses to abuse of older people in domestic settings.

Under 21A(2)(h) of the Crimes (Sentencing Procedure) Act 1999 (NSW), the court is to take into account as an aggravating factor whether the offence was motivated by hatred for, or prejudice against, a group of people to which the offender believed the victim belonged (such as age, or having a particular disability), when determining the appropriate sentence for an offence.

11.3.2 Older persons as victims of crime

The victimisation rate for older Australians remains lower than the general population. This is due to their unique nature of social relationships and activities.

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129 FaCS, NSW ageing strategy, above n 78, p 364.
130 Law Council of Australia, Submission 61, referred to in ALRC, above n 102, p 76.
131 For example Crimes Act 1900 (NSW), s 44.
132 FaCS, NSW ageing strategy, above n 78, p 364.
133 ibid.
Older people are victims of homicide most often as a result of an assault in their own home.\textsuperscript{134} Table 1 provides selected crime victimisation rates for people aged 65 years and over, compared with the total population.\textsuperscript{135}

Often older Australians have more accumulated wealth which make them an attractive target for scammers. Common online scams targeting older people include dating site scams pretending to be prospective partners and investment, rebate and inheritance scams.\textsuperscript{136} Some crimes are specifically targeted at older people because of their perceived or actual vulnerability or because they are potentially easy to steal from. Offences under this heading include:

- bogus worker cases where a person pretends that certain works require to be done to a property which are not required or where a person exaggerates the cost or value of any work which needs to be done
- robberies
- rogue traders
- theft/doorstep theft
- financial abuse — for example the illegal or unauthorised use of a person’s property, money, pension book or other savings

\textsuperscript{134} ABS, \textit{Personal Safety, Australia}, 2016, ABS cat no 4906.0.
investment scams/fraudulent investment schemes, including where the
internet is a vehicle for the crime. Older people are particularly susceptible to
internet scams due to their lower digital confidence.  

Crimes against older people are often not reported. Research has found that many
older people have little awareness of their legal rights and lack confidence in
enforcing those rights. They can be reluctant to take legal action and find the law
is disempowering and cannot solve their problems. Studies have identified the
following as some of the possible reasons for under reporting:

1. Reluctance to complain (the most common theme).
2. Lack of access to trusted people to tell of concerns or allegations; this may
   be a particular issue for older people who are socially isolated.
3. Older people with mental health issues may find it especially difficult to
   report crime.
4. Fear that the authorities will remove the victim from the abusive situation in
   the belief that it is the best course of action for the victim (as a consequence
   of which the victim may lose the home or be placed into an institution or care
   home which may be the exact outcome that the abuser was hoping for). See
   further Elder abuse at [11.2].
5. Lack of access to telephone or other means of informing trusted people.
6. Embarrassment, particularly if the abuser is a family member.
7. When crimes against older people occur in a private home, there may be less
   chance that this comes to the attention of social care or other professionals.
8. In cases of financial abuse, older people can be too embarrassed to
   report fraud if they have been duped into giving away money or valuable
   possessions.
9. English is not the person’s first language. A person may lack confidence
   to come forward and might need the support of an independent interpreter,
   especially if a crime is committed by a family member or friend.

11.3.3 Older persons as witnesses in criminal proceedings

Generally, there is no reason that age impacts the capacity of a witness. A judicial officer can take steps to assist an elderly person who may have specific health and cognitive issues. See below at 11.5 — Practical considerations.

An older person may find the experience of cross-examination challenging or bewildering. Note that s 41 of the Evidence Act 1995 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)). A judicial officer may control the manner and form of questioning of witnesses (ss 26 and 29(1)), and s 135(b) of the Evidence Act 1995 allows the court 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 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”. 140

Vulnerable persons (including an older person with a cognitive impairment)41 in criminal proceedings or civil proceedings arising from the commission of a personal assault offence have a right to alternative arrangements for giving evidence when the accused is unrepresented. A vulnerable person who is a witness (other than the accused or defendant) must be examined in chief, cross-examined or re-examined by a person appointed by the court instead of by the accused or the defendant (s 306ZL).

See further [10-000] Evidence from vulnerable persons in Local Court Bench Book.

11.3.3.1 Older persons as witnesses in sexual assault matters

An older person who is a victim or is called as a witness in a sexual assault matter may lack access to information about what constitutes sexual assault. Given the most frequent perpetrators are family members, an older person may face barriers in reporting their experiences to others. 142

140 R v TA (2003) 57 NSWLR 444 at [8].
141 See s 306M(1), Criminal Procedure Act 1986 (NSW).
142 R Mann, et al, Norma’s project: a research study into the sexual assault of older women in Australia, above n 111.
Section 11 — Older people

Some points to consider include:

- accessibility of the court for older people
- ensuring provisions are made for those with a disability if required
- cognitive impairment, short term memory loss combined with trauma can confuse a witness, particularly during cross-examination.

11.3.4 Older persons as perpetrators of crime

NSW has seen an overall increase in the prison population of 25% for the 10 years 2005-2015. Offenders aged over 55 increased on average 91% for this same period. This growth was most marked in the over 65 year olds, with elderly men increasing by approximately 225%. An ageing population increases the likelihood that older persons will be the perpetrators of crime. Offending rates for persons aged 50+ years have also increased since 2000. Older offenders increasingly contributed to all types of offences, with the most notable increases occurring among PCA/DUI offences, other traffic offences, drug offences and violent/sexual offences.

Brain disease can contribute towards criminal behaviour. Some dementia patients have been found to have profound behavioural and psychological symptoms, and criminal manifestations in individuals with dementia have been reported in aged care facilities. Clinical interviews of 28 consecutive first-time offenders in a group of people aged over 65 years found a prevalence of dementia of 21%. There is a growing body of evidence that some people with dementia can show impaired moral judgments, decline in social interpersonal conduct, transgression in social norms and antisocial acts”. One study showed that some dementia patients committed sociopathic acts because of disinhibition, and others had sociopathic behaviour associated with agitation paranoia, rather than primarily from poor impulse control. A study in Sweden of 210 offenders aged 60 and over found that 7% had a diagnosis of dementia, 32% psychotic

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144 ABS, Prisoners in Australia, 2017, cat no 4517.0.
illness, 8% depressive or anxiety disorder, 15% substance abuse or dependence, and 20% personality disorder. Older offenders were significantly less likely to be diagnosed with schizophrenia or a personality disorder, and more likely to have dementia or an affective psychosis compared to younger ones. Typically older offenders with a diagnosis of dementia are charged with sexual offences.  

A NSW Bureau of Crime Statistics and Research (BOCSAR) study found that between 2000 and 2015 there was a 94% increase in the proportion of older offenders (i.e., over 50) found guilty of a principal offence with a 228% increase in older Aboriginal offenders. Although older offenders are increasingly contributing to all offence types, the most notable increases over time in the proportion of older offenders were observed for drug offences (277%), other traffic offences (157%), PCA/DUI (90.2%) and violent/sexual offences (81.5%). By 2015, nearly one in five PCA/DUI offenders were aged 50+ while around one in 10 persons found guilty of a traffic, violent, or drug offence were aged 50 years or more. The most common offence committed by an older person (over 50) was PCA/DUI, although the proportion of offenders in this category fell from 34% to 26% in the study period.

The study found that the proportion of offenders aged 50 and over who received a custodial penalty rose by 111% between 2000 and 2015 with a 452% increase in the rate of older Aboriginal offenders. The most common offences for which older offenders were imprisoned in 2015 were violent/sexual offences (36.1%), drug offences (14.5%), justice procedure offences (13.8%) and property offences (13.0%). Possible reasons for why older people are appearing in court more often than in the past include older offenders being convicted of historical offences (mostly sexual offences as findings emerge from the Royal Commission into Institutional Responses to Child Sexual Abuse) and older first-time offenders with a decline in cognitive health.

NSW has also observed an increase in Indigenous and female inmates among the aged population in this period. Although the actual numbers are small, aged females in custody have increased approximately 84% since 2005.

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151 ibid, p 3.
152 ibid.
153 ibid, p 4.
154 ibid, p 5.
155 ibid, p 5.
156 ibid, p 6. See also Inspector of Custodial Services, Old and inside: managing aged offenders in custody, September 2015, p 16.
157 Inspector of Custodial Services, Old and inside: managing aged offenders in custody, above n 155, p 16.
Older offenders are increasingly presenting with a prior proven offence and/or have reoffended within two years of their index offence. The proportion of aged offenders in NSW with a history of prior imprisonment increased from 38.5% of the aged offender population in full-time custody in 1999 to 54.6% in 2009. Given the older prison population, and the fact that there is a 10-year differential between overall health of prisoners and that of the general population, older prisoners are more likely to experience premature ageing disease and disability, including dementia: see 11.1.4 — Health.

The study estimated that the number of older inmates in NSW custody is estimated to exceed 1,600 by 2020. The increasing proportion of older offenders in the prison population means that strategies will need to be put in place to cater for the specific requirements of older offenders, particularly Aboriginal offenders. Older inmates often have complex health issues and specific needs and vulnerabilities related to their age. Frail inmates have functional difficulties with the physical environment, including difficulties due to the number of steps, uneven surfaces, steep gradients and narrow doorways. There are few aged care beds available.

159 ibid.
160 Stavrou, above n 149, p 2.
161 ibid.
162 Inspector of Custodial Services, above n 155, p 9.
163 ibid.
11.4 Barriers

11.4.1 Access to justice

The Law and Justice Foundation conducted an extensive review of older people’s access to law.164 This highlighted both general barriers and particular barriers for older people in accessing legal services. The Law Council of Australia released their final report on the Justice Project in 2018.165 Examples of particular barriers are those relating to specific groups of older people, such as those living in residential aged care facilities and retirement villages; older people with specific health issues; those who have experienced abuse; those with difficulties with financial arrangements; and issues concerning older people with diminished capacity who require decision-making support.

Older people with a disability will require different levels of support in order to make their own decisions. This reflects the move toward supported decision-making principles that are part of the Convention on the Rights of Persons with a Disability,166 the recommendations of the ALRC Report on Equality, Capacity and Disability,167 and recent proposals to amend the NSW Guardianship Act 1987 to legislate for supported decision-making instead of substitute decision-making.168 The NSW Government has enacted the Ageing and Disability Commissioner Act 2019 in response to a number of reports and inquiries, to assist in raising awareness of abuse, neglect and exploitation of older persons. This Act commenced on 1 July 2019.

The general barriers identified as impacting on an older person’s access to legal services included:

- a lack of awareness of where to obtain legal information and assistance
- a lack of appropriately communicated legal information
- the high cost of legal services (financial barriers)
- a lack of interest by some legal practitioners in older clients
- potential conflict of interests when legal practitioners for older people are arranged by family members
- difficulties in accessing legal aid, including restrictive eligibility tests
- technological barriers, particularly for telephone and web-based services

- a lack of availability of legal aid for civil dispute
- lack of specialised legal services for older people, particularly in rural, regional and remote areas
- lack of resources in community legal centres to tailor their services to the needs of older people.

See further Legal Aid NSW “Policy Bulletin 2019/12”, where the Legal Aid NSW Board approved changes to eligibility policies to clarify that legal aid is available to people who are experiencing, or are at risk of, elder abuse.  

Some of the specific issues impacting older people and their access to justice are set out below.

11.4.1.1 Disabilities, mobility and vulnerability

Some older persons may suffer from physical disabilities associated with ageing, such as deafness or a hearing impairment, blindness or a visual impairment, or fatigue or frailty.

Older people may require assistance in the form of a walker or walking stick. Courtroom facilities may be inaccessible (for example, stairs rather than lifts, narrow doors, no nearby parking, heavy doors) which make it difficult for them to participate.

Some older people may be unable to sit or stand in one position either at all or beyond a particular time or may become easily fatigued. Refer to Section 5 of this Bench Book for further information regarding practical considerations for people with disabilities.

11.4.1.2 Dementia

Alzheimer’s disease is the most common form of dementia. As Alzheimer’s disease affects each area of the brain, certain functions or abilities are lost. Memory of recent events is the first to be affected, but as the disease progresses, long-term memory and other aspects of behaviour are affected.

Additional barriers may limit the ability of older people with Alzheimer’s disease or other dementias, to participate in the legal process. These include:

- communication barriers: the language used may be too complex, fast or abstract, and/or the proceeding too lengthy. They may become easily distracted, very jumbled, severely distressed, anxious, frightened, aggressive or angry
- fatigue

difficulty understanding or recalling dates, such as when events occurred, or appointments, such as court dates, and

as well as facing one or more of the above barriers, 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.

These barriers may be taken into consideration when the court is deciding whether or not to disallow a question in cross-examination: see s 41(2) of the Evidence Act 1995 (NSW) and see further at 11.3.3 — Older persons as witnesses in criminal proceedings.

The vulnerable witness provisions may also apply to an older witness who is cognitively impaired: see Ch 6, Pt 6 of Criminal Procedure Act 1986 (NSW) and 11.5.1.1 — Competence of an older person to give evidence.

It is important to note that, in many cases, the precise name or type of a particular older person’s disability or disabilities will not be relevant in court. It will be more important to determine accurately and appropriately whether that person requires any form of adjustment to be made, and if so, what type and level of adjustment.

11.4.2 Digital exclusion

Older Australians are embracing the digital life. Seventy-nine per cent of older Australians have accessed the internet at some point in their lives. Although the internet has the potential to assist older people with information needs, according to the Australian Digital Inclusion Index (ADII) 2017, Australians aged 65 years and over are the most digitally excluded age group. This is despite initiatives such as “Tech Savvy Seniors” digital literacy program, and the Tech Savvy Elders Roadshow, targeting older Aboriginal people, which provides free or low cost courses to seniors and was initiated in 2013. Aboriginal older people tend not to

use institutional sources, even those set up for them by governments; rather they rely on social and family networks.\(^{172}\) The penetration of new technology among certain groups, especially older people from CALD backgrounds, Aboriginal older people and those in remote areas, still remains low.\(^{173}\) Further, the level of online engagement reduces in the older age cohorts.\(^{174}\) For some older persons, the shift to online services and communication has made it more difficult to find sources of legal information and access legal assistance.\(^{175}\) Further, effective internet searching is a complex skill.\(^{176}\) In submissions to the ALRC inquiry, it was noted that many government agencies require online form completion, which makes access (particularly for those in rural and remote areas) more difficult. Demographic differences reveal that within the older age group who are “offline”, they are more likely to be unemployed, have no tertiary education, have lower income, live outside major capital cities and be single/not married.\(^{177}\) Along with privacy concerns, older Australians frequently cite concerns about security and viruses as a reason for not accessing the internet.\(^{178}\) These are valid concerns as people over the age of 65 years are increasingly vulnerable to scams, particularly those involving the loss of money.\(^{179}\) In 2017 alone, there were almost 16,000 reports involving a loss of over $9 million to Scamwatch by people aged 65 years over.\(^{180}\) Vision decline, motor skill diminishment and cognition effects can also impair an older person’s ability to use a computer (although many government websites provide speech-enabled devices). The lack of access to, and confidence with, information technology may be relevant where an older person is called for jury duty or appears as a witness or complainant in a trial, particularly in regional and remote areas.

\(^{172}\) For further information on Tech Savvy Elders see https://burraga.org/tech-savvy-elders, accessed 30 April 2019.
\(^{174}\) Submission to the Senate Standing Committee in Finance and Public Administration, \textit{Inquiry into the digital delivery of government services}, COTA Australia, October 2017.
\(^{175}\) Law Council of Australia, above n 138, p 22.
\(^{176}\) C Denvir, N Balmer and P Pleasence, “Portal or pot hole? Exploring how older people use the ‘information superhighway’ for advice relating to problems with a legal dimension” (2014) \textit{34 Ageing & Society} 670.
\(^{177}\) ALRC, \textit{Elder abuse}, above n 104.
Section 11 — Older people

11.4.3 Rural, regional and remote (RRR) issues

Lower population density and more geographically dispersed populations make it more difficult and expensive to create and maintain comprehensive service infrastructure such as transport, health care, social services, education, information and communications technology and culture, compared to urban areas. Consequently, rural populations have less access to services and activities and their situation may be further aggravated when combined with poorer socio-economic conditions. This puts rural populations at a disadvantage compared to urban ones and can be particularly problematic for older people who may face a greater risk of social isolation, reduced mobility, lack of support and health care deficits as a result of the place in which they live.\(^{181}\)

Research consistently identifies the RRR population as having particular vulnerability to legal problems, a lack of capacity to resolve legal problems on their own and limited access to professional legal services. For older adults, legal problems can arise in matters that include:

- the complexity of assets held by families resident in rural areas such as farming properties; lack of access to services that may assist with asset management arrangements and responses to situations where elder abuse is occurring or expended; and the dynamics involved in reporting or disclosing elder abuse in rural communities, where shame and concern to protect the family name potentially play an inhibiting role.\(^{182}\)

Lawyer availability in some RRR areas varies and can impact a person’s access to justice. Some areas in NSW have no or few registered practising solicitors. Studies by the Law and Justice Foundation of NSW\(^ {183}\) revealed that there were 19 local government areas (LGAs) in NSW without a single registered practising solicitor (private or public), and a number of other LGAs had only one or two. Access to solicitors in these outer regional, remote and very remote areas typically involved one or more parties travelling substantial distances. Further, the impacts on the justice system and rural communities of reduced levels of legal aid funding and increased demand for grants of legal aid are perceived as broad and adverse. Limited access to transport together with mobility restrictions for some older people compound the barriers they face in seeking legal assistance.

The lack of access to legal advice is compounded by patchy, unreliable or absent mobile coverage in many rural and remote areas. Internet services, particularly in


\(^{183}\) M Cain, D Macourt and G Mulherin, Lawyer availability and population change in regional, rural and remote areas of NSW, Law and Justice Foundation of NSW, 2014, p 28.
more isolated areas, only make available relatively small download allowances and these come at a much higher cost and slower speed than those services available in metropolitan areas.\footnote{184} Data capped plans are common in non-urban areas, and would affect the capacity of those outside major capital cities to access some digital content.

Isolation also puts an older person at risk of neglect and financial exploitation: see, for example, \textit{NAD} [2018] NSWCATGD 1 where an 84-year-old woman of Turkish heritage was being cared for by her son in regional NSW. Mrs NAD’s daughter initiated proceedings seeking the appointment of a guardian and financial manager for her mother, alleging the son was controlling, bullying and aggressive to the mother, neglected her and allowed no visitors to the home. A guardianship and financial management order was made in respect of Mrs NAD, as the tribunal found her interests were paramount.

\textbf{Figure 1 – Map of NSW showing areas of varying geographic remoteness} \footnote{185}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{ARIA_Remoteness_Map_NSFW.png}
\caption{ARIA Remoteness in NSW}
\end{figure}

### 11.5 Practical considerations

#### 11.5.1 Legal capacity

Not all older clients will experience a cognitive impairment, however, dementia is the leading cause of disability in people aged 65 years and over.\(^{186}\)

Capacity is the ability to make decisions. It is therefore task or domain-specific, that is, peculiar to the particular type of decision made. Thus, the capacity task is different for entering into a contract; executing a power of attorney, will or deed; appointing an enduring guardian or an attorney under a power of attorney; or consenting to treatment, divorce or marriage.\(^{187}\)

The degree of complexity of an older person’s affairs directly affects the level of cognitive function required to make a testamentary instrument. That is, the more complex the action, the more cognitive function is required.\(^{188}\) This represents an aspect of inherent vulnerability which greatly impacts legal capacity.\(^{189}\) A person’s inherent vulnerability may be exacerbated by situational factors, including family conflict. See further [11.2.3] — Succession/financial/capacity abuse.

The current NSW guidelines for capacity assessment caution lawyers about the potential for undue influence and the need to safeguard older people from abuse,\(^{190}\) however, family conflict is not raised separately as a factor that may influence decision-making capacity.

#### 11.5.1.1 Competence of an older person to give evidence

Competence is the capacity of an older person to function as a witness. The rules for an older person with regard to their capacity to give evidence are no different to any other person. The *Evidence Act 1995* (NSW) provides, except as in ss 13 to 19 inclusive, that every person is competent to give evidence and a person who is competent to give evidence about a fact is compellable to give that evidence: s 12.

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There can be a tendency to stereotype older people as witnesses, making assumptions that their memory may be inaccurate and that what they saw is defective. These stereotypes should be avoided.

An older person is not an inherently incompetent witness by reason of their age, however adjustments may need to be made to accommodate the needs and particular health issues the older witness has. See below at [11.5.3]ff.

The credibility and reliability of an older witnesses’ evidence depends on their accuracy, confidence, quality of observation, and how convincing their evidence is. A study in the UK examined police officers’ perceptions about older witnesses, their current interviewing protocol and challenges involved with interviewing older witnesses. Over half the officers surveyed perceived older witnesses to be less reliable and less thorough than younger witnesses. Many police officers lacked confidence in dealing with the emotional distress and memory loss often displayed by older witnesses and victims. Several officers stated they were inadequately trained and had insufficient time to devote to interviewing in general. Their results suggested that police and jurors frequently consider older adult witnesses and victims to be less reliable and thorough than young adult witnesses, which can present numerous challenges in the court process.

Older people with dementia or other age-related diseases may lack capacity for some decisions. This means that not only their capacity to understand information and to make decisions change over the course of a short period of time, it may also fluctuate in relation to different types of decisions. A person with fluctuating capacity, for example, may be able to decide to give a witness statement but be unable to understand and make decisions in relation to taking part in the court process.

As regards capacity and the interface with the law, certain health professionals such as psychiatrists, geriatricians or neuropsychologists may give opinions on clients who have been arrested or charged, as to whether they have capacity to be interviewed and whether they are fit to plead. There are established criteria for the assessment of capacity in these situations.

191 A Wright and R Holliday, “Police officers’ perceptions of older eyewitnesses” (2005) 10(2) Legal and Criminological Psychology 211.

192 ibid.

When considering a person with dementia’s fitness for trial or capacity to give evidence, the following needs to be considered:\textsuperscript{194}

1. The person’s ability to give a clear and consistent account of the incident
2. Whether the evidence has any delusional quality, making it more probable that the evidence is affected by the nature of the mental illness
3. Whether the person appears to understand the role and nature of court proceedings and their obligations
4. The person’s vulnerability to pressure of cross-examination and the possibility of the court proceedings affecting their own mental health, and
5. The possibility of further cognitive deterioration and the need for re-assessment should there be long delays in court proceedings.

So far as “vulnerable persons” are concerned, there may be an issue as to competence to give evidence. Section 306M(1) \textit{Criminal Procedure Act 1986} defines a “vulnerable person” as a child or cognitively impaired person. Section 306M(2) provides that “cognitive impairment” includes:

- an intellectual disability
- a developmental disorder (including an autistic spectrum disorder)
- a neurological disorder
- dementia
- a severe mental illness; and
- a brain injury.

The first step is to establish that a witness who is a vulnerable person is competent to give evidence, whether sworn or unsworn, about a fact. The next step is to establish whether that witness is competent to give sworn evidence about that fact.

See \textit{Local Court Bench Book} [10-000]ff regarding evidence from vulnerable persons and their competence to give evidence, and the ways in which evidence of a vulnerable person may be given.

\textsuperscript{194} See also R Jones and T Elliott, “Capacity to give evidence in court: issues that may arise when a client with dementia is a victim of crime” (2005) 29(9) \textit{Psychiatric Bulletin} 324 at 325. See also N O’Neill and C Peisah (eds), “Capacity and the Law”, Sydney University Press, 2011, ch 1 at 1.5.
11.5.1.2 Older people and the NSW Guardian ad Litem panel

In civil proceedings, an older person who does not have the ability to instruct their own lawyer or to self-represent may have a Guardian ad Litem appointed. A Guardian ad Litem (GAL) is someone who is responsible for the conduct of legal proceedings for a person, where that person is:

- incapable of representing him or herself
- incapable of giving proper instructions to his or her legal representative, and/or
- under legal incapacity due to age, mental illness or incapacity, disability or other special circumstances in relation to the conduct of the proceedings.\(^{195}\)

11.5.2 Language and communication

Initial considerations

Procedural fairness requires that, as with anyone who appears in court, an older person understands what the proceedings are about, the meaning of any questions asked of them, and is confident that the court adequately understands their evidence and replies to questions. An accused in a criminal trial in NSW has a right not to be tried unfairly, usually expressed as a right to a fair trial.\(^{196}\) Note that many people lose their hearing slowly as they age, and courts need to ensure that these older people are assisted to enable them to participate in the hearing.

As indicated in 5.4.1, some people with disabilities may need some form of communication aid to be made available for them to be able to communicate their evidence and/or hear what is being said by others. People with language barriers may need the services of an interpreter or translator: see further at 3.3.1.1. 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 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.

\(^{196}\) Jago v District Court (NSW) (1989) 168 CLR 23 at [29].
11.5.3 General communication guidance

Points to consider:

- Understand and address the common difficulties of elderly witnesses:
  - **Hearing loss**: speak loudly and slowly, eliminate background noise, ensure that a hearing aid is being used if necessary.
  - **Short term memory issues**: in some contexts, the older person may be able to prepare an aide-memoire.
  - **Mobility issues**: ensure that arrangements are made for the witness to be dropped off and picked up right outside the court to ensure all their energy is focused on testifying.
  - **Cognitive difficulties**: these need to be determined prior to the decision whether the witness has the ability to testify.

- Use the appropriate terminology if the older person has a disability—see section 5.2.3 of this Bench Book.

- Use an appropriate communication aid or interpreter — see 3.3.1.1 (interpreters) and 5.4.1 (people with disability) of this Bench Book — 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.

- Do not use any language that is discriminatory or sounds discriminatory.

- Legal information needs to be clear and readily accessible for older people. Explanations about court procedures need to be made in simple terms and provided in a friendly and courteous manner.

- Written communication may need to be provided in large print or with a full page magnifying aid.

- Ensure full descriptions rather than acronyms are used. This is particularly important in relation to government agencies or technological issues.

- Speak clearly and at a moderate pace, allowing an adequate response time.
Consider allowing someone whom you have declared to be a special witness to have a “communicator” with them while giving evidence — to assist communication and explain the questions put to the witness and to communicate and explain the evidence given by the witness.

Refer to sections 3.3.5.1 and 5.4.3.2 and 5.4.3.4 of this Bench Book for more practical considerations about language and communication and special measures which may be implemented to obtain evidence from older people who may have language barriers or be disabled.

11.5.4 Explaining court proceedings and processes adequately

Many barriers for older people accessing the law are distinctly personal: declining health and mobility, disability, ethnicity, language, gender and social isolation. Some distrust the police and legal services based upon past discriminatory experiences. It is important to explain court proceedings and processes adequately to an older person to ensure procedural fairness. This is particularly relevant to an older witness who may be a victim of sexual assault.

Points to consider:

- Explain what the court needs from them and why.
- Give them permission to ask when they are unsure or confused.
- Allow extra time for any explanations — particularly if they have hearing difficulties.
- Do all of this in simple and direct language, for example, use short sentences and ask only one question at a time.

11.5.5 Terminology and modes of address

Points to consider (and note that many of these points apply to senior lawyers and jurors, not just to litigators and witnesses who are older).

Generally, the preferred term used in NSW is “older person”, “older people”, “older adult” or “senior/s” when referring to people 60 years of age or over; however, it should be noted that not all people 60 years or more regard themselves as within these terms.

Avoid using terms such as “the aged”, unless referring to aged care facilities.

Some older people may prefer and expect to be addressed formally by their title, particularly when addressed by someone younger than themselves. Check how an older person would prefer to be addressed and then use that choice.

In defining an “older person” you should note that the average life expectancy for Aboriginal people is significantly lower than non-Aboriginal life expectancy. Within Aboriginal communities a person in their late 30s may be considered to be an “older person”.\(^{198}\)

The term “elder” has particular connotations for the Aboriginal community: “Elders are ritual leaders who are selected on the basis of their personal qualities and knowledge of the Law.” Elders are considered custodians of customary law as well as of sacred and spiritual objects.\(^{199}\)

Ensure that no terms of ageism are used such as grandmother/father or senior/older, unless relevant to the matter before the court.

If an older person has disabilities there will be additional considerations, particularly for those with hearing loss (approximately 50%) — see 5.2.2.2 of this Bench Book.

11.5.6 Oaths, affirmations and declarations

Points to consider:

198 See 2.1 “Aboriginal people — some statistics” of this Bench Book.
199 See 2.2 of this Bench Book.
In most cases, older persons 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 also 5.4.1 and 5.4.3

Whether an older 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.

Refer to section 4.4.2 of this Bench Book for more practical considerations regarding oaths and affirmations.

If you are unsure about the capacity of a particular older person to give even unsworn evidence you may need to consider requesting a capacity assessment.

11.5.7 Timing of proceedings, breaks and adjournments

When older people become involved with the justice system, or attend court, their needs are likely to be similar to those of other age groups unless they have a disability. For these older people and the very old, some adjustments should be considered before proceedings start or at the time the person first appears in court.

Some older people have physical disabilities or other limitations, and may be experiencing ill health, so it is important to be mindful to provide the same practical requirements as those listed in 5.4.1 and 5.4.4 of the this Bench Book.

Some particular points to consider in relation to older persons include:

- Schedule court appearances to accommodate a medical treatment regime.
- Provide appropriate breaks to enable older people to rest, take medication or use toilets.
- Pay attention to the amount of time an older person is being questioned, examined or required to be present, and due consideration given to

200 A North American resource has helpful suggestions regarding the role of the courts regarding accommodations in the court room and judicial process: Center for elders and the Courts, The role of the courts, a project of the National Center for State Courts at www.eldersandcourts.org/Aging/The-Role-of-the-Courts.aspx, accessed 30 January 2019. See also Stetson University’s Eleazer Courtroom at https://stetson.edu/law/academics/elder/home/eleazer-courtroom.php, accessed 29 April 2019. This courtroom has been designed to be elder friendly, including a witness box located on the floor and carpeting designed to indicate pathways.
physical requirements. Don’t rush the process when hearing evidence. Even a person in the early stages of dementia can provide a great deal of information, although it may not be in a logical sequential order.

- Giving evidence can be exhausting and stressful, so ensure that the time given for examination and cross-examination is not too long, or allow sufficient breaks.
- Many older people will be reliant on public transport to travel to and from court. Consider allowing sufficient time to allow them to exit the court, access transport and reach home in a reasonable hour.
- Older people often have significant responsibilities as carers, often for their disabled partners or spouses, or for their grandchildren. Given the lack of childcare facilities in courts and respite care more generally, 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, allow a witness or juror to check that any necessary care arrangements are in place.
- Ensure that courtrooms are equipped to assist those with impairments, for example hearing amplification, non-glare lighting, magnifying glass.
- Provide safe waiting areas for older victims and their families.

11.5.8 Directions to a jury\(^{201}\)

Points to consider:

- Negative stereotyping of older people is considered pervasive.\(^{202}\) It is important to ensure that the jury does not allow stereotyped or false assumptions or ignorance about older people, or the manner by which an older person’s evidence is presented, to unfairly influence their judgment.
- You may need to provide specific guidance as follows:
  - Explain that they must try to avoid making any stereotyped or false assumptions. It may be sensible to give them specific examples of stereotyping and explain that they must treat the particular older

\(^{201}\) See *Equality before the law bench book*, WA Supreme Court, 2009, p 175.
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 about all or most older people. Instead, they must carefully consider the evidence presented.

- If appropriate, explain what needs to be taken into account in relation to long-term abuse of an older person by a family member and the defences of duress, provocation and/or self-defence.

- 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, or cover them for the first time now, in particular, how they must treat evidence presented as a result of restricting direct cross-examination by a self-represented accused, using a communication aid or as a pre-recorded interview, etc.

- If you have declared any witness in the proceedings to be a special witness, remind jurors that making a declaration is a routine practice of the court and that they should not draw any inference as to the accused’s guilt from it.

- Keep in mind that older people may serve as jurors, and therefore it is likely that there will be older people on the jury.
### 11.6 Further information or help

The following organisations can provide information or expertise about older people, or related issues and also about other appropriate community agencies:

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<tr>
<th>Organisation</th>
<th>Address/Contact Information</th>
<th>Description</th>
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<tbody>
<tr>
<td>Ability Incorporated Advocacy Service</td>
<td>100 Main Street Alstonville NSW 2477 Ph: 02 6628 8088 Web: <a href="https://abilityadvocacy.org.au/">https://abilityadvocacy.org.au/</a></td>
<td>Provides assistance to all people with a disability, their parents and carers who live in the areas of Tweed to Taree including New England, Armidale, Glen Innes and Inverell.</td>
</tr>
<tr>
<td>Aboriginal Legal Services (NSW/ACT)</td>
<td>619 Elizabeth Street Redfern NSW 2016 Ph: 02 8303 6600 Web: <a href="http://www.alsnswact.org.au/">www.alsnswact.org.au/</a></td>
<td>Provides free advice and assistance to Indigenous people and their families (including people in custody), particularly in criminal matters. There are five regional organisations in NSW with 25 offices.</td>
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<tr>
<td>Aged Care Quality &amp; Safety Commission (Cth)</td>
<td></td>
<td>The role of the Aged Care Quality and Safety Commission (Commission) is to protect and enhance the safety, health, well-being and quality of life of people receiving aged care.</td>
</tr>
<tr>
<td>Combined Pensioners &amp; Superannuants Association</td>
<td>Level 3, 17-21 Macquarie St Parramatta NSW 2150 Ph: 9281 3588 Web: <a href="http://cpsa.org.au/">http://cpsa.org.au/</a></td>
<td>CPSA provides pensioners, superannuants and low-income retirees with information and advice and acts as an advocate on a variety of issues, including aged care, health and housing.</td>
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<tr>
<td>Council on the Ageing (NSW)</td>
<td>Level 11 31 Market Street Sydney NSW 2000 Ph: 1800 449 102 Web: <a href="https://cotansw.com.au/">https://cotansw.com.au/</a></td>
<td>COTA (NSW) is a not-for-profit, community organisation serving all persons aged 50 and over in NSW. It aims to mobilise older people, those who work with them, government and the community towards achieving well-being and social justice for older people.</td>
</tr>
<tr>
<td>Dementia Australia NSW</td>
<td>Macquarie Hospital Building 21, Gibson-Denney Centre Cnr Cox &amp; Norton Roads North Ryde NSW 2113 Ph: 02 9805 0100 Email: <a href="mailto:nsw.admin@dementia.org.au">nsw.admin@dementia.org.au</a> Web: <a href="https://dementia.org.au/">https://dementia.org.au/</a></td>
<td>A national peak body for people, of all ages, living with all forms of dementia, their families and carers.</td>
</tr>
<tr>
<td>Disability Council NSW</td>
<td>Level 3, 4-6 Cavill Ave Ashfield NSW 2131 Ph: 02 8879 9175 Email: <a href="mailto:DisabilityCouncil@facs.nsw.gov.au">DisabilityCouncil@facs.nsw.gov.au</a></td>
<td>The Disability Council is the official advisory body to the NSW government.</td>
</tr>
<tr>
<td>Elder Law at Western Sydney</td>
<td>Western Sydney University Locked Bag 1797, Penrith NSW 2751 Web: <a href="http://www.westernsydney.edu.au/elr">www.westernsydney.edu.au/elr</a></td>
<td>Elder Law at Western Sydney publishes the Elder Law Review, raising awareness within the Australian and international legal community of legal issues faced by older persons.</td>
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<tr>
<td><strong>Law Access</strong></td>
<td>LawAccess NSW provides a single point of access to legal and related assistance services in NSW.</td>
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<td>Parramatta Justice Precinct</td>
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<tr>
<td>160 Marsden Street Parramatta NSW 2124</td>
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<tr>
<td>Ph: 1300 888 529</td>
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<th><strong>Law Society of NSW</strong></th>
<th>The Solicitor Referral Service of the NSW Law Society refers clients who can pay for legal services to appropriate law firms within NSW. The law society also publishes a number of helpful resources such as the Guidelines for Solicitors preparing an Enduring Power of Attorney, which can be obtained through the society website.</th>
</tr>
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<tbody>
<tr>
<td>170 Phillip Street, Sydney NSW 2000</td>
<td></td>
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<tr>
<td>Ph: 02 9926 0333</td>
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</tbody>
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<tr>
<th><strong>Legal Aid of NSW</strong></th>
<th>Legal Aid NSW provides legal services to disadvantaged clients across NSW in most areas of criminal, family and civil law. They also deliver services to people experiencing or at risk of elder abuse.</th>
</tr>
</thead>
<tbody>
<tr>
<td>323 Castlereagh Street Haymarket 2000</td>
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<tr>
<td>Ph: 02 92195000</td>
<td></td>
</tr>
<tr>
<td>Fax: 02 92195935</td>
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<tr>
<th><strong>My Aged Care</strong></th>
<th>Australian government website which provides contacts and links to government and non-government information of relevance to seniors, veterans, retirees and those about to retire.</th>
</tr>
</thead>
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<tr>
<td>Ph: 1800 200 422</td>
<td></td>
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<tr>
<td>Web: <a href="https://myagedcare.gov.au/">https://myagedcare.gov.au/</a></td>
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<th><strong>National Seniors Association</strong></th>
<th>National Seniors Australia branches ensure seniors voice is heard on issues affecting millions of older Australians.</th>
</tr>
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<tr>
<td>Ph: 1300 765 050</td>
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<tr>
<th><strong>NSW Elder abuse helpline and resources</strong></th>
<th>Offer a free service that provides information, support and referrals relating to the abuse of older people living in the community across NSW. The service is confidential and callers remain anonymous.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ph: 1800 628 221</td>
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<th><strong>NSW Family &amp; Community Services</strong></th>
<th>Family and Community Services are involved in ageing, disability inclusion, carers and advisory councils.</th>
</tr>
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<tr>
<td>Family and Community Services Ageing, Disability and Home Care</td>
<td></td>
</tr>
<tr>
<td>Locked Bag 10, Strawberry Hills NSW 2012</td>
<td></td>
</tr>
<tr>
<td>Ph: 02 9377 6000</td>
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<tr>
<th><strong>Older Womens Network (OWN)</strong></th>
<th>OWN Groups promote the rights, dignity and wellbeing of older women. Groups organise a wide range of activities and advocate on issues of concern to older women.</th>
</tr>
</thead>
<tbody>
<tr>
<td>8-10 Victoria Street Newtown NSW 2042</td>
<td></td>
</tr>
<tr>
<td>Ph: 02 9519 8044</td>
<td></td>
</tr>
<tr>
<td>Web: <a href="http://ownnsw.org.au/">http://ownnsw.org.au/</a></td>
<td></td>
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</tbody>
</table>
### Public Interest Advocacy Centre
Level 5, 175 Liverpool St
Sydney NSW 2000
Ph: 02 8898 6500
Web: https://piac.asn.au/

The Public Interest Advocacy Centre is an independent, non-profit legal and policy centre. Using its legal and policy skills, PIAC makes strategic interventions in public interest matters to foster a fair, just and democratic society and to empower citizens, consumers and communities.

### Seniors Rights Service
Level 4, 418A Elizabeth St
Surry Hills NSW 2010
Ph: 1800 424 079
Web: https://seniorsrightsservice.org.au/

Seniors Rights Service is a community legal centre that protects the rights of older people. They provide telephone advisory services, advocacy, legal advice and educational services.
11.7 Further reading

Reports


NSW Government, *Preventing and responding to abuse of older people (elder abuse)*, NSW Interagency policy, June 2018.


NSW Government, *Preventing and responding to abuse of older people (Elder abuse)*, NSW Interagency Policy, June 2018.


Books


Articles


L Barry, “‘He was wearing street clothes, not pyjamas’: common mistakes in lawyers’ assessment of legal capacity for vulnerable older clients” (2018) 21 (1) *Legal Ethics* 3.

T Cockburn and B Hamilton, “Equitable remedies for elder financial abuse in inter vivos transactions” (2011) 31 *Qld Lawyer* 123.


Al Wright and R Holliday, “Police officers’ perceptions of older eyewitnesses” (2005) 10 (2) Legal and Criminology Psychology 211.


D Browne, “Avoiding elder financial abuse: safeguards solicitors should have in place” (2018) 41 NSWLSJ 79.


E Webb, “Papering over the void — could (or should) consumer law be used as a response to elder abuse?” (2016) 24 CCLJ 101.

T Cockburn and B Hamilton, “Equitable remedies for elder financial abuse in inter vivos transactions” (2011) 31 Qld Lawyer 123.

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