

Trauma-informed courts

Purpose of this chapter

There has been a growing awareness of trauma, including complex trauma and post-traumatic stress disorder, over the last 40 years. This has led to the development of a humane framework for health practitioners, and more recently, legal and other professionals and the judiciary, usually referred to as “trauma-informed practice”. The purpose of this chapter is to:

- highlight for judicial officers relevant information about the different types and particular instances of trauma that many individuals before the courts have faced; and
- provide guidance about how judicial officers may take account of this information in court — from the start to the conclusion of court proceedings. This guidance is not intended to be prescriptive.

Contents

12.1 Introduction	11503
12.2 What is “trauma”?	11507
12.2.1 Impact of trauma	11509
12.3 Trauma and its impact on particular groups	11513
12.3.1 Domestic and family violence	11513
12.3.2 Child sexual abuse/sexual assault	11515
12.3.3 First Nations People	11515
12.3.4 Children in out-of-home-care	11517

12.3.5 Migrants, refugees and asylum seekers	11518
12.3.6 Victims of sexual harassment	11519
23.3.7 People with disabilities	11520
12.3.8 LGBTQI people	11521
12.4 Practical considerations: embedding a trauma-informed practice	11523
12.4.1 Why be trauma-informed?	11523
12.4.2 Trauma-informed principles in practice	11524
12.4.3 Help with the court process	11525
12.4.4 Vulnerable witnesses	11526
12.4.5 Consent legislation changes	11527
12.4.6 Sentencing considerations	11527
12.4.7 Specific suggestions for trauma-informed judicial practices	11528
12.4.8 “Trauma-informed courts” versus “solution-focussed” courts	11529
12.5 Conclusion: why be trauma-informed?	11531
12.6 Further information or help	11533
12.6 Further reading	11533

12.1 Introduction

Many courts have come to recognise that acknowledging and understanding the impact of trauma on court participants 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. Every interaction is an opportunity.¹

Trauma is highly prevalent in the community.² It may be safely concluded that many court participants are trauma survivors and may continue to experience trauma to varying degrees. The experience of trauma among people with substance abuse and mental health disorders, especially those involved with the justice system, is so high as to be considered an almost universal experience.³ The very nature of legal proceedings, both civil and criminal, has the potential for severe stress for those involved.⁴ Further, there is a growing understanding of the prevalence and impact of trauma, experienced as vicarious trauma, on judicial officers themselves.⁵

While trauma-informed practice is most obviously applicable in criminal law, as noted by Drs Kezelman and Stavropoulos “there are few areas of legal practice to which trauma-informed principles do not apply”.⁶

Complex trauma-related problems present in many guises (including risky and/or challenging behaviours). While this may not necessarily be apparent in the courtroom, it may affect how a person behaves and the response of the presiding judicial officer. “Difficult” behaviour and/or “symptoms” may be the product of coping mechanisms and attempted self-protection in light of prior adverse experiences. If not seen through the lens of trauma, this behaviour is “often and inappropriately labelled as pathological, when [it] should instead be viewed as

-
- 1 M Triggiano, “Childhood trauma: essential information for courts,” Wisconsin Association of Treatment Court Professionals, 2015.
 - 2 Studies suggest that 57–75% of Australians will experience a potentially traumatic event at some point in their lives; according to the 2017–18 ABS National Health Survey, an estimated 13% or 2.4 million Australians aged 18 and over reported high or very high levels of psychological distress, a 12% increase from 2014–15 (11.7% or 2.1 million Australians). According to the 2007 National Survey of Mental Health and Wellbeing, 12% of Australians experience PTSD in their life (lifetime prevalence), with women being at almost twice the risk of men (15.8% and 8.6% respectively): AIHW, Stress and trauma, Snapshot, 23 July 2020, accessed 18 February 2022.
 - 3 Substance Abuse and Mental Health Services Administration (SAMHSA), “Essential components of trauma-informed judicial practice: what every judge needs to know about trauma”, Substance Abuse and Mental Health Services Administration, 2013, accessed 28 February 2022.
 - 4 C Kezelman and P Stavropoulos, “Trauma and the law: applying trauma-informed practice to legal and judicial contexts”, Blue knot foundation, 2016, p 10, accessed 4 May 2022.
 - 5 J Hunter, et al, “A fragile bastion: UNSW judicial traumatic stress study” (2021) 33 *JOB* 1; K O’Sullivan, et al, “Traumatic stress in judicial officers — prevalence and impact”, pre-print available, accessed 2 March 2022. M Kirby, “Judicial stress: an unmentionable topic”, (1995) 13 *Aust Bar Review* 101; M Kirby, “Judicial stress” (1995) 2(3) *TJR* 199.
 - 6 Kezelman and Stavropoulos, above n 4, p 10.

adaptations a person has had to make in order to cope with life's circumstances".⁷ Judicial understanding and acknowledgement of trauma helps to positively engage participants in services, treatment, and judicial interventions, whether or not they have a trauma-related or other mental health diagnosis. Communicating effectively and respectfully with court participants, eliminating unnecessary court procedures that could be perceived as threatening, and modifying the physical environment to create a sense of safety can help ensure that trauma survivors benefit from judicial interventions.⁸

Being a trauma-informed judicial officer does not mean that clinical knowledge or special qualifications are required. What is required is a *basic knowledge of the impacts of stress on the brain, body and behaviour* and *strategies to avoid exacerbating possible trauma-related problems* which research substantiates to be highly prevalent in the general population.⁹

Brief history of trauma-informed practice

Trauma-informed practice and principles emerged from the mental health sector in North America. Investigations of traumatic stress and treatments developed from observations of male soldiers' reactions to the horrors of the First World War but then waned until the Vietnam War when the experiences of Vietnam veterans began to be recognised as post-traumatic stress disorder (PTSD).¹⁰ In 1985, the International Society for Traumatic Stress was founded in the United States. Four years later, the United States Department of Veterans Affairs created the National Centre for Post-Traumatic Stress Disorder.¹¹ Trauma-informed practice has become "an increasingly prevalent approach in the delivery of therapeutic services, social and human services, and now legal practice".¹² There is also an overlap between trauma-informed practice and therapeutic jurisprudence: see further **12.4.2**.

The development of traumatology in the West is also indebted to studies of survivors of the Holocaust and their families. Intergenerational trauma was first identified among the children of Holocaust survivors,¹³ with one study in 1988 showing that children of Holocaust survivors were overrepresented in psychiatric referrals by 300%. Recent research has identified intergenerational trauma among

7 M Randall and L Haskell, "Trauma-informed approaches to law: why restorative justice must understand trauma and psychological coping" (2013) Fall *The Dalhousie Law Journal* 523 at 508 as noted in Kezelman and Stavropoulos, *ibid*, p 6.

8 SAMHSA, above n 3, as noted in P Hora, "The trauma-informed courtroom" (2020) 32(2) *JOB* 11 at 13.

9 Kezelman and Stavropoulos, above n 4, at p 5.

10 L Jones and J Cureton, "Trauma redefined in the DSM-5: rationale and implications for counselling practice" *The Professional Counselor*, 3 July 2014, accessed 4 May 2022.

11 M Curi, "A short-history of trauma-informed care", IowaWatch.org, 2018, accessed 4 May 2022.

12 S Katz and D Haldar, "The Pedagogy of Trauma-Informed Lawyering" (2016) 22 *Clinical l Rev* 359 at 361.

13 P Fossion et al, "Family approach with grandchildren of Holocaust survivors" (2003) 57(4) *American Journal of Psychotherapy*, 519-527.

other groups such as Indigenous populations in North America and Australia.¹⁴ Most of the studies on intergenerational trauma have found atypically high rates of anxiety, depression and PTSD in trauma survivors and their progeny.¹⁵

-
- 14 Maria Yellow Horse Brave Heart “The historical trauma response among natives and its relationship to substance abuse: a Lakota illustration” 35(1) *Journal of Psychoactive Drugs*; W Aguiar and R Halseth, *Aboriginal peoples and historic trauma: the processes of intergenerational transmission*, 2015, Prince George, BC, National Collaborating Centre for Aboriginal Health as noted in F Franco, “Understanding intergenerational trauma: an introduction for clinicians” *GoodTherapy*, 8 January 2021, accessed 11 April 2022.
- 15 T DeAngelis, “The legacy of trauma” (2019) 50(2) *American Psychology Association* 36.

12.2 What is “trauma”?

The clinical definition of trauma and diagnostic criteria have been “highly debated” over the years.¹⁶ The *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, released in 2013, created a new diagnostic category named “Trauma and stressor-related disorders” to include disorders in which exposure to a traumatic or stressful event is listed explicitly as a diagnostic criterion. These include reactive attachment disorder, disinhibited social engagement disorder, post-traumatic stress disorder (PTSD), (relocated from the anxiety disorders category in DSM-4)¹⁷ acute stress disorder, and adjustment disorders.¹⁸

Arguably, psychological trauma as it is construed in Western culture is gendered and beset by cultural chauvinism — many cultures experience trauma collectively and as part of the identity of the group, whereas Western models (as constructed in the DSM and the ICD)¹⁹ define trauma as an individual, subjective and intrapsychic experience.

Everybody experiences “normal” life stress. Without it, we would not get up in the morning. In contrast, trauma may be understood as stemming from the “overwhelming of coping mechanisms in response to perception or experience of extreme threat”.²⁰ For those who live with the effects of unresolved trauma, “normal” life stress can be profoundly destabilising, trapping them in a cycle of physical and psychological reactivity which is devastating to well-being and to a wide spectrum of functioning.²¹

Trauma may be caused by exposure to violence, physical and/or sexual abuse, neglect, natural disasters and accidents, and any other events that induce powerlessness, fear, recurrent hopelessness, and a constant state of alert. Trauma may also be caused by discrimination due to gender, race, poverty, and sexual orientation. The most traumatic experiences often include betrayal by a trusted person or institution.²²

It is important to distinguish between “**single incident**” trauma which connotes **single incidents and events (ie PTSD)** and **complex trauma** which is repeated, ongoing, and often extreme interpersonal trauma (between people) which may encompass violence, abuse, neglect or exploitation experienced as a child, young person and adult.²³ Complex trauma is more extensive in its impacts across a

16 Jones and Cureton, above n 10; SAMSHA, “Concept of trauma and guidance for a trauma-informed approach”, 2014, p 5, accessed 22 February 2022.

17 DSM-4, 1994.

18 DSM Library, Trauma and stressor-related disorders, accessed 21 February 2022.

19 International Classification of Diseases (ICD), maintained by the World Health Organization.

20 Kezelman and Stavropoulos, above n 4, p 3.

21 *ibid.*

22 SAMHSA, above n 3, at p 7.

23 Kezelman and Stavropoulos, above n 4, at p 4.

range of functioning and is more prevalent.²⁴ Complex trauma is usually borne by women in relationships characterised by abuse, neglect, intimate partner violence and coercive control.²⁵

Intergenerational or transgenerational trauma research considers the collective and cultural impact of trauma on whole communities and groups. In the Australian context, intergenerational and transgenerational trauma have been important concepts for First Nations scholars and clinicians examining the contemporary effects of colonisation — linked to a loss of social and cultural norms, values, meanings and structures — and the subsequent imposition of an alien system. Intergenerational trauma affects the children, grandchildren and future generations of the Stolen Generations specifically and First Nations communities generally due to colonisation and its subsequent effects.²⁶ Stolen Generations survivors might also pass on the impacts of institutionalisation, finding it difficult to know how to nurture their children because they were denied the opportunity to be nurtured themselves due to both their forced removal and the institutional cruelty suffered.²⁷

Emeritus Professor Judy Atkinson AM, a Jiman and Bundjalung woman, in *Trauma Trails*²⁸ writes that Western models of post-traumatic stress disorder are not applicable to First Nations people as they are premised on an individualistic understanding of mental illness. She argues that collective trauma affects the whole society, rather than only affecting people on an individual level. Atkinson views First Nations trauma as “cumulative” or “compounding”, which distinguishes it from a one-off traumatic event such as a natural disaster or unique event of interpersonal victimisation. Colonisation, she submits, “set in motion a series of disasters, one precipitating another, to propagate trauma on trauma on trauma”²⁹ In this model, trauma is both individual and collective and is passed on through survivors to their descendants. Trauma is further entrenched through policies, structures, and systems of control that disempower First Nations people.³⁰

The trans-generational effects of trauma occur via a variety of mechanisms including the impact on the attachment relationship with caregivers; the impact

24 *ibid.*

25 The most influential work in this area is Dr Judith Hermann’s book, *Trauma and Recovery*, Basic Books, 1992.

26 M Davis, *Family is Culture*, Review Report, 2019, p 21.

27 Healing Foundation, “What is intergenerational trauma?”, accessed 22 November 2021. See also, AIHW and Healing Foundation, “Aboriginal and Torres Strait Islander stolen generations and descendants: number, demographic characteristics and selected outcomes”, 2018, accessed 22 November 2021. See also EQBLBB, at [2.2.2]

28 J Atkinson, *Trauma trails, recreating song lines: the transgenerational effects of trauma in Indigenous Australia*, Spinifex Press, 2002.

29 *ibid.*, p 59.

30 From M Salter, et al, “A deep wound under my heart: constructions of complex trauma and implications for women’s wellbeing and safety from violence”, *Research Report*, Issue 12, pp 26–27, May 2020, ANROWS.

on parenting and family functioning; the association with parental physical and mental illness; disconnection and alienation from extended family, culture and society. These effects are exacerbated by exposure to continuing high levels of stress and trauma including multiple bereavements and other losses, the process of vicarious traumatization where children witness the on-going effect of the original trauma which a parent or other family member has experienced. Even where children are protected from the traumatic stories of their ancestors, the effects of past traumas still impact on children in the form of ill health, family dysfunction, community violence, psychological morbidity and early mortality.³¹

See further *Equality before the law Bench Book* at [2.2.2] Intergenerational/transgenerational trauma.

12.2.1 Impact of trauma

Unresolved early life trauma is correlated unequivocally with a raft of adverse physical and psychological health problems in adulthood and with a range of psychosocial issues as well.³² Trauma interrupts the connections between our different systems of functioning — physical, emotional and cognitive. Recovery occurs when these different levels of functioning become connected or “integrated” again.³³

The physical nexus between trauma and behavioural/psychological problems that can consequently manifest is well documented. Research into trauma survivors, for example Holocaust survivors and Vietnam veterans, has shown how trauma, including intergenerational trauma, affects a person’s neurophysiology. For example, excessive exposure to stress, mediated through the neurotoxic effects of cortisol and possibly neuroinflammation, causes damage to brain structure and function. Functional changes of hypothalamic-pituitary-adrenal (HPA) axis, as well as alterations in brain structures like the hippocampus, have been consistently reported in major depression.³⁴ The hippocampus, amygdala, and prefrontal cortex undergo stress-induced structural remodelling, which alters behavioural and physiological responses.³⁵

31 H Milroy, preface to S Zubrick, et al, “The Western Australian Aboriginal child health survey: the social and emotional wellbeing of Aboriginal children and young people”, Curtin University of Technology and Telethon Institute for Child Health Research, 2005, Perth, p xxi.

32 Kezelman and Stavropoulos, above n 4, at p 4.

33 Blue Knot at <https://blueknot.org.au/resources/building-a-trauma-informed-world/>, accessed 1 March 2022.

34 T Frodl and V O’Keane, “How does the brain deal with cumulative stress? A review with focus on developmental stress, HPA axis function and hippocampal structure in humans” (2013) 52 *Neurobiol Dis* 24.

35 B McKeon, “Physiology and neurobiology of stress and adaption: central role of the brain” (2007) 87 *Physio Rev* 873 at 873, 891.

Furthermore, 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.³⁶

Children's exposure to traumatic events is thought to impact the neurological development of the brain which becomes distorted such that the "survival" mechanisms of the brain and body are more dominant than the "learning" mechanisms,³⁷ resulting in wide-ranging impairments in arousal, cognitive, emotional and social functioning.³⁸

People respond to traumatic events in different ways and there is no standard way to react or behave. Unlike "normal" life stress, a perception of extreme threat activates innate "fight", "flight" and/or "freeze" responses which are protective at the time of the precipitating event/s but which corrode health over time if the underlying trauma is not resolved. For those who live with the effects of unresolved trauma, "normal" life stress can be profoundly destabilising, trapping them in a cycle of physical and psychological reactivity which is devastating to well-being and to a wide spectrum of functioning.³⁹ Once a threat is perceived, the defence circuitry triggers a cascade of responses that often involves freezing first. The response involves heightened attention, decreased heart rate, and a tense body primed for action. Many victims of crime are likely to experience a freeze response, especially in cases where the perpetrator is known to the victim.⁴⁰ For example, a person who may "freeze" out of fear and is unable to communicate, does not consent to sexual intercourse.⁴¹ There have been cases in Victoria and ACT where the "freeze response" has been used as expert evidence in sexual assault cases: see for example *R v Hakimi*.⁴²

36 Epigenetics refers to the process by which gene expression is inhibited or enhanced, ie 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, et al, "The effects of trauma, with or without PTSD, on the transgenerational DNA methylation alterations in human offsprings" (2018) 8 *Brain Sci* 83, accessed 23 May 2022. See also A Kuffer, A Maercker and A Burri, "Transgenerational effects of PTSD of traumatic stress: do telomeres reach across the generations?" (2014) *Journal of Trauma & Treatment*, accessed 23 May 2022.

37 J Atkinson, "Trauma-informed services and trauma-specific care for Indigenous Australian children", *Closing the Gap Clearinghouse Resource 21*, AIHW, 2013.

38 S McLean, "The effect of trauma on the brain development of children: evidence-based principles for supporting the recovery of children in care", *Australian Institute of Family Studies*, June 2016, accessed 23 May 2022.

39 Kezelman and Stavropoulos, above n 4, p 3.

40 E Werner, "Avoiding the second assault: a guidebook for trauma-informed prosecutors" (2021) 25(2) *Lewis & Clark Review* 573 at 586.

41 As recognised in the new consent legislation: see s 61HJ(1)(a), which has been introduced to address the "freeze" response where a person may not physically resist an assault.

42 [2012] ACTSC 11 at [19]. See also www.smh.com.au/opinion/jury-convicted-by-expert-evidence-on-freeze-fright-response-in-rape-victims-20140406-zqrkd.html, accessed 14 December 2021.

For a list of traditional credibility factors and how they lead to misunderstandings in relation to the response to trauma, see E Werner, “Avoiding the second assault: a guidebook for trauma-informed prosecutors”.⁴³

Example

Because of the way memory is encoded as the brain is trying to survive a threatening stimulus, a victim’s account of an event may contain gaps, inconsistencies, or be missing details. Gaps and inconsistencies should not be interpreted as proof of credibility, innocence, or guilt on their own. A gap or inconsistency may be indicative of the way that memory was encoded.

In cases with only two witnesses — the perpetrator and the victim — the negative impact on credibility may create a significant barrier to accessing justice.⁴⁴

43 Werner, above, n 40.

44 *ibid* at pp 586–587

12.3 Trauma and its impact on particular groups

Many people presenting before the courts who are vulnerable to trauma will have intersectional aspects of non-normative existence, for example, a First Nations person may also live with disability and be a member of the LGBTIQI community. It is important to bear in mind the potential overlapping nature of these vulnerabilities.

12.3.1 Domestic and family violence

Adults

In NSW, one in three women experience physical or sexual violence, or both, caused by someone known to them.⁴⁵ Many victims of domestic violence experience trauma and live with PTSD and experience symptoms that are both chronic and severe. These include: nightmares, insomnia, somatic disturbances, difficulty with intimate relationships, fear, anxiety, anger, shame, aggression, suicidal behaviours, loss of trust and isolation. Psychological disorders may also occur in conjunction with PTSD including depression, anxiety and alcohol/substance abuse problems.⁴⁶

Children

Of those women who experience domestic and family violence (DFV), over 50% have children in their care.⁴⁷ The effects of exposure to family and domestic violence on children and young people include:⁴⁸

- **Homelessness** — DFV is the leading cause of homelessness for children in Australia. This may result in negative impacts on children’s long-term physical and mental health; disruptive schooling, friendships and links to community and cultural activities. The loss of the family home itself can have traumatic effects on children.
- **Impaired learning, behaviour and wellbeing** — DFV can contribute to poorer educational outcomes and a range of behavioural issues, including impaired cognitive functioning; poorer academic outcomes; learning difficulties; low school attendance and doing school work/concentrating;

45 NSW Department of Communities & Justice, “The effects of domestic and family violence on children and young people”, accessed 19 November 2021

46 American Psychological Association, “Facts about women and trauma”, August 2017, accessed 22 November 2021.

47 *ibid.* See also AIHW “Children exposed to their parent or carer’s experience of domestic violence” in *Family, domestic and sexual violence data in Australia*, updated 16 December 2021, accessed 1 March 2022.

48 M Campo, “Children’s exposure to domestic and family violence: key issues and responses”, *CFCA Paper*, No 36, AIFS, 2015, pp 5–6, accessed 22 November 2021; NSW Department of Communities & Justice, above n 45.

ongoing anxiety and depression; trouble forming positive relationships; using bullying behaviour or becoming the target of bullying; difficulty in solving problems and less empathy and caring for others.

- **Impaired physical health** — including being significantly more likely to use mental health services, primary care, speciality health services and pharmaceutical services.
- **Trauma** — children exposed to DFV over a sustained period of time may develop trauma symptoms such as depression; low self-esteem; anxiety; poor coping mechanisms; eating disorders; substance abuse; chronic pain and self-harm.

In the longer term, a child growing up in an abusive household may learn to solve their problems by using violence, rather than through more peaceful means. Some of the long-term effects may include copying their parental role models and behaving in similarly destructive ways in their adult relationships.⁴⁹ An adolescent may be at higher risk of either perpetrating or becoming a victim of dating violence.⁵⁰

There is widespread concern that the impact of trauma on parenting is not being addressed in the child protection system, resulting in late and punitive interventions.⁵¹ Domestic violence and abuse of children are often correlated. The most consistent risk factor in juvenile offending is a history of child abuse and/or neglect.⁵²

In 2015–16, First Nations children were seven times as likely to be the subject of substantiated child abuse or neglect as non-First Nations children.⁵³ Given the high rates of First Nations children and young people in out-of-home care, it may be concluded that First Nations children are more likely than other cultural groups to come to the notice of child protection agencies.⁵⁴ If one or both parents have been in contact with these agencies themselves as children,

49 Supreme Court of WA, 13.3.4 “Impact of DV on child development”, *Equal Justice Bench Book*, September 2021, p 822, accessed 2 March 2022.

50 above n 45.

51 Salter, et al, above n 30, pp 10–11.

52 F Lima, M McLean and M O’Donnell, “Exploring outcomes for children who have experienced out-of-home care”, Department of Community Services and Telethon Kids Institute, 2018, p 3. See also P Johnstone, “Cross-over kids: the drift of children from the child protection system into the criminal justice system”, paper first presented to 2016 Aboriginal Legal Service Symposium of Aboriginal children, culture and the Law at [1-0035] Children’s Court of NSW Resource Handbook.

53 Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia*, 2018, (Cat No FDV 2) Summary (xii), pp 83 and 96, accessed 8 February 2021.

54 Davis, above n 26, ch 1.

their parenting is likely to be seen through this lens. Family violence within First Nations communities needs to be understood as both a cause and effect of social disadvantage and intergenerational trauma.⁵⁵

12.3.2 Child sexual abuse/sexual assault

A number of empirical studies examining violence against women have supported the hypothesis that women who were sexually abused as children show an increased likelihood of being re-victimised later in life. A history of childhood sexual abuse has been associated with subsequent sexual assault or rape as an adult, as well as physical abuse by a partner.⁵⁶

As with children impacted by family and domestic violence, many child abuse victims meet the specified criteria for post-traumatic stress disorder (PTSD) and may display a loss of developmental achievements and display learning difficulties, bedwetting, and aggressive behaviours towards others.

A further type of trauma, called “betrayal trauma”⁵⁷ is described as a social-affective response relevant to child sexual abuse at the hands of family, friends or trusted authority figures who are familiar to the victim. This includes systematic abuse perpetrated by members of the clergy, teachers and coaches within institutions like churches, schools and sporting clubs.

The legal difficulty that arises in cases alleging recurring incidents of child sexual abuse is that child complainants are required to provide particular details of individual sexually abusive incidents from among a series of recurring events. Particularisation is important in framing a criminal charge and in allowing the perpetrator to prepare a defence to the precise charges. Thus, children are often asked to recall when, where and on which occasion certain events or actions occurred.⁵⁸

See also the *Bugmy Bar Book* “Childhood sexual abuse”.⁵⁹

12.3.3 First Nations People

Judges and magistrates deal first hand with the impacts of transgenerational trauma, making decisions on a daily basis about people who carry inherited

55 *ibid*, p xi.

56 V Follette et al, “Cumulative trauma: the impact of child sexual abuse, adult sexual assault and spouse abuse” (1996) 9(1) *Journal of traumatic stress* 25 at 26.

57 J Goodman-Delahunty, M Nolan and E Van Gijn-Grosvenor, “Empirical guidance on the effects of child sexual abuse on memory and complainants’ evidence”, *Report for the Royal Commission into Institutional Responses to Child Sexual Abuse*, July 2017, p 79, accessed 23 November 2021.

58 *ibid*, p 98.

59 The Public Defenders, *Bugmy Bar Book*, accessed 13 December 2021.

trauma. It is important for First Nations people that judicial officers are informed about the impacts of trauma.⁶⁰ See further above at **12.2** “What is trauma?” and Section 2 “First Nations people” **2.2.2 Intergenerational/transgenerational trauma.**

A recent report by the Australian Institute of Health and Welfare⁶¹ found that First Nations children under the age of 15 who lived in the same household as a member of the Stolen Generations had similar outcomes as the adult descendants such as poorer school attendance, reported more racism at school, higher levels of stress, poorer self-assessed health and higher rates of household poverty compared to other First Nations children.⁶² These results provide a new perspective on how the intergenerational effects of removal from family that occurred for the Stolen Generations up to 1970 can still be seen in contemporary data about the children who live with the Stolen Generations.⁶³

A 2015 research report⁶⁴ on First Nations people with mental and cognitive disabilities in the criminal justice system found:

the nature of care and support needed for Aboriginal people with multiple and complex support needs is qualitatively different and more than the sum of their individual diagnoses and disabilities. Combined with the normalisation of the criminal justice system as the avenue through which Aboriginal dysfunction and disadvantage is managed, systems of control and containment predominate. This is also intergenerational. Aboriginal people articulated a holistic, integrated, culturally responsive model of care with rigorous client and community accountability that is needed to support Aboriginal people with multiple and complex support needs to reduce contact with the criminal justice system.

A more recent report, *Significance of culture to wellbeing, healing and rehabilitation*, attests to the importance of sentencing orders which enhance an offender’s prospects of rehabilitation by providing for engagement with culturally appropriate services and programs and which enable First Nations communities to play a role in the healing process wherever possible. The report will be relevant in assisting the framing of sentencing orders, including the finding of special circumstances and the crafting of conditions attached to community-based orders.⁶⁵

60 B O’Neill, “Decolonising the mind: working with transgenerational trauma and First Nations People” (2019) 31(6) *JOB* 54.

61 AIHW, “Children living in households with members of the Stolen Generations”, 2019, accessed 23 November 2021.

62 *ibid*, p 13–15.

63 M Salter et al, above n 30, p 27.

64 University of NSW Sydney, “A preventable path: Indigenous Australians with mental health disorders and cognitive disabilities in the criminal justice system”, Research Report, 2 November 2015, at 8.5, accessed 13 December 2021.

65 V Edwige and P Gray, *Significance of Culture to Wellbeing, Healing and Rehabilitation*, 2021, accessed 19 November 2021.

The *Bugmy Bar Book*, hosted on the NSW Public Defenders’ website, is a useful resource which summaries key research relating to experiences of disadvantage and deprivation including on the Stolen Generations and descendants; cultural dispossession; and incarceration of parents and caregivers.⁶⁶

Note the *Family is Culture*⁶⁷ Recommendation 114:

The NSW Judicial Commission should, in partnership with Aboriginal educators, provide opportunities for further education to Children’s Court of NSW Magistrates and staff regarding the research on intergenerational trauma, the effects of colonisation, domestic violence, poverty, substance abuse and mental health issues that may affect Aboriginal parents’ interactions with the court.

12.3.4 Children in out-of-home-care

Entry into the out-of-home-care (OOHC) system will have followed problems or trauma within the family unit, perhaps illness or death of the caring parent, domestic abuse, either of the child directly or within the family, leading to an unstable or dangerous environment, or drug and/or alcohol problems which create a chaotic lifestyle for dependent children. Many enter care because they have been abused or neglected. These experiences can leave children with complex emotional and mental health needs, which can increase their risk of experiencing a range of poor outcomes including vulnerability to abuse.⁶⁸

In NSW as at 30 June 2021, there were 15,895 children in OOHC (in 2020 there were 16,160). Of those 15,895, 43% (or 6,829) were First Nations children. While the overall number of children in OOHC has reduced, the absolute number of First Nations children being taken and put in out-of-home care has increased, and the proportion of the young people who are First Nations has increased since 2017.⁶⁹

A disproportionate number of juveniles in detention have previously come into contact with the child protection system and children in OOHC are also more likely to be under juvenile justice supervision.⁷⁰ The “drift” of children from OOHC into the juvenile justice system has been flagged as an issue of paramount

66 above n 59.

67 Davis, above n 26.

68 Judicial College (UK), *Equal Treatment Benchbook*, London, 2021, p 313, accessed 6 May 2022.

69 NSW Legislative Council, Transcript (Uncorrected), Friday 29 October 2021, p 17.

70 A McGrath, A Gerard and E Colvin, “Care-experienced children and the criminal justice system” (2020) 600 *Trends & Issues in crime and criminal justice*, AIC; Davis, above n 67.

concern for First Nations communities and the *Family is Culture* (FiC) report has made recommendations for judicial education to address this.⁷¹ Further, the links between these systems are seen as so strong that child removal into OOHC and juvenile detention are considered as key drivers of adult incarceration.⁷²

See further *Children’s Court Resource Handbook* at [1-0025] **Cross over kids**.

See also the *Bugmy Bar Book* “Out-of-home care”.⁷³

12.3.5 Migrants, refugees and asylum seekers

Asylum seekers and refugees are among the most vulnerable groups within our society. They have higher rates of mental health difficulties than are usually found within the general population.⁷⁴

Refugee and asylum-seeking families settling in Australia have likely witnessed and lived through war-trauma and human rights abuses. Many have lived for extended periods of time in protracted and tenuous transit situations with interrupted access to essential services to support health, education, accommodation and employment. As well as pre-migration trauma, asylum seekers suffer as a result of the loss of the support of family and friends, social isolation, loss of status, culture shock, uncertainty, racism, hostility (eg from the local population and press), housing difficulties, poverty and loss of choice and control. The process of seeking asylum adds further stress. New migrants may well have different experiences and understandings of the role of courts. Refugees and asylum seekers may have had traumatic experiences of the administration (or otherwise) of the rule of law in their own countries.⁷⁵

Asylum seekers who are detained in the host country experience further and more specific stress from the detention process itself and the detention centre environment, which may adversely affect their mental health status. Sources of stress include insecurity, loss of liberty, uncertainty regarding return to country of origin, social isolation, abuse from staff, riots, forceful removal, hunger strikes and self-harm.⁷⁶ Depression and anxiety are common. Post-traumatic stress disorder is greatly underestimated and underdiagnosed. For cultural reasons, mental illness may not be expressed or may manifest as physical

71 Davis, above n 26, p xxxvi; Rec 66.

72 Australian Law Reform Commission, Pathways to Justice, ALRC Report 133, December 2017, p 485 [15.1]; Bugmy Bar Book, “Out-of-home-care”, above n 59, at [31].

73 *ibid*.

74 F Shawyer et al, “The mental health status of refugees and asylum seekers attending a refugee health clinic including comparisons with a matched sample of Australian-born residents” (2017) 76 *BMC Psychiatry* 17, accessed 1 March 2022.

75 Judicial College (UK), above n 68, p 206.

76 *ibid*, p 223.

complaints. Stigma may also be attached to mental ill-health. Furthermore, Western psychological concepts are not universally applicable to asylum seekers who come from different cultures.⁷⁷

Lived trauma and the effects of social and emotional deprivations do not extinguish across a lifetime, nor are they completely ameliorated following resettlement in developed nations. The socioeconomic determinants of health and wellbeing are profoundly impacted by refugee and asylum-seeker journeys; specific refugee adverse childhood experiences are now also recognised. These risks and vulnerabilities are often cumulative, but also intergenerational.⁷⁸

The Refugee Council of Australia identifies suicide as a significant issue among members of Australia’s legacy caseload of asylum seekers, many of whom have experienced profound psychological distress. This is linked to feeling unable to continue with prolonged uncertainty regarding their status and flooding of traumatic experiences which continues for many, even after their claims for protection are granted.⁷⁹

See also the *Bugmy Bar Book* “Refugee background”; “Cultural dispossession”.⁸⁰

12.3.6 Victims of sexual harassment

An Australian Human Rights Commission (the Commission) survey conducted in 2018 showed that sexual harassment in Australian workplaces is widespread and pervasive.⁸¹ Re-traumatisation of the victim is a common theme throughout the report.

While the Respect@work inquiry focused on anti-discrimination, employment and WHS law, to provide a broader picture of the complex and intersecting legal and regulatory issues relating to workplace sexual harassment, the Commission considered other general civil and criminal laws and regulatory responses that may also be relevant. The Commission was also told about police and judicial responses in workplace sexual harassment matters which lacked sensitivity and understanding. The Commission heard the devastating accounts of victims who had been re-traumatised through their interaction with the legal system. This underscores the importance of those working in the system having sensitive, trauma-informed and gender-responsive approaches to victims of workplace sexual harassment. The Commission recommended that education on the nature,

77 UK Faculty of Public Health, *Briefing statement: the health needs of asylum seekers*, 2007.

78 Refugee Health Service, as discussed in Equal Justice Bench Book (WA), above n 49, p 34.

79 J Ariff, “Lethal hopelessness: understanding and responding to asylum seeker distress and mental deterioration”, Refugee Council of Australia, 1 February 2019, accessed 14 December 2021.

80 Public Defenders, above n 59.

81 Australian Human Rights Commission, *Respect@work: sexual harassment national inquiry report 2020*, accessed 14 December 2021.

drivers and impacts of sexual harassment be made available to judges, magistrates and tribunal members. This education should include that sexual harassment is driven by gender inequality and is a form of gender-based violence, be trauma-informed and be in line with the principles of “Change the story”. “Change the story: a shared framework for the primary prevention of violence against women and their children in Australia”⁸² provides an evidence-based framework to guide efforts to prevent sexual harassment, which sets out that violence against women is driven by gender inequality, is preventable and that actions must be taken by governments, organisations and individuals in the settings where they work, live, learn and socialise.⁸³

23.3.7 People with disabilities

There is growing awareness that people with an intellectual disability are significantly more likely to experience adverse life events, abuse and trauma in childhood compared with others in the general population. There is also growing evidence that adults with an intellectual disability are more vulnerable to traumatic experiences and abuse than the general population.⁸⁴

The segregation and social exclusion of people with disability produces stigma and discrimination, which may lead to violence, abuse, neglect and exploitation. Complaints made by people with disability, particularly those with psychosocial or intellectual disabilities, are not always taken seriously or are considered minor.⁸⁵ The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability, established in 2019, reported in its 2021 Interim Report that almost two-thirds of people with a disability have experienced violence and are twice as likely as people without disability to experience violence. People with a disability who are victims of domestic and family violence can experience particular forms of domestic and family violence, such as the withholding of food, water, medication or support services, the use of restraints, reproductive control and forced isolation.⁸⁶

See further **5.2.4 — Examples of the barriers for people with disabilities in relation to court proceedings.**

82 Published by Our Watch, an independent, not for profit organisation established to drive nationwide change in culture, behaviours and power imbalances to prevent violence against women and their children, accessed 18 March 2022.

83 *ibid* at pp 23, 33–34.

84 P McNally, L Taggart and M Shevlin, “Trauma experiences of people with an intellectual disability and their implications: a scoping review” (2021) 34(4) *Journal of Applied Research in Intellectual Disabilities* 927.

85 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability (Disability Royal Commission), *Interim Report*, October 2020, pp 8, 28, accessed 12 April 2022.

86 People with Disability Australia, “Women with disability and domestic and family violence: a guide for policy and practice”, 2021, p 3.

12.3.8 LGBTQI people

Research shows that members of the lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) community are more likely to experience potentially traumatising events, mental and physical health problems and discrimination due to their perceived sexual identity throughout their lifetime.⁸⁷ This may be due to persistent bullying, community violence, childhood or medical trauma (including conversion therapy which can encourage internalised homophobia, self-hatred, shame and confusion about sexuality and gender identity)⁸⁸ and sexual abuse.

Although many LGBTQI+ Australians live healthy and happy lives, research has shown that a disproportionate number experience poorer mental health outcomes and have higher risk of suicidal behaviours than their peers. Transgender and gender diverse people aged 16 and over are nearly four times more likely to have experienced sexual violence or coercion.⁸⁹

See further **8.1 — Some statistics: verbal abuse, intimidation and violence** and **9.2 — Transgender and transsexual people**.

87 See C Sarda, “Research roundup: traumatic events and the LGBTQ community“, American Psychological Association, September 2019, accessed 12 April 2022.

88 See L Sandy, A Powell and R Hiscock, “Why Australia needs a national ban on conversion therapy”, *The Conversation*, 8 September 2020, accessed 12 April 2022.

89 LGBTIQ+ Health Australia, “Understanding suicide amongst transgender and gender diverse people”, accessed 12 April 2022.

12.4 Practical considerations: embedding a trauma-informed practice

12.4.1 Why be trauma-informed?

All courts should apply the principles of participation, dignity and trust identified in procedural justice research.⁹⁰

Research shows that many people who experience complex trauma-related problems have been re-traumatised by the very services they have accessed for assistance. Such re-traumatisation occurs across the full spectrum of sectors, practices and services, including within and across the legal and justice sectors.⁹¹

Being a trauma-informed judicial officer will: ⁹²

- help to defuse the stressful courtroom environment parties/witnesses/defendants, and for judicial officers, legal practitioners and court staff and minimise the risk of participants being re-traumatised
- recognise that the effects of overwhelming stress may impede a traumatised witness to give evidence such that their evidence and conduct may appear “discursive, episodic, unreliable and even mendacious”
- enhance the likelihood that fair processes and justice will be achieved.

Being trauma-informed may also facilitate the proper application of therapeutic jurisprudence techniques in solution-focused courts such as drug courts, mental health courts and family violence courts, First Nations sentencing courts (in NSW, Circle Sentencing and the Walama List in the District Court) and in mainstream court and tribunal lists where appropriate.⁹³

90 M King, “What can mainstream courts learn from problem-solving courts” (2007) 32 *Alternative Law Journal* 91.

91 Kezelman and Stavropoulos, above n 4, p 5 citing A Jennings, “Models for developing trauma Informed behavioral health systems and trauma-specific services”, National Association of State Mental Health Program Directors and National Technical Assistance Center for State Mental Health Planning, United States, 2004, p 6.

92 Kezelman and Stavropoulos, above n 4, pp 11–17.

93 above n 90.

12.4.2 Trauma-informed principles in practice

The US-based Substance Abuse and Mental Health Services Administration (SAMHSA)⁹⁴ recommends adherence to six key principles rather than a prescribed set of practices or procedures. These principles may be adapted for the courtroom as follows:⁹⁵

1. **Safety:** throughout the courtroom, all participants feel physically and psychologically safe
2. **Trustworthiness and transparency:** operations and decisions are conducted with transparency with the goal of building and maintaining trust with all court participants
3. **Peer support:** peers are understood as individuals with lived experiences of trauma; peer support and mutual self-help are key vehicles for establishing safety and hope
4. **Collaboration and mutuality:** importance is placed on partnering and levelling the power differences in the courtroom
5. **Empowerment, voice and choice:** the courtroom fosters a belief in the primacy of the people served, in resilience
6. **Cultural, historic and gender issues:** the courtroom actively moves past cultural stereotypes and biases (eg based on race, ethnicity, sexual orientation, age, religion, gender); leverages the healing value of traditional cultural connections; incorporates policies, protocols, and processes that are responsive to the racial, ethnic and cultural needs of individuals served; and recognises and addresses historical trauma.

To the above, the following principles are integral to a trauma-informed practice:⁹⁶

- Be aware of **the impact that experiences of trauma may have on the experience of the court process**. For some victims their engagement with law enforcement agencies and the courts may exacerbate or prolong the trauma they have experienced. For example, absence of legal representation, lack of interpreter services, giving oral evidence, being cross examined, being present in the court room or court precinct with the perpetrator, or having to repeatedly return to court for mentions, adjournments and hearings may contribute to a victim's re-victimisation or secondary abuse through the court system. Judicial officers should ensure, where reasonably practicable and where resources permit, that any adverse consequences associated with court processes are addressed or at least mitigated.⁹⁷

94 SAMHSA, above n 16.

95 *ibid* p 10. See also Hora, above n 8, at 12.

96 Kezelman and Stavropoulos, above n 4, pp 7–19.

97 AIJA, “National Domestic and Family Violence Bench Book”, *Trauma-informed judicial practice*, ch 5.11, accessed 14 December 2021.

- **Be attuned to “what has happened” to a person rather than “what is wrong” with a person:** this allows sense to be made of behaviour and responses which may otherwise seem perplexing and/or counter-productive.⁹⁸
- Be aware that **a court participant’s memory and recall may be affected by trauma.**⁹⁹
- **Be aware of the risks of vicarious trauma and take active steps to minimise it.**¹⁰⁰ Awareness of your own conduct and self-care has major implications for your interactions with court participants.¹⁰¹

Dr Michael King, in *Solution-focused judging Bench Book*¹⁰² suggests that while a more comprehensive solution-focused approach is best suited to cases where there are underlying issues contributing to offending that place the defendant at increased risk of further offending, general principles of therapeutic communication between the judicial officer and the defendant are applicable in every case. These techniques can be adapted for use in general sentencing cases, depending on the circumstances. It is common for a court in sentencing to comment on the effect of the offending on the victim and, if a victim impact statement has been produced to the court or if the victim has given evidence at trial, to refer directly to what the victim has said concerning the matter. The court also comments on what a defendant has said about the offending. The court acknowledges the significance of what both have said. By doing so, the court is not only giving reasons for the sentence and demonstrating that it has taken into account all relevant matters, but also is according procedural justice, voice, validation and respect to the victim and defendant.

12.4.3 Help with the court process

Newly arrived migrants may well have different experiences and understandings of the role of courts. They may not trust a court. Refugees and asylum seekers may have had traumatic experiences of the administration of the law in their own countries. They may have come from countries where the accused in a criminal court does not necessarily enjoy the presumption of innocence. In their country of origin there may have been corruption among judges and/or judges may not

98 See also Hora, above n 8 at 12.

99 Kezelman and Stavropoulos, above n 4, p 14.

100 See the Judicial Commission Judicial Wellbeing portal on JIRS which includes both mental and physical wellbeing information to assist judicial officers maintain and sustain a healthy judicial life.

101 S Bloom, “Organizational stress as a barrier to trauma-sensitive change and system transformation”, National Technical Assistance Centre, 2006, p 2; cited in Kezelman and Stavropoulos, above n 4, p 17.

102 M King, *Solutions-focussed judging Bench Book*, AIJA and Legal Services Board, 2009, pp 191–192, accessed 2 March 2022.

generally be regarded as being independent of the government or other State authorities like the prosecution or police. These steps may help judicial officers establish trust and confidence:

- It will be particularly important to explain the process, what will happen, the court's powers and the opportunities which the individual will have to explain his or her case.
- Through the course of the hearing, carefully monitor that the individual understands the process and feels included in it.
- Demonstrate that the judicial officer is listening and is interested in what a party has to say through proper body language signifying attention and by (where appropriate) reflecting back something that the party has said or by checking with the party that the judicial officer's understanding of what a party has said is correct.
- If a defendant waives a right, a judicial officer needs to ensure it is done knowingly, not because the defendant assumes exercising rights is futile.
- Bear in mind intercultural ways of communication.¹⁰³
- If the individual has mental health difficulties, make the necessary adjustments (see Section 5 People with disabilities). This may require particular sensitivity. Bear in mind that such difficulties may not have been diagnosed and that the individual may be unwilling to admit them.¹⁰⁴

The use of **special witness** provisions may also help to ameliorate the impact of trauma on witnesses, in particular by ensuring that witnesses perceive that the court prioritises their safety.

12.4.4 Vulnerable witnesses

See *Criminal Trial Courts Bench Book* [1-360]ff regarding directions or warnings to be given where evidence is given by alternative means, particularly closed circuit television (CCTV), alternative seating arrangements, the use of screens, support persons, the admission of pre-recorded out-of-court representations to police and evidence given via audio visual link.

These relate to complainants or sexual offence witness defined in s 294D *Criminal Procedure Act* 1986 (CPA) in prescribed sexual offence proceedings;

103 See further "People from a linguistically and culturally diverse background", *Equality before the Law Bench Book*, Judicial Commission of NSW, Sydney, at [3.3].

104 Judicial College (UK), above n 68, pp 223–224.

vulnerable persons defined in s 306M CPA in personal assault proceedings; domestic violence complainants in s 3 and Pt 4B or s 289T CPA; victims defined in s 26 *Crimes (Sentencing Procedure) Act* 1999 relating to victim impact statements; and vulnerable persons in Commonwealth sexual offence proceedings: see s 15Y *Crimes Act* 1914 (Cth).

See further *Local Court Bench Book* at [8-000]ff (Evidence by domestic violence complainants); [10-000]ff (Evidence from vulnerable complainants); [12-000]ff (Remote witness video facilities).

12.4.5 Consent legislation changes

Legislation to change the law of consent in NSW, which commenced on 1 June 2022, acknowledges the impact of trauma upon victims of sexual assault. Importantly, the *Crimes Legislation Amendment (Sexual Consent Reforms) Act* 2021 specifically acknowledges the trauma-informed approach which is increasingly taken to a complainant's evidence.¹⁰⁵ This includes mandatory jury directions concerning consent which are “to discourage jurors from relying on misconceptions and assumptions about consensual and non-consensual sexual activity when making decisions about sexual trials”. It also includes not making assumptions that the person's clothing or appearance, or the consumption by the victim of alcohol or drugs, could be a reliable indicator of consent in some cases.¹⁰⁶ Further, misperceptions of the manner in which evidence may be given about an alleged sexual offence are addressed in new s 292D CPA, which provides for a direction that trauma may affect people differently, with some showing obvious signs of emotion or distress when giving evidence about an alleged sexual offence while others may not, and that the presence or absence of either does not necessarily mean a person is not telling the truth about it.¹⁰⁷

12.4.6 Sentencing considerations

The *Bugmy Bar Book* provides a number of chapters relating to experiences of trauma, disadvantage and deprivation, including exposure to DFV, cultural dispossession, those from OOHC and those who have experienced childhood sexual abuse. The purpose of the book is to inform the court about the meaning

105 For example, ss 293A, 294, and 294AA *Criminal Procedure Act* 1986. See P Mizzi and R Beech-Jones, “The law on consent in sexual assault is changing” (2022) 34(1) *JOB* 1 (in particular pp 5–6) for a detailed explanation of these changes.

106 As discussed in NSW Law Reform Commission (NSWLRC), *Consent in relation to sexual offences*, Report No 148, 2020, Ch 8.

107 *ibid* at 8.111–8.119.

and potential impact of an offender’s disadvantage and thereby assist courts in applying sentencing principles appropriate to an offender with a history of disadvantage.¹⁰⁸

12.4.7 Specific suggestions for trauma-informed judicial practices¹⁰⁹

Courtroom experience	Reaction of trauma survivor	Trauma-informed approach
Court officer handcuffs an individual without warning.	Anxiety about being restrained; fear about what is going to happen.	Tell the court officer and individual you intend to remand them. Explain what is going to happen and when. “The officer is going to walk behind you and you will be handcuffed.”
Judge remands one drug court participant for having a positive test but not another. They are both in the courtroom at the same time.	Concern about fairness; feeling that someone else is getting special treatment.	Explain for first participant, sobriety is a proximal goal and for second it is not. Compare time in the program and progress in treatment. Explain goal is a last resort and you hope participant will not give up on recovery.
Individuals who are agitated or “acting out” are required to wait before speaking to the judge.	Increased agitation; anxiety; acting out.	Provide scheduling information so participants know what will be expected of them and when. Prioritise those who appear before you and when. Those who are especially anxious may have the most trouble waiting and be more likely to act out.
“Your test came back dirty.”	“I’m dirty.” “There is something wrong with me.”	“Your drug screen showed the presence of drugs.” “Your drug test was positive.”
“Did you take your meds today?”	“I’m a failure. I’m a bad person. No one cares how the drugs make me feel.”	“Are the medications your doctor prescribed working well for you?”

108 N Cowdery, J Hunter and R McMahon, “Sentencing and disadvantage: the use of research to inform the court” (2020) 32(5) *JOB* 43 at 44; see also Fullerton J’s comments at *Perkins v R* [2018] NSWCCA 62 at [99].

109 From SAMHSA, above n 3; Hora, above n 8 at 13.

<p>“You didn’t follow the contract. You’re going to gaol. We’re done with you. There is nothing more we can do.”</p>	<p>“I’m hopeless. Why should I care how I behave in gaol? They expect trouble anyway.”</p>	<p>“Maybe what we’ve been doing isn’t the best way for us to support you. I’m going to ask you not to give up on recovery. We’re not going to give up on you.”</p>
<p>“I’m ordering you to get a mental health evaluation.”</p>	<p>“I must be crazy. There is something wrong with me that can’t be fixed.”</p>	<p>“I’d like to refer you to a doctor who can help us better understand how to support you.”</p>

12.4.8 “Trauma-informed courts” versus “solution-focussed” courts

Trauma-informed practice in the legal domain has built on therapeutic jurisprudence which has been informed by the work of David Wexler and Bruce Winick.¹¹⁰ Solution-focussed approaches seek to address the underlying issues instead of only focusing on the legal problem. Specialised problem-solving courts, such as drug courts, domestic violence courts, and mental health courts were established in the United States since the late 1980s then introduced into Australia with the NSW Drug Court being the first in 1999 and in other countries such as Austria, Canada, Ireland, New Zealand, Norway and the UK. A therapeutic jurisprudence approach considers the mental and emotional consequences of the legal system on litigants and ask legal practitioners to recognise the effect of their own ethical, personal, and spiritual values on their behaviour and decisions in the courtroom.¹¹¹ Therapeutic jurisprudence suggests that findings from the behavioural sciences can inform judicial and legal practice to promote wellbeing and minimise any negative effects on wellbeing consistent with other values the court system must take into account.¹¹² Solution-focussed courts centre on ways that enhance the well-being of litigants by improving the procedural fairness of the court experience, such as facilitating access to treatment and services where appropriate, and promoting and supporting positive behavioural change.¹¹³

110 D Wexler and B Winick, “Therapeutic jurisprudence as a new approach to mental health law policy analysis and research” (1991) 45 *U Miami L Rev* 979.

111 N Katirai, “Retraumatized in court” (2020) 62 *Ariz L R* 81 at 117.

112 see King, above n 90.

113 International Consortium for Court Excellence, *The International Framework for court excellence*, 3rd edn, 2020, accessed 24 May 2022. See further AIJA, “Problem-solving courts”, accessed 1 March 2022.

Current examples of trauma-informed courts

Various models exist in our system within which the “trauma informed” approach might be more easily met than in traditional court settings. Circle sentencing in some Local Courts, the Drug Court of NSW and the Youth Koori Court in Sydney fall under this umbrella. Another initiative which seeks to address potential further trauma to juvenile complainants is the Child Sexual Offence Evidence Program Scheme, which commenced on 31 March 2016 in the Sydney District Court concerning the early pre-recording of evidence with the assistance of a witness intermediary.

See further, W Hunt, “Adopting a trauma-informed approach in the District Court” (2020) 32(2) *JOB* 14.

The advent of therapeutic jurisprudence and solution-focussed courts has stimulated interest in how the actions of judicial officers in courts and tribunals generally can either impede or advance positive justice outcomes, such as satisfaction in, and respect for, the justice system and the comprehensive resolution of criminal, civil, family and administrative law cases and their underlying issues. As a result there is ongoing work into how therapeutic jurisprudence principles can be applied in diverse areas of judging, including trials, sentencing, bail applications, appeals and tribunal hearings without compromising traditional judicial values such as independence and impartiality.¹¹⁴

114 AIJA, “Therapeutic jurisprudence and judging”, accessed 19 November 2021.

12.5 Conclusion: why be trauma-informed?

There is a strong evidence base that trauma and its impacts are substantial, prevalent and persist long after the initial trauma has ended.¹¹⁵ There is a broad consensus that many people who engage with mainstream institutions are trauma survivors and that their trauma experiences shape their responses to those they engage with in an institutional setting.¹¹⁶ Further, mainstream institutional responses may re-traumatise individuals with PTSD, complex trauma, mental health problems, addictions and social disadvantage, particularly in the criminal justice system.¹¹⁷ Many struggle to obtain treatment and gain equal access to justice.

Solution-focussed approaches and strategies are based on behavioural science findings as to what is effective in promoting positive behavioural change. Using research and practices in the behavioural sciences and in other areas where behavioural science findings are applied may assist judicial officers and lawyers in the performance of their work.¹¹⁸ Therapeutic and trauma-informed approaches to judging emerged from specialised solution-focussed courts. Increasingly it is being recognised that trauma-informed practice can be applied more broadly in legal and judicial contexts.¹¹⁹ Factors also emphasised as important by procedural justice — giving parties' voice, validation and respect — are important elements of day-to-day judging.

115 See for example, Mental Health Coordinating Council, *Trauma-Informed Care and Practice: Towards a cultural shift in policy reform across mental health and human services in Australia, A National Strategic Direction, Position Paper and Recommendations of the National Trauma-Informed Care and Practice Advisory Working Group*. 2013, p 4, accessed 18 March 2022.

116 *ibid.*

117 Kezelman and Stavropoulos, above n 4, pp 5, 15.

118 King, above n 102, pp 3, 5.

119 *ibid.*, p 1; King, above n 90, Ch 8.

12.6 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:

<p>Blue Knot Foundation (National office) PO Box 597 Milsons Point NSW 1565 Ph: 1300 657 380 Email: helpline@blueknot.org.au Web: https://blueknot.org.au/</p>	<p>Blue Knot provides information and support for anyone who is affected by complex trauma.</p>
<p>Bravehearts (Head office) PO Box 575, Arundel BC Queensland 4214 Ph: 07 5552 3000 Email: bisl@bravehearts.org.au Web: https://bravehearts.org.au/</p>	<p>Bravehearts provides industry-leading child protection training and education programs, specialist child sexual assault and exploitation counselling and support services, as well as engaging in research and lobbying.</p>
<p>Healing Foundation Unit 11 (Level 2) 11 National Circuit Barton ACT 2600 Ph: 02 6272 7500 Email: info@healingfoundation.org.au Web: https://healingfoundation.org.au</p>	<p>The Healing Foundation is a national Aboriginal and Torres Strait Islander organisation that partners with communities to address the ongoing trauma caused by actions like the forced removal of children from their families.</p>
<p>Full Stop Australia Ph: 1800 385 578 Email: info@fullstop.org.au Web: https://fullstop.org.au/</p>	<p>Trauma specialist counselling for people of all genders who are impacted by violence and abuse</p>
<p>1800 Respect Ph: 1800 737732 Web: https://www.1800respect.org.au/</p>	<p>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.</p>
<p>Victims Services NSW Victims Access Line: 1800 633 063 Aboriginal Contact Line: 1800 019 123 Web: https://www.victimsservices.justice.nsw.gov.au/</p>	<p>Victims Services NSW provide counselling, financial support and a recognition payment to victims of a violent crime in NSW. From 1 January 2022, victims of modern slavery can also apply for victims support..</p>

12.6 Further reading

J Atkinson et al, “Addressing individual and community transgenerational trauma” in P Dudgeon, H Milroy and R Walker (eds), “Working together: Aboriginal and Torres Strait Islander mental health and wellbeing principles and practice” Attorney-General’s Department, ACT, 2nd edn, 2014.

AIJA, “Trauma-informed judicial practice” National Domestic and Family Violence Bench Book, Ch 5.11, accessed 17 November 2021.

Australasian Institute for Judicial Administration resources on problem-solving courts and therapeutic jurisprudence. Available at:

- the concept of therapeutic jurisprudence,
- therapeutic jurisprudence and judging.

R Dive, “The trauma-informed approach of the Drug Court of NSW” (2020) 32(3) *JOB* 19.

S Duncombe, “The trauma-informed approach of the NSW Youth Koori Court” (2020) 32(3) *JOB* 21.

P Hora, “The trauma-informed courtroom” (2020) 32(2) *JOB* 11.

W Hunt, “Adopting a trauma-informed approach in the District Court of NSW” (2020) 32(2) *JOB* 14.

Judicial College of Victoria, “Victims of crime in the courtroom: a guide for judicial officers” .

Judicial Commission of NSW, “Therapeutic jurisprudence and the trauma-informed court”, in Handbook for Judicial Officers, 2021.

N Katirai, “Retraumatized in court” (2020) 62(81) *Arizona Law Review* 81.

C Kezelman and P Stavropoulos, “Trauma and the law: applying trauma-informed practice to legal and judicial contexts”, Blue Knot Foundation, 2016.

M King, *Solution-focussed judging bench book*, AIJA and Legal Services Board, 2009.

M King, “What can mainstream courts learn from problem-solving courts” (2007) 32 *Alternative Law Journal* 91.

S McCarthy, “The trauma-informed barrister” (2020) 32(3) *JOB* 23.

Mental Health Coordinating Council, *Trauma-Informed Care and Practice: Towards a cultural shift in policy reform across mental health and human services in Australia*, A National Strategic Direction, Position Paper and Recommendations of the National Trauma-Informed Care and Practice Advisory Working Group, 2013, accessed 18 March 2022.

B O’Neill, “Decolonising the mind: working with transgenerational trauma and First Nations People” (2019) 31(6) *JOB* 34.

E Richardson, P Spencer and D Wexler, “The international framework for court excellence and therapeutic jurisprudence: creating excellent courts and enhancing wellbeing” (2016) 25 *JJA* 148.

M Salter et al, “A deep wound under my heart: constructions of complex trauma and implications for women’s wellbeing and safety from violence”, Research Report, Issue 12/2020, ANROWS.

S Wells and J Urff, “Essential components of trauma-informed judicial practice”, *Substance Abuse and Mental Health Services Administration*, 2013, accessed 24 January 2022.

R Waterworth, “Measuring legal actor contributions in court: judges roles, therapeutic alliance and therapeutic change” (2019) 28 *JJA* 207; (2021) *Handbook for Judicial Officers* 809.

E Werner, “Avoiding the second assault: a guidebook for trauma-informed prosecutors” (2021) 25.2 *Lewis & Clarke Law Review* 573.

S Zubrick, et al, “The Western Australian Aboriginal child health survey: the social and emotional wellbeing of Aboriginal children and young people”, Curtin University of Technology and Telethon Institute for Child Health Research, 2005.

[The next page is 12101]