Equality before the Law

Bench Book

Providing for community and individual difference in court proceedings

Judicial Commission of New South Wales

Equality before the Law Bench Book

Judicial Commission of New South Wales

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Email (for your comment) equalitybb@judcom.nsw.gov.au

Editors: Kate Lumley and Tamsin Janu

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 then Chief Justice, the Honourable JJ Spigelman, Chief Justice of NSW.

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 (former Member of the Judicial Commission)
- Mr Ernie Schmatt PSM (former Chief Executive, Judicial Commission)
- Ms Ruth Windeler (former Education Director, Judicial Commission)

Community representatives and expert reviewers

The following community representatives and expert reviewers provided insightful guidance on draft sections of the Bench Book relevant to their communities and/or areas of expertise. We wish to thank each of the following for their valuable contributions:

Section 2 — First Nations peoples

- 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

- Professor Sandra Hale, University of NSW (Interpreting and Translation) (Update 7)
- Mr Stepan Kerkyasharian AM, Chairperson, Community Relations Commission For a Multicultural NSW
- Mr Chandrasekaram Visakesa (Vissa), Senior Development Officer (Diversity Services), NSW Attorney General's Department
- Mr Mark Painting, CEO, National Accreditation Authority for Translators and Interpreters Ltd (Update 12)
- Ms Vivienne Lamn, Associate Director — Policy, Multicultural NSW (Update 24)
- Mr J Angelo Berbotto, National President of the Australian Institute of Interpreters and Translators, 2022–2024 (Update 26)

Section 4 — People with a particular religious affiliation

- Mr Stepan Kerkyasharian AM, Chairperson, Community Relations Commission For a Multicultural NSW
- The Reverend Canon Bruce McAteer, General Secretary, The Anglican Church of Australia General Synod Rev Dr Ann Wansbrough, Senior Policy Analyst, UnitingCare NSW/ACT
- Ms Marita Winters, Director, Catholic Communications Mr Graeme Lyall AM, Chairman, Buddhist Council of NSW Dr A Balasubramaniam, Chairman, Hindu Council of Australia
- Mr Nihal Agar, Chairman, Hindu Council of Australia Sheikh Fawaz Kamaz, Australian Federation of Islamic Councils Inc
- Mr Ali Roude OAM, Deputy Chairman, Islamic Council of New South Wales Inc
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- Her Honour Magistrate Rana Daher (Update 26)

Section 5 — People with disabilities

- Ms Julia Haraksin, Diversity Services, NSW Police and Justice Department Professor
- David Greenberg, Clinical Director, Justice Health
- 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)
- Ms Rukiya Stein, PhD candidate, University of New England School of Law (Update 26)

Section 6 — Children and young people

- His Honour Magistrate Scott Mitchell, Senior Children's Magistrate, St James Children's Court
- Professor Anne Graham, Director, Centre for Children and Young People
- Mr Stephen Robertson, Director, Policy, NSW Commission for Children and Young People
- Mr James McDougall, Director, National Children's & Youth Law Centre Associate
- Professor Judith Cashmore AO, University of Sydney (Update 5, 2009; Update 10, 2016; Update 12, 2018)
- Dr Jenny Bargen, University of Sydney (Update 10, 2016)
- Ms Rukiya Stein, PhD candidate, University of New England School of Law (Update 26)

Section 7 — Women

- Ms Philippa Davis, Principal Solicitor, Women's Legal Service NSW
- Ms Larissa Andelman, President, Women Lawyers' Association for NSW Inc; Ms Renée Bianchi, Vice President, Women Lawyers' Association for NSW Inc; Ms Holly Lam, Immediate Past President, and the Executive of the Women Lawyers' Association for NSW Inc.
- 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 and Update 22, 2022)
- 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

- Associate Professor Nola M Ries, Research Centre, Faculty of Law, University of Technology, Sydney
- Dr Lise Barry, Macquarie Law School, Sydney
- Adjunct Associate Professor Sue Fields, School of Law, Western Sydney University, Sydney
- Mr Richard McCullagh, Solicitor, Patrick McHugh & Co Pty Ltd
- Ms Jennifer Smythe, Assistant Principal Solicitor, Seniors Rights Service, Sydney

Section 12 — Trauma-informed courts

- Dr Michael King, Magistrate, Dandenong Drug Court and Magistrates Court, Melbourne
- Ms Barbara O'Neill, Trauma Recovery and Practice Practitioner, The Junction Neighbourhood Centre, Sydney
- Associate Professor Michael Robertson, Clinical Associate Professor, Centre for Values, Ethics & Law in Medicine (VELIM), School of Public Health, University of Sydney

Special acknowledgment

This Bench Book was inspired by three influential publications:

- Judicial College, Equal Treatment Bench Book, February 2021 ed (April 2023 revisions), London, accessed 4/10/2023
- Supreme Court of Queensland, Equal Treatment Benchbook, 2016, 2nd edn, Supreme Court of Queensland Library, Brisbane, accessed 4/10/2023
- S Fryer-Smith, Aboriginal Benchbook for Western Australian Courts, 2nd edn, 2008, AIJA, Victoria, accessed 4/10/2023

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 26: April 2025, Sections 1,2, 4, 5, 6, 8 and 9 updated

Currency

Update 26, April 2025

Section 1 — Equality before the law

A new section **Communication** at **1.3** discusses the importance of clear and effective communication in judicial settings, to ensure the accessibility and fairness of legal processes.

Section 2 — First Nations people

- Information under **Some statistics** at **2.1** has been updated to more accurately reflect the experiences of First Nations peoples, particularly regarding employment, health, violence, and prosecutions, bail and imprisonment. BOCSAR and census data have been amended to present the most recent statistical evidence.
- The insertion of **The importance of culture and cultural safety as a source of healing** at **2.2.4** discusses the effect of intergenerational and structural trauma in First Nations communities on individual interactions with the legal system, and the significance of cultural safety to empower First Nations peoples and mitigate harm. The adverse consequences of institutionalisation are illustrated by Shields and Ellis' expert report, which studies the psychiatric impacts of systems like youth detention and out-of-home care on First Nations peoples. The report reflects how patterns of behaviour and physical reactions often manifest in response to confinement, and is extensively referenced throughout the chapter. Practical harm reduction methods referenced at **2.2.4** include the use of an Indigenous Liaison Officer or diversionary programs, which aim to limit cultural wounds induced by involvement with legal proceedings.
- At **2.2.8 Justice reinvestment and the OCHRE plan** Operation Mantus has been added to highlight systemic issues with police conduct regarding arrest and investigation.

Section 4 — People with a particular religious affiliation

The chapter has been revised at various points to provide more accurate information on religious practices and traditions, as well as to include updates to legislation regarding religious vilification and "hate crimes".

- Significant additions have been made to **Religious vilification and "hate crimes"** at **4.2.7** in accordance with the introduction of Pt 4BA to the *Anti-Discrimination Act 1977* (NSW), which amended the Act to include specific reference to religious vilification as unlawful: s 49ZE. The section was further updated to include the newly created offence under s 93Z *Crimes Act 1900* (NSW) of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status, as followed

the Commonwealth's amendment of the *Criminal Code Act 1995* (Cth) which created the offence of advocating force or violence against groups: ss 80.2A and 80.2B.

- The population data under **Some statistics** at **4.1** have been amended to reflect trends from the most recent census.
- At **4.2.3.1**, a more extensive explanation of the Islamic teaching of Jihad has been added, to provide greater understanding of the Muslim tradition of anti-violence.

Section 5 — People with disabilities

- Information on **Legal protections for people with a disability** at **5.4** has been updated to consolidate relevant legislation and legal obligations at an international, federal and state level. The legal framework has regard to discrimination and "hate crime" offences, the provision of necessary supports for people with disabilities, and the economic, social and legal inclusion of people with disabilities in the community.
- The chapter has been extensively revised and updated in response to Recommendation 8.11 in the *Final Report* of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2023) which recommended that courts should consider modification of the trial process and ensure the defendant receives assistance to facilitate understanding and effective participation. **Conceptions and range of disabilities** at **5.2.2** has been updated to provide greater perspective on how medical and social models of disability inform societal responses to, and interactions with, people with disabilities. The information contained in this section informs the remainder of the chapter, as it reflects how people with disabilities should be assisted as far as reasonably practicable to participate on an equal basis to others in legal proceedings.
- **Autism spectrum condition** at **5.3.10** and **Attention Deficit Hyperactivity Disorder (ADHD)** at **5.3.11** have each been added under **Disability types and intersectionality**, providing guidance on how to conduct inclusive legal proceedings using practical adjustments. Each section also contains information on acceptable terminology which may be used, and the specifics of particular traits and severities of each condition. Reasonable adjustments to proceedings have also been added for people with **Intellectual disabilities** at **5.3.5**.
- A section has been added on **Witness/communication intermediaries** at **5.6.2** which emphasises the importance of communication adjustments in legal proceedings to ensure genuine and effective participation. The *Criminal Procedure Act 1986* (NSW) as amended by the *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023* (NSW) currently only allows for the use of an intermediary for children under 16 years, or over 16 years with a cognitive impairment or communication disability.

Section 6 — Children and young people

- An extensive section on **The witness/communication intermediary** has been added at **6.4.5** with detail on the role of witness and communication

intermediaries throughout the judicial process, and specific communication aids that may be recommended to assist in proceedings. Witness intermediaries were introduced under the Child Sexual Offence Program (CSOEP) by the legislative framework of the *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023*, and only applies to child sexual assault matters.

- **Appendices A–C** have been inserted to provide practical guidance and instruction on how to effectively communicate with children ages 4–11 and 12–16 at **6.9**, as well as a comprehensive checklist of discussion points at **6.10** for matters to be determined at ground rules hearings including a Ground Rules Hearing checklist at Appendix C.

Section 8 — Lesbians, gay men and bisexuals

- Information has been updated under **Some statistics** at **8.1** to reflect more recent population data on LGBTQIA+ identification, noting the impact of experiences of stigma, prejudice and discrimination on the health outcomes of LGBTQIA + people. The section has also been updated to include reference to the Sackar Special Commission of Inquiry into LGBTIQ hate crimes, which was established to examine the cultural and investigative deficiencies regarding 34 suspicious deaths of LGBTQIA+ people.
- A new section **Legal protections** has been inserted at **8.3.3**, with a consolidated summary of state and federal legislation relevant to the protection of LGBTQIA + people on various grounds. The most recent adjustments to the legal framework reviewed in the section are amendments enacted by the *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW), and the introduction of the *Conversion Practices Ban Act 2024* (NSW), which created the offence of engaging in conversion practices to change or suppress a person's sexual orientation or gender identity. The section also discusses the historical context of laws targeting the LGBTQIA+ community, including those which defined homosexuality as grounds for incarceration.
- Practice guidelines concerning language and terminology in legal proceedings, including correct use of pronouns and pronunciation of names, has been included at **8.5.1** and **8.5.2** with reference to District Court General Practice Note 1 and Supreme Court Practice Note SC Gen 22.

Section 9 — Gender diverse people and people born with diverse sex characteristics

Terminology has been changed throughout the chapter to generally remove the term "transsexual" unless required, with preference for language such as "transgender". Phraseology to describe intersex status has also been updated to include new descriptors at **9.3.1**.

- A new section **Legal protections and recognition** has been added at **9.4**, which surveys the effect of amendments by the *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW) to applications to alter the record of a person's sex: see **9.4.1**.
- State and federal protections have also been integrated at **9.4.2** with specific reference to legislation for the equality and protection of the LGBTQIA+ community such as the *Equality Legislation Amendment (LGBTIQA+) Act 2024*, with particular focus on its applicability to intersex and transgender people.

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 11 Sections are:

Section 2 — First Nations 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

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 subsection 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 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 15 contains a response sheet with contact details.

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Section 1

Equality before the law

Contents

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.[1]

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.

1 *Oaths Act 1900*, Sch 4.

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.[2]

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.

1.2 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**.

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

- 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. [3] — see **Section 6**.
- In 2016, 19.7% of households had a household income of less than $650 per week; the median individual income was $664 per week[4] — see **Section 7**.
- In 2020, around 4% of the adult population identified as gay, lesbian or bisexual[5] — 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.[6]

1.3 Communication

Last reviewed: April 2025

"Good communication is the bridge between confusion and clarity."[7]

Good communication is key in the legal process. Effective communication, where everyone can comprehend and be understood, will ensure clarity of evidence and a legal process without impediments.

To ensure the judicial system is accessible, fair and supportive for all individuals, it is important to prioritise effective communication with vulnerable individuals. Clear and effective communication with vulnerable people such as children, and those with disabilities:

1. Enhances understanding — this ensures all parties and litigants involved in a legal proceeding fully understand the proceedings, clear decisions can be made, and the implications of the decision are understood.
2. Promotes fairness and accessibility — clear and accessible communication promotes fairness, ensures vulnerable individuals can participate to the best of their ability, and ensures equality before the law.
3. Reduces anxiety — vulnerable individuals will feel more relaxed and have less stress when participating in the legal process.

3 Australian Bureau of Statistics, Census 2016 accessed 10/4/2025.
4 ibid.
5 From General social survey: summary results, Australia, 2021, accessed 10/4/2025.
6 Y Vidyattama, R Tanton and NSW Council of Social Service (NCOSS), *Mapping significant economic disadvantage in NSW*, National Centre for Economic and Social Modelling, October 2019.
7 Attributed to Nat Turner.

4. Tailors the delivery of information — by adapting communication style, judicial officers can meet the specific communication needs of vulnerable individuals which ensures information and questions are presented in a way that is understood.
5. Addresses barriers — identify barriers to communication and address these to ensure access to justice. Be cognisant of where the person comes from, ie, their background, culture, disability (if identified), and any additional needs they may have and the potential difficulty with participation in proceedings.

The court and legal processes are foreign to lay people. It is advisable to avoid the use of legal jargon, and multiple questions and to keep language simple and clear.

Procedural justice, ie the use of fair procedures, is crucial to building the trust and confidence amongst participants in the court system and leads people to be willing to accept and abide by a court's decisions. Individuals who are respected, given a voice and treated without bias will be more likely to participate effectively. [8]

1.4 Perception, pronunciation and pronouns

Last reviewed: October 2023

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.[9]

The apprehension of bias principle gives effect to the requirement that justice should both be done and be seen to be done, reflecting a requirement fundamental to the common law system of adversarial trial – that it is conducted by an independent and impartial tribunal. Even the *appearance* of departure from the principle is prohibited lest the integrity of the judicial system be undermined: *Charisteas v Charisteas*.[10]

The correct pronunciation of names and use of the appropriate gender pronoun is a matter of respect and is an important component of ensuring public confidence in the proper administration of justice.[11]

8 TR Tyler, "Procedural justice and the courts" (2007) 44(1/2) *Court Review: The Journal of the American Judges Association* 26.

9 A survey conducted in 2008 by the NSW Sentencing Council and the Bureau of Crime Statistics and Research found that the majority of NSW residents lack confidence in some aspects of the criminal justice system: see A Butler and K McFarlane, *Public confidence in the NSW criminal justice system*, NSW Sentencing Council Monograph 2, Sydney, 2009. See also L Snowball and C Jones, "Public confidence in the New South Wales criminal justice system: 2012 update" (2012) No 165 *Crime and Justice Bulletin*, accessed 10/4/2025.

10 *Charisteas v Charisteas* (2021) 273 CLR 289 at [18].

11 See Federal Circuit and Family Court of Australia, "Information notice: pronunciation of names & forms of address", accessed 10/4/2025.

When asking for any identity, but especially gender or pronouns, it is advised that the word "preferred" be left out of the discussion as it can alienate individuals who identify outside societal norms.[12]

The use of outdated and offensive terms in relation to gender, disability and neurodivergency, age and weight and other descriptors can lead to the perception of bias.[13]

1.5 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:[14]

- 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.

12 E Owen and S Skeen, "Creating publications and forms that are open, inclusive and affirming: a guide to practical inclusion", a paper presented for and by ACLEA, Annual Meeting, New Orleans, January 30, 2023, p 3.

13 ibid.

14 NSW Bureau of Crime Statistics and Research, "Trends and patterns in domestic violence assaults: 2001 to 2010" (2011) Issue paper no 61, accessed 10/4/2025.

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.[15]

1.5.1 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.[16]

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.[17] However, the pitfalls of this process have been noted judicially and extra-judicially.[18] 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".[19] 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 irrelevantly, 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.[20]

In recent years, there has been significant research into how mental short cuts, known as heuristics, affect the way decisions are made. Researchers have

15 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.
16 UCSF, "Unconscious bias", accessed 10/4/2025.
17 *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458 at [180].
18 *Fox v Percy* (2003) 214 CLR 118 at [30]–[31]; *Rama Furniture v QBE Insurance* (unrep, NSWCA, 20/6/1986); P McClellan, "Who is telling the truth? Psychology, common sense and the law" (2007) 19(1) *JOB* 1 at 2.
19 *Fox v Percy* (2003) 214 CLR 118 at [31].
20 G Pagone, "Unconscious biases and their impact on decision making" (2018) 30(5) *JOB* 43.

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.[21]

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.

1.6 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.[22]

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.

21 "Implicit bias", *National Domestic and Family Violence Bench Book*, AIJA at [5.10], accessed 10/4/2025.

22 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, accessed 10/4/2025.

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** — First Nations 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** — Gender diverse people and people born with diverse sex characteristics.

- **Section 10** — Self-represented parties.
- **Section 11** — Older people.
- **Section 12** — Trauma-informed courts.

1.7 Further reading

- AHRC, "Unconscious bias and the bamboo ceiling", Speeches, June 2014, accessed 10/4/2025.
- J Elek and A Miller, *The evolving science on implicit bias*, State Justice Institute and the National Centre for State Courts, Virginia, USA, March 2021.
- Equality Australia website, accessed 10/4/2025.
- "Implicit bias", *National domestic and family violence bench book*, [5.10] AIJA, 2020, accessed 10/4/2025.
- K Mason, "Unconscious judicial prejudice" (2001) 13(8) *JOB* 57.
- G Pagone "Unconscious biases and their impact on decision making" (2018) 30(5) *JOB* 43.

Section 2

First Nations people

Purpose of this chapter

In 2021 (the date of the last national Census), the estimated resident population of First Nations people in NSW was 292,100 (or 3.6%) of a total of 8.2 million residents of NSW. An estimated 33% of First Nations people in Australia live in NSW, the most populous State. The purpose of this chapter is to:

- identify and highlight the impact of colonisation including intergenerational/transgenerational trauma and historic disadvantage; highlight for judicial officers relevant information about the different values, cultures, lifestyles, socioeconomic disadvantage and/or potential barriers in relation to full and equitable participation in court proceedings for First Nations people in NSW
- highlight for judicial officers the importance of being connected to culture for First Nations' rehabilitation and healing, 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

2.1 Some statistics

Unless otherwise stated, statistics are derived from 2021 national census data.

Population

Last reviewed: April 2025

- Based on the most recent census in 2021, the resident population of NSW First Nations people is 278,000 (3.4%) of a total of 8.1 million residents of NSW. This is up from 2.9% in 2016, and 2.5% in 2011.[1] 34.2% of First Nations Australians live in NSW.[2]

1 Australian Bureau of Statistics (ABS), *NSW: Aboriginal and Torres Strait Islander population summary*, "Population", based on 2021 Census, released 1/7/2022, accessed 9/1/2025.
2 ibid, "Where Aboriginal and Torres Strait Islander people live".

Language

Last reviewed: April 2025

- The preamble to the *Aboriginal Languages Act 2017* (commenced 5 March 2020) recognises that "the languages of the first peoples of the land comprising New South Wales are an integral part of the world's oldest living culture and connect Aboriginal people to each other and to their land".
- In the 2021 census, 1.9% of First Nations people in NSW reported speaking an Aboriginal or Torres Strait Islander language at home. Of the 5,196 people in NSW who used Aboriginal or Torres Strait Islander languages, the most common language was Wiradjuri (22.2%).[3]
- It is increasingly recognised that loss of language is a continuing negative aspect of the impact of colonisation. The Aboriginal Languages Trust was established in NSW in March 2020 under the *Aboriginal Languages Act 2017* to increase the use of Aboriginal languages, support Aboriginal language groups and bring awareness of the contributions that languages bring to both First Nations people and NSW as a whole. See further at **2.2.4**.

Education

Last reviewed: April 2025

- Retention of First Nations students to Year 12 steadily increased between 2011–2021, from 37.1% to 56.7% across Australia. In 2021, 54.1% of First Nations students in NSW aged 20–24 years had completed Year 12 or higher, compared with 36.7% in 2011.[4]
- One in 10 (10.2%) First Nations people aged 18–24 years were attending university or other higher education institutions in 2021, up from 6.6% in 2011.[5]
- In 2021, 2.7% of First Nations people aged 25 years and over were attending university or other higher education institutions, up from 2.2% in 2011.[6]
- Nationally, between 2008 and 2021, determining the annual change (using linear regression analysis) excluding the 2020 period, the proportion of First Nations students in Years 3 and 5 achieving the minimum reading standard increased by 18% (from 68% to 84%) and 23% (from 63% to 78%), respectively.[7] In 2021, the proportion of First Nations students at or above the

3 ibid, "Language".
4 ibid, "Education".
5 ibid.
6 ibid.
7 Australian Institute of Health and Welfare (AIHW) and National Indigenous Australians Agency, *Aboriginal and Torres Strait Islander Health Performance Framework*, "Tier 2 — determinants of health: 2.04 Literacy and numeracy", accessed 9/1/2025.

national minimum standard for writing was highest for those in Year 3 (84%) and lowest for those in Year 9 (52%). The proportion of First Nations students in Year 9 (52%) meeting this benchmark was 14 percentage points lower than for those in Year 7 (65%), the largest difference between any two consecutive year groups.[8]

Employment

Last reviewed: April 2025

- In 2021, Australia-wide, the proportion of First Nations people who were employed decreased consistently with increasing remoteness, from 58% in major cities to 30% in very remote areas.[9]
- The employment rate of First Nations people increased with higher levels of education: in 2021, 85% of those with a Bachelor degree or higher were employed compared to 23% for those with Year 9 or lower education level.[10]
- In 2021, First Nations people aged 15–64 had a lower employment rate than non-Indigenous Australians (52% compared with 75%). For First Nations people aged 25–64 (the target age group for the employment Closing the Gap target), the employment rate increased from 51% in 2016 to 56% in 2021.[11]
- In 2021: a similar proportion of First Nations men and women aged 15–64 were employed (53% and 51%); a higher proportion of men than women were unemployed (8.3% compared with 6.5%); a lower proportion of men than women were not in the labour force (38% compared with 42%).[12]
- In 2021, the median weekly household income for First Nations households in NSW was $860,[13] compared with $2,185 for non-First Nations households (families).[14] Nationally, nearly one third (31.4%) of First Nations people were living below the poverty line in 2016,[15] and in 2019–2019 almost 2 in 5 (39%) First Nations people aged 15 and over reported that in the last 12 months their household had days without money for basic living expenses (up from 28% in 2014–2015).[16]

8 ibid.
9 AIHW, "Employment of First Nations people", 7/9/2023, accessed 18/3/2025.
10 ibid.
11 AIHW, "2.07 Employment", accessed 18/3/2025.
12 AIHW, "Employment of First Nations people", 7/9/2023, accessed 18/3/2025.
13 ABS, above n 1, "Income".
14 ABS, *Snapshot of NSW: 2021*, 28/6/2022, accessed 9/1/2025.
15 The poverty line, as calculated by Markham and Biddle using data from the 2016 Census of Population and Housing conducted by the ABS, is $404 per week before housing costs: F Markham and N Biddle, "Income, poverty and inequality", ANU Centre for Aboriginal Economic Policy Research (CAEPR), 2018, p 16, accessed 9/1/2025.
16 AIHW, "Indigenous income and finance", 16/9/2021, accessed 9/1/2025

- First Nations people experience pressures at work including high identity strain, in which they or others view their identity as not meeting the expectations of the dominant workplace culture (experienced by 63% of the 1,033 First Nations people across Australia surveyed in a 2020 study), a high cultural load, largely due to the expectation to educate others (39%), culturally unsafe workplaces (28%), unfair treatment because of their First Nations background (38%), hearing of racial slurs (44%) and appearance racism regarding what they "should" look like as a First Nations person (59%).[17]

Housing

Last reviewed: April 2025

- In NSW in 2021, 45.5% of NSW First Nations residents were living in dwellings they owned (with 53.1% renting),[18] compared with 64% of the total NSW population (with 32.6% renting).[19] 11.8% of First Nations people were renting through a state housing authority.[20]
- In NSW in 2021, 87.5% of First Nations people were living in appropriately sized (not overcrowded) housing and 17% of First Nations households were living in dwellings that did not meet an acceptable standard (that is, at least one basic household facility was unavailable or there were more than two major structural problems).[21]
- In NSW in 2021, 90 per 10,000 First Nations people were experiencing homelessness, compared with 43 per 10,000 of the total NSW population. Across Australia, First Nations people represented one in five (20.4%) people experiencing homelessness.[22]

Care and protection

Last reviewed: April 2025

- Between 1910 and 1969, official government policies moved from "protection", which saw First Nations people placed in missions and reserves, to assimilation. These policies led to the forced removal of generations of

17 UTS Jumbunna Institute and Diversity Council Australia, *Gari yala (speak the truth): centreing the work and experiences of Aboriginal and/or Torres Strait Islander Australians*, Report, November 2020, accessed 9/1/2025.
18 ABS, *Housing statistics for Aboriginal and Torres Strait Islander peoples*, 2021, released 16/9/2022, accessed 9/1/2025.
19 ABS, above n 14.
20 ABS, above n 1, "Housing tenure".
21 ABS, above n 18.
22 ABS, *Estimating homelessness: census*, 2021, released 22/3/2023, accessed 9/1/2025.

First Nations 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*.[23] See below at **2.2.2**. It has been estimated that more than 6,200 First Nations children in NSW were removed in this period.[24]

- Stolen Generations survivors and their descendants carry higher levels of disadvantage compared to other First Nations peoples, who are already at a disadvantage in Australia. There is a "gap within the gap". "[F]orced removal led to a cycle of poverty, ill-health, discrimination and incarceration. As a result, the Stolen Generations are one of the most disadvantaged groups with the broader Aboriginal and Torres Strait Islander population".[25]
- In NSW as at 30 June 2020, First Nations children were placed in out-of-home care at 10 times the rate for non-First Nations children (6,688 First Nations children out of 16,160 children). Nationally, as at 30 June 2020, 63% of First Nations children in out-of-home care were placed with relatives/kin, with other First Nations caregivers, or in Aboriginal residential care.[26] These informal arrangements do and will have multiple effects on the relative/kin caregivers, including financial, physical and mental health. The number of First Nations children in care is projected to increase by 54% by 2030 compared to an increase of 19% for non-First Nations children.[27]

Health

Last reviewed: April 2025

- In 2018, 24% of Aboriginal and Torres Strait Islander population had disability (an estimated 139,700 people), based on the Survey of Disability, Ageing and Carers. This includes an estimated 51,100 people with severe or profound disability (8.8% of the Indigenous population). First Nations Australians were 1.9 times as likely to have disability as non-First Nations Australians.[28]
- In 2018, an estimated 8.8% of Indigenous Australians had severe or profound disability (51,100 people), meaning they need help or supervision always

23 Australian Human Rights Commission (AHRC), *Bringing them home: report of the national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families*, 1997, accessed 9/1/2025.
24 J Korff, "A guide to Australia's stolen generations" (drawing on research conducted by the *Bringing them home* report, ibid), *Creative Spirits*, last updated 3/5/2022, accessed 9/1/2025.
25 Healing Foundation, *Make healing happen: it's time to act*, Report, May 2021, pp 4, 26, accessed 9/1/2025.
26 AIHW, *Child protection Australia 2019–2020*, Canberra, 2021, pp 47–58, accessed 17/4/2025. See also, C Liddle et al, *The Family Matters Report 2021*, SNAICC Report, p 25, accessed 17/4/2025.
27 SNAICC Report, ibid, p 13.
28 Australian Institute of Health and Welfare, National Indigenous Australians Agency, "Aboriginal and Torres Strait Islander health performance framework", Measures — disability, accessed 9/1/2025.

(profound) or sometimes (severe) to perform activities that most people undertake at least daily — core activities of self-care, mobility and/or communication[29]

- The leading 5 causes of death for Aboriginal and Torres Strait Islander people in the 5-year period 2015–2019 were cancer and other neoplasms (23%), circulatory diseases (23%) and injury and poisoning (15%), respiratory disease (10%) and endocrine, metabolic and nutritional disorders (9%).[30]
- There is increasing recognition of the impact of trans or intergenerational trauma on First Nations people as causative of poor physical and mental health outcomes. See **2.2.2** below.
- Life expectancy for First Nations males born in 2020–2022 was around 8.8 years lower than for non-Indigenous males — 71.9 years compared with 80.6 years. For First Nations females, life expectancy at birth was around 8.1 years lower than that for non-Indigenous females — 75.6 years compared with 83.8 years.[31]
- In 2018–2019, ear or hearing problems for First Nations people were 1.4 times the rate for non-First Nations people (17% and 13%, respectively).[32] In *R v Russell* (1995) 84 A Crim R 386 at 393, Kirby P noted that hearing loss is an endemic problem amongst First Nations people and noted the connection between hearing loss, being of First Nations descent and the criminal justice system.
- In 2017–2021, in the 5 jurisdictions combined, the death rate among First Nations infants was 5.3 per 1,000 live births — 1.8 times the rate for non-First Nations infants (3.0 per 1,000 live births).[33]
- Nationally, First Nations people living in regional and remote communities experience poorer health relative to non-First Nations Australians. A 2024 study published in The Lancet[34] suggested that these "findings align with discrimination-related stress processes and potentially reduced availability of culturally inclusive healthcare". The research suggests that the results reflect

29 Australian Institute of Health and Welfare, National Indigenous Australians Agency, "Aboriginal and Torres Strait Islander health performance framework", Measures — disability, accessed 9/1/2025.
30 Australian Institute of Health and Welfare, National Indigenous Australians Agency, "Aboriginal and Torres Strait Islander health performance framework", Measures — leading causes of mortality, accessed 9/1/2025.
31 Australian Institute of Health and Welfare, National Indigenous Australians Agency, "Aboriginal and Torres Strait Islander health performance framework", Measures — life expectancy at birth, accessed 9/1/2025.
32 Australian Institute of Health and Welfare, National Indigenous Australians Agency, "Aboriginal and Torres Strait Islander health performance framework", Measures — ear health, accessed 9/1/2025.
33 Australian Institute of Health and Welfare, National Indigenous Australians Agency, "Aboriginal and Torres Strait Islander health performance framework", Measures — infant and child mortality, accessed 9/1/2025.
34 K Saxby et al, "Community attitudes and Indigenous health disparities: evidence from Australia's Voice referendum", The Lancet Regional Health — Western Pacific, 1 August 2024, accessed 17/5/2025.

underlying negative attitudes towards First Nations Australians and fewer culturally sensitive options for accessing health care in some regions. The study linked the regional share of votes against the Voice to Parliament (2023 Referendum) with data from the *Household, Income and Labour Dynamics in Australia survey*, a large, national probability sample (n#17,000) of Australian adults. Adjusting for regional-level confounders, researchers used logistic regression analyses to predict health outcomes, healthcare use, and risk-taking behaviours among First Nations and non-First Nations Australians for different levels (quartiles) of opposition to the Voice.

Violence

Last reviewed: April 2025

- There is increasing recognition in the law and justice sector of the impact of trans/intergenerational trauma on First Nations people as causative of disproportionate interactions in the criminal justice system. See **2.2.2** below.
- In the 12 months to September 2024, there were 5,863 First Nations victims of DV-related assault in NSW.[35]
- In NSW in 2021, there were more female First Nations victims of assault than male victims; 2,865 females compared to 1,644 males.[36]
- In NSW in 2023, police-recorded crime data indicated that the First Nations victimisation rate of assault by a family member was 1,900 per 100,000 (or 5,600) First Nations people.[37]
- 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".[38] Trauma therapists and leading First Nations researchers such as Dr Jenny Atkinson et al consider that these indicia of First Nations disadvantage manifest as inter or transgenerational trauma and are the enduring effects of First Nations post-colonial history (see further **2.2.2**).[39]

35 BOCSAR, "Target 13: Aboriginal female and young victims of violence", 5/2/2025, accessed 18/3/2025.
36 ibid.
37 AIHW, "Family, domestic and sexual violence", Aboriginal and Torres Strait Islander people, 28/2/2025, accessed 18/3/2025.
38 J Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, 2008, Vol 1, p 109, accessed 17/4/2025.
39 See for example, J Atkinson, et al, "Addressing individual and community transgenerational trauma" in P Dudgeon, H Milroy, R Walker, *Working together: Aboriginal and Torres Strait Islander mental health and wellbeing principles and practice*, Australian Government Department of Prime Minister and Cabinet, 2nd edn, 2014, Ch 17, accessed 17/4/2025; J Atkinson, *Trauma trails recreating song lines — the transgenerational effects of trauma in Indigenous Australia*, Spinifex Press, 2002.

Prosecutions, bail and imprisonment

Last reviewed: April 2025

- Between September 2022 and September 2024, police bail refusal rate for adult First Nations defendants increased from 34.9% to 38.0%.[40] Court bail refusal rate increased from 19.1% to 21.6% in the same period.[41]
- In September 2024, First Nations young people made up 59.48% of young people in detention in NSW,[42] up from 39.7% in 2020.[43]The main offences for which Aboriginal young people are in custody in NSW are break and enter (17.6% or 22 young people), car theft (17.6% or 22 young people) and robbery (12.8% or 16 young people). Over the 24 months, the number of Aboriginal young people proceeded against to court increased 10.6% while the number of young people formally diverted from court by way of a police issued warning, caution or youth justice conference have decreased by 11.1%.[44]
- Overall, First Nations people remain grossly over-represented in NSW prison andis nearly 10 times the non-Aboriginal imprisonment rate.[45] In September 2024 there were 4,103 Aboriginal adults in custody, the highest number ever recorded. In December 2024, 32.3% of the adult custody population were Aboriginal. The recent increase is solely due to the remand population. In September 2024, the number of Aboriginal people held on remand in NSW was 1,864, up 25.5% since September 2022. The most common offences for which Aboriginal adults were on remand were DV assault (427 or 22.9%) and non-DV assault (344 or 18.5%). Both the number of Aboriginal adults proceeded against to court (up 5.6% or 1,812) and the number who were police and court bail refused has increased over the last year.[46]
- Between December 2023 and December 2024, the First Nations women custody population (received into custody) increased 13.2%, from 318 to 360 women.[47]
- First Nations women are the fastest growing prison population in Australia. The majority of the women (more than 80%) are mothers. Research indicates there is a cycle of trauma and incarceration relating to their own and their relatives' experience of being removed from their families as children, as

40 BOCSAR, NSW Closing the Gap quarterly update September 2024, January 2025, accessed 18/3/2025.
41 ibid; see also I Klauzner and S Yeong, "What factors influence police and court bail decisions?" (2021) 236 *Crime and Justice Bulletin*, p 21, accessed 31/3/2025.
42 BOSCAR, *NSW Closing the Gap quarterly update September 2024*, published January 2025, accessed 18/3/2025.
43 BOSCAR, *NSW custody statistics: quarterly update*, December 2021, released February 2022, accessed 17/4/2025.
44 BOSCAR, *NSW Closing the Gap quarterly update September 2024*, January 2025, accessed 18/3/2025
45 BOCSAR, *NSW Closing the Gap quarterly update September 2024*, January 2025, accessed 18/3/2025.
46 ibid.
47 BOCSAR, NSW custody statistics December 2024, February 2025, accessed 18/3/2025.

part of the Stolen Generations, pointing to ongoing intergenerational trauma.[48] First Nations women are more likely to be charged and imprisoned for minor offences than non-First Nations women. Consequently, First Nations women often cycle through the prison system on shorter sentences or remand (unsentenced) and experience multiple incarcerations.[49]

2.2 Some general information[50]

2.2.1 Aboriginal people, Torres Strait Islander people, Kooris, Murris and other groups[51]

Last reviewed: April 2025

- Australia has two First Nations peoples with separate ethnic and cultural identities — Aboriginal people and Torres Strait Islander people. Aboriginal and Torres Strait Islander people are also known as the First Nations people; a term that respectfully encompasses the diversity of Aboriginal and Torres Strait Islander cultures and identities.
- First Nations 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 First Nations community of origin.
- Many First Nations people in NSW have some non-Aboriginal/Torres Strait Islander ancestry.
- An increasing number of people who originally identified as non-First Nations, or who were previously unaware of their First Nations ancestry **are proudly identifying as First Nations Australians**, and being accepted by the relevant Aboriginal/Torres Strait Islander community as Aboriginal and/or Torres Strait Islander.
- It is deeply offensive to First Nations people to refer to them as half-caste or half-blood, full-caste or full-blood — see also **2.3.3.2**.

48 S Jamieson et al, "Aboriginal mothers are incarcerated at alarming rates — and their mental and physical health suffers", *The Conversation*, May 2019, accessed 17/4/2025.

49 ibid.

50 Some of the information for the original draft of this chapter issued in 2006 was drawn from S Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts*, 2nd edn, 2008, AIJA, accessed 17/4/2025; and the Supreme Court of Queensland, *Equal Treatment Benchbook*, 2nd edn, 2016, Supreme Court of Queensland Library, Brisbane, accessed 17/4/2025.

51 Some First Nations people who come from NSW call themselves other names, such as "Gooris" or "Murdis". First Nations 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.

- Most First Nations people in NSW are Aboriginal, speak English or a form of English (Aboriginal English).
- Many First nations people, including those who otherwise reside in urban centers, continue to acknowledge and observe traditional laws and customs, and undertake traditional activities.
- Many First Nations people who come from NSW call themselves "Kooris". "Koori" means "man", or "people" in many of the hundreds of languages originally spoken in NSW.
- Some First Nations people who come from NSW (largely those living near the Queensland border) call themselves "Murris", as this is the name used by First Nations people in Queensland.
- Some First Nations people from NSW and others from interstate call themselves other names.[52]
- **ATSI** (an acronym for Aboriginal or Torres Strait Islander people) **is often used by government services**. Many First Nations 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 First Nations communities** located within, near or on the edge of non-First Nations settlements. Note that many First Nations 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 First Nations people are somehow less Aboriginal than "traditional" Aboriginal people is offensive and unhelpful.
- In *Love v Commonwealth of Australia* (2020) 270 CLR 152, 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].
- In contested adoption proceedings, the NSW Court of Appeal held that an "Aboriginal child" for the purposes of the *Adoption Act 2000* means a child descended from the people who lived in Australia before British colonisation. The court disapproved the decision *Fischer v Thompson (Anonymised)* [2019] NSWSC 773. See further **2.3.6 Adoption proceedings.**

52 See ibid.

2.2.2 Culture — a brief overview

Last reviewed: April 2025

First Nations people resident in NSW are diverse having 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 First Nations people follow Aboriginal and Torres Strait Islander cultural "norms", there are many features of Aboriginal and Torres Strait Islander culture and values that are common to many First Nations people, irrespective of their particular tribal origin.

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

- **Collective, group-oriented identity** — First Nations culture is a much more collective and co-operative culture than, for example, the Anglo-Celtic Australian[53] relatively individualistic and stratified culture. Elders, not just one elder (that is, those considered to have wisdom, not necessarily the oldest), are charged with maintaining social, spiritual and cultural identity and cohesion.
- **Family and kinship ties are wider and stronger** — the family consists of the extended family often including distant family members (such as various levels of cousin). Family concerns are of primary importance, the nurturing of family and social networks is highly valued, and even distant family members are expected to look after one another.[54] 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 country is central** — First Nations people have a deeply embedded relationship with the country of their ancestors, based on Aboriginal and Torres Strait Islander 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.[55] A First Nations person may refer to land as "my country",

53 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.

54 S Fryer-Smith, *Aboriginal Benchbook for Western Australian courts*, above n 50, p 3:9.

55 "Explainer: Uluru Statement from the Heart", above n 81.

"country", or "Aboriginal nation". Living in an urban area away from "country" does not necessarily reflect a lack of ties to country. See *Northern Territory v Griffiths*[56] for a description of the lay and anthropological evidence of connection to the land and the effects, under Aboriginal and Torres Strait Islander laws and customs, when country is harmed.

A Welcome to Country or Acknowledgement of Country, often delivered at the beginning of an event such as a meeting or formal occasion, is important to pay respect to First Nations people and recognise that they are ongoing custodians of the land. A Welcome to Country is delivered through dance, song, speech or ceremony by a Traditional Owner or Elder who has authority to welcome others to their local region. An Acknowledgement of Country can be made by anyone — a First Nations or non-First Nations person — and often highlights First Nations people's intimate relationship with the land and their rich culture and history.[57]

- **Respect for First Nations spirituality and culture is important** — for example, "dreaming" stories or for Torres Strait Islanders "Tagai" stories, ceremonies, song, art and dance. First Nations education involves learning Aboriginal and Torres Strait Islander 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 First Nations languages. The *Aboriginal Languages Act 2017* (NSW) commenced 5 March 2020 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 First Nations languages.
- **Individual material possessions are traditionally not highly prized** — family and spiritual matters are more important.[58] 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 First Nations and non-First Nations people alike, may commonly occur in public rather than privately.[59] In addition, some Aboriginal people do not have the personal or financial resources to conduct social activities in private.
- **In many First Nations communities, references to deceased persons are taboo** — in these communities referring to the name of a deceased person

56 [2019] HCA 7 at [230].
57 Common Ground, "Acknowledgement of Country", last updated 26/4/2024, accessed 17/4/2025.
58 Above n 50, p 3:10.
59 ibid.

or showing a picture of someone who is (recently) deceased can cause great distress. It is always best to check with local First Nations representatives what the practice in relation to this is in particular communities.

- **Experience of "sorry business"** — First nations people from a young age will be exposed to familial and community deaths proportionately more than people from Anglo-Celtic backgrounds.[60] "Sorry business" refers to the cultural practices and protocols associated with death.

- **Different communication abilities and styles** — many First Nations people in NSW speak a form of Aboriginal English and have a different style of linguistic and body communication than non-First Nations people.[61] 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 First Nations 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 First Nations societies, men and women performed well-understood roles — each having their important jobs to do, and their own set of cultural and spiritual practices.[62] Violence was not uncommon but embedded in customary law and determined by responsibilities and obligations to kin, 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 changes to spatial arrangements between groups. Today, First Nations 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 First Nations people can be living in the same overcrowded house as those with whom they would traditionally not have been: for example; young men and

60 The First Nations mortality rate is 1.6 times higher than for non-First Nations people: AIHW, "Deaths in Australia", last updated 9/6/2022, accessed 17/4/2025.

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

62 F Gale, "Introduction", in F Gale (ed), *Women's Role in Aboriginal Society*, 3rd edn, 1978, Australian Institute of Aboriginal Studies, Canberra, p 1.

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.[63]

Women's business may have relevance in court proceedings: see **2.2.4 The possible impact of cultural practices in court**.

- **Impact of customary law** — customary law is integral to First Nations culture. For First Nations people customary law is an "all encompassing reality".[64] 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 First Nations communities act to solve their own problems and resolve disputes. Many First Nations 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 First Nations offenders are not doubly punished — that is, via the courts system and customary law.[65] Circle sentencing and the Walama List in the District Court enable input from First Nations Elders and provides a culturally appropriate way of discussing sanctions 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 First Nations people have experienced racism, prejudice and discrimination in relation to all forms of public interaction — for example, in connection with rental accommodation, 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.[66]

63 See L Behrendt, "Aboriginal women and the criminal justice system" (2002) 14(6) *JOB* 41 at 42.

64 Kimberley Aboriginal Law and Culture Centre, *New legend: a story of law and culture and the fight for self-determination in the Kimberley*, Fitzroy Crossing, Western Australia, 2006, p 15.

65 This information is drawn from B Thomas, *Strengthening community justice: some issues in the recognition of Aboriginal customary law in New South Wales*, Aboriginal Justice Advisory Council Discussion Paper (archived site), accessed 17/4/2025. For further information about Aboriginal customary laws, see Australian Law Reform Commission, *The recognition of Aboriginal customary laws*, ALRC Report No 31, 1986, Canberra, accessed 17/4/2025; M Dodson AM, "Customary law and the sentencing of Aboriginal offenders" (2008) 20(5) *JOB* 37; Law Reform Commission of Western Australia, *Aboriginal customary laws; the interaction of WA law with Aboriginal law and culture*, Project No 94, Final Report, Perth, 2006, accessed 17/4/2025.

66 See ALRC, *Pathways to justice — inquiry into the incarceration rate of Aboriginal and Torres Strait Islander people*, above n 67 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 may make some First Nations 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, following the guidance provided at **2.3**, below, should mean this is less likely to occur.

2.2.3 Intergenerational/transgenerational trauma

Last reviewed: April 2025

2.2.3.1 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.[67] 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.[68] The primary or distal cause of trauma for First Nations people was colonisation and attendant practices including massacres,[69] 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 First Nations people due to racism, prejudice, poverty and genetic poor health. Loss of connection to land is acknowledged as permanent and intergenerational.[70] 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

67 ALRC, *Pathways to justice — inquiry into the incarceration rate of Aboriginal and Torres Strait Islander people*, ALRC Report 133 (Final Report), 2018, [2.92]–[2.100], accessed 17/4/2025. See also The Healing Foundation, *Make healing happen: it's time to act*, Report, May 2021, p 55, accessed 17/4/2025.

68 American Psychiatric Association, Diagnostic and statistical manual of mental disorders (DSM-5), 2013.

69 A visual map is available of known massacre sites in Australia compiled by the University of Newcastle Colonial Frontier Massacres Project team, accessed 17/4/2025. There are 250 known sites in Australia currently mapped.

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

genes and the metabolome.[71] Many First Nations (and non-First Nations) people consider that the statistics in 2.1 above are a direct result of intergenerational trauma and the way in which the non-First Nations community has largely refused to respect the validity of First Nations people's prior claim to the land and has, over the years, in their view, attempted to assimilate or destroy First Nations 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.[72]

The 2021 Australian Institute of Health and Welfare report[73] 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.[74] 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.[75]

First Nations people are vastly over-represented in Australia in the criminal justice system and this has been described as a "national disgrace".[76]

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, First Nations people were moved from their own land and forced to live on church or government "missions" (often with people from different tribal

71 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, 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, accessed 17/4/2025. See also A Kuffer, A Maercker and A Burri, "Transgenerational effects of PTSD of traumatic stress: do telomeres reach across the generations?" (2014) 3(3) *Journal of Trauma & Treatment*, accessed 17/4/2025.

72 For more information on intergenerational trauma, see V Edwige and P Gray, "Significance of culture to wellbeing, healing and rehabilitation", *Bugmy Bar Book Project Committee* Expert Report, 2021, accessed 17/4/2025. This Report explores the concept of social and emotional wellbeing for Aboriginal and Torres Strait Islander people, the relationship between culture and healing, and the impact of imprisonment.

73 AIHW, "Children living in households with members of the Stolen Generations", 2019, accessed 17/4/2025.

74 ibid pp 13–15.

75 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, p 27, accessed 17/4/2025.

76 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], accessed 17/4/2025. 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, Chapters 1, 6, 17, 30, accessed 17/4/2025.

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-First Nations 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 First Nations cultural practices, values and ways of interrelating survived, but generally at great socio-economic cost, as illustrated at **2.1** above.[77]

2.2.3.2 Having a trauma-informed approach

The efficacy of a trauma-informed approach to working with First Nations people is increasingly being recognised in the legal and justice context. A therapeutic jurisprudence stance[78] 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.[79]

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.[80] While many First Nations 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 First Nations deaths in custody; mechanisms by which the diverse needs of First Nations people for land can be achieved;

77 For more information about First Nations 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*, above n 23.

78 Note, a therapeutic jurisprudence stance does not mean that the judicial officer takes the role of therapist: it means that the law can have therapeutic or anti-therapeutic consequences on individuals and that the legal profession should utilise practices that are either therapeutic (not therapy) or mitigate against re-traumatising people involved with the legal system without undermining justice and the rule of law: J Goldenson, S Brodsky and M Perlin, "'Trauma-informed forensic mental health assessment: practical implications, ethical tensions, and alignment with therapeutic jurisprudence principles'" (2022) 28(2) *Psychology, Public Policy, and Law* 226 at 227.

79 See for example P Hora, "The trauma-informed courtroom", International Society for Therapeutic Jurisprudence, accessed 17/4/2025.

80 OCHRE, *NSW Government Plan for Aboriginal affairs: education, employment & accountability*, accessed 17/4/2025.

and mechanisms whereby recognition can be given to the past injustices and continuing inequality experienced by First Nations 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 the process be acknowledged". Reconciliation involves an acceptance by the non-First Nations community of the way the First Nations community views the overall impact of colonisation, or truth-telling. The many losses suffered by First Nations 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". The key elements are: sovereignty, constitutional reform, the Makarrata Commission and truth telling, a process that exposes the full extent of the past injustices experienced by First Nations people.[81]

Truth telling is seen as essential to acknowledging the wrongs of the past and creating a path for reconciliation. For the first time in Australia's history, the Yoorrook Justice Commission will begin hearing evidence in Victoria in March 2022. The Commission has the full powers of a Royal Commission. Yoorrook means truth in the Wemba Wemba/Wamba Wamba language, and will make a formal record of two centuries of colonisation and oppression in Victoria.

For further information on a trauma-informed approach, see **Section 12 Trauma-informed courts** at **12.1** ff and the following resources and articles in the *Judicial Officers' Bulletin*:

- Judicial Commission of NSW, *Trauma-informed courts: guidance for trauma-informed judicial practices*, e-resource series 1, 2022
- Judicial Commission of NSW, *Therapeutic jurisprudence: a practical guide to developing therapeutic intervention skills for judicial officers in specialist courts*, e-resource series 2, 2024
- 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
- R Dive, "The trauma-informed approach of the Drug Court of NSW" (2020) 32(3) *JOB* 19

81 See further, J Korff, "Explainer: Uluru Statement from the Heart", *Creative Spirits*, accessed 17/4/2025.

- S Duncombe, "The trauma-informed approach of the NSW Youth Koori Court" (2020) 32(3) *JOB* 21
- S McCarthy, "The trauma-informed barrister" (2020) 32(3) *JOB* 28

2.2.4 The importance of culture and cultural safety as a source of healing

Last reviewed: April 2025

The impacts of historic actions disrupting First Nations culture and resultant intergenerational trauma have been conceptualised as "cultural wounds" which are best treated with "cultural medicines".[82] The individual impacts of intergenerational and systemic problems are best addressed via systemic and community-level interventions, parallel to individualised approaches.

First Nations people determine their cultural safety, highlighting the importance of partnership, collaboration, and empowered decision-making. Systems lacking cultural humility often create further difficulty and negative experiences causing further harm, particularly custody settings. This disproportionately affects vulnerable groups and creates significant impacts on children and families. Standard legal and government agency processes can (at their worst) ignore First Nations perspectives and create further harm by replication and inadvertent re-enactment of past intergenerational traumas. If cultural safety is ignored, it can undermine safety and rehabilitation goals.

Practical measures

Effective use of an Indigenous Liaison Officer if available, will enhance cultural safety. The following practices have been commended:

- referring to the presence of the Officer and seeking their advice
- allowing time for the Officer to familiarise the applicant or respondent with the court room
- ensuring the Officer was present whenever Aboriginal and Torres Strait Islander applicants or respondents were present.[83]

It is important to obtain advice from cultural consultants and the defence regarding culturally appropriate aspects of the hearing, and whether it might be more respectful (and effective) to have, for example, a closed hearing, or a female

82 MJ Chandler and WL Dunlop, "Cultural wounds demand cultural medicines" in M Greenwood et al (eds) *Determinants of Indigenous peoples health in Canada: beyond the social'*, Canadian Scholars' Press Inc, 2015, p 78, cited in V Edwige and P Gray, *Significance of culture to wellbeing, healing and rehabilitation*, Report, The Public Defenders, 2021, at [14], accessed 17/4/2025.

83 Judicial Council on Cultural Diversity and Inclusion, *The path to justice, Aboriginal and Torres Strait Islander women's experience of the courts*, 2016, p 32, accessed 17/4/2025.

judicial officer, or to limit access to information based on gender (depending on the hearing context). It is also important to be aware of the impact of possible unconscious racial and cultural biases and racial profiling: judicial officers, like most people, are not immune to holding implicit and unconscious biases despite their best efforts.

If different cultural norms and life experiences have influenced the matter before the court, it is important to determine if, and to what extent, the law allows those influences to be taken into account in the legal proceedings. The issue should be directly, but respectfully, addressed irrespective of whether those cultural or religious norms are different from the Australian legal context.

The *Bugmy Bar Book*[84] is an online evidence-based resource providing accessible summaries of key research about the impacts of experiences of trauma, socioeconomic inequality, structural disadvantage and strengths-based rehabilitation. Associated commissioned research, notably Edwige and Gray's expert report, *Significance of culture to wellbeing, healing and rehabilitation*,[85] has highlighted the importance of culture for First Nations people. Disconnection from culture, family and community has resulted in community and individual deficits for First Nations people. Connection to culture and the experience of cultural safety promotes wellbeing, rehabilitation and healing.[86]Shields and Ellis' expert *Impacts of institutionalisation* report similarly illustrates the psychiatric impacts of institutionalisation, including youth detention and out-of-home care settings, on First Nations peoples. These systems can create patterns of behaviour and physical reactions as a response to confinement, often accompanied by worse social, mental, physical and emotional outcomes.[87]

Diversionary options

There are court-based and other diversionary programs in place specifically for First Nations people. The Judicial Commission maintains a menu of court-based and other diversionary programs which may be accessed from JIRS for the reference of NSW judicial officers. See further **2.3 Practical considerations**.

2.2.5 The cultural importance of First Nations languages

Last reviewed: April 2025

NSW is the first jurisdiction in Australia to enact legislation to protect and recognise the importance of First Nations languages. The *Aboriginal Languages*

84 Accessed 17/4/2025.
85 V Edwige and P Gray, *Significance of culture to wellbeing, healing and rehabilitation*, Report, The Public Defenders, 2021, accessed 17/4/2025.
86 ibid at [1].
87 R Shields and A Ellis, *Impacts of institutionalisation*, Report, 2024, The Bugmy Bar Book, accessed 17/3/2025.

Act 2017 commenced 5 March 2020 with the aim of addressing the loss of so many of Australia's First Nations' languages and setting the right to control the nurturing of languages with First Nations people. The Act's preamble acknowledges:[88]

(a) The languages of the first peoples of the land comprising NSW are an integral part of the world's oldest living culture and connect Aboriginal people to each other and to their land;

(b) As a result of past government decisions, Aboriginal languages were almost lost, but they were spoken in secret and passed on through Aboriginal families and communities;

(c) Aboriginal people will be reconnected with their culture and heritage by the reawakening, growing and nurturing of Aboriginal languages;

(d) Aboriginal languages are part of the cultural heritage of NSW; and

(e) Aboriginal people are the custodians of Aboriginal languages and have the right to control their growth and nurturing.

The Act establishes the NSW Aboriginal Languages Trust with the objective to "provide a focused, coordinated and sustained effort in relation to Aboriginal language activities at local, regional and State levels".[89]

The Trust has conducted a consultation process with Aboriginal communities as part of a five-year Strategic Plan to support Aboriginal language groups and bring awareness of the contributions that languages bring to both First Nations people and NSW as a whole. [90]

From a national perspective, all State and Territory governments have signed up to targets set out by the National Agreement on Closing the Gap to have a sustained increase in the number and strength of Aboriginal and Torres Strait Islander languages being spoken by 2031.[91]

2.2.6 The possible impact of cultural practices in court

Last reviewed: April 2025

Unless appropriate account is taken of the types of cultural practices listed in 2.2 above, and the statistics listed at 2.1 First Nations people may:

- feel uncomfortable, resentful, fearful or overwhelmed
- feel offended by what occurs in court

88 *Aboriginal Languages Act 2017*.
89 Aboriginal Languages Bill 2017, Explanatory note.
90 S Smit, "NSW begins Aboriginal languages project", *National Indigenous Times*, 10/4/2021, accessed 17/4/2025.
91 S Jenkins, "New Closing the Gap targets aim to up number of Aboriginal and Torres Strait Islander languages spoken, reduce incarceration and suicide rates", *The Mandarin*, 30/7/2020, accessed 17/4/2025.

- 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, 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.

The Local Court and the Children's Court may order a hearing before a female magistrate if it is "necessary for the effective exercise of the court's statutory powers": *Lacey (a pseudonym) v Attorney General for NSW* [2021] NSWCA 27 at [119] per McCallum JA. A conditional stay of proceedings may be granted until a female magistrate can hear such a matter: at [25]; [45]; [119]. A court may limit the access to evidence in proceedings to females (lawyers, witnesses) for cultural or gender reasons: at [31]; [41]; [85].[92]

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

2.2.7 National framework to improve accessibility to Australian courts for First Nations women and migrant and refugee women

Last reviewed: April 2025

The Judicial Council on Diversity and Inclusion (JCDI) (formerly the Judicial Council on Cultural Diversity) has developed a national framework for both First Nations women and migrant and refugee women to improve access to justice, particularly in the context of family violence and family breakdown.

This framework is a national approach to improving access to justice and achieving equality before the law for First Nations 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 First Nations 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.

92 The matter was originally heard by a magistrate in the Children's Court, who declined to make the orders. The appeal in the Supreme Court in *TR v Constable Cox* [2020] NSWSC 389 was dismissed. This is the proceeding appealing against the Supreme Court decision.

In developing this national framework of best practice guidelines and resources to be used across Australian courts, the JCDI drew on the recommendations and findings of its two consultation reports — *The path to justice: Aboriginal and Torres Strait Islander women's experience of the courts*[93] and *The path to justice: migrant and refugee women's experience of the courts.*[94] Particular reference should be made to the suggestions at pp 7–21 of the Framework.

2.2.8 Justice reinvestment and the OCHRE plan

Last reviewed: April 2025

Justice reinvestment

Justice reinvestment (JR) is a policy solution to address the over incarceration of First Nations people in Australia. The ALRC Pathways to Justice Inquiry recommended that governments provide support to establish an independent justice reinvestment body.[95] 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 and is now working in Moree, Mount Druitt, Kempsey-Macleay Valley and Nowra. The Maranguka Justice Reinvestment Project was the first major JR pilot in Australia. KPMG conducted an impact assessment of 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.[96]

In 2022, to strengthen community capacity to prevent crime, the federal Government committed $69 million over four years to the Justice Reinvestment Program.[97]

Further information about the project may be found on the Just Reinvest NSW website.

93 JCDI, *The path to justice: Aboriginal and Torres Strait Islander women's experience of the courts*, 2016, accessed 17/4/2025.
94 JCDI, *The path to justice: migrant and refugee women's experience of the courts*, 2016, accessed 17/4/2025.
95 ALRC, *Pathways to Justice — inquiry into the incarceration rate of Aboriginal and Torres Strait Islander people*, above n 67, Recommendation 4.
96 KPMG, *Maranguka Justice Reinvestment Project: impact assessment*, 2018, p 6, accessed 17/4/2025.
97 Australian Government, Attorney-General's Department, "About the Australian Government's justice reinvestment commitments", *Justice reinvestment*, accessed 17/4/2025.

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 First Nations 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 First Nations 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 First Nations communities.[98]

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.[99]

Operation Mantus and police interviews of vulnerable people in custody

Operation Mantus was launched by the NSW Law Enforcement Conduct Commission in 2023, in response to a complaint about the arrest of a 14-year-old Aboriginal boy from Northern NSW. The investigation considered alleged use of excessive force by police, the absence of a body worn camera during the arrest, handcuffing, and the way in which the police interviewed the boy.

The report found systemic problems with how police interview vulnerable people, including young people and First Nations people, with vulnerable peoples' right to silence compromised in a significant number of cases even after their lawyers told police their wish not to be interviewed. The Commission made 19 recommendations around improving police interviewing, wearing of body worn video and training for custody managers.[100]

98 OCHRE, above n 80, p 11.

99 NSW Ombudsman, *OCHRE Review report*, October 2019, p 18, accessed 17/4/2025.

100 Law Enforcement Conduct Commission, *Operation Mantus*, Report, December 2023, accessed 8/1/2025. See also "Accountability and integrity of NSW law enforcement agencies — recent developments and reports of the Law Enforcement Conduct Commission" (2024) 36(5) *JOB* 43.

2.2.9 The Walama List in the District Court

Last reviewed: April 2025

The Walama List is a pilot in the NSW District Court operable from 31 January 2022. It is aimed at giving eligible First Nations offenders a more culturally-specific and community-based approach to sentencing. The Walama List is set up by Practice Note 26 of the NSW District Court. The pilot is the next step in the District Court's commitment to developing a Walama Court, and with it, culturally appropriate responses in sentencing First Nations offenders.[101]

The objectives of the Walama List are to: reduce the risk factors related to re-offending, reduce the rate of breaches of court orders, reduce the overrepresentation of First Nations persons in custody in NSW, increase compliance with court orders, increase community participation and confidence in the criminal justice system, and facilitate a better understanding of any underlying issues which may increase the likelihood of re-offending.

The Walama List is a sentencing court only for adult First Nations offenders with matters before the NSW District Court. While proceedings are conducted within the existing statutory framework for sentencing and in accordance with established sentencing principles and precedent, the Walama List proceedings also involve Elders and other Respected Persons of the community. The Elders and Respected Persons provide insight to the sentencing proceedings in both a Sentencing Conversation and Case Plan Conversation by informing the court about cultural, historical and social issues relating to the offender's background and community in a culturally safe way. Their presence also represents the importance of First Nations cultural authority in the decision-making and respect for the judicial process in sentencing. The Walama List pilot will operate one week per month with the capacity to accommodate up to 50 participants at a time. Offenders who plead guilty can participate in a tailor-made program that includes drug and alcohol treatment, counselling and other therapeutic supports prior to being sentenced.

Eligibility for the Walama List requires that the offender: has sentence proceedings listed in the NSW District Court Downing Centre, is descended from a First Nations person, identifies as an Aboriginal person or Torres Strait Islander, and is accepted as such by the relevant community; has pleaded guilty to the offence(s); has signed an Agreed Statement of Facts on Sentence; and, consents to having their matters dealt with in the Walama List.

101 See Media Release and fact sheet, "Pilot of specialist approach for sentencing Aboriginal offenders", 22/11/2021, accessed 17/4/2025. See also D Yehia, "Introducing the Walama List Pilot at the District Court of NSW" (2021) 33 *JOB* 114.

"Walama" is a word from the Dharug language meaning "come back" or return. In the context of the Walama List, it is a coming back to identity, community, culture, and a healthy, crime-free life.[102]

2.2.10 Protocol for dealing with inquiries into deaths of First Nations people

Last reviewed: April 2025

The final report of the Royal Commission into Aboriginal Deaths in Custody made a number of recommendations across a wide range of areas, including in relation to practices and procedures within the coronial jurisdiction. Recommendation 8 required the establishment of a Protocol for inquests into the deaths of First Nations people in custody to supplement the Practice Note when the death in custody is that of a First Nations person. The Local Court of NSW issued Coronial Practice Note 3 of 2021. This sets out case management arrangements which apply to all deaths occurring in custody or as a result of police operations, irrespective of the background of the deceased.

However, a considered response to Recommendation 8 was required. The Protocol, "Supplementary arrangements applicable to section 23 deaths involving First Nations Peoples", commenced on 22 April 2022, is issued pursuant to s 10(1)(d) of the *Coroners Act 2009* (the Act) and applies to all deaths or suspected deaths of First Nations people which fall within the scope of s 23 of the Act. The Protocol specifically recognises the extended family structure and complex and dynamic kinship system which defines where a person fits into their family and community (see 6.1) and ensures that any hearing is conducted in a culturally sensitive and appropriate manner, including by adhering to any cultural considerations raised by the family of the deceased (so far as is practicable), including matters such as making a Welcome to Country or an Acknowledgement of Country, a smoking ceremony and the display and use in court of symbols and items of cultural significance to the deceased and the deceased's family (see 11.1).

2.3 Practical considerations

2.3.1 Diversionary options

Last reviewed: April 2025

First Nations people are disproportionately represented in NSW prisons (reflecting national trends) and are more likely than non-First Nations people to be arrested for relatively minor offences.[103]

102 ibid.

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

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 First Nations 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).[104] For further information about non-custodial alternatives, see the *Sentencing Bench Book* at **[4-400]** and the Aboriginal Services Unit fact sheets.

For young First Nations 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.[105]

Relevant considerations:

Refer to JIRS "Court-based and other 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 First Nations community members and service providers who meet with justice agencies to develop solutions to crime offending problems in their communities.

104 For more information about MERIT, and other diversionary programs, see JIRS under "Court-based and other diversionary programs". For a list of national diversionary programs and analysis of these, see "Diverting Indigenous offenders from the criminal justice system", Resource Sheet no 24, December 2013, accessed 17/4/2025.

105 See further "Strategic innovations", accessed 17/4/2025.

If the defendant is represented by the Aboriginal Legal Service, the solicitor appearing will be able to assist with advice as to diversionary programs and services: see **2.4** below.

Always consider whether any diversionary option or alternative to custody might be appropriate in the circumstances of the particular matter(s) before you.

Consult with appropriate local First Nations community representatives about the appropriateness of using any diversionary option given the particular circumstances of the First Nations person before you.

2.3.2 Bail

Last reviewed: April 2025

As indicated in **2.1** above, First Nations people appearing in NSW courts are more likely to be refused bail than non-First Nations people (14.5% First Nations people refused bail compared with 6.9% non-First Nations people).[106] First Nations 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-First Nations defendants. Conditions of bail can often have a disproportionately stringent impact on First Nations 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.[107]

106 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. See also, I Klauzner and S Yeong, "What factors influence police and court bail decisions?", BOCSAR, *Crime and Justice Bulletin*, No 236, March 2021, p 21, accessed 16/6/2023 and I Klauzner, "Investigating bias towards Aboriginal people in police bail decisions", BOCSAR, *Crime and Justice Bulletin*, No 256, June 2023, accessed 8/1/2025.

107 See ALRC, *Pathways to justice — inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples*, above n 67 at 5.41–5.55.

Relevant considerations

First Nations people must not be subjected to any more stringent tests in relation to bail, or any conditions attached to bail, than non-First Nations people. A bail condition can be imposed only for the purpose of mitigating an unacceptable risk.[108]

Paternalism is not appropriate.[109]

In making an assessment of a bail concern under s 17 *Bail Act 2013* for the purposes of assessing an unacceptable risk, a bail authority is to consider only the matters listed in s 18(1) which includes any special vulnerability or needs the accused has including because of being an Aboriginal or Torres Strait Islander: s 18(1)(k).

First Nations people often have very close kinship and family ties to a particular location. Given First Nations kinship ties, it may also be less appropriate to attach a condition for a First Nations person that the person leave town, than it would be to do so for a non-First Nations person.[110]

A lengthy period on remand and separation from a child in the context of disadvantage and deprivation within a First Nations community (in the circumstances described by the High Court in *Bugmy v The Queen*[111]), has been considered a significant factor in showing cause why the detention of the applicant for bail is not justified. In *R v Alchin*,[112] McCallum J said: "If the Court can reasonably impose conditions which are calculated to break … [the cycle of disadvantage and deprivation], in my view it should. That is a strong factor in my finding cause shown."[113]

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 and Torres Strait Islander 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,

108 Section 20A(2); Div 3, *Bail Act 2013*. Section 20A(2) *Bail Act* provides, inter alia, a bail condition may "only" be imposed if it is "reasonably necessary to address a bail concern", "is reasonable and proportionate" and "is no more onerous than necessary".

109 *R v Connor Fontaine (a pseudonym)* [2021] NSWSC 177 at [7].

110 See for example *Gray v R* [2020] NSWSC 390 at [22] where the Aboriginal applicant's ties to community and country were recognised as a factor in granting bail with the condition the applicant reside with his grandmother in the community. See also the comments in *R v Brown* [2013] NSWCCA 178 at [34].

111 (2013) 249 CLR 571.

112 [2015] NSWSC 2112.

113 ibid at [3].

and about culturally-appropriate options in relation to bail conditions.[114] Community-based support, for example, might provide a viable option as family-based support. For how to contact appropriate local Aboriginal and Torres Strait Islander 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. Judicial notice can be taken that with regard to the culture of First Nations people, funerals and "Sorry Business" are exceptionally important,[115] and the inability to attend funerals and sorry business can have a negative impact on social and emotional wellbeing, as detailed in the *Bugmy Bar Book*.[116]

2.3.3 Language and communication

Last reviewed: April 2025

2.3.3.1 Background information

First Nations people may face a number of difficulties in relation to aspects of language and communication in court proceedings. The work of Dr Diana Eades

114 See *Bail Act 2013* s 31: the bail authority may take into account evidence or information considered credible or trustworthy in the circumstances. It was noted in *R v Brown* [2013] NSWCCA 178 at [35] (decided under the former *Bail Act 1978*): "In the cases of Aboriginal accused, particularly where the applicant for bail is young, alternative culturally appropriate supervision, where available, (with an emphasis on cultural awareness and overcoming the renowned anti-social effects of discrimination and/or an abused or disempowered upbringing), should be explored as a preferred option to a remand in gaol." Bail was refused in this case as, inter alia, no culturally appropriate alternative supervision was proposed or available.

115 *DPP (NSW) v PH* [2022] NSWSC 1245 at [45] re a detention application founded on s 22B of the *Bail Act* where the Aboriginal applicant's detention would have prevented him attending his grandfather's funeral.

116 *Bugmy Bar Book*, "Significance of funeral attendance and Sorry Business for Aboriginal and Torres Strait Islander peoples", May 2023, accessed 17/4/2025.

with First Nations speakers of English has shown how "linguistic factors can play a key role" in outcomes in the criminal justice process.[117] First Nations people may have:

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

Tone and subtle interjections by a judicial officer may have a powerful impact on changing the dynamics of the room.[118]

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.

117 D Eades, *Aboriginal ways of using English*, above n 61, Ch 7. Dr Eades comments that the increasing awareness of First Nations ways of using English only sometimes results in more equal delivery of justice to First Nations 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.

118 Judicial Council on Cultural Diversity and Inclusion, *The path to justice, Aboriginal and Torres Strait Islander women's experience of the courts*, 2016, p 32, accessed 17/4/2025.

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.

The University of NSW is undertaking a project to examine the ways judicial officers can improve courtroom communication and prevent miscommunication and error, particularly in criminal cases where speakers of the "new and emerging" and First Nations languages are involved, and where interpreters receive limited or no specialised training. See "Access to justice in interpreted proceedings: the role of judicial officers" for more information.[119]

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 First Nations people.

Points to consider:

Do not use ethnic identifiers (for example, "Aboriginal", "Koori", "Indigenous") unless it is necessary to do so — that is, when the person's First Nations 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 "Indigenous 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".

119 University of NSW, "Access to justice in interpreted proceedings: the role of judicial officers", accessed 17/4/2025.

- Do not use the acronym "ATSI" (either orally, or in writing) unless the relevant First Nations 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 a First Nations father and a non-First Nations 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 First Nations people to describe others. The word **"mob"** as in "my mob" is often used by First Nations 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 First Nations groups, should not be used by non-First Nations 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 First Nations 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 *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 *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,[120] but also our appearance, behaviour and body language is all heavily culturally-determined. How a First Nations 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 First Nations people who have had less contact with non-First Nations 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 a First Nations 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 First Nations 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

120 See for example, *Fox v Percy* (2003) 214 CLR 118 at [31]; *Elzahed v State of NSW* (2018) 97 NSWLR 898 at [43]–[47]; *State Rail Authority of NSW v Earthline Constructions Pty Ltd (in liq)* [1999] HCA 3 at [89]. See also L Re, "Oral evidence v written evidence: the myth of the 'impressive witness'" (1983) 57 *ALJ* 679; M Kirby, "Judging: reflection on the moment of decision" (1999) 4 *TJR* 189 and 193–194.

who do not fit any particular cultural norm, there are similar examples within First Nations cultures. So, it is also important not to assume that everyone who is a First Nations Australian will behave in the same way, or to assess First Nations people who do not seem to follow general First Nations patterns of behaviour as dishonest or lacking in credibility.

Some differences in relation to First Nations appearance, behaviour and body language of which appropriate account may need to be taken, are:[121]

Lack of direct eye contact/looking down or away — for many First Nations 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 First Nations 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 First Nations society. It often means the person wants to think, or to adjust to or become comfortable with a particular situation. (The average time between one person speaking and someone responding in most western cultures is ¾ of a second. In First Nations cultures, the time between one person speaking and another responding can be on average as long as seven (7) seconds.) For example, a young First Nations woman may not feel comfortable responding to questions about sexually related manners delivered by a man. A young First Nations 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.[122] First

121 The information in this box is drawn from the *Aboriginal Benchbook for Western Australian Courts*, above n 50, Ch 5; and the *Equal Treatment Benchbook*, above n 50, Ch 9, which in turn are both largely drawn from the writings and research of Dr Diana Eades and information prepared for the NSW Department of Public Prosecutions by B Thomas and G Wallace. (See "Further Reading" at **2.5**). See also Australasian Institute of Judicial Administration Inc, *Bench Book for Children Giving Evidence in Australian Courts*, 2009 (updated 2020), at [2.11], accessed 17/4/2025.

122 *Equal Treatment Benchbook*, above n 50.

Nations 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.[123] 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 a First Nations support person to be present.

Different gestures or sign language — these are significant ways of communicating in traditional First Nations culture. For example, sign language is particularly important in hunting and mourning practices. However, many gestures are common to First Nations people throughout Australia – for example, two arms crossed over and held in front of the body (as if in handcuffs) means "policeman".[124] More subtle gestures are also common, even among urban First Nations people — for example, eye movements, the head or lips may be used to indicate the direction of motion, or the location of a person or event being discussed. If there is any doubt about what a particular sign or gesture means, ask for its meaning rather than potentially ascribing the wrong meaning to it.

Different views about touching — First Nations people commonly touch each other to initiate conversation or instead of conversation. However, uninvited touch by a non-First Nations person can be interpreted as a sign of aggression.[125]

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

All these factors mean that you may need to alert the jury to the fact that any assessment they make based on a First Nations 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,

123 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 61, p 122.

124 *Aboriginal Benchbook for Western Australian courts*, above n 50, p 5:7, para 5.3.1, *Equal Treatment Benchbook*, above n 50, 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.

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

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.[126]

2.3.3.4 Verbal communication — language level and style

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

Yet, just the same as anyone else who appears in court, a First Nations 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 First Nations people resident in NSW speak English, or Aboriginal English. If there is any doubt about a First Nations person who speaks Aboriginal English understanding the questions being asked, or being adequately understood by non-First Nations people, an interpreter should be used. Note that there is significant criticism among First Nations people and non-First Nations people about the fact that First Nations interpreters are not used when they should be used, and the obvious difficulties (including inequitable and unjust outcomes) this causes.[127] 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 First Nations people with a disability that affects their communication ability (for example, a hearing

126 Note the concerns of the NSWLRC in its *Jury Directions in Criminal Trials*, Report 136, 2012, 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".

127 D Eades, *Aboriginal ways of using English*, above n 61; D Eades, "Aboriginal English in Courts" (1994) 1(4) *TJR* 367; D Eades, "Interpreting Aboriginal English in the legal system", paper presented at the Proper True Talk National Forum, Alice Springs, October 1995, in Commonwealth Attorney-General's Department, *Report of Proper True Talk National Forum: Towards a National Strategy for Interpreting in Aboriginal and Torres Strait Islander Languages*, 1996, Canberra, pp 57–68; D Eades, "Communicating with Aboriginal people in NSW" (2008) 20(10) *JOB* 85; D Eades, *Courtroom Talk and Neocolonial Control*, Mouton de Grutyer, Berlin, 2008; D Eades, "Telling and retelling your story in court: questions, assumptions and intercultural implications" (2008) 20 *Current Issues in Criminal Justice* 209. See also, University of NSW, "Access to justice in interpreted proceedings: the role of judicial officers", accessed 17/4/2025.

impairment, mental illness, alcohol or drug affected dementia or speech) — see **Section 5** at **5.6.1**ff. However, note that you may also need to use some of the additional First Nations-specific techniques described in this part — **2.3.3.4**.

Relevant considerations:[128]

Carefully assess the particular person's language and communication style — for example, do not assume that every First Nations 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 a First Nations support person (for example, a Local Court Aboriginal Client Services Specialist) with them (close by/within sight), or you may need to consider whether to close the court.

Be respectful — for example:

- Do not correct Aboriginal English — for example, do not correct any different usage of words, different verb tenses or omitted verbs or parts of verbs, changes in the order of words, or words beginning with a vowel which begin in 'h' in Standard English.
- Note that some Aboriginal English words do not mean the same as English words — for example, "mob", usually means "people", "camp", often means "live", "kill", may mean "hurt", "deadly", may mean "good".
- Seek clarification whenever you are unsure what a particular word or phrase means.
- Do not try to speak in Aboriginal English.
- Do not "talk down" to the person.
- Do not be paternalistic.

128 The information in this box is drawn from the *Aboriginal Benchbook for Western Australian Courts*, above n 50, Ch 5; and the *Equal Treatment Benchbook*, above n 50, Ch 9.

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".

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 First Nations people present that what you are about to say includes references to First Nations 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 First Nations 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?"[129] "Were you at the park?", and then wait for the answer.

– Be careful of the person agreeing or saying "yes" when they do not mean to agree — they may be saying yes, in order to show that they are being obliging/amenable, or because they see the situation as hopeless or futile, or rather than admit they do not understand the question.

– Be careful if the person is trying to repeat or is repeating the exact words and grammatical structure of the questioner — they may simply not have the English skills to give a more accurate or precise reply.

– Be careful of silences — for more on this see the box at **2.3.3.3** above. Silences may also mean that it is not possible to answer the question with a certain member of the family present.

– Be careful of "I don't know" responses — they may not mean evasiveness, they may simply mean that this is not an appropriate way for them to provide the information. There may also be issues of shame or modesty involved. Try a different approach.

– Vagueness about time, numbers or distances may simply be cultural. First Nations 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

129 *Equal Treatment Benchbook*, above n 50, p 123.

misunderstood, or is being demeaning, unnecessarily repetitive, unduly annoying, harassing, intimidating, offensive or stereotyping. Note: you have a mandatory duty under s 41 of the *Evidence Act* to disallow questions which are misleading or confusing (s 41(1)(a)), unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive (s 41(1)(b)), is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate (s 41(1)(c)), or has no basis other than a stereotype (s 41(1)(d)).[130]

Check the language of any prior confession against the language used by the particular First Nations person (and indeed assess any such confession more generally against the education level and cultural sophistication of the particular person).

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

Last reviewed: April 2025

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 a First Nations 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?".[131]

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

130 See **2.3.3.2** above.

131 M Triggiano, "Childhood trauma: essential information for courts," Wisconsin Association of Treatment Court Professionals, 2015.

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 First Nations 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.[132]

A court may order a hearing before a female magistrate if it is "necessary for the effective exercise of the court's statutory powers".[133] A conditional stay of proceedings may be granted until a female magistrate can hear such a matter.[134] A court may limit the access to evidence in proceedings to females (lawyers, witnesses) for cultural or gender reasons.[135]

If you are unsure how to assess the cultural appropriateness or otherwise of a particular behaviour, or unsure how best to deal with it to ensure justice is both done and seen to be done, you could ask the First Nations 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 First Nations people unfairly influence your (or others' assessment).

Be mindful of the high levels of domestic violence and sexual assault within First Nations 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 First Nations communities may mean you need to consider issues such as whether the person is fit to plead or be tried,

132 Section 41 *Evidence Act 1995*.
133 *Lacey (a pseudonym) v Attorney General for NSW* [2021] NSWCA 27 at [119].
134 ibid at [25]; [45]; [119].
135 ibid at [31]; [41]; [85].

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 **5.5.3**.[136]

2.3.5 First Nations burial rights and estate distribution orders

Last reviewed: April 2025

First Nations 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 First Nations 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 for a declaration that a person could make burial arrangements for a First Nations 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 First Nations cultural matters and concerns
3. the deceased's own wishes and
4. the wishes of any living close relatives.

136 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.

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].[137]

See also *Milson v Milson* [2020] NSWSC 919, which held that the wishes of the deceased's mother for the deceased to be buried according to the tribal custom of the Wiradjuri tribe should not govern the outcome of the case: at [85]. Importantly, the deceased had expressed a desire to be cremated, and Sackar J noted that while many First Nations people considered burial on country to be of great importance, there was no evidence to support the plaintiff's assertion that cremation was contrary to First Nations custom: at [81].

Estate distribution orders

Part 4.4 of the *Succession Act 2006* (NSW) provides for the distribution of an intestate First Nations 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 First Nations 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 First Nations 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

137 See also *McKenzie v McKenzie* [2023] SASC 71: while the nature and closeness of the intestate deceased's relationship with his only adult child was determined to be "of the utmost importance", the child's wishes needed to be balanced with evidence regarding the deceased's wishes concerning a location for burial: at [61].

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 First Nations concept of "family" is an important, if not decisive, element of determining "the laws, customs, traditions and practices" of a First Nations 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 First Nations status; the First Nations 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 First Nations 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 First Nations 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 First Nations 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 a First Nations 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 a First Nations community or group.[138]

2.3.6 Adoption proceedings

Last reviewed: April 2025

The *Adoption Act 2000* (NSW) requires the Supreme Court to apply the "Aboriginal and Torres Strait Islander child placement principles" specified in s 35 in making an adoption order if the child the subject of the order is an "Aboriginal child". An "Aboriginal child" is defined in s 4 as meaning "a child descended from an Aboriginal and includes a child who is the subject of a determination under subsection (2)". Subsection 2 provides that "the Court may determine that a child is an Aboriginal for the purposes of this Act if the Court is satisfied that the child is of Aboriginal descent". For an detailed discussion of the Aboriginal and Torres Strait Islander child placement principles and critique of their implementation (specifically in the context of the Children's Court care and protection jurisdiction), see P Gray, "Beyond placement: realising the promise of the Aboriginal and Torres Strait Islander Child Placement Principle" (2021) 33 *JOB* 99. The Aboriginal and Torres Strait Islander Child Placement principles are legislatively enshrined in the *Adoption Act* and in Ch 2, Pt 2 of the *Children and Young Persons (Care and Protection) Act*, referred to as the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in the context of the care and protection jurisdiction of the Children's Court.

2.3.7 Guidance to the jury — points to consider

Last reviewed: April 2025

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

138 G Lindsay, "Indigenous estate distribution orders", Ngara Yura Program presentation, 1 March 2018, p 6.

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 Book*[139] or *Local Court Bench Book*[140] (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 First Nations 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 First Nations 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 First Nations 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-First Nations 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 practices that they need to pay attention to.

2.3.8 Sentencing decisions — points to consider

Last reviewed: April 2025

In arriving at an appropriate sentence, the sentencer must take into account the purposes of sentencing as outlined in s 3A of the *Crimes (Sentencing Procedure) Act 1999*. Considerations, including the offender's subjective and objective circumstances, are relevant, noting that the *Bugmy Bar Book* and associated research have been compiled as an evidence-based resource to assist in substantiating the impacts of experiences of trauma, socioeconomic inequality and structural disadvantage.

Your sentencing decision must be fair and non-discriminatory.[141]

139 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*.
140 Judicial Commission of NSW, *Local Court Bench Book*, 1988—, Sydney.
141 See also Judicial Commission of NSW, *Sentencing Bench Book* at [2-200].

Points to consider:

A First Nations person must be treated fairly and without discrimination.

Regarding a victim impact statement (VIS) for proceedings commenced before 27/5/2019, a VIS may be received and considered by the court at any time after it convicts, but before it sentences, an offender. For proceedings commenced on or after 27/5/2019, the court must consider a VIS which has been tendered after it convicts, but before it sentences, an offender.[142]

It is important to ensure that the sentencing decision:

- Is not harsher than it would be if the person were not a First Nations person.
- Is not paternalistic.
- Takes into account the recommendations of the Royal Commission into Aboriginal Deaths in Custody (1991) and *Pathways to justice — inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report 133, 2008). These landmark reports contain recommendations to divert First Nations people away from detention/imprisonment where possible, and where detention is unavoidable, to detain/imprison the person as close to their community as possible. For example, you may be able to make use of:
  - circle sentencing which is a declared intervention program (see below)
  - other court-based programs such as the MERIT program through the Local Court[143] or other alcohol or drug programs imposed as a condition of bail or a bond under the *Crimes (Sentencing Procedure) Act 1999*

142 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*.

143 In 2019, 23% of MERIT participants identified as Aboriginal. The program reports positive outcomes for participants in the areas of frequency of alcohol and drug use, psychological distress and criminal justice outcomes, and MERIT completers were less likely to reoffend when compared to program non-completers: NSW Government, *Magistrates early referral into treatment program 2019 Annual Report,* 2019, pp 9–10, accessed 17/4/2025.

  - a community service educational program (for example, an anger management program),[144] or
  - a community-based order.[145]

    See further *Sentencing Bench Book* at **[3-500]**ff and the Court-based and other diversionary programs menu on JIRS.

- Takes account of the fact that high levels of incarceration result in the institutionalisation of a large proportion of First Nations offenders and a lengthy term of imprisonment may be particularly harsh for a First Nations offender.[146] The impacts of institutionalisation in youth detention, prison and out-of-home care are detailed in a psychiatric report commissioned by the Bugmy Bar Book Project Committee.[147]
- Where relevant, takes account of the principles in relation to the sentencing of First Nations offenders that were first enunciated in 1992 by Wood J in *R v Fernando*[148] and affirmed in *Bugmy v The Queen*[149] — 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 *Bugmy Bar Book* and commissioned research reports. These resources hold 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

144 For an example of a culturally-focused residential diversionary program aiming to reduce reoffending and enhance skills, see the Balund-a (Tabulam) Program for male offenders over 18.

145 See ALRC, *Pathways to justice — inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples*, above n 67, Recommendations 7–1, 7–2 and 7–3 regarding the need for community-based sentencing options to be widely available (particularly to those living in remote areas), culturally appropriate, flexible, and tailored to support the individual offender's needs. See also "7. Community-based sentences", pp 229–272.

146 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].

147 R Shields and A Ellis, *Institutionalisation*, Bugmy Bar Book Report, 2024, accessed 17/3/2025.

148 (1992) 76 A Crim R 58 at 62–63.

149 (2013) 249 CLR 571.

application of the *Bugmy* principles. This online resource is freely available for judicial officers and the legal profession to use.[150] To date, the following chapters have been published:

- Aboriginal and Torres Strait Islander stolen generations and descendants
- Acquired brain injury
- Child abuse and neglect
- Childhood, infant and perinatal exposure to and experience of domestic and family violence
- Childhood sexual abuse
- COVID-19 risks and impacts for prisoners and communities
- Cultural dispossession experienced by Aboriginal and Torres Strait Islander Peoples
- Early exposure to alcohol and other drug abuse
- Fetal Alcohol Spectrum Disorders (FASD)
- Hearing impairment
- Homelessness
- Impacts of imprisonment and remand in custody
- Incarceration of a parent or caregiver
- Interrupted school attendance and suspension
- Low socio-economic status
- Out-of-home care
- Refugee background
- Social exclusion
- Significance of funeral attendance and Sorry Business
- Unemployment

150 *Bugmy v The Queen* (2013) 249 CLR 571 at [41]. See also the judgment of Kirby P in *R v Russell* (1995) 84 A Crim R 386 at 392–394, where he discussed the implications for offending by young Aboriginal people of various health issues, particularly hearing disabilities, and the relevant literature on that topic. See also, *R v Henry* (1999) 46 NSWLR 346; at [10]–[11]; and Law Reform Commission of NSW, *Sentencing Aboriginal offenders*, Report No 96, 2000, Ch 2, accessed 17/4/2025. For a useful overview of case law dealing with recognising Aboriginal disadvantage in sentencing, and the relationship between the objective and subjective character of offending, see S Norrish, "Sentencing Aboriginal offenders: not enough 'judicial notice'?", paper given to the Judicial Conference of Australia Colloquium, Sydney, 13/10/2013, accessed 17/4/2025.

Commissioned research reports include:

– V Edwige and P Gray, *Significance of culture to wellbeing, healing and rehabilitation*, Bugmy Bar Book Report, 2021.

– R Shields AM and A Ellis, *Institutionalisation*, Bugmy Bar Book Report, 2024.

See further Appendix with reference to the *Fernando* principles and *Bugmy v The Queen*; and V Edwige and P Gray, *Significance of culture to wellbeing, healing and rehabilitation*, Report, 2021, hosted on the NSW Public Defenders website. This Report explores the concept of social and emotional wellbeing for First Nations people, the relationship between culture and healing, and the impact of imprisonment.

– Takes account of any relevant evidence from local First Nations groups or elders — see **2.4** below for how to contact relevant local First Nations groups/people.

– Where locally available, consider circle sentencing and/or youth justice conferencing[151] for Children's Court matters, and where appropriate — that is, where the First Nations person has admitted to the crime and 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

151 See JIRS under "Diversionary Programs" for contact information.

tune with Aboriginal cultural norms about how sanctions should be imposed in that they enable First Nations community discussion and involvement.[152]

– Note that circle sentencing tends to be effective only where the offender and the First Nations 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 NSW*.[153]

– Takes account of the fact that some First Nations 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"[154] 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] NSWCCA 118 at [29]. The weight to be given to any extra-curial punishment will depend on all the circumstances of the case and in some cases, extra-judicial punishment attracts little or no weight. You may need to find out what sort of customary punishment (if any) is likely to be imposed, and then consider whether to order a different

152 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 Trimboli, *An evaluation of the NSW Youth Justice Conferencing Scheme*, 2000, New South Wales Bureau of Crime Statistics and Research, the NSW Attorney General's Department.

For a good summary of circle sentencing in Australia, see A Hennessy, "Aboriginal sentencing practices in Australia", paper presented at the International Society for Reform of the Criminal Law Conference, Brisbane, July 2006. See also E Marchetti and K Daly, "Aboriginal Courts and Justice Practices in Australia" (2004) 277 *Trends and Issues in crime and criminal justice*, Australian Institute of Criminology.

For an analysis of the impact of circle sentencing on recidivism, see J Fitzgerald, "Does circle sentencing reduce Aboriginal offending?" (2008) 115 *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, accessed 17/4/2025. Following the publication of the BOCSAR study, Dr Don Weatherburn urged the State Government to strengthen its commitment to resourcing the circle courts: "Circle Sentencing Evaluation", Media Release, 16 July 2008.

153 Judicial Commission of NSW, *Circle sentencing in NSW* (video), Sydney, 2023, accessed 17/4/2025.

154 NSW Law Reform Commission, *Sentencing Aboriginal offenders*, Report 96, 2000, p 63, accessed 17/4/2025.

sentence in 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.[155] Note that in sentencing for Commonwealth offences, cultural practices cannot be taken into account in mitigation or aggravation of the seriousness of criminal offending.[156]

– Takes account of the fact that many First Nations people tend to have lower incomes than non-First Nations people — see the statistics in **2.1** above — 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.[157] Licence disqualification has a serious impact on rural and regional First Nations communities and many First Nations people convicted of driving while disqualified are disqualified for many years.[158]

– 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.

155 See for example the Northern Territory CCA decisions of *R v Minor* (1992) 79 NTR 1; *Jadurin v R* (1982) 44 ALR 424. In relation to "extracurial" punishment and its relevance to sentencing, see *R v Allpass* (1993) 72 A Crim R 561 at 567; *R v Daetz* [2003] NSWCCA 216; *R v Holden* (unrep, 28/7/97, NSWCCA) at [5]. See also the *Sentencing Bench Book*, above n 141, at [10-520]. For further consideration of customary law and its relevance to Aboriginal persons, see NSW Law Reform Commission, *Sentencing Aboriginal offenders*, Report 96, 2000, ch 3, accessed 17/4/2025. Note that in sentencing for Commonwealth offences, cultural practices cannot be taken into account in mitigation or aggravation of the seriousness of criminal offending.

156 Section 16A(2A) *Crimes Act 1914* (Cth).

157 Nationally, Aboriginal and Torres Strait Islander people are over-represented as fine recipients and are less likely than their non-First Nations counterparts to pay a fine at the time of issue. Aboriginal women are particularly disproportionately affected: ALRC, *Pathways to justice — inquiry into the incarceration rate of Aboriginal and Torres Strait Islander Peoples*, above n 67, pp 387–389.

158 ibid pp 404–405. 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 WDOs, and other diversionary programs, see JIRS under "Court-based and other diversionary programs".

2.3.9 The *Fernando* principles[159]

Last reviewed: April 2025

The *Fernando* principles, which involve a thoughtful analysis of sentencing in relation to particular First Nations offenders, have a resonance beyond the jurisdiction of NSW courts. They are taken up, for instance, in the *Aboriginal Benchbook for Western Australian Courts*,[160] 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*,[161] 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 First Nations 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 First Nations 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 First Nations 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 socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor.

159 The *Fernando* principles was written by his Honour Judge Stephen Norrish QC, former judge of the 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.

160 *Aboriginal Bench Book for Western Australian Courts*, above n 50.

161 (1992) 76 A Crim R 58 at 62–63 per Wood J. They were further explained in *R v Hickey* (unrep, 27/9/94, NSWCCA); *Stone v R* (1995) 84 A Crim R 218 at 221–223; *R v Ceissman* [2001] NSWCCA 73, especially at [29]–[33]; *R v Pitt* [2001] NSWCCA 156 at [19]–[21] and repeated in *R v Fernando* [2002] NSWCCA 28 at [64]–[67], per Spigelman CJ.

This involves the realistic recognition by the court of the endemic presence of alcohol within First Nations 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 First Nations 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 a First Nations 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*,[162] 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 391–392. To recognise that background in an appropriate case for the purpose of sentence is neither discriminatory nor paternalistic.

2.3.10 After *Fernando*

Last reviewed: April 2025

A number of NSW Supreme Court and NSWCCA decisions confined the application of the *Fernando* principles to Aboriginal people who came from remote areas: see for example *R v Morgan* (2003) 57 NSWLR 533 at [21]–[22] and *R v Newman* [2004] NSWCCA 102 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

162 (unrep, 14/11/97, NSWSC) at 10.

a correctional officer. The primary sentencing judge had applied the *Fernando* principles and the subsequent judgment of the NSWCCA in *Kennedy v R* [2010] NSWCCA 260. Justice Simpson in *Kennedy* at [53] commented that *Fernando* was not about sentencing First Nations people but about the recognition of social disadvantage, regardless of the offender's ethnicity, that frequently precedes the commission of a crime. Justice Simpson also commented that social deprivation, resulting from alcohol consumption (or otherwise) is not confined to remote or rural communities (at [57]).[163]

On appeal to the NSWCCA,[164] 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 resentenced 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 First Nations people: at [28]. The High Court rejected this submission as this approach was contrary to individualised justice. The High Court distinguished the Canadian decisions and Canadian legislative principles the appellant relied on: at [36]. The High Court held that a sentencing court should not apply a different method of analysis for Aboriginal offenders in NSW than for non-Aboriginal offenders: at [36].

The High Court nonetheless confirmed at [37] that: "An Aboriginal offender's deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender's sentence." The court approved the comments of Simpson J in *Kennedy* about the impact of social disadvantage as correctly explaining "the significance of the statements in *Fernando*" (at [37]). The court said that propositions (C) and (E) in *Fernando* addressed the significance of intoxication at the time of the offence. Intoxication is not usually a matter that mitigates an offender's conduct but the propositions recognise that where an offender's abuse of alcohol reflects the environment in which he or she was raised, it should be taken into account as a mitigating factor: at [38]. The High Court also confirmed that proposition (G) in *Fernando* recognises that a lengthy term of imprisonment might be particularly burdensome for a First Nations offender. The court said at [39] that in each of these respects,

163 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.

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

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 First Nations 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].

In *Hoskins v R* [2021] NSWCCA 169, a First Nations offender had a stable childhood but during adolescence, after discovering his parents were not his biological parents, he moved to live with his biological mother and was exposed to an environment where anti-social conduct was normalised. The sentencing judge was found to have erred by finding "no evidence" of social disadvantage and failing to apply the principles in *R v Fernando* and *Bugmy v The Queen*. The offender's childhood and adolescence were held to be equally formative: at [61], [64].

The Significance of Culture to Wellbeing, Healing and Rehabilitation,[165] a report commissioned by the Bugmy Bar Book Committee, was referred to by Loukas-Karlsson J in *R v BS-X* [2021] ACTSC 160 in respect to sentencing proceedings concerning a 15-year-old Wiradjuri male who had a diagnosis of complex developmental trauma. The report underlined the principles derived from *Bugmy*. In summarising some of the key aspects of the report relevant to sentencing decisions, her Honour said:[166]

> The report examines rehabilitation and wellbeing for Aboriginal and Torres Strait Islander people. Further, the report examines the relationship between Aboriginal culture, healing, rehabilitation, and the impact of imprisonment. The report highlights the importance of culture to Aboriginal and Torres Strait Islander peoples and therefore, the importance of culturally appropriate treatments to facilitate rehabilitation. The operation of culturally appropriate treatments are explored in relation to the criminal justice system. The report underlines that cultural identity is an important protective factor that promotes self-worth and therefore, rehabilitation.

165 V Edwige and P Gray, *Significance of culture to wellbeing, healing and rehabilitation*, Bugmy Bar Book Project Committee Expert Report, 2021, accessed 17/4/2025.

166 at [82].

2.4 Further information or help

Last reviewed: April 2025

- 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

    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

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

    Armidale
    128 Dangar Street
    Armidale NSW 2350
    Ph: (02) 6772 5770

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

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

    Wagga Wagga
    19 Trail Street
    Wagga Wagga NSW 2650
    Ph: (02) 6932 7200

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

- NTS Corp (previously NSW Native Title Services Ltd)
  Level 1, 44-70 Rosehill Street
  Redfern NSW 2016
  Ph: (02) 9310 3188 or 1800 111 844
  Email: information@ntscorp.com.au

- NSW Aboriginal Land Council
  Level 5, 33 Argyle Street
  Parramatta NSW 2150
  PO Box 1125
  Parramatta NSW 2150
  Ph: (02) 9689 4444
  Email: media@alc.org.au
- Aboriginal Medical Service Cooperative Redfern
  36 Turner Street
  Redfern NSW 2016
  Ph: (02) 9319 5823
- Tranby National Indigenous Adult Education and Training
  13 Mansfield Street
  Glebe NSW 2037
  Ph: (02) 9660 3444 or Freecall: 1800 601 988
  Email: reception@tranby.edu.au
- Nearest University — particularly if it has an Aboriginal Unit.
- Local First Nations 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

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2.6 Your comments

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

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

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

Section 15 contains information about how to send us your feedback.

[The next page is 3101]

Section 3

People from culturally and linguistically diverse backgrounds

Purpose of this chapter

NSW has a culturally diverse population, born in more than 300 countries, having more than 310 ancestries, communicating in more than 280 languages at home and around 139 different religious beliefs.* The purpose of this chapter is to:

- highlight for judicial officers relevant information about the different values, cultures, lifestyles, socioeconomic disadvantage and/or potential barriers in relation to full and equitable participation in court proceedings for people from culturally diverse backgrounds in NSW; 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.

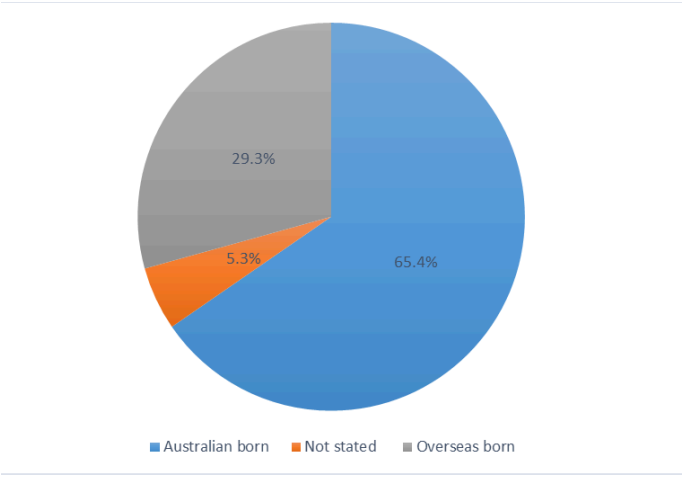
Contents

* Multicultural NSW, website, accessed 23/08/2022.

3.1 Introduction[1]

Last reviewed: October 2023

- **Population** — The NSW population according to the 2021 census was 8.07 million residents, up from 7.48 million residents in the 2016 census.
  - Figure 3.1 shows the breakdown of Australian born and overseas born NSW residents using figures from the 2021 census:



1 Unless otherwise indicated, the statistics in 3.1 are drawn from Australian Bureau of Statistics (ABS) 2021 census data QuickStats and Snapshot of NSW, accessed 23/8/2023.

- Of the 2.37 million of those born overseas, 1.85 million (or around 78%) were born in an other than main English-speaking country (OTMESC) — that is, a country other than that classified by the ABS as a main English-speaking country (MESC: New Zealand, United Kingdom, Republic of Ireland, South Africa, United States of America and Canada).[2]
- Approximately 22% of those born overseas were born in a MESC (520,665) — predominantly in the UK, South Africa and New Zealand. Many MESCs have values, customs, laws and legal systems that are similar (although not identical) to those in Australia.
- Around 30% of those born in an OTMESC were born in China, India and the Philippines. Table 3.1 ranks OTMESC birthplaces according to the percentage of the NSW population born there:

Table 3.1 — NSW residents born in OTMESC: 2021 census figures

Birthplace	Number of NSW residents	% of NSW population
China (excluding SARs and Taiwan)	247,595	3.1
India	208,962	2.6
Philippines	106,930	1.3
Vietnam	97,995	1.2
Nepal	64,946	0.8
Lebanon	63,293	0.8
Iraq	55,353	0.7
South Korea	51,816	0.7

- The overseas birthplace countries listed above showing the greatest increase between 2016 and 2021 are India, Nepal, Iraq and the Philippines.

- **Language spoken:**
  - 26.6% (2.15 million) of NSW residents speak a language other than English at home.
  - After English, the most common languages spoken at home are Mandarin (3.4%), Arabic (2.8%), Cantonese (1.8%), Vietnamese (1.5%) and Hindi (1%).

2 The ABS states: "The list of main English-speaking countries (MESC) is not an attempt to classify countries on the basis of whether or not English is the predominant or official language of each country. It is a list of the main countries from which Australia receives, or has received, significant numbers of overseas settlers who are likely to speak English. It is important to note that being from a non-main English-speaking country does not imply a lack of proficiency in English." "Other than main English-speaking countries" (OTMESC) are defined as non-main English-speaking countries comprising all countries that are not listed above: ABS, "Glossary", *Migrant data Matrices,*released 15/12/2021, accessed 23/8/2023.

  - Around 16.9% of those who speak a language other than English at home speak English "not well" or "not at all"[3] (note that this figure differs according to age, with much higher rates of limited English among the older population). 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 OTMESCs live in specific areas of Sydney, as do those with varying or lower levels of English proficiencies, that is, those who speak English "not well" or "not at all" (1.7 million). In 2021, almost half (47.9%) of the Sydney Inner City population (218,000) was born overseas, from 183 different countries. The areas of NSW with the highest proportion of their population born overseas were Auburn (61.7% – the highest proportion in Australia), Fairfield (56.1%), Parramatta (54.9%), Strathfield-Burwood-Ashfield (50.2%) and Canterbury (49.4%).[4]In general, a much smaller percentage of the local population outside Sydney was born in an OTMESC compared with Sydney, and the same can be said for those who speak English "not well" or "not at all".
- In NSW during 2019–2020, the areas with the highest net gains through regional overseas migration were both in Sydney — the Inner South West (8,100) and Parramatta (8,000).[5] Immigration was impacted due to COVID-19 during 2020–2022 due to Australian border closures.
- **Ancestry or ethnic background:**
  - 65.4% (5.28 million) of NSW residents are Australian born. Of all NSW residents (those born in Australia and overseas):
    - 43.7% (3.53 million) have both parents born in Australia
    - 6.3% (509,789) have their father born overseas
    - 4.6% (369,492) have their mother born overseas
    - 37% (3.18 million) have both parents born overseas
    - 6% (481,824) not stated,
- **Religion** — In 2021, of the 12.1% of people in NSW who were affiliated with a non-Christian religion, the most common were Islam (4.3%), Hinduism (3.4%) and Buddhism (2.8%).[6]It must be noted that the religious affiliations

3 The ABS generally classifies proficiency in spoken English (that is "the ability to speak English in every day situations") as: very well, well, not well or not at all. See ibid.
4 ABS, *Cultural diversity of Australia,* 20/9/2022, accessed 23/8/2023.
5 ABS, *Migration, Australia*, 2019–20 financial year, released 23/4/2021, accessed 23/8/2023.
6 ABS, *Snapshot of New South Wales,* 2021, released 28/6/2022, accessed 18/7/2023.

of all people are various and do not necessarily match the dominant religion of their birth country or country of ancestry. For more information about religious affiliation — see Section 4.

- **Socio-economic status:**
  - People from culturally diverse communities are more likely than people who were born in Australia and grew up speaking English at home to experience socio-economic disadvantage. General poverty rates are higher among migrants from OTMESCs. In 2019–2020, while 11% (or 1,454,000) of people born in Australia were living in poverty, as well as 11% (or 218,000) of people born in a MESC, there was a poverty rate of 18% (or 887,000 people) among those from OTMESCs.[7]
  - 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 unemployment rate reduces when the general unemployment rate goes down. In Australia, in 2021, the unemployment rate was 5.2% for Australian born people compared with 5.3% for those born overseas.[8] However, this is an aggregated statistic.
  - Newly arrived migrants and those from OTMESCs have higher unemployment rates than those who have been in Australia longer[9] and those who come from MESCs — in August 2021, the unemployment rate for migrants from OTMESCs (7.9%) was significantly higher than for those from MESCs (4.2%).[10] In the twelve months to February 2023, particularly high unemployment rates were seen from people born in North Africa and the Middle East (7.5%), which the *Australian labour market for migrants* publication suggests could reflect English language proficiency and period of residence in Australia.[11] Additionally, in February 2018 only 39% of adults who had migrated from the Middle East or North Africa were employed 5–10 years after arriving in Australia, compared to 83% of migrants from North-West Europe.[12]
  - Young migrants from OTMESCs recorded lower labour force participation rates than other cohorts — 59.2%, compared to 70.9% for MESC migrants and 68.5% for youth born in Australia.[13]

7 UNSW and ACOSS, *Poverty in Australia 2023: who is affected*, p 57. Note that MESCs are referred to as "major English-speaking countries" in this report.
8 OECD, Data, Migration, native-born unemployment and foreign-born unemployment, accessed 23/8/2023.
9 Australian Government, Jobs and Skills Australia, *Australian labour market for migrants — July 2023*, p 3, accessed 18/7/2023.
10 ibid, p 5.
11 ibid, p 4.
12 UNSW and ACOSS, above n 7, p 58.
13 *Australian labour market for migrants,*above n 9, p 6.

  - Interestingly, the gap between the Australian born unemployment rate and the migrant unemployment rate widens the higher the educational qualification of the migrant — presumably to do with the difficulty of getting overseas qualifications recognised and race discrimination within recruitment and selection practices. However, in 2019 data, recent migrants who had obtained a non-school qualification before arrival had a higher employment rate than those who had not (82% vs 59% for those who did not).[14]
  - Migrants, and particularly those from culturally diverse backgrounds, 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 varied or lower levels of English proficiency, difficulties negotiating a different culture, the difficulty in getting their overseas qualifications recognised, and some race discrimination in recruitment and selection processes.

- **Stigma and assumptions relating to crime rates** — within some sections of the community there is a perception (sometimes fed by the media) that members of particular culturally diverse groups are more likely to resort to crime than other cohorts. However, research indicates that 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.[15]

  Australian Bureau of Statistics figures[16] reveal that of the NSW prison population in 2022 of 12,372 inmates, 9527 were Australian born (7.7%) and of the overseas born groups listed, those born in New Zealand, Vietnam, Lebanon, Fiji, Samoa, Tonga, Iran and Sudan are over-represented in the prison population. As stated above, there is likely a correlation between the levels of imprisonment in these groups and general socio-economic disadvantage (with the possible exception of New Zealand), similar to that in Australia's First Nations population — see 2.1, 2.2.2.

14 ABS, Characteristics of recent migrants, Australia, Nov 2019, ABS cat no 6250.0, Table 2, accessed 23/8/2023.

15 S Mukherjee, "Ethnicity and Crime", *Trends and Issues in Crime and Criminal Justice No 117*, May 1999, Australian Institute of Criminology, accessed 23/8/2023; S Poynting, G Noble, P Tabar, Middle Eastern appearances: "Ethnic gangs", moral panic and media framing (2001) 34 *Australian and New Zealand Journal of Criminology* 67.

16 Australian Bureau of Statistics, 4517.0 — Prisoners in Australia, 2022, accessed 23/8/2023.

3.2 Cultural diversity

Last reviewed: October 2023

3.2.1 Cultural differences

- **It is now well-accepted among medical scientists, anthropologists and other students of humanity that "race" and "ethnicity" are social, cultural and political constructs, rather than matters of scientific "fact".**[17]
- **Each culturally diverse group will have its own set of cultural customs.**
- **Each culturally diverse group also contains its own set of variances and sub-cultures** — for example, there is not just one Vietnamese or Lebanese cultural "norm". Multicultural communities are steeped in diversity, not limited to language, faith, cultural values and geography. The assumption that a single individual or organisation represents their entire community can risk isolating members of the community.
- **Each culturally diverse group has also generally deviated from at least some of the cultural customs that are common in their country of ancestry** — 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 culturally diverse groups follow the cultural customs for their group, or they may alter their behaviour (particularly in public) to better align with Western cultural customs.** For example, some individuals from culturally diverse backgrounds feel the need to engage in "code-switching" — that is, adapting their behaviour, speech, appearance, name or expression to better reflect the dominant white culture — to decrease the risk of discrimination and exclusion, particularly in a professional environment.[18]
- **However, there are some common cultural differences between people from many culturally diverse backgrounds and people accustomed to Western cultural customs that may influence:**
  - The way in which people from different culturally diverse 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 a culturally diverse background based on how a person accustomed to Western cultural customs would behave.

17 *Hackett (A pseudonym) v Secretary, Dep of Communities and Justice* [2020] NSWCA 83 at [149].

18 Diversity Council Australia, *Culturally and racially maginalised women in leadership*, Synopsis report, March 2023, p 22, accessed 19/7/2023.

3.2.2 Examples of common cultural differences

Some of the common cultural differences between people from culturally diverse groups and people accustomed to Western cultural customs 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, 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 varied or lower levels of (Australian) English proficiency**.

  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 Western cultural customs 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 sometimes a much lesser understanding of the Australian legal and court system than those accustomed to Western cultural customs**. Many culturally diverse people 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 knowledge 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.
- **Different customs between the generations** — those from younger generations may be more likely to adhere to (or want to adhere to) Western cultural customs than those from older generations — see 3.3.6.1 below.
- **People from culturally diverse backgrounds may have experienced racism and race discrimination in Australia**. Experiences of racism were

widespread during COVID-19with racist verbal attacks, physical abuse and derogatory and xenophobic slurs being experienced "as though they were personally infected by COVID-19 by virtue of their foreign appearance."[19]

3.2.3 The possible impact of these cultural differences in court

The adversarial nature of the Australian court system means it can be uncomfortable and difficult to navigate for any individual, regardless of their cultural background or dominant language. However, unless appropriate account is taken of the types of cultural differences listed in 3.2.2 above, people from culturally diverse backgrounds may be particularly likely to:

- 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) in this Bench Book.

Note: that s 13A *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.[20] The court security officer must ensure the person's privacy when viewing the person's face if the person has asked for privacy.[21]

19 L Berg and B Farbenblum, "As if we weren't humans: The abandonment of temporary migrants in Australia during COVID-19", Migrant Worker Justice Initiative, 2020.

20 *Law Enforcement (Powers and Responsibilities) Act 2002*, s 3.

21 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.

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.

3.3 Practical and legal considerations[22]

Last reviewed: October 2023

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 "transfers a spoken or signed message from one language (the source language) into a spoken or signed message in another language (the target language) for the purpose of communication between people who do not share the same language".[23]

A **translator** is someone who transfers "a written message from one language (the source language) into a written message in another language (the target language) for the purpose of communication between a writer and reader who do not share the same language".[24]

Interpreters are required to act with accuracy and impartiality,[25] and are subject to the *Code of conduct for interpreters in legal proceedings*.[26] The Australian Institute of Interpreters and Translators (AUSIT) *Code of ethics and code of conduct*[27] and Australian Sign Language Interpreters' Association (ASLIA) *Code of ethics*[28] also apply to relevant language service professionals.

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.

22 Much of the information in 3.3 is sourced from the Judicial Council on Cultural Diversity and Inclusion, *Recommended national standards for working with interpreters in Courts and Tribunals*, 2022, 2nd ed, accessed 29/8/2023; Supreme Court of Queensland, *Equal Treatment Benchbook*, 2016, 2nd ed, Supreme Court of Queensland Library, Brisbane, accessed 3/3/2023; Chapter 6; the National Accreditation Authority for Translators and Interpreters (NAATI) website.
23 NAATI, "Certification glossary of terms", accessed 19/7/2023.
24 ibid.
25 JCDI, above n 22, p 21.
26 ibid, Sch 1, pp 27–28.
27 AUSIT, *Code of ethics,* November 2012, accessed 19/7/2023.
28 ASLIA, *Code of ethics and guidelines for professional conduct,* 2007, revised 2020, accessed 19/7/2023.

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 Diversity and Inclusion (JCDI) (previously the Judicial Council on Cultural Diversity) produced a resource in 2017 *Recommended national standards for working with interpreters in courts and Tribunals* (*Recommended national standards*). A second edition was published in March 2022. The resource recommends that if a party or witness in court has difficulties understanding or communicating 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 national 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.[29]

In November 2019 the *Uniform Civil Procedure Rules* 2005 (NSW) Pt 31 Div 3, which is based on the Model Rules set out in the *Recommended national standards*, was enacted.

Legal principles

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 1995* (NSW):

> 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.

In relation to ex tempore reasons, see *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 272 CLR 329, where the High Court accepted that as a matter of general fairness, rather than independent legal duty, the first respondent ought to have had the benefit of translated ex tempore reasons or written reasons at an earlier time: at [22]. However, the first respondent was not deprived of the opportunity to formulate his argument on appeal because of the fact the primary judge's ex tempore reasons were not translated, nor was he denied the opportunity to investigate any difference in substance between those reasons and the published reasons: at [43]. See also *Murray v Feast* [2023] WASC 273, where it was found that the magistrate erred in not allowing an interpreter where the defendant spoke Aboriginal English and Kriol. The Court was in substance expressing, in Mr Murray's presence, an erroneous view about the genuineness of Mr Murray's need for interpretation and therefore an erroneous view about the honesty of Mr Murray's approach to the giving of evidence generally: at [175].

29 JCDI, above n 22, pp 95–97.

NSW Government agencies will 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.

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 in *Re East; ex p Ngyuyen* Kirby J said that:

> where a trial would be unfair because of the absence of an interpreter, it is the duty of the judicial officer to endeavour to ensure that an interpreter is provided.[30]

The JCDI *Recommended 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.[31]

In summary, s 30 *Evidence Act 1995* (NSW), combined with relevant case law and the JCDI *Recommended national standards* 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 struggles 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 intepreter to help us?" or "What do you want to do?"[32]
>
> 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

30 (1998) 196 CLR 354 at [82]–[83]. See also *Dietrich v The Queen* (1992) 177 CLR 292 at 330-1; *Ebatarinja v Deland* (1998) 194 CLR 444 at [27]; *R v Johnson* (unrep, 22/5/87, QCCA) and *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75 at 75–77.

31 above n 22 at p 75.

32 This question is derived from the JCDI, *Recommended national standards* , above n 22, p 96ff.

provide and/or be questioned on. If a person asks for an interpreter, it is most likely that they will need one. In assessing the need for an interpreter, it may be helpful to refer to the four-part test in the *Recommended national standards*.

Someone with limited English proficiency may refuse an interpreter, sometimes due to overestimation of their ability to communicate in and understand English in the specialised context of legal proceedings. In this situation, the judicial officer should "weigh up the complexity of the matters being discussed", and either proceed without an interpreter or, if there is doubt regarding the limited English speaker's ability to understand or make themselves understood, insist on a certified interpreter being made available.[33]

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 person with limited English proficiency. Inform the interpreter that they have permission to ask you questions or to consult dictionaries if needed.
2. If the document is complex, the proceedings may need to be adjourned in order to obtain a translation by a certified translator.

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

The JCDI's *Recommended national standards for working with interpreters in courts and tribunals*[34] were produced to establish recommended and optimal practices for working with interpreters, with the aim of improving access to

33 JCDI, above n 22, p 54.

34 See both the online and in person training the JCDI provides for judicial officers on working with interpreters on its website. See also a summary of the publication in (2018) 30(4) *JOB* 36.

justice and procedural fairness. This resource has been recommended by the Council of Chief Justices. The *Recommended national standards* 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 national 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 national standards*; and
- adoption of the Model Rules to give effect to the proposed standards.

Practice Note SC Gen 21 — Interpreters in Civil Proceedings commenced operation on 4 March 2020 and applies to all civil proceedings commenced after its commencement and to any existing proceedings which the court directs should be subject to the Practice Note, in whole or in part. The Practice Note states that the court has resolved to implement and apply the *Recommended national standards*, which must be read together with *Uniform Civil Procedure Rules* Pt 31 Div 3. The Practice Note covers when parties are assessing the need for an interpreter, matters to be considered when an interpreter is engaged, conduct of proceedings, and interpreter fees.

In 2022 the JCDI published a companion document to the *Recommended national standards* entitled *Interpreters in criminal proceedings: benchbook for judicial officers,*[35] to assist judicial officers who are required to work with interpreters in criminal proceedings.

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.[36] Preferably, practitioners who are also formally trained should be given preference over those who are

35 JCDI, *Interpreters in criminal proceedings: benchbook for judicial officers,* August 2022, accessed 25/7/2023.

36 See NAATI's online directory for a list of accredited translators and interpreters, accessed 3 March 2023. The NAATI website provides online verification of NAATI certification. See also JCDI above n 22, p 90.

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 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*[37] 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.[38]

There are several techniques of interpreting:[39]

- **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.

  Note that both consecutive and simultaneous interpreting fall within the umbrella of "dialogue interpreting", which involves a conversation between two or more people, mediated by an interpreter.
- **Sign language interpreting** — see the *ASLIA guidelines for interpreters in legal settings*.[40]
- **Sight translation** involves transferring the meaning of the written text by oral delivery (reading in one language, relaying the message orally in another language). An interpreter may be asked to provide sight translation of short documents.

37 (1993) 70 *A Crim R* 515 at 516.

38 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 3 March 2023.

39 *NAATI Certification glossary terms*, n 23.

40 ASLIA, Guidelines for interpreters in legal settings, vers 2, 2018, accessed 6/3/2023.

.

Note: that besides face-to-face interpreting there are other channels of interpretation including via telephone or video conference, which should be used where appropriate and available.[41]

NAATI's new certification system (which came into effect in 2019) has been designed to evaluate that a candidate demonstrates the skills needed to practise as a translator or interpreter in Australia.[42] Certified specialist legal interpreters (CSLI) are experienced and accomplished interpreters who are experts in interpreting in the legal domain. They have completed training and undertake continuous professional development in specialist legal interpreting. Note that in some emerging communities, the only interpreters available may be certified provisional interpreters: their use should be monitored very carefully. See the *Recommended national standards* for the order of preference for an interpreter's level of qualification and certification to be followed when engaging an interpreter in a court setting, and the extent to which the level of qualification of an interpreter is often subject to availability of interpreters in the language required.[43]

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.[44]

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

41 JCDI, above n 22, p 37.
42 See further M Painting, "The new national certification system for the translating and interpreting profession in Australia" (2019) 31 *JOB* 63.
43 JCDI, above n 22, Standard 11, pp 40–44.
44 The Code of Ethics and a register of members are available on the AUSIT website, accessed 22/2/2023.

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.[45]

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 consider both the backgrounds of the individuals who require interpretative services and of the interpreter, and whether it is advisable to do so** (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?

See further UNSW's project "Access to justice in interpreted proceedings: the role of Judicial Officers".[46]

This project is using an innovative interdisciplinary approach and aims to generate new knowledge in examining the variations in judicial officers' communications practice when working with interpreters, and their impact on the effective transmission of information in the courtroom. Expected outcomes of this project will include improved outcomes of interpreted communication and better access to justice for participants with limited English proficiency.

3.3.1.4 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 over 120 languages and dialects (excluding Auslan) — Ph 8255 6767, or a quote can be requested online through the booking system.[47] Over the financial year to 30 June 2022, Multicultural

45 S Hale, "Helping interpreters to truly and faithfully interpret the evidence: the importance of briefing and preparation materials" (2013) 37(3) *Aust Bar Rev* 307.
46 UNSW, "Access to justice in interpreted proceedings: the role of judicial officers", accessed 22/2/2023.
47 See the Multicultural NSW website.

NSW provided over 22,000 interpreting services in Local Courts across NSW covering 113 languages — Arabic, Mandarin, Vietnamese, Cantonese and Persian being the most requested.[48]

Note: that Multicultural NSW has a contract with courts to provide interpreters in criminal matters, domestic violence and sexual assault cases free of charge.

- **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 150 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.

3.3.1.5 Who pays for an interpreter or translator

It is important that individuals are made aware of who pays for language services before proceedings have begun in order to prevent confusion and provide greater clarity for all who come before the court.

If an interpreter is required in a criminal or apprehended violence matter, court staff can arrange this: the service is free. The court registry must be advised that an interpreter is required as soon as court attendance dates are known. 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. Having limited English proficiency significantly disadvantages a person's ability to participate in the ADR.

3.3.1.6 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

48 Local Court of NSW, *Annual review 2022*, 3/7/2023, p 41, accessed 2/8/2023.

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.

3.3.1.7 Working with an interpreter — guidelines for magistrates and judges[49]

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 JCDI's *Recommended national standards* provides guidance for courts and judicial officers working with interpreters in civil and criminal proceedings.[50]

Establish the ground rules — the interpreter is required to "interpret everything accurately and impartially as if they were the voice of the person speaking".[51] Explain the interpreter's role both to the interpreter and to the witness/defendant/accused/jury.

Make the interpreter take an oath or affirmation — see Section 4.4.2. Ask interpreters to introduce themselves and state their credentials including NAATI certification and formal qualifications (eg degree or TAFE qualification in Interpreting).

Ensure that the interpreter is briefed on the matter prior to proceedings commencing. Interpreters should be afforded sufficient time to become familiar with the material.[52]

Give the interpreter regular breaks (every 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 good basic working conditions are not provided. In long hearings or trials that require all proceedings to be interpreted, two interpreters should work in tandem where possible to ensure that the quality of interpreting remains high.[53] See Standards 9.1 — 9.9 of the *Recommended national standards.*

49 Refer to the JCDI, above n 22, "Recommended standards for judicial officers", pp 19–20; "Annexure 5 — Summary: what judicial officers can do to assist the interpreter", p 98.
50 JCDI, above n 22, Standard 9.1, p 9.
51 ibid, p 98.
52 ibid, p 22.
53 ibid pp 45, 98.

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".[54] If the former was what was said or conveyed then that is what you want to hear, not the latter statement.

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. Ask what resources they will be accessing in court (eg online glossaries and dictionaries can be accessed on smart phones and tablets. Interpreters may need to consult them at different stages of the hearing or trial).

Ensure the interpreter does not block anyone's line of vision to the person whose speech is being interpreted.

Speak (and ensure everyone else speaks) to the person themselves, not to the interpreter (except when the interpreter personally asks for clarification).

Speak directly to the person who is being interpreted using "you" and "I" (and ensure everyone else does the same) — for example, "I want to know why you …", not "Please try to find out why he/she …", not "Can you ask her/him why he/she …".

Ensure the person whose speech is being interpreted speaks to the person they are providing the information for, not to the interpreter.

Ensure everyone speaks in simple and direct English, avoid technical terms and jargon if possible (see 3.3.5.3 below), stop any overlapping speech or attempts from lawyers or witnesses to interrupt the interpreter while s/he is interpreting, and speak slowly enough and in short enough chunks for the interpreter to

54 S Hale, *The discourse of court interpreting*, John Benjamins Publishing Co, 2004.

be able to do their job as well as possible.[55] Ask the interpreter to let you know if they are having difficulty with any of this or need clarification — so that you can intervene if necessary.

If anyone questions the interpreter's interpretation, do not take their criticism at face value but conduct further investigation. Bilinguals without a certified interpreter qualification often overestimate their competence. Compare qualifications and give the interpreter the opportunity to respond to the criticism.

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". 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.

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.[56]

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. This includes the questions and answers during evidence, any objections, legal arguments, other witness testimonies, and vulgar language including

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

56 S Hale, "The challenges of court interpreting: intricacies, responsibilities and ramifications" (2007) 32(4) *Alt LJ*, pp 198-202.

expletives. There should not be any non-interpreted lengthy exchanges between the interpreter and the person they are interpreting. When the defendant/accused with limited English is not giving evidence, the interpreter will be simultaneously whispering to the defendant/accused what the other parties are saying in the court in order to make him/her linguistically present.

Remain neutral and follow all the principles in AUSIT's Code of Ethics — see the end of 3.3.1.2 above.

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

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

3.3.2 Modes of address

3.3.2.1 Different naming systems

Some culturally diverse groups have different naming systems from the generally gender-specific "first" or "given" name, then middle name, then family name system used by individuals accustomed to Western cultural customs.

For example, they may:[57]

- 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.
- Not often use their family name when referring to someone else — using their given name and middle name only.

57 Examples sourced from the Supreme Court of Queensland, above n 22, pp 56–59.

- Have particular words in their names, or prefixes or suffixes attached to one of their names that indicate such things as:
  - Gender — for example, in general the Vietnamese middle names of "Van" for men and "Thi" for women.
  - Marital status.
  - Son of, or daughter of — for example the Muslim prefix "ibn" meaning "son of", "binte" meaning daughter of.
  - Father of, or mother of — for example the Muslim "Abu" meaning "father of " and "Umm" meaning mother of.
  - Using both their paternal and maternal surnames.

However, not all members of a group will follow the common cultural customs of their group. And many have either completely adopted Western naming system, or use alternative names that fit the Western naming system when they deal with Australian bureaucracy.

Some non-English names may be 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

People from some culturally diverse 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 may only know each other by a nickname that bears little resemblance to the person's actual name, and be happy for you to use the same nickname.

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

Ask the person's legal representative (where they have one) how a particular person wishes to be addressed, and if necessary how to pronounce their name(s), and then do as instructed. If you ask the person directly they may be uncomfortable with 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, people born in Vietnam or from a Vietnamese background may 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."[58]

3.3.3 Oaths and affirmations

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 cultural 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.[59]

58 D Tran, "Vietnamese community" (2002) 5(4) *TJR* 359 at p 362.
59 See s 3 (the definition of "face covering") *Law Enforcement (Powers and Responsibilities) Act 2002*.

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,[60] but also our appearance, behaviour and body language are all heavily culturally determined.**
- **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 a culturally diverse background.**
- **For some people from culturally diverse backgrounds, the traits that individuals accustomed to Western cultural customs may 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 Western culture that observe different styles of appearance, behaviour and body language, and also individuals who do not follow any particular cultural custom, there are similar examples within any other culture.** So, it is also important not to assume that everyone born in a particular country will behave in the same way, or to assess people from the same cultural background who do not seem to follow the typical patterns of behaviour of that culture as dishonest or lacking in credibility.

60 See *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186 at [21]–[27]. See also, L Re, "Oral evidence v written evidence: the myth of the 'impressive witness'" (1983) 57 ALJ 679; M Kirby, "Judging: reflection on the moment of decision" (1999) 4(3) *TJR* 189 at 193–4; and Downes J, "Oral evidence in arbitration", speech to the London Court of International Arbitration's Asia-Pacific Users' Council Symposium, Sydney, 14 February 2003, accessed 30/8/2023. Kirby J also addressed this theme in a judicial context in *State Rail Authority of NSW v Earthline Constructions Pty Ltd (in liq)*(1999) 160 ALR 588.

3.3.4.2 Examples of differences and the ways in which they may need to take into account

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 custom for people from that particular cultural 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.

– **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 Western culture, or they may not be used at all, or they may not be used as frequently by individuals accustomed to Western cultural customs. For example, people from some culturally diverse backgrounds tend to talk with their hands more than those accustomed to Western cultural customs; various types of bows or hands held together as though praying in the Christian tradition may be used in place of the handshake; 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 and some groups tend to nod/ shake their head for "yes" and "no" in the opposite way to that which is common in Western culture.

  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 Western culture may be seen as threatening, rude or culturally unacceptable within some other cultures. And/or those that are**

considered unacceptable within Western culture may be seen as acceptable or even expected within another culture — for more on this see 3.3.6.1 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.**[61]

3.3.5 Verbal communication

3.3.5.1 Background information

People from culturally diverse backgrounds and particularly those with limited English proficiency may face a number of difficulties in relation to aspects of verbal communication in court proceedings.

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

- Difficulties understanding (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 little or 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

61 Supreme Court of Queensland, above n 22, p 95.

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 a culturally diverse 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 limited English proficiency — 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 3.3.5.4.

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". As a further example, and as indicated in Section 4, individuals who follow the practices of Islam 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. Where there is uncertainty as to what language is appropriate, this should be clarified with the relevant individual or a community leader before proceedings where possible.

Use ethnic 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 cultural 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 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.[62]

Do not assume that someone from a culturally diverse background or who does not look Anglo-Celtic will have limited English proficiency, be unable to understand the court processes, or be unfamiliar with Western cultural customs and values. Australia has been a multi-cultural country for many years and their family 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 Australians who have grown up speaking English at home. For example, the words "bugger" and "bastard" are words bandied around quite casually by some Australians often with no thought as to their literal meaning, but people from other countries, including a Western country such as the United States, could be offended.

62 Supreme Court of Queensland,, above n 22, p 56.

> 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.[63]

3.3.5.3 Take appropriate measures to accommodate those with limited English proficiency, or with different styles of communication

Note: that an individual's ability to communicate in English is often reduced in situations of stress — such as court appearances. Further, some people may be more able to understand English than to speak it, or more able to speak it than understand it. Someone who appears to speak perfect English may still find the language used in court or by lawyers very difficult to follow.

People from culturally and linguistically diverse backgrounds may:

- **Use a much more roundabout style**, for example, gradually building a picture before finally getting to the point that an individual who grew up speaking English at home would have started with.
- **Talk much more slowly**, or **much more quickly**.
- **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 culturally diverse 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.

63 Note that s 41 *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 *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 *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.

- **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.** For example, in some cultures it is "considered impolite to flatly disagree with a questioner".[64] Some people who do this may try to indicate that they would prefer to come back to that subject later, others may not.
- **Use more, fewer or different hand gestures and body movements, and/or find the gestures and body movements used by individuals accustomed to Western cultural customs 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. Some cultures are lower touch cultures than Western culture, whereas other cultures tend to be higher touch.

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.

64 Supreme Court of Queensland, above n 22, p 54.

- **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.[65]

3.3.5.4 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.

65 ibid.

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 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 customs and values are heavily influenced by the particular religious affiliation/s of an 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 Western cultural customs.**
- **Just as there are sub-cultures among Australians accustomed to Western cultural customs that have slightly or completely different customs and values about these fundamental aspects, and also families or individuals who do not seem to follow any particular cultural customs, 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 culturally diverse 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 Western customs and values, (for example, to have a better chance of succeeding in a professional environment – see the comment on "code-switching" in 3.2.1 above),[66] or because they are now in families comprising members from different ethnic backgrounds. In the reverse, some older generations within ethnic communities may hold fast to customs and values that have in fact shifted in their own home countries.
- **There may also be considerable inter-generational conflict as younger generations move away from the customs and values of their parents' generation.**
- **Similarly there may be considerable conflict or problems within mixed race families** — for example, disinheritance, inability to negotiate differences

66 Diversity Council Australia, above n 18.

of opinion about fundamental aspects of custom and values, vulnerability of one partner due to their lower 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[67]

- **In almost all diverse 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 diverse cultures the family comes before the individual**. For example[68] in many Vietnamese families, Confucian values require members of the family to act according to their roles in the family, including by fulfilling duties to other relatives and ancestors. Family members' distinct roles are reflected in the language, where most family members have a title indicating their position within the family group (eg among some Vietnamese groups, *Anh Hai* ("second brother") is the title given to the eldest brother, with corresponding titles continuing down the line of siblings).

  This concept of the family before the individual may even extend to the "collective" or social group needing to come before the individual.
- **Larger families and extended family networks.** The family in some cultures is often much broader than the Western concept of the nuclear family of parents and children. The extended family may include aunts, uncles, siblings, nieces, nephews, cousins, grandparents, grandchildren and even in-laws and their families. Marriage and other such religious and cultural rituals may also be used to expand the family networks even further, drawing in people such as the best man or woman at a marriage, or a sponsor at a baptism.[69]

  > For example, for Greek people, "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. Similarly, 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 his education and wellbeing .

67 Much of the information in 3.3.6.2 is sourced from the Supreme Court of Queensland, *Equal Treatment Benchbook*, above n 22.

68 ibid, p 22, drawing on R T Schaefer (ed), *Encyclopedia of race, ethnicity and society*, Sage Publications, 2008, p 477; A Fauve-Chamoux and E Ochiai, "Introduction" in A Fauve-Chamoux and E Ochiai (eds), *The stem family in Eurasian perspective*, Peter Lang AG, 2009, p 1, 30; K Thu Hong, "Stem family in Vietnam" in A Fauve-Chamoux and E Ochiai (eds), *The stem family in Eurasian perspective*, Peter Lang AG, 2009, pp 431, 448–9.

69 ibid, p 22, quoting S Sarantakos, *Modern families: an Australian text*, Macmillan Education Australia, 1996, p 69.

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 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, although there are also some cultures which are, or have been, matriarchal and others where women's matrimonial property rights are legally protected**. **The sons in the families of some cultures may also have specifically defined roles**.
- **Different courtship and marriage customs** including arranged marriages where the partner may be sought from overseas not just from within Australia, a dowry needing to be provided by the family of the bride, overseas polygamous marriages, and/or a very strong push to marry within the particular ethnic group. In many families from culturally diverse backgrounds, the choice of marriage partner is a family not a personal decision. For some of these families, marriage outside the community or family wishes could lead to exclusion from the family and/or community.
- **In some instances, less tolerant views about such things as de facto relationships, having children outside a marriage, abortion, and/or homosexuality.** This may be more likely to be 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** and different cultures assign the caring responsibility to different members of the family.

  Allied to the stronger concepts of family, there may be stronger "concepts of family honour and shame"[70] which may act as a significant means of control and rationale for why members of particular cultural groups act as they do.

  These concepts also impact on whether family members attend court to support an individual facing a court sentence.
- **More extreme differences in behaviour and/or appearance between different levels, classes or "castes".**

70 ibid, p 40.

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

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 a culturally diverse 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.[71]

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

71 above n 63.

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: 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.[72]

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 culturally diverse 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*,[73]or the Local Court Bench Book[74] (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 explain that they must treat each person as an individual based on what they have heard or seen in court in relation to the specific person, rather than what they know or think they know about all or most people of that person's particular background. It may also be a good idea to give them specific examples of making culturally determined false assumptions — for example, that it would be false and legally unfair to conclude that anyone who follows a particular cultural custom that happens to conflict with what individuals accustomed to

72 See AUSIT Code of ethics, above n 27, pp 5–6.

73 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2nd edn, 2002 accessed 30/8/2023, and www.judcom.nsw.gov.au.

74 Judicial Commission of NSW, *Local Courts Bench Book*, 1988 and www.judcom.nsw.gov.au, accessed 30/8/2023.

Western cultural norms 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 individuals accustomed to Western cultural customs 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.[75]

Points to consider:

In order to ensure that any person from a culturally diverse 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.[76]

Bear in mind that many people from culturally diverse backgrounds may have a lower income level than the equivalent

75 See also Judicial Commission of NSW, *Sentencing Bench Book*, 2006, "Race and ethnicity" at [10-470], accessed 30/8/2023, and *R v Henry* (1999) 46 NSWLR 346 at [10]–[11].

76 See Pt 3, Div 2 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the Charter of Victims Rights contained in Div 2 *Victims Rights and Support Act 2013* (which allows the victim access to information and assistance for the preparation of any such statement). Note that any such statement should be made available for the prisoner to read, but the prisoner must not be allowed to retain it.

"class" of people not from those backgrounds (see 3.1 above) — 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

Last reviewed: October 2023

- **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 618
  Parramatta NSW 2124
  Ph: (02) 8255 6767
  contact@multicultural.nsw.gov.au
  https://multicultural.nsw.gov.au

  Translating and Interpreting Service (TIS National)

  GPO Box 241 MELBOURNE VIC 3001

  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 Diversity and inclusion
  PO Box 4758
  Kingston ACT 2604
  Ph: (02) 6162 0361
  Email: secretariat@jcdi.org.au
  www.jcdi.org.au

3.5 Further reading

Last reviewed: October 2023

Australasian Institute of Judicial Administration Inc, *Bench Book for Children Giving Evidence in Australian Courts*, 2020, Melbourne, accessed 30/8/2023.

Australian Bureau of Statistics website, accessed 30/8/2023.

Australian Law Reform Commission, *Multiculturalism and the law*, ALRC Report No 57, 1992, Canberra, accessed 30/8/2023.

H Bowskill, "The Judicial Council on Diversity and inclusion — an update", (2023) 35(4) *JOB* 33, accessed 6/9/2023.

J Downes, "Oral Evidence in Arbitration", speech to the London Court of International Arbitration's Asia-Pacific Users' Council Symposium, Sydney, 14 February 2003, accessed 30/8/2023.

R French, "Equal justice and cultural diversity — the general meets the particular", paper presented at the Judicial Council on Cultural Diversity, Cultural Diversity and the Law Conference, 14 March 2015, Sydney, accessed 30/8/2023.

S Hale, *The discourse of court interpreting*, John Benjamins Publishing Company, Amsterdam and Philadelphia, 2004.

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

S Hale, "Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals: a National Survey", Australasian Institute of Judicial Administration Inc, 2011 at www.aija.org.au/online/Pub%20no89.pdf, accessed 30/8/2023.

S Hale and L Stern, "Interpreter quality and working conditions: comparing Australian and international courts of justice" (2011) 23(9) *JOB* 75.

S Hale, "The challenges of court interpreting — intricacies, responsibilities and ramifications" (2007) 32(4) *Alternative Law Journal* 198.

S Hale (ed), Translation & Interpreting, *The international journal of translation and interpreting research*, accessed 15 May 2013.

Judicial Council on Cultural Diversity, *Recommended National Standards for working with interpreters in courts and Tribunals*, 2017, accessed 30/8/2023.

MD Kirby, "Judging: reflections on the moment of decision" (1999) 4 *TJR* 189.

J Kowalski, "Managing courtroom communication: reflections of an observer", (2008) 20(10) *JOB* 81.

E Kyrou, "Hot topic: judging in a multicultural society" (2015) 2(3) *Law Society of NSW Journal* 20.

W Martin, "Access to justice in multicultural Australia", paper presented at the Judicial Council on Cultural Diversity, Cultural Diversity and the Law Conference, 13 March 2015, Sydney.

S Mukherjee, "Ethnicity and crime", *Trends and Issues in Crime and Criminal Justice* No 117, May 1999, Australian Institute of Criminology, accessed 30/8/2023.

National Accreditation Authority for Translators and Interpreters, website , accessed 30/8/2023.

M Perry and K Zornada, "Working with interpreters: judicial perspectives", paper presented at the Judicial Council on Cultural Diversity, Cultural Diversity and the Law Conference, 13 March 2015, Sydney, accessed 30/8/2023.

Judicial Commission of NSW, *Sentencing Bench Book*, 2006, under "Race and ethnicity", at [10-470], accessed 30/8/2023.

L Re, "Oral evidence v written evidence: The myth of the 'impressive witness'" (1983) 57 *ALJ* 679.

Supreme Court of Queensland, *Equal Treatment Benchbook*, 2nd ed, 2016, Supreme Court of Queensland Library, Brisbane, Chapters 4 and 6, accessed 30/8/2023.

D Tran, "Vietnamese community" (2002) 5(4) *TJR* 359.

3.6 Your comments

Last reviewed: October 2023

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 15 contains information about how to send us your feedback.

[The next page is 4101]

Section 4

People with a particular religious affiliation

Purpose of this chapter

NSW is a multicultural society, and this is also apparent through the wide variety of different religions recorded on the Census (the 2021 Census being the most recent). The purpose of this chapter is to:

- provide a brief overview of the beliefs and court-relevant practices of the five most common religions in NSW, 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

4.1 Some statistics[1]

Last reviewed: April 2025

Table 4.1 shows the numeric breakdown of religious affiliations of the NSW population (8.07 million) and the percentage of the 2021 NSW population represented by each group.

Table 4.1 — Religious affiliation of NSW population[2]

Religious affiliation	Number of NSW residents	% of NSW population
Christian	3,844,453	47.6%
Muslim (practising Islam)	349,240	4.3%
Hindu	273,780	3.4%
Buddhist	222,770	2.8%
Jewish (practising Judaism)	40,249	0.5%
Other religions	87,200	1.1%
No religious affiliation	2,679,783	33.2%
Not declared/Inadequately described	574,688	7.1%
Total NSW population	**8,072,163**	

- **Of the 47.6% (3.84 million) who are Christian, in descending order of affiliation:**[3]
  - 1.74 million (21.7% of the population) are **Catholic** — 96.8% of whom are Western (Roman) Catholic, with the rest practising such denominations as Maronite Catholic and other Eastern Catholic.
  - 960,305 (11.9% of the population) are **Anglican**.

1 Unless otherwise indicated, the statistics in **4.1** are drawn from the Australian Bureau of Statistics, *Census of population and housing*, 2021, accessed 10/2/2025.
2 Australian Bureau of Statistics, *Cultural diversity: Census*, 2021, accessed 20/3/2025.
3 Drawn from the Australian Bureau of Statistics, *Census of population and housing*, 2021, compiled and presented by .id (informed decisions), *New South Wales: Religion*, accessed 20/3/2025.

- 172,132 (2.1% of the population) are **Uniting Church**.
- 153,481 (1.9% of the population) are **Presbyterian** and **Reformed**.
- 134,326 (1.7% of the population) are **Greek Orthodox**.
- 93,624 (1.2% of the population) are **Baptist**.
- 71,624 (0.9% of the population) are **Pentecostal**.
- 42,078 (0.5% of the population) are **Maronite Catholic**.
- 23,388 (0.3% of the population) are **Jehovah's Witnesses**.
- 22,729 (0.3% of the population) are **Seventh Day Adventist**.
- 17,185 (0.2% of the population) are **Lutheran**.
- 11,080 (0.1% of the population) are **Salvation Army**.
- And the remainder practise such religions as **Latter-day Saints (Mormons) and Churches of Christ**.

- **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 practising Muslim may be of African, Asian, European, Middle Eastern or Indigenous origin.
- **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.** 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.
  - Key findings in trends from the 2021 Census are that, Australia-wide, Christianity decreased by more than 1 million people but is still Australia's most common religion; Australia is becoming more religiously diverse and almost 10 million Australians reported having no religion.[4]

4 ABS, "Religious affiliation in Australia: exploration of the changes in reported religion in the 2021 Census", released 4/7/2022, accessed 18/3/2025.

4.2 Some information[5]

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

Last reviewed: April 2025

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 diverse 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.[6]

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

5 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, Australia New Zealand Policing Advisory Agency, *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, accessed 20/3/2025, 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.

6 Australia New Zealand Policing Advisory Agency, *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, p 48, accessed 20/3/2025.

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

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

4.2.1.2 Holy books and scriptures

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

4.2.1.3 Religious leaders

Christian religious leaders have various names depending on the denomination — 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 and the Sydney diocese of the Anglican church do 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.
- **Worship and festival times** — see **4.2.1.4** above.

4.2.2 Buddhism

Last reviewed: April 2025

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

- people born in a Buddhist family, and
- people who have chosen to become Buddhists.[7]

7 Supreme Court of Queensland, *Equal Treatment Benchbook*, 2016, see n 5, p 25.

There are two main Buddhist traditions:

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.[8]

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 free of prejudices and preconceived ideas once they have an 'uncluttered and tranquil mind.[9]

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.[10]

The Eightfold Noble Path enables Buddhists to follow tenets of morality, concentration in mind and wisdom:[11]

- 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.[12]

8 Australia New Zealand Policing Advisory Agency, *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, p 37, accessed 20/3/2025; Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 26.
9 Australia New Zealand Policing Advisory Agency, *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, p 37, accessed 20/3/2025.
10 ibid.
11 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 26.
12 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".[13] 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.[14]

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.[15]

13 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 27.
14 ibid.
15 ibid; Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, 2nd edn, 2002, 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.[16] 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** — touching the head of any person, especially a monk, is seen as impolite.[17] 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 times. 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, depending on the local climate and culture. Monks and nuns either shave their heads or have very short hair. Lay Buddhists may wear or carry threaded beads called a mala around their wrists or necks.[18]
- **Worship and festival times** — see **4.2.2.4** above.

4.2.3 Islam

Last reviewed: April 2025

The definition of "Islam" in Arabic means "submission" and refers to the submission to "Allah", the Arabic word for "God".[19]

It is incorrect to use the term "Muhammadanism" which suggests the worship of Muhammad[20] which is considered forbidden. Islam places great emphasis on pure monotheism, and the idea of the "indivisibility" of God.

Muslims in Australia come from over 70 different countries and are therefore ethnically and culturally diverse.[21] 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.

16 ibid.
17 Australia New Zealand Policing Advisory Agency, *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, p 42, accessed 20/3/2025.
18 ibid.
19 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 27.
20 When referencing Muhammad, "PBUH", the shortened form of "Peace be upon him", is used as a mark of respect.
21 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 28.

There are two main groups within Islam:

1. **Sunni**; and
2. **Shi'a**.

In most Muslim populations, the Sunni are the majority.[22] 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.[23] 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.[24] 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.[25]

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

A belief in six Articles of Faith[26] is a requirement of every Muslim — that is, a belief in:

1. One, unique, incomparable God (Allah).
2. All the angels.

22 ibid.
23 ibid.
24 ibid, p 27.
25 Australasian Police Multicultural Advisory Bureau, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, 2nd edn, 2002, p 50.
26 For further information, see Al-Muhajabah, Introduction to Islamic Monotheism, accessed 20/3/2025.

3. All the Prophets and messengers of Allah, including Adam, Noah, Abraham, Moses, David and Jesus.
4. All revealed books/scriptures of Allah.
5. The Day of Resurrection and the Day of Judgment.
6. Fate and Predestination.

The Five Pillars[27] (or duties) of Islam are regarded as central to the life of the Islamic community:

1. The profession of faith (Al-Shahada) — "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.

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 halal slaughtered, ie slaughtered in a prescribed way. 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.

Understanding "jihad"[28]

For non-Muslims, jihad can be misunderstood and controversial. The teachings of Islam are anti-violence. Muslims must not initiate violence or commit violence.

The word "jihad" in Arabic comes from the root "juhd", meaning making an effort, hence "struggling" and "contending". Military combat is **not** the essence of jihad.

In the Qu'uran, jihad is used in two distinct ways, the greatest and the lesser jihad.

The greatest jihad refers to the inner struggle against the ego: this struggle is germane to all genuine spiritual paths, the goal of which is to purify the soul.

27 Australia New Zealand Policing Advisory Agency, *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, p 69, accessed 20/3/2025. For further information, see Islami City, *The Five Pillars of Islam*, accessed 20/3/2025. See also Judicial College (UK), *Equal Treatment Benchbook*, July 2024 edn, London, accessed 20/3/2025.

28 Derived from HRH Prince Ghazi Bin Muhammad, *A thinking person's guide to Islam*, White Thread Press & Turath Publishing, 2017, Ch 11.

The lesser jihad refers to a just war in Islam, ie, military combat but only for the purpose of self-defence. While every Muslim is called upon to wage the greatest jihad, not everyone is called upon to wage the lesser. Military jihad is essentially defensive, not offensive or for the purposes of terrorism, and must be waged according to a methodology established for fighting in a humane way.

The renowned scholar of Islam, Shaykh Muhammad Al-Yaqoubi, has resoundingly refuted the ideology of the terrorist organisation ISIS, demonstrating that their ideology is aberrant and in total violation of Islamic law.[29]

4.2.3.2 Holy books and scriptures

The Holy **Qur'an** is considered the final, unaltered and unalterable word of Allah,[30] 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".[31]

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.[32] 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.

See further B Rauf, "After R v Bayda; R v Namoa (No 8)" for a discussion around the different textual interpretations of the Qur'an: "There are verses in the Qur'an which are open to interpretations of violence, just as there are verses in the Christian Bible, but they do not incite violence. Rather, it is violent people who incite violence; they use and misinterpret religious texts for their own purposes."[33]

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

29 Shaykh Muhammad Al-Yaqoubi, *Refuting ISIS*, Sacred Knowledge, 2016, 2nd edn, p 13.
30 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 29.
31 ibid.
32 ibid.
33 B Rauf, "After R v Bayda; R v Namoa (No 8)" (2019) 31(9) *JOB* 81 at 83.

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 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. Prayer is called salah; the times for salah are based on the position of the sun. There are five 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:

- Fair — before sunrise
- Dhuhr — when the sun has passed its highest point where shadow length is at its shortest
- Asr — is offered when the shadow length has doubled
- Maghreb — after the sun has set
- Isha — is an hour and half after sunset
- also Friday Dhuhr prayer is prayed in congregation at the mosque. This is mandatory for men.

The ablution ritual, called wudu, is a precondition to prayer. 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.[34]

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

34 ibid, p 30.

calendar.[35] It is the month during which the Qu'ran was revealed to the Prophet Muhammad. Muslims must fast, abstain from drinking alcohol, smoking and sexual relations for 29 to 30 days.[36] 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.[37] The great pilgrimage to Mecca in Saudi Arabia is also observed at this time when Muslims from all over the world congregate to perform the obligations of the pilgrimage.

4.2.3.5 Relevant practices

The Australian National Imams Council (ANIC) has issued an "Explanatory Note on the Judicial Process and Participation of Muslims"[38] 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".[39] 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.[40]

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

- **Status of women** — men and women are both equal in Islam. Both are bound by the same obligation as to fasting, prayer, zakat and so on. While equal, men and women have different roles. Women have children; men are caretakers of women. Women can work however they don't have an obligation to spend their wealth on the family. A male however is obligated to do so.
- **Islamic marriage** — the man must offer a dowry, called Marh. This is a mandatory element to the formation of the contract.

35 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 30; Australia New Zealand Policing Advisory Agency, *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, p 70, accessed 20/3/2025.
36 ibid.
37 ibid.
38 The note can be downloaded from the ANIC website, accessed 20/3/2025.
39 *R v Alou (No 4)* [2018] NSWSC 221 at [237]–[238] per Johnson J.
40 *R v Alou (No 4)* [2018] NSWSC 221 at [236].

- **Touching** — Muslims eat with the right hand because that is in accordance with the teaching of the Holy Prophet Muhammad. The left hand should not generally be used to touch a holy book, or to greet a person. It is not permissible for a man to shake hands with a woman who is not close kin and vice versa.
- **Death and coronial inquests** — as Muslims require an immediate burial to honour the deceased, it is important to ensure that families have access to spiritual support which can be sought from their selected Imam.
- **Dress** — Islam prescribes a modest dress code for both men and women. This code stems from a prohibition on exposing parts of the body known as the "aurat". The meaning of "aurat" is not universally agreed among Muslims and so there is no clear agreement on specifics of what constitutes "modest" dress. Generally, loose-fitting, non-transparent clothing and the covering of hair are requirements for women. There is diversity of opinion regarding the hijab (scarf or veil). Some Muslims believe women must cover their faces and heads, while others believe only the hair and head needs to be covered. There are also Muslims who believe it is not an Islamic requirement for women to wear veils. 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 face covering may remove their covering if required, although they may consider it a very serious matter and only remove it in exceptional circumstances.[41]
- **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

41 Australia New Zealand Policing Advisory Agency, *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, p 72, accessed 20/3/2025.

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.[42]

- **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 Australian National Imam's Council (ANIC) has issued an "Explanatory 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.

  See *Elzahed v Kaban*,[43] for a discussion on disrespectful behaviour in court (failing to stand for a judge when entering and leaving the court when presiding over the plaintiff's civil proceedings at [65]–[90]) and the elements of the offence under s 200A *District Court Act 1973* at [38], [41]–[48].

- **Worship and festival times** — see **4.2.3.4** above.

4.2.4 Hinduism

Last reviewed: April 2025

Hinduism is one of the oldest religions in the world. Different communities in India have practised and evolved it over thousands of years. "Hindu" is a corruption of "Shindu", the old name for the river Indus.[44]

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.[45] Hinduism is sometimes called "Sanatan Dharma" — the Eternal Religion.

42 *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), Pt 3, Div 4, ss 19A–19C.
43 *Elzahed v Kaban* [2019] NSWSC 670
44 Judicial College (UK), *Equal Treatment Benchbook*, July 2024 edn, p 323, accessed 20/3/2025.
45 Bhakti Marga Academy, Understanding Hinduism, accessed 20/1/2025.

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 seven major tenets of Hinduism are:[46]

- **Atma** — the soul or the divinity of the Self
- **Samsara** — reincarnation, the cycle of birth and death
- **Karma** — the cosmic law of action and reaction and is the governing law of samsara
- **Moksha** — means liberation from the cycle of birth and death (samsara)
- **Dharma** — the right path, way or purpose, this includes the practice of non-violence (ahimsa paramo dharma) and
- Tolerance of differences within itself and towards other religions (sanatan dharma)
- **Brahman** — while there are many deities and Hindus will worship different gods, Brahma is the creator God and Brahman is the omnipresent, impersonal foundation and sustainer of all things 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

  Beliefs may be related to the natural world in its countless manifestations with ancestors, the seasons and festivals all playing their part[47]
- **Srishiti and pralaya** — creation and dissolution: this reflects that time is cyclical, not linear. Srishiti is the moment when creation is brought into a manifested world; as the cycle completes, pralaya or dissolution occurs.

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

46 ibid.
47 Judicial College (UK), *Equal Treatment Benchbook*, July 2024 edn, p 324, accessed 20/3/2025.

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).[48] 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.[49]

Hindus do not believe in taking life, and traditionally most are vegetarian. Those who do eat meat will not eat beef or beef products, and this rule extends to any cooking utensils which may have been used for cooking non-vegetarian foods.[50]

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.[51]

Other holy texts are:[52]

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

48 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 32.
49 ibid, p 31.
50 Australia New Zealand Policing Advisory Agency, *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, p 62, accessed 20/3/2025.
51 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 32.
52 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, pp 32–33.

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., [53]

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.[54]

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

Hindu festivals are based on the lunar calendar, the main festivals are:[56]

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

53 Australia New Zealand Policing Advisory Agency, *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, p 61, accessed 20/3/2025.
54 ibid.
55 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 33.
56 ibid.

4.2.4.5 Relevant practices

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

- **Status of women** — women are revered in Hinduism and traditionally, a woman's role was a supportive one in the family and community. A woman's role has evolved over time due to the impact of globalisation and western influences.[57]
- **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.[58] 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.[59] 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.[60] 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.[61]
- **Worship and festival times** — see **4.2.4.4** above.

4.2.5 Judaism

Last reviewed: April 2025

Judaism is one of the world's oldest religions.

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

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

57 BBC, "Practices in Hinduism, Women's rights and inclusion", accessed 18/3/2025.
58 ibid.
59 ibid, p 43.
60 ibid.
61 ibid.

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.
10. God knows human deeds and thoughts.
11. God rewards good and punishes evil.
12. The Messiah will come to redeem Israel and the world.
13. There will be a resurrection of the dead.

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

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

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

62 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 35.
63 ibid, p 35.

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.[64]

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.[65]

4.2.5.3 Religious leaders

In Orthodox Judaism, only men can become rabbis; whereas Liberal and progressive Jews accept women as rabbis and cantors.[66]

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.[67]

4.2.5.4 Forms of worship and festivals

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

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

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

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

64 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 36.
65 ibid, p 35.
66 Judicial College (UK), *Equal Treatment Benchbook*, July 2024 edn, p 327, accessed 20/3/2025.
67 Australia New Zealand Policing Advisory Agency, *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, p 81.

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

Last reviewed: April 2025

For some practical information on Baha'i and Sikhism, see *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, Australia New Zealand Policing Advisory Agency.

Otherwise, see **4.4**.

4.2.7 Religious vilification and "hate crimes"

Last reviewed: April 2025

4.2.7.1 Anti-Discrimination Act 1977 (NSW)

Section 49ZE *Anti-Discrimination Act 1977* (NSW) makes it unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground the person/s:

- has, or does not have, a religious belief or affiliation, or
- engages, or does not engage, in religious activity.

Part 4BA *Anti-Discrimination Act 1977* prohibits religious vilification.

A "public act" is defined in s 49ZD to include:

- public communication including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material and conduct, and
- conduct, including actions and gestures, and the wearing or display of clothing, signs, flags, emblems and insignia.

This Part came into effect on 12 November 2023 providing that complaints of religious vilification can be made about a public act that occurred on or after this date to Anti-Discrimination NSW.

The incidence of religious vilification is often associated with particular events, such as an increase of Islamophobic incident reports after particular terrorist attacks or political rhetoric,[68] or during Israel-Gaza conflicts.[69]

4.2.7.2 Criminal offences of threatening or inciting violence

- Section 93Z *Crimes Act 1900* (NSW) creates an offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status.

  The elements of the offence are that a person:

  1. by a public act
  2. intentionally or recklessly threatens or incites violence towards another person or a group of persons

68 See further B Rauf, "After R v Bayda; R v Namoa (No 8)" (2019) 31(9) *JOB* 81.

69 See M Vergani and D Goodhardt, "We tracked antisemitic incidents in Australia over four years. This is when they are most likely to occur", The Conversation, 2 April 2021, accessed 24/3/2025.

3. on grounds that include that the other person has, or one or more of the members of the group have, a specific religious belief or affiliation.[70]

- Sections 80.2A and 80.2B Criminal Code (Cth)[71] create offences of recklessly advocating the use of force or violence against targeted groups or members of groups who have a protected attribute that includes religion.
- Where an offence was partially or wholly motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion), the court is required to take this into account as an aggravating factor in the sentencing exercise.[72]

Other options

As well as the option for a religious vilification complaint to be made to Anti-Discrimination NSW, other ways to notify of religious vilification include:

- The Islamophobia Register offers a secure and reliable service that allows people from across Australia to report any form of anti-Muslim abuse.
- The NSW Jewish Board of Deputies provides a site for submitting details of incidents of an anti-semitic nature that have been directed at individuals; or incidents that have seen/overheard in a public setting.

4.3 The possible impact of religious affiliations in court

Last reviewed: April 2025

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.[73] This may make some of them more likely to name *any* perceived

70 *Crimes Act 1900* (NSW), s 93Z(1)(b), inserted by *Crimes Legislation Amendment (Racial and Religious Hatred) Act 2025,* commenced on assent 2/3/2025.
71 Amended by *Criminal Code Amendment (Hate Crimes) Act 2025 (Cth)*, commenced 8/2/2025.
72 *Crimes (Sentencing Procedure Act) 1999* (NSW), s 21A(2)(h).
73 See statistics and information contained in the Annual Reports of the Anti-Discrimination Board of NSW, accessed 10/4/2025.

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

Last reviewed: April 2025

> **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

Last reviewed: April 2025

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.[74] "The

74 *Evidence Act 1995* (NSW), ss 21–23.

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."[75] Those reasonably objected to as incompetent to take an oath, or appears to the court to be incompetent to take an oath, may make a declaration in the form of the Sixth Schedule to the *Oaths Act 1900* (NSW).[76]

The legality of administering an oath depends upon two matters:[77]

1. Whether the oath appears to the court to be binding on the witness's conscience;[78]
2. If so, whether the witness considers it to be binding on his or her conscience.[79]

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")[80] **will only be suitable for those who are Christians and who are happy to take an oath.** It has generally stopped being the practice in most courts[81] for any person taking this oath to hold a copy of a religious text 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.[82]

For those who have no religion, or who do not wish to take an oath,[83] **the standard affirmation makes no reference to religion** — "I solemnly and sincerely declare and affirm that the evidence I shall

75 Judicial College (UK),*Equal Treatment Benchbook*, July 2024 edn, pp 3–8.
76 *Evidence Act 1995* (NSW), s 13(1).
77 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, p 51.
78 *Omychund v Barker* (1744) 1 Atk 21; 26 ER 15.
79 *R v Kemble* (1990) 91 Cr App R 178 at 180.
80 *Evidence Act 1995* (NSW), Sch 1; *Oaths Act 1900* (NSW), s 11A.
81 *Evidence Act 1995* (NSW), s 24(1).
82 Supreme Court of Queensland, *Equal Treatment Benchbook*, see n 5, 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.
83 *Oaths Act 1900* (NSW), s 13.

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."[84]

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.[85]

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.[86]

Section 24A of the *Evidence Act 1995* (NSW)[87] 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. However, 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.[88]

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.

84 *Evidence Act 1995* (NSW), Sch 1.
85 *Evidence Act 1995* (NSW), Sch 1.
86 Australian National Imams Council, "Explanatory note on the judicial process and participation of Muslims", 2017, at [4], accessed 24/3/2025.
87 *Evidence Act 1995* (NSW), s 24A.
88 *Evidence Act 1995* (NSW), s 24A.

– **It is always best to state that it is important that the witness swears to tell the truth in the way that will be most meaningful.** And that, for example, if they practise a particular religion that believes in a God or Gods, swearing to tell the truth in line with their religion (that is taking an oath) may be the most meaningful for them. If they reply that they want to swear to tell the truth in line with their religion, you will need to ask what religion they practise, and then if necessary, substitute the appropriate God or Gods — see **4.2** above.

– **It is always important to respect the wishes of the particular person in their choice of whether to take an oath or make an affirmation.**

It is also important *not* to assume that someone who refuses, or is unable, to take an oath is any less likely to tell the truth than someone who chooses to make an affirmation that makes no reference to religion.

4.4.3 Appearance, behaviour and body language

Last reviewed: April 2025

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.[89] The offence refers to behaviour which is disrespectful to the court or the judge presiding over the proceedings (according to established court practice and convention). The offender may be fined or face 14 days imprisonment if found guilty of the offence. The new offence does not affect any power with respect to contempt. Proceedings for contempt may be brought in respect of behaviour that constitutes a "disrespectful behaviour" offence, but a person cannot be prosecuted for both contempt and the offence for essentially the same behaviour.[90]

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.

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

90 *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.

All or some of these differences in appearance, behaviour and body language may need to be taken into account whenever you make any assessment based on the demeanour of a person with a particular religious affiliation.

If appropriate, you may also need to alert the jury to the fact that any assessment they make based on the demeanour of a person with a particular religious affiliation must, if it is to be fair, take into account any relevant religious difference. This may need to be noted early in the proceedings rather than waiting until you give your final directions to them — otherwise, their initial assessment of a particular person may be unfairly influenced by false assumptions, and may not be able to be easily changed by anything you say in your final directions to them.

As prescribed by law, you may also need to intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any particular religious difference in appearance, behaviour or body language.[91]

4.4.4 Language

Last reviewed: April 2025

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

91 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.

or irrational, even when it is unlawful in NSW. For example, it would be inappropriate to state that it is immoral to follow a religious practice that denies a particular form of medical treatment. In the case where that belief extends to the treatment of a child, for example, the court may have jurisdiction to make an order contrary to the practice. In such a case, the court should explain its decision on the basis of its jurisdiction, rather than engaging in discussion of the morality or otherwise of the belief.

Be careful not to generalise about a particular religion. As is evident from **4.2** above, most, if not all, religions have many approaches and forms.

Treat everyone as an individual, and do not make statements that imply that all those from a particular religious background are the same, or likely to act in the same way. Never assume or imply that even what you suspect or know to be the majority way of behaving or thinking for a particular religious group, is the standard by which any individual member of that group should be judged.

Be aware that for many who practise a religion, some words, concepts, values and ways of living may be much more problematic than for those who are not so orthodox about their religion, or for those who do not practise any religion. For example, the word "bugger" is a word bandied around quite casually by some Anglo-Celtic Australians often with no thought as to its literal meaning. In most religions, homosexuality and/or "practising" homosexuals or lesbians are considered unacceptable at best and sinful at worst — see also **Section 8**, under "Views of others".

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

Last reviewed: April 2025

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.[92]

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

92 see n 91.

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

Last reviewed: April 2025

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

If requested, wherever possible:

Make the appropriate allowances for those who need to pray at certain times of the day (for example, Muslims) — that is, have a break in proceedings.

Make the appropriate allowances for relevant holy days of the week and not insist that someone be called to give evidence on that day, or when they are meant to be at their place of religious worship.

Make the appropriate allowances for (particularly important) religious festivals and not insist that someone be called to give evidence during such times.

4.4.7 Directions to the jury — points to consider

Last reviewed: April 2025

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

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

This should be done in line with the *Criminal Trial Courts Bench Book* 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 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. It may also be wise to give them specific examples of making false assumptions based on their own religious practice or lack of it — for example, that it would be false and legally unfair to conclude that anyone who follows a particular religious norm that happens to conflict with their religious or other values (for example that people of the opposite sex should not generally touch each other in public), is therefore a strange person, untrustworthy or lacking in credibility.

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

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

Last reviewed: April 2025

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.[93]

Points to consider:

In order to ensure that any person with a religious affiliation referred to or specifically affected by your sentencing, decision(s)

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

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.**[94]

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.

4.5 Further information or help

Last reviewed: April 2025

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 March 2025:

Christianity

NSW Ecumenical Council

— includes 18 Christian denominations
Level 7, 379 Kent Street
Sydney NSW 1230
Ph: (02) 9299 2215

Catholic Archdiocese of Sydney

Catholic Communications
Polding Centre, 133 Liverpool Street
Sydney NSW 2000
Ph: (02) 9390 5100

94 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.

Anglican Church Diocese of Sydney

Suite 4, Level 5
189 Kent Street
Sydney NSW 2000
Ph: (02) 8267 2700
Email: gsoffice@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

Presbyterian Church of Australia

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

Greek Orthodox — Archdiocesan District of NSW and ACT

242 Cleveland Street
Redfern NSW 2016
Ph: (02) 9690 6100

Pentecostal

Apostolic Church Australia

National Administration Office
28/20 Enterprise Drive
Bundoora Vic 3083
Ph: (03) 9466 7999
Email: connect@actsglobal.church

Australian Christian Churches

State Office
Unit 408 (Level 4)
12 Century Circuit
Norwest NSW 2154
Ph (02) 9894 1555

Lutheran Church — NSW and District

215/20B Lexington Drive
Bella Vista NSW 2153
Ph: (02) 8660 1200

Jehovah's Witnesses

PO Box 280
Ingleburn NSW 1890
Ph: (02) 9829 5600

Salvation Army

The Salvation Army

NSW/ACT Divisional Headquarters
265 Chalmers Street
Redfern NSW 2016
Ph: (02) 9264 1711
Email: webmaster@aue.salvationarmy.org

Seventh-Day Adventist Church

Greater Sydney Conference
185 Fox Valley Rd
Wahroonga NSW 2076
Ph: (02) 9868 6522
Email: sydney@adventist.org.au

Buddhism

Buddhist Council of NSW

25/56-62 Chandos Street
St Leonards NSW 2065
Ph: (02) 9969 8893
Email: office@buddhistcouncil.org

Islam

Australian Federation of Islamic Councils

932 Bourke Street
Zetland NSW 2017
Ph: (02) 9319 6733
Email: admin@afic.com.au

Australian National Imams Council

Suite 3, 20 Worth Street
Chullora NSW 2190
Ph: 1300 765 940

Hinduism

The Hindu Council of Australia

17 The Crescent
Homebush NSW 2140
Ph: 1300 HINDUS
Email: info@hinducouncil.com.au

Judaism

NSW Jewish Board of Deputies

Level 2, 146 Darlinghurst Road
Darlinghurst NSW 2010
Ph: (02) 9360 1600
Email: mail@nswjbd.org.au

The following NSW government agency can provide information about the appropriate religious organisation(s) for any other religion.

Government agency

Multicultural NSW

Level 8, 56 Station Street East
Harris Park NSW 2150
Ph: (02) 8255 6767
Email: contact@multicultural.nsw.gov.au

4.6 Further reading

Last reviewed: April 2025

Australia New Zealand Policing Advisory Agency, *A Practical Reference to Religious and Spiritual Diversity For Operational Police* , 2nd edn, 2002.

Australia New Zealand Policing Advisory Agency, *Religious and Spiritual Diversity Guide for Operational Police*, 4th edn, 2022, accessed 20/3/2025.

Australian Bureau of Statistics, *2021 Census*, accessed 20/3/2025.

Australian National Imams Council, "Explanatory note on the judicial process and participation of Muslims", 2017, accessed 20/3/2025.

Multicultural NSW, accessed 20/3/2025.

"Participation of Muslims in court processes" (2018) 30(2) *JOB* 18.

Judicial College (UK), *Equal Treatment Benchbook*, July 2024 edn, London, accessed 20/3/2025.

Supreme Court of Queensland, *Equal Treatment Benchbook*, 2016, Brisbane, accessed 17/2/2025.

B Rauf, "After R v Bayda; R v Namoa (No 8)" (2019) 31(9) *JOB* 81.

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 15 contains information about how to send us your feedback.

[The next page is 5101]

Section 5

People with disabilities

Purpose of this chapter

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2023) (Royal Commission) has recommended that information be made available to judicial officers, legal practitioners and court staff about seeking or making adjustments and supports and services for people with disability, and the circumstances in which they may be required.* This chapter endeavours to respond to that recommendation.

There are many different types and levels of disabilities, with almost 1 in 6 residents of NSW having some form of disability and 1 in 20 having a disability that requires assistance.

It is useful to be aware that "disability" is a concept which includes a range of conditions. Conceptually, attitudes towards disability may be influenced by different considerations including cultural; one culture may not regard disability in the same way as another and not all cultures regard disability from a deficit-based perspective.

It is always preferable to emphasise the person rather than the disability. This chapter:

- highlights the numbers, types, levels and discrimination faced by those with a disability. The chapter also provides information on how language can have the effect of stereotyping, depersonalising, humiliating or discriminating against people with disabilities; and
- provides guidance about how judicial officers may take information about a disability into account in their interactions with all who appear in their court, including litigants, witnesses, legal practitioners and court staff — from the start to the conclusion of court proceedings. This guidance is not intended to be prescriptive.

* Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Final Report, Vol 8, Recommendation 8.11, p 21.

Contents

5.1 Royal Commission into violence, abuse, neglect and exploitation of people with disability

Last reviewed: April 2025

On 29 September 2023, the Royal Commission published its Final Report.[1] Established on 5 April 2019, the Royal Commission was directed "to examine

1 Royal Commission into Violence, Abuse, Neglect and Exploitation of people with disability, Final Report, 29/9/2023, accessed 7/4/2025.

and expose violence against, and abuse, neglect and exploitation of, people with disability in all settings and contexts".[2] The Final Report contains 222 recommendations. Of particular relevance to judicial officers is Vol 8 "Criminal justice and people with disability". Volume 8 sets out key findings which relevantly include:

- People with disability, particularly those with cognitive disabilities, are significantly over-represented at all stages of the criminal justice system. This over-representation reflects the disadvantages experienced by many people with disability.
- The over-representation of First Nations people with cognitive disability in custody, particularly in youth detention, has been described as "a largely hidden national crisis".
- Australia has international obligations, including under Articles 13 and 14(2) of the Convention on the Rights of Persons with Disabilities (CRPD), to take appropriate legislative, administrative and other systemic measures to promote the human rights of people with disability, including those in the criminal justice system.
- Children with disability in youth detention have complex needs and are likely to have experienced multiple traumas. They are exposed to an increased risk of violence, abuse, neglect and exploitation while in detention. Placing children with disability in detention, especially children with cognitive disability, increases the chances they will become enmeshed in the criminal justice system. The Royal Commission recommended that the age of criminal responsibility be raised to 14, in line with international accepted standards, to avoid this.
- The risk of indefinite detention for forensic patients is unacceptable.
- A recommendation that State and territory governments fund court-based diversion programs for people with cognitive disability charged with offences that can be heard in Local or magistrates' courts.
- People with cognitive disability should be supported to participate on an equal basis to others in legal proceedings. A person can be found fit to be tried provided their impairment is recognised and addressed during the course of the trial by the provision of appropriate supports or assistance. For example, a person's difficulty in understanding and answering questions asked in court may be overcome if other participants in the trial, including counsel and the judicial officer, take into account the person's cognitive impairment or communication needs.[3]

2 Letters Patent (Cth), 4 April 2019, as amended, recitals, (a).
3 Royal Commission, above n 1, Vol 8, p 147.

- Recommendation 8.12 in relation to determination of fitness to stand trial to plead is that courts should consider modification of the trial process and ensure the defendant receives assistance to facilitate understanding and effective participation in the legal proceedings.[4]
- The importance of having an independent third person present to assist people with a cognitive disability to understand the legal process and questions asked. Having an intermediary to assist communication for accused persons with a cognitive disability would enable better participation.[5]

5.2 Defining disability and prevalence

5.2.1 Definitions

Last reviewed: April 2025

The Royal Commission noted that data about people with disability is dispersed across many datasets with at least nine different "definitions" of disability used nationally.[6] Differences in how disability is conceptualised (see below) and defined is a major impediment to a robust evidence base.[7]

Statutory definitions of "disability" in NSW are as follows. For the purposes of the *Anti-Discrimination Act 1977* (NSW) in s 4 "disability" is defined 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.

"Disability" is defined for the purposes of the *Disability Inclusion Act 2014* (NSW) in s 7(1) as:

> in relation to a person, includes a long-term physical, psychiatric, intellectual or sensory impairment that, in interaction with various barriers, may hinder the person's full and effective participation in the community on an equal basis with others.

4 Royal Commission, above n 1, Vol 8, p 22.
5 Royal Commission, above n 1, Vol 8, [9.4], p 306.
6 Royal Commission, above n 1, Executive Summary, p 185.
7 Royal Commission, "Nature and extent of violence, abuse, neglect and exploitation against people with disability in Australia", *Research Report*, March 2021, p 6, accessed 7/4/2025.

The objects of the *Disability Inclusion Act 2014* are stated in s 3 and include acknowledging that people with disability have the same human rights as other members of the community, promoting the independence and social and economic inclusion of people with disability, enabling people with disability to exercise choice and control in the pursuit of their goals and providing safeguards in relation to the delivery of supports and services for people with disability.

The Australian Bureau of Statistics (ABS) defines the term "disability" for the purposes of population data as any limitation, restriction or impairment which restricts everyday activities and has lasted, or is likely to last, for at least six months.[8] The ABS and census surveys are based on the World Health Organization's (WHO) International Classification for Functioning, Disability and Health which considers that activities can be impacted by body structures and functions and can be hindered or facilitated by personal and environmental characteristics.[9]

The definition of "disability" under the *Disability Discrimination Act 1992* (Cth) (the Act) is wide ranging and includes the presence of disease and illness as being a disability. This encompasses people with chronic diseases which have long-lasting conditions with persistent effects.[10]

5.2.2 Conceptions and range of disabilities

Last reviewed: April 2025

- 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. People may have more than one disability.
- It is important to be aware that disability is a concept. The dominant medical model is deficit based whereas the disability rights model focuses on society's failure to accommodate a person's need and does not see impairments as necessarily requiring treatment, but the need for society to change to accommodate the person's needs.[11]

8 Survey, *Disability, Ageing and Carers, Australia: Summary of Findings*, 2018, released 24/10/2021, under the heading "Key statistics: Disability". Problem behaviour is a symptom of a disorder and may also be indicative of a problematic environment.
9 Royal Commission, above n 7.
10 Australian Institute of Health and Welfare (AIHW), *Chronic conditions and multimorbidity*, as quoted in AHRC, *Disability action plan guide 2021*, p 7, accessed 7/4/2025.
11 Legal Aid NSW, "Understanding trauma and mental health".

- Following Australia's ratification of the Convention on the Rights of Persons with Disabilities (CRPD) in 2008,[12] the social model of disability has sought to replace the medical model, reframing the construct of disability to recognise that: "attitudes, practices and structures can be disabling and act as barriers preventing people from fulfilling their potential and exercising their rights as equal members of the community".[13]
- Different cultures may understand disability in different ways: the western medicalised concept of disability with "its focus on diagnosis and deficit"[14] is but one conceptualisation. Some cultures may be more accepting of disability and may not entertain negative stereotypes that disability is an impairment. For example, for First Nations people whose cultural practices are inclusive, the concept of disability as a deficit is foreign. In these cultures, there is no word for disability. If a label is needed, communities often create unique terms that respect the individual's identity and avoid categorisation from a deficit-based perspective.[15]
- The multi-layered experiences of people with disability is referred to medically as co-morbidity and may be referred to as intersectionality, for example, First Nations people with disability have the intersectional experience of being First Nations as well as having a disability.[16] See also **Section 2 First Nations people**.
- Some disabilities are permanent, some are temporary, some are episodic.
- Some disabilities are obvious and some are hidden.
- 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.

12 UNHR, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008); Australia ratified the CPRD on 17 July 2008, accessed 7/4/2025.
13 Australian Government, *Australia's Disability Strategy 2011–2031*, 2024 update, p 9.
14 Royal Commission Final Report, Vol 9, Ch 2, "Disability is not a word we use", p 33.
15 S Avery, *Culture is inclusion: a narrative of Aboriginal and Torres Strait Islander People with disability*, FPDN, 2018, p 191; Royal Commission Final Report, Vol 9, Ch 2, "Disability is not a word we use", pp 35–48.
16 Royal Commission, above n 1, Executive Summary, p xiii.

5.2.3 Prevalence of disabilities in NSW[17]

Last reviewed: April 2025

- 1.34 million of NSW residents are estimated to have a disability.
- In NSW overall by age, 17.2% of women and 16.8% of men have a disability. 5.75% of the population (1 in 20) has a disability that requires assistance.
- Of the NSW residents with a disability, 33.5% have a profound or severe core activity disability; 48% have a moderate or mild core activity disability and 89% of those with a disability have specific limitations or restrictions.[18] People with a profound or severe core activity limitation are those needing assistance in their day-to-day lives in one or more of the three core activity areas of self-care, mobility and communication.
- The prevalence of disability increases with age. For the age group 75–79 years, 53.5% have a disability and for the age group 80–84, 58.6% have a disability.[19]

5.2.4 Care, assistance and support

Last reviewed: April 2025

- For people with disabilities in NSW (1,346,200), there are 273,900 reported primary carers (ie caring for 20.3% of people with disabilities).[20] The range of carers included partners of the recipient of care (33.44%), the child of the recipient (26.46%), or the parent of the recipient (26.8%).
- In NSW in 2018, the average age of carers living in households of someone with a disability was 38.3. The range of carers included partners of the recipient of care (33.44%), the child of the recipient (26.6%), or the parent of the recipient (26.8%).
- Women do most of the primary caring — numbering 202,600 in NSW (representing 73.97% of primary carers) while men numbered 69,400 (25.33% of primary carers).[21]

17 Unless otherwise indicated, the statistics in 5.2 are drawn from Australian Bureau of Statistics (ABS) Survey, *Disability, ageing and carers, Australia: summary of findings*, 2018, released 24/10/2019, accessed 7/4/2025. This includes the data cubes for tables in NSW, released 5/2/2020 and accessed 7/4/2025 and the ABS *Survey of disability, ageing and carers* (2022), released June 2024, accessed 17/4/2025.
18 ABS, ibid, Table 3.1.
19 ibid, Table 1.3.
20 ibid, Table 29.1.
21 ibid.

5.2.5 Accommodation

Last reviewed: April 2025

- 1,285,400 people with disabilities in NSW live in households (95.5%), with 271,000 living alone (20%).[22]
- 62,500 people with disabilities live in a non-private dwelling, such as accommodation where care is provided (4.6%).[23]

5.2.6 Employment and income

Last reviewed: April 2025

- 16.8% of those unemployed aged between 15 and 64 in NSW have a disability.[24]
- The median gross weekly personal income of people of working age with a disability in NSW is slightly under half that of people without a disability (47.8%).[25]
- 52% (612,300) of people in NSW with disabilities are reliant on a government pension or benefit as their main source of income.[26]
- People with a disability need to increase their adult-equivalent disposable income by 50% (in the short-run) to achieve the same standard of living as those without a disability. This figure varies considerably according to the severity of the disability, ranging from 19% for people without work-related limitations to 102% for people with severe limitations. Further, the average cost of disability in the long-run is higher and it is 63% of the adult-equivalent disposable income.[27]

5.2.7 Education

Last reviewed: April 2025

- Of the 28,847 students (3.6%) enrolled in NSW government school support classes or schools for specific purposes, 16% have a mild intellectual

22 ibid, Table 5.1.
23 ibid.
24 ibid, Table 8.1
25 $458/week for all people with reported disability in 2018 compared to $959/week for no reported disability: ibid, Table 7.1.
26 ibid, Table 7.1.
27 B Vu, et al "The costs of disability in Australia: a hybrid panel-data examination", *Health Economics Review*, 2020, accessed 7/4/2025.

disability; 3.7% have a moderate intellectual disability; 13.9% have a moderate or severe intellectual disability; 0.4% have a severe intellectual disability; 13.9% have autism; 8% have emotional disturbance; 0.3% have a physical disability, and 28% are multi-category.[28]

- 45.2% of people in NSW with disabilities have no non-school qualification compared to 33.6% of people without disabilities.[29]

5.2.8 Crime and violence

Last reviewed: April 2025

The Royal Commission found that over half of adults aged 18 to 64 with disability have experienced physical and/or sexual violence; this is particularly the case when the person has a mental disorder, acquired brain injury or intellectual disability.[30] The most frequent form of violence against a person with a disability is physical threat, followed by emotional abuse from a domestic partner. Other forms of violence are physical threat, domestic partner violence, stalking and sexual assault.[31] The majority of people with disabilities who experience violence know the perpetrator who is often an intimate partner, family, friend, or co-worker.[32] The perpetrators are often in positions of authority and trust. Women with disabilities experience higher rates of sexual assault, domestic and family violence, emotional abuse and stalking than men with disabilities or women without disabilities. This is particularly the case when a woman with disabilities has an intellectual impairment, mental disorder, is young or is First Nations.[33]

The Royal Commission further heard that the disadvantages experienced by people with a disability, such as homelessness, unstable housing, family and intimate partner violence etc, mean they are over-represented in the criminal justice system.[34]

NSW Bureau of Crime Statistics and Research studies have found a significant proportion of young and adult offenders were identified as people with disability and many of these individuals had also been victims of crime. The first study[35]

28 NSW Department of Education, "Schools and students: 2022 statistical bulletin", December 2023, accessed 7/4/2025.
29 ABS Survey, above n 17, Table 6.1.
30 Royal Commission, above n 1, Vol 3, p 83.
31 ibid at p 88.
32 ibid at p 89.
33 ibid at p 105.
34 Royal Commission, above n 1, Vol 8 at [1.5].
35 C Ringland et al, "People with disability and offending in NSW: Results from the National Disability Data Asset pilot", BOCSAR Bureau Brief no BB164, January 2023, p 1, accessed 7/4/2025. The study is based on data obtained for individuals in contact with the criminal justice system and/or specific disability support services over a 10-year period from 2009–2018.

examined the proportion of people with disability in NSW who offend, and the proportion of offenders who have a disability, separately for young and adult offenders. The study found:

- 27% of adult offenders were identified as having a disability.
- Almost a quarter of young offenders were identified as people with disability.
- More than 2 in 5 young people and around 1 in 2 adults with sentenced custodial episodes were identified as people with disability.
- Of adults with custodial contact, 41% had a psychosocial disorder,
- 10% had a cognitive impairment, and
- 14% had a physical impairment.
- Rates of disability were highest among DV offenders and higher among First Nations offenders than non-First Nations offenders.
- First Nations offenders were more likely to have been victims of crimes with 90% of First Nations young female offenders being victims of crime compared to 59% of female young offenders.

The study shows the rate of cognitive disability is higher in First Nations adult male offenders (13%) than in the non-Indigenous offending population (5.4%).[36] First Nations adult male offenders have higher rates of physical disability (16%) and psychosocial disability (33%) compared to non-Indigenous adult male offenders (9.5% and 17% respectively).

A second study of rates of victimisation based on victims of crime reporting to or detected by NSW Police suggests that intersectionality, ie, being younger, female, and/or Aboriginal, is associated with a greater risk of people with disability being victims of violent and DV-related crimes.[37] Persons of interest (POI) were less likely to be proceeded against in relation to violent incidents involving victims who were people with disability than incidents involving victims with no disability identified. In particular, in relation to violent and DV-related incidents, POIs were less likely to be proceeded against when incidents involved victims with both cognitive and physical disabilities, with or without psychosocial disability. People with disability who were victims of violent incidents were more likely to experience repeat victimisation than people with no disability identified.[38]

36 ibid at 15, 16.

37 C Ringland et al, "The victimisation of people with disability in NSW: Results from the National Disability Data Asset pilot" BOCSAR *Crime and Justice Bulletin*, No 252, September 2022, accessed 7/4/2025. This study examined data over a 5-year period from 2014–2018.

38 ibid.

People with disability are at higher risk of experiencing physical violence than those without disability and women and girls with disabilities are twice as likely to experience sexual violence compared to able bodied women and girls (33% or 605,081 women with disability compared to 16% of women without disability).[39]

People with intellectual disabilities, particularly First Nations people with disability, are "significantly overrepresented" in the criminal justice system.[40]

5.2.9 Discrimination

Last reviewed: April 2025

Types of discrimination may be termed "ableism"/"disableism".[41] Ableism is discrimination that favours able-bodied people without disability. Disableism is defined as the "systemic and interpersonal exclusion and oppression of people with disability". This discrimination is considered to have hard and soft forms. Hard disableism is a direct, conscious act of discrimination and abuse. Soft disableism can be ingrained into our language and social interactions and may not be identified as discrimination.

Disability discrimination, as with all discrimination, can either be "direct" or "indirect". Direct disability discrimination occurs when a person with a disability is treated less favourably than a person without a disability, such as by not making reasonable adjustments. Indirect disability discrimination occurs when an entity or "discriminator" requires a person with a disability to comply with certain requirements, but without making reasonable adjustments which puts the person with a disability at a significant disadvantage.[42]

Disability discrimination has been the most common type of complaint made to the Anti-Discrimination Board of NSW since 2011. In the 2023–2024 reporting year, the Board received 1,536 complaints under the Act, with 32.1% of all complaints received relating to disability discrimination, the most common form of complaint. The highest complaints about discrimination were in the area of goods and services and employment.[43]

39 Centre of Research Excellence in Disability and Health, *Nature and extent of violence, abuse, neglect and exploitation against people with disability in Australia*, Research report, March 2021, p 10, accessed 7/4/2025. This is based on 2018 Australian population data.

40 Australian Human Rights Commission (AHRC), "People with disability and the criminal justice system: submission to the Royal Commission into violence, abuse, neglect and exploitation of people with disability", 20 March 2020, accessed 7/4/2025.

41 People with Disability Australia, "Ableism and the impact of ableist language", PWDA Language Guide: A guide to language about disability, Update, 2021, accessed 7/4/2025.

42 *Disability Discrimination Act 1992* (Cth), ss 5 and 6.

43 Anti-Discrimination Board of NSW, *Anti-Discrimination NSW Annual Report 2023–2024*, accessed 7/4/2025.

In 2019–2020, the Australian Human Rights Commission received 1,164 complaints under the *Disability Discrimination Act 1992* (Cth) and finalised 1,288 complaints. The highest complaints were in the area of goods, services and facilities (33%), employment (29%) and complaints relating to the Disability Standards (12%).[44]

5.3 Disability types and intersectionality

5.3.1 Introduction

Last reviewed: April 2025

A judicial officer can ensure that a disabled witness, litigant, defendant, or legal practitioner appearing in court can effectively participate in the justice process by ensuring reasonable adjustments are provided. These adjustments should be made by taking into account the unique needs of the person and not a "one size fits all" approach.

Different terminology has been used to refer to disability. The most current and widely-accepted way is to use person-first (person with disability) or identity-first (disabled person or deaf individual) language. Given the differences in what is preferable, it is best to ask the person what terminology they prefer.

5.3.2 Physical disabilities — excluding deafness, hearing impairments, blindness and visual impairments

Last reviewed: April 2025

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.

Physical disabilities can present in diverse ways, including impacts on movement and coordination, physical capabilities, sensory function, bladder and bowel control, blood flow and energy levels. Severe or ongoing pain, such as chronic back pain, may compromise a person's ability to maintain focus during court proceedings. Court matters that go on for longer than an hour at a time would be difficult, therefore regular breaks would be required.

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.

44 AHRC, *Annual Report 2023–2024*, Complaints Statistics, accessed 7/4/2025.

The court process may pose some difficulties such as:

- difficulty reading and comprehending paperwork, lack of ability to sit or stand for long periods due to reduced mobility and stamina
- difficulty moving around the courtroom if required to stand and walk to the dock or witness box
- side effects from medication which may make the person drowsy or lack focus.

In some cases, it may be that the individual or their lawyer has not raised that a disability exists. Questions from the presiding judicial officer such as: "are you comfortable in that chair/dock; can you see and hear everything clearly?" may be necessary.

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** — Ccomplete 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 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, cancer, illnesses and other diseases.

5.3.3 Deafness and hearing impairments

Last reviewed: April 2025

- **Deafness or hearing loss** — 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, closed captions, writing and expressive speech. Some 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, severe or profound. 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.

5.3.3.1 Deafness and intersectionality

- Hearing loss among First Nations People is widespread and much more common than for non-Indigenous Australians.[45] It is more prevalent in First Nations children than any other population in the world.[46]
  - A higher proportion of First Nations People experience hearing problems than non-Indigenous Australians across most age groups and across remote, rural and metropolitan areas.[47]
  - It is also characterised by earlier onset, higher frequency, greater severity and persistence.

45 J Burns and N Thomson, "Review of ear health and hearing among Indigenous Australians", *Australian Indigenous HealthInfoNet,* No 15, 2013; Darwin Otitis Guidelines Group and Office for Aboriginal and Torres Strait Islander Health Technical Advisory Group, *Recommendations for clinical care guidelines on the management of Aboriginal and Torres Strait Islander Populations*, Menzies SHR, Darwin, 2010, accessed 7/4/2025.

46 Parliament of the Commonwealth of Australia, "Still waiting to be heard …", *Report on the inquiry into the hearing health and wellbeing of Australia*, House of Representatives Standing Committee on Health, aged care and sport, September 2017, accessed 7/4/2025.

47 B Gibson, Assistant Secretary, Health Branch, Indigenous Affairs Group, Department of the Prime Minister and Cabinet, Official Committee Hansard, Canberra, 3 March 2017, p 29

- **Factors** potentially contributing to high levels among First Nations children include:
  - crowded housing, particularly where young children have a lot of contact with other young children
  - low socioeconomic status
  - a lack of access to medical practitioners in remote areas
  - poor hygiene, and
  - high carriage rates of bacterial pathogens and the prevalence of multiple bacterial strains.
- Chronic or reoccurring infections can contribute to **multiple negative impacts** ranging from **delayed auditory, psychosocial and cognitive development**, to **permanent hearing loss**.
  - **Education:** Disrupt a child's language development and ability to benefit from education, contributing to poor school performance, absenteeism, dropout rates and subsequent difficulties gaining employment.
  - **Criminal justice system:** Hinder psychosocial development leading to self-doubt, behaviour problems, social isolation, family dysfunction and increased interaction with correctional facilities. Australian Hearing suggests hearing loss is over-represented in First Nations prisoners in all jurisdictions.[48]

People from culturally and linguistically diverse backgrounds:

- Families from culturally and linguistically diverse backgrounds can have "their own cultural beliefs around hearing loss and what this means", which may include "shame within their community" around hearing loss or a reluctance to wear hearing aids.[49]

The elderly:

- Rates of hearing impairment increase with age, with most people over 65 years of age experiencing hearing loss.[50]

48 Australian Hearing, *Submission to the Inquiry into the hearing health and wellbeing of Australia*, Submission 58 Supplementary Submission 3, 2017, at 18, accessed 7/4/2025.

49 Can:Do Hearing, *Submission to the Inquiry into the hearing health and wellbeing of Australia*, Submission 50, at 6, accessed 7/4/2025.

50 Speech Pathology Australia, *Submission to the Inquiry into the hearing health and wellbeing of Australia*, Submission 51, at 8, accessed 7/4/2025.

People living in rural and remote communities:

- People living outside major cities are more likely to have hearing disorders than those who live in cities, attributed to factors including the ageing of Australia's population outside of cities, and a greater potential for exposure to noise induced hearing loss, particularly in farming and mining.[51]

Veterans:

- The Department of Veterans' Affairs (DVA) advised that hearing loss is very common in the veteran community and is a reflection of the exposures that veterans face as part of their service.
- Attributed often to prolonged exposure to machinery noise or high intensity impulse munitions in a theatre of conflict.[52]

5.3.4 Blindness and visual impairments

Last reviewed: April 2025

- **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 **5.3.3**.
- **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.

5.3.5 Intellectual disabilities

Last reviewed: April 2025

Intellectual disability (ID) 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

51 Sounds Scouts Australia (cmee4 Productions), *Submission to the Inquiry into the hearing health and wellbeing of Australia*, Submission 41, at 8, accessed 7/4/2025.

52 Department of Veterans' Affairs, *Submission to the Inquiry into the hearing health and wellbeing of Australia*, Submission 90, at 1–2, accessed 7/4/2025.

assessment of ability to perform a range of cognitive, social and behavioural tasks required for independent living. In lay terms, ID refers to a slowness to learn and process information.[53]

In contrast, a learning disability refers to weaknesses in certain academic skills and may be caused by physical conditions such as poor vision or a hearing impairment.[54] A cognitive impairment as defined in the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) may arise from an ID: s 5(2)(a). See **5.5.3 Fitness to plead/criminal responsibility** for the definition of "cognitive impairment" under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*.

The majority of people with an ID have mild ID.[55] Seventeen percent of NDIS participants in NSW have ID as their primary diagnosis (nationally 16%).[56]

Deficits in adaptive behaviour refer to limitations in such areas as communication, social skills and ability to live independently. An ID is permanent. It is not a sickness, cannot be cured and is not medically treatable. People are born with an ID. It may be detected in childhood or it may not be detected until later in life.

There are various types and degrees of ID. Some of the more common causes of ID are Down syndrome, foetal alcohol spectrum disorder, fragile X syndrome, Prader-Willi Syndrome, Rett Syndrome, genetic conditions, birth defects and infections.[57]

People with an ID can, and do, learn a wide range of skills throughout their lives. The effects of an ID (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 IDs, they are *not* compulsive liars (see also **Capacity to give evidence** at **5.5.1**); 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 ID may:

- take longer to absorb information
- have difficulty understanding questions, abstract concepts, legalese or instructions

53 D Kenny, "Young offenders with an intellectual disability in the criminal justice system" (2012) 24 *JOB* 35.
54 B Cunningham, "What's the difference between learning disabilities and intellectual disabilities?", *Understood*, accessed 7/4/2025.
55 American Psychiatric Association, "What is intellectual disability", accessed 7/4/2025.
56 NDIS, "Quarterly reports to disability ministers", National dashboard, 30 September 2023, accessed 7/4/2025.
57 Inclusion Australia, "What is intellectual disability?" accessed 7/4/2025.

- 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
- may need to take more breaks than others do
- have difficulty expressing their needs
- readily acquiesce when they do not understand.

Reasonable adjustments that can be considered include:

- facilitating a pre-trial/pre-hearing familiarisation visit to the court and practice with live link/AVL equipment
- if appropriate, not donning wigs
- appointment of a witness/communication intermediary to facilitate communication and ensure effective participation
- reminding the person that the court does not know what may have occurred (as the person with a disability may have limited theory of mind ie the lack of ability to understand that others possess different knowledge, beliefs and perspectives). The person may assume that the court already knows what they know, thus they may not provide the relevant information
- clear explanation of the rules of communication, such as telling the person it is okay to say: "I don't know", "I don't understand" or "I don't remember"; allowing them to use a visual aid for these rules if relevant
- asking the person to explain in their own words if there is a sign of misunderstanding. Individuals with intellectual disabilities do not always realise they have not understood something and are prone to acquiescence
- try to establish rapport by asking one question about their interests. This is especially important for children, adolescents and young adults with intellectual disabilities who may function at an age that is lower than expected.

As it is the judicial officer's duty to control questioning and ensure effective participation, the following strategies can be used during questioning:

- ensure the person's preferred name or first name is used
- signpost questioning by using topics to ensure there is a logical order
- use plain and simple English; avoid legalese

- ask short, simple questions containing a single concept
- allow the use of appropriate or recommended visual/communication aids
- provide regular breaks
- have a ground rules hearing (with or without an intermediary present), to ensure questioning is appropriate for the person's cognitive and developmental level.

5.3.6 Acquired Brain Injury (ABI)

Last reviewed: April 2025

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 ABI as a consequence of a trauma (for example, a car accident), stroke, lack of oxygen, infection, degenerative neurological disease (dementia), tumour, and/or substance abuse.[58]

A cognitive impairment as defined in the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* may arise from an ABI: s 5(2)(d). Three percent of active participants in the NDIS in NSW have a primary disability of an ABI.[59] Significantly, the prevalence of ABI is much higher in the prison population than in the general population.[60]

Disability resulting from an ABI 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. ABI may result in physical and cognitive problems such as:

- headaches
- seizures
- poor balance
- visual and hearing disturbances
- chronic pain and paralysis
- memory loss
- lack of concentration

58 AIHW, "Disability in Australia: acquired brain injury" Bulletin 55, December 2007, accessed 7/4/2025.
59 For this and further statistics on ABI, see NDIS, "Acquired brain injury summary", Dashboard, September 2023, accessed 7/4/2025.
60 AIHW, "The health of people in Australia's prisons", 2022, at 40, accessed 7/4/2025.

- lack of motivation
- tiredness
- difficulty with an ability to plan and problem solve and inflexible thinking
- psychosocial/emotional issues such as depression, emotional instability, irritability, aggression and impulsive or inappropriate behaviour.[61]

See also the *Bugmy Bar Book* section on ABI.[62]

5.3.7 Mental disorders

Last reviewed: April 2025

Mental disorders identified in the DSM-5-TR must meet the elements of "mental disorder" as follows:[63]

> A mental disorder is a syndrome characterized by clinically significant disturbances in an individual's cognition, emotion regulation, or behavior that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities.

See **5.5.3 Fitness to plead/criminal responsibility** for the definition of "mental health impairment" under the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) as applies to criminal proceedings in NSW.

A mental disorder may be long-term, but is often temporary and/or episodic. Long-term mental disorder, 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.

Categories of mental disorders in DSM-5-TR:

DSM-5 is structured to reflect the interrelationship of various conditions and the occurrence of mental disorders across the life span.[64] It begins with neurodevelopmental disorders, it is then based on groups of internalising

61 AIHW, above n 58, at 3.

62 *Bugmy Bar Book*, accessed 7/4/2025.

63 American Psychiatric Association (APA), *Diagnostic and Statistical Manual of Mental Disorders*, 5th edn, text revised, (DSM-5-TR), Washington DC, 2022, at p 14. The DSM is designed to be a useful tool for clinicians and practitioners involved with mental health care to communicate the essential characteristics of mental disorders. The above definitions of mental disorders may not meet the needs of the courts and legal practitioners, however the categories may assist the courts understanding of the relevant characteristics of mental disorders.

64 APA, "The organization of DSM-5-TR", accessed 7/4/2025.

disorders such as anxiety, depression; externalising disorders such as impulsive, disruptive conduct and substance-use symptoms, neurocognitive disorders, and other disorders.[65]

- **Neuro developmental disorders** — neurodevelopmental disorders are behavioural and cognitive disorders, that arise during the developmental period, and involve significant difficulties with intellectual, motor, language, or social functions. They include disorders of intellectual development, communication disorders, autism spectrum condition (autism) (see **5.3.10**), attention deficit hyperactivity disorder (ADHD) (see **5.3.11**), specific learning disorder and motor disorders.[66]
- **Schizophrenia spectrum and other psychotic disorders** — a confusion or disturbance of a person's thinking processes — including delusions, hallucinations and/or hearing voices, disorganised thinking and speech, grossly disorganised or abnormal motor behaviour including catatonic behaviour and negative symptoms such as lethargy, anhedonia (an inability to feel pleasure) and diminished emotional expression (ie reduction in the expression of emotions in the face, eye contact, intonation and movements giving emotional emphasis to speech) and decrease in motivated self-initiated purposeful activities.[67] 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 and related disorders** — bipolar disorder 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.[68]
- **Depressive disorders** — is a group of mood disorders that includes disruptive mood dysregulation disorder, major depressive disorder, persistent depressive disorder, premenstrual dysphoric disorder, substance/medication-induced depressive disorder, and other specified and unspecified depressive disorders — 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.[69]

65 DSM-5-TR, above n 63, p 12.
66 ibid, pp 35ff. World Health Organization, "Mental disorders", 8 June 2022, accessed 7/4/2025. See also, APA, "Autism Spectrum Disorder", accessed 7/4/2025.
67 DSM-5-TR, above n 63, pp 101–103.
68 ibid, p 139 ff.
69 ibid, p 177ff.

During a depressive episode, the person experiences depressed mood (feeling sad, irritable, empty) or a loss of pleasure or interest in activities, for most of the day, nearly every day, for at least two weeks. Several other symptoms are also present, which may include poor concentration, feelings of excessive guilt or low self-worth, hopelessness about the future, thoughts about dying or suicide, disrupted sleep, changes in appetite or weight, and feeling especially tired or low in energy. People with depression are at an increased risk of suicide.[70]

- **Anxiety disorders** — is a group of mood disorders that have features of excessive fear and anxiety and related behavioural disturbances.[71] There are several different kinds of anxiety disorders, such as: generalised anxiety disorder (characterised by excessive worry), panic disorder (characterised by panic attacks), social anxiety disorder (characterised by excessive fear and worry in social situations), separation anxiety disorder (characterised by excessive fear or anxiety about separation from those individuals to whom the person has a deep emotional bond), and others.[72] Panic attacks may occur in the full range of anxiety disorders but are not a separate mental disorder.
- **Obsessive-compulsive and related disorders (OCD)** — an anxiety disorder that is characterised by the presence of obsessions (recurrent thoughts, urges or images experienced as intrusive and unwanted), compulsions (repetitive behaviours or mental acts that an individual feels driven to perform in response to an obsession) and other body-focused repetitive behaviours, and includes body dysmorphic disorder (a body image disorder), hair-pulling disorder (trichotillomania) and compulsive skin-picking disorder, hoarding disorder, substance/medication-induced obsessive-compulsive and related disorder amongst many others.[73]
- **Trauma and stressor-related disorders**

  Disorders which may develop following exposure to an extremely threatening or horrific event or series of events. It includes reactive attachment disorder, disinhibited social engagement disorder, post-traumatic stress disorder, acute stress disorder, adjustment disorders and acute grief disorder.[74]
- **Dissociative disorders**

  Characterised by the disruption of and discontinuity in the normal integration of consciousness, memory, identity, emotion, perception, body representation, motor control and behaviour. The disorder includes dissociative identity disorder, dissociative amnesia, depersonalisation/derealisation disorder and

70 World Health Organization, above n 66.
71 DSM-5-TR, above n 63, p 215 ff.
72 ibid.
73 ibid, p 263 ff.
74 ibid, pp 295 ff.

other specified and unspecified dissociative disorders. Dissociative disorders arise from traumatic experiences such as neglect and sexual, physical and emotional abuse, cumulative early trauma and repeated and sustained trauma or torture associated with captivity, eg prisoners of war or trafficking victims.[75]

- **Somatic symptom and related disorders**

  Somatic symptom disorder is the tendency to experience, conceptualise and communicate mental states and distress as physical symptoms and altered body states.[76] The types of somatic symptom and related disorders classified in DSM-5-TR are:

  (a) somatic symptom disorder

  (b) illness anxiety disorder

  (c) functional neurological symptom disorder

  (d) psychological factors affecting other medical conditions

  (e) factitious disorder

  (f) related disorders.

- **Feeding and eating disorders**

  There are predominantly three categories:[77]

  – Binge eating disorder is defined as recurring episodes of eating significantly more food in a short period of time than most people would eat under similar circumstances, with episodes marked by feelings of lack of control and subsequent feelings of guilt, embarrassment, or disgust and attempts to hide the behaviou,

  – Anorexia nervosa is characterised by distorted body image and excessive dieting that leads to severe weight loss with a pathological fear of becoming fat

  – Bulimia nervosa is characterised by frequent episodes (at least once per week) of binge eating followed by self-induced vomiting to avoid weight gain.

- **Sleep-wake disorders**

  There are 10 disorder groups:[78]

  – insomnia disorder

75 ibid, pp 329 ff.

76 ibid, pp 349 ff. See also, L Stone, "Somatising disorders: untangling the pathology" (2007) 36 *Australian Family Physician*, accessed 7/4/2025.

77 For more information about eating disorders, see APA, "Feeding and eating disorders", accessed 7/4/2025.

78 For more details about sleep-wake disorders, see APA, "What are sleep disorders", accessed 7/4/2025; also APA, "Sleep-wake disorders", accessed 7/4/2025.

- hypersomnolence disorder
- narcolepsy
- breathing-related sleep disorder
- circadian rhythm sleep-wake disorder
- non-rapid eye movement sleep arousal disorder
- nightmare disorder
- rapid eye movement sleep behaviour disorder
- restless legs syndrome
- substance/medication induced sleep disorder.

- **Gender dysphoria**

  Gender dysphoria is defined in adolescents and adults as a marked incongruence between one's experienced/expressed gender and their assigned gender, lasting at least 6 months, as manifested by at least two of the following:[79]

  - marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics)
  - strong desire to be rid of primary and/or secondary sex characteristics
  - strong desire for the primary and/or secondary sex characteristics of the other gender
  - strong desire to be of the other gender
  - strong desire to be treated as the other gender, or
  - strong conviction that one has the typical feelings and reactions of the other gender.

  Gender dysphoria in children is defined as a marked incongruence between experienced/expressed gender and assigned gender, lasting at least 6 months, as manifested by at least six of the following:

  - strong desire to be of the other gender or an insistence that one is the other gender
  - in boys (assigned gender), a strong preference for cross-dressing or simulating female attire; or in girls (assigned gender), a strong preference for wearing only typical masculine clothing and a strong resistance to the wearing of typical feminine clothing

79 For more information, see APA, "What is gender dysphoria?", accessed 7/4/2025.

- strong preference for cross-gender roles in make-believe play or fantasy play
- strong preference for the toys, games or activities stereotypically used or engaged in by the other gender
- strong preference for playmates of the other gender
- in boys (assigned gender), a strong rejection of typically masculine toys, games, and activities and a strong avoidance of rough-and-tumble play; or in girls (assigned gender), a strong rejection of typically feminine toys, games, and activities
- strong dislike of one's sexual anatomy, or
- strong desire for the physical sex characteristics that match one's experienced gender.

The condition must also be associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.

For further information, see **Transgender and gender diverse people** at **9.2.1**.

- **Disruptive, impulse-control, and conduct disorders**

  Disruptive, impulse-control and conduct disorders are linked by varying difficulties in controlling aggressive behaviours, self-control and impulses. They can be categorised as:[80]

  - oppositional defiant disorder
  - intermittent explosive disorder
  - conduct disorder
  - pyromania
  - kleptomania
  - related conditions such as attention deficit/hyperactivity disorder, autism spectrum condition, disruptive mood dysregulation behaviour.

- **Substance-related and addictive disorders**

  Substance-related disorders cover addiction caused by 10 different classes of drugs: alcohol, cannabis, hallucinogens, inhalants, opioids, sedatives, hypnotics, anxiolytics, stimulants, tobacco, and other (or unknown) substances.[81] All drugs have the ability to alter the brain reward systems which

80 For more information, see APA, "What are disruptive, impulse control and conduct disorders?", accessed 7/4/025.

81 DSM-5-TR, above n 63, p 543 ff.

reinforce behaviours. The underlying change in the brain circuits may persist beyond detoxification and cause repeated relapses and intense drug cravings. The disorder is based on diagnostic items:

- impaired control where the substance may be taken in larger amounts and the individual may be unable to discontinue or decrease the substance
- social impairment in work, home, school functions caused or exacerbated by substance use
- risky use of substances knowing the persistent or recurrent physical or psychological problems that result
- pharmacological criteria:
  - tolerance (requiring increased dose to achieve desired effect or reduced effect when usual dose is consumed)
  - withdrawal (decline of concentration of substance in blood and tissue cause an individual to consume the substance to relieve the symptoms.

- **Neurocognitive disorders**
  (see **5.3.8 Cognitive impairment**)
- **Personality disorders**

  Personality disorders are considered a deviation from a normal personality, noting that the distinction between normal and abnormal personality is "inherently relative, relying on arbitrary cut off points on the continuum between two extremes (very low and very high) of any behavior." A number of models have been proposed to describe, understand or define personality disorders, with debate as to whether there should be a dimensional or categorical approach. The NSW Law Reform Commission (NSWLRC) recommended that personality disorders be excluded from the definition of mental health impairment in the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (MHCIFPA).[82] Despite this recommendation, the MHCIFPA is silent on the question of personality disorders. This silence leaves open the possibility that clinical evidence may establish that a personality disorder meets the criteria in s 4(1) MHCIFPA.[83]

82 NSWLRC, "People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences", *Report 138*, 2013, pp 56–60, accessed 7/4/2025.

83 K Eagle and A Johnson, "Clinical issues with the Mental Health and Cognitive Impairment Forensic Provisions Act 2020" (2021) 33 *JOB* 67. This discusses the Victorian Supreme Court of Appeal case *R v Brown* [2020] VSCA 212 which overruled an earlier Victorian decision which had held that personality disorders could not be considered when assessing the moral culpability of an offender on sentence.

- **Paraphilic disorder** requires personal distress about atypical behaviour or the behaviour involves another person's psychological distress, injury or death or involves unwilling persons or persons not able to consent.[84]

  Examples include:
  - exhibitionistic disorder
  - fetishistic disorder
  - frotteuristic (touching or rubbing genitals against a non-consenting person) disorder
  - paedophilic disorder
  - sexual masochism disorder
  - sexual sadism disorder
  - transvestic disorder, and
  - voyeuristic disorder.
- **Medication-induced movement disorders and other adverse effects of medication** — are divided into two categories:[85]
  - hypokinetic, characterised by diminished movements and a paucity of movements, such as Parkinsonism which is a syndrome characterised by slowness, rigidity, tremor and postural instability
  - hyperkinetic, unwanted or excessive movements, such as tics, tremor, myoclonus (sudden, brief, involuntary muscle twitches) and akathisia (restlessness and fidgeting).

5.3.8 Cognitive impairment

Last reviewed: April 2025

The Disability Royal Commission, in its final report, discusses "cognitive disability", which arises from the interaction between a person with cognitive impairment and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis.[86]

Cognitive impairment is used in the Royal Commission Report as an umbrella term encompassing actual or perceived differences in cognition, including concentration, processing, remembering, or communicating information, learning, awareness, and/or decision-making.

84 APA, "Paraphilic disorders", accessed 7/4/2025.

85 S Alam et al, "Management of drug-induced movement disorders in psychiatry: an update", *Open Journal of Psychiatry & Allied Sciences*, 8 February 2016, accessed 7/4/2025; Lumen, "Medication-induced movement disorders", accessed 7/4/2025.

86 Royal Commission, above n 1, *Executive Summary: Our vision for an inclusive Australia and recommendations*, p 316.

For the purposes of criminal proceedings in NSW, "cognitive impairment" is set out in s 5(1) *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (MHCIFP Act), followed in s 5(2) by a non-exhaustive list of conditions which might meet that definition. These include:

- intellectual disability, (see **5.3.5**)
- borderline intellectual functioning
- dementia, (see **5.3.12**)
- an ABI, (see **5.3.6**)
- drug- or alcohol-related brain damage, including FASD, (see **5.3.9**)
- autism spectrum condition (autism) (see **5.3.10**).[87]

"'Borderline intellectual functioning', while specifically included in the definitions to the MHCIFP Act, has not been viewed as a formal disability, nor as necessarily indicating deficits in intellectual and adaptive domains. It is a term used to describe persons who function in the well-below average range."[88] A lower than average cognitive function may arise from a FASD or ASD or a mild traumatic brain injury, or learning or other difficulties impacting on a person's cognitive function. It can also include those who may have no identifiable reason or disorder but have a level of cognitive function that falls within the lower end of the average intelligence spectrum.

The Act explicitly excludes an impairment caused solely by the temporary effect of ingesting a substance or a substance use disorder: s 4(3).

Note, there are special provisions in Pt 6 of the *Criminal Procedure Act 1986* (NSW) for the giving of evidence by a cognitively impaired person. Section 306M(1) provides that a "vulnerable person" for the purposes of Pt 6 is "a child or a cognitively impaired person". There is, however, no one definition of "vulnerability". Individuals can be deemed vulnerable because of: age, cultural or linguistic background, disability, mental health issues, etc.

Vulnerable people may have undiagnosed communication-based disabilities which can be difficult to recognise. **Section 5.6** provides details on adjustments that may be reasonably made for people with communication-based disabilities.

87 See further M Ierace, "Introducing the new Mental Health and Cognitive Impairment Forensic Provisions Act 2020" (2021) 33(2) *JOB* 15.

88 F Ninivaggi, "Borderline intellectual functioning an academic or educational problem", Ch 28.3 in B Sadock, V Sadock, P Ruiz, *Kaplan & Sadock's comprehensive textbook of Psychiatry*, 10th edn, Wolters Kluwer, 2017, as quoted in K Eagle and A Johnson, "Clinical issues with the Mental Health and Cognitive Impairment Forensic Provisions Act 2020" (2021) 33(7) *JOB* 67.

For a vulnerable person, there may be an issue as to competence to give evidence. See below **5.5.1 Capacity to give evidence**. See also *Criminal Trial Courts Bench Book* at [1-105]–[1-118] for a discussion of the relevant case law concerning competence and sworn and unsworn evidence.

5.3.9 Foetal Alcohol Spectrum Disorders (FASD)

Last reviewed: April 2025

Foetal Alcohol Spectrum Disorder (FASD) is a neurodevelopmental disorder caused by prenatal alcohol exposure and has lifelong impacts.[89] Children and adolescents (10–18 years) with FASD experience cognitive and behavioural problems, mental illness and substance use that can increase contact with, and be exacerbated by, the justice system.[90]

FASD is experienced by individuals who have been exposed prenatally to alcohol.[91] This is an umbrella term that captures those individuals who have a unique range of physical, intellectual and behavioural disabilities. Individuals with this type of disorder may display specific facial anomalies, growth retardation, organ damage, hearing difficulties and vision problems, as well as the following behaviours:

- difficulty remembering. Children with FASD are 87 times more likely to have problems with memory than those without FASD.[92]
- difficulty controlling their impulses
- difficulty planning and organising their actions
- difficulty showing empathy

89 EJ Elliott, "Fetal alcohol spectrum disorders in Australia — the future is prevention" (2015) 25(2) *Public Health Research & Practice* e2521516, accessed 7/4/2025.

90 A Dudley et al, *Critical review of the literature: Fetal Alcohol Spectrum Disorders*, Telethon Kids Institute, 2015, accessed 7/4/2025.

91 FASD is referred to as a physical brain-based condition by the National Organisation for Fetal Alcohol Spectrum Disorders (NOFASD) Australia, accessed 7/4/2025. 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*, November 2012, recommended that the Commonwealth Government include FASD in the List of Recognised Disabilities (recommendation 18), accessed 7/4/2025. 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: AIHW: M Bonello, L Hilder and E Sullivan, *Fetal alcohol spectrum disorders: strategies to address information gaps*, Cat no PER 67, 2014, p 1, accessed 7/4/2025. *National fetal alcohol spectrum disorder (FASD) Strategic Action Plan 2018-2028* aims to reduce the incidence of FASD across Australia, accessed 7/4/2025.

92 J Latimer, The George Institute for Global Health, Australia, March 2015.

- 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.[93]

There is growing awareness of the prevalence and impacts of FASD in Australia. Neuro-developmental impairments due to FASD can predispose young people to interactions with the law. Individuals with FASD are disproportionately represented in youth justice systems,[94] with a prevalence rate 30.3 times greater than the general population.[95] A Western Australian prevalence study of 99 young people in youth detention (93% male and 74% First Nations) 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 First Nations 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.[96]

In *LCM v State of WA*,[97] the West Australian Court of Appeal considered the medical condition of 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.[98] See *Sentencing Bench Book* at [10-450]. *Churnside v The State of WA*,[99] a decision of the WA Court of Appeal that focused on providing appropriate support for an offender with FASD, has been proposed by Ian Freckelton AO KC as a model for sentencing judges and magistrates.[100]

See also the *Bugmy Bar Book* section on FASD[101] and for judicial officers, see the FASD page on JIRS with a range of further information.[102]

93 The Senate, Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, June 2013, pp 36–37, accessed 7/4/2025.

94 C Bower et al, "Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia" (2018) 8(2) *BMJ Open* e019605, accessed 7/4/2025; R Borschmann et al, "The health of adolescents in detention: a global scoping review" (2020) 5(2) *The Lancet Public Health* e114–e26.

95 S Lange et al, "Global prevalence of Fetal Alcohol Spectrum Disorder among children and youth: a systematic review and meta-analysis" (2017) 171(10) *JAMA Pediatrics* 948–956.

96 C Bower et al, "Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia" (2018) 8(2) *BMJ Open* e019605, accessed 7/4/2025.

97 *LCM v State of WA* [2016] WASCA 164.

98 *LCM v State of WA* [2016] WASCA 164 at [121].

99 *Churnside v The State of WA* [2016] WASCA 146.

100 I Freckelton, "Sentencing offenders with foetal alcohol spectrum disorder (FASD): the challenge of effective management" (2016) 23(6) *Psychiatry, Psychology and Law* 815.

101 *Bugmy Bar Book*, "Fetal alcohol spectrum disorders", accessed 7/4/2025.

102 Judicial Commission of NSW, JIRS, Foetal Alcohol Spectrum Disorder (FASD) legal resources, accessed 7/4/2025.

5.3.10 Autism spectrum condition

Last reviewed: April 2025

Autism spectrum condition (autism) is a lifelong neurodevelopmental disorder affecting how people behave and interact with the world around them.[103] It is estimated that 1 in 150 people in Australia have autism or 0.67% of the population. Autism is genetic.

Autism is not a mental health condition or an intellectual disability although there is a high level of comorbidity with these and other conditions, such as Attention Deficit Hyperactivity Disorder. Autism is a spectrum condition meaning autistic person will be unique in their presentation and skills. The main characteristics fall into two broad areas:

- difficulty with social interactions and communication
- restricted and repetitive behaviours and interests.

There are three levels of autism:[104]

- Level 1 — (sometimes referred to as Asperger's or high-level functioning) This is the least severe diagnosis where the individual may have very good language and communication skills, but has difficulty with social skills, inflexibility in behaviour and require help with organisation and higher-level problem solving.
- Level 2 — These individuals require more substantial support; they have communication and language difficulties, do not cope well with change, and struggle in social situations.
- Level 3 — This is the most severe diagnosis. These individuals have significant communication impairments and may be non-verbal. They have limited ability to interact with others, are very inflexible and can become distressed easily.
- A person should always be asked which terminology they prefer, if relevant to refer to their disability in proceedings.
- It is preferable to refer to "autism spectrum condition" than "autism spectrum disorder" if relevant.
- The Office for Autism (a South Australian government agency) recommends using identity-first language, for example terms such as **Autistic people** or **Autistic person** rather than "a person with autism".
- An autistic person may consider themselves as "neurodivergent", an umbrella term which includes autistic people, people with dyslexia, and Attention Deficit Hyperactivity Disorder.

103 Healthdirect, "Autism spectrum disorder", accessed 7/4/2025.

104 CS Allely. "What is autism spectrum disorder (ASD)?" in *Autism spectrum disorder in the criminal justice system* 1st ed, Routledge, 2022, pp 1–18.

Acceptable terminology

Autism traits in adults may include the following:

- struggling with time management
- feeling sensitive to the environment and possible sensory overload from the lights, room temperature, etc.
- difficulty with chronology of events
- feeling a sense of isolation
- literal thinking
- difficulty paying attention
- struggling to pay attention to detail, or having too strong an attention to detail
- feeling anxious in social situations
- having difficulty maintaining relationships
- becoming overwhelmed easily; heightened anxiety which may lead to stimming (flapping, fidgeting, tapping, humming, etc.) and will affect communication
- hypersensitivity to sounds, lights and touch. They may not like the feel of a chair or the buzzing of a light or microphone
- difficulty with unexpected change in routine or order of events.

Reasonable adjustments for autistic people[105]

- Appointment of a witness/communication intermediary where required to facilitate communication and the giving of clear evidence.
- Provide explicit instructions on case management directions.
- Give explicit and clear explanation of the hearing procedure, including length and timing of breaks. Specify that they can ask for a break any time when required.
- Provide regular breaks during the hearing.
- If requested, switch off devices such as fans or heaters with any humming sound.
- Establish the hearing rules at the outset, such as no guessing, tell the truth, and say "I don't know", "I don't' understand" or "I can't remember".
- Eye contact: explain "I don't expect eye contact. Look wherever you need to look to make you feel comfortable and concentrate".

105 Derived from Judicial College (UK), *Equal Treatment Bench Book*, 2024 edn, p 257, accessed 7/4/2025.

- Watch for signs of heightened anxiety from the person. Allow the use of a visual break card.
- Use topic cards or timelines to assist the person to follow the line of questioning.
- Avoid repetitive questioning as this will be confusing and may lead to ambiguous responses or acquiescence.
- Avoid the use of complex question such as tag questions ("you aren't telling the truth, are you?"), multi-faceted questions, idiomatic phrases ("jog your memory") and legal vocabulary.

See also **5.6 Practical considerations for judicial officers**.

5.3.11 Attention Deficit Hyperactivity Disorder (ADHD)

Last reviewed: April 2025

ADHD is a neurodevelopmental condition with an onset typically before 12 years of age.[106] It is estimated that 2% to 6% of the Australian population has ADHD. Both the DSM-5 and ICD-11[107] classifications include three presentations (or subtypes) of ADHD with different combinations of symptoms:

- inattentive presentation, allocated when the symptom threshold for inattention is met
- hyperactive-impulsive presentation, allocated when the symptom threshold for hyperactivity-impulsivity is met
- combined presentation, allocated when the symptom thresholds for both the inattentive and hyperactive-impulsive presentation are met.

ADHD traits in adults can include:

- carelessness and lack of attention to detail
- continually starting new tasks before completing old ones
- poor organisational skills
- inability to focus or prioritise; the person may be thinking about something else rather than what the judge is saying or the cross-examination questions.
- forgetfulness
- continually misplacing things
- restlessness and edginess

106 ADHD Guideline, Background About ADHD, accessed 7/4/2025.
107 World Health Organization, International Classification of Diseases, 11th edn, accessed 7/4/2025.

- difficulty keeping quiet and speaking out of turn
- blurting out responses and often interrupting others
- mood swings, irritability and quick temper
- extreme impatience
- inability to deal with stress.

Acceptable terminology

A person should always be asked which terminology they prefer, if relevant to refer to their disability in proceedings. Avoid language that reinforces stereotypes: eg avoid "This person has ADHD". Instead, use "This person has lived experience of ADHD". The correct terminology is ADHD, not ADD.

Reasonable adjustments for people with lived experience of ADHD[108]

- Appointment of a witness/communication intermediary where required to facilitate communication and the giving of clear evidence.
- Give one case management instruction at a time.
- Ask one simple question at time that contains a single point.
- Say the person's name before asking a question, especially when there is a change in topic or line of questioning.
- Use topics cards or timelines to enable the person to focus on the questioning. Haphazard question will lead to ambiguous responses.
- During the hearing, speak in short sentences; allow pauses for the person to process information; be prepared to calmly repeat instructions and questions.
- If the person is self-represented, be prepared to regularly sum up the current stage of proceedings and what is expected.
- Allow short breaks for the person to refocus.
- Be prepared for the person to become distressed or angry during cross-examination. Allow the use of a break card.
- Choose a room with limited distractions and noise.
- Repeat questions as required if it appears the person has lost focus, especially when changing topics of questioning or types of questions, eg from yes/no questions to propositions.
- Avoid the use of tag questions (you aren't telling the truth, are you?) as these are linguistically complex and the person may agree without meaning to.

108 Derived from Judicial College (UK), *Equal Treatment Bench Book*, July 2024 edn, p 251, accessed 7/4/2025.

5.3.12 Neurocognitive/neurological disorder

Last reviewed: April 2025

Neurocognitive disorder describes decreased mental function due to an acquired medical disease other than a mental disorder/developmental disorder. Some of the symptoms can be agitation, confusion, long-term loss of brain function (dementia), severe, short-term loss of brain function. There are three subcategories:[109]

- delirium
- mild neurocognitive disorder where mental function has decreased but the person is able to stay independent
- major neurocognitive disorder where mental function has decreased and there is a loss of ability to do daily tasks, also known as dementia. Section 5(2)(c) of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) provides that a cognitive impairment may arise from dementia (for the purposes of criminal proceedings in NSW).

The DSM-5 provides six cognitive domains which may be affected by mild or major neurocognitive disorders:

1. attention/distraction/selective attention/divided attention/processing speed
2. executive function such as planning, decision-making, working memory, responding to feedback/error correction, overriding habits and mental flexibility
3. learning and memory (immediate/recent/long-term memory)
4. language such as expressive language such as naming, fluency, grammar and syntax and receptive language
5. perceptual-motor-visual perception
6. social cognition such as recognition of emotions, behavioural regulation, social appropriateness.[110]

The causes of neurocognitive disorders can be:

- brain injury caused by trauma such as bleeding into the brain or a blood clot causing pressure on the brain
- breathing conditions such as low oxygen or high carbon dioxide
- cardiovascular disorders such as stroke or heart infections

109 APA, above n 64 at p 667 ff. See also Dementia Australia, "Diagnostic criteria for dementia", accessed 7/4/2025.

110 DSM-5-TR, above n 63, at pp 669ff.

- degenerative disorders such as Alzheimer's disease, Creutzfeldt-Jakob disease, Huntington disease, multiple sclerosis, hydrocephalus, Parkinson disease and Pick disease
- dementia due to metabolic causes such as kidney/liver/thyroid disease or vitamin deficiency
- drug- and alcohol-related conditions
- infections such as meningitis, septicemia, encephalitis
- complications of cancer and chemotherapy, and
- Neonatal Abstinence Syndrome — see *Children's Court of NSW Resource Handbook* at [7-6000].

5.4 Legal protections for people with a disability

5.4.1 International law

Last reviewed: April 2025

Australia has ratified the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD).[111] The 2023 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability explicitly recognised that Australia has obligations to promote the human rights of people with disability, including the protection of people with disability from all forms of exploitation, violence and abuse and ensure people with disabilities are recognised as persons before the law and have access to justice on an equal basis with others as stated in Arts 12 and 13 of the CRPD.[112]

Implementation of CRPD Art 12 and Art 13 is designed to ensure that the day-to-day interactions of citizens and the justice system are mediated by human rights principles and underpinned by a contemporary conceptualisation of disability to promote a more substantive vision of equality for people with disability.[113]

Australia also has obligations under Art 12 of the United Nations *Convention on the Rights of the Child*;[114] Art 14, Pt 3 of the *International Covenant on Civil and Political Rights*[115] and The United Nations Declaration of Basic Principles

111 UNHR, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008); Australia ratified the CPRD on 17 July 2008, accessed 7/4/2025.
112 Royal Commission, Final Report, Executive Summary, p X, accessed 7/4/2025.
113 R Kayess, Disability Discrimination Commissioner, "Viewing disability through a human rights lens" (2024) 36(9) *JOB* 87 at 88.
114 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Art 12, accessed 7/4/2025.
115 *International Covenant on Civil and Political Rights*, entry into force: 23 March 1976, in accordance with Art 49, accessed 7/4/2025.

of Justice for Victims of Crime and Abuse of Power,[116] to ensure that vulnerable people are equal participants before the law and that proper measures are in place to ensure their access to justice.

Equal access to justice is a broad term "encompassing peoples' effective access to the systems, procedures, information, and locations used in the administration of justice".[117] It includes the ability to provide accurate and complete information,[118] to be treated with respect and to be communicated with in a manner which promotes equal and fair participation.[119]

5.4.2 NSW legislation

Last reviewed: April 2025

5.4.2.1 Anti-Discrimination Act 1977 (NSW)

Part 4A *Anti-Discrimination Act 1977* proscribes direct and indirect discrimination on the ground of disability:

- in workplaces: Pt 4A, Div 2
- in the provision of State education: s 49L
- in the provision of goods and services: s 49M
- the provision of accommodation: s 49N, and
- in registered clubs: s 49O.

Exceptions are contained in Pt 4B.

Direct discrimination occurs when a person treats someone with a disability (or their relative or associate with a disability) less favourably: s 49B(1)(a). Indirect discrimination occurs when a rule or requirement is the same for everyone but unfairly affects people with disability, and is not reasonable in the circumstance: s 49B(1)(b). Complaints of and enquiries about less favourable treatment on the ground of disability may be made to the Anti-Discrimination Board of NSW.

116 United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res 40/34, UN GAOR, 96th plenary meeting, UN Doc A/RES/40/34 (29 November 1985), Art 4, accessed 7/4/2025.

117 S Ortoleva, "Inaccessible justice: human rights, persons with disabilities and the legal system" (2011) 17 *ILSA Journal of International and Comparative Law* 281 at 284, accessed 7/4/2025.

118 B O'Mahony, R Marchant and L Fadden, "Vulnerable individuals, intermediaries and justice" in G Oxburgh et al (eds), *Communication in investigative and legal contexts: integrated approaches from forensic psychology, linguistics and law enforcement*, John Wiley and Sons, 2015, p 287.

119 S Ortoleva, above n 117 at 284.

5.4.2.2 Disability Inclusion Act 2014 (NSW)

The objects of the *Disability Inclusion Act 2014* are stated in s 3, and include acknowledging that people with disability have the same human rights as other members of the community, promoting the independence and social and economic inclusion of people with disability, enabling people with disability to exercise choice and control in the pursuit of their goals and providing safeguards in relation to the delivery of supports and services for people with disability. Section 10 provides that each government department and local council must have a disability action plan that sets out the measures the department or council intends to put in place so that people with disability can access general supports and services.

5.4.3 Commonwealth legislation

Last reviewed: April 2025

5.4.3.1 Disability Discrimination Act 1992 (Cth)

The objects of the *Disability Discrimination Act 1992* are, amongst others, to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community: s 3(b).

Under the Act, discrimination may occur at work: Pt 2, in education: s 22; in accessing premises: s 23; in providing goods, services and facilities: s 24; in providing accommodation: s 25, in dealing with land: s 26; in participating in clubs and incorporated associations: s 27; in participating in sport: s 28; or in the administration of Commonwealth laws and programs: s 29. Section 29A provides an exemption on the ground of unjustifiable hardship.

Complaints of and enquiries about less favourable treatment on the ground of disability under the *Disability Discrimination Act 1992* may be made to the Australian Human Rights Commission at first instance.

5.4.3.2 Disability Services Act 1986 (Cth)

The *Disability Services Act 1986* is intended to assist people with disability to receive services necessary to enable them to work towards full participation as members of the community, to promote services provided to people with disability that assist them to integrate in the community and to assist people with disability to achieve positive outcomes, such as increased independence and employment opportunities.[120]

120 Attorney-General's Department, "Rights of people with a disability", accessed 7/4/2025.

5.4.3.3 Criminal Code Act 1995 (Cth)

A person with a disability, or a carer or assistant of a person with a disability, are protected groups for the purposes of "hate crimes" offences in the *Criminal Code Act 1995*, Ch 5, Div 80.[121] For the purposes of these offences, "disability" and "carer or assistant" have the same meaning as in the *Disability Discrimination Act 1992* (Cth): s 80.1A.

Offences in Ch 5, Div 80, Subdiv C proscribe certain offences against a targeted group and members of targeted groups. A member of a targeted group is distinguished by sex, sexual orientation, gender identity, intersex status and disability. Offences include:

- advocating force or violence against a targeted group: s 80.2A
- advocating force or violence against members of targeted groups or close associates: s 80.2B
- threatening force or violence against targeted groups s 80.2BA
- threatening force or violence against members of targeted groups or close associates: s 80.2BB
- advocating damage to or destruction of real property or motor vehicle owned or occupied by a member or close associate of a targeted group: s 80.2BC, or
- threatening damage to or destruction of real property or motor vehicle owned or occupied by a member of a targeted group or close associate: s 80.2BD.

The fault element for each offence is whether the person who advocates the use of force or violence does so reckless as to whether force or violence will occur.

5.4.4 Ageing and Disability Commissioner

Last reviewed: April 2025

The *Ageing and Disability Commissioner Act 2019* (NSW) established the dedicated role of the Ageing and Disability Commissioner. The Commissioner's purpose is to protect and promote the rights of adults with disability and the elderly from abuse, neglect and exploitation and to promote their rights.[122]

It is an offence for an employer to take detrimental action against an employee or contractor who assists the Ageing and Disability Commissioner with a report about abuse, neglect or exploitation of an adult with disability or an older adult.[123]

121 Inserted by the *Criminal Code Amendment (Hate Crimes) Act 2025* (Cth), commenced 8 February 2025.
122 *Ageing and Disability Commissioner Act 2019*, s 4.
123 ibid, s 15A.

5.4.5 NDIS Quality and Safeguards Commission

Last reviewed: April 2025

Since March 2021, the NSW Ombudsman no longer monitors disability reportable incidents. The NDIS Quality and Safeguards Commission is an independent agency established to improve the quality and safety of NDIS supports and services. NDIS providers are required to take all reasonable steps to prevent all forms of harm to people with disability.[124] The NDIS Quality and Safeguards Commission must be notified of "reportable incidents" to a person with disability, such as:

- death
- serious injury
- abuse or neglect
- unlawful sexual or physical contact with, or assault,
- restrictive practice.

5.5 Capacity

5.5.1 Capacity to give evidence

Last reviewed: April 2025

In most cases, people with disabilities will have the legal capacity to give sworn evidence in the same way as anyone else[125] — as long as, where required, appropriate adjustments are made so that evidence can be successfully communicated.[126] In all cases, the fundamental issue is whether the person is able to understand the nature and effect of a particular decision or action, and can communicate an intention to consent (or refuse consent) to the decision or action.[127] For the types of adjustments that may need to be made see **5.6.1**.

People with mental disorders or intellectual disabilities may be vulnerable to prejudicial assessments of their competence, reliability and credibility if judicial officers and juries have preconceived views regarding such people. For example, they may fail to attach adequate weight to the evidence provided because they doubt the person with a mental disorder/ID fully understands their obligation to tell the truth. In addition, such people are vulnerable to having their evidence discredited in court because of behavioural and communication issues associated with their disability. Testimonial injustice arises when a hearer does not take the

124 NDIS Quality and Safeguards Commission, "Incident management", accessed 7/4/2025.
125 *Evidence Act 1995* (NSW), s 13.
126 See for example, *Evidence Act 1995* (NSW), s 31, in relation to deaf and mute witnesses and *Criminal Procedure Act 1986* (NSW), Pt 6 in relation to the giving of evidence by vulnerable persons. A vulnerable person is defined to mean a child or a cognitively impaired person.
127 *CJ v AKJ* [2015] NSWSC 498 at [32].

statements of a speaker as seriously as they deserve to be taken. People with mental disorders are particularly vulnerable to having their credibility deflated due to negative stereotypes.[128]

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[129] — see **5.6.5**. 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.[130]

In *Bromley v The King*,[131] where the reliability of a witness with schizo-affective disorder was sought to be impugned on the basis of "fresh and compelling" psychiatric evidence, the High Court refused leave to appeal against a decision of the South Australian Court of Criminal Appeal which had held the expert opinion was not highly probative of the witness's reliability, as considerable evidence supporting the witness's evidence was not considered by those experts. The majority noted that each of the expert psychiatrists accepted that a person with schizo-affective disorder could be found to be reliable if other evidence supported that person's evidence.[132]

5.5.2 Consent

Last reviewed: April 2025

Informed consent refers to the permission given by a person to agree to a health care treatment, procedure or other intervention that is made. Consent may be

128 J Reynolds, "Disability and social epistemology", *The Oxford Handbook of Social Epistemology*, Oxford University Press, 2023, accessed 7/4/2025. The term "testimonial injustice" was first devised by M Fricker, "Testimonial injustice", *Contemporary Epistemology*, J Fantl, M McGrath and E Sosa (eds), 2019, accessed 7/4/2025.

129 M Kebbell et al, "Witnesses with intellectual disabilities in court: What questions are asked and what influence do they have?" (2004) 9 *Legal and Criminological Psychology* 23 at 24.

130 H Fisher et al, "Reliability and comparability of psychosis patients' retrospective reports of childhood abuse" (2011) 37 *Schizophrenia Bulletin* 546 concluded that retrospective self-reports of childhood adversity by psychosis patients can be considered to be reasonably reliable: at 550, accessed 7/4/2025.

131 *Bromley v The King* [2023] HCA 42.

132 *Bromley v The King* [2023] HCA 42 at [70].

made by the person or a legally appointed guardian concerning services, finances, relationships, medical and dental treatment, behaviour support and forensic procedures. For consent to be valid it must be voluntary, informed, specific and current. Consent by legally appointed decision makers can only be given on matters for which they have been authorised to give consent.[133]

On the issue of informed consent to medical procedures, the decision of Bell J in *PBU & NRE v Mental Health Tribunal*[134] has provided a "carefully reasoned analysis of how the imposition of treatment engages human rights and has the potential to be discriminatory against those with a mental illness". The decision established that "not everyone with a mental illness is deprived by their condition of their capacity to give informed consent to a treatment recommended by their clinicians. … The law provides in most jurisdictions in Australia that capacity to treatments such as ECT is presumed until the contrary is established".[135]

5.5.3 Fitness to plead/criminal responsibility

Last reviewed: April 2025

For the purposes of criminal proceedings in NSW, The *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (MHCIFPA) introduces separate definitions of "mental health impairment" and "cognitive impairment" following recommendations of the NSW Law Reform Commission.[136] These definitions are relevant to the assessment of fitness to stand trial, the partial defence to murder of substantial impairment, the defence of mental health or cognitive impairment, which leads to a verdict of "act proven but not criminally responsible" (Pt 3); and the diversionary provisions in Pt 2, Div 2 and Div 3 of the MHCIFPA.[137]

The MHCIFPA defines a "mental health impairment" in s 4 as follows:

133 For more information on this topic see NSW Department of Communities and Justice, *Capacity Toolkit*, at "Section 3 — Who might assess capacity", p 54, accessed 7/4/2025; and The Law Society of NSW, "When a client's mental capacity is in doubt: a practical guide for solicitors", 2016, accessed 7/4/2025.

134 *PBU & NRE v Mental Health Tribunal* [2018] VSC 111.

135 I Freckleton, "Mental health treatment and human rights" (2019) 44(2) *Alt LJ* 91. In *PBU & NRE v Mental Health Tribunal* [2018] VSC 111, Bell J said equality before the law protects "the inherent and universal dignity of human persons. This right is particularly important for persons with mental disability because they are especially vulnerable to discriminatory ill-treatment, stigmatisation and personal disempowerment" (at [113]), and "For anybody, mentally disabled or not, non-belief or non-acceptance of a diagnosis and lack of insight into the need for treatment would not be a sufficient basis for rebutting the presumption of capacity at common law": at [231].

136 NSWLRC, Report 135, *People with cognitive and mental health impairments in the criminal justice system: diversion*, 2012, pp 134–135, accessed 7/4/2025. See also Judicial Commission, *Criminal Trial Courts Bench Book*, 2006—, at [4-304].

137 See further J Sanders, "Diversion under the new Mental Health and Cognitive Impairment Forensic Provisions Act 2020" (2021) 33 *JOB* 18; M Ierace, "Introducing the new Mental Health and Cognitive Impairment Forensic Provisions Act 2020" (2021) 33 *JOB* 15, accessed 7/4/2025.

[A] person has a mental health impairment if:

(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and

(b) the disturbance would be regarded as significant for clinical diagnostic purposes, and

(c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

Section 4(2) provides a mental health impairment may arise from any of the following disorders but may also arise for other reasons:

(a) an anxiety disorder,

(b) an affective disorder, including clinical depression and bipolar disorder,

(c) a psychotic disorder,

(d) a substance induced mental disorder that is not temporary.

Excluded for the purposes of the MHCIFPA are if the impairment is caused solely by:

(a) the temporary effect of ingesting a substance, or

(b) a substance use disorder.

A person may (because of the level and nature of their mental health impairment or cognitive impairment or mental illness) be unfit to plead and/or be unfit to be tried,[138] or be found not criminally responsible for an offence further to s 28 of the MHCIFPA.

For the procedures for indictable matters for fitness to be tried 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 — Procedure for fitness to be tried (including special hearings)" at [4-300]ff and "Forms of orders for referrals to the Mental Health Review Tribunal under State law" at [4-325].

For summary proceedings, a magistrate may need to hold an inquiry further to s 12 of the MHCIFPA to determine whether the person has a mental health impairment or cognitive impairment, 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* at [30-060]. If the defendant is a mentally ill person or a mentally disordered person, s 18 of the MHCIFPA provides a

138 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2002–, [4–300] and [4-325]; *Local Court Bench Book* at [30-000] and ff; J Sanders, above n 137.

mechanism for making orders as set out in s 19 of the MHCIFPA including an order for the person to be taken to and detained in a mental health facility or an order for the person to be discharged into the care of a responsible person. See further *Local Court Bench Book* at [30-120].

See also Vol 8 of the Royal Commission at [4] and [8] which canvasses fitness and diversionary processes in Australian jurisdictions respectively.

For indictable proceedings, the defence of mental health impairment or cognitive impairment is set out in s 28 of the MHCIFPA. This incorporates the two limbs of the common law *M'Naghten* rules and provides that if, at the time of carrying out the act constituting the offence, the person had a mental health impairment or a cognitive impairment, or both, that had the effect that the person … did not know the nature and quality of the act, or did not know that the act was wrong, the person is not criminally responsible for the offence. Under s 30 of the MHCIFPA, if the jury is satisfied that the defence of mental health impairment or cognitive impairment has been established, the jury must return a special verdict of "act proven but not criminally responsible".

See further "Trial instructions H–Q — Intention" at [3-200]ff,[139] and "Defence of mental health impairment or cognitive impairment" at [6-200]ff.[140]

Section 23A of the *Crimes Act 1900* provides a partial defence to murder of "substantial impairment because of mental health impairment or cognitive impairment", enabling a murder charge to be reduced to a manslaughter charge.[141]

Given the number of people in prison with intellectual and psychiatric disabilities, it is important that these provisions are used, where appropriate, because in some cases the stigma of raising the existence of a mental illness, mental or cognitive impairment 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.

5.6 Practical considerations for judicial officers

5.6.1 Adjustments *before* the proceedings start

Last reviewed: April 2025

Many people with disabilities need adjustments to be made in order for them to participate in court or 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

139 *Criminal Trial Courts Bench Book*, above n 138.
140 ibid.
141 *Crimes Act 1900* (NSW), s 23A (as amended by *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*). See also *Criminal Trial Courts Bench Book*, above n 138 at [6-550].

some time to organise. A ground rules hearing or pre-trial hearing will enable the judge and parties to discuss the needs of the person and the relevant adjustments that need to be made so the vulnerable person can give their best evidence.[142]

The Royal Commission has provided a helpful list of possible information and communication requirements for people with a disability in Vol 6, [1.2] "Accessible communication and information". Recommendation 6.1 is directed to developing a national plan to promote accessible information and communications.

Preferably, the court will have advance notice of any such possible needs from the person themselves, their support person or carer, their legal representative, or a witness/communication intermediary. At other times, the court may not find out a person's needs until they appear.

If the legal representative has a disability, relevant adjustments and supports will need to be considered. Ideally, the court will provide an opportunity for legal representatives to specify their accessibility needs when filing initiating processes or notices of appearances.[143]

5.6.2 Witness/communication intermediaries

Last reviewed: April 2025

Witness/communication intermediaries advise legal professionals on the best method of communication with vulnerable people to enable effective participation in the legal proceedings and the giving of clear, complete and coherent evidence.[144]

The special measure of witness intermediaries was implemented in NSW in 2016 as a pilot program. The pilot initially ran for three years and became the Child Sexual Offence Evidence Program in 2019. The *Criminal Procedure Act 1986* (NSW) as amended by the *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023* (NSW) sets out the legislative basis for the program. The current legislation in NSW provides for the use of intermediaries only for children under 16 years and those over 16 years if they have a cognitive impairment or communication disability. No parallel legislation exists for vulnerable adult complainants, witnesses and defendants. Intermediaries do, however, provide their service to this vulnerable population through out of program referrals, which

142 The Advocate's Gateway,Toolkit 1: Ground Rules Hearings, accessed 10/3/2025.
143 A Dalton, E Alexander, N Wade, "No more hiding in plain sight: the need for a more inclusive legal profession" (2022) 171 *Precedent* 4 at 7, accessed 7/4/2025.
144 B O'Mahony, R Marchant and L Fadden, "Vulnerable individuals, intermediaries and justice" in G Oxburgh et al (eds), *Communication in investigative and legal contexts: integrated approaches from forensic psychology, linguistics and law enforcement*, John Wiley and Sons, 2015, p 288.

are made by the Office of the Director of Public Prosecutions, the court or Legal Aid NSW. The presiding judge determines how the intermediary can facilitate communication for vulnerable adults in out of program matters.[145] See further at **5.6.6**.

Consider appointing a **witness/communication intermediary** to assess the communication skills of the person with disability and provide the court recommendations on communication strategies and reasonable adjustments to ensure the provision of clear evidence and a fair process.

The presence of an intermediary can reduce the stress of giving evidence, enhance the quality of evidence that vulnerable people provide and enable access to justice for a vulnerable group of the population who would otherwise be deemed unable to participate in the legal process.[146]

The main considerations to take into account include the following:

Flexibility is required to ensure that as many people with disabilities as possible are able to give their evidence or act as jurors.[147]

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

145 R Stein, "Vulnerability and the right to effective participation in the criminal justice process: the role of the witness intermediary" (2024) 36(9) *JOB* 91 at 92.

146 J Cashmore and R Shackel, *Evaluation of the Child Sexual Offence Evidence Pilot — Final Outcome Evaluation Report*, UNSW, 2018, p 3, accessed 7/4/2025; E Henderson, "'A very valuable tool': judges, advocates and intermediaries discuss the intermediary system in England and Wales" (2015) 19 *The International Journal of Evidence and Proof* 154–171 at 168; R Stein, "Vulnerability and the right to effective participation in the criminal justice process: the role of the witness intermediary" (2024) 36(9) *JOB* 91 at 92.

147 For some examples of adjustments see Royal Commission into Violence, Abuse, Neglect and Exploitation of People with a Disability, Vol 6, [1.2] "Accessible communication and information"; NSW Law Reform Commission, *Blind or deaf jurors*, Report No 114, 2006, accessed 7/4/2025; and, ss 30 and 31 of the *Evidence Act 1995* (NSW) which provide for interpreters and for appropriate allowance to be made for deaf and mute witnesses.

people from some ethnic and First Nations 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.

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")**[148]

– **providing hearing amplification or transmission of sound to hearing aid receivers and headphones or loops from which a user's hearing aids can pick up**

– **making sure an Auslan (Australian Sign Language) interpreter**[149] **is available, and/or that a person can use their support person effectively as an interpreter** — that is, to help them give their evidence[150]

148 See the Department of Justice website page "Services for people with disability", accessed 4/7/2025, which provides information about how to get a hearing loop.

149 Auslan interpreters can be booked via the Deaf Society of NSW or Multicultural NSW — see **5.7** for contact details. For criminal matters, courts have a contract with the CRC to provide Auslan interpreters free of charge. The JCDI Resource, "Recommended national standards for working with interpreters in courts and tribunals", 2nd edn, accessed 7/4/2025, provides helpful advice for working with interpreters including Auslan interpreters.

150 *Criminal Procedure Act 1986* (NSW), s 306ZK 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.

- **providing information in large print**
- **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**[151]
- **allowing someone to have a support person with them at all times — close by and within their sight**[152]
- **allowing the use of an intermediary to facilitate communication**
- **making use of the Justice Health NSW's Statewide Community and Court Liaison Service (SCCLS)** — 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 (a text to speech device) 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 visual 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 **5.6.9** 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[153]
- **being flexible and/or more precise with the timing of listings, and/or the timing of starting and/or finishing receiving a**

151 See the *Companion Animals Act 1998* (NSW), ss 59–60 and *Disability Discrimination Act 1992* (Cth), s 54A — see n 158.

152 For information provided by the Department of Communities and Justice to support vulnerable persons (including people with disabilities) about going to court and the role of a support person, see Services for people with disability, accessed 7/4/2025. 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 **5.3.5** and resources at IDRS, accessed 7/4/2025.

153 See Department for Communities and Justice, "Support for witnesses", accessed 7/4/2025.

particular person's evidence — for example, in order to fit with a particular person's requirements in relation to eating, medication, treatment, transport and other such needs

- **having more frequent breaks**
- **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.**

The Inclusion and Diversity Services resources of the Department of Communities and Justice can provide further information or advice about how to meet the needs of a particular person with a disability.

5.6.3 Adjustments *during* proceedings

Last reviewed: April 2025

5.6.3.1 Reasonable adjustments

Many of the barriers listed in **5.6.4** can be substantially mitigated (and in some cases, completely mitigated) if the court makes or provides for 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.[154] If the legal representative has a disability, they are morally and ethically entitled to a workplace which has made reasonable adjustments and provided supports for them.

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

154 See *Disability Discrimination Act 1992* (Cth), ss 4, 5 and 6. Section 14 provides that the Act binds the Crown in right of each of the States.

- 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.

The NSW Department of Communities & Justice website provides information regarding inclusion in NSW courts for people living with disabilities.[155]

See also the Justice Advocacy Service (JAS)[156] which supports young people and adults with cognitive impairment who are in contact with the NSW criminal justice system to exercise their rights and fully participate in the process. JAS uses an individual advocacy approach by arranging a support person to be with victims, witnesses and suspects/defendants when they are in contact with police, courts and legal representatives.

5.6.3.2 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.[157] These animals are trained to assist people with disabilities by accomplishing multiple tasks, such as retrieving items, activating light switches, opening and closing doors and many other tasks specific to the needs of each individual. These animals increase the independence and self-esteem of the individual and are trained to support their owner in their home and community environments. They are trained to travel on public transport and to support their owner in public settings.

Assistance animals are used not only by people who are blind or vision-impaired, but also by a range of other people with disabilities, including people who are deaf or hearing-impaired, people who experience epileptic seizures, people with mental illness and people with physical disabilities.

155 NSW Department of Communities and Justice, *Disability and inclusion*, 2020, accessed 7/4/2025.
156 Intellectual Disability Rights Service Inc, *Justice Advocacy Service (JAS)*, accessed 7/4/2025.
157 *Disability Discrimination Act 1992* (Cth), s 9. No training organisations have yet been prescribed.

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.[158]

5.6.4 Specific examples of the barriers for people with disabilities in relation to court proceedings

Last reviewed: April 2025

The barriers for people with disabilities in relation to court proceedings — whether as a juror, legal practitioner, 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 difficulty hearing, blindness or low vision, or a speech impairment.
- **For people with intellectual/cognitive disabilities:**
  - Communication barriers — the language used is too complex, fast or abstract, and/or the proceedings are too lengthy.
  - Fatigue.
  - In *Dogan v R*,[159] a cognitively impaired complainant could give evidence in the form of previous representations made in a recorded interview with

158 See *Companion Animals Act 1998* (NSW), ss 59–60. 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. *Court Security Act 2005*, s 7A 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.

159 *Dogan v R* [2020] NSWCCA 151.

a police officer. Chapter 6, Pt 6 of the *Criminal Procedure Act 1986* permits evidence from a cognitively impaired person to be given in this manner, provided the court is "satisfied … the facts of the case may be better ascertained": ss 306P(2), 306S(1)(a). These provisions are "in addition to… and do not, unless the contrary intention is shown, affect the operation" of the *Evidence Act 1995*: s 306O.

- **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 neurocognitive disorders and FASD:**
  - 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 mental disorders or who are neuro-diverse:**
  - Communication barriers — difficulty comprehending and responding to complex questions, tag or leading questions and questions containing legalese
  - Difficulties with emotional regulation and anxiety — for example, they may be easily distracted, very jumbled, severely distressed/anxious/frightened, manic, delusory and/or aggressive or angry
  - Hypersensitivity to lights, noise, temperature and/or touch.

These problems are likely to be compounded if the person also happens to be First Nations, from an ethnic or migrant background, female, a child or young person, lesbian, gay or bisexual, transgender, or if they practise a particular religion or are representing themselves.

5.6.5 Oaths, affirmations and declarations

Last reviewed: April 2025

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 **5.6.5**.

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 guidance given in **6.2.1**, 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 **5.6.6**.

If you are unsure about the capacity of a particular person with a disability to give even unsworn evidence you may need to consider requesting an educational psychologist's assessment.

5.6.6 Language and communication

Last reviewed: April 2025

5.6.6.1 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 **5.6.2**, some people with disabilities will need an intermediary, interpreter or some form of communication aid to be made available for them to be able to communicate their evidence and understand 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 an intermediary or communication aid 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.

5.6.6.2 Terminology[160]

Within the disability movement, there have been several changes over time to the terms people with disabilities prefer to be used to describe people with disabilities.

It is always 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) reasonable adjustments.

The way language is used can have a profound impact on people with disabilities. Language can have the effect of stereotyping, depersonalising, humiliating or discriminating against people with disabilities. Language can result in a person with a disability feeling respected and worthwhile or disregarded and marginalised. People with disabilities, like everyone else, want to be treated as valued members of society. Terms such as "crazy", "mental", "retard(ed)", "slow" or "defective" are not accurate terms for people with disabilities and are no longer used — except in a derogatory way.

The term "disabled" is also not liked because it has negative connotations in that it reflects a sense of being "not able", "not working" or "broken down". It is also untrue, in that most people with disabilities are able to do a range of things. Many people with disabilities have full lives, including working, having a family, playing sport and community involvement.

> When referring to a person with a disability, always remember that people with disabilities are **people first**. The fact that a person has a disability is secondary to the fact that they are a person. Also note that to keep referring to a person's disability has the effect of giving the disability greater importance than the person.

160 People with disability Australia, *PWDA language guide: a guide to language about disability*, August 2021, accessed 7/4/2025.

Some examples of appropriate and inappropriate terminology[161]	
Use	**Do not use**
A person with a disability	Disabled/handicapped (person), invalid
People with disabilities	The disabled, the handicapped, invalids
A person with a mental, or a person with a mental illness	Mad, crazy, mental, mentally unstable, nuts, psycho(tic), psychopath(ic)
A person with Down syndrome	Mongol, mongoloid, downy
A person with Cerebral Palsy	Spastic, sufferer of/someone who suffers from Cerebral Palsy
A person with an ID/cognitive disability	Mental retard, mentally retarded, retard, simple, special needs
A person who has epilepsy	Epileptic
A person with a brain injury	Brain-damaged, brain-impaired
A person with dementia	Demented
A person with paraplegia/quadriplegia	Paraplegic/quadriplegic (which describes the person as their impairment)
A person with learning disability	Slow, slow learners, retarded, special needs
An autistic person, neurodivergent person, person on the autism spectrum	Aspy/aspie, high functioning, profoundly autistic
A person of short stature	Dwarf, midget
A person who has … (specify the actual deformity)	A deformed person
A person in a coma/who is unconscious	A vegetable/in a vegetative state
A person who is deaf, or a person who is hard of hearing (HOH)	Deaf person, hearing impaired, deaf as a doorpost
A person who is blind, has a vision impairment, a person with low vision	The blind, person without sight, blind as a bat
A person who is non-verbal	Mute, dumb
A person who uses a wheelchair	A person confined to a wheelchair, wheelchair-bound, wheelchair person
Seizure	Fit, spell, attack
Accessible Toilet/ Entry/ Parking	Disabled Toilet/Entry/Parking (because disabled as an adjective is seen as meaning that it's not working).
A person who has … (specify the disability)	Stricken, suffers from, challenged, victim

161 ibid.

5.6.6.3 General communication guidance

Points to consider:

Use the appropriate disability language and terminology — see **5.6.6.2**.

Use an intermediary, interpreter or appropriate communication aid (see 5.6.2 and 3.3.1) 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.[162]

Do not use any language that is discriminatory or sounds discriminatory — for example — "Could you explain to the court what you did step by step …" is better than "How could anyone with your disability …?"

Do not "talk down" to a person with a disability as though they are a child.

Talk to the person themselves, not their support person[163] **or interpreter** — for guidance on working with an interpreter, see **3.3.1.7**.

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 the intermediary, 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.

Avoid asking "do you understand?" as it is common for some people with disabilities to acquiesce or respond affirmatively to please the person asking the question. Instead ask them to repeat what was said to check their understanding.

162 In relation to witnesses who are deaf or mute see also *Evidence Act 1995* (NSW), s 31.

163 For information provided by the Department of Communities and Justice for people with cognitive disabilities who have to go to court, see n 152.

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 **5.6.6**.

As prescribed by law, intervene if, for example, cross-examination appears to be breaking any of the above points.[164]

5.6.6.4 Level and style of language to suit particular needs

- **People with physical disabilities** — you may need to adjust your language in order to communicate effectively with some people with physical disabilities, for example, those with a hearing impairment — see **5.6.6.5**.
- **People with intellectual disabilities, autism and ADHD** — you will almost always need to adjust both the level *and* style of your language in order to be able to communicate effectively with a person with an ID. For some techniques, see **5.6.6.6**.
- **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 **5.6.6.7**.
- **People with mental disorders or cognitive impairment** — you may need to adjust the style *and/or* the level of your language to be able to communicate effectively with some people with mental disorders or cognitive impairment. For some techniques see **5.6.6.8**.
- **People with FASD** — you may need to adjust the style and/or the level of your language to communicate with some people with FASD. People with FASD may be affected by physical, intellectual and/or behavioural disabilities — see **5.6.6.5**, **5.6.6.6** and **5.6.6.8**.

164 Note that pursuant to *Evidence Act 1995* (NSW), s 41, improper questions must be disallowed (for example, misleading or confusing, or unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive questions). Section 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, *Evidence Act 1995*, s 135(b), allows for the exclusion of any evidence that is misleading or confusing.

5.6.6.5 Communication techniques for people with physical disabilities

Points to consider:

For a person who is deaf or hearing impaired — you (and others in court) may need to simply ensure that your mouth is uncovered while you are speaking, or your volume is loud enough.

For a person who is blind or has a visual impairment — you (and others in court) may need to specifically identify items you are talking about, rather than pointing at them, or referring to them as "this" or "that" item.

For a person with a speech impairment or a stutter — you (and others in court) may simply need to be patient, and listen carefully until you are able to more easily understand them. The adjustment isn't usually for the listener to alter their speech, but rather, a willingness to listen to "different types" of speech and be patient. They may prefer writing or a visual communication aid to assist their communication.

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[165] — as prescribed under s 41 of the *Evidence Act 1995* (NSW).

165 Note *Evidence Act 1995* (NSW), ss 26, 29(1), 41 and 135(b), see n 164.

5.6.6.6 Communication techniques for people with intellectual disabilities

Points to consider:

Consider the use of a witness/communication intermediary

Note that many people do not want to acknowledge or admit they have an ID, so they may feign understanding.

Always talk directly to the person, not to a friend or family member, a carer or support person[166] — 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 ID — they are not a child. For example:

– **Use words or phrases such as:**

"about", vs "regarding" or "concerning"

"start", vs "commence"

"go", vs "proceed"

"to", vs "towards"

"remember", vs "recall"

"show", vs "depict"

"I want to take you to", vs "I want to direct your attention to"

– **Avoid unnecessary preamble** such as "I put it to you", "I suggest to you", "Wouldn't you agree that"… etc.

– **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 police asked you" vs "You were asked by the police".

– **Use short sentences containing one concept only.**

– **Avoid "double negatives"** — for example: "It's true, isn't it, that you did not go to her house alone?"

166 For information provided by the Department of Communities and Justice for people with cognitive disabilities who have to go to court: see n 152.

- **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", **"What happened"**, not "allegation" or "incident".

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.[167]

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.

167 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, 1996, accessed 7/4/2025.

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 are provided — 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 ID 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.[168]

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).

5.6.6.7 Communication techniques for people with an acquired brain injury

Points to consider:

A person with an acquired brain injury will have problems with memory, concentration, ability to tend to more than one question or concept, fatigue and processing information — it is important to use simple, direct language and questions containing a single concept.

Allow time for processing verbal information — the person asking a question can count 2–5 seconds before asking another question.

They can become easily agitated, angry or irritable resulting in impulsive or aggressive behaviour — use visual break or anxiety cards that the person can use to indicate they need a break. They may not do this independently.

Providing frequent breaks or shortening the hearing — allowing for late start times or early finish times.

168 Note ss 26, 29(1), 41 and 135(b) of the *Evidence Act 1995* (NSW), see n 164.

Each person with an ABI is different and is therefore likely to have their own set of communication needs — depending, of course, on how, and how seriously, the injury has affected their ability to process information and/or communicate it. Ascertain whether the brain injury primarily affected receptive or expressive language. For example, some people with expressive/Broca's 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 due to limited speech. Some with Wernicke's/receptive aphasia cannot comprehend language, but can express themselves well — what they say, however may be jumbled.

Some may need a witness/communication intermediary or 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 **5.6.6.3**

– use some or all of the other techniques listed at **5.6.6.6**, 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.[169]

5.6.6.8 Communication techniques for people with mental disorders or cognitive impairment

Points to consider:

Consider the use of a witness/communication intermediary.

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 ABI, an undisclosed ID, 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 Justice Health NSW's Statewide Community and Court Liaison Service (SCCLS) — if there is one attached to your court — see **5.7**.[170]

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.

169 ibid.
170 Justice Health and Forensic Mental Health Network, accessed 7/4/2025.

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 **5.6.6.4**.

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 issue

– 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.[171]

– Communication techniques for people with neurodevelopmental disorders — see **5.6.6.9**

– Autism — see **5.3.10**

171 See n 164.

- ADHD — see **5.3.11**
- Consider the use of a witness/communication intermediary — see **5.6.2**

5.6.6.9 Communication techniques for people with neurodevelopmental disorders

Points to consider:

Autism — see **5.3.10**

ADHD — see **5.3.11**

Consider the use of a witness/communication intermediary — see **5.6.2**

5.6.7 Breaks and adjournments

Last reviewed: April 2025

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.

5.6.8 Possible impact of a person's disability or disabilities on any behaviour relevant to the matter(s) before the court

Last reviewed: April 2025

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 **5.6.9** and **5.6.10**.

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.[172]

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

172 ibid.

– requiring the use of pseudonyms for parties and excluding any other identifying information.[173]

5.6.9 Directions to the jury — points to consider

Last reviewed: April 2025

As indicated at various points in 5.6, it is important that you ensure that the jury does not allow lack of knowledge of, 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.

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.

Remind them of any directions you made earlier in the proceedings in relation to how they must treat evidence that was presented using alternative means such as a communication aid, interpreter/support person, or via CCTV/behind a screen, etc — see **5.6.1**.

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.

The independent role of the witness/communication intermediary to assist the court and defendant/witness with communication.

173 A court may make orders under its inherent jurisdiction: *Court Suppression and Non-publications Orders Act 2010*, s 8; *Civil and Administrative Tribunal Act 2013*, s 64. See Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, above n 138, "Closed court, suppression and non-publication orders" at [1-349] and Judicial Commission of NSW, *Civil Trials Bench Book*, 2007–, "Closed court, suppression and non-publication orders" at [1-0400].

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

Last reviewed: April 2025

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).[174]

Points to consider:

The potential relevance of disabilities (depending on the nature of the disability) 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**. There may also be issues relating to the likelihood of **hardship in custody**, a finding of **special circumstances** and the shaping of conditions to enhance prospects of **rehabilitation**.[175]

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 5.6 (including the points made in 5.5) and in 5.6 that are relevant to the particular case.

Whether to allow a victim impact statement to be read out in court.[176]

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.

174 See also Judicial Commission of NSW, *Sentencing Bench Book*, Sydney, 2006–, particularly the commentary on the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) at [90-000]ff. Further, in relation to people with psychiatric and/or intellectual disabilities, see S Traynor, "Sentencing mentally disordered offenders: the causal link" (2002) 23 *Sentencing Trends and Issues*, Judicial Commission of NSW, Sydney; T Gotsis and H Donnelly "Diverting mentally disordered offenders in the NSW Local Court", Research Monograph 31, Judicial Commission of NSW, Sydney, 2008; *Veen (No 2) v The Queen* (1988) 164 CLR 465; *R v Engert* (1995) 84 A Crim R 67 at 69; *R v Israil* [2002] NSWCCA 255 at [18]–[27].

175 *Bugmy Bar Book*, accessed 7/4/2025.

176 See *Crimes (Sentencing Procedure) Act 1999* (NSW), Pt 3, Div 2, and the Charter of Victims Rights (at *Victims Rights and Support Act 2013*, Pt 2, Div 2), which allows the victim access to information and assistance for the preparation of any such statement.

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.[177] **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 **5.2.6 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 **5.6.6**. For example, it may be appropriate for it to be written down at the time of sentencing (in as simple and direct English as possible), and then given to the person and/or their legal representative — so as to help ensure understanding and compliance.

In *James v R*[178] the sentencing judge erred "in not determining whether and to what extent the applicant's mental condition, and in particular his intellectual disability, reduced his moral culpability for the offending behaviour".[179] The Court of Criminal Appeal held that the retributive effect and denunciatory aspect of a sentence appropriate to a person of ordinary capacity was inappropriate to such an offender and the needs of the community[180] and while his Honour "allowed that the applicant's moral culpability was reduced by his youth and immaturity … that is not the same as his significant intellectual disability".[181]

5.6.11 Dealing with the media

Last reviewed: April 2025

It is important to be aware of the presence of media in the courtroom and the reporting of court decisions in the news. Courts are often a source of news items for media outlets.

In some circumstances, it may be appropriate to seek advice from your media liaison officer, or to control the amount and detail of information in

177 Judicial Commission of NSW, *Sentencing Bench Book*, 2006–, "Health", at [10-450]. *R v Smith* (1987) 44 SASR 587; *R v Penalosa-Munoz* [2004] NSWCCA 33 at [14].
178 *James v R* [2021] NSWCCA 23.
179 *James v R* [2021] NSWCCA 23 at [66].
180 *James v R* [2021] NSWCCA 23 at [65].
181 *James v R* [2021] NSWCCA 23 at [63].

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 *Mindframe resource: guide for judicial officers on mental illness*.[182] Mindfame's objective is to destigmatise mental illness and to encourage media reporting about mental illness consistent with best practice guidelines.

5.7 Further information or help

Last reviewed: April 2025

- **Information and advice about accommodating the needs of a particular person with a disability:**
  - **Department of Communities and Justice (NSW)** "Disabilities and inclusion" page
- **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
  - **Deaf Connect (Parramatta office)**
    PO Box 1300
    Parramatta NSW 2124
    Ph: 1800 893 855
    SMS/Facetime/WhatsApp 0497 587 188
    Email: info@deafconnect.org.au
- **General information and advice about people with disabilities:**
  - **Disabled Australian Lawyers Association (DALA)**
    LinkedIn Page
    Email: dala.contactus@gmail.com
  - **Justice Health and Forensic Mental Health Network**
    PO Box 150
    Matraville NSW 2036
    Ph: (02) 9700 3000
    Email: JHFMHN-Admin@health.nsw.gov.au

182 *Mindframe resource: guide for judicial officers on mental illness*, Mindframe: for courts, accessed 4/7/2025.

- **Australian Centre for Disability Law**
  PO Box 989
  Strawberry Hills NSW 2012
  Ph: (02) 7229 0061 or 1800 800 708
  National Relay Service
  Email: adviceline@disabilitylaw.org.au

- **NSW Ageing and Disability Commission**
  Phone/TTY: 1800 628 221
  Email: helpline@adc.nsw.gov.au

- **People With Disability Australia**
  PO Box 666
  Strawberry Hills NSW 2012
  Ph: (02) 9370 3100 Freecall: 1800 422 015
  Email: pwd@pwd.org.au

- **Multicultural Disability Advocacy Association of NSW**
  PO Box 884 Granville NSW 2142
  Ph: (02) 9891 6400 Freecall: 1800 629 072
  Email: mdaa@mdaa.org.au

- **NSW Health — Disability page**
  Locked Mail Bag 2030
  St Leonards NSW 1590
  Ph: (02) 9391 9000

- **More specific information and advice about people with particular types of disabilities:**

Brain injury

- **Synapse — Australia's Brain Injury Organisation**
  PO Box 3483
  Parramatta CBD NSW 2124
  Freecall: 1800 673 074
  Email: info@synapse.org.au

Mental health or cognitive impairment

- **Dementia Australia**
  National Dementia Helpline: 1800 100 500
  Email: nsw.admin@dementia.org.au

- **Justice Health NSW's Statewide Community and Court Liaison Service (SCCLS)**
  — if there is one attached to your court
  Alternatively **Mental Health Commission of New South Wales**
  PO Box 5343
  Sydney NSW 2001
  Ph: (02) 9859 5200
  Email: MHC-ContactUs@health.nsw.gov.au

- **Mental Health Coordinating Council**
  Ground Floor Building
  125 Corner Church and Glover Street
  Lilyfield NSW 2040
  Ph: (02) 9060 9627
  Email: info@mhcc.org.au

- **Mental Health Advocacy Service**
  Legal Aid NSW head office
  323 Castlereagh Street
  Sydney 2000
  Ph: 1300 888 529

- **WayAhead Mental Health Association of NSW**
  Suite 2.03, Level 2/3 Spring St
  Sydney NSW 2000
  Ph: (02) 9339 6000
  General Mental Health Enquiries: 1300 794 991
  Anxiety Disorders Support: 1300 794 992
  Email: info@wayahead.org.au

- **Transcultural Mental Health Centre**
  Locked Bag 7118
  Parramatta CBD NSW 2124
  Ph: (02) 9912 3850
  Clinical Consultation Service: (02) 9912 3851
  Transcultural Mental Health Line: 1800 648 911
  Email: tmhc@health.nsw.gov.au

- **Rural and Remote Mental Health**
  PO Box 1017
  Clare SA 5453
  Ph: 1300 515 951
  Email: info@rrmh.com.au

Intellectual disability

– **Council for Intellectual Disability**
Level 2, 418A Elizabeth Street
Surry Hills NSW 2010
Freecall: 1800 424 065
Email: info@nswcid.org.au

– **Intellectual Disability Rights Service**
311 Castlereagh St
Haymarket NSW 2000

Ability Rights Centre is operated through IDRS.ARC is a community legal centre and disability advocacy service. ARC provides legal help, NDIS appeals and Disability Royal Commission advocacy, help for parents with disability and rights education.
Ph: (02) 9265 6350
Email: arc@idrs.org.au

Justice Advocacy Service (JAS) is also operated through IDRS. JAS provides a free service for people with cognitive impairment who have been involved in any type of criminal matter (including AVOs); as a victim, witness, suspect or defendant. For referrals, Ph 1300 665 908. To access legal advice if in police custody or at the police station
Ph: 1300 665 908 (open 7 days a week/24 hours)
Email: intakeJAS@idrs.org.au

– **Self Advocacy Sydney Inc**
Suite 214, Level 2
30–32 Campbell Street
Blacktown NSW 2148
Ph: (02) 9622 3005
Email: info@sasinc.com.au

Physical disability

– **Deaf Connect (previously Deaf Society of NSW)**
Suite 401, 4/69 Phillip Street
Parramatta NSW 2150
PO Box 1300
Parramatta 2124
Ph: 1800 893 855
SMS: 0497 587 188
Email: info@deafconnect.org.au

- **Hearing Matters Australia (previously Self Help for Hard of Hearing (SHHH) Australia)**
  Ground Floor Suite 650 Australian Hearing Hub Macquarie University NSW 2109 Ph: 0477 785 525 Email: admin@hearingmattersaustralia.org

- **Vision Australia (NSW Office)**
  Shop A, Ground floor, 128 Marsden St
  Parramatta NSW 2150
  Ph: (02) 9334 3333
  General enquiries: 1300 847 466
  Email: info@visionaustralia.org

- **Guide Dogs NSW/ACT**
  7–9 Albany Street
  St Leonards NSW 2065
  PO Box 1965
  North Sydney NSW 2059
  Ph: 1800 436 364
  Email: stleonards@guidedogs.com.au

- **Blind Citizens Australia, Sydney Branch**
  Ph: 0407 492 102
  Email: sydney@bca.org.au

- **Physical Disability Council of NSW**
  3/184 Glebe Point Road
  Glebe NSW 2037
  Within Sydney Ph: (02) 9552 1606
  Outside Sydney Metro Ph: 1800 688 831
  Email: admin@pdcnsw.org.au

- **Spinal Cord Injuries Australia**
  1 Jennifer Street
  Little Bay NSW 2036
  PO Box 397
  Matraville NSW 2036
  Ph: 1800 819 775
  Email: info@scia.org.au

- **Northcott Disability Services**
  1 Fennell Street
  North Parramatta NSW 2151
  Freecall: 1800 818 286
  Email: northcott@northcott.com.au

- **Forward Ability Support (previously ParaQuad NSW)**
  6 Holker Street
  Newington NSW 2127
  Ph: (02) 8741 5600
  Email: enquiries@fas.org.au
- **MS Australia**
  Suite 3.01
  18 Flour Mill Way
  Summer Hill NSW 2130
  Ph: 1300 010 158
  Email: info@msaustralia.org.au
- **The Kirby Institute**
  Level 6, High Street
  Wallace Wurth Building UNSW
  Kensington NSW 2052
  Ph: (02) 9385 0900
  Email: info@kirby.unsw.edu.au

5.8 Further reading

Last reviewed: April 2025

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Australian Human Rights Commission, *Equal before the law: towards disability justice strategies*, February 2014, accessed 7/4/2025.

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Council for Intellectual Disability, *Inclusive communication tips*, May 2020, accessed 7/4/2025.

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, accessed 7/4/2025.

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Foundation for Alcohol Research & Education, The Australian Fetal Alcohol Spectrum Disorders Action Plan 2013–2016, accessed 30/1/24.

M Ierace, "Introducing the new Mental Health and Cognitive Impairment Forensic Provisions Act 2020" 33(2) *JOB* 15.

Judicial Commission of NSW, *Civil Trials Bench Book*, "Persons under legal incapacity", 2007–, at [2-4600] ff.

Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, "Mental illness — including insane automatism", 2nd edn, 2002–, at [6-200] ff.

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Royal Commission, "Nature and extent of violence, abuse, neglect and exploitation against people with disability in Australia", *Research Report*, March 2021, accessed 7/4/2025.

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R Stein and J Goodman-Delahunty, "Bridging the justice gap: inequity in provision of intermediary assistance for vulnerable adults" (2024) 50(1) *Alt LJ* 1.

R Stein, J Goodman-Delahunty and T Sourdin, "A communication intermediary, an autistic defendant and cross-examination: A novel Australian Case" (2025) *Psychiatry, Psychology and Law* DOI: 10.1080/13218719.2025.2470627 (Forthcoming).

C Townsend et al, "Fetal Alcohol Disorder, disability and the criminal justice system" (2015) 8(17) *Indigenous Law Bulletin* 30.

D Weatherburn et al, "Does mental health treatment reduce recidivism among offenders with a psychotic illness?" (2021) 54(9) *Journal of Criminology* 239, accessed 7/4/2025.

Dealing with the media

Mindframe: for courts, accessed 7/4/2025.

NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80, 1996, accessed 7/4/2025.

NSW Law Reform Commission, *Blind or Deaf Jurors*, Report No 114, 2006, accessed 7/4/2025.

5.9 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 15 contains information about how to send us your feedback.

Section 6

Children and young people

Purpose of this chapter

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 developmental and linguistic capacity, and the adult-oriented court environment, processes and language used. The purpose of this chapter is to:

- identify some of the difficulties experienced by children and young people when appearing before court and the barriers they face; 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

6.1 Some information

6.1.1 Definitions

Last reviewed: April 2025

Legally, a "child" is generally defined as a person who is under the age of 18 years.[1] The *Children (Criminal Proceedings) Act 1987* (NSW) (s 3), the *Bail Act 2013* (NSW) (s 4), the *Young Offenders Act 1997* (NSW) (s 4),[2] 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.[3] However, for the purposes of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (s 3), administered by the Children's Court, 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, s 28 of the *Children (Criminal Proceedings) Act 1987* confers jurisdiction on the Children's Court to hear and determine proceedings if the offence is alleged to have been committed by a person who was a child when the offence was committed or was under the age of 21 years when charged before the Children's Court with the offence. Under s 19 of the *Children (Criminal*

1 This is in line with the definition of a child as a person under the age of 18 in the *United Nations Convention on the Rights of the Child*, which Australia ratified in 1990 — unless national laws recognise the age of majority earlier, accessed 10/3/2025.

2 Which defines "child" as "a person who is of or over the age of 10 years [age of criminal responsibility] and under the age of 18 years".

3 Under the uniform evidence legislation, "child" is defined as "a child of any age". For example, the *Evidence Act 1995* (NSW), s 3, Dictionary, Pt 1.

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.[4]

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.[5]

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 Barriers to participation in court

Last reviewed: April 2025

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 capacity and the adult-oriented court environment and processes.[6] Even where a child has the developmental and legal capacities to participate in legal processes, appropriate participation can be extremely difficult because the processes themselves are not designed for participation by children. Laws and regulations are made and implemented by adults, and the attributes, decision-making processes and language used in legal processes reflect this fact.[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]

A Child Rights Impact Assessment (CRIA) tool, [9]developed by the Australian Human Rights Commission with support from UNICEF, is designed to help governments and service providers assess how children's rights and wellbeing

4 Under *Children (Detention Centres) Act 1987*, s 9A(2), persons 18 years or older but under 21 are not to be detained in a detention centre in specified circumstances.

5 *Young Offenders Act 1997*, s 7A.

6 D Kenny, "The adolescent brain: implications for understanding young offenders" (2016) 28(3) *JOB* 23; P Johnstone, "Criminal matters — the grey matter between right and wrong: neurobiology and young offending" paper presented at Children's Legal Service Conference, 11 October 2014, Sydney, published in Judicial Commission of NSW, *Children's Court of NSW Resource Handbook* at [19-2000]; see also "Piaget's stages of cognitive development" at [18-6000] and M Allerton, "Apart from shortness, telephobia and addiction to technology, how are children different?" at [18-2000].

7 ALRC, *Seen and heard: priority for children in the legal process*, Report 84, 2010, [4.10], accessed 10/3/2025.

8 K McWilliams et al, "Children as witnesses" in Melton et al (eds), *The Sage handbook of child research*, Sage Publishing, 2014, p 285.

9 Australian Human Rights Commission website, accessed 18/3/2025.

will be affected by new laws and policies. The tool is an 18-question checklist which can be used to measure the impact of any new laws or policies on the wellbeing of Australian children and families and to determine whether the proposed laws and policies support their best interests.

The main points to note about the capacity 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:[10]

- The ability of children and young people to understand language, concepts, the meaning behind events and court processes differs from that of adults.[11]
- 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[12]
  - their greater dependence on context for comprehending language and concepts
  - their less developed capacity to sequence events and report them in order
  - 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)

10 K Richards, "What makes juvenile offenders different from adult offenders", *Trends & Issues in crime and criminal justice*, No 409, Australian Institute of Criminology (AIC), February 2011; Judicial Commission of NSW, *Children's Court of NSW Handbook*, 2013–.

11 DJ Miller et al, "Prolonged myelination in human neocortical evolution" (2012) 109(41) *Proceedings of the National Academy of Science USA* 16480, accessed 10/3/2025; BC Partridge, "The mature minor: some critical psychological reflections on the empirical bases" (2013) 38(3) *Journal of Medicine and Philosophy* 283.

12 For a useful discussion about children's memory, see DJ La Rooy, LC Malloy and ME Lamb, "The development of memory in childhood" in ME Lamb et al (eds), *Children's testimony: a handbook of psychological research and forensic practice*, 2nd edn, Wiley-Blackwell, 2011; P Bauer and R Fivush, *The Wiley handbook on the development of children's memory*, Wiley, 2013, Vol 2; G Monahan and L Young (eds), *Children and the law in Australia*, LexisNexis, 2008; ME Pipe et al, "Recent research on children's testimony about experiences and witnessed events" (2004) 24 *Developmental Review* 440, accessed 10/3/2025. See also Law Society of NSW, *Representation principles for children's lawyers*, 4th edn, 2014, accessed 10/3/2025.

  - differences in their level of maturity and therefore how they react to situations and interact with people
  - 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.[13]

- Children's and young people's comprehension and communication abilities will vary considerably, even among children of the same age, depending on their background, physical and mental health 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.[14]
- 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 neglect, or sexual abuse. Being exposed to family violence can have a wide range of detrimental impacts on a child's development, mental and physical

13 Department of Justice WA, *Equal Justice Bench Book*, "Children and young people" at [5.2.2], accessed 10/3/2025.

14 JA Quas et al, "Childhood sexual assault victims: long-term outcomes after testifying in criminal court" (2005) 70(2) *Monographs of the Society for Research in Child Development* 1.

health, housing situation and general wellbeing.[15] Some may 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.[16]

6.1.3 Mitigating difficulties experienced by children and young people when appearing before court[17]

Last reviewed: April 2025

There is a considerable body of research both in Australia and overseas demonstrating the difficulties faced by children and young people in giving evidence.[18]

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 may adversely affect their memory of events. Note

15 AIHW, *Australia's children*, Canberra, 2020, p 338, accessed 10/3/2025. See also *Bugmy Bar Book*, "Childhood exposure to domestic & family violence", accessed 10/3/2025.

16 See, for example, M Marien, "Cross-over kids — childhood and adolescent abuse and neglect and juvenile offending" (2012) 11(1) *TJR* 97; K Richards, "Children's exposure to domestic violence in Australia", *Trends and Issues in crime and criminal justice*, No 409, AIC, June 2011, accessed 10/3/2025; P Murphy et al, *A strategic review of the NSW juvenile justice system, Report for the Minister for Juvenile Justice*, Noetic Solutions Pty Ltd, Manuka, 2010, accessed 10/3/2025; J Cashmore, "The link between child maltreatment and adolescent offending: systems neglect of adolescents" (2011) 89 *Family Matters* 31, accessed 10/3/2025; K McFarlane, "From care to custody: young women in out-of-home care in the criminal justice system" (2010) 22(2) *CICJ* 345, accessed 10/3/2025; 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, accessed 10/3/2025; Center on the Developing Child, "The science of neglect, *InBrief*, 2013, accessed 10/3/2025; 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, accessed 10/3/2025; Youth Justice NSW, "2015 NSW young people in custody health survey: full report", Justice Health and Juvenile Justice, Sydney, 2017, accessed 10/3/2025.

17 The information in this Section is drawn from the following main sources — J Cashmore, "Child sexual assault in court", presentation to the Local Courts Conference, September 2005, Sydney; J Cashmore and L Trimboli, *An evaluation of the NSW Child Sexual Assault Specialist Jurisdiction Pilot*, NSW Bureau of Crime Statistics and Research (BOCSAR), 2005, accessed 10/3/2025; HL Westcott and M Page, "Cross-examination, sexual abuse and child witness identity" (2002) 11(3) *Child Abuse Review* 133 at 137–152; Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, Ch 13, accessed 10/3/2025; 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, accessed 10/3/2025; Quas et al, above n 14; 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 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, accessed 10/3/2025.

18 See M Powell and B Earhart, "Principles to enhance communication with child witnesses" (2018) 30(9) *JOB* 85; ALRC, *Seen and heard: priority for children in the legal process*, ibid; Lamb et al, above n 12; and Quas et al, above n 14, J Cashmore "Child witnesses: the judicial role" (2007) 8(2) *TJR* 281.

however research of the Royal Commission into Institutional Responses to Child Abuse drew attention to fundamental misconceptions about memory held by legal professionals, including judicial officers, which may adversely affect decision-making and which form the basis of rules of evidence and legal procedures.[19] For example, a prevalent misconception is the belief that recall of specific details reflects a more reliable memory on core information,[20] or older children's memories are more reliable than younger children.[21] (Also note s 294AA(1) *Criminal Procedure Act* which provides that the judge "must not warn a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses").

- **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 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.[22] See **6.8 — Appendix A** to this chapter for recommended language use when communicating with children.

19 J Goodman-Delahunty, M Nolan, E Gijn-Grosvenor, *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence*, Royal Commission into Institutional Responses to Child Abuse, Research Report, July 2017, accessed 10/3/2025.

20 ibid p 22.

21 ibid p 23.

22 R Zajac, S O'Neill, H Hayne, "Disorder in the courtroom? Child witnesses under cross-examination" (2012) 32 *Developmental Review* 181, accessed 10/3/2025.

- **Confrontational questioning** — if children and young people are intimidated, they may "shut down" and become unable to respond, or become distressed and break down. See **6.9 — Appendix B** to this chapter for recommended communication style when interviewing/questioning children.
- **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.

Many of these difficulties 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.

> **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, LGBTI, 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 6.2, 6.4 and the Appendices below, which provide practical strategies for judicial officers when children and young people appear in the court room as a party or witness to help ensure a just outcome is achieved.

6.2 Court proceedings

6.2.1 Competence to give evidence[23]

Last reviewed: April 2025

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*

23 TD Lyon, "Assessing the competency of child witnesses: best practice informed by psychology and law" in ME Lamb et al (eds), above, n 12, accessed 10/3/2025; R Marchant, "How young is too young? The evidence of children under five in the criminal justice system" (2013) 22(6) *Child Abuse Review* 432, accessed 10/3/2025.

Queen v GW.[24] 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*.[25]

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.[26]

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.[27]

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.[28]

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*[29] 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*.[30] 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.[31]

24 *The Queen v GW* (2016) 258 CLR 108 at [14].
25 *The Queen v GW* (2016) 258 CLR 108 at [46]. See also *Pease v R* [2009] NSWCCA 136 at [11] and *R v Suarwata* [2008] ACTSC 140 which deal with the need for the court to satisfy itself as to a person's understanding of the nature of the obligation to tell the truth.
26 *Evidence Act 1995*, s 13(1).
27 *Evidence Act 1995*, s 13(5); *RJ v R* [2010] NSWCCA 263 at [18].
28 ALRC, *Uniform evidence law*, ALRC Report 102, 2005 at [4.73], accessed 10/3/2025.
29 *MK v R* [2014] NSWCCA 274 at [69].
30 *R v RAG* [2006] NSWCCA 343 at [26]. See also the questions and answers put by the Crown to the child witness at [22].
31 *The Queen v GW* (2016) 258 CLR 108 at [28].

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.[32]

The above may be too difficult for a child if it is merely paraphrased, and could be simply rephrased as follows:

(a) "It is important to tell the truth."

(b) (i) "If you are asked a question and you don't know the answer then you should say 'I don't know'."

(ii) "If you are asked a question and you can't remember the answer then you should say 'I can't remember'."

(iii) "It does not matter if you do not know an answer or cannot remember something. The important thing is that you tell the truth." and

(c) "If someone asks you a question that you don't agree with, you can say you don't agree with it because it is not true."[33]

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).[34] Where a witness is a young child, there 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.[35] It is up to the court to determine the weight to be given to unsworn evidence.[36]

In establishing competency, the court is required to examine whether the witness has the basic comprehension skills to understand a question and provide intelligible answers. It is not an examination of whether a witness's evidence is credible or reliable. It is purely a question about capacity, not whether a witness has the capacity to understand a particular question that may have been framed in

32 *Evidence Act 1995*, s 13(5).
33 Based on J Cashmore, Judicial Commission of NSW, "Managing child witnesses", Local Court of NSW Magistrates' Orientation Program, June 2009, Sydney, accessed 10/3/2025.
34 *SH v R* (2012) 83 NSWLR 258 at [22].
35 *The Queen v GW* (2016) 258 CLR 108 at [56].
36 ALRC Report 102, above n 28, at [4.60].

a particular way. The question of competence is not dependent on any particular question asked. The proper consideration of s 13 issues may involve consideration on a fact by fact basis, but not on a question by question approach: *Gray v R*.[37]

For more on this, see the *Criminal Trial Courts Bench Book*[38] and **6.4.2 Oaths, affirmations and declarations**, below.

6.2.2 Criminal responsibility

Last reviewed: April 2025

The law conclusively presumes that a child under 10 years cannot be guilty of an offence.[39] 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, ie engaging in conduct that constitutes the physical element or elements of the offence, was morally wrong.[40]

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".[41]

The presumption cannot be rebutted merely as an inference from the doing of the acts constituting the offence, although the "circumstances of the offending" may be capable of rebutting the presumption without evidence of the accused's contemporaneous character or maturity: *RP v The Queen*;[42] *BC v R*.[43] See also *BDO v The Queen*,[44] where the High Court held that, in some cases where it is proved a child had the capacity to know that an act was morally wrong, it may follow that the child is likely to know that to be the case. But whether this is so will depend upon the evidence in the particular case: *BDO v The Queen*.[45] What was said in *RP v The Queen*[46] about matters of proof is relevant to the question of a child's capacity to know or understand that the act in question is morally wrong.

37 *Gray v R* [2020] NSWCCA 240 at [88]–[91].
38 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2002–, Sydney, under "Trial Procedure — Child witness/accused" at [1-100]ff.
39 *Children (Criminal Proceedings) Act 1987*, s 5; *Crimes Act 1914* (Cth), s 4M; Criminal Code (Cth), s 7.1; *RP v The Queen* (2016) 259 CLR 641 at [9].
40 *RP v The Queen* (2016) 259 CLR 641 at [9]. For proceedings involving Commonwealth offences by children this presumption is codified. See *Crimes Act 1914* (Cth), s 4N; Criminal Code (Cth), s 7.2.
41 *Children (Criminal Proceedings) Act 1987*, s 6(b).
42 *RP v The Queen* (2016) 259 CLR 641 at [8]–[9].
43 *BC v R* [2019] NSWCCA 111 at [43]–[45], [53].
44 *BDO v The Queen* (2023) 277 CLR 518.
45 *BDO v The Queen* (2023) 277 CLR 518 at [22].
46 *RP v The Queen* (2016) 259 CLR 641 at [23], [25].

6.2.3 Compellability

Last reviewed: April 2025

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.[47]

Under s 96(3) *Children and Young Persons (Care and Protection) Act 1998*, a child or young person is not required to give evidence in the Children's Court.[48]

6.2.4 Requirement to obtain the views of children and young people

Last reviewed: April 2025

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 statement (VIS).[49] 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.[50] 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. Note that a court may receive a victim impact statement only if it is given in accordance with and complies with the requirements prescribed by Pt 3, Div 2 *Crimes (Sentencing Procedure) Act 1999*.[51]

In criminal matters, where a child or young person is the defendant, s 6(a) *Children (Criminal Proceedings) Act 1987* reflects this principle in stating that

47 *Evidence Act 1995* (NSW), s 18. See also s 19 for circumstances where s 18 does not apply, in particular for an offence against or referred to in certain provisions of the *Children and Young Persons (Care and Protection) Act 1988*.

48 Although *Children and Young Persons (Care and Protection) Act 1998*, s 96(4) 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.

49 *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.

50 *Porter v R* [2008] NSWCCA 145 at [54]; *Siganto v The Queen* (1998) 194 CLR 656 at [29]; *Crimes Sentencing Procedure Act 1999*, s 3A(g) and Pt 3, Div 2 (victim impact statements).

51 For example in *AC v R* [2016] NSWCCA 107, the court was entitled to discount a letter, purporting to be a VIS, where the under age victim asked for her return to an abusive relationship and sexual offending. This could not sensibly be understood as evidencing either maturity, forgiveness, or a conclusion that the injury, emotional harm, loss or damage caused by the applicant's offence was not substantial: at [56].

"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) *Children and Young Persons (Care and Protection) Act 1998* 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.

[The next page is 6115]

6.3 Child care and protection

6.3.1 Some statistics

Last reviewed: April 2025

- In NSW in 2019–2020, 58,567 children were receiving child protection services (or 32.9 per 1,000); nationally the figure was 174,719 (31 per 1,000).[52]

52 AIHW, Data-tables, Child-protection, Australia, 2019–20, Table 2.2; Table S2.1, accessed 10/3/2025.

- In NSW in 2019–2020, 20,359 children were on care and protection orders (11.4 per 1,000). Of those, 8,191 were First Nations (72.3 per 1,000) which is 9.9 times the rate for non-First Nations children; nationally 60,903 children were on care and protection orders (10.8 per 1,000).[53]
- Of those 20,359 children, 515 were with parents; 6,423 with foster care; 5,960 with relatives/kin care; 2,517 were in other home-based care; 3,097 were in third-party parental care; 467 were in residential care; 26 in family group homes; 139 in independent living and 1,221 unknown.[54]
- In NSW in 2019–2020, 16,160 (or 9.1 per 1,000) children were in out of home care (OOHC); nationally the figure is 46,000 (8 per 1,000).[55]
- In NSW, 2,051 children were admitted to care and protection orders in 2019–2020; nationally, this figure was 13,062.[56]
- In NSW as at 30 June 2020, 16,160 children were in OOHC.[57] Of those, 6,688 were First Nations children or 41.4% (10.4 times more than non-First Nations children).[58] Of these, 35.3% were living with First Nations relatives or kin; 14.8% were living with other First Nations carers; and 22.5% were living with non-First Nations relatives or kin.[59]
- In NSW in 2019–2020, 2,521 children were discharged from care and protection orders; nationally this figure was 11,750.[60]
- Children in NSW accounted for 12,919 of the 30,600 that had been in out-of-home care for 2 or more years (23% of the national figure). Of the total 16,160 children in out-of-home care in NSW at 30 June 2020, 52.9% of had been in continuous out-of-home care for longer than 5 years.[61]
- Children with a disability are a particularly vulnerable group, especially those in the out-of-home care system. In NSW, 16.3% of children in out of home care were reported as having a disability (nationally 15.3%).[62] See further **Section 5 — People with disabilities**.

53 ibid, Table 2.2 and Table S4.9.
54 ibid, Table S4.5.
55 AIHW, "Child protection Australia 2019-2020", *Child Welfare Series No 74*, May 2021, p 49, accessed 10/3/2025.
56 AIHW, Data-tables, above n 52 Table 4.2.
57 ibid, Table S2.1.
58 ibid, Table S5.10.
59 ibid, Table S5.12.
60 ibid, Table 4.2.
61 ibid, Table S5.14.
62 AIHW, "Child protection Australia 2019-20", *Child Welfare Series No 74*, May 2021, pp 47–48, accessed 10/3/2025.

6.3.2 Out-of-home care[63]

Last reviewed: April 2025

A nationally consistent definition for out-of-home care was agreed in 2019, and all jurisdictions now report out-of-home care data according to this national definition.[64] Out-of-home care is defined as overnight care for children aged under 18 who are unable to live with their families due to child safety concerns. This includes placements approved by the department responsible for child protection for which there is ongoing case management and financial payment (including where a financial payment has been offered but has been declined by the carer). Out-of-home care includes legal (court-ordered) and voluntary placements, as well as placements made for the purpose of providing respite for parents and/or carers.[65]

Children in out-of-home care are generally on care and protection orders that confer most or all legal responsibility for their welfare to a child protection department. These children receive ongoing case management with a view to achieving a permanent placement or reunification where appropriate.[66]

When the national definition was implemented in 2019, children on third-party parental responsibility orders were excluded from out-of-home care as the minister or executive no longer has guardianship of children on these orders, although in NSW the State continues to fund the carers and provide some level of case management.[67]

6.3.3 Aboriginal and Torres Strait Islander Child Placement Principles (ATSICPP)

Last reviewed: April 2025

Aboriginal and Torres Strait Islander children are over-represented in out-of-home care (OOHC) in NSW, representing over 43.47% of children entering care as at 30 June 2023, despite being 5% of the population. This over-representation of Aboriginal children entering care has increased in proportion despite overall numbers entering OOHC decreasing since 2015–2016 in NSW.[68]Aboriginal children living in remote and very remote areas were 11 times as likely as non-Aboriginal children to be in OOHC.[69]

63 AIHW, Data-tables, Child-protection, Australia, 2019-2020, Table S5.8, accessed 10/3/2025.
64 AIHW, "Child protection Australia 2019-20", above n 62, p 5.
65 ibid p 47.
66 ibid p 48.
67 ibid.
68 AIHW, Data-tables, Child-protection, above n 63. See also M Davis, Independent Review of Aboriginal Children in OOHC, "Family is culture", *Review Report*, 2019, p 42, accessed 10/3/2025.
69 ibid.

The Aboriginal Case Management Policy (ACMP)[70] is the operational framework adopted by the Department of Communities and Justice (DCJ) for all practitioners working with Aboriginal children, young people and families in NSW. This policy is stated to provide a framework for Aboriginal-led and culturally embedded case management practice to safeguard the best interests of Aboriginal children and young people.[71]

The purpose of the Aboriginal and Torres Strait Islander Child Placement Principle (ATSICPP), enshrined in Ch 2, Pt 2 of the *Children and Young Persons (Care and Protection) Act 1998* (the "Care Act"),[72] and s 35 of the *Adoption Act 2000*, is to ensure Aboriginal and Torres Strait Islander children remain connected to their family, community, culture, and country.[73] Section 11 of the Care Act provides that Aboriginal people are to participate with the care and protection of their children "with as much self-determination as is possible". Section 12 states that Aboriginal families, kinship groups, representative organisations and communities are to be given the opportunity to participate in placement decisions and other significant decisions under the Act. Section 13 of the Care Act provides for a hierarchy of preferred placement options for Aboriginal or Torres Strait Islander children and young people if they are to be removed from their parents and sets out requirements for children to maintain contact with their families. The aim is to ensure that, if possible and assessed as safe, these children and young people are placed within their biological family, extended family, local Aboriginal community or wider Aboriginal community and culture. The fundamental purpose of the ATSICPP is to enhance and preserve Aboriginal children's sense of their Aboriginal identity and ensure an Aboriginal child's right to be raised in their own culture. ATSICPP also recognises the importance and value of family, extended family, kinship networks, culture and community, in raising Aboriginal children and the role of Aboriginal decision-making.[74]

6.3.3.1 Ensuring compliance with the ATSICPP

The 2019 *Family is Culture* review report[75] led to legislative amendments to the *Children and Young Persons (Care and Protection) Act 1998* in November 2023 regarding DCJ's compliance with the ATSICPP. See the *Local Court Bench Book* at [40-000]ff and *Children's Court of NSW Resource Handbook* at [2-1025].

70 The Department of Communities and Justice (DCJ) commissioned ABSec to develop the ACPM as government policy in 2018, accessed 10/3/2025.
71 ibid p 3.
72 Originally enacted in 1987 as *Children (Care and Protection) Act 1987*, s 87.
73 M Davis, above n 68, pp 265–266, p xiv.
74 ibid, p xiv.
75 M Davis, above n 68, pp 265–266.

Further, the 2019 *Family is Culture* review report[76] recognised the impact of intergenerational trauma in that it may manifest itself in behaviours that are regularly viewed as a reason to remove children, and not restore those children once they have been removed.[77] Many Aboriginal parents who are in contact with the child protection system have had their parenting abilities adversely affected by intergenerational trauma and its compounding effects. For example, they may not have had safe and stable homes themselves because their parents may not have had safe and stable homes.[78] The *Family is Culture* review report proposes that caseworkers must take intergenerational trauma into account, and understand that "neglect" is usually a form of intergenerational trauma which must be addressed first, rather than becoming a reason to remove a First Nations child into care, and that service delivery should take into account trauma-informed principles. See further the resources on JIRS for intergenerational trauma.

6.3.3.2 Principle of making "active efforts"

For commentary see the *Local Court Bench Book* at [40-000]ff and *Children's Court of NSW Resource Handbook* at [2-1010]ff.

6.3.3.3 "Cross over kids"

The importance of ensuring that ATSICPP are adhered to is exemplified in the link between the over-incarceration of Aboriginal people and involvement with the out-of-home care system. The *Family is Culture* review report has found "these issues don't operate in isolation either, they're connected an intergenerational story of trauma with Aboriginal child removals and oppression [sic]."[79] The increased likelihood of involvement in the criminal justice system is one of the broader harms of removal experienced by Aboriginal children in OOHC.

It is estimated that about 40% of children in residential OOHC do not attend school. "Education is the biggest protective factor against engagement in criminal behaviour", and it is recommended that consideration be given to improving school attendance for children in OOHC. Further, connection to culture and community is another important protective factor that reduced the likelihood that Aboriginal children would engage in criminal behaviour.[80]

76 M Davis, above n 68, Ch 1.
77 ibid at p 21.
78 ibid.
79 M Davis, "'Aboriginal children deserve better': Chair of a damning review calls for urgent action," UNSW News Room, 27 June 2020, accessed 10/3/2025.
80 Judge Peter Johnstone, Children's Court of NSW, Submission No 18 to "Family is Culture: independent review of Aboriginal children and young people in OOHC in NSW", November 2017.

The *Bail Act 2013* expressly requires the bail authority to have regard to any special vulnerability or needs the applicant has "because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment": s 18(1)(k).[81] Dr Kath McFarlane,[82] submitted that the "care-criminalisation policy vacuum has serious implications for practice". She also submitted that s 28 of the *Bail Act*, which permits a court to order bail on the condition that the child obtains suitable accommodation, means that a child "may be detained in circumstances where a homeless adult, charged with a like offence would not".

The *Family is Culture* review report submits that there is a need to ensure judicial awareness of care criminalisation and of the matters that should be considered when sentencing or otherwise dealing with children in OOHC (see Recommendation 66).[83] It is well recognised that juvenile detention is a "key driver of adult incarceration" for Aboriginal people[84] and that many children are placed in OOHC due to parental incarceration. Further, having a criminal record increases the likelihood of poor socioeconomic outcomes, such as unemployment, substance abuse and poverty[85] and poor socioeconomic status is also linked to child removals. The Report submits that it is imperative that the drift of children in OOHC to the criminal justice system is addressed as a matter of urgency to reduce the number of Aboriginal children in OOHC in the future.

6.3.3.4 Issues associated with the identification/de-identification of Aboriginal children

For the ATSICPP to be applied effectively, Aboriginal children in the child protection system need to have their cultural background identified promptly and accurately.[86] It is not unusual for Aboriginal families to be reluctant to self-identify to statutory child protection systems, given justified mistrust of these systems and their treatment of Aboriginal peoples.[87] As the Secretariat of National Aboriginal and Islander Child Care has noted, "without correct and early cultural

81 See L McCallum and E Timmins, "Black letter law" (2021) 33(4) *JOB* 37 at 40 for an analysis of this provision.

82 Scholar at Charles Sturt University, in a submission to the *Family is Culture* review report, addressed the issue of the interaction between the OOHC system and the criminal justice system in detail. See also L McCallum and E Timmins, above n 81, for further observations on the *Bail Act 2013* and the ongoing impact of bail decisions on disproportionate incarceration of Aboriginal people.

83 *Family is Culture* review report, above n 68, p XLVIII, 241.

84 Australian Law Reform Commission, *Pathways to justice — an inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples*, Final Report, December 2017, at 15.6, accessed 10/3/2025.

85 ibid.

86 See DCJ, Rules and Practice Guidance, for details about Aboriginal case management, legal matters, roles and responsibilities, accessed 10/3/2025.

87 DCJ, "Aboriginal case management policy rules and practice guidance", March 2023, p 4, accessed 10/3/2025.

identification, Aboriginal and Torres Strait Islander children at all levels of child protection involvement are at risk of being deprived of culturally safe support, case planning and placements."[88]

The *Family is Culture* review report[89] ventilated concerns about the late identification of Aboriginal children and the de-identification of children resulting in the ATSICPP not being applied to them. For example, failing to record a child's Aboriginality will have a flow on effect in terms of cultural planning and casework for the child and will limit their connections to culture in OOHC.[90] The report recommended (Recommendation 80) that judicial officers receive educational materials about the identification and de-identification of Aboriginal children.[91]

Section 5 of the Care Act defines an Aboriginal child or young person as "a child or young person descended from an Aboriginal". An Aboriginal person is defined as having the same meaning as Aboriginal person has in s 4(1) of the *Aboriginal Land Rights Act 1983* as follows:

(a) Is a member of the Aboriginal race of Australia, and

(b) Identifies as an Aboriginal person, and

(c) Is accepted by the Aboriginal community as an Aboriginal person.

The Children's Court may determine that a child or young person is an Aboriginal for the purposes of the Care Act if the court is satisfied that the child or young person is of Aboriginal descent, notwithstanding the definition in the Land Rights Act: s 5(2) Care Act.

The *Adoption Act 2000* similarly requires the Supreme Court to apply certain ATSICPP in making an adoption order if the child the subject of the order is an Aboriginal child (Ch 4, Pt 2, Div 2). In *Fischer v Thompson (Anonymised)*,[92] the court held that for a child to be an "Aboriginal child" for the purposes of the *Adoption Act*, it was necessary to identify an ancestor of the child who was "a member of the Aboriginal race of Australia, and identified as an Aboriginal person, and was accepted by the Aboriginal community as an Aboriginal person." However in *Hackett (a pseudonym) v Secretary, Department of Communities and Justice,*[93] this definition in *Fisher* was disapproved as being too narrow. The Court of Appeal held that a child is an Aboriginal child for the purposes of the *Adoption Act* in circumstances where evidence established that she or he was descended from the people who lived in Australia before British colonisation. Further, the

88 *Family is Culture* review report, above n 68, p 258.
89 ibid at 259–263.
90 ibid at 261.
91 ibid at 264.
92 *Fischer v Thompson (Anonymised)* [2019] NSWSC 773.
93 *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83.

court has a discretion under s 4(2) to determine that a child who qualifies as being of "of Aboriginal descent" is an "Aboriginal child" even if they or their forebear do not satisfy the three-limb definition in the *Aboriginal Land Rights Act 1983*.[94]

> 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".[95]

6.4 Practical considerations[96]

6.4.1 Minimise delays

Last reviewed: April 2025

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.[97]

94 *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* [2020] NSWCA 83 at [57], [60], [82], [86].

95 Judicial Commission of NSW, *Local Courts Bench Book*, 1988–, under "Children's Court — care and protection jurisdiction" at [40–000]ff; Judicial Commission of NSW, *Children's Court of NSW Resource Handbook*, 2nd edn, 2023–, under "Care and protection matters", at [2–1000]ff.

96 See also Department of Justice (WA), *Equal Justice Bench Book*, 2017, accessed 10/3/2025; Judicial College (UK), *Equal Treatment Bench Book*, 2021, Ch 2, accessed 10/3/2025, "Children, young people and vulnerable adults"; Judicial College (England and Wales), *Bench Checklist: Young Witness Cases*, 2012.

97 Note that *Civil Procedure Act 2005*, s 56 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 [7-160].

Determine the procedures for children and young people giving their evidence as part of the pre-trial case management process. 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.

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 **6.4.3.2** 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).

6.4.2 Oaths, affirmations and declarations

Last reviewed: April 2025

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.[98] 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

98 *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].

capacity to understand a question about a fact or to give an answer that can be understood to a question about a fact.[99] 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.

Research shows that in general:[100]

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.

See further 6.2, 6.4 and the Appendices below, provide practical strategies for judicial officers when children and young people appear in the court room as a party or witness to help ensure a just outcome is achieved.

6.4.3 Alternative ways to obtain a child or young person's evidence

Last reviewed: April 2025

Ch 6, Pt 6 *Criminal Procedure Act 1986*, which applies to children and young people under 16 at the time the evidence is given, prescribes alternative

99 *Evidence Act 1995*, s 13(1).

100 See J Cashmore, "Child witnesses" in G Monahan and L Young, *Children and the law in Australia*, LexisNexis, Sydney, 2008, and the articles cited therein. See also J Cashmore, "Child witnesses: the judicial role" (2007) 8(2) *TJR* 281 and other articles in the Judicial Commission of NSW, *Sexual Assault Trials Handbook*, 2007—; and J Cashmore and P Parkinson, "The competency of children to give evidence" (1991) 3(1) *JOB* 1. See also the Australasian Institute of Judicial Administration Inc (AIJA), *Bench Book for Children Giving Evidence in Australian Courts*, 2009, (updated March 2020), at [2.10.1]–[2.10.8] and [5.8]–[5.9], accessed 27/3/2025.

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": ss 306M and 306P.[101] These alternative arrangements are intended to make the process less stressful for child witnesses and to improve the quality of their evidence. Audio-taped or video-taped recordings of the investigative interviews preserve verbatim the child's early report of events after disclosure and increase the accuracy and completeness of the child's statement and the questions they were asked. They may help also to overcome some of the difficulties associated with the long delays between complaint and determination.

See further *Criminal Trial Courts Bench Book* at [1-360].

6.4.3.1 Video and/or sound recordings of previous representations [102]

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.[103]

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.[104] But if the child or young person is not the accused person, they must be available for cross-examination or re-examination.[105]

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.[106]

Any such recording must not be used if the court orders that to use it would be contrary to the interests of justice.

101 See also *Criminal Procedure Act 1986*, s 294D in sexual assault proceedings. In Commonwealth proceedings under the *Crimes Act 1914* (Cth) in relation to proceedings listed in s 15Y(1) (specifically a child proceeding), Pt IAD, Div 4 applies to children.

102 *Criminal Procedure Act 1986*, ss 306R–306Z; and see also *Criminal Trial Courts Bench Book*, above n 38, 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.

103 *Criminal Procedure Act 1986*, s 306U(2).

104 *Criminal Procedure Act 1986*, s 306U(1).

105 *Criminal Procedure Act 1986*, s 306U(3).

106 *Criminal Procedure Act 1986*, s 306V(2); *Criminal Procedure Regulation 2017*, r 20.

6.4.3.2 Closed-circuit television (CCTV) or "live link"[107]

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.[108]

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.[109]

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 **6.4.3.5** below.

6.4.3.3 Child sexual assault matters

The Child Sexual Offence Evidence Program (CSOEP) operates at the NSW District Court, Downing Centre, Newcastle District Court, and has been expanded to other District Courts across the state. The CSOEP provides that the evidence (including evidence in cross-examination and re-examination) of a child under 16 who is a complainant in an indictable proceeding in relation to a prescribed sexual offence must be given at a pre-recorded hearing in the absence of the jury (if any) unless there is a contrary court order. Evidence may also be given with respect to a prescribed sexual offence in a pre-recorded evidence hearing by a child under 18. District Court Criminal Practice Note 11 specifies procedures to be followed at the Downing Centre District Court.[110]

107 *Criminal Procedure Act 1986*, ss 306ZA–306ZI; and see also *Criminal Trial Courts Bench Book*, above n 38, [1-362]ff.

108 *Criminal Procedure Act 1986*, ss 306ZA, 306ZC; and *Criminal Trial Courts Bench Book*, 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.

109 *Criminal Procedure Act 1986*, s 306ZB(5).

110 *Criminal Procedure Act 1986*, Sch 2, Pt 29, cll 81–94 provides for the initial pilot scheme. See also Judicial Commission, *Sexual Assault Trials Handbook*, above n 97 at [10-260] and [10-270].

The *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023* amended the *Criminal Procedure Act 1986* by inserting new Ch 5, Pt 5, Div 1A, extending the program, with some amendments, to all District Courts in NSW.[111] Division 1A applies to proceedings:

(a) in relation to a prescribed sexual offence whenever committed, or

(b) if the proceedings relate to more than 1 offence — if at least 1 of the offences is a prescribed sexual offence whenever committed,

including an appeal or rehearing: s 294F.

These amendments apply to all proceedings commenced by a court attendance notice filed, or an indictment presented, in a prescribed or relevant place, on or after 29 January 2024: Sch 2, Pt 44, cll 121–122.

The original pilot in 2016 introduced the role of the witness intermediary. The witness intermediary is an accredited professional with specialist training who facilitates communication between the child and young person and the judge and lawyers. The witness intermediary is an officer of the court, thus impartial and independent in proceedings; they are not a support person for the child of young person. The intermediary role is described in further detail in **6.4.5** below. The Witness Intermediary Service (formerly known as Victims Services), within the Department of Communities and Justice, is responsible for the witness intermediary scheme.

6.4.3.4 Additional arrangements

- **In accordance with s 291 *Criminal Procedure Act 1986* (NSW), the court should be closed while the complainant or sexual offence witness in proceedings for prescribed sexual offences matters is giving evidence, whether or not the child complainant or witness is present in the court room or giving evidence via CCTV.**
- **If CCTV facilities are not available at the particular court, the court may adjourn the proceeding to a court that does have CCTV facilities.**[112] 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.[113] Alternative arrangements could include using screens, and/or changing seating arrangements to restrict the line of vision between the child and others.

111 *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act*, Sch 2, Pt 44, cl 119, definition of "Court"

112 *Criminal Procedure Act 1986*, s 306ZF; and see also *Criminal Trial Courts Bench Book*, above, n 38 at [1-362].

113 *Criminal Procedure Act 1986*, s 306ZH.

- **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.**[114] 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.[115]
- **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 Scheme. Witness intermediaries are officers of the court. For more information, see *Sexual Assault Trials Handbook* at [7-060] and **6.4.3.3** above.

6.4.3.5 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 6.4.3 to 6.4.3.4 (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.

114 *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 38 at [1-368].
115 *Evidence Act 1995* (NSW), s 29(2).

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 Department of Justice's publication *Remote Witness Video Facilities Operational Guidelines for Judicial Officers*,[116] 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.[117]

6.4.4 Language and communication

Last reviewed: April 2025

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. In addition, young people who appear to have good communication skills can be questioned as if they are adults. This can impede their understanding and may lead to unclear or inaccurate evidence. 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.[118]

116 See Judicial Commission, *Local Court Bench Book*, under "Remote witness video facilities" commencing at [12-000].

117 See also *Criminal Trial Courts Bench Book*, above, n 38 at [1-366].

118 NSW Courts and Tribunal Services, "Explaining legal terms to children: quick reference guide", accessed 10/3/2025.

6.4.4.1 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.[119] It also makes sense to do so to ensure that the court can get the best possible evidence from the child or young person. These explanations should be provided in simple language without the use of legalese and complex vocabulary.

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.

Remind them about the rules of communication and that they can say "I don't understand", "I don't know" or "Please repeat that". Children and young people, in particular those with autism or an intellectual disability will acquiesce when asked "do you understand?". Ask them to repeat in their own words what has been said.

Explain what the court needs from them and why — at the start of each different step they are involved in.

Explain what is meant by such things as bail, statement, affidavit, evidence, cross-examination, intent, not incriminating themselves, appeal — as they are mentioned.

Give them permission to ask questions when they are unsure or confused. Explicit, age-appropriate actions should be taken to ensure children and young people feel confident it is safe to ask any question they want regarding the process. For example, you could say: "Please feel free to ask any question you wish and I will do my best to answer this. You will not get into trouble, no matter what question you ask."

Allow extra time for their legal representative to explain proceedings to them.

Do all this using simple and direct language — as outlined in **6.4.4.2** below. See also **Appendix A** to this section for a recommended script for use in hearings with child witnesses.

119 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 38 at [1-180].

6.4.4.2 Level and style of language

Use language that is as simple and direct as possible.[120] **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"; "**remember**" not "recall"; "**start**", not "commence'; "**go**", not "proceed"; "**to**", not "towards"; "**show**" not "depict"; "**where**" not "whereabouts"; "**I want to ask/talk to you about**" not "I want to take you to/discuss"; "**do you know**" not "are you familiar with".

Use short sentences — as a general rule, all questions should be short, direct and convey only one idea at a time.

Avoid words and phrases which beg agreement — for example, "It's true, isn't it?" and "Is that not true?".

Avoid jargon and preamble — such as, "I put it to you that …" and "I suggest 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. Refer to people by Mr/Ms etc or names of people the children and young people are familiar with.

Use active, not passive speech (subject, verb and then object, not object, verb then subject) — for example, "The police asked you" not "You were asked by the police" or "The dog bit you", not "You were bitten by the dog".

Avoid double-barrelled or multi-faceted questions that are short — Ask only one question at a time. For example, "who did you tell first", "what did you tell them?", "where were you?" not "who did you tell first and what did you tell them? Where were you?"

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".

120 See AG Walker et al, *Handbook on questioning children: a linguistic perspective*, 3rd edn, American Bar Association, 2014. See also M Powell and B Earhart, above n 18.

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. See also **Appendix B** to this section for interviewing principles to guide communication with vulnerable witnesses and defendants, including children and young people.

6.4.5 The witness/communication intermediary

Last reviewed: April 2025

6.4.5.1 Function

The witness intermediary scheme in NSW commenced in 2016 and is now the Child Sexual Offence Program (CSOEP). The *Criminal Procedure Amendment (Child Sexual Offence Evidence) Act 2023* is the legislative framework for the scheme. The legislation provides intermediary assistance for children up to age of 16 years and 16 to 18 years if they have a communication or cognitive disability.[121] **The legislation is only for child sexual assault matters**.

Witness intermediaries are impartial, neutral officers of the court. They provide advice to judicial officers and other legal professionals on how best to communicate with vulnerable people, to ensure the provision of complete, coherent and accurate evidence.[122] Intermediaries are not witness supporters and

121 R Stein, "Vulnerability and the right to effective participation in the criminal justice process: the role of the witness intermediary" (2024) 36 *JOB* 91; R Stein and J Goodman-Delahunty, "Bridging the justice gap: inequity in provision of intermediary assistance for adults with disabilities" (2024) 50(1) *Alternative Law Journal* 61.

122 B O'Mahony, R Marchant and L Fadden, "Vulnerable individuals, intermediaries and justice" in G Oxburgh et al (eds), *Communication in investigative and legal contexts: integrated approaches from forensic psychology, linguistics and law enforcement*, John Wiley and Sons, 2015; ibid.

do not act on behalf of the prosecution or defence. Their main aim is to ensure a vulnerable witness or defendant can give evidence and if a defendant can understand proceedings in a trial.

6.4.5.2 Role before the trial

Before the trial commences, intermediaries assess the child or young person's communication skills. This assessment would entail how the person communicates, their understanding and use of language (receptive and expressive language), their emotional regulation, and if they require the use of communication aids. After the assessment, the intermediary provides a report to the court and parties, outlining the communication needs, and recommendations for questioning. In addition, the intermediary will recommend any communication/visual aids to be used and adjustments that may need to be made at the pre-recorded hearing, such as using a blank screen, adjusting a camera angle, etc.

6.4.5.3 Ground rules hearing

A ground rules hearing (GRH) is a meeting between the judge, parties and the intermediary. The intermediary is an officer of the court and must therefore not be affirmed or asked to take an oath. In this meeting, the judge directs the intermediary to discuss the contents of the intermediary report and recommendations for questioning. This is also an opportunity for the parties to seek clarification on how to ask *Browne v Dunn* propositions, the use of tag questions, or on any of the intermediary's recommendations. The judge will make orders on how the witness is to be questioned and how the intermediary can intervene to alert the judge if the witness needs a break or a question has not adhered to the recommended questioning format and an alternative is required.

In CSOEP matters, the GRH usually takes place a week before the pre-recorded hearing. In matters involving children that are not within the legislation, it is recommended that GRHs occur so the parties are aware about the types of questions that they should be asking to ensure they are appropriate for the developmental needs of the child or young person.

Further information on ground rules hearings can be found on The Advocates Gateway, Toolkit 1 and **6.11 — Appendix C — Ground rules hearing checklist** at the end of this section.

6.4.5.4 Intermediary role during the hearing

The intermediary will sit next to the child or young person in the CCTV/remote room. It is most important that the intermediary's hand can be seen so the judge can note when the intermediary needs to intervene for questioning. The

intermediary will also say, "Your Honour, that question is complex could it be rephrased?" or words to that effect depending on the problem with the questioning.

6.4.5.5 Accommodations and communication aids

Depending on the communication needs of the child or young person, the intermediary may recommend the following communication/visual aids:

1. Coloured post-it notes — these are used to signpost topics for questioning so the child or young person does not get confused about what they are being questioned about.
2. Timelines — to be used when a child or young person will be questioned about alleged incidents that occurred over a certain time period and the timing is in contention.
3. Break card — the child or young person can point to or show the court this card when they need a break. When the child or young person points to the card the intermediary, if one is present, can alert the court that a break is required.
4. Visual cards for the rules of communication — "I don't know, I need time, I don't understand" etc.
5. Use of an augmentative or alternative communication device — eg a visual alphabet chart or visual picture board.

6.4.6 Cross-examination[123]

Last reviewed: April 2025

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

123 P Bowden, T Henning and D Plater, "Balancing fairness to victims, society and defendants in the cross-examination of vulnerable witnesses: an impossible triangulation" (2014) 37(3) *MULR* 539, accessed 10/3/2025; A Cossins, "Cross-examining the child complainant: rights, innovations and unfounded fears in the Australian context" in JR Spencer and ME Lamb (eds), *Children and cross-examination: time to change the rules?*, Hart Publishing, 2012; A Cossins, "Cross-examination in child sexual assault trials: evidentiary safeguard or opportunity to confuse?" (2009) 33(1) *MULR* 68, accessed 10/3/2025; R Zajac and P Cannan, "Cross-examination of sexual assault complainants: a developmental comparison" (2009) 16 (Supplement 1) *Psychiatry, Psychology and Law* S36.

the witness "into silence, lead to contradictions in their responses and produce emotional disorganisation and distress".[124] 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."[125] One barrister, for example, described the cross-examination technique he uses with children to intimidate them:

> 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.[126]

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.[127]

6.4.6.1 Improper cross-examination[128]

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

124 CA Carter, BL Bottoms and M Levine, "Linguistic, social and emotional influences on the accuracy of children's reports" (1996) 20 *Law and Human Behaviour* 335; L Sas, *The interaction between children's developmental capabilities and the courtroom environment: the impact on testimonial competency*, Research Report (RR02-6e), November 2002, Department of Justice, Canada, accessed 10/3/2025. See also S Andrews, M Lamb and T Lyon, "Question types, responsiveness and self-contradictions when prosecutors and defense attorneys question alleged victims of child sexual abuse" (2015) 25 *Applied Cognitive Psychology*, 253, accessed 10/3/2025; R Zajac, S O'Neill, H Hayne, "Disorder in the courtroom? Child witnesses under cross-examination" (2012) 32 *Developmental Review* 181.

125 E Henderson, "Persuading and controlling: the theory of cross-examination in relation to children" in H Westcott, G Davies and R Bull (eds), *Children's testimony: a handbook of psychological research and forensic practice*, John Wiley & Sons, 2002, p 279.

126 ibid.

127 *Criminal Procedure Act 1986*, s 306ZL.

128 See also *Criminal Trial Courts Bench Book*, above n 38 at [1-340].

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 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".[129]

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".[130]

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).[131]

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.

129 *R v TA* (2003) 57 NSWLR 444 per Spigelman CJ at [8].

130 Wood CJ at CL, *Child witnesses — best practice for courts*, Australasian Institute of Judicial Training, 30 July 2004, District Court of NSW. See also D Yehia, "Cross-examination of children", The Public Defenders, (iv) Practical suggestions for cross-examining children, accessed 10/3/2025.

131 See P Johnson, "Controlling unreasonable cross-examination" (2009) 21(4) *JOB* 29; *Criminal Trial Courts Bench Book*, above n 38, at [1-340]ff; L Babb, "What does s 41 of the Evidence Act mean to you as a judicial officer", *Sexual Assault Trials Handbook*, at [7-200]. For proceedings in the Children's Court, see s 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.

- Use **simple and direct language without "talking down" to the child or young person** — see **6.4.4.2**.
- **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.
- **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 **6.4.7** 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.

Some children and young people, especially if they have an intellectual disability or autism, are prone to acquiescence when they do not

understand a question, but want to please the questioner.[132] A series of tag questions and complex propositions may lead to acquiescence. It may be necessary for the questions to be rephrased if this is noted.

6.4.7 Regular breaks

Last reviewed: April 2025

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 6.4.1), 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.

132 I Hepner, MN Woodward and J Stewart, "Giving the vulnerable a voice in the criminal justice system: the use of intermediaries with individuals with intellectual disability" (2014) 22(3) *Psychiatry, Psychology and Law* 453 at 454, accessed 10/3/2025.

6.4.8 Jury directions and warnings — points to consider

Last reviewed: April 2025

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. These provisions expressly prohibit a warning about unreliability "solely on account of the age of the child":

> **165AWarnings 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).

Note: The Commonwealth Act does not include subsection (6).

The requirement to give the jury a warning where evidence is given via CCTV or other technology applies to complainants in prescribed sexual offence proceedings (s 294B(7)) and to vulnerable persons in personal assault offence proceedings: s 306ZI(1). In either case, the judge must:

(a) inform the jury that it is standard procedure for evidence in such cases to be given by those means or use of those arrangements, and

(b) warn the jury not to draw any inference adverse to the accused person or give the evidence any greater or lesser weight because it is given by those means or by use of those arrangements.

A warning in similar terms is required where alternative arrangements (eg screens and seating) are employed: ss 294B(7), 306ZI(4). See further [1-364] **Warning to jury regarding use of CCTV or alternative arrangements** in *Criminal Trial Courts Bench Book*.

It is important that the jury is not influenced by 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.

Any warnings to the jury should be given in line with the *Criminal Trial Courts Bench Book*[133](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.

Specifically, 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 **6.4.3**.

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.

Draw the jury's attention to the presence of an intermediary and their independent role in facilitating communication.

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

Last reviewed: April 2025

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).[134]

133 *Criminal Trial Courts Bench Book*, above n 38, at [1-135] and [1-140].

134 See also Judicial Commission of NSW, *Sentencing Bench Book*, 2006–, at [2-200] and *R v Henry* (1999) 46 NSWLR 346 at [9]–[10].

Points to consider:

Section 25(2) of the *Children (Criminal Proceedings) Act 1987* is expressed in mandatory terms. A failure to obtain a background report in accordance with s 25 renders the sentence invalid.[135]

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 6.4 that are relevant to the particular case.

Whether to allow a victim impact statement (VIS) to be read out in court.[136]

In cases involving a child or young person as an alleged offender, in line with the *Children's (Criminal Proceedings) Act 1987* and relevant Handbook, consider the various options[137] **— for example, whether to:**

– remit to the Children's Court for sentencing

– refer to Youth Justice Conferencing or[138] 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

135 See *CO v DPP* [2020] NSWSC 1123 at [28]–[29].

136 See *Crimes (Sentencing Procedure) Act 1999* (NSW), Pt 3, Div 2, ss 30A–30G; *Crimes (Sentencing Procedure) Regulation 2017* (NSW), cl 11; *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: s 30A(3), (4). See *Sentencing Bench Book*, above n 134, at [12-790]ff. See also s 27(4A) *Crimes Sentencing Procedure Act 1999* for limitations in relation to VIS for an offence that is being dealt with by the Children's Court.

137 *Children's Court of NSW Resource Handbook*, 2nd edn, 2023– at [8-1000]ff; MS King, "Therapeutic jurisprudence, child complainants and the concept of a fair trial" (2008) 32 *CLJ* 303.

138 *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 and D Weatherburn, "Youth Justice Conferences versus Children's Court: A comparison of re-offending", *Crime and Justice Bulletin*, No 160, BOCSAR, February 2012, accessed 10/3/2025.

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.

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. [139]

Further, the NSW Youth Koori Court, appears to be successful in reducing rates of incarceration, with participants being 40% less likely to receive a custodial sentence at their court finalisation, without any adverse impact on re-offending rates.[140]

- 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[141]
- 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.[142]

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,

139 See "Youth Koori Court fact sheet", accessed 10/3/2025; S Duncombe, "NSW Youth Koori Court Pilot Program commences" (2015) 27(2) *JOB* 11; S Duncombe, "Expansion of the NSW Youth Koori Court program" (2018) 30(5) *JOB* 48.

140 E Ooi and S Rahman, "The impact of the NSW Youth Koori Court on sentencing and re-offending outcomes", *Crime and Justice Bulletin* No CJB248, BOCSAR, April 2022, accessed 10/3/2025.

141 *Children (Community Services Orders) Act 1987* (NSW), s 5.

142 See *Children (Criminal Proceedings) Act 1987* (NSW), s 14(1)(a) which provides that a court "shall not, in respect of any offence, proceed to, or record such a finding as, a conviction in relation to a child who is under the age of 16 years". See also *Young Offenders Act 1997*, ss 17 and 33.

(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

If you decide to order the child or young person to pay compensation (or a fine), consider the child's or young person's actual capacity to pay the compensation or fine.[143]

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.

[The next page is 6143]

6.5 Further information or help

Last reviewed: April 2025

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:

143 See *Children (Criminal Proceedings) Act 1987*, ss 24 and 33(1AA).

Advocate for Children and Young People Level 2, 407 Elizabeth Street Surry Hills NSW 2010 Ph: (02) 9286 7231 Email: acyp@acyp.nsw.gov.au	The Advocate works to improve the safety, welfare and wellbeing of all children and young people in NSW. The role of the NSW Advocate for Children and Young People is to influence and initiate positive change.
Department of Communities and Justice (DCJ) Ph: 1800 000 164	Are committed to the safety and wellbeing of children and young people and protecting them from risk of harm, abuse and neglect.
Children's Court Clinic 2 George Street (cnr O'Connell Street) Parramatta NSW 2124 Ph: (02) 8688 1530 Email: schn-childrenscourtclinic@health.nsw.gov.au	The clinic assists the Children's Court and higher courts in care and protection matters by providing independent expert clinical assessments of: # children and young persons, and/or # the capacity of parents and others to carry out parental responsibility
Youth Justice NSW Department of Communities and Justice Locked Bag 5000, Parramatta NSW 2124 Ph: 02 8346 1333	Youth Justice NSW helps young people aged between 10 and 18 that have come into contact, or are at risk of coming into contact, with the criminal justice system.
Legal Aid NSW Youth hotline: 1800 101 810	Legal Aid provides legal services to disadvantaged people across NSW. They can provide legal assistance in most areas of criminal, family and civil law.
Youth Law Australia Ph: 1800 950 570	Youth Law Australia is a community legal service that is dedicated to helping children and young people in Australia and their supporters to find legal solutions to their problems
Victim's Services NSW Department of Communities and Justice Locked Bag 5118 Parramatta 2124 Ph: 1800 633 063 Email: vs@dcj.nsw.gov.au	Victims Services provides information, referrals and programs to victims of crime in NSW.
Youth on Track See Youth on Track locations | NSW Government Currently Youth on Track is only offered in seven areas in NSW	Youth on Track is a program for people between 10 to 17 years, aiming to reduce the seriousness of offences in young people. The program focuses on intervening early and providing support to the young person and their family.

6.6 Further reading

Last reviewed: April 2025

M Aldridge and J Luchjenbroers, "Linguistic manipulations in legal discourse: Framing questions and 'smuggling' information" (2007) 14 *International Journal of Speech, Language and the Law* 85~107.

M Allerton, "Young people in NSW juvenile justice custody" (2004) 16(7) *JOB* 49.

Australasian Institute of Judicial Administration Inc, *Bench book for children giving evidence in Australian courts*, 2nd edn, 2015.

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J Cashmore, "Child witnesses: the judicial role" (2007) 8(2) *TJR* 281 and other articles in the Judicial Commission of NSW, *Sexual Assault Trials Handbook*, 2007–.

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R Ellis, "Judicial activism in child sexual assault cases", Judicial Commission of NSW, *Sexual Assault Trials Handbook*, 2007–, Sydney.

GS Goodman et al, "Testifying in criminal court: emotional effects on child sexual assault victims" (1992) 57(5) *Monographs of the Society for Research in Child Development* 1.

J Goodman-Delahunty, MA Nolan and EL van Gijn-Grosvenor, *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence*, Royal Commission into Institutional Responses to Child Sexual Abuse, 2017, Sydney, Commonwealth of Australia.

E Henderson, "Persuading and controlling: the theory of cross-examination in relation to children" in H Westcott, G Davies and R Bull (eds), *Children's testimony: a handbook of psychological research and forensic practice*, John Wiley & Sons, 2002, pp 279–293.

P Johnson, "Controlling unreasonable cross-examination" (2009) 21(4) *JOB* 29.

Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2002–, Sydney, under "Child witness/accused", at [1-100]ff and "Evidence given by alternative means" at [1-360]ff.

Judicial Commission of NSW, *Children's Court of NSW Resource Handbook*, 2nd edn, 2023–.

ME Lamb et al (eds), *Children's testimony: a handbook of psychological research and forensic practice*, 2nd edn, Wiley-Blackwell, 2011.

Law Society of NSW, *Representation principles for children's lawyers*, 4th edn, 2014, Sydney.

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.

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

Judicial Commission of NSW, *Sexual Assault Trials Handbook*, 2007—, Sydney.

A Pichler, J Goodman-Delahunty, S Sharman and N Westera, "A review of the use of special measures for complainants' evidence at trial" in I Bryce and W Petherick (eds), *Child sexual abuse: forensic issues in evidence, impact, and management*, Elsevier Academic Press, 2020, pp 467–518 (Ch 23).

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6.7 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 15 contains information about how to send us your feedback.

6.8 *Appendix A* — Recommended script for use in hearings with children or cognitively impaired witnesses or defendants[144]

Last reviewed: April 2025

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.

144 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.

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 ……

I will ask him/her to stand. Can you see him/her now?

(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?"

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?".

6.9 *Appendix B* — Recommended scenarios for use to determine competence

Last reviewed: April 2025

Children 4–11 years

- I want to talk to you about truth and lies.
- When we tell the truth, we talk about things that REALLY happened (REAL things).
  - We tell a story that we know is true
  - Things we have seen with our own eyes
  - Things we have heard with our own ears
  - Things we have felt on our own bodies
- A lie is when something did not REALLY happen (things that are not REAL).
  - We tell a story that is DIFFERENT than what REALLY happened
  - Things that are made up/make believe/imaginary
- **What can happen to someone who tells a lie or says something that is not true?**
- You MUST PROMISE to tell us what REALLY happened.
- You cannot make up things.
- OBLIGATION — You MUST/HAVE TO tell us the truth. Do you understand why you MUST/HAVE TO tell us the truth?

(According to research[145] children could identify a statement as the "truth" or a "lie" before they could define or explain the difference between the two concepts. Defining "truth" and "lies" is an abstract concept. Ideally, children should be provided an example and asked to indicate if a person told the truth or a lie).

145 TD Lyon and A Evans, "Assessing children's competency to take the oath in court: the influence of question type on children's accuracy" (2012) 36(3) *Law and Human Behavior* 196. See also N Bala et al, "A legal and psychological critique of the present approach to the assessment of the competence of child witnesses" (2001) 38 *Osgoode Hall Law Journal* 409 at 411.

Use the story board attached below to show the child a scenario and then ask: "Did the girl tell the truth or a lie about taking the train?"

These are other examples that can also be used once the story board has been shown:

"I will tell you something and you tell me if it is true or a lie."

It would be useful with really young kids that they have a visual with the two options in front of them.

Examples of questions to ask:

- There is an elephant in the room with you. Is that true or a lie?
- You are a girl/boy

Storyboard for children aged 4–11.

Adapted and created by Rukiya Stein

Accredited Witness Intermediary

Independent Communication Intermediary

October 2023

Children 12–16 years

- I want to talk to you about truth and lies.
- When we tell the truth, we talk about things that REALLY happened.
  - We tell a story that we know is true and real
- A lie is when something did not REALLY happen (things that are not REAL).
  - Something that is made up
- What can happen to someone who tells a lie or says something that is not true?
- OBLIGATION — It is very important to tell us the truth.
- Do you understand you MUST tell us the truth?

(According to research[146] children could identify a statement as the "truth" or a "lie" before they could define or explain the difference between the two concepts. Defining "truth" and "lies" is an abstract concept. Ideally, children should be provided an example and asked to indicate if a person told the truth or a lie).

Use the story board attached below to show the child a scenario and then ask:

"Did the boy tell the truth or a lie about eating the chips?"

146 ibid.

For the younger cohort (12–13 years), you can say:

- "I say something, tell me if it is true or a lie:"
- "You are wearing a _____ (colour) shirt."

"The wall in the room is red (true or lie)"

Storyboard for children aged 12–16.

Adapted and created by Rukiya Stein

Accredited Witness Intermediary

Independent Communication Intermediary

October 2023

6.10 *Appendix C* — Ground rules hearing checklist

Last reviewed: April 2025

A Ground Rules Hearing (GRH) between the intermediary, lawyers and judge is designed for discussion about the intermediary assessment report and recommendations for questioning.

Any decisions made at a GRH are informed directly by the witness intermediary assessment report.

In NSW, there is no legislative provision for GRHs to occur. Intermediary practice at a GRH and what occurs, is set out in the NSW witness intermediary handbook.

In NSW, GRHs usually occur a week in advance of the Pre-Recorded Hearing.

In a trial, the GRH can occur on the morning the witness or defendant is to give evidence, once a jury has been empanelled.

The intermediary does NOT have to take an oath or affirmation during the GRH.

The following occur at a GRH:

- The intermediary is asked to discuss the communication report and the recommendations for questioning with the judge and advocates.
- Both defence counsel and Crown prosecutor are invited to ask the intermediary any questions, seek clarification, or raise any objections in regards to the recommendations.
- Putting the case/*Browne v Dunn* — at the GRH, it is agreed upon as to which format is best suited to the vulnerable person's communication ability. For example, suggestive statement with "agree/disagree", "true/not true", "did" question, etc. This is guided by the intermediary's assessment of these propositions.
- The use of visual aids (Post-it notes, timelines, body charts, communication cards) and other communication tools are discussed.

- Any objections or clarifications are settled at the GRH and specific recommendations for questioning are agreed upon.
- The judge will decide how the intermediary should intervene (eg, hand up, saying "Your Honour", etc).
- The judge encourages the parties to have a confidential discussion with the intermediary regarding the form and structure of their questions to avoid interventions. The intermediary is impartial and an officer of the court, therefore any questions that are shared are done so in strict confidence.
- The judge makes the final orders as to how questioning should occur.

Ground rules hearing checklist

- ❑ Have all parties received and read the intermediary's report?
- ❑ Intermediary discusses main recommendations for questioning.
- ❑ Any visual aids (eg, Post-it notes, timelines, pictures, maps, etc)/fidget toys or other special measures that need to be used and how they will be used.
- ❑ How will the intermediary intervene/get the judge's attention if there is a communication issue or the child/young person needs a break, eg, "your Honour" or raise a hand.
- ❑ Have topics for questioning been agreed and will they be provided in advance to the intermediary or introduced on the day? Use of post-it notes.
- ❑ Recommendation for the parties to seek the assistance of the intermediary for their questions before the PRH/trial begins.
- ❑ Will wigs be worn?
- ❑ How the accused will be referred to (not all children/young people will know the word "accused").
- ❑ If the child has their own terminology for intimate body parts, consideration needs to be made to use those words.
- ❑ Discussion and order made for the structure of *Browne v Dunn* propositions.
- ❑ Any considerations for the best time of day to begin/end questioning; if medications are taken.
- ❑ Final orders on how the parties will question the child/young person and limitations placed on the types of questions asked, such as tag questions.
- ❑ Whether the child will take an oath or affirmation.
- ❑ If there will be a support person and/or an interpreter present and where they all sit in the remote room, with the intermediary present.
- ❑ Any envelopes that will need to be taken to the remote room.

Adapted and created by Rukiya Stein

Accredited Witness Intermediary

Independent Communication Intermediary

October 2023

6.11 *Appendix D* — Interviewing principles to guide communication with vulnerable witnesses and defendants, including children and young people[147]

Last reviewed: April 2025

Simple communication

Avoiding assumptions

Flexible response options

Encouraging elaboration

Use short sentences. If questions are too long, the interviewee might lose interest or find the questions hard to follow, especially if attention span is a concern. Questions with multiple parts (eg, those that ask interviewees to think about multiple subjects in rapid succession) increase the opportunity for confusion and error. As a general rule, all questions should be short, direct and convey only one idea at a time.

Avoid the use of jargon. Although jargon can help people communicate within peer groups who share a profession or activity, it can be confusing to anyone outside the group. Child interviewees are often asked questions that include complex legal terms (legalese). The cognitive and language skills required to process and memorise jargon are advanced. Short, everyday words are more appropriate choices for vulnerable witnesses.

Use active tense. In passive tense, the "doer" of the action is placed after the action itself (eg, "Were you questioned by the police earlier today?"). This is a complicated phrasing that may be difficult for vulnerable interviewees to understand. It is better to place the doer of the action first, ahead of the action (eg, "Did the police question you earlier today?").

Avoid non-literal language. Figurative and abstract language increases the chances of misunderstandings, as do the use of words that deviate from their original or conventional meaning. For example, questions like "Did your dad pass away?" or "Did he simmer down after that?" may not be well understood.

147 Adapted from M Powell and B Earhart, "Principles to enhance communication with child witnesses" (2018) 30(9) *JOB* 85 at 86–87.

Section 7

Women

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.

Purpose of this chapter

Statistics show that women experience inequality and disadvantage which arise because of their sex and gender characteristics. Being female is only one of many personal characteristics which intersect with other factors associated with unequal treatment or disadvantage. The purpose of this chapter is to:

- highlight socio-economic factors and gender disadvantage, including occupational segregation and workplace discrimination, sexual harassment and violence against women which contribute to gender imbalance; 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

7.1 Introduction[1]

Last reviewed: June 2023

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

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.

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 often confronts Aboriginal women and is manifested in a lived experience of racism and sexism.[2] 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. [3]

"Women's Business"[4] 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.

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 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

2 C Thomas and J Selfe, *Aboriginal women and the law*, NSW Women's Coordination Unit, 1993.

3 See also, Supreme Court of Queensland, *Equal Treatment Benchbook*, 2nd edn, p 169, accessed 14/6/2023.

4 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.

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% — involved a male killing his female partner. Of those men, almost all — 93% — 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.

of gender inequality, sex discrimination and 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" usually refers to the anatomical and physiological differences between male and female at birth. "Gender", as defined by the World Health Organization (WHO), refers to the "characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviours and roles associated with being a woman, man, girl or boy, as well as relationships with each other. As a social construct, gender varies from society to society and can change over time".[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 trans or gender diverse (ie, who were originally living as the opposite gender) 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.

It is noted that the *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on the basis of "sex"[7] and of being "transgender".[8] The Act binds the Crown in right of NSW,[9] but operates only in relation to prescribed areas of activity, such as employment and the provision of goods and services.

6 World Health Organization, "Gender", accessed 14/6/2023.
7 *Anti-Discrimination Act 1977*, Pt 3.
8 ibid, Pt 3A.
9 ibid, s 5.

7.1.1 Population demographics: a snapshot

According to the 2021 census, the population of NSW (8.072 million) had a slight majority of female residents (4.088 million, 50.7%) compared with male residents (3.984 million, 49.3%).[10] Of those female residents:

- most live in the Greater Sydney region[11]
- 169,236 are Aboriginal, comprising 49.8% of the total Aboriginal population of NSW[12]
- almost a third were born overseas (30.1%) as compared to 29.2% men[13]
- 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[14]
- 15,000 were experiencing homelessness on Census night in 2016 (along with 22,500 males)[15]
- over 255,000 are the lone parent in their household (82.2% of the 311,000 lone parent families).[16]

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 (other than in the First Nations 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),

10 Australian Bureau of Statistics (ABS), *Census QuickStats*, 2021, Canberra, accessed 14/6/2023.
11 ABS, *Census QuickStats*, 2016, Canberra, accessed 14/6/2023.
12 ibid.
13 Women NSW, Department of Family and Community Services, *Women in NSW 2018,* 2019, p 10, accessed 19/2/2020. China, England, India, New Zealand and Philippines are the top five overseas countries of birth for general population of NSW, according to ABS*, Census QuickStats*, 2016, Canberra, accessed 14/6/2023.
14 ABS, 2016 *Census of Population and Housing for NSW*, Table G06 — Social marital status by age by sex, Canberra.
15 ABS, *Census of Population and Housing: Estimating homelessness*, 2016, released 2018, cat 2019.0, "State and territory of usual residence, Sex by age of person" Data Cube, Table 4.2 Homelessness operational groups and other marginal housing, New South Wales — Sex by age of person — 2016. See also Homelessness Australia, accessed 14/6/2023.
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.

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.[17] 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.[18] 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".[19]

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.[20] There are sections of the Australian community that think that discrimination and inequality are no longer issues. The Sex Discrimination 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.[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).[22]

17 AHRC, *A conversation in gender equality*, March 2017, p 24, accessed 14/6/2023.
18 ibid pp 9, 27, 34.
19 ibid p 34.
20 ibid, referring to research captured in the Our Watch, "Change the story" framework; Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and VicHealth, *Change the story: a shared framework for the primary prevention of violence against women and their children in Australia*, 2015, Melbourne, accessed 14/6/2023.
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.
22 ABS *Education and Work, Australia,* May 2019, Canberra, ABS cat 6227.0, Table 9, released 13/11/2019, accessed 14/6/2023.

- 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.[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.[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 2019–2020 and the COVID-19 virus which emerged in 2020.[25]

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

- Overall, almost half of employed persons in Australia are women[26] and the proportion in NSW is very similar.[27] Australia lags behind countries including Canada, the UK and New Zealand in women's full-time employment.[28] The gender breakdown of participation rates, and full-time versus part-time work reveals an important difference.
- In NSW, as of August 2022:[29]

  - Women's participation in the paid workforce continues to increase but remains lower than men's.

23 ibid.

24 For some information about casualisation of the workforce and insecure work, see S Das, "Fact check: has the rate of casualisation in the workforce remained steady for the last 20 years?" *ABC News*, 12/7/2018, accessed 14/6/2020.

25 For examples of media coverage foreshadowing recession even before the strict measures to inhibit the spread of COVID-19 in Australia from mid-March 2020, see: M Cranston, "Risk of first recession in 29 years rising", 5/3/2020, *Financial Review*, accessed 14/6/2023.

26 47% based on "trend" data, according to ABS, *Labour Force, Australia,* December 2019, Canberra, ABS cat 6202.0, Table 1, *Labour force status by Sex, Australia — Trend, seasonally adjusted* and original, released 23/1/2020, accessed 14/6/2023.

27 47% based on "trend" data, ibid, Table 4. *Labour force status by Sex, New South Wales — Trend, Seasonally adjusted* and original, accessed 11 October 2022.

28 M Reddy, "'Poor culture' at executive level", *The Sydney Morning Herald*, March 2020. The article cites Chief Executive Women (CEW) as the source of this data: see "A long way to the top: women at work in Australia", which in turn cites ABS, 4125.0 — Gender indicators, Australia, September 2018, accessed 14/6/2023.

29 Based on participation rates of 61.6% for females and 70.5% for males where there are 4267.7 total persons employed: ABS, above n 27.

- The average participation rate for men was 70.5% and for women was 61.1%, an 8.5% difference.

- Breaking the workforce into full-time and part-time workers:[30]

  - of the full-time workers in NSW, 61.7% are male and 38.3% are female.

  - 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%).[31]

- In 2021, when considering all employees aged 15 years and over, women (26.4%) are more likely to work in casual jobs than men (22.5%) based upon access to paid leave entitlements. For women, those aged 15–34 years were the most likely to be employed casually (36.3%). For men, those aged 65 years or older were most likely to be employed casually (38.1%).[32]

- Within families with children under 12, 44% of mothers work part-time compared to 5% of fathers.[33]

- The largest difference between men and women was for people aged between 30 and 39 years where women were around three times more likely than men to be out of the labour force:

  – 30–34 years, 22.2% of women compared with 8.3% men

  – 35–39 years, 22.5% of women compared with 7.4% men.[34]

The progress on women reaching the most senior leadership roles in corporate Australia is going backwards, according to the *2022 Chief Executive Women (CEW) Senior Executive Census*, and at this rate it will take 100 years for women to make up at least 40% of all CEO positions on the ASX200.[35]

7.2.1.1 Gender pay gap in wages and superannuation

Last reviewed: June 2023

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

30 as at December 2019, ibid.
31 M Reddy, above n 28.
32 ABS, *Gender indicators — economic security*, 2019–2020, accessed 14/6/2023.
33 G Dent, "Five facts every Australian needs to know about men at work", *Women's Agenda,* 17/3/2020, accessed 14/6/2023. The author is summarising an address made by journalist Annabel Crabb for International Women's Day 2020, based on her main thesis of her text, *The Wife Drought.*
34 ibid.
35 Chief Executive Women, "2022 CEW census an urgent wakeup call — CEO gender balance 100 years away", accessed 14/6/2023.

economic factors that combine to reduce women's earning capacity over their lifetime.[36] 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. In May 2022, the gender pay gap stood at 14.1%.[37]

Impact of COVID-19

For every month affected by the COVID-19 pandemic, Australian women lost one year of progress towards economic equality, with COVID impacting on women's employment trends, leadership, wages, superannuation and unpaid work.[38] Women's jobs were hit harder than men's during the COVID lockdowns. At the peak in April 2021, almost 8% of Australian women had lost their jobs, and women's total hours worked were down 12%. The figures for men were 4% and 7%. Remote learning and the loss of formal and informal childcare and household support services led to a big rise in unpaid work which disproportionately fell on women during the lockdowns. Many women found it impossible to juggle this with their existing paid work commitments.[39] The economic effects of time out of the workforce are magnified for women, especially mothers, many of whom are already on a "stop/start" career path. Six months out of work can add another $100,000 to the $2 million average lifetime earnings gap between men and women.[40]

The Federal Government's recovery package was directed to personal income tax cuts, investment tax breaks and a big spend on infrastructure, with more direct support flowing to the male-dominated construction and energy sectors.

Further, women are much more likely to work in a short-term casual job, and so were ineligible for the Federal Government JobKeeper scheme during lockdown.[41]

Wages

- As at November 2022 in NSW, the average weekly wage for people working full-time ordinary hours was $1,684.90 for females, compared with $1896.80

36 KPMG, *She's Price(d)less – the economics of the gender pay gap,* 2019, summary report, p 8. See Full Report, accessed 14/6/2023.
37 above n 32.
38 B Hartge-Hazelman, "Australian women are losing one year of progress for every month of the pandemic", *Women's Agenda*, 18/8/2020, accessed 14/6/2023.
39 D Wood, K Griffiths and T Crowley, "Women's work: the impact of the COVID crisis on Australian women", Grattan Institute, March 2021, accessed 14/6/2023.
40 ibid p 3.
41 ibid p 10.

for males.[42] The discrepancy can be expressed as a weekly gender wage gap of 11.8% (ie on average, women earn $211.90 per week less than men).[43] The national gender pay gap is similar at 13.3%.[44]

- 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.[45] 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%.[46] In the NSW public service, the gender pay gap increased from $2,053 in 2020 to $3,905 in 2021 in favour of men based on median salary by gender.[47]
- Average total income over 40 years across men and women with and without children has been estimated as follows:[48]
  - 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.[49] The three key factors causing the gender pay gap have been identified and weighted according to causality by KPMG:[50]
  - 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%

42 ABS, *Average weekly earnings, Australia,* November 2022, released 23/2/2023, accessed 13/6/2023.
43 As calculated by applying the formula of the Workplace Gender Equality Agency (WGEA) to the ABS data: "Calculating gender pay gaps (GPG)", accessed 13/6/2023.
44 As at February 2023, calculated by WGEA using ABS data, "Gender pay gap data", accessed 14/6/2023. The WGEA also reports on data submitted in accordance with the *Workplace Gender Equality Act 2012* (Cth) from non-public sector employers with over 100 employees: in the report from 1 April 2021 to 31 March 2022, Australia's gender pay gap was calculated to be 22.8%. WGEA, *Australia's gender equality scorecard*, December 2022, p 4, accessed 14/4/2023.
45 M Reddy, above n 28.
46 Workplace Gender Equality Agency (WGEA), *GradStats – starting salaries,* February 2016, p 2, accessed 13/6/2023.
47 NSW Government, *State of the NSW Public Sector Report 2021*, pp 37–38, accessed 13/6/2023: women $90,394 and men $94,299.
48 G Dent, above n 33.
49 KPMG, above n 36, p 12.
50 ibid p 7.

The NSW Government has published a Gender Equality Dashboard to provide data showing progress in key indicators of women's social and economic outcomes (currently economic opportunity and advancement; health and wellbeing; and participation and empowerment).[51]

Superannuation

- There is also a gender gap in superannuation. Australian women live longer on average than Australian men[52] but they have less invested in superannuation, a situation that is slowly improving. In 2017–2018, the average balance for males at age 55–64 was around $332,700 and females $245,100. [53]

  Further, 23% of women retire with no superannuation at all.[54] Despite the Productivity Commission recommendation,[55] superannuation will not be added to taxpayer-funded parental leave payments after the Australian government rejected a plan from its retirement income reviewer, leaving hundreds of thousands of women financially worse off in retirement if they have a child. Industry Super analysis found 1.6 million women have taken up government-funded paid parental leave since it was introduced a decade ago but missed out on $1.86 billion in super due to taking time out of the workforce.[56]

- 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 55–59.[57] There is no statutory requirement for superannuation to be paid during periods of unpaid or paid parental leave, which is primarily taken by women.[58]

51 See NSW Government, "NSW Gender equality dashboard", accessed 14/6/2023.

52 "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 (1965–1967), 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, released 30/10/2019, accessed 14/6/2023. See also 11.1.6 Care and assistance in Older Persons section.

53 R Clare, *Better retirement outcomes: a snapshot of account balances in Australia*, The Association of Superannuation Funds of Australia Limited (ASFA), July 2019, p 5, accessed 14/6/2023. Clare cites ATO data and also references ABS data for 2017–18: an average in 2017–18 of $168,500 for males and $121,300 for females. See also Senate Standing Committees on Economics, Report from the Economic Security for Women in Retirement inquiry, *Report: "A husband is not a retirement plan" — achieving economic security for women in retirement*, Ch 2: Background, 2016, accessed 14/6/2023.

54 J Dunn, "Women less than equal in retirement" *Financial Review*, 8/12/2020, accessed 14/6/2023.

55 Productivity Commission, "Paid maternity, paternity and parental leave", Inquiry Report, May 2009, accessed 14/6/2023.

56 Industry Super Australia, "Paying Super on parental leave", 16/9/2021, accessed 14/6/2023.

57 See Industry Super Australia, "It's time to bridge the super gender gap", 8/3/2020, accessed 14/6/2023. See also the "Retirement income review" which was released in November 2020, accessed 14/6/2023.

58 See Industry SuperFunds, "The gender super gap", 31/12/2017, accessed 14/6/2023.

- 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. [59]

  Under the Government's early release scheme during the height of the pandemic, one in seven women were withdrawing a larger proportion of the superannuation to pay bills.[60] This means that the gender super gap is set to get even bigger for female workers who accessed the Government's COVID early release super scheme.[61]

- Further, the Australian Institute of Superannuation Trustees has suggested that women were coerced by abusive partners into taking out superannuation early under the federal government's pandemic relief scheme, with one estimate saying there could be tens of thousands of women affected.[62] See further **7.5.3 Coercive control**.

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.[63] Poverty in retirement is the result of women's cumulative experiences of economic disadvantage over their lifespan.[64] Those experiences are the "result of interconnected burdens" such as those discussed above (more part-time/casual 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.[65]

59 See C Hobbs, "Things to consider on the new option to access superannuation early", *Women's Agenda,* 1/4/2020, accessed 14/6/2023.

60 D Hughes, One-in-seven women using all their super to pay bills", *Financial Review*, 31/5/2020, accessed 14/6/2023, citing analysis by AMP.

61 AIST, "Gender super gap set to widen for women who applied for COVID early release", Media and News, accessed 14/6/2023.

62 K Curtis, "A perfect storm: up to 70,000 women may have been coerced into withdrawing super", *Sydney Morning Herald*, 21/2/2022, accessed 14/6/2023.

63 Senate Standing Committees on Economics, above n 53, p 13.

64 AHRC, *Everyone's business: 2018 sexual harassment survey*, 12/9/2018, p 12, accessed 13/4/2020.

65 ibid. See also ASFA, "Women's economic security in retirement", May 2018, accessed 14/6/2023. KPMG also identified these factors in its submission to the *Retirement income review*, 3/2/2020, accessed 14/6/2023.

Between 2011 and 2016, women aged 55 years and over were the fastest growing cohort of homeless Australians (31%).[66] 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.[67]

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.[68] 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.[69]

7.2.1.3 Occupational segregation and workplace discrimination

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.[70] Only 4% reported it to a government body.[71] 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.[72] Over 80% of mothers who experienced discrimination also experienced a negative impact as a result, such as to their mental health or finances.[73]

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

66 AHRC, "Older women's risk of homelessness: background paper", 2019, p 8, accessed 14/6/2023.
67 ABS, *Census of Population and Housing: Estimating homelessness: State and territory of usual residence, Sex by age of person*, 2016, Data cube: Excel spreadsheet, Cat. No. 2049.0 (2018).
68 AHRC, above n 66.
69 ABS, 2049.0 *Census of Population and Housing: Estimating Homelessness, 2016, Factsheet: domestic and family violence*, released 14/3/2018; ABS 2049.0 *Census of Population and Housing: Estimating Homelessness, 2016, Factsheet: Aboriginal and Torres Strait Islander Homelessness*, released 14/3/2018, accessed 14/6/2023.
70 AHRC, *Supporting working parents: pregnancy and return to work national review — report,* 2014, p 1, accessed 14/6/2023.
71 ibid, p 33; see also A Heron and S Charlesworth, "Effective protection of women at work: still waiting for delivery" (2016) 29 *Australian Journal of Labour Law* 1.
72 As summarised in G Jennings-Edquist, "Pregnant and discriminated against at work? Here's what to do", *ABC Life*, 24/10/2018, updated 19/8/2019, accessed 14/6/2023.
73 ibid.

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).[74]

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.[75]

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.[76]

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 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.[77]

The Law Council of Australia launched the Equitable Briefing Policy in 2016, with the aim to have women barristers briefed in at least 30% of all matters by

74 WGEA Data Explorer, 2019, accessed 14/6/2023.
75 ibid.
76 M Reddy, above n 28.
77 L Andelman, "Restructure required to bridge the gender gap", 8/3/2020, *LSJ Online*, accessed 14/6/2023.

July 2020. This target was met with 31% of briefs going to female barristers and 69% to male barristers. A similar goal for reducing the gap between fees paid to male and female barristers, while reduced, has not been realised.[78]

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.[79] Consequences of these imbalances include women's economic disadvantage, a lack of diversity within industries[80] and a failure to cater for the needs of the whole population.[81]

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"

Gender bias has been identified as a significant issue in the creation of inequality, for example, in employment and promotion decisions in the workplace.[82] While it may be explicit, it can also be implicit, hidden or unconscious.

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".[83]

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.[84]

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

78 J Doraisamy, "Women barristers now receiving 30% of briefs", *Lawyers Weekly online,*10/3/2022, accessed 14/6/2023.

79 C Williams, "The glass escalator: hidden advantages for men in the 'female' professions", (1992) 39(3) *Social Problems* 253. In the Australian context, see Women's Agenda, "How gender segregation creates glass elevators for men and pay gaps for women", *Women's Agenda*, 3/4/2020, accessed 14/6/2023.

80 AHRC, above n 17, p 29. See also Senate, Finance and Public Administration References Committee, *Gender segregation in the workplace and its impact on women's economic equality*, Report, June 2017, accessed 14/6/2023.

81 Faculty of Business and Economics at University of Melbourne, Episode 4: "His and Hers" Jobs, *Women are the business,* accessed 14/6/2023, 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.

82 WGEA, *Gender segregation in Australia's workforce*, August 2019, accessed 14/6/2023.

83 International Labour Organisation (ILO), *Breaking barriers: unconscious gender bias in the workplace*, International Labour Office, August 2017, p 3, accessed 14/6/2023.

84 C BasuMallick, *Is unconscious bias training enough to eliminate workplace bias?,* HR Technologist, 25/6/2019, accessed 14/6/2023.

Electoral representation

Across Australia, women continue to be significantly under-represented in parliament, with a "critical mass" of 30% regarded by the United Nations as the minimum level necessary for women to influence decision-making in Parliament.[85]

In NSW, women represent 34.4% of members of the NSW Legislative Assembly and 30.9% of the NSW Legislative Council as at May 2022.[86] First Nations women are under-represented in all State and Territory parliaments.[87] Gender imbalance also underlies a negative culture for women within parliament.[88]

Described as "glass cliff candidates", women standing for both major parties in the 2022 Federal Election faced a greater battle to get into parliament, with new analysis showing they are more likely to be running in a marginal or unwinnable seat than male counterparts.[89]

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.[90] 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".[91] Women account for 93.5% of primary parental leave in the non-public sector.[92]

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

85 J McCann and J Wilson, "Representation of women in Australian Parliaments 2014", Parliament of Australia, July 2014, accessed 14/6/2023.
86 NSW Government, "NSW Gender Equality Dashboard — Electoral representation", accessed 14/6/2023.
87 J McCann and J Wilson, above n 85.
88 R Nolan and J Pawluk, "Only more women will fix Parliament's 'culture' problem. Here's how to do it …", The McKell Institute, March 2021, accessed 14/6/2023.
89 G Hitch and K Calderwood, "Female federal election candidates still more likely than men to be running in margional or unwinnable seats, analysis shows", *ABC News*, 13/5/2022, accessed 14/6/2023.
90 KPMG, above n 36.
91 ibid.
92 M Reddy, above n 28.

interruption.[93] 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.[94]

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.

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.[95] 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.[96]

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. [97] 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).[98] 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.[99]

93 "Calculating the gender pay gap", above n 43 at p 27.

94 T Livermore, J Rodgers and P Siminski, "The effect of motherhood on wages and wage growth: evidence for Australia" (2010) 87(S1) *Economic Record* 80.

95 The largest percentage of males (35.6%) spent less than five hours, compared with the largest group of females (36.4%) who spent 5 to 14 hours: ABS, "National: who was the 'typical' Australian in 2016?"; ABS, 2071.0 — *Census of Population and Housing: Reflecting Australia — Stories from the Census, 2016 — Employment Data Summary*; ABS, *Table 12. Hours worked by hours of unpaid domestic labour by sex, count of employed persons*, downloadable in "Employment" Data Cube, accessed 14/6/2023.

96 R Wilkins, I Laß, P Butterworth and E Vera-Toscano, *The household, income and labour dynamics in Australia survey: selected findings from waves 1 to 17* ("the HILDA Survey"), 2019, Melbourne Institute of Applied Economic & Social Research, University of Melbourne, pp 97–98, accessed 14/6/2023.

97 L Ruppanner, "Census 2016: Women are still disadvantaged by the amount of unpaid housework they do", *The Conversation*, 11/4/2017, accessed 14/6/2023.

98 WGEA, "Unpaid care work and the labour market", November 2016, accessed 10/3/2020.

99 J Thorpe, R Tyson and N Neilson, *Understanding the unpaid economy*, March 2017, PwC, accessed 14/6/2023.

Women's unpaid workload increased during the COVID-19 pandemic, which meant less time for employment and education. Although unpaid work increased for both men and women for the duration of public health orders, an ABS Survey in June/July 2020 found that women were twice as likely as men to report that they did most of the unpaid domestic work (80% compared to 39%) and more than three times as likely to report that they did most of the unpaid caring responsibilities (38% compared to 11%) in their household.[100] Most families (64% used parent-only care during the initial lockdown compared to 30% pre- COVID), and the primary carer both before and during the crisis was predominantly the mother.

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.[101]

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.[102] 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[103]
- 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.[104]

100 ABS, "Household Impacts of COVID-19 survey", July 2020, released 27/72020, as reported in "Women's work: the impact of the COVID crisis on Australian women", above n 39, p 18.

101 L Ruppanner, "Understanding the mental load, what it is and how to get it under control", Opinion, *ABC News*, accessed 14/6/2023.

102 G Dent, above n 33. See also, KPMG, above n 36; P Ryan and R Puppazzoni, "Gender discrimination driving a pay wedge between men and women, report finds", *ABC News*, 22/8/2019, accessed 14/6/2023.

103 G Dent, above n 33.

104 ibid.

Only one in four men take parental leave[105] and fathers staying at work is a leading cause of the pay gap.[106] Factors that may explain this discrepancy include the 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.[107] This is consistent with research that identifies gender stereotypes and discrimination as significant in explaining the gender pay gap.[108]

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.[109]

Economic inequality, domestic violence and caring responsibilities significantly affect women in RRR areas.[110] 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.[111]

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.[112]

105 C Duffy, "Pushing parental leave in Australia to help close the gender pay gap", *ABC News*, 4/2/2020, accessed 14/6/2023.
106 ibid.
107 A Crabb, "Why don't more dads take parental leave? The answer is in their heads", *ABC News*, 8/9/2019, accessed 14/6/2023.
108 KPMG, above n 36, p 28.
109 25.2% of women live outside major cities in NSW in 2018: see *Women in NSW 2018*, p 10.
110 National Foundation for Australian Women, 2019, Women & Housing Fact Sheet, as stated in YWCA, *Women's housing needs in regional Australia*, May 2020, p 9, accessed 14/6/2023.
111 ibid.
112 ibid p 4.

Workplace participation rates in RRR areas are lower for women than men (66.8% for men and 56.5% for women).[113] Women's unpaid roles in family businesses in these settings also potentially undermine their financial security by leaving them without entitlements or superannuation.[114]

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.[115] 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".[116] Transitioning economies and natural disasters can increase the effects of pre-existing inequalities and discrimination on women in RRR areas.[117]

7.3 Sexual harassment

Last reviewed: June 2023

Sexual harassment is unwelcome sexual behaviour that makes — or that would reasonably be expected to make — a woman feel offended, humiliated or intimidated.[118] It is unlawful in certain areas of public life.[119] Sexual harassment is a form of gender-based violence.[120] (See 7.5 below for further discussion of violence against women.) There is no legal requirement that the perpetrator

113 Commonwealth of Australia, Department of the Prime Minister and Cabinet, *Towards 2025: a strategy to boost Australian women's workforce participation*, 2017, accessed 14/6/2023.

114 AHRC, *A conversation in gender equality*, March 2017, pp 7 and 13, accessed 14/6/2023.

115 ibid pp 6 and 13.

116 ibid p 13.

117 ibid p 14. Recent and ongoing events of these kinds include the NSW drought that started in 2017 and the 2019–2020 bushfire season. 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", 3/2/2020, accessed 14/6/2023. The greater isolation and vulnerability to coercive control and domestic abuse that some women experience in RRR areas may also have been exacerbated by the social distancing and quarantine responses to the COVID-19 global pandemic.

118 See definitions in *Anti Discrimination Act 1977* s 22A and the discussion at www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_antidiscriminationlaw/sexualharassment.aspx; see also the discussion of the meaning of sexual harassment at the Australian Human Rights Commission website, accessed 14/6/2023. Section 28A *of the Sex Discrimination Act 1984* (Cth) (SD Act) defines sexual harassment in the same terms as the NSW Act.

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

120 United Nations General Assembly, *Declaration on the elimination of violence against women*, GA Res 48/104, UN Doc A/RES/48/104, 20 December 1993, Art 1, 2(b).

intended to sexually harass the victim and sexual harassment includes conduct that need not be sexually explicit and includes holding up the victim to sexual ridicule amongst their colleagues.[121]

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 reported that the rate of change has been disappointingly slow and that Australia lagged behind other countries in preventing and responding to sexual harassment.[122]

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.[123]
- 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.[124]
- 53% of First Nations people compared to 32% of non-First Nations people reported harassment.[125]
- 79% reported that one or more of the harassers was male.[126]

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.[127]
- In 2018, 47% of Australian female respondents to the International Bar Association survey reported experiencing sexual harassment at work.[128]

121 See *Vitality Works Australia Pty Ltd v Yelda (No 2)* (2021) 105 NSWLR 403 at [35], [81], [96]–[97], [107], [109]; [125].
122 AHRC, *Respect@Work: national inquiry into sexual harassment in Australian workplaces*, March 2020, foreword, accessed 14/6/2023.
123 AHRC, above n 64, p 27
124 ibid.
125 ibid p 28.
126 ibid p 33.
127 L Knowles, "Sexual harassment of women rife in Australian legal profession, survey finds", *ABC News*, 8/3/2019, accessed 14/6/2023.
128 International Bar Association, "Us Too? Bullying and sexual harassment in the legal profession", 2019, pp 51–52, accessed 14/6/2023.

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. [129]

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,[130] or
- are organised according to a hierarchical structure.[131]

The *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth), which commenced 12 and 13 December 2022, was enacted in response to the Australian Human Rights Commission (AHRC)'s recommendations in the *Respect@Work* report. Most significantly, the Act has introduced a positive duty with the enactment of Pt IIA into the *Sex Discrimination Act 1984* (Cth) on an employer or a person conducting a business or undertaking to "take reasonable and proportionate measures to eliminate, as far as possible, certain discriminatory conduct" (ss 47B, 47C) including sexual harassment, sex discrimination, sex-based discrimination and certain types of

129 See ss 15, 32 and 75 of *Online Safety Act 2021* (Cth).

130 For example, one in five retail workers has been sexually harassed at work in the past five years, with the most common perpetrators a senior colleague or a customer: University of Sydney, *Gendered disrespect and inequality in retail work: a summary of findings*, March 2023, pp 17–20, accessed 13/6/2023.

131 ibid.

victimisation in a workplace context. Among other changes, it also confers new powers on the AHRC (see Div 4A and 4B *Australian Human Rights Commission Act 1986* (Cth)) to inquire into possible issues of systemic unlawful discrimination and research and assess compliance with the new positive duty.[132]

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,[133] reporting of sexual harassment by judicial officers is arguably under-reported and if reported, not actioned for fear of repercussions for a complainant.[134]

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".[135] Factors that were cited as contributing to this issue include: [136]

- 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.

132 Australian Human Rights Commission, "Fact sheet: Respect@Work – changes to the Sex Discrimination Act 1984 and the Australian Human Rights Commission Act (December 2022)", accessed 14/6/2023; *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth), Sch 2 and 3.

133 AHRC, above n 122, p 18.

134 K Nomchong, "Sexual harassment and the judiciary" (2020) 32 *JOB* 55 at 56.

135 J A Santos, "When justice behaves unjustly: addressing sexual harassment in the judiciary" (2018) 54 *Ct Rev* 156 at 157.

136 ibid.

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:[137]

> [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.

The Supreme Court of NSW in June 2020 published the "Supreme Court Policy on Inappropriate Workplace Conduct".[138] 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.

7.4 Intersectional discrimination

Last reviewed: June 2023

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.[139] 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.[140]

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.[141] 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.[142] Women can be left

137 High Court of Australia, Statement by the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia, accessed 14/6/2023.

138 Supreme Court of NSW, "Supreme Court policy on inappropriate workplace conduct", 2020, accessed 14/6/2023.

139 AHRC, above n 17, 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.

140 P Easteal, *Less than equal: women and the Australian legal system*, Butterworths, 2001, p 81. See also P Easteal (ed), *Women and the Law in Australia*, LexisNexis, 2010, for chapters on intersectionality for First Nations women, women with disabilities, and lesbians and same-sex attracted women.

141 *"A husband is not a retirement plan"*, above n 53, p 13.

142 Supreme Court of Queensland, above n 3, p 169.

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[143]: see also Section 8 and Section 9.

Section 28AA of the *Sex Discrimination Act 1984* (Cth) (SDA) was inserted with effect from 11 September 2021 to include the meaning of harassment on the ground of sex. The considerations listed at paras 28AA(2)(a) to (c) are modelled on the existing considerations in para 28A(1A)(a) to (c) of the SDA (sexual harassment) and ensures that the intersectionality between sex and other protected attributes are considered when applying the reasonable person test. For example, a young woman with disability or an Aboriginal woman may experience sexual or sex-based harassment differently. The importance of considering intersectionality was illustrated in *Djokic v Sinclair* [1994] HREOCA 16, in which the complainant's superior and co-workers regularly referred to her in a demeaning way with phrases such as "stupid wog bitch". In that case, the element of race was intermingled with incidents of sexual harassment and sex discrimination. The complainant succeeded in respect of all grounds, but there was a question about whether she would have satisfied the burden of proof if the various incidents had been disaggregated.[144]

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

Women with disabilities: see also Section 5

- After the age of 15, 40% of women with a disability have experienced physical violence, compared with 26% of women without a disability.[145]
- After the age of 15, 25% of women with a disability have experienced sexual violence, compared with 15% of women without a disability.[146]
- When living in group homes, women experiencing violence cannot choose with whom they live.[147]
- 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.[148]

143 University of NSW, *Calling it what It really is: a report into lesbian, gay, bisexual, transgender, gender diverse, intersex and queer experiences of domestic and family violence*, 2014, p 29, accessed 13/6/2023.
144 See Revised Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, p 42, accessed 14/6/2023.
145 AIHW, *People with disability in Australia*, Web report 2022, p 187, accessed 13/6/2023.
146 ibid.
147 AHRC, above n 17, p 16.
148 ibid.

Older women: see also Section 11

- Older women are significantly more likely than older men to be victims of elder abuse.[149]
- 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.[150]

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.[151]
- These women report fear that reporting violence would impact future visas and future work opportunities.[152]

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). [153]

Transgender women: *see also Section 9*

- Women who are transgender are highly likely to experience discrimination at work and from service providers.[154] Bullying and violence is also a major problem for transgender women.[155]

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. [156]

149 AIFS, *Elder abuse: understanding issues, frameworks and responses*, 2016, p 5, accessed 14/6/2023.
150 Australian Research Centre in Sex, Health and Society, *Norma's Project: a research study into the sexual assault of older women in Australia*, June 2014, p 16, accessed 14/6/2023.
151 AHRC, above n 17, p 16.
152 ibid, p 17.
153 L Szalacha et al, *Mental health, sexual identity, and interpersonal violence: findings from the Australian longitudinal women's health study*, BMC Women's Health, 2017, 17: 94.
154 PwC, *LGBTI perspectives on workplace inclusion*, 2016, p 5,accessed 14/6/2023.
155 ibid.
156 ABS, 3302.0.55.003 — *Life Tables for Aboriginal and Torres Strait Islander Australians*, 2015–2017, accessed 14/6/2023.

- The maternal mortality ratio for First Nations women between 2012 and 2017 was more than three times higher than for non-First Nations women.[157]
- First Nations women are 3.4 times more likely to experience sexual assault than non-First Nations women[158] 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).[159]
- 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.[160]

Indigenous women who are also carers experience "triple jeopardy": Indigenous, woman, carer. That is, the combination of these three aspects of their identity overlap to amplify their experiences of discrimination and exclusion at work.[161]

The Judicial Council on Diversity and Inclusion (JCDI) (formerly the Judicial Council on Cultural Diversity) produced the *National framework to improve accessibility to Australian courts for Aboriginal and Torres Strait Islander women and migrant and refugee women* ("the JCDI framework") in 2017 as a court-level response to intersectional discrimination. The JCDI 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".[162]

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

157 AIHW, *Maternal deaths in Australia,* November 2019, "Characteristics of women who died – maternal First Nations status", accessed 14/6/2023.

158 See www.indigenous.gov.au/news-and-media/announcements/ochre-ribbon-week-2020, accessed 14/6/2023.

159 BOCSAR, unpublished data 2018, supplied by the NSW Bureau of Crime Statistics in July 2019.

160 K Cripps and D Habbis, "Improving housing and service responses to domestic and family violence for Indigenous individuals and families", Final report No. 320, August 2019, accessed 14/6/2023. See also Judicial Council on Diversity and Inclusion (JCDI) (formerly the 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*, 2017, p 6, accessed 13/6/2023.

161 O Evans, "Gari Yala (speak the truth): gendered insights", WGEA Commissioned Research Report in partnership with the Jumbunna Institute of Education and Research and Diversity Council Australia, 2021, pp 3, 9, accessed 14/6/2023.

162 JCDI, above n 160, p 4.

disadvantaged" because that "will cater to all using the system".[163] 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".[164]

In terms of specific intersectional discrimination, the JCDI 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".[165] 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.[166]

Points to consider

Become familiar with the JCDI framework in specific courts, which may be accessed on the JCDI website.

Take up learning opportunities like the Cultural Diversity E-Learning course referenced in the JCDI framework.[167] This is also found on the Judicial Commission's website.

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.

163 ibid.
164 ibid p 6.
165 ibid.
166 ibid.
167 See Cultural Diversity E-Learning under "Training resources", accessed 14/6/2023.

7.5 Violence against women

7.5.1 Terminology and statistics

Last reviewed: June 2023

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. [168]

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".[169] It can include physical, sexual, emotional, psychological and financial abuse and violence. Violence includes attempted or threatened violence.[170] 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. [171]

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.[172] However, "domestic violence" is the term used in NSW case law and legislation.[173]

"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

168 United Nations General Assembly, *Declaration on the elimination of violence against women*, 1993, accessed 14/6/2023. See also F Leung and L Trimboli, "Improving police risk assessment of intimate partner violence", No 244, BOCSAR, February 2022; M Zaki, B Baylock and P Poletti, "Sentencing for domestic violence in the Local Court" (2022) 48 *Sentencing Trends & Issues*, accessed 14/6/2023.

169 AIHW, *Family, domestic and sexual violence in Australia: continuing the national story,* 2019, p 17, accessed 14/6/2023.

170 ABS, *4906.0 – Personal safety, Australia,* 2016, accessed 14/6/2023.

171 Some examples of behaviours used to define the concept of emotional abuse are found in ABS, *4906.0 — Personal safety*, ibid.

172 See J Hill, *See what you made me do: power, control and domestic violence*, Black Inc, 2019; "A Cottrell, "A core dysfunction in our society", *Kill Your Darlings*, 7/9/2019, accessed 25/4/2020.

173 See for example *Crimes (Domestic and Personal Violence) Act 2007* ss 4 and 5.

and control them, as well as to frighten them or hurt them physically".[174] It is through the framework of coercive control that an eight-stage progression towards domestic homicide has been identified.[175] See 7.5.3 **Coercive control**.

The term "**domestic violence offence**" is used in the legislation that regulates the system of apprehended violence orders in NSW.[176] 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".[177]

"**Family violence**" is used in some states and in family law.[178] It is "violent or intimidating behaviours against a person, perpetrated by a family member including a current or previous spouse or domestic partner".[179] It is also the term that is often preferred as more culturally appropriate in First Nations communities.[180] 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.[181] 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.

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

174 E Stark, "Re-presenting battered women: coercive control and the defense of liberty", paper presented at Violence Against Women: Complex Realities and New Issues in a Changing World, Les Presses de l'Université du Québec, 29 May–1 June 2011, accessed 13/6/2023. Stark was the first to use the term "coercive control" in E Stark, *Coercive control: how men entrap women in personal life*, OUP, 2007.

175 J Monckton-Smith, "Intimate partner femicide: using Foucauldian analysis to track an eight stage progression to homicide", 2019.

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

177 E Buxton-Namisnyk and A Butler, **"**What's language got to do with it? Learning from discourse, language and stereotyping in domestic violence homicide cases" (2017) 29 *Judicial Officers' Bulletin* 49 at 50.

178 ibid.

179 AIHW, above n 169, p 17.

180 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 169, p 17.

181 ibid.

prevent their perpetuation to the extent relevant in the courtroom. It is not easy for a woman to leave a violent person[182] — 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.[183] 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. 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.[184]

182 S Meyer, "Why women stay: a theoretical examination of rational choice and moral reasoning in the context of intimate partner violence" (2012) 45(2) *ANZJ Crim* 179.

183 For example, "Family violence myths and facts", Safe Steps Family Violence Response Centre, accessed 16/6/2023.

184 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*, 25/7/2020, accessed 16/6/2023.

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* (an online publication of the AIJA) has been created to complement the initiatives under the National Plan to Reduce Violence Against Women and their Children 2009–2022 ("National Plan").

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[185] and spikes with particular events, such as the grand final games of the various codes of football.[186]

Key statistics:

In NSW in 2021:[187]

- there was a total of 64,689 incidents of assault reported to police. Females were the victim in 48.3% (31,264) of the reported incidents. However, the majority (53%) of the reported assaults against females were perpetrated by a family member compared with 25% of males.[188]
- almost one third of homicide and related offences were related to family and domestic violence (26 victims).[189]
- most victims of family and domestic violence related assault were women (64.3%). An even larger proportion (85.3%) of family and domestic violence related sexual assault victims were women. Across Australia, women were also overwhelmingly (84.3%) the victims of family and domestic violence related kidnapping/abduction.[190]

185 See National Sexual Assault, Domestic Family Violence Counselling Service, accessed 16/6/2023.
186 P Hayes, "Bracing for violence on grand final day", *NewsGP*, 24/9/2019, accessed 16/6/2023.
187 ABS, *Recorded Crime – Victims*, 2021, released June 2022, accessed 16/6/2023.
188 ibid.
189 ibid.
190 ibid.

- in 2021–22, 76% of family and domestic violence offenders were male, with the male offender rate more than three times that of the female offender rate.[191]
- in 2022, most people being protected under an Apprehended Domestic Violence Order were female (around double the rate of males).[192]
- in 2020, 87% of women in custody in NSW had been the victim of abuse in either childhood or adulthood. Women in prison were at a higher risk of intimate partner violence and physical and emotional abuse than women in the general population.[193]
- trend data relating to domestic violence in NSW shows that over the five years prior to June 2022 there was a 2.6% increase in incidents of recorded domestic violence related assaults (28,720 over 12 months to June 2018 and 31,775 over 12 months to June 2022). The two-year trend, however, was stable.There was also a 9.3% increase in AVO breaches over the five years prior to June 2022 (a 5.8% increase over the two years prior).[194]
- Women's Domestic Violence Court Advocacy Services, funded by Legal Aid NSW, assisted more than 52,729 women in 2021–2022, up from 43,947 in 2017–2018 but relatively consistent with the numbers over the previous couple of years.[195]

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.[196] The proportion of women who experienced intimate partner violence decreased from 2.3% in 2016 to 1.5% in 2021–2022. The proportion of men who experienced intimate partner violence similarly dropped from 1.3% in 2016 to 0.6% in 2021–2022. Women continue to be far more likely than men to experience violence, emotional abuse and economic abuse by a cohabiting partner.[197]

Following public health orders implemented in NSW to curb the spread of COVID-19, figures from BOCSAR indicated that there was "no evidence of an increase in domestic violence related assault over the period from March 2020, through to December 2020 when restrictions ended".[198] However, evidence

191 ABS, *Recorded Crime – Offenders*, 2021–22 financial year, released February 2023, accessed 16/6/2023.
192 BOSCAR, *Domestic violence statistics for NSW*, "AVO statistics", January 2022–December 2022, accessed 16/6/2023.
193 Justice Health and Forensic Mental Health Network, *People in NSW public prisons: 2020 health status and service utilisation report*, November 2022, p 86, accessed 16/6/2023.
194 BOCSAR, *NSW recorded crime statistics,* quarterly update, June 2022, pp 9–10, accessed 16/6/2023.
195 Legal Aid NSW, *Annual Report 2021–2022*, p 67, accessed 16/6/2023.
196 ABS, *Personal Safety, Australia,* 2021–22 financial year, released 15/3/2023, accessed 16/6/2023. "Intimate partner" includes a cohabiting partner, non-cohabiting boyfriend/girlfriend or date, and ex-boyfriend/ex-girlfriend.
197 ibid.
198 BOCSAR, "Domestic violence in NSW in the wake of COVID-19: update to December 2020", June 2021, accessed 16/6/2023.

from domestic violence services indicated that lockdowns made seeking help for women challenging, with clients not coming forward because of safety concerns. Further, an AIC report[199] indicated that the pandemic coincided with the onset of domestic violence for many women. For other women, it coincided with an increase in the frequency or severity of ongoing violence or abuse.

For more information and statistics on domestic violence, see Judicial Commission of NSW, "Sentencing for domestic violence in the Local Court", *Sentencing Trends and Issues*, No 48, July 2022.

Domestic violence-related homicides[200]

There were 1683 homicide deaths[201] in total in NSW between July 2000 and June 2019 (1127 males, 555 females, 1 transgender person).[202] Of these:

- 31% occurred in a context of **domestic violence** (ie 530 deaths: 272 women, 155 men and 103 children)[203]
- 57% of homicides with a female victim were domestic violence (DV) related[204]
- 19% of homicides with a male victim were DV related[205]
- 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[206]
- 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[207]
- 36% of women were killed by a **former** intimate partner. Of these, 2/3 had ended the relationship within three months of being killed[208]
- 14% of women (32) and 26% of men (15) killed identified as Aboriginal.[209] The First Nations population is approximately 3% of the total NSW population, meaning Aboriginal people are highly overrepresented as IP homicide victims[210]

199 Australian Institute of Criminology, *The prevalence of domestic violence among women during COVID-19 pandemic*, Statistical Bulletin 28, July 2020, accessed 16/6/2023.
200 Data on domestic violence related deaths, including intimate partner homicides and relative/kin homicides, is sourced from the NSW Domestic Violence Death Review Team, *Report 2017–19*, accessed 16/6/2023.
201 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: ibid p xv.
202 ibid.
203 ibid p xv.
204 ibid p xv.
205 ibid p xv.
206 ibid.
207 ibid.
208 ibid.
209 ibid p 10.
210 ibid.

- 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.[211] 291 perpetrators (239 men (82%), 52 women (19%)) killed the 292 victims[212]
- 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)[213]
  - 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[214]
  - 82 perpetrators (68 men (83%), 14 women (17%)) killed the 84 adult homicide victims.[215]

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".[216] Being a woman is the biggest risk factor for becoming a victim of sexual assault and/or domestic and family violence.[217]

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.[218] The National Community Attitudes Survey 2017 (NCAS 2017)[219] found that the best predictors of a person's

211 ibid p xvi.
212 ibid p 8.
213 ibid p xvi.
214 ibid p 14.
215 ibid p 17.
216 National Council to Reduce Violence against Women and their Children, *Background paper to time for action: the national council's plan to reduce violence against women and their children, 2009–2021*, March 2009, p 29, accessed 16/6/2023
217 ibid p 26.
218 ANROWS, "National community attitudes towards violence against women", 2017, p 28, accessed 16/6/2023.
219 The survey is part of the of Council of Australian Governments, *The National Plan to reduce violence against women and their children 2010–2022*, accessed 16/6/2023 and is aligned with *Change the story: a shared framework for the primary prevention of violence against women and their children in Australia*: see www.anrows.org.au/NCAS/2017/about-the-survey/, accessed 16/6/2023.

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.[220]

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. [221] 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".[222] 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.[223]

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.[224]

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.[225]

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

220 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*, Research Report 03/2018, 2018, p 12 at https://d2rn9gno7zhxqg.cloudfront.net/wp-content/uploads/2019/12/05062144/anr001-NCAS-report-WEB-1019.pdf, accessed 11 September 2020.

221 ibid p 8.

222 K Webster, et al, *Attitudes towards violence against women and gender equality among people from non-English speaking countries: findings from the 2017 national community attitudes towards violence against women survey*, ANROWS Insights, Issue 02.2019, Sydney, p 8, accessed 16/6/2023.

223 *National Plan*, above n 219.

224 ibid p 17.

225 S Hulme, A Morgan and H Boxall, "Domestic violence offenders, prior offending and reoffending in Australia" (2019) 580 *Trends & issues in crime and criminal justice,* Australian Institute of Criminology, accessed 16/6/2023.

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 Hosseiniamraei*[226] 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

Last reviewed: June 2023

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, contradiction and extreme threat."[227]

Evan Stark devised the term "coercive control". He identified four key factors: violence, intimidation, isolation, and control.[228] Violence includes all types of punishment: emotional, psychological, sexual, and physical. Intimidation involves threats including emotional blackmail, menacing behaviours, vows to harm or ruin the victim or loved ones. Isolation involves actions that make it difficult or impossible for victims to maintain relationships with others. Control

226 [2016] NSWSC 1181 at [52] per RA Hulme J.

227 J Hill, "Patriarchy and power: how socialisation underpins abusive behaviour", *The Guardian*, 8/3/2020, accessed 16/6/2023.

228 E Stark, *Coercive control: how men entrap women in personal life*, Oxford University Press, 2007.

includes loss of agency by the victim over every aspect of life through strict rules and demands. It includes close monitoring and surveillance through means such as scrutinising devices or installing stalker apps.

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.[229] It is sometimes called "intimate terrorism"[230] and some victims have described it as the "worst part" of their experience of domestic violence.[231]

Common behaviours by perpetrators of coercive control against their victim include:[232]

- isolating their victim from friends and family, eg controlling and preventing access to them, and convincing their victim that their loved ones hate them[233]
- 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)[234]
- making threats (eg to kill their victim, themselves, their children or pets)[235] or intimidation
- gaslighting, ie emotionally abusing and manipulating "forcing them to question their thoughts, memories, and the events occurring around them."[236]

229 This "mental dislocation" has been described by Amnesty International as "torture": J Hill, above n 227.
230 H Gleeson, "Coercive control: the 'worst part' of domestic abuse is not a crime in Australia. But should it be?", updated 19/11/2019, *ABC News*, accessed 16/6/2023.
231 J Hill, above n 227. See also H Gleeson, ibid.
232 Unless otherwise specified, this list is adapted from Women's Aid UK webpage, "What is coercive control?", accessed 16/6/2023.
233 C Lamothe, "How to recognise coercive control", *Healthline*, 10/10/2019, accessed 12/6/2010.
234 Examples cited from research into media reporting of coercive control offences in the UK by a Deakin University academic described in above n 230.
235 ibid.
236 S York Morris, "How to recognise gaslighting and get help", *Healthline*, 31/3/2017, accessed 16/6/2023.

> 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.[237]

- reinforcing traditional gender roles[238]
- where there are children, turning children against the other parent[239]

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.[240] It is difficult and dangerous to leave situations of coercive control and domestic violence. A 2021 study[241] found that women who had experienced coercive control were unlikely to seek help from formal or informal sources if they had not also experienced physical/sexual forms of abuse.

Overall, the experiences reported by women highlight the complexity of describing coercive control and the need to avoid over-generalisations about what constitutes domestic violence. The evidentiary challenge with the use of the term "coercive control" is that the definition of associated behaviours is "deeply contextual".[242] The term offers a more detailed definition of domestic violence. It does not inform how coercively controlled relationships are created, how they are maintained, or why it can be so difficult for victims to exit.[243] Without that understanding, new laws may provide an opportunity for perpetrators to continue their repertoire of controlling behaviours.[244]

An eight-stage progression through coercive control to intimate partner homicide has been identified.[245] This research highlights the extent to which such homicides are planned and that they may be the first acts of physical violence.

See also NSW Domestic Violence Death Review Team *Report 2019/2021*[246] for examples of case studies of coercive control resulting in homicide.

237 ibid.
238 above n 233.
239 ibid.
240 C Gill and M Aspinall, *Understanding coercive control in the context of intimate partner violence in Canada: how to address the issue through the criminal justice system*, Research paper, Office of the Federal Ombudsman for Victims of Crime, 20/4/2020, accessed 16/6/2023.
241 H Boxall and A Morgan, "Experiences of coercive control among Australian women", AIC Statistical Bulletin 30, March 2021, accessed 16/6/2023.
242 NSW Government, "Coercive control discussion paper", October 2020, p 8, accessed 16/6/2023.
243 above n 241.
244 H Douglas, "Legal systems abuse and coercive control" (2018) *Criminology and Criminal Justice* 84, accessed 16/6/2023. See also D McMillan, "Criminalising coercive control: a complex discussion" (2021) 33 *JOB* 57.
245 J Monckton-Smith, above n 175.
246 NSW Domestic Violence Death Review Team, *Report 2019/2021*, 2022, pp 122–125, accessed 9/6/2023.

NSW is the first of the Australian States and territories to implement a stand-alone offence for coercive control through the *Crimes Legislation Amendment (Coercive Control) Act 2022* (assented to 23/11/2022), which will commence in mid-2024. The Act followed recommendations of a NSW Parliamentary Joint Select Committee report, *Coercive Control in domestic relationships*, Report 1/57, June 2021, that coercive control be criminalised on the basis that current laws do not provide adequate protection for victims.

The Act amends the *Crimes Act 1900* to create a new offence relating to abusive behaviour towards intimate partners (both current and former). It also amends the *Crimes (Domestic and Personal Violence) Act 2007* to provide a new definition of domestic abuse that takes into account elements that are often at the core of coercive control including financially abusive behaviour (s 6A(c)), verbally abusive, degrading and intimidating behaviour (s 6A(d)–(f)), stalking (s 6A(g)), and acts causing a person to be isolated such as preventing a person from keeping connections with their family, friends or culture (s 6A(j)). The Act's lengthy implementation period of between 14 and 19 months is designed to allow time for resourcing, education, training and raising community awareness.[247]

Queensland Parliament passed the Domestic and Family Violence Protection (Combating Control) and other Legislation Amendment Bill 2022 in February 2023 which, through measures such as broadening the definition of domestic and family violence, responds to the recommendations of the Women's Safety and Justice Taskforce and is designed to lay the foundation for a standalone offence of coercive control later in 2023.[248] Some aspects of coercive control are already illegal in Tasmania.[249]

For further background to this offence, see D McMillan, "Criminalising coercive control: a complex discussion" (2021) 33(6) *JOB* 57.

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".[250] The term includes behaviours such as:

- sending abusive text messages or emails
- making continuous threatening phone calls

247 NSW Government, *NSW passes landmark coercive control reform*, media release, 16/11/2022, accessed 16/6/2023.

248 Queensland Government, *First stage in legislating against coercive control passes Parliament*, media release, 22/2/2023, accessed 13/6/2023. See also reports 1 and 2 of the Women's Safety and Justice Taskforce, accessed 13/6/2023.

249 See *Family Violence Act 2004* (Tas), ss 8, 9.

250 eSafety Commissioner, "Domestic and family violence", accessed 16/6/2023.

- 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.[251]

Specific examples of harassing and abusive behaviours that are enabled by technology include: [252]

- **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.[253] 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.[254] 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. [255]

251 ibid.
252 eSafety Commissioner, "Online abuse targeting women", accessed 16/6/2023.
253 M Bromberg, "The devil you know is not better — the non-consensual distribution of intimate images and sentencing", (2020) 44 *Crim LJ* 173.
254 Sections 91Q and 91R *Crimes Act 1900*.
255 Section 91N *Crimes Act 1900*; see also s 9B, *Enhancing Online Safety Act 2015* (Cth).

A 2017 national survey[256] conducted by the Office of the Safety Commissioner found that while one in 10 online adult Australians have experienced their nude/sexual image being shared without their consent, women, younger adults, Indigenous Australians and those who identify as LGBTI are more likely to be the targets of online image-based abuse.

The survey found that:[257]

- Women are twice as likely to have their nude/sexual images shared without consent than men.
- Women are more likely to experience image-based abuse at the hands of a former intimate partner than men.
- Women are considerably more likely to report negative personal impacts as a result of image-based abuse.
- Experiences of stalking or threatening behaviour are higher amongst women than men, especially amongst young women aged 18–34 years.

Rectification orders are now available under s 91S of the *Crimes* Act 1900. Where a court finds a person guilty of an offence of recording or distributing an intimate image without consent under ss 91P and 91Q of that Act, the court can make a rectification order requiring the person to take reasonable actions to remove, retract, recover, delete or destroy any intimate image recorded or distributed by the person.[258]

- **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
- **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[259]

256 Office of the eSafety Commissioner, "Image-based abuse. National survey: summary report", October 2017, p 2, accessed 16/6/2023.
257 ibid.
258 Section 91S was inserted into the *Crimes Act 1900* by Act 31 of 2020, Sch 1.4 commencing 27 October 2020.
259 above n 252.

- **virtual mobbing** and **dog-piling**: when online users are encouraged en masse to incite hatred and harass individuals [260]
- **baiting**: humiliating people online by labelling them as sexually promiscuous[261]
- **spamming**: sending multiple junk email or viruses to others.[262]

Text messages, Facebook, and GPS tracking of smartphones are the most common means of harassment and abuse in situations of domestic violence.[263]

A key function of the eSafety Commissioner established by the *Online Safety Act 2021* (Cth) is to administer a complaints system for cyber-bullying material targeted at an Australian child; a complaints system for cyber-abuse material targeted at an Australian adult; complaints and objections system for non-consensual sharing of intimate images and an online content scheme.[264]

260 *Equal Treatment Bench Book* (UK), February 2018 (March 2020 revision), p 147, accessed 16/6/2023.
261 ibid.
262 ibid.
263 D Woodlock, *ReCharge: women's technology safety, legal resources, research and training*, 2015, Women's Legal Service NSW, Domestic Violence Resource Centre Victoria and WESNET, Collingwood, p 20, accessed 16/6/2023.
264 Explanatory Memoranda, Online Safety Bill, pp 1-2, accessed 16/6/2023.

Online abuse and harassment is gendered: women experience more of it in all forms and predominantly from men[265]

Women and girls are more likely to be targets of online abuse in all its forms.[266] Although both men and women experience online harassment and abuse, women are more likely to experience sexual harassment online. [267] Men are harassed and abused online by other men and women in equal proportion. Women are harassed and abused online almost exclusively by men.[268]

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.[269] 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 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.[270]

Technology-facilitated domestic violence

Domestic and family violence perpetrators commonly use technology such as phones and other devices as a weapon to control and entrap victims and survivors, alongside other forms of abuse. A 2022 Report[271] found that technological abuse occurred in relationships and that it continued and often escalated post-separation. These harms could be enacted using physical devices (phones, computers, tablets, GPS trackers), virtual or electronic accounts (such as social media profiles, email accounts, consumer accounts or institutional or employment portals) or software or platforms. The Report found that access to these channels may be achieved through force, coercion, deception or stealth.

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

265 eSafety Commissioner, "Know the facts about women online", accessed 16/6/2023.
266 ibid.
267 A Powell and N Henry, *Digital harassment and abuse of adult Australians: a summary report,* RMIT University, 2015, p 1, accessed 16/6/2023.
268 ibid.
269 D Woodlock, above n 263.
270 AHRC, above n 17, p 17.
271 B Harris and D Woodlock, "Spaceless violence: women's experiences of technology-facilitated domestic violence in regional, rural and remote areas", *Trends & Issues in crime and criminal justice*, No 644, February 2022, accessed 16/6/2023.

women and their children, and to better support those most at risk. The Committee published its report on 1 April 2021[272] and was advised that the Government's response to the report would be provided after the finalisation of the next National Plan to reduce violence against women and their children.[273]

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".[274] 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.[275]

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.[276] The health problems reported included problems with urination, painful periods, genital inflammation and irritation, sexual and fertility problems, chronic pain and psychological problems.[277] 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.

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.[278]

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

272 *Inquiry into family, domestic and sexual violence,* accessed 16/6/2023.
273 The Draft National Plan to end violence against women and children 2022–2032 closed on 25/2/2022. The draft can be accessed at https://engage.dss.gov.au/draft-national-plan-to-end-violence-against-women-and-children-2022-2032/, accessed 16/6/2023.
274 WHO, "Eliminating female genital mutilation: the imperative" *OHCHR, UNAIDS, UNDP, UNCEA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM*, 2008.
275 WHO, "Female genital mutilation", 3/2/2020, accessed 16/6/2023.
276 AIHW, "Discussion of female genital mutilation/cutting data in Australia", 2019, accessed 16/6/2023.
277 ibid p 10.
278 Sections 45 and 45A, *Crimes Act 1900*.

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.*[279] 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. Section 45(3) provides limited defences to FGM practices on medical grounds.[280]

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.[281] 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.[282]

7.5.6 Sexual assault

Last reviewed: June 2023

Prevalence

In NSW in 2021, there were 11,546 recorded victims of sexual assault, the highest number that has been recorded for the offence over the 29-year time series. Four in five victims were female and 49% of these women were between 10 and 17 years of age.[283] Most assaults took place at a residential location (65%) and less than 1% involved the use of a weapon.[284] The rate of sexual assault recorded by NSW Police has been increasing with an average annual rate of 3.4% over the five years to June 2022.[285]

Sexual assault and domestic violence are often inter-related. In 2021, 83% of all sexual assault victims knew the offender and around 41% of sexual assault incidents were family and domestic violence related.[286] The term "intimate partner sexual violence" is sometimes used to specifically describe the perpetration of sexual acts without consent:[287] see also **Domestic violence** at 7.5.2.

279 [2019] HCA 35 at [13], [37], [44]; [155]; [165], [174].
280 *The Queen v A2* at [58], [67]; [158]. See also, *A2 v R; Magennis v R; Vaziri v R* [2020] NSWCCA 7.
281 S Johnsdotter and B Essén, "Cultural change after migration: circumcision of girls in western migrant communities" (2016) 32 *Best Pract Res Clin Obstet Gyneacol* 15.
282 WHO, above n 274, p 12.
283 ABS, *Recorded crime — victims*, Australia, 2021, released July 2022, accessed 16/6/2023.
284 ibid.
285 BOCSAR, *NSW recorded crime statistics quarterly update*, June 2022, p 10, accessed 13/6/2023.
286 ABS, above n 283.
287 ANROWS, *Intimate partner sexual violence: research synthesis*, 2019, 2nd ed, p 1, accessed 16/6/2023.

Like domestic violence, sexual assault is under-reported. In 2021 only 65% of persons who experienced sexual assault had reported the incident to the police within a year.[288]

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 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

288 ABS, above n 283.

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, 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 2022

The NSW Attorney General referred to the NSW Law Reform Commission (NSWLRC) a review of s 61HA of the *Crimes Act 1900* partly as a result of the two NSWCCA decisions in 2016 and 2017.[289] Following the NSWLRC inquiry, legislation to change the law of consent in NSW commenced in June 2022 and made three significant changes:

- it altered the definition of consent in the *Crimes Act*;
- it altered the circumstances in which knowledge of the absence of consent is demonstrated by specifying that the accused's belief in consent will not be reasonable unless the accused says or does something to ascertain whether the other person consents to the particular sexual activity; and
- it introduced into ss 292A to 292E of the *Criminal Procedure Act 1986* (CPA) five directions about consent to address the potential impact on a jury of misconceptions about the way complainants conduct themselves in the context of an alleged sexual assault.

In addition, changes have been made which concern other aspects of the evidence given by a complainant in a sexual assault trial.[290] These provisions reflect the evolution in understanding of a complainant's possible ranges of behaviour, both during and following a sexual assault, and the trauma-informed approach which is increasingly taken to their evidence.

For a comprehensive summary of the changes, see P Mizzi and R Beech-Jones, "The law on consent is changing" (2022) 34(1) *JOB* 1.

7.5.7 Incels and manosphere-related misogynist violence

The "manosphere" is an umbrella term referring to a number of interconnected misogynistic communities online. It encompasses multiple types and degrees of misogyny — from broader male supremacist discourse to men's rights activism and "involuntary celibates" (Incels).[291]

MRAs, or Men's Rights Activists, believe that men are being victimised by employment and family law, among other things. Incels believe that all men deserve to have sex with women on demand and without regard for women's interest or preference.[292]

289 *Lazarus v R* [2016] NSWCCA 52 and *R v Lazarus* [2017] NSWCCA 279.
290 See ss 293A, 294, and 294AA of the *Criminal Procedure Act 1986*.
291 Institute for Strategic Dialogue & McCain Institute, "The threat landscape: incel and misogynist violent extremism", accessed 16/6/2023.
292 Anti-defamation League, "Where women are the enemy: the intersection of misogyny and white supremacy", ADL Centre on Extremism, p 6. See also the University of Exeter, "Rewriting the representation of women in society", 21/2/2022, accessed 16/6/2023.

Incel forums are overwhelmingly male-dominated and rife with misogyny that ranges in severity from broader generalisations of women to pro-rape discourse. Violent Incel discourse and propaganda is now readily available across fringe platforms like 4chan and 8Kun, as well as more mainstream sites like Reddit. Also prevalent are sites created by Incels for Incels, many of which remain online despite incitements to and glorification of violence present throughout.[293]

See "The Threat Landscape"[294] for key narratives and terminology related to the manosphere.

7.6 Women and criminal law

7.6.1 Female offenders

Last reviewed: June 2023

- Social and economic dependence, linked to violent and abusive relationships and addiction, often characterises the contact of women with the criminal justice system.[295]
- Around 70 to 90% of women in custody have experienced violence and abuse and women become trapped in cycles of abuse and imprisonment.[296]
- There is growing evidence that at least half of female perpetrated domestic violence occurs in circumstances where the woman is the person most in need of protection but has been misidentified as an aggressor.[297]
- There are significantly fewer female offenders in NSW than male offenders: 25% of NSW offenders proceeded against by police in 2021–2022 were female.[298]
- 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 2021–2022, only 34.4% of Legal Aid clients in NSW were female.[299]
- Between December 2021 and December 2022, the First Nations female custody population made up 38% of the adult women population (315 out

293 above n 291.
294 ibid.
295 Sydney Community Foundation, *Keeping women out of prison — position statement*, September 2016, p 4, accessed 16/6/2023.
296 ANROWS, *Women's imprisonment and domestic, family, and sexual violence: research synthesis*, ANROWS Insights, 03/2020, accessed 16/6/2023.
297 H Boxall, C Dowling and A Morgan, "Female perpetrated domestic violence: prevalence of self-defensive and retaliatory behaviour", *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology No 584, January 2020, accessed 16/6/2023; J Mansour, *Women defendants to AVOs: what is their experience of the justice system*, Women's Legal Service NSW, March 2014, accessed 16/6/2023.
298 ABS, above n 191.
299 Legal Aid NSW, *Annual report 2021–2022,* pp 26, 40 and 46, accessed 13/6/2023.

of 827), despite the First Nations population making up less than 3% of the Australian population. First Nations female prisoners also increased by 7.9%.[300]

- The gender breakdown of the most serious offences committed by inmates in full-time custody in NSW in 2021 was as follows:[301]
  - acts intended to cause injury: 3,248 men (26.5% of male prison population); 221 women (25.4% of female prison population)
  - illicit drug offences: 1,863 men (15.2%); 146 women (16.8%)
  - sexual assault and related offences: 2,169 men (17.7%); 41 women (4.7%)
  - offences against justice procedures: 1,212 men (9.9%); 85 women (9.8%)
  - fraud, deception and related offences: 224 men (1.8%); 69 women (7.9%)
- The gender breakdown of security level for inmates in full-time custody (convicted and unconvicted) in NSW in 2021 was as follows:[302]
  - maximum security: 28.2% (3,461) male inmates, 1.5% (13) of female inmates
  - medium security: 27.7% (3,399) male inmates, 20.1% (175) of female inmates
  - minimum security: 39.8% (4,878) male inmates, 66.4% (578) of female inmates

Experience of mental health of women in custody:

- A higher proportion of women (52.4%) had received some form of previous treatment for a mental health problem than men (45.8%).[303]
- A higher proportion of women reported:
  - having attempted suicide (13.1% of women, 11.5% of men).[304]
  - having engaged in self-harming behaviour (18.8% of women, 11.6% of men).[305]
- A history of mental health diagnosis was acknowledged by almost half of participants, of which the most common reported diagnoses were depression

300 BOCSAR, *NSW custody statistics — quarterly update*, December 2022, published February 2023, accessed 13/6/2023.
301 H Tang and S Corben, *NSW inmate census 2021: summary of characteristics*, Statistical Publication No 49, September 2020, p 6, accessed 13/6/2023.
302 ibid p 9.
303 Justice Health and Forensic Mental Health Network, *People in NSW public prisons: 2020 health status and service utilisation report*, November 2022, p 41, accessed 14/6/2023.
304 ibid p 47.
305 ibid p 45.

(58.3% of women, 48.5% of men), anxiety and schizophrenia. According to Kessler 10 criteria (a screening tool for psychological distress), moderate to severe distress was more prevalent among women (36.4%) than men (28.8%).[306]

- In the four weeks before entering custody, 60.6% of women (compared to 52% of men) reported drug use. A higher proportion of women also reported smoking (75.9% of women compared to 68.5% of men).[307]

Childhood experiences of women in custody[308]

A higher proportion of women (23.9% of the prison population) than men (13.6%) reported they had been placed in care at some time before the age of 16. 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,[309] with 87% of women in prison reporting to have been victims of abuse in either childhood or adulthood.[310] 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.[311]

Education experiences of women in custody[312]

- 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[313]

306 ibid pp 44, 40.
307 ibid pp 56, 50.
308 Justice Health and Forensic Mental Health Network, *Network patient health survey report 2015*, May 2017, p 24, accessed 14/6/2023.
309 M Stathopoulos and A Quadara, *Women as offenders, women as victims: the role of corrections in supporting women with histories of sexual abuse*, A report for the Women's Advisory Council of Corrective Services NSW, 2014, accessed 16/6/2023.
310 *People in NSW public prisons,* above n 303, p 86.
311 Australian Law Reform Commission, *Pathways to justice: Inquiry into the incarceration rates of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, 28/3/2018, accessed 16/6/2023.
312 *Network patient health survey report 2015*, above n 308, p 26.
313 ibid p 27.

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.[314]

314 A Symonds, "Children of prisoners" (2009) 21(3) *JOB* 24; E Stanley and S Byrne, "Mothers in prison: coping with separation from children", paper presented at the Women in Corrections: Staff and Clients Conference, convened by the Australian Institute of Criminology in conjunction with the Department for Correctional Services (SA), 31 October–1 November 2000, Adelaide, accessed 14/6/2023; A Larson, "Gendering criminal law: sentencing a mothering person with dependent children to a term of imprisonment" (2012) 1 *Australian Journal of Gender and Law*, accessed 14/6/2023.

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.[315]

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.[316]

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.[317]

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.[318] 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.[319]

Points to consider

The potential relevance of evidence of the incarceration of an offender's mother, father or caregiver in sentencing proceedings includes an

315 D Kenny, *Meeting the needs of children of incarcerated mothers: the application of attachment theory to policy and programming*, Consultant Report prepared for the Department of Corrective Services (NSW), October 2012, p 2, accessed 16/6/2023.

316 ibid p 5.

317 See *Bugmy Bar Book*, "Incarceration of a parent or caregiver", Executive summary, 2019, accessed 16/6/2023.

318 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 programs: final report,* 2016, p 3, accessed 14/6/2023.

319 Corrective Services NSW Mothers and Children's Program, accessed 31 August 2020 and *Diversionary programs* on JIRS. See also J Walker, E Baldry and E Sullivan, "Residential programmes for mothers and children in prison: key themes and concepts", *Criminology & Criminal Justice*, 2019, accessed 16/6/2023.

> 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**."[320]

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 Court-based and other diversionary programs menu which may be accessed from the JIRS homepage on the left hand menu bar. See also *Sentencing Bench Book* at [3-500]ff.

The most common penalties imposed on female offenders by the NSW Local Court over the three-year period from January 2020 to December 2022 were fines (42.3%), Community Correction Orders (16.5%) and Conditional Release Orders without conviction (16%), compared with male offenders: fines (42.9%), Community Correction Orders (18.4%) and Conditional Release Orders without conviction (11.4%).[321]

320 *Bugmy Bar Book*, above n 317.

321 Unpublished data from the Judicial Commission of NSW. These figures are overall figures and do not take into account the effect of sentencing factors on the penalties imposed.

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].

Chapter 6, Pt 4B of the *Criminal Procedure Act 1986* provides that a complainant in domestic violence proceedings may give evidence by alternative means. This includes:

– giving evidence in chief in the form of a recording: s 289F

– the giving of evidence by audio visual link or other technology: s 289V

– the use of a court appointed questioner (CAQ), or through the use of court technology where a defendant is not represented by an Australian legal practitioner, a complainant in domestic violence offence proceedings cannot be directly examined by the defendant, s 289VA See further **[8-000]** Evidence by domestic violence complainants in the *Local Court Bench Book*.

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.[322]

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[323] and/or self defence[324] 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 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).[325]

322 E Buxton-Namisnyk and A Butler, above n 177 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 Alaattinoğlu (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.

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

324 ibid at [6-450].

325 See further ibid at [6-440].

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.[326]

Section 61HJ(1)(a) of the *Crimes Act 1900* (NSW) has been introduced to address the "freeze" response where a person may not physically or verbally resist an assault.[327]

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.[328] **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.[329] 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)*

326 There have been cases in Victoria and ACT where the "freeze response" has been used as expert evidence in sexual assault cases, see *R v Hakimi* [2012] ACTSC 11. See also K Marson, "Jury convinced by expert evidence on 'freeze flight' response in rape victims", *Sydney Morning Herald*, 6/4/2014, accessed 16/6/2023; Meaning of consent at 7.3.1.1 in the *Victorian Criminal Charge Book*, Judicial College of Victoria; NSWLRC, Consent in relation to sexual offences, Draft proposals, 2019, accessed 16/6/2023.

327 Inserted by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021*, commenced 1 June 2022. This was addressed in recommendation 6.35 of the NSWLRC, *Consent in relation to sexual offences*, Report No 148, 2020. This addresses "a long-standing misconception that a person who does not consent will usually, if not always, offer physical or verbal resistance".

328 *Criminal Procedure Act 1986*s 294B(7).

329 *Criminal Procedure Act 1986* s 293 and *Evidence Act 1995* s 41(1)(d).

v R[330] 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.[331]

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).

7.8 Further information or help

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

Name of organisation and contact details	Description
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.

330 [2020] NSWCCA 150 at [15]. Note that a further appeal has been made to the High Court on this issue.

331 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 1986* 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.

Name of organisation and contact details	Description
Department of Communities and Justice ***Crisis lines*** Web: www.dcj.nsw.gov.au/contact-us/helplines.html Domestic Violence Line: 1800 656 463 Web: https://dcj.nsw.gov.au/children-and-families/family-domestic-and-sexual-violence.html Link2home Homelessness: 1800 152 152 Web: www.facs.nsw.gov.au/housing/help/ways/are-you-homeless 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.
Department of Communities and Justice ***LawAccess NSW*** Law Access: 1300 888 529 Web: www.lawaccess.nsw.gov.au	**LawAccess NSW** is a free government telephone service that provides legal information, advice and referrals for people who have a legal problem in NSW. Open business hours: Monday to Friday, 9am to 5pm (excluding public holidays)
Department of Communities and Justice ***Victim Services*** Victims Access Line (VAL): 1800 633 063 Aboriginal Contact Line: 1800 019 123 Web: www.victimsservices.justice.nsw.gov.au	**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. Open business hours: Monday to Friday, 9am to 5pm (excluding public holidays)

Name of organisation and contact details	Description
Family Violence Law Help Web: familyviolencelaw.gov.au	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.
Full Stop Australia Web: www.fullstop.org.au	**Full Stop Australia** offers trauma specialist counselling and support, education and advocacy for people affected by sexual, domestic or family violence.
Legal Aid NSW Client referrals and enquiries: sacps@legalaid.nsw.gov.au	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.
National Family Violence Prevention Legal Services (FVPLS) National Family Violence Prevention Legal Services Secretariat C/o Djirra, 292 Hoddle Street, Abbotsford VIC 3067 Ph: (03) 9244 3333 Email: secretariat@fvpls.org Web: www.nationalfvpls.org Individual locations: Web: www.nationalfvpls.org/Where-We-Are.php Web: www.nationalfvpls.org/Contact-Us.php	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. **National Family Violence Prevention Legal Services Forum** 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.

Name of organisation and contact details	Description
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.
NSW Sexual Violence Helpline NSW Sexual Violence Helpline: 1800 424 017 Sexual Abuse and Redress Support Service: 1800 211 028 Sexual, Domestic and Family Violence Helpline: 1800 943 539 Rainbow Sexual, Domestic and Family Violence Helpline: 1800 497 212 Web: https://whnsw.asn.au/faqconc/131/	Telephone and online counselling services for anyone affected by sexual assault in NSW. 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.
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.
Staying Home Leaving Violence program Department of Communities and Justice Ph: 1800 656 463 (DV hotline) Web: https://www.facs.nsw.gov.au/	The program works in cooperation with NSW Police to remove the perpetrator (the violent partner) from the family home. Other support includes safety planning, help in managing finances, support for children, and assistance with complicated legal processes.

Name of organisation and contact details	Description
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 Domestic Violence Court Advocacy Program (WDVCAS) – Legal Aid NSW Phone: 1800 938 227 Web: www.legalaid.nsw.gov.au/about-us/our-partners/womens-domestic-violence-court-advocacy-program	WDVCASs provide women victims of domestic and family violence with information, support through the court process, safety planning, case management, referrals to other local services, and access to safety action meetings. There are 27 WDVCASs throughout NSW – a list of the locations can be found on the website.
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** 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.

Name of organisation and contact details	Description
Women's Safety NSW PO Box K278, Haymarket NSW 1240 Phone: 0474 779 847 (for media, policy practice and law reform) Web: www.womenssafetynsw.org.au/	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.

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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 15 contains information about how to send us your feedback.

[The next page is 8101]

Section 8

Lesbians, gay men and bisexuals

Purpose of this chapter

Approximately one in 20 or 4.5% of the population aged 16 and over Australia-wide identify as LGBTQIA+. The purpose of this section and **Section 9** are to:

- highlight for judicial officers some common misconceptions made about the LGBTQIA + community, provide some explanations and terminology and discuss how they may impact access to justice, 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

8.1 Some statistics[1]

Last reviewed: April 2025

- LGBTIQA+ people are not a homogenous population. Each group in the acronym has unique needs and experiences as does each individual in the group. There may also be intersectionality in that a transgender person may also be gay.[2]
- **Proportion of the population — There are few reliable statistics on the number of LGBTQIA+ people resident in NSW.** In 2022, the Australian

1 Unless otherwise indicated, these statistics are drawn from information on the Twenty10 incorporating Gay and Lesbian Counselling Service's website, accessed 26/3/2025.
2 NSW Health, *NSW LGBTIQ+ Health Strategy 2022–2027*, p 12, accessed 18/3/2025.

Bureau of Statistics (ABS) conducted a health survey in which people were asked about their sexual orientation. Based on the responses of nearly 45,000 people, the ABS estimates that 4.5% of the adult population, ie over 16, Australia-wide identify as LGBTQIA+. Identification varied by age with a higher rate of 10% in the 16–24 age group.[3]

- **Discrimination** — There is little doubt that LGBTQIA+ people are discriminated against more than heterosexuals and cisgender people. Only in 1973, the Australian Medical Association removed homosexuality from its list of illnesses and disorders. In 1992, the Australian Defence Force removed a ban on military service by gays and lesbians.[4] In 2023–2024, 27.9% of all complaints, the second highest group, to the Anti-Discrimination Board of NSW consisted of "other discrimination" which included "transgender, homosexuality … homosexual vilification, transgender vilification".[5]

  Discrimination has a negative effect on the health and productivity of LGBTQIA+ people. The NSW LGBTIQ+ Health Strategy 2022–2027 identified significantly poor health and wellbeing outcomes for LGBTQIA + people in NSW due to chronic exposure to discrimination and stigma.[6] The statistics show increased mental health problems, including depression, anxiety disorders, self-harm and suicide, suicidal ideation due to discrimination, stigma and abuse.[7]

  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 LGBTQIA+ rights in Australia. On 9 December 2017, the main amendments to the *Marriage Act 1961* by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) commenced to legalise same-sex marriage in Australia.[8]

  See further **8.3.3 Legal protections**.

- **Verbal abuse, intimidation and violence** — the LGBTQIA+ community experiences much greater levels of verbal abuse and violence than

3 Australian Bureau of Statistics, "Estimates and characteristics of LGBTI+ populations in Australia", 19/12/2024, accessed 18/3/2025.
4 NSW Health, *NSW LGBTIQ+ Health Strategy 2022–2027*, 2022, p 4, accessed 18/3/2025.
5 Anti-Discrimination Board of NSW, *Annual Report 2023–24*, p 17, accessed 31/3/2025.
6 NSW Health, *NSW LGBTIQ+ Health Strategy 2022–2027*, 2022, p 12, accessed 18/3/2025.
7 W Leonard, et al, *Private Lives 2: The Second National Survey of the Health and Wellbeing of GLBT Australians*, Australian Research Centre in Sex, Health & Society, accessed 18/3/2025.
8 Schedule 1, Pts 1 and 2 of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) commenced 9/12/2017.

heterosexuals or cisgendered people. Many LGBTQIA+ people remain reluctant to report verbal abuse or violence for a variety of reasons, including fear of a homophobic or transphobic response, fear of "outing" themselves, fear of a distressing investigation process, a belief that little can be done, and concerns about privacy and security.[9]

Amendments to the *Crimes (Personal and Domestic Violence) Act 2007* (NSW) (CPDV Act), commenced 1 December 2024, include "outing" as conduct that may amount to harassment which is included in the definition of intimidation for the purposes of obtaining a protection order under s 7 CPDV Act. See further **8.3.3 Legal protections**.

In a 2021 Report,[10] the NSW Legislative Council's Standing Committee on Social Issues noted that there were 79 incidents of hate crime reported over the past 12 months by LGBTQIA+ people. This accounts for 16% of all recorded hate crime involvements, events and information received by police. There is also significant underreporting of such incidents. The Committee also noted a trend of increased violence and harassment experienced by LGBTQIA+ people, and poorer health outcomes experienced as a result.[11]

- **Sackar Special Commission of Inquiry into LGBTIQ hate crimes**

  Violent assaults on the LGBTQIA+ community, colloquially known as "gay bashings" in Sydney between 1970 and 2010, were the subject of a Special Commission of Inquiry (Commissioner, the Hon John Sackar) announced by the NSW Government in late 2021 and finalised in December 2023. This was established following a recommendation of the NSW Legislative Council's Standing Committee on Social Issues Final Report into Gay and Transgender Hate Crimes.[12]

  The inquiry investigated 34 suspicious deaths or unsolved murders of LGBTQIA+ people in this period, particularly young gay men, and made 19 recommendations, including holding fresh inquests into the deaths of several men. The report highlighted deficiencies in police investigations and the "shameful homophobia, transphobia and prejudice" in society and within the NSW Police Force.[13] The report recommends additional mandatory and ongoing training be provided to NSWPF officers concerning the LGBTQIA+

9 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, pp xi, 23.

10 NSW Legislative Council Standing Committee on Social Issues, *Final Report into Gay and Transgender Hate Crimes between 1970 and 2010*, Report 58, May 2021, p 48 accessed 27/3/2025.

11 ibid, p 51.

12 J Sackar, *Special Commission of Inquiry into LGBTIQ hate crimes*, 18 December 2023, accessed 18/3/2025.

13 ibid, Vol 1, p 2.

community about the indicia of LGBTQIA+ bias crime, cultural awareness, trauma-informed communication with family and loved ones of victims, and the role of conscious and unconscious bias.[14]

- **Family support** — some in the LGBTQIA+ community have lost touch with their families and/or previous friends after "coming out". Some people leave school (see under "education" below) and home due to lack of support.
- **Health** — surveys conducted during the development of the NSW LGBTIQ+ Health Strategy revealed lower self-ratings of health and wellbeing for LGBTIQ+ people, compared to the general population.[15]These health outcomes are directly related to experiences of stigma, prejudice, discrimination and abuse on the basis of being LGBTQIA+.[16]
- **Suicide attempts and ideation and self-harm of young people** — national statistics show that 16% of LGBTQIA+ young people reported that they had attempted suicide or had suicidal ideation (thoughts) with those who experience abuse and harassment even more likely to make a suicide attempt. Equally, 15.4% of LGBTQIA+ young people reported that they had current thoughts of suicide in the last two weeks. 33% reported having self-harmed and 41% had thoughts of harming themselves.[17]

  LGBTQIA+ people have an increased risk of depression and anxiety, substance abuse, self-harming and suicidal thoughts.[18] Two-thirds of LGBTQIA+ people in NSW have experienced a mental health condition; 25% experience suicidal thoughts and almost 1 in 10 had self-harmed.
- **"Coming out"** — some people take much longer to "come out" than others. Some never fully "come out". Some have had heterosexual relationships before coming out. Others have never had any heterosexual sexual experience.
- **Self-censorship** — because of the discrimination that LGBTQIA+ people often experience, many are not completely open or "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

14 J Sackar, *Special Commission of Inquiry into LGBTIQ hate crimes*, 18 December 2023, Recommendation 8, Vol 1, p 42. See also Recommendations 15(a) and 19(a), accessed 18/3/2025.

15 NSW Health, *NSW LGBTIQ+ Health Strategy 2022-2027*, 2022, p 12, accessed 18/3/2025.

16 LGBTIQ+ Health Australia, "Snapshot of mental health and suicide prevention statistics for LGBTIQ+ people", 13 May 2021, accessed 27/3/2025.

17 LGBTIQ+ Health Australia, "Snapshot of Mental health and suicide prevention statistics for LGBTI people", July 2016, accessed 27/3/2025. See further LGBTIQ+ Health Australia, "Snapshot of mental health and suicide prevention statistics for LGBTIQ+ people", accessed 27/3/2025 for a 2021 update which breaks down the percentage based on LGBTQIA+, transgender and gender diverse statistics, comparing them to the general population.

18 Beyond Blue, "LGBTIQ+ mental health", accessed 27/3/2025.

in public.[19] This is likely to be even more the case in a formal setting such as a court. Some people 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.[20]

- **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.[21]

  There are connections between early school leaving, poor educational attainment and homophobic bullying.[22]

  Around 10% of young Australians experience same-sex attraction, most realising this around puberty. They may be more likely to experience bullying at school and/or greater difficulty connecting with others. In an Australian study, 61% of young non-heterosexual people reported experiencing verbal abuse and 18% reported physical abuse.[23]
- **Children** — an increasing number of LGBTQIA+ 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]
- **Regional, rural and remote communities** — the issues faced by LGBTQIA + people in rural and regional communities are often heightened. There may often be limited or no access to a "community" — "an identified, visible group of LGBTQIA+ people coming together". "So those issues around homophobia and visibility can be more acute in regional and rural areas. So if you are a victim of violence or harassment then those issues about reporting just become magnified for those communities".[25]
- **In all other respects** — people in the LGBTQIA+ community are as diverse as any other people in relation to their level of education, employment status,

19 A Chapman, "Sexuality and workplace oppression" (1995) 20 *MULR* 311, p 315; Supreme Court of Queensland, *Equal Treatment Benchbook*, 2nd edn, 2016–, p 247.

20 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: Australian Bureau of Statistics, *Couples in Australia, 4102.0 — Australian Social Trends*, July 2013, accessed 27/3/2025.

21 M Kaye, "Skool's Out" (2007) 15(1) *Teaching Education*.

22 Department of Education and Communities, *Formative evaluation of the NSW Proud Schools Pilot: Stage 2, Final Report*, 2014.

23 K Robinson et al, "Growing up queer: issues facing young Australians who are gender variant and sexuality diverse", Young and Well Cooperative Research Centre, 2014, p V.

24 J Millbank, *Meet the parents: a review of the research on lesbian and gay families*, Gay and Lesbian Rights Lobby, 2002, accessed 27/3/2025.

25 NSW Legislative Council Standing Committee on Social Issues, *Final Report into Gay and Transgender Hate Crimes between 1970 and 2010*, Report 58, May 2021, p 52, accessed 31/3/2025.

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 heath, criminality etc. Their sexuality is simply one (albeit important) facet of their make up.

8.2 Some information

8.2.1 Common misconceptions

Last reviewed: April 2025

There are many stereotypes and false assumptions made about people in the LGBTQIA+ community. 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 never be made about a person's sexuality based on their actions, appearance or behaviour.
- **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.
- **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.[26] In addition, men who sexually abuse boys aged under 18 "are not necessarily homosexual. They are sexually attracted to children".[27]
- **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.
- **Lesbians, gay men and bisexuals could choose to be heterosexual** — note that since 4 April 2025, conversion practices are banned in NSW. See further **8.3 Legal protections**.
- **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

26 MR Stevenson, "Public policy, homosexuality and the sexual coercion of children" (2000) 12(4) *Journal of Psychology & Human Sexuality* 1–19.

27 B Adair, "Child sexual assault" (1996) 8(5) *JOB* 33 at 33.

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"[28] — 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.

8.2.2 Explanations and terminology

Last reviewed: April 2025

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**.

"**LGBTQIA+**" refers collectively to people who are lesbian, gay, bisexual, transgender, intersex, asexual and/or queer. See also **Section 9**.

8.2.2.2 Gay

"Gay" is a term mostly used to describe men whose primary emotional and sexual attraction is towards other men. However, it can be used to describe both men and women who are attracted towards people of the same sex.[29] 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".

28 Supreme Court of Queensland, *Equal Treatment Benchbook*, 2nd edn, 2016–, p 250.
29 Beyond blue, "Statistics", accessed 27/3/2025.

8.2.2.3 Lesbianism and lesbian

A lesbian is a woman whose primary emotional and sexual attraction is towards another woman.[30] "**Lesbianism**" (as opposed to "homosexuality") and "**lesbian**" as opposed to "homosexual" or "gay", are preferred terms.

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"**.

People 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 relationship between two people of the same sex.

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.

30 ibid.

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 may 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 insulting unless you identify as such, or have been given specific permission to use the particular term.

8.3 Legal protections and recognition

8.3.1 Age of consent

Last reviewed: April 2025

The age of consent in NSW is now the same for everyone, whether heterosexual, bisexual, lesbian or gay — that is, 16 years.[31]

8.3.2 Same-sex relationships

Last reviewed: April 2025

The definition of "marriage" in the *Marriage Act 1961* (Cth) excluded same-sex unions until 2017. 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* by the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) commenced to legalise same-sex marriage:[32] see **8.1** for further discussion of the Australian Marriage Postal Survey.

31 *Crimes Act 1900* (NSW), s 66C.

32 *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), Sch 1, Pts 1 and 2, commenced on 9 December 2017.

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*.[33]

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.[34]
- 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.[35] The *Family Law Act 1975* (Cth) recognises same-sex couples as parents.[36] In some cases, the courts have held that contrary to the intentions of the same-sex couple or express agreements with another, a person who has donated sperm is a parent in the circumstances of the case. In *Masson v Parsons*,[37] where the appellant provided semen to the respondent (who was in a same-sex relationship), so that she could conceive a child through artificial insemination, the High Court determined that the appellant was a parent of his daughter, and that s 60H of the *Family Law Act*, which provides rules in relation to parentage of children born via artificial conception procedures, is not exhaustive of the persons who may qualify as a parent of a child born as a result of an artificial conception procedure. The appellant had provided his semen to facilitate the artificial conception of his daughter on the express

33 ibid, Sch 1, Pt 1, cl 58.
34 *Family Law Act 1975* (Cth), s 4AA(2).
35 *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.
36 *Family Law Act 1975* s 18 as amended by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth). 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.
37 *Masson v Parsons* (2019) 266 CLR 554.

or implied understanding that he would be the child's parent; that he would be registered on her birth certificate as her parent; and that he would, as her parent, support and care for her, as since her birth, he has done. To characterise the appellant as a "sperm donor" was in effect to ignore all but one of the facts and circumstances which, in this case, have been held to be determinative.[38] See also *ND v BM*[39] where a lesbian couple had an express agreement with a man that he was to be a sperm donor with no legal rights or liabilities. The Family Court held that the fact that the pregnancy was achieved through sex rather than assisted conception meant that the legal presumption of parental status applied, regardless of the intentions of all concerned to the contrary.

- 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.[40]

8.3.3 Legal protections

Last reviewed: April 2025

8.3.3.1 Historical context

Decriminalisation

South Australia was the first Australian State to decriminalise homosexuality in November 1976. While NSW passed anti-discrimination laws protecting homosexual people in 1982,[41] decriminalisation did not occur until the *Crimes (Amendment) Act 1984* (NSW) was passed in 1984. This amended ss 79 and 80 *Crimes Act 1900* (NSW) and omitted references to "buggery". This meant that in NSW, for two years, homosexuality was not a ground for dismissal from employment but was a ground for potential incarceration.

38 ibid, [54].
39 *ND v BM* [2003] FamCA 469.
40 H Robert and F Kelly, "The legal benefits of being married", La Trobe University, 21 September 2017, accessed 27/3/2025.
41 *Anti-Discrimination Act 1977* (NSW), Pt 4C, assented 12/12/1982.

Former homosexual advance defence/homosexual panic defence

Formerly, the use of the so-called "homosexual advance defence" and "homosexual panic defence"[42] 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 provocation, but it has since been removed in every Australian jurisdiction as a result of legal reform. The defence has not been available in NSW since 13 June 2014. Section 23(3) *Crimes Act 1900* 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.[43]

There remains a partial defence of extreme provocation under s 23 *Crimes Act 1900*, commenced 13 June 2014. See **Notes — extreme provocation** at [6-444] *Criminal Trial Courts Bench Book*.

8.3.3.2 Current protections

State protections

Anti-Discrimination Act 1977 (NSW)

Anti-discrimination laws proscribing discrimination on the ground of homosexuality were first passed in NSW in Pt 4C *Anti-Discrimination Act 1977*.[44] Direct and indirect discrimination on the ground of homosexuality is defined in s 49ZG(1) as when the perpetrator:

(a) treats an aggrieved person or their relative or associate less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who he or she did not think was a homosexual person or who does not have such a relative or associate who he or she thinks is a homosexual person, or

(b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are not homosexual

42 Although no such defence exists at law, the term "homosexual advance defence" is used to describe those "cases in which criminal defendants have claimed they acted either in self-defence or under provocation when committing acts of violence against homosexual men who had made sexual advances towards them": J Keane, *Sentenced homicides in New South Wales 1994–2001*, Research Monograph 23, Judicial Commission of NSW, January 2004, p 98. The term "homosexual panic defence" is used to describe the uncontrollably violent response of a person to a homosexual advance and operates as "some form of insanity or diminished capacity defence": Criminal Law Review Division, *Homosexual advance defence: final report of the Working Party*, 1998, at [2.2], accessed 25/2/2025. As to the pre-13/6/2014 position see: *Green v The Queen* (1997) 191 CLR 334. In this case, the High Court "upheld the view that the defence of provocation may be available to a person who kills in response to a non-violent homosexual advance": Supreme Court of Queensland, *Equal Treatment Benchbook*, p 254 — but see Kirby J's powerful dissenting view in this case and similar comments by McPherson JA in *R v Irving* [2004] QCA 305. See also I Potas, "Sexuality-related hate crime" (2004) 16(3) *JOB* 18.

43 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2nd edn, 2002–, [6-440].

44 *Anti-Discrimination Act 1977* (NSW), assented 12/12/1982.

> persons, or who do not have a relative or associate who is a homosexual person, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case.

Protections against discrimination on the ground of homosexuality occur in areas including work,[45] education,[46] provision of goods and services[47] accommodation[48] and the provision of access or benefits by registered clubs.[49]

Homosexual vilification is proscribed by s 49ZT which makes it unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group. A public act is defined in s 49ZS to include any form of communication to the public, any conduct observable by the public and the distribution of any matter to the public.

Vilification on the grounds of being HIV/AIDS infected or thought to be HIV/AIDS infected is proscribed by s 49ZXB. This makes it unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group. A public act is defined in s 49ZXA to include any form of communication to the public, any conduct observable by the public and the distribution of any matter to the public.

Crimes (Personal and Domestic Violence) Act 2007 (NSW)

The *Equality Legislation Amendment (LGBTIQA+) Act 2024* (NSW) amended a number of Acts to modernise laws and advance equality of LGBTQIA+ persons.

Schedule 3[50] amended s 7 *Crimes (Personal and Domestic Violence) Act 2007* (meaning of intimidation) to insert an example of conduct that may amount to harassment, including intentionally disclosing or threatening to disclose without a person's consent the person's sexual orientation: s 7(1)(a).

Crimes (Sentencing Procedure) Act 1999 (NSW)

Section 21A(2) *Crimes (Sentencing Procedure) Act 1999* provides that an aggravating factor the court must take into account in determining the appropriate sentence for an offence includes where the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged including people of a particular sexual orientation: s 21A(2)(h). See also **8.3.3 Legal protections**.

45 *Anti-Discrimination Act 1977* (NSW), Div 2.
46 *Anti-Discrimination Act 1977* (NSW), s 49ZO.
47 *Anti-Discrimination Act 1977* (NSW), s 49ZP.
48 *Anti-Discrimination Act 1977* (NSW), s 49ZQ.
49 *Anti-Discrimination Act 1977* (NSW), s 49ZR.
50 Commenced 1/12/2024.

Conversion Practices Ban Act 2024 (NSW)

The *Conversion Practices Ban Act 2024*[51] makes it an offence to engage in conversion practices with the intention of changing or suppressing an individual's sexual orientation or gender identity. The Act also establishes a civil complaints scheme to provide avenues and processes for redress for individuals and representative bodies if they have a complaint under the Act. The civil process provides for the Anti-Discrimination Board to deal with reports through education, mediation and in cases of serious or systemic practices, through orders enforced by NCAT.

Section 5 creates an offence with a maximum penalty of 5 years in relation to conversion practices when substantial mental or physical harm is caused to the individual that endangers their life. Section 6 creates an offence with a maximum penalty of 3 years or 100 penalty units or both of taking individuals from NSW or engaging a person outside NSW for conversion practice to a person in NSW.

Federal protections

Criminal Code Act 1995 (Cth)

Groups that are distinguished by sexual orientation are protected groups for the purposes of "hate crimes" offences in the *Criminal Code Act 1995*, Ch 5, Div 80.

Offences in Ch 5, Div 80, Subdiv C proscribe certain offences against a targeted group and members of targeted groups. A member of a targeted group is distinguished by sex, sexual orientation, gender identity, intersex status and disability. Offences include:

- advocating force or violence against a targeted group: s 80.2A
- advocating force or violence against members of targeted groups or close associates: s 80.2B
- threatening force or violence against targeted groups: s 80.2BA
- threatening force or violence against members of targeted groups or close associates: s 80.2BB
- advocating damage to or destruction of real property or motor vehicle owned or occupied by a member or close associate of a targeted group and being reckless as to whether the damage or destruction will occur: s 80.2BC, and
- threatening damage to or destruction of real property or motor vehicle owned or occupied by a member of a targeted group or close associate: s 80.2BD.

51 Assented to 3/4/2024, commenced 4/4/2025.

The fault element for each offence is whether the person who advocates the use of force or violence does so reckless as to whether force or violence will occur.[52] See also **8.3.3 Legal protections**.

Sex Discrimination Act 1984 (Cth)

The Australian Human Rights Commission (AHRC) 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.[53] In 2013, the *Sex Discrimination Act 1984* (Cth) was amended by inserting s 5A.[54] This provision makes it unlawful to discriminate directly against a person on the basis of sexual orientation under federal law.[55] Indirect discrimination is subject to the reasonableness test in s 7B. Same-sex couples are protected from discrimination under the amended definition of "marital or relationship status" which incorporates the definition from s 2F *Acts Interpretation Act 1901* (Cth).

These amendments[56] 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.[57] A complaint mechanism is available through the AHRC if someone has been discriminated against on the basis of their sexuality or gender status.[58]

8.4 The possible impact of a person's sexual orientation and/or gender in court

Last reviewed: April 2025

The discrimination and abuse that many LGBTQIA+ people 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.

52 Recklessness was introduced as the fault element by the *Criminal Code Amendment (Hate Crimes) Act 2025*, commenced 8/2/2025.

53 The final consultation report was released in 2011: AHRC, *Addressing sexual orientation and sex and/or gender identity discrimination*, Consultation report, 2011, accessed 28/2/2025.

54 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth). Protections for same-sex relationships were also introduced in 2008 *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008* (Cth).

55 *Sex Discrimination Act 1984* (Cth), s 5A(1), (2).

56 Second Reading Speech, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Commonwealth, House of Representatives, *Debates*, 21/3/2013, p 2893.

57 AHRC, "New protection against discrimination on the basis of sexual orientation, gender identity and intersex status", 1/8/2013, accessed 25/2/2025.

58 See AHRC, "Complaints under the Sex Discrimination Act: sexual orientation", accessed 25/2/2025.

In addition, unless appropriate account is taken of any needs specific to their sexuality and/or gender, LGBTQIA+ 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 First Nations, from an ethnic or migrant background, a young person, female, transgender, 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 LGBTQIA+ people, 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

LGBTQIA+ people must be accorded the same dignity and respect as anyone else.

Points to consider:

Apologise if an initial mistake has been made about a person's gender or identity. It is always preferable to confirm pronouns and pronunciation of names before a hearing commences.

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.[59]

8.5.2 Language and terminology

Last reviewed: April 2025

Points to consider:

The Supreme Court and District Court of NSW have issued practice notes about pronunciation of names and forms of address of individuals in proceedings. Supreme Court Practice Note SC Gen 22[60] and District Court General Practice Note 1[61] provide guidance about when in the proceedings information regarding pronunciation and forms of address may be provided at [4].

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 person. It is always best to check with the particular person first — see also **8.2.2** above.

59 Note that *Evidence Act 1995* (NSW), s 41 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, the manner and form of questioning of witnesses, and *Evidence Act 1995*, s 135(b) allows you to exclude any evidence that is unfairly prejudicial to a party or is misleading or confusing.

60 Commenced 22/4/2024.

61 Commenced 27/5/2024.

Do not use stereotypes about LGBTQIA+ people or any form of discriminatory 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.[62]

8.5.3 The impact of a person's sexual orientation on any behaviour relevant to the matter(s) before the court

Last reviewed: April 2025

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 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.**[63]
- **Be mindful of the fact that LGBTQIA+ people can be victims of domestic and intimate partner violence, in just the same way that heterosexual and cisgender people can.** A national demographic and health and wellbeing survey found significant levels of intimate partner violence in LGBTQIA+ communities.[64]
- **As prescribed by law, intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any particular allegedly sexuality-determined difference.**[65]

Has the fact that the person is LGBTQIA+, 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

62 above, n 59.
63 ibid.
64 M Campo and S Tayton, "Intimate partner violence in lesbian, gay, bisexual, trans, intersex and queer communities", December 2015, Australian Institute of Family Studies, December 2015, accessed 31/3/2025.
65 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2nd edn, 2002–, at [6-440].

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

Last reviewed: April 2025

As indicated at various points in **8.5**, it is important that you ensure that the jury does not allow any bias, stereotyped or false assumptions 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*[66] or *Local Courts Bench Book* (as appropriate), and you should raise any such points with the parties' legal representatives first.[67]

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. 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 LGBTQIA+ people 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

66 Judicial Commission of NSW, *Criminal Trial Courts Bench Book,* 2nd edn, 2002–.
67 Judicial Commission of NSW, *Local Courts Bench Book*, 1988–.

guidance on any legal limitations that exist in relation to them taking full account of any of these matters. And you may also need to be more specific about the particular sexuality aspects that they need to pay attention to.

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

Last reviewed: April 2025

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 person affected by or referred to in your sentencing, decision and/or written judgment or decision.[68]

Points to consider:

In order to ensure that any person 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.[69]

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.[70]

68 See also Judicial Commission NSW, *Sentencing Bench Book*, 2006–, at [1-000], and *R v Henry* (1999) 46 NSWLR 346 at [10]–[11].

69 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.

70 *Crimes (Sentencing Procedure) Act 1999* (NSW), s 30A.

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.

8.6 Further information or help

Last reviewed: April 2025

Organisations that can provide information or expertise about lesbianism, homosexuality or bisexuality or related issues, are:

Inner City Legal Centre
(Includes Gay and Lesbian Advice Service)
Street Address:
Basement, Kings Cross Library
50–52 Darlinghurst Rd
Kings Cross NSW 2011

Postal Address:
PO Box 25
Potts Point NSW 1335
Phone: 02 9332 1966

Equality Australia
Email: info@equalityaustralia.org.au

8.7 Further reading

Australian Bureau of Statistics, *Year Book Australia*, 2012, ABS Cat No 1301.0, 2012.

Australian Bureau of Statistics, *Couples in Australia, 4102.0 — Australian Social Trends*, July 2013, accessed 31/3/2025.

Anti-Discrimination Board of NSW, *Annual Reports*, accessed 31/3/2025.

Australian Medical Association, *LGBTQIASB+ Health Position Statement*, 2023, accessed 31/3/2025.

M Flood and C Hamilton, *Mapping homophobia in Australia*, Australia Institute Webpaper, 2005, accessed 31/3/2025.

Twenty10 incorporating Gay and Lesbian Counselling Service, accessed 31/3/2025.

R Graycar and J Morgan, *The hidden gender of law*, 2nd ed, The Federation Press, 2002.

Judicial Studies Board, *Equal Treatment Bench Book*, 3rd edn, 2013, Pt 12, "Sexual orientation", accessed 31/3/2025.

J Millbank, *Meet the parents: a review of the research on lesbian and gay families*, 2002, accessed 31/3/2025.

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, p 235.

MR Stevenson, "Public policy, homosexuality and the sexual coercion of children" (2000) 12(4) *Journal of Psychology & Human Sexuality* at 1–19.

Supreme Court of Queensland, *Equal Treatment Benchbook*, 2016, "Chapter 15: Gender Identity and Sexual Orientation", accessed 31/3/2025.

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 15 contains information about how to send us your feedback.

[The next page is 9101]

Section 9

Gender diverse people and people born with diverse sex characteristics

Purpose of this chapter

In NSW, medically and legally, a person may identify and be recognised within the community as a gender other than that recorded on their original birth certificate, or as a gender which is not exclusively male or female. The purpose of this chapter is to:

- highlight some issues including discrimination affecting transgender and gender diverse people, and those faced by people born with diverse sex characteristics (intersex people) and address some common misconceptions concerning them; and
- provide guidance about how judicial officers may take account of this information if relevant in court — from the start to the conclusion of court proceedings. This guidance is not intended to be prescriptive.

Contents

9.1 Introduction

LGBTIQA+ people are not a homogenous population. Each group in the acronym has unique needs and experiences as does each individual in the group. There may also be intersectionality in that a transgender person may also be gay.[1]

1 NSW LGBTIQ+ Health Strategy 2022–2027, p 12, accessed 18/3/2025.

When communicating with a person in the courtroom, best practice is to check how they identify and the mode of address including the pronouns they prefer: see further at **9.6**.

9.1.1 Explanations and terminology — gender, transgender and non-binary people[2]

Last reviewed: April 2025

Gender identity refers to how someone conceptualises their gender. This identity may be distinguishable from a person's sexual orientation and sex assigned at birth.[3] When a person's sex assigned at birth aligns with their gender identity, they may be referred to as being "cisgender".[4] Gender may also be conceptualised as falling on a spectrum rather than being binary oppositions.[5]

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.

Section 38A *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".[6]

2 The information in 9.1.1 is drawn from The Gender Centre's website, accessed 26/3/2025.
3 Medical News Today, "What does nonbinary mean?", accessed 26/3/2025.
4 ibid.
5 ibid.
6 Gender Centre website, "Family support services: helpful information", accessed 24/3/2025.

"Non-binary" is an umbrella term that refers to someone who does not identify as exclusively a man or a woman. Someone who is non-binary may have a strong sense of their gender without identifying as a man or a woman,[7] or that they have no gender at all.[8]

"Non-binary" may also be used interchangeably with terms such as agender, androgynous, genderqueer, bigender, multigender, genderneutral, gender fluid and ceterosexual.[9]

9.1.2 Male-to-female (MtF) and female-to-male (FtM)

Last reviewed: April 2025

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 person has taken, or wants to undertake to affirm their gender.

The terms "**male-to-female transgender person**" and "**female-to-male transgender 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

Last reviewed: April 2025

The term "**cross-dresser**"[10] describes a person (typically a male) who occasionally wears clothes, makeup and accessories culturally associated with the opposite sex rather than someone who believes that their gender identity is different to their assigned gender.

Cross-dressing is not done for entertainment purposes (therefore a man who performs in drag as a drag queen is not a cross-dresser) but is a form of gender expression.

Some cross-dressers are gay or lesbian and some are heterosexual. Transgender women should never be referred to as cross-dressers.

7 above n 3.
8 See LGBTIQ+ Health Australia, "International non-binary people's day", 13/7/2021, accessed 26/3/2025.
9 above n 3.
10 GLAAD, "Glossary of terms: transgender", *GLAAD media reference guide*, 11th ed, accessed 26/3/2025.

9.1.4 Other terms

Last reviewed: April 2025

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

"**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. Unlike "transgender", "transsexual" is not an umbrella term. This term can be considered offensive and should only be used if someone describes themself as transsexual.[11]

9.2 Transgender and gender diverse people[12]

9.2.1 Some information

Last reviewed: April 2025

- The 2016 Census included a question on gender for the first time. It reported that 1260 people in Australia identified as "sex and/or gender diverse". The 2021 Census was the first time that respondents could choose between three sexes: male, female and non-binary. The decision not to include more questions on variations in sex characteristics or gender was roundly criticised by academics, demographers and policy bodies, with the ABS admitting that the addition of the non-binary category "did not yield meaningful data" as "the concept of non-binary sex was not consistently understood and was perceived in different ways by different people".[13]
- **The general community is starting to recognise the fact of gender diversity and the existence of greater numbers of people who are transgender or gender diverse** 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 people are male to female (MtF) or female to male (FtM).**[14] Most members of the general community are less aware of people who have changed or wish

11 New York State Office of Mental Health, *Language matters: gender*, accessed 24/3/2025.

12 The information in **9.2** is drawn from The Gender Centre's website, accessed 24/3//2025.

13 SBS, "Agency behind Australian census admits there was a problem with 'non-binary' question", *SBS News*, 30/9/2022, accessed 24/3/2025.

14 However note that in a 2017–2018 peer reviewed survey of transgender Australian adults, almost equal thirds of the 928 participants had female, male, and non-binary identities (37%, 36% and 27%): I Bretherton et al, "The health and well-being of transgender Australians: a national community survey" (2021) 8(1) *LGBT Health* 42, accessed 24/3/2025.

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.

- **People with, or perceived as having, gender issues are some of the most discriminated against and marginalised people in Australian society.**[15] 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 19% of transgender people are unemployed (three times that of the Australian unemployment rate in May 2018 of 5.5%)**[16] — 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.[17]
  - **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.
  - **Many have lost touch with their families and/or previous friends** in the process of expressing their desired gender identity, although others, for example, have kept and are actively supported by the same partner throughout their gender identity change, and/or have maintained or managed to re-establish their family relationships.
  - **Many have been victims of violence** — there is limited Australian research that records the level of domestic and family violence in LGBTIQ + relationships. However, transgender and gender diverse individuals may suffer from an even greater burden of intimate partner violence than gay or lesbian individuals. Transgender victims of intimate partner violence

15 See the statistics in I Bretherton et al, above n 14.
16 ibid.
17 JM Grant, L Mottet, et al, *Injustice at every turn: A report of the National Transgender Discrimination Survey*, Washington: The National Gay and Lesbian Task Force and the National Center for Transgender Equality, 2011.

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.[18] Other aspects of LGBTIQ+ violence include threatening to "out" the person as a method of control; not allowing the person to form relationships and seek support within the LGBTIQ+ community and a feeling of embarrassment about the abuse leading to limited reporting to police or health professionals.[19] 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".[20]

– **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,[21] with the most common place of abuse (80%) being at school.[22] Gender diverse young people usually experience high levels of anxiety, depression or gender dysphoria. This has a profound impact on their well-being, attendance and educational outcomes.[23]

– **Many have experienced, or continue to experience, greater than average levels of depression, drug and alcohol abuse and general ill health, and, as a result, there are relatively high levels of criminality within this community.**[24] The NSW LGBTIQ+ Health Strategy 2022–2027 reports high levels of distress and adverse impacts on mental health due to experiences of transphobia, discrimination, social

18 See NCADV, "Domestic violence and the LGBTQ community", 6 June 2018, accessed 24/3/2025.

19 Inner City Legal Centre, *Another Closet*, LGBTIQ Domestic Violence Interagency and ACON, 2014, p 13; also Another closet website, accessed 24/3/2025.

20 Supreme Court of Queensland, *Equal Treatment Benchbook*, 2005, Supreme Court of Queensland Library, Brisbane, p 252. For research on transgender women's experiences of sexual violence, with a focus on culturally and linguistically diverse trans women, see J Ussher et al, *Crossing the line: lived experience of sexual violence among trans women of colour from culturally and linguistically diverse (CALD) backgrounds in Australia*, ANROWS research report, issue 14, June 2020, accessed 24/3/2025.

21 I Bretherton et al, above n 14: 63% of participants had experienced verbal abuse and 22% had been physically assaulted because of their transgender status.

22 L Hillier et al, *Writing themselves in 3*, 2010, La Trobe University, Melbourne.

23 NSW LGBTIQ+ Health Strategy 2022–2027, p 41, accessed 18/3/2025; E Smith et al, "From blues to rainbows: the mental health needs of gender diverse and transgender young people in Australia", The Australian Research Centre in Sex, Health, and Society, Melbourne, 2014, accessed 26/3/2025.

24 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.

stressors and isolation.[25] 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.[26]

- **General health outcomes are poorer compared to the general population.** The NSW LGBTIQ+ Health Strategy 2022–2027 reports that 86% of the general population rate their health as excellent, very good or good compared to 50% of the transgender and gender diverse population.[27]
- **Compared to the general population, transgender and gender diverse people are more likely to have thoughts of suicide** — LGBTIQA+ people aged 18 and over are over 18 times more likely. Transgender and gender diverse people aged 14–25 are 15 times more likely to attempt suicide than the general population.[28]
- **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 LGBTIQA + people. A report found that 90% of those identifying as transgender or gender diverse had experienced some form of discriminatory behaviour in the workplace.[29] Transgender people report that they commonly experience discrimination in the workplace, including in both gaining and maintaining employment. [30]

25 NSW LGBTIQ+ Health Strategy 2022–2027, p 12, accessed 18/3/2025.
26 E Smith et al, above n 23. See also I Bretherton et al, above n 14.
27 NSW LGBTIQ+ Health Strategy 2022–2027, p 13, accessed 18/3/2025.
28 See LGBTIQ+ Health Australia, "Snapshot of mental health and suicide prevention statistics for LGBTIQ + people", October 2021, pp 3 and 11, accessed 24/3/2025.
29 PwC, *LGBTI perspectives on workplace inclusion*, 2016, p 5, accessed 24/3/2025.
30 In I Bretherton et al, above n 14, 33% of participants reported discrimination in employment as a result of being transgender.

Transgender people also report discrimination in accessing health care,[31] including sexual health care and education.[32]

9.2.2 Common misconceptions[33]

Last reviewed: April 2025

There are many stereotypes applied and false assumptions made about people who are transgender or gender diverse 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 not the same as 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 **8.1** 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 reality, a person assigned a male gender who now identifies as female might or

31 I Bretherton et al, above n 14, 26% of participants reported discrimination in accessing health care.
32 Kirby Institute, *The 2018 Australian trans and gender diverse sexual health survey: report of findings*, 2018, accessed 24/3/2025.
33 The information in **9.2.2** is drawn from The Gender Centre's website, accessed 24/3/2025.

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 with their assigned gender.[34] Given the huge and often adverse 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

9.3.1 Some information[35]

Last reviewed: April 2025

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, which do not fit the typical definitions of male or female."[36]

Other terms use to describe intersex status are "Differences in (or of) sex development" (DSD), "Disorders of sex development", "Variations in sex characteristics" (VSC) and "Diverse sex development".[37]

"**Intersex status**" is defined separately from gender identity in s 4 of the *Sex Discrimination Act 1984* (Cth), 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.[38]

Intersex variations may be regarded by medicine and in the Family Court's welfare jurisdiction as "sexual development disorders"[39] or "disorders of sex

34 Note the debate about definitions of sex and gender diversity at 4.1 of Australian Human Rights Commission, "Sex files: the legal recognition of sex in documents and government records", 2009, accessed 24/3/2025.

35 For information on intersex people, see InterAction for Health and Human Rights website, which brought together Intersex Peer Support Australia and Intersex Human Rights Australia, and is the leading national body by and for people with innate variations of sex characteristics.

36 United Nations Human Rights, Office of the High Commissioner, "Definitions", accessed 24/3/2025.

37 NHS, "Differences in sex development", last reviewed 16/3/2023, accessed 24/3/2025; GLAAD, "In focus: intersex people", *GLAAD media reference guide*, 11th edn, accessed 24/3/2025.

38 See "Parliament of Australia, Involuntary or coerced sterilisation of intersex people in Australia", Second Report, Parliament of Australia, Ch 1, October 2013, accessed 24/3/2025.

39 See *Re Carla* [2016] FamCA 7.

development", while the law may regard intersex people as "hermaphrodites",[40] or members of a third sex, and so disregard the person's lifelong legal sex. These contradictions are the subject of criticism[41] 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.

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.[42] 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.[43]

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.[44]

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.[45] Given that some people with genital ambiguity do not require medical treatment

40 *Tien-Lao & Tien-Lao* [2018] FamCA 953 at [53] and [55].

41 M Carpenter, "The 'normalisation' of intersex bodies and 'othering' of intersex identities" in J Scherpe, A Dutta and T Helms (eds) *The legal status of intersex persons*, September 2018, pp 445–514; M Carpenter, "The 'normalisation' of intersex bodies and 'othering' of intersex identities in Australia" (2018) 15(4) *Journal of Bioethical Inquiry* at 487–495.

42 See further M Carpenter, "Intersex health — Morgan Carpenter's presentation to Health in Difference Conference", 22/4/2013, accessed 24/3/2025.

43 ibid.

44 See Australian Human Rights Commission, "Protecting the human rights of people born with variations in sex characteristics in the context of medical interventions", accessed 24/3/2025.

45 ibid.

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.[46]

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.[47] Numbers are vague, not only due to diagnostic challenges and the growing impact of genetic selection,[48] 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".[49]

A 2015 Australian study[50] 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.[51]

General health outcomes are poorer. The NSW LGBTIQ+ Health Strategy 2022–2027 reports that 86% of the general population rate their health as excellent, very good or good compared to only 41% of the intersex population.[52]

Compared to the general population people with an intersex variation are more likely to have thoughts of suicide.[53] 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.[54]

46 See further, M Carpenter, "The human rights of intersex people: addressing harmful practices and rhetoric of change" (2016) 24(47) *Reproductive Health Matters* 74; F Kelly and M Smith, "Should court authorisation be required for surgery on intersex children? A critique of the family court decision in Re Carla" (2017) 31(2) *Australian Journal of Family Law* 118; A Kennedy, "Fixed at birth: medical and legal erasures of intersex variations" (2016) 39(2) *UNSW Law Journal* 813, accessed 24/3/2025.

47 M Carpenter, "The human rights of intersex people addressing harmful practise and rhetoric of change", ibid, quoting United Nations, Office of the High Commissioner for Human Rights, "Free & Equal Campaign Fact Sheet: Intersex", 2015, accessed 24/3/2025.

48 Intersex Australia, M Carpenter, "Submission on the Review of Part B of the Ethical Guidelines for the Use of Assisted Reproductive Technology in Clinical Practice and Research , 2007", Sydney, 29/4/2014, accessed 24/3/2025.

49 ibid.

50 See T Jones, "The needs of students with intersex variations" (2016) 16(6) *Sexuality, Society and Learning* 602.

51 ibid.

52 NSW LGBTIQ+ Health Strategy 2022–2027, p 13, accessed 18/3/2025.

53 People aged 16 or over with an intersex variation are over are nearly five times more likely to have suicidal ideation: see LGBTIQ+ Health Australia, above n 28, p 3.

54 See T Jones, "The needs of students with intersex variations" (2016) 16(6) *Sexuality, Society and Learning* 602.

NSW anti-discrimination law includes intersex people under the transgender umbrella,[55] 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.[56] The important thing to remember is that intersex people are not the same 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.[57]

9.4 Legal protections and recognition

9.4.1 Legal gender identity

Last reviewed: April 2025

Until 1 July 2025, in NSW, a person over 18 or the parents or guardians of a child (and intersex people if the person requires a change of gender) may apply to alter the register to record a change of sex if they have undergone a sex affirmation procedure: s 32B(1)(b) and (2)(b) *Births, Deaths and Marriages Registration Act 1995*. Alternatively, a person who has undergone a sex affirmation procedure may apply to register a change of sex (s 32DA).[58]

As of 1 July 2025, the procedures for acknowledgement of sex in the *Births, Deaths and Marriages Act 1995* will be amended by *Equality Legislation Amendment (LGBTIQA+) Act 2024*: persons who are over 18 years (or parents and guardians in respect of children) may apply for an alteration of a record of a person's sex.[59] New Div 5 will set out the powers and procedures for Registrars (s 32E) and the District Court (s 32F) where an application for an alteration of a record or registration of sex is received. Certain conditions and offences will apply for "restricted persons" (for example, inmates, forensic patients, parolees — see s 32GA) applying for or registering a change of sex.[60] There will longer be any requirement for a sex affirmation procedure. In the *Second Reading Speech*

55 *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).

56 M Carpenter, "Identification documents", InterAction for Health and Human Rights, January 2019, accessed 26/3/2025.

57 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, above n 46.

58 *Births, Deaths and Marriages Registration Act 1995* (NSW), ss 32B and 32DA.

59 See *Births, Deaths and Marriages Act 1995*, Pt 5A, Div 2, 3.

60 See *Births, Deaths and Marriages Act 1995*, Pt 5A, Div 6.

to the *Equality Legislation Amendment (LGBTIQA+) Act 2024*, the Hon Alex Greenwich MP noted that: "Trans people do not need surgical intervention to be who they are".[61]

The landmark case of *Kevin v Attorney-General (Cth)*[62] ("*Re Kevin*") and the subsequent appeal proceedings before the Full Court of the Family Court of Australia[63] 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 1961* (Cth) and s 43 of the *Family Law Act 1975* (Cth) 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.[64] These guidelines outline how sex and gender should be recognised and be reflected in personal records held by Australian Government departments and agencies.[65] *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 Registrar of Births, Deaths and Marriages has the power to register someone's sex as "non-specific".

9.4.2 Legal protections

Last reviewed: April 2025

State protections

Anti-Discrimination Act 1977

Some protections against discrimination on transgender grounds were introduced in NSW in 1996 under the *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996*. There is currently no specific protection from discrimination for intersex or non-binary people. The NSW Law Reform Commission is reviewing, inter alia, whether the range of attributes protected against discrimination should be reformed and will release a consultation paper in

61 The Hon Alex Greenwich, *Second Reading Speech*, to Equality Legislation Amendment (LGBTIQA+) Bill, Parliamentary Debates, 24/8/2023, accessed 18/3/2025.

62 *Kevin v Attorney-General (Cth)* [2001] FamCA 1074.

63 *Attorney-General (Cth) v Kevin* [2003] FamCA 94.

64 Australian Government, "Australian Government Guidelines on the recognition of sex and gender", November 2015, accessed 26/3/2025.

65 For a discussion of *Kevin v Attorney-General (Cth)* by the lawyer who appeared for Kevin, see R Wallbank, "The legal environment following Re Kevin: new perceptions and strategies for effective law reform in respect of the legal rights of people who experience variation in human sexual formation and expression", Discussion paper produced for the Neglected Communities Forum, NSW Parliament House, 25 February 2003.

2025. NSW Anti-Discrimination states on its website that it "supports amending the grounds in the Act to include protection based on sexual orientation, gender identity and intersex (or innate variations of sex characteristics)".[66]

Part 3A of the *Anti-Discrimination Act 1977* proscribes discrimination on transgender grounds. Definitions of "recognised transgender person" and "being transgender or a transgender person" are provided in s 4 and s 38A. Discrimination on transgender grounds includes direct and indirect discrimination. Section 38B provides that a person (the perpetrator) discriminates against a person on transgender grounds if they:

> (a) treat an aggrieved person or their relative or associate less favourably than in the same circumstances, or in circumstances which are not materially different, than the perpetrator treats or would treat a person who he or she did not think was a transgender person or who does not have such a relative or associate who he or she did not think was a transgender person, or
>
> (b) require the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who are not transgender persons, or who do not have a relative or associate who is a transgender person, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case, or
>
> (c) treat the aggrieved person as being of the person's former sex or requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons of the person's former sex comply or are able to comply, being a requirement or condition which is not reasonable having regard to the circumstances of the case …

Protections against discrimination exist in areas including work (Pt 2, Div 2), education (s 38K), provision of goods and services (s 38M) and accommodation (s 38N). Section 38P creates an exception for sport so that it is not unlawful to exclude a transgender person from participating in any sporting activity for members of the sex with which the transgender person identifies. Section 38Q creates an exception for superannuation funds.

The *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* also introduced amendments to the *Births, Deaths and Marriages Act 1995* (see **9.4.1**, above), the *Crimes Act 1900* to include more inclusive language regarding the definition of genitalia (see s 61H(4) and s 80A)[67] and insertion of s 14 (now repealed) into the *Wills, Probate and Administration Act 1898* to ensure a beneficiary under a will does not lose any right of entitlement under the will merely because the beneficiary is transgender.[68]

66 Accessed 18/3/2025.

67 Later amended by *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* as for the purposes of provisions of the *Crimes Act 1900* relating to sexual offences against adults and children, it is not relevant whether a body part referred to in the provisions is surgically constructed.

68 See now *Succession Act 2006*, s 46.

Crimes (Personal and Domestic Violence) Act 2007

The *Equality Legislation Amendment (LGBTIQA+) Act 2024* amended a number of Acts to modernise laws and advance equality of LGBTIQA+ persons.

For the purposes of applying for an apprehended domestic violence order under the *Crimes (Personal and Domestic Violence) Act 2007* (CPDV Act), Sch 3 *LGBTIQA+ Act*[69] amended s 7 CPDV Act (meaning of intimidation) to insert an example of conduct that may amount to harassment, including intentionally disclosing or threatening to disclose without a person's consent the person's gender history or that the person has a variation of sex characteristics.[70] "Gender history"[71] means the sex recorded at birth for the person is different to the sex the person identifies with, lives in or seeks to live in, whether or not the person's recorded sex is altered.

Crimes (Sentencing Procedure) Act 1999

Schedule 4[72] of the LGBTIQA+ Act amended s 21A(2)(h) *Crimes (Sentencing Procedure) Act 1999* to provide that an aggravating factor the court must take into account in determining the appropriate sentence for an offence includes where the offence was motivated wholly or partially by hatred for or prejudice against a group of people to which the offender believed the victim belonged in relation to their gender identity or particular variations of sex characteristics they have.

Federal protections

Criminal Code (Cth)

Groups that are distinguished by sexual orientation are protected groups for the purposes of "hate crimes" offences in Ch 5, Div 80 Criminal Code (Cth). Maximum penalties range from 5 years to 7 years imprisonment for proven offences.

Offences in Ch 5, Div 80, Subdiv C proscribe certain offences against a targeted group and members of targeted groups. A member of a targeted group is distinguished by sex, sexual orientation, gender identity, intersex status and disability. Offences include:

- advocating force or violence against a targeted group: s 80.2A
- advocating force or violence against members of targeted groups or close associates: s 80.2B

69 Commenced 1/12/2024.
70 Example in *Crimes (Personal and Domestic Violence) Act 2007*, s 7(1)(a).
71 Example in *Crimes (Personal and Domestic Violence) Act 2007*, s 7(1)(a).
72 Commenced 1/12/2024.

- threatening force or violence against targeted groups: s 80.2BA
- threatening force or violence against members of targeted groups or close associates: s 80.2BB
- advocating damage to or destruction of real property or motor vehicle owned or occupied by a member or close associate of a targeted group and being reckless as to whether the damage or destruction will occur: s 80.2BC, and
- threatening damage to or destruction of real property or motor vehicle owned or occupied by a member of a targeted group or close associate: s 80.2BD.

The fault element for each offence is whether the person who advocates the use of force or violence does so reckless as to whether force or violence will occur.[73] See also **8.3.3 Legal protections**.

Sex Discrimination Act 1984 (Cth)

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.[74] In 2013, the federal Parliament amended the *Sex Discrimination Act 1984* (Cth) by inserting ss 5B and 5C.

At the federal level, s 5B of the *Sex Discrimination Act 1984* makes direct and indirect discrimination unlawful on the ground of gender identity. Section 5C makes direct and indirect discrimination on the ground of intersex status unlawful. These provisions[75] seek to bridge the gap in coverage between the States and territories and the Commonwealth, and introduced more inclusive definitions with the addition of the ground of intersex status, addition of definitions for "gender identity" and removal of the definitions for "man" and "woman" in s 4(1).[76] A complaint mechanism is available through the Australian Human Rights Commission if someone has been discriminated against on the basis of their sexuality or gender status.[77]

73 Recklessness was introduced as the fault element by the *Criminal Code Amendment (Hate Crimes) Act 2025*, commenced 8/2/2025.

74 The final consultation report was released in 2011: Australian Human Rights Commission, *Addressing sexual orientation and sex and/or gender identity discrimination,*, Consultation report, 2011, accessed 28/2/2025.

75 *Second Reading Speech*, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, Commonwealth, House of Representatives, *Debates*, 21/3/2013, p 2893.

76 Australian Human Rights Commission, "New protection against discrimination on the basis of sexual orientation, gender identity and intersex status", 1/8/2013, accessed 25/2/2025.

77 See Australian Human Rights Commission, "Complaints under the Sex Discrimination Act: gender identity" and "Complaints under the Sex Discrimination Act: intersex status", accessed 28/2/2025.

9.5 Interactions in court

Last reviewed: April 2025

Unless appropriate account is taken of the gender identity of those attending court, transgender and gender diverse and intersex 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 9.6, following, provides additional information and practical guidance about ways of treating transgender, gender diverse people and intersex 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

Last reviewed: April 2025

> **Best practice is to always address a person using the name, pronouns and title they wish to use.**
>
> There is increasing recognition of the importance of using correct pronouns in court.
>
> See Practice Note SC Gen 22 — Pronunciation of names and forms of address, which recognises that using correct forms of address is an important component of the mutual respect to which all participants in judicial proceedings are entitled.[78] See also the Judicial Council on

78 Commenced 22/4/2024. See also the similar provisions in FCFCOA Information Notice: Pronunciation of names and forms of address, commenced 4/8/2023, accessed 26/3/2025. See also K McKenzie, "Language in the courtroom: transgender awareness" (2023) 35 *JOB* 11.

Diversity and Inclusion's (then the JCCD) Practice note on Pronunciation of names and gender pronouns[79] which notes that legal practitioners should consider the gender pronouns of a person and provide the Court with the appropriate pronouns, including counsel, parties, witnesses, interpreters, solicitors and entities.[80] It also notes that should the Court wish to clarify the correct gender pronoun before or during a hearing, an associate may contact the parties via their solicitors, and a judicial officer may also seek clarification during the running of the case by asking for clarification.[81]

A **gender neutral title** is an alternative to the gendered honorifics Miss, Mrs, Ms, Mr, Mt/Mm, Mx (pronounced as "mix") may be used for people who don't fit the gender binary and therefore don't feel that a gendered title fits their identity.

If there is any doubt about the gender identity used by the particular person, sensitively ask what name, pronouns and mode of address they want the court to use.[82]

Apologise if an initial mistake has been made about a person's gender identity.

Once established, use the agreed pronoun (he/his, she/her, they/them, ze/hir/hirs; ze/zir/zirs; xe/xem/xyrs) throughout the court proceedings. This is not an exhaustive list.

If a person's pronouns can't be determined, it is simplest to use gender neutral pronouns when referring to someone in the third person, for example, person/people; they/them; partner/spouse.

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**.

79 JCDI, "Pronunciation of names and gender pronouns", Practice Note, 2022, accessed 28/2/2025.
80 ibid at [3].
81 ibid at [4].
82 See K McKenzie, "Language in the courtroom: transgender awareness" (2023) 35(2) *JOB* 11, in which Judge McKenzie outlines the practice directive adopted in his court, the Provincial Court of Manitoba, Canada, which requires that all court participants identify their form of address at the outset of proceedings (including honourific or title, name and pronouns). He states that this practice promotes inclusiveness and equality, and reassures that the court is a safe space, all the while normalising gender diversity. It also removes the risk of misgendering and releases the burden on the misgendered individual to correct the court when a mistake is made.

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.[83]

9.6.2 Appearance and behaviour

Last reviewed: April 2025

Gender diverse people and intersex 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 that gender or sex should dress. No discomfort should be shown with the person's chosen dress style.

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**.

83 *Equal Treatment Benchbook*, above n 20, p 188; ibid at 12.

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.[84]

9.6.3 Language and terminology

Last reviewed: April 2025

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 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 gender diverse or intersex person is not a real woman or man.[85]

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.

84 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) 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) allows you to exclude any evidence that is unfairly prejudicial to a party or is misleading or confusing.

85 ibid.

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

Last reviewed: April 2025

As indicated in 9.2, people who are transgender or gender diverse have often had many more difficult issues including discrimination and transphobia to contend with than the average person.

Points to consider:

Treat the person as someone of the gender or sex they identify with throughout the proceedings.

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.[86]

Ensure that any values and practices that appear to be related to a person's identity and 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.[87]

Has the fact that the person is transgender or gender diverse or intersex, together with any difficulties they might have experienced as a result of this, been an influencing factor in the matter(s) before the court? If so, where possible, take appropriate account of these influences. For example, you may need to decide whether the law allows you to take account of any such influences and, then, as necessary and at the appropriate time in the proceedings, so as to ensure that justice is done and seen to be done, explain why any such influences can/should be taken into account, or cannot/should not be taken into account. And, for example, you may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing — see **9.6.5** and **9.6.6**.

86 See above n 83.
87 ibid.

9.6.5 Directions to the jury — points to consider

Last reviewed: April 2025

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 transgender, gender diverse or intersex people to unfairly influence their judgment.

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

This should be done in line with the *Criminal Trial Courts Bench Book*[88] or *Local Court Bench Book*[89] (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 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",[90] 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 or gender diverse or intersex people often have to live their lives as opposed to the way in which they themselves might act. In doing this you may also need to provide guidance on any legal limitations that exist in relation to them taking full account of any of these matters. You may also need to be more specific about the particular gender or sexual identity aspects to which they need to pay attention.

88 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, 2002–.
89 Judicial Commission of NSW, *Local Court Bench Book*, 1988–.
90 The "Court of Morals" Direction, NSW Criminal Law Review Division, *Homosexual Advance Defence: Final Report of the Working Party*, 1998, [6.11], accessed 26/3/2025.

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

Last reviewed: April 2025

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.[91]

Points to consider:

In order to ensure that any transgender or gender diverse or intersex person 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 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.[92]

Bear in mind that:

– **Research has demonstrated that a disproportionate number of transgender or gender diverse or intersex people experience poorer mental health outcomes, directly related to experiences of stigma, prejudice, discrimination and abuse**: see *R v 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."

91 See also Judicial Commission of NSW, *Sentencing Bench Book*, 2006, "Sentencing procedures generally" at [9-700] and *R v Henry* (1999) NSWLR 346 at [10]–[11].

92 *Crimes (Sentencing Procedure) Act 1999*, s 30A. See Pt 3, Div 2 of the *Crimes (Sentencing Procedure) Act 1999* 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.

- **Transgender or gender diverse or intersex 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** and **9.4.2**) 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 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.[93]

- **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,[94] 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.[95]

93 M Carpenter, "Detention", InterAction for Health and Human Rights, 2019 (reviewed February 2021), accessed 26/3/2025.
94 ibid.
95 ibid.

– **Many transgender or gender diverse or 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.

9.7 Further information or help

Last reviewed: April 2025

The following community organisations, funded by the Department of Communities and Justice and Sydney Local Area Health District, 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
10 Lilydale St
Marrickville NSW 2204
Ph: (02) 9519 7599
Email: reception@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: (02) 9332 1966
Email: iclc@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:

InterAction for Health and Human Rights
PO Box 92
The Channon NSW 2480
Email: info@interaction.org.au

9.8 Further reading

Last reviewed: April 2025

T Alexander, "The medical management of intersexed children: an analogue for childhood sexual abuse", Intersex Society of North America, 1997.

American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders* (DSM-V), 5th edn, Text Revision, American Psychiatric Association, Washington, DC, 2013.

Australian Human Rights Commission, "Sex files: the legal recognition of sex in documents and government records", 2009, accessed 26/3/2025.

Australian Human Rights Commission, "Face the facts: lesbian, gay, trans and intersex people", accessed 26/3/2025.

I Bretherton et al, "The health and well-being of transgender Australians: a national community survey" (2021) 8(1) *LGBT Health* 42, accessed 26/3/2025.

M Carpenter, "The 'normalisation' of intersex bodies and 'othering' of intersex identities", in *The Legal Status of Intersex Persons*, J Scherpe, A Dutta and T Helms (eds), 2018, Cambridge, Intersentia, pp 445–514.

M Carpenter, "Intersex variations, human rights, and the international classification of diseases" (2018) 20(2) *Health and Human Rights* 205, accessed 26/3/2025.

M Carpenter, "Detention", InterAction for Health and Human Rights, February 2019, accessed 26/3/2025.

L Elphick E Webb, "Yesterday once more: discrimination and LGBTI+ seniors" (2017) *43 Mon LR* 530.

The Gender Centre's website, accessed 26/3/2025.

GLAAD, "Glossary of terms: transgender", *GLAAD media reference guide*,11th ed, accessed 26/3/2025.

A Hill et al, "Private lives 3: the health and wellbeing of LGBTIQ people in Australia", La Trobe University, 2020, accessed 26/3/2025.

InterAction for Health and Human Rights website, accessed 26/3/2025.

Judicial College (UK), *Equal Treatment Bench Book*, 2013, Ch 8, "Gender reassignment", accessed 26/3/2025.

K McKenzie, "Language in the courtroom: transgender awareness" (2023) 35(2) *JOB* 11.

Supreme Court of Queensland, *Equal Treatment Benchbook*, 2nd edn, 2016, Supreme Court of Queensland Library, Brisbane, Chapter 15, "Gender identity and sexual orientation", accessed 26/3/2025.

J Ussher et al, *Crossing the line: lived experience of sexual violence among trans women of colour from culturally and linguistically diverse (CALD) backgrounds in Australia*, ANROWS research report, issue 14, June 2020, accessed 26/3/2025.

S Winter, M Diamond, et al, "Transgender people: health at the margins of society" (2016) *The Lancet* 388.

Young and Well Cooperative Research Centre, *Growing up queer: issues facing young Australians who are gender variant and sexuality diverse*, 2014, accessed 26/3/2025.

M Telfer et al, "Australian standards of care and treatment guidelines for trans and gender diverse children and adolescents", Version 1.1, Royal Children's Hospital Melbourne, 2018.

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 15 contains information about how to send us your feedback.

[The next page is 10101]

Section 10

Self-represented parties

Purpose of this chapter

The 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. 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 fulfil that duty. The purpose of this chapter is to:

- highlight the various reasons why people choose to represent themselves, the difficulties they face and the impact on the court of self-represented parties
- 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, and
- provide guidance about how to respond to the growing phenomena of "sovereign citizens" appearing in court.

Contents

10.1 Some information[1]

- **Right to self-represent** — Common law provides that everyone has the right to represent themselves in court[2] in both civil and criminal matters — unless they have been ruled as vexatious.[3] 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.[4]
- **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.

1 Much of the information in Section 10.1 is drawn from Judicial Studies Board, *Equal Treatment Bench Book*, London, updated 2008, Ch 1.3, at <www.judiciary.gov.uk>, accessed 4 June 2014; and Supreme Court of Queensland, *Equal Treatment Benchbook*, Supreme Court of Queensland Library, Brisbane, 2005, Ch 12, at <www.courts.qld.gov.au>, accessed 4 June 2014; and E Richardson, *Self-represented parties: A trial management guide for the judiciary*, County Court of Victoria, Melbourne, 2004.
2 See 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 46.
5 *Reisner v Bratt* [2004] NSWCA 22 at [4]–[6]; *Malouf v Malouf* (2006) 65 NSWLR 449 at [94].

[6] 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.[7] A SRP may be the applicant, respondent or the accused.

- The sovereign citizen movement is a group of loosely affiliated individuals who are connected by a shared antagonism towards government and a convoluted and conspiratorial interpretation of the law.[8] Self-identifying "sovereign citizens" believe that they possess an uncorrupted and true understanding of the legal system. According to this conception, individuals are 'sovereign' and not bound by the laws of the country in which they live unless they waive those rights by accepting a contract with the government. Such people generally deny the jurisdiction of the courts and the legitimacy of government and legal processes and have a conspiratorial world view.[9] See 10.5.
- **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[10]
  - 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
  - in the case of sovereign citizens, believe the system of law and courts have no validity over them

6 Senate Legal and Constitutional Affairs References Committee, Access to Justice, Canberra, December 2009, recommendation 17.

7 M Beazley, "Communicating the law: self-represented litigants in the Court of Appeal", paper presented at the NCAT Annual Conference, 2015, p 4.

8 From H Hobbs, "Understanding and responding to pseudolaw", NSW Supreme Court Judges Annual Conference, August 2023. For more on the sovereign citizen movement see: Francis Sullivan, 'The "Usurping Octopus of Jurisdictional Authority": The Legal Theories of the Sovereign Citizen Movement' (1999) 4 *Wisconsin Law Review* 785, 786; James Evans, 'The "Flesh and Blood" Defense' (2012) 53(4) *William and Mary Quarterly* 1361; Joshua Weir, 'Sovereign Citizens: A Reasoned Response to the Madness' (2015) 19(3) *Lewis & Clark Law Review* 829.

9 D Netolitzky, "A pathogen astride the minds of men: the epidemiological history of pseudolaw", paper delivered at the Centre d'expertise et de formation sur les intégrismes religieux et la radicalisation (CEFIR) symposium: "Sovereign Citizens in Canada", Montreal, 3 May 2018, p 2.

10 The Productivity Commission, "Access to Justice Arrangements", *Inquiry Report No 72*, 2014 at p 492, accessed 27/9/2023, found that most people who self-represent in courts do so involuntarily because they cannot afford a private lawyer or are ineligible for legal assistance.

- 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
  - in the case of sovereign citizens, may make allegations or use arguments which are ambiguous, inconsistent, unintelligible or incapable of being material facts or other material irrelevant in nature[11]
  - 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.

11 *Deputy Commissioner of Taxation v Bonaccorso (No 3)*[2016] NSWSC 1018 per Garling J at [11]; *Szanto v Bainton*[2011] NSWSC 985 per Ward J at [107].

Comprehensive data is lacking but it has been noted that outcomes for SRPs are not as good as for those with representation.[12] For example, a SRP may lose the opportunity for diversion and early intervention programs for first offenders and young people.[13]

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, particularly if the SRP is a sovereign citizen who may make nonsensical and voluminous submissions which generally have no foundation in Australian law. Effective communication may be difficult as the sovereign citizen may claim not to recognise or go by the name on the court papers and/or may claim the law does apply to them.
- The required evidence may not be presented at all, or may be presented inadequately, be illogical or irrelevant.
- 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.[14]

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.

12 E Richardson, T Sourdin and N Wallace, "Self-represented litigants: gathering useful information", *Final report*, 2012, Australian Centre for Justice Innovation, Monash University, p 11.

13 See Law Council of Australia, "The Justice Project", *People experiencing economic disadvantage (Part 1)*, 2018, pp 33-34, accessed 26 September 2023.

14 For a definition of querulant, see G Lester, "The vexatious litigant", (2005) 17(3) *Judicial Officers' Bulletin* 17.

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
- in the case of sovereign citizens, deny the jurisdiction of the court and legitimacy of the legal process
- 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).

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 or a sovereign citizen during the court process, so as to reduce the likelihood of these problems occurring.

10.3 Practical considerations[15]

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 5.6.6.4.

Ask the Registrar to check with the Supreme Court that the SRP is not on the list of vexatious litigants.[16]

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

15 Unless otherwise indicated, the information in Section 10.3 is drawn from Judicial College, *Equal Treatment Bench Book*, "Litigants in person and lay representatives", 2023 revision, London, Ch 1, at accessed 26/9/2023; Supreme Court of Queensland, *Equal Treatment Benchbook*, 2nd ed, Supreme Court of Queensland Library, Brisbane, 2016, Ch 12, accessed 27/9/2023; and the Honourable Justice TH Smith, Supreme Court of Victoria, "Possible guidelines for the trial of litigation involving unrepresented parties" in Australasian Institute of Judicial Administration Inc, Litigants in person management plans: Issues for courts and tribunals, Victoria, 2001, Appendix 2.

16 See *Vexatious Proceedings Act*, Pt 2.

bono scheme,[17] 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].[18]

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** and **LawAccess**.

If appropriate, provide information about applying to use a "McKenzie friend"[19] 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. [20] Leave is required for a lay advocate to appear on behalf of an unrepresented party and will only be granted in exceptional circumstances.[21] 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;

17 For more information on each of these free sources of legal representation, see Judicial Commission of NSW, *Pro bono schemes in NSW*, Sydney, 2nd ed, 2023 published on JIRS under "Publications"; State Library's Legal Information Access Centre and LawAccess.

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

19 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.

20 *Smith v R* (1985) 159 CLR 532; *Re Shaw* (2001) 127 A Crim R 440.

21 *Damjanovic v Maley* (2002) 55 NSWLR 149; *Portelli v Goh* [2002] NSWSC 997.

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.[22] An application seeking leave for a lay advocate to appear should be made before the hearing.[23] **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

22 *Re B* (1981) 2 NSWLR 372, *R v Smith* (1982) 2 NSWLR 608.
23 *Teese v State Bank of New South Wales* [2002] NSWCA 219.

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.[24]

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.[25]

Note that the *Criminal Trial Courts Bench Book*[26] provides specific directions in relation to what to say at the start of criminal proceedings when the accused person is self-represented.[27]

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 5.6.6.4):

The basic conventions — for example:

– Who is in the court and their names and roles.

24 See *Jeray v Blue Mountains City Council (No 2)* [2010] NSWCA 367 at [56].
25 Section 150, *Criminal Procedure Act 1986*.
26 Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, Sydney, "Self-represented accused" at [1-000]ff, accessed 8 September 2019.
27 See also Judicial Commission of NSW, *Civil Trials Bench Book*, Sydney, "Unrepresented litigants and lay advisers" at [1-0800]ff, accessed 8 September 2019.

- 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.[28]

10.3.3 The trial judge's role[29]

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.[30]

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

28 See L Flannery, "Dealing with unrepresented litigants in lengthy and complex trials", District Court twilight seminar, 8 May 2019, accessed 27/9/2023.

29 An excellent example of the trial judges role is set out in L Flannery, ibid at [62]–[73].

30 "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].

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.

Some sovereign citizens genuinely believe that their arguments represent the correct and true form of legal argumentation that *ought* to be followed by the legal system. These are not definitionally *mala fides* actors, but rather individuals who misunderstand critical elements in our legal system, such as the idea that legislation is not contractual. Given the fact that many adherents hold sincere but misinformed beliefs, courts should respond carefully when dealing with such litigants. Responses should be guided by a more structured form of engagement, instead of the mockery and minimalisation that may initially seem justified.[31]

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.

31 H Hobbs, S Young and J McIntyre, "The Internalisation of Pseudolaw: the growth of sovereign citizen arguments in Australia and Aottearoa New Zealand", (2024) 47(1) *UNSWLJ* (forthcoming). Note that courts in Australia and Aotearoa New Zealand are increasingly attempting to respond to pseudolaw by making substantive and informed rebuttals, particularly of strawman arguments.

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.

You may need to summarily dismiss the application as an abuse of court process in the case of a sovereign citizen who claims for example the court has no jurisdiction over them for spurious reasons and/or they claim to not recognise or go by the name on the court papers.[32]

You may need to strike out the matter for disclosing no cause of action or strike out the defence if a pleading is unintelligible, ambiguous, or so imprecise in its identification of material factual allegations as to deprive the opposing party of proper notice of the real substance of the claim or defence or it if contains inconsistent, confusing or irrelevant allegations.[33]

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.[34]

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.

32 See for example, *Bradley v The Crown* [2020] QCA 252.

33 *Szanto v Bainton* [2011] NSWSC 985 at [107]; Deputy Commissioner of Taxation v Bonaccorso (No 3) [2016] NSWSC 1018 at [14]–[18].

34 *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.

10.3.4 As the court proceedings progress

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.[35]

In civil proceedings, s 56(3) of the *Civil Procedure Act 2005* imposes a duty upon a party and its legal representatives, when opposed by an unrepresented litigant, to assist the court to understand and give full and fair consideration to the submissions of the litigant in person and to refer the court to evidence in the proceedings that is relevant to the submissions. That duty is accentuated where the party is a substantial institution accustomed to litigating cases, often against unrepresented litigants.[36]

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.[37] 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.[38] A number of cases have also looked at the bounds of judicial intervention in both criminal and civil cases, see *R v Zorad*,[39] *R v Mercer*[40], *Burwood Municipal Council v Harvey*[41] and *Minogue v Human Rights and Equal Opportunity Commission*.[42]

35 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.

36 *Serobian v Commonwealth Bank of Australia* [2010] NSWCA 181 at [41], [42].

37 See n 35.

38 TH Smith, Supreme Court of Victoria, "Possible guidelines for the trial of litigation involving unrepresented parties" in Judicial College of Victoria, *Civil Proceedings*, at www.judicialcollege.vic.edu.au/eManuals/MCBB/40262.htm, accessed 9 September 2019. See also Judicial Commission of NSW, *Civil Trials Bench Book*, above n 27, at [1–0820].

39 (1990) 19 NSWLR 91.

40 (1993) 67 A Crim R 91.

41 (1995) 86 LGERA 389.

42 (1999) 166 ALR 129.

For example, using simple and direct, non-legal language, (for information on the rules of simple, direct and non-legal language see, for example 2.3.3.4, 3.3.5.3 or 5.6.6.4), **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 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. Be aware however that the submissions of SRP's and particularly sovereign citizens may be voluminous (downloaded from the internet) and irrelevant to the proceedings.
- 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.[43] 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

43 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.

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.[44]

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.

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

44 Note also that s 41 of the *Evidence Act 1995* requires you to disallow improper questions (for example, misleading or confusing, or unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive) questions. The section also provides that questions must not be put to a witness in a "manner or tone that is belittling, insulting or otherwise inappropriate" or "has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability)". The duty imposed on the court under this section applies whether or not an objection is raised to a particular question: s 41(5). Sections 26 and 29(1) of the *Evidence Act 1995* also enable you to control the manner and form of questioning of witnesses, and s 135(b) of the *Evidence Act 1995* allows you to exclude any evidence that is misleading or confusing.

the witness that their statement is true and accurate. The witness should be given the opportunity to correct the written statement if it is not true and accurate. Then suggest that they only need to ask any questions of the witness if in their view that witness has anything to say that was not in their statement and that will help prove their case.

  - If the witness does have more to say, or gave their evidence orally, suggest that it is best to ask their witness short questions, one by one, in a way that will get the witness' story from them — starting from the beginning of their story. However, explain that they must not ask leading questions (ones where they are effectively telling the witness how to answer), and they must not ask questions that the witness is not qualified to answer.

- Intervene only when necessary — that is, in the same manner as for the self-represented person's own evidence — see above.

Explain that the other party may now want to question their witness about what they have said/shown — and that the witness should just answer the questions truthfully. Intervene as necessary, as before.

Once the cross-examination is finished, ask the 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.**[45] **A small percentage of sovereign citizens may become obsessed, querulant and/or vexatious.**

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.

> **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 5.6.6.4, **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

45 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.

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.**[46]

As prescribed by law, intervene if their cross-examination is for example, off the point, not assisting in testing the

46 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.

evidence, disallowable, incomprehensible to the witness, not being appropriately answered or unfair[47]— 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.[48]

Explain the purposes of re-examination including the right to object if new evidence is adduced.

Generally only ask your own questions of the other party and their witnesses after cross-examination by the self-represented party, and only when you need to clarify any particular point, or are unclear about the validity of their evidence. However, always explain why you are doing this to ensure that both parties understand that you are being neutral and simply trying to clarify what is being said.

10.3.4.3 Final submissions

There is a discretionary practice that the Crown not give a closing address in cases where an accused is unrepresented.[49] 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.

47 See, n 36.
48 *Criminal Procedure Act 1986*, s 294A.
49 See further *MS v R* [2017] NSWCCA 252 at [68].

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 5.6.6.4, **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 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*[50] or *Local Courts Bench Book*[51] (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).

50 above, n 25.
51 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.[52]

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.[53]

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,[54] and if unhappy with it, are referred to the appropriate source(s) of advice or assistance about any avenues they might have for appeal.

10.5 Sovereign citizens: further information

Last reviewed: October 2023

The sovereign citizen phenomenon appeared in North America more than two decades ago[55] and has become more prevalent in other jurisdictions including

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

53 *Vexatious Proceedings Act*, s 8(6).

54 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 5.6.6.4.

55 D Netolitzky, "A pathogen astride the minds of men: the epidemiological history of pseudolaw", paper delivered at the Centre d'expertise et de formation sur les intégrismes religieux et la radicalisation (CEFIR) symposium: "Sovereign Citizens in Canada", Montreal, 3 May 2018, p 17.

Australia with the rise of social media. In 2023, judicial officers in Australia reported a "sharp rise"[56] in the number of cases brought by litigants asserting that the legal system does not apply to them.

As Harry Hobbs notes,[57] a brief survey of Australian cases reveals considerable creativity. Litigants have submitted that *Magna Carta* discharges them of their obligation to pay their mortgage,[58] that the Australian Constitution ceased to have effect upon Australia signing the *Treaty of Versailles*,[59] and that the presence of the Royal Coat of Arms above the bench means English common law supersedes Australian statutory law.[60]

Common to those claiming to be sovereign citizens are:

- Refusing to respond to a name and calling themselves a "flesh and blood man" so as not to be subject to legal authority. This uses the "strawman" argument to say they have separated from the legal identity imposed on them by the government[61]
- Using a "trust" or a dummy corporation to create a separate entity
- Tendering documentation which does not comply with legal requirements may include affidavits with fingerprints[62]
- Claiming lack of jurisdiction[63] or invalid court documents[64]
- Claiming the Magna Carta, Bill of Rights, Acts of Settlement/Common Law invalidate the Australian Constitution and other current legislation[65]
- Questioning the validity of the appointment of the Governor which affects the validity of legislation and judicial appointments[66]

56 Sophie Kesteven and Damien Carrick, "Magistrates witness a 'sharp rise' in sovereign citizen cases brought before the Local Courts", *ABC Radio National*, 8 May 2023, accessed 27/9/2023.

57 H Hobbs, "Understanding and responding to pseudolaw", NSW Supreme Court Judges Annual Conference, 26 August 2023.

58 *Arnold v State Bank of South Australia* (1992) 38 FCR 484.

59 *Helljay Investments v Deputy Commissioner of Taxation* [1999] HCA 56. See also Institute of Tax Research, *Australia: The Concealed Colony* (1999).

60 *Koteska v Magistrate Manthey* [2013] QCA 105 at [15].

61 See *Wichman v Pepper Finance Corporation Ltd* [2019] NSWCA 195 at [14], [18]–[24]; *K Sheridan v Colin Biggers & Paisley* [2019] NSWSC 528 at [10]–[12], [42]–[43], [59]; *Christie v Cmr of Police* [2014] QDC 70; R v Sweet[2021] QDC 216 at [3], [4], [10]; *Adelaide City Council v Lepse* [2016] SASC 66 at [14], [16], [27]; *ACCC v Ran*a [2008] FCA 374 at [16]-[18], [27].

62 See *K Sheridan v Colin Biggers & Paisley*, ibid at [15]; *Woods v DCT* [2018] FCA 1971 at [21]; *R v Sweet*[2021] QDC 216 at [5].

63 *Christie v Cmr of Police* [2014] QDC 70; *R v Buzzacott* [2004] ACTSC 89 at [13]–[16]; *Ashwell v Cmr for Consumer Protection* [2015] WASC 337 at [25]–[29].

64 *Ennis v Credit Union Australia* [2016] FCCA 1705 at [16]–[23]; *Woods v DCT* [2018] FCA 1971 at [15]–[16]; *Lion Finance Pty Ltd v Johnston* [2018] FCCA 2745 at [18]–[25].

65 *Carnes v Essenberg* [1999] QCA 339; *Nikolic v MGICA* [1999] FCA 849 at [2], [5]; *Anderson v Kerslake* [2013] QDC 262 at [47], [71]; *Hubner v Erbacher* [2004] QDC 345 at [9], [10].

66 *Baker v AG (NSW)* [2013] NSWCA 329 at [15]–[16].

- Claiming to be fined before conviction.
- Claiming a right to trial by jury[67]
- Claiming First Nations sovereignty[68]
- Refusing to enter a plea[69] or pay filing fees[70]

10.5.1 Select case law rebuttals to sovereign citizen pseudo legal arguments

Judicial officers are bound by their judicial oath to treat an unrepresented litigant fairly and with courtesy. In dealing with unrepresented litigants, including sovereign citizens, courts have summarily dismissed the application as an abuse of court process;[71] struck out the statement of claim pursuant to UCPR r 14.28 (pleading had a tendency to cause prejudice, embarrassment or delay in the proceedings) as it was unintelligible, ambiguous, or so imprecise in its identification of material factual allegations as to deprive the opposing party of proper notice of the real substance of the claim or defence or it contained inconsistent, confusing or irrelevant allegations;[72] struck out the defence for not complying with the UCPR nor with the principles of pleading;[73] rebutted the pseudo-legal arguments;[74] or made orders to reject filings with that are defective.[75] Sovereign citizens are increasingly appearing before the courts (and lodging complaints with official complaints bodies like the Judicial Commission and Ombudsman's Office), particularly since the rise of social media and the occurrence of COVID-19.[76] Such people generally deny the jurisdiction of the courts and the legitimacy of government and legal processes and generally have a conspiratorial world view.[77]

67 ibid at [8]–[11].
68 *Anderson v Kerslake* [2013] QDC 262 at [10], [38]–[46], [65]–[70]; *R v Anning* [2013] QCA 263 at [39]–[45]; *Coe v Commonwealth of Aust* (1993) 118 ALR 193 at [2], [3], [22]–[29]; *Maher v R* [2021] NSWDC 212 at [12], [16]–[18].
69 *Anderson v Kerslake* [2013] QDC 262 at [10]; *R v Anning*, ibid at [8]–[10]; *Adelaide City Council v Lepse* [2016] SASC 66 at [4].
70 *Woods v DCT* [2018] FCA 1971 at [10].
71 *Bradley v The Crown* [2020] QCA 252.
72 *Szanto v Bainton* [2011] NSWSC 985 at [107], [120].
73 *DeputyCommissionerof Taxation v Bonaccorso (No 3)* [2016] NSWSC 1018 at [14]–[18], [24], [33].
74 See for example *R v Sweet* [2021] QDC 216 at [6].
75 *Re Gauthier* (2017) ABQB 555 (13 September 2017) [6] (Canadian decision).
76 The Judicial Commission reports complaints statistics in its Annual Report published on the Commission's website report that 70% of all complainants to the Commission in the financial year 2021-22 were self-represented.
77 D Netolitzky, "A pathogen astride the minds of men: the epidemiological history of pseudolaw", paper delivered at the Centre d'expertise et de formation sur les intégrismes religieux et la radicalisation (CEFIR) symposium: "Sovereign Citizens in Canada", Montreal, 3 May 2018, p 2.

10.6 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*, 2nd ed 2023, Sydney. This brochure is published on JIRS under the "Publications" 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", accessed 26/9/2023.
  - The **District Court** website has information for legal assistance, accessed 26/9/2023. 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
    www.lawsociety.com.au/pbs
- **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

- **Legal Aid Commission of NSW /Law Access 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

  Legal Aid Commission of NSW

  323 Castlereagh Street
  Sydney NSW 2000
  Ph: (02) 9219 5000
  www.legalaid.nsw.gov.au/

- **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
Website: http://www.clcnsw.org.au
Email: clcnsw@clc.net.au

- **State Library of New South Wales, Legal Information Access Centre,** accessed 26/9/2023.

10.7 Further reading

L Richardson, G Grant and J Boughey, "The impacts of self-represented litigants on civil and administrative justice: environmental scan of research, policy and practice", Australasian Institute of Judicial Administration, 2018, accessed 26/9/2023.

MJ Beazley, AO, "Communicating the law: self-represented litigants in the Court of Appeal", NCAT Annual conference, 2015.

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.

L Flannery, "Dealing with unrepresented litigants in lengthy and complex trials", 8 May 2019.

Judicial Commission of NSW, *Criminal Trial Courts Bench Book*, "Self-represented accused", at [1-800]ff, <www.judcom.nsw.gov.au>, accessed 26 August 2019.

Judicial Commission of NSW, *Civil Trials Bench Book*, Sydney, "Unrepresented litigants and law advisors", at [1-0800]ff, <www.judcom.nsw.gov.au>, accessed 26 August 2019.

Judicial Commission of NSW, Pro bono schemes in NSW, Sydney, 2019.

Judicial College, *Equal Treatment Bench Book*, "Litigants in person and lay representatives", 2023 revision, London, Ch 1, at accessed 26/9/2023.

Law Council of Australia, "Erosion of Legal Representation in the Australian Justice System", research project and report undertaken by Law Council of Australia in conjunction with Australian Institute of Judicial Administration, National Legal Aid and Aboriginal and Torres Strait Islander Legal Services, 2004, accessed 26/9/2023.

G Lester, "The vexatious litigant", (2005) 17(3) *Judicial Officers Bulletin* 17.

D Netolitzky, "A rebellion of furious paper: pseudo-law as a revolutionary legal system" (2021) 59 *Alberta Law Review* 1.

D Netolitzky, "The organized pseudolegal commercial argument phenomen" (2016) 53 *Alberta Law Review* 609.

D Netolitzky, "A pathogen astride the minds of men: the epidemiological history of pseudolaw", paper delivered at the Centre d'expertise et de formation sur les intégrismes religieux et la radicalisation (CEFIR) symposium: "Sovereign Citizens in Canada", Montreal, 3 May 2018.

NSW Bar Association, "Guidelines for barristers on dealing with self-represented litigants", October 2001, accessed 26/9/2023.

The Law Society of NSW, "Guidelines for solicitors dealing with self-represented parties", April 2006, accessed 26/9/2023.

JW Perry, "The Unrepresented Litigant", paper presented at AIJA 6th Conference, September 1998.

E Richardson, et al, "Self-represented litigants: gathering useful information", Final report — June 2012, Monash University.

T Soudin and N Wallace, "The dilemmas posed by self-represented litigants: the dark side" (2014) 24 *JJA* 61.

E Richardson, T Sourdin and N Wallace, "Self-Represented Litigants: Literature Review", Australian Centre for Justice Innovation, Monash University, 2012.

Supreme Court of Queensland, *Equal Treatment Benchbook*, 2nd ed, Ch 12, accessed 26/9/2023.

State Library of New South Wales, Legal Information Access Centre, accessed 26/9/2023.

D Webb, "The right not to have a lawyer" (2007) 16(3) *JJA* 165–178.

Faulks J, "Self-represented litigants: tackling the challenge", Paper delivered at Managing People in Court Conference, National Judicial College of Australia and the Australian National University, February 2013, accessed 26/9/2023.

G Zdenkowski, "Magistrates' Courts and Public Confidence" (2007) 8(3) *The Judicial Review* 385.

10.8 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 15 contains information about how to send us your feedback.

[The next page is 11101]

Section 11

Older people

Purpose of this chapter

It is estimated that by 2036, over one in five people in NSW (21%) will be aged over 65 years. Older people are not a homogenous group. The purpose of this chapter is to:

- highlight for judicial officers relevant information about the differences in education, health, accommodation, geographic isolation, mobility and cultural and linguistic backgrounds of those aged over 65, including the problem and prevalence of elder abuse, and how they may impact an older person's access to justice, 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

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

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.

4 AIHW, *Older Australians at a glance*, Canberra, 2018 at www.aihw.gov.au/reports/older-people/older-australia-at-a-glance/contents/summary, accessed 18 January 2019.

5 S Ellison et al, *The legal information needs of older people*, Research Report, Law and Justice Foundation, 2004 quoting R Schultz, *Review of the information needs of older people in South Australia*: Final Report, Council on the Ageing, The Consumer Forum for the Aged, 1993, p 22.

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]

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.

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]
- It is estimated that by 2036, over one in five people in NSW (21%) will be aged over 65 years. [11]

6 Australian Government, *Australia to 2050: future challenges*, 2010 at http://archive.treasury.gov.au/igr/igr2010/overview/pdf/igr_2010_overview.pdf, accessed 18 January 2019. See also https://aihw.gov.au/reports-statistics/population-groups/older-people/overview, accessed 26 April 2019.

7 C Walsh et al, "Elder abuse and oppression: voices of marginalized elders" (2011) 23(1) *Journal of Elder Abuse & Neglect* 17.

8 AIHW, *Older Australia at a glance*, above n 4.

9 ABS, *Population by age and sex*, ABS cat no 3235.0, June 2016 at www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3235.0Main+Features12016?OpenDocument , accessed 19 January 2019.

10 ibid.

11 ABS, NSW State and regional indicators, March 2010, as cited in NSW State Library, Public Library Services — People Places, "Older people" at https://www.sl.nsw.gov.au/public-library-services/people-places/older-people, accessed 30 November 2021.

- 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]

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]

12 ABS, *Cultural diversity in Australia*, cat no 2071.0, 2016 at www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Cultural%20Diversity%20Data%20Summary~30, accessed 4 February 2019.

13 ABS, *Census of population and housing: reflecting Australia — stories from the census*, cat no 2071.0, 2016, at www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Ageing%20Population~14, accessed 19 January 2019.

14 ibid.

15 ibid.

16 J Wilkinson, *Education in Country and City NSW*, NSW Parliamentary Library Research Service, Briefing Paper No 4/08, 2008, p 8. The Depression took its toll on all secondary schooling opportunities because in 1936, NSW' secondary education systems could not account for about 40% of children who had completed their primary schooling in 1934.

17 ABS, above n 13.

18 ibid.

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]
- 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]

19 NSW Dept of Family and Community Services, *NSW ageing strategy*, Research Report, 2018, at https://www.facs.nsw.gov.au/__data/assets/pdf_file/0007/631888/NSW-Ageing-Strategy-60-79-Research-Report,-January-2018.PDF, accessed 4 February 2019.

20 ABS, *Older people, New South Wales, 2004*, cat no 4108.1 at http://abs.gov.au/ausstats/abs@.nsf/mf/4108.1, accessed 6 January 2019.

21 NSW Dept of Family and Community Services, above n 19.

22 ibid, p 18.

23 Australian Human Rights Commission (AHRC), *Willing to work: national inquiry into employment discrimination against older Australians and Australians with disability*, 2016, p 60 at https://humanrights.gov.au/sites/default/files/document/publication/WTW_2016_Full_Report_AHRC_ac.pdf, accessed 7 May 2019.

24 NSW Dept of Family and Community Services, above n 19, p 6.

25 ibid.

- 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] See further 11.1.7 — Grandparents.

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 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.[29]
- 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).[30]

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),

26 ABS, *Census of population and housing: reflecting Australia*, above n 13.
27 ABS, *older people, New South Wales*, above n 20.
28 NSW Dept of Family and Community Services, above n 19.
29 ibid.
30 ABS, *Household income and wealth, Australia, 2015-16*, cat no 6523.10 at http://abs.gov.au/household-income, accessed 30 April 2019.

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.[31]

- Long-term health conditions most frequently reported were eyesight problems (81%), arthritis (48%), hypertension (41%) other circulatory diseases (33%) and hearing problems (33%).[32]
- 63% of older people in NSW rate their mental health as very healthy, although only 32% rate their physical health the same.[33]
- Dementia affects 10% of people in NSW aged over 65 years and 31% of people aged over 85 years.[34]
- 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.[35]
- 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).[36]
- 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.[37]

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.

31 AIHW, *Deaths in Australia*, Canberra, 2018 at https://aihw.gov.au/reports/life-expectancy-death/deaths-in-australia/contents/summary, accessed 30 April 2019.
32 ibid.
33 NSW Dept of Family and Community Services, above n 19, at p 5.
34 NSW Health, *NSW older people's mental health services*, Service plan 2017-2027, December 2017, p 2 at https://www1.health.nsw.gov.au/pds/ActivePDSDocuments/GL2017_022.pdf, accessed 30 April 2019.
35 ibid.
36 Mental Health Commission of New South Wales, *Living well in later life — the case for change*, July 2017, p 13.
37 Alzheimer's Australia, *Dementia in prison*, Discussion Paper no 9, 2014 at https://www.dementia.org.au/dementia-in-prison, accessed 19 January 2019.

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.[38] 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

38 See S Mallet et al, "Precarious housing and health inequalities: what are the links?" Summary Report, 2011, p 3 at https://vichealth.vic.gov.au/~/media/resourcecentre/publicationsandresources/health%20inequalities/precarious%20housing/precarious%20housing_summary%20report_web.pdf?la=en, accessed 30 April 2019; R Bentley, E Baker and K Mason, "Cumulative exposure to poor housing affordability and its association with mental health in men and women" (2012) 66 (9) *Journal of Epidemiology and Community Health* 761; J Allen, *Older people and wellbeing*, Institute for Public Policy Research, 2008; G Windle, V Burholt and R Edwards, "Housing related difficulties, housing tenure and variations in health status: evidence from older people in Wales" (2006) 3 *Health and Place* 12; NSW Government, *NSW Ageing Strategy 2016-2020*, p 27.

39 ABS, *Disability, ageing and carers, Australia: summary of findings*, 2015, cat no 4430.0.

40 Carers Australia, NSW, *Facts about carers*, 2014, p 3.

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 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.[47]

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.[48]
- 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

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*.

42 My Aged care at https://myagedcare.gov.au/help-home/home-care-packages/accessing-home-care-package, accessed 29 April 2019. Wait times were updated 28 February 2019.

43 Department of Health, *Falls among older people*, Report card at http://healthstats.nsw.gov.au/resources/falls_health_statistics_r.pdf, accessed 4 April 2018.

44 NSW Dept of Planning and Environment, *2016 New South Wales State and Local Government area population projections*, at www.planning.nsw.gov.au/Research-and-Demography/Demography/Population-projections, accessed 5 April 2019.

45 ABS, *Disability, ageing and carers*, above n 39.

46 ABS, *Older people, NSW*, above n 20.

47 ibid.

48 Australian Institute of Health and Welfare (AIHW), *Child protection Australia 2017-2018*, Canberra, 2018, pp 45-46.

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.[49]

- At 30 June 2021, 6,829 First Nations children in NSW were in out-of-home care (16 times the rate for non-Aboriginal children). The rate has increased by 4% since 2018, and First Nations children make up 43% of all children in the system.[50] Across Australia, in 2017–18, 65% of First Nations children were placed with relatives/kin, with other First Nations caregivers, or in Aboriginal residential care. These informal arrangements will have multiple effects on the grandparent caregiver, including financial, physical and mental health.[51]
- 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.[52] In parenting orders, grandparents will have reasonable prospects of success only when they are opposing everyone else and there are cogent, child-focussed reasons referenced to in s 60B(2) of the *Family Law Act* for doing so.[53]
- 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.[54]

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

49 B Horner et al, "Grandparent-headed families in Australia" (2007) 76 *Family Matters* 76.
50 NSW, Legislative Council, *Transcript* (Uncorrected), Friday 29 October 2021, p 7.
51 AIHW, above n 48, p 53. See also B O'Neill with E Fanning *Aboriginal people and intergenerational trauma*, Seniors Rights Service, at https://youtube.com/watch?v=6BYw0u6JHwA, accessed 30 April 2019.
52 G Wilson, "Shared parenting and grandparents in Australia", paper presented at IAML Annual meeting, Singapore, 2012, p 24.
53 ibid.
54 AIHW, above n 48.

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.[55]

- 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.[56]
- 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.[57]
- 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.[58]

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.[59] See further 11.2.3 — Succession/financial abuse.

55 NSW Department of Family and Community Services, *NSW ageing strategy 80+,* Research report, 2018, p 32 at www.facs.nsw.gov.au/download?file=631889, accessed 19 April 2019.

56 ibid.

57 COTA NSW, *Debt, rent and homelessness: an insecure future*, 2018, p 4 at https://cotansw.com.au/council-on-the-ageing-nsw-news-and-events-details/debt-rent-and-homelessness-an-insecure-future, accessed 30 April 2019.

58 AIHW, *Specialist homelessness services annual report 2016–17*, 2018 at https://aihw.gov.au/reports/homelessness-services/specialist-homelessness-services-2016-17/contents/contents, accessed 30 April 2019.

59 Legislative Council, General Purpose Standing Committee No 2, *Elder abuse in New South Wales*, Parliament of NSW Report 44 (Final report), 2016, p 102.

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. [60]
- 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.[61]
- 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.[62]
- 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.[63]
- 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.[64]

60 AIHW, *Rural and remote health*, May 2017 at https://aihw.gov.au/reports/rural-health/rural-remote-health/contents/rural-health, accessed 30 April 2019.

61 Rural Doctors Association of Australia, Budget Submission 2004-05 at https://rdaa.com.au/resources/submissions, accessed 19 January 2019.

62 National Rural Health Alliance & Aged and Community Services Australia, *Older people and aged care in rural, regional and remote Australia*, Discussion paper, 2004.

63 ibid, p 19.

64 A Pate, *Social isolation: its impact on the mental health of older Victorians*, COTA Victoria, Working Paper No 1, 2014, p 9; Aged and Community Services Australia, *Social isolation and loneliness among older Australians*, Issues paper No 1, October 2015; AIHW, *Australia's welfare*, 2017, at https://aihw.gov.au/getmedia/d18a1d2b-692c-42bf-81e2-47cd54c51e8d/aihw-australias-welfare-2017-chapter5-1.pdf.aspx, accessed 30 April 2019.

- 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.[65]
- Old age dependency ratios are higher in inner regional areas, reflecting trends for many Australians to leave major cities on retirement.[66]

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.[67] 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.[68]
- Women tend to have lower superannuation balances and retirement payouts than men.[69] Approximately 60% of women aged 65–69 in 2009–2010 had no superannuation.[70] 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.[71]
- 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 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.[72]

65 J Baxter, A Hayes and M Gray, *Families in regional, rural and remote Australia*, Australian Institute of Family Studies, 2011 at https://aifs.gov.au/publications/families-regional-rural-and-remote-australia, accessed 18 December 2018.

66 ibid.

67 AHRC, *Accumulating poverty? Women's experiences of inequality over the lifecycle*, Issues paper, 2009, p 7.

68 Workplace Gender Equality Agency, *Australia's gender pay gap statistics*, February 2019 at https://wgea.gov.au/data/fact-sheets/australias-gender-pay-gap-statistics, accessed 30 April 2019.

69 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.

70 Clare, above n 68, p 3.

71 Department of Social Services, *Income support customers: a statistical overview 2013*, Statistical Paper No 12, 2014.

72 See further, Senior Rights Victoria, *Elder abuse, gender and sexuality* at https://seniorsrights.org.au/wp-content/uploads/2018/05/Elder-Abuse-Gender-and-Sexuality.pdf, accessed 30 April 2019; ACSA Issues Paper, "Social isolation and loneliness", October 2015.

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.[73]
- People who have diverse sexualities, relationships, bodies and genders face particular issues as they age, and they face specific barriers to accessing aged care.[74] 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.[75] 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.[76] 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 are more digitally disengaged, citing lack of trust, confidence, skills and personal

73 ABS, *Census of population and housing: reflecting Australia — stories from the census, 2016*: Same-sex couples in Australia, 2016 at https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Same-Sex%20Couples~85, accessed 26 April 2019.

74 National LGBTI Health Alliance at https://lgbtihealth.org.au/, accessed 26 April 2019.

75 ABS, *Census of population and housing: reflecting Australia — stories from the census, 2016*: Sex and Gender Diversity in the 2016 Census, 2017 at https://abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Sex%20and%20Gender%20Diversity:%20Characteristics%20of%20the%20Responding%20Population~103, accessed 26 April 2019.

76 ibid.

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.[77]

- 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.[78]
- 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.[79]
- 42% of 50–69 year olds have high digital literacy. Only 21% of 70+ age group have high digital literacy.[80]
- 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.[81] 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.[82]

77 Office of the eSafety Commissioner, *Older Australians and digital confidence*, Research report, at https://esafety.gov.au/about-the-office/research-library/older-australians-and-digital-confidence, accessed 19 January 2019.

78 M Lam, "Australia's digital divide is not going away", *The Conversation*, 29 March 2018 at https://theconversation.com/australias-digital-divide-is-not-going-away-91834, accessed 18 December 2018, citing ABS, *Household use of information technology, Australia*, *2016-17*, cat no 8146.0.

79 FaCS, *NSW Ageing Strategy*, Report 60-79, 2018 at www.facs.nsw.gov.au/download?file=631888, accessed 4 February 2019.

80 ibid.

81 ABS — Data cube, 81460DO002_201415 *Household Use of Information Technology, Australia, 2014–15*, released at 11.30 am (Canberra time), 18 February 2016 at https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8146.02012-13?OpenDocument, accessed 4 February 2019. Note: social media use relates to Australian internet users.

82 ACMA, research snapshots at www.acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Digital-lives-of-older-Australians, accessed 21 January 2019.

- 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.[83]

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.[84] The Australian Law Reform Commission completed an inquiry in 2017.[85] 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".[86] While prevalence data in Australia is limited, estimates regarding the occurrence of elder abuse in NSW range from one in 20 people or 5%[87] and nationally from 2% to 6% of the older population.[88] This compares with reported rates of up to 14% internationally in high and middle income countries.[89] These approximations are believed to underestimate the true extent of abuse in older populations.[90]

83 S Ryan, *Older people need the internet too*, Australian Human Rights Commission, at www.humanrights.gov.au/news/opinions/older-people-need-internet-too, accessed 21 January 2019.

84 Legislative Council, General Purpose Standing Committee No 2, above n 58.

85 ALRC, *Elder abuse – a national legal response*, Report 131, 2017, at www.alrc.gov.au/publications/elder-abuse-report, accessed 15 February 2019.

86 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.

87 ibid, p 7.

88 C Cooper, A Selwood & G Livingston, "The prevalence of elder abuse and neglect: a systematic review" (2008) (2) *Age and Ageing* 151. The Australian Longitudinal Study of Women's Health conducted studies in 2008, 2011 and 2015. Measures the researchers used to assess neglect indicate a relatively stable prevalence rate of about 20% across waves, from ages 70-75 and 85-90 years. See further, at https://aifs.gov.au/publications/elder-abuse/export, accessed 22 February 2019.

89 World Health Organisation, "Elder Abuse Fact Sheet", Fact sheet No 357, 2014.

90 National Ageing Research Institute and Seniors Rights, "The older person's experience: outcomes of interventions into elder abuse", Victoria, p 6.

Internationally, five categories of elder abuse are recognised.[91] 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 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.[92]

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.[93] 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.

91 World Health Organisation at https://who.int/ageing/projects/elder_abuse/en/, accessed 22 February 2019. See also Legislative Council, General Purpose Standing Committee No 2, above n 58, p 5.

92 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 R Kaspiew, R Carson and H Rhoades, "Elder abuse in Australia" (2016) 98 *Family Matters* 64 at 65.

Elder abuse commonly occurs where the older person is dependent on another person for their daily needs.[94]

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.[95] Rates of abuse tend to increase with age.

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.[96]

In Aboriginal communities, perceptions about and experiences of elder abuse are complicated by family and community networks, cultural expectations relating

94 Legislative Council, General Purpose Standing Committee No 2, above n 58, p 121.

95 C Spike, *The EAPU helpline: results of an investigation of five years of call data*, Elder Abuse Prevention Unit, Queensland, 2015; EAHRU, *NSW elder abuse helpline and resource unit annual report 2015–2016*, NSW; Australian Network for the Prevention of Elder Abuse, *Australian network for the prevention of elder abuse working definition*, 1999, at www.eapu.com.au/anpea, accessed 20 July 2018.

96 WHO, *World report on ageing and health*, 2015, table 3.1; Legislative Council General Purpose Standing Committee No 2, above n 58, p 8.

to kinship structures, cultural values of sharing and reciprocity, and the extent to which grandparents, particularly grandmothers, are called upon to care for grandchildren.[97]

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.[98] Older 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.[99]

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.[100] 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.[101]

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.[102]

97 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.

98 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.

99 AIHW, *Older Australia at a glance*, above n 4.

100 National LGBTI Health Alliance, *The statistics at a glance: the mental health of lesbian, gay, bisexual, transgender and intersex people in Australia*, at http://lgbtihealth.org.au/statistics, accessed 21 January 2019.

101 A George and B Harris, *Landscapes of violence: women surviving family violence in regional and rural Victoria*, Centre for Rural and Regional Law and Justice, 2014, pp 46–63.

102 Department of Families, Housing, Community Services and Indigenous Affairs, *Report to the council of Australian Governments 2012: laying the groundwork 2011–2014*, 2012, p 96.

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.[103]

Some jurisdictions have offences for neglect,[104] although these are rarely utilised in respect of older people. These offences are generally framed as "failing to 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.[105]

In their critique of legal responses to elder abuse, Harbinson et al[106] 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 *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:[107]

- 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.

103 Law Council of Australia, Submission 61, referred to in ALRC, *Elder abuse – criminal justice response* at www.alrc.gov.au/publications/offences, accessed 21 January 2019.

104 For example *Crimes Act 1900* (NSW), s 44.

105 See ALRC, *Elder abuse*, ALRC DP 83 at www.alrc.gov.au/publications/offences#_ftnref4, accessed 14 August 2018.

106 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) *Journal of Elder Abuse and Neglect* 88.

107 See further, NSW Government, *OnGuard*, Issue 1, 2019 at https://www.publicguardian.justice.nsw.gov.au/Documents/MarchcopyV01.pdf, accessed 15 May 2019.

- 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. It is an offence for a person to take detrimental action against an employee or contractor who assists the Ageing and Disability Commissioner with a report about abuse, neglect or exploitation of an adult with disability or an older adult: s 15A.[108]

11.2.1 Abuse and neglect in residential care

Generally

There is no comprehensive data available on the prevalence of abuse of people in residential aged care. At 30 June 2020, a total of 189,954 people were using residential aged care (permanent or respite) and 58% of those were aged over 85 years.[109] Abuse may be committed by paid staff, other residents in residential care settings, or family members or friends.

The *2019-20 Report on the Operation of the Aged Care Act 1997* indicates that during the 2019–2020 financial year there were 5,718 notifications[110] (5,233 in 2018–2019)[111] of reportable assaults as previously defined in the Act. Of those, 4,867 (4,443 in 2018–2019) were recorded as alleged or suspected unreasonable use of force, 816 (739 in 2018–2019) as alleged or suspected unlawful sexual contact, and 35 (51 in 2018–2019) as both.[112] "Reportable assaults" captured a more narrow range of conduct, referring to "unreasonable use of force on a resident, ranging from deliberate and violent physical attacks on residents to the use of unwarranted physical force" and unlawful sexual contact, meaning any sexual contact with residents where there has been no consent".[113] Amendments made to the Act by the *Aged Care Legislation Amendment (Serious Incident*

108 Section 15A commenced 23 June 2021.

109 See Australian Institute of Health and Welfare, *Aged care in Australia*, at https://www.gen-agedcaredata.gov.au/Topics/People-using-aged-care#Aged%20care%20use%20in%20Australia, accessed 26 November 2021.

110 See Department of Health (Cth), *2019-20 Report on the Operation of the* Aged Care Act *1997*, p 84, at https://www.gen-agedcaredata.gov.au/www_aihwgen/media/ROACA/20366-Health-Report-on-the-Operation-of-the-Aged-Care-Act-2019%e2%80%932020-accessible.pdf, accessed 26 November 2021.

111 see Department of Health (Cth), *2018–19 Report on the Operation of the Aged Care Act 1997*, p 78 at https://www.gen-agedcaredata.gov.au/www_aihwgen/media/ROACA/2018-19-ROACA.pdf., accessed 26 November 2021.

112 above n 110, p 90 and n 111, p 84 respectively.

113 above, n 110, p 90.

Response Scheme and Other Measures) Act 2021 now include eight types of conduct as a "reportable incident" (see below) under the Serious Incident Response Scheme (SIRS) which commenced 1 July 2021.

Media focus on cases of abuse by paid staff in residential care facilities has brought this issue to public attention.[114] The Commonwealth Government announced the terms of reference for the Royal Commission into Aged Care Quality and Safety on 9 October 2018. The Royal Commission delivered its final report of 148 recommendations, which was tabled in the Australian Parliament on 1 March 2021.[115]

Under the 2021 amendments to the *Aged Care Act 1997* (Cth), which introduced the SIRS, s 54-3 was introduced and defined new terms for the reporting of certain incidents.[116] New ss 54-4 to 54-8 establish protections to ensure disclosers are supported and protected in making disclosures of information. These protections are intended to promote integrity and accountability of approved providers in providing supports and services and to safeguard care recipients.[117] The definition of a "reportable incident" is far broader than the previous "reportable assault" and includes any of the following incidents that have occurred, or alleged or suspected to have occurred to a residential aged care recipient in connection with the provision of care or flexible care in a residential setting:

- unreasonable use of force;
- unlawful sexual contact or inappropriate sexual conduct;
- psychological or emotional abuse;
- unexpected death;
- stealing or financial coercion by a staff member of the provider;
- use of "restrictive practice", other than in circumstances set out in the Quality of Care Principles;
- neglect; or
- unexplained absence from the residential care services provider: s 54-3(2).

114 The Commonwealth Dept of Health reports that more than 5,000 submissions had 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.

115 See the Executive Summary of the Report at https://agedcare.royalcommission.gov.au/publications/final-report-executive-summary, accessed 26 November 2021.

116 See "Serious Incident Response Scheme" at https://www.agedcarequality.gov.au/sirs#what-is-the-serious-incident-response-scheme-sirs-?, accessed 26 November 2021.

117 See Explanatory Memorandum to the Aged Care Legislation Amendment (Serious Incident Response Scheme and Other Measures) Bill 2020, p 8 at https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6642_ems_8b48ae7c-3b81-46b7-982f-75997f7e671d/upload_pdf/JC000645.pdf;fileType=application%2Fpdf, accessed 29 November 2021.

"Restrictive practices" in s 54-9 in relation to a care recipient is any practice or intervention that has the effect of restricting the rights or freedom of movement of the care recipient.

New reporting requirements as part of SIRS mean that residential aged care providers will be required to report and manage all serious incidents which impact on the safety and well-being of consumers, with the range of serious incidents that are reportable under SIRS being broader than those under previous compulsory reporting requirements.[118]

Sexual abuse in residential care

In 2019-20, there was notification of 816 alleged or suspected unlawful sexual contacts occurring in residential aged care facilities across Australia. This amounts to 2.3% of those in permanent residential care.[119] 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.[120]

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.[121]

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

118 Examples of reportable incidents can be found at https://www.agedcarequality.gov.au/sites/default/files/media/What_is_the_SIRS_Provider_Fact_sheet_FINAL.pdf, accessed 1 November 2021. Reporting timeframes are available at https://www.agedcarequality.gov.au/sirs.

119 See above n 110, p 90. See also, 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.

120 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.

121 See further R Critchlow, "NSW police and the abuse of older people" (2016) 10 *Elder Law Review* 1.

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.

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

Last reviewed: June 2023

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".[122] It includes misuse of powers of attorney[123] 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.[124] 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.[125]

122 Legislative Council, General Purpose Standing Committee No 2, above n 58, p 77.

123 For an overview of research on abuse committed by enduring Power of Attorney, see eg, N Ries, "When powers of attorney go wrong: preventing financial abuse of older people by enduring attorneys" (2018) 148 *Precedent* 9.

124 Critchlow, above n 113, at 77-78.

125 Legislative Council, General Purpose Standing Committee No 2, above n 58, p 34; ALRC, *Elder abuse*, above n 104, p 34.

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.[126]

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.

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.[127]

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 *Spink v Flourentzou*[128] 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

126 NSW Elder Abuse Helpline and Resource Unit, at https://www.facs.nsw.gov.au/resources/statistics/ageing-and-disability-abuse-helpline/metadata-for-elder-abuse-helpline-and-resource-unit-dashboard-2017-18, accessed 26 November 2021. Note the latest figures reported are 2016-17.

127 ibid.

128 [2019] NSWSC 256.

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].[129]

Capacity abuse

In NSW, the Office of the Legal Services Commission dealt with 35 "capacity complaints"[130] (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.

The demographic reality of an ageing population means that the likelihood of challenges to wills on the ground of testamentary capacity is increasing.[131] 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.[132] This is most readily demonstrated by the older person obtaining adequate, competent and relevant independent legal advice (well) prior to the impugned transaction.[133]

The Law Society of NSW publication "When a client's mental capacity is in doubt: a practical guide for solicitors"[134] provides some guidelines for solicitors to assist in the assessment of capacity when taking instructions. See also the Law Council of Australia's "Best practice guide for legal practitioners on assessing mental capacity".[135]

In *Ryan v Dalton* [2017] NSWSC 1007 at [107], the court made a number of observations for dealing with the "increasing number" of challenges to

129 Regarding family accommodation arrangements, see further P Lane, "Reform in elder law: granny flats" (2018) 92 *ALJ* 413; L Kyle, "Out of the shadows — a discussion on law reform for the prevention of financial abuse of older people" (2013) 7 *Elder Law Review*, Article 4; T Somes, "Identifying vulnerability: the argument for law reform for failed family accommodation arrangement" (2020) 12 *Elder Law Review* Article 7.

130 L Barry, "Capacity and vulnerability: how lawyers assess the legal capacity of older clients" (2017) 25 *JLM* 267.

131 *Ryan v Dalton* [2017] NSWSC 1007 at [101].

132 *Badman v Drake* [2008] NSWSC 1366 at [76].

133 *Matouk v Matouk (No 2)* [2015] NSWSC 748; *Christodoulou v Christodoulou* [2009] VSC 583.

134 The Law Society of NSW, 2016 at www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf, accessed 21 January 2018.

135 Law Council of Australia, "Best practice guide for legal practitioners on assessing mental capacity", June 2023, accessed 20/6/2023.

testamentary capacity. Justice Kunc, noting the ALRC recommendation 8-1,[136] 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 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.[137]

136 ALRC, *Elder abuse*, above n 84.
137 *McFee v Reilly* [2018] NSWCA 322.

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

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.[138] 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.[139] In its

138 AIFS, *Elder abuse: structures and framework*, Research report No 35, February 2016 at https://aifs.gov.au/publications/elder-abuse/6-structures-frameworks-and-organisation, accessed 5 March 2019.

139 FaCS, *NSW ageing strategy*, above n 78, p 364.

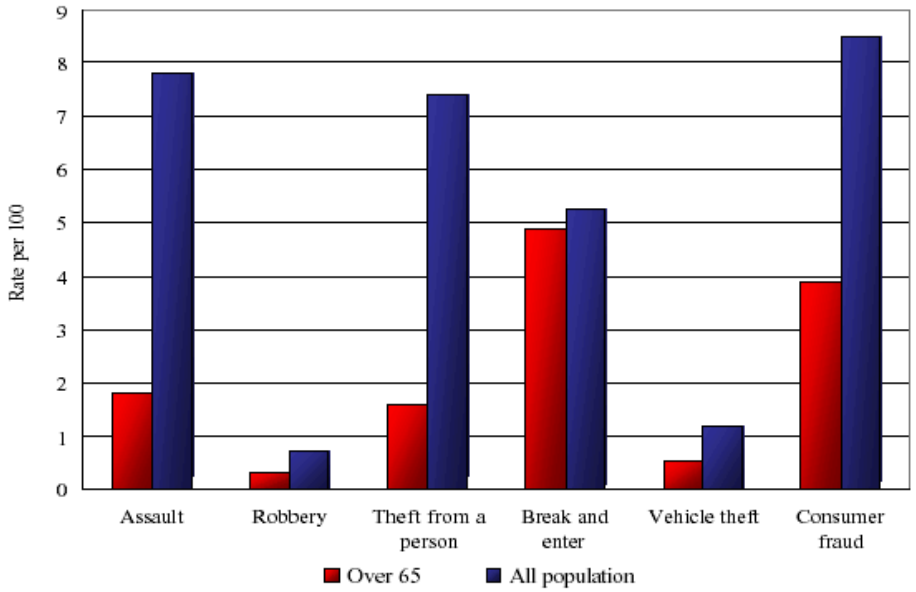
submission to the ALRC inquiry, the Law Council of Australia noted that "elder abuse" is rarely prosecuted under existing provisions.[140] General neglect offences exist in all State and Territory jurisdictions[141] although these are rarely utilised in respect of older people.[142] Neglect is a Table 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.[143]

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. Older people are victims of homicide most often as a result of an assault in their own home.[144] Table 1 provides selected crime victimisation rates for people aged 65 years and over, compared with the total population.[145]

140 Law Council of Australia, Submission 61, referred to in ALRC, above n 102, p 76.
141 For example *Crimes Act 1900* (NSW), s 44.
142 FaCS, *NSW ageing strategy*, above n 78, p 364.
143 ibid.
144 ABS, *Personal Safety, Australia*, 2016, ABS cat no 4906.0.
145 C Carcach, A Graycar and G Muscat, "The victimisation of older Australians", *Trends and Issues in Crime and Criminal Justice*, No 212, Australian Institute of Criminology, 2001.



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.[146] 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
- 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.[147]

146 ACCC scamwatch at https://scamwatch.gov.au/get-help/advice-for-older-australians, accessed 26 April 2019.

147 ACCC, *Targeting scams: report of the ACCC on scam activity 2016*, 2017, p 13 at https://accc.gov.au/publications/targeting-scams-report-on-scam-activity/targeting-scams-report-of-the-accc-on-scam-activity-2016, accessed 22 January 2019.

- A 2016 study found that vulnerability was related to the type of fraud invitation and that respondents aged 65 years and over were more likely to send money in response to a fraudulent invitation online than other age groups.[148]

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[149] have identified the following as some of the possible reasons for under reporting:

1. Reluctance to complain (the most common theme).[150]
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.

148 P Jorna, "The relationship between age and consumer fraud victimisation" (2016) 519 *Trends & issues in crime and criminal justice* cited in C Emami, R Smith and P Jorna, "Predicting online fraud victimisation in Australia" (2019) 577 *Trends & Issues in crime and criminal justice*, p 2.

149 For example: G Fitzgerald, *Hidden voices: older people's experience of abuse*, Action on Elderly Abuse, Help the Aged, 2004; C Carcach, A Graycar and G Muscat, *Trends and Issues in Crime and Criminal Justice*, above n 134.

150 The Law Council of Australia, *The justice project*, Final Report — Part 1 — Older Persons, 2018, p 19; S Ellison et al, *The legal information needs of older people*, Law and Justice Foundation, 2004.

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".[151]

Vulnerable persons (including an older person with a cognitive impairment)[152] 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.[153]

151 *R v TA* (2003) 57 NSWLR 444 at [8].
152 See s 306M(1), *Criminal Procedure Act 1986* (NSW).
153 R Mann, et al, *Norma's project: a research study into the sexual assault of older women in Australia*, above n 111.

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%.[154]

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.[155]

Brain disease can contribute towards criminal behaviour.[156] 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.[157] 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.[158] A study in Sweden of 210 offenders aged 60 and over[159] found that 7% had a diagnosis of dementia, 32% psychotic

154 Inspector of Custodial Services, *Old and inside: managing aged offenders in custody*, 2015, p 16 at www.custodialinspector.justice.nsw.gov.au/Documents/Old%20and%20inside%20Managing%20aged%20offenders%20in%20custody.pdf, accessed 5 April 2019.

155 ABS, *Prisoners in Australia*, 2017, cat no 4517.0.

156 R Ryan Darby et al, "Lesion network localization of criminal behaviour"(2018) PNAS 115(3) 601 at https://pnas.org/content/115/3/601, accessed 29 April 2019.

157 G Cipriani et al, "Violent and criminal manifestations in dementia patients" (2015) *Geriatric & Gerontology International* 541.

158 M Mendez, J Shapira and R Saul, "The spectrum of sociopathy in dementia" (2011) 23 *J Neuropsychiatry Clin Neurosci* 132.

159 S Fazel and M Grann, "Older criminals: a descriptive study of psychiatrically examined offenders in Sweden" (2002) 10 *Int J Geriatr Psychiatry* 907.

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.[160]

A NSW Bureau of Crime Statistics and Research (BOCSAR) study[161] found that between 2000 and 2015 there was a 94% increase in the proportion of older offenders (ie over 50) found guilty of a principal offence with a 228% increase in older Aboriginal offenders.[162] 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.[163] 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.[164]

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.[165] 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%).[166] 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.[167]

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.[168]

160 B Booth, "Elderly sexual offenders" (2016) 18(4) *Curr Psychiatry Rep* 34.
161 E Stavrou, "Changing age profile of NSW offenders", 2017, No 123, *BOCSAR Issue paper*.
162 ibid, p 3.
163 ibid.
164 ibid, p 4.
165 ibid, p 5.
166 ibid, p 5.
167 ibid, p 6. See also Inspector of Custodial Services, *Old and inside: managing aged offenders in custody*, September 2015, p 16.
168 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.[169] 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.[170]

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.[171] 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.[172] 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.[173] There are few aged care beds available.[174]

Australia does not have specialist aged care providers for people who have committed serious criminal offences, and few private providers are keen to take them on. That leaves many older prisoners, particularly older sex offenders, in prison long after their earliest release date, which in turn leaves prison hospitals to operate as proxy aged care providers.[175]

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.[176] This highlighted both general barriers and particular barriers for older people in accessing legal services. The Law Council of Australia released

169 J Leach and A Neto, "Offender population trends: aged offenders in NSW", Research Bulletin No 30, 2011, p 6.
170 ibid.
171 Stavrou, above n 149, p 2.
172 ibid.
173 Inspector of Custodial Services, above n 155, p 9.
174 ibid.
175 A Mann for Background Briefing, "Elderly sex offenders clog Australian jails, but struggle to find housing once released", ABC News online, 15 September 2017 at https://www.abc.net.au/news/2017-09-15/australian-jails-face-elderly-sex-offender-crisis/8945030, accessed 2 November 2021. See also Wintringham Specialist Aged Care, "Best practice support model for older prisoners", 25 September 2018, pp 24, 27, 29 at https://www.wintringham.org.au/file/2016/I/Best_practice_support_model_for_older_prisoners.pdf, accessed 2 November 2021.
176 S Ellison et al, *The legal needs of older people in NSW*, Law and Justice Foundation of NSW, December 2004.

their final report on the Justice Project in 2018.[177] 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,[178] the recommendations of the ALRC Report on Equality, Capacity and Disability,[179] and recent proposals to amend the NSW *Guardianship Act 1987* to legislate for supported decision-making instead of substitute decision-making.[180]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.

177 The Law Council of Australia, *The justice project*, Final Report — Part 1 — Older Persons, above n 138.

178 *Convention on the Rights of Persons with Disabilities*, UN Dept of economic and social affairs, opened for signature 30 March 2007, (A/RES/61/106) (entered into force 3 May 2008).

179 ALRC, *Equality, capacity and disability in Commonwealth laws*, Final Report, 2014 at https://alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_whole_pdf_file.pdf, accessed 30 April 2019.

180 NSW Law Reform Commission, *Review of the Guardianship Act 1987*, Report No 145, 2018 at https://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Report/Report%20145.pdf, accessed 30 April 2019.

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.[181]

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.

181 Legal Aid NSW, "Policy bulletin 2019/12 (Elder abuse), 30 September 2019 at www.legalaid.nsw.gov.au/for-lawyers/policyonline/policy-bulletins/policy-bulletin-2019-12-elder-abuse, accessed 2 April 2020.

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.[182] 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.[183] 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.[184] 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.[185] Further, the level of online engagement reduces in the older age cohorts.[186]

182 ACMA, "Digital lives of older Australians", Research snapshots, August 2016 at https://acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Digital-lives-of-older-Australians, accessed 5 March 2019.

183 Law Council of Australia, above n 164, p 22 at https://lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/Older%20Persons%20%28Part%201%29.pdf, accessed 30 April 2019. See also www.sl.nsw.gov.au/services-older-peoples-services-tech-savvy-seniors/about-tech-savvy-seniors, accessed 30 April 2019.

184 For further information on Tech Savvy Elders see https://burraga.org/tech-savvy-elders, accessed 30 April 2019.

185 S Edwards and A Fontana, *Legal information needs of older people*, Law and Justice Foundation of NSW, 2004.

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.[187] Further, effective internet searching is a complex skill.[188] 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.[189]

Along with privacy concerns, older Australians frequently cite concerns about security and viruses as a reason for not accessing the internet.[190] These are valid concerns as people over the age of 65 years are increasingly vulnerable to scams, particularly those involving the loss of money.[191] In 2017 alone, there were almost 16,000 reports involving a loss of over $9 million to Scamwatch by people aged 65 years over.[192]

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.

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

186 Submission to the Senate Standing Committee in Finance and Public Administration, *Inquiry into the digital delivery of government services*, COTA Australia, October 2017.
187 Law Council of Australia, above n 138, p 22.
188 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) 34 *Ageing & Society* 670.
189 ALRC, *Elder abuse*, above n 104.
190 National Seniors Australia, *Older Australians and the internet: bridging the digital divide*, Productive Ageing Centre, September 2011, p 21.
191 ACCC, *Targeting scams: report of the ACCC on scams activity 2016*, 2017, p 13 at https://accc.gov.au/publications/targeting-scams-report-on-scam-activity/targeting-scams-report-of-the-accc-on-scam-activity-2016, accessed 22 January 2019.
192 ACCC, *Scamwatch statistics* at https://scamwatch.gov.au/about-scamwatch/scam-statistics, accessed 22 November 2018.

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.[193]

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.[194]

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[195] 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 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.[196] 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.

193 UNECE, *Older persons in rural and remote areas,* Policy briefing on Ageing No 18, March 2017 at https://unece.org/fileadmin/DAM/pau/age/Policy_briefs/ECE-WG1-25.pdf, accessed 29 April 2019.

194 R Kaspiew, R Carson and H Rhoades, *Elder abuse: understanding issues, frameworks and responses*, Research Report No 35, AIFS, 2016, noted in N Ries, B Johnston and S McCarthy, "Technology-enabled legal service delivery for older adults: what can law learn from telehealth? Findings from an international review of literature" (2016) 10 *Elder Law Review* 3.

195 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.

196 ACMA, *Regional Australians online* at https://acma.gov.au/theACMA/engage-blogs/engage-blogs/Research-snapshots/Regional-Australians-online, accessed 18 December 2018.

Inadequate technological infrastructure in courts in RRR areas is a key contributing factor to RRR access to justice problems that must be addressed. The Law Council has suggested that the profession's response to the COVID-19 pandemic offers an opportunity to build upon delivery of online courts, tribunals and dispute resolution forums, as well as to address issues faced by people experiencing disadvantage who may, for a variety of reasons, experience difficulties in adapting to legal services moving online — including members of RRR communities.[197]

Isolation also puts an older person at risk of neglect and financial exploitation: see, for example, *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.

In 2020, the Law Council of Australia (drawing upon the expertise of the Constituent Bodies, the Law Council's RRR Committee, and the Justice Project Report) developed a RRR National Strategic Plan focusing on five key areas for action, with the corresponding projects to be implemented by the Law Council over 2021-23. The Law Council developed the strategies to address the main challenges faced by RRR lawyers and their communities, which include:

- difficulties in recruiting and retaining lawyers, and ensuring succession plans
- general shortages of lawyers in RRR areas
- conflict of interest problems due to scarcity of locally available lawyers; and
- scarce and over-stretched legal assistance services.

A copy of the National Strategic Plan can be found here.

197 Law Council of Australia, "Rural, regional and remote lawyers and communities: national strategic plan", 13 November 2020, p 18 at https://www.lawcouncil.asn.au/files/pdf/policy-statement/RRR_NSP.pdf, accessed 3 November 2021.

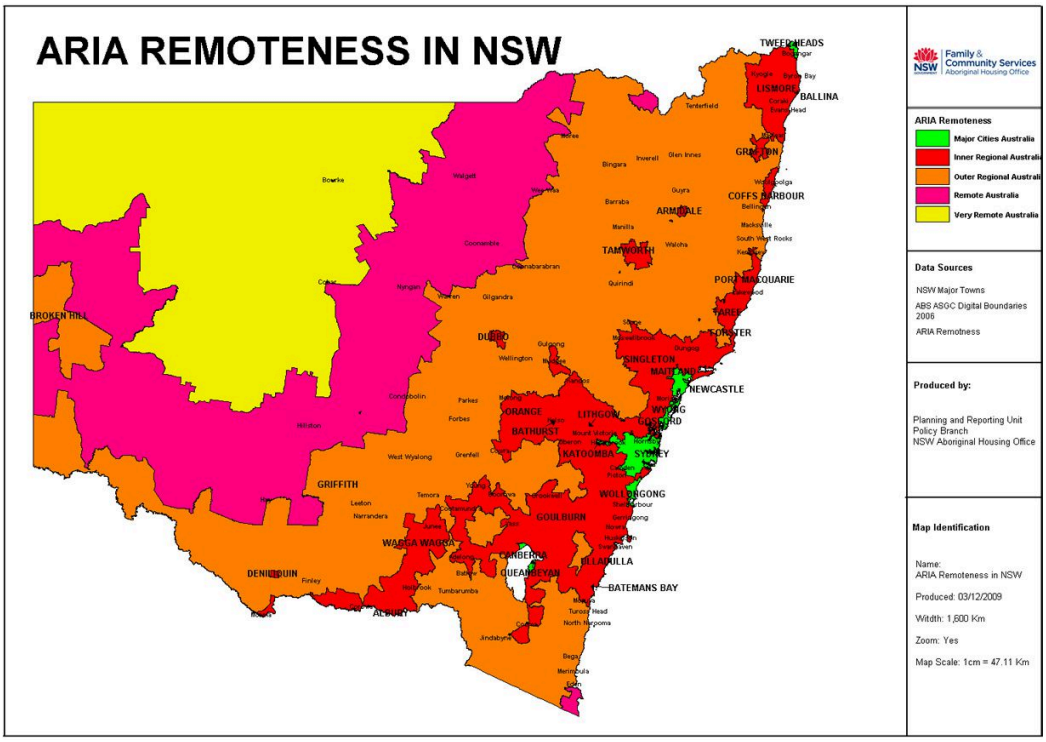


Figure 1 – Map of NSW showing areas of varying geographic remoteness[198]

11.5 Practical considerations

11.5.1 Legal capacity

Last reviewed: June 2023

Not all older clients will experience a cognitive impairment, however, dementia is the leading cause of disability in people aged 65 years and over.[199]

Capacity is the ability to make decisions. A presumption of capacity exists for all legal activities except the making of wills,[200] but courts are reluctant to use a presumption as the foundation for a decision on an issue such as capacity and instead decide through close analysis of the facts of each case.[201]

198 From ARIA remoteness in NSW at https://aho.nsw.gov.au/download?file=550680, accessed 5 March 2019.

199 See, for example, Dementia Australia, *Dementia Statistics in Australia* at www.fightdementia.org.au/understanding-dementia/statistics.aspx, accessed 22 January 2019; Deloitte Access Economics, *Dementia across Australia 2011–2050*, 2011 at https://dementia.org.au/sites/default/files/20111014_Nat_Access_DemAcrossAust.pdf, accessed 22 January 2019.

200 *Strata Plan No 23007 v Cross* (2006) 153 FCR 398 at [66]–[67] (in which the presumption is described as "longstanding"); *Murphy v Doman* (2003) 58 NSWLR 51 at [36]; *L v Human Rights and Equal Opportunity Commission* [2006] FCAFC 114 at [34].

Capacity is 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.[202]

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.[203] This represents an aspect of inherent vulnerability which greatly impacts legal capacity.[204] 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,[205] however, family conflict is not raised separately as a factor that may influence decision-making capacity. See also the Law Council of Australia's "Best practice guide for legal practitioners in relation to elder financial abuse" and its attachment "Best practice guide for legal practitioners on assessing mental capacity"[206] which were developed in response to a recommendation in the Australian Law Reform Commission's report *Elder abuse: a national legal response* (2017).[207] The best practice guides aim to assist legal practitioners to identify and respond to clients who may be subject to elder financial abuse and mitigate the risks of such abuse, and provide guidance on a legal practitioner's obligations in relation to assessing a client's mental capacity and how to assess capacity in various circumstances.

201 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at [26]–[28]; *Evans v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2012] FCAFC 81 at [12]–[13]; *Ashton v Pratt* (2015) 88 NSWLR 281 at [69]–[73]. See also "Best practice guide for legal practitioners on assessing mental capacity", above n 135, pp 1–2.

202 N O'Neill and C Peisah (eds), *Capacity and the law*, Sydney University Press Law Books, 2011, available at http://austlii.edu.au/au/journals/SydUPLawBk/2011/3.html, accessed 26 April 2019.

203 See K Purser, "Assessing testamentary capacity in the 21st century: is Banks v Goodfellow still relevant?" [2015] *UNSWLJ* 30 at http://austlii.edu.au/au/journals/UNSWLJ/2015/30.html, accessed 22 November 2018, quoting K Shulman et al, "Contemporaneous Assessment of Testamentary Capacity" (2009) *21 International Psychogeriatrics* 433.

204 See L Barry, "Capacity and vulnerability: how lawyers assess the legal capacity of older clients" (2017) 25 *JLM* 267.

205 See https://lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf and "Capacity Toolkit" at https://justice.nsw.gov.au/diversityservices/Documents/capacity_toolkit0609.pdf, accessed 22 November 2018. See also, L Barry, "'He wore street clothes, not pyjamas': common mistakes in lawyers' assessment of legal capacity for vulnerable older clients" (2018) 21(1) *Legal Ethics* 3.

206 Law Council of Australia, "Best practice guide for legal practitioners in relation to elder financial abuse", June 2023, accessed 20/6/2023; "Best practice guide for legal practitioners on assessing mental capacity", above n 135.

207 ALRC, *Elder abuse — a national legal response*, ALRC Report 131, 2017, accessed 20/6/2023.

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.

> 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.[208] 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.[209]

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.[210]

As regards capacity and the interface with the law, certain health professionals such as psychiatrists, geriatricians or neuropsychologists may give opinions on

208 A Wright and R Holliday, "Police officers' perceptions of older eyewitnesses" (2005) 10(2) *Legal and Criminological Psychology* 211.

209 ibid.

210 See further, "Capacity toolkit" at https://justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx, accessed 29 April 2019.

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.

When considering a person with dementia's fitness for trial or capacity to give evidence, the following needs to be considered:[211]

(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) *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 *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.

211 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) *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 (GAL) appointed. A 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.[212]

The NSW Civil and Administrative Tribunal (NCAT) may appoint a person to act as GAL for a party: s 45(4)(a) *Civil and Administrative Tribunal Act 2013*. A valid appointment of a GAL under s 45(4) and (6) requires that the Tribunal appoint a specified person to act in that role. The appointment of "a person" without nominating the person appointed effects no appointment at all: *Choi v NSW Ombudsman* (2021) 104 NSWLR 505 at [44].

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.[213] 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.

212 See further at http://gal.justice.nsw.gov.au/Pages/Gal_what_is_gal.aspx, accessed 26 April 2019.
213 *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 focussed 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 5.6.6.3 and 5.6.6.4 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.[214] 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".[215]

214 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Older people and the law*, 2007, p 168.

215 See 2.1 " Aboriginal people — some statistics" of this Bench Book.

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.[216]

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 5.3.2 of this Bench Book.

11.5.6 Oaths, affirmations and declarations

Points to consider:

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.

216 See 2.2 of this Bench Book.

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 5.6.1 and 5.6.2 of the this Bench Book.

Some particular points to consider in relation to older persons include:[217]

> 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 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.

217 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 Court*s 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.

11.5.8 Directions to a jury[218]

Points to consider:

Negative stereotyping of older people is considered pervasive.[219] 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 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:

218 See *Equality before the law bench book*, WA Supreme Court, 2009, p 175.
219 The Benevolent Society NSW, *The drivers of ageism*, Final Report, p 9.

Ability Incorporated Advocacy Service 100 Main Street Alstonville NSW 2477 Ph: 02 6628 8088 Web: https://abilityadvocacy.org.au/	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.
Aboriginal Legal Services (NSW/ACT) 619 Elizabeth Street Redfern NSW 2016 Ph: 02 8303 6600 Web: www.alsnswact.org.au/	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.
Aged Care Quality & Safety Commission (Cth) Ph: 1800 951 822 (free call) Email: info@agedcarequality.gov.au	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.
Combined Pensioners & Superannuants Association Level 3, 17-21 Macquarie St Parramatta NSW 2150 Ph: 9281 3588 Web: http://cpsa.org.au/	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.
Council on the Ageing (NSW) Level 11 31 Market Street Sydney NSW 2000 Ph: 1800 449 102 Web: https://cotansw.com.au/	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.
Dementia Australia NSW Macquarie Hospital Building 21, Gibson-Denney Centre Cnr Coxs & Norton Roads North Ryde NSW 2113 Ph: 02 9805 0100 Email: nsw.admin@dementia.org.au Web: https://dementia.org.au/	A national peak body for people, of all ages, living with all forms of dementia, their families and carers.
Disability Council NSW Level 3, 4-6 Cavill Ave Ashfield NSW 2131 Ph: 02 8879 9175 Email: DisabilityCouncil@facs.nsw.gov.au	The Disability Council is the official advisory body to the NSW government.
Elder Law at Western Sydney Western Sydney University Locked Bag 1797, Penrith NSW 2751 Web: www.westernsydney.edu.au/elr	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.
Financial Rights Legal Centre Level 1, 72-80 Cooper Street Surry Hills NSW 2010 Ph: 1800 007 007 Web: http://financialrights.org.au/	Offer advice and advocacy for consumers in financial stress.
Law Access Dept of Justice Parramatta Justice Precinct 160 Marsden Street Parramatta NSW 2124 Ph: 1300 888 529 Web: http://lawaccess.nsw.gov.au/	LawAccess NSW provides a single point of access to legal and related assistance services in NSW.

Law Society of NSW 170 Phillip Street, Sydney NSW 2000 Ph: 02 9926 0333 Web: https://lawsociety.com.au/	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.
Legal Aid of NSW 323 Castlereagh Street Haymarket 2000 Ph: 02 92195000 Fax: 02 92195935 Web: https://legalaid.nsw.gov.au/	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. Legal Aid's Elder Abuse Service had launched a YouTube series called *Age, Abuse & Justice* and a podcast series called *Hard Conversations.*
My Aged Care Ph: 1800 200 422 Web: https://myagedcare.gov.au/	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.
National Seniors Association Ph: 1300 765 050 Web: https://nationalseniors.com.au/about/branches?state=NSW	National Seniors Australia branches ensure seniors voice is heard on issues affecting millions of older Australians.
NSW Elder abuse helpline and resources Ph: 1800 628 221	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.
NSW Family & Community Services Family and Community Services Ageing, Disability and Home Care Locked Bag 10, Strawberry Hills NSW 2012 Ph: 02 9377 6000 Web: https://facs.nsw.gov.au/	Family and Community Services are involved in ageing, disability inclusion, carers and advisory councils.
Older Womens Network (OWN) 8-10 Victoria Street Newtown NSW 2042 Ph: 02 9519 8044 Web: http://ownnsw.org.au/	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.
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

Advocare, *National elder abuse*, Annual report 2015-2016, Advocare Incorporated, 2016.

Australian Law Reform Commission, *Elder Abuse — a national legal response*, ALRC Report 131 (Final Report), 2017.

Australian Law Reform Commission, *Equality, capacity and disability in Commonwealth laws*, ALRC Report 124, November 2014.

A Wiglesworth and L Mosqueda, *People with dementia as witnesses to emotional events*, Final technical report, US Department Justice, 2011.

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R Kaspiew et al, *Elder Abuse National Research — Strengthening the evidence base: research definition background paper*, Australian Institute of Family Studies and National Ageing Research Institute, 2019, accessed 2 April 2020.

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NSW Bureau of Crime, Statistics and Research, *Changing age profile of NSW offenders*, Crime and Justice Statistics, Issue paper no 123, 2017.

NSW Justice Department, "Capacity toolkit" at https://justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx, accessed 26 April 2019.

NSW Government, *Preventing and responding to abuse of older people (elder abuse)*, NSW Interagency policy, June 2018.

Ombudsman, *Abuse and neglect of vulnerable adults in NSW — the need for action*, A special report to Parliament under s 31 of the *Ombudsman Act 1974*, 2018.

S Ellison et al, *Access to justice and legal needs: the legal needs of older people in NSW*, Law and Justice Foundation NSW, December 2004.

NSW Government, *Preventing and responding to abuse of older people (Elder abuse)*, NSW Interagency Policy, June 2018.

S Edwards and A Fontana, *Legal information needs of older people*, Law and Justice Foundation of NSW, 2004.

Seniors Rights Service, *Abuse of older people: a community response*, Final report, 2018.

S Ellison et al, *Access to justice and legal needs: the legal needs of older people in NSW*, Vol 1, Ch 10, Law and Justice Foundation of NSW, 2004.

Dementia Australia publishes respectful language guidelines at https://dementia.org.au/files/resources/dementia-language-guidelines.pdf

Books

S Field, K Williams, C Sappideen, (eds) *Elder law: a guide to working with older Australians*, Federation Press, 2018.

R McCullagh, *Australian Elder Law*, Thomson Reuters, 2018.

R Lewis, *Elder Law in Australia*, 2nd ed, Lexis Nexis, 2012.

American Bar Association (ABA), *Judicial Determination of Capacity of Older Adults: A Handbook for Judges*, 2009.

Articles

J Anderson, "Vulnerability of elders to physical harm and death: criminal law responses" (2019) 93 *ALJ* 631.

L Barry, "Capacity and vulnerability: how lawyers assess the legal capacity of older clients" (2017) 25 *JLM* 267.

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.

E Moir et al, "Best practice for estimating elder abuse prevalence in Australia: moving towards the dynamic concept of 'adults at risk' and away from arbitrary age cut-offs" (2017) 29(2) *Current Issues in Criminal Justice* 181.

K Diesfeld, "Analysis of legal cases for prevention of elder abuse: decisions from New Zealand" (2011) 18 *JLM* 737.

R Berger, "Criminal behaviour among elderly: a look into what people think about this emerging topic" (2018) 7 *Advances in Aging Research*, 1-16, Scientific Research Publishing.

N Ries, "Elder abuse and lawyers' ethical responsibilities: incorporating screening into practice" (2018) *Legal Ethics*, DOI: 10.1080/1460728x.2018.1502965.L

E Webb and L Elphick, "Yesterday once more: discrimination and LGBTI+ seniors" (2017) 43 (2) *Monash University Law Review* 530.

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D Browne, "Avoiding elder financial abuse: safeguards solicitors should have in place" (2018) 41 *NSWLSJ* 79.

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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.

C Sharp, J Schultz Moore and M McLaws, "The coroner's role in the prevention of elder abuse: a study of Australian coroner's court cases involving pressure ulcers in elders" (2018) 26 *JLM* 494.

Guides and other resources

Law Council of Australia, "Best practice guide for legal practitioners in relation to elder financial abuse", June 2023, accessed 20/6/2023.

Law Council of Australia, "Best practice guide of legal practitioners on assessing mental capacity", June 2023, accessed 20/6/2023.

Law Council of Australia, "Rural, regional and remote lawyers and communities: national strategic plan", 13 November 2020.

Law Society of NSW, "Preventing elder abuse", various resources at https://www.lawsociety.com.au/news-and-publications/practice-resources/my-practice-area/elder-law-capacity-and-succession/elder, accessed 26 November 2021.

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Section 12

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

> 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

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.

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 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

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.

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.

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 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]

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]

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.

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.

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.

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 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

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

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 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 traumatisation 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]

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.

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.

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]

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"

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 eurobiology of stress and adaption: central role of the brain" (2007) 87 *Physio Rev* 873 at 873, 891.

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.

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 circuity 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]

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.

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-convinced-by-expert-evidence-on-freeze-fright-response-in-rape-victims-20140406-zqrkd.html, accessed 14 December 2021.

43 Werner, above, n 40.

> 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]

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 LGBTQI 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

44 ibid at pp 586–587

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.

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; 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

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] of the *Children's Court 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.

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, 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]

54 Davis, above n 26, ch 1.
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.

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 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 Welfare[61] 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 report[64] 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

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.

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]

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

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

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 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 **[2-3000] 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

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.
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.

stress disorder is greatly underestimated and underdiagnosed. For cultural reasons, mental illness may not be expressed or may manifest as physical 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

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.

sexual harassment. The Commission recommended that education on the nature, 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]

12.3.7 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.**

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]

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.

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.

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]

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

92 Kezelman and Stavropoulos, above n 4, pp 11–17.
93 above n 90.
94 SAMHSA, above n 16.
95 ibid p 10. See also Hora, above n 8, at 12.

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]
- **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

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.
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.

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 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]

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.

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; vulnerable persons defined in s 306M CPA in personal assault proceedings; domestic violence complainants in s 3 and Ch 6 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

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.

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 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 practices[109]

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 gaol 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.

107 ibid at 8.111–8.119.

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.

"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?"
"You didn't follow the contract. You're going to gaol. We're done with you. There is nothing more we can do."	"I'm hopeless. Why should I care how I behave in gaol? They expect trouble anyway."	"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."
"I'm ordering you to get a mental health evaluation."	"I must be crazy. There is something wrong with me that can't be fixed."	"I'd like to refer you to a doctor who can help us better understand how to support you."

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

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.

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]

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]

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

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.

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

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.

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.

12.6 Further information or help

Last reviewed: February 2024

The following organisations can provide information or expertise about older people, or related issues and also about other appropriate community agencies:

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/	Blue Knot provides information and support for anyone who is affected by complex trauma.
Bravehearts (Head office) PO Box 575, Arundel BC Queensland 4214 Ph: 07 5552 3000 Email: bisl@bravehearts.org.au Web:https://bravehearts.org.au/	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.
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	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.

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.

Full Stop Australia Ph: 1800 385 578 Email: info@fullstop.org.au Web: https://fullstop.org.au/	Trauma specialist counselling for people of all genders who are impacted by violence and abuse
1800 Respect Ph: 1800 737732 Web: https://www.1800respect.org.au/	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.
Victims Services NSW Victims Access Line: 1800 633 063 Aboriginal Contact Line: 1800 019 123 Web: https://www.victimsservices.justice.nsw.gov.au/	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..
Women's Trauma Recovery Centre Ph: 4255 6800 Web: www.womenshealthcentre.com.au/womens-trauma-recovery-centre/	The Women's Trauma Recovery Centre is a place for women to heal and rebuild lives after experiencing domestic, family, and sexual violence. Through an innovative and wrap-around approach, the Centre will support women to live independent and secure lives for the wellbeing of current and future generations.

12.7 Further reading

Last reviewed: February 2024

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" .

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Your comments

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

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

You can use the following proforma to send us your comments or simply forward them to us — by email or mail:

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Equality before the Law Bench Book
Judicial Commission of NSW
GPO Box 3634
Sydney NSW 2001

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