



**SECOND
EDITION**

**24 September
2021**

**EQUAL JUSTICE
BENCH BOOK**

Department of
Justice Western
Australia

TABLE OF CONTENTS

| | |
|---|-----------|
| TABLE OF CONTENTS | 1 |
| FOREWORD | 15 |
| 1 EQUAL JUSTICE | 16 |
| 1.1 EQUAL JUSTICE AND DISCRIMINATION | 17 |
| 1.2 AVOIDING BIAS AND STEREOTYPING | 18 |
| 1.3 PROVIDING FOR COMMUNITY AND INDIVIDUAL DIFFERENCE | 19 |
| 1.4 ABOUT THIS BENCH BOOK | 21 |
| 1.4.1 The contents of this Bench Book | 21 |
| 1.4.2 Second edition | 22 |
| 1.4.3 Community consultation..... | 23 |
| 1.4.4 How to use this Bench Book | 24 |
| 2 A PROFILE OF WESTERN AUSTRALIA..... | 26 |
| 2.1 DIVERSITY WITHIN THE WESTERN AUSTRALIAN POPULATION | 29 |
| 2.1.1 Religious affiliations | 29 |
| 2.1.2 People with disabilities | 31 |
| 2.1.3 Children and young people | 31 |
| 2.1.4 Older people | 32 |
| 2.1.5 Migration and multiculturalism | 33 |
| 2.1.6 Women | 35 |
| 2.1.7 Aboriginal people..... | 36 |
| 2.1.8 Residential distribution of Western Australians: by geographical location and by Aboriginality..... | 37 |
| 2.1.9 Diverse sexuality and diverse sex and gender | 38 |
| 2.2 BIRTHS, DEATHS, LIFE EXPECTANCY | 41 |
| 2.2.1 Births..... | 41 |
| 2.2.2 Deaths | 42 |
| 2.2.3 Life expectancy | 42 |
| 2.3 HEALTH AND WELLBEING | 43 |
| 2.3.1 Aboriginal people's health and well being | 44 |
| 2.3.2 Suicide | 46 |
| 2.3.3 Alcohol | 48 |
| 2.3.4 Drugs other than alcohol | 56 |

| | |
|--|------------|
| 2.4 ECONOMIC CONTEXT | 59 |
| 2.4.1 Living standards | 59 |
| 2.4.2 Income | 61 |
| 2.4.3 Poverty | 64 |
| 2.5 HOMELESSNESS | 66 |
| 2.5.1 Definitions of homelessness | 66 |
| 2.5.2 Homelessness statistics | 67 |
| 2.5.3 Homelessness and disadvantage | 68 |
| 2.5.4 People who are homeless and the justice system | 69 |
| 2.5.5 Aboriginal people and homelessness | 74 |
| 2.5.6 Young people and homelessness | 74 |
| 2.6 PRACTICAL CONSIDERATIONS | 75 |
| 2.6.1 Directions to a jury | 81 |
| 2.6.2 Sentencing, other decisions and judgment or decision writing | 82 |
| 2.7 FURTHER READING..... | 84 |
| | |
| 3 RELIGIOUS AFFILIATIONS | 86 |
| | |
| 3.1 SOME STATISTICS..... | 88 |
| 3.1.1 Religious affiliation..... | 89 |
| 3.1.2 No religious affiliation..... | 90 |
| | |
| 3.2 CHRISTIANITY..... | 91 |
| 3.2.1 History of Christianity in Western Australia..... | 92 |
| 3.2.2 Main beliefs | 93 |
| 3.2.3 Holy books and scriptures..... | 93 |
| 3.2.4 Religious leaders | 93 |
| 3.2.5 Forms of worship and feast days | 93 |
| 3.2.6 Diet..... | 94 |
| 3.2.7 Practices and customs relevant to appearance before the court..... | 95 |
| | |
| 3.3 BUDDHISM..... | 97 |
| 3.3.1 History of Buddhism in Western Australia..... | 97 |
| 3.3.2 Main beliefs | 98 |
| 3.3.3 Holy books and scriptures..... | 98 |
| 3.3.4 Religious leaders | 99 |
| 3.3.5 Forms of worship and festivals | 99 |
| 3.3.6 Practices relevant to appearance before the court | 100 |
| | |
| 3.4 ISLAM..... | 101 |
| 3.4.1 History of Islam in Western Australia | 102 |
| 3.4.2 Main beliefs | 103 |
| 3.4.3 Holy books and scriptures..... | 104 |
| 3.4.4 Religious leaders | 105 |
| 3.4.5 Forms of worship and festivals | 105 |
| 3.4.6 Practices relevant to appearance before the court | 106 |

| | |
|--|------------|
| 3.5 HINDUISM | 116 |
| 3.5.1 History of Hinduism in Western Australia..... | 117 |
| 3.5.2 Main beliefs | 117 |
| 3.5.3 Holy books and scriptures..... | 118 |
| 3.5.4 Religious leaders | 118 |
| 3.5.5 Forms of worship and festivals | 119 |
| 3.5.6 Practices relevant to appearance before the court..... | 119 |
| 3.6 SIKHISM | 121 |
| 3.6.1 History of Sikhism in Western Australia..... | 122 |
| 3.6.2 Main beliefs | 122 |
| 3.6.3 Holy books and scriptures..... | 123 |
| 3.6.4 Religious leaders | 123 |
| 3.6.5 Forms of worship and festivals | 123 |
| 3.6.6 Diet..... | 124 |
| 3.6.7 Practices relevant to appearance before the court..... | 124 |
| 3.7 JUDAISM | 125 |
| 3.7.1 History of Judaism in Western Australia | 126 |
| 3.7.2 Main beliefs | 126 |
| 3.7.3 Forms of worship and festivals | 127 |
| 3.7.4 Holy books and scriptures..... | 127 |
| 3.7.5 Religious leaders | 128 |
| 3.7.6 Forms of worship and festivals | 128 |
| 3.7.7 Diet..... | 128 |
| 3.7.8 Practices relevant to appearance before the court..... | 129 |
| 3.8 PRACTICAL CONSIDERATIONS | 130 |
| 3.8.1 Modes of address for religious leaders..... | 131 |
| 3.8.2 Oaths and affirmations | 131 |
| 3.8.3 Appearance, behaviour and body language | 138 |
| 3.8.4 Language..... | 139 |
| 3.8.5 The impact of religious values on behaviour relevant to the matter(s) before the court | 140 |
| 3.8.6 Appropriate breaks for religious practices..... | 142 |
| 3.8.7 Directions to the jury | 143 |
| 3.8.8 Sentencing, other decisions and judgment or decision writing..... | 144 |
| 3.9 FURTHER INFORMATION | 144 |
| 3.9.1 Christianity | 145 |
| 3.9.2 Buddhism | 147 |
| 3.9.3 Hinduism | 147 |
| 3.9.4 Judaism | 148 |
| 3.9.5 Multicultural interests | 148 |
| 3.10 FURTHER READING | 148 |
| 4 PEOPLE WITH DISABILITIES | 151 |
| 4.1 SOME STATISTICS | 157 |

| | |
|---|------------|
| 4.1.1 Number of people with disabilities..... | 157 |
| 4.1.2 Types of disabilities..... | 159 |
| 4.1.3 Severity of disability..... | 160 |
| 4.1.4 National Disability Insurance Scheme (NDIS)..... | 161 |
| 4.1.5 Care and assistance..... | 163 |
| 4.1.6 Health..... | 165 |
| 4.1.7 Accommodation and housing..... | 169 |
| 4.1.8 Employment and income..... | 171 |
| 4.1.9 Education..... | 173 |
| 4.2 CRIME AND IMPRISONMENT..... | 174 |
| 4.2.1 Fetal Alcohol Spectrum Disorder (FASD) and the criminal justice system..... | 179 |
| 4.2.2 People with disabilities as victims of crime..... | 185 |
| 4.3 DISCRIMINATION..... | 186 |
| 4.4 SOME INFORMATION..... | 187 |
| 4.4.1 Level of disability..... | 192 |
| 4.4.2 Descriptions of the main types of disabilities..... | 194 |
| 4.4.3 Mental illness and suicide in dealing with the media..... | 220 |
| 4.4.4 Terminology..... | 221 |
| 4.4.5 Barriers for people with disabilities in relation to court proceedings..... | 224 |
| 4.4.6 Adjustments to mitigate the barriers..... | 231 |
| 4.4.7 Specialist courts and other legal interventions..... | 233 |
| 4.5 LEGAL CAPACITY..... | 244 |
| 4.5.1 Capacity to give evidence..... | 244 |
| 4.5.2 Criminal responsibility..... | 245 |
| 4.5.3 Capacity to initiate, defend or participate as a party in other legal proceedings..... | 247 |
| 4.6 PRACTICAL CONSIDERATIONS..... | 249 |
| 4.6.1 Adjustments that may need to be considered before the proceedings start or at the time a person with a disability first appears in court..... | 249 |
| 4.6.2 Oaths, affirmations and declarations..... | 252 |
| 4.6.3 Language and communication..... | 253 |
| 4.6.4 Special measures for obtaining evidence from witnesses with disabilities..... | 265 |
| 4.6.5 Breaks and adjournments..... | 270 |
| 4.6.6 The possible impact of a person's disability or disabilities on any behaviour relevant to the matter(s) before the court..... | 270 |
| 4.6.7 Directions to the jury..... | 271 |
| 4.6.8 Sentencing, other decisions and judgment or decision writing..... | 272 |
| 4.7 FURTHER INFORMATION OR HELP..... | 275 |
| 4.7.1 Court and tribunal contacts for accommodating the needs of people with disabilities..... | 275 |
| 4.7.2 Information and advice about accommodating the needs of people with disabilities..... | 275 |
| 4.7.2 General information and advice about people with disabilities..... | 276 |
| 4.7.3 Acquired Brain injury..... | 277 |
| 4.7.4 Mental illness..... | 277 |
| 4.7.5 Dementia..... | 278 |

| | |
|--|------------|
| 4.7.6 Intellectual disability | 279 |
| 4.7.7 Autism spectrum disorder | 279 |
| 4.7.8 Physical disability | 279 |
| 4.7.9 Human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS)..... | 281 |
| 4.7.10 Fetal Alcohol Spectrum Disorder (FASD) | 281 |
| 4.8 FURTHER READING..... | 282 |
| 5 CHILDREN AND YOUNG PEOPLE..... | 285 |
| 5.1 SOME STATISTICS..... | 286 |
| 5.1.1 Population | 286 |
| 5.1.2 Education | 288 |
| 5.1.3 Employment status | 290 |
| 5.1.4. Crime..... | 291 |
| 5.1.5 Young people in youth justice supervision | 293 |
| 5.1.6 Children and young people as victims of crime | 294 |
| 5.1.7 Child protection applications | 294 |
| 5.2 SOME INFORMATION..... | 297 |
| 5.2.1 Definitions – child/ young person | 297 |
| 5.2.2 Child development and the effect of early abuse or neglect..... | 297 |
| 5.2.3 Royal Commission into Institutional Responses to Child Sexual Abuse..... | 301 |
| 5.2.4 Capabilities of children and young people..... | 310 |
| 5.2.5 Examples of difficulties experienced by children and young people when appearing before court | 314 |
| 5.2.6 The impact of these difficulties..... | 315 |
| 5.2.7 Causes and prevention of offending amongst young people | 316 |
| 5.2.8 The experience of children and young people with separation and family law | 317 |
| 5.3 LEGAL STATUS IN RELATION TO COURT PROCESSES..... | 318 |
| 5.3.1 Capacity to give evidence | 318 |
| 5.3.2 Criminal responsibility | 321 |
| 5.3.3 Compellability | 323 |
| 5.3.4 Family Court proceedings | 325 |
| 5.3.5 Criminal jurisdiction | 328 |
| 5.3.6 Non-criminal jurisdiction | 331 |
| 5.3.7 Requirements to obtain the views of relevant children and young people | 332 |
| 5.4 SPECIAL MEASURES FOR OBTAINING VIEWS OR EVIDENCE FROM CHILDREN AND YOUNG PEOPLE | 337 |
| 5.4.1 Special measures in Family Court proceedings..... | 338 |
| 5.4.2 Other provisions..... | 341 |
| 5.5 PRACTICAL CONSIDERATIONS | 352 |
| 5.5.1 Involvement of children and young people in legal proceedings | 352 |
| 5.5.2 Ground rules hearings for children and vulnerable witnesses | 354 |
| 5.5.3 Minimise delays | 355 |
| 5.5.4 Oaths, affirmations and declarations..... | 357 |
| 5.5.5 Managing the manner in which a child or young person gives evidence | 360 |
| 5.5.6 Language and communication | 363 |

| | |
|---|------------|
| 5.5.7 Adequately explain court proceedings and processes..... | 365 |
| 5.5.8 Cross-examination | 367 |
| 5.5.9 Regular breaks | 371 |
| 5.5.10 Jury Directions | 372 |
| 5.5.11 Sentencing, other decisions and judgment or decision writing..... | 373 |
| 5.5.12 Same school violence restraining orders | 377 |
| 5.6 FURTHER INFORMATION OR HELP | 378 |
| 5.7 FURTHER READING | 380 |
| 6 OLDER PEOPLE..... | 382 |
| 6.1 SOME STATISTICS..... | 383 |
| 6.1.1 Population..... | 383 |
| 6.1.2 Older Aboriginal and Torres Strait Islander peoples..... | 385 |
| 6.1.3 Education | 386 |
| 6.1.4 Employment..... | 387 |
| 6.1.5 Volunteering and unpaid work | 388 |
| 6.1.6 Income | 389 |
| 6.1.7 Care and assistance..... | 389 |
| 6.1.8 Accommodation and living arrangements..... | 390 |
| 6.1.9 Crime..... | 392 |
| 6.1.10 Health..... | 393 |
| 6.2 SOME INFORMATION..... | 398 |
| 6.2.1 Grandparents | 398 |
| 6.2.2 United Nations principles for older persons | 400 |
| 6.2.3 Elder abuse | 402 |
| 6.2.4 Ageing and health | 404 |
| 6.2.5 Ageing and disability..... | 405 |
| 6.2.6 Examples of the barriers for older people in relation to court proceedings | 410 |
| 6.3 PRACTICAL CONSIDERATIONS | 411 |
| 6.3.1 Legal Capacity | 412 |
| 6.3.2 Adjustments that may need to be considered before the proceedings start, or at the time an older person first appears in court..... | 412 |
| 6.3.3 Oaths, affirmations and declarations..... | 416 |
| 6.3.4 Language and communication | 416 |
| 6.3.5 Directions to a jury..... | 419 |
| 6.3.6 Sentencing, other decisions and judgment or decision writing | 421 |
| 6.4 FURTHER INFORMATION OR HELP | 423 |
| 6.5 FURTHER READING..... | 426 |
| 7 PEOPLE FROM CULTURALLY AND LINGUISTICALLY DIVERSE BACKGROUNDS..... | 428 |

| | |
|--|------------|
| 7.1 STATISTICS | 430 |
| 7.1.1 Population | 430 |
| 7.1.2 Language spoken | 434 |
| 7.1.3 Place of usual residence..... | 434 |
| 7.1.4 Ancestry or ethnic background..... | 435 |
| 7.1.5 Religion | 435 |
| 7.1.6 Socio-economic status | 435 |
| 7.1.7 Crime..... | 436 |
| 7.2 INFORMATION | 438 |
| 7.2.1 Cultural and linguistic differences | 438 |
| 7.2.2 Examples of common cultural and linguistic differences | 439 |
| 7.2.3 The possible impact of these linguistic and cultural differences | 440 |
| 7.2.4 Particular issues affecting refugees and asylum seekers..... | 441 |
| 7.3 PRACTICAL CONSIDERATIONS | 448 |
| 7.3.1 The need for an interpreter or translator | 448 |
| 7.3.2 Modes of address..... | 465 |
| 7.3.3 Oaths and affirmations | 467 |
| 7.3.4 Appearance, behaviour and body language | 467 |
| 7.3.5 Verbal communication..... | 472 |
| 7.3.6 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 | 484 |
| 7.3.7 Directions to the jury | 491 |
| 7.3.8 Sentencing, other decisions and judgment or decision writing..... | 492 |
| 7.4 FURTHER INFORMATION OR HELP | 493 |
| 7.4.1 Interpreting and translating services | 493 |
| 7.4.2 Government agencies | 493 |
| 7.4.3 Migrant Resource Centres | 494 |
| 7.5 FURTHER READING/VIEWING | 494 |
| 8 SELF-REPRESENTED PEOPLE..... | 498 |
| 8.1 GENERAL INFORMATION..... | 500 |
| 8.1.1 Right to self-represent | 500 |
| 8.1.2 Vexatious proceedings..... | 502 |
| 8.1.3 Self-representation in the Magistrates Court | 502 |
| 8.1.4 Restrictions on self-represented examining/cross-examining witnesses..... | 503 |
| 8.1.5 Restrictions on self-represented persons in the <i>Rules of the Supreme Court 1971 (WA)</i> | 504 |
| 8.1.6 Corporations as persons | 504 |
| 8.1.7 Duty of the Court | 504 |
| 8.1.8 Numbers of self-represented parties and funding sources | 506 |
| 8.2 VARIOUS JURISDICTIONS | 507 |
| 8.2.1 Civil jurisdiction..... | 507 |
| 8.2.2 Criminal jurisdiction | 509 |
| 8.2.3 Civil and criminal appeals | 511 |

| | |
|---|------------|
| 8.2.4 Children's Court | 511 |
| 8.2.5 Violence Restraining Orders | 512 |
| 8.2.6 Family Court of Western Australia..... | 513 |
| 8.2.7 State Administrative Tribunal | 514 |
| 8.3 THE SELF-REPRESENTED PERSON..... | 515 |
| 8.3.1 What are the key characteristics of parties who represent themselves?..... | 515 |
| 8.3.2 Why parties represent themselves | 516 |
| 8.3.3 Difficulties faces by self-represented parties..... | 517 |
| 8.3.4 Specific issues regarding additionally disadvantaged self-represented parties | 519 |
| 8.4 THE IMPACT OF SELF-REPRESENTED PEOPLE | 523 |
| 8.4.1 Difficulties for the court..... | 524 |
| 8.4.2 Difficulties for the parties | 524 |
| 8.5 PRACTICAL CONSIDERATIONS | 525 |
| 8.5.1 Prior to the court appearance..... | 525 |
| 8.5.2 At the start of court proceedings..... | 529 |
| 8.5.3 As the court proceedings progress | 531 |
| 8.5.3.2 The role of the court in Family Court proceedings | 536 |
| 8.5.4 Directions to the jury | 549 |
| 8.5.5 Sentencing, other decisions and judgement or decision writing..... | 550 |
| 8.6 FURTHER INFORMATION OR HELP | 551 |
| 8.6.1 Information on free sources on legal information, advice or representation | 551 |
| 8.6.2 Other useful websites for self-represented litigants | 554 |
| 8.7 FURTHER READING..... | 555 |
| 9 REGIONAL AND REMOTE WESTERN AUSTRALIA | 558 |
| 9.1 SOME STATISTICS..... | 560 |
| 9.1.1 Population distribution in Western Australia | 560 |
| 9.1.2 Aboriginal people in regional and remote Western Australia | 560 |
| 9.1.3 Cultural and linguistic diversity in regional and remote Western Australia | 561 |
| 9.1.4 Health and well being | 562 |
| 9.2 REGIONAL PROFILES..... | 564 |
| 9.2.1 Kimberley | 565 |
| 9.2.2 Pilbara | 570 |
| 9.2.3 Gascoyne..... | 575 |
| 9.2.4 Mid West..... | 578 |
| 9.2.5 Wheatbelt | 582 |
| 9.2.6 Peel | 584 |
| 9.2.7 Goldfields–Esperance | 587 |
| 9.2.8 Great Southern | 590 |
| 9.2.9 South West..... | 594 |
| 9.3 SOME INFORMATION..... | 596 |

| | |
|--|------------|
| 9.3.1 Disadvantage in regional and remote areas | 596 |
| 9.3.2 Barriers and challenges in remote, rural and regional locations | 597 |
| 9.3.3 Legal services | 602 |
| 9.3.4 Interpreters and translators | 606 |
| 9.3.5 Mental health services..... | 608 |
| 9.3.6 Aboriginal people..... | 610 |
| 9.3.7 Regional and remote courts..... | 611 |
| 9.3.8 Judicial officers..... | 617 |
| 9.3.9 Police..... | 618 |
| 9.3.10 Cross Border Justice Scheme | 619 |
| 9.4 PRACTICAL CONSIDERATIONS | 620 |
| 9.4.1 Language and communication: level and style | 620 |
| 9.4.2 Appearance and behaviour | 621 |
| 9.4.3 Bail | 621 |
| 9.4.4 Stranding..... | 624 |
| 9.4.5 Minimising the impact of regional and remote factors on other court processes, practices and procedures..... | 625 |
| 9.4.6 Logistical matters..... | 627 |
| 9.4.7 Family violence and sexual assault matters..... | 629 |
| 9.4.8 Directions to the jury | 630 |
| 9.4.9 Sentencing, other decisions and judgment or decision writing..... | 631 |
| 9.5 FURTHER INFORMATION OR HELP | 632 |
| 9.5.1 Regional and remote mental health services | 632 |
| 9.5.2 Regional and remote drug and alcohol services | 633 |
| 9.5.3 Legal services | 633 |
| 9.6 FURTHER READING/ VIEWING..... | 634 |
| 10 WOMEN | 636 |
| 10.1 STATISTICS | 638 |
| 10.1.1 General..... | 638 |
| 10.1.2 Gender pay gap..... | 640 |
| 10.1.3 Gender segregation in the workplace..... | 642 |
| 10.1.4 Women and superannuation | 643 |
| 10.1.5 Gender and education | 644 |
| 10.1.6 Women and Poverty | 645 |
| 10.1.7 Gender and victims of violence..... | 647 |
| 10.1.8 Care..... | 651 |
| 10.1.9 Legal Aid funding by area of law and gender..... | 653 |
| 10.1.10 Women in the legal profession and as judicial officers | 654 |
| 10.2 WOMEN AS OFFENDERS AND PRISONERS | 655 |
| 10.2.1 Women as offenders..... | 655 |
| 10.2.2 Gender and sentencing outcomes | 657 |
| 10.2.3 Women as prisoners | 658 |
| 10.2.4 <i>The Fines, Penalties and Infringement Notices Enforcement Amendment Act 2020</i> | 660 |

| | |
|--|------------|
| 10.2.5 Most common offences resulting in imprisonment, by gender | 661 |
| 10.3 SOME INFORMATION | 662 |
| 10.3.1 Gender, gender inequality and gender bias..... | 662 |
| 10.3.2 Possible gender bias or a perception of gender bias, in relation to court proceedings | 663 |
| 10.3.3 Sexual harassment | 664 |
| 10.4 PRACTICAL CONSIDERATIONS | 667 |
| 10.4.1 Modes of address..... | 667 |
| 10.4.2 Language and terminology | 668 |
| 10.4.3 The impact of gender on any matter(s) before the court..... | 670 |
| 10.4.4 Points to consider in relation to particular groups of women..... | 676 |
| 10.4.5 Directions to the jury | 683 |
| 10.4.6 Decisions and sentencing remarks..... | 684 |
| 10.5 PRISON FACILITIES FOR WOMEN | 685 |
| 10.6 FURTHER INFORMATION OR HELP | 687 |
| 10.7 FURTHER READING..... | 689 |
| 11 ABORIGINAL PEOPLE..... | 691 |
| 11.1 ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY | 695 |
| 11.2 ABORIGINAL BENCHBOOK FOR WESTERN AUSTRALIAN COURTS | 696 |
| 11.3 OTHER INITIATIVES | 698 |
| 11.4 FURTHER INFORMATION OR HELP | 702 |
| 11.4.1 Current challenges | 702 |
| 11.4.2 Aboriginal culture, values and aspirations..... | 703 |
| 11.4.3 Language and communication | 704 |
| 11.4.4 Community-driven programs..... | 704 |
| 11.4.5 Specifically for judicial officers..... | 705 |
| 11.4.6 Court liaison officers | 705 |
| 11.4.7 Aboriginal Legal Service of Western Australia (Inc.) (ALSWA) | 706 |
| 11.4.8 Aboriginal Family Law Services (AFLS) | 710 |
| 11.4.9 National Indigenous Australians Agency (NIAA) | 711 |
| 11.4.10 Prison support services | 711 |
| 11.4.11 Aboriginal Mediation Service..... | 713 |
| 11.4.12 Victim Support Service..... | 713 |
| 11.4.13 Child Witness Service | 714 |
| 11.5 FURTHER READING/VIEWING..... | 716 |
| 12A DIVERSE SEXUALITY: LESBIAN, GAY AND BISEXUAL PEOPLE AND PEOPLE WITH OTHER DIVERSE SEXUALITIES | 721 |

| | |
|--|------------|
| 12A.1 SOME STATISTICS | 724 |
| 12A.1.1 Population | 724 |
| 12A.1.2 Views of others | 725 |
| 12A.1.3 Discrimination..... | 725 |
| 12A.1.4 Verbal abuse, intimidation and violence | 726 |
| 12A.1.5 Family support..... | 729 |
| 12A.1.6 Mental health and suicide | 729 |
| 12A.1.7 Self-censorship | 731 |
| 12A.1.8 Education..... | 732 |
| 12A.1.9 Income level | 733 |
| 12A.1.10 Children | 735 |
| 12A.2 COMMON MISCONCEPTIONS | 736 |
| 12A.3 LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS | 738 |
| 12A.3.1 Marriage | 738 |
| 12A.3.2 Children and parenting..... | 739 |
| 12A.3.3 Property | 742 |
| 12A.4 EXPLANATIONS AND TERMINOLOGIES | 743 |
| 12A.4.1 Homosexual | 743 |
| 12A.4.2 Gay..... | 743 |
| 12A.4.3 Lesbian..... | 743 |
| 12A.4.4 Bisexual..... | 744 |
| 12A.4.5 Pansexual or omnisexual | 744 |
| 12A.4.6 Queer | 744 |
| 12A.4.7 Asexuality | 744 |
| 12A.4.8 Aromantic..... | 745 |
| 12A.4.9 Coming out, closeted and outed | 745 |
| 12A.4.10 Concepts describing prejudices and biases against lesbian, gay and bisexual people | 746 |
| 12A.5 PRACTICAL CONSIDERATIONS | 747 |
| 12A.5.1 Appearance and behaviour | 747 |
| 12A.5.2 Language and terminology | 748 |
| 12A.5.3 The impact of a person being lesbian, gay or bisexual or with other diverse sexuality on any behaviour relevant to the matter(s) before the court..... | 750 |
| 12A.5.4 Directions to the jury..... | 753 |
| 12A.5.5 Decisions and sentencing remarks | 754 |
| 12A.6 FURTHER INFORMATION AND HELP | 755 |
| 12A.7 FURTHER READING | 756 |
| 12B DIVERSE SEX AND GENDER: INTERSEX, TRANS AND GENDER DIVERSE PEOPLE (ITGD) . | 759 |
| 12B.1 SOME INFORMATION AND STATISTICS | 761 |
| 12B.1.1 Population..... | 761 |
| 12B.1.2 Discrimination..... | 762 |
| 12B.1.3 Health | 764 |

| | |
|--|------------|
| 12B.1.4 Children..... | 768 |
| 12B.1.5 Education..... | 768 |
| 12B.1.6 Family and other relationships..... | 770 |
| 12B.1.7 Family, domestic and sexual violence..... | 770 |
| 12B.1.8 Legal system..... | 771 |
| 12B.2 COMMON MISCONCEPTIONS..... | 772 |
| 12B.2.1 Common misconceptions about people who are gender diverse..... | 772 |
| 12B.2.2 Common misconceptions about intersex people..... | 775 |
| 12B.3 LEGAL CONSIDERATIONS..... | 776 |
| 12B.3.1 Recognition of those who are intersex, trans and gender diverse..... | 776 |
| 12B.3.2 Prison policies..... | 777 |
| 12B.4 EXPLANATIONS AND TERMINOLOGIES..... | 778 |
| 12B.4.1 ITGD..... | 778 |
| 12B.4.2 Sex/gender identity..... | 778 |
| 12B.4.3 Gender diverse..... | 778 |
| 12B.4.4 Gender history..... | 778 |
| 12B.4.5 Genderqueer/non-binary..... | 779 |
| 12B.4.6 Trans/transgender..... | 779 |
| 12B.4.7 Transitioning..... | 779 |
| 12B.4.8 Transphobia and heterosexism..... | 780 |
| 12B.4.9 Androgynous..... | 780 |
| 12B.4.10 Intersex..... | 781 |
| 12B.4.11 Cisgender..... | 781 |
| 12B.4.12 Male-to-Female (MtF) and Female-to-Male (FtM)..... | 782 |
| 12B.4.13 Cross-dressing..... | 782 |
| 12B.4.14 Deadnaming..... | 782 |
| 12B.4.15 Misgendering..... | 782 |
| 12B.5 PRACTICAL CONSIDERATIONS..... | 783 |
| 12B.5.1 Mode of address and gender to use..... | 783 |
| 12B.5.2 Appearance and behavior..... | 784 |
| 12B.5.3 Language and Terminology..... | 785 |
| 12B.5.4 The impact of being trans, intersex or gender diverse on behavior relevant to the matter(s) before the court)..... | 785 |
| 12B.5.5 Directions to the jury..... | 788 |
| 12B.5.6 Decisions and sentencing remarks..... | 789 |
| 12B.6 FURTHER INFORMATION AND HELP..... | 790 |
| 12B.7 FURTHER READING..... | 791 |
| 13 FAMILY, DOMESTIC AND SEXUAL VIOLENCE..... | 793 |
| 13.1 ABOUT THE STATISTICS..... | 797 |
| 13.1.1 Barriers to reporting and data collection..... | 797 |
| 13.1.2 Key statistics..... | 798 |

| | |
|---|------------|
| 13.1.3. The economic cost of family, domestic and sexual violence | 799 |
| 13.2 WOMEN AND FAMILY, DOMESTIC AND SEXUAL VIOLENCE | 800 |
| 13.2.1 Key Statistics | 802 |
| 13.2.2 Impacts upon women | 806 |
| 13.2.3 Forms of family, domestic and sexual violence | 808 |
| 13.2.4 Risk factors for women | 813 |
| 13.3 CHILDREN AND FAMILY, DOMESTIC AND SEXUAL VIOLENCE | 816 |
| 13.3.1 Key statistics | 816 |
| 13.3.2 Exposure to family, domestic and sexual violence | 818 |
| 13.3.3 Risk factors for children | 820 |
| 13.3.4 Impact on children | 821 |
| 13.3.5 Child protection and domestic violence | 824 |
| 13.4 MEN AND FAMILY, DOMESTIC AND SEXUAL VIOLENCE | 825 |
| 13.4.1 Key Statistics | 826 |
| 13.4.2 Experiences of violence and controlling behaviours | 826 |
| 13.4.3 Risk factors..... | 828 |
| 13.5 ABORIGINAL PEOPLE AND FAMILY, DOMESTIC AND SEXUAL VIOLENCE | 829 |
| 13.5.1 Key statistics | 830 |
| 13.5.2 Risk factors..... | 832 |
| 13.6 OTHER VULNERABLE POPULATIONS..... | 833 |
| 13.6.1 Rural, regional and remote communities | 833 |
| 13.6.2 Older people | 834 |
| 13.6.3 People with disabilities | 835 |
| 13.6.4 People from culturally and linguistically diverse backgrounds..... | 837 |
| 13.7 SOME BACKGROUND INFORMATION | 839 |
| 13.7.1 Theories of family and domestic violence | 839 |
| 13.7.2 Perpetrator characteristics | 843 |
| 13.7.3 Family and domestic violence as 'gender-based violence' | 844 |
| 13.7.4 The co-occurrence of family and domestic violence and sexual assault | 845 |
| 13.8 RECENT INITIATIVES | 848 |
| 13.8.1 Family violence restraining orders (FVROs) | 848 |
| 13.8.2 Intimate images | 851 |
| 13.8.3 National Domestic Violence Order Scheme (NDVOS)..... | 851 |
| 13.8.4 <i>Family Violence Legislation Reform Act 2020</i> | 852 |
| 13.8.5 Family Court initiatives | 861 |
| 13.9 PRACTICAL CONSIDERATIONS | 861 |
| 13.9.1 Dealing with children | 861 |
| 13.9.2 Family Court proceedings | 863 |
| 13.9.3 Restraining orders..... | 865 |
| 13.9.4 The co-occurrence of family and domestic violence and sexual assault | 869 |
| 13.9.5 Evidentiary issues..... | 872 |

| | |
|--|------------|
| 13.9.6 Long-term or repeated abuse as a contributory factor to violence..... | 876 |
| 13.9.7 Directions to the jury | 877 |
| 13.9.8 Sentencing, other decisions and judgment writing | 878 |
| 13.10 FURTHER INFORMATION OR HELP | 879 |
| 13.11 FURTHER READING..... | 885 |
| ACKNOWLEDGMENTS | 888 |
| Special acknowledgment – New South Wales Judicial Commission | 888 |
| Community input – first edition..... | 888 |
| Community input - second edition | 890 |
| Drafting, consultation and editing | 892 |
| Steering Committees | 892 |
| DISCLAIMER | 894 |

FOREWORD

All Western Australian judicial officers, in the oath or affirmation that they take upon appointment, undertake to *'do right to all manner of people, according to law, without fear or favour, affection or ill will'*.

To talk of 'equal justice' is certainly nothing new. For example, in 404 B.C., Greek General Pericles gave a well-known speech in which he stated that '[i]f we look to the laws, they afford equal justice to all in their private differences'.

Equality and justice are complementary and serve the same purpose of promoting fairness. True justice cannot exist without equality - it requires the delivery of decisions that represent and ensure impartial treatment.

Equal justice does not mean treating everyone in the same way. Treating people fairly requires identification and an understanding of their different circumstances. This Bench Book provides comprehensive information about some of those differing circumstances – relating to gender, culture, disability, language and other circumstances – and provides some practical strategies to remove or ameliorate disadvantage and inequality without prejudicing other participants in the legal process. The best way of doing that is to be informed by specialised knowledge and experience. That is why consultation with community groups, researchers and academics has been an integral element to the publication of this Bench Book, and why it has been essential to update and republish the Bench Book which was originally published in 2009.

The Bench Book has been developed primarily for use by judicial officers in Western Australia. It may also be a helpful resource for lawyers, law students and any other members of the community who have an interest in the redress of inequality, unfairness and disadvantage. Any feedback from readers of this Bench Book is welcomed, with a view to ensuring that it continues to fulfil its important role in the administration of justice.

The Hon Justice Peter Quinlan
Chief Justice of Western Australia

1 EQUAL JUSTICE

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

Judicial officers must treat all parties fairly regardless of gender, ethnicity, disability, sexuality, age, religious affiliation, socio-economic background, size or nature of family, literacy

level or any other such characteristic. Respect and courtesy should be the hallmarks of judicial conduct. Paternalistic or patronising attitudes have no place in the courtroom.



In the foreword to the New South Wales Judicial Commission's *Equality before the Law Bench Book*, the model and source for much of the material in this Bench Book, the Honourable JJ Spigelman AC, the former Chief Justice of the Supreme Court of New South Wales, noted Anatole France's reference 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. Former Chief Justice Spigelman continued:

*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.*¹

The former Chief Justice of the High Court of Australia, the Honourable Robert French AC, has described the idea of equality before the law (as represented in the picture above), in its formal sense, as being blind to difference including cultural attributes not expressly or impliedly accommodated by the law.²

His Honour noted that formal equality is not a guarantee of equal justice and can itself have adverse discriminatory outcomes depending on the different circumstances and attributes of those to whom it applies.

His Honour regarded bench books such as this one as embodying an attempt to attain "equal

¹ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2006, as revised July 2016) Foreword (accessed 30 July 2021).

² Chief Justice Robert French AC, *Equal Justice and Cultural Diversity — The General Meets the Particular* (Cultural Diversity and the Law Conference, 14 March 2015, Sydney) (accessed 20 July 2015).

justice" [which] may be seen as a more demanding standard than that of formal "equality before the law".³

1.1 EQUAL JUSTICE AND DISCRIMINATION

As the Honourable Michael McHugh AC, former Justice of the High Court, 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.*⁴

Australia is a signatory to a number of United Nations Conventions relating to human rights, discrimination and the need to treat people fairly. These have been specifically implemented through the following statutes:

- *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)
- *Equal Opportunity Act 1984* (WA)

Each of these statutes defines discrimination in terms similar to those of the Honourable Michael McHugh AC (although at greater length). Discrimination is defined to include both direct and indirect discrimination. In general, the definition of direct discrimination coincides with the latter part of his Honour's comment, whereas the definition of indirect discrimination coincides with the former part.

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

Everyone who comes into contact with the court system (whether represented or self-

³ Chief Justice Robert French AC, *Equal Justice and Cultural Diversity — The General Meets the Particular* (Cultural Diversity and the Law Conference, 14 March 2015, Sydney) page 6 (accessed 20 July 2017).

⁴ *Waters v Public Transport Corporation* [1991] HCA 49 [10]; (1991) 173 CLR 349, 402 (accessed 19 November 2020).

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.

1.2 AVOIDING BIAS AND STEREOTYPING

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

Judicial officers need to ensure that they do not treat anyone as a stereotype 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.

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 which people from different backgrounds may face in relation to court proceedings.

There is little doubt that Aboriginal⁵ people, people of diverse sexuality, sex or gender, people with a disability, women, people who are culturally or linguistically diverse, people living in regional or remote locations, older people and children experience higher rates of social inequity, discrimination and disadvantage - for further information refer to 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:

⁵ As is noted in the introductory section to chapter 11 of this Bench Book, the term Aboriginal is used in this Bench Book to refer to a person of Aboriginal descent who identifies as Aboriginal and is accepted as such by the community in which he or she lives. Although it is acknowledged that the Indigenous inhabitants resident in Western Australia descend from many hundreds of distinct and diverse cultural groups, the term Aboriginal is used following the recommendation of the Aboriginal advisers for the *Aboriginal Benchbook for Western Australian Courts* (Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008) Note to Chapter 1). Where there are references to data and statistics from other sources, the terms Aboriginal, Indigenous and Torres Strait Islander, and Indigenous are used consistently with the terminology in the source of that data.

- Surveys of young people in the child protection, youth justice and homelessness systems showed that young people involved in one of these sectors were more likely to experience involvement in each of the other sectors than the general population.⁶
- The *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* reported, on 16 March 2021, that lifetime rate of violence⁷ for adults 18-64 was 64% for people with disabilities and 45% for people without disabilities. The rates for physical violence specifically were 52% and 34% respectively.⁸
- The age-standardised rate of hospitalisations for assault among Indigenous people was 14 times higher than for non-Indigenous people in 2015 (1,157 and 83 per 100,000 people, respectively). The age-standardised rate of hospitalisations for assault among Indigenous females was 31 times higher than for non-Indigenous females (1,204 and 39 per 100,000 females, respectively).⁹

While it is important to understand which groups are most likely to experience inequity, discrimination or disadvantage, every individual is the product of many different influences. Characteristics such as ethnicity, gender, religious affiliation, disability, sexuality and socio-economic background may or may not have a determining influence on any particular individual's values, life experience or behaviour. However, such characteristics usually have a compounding effect. For example, an Aboriginal female with a disability is more likely to have experienced discrimination and disadvantage than a non-Aboriginal female without a disability.¹⁰

1.3 PROVIDING FOR COMMUNITY AND INDIVIDUAL DIFFERENCE

All of the above means that judicial officers cannot treat everyone the same way if they wish to

⁶ Australian Institute of Health and Welfare (AIHW) *Young People in Child Protection and Under Youth Justice Supervision 2018-19* (15 October 2020) Summary (both accessed 28 July 2021).

⁷ 'Violence' encompasses physical violence, sexual violence, partner violence, partner emotional abuse and stalking in this report.

⁸ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Research Report - Nature and Extent of Violence, Abuse, Neglect and Exploitation against People with Disability in Australia* (16 March 2021) pages 8-9 (accessed 28 July 2021).

⁹ Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2015* (2015) page 44 (accessed 28 July 2021).

¹⁰ For an example of a case that examines the interplay of three such characteristics (in this case, Aboriginality, chronic substance abuse and social disadvantage) refer to *Bropho v Harrison* [2013] WASC 250 (accessed 16 February 2021).

ensure equal justice, as to do so could lead to a perception of unfairness and, in some cases, a legally wrong outcome.¹¹

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 approaches that might be required range from the more obvious to the less obvious.

The more obvious approaches include:

- Employing a different method or style of communication for those who need it — for example children and young people, people with little or no English, people with a communication disability, or some people who are representing themselves.
- Using a different form of oath for some people who practise a non-Christian religion.¹²
- Allowing someone to present evidence from a stretcher or hospital bed.

Less obvious approaches include:

- Knowing and using appropriate terminology that will cause neither offence nor 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 different religious affiliations, people with child care responsibilities, young people or people who have a disability, in relation to such matters as the timing and length of court appearances.

¹¹ This principle has been referred to as the principle of 'substantive equality' — see, e.g., Gummow, Hayne and Heydon JJ in *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62; (2003) 217 CLR 92 [202] (accessed 20 July 2017): '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 Conaghan J, *Law and Gender* (Clarendon Law Series, 2013) and the discussion in Graycar R and Morgan J, *The Hidden Gender of Law* (Federation Press, 2nd ed. 2002) 28-55.

¹² See *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) s 4 (accessed 20 July 2017).

- Being able to understand and take appropriate account of the impact of having a low income 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 Aboriginal people.

1.4 ABOUT THIS BENCH BOOK

1.4.1 The contents of this Bench Book

The information in this Bench Book covers the entire Western Australian 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 Western Australian law courts and the State Administrative Tribunal, and the phrase 'judicial officer' is used to mean all Western Australian judges, magistrates and tribunal members.

This Bench Book provides Western Australian judicial officers with:

- Statistics and information about different groups of people in relation to:
 - values;
 - cultures;
 - lifestyles;
 - socioeconomic disadvantage; and
 - potential barriers in relation to full and equitable participation in court proceedings.
- Guidance about how judicial officers might take account of this information in court, from the start to the conclusion of court proceedings.

This Bench Book provides guidance only and is not meant to be in any way prescriptive.

Chapter 1 explains why this information has been provided.

Chapters 2-13 of this Bench Book provide information about community and individual differences, and offer practical examples of how to take appropriate account of these

differences.

Chapters 2-13 cover the following:

- **Chapter 2** — A Profile of Western Australia (focusing on disadvantage and poverty)
- **Chapter 3** — Religious affiliations
- **Chapter 4** — People with disabilities
- **Chapter 5** — Children and young people
- **Chapter 6** — Older people
- **Chapter 7** — Culturally and linguistically diverse people
- **Chapter 8** — Self-represented people
- **Chapter 9** — Regional and remote Western Australia
- **Chapter 10** — Women
- **Chapter 11** — Aboriginal people
- **Chapter 12A** — Diverse sexuality: lesbian, gay and bisexual people and people with other diverse sexualities
- **Chapter 12B** — Diverse sex and gender: intersex, trans and gender diverse people (ITGD)
- **Chapter 13** — Family, domestic and sexual violence.

1.4.2 Second edition

A Steering Committee was first convened in 2015 to oversee the revision of the Bench Book which would result in a full second edition. Some of the revised chapters were published when they became available in 2017. Due to the limited resources for this project, and the protracted nature of the process, a decision was made in 2018 to complete the rest of the Bench Book in its entirety before publishing it in full. This included reviewing the currency of information in the chapters that had been republished in 2017, and updating those chapters as required.

In addition to the updated content, two significant changes were proposed in relation to the second edition of the Bench Book. One was the splitting of the chapter on 'Diverse sexuality, sex and gender' into two chapters – one on diverse sexuality and the second on sex and gender. Relevant stakeholder feedback strongly recommended the division of the chapter into two separate topics.

Another significant change in the second edition of the Bench Book is in relation to addressing

the topic of Aboriginal people. The original Bench Book was designed as a companion to the *Aboriginal Benchbook for Western Australian Courts*.¹³ Unfortunately, because that *Benchbook* has not been revised since the second edition was published in 2008, it is no longer suitable to utilise as a primary resource. As an interim arrangement, a second edition of chapter 11 on Aboriginal people was published in 2017 (with some updates in 2020), following a limited review. In the longer term, resources permitting, it is intended that a committee of relevant stakeholders will be convened to oversee the development of a more detailed chapter on Aboriginal people, corresponding to other chapters in the Bench Book. Unfortunately, however, it is not expected that this chapter will fully replace the comprehensive material collated and analysed in the *Aboriginal Benchbook for Western Australian Courts*.

1.4.3 Community consultation

The Steering Committee which oversaw the development of the original *Equality before the Law Bench Book* considered it imperative that peak groups have an opportunity to provide input into the revision of the Bench Book. The original version was developed after an extensive consultation process, with submissions received from a wide range of local community-based non-government organisations and individuals, and a number of government agencies.

The Steering Committee overseeing the second edition invited those who contributed to the first edition to review their previous submissions and make any new submissions in relation to those chapters relevant to them. New stakeholders have also been invited to comment, particularly where new sections have been added to the Bench Book. For example, the increase in the proportion of the population that practice Sikhism meant that an extra section needed to be added to the chapter 3 (Religious Affiliations), so there was targeted consultation with the Sikh Association of Western Australia.

The Steering Committee would like to thank and acknowledge all those who provided submissions or feedback - some on more than one occasion - during the various stages of developing and revising the Bench Book. These contributions have been invaluable in ensuring that this resource is of contemporary relevance to Western Australia. A list of contributors is included in the 'Acknowledgments' section. Individual chapters also list submissions and

¹³ Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008).

feedback which were particularly relevant to the chapter, in the introductory section.

1.4.4 How to use this Bench Book

This Bench Book, or any section of it, can be read in its entirety or dipped into as necessary.

Each chapter and section has been written to stand alone. This means that there is intentional repetition between chapters and within sections in each chapter.

Liberal use has been made of bullet points and subheadings throughout. Cross-references have also been provided where appropriate, in green shaded boxes as below:

For further information about ... please refer to....

Chapters generally start with statistical and/or cultural information about the particular group and then provide additional information and guidance about how to treat members of that group during court proceedings.

The additional information and guidance part of each chapter is entitled 'Practical considerations'. The 'Practical considerations' part of each chapter follows, as closely as possible, the order in which you might need the information in court. To further enhance accessibility of the 'Practical considerations', a red square bullet point is used for each consideration (as contrasted to black dot points used generally throughout the Bench Book) and each of the headings have been placed in orange shaded boxes, as below:

Points to consider:

- Point 1
- Point 2 ...

As indicated at various points throughout the text, you may need to read or dip into more than one chapter if you happen to be dealing with a person who comes from more than one group — for example, a young person (chapter 5) with a disability (chapter 4).

Where possible Western Australian statistics have been cited in this Bench Book, however national statistics are provided where there is no recent State data. National data is also provided for purposes of comparison, where there are significant differences from the State statistics.

One example is the comparison of State and national rates of Aboriginal imprisonment in chapter 11. That is because it is important to draw the reader's attention to the fact that Western Australia (with 21.3%), Queensland and New South Wales account for 75% of the national Aboriginal prison population (as of September 2020).¹⁴ Western Australia continued to have the highest Aboriginal imprisonment rate of all states and territories in the quarter to September 2020.¹⁵

Note that some of the statistical data cited in various sections of this Bench Book may appear outdated or inconsistent. While every effort has been made to access the most current information, in some instances no recent data was available. Further, because data may have been collated at different times (due to the size of the Bench Book revision project) or may use different variables (for example, actual Census counts rather than estimated population) it may not always be comparable.

More generally, statistical data is often superseded by newer counts and improved data collection. While the data included in this Bench Book was believed to be correct as at the date the information was accessed, it may quickly become dated. It is hoped that the extensive references, often hyperlinked to websites, will provide judicial officers with a sufficient guide to access more current information as it becomes available. The date that information from websites was accessed by the authors of this Bench Book is recorded in the footnotes, to alert the reader to the fact that there may be newer information. Where a reference is hyperlinked, it will be underlined and italicised in the footnotes. Note that both the websites of the Australian Bureau of Statistics and the Australian Institute of Health and Welfare will inform the reader whether the information is the latest in a series, and will provide links to more recent information where it is available.

Where legislation or cases are referred to in footnotes, the date at which those were last accessed by the authors of this Bench Book has generally been recorded. Whilst that is unusual in terms of referencing style, the purpose is to remind the reader that the legislation may have since been amended, or the case law may have since developed.

¹⁴ ABS, *Corrective Services, Australia, September Quarter 2020* (Cat No 4512.0) Key Statistics - Aboriginal and Torres Strait Islander Prisoners (accessed 1 February 2021).

¹⁵ ABS, *Corrective Services, Australia, September Quarter 2020* (Cat No 4512.0) Key Statistics - Aboriginal and Torres Strait Islander Imprisonment Rates (accessed 1 February 2021).

2 A PROFILE OF WESTERN AUSTRALIA

This chapter provides a profile of Western Australia based on statistical and other data, with a focus on issues of disadvantage and poverty.

In its 'Back to the Future' report of 2016, the Bankwest Curtin Economics Centre (BCEC) found that:

The resources boom in Western Australia led to an unprecedented growth in employment, wages and economic growth for the state. Demand for skilled workers drew many to Western Australia to share in the state's growth story...

But high and rising incomes posed risks too, of creating a society of have's and havenot's. Income inequality rose substantially in Western Australia over the course of the resources boom, and by more than for the rest of Australia. Costs of living, especially housing costs, tracked to the rising trend in incomes, not just in Perth but in the resource-rich regional areas of WA. All this meant that the poorest WA households, particularly those reliant on welfare pensions and payments, failed to keep pace even with those on 'typical' median incomes.

Now that WA has passed the height of the resources boom, is there evidence of a reversal in the rising inequality trend? The evidence in this report confirms a fall in overall inequality in Western Australia since 2009-10. Interestingly, most of the action is at the bottom end of the income distribution. The incomes of the poorest 10 per cent of households in Western Australia are now closer to those of the median household. Yet the spread of incomes at the top end of the distribution appears no less unequal than at the end of the boom...

In fact, wealth inequality has actually risen slightly in Western Australia in the last two years. The wealthiest 20 per cent of households now account for 65 per cent of all household net wealth, while the poorest 20 per cent hold less than 1 per cent. The gap may be closing at the

*lower end, but there are no strong signs that we are moving towards a more egalitarian society.*¹⁶

In its 'Cost of Living 2019' report, the WA Council of Social Service (WACOSS) stated:¹⁷

Waged households brought in a little more, due principally to the 2018 State Wage Case decision, but any growth they saw in their income was quickly spent on covering their living costs, which went up across the board ... Rent. Utilities. Food. Transport. All cost more this year—in some cases, significantly so ... The increase in rent was noticeable, as this was the first time that our model households had experienced a rise in five years.

The WACOSS 'Cost of Living 2020' report noted the impact of Covid-19 pandemic policies on the cost of living for disadvantaged groups, which included:¹⁸

- income support increases for those on Newstart;
- protection for those facing economic hardship from having their utilities disconnected; and
- people on Disability Support Pensions being excluded from the Coronavirus supplement.

Other studies have shown that social disadvantage in Western Australia is geographically concentrated, particularly in some regional locations, and tends to be entrenched across a number of indicators, such as prison admissions, low levels of education, high levels of unemployment and low levels of internet access.¹⁹

The 'Demand for Community Services Snapshot, December 2019' by the Australian Council of Social Service (ACOSS) demonstrated significant unmet demand for services in 2019, including 33% of service providers in community legal services reporting that they rarely or never met demand.²⁰

¹⁶ Bankwest Curtin Economics Centre, *Back to the Future: Western Australia's Economic Future after the Boom* (2016) page 86 (accessed 25 July 2017).

¹⁷ WACOSS, *Cost of Living 2019* (16 December 2019) page 3 (accessed 19 November 2020).

¹⁸ WACOSS, *Cost of Living 2020* (17 December 2020) page 3 (accessed 16 September 2021).

¹⁹ Vinson T, Rawsthorne M, Beavis A and Ericson M, *Dropping Off The Edge 2015: Persistent Communal Disadvantage in Australia* (2015) Key Findings (accessed 19 November 2020).

²⁰ ACOSS, *Demand for Community Services Snapshot, December 2019* (accessed 19 November 2020).

The ACOSS report 'Australia's Community Sector and Covid-19 – Supporting Communities through the Crisis: An Australian Community Sector Survey Special Report September 2020' found that, since March 2020, three quarters of community services reported increases in demand, including legal, advocacy and peak body services. In migrant and multicultural services, 86% of respondent organisations reported increased client numbers.²¹

Social and economic disadvantage is often associated with membership of one or more of the various groups the subject of chapters 3 to 13 of this Bench Book and often coincides with disadvantage in the legal system.

The Steering Committee overseeing this Bench Book gratefully acknowledges the submissions and contributions of the following people and organisations who have assisted with the development of this chapter in the first edition and its subsequent revision:

- Western Australian Council of Social Service (WACOSS) (27 April 2007, 17 February 2020);
- Aged and Community Services Australia (2 July 2007);
- Ruah Community Services (29 August 2007, 13 December 2016, 24 August 2020);
- Dr Raewyn Mutch, Dr Amanda Wilkins, Dr Anita Banks and Professor Carol Bower (6 August 2009);
- Street Law Centre WA Inc. (December 2016, 3 August 2020);
- Professor Carol Bower, Head of Alcohol and Pregnancy and Fetal Alcohol Spectrum Disorder Research, Telethon KIDS Institute (8 December 2017);
- Dr Raewyn Mutch, Refugee Health Service at Perth Children's Hospital (5 March 2020);
- Telethon Kids Institute (Dr R Mutch, Dr H Passmore, Dr C Bower, N Kippin and S Hamilton) (9 March 2020); and
- Aboriginal Legal Service of Western Australia Limited (14 September 2020).

²¹ ACOSS, *Australia's Community Sector and Covid-19 – Supporting Communities through the Crisis: An Australian Community Sector Survey Special Report September 2020* (September 2020) page 8 (accessed 19 November 2020).

2.1 DIVERSITY WITHIN THE WESTERN AUSTRALIAN POPULATION

The population of Western Australia is diverse both with reference to social and economic standing and with reference to membership of the various groups highlighted in this Bench Book.

The following statistics indicate the representation of some of the groups highlighted in this Bench Book within the broader Western Australian population. A profile of various key indicators of social and economic disadvantage in Western Australia is also included.

Please note that some of the data quoted is based upon the 2011 Census results (for example, where the same data was not collected in the 2016 Census). There has been a significant increase in population since 2011: 13.9% between 2011 and 2020.²²

2.1.1 Religious affiliations²³

Although just under half of the population of Western Australia identified as Christian in 2016 Census (49.8%), there is significant diversity of religious affiliation in the State, as is the case elsewhere in Australia. Overall Western Australians are affiliated with more than 130 religions.

The Census data shows the following changes and trends between 2001 and 2016:

- a decrease in identification with Christianity (from 63.2% to 49.8%);
- an increase in people identifying as having secular beliefs, other spiritual beliefs or no religious affiliations (19.70% to 33.0%); and
- an increase in identification with beliefs other than Christianity, such as:
 - Buddhism;
 - Islam;
 - Hinduism; and
 - Sikhism.

Those changes are further illuminated in the table on the following page.

²² ABS, *Australian Demographic Statistics* (March Quarter 2020 and March Quarter 2011) (Cat No 3101.0) Summary – Key Figures (accessed 19 November 2020).

²³ ABS, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube) Table 8 (accessed 25 July 2017).

Religious affiliation of the Western Australian population - 2001-2016²⁴

| Religious affiliation | Number 2001 | % of WA population 2001 | Number 2016 | % of WA population 2016 |
|---|--------------------|--------------------------------|--------------------|--------------------------------|
| Christian | 1,156,272 | 63.2% | 1,231,600 | 49.8% |
| Buddhist | 29,963 | 1.6% | 52,830 | 2.1% |
| Islam | 19,460 | 1.1% | 50,649 | 2.0% |
| Hindu | 3,640 | 0.2% | 38,739 | 1.6% |
| Sikhism | 1,090 | 0.1% | 11,897 | 0.5% |
| Jewish | 5,057 | 0.3% | 5,427 | 0.2% |
| Other religions | 39,652 | 2.2% | 11,134 | 0.4% |
| Secular beliefs/ Other spiritual beliefs/ No religious affiliation | 361,088 | 19.7% | 816, 144 | 33.0% |
| Not declared/ inadequately described | 196,442 | 10.7% | 255,983 | 10.4% |
| Total WA population | 1, 828,293 | 100% | 2,474,410 | 100% |

For more information on religious affiliations please refer to chapter 3 of this Bench Book.

²⁴ ABS, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube) Tables 4 and 8 (accessed 27 November 2018).

2.1.2 People with disabilities

A significant number of people live with disabilities.²⁵

- In 2018, approximately 411,500 Western Australians (16.4%) reported a disability (an increase from 14.6% in 2015, but down from approximately 22.0% in 2012²⁶).
- In 2018, nationally there were 4.4 million (17.7%) people with disabilities.
- In 2015, the weekly median income of people with disability nationally was \$465.²⁷ In 2018 it was \$455, which was less than half of that for people with no reported disability (\$959). The difference was mainly in those aged 15-64 years (\$505 compared to \$1,016), and was not as large in those aged 65 years and over (\$448 compared to \$479).

For more information on people with disabilities please refer to chapter 4 of this Bench Book.

2.1.3 Children and young people

Children and young people constitute a significant proportion of the population of Western Australia. Statistics from the Australian Bureau of Statistics 2016 Census showed that:²⁸

- 19.3% of Western Australians were children aged 0-14 years, similar to the national figure of 18.7%.
- 25.4% of Western Australians were aged 0-19 years.
- Infants aged 0-4 years constituted 6.5% of the population; 5-14 year olds accounted for 12.7%; and 15-24 year olds accounted for 12.6% of the population.
- The 'traditional' nuclear family, consisting of two parents and children, is less common than might be assumed. Of the estimated 644,189 families in Western Australia:
 - 45.3% were couple families with children;

²⁵ Unless stated otherwise, data is from ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (2019) Western Australia (data cubes) (accessed 20 November 2020).

²⁶ ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (2019) Disability Tables, Western Australia (data cubes) Tables 1.1, 1.3 and 2.3, Summary of Findings (accessed 20 July 2020).

²⁷ ABS, *Disability, Ageing and Carers: Summary of Findings, 2015* (Cat No 4430.0) (2016) Disability Tables (data cube) Table 8.1 (accessed 25 July 2017).

²⁸ Unless otherwise indicated the information below is from the ABS, *2016 Census QuickStats* (2017) People - Demographics and Education (accessed 22 March 2019).

- 38.5% were couple families without children;
- 14.5% were one parent families; and
- 1.7% were classified as 'other families'.

There were around 242,000 Indigenous²⁹ people aged 10-24 years in Australia in 2016 – roughly 5% of the total Australian youth population. The Indigenous population has a younger age structure than the non-Indigenous population.³⁰

The 2017 report by the Commissioner for Children and Young People of Western Australia entitled 'Profile of Children and Young People in WA' states that there were approximately 38,000 young Aboriginal people under 18 living in Western Australia. They comprised 37.9% of the total Western Australian Aboriginal population.³¹

For more information on children and young people please refer to chapter 5 of this Bench Book.

2.1.4 Older people

In recent decades the demographic profiles of western industrialised countries such as Australia have shown an increasingly aged population.

In Western Australian, 14.0% of the population were aged 65 years and over in 2017. This is projected to increase to 20.7% by 2061.³²

Over the 20 years between 1999 and 2019, the proportion of the Australian population aged 65 years and over increased from 12.3% to 15.9%. The number of people aged 85 years and over

²⁹ As is noted in the introductory section to chapter 11 of this Bench Book, the term Aboriginal is used in this Bench Book to refer to a person of Aboriginal descent who identifies as Aboriginal and is accepted as such by the community in which he or she lives. Although it is acknowledged that the Indigenous inhabitants resident in Western Australia descend from many hundreds of distinct and diverse cultural groups, the term Aboriginal is used following the recommendation of the Aboriginal advisers for the *Aboriginal Benchbook for Western Australian Courts* (Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008) Note to Chapter 1). Where there are references to data and statistics from other sources, the terms Aboriginal, Aboriginal and Torres Strait Islander, and Indigenous are used consistently with the terminology in the source of that data.

³⁰ Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Adolescent and Youth Health and Wellbeing 2018: In Brief* (31 October 2018) (Cat No IWH 198) (accessed 22 March 2019).

³¹ Commissioner for Children and Young People, *Profile of Children and Young People* (November 2017) (accessed 22 March 2019).

³² ABS, *Population Projections, Australia, 2017 (base) to 2066* (Cat No 3222.0) (2013) (accessed 22 January 2020).

increased by 117.1%. This can be compared to a total population growth of 34.8% over the same period.³³

In 2016, 37% of older people were born overseas. In contrast to the younger overseas-born Australians, older people were more likely to have been born in Europe (67% of those born overseas) and less likely to have been born in Asia (16%). Almost one quarter of older people (24%) were born in England.³⁴ The majority of older people (82%) spoke only English at home.³⁵

For more information on older people please refer to chapter 6 of this Bench Book.

2.1.5 Migration and multiculturalism

Overseas migration has a large and wide-ranging influence on Western Australia's community and its economy. It accounted for approximately 44% of the growth in the State's population between 1978-79 and 2004-05. Net overseas migration was the single largest component of population growth in Western Australia from 1998-99 until mid-2013.³⁶ Between 2013 and 2019, annual net overseas migration to Western Australia fell and was exceeded by the natural increase in population.³⁷ However, in the March 2020 quarter, net overseas migration had again increased (24,826) compared to the natural population increase in Western Australia (18,008).³⁸

In the 2016 Census:³⁹

³³ ABS, *Australian Demographic Statistics, June 2019* (Cat No 3101.0) (2017) Feature Article: Twenty Years of Population Change (accessed 23 November 2020).

³⁴ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 22 January 2020).

³⁵ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 22 January 2020).

³⁶ Department of Treasury and Finance, *Migration in Western Australia: A Recent Economic History* (2006) page 30 (accessed 25 July 2017); ABS, *Australian Demographic Statistics, June Quarter 2019* (Cat No 3101.0) (19 December 2019) Time Series Spreadsheets - Table 2 (accessed 23 January 2020).

³⁷ ABS, *Australian Demographic Statistics, June Quarter 2019* (Cat No 3101.0) (19 December 2019) Time Series Spreadsheets - Table 2 (accessed 23 November 2020).

³⁸ ABS, *Australian Demographic Statistics, March Quarter 2020* (Cat No 3101.0) (24 September 2020) Time Series Spreadsheets - Table 2 (accessed 2 December 2020).

³⁹ ABS, *Census of Population and Housing : Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) Cultural Diversity (data cube) Table 1, 12 (accessed 24 January 2020).

- Western Australia continued to have the largest proportion of its population born overseas (32.2%) of all the States.
- The top countries of birth of overseas-born Western Australians were England (7.8% of the Western Australian population), New Zealand (3.2%), India (2%), South Africa (1.7%) and the Philippines (1.2%).
- 38.3% of people had both parents born in Australia and 40.5% of people had both parents born overseas.
- 41.0% of Western Australians reported their ancestry as English, Irish or Scottish and 22.8% reported having an Australian ancestry.⁴⁰

Western Australia is home to people from more than 220 countries speaking approximately 290 languages and dialects (including around 50 Aboriginal and Torres Strait Islander languages) and identifying with more than 130 religious faiths.⁴¹

The Refugee Health Service at Perth Children's Hospital is a multidisciplinary service that has seen and assessed over 4,500 new patients. The Refugee Health Service submitted:⁴²

Refugee and asylum-seeking families settling in Western Australia have 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. 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.

⁴⁰ Respondents had the option of reporting two ancestries on their Census form. Calculated percentages represent a proportion of total reported ancestry responses in Western Australia, and therefore the total responses count will not equal the persons count.

⁴¹ ABS, *Census of Population and Housing : Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Tables 1, 8, 12 (accessed 24 January 2020).

⁴² Submission from Dr Raewyn Mutch, Refugee Health Service at Perth Children's Hospital (5 March 2020).

Additionally, access barriers to health, justice and education services are influenced by lived and vicarious trauma, ethnicity, literacy and cross-cultural or gender norms.

For more information on culturally and linguistically diverse people please refer to chapter 7 of this Bench Book.

The Perth Children's Hospital Refugee Health Service has documented and published information about the strengths and weaknesses of newly settled refugees in Western Australia, which are included in section 7.2.4.2 of that chapter.

2.1.6 Women

The Australian Bureau of Statistics indicated that as at December 2016, unusually in comparison to the rest of Australia (with the exception of the Northern Territory), there were fewer female residents (49.8%) in Western Australia than males (50.2%).⁴³ However, by June 2019 the situation had reversed (50.1% females and 49.9% males).⁴⁴

The proportion of women to men in Western Australia increases with age. For example, as at 30 June 2019:⁴⁵

- 31% of women and 32.7% of men were aged 24 and under;
- 7.0% of women and 5.6% of men were aged 75 and over; and
- 2.2% of women and 1.3% of men were aged 85 and over.

For more information on women please refer to chapter 10 of this Bench Book.

⁴³ ABS, *Australian Demographic Statistics, December Quarter 2016* (Cat No 3101.0) (2017) (accessed 25 July 2017).

⁴⁴ Australian Bureau of Statistics (ABS), *Australian Demographic Statistics, June 2019* (Cat No 3101.0) (19 December 2019) Time Series Spreadsheets - Population Change, Components – States and Territories (accessed 24 January 2020).

⁴⁵ ABS, *Australian Demographic Statistics* (Cat No 3101.0) (19 December 2019) Data Cubes - Australian Demographic Statistic Tables – Table 6 (accessed 24 January 2020).

2.1.7 Aboriginal people⁴⁶

Aboriginal people account for a small but increasing percentage of the Western Australian and national population:

- The estimated resident population of Western Australia as at the time of the 2016 Census was 72,924 Aboriginal people, 1,434 Torres Strait Islander people and 1,626 people of both Aboriginal and Torres Strait Islander origin. This equated to 11.7% of the Australian Indigenous population and 3.1% of the total population of Western Australia. Aboriginal and Torres Strait Islander people accounted for 2.8% of the national population.
- In 2016, Western Australia had the third highest number of Aboriginal and Torres Strait Islander residents of all the states, behind only New South Wales and Queensland.
- At the time of the 2016 Census, in Western Australia, 50.0% of Aboriginal and/or Torres Strait Islander people were male and 50.0% were female. The median age was 23 years.⁴⁷
- For the Aboriginal and Torres Strait Islander population born in 2010-12, life expectancy is estimated to be 10.6 years lower than that of the non-Indigenous population for males (69.1 years compared with 79.7) and 9.5 years for females (73.7 compared with 83.1).⁴⁸
- Between 2005-07 and 2010-12, Indigenous life expectancy at birth for boys increased by 1.6 years and for girls by 0.6 years. Over the same period, the gap between Indigenous and non-Indigenous life expectancy narrowed by 0.8 years for males and 0.1 years for females.⁴⁹

For more information on Aboriginal people please refer to chapter 11 of this Bench Book.

⁴⁶ Unless otherwise indicated, data is from ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) Aboriginal and Torres Strait Islander Population – Summary, Article and Table 1 (accessed 20 January 2020).

⁴⁷ ABS, *2016 Census QuickStats – Western Australia* (2017) (accessed 25 July 2017).

⁴⁸ AIHW, *Life Expectancy* (2016) (accessed 25 July 2017).

⁴⁹ AIHW, *Life Expectancy* (2016) (accessed 25 July 2017).

2.1.8 Residential distribution of Western Australians: by geographical location and by Aboriginality

- Of the State population of approximately 2,656,156 people in 2020,⁵⁰ an estimated 18.5% live in a regional area of Western Australia, while 78.5% live in the Greater Perth area.⁵¹ The majority of Western Australians living in regional areas live close to the coast.
- The percentage of the population living in some regional areas, such as the Pilbara and Goldfields, declined after 2012 as a result of the downturn in mining.⁵²
- When looking specifically at the Aboriginal population of Western Australia there is a noticeable difference. In ABS estimates from June 2016, 40.2% of Aboriginal people lived in or around Perth, 21.8% in regional areas and 40.0% in remote or very remote areas. Nationally 37.4% of Aboriginal people lived in urban areas, 44.0% in regional areas and 18.6% in remote areas.⁵³
- Whilst Aboriginal people comprise 3.1% of the total population of Western Australia, in some regional and remote towns and areas the proportion is much higher. For example, in the City of Kalgoorlie-Boulder, Aboriginal people represented 9.5% of the population in 2017.⁵⁴ In the Pilbara, 13.9% of the resident population identified as Aboriginal and/or Torres Strait Islander people in the 2016 Census. Significantly, in the East Pilbara locality the proportion was much higher (19.6%).⁵⁵ In the Kimberley, 41.6% of the population were Aboriginal and/or Torres Strait Islander people in 2016.⁵⁶

⁵⁰ ABS, *Australian Demographic Statistics* (March Quarter 2020) (Cat No 3101.0) Summary – Key Figures (accessed 19 November 2020).

⁵¹ ABS, *Regional Population* (Cat No 3218.0) (2018) (accessed 13 January 2021).

⁵² ABS, *Regional Population Growth, Australia, 2014-15* (Cat No 3218.0) (2016) Population change in Australia's Mining Regions 2005-2015 (accessed 13 January 2021).

⁵³ ABS, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (Cat No 3238.0.55.001) (2018) Estimated Resident Aboriginal and Torres Strait Islander and Non-Indigenous Population, States and Territories, Remoteness Areas - 30 June 2016 (data cube) Table 1 (accessed 25 July 2017).

⁵⁴ Department of Regional Development, Goldfields-Esperance Development Commission, *2017/18 Annual Report* (2017) page 12 (accessed 23 November 2020).

⁵⁵ Pilbara Development Commission, *Community Profile* citing ABS, 2016 Census of Population and Housing, REMPLAN Community (accessed 1 May 2019).

⁵⁶ ABS, *2016 Census QuickStats* (2017) (Cat No 2001.0) Kimberley – People – Demographics & Education (accessed 1 May 2019).

- In a report published in July 2015, the State Government stated that:⁵⁷

Western Australia has about 95,000 Aboriginal residents, nearly half of whom live in the Kimberley, Pilbara, Goldfields and Mid West. In these regions, the State Government estimates that about 15,000 Aboriginal people reside in either town-based reserves or remote Aboriginal communities, with about 30,000 Aboriginal people living in regional towns.

For more information on rural and remote communities please refer to chapter 9 of this Bench Book.

2.1.9 Diverse sexuality and diverse sex and gender

Census data on sex and gender diversity in Australia was collected for the first time in the 2016 Census.⁵⁸ The Australian Bureau of Statistics (ABS) acknowledged the challenges in obtaining accurate data, and has committed to improving the future collection and processing of information about sex and gender diversity.

There is ongoing concern by advocacy groups about the reliability of data collected about people who are diverse in their sexuality, sex or gender.⁵⁹ In addition to the range of issues in relation to proposed data counting rules,⁶⁰ it is also the case that surveys have indicated that a large number of people hide their sexuality or gender identity, with young people aged 16 to 24 years most likely to do so.⁶¹

⁵⁷ Government of Western Australia, Regional Services Reform Unit, *Resilient Families, Strong Communities: A Roadmap for Regional and Remote Aboriginal Communities* (2016) page 6 (accessed 25 July 2017).

⁵⁸ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2018) Sex and Gender Diversity in the 2016 Census (accessed 12 August 2019).

⁵⁹ Ansara YG (National LGBTI Health Alliance), *Making the Count: Addressing Data Integrity Gaps in Australian Standards for Collecting Sex and Gender Information* [White paper] (2016) (accessed 25 July 2017); Submission from Equality Australia (17 March 2020); Submission from Living Proud (23 September 2019).

⁶⁰ Ansara YG (National LGBTI Health Alliance), *Making the Count: Addressing Data Integrity Gaps in Australian Standards for Collecting Sex and Gender Information* [White paper] (2016) (accessed 25 July 2017).

⁶¹ 34% of LGBTI people hide their sexuality or gender identity when accessing services, 42% at social and community events and 39% at work: Australian Human Rights Commission, *Face the Facts: Lesbian, Gay, Bisexual, Trans and Intersex People* (2014) page 26 (accessed 25 July 2017); Submission from Living Proud (23 September 2019).

2.1.9.1 Diverse sexuality: lesbian, gay and bisexual people and people with other diverse sexualities

It is necessary to look at national statistics because of the paucity of statistics available for Western Australia.

- In 2014, Australians were asked for the first time about their sexual orientation in the ABS *General Social Survey (GSS)*. Over 500,000 (3.0%) of the adult population identified as lesbian, gay, bisexual or other non-heterosexual. In 2019, that figure was 2.7%.⁶²
- The *6th National Survey of Secondary Students and Sexual Health (2018)* asked 6,327 participants in Years 10, 11 and 12 to indicate their sexual orientation. Twenty-one percent of the participants identified as lesbian, gay or bisexual, with 26.3% of participants not identifying as heterosexual.⁶³
- According to the 2016 Census, there were around 46,800 same-sex couples in Australia, representing approximately 0.9% of all couples in Australia. In the 20 years between 1996 and 2016, the reported number of same-sex couples more than quadrupled. The ABS recognised that the increase 'may in part reflect greater willingness by people to identify themselves as being in a same-sex relationship and an improvement over the last 20 years in the rights of same-sex couples'.⁶⁴
- According to the 2016 Census, 25.0% of female same-sex couples and 4.5% of male same-sex couples were living with children. However, children in same-sex couple families accounted for only 0.2% of all dependent children.⁶⁵

For more information on diverse sexuality please refer to chapter 12A of this Bench Book.

⁶² ABS, *General Social Survey: Summary Results, Australia, 2019* (Cat No 4159.0) (released 30 September 2020) (accessed 19 November 2020).

⁶³ Fisher CM, Waling A, Kerr L, Bellamy R, Ezer P, Mikolajczak G, Brown G., Carman M and Lucke J, *6th National Survey of Australian Secondary Students and Sexual Health 2018* (2019) (ARCSHS Monograph Series No. 113), Bundoora: Australian Research Centre in Sex, Health & Society, La Trobe University.

⁶⁴ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2018) (accessed 23 November 2020).

⁶⁵ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2018) (accessed 23 November 2020).

2.1.9.2 Diverse sex and gender: intersex, trans and gender diverse people

It is necessary to look at national statistics because of the paucity of statistics available for Western Australia.

- In the 2016 Census, 1260 people identified as sex and gender diverse, however, as noted by the ABS, this is a severe underestimate. This is likely due both to people not understanding how to report their sex or gender as diverse and to their fears of revealing personal information in an official document, based on past experiences of discrimination. Further:⁶⁶

In households, it is common for one person to complete responses on behalf of other household members, who may not know or respect how these other household members would report their sex or gender. This means that some people might not have had the opportunity to report their own sex or gender. Household forms may also introduce privacy concerns for some individuals. While the ABS had arrangements to provide private forms on request, some respondents may not have been aware of these or may have chosen not to take this additional step.

- There are no firm figures for Australia's intersex population. It has been estimated that approximately 1.7% of the population has some kind of intersex characteristics, including but not limited to Androgen Insensitivity Syndrome (AIS), Congenital Adrenal Hyperplasia and 5-alpha reductase deficiency.⁶⁷

In terms of gender reassignment recognition in Western Australia, the Gender Reassignment Board's Annual Report of 30 June 2020 shows that:⁶⁸

- 42 applications were lodged in the 2019-20 financial year, with seven carried over from the previous year;
- 29 of those applications were for male to female recognition and 20 were for female to male recognition; and

⁶⁶ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2018) Sex and Gender Diversity in the 2016 Census (accessed 12 August 2019).

⁶⁷ Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books, 2nd ed, 2008).

⁶⁸ Gender Reassignment Board of Western Australia, *Annual Report 2020*, page 3 (accessed 19 November 2020).

- 39 recognition certificates were granted and three applications for recognition certificates were refused.

There has been a steady increase in the number of people seeking recognition of their gender reassignment, with four recognition certificates issued in 2007-08,⁶⁹ and 14 issued in 2012-13.⁷⁰

For more information on people of diverse sex and gender please refer to chapter 12B of this Bench Book.

2.2 BIRTHS, DEATHS, LIFE EXPECTANCY

There are fluctuations in Australia's birth rates over time and between different states, as well as variations in the life expectancies of individuals which often relate to factors such as gender, race and socio-economic status.

2.2.1 Births

- In Australia in 2019, the overall fertility rate was 1.74. For Aboriginal and Torres Strait Islander mothers it was 2.37.⁷¹
- Western Australia's total fertility rate in 2018 was 1.76, falling from 2.1 in 2008.⁷²
- In 2018, the trend of male births outnumbering female births continued in Western Australia with a ratio of 105.9 male births for every 100 female births.⁷³

⁶⁹ Gender Reassignment Board of Western Australia, *Annual Report 2008*, page 3 (accessed 19 November 2020).

⁷⁰ Gender Reassignment Board of Western Australia, *Annual Report 2013*, page 3 (accessed 19 November 2020).

⁷¹ ABS, *Births Australia 2019* (Cat No 3301.0) (11 December 2019) Fertility, by age, by state (ABS Stat Datasets); Aboriginal and Torres Strait Islander Fertility, by Age, by State (ABS Stat Datasets) (accessed 24 January 2020).

⁷² ABS, *Births Australia 2018* (Cat No 3301.0) (11 December 2019) States and Territories (accessed 24 January 2020).

⁷³ ABS, *Births Australia 2018* (Cat No 3301.0) (11 December 2019) Births, Summary, by State (ABS Stat Datasets) (accessed 24 January 2020).

2.2.2 Deaths

- In 2018, the standardised death rate⁷⁴ in Western Australia was 5.0 deaths per 1,000 standard population. The Western Australian infant mortality rate⁷⁵ was 2.6 infant deaths per 1,000 live births in 2018.⁷⁶
- The standardised death rate in Western Australia was higher for males (6.4) than for females (4.3) in each of the years from 2005-2015 (6.4 and 4.3 per 1,000 respectively in 2015).⁷⁷

2.2.3 Life expectancy

Life expectancy in Australia has improved dramatically for both sexes in the last century.⁷⁸

- A boy born in Western Australia in 2016-18 could expect to live to 80.5 years whilst a girl could expect to live 85.1 years.
- Female life expectancy at birth in Greater Perth (83.3 years) was amongst the highest in the country.

⁷⁴ Standardised death rate is a method of adjusting the crude death rate to eliminate the effect of differences in population age structures when comparing death rates between different population sub-groups e.g. when comparing different states and territories.

⁷⁵ Infant mortality rate refers to the number of infant deaths in a particular time period per 1,000 live births in the same time period.

⁷⁶ ABS, *Deaths Australia 2018* (Cat No 3302.0) (11 December 2019) ABS Stat Datasets, Deaths, Year of Registration, Summary Data, Sex, States, Territories and Australia (accessed 24 January 2020).

⁷⁷ ABS, *Deaths Australia 2015* (Cat No 3302.0) (2016) ABS Stat Datasets, Deaths, Year of registration, Age at death, Age-specific death rates, Sex, States, Territories and Australia (accessed 25 July 2017).

⁷⁸ ABS, *Life Tables, States, Territories and Australia, 2016-2018* (Cat No 3302.0.55.001) (30 October 2019) Table 2 (accessed 20 January 2020).

2.3 HEALTH AND WELLBEING⁷⁹

The Health and Wellbeing Surveillance System is a continuous data collection system which was initiated in 2002 to monitor the health status of the general population. Each month, on average, 600 people throughout Western Australia are interviewed by way of a computer assisted telephone interview. The survey is designed to examine trends at the population level and as a result the information collected may not be representative of minority groups such as Aboriginal people, homeless people or those without telephones. Data published in 2019 indicated that:

- The proportion of people reporting excellent or very good health decreased significantly with age (16-44 years: 56.3%, 45-64 years: 56.9% and 65 years and over: 43.5%).
- 12.6% of respondents reported that their health was fair or poor.
- An estimated 22.3% of Western Australians were in a family where at least one person had a disability. Of those, 24.7% reported that this put a 'big' or 'very big' burden on the family.
- 24.0% of those surveyed were drinking at levels highly likely to increase their risk of long-term alcohol-related harm (35.4% of men and 12.6% of women) and 9.0% drank at levels highly likely to increase their risk of short-term alcohol-related harm (14.8% of men and 3.2% of women). This was assessed according to alcohol consumption guidelines introduced by the National Health and Medical Research Council.
- 16.3% of respondents reported having been diagnosed with a mental health condition during the past 12 months, with 9.8% reporting that they were currently receiving treatment for that mental health condition.
- A significantly lower proportion of respondents aged 65 years and over reported being diagnosed with any mental health condition in the past 12 months, compared with respondents aged 16-44 years and 45-64 years (8.9% compared with 19.9% and 14.7% respectively).

⁷⁹ Merema M and Radomiljac A (for Department of Health, Western Australia), *Health and Wellbeing of Adults in Western Australia 2018, Overview and Trends* (2019) pages 10, 11, 32, 33, 43, 77, 84 and 86 (accessed 24 November 2020).

- High or very high levels of psychological distress were reported for 9.2% of the population (using the Kessler Psychological Distress Scale-10).
- Sixteen to 44 year olds were 3.2 times more likely to report having thought about ending their own life in the last 12 months than respondents aged 65 years and over (6.8% compared with 2.1%).
- As a surrogate measure of social support, respondents were asked how many groups or associations they belong to (including church, social, political and professional groups), with 47.4% of all respondents reporting that they did not belong to any groups or associations of any kind.

2.3.1 Aboriginal people's health and well being⁸⁰

As indicated in section 2.1.7, the life expectancy of Australian Aboriginal people is markedly less than that of non-Aboriginal Australians. The health and well-being of Aboriginal people is also markedly different.

Aboriginal people continue to experience poorer health and have more exposure to health risk factors than non-Aboriginal people. The Australian Institute of Health and Welfare (AIHW) has reported:

The physical and social environments in which people live play an important role in whether they live a life relatively free of serious illness. This is particularly the case for Indigenous people who still suffer from the consequences of European settlement, in particular the impact of 'new' infectious and chronic diseases, and social dislocation. Many Indigenous people live today in conditions of clear economic disadvantage, due in part to their lower education and employment levels. All of these factors interact to contribute to poor health in many groups of Indigenous people. The consequent and often substantial difference in almost all measures of health and welfare between Indigenous and non-Indigenous Australians has become known as 'the Gap'...

⁸⁰ Unless otherwise indicated, data is drawn from AIHW, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2015* (2015) (accessed 17 August 2020).

In 2012-13, almost one-third (30%) of Indigenous adults were assessed as having high or very high levels of psychological distress. They were 2.7 times as likely as non-Indigenous adults to have these levels of psychological distress.

In 2012–13, almost half (48%) of Indigenous adults reported that either they or their relatives had been removed from their natural family. Levels of high or very high psychological distress were significantly more common among Indigenous adults who had been removed from their family (35% compared with 29% for those who had not been removed), and among those who had relatives removed (34% compared with 26% of those who had not had relatives removed)...

Indigenous adults were significantly more likely than non-Indigenous adults to assess their health as fair or poor. Indigenous adults whose highest level of school completion was Year 10 or equivalent or below were more likely to assess their health as fair or poor than those who had completed Year 12 or equivalent (33% compared with 15%).

Other findings reported by the AIHW (2015) included that:

- Consistent with their poorer health status and high mortality rates, Indigenous people used both disability and aged care services from a younger age than non-Indigenous people. For example, in 2012-13:
 - 27% of Indigenous aged care residents were under 65 years old (compared with 3.4% of non-Indigenous residents); and
 - 21% of Indigenous aged care residents were 85 years old and over (compared with 58% of non-Indigenous residents).
- The age-standardised rate of hospitalisations for assault among Indigenous people was 14 times higher than for non-Indigenous people.
- The age-standardised rate of hospitalisations for assault among Indigenous females was 31 times higher than for non-Indigenous females.
- The hospitalisation rate for Indigenous Australians was 2.3 times the rate for non-Indigenous Australians (based on age-standardised rates). Much of the difference (84%) in the rates was due to the substantially higher rates of hospitalisations for dialysis

among Indigenous people. Excluding hospitalisations for dialysis, the rate of hospitalisations for Indigenous people was 1.2 times the rate for non-Indigenous people.

- The potentially preventable hospitalisation rate for Indigenous people was 3.4 times the rate for non-Indigenous people (age-standardised rates of 101 and 30 per 1,000 population, respectively). The rate of potentially preventable hospitalisations provides an indirect measure of the lack of access to, or use of, primary health care. Potentially preventable hospitalisations are those hospitalisations that might have been prevented through the timely and appropriate provision and use of population health services, primary care or other non-hospital services.

For more information about Aboriginal people please refer to chapter 11 of this Bench Book.

2.3.2 Suicide⁸¹

There were 3,318 registered deaths from intentional self-harm in Australia in 2019. It was the 13th leading cause of all deaths, and the leading cause of deaths in people aged 15-44 years. The median age at death by intentional self-harm was 43.9 years; the median age at death from all causes was 81.7 years. Suicide accounted for the most 'years of potential life lost', which is a measure of premature morbidity.

Deaths from intentional self-harm occur amongst males at a rate over three times greater than that for females. In 2019, the standardised death rate for males was 19.8 deaths per 100,000 people, while for females it was 6.3 deaths per 100,000 people. Intentional self-harm was the 10th leading cause of death for males and the 22nd leading cause for females.

⁸¹ Unless otherwise stated, statistics are drawn from ABS, *Causes of Death, Australia 2019* (Cat No 3303.0) (23 October 2020) Australia's Leading Causes of Death 2018; Intentional Self-harm: Key Characteristics (accessed 24 November 2020).

2.3.2.1 Suicide and Indigenous Australians⁸²

In 2019, intentional self-harm was the fifth leading cause of death for Aboriginal and Torres Strait Islander men and the seventh leading cause for women. There were 195 Aboriginal and Torres Strait Islander people who died from suicide in 2019.

The national standardised death rate was 27.1 suicide deaths per 100,000 Aboriginal and Torres Strait Islander people in 2019, up from rates of 24.6 and 2015-19 and 21.3 in 2010-14. The national standardised death rate was much higher in Aboriginal and Torres Strait Islander men than women (39.4 and 15.2 suicide deaths per 100,000 people respectively). Western Australia consistently recorded the highest rate of all the States and Territories, being 38.1 per 100,000 for 2010-14, and 34.6 per 100,000 for 2015-19.

A 2016 audit of suicide rates among Aboriginal people in the Kimberley region found that suicide rates between 2005 and 2014 were among the highest in the world, with an age-adjusted Aboriginal suicide rate of 74 per 100,000 population per year.⁸³

2.3.2.2 Suicide in Western Australia⁸⁴

In Western Australia in 2019:

- There were 418 deaths due to suicide.
- The standardised rate of suicide in Western Australia was 16.0 persons per 100,000, higher than the rate for Australia (12.9 persons per 100,000 of population).

⁸² Unless otherwise stated, these statistics are drawn from ABS, *Causes of Death, Australia 2019* (Cat No 3303.0) (23 October 2020) Summary – Intentional Self-harm in Aboriginal and Torres Strait Islander People (accessed 24 November 2020).

⁸³ McHugh C, Campbell A, Chapman M and Balaratnasingam S, *Increasing Indigenous Self-harm and Suicide in the Kimberley: An Audit of the 2005-2014 Data* (2016) 205(1) *Medical Journal of Australia*, page 33 (accessed 24 January 2020).

⁸⁴ ABS, *Causes of Death, Australia 2019* (Cat No 3303.0) (25 September 2019) Intentional Self-harm Key Characteristics (accessed 24 November 2020).

2.3.3 Alcohol

Alcohol was involved in 17.5% of injury fatalities, 11.8% of non-fatal injury hospitalisations, and 32% of emergency department presentations due to injuries in Western Australia in 2012. The overall cost of injuries involving alcohol was \$1.9 billion in 2012.⁸⁵

Almost one in five (19.8%) trauma admissions to the Royal Perth Hospital in 2015 had documented alcohol and/or drug use in the 12 hours preceding their trauma event.⁸⁶

Consuming alcohol is associated with significant levels of harm and increased risk of a multitude of physical diseases including cancer, liver cirrhosis and cardiovascular disease. It is also associated with increased potential for psychiatric problems and behavioural problems such as violence and sexual risk taking.

The total cost to Australian society of alcohol-related problems was estimated to be over \$14 billion in 2010, including costs to the criminal justice system (20.6% or \$3.0 billion), costs to the health system (11.7% or \$1.7 billion), costs to productivity (42.1% or \$6.0 billion) and costs associated with traffic accidents (25.5% or \$3.7 billion).⁸⁷

2.3.3.1 Consumption

2.3.3.1.1 National data

The National Drug Strategy Household Survey (NDSHS) is a national household survey of non-institutionalised persons aged 12 years and over, which has been conducted every two to three years since 1985.⁸⁸ Key results of the 2019 survey indicated that:⁸⁹

⁸⁵ McCusker Centre for Action on Alcohol and Youth, *Alcohol: Drinking Patterns and Harms in Australia and WA* (August 2017) (accessed 24 November 2020).

⁸⁶ McCusker Centre for Action on Alcohol and Youth, *Alcohol: Drinking Patterns and Harms in Australia and WA* (August 2017) (accessed 24 November 2020).

⁸⁷ Manning M, Smith C and Mazerolle P (Australian Institute of Criminology), *The Societal Costs of Alcohol Misuse in Australia* (2 April 2013) Results and Discussion (accessed 24 November 2020).

⁸⁸ AIHW, *National Drug Strategy Household Survey* (accessed 25 November 2020).

⁸⁹ AIHW, *National Drug Strategy Household Survey 2019 - in brief* (16 July 2020) (accessed 16 September 2021); AIHW, *National Drug Strategy Household Survey 2019* (16 July 2020) (accessed 16 September 2021); AIHW, *National Drug Strategy Household Survey (NDSHS) - 2016 Key Findings* (2017) (accessed 24 January 2020); AIHW, *National Drug Strategy Household Survey (NDSHS) - 2016 Detailed Report* (2017) (accessed 24 January 2020).

- The proportion of people drinking alcohol in quantities that exceeded the single occasion risk (25%) and the lifetime risk guidelines (16.8%) had remained stable since 2016, however both had reduced since the 2009 National Health and Medical Council guidelines were introduced (29% and 21% respectively in the 2010 NDSHS).
- More people were giving up alcohol entirely (8.9% in 2019, compared to 7.6% in 2016).
- Young adults were drinking less:
 - In 2019, two in three 14-17 year olds had never consumed a full standard drink – more than double the proportion in 2001.
 - Between 2001 and 2019 the proportion of 14-19 year olds exceeding the single occasion risk guidelines decreased from 40.0% to 20.0%.
 - In 2019, 22% of 20-29 year olds had abstained from alcohol for the last 12 months, which was significantly increased from 8.9% in 2001.
- Older Australians were drinking at high levels. The likelihood of daily drinking increased with age, with 12.6% of over 70s drinking daily in 2019. For people in their 40s, 29% drank at levels that exceeded the single occasion risk and 21% exceeded the lifetime risk guidelines. For people in their 50s, the statistics were 27% and 21% respectively.
- Overall, Indigenous Australians were more likely to abstain from drinking alcohol than non-Indigenous Australians (29.0% compared with 21.0% respectively). However, among those who did drink, a higher proportion of Indigenous Australians drank at high risk levels (30.0% compared to 20.0% of non-Indigenous Australians).
- The rates of high risk drinking increased in remote and very remote areas:
 - In 2019, 25.0% of people in remote/very remote areas consumed alcohol in excess of the lifetime risk guidelines (compared to 15.5% in major cities).
 - In 2019, 38% of people in remote/very remote areas consumed alcohol in excess of the single occasion risk guidelines (compared to 24.0% in major cities).

Fetal Alcohol Spectrum Disorder (FASD) is the diagnostic term used to describe the lifelong severe neurodevelopmental impairments that result from brain damage caused by prenatal alcohol exposure.⁹⁰ FASD occurs in all parts of Australian society where alcohol is consumed.⁹¹ It makes the consumption of alcohol by women a particular issue.⁹²

- Although a higher proportion of Indigenous than non-Indigenous women abstain from alcohol, a higher proportion of Indigenous women drink at high-risk levels.
 - Thirty-five percent of Indigenous females aged 18 and over reported that they had not consumed alcohol in the previous 12 months, compared with 20% of non-Indigenous females.
 - Forty percent of Indigenous women reported that they had consumed alcohol at high-risk levels in the previous 12 months, compared with 31% of non-Indigenous women.
 - Fourteen per cent of Indigenous women reported that they drank at high-risk levels at least once a week, compared with 5% of non-Indigenous women.
- One survey of non-Aboriginal, recently pregnant women in Western Australia found that approximately 80% drank alcohol in the three months before pregnancy, with 14% consuming five or more standard drinks on a typical occasion. Forty-seven percent of women had not planned their pregnancy, suggesting that there are women who are consuming alcohol at high risk levels who may continue to do so before they know they are pregnant.⁹³

⁹⁰ FASD Hub, *What is FASD?* (accessed 4 March 2020).

⁹¹ Bower C and Elliott EJ, *Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder (FASD)* (2016) page 2 (accessed 28 January 2020).

⁹² Unless otherwise indicated, data is drawn from Closing the Gap Clearinghouse, *Fetal Alcohol Spectrum Disorders: A Review of Interventions for Prevention and Management in Indigenous Communities* (2014) (accessed 28 January 2020).

⁹³ Colvin L, Payne J, Parsons D, Kurinczuk JJ and Bower C, *Alcohol Consumption During Pregnancy in Nonindigenous West Australian Women* (2007) 31(2) *Alcoholism: Clinical and Experimental Research* 276 (accessed 25 July 2017).

- A recent study of over 1500 pregnant women in Victoria found that 41% did not drink alcohol in pregnancy, 27% drank in the first trimester only and 27% continued to drink throughout pregnancy. In the three months prior to conception, 37% of women consumed five or more standard alcoholic drinks on at least one occasion, and almost one in five declared drinking at this level after conception but before pregnancy recognition.⁹⁴

For more information on FASD refer to section 2.3.3.2 below and chapter 4 (4.2.1 and 4.4.2.7) of this Bench Book.

2.3.3.1.2 Western Australian data

The National Drug Strategy Household Survey (NDSHS) reported that in 2019, of Western Australians aged 14 years and over:⁹⁵

- one in four consumed five or more drinks in one session at least monthly;
- three in four had consumed alcohol in the last 12 months;
- there were slight but non-significant declines in the number of people drinking daily and weekly between 2016 and 2019; and
- the average age at which people first tried alcohol was 17.2 years.

Every three years, school students in Western Australia are surveyed to find out about their drug and alcohol use in the Australian School Students Alcohol and Drug (ASSAD) survey. In the 2017 survey, 3,361 students in year seven to 12 from 46 government, Catholic and independent schools completed the survey. The 2017 ASSAD survey found that:⁹⁶

- Rates of use have declined over the past three decades - the proportion of students reporting drinking in the previous year had dropped significantly between 1984 and 2017 (79.7% to 41.0%), as had the proportion reporting drinking in the previous month (50.0% to 23.3%) and previous week (33.5% to 14.5%).

⁹⁴ Muggli E, O'Leary C, Donath S, Orsini F, Forster D, Anderson PJ, Lewis S, Nagle C, Craig JM, Elliott E, Halliday J, 'Did You Ever Drink More?' *A Detailed Description of Pregnant Women's Drinking Patterns*, *BMC Public Health* 16 (2018) page 683.

⁹⁵ AIHW, *National Drug Strategy Household Survey 2019 -Western Australia* (16 July 2020) State and Territory Fact Sheets (accessed 25 November 2020).

⁹⁶ Mental Health Commission, *Alcohol Trends in Western Australia: Australian School Students Alcohol and Drug Survey* (2017) (accessed 28 January 2020).

- In the same time period, the proportion of students reporting they had never drunk alcohol has increased from 8.8% to 38.3%. The proportion in 2017 is over triple that in 2005 (12.3%).
- Of those students who drank in the past week, 29.2% drank at levels associated with single occasion harm. This was substantially reduced compared to 2011 (36.2%). The 2017 rates were similar for girls and boys (28.4% and 30.0% respectively).
- Students who drank in the past week were asked the source of their last alcoholic drink (but could select more than one). The most common sources were friends who were aged 18 or over (33.6%) and parents (22.7%).

2.3.3.2 Consequences

Twenty-four percent of Western Australian respondents reported to the 2019 National Drug Strategy Household Survey (NDSHS) that they had been a victim of an alcohol-related incident. This was fairly consistent with statistics for 2016 (26%) and 2013 (22%).⁹⁷

The types of alcohol-related incidents that were reported included:⁹⁸

- verbal abuse (20% of people);
- physical abuse (5.7%); and
- being put in fear (12.6%).

Alcohol can contribute to mortality in a number of ways, with deaths either directly attributable or partially attributable to harmful levels of alcohol consumption.

⁹⁷ AIHW, *National Drug Strategy Household Survey 2019 - Western Australia* (16 July 2020) State and Territory Fact Sheets (accessed 25 November 2020).

⁹⁸ AIHW, *National Drug Strategy Household Survey 2019 - Western Australia* (16 July 2020) State and Territory Fact Sheets (accessed 25 November 2020).

Directly attributable deaths include chronic conditions which are directly related to alcohol use (e.g. alcoholic liver cirrhosis) or acute conditions directly related to harmful consumption (e.g. alcohol poisoning which has led to respiratory depression). In Australia, deaths which are certified as directly attributable to alcohol are coded as the underlying cause of death (the condition which initiated the train of morbid events). The ABS refers to deaths certified as directly attributable to alcohol as 'alcohol-induced deaths'. In 2017, the ABS reported that there were 1,366 alcohol-induced deaths in Australia, with 133 of those in Western Australia. Nationally, in 2017, males aged between 60 and 64 dying from chronic alcoholic liver disease and living outside of a capital city were those most likely to die from a cause directly attributable to alcohol. This profile is similar to that in the late 1990s except the age of death has increased for both males and females.⁹⁹

Alcohol may also play a significant role in a death, yet not be certified as the underlying cause of death. An example of this may be a death due to a motor vehicle accident where a person recorded a high blood alcohol concentration as measured in toxicology, or a death from hepatocellular carcinoma where a person may have demonstrated long term harmful levels of alcohol consumption. In both of these examples, the alcohol use would be referred to as an 'associated cause of death'. The ABS differentiates these deaths as 'alcohol-related deaths'. The ABS reported that there were an additional 2,820 alcohol-related deaths in Australia in 2017.¹⁰⁰

Those 2,820 alcohol-related deaths in Australia in 2017 included deaths from:¹⁰¹

- intentional self-harm;
- accidental poisoning;
- ischaemic heart disease;
- land transport accidents; and
- accidental falls.

⁹⁹ ABS, *Causes of Death Australia, 2017* (Cat No 3303.2) (26 September 2019) Summary – Deaths due to Harmful Alcohol Consumption in Australia (accessed 25 November 2020).

¹⁰⁰ ABS, *Causes of Death Australia, 2017* (Cat No 3303.2) (26 September 2019) Summary – Deaths due to Harmful Alcohol Consumption in Australia (accessed 25 November 2020). No specific numbers for Western Australia were available.

¹⁰¹ ABS, *Causes of Death Australia, 2017* (Cat No 3303.2) (26 September 2019) Summary – Deaths due to Harmful Alcohol Consumption in Australia - Alcohol-related Deaths, Top 10 Underlying Causes, Proportion of Total Alcohol-related Deaths, by Age Group, 2017 (accessed 25 November 2020).

Earlier Western Australian data (for the period 2007-11) showed that the leading causes of alcohol-related deaths were cancers (27%), followed by suicides (16%), road injuries (9%), falls (4%) and assaults (2%).¹⁰²

The Road Safety Commission reported that, in 2019, 19% of road fatalities were in alcohol-related crashes (30 people) – a decrease of 28% on the preceding five-year average.¹⁰³ It was also a 52% reduction from the peak of 62 fatalities in 2016.¹⁰⁴ Most of the fatalities in alcohol-related crashes occurred in regional Western Australia (19 of 20 in 2019).¹⁰⁵

In 2010, Western Australian residents were hospitalised 15,775 times for conditions related to alcohol, at a cost of approximately \$100 million. In 2006, alcohol was estimated to be responsible for 3.85% of the total attributable burden of disease.¹⁰⁶

Of all boating and watercraft drowning fatalities in Australia between 2005-06 and 2014-15, 26% involved alcohol. Of those, 59% of those who died were over the blood alcohol concentration legal driving limit.¹⁰⁷

The Drug and Alcohol Officer reported that:¹⁰⁸

For young people under the age of 18 the use of alcohol is particularly harmful, because alcohol is typically consumed at risky levels. Consumption of alcohol may also increase the likelihood of other risky behaviour such as drink driving, physical violence, unsafe sex and mental health issues. Between 2007 and 2011, 2,484 Western Australian 12 to 17 year-olds were admitted to hospital for alcohol-related reasons and 6,485 bed days were utilised. For the same period, there were 25 alcohol-related deaths.

¹⁰² Drug and Alcohol Office and Epidemiology Branch of Department of Health WA, *Alcohol-related Hospitalisations and Deaths in Western Australia: State Profile* (2014) page 9 (accessed 25 July 2017).

¹⁰³ Road Safety Commission, *2019 Summary: Preliminary Fatal and Critical Injuries on Western Australian Roads* (2017) pages 9 and 20 (accessed 25 November 2020).

¹⁰⁴ Road Safety Commission, *2016 Summary: Preliminary Fatal and Critical Injuries on Western Australian Roads* (2017) page 22 (accessed 28 January 2020).

¹⁰⁵ Road Safety Commission, *2019 Summary: Preliminary Fatal and Critical Injuries on Western Australian Roads* (2017) page 20 (accessed 25 November 2020).

¹⁰⁶ Bridle R, Miller J, King T and Christou A, *Australian School Student Alcohol and Drug Survey: Alcohol Report 2011 – Western Australian Results* (2012) page 11 (accessed 28 January 2020).

¹⁰⁷ McCusker Centre for Action on Alcohol and Youth, *Alcohol: Drinking Patterns and Harms in Australia and WA* (August 2017) (accessed 7 March 2019).

¹⁰⁸ Bridle R, Miller J, King T and Christou A, *Australian School Student Alcohol and Drug Survey: Alcohol Report 2011 – Western Australian Results* (2012) page 11 (accessed 28 January 2020).

Recent research has indicated that during adolescence, the brain undergoes a unique period of development and that drinking during this period may be associated with a range of harmful effects. Some areas of the brain, such as the pre-frontal cortex, do not fully mature until the age of 21 in females and 28 in males. Damage to the brain, because of drinking, can affect the ability to remember information and pay attention as well as negatively affecting personality and behaviour. Teenage drinking can also result in poor school performance, an increased risk of social problems, suicidal thoughts and violence.

Higher levels of alcohol use among Indigenous Australians are reflected in data on hospital admissions and deaths. Indigenous Australian males are hospitalised for conditions to which alcohol makes a significant contribution at rates between 1.2 and 6.2 times those of non-Indigenous males, and Indigenous females at rates between 1.3 and 33.0 times greater (in the latter case for assault injuries). Similarly, deaths from various alcohol-related causes are five to 19 times greater than among non-Indigenous Australians.¹⁰⁹

The consequences for those who experience prenatal exposure to alcohol can also be significant. Alcohol readily crosses the placenta and is a teratogen (i.e. can cause malformations in the developing embryo). No level of maternal alcohol consumption is deemed safe for the embryo, with the National Health and Medical Research Council Guidelines recommend that to reduce the risk of harm to their unborn child, women who are pregnant or planning a pregnancy should not drink alcohol.¹¹⁰

Fetal Alcohol Spectrum Disorder (FASD) is the diagnostic term used to describe the lifelong severe neurodevelopmental impairments that result from brain damage caused by prenatal alcohol exposure.¹¹¹

In May 2016, guidelines for the diagnosis of FASD were endorsed in Australia, and updated in February 2020.¹¹²

¹⁰⁹ Gray D and Wilkes E, *Reducing Alcohol and Other Drug Related Harm* (AIHW Resource Sheet No 3) (2010) page 4 (accessed 25 November 2020).

¹¹⁰ National Health and Medical Research Council (to be published 2020), as submitted by the Telethon Kids Institute (Dr R Mutch, Dr H Passmore, Dr C Bower, N Kippin and S Hamilton) (9 March 2020).

¹¹¹ FASD Hub, *What is FASD?* (accessed 4 March 2020).

¹¹² Bower C and Elliott EJ, *Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder (FASD)* (2016) page 2 (accessed 28 January 2020).

For a diagnosis of FASD, an individual must have prenatal alcohol exposure and severe neurodevelopmental impairment in at least three of ten specified domains of central nervous system structure of function. The overarching diagnostic term of FASD simplifies the terminology and emphasises the primary importance of the severe neurodevelopmental impairment that results from an acquired brain injury caused by alcohol exposure before birth. Within FASD are two sub-categories: FASD with three sentinel facial features [short palpebral fissure, smooth philtrum and thin upper lip] and FASD with less than 3 sentinel facial features.

Please refer to chapter 4 (4.2.1 and 4.4.2.7) of this Bench Book
for more information on FASD.

2.3.4 Drugs other than alcohol

2.3.4.1 Consumption

The National Drug Strategy Household Survey (NDSHS) is a survey of non-institutionalised persons aged 12 years and over, which has been conducted every two to three years since 1985.¹¹³ Key results of the 2019 NDSHS included:¹¹⁴

- Recent use of some illicit drugs increased from 2016 to 2019 including cannabis (10.4% to 11.6%), cocaine (2.5% to 4.2%), ketamine (0.4% to 0.9%), ecstasy (2.2% to 3.0%) and hallucinogens (1.0% to 1.6%).
- Of particular significance, cocaine use has increased four-fold since 2004 (1.0% in 2004, to 2.1% in 2013, to 2.5% in 2016, then 4.2% in 2019). Use of cocaine at a frequency of at least monthly had also increased (10.1% in 2016 to 16.8% in 2019).
- Meth/amphetamine use remained stable between 2016 (1.4%) and 2019 (1.3%). Crystal/ice continued to be the main form of methamphetamines used in 2019 (50%; compared to 57% in 2016, 22% in 2010 and 50% in 2013).

¹¹³ AIHW, *National Drug Strategy Household Survey* (accessed 25 November 2020).

¹¹⁴ AIHW, *National Drug Strategy Household Survey 2019 - in brief* (16 July 2020) (accessed 25 November 2020); AIHW, *National Drug Strategy Household Survey 2019* (16 July 2020) (accessed 25 November 2020); AIHW, *National Drug Strategy Household Survey (NDSHS) - 2016 Key Findings* (2017) (accessed 24 January 2020); AIHW, *National Drug Strategy Household Survey (NDSHS) - 2016 Detailed Report* (2017) (accessed 24 January 2020).

- Misuse of pharmaceuticals had decreased slightly from 2016 to 2019 (4.8% to 4.2%).

Data specifically for Western Australians aged 14 years and over in 2019 showed that:¹¹⁵

- 15.6% had used an illicit drug in the past 12 months – slightly lower than the national rate of 16.4%.
- Cannabis is the most commonly used illicit drug, and this has not changed over time.
- The use of meth/amphetamine is higher in Western Australia (2.1%) than Australia as a whole (1.3%).
- The use of cocaine is lower in Western Australia (2.4%) than Australia as a whole (4.2%).
- 13.3% of respondents reported being a victim of an illicit drug-related incident.

Results from a 2017 survey of school students indicated that for students aged 12-17 years:¹¹⁶

In 2017, less than one in five Western Australian school students (18.1%) had ever used at least one illicit drug. This is a significant decrease since 1996 (40.7%).

Between 1996 and 2017, significant decreases also occurred in the proportion who had used illicit drugs in the past year (36.6% to 16.1%), past month (24.2% to 9.6%) and past week (16.5% to 5.6%).

... In 2017, an estimated one in six (16.8%) Western Australian school students had tried cannabis in their lifetime. This was a significant decline from 1996, where approximately two in five (39.4%) students were estimated to have tried cannabis in their lifetime.

The downward trend in cannabis use since 1996 is reflected across all other frequencies of use, with significant declines for use in the past year (35.8% to 15.2%), past month (23.3% to 8.8%) and past week (15.6% to 4.8%).

¹¹⁵ AIHW, *National Drug Strategy Household Survey 2019 - Western Australia* (16 July 2020) State and Territory Fact Sheets (accessed 25 November 2020).

¹¹⁶ Mental Health Commission, *Illicit Drug Trends in Western Australia: Australian School Students Alcohol and Drug Survey* (2017) pages 1-3 (accessed 16 September 2021).

... In 2017, 1.2% of Western Australian school students reported having ever used meth/amphetamine and 4.0% reported having ever used dexamphetamine for reasons other than medical purposes.

2.3.4.2 Consequences

The National Drug Strategy Household Survey (NDSHS) 2019 reported that opioid use cost the Australian community \$15.6 billion in the 2015-16 financial year and meth/amphetamine use cost the community over \$5 billion in 2013-14.¹¹⁷

The National Drug Strategy Household Survey (NDSHS) 2016 found that:¹¹⁸

People's perceptions of meth/amphetamines changed considerably between 2013 and 2016. Australians now consider meth/amphetamines to be more of concern than any other drug (including alcohol) and a greater number thought of it as the drug that caused the most deaths in Australia. For the first time, meth/amphetamines was the drug most likely to be nominated as a drug problem.

More people reported being a victim of an illicit drug-related incident in 2016, increasing from about 1.6 million in 2013 to 1.8 million in 2016.

Earlier data showed that each year, drug use was responsible for around 80 deaths in Western Australia. In 2010, Western Australian residents were hospitalised a total of 5,644 times for conditions related to drug use, costing approximately \$30 million. The main drugs responsible for hospitalisations were combination/ unspecified drugs, analgesics/ antipyretics/ anti-rheumatics, opioids and benzodiazepines.¹¹⁹

Evidence demonstrates that children and young people experience greater harms from drug use than others and therefore require additional support.¹²⁰

¹¹⁷ AIHW, *National Drug Strategy Household Survey 2019* (16 July 2020) page 1 (accessed 16 September 2021).

¹¹⁸ AIHW, *National Drug Strategy Household Survey (NDSHS) - 2016 Key Findings* (2017) (accessed 16 September 2021).

¹¹⁹ Miller J, Bridle R, Goggin L and Christou A, *Australian School Student Alcohol and Drug Survey: Alcohol Report 2011 – Western Australian Results* (2012) (accessed 28 January 2020).

¹²⁰ Miller J, Bridle R, Goggin L and Christou A, *Australian School Student Alcohol and Drug Survey: Alcohol Report 2011 – Western Australian Results* (2012) (accessed 28 January 2020).

2.4 ECONOMIC CONTEXT

There is strong evidence from Australia and other developed countries that low socioeconomic status is associated with poor health and increased exposure to health risk factors.¹²¹

This section focuses on data and trends that provide the economic context of disadvantage in Western Australia.

2.4.1 Living standards

In 2016, the Western Australian Council of Social Service (WACOSS) reported that Western Australia was a State in transition, following the end of an unprecedented resources boom. Slowing economic growth, high rates of unemployment and underemployment, and the rise in casual over permanent work was placing increased pressure on low-income households. WACOSS reported that State and Federal funding cuts to services such as financial counsellors and community legal centres increased levels of financial hardship on low income earners and those on income support, making the daily effort to cover their living costs a continually more difficult task.¹²²

In 2019 WACOSS reported:¹²³

Waged households brought in a little more, due principally to the 2018 State Wage Case decision, but any growth they saw in their income was quickly spent on covering their living costs, which went up across the board.

Rent. Utilities. Food. Transport. All cost more this year—in some cases, significantly so.

The increase in rent was noticeable, as this was the first time that our model households had experienced a rise in five years.

... The unemployed single model continues to make apparent the utter inadequacy of the Newstart Allowance, with the costs of covering the basics of life still outstripping their income.

¹²¹ See for example ABS, *Year Book Australia, 2009–10* (Cat No 1301.0) (2010) (accessed 25 July 2017); Reading CL and Wien F, *Health Inequalities and Social Determinants of Aboriginal Peoples' Health* (2009) (accessed 25 July 2017).

¹²² WACOSS, *Cost of Living 2016* (2016) (accessed 25 July 2017).

¹²³ WACOSS, *Cost of Living 2019* (16 December 2019) page 3 (accessed 28 January 2020).

The WACOSS 'Cost of Living 2020' report noted the impact of Covid-19 pandemic policies on the cost of living for disadvantaged groups, which included increased income support for those on Newstart.¹²⁴

The Committee for Perth reported in 2014 that despite the overall increase in wealth, outer metropolitan suburbs had suffered greater stress and financial hardship than Perth's inner and middle areas. Not only do people living in those suburbs have high levels of unemployment and lower incomes, but also lower access to work, education and other amenities. This is compounded by poor public transport and connectivity to Perth's key employment centres.¹²⁵

In relation to the cost of living in regional Western Australia, WACOSS reported in 2019 that:¹²⁶

- The rental market in the regions appears much more volatile than Perth, with much larger swings in both directions, largely due to the number of residential rental arrangements being entered into being much fewer than in Perth.
- In 2019, there were dramatic rent increases in the Pilbara, with noticeable increases in the Goldfields, Esperance and Peel regions.
- Food prices in Peel, the Southwest and Great Southern regions are all comparable to Perth. Food is most expensive in the Kimberley and Pilbara.

Individuals and families spend much more on electricity in the Pilbara/Kimberley. This is due to higher consumption to maintain liveable home temperatures (as the Uniform Tariff Policy ensures the same rate of charges for electricity in the regions). This means low-income households in regional areas may be at risk of 'bill shock' in summer.

¹²⁴ WACOSS, *Cost of Living 2020* (17 December 2020) page 3 (accessed 16 September 2021).

¹²⁵ Martinus K, *Economic Stress in Perth: A Matter of Geography* (August 2014) FactBase Bulletin 38, Committee for Perth and the University of Western Australia (accessed 20 January 2020).

¹²⁶ WACOSS, *Cost of Living 2019* (16 December 2019) pages 18-21 (accessed 29 January 2020).

2.4.2 Income

The 2016 Census indicated that the median weekly household income in Western Australia increased by 12.7% (to \$1,595) over the five years since the previous Census.¹²⁷

More recent ABS data for 2017-18 showed that incomes varied significantly across the population. While the average weekly equivalised¹²⁸ disposable household income in Western Australia was \$1,105, the average income of those in low income households (i.e. the lowest quintile) was \$393 while the average income of those in high income households (i.e. the highest quintile) was \$2,227.¹²⁹ Nationally the figures were similar: the average equivalised disposable household income in 2017-18 was \$1,062 per week. The average weekly income in low income households was \$399 and in high income households it was \$2,142.¹³⁰

The 'Inequality in Australia 2018' report by the Australian Council of Social Service and the University of New South Wales found that a person in the highest 20 per cent of income earners in Australia lives in a household with five times as much disposable income (after tax) as someone in the lowest 20 per cent.¹³¹

2.4.2.1 Labour market

As at December 2019, Australia had an unemployment rate of 4.9%. Western Australia had an unemployment rate of 5.6%.¹³² As of October 2020, Australia had an employment rate of 7.0% and in Western Australia it was 6.6%, with the effects of Covid-19 apparent.¹³³

Unemployment levels vary significantly over different parts of Western Australia, as shown by data from various sources (noting that this data was recorded prior to the impacts of Covid-19):

¹²⁷ ABS, *2016 Census QuickStats – Western Australia* (2017) People - Employment (accessed 25 November 2020).

¹²⁸ 'Equivalisation' accounts for increased consumption needs as household size increases.

¹²⁹ ABS, *Household Income and Wealth, Australia 2017-18* (Cat No 6523.0) (12 July 2019) Table 13.1 (accessed 25 November 2020).

¹³⁰ ABS, *Household Income and Wealth, Australia 2017-18* (Cat No 6523.0) (12 July 2019) Table 1.1 (accessed 25 November 2020).

¹³¹ ACOSS, *Inequality in Australia 2018* (August 2018) page 6 (accessed 3 February 2020).

¹³² ABS, *Labour Force, Australia, December 2019* (Cat No 6202.0) (2020) Time Series Spreadsheets – Tables 1 and 7 (accessed 3 February 2020).

¹³³ ABS, *Labour Force, Australia, October 2020* (Cat No 6202.0) (19 November 2020) (accessed 25 November 2020).

- The unemployment rates in 2017 were 5.4% in regional Western Australia and 6.4% in the metropolitan area.¹³⁴
- The unemployment rate in the Kimberley in 2017 was 9.9%.¹³⁵
- The unemployment rate in the Pilbara in 2018 was 2.3%.¹³⁶
- The Gascoyne's unemployment rate in 2016 was 10.2%. The rate varied considerably within the Gascoyne - in Exmouth, Shark Bay and Upper Gascoyne it was 5.6%, however in Carnarvon it was 13.2%.¹³⁷
- The unemployment rate in the Mid West region in 2016 was 5.0%.¹³⁸
- The unemployment rate in the Wheatbelt was 6.1% in 2016-17.¹³⁹
- Peel's unemployment rate in 2018-19 was 5.2% which had decreased from 7.3% in 2017.¹⁴⁰ However, Mandurah's youth (15-24 years) unemployment rate was estimated to be 18.8% in 2017-18.¹⁴¹
- The unemployment rate in the Goldfields-Esperance region in 2017 was 4.0%.¹⁴²
- The unemployment rate in the Great Southern region was 6.8% in 2016.¹⁴³

¹³⁴ Government of Western Australia, data.wa.gov.au – *Regional Profile – Kimberley*, Figure 4 citing Small Area Labour Market data, Dec 2017 (accessed 25 November 2019).

¹³⁵ Government of Western Australia, data.wa.gov.au – *Regional Profile – Kimberley*, Figure 4 citing Small Area Labour Market data, Dec 2017 (accessed 25 November 2019).

¹³⁶ Pilbara Development Commission, *Community Profile*, Work – Industry, citing ABS, 2016 Census of Population and Housing (accessed 1 May 2019).

¹³⁷ Gascoyne Development Commission, *Annual Report 2016/2017*, page 9 (accessed 1 May 2019).

¹³⁸ Government of Western Australia, data.wa.gov.au – *Regional Profile – MidWest*, citing Small Area Labour Market Data Dec 2017 (accessed 23 May 2019).

¹³⁹ Wheatbelt Development Commission, *Annual Report 2017-18*, page 6 citing the ABS, *Census of Population and Housing 2016* (accessed 10 June 2019).

¹⁴⁰ Peel Development Commission, *Annual Report 2018-19*, page 13, citing Department of Employment, 2016, Small Area Labour Market – March quarter 2018 (accessed 11 June 2019).

¹⁴¹ Peel Development Commission, *Annual Report 2017-18*, page 12, citing Department of Jobs and Small Business, WA Regional Labour Force Data April 2018 (2018) (accessed 29 January 2019).

¹⁴² Government of Western Australia, data.wa.gov.au – *Regional Profile – Goldfields-Esperance* (2018) (accessed 6 December 2019).

¹⁴³ Government of Western Australia, data.wa.gov.au – *Regional Profile – Great Southern*, citing Small Area Labour Market data, Dec 2017 (accessed 11 June 2019).

- The unemployment rate in the South West region was 5.4% at the end of 2018, with Bunbury recording the highest rate of 8.1% and Augusta-Margaret River the lowest of 3.4%.¹⁴⁴

The average full-time, adult, ordinary time weekly earnings for employees in Western Australia was \$1,840.80 in May 2020. For both males and females the average weekly income exceeded the national average weekly earnings.¹⁴⁵ However, as of August 2019, Western Australia continues to have the widest gender pay gap in Australia (22.7%).¹⁴⁶

2.4.2.2 Welfare benefits and services

With economic downturn the number of people reliant on welfare benefits and services tends to increase, however, as submitted by WACOSS, even during better economic times a significant number of people are reliant on welfare benefits and services.¹⁴⁷

- On 30 June 2016, there were 76,766 Western Australians over 21 years of age reliant on Newstart Allowance, with 66% of those on income support for more than a year. (Unemployed young people between the ages of 16 and 21 would have been in receipt of Youth Allowance, although that figure is not available.) In comparison, in June 2011 there were 42,197 Western Australians on Newstart Allowance, with 59% of those on income support for more than a year.¹⁴⁸
- Comparisons have shown that Centrelink payments often fall below an accepted poverty measurement, the Henderson Poverty Line.¹⁴⁹
- In January 2020, an unemployed single person without children on Newstart Allowance received \$279.50 per week in payments. Young people on Austudy and Youth

¹⁴⁴ South West Development Commission, *Statistics – Labour Market*, Labour force by Local Government (accessed 26 September 2018), citing Department of Employment, Small Area Labour Markets (smoothed data series).

¹⁴⁵ ABS, *Average Weekly Earnings, Australia, May 2020* (Cat No 6302.0) (2018) Key Statistics (accessed 25 November 2020).

¹⁴⁶ Workplace Gender Equality Agency, *Australia's Gender Pay Gap Statistics 2020* (17 August 2020) Data – Fact Sheets (accessed 25 November 2020).

¹⁴⁷ Submission from the Western Australia Council of Social Service Inc. (17 February 2020).

¹⁴⁸ ABS, *Data by Region, Main Statistical Area Structure, Western Australia* (2017) Selected Government Pensions and Allowances - As at 30 June (accessed 25 July 2017).

¹⁴⁹ Melbourne Institute of Applied Economic and Social Research, *Poverty Lines: Australia March Quarter 2020* (26 July 2020) page 5 (accessed 25 July 2017).

Allowance received even lower levels of payment - as little as \$33.00 per day. In November 2020, an unemployed single person without children received \$407.85 per week in payments (\$282.35 Job Seeker payment plus \$125.00 Coronavirus supplement). Young people on Austudy and Youth Allowance at that time received as little as \$36.00 per day (also including the Coronavirus supplement).¹⁵⁰

- The Australian Council of Social Service 'Demand for Community Services Snapshot, December 2019' showed that there was significant unmet demand for services in 2019, which had increased from previous years. In particular, 36% of service providers who provided housing services reported that they rarely or never met demand. This was also the case for those delivering financial counselling and support (35%) and legal services (33%). In the employment, education and training sector, 51% of service providers reported being mostly or fully able to meet demand.¹⁵¹

2.4.3 Poverty

WACOSS reported that in 2019:¹⁵²

- People on Newstart Allowance have an elevated risk of poverty, with 54.6% living below the 50% of median wages poverty line, and 66.5% living below the 60% of median income poverty line (compared to the population rate of 13.2% living below 50% of median wages, and 21.1% below 60%).
- Being single, either with or without children, significantly increases a person's likelihood of being in poverty, with singles continuously over-represented throughout all poverty depth groups. Over one in four single parent households are in poverty, and one in seven is experiencing severe poverty.
- The poverty rate for children in single parent households was more than nine times the rate of children growing up in households with both parents, with around one in three children in single parent households now living in income poverty.

¹⁵⁰ Current rates can be accessed from links on the [Centrelink](#) website (accessed 29 January 2020 and 26 November 2020).

¹⁵¹ ACOSS, *Demand for Community Services Snapshot, December 2019* (accessed 26 November 2019).

¹⁵² WACOSS, *Cost of Living 2019* (16 December 2019) page 29 (accessed 26 November 2020).

A 2014 Bankwest Curtin Economics Centre (BCEC) report found that while Perth ranked second last among state capitals in the number of those in 'standard' poverty (those who earn less than 50 % of the median household disposable income), Perth had the second highest rate of severe poverty in Australia (those who earn less than 30% of the median income).¹⁵³

Research by the BCEC which was published in 2018 has found that young people who experienced poverty in the family home have much poorer employment outcomes than those who experienced a better standard of living as children, and continue to experience much poorer outcomes for many years after becoming independent. In particular, young people who grew up in persistent poverty while in the family home had much poorer outcomes than all other groups after leaving home, with a 36.5% probability of employment at age 19, compared to 70% probability for those that did not experience any poverty growing up. Seven years later, at the age of 26, they are still 19% less likely to be employed than their counterparts.¹⁵⁴

WACOSS submitted that poverty may not only increase the risk of becoming involved with the justice system, it is also an adverse factor once within that system. This is because of the:¹⁵⁵

- limited financial capacity to secure legal representation;
- limited financial capacity to pay bonds or fines, making incarceration a more likely sentencing disposition;
- adverse impact of negative community attitudes associated with poverty which tend to attribute it to an individual rather than society; and
- loss of self-confidence and a sense of choice or control over one's life that may affect a person's demeanour and presentation.

¹⁵³ Bankwest Curtin Economics Centre, *Falling through the Cracks: Poverty and Disadvantage in Australia* (2014) page 60 (accessed 26 November 2020).

¹⁵⁴ WACOSS, *Cost of Living 2019* (16 December 2019) page 30, citing Rebecca Cassells, *Economic and Social Outlook for WA*, BCEC (2018) (accessed 26 November 2020).

¹⁵⁵ Submission from the Western Australia Council of Social Service Inc. (17 February 2020).

2.5 HOMELESSNESS

2.5.1 Definitions of homelessness¹⁵⁶

The Australian Bureau of Statistics employs a definition of 'homelessness' developed by Chris Chamberlain (a Director at the Centre for Applied Social Research at RMIT) and Associate Professor David MacKenzie.¹⁵⁷ The Chamberlain and MacKenzie definition divides 'people living outside of the minimum standard of housing' into five groups:

- *Primary homelessness*: people without conventional accommodation (living in the streets, in deserted buildings, improvised dwellings, under bridges, in parks, etc.).
- *Secondary homelessness*: people moving between various forms of temporary shelter including friends, emergency accommodation, youth refuges, hostels and boarding houses; and also includes overcrowding (multiple individuals staying in the same residence).
- *Tertiary homelessness*: people living in single rooms in private boarding houses without their own bathroom, kitchen or security of tenure.
- *Marginally housed*: people in housing situations close to (or below) the minimum standards including properties that pose health risks, fall below building requirements or are likely to be deemed 'uninhabitable'.
- *Culturally recognised exceptions*: where it is inappropriate to apply the minimum standard, e.g. seminaries, gaols, student halls of residence.

¹⁵⁶ The information in this section is primarily drawn from the submissions from the Street Law Centre WA Inc. (3 August 2020).

¹⁵⁷ ABS, *Australian Census Analytic Program: Counting the Homeless, 2006* (Cat. No 2050.0) (2008) 1; ABS, *Position Paper – ABS Review of Counting the Homeless Methodology, Aug 2011* (Cat No. 2050.0.55.002) (2011) Definition of homelessness (both accessed 14 June 2017).

The Street Law Centre WA Inc. noted that 'by this definition, refuges and crisis services are still considered homelessness. Young people will often say "staying with mates". If you don't have a signed lease in your name, you are homeless'.¹⁵⁸ Additionally, 'if someone does have a signed lease agreement, they may still be experiencing homelessness due to circumstances such as domestic violence and financial barriers preventing them from leaving the unsafe environment'.¹⁵⁹

2.5.2 Homelessness statistics

In 2016, there were 36.4 homeless people per 10,000 of population in Western Australia (9,005 in total). The rates in the other states and territories of Australia ranged between 31.8 (Tasmania) and 50.4 (New South Wales) per 10,000 of population, except for the Northern Territory (which was 599.4 per 10,000 of population).¹⁶⁰ On the 2016 Census night:¹⁶¹

- Of people experiencing homelessness in Western Australia, only 10.6% were staying in supported accommodation for the homeless, with the remainder either rough sleeping or in improvised dwellings (10.9%), staying in boarding houses (10%), severely crowded dwellings (39.1%), staying with other households (19.7%) or in other temporary lodging (0.5%).
- 12.2% of the homeless population in Western Australia was under the age of 12 years (1,208 children); another 7.5% were aged between 12 and 18 (741 children); and a further 11.9% were aged between 19 and 24 (1,183 young adults). The ABS acknowledges that youth homelessness is underestimated in the Census. This is due to the hidden nature of youth homelessness and the way information can be recorded in the Census, for example homeless youth could simply appear as visiting friends or family on Census night.

¹⁵⁸ Submission from the Street Law Centre WA Inc. (December 2016).

¹⁵⁹ Submission from the Street Law Centre WA Inc. (3 August 2020).

¹⁶⁰ ABS, *Census of Population and Housing: Estimating Homelessness, 2016* (Cat No 2049.0) (2017) Tables 1.2, 1.3 (accessed 29 January 2020).

¹⁶¹ ABS, *Census of Population and Housing: Estimating Homelessness, 2016* (Cat No 2049.0) (2017) Tables 1.3, 1.6 (accessed 29 January 2020).

- Aboriginal and Torres Strait Islander people comprised about 3.1% of the Western Australian population but they comprised 26.4% of the homeless population for whom Indigenous status was provided.
- At least 23,437 of the 116,427 people experiencing homelessness in Australia were Aboriginal and Torres Strait Islander.
- 2219 young people (aged under 25) were in marginal housing in Western Australia. Marginal housing includes people living in overcrowded conditions, improvised dwellings and caravan parks.

2.5.3 Homelessness and disadvantage

Ruah Community Services submitted that people experiencing homelessness often experience multiple disadvantages which are exacerbated by their homelessness:¹⁶²

The complexity of need has a notable impact on homeless people's interactions with the legal and court systems, and these are shared with many other minority groups who share these disadvantages. From homeless people's own experience it is also the smaller more practical issues which have a profound impact on their interactions and outcomes.

From 2012-2020, Ruah Community Services has conducted surveys in the Perth metropolitan area with 2,248 people experiencing homelessness, primarily those sleeping rough or experiencing chronic homelessness. Amongst the findings, the surveys identified:¹⁶³

- Aboriginal people were over-represented in the homeless population, with 33% of those surveyed identifying as Aboriginal.
- There was a high incidence of mental health issues, with 49% receiving treatment in the past 6 months. In addition, 34% confirmed that they have been hospitalised against their will as a result of their mental health at some point in their life.

¹⁶² Submission from Ruah Community Services (13 December 2016).

¹⁶³ Submission from Ruah Community Services (24 August 2020).

- There were concerning levels of disability with 16% reporting issues with mobility, 28% with a learning or developmental disability and 36% reporting brain injury or head trauma.
- Poor health and substantial levels of disease were common, with 63% reporting a diagnosis of a serious health condition including kidney disease, liver disease, diabetes, asthma, cancer, tuberculosis, emphysema and heart disease. Treatment for these illnesses is difficult to manage, given people's transient lifestyle, limited control over their diet and lack of safe storage for medication.
- Problematic drug and alcohol use was common, with 53% acknowledging current usage and 31% identifying that they had been treated for drug and alcohol problems in the past and relapsed.
- There were high levels of vulnerability with 55% reporting that they had been attacked since becoming homeless, and 28% identifying that people force or stand over them, making them do things they do not want to do. In addition to this, 57% had untreated emotional, physical, sexual or other trauma.

Disability can be associated with homelessness – either as a cause or an effect. Refer to chapter 4 of this Bench Book for more information on people with disabilities, in particular in relation to those with intellectual disability and mental illness.

2.5.4 People who are homeless and the justice system

Given that 38% of the 2,248 people experiencing homelessness who were surveyed by Ruah Community Services between 2012 and 2020 said they had current legal issues that were either underway or outstanding,¹⁶⁴ people experiencing homelessness are frequently going to be appearing in courts and tribunals – as accused, witnesses and/or victims.

¹⁶⁴ Submission from Ruah Community Services (24 August 2020).

To contribute to the understanding of the issues faced by people experiencing homelessness when attending court, Ruah undertook a consultation with a group of 18 homeless people, which included four women and six people identifying as Aboriginal, leading up to the 2017 publication of this chapter of the Equal Justice Bench Book.¹⁶⁵ Ruah advised that the insights remained valid when they made a further submission in 2020.¹⁶⁶

The most common issues raised in the Ruah consultation were practical, and included:

- Homeless people who are sleeping rough do not have a safe place to sleep, store their belongings and prepare food, or access to hygiene facilities. This has a significant impact on their capacity to prepare for and attend court. People talked about having long-term limited or broken sleep, so are exhausted when they arrive in court or they lose track of dates/time and fail to appear. They have difficulty receiving paperwork, with most using homeless centres as addresses for mail. Fifteen of the 18 people who participated in the consultation said they had nowhere safe to store their paperwork and had mail lost or stolen in the past three months.
- Homeless people's access to food and hygiene facilities is regulated by the opening and closing times of services. One person spoke about not eating before court, another about how the timing of court appearances means he could miss the meal services at the day centres/soup runs and be without food for the rest of the day. Later court appearances allow homeless people time to be able to attend day centres before the court so they can shower and dress beforehand.
- Once ready, getting to court also poses a difficulty as people lack transport or money for bus fares. This contributes to lateness, failure to attend and subsequent arrest warrants. The security measures exposed people by asking them to remove their shoes and empty their bags. For people with limited access to showers and clean clothes or who carried all their possessions with them, this was humiliating. Once in the court, people were often daunted by the formality and afraid of the outcomes. Fear was a common theme people raised when talking about their experiences of court. This had an impact on their capacity to contribute to the court process. People spoke about social

¹⁶⁵ Submission from Ruah Community Services (13 December 2016).

¹⁶⁶ Submission from Ruah Community Services (24 August 2020).

anxiety, feeling unable to speak up or communicate, and feeling threatened if they were asked to be a witness. For some this was a case of being introverted or feeling they could not articulate what they needed to say and so they may choose to remain silent even if it is not in their best interest. There were a couple of people who spoke about the impact of clinical anxiety. One man described a physical reaction to going to court, where he would become scared, dizzy and sick. He found this embarrassing and has at times not attended for court appearances to avoid a potential panic attack.

- People raised a number of issues around court processes, finding the rules confusing, being excluded from some options because of their lack of address and not understanding the vocabulary of the court. Most people talked about the difficulty of getting bail as they had no-one who could be a surety for them or they had no address to be bailed to. Several people talked about the lack of privacy in court. They talked about how they felt uncomfortable having other people in the court hearing about their business and as a result did not open up or explain factors contributing to the case. One also spoke about how they had found it traumatising listening to someone else's case while they were waiting.
- A number of those consulted voiced a preference to represent themselves. This was usually related to feeling that their experiences were not understood by lawyers. Others would like more help to access legal assistance, feeling they did not have the financial resources to seek representation, needed more time (particularly before court) to go through their issues, or were hampered by a lack of address/telephone to liaise with a solicitor. In court, they would like more time for their whole story to be understood and taken into account.
- Another significant issue people raised is the range of external pressures and priorities that had an impact on their behaviour in court and their capacity to be understood. These included pressing health issues, dealing with grief, relationships with the police, addiction, being victims of crime, anger and stress. One person talked about the impact these pressures had on his behaviour, how he gets angry and frustrated in court and was subsequently censured for bad language. For some, these pressures resulted in an almost fatalistic response to court: they chose to plead guilty, showed little regard for the outcomes and minimised their input to avoid prolonging the process.

- People spoke of good experiences in the court system. These included being able to deal with multiple issues on one court date and coming to a resolution on that day. Several people said they did not feel like they were treated differently by the court because they were homeless. One person praised a judge he appeared before for his good manners and calming attitude. He said this judge took time to listen to him and relieved the stress he was feeling before coming to court. Another person talked about a judge who understood his living situation and that he did not have a house. The judge took this into account when making arrangements for the matter before him. Others spoke about the quality of service in rural areas or the way processes were explained to them well while they were in police custody.
- One person talked about when it was discovered in court that they were homeless, no support services were contacted. They said this would have been a good opportunity to identify people in need and link them to the range of services working with the homeless.

By 2020, Ruah Community Services had merged with the Mental Health Law Centre and had also been delivering the 'Choices' program in both Emergency Departments and courts.¹⁶⁷ Both of these services have highlighted the importance of the final point above, about the opportunity provided by a court appearance to connect people with support services. Ruah submitted:¹⁶⁸

In one case study where the lawyer was able to work alongside a support worker, the individual was able to secure temporary accommodation and participate in a mental health support program. This in turn assisted them secure bail and for the lawyer to negotiate for charges to be dropped as the person's mental health stabilised and the mitigating factors around their health were understood. In contrast similar cases where only a lawyer was involved people have been remanded in custody and received prison sentences. In effect, the presence of support services that can help people secure accommodation means they are able to face justice on the same footing as other members of society.

¹⁶⁷ Ruah Community Services, *Choices* (accessed 24 August 2020).

¹⁶⁸ Submission from Ruah Community Services (24 August 2020).

These submissions from Ruah relate to the most marginalised of the homeless – people whose circumstances make them prone to involvement with the legal system. However, it is also important to remain aware that homelessness may manifest in a variety of ways and is not confined to those 'sleeping rough', extending to those who reside with family and friends.

All people who are experiencing homelessness will be affected by having no fixed abode. Being homeless creates significant barriers to complying with what might otherwise seem mundane tasks, such as:

- maintaining personal hygiene and appearance;
- receiving and paying accounts, such as the registration on a vehicle (which may have become a home);
- ensuring children attend school and do home-work;
- retaining paperwork;
- securing or maintaining employment; and
- accessing and storing medications.

The Street Law Centre WA Inc. submitted:¹⁶⁹

Those who are homeless are likely to be further disadvantaged due to lack of access to mobile phones and internet facilities. Those who are homeless, particularly those who are sleeping rough, are more likely to have mobile phones stolen, or not have the facilities to charge it or have credit. They are also more likely to change numbers because of this.

This means they do not have the added benefits, such as reminders that the court can send via text message [or email communications from the court]. They are also less likely to have immediate access to contact the court (and wait on hold) to notify them when something comes up (e.g. illness or inability to travel).

The Western Australian Council of Social Services submitted that some legislation may disproportionately impact upon people who are experiencing homelessness, particularly in

¹⁶⁹ Submission from the Street Law Centre WA Inc. (3 August 2020).

relation to 'move on' notices.¹⁷⁰ Section 27 of the Criminal Investigations Act 2006 empowers police to move a person on from a public place or vehicle for 24 hours, if they believe the individual is causing disruption or likely to commit a crime. Failing to adhere to the order may result in a fine or arrest. This may be highly disruptive and cause distress for people who need to relocate with all their belongings.¹⁷¹

Please refer to the points to consider in section 2.6 of this chapter that relate to people experiencing homelessness.

2.5.5 Aboriginal people and homelessness

Aboriginal people are particularly vulnerable to homelessness because of their relative social and economic disadvantage. They are overrepresented amongst those requiring assistance from homelessness services:

- In 2015-16, 24% of people supported by Australian specialist homelessness services identified as Aboriginal or Torres Strait Islander including almost one in four who were children aged under 10.¹⁷²
- During 2015-16, Specialist Homelessness Services supported 24,203 clients in Western Australia. The rate of provision of these services (93.4 per 10,000) is lower than in other states and territories other than Queensland and NSW. Of those for whom Indigenous status was stated, 42.3% (9,465) were Aboriginal and Torres Strait Islander.¹⁷³

2.5.6 Young people and homelessness

Young people exiting State care are particularly vulnerable to homelessness. On 30 June 2016, there were over 4,600 children and young people in the care of the Department for Child Protection and Family Support in Western Australia.¹⁷⁴ As of 30 June 2017, over 54% of

¹⁷⁰ Submission from the Western Australia Council of Social Service Inc. (17 February 2020).

¹⁷¹ Government of Western Australia, Department of Communities, *Homelessness in Western Australia: A Review of the Research and Statistical Evidence* (2017) page 68 (accessed 28 February 2020).

¹⁷² AIHW, *Specialist Homelessness Services 2015-16* (2016) Supplementary tables, National - Table Indigenous 1 (accessed 25 July 2017). Adjusted for non-response.

¹⁷³ AIHW, *Specialist Homelessness Services 2015-16* (2016) Supplementary tables, Western Australia - Table 1; National - Table Clients 2 (accessed 25 July April 2017).

¹⁷⁴ Department for Child Protection and Family Support, *Annual Report 2015-2016* (2016) page 7 (accessed 25 November 2020). Note that Child Protection and Family Support has been part of the Department of Communities since 2017.

children in care were Aboriginal children, despite the fact that they only represent 5.5% of the Western Australian youth population, with the number of Aboriginal children in care growing at a faster rate than non-Aboriginal children.¹⁷⁵ For young people turning 18 and leaving statutory care, their transition to adulthood and independence is often associated with poverty, unemployment and homelessness.

2.6 PRACTICAL CONSIDERATIONS

Judicial officers should give consideration to the following factors when dealing with persons from a low income or disadvantaged background.

Points to consider - Discrimination:

- Despite their different experiences, all participants in the Social Policy Research Centre's Experiencing Poverty: Voices of Low Income Australians agreed that discrimination based on employment status (i.e. being unemployed) was perhaps the most significant problem that caused people to be disadvantaged.¹⁷⁶

Points to consider - Stereotyping:

- Although there is a tendency in our society to attribute the responsibility for poverty to those experiencing it, it is important for judicial officers to understand that there are often a multitude of interconnecting factors that cause people to miss out on employment and consequently to be excluded from an adequate standard of living.

Points to consider - Legal assistance

- Judicial officers should consider the limitations on accessing affordable legal assistance when dealing with persons from a low-income background.

¹⁷⁵ Department for Child Protection and Family Support, *Annual Report 2015-2016* (2016) page 34 (accessed 25 July 2017); Department for Child Protection and Family Support, *Annual Report 2016-2017* (2017) page 14 (accessed 25 November 2020). Note that Child Protection and Family Support has been part of the Department of Communities since 2017.

¹⁷⁶ Submission from the Western Australia Council of Social Service Inc. (27 April 2007).

- Given its limited nature, not everyone in need of Legal Aid resources can access them. Access to Legal Aid for 'minor' charges that do not have a possibility of incarceration are particularly limited, despite the disproportionately adverse impact that such charges have upon people from low income backgrounds.
- The Aboriginal Legal Service (ALSWA) does not have sufficient funding to represent Aboriginal people in Midland, Fremantle, Rockingham, Joondalup and Mandurah Magistrates and Children's Courts. Aboriginal people in these courts may be unrepresented if Legal Aid is not available. Similarly, as of September 2020, ALSWA did not have sufficient funding to represent clients in the Family Violence lists, Intellectual Disability Diversion Program, START Court or the Drug Court.¹⁷⁷
- Community legal assistance is similarly overstretched and underfunded to meet demand. The Australian Council of Social Services' 'Demand for Community Services Snapshot, December 2019' indicated that only 67% of community legal services were able to meet demand.¹⁷⁸

Points to consider - Self-represented litigants:

- Due to difficulties in accessing legal representation, people experiencing homelessness may have to represent themselves in legal proceedings.
- Some people experiencing homelessness may prefer to represent themselves than use services for which they are eligible, usually because they do not feel that their experiences are understood by lawyers.
- Where a person experiencing homelessness is self-represented, it would be helpful for the judicial officer to seek further information to fully understand the individual's circumstances. Consideration should be given to any adverse effects that particular sentencing options may have on the person's capacity to cope with homelessness or their efforts to secure housing.¹⁷⁹

¹⁷⁷ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

¹⁷⁸ ACOSS, *Demand for Community Services Snapshot, December 2019* (accessed 29 January 2020).

¹⁷⁹ Submission from the Street Law Centre WA Inc. (3 August 2020).

Please refer to chapter 8 of this Bench Book for more information on self-represented people.

Points to consider – people who are homeless:

- People experiencing homelessness will have particular difficulties with complying with administrative processes; they are not easily contacted and may face problems retaining paperwork. This can create additional difficulties for homeless people in accessing services such as Centrelink which require proof of identity, keeping appointments (including court appearances), proving their case and obtaining legal advice or representation.
- It would be helpful if judicial officers would allow greater flexibility to homeless people:¹⁸⁰
 - Please remember that almost everything people experiencing homelessness do is in the public eye, which may increase the likelihood of them coming into conflict with the law - for example, if they can't find a public toilet, they might be the subject of a complaint and prosecution.
 - There are practical impediments for people experiencing homelessness in attending court at a set time, which do not apply to other people. You could consider allowing more time for court attendance before issuing an arrest warrant in case the person who is experiencing homelessness is doing their best to comply.
 - Given their social isolation and lack of access to facilities, people experiencing homelessness may also face obstacles in notifying the court of their unavailability to attend court, for example due to hospitalisation.
 - People who are experiencing homelessness may not have the most 'appropriate' attire for court. It is likely they will have limited access to clothing, or clean clothing.
 - Street Law WA Inc. submitted that where people experiencing homelessness have been unable to obtain legal services and obtain legal advice in the standard timeframes, more adjournments or extended adjournments may be appropriate.

¹⁸⁰ Submissions from the Street Law Centre WA Inc. (December 2016 and 3 August 2020).

- A summons to attend court will be served to a person's last known address. People who are experiencing homelessness generally do not update their addresses. As a result, less serious charges may be heard in their absence if they do not attend court. This can result in a fine being issued, without taking into account the circumstances of the person. Street Law WA Inc. submitted that it would be more equitable to determine whether the summons had been received before determining the matter.
- It should not be assumed that people experiencing homelessness will always be available to attend court appointments. They may have other commitments, such as:
 - they may be part of a methadone program that distributes medication at fixed times and dates; and/or
 - if they wish to shower before court appearance services may only be available from 9:00 am to 1:00 pm.
- People experiencing homelessness are more likely to be the victims of crime and also to be the perpetrators of crime. They are less likely to resort to the legal system for protection or to have access to the information they need about the legal system.¹⁸¹
- Significant restrictions on eligibility for social security payments are not confined to those seeking refugee status in Australia. Street Law Centre WA Inc. advises that many of its homeless clients are not Australian citizens or refugees, but are from New Zealand. They might be homeless because they have lost their job and have no income. This is because for people from New Zealand only become eligible for certain Centrelink payments if they have resided in Australia for 10 years or more.¹⁸² Consider whether alternative sentences to a fine might be appropriate and reduce the risk of escalating disadvantage and poverty. Non-payment of a fine might result in licence suspension, escalating the difficulty in securing a job and escaping homelessness.¹⁸³

¹⁸¹ Martin W, *The Cost of Homelessness – A Legal Perspective* (Homeless Persons Week Conference, Perth, 6 August 2014) (accessed 3 February 2020).

¹⁸² New Zealand citizens who arrived in Australia after 26 February 2001 are generally non-protected Special Category Visa (SCV) holders. After 10 years' residence they may be able to access a one-off six month period of Newstart, Sickness or Youth Allowance. Access to other entitlements such as Health Care Cards is available, and non-protected SCV holders may also be able to access Age or Disability Support Pension or Carer Payments under the International Social Security Agreement between Australia and New Zealand (Commonwealth Department of Human Services, *New Zealand Citizens Claiming Payments in Australia* (accessed 25 July 2017)).

¹⁸³ Submission from the Street Law Centre WA Inc. (December 2016).

Please refer to section 2.5 of this chapter for more information on homelessness.

Points to consider – Bail:

- The unavailability of suitable and stable accommodation may mean that people experiencing homelessness will struggle to secure an order for release on bail.
- If appropriate, you could enquire whether the Duty Lawyer or Aboriginal Court Officer might be able to assist an accused person who is experiencing homelessness to locate suitable accommodation.
- If accommodation cannot be arranged, consider whether you can deal with the substantive charges immediately rather than adjourning a matter.
- People who are homeless are likely to experience changes to their living situation during the time they are on bail. It would be helpful to enquire about their housing circumstances and any likely changes. It is quite burdensome for a person who is homeless to make applications to vary bail when their housing situation is constantly changing.¹⁸⁴
- Where a person is experiencing, or likely to experience, homelessness during the bail period, it would be helpful to offer some flexibility in reporting requirements – for example, an option of reporting to two or more police stations depending on their circumstances (such as the location of services or addresses of other family members).¹⁸⁵
- If a person who is experiencing homelessness is in custody, consider whether they have been referred to Bail Support Services (BSS) and ensure that all options have been considered and what supports/ transport the BSS can provide.

¹⁸⁴ Submission from the Street Law Centre WA Inc. (3 August 2020).

¹⁸⁵ Submission from the Street Law Centre WA Inc. (3 August 2020).

- The Aboriginal Legal Service commenced operating the Bail Support Service/Prison In-Reach Legal Service in April 2020. Legal Aid WA is also funded to provide a Bail Support Service/Remand Advocacy Service. These programs are funded by the Department of Justice as part of a wider Justice Reform Project. The overall objective of these programs is to 'reduce avoidable remand' by providing earlier access to bail to suitable applicants through the provision of bail support and prison in-reach legal services, and by supporting accused persons to comply with bail conditions and undertakings.¹⁸⁶
- In order to meet its objectives, the Bail Support Service/Prison In-Reach Legal Service:
 - develops viable alternative bail plans to be presented to the court to enable accused to be released on bail or to vary existing bail conditions;
 - assists and supports an accused to meet bail conditions (e.g. accessing suitable accommodation to provide a residential address, or locating a suitable surety);
 - supports accused persons whilst on bail to ensure compliance with conditions and to reduce reoffending; and
 - assists with early resolution of cases where an accused is remanded in custody.
- The Aboriginal Legal Service Bail Support Service employs four FTE Aboriginal Bail Support Workers and one PTE Team Leader. The Prison In-Reach Legal Service employs two FTE lawyers. To be eligible for these programs, the accused person must be appearing in the Perth Magistrates Court and represented by Aboriginal Legal Service. All referrals are assessed for their eligibility and suitability. An accused person must consent to participate in the program and consent to sharing of information with the Department of Justice for evaluation purposes.¹⁸⁷

¹⁸⁶ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

¹⁸⁷ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

Points to consider - Specialised courts:

- Homelessness is often associated with other criminogenic factors such as mental illness, substance abuse and child abuse and neglect. The causality between these factors and homelessness is not clear-cut and will vary from case to case. Substance abuse, mental illness and social isolation are plausible consequences, as well as causes, of homelessness.¹⁸⁸
- Consider whether referral to the Mental Health Court Diversion and Support Program (Start Court and Links), the Drug Court or the Intellectual Disability Diversion Program (IDDP) is appropriate. If you can obtain as much information as possible about a person's circumstances it will assist you to refer to the most appropriate specialist court.

2.6.1 Directions to a jury

Points to consider:

- Negative stereotypes may be associated with people who are economically or socially disadvantaged. It is important to ensure that the jury does not allow stereotyped or false assumptions or ignorance about poverty, unemployment, level of education and/or homelessness, and a person's appearance or manner when presenting evidence, to unfairly influence the jury's judgement.
- You may need to provide guidance as follows:
 - Explain that they must try to avoid making any stereotyped or false assumptions. For example, it is often helpful to give specific examples of stereotyping and explain that they must treat the particular 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 other people in similar circumstances. Instead they must carefully consider the evidence presented.

¹⁸⁸ Martin W, *A Judge's View of Homelessness* (Shelter WA Business Breakfast, Perth, 5 August 2016) (accessed 25 July 2017).

2.6.2 Sentencing, other decisions and judgment or decision writing

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, an older person, those they care for or those who care for them.

Points to consider:

- Are decisions clearly articulated so that they can be seen to relate to the issues and individuals involved and are not seen as being based on discriminatory assumptions and stereotypes?
- Note that many people may struggle financially because of their inability to access adequately remunerated or permanent employment. Homelessness, ill health and disability may also adversely impact on a person's capacity to meet financial commitments or fines. If you can obtain as much information as possible about a person's circumstances it will assist you in determining the most appropriate type of sentence.
- Homelessness may make it difficult for offenders to comply with orders requiring attendance at specified places and times or requiring the maintenance of on-going contact.
- After the completion of court proceedings, homelessness may make it difficult for offenders or other parties to receive services, notifications and/or reminders in person or by mail or telephone.
- The *Sentencing Act 1995* (WA) and related legislation contain provisions that may reduce the risk of fine defaulting by providing:
 - for a community-based order to be made with a community service requirement (of at least ten and not more than 120 hours) rather than a fine;¹⁸⁹

¹⁸⁹ *Sentencing Act 1995* (WA) ss 62, 67(3) (accessed 21 September 2020).

- for a fine to be converted to a work development order (WDO) at a rate of 6 hours' work for a fine up to \$300 and 12 hours work for a fine of \$300 to \$600;¹⁹⁰ and/or
 - scope and flexibility for offenders to obtain a Time to Pay Order in circumstances where the alternative of suspending the offender's drivers licence would hinder the offender in performing family or personal responsibilities.¹⁹¹
- If you are sentencing an offender and a fine is an option, consider:
- the offender's capacity to pay¹⁹² and, if an offender does not have the capacity to pay a fine, other options available as penalties;
 - utilising the Fines Enforcement Registry to check the offender's history of paying fines (if any) before sentencing (which can be done by the judicial support officer or associate checking online or by a telephone call from a remote court);
 - the option of immediately converting the fine to a Work and Development Order (WDO), if a fine is imposed on an offender and the court is satisfied that the offender does not have the means to pay such a fine;¹⁹³
 - alternative non-custodial options such as Community Based Orders (CBO);¹⁹⁴
 - utilising the resources provided by the sheriff/community development officer, who may have knowledge of the offender (additional to what you have from the pre-sentence reports) and of available programs;
 - sending an offender who receives a fine immediately to the registrar to work out a Time to Pay program, including automated payments; and/or

¹⁹⁰ *Sentencing Act 1995* (WA) ss 57A; *Fines, Penalties and Infringements Notices Enforcement Regulations 1994* (WA) reg 6A (accessed 21 September 2020).

¹⁹¹ *Fines, Penalties and Infringements Notices Enforcement Act 1994* (WA) s 27A(1) (accessed 29 January 2020).

¹⁹² *Sentencing Act 1995* (WA) s 53 (accessed 21 September 2020).

¹⁹³ *Sentencing Act 1995* (WA) s 57A (accessed 27 November 2018).

¹⁹⁴ *Sentencing Act 1995* (WA) Part 9 (accessed 27 November 2018).

- referring the offender to the *Work and Development Permit (WDP) Scheme*. This scheme is a partnership between the Department of Justice, Legal Aid and the Aboriginal Legal Service. Under a WDP, eligible people can complete approved activities (such as unpaid work, drug or alcohol programs, mentoring for under 25s, medical or mental health treatment) under the supervision of a sponsor, in place of the fine owed. Eligible people include those experiencing financial hardship, family violence or homelessness and/or who have a disability, mental illness or drug/alcohol issue.

- Street Law WA Inc. submitted that when sentencing you should consider:¹⁹⁵
 - whether an offender is in receipt of a Centrelink payment and their general capacity to pay a fine (a small fine will have a greater punitive impact where there is no/limited capacity to pay);
 - whether an offender has a large number of outstanding fines (again affecting capacity to pay, and with the consequence that a small fine will have a greater punitive impact);
 - where an offender has no capacity to pay but is not eligible for Centrelink payments, a fine will not be the most appropriate sentencing option; and
 - unpaid fines can result in licence suspension and thereby reduce a person's capacity to pay any fines.

2.7 FURTHER READING

Aged and Community Services Western Australia (accessed 29 January 2020)

Australian Bureau of Statistics (ABS) (accessed 29 January 2020)

Australian Council of Social Service (ACOSS) (accessed 29 January 2020)

Australian Institute of Health and Welfare (AIHW) (accessed 29 January 2020)

Bankwest Curtin Economics Centre (BCEC) (accessed 29 January 2020)

Choices (Accessed 24 August 2020).

¹⁹⁵ Submission from the Street Law Centre WA Inc. (3 August 2020).

Department of Communities (accessed 29 January 2020)

Department of Health (accessed 29 January 2020)

Department of Local Government, Sport and Cultural Industries (accessed 29 January 2020)

Melbourne Institute of Applied Economic and Social Research (accessed 29 January 2020)

Mental Health Commission (accessed 29 January 2020)

Office of the Director of Public Prosecutions Comparative Sentencing Tables (accessed 12 July 2021)

Ruah Community Services (accessed 29 January 2020)

Shelter WA (accessed 29 January 2020)

Social Policy Research Centre (UNSW) (accessed 29 January 2020)

Western Australia Council of Social Service Inc. (WACOSS) (accessed 29 January 2020)

3 RELIGIOUS AFFILIATIONS

This chapter provides a brief overview of the beliefs and court-relevant practices of the six most common religions in Western Australia in the order of the most commonly practised: Christianity, Buddhism, Islam, Hinduism, Sikhism and Judaism.

In relation to a definition of 'religion', the Australian Bureau of Statistics states:¹⁹⁶

[A] precise definition of the concept of religion, or of what generally constitutes 'a religion', is difficult, if not impossible, because of the intangible and wide-ranging nature of the topic. Generally, religion is regarded as a set of beliefs and practices, usually involving acknowledgement of a divine or higher being or power, by which people order the conduct of their lives both practically and in a moral sense.

In *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 136, Mason ACJ and Brennan J held that:

... for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.

The material used in this chapter was drawn from the New South Wales Judicial Commission's *Equality before the Law Bench Book*,¹⁹⁷ with modifications that incorporate local legislation, data and reference material. It has also been updated to incorporate the 3rd edition of the Australia New Zealand Policing Advisory Agency (ANZPAA), *A Practical Reference to Religious and Spiritual Diversity for Operational Police* and a number of other relevant resources.

As noted in the New South Wales *Bench Book*, not all people who practise the various religions described will accept these descriptions as accurate. The New South Wales Judicial Commission advises, however, that its descriptions were confirmed by representatives of each

¹⁹⁶ Australian Bureau of Statistics (ABS), *Australian Standard Classification of Religious Groups* (Cat No 1266.0) (2016) (accessed 23 October 2018).

¹⁹⁷ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2018) (accessed 23 October 2018).

particular religion as representing a mainstream understanding of that religion. The Steering Committee overseeing the production of this Bench Book has also sought to confirm the general acceptability of the descriptions presented with locally-based representative organisations.

It is noteworthy that there is a growing percentage of Australia's population reporting no religion. Those reporting no religion increased from 19% in 2006 to 30% in 2016.¹⁹⁸

The Committee gratefully acknowledges the following organisations and individuals, whose submissions and contributions have assisted with development of this chapter in the first edition and its subsequent revision:

- The Uniting Church in Australia - Social Justice (Western Australia) (11 May 2007);
- The Bodhinyana Buddhist Monastery (5 September 2008, 27 May 2020);
- Dar al Shifah Islamic Inc. (9 September 2008);
- The Catholic Social Justice Council (18 September 2008);
- The Jewish Society (Western Australia) (24 September 2008);
- The Centre for Muslim States and Societies, University of Western Australia (1 December 2008);
- The Archbishop of Perth, the Anglican Church of Australia, Diocese of Perth (20 March 2017);
- The Buddhist Council of Western Australia (6 April 2017, 27 May 2020);
- The Catholic Archdiocese of Perth (9 May 2017);
- The Jewish Community Council of Western Australia (Inc.) (11 May 2017, 14 April 2020);
- The Sikh Association of Western Australia (24 January 2018); and
- The Buddhist Society of Western Australia (27 May 2020).

¹⁹⁸ ABS, *Media Release – 2016 Census Data Reveals No Religion is Rising Fast* (27 June 2017) (accessed 23 October 2018).

3.1 SOME STATISTICS

At the time of the 2016 Census there were more than 125 religious faiths followed in Western Australia and religious diversity in Western Australia had increased as more people identified with a religion other than Christianity.¹⁹⁹ The numeric breakdown of broad religious affiliations and the percentage of the Western Australian population represented by each group, based on the 2016 Census results, are shown in Table 3-1.

Table 3-1 Religious affiliation of the Western Australian population²⁰⁰

| Religious affiliation | Number of Western Australian residents in 2016 | % of Western Australian population |
|--|--|------------------------------------|
| Christian | 1,231,600 | 49.8% |
| Buddhist | 52,830 | 2.1% |
| Islam | 50,649 | 2.0% |
| Hindu | 38,739 | 1.6% |
| Sikhism | 11,897 | 0.5% |
| Jewish | 5,427 | 0.2% |
| Other religions | 11,134 | 0.4% |
| Secular beliefs/ Other spiritual beliefs/ No religious affiliation | 816, 144 | 33.0% |
| Not declared/ inadequately described | 255,983 | 10.4% |
| Total Western Australian population | 2,474,410 | 100% |

Source: Australian Bureau of Statistics

¹⁹⁹ See also, Office of Multicultural Interests, *Cultural Diversity in Western Australia: A Demographic Profile* (2013) (accessed 25 November 2020).

²⁰⁰ Australian Bureau of Statistics (ABS), *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Table 4 (accessed 27 November 2018).

3.1.1 Religious affiliation

Of the 49.8% (1.2 million) Australians who are Christian, in descending order of affiliation:

- 530,371 people (21.4% of the population) are Catholic;²⁰¹
- 354,792 people (14.3% of the population) are Anglican;²⁰²
- 56,688 people (2.3% of the population) are Uniting Church;
- 44,793 people (1.8% of the population) are Presbyterian and Reformed;
- 42,116 people (1.7% of the population) are Baptist;
- 23,698 people (1.0% of the population) are Eastern Orthodox;
- 26,175 people (1.1% of the population) are Pentecostal;
- 7,927 people (0.3% of the population) are Lutheran;
- 11,089 people (0.4% of the population) are Jehovah's Witnesses;
- 7,494 people (0.3 of the population) are Churches of Christ;
- 7,112 people (0.3% of the population) are Seventh Day Adventists;
- 4,383 people (0.2% of the population) are Salvation Army; and
- the remainder are affiliated with such religions as Other Protestant and Latter-day Saints.

The Australian Bureau of Statistics Census data includes Australian Aboriginal Traditional Religions (1,116 people), although of course, Aboriginal people have a broad range of religious affiliations.

The religious affiliations of people born overseas or with recent overseas ancestry, whether from English speaking countries or non-English speaking countries, are varied and do not necessarily match the dominant religion within the particular country of origin. For example, Vietnamese Australians may be Christian or Buddhist or practise other religions. Indians may be Hindus, Muslims, Sikhs or Christians. Religious practice is not always confined to a single ethnic community. For example, Muslims can be Indonesian, Iranian, Iraqi, Bosnian, Pakistani, Indian, Malaysian, Somali, Turkish, Indigenous or Anglo-Australian, to name a few.

²⁰¹ Despite their names, Anglican Catholics and Liberal Catholics are not classified as 'Catholic'; Anglican Catholics are classified as Anglican and Liberal Catholics as 'Other Christian' by the Australian Bureau of Statistics: see ABS, *Australian Standard Classification of Religious Groups* (Cat. No. 1266.0) (2016), Data cubes (accessed 26 July 2018).

²⁰² This includes members of the Anglican Catholic Church: see above.

There is generally a wide diversity within religious groups, dependent on such things as cultural factors and doctrinal differences. It is important not to make assumptions or stereotypes. For example:

- many religions include people for whom their religion is the critical defining factor in their values and the way they behave, as well as people for whom their religion is of a less significant defining influence or importance; and
- many religions include a range of doctrinal differences, from the orthodox or fundamentalist (strict adherence to very specific religious rules) to more relaxed practices.

3.1.2 No religious affiliation

Although this chapter is concerned with particular religious affiliations, it is significant to note at the outset that, in the 2016 Census, the second most common response for the religious affiliation of persons normally residing in Western Australia was 'No Religion' (804,268 people). This group increased by almost a third (from 19.7% to 25.5% of the total population) between the 2001 Census and the 2011 Census,²⁰³ and increased again to 33.0% in the 2016 Census. This chapter does not seek to make generalisations about the beliefs of this group, due to the diversity of views that are encompassed (e.g. agnosticism, atheism, apathy towards religion, etc.). However, it is important that such a significant group is recognised and treated appropriately to ensure that non-belief does not lead to discriminatory or unequal treatment.

The Stanford Encyclopedia of Philosophy states that atheism should be construed as the proposition that God does not exist (or, more broadly, the proposition that there are no gods).²⁰⁴ On the other hand, an agnostic is described as a person who has entertained the proposition that there is a God but believes neither that it is true nor that it is false.²⁰⁵

Non-belief in religion is particularly relevant to whether a person will take an oath or make an affirmation prior to giving evidence. With more than one quarter of the community identifying as having no religious affiliation, and therefore likely to make an affirmation rather than take

²⁰³ Office of Multicultural Interests, *Cultural Diversity in Western Australia: A Demographic Profile* (2013) (accessed 25 November 2020).

²⁰⁴ Stanford Encyclopaedia of Philosophy, *Atheism and Agnosticism* (2017) (accessed 25 November 2020).

²⁰⁵ Stanford Encyclopaedia of Philosophy, *Atheism and Agnosticism* (2017) (accessed 25 November 2020).

an oath, it is important to acknowledge that an affirmation is neither an exceptional nor a lesser way of attesting to the veracity of a person's evidence.

For further information about oaths and affirmations please refer to section 3.8.2.

3.2 CHRISTIANITY

As outlined in section 3.1.1, there are a wide variety of Christian denominations or traditions practiced in Western Australia. In addition, people who practice Christianity come from a wide variety of culturally and linguistically diverse origins.

Christianity is based on the teachings of Jesus Christ, who lived 2000 years ago in the Middle East region. The annual dating system used in Australia has its origins in Christianity - BC (Before Christ) and AD (Anno Domini or the Year of the Lord) - although there has recently been some movement to the more religiously neutral BCE (Before the Common Era) and CE (Common Era). Almost all public holidays in Australia derive from the Christian calendar of festivals, as did, until recently, the notion of not working on Sundays.

Broadly speaking, Christianity is divided into two major groupings:

- *Eastern Christianity*: There are many Churches within Eastern Christianity, such as the Orthodox Churches. These Churches share a common faith and worship, and originate mainly from Africa, Eastern and Southern Europe and the Middle East. These branches of Eastern Christianity are closely aligned with cultural or ethnic groups (e.g. Greek, Macedonian).
- *Western Christianity*: There are many Churches within Western Christianity, such as the Roman Catholic Church (under the authority of the Pope), the Anglican Church, the Uniting Church and Pentecostal Churches.

There are a number of additional groups that may, or may not, be viewed as Christian denominations, such as:

- Christian Scientists;
- Church of Jesus Christ of Latter-day Saints (Mormons); and
- Jehovah's Witnesses.

Many Christian Churches contain within them a spectrum of liberal and conservative views. They may also give priority to different aspects of the faith.

Christians in Western Australia worship in over 40 languages. They come from many different countries, which means they share the culture of their homeland as well as being part of the worldwide Christian Church. Western Australian Christians may be:

- from European countries including the United Kingdom, Italy, Greece, Spain, Netherlands and Germany;
- from Asian countries including the Philippines, Indonesia, Malaysia, Vietnam, Korea and China;
- from Pacific Island countries including Tonga and Samoa;
- from African countries including Sudan, Sierra Leone, Ethiopia, Eritrea and South Africa; or
- from Middle Eastern countries including Egypt, Syria, Lebanon and Israel; and from Latin American countries including Chile and Peru.²⁰⁶

Some of these cultural Christian communities arrived in Australia as refugees or immigrants. Others are from Aboriginal communities and may use one or more of the many different Aboriginal languages.

Refer to chapter 11 of this Bench Book for further information in relation to
Aboriginal languages and communication.

3.2.1 History of Christianity in Western Australia

Christians have been in Western Australia since the establishment of the Swan River Colony in 1829. The first church service to be held in a church took place in January 1841 at the All Saints Church in the Swan Valley. There are more than 1,000 Christian Churches or other worship centres in Western Australia. Christian Churches are divided into a variety of denominations, each with its own ways of worshipping and teaching.²⁰⁷

²⁰⁶ Office of Multicultural Interests (with the Council of Churches of Western Australia Inc.), *Culture and Religion Information Sheet — Christianity* (2015) page 2 (accessed 25 November 2020).

²⁰⁷ Office of Multicultural Interests (with the Council of Churches of Western Australia Inc.), *Culture and Religion Information Sheet — Christianity* (2015) page 2 (accessed 25 November 2020).

3.2.2 Main beliefs

Christianity is one of the monotheistic (one god) religions (or faiths) in the Abrahamic tradition, which includes Islam and Judaism. Christianity takes its name from its 'founder' Jesus Christ, who lived approximately 2000 years ago in Palestine. Jesus was a Jewish man whom Christians believe was born to fulfil the prophecies in the Old Testament of the Bible. The prophecies tell of the birth of a Saviour for the people of Israel.

Central to the Christian faith is the Holy Trinity – God as Father, Son and Holy Spirit. Jesus is the Son of God, fully divine and fully human.²⁰⁸

3.2.3 Holy books and scriptures

The Christian Scriptures comprise the Old and New Testaments. These are collections of sacred writings; the Old Testament consists of Scriptures shared with the Jewish faith, and the New Testament records the gospel or 'good news' concerning Jesus.

3.2.4 Religious leaders

Most churches appoint specially ordained leaders (often known collectively as clergy), referred to variously as ministers, pastors or priests. Some churches ordain women but most do not.

It is appropriate to refer to Catholic and Orthodox priests and many Anglican clergy as 'Father'. The terms 'Reverend' and 'Pastor' are also used. Informality is common these days, so, if in doubt as to how to address a clergy member, it is appropriate to ask as to their preference.

Refer also to section 3.2.8.4 in relation to names and titles.

The role of religious leaders is to teach, to administer the sacraments and to care for the pastoral needs of church members and adherents.

3.2.5 Forms of worship and feast days

Christians can pray at any time of the day or night, in any place and in any physical posture, although it is considered essential by most Christians to be able to go to a place set aside and

²⁰⁸ Office of Multicultural Interests (with the Council of Churches of Western Australia Inc.) *Culture and Religion Information Sheet — Christianity* (2015) page 2 (accessed 26 November 2020).

consecrated for public and private worship. As a result, many Christians tend to pray congregationally in a church of their particular denomination, usually on Sundays (although Seventh Day Adventists worship on Saturdays). Christians may also pray in a church on religious feast days, and may also do so on any other day of the year. Church services vary between denominations from highly ritualised to informal. Leaders may wear liturgical garments, a clerical collar or a cross pinned onto a shirt, or no particular distinguishing dress.

Refer to section 3.2.8.3 in relation to dress.

Christian feast days include:

- Christmas — the birth of Christ — on 25 December in Western churches. (In its submission, the Uniting Church in Australia — Social Justice (WA) notes that the Christian celebration of Christmas may be regarded as very different to the secular holiday of Christmas.²⁰⁹)
- Good Friday and Easter Sunday (two days after Good Friday) — the crucifixion and resurrection of Christ respectively — in March or April in Western churches.

These feast days 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, and different rules are used to calculate the date of Easter.

There are many other feast days that have more or less significance depending on the particular denomination. For example, some denominations recognise many different Saints' days, and some pay more attention to particular religious events such as the Assumption of the Virgin Mary (or the Dormition of the Holy Mother of God, as Eastern Christians refer to it).

3.2.6 Diet

Some Christians will follow different dietary procedures during the six week period prior to Easter (the season of Lent). This may include fasting, avoiding meat, or avoiding other foods. Orthodox Christians may also fast before other events and celebrations. Some Christians do not eat meat on Fridays. Seventh Day Adventists follow a diet similar to the Jewish kosher diet.

²⁰⁹ Submission from the Uniting Church in Australia — Social Justice (WA) (11 May 2007).

3.2.7 Practices and customs relevant to appearance before the court

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

3.2.8.1 Status of women

The status of women in Christianity differs between denominations. Only some Christian denominations allow female clergy; for example, Catholic and Orthodox churches do not allow women to be priests.

3.2.8.2 Touching

There are no particular taboos on touching. However, note that there are some Christian denominations that forbid some forms of medical treatment — for example, Jehovah's Witnesses will refuse blood transfusions and all other forms of treatment involving the use of biological donations from others.

3.2.8.3 Dress

Some churches have distinctive dress to distinguish their leaders from others.

- In many churches, leaders wear the 'Roman collar'. This is a plain, often black, shirt with a white tab in the collar. Others wear a cross or crucifix prominently, as a way of defining their role in the church.
- Orthodox priests wear black tunics (soutanes) and distinctive headdress.
- Salvation Army members, as well as officers, wear a uniform with distinctive badges.
- Many church leaders have specific garments for use when they lead worship.²¹⁰
- Some church leaders wear no distinguishing religious dress at all.
- Religious sisters (or nuns) and religious brothers (or monks) tend not to wear distinguishing religious dress as often as they have in the past. Those in enclosed

²¹⁰ Office of Multicultural Interests (with the Council of Churches of Western Australia Inc.), *Culture and Religion Information Sheet — Christianity* (2015) page 4 (accessed 26 November 2020).

orders (that is, strictly separated from the affairs of the external world) are still likely to wear simple religious habits.

- Many Christians wear a cross around their neck, but not everyone who wears a cross is a Christian; the cross may be just an item of jewellery.

3.2.8.4 Names and titles²¹¹

Many Christian leaders are given honorific titles. A common title used instead of, or as an alternative to, 'Mr' or 'Ms/Mrs/Miss' is the word 'Reverend', such as 'The Reverend John Jones' or 'The Reverend Jane Jones'; an alternative, if addressing a male, is 'Father Jones'. Other Christian leaders may prefer to be referred to as 'Pastor'. Catholic priests are always referred to as 'Father' when being addressed orally, and as 'Reverend' in writing. Female Christian leaders are usually called 'Reverend' rather than 'Mother'. The title 'Mother' usually refers to a Christian female leader of a group of nuns.

There are other honorific titles for Christian leaders in higher leadership positions in the church. These titles may include Archbishop, Bishop, Archdeacon, Moderator or Pope. Salvation Army officers are given titles which are taken from the regular army, such as 'Captain' or 'Major'. The members of the Society of Friends (Quakers) do not use honorific titles at all. Many will not use 'Mr' or 'Ms/Mrs/Miss'.

3.2.8.5 Worship and festival times

Refer to section 3.2.6.

3.2.8.6 Seating

Many Christian communities are happy for men and women to sit together in a public meeting, but some Christians from particular cultural groups may prefer men and women to sit separately. If in doubt, it is wise for the organiser of the meeting to check with the participants.

²¹¹ Office of Multicultural Interests (with the Council of Churches of Western Australia Inc.), *Culture and Religion Information Sheet — Christianity* (2015) page 4 (accessed 26 July 2020).

3.3 BUDDHISM

Buddhism today is divided into three major branches, or traditions.

- *Theravada Buddhism* (Southern School from Burma, Cambodia, Laos, Sri Lanka and Thailand) focuses primarily on virtue, meditation and wisdom as vital elements of the way to enlightenment. This is based on the ancient Pali words of Sila (Virtue), Samadhi (deep state of meditation) and Panna (Wisdom).
- *Mahayana Buddhism* (found in China, Japan, Korea and Vietnam) emphasises the individual's journey along a path to full enlightenment, with the motivation to bring benefit to all other beings as a consequence of engaging in this journey. This path develops a life balanced in morality, compassion and wisdom which is epitomised in the Bodhisattva vows often taken by people following this path.
- *Vajrayana Buddhism* (originally practiced in the Himalayan regions such as Bhutan, Tibet, Mongolia and Kazakhstan; and now also increasingly through the Western world) combines the essential teachings of Theravada and Mahayana Buddhism with a Tantric or holistic view of the nature of the mind.

The Buddhist Council of Western Australia notes that Theravada, Mahayana and Vajrayana are arranged in that order to reflect the order of their existence. The Theravada is the teaching of the elders and closest to the original teachings of the Buddha which began around 500 B.C. Mahayana came into existence around the first century CE while Vajrayana around fifth century CE.

3.3.1 History of Buddhism in Western Australia

Though records are sparse, it is likely that Buddhism was first brought to Australia around the mid-19th century by Chinese miners joining the gold rushes. Japanese pearl divers and their families arrived shortly after the Chinese, bringing Buddhism with them to Broome, Darwin and Thursday Island. Celebration of Buddhist festivals became a popular feature of life in Broome, ceasing only during the World War II internment of Japanese residents.

The mid-1970s saw a turning point in the history of Buddhism throughout Australia with the arrival of large numbers of ethnic Buddhists as refugees from the Indochina wars. Most were from Vietnam but there were also numbers of Lao and Kampuchean Buddhists.

3.3.2 Main beliefs

Buddhism can be called either a religion or spirituality. It was founded in north-eastern India around 2600 years ago based on the teachings of Siddhartha Gautama, the Buddha (the Enlightened or Awakened One). The Buddha was not a god and the philosophy of Buddhism does not entail any theistic world-view. All of the many teachings of the Buddha are centred upon a set of truths about reality which are known together as 'The Four Noble Truths':

- There is suffering.
- That suffering has a cause.
- That suffering has an end.
- There is a path that leads to the end of suffering.

Buddhism teaches that to be a truly balanced individual, a person must develop both wisdom and compassion. It is believed that freeing the mind from prejudices and preconceived ideas, developing awareness and having an uncluttered and tranquil mind all assist in cultivating wisdom. Buddhists believe that there is a close connection between ethical behaviour and wisdom. Buddhists try to live by a moral code based on a principle of non-harm.

3.3.3 Holy books and scriptures

Buddhism commenced as an oral tradition, the Buddha himself having left no written record of his teachings. These were first recorded in texts some considerable time after the Buddha's death, having been preserved in the memories of monks in the interim. There is, as such, no specific Buddhist holy text.²¹²

However, there are numerous holy scriptures associated with the many forms of Buddhism. They are collectively known as the Tripitaka (or Three Baskets), consisting of:

- Vinaya Pitaka or monastic rules;
- Sutra Pitaka or discourses; and
- Abhidharma Pitaka or higher philosophy.

The teachings of the Buddha are collectively known as 'the Dharma' in Sanskrit dialect, which is used by Mahayana Buddhism and 'the Dhamma' in Pali dialect, which is used by Theravada Buddhism.

²¹² Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) page 10 (accessed 31 July 2018).

Often temples will provide talks or lessons about the teachings of the Buddha for its adherents. Buddhism is not based on reverence for holy books but on a clear understanding of the Buddha's teachings together with the practical application of those teachings.

3.3.4 Religious leaders

In English, monks and nuns are usually referred to as 'Venerable', although other titles may be used, such as Ajahn, Ani, Bhante, Geshe, Khenpo, Lama, Roshi, Sifu, SuCo, Sunim and Thay.

The basic role of the spiritual leader is to teach, to instruct monastic members and to act as an example.

Monks, nuns and some lay people are regarded as spiritual leaders. Buddhist monks and nuns should not be addressed as 'Mr' or 'Ms'. They may be addressed as 'Venerable', 'Roshi', 'Ajahn', 'Lama' 'Rinpoche', 'Master', 'Bhante' or 'Sister', depending on their tradition.²¹³

3.3.5 Forms of worship and festivals

Many Buddhists perform devotional practices or meditation in the early mornings and evenings. This may include chanting, prostration and/or silent meditation. Buddhist practices need not be undertaken in a temple, but many temples do offer services weekly and at festivals.

There are a number of dates of significance on the Buddhist calendar. The key dates are:

- February to May: Vesak/Wesak (traditionally, the full moon in May), commemorating the Buddha's birth, enlightenment and passing away. The dates vary between communities.
- From approximately the full moon of July to the full moon of October: Vassa/Vassavassa, which is the Rains Retreat.
- Approximately between January and April: New Year, the date of which varies between communities.

Most dates of significance are based on a lunar calendar, and therefore the dates change from year to year. The dates and the spelling of festival names also vary between cultural groups.

²¹³ Office of Multicultural Interests (with the Buddhist Society of Western Australia), *Culture and Religion Information Sheet — Buddhism* (2015) page 4 (accessed 26 November 2020).

3.3.6 Practices relevant to appearance before the court

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

3.3.6.1 Status of women

Women have an equal status to men in the Buddhist religion.

3.3.6.2 Touching²¹⁴

Shaking the hand of a monk or a nun is not appropriate, but is generally accepted with lay Buddhists. The more common greeting for Buddhists is to place both hands in a praying position, followed by a gentle bow.

Buddhist monks and nuns are generally guarded with members of the opposite sex, and avoid direct physical contact. Some lay Buddhists may also prefer not to be touched by a person of the opposite sex.

Touching the head of any person is seen as impolite and should be avoided. In some traditions, pointing the soles of the feet towards a statue of the Buddha, a shrine, monks, nuns, or people in general, is considered very impolite.

3.3.6.3 Dress

Buddhist monks and nuns often have short or shaved hair and wear robes that vary in colour from maroon, saffron, grey, brown, yellow and black. Monks, nuns and some lay Buddhists might wear or carry threaded beads, called a Mala.

3.3.6.4 Names and titles

Refer to section 3.3.4

²¹⁴ Office of Multicultural Interests (with the Buddhist Society of Western Australia), *Culture and Religion Information Sheet — Buddhism* (2015) page 4 (accessed 26 November 2020).

3.3.6.5 Language and communication²¹⁵

Some South-East Asian Buddhists may be reluctant to disagree or refuse requests directly, as this would be considered impolite. 'No' may be expressed or hinted at indirectly.

For some South-East Asian Buddhists, direct public criticism may lead to 'loss of face'. For them, this may result in a state of severe humiliation, loss of reputation and emotional upheaval.

3.4 ISLAM

Islam is one of the three monotheistic (one God) religions in the Abrahamic tradition, which includes Christianity and Judaism. Islam was founded in Arabia and is based on the teachings of the Qur'an and the example of the Prophet Muhammad, who was the last and final prophet of God (Allah) to come to Earth. Muslims believe that the Qur'an is a record of the exact words revealed by God through the Angel Gabriel to the Prophet Muhammad.

There are 1.6 billion Muslims from many races, nationalities and cultures throughout the world. The largest Muslim country is Indonesia with over 200 million adherents. In addition, there are significant numbers of Muslims in Africa, the Middle East and other countries in Asia. There are approximately 23 million Muslims in Europe and 7 million in the Americas. According to the 2016 Census, 604,240 people in Australia reported an affiliation with Islam, 63.6% of whom were born overseas²¹⁶. Muslims in Australia come from over 70 different countries and are therefore culturally and linguistically diverse.²¹⁷

The fundamental belief of all Muslims is the oneness of God, the prophet hood of Muhammad and the Qur'an. There are, however, two main variations within Islam, which reflect cultural, political and theological differences:

- Shi'a: Shi'as are predominantly from Afghanistan, Iran and Iraq. Shi'a leadership is chosen from the descendants of Muhammad.
- Sunni: Sunni Muslims come from many countries, including Indonesia, Lebanon, Pakistan and Turkey. Sunni leaders are elected.

²¹⁵ Office of Multicultural Interests (with the Buddhist Society of Western Australia), *Culture and Religion Information Sheet — Buddhism* (2015) page 4 (accessed 26 November 2020).

²¹⁶ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) Religion (data cube), Table 6 (accessed 11 July 2018).

²¹⁷ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed.) (2016) page 11 (accessed 30 July 2018).

There is another approach to Islam, known as *Sufism*. It is more mystical than other forms of Islam. There have been identifiable Sufi groups at different times and in different places and there is a small group of Sufi in Perth.

Variations in practice also reflect individual interpretations of Islam, the individual's cultural background and geographical environment.

Due to these influences, it can be difficult to separate religious beliefs and practices from cultural beliefs and practices.

3.4.1 History of Islam in Western Australia²¹⁸

In the early 16th century, Australia's first Muslims were fishermen from Makassar (Indonesia) who lived among the Aboriginal people of the north coast of Western Australia, Northern Territory and Queensland.

Centuries later, the discovery of gold in Western Australia in 1880 boosted the need for camel trains as a means of transport in the State's arid interior. During the gold mining boom, camel drivers from various parts of Afghanistan and present-day Pakistan worked at Coolgardie, Kalgoorlie and coastal port towns such as Albany, Fremantle, Geraldton and Port Hedland. They lived in 'Ghan' (from 'Afghan') camps or towns and followed the Islamic faith.

It was these Muslims who started planning the construction of the Perth Mosque in William Street, Northbridge, in 1895. Its foundation stone was laid in 1905 and the Mosque was opened in 1906.

After World War II, particularly in the 1960s and the 1970s, more Muslims started migrating to Australia. They came from many different countries such as Malaysia, Turkey, India, Pakistan, Indonesia, Lebanon, Afghanistan, South Africa, Iran and Burma. Most Muslims from Sudan, Iraq, Albania, Bosnia and Somalia started arriving in the mid-1990s.

²¹⁸ Office of Multicultural Interests (with the Islamic Council of Western Australia), *Culture and Religion Information Sheet — Islam* (2015) page 2 (accessed 26 November 2020).

3.4.2 Main beliefs

The main beliefs or articles of faith of Islam are:²¹⁹

- Belief in the oneness of God (Allah): Islam enjoins faith in the oneness and sovereignty of God, which makes people aware of the meaningfulness of the universe and of their place in it.
- Belief in the angels: Muslims believe in the angels of God. They are purely spiritual and splendid beings whose nature requires no food, drink or sleep.
- Belief in the books of God: Muslims believe that God revealed His books to various messengers to guide their nations.
- Belief in prophets: According to Islam, God created us for a noble purpose. That purpose is to worship him and to lead a virtuous life based on his guidance, as taught by his prophets.
- Life after death: The world, according to Islam, is a place of trial and people are continually being tested. Following death, the deceased will rise to stand for their final and fair trial in front of God. People with good records will be generously rewarded and warmly welcomed into the Heaven of God, and those with bad records will be punished and cast into Hell.
- Divine decree and destiny: Muslims believe in the timeless knowledge of God and in his power to execute his plans

Five duties, known as the Five Pillars of Islam, are regarded as central to the life of the Islamic community. The Five Pillars are:²²⁰

- The Declaration of Faith: There is no God but Allah and Muhammad is his Prophet (sometimes 'a messenger of Allah' is said in place of 'his Prophet');
- Five daily prayers;
- Payment of zakaat (alms to the poor);
- Fasting during the month of Ramadan; and
- Making a pilgrimage (Hajj) to Mecca.

²¹⁹ Office of Multicultural Interests (with the Islamic Council of Western Australia), *Culture and Religion Information Sheet — Islam (2015)* page 3 (accessed 26 November 2020).

²²⁰ Office of Multicultural Interests (with the Islamic Council of Western Australia), *Culture and Religion Information Sheet — Islam (2015)* page 4 (accessed 26 November 2020).

3.4.3 Holy books and scriptures²²¹

'The Holy [Qur'an] is a comprehensive guidebook on the basic mechanisms of any healthy and harmonious society' and details 'codes of conduct, morality, nutrition, modes of dress, marriage and relationships, business and finance, crime and punishment, laws and government...'.²²² It is considered the unaltered and unalterable word of Allah.²²³

The Supreme Court of Queensland's *Equal Treatment Benchbook* states:²²⁴

Sharia, or Islamic law, is central to the practice of Islam as a religion, providing guidance on how to live a good life in the path of God (Allah). Islamic law is therefore considered divine rather than man-made. It affects all areas of life, however it need not always been invoked. Partly for that reason, there is contention about the extent to which sharia, and certainly its punishments, applies to those living outside Muslim countries. Sharia may be divided into the categories of rules governing individuals' relationships with Allah (ibadat) and those detailing interpersonal relations (muamalat).

The law according to Islam is expressed by Allah as revealed in the Qur'an and is interpreted from scripture by religious scholars (ulama). There are five major schools (singular: madhabs; plural: madhabib) of Islamic legal scholarship or jurisprudence (fiqh). The Sunni majority Muslim population adhere to any one of four (Maliki, Hanafi, Hanbali, Shafii), while the minority Shia population adhere to their own. Much of this interpretation is ancient, having first been consolidated around the 900 CE.

The Qur'an, although the most important, is not the sole source of Islamic law. The words and practices of the Prophet Muhammad (sunnah, comprising also hadith – what Muhammad did, said and approved); community consensus (ijma); and deduction by analogy with existing rulings (qiya) also play a role, although with decreasing levels of significance respectively.

²²¹ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) pages 12-13 (accessed 11 July 2018).

²²² Forum on Australia's Islamic Relations, *Appreciating Islam* (2013) (accessed 26 November 2020).

²²³ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) page 12, citing Hussain J, *Islam: Its Law and Society* (Federation Press, 2nd ed, 2004), pages 14-15, 31-32 (accessed 30 July 2018)

²²⁴ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) page 12, citing Morgan D, *Essential Islam: A Comprehensive Guide to Belief and Practice* (Greenwood Publishing Group, 2010, pages 39, 165 and 168; Esposito JL, *What Everyone Needs To Know about Islam* (Oxford University Press 2002), page 166; and Hallaq WB, *An Introduction to Islamic Law* (Cambridge University Press, 2009), page 16 (accessed 30 July 2018).

3.4.4 Religious leaders

There is no official religious hierarchy in Islam.

Religious leaders are called Imams, although there are translations of the title in other languages.

The Imam is a respected person in the Muslim community and is generally appointed at each mosque. Imams lead the five daily prayers in the mosque and have extensive knowledge of the Islamic faith.

3.4.5 Forms of worship and festivals

On all days of the week, Muslims pray five times during the day and night - in the early morning, midday, afternoon, after sunset and at night. Prior to each prayer, many Muslims perform a ritual wash of their bodies.

Fridays are important to Muslims, as a holy day for prayers and attendance at a mosque.²²⁵ The following key dates are also of importance:²²⁶

- *Ramadan*: the ninth month of the Islamic calendar, signifying the month that Muhammad received the first revelation from God. During this month, Muslims fast for 29 to 30 days from sunrise until sunset. The fast includes abstention from eating, drinking, smoking and having sexual relations.
- *Eid-ul-Fitr*: signifying the end of Ramadan.
- *Eid-ul-Adha*: the twelfth month of the Islamic calendar, signifying the completion of the Hajj (pilgrimage to Mecca in Saudi Arabia) and commemorating Abraham's sacrifice of a sheep.

Muslim dates of significance are based on the Islamic lunar calendar, and therefore the dates vary from year to year.

²²⁵ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) page 178 (accessed 30 July 2018)

²²⁶ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) page 13 (accessed 30 July 2018).

3.4.6 Practices relevant to appearance before the court

On 12 December 2017, the Australian National Imams Council published an 'Explanatory Note on the Judicial Process and Participation of Muslims' (Explanatory Note).²²⁷ This was prepared to provide practical guidance to Australian Muslims on the etiquette and behaviours that should be observed when involved in court processes, and to provide information to judicial officers as to Islamic concepts and practices as they relate to matters which may be raised in connection with Muslims participating in court processes.

The Explanatory Note was considered by Justice Johnson of the New South Wales Supreme Court in *R v Alou (No 4)* [2018] NSWSC 221 (1 March 2018), who stated that '[t]his is a powerful statement by the leadership of Islam in Australia concerning the approach to judicial proceedings.'²²⁸ His Honour noted that this publication stated that there was no prohibition on a Muslim standing for a Magistrate or Judge, or standing and lowering their head on entering and leaving a courtroom, and found that, in that case, the Offender's failure to do so was based upon an unspecified foundation.

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

3.4.6.1 Status of women

Men and women have equal rights and responsibilities, but those responsibilities are not identical. A father, or in his absence the eldest son, is regarded as head of the household. In many Muslim communities women are regarded in a way that is often viewed as discriminatory by non-Muslims.²²⁹

Refer to section 3.4.6.3 for information in relation to the dress of Muslim women when appearing as witnesses.

²²⁷ The Explanatory Note can be downloaded from the News page of the website of the Australian National Imams Council, *ANIC News* (accessed 26 November 2020).

²²⁸ *R v Alou (No 4)* [2018] NSWSC 221 (1 March 2018) [237].

²²⁹ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2018) (accessed 30 July 2018).

3.4.6.2 Touching

- *Handshaking*: Observant²³⁰ Muslims will not shake the hand of a person of the opposite sex, unless that person is immediately related to her or him.
- *Hands*: For some Muslims, there is a separation of functions of the hands. The left hand is used for the removal of dirt and for cleaning, and should not be used to perform functions such as waving, eating, or handling/offering items.
- *Comforting*: Comforting of Muslim men and women should avoid physical contact.
- *Eye contact*: In Islam, both males and females are advised to lower their gaze. Muslims will therefore often avoid sustained eye contact. The Australian National Imams Council's 'Explanatory Note on the Judicial Process and Participation of Muslims' (published 12 December 2017) states:²³¹

Lowering the gaze and limiting eye contact are outlined as commendable practices in the Holy Qur'an. It is considered to be a part of modesty and respecting the opposite gender ... A Muslim applying this principle in his or her life may make a habit of this behaviour and may do it even in front of a Magistrate or Judge, including when they give evidence. If it occurs, this should not, in itself, be construed as the witness being evasive or troubled by the testimony which is being given. Rather, it is likely to be a sign of modesty or belief or practice as to modest behaviour.

3.4.6.3 Dress

The Islamic dress code requires men and women to dress modestly, and to cover certain parts of the body (known as Awrah).

Some Muslim women may wear one or more of the following articles of clothing:

- Hijab: headscarf;
- Niqab: face veil;
- Burqa: all in one, loosely draped covering for the whole body; or

²³⁰ The term 'observant' refers to those followers of a religion who observe their religious beliefs and practices very closely, regardless of which variation of the religion they follow. Alternative terms may include traditional, devout or strict.

²³¹ The Explanatory Note can be downloaded from the News page of the website of the Australian National Imams Council, *ANIC News*, page 8 (accessed 26 November 2020).

- Chador: full-length semicircle of fabric, which is thrown over the head. It has no hand openings or closures but is held shut by the hands or by wrapping the ends around the waist.

Muslim women may remove their face covering if required, although many consider it a very serious matter to do so.

The Australian National Imams Council's 'Explanatory Note on the Judicial Process and Participation of Muslims' (Explanatory Note), which was published 12 December 2017, states:²³²

It is not contrary to Sharia law for a woman to uncover her face when she is giving testimony in court, whether she is a witness in a case or is there to witness a deal, and it is not contrary to Sharia law for the Magistrate or Judge (male or female) to look at her in order to know or identify who she is, make assessments as to credibility where this is an issue and protect the rights of all concerned.

Some commentators argue that women should be permitted to wear a face covering whilst giving evidence, however the weight of judicial opinion is against that position. The issue is more than an either/or debate. Whilst the courts may order a woman to give evidence without her face covering, they also have a variety of means by which to modify the way in which the evidence is given to accommodate the genuine objections of a witness.²³³

In 2017, the Australian Law Journal published an article by Dr Renae Barker, a lecturer from the School of Law at The University of Western Australia, entitled 'Burqas and Niqabs in the Courtroom: Finding Practical Solutions'. Dr Barker analysed the existing case law to determine which practical solutions that the courts have considered have been the most effective both in terms of respecting a witness's religious beliefs and in facilitating the administration of justice. Dr Barker concluded:²³⁴

²³² The Explanatory Note can be downloaded from the News page of the website of the Australian National Imams Council, *ANIC News*, page 7 (accessed 26 November 2020).

²³³ Barker R, *Burqas and Niqabs in the Courtroom: Finding Practical Solutions*, *Australian Law Journal* (2017) 91 ALJ 225, 226.

²³⁴ Barker R, *Burqas and Niqabs in the Courtroom: Finding Practical Solutions*, *Australian Law Journal* (2017) 91 ALJ 225, 241.

As Lord Neuberger observed 'we, whether judges, lawyers or non-lawyers, involved in a criminal, family or civil trial, owe a duty to society to ensure that the justice system, and in particular the trial process, is as effective, as fair, and as compliant with the rule of law as it possibly can be – it must be the best we can do.'²³⁵ In determining what the 'best we can do' is in relation to witnesses who wish to give evidence wearing a face veil, the courts and the legal profession have at their disposal a range of tools which when used with creativity and sensitivity can lead to outcomes which are fair for all concerned and promote the best interests in justice.

While, as the majority observed in R v NS, '[t]estifying without the niqab via closed circuit television or behind a one-way screen may not satisfy [the witness's] religious obligations'.²³⁶ This does not, however, mean that the court should therefore ignore her request and insist that she give evidence in open court without her face veil. As Sachs J put it in Prince v President, Law Society of the Cape of Good Hope,²³⁷ '[t]he fact that they cannot be given all that they ask for is not a reason for giving them nothing at all.'

Judges have already explored a number of options for accommodating witnesses who wish to wear a face veil. While no two cases will be identical the removal of non-essential men from the courtroom and/or the use of screens to limit the number of men who can view the witness's uncovered face have emerged as the most viable options. The use of female court staff such as ushers and security personnel, in particular, is a positive step the courts can take which will have a minimal impact on the administration of justice but a significant impact on the witness.

While these measures do have implications for the principles of open justice and sex discrimination,²³⁸ derivation from these principles is permissible in the interests of justice.²³⁹ The use of CCTV, while viable, provides only limited accommodation of the witness's religious beliefs and therefore need only be considered where the witness has other vulnerabilities which would trigger the use of CCTV. If courts are able to be both 'resourceful and imaginative in their quest to explore and discover solutions'²⁴⁰ unnecessary delay and injustice will be

²³⁵ Lord Neuberger's speech, which is cited by Dr Barker can be downloaded at: The Supreme Court (United Kingdom), *Response to Media Coverage of Lord Neuberger's Lecture 'Fairness in the Courts'* (Media Release, 18 April 2015) (accessed 26 November 2020).

²³⁶ Citing *R v NS* [2012] 3 SCR 726 [33].

²³⁷ Citing *Prince v President, Law Society of Cape of Good Hope* [2002] ZACC 1 [148].

²³⁸ Citing *R v NS* [2012] 3 SCR 726 [33].

²³⁹ Citing *AAN v Secretary of State, Home Department* [2014] UKUT 102 (IAC) [20].

²⁴⁰ Citing *AAN v Secretary of State, Home Department* [2014] UKUT 102 (IAC) [20].

avoided. Arguably the two most creative solutions to date have been the use of a large umbrella in *Re S*,²⁴¹ and the use of a video feed showing only the back of the witness's head in *R v NS*,²⁴² which allowed the public to view the courtroom and thus complied with the need for justice not only to be done but to be seen to be done.

The legal practice and parties also have a role to play in arriving at practical solutions. As Doherty JA opined in the Ontario Court of Appeal decision in *R v NS*:

*I would hope, however, that if the individual rights recognized in the Charter are treated as something more than additional weapons in the lawyer's legal arsenal, the parties will engage in good faith efforts to reconcile competing interests and produce a satisfactory resolution that recognizes and respects both the accused's right to a fair trial and the witness's right to exercise her religious beliefs.*²⁴³

How lawyers can best respect their clients' and witnesses' religious beliefs has not been discussed in detail in the cases. However, as I have argued elsewhere:

*[w]hile it may not be possible to exclude all men, courts and the parties' legal teams can minimise their number ... Lawyers should ... very carefully consider which members of their team need to be present and where feasible assign as many roles to women as possible.*²⁴⁴

*Firms representing clients or calling witnesses who habitually wear the face veil should consider using female counsel where possible. Where the most appropriate person to conduct the examination in court is male they should consider whether they in fact need to view the witness's face or whether, as the male counsel did in *Re S*, they can place a screen between themselves and the witness to minimise the witness's discomfort. Where the witness who wears the face veil is to be called by the other party, lawyers should heed Doherty JA's hope and seek a 'satisfactory resolution' in 'good faith' rather than use individual rights such as the right to a fair trial as an 'additional weapon in [their] legal arsenal'.*²⁴⁵

²⁴¹ Citing *Re S* [2007] 2 FLR 461 [16]; [2006] EWHC 3743 (Fam).

²⁴² Citing Narain V, *The Place of the Niqab in the Courtroom* (2015) 19(1) *ICL Journal* 41, page 43 (accessed 26 November 2020).

²⁴³ Citing *R v NS* (2010) 102 OR (3d) 161 [102].

²⁴⁴ In Barker R, *Niqabs in the Court Room: The Need for Judicial Sensitivity and Imagination*, ABC Religion and Ethics (accessed 26 November 2020).

²⁴⁵ Citing *R v NS* (2010) 102 OR (3d) 161 [102].

While these cases are likely to continue to be rare, as indicated by Elzahed's lawyer's comment that it was the 'first time that I've experienced it',²⁴⁶ this does not absolve the legal profession of their obligations. Lawyers should therefore first seek to educate themselves about the religious beliefs of their clients and witnesses and secondly, raise any issues which these beliefs may cause with their clients, witnesses, the other parties and the court, at an early stage. Much distress, delay and injustice may be avoided by seeking solutions and accommodations early rather than as a witness attempts to take the stand while wearing her face veil.

Research is beginning to cast doubt on the veracity of facial expressions as an indicator of truthfulness, however, courts have so far been reluctant to accept this evidence and cast aside the use of demeanour evidence.²⁴⁷ While this continues to be the case, it is unlikely that courts will regularly permit witnesses to give evidence while wearing a face veil. As a consequence it is incumbent upon courts and the legal practice to find ways to accommodate a face veil wearing witness's religious beliefs to the fullest extent possible. In doing so they will respect not only the interests of justice and a fair trial for all but also the witness's right to freedom of religion.

The New South Wales Court of Appeal held in *Elzahed v NSW* [2018] NSWCA 103 (18 May 2018) (*Elzahed*) that there was no unfairness in the trial judge dismissing an application made by a witness (a Muslim woman) to give evidence wearing a niqab. The Court of Appeal found that the trial Judge did not err, stating at [32] – [35]:

To misapprehend the relevant facts may amount to House v The King error. Balla DCJ, having accepted the need to take into account the appellant's religious beliefs, stated that '[o]n the other hand, I must take into account whether I would be impeded in my ability to fully assess the reliability and credibility of the evidence ...if I am not afforded the opportunity of being able to see her face when she gives evidence.' Having identified the relevant interests, her Honour considered those interests and concluded that fairness to all parties required her to reject the appellant's application.

Her Honour did not err in so deciding ... the fact that the appellant's face would be covered while she gave evidence was clearly capable of impeding Balla DCJ's ability fully to access

²⁴⁶ As quoted by Farrell P, *Women Cannot Give Evidence in a Niqab, Australian Court Rules*, The Guardian, 1 December 2016 (accessed 26 November 2020).

²⁴⁷ Citing *R v NS* [2012] 3 SCR 726 [17] - [29].

the reliability and credibility of the appellant's evidence. The appellant's counsel below acknowledged as much. It was not an error, of fact or law, for her Honour so to conclude.

... the fact that the appellant's face would be covered was capable of affecting the weight to be given to the appellant's evidence. It was obvious, including to the appellant's counsel at trial, that the weight to be given to the evidence would affect the resolution of the conflict in the evidence about what had occurred ... In those circumstances it was open to her Honour to conclude that the impediment she identified in her ability to fully assess the reliability and credibility of the evidence should be taken into account.

The Court of Appeal continued at [68] – [69]:

No error has been shown in the discretionary decision made by Balla DCJ. Her Honour addressed a difficult case with sensitivity and care. In addressing this interlocutory application her Honour was fair to all parties and was at pains to ensure that justice according to the law was done. This can be seen in the way her Honour herself raised possible alternative methods of giving evidence, whilst being fair to all parties. Those alternative methods were rejected by the appellant. No error has been shown by her Honour's decision which was limited to the application actually made by the appellant, to give her evidence with her face covered by a niqab.

Even if we were persuaded that error had been established for any reason other than that the appellant was not permitted to give evidence wearing her niqab, this is not a case where any substantial wrong or miscarriage was thereby occasioned ... This is because it is clear on all the evidence now available that whatever the proposal, the appellant would have refused to give evidence at the trial other than while wearing her niqab.

In *R v Abdullah Chaarani* [2018] VSC 387 (unreported, 16 July 2018), Justice Beale of the Victorian Supreme Court considered an application by the wife of an accused, who was charged with terrorism offences, to wear a niqab in the public gallery during trial. Ms Al Quattan had previously been permitted to wear a niqab in court during committal proceedings. His Honour stated at [10]:

...the fact that Ms Al Quattan and others were permitted to wear their niqabs in the public gallery at the committal proceedings before a Magistrate sitting alone does not mean that they

should be allowed to do so at a trial before a judge and jury, where different considerations come into play.

His Honour referred to *Elzaded*, the Canadian Supreme Court case of *NS v R* [2012] 3 SCR 726, the New Zealand case of *Police v Razamjoo* [2005] DCR 408 and the English case of *R v D* (Unreported, Crown Court at Blackfriars, Judge Peter Murphy, 16 September 2013) and stated at [17]:

In summary, these cases suggest that witnesses may wear a niqab if they are not giving contested evidence and that an accused, where identity is not in issue, may wear a niqab except when testifying. If participants in court proceedings may wear niqabs in certain circumstances, then it follows, so the argument goes, that spectators in the public gallery may do so. But there is at least one point of distinction. An accused is compelled to be present in court and, more often than not, witnesses for the prosecution are subpoenaed to attend court. Ms Al Qattan is under no legal compulsion to attend court.

His Honour ultimately decided that it was a 'reasonable limitation' 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom' to require spectators in the public gallery to have their faces uncovered' (at [27]). At [24], his Honour discussed the accommodations that could be made:

... if someone feels strongly that it would be improper for them to uncover their face in court, they can choose not to attend. If that is Ms Al Qattan's choice, arrangements will be made for live streaming of the proceedings to a remote facility within the court building so that she can still view the trial.

3.4.6.4 Names and titles²⁴⁸

There is no uniformity in Muslim naming systems as Muslims come from different cultural backgrounds. There are, however, three systems by which Muslim names can be categorised:

- Muslims who have a surname or family name: In general, Muslims coming from Turkey, India, Pakistan, South Africa and Arab countries have surnames or family names. Certain Muslim ethnic groups coming from Indonesia, Malaysia and Singapore

²⁴⁸ Office of Multicultural Interests (with the Islamic Council of Western Australia) *Culture and Religion Information Sheet — Islam* (2015) (accessed 26 November 2020).

(especially those of Arab descent) and Indonesian Batak or Mandailing (from Sumatra), and some influential families from Java, have family names.

- Muslims whose fathers' names or second names are treated as surnames: The Malay people coming from Malaysia, Singapore, Christmas Island, Cocos Island and some African countries, and some of those from Indonesia, have their father's name as their surname. Most Malaysian and Singaporean Malays have, before their father's name, the word 'Bin' or 'Binti (Bte)' respectively, meaning 'son of' or 'daughter of'. For example, 'Osman bin Ali' is 'Osman, son of Ali'. He would probably be called Mr Osman, not Mr Ali; as Mr Ali would be Osman's father.
- Muslims who have only single names: This applies to Muslims from Indonesia only. In Indonesia the first given name is important, while the father's name is unimportant. As a result many Indonesians have only a single name, such as Suharto or Sudomo, etc. People arriving in Western countries such as Australia have some difficulties completing government forms that often require and emphasise a surname or family name.

3.4.6.5 Language and communication

Interpreter service arrangements should be made according to the gender of the person concerned: a male interpreter for a man and female for a woman, if available. As far as a woman is concerned, the translation can also be done by a male interpreter in the presence of her male relative.

Additional information is provided in chapter 7, on people from culturally and linguistically diverse backgrounds.

3.4.6.6 Body language and behaviour²⁴⁹

Some of the sensitivities in this area include:

- Beckoning 'come here' with the palm upwards or pointing to a person or object with your index finger, hand or foot is offensive to some Muslims.

²⁴⁹ Unless indicated otherwise, the information in this section is from: Office of Multicultural Interests (with the Islamic Council of Western Australia), *Culture and Religion Information Sheet — Islam* (accessed 26 November 2020).

- for some Muslim ethnic groups, particularly the Malays, the head should not be touched by other people as it is considered to be humiliating. However, this does not apply to Muslims coming from the Middle East for whom rubbing the head is considered a sign of love and respect.
- For some Muslims, there is a separation of functions of the hands. The left hand is used for the removal of dirt and for cleaning, and should not be used to perform functions such as waving, eating, or handling/offering items.²⁵⁰
- In Islam, both males and females are advised to lower their gaze. Muslims will therefore often avoid sustained eye contact.²⁵¹ The Australian National Imams Council's 'Explanatory Note on the Judicial Process and Participation of Muslims' (published 12 December 2017),²⁵² states:

Lowering the gaze and limiting eye contact are outlined as commendable practices in the Holy Qur'an. It is considered to be a part of modesty and respecting the opposite gender ... A Muslim applying this principle in his or her life may make a habit of this behaviour and may do it even in front of a Magistrate or Judge, including when they give evidence. If it occurs, this should not, in itself, be construed as the witness being evasive or troubled by the testimony which is being given. Rather, it is likely to be a sign of modesty or belief or practice as to modest behaviour.

3.4.6.7 Seating²⁵³

Muslim religious leaders should generally be seated next to people of the same gender. Some Muslims may prefer to be seated next to people of the same gender and this should be considered as a courtesy. However, when considering seating arrangements it is best to check with the individual regarding and personal preferences.

²⁵⁰ Australia New Zealand Policing Advisory Agency (ANZPAA), *A Practical Reference to Religious and Spiritual Diversity for Operational Police* (3rd ed) (2010) (accessed 26 November 2020).

²⁵¹ Australia New Zealand Policing Advisory Agency (ANZPAA), *A Practical Reference to Religious and Spiritual Diversity for Operational Police* (3rd ed) (2010) (accessed 26 November 2020).

²⁵² The Explanatory Note can be downloaded from the News page of the website of the Australian National Imams Council, *ANIC News*, page 8 (accessed 26 November 2020).

²⁵³ Office of Multicultural Interests (with the Islamic Council of Western Australia), *Culture and Religion Information Sheet — Islam* (2015) (accessed 26 November 2020).

3.5 HINDUISM²⁵⁴

Hinduism is a remarkably diverse religion. It has evolved in many ways in different communities across India over thousands of years. However, all Hindus have common fundamentals and variations in practice are largely based on the individual's cultural background, geographical environment, and which God is worshipped. Due to these influences, it can be difficult to separate religious beliefs and practices from cultural beliefs and practices.

Hinduism is one of the oldest religions in the world. Hindus believe that their religion is cyclical – without beginning or end – preceding the existence of this earth and the other worlds beyond. For that reason, it is also known as Sanatana Dharma, the eternal religion.

Hinduism is unusual as a religion, having 'no founder, no central creed and no central administration or hierarchy of ministers'.²⁵⁵ It advocates the principles of non-violence and tolerance of difference within itself and of other religions. Underlying Hinduism is a central belief in karma, which is the law of cause and effect, and reincarnation.

As a result of this diversity, Hindus accept that there may be many manifestations of the one universal God.

There are approximately one billion followers of Hinduism around the world. Between the 2006 and 2011 Census the number of people who identified themselves as Hindu in Australia increased to 275,290, an increase of 127,167 people, or 85.9 per cent.²⁵⁶ In the 2016 Census, 440,300 people in Australia identified as Hindu, which represents a further increase of 165,010 people, or 59.9 %.²⁵⁷

²⁵⁴ Unless indicated otherwise, material in Section 3.5 of this chapter is sourced from Australia New Zealand Policing Advisory Agency (ANZPAA), *A Practical Reference to Religious and Spiritual Diversity for Operational Police* (3rd ed) (2010) pages 36-43 (accessed 26 November 2020).

²⁵⁵ Australia New Zealand Policing Advisory Agency (ANZPAA), *A Practical Reference to Religious and Spiritual Diversity for Operational Police* (3rd ed) (2010) page 36 (accessed 26 November 2020).

²⁵⁶ Office of Multicultural Interests (with the Hindu Association of Western Australia), *Culture and Religion Information Sheet — Hinduism* (2015) page 2 (accessed 26 November 2020).

²⁵⁷ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) Religion (data cube), Table 6 (accessed 1 August 2018).

3.5.1 History of Hinduism in Western Australia²⁵⁸

The first Hindus came to Australia in the 19th century to work on cotton and sugar plantations. Many stayed to settle as small business owners and merchants.

However, most Hindus arrived in Australia and Western Australia from the late 1970s, after the removal of the 'White Australia Policy'. They migrated from a number of countries particularly India, Sri Lanka, Malaysia, Singapore, Fiji, South Africa, Kenya, Uganda and the United Kingdom. Census data shows that between 2001 and 2016, the percentage of the Western Australian population who identified as being Hindu increased from 0.2% to 1.6%.

3.5.2 Main beliefs²⁵⁹

The sacred Sanskrit word 'Om' is often said during Hindu rites. It is composed of three Sanskrit letters: 'a', 'u' and 'm', which represent the Trinity of the three supreme Hindu Gods: Brahma (the creator), Vishnu (the preserver), and Shiva (the destroyer). Pronouncing the syllable is said to engender a meditative awareness. The symbol for 'Om' is also said to contain the essence of creation of the universe and life within it. It is considered the essential mantra (sounds that assist in spiritual transformation) and its chanting is part of Hindu spiritual meditative practice.

The concepts of good/virtuous action and evil/wrongdoing are referred to respectively as punya and papa. Each has karmic consequences: in essence, the universe will reward acts of good and punish those that are wrong, whether in this life or a future reincarnation.

The Vedas (discussed in 3.5.3 – Holy books and scriptures) identify basic principles and moral rules. The general rules of moral conduct comprise satya (truthfulness), ahimsa (non-injury to others and treating all beings with respect), asteya (not cheating or stealing), brahmacharya (celibacy/no selfish accumulation of resources), shaucha (cleanliness), tapas (austerity and perseverance), aparighara (purity of mind and body), swadhyaya (study of the Vedas), santosh (contentment) and ishwara-pranidhana (acceptance of the Supreme).

Ten qualities also found a dharmic (righteous) life: dhriti (firmness or fortitude), kshama (forgiveness), dama (self-control), asteya (refraining from stealing or dishonesty), shauch

²⁵⁸ Office of Multicultural Interests (with the Hindu Association of Western Australia), *Culture and Religion Information Sheet — Hinduism* (2015) page 2 (accessed 26 November 2020).

²⁵⁹ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) pages 15-16 (accessed 31 July 2018).

(purity), indriya nigraha (control over the senses), dhih (intellect), vidya (knowledge), satyam (truth) and akrodhah (absence of anger). Adherence to these principles is said to be essential to spiritual development.

3.5.3 Holy books and scriptures

There are numerous Hindu holy books. The Vedas are the oldest, and are written in Sanskrit, an ancient language spoken only by scholars. The Vedas are a treasure-house of information on spiritual, material and social doctrine. The four Vedas are Rigveda, Yajurveda, Samveda and Atharvaveda. The Upanishads are the explanations of Vedas in a simple and practical form.

The Laws of Manu contain 2685 verses of instruction.

Other holy texts are:

- The Ramayana, which is an epic that contains the life and deeds of Sri Rama;
- The Mahabharata, which is an epic that tells of the lives of the Princes Pandava and Kaurava and Lord Krishna; and
- The Bhagavadgita, which is a popular scripture from the Mahabharata which 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 one should discharge one's duty with selfless dedication.

3.5.4 Religious leaders

There are two aspects to the Hindu religious leadership:

- Ritualistic — mainly male Hindu priests conduct prayers in the temples and various religious ceremonies and rites. Some temples have female priests.
- Spiritual — there are both male and female holy persons of great wisdom acquired through their devotion, dedication and austere living. A male spiritual person is called a Swami or Guru. A 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.

3.5.5 Forms of worship and festivals

Hindus are encouraged to pray at dawn and dusk every day. Often, Hindus will wash thoroughly and change their clothes before praying. There may also be a particular day of the week that is important for Hinduism, but it varies, depending on which god is worshipped.

There are Hindu festivals almost every month, although the names and dates of the festivals vary between communities. The main festivals observed in Australia and New Zealand are:

- February/March: Sivarathiri, a whole night vigil.
- March/April: Holi (celebration of fertility and harvest), Hindu New Year and Ram Naumi/Ram Navami (celebration of the birth of Lord Rama, the incarnation of the god Vishnu).
- August: Krishna Janmashtami/Krishna Jayanti, marking the birth of the God Krishna.
- August/September: Ganesha Chaturthi/Ganesh Chaturthi/Vinayaka Chaturthi, celebrating the birthday of the elephant-headed deity Ganesha/Ganesh.
- September/October: Navarathiri/Navrati, a 10 day festival celebrating the Goddess Durga.
- October/November: Deepavali/Diwali (Festival of Lights), celebrating the victory of good over evil.

There are a number of other festivals that are specific to particular regions and cultures. Hindu festivals are based on the Lunar Calendar, and therefore the dates vary from year to year.

3.5.6 Practices relevant to appearance before the court

The following are the practices of most importance in court situations.

3.5.6.1 Status of women

In general, women have an equal status to men.

3.5.6.2 Touching

Some Hindus avoid public contact between men and women. Some observant Hindus do not approve of handshaking with strangers, particularly members of the opposite sex. An alternative greeting is to clasp the hands or place both hands in a praying position, or bow. The left hand should not be used to offer objects to others, and fingers should not be pointed directly at people.

In some traditions, full eye contact between males and females is discouraged, as it is seen as bold.

3.5.6.3 Names and titles²⁶⁰

The use of family surnames is not universal among Hindus. The practice varies between cultural and geographical groups. The use of surnames is common among the people who have arrived in Australia from northern, eastern and western parts of India.

In Tamil Nadu in southern India and Sri Lanka, the use of surnames is uncommon. The following is an indication of the practice among Tamil speaking Hindus:

- A male uses his father's name first, followed by his own personal name. For example, 'Vijay Thiruselvan' is 'Thiruselvan, son of Vijay'. For legal purposes he would be known as Mr V Thiruselvan.
- Hindu female names follow the same pattern: father's initial plus personal name. When an Indian woman marries, she usually ceases to use her father's initial; instead she follows her personal name with her husband's name. For instance when S Kamala (female) marries V Thiru (male) she will go by the name of Mrs Kamala Thiru.

²⁶⁰ Office of Multicultural Interests, *Culture and Religion Information Sheet — Hinduism* (2015) page 5 (accessed 26 November 2020).

3.5.6.4 Body language and behaviour²⁶¹

Some Hindus originating from India show agreement by moving their head from side to side. This should not be misinterpreted as meaning 'no'.

3.5.6.5 Dress

Most married women wear a bindi or pottu (a round marking over the third eye, or the area on the forehead between the brows).

Upon marriage, Hindu women may put on a necklace (called mangalsutra or tali) or glass wedding bangles, which are not removed until the husband's death. Breaking or removing the necklace or wedding bangles before this time is considered an extremely bad omen.

Some Hindus wear a thin thread around their bodies, which passes diagonally across the body from the shoulder to about waist height.

3.6 SIKHISM²⁶²

The Sikh religion is one of the world's youngest religions and in 2016 was the fifth largest religion in Australia. In the 2016 Census, 125,901 people in Australia reported an affiliation with Sikhism.²⁶³

The Sikh religion was founded in 1469 in Punjab, North India by Guru Nanak Dev Ji, born in Pakistan. Nanak and his nine successors are known as 'gurus', which is a term for a spiritual guide or teacher. Sikhs believe in one God and the equality of all humanity, regardless of sex, race or ethnicity. Guru Nanak's followers became known as Sikhs (from the Sanskrit word shishya) which means disciple.

²⁶¹ Office of Multicultural Interests, *Culture and Religion Information Sheet — Hinduism* (2015) page 5 (accessed 26 November 2020).

²⁶² Unless otherwise indicated, material in Section 3.6 of this chapter is sourced from Australia New Zealand Policing Advisory Agency (ANZPAA), *A Practical Reference to Religious and Spiritual Diversity for Operational Police* (3rd ed) (2010) pages 64-74 (accessed 1 August 2018).

²⁶³ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) Religion (data cube), Table 6 (accessed 1 August 2018).

3.6.1 History of Sikhism in Western Australia²⁶⁴

Sikhs are known to have arrived in Western Australia in the early 19th century although a greater number arrived during the second half of the century. Shiploads of camels were brought to Australia in the 1860s and, although their handlers were known as 'Afghans', there were Sikhs among them. In the 1901 Census, 261 Afghans were recorded as being in Western Australia but no Indians. It is likely that all Sikhs were listed as Afghans. Many early Sikh settlers worked as camel handlers, while others travelled around Western Australia selling wares.

The annulment of the 'White Australia Policy' in 1973 saw increased opportunities for Sikh migration, with Sikhs coming to Western Australia from India, the UK, east Africa, Singapore, Malaysia and Fiji.

The Sikh Association of Western Australia (SAWA) was officially registered in August 1975. There are now three Sikh temples (Gurdwaras) in Western Australia in Canning Vale, Bayswater and Bennett Springs. The saffron flag with a unique emblem called the Khanda (signifying righteous and truthful living in complete harmony with all communities) identifies these premises. Nearly all Sikhs in Western Australia are fluent in written and spoken English and Punjabi.

3.6.2 Main beliefs

Sikhs believe that the ten gurus were one with the divine being and each had divine attributes. The tenth guru Gobind Singh Ji anointed the Holy Book 'Guru Granth Sahib' as the living eternal guru of the Sikhs.

The Sikh way of life is based on:

- Nam japna – remember God's name with every breath.
- Kirat karni – work and earn by the sweat of the brow, live a family way of life and practice truthfulness and honesty in all dealings.
- Vand ke chakna – share and live as an inspiration and support to the whole community.

²⁶⁴ Office of Multicultural Interests, *Culture and Religion Information Sheet —Sikhism* (2015) page 2 (accessed 26 November 2020).

- Control of kaam (desire), krodh (anger), lobh (greed), moh (attachment) and hanker (pride).

Sikhs believe in reincarnation (the cycle of life-death-rebirth). Cremation should occur as soon as possible after death and the ashes must be handed to the nearest family member to be disposed of at a later time.

3.6.3 Holy books and scriptures

The Holy Book, the 'Guru Granth Sahib' is the ultimate spiritual authority for Sikhs, its presence lends sanctity to the Sikh place of worship, the Gurdwara. The Holy Book is treated with the utmost reverence and respect; it should only be touched after washing hands. If giving evidence in a court, most Sikhs would prefer to take an affirmation than an oath. Observant Sikhs will not take an oath on any religious book, however, some Sikhs may take an oath on the Gutka (Sikh daily prayer book).

3.6.4 Religious leaders

The spiritual leaders are Gurus. Sikhs do not have a priestly class. A person referred to as a 'Granthi' usually performs the religious ceremonies in the Gurdwara (place of worship).

3.6.5 Forms of worship and festivals

A Sikh can worship at any time of the day or night but the expected prayer times are before sunrise and sunset and prior to going to bed at night. Generally a Sikh meditates ('Simran') on the Name of God by reciting His Name (the Magnificent Lord Waheguru).

Each year there are a number of Sikh festivals, called Gurburbs, which are associated with the birth and death anniversaries of the ten Sikh Gurus.

The main festivals are:

- 5 January: Guru Gobind Singh Birthday (Tenth Guru).
- 14 April: Besahki/Vishakhi, to commemorate the initiation of the five first Sikhs in their current form.
- Around November: Guru Nanak Dev Birthday (First Guru).

Special events are usually celebrated with the continuous reading of the Guru Granth Sahib (Sikh Holy Scripture), which usually takes 48 hours.

3.6.6 Diet

Observant Sikhs are strict vegetarians and do not eat fish, meat, eggs or by-products. Those Sikhs who do consume meats do not eat beef, and prefer meat slaughtered with a single blow, not left to bleed to death (halal or kosher).

Tobacco and other intoxicants are strictly prohibited.

3.6.7 Practices relevant to appearance before the court

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

3.6.7.1 Status of women

Sikh women have equal status with men in all spheres of life. It is appropriate for a female Sikh to speak to a female for interview or counselling purposes. However, if the situation permits and the person agrees it is preferable for a married woman to be interviewed in the presence of her husband or the eldest person in the family. The eldest person in the family is bestowed the appropriate respect and her or his views are strongly considered when making decisions on family matters.

3.6.7.2 Touching

Handshaking is generally considered appropriate and acceptable. However, some Sikh females may prefer to greet a male with folded hands. Touching a person of the opposite sex may be seen as offensive. The head and turban are sacred to Sikhs and they should not be touched.

3.6.7.3 Dress

Baptised or initiated Sikhs (known as Amritdhari Sikh) may wear the Five Kakaras (the 'Five Ks') to symbolise their faith:

- Kirpan – a small-sized sword placed in a shoulder belt (accepted by the Western Australian Police Service as a symbol rather than a weapon).
- Kara – an iron bangle worn on the wrist.

- Kachera – special underwear, akin to boxer shorts.
- Kanga – a small wooden comb to comb one's hair.
- Kesh – a Sikh must not cut hair from his/her body from birth to death.

Each of the Five Ks has a special religious significance and the Amritdhari must not be asked to separate any of the Five Ks from his/her body. The neatly tied turban over the unshorn hair represents a crown of spirituality while the Kara symbolises a bond to the Truth. Sikh youth normally wear a 'patka' (cloth) on their head and with transformation into adulthood they start wearing a 'pugg' (turban). Some Sikh females may also wear a turban over their head.

3.6.7.4 Names and titles

All Sikh males carry the surname Singh (which means lion) and Sikh females carry the name Kaur (which means lioness/princess). In some cases the ancestral names are included after the surname.

3.6.7.5 Seating

No special seating arrangements are required.

3.6.7.6 Oaths

Most Sikhs would prefer to take an affirmation than an oath. Observant Sikhs will not take an oath on any religious book, but some Sikhs may take an oath on the Gutka (Sikh daily prayer book).

3.7 JUDAISM²⁶⁵

Judaism is one of the world's oldest religions. It is the oldest of the monotheistic faiths in the Abrahamic tradition, which includes Christianity and Islam. The central principle of the monotheistic faiths is the belief in one God: the all-knowing, all-powerful and ever-present creator of the universe.

²⁶⁵ Unless otherwise indicated, material in Section 3.7 of this chapter is sourced from Australia New Zealand Policing Advisory Agency (ANZPAA), *A Practical Reference to Religious and Spiritual Diversity for Operational Police* (3rd ed) (2010) pages 52-57 (accessed 1 August 2018).

The same God who created the world revealed himself to Jewish people at Mount Sinai. The content of that revelation is the Torah (revealed instruction), which contains the five books of Moses.

Since Roman times, it has been the rule that any person whose mother was Jewish or who has converted to Judaism may be considered a Jew. Since the late 20th century, with the rise of gender equality, some reformist elements have adhered to the view that, if either parent is Jewish, the child is as well, without any need for conversion. In the 2016 Census, 91,022 people in Australia reported an affiliation with Judaism.²⁶⁶ Australian Jews form over sixty congregations, ranging from reformist to ultra-orthodox traditions. Jews in Australia have a history extending back to arrival with the First Fleet.

3.7.1 History of Judaism in Western Australia²⁶⁷

Jews were associated with Western Australia from early settlement in the 1820s although it was not until 1887, in Fremantle, that the first Jewish community was formed. The Perth Hebrew Congregation was founded in 1892 and opened its synagogue in 1897. Synagogues were also built in the gold rush towns of Kalgoorlie and Coolgardie.

The major Jewish centres in Australia are in Melbourne and Sydney, although there is a significant Jewish population in Perth.

3.7.2 Main beliefs²⁶⁸

The thirteen principles of faith of Moses Maimonides (commonly known as Rambam, derived from the Hebrew acronym of the scholar's title and full name) are considered the most widely-accepted list of Jewish beliefs and minimum requirements of the Jewish faith. These principles entail belief that:

- God (Yahweh) exists;
- God is one and unique;

²⁶⁶ Australian Bureau of Statistics (ABS), *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Table 1 (accessed 27 November 2018).

²⁶⁷ Office of Multicultural Interests (with the Jewish Community Council of Western Australia Inc.), *Culture and Religion Information Sheet — Judaism* (2015) page 2 (accessed 1 August 2018).

²⁶⁸ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) page 18 (accessed 1 August 2018).

- God is incorporeal;
- God is eternal;
- prayer is to be directed to God alone and to no other;
- the words of the prophets are true;
- Moses, whose teachings are true, was the greatest of the prophets;
- the Torah was given to Moses;
- there will be no other Torah;
- God knows the thoughts and deeds of men;
- God rewards the good and punishes the wicked;
- the Messiah will come; and
- the dead will be resurrected.

Although very basic and general principles, there has nevertheless been argument regarding how integral each principle is to Judaism. In particular, the modern movements of Judaism dispute the emphasis of some principles.

3.7.3 Forms of worship and festivals

The Sabbath, or Shabbat, is a holy day for Jews and extends from sunset on Friday to sunset on Saturday. Jews are commanded to remember and observe the Sabbath, which represents the day on which God rested after creating the universe, by refraining from labour. Practising Jews may spend the time in religious study and prayer, attend synagogue services, and partake in festival meals at home.

3.7.4 Holy books and scriptures²⁶⁹

The Torah contains 613 commandments for a holy way of life (mitzvot). Mitzvot have been expanded over the centuries through interpretation by Jewish spiritual leaders (rabbis). The interpretations, together with the Torah, comprise Jewish law (Halakhah), which covers all aspects of life and religious observance.

²⁶⁹ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) page 19 (accessed 11 July 2018).

3.7.5 Religious leaders

Religious leaders are called Rabbis. Rabbis are teachers, not anointed priests, whose authority comes from study and learning. The role of a Rabbi is to teach, guide, counsel and administer religious duties to their community.

3.7.6 Forms of worship and festivals

In Jewish religious practice, the Sabbath (the seventh day) is Saturday. It extends from sunset to nightfall - that is from sunset on the day prior to the festival to nightfall on the last day of the festival. Likewise, Jewish festivals extend from sunset on the day preceding the start day of the festival to nightfall on the day the festival ends.

Orthodox Jews pray three times a day, every day - morning, afternoon and evening.

The cycle of Jewish dates of significance is a combination of the biblical and the historic. The main festivals are:

- February/March: The Feast of Lots (Purim), commemorating the survival of Jewish people living in Persia.
- March/April: Passover (Pesach), an eight day festival that commemorates the Jewish exodus from Egypt.
- May/June: Pentecost (Shavuot), a two day celebration.
- September/October: New Year (Rosh Hashanah), the first day of the 'Days of Awe' period, which commemorates God's creation of the world.
- September/October: Day of Atonement (Yom Kippur), a day of fasting that falls ten days after Rosh Hashanah. This is the most sacred and solemn day of the Jewish year.
- October: Tabernacles (Succot), an eight day festival.
- December: Chanukah/Hanukkah (also known as the 'Festival of Lights') is celebrated over eight successive days.

Jewish dates of significance are based on a lunar calendar and fall on different dates each year.

3.7.7 Diet

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 and must be prepared and served with separate utensils. Kosher describes food prepared according to these standards. Observant Jews eat only kosher food.

- Certain animals must not be eaten — including, the flesh, organs, and milk of pork, birds of prey and their eggs, insects and shellfish.
- 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.

3.7.8 Practices relevant to appearance before the court

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

3.7.8.1 Status of women

Although it is the presence of ten men that allows a formal prayer service to take place, women have an equal status and critical role in Jewish life. A person's 'Jewishness' is determined through the matriarchal line.

3.7.8.2 Touching

Handshaking is generally considered appropriate and acceptable. However, many observant Jews avoid physical contact, including shaking hands, with members of the opposite sex unless the person is immediately related to him or her.

3.7.8.3 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 or on festivals. For reasons of integration some Jewish men wear a hat rather than a kippah or yarmulke. Some Jewish men may wish to wear a skull cap or hat while taking the oath. This should not be considered disrespectful to the court.²⁷⁰

²⁷⁰ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016), page 39 (accessed 11 July 2018).

Observant men also wear an undergarment with fringes on its corners; these fringes are sometimes worn in a visible manner. Ultra-Orthodox or Hasidic male Jews wear dark apparel, hats, earlocks and beards.

Many observant married women keep their hair covered with a wig (sheitel), hat, scarf or. Jewish women may observe a code of modesty. Generally, observant orthodox Jewish women do not wear trousers, but wear dresses that cover the knees and blouses that cover the elbows.²⁷¹

3.7.8.4 Names and titles

Although Jewish people are given Hebrew names at birth, for example David 'ben' (son of) Abraham or Sarah 'bat' (daughter of) Abraham, most Jewish people use their given names followed by their family name or surname. Jewish clerics are addressed with the title Rabbi followed by their family name.

3.7.8.5 Seating

Observant orthodox Jews should not be seated between two members of the opposite sex.

The Jewish Community Council of Western Australia (Inc) submitted:²⁷²

Observant Jews would feel extremely uncomfortable in a situation where they are alone with a member of the opposite sex in a closed room to the extent that they may react in a seemingly disproportional manner.

3.8 PRACTICAL CONSIDERATIONS

Unless appropriate account is taken of the relevant religious affiliation of those attending court, people practicing religions (particularly if they come from orthodox or conservative traditions within their religion) are likely to:

- feel uncomfortable, resentful or offended by what occurs in court; and
- feel that an injustice has occurred.

They are also liable, in some cases, to be treated unfairly or unjustly.

²⁷¹ Also refer to Office of Multicultural Interests (with the Jewish Community Council of Western Australia Inc.) *Culture and Religion Information Sheet — Judaism (2015) page 3* (accessed 26 November 2020).

²⁷² Submission from the Jewish Community Council of Western Australia (Inc.) (14 April 2020).

It should be noted that members of religions with the most obvious dress differences, or the greatest divergence from the more common forms of Christianity practised in Australia, tend to be discriminated against on religious or ethno-religious grounds much more frequently than other people. This may result in some persons attributing a perceived problem, or a perceived difference in treatment as being a form of religious discrimination, even when it is not. However, if you follow the guidance provided in this section that should be less likely to occur.

These problems are likely to be compounded if the person also happens to be from a culturally and linguistically diverse background, female, a child or young person, gender or sexuality diverse lesbian, a person with a disability, or a person who is representing themselves — see the relevant chapters in this Bench Book.

The following section provides additional background information and practical guidance about ways of treating people with various types of religious affiliation during the court process, in order to reduce the likelihood of these problems occurring.

3.8.1 Modes of address for religious leaders

Points to consider:

- In most cases, religious leaders should be addressed by their particular religious leadership title followed by their family name.
- To avoid offence, it is best to ask the particular religious leader what mode of address he/she would prefer.
- Be alert to the prospect that a departure from the usual honorific given to a religious leader may be used as a tactic and, in criminal matters where the religious leader is the accused, to subtly undermine the presumption of innocence.

3.8.2 Oaths and affirmations

Anyone who has the necessary competence to present evidence in a court (including interpreters), 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. Interpreters are also required to take a specific oath or make an affirmation to 'well and truly translate' the evidence in the case.²⁷³

Section 4(2) of the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) provides that the validity of an oath is not affected by the fact that, at the time of taking the oath, a person had no religious belief.

Further, section 5 of the *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) provides that any person who is required to take an oath is entitled to make an affirmation instead, particularly if:

- the person says that the taking of an oath is contrary to his or her religious belief or conscience;
- it is not reasonably practicable, without inconvenience or delay, at the time when and the place where the oath has to be taken, to administer to the person an oath in a manner that will bind the person's conscience; or
- for any other sufficient reason, the taking of an oath is found not to be appropriate.

The form of an oath is immaterial providing the oath is binding upon a witness's conscience.²⁷⁴

The legality of administering an oath depends upon two matters, which are:²⁷⁵

- whether the oath appears to the court to be binding on the witness's conscience; and
- if so, whether the witness considers it to be binding on his or her conscience.

It is irrelevant whether the witness observes a particular religion.

Many people do not know the difference between an oath and an affirmation, so it is usually best to state that it is important that the person swears to tell the truth in the way that will mean the most to them. The United Kingdom's *Equal Treatment Bench Book* recommends the following:²⁷⁶

²⁷³ *Evidence Act 1906* (WA) s 102 (accessed 2 August 2018).

²⁷⁴ *R v Sossi* [1986] WAR 163; (1985) 17 A Crim R 405.

²⁷⁵ *R v Kemble* (1990) 91 Cr App R 178 at 180. See also JD Heydon, LexisNexis, *Cross on Evidence* (at August 2016) [13275], especially the cases at n 2.

²⁷⁶ Judicial College (UK) *Equal Treatment Bench Book* (February 2021 revised edition) Chapter 9, page 274 [34] (accessed 7 April 2021).

As matters of good practice:

- *The important question of whether to affirm or swear an oath should be presented to all concerned as involving a choice between two procedures which are equally valid in legal terms.*
- *The primary consideration should be what binds the conscience of the individual.*
- *One should not assume that an individual from a particular community or ethnic background will automatically prefer to swear an oath rather than affirm, or vice versa.*

Points to consider for those who practice Christianity:

- In most cases, the standard oath (*'I swear by Almighty God that the evidence I will give in this case 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 translate any evidence that I am asked to translate in this case'*)²⁷⁷ will be suitable for those who are Christians and who are happy to take an oath.
- It has been customary in some courts and is generally the practice in Western Australia (although it is not essential) for any person taking the oath to hold a copy of the Bible in their hand as they take the oath. The requirement under s 7 (1) of the *Oaths, Affidavits and Statutory Declarations Act 2005* is that the person making the oath, whilst saying aloud the words of the oath (by repeating or reading) holds or touches a religious text acceptable to them or, in the absence of such a religious text, holds up one hand.
- 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. They may wish to make the standard affirmation (*'I sincerely declare and affirm that the evidence I will give in this case will be the truth, the whole truth and*

²⁷⁷ *Evidence Act 1906* (WA) ss 97(3), 102(1); *Oaths, Affidavits and Statutory Declarations Act 2005* (WA) s 4(1) (both accessed 11 July 2018).

nothing but the truth', or for interpreters — *'I sincerely declare and affirm that I will well and truly translate any evidence that I am asked to translate in this case')*.

Points to consider for those who practice other religions:

- 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 deity(ies): *I swear by [name of deity recognised by his or her religion] that the evidence I will give in this case will be the truth, the whole truth and nothing but the truth; or I swear, according to the religion and the beliefs I profess, that the evidence I will give in this case will be the truth, the whole truth and nothing but the truth.*
- Their appropriate religious text should be available as required.
- In Western Australia, administering an oath to another person requires that the person taking the oath hold or touch a religious text acceptable to that person or, in the absence of such a religious text, to hold up one of their hands and to state the oath aloud.
- 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 religious text 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 those cases, note that some witnesses may not be aware that they are able to swear to tell the truth in a way which is appropriate for them. It is always preferable to state that it is most important that the witness swears to tell the truth in the way which is most meaningful for them. If not guided in this regard, a person may simply agree to take the standard oath, with or without a Bible.
- 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.

- 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, whatever their religion.
- 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.

Points to consider for those who practice Islam:

- There are conflicting indications as to whether Muslims should swear an oath in court on the Qur'an. Nonetheless, a Qur'an should be available in courts for Muslims who wish to swear by their holy book.
- Those who touch the Qur'an must be in a state of ritual purity, meaning that the witness may require to wash before taking an oath on the Qur'an. Women may wish to affirm when they are menstruating.
- Additionally, as the person administering the oath is unlikely to be in a state of ritual purity, they should not touch the holy book directly. Instead, the Qur'an should be kept covered at all times, except if being touched by the witness when taking the oath. The person administering the oath should not use their left hand to handle the Qur'an.
- There is no religious significance in the colour of the cloth covering, although the *Equal Treatment Bench Book* (UK) suggests a green cloth be used.²⁷⁸
- The witness should be asked if she/he recognises the book as a true copy of the Holy Qur'an.
- When the oath is being taken, the witness may hold or touch the Qur'an with their right hand, as certain significance is attached to tasks according to the hand with which they are performed. However, an oath can be made by reference to the Holy Qur'an without

²⁷⁸ Judicial College (UK) *Equal Treatment Bench Book* (February 2021 revised edition) Chapter 9, page 464 (accessed 7 April 2021).

touching it. There are times when someone is not allowed to touch the Holy Qur'an such as not being in the state of ablution.

- Note that if the Qur'an is stored in a bookshelf, then it should be placed somewhere in the highest position; it should not be placed on the floor as this is seen as offensive. The Qur'an should be treated with care at all times.
- The Australian National Imams Council, in the *Explanatory Note on the Judicial Process and Participation of Muslims* (12 December 2017), suggests a procedure for administering an oath upon the Holy Qur'an.

Points to consider for those who practice Judaism:

- The preferred method for observant Jewish people is by affirmation as the mention of God's name should be avoided, as the witness (or juror) is only giving the truth as he or she sees it to be. However, if a member of the Jewish Faith chooses instead to swear an oath rather than make an affirmation then he or she should be allowed to do so. This oath should only be given on the Old Testament and the witness may also wear a head covering.

Points to consider for those who practice Buddhism:

- Buddhists in general may choose either to affirm or, possibly, swear an oath.
- There are a variety of sacred texts applicable to Buddhism, however as a general rule, it is not acceptable for a Buddhist to swear a promise on a text. Above all, a Buddhist should not be presumed to be Christian or asked to swear on a Bible. Aside from being disrespectful, the swearing of such an oath would have no meaning.
- According to the *Equal Treatment Bench Book* (UK), Tibetan Buddhists may have special requirements with regard to the form of oath or affirmation that they will take.

They should be asked to state the form of the oath that they will regard as binding on their conscience.²⁷⁹

- The witness may require a picture of a deity of the witness's practice.

Points to consider for those who practise Hinduism:

- Although there are a variety of sacred texts in the Hindu faith, the most appropriate for the swearing of an oath is the Bhagavad Gita ('Gita'). This does not appear to be strictly required, however, for the witness to consider the oath binding on her or his conscience.
- The handling of the Gita requires care. It should be kept wrapped in cloth, preferably red and remain covered except when the witness touches it to take the oath.
- No one but the witness should touch the book and it should not be marked in any way.
- The witness may wish to remove their shoes and bow before the Gita with folded hands before or after taking the oath.
- When the witness is taking the oath, they may hold the Gita in their right hand or above their head.

Points to consider for those who practise Sikhism:

- Generally, Sikhs prefer to take an affirmation rather than an oath.
- Observant Sikhs will not take an oath on any religious text, however some Sikhs may wish to take an oath on the Gutka (Sikh daily prayer book).
- According to the *Equal Treatment Bench Book* (UK), the Gutka should be kept in a covered cloth, the suggested colour of which is orange or yellow. It also states that Sikhs should not be asked to remove their head coverings in court.²⁸⁰

²⁷⁹ Judicial College (UK) *Equal Treatment Bench Book* (February 2021 revised edition) Chapter 9, page 459 (accessed 7 April 2021).

²⁸⁰ Judicial College (UK) *Equal Treatment Bench Book* (February 2021 revised edition) Chapter 9, page 472 (accessed 7 April 2021).

3.8.3 Appearance, behaviour and body language

Points to consider:

- Dress: No-one should ever be asked to remove their religious dress in open court — even when it might appear necessary (for example, to check the extent of someone's injury). Where it is necessary to see under someone's religious dress, it will be necessary to check with that person, or with someone who can advise you of the appropriate religious practice or what can be done. There are a range of different approaches, depending on the circumstances of the particular case and the individual concerned. 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. A good understanding of the special measures that may be of use in the particular case, and of the need to identify the need for such adaptations at a preliminary hearing, are key.

Additional information on religious dress and how to deal with issues arising from this is provided in sections 3.2.8.3 (Christianity), 3.3.6.3 (Buddhism), 3.4.6.3 (Islam), 3.5.6.5 (Hinduism), 3.6.7.3 (Sikhism) and 3.7.8.3 (Judaism).

- Eye Contact: In some religions it is taboo for one person to make eye contact with another, particularly with another of the opposite gender. For these people, not looking someone in the eye will not necessarily have anything to do with their honesty or credibility.
- Touching or standing close: Many religions have rules that members of the opposite gender who are not family members are not allowed to touch each other, or in some cases, stand 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), ask the

person themselves, or consider whether the court needs to obtain 'expert' advice from someone who has knowledge about the particular religion.

- Note that it may be hard to get the information you need from the person themselves as they may not feel it is their place to inform you, or they may not understand why you need the information, or they may be reluctant to give you the information for some other reason that is religiously or culturally appropriate to them.
- All or some of these differences in appearance, behaviour and body language may need to be taken into account whenever you make any assessment based on the demeanour of a person with a particular religious affiliation.
- Where 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.
- As prescribed by law,²⁸¹ you may also need to intervene if it appears that any cross-examination is alluding to any particular religious difference in appearance, behaviour or body language in an unduly annoying, harassing, intimidating, offensive, or oppressive way.

3.8.4 Language

Points to consider:

- Use the appropriate language to describe any God(s) or religious values or practices. For example, always use 'the' before any reference to the Buddha or the Dharma/Dhamma. There must be no blasphemy or apparent blasphemy.
- Do not use any form of discriminatory or discriminatory-sounding language — be careful not to describe a religious practice as immoral or irrational, even when it is unlawful in Western Australia. 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.

²⁸¹ *Evidence Act 1906* (WA) s 26 (accessed 1 August 2018).

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. 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 what you suspect or know to be the majority way of behaving or thinking for a particular religious group is the standard by which an 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 used quite casually by some Anglo-Australians, often with no thought as to its literal meaning.
- In many 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.

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

In most cases, a person's religion will have some influence on their values, and therefore on how they behave; in some cases the influence may be critical.

In other words, any of the values implied within the descriptions of the various religions referred to previously 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 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? 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 proceedings, to ensure that justice is done and seen to be done, explain why such influences can/should be taken into account, or cannot/should not be taken into account. You may need to explain this in the direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing.
- 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 particular value(s) or practice(s). For example, this may mean lawfully intervening if cross-examination becomes disrespectful or if it simply fails to take account of a relevant religious difference.²⁸²
- Be aware that measures can be put in place should you declare a witness to be a 'special witness'. You can make such a declaration if a witness is likely to suffer severe emotional trauma, or to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily, by reason of cultural background, the nature of the subject-matter for the evidence, or any other factor that the court considers relevant.²⁸³
- There is also provision in s 121 of the Evidence Act 1906 (WA) for you, on your own initiative or on the application of any party to the proceedings, to allow evidence to be taken by video-link from outside the place where the court is sitting — although you should not do so if satisfied that this is not in the interests of justice.

²⁸² *Evidence Act 1906* (WA) s 26 (accessed 2 August 2018).

²⁸³ *Evidence Act 1906* (WA) ss 106R, 106RA (accessed 2 August 2018).

- In addition to the restrictions on unrepresented persons directly cross-examining witnesses who are children, complainants in serious sexual assault proceedings or certain witnesses in restraining order matters,²⁸⁴ you have discretion to allow the cross-examination by an unrepresented accused of any witness to be by video-link, while screened, or without questions being put directly— having regard to the nature of the charge, the wishes of the witness, and the availability of any necessary facilities or equipment.²⁸⁵
- Instruct the jury that declaring a witness to be a special witness, or using alternative means for a witness to present evidence, are routine practices of the court and these measures should not affect how they consider the evidence.
- 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 the person themselves. But note that it may be hard to get the information you need from the person themselves as they may not feel it is their place to inform you, or they may not understand why you need the information, or they may be reluctant to give you the information for some other reason that is religiously or culturally appropriate to them.
- Be careful not to generalise about a particular religion; check the particular person's own religious values and practices.

3.8.6 Appropriate breaks for religious practices

Court times and holidays are generally more suited to those who practice any form of Christianity than those who practice a non-Christian religion.

Points to consider:

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

²⁸⁴ *Evidence Act 1906* (WA) s 106G, *Restraining Orders Act 1997* (WA) ss 44C, 53D (accessed 2 August 2018).

²⁸⁵ *Evidence Act 1906* (WA) s 25A (accessed 2 August 2018).

- Make the appropriate allowances for relevant holy days of the week and do 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 do not insist that someone be called to give evidence during such times.

3.8.7 Directions to the jury

It is important that you ensure that the jury does not allow any ignorance of religious difference or stereotyped or false assumptions about people practicing (or not practicing) a particular religion, to unfairly influence their judgement.

Points to consider in your final directions to the jury:

- They must try to avoid making stereotyped or false assumptions — and what is meant by this. For example, it may be wise to give them specific examples of religious stereotyping (for example, that all Muslims are violent towards non-Muslims).
- It may also be wise to give them specific examples of making false assumptions based on their own religious practice or lack of it — for example, it would be false and legally unfair to conclude that anyone who follows a particular religious norm that happens to conflict with a juror's 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, 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 hold of value, as opposed to the way in which the jurors 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. You may also need to be more specific about the particular religious aspects that they need to pay attention to.

- Remind them of any directions you made earlier in the proceedings in relation to how they must treat evidence that was presented in any alternative manner.

3.8.8 Sentencing, other decisions and judgment or decision writing

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, everyone affected or referred to, regardless of their religion or lack of religion.

Points to consider in your decisions and sentencing:

- In order to ensure that any person with a religious affiliation referred to or specifically affected by your sentencing, decision(s) and/or written judgment or decision also considers it/them to be fair and non-discriminatory, you may need to pay due consideration to (and indeed specifically allude to) any of the points raised in this chapter.

If a witness is not personally capable of giving a victim impact statement for any reason, consider whether it is appropriate for someone else to do so on the victim's behalf.²⁸⁶

- Consider whether to quote from a victim impact statement in court.²⁸⁷
- 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 — to ensure that the matter is, and is seen to be, assessed in a similar way to the way in which the matter would be assessed if it were related to, say, 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.

3.9 FURTHER INFORMATION

The following organisations can provide further information or expertise about the most common religions briefly described in this section.

²⁸⁶ *Sentencing Act 1995* (WA) s 24(2) (accessed 2 August 2018).

²⁸⁷ See Part 3, Division 4 of the *Sentencing Act 1995* (WA) (accessed 2 August 2018). Note that a court may make a written victim impact statement available to the prosecutor and to the offender, on such conditions as it thinks fit, pursuant to s 26(1).

3.9.1 Christianity

Anglican Diocese of Perth

The Diocese of Perth is a diocese within the Anglican Church of Australia. It is the Metropolitan See in the State of Western Australia. It is one of 23 dioceses in Australia, and one of three in Western Australia (with the others being Bunbury and the North West).

Baptist Churches WA

Baptist Churches Western Australia (BCWA) provides services such as consultancy, education, youth camps, legal and financial advice, banking, advocacy and insurance to the various Baptist Churches, agencies and institutions of Western Australia.

Catholic Archdiocese of Perth

The Catholic Archdiocese promotes awareness and understanding of the Catholic Faith in Western Australia. The Archdiocese promotes professional standards; effective communications; support for clergy; strengthening of parishes; adult faith formation; outreach to those in need; and growth and development of the Archdiocese.

Council of Churches of Western Australia Inc.

The Council of Churches of Western Australia is an incorporated association of Christian Churches or related Christian bodies.

The Hellenic Community of WA (Inc.)

This organisation was formed in 1923 and incorporated in 1924, with the objects of establishing a Greek Orthodox Church and a Greek school in Western Australia, and improving the religious, moral, mental and social conditions of its members. The organisation now provides services in areas including aged care, Greek studies and Hellenic Community radio and youth groups.

JW.Org - Jehovah's Witnesses

This website provides information about the Jehovah's Witnesses organisation world-wide. The publications 'Watchtower' and 'Awake!' are produced and published by JW.Org.

Lutheran Church of Australia — Western Australian District Inc.

The Lutheran Church is the largest Protestant church in the world, with over 70 million members. This website provides information about the history of Australian and New Zealand Lutherans.

Macedonian Community of WA (Inc.)

The Macedonian Community of Western Australia. (Inc.) aims to promote the distinct Macedonian language, culture and history for present and future generations of Macedonians in Australia whilst simultaneously encouraging a strong and productive commitment to the general Australian community as loyal and proud Australian citizens. The Macedonian Community of Western Australia. (Inc.) opened the Macedonian Orthodox Church of St Nikola in North Perth in 1968.

Presbyterian Church of Western Australia

The General Assembly of the Presbyterian Church of Western Australia (PCWA) was formed in 1901, initially with three Presbyteries. The website now lists 11 Presbyterian Churches in Western Australia.

Church of the Holy Apostles Peter and Paul

The Russian Orthodox Church of Saints Peter and Paul is located in Bayswater, Perth

Salvation Army

The Salvation Army is a Christian organisation which has provided 150 years of community service in areas such as aged care, alcohol and drug use programs and women's support programs. There are numerous Salvation Army Corps in Western Australia providing both worship and community services.

Metropolitanate of Australian and New Zealand - Serbian Orthodox Church

This website provides information about the history of the Church, current news relating to the Church and the locations of parishes. The Western Australian Serbian community's focal point is the Serbian Orthodox Church of the Holy Trinity in Perth City. In 2016, the Church was reconstructed and the associated Church Hall was refurbished.

Seventh Day Adventist Church

The Seventh Day Adventist Church is a Christian Church with over 14 million members worldwide. The Western Australian Conference head office is located in Gosnells.

Uniting Church in Australia, Western Australia

The Uniting Church in Australia (UCA) was formed on 22 June 1977, when the Congregational Union in Australia, the Methodist Church of Australasia, and the Presbyterian Church of Australia joined together.

3.9.2 Buddhism

Buddhist Council of Western Australia

The Buddhist Council of Western Australia was formed in 2005 to serve as a peak body to represent the Buddhist community at government level and national levels. The Buddhist Council of Western Australia is a member of the Federation of Australian Buddhist Councils, and is made up of all three of the major denominations of Buddhism.

The Buddhist Society of Western Australia

The Buddhist Society of Western Australia is a non-profit organisation which encompasses two monasteries, a city centre and a meditation retreat.

3.9.3 Hinduism

Hindu Association of Western Australia Inc.

The Hindu Association of Western Australia aims to promote the Perth Hindu Temple as a focal point for worship, prayer, education, community and family life.

3.9.4 Judaism

Jewish Community Council of Western Australia (Inc.)

The Jewish Community Council of Western Australia (JCCWA) is the representative body for the Western Australian Jewish community and has 25 affiliate organisations. It is a constituent of the Executive Council of Australian Jewry. The JCCWA liaises with state and local government authorities, the media and engages in intercommunal and outreach activities. The JCCWA also acts to strengthen and support ties to Israel.

Perth Hebrew Congregation

The Perth Hebrew Congregation is the oldest and largest organisation of Western Australian Jewry and the core institution of Orthodox Judaism in Western Australia.

3.9.5 Multicultural interests

The following Western Australian government agency can provide information about the appropriate religious organisation(s) for any other religions:

Department of Local Government, Sport and Cultural Industries, Office of Multicultural Interests (WA)

The Office of Multicultural Interests is a division of the Department of Local Government, Sport and Cultural Industries. Its key role is to advise the Minister on the development of State Government policies and programs to achieve the full potential of multiculturalism.

3.10 FURTHER READING

ABS, Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016 (Cat No. 2071.0) (2017) (accessed 13 March 2019)

Australian Human Rights Commission, Religious Freedom Review (2018) (accessed 13 March 2019)

Australia New Zealand Policing Advisory Agency (ANZPAA), *A Practical Reference to Religious and Spiritual Diversity for Operational Police* (3rd ed) (2010) (accessed 13 March 2019)

Barker R, *Burqas and Niqabs in the Courtroom: Finding a Practical Solutions*, Australian Law Journal (2017) 91 ALJ 225

Bouma G, Cahill D, Dellal H & Zwartz A, *Freedom of Religion and Belief in 21st Century Australia* (Report prepared for the Australian Human Rights Commission, 2011) (accessed 13 March 2019)

Fok D, *Redefining Gender Equality in the Context of Religion Today*, *The Yale Review of International Studies* (April 2011) (accessed 13 March 2019)

Griffiths D, *There's No Art to Find the Mind's Construction in the Face: Some Thoughts on the Burqa Case in New Zealand* (2005) 1(2) New Zealand Postgraduate Law E-Journal (accessed 13 March 2019)

Judicial College (UK), *Equal Treatment Bench Book* (February 2021 revised edition) Chapter 9 (accessed 7 April 2021)

Judicial Commission of New South Wales, *Equality before the Law Bench Book* (accessed 13 March 2019)

Krayem G, *Freedom of Religion and Belief in the 21st century, Freedom of Religion, Belief and Gender: A Muslim Perspective* (Supplementary Paper, For the Australian Human Rights Commission Project, 2010) (accessed 13 March 2019)

Office of Multicultural Interests website, including Culture and Religion Information Sheets
(accessed 13 March 2019)

Office of the Director of Public Prosecutions Comparative Sentencing Tables (accessed
12 July 2021)

Supreme Court of Queensland, Equal Treatment Benchbook (2nd ed, 2016) (accessed 13 March
2019)

4 PEOPLE WITH DISABILITIES

People with Disabilities (WA) Inc. submitted:²⁸⁸

The barriers for a person with disability in relation to court proceedings depend on the type and level of the particular person's disability.

These barriers are worsened by the stigma they experience as a result of their different physical appearance or behaviour, or because of their lack of understanding of court processes. Often the response from the legal system is definitive with little room for a flexible approach. Wherever possible we hope that people are able to be supported appropriately by those that know them, those that understand their specific needs and those with expertise in the area.

According to the Australian Bureau of Statistics (ABS), in 2018:

- almost one in six Western Australians reported living with a disability in 2018 (16.4%), which was lower than the national rate (17.7%);²⁸⁹
- almost one in ten Western Australians (8.2%) were carers for people with disabilities in 2018;²⁹⁰
- 20.3% of Australians with disabilities are a carer for someone else.²⁹¹

There are many different definitions of disability, used for different purposes and in different jurisdictions, as will be discussed below.

For the purposes of ABS surveys and censuses, a person has a disability if they report that their everyday activities have been impacted by one or more of the following for at least six months:²⁹²

- loss of sight;
- loss of hearing;

²⁸⁸ Submission from People with Disabilities (WA) Inc. (9 March 2020).

²⁸⁹ ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (2019) Western Australia (data cube) Summary of Findings, Table 4.1 (accessed 16 January 2020).

²⁹⁰ ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (2019) Carers Tables (data cube) Table 31.1 (accessed 16 January 2020).

²⁹¹ ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (2019) Carers Tables (data cube) Table 30.3 (accessed 16 January 2020).

²⁹² ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (2019) Explanatory Notes - Glossary (accessed 17 February 2020).

- speech difficulties;
- shortness of breath or breathing difficulties causing restriction;
- chronic or recurrent pain or discomfort causing restriction;
- blackouts, seizures or loss of consciousness;
- difficulty learning or understanding;
- incomplete use of arms or fingers;
- difficulty gripping or holding things;
- incomplete use of feet or legs;
- nervous or emotional condition causing restriction;
- restriction in physical activities or in doing physical work;
- disfigurement or deformity;
- mental illness or condition requiring help or supervision;
- memory problems or periods of confusion causing restriction;
- social or behavioural difficulties causing restriction;
- long-term effects of head injury stroke or other acquired brain injury causing restriction
- receiving treatment or medication for any other long-term conditions or ailments and still being restricted; and/or
- any other long-term conditions resulting in a restriction.

People with Disability Australia states that:²⁹³

According to the medical model of disability, 'disability' is a health condition dealt with by medical professionals. People with disability are thought to be different to 'what is normal' or abnormal. 'Disability' is seen to be a problem of the individual. From the medical model, a person with disability is in need of being fixed or cured. From this point of view, disability is a tragedy and people with disability are to be pitied. The medical model of disability is all about what a person cannot do and cannot be.

The social model sees 'disability' is the result of the interaction between people living with impairments and an environment filled with physical, attitudinal, communication and social barriers. It therefore carries the implication that the physical, attitudinal, communication and

²⁹³ People with Disability Australia, [*Social Model of Disability*](#) (accessed 17 February 2020).

social environment must change to enable people living with impairments to participate in society on an equal basis with others.

... The social model of disability is now the internationally recognised way to view and address disability. The United Nations Convention on the Rights of Persons with Disabilities marks the official paradigm shift in attitudes towards people with disability and approaches to disability concerns.

The social model has been adopted by the *Western Australian Disability Health Framework 2015-2025: Improving the Health Care of People with Disability* to define disability. This framework was developed to create an inclusive Western Australian health system that enables people with disabilities to enjoy the highest attainable standard of health throughout their life.²⁹⁴

In the Federal legislative context, there is a definition of 'disability' in the *Disability Discrimination Act 1992 (Cth)*, which was enacted with the objectives of eliminating discrimination against persons on the ground of disability in the areas of work, accommodation, education, access to premises, clubs and sport, the provision of goods, facilities, services and law. This legislation also aims to ensure that persons with disabilities have the same rights to equality before the law as the rest of the community, and to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.²⁹⁵

'Disability' is defined in s 4 of the *Disability Discrimination Act 1992 (Cth)* to mean:

- (a) total or partial loss of the person's bodily or mental functions; or*
- (b) total or partial loss of a part of the body; or*
- (c) the presence in the body of organisms causing disease or illness; or*
- (d) the presence in the body of organisms capable of causing disease or illness; or*
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or*
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*

²⁹⁴ Western Australian Department of Health, *WA Disability Health Framework 2015-2025: Improving the Health Care of People with Disability* (2015) (accessed 15 March 2018).

²⁹⁵ *Disability Discrimination Act 1992 (Cth)* s 3 (accessed 23 October 2018).

(g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes disability that:

(h) presently exists; or

(i) previously existed but no longer exists; or

*(j) may exist in the future (including because of genetic predisposition to that disability);
or*

(k) is imputed to a person.

*To avoid doubt, a **disability** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.*

The National Disability Insurance Scheme Act 2013 (Cth) establishes the National Disability Insurance Scheme (NDIS). That Act does not expressly define 'disability', however the National Disability Insurance Agency (NDIA) must be satisfied that a prospective NDIS participant meets the 'disability requirements' in s 24(1)(a). To do so a person must have a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition (s 24(1)(a)); the impairment(s) must result in a substantially reduced capacity of the person for communication, social interaction, learning, mobility, self-care or self-management (s 24(1)(b)); the impairment(s) affect the person's capacity for social and economic participation (s 24(1)(c)); and the person is likely to require support under the NDIA for their lifetime (s 24(1)(e)).

In Western Australia, a definition of 'disability' is contained in s 3 of the Disability Services Act 1993 (WA). For the purposes of that Act, a disability is that:

(a) which is attributable to an intellectual, psychiatric, cognitive, neurological, sensory, or physical impairment or a combination of those impairments; and

(b) which is permanent or likely to be permanent; and

(c) which may or may not be of a chronic or episodic nature; and

(d) which results in —

(i) a substantially reduced capacity of the person for communication, social interaction, learning or mobility; and

(ii) a need for continuing support services.

In 2014, the Australian Human Rights Commission released a report entitled *Equal before the Law: Towards Disability Justice Strategies* which stated:²⁹⁶

People with disabilities do not enjoy equality before the law when they come into contact with the criminal justice system in Australia. Whether a person with disability is the victim of crime, accused of a crime or a witness, they are at increased risk of being disrespected and disbelieved. If a victim, their disability may be seen to mitigate the offender's guilt; if a perpetrator, their disability makes incarceration more likely. Fundamental human rights that we all expect to enjoy are at stake.

The Department of Communities considers that with the assistance of appropriate aids and services, the restrictions experienced by many people with disabilities may be overcome.²⁹⁷

National Disability Services WA submitted that good justice outcomes for people with disability remains an area requiring significant improvement.²⁹⁸ Their pre-budget submission 2020-21 recommends that the State government fund the development of a Disability Justice Blueprint, in partnership with people with disability and the sector. The organisation stated in that submission:²⁹⁹

The justice system does not adequately support the disability needs of people with disability. Whether the person with disability is a victim of crime, accused of a crime or a witness, they are at increased risk of being disrespected and disbelieved. If a victim, their disability may be seen to mitigate the offender's guilt; if a perpetrator, their disability makes incarceration more likely.

...People with disability in prison do not have access to supports, adjustments or aids. The impact on Aboriginal people is more significant given they are over represented in WA's prisons.

This chapter provides some statistical data and background information on people with disabilities as well as practical guidance for judicial officers about making appropriate

²⁹⁶ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) page 8 (accessed 23 October 2018).

²⁹⁷ Department of Communities, *What is Disability?* (accessed 27 November 2018).

²⁹⁸ Submission from National Disability Services WA (22 June 2020).

²⁹⁹ National Disability Services WA, *Pre-budget Submission 2020-21*, pages 49 and 50 (accessed 20 July 2020).

adjustments for, and communicating with, people with disabilities, to reduce the barriers they face when involved in court or tribunal processes.

The material used in this chapter was drawn from the New South Wales Judicial Commission's *Equality before the Law Bench Book*,³⁰⁰ with modifications that incorporate local legislation, data and reference material.

The Steering Committee overseeing the production of this Bench Book gratefully acknowledges the submissions and contributions received from the following organisations, many suggestions from which have been incorporated into this chapter:

- Office of the Public Advocate (29 March 2007, 8 October 2008, 4 June 2020);
- Disability Services Commission (19 April 2007, 9 October 2008) (from 1 July 2017, part of the Department of Communities);
- Kin Advocacy (formerly Ethnic Disability Advocacy Centre (20 April 2007, 5 March 2020);
- National Disability Services WA (27 April 2007, October 2008, 22 June 2020, 30 June 2020);
- People with Disabilities (WA) Inc. (3 May 2007, 10 October 2008, 9 March 2020, 8 April 2020), informed through collaboration with Advocacy WA, Ethnic Disability Advocacy Centre, Explorability, Sussex Street Community Legal Service, Midlas and Your Say;
- Mental Health Law Centre WA Inc. (28 May 2007, 23 June 2020);
- Deaf Society of Western Australia (May 2008) (renamed Access Plus WA Deaf);
- Mental Health Division, Department of Health (7 October 2008);
- Association for the Blind of Western Australia (Inc.) (24 February 2009);
- Dr Raewyn Mutch, Dr Amanda Wilkins, Dr Anita Banks and Professor Carol Bower (6 August 2009);
- VisAbility (formerly the Association for the Blind) (12 December 2018);
- Telethon Kids Institute: Professor Desiree Silva, Clinical Associate Professor Raewyn Mutch, Dr Jenny Downs, Ms Jenny Bourke, Ms Joanne Granich, Ms Heather Jones (15 May 2014);
- Telethon Kids Institute: Clinical Associate Professor Raewyn Mutch, Dr Hayley Passmore, Professor Carolyn Bower, Natalie Kippin and Sharynne Hamilton) (9 March 2020); and

³⁰⁰ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2018) Section 5 (accessed 20 August 2018).

- Office of the Public Trustee (22 April 2020); and
- Department of Communities (15 September 2020).

4.1 SOME STATISTICS³⁰¹

4.1.1 Number of people with disabilities

The 2018 Australian Bureau of Statistics (ABS) *Survey of Disability, Ageing and Carers* reported that there were almost 4.4 million Australians with disabilities (17.7% of the population). The majority of people with disabilities reported a physical condition (76.8%) as their main long-term health condition. The other 23.2% reported mental and behavioural disorders.³⁰²

Of the 2.49 million residents of Western Australia in 2018:³⁰³

- 411,500 (16.5%) had a disability;
- disability was fairly evenly distributed between males and females (15.6% of males and 17.2% of females reported a disability); and
- older people had a substantially higher rate of disability than younger people – for example, 2.6% of people aged 15-64 and 14.5% of people aged 65 and over had a profound or severe core activity limitation.

The Australian Institute of Health and Welfare reported that between 2003 and 2015, the national crude rates of disability and of severe or profound core activity limitation (that is, sometimes or always needing help with one or more activities of self-care, mobility and communication) generally decreased for both sexes, and especially for older Australians.³⁰⁴

³⁰¹ Unless otherwise indicated, the statistics in this sub-section are drawn from ABS, *Disability, Ageing and Carers: Summary of Findings, 2015* (Cat No 4430.0) (2016) (accessed 15 March 2019).

³⁰² ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (2019) Summary of Findings (accessed 20 July 2020).

³⁰³ ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (2019) Disability Tables, Western Australia (data cube) Tables 1.1, 1.3 and 2.3 (accessed 20 July 2020).

³⁰⁴ Australian Institute of Health and Welfare (Canberra) *Life Expectancy and Disability in Australia: Expected Years Living With and Without Disability* (Cat No DIS 66) (2017) (accessed 26 November 2020).

The Western Australian Commissioner for Children and Young People, reported on the numbers of children and young people with a disability in Western Australia in 2018, finding:³⁰⁵

- Of children and young people aged 0 to 24 years, 6.6% (54,400) of the total population had a reported disability. The corresponding national estimate was 577,000.
- For those aged 0 to 4 years, an estimated 5,100 children had a reported disability. The corresponding national estimate was 52,800.
- For those aged 5 to 14 years, an estimated 23,700 children and young people had a reported disability. The corresponding national estimate was 274,600.
- For aged 15 to 24, an estimated 25,600 young people had a reported disability. The corresponding national estimate was 249,600.

In 2015, the ABS published a document entitled *Aboriginal and Torres Strait Islander People with Disability in Australia* reporting that for Aboriginal and Torres Strait Islander people:³⁰⁶

- almost one in four reported living with a disability;
- higher rates of disability were experienced across all age groups when compared to non-Indigenous people;
- around one in three people with disabilities had profound or severe disability;
- around three in five people with disabilities needed assistance with at least one activity of daily life;

³⁰⁵ Commissioner for Children and Young People Western Australia, *Profile of Children and Young People in WA* (2017) page 21 (accessed 17 February 2020).

³⁰⁶ ABS, *Disability, Ageing and Carers: Summary of Findings, 2015* (Cat No 4430.0) (2016) Aboriginal and Torres Strait Islander People with Disability in Australia Information Sheet (accessed 15 March 2020). As is noted in the introductory section to chapter 11 of this Bench Book, the term Aboriginal is used in this Bench Book to refer to a person of Aboriginal descent who identifies as Aboriginal and is accepted as such by the community in which he or she lives. Although it is acknowledged that the Indigenous inhabitants resident in Western Australia descend from many hundreds of distinct and diverse cultural groups, the term Aboriginal is used following the recommendation of the Aboriginal advisers for the *Aboriginal Benchbook for Western Australian Courts* (Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008) Note to Chapter 1). However, where data and statistics are referred to from other sources, the terms Aboriginal, Aboriginal and Torres Strait Islander, and Indigenous are used consistently with the terminology in the source of that data.

- experiences of discrimination due to disability were almost twice as likely than in non-Indigenous people;
- around two in five people with disabilities lived in a major city;
- 41.7% of people with disabilities participated in the labour force; and
- one in three people with disabilities lived in a household in the lowest income quintile.

In 2014-15 in Western Australia, 43% of Indigenous Australians aged 15 and over reported having a disability or restrictive long-term health condition. The age-standardised rate for Indigenous Australians reporting having a disability or restrictive long-term health condition was 1.6 times the rate for non-Indigenous Australians (47% compared with 29%).³⁰⁷

4.1.2 Types of disabilities

The ABS identifies six separate groupings based on the particular type of disability identified. These groups are:³⁰⁸

1. *Sensory* - loss of sight; loss of hearing; and speech difficulties.
2. *Intellectual* - difficulty learning or understanding things.
3. *Physical* - shortness of breath or breathing difficulties; blackouts, seizures or loss of consciousness; chronic or recurrent pain or discomfort that restricts everyday activities; incomplete use of arms or fingers; difficulty gripping or holding things; incomplete use of feet or legs; restriction in physical activities or in doing physical work; and disfigurement or deformity.
4. *Psychosocial* - nervous or emotional condition that restricts everyday activities; mental illness or condition requiring help or supervision; memory problems or periods of confusion that restrict everyday activities; and social or behavioural difficulties that restrict everyday activities.

³⁰⁷ Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Health Performance Framework 2017 Report, Western Australia* (20 October 2017) page 46 (accessed 16 September 2021).

³⁰⁸ ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (2019) Explanatory Notes – Appendix 2 – Disability Groups (accessed 17 February 2020).

5. *Head injury, stroke or acquired brain injury* - head injury, stroke or acquired brain injury, with long-term effects that restrict everyday activities.
6. *Other* - receiving treatment or medication for any other long-term conditions or ailments and still restricted in everyday activities; and any other long-term conditions resulting in a restriction in everyday activities.

In 2015, 79.0% of Western Australians with disabilities reported that their main condition(s) were physical condition(s). The main condition(s) affecting 21.0% of Western Australians with disabilities were mental and behavioural disorder(s).

According to the Disability Services Commission's Annual Report for 2016-17, the total number of people supported by the Commission was 26,090. The five most common disability types were: intellectual (34%), physical (25%), autistic (21%), neurological (8%) and sensory (4%).³⁰⁹

Refer to section 4.1.6 for statistics as regarding the impact of the different types of disabilities on health (i.e. physical, mental and social wellbeing).

Although not generally regarded to be a disability by people with disabilities, poor literacy skills are included in this chapter. That is because people with poor literacy skills can often benefit from the use of some of the communication techniques listed in section 4.6.3.

4.1.3 Severity of disability

The severity of disability is the level of specific limitation or restriction caused by the disability. This is determined by:

- the amount of difficulty experienced;
- the level of assistance needed;
- the use of an aid to undertake a particular core activity (self-care, mobility or communication); and/or
- the use of an aid to participate in education and employment activities.

³⁰⁹ Government of Western Australia, Disability Services Commission, *Annual Report, 2016-2017*, page 3 (accessed 21 January 2020).

In 2015, 315,400 people (87.0% of people with disabilities) in Western Australia had a disability that limited them in relation to self-care, mobility and communication, and/or restricted their schooling or employment. Of children and young people aged 0 to 24 years, 24,700 have a profound or severe core activity limitation. The corresponding national estimate was 133,400 for the same age group:³¹⁰

- For ages 0 to 4 years, an estimated 2,600 children in Western Australia had a profound or severe core activity limitation. The corresponding national estimate was 19,400.
- For ages 5 to 14 years, an estimated 13,200 children and young people in Western Australia had a profound or severe core activity limitation. The corresponding national estimate was 78,300.
- For ages 15 to 24 years, an estimated 8,900 young people in Western Australia had a profound or severe core activity limitation. The corresponding national estimate was 35,700.

4.1.4 National Disability Insurance Scheme (NDIS)

On 12 December 2017, the Commonwealth and Western Australian governments agreed that Western Australia would join the Australia-wide National Disability Insurance Scheme (NDIS). This meant that the bilateral agreement signed in January 2017 by the previous Western Australian Government for a State-delivered NDIS (the WA NDIS) was replaced by a new agreement and the transition continues to be carried out in a planned, phased approach.³¹¹ The NDIS aims to provide ongoing national consistency for eligibility, the provision of reasonable and necessary supports, choice and control, and portability of support packages across jurisdictions.³¹² The State Government has invested \$1.4 billion to the NDIS to meet the terms of the bilateral agreement to 2023 and made a longer term commitment to fund 25% of the cost of the NDIS beyond that point in time.³¹³

³¹⁰ Commissioner for Children and Young People Western Australia, *Profile of Children and Young People in WA* (February 2019) page 23 (accessed 21 January 2020).

³¹¹ Submission from the Department of Communities (15 September 2020) referring to Disability Services, *News 2017: WA to Join the Nationally Delivered NDIS* (12 December 2017) (accessed 8 October 2020).

³¹² Government of Western Australia, Disability Services Commission, *Annual Report 2016-2017*, page 6 (accessed 20 August 2018).

³¹³ Submission from National Disability Services WA (22 June 2020).

As at 30 June 2021, in Western Australia:³¹⁴

- 39,951 active participants were being supported by the NDIS;
- 21,196 of those are receiving supports for the first time; and
- 34% of participants were fully or partially self-managing their plan.

Children aged 0-6 years of age are supported through the Early Childhood, Early Intervention Services (ECEI services, which are delivered through Wanslea Family Services, an NDIA partner).³¹⁵

The National Disability Insurance Agency (NDIA) assumed responsibility for the delivery of the NDIS in Western Australia as of July 2018. The NDIS will continue to be rolled out in Western Australia, with the aim of reaching full scheme on 1 July 2023.

The NDIS was established by the *National Disability Insurance Scheme Act 2013 (Cth)*. Amongst other things, that Act includes access criteria (s 21), age requirements (s 22), residency requirements (s 23), disability requirements (s 24) and early intervention requirements (s 25) for participation in the NDIS.

The *National Disability Insurance Scheme Act 2013 (Cth)* does not expressly define 'disability'. The NDIA must be satisfied that a prospective NDIS participant meets the 'disability requirements' in s 24(1)(a). To do so a person must have a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition (s 24(1)(a)); the impairment(s) must result in a substantially reduced capacity of the person for communication, social interaction, learning, mobility, self-care or self-management (s 24(1)(b)); the impairment(s) affect the person's capacity for social and economic participation (s 24(1)(c)); and the person is likely to require support under the NDIA for their lifetime (s 24(1)(e)).

The term 'impairment' commonly refers to a loss of, or damage to, a physical, sensory or mental function (*Mulligan and NDIA* [2014] AATA 374 at [19]).

³¹⁴ NDIS, *Quarterly Reports* (30 June 2021) WA Dashboard as at 30 June 2020 (accessed 16 September 2021).

³¹⁵ National Disability Insurance Scheme, *NDIS in Western Australia* (accessed 8 October 2020).

For the purpose of determining access, the *National Disability Insurance Scheme Act 2013* (Cth) is not concerned with what caused a person's disability. All people with disabilities who meet the access criteria can be participants, whether the disability came about through birth, disease, injury or accident (see *Mulligan and NDIA* [2015] FCA 44 at [16]).³¹⁶

The NDIA has developed a list of conditions and state or territory disability programs which are designed to streamline the access process. Where a prospective participant has a condition included in List A or List B, or was an existing client of a disability program included in List C, the NDIA will be satisfied that the person meets one or more of the disability requirements.³¹⁷

National Disability Services advises:³¹⁸

It should be highlighted that the transition to the NDIS in Western Australia has been delayed and is behind schedule.

The NDIS does not cover all people with disability in Western Australia.

The Western Australian state disability ecosystem also comprises more than 347,000 Western Australians with disability who are not eligible for individualised funded supports under the Scheme, as well as the projected 48,000 people eligible for the NDIS.

4.1.5 Care and assistance

Under the *Carers Recognition Act 2004* (WA) ss 4 and 5, a carer is an individual providing **ongoing** care or assistance to a person with a disability, a person with a chronic illness (including a mental illness) or a person who requires assistance with everyday tasks because of frailty. However, the person is not a carer if the person provides the care or assistance under a contract for services (i.e. paid care workers) or whilst doing community work.

In Australia in 2018:³¹⁹

³¹⁶ National Disability Insurance Scheme, *NDIS in Western Australia*, Access to the NDIS Operational Guideline: The Disability Requirements, section 8 (accessed 26 November 2020).

³¹⁷ National Disability Insurance Scheme, *NDIS in Western Australia*, Access to the NDIS; Sections 8.6.1 - 8.6.3 (accessed 17 September 2019).

³¹⁸ Submission from National Disability Services WA (22 June 2020).

³¹⁹ ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (2019) (Cat No 4430.0) Key Statistics – Disability, Key Statistics - Carers (accessed 16 January 2020).

- around three in five people with disabilities needed assistance with at least one activity of daily life;
- 53.1% of people with disabilities used aids or equipment to help with their disability.
- the average age of a primary carer was 55 years;
- 37.4% of primary carers (i.e. people who are the main provider of informal assistance to a person with disability) were living with a disability themselves;
- females were more than 2.5 times more likely than men to be a primary carer;
- for carers aged 15 to 64 years, the labour force participation rate for primary carers (58.8%) and other carers (76.6%) was lower than for non-carers (77.4%); and
- the primary reason for taking on a carer role was most commonly a sense of family responsibility (78.6%), according to reports by primary carers. The second most common reason was a feeling that they could provide better care than anyone else, followed by feeling an emotional obligation to undertake the role.

In 2016, data from the Western Australian Government's *Health and Wellbeing Surveillance System* showed that the primary carer of a child with a disability, long-term illness or pain was most frequently their mother (73.0%).³²⁰

Estimates from the 2016 ABS Census indicated that, of people aged 15 years and over, 9.8% (196, 328 people) provided unpaid assistance to a person with a disability during the two weeks before the Census.³²¹

Western Australian legislation was developed in response to calls from carers for greater recognition and consideration by service providers.³²² Under the *Carers Recognition Act 2004* (WA) s 4 and Sch 1, the Western Australian Carers Charter provides that:³²³

³²⁰ Government of Western Australia, Department of Health, *Health and Wellbeing of Children in Western Australia 2016, Overview and Trends*, page 15 (accessed 17 September 2019).

³²¹ ABS, *2016 Census QuickStats* (accessed 17 September 2019).

³²² Carers Australia Western Australia, Carers Recognition Act 2004, '*What is the Carers Recognition Act 2004?*' (accessed 28 August 2018).

³²³ *Carers Recognition Act 2004* (WA) Sch 1.

1. *Carers must be treated with respect and dignity.*
2. *The role of carers must be recognised by including carers in the assessment, planning, delivery and review of services that impact on them and the role of carers.*
3. *The views and needs of carers must be taken into account along with the views, needs and best interests of people receiving care when decisions are made that impact on carers and the role of carers.*
4. *Complaints made by carers in relation to services that impact on them and the role of carers must be given due attention and consideration.*

'Carer respite' enables a carer to access support if they need a break from their role. Respite may be available as either:

- residential respite which involves short-term stays away from home; and
- non-residential respite which involves someone coming into the home to care for a family member with a disability or accompanying them to activities in the community.

People with disability on the National Disability Insurance Scheme (NDIS) may be funded for respite through their NDIS plan.³²⁴

Carer Gateway is a Federal Government initiative which commenced on 6 April 2020, providing a mix of free digital and in-person supports, services and advice for carers. These services were specifically designed and tested by carers to help reduce stress and build resilience in the caring role. In addition to a number of resources available through the national Carer Gateway website, dedicated in-person supports and services are delivered throughout the states and territories through a network of Carer Gateway Service Providers. For Western Australia, Carers WA and HelpingMinds deliver these services.³²⁵

4.1.6 Health

The *Western Australian Disability Health Framework 2015-2025* was developed by the Disability Health Network as Western Australia's response to the World Health Organisation

³²⁴ Submission from People with Disabilities (WA) Inc. (9 March 2020).

³²⁵ Carers WA, *Carer Gateway Service* (accessed 8 October 2020).

(WHO) Global Disability Action Plan 2014-2020. The framework adopts the World Health Organisation definition of health:³²⁶

Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.

According to the *WA Disability Health Framework 2015-2025*, despite the overall improvement in the general population's health, there is a large gap between the health of Australians with disabilities and those without disabilities.³²⁷

When compared with people who did not have disabilities, people with disabilities were more likely to assess their health as poor (13% compared with 0.8%) or fair (23% compared with 5.8%).³²⁸

In 2016, the National Mental Health Commission reported that people living with severe mental illnesses are particularly at risk of poor physical health, being:³²⁹

- six times more likely to die from cardiovascular disease;
- five times more likely to smoke; and
- four times more likely to die of respiratory disease.

In Western Australia, the life expectancy gap between individuals with and without a mental illness increased from 13.5 to 15.9 years for males and from 10.4 to 12.0 years for females between 1985 and 2005.³³⁰

An Australian Institute of Health and Welfare (AIHW) study found that people with severe or profound disabilities aged 15 to 64 years, in comparison to people without disabilities were:³³¹

- ten times more likely to have check-ups with general practitioners; and

³²⁶ Government of Western Australia, Department of Health, *WA Disability Health Framework 2015-2025: Improving the Health Care of People with Disability*, page 4 (accessed 15 March 2019).

³²⁷ Government of Western Australia, Department of Health, *WA Disability Health Framework 2015-2025: Improving the Health Care of People with Disability*, page 5 (accessed 17 September 2019).

³²⁸ ABS, *General Social Survey: Summary Results, Australia, 2014* (Cat No 4159.0) (2015) People with Disability (accessed 17 September 2019).

³²⁹ Australian Government, National Mental Health Commission, *2017 National Report on Mental Health and Suicide Prevention*, page 27 (accessed 15 March 2019).

³³⁰ Mental Health Commission, *Better Choices. Better Lives. Western Australian Mental Health, Alcohol and Other Drug Services Plan 2015-2025* (2015) (accessed 15 March 2019).

³³¹ Cited in Government of Western Australia, Department of Health, *WA Disability Health Framework 2015-2025: Improving the Health Care of People with Disability*, page 2 (accessed 25 November 2020).

- five times more likely to consult specialist doctors and other health professionals like occupational therapists, social workers and welfare workers.

According to the AIHW people with disabilities use a range of mainstream health services – such as general practitioners, medical specialists and dentists. Some experience difficulties in accessing these services, such as unacceptable or lengthy waiting times, cost, inaccessibility of buildings, and discrimination by health professionals. In 2015, amongst people with disabilities aged under 65 living in the community:³³²

- one in five delayed or did not see a GP because of the cost;
- one in four did not see a medical specialist when required, mainly because of the cost; and
- one in four delayed going or did not go to the hospital because of the cost.

It may not always be the cost of the medical service or appointment itself that is a bar to help-seeking. It may be the associated costs, such as the costs of transport and care required to get to a medical service or appointment, or medication costs, which are a barrier.³³³

According to 2018 ABS data, 23.2% of people with disabilities reported their main long-term health condition was a mental or behavioural disorder and 76.8% reported that it was a physical disorder.³³⁴

The 2015 ABS data for Western Australia showed that:³³⁵

- 76,200 people with a reported disability indicated that their main condition was a mental and/or behavioural condition, with 34,300 of those having a profound or severe core activity limitation.
- Of those with a mental and/or behavioural condition, 25,600 had an intellectual and developmental disorder, with 16,600 of those having a profound or severe core activity limitation.

³³² Australian Institute of Health and Welfare, *Access to Health Services by Australians with Disability* (3 December 2017) (accessed 15 March 2019).

³³³ Submission from the Department of Communities (8 October 2020).

³³⁴ ABS, *Disability, Ageing and Carers, Australia: Summary of Findings 2018* (2019) (Cat No 4430.0) Key Statistics - Disability (accessed 16 January 2020).

³³⁵ ABS, *Disability, Ageing and Carers, Western Australia, 2015* (Cat No 4430.0) Data Cubes - Western Australia – Table 12.1 (accessed 15 March 2019).

- Of those with a mental and/or behavioural condition, 26,400 had a psychosis and/or mood affective disorder, with 12,300 of those having a profound or severe core activity limitation.
- 286,400 people with a reported disability indicated that their main condition was a physical condition, with 67,800 of those having a profound or severe core activity limitation.
- Of those with a physical condition, the most common conditions were diseases of the musculo-skeletal system and connective tissue, which affected 109,600 people, with 22,300 of those having a profound or severe core activity limitation.

Estimates from the ABS *National Health Survey 2017-18* show that about 4.0 million Australians (16% of the population) have back problems. Back problems are Australia's second leading cause of disease burden overall, accounting for 4.1% of the national disease burden. Back problems are most common in people aged 65-79 years. There are many causes which include issues related to posture and injuries, osteoarthritis, disc disease, osteoporosis and some genetic conditions. Pain is the main symptom of back problems, with one study reporting that 14% of people with long term back problems experience constant or persistent pain. The survey estimated that 70-90% of people will suffer from lower back pain in some form at some point in their lives.³³⁶

In a 2017 Australian-based study, 14% of people with disabilities self-reported disability-based discrimination in the previous year. The study found that disability-based discrimination is associated with higher psychological distress and poorer self-rated health, which suggests that discrimination may be an important determinant of poorer health outcomes. It was concluded that disability-based discrimination is an under-recognised public health problem and addressing discrimination is likely to reduce social and economic disadvantage and improve the health of Australians with disabilities.³³⁷

For more information about disability discrimination please refer to section 4.3 of this chapter.

³³⁶ Australian Institute of Health and Welfare, *Back Problems* (30 August 2019) (accessed 17 September 2019).

³³⁷ Krnjacki L, et al, *Disability-based Discrimination and Health: Findings from an Australian-based Population Study*, Australian and New Zealand Journal of Public Health (2018) 42(2) Abstract, page 172 (accessed 18 September 2019).

4.1.7 Accommodation and housing

The Department of Communities provides a range of housing options to help people with disabilities access appropriate and affordable housing. The Department of Communities defines a person with a disability as:³³⁸

Any person with an intellectual, psychiatric, cognitive, neurological, sensory or physical impairment that is permanent or is likely to be permanent, which impacts on the housing needs of that person.

In July 1996, the then Housing Authority introduced the Community Disability Housing Program (CDHP). The purpose of the CDHP is to provide long term rental housing for people with disability and/or mental illness who require ongoing support services. Eligible individuals have been provided with a level of funding (through the Department of Communities, the NDIS or the Mental Health Commission) for use by the individuals to purchase relevant support services to enable them to live independently in the community. The individual is responsible for either self-managing their supports or choosing a suitable support provider. The management of the housing and tenancy is primarily undertaken through a community housing organisation.³³⁹

The National Disability Insurance Scheme (NDIS) may also offer funding for support to live independently in the community with living supports, or in shared supported accommodation.³⁴⁰ The NDIS may provide funding for:

- fund home modifications – to the participants own home, a private rental property or social housing;
- the cost of purpose built-housing, for participants who need specialised housing due to their disability; and
- daily living supports.

³³⁸ Government of Western Australia, Department of Communities - Housing Authority, Living with a Disability - *Housing Options for People with Disabilities Brochure*, page 2 (accessed 17 February 2020).

³³⁹ Submission from the Department of Communities (15 September 2020).

³⁴⁰ Submission from People with Disabilities (WA) Inc. (9 March 2020).

The NDIS may provide options such as co-residency, host families and other shared living arrangements.³⁴¹

The NDIS will generally not pay rent for a participant.

People with Disabilities (WA) Inc. is concerned that the growing divide between federal disability income such as the Disability Support Pension, and high rents in Western Australia will lead to more people with disabilities becoming homeless.³⁴²

Results from the 2016 ABS Census indicated that in 2016, as in 2011 and 2006, 5% of homeless persons needed help or assistance in one or more of the three core areas of self-care, mobility and communication because of a disability, long-term health condition (lasting six months or more) or old age.³⁴³

The Mental Health Commission provides information on residential services for people with mental illness to live for short, medium or long-term stays. However, these residential services are not funded by the Mental Health Commission but are provided by non-government organisations.³⁴⁴

Whilst it is not to be regarded as an accommodation or housing option, the Bennett Brook Disability Justice Centre provides placement for persons who are accused of a crime but are unfit to plead. It provides an appropriate and rehabilitative placement option, as an alternative to prison, for accused people on a custody order under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).³⁴⁵

Further information about the Bennett Brook Disability Justice Centre can be found in section 4.4.7.4 of this chapter.

³⁴¹ Submission from People with Disabilities (WA) Inc. (9 March 2020).

³⁴² Submission from People with Disabilities (WA) Inc. (9 March 2020).

³⁴³ ABS, *Census of Population and Housing: Estimating Homelessness, 2016* (Cat No 2049.0) (14 March 2018) Key Results - Disability (14 March 2018) (accessed 18 September 2019).

³⁴⁴ Government of Western Australia, Mental Health Commission, *Residential Services for Mental Health* (accessed 15 March 2019).

³⁴⁵ Disability Services Commission, *Annual Report 2015-2016* (2016) pages 11, 14, and 46 (accessed 15 March 2019); Department of Communities, *Bennett Brook Disability Justice Centre* (accessed 26 November 2020)).

4.1.8 Employment and income

Australia signed the *Convention on the Rights of Persons with Disabilities* (CRPD) on 30 March 2007, and has since ratified the CRPD.³⁴⁶ The CRPD sets out the rights of people with disabilities generally and in respect of employment.³⁴⁷ In particular, article 27 of the CRPD protects the right to work for people with disabilities. This includes, among other things:³⁴⁸

- the right to work on an equal basis to others;
- the right to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions; and
- the right to effective access to general technical and vocational training.

Key figures for Australians with disabilities of working age in 2018 include:³⁴⁹

- an unemployment rate for people with disabilities of 10.3%, compared to people without disabilities at 4.6%;
- 28.3% of people with disabilities were working full-time, compared with 54.8% of those without disabilities;
- 46.6% of people with disabilities were not in the labour force, compared to 15.9% of those without disabilities;
- 64.5% of those people with disability working part-time had an employment restriction (such as around the number of hours they could work or the need for special equipment); and
- the weekly median income of people with disabilities was \$455 which was less than half of those with no reported disabilities.

³⁴⁶ *Convention on the Rights of Persons with Disabilities Declaration 2009* (accessed 26 November 2020).

³⁴⁷ *Convention on the Rights of Persons with Disabilities Declaration 2009* (accessed 26 November 2020).

³⁴⁸ Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (2016) (accessed 26 November 2020).

³⁴⁹ ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (2019) Key Statistics – Disability (accessed 21 January 2020).

From 2015-17, the proportion of higher education new graduates obtaining full-time employment was lower for people with disabilities than people without disabilities.³⁵⁰ For example, the recorded rates were:

- In 2015:
 - Reported disability (56.2%)
 - No disability (69.2%)
- In 2016:
 - Reported disability (60.9%)
 - No disability (71.5%)
- In 2017:
 - Reported disability (61.5%)
 - No disability (72.4%)

Prior to 30 June 2020, Australian Disability Enterprises supported people with moderate to severe disabilities to engage in a wide variety of work tasks such as packaging, assembly, production, recycling, screen printing and food service.³⁵¹ From that date, the program ceased, with the 20,000 supported employees being transitioned to the NDIS program.³⁵²

Disability Employment Services assist and support people with disabilities to find work in open work situations, including providing support to employers.³⁵³ As of 2020, there were 224 providers of the Disability Employment Services programs operating over 2000 sites in Australia.³⁵⁴

Of the 755 complaints about disability discrimination received by the Australian Human Rights Commission in 2016-17, 311 (33%) were in the area of employment.³⁵⁵ This is consistent with data from other state and territory anti-discrimination and equal opportunity agencies. For

³⁵⁰ Graduate Careers Australia, *Employment and Salary Outcomes of Higher Education Graduates from 2017* (February 2018) page 8 (accessed 25 November 2020).

³⁵¹ Australian Government, Department of Social Services, Disability and Carers, *Australian Disability Enterprises* (last updated 17 September 2020) (accessed 8 October 2020).

³⁵² Australian Government, Department of Social Services, Disability and Carers, *ADE Transition to the NDIS* (last updated 17 September 2020) (accessed 8 October 2020).

³⁵³ Disability Employment Australia, Disability Employment Services Sector, *Get the Low-down on DES* (accessed 8 October 2020).

³⁵⁴ Disability Employment Australia, Disability Employment Services Sector, *Get the Low-down on DES* (accessed 15 January 2020).

³⁵⁵ Australian Human Rights Commission, *Annual Report 2016-2017*, pages 20 and 22 (accessed 15 March 2019).

example, in 2014-15 the average proportion of disability discrimination complaints which related to employment, across all Australian jurisdictions, was 40.4%.³⁵⁶

According to Australian Human Rights Commission data, most complaints of disability discrimination in employment relate to events that occur in the course of employment. In 2014-15, 54.6% of complaints were about events during employment, 34.7% were about the end of employment and the remaining 10.6% were about events while looking for employment.³⁵⁷

4.1.9 Education

In 2015, 81% of children and young people aged five to 20 with disabilities, and 84% of those with severe or profound limitation, attended school or an educational institution.³⁵⁸

Between 2003 and 2015, there was a shift towards attending special schools and away from attending special classes in mainstream schools. The Australian Institute of Health and Welfare states that this could reflect a mix of positive and negative experiences. For example, a special school might provide the most appropriate support but may increase segregation.³⁵⁹

People with disabilities continue to have lower levels of educational attainment than those without disabilities. In 2015, around one in three people with disabilities aged 20 and over (32%), and one in four with severe or profound limitation (25%), had completed Year 12 or equivalent. This was much lower than the two in three people without disabilities in this age range (62%).³⁶⁰

The 2018 ABS Census indicated that there had been increases in education attainment for people aged 15 and over living with disabilities (who were living in households³⁶¹).³⁶²

³⁵⁶ Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (2016) page 12 (accessed 26 November 2020).

³⁵⁷ Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability* (2016) page 171 (accessed 26 November 2020).

³⁵⁸ Australian Institute of Health and Welfare, *Disability in Australia: Changes over Time in Inclusion and Participation in Education* (2017) pages 1 and 4 (accessed 26 November 2020).

³⁵⁹ Australian Institute of Health and Welfare, *Disability in Australia: Changes over Time in Inclusion and Participation in Education* (2017) pages 2 and 3 (accessed 26 November 2020).

³⁶⁰ Australian Institute of Health and Welfare, *Disability in Australia: Changes over Time in Inclusion and Participation in Education* (2017) page 4 (accessed 26 November 2020).

³⁶¹ The ABS categorises accommodation as 'households' and 'cared accommodation' such as hospitals, nursing homes and aged care hostels.

³⁶² ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (2019) Disability – Education (accessed 20 January 2020).

- 33.4% had completed a year 12 or equivalent (up from 31.4% in 2015);
- 16.1% had a Bachelor degree (up from 14.9% in 2015); and
- 9.2% had an advanced diploma or diploma (up from 8.2% in 2015).

4.2 CRIME AND IMPRISONMENT

The National Prisoner Health Data Collection (NPHDC) included information on disabilities among prison entrants for the first time in 2015, including both physical and intellectual disabilities:³⁶³ The data collected in 2018 showed that:³⁶⁴

- 30% of prison entrants reported being told they had a chronic condition (which included asthma, arthritis, cardiovascular disease, diabetes and/or cancer). This was higher in female prison entrants (45%) than males (28%).
- 29% of prison entrants reported that they had a chronic health condition which affected participation in day-to-day activities, education or employment.
- The self-reported prevalence of limitations that affected education or employment participation among prison entrants aged 18–34 was four times that of people of the same age in the general community.
- 40% of prison entrants reported being told they had a mental health condition at some stage in their life. This was higher in female prison entrants (65%) than males (36%).
- 23% of prison entrants reported currently taking medication for a mental health condition.

In relation to mental illness, Mental Health Commission internal modelling suggests that 59% of the adult prison population, and 65% of the juvenile detainees in Western Australia has a mental illness: almost three times the prevalence in the general population.³⁶⁵

³⁶³ Australian Institute of Health and Welfare (AIHW), *The Health of Australia's Prisoners 2015* (27 November 2015) (accessed 26 November 2020).

³⁶⁴ Australian Institute of Health and Welfare (AIHW), *The Health of Australia's Prisoners 2018* (30 May 2019) pages 27, 58 and 77 (accessed 26 November 2020).

³⁶⁵ Mental Health Commission, *Better Choices. Better Lives. Western Australian Mental Health, Alcohol and Other Drug Services Plan 2015-2025* (accessed 26 November 2020).

A 2012-13 study in Western Australia also found that 'the prevalence of mental disorder and substance use disorders in Western Australian reception prisoners is much higher than in the general population' and that:³⁶⁶

- nearly two thirds (63%) of women and 40% of men fulfilled criteria for a current diagnosis of mood disorder, anxiety disorder, post-traumatic stress disorder and/or eating disorder;
- 44.2% of women and 24% of men had attempted suicide at some time in their life;
- over a quarter (26%) of women fulfilled criteria for post-traumatic stress disorder;
- an estimated one in five (20%) of women and 13 % of men had a lifetime diagnosis of a psychotic disorder (i.e. schizophrenia, schizoaffective disorder or organic psychotic disorder);
- nearly a third of women (30.3%) and 17.9% of men had previously been inpatients in a psychiatric unit;
- 52.9% of women and 37.9% of men had a co-occurring mental illness and a substance use disorder; and
- only 12.6% of women reception prisoners, and 15.9% of men had neither a mental disorder nor a substance use disorder

The Office of the Inspector of Custodial Services issued a report in September 2018 into prisoner access to secure mental health treatment.³⁶⁷ It reported that:

- Half of the 7,000 people in prison in Western Australia have some level of mental health disorder. Of this group:
 - around ten per cent require 'close mental health support';
 - over 200 need, or may need treatment in clinical conditions; and

³⁶⁶ Davison S, Fleming J, Butler T, Morgan V, Petch E, Morgan F, Rock D, Jones J, Wright M, Mitchell M & Janca A, *Mental Health and Substance Use Problems in Western Australian Prisoners: Report from the Health and Emotional Wellbeing Survey of Western Australian Reception Prisoners, 2013* (2015) pages 10 and 11 (accessed 15 March 2019).

³⁶⁷ Office of the Inspector for Custodial Services, Government of Western Australia, *Prisoner Access to Secure Mental Health Treatment* (27 November 2018) (accessed 2 July 2020).

- at least 25 are so unwell that they require 'intensive and/or immediate care in a specialist inpatient mental health bed'.³⁶⁸

The Inspector reported:³⁶⁹

Prisoners are more likely to have experienced risk factors which cause mental illness when compared to the rest of the community. These risk factors include being socially excluded or isolated; poverty, neglect, abuse or trauma; misusing drugs or alcohol; having poor physical health; or having a physical or intellectual disability (COAG, 2012). In 2015, almost half of the people entering prison in Australia (49%) had reported being told by health professional that they had a mental health disorder (AIHW, 2015). This was an increase from 38 per cent in 2012. The report also stated that more than a quarter of people entering prison (27%) were taking medication prescribed for mental health conditions (AIHW, 2015).

Both mental illnesses and intellectual disabilities among offenders and prisoners have been acknowledged as particular issues which need to be addressed. New South Wales research on cognitive impairment showed that:³⁷⁰

Having a cognitive impairment predisposes persons who also experience other disadvantageous social circumstances to a greater enmeshment with the CJS [Criminal Justice System] early in life and persons with cognitive impairment and other disability such as mental health and AOD [Alcohol and Drugs] disorders (complex needs) are significantly more likely to have earlier, ongoing and more intense police, juvenile justice, court and corrections episodes and events. The cognitive and complex needs groups in the study have experienced low rates of disability support as children, young people and adults with Indigenous members of the cohort having the lowest levels of service and support. It is evident that those who are afforded ADHC [Ageing, Disability and Home Care] support do better, with less involvement in the CJS after they become clients compared with those with cognitive disability who do not receive ADHC services.

³⁶⁸ Office of the Inspector for Custodial Services, Government of Western Australia, *Prisoner Access to Secure Mental Health Treatment* (27 November 2018) page 5 (accessed 2 July 2020).

³⁶⁹ Office of the Inspector for Custodial Services, Government of Western Australia, *Prisoner Access to Secure Mental Health Treatment* (27 November 2018) page 9 (accessed 2 July 2020).

³⁷⁰ New South Wales Council for Intellectual Disability, *Participants or Just Policed?* (2014) page 2, citing Baldry and Others (2012) (accessed 26 November 2019).

National Disability Services WA cautions that prisoners with psychiatric disabilities should not be conflated into the one group with those who have intellectual disabilities — the responses required will be different.³⁷¹ People with Disabilities (WA) Inc. also cautions against aggregating mentally impaired defendants in one group for the same reasons.³⁷²

Communication methods and assumptions about understanding are different and need to be assessed individually. Although there may be co-occurring instances of intellectual disability, ABI, Autism and mental illness, if the support and questions are not tailored for the persons' cognitive ability there is a higher likelihood of misunderstanding and false information being inadvertently provided.

Alzheimer's WA advises intellectual disability is different to dementia, which can translate to memory, language skills and changes in personality and behaviour

Refer to sections 4.6.3.3.2, 4.6.3.3.4 and 4.6.3.3.5 for more information on communication with techniques for people with intellectual disabilities, acquired brain injury and mental illness.

In 2018, the non-government organisation Human Rights Watch reported that people with disabilities, particularly cognitive or psychosocial disabilities, are overrepresented in the criminal justice system in Australia – comprising around 18% of the nation's population, but almost 50% of people entering prison.³⁷³

- Aboriginal and Torres Strait Islander people with cognitive disabilities who find themselves in conflict with the law are more likely to be investigated, charged, and remanded in custody, than Aboriginal and Torres Strait Islander people without cognitive disabilities.³⁷⁴

³⁷¹ Submission from National Disability Services WA (October 2008).

³⁷² Submission from People with Disabilities (WA) Inc. (9 March 2020).

³⁷³ Human Rights Watch, *'I Needed Help, Instead I Was Punished' Abuse and Neglect of Prisoners with Disabilities in Australia* (6 February 2018) (accessed 15 March 2019).

³⁷⁴ Human Rights Watch, *'I Needed Help, Instead I Was Punished' Abuse and Neglect of Prisoners with Disabilities in Australia* (6 February 2018) (accessed 15 March 2019).

- Prisoners with disabilities reported having difficulty accessing basic services such as toilets, showers, kitchen, or bathrooms because the physical infrastructure was not accessible.³⁷⁵

New South Wales research, which was published in 2015, on Aboriginal people with mental and cognitive disabilities in the criminal justice system found that:³⁷⁶

An assimilationist approach was perceived as still pervasive amongst many of those working within criminal justice and human service agencies, with little recognition of the ongoing impact of colonisation, intergenerational trauma, and grief and loss for Aboriginal peoples. The lack of understanding and recognition around cognitive impairment was perceived as a key problem exacerbating contact with the criminal justice system. The overrepresentation of Aboriginal people with mental and cognitive disabilities in the criminal justice system was described as normalised in every community and context we investigated. Disability emerged as part of the accepted overall presentation of Aboriginal people with multiple and complex support needs in the criminal justice system. The view that Aboriginal people with disability should be managed by criminal justice agencies, that this is 'just how it is', permeates all agencies' practice. What emerged strongly from the data was the systemic normalisation of disadvantage, disability and offending, with the conflation of these seen most clearly in people with complex support needs.

Many Aboriginal people who end up in the criminal justice system have early lives marked by poverty, instability and violence, without access to good primary health care or early childhood education. What emerged from the qualitative interviewees is the way that an Aboriginal child with an intellectual disability or Fetal Alcohol Spectrum Disorder (FASD) rarely receives early diagnosis or positive intervention, resulting in their disengagement or expulsion from school at a relatively young age. Drug and alcohol misuse by young people is a common experience, along with emerging mental health issues. Frequent out of home care placements, which break down resulting in homelessness, are often experienced. Aboriginal people with mental and cognitive disabilities were described as particularly at risk of physical and sexual violence

³⁷⁵ Human Rights Watch, *'I Needed Help, Instead I Was Punished' Abuse and Neglect of Prisoners with Disabilities in Australia* (6 February 2018) (accessed 15 March 2019).

³⁷⁶ University of New South Wales Sydney, *A Preventable Path Indigenous Australians with Mental Health Disorders and Cognitive Disabilities in the Criminal Justice System Report* (2 November 2015) page 11 (accessed 15 March 2019).

from a young age, Aboriginal girls and women in particular. Increased police contact as a person of interest in relation to minor theft or public order offences is a common pathway, with the likelihood of a number of court appearances before a juvenile justice custodial period. Moving into adulthood, drug and alcohol misuse and mental health-related illnesses tend to worsen, often accompanied by increased experience of violence and self-harm, more serious offending and longer periods in custody. Trauma and violence emerged as common and pervasive experiences for Aboriginal people with mental and cognitive disabilities in the criminal justice system.

Other than occasional crisis-related admissions into hospital, there are reportedly few positive health and wellbeing options for this group. Drug and alcohol rehabilitation is often only available in a regional centre, which may be many hundreds of kilometres away, and even then, excludes people with a cognitive impairment. Mental health services are unable to accept people with drug or alcohol addiction. The few diversionary programs that aim to assist people whose offending is connected to their drug and alcohol addiction will not accept those with a history of violence. Incarceration becomes the default option in the absence of available or appropriate community-based care, housing or support.

4.2.1 Fetal Alcohol Spectrum Disorder (FASD) and the criminal justice system³⁷⁷

International research over the past decade has highlighted the link between Fetal Alcohol Spectrum Disorder (FASD) and involvement in the criminal justice system.

Fetal Alcohol Spectrum Disorder (FASD) is the diagnostic term used to describe the range of lifelong severe neurodevelopmental impairments that result from brain damage caused by prenatal alcohol exposure.³⁷⁸ No safe level of alcohol use in pregnancy has been established. The dose, pattern and timing of prenatal alcohol exposure all influence the resulting adverse outcomes.³⁷⁹ Not all exposure to alcohol in utero will have the same degree or type of effect on the developing fetus. A number of complex and interrelated factors can influence the effects

³⁷⁷ The information in this section is primarily based on the submission from the Telethon Kids Institute (Dr R Mutch, Dr H Passmore, Dr C Bower, N Kippin and S Hamilton) (9 March 2020).

³⁷⁸ FASD Hub, *What is FASD?* (accessed 4 March 2020).

³⁷⁹ O'Leary CM, Bower C, Zubrick SR, Geelhoed E, Kurinczuk JJ, Nassar N, *A New Method of Prenatal Alcohol Classification Accounting for Dose, Pattern and Timing of Exposure: Improving our Ability to Examine Fetal Effects from Low to Moderate Exposure* (*Journal of Epidemiology and Community Health*, 64, pages 956- 962 (2010)).

of prenatal alcohol exposure, including social determinants of health, colonisation³⁸⁰ and genetics.

In May 2016, a guide to the diagnosis of FASD was endorsed in Australia, including consensus to use FASD as a diagnostic term. The Guide was updated in February 2020³⁸¹ and is proposed for review in 2020-2022.

*For a diagnosis of FASD, an individual must have prenatal alcohol exposure and severe neurodevelopmental impairment in at least three of ten specified domains of central nervous system structure or function. The overarching diagnostic term of FASD simplifies the terminology and emphasises the primary importance of the severe neurodevelopmental impairment that results from an acquired brain injury caused by alcohol exposure before birth. Within FASD are two sub-categories: FASD with three sentinel facial features [short palpebral fissure, smooth philtrum and thin upper lip] and FASD with less than 3 sentinel facial features.*³⁸¹

Studies have found higher rates of FASD among Indigenous Australians than non-Indigenous Australians, but data on population prevalence rates in Australia are limited³⁸² and the condition is often unrecognised and undiagnosed, despite the fact that FASD can affect the child of any woman who consumes any amount or type of alcohol during pregnancy.³⁸³

In Australia, FASD is under-recognised and often goes undiagnosed.³⁸⁴ Significantly, however, FASD occurs in all parts of Australian society where alcohol is consumed.³⁸⁵

³⁸⁰ Blagg H, Tulich T, Mutch R, Williams R and May S, *FASD and the Criminal Justice System: Report to the Australian National Advisory Council on Alcohol and Drugs (ANACAD) Secretariat (Reference ID: 6000078020)* (2018).

³⁸¹ Bower C and Elliott EJ, *Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder (FASD)* (2016) (accessed 4 March 2020).

³⁸² Elliot EJ, Payne J, Morris A, Haan E, Bower, *Fetal Alcohol Syndrome: A Prospective National Surveillance Study, Archives Diseases in Childhood*, 93, pages 732-737 (2008); Fitzpatrick J, et al, *The Lilitwan Project: Neurodevelopmental Outcomes and Fetal Alcohol Spectrum Disorders in Remote Australian Aboriginal Children*, *Drug and Alcohol Review* (2015) 34(1) pages 25 and 26 (accessed 15 March 2019); Mutch RC, Watkins R, Bower C, Fetal alcohol spectrum disorders: Notifications to the Western Australian Register of Developmental Anomalies. *Journal of Paediatrics and Child Health*, 51, pages 433-436 (2015).

³⁸³ Bower C and Elliott EJ, *Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder (FASD)* (2016) (accessed 4 March 2020).

³⁸⁴ Bower C and Elliott EJ, *Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder (FASD)* (2016) page 2 (accessed 4 March 2020).

³⁸⁵ Bower C and Elliott EJ, *Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder (FASD)* (2016) page 2 (accessed 4 March 2020).

In *LCM v The State of Western Australia*, Martin CJ observed:³⁸⁶

FASD, generically speaking, has some particular characteristics which are relevant to the sentencing process. As Professor Douglas pointed out:

The cognitive, social and behavioural problems associated with FASD often bring sufferers to the attention of the criminal justice system. It has been estimated that approximately 60% of adolescents with FASD have been in trouble with the law. Impulsive behaviour may lead to stealing things for immediate consumption or use, unplanned offending and offending behaviour precipitated by fright or noise. As a result of their suggestibility, FASD sufferers may engage in secondary participation with more sophisticated offenders. Lack of memory or in not understanding cause and effect may lead to breach of court orders, further enmeshing FASD sufferers in the justice system. Impaired adaptive behaviour that results from brain damage is translated into practical problems such as trouble handling money and difficulties with day to day living skills. It may be difficult for FASD sufferers to understand or perceive social cues and to tolerate frustration. Inappropriate sexual behaviour is also common amongst FASD sufferers; in one study, about 50% of FASD sufferers had displayed inappropriate sexual behaviours. Canadian research has found that FASD is over-represented in prison populations of sex offenders.

*...Pre-natal alcohol exposure increases up to threefold the likelihood of alcohol abuse in adolescence. Researchers have noted that about 30% of FASD sufferers develop substance abuse problems. Such problems also increase the likelihood of involvement within criminal justice interventions, especially in Indigenous communities in Australia where alcohol use is often prohibited.*³⁸⁷

In *Churnside v The State of Western Australia*, the Court of Appeal noted:³⁸⁸

The circumstances of this case demonstrate that the courts of this State must make every possible effort and take every step consistent with the interests of justice to engage the services of governmental and non-governmental agencies to assist offenders to change their living

³⁸⁶ *LCM v The State of Western Australia* [2016] WASCA 164 [10] (accessed 16 September 2021).

³⁸⁷ Martin CJ citing Douglas H, *The Sentencing Response to Defendants with Fetal Alcohol Spectrum Disorder* (2010) 34(4) *Criminal Law Journal* 221, 223-225.

³⁸⁸ *Churnside v The State of Western Australia* [2016] WASCA 146 [7].

circumstances and behaviour in a way which will reduce the risk of reoffending, particularly in relation to offenders who suffer from cognitive deficits of the kind associated with foetal alcohol spectrum disorder. Without those efforts being made, the repetitive cycle of offending followed by ineffectual punishment is likely to continue indefinitely to the detriment of both the relevant offender and to the safety of the community.

International research has previously reported that the proportion of people in correctional facilities with FASD was between 98 and 233 per 1,000.³⁸⁹

- 23% of youths in juvenile detention had a diagnosis of FASD.³⁹⁰
- A person with FASD has 19 times the risk of being incarcerated than a person without FASD.³⁹¹
- 17.5% of adults in the Canadian correctional population met criteria for FASD, and an additional 13.8% may have met criteria but there was insufficient information to make a reliable clinical decision³⁹²

More recently, the Telethon Kids Institute undertook a study at Banksia Hill Detention Centre (Western Australia's only youth detention centre) to assess and identify the prevalence of FASD among young people sentenced to detention, to ascertain the views and experiences of the prevalence study participants and to design, implement and evaluate a workforce development strategy to build capacity among the detention centre workforce to consider, recognise and respond to FASD and other neurodevelopmental impairments.³⁹³ The project was intended to

³⁸⁹ Telethon Kids' Institute, *What Have We Done and What Are We Doing? FASD and Justice Projects*, Slide 2 (accessed 18 September 2019).

³⁹⁰ Fast, D K, Conry J and Looock, CA, *Identifying Fetal Alcohol Syndrome among Youth in the Criminal Justice System*, *Journal of Developmental and Behavioral Pediatrics*, 20(5), pages 370-372 (1999).

³⁹¹ Popova S, Lange S, Bekmuradov D, Mihic A and Rehm J, *Fetal Alcohol Spectrum Disorder Prevalence Estimates in Correctional Systems: A Systematic Literature Review*, *Canadian Journal of Public Health*, 102(5), pages 336-340 (2011); Popova S, Lange S, Shield K, Burd L and Rehm J, *Prevalence of Fetal Alcohol Spectrum Disorder among Special Subpopulations: A Systematic Review and Meta-analysis*, *Addiction*, 114(7), pages 1150-1172 (2019) (accessed 2 April 2020).

³⁹² McLachlan K, *Fetal Alcohol Spectrum Disorder in Yukon Corrections* (2017) (accessed February 2020).

³⁹³ Bower C, Watkins RE, Mutch RC, Marriott R, Freeman J, Kippin N, . . . Giglia R, *Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study among Young People Sentenced to Detention in Western Australia*, *BMJ Open*, 8(2) (2018); Passmore HM, Giglia R, Watkins RE, Mutch RC, Marriott R, Pestell C . . . Bower C, *Study Protocol for Screening and Diagnosis of Fetal Alcohol Spectrum Disorders (FASD) among Young People Sentenced to Detention in Western Australia*, *BMJ Open*, 6(6) (2016).

assist the through-care planning process by developing case management plans for young people and a workforce development strategy to assist the Department in training staff.³⁹⁴

Findings from the Banksia Hill Project included unprecedented levels of severe neurodevelopmental impairment amongst a representative sample of sentenced youth, and the highest known prevalence of FASD in a custodial setting worldwide:³⁹⁵

- 89% of sentenced young people had at least one form of severe neurodevelopmental impairment regardless of whether they had FASD or not.
- 36% were diagnosed with FASD, and this is likely an underestimate given there was an additional 9% who had severe impairment in three or more domains, but prenatal alcohol exposure was unknown.
- About a quarter of the young people were found to have cognitive impairment, with an IQ score at or below 70.
- 40% of the young people who participated in the study were under the age of 16 years, 73% were Aboriginal and half were from the Perth metropolitan area.
- 45% were identified with language disorder (developmental disorder related to communication skills), and of those with FASD, 69% were found to have impaired language and communication skills.³⁹⁶

Youth Justices Psychological Services (YJPS) presented an oral paper at the Seventh Annual International Conference on Fetal Alcohol Spectrum Disorder on 1 March 2017, which included the following statistics from 2016 Court reports.³⁹⁷

³⁹⁴ Department of Corrective Services, *Annual Report 2014-2015* (2015) page 44 (accessed 16 August 2018).

³⁹⁵ Bower C, Watkins RE, Mutch RC, Marriott R, Freeman J, Kippin N, . . . Giglia R, *Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study among Young People Sentenced to Detention in Western Australia*, *BMJ Open*, 8(2) (2018).

³⁹⁶ Kippin NR, Leitao S, Watkins R, Finlay-Jones A, Condon C, Marriott R . . . Bower C, *Language Diversity, Language Disorder, and Fetal Alcohol Spectrum Disorder among Youth Sentenced to Detention in Western Australia*, *International Journal of Law & Psychiatry*, 61, pages 40-49 (2018).

³⁹⁷ Annette Paul (Principal Clinical Psychologist) and Dr Carmel Pestell (Clinical Neuropsychologist), *Potential Pitfalls and Challenges to Providing Psychological Services for Young People with FASD within the Western Australian Juvenile Justice System* (1 March 2017) (accessed 4 April 2020).

- 28 of 242 young people receiving YJPS were recorded as having FASD, which equated to 12%;
- however, of those 28, only 17 had a confirmed FASD diagnosis (the 11 without a diagnosis included cases where maternal alcohol use was not confirmed; and where the young person was deemed 'at risk' of FASD based on only two, out of the required three, impaired domains);
- of the young people receiving YJPS recorded as having FASD, 89% were male and 11% female; and
- of the young people receiving YJPS recorded as having FASD, 79% were Aboriginal and 21% non-Aboriginal.

The FASD Research Australia Centre of Research Excellence (CRE) was established by Australian leaders in FASD research, with funding for five years (for the period of 2016 to 2020) from the National Health and Medical Council. There are two research centres, based in Perth and Sydney. The research centres have identified key focus areas in prevention, screening, diagnosis and management of FASD. One of the three key focus areas in management is the development of interventions to support youth in detention with FASD.³⁹⁸

The Telethon Kids Institute advised:³⁹⁹

In 2019, a new standard was set in international human rights guidelines with child rights' experts recommending the minimum age at which children should be held legally responsible should be raised to 14 years.⁴⁰⁰ Very few typically developing children or youth offenders could be considered fully cognisant of the moral, ethical or social implications of their actions and thought should be given throughout all legal processes to consider a child's developmental age, rather than their chronological age. In addition, the UN CRC emphasises (point 28):

³⁹⁸ National Organisation for Alcohol Spectrum Disorders (NOFASD) *FASD Research Australia CRE* (accessed 2 April 2020).

³⁹⁹ Submission from Telethon Kids Institute (Dr R Mutch, Dr H Passmore, Dr C Bower, N Kippin and S Hamilton) (9 March 2020).

⁴⁰⁰ United Nations, *Convention on the Rights of the Child; General Comment No. 24 on Children's rights in the Child Justice System - Committee on the Rights of the Child CRC/C/GC/24* (2019) (2 April 2020).

Children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility. If not automatically excluded, such children should be individually assessed.

Please refer to section 4.4.2.7 for more information on FASD.

4.2.2 People with disabilities as victims of crime

National Disability Services WA submitted that:⁴⁰¹

- People with disabilities experience higher rates of abuse and violence than people who do not have disabilities.
- Violence against people with disabilities is often difficult to detect, investigate and prosecute. The true incidence of abuse is likely to be under-reported given the wide range of barriers to reporting. These include:
 - lack of education, awareness and training for support workers and people with disabilities;
 - fear of retribution; and
 - fear of not being believed.
- Processes fail to respond to individual reports, and as a result, opportunities to implement secondary protection measures to reduce future acts of violence, abuse or neglect are missed.
- There is a lack of support to communicate / participate in all stage of the criminal justice process.
- Complaints processes are often inaccessible and ineffective.
- 47% of people with disabilities experience physical violence after the age of 15, compared with 37% of people without disabilities.

⁴⁰¹ Submission from National Disability Services WA (22 June 2020).

- People with disabilities are 1.6 times more likely to have been victims of physical or threatened violence than people without disabilities (14% compared to 8%).
- Women with disabilities suffer higher rates of abuse. This is especially the case amongst women with psychosocial disabilities, where the rate is 12% (compared to 5% amongst women with disabilities generally).
- People with disabilities are 1.7 times more likely to be victims of break-ins.
- The 2015 Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings supported many of these findings

Please refer also to Chapter 13 (Family, Domestic and Sexual Violence) which contains information in relation to people with disabilities in section 13.6.3.

4.3 DISCRIMINATION

According to the Equal Opportunity Commission of Western Australia, there are 20 grounds of unlawful discrimination and 15 areas of public life under which a complaint can be lodged. Of the various grounds under the *Equal Opportunity Act 1984* (WA), complaints of impairment discrimination have consistently been the highest for many years, ahead of discrimination on the basis of race, age or gender. In 2016-17, 28.6% of complaints lodged were on the grounds of impairment.⁴⁰² In 2017-18, 26.5% of complaints lodged were on the grounds of impairment.⁴⁰³

In 2016, the Australian Human Rights Commission launched the 2016 edition of *Federal Discrimination Law* which provides an overview of the federal discrimination laws, examines the significant issues that have arisen in federal unlawful discrimination cases, and contains comprehensive tables of damages awarded since 13 April 2000 when the hearing of unlawful discrimination matters was transferred from the Commission to the Federal Court and Federal Circuit Court.⁴⁰⁴

⁴⁰² Government of Western Australia, Equal Opportunity Commission, *Annual Report 2016–17*, pages 3 and 28 (accessed 19 March 2019).

⁴⁰³ Government of Western Australia, Equal Opportunity Commission, *Annual Report 2017–18*, pages 2, 23 and 26 (accessed 19 March 2019).

⁴⁰⁴ Australian Human Rights Commission, *Launch of the Federal Discrimination Law 2016* (accessed 19 March 2019).

In 2018, the ABS reported that:⁴⁰⁵

- 9.6% of people with disabilities aged 15 years and over living in households⁴⁰⁶ reported that they had experienced disability discrimination (being treated less fairly than others because of their disability);
- the rates of reported discrimination were 10.3% for women and 8.8% for men;
- higher proportions of young people with disabilities (aged 15 to 24) reported experiencing discrimination (18.9%) compared to those aged 65 years and over (3.2%);
- the most common sources of disability discrimination were service and hospitality staff (36.3%), family and friends (21.0%) and employers (20.7%); and
- of those in the labour force who had experienced disability discrimination, the source was employers in 40.4% of cases and work colleagues in 34.5% of case.

In a 2017 Australian-based study, 14% of people with a disabilities self-reported disability-based discrimination in the previous year. The study found that disability-based discrimination is associated with higher psychological distress and poorer self-rated health, which suggests that discrimination may be an important determinant of poorer health outcomes. It was concluded that disability-based discrimination is an under-recognised public health problem and addressing discrimination is likely to reduce social and economic disadvantage and improve the health of Australians with disabilities.⁴⁰⁷

4.4 SOME INFORMATION

In the Federal context, there is a definition of 'disability' in the *Disability Discrimination Act 1992 (Cth)*, which is an Act with the objectives of eliminating discrimination against persons on the ground of disability in the areas of work, accommodation, education, access to premises,

⁴⁰⁵ ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (Cat No 4430.0) (24 October 2019) Disability – Discrimination (accessed 20 January 2020).

⁴⁰⁶ The 2015 ABS Survey of Disability Ageing and Carers categorised accommodation as (a) households and (b) cared accommodation, such as hospitals, nursing homes and aged care hostels.

⁴⁰⁷ Krnjacki, L, et al, *Disability-based Discrimination and Health: Findings from an Australian-based Population Study*, *Australian and New Zealand Journal of Public Health* 42(2) (2018) pages 1 and 173 (accessed 19 March 2019).

clubs and sport, the provision of goods, facilities, services and law.⁴⁰⁸ 'Disability' is defined in s 4 of the *Disability Discrimination Act 1992 (Cth)* to mean:

- (a) *total or partial loss of the person's bodily or mental functions; or*
- (b) *total or partial loss of a part of the body; or*
- (c) *the presence in the body of organisms causing disease or illness; or*
- (d) *the presence in the body of organisms capable of causing disease or illness; or*
- (e) *the malfunction, malformation or disfigurement of a part of the person's body; or*
- (f) *a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or*
- (g) *a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;*

and includes disability that:

- (h) *presently exists; or*
- (i) *previously existed but no longer exists; or*
- (j) *may exist in the future (including because of genetic predisposition to that disability);*
or
- (k) *is imputed to a person.*

*To avoid doubt, a **disability** that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.*

The *National Disability Insurance Scheme Act 2013 (Cth)* establishes the National Disability Insurance Scheme (NDIS) and the National Disability Insurance Agency (NDIA). That Act does not expressly define 'disability', however the NDIA must be satisfied that a prospective NDIS participant meets the 'disability requirements' in s 24(1)(a). To do so a person must have a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition (s 24(1)(a)); the impairment(s) must result in a substantially reduced capacity of the person for communication, social interaction, learning, mobility, self-care or self-management (s 24(1)(b)); the impairment(s) affect the person's capacity for social and economic participation (s 24(1)(c)); and the person is likely to require support under the NDIA for their lifetime (s 24(1)(e)).

⁴⁰⁸ *Disability Discrimination Act 1992 (Cth)* s 3 (accessed 23 October 2018).

For more information on the National Disability Insurance Scheme, please refer to section 4.1.4 of this chapter.

The *Disability Services Act 1993* (WA)⁴⁰⁹ section 3 defines 'disability' for the purposes of that Act as meaning a disability:

- (a) *which is attributable to an intellectual, psychiatric, cognitive, neurological, sensory, or physical impairment or a combination of those impairments; and*
- (b) *which is permanent or likely to be permanent; and*
- (c) *which may or may not be of a chronic or episodic nature; and*
- (d) *which results in —*
 - (i) *a substantially reduced capacity of the person for communication, social interaction, learning or mobility; and*
 - (ii) *a need for continuing support services.*

As indicated by paragraph (a) of that definition, there are many different types of disabilities, and these can be grouped and sub-grouped in any number of ways. There is also overlap between various categories of disabilities, for example a brain injury might result in physical, cognitive and/or mental disorders.

The Judicial Commission of New South Wales, in its *Equality before the Law Bench Book* groups the different types of disabilities as follows:⁴¹⁰

- **Physical disability** — including deafness or hearing impairments, blindness or visual impairments, mobility disabilities, and other forms of physical differences in the body or its functioning such as HIV/AIDS.
- **Intellectual disability** — including difficulty learning and understanding things.
- **Brain injury** — which may result in physical disabilities and/or cognitive disabilities and includes FASD.

⁴⁰⁹ Which is '[a]n Act for the establishment of the Disability Services Commission and the Ministerial Advisory Council on Disability, for the furtherance of principles applicable to people with disability, for the funding and provision of services to such people that meet certain objectives, for the resolution of complaints by such people, and for related purposes': Long title.

⁴¹⁰ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2018) (accessed 30 August 2018).

- **Psychiatric disability** — including mental illness, and/or behavioural disorders.

The Australian Bureau of Statistics (ABS) groups the types of disabilities slightly differently. It separates sensory disabilities (hearing, speech and vision) from other physical disabilities, and includes a category of psychosocial disabilities instead of psychiatric disabilities.⁴¹¹

For more information on the ABS categorisation of disabilities, and statistics on the prevalence of different types of disabilities, please refer to section 4.1.2 of this chapter.

Each of these disabilities is described in 4.4.2 of this section.

It is important to be mindful that:

- Every person with a disability is different and unique.
- Some people have one disability only, some have more than one disability within one of the groupings listed above, and others have more than one disability from two or more of the groupings.
- No two people with the same type of disability are identical in relation to their disability or their abilities. Every type of disability affects people in different ways. A disability may range from having a minor impact on how a person conducts their life to having a profound impact.
- Some disabilities are obvious but some are not.

People with Disabilities (WA) Inc. cautions that just because someone may have one disability, for example a physical disability such as cerebral palsy, it should not be assumed they have other disabilities; equally it should not be assumed that people with a disability do not have other disabilities, even if these are not immediately visible.⁴¹²

Kin Advocacy (formerly the Ethnic Disability Advocacy Centre) provided the following submission as to the types of barriers ethnically diverse people with disabilities may face:⁴¹³

⁴¹¹ ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (2019) Explanatory Notes – Appendix 2 – Disability Groups (accessed 17 February 2020).

⁴¹² Submission from People with Disabilities (WA) Inc. (9 March 2020).

⁴¹³ Submission from Kin Advocacy (formerly the Ethnic Disability Advocacy Centre) (5 March 2020).

People with disabilities from CaLD [Culturally and Linguistically Diverse] backgrounds face additional disadvantages:

- a lack of access to culturally appropriate services and support; and*
- not receiving the support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes.*

The legal system does not provides the modifications, supports and aids needed to participate in accessing justice in the criminal justice system and participate in decisions that affect their lives. The system needs to empower them to participate in criminal justice processes, provided with the support and aids they require, including communication that is accessible and appropriate.

These should include provision with necessary modifications and adjustments in order to obtain effective access to justice - 'reasonable accommodation' that provides adjustments that aim to level the playing field. This may include, but is not limited to:

- physical access to court buildings;*
- provision of accessible information;*
- adjustments in court proceedings;*
- effective use of Translation and Interpreting Services (TIS); and*
- the use of language which can be understood by a person with disability.*

People with intellectual disabilities may further face additional disadvantage. This includes a general lack of understanding of court proceedings. People with disabilities from CaLD backgrounds can be particularly disadvantaged in rural areas. A particular group to be aware of is refugees and other humanitarian entrants, who arrive in Australia due to a variety of different traumatic experiences, including conflict, famine and environmental disasters. Many of these people suffer from psychiatric disabilities, including Post Traumatic Stress Syndrome

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 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 be made, and if so, what type and level of adjustment. Refer to section 4.9 (particularly 4.6.1) for more information about mitigating barriers for people with disabilities and making appropriate adjustments.

4.4.1 Level of disability

There are many forms and degrees of disability. The World Health Organisation (WHO) developed the *International Classification of Functioning, Disability and Health* (ICF) which was endorsed by all 191 WHO Member States in 2001 as the international standard to describe and measure health and disability.⁴¹⁴

The Australian Bureau of Statistics' *Survey of Disability, Ageing and Carers* was developed to align with the ICF. The ABS survey defines disability as any limitation, restriction or impairment which restricts everyday activities and has lasted, or is likely to last, for at least six months, and differentiates between those who have long-term health conditions that limit their activities and those who have long-term conditions without restrictions and limitations.⁴¹⁵ It categorises degrees of disability according to limitations to the core activities of communication, mobility and self-care.⁴¹⁶ The categories are as follows:⁴¹⁷

- **Mild** — where a person does not need assistance and has no difficulty with core activity tasks, but uses aids or equipment.
- **Moderate** — where a person does not need assistance, but has difficulty with core activity tasks.
- **Severe** — where a person sometimes needs assistance or supervision with core activity tasks, has difficulty understanding or being understood by family or friends, or can communicate most easily using sign language or other non-spoken forms of communication.

⁴¹⁴ World Health Organisation, *International Classification of Functioning, Disability and Health* (ICF) (page updated 2 March 2018) (accessed 30 August 2018).

⁴¹⁵ ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (24 October 2019) Glossary (accessed 21 January 2020).

⁴¹⁶ ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (24 October 2019) Glossary (accessed 21 January 2020).

⁴¹⁷ ABS, *Disability, Ageing and Carers: Summary of Findings, 2018* (Cat No 4430.0) (24 October 2019) Glossary (accessed 21 January 2020).

- **Profound** — where a person is unable to perform self-care, mobility and/or communication tasks, or always needs assistance.

The *National Disability Insurance Scheme Act 2013 (Cth)* considers a person will meet the disability requirements if a person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition (s 24(1)(a)) which results in:

- substantially reduced capacity of the person for communication, social interaction, learning, mobility, self-care or self-management (s 24(1)(c));
- affected capacity for social and economic participation (s 24(1)(d)) and
- the person being likely to require support under the NDIS for their lifetime (s 24(1)(b) and (e)).

The Disability Services Commission advised that:⁴¹⁸

Some people with a profound or severe disability, including people with both physical and intellectual disabilities, are unable to learn basic social and living skills. They may need full support in all aspects of their lives, including specialised care in an accommodation facility. Most people with disabilities are able to overcome the restrictions imposed by their disability and with the use of aids and equipment function independently within the community. The majority of people with disabilities live with assistance from family and friends, while others receive specialised services and supports from government and non-government agencies in the community.

The Department of Communities also noted that people with disabilities now have the potential to access the NDIS as a source of funding for supports that are required.⁴¹⁹

⁴¹⁸ Submission from the Disability Services Commission (19 April 2007).

⁴¹⁹ Submission from the Department of Communities (15 September 2020).

4.4.2 Descriptions of the main types of disabilities

4.4.2.1 Physical disabilities other than sensory disabilities

A physical disability is a disorder of the musculoskeletal, circulatory, respiratory and nervous (neurological) systems,⁴²⁰ and may affect mobility, self-care and recreational and employment opportunities. A physical disability may have existed since birth or may have resulted from accident, illness, or injury. It may be mild, moderate, severe or profound in its effect on a person's life.

A person with a physical disability may need to use some sort of equipment for assistance with mobility. Some persons 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. Others may require greater assistance. For example, people with arthritis, paraplegia and quadriplegia may require high levels of support in order to maintain independence within the community.

Some common physical disabilities are:⁴²¹

- **Quadriplegia** — complete or partial loss of function (movement or sensation) in the trunk, lower limbs and upper limbs. Generally, this has resulted from damage high in the spinal column — for example, the neck.
- **Paraplegia** — complete or partial loss of function (movement or sensation) in the trunk and lower limbs. Generally, this has resulted from damage lower in the spinal column — for example, below the neck.
- **Cerebral palsy** — a disorder of movement and posture due to a defect or lesion on the immature brain. Cerebral palsy can cause stiffness of muscles, erratic movement of muscles or tremors, a loss of balance, and possibly speech impairment. A person with cerebral palsy may have other disabilities including sensory impairment, epilepsy, and/or intellectual disability; however, many do not. Do not assume that a person with

⁴²⁰ Government of Western Australia, Department of Communities, *What is Disability?*, Types of Disability (accessed 20 January 2020).

⁴²¹ Unless otherwise specified, information is drawn from the Judicial Commission of New South Wales, *Equality before the Law Bench Book* (last updated 12 June 2018) Section 5 [5.2.2.1] (accessed 18 September 2019).

cerebral palsy has another disability. There are many people with cerebral palsy who do not have an intellectual disability.

- **Epilepsy** — a disorder that, if left untreated, is likely to result in seizures – disturbances in particular areas of the brain that cause loss of control of one or more aspects of bodily activity. Seizures may be triggered 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 joints. Two out of three people with arthritis are under the age of 65.
- **Neurological Disorders** — disorders that affect the brain, spinal cord, eyes and nerves throughout the body. Conditions include cerebral palsy and epilepsy (described above) as well as multiple sclerosis, muscular dystrophy, motor neurone disease, dementia, spina bifida, Huntington's disease, Parkinson's disease and polio. Neurological disorders may fluctuate or progress. No cure is known for most of these conditions, however there are treatments and/or therapies that can manage symptoms. However, some of these conditions can reduce life expectancy. Some of the conditions are hereditary.⁴²²

Some neurological disorders may be linked with other disorders – for example, spina bifida may be linked to hydrocephalus, which is associated with learning difficulties. However, even if someone with spina bifida has hydrocephalus, they may or may not have learning difficulties. Do not assume a person with spina bifida also has another disability.

Alzheimer's WA reports that there is a correlation between Down Syndrome and Alzheimer's type dementia. Almost all people with Down Syndrome show some of the changes associated with Alzheimer's disease by age 40, and 50% have developed

⁴²² Multiple Sclerosis Western Australia, *Learning About Conditions* (accessed 20 February 2020).

Alzheimer's disease by age 60. However, do not assume that all people with Down Syndrome will develop Alzheimer's disease.⁴²³

Dementia and related conditions are discussed in more detail in chapter 6 on older people (sections 6.1.10.5 and 6.2.5.2).

- **There are many other physical disabilities** — for example, amputations and cystic fibrosis.

4.4.2.2 Deafness, hardness of hearing and related conditions

In 2014, the West Australian Institute for Deaf Education, operated by the state government, recorded enrolments of 2,100 children who were Deaf or with hearing loss.⁴²⁴ Nationally, there were almost 16,000 Deaf and hearing impaired children under the age of 21 in Australia who are fitted with hearing aids.⁴²⁵

- **Deafness** — complete, or almost complete, inability to hear. People who are deaf rely on their vision to assist them to communicate, and use a variety of ways to communicate, including Australian sign language (Auslan), lip reading, writing and expressive speech. Many people who are Deaf regard deafness as a culture rather than as a disability. The Western Australian Deaf Society has advised that Deaf people consider being deaf as part of their identity.
- **Deafblindness** — sensory disability resulting from a combination of hearing and vision loss or impairment. 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 with a hearing impairment has partial hearing loss. The hearing loss may be mild, moderate, or severe. A person who has a hearing impairment will usually prefer to rely as much as possible on their available hearing,

⁴²³ Alzheimer's WA, *About Dementia Help Sheets No. 15: Down Syndrome and Alzheimer's Disease* (2012) accessed 27 March 2020).

⁴²⁴ WA Foundation for Deaf Children, *Research* (accessed 1 September 2021).

⁴²⁵ WA Foundation for Deaf Children, *Research* (accessed 1 September 2021).

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 hardness of hearing, and for some people hearing aids are not helpful.

4.4.2.3 *Blindness and vision impairments*

- **Blindness** — a complete, or almost complete, loss of vision. People who are blind vary in their ability to see. Some may be able to perceive light, shadow and/or shapes; others see nothing at all. People who are blind may use a guide dog, white cane (the international symbol of vision impairment), or a laser sensor or pathfinder. They may read using Braille or computer-assisted technology that reads aloud text or uses the inbuilt accessibility features in their devices.
- **Colour blindness** — an inability to distinguish between colours in a normal way. It is also known as colour deficiency. Some people with colour blindness have difficulty distinguishing between red and green, whereas others see the world in black, white and grey.
- **Deafblindness** — sensory disability resulting from a combination of hearing and vision loss or impairment. 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.
- **Vision impairment/low vision** — a partial loss of vision that is *not* correctable by wearing glasses and that affects the performance of daily tasks.

4.4.2.4 *Human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS)*

Human immunodeficiency virus (**HIV**) and acquired immune deficiency syndrome (**AIDS**) have been included in this chapter, as is the case in the New South Wales Judicial Commission's *Equality before the Law Bench Book*.⁴²⁶ However, these can not necessarily be regarded as

⁴²⁶ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2018) Section 5 [5.2.2.7] (accessed 20 August 2018).

physical disabilities, but health conditions which may limit a person's physical abilities.⁴²⁷ It is important that this information be included in this Bench Book so as to address some of the misconceptions and myths around these conditions.

HIV weakens a person's immune system making it difficult to fight infections. HIV can be passed on when body fluids containing the virus such as blood, semen, vaginal fluid, anal fluid or breast milk enter the bloodstream of a person who does not have HIV. If left untreated, HIV can cause AIDS. AIDS occurs when the body's immune system is compromised and unable to fight off infections and illnesses effectively.⁴²⁸

The number of new HIV diagnoses in 2017 in Western Australia was 79, which was the lowest number of annual new cases since 2009 (75) and represented a 27% decrease in annual cases since 2015 (108). In 2017, 47% of new HIV diagnoses were notified in men who have sex with men (MSM), 35% by heterosexual males and 13% by heterosexual females. Where injecting drug use was reported as the main risk factor, cases remained low with only one notification in 2017. The decline in HIV notifications was mainly driven by a decrease in cases among MSM, which decreased by 42% between 2016 (64) and 2017 (37).⁴²⁹

The terms HIV and AIDS are often use synonymously. This is incorrect; they do not mean the same thing. HIV is a virus, whilst AIDS is the final stage of HIV infection when the body can no longer fight certain infections, diseases and cancers.⁴³⁰

The *Equal Treatment Bench Book* (United Kingdom), as revised in February 2021, states that some people are not aware of the difference between HIV and AIDS and the medical developments of the previous decade which enable people with HIV to lead normal lives. It sets out the following 'myth busters':⁴³¹

- An individual cannot be infected by 'AIDS'.

⁴²⁷ Submission from the Department of Communities (15 September 2020).

⁴²⁸ Government of Western Australia, Department of Health, *WA HIV Strategy 2019-2023*, page 13 (accessed 21 January 2020).

⁴²⁹ Government of Western Australia, Department of Health, *WA HIV Strategy 2019-2023*, page 13 (accessed 21 January 2020).

⁴³⁰ Judicial College (United Kingdom), *Equal Treatment Bench Book* (revised February 2021) Appendix B, page 415 (accessed 7 April 2021).

⁴³¹ Judicial College (United Kingdom), *Equal Treatment Bench Book* (revised February 2021) Appendix B, page 415 - 416 (accessed 7 April 2021).

- There is no cure for HIV, but treatment can keep the virus under control and the immune system healthy. Treatment with anti-retrovirals (ART) does not merely alleviate symptoms but it restores and maintains the immune system, suppresses the replication of HIV in the body and often enables the individual to live a long and relatively normal life. AIDS-related illness has become much less common due to advancements in HIV treatments. ART can be associated with side effects such as fatigue, depression, nightmares and diarrhoea.
- HIV can now be treated with a 'one pill daily' medication regime licensed for the treatment of HIV.
- Research shows that HIV-positive individuals on effective ART (with a suppressed viral load for six months) and without sexually transmitted infections are sexually non-infectious.
- There are common misconceptions about how HIV is passed between people. It is transmitted through infected blood, semen, vaginal fluids or breast milk.
- It cannot be passed on through kissing or touching, biting, coughing or spitting, breathing the same air, and is not transmitted via chairs, toilet seats, swimming pools, water fountains or shared eating utensils.

The Australian Government's Department of Health has implemented eight national HIV strategies – the first in 1989 and most recently the *Eighth HIV Strategy 2018 – 2022* . It has been reported that the milestones and achievements of the *Seventh National HIV Strategy 2014 – 2017* included:⁴³²

- the recognition that ART is a significant prevention approach, with potential to prevent onwards transmission of HIV;
- earlier ART initiation, irrespective of the presence of symptomatic disease, which has health benefits for the patient, and public health benefits in terms of prevention;

⁴³² Reported in Government of Western Australia, Department of Health, *WA HIV Strategy 2015-2018* (accessed 15 March 2019).

- the introduction of HIV rapid testing in community-based settings, which increases access to testing for priority populations; and
- maintenance of the virtual elimination of HIV amongst sex workers, people who inject drugs, and mother-to-child transmission of HIV.

The *WA HIV Strategy 2019-2023* builds on the State's previous HIV strategies and is aligned with the *Eighth National HIV Strategy 2018-2022*, with the aims of:⁴³³

- working towards the United Nations' 95-95-95 goal to which Australia has committed (which involves responses to ensure that 95% of people with HIV are tested and know their status, 95% of people who are diagnosed with HIV receive effective anti-viral treatment, and 95% of treated people are virally suppressed);
- reducing the morbidity and mortality caused by HIV; and
- minimising the personal and social impact of HIV.

4.4.2.5 Intellectual disability

The Disability Services webpage of the Western Australian Department of Communities states:⁴³⁴

Intellectual disability includes intellectual and developmental disability which relate to difficulties with thought processes, learning, communicating, remembering information and using it appropriately, making judgments and problem solving. Intellectual disability is the result of interaction between developmentally attributable cognitive impairment, attitudinal and environmental barriers.

There are a number of known causes of intellectual disability including chromosomal disorders such as Down syndrome, birth defects and infections which can affect the central nervous system either before or after birth. Fetal Alcohol Spectrum Disorders (**FASD**) occur in some

⁴³³ Government of Western Australia, Department of Health, *WA HIV Strategy 2019-2023* (accessed 1 October 2019).

⁴³⁴ Government of Western Australia, Department of Communities, *Disability Services*, About Disability – What is Disability? (accessed 26 November 2020).

children exposed to alcohol in-utero, which may result in a number of poor outcomes including developmental delay and behavioural problems.

Please refer to sections 4.2.1 and 4.4.2.7 for more information on FASD.

An intellectual disability is permanent. It is not a sickness, cannot be cured and is not medically treatable. People may be born with an intellectual disability or develop one later in life before the age of 18 years.⁴³⁵ However, people with an intellectual disability can, and do, learn a wide range of skills throughout their lives. The effects of an intellectual disability (for example, difficulties in learning and development) can be minimised through appropriate levels of support, early intervention and educational opportunities.⁴³⁶

Importantly, and contrary to some of the extreme misconceptions that may be held, people with intellectual disabilities are *not* compulsive liars; are neither asexual nor extremely promiscuous (applied particularly to women); and *do* feel emotion and pain.⁴³⁷

Depending on the person, a person with an intellectual disability may:⁴³⁸

- take longer to absorb information;
- have difficulty understanding questions, abstract concepts or instructions;
- 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; and/or
- have difficulty expressing their needs.

⁴³⁵ Submission by Department of Communities (15 September 2020).

⁴³⁶ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (last updated 12 June 2018) Section 5 [5.2.2.4] (accessed 26 November 2020).

⁴³⁷ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (last updated 12 June 2018) Section 5 [5.2.2.4] (accessed 26 November 2020).

⁴³⁸ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (last updated 12 June 2018) Section 5 [5.2.2.4] (accessed 26 November 2020).

Alzheimer's WA advises that it is important to note that some of the behaviours may be similar in both intellectual disability and dementia,⁴³⁹ however they are separate and distinct conditions.⁴⁴⁰

Dementia and related conditions are discussed in more detail in chapter 6 on older people (sections 6.1.10.5 and 6.2.5.2).

Given the complex and cognitively demanding nature of legal proceedings, it is likely that processes at all stages of engagement with the criminal justice system (including police arrest and interviews, determining fitness to plead, court proceedings, sentencing, supervision orders and incarceration) will need to be adapted to appropriately consider the needs of an individual with intellectual disability. Indigenous children and young people have another layer of need relating firstly to intergenerational trauma incurred as a result of past colonial policies, and secondly to their different cultural ways of being and knowing.⁴⁴¹

4.4.2.5.1 Intellectual disability under the National Disability Insurance Scheme (NDIS)

To be eligible for NDIS services a person must meet the disability requirements under s 24 of the *National Disability Insurance Scheme Act 2013 (Cth)*. That includes a disability that is attributable to one or more intellectual impairments, which are or are likely to be permanent and result in substantially reduced functional capacity. The NDIS has published Operational Guidelines which attach lists of conditions which are likely to meet the disability requirements in s 24. Where a prospective participant has a condition included in List A or List B, or was an existing client of a disability program included in List C prior to the introduction of the NDIS, the NDIA will be satisfied that the person meets one or more of the disability requirements.⁴⁴² In relation to intellectual disability, List A conditions include:⁴⁴³

Intellectual disability diagnosed and assessed as moderate, severe or profound in accordance with current DSM criteria (e.g. IQ 55 points or less and severe deficits in adaptive functioning).

⁴³⁹ Submission from People with Disabilities (WA) Inc. (9 March 2020).

⁴⁴⁰ Submission from the Department of Communities (15 September 2020).

⁴⁴¹ Submission from the Department of Communities (15 September 2020).

⁴⁴² National Disability Insurance Scheme, *NDIS in Western Australia*, Access to the NDIS; Sections 8.6.1-8.6.3 (accessed 15 March 2019).

⁴⁴³ National Disability Insurance Scheme, *NDIS in Western Australia* Access to the NDIS; 8. Operational Guidelines; List A – Conditions which are Likely to Meet the Disability Requirements under Section 24 of the NDIA Act (accessed 19 March 2019).

List B conditions are permanent conditions for which functional capacity is variable and further assessment of functional capacity is generally required. List B includes:⁴⁴⁴

Conditions primarily resulting in intellectual/ learning impairment:

- *Intellectual disability*
- *Pervasive developmental disorders not meeting severity criteria in List A or List C*
- *Asperger syndrome*
- *Atypical autism*
- *Childhood autism*

In relation to autism spectrum disorder and Asperger syndrome, People with Disabilities (WA) Inc. submitted⁴⁴⁵:

Asperger syndrome is one of several sub-types of autism that have been folded into the single diagnosis of autism spectrum disorder. It is not common for autism spectrum to be viewed by the community as an intellectual disability being more often seen as a neurological and developmental disorder.

For more information on autism spectrum disorder, including Asperger Syndrome, please refer to section 4.4.2.9 of this chapter.

4.4.2.5.2 Intellectual Disability under the Diagnostic and Statistical Manual

The Fifth Edition (DSM-5) of the Diagnostic and Statistical Manual of Mental Disorders was published on 18 May 2013. For the first time a diagnosis of 'intellectual disability' was included, essentially replacing what was previously called 'mental retardation'. The DSM-5 diagnostic criteria for an 'intellectual disability' are summarised below:⁴⁴⁶

- **Deficits in intellectual functioning** - This includes deficits in various mental abilities: reasoning, problem solving, planning, abstract thinking, judgment, academic learning (to learn in school via traditional teaching methods) and experiential learning (to learn

⁴⁴⁴ National Disability Insurance Scheme, *NDIS in Western Australia*, Access to the NDIS; 8. Operational Guidelines; List B – Permanent Conditions for which Functional Capacity are Variable and Further Assessment of Functional Capacity is Generally Required (accessed 15 March 2019).

⁴⁴⁵ Submission from People with Disabilities (WA) Inc. (9 March 2020).

⁴⁴⁶ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5, 2013).

through experience, trial, error and observation). These mental abilities are measured by IQ tests. A score of approximately two standard deviations below average represents a significant cognitive deficit. These scores would occur in about 2.5% of the population. Or stated differently, 97.5% of people of the same age and culture would score higher. The tests used to measure IQ must be standardized and culturally appropriate. This is typically an IQ score of 70 or below.

- **Deficits or impairments in adaptive functioning** - This includes skills needed to live in an independent and responsible manner (communication, social skills, personal independence at home or in the community, and school/work functioning). Without these skills, a person needs additional supports to succeed at school, work, or independent life. Deficits in adaptive functioning are measured using standardized, culturally appropriate tests.

4.4.2.6 Acquired brain injury⁴⁴⁷

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 acquired brain injury as a consequence of trauma (for example, a car accident), stroke, infection, neurological disease (dementia), tumour, hypoxia and/or substance abuse (including alcohol and solvent use such as petrol sniffing).

Disability resulting from an acquired brain injury may be mild, moderate, severe or profound. It is rarely assisted by medication.

Every brain injury is different. Two injuries may appear to be similar but the outcomes can be vastly different. Brain injury may result in a physical disability only, or in a personality or thinking process change only, or in a combination of physical and cognitive disabilities.

Acquired brain injury may result in:

- memory loss;
- lack of concentration;

⁴⁴⁷ Unless otherwise stated, this information is adapted from the Judicial Commission of New South Wales, *Equality before the Law Bench Book* (last updated 12 June 2018) Section 5 [5.2.2.5] (accessed 26 November 2020).

- lack of motivation;
- tiredness;
- difficulty with abstract thinking;
- behavioural disinhibition resulting in inappropriate behaviour (which often accompanies frontal lobe damage);
- mood swings; and/or
- agitation and frustration.

If a person's cognitive ability (to think, remember and process information) falls below normal limits for a person's age and level of learning and training, and this occurs when a person is born or during the developmental period, it is called intellectual disability. If a cognitive deficit occurs after the age of 18 it is called a cognitive or learning disability. A cognitive or learning disability, therefore, may be associated with a brain injury acquired in later life, although it will manifest in the same way as intellectual disability.⁴⁴⁸

4.4.2.7 Fetal Alcohol Spectrum Disorder (FASD)⁴⁴⁹

Fetal Alcohol Spectrum Disorder (FASD) is the diagnostic term used to describe the lifelong severe neurodevelopmental impairments that result from brain damage caused by prenatal alcohol exposure.⁴⁵⁰

In May 2016, a guide to the diagnosis of FASD was endorsed in Australia, including consensus to use FASD as a diagnostic term. The Guide was updated in February 2020 and is proposed for review 2020-2022.⁴⁵¹

For a diagnosis of FASD, an individual must have prenatal alcohol exposure and severe neurodevelopmental impairment in at least three of ten specified domains of central nervous system structure or function. The overarching diagnostic term of FASD simplifies the terminology and emphasises the primary importance of the severe neurodevelopmental

⁴⁴⁸ Submission from the Disability Services Commission (as it was then, now part of the Department of Communities) (19 April 2007).

⁴⁴⁹ The information in this section is primarily based on the submission from the Telethon Kids Institute (Dr R Mutch, Dr H Passmore, Dr C Bower, N Kippin and S Hamilton) (9 March 2020). Refer also to Closing the Gap Clearinghouse, *Fetal Alcohol Spectrum Disorders: A Review of Interventions for Prevention and Management in Indigenous Communities* (25 February 2015) (accessed 28 January 2020).

⁴⁵⁰ FASD Hub, *What is FASD?* (accessed 4 March 2020).

⁴⁵¹ Bower C and Elliott EJ, *Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder (FASD)* (2016) (accessed 4 March 2020).

impairment that results from an acquired brain injury caused by alcohol exposure before birth. Within FASD are two sub-categories: FASD with three sentinel facial features [short palpebral fissure, smooth philtrum and thin upper lip] and FASD with less than 3 sentinel facial features.

FASD occurs in all socioeconomic groups where alcohol is consumed. The effects of prenatal alcohol exposure may not be seen at birth. FASD has lifelong consequences and may be diagnosed in children, youth and adults. As well as being a medical condition, FASD is a social issue for individuals living with FASD and their families. No level of maternal alcohol consumption at any time during pregnancy can be guaranteed to be completely 'safe' or 'no risk' for the developing fetus - the brain continues to develop throughout pregnancy. Although some people will have the facial features associated with FASD, most will not. However, all people with FASD will have damage to different parts of the brain.⁴⁵²

The ten domains of central nervous system structure or function are:⁴⁵³

- brain structure/neurology;
- motor skills;
- cognition;
- language;
- academic achievement;
- memory;
- attention;
- executive function (including impulse control and hyperactivity);
- affect regulation; and
- adaptive behaviour, social skills or social communication.

Impairments associated with FASD can include:⁴⁵⁴

- developmental delay;
- low IQ (only a small % will have an intellectual disability with an IQ <70, with most people with FASD registering in the lower end of the normal range);

⁴⁵² Telethon Kids Institute, *Alcohol and Pregnancy & FASD* (2019) [What is FASD?](#) (accessed 26 November 2020).

⁴⁵³ Bower C and Elliott EJ, *Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder (FASD)* (2016) (accessed 4 March 2020).

⁴⁵⁴ Telethon Kids Institute, *Alcohol and Pregnancy & FASD* (2019) [What is FASD?](#) (accessed 26 November 2020).

- poor language and communication skills affecting for example, vocabulary and grammar knowledge, providing explanations, and social communication skills;
- slow cognitive and auditory pace;
- poor judgment and inability to understand cause and effect;
- repeating the same actions or behaviours in the absence of a rationale for that behaviour or emotion;
- poor organisational and planning skills;
- difficulty with abstract concepts;
- problems with maths, time and money;
- impaired judgement and impulsivity;
- emotional – irritability, angry, frustrated, immature;
- sensory problems – noise, lighting, pain, cold;
- motor co-ordination problems;
- difficulty sleeping;
- high levels of activity;
- social and behavioural problems; and/or
- difficulty forming and maintaining relationships and sometimes being indiscriminately friendly.

FASD has lifelong consequences and can lead to significant secondary impairments, such as difficulties at school, substance use, mental ill-health, difficulties living independently, problems obtaining and maintaining employment and early contact with the justice system.⁴⁵⁵ Individuals with FASD have a shortened lifespan with an average life expectancy of only 34 years of age.⁴⁵⁶ As neurological disability is permanent, FASD is not 'outgrown', and primary impairments are not 'cured'. An approach to management of FASD over the life course that is multifaceted, cross disciplinary and collaborative will enhance participation and quality of life for individuals, families and communities.⁴⁵⁷

⁴⁵⁵ Bower C and Elliott EJ, *Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder (FASD)* (2016) (accessed 4 March 2020); Elliott E, *Fetal Alcohol Spectrum Disorders in Australia – The Future is Prevention, Public Health Res Pract*; 25(2) (2015).

⁴⁵⁶ Thanh N and Jonsson, E, *Life Expectancy of People with Fetal Alcohol Syndrome, Journal of Population Therapy and Clinical Pharmacology*, 23(1) (2016).

⁴⁵⁷ Submission from the Mental Health Law Centre WA Inc. (23 June 2020).

The impairments common to FASD have the potential to influence all stages of an individual's journey through the justice system, as a complainant, witness or defendant.⁴⁵⁸ Individuals with FASD who become involved with the criminal justice system may not understand the arrest and court process, will have diminished competency and capacity and will not fully grasp the severity of the situation. They may appear to be competent whilst they are not actually understanding the process.⁴⁵⁹ Individuals with a FASD may make false confessions without understanding the legal consequences of such an act. Individuals with a FASD can also be victimised in custody.

Using Grisso's Miranda Instruments and the Fitness Interview Test-Revised, justice-involved young people (mean age 17 years) both with FASD and without FASD have been found to be at increased risk for misunderstanding, mis-appreciation and miscommunication across arrest and trial contexts.⁴⁶⁰ Importantly, cognitive and language assessment measures related to IQ and comprehension were found to be important for better identifying youth with impaired psycho-legal abilities, regardless of diagnosis.⁴⁶⁰ Individuals with FASD are at risk of victimisation and may not have an adequate appreciation for the concept of 'victim'.⁴⁶¹

Given the complex and cognitively demanding nature of legal proceedings, it is likely that processes at all stages of engagement with the criminal justice system (including police arrest and interviews, determining fitness to plead, court proceedings, sentencing, supervision orders and incarceration) will need to be adapted to appropriately consider the needs of an individual with FASD.⁴⁶² Indigenous children and young people have another layer of need relating firstly to intergenerational trauma incurred as a result of past colonial policies, and secondly to their different cultural ways of being and knowing.⁴⁶³

⁴⁵⁸ Blagg H, Tulich T, Mutch R, Williams R and May S, *FASD and the Criminal Justice System: Report to the Australian National Advisory Council on Alcohol and Drugs (ANACAD) Secretariat* (Reference ID: 6000078020) (2018).

⁴⁵⁹ Telethon Kids Institute, *Alcohol and Pregnancy & FASD* (2019) What is FASD? (accessed 26 November 2020).

⁴⁶⁰ McLachlan K, Roesch R, Viljoen JL and Douglas KS, *Evaluating the Psycholegal Abilities of Young Offenders with Fetal Alcohol Spectrum Disorder, Law and Human Behaviour*, 38, pages 10-22 (2013).

⁴⁶¹ Fraser C, *Victims and Fetal Alcohol Spectrum Disorder (FASD): A Review of the Issues, Victims of Crime Research Digest*, 1 (2008) pages 24-28 (accessed 20 February 2020).

⁴⁶² Reid N, Kippin N, Passmore H and Finlay-Jones A, *Fetal Alcohol Spectrum Disorder: The Importance of Assessment, Diagnosis and Support in the Australian Justice Context. Psychiatry, Psychology and Law* (2020) pages 1-10; Blagg H, Tulich T, Mutch R, Williams R and May S, *FASD and the Criminal Justice System: Report to the Australian National Advisory Council on Alcohol and Drugs (ANACAD) Secretariat* (Reference ID: 6000078020) (2018).

⁴⁶³ Hamilton S, Reibel T, Maslen S, Watkins R, Freeman J, Passmore H ... and Bower C, *Disability 'In-justice': The Benefits and Challenges of 'Yarning' with Young People Undergoing Diagnostic Assessment for Fetal*

The Telethon Kids Institute submitted:⁴⁶⁴

Intermediary schemes (also known as communication assistance) are used to help facilitate communication between parties in legal proceedings. The intermediary role is usually undertaken by speech pathologists who have additional training related to legal settings and who are appointed by the court, so remain impartial.⁴⁶⁵ The service helps to better ensure that the language and cognitive abilities of an individual are better understood by those in legal and justice agencies, and that the individual can better participate in required proceedings. Intermediary schemes are currently available for select cases in select states in Australia (New South Wales, Victoria) however the service should be made available to all states and territories of Australia, and to any individual who has speech, language, communication and cognitive needs, at all stages of the justice process.⁴⁶⁶

Regarding sentencing orders and rehabilitation, criminogenic programs often involve individuals learning about responsibility for their actions and require adequate language and social cognitive skills.⁴⁶⁷ The language used to convey concepts, such as internality (i.e. thoughts and feelings), and to link outcomes with behaviours can be complex.⁴⁶⁸ As individuals with FASD often have language and social cognitive impairments,⁴⁶⁹ it is important that criminogenic and rehabilitative programs, are specifically informed by both an individual's

Alcohol Spectrum Disorder in a Youth Detention Centre, Qualitative Health Research 30(2), pages 314-327 (2020).

⁴⁶⁴ Submission from Telethon Kids Institute (Dr R Mutch, Dr H Passmore, Dr C Bower, N Kippin and S Hamilton) (9 March 2020).

⁴⁶⁵ Stewart J, M Woodward and F Hepner, *Fitness to Stand Trial, Human Rights and Possibilities from England and Wales*, *Journal of Law and Medicine*, 22, pages 886-99 (2015); Plotnikoff J and R Woolfson, *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Policy Press: Bristol: UK, 2015).

⁴⁶⁶ Law Council of Australia, *The Justice Project Final Report* (August 2018) (accessed 2 April 2020).

⁴⁶⁷ Noel KK and C Westby, Applying Theory of Mind Concepts when Designing Interventions Targeting Social Cognition among Youth Offenders, *Topics in Language Disorders*, 34, pages 344-61 (2014).

⁴⁶⁸ Noel KK and C Westby, Applying Theory of Mind Concepts when Designing Interventions Targeting Social Cognition among Youth Offenders, *Topics in Language Disorders*, 34, pages 344-61 (2014)

⁴⁶⁹ Kippin NR, Leitao S, Watkins R, Finlay-Jones A, Condon C, Marriott R ... and Bower C, *Language Diversity, Language Disorder, and Fetal Alcohol Spectrum Disorder among Youth Sentenced to Detention in Western Australia*, *International Journal of Law & Psychiatry*, 61 (2018) pages 40-49; Stevens SA, Dudek J, Nash K, Koren G and Rovet J, *Social Perspective Taking and Empathy in Children with Fetal Alcohol Spectrum Disorders*, *Journal of the International Neuropsychological Society*, 21 (2015) pages 74-84; Schonfeld AM, Mattson SN and Riley EP, *Moral Maturity and Delinquency after Prenatal Alcohol Exposure*, *Journal of Studies on Alcohol*, 66 (2005) pages 545-54.

*language and cognitive abilities. This requires a collaborative team approach with speech-language pathologists and psychologists.*⁴⁷⁰

During 2017, the Commonwealth Government's Department of Health undertook a range of nation-wide consultations to inform the development of the *National FASD Strategy 2018-2028*.⁴⁷¹ The Strategy was released on 21 November 2018 at the Second Australasian FASD Conference in Perth. It is intended to provide a national approach for all levels of government, organisations and individuals on strategies to target the reduction of alcohol-related harms relating to FASD, to reduce the prevalence of FASD in Australia, and to provide advice and linkages on the support which is available for those affected by the disorder. The objectives of the National FASD Strategy 2018-2028 are to:⁴⁷²

- strengthen efforts and address the whole-of-life impacts of FASD;
- address the whole-of-population issues;
- support collaborative cross-sectoral approaches required to prevent FASD in Australia; and
- provide information and support those living with and affected by the disorder.

In Canada, a *Consensus Statement on Legal Issues of Fetal Alcohol Spectrum Disorder* was issued in 2013. It described the challenges of FASD for the legal system in the following terms:⁴⁷³

The neurodevelopmental deficits associated with FASD present a fundamental challenge to the ... criminal justice system, which is premised on assumptions that people act in a voluntary manner that is determined by free will and they can make informed and voluntary choices with respect to both the exercise of their rights and the decision to commit crimes. It is presumed that a person intends the natural consequences of his or her actions, and that, for example, an

⁴⁷⁰ Snow PC and Sanger DD, *Restorative Justice Conferencing and the Youth Offender: Exploring the Role of Oral Language Competence*, *International Journal of Language and Communication Disorders*, 46 (2011) pages 324-33.

⁴⁷¹ Australian Government, Department of Health, *National FASD Strategy 2018-2028* (accessed 19 March 2019).

⁴⁷² National Organisation for Alcohol Spectrum Disorders (NOFASD) *National FASD Strategy* (accessed 26 November 2020).

⁴⁷³ Institute of Health Economics, *Consensus Statement on Legal Issues of Fetal Alcohol Spectrum Disorder* (18-20 September 2013) Vol 5, page 4 (accessed 26 November 2020).

individual would never make a statement against his or her interest unless it was either true or coerced.

The evidence we have heard is compelling that those with FASD are likely to have diminished capacity to foresee consequences, make reasoned choices or learn from mistakes. Therefore, their actions are likely to clash with assumptions about human behaviour at almost every stage of the justice system.

Throughout their lives, individuals with FASD are more likely to be involved with the legal system than individuals without FASD. Children with FASD are overrepresented in foster care and group care systems and their special needs and developmental issues have been identified by the courts...

There is a growing collection of Australian parliamentary reports, case law and academic research highlighting necessary considerations regarding FASD-associated impairments within the criminal justice system.⁴⁷⁴ These include, but are not limited to:

- The poor identification processes (and therefore specialist assessment) of individuals with FASD and referral for specialist assessment.⁴⁷⁵
- Repeated, negative contact with the justice system raises the likelihood of people with FASD, and young people in particular, developing 'secondary' disabilities, such as substance abuse and mental illness, which, in turn, increases their susceptibility to further contact with the justice system (as victims and offenders).⁴⁷⁶
- A lack of awareness among police, prosecuting authorities, lawyers and justice professionals of FASD remains a serious concern.⁴⁷⁷

⁴⁷⁴ Blagg H, Tulich T, Mutch R, Williams R and May S, *FASD and the Criminal Justice System: Report to the Australian National Advisory Council on Alcohol and Drugs (ANACAD) Secretariat* (Reference ID: 6000078020) (2018).

⁴⁷⁵ Mutch RC, Watkins R, Jones H and Bower C, *Fetal Alcohol Spectrum Disorder: Knowledge, Attitudes and Practice within the Western Australian Justice System* (2013) (accessed 2 April 2020).

⁴⁷⁶ Blagg H, Tulich T, Mutch R, Williams R and May S, *FASD and the Criminal Justice System: Report to the Australian National Advisory Council on Alcohol and Drugs (ANACAD) Secretariat* (Reference ID: 6000078020) (2018).

⁴⁷⁷ Douglas H, Hammill J, Hall W and Russell EA, *Judicial Views of Foetal Alcohol Spectrum Disorder in Queensland's Criminal Justice System*, *Journal of Judicial Administration*, 21(3) (2012) pages 178-188; Mutch RC, Watkins R, Jones H and Bower C, *Fetal Alcohol Spectrum Disorder: Knowledge, Attitudes and Practice within the Western Australian Justice System* (2013) (accessed 2 April 2020).

- The suggestibility of a person with FASD means they are more likely to gratuitously concur with propositions put to them by police in interviews.⁴⁷⁸
- Difficulties with memory place persons with FASD at a disadvantage when trying to explain behaviour, give instructions to lawyers, or give evidence.⁴⁷⁹
- The legislative regimes for fitness to stand trial as they apply to persons with FASD have been criticised, and the absence of appropriate accommodations noted.⁴⁸⁰
- There is an absence of appropriate diversionary alternatives, and in particular place-based 'on country' therapeutic diversionary alternatives for Aboriginal youth with FASD.⁴⁸¹
- Sentencing responses to FASD have been criticised as inadequate and likely to lead to further engagement with the justice system.⁴⁸²
- The difficulties that persons with FASD experience with memory and linking actions with consequences are likely to render diversionary alternatives such as fines, community-based orders, and good behaviour bonds, futile.⁴⁸³ The imposition of community-based orders on persons likely affected by FASD was criticised as 'unrealistic' by the Court of Appeal of the Supreme Court of Western Australia in the

⁴⁷⁸ Parliament of Australia 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* (Inquiry, 29 November 2012) (accessed 2 April 2020); Parliament of Australia Senate Standing Committees on Community Affairs, *Inquiry Into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (Report, November 2016) (accessed 2 April 2020).

⁴⁷⁹ Blagg H, Tulich T, Mutch R, Williams R and May S, *FASD and the Criminal Justice System: Report to the Australian National Advisory Council on Alcohol and Drugs (ANACAD) Secretariat* (Reference ID: 6000078020) (2018).

⁴⁸⁰ Blagg H, Tulich T, Mutch R, Williams R and May S, *FASD and the Criminal Justice System: Report to the Australian National Advisory Council on Alcohol and Drugs (ANACAD) Secretariat* (Reference ID: 6000078020) (2018).

⁴⁸¹ Blagg H, Tulich T, Mutch R, Williams R and May S, *FASD and the Criminal Justice System: Report to the Australian National Advisory Council on Alcohol and Drugs (ANACAD) Secretariat* (Reference ID: 6000078020) (2018).

⁴⁸² Blagg H, Tulich T, Mutch R, Williams R and May S, *FASD and the Criminal Justice System: Report to the Australian National Advisory Council on Alcohol and Drugs (ANACAD) Secretariat* (Reference ID: 6000078020) (2018).

⁴⁸³ Blagg H, Tulich T, Mutch R, Williams R and May S, *FASD and the Criminal Justice System: Report to the Australian National Advisory Council on Alcohol and Drugs (ANACAD) Secretariat* (Reference ID: 6000078020) (2018); *LCM v The State of Western Australia* [2016] WASCA 164 (accessed 19 March 2019); Freckelton I, *Assessment and Evaluation of Fetal Alcohol Spectrum Disorder (FASD) and its Potential Relevance for Sentencing: A Clarion Call from Western Australia: LCM v The State of Western Australia [2016] WASCA 164 per Martin CJ, Mazza JA and Beech J, Psychiatry, Psychology and Law*, 24(4) (2017) pages 485-495 (accessed 2 April 2020).

case of *AH v Western Australia* [2014] WASCA 228. A person with FASD may be unable, rather than wilfully unwilling, to comply with conditions stipulated in community-based or supervised release orders.

- Challenges to the effective management of people with FASD in the justice system have been noted, including lack of appropriate treatment programs.⁴⁸⁴
- Incarceration may worsen or exacerbate the condition of an offender with FASD.⁴⁸⁵
- The 2016 Supreme Court of Appeal case *LCM v The State of Western Australia*⁴⁸⁶ specifically considered the significance to the sentencing process of an offender's diagnosis of FASD and canvassed the extensive consideration of an offender's diagnosis with FASD in Canadian case law.⁴⁸⁷
- In *Churnside v The State of Western Australia*⁴⁸⁸ the Court of Appeal noted that the offender's cognitive deficits associated with FASD limited the extent to which a sentence of imprisonment could facilitate community protection and deterrence, stating at [6]:

... the present case is not one which, having regard to the nature of the offence and the circumstances of the offender, required the imposition of an immediate term of imprisonment. The appellant's cognitive deficits, which are no fault of his, limit the deterrent effect of imprisonment, both at a general and personal level. The community protection which his imprisonment offers is entirely short-term, as time spent in custody will do nothing to address the prospect of the appellant resuming a cycle of offending and imprisonment on release.

⁴⁸⁴ *AH v The State of Western Australia* [2014] WASCA 228 (accessed 2 April 2020); *LCM v The State of Western Australia* [2016] WASCA 164 (accessed 19 March 2019); Mutch RC, Watkins R, Jones H and Bower C, *Fetal Alcohol Spectrum Disorder: Knowledge, Attitudes and Practice within the Western Australian Justice System* (2013) (accessed 2 April 2020).

⁴⁸⁵ *AH v The State of Western Australia* [2014] WASCA 228 (accessed 2 April 2020).

⁴⁸⁶ *LCM v The State of Western Australia* [2016] WASCA 164 (accessed 19 March 2019).

⁴⁸⁷ Freckelton I, *Assessment and Evaluation of Fetal Alcohol Spectrum Disorder (FASD) and its Potential Relevance for Sentencing: A Clarion Call from Western Australia: LCM v The State of Western Australia [2016] WASCA 164 per Martin CJ, Mazza JA and Beech J*, *Psychiatry, Psychology and Law*, 24(4) (2017) pages 485-495 (accessed 2 April 2020).

⁴⁸⁸ *Churnside v The State of Western Australia* [2016] WASCA 146.

- In *The State of Western Australia v JC (A Child)* [2021] WASC 21,⁴⁸⁹ Smith J referred to the Court of Appeal's decisions in *LCM* and *Churnside* before stating at [42] :

Consequently, a diagnosis of FASD (depending on the degree of severity) may be a significant mitigating factor.

The Banksia Hill study completed by Telethon Kids Institute underscores the need for universal, comprehensive health and neurodevelopmental assessment of young people engaged with the justice system. The assessment should be undertaken by a multidisciplinary team including an experienced paediatrician or physician, a speech-language pathologist, an occupational therapist and psychologist (neuropsychologist or school psychologist).⁴⁹⁰ This comprehensive assessment is critical to understand an individual's neurocognitive capacity, risk and protective abilities.

As part of the Banksia Hill study, the Telethon Kids Institute also developed *Reframe*, an evidence-based workforce training intervention which aims to upskill frontline justice professionals in the management and support of individuals with FASD and other neurodevelopmental impairments.⁴⁹¹ Refer to section 4.2.1 for more information about the Banksia Hill study by the Telethon Kids Institute.

The Telethon Kids Institute has developed a number of *FASD Resources for the Justice System* to assist judicial officers and others in understanding and recognising FASD in people engaging with the justice system.

⁴⁸⁹ *The State of Western Australia v JC (A Child)* [2021] WASC 21.

⁴⁹⁰ Bower C, Watkins RE, Mutch RC, Marriott R, Freeman J, Kippin N ... and Giglia R, *Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study among Young People Sentenced to Detention in Western Australia*, *BMJ Open*, 8(2) (2018); Kippin NR, Leitao S, Watkins R, Finlay-Jones A, Condon C, Marriott R ... and Bower C, *Language Diversity, Language Disorder, and Fetal Alcohol Spectrum Disorder among Youth Sentenced to Detention in Western Australia*, *International Journal of Law & Psychiatry*, 61 (2018) pages 40-49; Hamilton SL, Reibel T, Watkins R, Mutch RC, Kippin NR, Freeman J ... and Bower, C, *'He Has Problems; He Is Not the Problem ...' A Qualitative Study of Non-Custodial Staff Providing Services for Young Offenders Assessed for Foetal Alcohol Spectrum Disorder in an Australian Youth Detention Centre*, *Youth Justice*, 19(2) (2019) pages 137-15; Safe B, Joosten AV, Bower C, Condon C, Watkins R, Mutch RC and Giglia R, *A Comparison of the Motor Skills of Young People in a Youth Detention Centre with Diagnosed Fetal Alcohol Spectrum Disorder, Prenatal Alcohol Exposure, and a Reference Population*, *Journal of Fetal Alcohol Syndrome Risk and Prevention*, 1(1) (2018).

⁴⁹¹ Passmore HM, Mutch RC, Burns S, Watkins R, Carapetis J, Hall G and Bower C, *Fetal Alcohol Spectrum Disorder (FASD): Knowledge, Attitudes, Experiences and Practices of the Western Australian Youth Custodial Workforce*, *Int J Law Psychiatry*, 59, pages 44-52 (2018); Passmore HM, Mutch RC, Watkins R, Burns S, Hall G, Urquhart J, Carapetis J and Bower C, *Reframe the Behaviour: Evaluation of a Staff Training Intervention to Increase Capacity in Managing Youth with FASD and Neurodevelopmental Impairments in a Custodial Environment*, *Psychiatry, Psychology and Law*. (under review) (2018).

Resources include key Australian and international court cases and legal materials, current research about FASD in the justice system and professional development resources including videos for justice professionals such as judicial officers.

4.4.2.8 Mental illness

A mental illness is a condition that impairs a person's mental functioning. A mental illness may be long-term, but is often temporary and/or episodic. It does *not* affect the person's intellect and can sometimes be assisted by medication.

Section 6 of the *Mental Health Act 2014* (WA) defines 'when a person has a mental illness':

(1) A person has a mental illness if the person has a condition that —

- (a) is characterised by a disturbance of thought, mood, volition, perception, orientation or memory; and*
- (b) significantly impairs (temporarily or permanently) the person's judgment or behaviour.*

(2) A person does not have a mental illness merely because one or more of these things apply

—

- (a) the person holds, or refuses or fails to hold, a particular religious, cultural, political or philosophical belief or opinion;*
- (b) the person engages in, or refuses or fails to engage in, a particular religious, cultural or political activity;*
- (c) the person is, or is not, a member of a particular religious, cultural or racial group;*
- (d) the person has, or does not have, a particular political, economic or social status;*
- (e) the person has a particular sexual preference or orientation;*
- (f) the person is sexually promiscuous;*
- (g) the person engages in indecent, immoral or illegal conduct;*
- (h) the person has an intellectual disability;*
- (i) the person uses alcohol or other drugs;*
- (j) the person is involved in, or has been involved in, personal or professional conflict;*
- (k) the person engages in anti-social behaviour;*
- (l) the person has at any time been —*
 - (i) provided with treatment; or*
 - (ii) admitted by or detained at a hospital for the purpose of providing the person with treatment.*

(3) Subsection (2)(i) does not prevent the serious or permanent physiological, biochemical or psychological effects of the use of alcohol or other drugs from being regarded as an indication that a person has a mental illness.

(4) A decision whether or not a person has a mental illness must be made in accordance with internationally accepted standards prescribed by the regulations for this subsection.

Regulation 4 of the Mental Health Regulations 2015 (WA) prescribes the following standards for diagnosing mental illness:

For section 6(4) of the Act, a decision whether or not a person has a mental illness must be made in accordance with the diagnostic standards set out in either or both of these publications

—

(a) the International Statistical Classification of Diseases and Related Health Problems published from time to time by the World Health Organisation;

(b) the Diagnostic and Statistical Manual of Mental Disorders published from time to time by the American Psychiatric Association.

The Criminal Law (Mentally Impaired Accused) Act 1996 (WA) separately defines 'mental illness' and 'mental impairment' in section 8 as follows:

mental illness means an underlying pathological infirmity of the mind, whether of short or long duration and whether permanent or temporary, but does not include a condition that results from the reaction of a healthy mind to extraordinary stimuli;

mental impairment means intellectual disability, mental illness, brain damage or senility.

As is evident from the above definitions and from section 6(2)(h) of the Mental Health Act 2014 (WA), there is a distinction between an intellectual disability and a mental illness.

A mental illness affects a person's judgment and thought processes, often having consequential influences on a person's mood, perception or behaviour. An intellectual disability is a permanent alteration to a person's cognitive processes and brain function. Usually a mental illness can be treated with psychiatric or psychological intervention. The same cannot be said for intellectual disability.⁴⁹²

⁴⁹² Submission from the Mental Health Law Centre WA Inc. (23 June 2020).

Mental illnesses include psychotic conditions, such as postnatal depression, major depression and schizophrenia; and non-psychotic conditions, such as anxiety disorders and obsessive-compulsive disorder.

The Mental Health Law Centre advised that some signs that may indicate that a person has a mental illness include:⁴⁹³

- dissociated sentences — no logical flow to ideas;
- answers that do not match the questions asked;
- beliefs and opinions that are radically inconsistent with known facts;
- very rapid speech;
- referential thoughts (believing everyday occurrences occur in relation to them);
- persecutory beliefs;
- auditory and visual hallucinations or delusions;
- very dulled/slow/depressed manner or posture;
- short attention span;
- difficulty understanding questions or instructions;
- inappropriate or fluctuating emotional state; and/or
- side-effects of medication such as slurred speech and/or inability to focus.

Some of the most common psychiatric disorders are:⁴⁹⁴

- **Schizophrenia spectrum disorders** — a confusion or disturbance of a person's thinking processes, including delusions, hallucinations and/or hearing voices, disordered thinking and speech, abnormal motor behaviour and negative symptoms such as lethargy, anhedonia (an inability to feel pleasure) and flat affect (i.e. diminished emotional expression). Schizophrenia is not a 'split personality' or 'multiple personality disorder'. Multiple personality disorder is a very rare condition. Importantly, and contrary to popular opinion, people with schizophrenia are not generally dangerous or violent when receiving appropriate treatment.
- **Bipolar mood disorder** — this used to be called 'manic depressive illness'. There are two sub-classifications of this disorder – Bipolar I Disorder and Bipolar II Disorder.

⁴⁹³ Submission from the Mental Health Law Centre WA Inc. (21 May 2007).

⁴⁹⁴ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (as updated 12 June 2018) Section 5 [5.2.2.6] (accessed 26 November 2020).

Bipolar I Disorder involves the experience of both manic episodes (feelings of elation, grandiosity, decreased need for sleep and a flight of ideas) and major depressive episodes. Bipolar II is diagnosed when there is hypomania (mood and energy elevation, with mild impairment of judgement and insight) and major depression.

- **Depressive disorders** — is a group of mood disorders that include major depressive disorder, major depressive episode and persistent dysthymia (also known as neurotic depression) — all characterised by sad, empty and irritable moods, together with cognitive and somatic changes that affect a person's ability to cope with daily life.
- **Anxiety disorders** — is a group of mood disorders that result in intense feelings of apprehension, tension and/or fear without a discernible cause and that seriously affect a person's ability to cope with daily life. Anxiety can take the form of a specific phobia or more pervasive forms such as generalised anxiety disorder, social anxiety and agoraphobia — which is a fear of real or anticipated exposure in a wide range of situations including both open and enclosed spaces. Panic attacks may occur in the full range of anxiety disorders but are not a separate mental disorder.
- **Obsessive-Compulsive Disorder (OCD)** — a disorder that is characterised by the experience of obsessions, compulsions and other body-focused repetitive behaviours, and is now coded in the DSM-5 with body dysmorphic disorder (BDD) (a body image disorder), hair-pulling disorder (trichotillomania) and compulsive skin-picking disorder (CSP).
- **Hoarding Disorder** — a disorder that is characterised by a persistent sense of distress at discarding possessions. One of the prominent features of the disorder is a feeling of indecisiveness and difficulties with procrastination.

In 2017-18 there were 4.8 million Australians (20%) who reported having a mental or behavioural condition, up from 17.5% for 2014-15. Anxiety-related conditions were most frequently reported (13% of the population) followed by mood (affective) disorders, which includes depression (10%). Around one in twenty Australians (6%) reported having both an anxiety-related condition and a mood (affective) disorder.⁴⁹⁵

⁴⁹⁵ ABS, *National Health Survey: First Results, 2017-18* (Cat No 4364.0.55.001) (2018) Mental and Behavioural Conditions (26 November 2020).

4.4.2.9 Autism Spectrum Disorder

The Autism Association of Western Australia is the largest specialist lifespan organisation in Australia providing services to people with autism spectrum disorder. It provides the following definition of autism spectrum disorder:⁴⁹⁶

Autism Spectrum Disorder, often shortened to Autism, is a neurodevelopmental condition that impacts on child development in a number of key areas, including communication, social interaction and repetitive patterns of behaviour. Autism is also frequently associated with sensory sensitivities and sensory processing difficulties.

The Autism Association of Western Australia also outlined some common signs of autism spectrum disorder, including:⁴⁹⁷

- **Language and Communication** – some people with autism spectrum disorder find it difficult to communicate or to understand language. For example, they may use few or no words, repeat patterns of words, and may have well-developed speech but talk only about a few topics.
- **Social interaction** – people with autism spectrum disorder often have difficulty establishing and maintaining relationships, as they have difficulty reading the intentions, motivations or reactions of others.
- **Repetitive activity** – people with autism spectrum disorder often have a restricted and repetitive range of behaviour, with an unusual level of intensity in their interests or focus.
- **Routine and predictability** – often people with autism spectrum disorder show a strong preference for routine and predictability. People with autism may also insist on activities that follow a particular order and resist an activity with which they are not familiar.

⁴⁹⁶ Autism Association of Western Australia, *What is Autism – What is Autism Spectrum Disorder* (accessed 26 November 2020).

⁴⁹⁷ Autism Association of Western Australia, *Signs of Autism (2019)* (accessed 26 November 2020).

- **Planning, organising and problem-solving** – people with autism spectrum disorder may have difficulty transferring skills learnt in one context to another, so skills often need to be taught in the context in which they are required.
- **Sensory difficulties** - people with autism spectrum disorder experience sensory difficulties around their sight, sound, touch, taste and sense of smell. Some everyday noises can be experienced as overwhelming and busy environments can be stressful.

Asperger syndrome is one of the autism spectrum disorders. Experts are divided as to what causes Asperger syndrome. The most current research suggests the possibility of both a neurological and genetic cause. This means that in some families there will be more than one child, or family member, with Asperger syndrome. People with Asperger syndrome view the world differently to other people and have difficulty with actual communication despite apparently good language skills. Their behaviour may vary from somewhat unusual, to eccentric or 'odd', to aggressive and difficult. A person with Asperger syndrome often has a narrow field of interests and a desire and capacity to learn everything there is to know in relation to a specific interest.⁴⁹⁸

4.4.3 Mental illness and suicide in dealing with the media

It is important to be aware of the presence of media in the courtroom and the reporting of court decisions in the news. Courts are often a source of news items for media outlets.

In some circumstances, it may be appropriate to seek advice from your media liaison officer, or to control the amount and detail of information in judgments. For instance, where the circumstances disclose facts which may be 'sensationalised' by media, a detailed factual description of events might be capable of reinforcing stereotypes of those who have a mental illness.⁴⁹⁹ Sometimes, providing a detailed medical history and specifying the vulnerabilities facing a person in the circumstances of the case may lessen the stigma and judgment associated with persons suffering from mental illness.⁵⁰⁰

⁴⁹⁸ Government of Western Australia, Department of Health, *Asperger Syndrome* (accessed 26 November 2020).

⁴⁹⁹ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2018) Section 5 [5.2.2.9] (accessed 26 November 2020).

⁵⁰⁰ Submission from the Mental Health Law Centre WA Inc. (23 June 2020).

For further advice and information, please refer to the resources for judicial officers produced by the *Mindframe National Media Initiative* (Mindframe). The information published by Mindframe includes a 'Guide for Judicial Officers on Mental Illness'; a 'Guide for Judicial Officers on suicide'; a 'Guide for Other Court Officers on Mental Illness'; and a 'Guide for Other Court Officers on Suicide'.⁵⁰¹

Mindframe was a Commonwealth Department of Health initiative to encourage responsible, accurate and sensitive media representation of mental illness and suicide, to address community concerns relating to media depictions that stigmatise mental illness or promote self-harm.⁵⁰²

4.4.4 Terminology

It is preferable to emphasise the person rather than the disability. People with disabilities are people first; they happen to have a disability. Terms such as 'suffer', 'stricken with', 'victim' or 'challenge' are not generally appreciated.

People with Disabilities (WA) Inc. advised that it is important to be aware of the appropriate terms to use when addressing a person with a disability.⁵⁰³ Language can have the effect of stereotyping, depersonalising, humiliating or discriminating against people with disabilities. People with disabilities, like everyone, 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 terms that people with disabilities prefer to be used to describe them have changed several times over the years. According to People with Disabilities (WA) Inc.:⁵⁰⁴

Terms such as 'disabled', 'mentally retarded' [or] 'spastic' are offensive to many people with a disability. It is offensive to call someone an invalid as this literally means they are 'not valid'. It is appropriate to say that a person has a disability or has disabilities and to state the

⁵⁰¹ Mindframe, *Resources for Court Officers* (page updated 2020) (accessed 16 September 2021).

⁵⁰² Australian Government, Department of Health, *Mindframe National Media Initiative* (last updated 31 October 2012) (accessed 19 March 2019).

⁵⁰³ Submission from People with Disabilities (WA) Inc. (9 March 2020).

⁵⁰⁴ Submission from People with Disabilities (WA) Inc. (9 March 2020).

disability that they have and not to label them purely by their disability or suggest that they 'suffer' from a particular disability.

The term 'disabled' is disliked because it has negative connotations, in that it reflects a sense of being 'not able', 'not working' or 'broken down'. It is also untrue, as 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 becoming involved in the community.

It is critical that people with disabilities are treated with the same respect as anyone else: the appropriateness of the language used in communication is central to ensuring that this respect is demonstrated.

Some examples of appropriate and inappropriate terminology follow:

| 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 psychiatric disability, or a person with a mental illness | Mad, crazy, mental |
| A person with Down syndrome | Mongol, mongoloid |
| A person with cerebral palsy | Spastic, sufferer of/someone who suffers from cerebral palsy |
| A person with an intellectual disability | Mental retard, mentally retarded, retard |
| A person who has epilepsy | Epileptic |
| A person of short stature | Dwarf |
| A person who has ... (that is, specify the actual deformity) | A deformed person |
| A person in a coma/who is unconscious | A vegetable/in a vegetative state |

| Use | Do Not Use |
|---|--|
| A Deaf person (with the capitalised 'D' — this indicates the existence of a Deaf Culture), or a person who is hard of hearing | Person who is deaf, hearing impaired person |
| A person who is blind | A blind person |
| A person with a vision impairment or low vision | Visually impaired person, can't see well, bad or poor eyesight, has trouble seeing |
| A person who uses a wheelchair | A person confined to a wheelchair |
| Seizure | Fit, spell, attack |
| Accessible toilet/entry/parking | Disabled toilet/entry/parking (because disabled as an adjective is seen as meaning that 'it is not working') |
| A person who has ... (that is, specify the actual disability) | Stricken, suffers from, challenged, is a victim of ... |

The Australian Network on Disability (AND) 'Inclusive Language' fact sheet also suggests:⁵⁰⁵

- **Do not use language that implies a person with disability is inspirational simply because they experience a disability.** People with disabilities are just living their lives, they are no more super-human than anyone else. Implying that a person with a disability is courageous or special just for getting through the day is patronising and offensive.
- **Change the focus from disability, to accessibility.** In recent years, AND members have increasingly referred to Accessibility Action Plans or Access and Inclusion Plans, rather than Disability Action Plans. This makes the focus much more inclusive and incorporates the requirements of a diverse range of people who may have access needs, including older people, parents and carers of young children, and travellers. Similarly,

⁵⁰⁵ Australian Network on Disability, *Inclusive Language* (accessed 26 November 2020).

car parks, lifts and bathrooms are now appropriately described as accessible rather than disabled or handicapped.

- **Avoid euphemisms and made up words.** 'Differently able', 'people of all abilities', 'disAbility', 'diffAbled', 'special needs' and the like, are all euphemistic and can be considered patronising. While the intention is usually good, these phrases tend to fall into the trap of portraying people with disabilities to be special or inspirational, just for living with disability (see above point).

The Diversity Council Australia emphasises that:⁵⁰⁶

- inclusive language is not about being 'politically correct' , but is about using language that that is respectful and gives a more accurate view of the real world by reflecting social diversity rather than perpetuating stereotypes;
- it can be difficult to 'walk in somebody else's shoes' and understand why they may feel excluded by certain words or phrases;
- non-inclusive jokes can lead to toleration of hostile feelings and discrimination against people from excluded groups; and
- if you are in doubt as to what language to use, ask for advice from the people with lived experience.

4.4.5 Barriers for people with disabilities in relation to court proceedings

The barriers for a person with disability in relation to court proceedings — whether as juror, support person, witness or accused — depend on the type and level of the particular person's disability. The barriers faced by people with disabilities are exacerbated by the marginalisation that they experience as a result of their different physical appearance or different behaviour, or because of their lack of understanding of the court processes.

The Department of Communities submitted that:⁵⁰⁷

⁵⁰⁶ Diversity Council Australia, *Words at Work: Building Inclusion through the Power of Language* (2016) pages 3, 5 and 11 (accessed 20 January 2020).

⁵⁰⁷ Submission from the Department of Communities (15 September 2020).

The presumption should be all people have capacity to participate in proceedings with appropriate support - this support depends on the need of each individual and may include physical access, a support person, explanations in a manner they can understand, docs in accessible formats, etc.

People with Disabilities (WA) Inc. submitted that:⁵⁰⁸

People with disabilities are often stereotyped based on their physical appearance and behaviour. It is easy for this discrimination to be transposed into the court setting leading to potential inaccurate judgments and assumptions to be made about the individual by lawyers, the judge and the jury.

The Australian Human Rights Commission reported in its 2014 publication 'Equal before the Law: Towards Disability Justice Strategies':⁵⁰⁹

People with disabilities and people who work in the court system expressed considerable frustration to the Commission. The reasons for reasonable adjustments not being provided in court processes included:

- *people with disabilities were not aware that reasonable adjustments were available;*
- *support persons and interpreters were not booked;*
- *there was a lack of availability of support workers;*
- *communication devices were banned in court; and/or*
- *there was no help filling out forms or meeting other purely procedural requirements.*

In addition to the lack of screening mechanisms, training and inability of lawyers and judges to identify disability, the Commission also heard that there were delays and costs associated with obtaining a formal diagnosis and time constraints on lawyers and courts. The Disability Rights Advocacy Service stated:

It is often the case that people with a mental illness, intellectual disability or acquired brain injury plead guilty (are 'plead out') by duty lawyers who may not identify the disability and thus, be oblivious to whether or not the disability is related to the alleged offending. The

⁵⁰⁸ Submission from People with Disabilities (WA) Inc. (9 March 2020).

⁵⁰⁹ Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) page 24 - 26 (accessed 26 November 2020).

lack of identification is further exacerbated by the lack of time available to a duty lawyer to properly and thoroughly investigate a matter prior to entering a plea.

The Commission heard that courts were not adjourned to find out if a person had disabilities and that systematic approaches to identify disability also did not exist, resulting in supports and services not being provided and no accommodations being made.

... Styles of communication and questioning were also raised as serious concerns for people who need communication supports or who have complex and multiple support needs.

... The court process and cross-examination in particular, is stressful and difficult for many people. For people with disabilities who have complex or multiple support needs there is an ever-present risk that in the absence of support they will give inconsistent evidence or plead guilty to get the process over.

In relation to the above findings the Department of Communities submitted in September 2020:⁵¹⁰

Western Australia does not currently have an independent court support person scheme. The accused may need to bring their own support person who is not necessarily acknowledged by the court.

... Lawyers may be cautious about raising the issue of disability / the accused person's capacity due to the potential application and implications under the current Criminal Law (Mentally Impaired Accused) Act 1996.

Some examples of the barriers experienced by people with disabilities, unless appropriate adjustments are made, are listed in subsections 4.4.5.1 to 4.4.5.5.

Section 4.4.6 provides information on strategies that could be used to mitigate these barriers.

These problems are likely to be compounded if the person also happens to be Aboriginal, from an ethnic or migrant background; female; a child or young person; a lesbian, gay or bisexual, transgender(ed) or intersex person; a person practicing a minority religion; or a person representing themselves — refer to the other relevant chapter(s).

⁵¹⁰ Submission from the Department of Communities (15 September 2020).

4.4.5.1 Barriers 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 doorknobs).
- Inability to sit or stand in one position, either at all or beyond a particular time, and/or fatigue.
- Communication barriers related to deafness or hardness of hearing, blindness or vision impairment, or speech impairment.

4.4.5.2 Barriers for people with intellectual disabilities

- A lack of awareness of their disability. For example, people with an intellectual disability may not always inform their legal representative about their disability, or may not have a diagnosis. They may not self-identify as having a disability (in some cases to fit in). This may result in agreeing to what is asked, answering briefly or becoming hostile if they feel confused or cannot answer.
- Particular difficulties when they are in a stressful situation such as the court system.
- Limited capacity to participate in the court or tribunal process as a result of the particular characteristics of each individual with an intellectual disability. For example:
 - limited reading and writing skills;
 - difficulty understanding complex information and processes, including directions, procedures, forms, and keeping appointments in new places;
 - a short attention span and being easily distracted, making a long trial or wait difficult;
 - difficulty understanding questions — although this varies depending on how a question is asked: for example, a 'what' question is easier to answer than a 'why' question;
 - requiring a long time to think through a question and make a response;
 - answering questions inconsistently or inappropriately;
 - experiencing memory difficulties, especially for detail in such things as remembering to bring documents to court;

- difficulty in thinking abstractly;
- difficulty in following long, complex sentences;
- difficulty in understanding or recalling dates, such as when events occurred; or appointments, such as court dates;
- difficulty in organising, structuring and expressing information in an orderly way (e.g., they may start a story at the end);
- difficulty in managing themselves and their stress levels in a formal environment. (e.g., they may behave in a way that is inappropriate such as laughing in court or talking in a very loud voice, or act without thinking, such as calling out to people they know in court).

4.4.5.3 Barriers for people with a Fetal Alcohol Spectrum Disorder (FASD)

- Any one or more of the difficulties experienced by people with physical, intellectual or 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.

4.4.5.4 Barriers for people with an acquired brain injury

- Any one or more of the difficulties experienced by people with physical or intellectual disabilities.
- In addition their communication difficulties may be exacerbated by, for example, being unable to concentrate and/or process information easily, having memory difficulties and/or by having disinhibited behaviour.

4.4.5.5 Barriers for people with mental illness⁵¹¹

- A low level of understanding of the legal system, particularly if they are not supported by family or friends. People with a mental illness may lack support from family members or friends, sometimes as a result of alienation because of illness-induced actions. The Mental Health Law Centre emphasised the importance of there being adequate support for a person with a mental illness.
- Communication barriers — for example, they may be easily distracted, very jumbled, severely distressed/anxious/frightened, manic, delusory and/or aggressive or angry. People with mental illness may have difficulty making decisions and communicating those decisions where the power to do so has been referred to guardians or personal representatives in the past. Medications prescribed for some mental illnesses also often have side-effects that affect a person's ability to process new information and communicate their thoughts in a timely manner.
- Many people with mental illness have or are experiencing homelessness or difficulty accessing appropriate community services to manage their treatment needs.
- People with diagnosed mental illness are often embarrassed or ashamed to share the details of their mental illness. Many people with mental illness have experienced some form of trauma and/or stigma associated with receiving a mental health diagnosis.
- There is often an overlap of conditions or restrictions placed on people receiving treatment in the community under the *Mental Health Act 2014* (WA) and other legislation or conditions imposed by the criminal justice system. A person who becomes acutely mentally unwell in Western Australia may be treated without their consent, through an involuntary treatment order. This order is instigated by a doctor or mental health practitioner and issued under the *Mental Health Act 2014* (WA). Strict criteria govern when these orders can be applied. All the following criteria must be met:⁵¹²
 - the person has a mental illness requiring treatment;

⁵¹¹ The information in this section is based on the submissions from the Mental Health Law Centre WA Inc. (23 June 2020).

⁵¹² *Mental Health Act 2014* (WA) s 25 (accessed 29 July 2021).

- because of the mental illness there is a significant risk –
 - to the health or safety of the person, or to another person; or
 - of serious harm to the person or to another person;
 - or, there is a significant risk of serious physical or mental deterioration (in the case of a community treatment order);
 - the person does not demonstrate the capacity required to decide about the provision of their treatment;
 - the person cannot be adequately provided with treatment in a way that would involve less restriction of the person's freedom of choice and movement than making the treatment order.
- People with an acute mental illness can be treated involuntarily as an inpatient in a hospital setting, or in the community.
 - A Hospital Order can be made by a judicial officer under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA). It has the same effect as if the person had been referred for assessment for involuntary treatment under the *Mental Health Act 2014* (WA) without a person having been assessed by a psychiatrist. It has the same effect of making a person an involuntary patient for treatment purposes, however, a person's bail is revoked when a Hospital Order is imposed. Often a person suffering from an acute mental illness or person with an untreatable intellectual disability will be remanded in a prison custodial setting until they can be assessed by a psychiatrist. If they do not meet the criteria for mental illness in accordance with the *Mental Health Act 2014* (WA), they will be returned to a prison custodial setting until bail can be revisited. The Office of the Inspector for Custodial Services reported:⁵¹³

Between 1 July 2016 and 31 August 2017 there were 319 Form 1A referrals for hospital assessment made for 147 different prisoners. These referrals were made through the Department's medical database and therefore, can be considered the minimum number submitted as doctors and authorised mental health practitioners can also make a

⁵¹³ Office of the Inspector for Custodial Services, Government of Western Australia, *Prisoner Access to Secure Mental Health Treatment* (27 November 2018) page 5 (accessed 17 July 2020).

referral through other means. Of the 319 referrals, 61 percent did not result in a placement at the Frankland Centre (194).

- There is a lack of understanding in the community and criminal justice system about the difference between mental illnesses and mental disabilities (or intellectual disabilities). Usually mental illness can be mitigated with treatment, mental disability cannot.
- People with a mental illness that come before the criminal justice system often face a risk of a custody order, or Hospital Order, placing them in a forensic psychiatric facility or prison in order to ensure the receipt of treatment for their condition.

4.4.6 Adjustments to mitigate the barriers

Many of these barriers can be substantially mitigated (and in some cases completely mitigated) if appropriate adjustments are made by the court.

If such adjustments are not made, people with disabilities and/or any carers are likely to:

- be unable to participate fully, adequately, or at all in court proceedings;
- feel uncomfortable, fearful or overwhelmed;
- feel resentful or offended by what occurs in court;
- not understand what is happening and/or be unable to get their point of view across and be adequately understood;
- feel that an injustice has occurred; and/or
- in some cases be treated with less respect, unfairly and/or unjustly when compared with other people.

If such adjustments are not made people with disabilities are also liable, in some cases, to be treated unfairly or unjustly.

Section 4.6 provides additional information and practical guidance about ways of making appropriate adjustments for and treating people with disabilities so as to reduce the likelihood of these problems occurring and help ensure that a just outcome is achieved.

4.4.6.1 Guide or hearing dogs and other assistance animals

It is widely recognised that some people with disabilities are assisted by trained and skilled assistance animals. Assistance animals are not pets but highly trained disability support services that enable a person with a disability to safely participate in personal and public life.⁵¹⁴

Historically, 'guide dogs' have been the predominant assistance animals, however it is now understood that the support required can come from a variety of animals, supporting a range of people with different disabilities. For example, assistance animals can provide support to people who are deaf or hard of hearing; who require physical support for mobility or other functional tasks; who experience episodic and serious medical crisis (e.g. epilepsy, changes in blood pressure or blood sugar); and who experience psychiatric disorders including post-traumatic stress disorder, anxiety, hallucinations, panic attacks or suicidal ideation.⁵¹⁵

Each state has its own accreditation system in relation to assistance animals. In Western Australia section 8(2) of the *Dog Act 1976* (WA) provides that a person who has a disability or medical condition an effect of which can be alleviated by the use of an assistance dog:

(a) is entitled to be accompanied by an assistance dog, in any building or place open to or used by the public, for any purpose, or in any public transport; and

(b) is not guilty of an offence by reason only that he or she takes that dog into or permits that dog to enter any building or place open to or used by the public or on any public transport.

An 'assistance dog' is defined in section 8(1) of the *Dog Act 1976* (WA) as follows:

assistance dog means a dog —

(a) that is trained or is being trained by a representative of an organisation that is prescribed for the purposes of this definition; or

(b) that is trained or is being trained by an individual having the qualifications and experience prescribed for the purposes of this definition; or

⁵¹⁴ Australian Human Rights Commission, *Assistance Animals and the Disability Discrimination Act 1992 (Cth)* (18 January 2016) (accessed 26 November 2020).

⁵¹⁵ Australian Human Rights Commission, *Assistance Animals and the Disability Discrimination Act 1992 (Cth)* (18 January 2016) (accessed 26 November 2020).

(c) that is assessed by a person mentioned in paragraph (a) or (b) as being competent to be an assistance dog; or

(d) that is being assessed by a person mentioned in paragraph (a) or (b) to decide whether the dog is competent to be an assistance dog; or

(e) that has been approved, for the purposes of a law of another State or a Territory, as a dog whose use can alleviate or manage an effect of a person's disability or medical condition; or

(f) that is approved by the CEO for the purposes of this definition.

4.4.7 Specialist courts and other legal interventions

For offenders with a general decision-making disability, it may be possible to secure assistance through the appointment of a guardian or administrator as outlined in 4.4.7.1.

For some offenders with intellectual disabilities, there is the option of a diversion program operated through the Central Law Courts in Perth, as outlined at section 4.4.7.2.

For some offenders experiencing a mental health issue, there is the option of the Mental Health Court Diversion and Support Program as outlined in 4.4.7.3.

More generally, section 4.6 provides additional information and practical guidance about ways of making appropriate adjustments for and treating people with disabilities, to reduce the likelihood of problems occurring and to help ensure that a just outcome is achieved.

All people with disabilities may face additional barriers — due to being female; Aboriginal; from another culturally or linguistically diverse background; an older person; a lesbian, gay, bisexual, trans or intersex person; a child or young person; a person practising a minority religion; or a person representing themselves — see the relevant chapter(s).

4.4.7.1 Guardianship and Administration

The guardianship and administration system enables a substitute decision-maker to be legally appointed to make decisions on behalf of a person who has lost the capacity to do so. The principles set out in section 4 of the *Guardianship and Administration Act 1990* (WA) (GAA)

require that an order for a substitute decision maker be in the least restrictive terms possible in the circumstances of the person concerned, and to the greatest extent possible take into account the views of the person concerned. Guardianship orders can only come into effect once a person has reached 18 years of age.

The existence or the extent of any guardianship or administration order does not necessarily reflect the level of a person's decision-making disability. That is because an order will only be made under the GAA where there is a need for decision(s) to be made. For example, a person with profound disabilities who lives in a care facility and does not work may not require a guardianship order, as there may be no decisions that need to be made around such matters as work, with whom they associate and/or with whom and where they live.⁵¹⁶

There are three government agencies which play a key role in guardianship and administration in Western Australia:

- The State Administrative Tribunal (SAT);
- The Office of the Public Advocate; and
- The Public Trustee.

The State Administrative Tribunal is an independent statutory tribunal established under the *State Administrative Tribunal Act 2004* (WA). The SAT has the function of determining at hearings whether, and under what conditions, a guardian or administrator will be appointed.

A person with a decision-making disability may need assistance in relation to legal proceedings such as instructing a solicitor or applying for criminal injuries compensation. It may be necessary to make an application to the SAT for the appointment of a guardian or administrator. Information on making an application is available from various sources including the SAT itself,⁵¹⁷ the website of the Office of the Public Advocate,⁵¹⁸ and the publication *Freedom v Protection – A Guide to Guardian and Administration Orders, Litigation and Court Trusts for*

⁵¹⁶ Submission from the Public Trustee (22 April 2020).

⁵¹⁷ In particular, refer to the *State Administrative Tribunal Practice Note 9: Proceedings under the Guardianship and Administration Act 1990* for information on making an application for guardianship or administration (accessed 26 November 2020).

⁵¹⁸ Department of Justice, *Office of the Public Advocate* (2 June 2015) (accessed 26 November 2020).

People with Impaired Decision Making (particularly chapters 4 and 5) by Michael Bowyer on the website of the Public Trustee.⁵¹⁹

Refer to section 4.5.3 of this Bench Book for more information on the requirements for initiating, defending, or participating in legal proceedings by those subject to a guardianship or administration order.

The Public Advocate is an independent statutory officer appointed under the GAA to promote and protect the human rights, dignity and autonomy of adults with a decision-making disability and to reduce their risk of neglect, exploitation and abuse.

In Western Australia, the Public Advocate is the only officer with statutory responsibility to:

- conduct investigations on referral from the SAT, and when allegations arise from the community that the wellbeing of a person with a decision-making disability may be jeopardised, to determine whether a guardian or administrator may need to be appointed;
- act as guardian of last resort for adults with decision-making disabilities, when appointed by SAT when there is no one else who is suitable, available and willing; and
- provide specialist information and advice to protect and safeguard the interests of people with decision-making disabilities, and promote public awareness, concerning the provisions of the *Guardianship and Administration Act 1990* (WA).

The Public Advocate may be appointed by SAT as guardian of last resort or a joint guardian under the GAA. Section 53 of the GAA provides that a joint guardian cannot perform any function without the concurrence of the other guardian(s) and, where the guardians are not unanimous as to how a function should be performed, a guardian may apply to the SAT for directions.

As of 30 June 2019, the Public Advocate was guardian of last resort for 2,140 individuals (an increase of 11 percent over the previous year) with a primary decision-making disability: 566

⁵¹⁹ Michael Bowyer (Department of Justice, Office of the Public Trustee), Resources and Publications, *Freedom v Protection – A Guide to Guardian and Administration Orders, Litigation and Court Trusts for People with Impaired Decision Making*, Chapters 4 and 5 (accessed 5 June 2020).

had dementia, 630 had an intellectual disability, 571 had a mental illness, 338 had an acquired brain injury and 35 had another type of decision-making disability.⁵²⁰ Age-related dementia has been the primary decision-making disability for people under the Public Advocate's guardianship since 2007/08, reflecting the ageing nature of the population.⁵²¹ However, for the second year a primary diagnosis of an intellectual disability accounted for the largest proportion of all adults for whom the Public Advocate was appointed guardian as at 30 June 2019. These changing trends relate to the introduction of the National Disability Insurance Scheme in Western Australia.⁵²²

The Office of the Public Advocate provides a range of other services to ensure the protection of vulnerable Western Australians with a decision-making disability. These services include:⁵²³

- provides information, advice and training on guardianship, administration, Enduring Powers of Attorney, Enduring Powers of Guardianship, Advanced Health Directives, and protecting vulnerable adults;
- advocates for adults with decision-making disabilities;
- investigates concerns about the abuse, neglect or exploitation of adults with decision-making disabilities;
- reports to the SAT on whether a guardian or administrator is required;
- provides guardianship services when appointed by the SAT; and
- conducts a community guardianship program.

The Public Trustee provides support and examines the accounts of over 1,500 private administrators who are usually family members or close friends appointed by SAT to manage the financial affairs of another person who lacks the ability to manage their own. The Public Trustee can be, and often is, appointed by the SAT to act as administrator itself. As of 2020, there were over 4,000 such appointments. In practice, this normally happens when no-one is

⁵²⁰ Office of the Public Advocate, *Annual Report 2018/19* (2019) pages 5 and 9 (accessed 20 January 2020).

⁵²¹ Office of the Public Advocate, *Annual Reports* (accessed 20 January 2020).

⁵²² Submission from the Public Advocate (4 June 2020).

⁵²³ Submission from the Public Advocate (4 June 2020). See also Office of the Public Advocate, *Information Sheet 2: The Role of the Public Advocate* (2016) (accessed 20 January 2020).

willing and suitable to act as a private administrator. If for some reason the Public Trustee cannot act, the Public Advocate is the administrator of last resort.⁵²⁴

People with Disabilities (WA) Inc. encourages best practice as evidenced in the Victorian Office of the Public Advocate's guide *Supported Decision Making In Victoria: A Guide for Families and Carers*.⁵²⁵ The Victorian Guide is based upon the national decision-making principles developed by the Australian Law Reform Commission in 2014.⁵²⁶ Victoria has new guardianship and administration legislation that aims to move further towards 'supported decision-making'.

In Western Australia, the Legislative Council's September 2018 *Final Report of the Select Committee into Elder Abuse*,⁵²⁷ discussed supported decision-making stating at [7.75]:

Supported decision-making is where a person is given support and advice to make a decision for themselves. A person may have a disability or vulnerability where they find it difficult to make decisions on their own, but supported decision-making does not displace their will. It differs from what occurs under the GAA because substituted decision-making is where someone else substitutes their own will (based on the best interests of the person in question) to make decisions on behalf of that person.

Currently, in Western Australia, guardians and administrators are subject to the 'best interests' test. This can involve considering the wishes of the represented person, but a guardian or administrator is not bound by those. So, guardians and administrators are substitute decision-makers who make the decision on behalf of the represented person.⁵²⁸

There is a push, both domestically and internationally for Australia to move from substitute decision-making to supported decision-making. The Public Trustee submitted that in reality Western Australia has both.⁵²⁹

⁵²⁴ Submission from the Public Trustee (22 April 2020). See also Department of Justice, Public Trustee, resources and Publications, *About Us* (last updated 15 April 2019) (accessed 20 January 2020).

⁵²⁵ Submission from People with Disabilities (WA) Inc. (8 April 2020).

⁵²⁶ Australian Law Reform Commission, *Towards Supported Decision Making in Australia* (18 September 2014) (accessed 16 April 2020).

⁵²⁷ Western Australia Legislative Council, *Final Report of the Select Committee into Elder Abuse* (September 2018) pages 90 and 91 (accessed 8 June 2020).

⁵²⁸ Submission from the Public Trustee (22 April 2020). See also Department of Justice, Public Trustee, Resources and Publications *Freedom vs Protection* [7.9] to [7.12] (accessed 20 January 2020).

⁵²⁹ Submission from the Public Trustee (22 April 2020).

SAT can only appoint a guardian or administrator when there is no less restrictive alternative. Most people with decision-making disabilities are not subject to SAT appointments. It is fair to assume that many of these people are making their own decisions, at times with support from others.

If, as a last resort, SAT does make an appointment, the person's wishes in some cases may well be the crucial factor when determining at least some of the decisions that the guardian or administrator makes.

Sometimes, the terminology used can be misleading. Proponents of 'supported decision-making' sometimes use the term 'fully-supported decision-making' to describe some decisions. That is just another way of saying 'substitute decision-making'.

The Public Advocate advised the Select Committee into Elder Abuse that while the GAA statutory regime does not include specific provisions for supported decision-making, it is flexible enough to allow for the various agencies and parties involved to work collaboratively so as to enable an adult with a decision-making disability to be supported in their personal, lifestyle and treatment decisions.⁵³⁰

Use of enduring documents such as Advanced Health Directives and Enduring Powers of Attorney are means of supporting decision-making rather than substituting a person's decision-making entirely, because 'they are a form of self-determination undertaken by an adult when they have capacity in preparation for the possible loss of capacity in the future'.⁵³¹

The Select Committee into Elder Abuse noted the Public Advocate's caution against adding additional layers of complexity to the GAA by formalising supported decision-making.⁵³²

⁵³⁰ Western Australia Legislative Council, *Final Report of the Select Committee into Elder Abuse* (September 2018) [7.78] (accessed 8 June 2020).

⁵³¹ Western Australia Legislative Council, *Final Report of the Select Committee into Elder Abuse* (September 2018) [7.79] citing the Public Advocate (accessed 8 June 2020).

⁵³² Western Australia Legislative Council, *Final Report of the Select Committee into Elder Abuse* (September 2018) [7.81] citing the Public Advocate (accessed 8 June 2020).

4.4.7.2 Intellectual Disability Diversion Program (IDDP) Court⁵³³

The Intellectual Disability Diversion Program (IDDP) Court is operated by the Department of Justice, with advice and support from the Department of Communities. The IDDP Court seeks to address the over-representation of individuals in the adult criminal justice system who have intellectual disabilities, cognitive disabilities and/or autism spectrum disorder.

The IDDP Court sits one day each week at the Perth Magistrates Court. It has a dedicated magistrate, and in the 2017-18 financial year was staffed by a 0.5 FTE Team Leader, a Senior Communities Corrections Officer and a Support Officer, funded as part of the overall operation budget of the Magistrates Court. Administrative Support is provided from Adult Community Corrections. The Department of Justice has allocated funding to the IDDP to the end of the 2020-21 financial year.⁵³⁴

The IDDP Court is overseen by operational and steering committees that include representatives from participating agencies including the Department of Communities.

Referrals to the IDDP Court are typically made by magistrates in general court lists, often at the suggestion of a defence lawyer, supporting agency, carer or family member.

Legal Aid duty lawyers can advise and represent people in the Magistrates Court and can give advice on the day about whether a referral to the IDDP Court is appropriate. There is also a dedicated duty lawyer who attends the IDDP Court.

Where appropriate, monitoring by the magistrate aims to promote compliance within the program, engage individuals in goal setting, and support them through the change process.

To be eligible to participate the individual must:

- have been diagnosed with an intellectual disability, cognitive disability or autism spectrum disorder by a suitably qualified person, or they are likely to be so diagnosed if assessed by a suitably qualified person;

⁵³³ Unless otherwise stated, the following information is taken directly from website of the Magistrates Court of Western Australia, *Intellectual Disability Diversion Program Court* (last updated 1 May 2019) (accessed 20 February 2020).

⁵³⁴ Western Australian Legislative Council, *Parliamentary Debates - Intellectual Disability Diversion Program – Questions on Notice*, (Hon Sue Ellery, 28 March 2018, page 1411) (accessed 26 November 2020).

- have entered, or be likely to enter, a plea/pleas of guilty to at least a significant proportion of their magistrate court charge;
- be suitable for conditional bail; and
- consent to take part in in the IDDP Court program.

Participation is strictly voluntary. If a 'not guilty' plea is entered and maintained, the accused person is ineligible for the IDDP Court program.

Adult Community Corrections assesses the suitability of applicants for the program. Applicants may also need to be assessed by an expert such as a psychologist or neuropsychologist, which if required will be ordered by the IDDP Court.

If accepted into the IDDP Court program, Adult Community Corrections will develop a plan in conjunction with the individual, their family and/or carer and, if applicable, guardian, the Department of Communities and any relevant service providers. The individual will be required to attend the IDDP Court as directed by the magistrate to monitor their progress on the program over a period of approximately four to six months.

Progress on the plan will be taken into account by the magistrate when sentencing the individual.

4.4.7.3 Mental Health Court Diversion and Support Program⁵³⁵

The Mental Health Court Diversion and Support Program offers a solution focused response for individuals experiencing a mental health issue. Program participants are supervised by a Court while they receive holistic support that endeavours to address the underlying causes of their offending behaviour. This approach aims to:

- enhance participants' health and wellbeing;
- improve community safety;
- reduce future contact with the criminal justice system;
- re-engage or link participants with the most appropriate services to help manage their mental health; and

⁵³⁵ The following information is taken directly from website of the Magistrates Court of Western Australia, *Start Court* (updated 9 October 2019) (accessed 20 February 2020).

- where appropriate, provide an alternative to imprisonment.

The Program comprises an adult program, Start Court, and a young people's program, Links. The program is a partnership between the Mental Health Commission and the Department of the Justice. Independent consumer and family representatives are involved operationally. The other agencies that contribute to the program are:

- The Department of Health
- The Department of Corrective Services
- Western Australia Police
- Legal Aid Western Australia
- Outcare Inc. (a Non-Government service provider)
- Mental Health Law Centre.

4.4.7.3.1 Start Court (adult program)⁵³⁶

The Start Court is a Magistrates Court that specialises in dealing with offenders who have mental health issues. It is based within the Central Law Courts in Perth. The Court sits Tuesdays to Fridays.

Referrals to the Start Court are typically made by Magistrates in general court lists, often at the suggestion of a defence lawyer, family member or the individual him or herself.

Legal Aid duty lawyers can advise and represent people in the Magistrates Court and can provide advice on the day about whether a referral to Start Court is appropriate. There is also a dedicated duty lawyer who attends the Start Court each day.

The Start Court offers a program that combines access to mental health supports and services (including alcohol and other drug support if necessary), with regular appearances before the Start Court Magistrate. The program can take up to six months to complete.

To be eligible to participate, the individual must:

- have a mental health condition;

⁵³⁶ The following information is taken directly from website of the Magistrates Court of Western Australia, *Start Court* (updated 9 October 2019) (accessed 20 February 2020).

- accept that he or she committed the offence(s) that led to the court appearance; and
- be eligible for bail.

Participation is strictly voluntary. If a 'not guilty' plea is entered and maintained, the accused is ineligible for the Start Court program.

An assessment of suitability for the program will be undertaken with applicants, after they have attended a Start Court Information Session at the direction of the Court.

Successful participation in the Start Court may be taken into account for sentencing purposes.

The Start Court is operated by a dedicated team that includes a Magistrate, mental health clinicians, community support coordinators, peer support workers, legal representation, Police, and Community Corrections personnel.

The Start Court is overseen by Operational and Steering Committees that include representatives from participating agencies as well as independent consumer and family representatives.

4.4.7.3.2 Links (young people's program)⁵³⁷

Links offers mental health assessment and support to young people who appear before the Children's Court.

It comprises a clinical mental health team that is based within the Perth Children's Court, and a team of community support coordinators who assist participants to address non-clinical issues (such as issues relating to school engagement, transport and relationships).

Any young person appearing before the Court who is suspected of having a mental health issue may be referred to Links. Anyone can make a referral, including Magistrates, defence lawyers, other welfare agencies and family members.

Young people who are referred to Links are offered a voluntary mental health assessment. The outcomes of the assessment help to guide the future management of the young person's court proceedings and care.

⁵³⁷ The following information is taken directly from website of the Mental Health Commission, [Links](#) (accessed 20 February 2020).

Those young people assessed as having significant unmet mental health needs may be offered case management support by a Links community support worker or referred to other services for treatment and support.

Links works closely with other services and agencies that operate in the Children's Court and is part of the Children's Court Drug Court team.

4.4.7.4 Bennett Brook Disability Justice Centre

In August 2015, the Disability Services Commission opened the Bennett Brook Disability Justice Centre, Western Australia's first 'declared place' for people who are accused of a crime, but deemed to be unfit to plead under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA). Under section 24(5A) of that Act, a person may only be detained in a declared place if they are at least 16 years old, have a disability as defined in section 3 of the *Disability Services Act 1993* (WA), and the predominant reason for the disability is not mental illness. Placement at Bennett Brook is based on the recommendation of the Mentally Impaired Accused Review Board and the approval of the Minister for Disability Services. It provides an appropriate and rehabilitative placement option, as an alternative to prison, for accused people on a custody order under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) who may have intellectual or cognitive disabilities, or autism spectrum disorder.⁵³⁸ The facility is managed by the Department of Communities under the *Declared Places (Mentally Impaired Accused) Act 2015* (WA).

Throughout 2019–20, three people resided at the Centre. One person ceased to be a resident and returned to an alternative place of custody. All residents were granted leaves of absence by the Mentally Impaired Accused Review Board, which enabled them to leave the Centre with appropriate support and participate in activities within the community.⁵³⁹

⁵³⁸ Disability Services Commission, *Annual Report 2015-2016* (2016) pages 11, 14, and 46 (accessed 13 September 2021); Disability Services Commission, *Annual Report 2019-20* (13 September 2020) pages 131 (accessed 13 September 2021); Department of Communities, *Bennett Brook Disability Justice Centre* (accessed 15 March 2019).

⁵³⁹ Disability Services Commission, *Annual Report 2019-20* (13 September 2020) pages 131 (accessed 13 September 2021);

4.5 LEGAL CAPACITY

4.5.1 Capacity to give evidence

In most cases, people with disabilities will have the legal capacity to give sworn evidence in the same way as anyone else,⁵⁴⁰ as long as appropriate adjustments are made so that they can successfully communicate their evidence.⁵⁴¹

The Australian Human Rights Commission, in its 2014 publication 'Equal before the Law: Towards Disability Justice Strategies', summarised:⁵⁴²

Access to justice in the criminal justice system for people with disabilities who need communication supports or who have complex and multiple support needs (people with disabilities) is a significant problem in every jurisdiction in Australia. Whether a person with disability is the victim of a crime, accused of a crime or a witness, they are at increased risk of being disrespected and disbelieved and of not enjoying equality before the law.

The Commission found that people with disabilities frequently experience prejudicial assessments of their competency to give evidence either as a witness to criminal proceedings or as a defendant to proceedings. Although the report was specifically in the context of criminal law proceedings, there is little reason to think that the same barriers to justice would not apply in other kinds of court proceedings.

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.⁵⁴³

In some cases, a psychologist's assessment may be required in order to adequately assess a particular person's ability to give evidence, and to help the court understand the person's characteristics and demeanour and/or how to best communicate with them in court.

⁵⁴⁰ *Evidence Act 1906* (WA) s 97(1) (accessed 15 March 2019).

⁵⁴¹ *Evidence Act 1906* (WA) ss 106HB, 106R, 106RA (accessed 15 March 2019).

⁵⁴² Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014) page 5 (accessed 15 March 2019).

⁵⁴³ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (updated 12 June 2018) Section 5 [5.3.1], citing Keibell M 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, page 24 (accessed 15 March 2019).

It may be necessary in some cases for a witness with a mental impairment to give unsworn evidence under section 106B of the *Evidence Act 1906* (WA) — so long as they are able to give an intelligible account of the events which they have experienced. Note that for these purposes, 'mental impairment means intellectual disability, mental illness, brain damage or senility.'⁵⁴⁴

In relation to people with a mental illness, the Mental Health Law Centre submitted:⁵⁴⁵

The evidence of a person suffering from a mental illness should be given the same weight it would be given if the person giving the evidence did not have a mental illness. But the evidence should be considered in the context of the perception of the person giving the evidence, for example if the person were suffering persecutory delusions or grandiosity, the evidence should be considered in light of that.

Some people suffering from mental illness will experience confusion and intimidation in the criminal justice setting. This may result in persistent agreeance with authority figures or a desire to comply with the version of information put to them.

It is important that persons with mental illness feel comfortable and empowered to give their evidence in accordance with their recollection.

Please note that consideration should be given to *Circular to Practitioners 18 of the Guidelines for Cross - examination of Children and Persons Suffering a Mental Disability*, (contained within the District Court Consolidated Criminal Practice Directions), which were updated by the District Court of Western Australia on 3 April 2020.

4.5.2 Criminal responsibility

Some people with some intellectual disabilities or psychiatric disabilities may be unfit to plead or to be tried, or may be found not guilty by reason of mental illness.

⁵⁴⁴ *Evidence Act 1906* (WA) s 106A, *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 8 (both accessed 15 March 2019).

⁵⁴⁵ Submission from the Mental Health Law Centre WA Inc. (21 May 2007).

Under s 130 of the *Criminal Procedure Act 2004* (WA), any question about an accused's mental fitness to stand trial must be dealt with under the *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

Given the number of people in prison with intellectual and psychiatric disabilities (the statistics are contained in section 4.1) it is important that these provisions are used where appropriate. In some cases the stigma of raising the existence of mental illness, an intellectual disability, brain injury, FASD or dementia may mean that, unless the court intervenes at an early stage, a person may not raise these issues and may end up unjustly convicted and/or sentenced. On the other hand, it is also important to ensure that these provisions are not used when they should not be.

Note, however, that concerns have been expressed for many years that because of the limited dispositions available under the existing legislation for an accused person who is unfit to plead, it is possible that the accused will be detained in custody for a far more extended time than if he or she had pleaded guilty.⁵⁴⁶

Where an accused person is unfit to plead, the evidence against the accused is not tested, merely presented on the Prosecution case. The accused has no capacity to defend the proceedings because they are unfit to instruct a solicitor and defend the allegation(s).

An accused may be deemed temporarily unfit to plead but may become fit to plead following treatment. It is important to note, that is not likely the accused will become fit to plead where there is an intellectual disability as opposed to a mental illness.

An accused who is deemed unfit to plead or not guilty by reason of insanity is acquitted of the charge and subject to either unconditional release or a custody order. Persons under a custody order become subject to the Mentally Impaired Accused Review Board. As a result of limited facilities available to persons on custody orders, it is likely that upon their condition being stabilised, they could be remanded in a prison custodial setting despite being acquitted of the charged offence(s).

⁵⁴⁶ See for example, Wicham J in *Wilsmore v Court* [1983] WAR 190, 201; Martin CJ in *The State of WA v Tax* [2010] WASC 208 [19].

The Office of the Inspector of Custodial Services observed:⁵⁴⁷

For several reasons, there is only a small number of people held on custody orders. Our 2014 review discussed this in detail (OICS, 2014). Our review concluded that people who were placed at the Frankland Centre fared better than those on custody orders who were placed in prison, particularly in terms of the speed of their release. But again, regardless of the fact that these people have not been found guilty of committing an offence, only people with the highest needs were able to access the centre due to the lack of beds. Our review found that people were penalised for having less severe health needs, because those that did not access the Frankland Centre had a much slower path to release.

As there is no maximum term that a person can be subject to a custody order, they may be remanded in custody for longer than had they plead guilty to the charged offence. Given the indeterminable length of a custody order, many accused may simply plead guilty to the charge as opposed to raising an appropriate defence.

4.5.3 Capacity to initiate, defend or participate as a party in other legal proceedings

In addition to issues about an accused's mental fitness to stand trial (dealt with at 4.5.2), a person's capacity to initiate, defend or participate in legal proceedings as a party may be restricted if they are not of full legal capacity.

Normally in civil proceedings, the role of the Court is to determine disputes between parties. It is an adversarial, not an inquisitorial, system. However, when the Court gets evidence that a party may not have sufficient capacity to conduct the proceedings or instruct a lawyer, the Court cannot ignore this or let the parties resolve this amongst themselves. The matter must be addressed and dealt with by the Court.⁵⁴⁸

In these instances a person may need to have a 'litigation guardian', 'next friend' or 'guardian *ad litem*' involved in legal proceedings. Generally this requirement will apply to persons who are the subject of a guardianship or administration order made by the State Administrative

⁵⁴⁷ Office of the Inspector for Custodial Services, Government of Western Australia, *Prisoner Access to Secure Mental Health Treatment* (27 November 2018) (accessed 2 July 2020).

⁵⁴⁸ Submission from the Public Trustee (22 April 2020).

Tribunal (refer to 4.4.7.1), and generally the litigation guardian will be the guardian or administrator appointed by the State Administrative Tribunal.⁵⁴⁹ Note, however, that the *Rules of the Supreme Court 1971* (WA) provide for a next friend or guardian ad litem to be appointed to represent not only persons who are the subject of guardianship or administration orders, but also those who 'by reason of mental illness, defect or infirmity, however occasioned' are declared by the Court to be incapable of managing their affairs.⁵⁵⁰ In the Supreme and District Courts, the next friend or guardian *ad litem* must act by a solicitor.⁵⁵¹

The Public Trustee's publication *Freedom v Protection – A Guide to Guardian and Administration Orders, Litigation and Court Trusts for People with Impaired Decision Making*, by Michael Bowyer, states:⁵⁵²

There is a presumption that all adult parties have the capacity to conduct litigation, but if the Court gets evidence that a person may not have the capacity to do this, the court has to decide whether the person does have capacity. If this doesn't happen, the proceedings should be set aside as irregular. Normally, if a client loses capacity, the solicitor no longer has authority to act.

The District Court has a Practice Direction that requires an application to be made to SAT for a guardianship or administration order. The Supreme Court doesn't have anything similar. If proceedings are on foot, that court could adjourn them, to allow an application to be made to SAT for an administration order. Alternatively, it could consider whether or not to make a declaration of incapacity under Order 70 rule 1. Either way, the court could ask the Public Advocate to investigate capacity.

This can, at least up to a point, involve pre-judging what the court later has to decide in the case. In a claim under the Family Provision Act 1972, the daughter of a deceased person may seek more from her father's estate because she has a severe mental illness and can't work. If

⁵⁴⁹ See for example, *Guardianship and Administration Act 1990* (WA) s 45; *State Administrative Tribunal Act 2004* (WA) s 40; *State Administrative Tribunal Rules 2004* (WA) r 39; *Magistrates Court (Civil Proceedings) Act 2004* (WA) ss 3, 21; *Magistrates Court (Civil Proceedings) Rules 2005* (WA) rr 116, 118) (all accessed 19 March 2019).

⁵⁵⁰ *Rules of the Supreme Court 1971* (WA) O 70 r 1 (accessed 19 March 2019).

⁵⁵¹ *Rules of the Supreme Court 1971* (WA) O 70 r 2(3) (accessed 19 March 2019).

⁵⁵² Michael Bowyer (Department of Justice, Office of the Public Trustee), Resources and Publications, *Freedom v Protection – A Guide to Guardian and Administration Orders, Litigation and Court Trusts for People with Impaired Decision Making*, [10.3] (accessed 8 June 2020).

she has such an illness, it may be enough for her to be a 'person under disability'. But what if the other parties say she's faking it or exaggerating her symptoms, so she can get more money? If the court or SAT agree her claim may fall apart.

The District Court Practice Direction referred to in the above quotation is PD 12.2.2 which states:⁵⁵³

... The Court recognises that the expertise in the appointment of representatives of incapable persons resides with SAT. Accordingly, a person seeking to commence or defend litigation on behalf of an incapable person who is not an infant should first seek a guardianship or administration order pursuant to the GAA. The Court will not usually make a declaration that a person is incapable of managing their affairs for the purpose of making that person a person under disability within O 70.

4.6 PRACTICAL CONSIDERATIONS

4.6.1 Adjustments that may need to be considered before the proceedings start or at the time a person with a disability first appears in court

People with disabilities have the right to give evidence and to act as jurors, which is subject to some exceptions. For example, where a person has been declared under section 111 of the *Guardianship and Administration Act 1990* to be incapable of making judgments for the purpose of the *Electoral Act 1907*, their name will be removed from the electoral roll under section 51A of the *Electoral Act 1907*, and they will consequently not be liable to serve as a juror under section 4(1) of the *Juries Act 1957*.

However, adjustments may need to be made to the usual court processes and procedures. It may take some discussion to work out exactly what is required, and time to organise for the adjustments to be put in place. Inquire what adjustments a person with a disability requires – don't presume.

⁵⁵³ Accessed 8 June 2020.

Points to consider before the proceedings start or at the time the person with a disability first appears in court:

- The court may have advance notice of any needs from the person themselves, their support person or carer, or their legal representative. At other times, the court may not find out about a person's needs until they appear.
- People with physical disabilities might not tell the court of their disability out of embarrassment, not being very assertive, not knowing that adjustments could be made by the court, assuming the court is accessible, not being aware of court procedures and/or fear of not being taken seriously. Self-represented people may be particularly unlikely to raise the matter. Therefore, a helpful practice could be to look around the courtroom prior to proceedings commencing to consider whether everyone present can participate as required. If there is doubt, a simple enquiry may be made such as 'Are you comfortable sitting there?' or 'Is everyone warm enough?'⁵⁵⁴
- While in some cases, providing adjustments might delay the start or continuation of proceedings or cost money to provide, this needs to be balanced against the particular person's right to give their evidence effectively or to act as a juror.
- Examples of adjustments that may need to be implemented include:
 - moving the court to a more accessible courtroom or venue;
 - changing the physical layout of the court - for example, allowing a witness to present evidence from the bar table or from a stretcher;
 - providing assistance with physical entry to the court;
 - allowing a person prior access to the court in order to familiarise themselves with it;
 - providing an infra-red assistive hearing device (a hearing loop);
 - allowing evidence to be received by telephone, and maybe using a teletypewriter (TTY) in place of a standard telephone;

⁵⁵⁴ Judicial College (United Kingdom), *Equal Treatment Bench Book* (revised February 2021) Chapter 3 [62], page 103 (accessed 7 April 2021).

- making sure an Auslan (Australian Sign Language) interpreter is available or that a person can use their support person as an interpreter to help them give their evidence;
- ensuring 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;
- considering, for those people with disabilities who have reduced decision-making capacity, whether arrangements should to be put in place for substitute (or supported) decision-making for the legal proceedings.

Refer to sections 4.4.7.1 and 4.5.3 for more information guardianship, administration and capacity.

- considering whether you should declare a witness with a disability to be a 'special witness' enabling certain measures to be put in place including, for criminal proceedings, allowing certain visually recorded investigative interviews to be used as evidence-in-chief and/or allowing the witness to give evidence using closed circuit television (CCTV) or similar technology, and/or screens, and/or the pre-recording of their evidence, 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;⁵⁵⁵
- allowing someone to have a support person with them at all times, close by and within sight;⁵⁵⁶
- allowing someone to have a 'communicator' with them while giving evidence, to assist communicate and explain the questions put to the witness and to communicate and explain the evidence given by the witness;⁵⁵⁷
- being flexible and/or more precise with the timing of listings, of starting and finishing receiving a particular person's evidence, to fit with a particular person's requirements in relation to eating, medication, treatment, transport and other such needs;
- having frequent breaks;

⁵⁵⁵ *Evidence Act 1906* (WA) s 106R. See also ss 106HB, 106I and 106RA (accessed 19 March 2019).

⁵⁵⁶ *Evidence Act 1906* (WA) s 106R(4)(a) (accessed 19 March 2019).

⁵⁵⁷ *Evidence Act 1906* (WA) ss 106F, 106R(4)(b), 106R(4b) (accessed 19 March 2019).

- prior to the court appearance of a person with a disability, ensuring all critical documents have been provided to them in advance in an appropriate format, and/or that they have been read to them, and/or signed by them; and
- providing a computer/technology assisted communication device, or allowing someone to use their own — for example, a light writer to type 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.
- Note that if a person is likely to need to be declared a special witness and have the special measures referred to above put in place, the party who is to call the person must apply for a hearing to have these matters dealt with before the proceeding commences.⁵⁵⁸

4.6.2 Oaths, affirmations and declarations

Points to consider:

- In most cases, people with disabilities will be able to take an oath or affirmation like anyone else, so long as appropriate adjustments are made so that they can successfully communicate their evidence.
- Whether a person with a disability takes an oath or an affirmation and the type of oath taken will depend on their religious affiliation or lack of religious affiliation.

For more information on oaths and affirmations please refer to chapter 3
of this Bench Book.

- It may be necessary for some people with disabilities (a person with a mental impairment, irrespective of age) to give unsworn evidence — as long as they are able to give an intelligible account of events which they have observed or experienced.⁵⁵⁹

⁵⁵⁸ *Evidence Act 1906* (WA) s 106S (accessed 14 September 2018).

⁵⁵⁹ *Evidence Act 1906* (WA) s 106C, 106B(2) (accessed 12 September 2018).

- Make sure you do not talk down to people with disabilities — they are not children.
- If you are unsure about the capacity of a particular person with a disability to give even unsworn evidence, consider requesting a psychologist's assessment.

4.6.3 Language and communication

4.6.3.1 Initial considerations

Procedural justice and the integrity of the court process demand that all witnesses understand what is going on, the meaning of any questions they are asked and that their evidence and replies are adequately understood by the court.

It is critical that people with disabilities are treated with the same respect as anyone else.

Some people with disabilities will need a communication aid or interpreter to communicate their evidence and/or hear what is being said by others. They may also need some adjustments to be made in the level or style of language used, or the manner in which they are given information about what is going on.

Some people who do *not* need a communication aid or interpreter may also need adjustments to be made in the level or style of language used and/or the manner in which they are given information.

The level and style of language, any explanations about what is going on, and any cross-examination must be appropriate to the capacity and needs of the particular individual.

4.6.3.2 General communication guidance

Points to consider:

- Use the appropriate language and terminology in relation to disabilities.
- Do not refer to a person's disability unless this is relevant to assessing their communication (or other accessibility) needs or to the matters before the court.

Refer to section 4.4, particularly the terminology table in section 4.4.4.

- Do not talk down to a person with a disability as though they are a child.

- Talk to the person directly, not their support person or interpreter.
- Use a level of language and style of communication appropriate to the needs of the particular person with a disability.
- 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...?'

Refer also to section 4.4.4, the *Inclusive Language* factsheet by the Australian Network on Disability, and the *Words at Work: Building Inclusion through the Power of Language* resource produced by the Diversity Council Australia.

- It is always best to ask if you think there might be any special communication style needs, in case the person does not think they need to tell you or does not want to volunteer the information.
- For a person using communication equipment you (and others in court) may need to adjust how you speak to suit the technology being used. Any person using such equipment should be able to tell you what you can do to make communication work better.
- Consider allowing someone who you have declared to be a special witness to have a 'communicator' with them while giving evidence — to assist, communicate and explain the questions put to the witness and to communicate and explain the evidence given by the witness.
- Use an appropriate communication aid or interpreter and explain to any jury the reason for its use, and that they must not discount the person's evidence because of the manner in which it is communicated.

For further guidance on working with an interpreter see chapter 7.

- Do not assume (or appear to assume) that a person with a disability who has some communication adjustment need is intellectually any less capable than someone with no such need.

- Whenever a person with a disability appears to be having difficulty in communicating their evidence or in understanding what is required of them, double-check directly with them (or their support person or legal representative, if appropriate) whether there is anything that could be provided to assist them — for example, a higher volume or a reader.
- Check whether the person is experiencing any discomfort or difficulty in delivering their evidence that the court might be able to help alleviate in any way at all.
- As prescribed by law,⁵⁶⁰ you may need to intervene if others in court are not directing their questions in an appropriate manner, as prescribed under s 26 of the *Evidence Act 1906* (WA). In deciding whether to disallow a question, among other things, you can take into account any physical disability of the witness.

4.6.3.3 Level and style of language to suit particular needs

4.6.3.3.1 Communication techniques for people with physical disabilities

Points to consider- communicating with people who are Deaf or who are hard of hearing:

- For a Deaf person or person who is hard of hearing, you (and others in court) may need to simply make sure that your mouth is uncovered, or your volume is high enough. Do not speak too quickly, especially when using the assistance of an Auslan interpreter.
- Many Deaf people use both English and Auslan, but may not be fluent in spoken English — it may be necessary to engage an Auslan interpreter because speech and lip-reading may be unreliable.⁵⁶¹
- Any interpreter should be qualified and competent — for more information see the Access Plus WA Deaf - *Access Interpreting*.

⁵⁶⁰ *Evidence Act 1906* (WA) s 26 (accessed 15 March 2019).

⁵⁶¹ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) page 128 (accessed 15 March 2019).

Points to consider – communicating with people who are blind or who have vision impairment:

- For people with vision impairment, it is advisable to ask the individual as to their needs, even to the detail of specifying a particular font style and size for printed material.
- For a person who is blind or has a vision 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.
- People who have severe vision impairment and hardness of hearing often adopt a 'hands-on' signing method:⁵⁶² the person places his or her hands lightly on the signing person's hands in order to comprehend Auslan, Deafblind Sign Language or any other manual system such as the Deafblind alphabet. The person communicating a message spells it out on the hands of the person who is Deafblind.

Points to consider – communicating with people who have a speech impediment:

- For a person with a speech impediment you (and others in court) may simply need to be patient and listen carefully. 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.

4.6.3.3.2 Communication techniques for people with intellectual disabilities

Points to consider – communicating with people who have intellectual disabilities:

- Many people do not want to acknowledge they have an intellectual disability, so they may feign understanding.
- Always talk directly to the person, not to a friend or family member, a carer or support person — the support person will tell you if they think the person does not understand.

⁵⁶² Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) page 131 (accessed 26 November 2020).

- In appropriate cases, if an accused person has an intellectual disability, ask whether they have considered their eligibility for diversion through the Intellectual Disability Diversion Program .

Information and eligibility criteria for the Intellectual Disability Diversion Program is discussed in section 4.4.7.2.

- Slow down your speech.
- Use language that is as simple and direct as possible, but do not talk down to a person with an intellectual disability. For example:
 - Use the person's name and ensure they are paying attention before speaking to them.⁵⁶³
 - Use the words or phrases we tend to learn first — for example 'about' not 'regarding' or 'concerning'; 'start' not 'commence'; 'go' not 'proceed'; 'to' not 'towards'; 'I think you said/did' not 'I put it to you that ...'; 'It's true isn't it' not 'Is that not true?'
 - Give preference to short, one- or two-syllable words.
 - Avoid words with more than one meaning.
 - Use active, not passive, speech (subject, verb and then object, not object, verb and then subject) — for example, 'The dog bit you', not 'You were bitten by the dog.'
 - Use short sentences of five to eight words, containing one idea only and using the everyday words of the person.⁵⁶⁴ Use 'Easy English' and pictures next to words if possible. VisAbility have published a helpful *Easy English Checklist*.
 - Avoid double negatives. Use single negatives instead — for example, 'Did he tell you not to do this?' not 'Didn't he tell you not to do this?'
 - Use simple verb tenses — the simplest, most definite or concrete verb tense possible with as few extra words as possible — for example, 'you say' not 'you are saying', 'she had' not 'she had had.'
 - Avoid hypothetical questions. Be direct: 'Do you want a break?' not 'If you think that you might like a break, let me know.'

⁵⁶³ Judicial College (United Kingdom), *Equal Treatment Bench Book* (revised February 2021) Chapter 3 [69], page 125 (accessed 7 April 2021).

⁵⁶⁴ Submission from People with Disabilities (WA) Inc. in consultation with VisAbility Accessibility Services (9 March 2020).

- 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 and 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 can you tell us about...' not 'your evidence'; and 'against' not 'versus.'
- Explain what they must do and why, and what is happening, carefully and patiently, in short amounts, using simple, direct, non-legal language. Then ask the person to tell it back to you to make sure they understand – ask them to say what they must do, or what is happening, using their own words.⁵⁶⁵ If necessary, give the explanation in a different way.
- If you need to check that a person has understood what was said, ask them to repeat back to you what they think was said. Do not ask 'Do you understand?' as people might incorrectly believe that they have understood.⁵⁶⁶
- Allow additional time for the person's legal representative to explain the proceedings to them.
- Consider allowing the evidence to be given in narrative form, to avoid the person getting muddled and distracted by a series of questions.
- Ask questions one at a time.
- Use open-ended questions — avoid leading questions, and avoid questions soliciting a 'yes/no' answer.

⁵⁶⁵ Submission from People with Disabilities (WA) Inc. (9 March 2020).

⁵⁶⁶ Judicial College (United Kingdom), *Equal Treatment Bench Book* (revised February 2021) Chapter 3 [71], page 125 (accessed 7 April 2021).

- Watch for 'pleasing' behaviour — the person may try to give you the answers they think you want.
- Do not rush the person or appear impatient, and try not to interrupt. Allow extra time for answers.
- Try not to direct or pressure the person or they may change their answer to 'please' you or to enable a quick exit.
- Keep questioning as short as possible; watch for emotional or information overload and take breaks if necessary.
- Make sure they can understand any written material they need to understand. It may need to be in large print (with pictures), or it may need to be read out aloud to the person, or translated into simple, direct language.⁵⁶⁷ Be aware that some people with an intellectual disability may pretend to read.
- As prescribed by law, intervene whenever others (for example, during cross examination) do not give proper consideration to these points — establish these points as the 'ground rules' for cross-examination, if necessary.⁵⁶⁸
- Check the language of any prior confession against the language used by the particular person (and assess any confession against the intellectual ability of the particular person).

4.6.3.3.3 Communication techniques for people with FASD

Points to consider

- People with FASD may be affected by physical, intellectual and/or behavioural disabilities.
- Many people are not aware or do not want to acknowledge that they have a disability,

⁵⁶⁷ Submission from People with Disabilities (WA) Inc. (9 March 2020).

⁵⁶⁸ Note that s 26 of the *Evidence Act 1906* (WA) enables you to disallow improper questions (accessed 20 March 2019).

so they may feign understanding. People with FASD are at increased risk for suggestibility and may agree with what is put to them without an adequate understanding of what is said or appreciation of the consequences.⁵⁶⁹ This may include making a false confession.⁵⁷⁰

- It is important that for any individual with FASD and/or speech, language and communication needs, a speech-language pathology assessment is undertaken. This will help to determine both the individual's capacity in communication and their functional communication abilities. The assessment can then inform what communication techniques are most appropriate to use with them.⁵⁷¹

Please refer to sections 4.2.1 and 4.4.2.7 for further information about the range different impairments person associated with FASD. Communication techniques will need to vary according to the nature and combination of disabilities affecting the person.

If the person has intellectual disability as a feature of FASD please also refer to section 4.6.2.3.2.

The Telethon Kids Institute has developed a number of *FASD Resources for the Justice System* to assist judicial officers and others in understanding and recognising FASD in people engaging with the justice system.

4.6.3.3.4 Communication techniques for people with an acquired brain injury

Points of consider – communicating with people with an acquired brain injury:

- Each person with an acquired brain injury is different and will have their own set of communication needs depending on how seriously the injury has affected their ability to process information or communicate it. Ascertain whether the brain injury primarily affected receptive or expressive language. For example, some people with aphasia (a

⁵⁶⁹ McLachlan K, Roesch R, Viljoen JL and Douglas KS, *Evaluating the Psycholegal Abilities of Young Offenders with Fetal Alcohol Spectrum Disorder, Law and Human Behaviour*, 38 (2013) pages 10-22.

⁵⁷⁰ Telethon Kids Institute, *Alcohol and Pregnancy & FASD* (2019) *What is FASD?* (2018) (accessed 26 November 2020).

⁵⁷¹ Submission from Telethon Kids Institute (Dr R Mutch, Dr H Passmore, Dr C Bower, N Kippin and S Hamilton) (9 March 2020).

class of language disorder caused by a dysfunction in the brain) can understand what is being said to them but cannot respond verbally.

- Some people may need a support person to interpret for them. Others may need to be listened to for a while until you understand what they are saying; you may have to ask them 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, or ask them to stop it and explain why you are doing this.
- If a person appears 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;
 - ask them to repeat back to you in their own words; and
 - use simple, direct non-legal language.
- If you need to check that a person has understood what was said, ask them to repeat back to you what they think was said. Do not ask 'do you understand?' as people might incorrectly believe that they have understood.
- If their words or thoughts are jumbled: be patient — they 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 that they can understand any written material they need to understand — it may need to be in large print or read out to them or translated into simple, direct language.

- As prescribed by law,⁵⁷² 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.

4.6.3.3.5 Communication techniques for people with psychiatric disabilities/ mental illnesses

Points to consider – communicating with people with psychiatric disabilities/ mental illnesses:

- 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.
- One example of behaviour that may be exhibited by people with a mental illness is avoidance of eye contact: the Mental Health Law Centre advised that this should not be interpreted as indicating dishonesty, but is usually associated with anxiety.⁵⁷³
- The Mental Health Law Centre also highlighted the importance of using 'plain English' when speaking with people diagnosed with mental illnesses.⁵⁷⁴ Speak slowly and allow extra time for the person to answer. Set time limits for cross-examination.
- Although the disability or its causes may be irrelevant to the matter, what is important is how the disability affects the functionality of the person with the disability and what adjustments can be made to accommodate their impairments.⁵⁷⁵
- If the person is experiencing difficulty with memory or concentration, ask them the best way to assist them in understanding and remembering.
- If a person is aggressive (that is directing their anger at you or others personally, making abusive statements, or threatening violence or self-harm):

⁵⁷² *Evidence Act 1906* (WA) s 26 (accessed 20 March 2019).

⁵⁷³ Submission from the Mental Health Law Centre WA Inc. (23 June 2020).

⁵⁷⁴ Submission from the Mental Health Law Centre WA Inc. (23 June 2020).

⁵⁷⁵ Submission from People with Disabilities (WA) Inc. (9 March 2020).

- summarise the problem;
 - set ground rules: 'I will listen to your concerns but I need you to...';
 - focus on why they are there;
 - explain the reasons behind your actions or decisions; and/or
 - call security if anyone is threatened.
- If a person is highly anxious or paranoid:
 - allow them to attend court prior to the proceedings to familiarise themselves with it;
 - if available consider holding the hearing in a less threatening environment, such as a conference room;
 - explain the purposes of microphones, recorders, video cameras etc. at the beginning of the hearing;
 - explain the roles of everyone in the courtroom; and/or
 - speak calmly and slowly.
- If a person is delusional:
 - do not argue with them about the delusion, as this could provoke them — and 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; and/or
 - if necessary, call a break.
- People with Disabilities (WA) Inc. advised:⁵⁷⁶
 - You may need to ask questions to try to find out if it would be better to delay taking evidence until, for example, the behavioural effect of any medication or any drug or alcohol use has kicked in or worn off (as appropriate).

⁵⁷⁶ Submission from People with Disabilities (WA) Inc. (9 March 2020).

- Due to stigma many people do not want to acknowledge or admit that they have a psychiatric disability, so they may feign understanding or react to the labelling aggressively.
 - Always talk directly to the person, not to a friend or family member, a carer or support person – the support person will tell you if they think the person does not understand.
 - Keep questioning as short as possible – watch for emotional or information overload. Take breaks if necessary.
 - Allow additional time for the person's legal representative to explain the proceedings to them. Cognition can be a problem for people experiencing mental illness.
- The Mental Health Law Centre advised that 'it is important to not assume that a statement made by a person with a mental illness is delusional because it sounds extreme or bizarre'. The Centre also advises that judicial officers should 'be aware that statements which may seem plausible can be delusional'.⁵⁷⁷
 - As prescribed by law,⁵⁷⁸ 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.
 - For accused persons, consider if it would be useful to make use of the Court Liaison Service. The Court Liaison Service is part of the Community Forensic Mental Health Service (CFMHS), based at Moore House, Graylands Campus. It provides a liaison Service to all the courts in Western Australia; in person to Metropolitan Courts, and via videoconference to Regional Courts. The Court Liaison Service also assesses individuals arrested by the police who are in police custody at Northbridge lock up and are suspected of being acutely mentally ill.⁵⁷⁹

⁵⁷⁷ Submission from the Mental Health Law Centre WA Inc. (21 May 2007).

⁵⁷⁸ *Evidence Act 1906* (WA) s 26 (accessed 20 March 2019).

⁵⁷⁹ Government of Western Australia, Department of Health, *Community Forensic Mental Health Service (CFMHS) - State Mental Health Service of Western Australia* (accessed 20 March 2019).

4.6.4 Special measures for obtaining evidence from witnesses with disabilities

The *Evidence Act 1906* (WA) prescribes several alternative ways of obtaining evidence from witnesses with particular needs, including those witnesses with a disability who have been declared a 'special witness'.

Some of the 'special witness' provisions apply on grounds other than disability but might be also be applicable to witnesses who have a disability. For example, refer to the restrictions on unrepresented persons cross-examining child witnesses and complainants in serious sexual assault cases, in chapters 5 and 13 of this Bench Book respectively.⁵⁸⁰

Judicial officers also have the discretion to allow any witness in proceedings in which the accused is self-represented to be cross-examined by video link, while screened, or without being directly questioned by the accused — having regard to the nature of the charge, the wishes of the witness, and the availability of any necessary facilities or equipment.⁵⁸¹

Other than in relation to certain child witnesses,⁵⁸² the court can also order that a person be treated as a 'special witness' if:⁵⁸³

- by reason of physical disability or mental impairment, the person would be unlikely to be able to give evidence, or to give evidence satisfactorily; or

the person would be likely, by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant:

to experience severe emotional trauma; or

to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily.

⁵⁸⁰ *Evidence Act 1906* (WA) s 106G, *Restraining Orders Act 1997* (WA) ss 44C, 53D (both accessed 20 March 2019).

⁵⁸¹ *Evidence Act 1906* (WA) s 25A (accessed 20 March 2019).

⁵⁸² See Section 5 of this Bench Book for details on the special arrangements in place for child witnesses.

⁵⁸³ *Evidence Act 1906* (WA) s 106R(3) (accessed 20 March 2019).

Once a witness has been declared a special witness there are a number of additional measures that can be put in place which are intended to make the process less stressful for the witness and thereby to improve the quality of their evidence.

Note that if the proceedings are before a jury and you restrict the means of cross-examination by a self-represented accused and/or you declare a person to be a special witness, you should instruct the jury that implementing these procedures or 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.⁵⁸⁴

4.6.4.1 Visually recorded interviews with 'special witnesses' with mental impairment in any proceeding for an offence

Points to consider:

- You can admit the visual recording of a witness's interview, referred to as a visually recorded interview, as all or part of their evidence-in-chief in any proceeding for an offence, if:⁵⁸⁵
 - the witness has a mental impairment⁵⁸⁶ and you have declared the witness to be a 'special witness' under s 106R of the *Evidence Act 1906* (WA);
 - the interview is conducted by a person of a prescribed class and the conduct of the interview meets the prescribed requirements to the prescribed extent;⁵⁸⁷ and
 - the accused or their legal representative has been given an opportunity to view the visually recorded interview and has been provided with a transcript.⁵⁸⁸
- You must instruct a jury that this procedure is a routine practice of the court and that they should not draw any inference as to the accused's guilt from the use of the procedure.⁵⁸⁹

⁵⁸⁴ *Evidence Act 1906* (WA) ss 25A(4), 106R(7) (accessed 20 March 2019).

⁵⁸⁵ *Evidence Act 1906* (WA) ss 106HA, 106HB (accessed 20 March 2019).

⁵⁸⁶ *Evidence Act 1906* (WA) s 106A; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 8 — mental impairment means intellectual disability, mental illness, brain damage or senility (accessed 20 March 2019).

⁵⁸⁷ *Evidence Act 1906* (WA) s 106HA(1a) (accessed 20 March 2019).

⁵⁸⁸ *Evidence Act 1906* (WA) s 106HB(2)(a),(b) (accessed 20 March 2019).

⁵⁸⁹ *Evidence Act 1906* (WA) s 106HB(7)(a) (accessed 20 March 2019).

4.6.4.2 Video links or screening arrangements for 'special witnesses' in any proceeding for an offence

Points to consider:

- If, in any proceeding for an offence, you have declared a person with a disability to be a special witness, you may arrange for that person to give evidence by video link⁵⁹⁰ or, if those facilities are not available, with screens in place.⁵⁹¹
- Note that if the witness is the complainant in a serious sexual offence, you must declare that person to be a special witness unless you are satisfied that the witness would otherwise be able to give evidence satisfactorily and that person does not wish to be a special witness.⁵⁹²

For more information on evidentiary issues associated with sexual assault please refer to chapter 13.

- If the special witness's evidence is given by video link, it is to be visually recorded; a similar requirement applies when those facilities are not available and the special witness is screened while giving evidence.⁵⁹³
- In the event that video link equipment or remote witness facilities are not available, a screen is to be placed while the special witness is giving evidence to ensure that the special witness cannot see the accused, but the judge, jury, accused and counsel can see the special witness.⁵⁹⁴
- Instruct the jury that declaring a witness to be a special witness is a routine practice of the court and this should not affect how they consider the evidence.
- Note that certain child witnesses in proceedings defined in Sch 7 of the *Evidence Act 1906* (WA) cannot be declared to be special witnesses. In these matters you must make

⁵⁹⁰ *Evidence Act 1906* (WA) ss 106R(4), 106N(2) (accessed 20 March 2019).

⁵⁹¹ *Evidence Act 1906* (WA) ss 106N(2), 106N(4), 106R(4)(c) (accessed 20 March 2019).

⁵⁹² *Evidence Act 1906* (WA) s 106R(3) - (3a) (accessed 20 March 2019).

⁵⁹³ *Evidence Act 1906* (WA) ss 106N(3a), 106N(5) (accessed 20 March 2019).

⁵⁹⁴ *Evidence Act 1906* (WA) s 106N(4) (accessed 20 March 2019).

arrangements for the child to give evidence by video link or with screening unless you have granted the prosecutor's application that these arrangements not apply.⁵⁹⁵

4.6.4.3 Visually recording evidence of 'special witnesses' at a special hearing in any proceeding for an offence

Points to consider:

- If, in any proceeding for an offence, you have declared a person with a disability to be a special witness, you can allow, on your own motion or upon application by any party, for the whole of that person's evidence to be given at a special hearing and visually recorded.⁵⁹⁶
- Instruct the jury that declaring a witness to be a special witness is a routine practice of the court and this should not affect how they consider the evidence.⁵⁹⁷
- Note that these arrangements can only be made in relation to certain child witnesses in proceedings set out in Sch 7 of the *Evidence Act 1906* (WA).⁵⁹⁸ (But see the alternative arrangements available under s 106I to record the affected child's evidence at a special hearing).⁵⁹⁹

4.6.4.4 Additional arrangements available in any proceedings

Points to consider:

- If you have declared a person with a disability to be a special witness, you can allow that person to have a support person of their choice present while they give evidence, but the support person must be approved by the court and must not be a person who is a witness in or party to the proceedings.⁶⁰⁰

⁵⁹⁵ *Evidence Act 1906* (WA) ss 106N, 106O (accessed 20 March 2019).

⁵⁹⁶ *Evidence Act 1906* (WA) s 106RA (accessed 20 March 2019).

⁵⁹⁷ *Evidence Act 1906* (WA) s 106R(7) (accessed 20 March 2019).

⁵⁹⁸ *Evidence Act 1906* (WA) s 106RA(2) (accessed 20 March 2019).

⁵⁹⁹ *Evidence Act 1906* (WA) s 106I (accessed 20 March 2019).

⁶⁰⁰ *Evidence Act 1906* (WA) s 106R(4)(a) (accessed 20 March 2019).

- If you have declared a person with a disability to be a special witness, you can allow that person to have a communicator while they are giving evidence.⁶⁰¹
- The function of the communicator is, where requested to do so by the court, to communicate and explain to the witness the questions put to them, and to explain to the court the evidence given by the witness.⁶⁰²
- Note that there is provision under s 121 of the *Evidence Act 1906* (WA) for you, on your own initiative or on the application of any party to the proceedings, to allow evidence to be taken by video-link from outside the place where the court is sitting — although you should not do so if satisfied that this is not in the interests of justice.
- In addition to the restrictions on unrepresented persons directly cross-examining witnesses who are children, complainants in serious sexual assault proceedings or certain witnesses in restraining order matters,⁶⁰³ you have discretion to allow the cross-examination by an unrepresented accused of any witness to be by video link, while screened, or without questions being put directly — having regard to the nature of the charge, the wishes of the witness, and the availability of any necessary facilities or equipment.⁶⁰⁴
- Instruct the jury that declaring a witness to be a special witness, or using alternative means for a witness to present evidence, are routine practices of the court and these measures should not affect how they consider the evidence.

You should consider discussing with the parties and/or their legal representatives in any proceedings the use of any special measures referred to in section 4.6.4.1 - 4.6.4.3 irrespective of whether the person has been declared a special witness — if to do so would be in the interests of justice.

⁶⁰¹ *Evidence Act 1906* (WA) s 106R(4)(b) (accessed 20 March 2019).

⁶⁰² *Evidence Act 1906* (WA) s 106F, 106R(4b) (accessed 20 March 2019).

⁶⁰³ *Evidence Act 1906* (WA) s 106G; *Restraining Orders Act 1997* (WA) ss 44C, 53D (accessed 20 March 2019).

⁶⁰⁴ *Evidence Act 1906* (WA) s 25A (accessed 20 March 2019).

4.6.5 Breaks and adjournments

Points to consider:

- Some people with disabilities (and their carers, support people, interpreters, and assistance animals) may need 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.
- While it is critical to minimise delays, it is also critical to ensure adequate and sufficient breaks for these purposes, or the particular person may not be able to give their evidence (or act as a juror) effectively.
- 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 give them the break when they ask.
- As they will not always ask, watch for signs that a break might be needed — for example, wandering concentration, stress and/or discomfort.
- Use 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.
- You may need to adjourn proceedings in order to move to another court room, take evidence elsewhere, get an interpreter or support person, get particular technological equipment and/or allow for someone's transport, illness or disability needs.

4.6.6 The possible impact of a person's disability or disabilities on any behaviour relevant to the matter(s) before the court

Points to consider:

- Has the nature of a particular person's disability had any influence on the matter(s) before the court? If so, where possible, take appropriate account of any such influence.
- 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 — to

ensure that justice is done and seen to be done — explain why any such influence can or cannot be taken into account. You may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing.

- Ensure that the person with a disability is 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.⁶⁰⁵
- 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; or
 - requiring the use of pseudonyms for parties and excluding any other identifying information.

4.6.7 Directions to the jury

Points to consider:

- It is important that you ensure that the jury does not allow any ignorance of people with disabilities, or any stereotyped or false assumptions about people with disabilities, or the manner in which a particular person's evidence is presented, to unfairly influence their judgement.
- You may need to provide specific guidance as follows, although you should raise any such points with the parties' legal representatives first.

⁶⁰⁵ Note that s 26 of the *Evidence Act 1906* (WA) enables the court to disallow a question put to witness in cross-examination, or inform the witness that it need not be answered, if the question is misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. The court may take into account any mental, intellectual or physical disability to which the witness is or appears to be subject (accessed 20 March 2019).

- Caution the jurors against making false assumptions about the evidence of people with disabilities or particular types of disabilities. For example, it is a misperception that people infected with HIV bear moral responsibility for their conditions because they may have engaged in drug use or sex work. This may be based on inaccurate information about the mechanisms of HIV transmission. As discussed in 4.4.2.4, HIV may be transmitted via blood, semen, breastmilk and vaginal fluids. There may also be a further misperception that HIV and AIDS are life threatening conditions, whereas with the new anti-retroviral treatments available in Australia AIDS diagnoses are rare.
- If you have declared any witness in the proceedings to be a special witness, remind jurors that the making of that declaration is a routine practice of the court and that they should not draw any inference as to the accused's guilt from it.⁶⁰⁶
- Remind the jury of any directions you made earlier in the proceedings in relation to how they must treat evidence presented as a result of restricting direct cross-examination by a self-represented accused, using a communication aid, interpreter, or as a pre-recorded interview, etc.
- Draw the jury attention to any evidence presented in court about the particular person's capacities — for example, in relation to interpreting their conduct or intent, 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.

4.6.8 Sentencing, other decisions and judgment or decision writing

Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory and preferably seen to be so by all those involved; for example, to any person with a disability and any carer(s).

Points to consider:

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

⁶⁰⁶ *Evidence Act 1906* (WA) s 106R(7) (accessed 20 March 2019).

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 section 4.6 (including the points made in 4.6.7 about directions to the jury) that are relevant to the particular case.

- If a victim is not personally capable of giving a victim impact statement, because of a disability or for any other reason, consider whether it is appropriate for someone else to do so on the victim's behalf.⁶⁰⁷
- Consider whether to allow a victim impact statement to be read out in court.⁶⁰⁸
- Note that many people with disabilities struggle financially because of the barriers against full or adequate remunerated employment and the financial costs associated with their disability. A specific level of fine for them will often mean considerably more than the same level of fine for others.⁶⁰⁹
- Ensure you do not undervalue the financial costs associated with any person's disability in relation to such matters as compensation, property division and inheritance.
- 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.⁶¹⁰ For example, an HIV-infected prisoner may find imprisonment more burdensome because he or she has a greater risk of contracting opportunistic infections.
- 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 needs.

⁶⁰⁷ *Sentencing Act 1995* (WA) s 24(2) (accessed 11 September 2018).

⁶⁰⁸ See Part 3, Division 4 of the *Sentencing Act 1995* (WA) (accessed 12 September 2018). Note that to ensure procedural fairness, it is practice for victim impact statements to be made available to defence counsel, but defence counsel are not able to retain them. See, for example, Supreme Court of WA, *Consolidated Practice Directions*, PD 5.11 (as at 24 August 2018) (accessed 12 September 2018).

⁶⁰⁹ The Mental Health Law Centre WA Inc. raised specific concern about the financial difficulties for people with mental illnesses because of the limited pension they often receive (submission from the Mental Health Law Centre WA Inc. - 21 May 2007).

⁶¹⁰ See for example, *R v Smith* (1987) 44 SASR 587; *R v Penalosa-Munoz* [2004] NSWCCA 33; (2004) 143 A Crim R 594 [14].

- For example, it may be appropriate for the decision to be written down at the time of sentencing (in as simple and direct English as possible), and then given to the person or their legal representative to help ensure understanding and compliance.
- In particular, when you are sentencing an offender, if the offender is present in court or appearing by video-link, you must explain, in language likely to be understood, the effect of the sentence, the obligations of the offender and the consequences of non-compliance.⁶¹¹
- In sentencing people with a mental illness, the Mental Health Law Centre submitted that:⁶¹²
 - Mental illness is a relevant consideration as it may:
 - impair a person's ability to exercise appropriate judgement;
 - impair a person's ability to make calm and rational choices, or to think clearly;
 - make a person disinhibited and lacking consequential thinking processes;
 - impair a person's ability to appreciate the wrongfulness of his conduct;
 - obscure the intent to commit the offences; or
 - contribute (causally) to the commission of the offences.
 - The sentencing of mentally unwell offenders is one of the most complex and acute issues in the criminal justice system and every case must be looked at on its own facts: *Krijestorac v Western Australia* [2010] WASCA 35 [17]-[19], applying the principles laid out in *R v Verdins* (2007) 16 VR 269.
 - If the Court finds there is no causal connection between offending and mental disorder, the Court can still consider mental disorder relevant to issues such as the offender's rehabilitation, treatment, deterrence and the question of whether any sentence of immediate imprisonment would weigh more heavily on the offender than a person in normal health: *Mason v The State of Western Australia* [2018] WASCA 43 [61].
 - A prisoner suffering from serious psychiatric illness is not an appropriate vehicle for general deterrence, whether or not the illness played a part in the commission of the offence, and the imposition of a custodial term may 'weigh more heavily' on a person with a mental illness: *R v Tsiaras* [1996] 1 VR 398, 400.

⁶¹¹ *Sentencing Act 1995* (WA) s 34 (accessed 20 March 2019).

⁶¹² Submission from the Mental Health Law Centre (23 June 2020).

4.7 FURTHER INFORMATION OR HELP

4.7.1 Court and tribunal contacts for accommodating the needs of people with disabilities

Supreme Court of Western Australia

Generally the associate to the Judicial Officer liaises with Listings section of the Court which in turn lists the matter in a suitable court room. Contact details for associates can be found at the Supreme Court website.

Family Court of Western Australia

The Business Services Section, Business Support and Administration Officer can assist with arrangements to be made for people with disabilities.

District Court of Western Australia

The Manager Customer Support can assist with arrangements for people with disabilities.

State Administrative Tribunal Western Australia (SAT)

The 'notice of hearing' advises SAT users of the facilities that are available; the Tribunal has a number of access measures in place. These include, but are not limited to, the ability to hold offsite hearings, the allocation of ACROD parking, and an 'Access and Facilities' brochure. Should you become aware of access needs, contact the team leader from relevant stream.

Magistrates Court of Western Australia

The registrar at the relevant court location should be contacted.

4.7.2 Information and advice about accommodating the needs of people with disabilities

Department of Communities

The Department of Communities works in partnership with service providers and other government departments to provide information, supports and services to people with disabilities, their families and carers.

National Disability Services Western Australia

NDS represents the full spectrum of disability service providers with members ranging in size from small support groups to large multi-service organisations. NDS provides members with a voice, enabling the sector to collectively initiate change, influence outcomes and deliver the funding needed to ensure the best possible quality of life for people with disabilities.

4.7.2 General information and advice about people with disabilities

Kin Advocacy (formerly the Ethnic Disability Advocacy Centre)

Kin Advocacy is the peak advocacy organisation in Western Australia and aims to safeguard the rights of people with layered disadvantage – those with disability, cultural and language barriers. The Centre provides individual and systemic advocacy services for people with all types of disabilities including physical, sensory, intellectual and psychiatric conditions.

People with Disabilities (WA) Inc. (PWdWA)

PWDWA is the peak disability consumer organisation representing the rights, needs and equity of all Western Australians with disabilities via independent individual, systemic and self-advocacy. PWDWA is run **BY** and **FOR** people with disabilities and as such, strives to be the voice for all people with disabilities in Western Australia.

Office of the Public Advocate

The Office of the Public Advocate provides advocacy and investigation, and guardianship services under the *Guardianship and Administration Act 1990* (WA), and community education in relation to the Act.

State Administrative Tribunal

Guardianship or administration applications for those with decision-making disabilities are made to the Tribunal.

Sussex Street Community Law Service Inc.

This 'non-profit' non-government community based organisation is based in Victoria Park. The Western Australian Disability Discrimination Unit is part of this service, providing outreach services in both the metropolitan and country areas to people who feel they may have been

discriminated against because of their disability. The Individual Disability Advocacy Service (IDAS) is another part of the service, providing free information, referral, support and advocacy to people with disabilities, their family members and their carers.

4.7.3 Acquired Brain injury

Headwest

Headwest provides individual, system, peer and self-advocacy services for people dealing with Acquired Brain Injury - including people with an ABI, their carers and their families.

4.7.4 Mental illness

Mental Health Commission

The Commission plans and purchases mental health, alcohol and other drug services through government, non-government and private sector service providers. The Commission also directly provides alcohol and other drug treatment and support via the Next Step Drug and Alcohol Service, Alcohol and Drug Support Line, the Community Alcohol and Drug Services, and delivers a range of prevention services and campaigns.

The Commission publishes a directory of mental health services across the State on its website.

Mental Health Law Centre (WA) Inc.

The Centre provides a range of services to clients such as:

- telephone advice on a range of legal matters;
- representation to involuntary clients under the Mental Health Act 2014 (WA);
- representation to clients who are before the START Court, Magistrates Court, District Court or Supreme Court, where there is a causal link or nexus between their alleged offending behaviour and a diagnosed mental illness;
- representation before the Mentally Impaired Accused Review Board and/or Prisoners Review Board; and
- assistance with guardianship and administration matters before the State Administrative Tribunal.

State Forensic Medical Health Service

The State Forensic Mental Health Services (SFMHS) provides healthcare for mentally unwell people in Western Australia within the criminal justice system. This includes remandees, detainees, prisoners, court attendees and those subject to the Criminal Law (Mentally Impaired Accused) Act 1996 (WA).

Transcultural Mental Health Services

Transcultural Mental Health Services runs a clinic from Royal Perth Hospital which provides direct clinical consultation for consumers from ethno-culturally diverse backgrounds. These consumers have had complex cultural variables identified as impediments to assessment and/or management of their mental health issues.

The Transcultural Mental Health Clinic is staffed by a consultant psychiatrist and a clinical psychologist, and provides the following interventions:

- initial, specialised, clinical assessment and reporting;
- consultative support to facilitate management and treatment by the referrer;
- clinical liaison with referrer and advice regarding ongoing management; and
- specialist clinical education and training for staff and agencies who require upskilling in the area of transcultural mental health.

Western Australian Association for Mental Health (WAAMH)

WAAMH influences mental health reform through systemic advocacy, community education, sector development and innovation for the benefit of people with mental health issues, their families and carers. WAAMH is the peak body in Western Australia representing community mental health services and is unable to provide clinical assistance or services; there is a service directory published on its website for those seeking help or in need urgent assistance.

4.7.5 Dementia

Dementia Australia

Dementia Australia provides specialised services to people with dementia, their families and carers, health and aged care professionals and the general public. Services are provided in both metropolitan and regional areas of Western Australia.

4.7.6 Intellectual disability

Citizen Advocacy Perth West

The Citizen Advocacy Perth West office seeks out people with intellectual disabilities living in hostels, group homes or in the community, who have no actively involved family and are therefore particularly at risk. These individuals are matched to a person who undertakes to act as friend and spokesperson or 'advocate' for the person with the disability.

Developmental Disability WA (DDWA)

DDWA works to advance advocacy, policy and community, for and with people with intellectual and other developmental disabilities and their families, and the people who support them.

4.7.7 Autism spectrum disorder

Autism Association of Western Australia

The Autism Association focuses on providing services to meet the needs of individuals with Autism and related disabilities, and to support families and the community through information, advice and regional outreach. It provides assessment services, an autism specific early learning centre, advice and other intervention, therapy and support services.

4.7.8 Physical disability

Ability Centre

The Centre supports people with disabilities and their families through a range of services, supports and community awareness, maintaining a specialty in cerebral palsy.

Access Plus WA Deaf

This non-profit organisation was established in 1921 to provide services to Deaf people in Western Australia. The services include interpreting, support services (as a Registered NDIS provider) and Auslan classes. The organisation was renamed in 2018, after previously being called The Western Australian Deaf Society.

Blind Citizens WA Inc.

Among other services, offers a Braille and audio production service and provides guidelines on the best presentation of information in large print.

MSWA

MSWA (formerly known as The Multiple Sclerosis Society of Western Australia) provides support and services to people living with neurological conditions in Western Australia, including people living with multiple sclerosis, stroke, Parkinson's disease, Huntington's disease, Motor Neurone Disease, and acquired Brain Injury. Its nursing and allied health professionals provide information and a range of supports from the time of diagnosis. MSWA also plays a role in educating the broader community, liaising with government and other relevant bodies on related issues, and advocating for the rights of all people with MS, other neurological conditions and disabilities in general.

Spine & Limb Foundation Inc.

The Spine & Limb Foundation (Inc.) supports people with spinal cord paralysis, sustained through injury or disease, and those with traumatic and genetic limb loss. The Foundation also assists persons who are aging. It provides rehabilitation assistance to patients moving back into the community following discharge from hospital. It also provides support, information, advice and advocacy services to enable people with a range of disabilities to participate in community life.

VisAbility

VisAbility (formerly the Association for the Blind) is a local provider of disability services that have provided innovative, life-changing services to people living with disabilities for more than 100 years. Their professional therapy and support services assist people across a range of ages and disabilities in their homes, at school, at work and in the community.

VisAbility specialises in services for people who are blind, vision impaired or are print disabled. VisAbility can convert materials to accessible formats such as braille, audio, large print, eText and accessible .pdf.

My Vision My Choice

My Vision My Choice is an online portal for people in Western Australia who are blind or have vision impairment, which provides information and resources on the National Disability Insurance Scheme (NDIS). My Vision My Choice was created by VisAbility and funded by the Department of Communities.

4.7.9 Human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS)

WA AIDS Council

The WA AIDS Council provides a wide range of services in the prevention of HIV, sexually transmitted infections and blood borne viruses, and the treatment and care of people living with HIV and AIDS. It provides counselling, wellness, referral, general and financial assistance to people living with HIV; needle and syringe exchange programs; professional training and development for health sector workers and a range of support and prevention education services to target audiences at risk of HIV, sexually transmitted infections and blood borne virus transmissions.

4.7.10 Fetal Alcohol Spectrum Disorder (FASD)

FASD Hub Australia

The FASD Hub Australia website includes extensive resources on FASD including dedicated material for justice professionals. The Hub was developed by an alliance of organisations (University of Sydney, Telethon Kids Institute, FASD Research Australia Centre of Research Excellence, Menzies School of Health Research, NOFASD, and the Australian and New Zealand FASD Clinical Network).

Telethon Kids Institute

The Institute's Alcohol, Pregnancy & FASD webpage includes extensive resources on FASD including dedicated material for justice professionals.

WA Country Health Service (WACHS)

The WACHS website includes information on alcohol and pregnancy, FASD information for health professionals and FASD information for the public.

National Organisation for Fetal Alcohol Spectrum Disorders (NOFASD Australia)

NOFASD is the national peak organisation which provides information, services, linkages and referrals regarding FASD, and represents individuals with FASD and their parents and carers in national and international forums. The organisation was originally called the 'National Organisation for Fetal Alcohol Syndrome and Related Disorders' (NOFASARD) and was incorporated in South Australia on the 30 August 1999. The organisation was re-named NOFASD Australia in 2013 to remain current with diagnostic terminology. NOFASD has been funded primarily by the Commonwealth Government since 2012.

4.8 FURTHER READING

American Psychiatric Association, Diagnostic and Statistical Manual or Mental Disorders (DSM-5) (accessed 20 March 2019)

Australian Federation of AIDS Organisations, HIV Media Guide – The Facts about HIV (accessed 20 March 2019)

Australian Human Rights Commission, A Future without Violence: Quality, Safeguarding and Oversight to Prevent and Address Violence against People with Disability in Institutional Settings (2018) (accessed 20 March 2019)

Australian Human Rights Commission, Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability (2016) (accessed 20 March 2019)

Australian Human Rights Commission, Equal before the Law: Towards Disability Justice Strategies (2014) (accessed 20 March 2019)

Australian Institute of Health and Welfare, 2016, Health Status and Risk Factors of Australians with Disability 2007-08 and 2011-12 (Cat No DIS 65). Canberra: AIHW (accessed 20 March 2019)

Australian Institute of Health and Welfare, Life Expectancy and Disability in Australia: Expected Years living with and Without Disability (2017) (accessed 20 March 2019)

Baldry E, McCausland R, Dowse L & McEntyre E, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System* (2015) (accessed 20 March 2019)

Blagg H & Tulich T, *Diversions Pathways for Aboriginal Youth with Fetal Alcohol Spectrum Disorder*. Trends & issues in crime and criminal justice No. 557. Canberra: Australian Institute of Criminology (28 August 2018) (accessed 20 March 2019)

Bower C & Elliott EJ, *Australian Guide to the Diagnosis of Fetal Alcohol Spectrum Disorder (FASD)* (2016) (accessed 20 March 2019)

Closing the Gap Clearinghouse (AIHW and AIFS), *Fetal Alcohol Spectrum Disorders: a Review of Interventions for Prevention and Management in Indigenous Communities* (2015) (2015) (accessed 20 March 2019)

Crawford C, *Churchill Fellowship Report - Youth Affected by FASD in the Criminal Justice System* (2015) (accessed 20 March 2019)

Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996: Final Report* (April 2016) (accessed 14 September 2018)

Edgely M, *Solution-focused Court Programs for Mentally Impaired Offenders: What Works?* (2013) 22 *Journal of Judicial Administration* 207 (accessed 20 March 2019)

Education and Health Standing Committee, *Foetal Alcohol Spectrum Disorder: the Invisible Disability* (2012) (accessed 20 March 2019)

Fazel S & Danesh J, *Serious Mental Disorder in 23,000 Prisoners: A Systematic Review of 62 Surveys* (2002) 359 *The Lancet* 545 (accessed 20 March 2019)

Joint United Nations Programme on HIV/AIDS (UNAIDS), *Judging the Epidemic: A Judicial Handbook on HIV, Human Rights and the Law* (2013) (accessed 20 March 2019)

Mindframe, *Mindframe Resource for Courts* (2008) (accessed 20 March 2019)

McCausland R, Johnson S, Baldry E & Cohen A, *People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System Cost-benefit Analysis of Early Support and Diversion* (August 2013) (accessed 20 March 2019)

McEntyre E, Baldry E & McCausland R, *Here's how we can Stop Putting Aboriginal People with Disabilities in Prison* (6 November 2017) *The Conversation* (accessed 20 March 2019)

National Disability Insurance Scheme, *NDIS in Western Australia* (accessed 20 March 2019)

Office of the Director of Public Prosecutions Comparative Sentencing Tables (accessed 12 July 2021)

Passmore H et al, *Fetal Alcohol Spectrum Disorder (FASD): Knowledge, Attitudes, Experiences and Practices of the Western Australian Youth Custodial Workforce* (2018) *International Journal of Law and Psychiatry* 59 (accessed 20 March 2019)

People with Disability Australia, *Social Model of Disability* (accessed 20 March 2019)

Senate Standing Committee on Community Affairs, *Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (2016) (accessed 20 March 2019)

Telethon Kids Institute, *FASD and Justice Videos* (accessed 20 March 2019)

United Nations – Disability, Department of Economic and Social Affairs, *Convention on the Rights of Persons with Disabilities* (accessed 20 March 2019)

5 CHILDREN AND YOUNG PEOPLE

Children and young people have a very different experience of the justice system than adults. It is important that the courts are an accessible and safe environment for children and young people, and that their vulnerabilities are taken into account. This chapter explores that experience, and the considerations that must be taken into account when dealing with children and young people.

The material used in this chapter was drawn from the New South Wales Judicial Commission's *Equality before the Law Bench Book*,⁶¹³ with modifications as a result of the incorporation of local legislation, data and reference material. The Steering Committee overseeing the production of this Bench Book also gratefully acknowledges the submissions and contributions of the following organisations, which have assisted in the development of this chapter in the first edition and then its subsequent revision:

- Legal Aid Western Australia and Youth Legal Service (Joint Submission 18 December 2007);
- Commissioner for Children and Young People (5 March 2009, 28 May 2020);
- Advocate for Children in Care (9 March 2009);
- Department for Child Protection (26 March 2009);
- Judge Kevin Sleight, District Court (22 May 2009);
- Legal Aid — Goldfields Office (23 July 2009);
- Youth Legal Service (3 June 2020);
- Legal Aid Western Australia (9 June 2020);
- Department of Communities (15 September 2020).

⁶¹³ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (last updated June 2018) Section 6 (accessed 22 March 2019).

5.1 SOME STATISTICS

5.1.1 Population

Children and young people constitute a significant proportion of the population of Western Australia. ABS statistics for 2016 showed that:⁶¹⁴

- 19.3% of Western Australians were children aged 0-14 years, similar to the national figure of 18.7%.
- Of the estimated 2.47 million residents of Western Australia, 626,683 were aged 0-19 years.
- Infants aged 0-4 years constituted 6.5% of the population; 5-14 year olds accounted for 12.7%; and 15-24 year olds accounted for 12.6% of the population.
- The 'traditional' nuclear family, consisting of two parents and children, is less common than might be assumed. Of the estimated 644,189 families in Western Australia:
 - 45.3% were couple families with children;
 - 38.5% were couple families without children;
 - 14.5% were one parent families: and
 - 1.7% classified as 'other families'.

ABS statistics on family blending in Australia in 2016 showed that, of couples with children:⁶¹⁵

- 89.4% were intact families. An intact family is a couple family containing at least one child who is the natural or adopted child of both partners in the couple, and no child who is the stepchild of either partner in the couple. Note that a child who is either the natural child of one partner but not of the other, or who is reported as being the stepchild of both parents, is classified as a stepchild. Intact families may also include other children who are not the natural children of either partner in the couple, such as foster children and grandchildren being raised by their grandparents.

⁶¹⁴ Unless otherwise indicated the information below is from the ABS, *2016 Census QuickStats* (2017) *People - Demographics & Education* (accessed 30 November 2020).

⁶¹⁵ IDCommunity Demographic Resources, *Australia, Family Blending*, compiled from data from ABS, Census of Population and Housing, 2016 (Enumerated data) (accessed 30 June 2020).

- 6.4% were step families. A stepfamily is a couple family containing one or more children, at least one of whom is the stepchild of one of the partners in the couple, and none of whom is the natural or adopted child of both members of the couple. Stepfamilies may also include other children who are neither the natural child nor the stepchild of either partner in the couple.
- 3.7% were blended families. A blended family is a couple family containing two or more children, of whom at least one is the natural or adopted child of both members of the couple, and at least one is the stepchild of either partner in the couple. Blended families may also include other children who are not the natural children of either parent.
- 0.5% were other couple families. Other couple family refers to families containing one or more children where no child is the natural or adopted child of either partner in the couple, and no child is the stepchild of either parent in the couple. Examples of such couple families include those with foster children of any age, otherwise related or unrelated children aged under 15 years, or grandchildren being raised by their grandparents.

The Aboriginal⁶¹⁶ population has a younger age structure than the non-Indigenous population. Aboriginal and Torres Strait Islander people accounted for 2.8% of the national population in 2016.⁶¹⁷ However there were 242,000 Indigenous people aged 10-24 in Australia – which was approximately 5.0% of the total Australian youth population.⁶¹⁸

⁶¹⁶ As is noted in the introductory section to chapter 11 of this Bench Book, the term Aboriginal is used in this Bench Book to refer to a person of Aboriginal descent who identifies as Aboriginal and is accepted as such by the community in which he or she lives. Although it is acknowledged that the Indigenous inhabitants resident in Western Australia descend from many hundreds of distinct and diverse cultural groups, the term Aboriginal is used following the recommendation of the Aboriginal advisers for the *Aboriginal Benchbook for Western Australian Courts* (Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008) Note to Chapter 1). However, where data and statistics are referred to from other sources, the terms Aboriginal, Aboriginal and Torres Strait Islander, and Indigenous are used consistently with the terminology in the source of that data.

⁶¹⁷ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) Aboriginal and Torres Strait Islander Population – Summary, Article and Table 1 (accessed 20 January 2020).

⁶¹⁸ Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Adolescent and Youth Health and Wellbeing 2018: In Brief* (31 October 2018) (Cat No IWH 198) (accessed 30 November 2020).

The 2020 Commissioner for Children and Young People of Western Australia report *Profile of Children and Young People in WA*, states that there were approximately 40,000 young Aboriginal people under 18 living in Western Australia in 2016. Young people comprised 39.6% of the total Western Australian Aboriginal population, which is almost double their proportion in the non-Aboriginal population.⁶¹⁹

5.1.2 Education

Organised education is a major component of the lives of children and young people.

- Children are required to be at school full-time or participating in an approved alternative arrangement from the beginning of the year in which the child turns 5 years and 6 months, until either their 18th birthday or the end of the calendar year in which the child reaches the age of 17 years and 6 months (whichever happens first).⁶²⁰
- Parents of school-aged children other than those in Years 11 and 12 are obliged to enrol their children in educational programs and either send them to school or have approval to be a home educator.⁶²¹
- The Department of Education, on behalf of the Minister for Education, assesses and may approve alternative arrangements to school for the final years of compulsory education, which can include:⁶²²
 - full time further accredited education and/or training at a registered training organisation, higher education institution, university or approved community based course;
 - full time apprenticeship or traineeship;
 - full time approved employment; or
 - equivalent full time combination of the above.

The Department of Education of Western Australia reported in its Annual Report 2018-19 that that the apparent secondary graduation rate (the percentage of the Year Eight cohort that achieves a WACE by Year 12) of public school students was 66.8 % in 2018, after fluctuating

⁶¹⁹ Commissioner for Children and Young People, *Profile of Children and Young People in WA 2020* (4 February 2020) pages 5 and 11 (accessed 30 November 2020).

⁶²⁰ *School Education Act 1999* (WA) (accessed 20 January 2020).

⁶²¹ Email advice from Phil Green, Department of Education (25 October 2016). See *School Education Act 1999* (WA) ss 9, 10 (accessed 15 March 2019).

⁶²² *School Education Act 1999* (WA) ss 11A-11 E (accessed 20 January 2020).

between 63.1% and 80.5% from 2013-18.⁶²³ However, the apparent secondary graduation rate for Aboriginal public school students was 22.7 % in 2018.⁶²⁴ Other points to note include that:⁶²⁵

- girls continued to substantially outperform boys in all areas of literacy across all year levels;
- the apparent secondary graduation rate of public school students was 71.4% for girls and 62.7% for boys;
- Intensive English Centres at 14 metropolitan public schools provided targeted programs to 958 primary and secondary students for whom English is an additional language in 2019;
- Specialised Learning Programs operated in 13 schools to provide support for students with autism spectrum disorder, with seven schools new to the program in 2019;
- the average attendance rate across public schools for 2018 was 90.7%, however amongst Aboriginal students it was 75.3%;
- 3.9% of students were at sever attendance risk (i.e. an attendance rate of less than 60%) – amongst non-Aboriginal students the rate was 2.1%, however amongst Aboriginal students it was 22.8%; and
- persistent failure to attend school resulted in 94 advisory panels being convened in 2018 (57 in 2017 and 83 in 2016) and 156 responsible parenting agreements being initiated (149 in 2017 and 105 in 2016).

⁶²³ Department of Education, *Department of Education Final Report, 2018-19* (2019) page 199 (accessed 22 January 2020).

⁶²⁴ Department of Education, *Department of Education Final Report, 2018-19* (2019) page 199 (accessed 22 January 2020).

⁶²⁵ Unless otherwise indicated the information below is from Department of Education, *Department of Education Final Report, 2018-19* pages 27, 28, 31, 32, 196 and 199 (accessed 22 January 2020).

The *Closing the Gap Report 2020* reported that school attendance rates for Indigenous students had not improved from 2013-19. Attendance rates for Indigenous students in 2019 (82 %) remained lower than for non-Indigenous students (92%). Attendance rates for Indigenous students were much lower in remote areas, especially for secondary school.⁶²⁶

In August 2015, the Auditor General's Report, *Follow-On: Managing Student Attendance in Western Australian Public Schools* reported that since 2009, the pattern of student attendance at schools had remained stable. In 2014:⁶²⁷

- 70% of students (184,303) attended school at least 90 per cent of the time (in 2009 this was 72%);
- 18.8% of students (49,611) attended 80-89% per cent of the time and were at indicated educational risk (in 2009 this was 18% per cent);
- 7.5% (19,687 students) attended 60-79% of the time and were at moderate educational risk (in 2009 this was 7%);
- 3.7% of students (9,655) attended less than 60% of the time and were at severe educational risk (in 2009 this was 3%); and
- 65% of Aboriginal students fall into one of the three categories of educational risk due to non-attendance. Half of all students at 'severe educational risk' are Aboriginal students although they represent just 9% of all students.

5.1.3 Employment status

In Western Australia, the *Children and Community Services Act 2004* (WA) outlines the legal standards for the employment of children. In most circumstances children under the age 15 cannot be employed.⁶²⁸ Exceptions include those:⁶²⁹

⁶²⁶ Commonwealth Government, *Closing the Gap Report 2020* (2020) (accessed 30 November 2020).

⁶²⁷ Auditor General, *Follow-On: Managing Students Attendance in Western Australian Public Schools (Report 16)* (2015) (accessed 22 January 2020).

⁶²⁸ *Children and Community Services Act 2004* (WA) s 190 (accessed 30 November 2020).

⁶²⁹ *Children and Community Services Act 2004* (WA) s 191 (accessed 30 November 2020).

- working in a family business run by a relative such as a parent, aunt, uncle or grandparent;
- employed as actors, performers, entertainers;
- who work for not-for-profit or charity;
- aged 10 years and over carrying out delivery work (delivering newspapers, pamphlets and advertising materials) between 6am and 7pm, when accompanied by an adult (if 10-13 years old) or with written permission of a parent (if aged 13 years or over); and
- aged 13 years or older who are employed in a shop, retail outlet or restaurant, provided that the parent has given permission, and the child does not work before 6am, after 10pm or during school hours.

As of May 2019, 84.5% of young people aged 15-19 were fully engaged. The table below demonstrates different scenarios by which people can be fully engaged, partially engaged, or not engaged.⁶³⁰

| Employment Status | Education Status | | |
|--------------------|------------------|-------------------|-------------------|
| | Full Time study | Part Time study | Not Studying |
| Employed Full Time | Fully engaged | Fully engaged | Fully engaged |
| Employed Part Time | Fully engaged | Fully engaged | Partially engaged |
| Not Employed | Fully engaged | Partially engaged | Not engaged |

5.1.4. Crime

In Western Australia, a child under the age of 10 years is not criminally responsible for any act or omission.⁶³¹ A child who is under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission they had capacity to know that they ought not to do the act or make the omission.

⁶³⁰ ABS, *Education and Work, Australia, May 2019* (Cat No 6227.0) (13 November 2019) Table 32 (accessed 22 January 2020).

⁶³¹ *Criminal Code Act Compilation Act 1913* (WA) s 29 (accessed 30 November 2020).

The Children's Court of Western Australia deals with offences alleged to have been committed by young people aged 10 to 17 years. If a young person turns 18 after the date of the alleged offence, he or she will still appear before the Children's Court. In 2018-19, 4,286 defendants had matters finalised in the Children's Court of Western Australia.⁶³²

- The most prevalent principal offences were unlawful entry with intent/ burglary (755), theft (731), traffic and vehicle regulatory offences (578), and acts intended to cause injury (619).
- 3,195 (74.5%) were male and 1,016 were female (23.7%). The remaining 75 defendants did not have their gender listed (1.7%).
- 3,207 (74.8%) had an adjudicated outcome: 48 were acquitted, 3,157 were found guilty, 14 were transferred to other courts and 249 were withdrawn by the prosecution; and
- of those 3,157 found guilty, 193 received a custodial order (13 of those being fully suspended), whereas 2,967 received a non-custodial order.

Note that over the last decade, international research has highlighted a link between Fetal Alcohol Spectrum Disorders (FASD) and involvement in the criminal justice system.

For practical guidance on adjustments that can be made for people with disabilities in court and for more information on FASD, please refer to chapter 4 (sections 4.2.1 and 4.4.2.7) on people with disabilities.

⁶³² ABS, *Criminal Courts, Australia, 2018-19* (Cat No 4513.0) (published 27 February 2020) Tables 36 and 40 (accessed 30 November 2020).

5.1.5 Young people in youth justice supervision

Young people in youth justice supervision may be detained at a youth detention centre or under supervision in the community. Young people may be under supervision when they are unsentenced—that is, when they have been charged with an offence and are awaiting the outcome of their court matter, or when they have been found or pleaded guilty and are awaiting sentencing. They may also be sentenced to a period of supervision if proven guilty in a court. Supervision in the community can take the form of community supervision orders or supervised release from detention; young people on community-based orders may be required to complete community work, as well as to participate in vocation, education or rehabilitation programs.

The Australian Institute of Health and Welfare (AIHW) found that in 2019-20, there were 685 young people (aged 10 and over) under youth justice supervision in Western Australia on an average day – 84% of those were in the community and the remainder were in detention facilities.⁶³³

Of the young people under youth justice supervision on an average day in Western Australia in 2019-20:⁶³⁴

- 59% were Aboriginal (compared to 7% in the general population);
- 81% were male;
- 63% of those in detention were unsentenced (an increase from 57% in 2018-19); and
- young people spent an average of 160 days under supervision, which was more than the national average of 123 days.

The AIHW also reported that in Western Australia 2018-19:⁶³⁵

- The rate of young people (i.e. aged 10-17 years old) under supervision on an average day was 23 per 10,000, which was higher than the national average (16 per 10,000) but down from 2018-19 (28 per 10,000).

⁶³³ Australian Institute of Health and Welfare, *Youth Justice in Australia 2019-20* (28 May 2021) State and Territory Fact Sheets (accessed 28 July 2021).

⁶³⁴ Australian Institute of Health and Welfare, *Youth Justice in Australia 2019-20* (28 May 2021) National Summary; State and Territory Fact Sheets (accessed 13 October 2020).

⁶³⁵ Australian Institute of Health and Welfare, *Youth Justice in Australia 2019-20* (28 May 2021) National Summary; State and Territory Fact Sheets (accessed 13 October 2020).

- The rate of young people under community-based supervision was 19 per 10,000 and in detention was 4 per 10,000.
- Aboriginal young people were substantially over-represented in youth justice supervision, being 20 times more likely than non-Aboriginal young people to be under community-based supervision on an average day and 36 times more likely to be in detention.

5.1.6 Children and young people as victims of crime

Children and young people are disproportionately represented as the victims of violent and other crimes, which may be contrary to common perceptions.

In Australia in 2019:⁶³⁶

- 55.1% of sexual assault victims were aged 0-19 years;
- 54 of the 414 victims of homicide and related offences (13.0%) were aged 0-19 years; and
- 13.7% of victims of blackmail/extortion were aged 0-19 years.

Much child sexual abuse is not reported. For those matters that are reported, there is a high level of attrition in the number of cases progressing to trial and conviction.⁶³⁷

5.1.7 Child protection applications

The Department of Communities - Child Protection and Family Support receives and assesses allegations of abuse and neglect, including concerns for a child's wellbeing, and takes action to protect children and young people. This may include arranging for a child's or young person's care out of home and making an application to the Children's Court for a protection order under the *Children and Community Services Act 2004* (WA). Protection orders may be varied, revoked, or revoked and replaced by further application to the Court.

⁶³⁶ ABS, *Recorded Crime – Victims, Australia, 2019* (Cat No 4510.0) (2019) Data Cubes (accessed 30 November 2020).

⁶³⁷ Australian Institute of Health and Welfare, *Young Australians: Their Health and Wellbeing* (2011) (accessed 30 November 2020).

Under Part 4, Division 3, Subdivisions 3 to 6 of the *Children and Community Services Act 2004* (WA) a range of protection orders are available to the court. The term 'protection order' refers to the following types of orders:

- **Protection order (supervision):** for the CEO of the Department to provide for the supervision of the wellbeing of the child (but not affecting parental responsibility), for a period not in excess of two years and ending before the child reaches 18 years of age.⁶³⁸
- **Protection order (time-limited):** gives the CEO parental responsibility for the child for a period not in excess of two years and ending before the child reaches 18 years of age.⁶³⁹
- **Protection order (until 18):** gives the CEO parental responsibility for the child until the child reaches 18 years of age.⁶⁴⁰
- **Protection order (special guardianship):** gives an individual, or two individuals jointly, parental responsibility for a child until the child is 18 years of age.⁶⁴¹ Note that this type of order replaced the protection order (enduring parental responsibility) in 2010. Schedule 1, div 7, cl 28(4) of the *Children and Community Services Act 2004* (WA) provides that a reference in a written law or other document to a protection order (enduring parental responsibility) is to be construed as a reference to a protection order (special guardianship).

Of the total 1,497 protection applications lodged in 2019-20, 783 related to Aboriginal children and 714 to non-Aboriginal children. In the same time period, 1,079 protection orders were granted, 567 relating to Aboriginal children and 512 to non-Aboriginal children.⁶⁴²

⁶³⁸ *Children and Community Services Act 2004* (WA) ss 47, 48 (accessed 30 November 2020).

⁶³⁹ *Children and Community Services Act 2004* (WA) ss 54, 55 (accessed 30 November 2020).

⁶⁴⁰ *Children and Community Services Act 2004* (WA) ss 57-59 (accessed 30 November 2020).

⁶⁴¹ *Children and Community Services Act 2004* (WA) s 60 (accessed 30 November 2020).

⁶⁴² Department of Communities, Child Protection, *Child Protection Activity Performance Information 2019-20* page 14 (accessed 30 November 2020).

The Department received 18,022 notifications of children at risk of abuse and harm. If, after completing an initial assessment of the information it receives, the Department determines that it should have an ongoing role, a child safety investigation is undertaken. In 2019-20, 14,192 investigations were initiated.⁶⁴³

On 30 June 2020, there were 5,498 Western Australian children in out-of-home care, with 56.1% of those being Aboriginal children and 47% living in foster care with family members.⁶⁴⁴ The number of children in out-of-home care had increased from 2,220 in 2006, and the proportion of those who were Aboriginal had increased from 38.3% in 2006.⁶⁴⁵

Research by the Australian Institute of Health and Welfare found that, of the 7,904 children under youth justice supervision in 2018-19, 54.0% (71.0% of females and 49.0% of males) had received child protection services within the five year period from 2014-19.⁶⁴⁶

The *Children and Community Services Act 2004* (WA) provides for the CEO to make 'secure care arrangements', which are defined in s 88C(1) of that Act. Secure care arrangements can be made by the CEO where there is an immediate and substantial risk that a protected child will cause harm to themselves or another person, and no other suitable way to manage the risk and ensure the child receives the care they need. Secure care is a 'planned, short term intensive intervention in a therapeutic environment to contain, stabilise, assess and support the child's wellbeing' and 'should be an intervention of last resort' to provide a 'circuit breaker to stabilise the child's behaviours'.⁶⁴⁷ The Kath French Secure Care Centre, in Stoneville, was opened in May 2011. It can accommodate a maximum of six children from across the State,⁶⁴⁸ for a period of no longer than 21 days.⁶⁴⁹

⁶⁴³ Department of Communities, Child Protection, *Child Protection Activity Performance Information 2019-20* page 1 (accessed 30 November 2020).

⁶⁴⁴ Department of Communities, Child Protection, *Child Protection Activity Performance Information 2019-20* pages 1, 17 and 22 (accessed 30 November 2020).

⁶⁴⁵ Department of Communities, Child Protection and Family Support, *Annual Report 2010-11* page 8 (accessed 30 November 2020).

⁶⁴⁶ Australian Institute of Health and Welfare, *Young People in Child Protection and Under Youth Justice Supervision 2018-19* (15 October 2020) Summary (accessed 28 July 2021).

⁶⁴⁷ Department of Communities, Child Protection and Family Support, *Policy on Children Entering Secure Care* (2016, reviewed 2019) page 1 (accessed 30 November 2020).

⁶⁴⁸ Department of Communities - Child Protection and Family Support, *Policy on Children Entering Secure Care* (2016, reviewed 2019) pages 1-2 (accessed 30 November 2020).

⁶⁴⁹ *Children and Community Services Act 2004* (WA) s 88D (accessed 30 November 2020).

5.2 SOME INFORMATION

5.2.1 Definitions – child/ young person

Western Australian legislation generally defines a 'child' as a person who is under the age of 18 years of age, or who, in the absence of positive evidence, is apparently under the age of 18 years. A 'young person' is similarly defined under s 3 of the *Young Offenders Act 1994* (WA) to refer to someone who has not yet reached the age of 18 years. As 'child' is not a descriptor that is generally acceptable to older children, the term 'children and young people' tends to be more generally used.

Under the *Evidence Act 1906* (WA) and the *Young Offenders Act 1994* (WA), the terms 'child' and 'young person' (and the relevant procedures set out in those Acts) may apply not only to individuals under the age of 18 years, but also to persons who committed or are alleged to have committed an offence before the age of 18, even if they are over the age of 18 during proceedings relating to the offence.⁶⁵⁰

5.2.2 Child development and the effect of early abuse or neglect⁶⁵¹

Historically, children involved in the criminal justice system received the same treatment as adults. Since the early 1800s, however, it has increasingly been recognised that developmental immaturity is a cause for differential treatment. Since then, legislation and policy has developed in a manner that has generally treated children less harshly because of their youth.⁶⁵² It is well recognised today that childhood and adolescence are key developmental phases, and that early experiences can affect that development.

⁶⁵⁰ See *Evidence Act 1906* (WA) s 106A; *Children's Court of Western Australia Act 1988* (WA) s 19(2); *Young Offenders Act 1994* (WA) ss 3, 4 accessed 30 November 2020).

⁶⁵¹ Unless otherwise indicated the information in this section is drawn from US Department of Health and Human Services, Children's Bureau (Child Welfare Information Gateway), *Understanding the Effects of Maltreatment on Brain Development* (2015) Publications> Browse by Topic> Child Abuse and Neglect - (accessed 30 November 2020).

⁶⁵² For example, s 7 of the *Young Offenders Act 1994* (WA) requires age and maturity to be taken into account when dealing with a young person for an offence.

The development of a child's brain follows a well-chartered course. Babies are born with many more neurons than will ever be needed. At birth, the neurons required for lower-level, basic bodily functions are well-developed, having been set in place during fetal growth. The areas of the brain necessary for higher-level functioning, such as emotion, language and abstract thought, then grow rapidly in a child's first three years.

'Brain development, or learning, is... the process of creating, strengthening and discarding connections among the neurons; these connections are called synapses'.⁶⁵³ Some synapses are strengthened and remain in place. The 'pruning', or elimination, of synapses is a normal part of brain development which continues through adolescence and into adulthood. At the same time, the process of myelination takes place, which is where an insulating layer called myelin is laid down around mature brain cells to assist in the transmission of information across synapses. A lack of myelin, as exists in young children, inhibits effective transmission and therefore also the processing of information.

Which synapses are pruned and which are kept is dependent upon the experiences children have, as is the rate of myelination. If infants do not receive adequate stimulation, certain synapses (for example, for language acquisition or relationship formation) will not be developed or will be discarded. It is possible to ameliorate this to some degree in later life, but it is certainly not as easy. Further, where children are neglected or abused (particularly if severely or for prolonged periods), they are likely to progress into a chronic state of fear and to respond accordingly. Such hyper-arousal is to the detriment of other functions and also tends to mean that these children struggle to comprehend any later attempts at nurturing and kindness.

The US Department of Health and Human Services, Children's Bureau has published material relating to the scientific evidence of altered brain functioning as a result of early abuse and neglect. It reported the following.

- Children's development is based on the creation of memories. Repeated experiences will strengthen a neuronal pathway, the pathway will then become encoded, and it eventually becomes a memory.

⁶⁵³ US Department of Health and Human Services, Children's Bureau (Child Welfare Information Gateway), *Understanding the Effects of Maltreatment on Brain Development* (2015) Publications> Browse by Topic> Child Abuse and Neglect - page 2 (accessed 30 November 2020).

- 'The creation of memories is part of our adaptation to our environment. Our brains attempt to understand the world around us and fashion our interactions with that world in a way that promotes our survival and, hopefully, our growth, but if the early environment is abusive or neglectful, our brains may create memories of these experiences that adversely color our view of the world throughout our life'.⁶⁵⁴
- Babies are born with the capacity for *implicit memory* – the capacity to perceive their environment and recall it in particular unconscious ways. For instance, they recognise a parent's voice from an unconscious memory. Early implicit memories have a substantial impact on a child's subsequent attachment relationships.
- *Explicit memory*, which develops around age two years old, refers to conscious memories and is associated with language development. Explicit memory allows a child to talk about themselves in the past and future or in different locations via the process of conscious recollection.
- Some children who have suffered abuse, neglect or other forms of trauma may not retain or be able to retrieve explicit memories of their experiences. They may, however, retain implicit memories of the physical or emotional sensations, and these implicit memories may produce flashbacks, nightmares, or other uncontrollable reactions.

⁶⁵⁴ US Department of Health and Human Services, Children's Bureau (Child Welfare Information Gateway), *Understanding the Effects of Maltreatment on Brain Development* (2015) Publications> Browse by Topic> Child Abuse and Neglect - page 4 (accessed 14 September 2021).

- Child maltreatment or other forms of negative stress (i.e. where there is strong, repeated and prolonged activation of the body's stress response), such as domestic violence, chronic neglect or disasters, can negatively affect brain development. This includes changes to the volume and chemical activity of certain areas of the brain, including the cerebellum (which helps co-ordinate motor behaviour and executive functioning) and the corpus callosum (which is responsible for emotions and higher cognitive abilities). Maltreatment also affects the emotional and behavioural functioning of the child (e.g. over-sensitivity to stressful situations, a persistent fear response or a state of hyperarousal). For example,⁶⁵⁵

Healthy brain development includes situations in which babies' babbles, gestures, or cries bring reliable, appropriate reactions from their caregivers. These caregiver-child interactions—sometimes referred to as 'serve and return'—strengthen babies' neuronal pathways regarding social interactions and how to get their needs met, both physically and emotionally. If children live in a chaotic or threatening world, one in which their caregivers respond with abuse or chronically provide no response, their brains may become hyper alert for danger or not fully develop. These neuronal pathways that are developed and strengthened under negative conditions prepare children to cope in that negative environment, and their ability to respond to nurturing and kindness may be impaired.

- The particular consequences of maltreatment may depend on such factors as the age of the child at the time it occurs, whether the maltreatment was a once-off incident or repeated, whether the abuser is a parent or another adult, whether the child had other dependable nurturing individual(s) in their life, the form and severity of the maltreatment, whether there was intervention, the length of time of maltreatment, and other individual and environmental characteristics.

In relation to the impact of domestic violence upon children and young people, research demonstrates that there is no measurable difference in the outcomes (emotional, social, and behavioural) for children who have been physically abused than for children who have been

⁶⁵⁵ US Department of Health and Human Services, Children's Bureau (Child Welfare Information Gateway), *Understanding the Effects of Maltreatment on Brain Development* (2015) Publications> Browse by Topic> Child Abuse and Neglect - page 5 (accessed 14 September 2021).

exposed to family and domestic violence.⁶⁵⁶ Any distinction between witnessing domestic violence and direct interfamilial abuse of young people and children may be a false one, in terms of the impact on future abuse and offending. In any event, domestic violence and abuse of children often coalesce. Exposure to domestic violence has short and long term neurobiological effects, impacting on each of the developmental stages from *in utero* to young adulthood.

Please refer to chapter 13 of this Bench Book (section 13.3.4) for a detailed discussion of the impact of domestic violence on child development, including both the short and long term neurobiological effects.

5.2.3 Royal Commission into Institutional Responses to Child Sexual Abuse

The Royal Commission into Institutional Responses to Child Sexual Abuse highlighted the issue of children as victims of sexual abuse. This Commission has also conducted significant research into problems associated with the legal responses to child sexual abuse. Some of the Commission's key publications in this area are discussed below.

An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse (2016):⁶⁵⁷

This evaluation involved extensive consultation with the judiciary, prosecutors, defence counsel and witness advisors, and an analysis of a large representative sample of prosecution case files, trial transcripts and police video interviews. The analysis was undertaken across three representative jurisdictions of New South Wales, Victoria, and Western Australia, and across demographic variables such as age groups.⁶⁵⁸

⁶⁵⁶ Western Australia, Department of Child Protection, *Family and Domestic Violence Background Paper* (2012) page 4 (accessed 14 September 2021).

⁶⁵⁷ Powell M, Westera N, Goodman-Delahunty J and Pichler AS, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse*, Sydney, Australia: Royal Commission into Institutional Responses to Child Sexual Abuse (2016) (accessed 14 September 2021).

⁶⁵⁸ Powell M, Westera N, Goodman-Delahunty J and Pichler AS, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse*, Sydney, Australia: Royal Commission into Institutional Responses to Child Sexual Abuse (2016) page 2 (accessed 14 September 2021).

This evaluation examined the use and effectiveness of alternate measures and guidelines that had been introduced over the previous two decades for eliciting evidence from complainants of child sexual abuse. The authors' findings were that the effectiveness of the alternate measures was diminished by the factors discussed below.

- Problems with technology had an impact on effectiveness, and this included problems with both CCTV and pre-recorded police interviews (such as difficulties seeing or hearing the complainant, outdated or missing equipment and a lack of training for court personnel).
- Police interviews of complainants' evidence-in-chief, whilst considered to be a highly effective reform, were diminished in effectiveness where police failed to employ investigative techniques known to elicit the best quality evidence from children, and by the inclusion of much irrelevant detail which exacerbates problems for children under cross examination. According to the authors, the problem 'clearly stems from inadequate training.'
- Problems with questioning of child complainants in court included the following:⁶⁵⁹
 - When judges tested the competency of child complainants or explained the court's expectations of giving evidence, 'their questioning was not informed by empirical evidence on what promotes truth-telling in children, nor by an understanding of child development'. The 'questioning sessions were conducted in a manner likely to confuse and fatigue child complainants before they even gave evidence'.
 - Cross-examination was found to be the most concerning aspect of courtroom questioning. Issues of concern included:
 - developmentally inappropriate questioning of children; and
 - strategies used by defence lawyers such as focusing on minor inconsistencies of evidence in respect to peripheral matters (unrelated to the abusive incident) to undermine the credibility of the child witness. Research has demonstrated that 'errors regarding these sorts of details are not indicative of the veracity of the central allegation'.⁶⁶⁰

⁶⁵⁹ Powell M, Westera N, Goodman-Delahunty J and Pichler AS, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse*, Sydney, Australia: Royal Commission into Institutional Responses to Child Sexual Abuse (2016) page 244 (accessed 14 September 2021).

⁶⁶⁰ Powell M, Westera N, Goodman-Delahunty J and Pichler AS, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse*, Sydney, Australia: Royal Commission into Institutional

- Despite the fact that legislative reforms now allow judges to intervene to prevent inappropriate questioning, they seldom did so. When they did, it was predominantly only as to the form, but rarely as to content, of the questions.

In respect to cross-examination the authors identified:⁶⁶¹

- that there is a clear conflict between scientific evidence around indicators of reliability and creditability and current court practices;
- that many of the tactics used by the defence are significantly damaging to the complainant and are based on largely unfounded assumptions;
- that anxiety and stress, delays in the trial process and the manner in which professionals question both adult and child witnesses, affect willingness to engage in the justice process and the accuracy and usefulness of the evidence a person can give; and
- that the introduction of alternative measures over the last two decades, such as allowing restrictions on courtroom questioning, have been a major step forward, with police and judges most frequently rating pre-recorded interviews as the most effective procedure that has been introduced.

For judicial officers, two areas were noted as particularly important:

- to improve the quality of questioning in the courtroom; and
- to reduce waiting times and delays in all stages of proceedings.

Two-fifths of participants across the representative states reported waiting for two to five hours before giving evidence at a hearing or trial. One-quarter of participants reported the time before giving evidence to exceed one day.⁶⁶²

Responses to Child Sexual Abuse (2016) page 244 (accessed 14 September 2021) citing Fisher, Vrij and Leins (2013).

⁶⁶¹ Powell M, Westera N, Goodman-Delahunty J and Pichler AS, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse*, Sydney, Australia: Royal Commission into Institutional Responses to Child Sexual Abuse (2016) pages 244-245, 271 and 273 (accessed 14 September 2021).

⁶⁶² Powell M, Westera N, Goodman-Delahunty J and Pichler AS, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse*, Sydney, Australia: Royal Commission into Institutional Responses to Child Sexual Abuse (2016) page 51 (accessed 14 September 2021).

Consultation Paper – Criminal Justice (2016)⁶⁶³

This paper provided an overview of the key issues that could potentially obstruct the criminal justice system from responding effectively to child sexual abuse. The key issues identified as requiring reforms were delays in prosecutions, difficulties in giving evidence as a victim, and the way in which the criminal justice system deals with allegations of offending against more than one child (i.e. tendency and coincidence evidence and joint trials).⁶⁶⁴

The paper identified issues in relation to judicial directions and informing juries. These arose because, for centuries, judges have relied on their own understandings of human behaviour to inform the content of the relevant directions and warnings, in the absence of research or other evidence as to how people behave. In some cases, it is now known that those assumptions were incorrect, such as the assumption that a victim of a sexual offence will complain at the first reasonable opportunity. Research has now discredited that assumption.⁶⁶⁵

Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence 2017⁶⁶⁶

This report investigated the complex relationship between child sexual abuse and memory.

The report draws a clear distinction between a '*common-sense memory belief system*' which is made up of misconceptions about memory, and a '*scientific memory belief system*' which is supported by evidence and research. Common sense memory belief systems are more likely to be held by the police and members of the general public, while scientific memory belief systems are more likely endorsed by memory experts.

⁶⁶³ Royal Commission into Institutional Responses to Child Sexual Abuse, Consultation Paper- Criminal Justice (September 2016) (accessed 14 September 2021).

⁶⁶⁴ Royal Commission into Institutional Responses to Child Sexual Abuse, Consultation Paper- Criminal Justice (September 2016) page 40 (accessed 14 September 2021).

⁶⁶⁵ Royal Commission into Institutional Responses to Child Sexual Abuse, Consultation Paper- Criminal Justice (September 2016) page 45 (accessed 14 September 2021).

⁶⁶⁶ Goodman-Delahunty J, Nolan M, and Van Gijn-Grosvenor E, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse – Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence (July 2017) (accessed 14 September 2021).

A common misconception regarding memory is that memory operates like a video camera, and humans can access their memories and remember past events or experiences exactly as they occurred. This is untrue, as memories are dynamic and affected by a range of factors, including but not limited to:

- what the person pays attention to during the event (as we can only remember what we have actually experienced);
- the individual's interpretation of the event, and
- any trauma or stress experienced and stored into memory.

The Australian public generally rates children and young people's memory as less reliable than that of adults. Young children were perceived as having the least reliable memories with perceived reliability increasing with age until the age of eight or nine, after which perceived reliability decreased. In child sexual abuse cases, boys were perceived to be less honest than girls after the age of six.⁶⁶⁷ These misconceptions have been shown to be damaging in trial simulation studies, especially as false allegations of sexual abuse are rare.

The report also examined common misconceptions regarding the effects of delay upon memory. A large proportion of the general public, law enforcement and legal practitioners hold a simplistic view of memory, assuming that memories simply fade slowly over time. However, the relationship between memory and time is more complicated, with a period of rapid forgetting soon after an event, which is then followed by more stable memory retention. This is a damaging misconception, as trial simulations have demonstrated that the longer a delay between alleged cases of child sexual abuse, the less likely a conviction.

⁶⁶⁷ Goodman-Delahunty J, Nolan M and Van Gijn-Grosvenor E, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse – *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence* (July 2017) pages 23-24; Chapters 4,5 and 7 (accessed 14 September 2021).

The effect of reoccurring events on a child or young person's memory of sexual abuse is complex. While common sense might dictate that the more times an event is repeated, the more details one would remember, this is not necessarily the case. Repeated events increase the likelihood the person will remember the 'gist' of the events, but make it difficult for the person to remember particulars about each event and give accurate temporal information. This can make it difficult for the prosecution to prove their case, and highlights the.⁶⁶⁸

... perverse paradox that applies to ongoing or persistent child sexual abuse – namely, [that] the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence.

A commonly held belief is that memories which are particularly traumatic or dramatic are more accurate. While this might be the case for some people, this does not mean that all people's memories respond in the same way. However, not all sexual abuse is experienced as traumatic at the time of the abuse.⁶⁶⁹ Further, 'a number of studies show that in the absence of mental illness, children and adults generally have accurate recall for traumatic and negatively stressful personal life events'.⁶⁷⁰ Studies have shown that children who experience subjective trauma at the time of abuse are more likely to develop mental illness, which may inhibit consolidation of emotional or traumatic information. Trauma that results in mental illness can impair autobiographical and event memory.⁶⁷¹

⁶⁶⁸ Goodman-Delahunty J, Nolan M and Van Gijn-Grosvenor E, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse – *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence* (July 2017) page 98 (accessed 14 September 2021), citing *R v Johnson* [2015] SASSCF 170 [2].

⁶⁶⁹ Goodman-Delahunty J, Nolan M and Van Gijn-Grosvenor E, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse – *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence* (July 2017) page 95 (accessed 14 September 2021).

⁶⁷⁰ Goodman-Delahunty J, Nolan M and Van Gijn-Grosvenor E, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse – *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence* (July 2017) page 96 (accessed 14 September 2021).

⁶⁷¹ Goodman-Delahunty J, Nolan M and Van Gijn-Grosvenor E, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse – *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence* (July 2017) page 96 (accessed 14 September 2021).

*The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases*⁶⁷²

This project confirmed other scientific research over decades that 'delay is a typical rather than aberrant, feature of child sexual abuse.'⁶⁷³ For many reasons, children do not report immediately during childhood or during adolescence, and an unknown number never report at all. Those reasons include:

- threats by the perpetrator;
- fear of the consequences;
- no opportunity to tell;
- not wanting to harm the relationship with the perpetrator; and
- where the abuse occurred when they were very young, it was not until they were older that they realised its true nature.

'The "grooming" behaviours of perpetrators operate on these fears and feelings and are deliberately intended to gain and maintain children's compliance, secrecy and loyalty'.⁶⁷⁴

Where there is a complaint proximate to the time of the abuse it is often revealed by the child 'accidentally' – for example, by behaviours noticed by an adult. A 1993 study showed that 87.5% cent of pre-school children disclosed accidentally. That same study reported that disclosure of father-daughter incest increased as the victim's age increased – 3% of children aged three years and 5% of children aged four to seven years self-disclosed compared with 64% of victims aged 12-17.⁶⁷⁵

⁶⁷² Cashmore J, Taylor A, Shackel R and Parkinson P, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse – *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases* (August 2016) (accessed 14 September 2021).

⁶⁷³ Cashmore J, Taylor A, Shackel R and Parkinson P, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases* (2016) page 32 (accessed 14 September 2021) quoting Cossins A, 'Time Out for Longman: Myths, Science and the Common Law' (2010) 34(1) *Melbourne University Law Review* 69.

⁶⁷⁴ Cashmore J, Taylor A, Shackel R and Parkinson P, *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases*, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, (2016) page 31 (accessed 14 September 2021) quoting Erooga, M, *Understanding and Responding to People who Sexually Abuse Children whilst Employed in Positions of Trust: An Overview of the Relevant Literature* – Part two: Organisations. Creating safer organisations: Practical steps to prevent the abuse of children by those working with them (2012) pages 27-43 (Chichester: Wiley-Blackwell/NSPCC).

⁶⁷⁵ Cashmore J, Taylor A, Shackel R and Parkinson P, *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases*, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse (2016) page 31 (accessed 14 September 2021).

Where the complaint is proximate to the acts of abuse the key issues for criminal justice proceedings is the scope and reliability of the evidence, because the evidence of the child is typically the only evidence. The way the child is questioned both during the investigative procedures and at trial will have a 'significant impact on the quality, quantity and credibility of the evidence the child can provide.'⁶⁷⁶ Video-recorded interviews may be used to preserve an accurate record of this first disclosure, guarding against the impact of delay on the quality and completeness of the child's evidence, and on the willingness of the child to remain engaged in the prosecution process.

Delayed reporting of sexual abuse can lead to evidentiary problems including degraded evidence, and may result in judicial warnings. These warnings focus on matters that are typical in child sexual abuse matters – delay in making a complaint, lack of corroboration as there is rarely any physical evidence and no witnesses other than the child and the perpetrator.

The authors state that '[a]rguably the most important and problematic of these warnings is the Longman warning...'. The Longman warning requires the judge to warn the jury that it may be dangerous to convict in cases of sexual assault where there has been a significant delay between the alleged crime and trial. Amongst the criticisms made by the judiciary, law reform commissions and academic commentators were:

- the link made between delay and complainant credibility;
- the inconsistency of the warning with the findings of psychological literature about the patterns of disclosure of victims and sexual abuse; and
- the possibility that a jury may perceive the term 'dangerous to convict' as a direction to acquit.

There are many reasons why individuals delay reporting, and long periods of delay are not indicative of a witness's reliability or creditably. Some of the many reasons for delay include:

- threats of physical harm,
- threats of rejection, including being sent away;

⁶⁷⁶ Cashmore J, Taylo, A, Shacke, R and Parkinson P, *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases*, Report for the Royal Commission into Institutional Responses to Child Sexual Abuse (2016) page 31 (accessed 14 September 2021).

- fear of being disbelieved, especially if the complaint might pit the child's word against that of an adult, with the resulting stigma of being thought to have lied about a matter of significance;
- a belief that adults may already know of the abuse (particularly where the offences take place in circumstances where discovery is likely), in which case it would be pointless to complain;
- a belief or knowledge that other children are being or have been abused, leading to a belief either that the behaviour is normal or that the offender is so powerful that there is no point in complaining;
- the desire to protect a parent from the upsetting reality, particularly if the abuser is a step-parent or grandparent;
- a sense of privacy and, to a degree, shame, which often accompanies discussion of sexual matters, so that a child is often reluctant to broach such issues;
- confusion on the part of most young children about what behaviour is or is not normal or acceptable; and
- the element of 'grooming' so that the abuse co-exists with innocent and pleasurable experiences and expressions of love or affection. It is that grooming process which makes it difficult for even the most articulate of children (and often even when grown up) to explain how they feel or felt about the offender and why it was that they made no disclosure at the time.

The reality of child sexual abuse is that it typically involves:

- an offender who is known or related to the child;
- grooming by the offender over time to gain a child's trust as well as to maintain secrecy and future sexual access;
- a relationship of dependence, control or power between the child and the offender;
- no eyewitnesses to the actual sexual contact; and

- no forensic evidence.

5.2.4 Capabilities of children and young people

Children and young people face particular difficulties in our adversarial legal system — whether appearing as witnesses or as alleged offenders — largely because of a mismatch between their capacities and the adult-orientated court environment and processes. If these difficulties are not taken into account and accommodated, the evidence that the court obtains from them may be of poorer quality and/or less complete.

The main points to note about the capabilities of children and young people are that:

- Their ability to understand language, concepts, the meaning behind events and court processes differs from that of adults.
- Their ability to communicate their evidence may be 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 relate to them;
 - 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);
 - differences in their levels of maturity and thus how they react to particular situations and interact with people;⁶⁷⁷
 - their shorter attention span, especially under stress;
 - the fact that by the time they appear in court their developmental age (or stage of development) may have altered substantially (which will affect how they present their evidence and how they are viewed by those in court);
 - their relative lack of power in the adult world; and

⁶⁷⁷ The *Young Offenders Act 2004* (WA) ss 7(l) and 8(d) makes reference to 'maturity' being a consideration within the general principles of juvenile justice.

- their often being subjected to express or implicit family or peer pressure to give — or not to give — particular evidence.
- Children and young people's comprehension and communication abilities can vary considerably, even among children of the same age, depending on their background and experiences and the differences in their acquired life skills and relationship skills.
- Cultural and family functionality/dysfunctionality strongly influences the manner in which children and young people comprehend and respond to any situation.
- Children 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.
- 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. In addition, some may have come to the attention of the police because of homelessness, or because they are engaging in sex work to pay for their drug and/or alcohol addiction.

Care should be taken not to make assumptions about the intellectual capacity of children and young people. Each child and young person's understanding must be assessed based on their personal characteristics and development. Legal Aid Western Australia and Youth Legal Services noted that:⁶⁷⁸

The development of 'executive function' in the brain is not generally complete until the age of approximately 25, and it should therefore be noted that older children are not adults.

⁶⁷⁸ Submission from Legal Aid Western Australia and Youth Legal Services (18 December 2007).

Be careful not to make assumptions about the level of a child's intellectual development based on the physical appearance of the child. Some young children are physically very developed and this frequently leads to erroneous expectations that their behaviour or their intellectual development is also developed. It is important to make assessments based on the age of the child, rather than the size of the child.

Further, as submitted by the Department of Communities:⁶⁷⁹

.. age should not be the sole indicator of intellectual/cognitive development. Assessments should take into account the developmental age and capacity, taking into account trauma, disability, FASD and other issues that may impact on cognitive capacity.

It is well known that for many children the worst part of the trial process, second only to the fear of seeing the accused, is cross-examination. While there has been significant positive reform in Western Australia, cross-examination has proved to be the most difficult area in which to effect change.

The AIJA reports that adults may find an inconsistency in a child's testimony as indicative of a lack of creditability. Inconsistencies can be due to a number of factors and do not necessarily mean the child is intentionally lying to the court. These factors include:

- the child's language skills and the listener's misunderstanding of the child's language;
- the questioner meaning one thing by a question, while the child places another interpretation on it; and
- neither the questioner nor the child appreciating there has been a miscommunication.

Children cannot be expected to understand all of the language used during cross-examination – the vocabulary, the syntax, the tagged questions ('he didn't do it did he?'), leading questions (the child may feel pressured into agreeing with the implied answer), repetitive questioning (likely to elicit a response which is untrue because the child fears he must have answered wrongly the first time) and flitting from one topic to another. Such linguistic practices may confuse and distress children into responses apparently inconsistent with the child's evidence-in-chief or internally inconsistent, even if in some minor peripheral detail, defence counsel

⁶⁷⁹ Submission from the Department of Communities (15 September 2020).

exploits to persuade the jury that the child's evidence is not reliable. The suggestion that lack of recall of peripheral matters is indicative of fabrication has no empirical foundation.

Research has shown that young children are particularly vulnerable to suggestibility in the context of abuse disclosures. This may be an issue in the context of leading and/or repetitive questioning in cross-examination. Whilst there is no strict age cut-off, pre-school age children appear to be disproportionately vulnerable to suggestive influences.⁶⁸⁰ Legal Aid Western Australia submitted that this is particularly relevant in a family law context.⁶⁸¹

Examples of questions that produce unreliable answers, include the following:

- **Tagged questions** (e.g. 'Jim didn't touch you with his willy, did he?'): These are powerfully suggestive and complex to respond to accurately, the witness has to be able to judge whether the 'statement' part of the question is true; understand that the tag expresses the advocate's point of view, and is not necessarily true; be able to counter that point of view; and (if the question combines both a positive and a negative) understand that a positive statement takes a negative tag and vice versa.
- **Other assertions** such as 'isn't it a fact that...'; 'is that right?' give undue emphasis to the suggestion. Alternatives include: 'are you sure ...?' or 'is it true that Jim hit you?'
- **Questions in the form of statements** e.g. 'you went to his house that night' may not be understood as requiring a response.
- **'Do you remember?'** questions: these are complex, particularly where the witness is asked not about an event, but about what (s)he told someone else.
- **Questions containing negatives** which are harder to decode. Judges are usually alert to double negatives but difficulties can arise from single negatives, negative forms (e.g. 'incorrect', 'unhappy') and concealed negatives (e.g. 'unless').
- **'Forced choice' questions.** These may omit the correct answer so it is preferable to offer an open-ended option as well.
- **Questions using figures of speech** (e.g. 'I'm going to jog your memory') and the **present tense** (e.g. 'are you at school?') which may be interpreted literally.

⁶⁸⁰ Bruck M and Ceci S, *The Suggestibility of Children's Memory* (1999) *Annu. Rev. Psychol.*(1999) 50: 419-439 (accessed 30 June 2020).

⁶⁸¹ Submission from Legal Aid Western Australia (9 June 2020).

- **Questions repeated by an authority figure**, such as an advocate, as these may cause the witness to conclude that the first answer was wrong (even if correct) and to change it. If a question must be repeated because an answer was unclear, this should be explained to the witness.
- **A series of leading questions inviting repetition of either 'yes' or 'no' answers.** An acquiescent witness may adopt a pattern of replies 'cued' by the questioner and cease to respond to individual questions.
- **A challenge that the witness is lying or confused.** If this is developmentally appropriate for the witness it should be addressed separately, in simple language, at the end of cross-examination. Repeated assertions to a young or vulnerable witness that (s)he is lying are likely to cause the witness serious distress. They do not serve any proper evidential purpose and should not be permitted.

5.2.5 Examples of difficulties experienced by children and young people when appearing before court

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

The main difficulties which can jeopardise the reliability and comprehensiveness of their evidence include:

- **Long delays in getting to court:** Delays increase stress and anxiety in children and young people. This stress and anxiety can adversely affect children's memory of events.
- **Long waiting periods at court**, often in an alien environment, resulting in increased stress, boredom, tiredness and restlessness. These delays are often due to preliminary legal argument, equipment failures and court schedules. It is of note however that a recent study found that that Western Australia had relatively good results in terms of waiting times for complaints to give evidence in court.⁶⁸²

⁶⁸² Powell M, Westera N, Goodman-Delahunty J and Pichler AS, *An Evaluation of How Evidence is Elicited from Complainants of Child Sexual Abuse* (2016) (accessed 2 November 2016).

- **Formal and intimidating court environment and procedures** that take little or insufficient account of a child's or young person's needs — including their need for breaks to allow them to rest, go to the toilet or get a drink.
- **Having to confront the accused:** Even when children and young people use video-link or closed circuit television (CCTV), they sometimes come face to face with the accused or his/her supporters in the court precincts, causing distress and intimidation.
- **Incomprehensible processes and procedures:** Children and young people may not understand what the court is trying to do, why they have to answer questions they may have already answered many times before, 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 'I don't know's or silences, or to give confused or contradictory evidence.
- **Confrontational questioning:** If children and young people are intimidated, they may 'shut down' and become unable to respond, or become distressed and break down.
- **The presence or absence of their parent(s) or guardian(s):** While some children will be helped by having their parent(s) or guardian(s) present, others will feel inhibited or pressured by their presence. Some children in out-of-home care may not have a support person they trust with them, which may result in distress and affect the reliability of their evidence.

Refer to section 5.2.4 in relation to capabilities of children and young people in court, and in particular the difficulties they face during cross-examination.

5.2.6 The impact of these difficulties

Many of the difficulties listed in 5.2.5 can be substantially mitigated if appropriate measures are taken by the courts to be sensitive and responsive to the needs of children and young people.

If appropriate measures are not taken, children and young people and their parents or guardians may:

- not feel safe or secure enough to testify to the best of their abilities;

- not understand the court's needs or questions to enable them to give their evidence adequately; and
- feel that they have been treated unfairly or that an injustice has occurred.

If appropriate measures are not taken, in some cases children and young people will be treated unfairly or unjustly.

These problems are likely to be compounded if the child or young person also happens to be female, Aboriginal or from another CaLD background, is lesbian, gay, bisexual, trans or intersex, has a disability (including FASD) or practices a minority religion: please refer to the relevant chapters in this Bench Book.

5.2.7 Causes and prevention of offending amongst young people⁶⁸³

In 2016, the Commissioner for Children and Young People identified in his report *'Speaking out about Youth Justice: The Views of WA Children and Young People who had Contact with Youth Justice Services'* five major themes in relation to why young people⁶⁸⁴ get into trouble with the justice system. All participants in the study identified at least one key theme as a reason they had committed an offence, with the vast majority attributing three to five of these issues as contributing to their criminal behavior. The themes were, in order of frequency:

- problems with family;
- friends who were involved in criminal behaviour;
- disengagement from school;
- disconnection with the broader community; and
- personal issues including, crime as a normal habit, drug and alcohol use, cognitive disorders and mental health issues.

'Problems with family' extended to families being involved in criminal behavior, alcohol, drug and mental health issues, and violence in the home.

⁶⁸³ The information in this section is drawn from the Commissioner for Children and Young People (Western Australia), *Speaking out about Youth Justice: The Views of WA Children and Young People who had Contact with Youth Justice Services* (7 December 2016) (accessed 2 June 2020).

⁶⁸⁴ For the purpose of this report, the young people were aged 10-19 years.

Aboriginal young people and their families said that a lack of connection to culture and country was also a factor in young people getting into trouble.

Young people and families recognized that offending could be prevented when there was access to appropriate supports and services which included:

- positive role models;
- living in safe and stable homes;
- participating in education or employment;
- being involved in activities and having fun things to do; and
- support to change behaviour and cope with personal challenges.

Overall, young people had a sound knowledge of how to access help – which was generally family or friends, a trusted worker such as a teacher or youth justice officer, the Kids Helpline or police.

Commonly, young people and families stated a desire to be consulted about the support services they received and emphasised the need for services to be tailored to meet individual needs.

5.2.8 The experience of children and young people with separation and family law⁶⁸⁵

In 2019, the Commissioner for Children and Young People identified in his report *'Speaking out about Family Separation: The Views of Children and Young People with Experience of Separation and the Family Law System in WA'* that the issues important to young people⁶⁸⁶ in post-separation parenting arrangements included:

- Ongoing, open and respectful communication with parents during and after separation: including discussing in an age appropriate way the reasons for separation, proposed parenting arrangements, how the children will be supported by extended family and others, as well as maintaining a respectful relationship with each parent.

⁶⁸⁵ Commissioner for Children and Young People, *Speaking out about Family Separation: The Views of Children and Young People with Experience of Separation and the Family Law System in WA* (April 2019) (accessed 14 September 2021).

⁶⁸⁶ The young people involved in the consultations were 12 to 20 years old.

- Being listened to by parents and service providers: including being informed through any family law proceedings, and having their concerns and ideas taken seriously, particularly when those concerns were related to safety.
- Being treated fairly and as a person of value in their own right: which meant being acknowledged as an expert in their own life and a critical stakeholder in parenting arrangements and other family-related matters.
- Professionals who had a good rapport with children, and were capable of taking action. Children and young people emphasised the importance of genuine respect, compassion and competence of social workers, teachers, pastoral care staff and other professionals involved.
- Education, awareness and understanding at a community level of issues surrounding parental separation and the family court system. Children and young people identified schools in particular as having an important role to play in providing more education and resources, as well as other support services, not only for those children directly impacted by family separation but also for the wider school community. Children and young people spoke of the stigma that still remained around parental separation, which was particularly felt at school.

5.3 LEGAL STATUS IN RELATION TO COURT PROCESSES

5.3.1 Capacity to give evidence

The rules for children and young people giving evidence are different from those for adults:

- A child or young person under 12 years old can give sworn evidence only if they understand that the giving of evidence is a serious matter, and that in giving evidence, they have an obligation to tell the truth: *Evidence Act 1906* (WA) s 106B.
- However, a child or young person under 12 years old can give unsworn evidence if the court is satisfied, before the evidence is given, that the child or young person is able to give an intelligible account of events which he or she has observed or experienced: *Evidence Act 1906* (WA) s 106C.

- Generally, all persons aged 12 years and above can only give evidence if it is sworn. The exception is where, because of mental impairment, the witness is not competent to give sworn evidence but may give unsworn evidence if able to give an intelligible account of events which he or she has observed or experienced: *Evidence Act 1906* (WA) s 106C.

Sections 106B and 106C of the *Evidence Act 1906* (WA) require the presiding judicial officer to arrive at certain opinions, after making due inquiry. The following principles relevant to the judicial inquiry to be taken pursuant to s 106B or 106C are taken from *GWD v The State of Western Australia*⁶⁸⁷ and *Revesz v The Queen*.⁶⁸⁸

- The nature of the inquiry under s 106B and s 106C is not prescribed nor is the material upon which the judicial officer is entitled to take into account. Invariably any inquiry requires the judicial officer to speak directly to the child.
- The inquiry must be conducted in the presence of the jury. The jury is entitled to consider what the child says and the child's demeanour in the inquiry in deciding the credibility of the child's evidence.
- The inquiry must be tailored, as far as the judicial officer is able, to the age, culture, background and ability of the child. The questions must, in an appropriate way, address the issues of whether the child understands that the giving of evidence is a serious matter and that he or she in giving evidence has an obligation to tell the truth or whether the child is capable of giving an intelligible account of events with which he or she has observed or experienced.
- There is no requirement under s 106B that the child possesses a belief in God or will be subject to some divine sanction.
- Counsel have an important role to play in the inquiry. While counsel are not involved in the questioning of the child witness, counsel in accordance with their duties to the court and to their client, may make submissions as to the adequacy of the inquiry and the conclusion which the judicial officer should reach.

⁶⁸⁷ *GWD v The State of Western Australia* [2010] WASCA 206 [34]-[46], [49].

⁶⁸⁸ *Revesz v The Queen* (1996) 88 A Crim R 253, 259 (Owen J).

- An appropriate procedure would be for the judicial officer, upon completion of the inquiry but before announcing his or her decision to ask whether counsel wish to make any submission. A judicial officer may, at this point, wish to express a tentative view as to whether and how the child's evidence may be received.
- While the answers given by a child in the inquiry will be important to the formation of a judicial officer's opinion, there is nothing in s 106B and s 106C that restricts the judicial officer to a consideration of only those answers. A judicial officer may also take into account the child's visually recorded interview as a basis for his or her opinion, provided the parties are first given the opportunity to make submissions on the material. (As a matter of practice, submissions are normally made in the absence of the jury).
- The provisions of s 106B do not require the judicial officer to make any inquiry as to whether the child understands the repercussions of not telling the truth, nor does a child have to understand the difference between telling the truth in court and telling the truth elsewhere. This latter requirement was removed by statute in 2005.
- If the trial judge decides that the child can take the oath or affirm, then that is how matters should proceed. If the decision is that the child is not competent to take an oath or affirm then attention is transferred to s 106C. Again a finding must be made. If the trial judge is satisfied that the child can give an intelligible account of events he or she has observed or experienced, the witness can give unsworn testimony. In the absence of such a finding the child cannot give evidence at all.

Refer to sections 5.8 and 5.9 of the *Bench Book for Children Giving Evidence in Australian Courts* (updated 2020), published by the Australasian Institute of Judicial Administration (AIJA), for further information on the competency testing and unsworn evidence of child witnesses.

Additional information is provided in section 5.5.4 on oaths, affirmations and declarations.

5.3.2 Criminal responsibility

Under section 29 of the *Criminal Code*, a child under the age of 10 years is not criminally responsible for any act or omission.⁶⁸⁹

A child under the age of 14 years is not criminally responsible for an act or omission unless it is proven that at the time of doing the act or making the omission they had capacity to know that they ought not to do the act or make the omission.⁶⁹⁰

A child who is not at law criminally responsible, or not proven in fact to be criminally responsible, cannot be an accomplice.⁶⁹¹

Buss P and Mazza JA confirmed the legal effect of section 29 in *Birdsall v The State of Western Australia* [2019] WASCA 70 as follows:⁶⁹²

As we have mentioned, the legal effect of the personal exemption or immunity from criminal responsibility, which s 29 confers on a child, is that the child is not liable to punishment for his or her acts or omissions and does not commit an offence. The exemption or immunity is personal to the child in that s 29 is concerned with whether, at the material time, the particular child had the capacity to know that his or her acts or omissions were 'wrong'. The exemption or immunity is not conditioned by the nature or quality of the child's acts or omissions or the circumstances in which the acts were done or the omissions were made.

More recently in *Rye v The State of Western Australia* [2021] WASCA 43,⁶⁹³ their Honours Buss P and Mazza JA articulated the legal effect of s 29 as being whether at the material time, the child had capacity to know that doing the act or making the omission was 'morally wrong as distinct from legally wrong or a breach of the criminal law or merely naughty, mischievous or rude'. Their Honours went on to state that:

In our opinion, a child will have capacity to know that doing the relevant act or making the relevant omission was morally wrong if, at the material time, he or she had capacity to

⁶⁸⁹ *Criminal Code* (WA) s 29 (accessed 30 November 2020).

⁶⁹⁰ *Criminal Code* (WA) s 29 (accessed 30 November 2020).

⁶⁹¹ *R v Quy* (1905) 7 WALR 268.

⁶⁹² *Birdsall v The State of Western Australia* [2019] WASCA 70 [175] (Buss P and Mazza JA).

⁶⁹³ *Rye v The State of Western Australia* [2021] WASCA 43 [51].

know that the conduct in question was seriously wrong by the ordinary standards of reasonable adults.

The concept addressed by section 29 was known at common law as *doli incapax* ('incapable of wrong'). However, the test in section 29 differs from the common law in that the second paragraph refers to 'capacity to know' where as the common law is concerned with actual knowledge.⁶⁹⁴

The onus is on the prosecution to prove that a person under 14 years old had the capacity to know that the act or omission was wrong – the accused bears no onus of proof.⁶⁹⁵

It has long been accepted that the accused's capacity to know what s/he was doing was wrong is more than knowing that it is something that would attract adult disapproval, as adults frequently disapprove of acts that are not criminal in nature.⁶⁹⁶

Proof of capacity in terms of section 29 cannot come only from the act or omission itself. The actual age of the child, and their social, emotional and intellectual maturity, and the gravity and circumstances of the offence, are factors to be considered. However, the prosecution cannot rely on the apparently heinous nature of an alleged offence to suggest that it is inconceivable that the child could not have known the conduct was wrong – i.e. that they 'must have known'. If there is no evidence beyond the facts of the offence, there is no case to answer. However, the evidence may come from other conduct of the accused child, such as attempts to avoid detection or apprehension.⁶⁹⁷

Proof of earlier inappropriate or disreputable behaviour, including prior criminal conduct, may also be relevant to the capacity to know an act or omission was wrong. If it is relevant, it may be admitted even though it may not otherwise be admissible in the trial and even though it might be prejudicial to the accused.⁶⁹⁸

⁶⁹⁴ See, for example, *R v Folling; Ex Parte Attorney General* [1998] QCA 97.

⁶⁹⁵ See *Mitheo v Jones* [2008] WASC 41 in relation to the onus in relation to any issues arising under Chapter V of the Criminal Code, other than s 27 (insanity).

⁶⁹⁶ Kumar K, *Criminal Law WA –LexisNexis* (Current to Act 4 2019, last updated May 2017) [s 29.7] (accessed 2 July 2020).

⁶⁹⁷ Kumar K, *Criminal Law WA –LexisNexis* (Current to Act 4 2019, last updated May 2017) [s 29.8] (accessed 2 July 2020).

⁶⁹⁸ *R v B* [1979] 3 All ER 460; Kumar K, *Criminal Law WA –LexisNexis* (Current to Act 4 2019, last updated May 2017) [s 29.8] (accessed 2 July 2020).

In view of international and domestic scrutiny, on 23 November 2018, the Council of Attorneys-General agreed that 'it would be appropriate to examine whether to raise the age of criminal responsibility from 10 years of age' and that a 'working group would be established to review this matter'. An interjurisdictional working group of officials was established to review the age of criminal responsibility and make recommendations to the Council in that regard. The Working Group is chaired by the Department of Justice, Western Australia and includes representation from each state, territory and the Australian Government. The Working Group will provide a report with recommendations to the Council of Attorneys-General.⁶⁹⁹

5.3.3 Compellability

A person is compellable if that person can lawfully be obliged to give evidence: see ss 6–9 *Evidence Act 1906* (WA). Generally for child witnesses, particularly those under the age of 12 years of age, compellability is in effect a question of competence. That is, a child can be compelled to give evidence, subject to some exceptions, should he or she be capable of giving evidence in court.

Refer to section 5.3.1 for information on capacity of children to give evidence.

Unlike some other jurisdictions, such as New South Wales, there are no special rules relating to the compellability of children and young people in criminal proceedings against their parents.⁷⁰⁰

While child witnesses may be competent and otherwise compellable, in Family Court proceedings, protection proceedings and restraining order proceeding they can only be required to give evidence if the relevant court gives leave.

5.3.3.1 Compellability in Family Court proceedings

In Family Court proceedings, a child is not allowed to be a witness or to swear an affidavit unless the Court orders otherwise.⁷⁰¹

⁶⁹⁹ Department of Justice, *Review of Age of Criminal Responsibility* (18 February 2020) (accessed 30 November 2020).

⁷⁰⁰ Compare with *Evidence Act 1995* (NSW) s 18 (accessed 25 March 2019).

⁷⁰¹ *Family Court Act 1997* (WA) s 214A (accessed 17 February 2020).

Refer to section 5.3.7 and 5.4 of this Bench Book in relation to the alternative measures for the Family Court to obtain a child's views and the special arrangements available should leave be given for the child to give evidence.

5.3.3.2 Compellability in protection proceedings

In protection proceedings, s 150(2) of the *Children and Community Services Act 2004* (WA) provides that a child can only be compelled to give evidence or be cross-examined with the leave of the Children's Court. Note that this applies to all children whether or not they are the subject of the protection proceedings.⁷⁰² Leave can only be granted if the Court is satisfied that the child is unlikely to suffer emotional trauma as a result, or to be so intimidated or distressed as to be unable to give evidence or be cross-examined satisfactorily.⁷⁰³

Refer to section 5.4 of this Bench Book for the special arrangements available should leave be given for a child to give evidence.

5.3.3.3 Compellability in restraining order proceedings

In restraining order matters other than those in which a child is the respondent,⁷⁰⁴ children are not to be called to give oral evidence except by the leave of the court.⁷⁰⁵ Leave is to be granted only where the court is satisfied that exceptional circumstances exist which, in the interests of justice, justify the making of the order.⁷⁰⁶

⁷⁰² *Children and Community Services Act 2004* (WA) s 150(1) (accessed 30 November 2020).

⁷⁰³ *Children and Community Services Act 2004* (WA) s 150(3) (accessed 30 November 2020).

⁷⁰⁴ These matters fall within the jurisdiction of the Children's Court subject to any factual mistake as to a respondent being a child: see s 20(2A) of the *Children's Court of Western Australia Act 1988* (WA) (accessed 30 November 2020).

⁷⁰⁵ *Restraining Orders Act 1997* (WA) s 53A(1) (accessed 30 November 2020).

⁷⁰⁶ *Restraining Orders Act 1997* (WA) s 53A(2) (accessed 30 November 2020). See section 5.6.8 of this *Bench Book* for the special arrangements available should leave be given for a child to give evidence.

5.3.4 Family Court proceedings

5.3.4.1 Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) came into effect on 1 July 2006. The Act contained significant amendments to the laws relating to children and effected a significant change to the way in which courts are to conduct family law proceedings relating to children. On a State level, those provisions were imported into the *Family Court Act 1997* (WA).

These changes included that the Family Court give effect to five principles in performing its duties, exercising powers and making decisions in child-related proceedings.⁷⁰⁷ They are summarised as follows:

- The Court must consider the needs of the child and the impact on the child of the proceedings.
- The Court must actively manage and control the conduct of the proceedings.
- The proceedings are to be conducted in a way that will safeguard against violence, abuse and neglect.
- As far as possible the proceedings are to be conducted in a way that will promote co-operative and child-focused parenting by the parties.
- The proceedings are to be conducted without undue delay and with as little formality and legal technicality as possible.

5.3.4.2 Family violence

Family violence is now a large part of the workload of the Family Court. In 2020, family violence was identified as a risk in 82% of all children's case assessment conferences, with an increase in the lodgment of Family Violence/ Child Abuse notices from 390 in 2011 to 889 in 2020.⁷⁰⁸

⁷⁰⁷ *Family Court Act 1997* (WA) s 202B (1) (accessed 30 November 2020).

⁷⁰⁸ Family Court of Western Australia, *Annual Review 2020* (2019) page 2 (accessed 17 August 2021).

The Family Court Amendment (Family Violence and Other Measures) Act 2013 (WA), amended the Family Court Act 1997 (WA) in the terms of the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth). The Explanatory Memorandum to the Family Court Amendment (Family Violence and Other Measures) Bill 2013 (WA) stated:

The Family Law Legislation Amendment Act 2011 (Cth) resulted from reports received by the Commonwealth Government in relation to the 2006 family law reforms and how the family law system deals with family violence. The reports indicate that the Act fails to adequately protect children and other family members from family violence and child abuse. These reports are: the Evaluation of the 2006 family law reforms by the Australian Institute of Family Studies (AIFS); Family Courts Violence Review by the Honourable Professor Richard Chisholm AM; and Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues by the Family Law Council.

In relation to the amendments to s 66C, known as the 'friendly parent provision', the Explanatory Memorandum stated:

Subclause (1) inserts a new subsection (3A) after existing section 66C(2).

The fundamental principle that guides decision making in family law proceedings relating to children is that the best interests of the child is the paramount consideration.

Factors to guide the Court in the determination of the best interests of the child are listed as 'primary' and 'additional'. The two primary considerations are: (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. The new subsection makes it clear that of the two primary considerations greater weight is to be given to consideration of the protection of the child from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence.

Subclause 2(a) repeals existing subsection 66C(3)(c) and replaces it with new subsections 66C(3)(c) and (da). Currently subsection 66C(3)(c) is commonly referred to as the 'friendly parent provision'. This provision required the family courts, when determining the child's best

interests, to consider the willingness of one parent towards the other in facilitating a child's relationship with other parent. The Australian Institute of Family Studies Evaluation of the 2006 Family Law Reforms and the Family Law Council report to the Attorney-General, Improving responses to family violence in the family law system noted the impact this provision had in discouraging disclosures of family violence and child abuse. These reports indicate that parties were not disclosing concerns of family violence and child abuse for fear of being found to be an 'unfriendly parent'.

The repeal of subsection 66C(3)(c) is intended to remove this disincentive and enable all relevant information to be put before the courts for consideration in making parenting orders. Removal of the 'friendly parent' provision will not prevent the court from considering a range of matters relevant to the care, welfare and development of the child such as a parent's attitude to the responsibilities of parenthood.

Proposed subsection 66C(3)(c) will require the court to consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent. This will include the extent to which each parent has taken, or failed to take, the opportunity to spend time with the child, communicate with the child, and participate in decision-making about major long-term issues in relation to the child.

Proposed subsection 66C(3)(da) will require the court to consider the extent to which each parent has facilitated, or failed to facilitate, the other parent doing these things and the extent to which each parent has fulfilled, or failed to fulfil, his or her obligation to maintain the child.

Subclause 2(b) deletes paragraph 66C(3)(k) and replaces it with a similar provision which removes the requirement that a family violence orders must be final or contested. The effect of this new paragraph is the courts must have regard to any family violence order made, including interim, non-contested and police issued order, and give appropriate weight to those orders. The definition of 'family violence order' remains unchanged.

Subclause (3) deletes the existing sections 66C(4) and (5). The repealed section 66C(4) has been substantially re-enacted as the new section 66(3)(c).

5.3.4.3 Representation of children

Children may be represented in their parents' litigation through an Independent Children's Lawyer who represents and promotes the best interests of the child.

For more detailed information on the role of the Independent Children's Lawyer please refer to section 5.4.1.2.

The *Family Law Act 1975* (Cth) and the *Family Court Act 1997* (WA) also provide that a parenting order in relation to a child may be applied for by a number of adult parties, but also by the child.⁷⁰⁹ Unless the Court 'is satisfied that a child understands the nature and possible consequences of the case and is capable of conducting the case', a child may be a party to a case only by a case guardian.⁷¹⁰

5.3.4.4 Rules of evidence

The rules of evidence do not apply to child-related proceedings unless the circumstances are exceptional.⁷¹¹

5.3.5 Criminal jurisdiction

The special legal status accorded to children in court processes is reflected by the exclusive jurisdiction of the Children's Court to hear and determine a charge of an offence alleged to have been committed by a child.⁷¹² The jurisdiction of the Children's Court also extends to include proceedings in respect of an offence allegedly committed by a person before attaining the age of 18, even if they have attained the age of 18 at the time of the proceedings.⁷¹³

⁷⁰⁹ *Family Law Act 1975* (Cth) s 65C; *Family Court Act 1997* (WA) s 88(b) (accessed 30 November 2020).

⁷¹⁰ *Family Law Rules 2004* (Cth) r 6.08(2) (accessed 30 November 2020).

⁷¹¹ *Family Law Act 1975* (Cth) s 69ZT; *Family Court Act 1997* (WA) s 202H (accessed 30 November 2020).

⁷¹² *Children's Court of Western Australia Act 1988* (WA) s 19(1) (accessed 30 November 2020).

⁷¹³ *Children's Court of Western Australia Act 1988* (WA) s 19(2) (accessed 30 November 2020).

However, a child or young person charged with certain indictable offences may elect to be tried in the Supreme or District Court,⁷¹⁴ which has all the powers of the Children's Court as if the child had been before that Court.⁷¹⁵ The Children's Court may also transfer charges to the Magistrates Court where a child and adult are charged with the same offence, or if the accused has turned 18.⁷¹⁶

5.3.5.1 Principles of juvenile justice

In any criminal proceedings against a child or young person, bear in mind the principles of juvenile justice, particularly those in s 7(b)-(m) of the *Young Offenders Act 1994* (WA):⁷¹⁷

- (b) a young person who commits an offence is to be dealt with, either formally or informally, in a way that encourages the young person to accept responsibility for his or her conduct; and*
- (c) a young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult; and*
- (d) the community must be protected from illegal behaviour; and*
- (e) victims of offences committed by young persons should be given the opportunity to participate in the process of dealing with the offenders to the extent that the law provides for them to do so; and*
- (f) responsible adults should be encouraged to fulfil their responsibility for the care and supervision of young persons, and supported in their efforts to do so; and*
- (g) consideration should be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so; and*

⁷¹⁴ *Children's Court of Western Australia Act 1988* (WA) s 19B (accessed 30 November 2020).

⁷¹⁵ *Children's Court of Western Australia Act 1988* (WA) s 19(9) (accessed 30 November 2020).

⁷¹⁶ *Children's Court of Western Australia Act 1988* (WA) ss 19B, 19C, 19D (accessed 30 November 2020).

⁷¹⁷ *Young Offenders Act 1994* (WA) (accessed 30 November 2020).

- (h) *detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary; and*
- (i) *detention of a young person in custody, if required, is to be in a facility that is suitable for a young person and at which the young person is not exposed to contact with any adult detained in the facility, although a young person who has reached the age of 16 years may be held in a prison for adults but is not to share living quarters with an adult prisoner; and*
- (j) *punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways; and*
- (k) *a young person who is dealt with for an offence should be dealt with in a time frame that is appropriate to the young person's sense of time; and*
- (l) *in dealing with a young person for an offence, the age, maturity, and cultural background of the offender are to be considered; and*
- (m) *a young person who commits an offence is to be dealt with in a way that —*
 - (i) *strengthens the family and family group of the young person; and*
 - (ii) *fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons; and*
 - (iii) *recognises the right of the young person to belong to a family.*

5.3.5.2 Bail

Children have a qualified right to bail under the *Bail Act 1982* (WA)⁷¹⁸ (with special provisions being made where the child is accused of murder⁷¹⁹).

⁷¹⁸ *Bail Act 1982* (WA) Schedule 1, Part C, clause 2 (accessed 30 November 2020).

⁷¹⁹ *Bail Act 1982* (WA) s 7C (accessed 30 November 2020).

The Department of Justice has a supervised bail program which may be made available to young people who do not have a surety or access to a responsible adult. The Department takes responsibility for the young person but does not keep them in custody in a detention centre. They may be required to return to family, live in a youth hostel or go to a home-treatment program whilst waiting for their next appearance in court. The Department develops a behavioural contract with which the young person must comply to remain out of a detention centre. This may include requirements to regularly attend school, avoid certain places or look for a job.⁷²⁰

A magistrate or judge may also impose conditions on the grant of bail – including community bail, home detention bail, and bail release to a community hostel.

5.3.6 Non-criminal jurisdiction

There are restrictions upon children and young people initiating, defending or participating in legal proceedings as a party. In these instances, a child or young may need to be represented by a 'litigation guardian', 'next friend' or 'guardian *ad litem*'.⁷²¹ Generally this requirement applies to all persons under the age of 18 years. In the Supreme Court, the *next friend* or guardian *ad litem* must act by a solicitor.⁷²²

The courts also have a general discretion to appoint a litigation guardian to separately represent the interests of a child or young person whose interests are or may be affected by legal proceedings.⁷²³

The Children's Court exercises exclusive jurisdiction in relation to a number of non-criminal jurisdictions with respect to children. These are outlined in s 20(1) of the *Children's Court of Western Australia Act 1988* (WA):⁷²⁴

⁷²⁰ Department of Justice, *Appearing in the Children's Court: Supervised Bail* (last updated October 2016) (accessed 30 November 2020).

⁷²¹ *State Administrative Tribunal Act 2004* (WA) s 40; *State Administrative Tribunal Rules 2004* (WA) r 39; *Magistrates Court (Civil Proceedings) Act 2004* (WA) ss 3, 21; *Magistrates Court (Civil Proceedings) Rules 2005* rr 116, 120 (accessed 26 March 2019).

⁷²² *Rules of the Supreme Court 1971* (WA) O 70 (accessed 26 March 2019).

⁷²³ *Legal Representation of Infants Act 1977* (WA) s 5 (accessed 30 November 2020). In relation to the Children's Court however, this applies only to applications made under the *Children and Community Services Act 2004* (WA) – see s 3(1)(d) (accessed 26 March 2019).

⁷²⁴ *Children's Court of Western Australia 1988* (WA) (accessed 30 November 2020).

(1) Subject to this Act, the Court has exclusive jurisdiction to hear and determine all applications made with respect to a child —

(a) under the Children and Community Services Act 2004; and

(b) under section 29 or 38(1) of the School Education Act 1999; and

[(c) deleted]

(d) under section 334 of the Health Act 1911.

The most significant of these jurisdictions concerns applications under Part 4 of the Children and Community Services Act 2004 (WA) relating to the protection and care of children.

5.3.7 Requirements to obtain the views of relevant children and young people

Whenever the outcome of a matter will have an impact on a particular child or young person or their interests, it is critical to try to obtain the views of that child or young person, including the impact of crime upon the child as a victim.⁷²⁵

Article 12 of the United Nations Convention on the Rights of the Child requires that a child or young person who is 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.⁷²⁶

5.3.7.1 Obtaining views in protection proceedings

Article 12 of the United Nations Convention on the Rights of the Child is reflected in s 10 of the Children and Community Services Act 2004 (WA):⁷²⁷

(1) If a decision under this Act is likely to have a significant impact on a child's life then, for the purpose of ensuring that the child is able to participate in the decision-making process, the child should be given —

⁷²⁵ See Sentencing Act 1995 (WA) Part 3 Division 4 (accessed 26 March 2019). Note that s 24(2) provides that if a victim, because of age or any other reason, is personally incapable of giving a victim impact statement, another person may give it on the victim's behalf if the court is satisfied that it is appropriate for that other person to do so.

⁷²⁶ United Nations Conventions on the Rights of the Child (CRC, 1989) Article 12 (accessed 30 November 2020).

⁷²⁷ Children and Community Services Act 2004 (WA) (accessed 17 August 2021).

- (a) *adequate information in a manner and language that the child can understand, about —*
 - (i) *the decision to be made; and*
 - (ii) *the reasons for the Department's involvement; and*
 - (iii) *the ways in which the child can participate in the decision-making process; and*
 - (iv) *any relevant complaint or review procedures; and*
- (b) *the opportunity to express the child's wishes and views freely, according to the child's abilities; and*
- (c) *any assistance that is necessary for the child to express those wishes and views; and*
- (d) *adequate information as to how the child's wishes and views will be recorded and taken into account; and*
- (e) *adequate information about the decision made and a full explanation of the reasons for the decision; and*
- (f) *an opportunity to respond to the decision made.*
- (2) *In the application of the principle set out in subsection (1), due regard must be had to the age and level of understanding of the child concerned.*
- (3) *Decisions under this Act are likely to have a significant impact on a child's life include but are not limited to —*
 - (a) *decisions about the placement arrangements or secure care arrangements in respect of the child; and*
 - (b) *decisions in the course of preparing, modifying or reviewing care plans or provisional care plans for the child; and*
 - (c) *decisions about the provision of social services to the child; and*
 - (d) *decisions about contact with the child's parents, siblings, and other relatives and with any other people who are significant in the child's life.*
- (4) *In subsection (3)(b) —*

care plan has the meaning given in section 89(1);

provisional care plan has the meaning given to that term in section 39(1).

The Children and Community Services Act 2004 (WA) provides a mechanism for children to apply for reconsiderations of secure care decisions. Section 10(3)(a) provides for 'secure care arrangements' which are 'planned, short term intensive intervention(s) in a therapeutic environment to contain, stabilise, assess and support the child's wellbeing' and 'should be an intervention of last resort'.⁷²⁸ As soon as practicable after making a secure care arrangement in respect of a child, the CEO must decide the secure care period,⁷²⁹ which must not exceed 21 days. However, the Department may apply for an extension of the secure care period if there are exceptional circumstances.⁷³⁰ The CEO may extend the secure care period by up to 21 days, but not more than once.⁷³¹

A child may apply in writing to the CEO for reconsideration of a secure care decision made in relation to them.⁷³² The CEO must consider the application as soon as practicable, and either confirm, vary or reverse the decision, or substitute another decision.⁷³³ The CEO must give the child written notice of the decision and the reasons for it.⁷³⁴ If the child is aggrieved by that decision, they may apply to the State Administrative Tribunal for a review of the decision.⁷³⁵

Refer to section 5.1.7 for additional information about secure care arrangements - in particular the Kath French Secure Care Centre in Stoneville.

In some protection cases in the Children's Court a child may be appointed a lawyer – a 'Child Representative', sometimes also called a 'Separate Representative'. A Child Representative assists the Court work out what the child wishes or what is in their best interests.⁷³⁶

⁷²⁸ Department of Communities - Child Protection and Family Support, Policy on Children Entering Secure Care (2016) page 1 (accessed 17 February 2020).

⁷²⁹ Children and Community Services Act 2004 (WA) s 88F(1) (accessed 17 August 2021).

⁷³⁰ Children and Community Services Act 2004 (WA) s 88F(2) (accessed 17 August 2021).

⁷³¹ Children and Community Services Act 2004 (WA) s 88F(3), (4) (accessed 17 August 2021).

⁷³² Children and Community Services Act 2004 (WA) s 88G(2), (3) (accessed 17 August 2021).

⁷³³ Children and Community Services Act 2004 (WA) s 88G(4) (accessed 17 August 2021).

⁷³⁴ Children and Community Services Act 2004 (WA) s 88G(5) (accessed 17 August 2021).

⁷³⁵ Children and Community Services Act 2004 (WA) s 88H (accessed 17 August 2021).

⁷³⁶ Legal Aid Western Australia, Child Representatives in the Children's Court (accessed 30 June 2020).

A Child Representative can act on the child's instructions, or in the child's best interests, in protection proceedings. Even where acting on best interests, the Child Representative may inform the Court of the child's wishes.⁷³⁷

A Child Representative should act on instructions where a child has 'sufficient maturity and understanding' to give instructions and wishes to do so. A Child Representative acting on instructions must take instructions from a child as they would do from a party to the proceedings. Where a child does not have 'sufficient maturity and understanding to instruct' the Child Representative will represent the child on the basis of his/her best interests. Any questions as to whether a child is able to instruct will be determined by the Children's Court.⁷³⁸

The Children's Court has published *Guidelines for Child Representatives* to provide guidance to Child Representatives in fulfilling their role, and to assist practitioners, parties, children and other people to understand the Courts' general expectations of Child Representatives. The Guidelines were developed in collaboration with the Department for Child Protection and Family Support and the Youth Affairs Council. They are made available by the Legal Aid Western Australia which funds the work of Child Representatives in Western Australia.⁷³⁹

Young people have a right to attend and participate in hearings in the Children's Court, which is very different from the Family Court, where people under the age of 18 years cannot enter the courtroom without leave of the Court. There is a philosophical difference in how the two jurisdictions approach children and their right to participate.⁷⁴⁰

5.3.7.2 Obtaining views in Family Court proceedings

In deciding whether to make a particular parenting order the Family Court must regard the best interests of the child as the paramount consideration.⁷⁴¹ In determining what is in the best interests of the child, the Court is bound to consider, among other things, 'any views expressed

⁷³⁷ Legal Aid Western Australia, *Child Representatives in the Children's Court* (accessed 30 June 2020).

⁷³⁸ Children's Court of Western Australia, *Guidelines for Child Representatives* (last updated 30 April 2019) [1.1.1], [2.2] (accessed 30 June 2020).

⁷³⁹ Children's Court of Western Australia, *Guidelines for Child Representatives* (last updated 30 April 2019) (accessed 30 June 2020).

⁷⁴⁰ Submission from Legal Aid Western Australia (9 June 2020).

⁷⁴¹ *Family Law Act 1975* (Cth) s 60CA; *Family Court Act 1997* (WA) s 66A (accessed 26 March 2019).

by the child and any factors (such as the child's maturity level or level of understanding) that the Court thinks are relevant to the weight it should give to the child's views'.⁷⁴²

In *Bondelmonte v Bondelmonte* [2017] HCA 8⁷⁴³ the High Court reiterated that although a child's views and wishes can be relevant, they are not the determinative factor and a court is not bound by those views. That case concerned two boys aged 17 and 15 who had travelled to New York with their father (with whom they had been living in Australia). During the trip the father advised the mother that he would not be returning to Australia and that the boys had expressed a wish to also stay in New York. The mother successfully applied for an interim order for the boys to be returned to Australia. Upon appeal by the father, that decision was upheld by the Full Court of the Family Court and then by the High Court.

Research by the Australian Institute of Family Studies (AIFS) (reported in 2018)⁷⁴⁴ showed that more than one-third of the participating children and young people expressed a desire to engage with the court process and communicate their views directly to the Court. Judicial interviews are uncommon in the family law context in Australia, however some children expressed a desire to speak directly to the judicial officer deciding the case that affected them. The AIFS attributed the reluctance of judicial officers to speak with children and young people to a perceived lack of expertise and training, and a concern that such meetings may negatively impact upon the child or young person's wellbeing or family relationships. Recommendations included the development of guidelines to support judicial officers to meet with children and young people should they consider it appropriate; and/or the presence of a family consultant during a judicial interview.⁷⁴⁵

Refer to section 5.4.1 for information on special measures to obtain a child or young person's view in family law proceedings.

⁷⁴² *Family Law Act 1975* (Cth) s 60CC(3); *Family Court Act 1997* (WA) s 66C(3) (accessed 26 March 2019).

⁷⁴³ *Bondelmonte v Bondelmonte* [2017] HCA 8.

⁷⁴⁴ Australian Institute of Family Studies, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Final Report – June 2018) (accessed 30 November 2020).

⁷⁴⁵ Australian Institute of Family Studies, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Final report – June 2018) 4.5 – Experiences of non-participation in the decision-making process (accessed 30 November 2020).

5.4 SPECIAL MEASURES FOR OBTAINING VIEWS OR EVIDENCE FROM CHILDREN AND YOUNG PEOPLE

Where children are concerned, justice is done only when the child is dealt with in such a manner that their views are considered and/or their evidence is properly and adequately given. Accordingly, special measures should be implemented to ensure that this is achieved.

An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse (2016)⁷⁴⁶ was conducted on behalf of the Royal Commission into Institutional Responses to Child Sexual Abuse. It found that child complainants in Western Australia typically gave evidence-in-chief via pre-recorded police interviews and were cross-examined via CCTV (pre-recorded or live). However, frequent problems reduced the effectiveness of special measures. Technological issues were common, which frustrated judges and lawyers, disrupted trials and possibly increased complainants' stress.

The particularly demanding nature of cross-examination is of great concern. It can jeopardise both the pursuit of justice and the wellbeing of the child: not only may the child be exposed to unnecessary stress and trauma, but the quality of the child's evidence can also be severely undermined. If valuable evidence is lost because of emotional or developmental vulnerability, then justice cannot be done.

A critical aspect of obtaining evidence is the rapport a judicial officer establishes with the child. This is particularly important in ensuring the child feels comfortable enough to look to the judicial officer for guidance if they feel they need help; this is especially important in the context of being cross-examined.

Alternative means of informing the Family Court of a child's views may avoid the need for children to be called to give evidence at all in that jurisdiction.

Further information is provided in the summary of the findings of *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse (2016)* in section 5.2.3 of this Bench Book, and in chapter 4 of the AIJA's *Bench Book for Children Giving Evidence in Australian Courts* (updated March 2020).

⁷⁴⁶ Powell, M, Westera, N, Goodman-Delahunty, J and Pichler, AS, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse* Sydney, Australia: Royal Commission into Institutional Responses to Child Sexual Abuse (2016) page 4 (accessed 25 March 2019).

5.4.1 Special measures in Family Court proceedings

Usually the Family Court will direct that a family consultant give the Court a report on such matters relevant to the proceedings as the Court thinks desirable, including a child's views.⁷⁴⁷

The Court can seek a wishes report from the Family Consultant or request that the Family Consultant facilitate a Child Dispute Conference. However, family and wishes reports are not the norm in Western Australia. The child's wishes are more frequently obtained through a single expert report in this State.⁷⁴⁸

5.4.1.1 Single Expert Witness

The Family Court may in complex cases appoint experts to give evidence in relation to significant issues in dispute, for example psychologists, psychiatrists or social workers. As much as possible the court will appoint a Single Expert Witness, rather than have more than one expert give evidence. The Single Expert can also give evidence in Court if the case goes to trial. The expert evidence is to assist the Court to decide what orders are in the best interests of the child(ren).⁷⁴⁹

The Single Expert Witness may meet with (and observe) a child for a number of reasons, including to ascertain their wishes. Single Expert Witnesses are usually invited to provide an opinion as to whether the wishes expressed by a child have been influenced by another person or whether there are other reasons why expressed wishes should be treated with caution.⁷⁵⁰

If the Court thinks a Single Expert Witness report will be required, it will normally ask the parties to come up with a list of experts who are willing to be appointed and what they will charge to produce a report and attend Court. If the parties cannot agree on who should be the Single Expert Witness, the Court can choose someone from the list of experts.⁷⁵¹

Each party can be asked to pay up to half of the costs of the Single Expert Witness's report.⁷⁵²

⁷⁴⁷ *Family Court Act 1997* (WA) s 73(3a) (accessed 30 November 2020).

⁷⁴⁸ Submission from Legal Aid Western Australia (9 June 2020).

⁷⁴⁹ Legal Aid Western Australia, *Single Expert Witness* (accessed 30 June 2020).

⁷⁵⁰ Submission from Legal Aid Western Australia (9 June 2020).

⁷⁵¹ Legal Aid Western Australia, *Single Expert Witness* (accessed 30 June 2020).

⁷⁵² Legal Aid Western Australia, *Single Expert Witness* (accessed 30 June 2020).

The parties are also asked to prepare a draft with the questions that the Single Expert Witness will be asked to answer in their report. The instructions and questions for the report are only given to the Single Expert Witness after the draft has been approved by the Court.⁷⁵³

If the Court wants the report to include the results of a test or investigation done by the expert, that will need to be made clear as part of the instructions and questions given to the Single Expert Witness.⁷⁵⁴

5.4.1.2 Independent Children's Lawyer⁷⁵⁵

An Independent Children's Lawyer (ICL) is a lawyer appointed by the Family Court to represent and promote a child's best interests in parenting cases. The ICL should act impartially towards the Court and the parties involved in the case, and only be focused on what is in the best interests of the child.

The Family Court produces *Guidelines for Independent Children's Lawyers* which are intended to assist ICLs carry out their role, and to be a resource for training ICLs. The Guidelines also assist practitioners, parties, children and other persons involved, to understand the role. The Guidelines are a public document endorsed by the Family Court of Australia, the Chief Judge of the Family Court of Western Australia and the Chief Judge of the Federal Court of Australia.⁷⁵⁶

The Guidelines require an ICL to meet with children (assuming that they are at an age and developmental stage where this is appropriate), unless there are exceptional reasons for them not to do so.⁷⁵⁷ An ICL may delay the time they meet with children, depending on the issues that are before the Court. The ICL can explain to children how family law works and what decisions the Family Court might have to make about their future. The extent to which the ICL interacts with the children will depend upon their age and maturity, and how much involvement the children already has with other people, such as counsellors.

⁷⁵³ Legal Aid Western Australia, *Single Expert Witness* (accessed 30 June 2020).

⁷⁵⁴ Legal Aid Western Australia, *Single Expert Witness* (accessed 30 June 2020).

⁷⁵⁵ Unless stated otherwise, the information in this section is from Legal Aid Western Australia, *Independent Children's Lawyers* (accessed 30 June 2020).

⁷⁵⁶ Family Court of Western Australia, *Guidelines for Independent Children's Lawyers* (as updated 1 May 2019).

⁷⁵⁷ Family Court of Western Australia, *Guidelines for Independent Children's Lawyers* (as updated 1 May 2019).

Sometimes an ICL may determine the child's wishes, but often in Western Australia those wishes are reported to the Court by the report of the Single Expert Witness or Family Consultant, even where an ICL has been appointed.⁷⁵⁸

The ICL must ensure that the Family Court has all the important information about a child's needs and background, including asking for expert evidence if necessary, to help the Court make the best decision for the children. The ICL will also work with the Family Consultant and other experts involved in the case.

5.4.1.3 Children's evidence

A child (under 18 years old) must not swear an affidavit, be called as a witness or enter the courtroom, without an order of the Family Court.⁷⁵⁹

It is very rare for the Family Court to make an order that a child be called as a witness.⁷⁶⁰ There is a philosophical difference in how the Family Court and the Children's Court approach children and their right to participate in proceedings. In the Children's Court, young people can attend and participate in protection hearings.⁷⁶¹

For more information about the participation of children in protection proceedings in the Children's Court please refer to section 5.3.7.1.

Any party applying for a child to be called as a witness in the Family Court must:⁷⁶²

- file an affidavit setting out the facts relied on in support of the application;
- include the name of a support person in that affidavit; and
- attach a summary of the evidence to be adduced from the child.

If the Family Court makes an order that a child be called as a witness, it may also order that the child's evidence be given to the Court by way of affidavit or electronic means, and in the presence of a support person who is named in the order.⁷⁶³

⁷⁵⁸ Submission from Legal Aid Western Australia (9 June 2020).

⁷⁵⁹ *Family Court Act 1997* (WA) s 214 (accessed 30 June 2020).

⁷⁶⁰ Submission from Legal Aid Western Australia (9 June 2020).

⁷⁶¹ Submission from Legal Aid Western Australia (9 June 2020).

⁷⁶² *Family Law Rules 2004* (Cth) r 15.02(1) (accessed 30 June 2020).

⁷⁶³ *Family Law Rules 2004* (Cth) r 15.02(2) (accessed 30 June 2020).

A judge has a discretion to interview the child; however, judicial interviews are uncommon.

Section 5.3.7.2 refers to research showing that more than one-third of children wished to communicate their views directly to the Court.

5.4.2 Other provisions

To assist the court to obtain a child or young person's evidence, legislation, and in particular the *Evidence Act 1906* (WA), prescribes several mechanisms which make the process less stressful for the child witness and improve the quality of the evidence obtained.

These mechanisms are set out in sections 5.4.2.1 - 5.4.2.10.

In proceedings in which the giving of evidence by a child is likely to require the making of an order directing the use of certain of the mechanisms, the person who is calling that child as a witness is required to apply for a special hearing for the purpose of having such matters dealt with before the proceeding commences.⁷⁶⁴

5.4.2.1 Self-represented parties

Be aware that:

- in any criminal proceedings, an accused person who is not represented by legal counsel is not entitled to cross-examine any child witness directly;⁷⁶⁵ and
- in restraining order matters, no unrepresented person is to cross-examine any child witness directly.⁷⁶⁶

In some instances an accused person may wish to have legal representation but may be unaware of potential representation through Legal Aid Western Australia or have difficulty in completing and lodging application forms.

⁷⁶⁴ *Evidence Act 1906* (WA) s 106S (accessed 26 March 2019).

⁷⁶⁵ *Evidence Act 1906* (WA) s 106G (accessed 26 March 2019).

⁷⁶⁶ *Restraining Orders Act 1997* (WA) s 53D (accessed 26 March 2019).

If you would like information about the status or progress of an unrepresented accused's application to Legal Aid (WA), you can contact the Legal Aid InfoLine (Assessing) on ph. 1300 650 579.

Under s 106G of the *Evidence Act 1906* (WA)⁷⁶⁷ and s 53D of the *Restraining Orders Act 1997* (WA),⁷⁶⁸ although an unrepresented person is not entitled to directly cross-examine a child, he or she can put any question to the child witness (subject to the general disallowance discretion of the judicial officer⁷⁶⁹), by stating the question to the judicial officer or a person approved by the court who will repeat the question to the child.

5.4.2.2 Visually recorded investigative interviews with children in any proceeding for an offence

Under the provisions of sections 106HA and 106HB of the *Evidence Act 1906* (WA) a visual recording of a child's investigative interview is admissible as all or part of the evidence-in-chief in any proceeding for an offence, provided that:

- the interview was conducted in a manner that meets the prescribed requirements, by a person of a prescribed class who had reason to believe that the child, or another child, may have been physically or sexually abused; and
- the accused or legal representative has been given an opportunity to view the visually recorded interview and has been provided with a transcript.

Regulations regarding the visual recording of interviews with children are codified in the *Evidence (Visual Recording of Interviews with Children and Persons with Mental Impairment) Regulations 2004* (WA).

⁷⁶⁷ *Evidence Act 1906* (WA) s 26 (accessed 30 November 2020).

⁷⁶⁸ Note that, other than in the Children's Court, children would not normally give evidence in restraining order proceedings (*Restraining Orders Act 1997* (WA) s 53A(1)) – refer to section 5.3.3.3 of this Bench Book. If the court does give leave, special arrangements apply (ss 53B, 53C, 53E).

⁷⁶⁹ *Evidence Act 1906* (WA) s 26 (accessed 30 November 2020).

The findings of *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse* (2016) undertaken on behalf of the Royal Commission into the Institutional Responses to Child Sexual Abuse include:⁷⁷⁰

- Vulnerable witnesses have reported that the use of pre-recorded police interviews as evidence-in-chief was beneficial, relieving their stress and anxiety at trial because they were not required to testify in court.
- There is strong consensus among legal professionals that using the pre-recorded interview as evidence-in-chief is more reliable than live evidence due to the closer proximity in time to the events at issue. However, professionals did express concerns over the quality of police interviews, which were often unnecessarily long and cluttered with irrelevant details.
- From the point of view of jurors, studies indicate that jury members view children who testify on video as less confident and honest than children who testify live, but these perceptions do not translate into any differences in credibility judgments, which are poor irrespective of how the child gives evidence.

If the recorded interview is admitted into evidence, the judicial officer is to instruct the jury that the procedure is a routine practice of the court and that they should not draw any inference as to the accused's guilt from the use of the procedure.⁷⁷¹

5.4.2.3 Special hearing to take and record evidence of child witnesses in full

Where a Schedule 7 proceeding under the *Evidence Act 1906* (WA) has been commenced in a court, a party may apply for an order directing that the whole of the affected child's evidence (including cross-examination and re-examination):⁷⁷²

- be taken at a special hearing and recorded on visual recording; and
- be presented to the court in the form of that visual recording.

⁷⁷⁰ Powell M, Westera N, Goodman-Delahunty J and Pichler AS, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse*, Sydney, Australia: Royal Commission into Institutional Responses to Child Sexual Abuse (2016) page 15 (accessed 27 March 2019).

⁷⁷¹ *Evidence Act 1906* (WA) s 106HB(7)(a) (accessed 30 November 2020) .

⁷⁷² *Evidence Act 1906* (WA) s 106I (accessed 30 November 2020).

The party may also apply for an order directing that the affected child not be present at the proceeding.⁷⁷³

Schedule 7 proceedings include:

- proceedings for criminal offences of a sexual nature;
- specified offences involving the accused in a designated relationship with the child; and
- applications relating to protection and care under the *Children and Community Services Act 2004* (WA).

The affected child must be either the complainant or the subject of the application.⁷⁷⁴ Note that, in any protection proceedings a child can only be compelled to give evidence or be cross-examined with the leave of the Children's Court.⁷⁷⁵

As provided by section 106K of the *Evidence Act 1906* (WA), some of the directions which a court might make in relation to a special hearing include:

- whether the affected child is to be in the courtroom or in a separate room when their evidence is being taken; and
- which persons may be present in the room with the affected child when the child's evidence is being taken.

At the hearing to record the child's evidence, certain measures must be employed to ensure the protection of the child witness.⁷⁷⁶ For instance:⁷⁷⁷

- The accused is not to be in the same room as the affected child when the child's evidence is being taken, but is to be capable of observing the proceedings by means of a closed circuit television system and is at all times to have means of communicating with his or her counsel.

⁷⁷³ *Evidence Act 1906* (WA) s 106I(1)(b) (accessed 30 November 2020).

⁷⁷⁴ *Evidence Act 1906* (WA) s 106A (accessed 30 November 2020).

⁷⁷⁵ *Children and Community Services Act 2004* (WA) s 150 (accessed 30 November 2020).

⁷⁷⁶ *Evidence Act 1906* (WA) s 106K(3) (accessed 30 November 2020).

⁷⁷⁷ *Evidence Act 1906* (WA) s 106T (accessed 30 November 2020); *RPM v R* [2004] WASCA 174 at [84] (Malcolm CJ).

- When dealing with child witnesses, *who* is with the child in the room when the child is giving evidence should be a consideration, as it should not be a person who might influence the evidence that the child gives (for example, a person by whom the child feels threatened).
- Evidence of an affected child recorded at a special hearing is admissible in any hearing in relation to the proceedings (including a re-trial⁷⁷⁸) to the same extent as if it were given orally in the hearing in accordance with the usual rules and practice of the court.

The *AIJA's Bench Book for Children Giving Evidence in Australian Courts* (updated 2020) includes a *Suggested 'Script' for Use in Special Hearings with Children or Cognitively Impaired Witnesses*.⁷⁷⁹ Note, however, that the New South Wales *Equality before the Law Bench Book* cautions against asking hypothetical or abstract questions about truth or lies, in particular, recommending that you do not ask whether you, the judicial officer, are telling a lie — for example, 'If I said X, would I be telling the truth or a lie?' as this requires the child to say that you, a judicial officer, are lying.

Please note that consideration should be given to *Circular to Practitioners 18* of the *Guidelines for Cross - examination of Children and Persons Suffering a Mental Disability*, (contained within the District Court Consolidated Criminal Practice Directions), which were updated by the District Court of Western Australia on 3 April 2020.

5.4.2.4 Video-links or screening arrangements for the protection of child witnesses

Video-link technology allows children and young people to testify from a separate room or remote facility away from the courtroom.

⁷⁷⁸ As was discussed in *Ferry v the Queen* [2003] WASCA 207 at [48]-[51] (Anderson J).

⁷⁷⁹ Australasian Institute of Judicial Administration Incorporated, *Bench Book for Children Giving Evidence in Australian Courts* (updated 2020) Appendix, page 195 (accessed 30 November 2020).

Where there is a Schedule 7 proceeding under the *Evidence Act 1906* (WA)⁷⁸⁰ and the necessary equipment is available, the court is to make arrangements for the giving of evidence of an affected child,⁷⁸¹ to enable the child either:⁷⁸²

- to give evidence outside the courtroom but within the court precincts,⁷⁸³ and the evidence transmitted by video-link;⁷⁸⁴ or
- to give evidence in the courtroom, with the accused held in a room apart from the courtroom and the evidence transmitted by video-link.⁷⁸⁵

It is also open for the prosecutor to apply to the court for an order that the CCTV/video-link provision does not apply to a particular proceedings. For a judicial officer to issue the order, they must be satisfied that the affected child is able and wishes to give evidence in the presence of the defendant.⁷⁸⁶

Where the necessary CCTV/video-link facilities and equipment are not available, a screen, one-way glass or other device is to be placed so that the child giving evidence cannot see the accused; but the judge, the jury, the accused and his or her counsel can see the child.⁷⁸⁷ Note, however, that screening is rarely used, and only as a last resort.

⁷⁸⁰ That is a proceeding for a criminal offence of a sexual nature against the child, for specified serious offences involving defendants in a designated relationship with the child, or for applications relating to the protection and care of children under the *Children and Community Services Act 2004* (WA): see Schedule 7 of the *Evidence Act 1906* (WA) (accessed 30 November 2020).

⁷⁸¹ That is a child who is either the complainant or the subject of a protection application — see *Evidence Act 1906* (WA) s 106A (accessed 27 March 2019).

⁷⁸² *Evidence Act 1906* (WA) s 106N (accessed 30 November 2020).

⁷⁸³ The Chief Judge of the District Court accepts that a child may give evidence from another place (which may not be within a court building and could be several hundred kilometres away) that is transmitted to the court via video/audio link and this is deemed to constitute being within court precincts. However, whether evidence should be given from another location is a matter of discretion for the presiding judicial officer having regard to such factors as: (1) the quality of the video/audio link at the remote location; (2) whether a court support/court officer is present at the remote location; (3) whether the court can monitor any support person who may be present at the remote location; and (4) whether there is a time difference between the court's location and the remote location. Also, while this practice is accepted by the Chief Judge it is not legally binding on lawyers. Note, however, there is also the discretion — unless it is not in the interests of justice — to receive evidence by video-link from any place in the State and where the place from which evidence is transmitted is 'taken to be part of the court' — see section 5.4.2.6 of this Bench Book.

⁷⁸⁴ *Evidence Act 1906* (WA) s 106N(2)(a) (accessed 30 November 2020) .

⁷⁸⁵ *Evidence Act 1906* (WA) s 106N(2)(b) (accessed 30 November 2020) .

⁷⁸⁶ *Evidence Act 1906* (WA) s 106O (accessed 30 November 2020).

⁷⁸⁷ *Evidence Act 1906* (WA) s 106N (accessed 30 November 2020).

If the child's evidence is taken using CCTV or one-way glass, the evidence is to be recorded on a visual recording.⁷⁸⁸

If either video-link or screening is employed, the judicial officer is to instruct the jury that the procedure is a routine practice of the court and that they should not draw any inference as to the accused's guilt from the use of the procedure.⁷⁸⁹

5.4.2.5 Special hearings, video-links or screening arrangements for children as special witnesses in any proceeding for an offence

Other provisions of the *Evidence Act 1906* (WA) may enable children and young people to give their evidence at a special hearing even if the proceedings do not relate to Schedule 7 matters, or if the child or young person is not the complainant or the subject of a protection application. If a child or young person is declared - on application by a party or the court's own motion - to be a 'special witness' under s 106R of the *Evidence Act 1906* (WA), an application can be made to allow them to have their evidence in any criminal matter visually recorded in a special hearing.⁷⁹⁰ Note that unlike section 106I (which applies only to Schedule 7 proceedings) the court may of its own motion make an order that the evidence of the special witness be taken at a special hearing and recorded on a visual recording.

A child or young person who is declared a special witness may give their evidence in any proceeding for an offence by video-link or, if the equipment is not available, with the use of screens, one-way glass or other device so that they cannot see the accused.⁷⁹¹

The court may order that a child or young person be treated as a special witness⁷⁹² if that child otherwise would:

- by reason of physical disability or mental impairment, be unlikely to be able to give evidence, or to give evidence satisfactorily; or

⁷⁸⁸ *Evidence Act 1906* (WA) ss 106N(3a), 106N(5) (accessed 30 November 2020).

⁷⁸⁹ *Evidence Act 1906* (WA) s 106P (accessed 30 November 2020).

⁷⁹⁰ *Evidence Act 1906* (WA) s 106RA (accessed 30 November 2020).

⁷⁹¹ *Evidence Act 1906* (WA) s 106R(4)(c) (accessed 30 November 2020).

⁷⁹² *Evidence Act 1906* (WA) s 106R(3) (accessed 30 November 2020) .

- by reason of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant, be likely —
 - to suffer severe emotional trauma; or
 - to be so intimidated or distressed as to be unable to give evidence satisfactorily.

Note that if you declare a child to be a special witness, you must also instruct a jury that making the declaration is a routine practice of the court and that they should not draw any inference as to the accused's guilt from it.⁷⁹³

The AIJA's *Bench Book for Children Giving Evidence in Australian Courts* (updated 2020) includes a *Suggested 'Script' for Use in Special Hearings with Children or Cognitively Impaired Witnesses*.⁷⁹⁴ Note however that the New South Wales Equality before the Bench Book cautions against asking hypothetical or abstract questions about truth or lies, in particular, recommending that you do not ask whether you, the judicial officer, are telling a lie — for example, 'If I said X, would I be telling the truth or a lie?' as this requires the child to say that you, a judicial officer, are lying.

5.4.2.6 Discretion to take evidence by video-link in the interests of justice

A court has a general discretion under section 121 of the *Evidence Act 1906*, on its own initiative or on the application of a party to a proceeding before the court, to direct that evidence will be taken by video-link from a person outside the courtroom or place where the court is sitting — although the court shall not make such a direction if satisfied that to do so is not in the interests of justice.⁷⁹⁵

If evidence is taken by video-link in accordance with such a direction, section 121(3) requires that the place of the recording shall be taken to be part of the court.⁷⁹⁶

⁷⁹³ *Evidence Act 1906* (WA) s 106R(7) (accessed 30 November 2020).

⁷⁹⁴ Australasian Institute of Judicial Administration Incorporated, *Bench Book for Children Giving Evidence in Australian Courts* (updated 2020) Appendix, page 195 (accessed 30 November 2020).

⁷⁹⁵ *Evidence Act 1906* (WA) s 121 (accessed 30 November 2020).

⁷⁹⁶ *Evidence Act 1906* (WA) s 121(3) (accessed 30 November 2020).

Section 106N(2)(a) of the *Evidence Act 1906* (WA) was amended in 2020 to provide that evidence of children may be given at 'a place, other than the courtroom, that is approved by the court'.⁷⁹⁷ That provision had previously allowed evidence of children to be given outside the courtroom but within the court precincts. This amendment has removed previous contention between ss 121 and 106N.

5.4.2.7 Expert evidence in sexual assault proceedings

A 2008 amendment to the *Evidence Act 1906* (WA) introduced the ability for expert evidence of child behaviour to be provided in proceedings for sexual offences where the complainant that is relevant to the proceedings may be adduced in relation to:⁷⁹⁸

- child development and behaviour generally; and
- child development and behaviour in cases where children have been victims of sexual offences.

Chapter 6 of the AIJA's *Bench Book for Children Giving Evidence in Australian Courts* (updated 2020), includes a detailed analysis of the use of expert evidence in relation to cases involving allegations of the sexual assault of children.

5.4.2.8 Additional arrangements in certain proceedings

In Schedule 7 proceedings a relevant statement of an affected child made to another may, at the discretion of the court, be admitted into evidence, if a copy of the statement is given to the accused and the accused is given an opportunity to cross-examine the child. The evidence of the making and content of the statement must be given by the person to whom the affected child made the statement.⁷⁹⁹

⁷⁹⁷ *Evidence Act 1906* (WA) s 106N (accessed 30 November 2020).

⁷⁹⁸ *Evidence Act 1906* (WA) s 36BE (accessed 30 November 2020).

⁷⁹⁹ *Evidence Act 1906* (WA) s 106H (accessed 30 November 2020).

5.4.2.9 Arrangements in restraining order proceedings

In restraining order matters other than those when a child is a respondent,⁸⁰⁰ children are not to be called to give oral evidence except by the leave of the court.⁸⁰¹ Leave may be granted in exceptional circumstances; and if the order is made there are special arrangements which must be adopted for the child to give evidence.⁸⁰²

Those arrangements include that:⁸⁰³

- the child give evidence by video-link;
- the child is entitled to a support person;
- the child is not to be cross-examined by an unrepresented person; and
- evidence of a representation made by the child about a relevant matter is admissible.

5.4.2.10 Additional arrangements in all proceedings

You may need to consider additional arrangements where children or young people are giving evidence in any proceedings:

- The Child Witness Service is available to make an assessment and to prepare and support a child giving evidence.

Refer to section 5.6 (further information or help) of this chapter for contact details for the Child Witness Service.

- If you consider that it is required in the interests of justice, you should explore with the parties the pre-recording of evidence or the use of CCTV/video-links or screening in any proceedings where a child or young person is required to give evidence.
- If a child is giving evidence from a remote witness room, the court needs to be set up so the child does not see the accused on the TV monitor. For example, the accused should not be seated next to the defence counsel.

⁸⁰⁰ These matters fall within the jurisdiction of the Children's Court subject to any factual mistake as to a respondent being a child: see s 20(2A) of the *Children's Court of Western Australia Act 1988* (WA) (accessed 30 November 2020).

⁸⁰¹ *Restraining Orders Act 1997* (WA) s 53A(1) (accessed 30 November 2020).

⁸⁰² *Restraining Orders Act 1997* (WA) s 53A(2) (accessed 30 November 2020).

⁸⁰³ *Restraining Orders Act 1997* (WA) Part 6, Division 1 (accessed 30 November 2020).

- You also need to ensure the monitor is on mute before addressing the accused when the child is still in the CCTV room.
- A child is entitled to be accompanied by a support person while giving evidence⁸⁰⁴ — irrespective of whether a video-link is used — but the support person must be approved by the court and must not be a person who is a witness in or party to the proceedings.
- Where a child is to give evidence in any proceeding in a court, the court may appoint a 'child communicator' — that is, a person whom the court considers suitable and competent to assist the child's communication with the court.⁸⁰⁵
- The function of the communicator is, where requested by the court, to communicate and explain:
 - to the child, questions put to him/her, and
 - to the court, the evidence given by the child.⁸⁰⁶

When the Law Reform Commission of Western Australia recommended the adoption of a provision concerning 'child interpreters' in 1991, it described the function as analogous to that of a foreign language interpreter in a case where the witness does not have sufficient understanding of English.⁸⁰⁷

The use of 'children's champions' (also called a 'witness intermediaries'), in criminal proceedings concerning prescribed sexual offences, was trialled in New South Wales (31 March 2016 to 31 March 2019)⁸⁰⁸ before transitioning to a permanent program on 1 April 2019.⁸⁰⁹ The children's champions are accredited professionals appointed to a panel by the

⁸⁰⁴ *Evidence Act 1906* (WA) s 106E (accessed 30 November 2020).

⁸⁰⁵ *Evidence Act 1906* (WA) s 106F(1) (accessed 30 November 2020).

⁸⁰⁶ *Evidence Act 1906* (WA) s 106F(2) (accessed 30 November 2020).

⁸⁰⁷ Law Reform Commission of Western Australia, *Evidence of Children and other Vulnerable Witnesses* (1991) 6.40 – 6.43, page 91 (accessed 27 March 2019).

⁸⁰⁸ *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW) (accessed 27 March 2019).

⁸⁰⁹ NSW Government Communities and Justice, *Child Sexual Offence Evidence* (accessed 30 November 2020).

Victims Services in the Department of Justice.⁸¹⁰ The New South Wales legislation expressly states that a children's champion is an officer of the Court with a duty of impartiality.⁸¹¹

A child communicator in Western Australia is not described in legislation as an officer of the court as children's champions are in New South Wales, but must still however:

- take an oath or make a declaration, in such form as the court sees fit, that they will faithfully perform their functions;⁸¹² and
- not wilfully make any false statement to the child or the court. To do so would be a crime punishable by 5 years' imprisonment.⁸¹³

The AIJA's *Bench Book for Children Giving Evidence in Australian Courts* (updated 2020) provides detailed information on the position of child witnesses in criminal proceedings, in relation to both the legal issues involved and the psychological aspects of children giving evidence.

5.5 PRACTICAL CONSIDERATIONS

5.5.1 Involvement of children and young people in legal proceedings

There is a philosophical difference in how the Family Court and the Children's Court approach children and their right to participate in proceedings. In the Children's Court, young people can attend and participate in protection hearings.⁸¹⁴ In the Family Court, anyone under 18 years of age must not swear an affidavit, be called as a witness or enter the courtroom without an order of the Family Court.⁸¹⁵ It is very rare for the Family Court to make an order that a child be called as a witness.⁸¹⁶

⁸¹⁰ *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW) s 88 (accessed 19 September 2019).

⁸¹¹ *Criminal Procedure Amendment (Child Sexual Offence Evidence Pilot) Act 2015* (NSW) s 89 (accessed 19 September 2019).

⁸¹² *Evidence Act 1906* (WA) s 106F(3) (accessed 30 November 2020).

⁸¹³ *Evidence Act 1906* (WA) s 106F(4) (accessed 30 November 2020).

⁸¹⁴ *Children and Community Services Act 2004* (WA) s 10 (accessed 30 June 2020).

⁸¹⁵ *Family Court Act 1997* (WA) s 214 (accessed 30 June 2020).

⁸¹⁶ Submission from Legal Aid Western Australia (9 June 2020).

Refer to sections 5.3.7 on obtaining a child's views in Children's Court and Family Court proceedings.

Points to consider – children and young people in legal proceedings:

- If the outcome of a matter before you will have an impact on a particular child or young person or their interests, it is critical to try to obtain their views. Remember that, in some jurisdictions, there are a number of alternative processes available to obtain the views of a child or young person without the need for them to give evidence directly to the court.

For more information on alternative procedures refer to section 5.3.7.1 in relation to protection proceedings and 5.3.7.2 and 5.4.1 in relation to Family Court proceedings.

- The Family Court is bound to give effect to five principles which advance the interests of children when conducting child-related proceedings.⁸¹⁷

The five principles that the Family Court must give effect to in performing its duties, exercising powers and making decisions in child-related proceedings are summarised in section 5.3.4 of this chapter.

- In proceedings such as those before the Family Court, or in protection proceedings or restraining order applications (other than when the child is the respondent), even if a child or young person would be a competent and otherwise compellable witness, he or she can only be called as a witness with the leave of the court.⁸¹⁸ If a child or young person is to be called to give evidence, the Child Witness Service is available to make an assessment and to prepare and support the child or young person to give their evidence.

Refer to section 5.6 for contact details for the Child Witness Service.

⁸¹⁷ *Family Law Act 1975* (Cth) s 69ZN(1); *Family Court Act 1997* (WA) s 202B(1) (accessed 27 March 2019).

⁸¹⁸ *Family Law Act 1975* (Cth) s 100B(2); *Family Court Act 1997* (WA) s 214A(2); *Children and Community Services Act 2004* (WA) s 150; *Restraining Orders Act 1997* (WA) s 53A(1) (accessed 27 March 2019).

5.5.2 Ground rules hearings for children and vulnerable witnesses

It may be appropriate in the case of a very young child complainant or witness under a disability, to undertake a 'ground rules' directions hearing before the witness' evidence is pre-recorded, or otherwise given at trial. Various provisions of the *Evidence Act 1906* (WA) empower courts to make an order for such a hearing.⁸¹⁹

The purpose of a 'ground rules' hearing is to discuss any difficulties that may be experienced in the taking of the evidence and to discuss and impose rules and procedures to be followed to facilitate the taking of the evidence.

This is a procedure used extensively in the UK in conjunction with the use of intermediaries. Its use and benefits are set out in the text by Joyce Plotnikoff and Richard Woolfson *Intermediaries in the criminal justice system – improving communication for vulnerable witnesses and defendants*, 2015.

An example of a type of 'ground rules' hearing is set out in Circular to Practitioners 19 of the *District Court's Criminal Consolidated Practice Directions*.

When making appropriate orders at a ground rules hearing, consideration should be given to the age and ability of the child or vulnerable witness and anything else which will assist the witness in giving evidence. Orders may include, but are not limited to:

- Permitting the witness to have with him or her in the remote room a special toy or comforter.
- Allowing the use of plans, body maps or other aids to help communicate a question or answer.
- Taking frequent short breaks (no longer than 2-3 minutes).
- Requiring that questions take place on a topic by topic basis (with no jumping between topics) and that some 'signposting' of the topic be given to the witness before questions are asked.

⁸¹⁹ See *Evidence Act 1906* (WA) ss 25- 27, 106E, 106F, 106R and 106S (accessed 13 May 2021).

- Imposing a word limit on questions (word limit roughly the same as the age of the witness).
- Allowing time for the witness to answer questions.
- Prohibiting repetitive questions.
- Prohibiting 'tagged questions' and negative questions (eg '*He didn't touch you, did he?*' or '*I put it to you that you did not see John doing any of those things, did you?*') and requiring open questions only to be put to the child eg '*Are you sure John touched you?*' or '*Did you see John doing those things?*'.
- Imposing a time limit on cross-examination.

5.5.3 Minimise delays

It is important to try to keep delays in cases involving a child or young person (whether as a witness or alleged offender) to a minimum, 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.

In child sexual abuse cases it has been suggested that the rate of acquittal may be reduced by reducing delays in getting cases to trial, as extended delays may impact on memory and recall leading to inconsistencies in evidence that make witnesses seem unreliable.⁸²⁰

Legal Aid Western Australia submitted:⁸²¹

⁸²⁰ Powell M, Westera N, Goodman-Delahunty J and Pichler AS, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse*, Sydney, Australia: Royal Commission into Institutional Responses to Child Sexual Abuse (2016) pages 75-76 (accessed 14 September 2021).

⁸²¹ Submission from Legal Aid Western Australia (9 June 2020).

Where child abuse allegations have been made and a party to Family Court proceedings has been charged, the Family Court matters may be adjourned pending the outcome of the criminal law matters, which can cause extensive delay in the Family Court proceedings and put increased stress on family systems seeking assistance from the Family Court in determining a child's care arrangements.

There are some delays beyond your control, but some you may be able to minimise.

Points to consider to minimise delay:

- 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.
- 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.

Further information about special measures - including video-links, special hearings and screening arrangements - can be found in section 5.4.2, especially 5.4.2.3 - 5.4.2.5.

- 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.
- Importance should be placed on encouraging children to go to school, so consideration should be given to timing court appearances so that, as far as practicable, they don't interfere with everyday schooling requirements and educational events (such as Western Australian Certificate of Education (WACE) and other examinations). Appearances could be scheduled during school holidays where possible.

- Take into account the appropriateness of court venues in light of travel, accommodation, family and other pressures.
- Consider other major events in the child's or young person's life, such as 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). A child is entitled to a support person, who must be approved by the court and must not be a person who is a witness in or party to the proceedings.⁸²²
- 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 that is appropriately designed for children and young people (that is, with suitable distractions, appropriate décor and a support person or people present).

5.5.4 Oaths, affirmations and declarations

Children and young people over the age of 12, who understand the obligation imposed by an oath or affirmation, are required to give sworn evidence in the same way as adults.⁸²³

Children under the age of 12 may give sworn evidence only if they are deemed competent to give evidence upon oath or affirmation: that is, they understand that the giving of evidence is a serious matter and that they have an obligation to tell the truth when giving evidence.⁸²⁴

Whether a child or young person takes an oath or an affirmation, and the type of oath or affirmation they should take, may depend on their religious affiliation or lack of religious affiliation — refer to chapter 3 of this Bench Book.

⁸²² *Evidence Act 1906* (WA) s 106E (accessed 30 November 2020).

⁸²³ *Evidence Act 1906* (WA) s 97 (accessed 30 November 2020).

⁸²⁴ *Evidence Act 1906* (WA) s 106B (accessed 30 November 2020).

Where a child under the age of 12 is deemed not competent to give evidence under oath or affirmation, they will be able to give unsworn evidence if the court is satisfied that they are able to give an intelligible account of events observed or experienced.⁸²⁵

Research has indicated that in general:

- Children as young as 4 or 5 years old recognise deliberately false statements as lies.
- Children up to around 11 years old tend to be more stringent than adults in their assessment of what constitutes a lie — for example, they may describe incorrect guesses and exaggeration as lies.
- Children 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 when a child is lying than telling when an adult is lying). Young children also tend to have a greatly exaggerated view of what will happen to them if they lie in court, with many believing that they will go to jail.
- 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 (as it is hard for some adults also), so asking them to do this will not generally help the court to be satisfied that they understand the difference.

Points to consider – oaths, affirmations and declarations:

- Questions should be tailored to ensure the child feels comfortable, taking into account the child's age, culture, background and ability. This may be particularly important due to the intellectual capacity of the child you are dealing with. Reviewing the video record of an interview with the child is a particularly helpful tool to assist with tailoring appropriate questions.

⁸²⁵ *Evidence Act 1906* (WA) s 106C (accessed 30 November 2020).

- A judicial officer may also take into account the child's visually recorded interview as a basis for his or her opinion, provided the parties are first given the opportunity to make submissions on the material.⁸²⁶ As a matter of practice, submissions are normally made in the absence of the jury.
- Assess the particular child or young person's capacity to understand a question and give an answer that can be understood. Try to put the child or young person at ease and settle them into the question-answer mode with a few simple questions about their name, age, schooling and favourite pastimes. Ask simple questions, one at a time, from the bench, until you are satisfied about their capacity.⁸²⁷
- Depending on the circumstances, make sure you do not ask questions which could place the child at risk — for example asking them their address or which school they attend.
- It is important to use open-ended questions that will enable the child or young person to engage in a dialogue with the judicial officer. This will build rapport and assist with assessing whether the child or young person can give an intelligible account.
- To assess whether a child or young person is capable of giving an intelligible account, it may be useful to ask them to explain something they have an interest in or can readily recall — for example, 'Can you tell me how you got to court today?'
- If a child does not appear to understand the difference between the truth and a lie, it may be necessary to ask a few extra questions to make sure that it is not because they are shy or have misunderstood your questions.
- Consider whether a 'child communicator' should be appointed to assist the court to communicate and explain the questions to the child and the child's answers to the court.⁸²⁸

⁸²⁶ *GWD v The State of Western Australia* [2010] WASCA 206 [46].

⁸²⁷ See, for example, *Hamilton v R* (Unreported; WASC CCA, Library No 970082A; 4 March 1997).

⁸²⁸ *Evidence Act 1906* (WA) s 106F (accessed 30 November 2020).

- Once you are reasonably sure that the child understands the difference between telling lies and telling the truth, explain, in simple terms, the importance of doing so — for example, 'It is very important that you tell the truth when you are asked questions by anybody in court today.'

5.5.5 Managing the manner in which a child or young person gives evidence

Points to consider- managing the manner of giving evidence:

- In Family Court proceedings, you have a discretion to obtain a child's evidence by way of affidavit or electronic means, and in the presence of a support person.⁸²⁹

Refer to section 5.4.1.3 for more information about children giving evidence in Family Court proceedings.

- Note that no child or young person giving evidence is to be questioned directly by an unrepresented accused in any criminal proceedings or an unrepresented person in a restraining order application.⁸³⁰
- For information about the status or progress of an unrepresented accused person's application to Legal Aid (WA), you can contact the Legal Aid Operations Co-ordinator — Assessing, on telephone number: 1300 650 579.
- Consider whether the alternative measures discussed in section 5.4 of this chapter apply to the proceedings you are conducting — including the fact that these are not mutually exclusive — and whether these have been properly and fully explored by the appropriate legal representative. Specifically:
 - Can the pre-recorded videotape of a child or young person's investigative interview be presented as all or part of their evidence-in-chief in criminal proceedings?⁸³¹

⁸²⁹ *Family Law Rules 2004* (Cth) r 15.02(2) (accessed 30 November 2020).

⁸³⁰ *Evidence Act 1906* (WA) s 106G; *Restraining Orders Act 1997* (WA) s 53D (accessed 30 November 2020).

⁸³¹ *Evidence Act 1906* (WA) ss 106HA, 106HB (accessed 30 November 2020).

- Is the child or young person able to give evidence by way of a special hearing whether because of the nature of the offence or proceedings, or because he or she has been declared a 'special witness' in criminal proceedings?⁸³²
 - Must the child or young person give evidence by way of video-link from a remote room, or screened, because of the nature of the proceedings?⁸³³
 - Is the child or young person able to give evidence by way of video-link from a remote room, or screened, because he or she has been declared a 'special witness' in criminal proceedings?⁸³⁴
 - Is there agreement that it is in the interests of justice for the evidence of a child or young person to be received by video-link from a place outside where the court is sitting?⁸³⁵
 - Can a statement from a child or young person be admitted into evidence because of the nature of the proceedings?⁸³⁶
 - Can expert evidence of child behaviour be provided in proceedings for sexual offences where the complainant was under the age of 18 at the time of the offence?⁸³⁷
- A child is entitled to be accompanied by a support person while giving evidence — irrespective of whether a video-link is used or the nature of the proceedings — but the support person must be approved by the court and must not be a person who is a witness in or party to the proceedings.⁸³⁸
 - Where a child is to give evidence in any proceeding in a court, you can appoint a 'child communicator' — that is, a person who you consider suitable and competent to assist the child's communication with the court.⁸³⁹

⁸³² *Evidence Act 1906* (WA) ss 106I, 106RA (accessed 30 November 2020).

⁸³³ *Evidence Act 1906* (WA) s 106N (accessed 30 November 2020).

⁸³⁴ *Evidence Act 1906* (WA) s 106R (accessed 30 November 2020).

⁸³⁵ *Evidence Act 1906* (WA) s 121 (accessed 30 November 2020).

⁸³⁶ *Evidence Act 1906* (WA) s 106H (accessed 30 November 2020).

⁸³⁷ *Evidence Act 1906* (WA) s 36BE (accessed 30 November 2020).

⁸³⁸ *Evidence Act 1906* (WA) s 106E (accessed 30 November 2020).

⁸³⁹ *Evidence Act 1906* (WA) s 106F (accessed 30 November 2020).

- The function of the communicator is, if requested by you, to communicate and explain:⁸⁴⁰
 - to the child, questions put to him/her; and
 - to the court, the evidence given by the child.

- If you consider that in the interests of justice it is required, you may wish to explore with the parties the pre-recording of evidence or the use of CCTV/video-links or screening in any proceedings in which a child or young person is required to give evidence.⁸⁴¹

- Ensure that where CCTV is being used, it is used in a way that is as effective as possible. For example, the accused should not be seated next to the defence counsel, so that the child does not see the accused on the TV monitor. Judicial officers also need to ensure the monitor is on mute before addressing the accused when the child is still in the CCTV room.

- If the child or young person elects to give all or any of their evidence in court, ensure that the alternative options of screens and seating changes have been fully explained to them by the appropriate legal representative.

- 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 they become distressed, the alternative options may need to be explored with them again.

- Ensure that you instruct any jury that the procedures employed to assist the child give evidence and/or the declaration of the child as a special witness is a routine practice of the court and that they should not draw any inference as to the accused's guilt from the use of these measures.⁸⁴²

⁸⁴⁰ *Evidence Act 1906* (WA) s 106F (accessed 30 November 2020).

⁸⁴¹ *Evidence Act 1906*(WA) s 121 (accessed 30 November 2020).

⁸⁴² *Evidence Act 1906* (WA) s 106P (accessed 30 November 2020).

5.5.6 Language and communication

Procedural justice 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 replies are understood by the court.

The difficulty children may experience with inappropriate language in court undermines the possibility of equal treatment of child witnesses:⁸⁴³

- A trial can only be considered fair if witnesses are able to understand the questions they are required to answer.
- Children's behaviour in court and their perceptions of the court process have been shown to be substantially affected by difficulties with the language used.

The level and style of language, any explanations about what is going on, and any cross-examination must be appropriate to the developmental age of the particular child or young person. It is easy for those who are familiar with the court and the language used there to underestimate how intimidating a court can be for those who are unfamiliar with its language and procedures.

The New South Wales Courts have developed the *'Explaining Legal Terms to Children' - Quick Reference Guide*⁸⁴⁴ to assist judicial officers to communicate with children in the criminal jurisdiction. Refer to this guide for examples of alternate definitions/explanations which may be used when explaining complex legal terms to children.

The *Evidence Act 1906* (WA) recognises the responsibility of the court to put an end to improper questioning. Section 26 provides that:⁸⁴⁵

- (1) *The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is: —*
- (a) *misleading; or*
 - (b) *unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.*

⁸⁴³ Cashmore J and Trimboli L, *Child Sexual Assault Trials: A Survey of Juror Perceptions*, *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice*, No 102 (September 2006) (accessed 27 March 2019).

⁸⁴⁴ New South Wales Attorney General and Justice, Courts and Tribunal Services, *Explaining Legal Terms to Children: Quick Reference Guide* (2015) pages 1-6 (accessed 9 September 2021).

⁸⁴⁵ *Evidence Act 1906* (WA) s 26 (accessed 30 November 2020).

- (2) *Subsection (1) extends to a question that is otherwise proper if the putting of the question is unduly annoying, harassing, intimidating, offensive or oppressive.*
- (3) *Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account —*
- a. *any relevant condition or characteristic of the witness, including age, language, personality and education; and*
 - b. *any mental, intellectual or physical disability to which the witness is or appears to be subject.*

Interpreters are available for children and young people where appropriate – please refer to chapter 7 (for culturally and linguistically diverse young people) and chapter 9 (for young Aboriginal people).

Points to consider – language and communication with children and young people:

- Always communicate with the child with respect. Generally, it is preferable to refer to the child by their name.
- Use language that is as simple and direct as possible.
- Use the words or phrases that the child or young person is likely to have learned first — for example, 'about', not 'regarding' or 'concerning'; 'start', not 'commence'; 'go', not 'proceed'; 'to', not 'towards'.
- Avoid words and phrases which beg agreement — for example, 'It's true, isn't it?' and 'Is that not true?'
- Use active, not passive speech (subject, verb and then object — not object, verb then subject) — for example, 'The dog bit you', not 'You were bitten by the dog'.
- Use short sentences and, if asking questions, ask only one at a time.
- Avoid double negatives: Use single negatives instead — for example, 'Did he tell you not to do this?' not 'Didn't he tell you not to do this?'

- Use simple verb tenses — the simplest, most definite or concrete verb tense possible with as few extra words as possible — for example, 'you say', not 'you are saying'; and '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.
- Only use legal jargon when necessary, and if you do need to use it, explain it in simple English. For example, avoid 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'; or 'against', not 'versus'.
- Avoid terms such as 'my friend' or 'argument'.
- Do not talk down to a child or young person — try to use a language style that is appropriate to the particular child or young person's developmental age.
- Be careful not to assume that the child or young person understands the words you are using — children will generally nod and agree with a judicial officer in order to please, even if they do not understand what is being said.

5.5.7 Adequately explain court proceedings and processes

In any proceedings in the Children's Court, the court is obliged to satisfy itself that the child who is the subject of the proceedings understands the nature of those proceedings.⁸⁴⁶ Section 44 of the *Young Offenders Act 1994* (WA) also requires you to explain court proceedings and processes to young offenders.

⁸⁴⁶ *Children's Court of Western Australia Act 1988* (WA) s 34 (accessed 30 November 2020).

Further, it makes sense to explain court proceedings and processes to children and young people, to ensure that the court can get the best possible evidence from the child or young person.

Points to consider when explaining court proceedings and processes:

- You may need to explain to a child:
 - how everyone in the court tries to be as fair as possible to them and everyone else involved;
 - what the court needs from them and why — at the start of each different step they are involved in; and
 - what is meant by such things as bail, statement, affidavit, evidence, cross-examination, intent, not incriminating themselves, appeal — do this as those things are mentioned.

- You may need to give a child:
 - permission to ask 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'; and
 - extra time for their legal representative to explain proceedings to them.

- All of the above should be done using simple and direct language.

The New South Wales Courts *'Explaining Legal Terms to Children' - Quick Reference Guide*⁸⁴⁷ provides examples of alternate definitions/explanations which could be used when explaining complex legal terms to children.

⁸⁴⁷ New South Wales Attorney General and Justice, Courts and Tribunal Services, *Explaining Legal Terms to Children: Quick Reference Guide* (2015) pages 1-6 (accessed 9 September 2021).

5.5.8 Cross-examination

Cross-examination is generally seen by children and young people as the hardest part of the court process. Children and young people find it very difficult to have their motives misconstrued and to be accused of lying. While it is important that a child or young person's evidence is properly tested, it is also important that over-zealous cross-examination does not intimidate the witness into keeping silent, lead them to contradict their response or produce emotional disorganisation and distress. Research has consistently shown that many of the strategies used by lawyers to cross-examine children are stress-inducing, developmentally inappropriate, suggestive and evidentially unsafe.

The AIJA's *Bench Book for Children Giving Evidence in Australian Courts* (updated 2020) points to recent studies which have shown that cross-examination often causes inaccuracies in the evidence of children, because of the use of language and linguistic techniques which are designed to create inconsistencies and confusion. Judicial officers need to ensure that the cross-examination of a child is conducted in such a way that there is an appropriate balance between the right of the accused to test the evidence and the right of a child to be treated with dignity and respect.⁸⁴⁸

Particular issues of concern are:⁸⁴⁹

- developmentally inappropriate questioning of children; and
- strategies used by defence lawyers such as focusing on minor inconsistencies of evidence in respect to peripheral matters (unrelated to the relevant incident) to undermine the credibility of the child witness.

⁸⁴⁸ Australian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (updated 2020) page 31 and Chapters 3 and 4 (accessed 30 November 2020).

⁸⁴⁹ Powell, M, Westera, N, Goodman-Delahunty, J and Pichler, AS, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse*, Sydney, Australia: Royal Commission into Institutional Responses to Child Sexual Abuse (2016) particularly Chapter 17: Cross-examination on Inconsistencies (accessed 25 March 2019).

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 were 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.

Points to consider – cross-examination:

- It may help the orderly conduct of the trial if the judicial officer expressly states from the outset that he/she:
 - has a positive duty to act to disallow improper or inappropriate questions and will do so as necessary; and
 - expects counsel to carefully consider the questions asked.
- Given the particular difficulties faced by children and young people, 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 26 of the *Evidence Act 1906* (WA).
- The ground rules could be, for example, that cross-examination must:
 - be appropriate for the (developmental) age of the particular child or young person — while it is the duty of the prosecution to be alert and object to inappropriate questioning, research indicates that the court cannot rely on this to happen;
 - use simple and direct language without talking down to the child or young person;
 - be conducted one question at a time, allowing time for the child or young person to answer;
 - allow the child or young person time to consider the question, and formulate and provide the response — this may mean that there will be periods of silence in the courtroom, and although this may be uncomfortable it is important that this

time is not filled with further questions or discussion, so that appropriate time is provided to enable child or young person to process the information;

- 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 voices, 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 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.
 - They may respond differently when they are older if there has been some considerable delay since they gave the earlier evidence.
- not assert that the child or young person is lying as this can cause considerable trauma. A better approach for suggesting that information provided is not truthful is to use alternatives, such as suggesting the child or young person may be mistaken or wrong;
- be conducted with minimal use of leading or closed questions — due to the suggestibility of children the accuracy of the evidence given by child witnesses is greatly diminished by the use of closed or leading questions;⁸⁵⁰
- be conducted with minimal use of the 'agreement technique' which involves counsel asking a series of innocuous questions in rapid succession to get the witness into the habit of making agreeable responses and then asking a

⁸⁵⁰ Andrews, SJ, Lamb, ME & Lyon, TD, *Question Types, Responsiveness and Self-contradictions when Prosecutors and Defence Attorneys Question Alleged Victims of Child Sexual Abuse* (15 December 2014) *Applied Cognitive Psychology* (accessed 28 March 2019).

contentious question in the hope that the witness will continue the pattern regardless of accuracy. This style of questioning is usually carried out once counsel has induced the child to believe that a negative answer will elicit an unpleasant response, thus increasing the likelihood of agreement.⁸⁵¹ Children appear to be susceptible to this technique due to their suggestibility;⁸⁵²

- be conducted in a chronological sequence which will reduce the risk of the child becoming confused. Use of the 'skip around' technique should be limited — that is, the practice of juxtaposing unrelated questions is employed by advocates to unsettle the witness in an attempt to elicit inconsistent testimony;⁸⁵³
 - be respectful and understanding of the developmental and social restraints 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; and
 - be as brief as possible.
- Note the restrictions on unrepresented persons directly cross-examining children. No child or young person giving evidence is to be questioned directly by an unrepresented accused in any criminal proceedings or by an unrepresented person in a restraining order application.⁸⁵⁴
- Look for signs of distress. Some indicators to watch for are evasiveness, an increasing number of 'I don't know's, silence or stopping answering altogether, hyperventilation, confused answers, trying harder and harder to find an answer they think might be wanted, or complete breakdown. These indicate that the child or young person may be 'tuning out' or is distressed, and that some judicial intervention is necessary. This may include:
- re-phrasing the question yourself;

⁸⁵¹ Ellison L, *Cross-examination and the Intermediary: Bridging the Language Divide?* (2002) *Criminal Law Review* 114, page 124 (accessed 28 March 2019).

⁸⁵² Ellison L, *Cross-examination and the Intermediary: Bridging the Language Divide?* (2002) *Criminal Law Review* 114, page 124 (accessed 28 March 2019).

⁸⁵³ Ellison L, *Cross-examination and the Intermediary: Bridging the Language Divide?* (2002) *Criminal Law Review* 114, page 124 (accessed 28 March 2019).

⁸⁵⁴ *Evidence Act 1906* (WA) s 106G; *Restraining Orders Act 1997* (WA) s 53D (accessed 30 November 2020).

- clarifying the answer with the child or young person;
- asking the lawyer to adjust their language, level or tone; and/or
- calling a break.

5.5.9 Regular breaks

Points to consider – regular breaks for children and young people:

- As indicated earlier, 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 (refer to 5.5.3) 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 say that they can ask for an earlier break if they need one.
- However, while some children and young people (or their support person) may ask for a break if specifically given permission to do so, some still will not ask. 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 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.
- However, be aware that too many breaks could be counterproductive in some circumstances:
 - The child or young person may refuse to come back into the court.
 - The breaks may extend the length of the trial beyond a day, in which case it may be more traumatic for the child or young person to come back than to finalise the matter within the allotted time. However, this needs to be balanced against the interests of justice and ensuring it does not affect the quality of the evidence provided.

- If the child or young person thinks they can take a break at any time, the breaks may coincide with questioning becoming difficult. This may prolong the length of cross-examination and make it more difficult to elicit the testimony.

To avoid some of these issues arising, you may wish to set out when breaks will occur at the start of the proceedings (with some flexibility to alter the times if the child or young person requests).

5.5.10 Jury Directions

The *Evidence Act 1906* (WA) makes clear that a general corroboration warning on evidence of children should not be given. Section 106D provides:

In any proceeding on indictment for an offence in which evidence is given by a child, the judge is not to warn the jury, or suggest to the jury in any way, that it is unsafe to convict on the uncorroborated evidence of that child because children are classified by the law as unreliable witnesses.

Nonetheless, it is accepted in cases following the insertion of s 106D (in 1992) that the trial judge retains the ability to warn a jury about the reliability of evidence of a particular child witness if that is deemed appropriate.⁸⁵⁵

It is important that the jury does not allow any ignorance about children or young persons, or any stereotyped or false assumptions about children or young people or the manner by which a particular child or young person's evidence was presented to unfairly influence their judgment.

Refer to section 5.2.3 of this chapter in relation to misconceptions that the general public have about memory formation generally and child memories particularly. That section contains a summary of some findings made in the report for the Royal Commission into Institutional Responses to Child Sexual Abuse entitled *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants' Evidence*.

⁸⁵⁵ *Reference of a Question of Law Pursuant to the Criminal Code s 693A* (Reference No 1 of 1999) [1999] WASCA 53; *RPM v the Queen* [2004] WASCA 174 [95].

Points to consider – jury directions

- Caution the jury against making any false assumptions about children's and young people's evidence generally, or a particular child 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 presented as a result of restricting direct cross-examination by a self-represented accused or via a recording or CCTV.
- 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 them, any conflicting evidence presented by others and how the jury should relate these matters to the points they need to decide.

5.5.11 Sentencing, other decisions and judgment or decision writing

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 involved — for example, the child, young person and/or their parent(s) or guardian(s).

Points to consider in decisions and sentencing:

- In order to ensure that any child or young person referred to or specifically affected by your sentencing decision(s) and/or written judgment or decision considers it/them to be fair and non-discriminatory, you may need to consider (and indeed specifically allude to) some of the points raised as practical considerations.
- If a child is not personally capable of giving a victim impact statement, because of age or any other reason, consider whether it is appropriate for someone else to do so on the child's behalf.⁸⁵⁶

⁸⁵⁶ *Sentencing Act 1995* (WA) s 24(2) (accessed 28 March 2019).

- Consider whether to allow a victim impact statement to be read out in court.⁸⁵⁷
- In relation to bail decisions concerning a child or young person, Legal Aid (WA) and Youth Legal Service advised that the following factors may be relevant:⁸⁵⁸
 - A child from a regional area should not have to spend any more time in a remand centre than a child of similar antecedents and charge(s) who appears in a metropolitan court.
 - A child should not be remanded in custody simply because there is no-one in court to bail the child.
 - The court should scrutinise the child's home environment and discover if there is an option of support from the Department of Communities (Child Protection and family Support) or the *Supervised Bail Program* run by the Department of Justice.

Refer to section 5.3.5.2 of this chapter for further information on the
Supervised Bail Program.

- The court should always ensure that a child receives legal advice, especially before making a decision to remand a child in custody.
- In cases involving a child or young person as an alleged offender, the behaviour of the child (such as substance abuse) may relate to the adequacy of the protection and care of the child, or previous or current trauma and/or abuse. In these circumstances the court could consider seeking an assessment by the Department of Communities - Child Protection and Family Support.
- In cases involving a child or young person as an alleged offender, in line with the *Young Offenders Act 1994* (WA), consider whether to:
 - refer the matter for consideration by a Juvenile Justice Team — (a) before dealing with the charge; (b) after a plea of guilty has been entered but before the

⁸⁵⁷ See Part 3, Division 4 of the *Sentencing Act 1995* (WA) (accessed 30 November 2020). Note that a court may make a written victim impact statement available to the prosecutor and to the offender, on such conditions as it thinks fit.

⁸⁵⁸ Submission from Legal Aid Western Australia and Youth Legal Service (18 December 2007).

court records a finding that the young person is guilty of the offence; (c) after a hearing of the charge but before the Court records a finding that the young person is guilty of the offence; or (d) after a plea of not guilty has been entered and the court has found the charge proved, but before the court records a finding that the young person is guilty of the offence;⁸⁵⁹

- release without punishment;⁸⁶⁰
 - release without punishment, upon an undertaking by the offender or a responsible adult;⁸⁶¹
 - release without punishment, upon the offender entering into a recognisance (with or without a surety) to keep the peace and be of good behaviour for a term not exceeding one year;⁸⁶²
 - impose a fine;⁸⁶³
 - release on a Youth Community Based Order, imposing on the offender attendance conditions, work conditions, and/or supervision conditions;⁸⁶⁴
 - release on an Intensive Youth Supervision Order, imposing the same conditions as may be imposed under a Youth Community Based Order, except that the supervision conditions that may be imposed are not subject to the same limits.⁸⁶⁵ Detention can be a component of an Intensive Youth Supervision Order (a Conditional Release Order);⁸⁶⁶ or
 - impose a custodial sentence, which is the sentence of last resort.⁸⁶⁷
- In cases involving a child or young person as an alleged offender, you will also need to decide whether or not to record a conviction.⁸⁶⁸
 - A fine is not to be imposed on a young person unless the court is satisfied after making reasonable enquiry that the person who is ordered to pay the fine has the

⁸⁵⁹ *Young Offenders Act 1994* (WA) s 28 (accessed 30 November 2020).

⁸⁶⁰ *Young Offenders Act 1994* (WA) s 66 (accessed 30 November 2020).

⁸⁶¹ *Young Offenders Act 1994* (WA) s 67 (accessed 30 November 2020).

⁸⁶² *Young Offenders Act 1994* (WA) s 69 (accessed 30 November 2020).

⁸⁶³ *Young Offenders Act 1994* (WA) s 71 (accessed 30 November 2020).

⁸⁶⁴ *Young Offenders Act 1994* (WA) s 73-79 (accessed 30 November 2020).

⁸⁶⁵ *Young Offenders Act 1994* (WA) ss 98-117 (accessed 30 November 2020).

⁸⁶⁶ *Young Offenders Act 1994* (WA) ss 99, 101 (accessed 30 November 2020).

⁸⁶⁷ *Young Offenders Act 1994* (WA) ss 118-123 (accessed 30 November 2020).

⁸⁶⁸ *Young Offenders Act 1994* (WA) ss 55 (accessed 30 November 2020).

means to do so, on demand or by instalment.⁸⁶⁹ Consideration should be given to factors such as:

- many jobs for children being temporary, resulting in very large fines taking a long time to pay off;
 - the cost of living and how much a fine will detract from the child's or young person's capacity to save or to support himself/herself;
 - the majority of the children in the Children's Court jurisdiction coming from financially disadvantaged homes and not having parents who can assist them financially; and
 - the self-discipline and organisational skills that would be required in order to maintain payments by instalments over a lengthy period.
- When setting the length of an order, you may wish to consider:
- the age of the child (a four-month order is a long time for a twelve-year old);
 - the educational level of the child relative to the obligations under the order. The child might not have the intellectual capacity to benefit fully from counselling or intervention at the age of twelve, as opposed to the age of sixteen; and
 - gender differences, and whether a male will benefit from intervention in the same way that a female might. It has been the experience of Legal Aid (WA) and Youth Legal Service that boys hate to discuss their feelings.
- When explaining a non-custodial sentence (for instance, a Youth Community Based Order) to a child, try and express it as a positive outcome rather than a punishment — for instance, try and address how the child might benefit from doing community work etc.
- Ensure that you explain to any child or young person affected by your sentencing decision or judgment what it is and means, so that they can understand the consequences for them. It is a good idea to check what their understanding of the judgment is – perhaps by asking them to tell you. It may also be appropriate to write it down (in as simple and direct English as possible), and give it to the child or young

⁸⁶⁹ *Young Offenders Act 1994* (WA) s 72 (accessed 30 November 2020).

person and/or their legal representative, to help ensure understanding and compliance.

- Avoid using the word 'sentence' unless you are imposing a custodial order —some children may assume that if they are being 'sentenced' they are going to go to detention, even if the judicial officer intends to get a report for consideration of a community order. If you do use the word 'sentence', some explanation should accompany it.
- Avoid using the word 'counselling' without explanation — the word can have negative connotations and should be explained in broader, more inviting terms — such as 'education' or 'someone to have a chat with and to help with problems when you get angry.'

5.5.12 Same school violence restraining orders⁸⁷⁰

In 2019, then President of the Children's Court, Judge Wager, assembled a Sub-Committee to address issues relating to the volume of child against child restraining orders in the Children's Court. One of the aims was to look at ways of keeping respondent children at school during the period of an interim order and for the period of a final order.

The *School Education Act 1999* requires a person of school age to attend school on school days. Schools aim for a 95% attendance rate to maximise the educational benefits for individual students.

Points to consider in making restraining order against a child who is at school:

- Children will be prevented from attending school if a restraining order prevents the child from coming within 100 metres of a protected person, or if it restrains the child from attending a protected person's school which is also their own school.
- There is now a process in place in the Perth Children's Court to ensure that children can continue to attend school even if the interim or final violence restraining order is

⁸⁷⁰ It was submitted by the Youth Legal Service that the inclusion of this section may assist Magistrates outside the metropolitan area (3 June 2020).

granted. If there is a Safety Plan implemented by the School, then the respondent child should not be kept away from school and an order to keep 10 metres away from the protected person can be made.

- In conjunction with Legal Aid WA fact sheets and information videos have been produced about same school violence restraining orders which are available on the Legal Aid WA website.⁸⁷¹
- There is a short questionnaire on the Children's Court website to be completed by applicants for restraining orders when the applicant and respondent attend the same school (Public Schools only).⁸⁷² This is to assist the Court with information on what is being done to manage the issues in the school. Any information is provided voluntarily, and will be provided to the Magistrate, the Department of Education and to the school.

5.6 FURTHER INFORMATION OR HELP

The following agencies can provide further information about children and young people and the issues that may affect them when they are involved in legal proceedings:

Child Witness Service

The *Child Witness Service* provides free emotional support and practical preparation for children under 18 years of age who are to give evidence to a court. The children involved can be victims or witnesses to any criminal charge, in any court. This includes the Magistrates Court, Children's Court, District Court or Supreme Court.

Banksia Hill Juvenile Detention Centre

Banksia Hill is the only detention centre for offenders aged 10 to 17 years in Western Australia. It accommodates young males and females from all over the State who:

- have been sentenced to a period of detention;
- have been arrested and are waiting for a first Court appearance or bail determination;
- are waiting for their court case if they have been denied bail; or

⁸⁷¹ Legal Aid Western Australia, *Child VROs* (accessed 5 June 2020).

⁸⁷² Children's Court of Western Australia, *Violence Restraining Order Application – Information to Assist the Court when the Applicant and Respondent Attend the Same School* (31 March 2020) (accessed 5 June 2020).

- are waiting to be sentenced after conviction.

In some cases, where required by law or directed by the Children's Court, a young person aged over 17 may also be held at Banksia Hill instead of an adult prison.

Commissioner for Children and Young People

The Commissioner for Children and Young People works closely with children and young people, their families, community and government to make Western Australia a better place for 0 to 18 year olds. The Commissioner's website has links to resources including reports, policy briefs, issues papers, submissions, media releases, speeches and other resources produced by the Commissioner.

Juvenile Justice

The Western Australian Police Force in partnership with the Department of Justice diverts early and minor young offenders from the formal justice system. The core objective is to reduce re-offending among young people through:

- programs and services to divert young people away from the criminal justice system; and
- programs and services for young people on court orders in the community.

Department of Communities - Child Protection and Family Support

The Department of Communities - Child Protection and Family Support provides a range of child safety and family support services to Western Australian individuals, children and their families, from the Kimberley to the Great Southern regions of the State.

Department of Justice - Corrective Services

The key functions of Corrective Services are to:

- keep the community safe by securing and rehabilitating prisoners and offender in custody and in the community;
- keep prisoners, offenders and corrective services employees safe from harm and injury;
- rehabilitate offenders in custody and in the community so they become law abiding citizens; and

- promote crime prevention.

Legal Aid Western Australia

Legal Aid Western Australia provides legal services to young people including criminal matters and Child Representatives (Separate Representatives) in protection and care proceedings.

Youth Legal Service Inc.

Youth Legal Service is a not-for-profit organisation providing free professional legal services to children and young people (aged under 25 years) across Western Australia.

5.7 FURTHER READING

Australian Institute of Health and Welfare, *Youth Justice in Australia 2019-2020* (2021) (accessed 28 July 2021)

Australasian Institute of Judicial Administration Incorporated, *Bench Book for Children Giving Evidence in Australian Courts* (updated February 2020) (accessed 28 July 2021)

Bolitho J and Freeman K, *The Use of Effectiveness of Restorative Justice in Criminal Justice Systems Following Sexual Abuse or Comparable Harms* (March 2016) (accessed 28 March 2019)

Bruck M and Ceci S, *The Suggestibility of Children's Memory* (1999) *Ann. Rev. Psychol.* (1999) 50: 419-439 (accessed 30 June 2020).

Cashmore J, Taylor A, Shackel R and Parkinson P, *The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases* (August 2016) (accessed 28 March 2019)

Commissioner for Children and Young People, *Speaking out about Family Separation: The Views of Children and Young People with Experience of Separation and the Family Law System in WA* (April 2019) (accessed 2 June 2020)

Commissioner for Children and Young People (Western Australia), *Speaking out about Youth Justice: The Views of WA Children and Young People who had Contact with Youth Justice Services* (7 December 2016) (accessed 2 June 2020)

Family Court of Australia, *Family Violence Best Practice Principles* (3 May 2016) (accessed 28 March 2019)

Hamer D, *The Admissibility and Use of Tendency, Coincidence and Relationship Evidence in Child Sexual Assault* (March 2016) (accessed 28 March 2019)

Keane, A, *Cross-examination of Vulnerable Witnesses: Towards a Blueprint for Re-professionalisation* (1 April 2012) (accessed 28 March 2019)

Law Society of New South Wales, *Representation Principles for Children's Lawyers (4th ed)* (August 2014) (accessed 28 March 2019)

Office of the Director of Public Prosecutions Comparative Sentencing Tables (accessed 12 July 2021)

Powell M, Roberts K and Guadagno B, *Particularisation of Child Abuse Offences: Common Problems when Questioning Child Witnesses* 19(1) (2007) *Current Issues in Criminal Justice* 64 (accessed 28 March 2019)

Powell M, Westera N, Goodman-Delahunty J and Pichler AS, *An Evaluation of how Evidence is Elicited from Complainants of Child Sexual Abuse* (August 2016) (accessed 28 March 2019)

Royal Commission into Institutional Responses to Child Sexual Abuse, *Consultation Paper: Criminal Justice* (September 2016) (accessed 28 March 2019)

Stolzenberg SN and Lyon TD, *How Attorneys Question Children about the Dynamics of Sexual Abuse and Disclosure in Criminal Trials* (January 2014) (accessed 28 March 2019)

6 OLDER PEOPLE

There are various determinations as to when a person can be classified as 'older'. There is no precise definition or specific 'number' to signify the onset of older age or the passing from 'younger' older age to 'older' older age. State and Commonwealth Government authorities and leading research and statistical agencies, however, use definitions of 'older' that range from 45 years of age and over to 65 years of age and over.

The Department of Human Services, for example, has been slowly increasing the age for eligibility for the Commonwealth Aged Pension from 65 years. It will continue to increase incrementally by six months every two years until it is 67 years in 2023.⁸⁷³ Eligibility for the Western Australian Seniors Card was 63 years as of 1 December 2020, and will incrementally increase to 65 years by 2023.⁸⁷⁴ The Australian Bureau of Statistics (ABS) defines 'older', for statistical purposes, as 65 years of age and over. The Australian Institute of Health and Welfare defines 'older' age for Aboriginal and Torres Strait Islander peoples as 50 years and over due to the generally poorer health of Indigenous Australians compared with other Australians.⁸⁷⁵

It is widely recognised that 'older' is a chronologically, medically and culturally relative concept. There is great diversity in physical health, mobility, cognitive capacity and longevity among the ageing cohort. The Australian Law Reform Commission notes that the term 'older' comprises cohorts with different capacities and needs.⁸⁷⁶ Further, not all people within these varying 'older' categories regard themselves as older. The statistics referred to in section 6.1 demonstrate this diversity, and in particular the ongoing contribution made by older people to the community.

⁸⁷³ Department of Human Services, *Age Pension, Age Rules* (2018) (accessed 30 November 2020).

⁸⁷⁴ Department of Communities, WA Seniors Card Centre, *WA Seniors Card Eligibility* (accessed 30 November 2020).

⁸⁷⁵ Australian Institute of Health and Welfare (AIHW), *Older Australia at a Glance* (2018) (accessed 17 September 2018). As is noted in the introductory section to chapter 11 of this Bench Book, the term Aboriginal is used in this Bench Book to refer to a person of Aboriginal descent who identifies as Aboriginal and is accepted as such by the community in which he or she lives. Although it is acknowledged that the Indigenous inhabitants resident in Western Australia descend from many hundreds of distinct and diverse cultural groups, the term Aboriginal is used following the recommendation of the Aboriginal advisers for the *Aboriginal Benchbook for Western Australian Courts* (Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008) Note to Chapter 1). However, where data and statistics are referred to from other sources, the terms Aboriginal, Aboriginal and Torres Strait Islander, and Indigenous are used consistently with the terminology in the source of that data.

⁸⁷⁶ Australian Law Reform Commission, *Elder Abuse, Discussion Paper 83* (2016) (accessed 19 September 2018).

Older age does not necessarily mean dependency. Statistics show that many older people continue to be a vital support to their families, as carers, by providing informal childcare, and by raising grandchildren. The statistics on paid and voluntary work also demonstrate that older people continue to make a vital contribution to the community regardless of age.

Many older people are able to participate in court processes in the same way as other members of the community. Capacity is not necessarily determined by age. This chapter of the Bench Book focuses on those older people who may be disadvantaged in court processes if consideration is not given to their particular circumstances and needs. Many of the issues that arise for older people are a consequence of disabilities they may have. Disabilities are discussed in greater detail in chapter 4 of this Bench Book.⁸⁷⁷

The Steering Committee overseeing the production of this Bench Book particularly acknowledges the submissions and contributions of the following organisations:

- Council of the Ageing (WA) Incorporated (12 April 2007, 26 February 2020);
- GRAI (GLBTI⁸⁷⁸ Rights in Ageing Inc.) (18 April 2007, 27 February 2020);
- Aged and Community Services WA (2 July 2007);
- Department of Communities (23 October 2017); and
- Office of the Public Advocate (4 June 2020).

6.1 SOME STATISTICS

6.1.1 Population

- In 2017, there were 3.8 million Australians aged 65 years and over (comprising 15% of the total population).⁸⁷⁹ Similarly, in Western Australian 14% of the populations were aged 65 years and over. This is projected to increase to 20.7% by 2061.⁸⁸⁰

⁸⁷⁷ While the proportion of people in Australia aged 65 years and over continues to increase, the prevalence of disability amongst older people has decreased. Around half (50.7%) of older people had a disability in 2015, down from 52.7% in 2012: ABS, *Disability, Ageing and Carers Survey, Australia: Summary of Findings, 2015* (Cat No 4430.0) (2016) (accessed 19 September 2018).

⁸⁷⁸ Gay, lesbian, bisexual, trans and intersex.

⁸⁷⁹ AIHW, *Older Australia at a Glance* (10 September 2018) Demographics of Older Australians: Australia's Changing Age and Gender Profile (20 January 2020).

⁸⁸⁰ ABS, *Population Projections, Australia, 2017 (Base) to 2066* (Cat No 3222.0) (2013) (accessed 22 January 2020).

- Over the 20 years between 1999 and 2019, the proportion of the Australian population aged 65 years and over increased from 12.3% to 15.9%. The number of people aged 85 years and over increased by 117.1%. This can be compared to a total population growth of 34.8% over the same period.⁸⁸¹
- The number and proportion of older Australians is expected to continue to grow. By 2057, it is projected there will be 8.8 million people aged 65 and over in Australia (22% of the population); by 2097, 12.8 million people (25%) will be aged 65 and over.⁸⁸²
- At June 2017, 1.7% of the total Western Australian population was aged 85 years and over (43,135 residents). This is projected to increase to 3.8% of the population by 2061.⁸⁸³
- In 2016, 37% of older people were born overseas. In contrast to the younger overseas-born, older people were more likely to have been born in Europe (67% of those born overseas) than Asia (16%), and 24% were born in England.⁸⁸⁴
- In 2016, the majority of older people (82%) spoke only English at home. For those who spoke a language other than English at home, Italian and Greek were the most commonly reported languages (3.2% and 2.2% of all older people respectively).⁸⁸⁵
- By 2026, it is expected that around one in five older people in Western Australia will be from a culturally and linguistically diverse (CaLD) background.⁸⁸⁶

⁸⁸¹ ABS, *Australian Demographic Statistics, June 2019* (Cat No 3101.0) (2017) Feature Article: Twenty Years of Population Change (accessed 22 January 2020).

⁸⁸² AIHW, *Older Australia at a Glance* (10 September 2018) Demographics of Older Australians: Australia's Changing Age and Gender Profile (accessed 22 January 2020).

⁸⁸³ ABS, *Population Projections, Australia, 2017 (base) to 2066* (Cat No 3222.0) (2013) (accessed 22 January 2020).

⁸⁸⁴ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 22 January 2020).

⁸⁸⁵ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 22 January 2020).

⁸⁸⁶ Department of Local Government and Communities, *Seniors Strategic Planning Framework 2012-2017* (2016) (accessed 22 January 2020).

6.1.2 Older Aboriginal and Torres Strait Islander peoples⁸⁸⁷

Older Indigenous Australians play a significant role in maintaining traditions and links to Indigenous culture. They are also very important and respected members of their communities as role models, supporters and educators for the young.

The Indigenous population has a much younger age structure than the non-Indigenous population, with this difference being due to higher rates of fertility among the Indigenous population, as well as deaths occurring at younger ages.⁸⁸⁸ ABS statistics show that:⁸⁸⁹

- in 2016, the proportion of Aboriginal and Torres Strait Islander people aged 65 years and over was only 4.8%, compared with 16% for non-Indigenous people; and
- the number of older Aboriginal and Torres Strait Islander people (aged 50 years and over) is growing, but still represents a relatively small proportion of the total Indigenous population (12% in 2016). By way of comparison, 31% of the non-Indigenous population is aged 50 years or older (in 2016).

There is a gap in life expectancy between Indigenous and non-Indigenous Australians due to the earlier age at death of both Indigenous males and females.⁸⁹⁰

- On the whole, deaths of Indigenous males aged 60-74 made the biggest contribution to the male life expectancy gap.
- Death rates of Indigenous females aged 65 and over made the biggest contribution to the life expectancy gap between Indigenous and non-Indigenous females.

Older Indigenous people tend to have higher rates of disability than non-Indigenous people. In the 2016 ABS Census, 27% older Aboriginal and Torres Strait Islander people reported a need

⁸⁸⁷ Unless otherwise indicated, data is drawn from AIHW, *Older Aboriginal and Torres Strait Islander People* (2011) (accessed 19 September 2018). Please note that the terms Indigenous and Aboriginal and Torres Strait Islander are both used in this chapter, reflecting the terminology used in the source of each statistic.

⁸⁸⁸ AIHW, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (2015) (accessed 8 October 2018).

⁸⁸⁹ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 22 January 2020).

⁸⁹⁰ AIHW, *Trends in Indigenous Mortality and Life Expectancy 2001-2015, Evidence from the Enhanced Mortality Database* (1 December 2017) Summary vii-viii (accessed 22 January 2020).

for assistance with core activities (which are defined as self-care, mobility or communication tasks), compared with 19% of non-Indigenous people aged 65 and over.⁸⁹¹

In 2016, older Aboriginal and Torres Strait Islander persons (aged 55 years and over) accounted for 8% of all homeless Aboriginal and Torres Strait Islander persons.⁸⁹²

6.1.3 Education

An older person's level of education can affect their capacity to understand and navigate the justice system. According to the 2016 ABS Census:⁸⁹³

- 33% of Australians aged over 65 had completed Year 12 or equivalent, and 40% had a non-school qualification.
- Levels of school and non-school educational attainment for older Australians were higher for the 65 to 74 years age group than those in the 75 to 84 and 85 and over age groups, reflecting increased accessibility and desirability of education over time.
- Australians in the 65 to 74 years age group were more likely than those in the 85 years and over group to have a non-school qualification (46% compared to 27%). They were also more likely to have completed Year 12 (37% compared to 25%).

By May 2019, the ABS estimated that 65% of Australian men and 55.5% of women aged 55-64 had attained at least one non-school qualification; and that 56.6% of Australian men and 44.5% of women aged 65-74 had attained at least one non-school qualification.⁸⁹⁴

⁸⁹¹ AIHW, *Older Australia at a Glance* (2018) (accessed 20 September 2018).

⁸⁹² ABS, *Census of Population and Housing: Estimating Homelessness 2016* (Cat No 2049.0) (2018) Key Findings (accessed 22 January 2020).

⁸⁹³ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 21 September 2018).

⁸⁹⁴ ABS, *Education and Work, Australia, May 2019* (Cat No 6227.0) (13 November 2019) Data Cubes - [Tables 24 and 27](#) (accessed 22 January 2020).

6.1.4 Employment

There is no statutory retirement age in Australia – except for judges⁸⁹⁵ and magistrates.⁸⁹⁶ It is otherwise illegal to discriminate on the basis of age.⁸⁹⁷

In 2016-17 in Australia, the three most common reasons given for retirement (for men and women whose last job was less than 20 years ago) were:⁸⁹⁸

- 'reached retirement age/ eligible age for superannuation/ pension' (36% of men and 22% of women);
- 'own sickness, injury or disability' (21% of men and 12% of women); and
- 'retrenched/ dismissed/ no work available' (7% of men and 5% of women).

Australia-wide, the proportion of people in the labour force aged 65 years and over has been steadily increasing from 9.4% in 2006 to 14% in 2016. One in every five people (21%) aged 65 to 74 years was in the labour force in 2016.⁸⁹⁹

The proportion of 55 to 64 year olds in the labour force has also increased over the same period (58% to 66%), which suggests that it is likely that the number of older people in the labour force will continue to increase.⁹⁰⁰

The most common industry in which older people (men and women aged 65 years and over) were employed in 2016 was specialised beef cattle farming (3.2%). This aligns with livestock farming being reported as the most common occupation (4.7%).⁹⁰¹

⁸⁹⁵ The mandatory retirement age for Western Australian Supreme Court and District Court judges is 70 years of age: *District Court of Western Australia Act 1969* (WA); *Judges' Retirement Act 1937* (WA).

⁸⁹⁶ The mandatory retirement age for Western Australian magistrates is 70 years of age: *Magistrates Court Act 2004* (WA), Sch 1 cl 11(1)(a). The *Courts Legislation Amendment Act 2018* (WA) s 9 (assented to on 2 November 2018) increased the mandatory retirement age from 65 to 70 years of age. The retirement age in all other Australian jurisdictions other than South Australia is either 70 or 72 years.

⁸⁹⁷ In Western Australia, see the *Equal Opportunity Act 1984* (WA) Pt IVB, div 2 (accessed 2 December 2020).

⁸⁹⁸ ABS, *Retirement and Retirement Intentions, Australia July 2016 to June 2017* (Cat No 6238.0) Reasons for Ceasing Last Job (accessed 22 January 2020).

⁸⁹⁹ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 1 April 2019).

⁹⁰⁰ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 1 April 2019).

⁹⁰¹ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 1 April 2019).

Amongst older women (aged 65 years and over), there were notably high rates of employment in hospitals other than psychiatric hospitals (5.8%), aged care residential services (5.0%) and primary education (3.5%).⁹⁰²

The Western Australian Labour Economics Office produces a monthly *Western Australian summary* of ABS labour force data, including a comparison of state and national data.

6.1.5 Volunteering and unpaid work

Older people play an important role in providing unpaid childcare:

- The proportion of older people (65 years of age and older) providing care for a child aged under 15 years, who was not their own child, increased from 10% in 2006 to 13% in 2016.⁹⁰³
- In 2016, people aged 65-74 years were the age category most likely (19%) to have provided care for a child aged under 15 years who was not their own.⁹⁰⁴

Older people make a significant contribution to the State's economy through volunteer work:

- In 2014, more than a third of people aged 65-74 years (35%) and more than a quarter of people aged 75 years and over (29%) had volunteered in the 12 months prior to the survey interview.⁹⁰⁵
- A report commissioned by Volunteering Western Australia estimated that the cost of replacing labour volunteered by those aged 65 years and over in 2014 would have been \$3.6 billion, or 20% of the total cost of replacing volunteer labour in Western Australia.⁹⁰⁶

⁹⁰² ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 1 April 2019).

⁹⁰³ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 1 April 2019).

⁹⁰⁴ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 1 April 2019).

⁹⁰⁵ ABS, *General Social Survey: Summary Results, Australia, 2014* (Cat No 4159) (2015) Table 22: Volunteers - Characteristics - State and Territory (accessed 1 April 2019).

⁹⁰⁶ Volunteering WA and Institute of Project Management, *The Economic, Social and Cultural Value of Volunteering to Western Australia* (2015) pages 99-100 (accessed 1 April 2019).

6.1.6 Income

- In 2016, the weekly median personal income for older Australians (aged 65 and over) was \$440 per week.⁹⁰⁷
- As at June 2017, 2.5 million people aged 65 and over received at least a partial age pension, representing 66% of older people.⁹⁰⁸

6.1.7 Care and assistance

The 2016 ABS Census estimated that 3.1% of people aged under 65 years reported a 'Core Activity Need for Assistance'⁹⁰⁹ in one of the three core activity areas of mobility, communication or self-care. The proportion increased with age from one in ten (9.7%) people aged 65 to 74 years to one in two people aged 85 years and over (53%).⁹¹⁰

In relation to older people's provision of assistance to other older people, people with disabilities or children who were not their own:

- In 2016, older people were slightly more likely than those aged under 65 years to provide unpaid assistance to a person with a disability (13% compared to 12%). This statistic includes care provided by recipients of the Carer Allowance or Carer Payment. The proportion of older people providing unpaid assistance to a person with a disability decreased with age, from 15% of people aged 65 to 74 years to 7% of people aged 85 years and over.⁹¹¹
- The proportion of older people (aged 65 years and over) providing care for a child aged under 15 years, who was not their own, increased from 10% in 2006 to 13% in 2016.⁹¹²

⁹⁰⁷ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (last updated 10 September 2018) (accessed 22 January 2020).

⁹⁰⁸ AIHW, *Older Australia at a Glance* (2018) (accessed 17 September 2018).

⁹⁰⁹ ABS, *Census Dictionary: Glossary: Core Activity Need for Assistance* (Cat No 2901.0) (2016) (accessed 23 September 2019).

⁹¹⁰ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 21 September 2018).

⁹¹¹ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 21 September 2018).

⁹¹² ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 21 September 2018).

- People aged 65-74 years were most likely (19%) to have provided care for a child aged under 15 years who was not their own.⁹¹³
- In 2015, an estimated 17% of Western Australians aged between 65 and 74 years, and 11% of those aged 75 years and over, had provided informal assistance (either help or supervision) to an older person, or someone with a disability or long-term health condition, on an ongoing basis for at least six months.⁹¹⁴
- An estimated 47,500 Western Australians aged 65 years and over were carers in 2015. More than half (53.2%) were male. Forty percent of carers aged 65 years and over were primary carers — that is, they provided more care than any other person or institution to the person needing care. Males aged 65 years and over were more likely than females to be secondary carers (67% versus 49.5%) — that is, another person or institution was providing more care than they were.⁹¹⁵
- The number of people providing care may be under-estimated: many older people do not self-identify as carers because the role and responsibility has been a constant and long-term part of their life. Older Aboriginal people and people from CaLD backgrounds are even less likely to identify as carers due to cultural perceptions of care as a normal part of familial relationships.⁹¹⁶

6.1.8 Accommodation and living arrangements

Most older people live with family members in private dwellings, but as people age they are likely to undergo changes in their living arrangements. Losing a spouse or experiencing disability or age related frailty are two obvious factors that can cause such change. The living arrangements of older people vary by age, gender and whether they need assistance with

⁹¹³ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2017) (accessed 1 April 2019).

⁹¹⁴ ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2015* (Cat. 4430.0) (2017) Downloads - Data cubes - Western Australia - Table 32.3 - All persons, living in households, carer status, by age and sex–2015, estimate (accessed 1 April 2019).

⁹¹⁵ ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2015* (Cat. 4430.0) (2017), Downloads - Data cubes – Western Australia - Table 33.1 - All persons, living in households, carer status, by age and sex–2015, estimate (accessed 22 October 2018).

⁹¹⁶ Department of Communities, *WA Carers Strategy* (updated April 2019) page 9 (accessed 2 December 2020).

everyday activities. For all Australians, the likelihood of a person living alone increases with age.⁹¹⁷

Data was not available for Western Australia but nationally in 2016, the ABS made the following estimates:⁹¹⁸

- More than half (58%) of all older people (aged 65 years and over) lived with a spouse or partner in a private dwelling. This included people who had no children in the dwelling (48% of all older people), lived with children (7.7%), or lived in a multi-family household (2.6%).
- Twenty-five percent of older people (aged 65 years and over) lived alone.
- The 65 to 74 years age group were most likely to live with a spouse or partner (68% of people in this age group), while those aged 85 years and older were more likely than the other age groups to live alone (35%).
- Older women were more likely than other age groups to be in a lone person household: close to one-third (31%) of older women lived alone compared to almost one in five older men (18%). The difference between women and men was greatest for the 85 years and over age group (41% compared to 25%).
- Older persons (aged 55 years and over) made up 16% (18,625 persons) of the total homeless population.
- Older Aboriginal and Torres Strait Islander persons (aged 55 years and over) accounted for 8% of all homeless Aboriginal and Torres Strait Islander persons.
- Males accounted for 63% of older persons (aged 55 years and over) who were homeless on Census night in 2016, which represented an increase of 26% from 2011 to a total of 11,757 homeless men in 2016; and

⁹¹⁷ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016: Ageing Population, 2016* (2018) (Cat No 2071.0) (accessed 1 April 2019).

⁹¹⁸ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016: Ageing Population, 2016* (2018) (Cat No 2071.0) (accessed 1 April 2019).

- The number of older homeless females increased by 31% from 2011 with 6,866 homeless women in 2016.

In 2017, The Australian Institute of Health and Welfare reported the following statistics in relation to Indigenous Australians in residential aged care:⁹¹⁹

- At 30 June 2016, there were 1,531 Indigenous Australians in permanent residential aged care. This represents 0.9% of permanent residential aged care residents and 0.2% of the total Indigenous population. The rate of Indigenous Australians in permanent residential aged care was highest in remote and very remote areas and lowest in major cities.⁹²⁰
- The age profile of Indigenous people in permanent residential aged care was substantially younger than that of non-Indigenous people. One-quarter (26%) of Indigenous permanent aged care residents were aged under 65 compared with only 3.3% of non-Indigenous aged care residents. Indigenous Australians had higher rates of aged care use in all age groups until age 85.

In September 2018, the Commonwealth Government announced a Royal Commission into Aged Care Quality and Safety. On 8 October 2018, the Federal Government announced the terms of reference for the Royal Commission, based in Adelaide. The Commissioners are required to produce an interim report by October 2019 and a final report by 12 November 2020.⁹²¹

6.1.9 Crime

In Australia in 2018-19, the physical or threatened assault victimisation rate for those aged 65 years and over was 1.7%. By contrast, the rate for those aged 15-24 years was 5.5%.⁹²²

When surveyed, older people are also less likely to report that they had experienced incidents of crime than younger people. In 2014, older people reported that they had experienced one

⁹¹⁹ AIHW, *Australia's Welfare 2017* (2017) pages 295-296 (accessed 11 October 2018).

⁹²⁰ AIHW, *Australia's Welfare 2017* (2017) pages 295-296 (accessed 11 October 2018).

⁹²¹ Department of Health, *Announcement of Royal Commission into Aged Care Quality and Safety* (2018, updated 22 January 2020) (accessed 22 January 2020).

⁹²² ABS, *Crime Victimisation, Australia, 2018-19* (Cat No 4530.0) (18 February 2020) Physical assault - Who experienced personal and household crimes? (accessed 2 December 2020).

episode of crime in the previous 12 months at the following rates: 4.9% in those 65-74 years; 2.5% in those 75-84 years; and 3.3% in those 85 years and over. This is lower than in all the age categories under 65 years of age. For example, the rates in the age groups of 15-24 and 25-34 years were 8.9% and 9.3% respectively.⁹²³

When asked how safe they felt walking alone in their local area after dark, 42.4% of those aged 65-74 years responded that they felt safe or very safe. That proportion declined significantly for older groups, falling to 11.6% of those aged over 85 years. By contrast, the highest rate of 59.2% was recorded in the 35-44 years age group.⁹²⁴

When asked how safe they felt at home alone after dark, over 85% of people aged 65 years and over said they felt safe or very safe, which was comparable to the rates in all the age groups under 65 years of age.⁹²⁵

For more information on elder abuse please refer also to section 6.2.3 of this chapter.

6.1.10 Health

6.1.10.1 Mortality

The leading causes of deaths for older Australians (Indigenous Australians aged 50 years and over and non-Indigenous Australians aged 65 years and over) in the two years to 30 June 2014 were:⁹²⁶

- Coronary heart disease (14%);
- Dementia (9%);
- Cerebrovascular disease (mostly stroke) (8%);
- Lung cancer (5%);
- Chronic obstructive pulmonary disease (5%); and
- Diabetes (3%).

⁹²³ ABS, *General Social Survey: Summary Results, Australia, 2014* (Cat No 4159.0) (2015) Table 6.3: All persons, Selected personal characteristics – By 10 year age group (accessed 22 January 2020).

⁹²⁴ ABS, *General Social Survey: Summary Results, Australia, 2014* (Cat No 4159.0) Table 6.3: All persons, Selected personal characteristics – By 10 year age group (2015) (accessed 22 January 2020).

⁹²⁵ ABS, *General Social Survey: Summary Results, Australia, 2014* (Cat No 4159.0) (2015) Table 6.3: All persons, Selected personal characteristics – By 10 year age group (accessed 22 January 2020).

⁹²⁶ AIHW, *Cause of Death Patterns and People's Use of Aged Care: A Pathway in Aged Care Analysis of 2012-14 Death Statistics* (released 2018) (accessed 22 January 2020).

Indigenous Australians have a higher mortality rate and a lower life expectancy than non-Indigenous Australians, as reflected in their younger age profile. In 2016, just 5% (31,000) of the Indigenous population were aged 65 years and over compared with 16% (3.4 million) of the non-Indigenous population.⁹²⁷

6.1.10.2 Improvements in health

Improvements in medical science and technology have resulted in people having longer and healthier lives. In 2016, 80.7% of people aged 65 years and over living in Western Australia considered themselves to be in 'excellent', 'very good' or 'good' health.⁹²⁸

6.1.10.3 Disability

The International Classification of Functioning, Disability and Health (ICFDH) defines 'disability' as 'an umbrella term for impairments, activity limitations and participation restrictions'.⁹²⁹

It denotes the negative aspects of the interaction between an individual (with a health condition) and that individual's contextual factors environmental and personal factors). For the purpose of ABS surveys:⁹³⁰

[A] person has a disability if they report they have a limitation, restriction or impairment, which has lasted, or is likely to last, for at least six months and restricts everyday activities.

Although substantially higher rates of older people have a disability than younger people, the proportion of older people with disabilities tended to fall in each Census between 2003 and 2018. In 2015, the proportion of older Australians who had a disability of some kind was 26.9% for those aged 60-64 years (down from 38.9% in 2003), rising to 84.6% of those aged 90 and over (down from 92.1% in 2003). By way of comparison, the rates of disability in younger

⁹²⁷ AIHW, *Older Australia at a Glance* (2018) (accessed 22 January 2020).

⁹²⁸ Tomlin S, Joyce S and Radomiljac A, *Health and Wellbeing of Adults in Western Australia 2016, Overview and Trends* (2017) (accessed 3 April 2019).

⁹²⁹ World Health Organisation, *International Classification of Functioning, Disability and Health* (2002) Towards a Common Language for Functioning, Disability and Health, page 2 (accessed 23 September 2019).

⁹³⁰ ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (Cat. 4430.0) Glossary (24 October 2019) Glossary (accessed 22 January 2020).

people ranged from 9.6% for those aged 5-14 years, increasing to 22.0% for those aged 55-59 years of age.⁹³¹

Although rates of disability vary over the different age groups, differences in the incidence of disabilities between males and females was marked only in the early years (for example, 0-4 years – 4.8% and 2.7% respectively, and 5-14 years of age – 12.0% and 7.1% respectively) with there being little difference in the rates in later life (85-89 years of age - 71.9% and 75.2% respectively, and 90 and over – 85.1% and 84.3% respectively).⁹³²

6.1.10.4 Long-term health conditions

A 'long-term health condition' is defined by the ABS as:⁹³³

...a disease or disorder that has lasted, or is likely to last, for six months or more and is current at the time of the survey. The exception to this is a periodic or episodic condition (e.g. asthma, epilepsy or schizophrenia, where people suffer attacks or relapses at irregular intervals) where the attack or relapse has occurred in the last 12 months. Conditions that had not occurred in the last 12 months because they had been controlled by medication were also included. Long-term health conditions were coded to a classification based on the World Health Organisation's International Classification of Diseases, 10th Revision (ICD-10).

In Western Australia, in 2015, the long term health conditions that were most prevalent among all people aged 65 years and over were:⁹³⁴

- arthritis (15.1%);
- hypertension (10.2%);
- back problems (8.8%);
- diseases of the ear and mastoid process (6.7%);
- diabetes (5.3%); and
- heart disease (4.7%).

⁹³¹ ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (Cat. 4430.0) (24 October 2019) Data Cubes – Disability tables - Table 1.3 (accessed 22 January 2020).

⁹³² ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (Cat. 4430.0) (24 October 2019) Data Cubes – Disability tables - Table 1.3 (accessed 22 January 2020).

⁹³³ ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (Cat. 4430.0) Glossary (24 October 2019) Glossary (accessed 22 January 2020).

⁹³⁴ ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2015* (Cat. 4430.0) (2017) Disability, Ageing and Carers, Australia: Western Australia, 2015, Table 27.3 (accessed 22 January 2020).

6.1.10.5 Dementia

Dementia is not a specific disease, but rather a group of conditions (one being Alzheimer's disease) which are degenerative, irreversible and gradually affect brain functions.⁹³⁵ Alzheimer's disease is the most common form of dementia, accounting for around two-thirds of cases.⁹³⁶

Many conditions have symptoms similar to dementia, so a diagnosis of dementia cannot be made just because some of the symptoms are present. Strokes, depression, alcoholism, infections, hormone disorders, nutritional deficiencies and brain tumours may all cause dementia-like symptoms.⁹³⁷

The statistics on Alzheimer's disease and dementia are based on self-reporting and are therefore likely to be significantly under-estimated.⁹³⁸ Dementia prevalence rates are relatively low until the age of 65 years, when rates start to increase rapidly, indicating the increased risk of developing dementia due to age. In 2019, there are an estimated 447,115 Australians living with dementia. Dementia affects one in ten people aged over 65 and three in ten aged over 85 years old were affected by dementia. In 2019, there are an estimated 250 new cases of dementia in Australia each day. It is expected that by 2025 there will be 318 new cases per day and by 2056 this will increase to 650 new cases per day.⁹³⁹

The ABS has reported that:

- In 2016, dementia was the third leading cause of death of Australian males, with 4,679 deaths recorded.⁹⁴⁰
- Dementia became the leading cause of death of Australian females for the first time in 2016.⁹⁴¹

⁹³⁵ AIHW, *Australia's Welfare 2017* (2017) page 181 (accessed 22 January 2020).

⁹³⁶ Dementia Australia, *What is Dementia?* (reviewed 2017) About Dementia – What is Dementia? (accessed 2 December 2020).

⁹³⁷ Dementia Australia, *Diagnosing Dementia* (reviewed 2017) About Dementia – Diagnosing Dementia (accessed 2 December 2020).

⁹³⁸ Deloitte Access Economics, *Dementia Across Australia: 2011-2050* (2011) page 11 (accessed 2 December 2020).

⁹³⁹ Dementia Australia, *Dementia Statistics – Key Facts and Statistics* (updated January 2020) Australian Statistics (accessed 2 December 2020).

⁹⁴⁰ ABS, *Causes of Death, Australia, 2016* (Cat No 3303.0) (2017) Australia's Leading Causes of Death, 2016 (accessed 3 April 2019).

⁹⁴¹ Dementia Australia, *Dementia: Key Facts and Statistics* (updated September 2018) (accessed 3 April 2019).

- Dementia was the second leading cause of death overall in 2018, with deaths due to dementia increasing by 66.8% in the ten years between 2009 and 2019. By contrast the number of deaths from ischaemic heart disease (the leading cause of death) had decreased by 16.0% in the same period.⁹⁴²

Commissioned research by Dementia Australia on dementia prevalence estimates and projections estimates that:

- By 2050 the number of people with dementia in Western Australia is expected to be 69,000; there were an estimated 23,000 people with dementia in Western Australia in 2016 and 36,500 in 2020.⁹⁴³
- By 2058 the number of people with dementia in Australia is expected to be 1,076,000; there were an estimated 459,000 people with dementia in Australia in 2020.⁹⁴⁴

6.1.10.6 Falls⁹⁴⁵

In 2016-17, an estimated 125,021 Australians aged 65 years or older were hospitalised for fall-related injuries, representing three quarters of all hospitalisations for injuries in that age group. The rate of fall-related injury cases was higher for women than for men in all age groups over 65 years of age.

The most common causes of fall-related injury cases for those aged 65 and over in 2016–17 were:

- 'falls on the same level from slipping, tripping and stumbling' (34%);
- 'falls from household objects' (15% combined) — such as beds (5,417 cases), chairs (3,809 cases), stairs and steps (7,850 cases), and ladders (2,155 cases).

Around 85% of fall-related injury cases in 2016–17 were recorded as having occurred in either the home or in residential aged care.

⁹⁴² ABS, *Causes of Death, Australia, 2019* (Cat No 3303.0) (23 October 2020) Australia's Leading Causes of Death, 2018 (accessed 2 December 2020).

⁹⁴³ Dementia Australia, *Dementia Statistics - WA* (accessed 2 December 2020).

⁹⁴⁴ Dementia Australia, *Dementia Statistics – Key Facts and Statistics* (updated January 2020) Australian Statistics (accessed 2 December 2020).

⁹⁴⁵ AIHW, *Trends in Hospitalised Injury due to Falls in Older People 2007-08 to 2016-17* (19 September 2019) Summary – Fall-related Injury Cases (accessed 22 January 2020).

For more information on ageing and health and disability see sections 6.2.4 and 6.2.5. Those sections contain further information about each of the conditions and diseases referred to in this section.

6.2 SOME INFORMATION

6.2.1 Grandparents

Many grandparents provide significant financial and practical assistance to family and friends, such as caring for family members, assisting their families with major purchases and childcare. A growing number of grandparents provide full-time care of grandchildren.

In 2017, grandparents were the most common providers of care for children aged 0 to 12 years who attend school (18.6%). Grandparents were also a significant provider of care (25.8%) for children aged 0 to 12 years who did not attend school. By comparison, long day care⁹⁴⁶ accounted for 36.9% of care provided to this group.⁹⁴⁷

Some grandparents reside in the same household as their children and grandchildren. It is estimated that, in 2015, 5% of Australian children lived in a three-generational home with their parent/s and grandparent/s.⁹⁴⁸

6.2.1.1 Grandparents and Family Law

The *Family Law Act 1975* (Cth) and *Family Court Act 1997* (WA) confirm the importance of children having a relationship with their grandparents.

Arrangements for children to spend time with their grandparents can be included in parenting agreements. Grandparents can also apply to the Family Court for a parenting order when

⁹⁴⁶ Defined by the ABS as 'a centre-based form of child care service providing all-day or part-time care for children': ABS, *Childhood Education and Care, Australia, June 2017* (Cat No 4402.0) Glossary (accessed 22 January 2020)

⁹⁴⁷ ABS, *Childhood Education and Care, Australia, June 2017* (Cat No 4402.0) Summary of Findings – Use of Care (accessed 22 January 2020).

⁹⁴⁸ Australian Institute of Family Studies, *Facts and Figures, Older People*, citing Baxter, J and Warren, D, *Grandparents in Their Young Grandchildren's Lives* (2015) in Australian Institute of Family Studies (Ed.), *The Longitudinal Study of Australian Children Annual Statistical Report 2015* (September 2016) pages 13–40 (accessed 3 April 2019).

agreement cannot be reached with either or both of the parents about the arrangements for a child.⁹⁴⁹

Children have a right to spend time, and to communicate on a regular basis, with both their parents and other people significant to their care, welfare and development, including as grandparents and other relatives.⁹⁵⁰

6.2.1.2 Grandparent families

The term 'grandparent family' refers to a family in which there is a grandparent-grandchild relationship in the family and no parent-child relationship.⁹⁵¹

In 2011, there were 46,680 grandparent families in Australia, representing just under 1% of all families. The most common forms of grandparent families were couple families with grandchildren under 15 years old. The next two most common forms (with similar representation) were single-grandparent families with either grandchildren under 15 years old or non-dependent grandchildren. The least common forms were couple- and single-grandparent families with dependent student grandchildren.⁹⁵²

The following trends emerge for grandparent families with dependent grandchildren (29,880 families):⁹⁵³

- 43% of such grandparent families were couple families with grandchildren under 15 years old;
- 30% comprised a single grandparent with grandchildren under 15 years old;

⁹⁴⁹ *Family Law Act 1975 (Cth)* s 65C(ba); *Family Court Act 1997 (WA)* s 88(ba) (both accessed 2 December 2020).

⁹⁵⁰ *Family Law Act 1975 (Cth)* s 60B(2)(b); *Family Court Act 1997 (WA)* s 66(2)(b) (both accessed 11 October 2018).

⁹⁵¹ ABS, *Census of Population and Housing: Understanding the Census and Census Data, Australia, 2016* (Cat No 2900.0) (accessed 24 September 2019).

⁹⁵² Australian Institute of Family Studies, *Australian Households and Families* (2013) Australian Family Trends (accessed 22 January 2020). This report is in the archived section of the AIFS website, however the statistics are provided in the absence of more recent data in the same dimensions. N.B. In this data, a non-dependent child is aged 15 years or older, resident in the same household as the grandparent(s), is not a full-time student aged 15-24, and has no identified partner or child of his/her own usually resident in the household.

⁹⁵³ Australian Institute of Family Studies, *Australian Households and Families* (2013) Australian Family Trends (accessed 22 January 2020). This report is in the archived section of the AIFS website, however the statistics are provided in the absence of more recent data in the same dimensions.

- 15% comprised a single grandparent with grandchildren who were dependent students; and
- 13% were couple families with grandchildren who were dependent students.

Many grandparents provide full-time care of grandchildren due to the complex circumstances related to problems facing their own children, such as drug and alcohol abuse, mental illness, imprisonment and family violence.

There are many stresses that grandparent families face while adapting to their changed circumstances. These include lifestyle changes, financial hardship, emotional upheaval, legal difficulties and conflict between generations.

The Department of Local Government and Communities (now part of the Department of Local Government, Sport and Cultural Industries) produced the following guides to assist grandparent families:

Grandfamilies Guide to assist those who provide support and information to grandfamilies; and

Grandfamilies: Legal Matters and Resources guide to assist Western Australian grandparent carers to understand legal issues relating to the care of their grandchildren.

6.2.2 United Nations principles for older persons

The Vienna International Plan of Action on Ageing, which was adopted at the first World Assembly on Ageing in Vienna in 1982, outlines older peoples' rights. These were elaborated in terms of independence, participation, care, self-fulfilment and dignity in the United Nations *Principles for Older Persons* (Resolution 46/91, 16 December 1991).

The *Madrid International Plan of Action on Ageing* (MIPAA), which was adopted in 2002, suggests ways for governments, nongovernmental organisations and other stakeholders to reorient the ways societies perceive, interact with and care for their older citizens. It is a resource for policy-making, which focuses on three priority areas:⁹⁵⁴

⁹⁵⁴ United Nations Department of Economic and Social Affairs, *Madrid Plan of Action and its Implementation*, Political Declaration and Madrid International Plan of Action on Ageing (Second World Assembly on Ageing, Madrid, Spain, 2002) Foreword and Political Declaration - Article 1 (accessed 2 September 2021).

- older persons and development;
- advancing health and well-being into old age; and
- ensuring enabling and supportive environments.

In the 2017 United Nations review of the implementation of the MIPAA in Australia and the Pacific, the following observations were made in relation to Australia's implementation in the three priority areas.⁹⁵⁵

- In the area of older persons and development:
 - Australia, like most countries in the region, offered means-tested pensions. In 2016, the maximum single person rate was \$877.10 AUD per fortnight and the maximum rate for each member of a couple was \$661.20 AUD per fortnight.
 - Australia was one of only a few countries in the region that did not have a mandatory retirement age.
- In the area of advancing health and well-being into old age:
 - In 2015, of the 698 public hospitals in Australia, 285 provided geriatric care facilities.
 - In 2016, a dementia training program was introduced in Australia, involving a national approach to accreditation, education and upskilling personnel with regard to dementia care.
- In the area of ensuring enabling and supportive environments:
 - The Australian Government introduced the National Aged Care Quality Indicator Programme in 2016, a voluntary programme measuring the quality of aged care facilities with a view to assisting decision-making by consumers.
 - In 2015, 2,862 older persons reported neglect, abuse or violence. Among permanent care residents, the incidence of abuse reports was 1.2%. The Australian Government announced that an inquiry would be conducted by the Australian Law Reform Commission on protecting the rights of older persons from abuse.

⁹⁵⁵ UN Economic and Social Commission for Asia and the Pacific, *Government Action towards Implementation of the MIPAA, 2002: Achievements and Remaining Challenges – Note by the Secretariat* (meeting, Bangkok, 12-14 September 2017) (accessed 2 September 2021).

6.2.3 Elder abuse⁹⁵⁶

The most widely known and accepted definition of elder abuse is that provided by the World Health Organisation (WHO), which is endorsed in the *Western Australian Elder Abuse Protocols*.⁹⁵⁷ 'Elder abuse' is defined as:⁹⁵⁸

...a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.

Commonly recognised categories of elder abuse include psychological or emotional abuse, financial abuse, physical abuse, neglect and sexual abuse.

- Psychological abuse or emotional abuse includes verbal abuse, name calling, bullying and harassment.
- Financial abuse includes incurring bills for which the older person is responsible; living in the older person's home for reasons other than for the benefit of the older person; stealing the older person's goods; threatening, coercing or forcing an older person into handing over an asset; and abusing power of attorney arrangements.
- Physical abuse includes pushing, shoving, kicking, punching, slapping, biting, burning and/or rough handling.
- Neglect includes failing to provide an older person with such things as food, shelter or medical care.
- Sexual abuse includes rape and other unwanted sexual contact, inappropriate touching and the use of sexually offensive language.

In 2016, the Australian Institute of Family Studies (AIFS) published a report on elder abuse. The key points were:⁹⁵⁹

⁹⁵⁶ Unless otherwise indicated, the information in this section is drawn from the Australian Law Reform Commission, *Elder Abuse – A National Legal Response Final Report* (2017) (accessed 2 September 2021).

⁹⁵⁷ Alliance for the Prevention of Elder Abuse: Western Australia, *Elder Abuse Protocol: Guidelines for Action* (December 2017) page 4 (accessed 10 June 2020).

⁹⁵⁸ World Health Organisation, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002) (accessed 22 January 2020).

⁹⁵⁹ Kaspiew R, Carson R and Rhoades H, *Elder Abuse: Understanding Issues, Frameworks and Responses* (Research Report No 35 for the AIFS) (2016) (accessed 19 September 2018).

- Between 2% and 10% of older Australians suffer elder abuse in any given year. The prevalence of neglect is possibly higher.
- The available evidence suggests that most elder abuse is intra-familial and intergenerational, with mothers most often being the subject of abuse by sons. Women were 2.5 times more likely than men to suffer elder abuse, and those aged 75 years or older were also more at risk.
- Financial abuse appears to be the most common form of elder abuse. This is the area where most empirical research is available.
- Psychological abuse appears slightly less common than financial abuse, and seems to frequently co-occur with financial abuse.
- The problem of elder abuse is of increasing concern as the coming decades bring unprecedented numbers of older Australians: in 2050, just over a fifth of the population is projected to be over 65 and those aged 85 and over are projected to represent about 5% of the population.
- Older people with cognitive impairment or another disability, who are isolated, or who have a prior history of traumatic life events are at high risk of elder abuse. Other factors that have been established as risk factors for the perpetration of elder abuse include the perpetrator's depression or alcohol and drug misuse, and the perpetrator being in a position of financial, emotional or relational dependence with the victim.

Using international prevalence and incidence estimates, the Western Australian Crime Research Centre calculated the average prevalence rate for elder abuse in Western Australia to be 4.6% (ranging between 3.1% and 6.0%), or approximately 12,500 people, in 2011. In approximately 75% of reported incidents of elder abuse, older men and women were estimated to have a decision-making disability, and nearly half had a significant physical disability.⁹⁶⁰ Combined with population estimates for Western Australia, it was anticipated that the total

⁹⁶⁰ Clare M, Black Blundell B and Clare J, *Examination of the Extent of Elder Abuse in Western Australia a Qualitative and Quantitative Investigation of Existing Agency Policy, Service Responses and Recorded Data* (2011) 9.6 – WA Research: Summary of Findings (accessed 24 September 2019).

number of victims over the age of 65 would increase by around 90% over the following 20 years.⁹⁶¹

Western Australian criminal law does not contain specific offences targeting abuses against older people. However, a victim's age may be taken into account as a circumstance of aggravation. Equivalent provisions operate in other Australian jurisdictions. Section 262 of the Western Australian *Criminal Code* creates a special duty of care to provide the 'necessaries of life' whereby someone who has charge of another person cannot withdraw themselves from that charge.

6.2.4 Ageing and health

In 2015, 77.7% of people aged 65 years and over in Western Australia rated their health as 'excellent', 'very good' or 'good'.⁹⁶²

Older people are a diverse group, with a varied health status and needs. National Seniors Australia noted that:⁹⁶³

The over-50s are a diverse segment of the State's population. At the younger end of the spectrum the growth in the 'baby boomer' population is bringing new issues and expectations of retirement, replacing the traditional view of 'dependency and decline' with one of independence and increased productivity. Additionally, increased life expectancies are supporting marked growth in the numbers of people aged 75 and older.

Older Australians therefore have varying needs and requirements to live a healthy and comfortable life.

Increasing age can bring decreases in auditory and visual acuity, a slower rate of processing information, reduced volume of oral communication and some physical disabilities including continence problems. The Council on the Ageing (WA) cautioned that none of these conditions

⁹⁶¹ Clare M, Black Blundell B and Clare J, *Examination of the Extent of Elder Abuse in Western Australia a Qualitative and Quantitative Investigation of Existing Agency Policy, Service Responses and Recorded Data* (2011) Finding 2.1 (accessed 24 September 2019).

⁹⁶² Dombrovskaya M and Landrigan T, *Health and Wellbeing of Adults in Western Australia 2019* (2020) page 11 (accessed 2 December 2020).

⁹⁶³ National Seniors Australia, *Western Australian State Budget Submission 2017-18* (2017) (accessed 21 September 2018).

necessarily indicates reduced cognitive ability, but they can impact on an older person's ability to access, properly or at all, the justice system.⁹⁶⁴

Other conditions may impact on cognitive ability as people age. There is an increasing likelihood of both physical disability and Alzheimer's disease or other types of dementia the older one gets, particularly in those aged over 85 years. Older people with dementia may have decision-making disabilities and a need for substitute decision-making.⁹⁶⁵

6.2.5 Ageing and disability

The International Classification of Functioning, Disability and Health (ICFDH) defines disability as 'an umbrella term for impairments, activity limitations and participation restrictions. It denotes the negative aspects of the interaction between an individual (with a health condition) and that individual's contextual factors (environmental and personal factors)'. The ABS regards that:⁹⁶⁶

A person has a disability if they report they have a limitation, restriction or impairment, which has lasted, or is likely to last, for at least six months and restricts everyday activities.

In many cases, the precise name or type of an older person's disability or disabilities will not be relevant in court. Comments should only be made in relation to any disability if relevant to the matters before a court.

Of greater importance is an accurate determination of whether the person requires an adjustment to be made, and if so, what level and type of adjustment.

For further information on the prevalence of disability in older Western Australians refer to 6.1.10.3, and for further information on disability more generally refer to chapter 4 of this Bench Book.

⁹⁶⁴ Submission from the Council on the Ageing (WA) (12 April 2007).

⁹⁶⁵ Dementia Australia, *Dementia Statistics – Key Facts and Statistics* (updated April 2019) Australian Statistics (accessed 23 September 2019).

⁹⁶⁶ ABS, *Disability, Ageing and Carers, Australia: Summary of Findings, 2018* (Cat. 4430.0) Glossary (24 October 2019) Glossary (accessed 22 January 2020).

6.2.5.1 Physical disability

The likelihood of developing a physical disability increases with age. The main conditions affecting older peoples' physical abilities include:

- **Arthritis** — a generic term for different diseases affecting the joints, the most common types being osteoarthritis, rheumatoid arthritis and gout. The prevalence of arthritis increases with age, particularly for women. In 2017-18, the rates of arthritis in women aged 55-64 and 65 and over were 39.6% and 57.3% respectively, whilst the rates for men in those age brackets were 28.0% and 39.3%.⁹⁶⁷
- **Hearing loss** — an estimated 3.6 million Australians had hearing loss in 2017, which was 14.5% of the total population. Hearing loss is much more prevalent in people aged over 50 years.⁹⁶⁸ Courts need to ensure that people experiencing hearing loss or impairment receive appropriate interpreting services to enable them to participate in proceedings.

For more information on hearing loss and hearing impairment, refer to chapter 4 of this Bench Book on people with disabilities.

- **Other** — older people are more likely to experiencing the debilitating effects of kidney disease, heart, stroke and vascular diseases, diseases of the eye and adnexa, diabetes and cancer, than other members of the population.⁹⁶⁹

6.2.5.2 Dementia and related diseases

Dementia is not a specific disease, but rather a group of conditions (one being Alzheimer's disease) which are degenerative and irreversible, and gradually affect brain functions.⁹⁷⁰ Dementia affects thinking, emotion, behaviour and the ability to perform everyday tasks. It can affect brain function enough to interfere with the person's normal social or working life. Dementia is characterised by the inability to carry out everyday activities as a consequence of

⁹⁶⁷ ABS, *National Health Survey: First Results, 2017-18* (Cat No 4364.0.55.001) Arthritis and Osteoporosis (2018) (accessed 22 January 2020).

⁹⁶⁸ Hearing Care Industry Australia, *The Social and Economic Cost of Hearing Loss in Australia* (2017) page 15 (accessed 24 September 2019).

⁹⁶⁹ ABS, *National Health Survey: First Results, 2017-18* (Cat No 4364.0.55.001) Arthritis and Osteoporosis (2018) (accessed 22 January 2020).

⁹⁷⁰ AIHW, *Australia's Welfare 2017* (2017) page 181 (accessed 4 April 2019).

diminished cognitive ability, memory, intellect, rationality, social skills and physical functioning.⁹⁷¹

According to the Dementia Australia's Help Sheet:⁹⁷²

*Alzheimer's disease is a progressive dementia – caused by a progressive degeneration of brain cells. The brain is the control centre for your whole body and different regions of the brain are responsible for different behaviours. The brain degeneration that occurs in Alzheimer's disease affects memory, thinking skills, emotions, behaviour and mood. As a result, a person's ability to carry out daily activities becomes impaired. As the disease progresses, symptoms worsen.*⁹⁷³

Other forms of dementia include vascular dementia, Parkinson's disease, Lewy body dementia, frontotemporal lobar degeneration, Huntington's disease, alcohol-related dementia (Korsakoff's syndrome) and Creutzfeldt-Jacob disease.⁹⁷⁴

People living with dementia have specific needs and are likely to require special consideration in a court or tribunal setting. The prevalence of dementia is increasing and predicted to increase further, so you will be required to consider the specific needs of people with dementia on a more frequent basis. Refer to section 6.2.6.2 for further information about the specific barriers for people with dementia in court proceedings.

Dementia-causing diseases develop gradually, therefore early signs and symptoms may be subtle, vague, and not immediately obvious. Early symptoms vary from person to person and between diseases. Common dementia symptoms include:⁹⁷⁵

- **Memory loss that affects day-to-day function** — People with dementia may forget things regularly or not remember them at all.

⁹⁷¹ Dementia Australia, *Dementia Statistics - WA* (accessed 4 April 2019).

⁹⁷² Dementia Australia, *Help Sheets* (last reviewed 2017) About Dementia – 13: Alzheimer's Disease, page 1 (accessed 2 September 2021).

⁹⁷³ Dementia Australia, *Help Sheets* (last reviewed 2017) About Dementia - 13: Alzheimer's Disease (accessed 2 September 2021).

⁹⁷⁴ Dementia Australia, *Help Sheets* (reviewed 2017) About Dementia – 01: What is Dementia? (accessed 2 September 2021).

⁹⁷⁵ Dementia Australia, *Help Sheets* (last reviewed 2017) About Dementia – 02: Diagnosing Dementia, page 1 (accessed 2 September 2021).

- **Difficulty performing familiar tasks** — People with dementia may have trouble remembering processes, such as the steps involved in preparing a meal, sufficient to cope with reasonable levels of distraction.
- **Disorientation to time and place** — People with dementia may have difficulty finding their way to a familiar place, feel confused about where they are, or think they are back in some past time in their life.
- **Problems with language** — People with dementia may forget simple words or substitute inappropriate words making sentences difficult to understand. This can be more problematic for people who speak a language other than English, who may also lose their English language proficiency.
- **Problems with abstract thinking** — People with dementia may have trouble understanding abstract concepts such as numbers and numerical processes.
- **Poor or decreased judgment** — People with dementia may have difficulty making appropriate decisions, such as what to wear in cold weather.
- **Problems with spatial skills** — People with dementia may have difficulty judging distance or direction when driving.
- **Problems misplacing things** — A person with dementia may put things in inappropriate or unusual places and then forget where they have placed things.
- **Changes in mood, personality or behaviour** — Occasional changes in mood are normal. People with dementia may experience rapid mood changes for no apparent reason. They may become confused, suspicious or withdrawn. Some become disinhibited or more outgoing.
- **A loss of initiative** — Dementia may cause a person to lose interest in previously enjoyed activities.

Note that a number of conditions produce symptoms similar to dementia, which may be treatable. These include some vitamin and hormone deficiencies, depression, medication effects, infections and brain tumours.⁹⁷⁶

6.2.5.3 *Depression and dementia*⁹⁷⁷

Depression is more than feelings of extreme sadness; it is a serious illness which requires treatment.

A depressed mood may be:

- a normal reaction to a traumatic event;
- a symptom of another disorder such as hypothyroidism; or
- part of a depressive disorder such as major depression.

A depressive syndrome will usually consist of depressed mood or loss of interest in previously enjoyed activities, together with other symptoms, such as:

- lack of energy;
- poor sleep;
- loss of appetite; and/or
- feelings of guilt.

Depression is not a normal part of ageing.

Depression is common among people with dementia. Depressive symptoms have been reported to occur in approximately 20-30% of people with dementia. People in long-term residential care appear to be particularly at risk of depression.

Other factors that may contribute to a person's depression include:

- medication side effects;
- physical illness;
- reaction to diagnosis and perceived impact on lifestyle;
- social isolation;

⁹⁷⁶ Dementia Australia, *Help Sheets* (last reviewed 2017) About Dementia – 01: What is Dementia? (accessed 2 September 2021).

⁹⁷⁷ The information in this section is drawn from Dementia Australia, *Depression and Dementia* (accessed 2 September 2021).

- fatigue; and
- environmental factors, such as the inability to screen out unwanted stimulation of loud noises and crowds.

6.2.6 Examples of the barriers for older people in relation to court proceedings

Older people with disabilities may face specific barriers during court proceedings, whether as jurors, support people, witnesses or as an accused. These barriers depend on the type and severity of the disability, and are exacerbated where appropriate adjustments are not made.

The barriers faced by older people with disabilities depend on the type and severity of the particular person's disability or disabilities, as with a person of any age with disability. Refer to chapter 4 of this Bench Book for more specific information in relation to disability.

A few examples of the barriers for older people in relation to court proceedings follow.

6.2.6.1 Barriers for older people with physical disability

- Venues or courtroom facilities may be inaccessible: for example, stairs rather 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.
- Some older people may be unable to sit or stand in one position at all or for prolonged periods, and may also be easily fatigued.
- Hearing, vision, speech loss and/or speech impairment is likely to create communication barriers.

6.2.6.2 Barriers for older people with dementia

Older people living with dementia (including Alzheimer's disease and other types of dementia), may experience additional barriers in court such as:

- communication barriers (the language used in proceedings may be too complex, fast or abstract, and/or the proceeding too lengthy, which may cause people with dementia to become distracted, confused, distressed, aggressive or angry);
- fatigue;

- difficulty understanding or recalling dates, such as when events occurred, or appointments, such as court dates; and
- an inability to concentrate and/or process information easily, memory difficulties and/or uninhibited behaviour.

These barriers may be considered when a court is deciding whether or not to disallow a question in cross-examination: see s 26(3) of the *Evidence Act 1906 (WA)*. Consideration can also be given as to whether an older witness should be declared a 'special witness' under s 106R of the *Evidence Act 1906 (WA)*.

The barriers for people with disabilities (not just older people) are discussed in further detail in section 4.4.5 of chapter 4 of this Bench Book.

Section 6.3 provides additional information and practical guidance about ways of treating older people during the court process to reduce the likelihood of problems.

6.3 PRACTICAL CONSIDERATIONS

Most older people are able to participate in court processes in the same way as everyone else. The barriers listed in 6.2.6 can be substantially, and in some cases completely, mitigated if appropriate adjustments are made.

Without these adjustments, some older people may:

- be unable to participate fully, adequately, or at all in court proceedings;
- feel uncomfortable, fearful or overwhelmed;
- feel resentful or offended by what occurs in court;
- not understand what is happening and/or be unable to convey their point of view and be adequately understood;
- perceive that an injustice has occurred; and/or
- believe that they have been treated with less respect, unfairly or unjustly when compared with other people.

If adjustments are not made for those older people who require them, injustice can manifest.

People who identify as Aboriginal, from a CaLD background, lesbian, gay, bisexual or trans, who practice a minority religion, or who are representing themselves, may face multiple and additional barriers – refer to the relevant chapter(s) in this Bench Book.

6.3.1 Legal Capacity

Refer to chapter 4 of this Bench Book on people with disabilities for a discussion regarding legal capacity.

6.3.2 Adjustments that may need to be considered before the proceedings start, or at the time an older person first appears in court

Older people's needs within the justice system vary from those of the general population only when they have disabilities. For these older people, some adjustments should be considered before proceedings start or at the time the person first appears in court.

According to the *Legal Needs of Older People in NSW* report undertaken by the Law and Justice Foundation of New South Wales, many older people are reluctant to complain and fail to get the assistance they need to resolve legal problems. Furthermore, they may be less aware of available legal information and advice services than younger people. The research found that many older people have little awareness of their legal rights and lack confidence in enforcing those rights. Older people can be reluctant to take legal actions and find the law is disempowering and cannot solve their problems.⁹⁷⁸

The following guidelines detail some useful procedures that will support an older person through court proceedings.

Points to consider – adjustments before in-court proceedings commence or at first appearance:

- In addition to the large number of older people who are in paid employment or who undertake voluntary work, older people often have significant responsibilities as carers

⁹⁷⁸ Ellison S, Schetzer L, Mullins J, Perry J and Wong K, *Legal Needs of Older People in NSW* (2004) (accessed 18 October 2018).

for partners or spouses who have disabilities, or for their grandchildren. This may affect their availability to attend court.

- Some older people may find getting to court physically difficult or problematic. If they live in outer suburbs, public transport is often difficult to access and taxi fares prohibitive. The issues are exacerbated for older people who live in regional or remote areas.⁹⁷⁹
- Under s 121 the *Evidence Act 1906* (WA) you, on your own initiative or on the application of any party to the proceedings, can allow evidence in any proceedings to be taken by video link from outside the place where the court is sitting — although you should not do so if satisfied that this is not in the interests of justice.
- In addition to the restrictions on unrepresented persons directly cross-examining complainants in serious sexual assault proceedings or certain witnesses in restraining order matters,⁹⁸⁰ you have discretion to allow the cross-examination by an unrepresented accused of any witness to be by video link, while screened, or without questions being put directly. This discretion is to be exercised having regard to the nature of the charge, the wishes of the witness, and the availability of any necessary facilities or equipment.⁹⁸¹
- You may need to consider additional measures to support older people given that there is a larger proportion who have disabilities or health problems when compared to younger people.
- While not all older people will require assistance, appropriate communication techniques, devices or support persons should be used depending on what, if any, communication difficulties the individual has and how severe they are.

⁹⁷⁹ Submission from the Council on the Ageing Western Australia (26 February 2020).

⁹⁸⁰ *Evidence Act 1906* (WA) s 106G; *Restraining Orders Act 1997* (WA) ss 44C, 53D (both accessed 2 December 2020).

⁹⁸¹ *Evidence Act 1906* (WA) s 25A (accessed 2 December 2020).

- Some older people may have decision-making disabilities, and consideration may need to be given to whether arrangements should be put in place for substitute decision-making
- If you declare an older person to be a special witness, you can allow them to be accompanied by a support person and/or communicator in any court proceedings.⁹⁸²
- You can declare a person to be a special witness if, among other things:⁹⁸³
 - by reason of physical disability or mental impairment the person is unlikely to be able to give evidence, or to give evidence satisfactorily; and/or
 - the person is likely to suffer severe emotional trauma or to be so intimidated or distressed as to be unable to give evidence satisfactorily by reason of age, relationship to any party to the proceedings or the subject-matter of the evidence.
- In the prosecution of serious sexual assaults, a complainant must be declared to be a special witness, unless you are satisfied the witness would otherwise be able to give evidence satisfactorily and that person does not wish to be a special witness.⁹⁸⁴
- If you have declared an older person to be a special witness in criminal proceedings you can also allow them to give evidence by video link or while screened.⁹⁸⁵
- On application by a party or on your own motion, you can allow an older person, whom you have declared to be a special witness, to have the whole of their evidence in any criminal matter taken at a special hearing and visually recorded.⁹⁸⁶
- Note also that provided certain requirements are met, there is provision for persons with a mental impairment whom you have declared a special witness to have their investigative interview admitted as whole or part of their evidence-in-chief in criminal proceedings — provided the person conducting the interview had reason to believe that the person being interviewed had, or may have, suffered physical or sexual abuse.⁹⁸⁷

⁹⁸² *Evidence Act 1906* (WA) s 106R(4) (accessed 2 December 2020).

⁹⁸³ *Evidence Act 1906* (WA) s 106R(3) (accessed 2 December 2020).

⁹⁸⁴ *Evidence Act 1906* (WA) s 106R(3a) (accessed 2 December 2020).

⁹⁸⁵ *Evidence Act 1906* (WA) s 106R(4)(c) (accessed 2 December 2020).

⁹⁸⁶ *Evidence Act 1906* (WA) s 106RA (accessed 2 December 2020).

⁹⁸⁷ *Evidence Act 1906* (WA) ss 106HA, 106HB(1a) (accessed 2 December 2020).

'Mental impairment' is defined to include intellectual disability, mental illness, brain damage or senility.⁹⁸⁸ If you admit the investigative interview as evidence, you must instruct a jury that this procedure is a routine practice of the court and that they should not draw any inference as to the accused's guilt from the use of the procedure.⁹⁸⁹

- You should consider discussing with the parties and/or their legal representatives in any proceedings the use of any special measures — irrespective of whether the person has been declared a special witness — if to do so would be in the interests of justice.
- Instruct the jury that declaring a witness to be a special witness is a routine practice of the court and this should not affect how they consider the evidence.
- Attention must be paid to the amount of time an older person is questioned, examined or required to be present, and due consideration given to physical requirements. This is particularly important in relation to the risk of falls among older people. Contributing factors may be fatigue, impaired vision (acuity and depth perception), dizziness and vertigo, impaired cognition and confusion, medication use affecting balance, vision and alertness, and inadequate nutrition and diet.

For more information about the guardianship and administration system that enables the appointment of substitute decision-makers, refer to section 4.4.7.2 of chapter 4 of this Bench Book.

For more information on evidentiary issues associated with sexual assault refer to chapter 13 of this Bench Book.

For more information on adjustments that need to be considered or special measures for obtaining evidence from witnesses with disabilities, refer to chapter 4 on people with disabilities.

⁹⁸⁸ *Evidence Act 1906* (WA) s 106A; *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 8 (accessed 2 December 2020).

⁹⁸⁹ *Evidence Act 1906* (WA) s 106HB(7)(a) (accessed 2 December 2020).

6.3.3 Oaths, affirmations and declarations

Points to consider – oaths, affirmations and declarations:

- Whether an older person takes an oath or an affirmation, and the type of oath or affirmation they take, will largely depend on their religious affiliation or lack thereof.
- Generally, factors for consideration for older people in relation to oaths and affirmations are the same as for other age groups.

Whether an oath or affirmation is taken will depend on the older person's particular religious affiliation. Refer also to chapter 3 of this Bench Book

Refer to section 4.6.2 of chapter 4 of this Bench Book for practical considerations regarding oaths and affirmations for older people with disabilities.

6.3.4 Language and communication

Anyone who appears in court needs to understand what is going on and 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.

Refer to chapter 4 on people with disabilities (particularly section 4.4.2.2) for more information on communication techniques for people with hearing disabilities.

As indicated in section 6.3.2, if declared a 'special witness' an older person is entitled to be assisted by a communicator while giving evidence.

Some older people who do not need a communicator, communication aid or interpreter may require adjustments in the level or style of language used or the manner in which they are given information about the court processes.

Older people from non-English speaking backgrounds may lose a prior capacity to understand or communicate in English, thus requiring interpreting and translating services.

The Council of Chief Justices of Australia has recommended a 'Four-part test for determining need for an interpreter' which was developed by Judicial Council for Cultural Diversity.⁹⁹⁰

Refer to chapter 7 of this Bench Book for more information on the arrangements that can be made to assist those from culturally and linguistically diverse backgrounds.

6.3.4.1 General communication guidance

Points to consider – communication:

- Use the appropriate terminology — refer to section 6.3.4.2.
- Do not use any discriminatory language.
- Legal information needs to be clear and readily accessible for older people. Explanations about legal 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.
- Use full descriptions rather than acronyms. This is particularly important when referring to government agencies or technology.
- Speak clearly and at a moderate pace, allowing an adequate response time.
- Consider allowing someone whom you have declared a special witness to have a 'communicator' with them while giving evidence — to assist communicate and explain the questions put to the witness and to communicate and explain the evidence given by the witness.⁹⁹¹

⁹⁹⁰ JCCD, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2017) Standard 16.3 (accessed 2 September 2021).

⁹⁹¹ *Evidence Act 1906* (WA) ss 106F, 106R(4)(b), 106R(4b) (accessed 21 September 2018).

Refer to section 6.3.4.2 of this chapter for information about appropriate terminology and modes of address for older people involved in court proceedings.

If an older person has a disability, you should only comment if it is relevant to the proceedings before you and, if it is, use the appropriate terminology as discussed in chapter 4 of this Bench Book (in section 4.4.4).

6.3.4.2 Terminology and modes of address

Points to consider — terminology and modes of address (which apply to older lawyers and jurors as well as litigants and witnesses):

- The preferred terms used in Western Australia are '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 honorific.
- In defining an 'older person' you should note that the average life expectancy for Aboriginal people is significantly lower than for non-Aboriginal people. Within Aboriginal communities a person in their late 30s may be considered to be an 'older person'.
- 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.⁹⁹²

⁹⁹² Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (2nd ed.) (2008).

- Ensure that no terms of ageism are used such as grandmother/father or senior/old, 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 - refer to chapter 4 of this Bench Book (particularly 4.6.2.3.1 in relation to older people with hearing loss).

6.3.4.3 Timings of proceedings, breaks and adjournments

Points to consider – breaks and adjournments:

- Be mindful of the physical limitations for some older people who may be experiencing ill health or disability. This may require scheduling court appearances to accommodate taking medications, using toilets or having a rest.
- Attention must be paid to the amount of time an older person is being questioned, examined or required to be present, and due consideration given to physical requirements.
- Older people often have significant responsibilities as carers for partners or spouses who have disabilities, or for their grandchildren. Given the lack of childcare facilities in courts and respite care more generally, you may need to consider these factors 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.

Where an older person has a disability, refer to section 4.6.5 of chapter 4 of this Bench Book for more points in relation to breaks and adjournments.

6.3.5 Directions to a jury

Points to consider when giving directions to a jury:

- Research has found and that 'ageing' is a loaded term that holds predominantly negative connotations – particularly among younger Australians. Most Australians feel that age

discrimination is common.⁹⁹³ 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 jurors must try to avoid making any stereotyped or false assumptions. It is advisable to give 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. Remind them that as jurors, 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.
- Keep in mind that as the *Juries Act 1957* (WA)⁹⁹⁴ provides that people up to the age of 75 may serve as jurors, it is likely that there will be older people on the jury.
- Final jury directions should repeat any earlier directions on the above points. If such directions have not yet been issued, they ought to be given. Particular attention should be given to how jurors must treat evidence arising from restricted direct cross-examination by a self-represented accused, the use of a communication aid, or from a pre-recorded interview, for example.
- 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.⁹⁹⁵

⁹⁹³ Australian Human Rights Commission, *Fact or Fiction? Stereotypes of Older Australians* (20 June 2013) page 4 (accessed 16 September 2021).

⁹⁹⁴ *Juries Act 1957* (WA) s 5(3) (accessed 16 September 2021).

⁹⁹⁵ *Evidence Act 1906* (WA) s 106R(7) (accessed 2 December 2020).

6.3.6 Sentencing, other decisions and judgment or decision writing

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, including any older people, those they care for or those who care for them.

Points to consider in sentencing and decision writing:

- If a victim is not personally capable of giving a victim impact statement, because of age-related disability or for any other reason, consider whether it is appropriate for someone else to do so on the victim's behalf.⁹⁹⁶
- Consider whether to allow a victim impact statement to be read out in court.⁹⁹⁷
- Decisions should be clearly articulated so that these can be seen to relate to the issues and individuals involved, and are not seen as being based on discriminatory assumptions and stereotypes.
- Note that some older people may struggle financially because of their reliance on fixed incomes such as superannuation, savings or pensions, their limited ability to obtain further income through paid employment, their caring responsibilities and their own need for care services.
- Ensure that any older person 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 — refer to section 6.3.4. For example, it may be appropriate for the decision 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, to help ensure understanding and compliance
- Note that in particular, when sentencing an offender you must, if the offender is personally present in court or appearing before the court by video link, explain to the

⁹⁹⁶ *Sentencing Act 1995* (WA) s 24(2) (accessed 2 December 2020).

⁹⁹⁷ See Part 3, Division 4 of the *Sentencing Act 1995* (WA). Note that a court may make a written victim impact statement available to the prosecutor and to the offender, on such conditions as it thinks fit (accessed 2 December 2020).

offender, in language likely to be understood, the effect of the sentence, the obligations of the offender, and the consequences of not complying with the sentence.⁹⁹⁸

- Other factors that may need to be considered when sentencing or making a decision affecting an older person are their special dietary or medication requirements; mobility issues; incontinence; and the presence and consequences of 'elder abuse'. For example, custody may prove particularly onerous for older people with multiple health conditions who struggle with basic personal care. Such people may also be more vulnerable to victimisation.
- While declining health, mobility or cognitive function may well be significant considerations when sentencing an older offender to a custodial term,⁹⁹⁹ those same considerations are relevant when sentencing any offender, on the basis that imprisonment is more onerous for those offenders than others. Similarly, should a custodial sentence be considered for any offender with chronic health conditions, the adequacy of the medical care available in custodial settings will be relevant to sentencing.¹⁰⁰⁰
- In contrast to children and young people, older people are not recognised at law as a special category of offender for the purposes of sentencing and sentence administration. Age of itself may, however, be a mitigating factor in sentencing in a number of ways. Advanced age may:
 - be a consideration in determining whether a sentence is crushing; the rationale being that each year of a sentence represents a substantial proportion of the period of life which is left to an offender of advanced age;¹⁰⁰¹
 - justify (in the exercise of mercy) a sentence significantly shorter than might otherwise be the case if, in the context of the state of an offender's health, there is a real risk of an offender dying in custody;¹⁰⁰² and

⁹⁹⁸ *Sentencing Act 1995* (WA) s 34 (accessed 2 December 2020).

⁹⁹⁹ See for example, *WA v Pennington* [2015] WASC 193 (accessed 21 June 2017).

¹⁰⁰⁰ See for example, *WA v Pennington* [2015] WASC 193 (accessed 21 June 2017).

¹⁰⁰¹ See for example *GHK v WA* [2014] WASCA 19 [9], [134] (29 January 2014) (accessed 4 April 2019).

¹⁰⁰² *Smith v The Queen* (Unreported, WACCA, Library No 940285, 2 May 1994); *WA v Pennington* [2015] WASC 193 [50] (accessed 21 June 2017).

- be a factor in diminishing the importance of personal deterrence, should an offender be of sufficiently advanced age and given the absence of any realistic opportunity for future offending.¹⁰⁰³
- Advanced age is a relevant consideration in determining whether a sentence will be crushing, with the rationale being that each year of the sentence represents a substantial proportion of the remaining period of the offender's life.¹⁰⁰⁴ However, age is only one factor in the sentencing process, and advanced age can never be a justification for a sentence which is not fairly proportionate to the offence or otherwise unacceptably inappropriate.¹⁰⁰⁵ An offence may be so serious that humanitarian considerations relating to advanced age cannot be accommodated.¹⁰⁰⁶

Refer to section 4.6.8 of chapter 4 of this Bench Book for more points of consideration in relation to sentencing and decisions that involve older people with a disability.

6.4 FURTHER INFORMATION OR HELP

The following organisations provide information or expertise about older people, related issues and also about other appropriate community agencies:

Advocare

Advocare Incorporated is an independent, community based, not-for-profit organisation that supports and protects the rights of older people and people with disabilities.

Aged & Community Services Western Australia

Aged and Community Services Western Australia (ACSWA) is the largest peak industry body for not-for-profit aged and community care providers in Western Australia, representing a large number of church, charitable and local government organisations throughout the state. ACSWA is affiliated with the national group Aged and Community Services Australia and has sister associations across Australia.

¹⁰⁰³ See for example *GHK v WA* [2014] WASCA 19 [31] (29 January 2014) (accessed 4 April 2019).

¹⁰⁰⁴ *Headley v WA* [2018] WASCA 37 [30], and the cases referred to therein (accessed 4 April 2019).

¹⁰⁰⁵ *Gulyas v WA* [2007] WASCA 263 [35] (accessed 4 April 2019).

¹⁰⁰⁶ *Headley v WA* [2018] WASCA 37 [31] (accessed 4 April 2019).

Dementia Australia

Dementia Australia represents the 447,115 Australians living with dementia and the estimated 1.5 million Australians involved in their care (in 2019), as a national peak body.

Council on the Ageing (COTAWA)

COTAWA was previously named the Old People's Welfare Council of Western Australia (from 1959-1968), and is now part of the national confederation of COTA. COTAWA works towards an equitable, just and inclusive society in which older people can flourish. It runs programmes in the areas of cybercrime prevention and seniors' online safety; Senior's Week awards and grants; and active ageing (e.g. 'Mall Walking' and 'Strength for Life').

Department of Local Government - Sport and Cultural Industries

The Department of Local Government and Communities (DLGC) works in collaboration with Western Australia's local governments and community services sector to oversee the delivery of programs and services that support and strengthen the State's diverse communities. It is committed to achieving the best possible outcomes for seniors, young people, women, volunteers, children and families and multicultural communities.

Department of Communities - Disability Services

The former Disability Services Commission is now part of the Department of Communities. The Disability Services section is responsible for advancing opportunities, community participation and quality of life for people with disabilities. Established under the Disability Services Act 1993 (WA), Disability Services provides a range of direct services and supports and also funds non-government agencies to provide services to people with disabilities, their families and carers.

GRAI (GLBTI Rights in Ageing)

GRAI is a community-run organisation based in Perth. Founded in 2005, GRAI works to support the rights and well-being of older LGBTI people. We provide advocacy to government agencies, research, and training for the aged-care sector, as well as information and social events for the LGBTI community.

National Seniors Association (Australia)

National Seniors was established by a group of visionary Queenslanders in 1976. Forty years on, with over 130,000 members, 120 branches, and 50 employees, it is the consumer lobby group for older Australians and the fourth largest organisation of its type in the world.

Office of the Chief Psychiatrist

Dr Nathan Gibson was appointed as the Chief Psychiatrist of Western Australia in 2013. The Chief Psychiatrist is supported by the Office of the Chief Psychiatrist (OCP), which consists of a manager, clinical advisors, project officers, data analysts and administrative staff. The primary role of the OCP is to support clinicians as they deliver mental health services to the Western Australian community. Other functions include:

- engagement with consumers, carers and stakeholders;
- clinical facilitation, support and education;
- expert advice liaison, consultation and national representation;
- standards monitoring and compliance; and
- authorisations and approvals.

Mental Health Commission

The Mental Health Commission, established in 2010, strives to establish mental health systems that meet the needs of Western Australia's population and deliver quality outcomes for individuals and their families. On 1 July 2015, the Commission amalgamated with the Drug and Alcohol Office to deliver an integrated approach to helping people with mental health, drug and alcohol problems. The merger recognises that these problems commonly coexist.

Office of the Public Advocate

The Office of the Public Advocate (OPA) provides advocacy and investigation, and guardianship services under the *Guardianship and Administration Act 1990 (WA)* and community education in relation to the Act.

Older People's Right Service (OPRS)

The Older People's Rights Service is a partnership between Advocare and the Northern Suburbs Community Legal Centre. It provides a legal service for older people suffering elder abuse as

well as crisis counselling and support, information, education and referral. Advocates refer clients to the Older People's Rights Service as required.

People with Disabilities (WA) Inc.

People with Disabilities Western Australia (PWDWA) provides non-legal advocacy to people with disabilities. Advocacy involves speaking, acting and writing on behalf of disadvantaged people and groups to promote, protect and defend their welfare and justice. These advocacy services are available to any person with a disability. Membership is not required to access advocacy services. All of the advocacy work that PWDWA does follows the principles of the National Disability Strategy 2010-2020.

WA Centre for Health and Ageing

The Western Australian Centre for Health and Ageing (WACHA) is a not-for-profit Centre dedicated to improving health in mid-life and beyond. Its research focuses on searching for and finding new treatments to prevent disease, and discovering cures for diseases such as, dementia, depression and frailty.

6.5 FURTHER READING

Alliance for the Prevention of Elder Abuse: Western Australia, Elder Abuse Protocol: Guidelines for Action (2017) (accessed 2 December 2020)

Australian Bureau of Statistics, Australian Aboriginal and Torres Strait Islander Health Survey: First Results, Australia, 2012-13 (Cat No 4727.0.55.001) (2013) (accessed 2 December 2020)

Australian Human Rights Commission, Fact or Fiction? Stereotypes of Older Australians (2013) (accessed 2 December 2020)

Australian Human Rights Commission, Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability (2016) (accessed 2 December 2020)

Australian Institute of Health and Welfare, Older Aboriginal and Torres Strait Islander people (2011) (accessed 2 December 2020)

Australian Institute of Health and Welfare, *Older Australians at a Glance* (2016) (accessed 2 December 2020)

Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (ALRC Report 131) (2017) (accessed 2 December 2020)

Clare M, Black Blundell B and Clare J, *Examination of the Extent of Elder Abuse in Western Australia a Qualitative and Quantitative Investigation of Existing Agency Policy, Service Responses and Recorded Data* (2011) (accessed 2 December 2020)

Department for Local Government and Communities, *Grandfamilies* (2018) (accessed 2 December 2020)

Kaspiew R, Carson R and Rhoades H (for Australian Institute of Family Studies), *Elder Abuse: Understanding Issues, Frameworks and Responses* (2016) (accessed 2 December 2020)

Kaspiew R and Others (for Australian Institute of Family Studies), *Elder Abuse National Research — Strengthening the Evidence Base: Research Definition Background Paper* (October 2019) (accessed 2 April 2020)

Legal Aid Western Australia, *Elder Abuse* (last reviewed 24 May 2018) (accessed 2 December 2020)

Office of the Director of Public Prosecutions Comparative Sentencing Tables (accessed 12 July 2021)

Western Australian Police Force, *Seniors and Elder Abuse* (last updated 21 January 2019) (accessed 2 December 2020)

7 PEOPLE FROM CULTURALLY AND LINGUISTICALLY DIVERSE BACKGROUNDS

*A judicial officer with a proper understanding of the importance of language and cultural differences will be able to evaluate the extent to which the witness's demeanour, language and behaviour are attributable to general characteristics of that person's ethnic group rather than to his or her individual personality.*¹⁰⁰⁷

The 2016 Australian Census confirmed that Australia is a diverse nation and that Western Australia is the most diverse state, with 32.2% of the population born overseas.¹⁰⁰⁸

Until mid-2013, Western Australia's population was the fastest growing of all Australian states and territories. Overseas migration was the single largest component of population growth in Western Australia between 1998 and 2013.¹⁰⁰⁹ Between 2013 and 2019, annual net overseas migration to Western Australia fell and was exceeded by the natural increase in population.¹⁰¹⁰ However, in the March 2020 quarter, net overseas migration had again increased (24,826) compared to the natural population increase in Western Australia (18,008).¹⁰¹¹

The term 'culturally and linguistically diverse' is generally used to refer to groups and individuals whose religion, race, language and ethnicity is other than Anglo-Saxon, Anglo-Celtic, Aboriginal or Torres Strait Islander (information concerning Aboriginal people can be found in chapter 11 of this Bench Book). For convenience, 'CaLD' is commonly used as an abbreviation for 'culturally and linguistically diverse'.

¹⁰⁰⁷ Roberts-Smith L, *Communication Breakdown: The Importance of Cultural Language Awareness in Court* [1990] *NSW Bar Association News* 10 (accessed 4 April 2019).

¹⁰⁰⁸ Australian Bureau of Statistics (ABS), *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Table 1 (accessed 4 April 2019).

¹⁰⁰⁹ ABS, *Australian Demographic Statistics, June Quarter 2019* (Cat No 3101.0) (19 December 2019) Time Series Spreadsheets - Table 2 (accessed 23 January 2020).

¹⁰¹⁰ ABS, *Australian Demographic Statistics, June Quarter 2019* (Cat No 3101.0) (19 December 2019) Time Series Spreadsheets - Table 2 (accessed 23 January 2020).

¹⁰¹¹ ABS, *Australian Demographic Statistics, March Quarter 2020* (Cat No 3101.0) (24 September 2020) Time Series Spreadsheets - Table 2 (accessed 2 December 2020).

People from more than 220 different countries live, work and study in Western Australia, speaking as many as 290 languages (including around 50 Aboriginal and Torres Strait Islander languages) and identifying with more than 130 religious faiths.¹⁰¹²

The material used in this chapter was originally drawn from the New South Wales Judicial Commission's Equality before the Law Bench Book, with modifications to incorporate local legislation, data, reference material and agency submissions. The Steering Committee overseeing the production of the 2nd edition of this Bench Book also gratefully acknowledges the submissions and contributions of the following people and organisations, which have assisted with development of this chapter in the first edition and its subsequent revision:

- Kin Advocacy (formerly the Ethnic Disability Advocacy Centre) (20 April 2007, 5 March 2020);
- Fremantle Multicultural Centre Incorporated (26 April 2007);
- Multicultural Women's Advocacy Service (4 May 2007);
- Albany Migrant Resource Centre (14 August 2007);
- The Humanitarian Group (28 September 2016 and 13 February 2017);
- Women's Health and Family Services (29 September 2016);
- Office of Multicultural Interests (September 2016); and
- Dr Raewyn Mutch, Refugee Health Service at Perth Children's Hospital (5 March 2020).

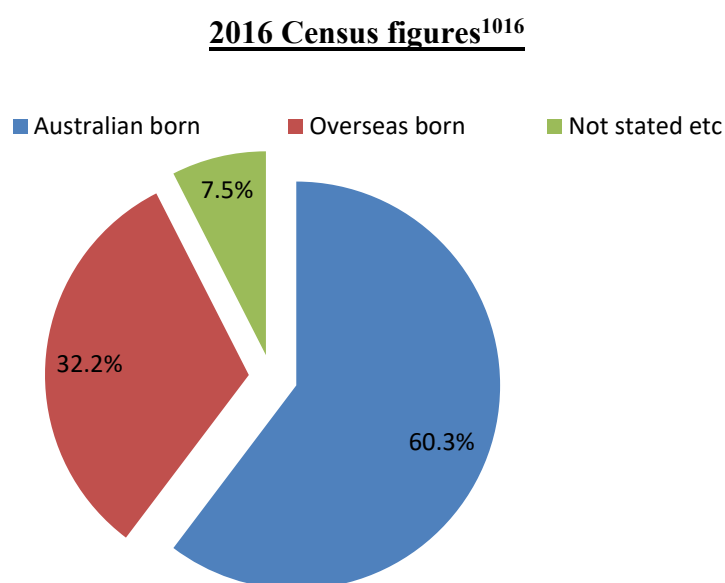
¹⁰¹² ABS, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube) - Tables 1, 8, 12 (accessed 23 January 2020).

7.1 STATISTICS

7.1.1 Population

Of all the states and territories, Western Australia had the largest proportion of its population born overseas (one-third) in the 2016 Census.¹⁰¹³ In the previous 2011 Census, more than half of the total population – over one million people – had one or both parents born overseas.¹⁰¹⁴ Figure 7.1 shows the breakdown of Australian born and overseas born Western Australian residents using figures from the 2016 Census.¹⁰¹⁵

Figure 7.1 - Australian born and overseas born Western Australian residents:



In 2016, of the almost 2.475 million Western Australians:¹⁰¹⁷

¹⁰¹³ ABS, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Table 1 (accessed 5 April 2019).

¹⁰¹⁴ ABS, *2011 Census Community Profiles – Western Australia* (2013), Basic Community Profile, Table B08 (accessed 5 April 2019).

¹⁰¹⁵ ABS, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Table 1 (accessed 5 April 2019).

¹⁰¹⁶ Excludes inadequately described, not stated and born at sea. ABS, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Table 1 (accessed 5 April 2019).

¹⁰¹⁷ ABS, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Table 1 (accessed 5 April 2019).

- Just under half (383,802) of those born overseas (796,347) were born in the main English-speaking countries,¹⁰¹⁸ predominantly in the United Kingdom and New Zealand.
- Almost one-third (33.1%) of those born in a non-main English-speaking country were born in India, Philippines, Malaysia or China.¹⁰¹⁹ Table 7-1 lists non-main English-speaking birthplaces and the percentage of the Western Australian population that was born in each place.

Table 7-1 Western Australian residents born in non-main English-speaking birthplaces – 2016 Census Figures

| Birthplace | Number of WA | % of WA population |
|-----------------------|--------------|--------------------|
| India | 49,385 | 2.0 |
| Philippines | 30,835 | 1.2 |
| Malaysia | 29,126 | 1.2 |
| China ¹⁰²⁰ | 27,081 | 1.1 |
| Italy | 19,210 | 0.8 |
| Vietnam | 15,845 | 0.6 |
| Singapore | 14,987 | 0.6 |
| Zimbabwe | 11,649 | 0.5 |
| Indonesia | 11,394 | 0.5 |
| Germany | 10,958 | 0.4 |

Source: Australian Bureau of Statistics¹⁰²¹

Of the countries listed above, those showing the greatest numerical increase between 2011 and 2016 were India, the Philippines, China and Malaysia.¹⁰²²

¹⁰¹⁸ ABS defines 'main English-speaking countries' as Canada, England, Ireland, New Zealand, Northern Ireland, Scotland, South Africa, the United States and Wales.

¹⁰¹⁹ Excluding Hong Kong, Macau and Taiwan.

¹⁰²⁰ Excluding Hong Kong, Macau and Taiwan.

¹⁰²¹ ABS, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Table 1 (accessed 5 April 2019).

¹⁰²² ABS, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Table 1; ABS, *2016 Census Community Profiles – Western Australia* (2017) Time Series Profile, Table T08 (both accessed 5 April 2019).

Australia's overall migrant population is relatively large when compared with other Western nations. Taken as a proportion of the population, in 2010 Australia had a larger migrant population (27.7%) than New Zealand (22.4%), Canada (20.0%), the United States of America (13.1%) and the United Kingdom (12.3%). In 2017, of all the nations which are a part of the Organisation for Economic Co-operation and Development (OECD), only Luxemburg (43.7%) and Switzerland (28.3%) had larger proportionate foreign-born populations.¹⁰²³

The majority of migrants living in Australia are well established in the community. In 2011, the median length of residence for migrants in Australia was 20 years.¹⁰²⁴ The ABS noted that:¹⁰²⁵

Length of residence in Australia differs markedly by country of birth, reflecting changing immigration trends over time. Migrants born in European nations like the Netherlands, Italy or Germany, for example, are some of the most established population groups in the country with median lengths of residence in Australia in excess of four decades. By contrast, migrants born in nations like China or India are relatively new arrivals to the country, reflecting the growing significance of migration to Australia from countries in Asia in recent decades. In 2011, the median length of residence in Australia for migrants born in China and India was 8 years and 5 years respectively.

There are a significant proportion of migrants who enter Australia on temporary visas: in 2018-19 and 2019-20 there were 8.8 million and 6.4 million temporary visas issued respectively. In comparison, there were less than 180,000 places allowed under the permanent migration program in 2018-19, and less than 154,000 in 2019-20 (noting the impact of Covid-19). The number of refugee and humanitarian visas issued in 2018-19 totalled fewer than 18,000, with approximately another 2,900 temporary protection (three year) and safe haven enterprise (five year) visas granted.¹⁰²⁶ The number of refugee and humanitarian visas issued in 2019-20 was

¹⁰²³ The Organisation for Economic Co-operation and Development (OECD), *Foreign-born Population (Indicator)* (2017) (accessed 5 April 2019).

¹⁰²⁴ ABS, *Australian Social Trends, 2014* (Cat No 4102.0) (2014) 'Migrants in Australia' (accessed 5 April 2019).

¹⁰²⁵ ABS, *Australian Social Trends, 2014* (Cat No 4102.0) (2014) 'Migrants in Australia' (accessed 5 April 2019).

¹⁰²⁶ Department of Immigration and Border Protection, *2015-16 at a Glance* (undated) (accessed 31 July 2017).

approximately 13,000, with approximately another 1,900 temporary protection and safe haven enterprise visas granted (again noting that these statistics were impacted by Covid-19).¹⁰²⁷

Womens Health and Family Services noted that gaps in published data may mean that contemporary trends are not fully appreciated, citing as an example 'a significant growth in [non-main English-speaking] African communities that have settled in Western Australia' since the 2011 Census.¹⁰²⁸ Such limitations in data could lead to inadequate recognition of and responses to important social trends impacting on the legal system.

For example, some years ago work had been undertaken in Western Australia to respond to a significant number of African humanitarian entrants with high and complex needs. This included improvements in access to settlement services, education, vocational training, employment, health, housing, police and domestic violence services. Aspects of the response related to addressing discrimination by the wider community but also included addressing alcohol abuse and domestic violence, for example, which was associated with the settlement difficulties experienced by some members of the African community.¹⁰²⁹

However, as indicated in the Scanlon Foundation/Monash University 2015 survey on social cohesion:

*Experience of discrimination over the last 12 months is at the highest level among some African groups, with discrimination indicated by 53% of those born in Egypt, 60% Ethiopia, 67% Kenya, 75% Zimbabwe, and 77% South Sudan. A relatively high proportion of South Sudanese, 59%, indicated that they had experienced discrimination when in contact with police over the last 12 months, 26% indicated that their property had been damaged, and 17% that they had been subject to physical attack.*¹⁰³⁰

¹⁰²⁷ Australian Government, Department of Home Affairs, *Visa Statistics* (last updated 1 December 2020) Australia's Migration Trends 2019-20 Highlights; Australia's Migration Trends 2018-19 Highlights (accessed 2 December 2020).

¹⁰²⁸ Submission from Women's Health and Family Services (29 September 2016).

¹⁰²⁹ Office of Multicultural Interests, *Settlement Issues for African Humanitarian Entrants in Western Australia Implementation Report - Final Report* (2009) (accessed 5 April 2019).

¹⁰³⁰ Markus A, *Australians Today: The Australia@2015 Scanlon Foundation Survey* (2016) 4 (accessed 31 July 2017).

Women's Health and Family Services advised that various not-for-profit organisations and the Western Australian Police continue to make efforts to deal with a wide range of criminal and other legal issues within these communities, including family and domestic violence.¹⁰³¹

7.1.2 Language spoken¹⁰³²

In 2016, 17.6% (435,339) of Western Australian residents reported that they spoke a language other than English at home.

Of those who migrated to Western Australia from another country:

- 57.3% reported that they spoke English only.
- 42.2% reported speaking another language:
 - 85.8% of those who also spoke another language reported that they spoke English well or very well.
 - 13.5% of those who also spoke another language did not speak English well or at all.
 - Between 7.7% and 37.6% (depending on the age range) of those who reported speaking another language either could not speak English well or could not speak English at all, with older (55+) migrant groups being less proficient.

Those who speak another language but also speak English reasonably well may require an interpreter in a court situation — refer to section 7.3.1 of this chapter.

7.1.3 Place of usual residence

At the time of the 2016 Census, Western Australia was one of the most culturally diverse of all Australian states and territories, and Perth one of the most diverse capital cities. A high proportion of Western Australia's overseas-born population were living in the Greater Perth

¹⁰³¹ Submission from Women's Health and Family Services (29 September 2016).

¹⁰³² ABS, *2016 Census Community Profiles – Western Australia* (2017) General Community Profile, G01, G11 (accessed 5 April 2019).

area, accounting for 36% of Perth's total population.¹⁰³³ Twelve percent of overseas-born Western Australians were residing in rural and regional areas, which represented a 1% decrease since the 2011 Census.¹⁰³⁴

7.1.4 Ancestry or ethnic background¹⁰³⁵

Of those usually resident in Western Australia in 2016:

- 38.3% had both parents born in Australia;
- 7.5% had their father only born overseas;
- 5.8% had their mother only born overseas; and
- 40.5% had both parents born overseas.

That means that 53.8% of Western Australian residents had recent overseas ancestry — that is, at least one parent born overseas. The top five ancestries in 2016 were English (27.9%), Australian (22.8%), Irish (6.7%), Scottish (6.4%) and Italian (3.7%).

7.1.5 Religion

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 country of origin.

Additional information is provided in chapter 3 on religious affiliations.

7.1.6 Socio-economic status¹⁰³⁶

As of November 2019, the unemployment rate for all Australian residents who were born overseas was 5.9%, whereas it was 4.7% for those born in Australia. Migrants who had obtained citizenship in Australia were more likely to be employed (76%) than migrants on

¹⁰³³ ABS, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Table 11 (accessed 5 April 2019).

¹⁰³⁴ ABS, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Table 11 (accessed 5 April 2019).

¹⁰³⁵ ABS, *2016 Census QuickStats – Western Australia* (2017) People — Cultural and language diversity (accessed 5 April 2019).

¹⁰³⁶ Unless otherwise stated this information is drawn from the Judicial Commission of New South Wales, *Equality before the Law Bench Book* (updated 12 June 2018) Section 3 (accessed 2 December 2020).

permanent (66%) or temporary (65%) visas. Male migrants were more likely to be employed fulltime (90% of those employed) than women (63%).¹⁰³⁷

Ninety percent of recent migrants who applied had their overseas qualification recognised, however only 54% had utilised their highest non-school qualification in their first job since arriving in Australia.¹⁰³⁸ Migrants, and particularly those from non-English-speaking backgrounds, often take at least one generation to establish themselves at the same professional level as they came from, due to a combination of the delays caused by migrating and resettling, their lower proficiency in English, difficulties in negotiating a different culture, the difficulty in getting their overseas qualifications recognised and possibly some race discrimination in recruitment and selection processes.

7.1.7 Crime

As of 30 June 2019, 16% of all Western Australian prisoners were born overseas. Persons born in New Zealand comprised the largest proportion (3.0% of total prisoners), followed by the United Kingdom (2.8%) and Vietnam (1.8%).¹⁰³⁹

Within some sections of the community there is a perception (sometimes fed by the media) that members of some migrant groups are more likely to resort to crime than other groups. However, statistics about ethnicity and crime rarely take into account social and economic variables. In other words, social disadvantage, rather than ethnicity, would appear to be the main influencing factor in relation to propensity to commit crime.¹⁰⁴⁰ As indicated in Table 7-2 below, many immigrant minorities were not represented in the Western Australian prison population at all and of those that were, most are not over-represented in comparison to their representation amongst the total population. Persons born in Australia constituted a significantly higher proportion of the prison population than the total population; this is largely attributable to the highly disproportionate rate of Aboriginal imprisonment in Western Australia.

¹⁰³⁷ ABS, *Characteristics of Recent Migrants, Australia, November 2019* (Cat No 6250.0) (12 June 2020) (accessed 12 December 2020).

¹⁰³⁸ ABS, *Characteristics of Recent Migrants, Australia, November 2019* (Cat No 6250.0) (12 June 2020) (accessed 12 December 2020).

¹⁰³⁹ ABS, *Prisoners in Australia 2019* (Cat No 4517.0) (3 December 2020) Prisoners – Selected Country of Birth by State and Territory, Table 22 (accessed 10 December 2020).

¹⁰⁴⁰ Mukherjee S, *Ethnicity and Crime, Trends and Issues in Crime and Criminal Justice* (May 1999) Australian Institute of Criminology, No. 17, pages 1 and 6 (accessed 5 April 2019).

Table 7-2 WA Prison Population and Country of Birth¹⁰⁴¹

| County of birth | % of WA prisoners - number inmates | % Total WA population |
|------------------|---------------------------------------|-----------------------|
| Australia | 83.4% - 5,279 | 60.3 |
| New Zealand | 3.7% - 234 | 3.2 |
| United Kingdom | 3.2% - 203 | 9.4 |
| Vietnam | 1.3% - 83 | 0.6 |
| Hong Kong | 0.7% - 45 | 0.2 |
| Malaysia | 0.6% - 37 | 1.2 |
| China | 0.5% - 32 | 1.1 |
| South Africa | 0.4% - 24 | 1.7 |
| Ireland | 0.4% - 23 | 0.7 |
| Sudan | 0.3% - 19 | 0.1 |
| United States of | 0.3% - 16 | 0.4 |
| India | 0.3% - 16 | 2.0 |
| Italy | 0.3% - 16 | 0.8 |
| Iraq | 0.2% - 13 | 0.1 |
| Germany | 0.2% - 11 | 0.4 |
| Iran | 0.2% - 10 | 0.2 |
| Thailand | 0.1% - 9 | 0.3 |
| Lebanon | 0.1% - 9 | 0.04 |
| Afghanistan | 0.1% - 8 | 0.2 |
| Canada | 0.1% - 7 | 0.2 |
| Philippines | 0.1% - 6 | 1.2 |
| Taiwan | 0.1% - 6 | 0.2 |
| Sri Lanka | 0.1% - 5 | 0.3 |
| Turkey | 0.1% - 4 | 0.05 |
| Fiji | 0.1% - 4 | 0.05 |
| Other | 3.0% - 193 | |
| Total | 6,329 inmates | |

Source: Australian Bureau of Statistics (2016)

¹⁰⁴¹ ABS, *Prisoners in Australia, 2016* (Cat No 4517.0) (2016) Prisoner characteristics, States and Territories (data cube), Table 21; ABS, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Cultural Diversity (data cube), Table 1 (both accessed 5 April 2019).

7.2 INFORMATION

7.2.1 Cultural and linguistic differences

All cultures have their own set of cultural 'norms', although not all members of ethnic communities follow the cultural norms for their group.

All cultures (including mainstream-English-speaking Australian cultures) have their own set of variances and sub-cultures — for example, there is not just one Vietnamese or Lebanese cultural 'norm'.

Cultures are dynamic and constantly evolving, and each ethnic and/or non-English-speaking group has also generally deviated from at least some of the cultural norms found in their home country. This may be due to the impact of the (frequently, extremely difficult) migration and settlement experience, and then acculturation to life in Australia.

In the justice system, linguistic and cultural differences may affect:

- the way in which people from CaLD backgrounds present themselves and behave in court;
- the way in which people from CaLD backgrounds perceive justice to have been done or not done; and
- the way in which justice actually is or is not done. For example,
 - assumptions based on how a mainstream-English-speaking Australian might behave in a situation may result in an injustice for a person from a CaLD background; or
 - a non-English-speaking person's limited capacity to understand or fully participate in court proceedings can reflect upon the fairness of the legal proceedings.

7.2.2 Examples of common cultural and linguistic differences¹⁰⁴²

Cultural differences can include:

- Different naming systems and modes of address — refer to section 7.3.2.
- Differences in family make-up and in how individual members of the family are perceived and treated — refer to section 7.3.6.
- Different styles of behaviour and appearance; different customs about how men and women, and sometimes children, should behave and be treated; different customs as to how people in authority should behave and be treated; and different customs in relation to marriage, property ownership and inheritance — refer to sections 7.3.4 and 7.3.6.
- Different communication styles (linguistic and body language), combined in many cases with a low proficiency in the English language or complete inability to speak or understand (Australian) English. An individual's ability to communicate in English is often compromised in situations of stress — which may include court appearances. Also, where someone is fluent in English and/or appears to use body language that is similar to many mainstream-English-speaking Australians, it does not necessarily mean that they follow all, or even most, mainstream-English-speaking Australian norms or idioms — refer to sections 7.3.1 and 7.3.5.
- Different levels of understanding of legal and court systems — often a much lesser level of (and sometimes a complete lack of) understanding of the Australian legal and court system than their mainstream-English-speaking Australian counterparts. Many come from countries using completely different legal systems (for example, an inquisitorial system) or have experienced an extremely repressive dictatorial, and in their view unjust, system. They may not understand the jury system, cross-examination, the rules of evidence, or what bail represents and means. They may well have very good reason to fear everything to do with the legal and court system, and, in particular, reason to fear the type of questioning that can occur under strenuous cross-examination.

¹⁰⁴² The examples provided in this chapter are used to illustrate cultural differences and how they may impact on courts. Although some people from a culturally or linguistically diverse background may behave in the manner described, the examples do not imply that the behaviour is typical of all people from that background or that there is, for example, a single mainstream-English-speaking Australian culture or behaviour.

They may be survivors of torture and trauma, thus making the court experience particularly terrifying — refer to section 7.2.4 and 7.3.5.5.

- Different customs between the generations — those from younger generations are more likely to adhere to (or want to adhere to) mainstream English-speaking Australian customs and values than those from older generations — see section 7.3.6.1.
- A range of different religious affiliations which may influence behaviour and values.

Additional information is provided in chapter 3 on religious affiliations.

7.2.3 The possible impact of these linguistic and cultural differences

The cultural and linguistic background of the person may mean that they:

- feel uncomfortable, fearful or overwhelmed;
- feel offended by what occurs in court;
- do not understand what is happening or are unable to get their point of view across and be adequately understood;
- feel that an injustice has occurred;
- are unfamiliar with the legal system and processes, and their rights, responsibilities and obligations;¹⁰⁴³ and
- are not confident or comfortable speaking in a court setting.¹⁰⁴⁴

In some cases unless appropriate account is taken of these differences, people from CaLD backgrounds may be treated unfairly or unjustly.

¹⁰⁴³ Submission from the Office of Multicultural Interests (September 2016).

¹⁰⁴⁴ Submission from the Office of Multicultural Interests (September 2016).

These problems are likely to be compounded if a person is also female, a young person, lesbian, gay, bisexual or trans, an older person, a person with a disability, a person who practices a minority religion or a person who is representing themselves – refer to the relevant chapter(s) in this Bench Book.

7.2.4 Particular issues affecting refugees and asylum seekers¹⁰⁴⁵

The interaction between refugees and asylum seekers and the legal system may not only be impacted by their CaLD backgrounds but by a range of other factors.

Refugees and other forced migrants come from backgrounds where they have suffered persecution, torture, gross violations of human rights, and other further trauma in refugee camps or en route to Australia. Amendments to the **Migration Act 1958** (Cth) have significantly impacted upon families from refugee backgrounds whose members become involved with the criminal justice system.

7.2.4.1 The 'legacy caseload'

The 'legacy caseload' is a group of approximately 30,000 asylum seekers who came to Australia prior to 1 January 2014, who were permitted to remain in Australia in order to lodge applications for substantive visas, but had not had their refugee status determined by this date.¹⁰⁴⁶

People in the legacy caseload have faced a range of challenges during their time in Australia including:¹⁰⁴⁷

- processing delays;
- that while most have been released from closed detention, they have limited access to support services while living in the Australian community;

¹⁰⁴⁵ Aspects of this section are drawn from the submission from The Humanitarian Group (28 September 2016).

¹⁰⁴⁶ Australian Human Rights Commission, Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload' (7 July 2019) page 7 (accessed 7 January 2021).

¹⁰⁴⁷ Australian Human Rights Commission, Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload' (7 July 2019) pages 7 and 11 (accessed 7 January 2021).

- that where they are found to be refugees they are not eligible for permanent residency in Australia;
- restrictions on family reunion opportunities, resulting in the prospect of indefinite separation from their family members; and
- an increased likelihood of refoulement due to changes in processes for assessing refugee claims, including the removal of access to comprehensive merits review.

These challenges have led to financial hardship, deteriorating mental health and poorer settlement outcomes.

An article published by the University of South Australia identified this particular group as more susceptible to mental health deterioration, which significantly impacts on their autobiographical memory and may produce inconsistencies in their claims.¹⁰⁴⁸

The Australian Human Rights Commission has stated that the evidence suggests that prolonged waiting times for the determination of refugee status has resulted in the legacy caseload having poorer mental health outcomes than other refugee and asylum seeker groups. This includes 'protracted asylum seeker syndrome', feeling 'mentally trapped', 'boxed in', hopeless and helpless. There are high rates of both suicidal ideation and suicide. A mental health expert consulted by the Commission reported that some members of the legacy caseload were experiencing suicidal ideation in the absence of any underlying mental health disorder, which was a new trend. Another expert reported suicidal ideation in children under 10 years old, which is a rare phenomenon. This phenomenon is sometimes described as 'lethal hopelessness'.¹⁰⁴⁹

As of October 2020, 26,313 (84.3%) applicants in the legacy caseload had a decision made on their application by the Department of Home Affairs. However, there remained 4,884 people waiting for a decision from the Department. At that time, 17,777 people from the legacy

¹⁰⁴⁸ Procter N, Kenny MA and Grech C, Lethal Hopelessness: Understanding and Responding to Asylum Seeker Mental Deterioration (2016) *Shared Learning in Clinical Practice Mental Health Practice Development Newsletter - Supplement – September 2016*, 1-2 (accessed 7 January 2021).

¹⁰⁴⁹ Australian Human Rights Commission, Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload' (7 July 2019) pages 39 - 41 (accessed 7 January 2021).

caseload had been granted a visa, which includes those whose visa was granted after the decision was remitted to the Department following merits or judicial review.¹⁰⁵⁰

7.2.4.2 Strengths and vulnerabilities of newly settled refugees¹⁰⁵¹

Refugee and asylum-seeking families settling in WA have 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. 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. Additionally, access barriers to health, justice and education services are influenced by lived and vicarious trauma, ethnicity, literacy and cross-cultural or gender norms.

The Perth Children's Hospital Refugee Health Service (RHS) has documented and published strengths and vulnerabilities of newly resettled refugees in Western Australia over the last 15 years. Over 4,500 new patients have been seen and assessed by the multidisciplinary RHS. More recent data from the emerging Middle Eastern (Syrian/Iraqi) cohort have identified factors previously unreported in other cultural cohorts (K Lindsay et al 2020; unpublished data) but demonstrate that short transit times do not lessen resettlement risks. Salient demographic and socioeconomic factors that influence resettlement and need consideration include:

- Cultural diverse cohort (48 different ethnic backgrounds and 37 language/dialects spoken within current cohort) - over 95% do not have English proficiency.
- Large family size (median number of siblings 4, range 1-11), with limited access to private transportation.
- Highly itinerant population with a reliance on rental accommodation.

¹⁰⁵⁰ Kaldor Centre for International Refugee Law, University of New South Wales, [The 'Legacy Caseload'](#) (16 November 2020) (accessed 7 January 2021).

¹⁰⁵¹ Submission from Dr Raewyn Mutch, Refugee Health Service at Perth Children's Hospital (5 March 2020).

- Immense relative national social disadvantage with 70-80% residing in suburbs categorised as profoundly impoverished (Newman 2018, K Lindsay and S Cherian 2020: unpublished data).
- Profound parental education gaps (over 50% of mothers and 40-50% fathers have no formal prior education or primary level only); most are subsequently illiterate in their first (primary) language or dialect.
- High levels of prior adverse childhood experiences and vicarious trauma (Hanes 2017/2019).
- Ongoing nutritional deprivation and food insecurity following resettlement (Newman 2018).
- Complex biopsychosocial health, developmental and educational concerns with compounding factors included ongoing trauma, family separation, limited parental education and health literacy as well as language/transport barriers and cultural adjustment (Mutch 2012, Mace 2014, Nicol 2014/15, Hirani 2017/18, Hanes 2018/19).
- Three or more Adverse Childhood Experiences (ACEs) had been lived by 67% of all of the Middle Eastern cohort (Lindsay et al).
- Significant cultural child protection concerns including large numbers of disclosed maternal underage marriage (30% of our Middle Eastern/Syrian mothers), enforced child labour, previous and current child abuse risks.
- High levels of witnessed trauma and inflicted violence (91% Iraqi; 85% Syrian cohort) including gender based violence, bombings, beheadings, chemical weapon exposure and other atrocities associated with warfare which have targeted or indirectly impacted on civilians.
- Previous nuclear family separation (25-30%) and/or death of family member (up to 40% in some refugee cohorts); 30% still suffer from ongoing separation because of Australian domestic and country of origin immigration laws.
- More than one in two children had experienced interrupted education; up to 80% of Syrian/Iraqi children have had substantial gaps in education during transit.

- Undiagnosed chronic illness, disability and/or multisystem health concerns are often prevalent in both children and parents.
- Psychological trauma manifesting as physical symptoms, poor sleep, anxiety or post-traumatic stress disorder (PTSD) is commonly described and may manifest up to several years post-resettlement. This is relevant for children, adolescents and parents, impacting on education and ability to maintain employment and/or social connectivity or other protective factors.
- Almost one third of families require assistance with linking the families into essential community health and other statutory services or additional welfare supports. Parental capacity is often impacted by trauma, mental, cognitive and physical health concerns, illiteracy or limited knowledge of western models of care/service provision, lack of technology (e.g. internet access), financial barriers and/or stigma.
- Higher risk of neurocognitive disability in children born to mothers from low-socioeconomic countries (including refugee-source nations) (Abdullahi 2018/2019).

These findings, whilst not exhaustive, provide examples of common experiences survived by refugee and asylum-seeking families prior to settling in Western Australia and post-settlement. The impact of these experiences should be considered when an individual from a refugee and asylum-seeking background is before the Court. Their lived-trauma does not extinguish across their lifetime and may impact upon their participation in justice systems as a witness, victim or perpetrator.

7.2.4.3 The intersection of criminal law and migration law

7.2.4.3.1 Sentencing and visa cancellation or deportation

In Western Australia, sentencing laws provide no capacity to take into account the impact of a sentence on a person's visa or the likelihood of deportation:

- Deportation is not considered to be a matter of mitigation during sentencing,¹⁰⁵² and a judge may not tailor a sentence to prevent s 501 from applying. As stated by Street CJ in *R v Chi Sun Tsui* (1985) 1 NSWLR 308 at 311, 'the prospect of deportation is not a relevant matter for consideration by a sentencing judge, in that it is the product of an entirely separate legislative policy area of the regulation of society'. That case concerned the construction of parole legislation in New South Wales. However, this statement is applicable to sentencing principles applied in Western Australia. Note that the approach taken in Victoria and Queensland in recent years has departed from this approach.¹⁰⁵³
- Whether or not a person is deported is an executive decision to be taken by the executive government,¹⁰⁵⁴ and thus not within the province of the courts.

However, as The Humanitarian Group submitted it is also the case that:¹⁰⁵⁵

- Non-citizens, regardless of the amount of time they have spent in Australia or the level of connection they have with the Australian community, face what is effectively a double-penalty – one from the criminal law and another through migration law.
- The prospect of visa cancellation for refugees is even more serious than for other migrants. Australia does not deport or remove people in relation to whom Australia has non-*refoulement* obligations pursuant to international treaties that have been ratified.¹⁰⁵⁶ As a result, refugees and those qualifying for complimentary protection, whose visas have been cancelled, face the prospect of indefinite detention.¹⁰⁵⁷

¹⁰⁵² *Ponniah v R* [2011] WASCA 105 [48] (Mazza JA; Pullin JA and Buss JA agreeing at [1]-[2]). In other cases, the prospect of deportation has been held to be an irrelevant sentencing factor: *Dauphin v The Queen* [2002] WASCA 104 [22].

¹⁰⁵³ *Hickling v SOWA* [2016] WASCA 124 [51] (Mazza JA and Mitchell J).

¹⁰⁵⁴ *Ponniah v R* [2011] WASCA 105 [48]; *Chu Shao Hung v the Queen* [1953] HCA 33; (1953) 87 CLR 575, 583-584.

¹⁰⁵⁵ Aspects of this section are drawn from the submission from The Humanitarian Group (28 September 2016).

¹⁰⁵⁶ Minister for Immigration and Border Protection, *Direction No 65 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under s501 and revocation of mandatory cancellation of a visa under s 501CA* (22 December 2014) [10.1(2)] (accessed 17 August 2021).

¹⁰⁵⁷ Minister for Immigration and Border Protection, *Direction No 65 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under s501 and revocation of mandatory cancellation of a visa under s 501CA* (22 December 2014) [10.1(6)] (accessed 17 August 2021).

- The impact that court proceedings may have on a person's visa status and on the person's family members can create significant additional distress and affect those persons' view of and behaviour towards the court.

7.2.4.3.2 Section 501(3A) of the *Migration Act 1958* (Cth)

On 11 December 2014, s 501(3A) was inserted into the *Migration Act 1958* (Cth) via the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth), changing the s 501 'character test'. Section 501(3A) requires the mandatory cancellation of visas where a person is found guilty of a sexually based crime against a child. At the same time, the length of sentences required to trigger a discretionary visa cancellation was also effectively shortened to a series of sentences amounting together to 12 months or more.¹⁰⁵⁸

The Department of Home Affairs reported in 2017 that the number of visas cancelled has risen exponentially since the amendment, from 76 in 2013-14 to 986 in 2015-16, to 1,278 in 2016-17.¹⁰⁵⁹

For the period from 1 July 2019 to 30 June 2020, 1,021 visas were cancelled on character grounds. The nationalities of those persons who had their visa cancelled were New Zealand (477), United Kingdom (99), Vietnam (62), Sudan (31), China (22), Iran (17), Malaysia (17), Fiji (16), Iraq (14), not recorded (20) and all other countries (246).¹⁰⁶⁰ In many cases, the visa cancellations may be revoked. However, by that time the person will have typically spent many months in immigration detention. Detention seriously impairs a person's education, employment, and relationships, creating even greater challenges for them and their families upon release.

¹⁰⁵⁸ *Migration Act 1958* (Cth) s 501(6), (7) (accessed 5 April 2019).

¹⁰⁵⁹ Australian Government, Department of Home Affairs, *Key Visa Cancellation Statistics* (accessed 7 January 2021).

¹⁰⁶⁰ Australian Government, Department of Home Affairs, *Key Visa Cancellation Statistics* (accessed 7 January 2021).

7.3 PRACTICAL CONSIDERATIONS¹⁰⁶¹

7.3.1 The need for an interpreter or translator

7.3.1.1 When to use an interpreter or translator

An interpreter is someone who interprets speech orally – for example, they may interpret what is being said in court to any party or witness to the proceedings. Note however that interpreters are not experts on cultural practices or communication styles and should not be asked to explain these things.¹⁰⁶²

There are several techniques adopted by professional interpreters:

- **Consecutive interpreting** is when the interpreter listens to larger segments of the original message (perhaps taking notes while listening) and then interprets while the speaker pauses. This is the most commonly used mode of interpreting spoken languages.
- **Simultaneous interpreting** is interpreting while the speaker continues to speak or sign. Thus the interpretation lags a few seconds behind the speaker. In settings such as business negotiations and court cases, whispered simultaneous interpreting (called *chuchotage*) may be used to keep one party informed of the proceedings.
- **Sight translation** involves transferring the meaning of the written text by oral delivery (reading in one language, relaying message orally in another language). An interpreter may be asked to provide sight translation of short documents, although the Supreme Court's practice directions indicate that this will not ordinarily be permitted in court hearings.¹⁰⁶³ The *Western Australian Language Services Policy 2020* also states that sight translation should not be used for legal, lengthy or linguistically complex texts.¹⁰⁶⁴

¹⁰⁶¹ Much of the information in section 7.3 is sourced from the Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed, 2016) Chapter 6; and the Office of Multicultural Interests, *Western Australian Language Services Policy 2020* (published 3 November 2020) (both accessed 17 August 2021).

¹⁰⁶² Submission from The Humanitarian Group (28 September 2016).

¹⁰⁶³ Supreme Court of Western Australia, *Consolidated Practice Directions* (as at 1 February 2019) PD 9.13[3] (accessed 5 November 2019).

¹⁰⁶⁴ Office of Multicultural Interests, *Western Australian Language Services Policy 2020* (published 3 November 2020) page 5 (accessed 17 August 2021).

- **Deaf interpreting** uses a range of communication skills and knowledge to address complex situations and the needs of particular client groups (for example, a person may be both Deaf and visually impaired).
- **Relay interpreting** is where one language is interpreted into a second language, with the second language then interpreted into a third language (for example, Standard English speaker to English/Kriol interpreter to Kriol/Jaru interpreter to Jaru speaker).

Some information about sign language interpreting is provided in chapter 4 on people with disabilities: refer to section 4.6.3.3.1. Note that people who are Deaf regard deafness as a culture rather than a disability.

A translator is someone who transfers a source text (written texts, documents and other recorded information such as business letters or a taped videoconference) from one language to another language – the 'target language'.

In many cases, an appropriate interpreter or level of translation will already have been arranged by the time a person appears or the document is used in court, usually 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.

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

The *Western Australian Language Services Policy 2020* and policy guide aims to provide Western Australian public sector agencies with the tools to promote equitable access to information and services through the provision of language services. The ways agencies can do this include:

- the inclusion of language services and multilingual information into core operational plans and/or project budgets;
- ensuring staff are aware of the agency's language policies, including working effectively with interpreters;

- providing staff with access to cultural competency and cross-cultural communication training; and
- collating and utilising data on languages spoken by clients to develop more responsive and targeted client services.

National and state legislation and policies,¹⁰⁶⁵ underpinned by the Universal Declaration on Human Rights and related covenants, support a person's rights to language services. There are substantial risks associated with not providing language services, particularly in legal contexts. For example, it is well recognised that a criminal trial cannot be fair if the accused does not understand the language in which it is conducted.¹⁰⁶⁶ Article 14(3)(f) of the *International Covenant on Civil and Political Rights* (ICCPR) protects this right explicitly.¹⁰⁶⁷

While there is no absolute legal right under Western Australian law to a language interpreter, there is a presumption that those who need one (either in order to give their evidence or to understand the evidence of others) should be able to use one.¹⁰⁶⁸

The Judicial Council on Cultural Diversity (JCCD)¹⁰⁶⁹ has developed Australian National Standards for Working with Interpreters in Courts and Tribunals to establish recommended and optimal practices for Australia's courts. Standard 3 states:¹⁰⁷⁰

Courts must accommodate the language needs of parties and witnesses with limited or no English proficiency in accordance with the requirements of procedural fairness.

¹⁰⁶⁵ Such as the Office of Multicultural Interests, *Western Australian Language Services Policy 2020* (published 3 November 2020) (accessed 17 August 2021).

¹⁰⁶⁶ See for example, *Dietrich v The Queen* (1992) 177 CLR 292, 330-331, 363 (accessed 8 April 2019).

¹⁰⁶⁷ Submission from the Office of Multicultural Interests (September 2016).

¹⁰⁶⁸ See for example, *Ebatarinja v Deland* (1998) 196 CLR 354, 454; *Re East; Ex parte Nguyen* (1998) 169 CLR 354, 390 (both accessed 8 April 2019). The Western Australian case, *Gibson v Western Australia* [2017] WASCA 141 makes it clear that interpreter services may also be required when counsel is taking instructions from an accused (accessed 8 April 2019).

¹⁰⁶⁹ The JCCD has been endorsed by the Council of Chief Justices of Australia and its purpose is to develop a framework to support procedural fairness and equality of treatment for all court users – regardless of their race, colour, religion, or national or ethnic origin – and to promote public trust and confidence in Australian courts and the judiciary.

¹⁰⁷⁰ JCCD, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2017) (accessed 8 January 2021).

Sections 10, 137 and 138 of the Criminal Investigation Act 2006 (WA) contain a number of protective provisions for arrested persons and suspects. In particular, s 137(3)(d) of that Act provides that an arrested person is entitled to assistance by an interpreter or other qualified person if the person is unable to understand or communicate in spoken English sufficiently. In addition to these rights, an arrested suspect may not be interviewed until the services of an interpreter or other qualified person are available 'if he or she is *for any reason* unable to understand or communicate in spoken English sufficiently': s 138(2)(d) (emphasis added).

Section 75(3)(b) of the Criminal Procedure Act 2004 (WA) also provides that in summary proceedings, a court may adjourn a charge so that the services of an interpreter can be obtained.

Although the Evidence Act 1906 (WA) does not provide an accused charged with an offence with a statutory right to an interpreter, it provides for persons acting as an interpreter to be sworn or affirmed for that purpose (ss 102 and 103).

Section 30 of the Commonwealth's Evidence Act 1995 provides:¹⁰⁷¹

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.

The decision as to whether interpreter and translator services are used within the court is the responsibility of the judicial officer in consultation with the parties. There is a 'Four-part test for determining need for an interpreter' annexed to the JCCD's Recommended National Standards for Working with Interpreters in Courts and Tribunals which may be of assistance. This test has been adopted from the Northern Territory Aboriginal Interpreter Service. Note that the JCCD's recommended standards have been endorsed by the Council of Chief Justices and these standards require judicial officers to satisfy themselves as to whether a party or witness requires an interpreter in accordance with this four-part test.¹⁰⁷²

¹⁰⁷¹ This Act applies to proceedings in the Federal Court, and some appeals to the Family Court of Australia: Evidence Act 1995 (Cth) s 4.

¹⁰⁷² JCCD, Recommended National Standards for Working with Interpreters in Courts and Tribunals (2017) Standard 16.3 (accessed 8 January 2021).

The particular difficulties relating to the availability of interpreters for people speaking Aboriginal languages are discussed in chapter 9 (Regional and remote Western Australia) at section 9.3.4.1.

While, at common law, a party in civil or criminal proceedings is not entitled as of right to give evidence in their native language through an interpreter,¹⁰⁷³ there are many cases where the provision of an interpreter has been stressed as being critical wherever there is any possibility that to not provide one would disadvantage a party or jeopardise their right to a fair trial.¹⁰⁷⁴

In *Dietrich v The Queen*, Gaudron J commented that the requirement that a trial be fair may require that 'procedures...be modified, for example, to allow evidence to be given through an interpreter'.¹⁰⁷⁵

In *Re East; Ex parte Nguyen*, Kirby J commented that where a trial would be unfair because of the lack of an interpreter, 'it is the duty of the judicial officer to endeavour to ensure that an interpreter is provided'.¹⁰⁷⁶

In *Ebatarinja v Deland*, the High Court commented that where an accused 'does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial'.¹⁰⁷⁷

The Australian Law Reform Commission has also stated that the provision of an interpreter 'is necessary to put a non-English-speaking defendant in the same position as an English-speaking one, so far as it is possible to do'.¹⁰⁷⁸

¹⁰⁷³ *Dairy Farmers Cooperative Milk Co Ltd v Acquilina* [1963] HCA 59; (1963) 109 CLR 458, 464 (accessed 9 April 2019).

¹⁰⁷⁴ See, for example, *Western Australia v Gibson* [2014] WASC 240 [3], [180] (accessed 9 April 2019).

¹⁰⁷⁵ *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292, 363, see also Deane J at 330 -331 (accessed 9 April 2019)).

¹⁰⁷⁶ *Re East; Ex parte Nguyen* [1998] HCA 73; (1998) 196 CLR 354, 390 (accessed 9 April 2019)).

¹⁰⁷⁷ *Ebatarinja v Deland* [1998] HCA 62; (1998) 194 CLR 444, 454 (accessed 9 April 2019).

¹⁰⁷⁸ Australian Law Reform Commission, *Multiculturalism and the Law Report No 57* (1992) [3.33] (accessed 10 April 2019).

Points to consider - when to use an interpreter:

- In summary, relevant provisions in the Evidence Act 1906 (WA) and other legislation, combined with relevant case law, mean you should err on the side of caution.
- Make sure that an appropriate level of interpreter is provided wherever it appears that a particular person's inability to understand fully or communicate adequately in English might impact on their ability to receive a fair hearing. This may become apparent after someone has started to give evidence.
- Generally allow an interpreter to be provided if a particular person, or their legal representative, asks for one, unless you are firmly of the view that this is unnecessary given your judgment of the level of the person's English communication and the information they need to provide and/or be questioned on.
- If a document in a language other than English is at all important to the proceedings, ensure that it is effectively and adequately translated by an appropriate level of translator and that the accredited translation is made available to all relevant parties.
- If a document in English needs to be understood by someone whose English is inadequate for this, there are two options:
 - If the document is relatively simple, you may permit a copy to be given to the interpreter to read and subsequently perform a sight translation for the benefit of the non-English speaker. Inform the interpreter that they have permission to ask you questions or to consult dictionaries if needed. Note however that the Supreme Court's practice directions indicate that this option would not ordinarily be permitted.
 - If the document is complex, the proceedings may need to be adjourned in order to obtain a translation by an accredited translator.

7.3.1.2 Type of interpreter or translator to use¹⁰⁷⁹

In Australia, interpreters have a wide variety of accreditations, certifications, qualifications, in-service training, experience and engagement with professional associations.

In the 2006 case of *de la Espriella-Velasco v The Queen*, Roberts-Smith J stated that:¹⁰⁸⁰

It is important to note that, first, none of the NAATI levels of accreditation involve specialist examination or legal interpreting accreditation. All are generalist levels, although individuals may choose to specialise in particular areas such as law, medicine, social work or the like. Secondly, the majority of interpreters currently working in the courts in Australia are accredited at 'Interpreter' level (the old Level 3). Finally, there is a strong academic view that the NAATI examination, at any level, is not adequate to test court interpreters.

At that time, for some languages, National Accreditation Authority for Translators and Interpreters (NAATI) accreditation was not available even to those levels queried in *de la Espriella-Velasco v The Queen* and was only available to a paraprofessional level. Moreover, NAATI did not have accreditation for some languages at all (e.g. some of the African and Aboriginal languages).

In 2018, NAATI reviewed their scheme of *accreditation* and replaced it with a *certification* model. The certification system is designed to evaluate whether an individual is competent to practice as a translator or interpreter by setting minimum standards across a number of areas of competency. NAATI allowed interpreters a period in which to transition to the certification system, with NAATI credentials from pre-2018 (accreditation or recognition) remaining valid until their expiry.¹⁰⁸¹

The NAATI certification model (effective January 2018) specifies the following levels of certification, according to proficiency and skill:¹⁰⁸²

- Certified Conference Interpreter;

¹⁰⁷⁹ Unless otherwise indicated, drawn from JCCD, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2016) (accessed 10 April 2019).

¹⁰⁸⁰ *de la Espriella-Velasco v The Queen* [2006] WASCA 31; (2006) 31 WAR 291 [14] (accessed 10 April 2019).

¹⁰⁸¹ JCCD, *Addendum to the Recommended National Standards for Working with Interpreters in Courts and Tribunals* (May 2019) page 1 (accessed 17 August 2021).

¹⁰⁸² JCCD, *Addendum to the Recommended National Standards for Working with Interpreters in Courts and Tribunals* (May 2019) page 1 (accessed 17 August 2021).

- Certified Specialist Interpreter – Legal (CSIL) (available from mid-2019);
- Certified Interpreter (CI);
- Certified Provisional Interpreter (CPI); and
- Recognised Practicing Interpreter (not certified).

A CI is suitable to work in legal contexts which are complex but not specialised, including formal proceedings in courts and tribunals. The CI certification is equivalent to a 'Professional Interpreter' under the previous accreditation system.¹⁰⁸³

A CSIL must undertake training and continuous professional development in specialist legal interpreting. While CSILs might work in the same institutions as CIs, they are competent to interpret complex, highly specialised, expert-to-expert communication in those institutions. For example: sentencing remarks by a judge, expert witness statements or testimony, or presentation of legal arguments.¹⁰⁸⁴ There was no equivalent to the CSIL level under the previous NAATI accreditation system.¹⁰⁸⁵

A CPI is suitable for general conversations and interpreting in a broad range of non-complex, non-specialised contexts, for covering dialogue interpreting. The CPI certification is equivalent to a 'Paraprofessional Interpreter' under the previous accreditation system.¹⁰⁸⁶

In reality, in Australia there is a very limited range and availability of Professional Interpreters/ Certified Interpreters and, in some languages, even of Paraprofessional Interpreters/ Certified Provisional Interpreters. This reflects Australia's great cultural diversity. The pool of certified or accredited, trained and experienced interpreters also varies considerably between languages. Differences can reflect the size of the language-cultural group in Australia, the demand for interpreting in that language and socio-historical factors associated with people from that language group.

¹⁰⁸³ JCCD, *Addendum to the Recommended National Standards for Working with Interpreters in Courts and Tribunals* (May 2019) page 1 (accessed 17 August 2021).

¹⁰⁸⁴ NAATI, *Certified Specialised Legal Interpreter* (2019) (accessed 7 January 2021).

¹⁰⁸⁵ JCCD, *Addendum to the Recommended National Standards for Working with Interpreters in Courts and Tribunals* (May 2019) page 1 (accessed 17 August 2021).

¹⁰⁸⁶ JCCD, *Addendum to the Recommended National Standards for Working with Interpreters in Courts and Tribunals* (May 2019) page 1 (accessed 17 August 2021).

Australia's linguistic diversity necessitates a practical approach to establishing standards for interpreting in Australian courts, while providing mechanisms to continue the work of the justice system.

According to the Judicial Council on Cultural Diversity,¹⁰⁸⁷ generally courts should prefer to engage a 'Qualified Interpreter' – that is, a person qualified for court interpreting because she or he has all of the following attributes:

- a tertiary (VET or university) qualification in interpreting;
- accreditation/ certification from NAATI;¹⁰⁸⁸
- membership with a professional body (e.g. the Australian Institute of Interpreters and Translators, Australian Sign Language Interpreters' Association or other recognised State or Territory based interpreter association); and
- experience in interpreting in court.

Where a Qualified Interpreter cannot reasonably be obtained, a 'Suitable Person' may be engaged instead; that is an interpreter who has some of the attributes of a qualified interpreter or, where no interpreter can be found, a bilingual.¹⁰⁸⁹

¹⁰⁸⁷ JCCD, *Addendum to the Recommended National Standards for Working with Interpreters in Courts and Tribunals* (May 2019) page 1 (accessed 17 August 2021)..

¹⁰⁸⁸ See NAATI, *Find a Certified Translator or Interpreter* (accessed 7 January 2021).

¹⁰⁸⁹ For more detail see JCCD, *Addendum to the Recommended National Standards for Working with Interpreters in Courts and Tribunals* (May 2019) page 1 (accessed 17 August 2021). For more detail see JCCD,.

Note, however, that using an unaccredited or inappropriately accredited practitioner can hinder communication in court and lead to a successful appeal and/or retrial if the trial is found to be unfair. The New South Wales Court of Criminal Appeal ordered a new trial in *R v Saraya* because, in relation to the evidence which the appellant gave in his trial, 'the deficiencies in interpretation were such that the appellant was unable to give an effective account of the facts vital to his defence'.¹⁰⁹⁰ *R v Saraya* was considered by the Western Australian Court of Appeal in *de la Espriella-Velasco v The Queen*, although it was distinguished on the facts of that case.¹⁰⁹¹

Other issues may also be relevant to the choice of interpreter. Although it might be assumed that people without sufficient English language skills would always welcome the assistance of an interpreter, some people from CaLD communities may have reservations about using an interpreter as outlined below.¹⁰⁹² If possible, when selecting an interpreter consider:

- issues of confidentiality, particularly in small language groups, where the interpreter and the person in court may have friends or family in common;
- issues of reliability, where an interpreter speaks the same language but the person before the court is from a different clan where there is historic animosity and lack of trust;
- the gender of an interpreter as a relevant issue. Some cultural practices pose restrictions on men and women interacting, so having to use an interpreter of the opposite gender may increase mental distress and prove disadvantageous; and

¹⁰⁹⁰ (1993) 70 A Crim R 515, 516 (Badgery-Parker J).

¹⁰⁹¹ [2006] WASCA 31; (2006) 31 WAR 291 (accessed 1 August 2017). For a discussion of the authorities looking at the manner in which interpreter services can be provided in legal proceedings, see the judgment of Roberts-Smith J and in particular the discussion of the problems associated with interpreting 'word for word' and literal interpretation, at [17], [52], [75] (see also Law Reform Commission WA, *Aboriginal Customary Laws Final Report* (2006) 332-342 (accessed 9 April 2019)).

¹⁰⁹² Submission from The Humanitarian Group (28 September 2016).

- that when interpreting in court or tribunal hearings, an interpreter's second language should only be used as a last resort. It is also important for judicial officers to be sensitive to circumstances where the person before the court appears to have sufficient English and may be reluctant to advise the court of issues understanding technical and sophisticated language. This is particularly relevant in matters where a person from a culturally or linguistically diverse background is self-represented.¹⁰⁹³

7.3.1.3 Suppliers of interpreters or translators to use

The main suppliers of National Accreditation Authority for Translators and Interpreters (NAATI) accredited interpreters and translators in Western Australia, other than for Aboriginal languages, are:

ONCALL Interpreters and Translators Agency Pty Ltd

- Face-to-face interpreting services are provided 24 hours a day 7 days a week for over 150 different languages and dialects.
- Note that Court and Tribunal Services will pay for the cost of interpreters and translators booked through a court, under a contract with ONCALL.

Translating and Interpreting Service (TIA)

- Run by the Commonwealth Department of Home Affairs, TIS provides telephone interpreting services 24 hours a day, 7 days a week, on-site interpreters and a document translation service for over 160 languages and dialects.

Access Plus Western Australian Deaf (formerly the Western Australian Deaf Society) - Access Interpreting

- Access Interpreting is the only organisation to hold a Common Use Agreement with the Government of Western Australia for Auslan Interpreting Services. All interpreters registered with Access Interpreting are accredited by NAATI. All Auslan Interpreters must adhere to the code of ethics set out by the Australian Sign Language Interpreters' Association.

¹⁰⁹³ Submission from The Humanitarian Group (28 September 2016).

There are also independent interpreters or translators. If any of these are used, you can check that they are NAATI-certified/accredited and that their certification/accreditation is of a sufficient level. This can be verified on the [NAATI website](#) — see section 7.3.1.2.

As indicated, NAATI does not have certification/accreditation for all languages. If a qualified interpreter is not available, ONCALL will advise the court.

Judicial officers must determine whether an interpreter is required and whether a non-certified/accredited interpreter would be appropriate in the circumstances.

The main issue is ensuring a fair trial can be conducted; the availability of resources is a secondary consideration.

Aboriginal Interpreting WA (which previously operated as Kimberley Interpreting Service between the years 2000 and 2017) provides interpreters in a number of Aboriginal languages.

Refer to section 9.3.3.4.1 for further information about the services provided by *Aboriginal Interpreting WA*.

7.3.1.4 Who pays for an interpreter or translator¹⁰⁹⁴

In criminal cases, the Department of Justice's Court and Tribunal Services will pay for interpreting and translating services which have been booked through them for any client or party. These services are provided by ONCALL under a contract with Court and Tribunal Services.

Arrangements also exist to access *Aboriginal Interpreting WA* (which previously operated as Kimberley Interpreting Service, between the years 2000 and 2017), which provides interpreters in a number of Aboriginal languages.

Refer to section 9.3.4.1 for further information about the particular barriers in accessing Aboriginal interpreters.

¹⁰⁹⁴ The Department of Justice has a language services policy – see the Office of Multicultural Interests, *Western Australian Language Services Policy 2020* (published 3 November 2020) (accessed 17 August 2021).

In civil cases, where a request has been made by a judicial officer or a booking has been made for an interpreter or translator through the court, Court and Tribunal Services will pay for that service in some jurisdictions as indicated below. A party may also arrange and pay for any interpreters or translators that they require for themselves or their witnesses. At the end of the trial, the successful party may at the discretion of the judicial officer seek to recover any interpreter/translator costs as part of their costs.¹⁰⁹⁵

In the Family Court of Western Australia, where an interpreter is required in or by the court (e.g. for court proceedings, court conferences, family consultant appointments) the interpreter is arranged and paid for by Court and Tribunal Services. The Court will not meet the cost of interpreters that are not arranged by the Court, nor accept responsibility for the cost of interpreters for the purpose of instructing solicitors.¹⁰⁹⁶

In the Coroner's Court, where an interpreter is required for a hearing or requested by the coroner, the interpreter will be arranged and paid for by Court and Tribunal Services.

The *State Administrative Tribunal* books interpreters for parties whose first language is a language other than English, who are Deaf or hearing impaired, or who have special needs, at no cost to the parties. Most interpreters are required for Human Rights matters. A senior member of staff checks various sources of information to assess whether an interpreter is required. Parties may also raise the need for an interpreter after receiving their Notice of Hearing, which invites parties to inform the listings officer of their request.

7.3.1.5 Working with an interpreter

Points to consider to ensure the best use of an interpreter:

- Remember that there may be issues concerning who will make an appropriate interpreter. You should attempt to assess a person's needs; ask if they would prefer a male or female interpreter and if there are any possible conflicts with an interpreter who may be assigned to them.

¹⁰⁹⁵ Legal Aid also covers the cost of interpreters if they are booked by them: refer to Legal Aid WA, *Get Help in Your Language* (reviewed 27 April 2018) (accessed 17 August 2021).

¹⁰⁹⁶ The Family Court of WA *Interpreter Services Policy* (webpage updated 17 September 2020) (accessed 17 August 2021).

- It will greatly assist interpreters of any level to perform at a higher standard if they are briefed prior to any assignment. This may include a summary of the case in which they will be required to interpret, if possible, or at the very least, some information from the judicial officer at the commencement of their interpreting job. Interpreters should also be made aware that they are allowed to ask questions to seek clarification if needed in order for them to render accurate interpretations.¹⁰⁹⁷
- Unless exempted, make the interpreter take an oath or affirmation.

Additional information on oaths and affirmations can be found in
chapter 3 (section 3.8.2).

- Ensure that the interpreter understands that they must try their best (within the confines of the particular language they are interpreting from or into) to convey 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 (educational) level and style of communication and language 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, 'No, I saw a large, black dog' is very different from 'Not really, I er think I saw, sort of saw a dog that was kind of large, its coat was blackish'. If the latter was what was said or conveyed then that is what you want to hear, not the former statement. It is important that interpreters do not wittingly or unwittingly either upgrade or downgrade a particular person's evidence, educational level or style of language.
- Check with the interpreter what needs they have in relation to such things as the speed and amount of speech to be interpreted at any one time.
- Ensure the interpreter does not block anyone's line of vision to the person whose speech is being interpreted.

¹⁰⁹⁷ Hale S, 'Helping Interpreters to Truly and Faithfully Interpret the Evidence: The Importance of Briefing and Preparation Materials' (2013) 37(3) *Australian Bar Review* 307.

- 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 ...' or '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 (refer to the examples provided in section 7.3.5.3), and also slowly enough and in short enough chunks for the interpreter to be able to do their job as well as possible. Ask the interpreter to let you know if they are having difficulty with any of this so that you can intervene if necessary.¹⁰⁹⁸
- Ensure that the person being interpreted is aware that they are able request another interpreter where the client/interpreter relationship is compromised.¹⁰⁹⁹
- 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'.
 - Speak as if they are the person they are interpreting for — that is, they will use 'I', not 'he' or 'she', when reflecting the actions or feelings of the person whose speech they are interpreting.
 - Within the guidelines listed in this section, generally interpret everything that they, and the person they are interpreting for, say. There should not usually be any non-interpreted lengthy exchanges between the interpreter and the person they are interpreting for unless there is good reason for this — for example, where the interpreter is quietly interpreting a conversation occurring between two other parties (such as an English-speaking witness and their cross-examiner). It is

¹⁰⁹⁸ See also s 26 of the *Evidence Act 1906* (WA), dealing with improper questions put to witnesses (accessed 10 April 2019).

¹⁰⁹⁹ Submission from The Humanitarian Group (28 September 2016).

important to be aware of the reactions of the witness to what is being interpreted; this may indicate that an interpreter has overstepped their role.¹¹⁰⁰

- It is also important to note that it is difficult, if not impossible, to make accurate assessments in relation to the demeanour and language style or language level of a witness when their speech is being interpreted. You may need to alert the jury to this fact relatively early, so that they are not unfairly influenced.

Points to consider – guidelines for magistrates and judges for working with interpreters in court¹¹⁰¹ (developed by Professor Sandra Hale,¹¹⁰² University of New South Wales):

- Ask interpreters to introduce themselves and state their level of NAATI accreditation and their formal qualifications (e.g. degree or TAFE qualification in interpreting) if any.
- Ask them if they have worked in court before. If not, explain their role: 'To interpret everything faithfully and impartially in the first/second grammatical person'.
- Remember that interpreting faithfully does not mean interpreting 'literally' — word-for-word translating normally produce nonsensical renditions.
- Ask them what resources they will be accessing in court (for example, online glossaries and dictionaries can now be accessed on smart phones and tablets. Interpreters may need to consult them at different stages of the hearing or trial).
- Tell the interpreter to feel free to seek clarification when needed, seek leave to consult a dictionary or to ask for repetitions. (NB it is a sign of a good interpreter to take such actions when needed, to ensure accuracy of interpretation).
- Explain the interpreter's role to the witness/defendant/accused/jury. Ask the interpreter when s/he would like to take their breaks — ideally breaks should be provided at least

¹¹⁰⁰ For example, Womens Health and Family Services advised of instances in which interpreters have taken the opportunity to tell clients to return to their husbands and cease their actions (Submission from Women's Health and Family Services, 29 September 2016).

¹¹⁰¹ Adapted from the NSW *Equality before the Law Bench Book* (2006), section 3 (as updated 12, June 2018) (accessed 8 January 2021).

¹¹⁰² Editor of *Translation & Interpreting.org: The International Journal of Translation and Interpreting Research* (accessed 17 August 2021).

every 45 minutes (interpreting requires a very high cognitive load and is mentally very taxing).

- Ensure that the interpreter is comfortable and is provided with a chair, a jug of water and glass, a table to lean on to take notes and a place to put their belongings (such as a bag and umbrella).
- Instruct lawyers and witnesses to speak clearly and at a reasonable pace, and to pause after each complete concept to allow the interpreter to interpret (NB if you cannot remember the question in full or understand its full meaning, it is very likely the interpreter will not either).
- If there is anything to be read out, provide the interpreter with a copy of it so s/he can follow. If it is a difficult text, give him or her time to read through it first.
- Stop any overlapping speech or any attempts from lawyers or witnesses to interrupt the interpreter while s/he is interpreting.
- Do not assume that the witness will understand legal jargon when interpreted into their language. Interpreters must interpret accurately, and cannot simplify the text or explain legal concepts. If there are no direct equivalents, the interpreter may ask for an explanation which can then be interpreted.
- Interpreters are required to interpret vulgar language, including expletives.
- Interpreters are required to interpret everything for the defendant or accused, to make them linguistically present. This includes the questions and answers during evidence, any objections, legal arguments and other witness testimonies. The consecutive mode will be used when interpreting questions and answers. The whispering simultaneous mode (called chuchotage) will be used for all other instances (if the interpreter is trained in this mode of interpreting).
- If anyone questions the interpreter's rendition, do not take their criticism at face value. Bilinguals who are not trained interpreters often overestimate their competence.

Compare qualifications and give the interpreter the opportunity to respond to the criticism.

7.3.1.6 The provision of interpreters and translators before court proceedings start

It is important to check whether, in the lead-up to the court proceedings, all relevant parties have access to interpreters and/or translated documents such as statements and affidavits that it is critical for them to understand before they sign the documents, or that they need to read in advance and adequately understand.

7.3.2 Modes of address

7.3.2.1 Different naming systems

Points to consider:

- Some ethnic groups have very different naming systems from the generally gender-specific 'first' or 'given' name, then middle name, then family name system used by mainstream English-speaking Australians. For example, they may:
 - reverse the order of names and thus start with their family name and end with their given name — as do, for example, Chinese and Vietnamese;
 - not have a family name at all — as do, for example, Icelanders;
 - not often use their family name when referring to someone else — for example, Russians tend to use their given name and middle name only (the middle name being a name that indicates their father's given name); and
 - have particular words in their names, or prefixes or suffixes attached to one of their names, that indicate such things as:

Gender — for example, the Vietnamese names of 'Van' for men and 'Thi' for women.

Marital status — for example, 'Achi' after some Indian women's names indicating that they are married.

Son of, or daughter of — for example the Muslim prefix 'Ibn' meaning 'son of', or the Jewish 'Ben' meaning son of; or the initial in some Indian names that indicates

who they are the son of; or the suffix at the end of a Russian's middle name that represents the name of their father, which is 'ova' for women or 'ovic' for males.

Father of, or mother of — for example the Muslim 'Abu' (meaning father of); and the Muslim 'Ummul' (or 'Ummu', meaning mother of).

Spanish speakers — may use both their paternal and maternal surnames, with the paternal name appearing first e.g. Juan Lopez Garcia (Lopez being the paternal surname and Garcia the maternal surname).

- Not all members of a particular ethnic or religious group will follow the cultural norm for their group. Many have either completely adopted the mainstream-English-speaking Australian naming system, or use alternative names that fit that system when they deal with Australian bureaucracy.
- Some ethnic names may be difficult for English-speaking monolingual Australians to pronounce. For example the original language may be tonal. In tonal languages, each word has a marker that indicates the pitch or 'shape' of the word, and therefore how it should be pronounced. Unfortunately, there is no easy way of indicating this in English.

7.3.2.2 The mode of address and/or naming system to use

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

Points to consider when naming or addressing people in court:

- Ask the person's legal representative (where they have one) how a particular person wishes to be addressed, and if necessary how to pronounce their name(s), and then do as instructed. If you ask the person directly they may be uncomfortable at having to pronounce their name or their preferred form of address, and/or may just agree to whatever the judicial officer suggests despite their unease with that suggestion.

- Use the phrase 'given name' rather than 'Christian name'.
- Use the phrase 'family name' rather than 'surname'.
- Where necessary, clarify what each part of a particular person's names represents — that is, whether it is a given name, nickname, family name.
- 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 is a given name, family name, and so on), and then check whether you and others in the court can use the same naming system or whether you need to use a more formal naming system.
- When someone avoids referring to someone else from their own or even another ethnic background by name, check whether this is customary. For example, Vietnamese people will tend to avoid mentioning the name of anyone who is senior in age or status, as to do so would be seen as impolite and insolent. In fact, 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.

7.3.3 Oaths and affirmations

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 or linguistic background.

Additional information on oaths and affirmations is provided in section 3.8.2.

7.3.4 Appearance, behaviour and body language

7.3.4.1 Background information

It is commonly known that most people, including jurors, are likely, at least in part, to assess a person's credibility or trustworthiness based on their perceptions of the person's demeanour.

However, not only has demeanour been found to be an unreliable indicator of veracity,¹¹⁰³ but appearance, behaviour and body language are all heavily culturally determined. For example, how a Chinese person appears and behaves in a particular situation is likely to be different from how an Anglo-Celtic Australian appears and behaves.

The jury's perception of demeanour, influenced by their own cultural stereotypes, may impact on their decision-making. This means that it is vital that no-one in the court allows any culturally determined assumptions about what they believe does or does not look trustworthy to unfairly mislead or influence their assessment of the credibility or trustworthiness of a person from a CaLD background.

For many people from ethnic or migrant backgrounds, the traits that some other people may regard as indicative of dishonesty or evasiveness (for example, not looking someone in the eye) are the very traits that are the cultural 'norm' and expected to be displayed in order to be seen as polite and appropriate and not as rude or culturally inappropriate.

There are sub-cultures within every culture, including mainstream-English-speaking Australian culture, that observe different styles of appearance, behaviour and body language, and also individuals who do not fit any particular cultural norm. So it is important not to assume that everyone born, for example, in Vietnam will behave in the same way, or to assess people from a Vietnamese background who do not seem to follow general Vietnamese patterns of behaviour as dishonest or lacking in credibility.

7.3.4.2 Examples of differences in appearance, behaviour and body language and ways in which you may need to take account of them

Points to consider - differences in appearance, behaviour and body language:

- Differences in appearance, behaviour and body language that you may need to take account of include:

¹¹⁰³ See for example, Re L, 'Oral Evidence v Written Evidence: The Myth of the "Impressive Witness"' (1983) 57 ALJ 679; Kirby J, *Judging: Reflection on the Moment of Decision* (speech to the 5th National Conference on Reasoning and Decision-Making, Wagga Wagga, 4 December 1998) (accessed 10 April 2019); 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 10 April 2019). Kirby J also addressed this theme in a judicial context in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 160 ALR 588.

- **No direct eye contact with a questioner, or someone in authority, or someone of a different gender** — it may be the expected cultural norm for people from a particular ethnic background to keep their eyes downcast and not make direct eye contact. This action would therefore bear no relation to the honesty or credibility of the particular person. For example, it would generally be considered culturally inappropriate for Vietnamese people and women from most other South-East Asian backgrounds to make direct eye contact with persons in authority.
- **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.

Additional information on religious dress and how to deal with issues arising from this is provided in chapter 3 in sections 3.8.3 (general considerations about appearance), 3.2.8.3 (Christianity), 3.3.6.3 (Buddhism), 3.4.6.3 (Islam), 3.5.6.5 (Hinduism), 3.6.7.3 (Sikhism) and 3.7.8.3 (Judaism).

- **Hand, finger and other gestures and movements, such as eye movements and head nods, head shakes, a lowered head or bowing** — these may not necessarily mean the same thing as they mean in mainstream English-speaking Australian culture, or may not be used as frequently, if at all, by mainstream-English-speaking Australians. For example,¹¹⁰⁴ people from some ethnic backgrounds (such as Italians) tend to talk with their hands more than mainstream English-speaking Australians; various types of bowing or having the hands held together as though praying in the Christian tradition may be used in place of the handshake (for example, by those from South-East Asian backgrounds); heads may be held in a downward position with eyes downcast to indicate the culturally appropriate form of submissiveness expected from women towards men or from anyone towards those in authority or in a higher 'caste' or social level (for example, by those from South-East Asian or Indian backgrounds; and some groups tend to nod or shake

¹¹⁰⁴ As indicated previously, the examples provided in this chapter are used to illustrate cultural differences and how they may present in courts. Although some people from a culturally or linguistically diverse background may behave in the manner described, the examples do not imply that the behaviour is typical of all people from that background or that there is, for example, a single mainstream English-speaking Australian behaviour.

their head for 'yes' and 'no' in the opposite way to mainstream English-speaking Australians (for example, Bulgarians and Greeks).

- If any particular gesture or movement is different, more regular or less frequent than you would expect, or seems to contradict what is being said, or in any way seems incomprehensible yet possibly significant, you should ask for its meaning rather than risk ascribing a wrong meaning to it.
- **Certain forms of touching, gestures and/or body movements** that are seen as acceptable within mainstream English-speaking Australian culture may be seen as threatening, rude or culturally unacceptable within some ethnic cultures. Conversely, those that are considered unacceptable within mainstream English-speaking Australian culture may be seen as acceptable or even expected within another culture.

Refer to section 7.3.5.4.3 for further information about ways you may need to take account for different communication styles in different cultural groups.

- **Silence or seeming to avoid answering a particular question** may not mean that the person is dishonest or evasive. 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 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 by video-link or at a pre-recorded special hearing; or allowing a support person to attend.¹¹⁰⁵
- Some measures which may be implemented on the basis that you declare a person to be a 'special witness' within the meaning of s 106R of the *Evidence Act 1906* (WA), in

¹¹⁰⁵ *Evidence Act 1906* (WA) ss 106R, 106RA, 121 (accessed 8 January 2021).

particular s 106R(3)(b) which makes specific allowance for emotional trauma, intimidation or distress by reason of cultural background, among other things.

- In addition to the restrictions on unrepresented persons directly cross-examining witnesses who are children, complainants in serious sexual assault proceedings or in restraining order matters,¹¹⁰⁶ you have a discretion to allow the cross-examination by an unrepresented accused of any witness to be by video-link, while screened, or without questions being put directly — having regard to the nature of the charge, the wishes of the witness, and the availability of any necessary facilities or equipment.¹¹⁰⁷
- You should consider discussing the use of any special measures referred to above with the parties and/or their legal representatives.
- Instruct the jury that declaring a witness to be a special witness, or using alternative means for a witness to present evidence, are routine practices of the court and these measures should not affect how they consider the evidence.
- Although not specifically included within the terms of the provision, you may also take a witness's cultural and linguistic background into account when deciding whether a question should be disallowed as an improper question within the terms of s 26 of the *Evidence Act 1906* (WA).
- If you are unsure whether a particular behavioural trait is to be expected within a particular culture, or 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), the person themselves, or their interpreter (if they have one, and are from the same specific ethnic culture as the person themselves). Note that it may be hard to get the information you need from the person themselves as they may not feel it is their place to inform you, or they may not understand why you need the information, or they may be reluctant to give you the information for some other reason that is culturally appropriate to them.

¹¹⁰⁶ *Evidence Act 1906* (WA) s 106G, *Restraining Orders Act 1997* (WA), ss 44C, 53D (both accessed 8 January 2021) — also see section 13.9 of this Bench Book.

¹¹⁰⁷ *Evidence Act 1906* (WA) s 25A (accessed 8 January 2021).

- All or some of these differences in appearance, behaviour and body language may need to be taken into account whenever you make any assessment of a person from a CaLD background.
- If appropriate, you may need to alert the jury to the fact that any assessment they make based on the demeanour of a person from an ethnic or migrant background must, if it is to be fair, take into account any relevant cultural differences in relation to demeanour. This should be brought to their attention 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 easily changed by anything you say in your final directions.

7.3.5 Verbal communication

7.3.5.1 Background information

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

For example, as indicated earlier in this chapter:

- They may have low proficiency or a complete inability to speak or understand English.
- They may have a communication style that makes it hard for others to adequately understand them, or that leads to them being wrongly assessed as, for example, evasive or dishonest.
- They may have a different understanding of how legal and court systems work, and often have little if no understanding of the Australian legal and court system. Many come from countries using completely different systems — for example, an inquisitorial system — or have experienced an extremely repressive dictatorial and, in their view, unjust system. The Albany Migrant Resource Centre emphasised that people of culturally diverse backgrounds may have suffered trauma due to their treatment by the justice system in their own country.¹¹⁰⁸

¹¹⁰⁸ Submission from Albany Migrant Resource Centre (14 June 2007).

- People with disabilities from CaLD backgrounds face additional disadvantage, particularly those with intellectual disabilities. This includes a lack of understanding of court proceedings. Kin Advocacy (formerly the Ethnic Disability Advocacy Centre) stressed that many refugees and humanitarian entrants suffer from psychiatric disabilities, including Post Traumatic Stress Disorder, and that it is important that this is taken into account during legal proceedings.¹¹⁰⁹

See chapter 4 (section 4.6.3.3.5) for more information on techniques for communicating with people with psychiatric disabilities/ mental illnesses.

It is critical that all the above matters are taken into account so as not to disadvantage the particular person. Just like everyone else, a person from a culturally or linguistically 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:

- (a) Everyone in court avoids any language that could be seen as either stereotyping or culturally offensive — refer to section 7.3.5.2.
- (b) Appropriate measures are taken to assist people with a lesser ability or inability to speak or understand English — refer to section 7.3.5.3.
- (c) Appropriate measures are taken to ensure that a person's different communication style does not disadvantage them — refer to section 7.3.5.4.
- (d) Appropriate explanations are given about the court process — refer to section 7.3.5.5.

7.3.5.2 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.

¹¹⁰⁹ Submission from Kin Advocacy (formerly the Ethnic Disability Advocacy Centre) (5 March 2020).

- Where it is necessary to use an ethnic identifier, use the correct and appropriate term, and do not confuse ethnic identifiers with religious identifiers. For instance, it is best not to use the general terms 'Asian' or 'South-East Asian' but instead identify the person's particular country of birth or previous residence — for example, 'Thai' or 'from Thailand'. While many people in Australia consider that the terms Arab and Muslim are interchangeable, it is important to be accurate. Muslims come from a large variety of different ethnic backgrounds, and there are many Arabs who practise non-Muslim religions, just as not all people of Irish background are Catholic.
- Use ethnic- or race-based descriptors only when relevant, and do not generally use them as the sole descriptor. For example, a person's occupation may be just as, or even more, relevant than their ethnicity.
- 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 culturally or linguistically diverse 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 ethnic or migrant group is the norm against which any individual member of that group should be judged.
- Mainstream generalisations and negative stereotyping result in incorrect cultural assumptions and have the capacity to gravely impact on individual's rights.¹¹¹⁰
- Use the signifier 'Australian' accurately. 'Australian' should only be used to identify nationality, not to identify ethnic background. It is not only those from mainstream-English-speaking backgrounds who are Australian, and some people from mainstream English-speaking backgrounds are not Australian. 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.

¹¹¹⁰ Submission from The Humanitarian Group (28 September 2016).

- Do not assume that someone from a non-English-speaking background or who does not look Anglo-Celtic will be unable to speak English well or at all, be unable to understand the court processes, or be unfamiliar with mainstream English-speaking Australian customs and values. Some of these people's families may have been living in Australia for generations.
- Be aware that for some cultures, some words may be much more offensive than they are for mainstream-English-speaking Australians. For example, the words 'bugger' and 'bastard' are words bandied around quite casually by some mainstream-English-speaking Australians, often with no thought as to their literal meaning.
- 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.¹¹¹¹

7.3.5.3 Take appropriate measures to accommodate those with a lesser proficiency in or inability to speak or understand English

An individual's ability to communicate in English is often reduced in situations of stress — such as court appearances. 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.

Points to consider:

- Use an appropriate level of interpreter or translator when necessary.

For more information about interpreters and translators please refer to section 7.3.1.

- Be patient. For example, you may need to allow time for the person's legal representative to explain the proceedings to their client.

¹¹¹¹ Section 26 of the *Evidence Act 1906* (WA) (accessed 8 January 2021) enables you to disallow improper questions (for example, misleading or unduly annoying, harassing, intimidating, offensive or repetitive questions). It also provides that the court must take into account any relevant condition or characteristic of the witness including age, language, personality and education in determining whether to disallow a question.

- 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;
 - use words and phrases like 'law' not 'statute' or 'legislation';
 - avoid legal terminology that may be confusing. For example, use 'Mr Smith will now ask you some questions' not 'Mr Smith 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'; and 'to' not 'towards'.
 - Use active 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 — 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 'shall not' not 'shan't'; 'cannot' not 'can't'; 'will not' not 'won't'; 'she is' not 'she's'; and 'they will' not 'they'll'.
 - Note that some languages have far fewer verb tenses than English — use 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 those who have recently arrived from the United Kingdom may not understand these. Also note that many other migrants would have learnt English originally, not Australian English, so do not use Australian shortenings of words. For example, use 'vegetables' not 'vegies'. Do not use Australian colloquialisms or Australian (sporting and other such) analogies — for example, use 'difficult' not 'sticky wicket', or 'very pleased' not 'stoked'.
- 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, for example, an unusual word or verb tense is being used; and
 - be careful about the words you use and your tone of voice, so you do not appear demeaning. Do not, for example, show that you are exasperated.
- You may need to intervene if anyone in court says anything that appears difficult for the person to understand, or that seems to be misunderstood. If necessary, you may need to rephrase the sentence or question yourself.¹¹¹²

7.3.5.4 Take appropriate measures to accommodate those with a different communication style

7.3.5.4.1 Background information

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

7.3.5.4.2 Examples of different styles of communication¹¹¹³

- Using a much more roundabout style: such as gradually building a picture before finally getting to the point that a mainstream English speaker would have started with — for example, Latin American Spanish speakers tend to do this.
- Talking much more slowly (for example, some Africans tend to do this), or much more quickly (for example, some Latin American Spanish speakers tend to do this).

¹¹¹² Section 26 of the *Evidence Act 1906* (WA) (accessed 9 January 2021) enables you to disallow improper questions (for example, misleading or unduly annoying, harassing, intimidating, offensive or repetitive questions). It also provides that the court must take into account any relevant condition or characteristic of the witness including age, language, personality and education in determining whether to disallow a question.

¹¹¹³ As indicated previously, the examples provided in this chapter are used to illustrate cultural differences and how they may present in courts. Although some people from a culturally or linguistically diverse background may behave in the manner described, the examples do not imply that the behaviour is typical of all people from that background or that there is, for example, a single mainstream-English-speaking Australian behaviour.

- Using less powerful-sounding speech — that is, with many more hesitations, silences, hedges ('I think', 'it seems like', 'sort of', 'actually') and/or terms of politeness (sir, madam, please). Native English speakers tend to do this when they are from less powerful sub-groups or have a lesser level of formal education. People from non-English-speaking backgrounds may do this even if they are from relatively powerful sub-groups within their culture or are highly educated.

Refer to section 7.3.4.2 in relation to silence and/or apparent avoidance in answering a question.

- Talking more quietly or more submissively. This is often more pronounced in women than men, although men may also do it. For example, Thai women are generally expected to speak softly in order not to appear over-assertive and unfeminine. However, in many South-East Asian cultures quiet modes of speaking are generally seen as polite for both men and women.
- Preferring to agree with whatever is being put to them, or to come up with some form of compromise, rather than to openly disagree with whatever is being put to them — even when they do disagree. Some people who do this may try to indicate that they would prefer to come back to that subject later, others may not. For example, in Japan and in some South-East Asian cultures it is generally considered impolite to flatly disagree with a questioner. Japanese people, however, will tend to indicate that they'd like to return to the subject later on.
- Using more, fewer or different hand gestures and body movements, and/or finding the gestures and body movements used by mainstream-English-speaking Australians threatening, rude, or culturally unacceptable, to the extent that they retreat into silence or become unable to continue with their evidence. For example, it is generally considered culturally unacceptable for Thais to touch someone else's head. In some cultures touching is not as acceptable as in the mainstream-English-speaking Australian culture. In China and Vietnam even married couples would not generally kiss or hold hands in public, whereas in Italy touching is readily acceptable. Touching can also be used to signify something different — in Indonesia two men will often hold hands as a sign of friendship, not as a sign that they are gay partners.

Refer also to section 7.3.4.2 in relation to bodily movements and gestures which may be considered acceptable and unacceptable in different cultural groups.

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

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

Points to consider – different communication styles:

- Listen to and watch the particular style of communication of anyone from a culturally or linguistically diverse background (whether speaking in English, or speaking through an interpreter).

Refer to section 7.3.1.5 for suggestions as to how to make best use of an interpreter.

- Check if their style consistently displays any or indeed several of the styles listed above, and also check if the person is showing any signs of unease or discomfort with what is being asked of them or with how it is being asked (for example, silence, evasiveness, shock, trembling, quieter and quieter voice or blushing).
- Bear in mind that not everyone from a particular cultural or linguistic background will follow the cultural norms for their particular background. Some will have adopted mainstream-English-speaking Australian norms of behaving. Others may never have followed some or all of the cultural norms within their own culture.
- If someone is consistently displaying one or more of these different styles of communication or showing signs of discomfort with what is going on, try to determine whether what you are seeing and hearing is the culturally appropriate way of behaving for someone of that background, or whether it is indicative of evasiveness or dishonesty. Ask the person's legal representative (if they have one), or ask the person themselves, or consider whether the court needs to obtain 'expert' advice from the interpreter — as

long as they are from the same ethnic/cultural background, not just the same language background. But note that it may be hard to get the information you need from the person themselves as they may not feel it is their place to inform you, or understand why you need the information, or be reluctant to give you the information for some other reason culturally appropriate to them.

- If you determine that what is being displayed is culturally appropriate for someone from that background, you may need to:
 - Be patient and try to ensure there are not too many interruptions.
 - Ensure that any cross-examination does not pay undue or unfair attention to any of these behaviours, and that, where at all possible, it is conducted in a manner that is culturally appropriate for that person¹¹¹⁴ — for example, without any gestures that are threatening to that person, in a quieter or less threatening tone of voice.
 - Find other ways of getting the information you need. For example, you may need to get the question rephrased, or presented less intimately or less threateningly. Or you may need to take measures to make sure the person fully understands what is going on and/or why the question is being asked; or excluding people from the courtroom in which they are giving evidence; or allowing them to give evidence remotely by video-link; or closing the court; or allowing a support person to attend.¹¹¹⁵
 - If appropriate, alert the jury to the fact that any assessment they make based on the communication style of a person from a CaLD background must, if it is to be fair, take into account any relevant cultural or linguistic differences in relation to this. This may need to be noted early in the proceedings rather than waiting until you give your final directions to the jury — otherwise, the jury's initial assessment of a

¹¹¹⁴ Section 26 of the *Evidence Act 1906* (WA) (accessed 8 January 2021) enables you to disallow improper questions (for example, misleading or unduly annoying, harassing, intimidating, offensive or repetitive questions). It also provides that the court must take into account any relevant condition or characteristic of the witness including age, language, personality and education in determining whether to disallow a question.

¹¹¹⁵ Some of these measures may be implemented on the basis that a person is a 'special witness' within the meaning of s 106R of the *Evidence Act 1906* (WA) (accessed 8 January 2021), in particular s 106R(3) which makes specific allowance for emotional trauma, intimidation or distress by reason of cultural background, amongst other things. If you believe it to be required in the interests of justice in any case, you may wish to explore implementing these measures with the parties— see also s 121 of the *Evidence Act 1906* (WA) (accessed 10 April 2019) in relation to the discretion to take evidence by video-link.

particular person may be unfairly influenced by false assumptions, and may not be easily changed by anything you say in your final directions.

- You may need to intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any particular cultural difference in appearance, behaviour or body language.¹¹¹⁶

7.3.5.5 Explain court proceedings adequately

The provision of interpreters and translators can assist people from CaLD backgrounds to participate in legal proceedings. As indicated previously, however, the impediments to participation consist not only of linguistic but also of cultural differences relating to the role and nature of the legal system.

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 even threatening. For example, Womens Health and Family Services advised that this is 'the main reason why many of our clients do not wish to take any legal action in their [family violence] situations'.¹¹¹⁷

It is of note too that the perception of the Australian legal system by some people from CaLD backgrounds may not only be affected by their experiences in their countries of origin but also by their experiences as refugees or asylum seekers. The Humanitarian Group advised that people who have been through several immigration interviews and tribunal hearings and who have spent time in immigration detention, may not distinguish between the courts and administrative proceedings.¹¹¹⁸

¹¹¹⁶ Section 26 of the *Evidence Act 1906* (WA) (accessed 8 January 2021) enables you to disallow improper questions (for example, misleading or unduly annoying, harassing, intimidating, offensive or repetitive questions). It also provides that the court must take into account any relevant condition or characteristic of the witness including age, language, personality and education in determining whether to disallow a question.

¹¹¹⁷ Submission from Women's Health and Family Services (29 September 2016).

¹¹¹⁸ Submission from The Humanitarian Group (28 September 2016).

Similarly, trauma may not only be associated with their experiences in their countries of origin but also with their time in immigration detention facilities. The Administrative Appeals Tribunal's *Migration and Refugee Division - Guidelines on Vulnerable Persons*, for example, refers to the impairments that may be caused by traumatic experiences and which render people vulnerable and in need of particular procedural support to ensure that they are not disadvantaged in AAT proceedings. It notes that immigration detention may be a traumatic event:¹¹¹⁹

Detention in immigration detention facilities is characterised by confinement and deprivation of liberty. Some people may experience detention as a traumatic event and/or witness traumatic events in detention such as witnessing self-harm, suicide attempts, and destruction of property.

It also notes the following effects of traumatic experiences:¹¹²⁰

The following symptoms and effects may manifest during the conduct of hearings and influence an applicant's ability to participate:

- *Poor attention, poor concentration and distractibility which may be the result of intrusive recollection of events, generalised fear and emotional arousal, or depression. Anger and hostility towards Members may occur which are the result of over- reactivity to reminders of traumatic experiences, poor control of emotions, sensitivity to feeling that one is not believed, protection against shame and guilt, anxiety and distrust of people in authority.*
- *Memory difficulties which can manifest as extremely vivid recollection of some details alongside amnesia for other detail. This may lead to apparent inconsistencies and/or inability to present a chronologically intact account. These difficulties may be the result of any of the aforementioned factors - intrusive recollection of events, generalised fear, avoidance or depression, protection against shame and guilt.*

¹¹¹⁹ Administrative Appeals Tribunal, *Migration and Refugee Division Guidelines on Vulnerable Persons* (November 2018) [91] (accessed 17 August 2021).

¹¹²⁰ Administrative Appeals Tribunal, *Migration and Refugee Division Guidelines on Vulnerable Persons* (November 2018) [94] (accessed 17 August 2021).

- *Hesitancy to disclose due to fear of reliving experiences, shame, guilt, or anger about having to prove experiences of violence or injustice.*
- *Emotional distress due to intrusive memories/images of traumatic experiences, grief, shame or guilt.*
- *Some effects may be more pronounced if exposure to traumatic events has recently occurred (such as traumatic events in detention and/or there has been recent bad news about safety of family members) or personal circumstances at the time of review are very stressful.*

Points to consider when explaining court proceedings:

- The different understandings of how legal and court systems, and the often much lesser understanding of the Australian legal and court system than their mainstream-English-speaking Australian counterparts may well cause people from CaLD backgrounds to fear everything to do with the legal and court system.
- The Fremantle Multicultural Centre Inc. cautioned that it is not the role of an interpreter to familiarise a witness with the court's functions, procedure or conventions.¹¹²¹
- A person from a CaLD background who is self-represented may have no familiarity with Australian courtroom conventions and terminology.
- To ensure that people from CaLD backgrounds are not disadvantaged in any way and so that you receive the information you need, you may need to explain (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. You may need to explain that it may be necessary to ask questions about 'difficult' or 'upsetting' past experiences

¹¹²¹ Submission from Fremantle Multicultural Centre Inc. (26 April 2007).

during the hearing. Assure the person that the questions will be limited to those that are necessary for the review process.¹¹²²

- Don't expect the person to display emotion when recounting traumatic experiences. Emotional detachment is a symptom of Post-Traumatic Stress Disorder and/or functions as a coping mechanism.¹¹²³
- Explain how they will be giving their evidence and the rationale for this.
- Explain what is meant by things such as bail, statement, affidavit, evidence, cross-examination, intent, not incriminating themselves and appeal.
- Give them permission to ask questions when they are at all unsure or confused.
- Stop the proceedings more frequently and provide either a break and/or explanation. If the person appears distressed or angry ask if they want to continue or take a break.¹¹²⁴
- Provide more time than usual for their legal representative to explain the proceedings to them.

Refer to chapter 8 on self-represented people if the person is not represented.

7.3.6 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

7.3.6.1 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 these customs and values are heavily influenced by the particular religious affiliation of that ethnic group or sub-group.

¹¹²² Administrative Appeals Tribunal, *Migration and Refugee Division Guidelines on Vulnerable Persons* (November 2018) [95] (accessed 17 August 2021).

¹¹²³ Administrative Appeals Tribunal, *Migration and Refugee Division Guidelines on Vulnerable Persons* (November 2018) [95] (accessed 17 August 2021).

¹¹²⁴ Administrative Appeals Tribunal, *Migration and Refugee Division Guidelines on Vulnerable Persons* (November 2018) [95] (accessed 17 August 2021).

Additional information on religious affiliations is provided in
chapter 3 of this Bench Book.

- These sets of customs and values can be slightly different or very different from mainstream English-speaking Australian cultural norms.
- Just as there are sub-cultures within mainstream-English-speaking Australian culture that have slightly or completely different customs and values, and also families or individuals who do not seem to fit any particular cultural norm, there are similar examples within any other culture. It is important not to assume that everyone who is, for example, Arab will adhere to a similar set of values or customs, or even that everyone born, for example, in Lebanon will adhere to the same customs and values, or even that all Christian Lebanese people will adhere to the same set of customs and values.
- In addition, many people from CaLD backgrounds have varied their customs and values from those in their home country, in order to adapt to having a smaller family here, or to adapt to mainstream English-speaking Australian customs and values, or because they are now in families comprised of members from different cultural backgrounds. Conversely, some older generations within cultural and linguistic communities may hold fast to customs and values that have in fact shifted in their own home countries.
- There may 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 families comprised of members of different cultural origins; such as disinheritance, inability to negotiate differences of opinion about fundamental aspects of custom and values, vulnerability of one partner due to a lower proficiency in English, visa status (often used as a threat to CaLD women in domestic violence situations), unequal economic and legal status (for example, a male perpetrator of domestic violence can often afford a top lawyer while his female victim generally cannot) or a lack of family members who are related by birth (as opposed to marriage) in Australia.

7.3.6.2 Examples of different customs and values¹¹²⁵

Please note that the ethno-specific examples given in this Bench Book are examples only. They are not comprehensive. In addition, as indicated in section 7.3.5, it is important not to stereotype. It would be incorrect to assume that every member of a cited ethnic group follows the particular practice listed below.

- It is difficult to generalise about family types across cultures due to great local variation: family structures are related to the physical environment, political and legal systems, religion, and education, among other factors. Migration may also have an effect on family structures, as individuals adapt to the new society.
- For many, family life is characterised by familism, a view which prioritises the interests of the family over the individual interests of its members, and in which family identity is stronger than personal identity. For instance, 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 (e.g. 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).
- Womens Health and Family Services advised that the primacy of the family over the individual is particularly relevant in domestic and family violence situations.¹¹²⁶
- The family in many non-Northern European cultures is often much broader than the mainstream-English-speaking Australian concept of the nuclear family of parents and children. The extended family may include aunts, uncles, siblings, nieces, nephews, cousins, grandparents, grandchildren and even in-laws and their families. Some ethnically and culturally diverse families may nurture and expand their kinship through traditional religious, cultural and social practices. For example, for Greek people, 'the best man at weddings or the sponsor at a child's baptism (*Koumparos*) is considered a

¹¹²⁵ Much of the information in this section, including the specific cultural examples, has been sourced from the 1st and 2nd editions of Supreme Court of Queensland *Equal Treatment Benchbook* (2005) and (2016) (2nd edition accessed 7 April 2021).

¹¹²⁶ Submission from Women's Health and Family Services (29 September 2016).

spiritual relative and enters lasting and binding commitments'. Similarly, 'the sponsor of Kivrelik (i.e. the ritual performed through the rite of circumcision) becomes a part of the family of the young man and assumes duties related to his education and wellbeing'.¹¹²⁷

- The most important matter to note, however, is that families (as identified by those who see themselves as a part of them) come in many and varied forms. Where relevant, clarification should be sought as to the relationships between various individuals, rather than assumptions made. There may be strong obligations to overseas family members, including the need to send money overseas, the need to sponsor family members to come to Australia, and the need to arrange marriages between people resident in Australia and people currently resident in the country of origin.
- There may be a much greater sense of the male as head of the family, with women taking more subordinate roles than men and perhaps not allowed or expected to own or even jointly own property or inherit family assets. For example, a much more dominant role is generally given to men in most Arab cultures. This may also be true of some African and some South-East Asian cultures. There are also some cultures which are, or have been, matriarchal (where women have taken the dominant role) — for example, in Kerala in Southern India; and others where women's matrimonial property rights are legally protected — for example, Sri Lankan Tamils. The sons in the families of some cultures may also have specifically defined roles. For example, in the Tamil culture it is the eldest brother's role to earn and provide the dowry for the younger sisters.
- Different courtship and marriage customs may apply — including arranged marriages where the partner may be sought from overseas, not just from within Australia (common in Indian and Bangladeshi cultures); or where a dowry is expected to be provided by the family of the bride (common in some sub-continent Indian cultures); or overseas polygamous marriages (common in some Arabic cultures and some sub-Saharan African cultures); or a very strong push to marry within the particular ethnic group (common in many ethnic cultures). In many families, the choice of marriage partner is a family, not a personal, decision (common in sub-continent Indian cultures,

¹¹²⁷ Sarantakos S, *Modern Families: An Australian Text* (Macmillan Education Australia, 1996) page 69.

South-East Asian, some African and some Arabic cultures). For some of these families, marriage outside the community or against the family's wishes could lead to exclusion from the family and/or community.

- In some instances, less tolerant views are held about such things as de facto relationships, having children outside a marriage, abortion, or homosexuality — this is generally particularly the case for sub-Saharan African cultures, many Pacific Islander cultures, sub-Indian continent cultures and Arabic cultures, but is even more generally the case where the religion (or denomination or branch of religion) practised by the particular family group is not tolerant of such things.

Additional information is provided in chapter 3 of this Bench Book on religious affiliations.

- Grandparents frequently live with and are cared for by a member of the family — for example, this is often the case in Greek, Vietnamese, African and Chinese families. Different cultures assign the caring responsibility to different members of the family: in many South-East Asian cultures it is the eldest son who is expected to care for aged parents, whereas in Greek families the female members of the family are expected to care for aged parents.
- Allied to the stronger concept of family, there may be 'stronger concepts of family honour and shame'¹¹²⁸ which may act as a significant means of control and rationale for why members of particular ethnic groups act as they do. For instance:¹¹²⁹

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

¹¹²⁸ Supreme Court of Queensland, *Equal Treatment Benchbook* (1st ed, 2005) Chapter 4.

¹¹²⁹ Supreme Court of Queensland, *Equal Treatment Benchbook* (1st ed, 2005) Chapter 4.

- These concepts can impact on whether family members attend court to support an individual facing a court sentence — for instance, in Chinese and Vietnamese families:¹¹³⁰

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

- There may be more extreme differences in behaviour and/or appearance between different levels, classes or 'castes'. For example, South-East Asian and sub-continent Indian cultures tend to be much more hierarchical and expect juniors to defer to seniors in workplaces in a more structured and rigid way.
- In relation to family roles and culture, however, it should be considered that long periods of war and conflict in a country can often lead to a break-down in traditional family and clan structures which may be exacerbated by the migration process. This sometimes leads to conflicts and disputes within families and cultural communities as they struggle to adapt. The impact of this can be seen between generations, between members of cultural communities and within families.¹¹³¹

7.3.6.3 Ways in which you may need to take account of these custom and value differences

Any of the differences listed in 7.3.6.1 and 7.3.6.2 could (depending on the matter before the court) be a major influence on the way in which a person from a CaLD background behaves or presents themselves or their evidence in court.

Points to consider so as to appropriately account for differences in customs and values:

- You may need to decide whether Australian law allows you to take account of any such influences to ensure that justice is done and seen to be done.
- As appropriate and at the appropriate time in the proceedings, you may need to explain why any such influences can/should be taken into account or cannot/should not be taken

¹¹³⁰ Supreme Court of Queensland, *Equal Treatment Benchbook* (1st ed, 2005) Chapter 4.

¹¹³¹ Submission from The Humanitarian Group (28 September 2016).

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.

- The cultural customs or values of a particular person need to be accorded respect by everyone in court, while explaining and upholding Western Australian 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.¹¹³²
- 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 absence 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 adherence to a particular set of cultural customs or values, or are 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), ask the person themselves, or consider asking their interpreter (if they have one, and they are from the same ethnic culture as the particular person). Note that it may be hard to get the information you need from the person themselves as they may not feel it is their place to inform you, or they may not understand why you need the information, or they may be reluctant to give you the information for some other reason that is culturally appropriate to them.
- Note 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

¹¹³² Section 26 of the *Evidence Act 1906* (WA) (accessed 8 January 2021) enables you to disallow improper questions (for example, misleading or unduly annoying, harassing, intimidating, offensive or repetitive questions). It also provides that the court must take into account any relevant condition or characteristic of the witness including age, language, personality and education in determining whether to disallow a question.

7.3.7 Directions to the jury

As indicated at various points in section 7.3, 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 backgrounds, to unfairly influence their judgment.

Points to consider in directing the jury:

- 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.
- This should be done in accordance with Western Australian law 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 jurors must try to avoid making stereotyped or false assumptions — and what is meant by this. It may be a good idea to give them specific examples of racial or ethnic stereotyping and explain that they must treat each person as an individual based on what they have heard or seen in court in relation to the specific person, rather than what they know or think they know about all or most people of that person's particular background.
 - It may also be a good idea to give specific examples of false assumptions that anyone who follows a cultural norm that conflicts with what mainstream English-speaking Australians tend to believe (such as that women should be submissive or subordinate to men) is therefore a bad person or untrustworthy or lacking in credibility.
 - That jurors need to assess a particular person's evidence in the context of what they have learned in court about the way in which people from that background tend to behave and speak, and what they tend to value (as opposed to the way in which they themselves or English-speaking Australians generally might be expected to act). In doing this you may need to provide guidance on any legal limitations on to

the jury taking account of any of these matters. You may also need to point out the particular aspects of cultural difference that they need to pay attention to.

- If you have declared any witness in the proceedings to be a special witness, or restricted the direct cross-examination by a self-represented accused, remind jurors that these are routine practices of the court and that they should not draw any inference as to the accused's guilt from these measures.

7.3.8 Sentencing, other decisions and judgment or decision writing

Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory to all persons affected by them.

Points to consider in your sentencing and other decisions:

- In order to ensure that any person from a culturally or ethnically diverse background considers your sentencing, decisions and/or judgments to be fair and non-discriminatory, you may need to consider (and indeed allude to) any of the points raised in section 7.3.1 - 7.3.7 that are relevant to the particular case.
- Consider whether to allow a victim impact statement to be read out in court. Note that a court may make a written victim impact statement available to the prosecutor and to the offender, on such conditions as it thinks fit.¹¹³³
- If a victim is not personally capable of giving a victim impact statement for any reason, consider whether it is appropriate for someone else to do so on the victim's behalf.¹¹³⁴
- Bear in mind that many people from migrant and ethnic backgrounds have a lower income level than the equivalent 'class' of people who are not from those backgrounds — so a specific level of fine for them will often mean considerably more than the same level of fine for others.

Refer to the 'points to consider in section 2.6.2 of chapter 2 in relation to sentencing options.

¹¹³³ *Sentencing Act 1995* (WA) s 26 (accessed 8 January 2021).

¹¹³⁴ *Sentencing Act 1995* (WA) s 24(2) (accessed 8 January 2021).

- To facilitate 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.
- When you are sentencing an offender there is a statutory requirement that you must, if the offender is personally present in court or appearing before the court by video-link, explain to the offender, in language likely to be understood, the effect of the sentence, the obligations of the offender and the consequences of not complying.¹¹³⁵

7.4 FURTHER INFORMATION OR HELP

7.4.1 Interpreting and translating services

Refer to section 7.3.1.3 for a list of suppliers of interpreting and translating services in Western Australia.

Refer to section 7.3.1.4 for information about the funding of these services.

7.4.2 Government agencies

The following government agencies can provide further information about CaLD communities and their cultural or language needs, and also about other appropriate community agencies, individuals, and/or written material:

Office of Multicultural Interests

The Office of Multicultural Interests website contains an extensive directory informing of the various services (and contact details) provided by government and non-government agencies to assist CaLD communities in WA.

Translating and Interpreting Services (TIS National)

The Translating and Interpreting Service (TIS National) is an interpreting service provided by the Department of Home Affairs for people who do not speak English and for agencies and businesses that need to communicate with their non-English-speaking clients.

¹¹³⁵ Sentencing Act 1995 (WA) s 34 (accessed 8 January 2021).

Judicial Council on Cultural Diversity

The Judicial Council on Cultural Diversity is an advisory body formed to assist Australian courts, judicial officers and administrators to positively respond to our diverse needs, including the particular issues that arise in Aboriginal and Torres Strait Islander communities.

7.4.3 Migrant Resource Centres

Migrant Resource Centres offer multilingual information, advice and referral services, and a resource base for settlement activities of immigrants and refugees. Migrant Resource Centres also foster the development of specific services to meet local needs and promote awareness of the needs of migrants and humanitarian entrants. In addition to settlement services, Migrant Resource Centres provide other services such as crisis accommodation, health, employment and legal advice, counselling and aged care. Further information on Migrant Resources Centres and other ethnic organisations and service providers is available from the Office of Multicultural Interests and the Australian Refugee Health Practice Guide.

7.5 FURTHER READING/VIEWING

Abdullahi I, Wong K, Glasson EJ, Mutch R, Glasson EJ, de Klerk N, Cherian S, Downs J and Leonard H, Risk of Developmental Disorders in Children of Immigrant Mothers; A Population Data Linkage Evaluation (Journal of Pediatrics, 204:275-284, 4 October 2018) (accessed 8 January 2021)

Abdullahi I, Leonard H, Cherian S, Mutch R, de Klerk N and Downs J, The Risk of Neurodevelopmental Disabilities in Children of Immigrant and Refugee Parents: Current Knowledge and Directions for Future Research (Review Journal of Autism and Developmental Disorders, 5(1): 29-42, 2018) (accessed 8 January 2021)

Abdullahi I, Wong K, de Klerk N, Mutch R, Glasson E, Downs J, Cherian S and Leonard H, Hospital Admissions in Children with Developmental Disabilities from Ethnic Minority Backgrounds (Dev. Med. and Child Neurol. 2019 - in press) (accessed 8 January 2021)

Abdullahi I, Wong K, Bebbington K, Mutch R, de Klerk N, Cherian S, Downs J, Leonard H and Glasson EJ, Diagnosis of Autism Spectrum Disorder According to Maternal-race Ethnicity

and Country of Birth: A Register-based Study (Journal of Autism and Dev. Disorders 2019 – in press) (accessed 8 January 2021)

Australian Bureau of Statistics, *2016 Census Community Profiles – Western Australia* (2017) (accessed 8 January 2021)

Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (Cat No 2071.0) (2017) Downloads – Data Cubes – Cultural Diversity (accessed 8 January 2021)

Australian Bureau of Statistics, *2016 Census QuickStats – Western Australia* (2017) (accessed 8 January 2021)

Australian Law Reform Commission, *Multiculturalism and the Law (Report No 57)* (1992) (accessed 8 January 2021)

Department of Local Government and Communities, Office of Multicultural Interests, *Western Australian Language Services Policy 2020 and Guidelines* (3 November 2020) (accessed 8 January 2021)

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 8 January 2021)

French R, *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 8 January 2021)

Hale S, *Helping Interpreters to Truly and Faithfully Interpret the Evidence: The Importance of Briefing and Preparation Materials* (2013) 37(3) *Australian Bar Review* 307

Hanes G, Chee J, Mutch R and Cherian S, *Paediatric Asylum Seekers in Western Australia: Identification of Adversity and Complex Health Needs through Comprehensive Refugee Health Assessment* (Journal Paediatric Child Health, 13 March 2019 - in print) (accessed 31 March 2020)

Hanes G, Mutch R, Sung L and Cerian S, *Adversity and Resilience amongst Resettling Western Australian Paediatric Refugees* (Journal Paediatric Child Health 2017; 53(9): 882-888) (accessed 31 March 2020)

Hirani K, Mutch R, Cherian S and Payne D, *The Health of Adolescent Refugees Resettled in High-income Countries* (Arch. Dis. Child, 101(7): 670-6. 2016) (accessed 31 March 2020)

Hirani K, Mutch R, Payne D and Cherian S, *Medical Needs of Adolescent Refugees Resettling in Western Australia* (Arch. Dis. Child, 2018) (accessed 31 March 2020)

Hirani K, Cherian S, Mutch R and Payne D, *Identification of Health Risk Behaviours in Adolescent Refugees Resettling in Western Australia* (Arch. Dis. Child, 103(3): 240-246, 2018) (accessed 8 January 2021)

Judicial Council on Cultural Diversity, *Addendum to the Recommended National Standards for Working with Interpreters in Courts and Tribunals* (May 2019) (accessed 8 January 2021)

Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2017) (accessed 8 January 2021)

Kirby M, *Judging: Reflection on the Moment of Decision* (Speech to the 5th National Conference on Reasoning and Decision Making, Wagga Wagga, 2 December 1998) (accessed 8 January 2021)

Mace AO, Mulheron S, Jones C and Cherian S, Educational, Developmental and Psychological Outcomes of Resettled Refugee Children in Western Australia: *A Review of School of Special Educational Needs: Medical and Mental Health Input* (Journal of Paediatrics and Child Health 50(12): 985-92, 27 June 2014) (accessed 8 January 2021)

Martin W, *Access to Justice in Multicultural Australia* (Paper presented to the Council of Australasian Tribunals National and New South Wales Joint Conference, 8 June 2017, Sydney) (accessed 8 January 2021)

Markus A, *Australians Today: The Australia@2015 Scanlon Foundation Survey* (2016) (accessed 1 August 2017)

Mutch R, Cherian S, Nemba K, Geddes J, Rutherford D, Chaney G and Burgner D, *A Tertiary Paediatric Refugee Health Clinic in Western Australia: Analysis of the First 1026 Children* (Journal of Paediatric Child Health, 48(7): 582-7, 20 March 2012) (accessed 31 March 2020)

Newman K, O'Donovan K, Robertson A, Bear N, Mutch R and Cherian S, *Nutritional Assessment of Resettled Paediatric Refugees in Western Australia* (Journal Paediatric Child Health, 55(5): 574-58, 2019) (accessed 8 January 2021)

Organisation for Economic Co-operation and Development, *International Migration Database* (2017) (accessed 8 January 2021)

Perry M and Zornada K, *Working with Interpreters: Judicial Perspectives* (Paper presented at AIJA Cultural Diversity and the Law Conference, 13 March 2015, Sydney) (accessed 8 January 2021)

Roberts-Smith L, Communication Breakdown: The Importance of Cultural Language Awareness in Court (1990) *NSW Bar Association News* 10 (accessed 8 January 2021)

Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) Chapters 4 and 6 (accessed 7 April 2021)

8 SELF-REPRESENTED PEOPLE

There is no standard definition of the term 'self-represented party', and multiple terms are used to describe self-represented people in courts including: self-represented parties, litigants in person, *pro se* litigants and unrepresented parties/litigants.¹¹³⁶

The Law Society of New South Wales, in its *Guidelines for Dealing with Self-represented Parties in Civil Proceedings*, categorises self-represented litigants as follows:¹¹³⁷

1. ***Direct self-represented party***: where the party received little if any legal advice.
2. ***'Unbundled' represented party***: where the party retains a legal practitioner for certain aspects of law or procedure, or at a particular stage or stages of the case. The legal practitioner may be retained on a paid basis or through a Community Legal Centre or self-representation service.
3. ***Client of directly-briefed barrister***: which will depend on the terms of the retainer.

In 1999, the Law Reform Commission of Western Australian (LRCWA) acknowledged the changing profile of court users toward a greater incidence of self-representation in its *Review of the Criminal and Civil Justice System*,¹¹³⁸ which contained 28 recommendations which related to self-represented people.

When the LRCWA released the *Review of the Criminal and Civil Justice System*¹¹³⁹ in 2002, it noted that the then Chief Justice of Western Australia had established committees to address the issue of self-represented litigants in both civil and criminal matters, and that some of the recommendations regarding customer service and enhanced accessibility to court services had

¹¹³⁶ Richardson E, Sourdin T and N Wallace, *Self-Represented Litigants – Literature Review* (2016) Australian Centre for Court and Justice Innovation, Monash University (accessed 8 January 2021).

¹¹³⁷ Law Society of New South Wales, *Guidelines for Dealing with Self-represented Parties in Civil Proceedings* (December 2016) page 2 (accessed 8 January 2021).

¹¹³⁸ Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia – Final Report* (1999) (accessed 8 January 2021).

¹¹³⁹ Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia – Final Report* (1999) (accessed 8 January 2021).

been addressed.¹¹⁴⁰ However, substantial work that had been proposed in this area was not implemented.

The Family Court of Western Australia (which has the highest number of unrepresented parties of all of the courts in this State) has since developed various processes, procedures and aids to assist such people access the system. These include handbooks designed to help those who do not have a lawyer to present their case. There are separate handbooks for children's cases and property cases, which cover topics such as preparing for trial, the relevant law and the trial process. The handbooks were most recently revised in December 2015.¹¹⁴¹

Similarly, most people are self-represented in the State Administrative Tribunal (SAT), so the SAT aims to accommodate self-represented parties and uses an inquisitorial process as well as simplified procedures to facilitate this.

Additionally, since 2013, Legal Aid Western Australia has operated a self-represented litigants' service at the Federal Court and Federal Circuit Court of Australia, and provides an advice service to self-represented litigants at the Administrative Appeals Tribunal – mostly in relation to Tier 2 matters regarding social security entitlements.

In recent times, there has been a significant focus on unmet legal needs in the context of access to justice in Australia. See for example, the Law and Justice Foundation's *Legal Australia-Wide Survey: Legal Need in Australia*,¹¹⁴² the *Indigenous Legal Needs Project*,¹¹⁴³ and the Productivity Commission's inquiry into *Access to Justice Arrangements*.¹¹⁴⁴ Although some parties may choose to be self-represented, the consensus is that it is more likely that most would prefer to have legal representation.

¹¹⁴⁰ Law Reform Commission of Western Australia, *30th Anniversary Reform Implementation Report* (2002) page 248 (accessed 8 January 2021).

¹¹⁴¹ Family Court of Western Australia, *Self-represented Litigants Handbooks* (accessed 8 January 2021).

¹¹⁴² Coumarelos C, Macourt D, People J, McDonald HM, Wei Z, Iriana R and Ramsey S, *Legal Australia-Wide Survey - Legal Need in Australia* (2012) (accessed 12 April 2019).

¹¹⁴³ See Allison F, Schwartz M and Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (2014) (accessed 8 January 2021).

¹¹⁴⁴ Productivity Commission, *Access to Justice Arrangements* (3 December 2014) (accessed 8 January 2021).

This interest in self-represented parties is also evident in the Bench Books produced in the United Kingdom,¹¹⁴⁵ New South Wales¹¹⁴⁶ and Queensland.¹¹⁴⁷ Unless otherwise indicated the material used is drawn from the New South Wales Judicial Commission's *Equality before the Law Bench Book* with modifications as a result of the incorporation of local legislation, data and reference material.

The Steering Committee overseeing the production of this Bench Book gratefully acknowledges the submissions and contribution of the following people and organisations, which have assisted with development of this chapter in the first edition and its subsequent revision:

- Ms Hannah McGlade (28 March 2007);¹¹⁴⁸
- Justice Ralph Simmonds, Supreme Court (22 October 2008);
- Criminal Lawyers Association of Western Australia (13 September 2017);
- Aboriginal Legal Service of Western Australia Limited (13 October 2017, 14 September 2020);
- Legal Aid Western Australia (30 October 2017, 8 June 2020);
- The Law Society of Western Australia (23 November 2017, 17 June 2020); and
- Western Australian Bar Association (Inc.) (13 December 2017).

8.1 GENERAL INFORMATION

8.1.1 Right to self-represent

Common law provides that everyone has the right to represent themselves in court in both civil and criminal proceedings — unless the proceedings have been ruled as vexatious (refer to 8.1.2 for further information on vexatious proceedings).

The court has a duty to give all 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.

¹¹⁴⁵ Judicial College (UK), *Equal Treatment Bench Book* (February 2021 revision) Chapter 1 - Litigants in Person and Lay Representatives (assessed 7 April 2021).

¹¹⁴⁶ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2006, updated 14 September 2019) Section 10 - Self-represented Parties (accessed 8 January 2021).

¹¹⁴⁷ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed, 2016) Chapter 12 - Self-Represented Litigants (accessed 8 January 2021).

¹¹⁴⁸ Ms McGlade submitted a copy of her article, *Aboriginal Women, Girls and Sexual Assault* (2006) 12 ACSSA Newsletter 6 (accessed 8 January 2021).

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. What is required to produce a fair trial depends on the particular circumstances of the case.

Refer to section 8.1.7 for more information on the content of the duty of the court.

In civil proceedings, one or both sides (the plaintiff/applicant and defendant/respondent) might be self-represented. While the right of a litigant to appear in person is fundamental, the High Court has stated that 'it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the courts',¹¹⁴⁹ although there is a scarcity of quantitative data available to validate figures with precision and demonstrate the impact of self-represented litigants on the efficiency and efficacy of Australian courts and tribunals.¹¹⁵⁰

In criminal proceedings, an accused person might be self-represented, but prosecutions are generally initiated by 'authorised persons' on behalf of the State. In those rare cases in the lower State courts, where it is expressly allowed under the legislation, a person acting in his or her private capacity might commence a prosecution¹¹⁵¹ and such a person might be self-represented.

Section 13 of the *Crimes Act 1914* (Cth) states that unless the contrary intention appears in the Act or regulation creating the offence, any person may:¹¹⁵²

- (a) *institute proceedings for the commitment for trial of any person in respect of any indictable offence against the law of the Commonwealth; or*
- (b) *institute proceedings for the summary conviction of any person in respect of any offence against the law of the Commonwealth punishable on summary conviction.*

¹¹⁴⁹ *Cachia v Hanes* [1994] HCA 14 [22]; (1994) 179 CLR 403, 415 (Mason CJ, Brennan, Deane, Dawson and McHugh JJ) (accessed 24 April 2019).

¹¹⁵⁰ LawRight, *Self-represented Litigants in the Australian Civil Justice System 10 Years of the Self Representation Service in Australia* (National Access to Justice and Pro Bono Conference, 23 March 2017) (accessed 8 January 2021).

¹¹⁵¹ *Criminal Procedure Act 2004* (WA) s 20(5) (accessed 8 January 2021).

¹¹⁵² *Crimes Act 1914* (Cth) s 13 (accessed 26 April 2019).

8.1.2 Vexatious proceedings

In Western Australia, under the *Vexatious Proceedings Restriction Act 2002* (WA), 'vexatious proceedings' means proceedings:¹¹⁵³

- (a) which are an abuse of the process of a court or a tribunal; or
- (b) instituted to harass or annoy, to cause delay or detriment, or for any other wrongful purpose; or
- (c) instituted or pursued without reasonable ground; or
- (d) conducted in a manner so as to harass or annoy, cause delay or detriment, or achieve any other wrongful purpose.

The *Vexatious Proceedings Restriction Act 2002* (WA) provides a mechanism for the Supreme Court, a judge, the District Court or a District Court judge to make an order to stay vexatious proceedings that have already been commenced or to prohibit a person instituting proceedings.¹¹⁵⁴

8.1.3 Self-representation in the Magistrates Court

Section 44 of the *Magistrates Court (Civil Proceedings) Act 2004* provides that a party to a civil proceeding is 'personally entitled to appear before that Court in order to present and conduct the party's case and to call, examine, cross examine, and re-examine witnesses',¹¹⁵⁵ or the party may be represented by a legal practitioner or, in certain circumstances set out in section 44(2), by another person.

However, section 30 provides that in 'minor cases' (i.e. within a jurisdictional limit¹¹⁵⁶), despite section 44(2), a party is *not* entitled to be represented, either by a legal practitioner or any other person, unless the Court has granted leave.

¹¹⁵³ *Vexatious Proceedings Restriction Act 2002* (WA) s 3 (accessed 8 January 2021).

¹¹⁵⁴ *Vexatious Proceedings Restriction Act 2002* (WA) s 4 (accessed 8 January 2021).

¹¹⁵⁵ *Magistrates Court (Civil Proceedings Act 2004)* (WA) s 44(1) (accessed 8 January 2021).

¹¹⁵⁶ The minor cases jurisdictional limit has been \$10,000 since 1 January 2009: *Magistrates Court (Civil Proceedings Act 2004)* (WA) s 3 (accessed 8 January 2021).

8.1.4 Restrictions on self-represented examining/cross-examining witnesses

There are some restrictions that may be placed upon self-represented accused persons when examining or cross-examining a witness. Section 25A of the *Evidence Act 1906* (WA) empowers a court to order that a self-represented accused person who wishes to cross-examine a witness be separated from the witness and remote evidence be given by video link,¹¹⁵⁷ or alternatively, separated within the courtroom by the use of screens.¹¹⁵⁸ The court can also order that the accused person not question the witness directly and make alternative arrangements for the accused's questions to be put to the witness (i.e. an order that the question(s) be stated by the accused to the judge or another approved person, who then repeats it accurately to the witness).¹¹⁵⁹

Section 106G of the *Evidence Act 1906* (WA) prevents a self-represented accused person from personally cross-examining a 'protected witness', defined as being either a child or, in serious sexual offence proceedings, the complainant regardless of age.

Section 44C of the *Restraining Orders Act 1997* (WA) may limit the ability of an unrepresented respondent or person who is bound by an order to directly cross examine a person with whom they are in a family relationship (as defined in section 4) or an imagined personal relationship (as defined in section 3); and section 53D prohibits any unrepresented person from directly cross-examining any child witness.

In the federal family law context, the *Family Law Amendment (Family Violence Cross-examination of Parties) Act 2018* (Cth) prevents personal cross examination in Family Court proceedings where family violence was an issue. The cross-examination may only be conducted by a legal practitioner. It is the usual custom for Western Australia to amend the *Family Court Act 1997* (WA) to mirror any amendments made to the *Family Law Act 1975* (Cth). The Family Court Amendment Bill 2021 was introduced into the Western Australian Legislative Assembly on 2 June 2022 to make the same changes to the State legislation.

¹¹⁵⁷ *Evidence Act 1906* (WA) s 25A(1)(a) (accessed 8 January 2021).

¹¹⁵⁸ *Evidence Act 1906* (WA) s 25A(1)(b) (accessed 8 January 2021).

¹¹⁵⁹ *Evidence Act 1906* (WA) s 25A(1)(c) (accessed 8 January 2021).

8.1.5 Restrictions on self-represented persons in the *Rules of the Supreme Court 1971* (WA)

There are additional restrictions on those who are not capable of managing their affairs — for example, 'persons under disability' as defined in Order 70 of the *Rules of the Supreme Court 1971* (WA) must be represented by a next friend or guardian *ad litem* in civil legal proceedings in the Supreme Court.

8.1.6 Corporations as persons

Corporations are considered to be legal 'persons' (*Interpretation Act 1984* (WA) section 5). There are, however particular limitations on the representation of corporations in legal proceedings.¹¹⁶⁰ For example, section 39(1)(a) of the *State Administration Tribunal Act 2004* (WA) requires a party that is a body corporate to be represented by a lawyer unless the person representing it is a director, secretary or other officer of the body corporate. Under the *Rules of the Supreme Court 1971* (WA), unless expressly provided for in an Act, a body corporate can only sue if represented by a solicitor and can only defend a civil action if represented by a legal practitioner.¹¹⁶¹

In criminal matters, there are particular procedures in Part 5 Div 6 of the *Criminal Procedure Act 2004* (WA) that apply to prosecutions against a corporation. Section 151 provides that a corporation may appoint an individual, who need not be a legal practitioner, to be its representative in proceedings before the Court. Section 152 requires that the appointment must be under the seal of the corporation or by a certificate signed by an officer of the corporation (as defined in the *Corporations Act 2001* (Cth)). Section 153 then provides that the representative may do all things that an accused who is an individual may do before a court. Pursuant to section 154, a corporation can only enter a plea in writing, which must either be signed by the corporation's representative or sealed with the corporation's seal.

8.1.7 Duty of the Court

The courts now frequently refer to their 'duty' or 'obligation' in relation to self-represented persons. This is usually defined in terms that require the impartial function of the judge to be

¹¹⁶⁰ The extent to which companies may be represented by individual persons who are not legal practitioners has been considered in some detail in *Re Hoffman* [2004] WASCA 238 (accessed 26 April 2019).

¹¹⁶¹ *Rules of the Supreme Court 1971* (WA) O 4 r 3(2) and O 12 r 1(2) (accessed 8 January 2021).

preserved, while also requiring the judge to intervene where this is necessary to ensure the trial is fair and just.¹¹⁶² The same duty applies to masters, magistrates, commissions and tribunals, but of course the application of the duty would have to take into account the particular demands of those jurisdictions. The duty applies even when all the parties are litigants in person.

In *Tomasevic v Travaglini*,¹¹⁶³ Bell J discussed the obligations of judicial officers when self-represented litigants appear before them:

Every judge in every trial, be it criminal or civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. The duty is inherent in the rule of law and the judicial process. Equality before the law and equal access to justice are fundamental human rights specified in the ICCPR. The proper performance of the duty to ensure a fair trial would also ensure those rights are promoted and respected.

*Most self-represented persons lack two qualities that competent lawyers possess - legal skill and ability, and objectivity. Self-represented litigants therefore usually stand in a position of great disadvantage in legal proceedings of all kinds. Consequently, a judge has a duty to ensure a fair trial by giving self-represented litigants due assistance. Doing so helps to ensure the litigant is treated equally before the law and has equal access to justice.*¹¹⁶⁴

In criminal trials, a judge has an overriding duty to ensure that an accused person receives a fair trial: *Dietrich v R* (1992) 177 CLR 292. What is required to produce a fair trial depends on the circumstances. It may be necessary to:

- ensure acceptable custodial facilities or a special court venue are available;
- exclude unfair prejudicial evidence;
- allow an adjournment for pre-trial publicity to abate; and/or
- use interpreters.

Refer to chapter 7 for further information as to when and how interpreters should be used.

¹¹⁶² *Tomasevic v Travaglini* [2007] VSC 337 [139]-[141] (accessed 26 April 2019).

¹¹⁶³ *Tomasevic v Travaglini* [2007] VSC 337 (accessed 26 April 2019).

¹¹⁶⁴ *Tomasevic v Travaglini* [2007] VSC 337 [139]-[141] (accessed 26 April 2019).

Where the accused is self-represented, a judicial officer will need to provide some explanation to him or her to fulfil their obligations. As the High Court stated in *MacPherson v R*:¹¹⁶⁵

It would be wrong to think that a judge who explained to an accused person the choices open to him would be playing the part of an advocate - he would be performing his duty as a judge by informing the accused of his rights in relation to the conduct of the trial.

Refer to section 8.5 for further information on the content of the duty of the judge/court as it specifically relates to civil proceedings (8.5.3.1), Family Court proceedings (8.5.3.2) and criminal proceedings (8.5.3.3).

8.1.8 Numbers of self-represented parties and funding sources

A 2014 inquiry by the Productivity Commission into Access to Justice Arrangements reported that:

- The proportion of parties representing themselves appears to be increasing in some tribunals and courts. Some people see this as a problem because they believe outcomes for self-represented litigants are not as favourable as for those with legal representation. Self-represented litigants are also said to take up more court time and lead to more costly trials.
- On the other hand, a number of participants, including members of the judiciary, told the Commission that parties should expect to be able to effectively represent themselves in many tribunals and magistrates' courts. Indeed, individuals have a right to self-represent in the ordinary course of litigation, and in all courts exercising federal jurisdiction.¹¹⁶⁶
- The information at state and territory level was limited. From the limited data available, the proportion of self-represented parties seems to have increased slightly over time in some jurisdictions.¹¹⁶⁷

¹¹⁶⁵ *MacPherson v R* [1981] HCA 46 [16]; (1981) 147 CLR 512 (accessed 26 April 2019).

¹¹⁶⁶ Productivity Commission, *Access to Justice Arrangements* (3 December 2014) pages 487-489 (accessed 8 January 2021).

¹¹⁶⁷ Productivity Commission, *Access to Justice Arrangements* (3 December 2014) page 489 (accessed 8 January 2021).

Data from the High Court of Australia showed that the proportion of special leave applications filed by self-represented litigants was 47% in 2019-2020,¹¹⁶⁸ 55% in 2018-2019,¹¹⁶⁹ 48% in 2017-18 and 42% in 2016-17.¹¹⁷⁰ For 2015-16, 76% of the immigration applications filed were filed by self-represented litigants. Immigration matters constituted 33% of all special leave applications that year.¹¹⁷¹

Data from the Federal Court of Australia showed that 16% of the actions commenced in Western Australia during 2019-20 were by self-represented litigants (96 litigants). There was considerable variation across the State registries, with 71% of actions in New South Wales (415 litigants) and 0% of the actions in Tasmania and Northern Territory being commenced by self-represented litigants during that same year.¹¹⁷²

8.2 VARIOUS JURISDICTIONS

8.2.1 Civil jurisdiction

The Productivity Commission reported that there are no firm figures across all Western Australian courts in relation to numbers of self-represented litigants. However, it was reported that in Western Australia, of the 41,048 matters lodged in the Civil Registry of the Magistrates Court in 2008-09, one or more parties were self-represented in 98% of matters at lodgement and in 53% per cent of hearings (excluding residential tenancy matters). While the Productivity Commission reported that the Supreme Court of Western Australia lacked the capacity to record meaningful data on the numbers of self-represented litigants at that time, self-representation was the norm in the Court's probate jurisdiction.¹¹⁷³

In 2008, the Supreme Court enacted a rule for its civil jurisdiction allowing for *pro bono* lawyers to recover costs as if the services were provided for a fee (Rules of the Supreme Court 1971 (WA) O 66 r 8A); it also applies in the District Court. This may be of assistance to parties

¹¹⁶⁸ High Court of Australia, Annual Report 2019-2020, page 20 (accessed 8 January 2021).

¹¹⁶⁹ High Court of Australia, Annual Report 2018-2019, pages 5 and 21 (accessed 8 January 2021).

¹¹⁷⁰ High Court of Australia, Annual Report 2017-2018, page 21 (accessed 8 January 2021).

¹¹⁷¹ High Court of Australia, Annual Report 2015-2016, page 20 (accessed 8 January 2021). Note that no comparable data was contained in the reports for the following years.

¹¹⁷² Federal Court of Australia, Annual Report 2019-20, Table 3.6, page 31 (accessed 8 January 2021).

¹¹⁷³ Productivity Commission, Access to Justice Arrangements (3 December 2014) Appendix F - Data on Self-represented Litigants (accessed 26 April 2019).

who would prefer legal representation in civil proceedings but are not in a financial position to fund it.

The Federal Court of Australia's 2019-20 annual report shows that 16% (or 96 self-represented litigants) of the actions commenced in Western Australia that year were by self-represented litigants. New South Wales had the highest percentage, at 71% during the same period, and Tasmania and the Northern Territory had the lowest, at 0%.¹¹⁷⁴

In its 2017-18 Annual Report, Legal Aid Western Australia (LAWA) stated that in the civil law division, funding had been secured until 31 August 2020 to provide the 'Self-represented Litigants Service' in the Federal Court of Australia and the Federal Circuit Court of Australia. Assistance is provided predominantly in the areas of fair work, bankruptcy and migration appeals, but there is also some assistance in child support appeals, small business insolvency and constitutional law matters. Assistance is generally provided on the likely utility of an application or appeal, court process and procedure, court etiquette, disclosure and evidence, the drafting of documents, forms and pleadings, settlement negotiations and other options to resolve the person's legal problems.¹¹⁷⁵

The 2018-19 Annual Report by LAWA stated that its mortgage hardship service was expanded in March 2019, in response to record demand for legal assistance arising from home loan defaults. An outreach service was extended to Baldivis, Merriwa and Midland – three of the worst affected locations. The team advises people who have been served with a Supreme Court writ for mortgage possession, negotiates with lenders and assists people lodge complaints with the Australian Financial Complaints Authority.¹¹⁷⁶

The 2018-19 Annual Report by LAWA also stated that a specialised elder abuse unit was established in February 2019, in response to research indicating that about 5% of people aged over 65 years old in Western Australia experience elder abuse each year. Whilst services had previously been provided to people affected by elder abuse, LAWA decided that these services should be better coordinated in a specific unit, which is now called the Seniors Rights and Advocacy Service.¹¹⁷⁷

¹¹⁷⁴ Federal Court of Australia, *Annual Report 2019-20*, Table 3.6, page 31 (accessed 8 January 2021).

¹¹⁷⁵ Legal Aid Western Australia, *Annual Report 2017-18*, page 25 (accessed 1 October 2019).

¹¹⁷⁶ Legal Aid Western Australia, *Annual Report 2017-18*, page 16 (accessed 1 October 2019).

¹¹⁷⁷ Legal Aid Western Australia, *Annual Report 2017-18*, page 18 (accessed 1 October 2019).

The 2019-20 Annual Report by LAWA stated that its services in elder abuse had increased by 208%. An Elder Abuse Strategic Plan had also been launched to provide a pathway for improving service provision and increasing community awareness of elder abuse. Legal Aid also had commenced collaborative projects with Advocare (a direct referral pathway from Advocare's Elder Abuse Helpline to LAWA's elder abuse service) and Northern Suburbs Community Legal Service (establishing a community for practitioners of elder abuse law to share information).¹¹⁷⁸

8.2.2 Criminal jurisdiction

A guiding legal principle in Australia is that a person facing a charge on a serious matter, in the superior courts, might have the proceedings against them stayed by the court in the absence of legal representation. Consequently, the eligibility guidelines of Legal Aid Western Australia (LAWA) ensure that those persons charged with serious criminal offences that must be dealt with in either the District or Supreme Court, or offences that a Magistrate has decided should be dealt with in the superior courts, will be granted aid for legal representation if they do not have the financial means to pay for a lawyer.¹¹⁷⁹ The Aboriginal Legal Service of Western Australia Limited (ALSWA) also provides representation in criminal matters in the District and Supreme Courts.¹¹⁸⁰ This means that people appearing on criminal charges before the Supreme or District Courts are generally represented.

The position is different in the criminal jurisdiction of the Magistrates Court and Children's Court. Reduced funding to LAWA meant that from 1 November 2017, a grant of aid for representation in a criminal matter in the Magistrates Court was ordinarily only be available where serious charges are involved. If this is established and the accused meets the means test, three priorities will apply:¹¹⁸¹

- The first priority is where there are personal disadvantage or mental health indicators present that impact the ability of the accused to instruct a solicitor or to communicate logically and coherently in order to self-represent.

¹¹⁷⁸ Legal Aid Western Australia, *Annual Report 2019-20*, page 25 and 26 (accessed 8 January 2021).

¹¹⁷⁹ Legal Aid Western Australia, *Annual Report 2015-16*, page 3 (accessed 8 January 2021).

¹¹⁸⁰ Aboriginal Legal Service of Western Australia, *Services* (accessed 11 January 2021).

¹¹⁸¹ Submission from Legal Aid Western Australia (30 October 2017).

- The second priority are cases involving multiple charges – cases involving 10 or more charges that are disparate and require substantive instructions may be granted when there are accompanying serious charges and mental health issues.
- The third priority are cases where charges of a violent or sexual nature are proceeding to trial and the applicant for legal aid will be directly cross examining the complainant.

In the 2019-20 financial year, LAWA provided a duty lawyer in every location in Western Australia where a Magistrate presided over criminal lists.¹¹⁸² In some locations they are not available every day.¹¹⁸³ The role of a duty lawyer is limited. Duty lawyers do not provide representation in Magistrates Court trials and do not deal with all types of matters. For example, there are only limited circumstances in which representation can be provided in Magistrates Court traffic lists.¹¹⁸⁴

ALSWA also provides a comprehensive duty service by court officers and lawyers at the Perth Magistrates Courts and Children's Courts; Armadale Magistrates Court and Children's Court; and in all regional Magistrates Courts (including circuit courts). ALSWA provides legal representation for defended hearings in these Magistrates Courts and Children's Court on a regular basis.¹¹⁸⁵

The use of audio-visual technology in circuit courts throughout the state increases the number of people that can be represented, even if the duty lawyer is not able physically to be in the courtroom.

Under the *Official Prosecutions (Accused's Costs) Act 1973* (WA), a Magistrate has the jurisdiction to award costs to an accused who is deemed to be successful. For the costs to be payable to a successful accused, those costs must be properly incurred by an accused in an official prosecution, and be due and payable, or paid, by the accused to another person (i.e. not for pro bono services) or as court fees. The amount of costs ordered, other than court fees, shall be in accordance with the scale fixed from time to time by a costs determination.¹¹⁸⁶

¹¹⁸² Legal Aid Western Australia, *Annual Report 2019-20*, page 11 (accessed 8 January 2021).

¹¹⁸³ Legal Aid Western Australia, *Find a Duty Lawyer Service* (accessed 8 January 2021).

¹¹⁸⁴ Legal Aid Western Australia, *Get Help at Court* (reviewed 12 April 2018) (accessed 8 January 2021).

¹¹⁸⁵ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

¹¹⁸⁶ *Official Prosecutions (Accused's Costs) Act 1973* (WA) ss 4, 5(5) (accessed 11 January 2021).

8.2.3 Civil and criminal appeals

While there are no figures available, it appears few people pursue civil appeals without legal representation. Legal Aid Western Australia (LAWA) is unlikely to provide a grant for civil appeals. ALSWA does not ordinarily have capacity to provide representation for civil appeals; however, legal assistance might be granted in exceptional cases (especially if pro bono support from external law firms and/or barristers is available).

However, people appealing criminal matters from the District or Supreme Court to the Court of Appeal will be granted legal aid, subject to means, for representation if leave to appeal is granted. LAWA provides a kit to assist appellants which includes information on finding legislation, court etiquette, the appeal process, example grounds of appeal and relevant forms.¹¹⁸⁷

People appealing criminal matters from the Magistrates Court to the Supreme Court, are not generally eligible for funding by LAWA but it does provide a kit to assist appellants in these appeals.¹¹⁸⁸

ALSWA provides advice and representation in relation to criminal appeals before the Court of Appeal and before single judges of the Supreme Court in cases where ALSWA represented the accused in the original matter, and where the appeal is determined to have merit.¹¹⁸⁹

8.2.4 Children's Court

Legal Aid Western Australia provides the following assistance

- Where matters are not suitable for duty lawyer assistance, parties will receive an initial grant for advice, negotiations and filing of a Response Form, where personal disadvantage or mental health indicators are present. Grants of legal aid will be prioritised for people with mental health issues.¹¹⁹⁰

¹¹⁸⁷ Legal Aid Western Australia, *District and Supreme Court Appeal Kit* (reviewed 31 August 2020) (accessed 10 January 2021).

¹¹⁸⁸ Legal Aid Western Australia, *Magistrates Court Appeal Kit* (reviewed 31 August 2020) (accessed 10 January 2021).

¹¹⁸⁹ Submission from the Aboriginal Legal Service of Western Australia Limited (13 October 2017).

¹¹⁹⁰ Submission from Legal Aid Western Australia (30 October 2017).

- In protection and care matters in the Children's Court, child representatives (also known as 'separate representatives') continue to be funded where appropriate. There was an increase in the number of child representatives appointed in 2019-20.¹¹⁹¹
- A child representative is a lawyer who acts for a child to assist the Children's Court work out what the child wants or what is in their best interests. The court decides whether or not a child should have a separate representative.¹¹⁹²

The Aboriginal Legal Service provides the following assistance:¹¹⁹³

- The ALSWA Family Law Unit represents persons involved in child protection proceedings in the Children's Court of Western Australia, including parents and other persons having a direct and significant interest in the welfare of the relevant children.
- However, because the Family Law Unit employed only four full time lawyers (as of 2020), and also provides advice and representation in the Family Court (refer to 8.2.6 for more information), ALSWA is not able to represent every Aboriginal person seeking assistance in these matters.

8.2.5 Violence Restraining Orders

The Legal Aid Domestic Violence Legal Unit (DVLU) provides assistance to women, children and men in same-sex relationships who are victims of domestic violence. For reasons of conflict, other men are assisted by the Client Services Unit.¹¹⁹⁴

The assistance provided by the DVLU includes advice and assistance at court, including representation when applying for a Family Violence Restraining Order (FVRO) and in a defended hearings for a FVRO. A DVLU duty lawyer attends the Perth Magistrates Court each morning. A duty lawyer will also attend Joondalup Magistrates Court to assist FVRO applicants where an objection to the interim FVRO has been lodged with the court. The DVLU provides telephone advice in regional areas.¹¹⁹⁵

¹¹⁹¹ Legal Aid Western Australia, *Annual Report 2019-20*, pages 51 and 111 (accessed 11 January 2021).

¹¹⁹² Legal Aid Western Australia, *Find Legal Answers: Child Protection* (accessed 26 April 2019).

¹¹⁹³ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

¹¹⁹⁴ Legal Aid Western Australia, *Annual Report 2018-19*, page 20 (accessed 1 October 2019).

¹¹⁹⁵ Legal Aid Western Australia, *Get Help with Restraining Orders* (reviewed 5 April 2018) (accessed 1 October 2019); Legal Aid Western Australia, *Annual Report 2019-20*, page 29 (accessed 11 January 2021).

With respect to violence restraining orders, from 1 November 2017 a limited grant of legal aid is provided for advice, negotiation and first appearance if required. This would be in circumstances where there is a history of family and domestic violence or there is physical or sexual violence or a threat to the person's safety (e.g. stalking, threats to family members or pets, threats to kill), an interim VRO has been granted and the other party has objected to the order.¹¹⁹⁶

8.2.6 Family Court of Western Australia

The Family Court of Western Australia is mindful that many parties engaging with the Court do not have legal representation, either by choice or due to financial constraints. The Court is mindful that this can put parties at a disadvantage and cause difficulties in understanding and complying with court processes and orders which can delay and complicate the progress of matters. As such, the Court maintains a range of guides to ensure that self-represented parties are able to effectively participate in the process, and are aware of their options for seeking legal advice.¹¹⁹⁷

Family Court of Western Australia statistics for 2020 showed that:¹¹⁹⁸

- 78% of divorce applications;
- 39% of applications seeking parenting-only orders;
- 28% of applications seeking final parenting and financial orders; and
- 21% of applications seeking final financial-only orders,

were made by self-represented litigants.

Because of the high number of self-represented litigants in this jurisdiction, LAWA operates a duty lawyer service at the Family Court of Western Australia, called Family Court Services. The Legal Aid Western Australia website states that:¹¹⁹⁹

The service helps people with immediate family law needs, who need urgent advice or who have a court date that day and are not able to access a lawyer in time. The focus of Family Court Services is on parenting arrangements and child contact, including advice on recovery

¹¹⁹⁶ Submission from Legal Aid Western Australia (30 October 2017).

¹¹⁹⁷ Family Court of Western Australia, *Annual Review 2019*, page 4 (accessed 11 January 2021).

¹¹⁹⁸ Family Court of Western Australia, *Annual Review 2020*, page 5 (accessed 17 August 2021).

¹¹⁹⁹ Legal Aid Western Australia, *Family Law* (reviewed 19 April 2018) (accessed 17 August 2021).

orders. It many help with property settlement issues where families are experiencing family violence.

Family Court Services also provides FASS (Family Advocacy and Support Service). FASS provides:

- legal and social support services to for families who are experiencing family violence, and*
- advice, and in some cases court representation, to help families manage their legal matters in family court, protection and care and family violence restraining order proceedings.*

FASS duty lawyer and support services are provided by Legal Aid WA on Family Court Magistrates Circuits in regional areas including Geraldton, Kalgoorlie, Broome, Albany and Bunbury.

ALSWA provides advice and representation in relation to family law matters (including parenting order proceedings). However, because the Family Law Unit employed only four full time lawyers (as of 2020), ALSWA is not able to represent every Aboriginal person seeking assistance in these matters. The ALSWA Family Law Unit also represents persons involved in child protection proceedings in the Children's Court of Western Australia, including parents and other persons having a direct and significant interest in the welfare of the relevant children (refer to 8.2.4 for more information).¹²⁰⁰

8.2.7 State Administrative Tribunal

Most people are self-represented in the State Administrative Tribunal (SAT), especially applicants. While the Tribunal operates in some ways like a court, it is not a designated court and it functions differently. All of SAT's procedures are designed on the basis that people will be self-represented most of the time. Additionally, SAT is different from the traditional adversarial courts as it may inform itself on matters as it thinks fit and can ask questions of the parties if to gather relevant information, or is of the view that a matter needs further discussion or development. Conversely, in an adversarial court it is the responsibility of the parties to produce the evidence and ask the questions.

¹²⁰⁰ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

8.3 THE SELF-REPRESENTED PERSON

8.3.1 What are the key characteristics of parties who represent themselves?

A literature review prepared by Richardson, Sourdin and Wallace for the Australian Government's Attorney-General's Department in 2012 (*Building an Evidence-base for the Civil Justice System*) identified the following characteristics of self-represented litigants:¹²⁰¹

- Self-represented litigant (SRL) applicants are more likely to be male than female.
- SRL respondents are more likely to be male in Family Court matters.
- SRLs are more likely to be young (median age 35 years), unemployed, and to have lower education levels.
- SRLs tend to come from culturally and linguistically diverse backgrounds.
- The overall demographic characteristics including gender, employment and income status may differ depending on whether the person is fully self-represented or partially self-represented.
- SRLs that were employed were from a range of professional, trade and sales/personal service occupations.
- Some SRLs may have impaired capacity which impacts on their ability to self-represent or may have a disability.
- Some studies suggest that SRLs are more commonly defendants in proceedings; however this finding was not the case in another study (Richardson, Sourdin & Wallace 2012).

¹²⁰¹ Sheen R and Gregory P, *Building an Evidence-base for the Civil Justice System: Civil Justice System Framework and Literature Review Report* (2012) (accessed 26 April 2019).

Note that Richardson, Sourdin and Wallace found that there is a general lack of data around individual or demographic characteristics of self-represented litigants, with reasons for this including inconsistency in the definition of self-representation, a lack of knowledge in courts about what information is useful to collect, data collection not being prioritised and data collection being limited to that required for immediate operational purposes.¹²⁰²

8.3.2 Why parties represent themselves

The Productivity Commission found that self-represented parties either choose, or may be forced by circumstances, to represent themselves and that there is limited evidence on the relative dominance of these factors.¹²⁰³

There can be many reasons why people represent themselves. For example, a person may:

- be appearing in a jurisdiction where self-representation is encouraged or representation is statutorily precluded;¹²⁰⁴
- have been refused Legal Aid or presume that they are ineligible;
- not be able to afford legal representation;
- have been told by lawyers that their case had no merit, but believe that it does have merit;
- have been ruled by lawyers as in some way too 'difficult' (for example, they are unable to speak English or to communicate well or sufficiently logically);
- not trust lawyers;
- believe they are the best person to put their case across;

¹²⁰² Richardson E, Grant G and Boughey J, *The Impacts of Self-represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Literature* (October 2018) page 8 (accessed 13 January 2021).

¹²⁰³ Productivity Commission, *Access to Justice Arrangements* (3 December 2014) Volume 1, page 490 (accessed 11 January 2021).

¹²⁰⁴ For an example of this see: *Magistrates Court (Civil Proceedings) Act 2004* (WA) ss 30, 44; State Administrative Tribunal, *Minor Proceedings* (2013) (both accessed 11 January 2021).

- have withdrawn instructions from their lawyer relatively recently and not had time to find alternative representation; and/or
- 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.

The Productivity Commission reported in 2014 that studies that examine the link between self-representation and legal aid funding are relatively small in number and some were then over a decade old. They provide mixed results on the impact of legal aid funding on levels of self-representation. However, a number of participants in its inquiry argued that changes to legal aid funding levels and guidelines affect levels of self-representation.¹²⁰⁵

In its submission to the Productivity Commission, the Women's Legal Service Victoria (WLSV) reported that changes to legal aid guidelines can affect more than just the number of self-represented parties. It had seen more settlements being negotiated in high conflict or complex family disputes because the women seeking their assistance 'were faced with either trying to negotiate a settlement or attending the trial by themselves and arguing their case, and for most of them it wasn't really a choice'.¹²⁰⁶

8.3.3 Difficulties faces by self-represented parties

Whatever their literacy or educational level, whatever the type of matter, and - to some extent - however informal the court, people who represent themselves are likely to face considerable barriers in presenting their case, particularly if they are the accused or the other party is represented.

The United Kingdom Judicial Working Group on Litigants in Person (Judiciary of England and Wales 2013) found that self-represented parties frequently have difficulty:¹²⁰⁷

- understanding procedural requirements;
- understanding the concepts of evidence and cause of action;

¹²⁰⁵ Productivity Commission, *Access to Justice Arrangements* (3 December 2014) Volume 1, page 492 (accessed 11 January 2021).

¹²⁰⁶ Productivity Commission, *Access to Justice Arrangements* (3 December 2014) Volume 1, page 493 (accessed 11 January 2021).

¹²⁰⁷ Cited in the Productivity Commission, *Access to Justice Arrangements* (2014) Volume 1, pages 494-495 (accessed 11 January 2021).

- asking appropriate questions and cross examining;
- identifying and focusing on the determinative issues in a case;
- identifying and paying for expert evidence and interpreters; and
- working with opposing counsel.

The Productivity Commission noted that in more adversarial settings with strict and formal procedures built around a norm of legal representation, such as higher courts, self-represented parties can be particularly disadvantaged.¹²⁰⁸

The civil justice system in Western Australia has traditionally operated on the premise that litigants will be represented in court by lawyers. In civil courts, people representing themselves may not be adequately informed or prepared and, as a consequence, place considerable demands and stress on court staff and the judiciary. Not only do many lack legal skills and knowledge of the substantive law, procedural requirements and legal terminology, many do not possess the advocacy skills necessary to prove their cases.

Ideally, all defendants in criminal matters would be legally represented because of the complex nature of both criminal procedure and the substantive law (including the knowledge of mitigating factors and defences), and the impact of conviction, including any sentencing outcomes. Legal representation provides an advantage in any jurisdiction, but the impact may be more exacerbated in criminal matters. A leading High Court case in this area, *Dietrich v R* (1992) 177 CLR 292,¹²⁰⁹ originally confined this principle to serious cases. In the past, that might not have included hearings in a Magistrates Court. The effect of section 5 of the *Criminal Code* (inserted in 2005) and the category of 'either way offences' means that many offences triable on indictment will be heard by magistrates. There is no reason why a trial for at least the more serious of these could not fall within the *Dietrich* principle.¹²¹⁰

Difficulty with self-representation also arises because there is a lack of objectivity and emotional distance from the case.¹²¹¹ This lack of objective reasoning in assessing the merits

¹²⁰⁸ Productivity Commission, *Access to Justice Arrangements* (3 December 2014) Volume 1, pages 494-495 (accessed 11 January 2021).

¹²⁰⁹ [1992] HCA 57; (1992) 177 CLR 292 (accessed 5 May 2017).

¹²¹⁰ For a discussion of the application of *Dietrich* in the Magistrates Court proceedings see LexisNexis commentary *Criminal Law Western Australia* [7585.1], [7860.15] (accessed 14 December 2018).

¹²¹¹ See *McInnis v R* [1979] HCA 65; (1979) 143 CLR 575, 590 (Murphy J) (accessed 30 April 2019).

of their case means self-represented people are more likely than represented litigants to be involved in frivolous or vexatious litigation.¹²¹²

There is also the potential for self-represented litigants to undervalue the strength of their case because they do not have a full understanding of the legal merits and, therefore, they may enter into unreasonable settlements or negotiations, especially to avoid protracted court proceedings.

Such a lack of distance is especially pertinent to litigants in the Family Court jurisdiction, where emotional involvement in the subject matter of the case is inherent, especially where it involves children and risk to children. This is an added obstacle for self-represented litigants who already face obstacles in conducting and presenting their case in an adversarial court. Given the very high incidence of unrepresented parties in its jurisdiction, however, the Family Court of Western Australia, seeks to assist self-represented litigants in various ways, including providing guides to self-represented parties:

- *A Guide to Representing Yourself in the Family Court of Western Australia – Children's Cases* (revised December 2015)
- *A Guide to Representing Yourself in the Family Court of Western Australia – Property Cases* (revised December 2015)

8.3.4 Specific issues regarding additionally disadvantaged self-represented parties

The adversarial system is particularly difficult for people for whom English is a second language, who do not speak English or who have poor or minimal literacy skills. This can be exacerbated if litigants are also unrepresented.

For further information in relation to culturally and linguistically diverse people refer to chapter 7 of this Bench Book.

Other disadvantaged groups who face specific issues as self-represented people are those with mental illness or intellectual disabilities and some Aboriginal people (although, of course, members of these groups may also not speak English as a first language and may have poor literacy skills). These groups face common problems accessing legal representation and

¹²¹² Australasian Institute of Judicial Administration (AIJA), *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001) (accessed 30 April 2019).

consequently, in many cases, they will appear before the court as a self-represented person. Their particular difficulties in understanding and engaging with legal processes may contribute to them securing worse outcomes. An evaluation of the demography of criminal defendants and prisoners in Western Australia reveals a disproportionate number of people with mental illnesses or intellectual disabilities, and people of Aboriginal origin.

For more information regarding parties who have a disability refer to
chapter 4 of this Bench Book.

8.3.4.1 Aboriginal People

It has been well documented that the cultural and societal perspective of Aboriginal people is different from that of non-Aboriginal court users and this must be kept in mind when they appear before the court. One of the primary goals of ALSWA is to support Aboriginal persons through the court process, with the majority of its resources being directed towards representation in the criminal jurisdiction.

Due to funding constraints, ALSWA does not attend the following courts in the Perth metropolitan area:¹²¹³

- Joondalup Magistrates and Children's Courts
- Fremantle Magistrates and Children's Courts
- Midland Magistrates and Children's Courts
- Mandurah Magistrates and Children's Courts
- Rockingham Magistrates and Children's Courts

ALSWA also does not attend some Magistrates and Children's Courts in regional Western Australia, including Bridgetown, Margaret River, Kalbarri, Leeman, Dongara, Three Springs, Northampton, Ravensthorpe, Jurien Bay and Southern Cross.¹²¹⁴

This means that adult Aboriginal accused persons appearing in these courts who wish to defend criminal charges and do not satisfy Legal Aid Western Australia (LAWA) eligibility criteria for a grant of aid are unlikely to be represented at contested hearings. Most children wishing to

¹²¹³ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

¹²¹⁴ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

defend criminal charges will be eligible for a LAWA grant of aid and will be represented at contested hearings.¹²¹⁵

ALSWA represents numerous female accused persons in the criminal justice system and provides substantial legal services to Aboriginal women in the areas of child protection, family law, family violence and civil matters. ALSWA can often be conflicted out of representation due to being able to represent only one of the parties or having previously represented one of the parties. However, ALSWA explained in its submission to this Bench Book that in certain circumstances, conflict of interest issues also arise due to timing. Usually, a person charged with an offence contacts or accesses ALSWA first (because they are arrested and appear in court soon after an incident). However, if the victim contacts ALSWA first and seeks assistance, ALSWA would then be unable to represent the accused.¹²¹⁶

Mr Dennis Eggington, the Chief Executive Officer of ALSWA, has identified a number of areas where, in his view, the Western Australia court system, particularly the criminal jurisdiction, fails to meet the needs of Aboriginal and Torres Strait Islander persons. These include failure:

- to consistently provide suitable qualified and experienced interpreters in Aboriginal languages;
- to ensure Aboriginal and Torres Strait Islander court users read and meaningfully understand the contents of written material, bearing in mind language and literacy in the relevant language;
- ensure that court practices and procedures are observed in a culturally secure and sensitive manner; and
- to adequately, or in a formal and consistent way, take evidence in relation to the content of relevant Aboriginal law.

In response to the disproportionate incidence of Aboriginal persons appearing before court on criminal charges, a number of measures have been implemented by the Department of Justice

¹²¹⁵ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

¹²¹⁶ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

through the Aboriginal Justice Program.¹²¹⁷ It has identified priority locations for the delivery of services related to Motor Drivers Licensing issues and Fines Enforcement. Open Days are held where there are representatives from the Department of Transport, Centrelink, the Registry of Births, Deaths and Marriages, the Fines Enforcement Registry and other services based on location and need. Services provided on Open Days include:

- obtaining birth certificates;
- making arrangements to resolve outstanding fines;
- vehicle and drivers licensing enquiries;
- undertaking theory and practical driving tests;
- assisting with job readiness; and
- accessing other supporting agencies (for example: financial and legal services).

In addition, Aboriginal court liaison officers are located in eight courts throughout the State, to provide a link between the justice system and the community. They provide information and advice to Aboriginal people on court procedures and help explain court outcomes, consequences of non-compliance with court orders and payment options for fines.

Although these strategies have been well received, representation remains a pertinent issue and one that continues to present as a cause for concern.

Mr Eggington sees a lack of legal representation as problematic for both the interests of justice and the plight of Aboriginal accused persons, for there is a 'real risk of self-represented Aboriginal and Torres Strait Islander court users being convicted of offences they have not committed or to which they have a legal defence'.¹²¹⁸

There are currently services that provide legal representation specifically to women, such as the Aboriginal Family Law Services. Note earlier comments about ALSWA's representation of women.

¹²¹⁷ Department of Justice, *Aboriginal Justice Program* (accessed 24 February 2020). Note that a trial of a community (Aboriginal) court in Kalgoorlie was effectively discontinued. For more information see the transcript of the speech by the Hon Wayne Martin AC, *Reflecting on the Practice of Non-adversarial Justice* (Second International Conference on Non-adversarial Justice: Integrating Theory and Practice, 6 April 2017) (accessed 11 January 2021).

¹²¹⁸ Aboriginal Legal Service of Western Australia, Communication with Department of the Attorney General (WA) (2005) (ref: 2005/187-3 Part 6).

Refer to chapter 11 of this Bench Book for more information in relation to the specific issues for Aboriginal people. Refer also to chapter 10 (10.4.4.1) regarding specific issues faced by Aboriginal women.

8.4 THE IMPACT OF SELF-REPRESENTED PEOPLE

In cases where one or both parties are self-represented, difficulties may arise not only for the parties but also the court. The Australasian Institute of Judicial Administration (AIJA) has observed that any adverse impact on the justice system varies based on a number of factors, including:¹²¹⁹

- the nature of the jurisdiction (for example whether it is a court or tribunal); and
- whether a matter is regarded as routine or complex.

Some small claims courts and most tribunals are structured around a norm of self-representation, however it can be more problematic for higher courts. The adversarial nature of their proceedings places a heavy responsibility on parties to provide all relevant facts and law, and to abide by procedural directions and guides and court rules. It is on this basis that legal representation can be expected in the higher courts.

The AIJA observed that:¹²²⁰

Of particular importance in higher courts are the rules of evidence. The court and tribunal systems are to varying degrees designed around professional people able to work efficiently in these environments.

Whilst it is often not their intention, self-represented parties are generally viewed as creating difficulties for courts by taking up more time and resources than legally represented parties.

This is said to be the result of self-represented parties tending to:¹²²¹

- raise irrelevant concerns to the legal issues in question;
- cause frustration to judges;

¹²¹⁹ Cited by the Productivity Commission, *Access to Justice Arrangements* (2014) Inquiry Report, Volume 1, page 498 (accessed 11 January 2021).

¹²²⁰ Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001) page 4 (accessed 14 August 2018).

¹²²¹ Productivity Commission, *Access to Justice Arrangements* (2014) Inquiry Report, Volume 1, page 498, citing a submission made by Legal Aid New South Wales to the Commission (accessed 11 January 2021).

- prolong the process;
- submit incomplete documentation;
- rely on judges to an extent that raises concerns about the appearance of bias; and
- rely on opposing counsel to an extent that raises concerns about their ability to properly represent the interests of their own client.

Although evidence of the impacts of self-represented parties is mixed, most studies suggest that they use more court and tribunal resources than represented parties, including a Western Australian review conducted in 2004 which suggested that single judge appeals with self-represented parties consume on average almost 20 per cent more hearing time than when self-represented parties are not involved.¹²²²

8.4.1 Difficulties for the court

The difficulties faced by self-represented parties may in turn lead to difficulties for the court. For example:

- The proper processes may not have been followed.
- It may be much harder (and might take longer than usual) to get to the essence of what the case is about.
- The required evidence may not be presented at all, or may be presented inadequately.
- It will often be necessary for the judicial officer to intervene much more than usual.
- Finding the appropriate balance between intervention and neutrality can be difficult for the judicial officer.
- It is more difficult for the other party and/or the prosecution to deal with an unrepresented party than a represented party.

8.4.2 Difficulties for the parties

Self-represented parties must be given the opportunity to present their case as positively as they can, in the same way as represented parties are given that chance.

Unless ways are found to minimise the difficulties that self-represented parties face and the consequential difficulties faced by the court, self-represented parties are likely to:

¹²²² Productivity Commission, *Access to Justice Arrangements* (2014) Inquiry Report, Volume 1, page 500 (accessed 11 January 2021).

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

The difficulties faced by self-represented people may be compounded when parties are:

- both self-represented;
- from a non-English speaking or migrant background;
- alleging family or domestic violence;
- Aboriginal;
- gender or sexuality diverse;
- people with disability; and
- older people.

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 feel as though they have been treated unfairly or unjustly.

8.5 PRACTICAL CONSIDERATIONS

The following section provides additional information and practical guidance about ways to treat a self-represented person during the court process, so as to reduce the likelihood of issues arising.

8.5.1 Prior to the court appearance

Many of the difficulties self-represented parties both face and cause may 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.

Points to consider before the first appearance:

- You should use simple and direct non-legal language when communicating to the person what you are doing and why you are doing it.
- You may need to ask a registrar to check with the Supreme Court and District Court whether a party is currently on the list of vexatious litigants.¹²²³
- Check with all parties whether there is any possibility of resolving the matter via negotiation or mediation (by the court or externally) and, where relevant, make the appropriate directions to attend. If this is an option and is happening externally to the court, ensure that the parties know that they must tell the court immediately if the matter is settled so that any court dates can be allocated to other matters.
- Check whether the self-represented person understands the effect of any orders made by the court at a directions hearing, including what they are required to do and by when.
- Check whether the self-represented person has exhausted the possibilities of accessing legal representation — via Legal Aid, ALSWA, duty counsel, a community legal centre, a *pro bono* scheme (including Law Access) or a lawyer. This includes checking that they know how to access information in relation to these options and how to lodge an application for assistance.
- If required, obtain information about the status or progress of an unrepresented accused person's application to Legal Aid (WA), you can contact the Legal Aid Co-ordinator — Assessing, on telephone number: 9261 6530.
- Refer a self-represented person to written and verbal explanatory information about the court and its processes and/or references to appropriate organisations and/or their websites. Note that referral to a person to give verbal, rather than written, information

¹²²³ Refer to the *Vexatious Proceedings Restriction Act 2002* (WA) (accessed 11 January 2021). The Principal Registrars of the Supreme and District Courts are responsible for publishing in the *Gazette* any order made under that Act.

will be particularly critical for self-represented parties who have limited literacy or who are not literate in English.

- In terms of written information:
 - The websites of all courts and the State Administrative Tribunal contain information that will assist self-represented people, including forms and fact sheets that can be downloaded and information on current fee schedules.
 - In the Supreme Court, inform the self-represented person of the availability of kiosks in the Court's Registry (introduced in March 2018). These can be used by self-represented litigants (and other litigants) who need to file documents, access information from the Court's website or access the legal resources/ databases that are available on the kiosks.
- In terms of verbal information:
 - You may need to refer a self-represented person to an officer of the court for assistance, in which case it is important that it is a person who can appropriately assist. In Perth-based courts, the appropriate officer is often referred to as the Manager Customer Services. The State Administrative Tribunal has a position of Manager Community Relations. Registrars may be able to assist in the regional courts.
 - The appropriate officer can provide a list of appropriate avenues for legal representation¹²²⁴ and provide information on what forms need to be completed. An appropriate court officer cannot provide legal advice; recommend a particular lawyer; tell them what to put on the forms; tell them what to put in a statement of claim or grounds of appeal; comment on the sufficiency of the statement of claim or grounds of appeal; and/or tell them what to say in court.
 - In *Woodley v Woodley* [2018] WASCA 149 [76] the Court of Appeal (adopting a passage from *Stone v Braun* [2015] WASCA 103) stated that a court/judge 'may

¹²²⁴ Generally speaking, representation is allowed by a legal practitioner, though in limited circumstances the court may give leave for a person who is not a legal practitioner (or who is still an articled clerk) to appear. See *Criminal Procedure Act 2004* (WA) s 172; *Magistrates Court (Civil Proceedings) Act 2004* (WA) s 44 (but see s 30 which provides that without leave of the Court a party to a minor case is not entitled to be represented); *District Court of Western Australia Act 1969* (WA) s 39; *State Administrative Tribunal Act 2004* (WA) s 39 (noting that s 39(1) provides for a wider range of persons to appear in the SAT without leave, including, for example, a person who 'has particular knowledge or experience relevant to the matter that is being dealt with') (accessed 29 April 2019).

need to take appropriate steps to *ensure*, so far as possible, that a self-represented litigant has sufficient information about the practice and procedure of the court to mean that there is a fair trial.' However, this passage was not referring specifically to the role of the court officer/ Manager Customer Services.

- In an appropriate case, provide information about applying to use a 'McKenzie friend' or lay advocate, and how either might help.
 - A court has the discretion to allow a person to attend as a [McKenzie] friend of an unrepresented party to provide some assistance to that party. The Court of Appeal stated in *Van der Feltz v Legal Practice Board of Western Australia* [2017] WASCA 113 [28]-[29]:¹²²⁵

The court has a broad discretion as to the precise role which the person may play. Commonly the role involves taking notes and quietly making suggestions to the party. Although to do so is generally undesirable, in exceptional circumstances the person may be permitted to address the court on behalf of the party ... A McKenzie friend has no entitlement to engage in legal practice, or to perform any particular role when given permission to assist a party in court.
 - A 'lay advocate' is a person who has permission from the court to represent a party (including addressing the court on the party's behalf) who has not been admitted to legal practice.
 - For both McKenzie friends and lay advocates, matters to consider include: the complexity of the case; any genuine difficulties the self-represented party has in presenting or preparing their case; any risks resulting from reduced professional accountability and duties to the court; and the public interest in effective, efficient and expeditious disposal of litigation.
 - The proper role of a McKenzie friend is generally strictly limited and often involves taking notes and quietly making suggestions to the party, with the court having a broad discretion as to the precise role which the person may play.
- Inform the self-represented person which test or standard of proof the court will use in deciding their case — that is, 'balance of probabilities', or 'beyond reasonable doubt'.

¹²²⁵ See also, *Scarce v Killalea* [2003] WASCA 81 (adopted in *Santos v The State of Western Australia* [2013] WASCA 39 [10]) (accessed 25 January 2019).

- Provide information about what is and is not allowed in court in relation to evidence, and what is and is not allowed in relation to expert witnesses.
- Provide information as to what must be filed 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.
 - In relation to the Supreme Court, since 1 March 2018, it has been mandatory to present documents for filing electronically using the Court's electronic case management system (ECMS), unless there is an exception under the *Rules of the Supreme Court 1971*, O 67A r 3(1). The ECMS is the electronic filing system on the eCourts Portal of Western Australia website. A litigant must become a registered user of the eCourts Portal to use this system to electronically file a document, and may do so using the kiosks in the Registry. Staff at the Supreme Court Registry can also provide information about the use of the kiosks and how to become a registered user of the eCourts Portal.
- Provide information about who and what they need to bring with them when they come to court — for example: their witness(es), any original documentary evidence and copies for the court and the other party.
- Provide information in relation to the use of subpoenas to obtain documents from a third party, and the court process for gaining access to documents once subpoenaed.
- They may also need to be informed of other pre-trial matters that may arise, and the process for putting on or responding to a notice of motion.

8.5.2 At the start of court proceedings

A self-represented person will not generally know how court proceedings run, who does what and in what order, and what they are allowed and not allowed to do in presenting their case or in testing the other party's evidence.

It is therefore a good idea, at the start of the proceedings, to set the scene and the ground rules in relation to the process that will be followed, so as to help minimise delays and problems later on.

Points to consider at the first appearance:

- You may need to explain basic courtroom conventions to a self-represented person using simple and direct, non-legal language. For example:
 - who is in the court and their names and roles;
 - how to address the judicial officer(s) and the other party or their legal representative(s);
 - the need to ensure mobile phones are off or in silent mode;
 - that they can take notes but cannot record the proceedings;
 - how to obtain or apply for access to any transcript of the proceedings (you may also wish to check that they have paper and a pen);
 - 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; and
 - 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.
- You need to explain 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.
- You should explain that your role is to make sure everyone is able to present their evidence as fairly and effectively as possible, but to stay neutral and not favour either side, and then to decide the case. You might also wish to explain that you may well ask more questions than you do usually in order to check that you understand the self-represented person's case, and that if any such question concerns the other party - in relation to you remaining neutral - that they should say so at the time.
- Explain 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.

Then gain agreement with the parties that these are the only issues that will be dealt with.

- Explain the order of events — who does what and 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: whether mediation or negotiation is appropriate (again); that the necessary statements and documentary evidence has been filed and the other party has received copies; that any documents they subpoenaed have been received; that they have their witnesses ready to proceed; and that if they wish to rely on any further documents or pre-prepared statements, the other party has been provided an opportunity to see them first so that any issues of admissibility can be canvassed when appropriate.
- Note that you may need to exercise a greater degree of flexibility than you would in the case of a represented party, if some of these issues have not been dealt with properly — bearing in mind the self-represented party's likely lack of legal process knowledge, understanding and lack of objectivity.
- You may need to adjourn the proceedings until any of these issues are dealt with properly.
- In jury trials, it may also be important to ensure that the jury is not unduly influenced (either in favour of or against a person) simply because they are representing themselves. You may therefore need to explain that there are many reasons why people represent themselves and that they must not use the fact that a party 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.

8.5.3 As the court proceedings progress

The court has a duty to give persons who represent themselves a fair hearing, and it may be appropriate for the court to give some assistance to such persons in order to fulfil 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.

Refer to the following sections for further information and relevant authorities on the content of the duty of the judge/court as the proceedings progress: 8.5.3.1 in relation to civil proceedings, 8.5.3.2 in relation to Family Court proceedings and 8.5.3.3 in relation to criminal proceedings.

8.5.3.1 The role of the court in civil proceedings

In *Moleirinho v Talbot & Olivier Lawyers Pty Ltd* [2014] WASCA 65 [51], the Court of Appeal considered the court's obligations in civil cases where one or more of the parties is unrepresented and there is a risk of that party's case not being adequately presented to the court. The following passage from that case was later adopted by the Court of Appeal in *Stone v Braun* [2015] WASCA 103 [62]-[69] and *Woodley v Woodley* [2018] WASCA 149 [76]:

What a judge ought do to assist a litigant in person depends on the litigant, the nature of the case, and the litigant's intelligence and understanding of the case: Abram v Bank of New Zealand [1996] FCA 635; (1996) ATPR 41-507, 31; Tobin v Dodd [2004] WASCA 288 [14]. The boundaries of intervention are flexible but the lodestar is a fair and just trial. It is clear, however, that a judge must not intervene to such an extent that he or she cannot maintain a position of neutrality or as to give an unrepresented litigant a positive advantage over another party. The advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which that litigant will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which the adversarial procedure offers to the unwary and untutored: Rajski v Scitec Corporation Pty Ltd [1986] NSWCA 1, 14; Minogue v Human Rights and Equal Opportunity Commission [1999] FCA 85; (1999) 84 FCR 438 [26]-[29].

Many cases have recognised the dilemma created by the need to diminish the disadvantages suffered by a self-represented litigant while maintaining the court's neutrality. The following passage from *Stone v Braun* [2015] WASCA 103 [65]-[69] (Beech J; Buss and Mazza JJA agreeing at [1], [2]) provides guidance:¹²²⁶

¹²²⁶ This passage was later adopted in *Woodley v Woodley* [2018] WASCA 149 [76].

Depending on the circumstances, the court may need to take appropriate steps to ensure, so far as possible, that a self-represented litigant has sufficient information about the practice and procedure of the court to mean that there is a fair trial. This duty does not extend to advising the self-represented litigant as to how his or her rights should be exercised. Further, a duty to provide information in order to attempt to overcome the procedural disadvantages faced by a self-represented litigant is not a duty to run the case for him or her.

*The importance of ensuring that a self-represented litigant understands the distinction between evidence and submissions is at the heart of the decision in *Downes v Maxwell*. In that case, the trial judge had repeatedly explained, and emphasised, the distinction between evidence and submissions. Nevertheless, on appeal the majority found that there had been a denial of procedural fairness, because there was a real risk that a comment of the trial judge to the self-represented litigant made just before the time for him to elect whether to give evidence may have misled him to believe that his oral submissions could be relied on as his case.*

In some circumstances a judge ruling proposed evidence to be inadmissible may need to explain the ground on which it is inadmissible with sufficient clarity to ensure that a self-represented litigant understands it, and can consequently consider steps that might be taken to remedy the problem.

*In communicating with a self-represented litigant, the court must be careful to ensure that things said by the court do not inadvertently mislead the self-represented litigant, including by reinforcing a misapprehension about the applicable substantive and procedural law, or about the way in which the case is to be conducted. That is illustrated by *Moleirinho* and *Downes v Maxwell*. (citations omitted)*

More recently, the Court of Appeal succinctly summarised the relevant principles in *Zerjavic v Chevron Australia Pty Ltd* [2020] WASCA 40 at [75]:

- 1. The court's obligation is to ensure a fair and just trial for all parties.*
- 2. A self-represented litigant is subject to the practice and procedure of the court as much as any other litigant*
- 3. The court's obligation in the case of a self-represented litigant is to give sufficient information about the practice and procedure of the court to mean that there is a fair trial*

to both parties (the application of the principle depending on the circumstances of the case). In general, however, the guidance provided in *In the Marriage of Johnson* is valuable and of general application even though it is specifically directed to the exigencies of family law litigation. Among other things a trial judge should usually inform a self-represented litigant of the manner in which the trial is to proceed and his or her right to examine witnesses and object to evidence. Also, it will usually be of importance to ensure that a self-represented litigant understands the distinction between evidence and submissions.

4. *A trial judge's duty does not extend to advising a self-represented litigant as to how his or her rights should be exercised.*
5. *All the more so the trial judge's role in providing information to the self-represented litigant with the object of attempting to overcome procedural disadvantages faced by not being legally trained is not a duty to formulate or conduct the case for the self-represented litigant. (citations omitted)*

In *Zerjavic v Chevron Australia Pty Ltd* [2020] WASCA 40, the Court of Appeal referred to guidance provided in *In the Marriage of Johnson* (1997) 139 FLR 384. More information can be found in section 8.5.3.2.

Points to consider – Permissible interventions in civil proceedings:

Guidance from the Judicial Commission of New South Wales in its *Civil Trials Bench Book* (as updated December 2020) is provided below, with some modifications to incorporate references to Western Australian legislation and case law:

- In interlocutory matters, the court will normally be slow to terminate proceedings summarily because of a defective pleading by an unrepresented litigant, at least where it appears that there is a viable cause of action which, with appropriate amendment and a little assistance from the court, could result in a pleading being lodged in proper form: *Wentworth v Rogers* (No 5) (1986) 6 NSWLR 534, 536; *Smith v McCusker QC* [2005] WASCA 226; *Opperman v The State of Western Australia* [2011] WASC 25.

- A judge cannot permit an unrepresented litigant, even without objection, to give evidence from the bar table, without oath or affirmation: *Randwick City Council v Fuller* (1996) 90 LGERA 380.
- It may be necessary to draw the attention of an unrepresented party to the distinction between evidence and submissions. A failure by a judicial officer to let an unrepresented party know that their oral submissions from the bar table went beyond their evidence may constitute a denial of procedural fairness – see *Stone v Braun* [2015] WASCA 103.
- It may be appropriate to alert the unrepresented party to the rules in *Browne v Dunn* (1893) 6 R 67 and *Jones v Dunkel* [1959] HCA 8; (1959) 101 CLR 298.
- It can be appropriate for the court to intervene and to attribute an objection to the unrepresented party where potentially inadmissible evidence is sought to be tendered: *National Australia Bank Ltd v Russo* [1999] NSWSC 539; (1999) 47 NSWLR 309.
- While the granting of an adjournment remains a matter of discretion, it might more readily be granted to an unrepresented litigant who has misunderstood procedural requirements and is, as a consequence, not in a position to complete the presentation of evidence, provided that no substantive or procedural injustice is done to the other party involved: *Titan v Babic* [1994] FCA 1077; (1994) 126 ALR 455; *R v Leicester City Justices; Ex p Barrow* [1991] 2 QB 260. See also *Kelly v Westpac Banking Corporation* [2014] NSWCA 348 at [42]–[43].
- It is appropriate for a judge to attempt to clarify the submissions of an unrepresented litigant, particularly where the substantive issues are being ignored or obfuscated by garrulous or misconceived advocacy: *Neil v Nott* [1994] HCA 23; (1994) 68 ALJR 509 at 510.
- It is generally appropriate for a judge to draw to the attention of an unrepresented litigant possible unfavourable consequences, including adverse cost orders, of a particular procedural step especially where the course sought to be pursued is unusual: *Jeray v Blue Mountains City Council (No 2)* (2010) 180 LGERA 1.

- It will also be appropriate for a judge to draw to the attention of the unrepresented litigant the possible availability of legal assistance through Legal Aid or *pro bono* schemes, and to identify the advantages of the litigant having professional assistance. In many instances there may be no entitlement to legal assistance or the unrepresented litigant may prefer to present the case in person, either through mistrust of the profession or for other reasons. In such a case, the issue should not be pushed, lest it engender suspicion concerning the willingness of the court to hear the case impartially, an inevitable problem in the case of the vexatious or querulous litigant.
- If the litigant in person is so disadvantaged by mental incapacity as to lack competency to manage his or her own affairs, then the court should appoint a next friend or guardian *ad litem*, or stay the proceedings until the litigant is competent or until a next friend or guardian *ad litem* can be appointed: *Murphy v Doman* [2003] NSWCA 249; (2003) 58 NSWLR 51; *Scates v State Administrative Tribunal Of Western Australia* [2011] WASC 319 [110].
- A solicitor acting for himself or herself will not generally be afforded the latitude allowed to an unrepresented litigant: *Leybourne v Permanent Custodians Ltd* [2010] NSWCA 78.

8.5.3.2 The role of the court in Family Court proceedings

The Family Court of Australia in *Re F: Litigants in Person Guidelines* [2001] FamCA 348 revised the guidelines in respect of self-represented litigants that had been set out in *Johnson and Johnson* (1997) FLC 92-764, and added further guidelines. The Court noted that the guidelines were not intended to be exhaustive and that there may well be other interventions that a judge can properly make without giving rise to an apprehension of bias.

Points to consider - the revised guidelines suggested in *Re F: Litigants in Person Guidelines* [2001] FamCA 348 [8]:

- A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial.

- A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross examine the witnesses.
- A judge should explain to the litigant in person any procedures relevant to the litigation.
- A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.
- If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course.
- A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise.
- If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights.
- A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated: *Neil v Nott* [1994] HCA 23; (1994) 121 ALR 148 at 150.
- Where the interests of justice and the circumstances of the case require it, a judge may:
 - draw attention to the law applied by the court in determining issues before it;
 - question witnesses;
 - identify applications or submissions which ought to be put to the court;
 - suggest procedural steps that may be taken by a party;

- clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

8.5.3.3 *The role of the court in criminal proceedings*

In *O'Connell -v- The State Of Western Australia* [2012] WASCA 96 [110], Mazza JA remarked at [110] that:

The guidelines set by the Family Court in Re F; Litigants in Person Guidelines were intended to apply to in litigants in person appearing in trials before the Family Court. They were never intended to be guidelines for criminal trials and should not be applied by analogy to criminal trials. In the context of a criminal trial, it is appropriate to have regard to what was said by the High Court in MacPherson v The Queen and Dietrich v The Queen.

More recently in *VJS v The State of Western Australia* [2017] WASCA 172 at [175]-[176], Mazza stated in regards to the court's duty to an unrepresented accused:

An unrepresented accused will generally, if not always, be at a disadvantage compared to someone who is represented by counsel. This is because he or she will not ordinarily have the knowledge and skill of counsel, or the ability to present his or her case dispassionately. Further, there will almost always be a mismatch in competence as between a legally qualified prosecutor on the one hand, and a self-represented accused on the other. By reason of these disadvantages, the burden on a trial judge to ensure a fair trial is greater when faced with an unrepresented accused.

*An unrepresented accused forfeits none of their legal rights and is entitled to a fair trial like any other litigant, regardless of the circumstances in which he or she comes to be without counsel, and even if the absence of counsel is for tactical reasons or as a result of perverse behaviour on his or her part. However, when an appeal court is called upon to make a judgment about whether the trial of an unrepresented accused was unfair, that judgment must take into account that the accused was unrepresented as a consequence of his own choice or conduct. I have already referred to Gaudron J's statement to this effect in **Dietrich**. Deane J made similar observations in that case. (citations omitted)*

Points to consider – criminal proceedings with a self-represented accused:

- Criminal proceedings in the Magistrates Court more frequently involve a self-represented accused person than those in the higher courts. That is because Legal Aid or the Aboriginal Legal Service often represent accused persons in the higher courts who cannot afford representation.
- Trial by jury is a sophisticated process involving the application of rules of procedure and of evidence highly honed over the centuries. It also requires a grasp of legal logic and of law. When an accused is unrepresented by a qualified counsel at a trial by jury on indictment the difficulties for the accused, for the prosecutor, for the jury and for the judge are immeasurably increased and the chance of a miscarriage of justice is also increased: *Love v R* (1983) 9 A Crim R 1.
- Nevertheless, lack of representation does not give the accused person a license to be as provocative as he or she chooses, especially when this is done with the motive of delaying the proceedings, aborting the trial or hoping to distract or gain the sympathy of the jury. If the trial judge has done all that could sensibly be expected to see that the trial is conducted with apparent fairness and reasonable expedition, any consequences of the accused person's behaviour will be visited on the accused person himself or herself. In those circumstances he or she can hardly be heard to say that the trial was unfair: *Michael v The State of Western Australia* [2007] WASCA 100 [85].
- A criminal trial is an adversarial process and it is not the role of the trial judge to play the part of an advocate and give advice, guidance and representation which counsel would have provided. However, consistent with a trial judge's duty to ensure a fair trial, he or she is under an obligation to give an unrepresented accused such information and advice as is necessary to ensure that he or she has a fair trial and there is no limited category of matters of which a judge must advise an unrepresented accused: the touchstones are fairness and balance: *O'Connell v The State of Western Australia* [2012] WASCA 96 [106].
- Although the functions of a judge and defence counsel are very different and any attempt to combine the two roles is inherently problematic, the courts have recognised

that, where the accused is unrepresented, a trial judge has considerable discretion not to apply strictly the procedural and evidentiary rules that would otherwise operate, notwithstanding that strict adherence to such rules may be required of the State. The extent to which the trial judge may give the accused such leeway, or may be required to inform the accused of the legal position as to the substantive and procedural issues in the case, and the degree to which the judge may properly intervene in the conduct of the trial in order to achieve its effective conduct while ensuring that it is not unfair to the accused, will obviously depend on the circumstances of the case. But the general position seems to be that there is a trend towards requiring more judicial intervention in the conduct of a criminal trial in order to achieve the twin objectives of efficiency and fairness: *R v White* [2003] 1 VSCA 174; (2003) 7 VR 442.

8.5.3.4 The self-represented person's evidence

It is a good idea to explain the ground rules before the self-represented party starts to present their case. Doing this may help ensure that the self-represented party presents only the evidence needed, adheres to the rules of evidence to the greatest extent that they can, 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 receiving the relevant evidence 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 number of cases have looked at the bounds of judicial intervention in both civil and criminal cases (refer to 8.5.3.1 and 8.5.3.3 respectively).

Points to consider when the self-represented person presents evidence:

- Using simple and direct, non-legal language, and in a neutrally informative (as opposed to advisory or leading) manner, you may need to explain to the self-represented person that it is their turn to present their case and how they must do this.
- 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 that this means they must make sure that the court hears or sees all their evidence (that is, all the facts and information they have that they think proves their case). Explain that they must, however, 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 in what is called their 'final submission'.
- For those who are defending themselves in a criminal trial, it will also be important to explain that they have a legal right to remain silent.

Points to consider when the self-represented person gives evidence in chief:

- Explain that most people present their case by first giving their own evidence — that is, by saying/showing what they personally saw or heard, and then, 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).
- 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, not what someone else has told them they saw or heard.
- 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.
- Where written statements are allowed and their witness statement is admissible, it should be admitted into evidence in the usual way. Confirm with them that it is a true and accurate record.
- Say that they only need to say anything more if they have more evidence than they have put in their statement.

- If they do have anything more to say, or there is no written statement, suggest that they give their evidence by telling their story of what they personally saw or heard, starting from the first thing that they saw or heard and then the next thing.
- 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 a point or from what the court is able to take into consideration; they are presenting something inadmissible; they are presenting their evidence out of sequence; or if they are referring to irrelevant material or being repetitive and in doing so taking up an inordinate amount of the court's time.
- 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. Then ask whatever (brief) question(s) you need to ask to keep the matter progressing as efficiently and effectively as possible.

Points to consider in relation to cross-examination of the self-represented person:

- Explain that the other party may now want to question them about what they have said/shown — and that they must answer their questions truthfully.
- As required by law, intervene if the other party appears to be asking unfair or inappropriate questions — given that the self-represented party may not be fully aware of the rules about this. Be careful to do so in a way that is neutral. Always explain why you are intervening, in a careful and non-provocative manner.¹²²⁷
- Once cross-examination has finished, ask them if they want to add anything more to their own evidence (for example, to give more information or to clarify any of the answers they just gave) and then let them do so — intervening, as necessary. They should also be made aware that they can seek leave to add any new information that has not arisen.

¹²²⁷ *Evidence Act 1906 (WA)* s 26 gives the court power to disallow questions that are misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. Note also that s 112 gives the court power in a criminal proceeding to exclude evidence that has been obtained illegally or would, if admitted, operate unfairly against the accused (accessed 13 January 2021).

- 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?' But, always explain why you need to do this, so that both the self-represented party and the other party can understand your motive and your neutrality.
- If the self-represented party has introduced new or altered evidence, allow the other party to ask any final questions in the usual manner, intervening as necessary.

Points to consider in relation to the self-represented person calling witnesses:

- Ask the self-represented person to move back to the bar table (once they have given their evidence in chief and been cross-examined) 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. You may need to remind them at this point as to the basic rules as to what can and cannot be said.
- Swear in witnesses as usual, and then yourself get the witnesses' names and details entered into the court record.
- Ensure any statement, if admissible, is admitted in evidence and explain that the self-represented person needs to confirm with the witness that their statement is true and accurate. 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 that will help prove their case.
- If the witness does have more to say, or is giving 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.

- 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.
- 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.
- Once the cross-examination is finished, ask the self-represented party if they want to ask their witness anything more (for example, to give more information or clarify any of the answers they just gave) and then let them do so — intervening as necessary.
- 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. But, 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.

Points to consider in relation to the other party's evidence:

- 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 declare the person to be a vexatious litigant (Supreme and District Court only).¹²²⁸ In the Magistrates Court, consider whether you should refer the matter to the Attorney General to consider whether an application should be made

¹²²⁸ *Vexatious Proceedings Restriction Act 2002 (WA)* s 4 (accessed 13 January 2021).

to the Supreme Court to decide whether the self-represented person is a vexatious litigant.¹²²⁹

8.5.3.5 Testing the other party's evidence

A self-represented party is unlikely to be able to determine issues of admissibility or to be able to test the other party's or their witnesses' evidence via cross-examination as well as a legal representative.

In the Magistrates Court there is a statutory obligation on the Court to inform a self-represented person of the need, when cross-examining a witness called by another party, to ask the witness about any evidence that the self-represented party intends to adduce and intends to allege will contradict the witness's evidence, and about which the witness or the other party has not previously had notice. The Court must also advise the self-represented person of consequences if they fail to do so.¹²³⁰

In any jurisdiction however, as a matter of fairness, you may need to intervene whenever:

- there might be an issue of admissibility — for example, to stop leading questions or questions that the witness is not qualified to answer;
- the self-represented party is not picking up on an aspect of the other party's evidence that requires testing; and/or
- the self-represented party is using cross-examination in an unfair manner or to ventilate about irrelevant matters.

You will need to do this without showing any partiality and without advocating, or appearing to advocate, on behalf of the self-represented person.

Points to consider when a self-represented party is testing the other party's evidence:

- Use simple and direct, non-legal language, and a neutrally informative (as opposed to advisory or leading) manner.

¹²²⁹ *Vexatious Proceedings Restriction Act 2002 (WA)* s 4 (accessed 13 January 2021).

¹²³⁰ *Magistrates Court Act 2004 (WA)* s 30 (accessed 13 January 2021).

- Explain the rules and method by which the other party must present their side of the case. For example, it may be useful to say that the other party now has to present their side of the case using the same rules and method as the self-represented person themselves had to follow when they presented their side of the case — with no leading questions and no questions that the person is not qualified to answer.
- Explain that the self-represented person will get their chance to ask questions of the other party later — so they should not generally interrupt or say anything while the other party or any of their witnesses is presenting their story/case, even if they think what the person is saying is wrong or is telling lies. However, explain that they can interrupt whenever they think the other party or one of their witnesses is saying something that breaks the rules (for example, a leading question) and that you will then decide whether the other party has to stop presenting that way or can continue presenting that way.
- Intervene if the self-represented party does not seem to be picking up on something that might be inadmissible, but otherwise let them present their evidence without intervention — if you do intervene, explain why you are doing so, and do so in a non-provocative way, so that the other party does not have any cause to think that you are being partial.
- Before asking the self-represented person to start any cross-examination, explain:
 - the purpose of cross-examination (that is to test the other party's evidence or to put the self-represented person's version of the events to them, not to give opinions about why it is 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;
 - 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 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 serious sexual offence proceedings, they are prohibited from personally cross-examining the complainant; and in any proceedings they are prohibited from personally cross-examining a child.¹²³¹
- A self-represented respondent the subject of a restraining order application or order would not generally be allowed to directly question any witness with whom they are in a family relationship or an imagined personal relationship; and any unrepresented person is prohibited from directly cross-examining any child witness in such proceedings.¹²³²
- You have a discretion to allow any witness in any criminal proceeding to give evidence without being directly questioning by the accused.¹²³³
- As prescribed by law, intervene if the self-represented party's cross-examination is off the point, not assisting in testing the evidence, disallowable, incomprehensible to the witness, not being appropriately answered or unfair.¹²³⁴ Explain why a question cannot be asked, why it is not helping to test the evidence, help rephrase the question for them, or explain how it must be answered. Always do this in a way that shows you are being neutral.
- 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. 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.

¹²³¹ *Evidence Act 1906 (WA)* s 106G (accessed 13 January 2021).

¹²³² *Restraining Orders Act 1997 (WA)*, ss 44C, 53D (accessed 13 January 2021). N.B. 'Family relationship' is defined in s 4 and 'imagined personal relationship' is defined in s 3 of the Act.

¹²³³ *Evidence Act 1906 (WA)* s 25A (accessed 13 January 2021).

¹²³⁴ *Evidence Act 1906 (WA)* s 26 gives the court power to disallow questions that are misleading, unduly annoying, harassing, intimidating, offensive, oppressive or repetitive. Note also that *Evidence Act 1906 (WA)* s 112 gives the court a power in a criminal proceeding to exclude evidence that has been obtained illegally or would, if admitted, operate unfairly against the accused (accessed 13 January 2021).

8.5.3.6 Final submissions

A self-represented party has the same right to present final submissions as a represented party. However, in order to do this effectively, they may need some guidance about the process.

Points to consider prior to a self-represented person making final submissions:

- Use simple and direct, non-legal language, and in a neutrally informative (as opposed to advisory or leading) manner.
- Explain the purpose of final submissions — that is, to summarise why they believe that the case should be decided in their favour, based on the evidence that has been presented in Court (and not on the basis of any other extrinsic material that wasn't presented to the Court).
- 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 proven 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.
- Explain that they might also need to explain what they see as the problems with the other party's evidence.
- If appropriate, they should tell the court as precisely as they can what they think the outcome of the case should be and what they want from the court.
- You may need to remind them that final submissions can only be based on the evidence that has been presented by both parties in court – i.e. cannot rely on extrinsic material not presented to the court.
- 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.

- Where appropriate, explain by what date they must file any final written submissions with the court, and how many copies they must provide.
- Explain that the other party is allowed to do the same — that is, explain why they think they have proved their case, and the problems they see in the self-represented party's case, and that the self-represented person must not interrupt the other party as they do this.
- If you are not giving your decision or full decision at the time, explain precisely when you will do this, and when and in what form they will receive it.

8.5.4 Directions to the jury

It is important that you ensure that the jury does not allow any issues or assumptions that they might have about people representing themselves to influence their judgment.

Points to consider in your directions to the jury:

- You may need to alert the jury to, or remind them of, the fact that there are many reasons why people represent themselves and that they must not use the fact that the party did so to influence them one way or the other.¹²³⁵
- In a serious sexual offence matter, remind the jury that there are statutory reasons 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.¹²³⁶
- In any proceeding for an offence, remind the jury that there are statutory reasons why the self-represented accused person was not allowed to directly cross-examine any child witness, and explain that this fact must not affect the way in which they view the evidence.¹²³⁷

¹²³⁵ *Criminal Procedure Act 2004 (WA)* s 112, the judge must instruct the jury on the law applicable to the case and may make any observations about the evidence that the judge thinks necessary in the interests of justice (accessed 13 January 2021).

¹²³⁶ *Evidence Act 1906 (WA)* s 106G (accessed 13 January 2021).

¹²³⁷ *Evidence Act 1906 (WA)* s 106G (accessed 13 January 2021).

- In any proceeding in which you have exercised your discretion to restrict the manner in which a self-represented accused cross-examined a witness, explain that this is a routine practice of the court and that this fact must not affect the way in which they view the evidence.¹²³⁸
- If applicable, alert them to any of the points listed in the 'Directions to the Jury' section of any other appropriate chapter of this Bench Book.

8.5.5 Sentencing, other decisions and judgement or decision writing

Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory and preferably be seen by both the self-represented party and any represented party to be so.

Points to consider in sentencing and decision writing:

- Consider whether it is appropriate to refer to the fact of self-representation, and/or to the difficulties that self-representation caused the self-represented person, the other party and/or the court.
- In rare cases, you may need to consider declaring the person to be a vexatious litigant (Supreme and District Court only) or, in the Magistrates Court, consider referring the matter to the Attorney General to consider whether an application should be made to the Supreme Court to decide whether the self-represented person is a vexatious litigant.¹²³⁹
- When sentencing an offender, if they are personally present, ensure that the self-represented person is told of the outcome in a way in which they can understand the sentence, decision and/or judgment and what it means for them,¹²⁴⁰ and if unhappy with it, are referred to the appropriate source(s) of advice or assistance about any avenues they might have for appeal.

¹²³⁸ *Evidence Act 1906 (WA)* s 106G (accessed 13 January 2021).

¹²³⁹ *Vexatious Proceedings Restriction Act 2002 (WA)* s 4 (accessed 13 January 2021).

¹²⁴⁰ *Sentencing Act 1995 (WA)* s 34 (accessed 13 January 2021).

8.6 FURTHER INFORMATION OR HELP

Self-represented persons have access to a range of information designed to assist them including fact sheets, information on websites and telephone advisory services. This information is not only provided in Western Australia by Community Legal Centres, Legal Aid Western Australia and the Law Society of Western Australia, but also by the courts in each Western Australian jurisdiction — either in pamphlets/ information sheets that are available in hard copy at the courts or on court websites.

8.6.1 Information on free sources on legal information, advice or representation

Aboriginal Legal Service of Western Australia

The Aboriginal Legal Service of Western Australia (ALSWA) provides legal aid services to Aboriginal and Torres Strait Islander peoples throughout Western Australia in accordance with grant conditions imposed by the Commonwealth Attorney General's Department.

Criminal Law: ALSWA provides services at the Perth Magistrates and Children's Courts and Armadale Magistrates and Children's Courts which includes bail hearings, contested hearings, sentencing hearings, adjournments and remands. ALSWA also provides services in regional Magistrates and Children's Courts, as well as Perth and regional District and Supreme Courts. In addition, ALSWA provides services at Northbridge Police Station court on Saturdays and Sundays and at Banksia Hill Detention Centre on Saturdays.

Family law: ALSWA provides legal advice during weekday office hours for family law issues, including parenting orders, and representation mainly in relation to parenting orders. Lawyers also represent parents or other interested persons in protection proceedings in the Children's Courts throughout Western Australia.

Civil law and Human Rights: ALSWA provides legal advice in a wide range of civil law and human rights matters, including discrimination and equal opportunity; coronial inquests, serious police and prison complaints; and unlawful detention.

Citizens Advice Bureau of WA

Citizens Advice Bureau (CAB) is an independent, not-for-profit organisation connecting people all over Western Australia with information and services so they can make independent and informed decisions. They provide information and referral, a low-cost legal advice service on a wide range of issues, and a mediation service.

Community Legal Centres Association (WA) Inc.

The Community Legal Centres Association (WA) Inc. is the peak organisation representing and supporting 28 Community Legal Centres (CLCs) operating in Western Australia. It is committed to the principles of human rights, social justice and equity, including the rights of Western Australians to equity in access to legal services. It publishes a Directory of Community Legal Centres throughout the State, including contact details and the areas of law in which they may be able to assist. Some are generalist centres providing a range of services across various legal fields, while others are specialist centres providing services within one area of expertise, for example, family violence prevention, mental health, employment law, consumer credit.

John Curtin Law Clinic (Curtin Business School)

The Law Clinic is part of the Curtin University Law School offers services to eligible Western Australian small businesses in a clinical legal education environment. The clinic may be able to provide legal advice and assistance to eligible small businesses by:

- identifying legal options;
- filling out court forms; and
- legal research.

Law Society of Western Australia Law Access Scheme

Law Access matches applications for pro bono legal assistance from individuals and not-for-profit organisations to lawyers. The means-tested service is designed to increase community access to justice and legal services where the application has legal merit. All other avenues of assistance, such as Legal Aid and community legal centres, must have been exhausted.

Legal Aid Western Australia

Legal Aid provides free legal advice and grants legal aid for matters in specified areas of criminal law, family law and civil law. Applicants are assessed on their financial means; the merits of the case; and whether they meet Legal Aid policy guidelines. The Legal Aid Commission of Western Australia also has regional offices throughout the State and provides specialist services as listed below.

- Criminal Law, Duty Lawyer service
- Dispute Resolution Unit
- Family Court Services (Duty lawyer)
- Family Advocacy and Support Service (FASS)
- Children's Court (Protection) Services
- Domestic Violence Legal Unit
- Child Support
- Civil Litigation Assistance Scheme (funding assistance for professional fees and disbursements in some civil law matters for plaintiffs who satisfy the means test and merits test)
- Youth Law Team
- Federal Courts Self-Represented Litigants Service
- Administrative Appeals Tribunal Service
- Mortgage Hardship Service
- Seniors Rights and Advocacy Service

Information is available on the Legal Aid website which includes guidance on representing yourself as an applicant in a family and domestic violence restraining order final hearing, appeal kits for the Magistrates Court and the District and Supreme Courts and enforcement process. There are also a number of interactive resources which contain step by step practical information if you are representing yourself. The following self-help kits and guides are available:

Recovery order self help guide: This family law self help guide is for those whose child is with someone else who is refusing to bring them back. It includes 'how to' videos by experienced family lawyers, checklists, sample letters and information about what to do before court, in court and after court.

Representing yourself at a Magistrates Court criminal trial: This criminal law self help guide is for those who are representing themselves and running their own criminal trial in the Magistrates Court. It includes 'how to' videos by experienced criminal lawyers, sample letters, documents and FAQs. It goes through the process of preparing for trial, what happens in Court, running the trial and the verdict.

Mortgage stress self-help guide: This mortgage stress self help guide is for those who are having problems meeting their mortgage payments or are already behind in payments. It goes through how to apply for a hardship variation from the lender, and also how to apply to an external dispute resolution scheme if the hardship application is refused. It also covers options if the lender takes the mortgagor to court and gets judgment against him or her.

Western Australia Bar Association Inc.

The Western Australian Bar Association (WABA) is a voluntary professional association of practising barristers in Western Australia. The WABA seeks to provide guidance and professional support to its members, and to assist the legal profession by promoting and governing a specialized referral bar that provides excellence in service and leadership to the profession.

8.6.2 Other useful websites for self-represented litigants

Court-based information:

- *District Court of Western Australia – Self-represented litigants guide (civil); Self-represented accused (criminal)*.
- *Family Court of Western Australia*
- *State Administrative Tribunal*
- *Supreme Court of Western Australia*
- *Magistrates Court of Western Australia*

Other websites:

- [Department of Justice](#)
- [Australasian Institute of Judicial Administration](#)
- [Australasian Legal Information Institute \(Austlii\)](#)
- [Federal Register of Legislation](#)
- [Parliamentary Counsel's Office: Western Australian Legislation](#)
- [State Library of WA, Law Information Gateway](#)

8.7 FURTHER READING

Allison F, Schwartz M & Cunneen C, [Indigenous Legal Needs Project WA Report - The Civil and Family Law Needs of Indigenous People in WA](#) (2014) (accessed 13 January 2021)

Dewar J, Smith, B & Banks C, [Litigant in Person in the Family Court of Australia](#) Research Report No 20 (2000) (accessed 13 January 2021)

Family Court of Australia, [Self-represented Litigants — A Challenge: Project Report](#) (2003) (accessed 13 January 2021)

Family Court of Western Australia, [Information Kits and Brochures](#) (accessed 13 January 2021)

Faulks J, [Self-Represented Litigants: Tackling the Challenge](#) (Paper presented at the National Judicial College of Australia and the Australian National University Managing People in Court Conference, February 2013) (accessed 13 January 2021)

Grainger J, [Litigants in Person in the Civil Justice System – Learning from NZ, the US and the UK](#) (published by the Winston Churchill Memorial Trust of Australia) (accessed 30 April 2019)

Hunter R, Genovese A, Chrzanowski A & Morris C, [The Changing Face of Litigation: Unrepresented Litigants in the Family Court of Australia](#), Law and Justice Foundation of New South Wales (August 2002) (accessed 13 January 2021)

Judicial Commission of New South Wales, [Equality before the Law Bench Book](#) (2006; update 17; September 2020) Section 10 - Self-represented Parties (accessed 13 January 2021)

Judicial Commission of New South Wales, *Civil Trial Courts Bench Book* (2007; update 42, December 2020) (accessed 13 January 2021)

Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (2004; update 63, August 2020) (accessed 13 January 2021)

Judicial College (UK), *Equal Treatment Bench Book* (February 2021 revision) Chapter 1 – Litigants in Person and Lay Representatives (accessed 13 January 2021)

Law Society of New South Wales, *Guidelines for Dealing with Self-represented Parties in Civil Proceedings* (December 2016) (accessed 13 January 2021)

Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia* (Final Report, 1999) (accessed 13 January 2021)

Legal Aid Western Australia, *Annual Reports* (accessed 13 January 2021)

Moorhead, R & Sefton M, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* DCA Research Series (2005) (accessed 13 January 2021)

Office of the Director of Public Prosecutions Comparative Sentencing Tables (accessed 12 July 2021)

Parliament of Australia Senate Committee, *Inquiry into Legal Aid and Access to Justice, Final Report* (June 2004) (accessed 13 January 2021)

Productivity Commission, *Access to Justice Arrangements* (3 December 2014) (accessed 13 January 2021)

Richardson E, Grant G and Boughey J, *The Impacts of Self-represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Literature* (October 2018) (accessed 13 January 2021)

Richardson E, Sourdin T and Wallace N, *Self-Represented Litigants Gathering Useful Information Final Report* (2012) (accessed 13 January 2021)

Richardson E, Sourdin T and N Wallace, *Self-Represented Litigants – Literature Review* (2016) Australian Centre for Court and Justice Innovation, Monash University (accessed 13 January 2021)

Sourdin T & Wallace N, *The Dilemmas Posed by Self-Represented Litigants – The Dark Side Access to Justice* (2014) 24 JJA 61 (accessed 13 January 2021)

Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd edition, 2016) Chapter 12 – Self-Represented Litigants (accessed 13 January 2021)

9 REGIONAL AND REMOTE WESTERN AUSTRALIA

Geographically, Western Australia is the largest state in Australia, comprising 33% of the size of Australia. With an area of over 2,500,000 square kilometres, it is the second largest sub-national entity in the world. Western Australia is also the largest police jurisdiction in the world; Western Australia Police operate over 150 police stations across eight metropolitan and seven regional districts.¹²⁴¹

Perth is one of the most isolated capital cities in the world, and is closer to Jakarta than it is to the Australian capital city, Canberra.

Western Australia's population was an estimated 2,656,156 people in 2020.¹²⁴² Approximately 18.5% of the population live in a regional area of Western Australia, while 78.5% live in the Greater Perth area.¹²⁴³ The majority of Western Australians living in regional areas live close to the coast.

Despite its small population, Western Australia accounted for 36.5% or \$171.4 billion of Australia's total exports of \$470.2 billion in 2018-19.¹²⁴⁴ Western Australia's major exports in 2018-19 were:¹²⁴⁵

- iron ores and concentrates;
- natural gas;
- gold;
- crude petroleum; and
- wheat.

¹²⁴¹ Western Australian Police Force, *About Us* (updated 10 April 2019) (accessed 5 October 2020).

¹²⁴² ABS, *Australian Demographic Statistics* (March Quarter 2020) (Cat No 3101.0) Summary – Key Figures (accessed 19 November 2020).

¹²⁴³ ABS, *Regional Population* (Cat No 3218.0) (25 March 2020) (accessed 13 January 2021).

¹²⁴⁴ Department of Foreign Affairs and Trade, *Australia's Trade by State and Territory 2018-19* (May 2020) page 9 (accessed 13 January 2021).

¹²⁴⁵ Department of Foreign Affairs and Trade, *Australia's Trade by State and Territory 2018-19* (May 2020) page 74 (accessed 13 January 2021).

Western Australia's major export destinations in 2018-19 were:¹²⁴⁶

- China;
- Japan;
- Hong Kong;
- Republic of Korea; and
- Singapore.

In contrast, Western Australia accounted for 10.9% or \$45.9 billion of Australia's \$421.4 billion worth of imports of goods and services in 2017-18.¹²⁴⁷

The size of the State and its relatively small and concentrated population raise challenges to agencies providing services in regional and remote areas.

This chapter will profile the regional and remote areas of Western Australia, how the courts operate in those areas, and the barriers and issues of administering justice.

The Steering Committee overseeing the production of this Bench Book gratefully acknowledges the submissions and contributions of the following judicial officers, other persons and organisations, who have assisted with development of this chapter in the first edition and its subsequent revision:

- Magistrate Catherine Crawford, Magistrates Court of Western Australia (9 June 2009, 10 June 2009, 15 June 2009);
- Magistrate Greg Benn, Magistrates Court of Western Australia (16 July 2009);
- Mr Tom Millward, Manager Justice of the Peace Branch, Magistrates Courts and Tribunals (18 July 2016);
- Department of Corrective Services (17 October 2016);
- Legal Aid Western Australia (8 June 2020); and
- The Aboriginal Legal Service of Western Australia Limited (21 September 2020).

¹²⁴⁶ Department of Foreign Affairs and Trade, *Australia's Trade by State and Territory 2018-19* (May 2020) page 74 (accessed 13 January 2021).

¹²⁴⁷ Department of Foreign Affairs and Trade, *Australia's Trade by State and Territory 2018-19* (May 2020) page 9 (accessed 13 January 2021).

9.1 SOME STATISTICS

9.1.1 Population distribution in Western Australia

Western Australia's population was an estimated 2,656,156 people in 2020.¹²⁴⁸ Approximately 18.5% of the population live in a regional area of Western Australia, while 78.5% live in the Greater Perth area.¹²⁴⁹ The majority of Western Australians living in regional areas live close to the coast.

- The 2016 Census reported that Australia-wide there were approximately 2.3 million people living in small towns (9.7% of the total population). Between 2011 and 2016, the number of Australians living in major cities (with populations of 100,000 or more) increased from 14.9 million (69%) to 16.6 million (71%).¹²⁵⁰

9.1.2 Aboriginal people in regional and remote Western Australia

- In 2016, 41% of Aboriginal and/or Torres Strait Islander people lived in Perth and 59% lived in regional areas of Western Australia.¹²⁵¹
- In 2016, approximately 2% of the population in Greater Perth (2,019,263) and approximately 11% of the population in regional Western Australia (536,715) were Aboriginal and/or Torres Strait Islander (58,842).¹²⁵²
- Nationally, in 2016, one-third of all Aboriginal and Torres Strait Islander people lived in the major cities of Australia (289,400), compared with around three-quarters of non-Indigenous population (17,013,400). Of those Aboriginal and Torres Strait Islander people who did not live in major cities, 24% lived in 'inner regional Australia'; 20% lived

¹²⁴⁸ ABS, *Australian Demographic Statistics* (March Quarter 2020) (Cat No 3101.0) Summary – Key Figures (accessed 19 November 2020).

¹²⁴⁹ ABS, *Regional Population* (Cat No 3218.0) (25 March 2020) (accessed 13 January 2021).

¹²⁵⁰ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (2018) (Cat No 2071.0) (accessed 1 May 2019).

¹²⁵¹ ABS, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (Cat No 3238.0.55.001) (2018) (accessed 26 November 2019).

¹²⁵² ABS, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (Cat No 3238.0.55.001) (2018) (accessed 26 November 2019).

in 'outer regional Australia'; 7% lived in 'remote Australia'; and 12% in 'very remote Australia'.¹²⁵³

For the locations of Aboriginal communities in Western Australia, refer to the Aboriginal Communities maps which are produced by the Department of Planning, Lands and Heritage (formerly the Department of Aboriginal Affairs).¹²⁵⁴

9.1.3 Cultural and linguistic diversity in regional and remote Western Australia

The 2016 Census demonstrated that the population and cultural landscape is changing, with:

- 53.5% of Western Australians having one or both parents born overseas.¹²⁵⁵
- 12% of overseas-born Western Australians residing in rural and regional areas.¹²⁵⁶
- In 2016, most culturally and linguistically diverse (CaLD) young people (aged 12-24 years old) lived in the Perth Metropolitan area (93.3%), and less than 7% of CaLD young people lived in regional areas. The regional local government areas with more than 100 CaLD young people were:¹²⁵⁷
 - Kalgoorlie-Boulder;
 - Derby/West Kimberley;
 - Albany;
 - Bunbury;
 - Geraldton-Greenough;
 - Roebourne;
 - Broome;
 - Capel;
 - Busselton; and
 - Harvey.

¹²⁵³ ABS, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (Cat No 3238.0.55.001) (2018) (accessed 26 November 2019).

¹²⁵⁴ Department of Planning, Lands and Heritage, *Aboriginal Communities Map*, Information and Services – Mapping – Community Maps (accessed 26 November 2019).

¹²⁵⁵ Department of Local Government, Sport and Cultural Industries, Office of Multicultural Interests, *WA's Changing Population and Cultural Landscape: Census 2016* (accessed 1 May 2019).

¹²⁵⁶ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (27 March 2018) Cultural Diversity Data Cube – Table 11 (accessed 1 May 2019).

¹²⁵⁷ Department of Local Government, Sport and Cultural Industries, Office of Multicultural Interests, *Culturally and Linguistically Diverse Youth in Western Australia* (1 May 2017) page 4 (accessed 26 September 2018).

- Ninety percent of people born in non-main English speaking countries¹²⁵⁸ live in Metropolitan Perth with the highest proportion in a number of local government areas:¹²⁵⁹
 - Canning (39.3%);
 - Gosnells (30.1%);
 - Bayswater (27.2%);
 - Stirling (24.9%);
 - Melville (20.7%);
 - Cockburn (19.8%);
 - Swan (18.8%);
 - Armadale (17.9%);
 - Wanneroo (17.1%); and
 - Joondalup (11.2%).

Additional information on people from culturally and linguistically diverse backgrounds is provided in chapter 7 of this Bench Book.

9.1.4 Health and well being

9.1.4.1 Births

- In 2017, there were 34,498 births across Western Australia, with 25% of those being in regional areas.¹²⁶⁰
- The median age of mothers in Western Australia in 2016 was 30.8 years. In the major cities the median age was 31.2 years and in the regional and remote areas it was approximately 29 years.¹²⁶¹

¹²⁵⁸ N.B The ABS and the Department of Local Government, Sport and Cultural Industries classify all countries except the following as non-main English speaking countries: Australia, Canada, England, Ireland, New Zealand, Northern Ireland, Scotland, South Africa, the United States and Wales.

¹²⁵⁹ Department of Local Government, Sport and Cultural Industries, Office of Multicultural Interests, *WA's Changing Population and Cultural Landscape: Census 2016* (accessed 26 November 2019).

¹²⁶⁰ ABS, *Births, Australia, 2017* (Cat No 3301.0) (2017) Table 2.5 Births, Summary, Statistical Areas Level 2 - 2011 to 2017 (accessed 26 November 2019).

¹²⁶¹ ABS, *Births, Australia 2016* (Cat No 3301.0) (2017) Table 4.1 Births, Summary, Remoteness Areas - 2006 to 2016 (accessed 1 May 2019).

9.1.4.2 Deaths

- In 2017, the standardised death rate was lowest in the major cities of Australia, with 5.2 deaths per 1,000 standard population. Age-specific death rates then increased with increasing remoteness.¹²⁶² The standardised death rate in 'very remote' areas of Western Australia was 7.6 deaths per 1,000 standard population, compared to a rate of 5.5 in Greater Perth.¹²⁶³
- In 2017, the infant mortality rate was lowest in major cities of Australia at 2.9 deaths per 1,000 live births, and highest in 'very remote' areas at 7.7 deaths per 1,000 live births.¹²⁶⁴

9.1.4.3 Life expectancy

- In 2016-18, the average life expectancy across the nation was 80.7 years for males and 84.9 years for females.¹²⁶⁵ In Western Australia, the life expectancy was very similar to that nationally, being 80.5 for males and 85.1 for females.¹²⁶⁶
- In 2017, males living in 'very remote' areas of Australia had a mortality rate 1.4 times higher than people living in major cities, whilst for females it was 1.8 times higher.¹²⁶⁷

9.1.4.4 Health considerations in regional and remote areas

The rates of the following chronic diseases increase in accordance with increasing remoteness: coronary artery disease; chronic kidney disease, lung cancer, stroke, suicide, self-inflicted injuries and type-2 diabetes.¹²⁶⁸

In 2018, people in outer regional and remote areas in Australia had higher rates of daily smoking (19.6% compared to 12.8%), risky alcohol consumption (24% compared to 15%),

¹²⁶² ABS, *Deaths, Australia, 2017* (Cat No 3302.0) (2018) Death Rates (accessed 1 May 2019).

¹²⁶³ ABS, *Deaths, Australia, 2017* (Cat No 3302.0) Table 6.1 – Deaths, Summary, Remoteness Areas – 2011-17 (1 May 2019).

¹²⁶⁴ ABS, *Deaths, Australia, 2017* (Cat No 3302.0) (2018) Death Rates – Remoteness Area (accessed 1 May 2019).

¹²⁶⁵ ABS, *Life Tables, States, Territories and Australia 2016-2018*, (Cat No 3302.0.55.001) (30 October 2019) Life Expectancy at Birth (accessed 25 November 2019).

¹²⁶⁶ ABS, *Life Tables, States, Territories and Australia 2016-2018* (Cat No 3302.0.055.001) (30 October 2019) Table 1.5 (accessed 1 May 2019).

¹²⁶⁷ Australian Institute of Health and Welfare, *Rural and Remote Health* (22 October 2019) Health Status and Outcomes (accessed 13 January 2021).

¹²⁶⁸ Australian Institute of Health and Welfare, *Rural and Remote Health* (22 October 2019) Burden of Disease (accessed 13 January 2021).

physical inactivity and being overweight or obese (71% compared to 65%) than people living in major cities.¹²⁶⁹

People in major cities are more likely to use a dental service than people in outer regional and remote areas in Western Australia (61.5% compared with 49.8% and 48.3% in the year 2017).¹²⁷⁰

The Commonwealth Department of Infrastructure and Regional Development has reported that adults in the Greater Perth self-report having higher levels of psychological distress than in the regions.¹²⁷¹ The Department also reported that the suicide rate was 1.8 times higher outside of Greater Perth than within it.¹²⁷²

The prevalence of high-risk alcohol consumption for long-term and short-term harm was higher in country areas (30.4% risk for long-term harm and 12.5% risk for short-term harm) than metropolitan areas (25.3% and 11.9% respectively) in Western Australia, in 2019.¹²⁷³

9.2 REGIONAL PROFILES

This section includes a brief profile of each of the nine regional development regions of Western Australia, which are:

- Kimberley;
- Pilbara;
- Gascoyne;
- Mid West;
- Wheatbelt;
- Peel;
- South West;
- Great Southern; and

¹²⁶⁹ Australian Institute of Health and Welfare, *Rural and Remote Health* (22 October 2019) Health Status and Outcomes (accessed 13 January 2021).

¹²⁷⁰ Merema M, Radomiljac A, *Health and Wellbeing of Adults in Western Australia, 2017, Overview and Trends* Department of Health, Western Australia (2018) Figure 18, page 102 (accessed 1 May 2019).

¹²⁷¹ Department of Infrastructure and Regional Development, *Yearbook 2018 – Progress in Australian Regions* December 2018) page 26 (accessed 25 November 2019).

¹²⁷² Department of Infrastructure and Regional Development, *Yearbook 2018 – Progress in Australian Regions* (December 2018) (accessed 25 November 2019).

¹²⁷³ Department of Health, *Health and Wellbeing of Adults in Western Australia 2019, Overview and Trends* Figure 5, page 44 (accessed 13 January 2021).

- Goldfields-Esperance.

The information included in each profile may vary from region to region due to variations in the currency and availability of data. The data for this section has largely been drawn from materials published by Regional Development Commissions, which are entities established under the *Regional Development Commissions Act 1993* (WA) to coordinate and promote social and economic development in the regions.

Note that for completeness, information on the Peel region has been included in this edition of the Bench Book. Whilst that area is considered part of the 'Perth metro' for some purposes (including Magistrates Court circuits) it is a non-metropolitan region under the *Regional Development Commissions Act 1993* (WA).

For a map of the regions of Western Australia, click [here](#).¹²⁷⁴

9.2.1 Kimberley

9.2.1.1 The region

The Kimberley region is approximately 419,259.8 square kilometres, and comprises the local government districts of Broome, Derby-West Kimberley, Halls Creek and Wyndham-East Kimberley.¹²⁷⁵

The population of the Kimberley in 2018 was 36,014 people.¹²⁷⁶ The population of Aboriginal and/or Torres Strait Islander people in the region in 2016 was approximately 14,299 (42% of the total regional population).¹²⁷⁷ The population of the Kimberley region has been predicted to reach 93,173 by the year 2036.¹²⁷⁸

¹²⁷⁴ Department of Primary Industries and Regional Development, *Maps – Regional Map WA*, Source: Department of Water, Regions and Local Government Areas – Western Australia (2011) (accessed 13 January 2021).

¹²⁷⁵ *Regional Development Commissions Act 1993* (WA) sch 1 (accessed 13 January 2021).

¹²⁷⁶ ABS, *Kimberley (SA3) (51001)* (last updated 29 October 2018) (accessed 26 November 2019).

¹²⁷⁷ ABS, *2016 Census QuickStats* (2017) (Cat No 2001.0) Kimberley – People – Demographics & Education (accessed 1 May 2019).

¹²⁷⁸ Kimberley Development Commission, *Annual Report 2016/2017* (1 September 2017) page 3 (accessed 1 May 2019).

The population of the Kimberley region had a median age of 31.3, compared to the Western Australian median age of 37.2, in 2016. Notably, the median age of the Kimberley Aboriginal population is only 22.¹²⁷⁹

The Shire of Broome is the most populous local government area accounting for 49% (17,002) of the region's population. This is followed by the Shire of Derby–West Kimberley (24%), the Shire of Wyndham–East Kimberley (21%) and the Shire of Halls Creek (10%).¹²⁸⁰

These shires manage their responsibilities over a land area equivalent to one sixth of Western Australia, twice the size of Victoria and three times that of the United Kingdom.

There are over 160 Aboriginal communities scattered throughout the region.¹²⁸¹

For the locations of Aboriginal communities in Western Australia, including in the Kimberley region, refer to the current Aboriginal Communities maps which are produced by the Department of Planning, Lands and Heritage (formerly the Department of Aboriginal Affairs).¹²⁸²

9.2.1.2 Housing

In 2013, the median house price in the Kimberley was at an all-time high of \$625,000.¹²⁸³ It then decreased gradually each year until 2019, when the median house price was \$303,000.¹²⁸⁴ There was a rise in 2020 to \$340,000.¹²⁸⁵

In 2015, the larger centres of Broome, Derby and Kununurra recorded average house prices of \$585,000; \$330,000 and \$470,000 respectively.¹²⁸⁶ However, as at June 2018, the average

¹²⁷⁹ ABS, *Kimberley (SA3) (51001)* (last updated 2018) (accessed 1 May 2019).

¹²⁸⁰ ABS, *Regional Population Growth, Australia* (Cat No 3218.0) (2018) Table 5 – Estimated Resident Population, Local Government Areas, Western Australia (accessed 26 September 2018).

¹²⁸¹ Kimberley Development Commission, *Annual Report 2016/2017* (1 September 2017) page 3 (accessed 1 May 2019).

¹²⁸² Department of Planning, Lands and Heritage, *Aboriginal Communities Maps*, Information and Services – Mapping – Community Maps (accessed 13 January 2021).

¹²⁸³ Kimberley Development Commission, *Housing* (2 July 2020) (accessed 13 January 2021).

¹²⁸⁴ Kimberley Development Commission, *Housing* (2 July 2020) (accessed 13 January 2021).

¹²⁸⁵ Kimberley Development Commission, *Housing* (2 July 2020) (accessed 13 January 2021).

¹²⁸⁶ Kimberley Development Commission, *Housing* (2018) citing Real Estate Institute of Western Australia (REIWA) (accessed 1 October 2018).

house price in Broome was \$430,000, representing a -3.4% year-on-year % change, and a -7.5% quarter-on-quarter % change.¹²⁸⁷

9.2.1.3 Education and training

According to the Kimberley Development Commission, while there are pockets of educational excellence in the Kimberley, student outcomes lag behind those of other regions. In order to close the gap in educational outcomes, the Kimberley Schools Project seeks to 'empower communities outside the school gates and more effectively target resources to teachers and principals inside the school gates'.¹²⁸⁸

From 2018-20, the Kimberley Schools Project involved the provision of \$25 million of Royalties for Regions funding to accelerate and intensify existing strategies to improve educational outcomes, and so underpin broader economic and social development in the region.¹²⁸⁹

All schools in the Kimberley region (whether operating either as independent schools, by the Department of Education, or by the Catholic Education Office) are invited to join the Kimberley Schools Project by submitting an expression of interest each year. There were 23 participating schools in 2020.¹²⁹⁰

The Kimberley Schools Project arose primarily from the report *2036 and Beyond: A Regional Investment Blueprint for the Kimberley*. The major issues identified were attendance, engagement (especially for Aboriginal students), staff retention and training, and the need for 'full service schools'. The report found that a large number of students were attending District High Schools and Remote Community Schools where curriculum options and the capacity to

¹²⁸⁷ Realestate.com.au, *Property Outlook – Australian Property Market Report – July 2018* (accessed 26 November 2019).

¹²⁸⁸ Kimberley Development Commission, *Kimberley Schools Project* (updated 7 March 2019) (accessed 1 May 2019).

¹²⁸⁹ Kimberley Development Commission, *Kimberley Schools Project* (updated 10 December 2019) (accessed 6 February 2020).

¹²⁹⁰ Kimberley Development Commission, *Kimberley Schools Project* (updated 12 January 2021) (accessed 13 January 2021).

progress to year 12 were limited. The report noted that in 2011, 2,256 Kimberley students attended District High Schools with only 619 at Senior High Schools (i.e. to year 12).¹²⁹¹

In 2018, Kimberley schools were reported to have the lowest attendance rates of all eight education regions in Western Australia, with only 40.5% of students attending school regularly. This was contrasted to the Northern Metropolitan Perth region where the rate is 76%.¹²⁹²

9.2.1.4 Health

Some key health statistics reported for Kimberley residents in 2018 included that:¹²⁹³

- 30% of residents were obese (adults 16 years and over);
- the rate of Emergency Department attendances was four times higher than the State rate;
- the lung cancer incidence was 1.5 times higher than the State rate;
- deaths as a result of transport accidents were 2.4 times higher than for the State generally;
- the suicide rate was 8.4 times higher for males and 6.6 times higher for females aged 15-24 years than the State rate;
- 46% drank alcohol at levels that risk long term harm (adults 16 years and over); and
- there were 9,505 hospitalisations for injury and poisoning for adults (15-64 year olds) in the period of 2011-15.

There are two major hospitals in the Kimberley region which are located in Kununurra and Broome. There are seven Aboriginal Community Controlled Health Services (ACCHSs) operating in the region, which deliver culturally appropriate services. The Kimberley

¹²⁹¹ Government of Western Australia, Kimberley Development Commission, *2036 and Beyond: A Regional Investment Blueprint for the Kimberley* (July 2015) pages 96 – 98, especially Table 11 (accessed 5 February 2020).

¹²⁹² The West Australian, *7000 WA Students Skip School for Family Holidays* (20 November 2018) (accessed 6 February 2020).

¹²⁹³ WA Country Health Service, *Kimberley Health Profile, Planning and Evaluation Unit, January 2018* (accessed 1 October 2018).

Aboriginal Medical Services (KAMS) is a regional ACCHS which provides advocacy and support for network members.¹²⁹⁴

Rural Health West has produced a *Kimberley – Population and Health Snapshot* which provides information on the major health services in the region, and other key health issues for residents.¹²⁹⁵

The Royal Flying Doctor Services base located at the Broome International Airport includes a treatment centre and administrative offices. The service also provides a 24-hour emergency aero-medical service across the region.¹²⁹⁶ The Broome facilities were established in 2016 after the closure of the Derby base.

9.2.1.5 Industry

The gross regional product of the Kimberley region in 2016 was \$2.6 billion of the \$81.9 billion for the entire of regional Western Australia.¹²⁹⁷ In 2017, agriculture was the main industry in the region contributing \$206 million to the gross regional domestic product and providing long term employment and business opportunities.¹²⁹⁸

The Kimberley region has a diverse economy. Mining, agricultural production, construction, tourism and retail trade are major contributors to the region's economic output. The Kimberley accounts for all of Western Australia's diamond output and produces approximately 90% of the world's pink diamonds.¹²⁹⁹

9.2.1.6 Employment

According to the ABS, the industries providing the most employment in the Kimberley in 2016 were:¹³⁰⁰

¹²⁹⁴ Rural Health West, *Regional Population and Health Snapshots - Kimberley*, Kimberley Health Services - pages 1 and 4 (accessed 13 January 2021).

¹²⁹⁵ Rural Health West, *Regional Population and Health Snapshots - Kimberley* (accessed 13 January 2021).

¹²⁹⁶ Royal Flying Doctor Service, *The RFDS in WA*, Broome RFDS Base (accessed 13 January 2021).

¹²⁹⁷ Government of Western Australia, *data.wa.gov.au – Regional Profile – Kimberley*, Figure 2 citing ABS Cat No 5220, Dec 2017 (accessed 13 January 2021).

¹²⁹⁸ Kimberley Development Commission, *Annual Report 2017/2018* page 4 (accessed 13 January 2021).

¹²⁹⁹ Department of Regional Development, *Kimberley: A Region in Profile 2014* pages 1 and 11 (accessed 1 May 2019).

¹³⁰⁰ ABS, *Kimberley (SA3) (51001)* (last updated 2018) Economy & Industry - Industry of Employment – Proportion of Employed Persons – Census (accessed 1 May 2019).

- health care and social assistance (15.4%);
- education and training (13.5%);
- public administration and safety (9.4%);
- accommodation and food services (8.3%); and
- construction (7.7%)

The unemployment rate in the Kimberley in 2017 was 9.9%, which was higher than the rate of 5.4% in regional Western Australia generally and 6.4% in the metropolitan area.¹³⁰¹

9.2.2 Pilbara

9.2.2.1 The region

The Pilbara region comprises the local government districts of Ashburton, East Pilbara, Port Hedland and Roebourne.¹³⁰² The Pilbara covers a total area of 507,896 square kilometres (including offshore islands), extending from the Indian Ocean to the Northern Territory border. The Pilbara is one of the largest regions in Western Australia and represents approximately 20% of Western Australia's land mass.¹³⁰³

In 2018, the estimated resident population of the Pilbara was 61,688 people, with 13,026 in Ashburton; 10,591 in East Pilbara; 21,472 in Karratha; and 14,465 in Port Hedland.¹³⁰⁴ The percentage of people 65 years and over in the Pilbara was 2.5%. For comparison, the percentage of people 65 years and over in Western Australia was 14.0%.¹³⁰⁵

In the 2016 Census, 13.95% of the resident population of the Pilbara identified as Aboriginal and/or Torres Strait Islander people. The proportion of residents of the East Pilbara locality who identified as Aboriginal and/or Torres Strait Islander was much higher (19.56%).¹³⁰⁶

¹³⁰¹ Government of Western Australia, *data.wa.gov.au – Regional Profile – Kimberley*, Figure 4 citing Small Area Labour Market data, Dec 2017 (accessed 13 January 2021).

¹³⁰² *Regional Development Commissions Act 1993* (WA) sch 1 (accessed 13 January 2021).

¹³⁰³ Pilbara Development Commission, *Our Region* (accessed 1 May 2019).

¹³⁰⁴ Pilbara Development Commission, *Community Profile* (accessed 1 May 2019).

¹³⁰⁵ Pilbara Development Commission, *Community Profile* (accessed 1 May 2019).

¹³⁰⁶ Pilbara Development Commission, *Community Profile* citing ABS 2016 Census of Population and Housing, REMPLAN Community (accessed 1 May 2019).

9.2.2.2 Housing

House prices in the Pilbara were stable from 2016 to 2018, with a median house price was \$267,150 in September 2018.¹³⁰⁷ The median house price for the Pilbara was well down from a peak of \$835,000 in late 2012.¹³⁰⁸ However, by 2020 property prices in the region had increased, particularly in Karratha.¹³⁰⁹

According to the 2016 Census data, 62.97% of people in the Pilbara rented accommodation, 9.11% owned a dwelling with a mortgage and 7.89% owned a dwelling outright.¹³¹⁰

9.2.2.3 Education and training

The Pilbara Education Region comprises 29 public schools providing kindergarten to Year 12 school-based education programs for over 8,800 students in the north-west of Western Australia.¹³¹¹

School attendance is a major issue in the region, and attendance strategies have been developed in response.

- The Hedland Schools Attendance Strategy is a collaborative initiative between Hedland Aboriginal Strong Leaders and Elders (HASL), government agencies, schools and community organisations, which commenced in Term One 2019. Each school day the Pilbara Attendance Coordinator from the Pilbara Education Regional Office joins representatives from Police, the Department of Communities, and a member from the Youth Involvement Council in a meeting at South Hedland Police Station. Homes are visited and the Pilbara Attendance Coordinator supports school-aged children to attend school using the service provided.¹³¹²

¹³⁰⁷ Domain, *Analysis: Are we on the Verge of a West Australian Property Renaissance?* (10 September 2018) (accessed 1 May 2019).

¹³⁰⁸ Domain, *Analysis: Are we on the Verge of a West Australian Property Renaissance?* (10 September 2018) (accessed 1 May 2019).

¹³⁰⁹ ABC News, *Karratha Property Prices Booming Again Amid Fears Locals Already Being Priced Out of the Area* (2 September 2020) (accessed 15 January 2021).

¹³¹⁰ Pilbara Development Commission, *Pilbara Region – Housing – Ownership*, citing ABS 2016 Census of Population and Housing, REMPLAN Community (accessed 1 May 2019).

¹³¹¹ Department of Education, Pilbara Education Region, *About the Pilbara Region* (last updated 9 June 2019) (accessed 30 November 2019).

¹³¹² Hedland Attendance Strategy Interagency Working Party, *Hedland Attendance Strategy* (accessed 6 February 2020).

- The Karratha Attendance Strategy is a collaboration between the Pilbara Regional Education Office and Karratha Police which commenced in May 2019, in response to regular attendance rate (i.e. attending school 90% of the time) being only 59%, which was 13% below the State average. The Strategy involves partnering with Karratha retailers who refuse to serve unaccompanied children during school hours.¹³¹³
- The Federal Government has funded a Remote School Attendance Strategy in Roebourne since 2014, when Roebourne District High School was identified as being among the 40 schools in Australia with the worst attendance rates (an average of 53% attendance from 2008-12).¹³¹⁴ School attendance team members talk to children and parents about the importance of school, provide practical support (lunches, transport, uniforms etc.) and monitor and reward attendance.¹³¹⁵ By 2019, Roebourne District High School attendance rates for year seven and eight students still remained low at 63% and 43% respectively, whereas the public state school averages were 90% and 87% respectively.¹³¹⁶
- The Auditor General reported in 2015 that schools in the Jigalong community and a primary school in Newman had recognised that students spent considerable time in both places. Consequently, children from Jigalong were welcome to also attend at Newman and their attendance was recorded.¹³¹⁷

In the Pilbara region, 17.3% of people have a Bachelor Degree or higher, which is significantly lower than the proportion of Western Australians generally (33.6%).¹³¹⁸ For the specific centres in the Pilbara:¹³¹⁹

- In Ashburton, 15.26% have a Bachelor Degree or higher.
- In East Pilbara, 13.41% have a Bachelor Degree or higher.
- In Karratha, 20.43% have a Bachelor Degree or higher.

¹³¹³ Pilbara News, *School Attendance Strategy Rolled out in Karratha* (14 May 2019) (accessed 6 February 2020).

¹³¹⁴ Pilbara News, *Roebourne Truancy Fight gets Canberra Cash* (12 February 2014) (accessed 6 February 2020).

¹³¹⁵ REFAP, *Remote School Attendance Strategy (RSAS)* (accessed 6 February 2020);

¹³¹⁶ Department of Education, Schools Online, *Roebourne District High School* (accessed 6 February 2020).

¹³¹⁷ Western Australian Auditor General, *Follow On: Managing Student Attendance in Western Australian Public Schools* (Report 16: August 2015) pages 22-23 (accessed 6 February 2020).

¹³¹⁸ Pilbara Development Commission, *Community Profile* (accessed 1 May 2019).

¹³¹⁹ Pilbara Development Commission, *Community Profile* (accessed 1 May 2019).

- In Port Hedland, 18.24% have a Bachelor Degree or higher.

North Regional TAFE is the largest provider of training and vocational services in the north of Western Australia¹³²⁰ with 11 campuses. The Karratha campus is the major campus in the Pilbara, specialising in business, fabrication, hairdressing, safety, high risk and computing training. The other campuses include Roebourne - Minurmarghali Mia, Hedland - Pundulmurra, Newman and Tom Price.¹³²¹

9.2.2.4 Health

Some key health statistics reported for Pilbara residents in 2018 included that:¹³²²

- 36% of adults aged 16 and over were obese;
- the death rate for transport accidents was 1.2 times higher than in Western Australia generally;
- the rate of alcohol-related hospitalisations was 1.3 times higher than for Western Australia generally;
- one in three adults aged 16 and over drank alcohol at levels that risk long-term harm;
- the cancer mortality rate was 1.9 times higher for Aboriginal people compared with non-Aboriginal; and
- the suicide rate was 1.2 times higher for males, and 1.9 times higher for females aged 15-24 than in Western Australia generally.

Rural Health West has produced a *Pilbara – Regional Population and Health Snapshot* which provides information on the major health services in the region and the key health issues for residents.¹³²³

¹³²⁰ North Regional TAFE Western Australia, *About Us* (last updated 14 December 2018) (accessed 2 May 2019).

¹³²¹ North Regional TAFE Western Australia, *Courses at Karratha* (accessed 2 May 2019).

¹³²² WA Country Health Service, *Pilbara Health Profile, Planning and Evaluation, January 2018* (accessed 1 October 2018).

¹³²³ Rural Health West, *Regional Population and Health Snapshots – Pilbara* (accessed 15 January 2021).

9.2.2.5 Industry

As at 2019, the mining industry made the greatest contribution to economic output in the region, valued at \$44.5 billion. This was followed by the construction and manufacturing industries.¹³²⁴

In 2016, the Pilbara had a Gross Regional Product of \$29.8 billion. The Gross Regional Product of regional Western Australia as a whole was \$81.9 billion.¹³²⁵

9.2.2.6 Employment¹³²⁶

The top 5 industries of employment in the Pilbara region in 2016 were:

- mining (36.0%);
- construction (13.0%);
- transport, postal and warehousing (5.6%);
- education and training (5.3%); and
- accommodation and food services (5.3%).

In each of the local government districts (Ashburton, East Pilbara, Karratha and Port Hedland) mining was the top industry of employment.

In 2016, 52.0% of people in the Pilbara region were employed full-time, 9.8% were employed part-time, and 13.2% were not in the labour force.

In 2018, according to the ABS Labour Force Survey and Small Area Labour Markers, the overall unemployment rate in the Pilbara region (2.3%) was significantly lower than the state average (6.8%). Ashburton had the lowest unemployment rate (1.6%) and Karratha saw the highest at (5.0%). In June 2020, the Pilbara unemployment rate was 3.0%.¹³²⁷

¹³²⁴ Department of Primary Industries and Regional Development, *Economy Profile*, citing REMPLAN data (2019) (accessed 30 November 2019).

¹³²⁵ Government of Western Australia, data.wa.gov.au, *Regional Profile – Pilbara* Figure 2 citing ABS Cat. 5220, Dec 2017 (accessed 15 January 2021).

¹³²⁶ Pilbara Development Commission, *Community Profile*, Work – Industry, citing ABS, 2016 Census of Population and Housing (accessed 1 May 2019).

¹³²⁷ Department of Primary Industries and Regional Development, *Our Place - Our Community*, citing REMPLAN data (accessed 15 January 2020).

9.2.3 Gascoyne

9.2.3.1 The region

The Gascoyne region consists of the local government districts of Carnarvon, Exmouth, Shark Bay and Upper Gascoyne.¹³²⁸ It covers more than 137,938 square kilometres – almost 5.5% of Western Australia's total area,¹³²⁹ yet only 0.4% of Western Australia's population.¹³³⁰

The resident population of the Gascoyne region was 9,757 in 2017-18, with the population concentrated in the key centres of Carnarvon, Exmouth and Shark Bay.¹³³¹ The estimated resident population of Aboriginal and Torres Strait Islander Australians was approximately 13% of the population of the region.¹³³² The Gascoyne's population is projected to increase to 11,500 by 2026.¹³³³

9.2.3.2 Housing

The median house sale prices in Carnarvon in the 12 months to September 2020 was \$449,000.¹³³⁴ In Exmouth it was \$503,000, representing a 14.2% increase since the previous 12 month period.¹³³⁵

9.2.3.3 Education and training

The Gascoyne region provides education facilities from pre-school to post-secondary education, with seven government and three non-government schools.¹³³⁶ These services include the Carnarvon School of the Air, which is one of five schools of the Air based in Western Australia. Time, distance and weather conditions are major factors affecting the delivery of educational services. Technology increasingly helps overcome the tyranny of distance, where satellite technologies are used to enable more rapid and timely communication between home-tutor, teacher and student.¹³³⁷

¹³²⁸ *Regional Development Commissions Act 1993* (WA) sch 1 (accessed 1 May 2019).

¹³²⁹ Department of Primary Industries and Regional Development, *Gascoyne* (accessed 1 May 2019).

¹³³⁰ Gascoyne Development Commission, *Annual Report 2016/2017* (accessed 15 January 2021).

¹³³¹ Gascoyne Development Commission, *Annual Report 2017/2018* (accessed 15 January 2021).

¹³³² ABS, *2016 Census QuickStats* (Cat No 3238.0.55.001) (updated 13 December 2018) (accessed 1 May 2019).

¹³³³ Gascoyne Development Commission, *Annual Report 2016/2017* (accessed 15 January 2021).

¹³³⁴ Corelogic, *Property Value – Carnarvon WA 6701* (accessed 15 January 2021).

¹³³⁵ Corelogic, *Property Value – Exmouth WA 6707* (accessed 15 January 2021).

¹³³⁶ Gascoyne Development Commission, *Education* (accessed 15 January 2021).

¹³³⁷ Department of Education, *Carnarvon School of the Air – School Overview* (accessed 15 January 2021).

School attendance is an issue in the Gascoyne. For example, the attendance rates at Carnarvon Community College in 2019 were 65.2% for primary and 50.5% for secondary students, compared to the State averages of 91.6% and 86.8% respectively.¹³³⁸ A federally funded Remote School Attendance Strategy has been in place in Roebourne since 2014. Team members talk to children and parents about the importance of school, provide practical support (such as lunches, transport, uniforms etc.) and monitor and celebrate attendance.¹³³⁹

Post-secondary and community courses are offered through Central Regional TAFE campuses in Carnarvon and Exmouth. The Carnarvon campus delivers approximately forty qualifications to around 600 students each year. Training is offered in art, hospitality, business and administration, financial services, information technology, general education, conservation and land management, clothing production and printmaking, community services, maritime operations, engineering and more.¹³⁴⁰

Since 2016, Geraldton Universities Centre (GUC) in an arrangement with the Shire of Carnarvon are providing opportunities for Carnarvon residents to come together to study, accessing GUC tutorials via web conferencing, with laptops and internet provided by GUC.¹³⁴¹

For more information on the educational opportunities across the Gascoyne, see the *Gascoyne Development Commission*.

9.2.3.4 Health

Some key health statistics reported for the Gascoyne region in 2018 included:¹³⁴²

- a higher rate of smoking than the State average, particularly amongst pregnant women (13% compared to the State average of 9%) and pregnant Aboriginal women (51%);
- significantly higher asthma rates than the state-wide and country Western Australia rates; and

¹³³⁸ Department of Education, Schools Online, *Carnarvon Community College* (accessed 6 February 2020).

¹³³⁹ Ngala, Midwest and Gascoyne, *Remote School Attendance Strategy* (accessed 6 February 2020).

¹³⁴⁰ Central Regional TAFE Western Australia, *Campuses – Carnarvon* (last updated December 2019) (accessed 15 January 2021).

¹³⁴¹ Geraldton Universities Centre, *Carnarvon – Media Release – GUC Extends Supports for University Study in Carnarvon as Applications Open for 2017* (accessed 11 October 2018).

¹³⁴² WA Primary Health Alliance, *Health Snapshot - Midwest/ Gascoyne* (accessed 15 January 2021).

- lower rates of undertaking cancer screening tests than the country Western Australia rate.

Gascoyne is serviced by both government and private healthcare providers:¹³⁴³

- Carnarvon Hospital provides emergency, general, maternity, paediatric, palliative and permanent care.
- Gascoyne Population Health and Primary Health Care provides a range of allied health services including physiotherapy, speech therapy, occupational therapy, diabetes education, dietician, child health services and an alcohol and drugs team, plus a visiting podiatrist.
- Exmouth Hospital provides emergency, intensive care and home and community care.
- Carnarvon Medical Service Aboriginal Corporation offers primary and secondary health medical services, tertiary specialist, allied health services and a dental clinic to Indigenous and other persons.
- Carnarvon Medical Centre has three rural general practitioners.
- Western Australia Country Health Services have remote nursing posts at Coral Bay and the Burringurrah Community.
- Other services including:
 - Royal Flying Doctor;
 - St John's Ambulance;
 - Central West Mental Health Service and Child and Adolescent Mental Health Service;
 - Private Dental in Carnarvon and Exmouth;
 - Visiting child health services in Denham and Burringurrah;
 - Meals on Wheels;
 - Silver Chain services in Carnarvon and Shark Bay;
 - Home and Community Care services; and

¹³⁴³ Gascoyne Development Commission, *Health Services* (accessed 15 January 2021).

- Vising Indigenous Dental Clinic Program.

9.2.3.5 Industry

In 2016, Gascoyne had a \$1.1 billion gross regional product of the \$81.9 billion for the entire regional Western Australia.¹³⁴⁴ The Gascoyne region has a diverse economy, the key industries being tourism, mining, horticulture, fishing and pastoral.¹³⁴⁵ Tourism is the leading industry in the region, contributing \$304 million to the Gascoyne economy in 2016.¹³⁴⁶

The main commodity mined in the Gascoyne region is salt - valued at \$85.9 million in 2015-16 and comprising one third of Western Australia's annual salt production. The next largest economic activity in the region was retail, followed by horticulture, commercial fishing, pearling and pastoralism.¹³⁴⁷

9.2.3.6 Employment

The Gascoyne's unemployment rate in June 2017 was 5.0%, which steadily rose to 5.9% in June 2018, 8.9% in June 2019 and 9.10% in June 2020.¹³⁴⁸

9.2.4 Mid West¹³⁴⁹

9.2.4.1 The region

The Mid West region is made up of 18 distinct Local Government Areas: Carnamah, Chapman Valley, Coorow, Cue, Geraldton, Greenough, Irwin, Meekatharra, Mingenew, Morawa, Mt Magnet, Mullewa, Murchison, Northampton, Perenjori, Sandstone, Three Springs and Yalgoo.¹³⁵⁰

¹³⁴⁴ Government of Western Australia, *data.wa.gov.au – Regional Profile – Gascoyne* Figure 2 citing ABS Cat 5220, Dec 2017 (accessed 1 May 2019).

¹³⁴⁵ Department of Local Government, Sport and Cultural Industries, Regional, *Regional Arts and Cultural Action Plan - Gascoyne*, page 1 (accessed 1 May 2019).

¹³⁴⁶ Gascoyne Development Commission, *Annual Report 2017/2018*, page 19 (accessed 25 September 2018).

¹³⁴⁷ Gascoyne Development Commission, *Annual Report 2016/2017*, pages 8 and 9 (accessed 25 September 2018).

¹³⁴⁸ Department of Primary Industries and Regional Development, *Our Place - Our Community*, citing REMPLAN data (accessed 15 January 2021).

¹³⁴⁹ Unless otherwise indicated, this data is taken from the Mid West Development Commission and Department of Regional Development, *Mid West* (2017) (accessed 30 November 2019).

¹³⁵⁰ *Regional Development Commissions Act 1993* (WA) sch 1 (accessed 15 January 2021).

The Mid West is further divided into three sub-regions of Batavia Coast, Murchison and North Midlands.

The region covers approximately 478,000 square kilometres (including offshore islands) and extends from Green Head to Kalbarri and more than 800km inland to Wiluna in the Gibson Desert. This equates to almost one fifth of the total land area of Western Australia.

In 2018, the estimated resident population of the Mid West was 53,635, with Greater Geraldton being the most populated area with an estimated resident population of 38,738.¹³⁵¹ In 2016, it was estimated that Aboriginal and/or Torres Strait Islander peoples made up approximately 13% of the population of the region.¹³⁵²

9.2.4.2 Housing

The median house price in Geraldton in the 12 months to September 2020 was \$262,000, which was an increase of 9.2% from the previous 12 month period.¹³⁵³

9.2.4.3 Education and training

There are 50 government schools in the Mid West region,¹³⁵⁴ with almost 11,000 enrolments from kindergarten to year 12.¹³⁵⁵

In 2018, it was reported that Mid West schools had the third lowest regular attendance rate (55.9%) of the eight educational regions in Western Australia, behind the Kimberley (40.5%) and Pilbara (54.5%). This can be contrasted to the Northern Metropolitan Perth region where the rate is 76%.¹³⁵⁶

There are 250 qualifications available through the Central Regional TAFE. Marine education, training and industry research is undertaken through the Batavia Coast Maritime Institute.

¹³⁵¹ City of Greater Geraldton, *Economy Profile – Greater Geraldton, Mid West Region* (accessed 22 May 2019).

¹³⁵² ABS, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (Cat No 3238.0.55.001) (2018) (accessed 25 May 2019).

¹³⁵³ Corelogic, *Property Value – Geraldton WA 6530* (accessed 15 January 2021).

¹³⁵⁴ Department of Education, Midwest Education Region, *Our Schools* (updated 30 May 2016) (accessed 15 January 2021).

¹³⁵⁵ Mid West Development Commission, *Studying in the Mid West* (2019) (accessed 15 January 2021).

¹³⁵⁶ The West Australian, *7000 WA Students Skip School for Family Holidays* (20 November 2018) (accessed 6 February 2020).

There are further educational opportunities through the Geraldton Universities Centre, and the Western Australian Centre for Rural Health.¹³⁵⁷

9.2.4.4 Health

There are 14 hospitals, nursing posts and health centres across the Mid West region.¹³⁵⁸ In 2018, the use of mental health services in the region was 10% lower than the rest of Western Australia, despite having a similar rate of diagnosed mental health problems.¹³⁵⁹ Mid West residents use General Practice chronic disease services nearly twice as often as other Western Australians.¹³⁶⁰

Key health facts reported for Midwest residents in 2018 included that:¹³⁶¹

- 35% of adults aged 16 and over were obese;
- one in four people had a high cholesterol level;
- one in five adults aged 16 and over had high blood pressure;
- the region had the second highest hospital admission rate in regional Western Australia for cardiovascular disease;¹³⁶²
- potentially preventable hospitalisations for adults were over 40% higher than for the State as a whole in all categories (vaccine preventable, chronic and acute conditions);
- potentially preventable hospitalisations for 0-14 year olds were 1.2 times higher than for the State, which was largely attributable to dental conditions and ear, nose and throat infections;

¹³⁵⁷ Mid West Development Commission, *Studying in the Mid West* (2019) (accessed 15 January 2021).

¹³⁵⁸ Mid West Development Commission, *Living in the Mid West*, (accessed 23 May 2019).

¹³⁵⁹ WA Country Health Service, *Midwest Health Profile, Planning and Evaluation Unit, November 2018* page 5 (accessed 23 May 2019).

¹³⁶⁰ WA Primary Health Alliance (WAPHA), *Midwest – Health Snapshot of the Midwest* (accessed 23 May 2019).

¹³⁶¹ Unless otherwise stated, statistics are from the WA Country Health Service, *Midwest Health Profile, Planning and Evaluation Unit, November 2018* pages 24, 28 and 33-34 (accessed 13 November 2018).

¹³⁶² WA Primary Health Alliance (WAPHA), *Midwest – Health Snapshot of the Midwest* (accessed 25 May 2019).

- there was a 1.4 times higher rate of lung cancer than in Western Australia generally; and
- there was a 1.4 times higher rate of alcohol-related hospitalisations than in Western Australia generally.

Key health facts for the Aboriginal population in the Mid West region include that:¹³⁶³

- 51% of Aboriginal women smoke during pregnancy; and
- Aboriginal people are presenting to emergency departments for non-urgent presentations at twice the rate on non-Aboriginal people.

9.2.4.5 Industry

The gross regional product of the Mid West region in 2016 was \$6.1 billion of the \$81.9 billion for the entire regional Western Australia.¹³⁶⁴

The top ranking industries of employment according to the 2016 ABS Census were:¹³⁶⁵

- health care and social assistance (10.8%);
- education and training (9.7%);
- retail trade (9.6%);
- agriculture, forestry and fishing (9.3%); and
- construction (8.6%).

The Mid West is the State's most important fishing region, with the valuable rock lobster industry generating around \$85 million (2014) which was nearly half of Western Australia's total rock lobster revenue.¹³⁶⁶

¹³⁶³ WA Primary Health Alliance (WAPHA), *Midwest – Health Snapshot of the Midwest* (accessed 23 May 2019).

¹³⁶⁴ Government of Western Australia, *data.wa.gov.au – Regional Profile – MidWest*, citing ABS (Cat No 5220) Dec 2017) (accessed 23 May 2019).

¹³⁶⁵ ABS, *Mid West (SA3) (51104)* (2018) (accessed 23 May 2019).

¹³⁶⁶ Department of Regional Development, *Mid West: A Region in Profile 2014* (accessed 12 October 2018).

9.2.4.6 Employment

In 2016, the participation rate in the labour force for persons aged 15 years and over was 58.6%.¹³⁶⁷ The occupations of employed persons in the Mid West region, as a percentage of the total number of employed people are:¹³⁶⁸

- technicians and trades workers (16.5%);
- professionals (14.7%);
- managers (14.3%);
- labourers (12.3%);
- community and person service workers (10.5%); and
- clerical and administrative workers (11.5%)

The Mid West's unemployment rate in June 2017 was 5.1%, which steadily rose to 7.5% in June 2018 and 8.9% in June 2019. It remained steady at 8.40% from September 2019 to June 2020.¹³⁶⁹

9.2.5 Wheatbelt

9.2.5.1 The region¹³⁷⁰

The Wheatbelt consists of the local government districts of Beverley, Brookton, Bruce Rock, Chittering, Corrigin, Cuballing, Cunderdin, Dandaragan, Dalwallinu, Dowerin, Dumbleyung, Gingin, Goomalling, Kellerberrin, Kondinin, Koorda, Kulin, Lake Grace, Merredin, Moora, Mt. Marshall, Mukinbudin, Narembeen, Narrogin (Town), Narrogin (Shire), Northam (Town), Northam (Shire), Nungarin, Pingelly, Quairading, Tammin, Toodyay, Trayning, Victoria Plains, Wagin, Wandering, West Arthur, Westonia, Wickepin, Williams, Wongan-Ballidu, Wyalkatchem, Yilgarn and York.¹³⁷¹

¹³⁶⁷ ABS, *Mid West (SA3) (51104)* (2018) (accessed 23 May 2019).

¹³⁶⁸ ABS, *Mid West (SA3) (51104)* (last updated 2018) (accessed 23 May 2019).

¹³⁶⁹ Department of Primary Industries and Regional Development, *Economy, Jobs and Business Insights*, citing REMPLAN data (accessed 15 January 2021).

¹³⁷⁰ Unless otherwise indicated, the information in this section is taken directly from the Government of Western Australia, *Wheatbelt Development Commission* (accessed 15 January 2021).

¹³⁷¹ *Regional Development Commissions Act 1993* (WA) (accessed 15 January 2021).

With a population of 75,000 in 2019, the Wheatbelt is the third most populous region in the State. This population is highly dispersed with over 200 towns and settlements spread across 155,256 square kilometres. There is no single dominant regional centre.

The region has an increasingly diverse economic base, with growth in the mining, transport and logistics, manufacturing and construction sectors underpinned by a strong agriculture sector.

9.2.5.2 Housing¹³⁷²

The Wheatbelt Development Commission states that the region's strengths are its multiple 'livability' options, vibrant communities, access to quality services and the availability of affordable, quality housing. For government, the considerable existing (and at times underutilised) infrastructure across many communities presents a cost effective opportunity to grow the population.

9.2.5.3 Education and Training

The Wheatbelt region has:¹³⁷³

- 73 primary schools; and
- 29 secondary school options (District High Schools, Senior High Schools, agricultural colleges, K - 12 campuses).

The Central Regional TAFE Northam campus delivers a range of training options including horticulture and grain production. There are also Central Regional TAFE campuses in Merredin and Moora.¹³⁷⁴

9.2.5.4 Health

Key health facts reported for Wheatbelt residents in 2018 included that:¹³⁷⁵

- 38% of adults aged 16 and over were obese;

¹³⁷² Unless otherwise indicated, the following is taken directly from the Government of Western Australia, *Wheatbelt Development Commission* (accessed 15 January 2021).

¹³⁷³ Wheatbelt Development Commission, *Clever People* (accessed 15 January 2021).

¹³⁷⁴ Central Regional TAFE, *Campuses* (accessed 6 February 2020).

¹³⁷⁵ WA Country Health Service, *Wheatbelt Health Profile* (November 2019) pages 26, 30 and 31 (accessed 10 June 2019).

- Aboriginal people aged 15-64 years in the region were hospitalised at a rate 2.2 times higher than non-Aboriginal people, and had a 1.8 times higher cancer mortality; and
- the region had a 1.2 times higher rate for alcohol-related hospitalisations than the State generally.

9.2.5.5 Industry

In 2017 the gross regional product of the Wheatbelt region was \$6.66 billion, of the \$81.9 billion total for the entire of regional Western Australia.¹³⁷⁶

The Wheatbelt produced \$3.35 billion or 41% of Western Australia's total gross value of agricultural commodities produced (GVACP) in 2015-16, which consisted of:¹³⁷⁷

- horticulture - \$126.4 million GVACP;
- livestock - \$467.1 million GVACP;
- livestock products (eggs, wool and milk) - \$386.3 million GVACP; and
- broadacre crops (grains, oilseeds and other crops) - \$2.26 billion GVACP.

9.2.5.6 Employment

The unemployment rate in the Wheatbelt in June 2017 was 6.5%, which dropped to 3.0% in June 2018. It was 3.7% in June 2019 and 3.2% in June 2020.¹³⁷⁸

9.2.6 Peel

9.2.6.1 The region¹³⁷⁹

Western Australia's Peel Region consists of the local government districts of Boddington, Mandurah, Murray, Serpentine-Jarrahdale and Waroona.¹³⁸⁰ Located 75km south of Perth, it is Western Australia's smallest non-metropolitan region geographically. However, Mandurah is the second fastest growing regional city in Australia.

¹³⁷⁶ Wheatbelt Development Commission, *Annual Report 2017-18*, page 4 (accessed 10 June 2019).

¹³⁷⁷ Wheatbelt Development Commission, *Annual Report 2017-18*, page 4 (accessed 10 June 2019).

¹³⁷⁸ Department of Primary Industries and Regional Development, *Economy, Jobs and Business Insights*, citing REMPLAN data (accessed 15 January 2021).

¹³⁷⁹ Unless otherwise indicated, the following is taken directly from the *Peel Development Commission* (accessed 30 November 2019).

¹³⁸⁰ *Regional Development Commissions Act 1993* (WA) (accessed 15 January 2021).

In the period of 2006-16, there was a 52% population growth in the Peel region. The majority of the Peel's population is located in the City of Mandurah (62%), followed by the shires of Serpentine-Jarrahdale (21%), Murray (13%), Waroona (3%) and Boddington (1%).

9.2.6.2 Housing

According to a Housing Authority study of Perth/ outer Perth housing affordability, Peel had the lowest number of private housing sales but the highest proportion of housing sales affordable to very low or low income households in 2016.¹³⁸¹

The median house price in Mandurah in the 12 months to September 2020 was \$260,000, which was an increase of 9.0% from the previous 12 month period.¹³⁸²

9.2.6.3 Education and training¹³⁸³

There are 43 government and private schools in the region catering to pre-primary, primary and secondary students as well as students requiring specialist education support.

Peel also hosts the Peel Education Campus, a multi-partnered facility hosting co-located campuses of John Tonkin College, Challenger Institute of Technology, Career Enterprise Centre and Murdoch University. Because of the unique relationship between the institutions there are flexible education and training options available.

The Peel Campus of Murdoch University offers courses in nursing, business, and information technology. Challenger Institute of Technology offers a range of courses including metal trades, construction, community services, arts, beauty, business and information technology. In addition to its main campus in Mandurah, Challenger Institute has access centres at Boddington, Waroona and Mundijong.

¹³⁸¹ Housing Authority *Housing Affordability - A Study for the Perth Metropolitan Area* (2016) page 4 (accessed 10 June 2019).

¹³⁸² Corelogic, *Property Value – Mandurah WA 6210* (accessed 15 January 2021).

¹³⁸³ Unless otherwise indicated, the following is directly from the Peel Development Commission, *Health and Education* (accessed 30 November 2019).

9.2.6.4 Health¹³⁸⁴

Peel Health Campus, located in Mandurah, is the major health care provider in the Peel region. The Campus has been in operation since 1997 and offers public and private hospital services. It is managed by Health Solutions on behalf of the Western Australian Government. There is also a small hospital in Boddington and the Murray Hospital in Pinjarra.

Major community health centres are located in Mandurah, Pinjarra and Boddington, with the Boddington facility having opened in 2011.

As of 2019, a major child health study was being undertaken in the Peel Region which the Peel Development Commission supported through the provision of seed funding. The study is being undertaken collaboratively by Curtin, Murdoch and Edith Cowan Universities, the University of Western Australia and the Telethon Institute for Child Health Research. The Peel Child Health Study is a longitudinal study into the psychosocial, biological and environmental pathways to child health and wellbeing, including the influence of community.

9.2.6.5 Industry

The estimated value of gross regional product for the Peel was \$8.3 billion in 2018–19 with mining comprising 37.1%.¹³⁸⁵

The Peel's minerals sector produces alumina, gold, copper and mineral sands. The key resource companies operating regionally include Alcoa (Pinjarra and Wagerup), South 32 and Newmont (Boddington), and MZI (Keysbrook). The region is complemented by stable manufacturing and construction service industries, agriculture, health services, tourism and retail trades.¹³⁸⁶

9.2.6.6 Employment

At the 2016 ABS Census, nearly 7% of employment in the Peel region was attributed to mining related activity.¹³⁸⁷

¹³⁸⁴ Unless otherwise indicated, the following is directly from the Peel Development Commission, *Health and Education* (accessed 30 November 2019).

¹³⁸⁵ Peel Development Commission, *Annual Report 2018-19*, page 32 (accessed 30 November 2019).

¹³⁸⁶ Peel Development Commission, *Annual Report 2018-19*, page 13 (accessed 30 November 2019).

¹³⁸⁷ Peel Development Commission, *Annual Report 2018-19*, page 32 (accessed 30 November 2019).

In 2018-19, Peel's unemployment rate was 5.2% compared to the State average of 4.6%.¹³⁸⁸ It was 6.9% in the March quarter of 2020 and 8.7% in the June quarter of 2020.¹³⁸⁹

Mandurah's youth (15-24 years) unemployment rate has been particularly high over the last few years, estimated at 18.8% in 2017-18.¹³⁹⁰

9.2.7 Goldfields–Esperance¹³⁹¹1392

9.2.7.1 The region

The Goldfields-Esperance region is located in the south-eastern corner of Western Australia and covers 771,276 square kilometres (including offshore islands). It is the largest of the State's nine non-metropolitan regions and over three times the size of Victoria. The region consists of the local government districts of Coolgardie, Dundas, Esperance, Kalgoorlie-Boulder, Laverton, Leonora, Menzies, Ngaanyatjaraku, Ravensthorpe and Wiluna.¹³⁹³ Note that Wiluna became part of the region in 2020 and was previously part of the Mid-West.

At 30 June 2018, the region had an estimated resident population of 55,121 people.¹³⁹⁴ Kalgoorlie-Boulder is the largest administrative and service centre in the region, with 54.4% of the region's total population in 2018.¹³⁹⁵

The Goldfields–Esperance region has a significant Aboriginal population (7,249 at June 2016).¹³⁹⁶ This was particularly the case in the City of Kalgoorlie-Boulder, in which Aboriginal people represented 9.5% of the region's population in 2017.¹³⁹⁷

¹³⁸⁸ Peel Development Commission, *Annual Report 2018-19*, page 13, citing Department of Employment, 2016, Small Area Labour Market – March quarter 2018 (accessed 11 June 2019).

¹³⁸⁹ City of Mandurah, *Unemployment* (accessed 15 January 2021).

¹³⁹⁰ Peel Development Commission, *Annual Report 2017-18*, page 12, citing Department of Jobs and Small Business, WA Regional Labour Force Data April 2018 (2018) (accessed 29 January 2019).

¹³⁹¹ Unless otherwise indicated, the data is drawn from Goldfields-Esperance Development Commission and Department of Regional Development, *Goldfields-Esperance* (2017) (accessed 15 January 2021).

¹³⁹² Unless otherwise indicated, the data is drawn from Goldfields-Esperance Development Commission and Department of Regional Development, *Goldfields-Esperance* (2017) (accessed 15 January 2021).

¹³⁹³ *Regional Development Commissions Act 1993* (WA) sch 1 (accessed 10 January 2021).

¹³⁹⁴ Goldfields-Esperance Development Commission, *GEDC Region, Population*, citing ABS, *Regional Population Growth 2017-18* (Cat No 3218.0, released 27 March 2019) (accessed 10 June 2019).

¹³⁹⁵ Goldfields-Esperance Development Commission, *Kalgoorlie/Boulder Region, Population*, citing ABS, *Regional Population Growth 2017-18* (Cat No 3218.0, released 27 March 2019) (accessed 10 June 2019).

¹³⁹⁶ ABS, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (Cat No 3238.0.55.001) (2018) (accessed 10 June 2019).

¹³⁹⁷ Department of Regional Development, Goldfields-Esperance Development Commission, *2017/18 Annual Report* (2017) page 12 (accessed 10 June 2019).

9.2.7.2 Housing

The median house price in Kalgoorlie in the 12 months to September 2020 was \$255,000, which was decrease of 15% from the previous 12 month period (the national average was an increase of 4.3% during this time).¹³⁹⁸

9.2.7.3 Education and training

The Goldfields Education Region comprises 54 schools spread over the region. There are five school networks to meet the diverse needs of that number of schools, with each having a Network Principal to coordinate collaboration between schools.¹³⁹⁹

School attendance rates have been an ongoing issue in remote schools such as Ngaanyatjarra, Wiluna and Laverton, but also in some schools in Kalgoorlie. In 2019, the attendance rate at Ngaanyatjarra Lands School was 52.2% for primary school and 35.0% for secondary school.¹⁴⁰⁰ At Wiluna Remote Community School the rates were 63.8% and 38.3% respectively,¹⁴⁰¹ and in Laverton School they were 72.8% and 60.7% respectively.¹⁴⁰² These can be contrasted to the State public school rates of 91.6% and 86.8% respectively. The attendance rate in East Kalgoorlie Primary School was also well under the State public school rate at 74.5%.¹⁴⁰³

According to the ABS 2016 Census, of the Goldfields-Esperance population aged 15 years and over:¹⁴⁰⁴

- 37.09% had completed Year 12 or equivalent;
- 12.56% had completed Year 11 or equivalent;
- 25.67% had completed Year 10 or equivalent;
- 5.78% had completed Year 9 or equivalent;
- 3.93% had completed Year 8 or below; and
- 0.37% did not go to school.

¹³⁹⁸ Corelogic, *Property Value – Kalgoorlie WA 6430* (accessed 15 January 2021).

¹³⁹⁹ Department of Education, *Goldfields Education Region* (accessed 29 January 2019).

¹⁴⁰⁰ Department of Education, Schools Online, *Ngaanyatjarra Lands School* (accessed 6 February 2020).

¹⁴⁰¹ Department of Education, Schools Online, *Wiluna Remote Community School* (accessed 6 February 2020).

¹⁴⁰² Department of Education, Schools Online, *Laverton School* (accessed 6 February 2020).

¹⁴⁰³ Department of Education, Schools Online, *East Kalgoorlie Primary School* (accessed 6 February 2020).

¹⁴⁰⁴ Goldfields Esperance Development Commission, *Community Profile – Education – School Completion*, citing data from *REMPLAN* and the Australian Bureau of Statistics, (ABS) Census of Population and Housing (accessed 12 October 2018).

9.2.7.4 Health

The health statistics reported for the Goldfields region in 2016 included that:¹⁴⁰⁵

- youth suicide was the second leading cause of death in young people aged 15 to 24 year olds;
- almost half of Aboriginal mothers and one in six non-Aboriginal mothers smoked while pregnant;
- there was a high rate for dispensing of opioid medicines; and
- 8.3% of adults were consuming alcohol at levels considered to be a high risk to health.

Some key health statistics reported for Goldfields Residents in 2018 included that:¹⁴⁰⁶

- one in 12 children and 38% of adults (16 and over) were obese;
- the rate of alcohol-related hospitalisations was 1.4 times higher than in Western Australia generally;
- the rate of lung cancer was 1.6 times higher than in Western Australia generally;
- 52% of children and 40% of adults (16 and over) did not do sufficient physical activity; and
- the death rate for transport accidents was double that of Western Australia generally.

9.2.7.5 Industry

Esperance provides the regions' critical port infrastructure, established industries, and community service sectors. Mining, agriculture and tourism are the region's leading sectors. In 2018, the gross regional product of the Goldfields-Esperance area was \$7.5 billion, which

¹⁴⁰⁵ WA Primary Health Alliance, Country WA Primary Health Network, *Goldfields Health Snapshot 2016* (accessed 11 June 2019).

¹⁴⁰⁶ WA Country Health Service, *Goldfields Health Profile, Planning and Evaluation Unit, November 2018* pages 21, 28, 32, 33 and 34 (accessed 11 June 2019).

equated to \$136,306 per capita and \$238,926 per worker. Mining contributed 56.1% of that sum.¹⁴⁰⁷

9.2.7.6 Employment

At the time of the 2016 census, the main industry of employment was mining, comprising 33% of the labour force. The next highest area of employment was health care and social assistance (7%), followed by retail trade (7%), education and training (6.5%), and construction (6%).¹⁴⁰⁸

In 2017, the unemployment rate in the Goldfields-Esperance region was 4.0%, which was lower than for regional Western Australia (5.4%) and for metropolitan Western Australia (6.4%).¹⁴⁰⁹

An important issue for the Goldfields-Esperance Development Commission is the high rate of unemployment amongst the region's Aboriginal population, which has required a greater focus on strategies to improve education, training and employment opportunities for local Aboriginal people.¹⁴¹⁰

9.2.8 Great Southern¹⁴¹¹

9.2.8.1 The region

The total land area of the Great Southern region is 39,007 square kilometres (including offshore islands), representing approximately 1.5% of the Western Australia's total land area.

The Great Southern region comprises of the local government districts of Albany (Town), Albany (Shire), Broomehill, Cranbrook, Denmark, Gnowangerup, Jerramungup, Katanning, Kent, Kojonup, Plantagenet, Tambellup and Woodanilling.¹⁴¹²

¹⁴⁰⁷ Department of Regional Development, Goldfields-Esperance Development Commission, *2018-19 Annual Report* (2018) page 6 (accessed 6 December 2019).

¹⁴⁰⁸ Goldfields-Esperance Development Commission, *Economy Profile – GEDC Region – Employment by Industry*, citing latest REMPLAN data incorporating ABS 2016 Census Place of Work Employment Data (accessed 6 December 2019).

¹⁴⁰⁹ Government of Western Australia, *data.wa.gov.au – Regional Profile – Goldfields-Esperance* (2018) (accessed 6 December 2019).

¹⁴¹⁰ Department of Regional Development, Goldfields-Esperance Development Commission, *2017-18 Annual Report* (2017) pages 30-31 (accessed 10 June 2019).

¹⁴¹¹ Unless otherwise indicated, the data is drawn from *Great Southern Development Commission* (accessed 11 June 2019).

¹⁴¹² *Regional Development Commissions Act 1993* (WA) sch 1 (accessed 10 June 2019).

The estimated resident population of the Great Southern region in 2017 was 59,167 people, approximately 9% of the total for regional Western Australia.¹⁴¹³

The population of the Great Southern is concentrated in the City of Albany. In 2017, the City's accounted for 63% of the region's total.¹⁴¹⁴ The Shire of Denmark was the second largest population centre with 10% of the region's total,¹⁴¹⁵ followed by the Shire of Plantagenet (9%).¹⁴¹⁶ Aboriginal and/or Torres Strait Islander people constituted 4.2% of the population of Albany in 2016.¹⁴¹⁷

9.2.8.2 Housing

The median house price in Albany in the 12 months to September 2020 was \$535,000, which was a decrease of 2.3% from the previous 12 month period (when the national average was an increase of 4.3% for the same period).¹⁴¹⁸

9.2.8.3 Education and training

In the Great Southern region (2018), there were:¹⁴¹⁹

- 30 primary schools;
- 15 high schools;
- one university campus; and
- four Great Southern Institute of Technology campuses.

Education delivery is variable across the region due to geographical factors, the socio-economic index, transport infrastructure, community structures and numerous other factors.¹⁴²⁰

¹⁴¹³ Government of Western Australia, *data.wa.gov.au – Regional Profile – Great Southern*, citing ABS (Cat No 5220) Dec 2017 (accessed 11 June 2019).

¹⁴¹⁴ ABS, *Albany (C) (LGA) (50080)* (last updated 2018) (accessed 11 June 2019).

¹⁴¹⁵ ABS, *Denmark (S) (LGA) (52730)* (last updated 2018) (accessed 11 June 2019).

¹⁴¹⁶ ABS, *Plantagenet (S) (LGA) (57210)* (last updated 2018) (accessed 11 June 2019).

¹⁴¹⁷ ABS, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (Cat No 3238.0.55.001) (2018) (accessed 11 June 2019).

¹⁴¹⁸ Corelogic, *Property Value – Albany WA 6330* (accessed 15 January 2021).

¹⁴¹⁹ Regional Development Australia, Great Southern WA, *Our Education & Employment* (accessed 6 December 2019).

¹⁴²⁰ Regional Development Australia, Great Southern WA, *Our Education & Employment* (accessed 6 December 2019).

9.2.8.4 Health

Some key health facts reported for Great Southern residents in 2018 included:¹⁴²¹

- one in seven adults (16 years and over) having mental health problems;
- a 1.5 times higher rate of asthma than the State rate; and
- a 1.6 times higher death rate from transport accidents than the State rate.

Hospital, community and public health, and mental health and aged care services in the region include:¹⁴²²

- Hospital services:
 - Albany Health Campus
 - Katanning Hospital
 - Denmark Hospital and Health Service
 - Gnowangerup Health Service
 - Kojonup Health Service
 - Plantagenet Hospital
 - Ravensthorpe Health Service
- Community and public health services:
 - Great Southern Population Health Unit
 - Tambellup Health Clinic
 - Jerramungup Health Centre
 - Ravensthorpe Community Health
 - Bremer Bay Health Centre
- Mental health and aged care services
 - Great Southern Mental Health – Albany, Katanning and Narrogin
 - Juniper Bethshan – Katanning
 - Great Southern Aged and Subacute Care Services
 - Springhaven Frail Aged Hostel

¹⁴²¹ WA Country Health Service, *Great Southern Health Profile, Planning and Evaluation Unit, November 2018* pages 22, 29-30 (accessed 1 October 2018).

¹⁴²² Rural Health West, *Great Southern – Population and Health Snapshot for 2016* (accessed 11 June 2019).

- Clarence Estate Residential
- Plantagenet Village Homes

Rural Health West has produced a *Great Southern – Population and Health Snapshot* which provides some useful information on the major health services in the region and key health issues for residents.¹⁴²³

9.2.8.5 Industry

The Great Southern's gross regional product was estimated at \$4.0 billion in 2016, of the total of \$81.9 billion for Western Australia.¹⁴²⁴ The region accounts for 13% of the overall agricultural output for Western Australia. The main agricultural industries include cropping, livestock and wool. Horticulture and viticulture also make significant contributions to this sector.¹⁴²⁵

The region is Western Australia's largest wine grape producing region, producing 37% of the State's annual crush. The region is one of Western Australia's largest producers of oysters and has two of Australia's largest pilchard fisheries.¹⁴²⁶

9.2.8.6 Employment

In 2016, the Great Southern region had a labour force participation rate of 56.2%. By way of comparison, the labour force participation rate of regional Western Australia as a whole was 70.1%.¹⁴²⁷

The unemployment rate in the Wheatbelt in June 2017 was 6.5%, which dropped to 3.1% in June 2018. It was 3.7% in June 2019 and 3.3% in June 2020.¹⁴²⁸

¹⁴²³ Rural Health West, *Regional Population and Health Snapshots – Great Southern* (accessed 15 January 2021).

¹⁴²⁴ Government of Western Australia, *data.wa.gov.au – Regional Profile – Great Southern*, citing ABS (Cat No 5220) (Dec 2017) (accessed 11 June 2019).

¹⁴²⁵ Regional Development Australia, Great Southern WA, *Our Regions Industry* (accessed 11 June 2019) (January 2019).

¹⁴²⁶ Regional Development Australia, Great Southern WA, *Our Regions Industry* (accessed 11 June 2019).

¹⁴²⁷ Department of Primary Industries and Regional Development, *Labour Force and Employment* (last updated 2017) (accessed 11 June 2019).

¹⁴²⁸ Department of Primary Industries and Regional Development, *Economy, Jobs and Business Insights*, citing REMPLAN data (accessed 15 January 2021).

The main industries employing people in the Great Southern region in 2016 were:¹⁴²⁹

- agriculture, forestry and fishing (15%);
- health care and social assistance (11.4%);
- education and training (9.4%); and
- construction (8.1%).

9.2.9 South West¹⁴³⁰

9.2.9.1 The region

The South West region of Western Australia covers an area of 23,998 square kilometres and consists of the local government districts of Augusta-Margaret River, Boyup Brook, Bridgetown-Greenbushes, Bunbury, Busselton, Capel, Collie, Dardanup, Donnybrook-Balingup, Harvey, Manjimup and Nannup.¹⁴³¹

The South West is the most populated region in Western Australia outside of Perth. As at July 2018, there were 178,406 people living in the South West region, with the population projected to increase to 230,000 by 2031.¹⁴³² Busselton had the largest resident population in the region in 2018 with an estimated 38,926 people. Bunbury was the second largest population centre, with a population of 31,776 people.¹⁴³³

9.2.9.2 Housing

The property market in the South West region shows a wide variety in real estate prices across the various locations.¹⁴³⁴ The median house price in Busselton in the 12 months to was \$435,000, which was an increase of 16.0% from the previous 12 month period.¹⁴³⁵

¹⁴²⁹ ABS, *Albany (SA3) (50901)* (last updated 2018) (accessed 11 June 2019).

¹⁴³⁰ Unless otherwise indicated, the data is drawn from South West Development Commission and Department of Primary Industries and Regional Development, *South West: A Region in Profile* (2014) (accessed 11 June 2019).

¹⁴³¹ *Regional Development Commissions Act 1993* (WA) sch 1 (accessed 10 June 2019).

¹⁴³² South West Development Commission, *Statistics – Population*; citing ABS, March 2018 (accessed 11 June 2019).

¹⁴³³ South West Development Commission, *Statistics – Population*; citing ABS, March 2018 (accessed 11 June 2019).

¹⁴³⁴ South West Development Commission, *Housing & Real Estate* (accessed 12 October 2018).

¹⁴³⁵ Corelogic, *Property Value – Busselton WA 6280* (accessed 15 January 2021).

9.2.9.3 Education and training

The South West education region has 100 government schools and covers the whole southwest region of Western Australia going as far north as Yarloop and as far east as Bremer Bay.¹⁴³⁶

There are a number of higher education and training options in the region. Bunbury's Edith Cowan University is the largest university in regional Western Australia and offers courses in business, computer technology, creative industries, education, nursing, science, social work and surf science.¹⁴³⁷ The region also has the South West Institute of Technology where students can study a selection of courses including construction and hospitality, and the Rural Clinical School of Western Australia which gives medical students the opportunity to practice their skills.¹⁴³⁸

For comprehensive information about the options for education and training in the South West region, see the South West Development Commission, *Education and Training* Page.

9.2.9.4 Health

Key health facts reported for South West residents in 2018 included that:¹⁴³⁹

- 33% of adults (16 and over) were obese;
- the death rate for transport accidents was 1.8 times higher than for the State; and
- the leading cause of avoidable death in adults in 2015 was suicide/self-inflicted injuries.

In the region there are a number of hospital, community and public health, mental health, aged care and Aboriginal medical services, including: Bunbury South West Health Campus, Community Health Service – Bunbury, Harvey, Naturaliste, WACHS South West Regional Aged Care, and South West Aboriginal Medical Service.¹⁴⁴⁰

¹⁴³⁶ Department of Education, *Southwest Education Region*, About Us (last updated 23 February 2017) (accessed 15 January 2021).

¹⁴³⁷ South West Development Commission, *Education and Training* (accessed 11 June 2019).

¹⁴³⁸ South West Development Commission, *Education and Training* (accessed 12 October 2018).

¹⁴³⁹ WA Country Health Service, *South West Health Profile, Planning and Evaluation November 2018* pages 20, 29 and 44 (accessed 11 June 2019).

¹⁴⁴⁰ Rural Health West, *Regional Population and Health Snapshots – South West* (accessed 15 January 2021).

Rural Health West has produced a *South West – Population and Health Snapshot* with information on the major health services in the region and other health issues for residents.¹⁴⁴¹

9.2.9.5 Industry

The gross regional product value for the South West was estimated at \$13.5 billion in 2018.¹⁴⁴² Mining is one of the largest industries in the region, with an estimated value of mining and mineral processing of \$2.69 billion for 2017-18.¹⁴⁴³

9.2.9.6 Employment

As at December 2018, the total labour force in the South West region was 102,420 people.¹⁴⁴⁴

The unemployment rate was 5.4% at the end of 2018, with Bunbury recording the highest level of unemployment at 8.1% and Augusta-Margaret River the lowest at 3.4%.¹⁴⁴⁵

The unemployment rate in June 2020 was 5.0%.¹⁴⁴⁶

9.3 SOME INFORMATION

9.3.1 Disadvantage in regional and remote areas

It is difficult to address disadvantage in regional and remote areas, given the problems of distance and limited resources such as time, finances, personnel, services and facilities. This chapter highlights the challenges that working in regional and remote areas pose for the administration and delivery of justice.

¹⁴⁴¹ Rural Health West, *Regional Population and Health Snapshots – South West* (accessed 15 January 2021).

¹⁴⁴² South West Development Commission, *Statistics – Gross Regional Product* citing data is synthesised by the Department of Regional Development from ABS National Accounts Data (accessed 12 June 2019).

¹⁴⁴³ South West Development Commission, *Industries* (accessed 12 June 2019).

¹⁴⁴⁴ South West Development Commission, *Statistics – Labour Market*, Labour force by Local Government, citing Department of Employment, Small Area Labour Markets (smoothed data series) (accessed 12 June 2019).

¹⁴⁴⁵ South West Development Commission, *Statistics – Labour Market*, Labour force by Local Government (accessed 26 September 2018), citing Department of Employment, Small Area Labour Markets (smoothed data series).

¹⁴⁴⁶ Department of Primary Industries and Regional Development, *Economy, Jobs and Business Insights*, citing REMPLAN data (accessed 15 January 2021).

The significance of the information presented in this chapter is reflected in the fact that in the 2017/18 financial year approximately 26% of all Western Australian cases were heard in regional areas.¹⁴⁴⁷

Please refer to chapter 2 of this Bench Book for more detailed information about the impact of poverty and disadvantage in Western Australia on individuals (both in the cities and remote and regional areas).

9.3.2 Barriers and challenges in remote, rural and regional locations

9.3.2.1 Distance

The impact of distance on the administration of, and access to, justice in regional and remote areas of Western Australia can be significant and manifest in many ways:

- Various modes of travel, including air, must be utilised to deliver and access court, correctional, legal, and counselling services. This affects the parties as well as judicial and other court officers, police as investigators and prosecutors, lawyers, support services and DPP prosecutors.
- The costs associated with the need to travel long distances are often prohibitive.
- Distances cited between locations on maps are often misleading, being measured as direct lines 'as the crow flies' rather than as travel routes.
- The remoteness of many communities can hamper access to the various government and non-government services, including courts, correctional, health, educational and counselling services.
- Parties, lawyers, judges and relevant service providers may be delayed when travelling by air or road for any number of unavoidable reasons (e.g. mechanical failure, weather).

¹⁴⁴⁷ Drawn from Department of Justice, Strategic and Business Development Directorate, Court and Tribunal Services, 'Ad Hoc query', Magistrate Matters by Metro and Regional Proportion (accessed 2 October 2018).

9.3.2.2 Travelling by road

- Parties may have difficulty attending court or accessing legal services (such as Legal Aid) due to a lack of public transport, not having a driver's licence or motor vehicle, or because of financial hardship. These issues are more likely to be prevalent for people from remote and disadvantaged communities. In rural and remote Australia there are low levels of public transport, and in some remote areas the rate of vehicle ownership is much lower than in cities.¹⁴⁴⁸
- Cars in remote Indigenous communities are heavily used and, due to the fact that they are often purchased second hand and used in rough terrain, maintenance is often expensive and they have a short lifespan.¹⁴⁴⁹

9.3.2.3 Aboriginal people and motor vehicle licensing

A 2015 paper on Indigenous driving issues in the Pilbara region, highlighted the following issues:¹⁴⁵⁰

- There are major structural barriers to Indigenous Australians obtaining their driver's licence. These include:
 - a lack of sufficient identification (many Indigenous people not having a birth certificate);
 - many Indigenous people's lack of literacy and/or English often not being the first language;
 - lack of education and understanding of technology;
 - the protracted, bureaucratic licencing process;
 - limited financial capacity; and
 - the costs associated with applying for a licence.

¹⁴⁴⁸ Rosier K and McDonald M, *The Relationship between Transport and Disadvantage in Australia* (2011) (accessed 15 January 2021).

¹⁴⁴⁹ Rosier K and McDonald M, *The Relationship between Transport and Disadvantage in Australia* (2011) page 1 (accessed 15 January 2021).

¹⁴⁵⁰ Barter A, *Indigenous Driving Issues in the Pilbara Region*, (2015) (accessed 17 August 2021).

- Many Indigenous people have a historical distrust of police and government. Some Indigenous people feel shame and intimidation so do not like walking into a licencing centre or police station where they are the only Indigenous person.
- For the Pilbara Indigenous community, there is a sense that you do not need a licence to drive in the bush; not having a driver's licence is the norm and is intergenerational.
- Indigenous Australians are overtly criminalised for the offence of driving without a valid licence from a remote community to a town to do shopping, visit family, take children to school or to attend cultural events. However, there is also a need to drive in a remote area due to the vast distances, harsh environment and lack of public transport which results in people driving whether or not they hold a valid licence.

It was concluded that:¹⁴⁵¹

*Given the significant need to drive and lack of alternative options, there is a link between the low number of people who hold a driver's licence and the high number of people incarcerated for licensing offences. While licensing offences are relatively minor and fall at the lower end of the harm scale, they carry a term of imprisonment, the most severe form of punishment. Incarceration disrupts families, culture and everyday life, and is highly damaging to communities. It has also been shown that incarceration leads to higher rates of recidivism and that prisoners are more likely to progress to more serious crimes with each successive imprisonment.*¹⁴⁵²

9.3.2.4 Costs

The following additional costs need to be factored into the administration of and access to justice in regional and remote areas:

¹⁴⁵¹ Barter A, *Indigenous Driving Issues in the Pilbara Region* (2015) Chapter 5, Proof of Birth (2015) page 71 (accessed 17 August 2021).

¹⁴⁵² Barter A, *Indigenous Driving Issues in the Pilbara Region*, Chapter 5, Proof of Birth (2015) page 71, citing Wyatt B, 'Indigenous Licensing and Fine Default: A Clean Slate', Western Australian Parliamentary Committee to Explore the Effect of Motor Driver's Licence and Driving Laws on Remote Communities, Report presented on behalf of the Minister for Corrective Services, Margaret Quirk MLA, 2007 (accessed 17 August 2021).

- Facilities cost more to develop and build. This is often due to a lack of suitably qualified tradespeople in regional and remote areas, requiring both the workforce and building materials to be sourced and transported to the regional/remote site.
- Accommodation is a high-cost component of service delivery and facilities management. Accommodation is often scarce and is usually required in high-demand areas, in competition with the private sector and other government agencies.
- The transport of accused persons, victims, litigants, witnesses, court staff and judicial officers to regional and remote court locations can be a logistically demanding and costly exercise.

9.3.2.5 Protection of privacy

Privacy issues in small communities have the potential to manifest in a number of ways, ranging from local police receiving a report of domestic violence or sexual abuse from a friend or relative, to difficulties in convening a jury in a town where the local community all know one another and are familiar with the circumstances of the case.

The provision of separate waiting areas within many remote courts is limited or non-existent. Separate areas for lawyers and other service providers (e.g. Adult Community Corrections and Youth Justice Services) to interview accused persons (including those in custody) and witnesses, are also limited in many places. The potential for intimidation is greater in smaller communities where residents are generally known to one another.

9.3.2.6 Accessing services in regional and remote Western Australia

The availability of suitable, or any, services and facilities is a perennial challenge in regional and remote areas, especially in the north and east of Western Australia and those areas inaccessible by land or distant from the main centres. Consequently, services provided within each regional and remote community vary.

Various issues are related to remoteness:

- Core services are not as readily available, or available at all, in the regions.

- The cost of providing services and facilities can be prohibitive. Most services incur additional costs to implement, because of the cost of travel.
- Facilities generally vary in quality from those available in the cities, and also between those available in regional centres and remote communities.
- It is difficult to attract and retain staff who are able to provide appropriate services.
- Agencies that are integral to the criminal justice process, such as the Office of the Director of Public Prosecutions (DPP), the Child Witness Service (CWS) and Victim Support Services (VSS), have limited or no offices, and no permanent officers in the regions: DPP officers fly in and fly out, and VSS and CWS are represented part-time by contractors, except in some larger regional centres.
- Accommodation needs have to be met: both long-term for staff in larger regional centres, and short-term for staff travelling with a circuiting court. This can prove particularly challenging in areas where the resources sector occupies a large proportion of available temporary accommodation.
- Weather conditions will often impact on the accessibility of particular regional areas throughout the year. For example, the wet season in the north of the State often brings difficulties for small towns such as Derby, Fitzroy Crossing, Halls Creek and Broome, as people living in outlying communities move into town during those periods to avoid being cut off from essential services. This can lead to accommodation shortages resulting in higher levels of homelessness and increased demand for the limited services available in those areas. Furthermore, seasonal weather may prevent people from travelling to court due to the inaccessibility of roads. Similarly, court circuits may not be able to operate or may finish early to minimise the risk of being stranded by storms (for example, in Balgo and Kalumbaru). During these periods, flexibility around court appearances is often required.
- One significant concern is the limited availability of suitable programs in regional and remote areas as sentencing options for offenders. For example, Adult Community Corrections, Youth Justice Services and mental health services may not be available due

to barriers including distance, transience of the offender population and accommodation issues.

The Department of Justice maintains a *locations map* of the locations of Adult Community Corrections, Youth Justice Services and Work Camps on its website.

9.3.3 Legal services

Legal services are less available in regional and remote areas than in the metropolitan area, which often results in parties being less prepared when attending court than they might otherwise be. Some of the issues include:

- While many major (and some smaller) regional centres have services such as the Aboriginal Legal Service (ALS), Legal Aid, or a Community Law Centre within their boundaries, residents of more remote towns and communities are often required to travel considerable distances to access those same services.
- While agencies such as Legal Aid and the ALS have a number of regional offices, not all those requiring legal assistance will be entitled to subsidised legal representation. In addition there are limits on the capacity of these agencies to advise and represent all those who are eligible.
- For those not eligible for subsidised legal assistance, alternative legal representation (including private) is often not readily available.
- Legal Aid and ALS lawyers follow the court circuits, and therefore are not always centrally available. The logistics of circuits means time to see clients and prepare matters for court is limited, which often results in adjournments. Many clients may only meet their lawyer on the day of the hearing.
- Where a young person is not represented, Youth Justice Officers may assist the young person and their family during court proceedings as a friend of the court. Pursuant to section 33 of the *Children's Court of Western Australia 1988* (WA), Youth Justice

Officers are entitled to examine and cross-examine witnesses and be heard concerning the remand, punishment or disposal of the child.¹⁴⁵³

Chapter 8 provides information and practical guidance for judicial officers in relation to self-represented litigants.

- Refer to chapter 11 of this Bench Book and the *Aboriginal Benchbook for Western Australian Courts*¹⁴⁵⁴ for information about Aboriginal people.
- The Citizen's Advice Bureau has produced a *List of Community Legal Centres – WA*.
- The *Legal Aid website* contains information about the location of all regional offices and information about the Telephone Infoline.

9.3.3.1 Office of the Director of Public Prosecutions

For indictable matters first heard in the Perth Magistrates Court or Stirling Gardens Magistrates Court, the Office of the Director of Public Prosecutions (ODPP) takes conduct of the case as soon as the Police confirm that the evidence has been disclosed to the accused and provided to the ODPP. Having reviewed the evidence, the ODPP prosecutor will then appear at the committal hearing at the Magistrates Court. However, due to geographical and resourcing issues, the ODPP does not take over prosecutions before Magistrates in the regional courts. Police prosecutors will manage cases during the committal process and the ODPP will take conduct of the case at the first hearing in the District or Supreme Court.¹⁴⁵⁵

In 2017-18, 25.3% of all committals to the Supreme and District Courts were in regional courts.¹⁴⁵⁶

As the ODPP does not have any regional offices, there are various difficulties associated with conducting trials in regional courts, some of which are outlined below:

- Prosecutors need to travel to and from regional courts.

¹⁴⁵³ *Children's Court of Western Australia Act 1988* (WA) s 33 (accessed 15 January 2021).

¹⁴⁵⁴ Available on the *Supreme Court of Western Australia* website (accessed 15 January 2021).

¹⁴⁵⁵ Office of the Director of Public Prosecutions for Western Australia, *Annual Report 2018-19*, page 19 (accessed 15 January 2021).

¹⁴⁵⁶ Office of the Director of Public Prosecutions for Western Australia, *Annual Report 2017-18*, page 19 (accessed 15 January 2021). There is no equivalent statistic in the 2018-19 and 2019-20 Annual Reports.

- The availability of accommodation, support facilities and technology is limited in the regions as compared to Perth. The ODPP reported in its 2018-19 Annual Report that gradual improvements had been made in the area of information and technology, which included more functional laptops being provided to staff for use on circuit during that year.¹⁴⁵⁷
- When dealing with matters on regional circuits, the ODPP has significantly less opportunity or time to meet victims and witnesses. Contact often occurs on the Sunday afternoon or Monday morning immediately prior to the court proceedings.
- The time for preparation and decision-making is compressed and may affect the progress of the case, including last-minute pleas or late vacation of trial dates.
- Metro-based ODPP prosecutors are less likely to have the same level of local knowledge about geography, people and customs, as regionally based (local) police prosecutors.

9.3.3.2 Witness services

A number of factors associated with witnesses (especially those with protected or special witness status) providing testimony present particular challenges in regional and remote areas. These include:

- Many court venues were not designed to accommodate audio-visual (AV) facilities.
- While all courts managed by the Department of the Justice have some level of AV functionality, not all have dedicated remote witness facilities.
- There are logistical difficulties in trying to keep witnesses separate from alleged offenders and their families.
- Recruitment and retention of appropriate court personnel, such as court appointed officers and technicians, can be challenging in small communities.
- Maintaining the privacy of witnesses is difficult in small towns and communities. For example, people know whose car is parked outside the court house.

¹⁴⁵⁷ Office of the Director of Public Prosecutions for Western Australia, *Annual Report 2018-19*, page 7 (accessed 15 January 2021).

- Essential support services and programs are limited.

9.3.3.3 Victims and child witnesses

The work of the Child Witness Service and Victim Support Service can be different in regional and remote areas and there may be challenges not experienced in the metropolitan area, including:

- Distance — when clients live in remote communities there are often difficulties associated with meeting them to make assessments, preparing children to give evidence and keeping clients informed about the court process, because of the travel involved.
- Transient clients — clients often move between different towns and communities, and significant time is expended trying to locate them.
- Informing clients — using written forms of communication to inform clients is often unsuitable as:
 - the languages, literacy, and/or comprehension of some groups render it inappropriate;
 - there are limited or no postal services to some regional and remote areas; and
 - the transience of certain groups means receipt of correspondence is not guaranteed.
- Competing priorities — in many regional areas both the victim support service and child witness service are provided by one officer. Often provision of services to children is prioritised, so it may not be possible to provide services to adults. Furthermore, these officers travel extensively throughout the region, which can significantly limit their availability and the number of clients they can service.
- Facilities — while there are now AV facilities in all Western Australian courts, the design of some of the older courthouses is such that the provision of dedicated areas where children and vulnerable adults can wait prior to giving evidence is not always possible. Similarly, older courthouses often do not have the capacity to accommodate remote witness facilities.
- Travel — the logistical difficulties in arranging travel and accommodation for witnesses and victims are magnified in regional and remote areas, as:

- accommodation may be unavailable or unsuitable; and
 - payment for travel and accommodation can present a large barrier or be inconvenient for victims and witnesses despite regulations¹⁴⁵⁸ providing for the recovery of 'reasonable' travel expenses.
- Designated officers — most regional courts do not have their own court-appointed officers for the purpose of assisting child witnesses.
 - Counselling — there are limited agencies to which clients can be referred.
 - Preparation — as a result of distance and other regional or remote factors, most preparation with children is intensive, and if there are multiple children involved, this can be both busy and challenging; consequently, the preparation of each child may not be thorough.

Despite the above challenges, progress is being made to implement initiatives which will better accommodate the diverse needs of witnesses in the regions. This includes greater use of AV technology.

For a guide to victim services available in Western Australia please refer to the Department of Justice's website [*Victim Support Services*](#). Note that this information is only a guide and judicial officers and staff are advised to regularly check its currency with regional court staff.

9.3.4 Interpreters and translators

The process of accessing interpreters may be the same in regional and remote areas as elsewhere, as telephone interpreters are frequently utilised in this context. However, limited accessibility of accredited interpretation services and the challenge of distance amplify the communication barriers for court users in regional and remote communities who are not fluent in English.

¹⁴⁵⁸ *Evidence (Fees, Allowances and Expenses) Regulations 2008* (WA) (accessed 15 January 2021).

The *Western Australian Language Services Policy 2020*¹⁴⁵⁹ contains useful information relevant to the courts, providing guidance regarding the circumstances in which interpreters and translators should be used and how to engage those services.

It is the responsibility of the judicial officer, in consultation with the parties, to determine whether interpreter and translator services are required in court.

More information about the need for interpreters and translators in the courts, working with interpreters and translators, and the payment of associated costs can be found in chapter 7 (on People from Culturally and Linguistically Diverse Backgrounds).

9.3.4.1 Interpreters and translators: Aboriginal people

The *Western Australian Language Services Policy 2020* highlights a perception that Aboriginal people are more fluent in English than many of them actually are.¹⁴⁶⁰ As a result, the development of interpreting services in Aboriginal languages and the use of interpreters for Aboriginal people have lagged behind the development of these services for migrants.

This lag is reflected in the National Accreditation Authority for Translators and Interpreters (NAATI) interpreting certification. For some Aboriginal languages there is only NAATI 'certified provisional interpreter' level *certification* (equivalent to the 'paraprofessional' level *accreditation* used by NAATI until 2019).¹⁴⁶¹ For many Aboriginal languages there is no training available to achieve certification as an interpreter.

Where certified interpreters do exist, it may be that cultural reasons prevent an Aboriginal interpreter from interpreting for certain persons or certain issues, or from attending court at particular times or locations. It is important to note that availability of and access to interpreters for Aboriginal people may be impacted by cultural conflicts (e.g. the interpreter may be related to or have a family connection with a complainant or prosecution witnesses) or gender issues

¹⁴⁵⁹ Department of Local Government, Sport and Cultural Industries, Office of Multicultural Interests, *Western Australian Language Services Policy 2020* (3 November 2020) (accessed 17 August 2021).

¹⁴⁶⁰ Department of Local Government, Sport and Cultural Industries, Office of Multicultural Interests, *Western Australian Language Services Policy 2020* (3 November 2020) see, for example, page 3 (accessed 17 August 2021).

¹⁴⁶¹ Judicial Council on Cultural Diversity, *Addendum to the Recommended National Standards for Working with Interpreters in Courts and Tribunals* (May 2019) page 2 (accessed 7 April 2021).

(e.g. in some cases it may not be culturally appropriate for a member of the opposite gender to interpret for an accused).¹⁴⁶²

The *Aboriginal Interpreting WA* service provides interpreters accredited by the National Accreditation Authority for Translators and Interpreters (NAATI) in over 40 Western Australian languages to clients anywhere in Australia. This service was previously known as the Kimberley Interpreting Service (2000-2017).

Information and contact details for interpreter services and Aboriginal language services in Western Australia can also be found in chapter 11 of this Bench Book.

At the discretion of the judicial officer, non-accredited interpreters may be used. Judicial officers must determine whether an interpreter is required and whether a non-accredited interpreter would be appropriate in the circumstances. The issue is one of whether a fair trial can be conducted; resourcing issues are a secondary consideration.

The Judicial Council on Cultural Diversity published *Recommended National Standards for Working with Interpreters in Courts and Tribunals* in 2017, which have been deliberately structured to take into account the differences in languages and the availability of specialised interpreting skills in remote and regional locations, when decisions are made as to an appropriate person to interpret.¹⁴⁶³

9.3.5 Mental health services

The Western Australian Association for Mental Health published a consultation report on regional, rural and remote mental health in Western Australia in 2017, which found:¹⁴⁶⁴

The standout issue identified in the thematic analysis is the lack of funding, resources and services in regional, rural and remote areas. More services, specialist services and support are urgently needed. The services must be recovery focussed and developed via coproduction with people with lived experience.

¹⁴⁶² Submission from the Aboriginal Legal Service of Western Australia Limited (21 September 2020).

¹⁴⁶³ Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2017) (accessed 7 April 2021).

¹⁴⁶⁴ Western Australian Association for Mental Health, *Speaking Out about what Matters: Regional, Rural and Remote Mental Health in WA*, Consultation Report (2017) page 9 (accessed 7 April 2021).

Another clear issue identified is the pressing need for locally-based services, based on local knowledge and consultation, and provided by local organisations. These can meet community-identified needs, and contribute to the capacity building of the community and its residents.

People with lived experience are an existing resource within local communities. To grow and realise both the expertise and benefits of this resource, locally relevant initiatives are needed to build the capacity of consumers and carers who do not have access to the training and natural development opportunities that exist in metropolitan areas and large regional centres. To support and enable lived experience expertise, capacity building is also needed for the staff of community mental health service providers. Recovery Colleges are one model that would assist with this development.

Workforce issues also featured strongly, particularly in the large group discussion. Issues raised included the use of short-term contracts, the need to retain staff, the high costs of training regional staff and the limited access to training.

Other issues identified by participants included the impact of alcohol and other drugs, the need for governments to commit to support people who fall outside of the NDIS, the need for culturally appropriate services for Aboriginal peoples, the need for services for young people, the lack of mental health services for people in aged care, the lack of housing with supports, and the need for more mental health promotion and prevention.

Please refer to chapter 4 of this Bench Book (on People with Disabilities) for more information on people with mental illness.

Information regarding mental health services in regional Western Australia, is available from the [WA Country Health Service](#).¹⁴⁶⁵

9.3.5.1 Hospital orders

A judicial officer may make an order that an accused be detained in an authorised hospital if the accused is refused bail, and the judicial officer *reasonably suspects* that:¹⁴⁶⁶

- the accused has a mental illness in need of treatment; and

¹⁴⁶⁵ WA Country Health Service, *Mental Health Issues in Western Australia* (accessed 9 December 2019).

¹⁴⁶⁶ *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) s 5 (accessed 15 January 2021).

- there is a significant risk to the health or safety of the accused or another person; and
- the accused does not have the capacity to consent to treatment.

The register of authorised hospitals is available on the [webpage of the Chief Psychiatrist](#).

From a regional point of view, it would be preferable if an accused were given a hospital order to a local authorised hospital, so that they would not be taken outside of their local area where they may have family or other support. Generally, however, most accused persons on hospital orders are sent to the Frankland Centre in Graylands for assessment.

The test for making a hospital order is '*reasonable suspicion*' and it is therefore not necessary for the judicial officer to have a medical professional examine an accused *before* the making of a hospital order. However, the current practice is generally to have a psychiatric nurse from the Frankland Centre make an assessment by video link.

The *Criminal Law (Mentally Impaired Accused) Act 1996* (WA) was reviewed and a final report was released in 2016.¹⁴⁶⁷

For further information regarding the logistics of executing a hospital order in a regional or remote court, please contact the local registrar.

9.3.6 Aboriginal people

Due to the significant representation of Aboriginal people in regional and remote Western Australia, many of the issues contained in this chapter particularly impact on Aboriginal people.

Various initiatives have been considered and formulated in response to the barriers faced by Aboriginal people in the justice system, including:

- Aboriginal Courts were established to canvass and deal with a range of issues including language. Note, however, that the State's only formal Aboriginal Court, the Kalgoorlie Community Court, was established in 2006 but discontinued in 2014.

¹⁴⁶⁷ Department of the Attorney General, *Review of the Criminal Law (Mentally Impaired Accused) Act 1996 Final Report* (April 2016) (accessed 9 December 2019).

- Measures such as the *Aboriginal Benchbook for Western Australian Courts (2nd ed. 2008)*¹⁴⁶⁸ have facilitated increased understanding of the barriers faced by Aboriginal people within the justice system. The *Aboriginal Benchbook* includes a section on communicating with Aboriginal people in the court context.
- The appointment of Aboriginal Liaison Officers, who have a proven understanding of Aboriginal issues, has increased awareness of the issues within the justice system. They have assisted in breaking down the barriers faced by Aboriginal people. Note, however, that Aboriginal Liaison Officers are not employed as interpreters.

For additional information on Aboriginal people, refer to chapter 11 of this Bench Book and to the *Aboriginal Benchbook for Western Australian Courts*.¹⁴⁶⁹ Refer also to section 9.3.4.1 of this chapter in relation to Aboriginal interpreting and translating services.

9.3.7 Regional and remote courts

There are a number of court locations in regional Western Australia - for example, in Albany, Broome, Bunbury, Carnarvon, Geraldton, Kalgoorlie and Karratha. For all Magistrates Court locations and contacts see the *Magistrates Court of Western Australia* website. Note that some regional Magistrates courts also act as District Court registries for the commencement of civil actions.¹⁴⁷⁰

9.3.7.1 Court buildings

The buildings in which a court can convene vary broadly across the State. The larger regional locations have dedicated court buildings. Despite this, facilities in these regional locations may not meet the needs of everyone using the courts.

- Courts can be held in community halls or may be convened at police stations in regional and remote locations throughout the State.

¹⁴⁶⁸ Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts (2nd ed) (2008)* (accessed 27 September 2018), available on the *Supreme Court* website.

¹⁴⁶⁹ Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts (2nd ed) (2008)* (accessed 27 September 2018), available on the *Supreme Court* website.

¹⁴⁷⁰ Magistrates Court of Western Australia, *Court Locations & Contacts* (last updated 14 January 2021) (accessed 15 January 2021).

- Multi-function police facilities (MFPFs) have been established in various remote Aboriginal communities, and, as the title suggests, serve a number of functions, including the provision of a venue for court to be convened. Some court facilities can be physically opened up for the community to access proceedings. For courts situated at MFPFs, the officer in charge also fulfils the function of deputy registrar for the court.
- As at June 2019, there were MFPFs at Balgo, Bidadanga, Blackstone, Burringurrah, Dampier Peninsula, Jigalong, Kalumburu, Kintor (NT), Looma, Warakurna, Warburton and Warmun.¹⁴⁷¹
- When court proceedings are held in police stations or MFPFs there may be a perception of a lack of separation between the judicial function and the investigatory, even prosecutorial, functions.

9.3.7.2 Court Operations

9.3.7.2.1 Supreme Court

The Supreme Court mandated electronic filing through the eCourts portal in civil matters in March 2018, unless there is an exemption in the *Rules of the Supreme Court 1971* or the Court's Consolidated Practice Directions.

Where a document may be filed other than electronically (by post or delivery, in criminal matters or where there is an exemption from electronic filing in civil matters) that must be done in the Perth Registry. Other Western Australian courts are not appointed to act as a registry for the Supreme Court.

9.3.7.2.2 District Court

The District Court has a centralised registry in Perth for criminal matters where filing must occur.

In civil matters, the *Rules of the Supreme Court 1971* in relation to mandatory electronic filing also apply to the District Court. However, where there is an exemption from electronic filing

¹⁴⁷¹ Legislative Council Standing Committee on Estimates and Financial Operations, *2019/20 Budget Estimates Hearing – Question Prior to Hearing* (6 June 2019) page 6 (accessed 9 December 2019) .

under the rules or practice directions, documents can be lodged in the 12 major regional centres visited by the District Court on circuit. In those Courts the registrar of the Magistrates Court has been appointed as a deputy registrar of the District Court.¹⁴⁷²

9.3.7.2.3 Family Court

For family law matters, there are a range of services available throughout Western Australia, including Family Relationship Centres which undertake outreach work within regional Western Australia. Generally, a person must access a family dispute resolution service and receive a certificate before an application for a parenting order can be made to the Family Court. The Family Relationships Advice Line and website provide information on where those services are available.¹⁴⁷³

Where a person seeks an urgent court order in relation to parenting or financial family law issues, the person needs to make an application to the Family Court of Western Australia and seek a listing in a circuit town or via telephone/video link. Alternately, if they are near a town with a Magistrates Court managed by the Department of Justice, they may make an application in that court for interim orders and transfer for further hearing in the Family Court of Western Australia.¹⁴⁷⁴

9.3.7.2.4 State Administrative Tribunal

Access to the State Administrative Tribunal (SAT) can initially be made via the SAT [website](#) or by phone. The Tribunal operates both a standard and 1300 number for phone inquiries, which ensures all callers can access the Tribunal at local call rates.

The Tribunal website provides comprehensive information on the Tribunal itself, its processes, applications, current hearings and decisions. The SAT wizard is an online tool which produces and provides information on applications which can be made to the Tribunal, providing specific procedural information such as who may make an application, any fees payable, service requirements and accompanying documents required. Once completed, an application may be

¹⁴⁷² Magistrates Court of Western Australia, [Court Locations & Contacts](#) (last updated 4 January 2021) (accessed 15 January 2021).

¹⁴⁷³ The [Family Relationships Online - Advice Line](#) can be contacted on free call 1800 050 321 (accessed 15 January 2021).

¹⁴⁷⁴ Forms, kits and information are available from the Family Court's [website](#) or through its Call Centre on (08) 9224 8222 or 1800 199 228 (country free call) (accessed 15 January 2021).

lodged by post. In special circumstances (such as when an applicant lives in a remote location) SAT's Executive Officer may agree to the application being emailed or faxed.

For people outside the metropolitan area or with other access difficulties, hearings of the Tribunal can be conducted by the use of tele-conference and video-conference facilities accessing hearing rooms in the Tribunal. By direction of a member, hearings may also take place in regional and remote areas, should the needs of the parties and the matter require it.

9.3.7.2.5 Coroner's Court

There are ten regional coronial jurisdictions: Albany, Broome, Bunbury, Carnarvon, Islands, Geraldton, Kalgoorlie, Kununurra, Northam and Port Hedland.¹⁴⁷⁵ The local magistrate is also the coroner for the region and will deal with all coroner's cases occurring locally. In most cases the local courthouse is used if an inquest is held into a death. If a courthouse is not available the coroner can use any suitable venue. A regional coroner may refer a case to the State Coroner. After consultation with a regional coroner the State Coroner may decide to take over a case falling under regional jurisdiction, either upon request of the regional coroner or if the State Coroner considers it is practical to do so.

9.3.7.2.6 Children's Court

Regional Children's Courts in Western Australia are presided over by the local circuit magistrate, who attends on a regular basis at most regional towns. These magistrates have the same sentencing powers as a magistrate at the Perth Children's Court. Serious matters are sent to the President of the Children's Court, although in some circumstances the President can confer these powers on a magistrate. The President may travel to regional areas to deal with serious matters, and Perth Children's Court magistrates also travel to regional towns to hear Children's Court defended matters, where the local magistrate's workload prohibits them from managing these cases. The President monitors regional listing delays for regional magistrates to ensure that time standards are maintained and that assistance is provided when required.

On 1 December 2020, the Children's Court introduced a new practice direction in response to a review of court procedures where a young person faces a multi-day trial in a regional court before a Magistrate. The intention is to avoid young people being remanded in custody

¹⁴⁷⁵ Office of the State Coroner, *Annual Report 2019-2020*, page 17 (accessed 18 January 2021).

overnight in regional police lock-ups, and to avoid unnecessary transport between Banksia Hill Detention Centre and regional courts during multi-day trials. The direction is that any trials expected to take more than a day are to be adjourned to the Perth Children's Court's trial call over list (held fortnightly on a Tuesday). When the matter comes on in the call over list the DPP assumes conduct of the prosecution and the President of the Children's Court will decide whether the matter should be listed for trial in Perth (with witness evidence by video-link from the remote location).¹⁴⁷⁶

9.3.7.2.7 Magistrates Courts

All regional Magistrates Courts that are managed by the Department of the Justice undertake a variety of functions additional to those relating to Magistrates Court matters. Services that may be provided by these Courts include:

- motor vehicle and driver's licensing matters for the Department of Transport, including extraordinary driver's licence applications;
- registry of Births, Deaths and Marriages;
- mining matters for the Department of Mines and Petroleum;
- agent for the Western Australian Electoral Commission;
- acting as a Family Court;
- acting as a Children's Court;
- providing Coronial Services;
- providing specialist courts, for example the Barndimalgu Court in Geraldton (for family and domestic violence matters involving Aboriginal people);
- registry duties for the District Court as well as mediations; and
- providing assistance with Violence Restraining Order applications.

¹⁴⁷⁶ Children's Court, *Practice Direction No. 11 of 2020* [3] (accessed 18 January 2021).

9.3.7.3 Courtroom technology

The use of courtroom technology affords both the court and court users a range of benefits and, importantly, provides greater access to justice to those living in remote and regional communities.

Technology is not without its limitations: equipment may fail, and repairs will likely take longer to effect in remote and regional courts. Further, the infrastructure and equipment available in the regions, along with reliability, servicing schedules and staff competencies all impact on the extent to which the technology can be effectively used.

Despite such problems, the remoteness of many of the State's communities and courts has resulted in increasing utilisation of audio-visual technology in the courts.

Section 121 of the *Evidence Act 1906* sets out the criteria for the use of a video or audio-link to take evidence. Prior to 2008, that section provided that an application for evidence or submissions to be by audio or video-link was not to be granted unless it was in the interests of justice to do so. The provision was amended in 2008 so that the use of audio or video technology can be allowed unless it is not in the interests of justice to do so.

Section 66B of the *Bail Act 1982* (WA) specifically provides for video or audio-link to be used in bail proceedings, though s 66B(5) provides that nothing in the section prevents a judicial officer from requiring an accused be brought before the court for the purpose of bail proceedings.

Section 14A of the *Sentencing Act 1995* (WA) specifically provides for the court to sentence by video-link, provided that to do so is in the interests of justice.

Section 141 of the *Criminal Procedure Act 2004* (WA) provides that, subject to s 77, if an accused is required to appear in court in relation to a charge for any purpose other than to be sentenced, the accused may be permitted to appear by video or audio-link. However, s 77 places restrictions on the use of video or audio-link in relation to an accused who is in custody or detention, requiring that if it is the accused's first appearance in relation to a charge, the trial or sentencing proceedings, he or she should appear in person unless the court otherwise orders. For all other matters the accused would normally appear by way of video or audio-link.

The Supreme Court issued a Practice Direction that '[e]very appearance by a person in custody before the Court shall be by video link rather than in person UNLESS the person is self-represented or the appearance is for sentence or for trial, or is ordered to be in person by a Judicial Officer of the Court'.¹⁴⁷⁷ A Practice Direction in similar terms applies to adults in custody appearing before the Children's Court.¹⁴⁷⁸

The situation is different again for criminal appeals, as s 43 of the *Criminal Appeals Act 2004* (WA) generally gives a person in custody the entitlement to be present at the actual hearing.

It is important to acknowledge that, for many people, the courtroom is an alien environment. The discomfort felt by those people could well be magnified in a 'virtual' courtroom where the participants are linked by only electronic connections.¹⁴⁷⁹ This distress may be further exacerbated in the case of Aboriginal people whose cultural and societal perspective is different from that of other court users. A challenge then to the Western Australian judiciary is to ensure that the use of video or audio-links does not detract from the quality of justice administered by the courts.

9.3.8 Judicial officers

Travel to remote locations may mean that judicial officers have limited access to the assistance of colleagues and support staff which would otherwise be available.

Until July 2020, unpaid Justices of the Peace presided over the Magistrates Court in many regional and remote areas of Western Australia where a magistrate was not always available. As of 3 July 2020, only legally qualified Magistrates deal with criminal matters in any of the State's Magistrates Courts. The combination of video link technology and the appointment of additional magistrates allowed the change to be made. As of July 2020, Justices of the Peace could still authorise search warrants if they had accessed the appropriate training.

¹⁴⁷⁷ Supreme Court, *Consolidated Practice Direction* 3.2 [3] (accessed 18 January 2021).

¹⁴⁷⁸ Children's Court, *Practice Direction No. 1 of 2009* [3] (accessed 18 January 2021).

¹⁴⁷⁹ This issue was identified in recommendation 435 of the Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia* (accessed 9 December 2019).

9.3.8.1 Judges

While all Supreme and District Court judges are based in Perth, these Courts operate extensive circuit programs which travel to 12 regional court locations, and elsewhere as required.

Superior court judicial officers travelling on circuits to regional and remote areas can experience various difficulties and issues, including:

- limited local knowledge due to not residing in regional, rural or remote areas;
- limited access to support staff and legal resources;
- a lack of support services (legal representation, victim support services and support services) for the accused person can result in increased pressure on a presiding judicial officer; and
- the resource needs of both the circuiting court and local court must be considered.

9.3.8.2 Magistrates

Magistrates operating within regional communities can face a number of challenges, such as:

- being in a small town or community potentially raising issues of privacy, conflict of interest, socialising, and personal safety;
- isolation from colleagues; and
- issues may arise from the historical interface of Aboriginal people with the criminal justice system.

9.3.9 Police

In smaller regional and remote areas police officers are often required to fulfil diverse policing roles and employ standard practices dissimilar to those in metropolitan areas and larger regional centres. For example, they may be required to act as a deputy registrar of the court as well as the prosecuting officer, which can lead to a blurred separation of duties.

As police officers usually reside in the communities which they police, tensions can rise when dealing with accused persons who they may have cause to interact with while off duty. This can be particularly problematic with respect to matters of domestic violence and abuse.

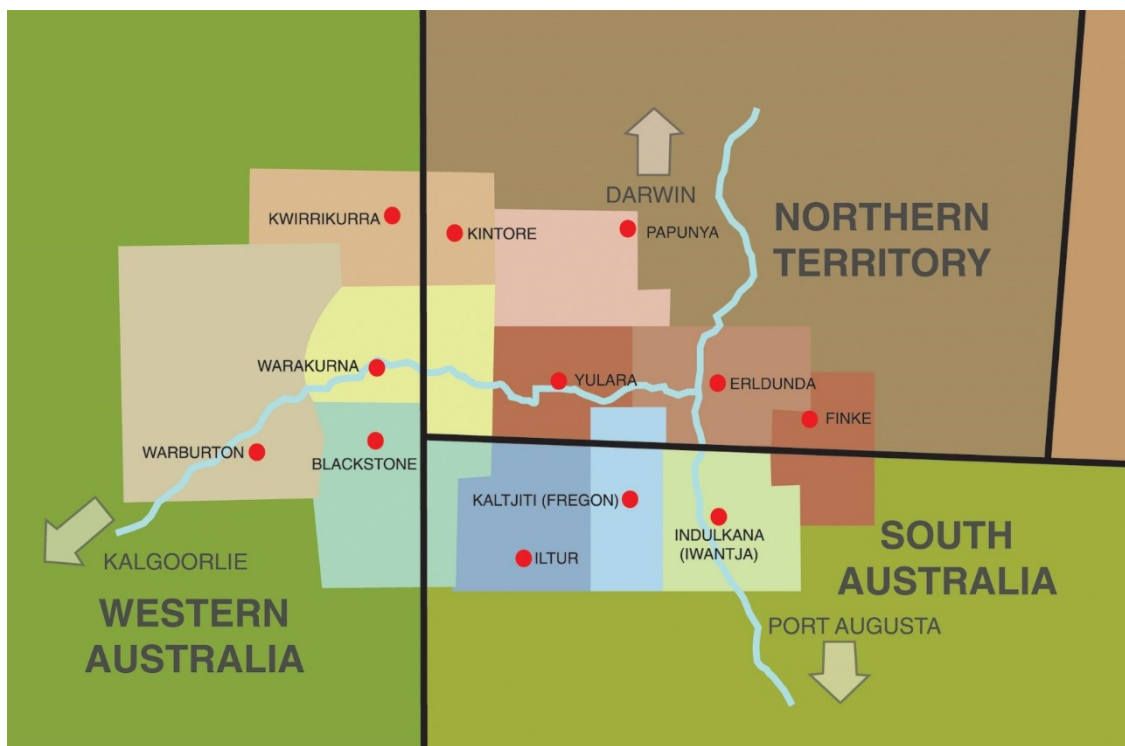
9.3.10 Cross Border Justice Scheme¹⁴⁸⁰

The *Cross-border Justice Scheme* is a historical partnership between Western Australia, the Northern Territory and South Australia which effectively removes their borders in the outback region where they meet.

The objective of the scheme is to minimise the effect of the State and Territory borders in the cross-border region for the purposes of law enforcement and delivery of justice services.

The Cross-border Justice Scheme, which became operative in November 2009, was developed in response to a call from the women and children of the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (NPY) Lands for help to reduce the prevalence of abuse in their communities.

In an Australian first, there is effectively no legal state boundaries in this region (below) for accused persons to cross to escape justice.



¹⁴⁸⁰ Department of Justice, *Cross-border Justice* (last updated 16 April 2019) (accessed 18 January 2021).

Police, magistrates, fines enforcement agencies, community corrections officers, youth justice officers and prisons of one jurisdiction are now able deal with offences that may have occurred in another of the participating jurisdictions.

9.4 PRACTICAL CONSIDERATIONS

9.4.1 Language and communication: level and style

English language proficiency and style can vary considerably across the different regions of the State. (Refer to section 9.1.3.)

Points to consider – language and communication:

- Where a person is represented by the ALS or Legal Aid, counsel should identify any relevant issues in relation to that person's language and communication skills and draw them to your attention.
- Where a person is unrepresented, you should remain alert to the possibility that language may be an issue.
- Ultimately, you need to be satisfied that parties and witnesses have sufficient understanding to participate (especially in the criminal justice process) without the need to engage an interpreter. It is important that this assessment is made early in proceedings.
- In making your assessment, be mindful of gratuitous concurrence: that is, where a person nods in response to a question (similar to 'aha', 'hmm' or 'uh-huh') as this does not necessarily mean agreement or even indicate that the question has been understood.¹⁴⁸¹
- Refer to the decision making tree in the *Western Australian Language Services Policy 2020* to assist in determining whether an interpreter is required.¹⁴⁸²

¹⁴⁸¹ Department for Local Government and Communities, *Western Australian Language Services Policy 2020* (2014) page 7 (accessed 18 January 2021).

¹⁴⁸² Department for Local Government and Communities, *Western Australian Language Services Policy 2020* (2014) page 8 (accessed 18 January 2021).

- If travelling on circuit to areas where Standard English is not common among Aboriginal people, you may need to consider whether a standby interpreter in Kriol or the dominant language should be arranged.

9.4.2 Appearance and behaviour

Dress standards will be more casual in many remote and regional courts, reflecting not only the casual lifestyle but also the weather conditions and the situations in which lawyers and service providers often have to see their clients — for example in police lockups and outside the court.

Point to consider – appearance and behaviour:

- Generally, you should accept a lesser standard of dress, subject to it not compromising the court in any way.

9.4.3 Bail

Decisions regarding bail are more complex in regional areas and present issues not faced in the metropolitan area. For example:

- A short overnight remand in custody may mean the person charged is transported a long way from their usual place of residence, creating problems for returning to their home if bail is later granted, and potentially leading to the person being stranded.
- Due to distance from the court or the local police station, it may be difficult for a person's surety to sign bail papers.
- For juveniles, it is important to check whether a responsible adult is present or is available to sign the bail undertaking, or in cases where bail has been varied, to resign the bail undertaking.
- Transport in regional areas is not always readily accessible. Being released on bail late at night or on weekends when transport services are likely to be limited, or there may be difficulties in making a reservation, may be more problematic than in metropolitan areas.
- Accessing accommodation in remote locations can be difficult.

- Accessing legal advice in remote locations can be difficult.

Point to consider - bail:

- In considering bail, consider any difficulties associated with the availability of legal advice, surety, a responsible adult (for juveniles), accommodation or transport, or the need to transport a person in custody to another location.
- Be aware that if a local magistrate is not available to grant bail that an application can be made by phone to minimise the need to place a person in custody. Note that as of 3 July 2020, Justices of the Peace no longer hear bail applications.

9.4.3.1 Children and bail

Bail considerations for children in regional areas are critical. The issues outlined above are equally applicable and most likely are further complicated by the young age of the person and the absence of dedicated juvenile detention facilities in regional areas.

Presidents of the Children's Court have issued practice directions in relation to bail, and refusal of bail, of children, which provide:

- No accused child should be transported out of a magisterial region to Perth unless the President, a judge or magistrate has refused bail or has granted bail on conditions that have not been met.¹⁴⁸³
- Where a young person is denied bail by a regional Court constituted by a justice of the peace on a Saturday or public holiday when the Children's Court is sitting in Perth, the matter must be immediately listed for re-hearing by a magistrate in Perth. This is to ensure that young persons are not unnecessarily detained over the weekend in police lock-ups in regional Western Australia.¹⁴⁸⁴
- In 2018, acting magistrates who preside at the Northbridge Magistrates Court on Sundays, were temporarily appointed as acting magistrates of the Children's Court.

¹⁴⁸³ Children's Court of Western Australia, *Practice Direction No. 2 of 2008*, *Bail Act 1982 Applications* (8 April 2018) (2008) (accessed 18 January 2021).

¹⁴⁸⁴ Children's Court of Western Australia, *Practice Direction No. 1 of 2011*, *Relisting Refusal of Bail Matters* (7 June 2011) (accessed 18 January 2021).

The temporary magistrates can hear and consider the matter of bail on a Sunday, and ensure that the young person (from a city or a country area) appears before the Children's Court at the next available sitting.¹⁴⁸⁵

Point to consider - children and bail:

- Careful consideration should be given to the consequences of strict bail conditions, or remands in custody without bail, for children in regional and remote areas.
- Children from regional areas who are remanded to Perth endure separation from family and their familiar environment.
- There are often no bail accommodation/hostel options in regional centres, which may result in children being remanded to Perth-based accommodation. The Department of Justice funds a Youth Bail Options program in some regional centres, which is run by non-government organisations. The program provides supported accommodation ('bail hostel'), day programs, supervision, meals, mentoring and support. Life without Barriers runs the program in Broome and Kununurra, and Hope Community Services (previously 'Drug Arm') run the program in Geraldton and Kalgoorlie.¹⁴⁸⁶
- A child should not be remanded in custody simply because there is no-one in court to bail the child. It may be possible to make a Supervised Bail arrangement, under which the Department of Justice takes responsibility for the young person but does not keep them in custody. The young person may return to their family, live in a youth hostel or go to a treatment program while they are waiting to go to court. The Department will develop a behavioural contract that the young person must follow if they wish to stay out of a detention centre.¹⁴⁸⁷ Alternatively, you should scrutinise the child's home environment and determine whether there is an option of support from the Department for Communities (Child Protection and Family Support).

¹⁴⁸⁵ Children's Court of Western Australia, *Practice Direction No. 2 of 2018*, Sunday Bail matters (5 September 2018) (accessed 18 January 2021).

¹⁴⁸⁶ Amnesty International, *There is Always a Brighter Future – Keeping Indigenous Kids in the Community and Out of Detention in Western Australia* (11 June 2015) pages 32 and 52 (accessed 18 January 2021).

¹⁴⁸⁷ Department of Justice, *Supervised Bail* (updated 17 October 2016) (accessed 18 January 2021).

- A child from a regional area should not be required to spend any more time in a remand centre than a child with similar antecedents and charge(s) who appears in a metropolitan court.
- In determining bail conditions, be aware that children under the age of 17 do not have a driver's licence, may not be working and may not be able to attend court without support from an adult. The availability of public transport in remote areas may also be extremely limited and the cost may be prohibitively expensive for a child to access.
- You should always ensure that a child receives legal advice before making a decision to remand a child in custody. This is important to ensure that the court process proceeds as quickly as possible to avoid potentially lengthy remands in custody.

9.4.4 Stranding

Although the stranding of people involved in court processes can occur anywhere, it is a significant issue in regional and remote Western Australia. In particular, people from very remote Aboriginal communities can become stranded at any stage during court proceedings due to limited transport availability or weather conditions.

The transport of persons in custody for court proceedings or between custodial facilities can also result in a person being stranded, although the increased use of audio visual equipment appears to have reduced the incidence of stranding.

Points to consider – stranding:

- When making court orders, be wary of stranding persons who have no means of returning to their home, particularly when their home is in a remote community.
- You should enquire as to the possibility of stranding occurring if it has not been raised by counsel for the defence or prosecution, and set in place an arrangement that minimises the risk of stranding a person who is being released from custody. This can be dealt with by communicating with counsel for the defence or prosecution, or with court staff.

- You should raise any concerns regarding possible stranding with youth justice officers. The Youth Justice Service regularly assists young people who have been arrested to return home after they have been dealt with by the court to avoid stranding.

9.4.5 Minimising the impact of regional and remote factors on other court processes, practices and procedures

9.4.5.1 Before court proceedings start

Points to consider prior to proceedings:

Issues to consider before the proceedings start include:

- the availability of facilities such as audio-visual technology (AV);
- the opportunity to maximise the use of AV technology, remembering your general discretion to allow it provided that doing so would not be contrary to the interests of justice;¹⁴⁸⁸
- whether all participants are aware that AV will be used, and appropriate court officers are available to assist with operating the AV;
- the particularly busy seasonal demands in agricultural- or fishing- based communities (e.g. a wheat farmer may be reluctant to attend court in the middle of harvest as a defendant, claimant or witness);
- the impact of travel distance and the availability of accommodation for witnesses, for all involved in the proceedings and especially children;
- the need to transport persons in custody to and from the court;
- the impact of air flights and long driving distances on sitting times;
- the need to courier files; and

¹⁴⁸⁸ *Evidence Act 1906* (WA) s 121; but note the limitations discussed in section 9.3.7.3 of this Chapter (accessed 10 December 2019).

- specific events in a town, such as the Kalgoorlie Cup, where an influx of tourists limits the availability of accommodation.

9.4.5.2 At the start of court proceedings

Points to consider when the proceedings begin:

Particular issues in regional and remote locations may include:

- the availability of legal representation for the accused or the parties to litigation;
- the jury, accused and witnesses coming into contact in waiting areas; and
- limited infrastructure for persons in custody.

9.4.5.3 As the court proceedings progress

Points to consider during the proceedings:

- Juries may know of the accused in small towns.
- Facilities for juries may be limited.
- Consideration may need to be given to closing the court to protect identity; this is a requirement in violence restraining order applications and Children's Court hearings.
- Police often fulfil multiple roles in the court, for example orderly and court security, so may need additional guidance such as suggesting that family members are invited into court when a juvenile is being dealt with.
- Some people will have to travel long distances to get to court sittings and others may not have a driver's licence or their own vehicle. This should be considered when deciding whether to adjourn a matter, for example, as it can add a greater burden on participants.
- In many mining areas, the workers are on fly-in-fly-out arrangements and will therefore be seeking adjournments that fit their particular work cycle.

- If the local area attracts itinerant workers such as fruit pickers or shearers and these people are involved in court proceedings, an early return date is more likely to see the person appear.
- Consider whether the accused needs to appear in person on the next occasion, or whether it may be sufficient for counsel to appear fully instructed, or for an appearance to be by video-link. Ensure that the warrant is endorsed appropriately in this regard.

9.4.5.4 Finalisation of court proceedings

Points to consider when proceedings being finalised:

- The availability of legal services, victim support, adult community corrections and youth justice services may be limited.
- There may be difficulties confronting victims and/or offenders from small communities after legal proceedings conclude.
- Programs available to the accused may be limited.
- Stranding of people can be a problem.
- Support services for the offender may be limited or may close prior to finalisation of the matter.

9.4.6 Logistical matters

Points to consider in relation to logistical matters:

- When the higher courts are on circuit, the dual roles and multiple responsibilities held by regional staff can pose challenges for both visiting judicial officers and court officers. For example, a judicial support officer may be on circuit with the magistrate at the same time as the District Court circuit is in the region, resulting in the courthouse being one staff member short. In small centres this can equate to a significant gap in capacity to provide services at the courthouse, albeit temporary.

- Court listings require careful management to accommodate Magistrates Court sittings and higher courts circuits.
- It is important to be aware of the potential logistical issues associated with any court orders made involving persons in custody, and to seek to keep the transport of such persons to a minimum. For example, if a remand order is made in relation to an accused in Halls Creek, they will be transported to the West Kimberley Regional Prison, or in some cases to a metropolitan prison. If the warrant specifies that the next appearance is by video-link to Halls Creek courthouse, unnecessary transport can be avoided.
- Remanding a juvenile in custody anywhere in the State will result in the juvenile being transported to a juvenile detention centre in Perth. Not only is this costly in terms of transport and escorts, but it also removes the juvenile from his or her family, community and country.
- When considering making orders for an accused to reside at a particular Aboriginal community, as a matter of courtesy and respect the community should be contacted to ensure they agree to this.
- Be aware that even if you are on circuit, any pre-sentence report should be made as soon as practicable and in any event within 14 days before the sentencing day.¹⁴⁸⁹
- Generally psychological/psychiatric reports will not be available in less than six weeks. Psychological reports can generally be provided sooner than psychiatric reports.
- Alternatively, a verbal pre-sentence report may be requested that will expedite provision of the report; psychological/psychiatric reports cannot be delivered verbally.

¹⁴⁸⁹ *Sentencing Act 1995* (WA) s 22(1)(b) (accessed 18 January 2021).

- Making hospital orders for accused people with suspected mental health issues is particularly problematic in regional areas. Often the initial psychiatric interview/assessment of a person who is the subject of a hospital order is conducted by video-link. The limited capacity and staffing available locally will often mean that subsequently the person will need to be transferred to the Frankland Centre at Graylands Hospital in Perth. As there is only limited authority of the contracted court security and transport provider to hold this type of prisoner, it can cause further difficulties.
- In regional and remote areas there is limited access to facilities and services (anger management, domestic violence and drug and alcohol programs, counselling, medical assistance, public transport), as well as reduced availability of services that are directly court-related (audio-visual technology, sheriff's officers, victim support officers, prisons).

9.4.7 Family violence and sexual assault matters

People in regional and remote areas face particular issues in relation to family and domestic violence and sexual assault, some of which are outlined below.

Points to consider in family violence and sexual assault proceedings:

- Be aware of the limited number of appropriate victim and offender programs available in regional and remote areas.
- Where individual police officers know parties socially in regional and remote areas, the involvement of the police could be perceived as being compromised.
- Attitudes and behaviours may differ in regional and remote areas.
- Social and physical isolation reduces access to information and support services.
- Aboriginal people and people from culturally and linguistically diverse backgrounds may be further isolated by language and cultural barriers, and lack of access to interpreter services.
- Firearms are more accessible in rural areas.

- High levels of alcohol consumption and other drugs may exacerbate violent outbursts.
- Isolation may increase self-harming behaviours.
- Be aware of extended family violence issues and the inability of some Aboriginal people to leave their community.
- Be aware of the lack of services and facilities, including safe places such as refuges or alternative accommodation; and that accommodation for men is limited. Also, be aware that people are often isolated from relatives and friends who can support them.

For more information regarding family and domestic violence, refer to
chapter 13 of this Bench Book.

9.4.8 Directions to the jury

It is important to ensure that the jury does not allow any ignorance of the issues associated with living in regional and remote areas of Western Australia to impact upon the administration of justice.

Points to consider when directing the jury:

- Where individual police officers know parties socially in regional and remote areas, the involvement of the police could be perceived as being compromised.
- Attitudes and behaviours may differ in regional and remote areas.
- Social and physical isolation reduces access to information and support services.
- Aboriginal and other people from culturally and linguistically diverse backgrounds may be further isolated by language and cultural barriers, and lack of access to interpreter services.
- Isolation may increase self-harming behaviours.
- Be aware of extended family violence issues and the inability of some Aboriginal people to leave their community.

- Be aware of the lack of services and facilities, including safe places such as refuges or alternative accommodation; and that accommodation for men is limited. Also, be aware that people are often isolated from relatives and friends who can support them.
- Bail and remand can pose particular difficulties for family members and victims in regional and remote areas.

9.4.9 Sentencing, other decisions and judgment or decision writing

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. Different considerations may apply when sentencing offenders in remote and regional areas.

- Certain penalties that are commonplace in the metropolitan area or town centres can be more onerous in regional and remote areas because of travel distances and costs, the mobility of the population, and the lower availability of public transport.
- Some sentencing options may not be available. For example, there may be no rehabilitation or community service programs available in the offender's home community.
- Judicial officers need to be aware that the sentence that an offender receives and whether they complete the sentence will generally become known in a small town or remote community. Be aware of the impact of failure to comply. Effective sentencing is crucial: if, for example, a person is sentenced to do community service and they do not complete it, and the local community become aware of this, the community may feel that justice has been undermined.

Points to consider in sentencing decision(s) and/or written judgment:

- If a victim is not personally capable of giving a victim impact statement, because of disability or for any other reason, consider whether it is appropriate for someone else to do so on the victim's behalf.¹⁴⁹⁰

¹⁴⁹⁰ *Sentencing Act 1995* (WA) s 24(2) (accessed 18 January 2021).

- Consider whether to allow a victim impact statement to be read out in court.¹⁴⁹¹
- The availability and diversity of programs is more limited than in the metropolitan area. This issue is exacerbated by the need to develop programs that will be suitable for or relevant to Aboriginal offenders.
- In addition to a pre-sentence report which contains information regarding availability and suitability of programs in the area, you may also take advantage of the local Sheriff or a Community Development Officer who may have knowledge of the offender, and of available programs.¹⁴⁹²
- Consider the individual's ability to comply with any sentencing requirement, including the availability of programs and services, and the consequences of non-compliance. For example, consider:
 - that Juvenile Justice teams may meet infrequently in regional areas;
 - the likely outcome if the person does not comply;
 - where incarceration is to be imposed, where the individual would be held;
 - issues regarding removal from supports including family and friends;
 - the impact of lack of a driver's licence, motor vehicle or appropriate public transport; and
 - cultural and social issues, particularly for remote Aboriginal offenders.

9.5 FURTHER INFORMATION OR HELP

9.5.1 Regional and remote mental health services

Please refer to the *Department of Health* website, which provides a list of mental health services by location.

¹⁴⁹¹ *Sentencing Act 1995* (WA) Pt 3 Div 4 (accessed 18 January 2021).

¹⁴⁹² Officers are available at Broome, Carnarvon, Geraldton, Kalgoorlie, Kununurra, Roebourne and South Hedland.

9.5.2 Regional and remote drug and alcohol services

Regional Community Drug and Alcohol Services

The Mental Health Commission website includes the contact details for regional drug and alcohol services.

Note that the Halls Creek Health Hub opened in 2015 to provide an alcohol, drug and mental health treatment, support and harm prevention service to Halls Creek and surrounding communities. This is part of the Kimberley Community Alcohol and Drug Service which already had offices in Broome, Kununurra, Derby and Fitzroy Crossing.

9.5.3 Legal services

Aboriginal Legal Service of Western Australia (ALSWA)

ALSWA Provides a range of legal services including representation to Aboriginal and Torres Strait Islander people throughout Western Australia. ALSWA has a head office in Perth and offices in eleven regional locations (as at 2020). Refer to the ALSWA website for the location and contact details of regional offices.

For more comprehensive information about ALSWA refer to chapter 11
(particularly section 11.4.7) of this Bench Book.

Adult Community Corrections (ACC) and Youth Justice Services (YJS)

Managed by the former Department of Corrective Services, now part of the Department of Justice, ACC and YJS are responsible for the sentencing and release options administered by the Department. Both ACC and YJS have offices in many regional centres throughout Western Australia. See the Department of Justice - Our Locations page.

Community Legal Western Australia

Community Legal WA is the peak organisation representing and supporting Community Legal Centres (CLCs) which operate in Western Australia. Its website contains a CLC Directory, with contact details for all members of the Association. Some CLCs are generalist, meaning

that they provide a range of services across various legal fields, whilst others are specialist in one area – such as employment law, mental health or consumer credit.

Legal Aid Western Australia

Legal Aid Western Australia provides legal advice and grants of legal aid for matters in specified areas of the law. Applicants are assessed on a number of factors including their financial means, the type of matter in relation to which assistance is being sought, and the merits of the case. Legal Aid Western Australia has a number of regional offices; refer to the Legal Aid website for location and contact details.

Mental Health Law Centre (WA) Inc.

The Mental Health Law Centre provides specialised legal services throughout Western Australia, including

- telephone advice on a range of legal matters;
- representation to involuntary clients under the [Mental Health Act 2014](#) (WA);
- representation to clients who are before the START Court, Magistrates Court, District Court or Supreme Court, where there is a causal link or nexus between their alleged offending behaviour and a diagnosed mental illness;
- representation before the Mentally Impaired Accused Review Board and/or Prisoners Review Board; and
- assistance with guardianship and administration matters before the State Administrative Tribunal.

9.6 FURTHER READING/ VIEWING

Department of Planning, Lands and Heritage, [Country Planning](#) (page last reviewed 24 November 2018) (accessed 18 August 2021)

Department of Primary Industries and Regional Development, [Our WA Regions](#) (accessed 15 January 2021)

Department of Primary Industries and Regional Development, *Regional Price Index* (accessed 18 August 2021)

Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (2nd ed.)(2008) accessible on the Supreme Court of Western Australia website (accessed 15 January 2021)

Gascoyne Development Commission (accessed 15 January 2021)

Goldfields Esperance Development Commission (accessed 15 January 2021)

Government of Western Australia, *Law Almanac* (accessed 18 August 2021)

Great Southern Development Commission (accessed 15 January 2021)

Indigenous Justice Clearinghouse, *Inquest into the Death of Ian Ward* (2009) (accessed 18 August 2021)

Judicial Council on Cultural Diversity, *Recommended National Standards for Working with Interpreters in Courts and Tribunals* (2017) (accessed 7 April 2021)

Judicial Council on Cultural Diversity, *Addendum to the Recommended National Standards for Working with Interpreters in Courts and Tribunals* (May 2019) (accessed 7 April 2021)

Kimberley Development Commission (accessed 15 January 2021)

Mid West Development Commission (accessed 15 January 2021)

Office of the Director of Public Prosecutions Comparative Sentencing Tables (accessed 12 July 2021)

Pilbara Development Commission (accessed 15 January 2021)

South West Development Commission (accessed 15 January 2021)

Tourism Western Australia, *Regional Fact Sheets and Visitor Profiles* (accessed 15 January 2021)

10 WOMEN

In its *Equal Treatment Benchbook*, the Supreme Court of Queensland noted that:¹⁴⁹³

Until relatively recently, women's voices have largely been absent in the legal sphere, by virtue of women's exclusion from the development of the law in Parliament and its interpretation in the courts. Although women's representation among parliamentarians, judicial officers and lawyers is increasing, men still comprise the vast majority of actors in the courtroom, while many legal processes and laws have been regarded as operating to the detriment of women. Gender role stereotypes still persist in relation to the working and domestic activities of both genders.

Despite recent gains in the representation of women in law-related employment in this State, the imbalance in gender representation continues to be very significant and can impact on both the practice and perception of the law. For example, in June 2020, 38.9% of Western Australian judges and magistrates were women (17 male and 4 female judges in the Supreme Court; 17 male and 13 female judges in the District Court; and 24 male and 20 female magistrates in the Magistrates Court).¹⁴⁹⁴

This chapter of the Bench Book is intended to provide information about the impact of gender on various aspects of life and to suggest ways in which judicial officers can contribute to promoting confidence in the administration of justice.

While there are ways in which men are disadvantaged by the existing inequality between the genders - such as the mindsets which prevent taking up of parental leave by men - this chapter acknowledges that gender inequality is generally to the disadvantage of women. Similarly, whilst it is acknowledged that men experience domestic violence and women may perpetrate it, the statistical prevalence of domestic violence against women is such that it 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

¹⁴⁹³ Supreme Court of Queensland, *Equal Treatment Benchbook* (2nd ed) (2016) page 166 (accessed 25 January 2021).

¹⁴⁹⁴ Australasian Institute of Judicial Administration, *Judicial Gender Statistics* (2020) (accessed 25 January 2021).

can also be victims.¹⁴⁹⁵ Of course, whilst men can suffer from disadvantage and discrimination on the basis of gender, the content of this chapter reflects the reality that this is rarer.

The material used in this chapter was drawn largely from the New South Wales Judicial Commission's *Equality before the Law Bench Book*,¹⁴⁹⁶ with modifications as a result of the incorporation of local legislation, data and reference material.

The Steering Committee overseeing the production of this Bench Book gratefully acknowledges the submissions and contributions received from the following individuals and organisations, who have assisted in the development of this chapter in the first edition and then its subsequent revision:

- Ms Hannah McGlade (28 March 2007);
- Multicultural Women's Advocacy Service (4 May 2007);
- Women Lawyers of Western Australia (Inc.) (15 June 2007, 19 January 2009);
- Office for Women's Policy (17 July 2007);
- Legal Aid Western Australia (27 October 2008, 26 February 2009, 8 June 2020);
- Women's Council for Domestic & Family Violence Services (WA) (21 January 2009, 28 February 2020);
- Women's Health and Family Services (incorporating the Multicultural Women's Advocacy and Support Service) (8 June 2020); and
- Department of Communities (15 September 2020).

¹⁴⁹⁵ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2018) Section 7 [7.1] (accessed 1 February 2021).

¹⁴⁹⁶ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2018) Section 7 (accessed 6 February 2020).

10.1 STATISTICS

10.1.1 General

According to the Australian Bureau of Statistics (ABS):

- As at June 2020, there were 12,734,109 males and 12,952,932 females in Australia.¹⁴⁹⁷ There were 1,327,576 males and 1,334,360 females in Western Australia.¹⁴⁹⁸
- The proportion of women to men in Western Australia increases with age. For example, as at 30 June 2019:¹⁴⁹⁹
 - 31% of women and 32.7% of men were aged 24 and under;
 - 7.0% of women and 5.6% of men were aged 75 and over; and
 - 2.2% of women and 1.3% of men were aged 85 and over.
- As at June 2016, 3.9% of the population of Western Australia were Aboriginal and/or Torres Strait Islander people (compared to 3.3% nationally), comprised of 50,295 females and 50,217 males.¹⁵⁰⁰
- In terms of education, more women than men attain a bachelor degree. For example, in 2020, 48.3% of women and 36.1% of men aged 25 to 29 years had a bachelor degree; and 37.1% of women and 29.4% of men aged 18 to 64 years had a bachelor's degree.¹⁵⁰¹

¹⁴⁹⁷ Australian Bureau of Statistics (ABS), *Australian Demographic Statistics, June 2020* (Cat No 3101.0) (19 December 2019) Time Series Spreadsheets - Population Change, Components – States and Territories (accessed 25 January 2021).

¹⁴⁹⁸ Australian Bureau of Statistics (ABS), *Australian Demographic Statistics, June 2019* (Cat No 3101.0) (19 December 2019) Time Series Spreadsheets - Population Change, Components – States and Territories (accessed 24 January 2020).

¹⁴⁹⁹ ABS, *Australian Demographic Statistics* (Cat No 3101.0) (2019) Data Cubes - Australian Demographic Statistic Tables – Table 6 (accessed 24 January 2020).

¹⁵⁰⁰ ABS, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016* (Cat No 3238.0.55.001) (31 August 2018) (accessed 25 January 2021).

¹⁵⁰¹ ABS, *Gender Indicators, Australia, 2020* (Cat No 4125.0) (2020) Selected Highlights: Differences between Australian Men and Women (accessed 25 January 2021).

- In 2020, the median starting salary for female undergraduates was \$63,400 compared to \$65,000 for male undergraduates. While a disparity has consistently remained, the median starting salary increased at a higher rate for female undergraduates (\$7,000) from 2016 compared to males (\$5,000).¹⁵⁰²
- In terms of employment, fewer women are in the labour force than men, and those in the labour force are more likely to be in part-time and casual employment. Women are more likely to be under-employed than men.¹⁵⁰³
- In terms of income, women earn less overall, averaging a rate of 89% of male earnings (for non-managerial adult hourly ordinary time cash earnings, in 2018).¹⁵⁰⁴ That had decreased to 86% at 13 August 2020, with the Workplace Gender Equality Agency noting that the Covid-19 pandemic had a disproportionate impact on women.¹⁵⁰⁵
- In terms of wealth, women aged 55-64 have 37% less superannuation than men of the same age, with an average of \$196,000 compared with \$310,000 (2018). However rates of home ownership are similar in that age category.¹⁵⁰⁶
- In terms of criminality, the imprisonment rate is almost 12 times higher for men than women (2018). Women are more likely to be sentenced for illicit drug offences, fraud, deception, and related offences, while men are more likely to be sentenced for acts intended to cause injury, sexual assault and related offences.¹⁵⁰⁷
- In terms of victims of crime, women were five times more likely to be victims of sexual assault than men in 2020.¹⁵⁰⁸

¹⁵⁰² ABS, *Gender Indicators, Australia, 2020* (Cat No 4125.0) (2020) Selected Highlights: Differences between Australian Men and Women (accessed 25 January 2021).

¹⁵⁰³ ABS, *Gender Indicators, Australia, Sep 2018* (Cat No 4125.0) (2018) Selected Highlights: Differences between Australian Men and Women (accessed 27 February 2019).

¹⁵⁰⁴ ABS, *Gender Indicators, Australia, Sep 2018* (Cat No 4125.0) (2018) Selected Highlights: Differences between Australian Men and Women (accessed 27 February 2019).

¹⁵⁰⁵ Workplace Gender Equality Agency, *The National Gender Pay Gap is Now 14%* (13 August 2020) (accessed 25 January 2021).

¹⁵⁰⁶ ABS, *Gender Indicators, Australia, Sep 2018* (Cat No 4125.0) (2018) Selected Highlights: Differences between Australian Men and Women (accessed 25 January 2021).

¹⁵⁰⁷ ABS, *Gender Indicators, Australia, Sep 2018* (Cat No 4125.0) (2018) Selected Highlights: Differences between Australian Men and Women (accessed 27 February 2019).

¹⁵⁰⁸ ABS, *Gender Indicators, Australia, 2020* (Cat No 4125.0) (2020) Key Statistics (accessed 25 January 2021).

10.1.2 Gender pay gap

According to the Workplace Gender Equality Agency:¹⁵⁰⁹

The national gender pay gap measures the difference between the average weekly full-time base salary earnings of men and women, expressed as a percentage of men's earnings. It is a measure of women's overall position in the paid workforce and does not compare like roles.

The gender pay gap is influenced by a number of factors, including:¹⁵¹⁰

- discrimination and bias in hiring and pay decisions;
- women and men working in different industries and different jobs, with female-dominated industries and jobs attracting lower wages;
- women's disproportionate share of unpaid caring and domestic work;
- lack of workplace flexibility to accommodate caring and other responsibilities, especially in senior roles; and
- women's greater time out of the workforce impacting on career progression and opportunities.

Decisions by Fair Work Australia in 2011 and 2012 found that gender is a significant factor in the unequal remuneration of employees in the social and community services (SACS) industry and those in comparable employment in state and local government.¹⁵¹¹ Fair Work Australia determined that:¹⁵¹²

- much of the work in the SACS industry is 'caring' work;
- the characterisation of work as caring work can disguise the level of skill and experience required and contribute, in a general sense, to a devaluing of the work; and

¹⁵⁰⁹ Workplace Gender Equality Agency, *The National Gender Pay Gap is Now 14%* (13 August 2020) (accessed 25 January 2021).

¹⁵¹⁰ Workplace Gender Equality Agency, *Gender Pay Gap* (accessed 25 January 2021).

¹⁵¹¹ Submission from the Department of Communities (15 September 2020) referring to decisions made under the Federal *Fair Work Act 2009 (Cth)*: *Equal Remuneration Case—May 2011 Decision [2011] FWAFB 2700; Equal Remuneration Case—June 2012 Decision [2012] FWAFB 5184.*

¹⁵¹² *Equal Remuneration Case—May 2011 Decision* [2011] FWAFB 2700 [253].

- because caring work in this context has a female characterisation, to the extent that work in the industry is undervalued because it is caring work, the undervaluation is gender-based.

As at December 2020, in Western Australia:¹⁵¹³

- Women constituted 34.1% of full-time employees and 73.1% of all part-time employees.
- The official unemployment rate for women was 6.6%, which was more than for men (5.8%).

A submission from Women Lawyers of Western Australia (Inc.) highlighted that official unemployment rates, based on eligibility for unemployment benefits, may mask real unemployment rates because these do not capture actual numbers of women looking for work.¹⁵¹⁴

As at November 2015, Western Australian women earned 75.1% of Western Australian men's average weekly earnings, significantly less than the national rate of 82.7%.¹⁵¹⁵ As at May 2020, Western Australian women earned 77.3% of Western Australian men's average weekly earnings, significantly more than the national rate of 70.4%, noting the impact of the Covid-19 pandemic on employment at that time.¹⁵¹⁶

In August 2020, the gender pay gap in Australia was 14.0%. The nation-wide gap has hovered between 13.9 and 18.5% over the two decades from 1999-2019. Western Australia had the widest gender pay gap in August 2020 of 22.7%, which had also been the case in 2017-19.¹⁵¹⁷

¹⁵¹³ ABS, *Labour Force Australia, December 2020* (Cat No 6202.0) (released 21 January 2021) Table 8 (accessed 28 January 2021).

¹⁵¹⁴ Submission from Women Lawyers of Western Australia (Inc.) (19 January 2009).

¹⁵¹⁵ ABS, *Average Weekly Earnings, Australia, Nov 2015* (Cat No 6302.0) (2016) Table 11E (accessed 6 November 2018).

¹⁵¹⁶ ABS, *Average Weekly Earnings, Australia, May 2020* (Cat No 6302.0) (2020) Key statistics (accessed 27 January 2021).

¹⁵¹⁷ Workplace Gender Equality Agency, *Australia's Gender Pay Gap* (17 August 2020) Gender pay Gap 2020 infographic (accessed 28 January 2021).

In 2018, it was reported that the gender pay gap increases with occupational hierarchy, whereby higher status occupations in management will often be accompanied by a wider gender pay gap, whereas non-managerial positions typically coincide with narrower gender pay gaps. Female executives are currently paid on average \$39,000 less than male executives annually – this increases to \$73,500 when taking into account additional remuneration such as bonuses and other discretionary pay.¹⁵¹⁸

10.1.3 Gender segregation in the workplace

The Commonwealth Senate Finance and Public Administration References Committee defines workplace gender segregation as follows:¹⁵¹⁹

Workplace gender segregation refers to the unequal distribution of women and men in certain occupations or industries, or in organisational hierarchies. It manifests itself in two distinct ways.

... Horizontal segregation is under- or over- representation of women and men in certain occupations or industries. Vertical Segregation is the imbalance between women and men in leadership categories (occupational hierarchies) ... men dominate leadership categories while women are concentrated in non-management roles.

The Australian Human Rights Commission found that gender segregation had remained a persistent feature of the Australian economy over the 20 years to 2016, operating at the three levels of industry, occupation and role. In 2015, less than 30% of workers in reporting organisations worked in gender balanced organisations. The average remuneration in female-dominated organisations is lower than in male-dominated organisations. However, female managers in male-dominated organisations are more likely to earn salaries closer to their male colleagues.¹⁵²⁰

¹⁵¹⁸ Bankwest Curtin Economics Centre, *Gender Equity Insights 2018: Inside Australia's Gender Pay Gap* (March 2018) page 15 (accessed 28 January 2021).

¹⁵¹⁹ Commonwealth Senate Finance and Public Administration References Committee, *Gender Segregation in the Workplace and its Impact on Women's Economic Equality* (7 June 2017) page 4 (accessed 28 January 2021).

¹⁵²⁰ Australian Human Rights Commission, *Gender Segregation in the Workplace and its Impact on Women's Economic Equality* (6 March 2017) pages 5-6 (accessed 28 January 2021).

10.1.4 Women and superannuation

In 2015, the Commonwealth Senate referred the matter of economic security for women in retirement to the Economics Reference Committee for inquiry. In 2016, the Committee published the findings below.¹⁵²¹

- Australia has a three pillar retirement income system that includes:
 - a government provided Age Pension;
 - compulsory savings enforced through the superannuation guarantee; and
 - voluntary savings (both through superannuation and other sources).
- Women in general, face an insecure retirement. Men's superannuation balances at retirement are on average twice as large as those of women. In practice this means that women, particularly single women, are at greater risk of experiencing poverty, housing stress and homelessness in retirement.
- The problem of economic insecurity for women in retirement is due to the fact that women and men experience work differently throughout their lifecycle. Women are more likely to work in lower paid roles and lower paid fields, are more likely to work part-time or casually, and are more likely to take breaks from paid employment to provide unpaid care for others. Thus, over their lifetimes, women earn significantly less than men and Australia's retirement income system does not adequately accommodate this difference.

The Association of Superannuation Funds Australia reported that in 2019:¹⁵²²

- 23% of women 60-64 years have no superannuation (compared to 13% of men); and
- one third of women across all age groups have no superannuation (compared to one quarter of men)

¹⁵²¹ Commonwealth of Australia, *A Husband is not a Retirement Plan: Achieving Economic Security for Women in Retirement* (29 April 2016) (accessed 28 January 2021).

¹⁵²² Association of Superannuation Funds Australia, *Better Retirement Outcomes: A Snapshot of Account Balances in Australia* (July 2019) Page 4 (accessed 28 January 2021).

According to the ABS, in 2020:¹⁵²³

- Australian women aged 55-64 had much less superannuation than men of the same age - an average of \$245,126 for women compared with \$332,662 for men.
- There was less discrepancy between men and women aged 44 years and younger in terms of the average superannuation balances, but male superannuation balances were still higher in every age group.
- Whilst women had lower superannuation balances across the board, it is noteworthy that rates of home ownership are higher amongst women, with 58.6% of women owning their own dwelling in 2017-18 (compared to 55.5% of men) and 25.2% owning their own dwelling without a mortgage (compared to 22.5% of men).

10.1.5 Gender and education

A number of differences have been noted in the educational attainment of women when compared to those of men as reflected in the following national data:

- Until 1987, more males than females were students of higher education (that is, education which results in the granting of a bachelor degree or higher). In the 1950s, only one in five university students were female. By 2011, there were 1,069,000 higher education students with 57% of those being women.¹⁵²⁴
- As at May 2020, of those aged 20 to 64 years in Australia, 69% had attained at least one non-school qualification. The proportion of females (70%) was higher than the proportion of males (68%).¹⁵²⁵

¹⁵²³ ABS, *Gender Indicators, Australia, Sep 2020* (Cat No 4125.0) (2017) Economic Security – Earnings, Income and Economic Situation (accessed 28 January 2021).

¹⁵²⁴ ABS, *Australian Social Trends September 2012 – Education Differences between Men and Women* (Cat No 4102.0) (2012) (accessed 18 September 2018).

¹⁵²⁵ ABS, *Education and Work, Australia* (Cat No 6227.0) (11 November 2020) Education and Work (accessed 28 January 2021).

- Similarly, the proportion of women with bachelor degrees is higher than the proportion of men. In May 2017, 35% of women and 28% of men had attained a bachelor degree or higher (a greater gender difference than in 2004, when 22% of women and 20% of men had bachelor degrees).¹⁵²⁶
- Women are most likely to obtain bachelor degrees in the areas of management and commerce, society and culture or health; while men are most likely to obtain their degree in engineering, management and commerce or architecture.¹⁵²⁷
- As indicated in section 10.1.2 (gender pay gap), the improving educational attainment of females relative to males since the mid-1970s has not translated into a corresponding increase in the rates of pay for women relative to men. Median starting salaries for women graduates in their first full-time employment have been consistently lower than their male counterparts. In 2020, the median starting salary of female graduates was \$63,400 compared to \$65,000 for male graduates.¹⁵²⁸ The gap has narrowed when compared to previous years. For example, in 2017 the median starting salaries for female and male graduates were \$56,000 and \$60,000 respectively, with female graduates earning less in 16 out of 19 key industries (as those industries are defined by the ABS).¹⁵²⁹

10.1.6 Women and Poverty

The 2018 *Poverty in Australia Report* by the Australian Council of Social Service (ACOSS) and the Social Policy Research Centre found that women continue to be more likely to live below the poverty line regardless of which poverty line is used. This is due to women tending to have lower employment rates and lower wages than men and a greater caring role both for children and for other family members.¹⁵³⁰

¹⁵²⁶ ABS, *Women Outpace Men in Attaining a Higher Education* (Cat No 6227.0) Media Release, Education and Work (accessed 20 July 2018).

¹⁵²⁷ ABS, *Gender Indicators, Australia, 2020* (Cat No 4125.0) (15 December 2020) Education (accessed 29 January 2021).

¹⁵²⁸ ABS, *Gender Indicators, Australia, 2020* (Cat No 4125.0) (15 December 2020) (accessed 29 January 2021).

¹⁵²⁹ ABS, *Gender Indicators, Australia Sep 2017* (Cat No 4125.0) (2018) (accessed 20 July 2018).

¹⁵³⁰ Australian Council of Social Service and the Social Policy Research Centre, *Poverty in Australia 2018 (2018)* page 42 (accessed 29 January 2021).

The later ACOSS report *Poverty in Australia 2020: Part 2 – Who is Affected?* reported that pre-Covid-19, households with children with a female main income earner were more than twice as likely to live in poverty than those in which the main income earner was male (37% compared to 18%). In contrast, among households without children, the average poverty rate where the main income-earner is female is 12%, compared with 10% where the main income-earner is male.¹⁵³¹

Sole parents are at a particularly high risk of poverty, with one third (33%) of sole parents (the majority of which were single mothers) in poverty in 2012. As a consequence, just over a third (36.8%) of all children in poverty were in sole parent households. This reflects the lower rates of employment among sole parent households, especially those with very young children, and low levels of social security payments for these families.¹⁵³²

The 2018 Annual Statistical Report of the Household, Income and Labour Dynamics in Australia (HILDA) Survey found that, in 2016:¹⁵³³

- 80.9% of sole-parent families with one child had a woman as head of the family;
- 88.8% of sole-parent families with two children had a woman as head of the family;
- and
- 90.9% of sole-parent families with three or more children had a woman as head of the family.

The Australian Institute of Family Studies has reported that work participation rates for women heading sole-parent families have changed significantly since the 1980s. In 1983, 68% of women who were sole parents had no paid work, whereas by 2010, the rate was 43%. The rate of both full-time and part-time work (especially the latter) amongst women who were sole-parents increased over this period – in 1983, 20% had paid full-time work and 12% had paid part-time work; by 2010, 29% had paid full-time work and another 29% had paid part-time work.¹⁵³⁴

¹⁵³¹ Australian Council of Social Service, *Poverty in Australia 2020: Part 2 - Who is Affected?* (28 May 2020) (accessed 29 January 2021).

¹⁵³² Australian Council of Social Service, *Poverty in Australia 2014* (2014) page 10 (accessed 29 January 2021).

¹⁵³³ University of Melbourne and the Melbourne Institute, *Household, Income and Labour Dynamics in Australia Survey*: Selected Findings from Waves 1 to 16, pages 16-17 and Table 2.8 (funded by the Australian Government Department of Social Services) (accessed 18 September 2018).

¹⁵³⁴ Australian Institute of Family Studies, *Families in Australia 2011* (2011) Participation in the World of Work and Family Life (accessed 7 November 2018).

10.1.7 Gender and victims of violence

10.1.7.1 ABS Personal Safety Surveys - 1996, 2005, 2012 and 2016

The ABS 1996 *Personal Safety Survey*¹⁵³⁵ was one of the first Australian research projects to look at women's and men's experiences of violence and identify the differences. It was repeated in 2005, 2012 and 2016, with the following findings in relation to age and gender differences:

- There were distinct differences in the feelings of safety for Australian men and women. In 2016, 41% of men waited for and used public transport after dark, whilst only 27% of women would do so. Amongst both men and women these figures had increased since 2005, when 34% of men and 22% of women reported waiting for and using public transport after dark.¹⁵³⁶ The proportion of those who *felt safe* waiting for public transport increased between 2005 and 2016, from 79% to 87% for men and from 55% to 68% for women.¹⁵³⁷
- In the 12 months prior to the 2012 survey, approximately 6.2% (55,300) of women in Western Australia had experienced physical violence, compared to 1.0% (9,200) who had been victims of sexual violence. In contrast, 8.6% (77,500) of men had been victims of physical violence. Data on male victims of sexual violence in Western Australia was not available, but nationally the estimate was 0.5%.¹⁵³⁸
- In Western Australia, of those women who experienced violence in the 12 months prior to the 2012 survey (possibly on more than one occasion or by more than one perpetrator), 41% (25,600) were assaulted by a stranger, whereas 48.3% (44,600) of men who had experienced violence were assaulted by a stranger. Assaults by a known person accounted for 59% (36,800) of assaults on females and 51.7% (47,700) of assaults on males.¹⁵³⁹

¹⁵³⁵ ABS, *Women's Safety Australia, 1996* (Cat No 4128.0) (1996) (accessed 16 August 2016); ABS, *Personal Safety, Australia* (2016) (accessed 21 January 2021).

¹⁵³⁶ ABS, *Personal Safety Survey 2016* (Cat No 4906.0) (2018) Feelings of General safety; Table 39 (accessed 2 September 2021).

¹⁵³⁷ ABS, *Personal Safety Survey 2016* (Cat No 4906.0) (2018) Feelings of General safety; Table 39 (accessed 2 September 2021).

¹⁵³⁸ ABS, *Personal Safety, Australia, 2012* (Cat No 4906.0) (2013) (accessed 2 September 2021).

¹⁵³⁹ ABS, *Personal Safety, Australia, 2012* (Cat No 4906.0) (2013) (accessed 2 September 2021).

- The age profile of women and men who were victims of violence differed:¹⁵⁴⁰
 - Women aged 18-24 years were the most likely to have experienced violence. In 2016, an estimated 12.0% of women aged 18-24 years (129,100) experienced violence in the 12 months prior to interview.
 - Women aged 65 years and over were the least likely to have experienced violence. In 2016, an estimated 1.2% of women aged 65 years and over (21,200) experienced violence in the 12 months prior to interview.
 - Men aged 18-24 years and 25-34 years were most likely to have experienced violence. In 2016, an estimated 11% of men aged 18-24 years (120,400) and 9.3% of men aged 25-34 years (163,000) experienced violence in the 12 months prior to the survey.
 - Men aged 55-64 years and 65 years and over were least likely to have experienced violence. In 2016, an estimated 2.8% of men aged 55-64 years (38,600) and 1.4% of men aged 65 years and over (23,800) experienced violence in the 12 months prior to the survey.

The ABS looked at reporting of assaults in both 1996 and 2012:

- In 1996, 88.6% of women who had experienced sexual assault by a man since the age of 15 ***had not*** reported the incident to police.¹⁵⁴¹
- In 2012, this had fallen to 80.6%. An estimated 65.2% of women and 67.9% of men ***did not*** contact police about their most recent incident of sexual or physical assault.¹⁵⁴²

In relation to partner violence and emotional abuse, the ABS reported that in 2016:

¹⁵⁴⁰ ABS, *Personal Safety Survey 2016* (Cat No 4906.0) (2017) (accessed 2 September 2021).

¹⁵⁴¹ ABS, *Sexual Assault in Australia: A Statistical Overview, 2004* (Cat No 4523.0) (2004) (accessed 16 August 2016).

¹⁵⁴² ABS, *Personal Safety, Australia, 2012* (Cat No 4906.0) (2013) Selected Characteristics of the Different Types of Violence (accessed 2 September 2021).

- Women were more likely than men to experience violence by a partner. An estimated 17% of women and 6.1% of men aged 18 years and over had experienced violence by a partner since the age of 15.¹⁵⁴³
- Women are more likely than men to have experienced emotional abuse by a partner. An estimated 23% of women and 16% of men aged 18 years and over had experienced emotional abuse by a partner since the age of 15.¹⁵⁴⁴

In relation to stalking, in 2016:¹⁵⁴⁵

- Overall, women were more likely to have experienced an episode of stalking than men. An estimated one in six women (17% or 1.6 million) and one in 15 men (6.5% or 587,000) experienced an episode of stalking since the age of 15.
- Women were more likely to have experienced stalking by someone they knew rather than a stranger. An estimated 75% of women who had experienced stalking by a male, and 89% of women who had experienced stalking by a female, knew their most recent stalker.
- Where men were stalked by a male, it was equally likely to be a known male as a male stranger.
- An estimated 95% of men who experienced stalking by a female knew their most recent stalker.

In relation to sexual harassment, in 2016:¹⁵⁴⁶

- Women aged 18 years and over were more likely than men to have experienced one or more selected types of sexual harassment behaviours during their lifetime.

¹⁵⁴³ ABS, *Personal Safety Survey 2016* (Cat No 4906.0) (2017) Prevalence of Partner Violence; Table 3 (accessed 2 September 2021).

¹⁵⁴⁴ ABS, *Personal Safety Survey 2016* (Cat No 4906.0) (2018) Experience of Emotional Abuse by a Partner; Table 29 (accessed 2 September 2021).

¹⁵⁴⁵ ABS, *Personal Safety Survey 2016* (Cat No 4906.0) (2017) Experience of Stalking; Tables 34-36 (accessed 2 September 2021).

¹⁵⁴⁶ ABS, *Personal Safety Survey 2016* (Cat No 4906.0) (2018) Experience of sexual harassment; Table 32 (accessed 2 September 2021).

- An estimated 53% of women and 25% of men aged 18 years and over had experienced one or more selected types of sexual harassment behaviours during their lifetime.

10.1.7.2 Other surveys

The ABS reported that in 2019 in Western Australia 60% of victims of assault were female.¹⁵⁴⁷

The Australian Institute of Criminology reported in 2016 that:¹⁵⁴⁸

- Females were sexually assaulted at a higher rate than males across all age groups.
- The highest rates of sexual assault victimisation for females and males were in the 10-14 years age group, at 559 per 100,000 female population compared to 114 per 100,000 male population in that age group.
- The next highest rate was for the 15-24 years age group for females, and the 0-9 years age group for males.
- Where the relationship between victim and offender was stated, most sexual assault victims had some form of relationship with the offender. However, women were far more likely to be sexually assaulted by a family member than male victims, and men were far more likely to be assaulted by strangers.

In relation to homicides:

- The majority of victims of homicide in 2019 were male (70% nationally and 59% in Western Australia).¹⁵⁴⁹
- The majority of victims of domestic/family homicides in Australia in 2019 were female (64%).¹⁵⁵⁰

¹⁵⁴⁷ ABS, *Recorded Crime – Victims, Australia, 2019* (Cat No 4510.0) (9 July 2020) (accessed 29 January 2021).

¹⁵⁴⁸ Australian Institute of Criminology, *Australian Crime: Facts and Figures 2014* (2016) pages 15-16 (accessed 27 January 2019).

¹⁵⁴⁹ ABS, *Recorded Crime – Victims, Australia, 2019* (Cat No 4510.0) (9 July 2020) (accessed 29 January 2021).

¹⁵⁵⁰ ABS, *Recorded Crime – Victims, Australia, 2019* (Cat No 4510.0) (9 July 2020) (accessed 29 January 2021).

- Females are typically the victims in intimate partner homicides but males are more likely to be the victims all other types of domestic/family homicide (filicides, parricides, siblicides or homicides involving other family relationships).¹⁵⁵¹
- Males account for the majority of offenders in both domestic/family and non-domestic/family homicides, except filicides where females account for over half of offenders. A 2015 report found that females were the offender in 23% of intimate partner homicides.¹⁵⁵²

Indigenous women and girls are 35 times more likely to be hospitalised due to family violence related assaults than other Australian women and girls.¹⁵⁵³

Historically women have disproportionately been the victims of family and domestic violence. This has not changed. For more information on women as the victims of family and domestic violence please refer to chapter 13.

10.1.8 Care

Care work is the work of caring for others and includes both paid and unpaid forms of care work. Paid care work is done in occupations providing a service to others that helps develop their capacities, such as childcare educators, all levels of teaching and all types of health care workers. Unpaid care work includes all forms of domestic work and home maintenance; caring for children, elderly family members or family members with a disability; and voluntary community work. The monetary value of unpaid care work in Australia was estimated to be \$650.1 billion, or 50.6% of the gross domestic product, in 2012.¹⁵⁵⁴

¹⁵⁵¹ In Australia, between 2002-03 and 2011-12, 2,631 homicide incidents were recorded and 1,088 (41%) were classified as domestic/family homicides, involving 1,158 victims and 1,184 offenders: Cussen T and Bryant W, *Domestic/Family Homicide in Australia* (Research in Practice No 38, May 2015) (accessed 6 March 2019).

¹⁵⁵² Cussen T and Bryant W, *Domestic/Family Homicide in Australia* (Research in Practice No 38, May 2015) (accessed 6 March 2019).

¹⁵⁵³ Department of Social Security, *The National Plan to Reduce Violence against Women and their Children 2010-2022* (accessed 29 January 2021).

¹⁵⁵⁴ Workplace Gender Equality Agency, *Unpaid Care Work and the Labour Market: Insight Paper* (9 November 2016) page 3 (accessed 29 January 2021).

10.1.8.1 Unpaid care work

In 2016, the Commonwealth Government's Workplace Gender Equality Agency reported that:¹⁵⁵⁵

- Australian women spend substantially more time than men in unpaid care work;
- the unequal distribution of unpaid care work reinforces gender stereotypes, such as the 'male breadwinner model';
- gender inequality in unpaid care work contributes to the gender inequalities in the labour market; and
- the redistribution of unpaid care work can reduce gender stereotypes and increase female workforce participation.

Women spend 64.4% of their average weekly working time on unpaid care work compared to 36.1% for men. This equates to a 'gender time gap in unpaid care work' of on average two hours and 19 minutes per day, which means that for every hour Australian men commit to unpaid care work, Australian women commit one hour and 48 minutes.¹⁵⁵⁶

10.1.8.2 Parental leave

Primary parental leave is leave taken by a member of a couple or a single carer, regardless of gender, identified as having greater responsibility for the day-to-day care of a child. Secondary parental leave is leave taken by a member of a couple or a single carer who is not the primary carer. Primary parental leave is the type of leave most likely to affect a person's career trajectories.¹⁵⁵⁷

¹⁵⁵⁵ Workplace Gender Equality Agency, *Unpaid Care Work and the Labour Market: Insight Paper* (9 November 2016) (accessed 29 January 2021).

¹⁵⁵⁶ Workplace Gender Equality Agency, *Unpaid Care Work and the Labour Market: Insight Paper* (9 November 2016) page 3 (accessed 29 January 2021).

¹⁵⁵⁷ ABS, *Gender Indicators, Australia* (Cat No 4125.0) (15 December 2020) Work and Family Balance (accessed 29 January 2021).

According to the ABS, in 2018-19, 93.5% of primary parental leave used by non-public sector employees was taken by women. Conversely, 96.1% of secondary parental leave was taken by men.¹⁵⁵⁸

Proportionally, managers were more likely than non-managers to use parental leave, either in a primary or secondary carer capacity. Around one in 15 women who were managers in the non-public sector accessed primary parental leave in 2018-19, compared with one in 24 women in non-managerial positions.¹⁵⁵⁹

In the 2016-17 reporting year, the mining industry had the highest take up rates of primary parental leave for women (11.6 and 11.3 women per 100 female managers and non-managers respectively).¹⁵⁶⁰

10.1.8.3 Providing care to a person with a disability

In 2018, 6.1% of females and 2.5% of males aged 15 years and over provided primary care to a person with disability. Women (45.7%) were more likely than men (41.9%) to be employed and providing primary care to a person with.¹⁵⁶¹

10.1.8.4 Volunteer work

Female volunteering decreased from 38.1% in 2010 to 28.1% in 2019. Whereas more females than males were volunteering in 2010, the male rate had overtaken female rate in 2019. The overall volunteering rate in 2019 was 28.8%.¹⁵⁶²

10.1.9 Legal Aid funding by area of law and gender

Due to the relative funding priorities given to criminal matters over family and civil matters, the majority of Legal Aid clients are male.

¹⁵⁵⁸ ABS, *Gender Indicators, Australia* (Cat No 4125.0) (15 December 2020) Work and Family Balance (accessed 29 January 2021).

¹⁵⁵⁹ ABS, *Gender Indicators, Australia* (Cat No 4125.0) (15 December 2020) Work and Family Balance (accessed 29 January 2021).

¹⁵⁶⁰ ABS, *Gender Indicators, Work and Family Balance* (Cat No 4125.0) (2018) (accessed 2 October 2018).

¹⁵⁶¹ ABS, *Gender Indicators, Australia* (Cat No 4125.0) (15 December 2020) Work and Family Balance – Providing Primary Care (accessed 29 January 2021).

¹⁵⁶² ABS, *Gender Indicators, Australia* (Cat No 4125.0) (15 December 2020) Work and Family Balance – Volunteering (accessed 29 January 2021).

In 2016-17, 55% of all Legal Aid grants were awarded to males, primarily in the area of criminal law, where those accounted for 81% of all grants of aid. Women were granted 72% of all grants of aid in the area of family law and 58% of all grants in the area of civil law.¹⁵⁶³

The 2017-18, 2018-19 and 2019-20 Legal Aid reports do not contain the percentages of grants awarded to males and females overall, however there are breakdowns of males and females by age category which show that males received a greater proportion of grants in every age bracket.¹⁵⁶⁴

10.1.10 Women in the legal profession and as judicial officers

Despite recent gains in the representation of women in law-related employment in this State, the imbalance in gender representation continues to be very significant and can impact on both the practice and perception of the law.

The Australian Bar Association reported that, as at January 2021, 73.3% of the members of all State and Territory Bar Associations were male and 26.6% were female. In Western Australia, there were 193 male and 67 female members.¹⁵⁶⁵ For comparison, in 2015 there were 183 male and 37 female members in Western Australia.¹⁵⁶⁶

The Australasian Institute of Judicial Administration's judicial gender statistics for June 2020 showed that 38.9% of Western Australian judges and magistrates were women (17 male and 4 female judges in the Supreme Court; 17 male and 13 female judges in the District Court; and 24 male and 20 female magistrates in the Magistrates Court).¹⁵⁶⁷

At the Commonwealth level, as at June 2020, three of the seven High Court judges were women; 14 of the 52 Federal Court judges were women; and 18 of the 38 Family Court Judges were women.¹⁵⁶⁸

¹⁵⁶³ Legal Aid Western Australia, *Annual Report 2016-17* (2017) page 8 (accessed 4 October 2019).

¹⁵⁶⁴ Legal Aid Western Australia, *Annual Report 2018-19* (2019) page 14; Legal Aid Western Australia, *Annual Report 2017-18* (2018) page 17 (both accessed 29 January 2021). There is no equivalent data in the 2019-20 report.

¹⁵⁶⁵ Australian Bar Association, *Member Information* (January 2021) (accessed 18 August 2021).

¹⁵⁶⁶ Australian Bar Association, *Statistical Profile of Australian Barristers and Membership of Australian Bar Associations as at June 2015* (2015) (accessed 7 August 2018).

¹⁵⁶⁷ Australasian Institute of Judicial Administration, *Judicial Gender Statistics* (2020) (accessed 25 January 2021).

¹⁵⁶⁸ Australasian Institute of Judicial Administration, *Judicial Gender Statistics* (2020) (accessed 25 January 2021).

10.2 WOMEN AS OFFENDERS AND PRISONERS

Whilst this section of the Bench Book has a large volume of statistics, it has not been included in section 10.1 'Statistics'. That is because the section also incorporates information from research literature and case law, which is best understood in the context of the statistical information. As will be evident in sections 10.2.1 to 10.2.5:

- the types of offences most frequently resulting in convictions/ imprisonment varies by gender;
- the antecedents to offending vary between genders; and
- Aboriginal women are remarkably over-represented in the prison population of Western Australia.

10.2.1 Women as offenders

A New South Wales report on women as offenders found that:¹⁵⁶⁹

Compared to the international and particularly US research, the Australian evidence base is fairly thin. The literature was consistent in identifying a trifecta of factors that characterise women in corrections: mental illness/poor mental health; alcohol and substance dependency; and histories of early interpersonal victimisation, particularly child sexual abuse. Based on what is known about the long-term consequences of trauma, these three characteristics would seem to be interrelated. What is striking in the literature is not only the centrality of these three elements, but also how they are further connected to a range of other experiences. Whether they are Canadian, Scottish, British, American or Australian studies, the same profile and needs of female prisoners are identified. In no particular order these are:

- *histories of childhood victimisation, particularly sexual abuse;*
- *a background of state care;*
- *mental disorders such as borderline personality disorder (BPD), major depression, post-traumatic stress disorder (PTSD);*
- *intellectual and cognitive impairments;*
- *substance abuse and dependency;*
- *housing instability;*

¹⁵⁶⁹ Stathopoulos M & Quadara A, *Women as Offenders. Women as Victims. The Role of Corrections in Supporting Women with Histories of Sexual Abuse* (2014) (accessed 13 March 2019).

- *primary care for dependent children;*
- *low educational attainment;*
- *minimal employment histories compared to male prisoners; and*
- *subsequent victimisation as adolescents and adults such as sexual assault and family and domestic violence.*

In relation to the types of offences committed by women, the 2014 New South Wales report found that:¹⁵⁷⁰

The available research suggests women commit fewer and less serious crimes. Typically, drug offences, fraud and property theft are identified as 'women's offences'. At the same time, some statistical analyses suggest that the violent offending among women is increasing. The ABS overview of national trends found significant increases in robbery, theft, assault and homicide. For sentenced female prisoners in Australia, the most serious offence with the highest proportion has been illicit drugs, followed by acts intended to cause injury.

ABS data for Western Australia shows that between 2013-14 and 2017-18, the number of female offenders increased by 26.4%. However, the rate of female offending dropped between 2017-18 and 2018-19 for the first time since 2013, with a reduction in offending rate of 6.3%. There was a similar trend in male offending with increases each year between 2013-14 and 2017-18, and a 5.1% decrease between 2017-18 and 2018-19. Each year throughout the period from 2008-19, the main three categories of female offending have been acts intended to cause injury (17.3% of total female offending in 2018-19), theft (21.2%, 2018-19) and illicit drug offences (22.9%, 2018-19).¹⁵⁷¹

The ABS found that in 2018-19 in Western Australia:¹⁵⁷²

- Women accounted for approximately one in four of the individuals who are proven guilty across all levels of criminal courts.

¹⁵⁷⁰ Stathopoulos M and Quadara A, *Women as Offenders. Women as Victims. The Role of Corrections in Supporting Women with Histories of Sexual Abuse* (2014) (accessed 13 March 2019).

¹⁵⁷¹ ABS, *Recorded Crime – Offenders, 2018-2019* (Cat No 4519.0) (released 6 February 2020) (accessed 29 January 2021).

¹⁵⁷² ABS, *Criminal Courts, Australia, 2018-19* (Cat No 4513.0) (released 27 February 2020) Western Australia; Tables 36 to 40 (accessed 29 January 2021).

- Only 26.3% of the defendants whose matters were finalised across all of the criminal courts were female.
- Only 16% of defendants finalised in the higher courts (District and Supreme Courts) were women.

Note that a finalised defendant, for the purpose of the ABS surveys, means a person for whom all charges in a case have been formally completed so that they cease to be an item of work for the court. The majority (91%) of finalisations are in the Magistrates Court.¹⁵⁷³

10.2.2 Gender and sentencing outcomes

It has been observed that while there has been limited empirical research in Australia of disparities in sentencing outcomes for female and male offenders, it appears that female offenders fare better:¹⁵⁷⁴

Female offenders are less likely than male offenders to be prosecuted if detected, stand a greater chance of acquittal if charged, are more likely to be leniently sentenced if convicted and usually serve less time once imprisoned.

In *Broadbent v The State of Western Australia* [2016] WASCA 148, Buss JA (as his Honour then was) stated:¹⁵⁷⁵

There is no principle of law that requires or justifies disparity between co-offenders on account of their gender.

... A disparity in sentences between co-offenders in a particular case may be required or justified on account of relevant differences between the co-offenders and their role in the offending; for example, age, background, criminal history, general character and the part each played in the criminal conduct in question.

¹⁵⁷³ ABS, *Criminal Courts, Australia. 2018-19* (Cat No 4513.0) (released 27 February 2020) Summary – Defendants Finalised; Glossary (accessed 29 January 2021).

¹⁵⁷⁴ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2016) Section 7.1.5 (accessed 6 March 2019).

¹⁵⁷⁵ *Broadbent v The State of Western Australia* [2016] WASCA 148 [284], [289], [290].

... A difference in gender is not, of itself, a factor that requires or justifies disparity. Counsel for Ms Broadbent's argument based on her gender must be rejected. A lower minimum non-parole period for Ms Broadbent compared to Mr Young was not required or justified because of her gender, either of itself or in combination with any other factor or factors.

Aboriginal women are significantly over-represented in the justice system in comparison with non-Aboriginal women. A Western Australian study of the impact of gender and Aboriginality upon sentencing outcomes, finding that:¹⁵⁷⁶

... in contrast to non-Indigenous females, Indigenous women in the Western Australian higher courts are likely to receive lenient sentences when they appear before the court under like statistical circumstances (i.e. with similar current and past criminality) ... Consistent with our prior statistical analyses, a major finding of the current qualitative study is that the sentencing stories of Indigenous and non-Indigenous women differed in ways that may have mitigated sentence severity more substantially for Indigenous females.

Consistent with the focal concerns approach to sentencing, Indigeneity affected judicial assessments of women's blameworthiness, risk, and practical constraints and consequences. More specifically, our analysis of the sentencing transcripts showed that narratives of blameworthiness and risk around mental health, familial trauma, and substance abuse differed by Indigeneity. Employment participation and community ties (risk reduction factors) and expressions of remorse (which may mitigate blameworthiness) also varied between the Indigenous and non-Indigenous sentencing transcripts. Furthermore, Indigenous females were viewed differently in terms of social cost (i.e. practical constraints and consequences). However, there were few differences by Indigenous status for offence seriousness (blameworthiness), criminal history (risk), or familial ties (risk).

10.2.3 Women as prisoners

In 2014 the Inspector of Custodial Services reported that:¹⁵⁷⁷

¹⁵⁷⁶ Jeffries S and Bond CEW, *Gender, Indigeneity, and the Criminal Courts: A Narrative Exploration of Women's Sentencing in Western Australia* (2013) 23(1) *Women & Criminal Justice* 19.

¹⁵⁷⁷ Office of the Inspector of Custodial Services, *Female Prisons in Western Australia and the Greenough Women's Precinct* (2014) pages v-vi (accessed 27 February 2019).

Women still form a relatively small proportion of Western Australia's prison population but their numbers have grown quickly, and at a much faster rate than male numbers. At the time of writing, there were 486 women in prison, a staggering increase of 40% in five years (in July 2009 there were 350). The number of male prisoners has increased by 15% over the same period (from 4120 to 4748). Another way to represent the trends is that women currently comprise 9.3% of the prison population compared with 7.7% in July 2009.

Over the past 20 years, there has also been growing recognition in research and in official policy documents that women prisoners have different, and usually more complex, needs than men. Key differences include:

- *Legal status: 27% of women are on remand, compared with 22 % of men;*
- *Aboriginality: 52% of women are Aboriginal, compared with 38 % of men;*
- *Mental health: a serious issue amongst the prisoner population as a whole, especially women;*
- *Women still generally carry higher and more immediately pressing family responsibilities; and*
- *Women are commonly victims as well as offenders.*

The literature universally recognises that the majority of Australian women prisoners have a history of institutional intervention, with over 50% having been in State care as a child, and up to 25% having spent time in a youth detention facility.¹⁵⁷⁸ Various studies have found that between 12 and 50% of women prisoners have an intellectual and/or learning disability.¹⁵⁷⁹

ABS statistics for 30 June 2017 showed that:¹⁵⁸⁰

- Women constituted 9.5% of the total Western Australian prison population. This exceeded the national rate of 8.0%.

¹⁵⁷⁸ Debbie Kilroy, *Women in Prison in Australia* (Presentation to Current Issues in Sentencing Conference, National Judicial Council of Australia and the ANU College of Law, 6-7 February 2016, Canberra) page 12 (accessed 1 February 2021).

¹⁵⁷⁹ Debbie Kilroy, *Women in Prison in Australia* (Presentation to Current Issues in Sentencing Conference, National Judicial Council of Australia and the ANU College of Law, 6-7 February 2016, Canberra) page 12 (accessed 1 February 2021).

¹⁵⁸⁰ ABS, *Prisoners in Australia, 2017* (Cat No 4517.0) (2017) (accessed 6 November 2018).

- Between 2005 and 2017, the Western Australian female imprisonment rate had increased from 35.1 prisoners per 100,000 adult female population to 69 prisoners per 100,000. This exceeded the national 2017 rate of 34 prisoners per 100,000, and was the second highest in the country after the Northern Territory (125 per 100,000 adult female population).

On 20 September 2020, there were 685 adult women prisoners in Western Australia (10.4% of the total prison population). Of these, 47.0% were Aboriginal.¹⁵⁸¹ For comparison with pre-Covid-19 statistics, on 31 December 2019, there were 777 adult women prisoners in Western Australia (11.0% of the total prison population). Of these, 45.8% were Aboriginal.¹⁵⁸²

While there was an overall increase in the proportion of remand prisoners in Western Australia from 2009 to 2015 (from 15% to 25% of the prison population), the Inspector of Custodial Services reported that there was a disproportionate increase in the proportion of women remand prisoners, particularly Aboriginal women.¹⁵⁸³

The impact of the growth has not been even, and there are some disconcerting gender differences. In mid-2009, roughly equal proportions of men and women were on remand (15-17%). The situation has changed. At the time of writing, 29 % of women in prison are on remand, compared with around 24.5 % of men (Aboriginal and non-Aboriginal). The growth in the number of Aboriginal women on remand has been especially sharp and alarming (over 150%).

Refer to section 10.5 for more information on prison facilities for women in this State.

10.2.4 The Fines, Penalties and Infringement Notices Enforcement Amendment Act 2020

Until recently, fine default was an issue particularly impacting on women's imprisonment in Western Australia. The Inspector of Custodial Services reported in 2016 that fine defaulters tended to serve very short periods in custody (i.e. their 'turnover' was high but their stay was

¹⁵⁸¹ Department of Justice, *Corrective Services Reports: Adult Prisoners in Custody* (updated 4 January 2021) July-September 2020, pages 1 and 4 (1 February 2021).

¹⁵⁸² Department of Justice, *Corrective Services Reports: Adult Prisoners in Custody* (updated 4 January 2021) October- December, pages 1 and 4 (1 February 2021).

¹⁵⁸³ Office of the Inspector of Custodial Services, *Western Australia's Rapidly Increasing Remand Population* (15 December 2015) page 5 (accessed 1 February 2021).

short), with this 'churning in and out' being financially costly, socially undesirable, and risky and disruptive for prisons.¹⁵⁸⁴

Moreover, the Inspector reported that females constituted 22% of the fine defaulter population although they made up approximately only 15% of the total prison population. In particular Aboriginal people comprised 64% of female fine defaulters and only 38% of male final defaulters.¹⁵⁸⁵

Research in 2010-2012 in relation to Indigenous women's offending patterns in Western Australia, New South Wales and the Northern Territory had indicated that fines were much more commonly imposed in Western Australia than other jurisdictions.¹⁵⁸⁶

The *Fines, Penalties and Infringement Notices Enforcement Amendment Act 2020* was passed on 19 June 2020, to address the above issues. It was largely prompted by the 2014 death in custody of a 22 year old Aboriginal woman who had been imprisoned for three days for fine default. Under the amended legislation, community service is ordered for fine default, with imprisonment a last resort in limited circumstances and only to be ordered by a magistrate.

10.2.5 Most common offences resulting in imprisonment, by gender

Relatively few women are imprisoned in Australia (3,144 as at 30 June 2020) compared to men (37,908).¹⁵⁸⁷

ABS data shows that the most common offences/ charges for female prisoners (2017) were illicit drug offences (21%), acts intended to cause injury (20%) and unlawful entry with intent (10%). For male prisoners, the most common offences/ charges were acts intended to cause injury (23%), illicit drug offences (14%) and sexual assault (12%).¹⁵⁸⁸

¹⁵⁸⁴ Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australia Prison System* (2016) (accessed 18 August 2021).

¹⁵⁸⁵ Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australia Prison System* (2016) pages ii, v and 12 (accessed 13 March 2019).

¹⁵⁸⁶ MacGillivray P and Baldry E (Written for the Indigenous Justice Clearinghouse), *Australian Indigenous Women's Offending Patterns* (19 June 2015) (accessed 18 August 2016).

¹⁵⁸⁷ ABS, *Prisoners in Australia* (Cat No 4517.0) (3 December 2020) (accessed 1 February 2021).

¹⁵⁸⁸ ABS, *Prisoners in Australia, 2017* (Cat No 4517.0) (2017) (accessed 6 November 2018).

ABS data showed that between 30 June 2019 and 30 June 2020 the number of female prisoners decreased by 10.0% (for men was 4.0%). There was a 28% decrease in the number of thefts (for men it was 20%) and a 10% reduction in drug offences (for men it was 6%).¹⁵⁸⁹

10.3 SOME INFORMATION

10.3.1 Gender, gender inequality and gender bias

The statistics in section 10.1 and 10.2, while relatively general, demonstrate considerable gender inequality within Western Australia. Women tend to fare worse than men in relation to their employment status, income level, and in the nature of violence committed against them. Women tend to undertake more unpaid household work, childcare and other unpaid caring work.

While it is true that, statistically at least, women defendants appear to fare better than men in relation to criminal prosecutions (refer to section 10.2.2), it is argued that women generally fare poorly or unfairly in comparison to men in relation to court matters requiring a female (as opposed to male) perspective.

- Insufficient account is taken of the realities of the female experience of sexual assault and family and domestic violence, and women are frequently assessed from the male standpoint of what a 'reasonable man' would have done rather than what a 'reasonable woman' would have done in the circumstances.
- Women tend to receive a lesser share of financial assets in many forms of property division.
- Women's unpaid contribution to household work and childcare activities is often undervalued in relation to such matters as personal injury compensation and succession law, and in commercial contexts (for example, in disputes about signing guarantees).

¹⁵⁸⁹ ABS, *Prisoners in Australia* (Cat No 4517.0) (3 December 2020) (accessed 1 February 2021).

Not all women fare badly in comparison to men or feel discriminated against. However, the general existence of gender inequality or bias in our society means that, unless appropriate account is taken of potential gender bias in court proceedings, a woman may:

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

Refer to section 10.4 for additional information and practical guidance about ways of treating women to reduce the likelihood of these problems occurring.

10.3.2 Possible gender bias or a perception of gender bias, in relation to court proceedings

No judicial officer would consciously discriminate against a person on the basis of their gender. However, it is relatively easy to act unconsciously in a way that may cause offence to women generally or to a particular woman, or that is perceived as discriminatory or gender-biased.

Some examples of situations where gender bias could occur, or be perceived to occur, are:

- using language and terminology carelessly and/or inappropriately — that is, using language, statements or comments that create, or could create, a perception of gender bias;
- assessing a woman against how a man would have acted or felt in a situation;
- assessing a woman against how a 'normal' woman ought to behave;
- showing a lack of understanding of the nature of family and domestic violence or sexual assault, or of the impact of such violence on women (refer to chapter 13 for more information);
- showing a lack of understanding of the value of household work and child care activities;

- not taking appropriate account of the statistical differences between men and women in relation to such matters as income level, household work and childcare activities;
or
- implying that a woman makes a less credible witness than a man.

These problems are likely to be compounded if the woman also happens to be Aboriginal, from another culturally or linguistically diverse background, older, lesbian, bisexual, or trans; if she has disability, if she practises a minority religion; if she is a young person; or representing herself. Please refer to the appropriate chapter(s) of this Bench Book for further information.

10.3.3 Sexual harassment¹⁵⁹⁰

Sexual harassment is unwelcome sexual behaviour that makes — or that would reasonably be expected to make — a woman feel offended, humiliated or intimidated. It is unlawful in certain areas of public life. Sexual harassment is a form of gender-based violence.

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

In the legal profession, it has been reported that:

- 71% of the 242 of respondents to the Women Lawyers Association of New South Wales 2019 survey for the legal profession reported having been sexually harassed, but only 18% had made a formal complaint.¹⁵⁹¹

¹⁵⁹⁰ This section is drawn directly from Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2018, chapter 7 updated September 2020) Section 7 [7.3] (accessed 1 February 2021)

¹⁵⁹¹ Knowle L, *Sexual Harassment of Women Rife in Australian Legal Profession, Survey Finds* (ABC news, 8 March 2019 (accessed 1 February 2021).

- In 2018, 47% of Australian female respondents to the International Bar Association survey reported experiencing sexual harassment at work.¹⁵⁹²

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; and/or
- sexual harassment involving the use of technology, including sexually explicit emails, text or social media, indecent phone calls, repeated or inappropriate advances online, or sharing or threatening to share intimate images or film without consent.

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 (e.g. customers, clients or patient); or
- are organised according to a hierarchical structure.

¹⁵⁹² International Bar Association, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (2019) pages 51 and 52 (accessed 1 February 2021).

10.3.3.1 Sexual harassment and the judiciary¹⁵⁹³

Specific data on complaints about judicial sexual harassment is unavailable. As workplace sexual harassment is enabled by power disparities, reporting of sexual harassment by judicial officers is arguably under-reported and if reported, not actioned for fear of repercussions for a complainant.¹⁵⁹⁴

The American Judges Association Court Review suggested in 2018 that:¹⁵⁹⁵

... 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.

Factors that were cited as contributing to this issue included:¹⁵⁹⁶

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

In the wake of allegations against a former High Court Justice made public in June 2020, the Chief Justice of Australia, the Honourable Susan Kiefel AC, stated that:¹⁵⁹⁷

¹⁵⁹³ With the exception of the final paragraph, this section has been drawn from the Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2018) Section 7 [7.4] (accessed 1 February 2021).

¹⁵⁹⁴ Nomchong K, *Sexual Harassment and the Judiciary* (2020) 32 *JOB* 55, 56.

¹⁵⁹⁵ Santos JA, *When Justice Behaves Unjustly: Addressing Sexual Harassment in the Judiciary* (2018) 54 *Ct Rev* 156, 157.

¹⁵⁹⁶ Santos JA, *When Justice Behaves Unjustly: Addressing Sexual Harassment in the Judiciary* (2018) 54 *Ct Rev* 156, 157.

¹⁵⁹⁷ Hon Chief Justice Susan Keifel AC, *Media Statement* (3 July 2020) (accessed 2 February 2021).

... [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.

In June 2020, the Heads of Jurisdiction of Western Australia also made a joint statement stating that:¹⁵⁹⁸

Sexual harassment in any workplace is unlawful and wholly unacceptable. It is also contrary to the demands of justice that judicial officers are sworn to uphold. For that reason any form of sexual harassment by a judicial officer is not only reprehensible, but a breach of the public trust.

10.4 PRACTICAL CONSIDERATIONS

10.4.1 Modes of address

Points to consider:

- Note that many of the points which follow apply to female lawyers, jurors and expert witnesses, in addition to female witnesses, litigants or defendants.
- Check what title a woman prefers and then use the title she chooses — without making any negative comment or asking questions about her marital status — unless such questions are relevant to the matter(s) before the court.
- Do not assume the 'Ms' is interchangeable with 'Miss' or that either title means that a woman is not married.
- Address women using the same level of name as you address men in the court — for example, do not address women by their first names if you are addressing men as Mr X.

¹⁵⁹⁸ Public Notice (24 June 2020).

- Do not make any negative comment about a married woman's choice to use — or not use — her husband's name, or to use a hyphenated family name consisting of both her original family name and her husband's family name, or to use a form of name reflecting her status as her father's daughter, as a wife or as a mother, in accordance with different cultural practices.

For more information on culturally and linguistically diverse people refer also to chapter 7.

10.4.2 Language and terminology¹⁵⁹⁹

Points to consider:

- Use of acceptable terminology helps to maintain the confidence of users and observers in the court system. There is rarely one rule that will be acceptable to everyone, however the following guidelines are generally representative. Many of these points below apply to terminology used in relation to female lawyers, jurors and expert witnesses, in addition to female witnesses, litigants or defendants:
- Wherever possible use gender neutral terminology such as 'chair' or 'chairperson', not 'chairman'; 'foreperson' not 'foreman' (in relation to jurors). This should extend to terminology used to describe an occupation — for example, use 'barperson' or 'bar attendant' rather than 'barmaid'; 'steward' rather than using 'stewardess'.
- Where referring to a yet unidentified person (such as another judge, doctor, social worker, etc.) use the term 'he or she' or 'they' for the pronoun. Do not always use 'he', and similarly, in female-dominated professions do not always use 'she'.
- Women should be referred to as 'women' and not 'ladies', unless in a context where the term 'ladies and gentlemen' is used. Some women of certain demographics (generally of an older generation) may consider 'ladies' more polite, but on the whole, women would find 'lady' patronising in a context where men are referred to as 'men'.

¹⁵⁹⁹ Judicial College (UK), *Equal Treatment Bench Book* (February 2021 revision) (accessed 7 April 2021).

- Adult women should not be referred to as 'girls'. Instead use 'women' or, where their age is on the borderline between child and adult, 'young women'.
- Where it is relevant to refer to age, user 'older woman' rather than 'old woman'.
- Avoid expressions which assume traditional patriarchal arrangements, e.g. 'The form must be signed by both the staff member and his wife' It would be more appropriate to say: 'The form must be signed by both partners/spouses'.
- Do not use a gender descriptor unless relevant to the matter(s) before the court — for example, 'pilot', not 'female pilot'.
- Do not comment on a woman's dress, particularly when you are making no such comments about any of the men in court — unless it is relevant to the matter(s) before the court.
- Do not refer to a woman by her physical appearance unless relevant to the matter(s) before the court. It is almost never acceptable to comment on a person's looks, appearance, fragrance, or whether he or she has a nice smile. In the United States, inappropriate references to a woman's physical appearance led to a successful appeal based upon denial of a fair trial.¹⁶⁰⁰
- Do not use, or allow others involved in court proceedings to use, any form of discriminatory language or assumptions, even if it may be meant as a joke. For example, do not allow it to be stated or implied by anyone involved in court proceedings that women tend to exaggerate (implying that their evidence is less credible); all women are nurturing; women like to shop more than men; women are gossips; men cannot control their sexual urges; it is a woman's job to look after the children or home; a woman's career is not as important as a man's; the women jurors in particular might like to finish early so they can shop/prepare food for their family; the men jurors in particular might like to finish early so that they can watch a particular game, race or program.

¹⁶⁰⁰ *State v Pace* (1994) 447 SE 2d 186.

- Treat every person as an individual. Do not make statements that imply that all persons of the same gender are the same or likely to act in the same way.
- Never assume or imply that what you consider to be the majority way of behaving and thinking for women is the standard by which any individual woman should be judged.
- Carefully explain any legal concept that sounds like it only includes men or change it so that it includes women. An example is the legal concept of the 'reasonable man'. Where appropriate, the term 'reasonable woman' or 'reasonable person' should be used, with any comparisons being to how a 'reasonable woman' would have behaved in view of the evidence pertaining to the circumstances. The Department of Communities has submitted that if you were to use the term 'reasonable person', there is still a high risk this may be unintentionally interpreted by jury members (particularly male jury members) as the default male position.¹⁶⁰¹

10.4.3 The impact of gender on any matter(s) before the court

10.4.3.1 General considerations

Points to consider:

- The court process must be free from stereotypical assumptions pertaining to gender.
- Stereotypes can undermine the credibility of a woman through assumptions relating to personal characteristics, moral character or reputation, perceived 'risk-taking behaviour' and assumptions about sexual assault scenarios, sexual assault reporting and post-assault behaviour.
- Do not judge, or appear to judge, a particular person by the way you or society thinks a person of that gender should, or ought to, behave. There is no right or wrong behaviour for women as opposed to men, only behaviour that is lawful/legal or unlawful/illegal for everyone.

¹⁶⁰¹ Submission from the Department of Communities (15 September 2020).

- Do not compare a woman's behaviour with the way a man 'would have' behaved. Women's and men's experiences and feelings and therefore actions or inactions in relation to similar situations might be (and often are) different for very valid reasons — for example, unequal income levels, unequal strength or unequal power. It is important to try to understand the reality, and then to demonstrate an understanding of the reality from a woman's (and the particular woman's) perspective.
- For similar reasons, be careful about applying and/or using the concept of the 'reasonable man' — it is potentially inaccurate or unfair when applied to a woman. The terms 'reasonable woman' or 'reasonable person' would be more appropriate. However, note that the Department of Communities has submitted that that term 'reasonable person' could be unintentionally interpreted by jurors (particularly male jurors) as the default male person.¹⁶⁰²
- Has the fact of being a woman as opposed to a man been an influencing factor in the matter(s) before the court? If so, where possible, you may need to take appropriate account of these influences. For example:
 - You may need to decide whether the law allows you to take account of any such influences and, then, as necessary and at the appropriate time in the proceedings, to ensure that justice is done and seen to be done, explain why any such influences can/should be taken into account, or cannot/should not be taken into account. You may need to explain this in any direction you make to the jury during the proceedings or before they retire, and in your decision-making or sentencing.
 - As prescribed by law,¹⁶⁰³ you may need to intervene if it appears that any cross-examination is stereotyping and/or alluding to a woman's gender in an unduly annoying, harassing, intimidating, offensive, or oppressive way.

¹⁶⁰² Submission from the Department of Communities (15 September 2020).

¹⁶⁰³ Evidence Act 1906 (WA) s 26 (accessed 1 February 2021).

10.4.3.2 *Sexual assault and other violence against women*

It is important to understand the fear, shame and trauma that a woman may feel as a result of a sexual assault. Often it is distressing to be in the presence of the offender, who is usually a person known to the victim. There is also the strong fear of retribution after proceedings have ended.

Similar issues relating to shame, trauma, the distress of being in the presence of the offender and fear of retribution also arise in relation to family and domestic violence.

Family, domestic and sexual violence is dealt with in detail in Chapter 13.

Points to consider:

- An important message for women is that family and domestic violence is not their fault and that violence and the abuse of women is not acceptable in our society. Hearing these messages from a person in authority, such as a judicial officer, can be one of the most powerful interventions that can be provided.
- Develop and demonstrate an understanding of the nature of family and domestic violence and its impact on women.
- Develop and demonstrate an understanding of the nature of sexual assault and its impact on women.
- Do not repeat in court any of the unfounded assumptions and myths about family and domestic violence or sexual assault. Instead, cite the facts based on accurate statistics and research — for example:

- It is not easy for a woman to leave a violent man — it takes considerable emotional and practical strength 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 or further violence from their partner. There are often insufficient support and protection structures to enable a woman to either leave or leave safely. This can be even more difficult for Aboriginal women, women from other culturally and linguistically diverse backgrounds, women with disabilities and women in rural and remote locations. Statistically, the most dangerous time for a woman in a violent relationship is at separation or after leaving the relationship.
- When a woman says 'no' she does not mean 'yes' — she means 'no', in much the same way as a man means 'no' when he says 'no' to unwanted sexual advances from a woman or a man.
- It is no more acceptable for a man to resort to sexual assault or violence than it is for a woman to do so.
- Women may be sexually assaulted by a friend. Of all women who are sexually assaulted, most are assaulted by someone they know, not a stranger.
- Women do not ask to be assaulted or raped. It is no more acceptable for a man to assault a woman because he felt she was acting, behaving or dressing in a manner that was 'asking for it', than it is for a man or woman to rob a man wearing expensive clothes or an expensive watch on a date or a night out.¹⁶⁰⁴
- Women who are sexually assaulted react in many different ways — there is no standard way to react or behave.
- Lesbian, bisexual and trans-women may also be violently and sexually abused by their partners.

Refer also to chapter 12A for more information in relation to abuse of lesbian and bisexual women; and chapter 12B of this Bench Book for more information in relation to abuse of trans-women.

¹⁶⁰⁴ Submission from the Department of Communities (15 September 2020).

- Do not dismiss or undervalue the impact of family, domestic violence or sexual violence on a woman. In this context, note that prostitutes (male or female) are entitled to the same protection of the law as any other citizen.¹⁶⁰⁵
- Be aware of the widespread criticism in relation to the use of the defence of provocation - it is no more acceptable for a man to hit his wife, partner or lover (or partner's lover) than to hit a work colleague.

10.4.3.3 Evidentiary issues

Consider the difficulties for a woman in presenting evidence about family or domestic violence or sexual assault in our adversarial system — there are legislative provisions available which may address these difficulties and which should be considered.

Chapter 13 (particularly section 13.9.5) contains information regarding evidentiary issues that you should consider if women are victims of family, domestic and sexual violence.

Chapter 5 (particularly section 5.4) contains information in relation to the special measures available if the witness is a child or young person.

Points to consider:

- There are restrictions on unrepresented persons directly cross-examining witnesses who are children, complainants in serious sexual assault proceedings or certain witnesses in restraining order matters.¹⁶⁰⁶
- You have a discretion to allow the cross-examination by an unrepresented accused of any witness to be by video-link, while screened, or without questions being put directly — having regard to the nature of the charge, the wishes of the witness, and the availability of any necessary facilities or equipment.¹⁶⁰⁷

¹⁶⁰⁵ *Michael v The State of Western Australia* [2008] WASCA 66 [98], [240], [244].

¹⁶⁰⁶ *Evidence Act 1906 (WA)* s 106G; *Restraining Orders Act 1997 (WA)* ss 44C, 53D (accessed 1 February 2021).

¹⁶⁰⁷ *Evidence Act 1906 (WA)* s 25A (accessed 1 February 2021).

- If you declare a person to be a 'special witness' you can allow them to be accompanied by a support person and/or communicator in any court proceedings.¹⁶⁰⁸ You can declare a woman to be a special witness if she is likely to suffer severe emotional trauma or to be so intimidated or distressed as to be unable to give evidence satisfactorily because of her relationship to any party to the proceeding, the nature of the subject-matter of the evidence or for any other relevant reason.¹⁶⁰⁹
- In the prosecution of serious sexual offences, a complainant must be declared to be a special witness unless you are satisfied the witness would otherwise be able to give evidence satisfactorily and that person does not wish to be a special witness.¹⁶¹⁰

For more information on evidentiary issues associated with sexual assault, refer to chapter 13 (particularly section 13.9.5) of this Bench Book.

- If you have declared a woman to be a special witness in criminal proceedings you can allow her to give evidence by video-link or while screened.¹⁶¹¹
- You can also, on application by a party or on your own motion, allow a woman, whom you have declared to be a special witness, to have the whole of her evidence in any criminal matter taken at a special hearing and visually recorded.¹⁶¹²
- Under section 121 the *Evidence Act 1906* (WA) you, on your own initiative or on the application of any party to the proceedings, may allow evidence to be taken by video-link from outside the place where the court is sitting — although you should not do so if satisfied that this is not in the interests of justice.
- You should consider discussing with the parties and/or their legal representatives the use of any special measures referred to above — irrespective of whether a woman has been declared a special witness — if to do so would be in the interests of justice.

¹⁶⁰⁸ *Evidence Act 1906* (WA) s 106R(4) (accessed 1 February 2021).

¹⁶⁰⁹ *Evidence Act 1906* (WA) s 106R(3) (accessed 1 February 2021).

¹⁶¹⁰ *Evidence Act 1906* (WA) s 106R(3a) (accessed 1 February 2021).

¹⁶¹¹ *Evidence Act 1906* (WA) s 106R(3) (accessed 1 February 2021).

¹⁶¹² *Evidence Act 1906* (WA) s 106R(4) (accessed 1 February 2021).

- Instruct the jury that declaring a witness to be a special witness, or using alternative means for a witness to present evidence, are routine practices of the court and these measures should not affect how they consider the evidence. You must intervene if the accused or their counsel tries to suggest that evidence presented in this way should be given less weight.

10.4.4 Points to consider in relation to particular groups of women

Women from different backgrounds may be affected by issues or factors specific to that background. It is important for judicial officers to be aware of those factors when dealing with these women.

10.4.4.1 Aboriginal women

Aboriginal women are over-represented in relation to almost all of the social, economic and health disadvantages faced by women in Western Australia, in particular in relation to being victims of family and domestic violence.

Refer also to chapter 13 (section 13.5) of this Bench Book for more information on family, domestic and sexual violence in relation to Aboriginal women.

One of the submissions received in relation to the first edition of this Bench Book attached an article which highlighted discrimination within the criminal justice system against Aboriginal women and girls in cases of sexual assault:¹⁶¹³

A fundamental principle of our legal system is that all who come before it are equal and entitled to its equal protection, but the discriminatory legal recourse offered to Aboriginal rape victims undermines and belittles this important human rights principle.

¹⁶¹³ McGlade H, *Aboriginal Women, Girls and Sexual Assault* (2006) 12 ACSSA Newsletter 6, 10 (accessed 13 March 2019).

Reference was made to the Northern Territory cases of *Lane* (1980), *Jackie Pascoe Jamilmira* (2002) and its appeal in *Hales v Jamilmira* [2003] NTCA 9; (2003) 13 NTLR 14, and *The Queen v GJ* [2005] NTCCA 20; (2005) 16 NTLR 230 as examples where such discrimination has occurred. In these cases, it was argued that the courts had given more weight to evidence that physical and sexual abuse are tolerated in situations of arranged marriage under traditional Aboriginal law than to evidence from the victims regarding the physical abuse they suffered. Sentencing was also said to have reflected this attitude.¹⁶¹⁴ Moreover, in the case of *Jackie Pascoe Jamilmira* where charges of rape had been reduced by police to a charge of 'unlawful intercourse with a minor', it was argued that the same reasoning, giving less weight to the victim's evidence, was followed.

The article highlights the tensions between the *Racial Discrimination Act 1975* (Cth) and the *Sexual Discrimination Act 1984* (Cth). The point is made that these cases should be contrasted to the decision of the NSW Court of Criminal Appeal in *R v MAK; R v MSK* [2005] NSWCCA 98,¹⁶¹⁵ where the argument that sexual assault was perceived differently in Australia and Pakistan was refused as a defence.¹⁶¹⁶

One of the difficulties in these cases was that the focus of Aboriginal and Torres Strait Islander legal services' resources was upon the representation of defendants, who are predominantly men, with the corollary that Aboriginal women's interests may not be sufficiently represented or acknowledged in the legal system.¹⁶¹⁷ One response to that problem was the establishment of Family Violence Prevention Legal Services (FVPLSs) throughout Australia in 2012, to provide specialist, culturally safe legal services and supports to Aboriginal and Torres Strait Islander victim/survivors of family violence. There are FVPLSs in Western Australia including the Aboriginal Family Law Service Western Australia and the Southern Aboriginal Corporation Family Violence Prevention Legal Service.

For more information on the Family Violence Prevention Legal Service Units and their contact details, refer to chapter 13 (section 13.10) of this Bench Book.

¹⁶¹⁴ Although it was also noted that sentences were progressively increasing to reflect the seriousness of the crime.

¹⁶¹⁵ *R v MAK; R v MSK* [2005] NSWCCA 98.

¹⁶¹⁶ McGlade H, *Aboriginal Women, Girls and Sexual Assault* (2006) *12 ACSSA Newsletter* 6 (accessed 13 March 2019).

¹⁶¹⁷ McGlade H, *Aboriginal Women, Girls and Sexual Assault* (2006) *12 ACSSA Newsletter* 6 (accessed 13 March 2019).

It is important for judges and magistrates to be aware of this issue as it develops in the law, and always to consider women's rights equally before the court, no matter what their cultural background. This is consistent with Australia's international obligations under the United Nations *Convention on the Elimination of All Forms of Discrimination against Women* (1979).

In a 2016 publication on sentencing for domestic violence, the Judicial Commission of New South Wales noted:¹⁶¹⁸

Domestic violence has proved difficult to eradicate. It is regarded as endemic, problematic and entrenched... The existence of a domestic relationship between an offender and the victim does not render an offence of a lesser criminality. Particular significance must be attributed to general and specific deterrence, denunciation and protection of the community. The High Court has made clear that there is an obligation on the court to vindicate the rights and the dignity of each victim of violence.

The reference to the High Court relates to *Munda v Western Australia* [2013] HCA 38; (2013) 249 CLR 600, in which it acknowledged that general deterrence may have limited utility where a violent offence is not pre-meditated and in communities with widespread disadvantage. However, the High Court emphasised that the criminal law is not limited to the utilitarian value of general deterrence but includes:¹⁶¹⁹

[t]he long-standing obligation of the state to vindicate the dignity of each victim of violence, to express the community's disapproval of that offending, and to afford such protection as can be afforded by the state to the vulnerable against repetition of violence.

Further discussion of the issues concerning recognition of customary law and sentencing can be found in the *Aboriginal Benchbook for Western Australia Courts*.¹⁶²⁰

Points to consider - Aboriginal women:

- There are several issues that particularly affect Aboriginal women:

¹⁶¹⁸ Judicial Commission of New South Wales, *Sentencing for Domestic Violence* (2016) (accessed 13 March 2019).

¹⁶¹⁹ *Munda v Western Australia* [2013] HCA 38; (2013) 249 CLR 600 at [54].

¹⁶²⁰ Fryer-Smith S, *Aboriginal Benchbook for Western Australia Courts* (2nd ed) (2008) (accessed 1 February 2021).

- Be sensitive towards issues of sexuality. It may be a taboo subject and may connote 'shame'.
- Some women may hide physical injuries due to feelings of shame.
- There may be community repercussions from the legal process for the woman, her family and children.
- Be aware that leaving a violent relationship is especially problematic for Aboriginal women as they also may fear reprisal from extended family members.
- Do not make the assumption that all Aboriginal people will necessarily want access to Aboriginal services.

The *Aboriginal Benchbook for Western Australia Courts* contains further information.¹⁶²¹

10.4.4.2 Women from culturally and linguistically diverse backgrounds

The needs of women from culturally and linguistically diverse backgrounds, including refugees, may be influenced by cultural and religious beliefs, level of education, length of residence in Australia, level of English fluency, family and social networks and economic dependence.

Points to consider – women from culturally and linguistically diverse backgrounds:

- Some issues particular to women from culturally and linguistically diverse backgrounds may include:
 - more limitations on access to independent income;
 - unfamiliarity with the English language and limited access to interpreters, which may reduce access to information and support services; and
 - increased levels of social isolation.

The additional challenges that may confront women from culturally and linguistically diverse backgrounds in the context of family and domestic violence are discussed in chapter 13 (particularly sections 13.2.3 and 13.6.4) of this Bench Book.

¹⁶²¹ Fryer-Smith S, *Aboriginal Benchbook for Western Australia Courts* (2nd ed) (2008) (accessed 1 February 2021).

Please also refer to chapter 7 of this Bench Book for further information on culturally and linguistically diverse people generally.

10.4.4.3 Women with disabilities

In addition to the other barriers affecting people with disabilities, women with disabilities are particularly affected by violence and sexual assault.

Points to consider – women with disabilities:

- While there is a lack of Australian research on the extent and nature of family and domestic violence against women with disabilities, overseas research in recent years has shown that women with physical disabilities are at similar or greater risk of abuse as women who do not have disabilities.¹⁶²²
- In most cases the perpetrator is known to the woman or is a family member. The woman may even be reliant on the perpetrator for care and support. Women with disabilities may be living in residential facilities or at home, isolated and dependent on others, making it difficult for them to respond to unwanted kissing or touching.
- Threats of being sent to an institution, control of finances and a lack of legal capacity to act on their own behalf can make women with disabilities particularly vulnerable; these are also considered forms of family and domestic abuse.

Please refer to chapter 4 of this Bench Book on people with disabilities and chapter 13 (particularly section 13.6.3) on family, domestic and sexual violence, for further information.

10.4.4.4 Women from rural or remote areas

Women in rural and remote areas may face particular issues in relation to family and domestic violence and sexual assault.

Points to consider – women from remote and rural areas:

¹⁶²² Frohmader C, *Fact Sheet: Violence against Women with Disabilities*, Australian Civil Society Delegation to the 53rd Session of the Committee against Torture, Geneva (2014) (accessed 17 August 2016).

- Social and physical isolation reduces access to information and support services. For example, access to police services may be hampered by social relations between police officers and the alleged victim or perpetrator of criminal offences.
- Guns are more accessible in rural areas.
- Isolation may increase self-harming behaviours.
- Local communities may have conservative attitudes towards women.
- Be aware of the extended family violence issues and the particular difficulties for some Aboriginal women to leave their community.

For further information please refer to chapter 9 on rural and remote Western Australia, chapter 13 on family, domestic and sexual violence (particularly 13.6.1) and/or chapter 11 of this Bench Book on Aboriginal people.

10.4.4.5 Women in same-sex relationships

In addition to the disadvantages faced by people in same-sex relationships, women in same-sex relationships can face the same issues of power and control with regard to family and domestic violence as affect heterosexual relationships.

Points to consider – women in same-sex relationships

- Threats of 'outing' or publicising a person's sexuality can be a form of abuse in same-sex relationships. Lesbians may face severe discrimination and may suffer the loss of important close relationships if their sexuality is made public.
- People in same-sex relationships may face isolation within the community.

Please refer to chapter 12A of this Bench Book on diverse sexuality, sex and gender for further information.

10.4.4.6 *Pregnant women, new mothers and breastfeeding women*¹⁶²³

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.

A woman who is heavily pregnant or has just given birth should not be expected to attend a court or tribunal unless she feels able to do so. Although every woman is different, this is likely to apply at least to the month before the birth and at least two months after the birth. This period would be longer if there were complications at birth. Even a telephone hearing may be too difficult if the woman is looking after the baby on her own. This may mean that a hearing has to be adjourned.

Breaks should be allowed for breastfeeding, having checked with the mother as to the best timing.

10.4.4.7 *Timing of proceedings, breaks and adjournments*

Points to consider:

- Women tend to be responsible for a predominant amount of unpaid childcare.
- Women also tend to be the main carers for other relatives more frequently than men — such as those with disabilities and those who are elderly.
- Given the lack of childcare facilities in courts and respite care 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, to allow a witness or juror to check that any necessary care arrangements are in place).
- Note that a woman may need adjournments to breastfeed her child or to express milk.

¹⁶²³ The information in this section is from Judicial College (UK), *Equal Treatment Bench Book* (2018) (accessed 7 April 2021).

10.4.5 Directions to the jury

Points to consider

- It is important that you ensure that the jury does not allow any stereotyped or false assumptions about women, family and domestic violence, sexual assault or the manner by which a particular woman's evidence was presented to unfairly influence their judgement. You should raise any such points with the parties' legal representatives first.
- For example, you may need to provide specific guidance as follows:
 - Caution jurors against making any false assumptions about the credibility of female witnesses as opposed to male witnesses.
 - Explain that they must try to avoid making stereotyped or false assumptions — about women's behaviour generally, a particular woman's behaviour, or, if relevant, about the nature and impact of either family or domestic violence or sexual assault. Instead they must carefully consider the particular evidence presented.
 - If appropriate, explain what needs to be taken into account in relation to long-term abuse of a woman by her partner and the defences of duress, provocation and/or self-defence.

Refer to chapter 13 of this Bench Book (particularly 13.9.6) for information about long-term or repeated abuse, assaults and threats as a contributory factor to family and domestic violence.

- If appropriate, explain that jurors must not make misplaced comparisons with how a man would have behaved — and that, instead, they should make any such comparisons to how a 'reasonable woman' would have behaved in light of what they have been told about the particular circumstances.
- Remind jurors of any directions you made earlier in the proceedings in relation to how they must treat evidence that was presented in any alternative manner.

Refer also to section 10.4.3.3 of this chapter in relation to directions about evidentiary issues.

10.4.6 Decisions and sentencing remarks

Your decisions and sentencing remarks must be fair and non-discriminatory to any woman affected by or referred to in your decisions and sentencing remarks.

Points to consider:

- In order to ensure that any woman referred to or specifically affected by your decisions and sentencing remarks considers those to be fair and non-discriminatory, you may need to give consideration to (and indeed specifically allude to) the points that have been raised in the sections 10.4.3 and 10.4.4 that are relevant to the particular case.
- If a witness is not personally capable of giving a victim impact statement for any reason, consider whether it is appropriate for someone else to do so on the victim's behalf.¹⁶²⁴
- Consider whether to quote from a victim impact statement in court.¹⁶²⁵
- Bear in mind that:
 - Women tend to have lower income levels and higher caring commitments than men — so a specific level of fine for a woman may mean considerably more than the same level of fine for a man.
 - Women may find community service orders harder to comply with than men, given their generally greater proportion of household work and childcare activities — consideration may need to be given to the hours to be served and the location in which the order is to be served.
 - It is important not to undervalue women's unpaid household duties and childcare activities in relation to such matters as personal injury compensation and property division.
 - It is important to ensure that the financial as well as the non-financial assets of male and female partners are dealt with fairly in relation to all forms of property division.

¹⁶²⁴ *Sentencing Act 1995 (WA)* s 24(2) (accessed 2 February 2021).

¹⁶²⁵ See Part 3, Division 4 of the *Sentencing Act 1995 (WA)*. Note that a court may make a written victim impact statement available to the prosecutor and to the offender, on such conditions as it thinks fit (accessed 2 February 2021).

- While the children of male prisoners are usually cared for by their female partner, research shows that the children of female prisoners are frequently cared for by temporary carers — this impacts much more negatively on their children.
- Note that female offenders are less likely than male offenders to be convicted of violent crimes, so it may be appropriate (depending on the nature of the offence) to consider imposing a non-custodial sentence or possibly home or periodic detention for a woman who is the primary child carer.
- On the other hand, it is also important not to be paternalistic and, for example, give a woman a more favourable sentence than you would give a man in materially similar circumstances.

10.5 PRISON FACILITIES FOR WOMEN

Western Australia has three custodial centres for women.

Bandyup Women's Prison is situated in Guildford. It is the only female prison in Western Australia that caters for all security classifications. The stated capacity as at 21 October 2015 was 394. Bandyup holds women on remand who are awaiting court appearances, assesses newly-sentenced prisoners and manages women who are serving their sentences. The inclusion of a mother and baby unit means that babies up to the age of 12 months can live with their mothers, if it is decided it is in the child's best interests. Bandyup provides prisoners with work and other prison-based opportunities and activities, including self-development and therapeutic programs.¹⁶²⁶

¹⁶²⁶ Department of Justice, *Bandyup Women's Prison* (updated 11 August 2021) (accessed 19 August 2021).

Boronia Pre-Release Centre for Women is situated in Bentley. The stated capacity as at 21 October 2015 was 95. Boronia is a minimum-security facility which manages female prisoners and their children in a community-style setting. Boronia prepares women for re-entry into the community by offering meaningful rehabilitation activities and work placements. These are designed to address the unique needs of women prisoners and provide them with practical skills. Women can enrol in traineeships through Boronia's hospitality and catering, horticulture, retail operations, asset management and retail supervision programs. Women may also take part in valuable work in the local community for businesses and not-for-profit organisations.¹⁶²⁷

Melaleuca Women's Prison, which is situated in Canning Vale, opened in December 2016. It has a total capacity of 254. It was established to address the stress and overcrowding at Bandyup, which had been the subject of particular public commentary, including by the Inspector of Custodial Service in 2014.¹⁶²⁸

Melaleuca is owned by the Department of Corrective Services and was operated by a private service provider until 4 April 2020, when it returned to public operations. The services at Melaleuca have been developed to meet the specific needs of female offenders. They are based on the philosophy that any contact with the corrective services system is an opportunity to link women with support that will strengthen their capacity to live stable and productive lives and reduce their likelihood of reoffending.¹⁶²⁹

Women may also be incarcerated at Broome Regional Prison, Eastern Goldfields Regional Prison, Greenough Regional Prison and West Kimberley Regional Prison.

- **Broome Regional Prison** has capacity to manage a small number of female prisoners of all security ratings, from across the Kimberley region.¹⁶³⁰

¹⁶²⁷ Department of Justice, *Boronia Women's Prison* (updated 11 August 2021) (accessed 19 August 2021).

¹⁶²⁸ Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Bandyup Women's Prison* (2014) (accessed 1 February 2021).

¹⁶²⁹ Department of Justice, *Melaleuca Women's Prison* (last updated 11 August 2021) (accessed 19 August 2021).

¹⁶³⁰ Department of Justice, *Broome Regional Prison* (last updated 11 August 2021) (accessed 19 August 2021).

- **Eastern Goldfields Regional Prison** is an integrated minimum-security facility for men and women. It has a capacity to manage higher-security female prisoners for a short term to allow visits or court appearances.¹⁶³¹
- **Greenough Regional Prison** manages prisoners from throughout the Midwest region, extending from Exmouth in the north to Moora in the south, and east as far as Wiluna. It manages up to 69 female prisoners.¹⁶³²
- **West Kimberley Regional Prison** was opened on 1 November 2012. Located south of the Gibb River Road and the Derby Highway intersection, the prison offers many firsts across Australia, with a design and operating philosophy premised upon Aboriginal cultures and values as far as is possible. Its philosophy includes recognition and acceptance of cultural, kinship, family and community responsibilities as well as spiritual connection to land. West Kimberley Regional Prison has capacity to house 30 female prisoners in self-care units in groups of 6 to 7 prisoners. In keeping with the prison philosophy, the houses are grouped so that prisoners can be located according to family ties or language, as well as security rating.¹⁶³³

All young people aged between 10 and 17 years in the state are detained at **Banksia Hill Detention Centre**.

10.6 FURTHER INFORMATION OR HELP

Further information about women's services and rights can be found at:

Women's Health and Family Services

Women's Health and Family Services is a not for profit organisation that specialises in women's health issues, which has operated since 1977. It provides a range of services which include: medical, counselling, mental health, drug and alcohol support, domestic violence, community workshops and professional training. Creche facilities and interpreting services are available.

¹⁶³¹ Department of Justice, *Eastern Goldfields Regional Prison* (last updated 11 August 2021) (accessed 19 August 2021).

¹⁶³² Department of Justice, *Greenough Regional Prison* (last updated 11 August 2021) (accessed 19 August 2021).

¹⁶³³ Department of Justice, *West Kimberley Regional Prison* (last updated 11 August 2021) (accessed 19 August 2021).

Women's Information Service

The Women's Information Service offers free, confidential information for women throughout Western Australia. A free telephone service operates from 9.00am to 4.00pm on weekdays. It provides information and referrals about issues such as health, finances, legal matters, counselling and domestic violence.

Women's Services Directory

The Women's Services Directory provides the contact details of organisations throughout Western Australia that assist women, in the areas of:

- advice and support;
- grants and funding;
- legislation and compliance; and
- community initiatives.

Women's Legal Service WA

Women's Legal Service WA is a community legal centre which provides legal information (via client services officers) and legal advice appointments to women experiencing disadvantage in the main practice areas of family law (children's issues, divorce applications and some property settlement matters), family violence, care and protection and criminal injuries compensation.

Legal Aid Western Australia

Legal Aid Western Australia is the largest provider of legal aid services in Western Australia, with around 300 lawyers and support staff in nine offices covering Perth and regional Western Australia.

Please refer also to chapter 13 (section 13.10) of this Bench Book for information on services available for women who have been victims of family, domestic and/or sexual violence.

10.7 FURTHER READING

Australasian Institute of Judicial Administration (AIJA), *Judicial Gender Statistics* (accessed 2 February 2021)

Australian Bureau of Statistics (ABS), *Criminal Courts, Australia* (Cat No 4513.0) (accessed 2 February 2021)

ABS, *Gender Indicators, Australia* (Cat No 4125.0) (accessed 2 February 2021)

ABS, *Personal Safety, Australia* (Cat No 4906.0) (accessed 2 February 2021)

ABS, *Prisoners in Australia* (Cat No 4517.0) (accessed 2 February 2021)

Australian Institute of Criminology, *Australian Crime Statistics* (2016) (accessed 2 February 2021)

Cussen T and Bryant W, *Domestic/Family Homicide in Australia* (Research in Practice No 38, May 2015) (accessed 2 February 2021)

Department of Communities, *Women's Report Card* (21 January 2021) (accessed 2 February 2021)

Department of Social Security, *The National Plan to Reduce Violence against Women and their Children 2010-2022* (accessed 2 February 2021)

Fryer-Smith S, *Aboriginal Benchbook for Western Australia Courts* (2nd ed, 2008) (accessed 2 February 2021)

Australian Human Rights Commission, *Gender Segregation in the Workplace and its Impact on Women's Economic Equality* (2017) (accessed 2 February 2021)

Judicial Commission of New South Wales, *Sentencing for Domestic Violence* (2016) (accessed 2 February 2021)

Judicial College (United Kingdom), *Equal Treatment Bench Book* (February 2018, amended March 2020) Part 6 - Gender (accessed 7 April 2021)

Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report (2007)* (accessed 2 February 2021)

Office of the Director of Public Prosecutions Comparative Sentencing Tables (accessed 12 July 2021)

Office of the Inspector of Custodial Services, *Annual Reports* (accessed 2 February 2021)

Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Bandyup Women's Prison* (2014) (accessed 2 February 2021)

Stathopoulos M and Quadara A, *Women as Offenders. Women as Victims. The Role of Corrections in Supporting Women with Histories of Sexual Abuse* (2014) (accessed 30 January 2020)

Women Lawyers of Western Australia, *20th Anniversary Review of the 1994 Chief Justice's Gender Bias Taskforce Report (2014)* (accessed 2 February 2021)

Workplace Gender Equality Agency, *Australia's Gender Pay Gap Statistics* (accessed 2 February 2021)

Workplace Gender Equality Agency, *About Workplace Gender Equality* (accessed 2 February 2021)

World Economic Forum, *Global Gender Gap Report 2017* (accessed 2 February 2021)

11 ABORIGINAL PEOPLE¹⁶³⁴

Many Aboriginal people coming into contact with the courts and the justice system experience a variety of complex social and economic disadvantages stemming from colonisation, dispossession and past government policies such as the Stolen Generations. These disadvantages include low income, substance abuse, homelessness, overcrowding, semi-itinerant lifestyles, family disruption, intergenerational trauma, poor education, unemployment, discrimination, racism, and physical and mental health problems. All of these factors impact on offending behaviour as well as creating barriers for Aboriginal people to successfully access and navigate the Australian legal system.¹⁶³⁵

There are features of the legal system that disproportionately affect Aboriginal people. For example mandatory sentencing or presumptive terms of imprisonment upon conviction have a disproportionate effect upon Aboriginal people.¹⁶³⁶ There is a shortage of culturally appropriate rehabilitation programs (particularly in regional and remote areas), Aboriginal-specific legal services are limited by resourcing and there is a lack of Aboriginal language interpreters.¹⁶³⁷ Aboriginal people are less likely to be granted bail than non-Aboriginal people and are significantly overrepresented amongst remand prisoners, as discussed by the Australian Law Reform Commission (2018).¹⁶³⁸

¹⁶³⁴ The term Aboriginal is used in this chapter to refer to a person of Aboriginal descent who identifies as Aboriginal and is accepted as such by the community in which he or she lives. Although it is acknowledged that the Indigenous inhabitants resident in Western Australia descend from many hundreds of distinct and diverse cultural groups, the term Aboriginal is used following the recommendation of the Aboriginal advisers for the *Aboriginal Benchbook for Western Australian Courts* (Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008) Note to Chapter 1).

¹⁶³⁵ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

¹⁶³⁶ Australian Law Reform Commission, *Pathway to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (9 January 2018) Recommendations (accessed 1 February 2021).

¹⁶³⁷ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

¹⁶³⁸ Australian Law Reform Commission, *Pathway to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (9 January 2018) Bail - Summary [5.2] (1 February 2021).

Irregular employment, previous convictions for often low-level offending, and a lack of secure accommodation can disadvantage some accused Aboriginal and Torres Strait Islander people when applying for bail. Furthermore, when bail is granted, cultural obligations to attend sorry business following a death in the family or community, or to take care of family may conflict with commonly issued bail conditions—such as curfews and exclusion orders—leading to breach of bail conditions, revocation of bail and subsequent imprisonment. This issue has continued despite existing laws and legal frameworks that enable some bail authorities to take cultural considerations into account.

Research was conducted in 2012-14 to identify and analyse the legal needs of Aboriginal communities in Western Australia in non-criminal areas of law.¹⁶³⁹ It found that there was a significant need amongst Aboriginal people for assistance with legal problems or disputes in a large range of areas (in order of priority):

- housing
- disputes with neighbours
- discrimination
- credit/debt
- Stolen Wages
- Stolen Generations
- consumer law issues
- child protection
- education
- social security/Centrelink
- wills.¹⁶⁴⁰

¹⁶³⁹ The Indigenous Legal Needs Project in Western Australia was part of a national project, and is reported by Allison F, Schwartz M and Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (Indigenous Legal Needs Project WA Report) (2014) page 10 (accessed 1 February 2021).

¹⁶⁴⁰ Allison F, Schwartz M and Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (Indigenous Legal Needs Project WA Report) (2014) pages 10, 11, 29 and 30 (accessed 1 February 2021).

That research also highlighted the complex interplay between civil, family and criminal law problems. It uncovered instances of lateral escalation, where an unresolved civil law issue created further civil law issues, leading to a complex of legal needs that are, at least in part, created through the failure to address initial legal concerns. For instance, eviction as a tenant or discrimination in accessing private tenancies can create overcrowding in Aboriginal households, which might then lead to child removal and neighbourhood disputes.¹⁶⁴¹

Further, when civil law issues are left unaddressed or unresolved, the situation sometimes deteriorates to also involve criminal law issues. This is evident in areas such as social security and discrimination, for example.¹⁶⁴² The opposite can also be the case: criminal law issues, including family violence, can give rise to civil law needs. An example is that where family conflict and violence is present removal of children might follow; and/or debt may be incurred as a result of damage caused to a tenant's home by that family violence.¹⁶⁴³

While the Indigenous Legal Needs Project highlighted the lack of access to the non-criminal areas of law by Aboriginal people in Western Australia, statistics also show that Aboriginal people continue to be grossly over-represented in many aspects of the criminal justice system, including Western Australia's prisons and juvenile detention facilities.¹⁶⁴⁴

In response to the grave concerns held by the judiciary about the continuing over-representation of Aboriginal people in Australian criminal justice systems, the Australasian Institute of Judicial Administration commissioned the development of an *Aboriginal Benchbook for Western Australian Courts* (the *Aboriginal Benchbook*). That was first published in 2002, and a second edition was published in 2008.¹⁶⁴⁵

¹⁶⁴¹ Allison F, Schwartz M and Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (Indigenous Legal Needs Project WA Report) (2014) page 10 (accessed 1 February 2021).

¹⁶⁴² Allison F, Schwartz M and Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (Indigenous Legal Needs Project WA Report) (2014) pages 16 and 34 (accessed 1 February 2021).

¹⁶⁴³ Allison F, Schwartz M and Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (Indigenous Legal Needs Project WA Report) (2014) page 16 (accessed 1 February 2021).

¹⁶⁴⁴ See section 11.2 below.

¹⁶⁴⁵ Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008) (accessed 1 February 2021).

When this Bench Book was first published in 2009 it did not seek to address the issues which, at that time, had been so comprehensively addressed in the revised *Aboriginal Benchbook*. Instead, the focus of the original chapter 11 was on references to further information and reading, which the Steering Committee hoped would be of assistance to judicial officers and complement the detailed material already available in the *Aboriginal Benchbook*.

Unfortunately, however, the second edition of the *Aboriginal Benchbook* can no longer be relied upon as a primary resource in this area given that it has not been updated since 2008. As an interim arrangement this revised edition of chapter 11 on Aboriginal people has been published following a limited review. In the longer term, resources permitting, it is intended that a committee of relevant stakeholders will be convened to oversee the development of a much more detailed chapter on Aboriginal people, corresponding to other chapters in this Bench Book.

The Steering Committee which had oversight of the development of the second edition of this Bench Book would like to acknowledge the submissions and contributions of the following organisations which have assisted in the preliminary revision of this chapter:

- Aboriginal Legal Service of Western Australia Limited (18 April 2017, 14 September 2020);
- Magistrate Catherine Crawford (21 April 2017);
- Department of Aboriginal Affairs (1 May 2017);
- Legal Aid Western Australia (16 May 2017); and
- The University of Notre Dame Australia (25 May 2017).¹⁶⁴⁶

¹⁶⁴⁶ The University of Notre Dame Australia kindly agreed for the material collated for the 'Nih, Wongee, Wallock, Una - Acknowledge, Listen, Talk and Share - A Cultural Dialogue with the WA Judiciary' program, which was run in 2016 in conjunction with the Nulungu Research Institute and funded by the National Judicial College of Australia, to augment the materials for this chapter of the Bench Book.

11.1 ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

The Royal Commission into Aboriginal Deaths in Custody found that it was critical that non-Aboriginal people change their attitudes towards Aboriginal people:¹⁶⁴⁷

Non-Aboriginal Australia must face the fact that for a very long time we have proceeded on the basis that Aboriginal people were inferior, were unable to make decisions affecting themselves, that we knew what was best for them, that we had to make decisions affecting them; it became second nature for us to have that attitude. It is very easy for us to adopt that attitude without even being aware that we are adopting it. This is true both for public officials and for private persons. It is an attitude which is very deeply resented by Aboriginal people, as would, indeed, be by us if [the] roles were reversed. I say very frankly that when I started upon my work in this Commission I had some knowledge of the way in which broad policy had evolved to the detriment of Aboriginal people and some idea of the consequences. But, until I examined the files of the people who died and the other material which has come before the Commission and listened to Aboriginal people speaking, I had no conception of the degree of pin-pricking domination, abuse of personal power, utter paternalism, open contempt and total indifference with which so many Aboriginal people were visited on a day to day basis. It is hard to convey the understanding because each particular story takes time and space to tell. Some of the stories are contained in the individual case reports. Let me refer to just two.

I quote ... the letter of a protector in Queensland who was quite shocked to receive a request from a newly-married Aboriginal woman to have from her bank account, of which he was trustee, four-fifths of her week's earnings, even though he acknowledged that her employer — who was going to do the shopping — would be very careful in the disbursement of her money. He refused the request but as it was Christmas allowed her a little of her own money 'to buy lollies with' (for which she had not asked).

In one of the cases that I inquired into, a young boy was put in an institution because he kept running away from his home where there was a lot of domestic strife. He wanted to go to the home of his sister, a married woman, who lived on a reserve. The sister and her husband are to this day leading members of the community. The superintendent refused the lad permission

¹⁶⁴⁷ Johnston E, QC, *Royal Commission into Aboriginal Deaths in Custody: National Report* (1991) [1.7.23] - [1.7.32] (accessed 1 February 2021).

to come on to the reserve to join his sister. His reasons included that the couple were thought to keep some beer in the fridge — at a time when it was lawful for them to do so — and they had some household items on hire-purchase, including a TV...

This petty tyranny, escalating to interference with the most fundamental of rights to practise one's own culture, one's own religion, to parent one's own children is deeply resented. Any assumption of superiority, any attitude of knowing what is best for Aboriginal people produces a negative reaction and endangers the process of consultation and negotiation...

Commissioner Dodson speaks of the need for a maturing of the relationship between Aboriginal and non-Aboriginal people; a deeper understanding of how each sees the other and why; a bringing out of the common ground between us — the centrality of being human beings. He suggests that as Aboriginal people need time space and distance for thinking through their position, perhaps non-Aboriginal Australia needs to take some time to think through its position in relation to Aboriginal people, to ask ourselves whether we have not stereotyped Aboriginal people, whether as noble savages, scroungers, horsemen, child-like persons, servants or people addicted to alcohol.

11.2 ABORIGINAL BENCHBOOK FOR WESTERN AUSTRALIAN COURTS

The commissioning of the first *Aboriginal Benchbook* was informed by the recommendation of the Royal Commission into Aboriginal Deaths in Custody that judicial officers participate in appropriate cross-cultural training and development programs. These programs were to be:¹⁶⁴⁸

... designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today.

¹⁶⁴⁸ Johnston E, QC, *Royal Commission into Aboriginal Deaths in Custody: National Report* (1991) Recommendation 96 (accessed 19 August 2021).

Since 2002, the concerns which prompted the commissioning of the first edition of the *Aboriginal Benchbook*, and the disproportion of Aboriginal representation in the Western Australian criminal justice system, have increased significantly. A second edition of the *Aboriginal Benchbook* was published in late 2008.

Despite this, Aboriginal imprisonment has continued to increase, particularly the imprisonment of Aboriginal women. Aboriginal people comprised 3.1% of the total population of Western Australia, as at the time of the 2016 Census.¹⁶⁴⁹ However, 39% of the adult prison population, 43% of the adult female prison population, and 76% of juveniles held in detention in Western Australia as at June 2019 were Aboriginal.¹⁶⁵⁰

In a 2016 speech commemorating his ten years in office, the former Chief Justice of Western Australia, Wayne Martin AC, stated that:¹⁶⁵¹

I have said many times over the last 10 years that I consider the gross over-representation of Aboriginal people to be the biggest single issue which confronts the justice system of this State and indeed, this country. Clearly, we have made no progress in reducing the rate of Aboriginal incarceration and, in fact, there are almost 1,000 more Aboriginal people in WA's prisons than there were at the time I was appointed.

In March 2021, Western Australia (with 21%), Queensland and New South Wales accounted for 74% of the national Aboriginal prison population.¹⁶⁵² Western Australia continued to have the highest Aboriginal imprisonment rate of all states and territories at 3,820 persons per 100,000 Aboriginal adult population in the quarter to March 2021.¹⁶⁵³

¹⁶⁴⁹ Australian Bureau of Statistics (ABS), *2016 Census QuickStats – Western Australia* (2017) People – Demographics and Education (accessed 29 September 2017).

¹⁶⁵⁰ Department of Justice, Corrective Services, *Corrective Services Reports* (accessed 7 October 2019).

¹⁶⁵¹ The Honourable Wayne Martin AC, *The State of Justice: A Perspective after 10 Years as Chief Justice of Western Australia* (Law Society of Western Australia and Western Australian Bar Association Gala Dinner, 9 September 2016) page 7 (accessed 1 February 2021).

¹⁶⁵² ABS, *Corrective Services, Australia, March Quarter 2021* (Cat No 4512.0) Key Statistics - Aboriginal and Torres Strait Islander Prisoners (accessed 19 August 2021).

¹⁶⁵³ ABS, *Corrective Services, Australia, March Quarter 2021* (Cat No 4512.0) Key Statistics - Aboriginal and Torres Strait Islander Imprisonment Rates (accessed 19 August 2021).

11.3 OTHER INITIATIVES

As noted in the second edition of the *Aboriginal Benchbook*, in the years since the first edition was published in 2002:¹⁶⁵⁴

*A number of significant reports, including **Putting the Picture Together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities** (the Gordon Report), **Little Children are Sacred** and **Overcoming Indigenous Disadvantage: Key Indicators 2007** have highlighted the social, cultural and economic marginalisation of Aboriginal people, and the decline of traditional cultural authority, which lie at the heart of Aboriginal offending. It is notorious that in 2007 the alarming incidence of dysfunction, domestic and child abuse and suicides in Aboriginal communities in the Kimberley region of Western Australia (and in other parts of northern Australia) prompted emergency Governmental intervention to protect the women and children in those communities, and to prosecute perpetrators of abuse. The continuing high Aboriginal crime rate, the contents of wide-ranging reports and the unprecedented Governmental interventions in Aboriginal communities clearly signal the urgent need for all Australians to strive for Aboriginal societal, economic and cultural gains.*

Significantly, too, over the same years, the Law Reform Commission of Western Australia (LRCWA) concluded its inquiry into Aboriginal customary laws.¹⁶⁵⁵ In its submission in relation to the first edition of this Bench Book, the LRCWA stated that it had found, amongst other things, that the issue of over-representation of Aboriginal people in custody must be addressed not only for the general welfare of Aboriginal people but also to ensure that the criminal justice system did not further contribute to the destruction of Aboriginal culture and law.¹⁶⁵⁶

The LRCWA found that Aboriginal customary law governs:¹⁶⁵⁷

¹⁶⁵⁴ Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008) [1:1].

¹⁶⁵⁵ Law Reform Commission of Western Australia, *Project No. 94 – Aboriginal Customary Laws* (September 2006) (accessed 2 October 2017). The inquiry extended to all areas of Aboriginal customary law with the exception of native title and matters under the *Aboriginal Heritage Act 1972* (WA).

¹⁶⁵⁶ Submission from the Law Reform Commission of Western Australia (17 April 2007).

¹⁶⁵⁷ Submission from the Law Reform Commission of Western Australia (17 April 2007).

... all aspects of Aboriginal life, establishing a person's rights and responsibilities to others and therefore must be taken into account when Aboriginal people come into contact with the justice system.

When the Royal Commission into the Protection and Detention of Children in the Northern Territory commenced on 11 October 2016, Counsel Assisting, Mr P J Callaghan SC, remarked that:¹⁶⁵⁸

... we have identified more than 50 reports that have some relevance to the issues covered by our terms of reference. Most of these have been produced in the last 10 years. There was a national inquiry, there have been two Royal Commissions, four commissions or boards of inquiry, a parliamentary report, four Northern Territory government reviews and 23 independent reviews that have all published findings and recommendations that command our attention. There are a further seven reports that include relevant statistical analyses, and implementation or progress reviews. We have also identified, from coronial proceedings, 11 decisions which themselves contain relevant recommendations.

... it seems to us that all of these investigations have been conducted, and indeed this Commission is being held, under the long shadow cast by the Royal Commission into Aboriginal Deaths in Custody. The Royal Commission into Aboriginal Deaths in Custody was premised on a terrible truth: that between 1 January 1980 and 31 May 1989, 99 Aboriginal and Torres Strait Islander people died in prisons or in the custody of police. Three died in juvenile detention centres. One was just 14 years old.

Those commissioners undertook, pursuant to their terms of reference, to examine the deaths of each of those 99 people and investigate the underlying social, cultural, and legal issues that lay behind their deaths. Those commissioners made 339 recommendations. We call attention today to recommendation 62: recommendation 62 recognised that the problems affecting Aboriginal juveniles are so widespread, and have such potentially disastrous repercussions for the future, that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal

¹⁶⁵⁸ *Royal Commission into the Child Protection and Youth Detention Systems of The Northern Territory*, Darwin, Tuesday, 11 October 2016, Transcripts and Final Report (accessed 28 June 2019).

juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities.

... issues addressed by the Royal Commission into Aboriginal Deaths in Custody are of enduring concern. The principles which underpinned that Commission's recommendations are timeless.

Those principles are repeated and reflected in recommendations made in many of the other 50 or so reports to which I've referred ... But the very fact that there have been so many reports prepared already and the very existence of this Commission, after so much has been said and written, raises – we suggest – another issue altogether.

It invites a question: do we need to confront some sort of inquiry mentality, in which investigation is allowed as a substitution for action, and reporting is accepted as a replacement for results? The bare fact that there has been so much said and so much written over such a long time is suggestive of a persistent failure that should not be allowed to endure.

Some days later, an Australian Law Reform Commission inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples was announced.¹⁶⁵⁹ The Australian Law Reform Commission published Report 133: *Pathway to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* on 9 January 2018, which contained recommendations for Commonwealth, State and Territory governments in relation to:¹⁶⁶⁰

- justice reinvestment (that is, the reinvestment of resources from the criminal justice system to community-led, place-based initiatives that address the drivers of crime and incarceration);
- bail;
- sentencing and Aboriginality;
- community based sentences;

¹⁶⁵⁹ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (published 1 December 2016; modified 28 March 2018) (accessed 1 February 2021).

¹⁶⁶⁰ Australian Law Reform Commission, *Pathway to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (27 March 2018) Recommendations (accessed 1 February 2021).

- mandatory sentencing;
- prison programs and parole;
- access to justice (which included interpreting services, specialist sentencing courts, and special hearing processes to make qualified determinations of guilt after a person is found unfit to stand trial);
- specialist services and programs for Aboriginal women;
- fines and driver licences;
- alcohol;
- police accountability;
- the establishment of a national inquiry into child protection laws and processes affecting Aboriginal children (acknowledging the recognised links between out-of-home care, juvenile justice and adult incarceration); and
- criminal justice targets and Aboriginal justice arrangements (i.e. specific targets by which to reduce the rate of Aboriginal incarceration and the rate of violence against Aboriginal people).

These numerous reports and recommendations are an acknowledgement that there is much in terms of the interaction between the legal system and Aboriginal Australians that causes concern and requires reform.

Judicial officers, of course, are largely constrained to apply the law as it is. As such it is of critical importance that, as the Royal Commission into Aboriginal Deaths in Custody recommended, judicial officers seek to understand:¹⁶⁶¹

... contemporary Aboriginal society, customs and traditions [as well as] the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today.

¹⁶⁶¹ Johnston E, QC, *Royal Commission into Aboriginal Deaths in Custody: National Report* (1991 Recommendation 96 (accessed 19 August 2021).

It is hoped that the following material might assist towards the attainment of that goal, as well as ensure that judicial officers are informed of some of the resources that may be able to assist them to do so.

11.4 FURTHER INFORMATION OR HELP

11.4.1 Current challenges

In its submission to the revised edition of this chapter, the then Department of Aboriginal Affairs noted that there were a number of current, varied and complex challenges facing Aboriginal people in their access to equal justice.¹⁶⁶² It highlighted particularly:

- offenders with cognitive disabilities, in particular Fetal Alcohol Spectrum Disorders and correlated psychological disorders;
- the impact of drug and alcohol abuse and misuse, notably including the rise of methamphetamine use in Aboriginal communities;
- remoteness and access to legal services, and other support services provided by government more broadly;
- language and community barriers and the requirement for interpreter services to understand the law and criminal proceedings; and
- domestic and family violence, and the need for victim support.

It is intended, resources permitting, that these and other issues will be dealt with in detail in the longer term by way of a committee of relevant stakeholders being convened to oversee the development of a much more detailed chapter on Aboriginal people, corresponding to other chapters in this Bench Book.

Additional information on people with cognitive disabilities and in particular Fetal Alcohol Spectrum Disorder is provided in chapter 4 (sections 4.2.1 and 4.4.2.7) of this Bench Book.

¹⁶⁶² Submission from the Department of Aboriginal Affairs (1 May 2017).

Additional information on people living in regional and remote areas is provided in chapter 9 of this Bench Book – in particular, sections 9.3.4.1 (interpreters and translators for Aboriginal people), 9.3.7 (information about Aboriginal people in regional and remote areas) and 9.4 (practical considerations).

Additional information on Aboriginal language services is provided in sections 11.4.3 and 11.4.14 of this chapter; with information on using interpreting services in chapter 7 (section 7.3.1).

Additional information on domestic and family violence is provided in chapter 13 (with section 13.5 relating specifically to Aboriginal people).

11.4.2 Aboriginal culture, values and aspirations

Nannup N, A Nyoongar Perspective on Spirituality (6 October 2011) (accessed 27 June 2019)

Oscar J, *Reconciliation, It is Ours* - National Indigenous Television - SBS (1 June 2016) (accessed 1 February 2021)

Pelizzon J and Kennedy J, *Welcome to Country: Legal Meanings and Cultural Implications* (2012) 16:2 *Australian Indigenous Law Review* 58 (accessed 1 February 2021)

Reconciliation Australia, *2021 State of Reconciliation in Australia Report* (19 January 2021) (accessed 1 February 2021)

The University of Sydney, *Kinship Learning Module* (5 August 2014) (accessed 1 February 2021)

Weir J and Stacey C, *The Benefits Associated with Caring for Country: Literature Review* (June 2011) (accessed 1 February 2021)

11.4.3 Language and communication

Aboriginal Resource and Development Services (ARDS), North Australian Aboriginal Justice Agency (NAAJA), Aboriginal Interpreter Service, Northern Territory Government (AIS), *The Plain English Legal Dictionary: A Resource for Judicial Officers, Aboriginal Interpreters and Legal Professionals Working with Speakers of Aboriginal Languages* (2015) (accessed 1 February 2021)

Eades D, *Communication with Aboriginal Speakers of English in the Legal Process*, Australian Journal of Linguistics (December 2012) Vol. 32(4), pages 473-489 (accessed 6 October 2020)

Eades D, *Taking Evidence from Aboriginal Witnesses Speaking English: Some Sociolinguistic Considerations*, Precedent (January/February 2015) Issue 126, pages 44-48 (accessed 1 February 2021)

Eades D, *Telling and Re-telling Your Story in Court: Questions, Assumptions and Intercultural Implications* (2008) 20:2 *Current Issues in Criminal Justice* 209 (accessed 1 February 2021)

First Languages Australia, *Gambay - Languages Map* (accessed 1 February 2021)

Lempert W, *Marumpu Wangka! Kukatja Hand Talk* (2015) (accessed 1 February 2021)

Indigenous Community Videos on Demand, *You Understand, Don't You? (Pintupi-Luritja)*, A reverse role play performed at the Language and the Law Conference II, Supreme Court of the Northern Territory – Darwin (2015) (accessed 1 February 2021)

11.4.4 Community-driven programs

Allen, D, *The Yiriman Project* (31 July 2012) (accessed 1 February 2021)

Hovane V, Dalton (Jones) T and Smith P 'Aboriginal Offender Rehabilitation Programs', in Dudgeon P, Milroy H & Walker R (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2nd ed. 2014) page 509 (accessed 1 February 2021)

Powell T, Ross R, Kickett D and Donnelly J, 'Red Dust Healing: Acknowledging the Past, Changing the Future', in Dudgeon P, Milroy H & Walker R (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2nd ed. 2014) page 459 (accessed 1 February 2021)

11.4.5 Specifically for judicial officers

Byers F, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts – Report Prepared for the Judicial Council on Cultural Diversity* (2016) (accessed 1 February 2021)

Farrelly T and Carlson B, *Towards Cultural Competence in the Justice Sector - Current Initiatives Paper 3, Indigenous Justice Clearinghouse* (June 2011) (accessed 1 February 2021)

Guthrie J and Jones C, *Efficacy, Accessibility and Adequacy of Prison Rehabilitation Programs for Indigenous Offenders Across Australia, Australian Institute of Judicial Administration* (2016) (accessed 1 February 2021)

11.4.6 Court liaison officers

Aboriginal liaison officers are located at various courthouses throughout the State and provide a critical link between the justice system, Aboriginal people and the community. Aboriginal liaison officers work closely with magistrates, support agencies and Aboriginal communities to provide relevant information and advice on court procedures to Aboriginal people and communities that come into contact with the justice system. Aboriginal liaison officers also help the accused to understand outcomes of court proceedings by explaining payment options for fines, bail and the consequences of not complying with court orders or failing to pay fines.

Metropolitan:

Perth Magistrates Court

Perth Children's Court

Regional:

Albany Court

Broome Court

Carnarvon Court

Kununurra Court

South Hedland

11.4.7 Aboriginal Legal Service of Western Australia (Inc.) (ALSWA)

The Aboriginal Legal Service of Western Australia Limited (ALSWA) provides legal representation and support services for Aboriginal and Torres Strait Islander peoples in Western Australia, including advocating policy and law reform in submissions, at conferences and in the media. ALSWA provides legal assistance services for criminal law; family law and child protection matters and civil and human rights law.

Support services include the Youth Engagement, the Bail Support Service/Prison In-Reach Legal Service, the Custody Notification Service and the Work and Development Permit Service).

For more information on specific ALSWA services see sections 11.4.7.2 (Youth Engagement Program), 11.4.7.2 (Bail Support Service/Prison In-Reach Legal Service), 11.4.10.1 (Custody Notification Service) and 11.4.7.4 (Work and Development Permit Service).

ALSWA has 11 regional offices (Albany, Broome, Bunbury, Carnarvon, Derby, Geraldton, Halls Creek, Kalgoorlie, Kununurra, Northam, and South Hedland) and its head office is in Perth.

ALSWA office locations and contact details are available on the [ALSWA website](#).

11.4.7.1 ALSWA Court Officers¹⁶⁶³

Court officers are unique to ALSWA. Court Officers are Aboriginal people employed by ALSWA. One of the main duties of a Court Officer is to represent Aboriginal and Torres Strait Islander people in the Magistrates Court and Children's Court. A Court Officer's authority to appear in court comes from a certificate granted under s 48 of the *Aboriginal Affairs Planning Authority Act 1972* (WA).

¹⁶⁶³ Drawn from *Aboriginal Legal Service of Western Australia Inc. - Court Officers* (website updated 2018) (accessed 27 June 2019).

ALSWA's Court Officer Unit is headed by a Unit Manager, who is based in ALSWA's head office at Perth, and who is responsible for all Court Officers in Western Australia.

There are several Court Officers based in Perth and usually one or two Court Officers in each of ALSWA's regional offices.

Most Court Officers employed in ALSWA's regional offices are from local communities. They therefore have a full understanding of local issues and understand local languages.

Court Officers can be contacted via any of ALSWA's regional offices, or through the Perth office during normal office hours on (08) 9265 6666.

The main responsibilities of a Court Officer are to:

- represent clients in the Magistrates Court and Children's Court in relation to bail applications, sentencing hearings and procedural matters (e.g. remands and adjournments);
- assist in ensuring strong and successful communication between ALSWA lawyers and clients. This includes acting as a bridge in communication when there are language barriers, to ensure complete understanding and ultimately the proper representation of clients;
- provide assistance and guidance to non-Aboriginal lawyers in relation to cultural, family and community issues;
- undertake regular prison visits;
- provide legal advice to clients on all legal issues; and
- provide community legal education and liaison within Aboriginal, Torres Strait Islander and wider communities.

11.4.7.2 ALSWA Youth Engagement Program¹⁶⁶⁴

ALSWA received funding from the Western Australian State Government in 2016 for its Youth Engagement Program (YEP).

The YEP provides flexible, holistic and individualised case management and support to clients of ALSWA who are appearing in the Perth Children's Court. Services include:

- mentoring;
- assistance with accommodation;
- assistance with birth certificates, Centrelink, Medicare, bank accounts and NDIS;
- provision of transport to enable clients to meet their obligations under court orders;
- identification of appropriate programs and services;
- referrals and introductions to other services, in particular assistance to reengage with education and training programs;
- reminders about appointments and court dates; and
- general case management.

Since 2018, YEP has funded three FTE positions. The Aboriginal diversion officers work closely with other agencies to ensure there is no unnecessary duplication of services and to ensure the most beneficial outcomes for young people and their families.

From 1 July 2019 to 30 June 2020 YEP supported 86 young people. Usually YEP assists approximately 40 clients at any one time.

¹⁶⁶⁴ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

11.4.7.3 ALSWA Bail Support Service and Prison In-Reach Service¹⁶⁶⁵1666

ALSWA commenced operating the Bail Support Service and Prison In-Reach Legal Service in April 2020. These programs are funded by the Department of Justice as part of a wider Justice Reform Project. Legal Aid WA is also funded to provide a Bail Support Service/Remand Advocacy Service. The overall objective of these programs is to 'reduce avoidable remand' by providing earlier access to bail to suitable applicants through the provision of bail support and prison in-reach legal services, and by supporting accused persons to comply with bail conditions and undertakings.

In order to meet this objective, the Bail Support Service and Prison In-Reach Legal Service:

- develops viable alternative bail plans to be presented to the court to enable accused to be released on bail or to vary existing bail conditions;
- assists and supports accused to meet bail conditions, e.g. access suitable accommodation to provide residential address or locate a suitable surety;
- supports accused persons whilst on bail to ensure compliance with conditions and to reduce reoffending; and
- assists with early resolution of cases where accused is remanded in custody.

The ALSWA Bail Support Service employs four FTE Aboriginal Bail Support Workers and one PTE Team Leader. The Prison In-Reach Legal Service employs two FTE lawyers. To be eligible for these programs, the accused person must be appearing in the Perth Magistrates Court and represented by ALSWA. All referrals are assessed for their eligibility and suitability; the accused person must consent to participate in the program and consent to sharing of information with the Department of Justice for evaluation purposes.

¹⁶⁶⁵ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

¹⁶⁶⁶ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

11.4.7.4 ALSWA Work and Development Permit Service¹⁶⁶⁷

In September 2020, ALSWA commenced operating a Work and Development Permit Service. This service is also funded by the Department of Justice as part of the new Work and Development Permit Scheme.¹⁶⁶⁸ The Scheme is a partnership between the Department of Justice, ALSWA and Legal Aid WA which is designed to help people who are unable to pay their court fines due to hardship (i.e. financial hardship, family violence, mental illness, alcohol or drug use problem, disability or homelessness). Under a Work and Development Permit, eligible people can complete approved activities under the supervision of a sponsor in order to clear their unpaid fines.

The ALSWA Work and Development Permit Service will work to assist community organisations to become approved sponsors under the scheme; and to link clients with outstanding fine debts to appropriate organisations to undertake approved activities.

11.4.8 Aboriginal Family Law Services (AFLS)¹⁶⁶⁹

11.4.8.1 Legal Services

The Aboriginal Family Law Services (AFLS) provides legal services for all Aboriginal people in the regional areas that they service, including children, who have experienced family violence or sexual assault. This includes legal advocacy, casework, court support and representation in matters related to family violence and sexual assault. The AFLS cannot act for perpetrators of violence.

The legal matters AFLS assist with include Violence Restraining Orders (VROs), criminal injuries compensation, child recovery orders, parenting plans and representing clients in child protection matters. AFLS also advocates for law reforms that support the wellbeing of Aboriginal victim survivors and help to prevent family violence.

¹⁶⁶⁷ Submission from the Aboriginal Legal Service of Western Australia Limited (14 September 2020).

¹⁶⁶⁸ Department of Justice, *Work and Development Permit (WDP) Scheme* (accessed 1 February 2021).

¹⁶⁶⁹ AFLS, *Services* and *Non-legal Support* (website updated 2018) (accessed 19 August 2021).

11.4.8.2 Support Services

The AFLS website states that it provides 'a holistic service, understanding that violence impacts us on many levels'.

AFLS will assist clients through referrals with counselling to help recover from the trauma of violence and abuse. AFLS can also help with referrals to other agencies (where that is appropriate) to help with other matters such as housing and accommodation. AFLS will work with other agencies, including the police, to promote safety for their clients.

The AFLS is of the view that addressing family violence is a community-wide responsibility and provides community education to promote safety and the right of all members of the community to live free from violence and fear.

Office locations and contact details are listed on the [*AFLS website*](#).

11.4.9 National Indigenous Australians Agency (NIAA)

The Indigenous Affairs Group, which was previously within the Federal Department of the Prime Minister and Cabinet, became the National Indigenous Australians Agency (NIAA) on 1 July 2019. The functions of the NIAA include leading and coordinating Commonwealth policy development; implementing Australia's 'Closing the Gap' targets; and analysing and monitoring the effectiveness of programs and services for Aboriginal people (including programs and services delivered by bodies other than NIAA).¹⁶⁷⁰

11.4.10 Prison support services

11.4.10.1 Custody Notification Service¹⁶⁷¹

The Custody Notification Service (CNS) is operated by the Aboriginal Legal Service of Western Australia. It commenced operations in October 2019. The CNS is a telephone service operating 24 hours per day 7 days per week every day of the year for Aboriginal people who

¹⁶⁷⁰ *Order to Establish the National Indigenous Australians Agency as an Executive Agency*, pursuant to the *Public Service Act 1999* (Cth) (dated 29 May 2019, commencement 1 July 2019).

¹⁶⁷¹ Aboriginal Legal Service of Western Australia Limited, *Custody Notification Service (CNS)* (accessed 6 October 2020).

are detained by in a police facility (both adults and children). The main objectives of the CNS are to:

- prevent or reduce Aboriginal deaths in police custody;
- prevent or reduce harm suffered by Aboriginal people in police custody; and
- protect the legal rights of Aboriginal people in police custody.

These objectives will be achieved by:

- conducting a thorough and culturally competent welfare check;
- providing appropriate early fundamental legal advice; and
- referring Aboriginal people to the appropriate services to address ongoing welfare and legal needs.

Under the *Police Force Amendment Regulations 2019* (WA), which commenced on 2 October 2019, Western Australian Police are required to telephone the CNS every time an Aboriginal person is detained in any police facility in the State. Those Regulations require police to telephone the CNS and advise the CNS staff member of:

- the name of the person detained;
- why that person has been arrested or apprehended;
- the name and contact details of the Responsible Officer;
- whether the detainee is likely to be released on bail (if arrested for an offence) and if not, where that person will be taken; and
- any other relevant details.

The Western Australian Police must provide a reasonable opportunity for the detainee to speak with the CNS staff member and the Responsible Officer must make themselves available to speak with the CNS staff member after the phone communication between the CNS and the detainee has finished.

The CNS applies in a variety of situations such as when a person is arrested for an offence, arrested on a warrant (e.g., warrant of commitment for unpaid fines, return to prison warrant or warrant to be brought before court); apprehended for protective reasons due to intoxication; detained for the purpose of being served with an order (e.g. family violence restraining order); or detained for the purpose of undergoing a mandatory infectious diseases test.

11.4.10.2 Peer Support Program¹⁶⁷²

The Peer Support Program is aimed at reducing the risk of self-harm and suicide amongst prisoners, particularly amongst those who are Aboriginal, young and vulnerable. The risk of suicide is reduced when there is access to sufficient cultural and welfare support.

The program is run by Aboriginal Staff of the Prison Support Services, who select and train well-behaved prisoners who are willing to provide cultural support to assist other prisoners who are a risk to themselves and/or vulnerable to harm from others. From June 2020, Prison Support Services commenced a new reporting system to better identify prisoners at risk.

Refer also to section 11.4.7.3 for information on the ALSWA Bail Support Service and Prison In-Reach Legal Service

11.4.11 Aboriginal Mediation Service

The Aboriginal Mediation Service (AMS) aim is to assist Aboriginal and Torres Strait Islander people to resolve conflicts before they escalate into violence or result in court action. AMS conflict resolution services are culturally appropriate, voluntary, confidential and available state-wide. The service is free and may assist in family, burial, community or neighbour conflicts but is not available in matters of family law. If the matter is suitable for mediation, a mediator will be allocated to facilitate the process. If the matter is not suitable for mediation, alternative options will be discussed with the parties.

The Aboriginal Mediation Service office location and contact details are linked in the heading to this section.

11.4.12 Victim Support Service¹⁶⁷³

The Victim Support Service is available at the Magistrates Court of Western Australia, District Court of Western Australia and Supreme Court of Western Australia. The Victim Support

¹⁶⁷² The information in this section is drawn from the Department of Justice, *Annual Report 2019-2020*, pages 41-42 (accessed 19 August 2021).

¹⁶⁷³ Government of Western Australia, *Support for Victims of Crime: Victim Support Service* (page reviewed 30 November 2020) (accessed 3 February 2021).

Service is a voluntary and free service available to victims of crime. Under the *Victims of Crime Act 1994*, victims are defined as:

- people who suffer injury or loss as a direct result of an offence; or
- any member of the immediate family where an offence results in the death of an individual.

Trained staff can assist with:

- counselling and support;
- accessing services such as counselling, legal, medical and other relevant services
- information on the status of police investigations;
- access to information about ongoing court matters, preparing for court and providing in court support;
- helping to write a victim impact statement;
- helping with enquiries about rights in the criminal justice system, including criminal injuries compensation claims.

Victim Support Service office location and contact details are linked above.

Please refer to sections 11.4.8 and chapter 13 (section 13.10) of this Bench Book for contact details for the **Aboriginal Family Law Services** and the **Family Violence Service**.

11.4.13 Child Witness Service¹⁶⁷⁴

The court process can add to the stress of a child victim. However, ensuring they are adequately prepared as a witness can reduce their emotional stress and enable them to better participate in court proceedings.

The Child Witness Service is available in all courts in Western Australia including the Magistrates Court, Children's Court, District Court or Supreme Court.

The Child Witness Service is a voluntary and free service available to children under 18 years of age who are to give evidence to a court. Trained staff can assist with:

¹⁶⁷⁴ Government of Western Australia, *Support for Victims of Crime: Child Witness Service* (page reviewed 30 November 2020) (accessed 3 February 2021).

- accessing services such as counselling, police, legal, medical and other relevant services;
- working with the Police and the Director of Public Prosecutions and providing the child with up to date information as a matter progresses through the court system;
- preparing a child for giving evidence in court and providing in court support; and
- helping a child to prepare a victim impact statement.

Child Witness Service office location and contact details are linked in the heading to this section.

11.4.14 Aboriginal language centres and interpreting services in Western Australia

11.4.14.1 Aboriginal Interpreting WA (AIWA)¹⁶⁷⁵

Aboriginal Interpreting WA (AIWA) provides over 100 interpreters accredited by the National Accreditation Authority for Translators and Interpreters (NAATI), in over 40 Western Australian Aboriginal languages, to clients anywhere in Australia.

The service commenced operations as the Kimberley Interpreting Service in 2000, with an office in Kununurra. It was renamed as Aboriginal Interpreting WA in 2017 with offices being established in Broome and Perth.

Aboriginal Interpreting WA is a member of the Australian Institute of Interpreters and Translators Inc. (AUSIT) and has representation on the NAATI reference group for Aboriginal language interpreting.

The Aboriginal Interpreting WA office locations and contact details are linked in the heading to this section.

11.4.14.2 Other language centres/resources

Miromaa Aboriginal Language & Technology Centre, (accessed 3 February 2021)

¹⁶⁷⁵ *Aboriginal Interpreting WA*, AIWA home (accessed 3 February 2021).

Nathan D, *Aboriginal Languages of Australia – Western Australia* (15 October 2015) (accessed 3 February 2021)

11.4.14.3 National Relay Service (NRS) - Telephone service for people with hearing or speech impairments¹⁶⁷⁶

The NRS is an Australia-wide telephone service for people who are Deaf or have a hearing or speech impairment. It is also available to anyone who wants to call a person with a hearing or speech impairment.

The NRS office locations and contact details are linked in the heading to this section.

11.5 FURTHER READING/VIEWING

Allison F, Schwartz M and Cunneen C, *The Civil and Family Law Needs of Indigenous People in WA* (Indigenous Legal Needs Project) (27 February 2015) (accessed 3 February 2021)

Amnesty International, *A Brighter Tomorrow: Keeping Indigenous Kids in the Community and Out of Detention in Australia (National Overview)* (May 2015) (accessed 3 February 2021)

Amnesty International, *There is Always a Brighter Future: Keeping Indigenous Kids in the Community and Out of Detention in Western Australia* (May 2015) (accessed 3 February 2021)

Amnesty International, *Raise the Age: Kids Belong in Community* (May 2020) (accessed 3 February 2021)

Atkinson J, Nelson J and Atkinson C, *Trauma, Transgenerational Transfer and Effects on Community Wellbeing* in Purdie N, Dudgeon P and Walker R, *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2010) (accessed 3 February 2021)

Australian Government, *Closing the Gap 2020* (accessed 3 February 2021)

Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31) (12 June 1986) (accessed 3 February 2021)

¹⁶⁷⁶ Australian Government, Department of Communications and the Arts, *National Relay Service* (accessed 3 February 2021).

Bennett P, *Specialist Courts for Sentencing Aboriginal Offenders: Aboriginal Courts in Australia* (31 July 2015) (accessed 3 February 2021)

Committee to Explore the Effect of Motor Driver's Licence and Driving Laws on Remote Communities, *Indigenous Licensing and Fine Default: A Clean Slate* (2007)¹⁶⁷⁷

Corruption and Crime Commission, *Report on Operation Aviemore: Major Crime Squad Investigation into the Unlawful Killing of Mr Joshua Warneke* (5 November 2015) (accessed 28 June 2019)

Corruption and Crime Commission, *Report on the Investigation of Alleged Public Sector Misconduct by Western Australia Police Officers in Relation to Incidents that Occurred at Broome Police Station on 29 March and 19 April 2013* (23 December 2013) (accessed 3 February 2021)

Corruption And Crime Commission, *Report on the Investigation of Alleged Public Sector Misconduct in Relation to the Use Of Taser® Weapons by Officers Of Western Australia Police and the Department of Corrective Services* (16 April 2012) (accessed 3 February 2021)

Corruption and Crime Commission, *Report on the Investigation of an Incident at the East Perth Watch House on 7 April 2013* (20 August 2015) (accessed 3 February 2021)

Cunneen C, *How 'Tough on Crime' Politics Flouts Death-in-Custody Recommendations, The Conversation* (14 April 2016) (accessed 3 February 2021)

Delmege S, *A Trans-generational Effect of the Aborigines Act (1905) WA: The Making of the Fringedwellers in the South-west of Western Australia, Murdoch University Electronic Journal of Law* (2005) (accessed 3 February 2021)

Department of Justice, *Statistics* (adult prisoners in custody; adult offenders managed in the community; young people in detention; young people managed in the community) (accessed 3 February 2021)

¹⁶⁷⁷ Also known as 'The Wyatt Report'. The Committee was established by the Minister for Corrective Services in April 2007, chaired by the Hon Ben Wyatt MLA. An electronic copy of this report is available through the Supreme Court Library and can also be accessed via the e-Bench.

Doherty L and Bricknell S, *Deaths in Custody in Australia 2018-19* (15 December 2020) Australian Institute of Criminology, Statistical Report 31 (accessed 3 February 2021)

Dudgeon P, Milroy H and Walker R, *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (2nd ed. 2014) (accessed 3 February 2021)

Four Corners (ABC), *Hidden Harm* (2 November 2015) (accessed 3 February 2021)

Four Corners (ABC), *Who Killed Mr Ward? - 2009* (8 August 2011) (accessed 3 February 2021)

Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008) (3 February 2021)

Gannoni A and Bricknell S, *Indigenous Deaths in Custody: 25 Years since the Royal Commission into Aboriginal Deaths in Custody* (February 2019) Australian Government, Australian Institute of Criminology, Statistical Bulletin 17 (accessed 3 February 2021)

Gordon S, Hallahan K and Henry D, *Putting the Picture Together: Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (The Gordon Report) (2002) (accessed 3 February 2021)

Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) (accessed 3 February 2021)

Johnston E, *Royal Commission into Aboriginal Deaths in Custody: National Report* (1991) (accessed 3 February 2021)

Judicial Commission of NSW, *Equality before the Law Bench Book* (2006 – as updated 28 September 2020) section 2 (accessed 3 February 2021)

Klein E, Jones M and Cubilo E, *Have Aboriginal and Torres Strait Islander Legal Services Failed? A Response to Weatherburn* (February 2016) 14:1 *Australian Review of Public Affairs*, (accessed 3 February 2021)

Law Reform Commission of Western Australia, *Aboriginal Customary Law: Final Report* (Project No 94) (2006) (accessed 3 February 2021)

McGlade H, *Aboriginal Women, Girls and Sexual Assault* (12 September 2006) 12 ACSSA Newsletter 6-13 (accessed 28 June 2019)

Office of the Director of Public Prosecutions Comparative Sentencing Tables (accessed 12 July 2021)

Office of the Auditor General for Western Australia, *Performance Examination: The Juvenile Justice System: Dealing with Young People under the Young Offenders Act 1994* (Report No 4) (June 2008) (accessed 3 February 2021)

Reconciliation Australia, *2021 State of Reconciliation in Australia Report* (19 January 2021) (accessed 3 February 2021)

State Coroner, *Inquest into the Death of Andrea Louise Pickett* (28 June 2012) (accessed 3 February 2021)

Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2016* (17 November 2016) (accessed 3 February 2021)

Truth and Reconciliation Commission of Canada, *Summary of the Final Report of the Truth and Reconciliation Commission of Canada (2015)* (accessed 3 February 2021)

Weatherburn D, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (AIATSIS, 2014) (available to judicial officers in the SCJMR Chris Steytler Library)

Wild R and Anderson P, *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (30 April 2007) Northern Territory Government (accessed 3 February 2021)

The Western Australian Inter-Jurisdictional Education Committee has made available a range of DVD recordings of presentations relating to judicial officers' professional development on Aboriginal cultural awareness issues, including the following:

- Lieutenant General (Ret'd) John Sanderson AC, *Administering Justice in the Complex, Non-Linear Environment of Indigenous Affairs in WA* (2008);
- Judge Mary Ann Yeats, *An Open Discussion on Black and White Justice: the New Aboriginal Benchbook* (2008);
- Dr Diana Eades, *Aboriginal English and the Courts* (2008); and
- Dr Pat Dudgeon, Dr Dawn Bessarab and Ms Hannah McGlade, *Women and Violence: Aboriginal Women's Perspective* (2009).

These are available (to judicial officers only) from the court libraries.

12A DIVERSE SEXUALITY: LESBIAN, GAY AND BISEXUAL PEOPLE AND PEOPLE WITH OTHER DIVERSE SEXUALITIES

This chapter seeks to assist judicial officers in their understanding of the complex issues that face people who are marginalised because of their diverse sexuality.

As noted in the 2014 *Growing up Queer* report:¹⁶⁷⁸

Sexuality diverse is a broad term used to include people who identify as gay, lesbian, bisexual, queer, pansexual or questioning their sexuality.

The stories and experiences of queer Australian youth recorded by the 2014 *Growing up Queer* report demonstrate the need for representations of queer youth to acknowledge:¹⁶⁷⁹

... the complexities, contradictions and diversities of their subjectivities, embodiment, and their social lives that are intersected by experiences of class, ethnicity, age, geographical location and family relationships.

It is important to be aware that there is no necessary connection between an individual's sexuality and their sex and gender. Sexuality, also sometimes referred to as sexual orientation, concerns who a person is attracted to and wants to have sexual or romantic relationships with.¹⁶⁸⁰ According to The Australian Research Center in Sex, Health and Society in its 2014 *Blues to Rainbows* report:¹⁶⁸¹

¹⁶⁷⁸ Robinson KH, Bansel P, Denson N, Ovenden G and Davies C, *Growing up Queer: Issues Facing Young Australians who are Gender Variant and Sexuality Diverse* (2014) (accessed 20 August 2021).

¹⁶⁷⁹ Robinson KH, Bansel P, Denson N, Ovenden G and Davies C, *Growing up Queer: Issues Facing Young Australians who are Gender Variant and Sexuality Diverse* (2014) (accessed 20 August 2021).

¹⁶⁸⁰ The Freedom Centre, *LGBTIQ+ Glossary* (updated 2019) (accessed 20 August 2021).

¹⁶⁸¹ Smith E, Jones T, Ward R, Dixon J, Mitchell A and Hiller L, *From Blues to Rainbows: The Mental Health and Well-being of Gender Diverse Young People in Australia* (2014) page 45 (accessed 3 February 2021).

Gender diversity and sexuality are often conflated in popular culture and discussion, despite gender identity(ies) and sexual identity(ies) being two separate aspects of an individual's sense of self. Many people relate to a variety of both gender and sexuality identities that can also change during their lifetime. Furthermore, the category of 'sexuality' often conflates behaviour, desire and pleasure despite the fact that these aspects may not necessarily link to a fixed identity.

Those who do not readily fit within what is viewed as 'the norm' may have difficulty accepting their own identity and needs, let alone being accepted by others. Moreover, lesbian, gay and bisexual people and people with other diverse sexualities are often subjected to levels of discriminatory conduct and violence much higher than that experienced by heterosexual people.

The Steering Committee overseeing the production of this Bench Book decided that, in this revised second edition, this sub-chapter be separated from sub-chapter 12B – Diverse Sex and Gender – Intersex, Trans and Gender Diverse People. The two sub-chapters were combined in the first edition, but it was decided to separate them because of the different needs and issues faced by the different groups.¹⁶⁸²

People with diverse sexualities (including same-sex attracted and other diverse sexualities) have better statutory protection against discrimination than they have had in the past. Both the Western Australian and the Commonwealth Governments have made legislative changes to assist in reducing discrimination against these groups.¹⁶⁸³

Changes to Commonwealth legislation in regard to marriage came into effect on 9 December 2017. The *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) removed restrictions on the marriage of same-sex couples.¹⁶⁸⁴ This change in legislation followed an

¹⁶⁸² Including advice provided by the Australian Federation of AIDS Organisations Ltd. (25 March 2009).

¹⁶⁸³ The *Equal Opportunity Act 1984* (WA) was amended by the *Acts Amendment (Gay and Lesbian Law Reform) Act 2002* (WA) (No. 003 of 2002) which inserted Part IIB – Discrimination on ground of sexual orientation. This protects people from discrimination on the grounds of sexual orientation in areas of employment, education, accommodation and the provision of goods, services and facilities, amongst a host of other aspects of public life. 'Sexual orientation' is defined in s 4 of that Act to 'mean heterosexuality, homosexuality, lesbianism or bisexuality and includes heterosexuality, homosexuality, lesbianism or bisexuality imputed to the person'. The *Sex Discrimination Act 1984* (Cth) prohibits discrimination on the ground of sexual orientation, which is defined in s 4 to mean 'a person's orientation towards: (a) persons of the same sex; or (b) persons of a different sex; or (c) persons of the same sex and persons of a different sex'.

¹⁶⁸⁴ *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) (accessed 3 February 2021).

Australia wide postal survey. The 61.6% 'yes' vote in favour of the changes signified Australia's changing attitudes towards same-sex relationships.

Additionally, the fact that openly lesbian women and gay men have been elected to Parliament suggests greater acceptance of diversity in the general community. It also provides an effective voice to achieve change.

The material used in this chapter is largely drawn from the New South Wales Judicial Commission's *Equality before the Law Bench Book*,¹⁶⁸⁵ specifically section 8 - Lesbians, gay men and bisexuals.

The Steering Committee overseeing the production of this Bench Book gratefully acknowledges the submissions and contributions of the following organisations, which have assisted in the development of chapter 12 in the first edition and then this chapter 12A in the revised edition:

- Living Proud Inc.¹⁶⁸⁶ (17 April 2007, 23 September 2019);
- GRAI (GLBTI Rights in Aging) Inc.¹⁶⁸⁷ (18 April 2007, 27 February 2020);
- WA Gender Project (25 April 2007);
- Freedom Centre, WA AIDS Council (24 March 2009, 5 August 2009);
- Australian Federation of AIDS Organisations Ltd. (AFAO) (25 March 2009, 23 September 2019);
- Pride in Law Association (22 September 2019); and
- Equality Australia (17 March 2020).

¹⁶⁸⁵ New South Wales Judicial Commission, *Equality before the Law Bench Book* (Section 8 updated 11 December 2017) (accessed 3 February 2021).

¹⁶⁸⁶ Gay and Lesbian Community Services of Western Australia Inc. was renamed 'Living Proud Inc.' and promoted as 'Living Proud: LGBTI Community Services of WA' in 2013.

¹⁶⁸⁷ At the time of its 2007 contributions, GRAI was named the 'GLBTI Retirement Association Inc'.

12A.1 SOME STATISTICS

12A.1.1 Population

Whilst there is no single authoritative data set detailing the number of lesbian, gay and bisexual people and people with other diverse sexualities in Australia, a number of reliable studies have produced informative data.

In 2014, Australians were asked for the first time about their sexual orientation in the ABS *General Social Survey*. Over 500,000 (3.0%) of the adult population identified as gay, lesbian, bisexual or other non-heterosexual. In 2019, that figure was 2.7%.¹⁶⁸⁸

In 2018, the *6th National Survey of Secondary Students and Sexual Health* was conducted. The 6,327 participants in school years 10, 11 and 12 were asked to indicate their sexual orientation. Twenty-one percent of the participants identified as lesbian, gay or bisexual, with 26.3% of participants not identifying as heterosexual.¹⁶⁸⁹

In one Australian study, approximately half of the men and two thirds of the women who had engaged in same-sex sexual experiences regarded themselves as heterosexual rather than homosexual. This illustrates that same-sex attraction and experience are more common in Australia than is indicated by the relatively few people reporting a lesbian, gay or bisexual identity.¹⁶⁹⁰

In relation to gay men, the *Perth Gay Community Survey* is a longitudinal and cross-sectional study which is conducted biannually. It is funded by the Department of Health and supported by the Western Australian AIDS Council. The major aim of the survey is to provide data on sexual and social behaviours of men in the Perth gay community, and how these relate to the transmission of HIV and other sexually transmissible infections. In the 2019 survey, a total of 755 men aged 16 and above were surveyed. Eighty five percent of the survey sample identified

¹⁶⁸⁸ ABS, *General Social Survey: Summary Results, Australia* (Cat No 4159.0) (accessed 3 February 2021).

¹⁶⁸⁹ Fisher C M, Waling A, Kerr L, Bellamy R, Ezer P, Mikolajczak G, Brown G., Carman M and Lucke J, *6th National Survey of Australian Secondary Students and Sexual Health 2018* (2019) (ARCSHS Monograph Series No. 113), Bundoora: Australian Research Centre in Sex, Health & Society, La Trobe University (accessed 1 February 2021).

¹⁶⁹⁰ Drawn from Smith AM, Rissel CE, Richters J, Grulich AE and De Visser RO, *Sex in Australia: Sexual Identity, Sexual Attraction and Sexual Experience among a Representative Sample of Adults* (2003) *Australian and New Zealand Journal of Public Health* 27(2) page 138 (accessed 22 July 2019).

as gay.¹⁶⁹¹ The demographic profile of the men recruited showed increasing ethnic diversity when compared to previous surveys, although the majority continued to be Anglo-Australian (62.7%). In 2019, 4.1% of those surveyed reported an Aboriginal or Torres Strait Islander background. The survey reported that the majority lived in the metropolitan area (91.8%), were well-educated (47.8% had a university degree) and were in full-time employment (61.7%).¹⁶⁹²

12A.1.2 Views of others

While discrimination is still very prevalent in society, attitudes towards lesbian, gay and bisexual people and people with other diverse sexualities have changed significantly over the past decade.

In 2017, 66.0% of the Australian population believed that same-sex couples should have the same rights as heterosexual couples, compared to 39.8% in 2005 and 54.0% in 2011.¹⁶⁹³ There are clear socio-demographic differences between those who support equal rights and those who do not support them. Support was highest amongst females, those who were non-religious, those aged under 40 and those holding a university degree. People who were low income earners, migrants from non-speaking backgrounds and/or living in a remote or regional community were significantly more likely not to support equal rights.¹⁶⁹⁴

12A.1.3 Discrimination

Equal opportunity legislation provides protection against discrimination on the basis of sexual orientation at work, in education, and in professional or trade organisations.¹⁶⁹⁵ Despite this, a 2012 study *Private Lives: The Second National Survey of the Health and Wellbeing of GLBT Australians*, also referred to as the *Private Lives 2 Report*, reported that 38.8% of respondents

¹⁶⁹¹ Broady T, Chan C, Bavinton B, Mao L, Sackville-Podmore R, Pierce M, Lobo R, Churcher S, Bastian L, Prestage G and Holt, M, *Gay Community Periodic Survey: Perth 2019*, Centre for Social Research in Health, UNSW Sydney (2020) page 1 (accessed 3 February 2021).

¹⁶⁹² Broady T, Chan C, Bavinton B, Mao L, Sackville-Podmore R, Pierce M, Lobo R, Churcher S, Bastian L, Prestage G and Holt, M, *Gay Community Periodic Survey: Perth 2019*, Centre for Social Research in Health, UNSW Sydney (2020) page 2 (accessed 3 February 2021).

¹⁶⁹³ Perales F and Campbell A, *Who Supports Equal Rights for Same-Sex Couples? Evidence from Australia* (2017) page 14 (accessed 22 July 2019).

¹⁶⁹⁴ Perales F and Campbell A, *Who Supports Equal Rights for Same-Sex Couples? Evidence from Australia* (2017) Non-technical Summary; pages 7 and 10 (accessed 22 July 2019).

¹⁶⁹⁵ *Equal Opportunity Act 1984* (WA) Part IIB (accessed 22 July 2019).

occasionally or usually hid their sexuality or gender identity at work.¹⁶⁹⁶ The 2020 *Private Lives 3* report indicated that only 55.7% and 60.7% of respondents felt accepted either 'a lot' or 'always' at their educational institution or work, respectively.¹⁶⁹⁷ Further, the Australian Human Rights Commission, in its *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights*, reported in 2015 that 16% of lesbians and gay men had been discriminated against in the workplace based on their sexual orientation.¹⁶⁹⁸

For the purposes of effective health care, knowledge of an individual's sexuality may be important. Non-disclosure may result in sub-optimal services – for example, there may be assumptions of heterosexuality, poor communication and failure to refer to appropriate LGB-specific resources and referral networks. The *Private Lives 2 Report*¹⁶⁹⁹ indicated that lesbian, gay and bisexual people had become more comfortable accessing health care services than previous research has demonstrated. However almost one in five (18.5%) of those with a regular general practitioner reported that their general practitioner did not know their sexuality and 12.8% reported that they did not know if their general practitioner knew their sexuality. Similarly, a 2015 study of same-sex attracted women aged 30-85 years revealed that 36% of the women had not disclosed their sexual orientation to their general practitioner.¹⁷⁰⁰

12A.1.4 Verbal abuse, intimidation and violence

Lesbian, gay and bisexual people experience greater levels of verbal abuse and violence than heterosexual people. In the *Private Lives 3 Report*, lesbian, gay and bisexual participants reported heterosexist violence and harassment in the form of:¹⁷⁰¹

¹⁶⁹⁶ Leonard W, Pitts M, Mitchell A, Lyons A, Smith A, Patel S, Couch M and Barret A, *Private Lives 2: The Second National Survey of the Health and Wellbeing of GLBT Australians* (2012) page 46 (accessed 3 February 2021).

¹⁶⁹⁷ Hill A, Bourne A, McNair R, Carman M and Lyons A, *Private Lives 3: The Third National Survey of the Health and Wellbeing of LGBTIQ People in Australia* (2020) page 37 (accessed 3 February 2021).

¹⁶⁹⁸ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights*, page 19, citing Diversity Council Australia, public submission 5 to the Australian Human Rights Commission, National SOGII Consultation (2015) (accessed 3 February 2021).

¹⁶⁹⁹ Leonard W, Pitts M, Mitchell A, Lyons A, Smith A, Patel S, Couch M and Barret A, *Private Lives 2: The Second National Survey of the Health and Wellbeing of GLBT Australians* (2012) (accessed 3 February 2021).

¹⁷⁰⁰ McNair R, Hegarty K and Taft A, *Disclosure for Same-sex Attracted Women Enhancing the Quality of the Patient–doctor Relationship in General Practice* (2015) *Australian Family Physician* 44(8) pages 573-578 (accessed 3 February 2021).

¹⁷⁰¹ Leonard W, Pitts M, Mitchell A, Lyons A, Smith A, Patel S, Couch M and Barret A, *Private Lives 2: The Second National Survey of the Health and Wellbeing of GLBT Australians* (2012) Table 8.2, page 47 (accessed 3 February 2021). Note, the 2012 statistics are included here as in the *Private Lives 3 Report*

- verbal abuse (including hateful or obscene phone calls (26% of males and 22.5% of females));
- harassment such as being spat at and offensive gestures (15.4% of males and 14.8% of females);
- threats of physical violence, physical attack or assault without a weapon (punched, kicked, beaten) (10.5% of males and 5.9% of females);
- written threats of abuse including emails and graffiti (6.8% of males and 4.9% of females); and
- sexual assault (2.3% of males and 3.1% of females).

Data shows that lesbian, gay and bisexual people with a disability are:¹⁷⁰²

- more frequently subjected to verbal abuse than those without a disability (32% compared to 24%);
- more likely to have 'received written threats of abuse including emails and graffiti' (11% compared to 5%);
- more likely to have been subject to harassment (21% compared to 14%); and
- more likely to have been subject to threats of physical violence or physical assault without a weapon, such as being punched, kicked or beaten (13% compared to 8%).

A 2010 national survey of 3,134 same-sex attracted and gender questioning young people found that 61% reported verbal abuse and 18% reported physical abuse because of homophobia. School was the place of abuse for 80% of the respondents who reported abuse.¹⁷⁰³

(2020) the statistics included harassment on both the basis of sexual orientation and gender identity, and for females and males, together.

¹⁷⁰² Equality Australia, *With our Heads Held High - Submission to the Victorian Inquiry into Anti-Vilification Protections* (3 February 2020) page 3, citing Leonard and Mann, *The Everyday Experience of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) People Living with a Disability* (2018). N.B. These statistics also include transgender respondents.

¹⁷⁰³ Equality Australia, *With our Heads Held High - Submission to the Victorian Inquiry into Anti-Vilification Protections* (3 February 2020) page 4, citing Hillier, *Writing Themselves In 3* (2010) page 39.

Evidence also suggests that intimate partner abuse and family violence is a hidden issue in the lesbian, gay and bisexual population and is likely to be under-reported both in practice and in research:

- A Victorian study of lesbian, gay and bisexual participants found that two-thirds of respondents did not report abuse they received from a same-sex partner, with the major reasons cited as being:¹⁷⁰⁴
 - fear of escalating the abuse;
 - that they perceived it to be a minor incident;
 - that they did not believe they would be dealt with fairly;
 - not knowing where to go for assistance;
 - fear of discrimination;
 - fear of being 'outed'; and
 - fear of losing the relationship.
- When violence is reported, the lack of appropriate services for either perpetrator or victim is likely to contribute to an unsatisfactory response or resolution, which compounds the problem of silence and distrust.
- In addition to under-reporting, it is important to note that many lesbian, gay and bisexual individuals also experience abuse from within their own home. An Australian study of lesbian, gay and bisexual youth (aged 14-21) found that 24% had experienced verbal and physical abuse at home, which was often by their parents.¹⁷⁰⁵
- Estimates of the rates of family violence experienced by all Australian women range between 8% and 28%. By way of comparison, 27.7% of male and 40.7% of female respondents in the first *Private Lives* sample reported having been in a relationship where the partner was abusive.¹⁷⁰⁶ While it is not clear from the data whether the abuse

¹⁷⁰⁴ Leonard W, Mitchell A, Patel S and Fox C, *Coming Forward - The Underreporting of Heterosexist Violence and Same Sex Partner Abuse in Victoria* (2008) pages 47-48 (accessed 3 February 2021).

¹⁷⁰⁵ Hiller L, Jones T, Monagle M, Overton N, Gahan L, Blackman J and Mitchell A, *Writing Themselves in 3: The Third National Study of the Sexual Health and Wellbeing of Same Sex Attracted and Gender Questioning Young People* (2010) page 46 (accessed 3 February 2021).

¹⁷⁰⁶ Pitts M, Smith A, Mitchell A and Patel S, *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians* (2006) pages 50-51 (accessed 4 February 2021).

was from a same-sex partner or not, it was likely, given the relationship profile of the sample, that a significant amount occurred in same-sex relationships.

- Irrespective of the gender of the perpetrator, the levels of experience of domestic violence represents a considerable burden of distress and injury for lesbian, gay and bisexual people.

12A.1.5 Family support

Some people are supported by their families after 'coming out' as lesbian, gay or bisexual, but others lose touch with their families or friends. As reported in the 2014 *Growing up Queer* report, some families completely reject their child once they reveal their sexuality, with the child forced to leave home. If this occurs before the age of 18, those young people may need to access government housing, including short-term emergency accommodation, hostels and foster care.¹⁷⁰⁷

Similarly, while people may not lose touch with their families or friends as a result of 'coming out', they may nonetheless experience extremely difficult family relationships and friendships through ongoing insults and pressure to 'act' or 'be' heterosexual. Maintaining the impression that they are not lesbian, gay or bisexual can result in tensions in their relationships with others and within themselves. These types of stressors may result in mental health issues.

Where there is a lack of support at home, young lesbian, gay and bisexual people and people of other diverse sexualities can become more vulnerable to homelessness, sex work and the use of alcohol or drugs.

12A.1.6 Mental health and suicide

Lesbian, gay and bisexual people and people of other diverse sexualities are at a greater risk of a range of mental health issues and increased suicidality. This is due to the discrimination, harassment and homophobia that exists in our heteronormative culture, not their sexuality.

¹⁷⁰⁷ Robinson KH, Bansel P, Denson N, Ovenden G and Davies C, *Growing up Queer: Issues Facing Young Australians who are Gender Variant and Sexuality Diverse* (2014) Executive summary (viii) (accessed 20 August 2021).

Additionally, adverse life events and less positive support from family and friends increases the risk of mental health problems.

The 2014 *Growing up Queer* report, an Australian study of 1032 gender and sexuality diverse young people aged 16-27, identified the key themes and risk factors underlying the various mental health issues faced by this population. These included:¹⁷⁰⁸

- 'coming out' to their families, communities and schools;
- access to limited sexual education at school (where it was heteronormative and focused on reproductive sex);
- homophobia and transphobia in the workplace; and
- access and experience of support services.

The 2020 *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI People* published by the National LGBTI Health Alliance highlighted the increased risk of suicidality, suicidal ideation, self-harm, depression, anxiety, and psychological distress in lesbian, gay and bisexual people. The study revealed that 41.4% of lesbian, gay and bisexual people aged over 16 met the criteria for a mental disorder and had experienced symptoms in the last 12 months. The study also revealed that, when compared to the general population, lesbian, gay and bisexual people are:¹⁷⁰⁹

- over six times more likely to have suicidal thoughts;
- twice as likely to have been diagnosed and treated for a mental health disorder;
- nearly six times more likely to currently meet the criteria for a depressive episode;
- more than twice as likely to currently meet the criteria for an anxiety disorder; and
- over three and a half times more likely to be diagnosed with anxiety in their lifetime.

The study highlighted some of the differences between the mental health and well-being of specific populations, including the general population. For example, of the general population aged 16 years and over, 3.2 % reported attempting suicide and 13.3% reported suicidal ideation

¹⁷⁰⁸ Robinson KH, Bansel P, Denson N, Ovenden G and Davies C, *Growing up Queer: Issues Facing Young Australians who are Gender Variant and Sexuality Diverse* (2014) Key Issues Arising from this Research, (viii)-(x) (accessed 20 August 2021).

¹⁷⁰⁹ LGBTIQ+ Health Australia, *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI People* (July 2020) pages 2-4 (accessed 1 February 2021).

in their lifetime. However, of bisexual people aged 18 and over, 27.8% reported attempting suicide and 77.6% reported suicidal ideation in their lifetime.¹⁷¹⁰

12A.1.7 Self-censorship

The experience of being lesbian, gay, bisexual or other diverse sexuality differs from the experiences of other groups who may be the subject of discrimination: there is usually a choice about publicly identifying themselves as such, unlike, for example, women or people with a mobility impairment.

Because of this discrimination and harassment, lesbian, gay and bisexual people and people with other diverse sexualities sometimes adopt a practice of self-censorship, not being completely open or 'out' about their sexuality.¹⁷¹¹ They may, for example, limit discussion of weekend activities and change the pronoun when referring to a partner, or never hold hands in public. Some lesbian, gay or bisexual people choose not to live with their partner through fear of public exposure, and some live together but do not identify as living in a same-sex relationship. However, anecdotal evidence suggests that this is not as common as it once was.¹⁷¹²

The *Private Lives* study found that:¹⁷¹³

- the majority (87.6%) of the LGBTI sample had at some time avoided disclosure of their diverse sexuality, sex and gender;
- fear of prejudice or discrimination caused lesbian, gay and bisexual people, at least sometimes, to modify their daily activities (65.9% of males and 68.8% of females); and
- 73.6% of males and 71.2% of females reported behaviour modification in public.

¹⁷¹⁰ LGBTIQ+ Health Australia, *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI People* (July 2020) pages 2-4 (accessed 1 February 2021).

¹⁷¹¹ Pitts M, Smith A, Mitchell A and Patel S, *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians* (2006) page 48 (accessed 4 February 2021).

¹⁷¹² New South Wales Judicial Commission, *Equality before the Law Bench Book* (chapter 8 updated 11 December 2017) section 8.1 (accessed 3 February 2021).

¹⁷¹³ Pitts M, Smith A, Mitchell A and Patel S, *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians* (2006) pages 48-50 (accessed 4 February 2021).

Self-censorship may be even more pressing in a formal and public setting, such as a court. When a lesbian, gay or bisexual person or person with other diverse sexuality is giving evidence, particularly if that person has not 'come out', it may appear that the witness is being evasive or selective when answering questions which deal with their personal lives and activities. The Supreme Court of Queensland's *Equal Treatment Bench Book* comments that:¹⁷¹⁴

Judges should be alert to questioning of witnesses with regard to their sexuality and be ready to restrict such questioning where unnecessary or irrelevant.

12A.1.8 Education

Those who start to 'come out' at school, or who are seen by other students as different, may have difficulties reaching their full educational potential for a variety of related reasons.

In a 2015 study, students reported that overall levels of support and positivity to lesbian, gay and bisexual students was higher amongst their fellow students than amongst teachers. Whilst 45% reported that teachers were 'never' or 'hardly ever' positive or supportive, only 25% reported the same in relation to their peers.¹⁷¹⁵

In the same study, 66.2% of respondents from government schools, 70.5% of respondents from private elite schools and 74.6% of respondents from catholic schools reported that LGBTI issues were never discussed in the school curriculum.¹⁷¹⁶

In relation to tertiary education, the ABS reported in 2016 that more people in same-sex couples than opposite-sex couples had a Bachelor degree or higher (45% compared to 29%); and that people in same-sex couples were more likely to have a postgraduate degree than people in opposite-sex couples (12.4% compared with 6.8%).¹⁷¹⁷ However, the ABS noted that the higher educational attainments may be a reflection on the younger age profile of same-sex couples.

¹⁷¹⁴ Supreme Court of Queensland, *Equal Treatment Benchbook* (2016) page 188 (accessed 7 April 2021).

¹⁷¹⁵ Ullman J, *Free2Be?: Exploring the Schooling Experiences of Australia's Sexuality and Gender Diverse Secondary School Students* (November 2015) page 29 (accessed 3 February 2021).

¹⁷¹⁶ Ullman J, *Free2Be?: Exploring the Schooling Experiences of Australia's Sexuality and Gender Diverse Secondary School Students* (November 2015) page 31 (accessed 3 February 2021).

¹⁷¹⁷ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2018) Same-Sex Couples in Australia, 2016 (accessed 3 February 2021).

Living Proud submitted that their view is that the ABS statistics are not indicative as they undercount queer people and the results are skewed towards the most privileged couples.¹⁷¹⁸

12A.1.9 Income level

The ABS reported in 2016 that people in same-sex relationships had significantly higher incomes than those in opposite-sex relationships:¹⁷¹⁹

- The proportion of men in same-sex couples earning \$2,000 or more a week was higher than that of men in opposite-sex couples (23% compared to 18%).
- Women in same-sex couples were more than twice as likely to be earning \$2,000 or more a week than women in opposite-sex couples (14% compared with 6%). This was attributed in part to the greater likelihood of women in opposite-sex couples leaving the workforce to have children (permanently or temporarily).

As with the statistics relating to education (in 12A.1.8), Living Proud submitted that the ABS income statistics are not indicative as they undercount queer people and the results are skewed towards the most privileged couples.¹⁷²⁰ While income levels may be higher for some members of the lesbian, gay and bisexual population, many individuals experience economic disadvantage and poverty – what has been described as the myth of 'pink privilege'.¹⁷²¹

Equality Australia also submitted that these statistics could be misleading:¹⁷²²

While 2016 ABS data does report that people in same-sex relationships have higher incomes than those in opposite sex relationships, this figure should be read with caution.

First, LGB people are not counted in the Census per se, so we do not know whether the LGB people are proportionately more or less likely to be in relationships, and single LGB people (and thereby their incomes) are not collected in the Census at all.

¹⁷¹⁸ Submission from Living Proud (23 September 2019).

¹⁷¹⁹ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2018) Same-Sex Couples in Australia, 2016 - Income (accessed 3 February 2021).

¹⁷²⁰ Submission from Living Proud (23 September 2019).

¹⁷²¹ New South Wales Council of Social Service, *Beyond the Myth of Pink Privilege: Poverty, Disadvantage and LGBTI People in NSW* (2015) page 3 (accessed 3 February 2021).

¹⁷²² Submission from Equality Australia (17 March 2020).

Same-sex couples also may underreport their relationships to the ABS, as we have seen marked numbers of increasing same-sex couples since the ABS began collecting data on same-sex de facto couples in 1996. You can see the marked increase in the number of same-sex couples in 1996, 2001, 2006, 2011 and 2016 censuses. This may be due to increased reporting, increased numbers of same sex couples, or both.

Homelessness remains an issue amongst lesbian, gay and bisexual people and people with other diverse sexualities. After 'coming out' a person may no longer be welcome in their home and where they have no other options they may become homeless.¹⁷²³ Many youth homelessness services in Perth report that up to 40% of their clients are LGBTI.¹⁷²⁴

Additionally, discrimination and harassment in the workforce can lead to people leaving their workplace, thus increasing disadvantage and potential poverty.¹⁷²⁵

The Australian Federation of AIDS Organisations submitted:¹⁷²⁶

Some gay men, lesbians and bisexuals may experience economic advantage as a result of not being financially (and otherwise) responsible for children. Alternatively, some gay men, lesbians and bisexuals are disadvantaged by the associated costs of living alone, and their education and workforce entry having been limited as a result of harassment and stigma. Gay men in particular have faced a disproportionate share of the 'cost' of living with HIV, and many have experienced severe economic disadvantage including living below the poverty line.

For more information regarding people living with disabilities (including HIV), including the financial implications, refer to chapter 4 of this Bench Book.

¹⁷²³ New South Wales Council of Social Service, *Beyond the Myth of Pink Privilege: Poverty, Disadvantage and LGBTI People in NSW* (2015) pages 9-20 (accessed 3 February 2021).

¹⁷²⁴ Submission from Living Proud (23 September 2019).

¹⁷²⁵ New South Wales Council of Social Service, *Beyond the Myth of Pink Privilege: Poverty, Disadvantage and LGBTI People in NSW* (2015) pages 14, 19-20 (accessed 3 February 2021).

¹⁷²⁶ Submission from Australian Federation of AIDS Organisations Ltd. (25 March 2009, reviewed 23 September 2019).

12A.1.10 Children

ABS statistics demonstrate that lesbians and gay men are less likely to be parents or to live with children than heterosexual people. The 2016 Census data indicates:¹⁷²⁷

- the proportion of same-sex families with children is around 15%;
- 25% of female same-sex couples had children, compared to 4.5% of male same-sex couples; and
- children in same-sex families only account for 0.2% of all dependent children.

However, in relation to the ABS statistics, Equality Australia submitted:¹⁷²⁸

These figures are likely to underrepresent the proportion of LGB parents, because the data is based only on same-sex couples who live together with their children on Census night – it does not count non-resident or single parents who are LGB, or adult children who do not live at home.

Lesbian and gay individuals or couples may live with children from previous heterosexual relationships, foster children or have children born using reproductive technologies, donors or surrogates. Equality Australia submitted:¹⁷²⁹

The key issue to understand with same-sex families is the diversity of family structures. Roles given to members of the family can differ from heteronuclear models of family. For example, same-sex families may comprise single or multiple parents, depending on whether the children are being brought up by a single parent, a couple, or a couple who co-parent with a known donor and their partner (if any). There can also be step-parents raising blended families, or other significant people involved in the care of children.

The degree of involvement and role of donors in gay or lesbian families may also vary, from donors who are unknown or who have no or little contact, to some who have contact with children but are not regarded as ‘parents’, right through to those who share parental responsibility for the children. Children within the same family may also have the same or different donors.

¹⁷²⁷ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2018) (accessed 3 February 2021).

¹⁷²⁸ Submission from Equality Australia (17 March 2020).

¹⁷²⁹ Submission from Equality Australia (17 March 2020).

As in the heterosexual population, there is diversity among lesbian, gay and bisexual people and people with other diverse sexualities in many aspects of their lives. It is important not to typecast. Sexuality is simply one facet of a person. Different people rank their sexuality with differing degrees of importance.

12A.2 COMMON MISCONCEPTIONS¹⁷³⁰

Some of the most common misconceptions about lesbian, gay and bisexual people and people with other diverse sexualities include:

- ***You can tell if someone is lesbian or gay (and possibly if they are bisexual) because of the way they look and/or behave*** — Assumptions should not be made about a person's sexuality based on their actions, appearance or behaviour. People who are lesbian, gay, bisexual and heterosexual behave in different ways, some of which do not fit the stereotypical idea of how a person of that sexuality should act.
- ***In lesbian and gay male couples, one is more masculine and takes the traditional male role and the other is more feminine and takes the traditional female role*** — The dynamics of any relationship vary, regardless of the sexual orientation of the partners.
- ***Gay men are more likely to sexually abuse children or youths*** — There is no research evidence to indicate that gay men are any more likely than straight men to sexually abuse children. Men who abuse boys are not doing so because they are gay in the same way that men who abuse girls are not doing so because they are straight. They are sexually attracted to children. The most common identifying factor in relation to people who abuse children and young people is that the offender is known to them, often being a family member.
- ***Lesbians or gay men make bad parents*** — Research indicates that there is no discernible difference between the children who live with one or two lesbian or gay male parent(s) and the children who live with one or two heterosexual parent(s) in

¹⁷³⁰ Unless stated, this information is drawn from the New South Wales Judicial Commission, *Equality before the Law Bench Book* (Section 8 updated 11 December 2017) (accessed 3 February 2021).

relation to such things as their levels of happiness, social adjustment, satisfaction with life and/or moral or cognitive development.¹⁷³¹

- ***Lesbians, gay men and bisexuals could choose to be heterosexual*** — A person could choose to be in a heterosexual relationship. However, that will not change their sexual attraction as sexual attraction is not a choice.
- ***People who call themselves bisexual are really lesbian or gay but choose not to describe themselves as such, or they are really heterosexual but like the idea of describing themselves as capable of having sexual relationships with anyone*** — Bisexuality is a valid identity. Bisexual people live their lives in a variety of ways. They are too diverse to categorise in either of these ways
- ***Same-sex relationships do not have the same significance as heterosexual relationships*** — Each partner within a relationship (and any children associated with them), individually or together, determine the significance of the relationship. The significance of any relationship should not be judged by the sexual orientation of its members but how people in a relationship treat each other.
- ***Everyone who is same-sex attracted or who engages in same-sex sexual behaviour identifies as gay, lesbian or bisexual*** — Human sexuality and attraction is complex. Sometimes sexual identities, experiences and attractions align with each other, other times they do not. For example, some people can identify as straight but engage in same-sex sexual behaviour. Some people may identify as lesbian, gay or bisexual at a later stage in their life, despite having been married to a person with a different gender. Different cultures may also have different terms to express identities based on same-sex attraction and may not necessarily use 'gay', 'lesbian' or 'bisexual' identity labels.¹⁷³²
- ***Gender and sexuality are not the same thing, but they overlap*** — The gender people identify with, and the gender(s) they are sexually or romantically attracted to, are two different things. But these are also related. For example, an ostensibly married opposite

¹⁷³¹ Dempsey D, *Same-sex Parented Families in Australia*, CFCA Paper No.18 (2013) pages 9-17 (accessed 3 February 2021).

¹⁷³² Submission from Equality Australia (17 March 2020).

sex couple may have one partner who later affirms a different gender identity to the one they were known by at the date of their marriage. Do not assume the sexual identity of anyone based on the gender of their partner. Where sexual identity is relevant to an issue before the court (which is likely only in a very small number of circumstances), consider whether you can sensitively, discreetly and politely ask the person – recognising that not everyone will be comfortable disclosing their sexuality, particularly in the presence of other people who may not know.¹⁷³³

12A.3 LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS

12A.3.1 Marriage

Changes to Commonwealth legislation in regard to same-sex marriage came into effect on 9 December 2017. The *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) removed restrictions on the marriage of same-sex couples.¹⁷³⁴ That amending legislation changed the definition of 'marriage' in the *Marriage Act 1961* (Cth) from being a 'union of a man and a woman' to a 'union of two people'.¹⁷³⁵ The legislative changes were a consequence of a shift in community attitudes towards same-sex relationships, with 62% of people voting 'yes' in the Australian Marriage Postal Survey.

Prior to 9 December 2017, same-sex marriages that were entered into overseas had not been recognised under Australian laws. Section 88EA of the *Marriage Act 1961* (Cth) had before that date expressly stated that a union solemnised in a foreign country between: (a) a man and another man; or (b) a woman and another woman, was not recognised in Australia. Section 88EA was repealed by the *Marriage Amendment (Definition and Religious Freedoms) Act (2017)*.¹⁷³⁶

¹⁷³³ Submission from Equality Australia (17 March 2020).

¹⁷³⁴ *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) (accessed 3 February 2021).

¹⁷³⁵ *Marriage Act 1961* (Cth) s 5 (accessed 3 February 2021).

¹⁷³⁶ *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) Sch 1, Pt 1, cl 58 (accessed 23 July 2019).

There are provisions in the legislation (as amended) which allow for religious ministers, churches and bodies established for religious purposes to refuse to perform marriages or deliver services related to marriage.¹⁷³⁷

In Western Australia, it is unlawful to discriminate against someone because of their marital status under the *Equal Opportunity Act 1984* (WA). 'Marital status' for the purposes of that Act means the status of being '(a) single; or (b) married; or (c) married but living separately and apart from one's spouse; or (d) divorced; or (e) widowed; or (f) the de facto partner of another person'.¹⁷³⁸ The relevant definition of 'de facto relationship' is contained in s 13A of the *Interpretation Act 1984* (WA). Section 13A was inserted in 2002, with s 13A(1) providing that for the purpose of other written laws in the State:

A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.

Section 13A(3) provides that in determining whether people are in a de facto relationship it does not matter whether the persons are different sexes or of the same sex.

12A.3.2 Children and parenting

The Gay & Lesbian Equality (WA) Inc. and Gay and Lesbian Community Services of Western Australia Inc. (now Living Proud Inc.)¹⁷³⁹ noted in a 2009 publication that:¹⁷⁴⁰

Gay men, lesbians, bisexuals and transgender people live with and parent children in many situations. Legal rights and responsibilities in relation to those children can be complex, particularly if they are conceived using reproductive technology or self-insemination.

This is a new area of law that is still developing and many of the issues haven't been fully tested in court. The law in Western Australia is a complex mix of state and federal laws.

¹⁷³⁷ *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) ss 47A, 47B (accessed 23 July 2019).

¹⁷³⁸ *Equal Opportunity Act 1984* (WA) s 4 (accessed 3 February 2021).

¹⁷³⁹ Gay and Lesbian Community Services of Western Australia Inc. was renamed 'Living Proud Inc.' and promoted as 'Living Proud: LGBTI Community Services of WA' in 2013.

¹⁷⁴⁰ Gay and Lesbian Equality (WA) Inc. and Gay and Lesbian Community Services of Western Australia Inc., *Equality Rules: A Guide to Equality for Gay Men, Lesbians and Bisexuals under WA Law* (2003) (accessed 5 August 2009).

12A.3.2.1 Adoption

In Western Australian law, s 38 of the Adoption Act 1994 (WA) provides that a person, or two persons jointly, may apply to adopt a child under the Act and be assessed by the CEO for suitability for adoptive parenthood. Section 39 then sets out who may apply under s 38. The provision does not distinguish between same-sex or different-sex couples, so all are able to apply to adopt children if they also meet the other criteria (e.g. residency and age requirements).¹⁷⁴¹

12A.3.2.2 Surrogacy and in vitro fertilisation

Surrogacy describes an arrangement where a woman (the birth mother) seeks to become pregnant and to give birth to a child and for a person or persons other than the birth mother (the arranged parent or arranged parents) to raise the child. Traditional (partial) surrogacy refers to an arrangement where the birth mother's egg is used with the sperm provided by either the arranged father or a donor. Gestational (full) surrogacy uses assisted reproductive technology (in vitro fertilisation (IVF)) with the birth mother having no genetic connection to the child. One or both of the arranged parents may be the genetic parent, or a donor egg and sperm or embryo may be used. A surrogacy arrangement that involves no financial or material gain is known as altruistic surrogacy. This is permissible in Australia, subject to certain conditions.¹⁷⁴²

Surrogacy legislation was passed in Western Australia in 2008.¹⁷⁴³ The Surrogacy Act 2008 (WA) s 19(2) defines an 'eligible couple' and an 'eligible person' to seek transfer of a child's parentage as:

eligible couple means 2 people of opposite sexes who are married to, or in a de facto relationship with, each other and who, as a couple —

- (a) are unable to conceive a child due to medical reasons not excluded by subsection*
- (3) [advanced age or another prescribed reason]; or*

¹⁷⁴¹ Adoption Act 1994 (WA) s 39(a), (b) (accessed 3 February 2021).

¹⁷⁴² Government of Western Australia, Department of Health, Review of the Surrogacy Act 2008 – Report to the Western Australian Parliament (November 2014) page 4 (accessed 3 February 2021).

¹⁷⁴³ Surrogacy Act 2008 (WA) (accessed 3 February 2021).

- (b) *although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease;*

eligible person means a woman who —

- (a) *is unable to conceive a child due to medical reasons not excluded by subsection (3) [advanced age or another prescribed reason]; or*
- (b) *although able to conceive a child, would be likely to conceive a child affected by a genetic abnormality or a disease; or*
- (c) *although able to conceive a child, is unable for medical reasons to give birth to a child.*

The Human Reproductive Technology Act 1991 (WA) s 23(1)(a) provides that in vitro fertilisation may be carried out where it would be likely to benefit:¹⁷⁴⁴

- (i) *persons who, as a couple, are unable to conceive a child due to medical reasons; or*
- (ia) *a woman who is unable to conceive a child due to medical reasons; or*
- (ii) *a couple or a woman whose child would otherwise be likely to be affected by a genetic abnormality or disease; or*
- (iii) *a woman who is unable to give birth to a child due to medical reasons and is a party to a surrogacy arrangement (as defined in the Surrogacy Act 2008 section 3) that is lawful.*

Section 23(1)(c) specifies that any person seeking to be regarded in applying paragraph (a) as members of a couple are:

- (i) *married to each other; or*
- (ii) *in a de facto relationship with each other and are of the opposite sex to each other.*

The Human Reproductive Technology and Surrogacy Legislation Amendment Bill 2018 was introduced in the Western Australian Parliament on 23 August 2018.¹⁷⁴⁵ In the Second Reading Speech the Minister for Health noted that discrimination on the grounds of sexual orientation,

¹⁷⁴⁴ As accessed 3 February 2021.

¹⁷⁴⁵ The Bill was referred to the Standing Committee on Legislation on 18 October 2018, which published its report on 27 June 2019 (Report No 40/ Tabled Paper 2835).

gender identity and intersex status became unlawful in all States and Territories by amendments to the *Sex Discrimination Act 1984* (Cth), however exemptions made by Commonwealth regulations were in place exempting the *Human Reproductive Technology Act 1991* (WA) and *Surrogacy Act 2008* (WA) from application of the *Sex Discrimination Act* until 31 July 2017.¹⁷⁴⁶

The intention of the Bill is to bring Western Australia in line with all other Australian jurisdictions that allow male same-sex couples to engage in altruistic surrogacy (with the exception of the Northern Territory which has no relevant laws). The amendments would:¹⁷⁴⁷

- *firstly, provide equitable access to surrogacy through use of assisted reproductive technology for male same-sex couples and single men, and*
- *secondly, enable licensed fertility clinics and practitioners to provide such services without discrimination on the basis of sex and sexual orientation, in compliance with Commonwealth and State legislation (Equal Opportunity Act 1984 (WA)).*

12A.3.3 Property

Property laws and the common law regarding contract and equity apply to de facto relationships which ended prior to 1 December 2002.

The *Family Court Act 1997* (WA) applies to de facto relationships which ended after that date (i.e. the date of commencement of Part 5A of that Act).¹⁷⁴⁸ The relationship would need to meet the definition of 'de facto relationship' in s 13 of the *Interpretation Act 1984* (WA).

The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) amended the *Family Law Act 1975* (Cth) to extend the federal jurisdiction to financial matters arising out of the breakdown of de facto relationships, including both opposite-sex and same-sex relationships.¹⁷⁴⁹

¹⁷⁴⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 August 2018, page 5283 (Mr RH Cook, Minister for Health) (accessed 8 August 2019).

¹⁷⁴⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 August 2018, page 5283 (Mr RH Cook, Minister for Health) (accessed 8 August 2019).

¹⁷⁴⁸ *Family Court Act 1997* (WA) s 205U (accessed 8 August 2019).

¹⁷⁴⁹ *Family Law Act 1975* (Cth); *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth). A definition of 'de facto relationships' is contained in s 4AA of the *Family Law Act 1975* (Cth) (accessed 19 August 2019).

Those 2008 amendments provided for parents in same-sex couples to have some of the same rights as parents in opposite-sex couples. For example, a non-biological parent of child(ren) born through assisted reproduction in a two-female-parent family can be legally recognised as a parent for the purposes of property division proceedings.¹⁷⁵⁰

12A.4 EXPLANATIONS AND TERMINOLOGIES¹⁷⁵¹

12A.4.1 Homosexual

'Homosexuality' is sometimes used to describe both lesbian and gay male sexuality — that is, as a term for people whose sexual and romantic feelings are for the same gender.

However, the term has been used in pathologising ways and is not often now used as an identity label; most people who experience same gender attraction will use labels like lesbian or gay.

Some lesbians may regard 'homosexual' and 'homosexuality' as male terms exclusive of women.

12A.4.2 Gay

'Gay' is used to describe people whose sexual and romantic feelings are for the same gender.

'Gay' can refer to men or women.

'Gay' is an adjective and should never be used as a noun.

Some lesbians prefer the term 'lesbian'.

The term 'gay man' is the closest match for the term 'lesbian.'

12A.4.3 Lesbian

Lesbian refers to a woman whose sexual and romantic feelings are for other women.

¹⁷⁵⁰ *Family Law Act 1975* (Cth); *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) (accessed 19 August 2019).

¹⁷⁵¹ Definitions are taken from both The Freedom Centre (a Western Australian peer support centre for young people under 26 years old, funded by the Mental Health Commission) *LGBTIQ+ Glossary* (updated 2019); and the New South Wales Judicial Commission, *Equality before the Law Bench Book* (chapter 8 updated 11 December 2017) (accessed 4 February 2021).

The terms 'lesbian' (as opposed to 'homosexual' or 'gay') and 'lesbianism' (as opposed to 'homosexuality') are generally preferred by women who are sexually and romantically attracted to women.

12A.4.4 Bisexual

'Bisexual' (or 'bi') refers to people who are sexually and romantically attracted to more than one gender.

12A.4.5 Pansexual or omnisexual

'Pansexual' refers to people whose sexual and romantic feelings are for all genders, thus it rejects the gender binary of male/female and asserts that there are more than two genders or gender identities. 'Pan' and 'omni' mean 'all.'

12A.4.6 Queer

Some (particularly younger) lesbian, gay and bisexual people and people with other diverse sexualities use 'queer', and/or 'queer-identifying', to describe anyone who is not completely heterosexual. This umbrella term often includes trans people, despite the fact that being trans is not based on sexuality.

Because the term has historically been used negatively and in discriminatory ways, some members of the gay, lesbian, bisexual and trans communities prefer not to use this term. Consequently, it should not be used to refer to a person or group without their permission. However, for some this term accurately describes their identity and has been embraced with pride.

12A.4.7 Asexuality

'Asexual' refers to someone who does not experience sexual attraction to others and who may lack interest in or desire for sex.

Asexual people can still be in a relationship through expressing other forms of attraction.¹⁷⁵²

¹⁷⁵² Submission from Pride in Law Association (22 September 2019).

12A.4.8 Aromantic

Aromantic refers to someone who does not experience romantic attraction of feelings and who may lack interest in romantic relationships.

Aromantic people can still be in a relationship through expressing other forms of attraction.¹⁷⁵³

12A.4.9 Coming out, closeted and outed

'Coming out' may be used to describe the process of openly describing oneself as lesbian, gay or bisexual, and then living openly, or relatively openly, as lesbian, gay or bisexual.

'Coming out' is a continual process, which does not stop with saying it in to one person or in one setting.¹⁷⁵⁴

A person who has 'come out' may be described as 'out'. Lesbians and gay men who have 'come out' are sometimes said to have 'come out of the closet'.

Those who are not open about their sexuality are described as 'in the closet' or 'closeted'.

People who are closeted are sometimes 'outed' (that is, publicly named as lesbian, gay or bisexual) — usually by others who wish to embarrass or shame them, or for political purposes.

GRAI (GLBTI Rights in Ageing Inc.) submitted that 'closeted' means a person who regards their sexuality as a private and personal matter, not to be disclosed except possibly to a limited number of trusted individuals.¹⁷⁵⁵

Equality Australia submitted that:¹⁷⁵⁶

Describing someone as 'closeted' can be offensive, as it implies a lack of acceptance of their own sexuality.

The use of the word 'disclosure' is much more neutral.

¹⁷⁵³ Submission from Pride in Law Association (22 September 2019).

¹⁷⁵⁴ Submission from Australian Federation of AIDS Organisations Ltd. (AFAO) (23 September 2019).

¹⁷⁵⁵ Submission from GLBTI Retirement Association Inc. (18 April 2007). N.B. GLBTI Retirement Association Inc. has since been renamed GRAI (GLBTI Rights in Aging Inc).

¹⁷⁵⁶ Submission from Equality Australia (17 March 2020).

Particularly for people who are navigating cultural or faith-based identities alongside sexual identity, the degree of disclosure regarding one's sexuality can vary, and does not necessarily indicate the degree of self-acceptance with one's sexuality. The terms 'coming out' and 'closeted' are fairly Westernised ways of thinking about sexuality and may not reflect the experience of LGB people from CALD backgrounds.

12A.4.10 Concepts describing prejudices and biases against lesbian, gay and bisexual people¹⁷⁵⁷

'Homophobia' means negative or hostile attitudes and beliefs, and/or prejudice or hatred held towards homosexuality or people who are same-sex attracted. Examples of homophobia include repulsion or disgust towards sexual minorities, unease or suspiciousness of sexual minorities, or holding irrational or untrue beliefs about lesbian, gay and bisexual people as a group.

'Heterosexism' is concerned with the privileging of heterosexual people, relationships, behaviours and attitudes in a way which subordinates non-heterosexual forms. Heterosexism is evident where language or behavior assumes universal heterosexuality, leading to the invisibility of same-sex attracted people. One example of heterosexism would be 'Mr and Mrs' bath towels in a hotel double bedroom. Whilst this example may perhaps be trivial, when part of a systemic experience of ongoing language and behavior that makes same-sex life and love invisible, such 'trivial' incidents such as this serve to consolidate the oppressiveness of heterosexism.

Both homophobia and heterosexism have grave effects on sexual minorities, fueling violence and discrimination against sexual minority groups, promoting cultures of silence, and limiting the spaces available for lesbian, gay and bisexual people to express their sexuality with safety and freedom.

¹⁷⁵⁷ Based on the submission from Equality Australia (17 March 2020) citing Kassisieh G, *From Lives of Fear to Lives of Freedom: A Review of Australian Refugee Decisions on the Basis of Sexual Orientation* (for Gay and Lesbian Rights Lobby (NSW), May 2008) page 4.

12A.5 PRACTICAL CONSIDERATIONS

Unless appropriate account is taken of any specific needs, lesbian, gay and bisexual people and people with other diverse sexualities are likely to:

- feel uncomfortable, resentful and/or offended by what occurs in court;
- feel that an injustice has occurred; and
- in some cases if appropriate account is not taken of these specific needs, people of diverse sexuality may be treated unfairly.

These problems are likely to be compounded if the person also happens to be older, Aboriginal,¹⁷⁵⁸ from another culturally and linguistically diverse background, a young person, female, a person with a disability, a person who practices a minority religion or who is self-represented. Refer to the other relevant chapter(s) for more information.

12A.5.1 Appearance and behaviour

Lesbian, gay and bisexual people and people with other diverse sexualities must be accorded the same dignity and respect as everyone else.

Points to consider in relation to appearance and behaviour:

- Be sensitive to the fact that a person's style of dress or presentation (e.g., haircut, makeup or lack thereof) may or may not accord with the general view of the community as to how someone of that sex/gender should dress or look.
- No discomfort should be shown with any style that is more common in someone of the opposite sex, or with any style that might be seen as the stereotypical presentation of someone who is lesbian or gay (for example, excessively camp, femme or feminine, or excessively butch or masculine).

¹⁷⁵⁸ The term Aboriginal is used in this Bench Book to refer to a person of Aboriginal descent who identifies as Aboriginal and is accepted as such by the community in which he or she lives. It is acknowledged that the Indigenous inhabitants resident in Western Australia descend from many hundreds of distinct and diverse cultural groups.

- Be aware that you may have to ensure that the jury understands the need for such sensitivity early in the proceedings, rather than waiting until your final directions to them. Otherwise, the jury's initial assessment of a particular person may be unfairly influenced by false assumptions, and may not be changed easily by anything you say in your final directions.

Refer also to the list of common misconceptions in section 12A.2.

- As prescribed by law, intervene if it appears that any cross-examination is unfairly or inappropriately alluding to a person's sexuality, in appearance or behaviour.¹⁷⁵⁹

12A.5.2 Language and terminology

Points to consider in relation to language:

- Use sexuality descriptors only when relevant to the matter before the court, and then use only those that are both accurate and acceptable to the particular lesbian, gay or bisexual person or person with other diverse sexuality.
- For example, it is generally best to use 'lesbian woman', 'gay man/person', and 'queer person' as opposed to 'gays', 'lesbians', or 'queers'. But it is always best to check with the particular person first.

Refer to 12A.4 for further information about terminology.

- Where possible, it is always preferable to ask a person what their preferred term is for their current or previous partner. Equality Australia submitted that using the word 'partner' for people who are married could be considered offensive, and recommends that the terms 'partner', 'spouse', 'de facto' or 'husband/wife' (as appropriate) be used to describe relationships.¹⁷⁶⁰

¹⁷⁵⁹ *Evidence Act 1906* (WA) s 26 (accessed 19 August 2019).

¹⁷⁶⁰ Submission from Equality Australia (17 March 2020).

- Do not use explicitly or implicitly discriminatory language or comments — for example, do not state or imply, or allow others to state or imply, that all gay men are sexually promiscuous or that all lesbian women hate men.
- Treat everyone as an individual, and do not make statements that imply that all those who are lesbian, gay or bisexual are the same or likely to act in the same way.
- Never assume or imply that the way you think the majority of lesbians, gay or bisexual people behave or think is the standard by which any individual member of that group should be judged.
- When addressing same-sex families in court, terminology can be extremely important, as it may be considered very offensive to make assumptions about parental roles, especially based on biology. If unsure about the relationship between an adult and their child, it is advisable to politely ask what the relationship is where this is not a factual matter in issue – noting that parental roles can be contested in conflicted family situations. Assumptions based on biology, or assuming parental roles which do not align with the family actual relationships (such as by distinguishing between lesbian mums based on biology, or assuming the man who donated sperm is a father in a lesbian-led family), can be very offensive in certain circumstances, and confusing to children.¹⁷⁶¹
- It is advisable to be clear that the legal relationship between an adult and a child may differ from the reality of a social relationship between a parent and their child, especially in families where there are more than two parents or adults who play a parental role.¹⁷⁶²
- Do not assume the sexual identity of anyone based on the gender of their partner. For example, an ostensibly married opposite sex couple may have one partner who later affirms a different gender identity to the one they were known by at the date of their marriage. Where sexual identity is relevant to an issue before the court (which is likely only in a very small number of circumstances), consider whether you can sensitively,

¹⁷⁶¹ Submission from Equality Australia (17 March 2020).

¹⁷⁶² Submission from Equality Australia (17 March 2020).

discreetly and politely ask the person – recognising that not everyone will be comfortable disclosing their sexuality, particularly in the presence of other people who may not know.¹⁷⁶³

12A.5.3 The impact of a person being lesbian, gay or bisexual or with other diverse sexuality on any behaviour relevant to the matter(s) before the court

Points to consider:

- Be sensitive to the fact that evasiveness about personal life and activities may simply be a reluctance to disclose one's sexuality in court. You may need to intervene if any such questioning is unduly annoying, harassing, or offensive,¹⁷⁶⁴ or consider whether it would be best to close the court.
- In particular, be sensitive to the difficulties faced by older people whose formative years were spent in a society which was more hostile to people with diverse sexualities.
- The same particular sensitivities may be needed when dealing with members of some ethnic or cultural groups whom are lesbian, gay, bisexual or with other diverse sexualities.
- Where the disclosure of sexuality to others is relevant, it is prudent to ask specific, sensitive and polite questions regarding who may know about the person's sexual identity, or to whom the person has disclosed their identity.¹⁷⁶⁵
- Care should be taken not to 'out' someone (especially witnesses giving evidence under compulsion) without investigating the possibility of giving evidence in camera.¹⁷⁶⁶
- Assess same-sex relationships with the understanding that, as with any relationship, they vary. For example, some couples allow sexual activity outside the relationship. Some couples have a strong relationship and others do not. Financial and other such

¹⁷⁶³ Submission from Equality Australia (17 March 2020).

¹⁷⁶⁴ *Evidence Act 1906* (WA) s 26 (accessed 3 February 2021).

¹⁷⁶⁵ Submission from Equality Australia (17 March 2020).

¹⁷⁶⁶ Submission from Equality Australia (17 March 2020).

arrangements vary from couple to couple. These variations occur amongst both heterosexual couples and same-sex couples.

- Do not let stereotyped views about lesbian, gay and bisexual people and people of other diverse sexualities to unfairly influence your (or others') assessment. Subject to the law, ensure that any values and practices that appear to be related to a person's sexuality are respected in court.
- For example, you may need to:
 - as prescribed by law, intervene if any of the common misconceptions listed in 12A.2 appear to be unfairly behind any questioning;¹⁷⁶⁷ and/or
 - intervene if cross-examination becomes unduly annoying, harassing, intimidating, offensive or oppressive.¹⁷⁶⁸ Note that you are entitled to consider any relevant characteristic of the witness in determining this issue.¹⁷⁶⁹
- Be mindful that family, domestic and sexual violence can affect any relationship.

For more information about family, domestic and sexual violence please refer to chapter 13.

- Be aware of the extent of verbal abuse, intimidation and violence that is experienced by lesbian, gay and bisexual people and people with other diverse sexualities.

For statistical information in relation to verbal abuse, intimidation and violence that is experienced by lesbian, gay and bisexual people please refer to 12A.1.4.

- In order to deal with this issue fairly and appropriately, you may need to take such measures as excluding people from the courtroom while the witness is giving evidence; or allowing the witness to give evidence remotely by video-link at a pre-recorded special hearing; or allowing a support person to attend.¹⁷⁷⁰

¹⁷⁶⁷ *Evidence Act 1906* (WA) s 26 (accessed 3 February 2021).

¹⁷⁶⁸ *Evidence Act 1906* (WA) s 26 (accessed 4 February 2021).

¹⁷⁶⁹ *Evidence Act 1906* (WA) s 26(3)(a) (accessed 4 February 2021).

¹⁷⁷⁰ *Evidence Act 1906* (WA) ss 106R, 106RA, 121 (accessed 4 February 2021).

- Some of these measures may be implemented on the basis that you have declared a person to be a 'special witness' within the meaning of s 106R of the *Evidence Act 1906* (WA). In particular, s 106R(3) provides for a 'special witness' order to be made where a person would be likely to suffer emotional trauma, intimidation or distress by reason of the subject matter of the evidence, if such order was not made.
- In addition to the restrictions on unrepresented persons directly cross-examining witnesses who are children, complainants in serious sexual assault proceedings or certain witnesses in restraining order matters, you have a discretion to allow the cross-examination by an unrepresented accused of any witness to be by video-link, while screened, or without questions being put directly — having regard to the nature of the charge, the wishes of the witness, and the availability of any necessary facilities or equipment.¹⁷⁷¹
- You should consider discussing with the parties and/or their legal representatives the use of any special measures referred to above if to do so would be in the interests of justice.
- Instruct the jury that declaring a witness to be a 'special witness', or using alternative means for a witness to present evidence, are routine practices of the court and these measures should not affect how they consider the evidence.
- As prescribed by law, intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any sexuality-determined difference, if it is disrespectful, or if it fails to take account of a relevant sex/gender difference.¹⁷⁷²
- Has the fact that the person is lesbian, gay or bisexual or with other diverse sexuality, 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. 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, explain why any such influences can/should be taken into

¹⁷⁷¹ *Evidence Act 1906* (WA) s 25(a) (accessed 4 February 2021).

¹⁷⁷² *Evidence Act 1906* (WA) s 26 (accessed 4 February 2021).

account, or cannot/should not be taken into account. You may need to explain this in any direction you make to the jury and in your decision-making or sentencing.

12A.5.4 Directions to the jury

As indicated at various points throughout the chapter, it is important to ensure that the jury does not allow any ignorance about diverse sexualities, including lesbian, gay and bisexual people, to unfairly influence their judgment.

Points to consider in directing the jury:

- In your final directions to the jury, you may need to remind them of any points that you alerted them to during the proceedings, or raise points for the first time.
- For example, you may need to:
 - provide specific guidance that they must try to avoid making stereotyped or false assumptions — including an explanation of what is meant by this;
 - remind them specifically that while the particular lesbian, gay, or bisexual person's behaviour and/or sexuality may not accord with what they themselves regard as morally acceptable, they must 'remember that this is a court of law and not a court of morals'; and
 - direct them to the specific questions they must decide, explaining that they must decide the matter(s) without prejudice to anyone.
- On the other hand, you may also need to direct the jury to assess the particular person's evidence alongside what they have learned in court about the way in which lesbian, gay or bisexual people or people with other diverse sexualities may (or feel they have to) live their lives, as opposed to the way in which the jurors themselves might act.
- You may need to provide guidance as to any legal limitations that exist in relation to the jury taking full account of any of these matters, and which particular aspects they need to give attention.
- If you have declared a witness in the proceedings to be a 'special witness', or restricted the direct cross-examination by a self-represented accused, remind jurors that these are

routine practices of the court and that they should not draw any inference as to the accused's guilt from these measures.

12A.5.5 Decisions and sentencing remarks

Subject to any laws, any decisions including sentencing judgments should be fair and non-discriminatory to any lesbian, gay or bisexual person or person with other diverse sexuality affected by the decision or referred to in the decision, and be seen to be so by them.

Points to consider in your sentencing and other decisions:

- You may need to pay due consideration to (and indeed specifically allude to) any of the points raised earlier in this section 12A.5.
- Ensure that proper account is taken of the status of same-sex relationships, or non-biological parent-to-child connections, including when making decisions (for example, in relation to such matters as damages, compensation, property division and inheritance).
- If a victim is not personally capable of giving a victim impact statement, for any reason, consider whether it is appropriate for someone else to do so on the victim's behalf.¹⁷⁷³
- Consider whether to allow a victim impact statement to be read out in court.¹⁷⁷⁴
- Be aware that lesbian, gay and bisexual people and people with other diverse sexualities who are sent to prison face particular difficulties because of the way their sexuality is perceived.

¹⁷⁷³ *Sentencing Act 1995* (WA) s 24(2) (accessed 4 February 2021).

¹⁷⁷⁴ Refer to Part 3, Division 4 of the *Sentencing Act 1995* (WA) (accessed 4 February 2021). Note that a court may make a written victim impact statement available to the prosecutor and to the offender, on such conditions as it thinks fit, pursuant to s 26(1).

12A.6 FURTHER INFORMATION AND HELP

Australian Federation of AIDS Organisations (AFAO)

The Australian Federation of AIDS Organisations (AFAO) is the national peak organisation for Australia's community-led response to HIV. AFAO represents the diverse communities most affected by HIV and draws together Australia's leading community, research, public health and clinical workforce organisations to provide a clear and united voice to governments and Australia's Federal Parliament. AFAO's member organisations – spanning community, research and clinical workforce – share AFAO's values and support the work that is done by AFAO. In Asia and the Pacific, AFAO partners with civil society organisations and communities to advocate for programs to prevent HIV transmission and stop AIDS-related deaths by 2030.

Freedom Centre

The Freedom Centre aims to support young people, families and entire communities to be healthy, happy and informed about diverse sexuality, sex and gender. Volunteers and staff are all people who are young, LGBTIQ+ and specifically trained to provide support and information to their peers. The Freedom Centre has drop-in spaces for young LGBTIQ+ people and those questioning their sexuality to meet others and obtain information and peer support.

GRAI (GLBTI Rights in Ageing)

GRAI is a community-run organisation based in Perth. Founded in 2005, GRAI works to support the rights and well-being of older LGBTI people. GRAI provides advocacy, works to establish partnerships with government agencies, undertakes research and provides training for the aged-care sector. GRAI also provides information and social events for the LGBTI community.

Living Proud (LGBTI Community Services of WA)

Living Proud (formerly Gay & Lesbian Community Services of WA Inc.) provides support, information and resources to the Western Australian LGBTI community. Living Proud is a non-profit organisation which provides a range of services, support and resources to promote

wellbeing, reduce discrimination and disadvantage among LGBTI people and improve their access to services.

LGBTIQ+ Health Australia

LGBTIQ+ Health Australia (formerly the National LGBTI Health Alliance) is the national peak health organisation in Australia for organisations and individuals that provides health-related programs, services and research focused on lesbian, gay, bisexual, transgender, intersex and queer people and other sexuality and gender diverse (LGBTIQ+) people and communities.

Parents, Families and Friends of Lesbians and Gays (PFLAG)

PFLAG Perth is a volunteer run, non-profit organisation in Western Australia, providing a support system for families and friends of people who are LGBTI, along with education and advocacy in the community. PFLAG commenced its operations in Perth in 1989.

Pride in Law Association

Pride in Law is an LGBTIQ+ Law Association which was established in Brisbane in July 2017 to support and connect LGBTIQ+ members of the legal community and their allies. Pride in Law is an apolitical non-profit organisation and the first of its kind in Australia. Pride in Law intends to launch in Western Australia with plans to spread to other jurisdictions.

Western Australian AIDS Council

The Western Australian AIDS Council is a non-government organisation committed to the HIV response in Western Australia, which was established in 1985. It is the peak Western Australian body in the provision of services aimed at the prevention of HIV, sexually transmitted infections and blood borne viruses, and the treatment and care of people living with HIV and AIDS.

12A.7 FURTHER READING

Australian Bureau of Statistics (ABS), Gender Social Survey: Summary Results, Australia (Cat No 4159.0) (released 30 September 2020) (accessed 4 February 2021)

ABS, Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016

(Cat No 2071.0) (released 27 March 2018) Same-Sex Couples in Australia (accessed 4 February 2021)

Attorney-General's Department (Cth), *Australian Government Guidelines on the Recognition of Sex and Gender* (2013) (accessed 4 February 2021)

Broady T, Chan C, Bavinton B, Mao L, Sackville-Podmore R, Pierce M, Lobo R, Churcher S, Bastian L, Prestage G and Holt, M, *Gay Community Periodic Survey: Perth 2019*, Centre for Social Research in Health, UNSW Sydney (2020) (accessed 3 February 2021)

Campo M, and Tayton S, *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities* (Australian Institute of Family Studies, December 2015) (accessed 4 February 2021)

Dempsey D, *Same-sex Parented Families in Australia*, CFCA Paper No.18 (2013) (accessed 3 February 2021)

Hill A, Bourne A, McNair R, Carman M and Lyons A, *Private Lives 3: The Third National Survey of the Health and Wellbeing of Gay, Lesbian, Bisexual and Transgender Australians (2020)* (accessed 3 February 2021)

Hiller L, Jones T, Monagle N, Gahan L, Blackman J and Mitchell A, *Writing Themselves in 3: The Third National Study on the Sexual Health and Wellbeing of Same Sex Attracted and Gender Questioning Young People* (2010) (accessed 3 February 2021)

International Lesbian, Gay, Bisexual, Trans and Intersex Association, *Minorities Report 2017: Attitudes to Sexual and Gender Minorities around the World* (2017) (accessed 4 February 2021)

LGBTQ+ Health Australia, *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI People* (July 2020) (accessed 3 February 2021)

Lyons A, Hosking W and Rozbroj T, *Rural-Urban Differences in Mental Health, Resilience, Stigma, and Social Support Among Young Australian Gay Men* (Journal of Rural Health 31 (1) 2015) (accessed 4 February 2021)

New South Wales Council of Social Service, *Beyond the Myth of Pink Privilege: Poverty, Disadvantage and LGBTI People in NSW* (2015) (accessed 3 February 2021)

Office of the Director of Public Prosecutions Comparative Sentencing Tables (accessed 12 July 2021)

Robinson KH, Bansel P, Denson N, Ovenden G and Davies C, *Growing up Queer: Issues Facing Young Australians who are Gender Variant and Sexuality Diverse* (2014) (accessed 16 May 2018)

Smith E, Jones T, Ward R, Dixon J, Mitchell A and Hiller L, *From Blues to Rainbows: The Mental Health and Well-being of Gender Diverse Young People in Australia* (2014) (accessed 4 February 2021)

Ullman J, *Free2Be?: Exploring the Schooling Experiences of Australia's Sexuality and Gender Diverse Secondary School Students* (November 2015) (accessed 3 February 2021).

12B DIVERSE SEX AND GENDER: INTERSEX, TRANS AND GENDER DIVERSE PEOPLE (ITGD)

People who are 'diverse in their sex or gender' includes, but is not limited to, trans and intersex people. Sex and gender may be interrelated for some, but this is not the case for all people.¹⁷⁷⁵ 'Sex' refers to the biological attributes (including chromosomes and physical anatomy) that define people as either male, female, a combination of female and male, or neither female nor male.¹⁷⁷⁶ 'Gender identity' is the identification of oneself as a man, a woman, or another gender outside this binary.¹⁷⁷⁷

The Courts have recognised sex and gender outside the binary. In *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490 at [2], [46], the High Court recognised genders other than 'male' and 'female' and confirmed that a person's sex could be registered as 'non-specific'. Later, the Family Court stated in *Tien-Lao and Tien-Lao* [2018] FamCA 953 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.

The Steering Committee overseeing the production of this Bench Book decided that, in the revised second edition, this sub-chapter be separated from sub-chapter 12A (diverse sexuality – lesbian, gay and bisexual people and people with other diverse sexualities). The two sub-chapters were combined in the first edition, but it was decided to separate them because of the different needs and issues faced by these different groups. It is important to note that the needs

¹⁷⁷⁵ The Freedom Centre, *LGBTIQ+ Glossary* (updated 2019) (accessed 4 February 2021).

¹⁷⁷⁶ The Freedom Centre, *LGBTIQ+ Glossary* (updated 2019) (accessed 4 February 2021).

¹⁷⁷⁷ The Freedom Centre, *LGBTIQ+ Glossary* (updated 2019) (accessed 4 February 2021).

of intersex people and trans people, and the nature of the discrimination each group faces, also differ in many respects.

While statutory protections have improved in recent years, discrimination and abuse are still common experiences for intersex, trans and gender diverse people. This discrimination contributes to the higher rates of mental health problems amongst intersex, trans and gender diverse people. As explained by one trans male, it is not trans status that is detrimental to health, but society's reaction to and treatment of the person:¹⁷⁷⁸

To me, it's not the fact that I'm trans that caused problems. It's that general society doesn't accept trans people. I'm not anxious in public because I'm trans – I'm anxious in public because people tend to be threatened by people like me. I'm not depressed because I'm trans – I'm depressed because general society excludes people like me from support.

Much of the information in this chapter is drawn from the New South Wales Judicial Commission's *Equality before the Law Bench Book*,¹⁷⁷⁹ specifically section 9 - 'Gender diverse people and people born with diverse sex characteristics', which was updated on 13 June 2019. The New South Wales Judicial Commission acknowledged that 'intersex and transgender people are different, their needs are different, and the discrimination they face is different.'¹⁷⁸⁰ Consequently their section 9 separates some issues affecting gender diverse people, and those issues faced by people born with diverse sex characteristics (intersex people). Parts of chapter 12B of this Bench Book do the same – for example, the common misconceptions about people who are gender diverse and people who are intersex are in separate parts of section 12B.2.

The Steering Committee overseeing the production of this Bench Book also gratefully acknowledges the submissions and contributions of the following organisations, which have assisted in the development of chapter 12 in the first edition and then this chapter 12B in the revised edition:

¹⁷⁷⁸ Strauss P, Cook A, Winter S, Watson V, Wright- Toussaint D and Lin A, *Trans Pathways: The Mental Health Experiences and Care Pathways of Trans Young People* (2017) page 25 (accessed 12 August 2019).

¹⁷⁷⁹ New South Wales Judicial Commission, *Equality before the Law Bench Book* (chapter 9 updated 13 June 2019) (accessed 12 August 2019).

¹⁷⁸⁰ New South Wales Judicial Commission, *Equality before the Law Bench Book* (chapter 9 updated 13 June 2019) (accessed 12 August 2019), citing the Hon Roslyn Dundas, MLA, ACT Parliament, Media Release following the amendment to the *Legislation Act 2001* (ACT).

- Living Proud Inc.¹⁷⁸¹ (17 April 2007 and 23 September 2019);
- GRAI (GLBTI Rights in Aging) Inc.¹⁷⁸² (18 April 2007, 28 February 2020);
- WA Gender Project (25 April 2007);
- Freedom Centre, WA AIDS Council (24 March 2009, 5 August 2009); and
- Pride in Law Association (22 September 2019).

12B.1 SOME INFORMATION AND STATISTICS

12B.1.1 Population

There are no official statistics as to the number of Western Australians who are or who might be perceived as being intersex, trans or gender diverse (sometimes collectively referred to as ITGD).

National data on sex and gender diversity was collected for the first time in the ABS 2016 Census.¹⁷⁸³ The ABS acknowledged the challenges in obtaining reliable data, and has committed to improving the future collection and processing of information.

In the 2016 Census, 1260 people identified as sex and gender diverse, however, as noted by the ABS, this is a severe underestimate. This is likely due to people not understanding how to report their gender or sex as diverse and fear of revealing their personal information in an official document, based on past experiences of discrimination. Further:¹⁷⁸⁴

In households, it is common for one person to complete responses on behalf of other household members, who may not know or respect how these other household members would report their sex or gender. This means that some people might not have had the opportunity to report their own sex or gender. Household forms may also introduce privacy concerns for some individuals. While the ABS had arrangements to provide private forms on request, some respondents may not have been aware of these or may have chosen not to take this additional step.

¹⁷⁸¹ Gay and Lesbian Community Services of Western Australia Inc. was renamed 'Living Proud Inc.' and promoted as 'Living Proud: LGBTI Community Services of WA' in 2013.

¹⁷⁸² At the time of its 2007 contributions, GRAI was named the 'GLBTI Retirement Association Inc'.

¹⁷⁸³ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2018) Sex and Gender Diversity in the 2016 Census (accessed 4 February 2021).

¹⁷⁸⁴ ABS, *Census of Population and Housing: Reflecting Australia – Stories from the Census, 2016* (Cat No 2071.0) (2018) Sex and Gender Diversity in the 2016 Census (accessed 4 February 2021).

It has been estimated that approximately 1.7% of the population has some kind of intersex characteristics, including but not limited to Androgen Insensitivity Syndrome (AIS), Congenital Adrenal Hyperplasia and 5-alpha reductase deficiency.¹⁷⁸⁵

In April 1997, when the Gender Reassignment Bill 1997 was read for the second time in the Western Australian Parliament, it was estimated that there were at least 250 people in Western Australia with gender dysphoria and that about 80 had undergone gender reassignment procedures.¹⁷⁸⁶

In its Annual Report of 2020, the Gender Reassignment Board advised that 42 applications had been lodged in the 2019-20 financial year (with seven carried over from the previous year). This resulted in 39 recognition certificates being granted.¹⁷⁸⁷ There has been a steady increase in the number of people seeking recognition of their gender reassignment. For example, four recognition certificates were issued in 2007-08,¹⁷⁸⁸ and 14 were issued in 2012-13.¹⁷⁸⁹

For information regarding legal recognition of gender reassignment under the *Gender Reassignment Act 2000* (WA) please refer to 12B.3.

12B.1.2 Discrimination

Intersex, trans and gender diverse people face a lack of understanding and knowledge about many aspects of their lives and experiences. Misunderstandings usually arise from myths and stereotypes. They may inappropriately be considered 'freakish' and suffer many indignities accordingly. As a result, many seemingly innocuous, everyday activities can be misunderstood. For example, many trans people have to deal with shocked reactions, accusations of sexual perversion and threats of violence when they enter a public bathroom. For a person in the middle of transition, this can often result in difficulty accessing either bathroom.

In the year 2000, amendments were made to the *Equal Opportunity Act 1984* to prohibit

¹⁷⁸⁵ Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books, 2nd ed, 2008). See also Intersex Human Rights Australia, *Intersex Population Figures* (28 September 2013) (accessed 4 February 2021).

¹⁷⁸⁶ Western Australia, *Parliamentary Debates*, Legislative Council, 13 April 1997, page 291 (Hon NF Moore, Leader of the House).

¹⁷⁸⁷ Gender Reassignment Board of Western Australia, *Annual Report 2020*, page 3 (accessed 4 February 2021).

¹⁷⁸⁸ Gender Reassignment Board of Western Australia, *Annual Report 2008*, page 3 (accessed 4 February 2021).

¹⁷⁸⁹ Gender Reassignment Board of Western Australia, *Annual Report 2013*, page 3 (accessed 4 February 2021).

discrimination against people on the basis of their gender history, defined as being where 'the person identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex'.¹⁷⁹⁰ The 'opposite sex' was defined as 'a sex of which the person was not a member at birth'.¹⁷⁹¹ Protections against discrimination apply in areas including employment and education.¹⁷⁹²

In the past, only individuals who had undergone a medical procedure (requiring sterilisation) and as such had been issued a recognition certificate were protected from discrimination under the law.¹⁷⁹³ However, in *AB v Western Australia* (2011) 244 CLR 390, the High Court ruled that sterilisation is not required to obtain a gender recognition certificate.¹⁷⁹⁴

The New South Wales Judicial Commission has noted that although some legislative protections against discrimination on transgender grounds were introduced in 1996,¹⁷⁹⁵ trans people remain marginalised with:¹⁷⁹⁶

- an unemployment rate of approximately 10%, or more than double the national average, in 2011 (noting that some studies have shown rates of trans unemployment as high as 60%, but may not be statistically reliable);
- many of those who are employed feeling the need to, or being forced to, change jobs during their gender identity change, or working in jobs below their capacity or qualifications;
- high rates of domestic, family and sexual violence (higher than people in either gay, lesbian or different-sex relationships), frequently including the use of offensive pronouns such as 'it' to refer to the transgender partner and ridicule regarding their body or appearance; and

¹⁷⁹⁰ *Equal Opportunity Act 1984* (WA) s 35AA(1) (accessed 4 February 2021).

¹⁷⁹¹ *Equal Opportunity Act 1984* (WA) s 35AA(2) (accessed 4 February 2021).

¹⁷⁹² *Equal Opportunity Act 1984* (WA) Part IIAA (accessed 4 February 2021).

¹⁷⁹³ Submission from WA Gender Project (25 April 2007).

¹⁷⁹⁴ *AB v Western Australia* (2011) 244 CLR 390.

¹⁷⁹⁵ *Anti-Discrimination Act 1977* (NSW) ss 38A–38T. Note that there is as yet no federal statutory anti-discrimination protection for people who have or are perceived as having sex/gender identity issues (accessed 4 February 2021).

¹⁷⁹⁶ New South Wales Judicial Commission, *Equality before the Law Bench Book* (chapter 9 updated 13 June 2019) section 9.2.1 (accessed 4 February 2021).

- high rates of bullying, with the most common place (80%) being at school.

In relation to employment, the first Australian *Private Lives Report* of 2006 found that 23.5% of trans males, 34.9% of trans females, 18.2% of intersex males and 28.6% of intersexed females were refused employment or promotion as a consequence of their sex or gender status.¹⁷⁹⁷ Note that the 2020 *Private Lives 3* report found that refusal of employment or promotion based on sexual orientation and/or gender identity was 9.9%, but did not report separately for intersex, trans and gender diverse people.¹⁷⁹⁸

Other significant issues for intersex, trans and gender diverse people include:

- Many intersex, trans and gender diverse people are unable to access services despite protections available to those who have undergone gender reassignment. The WA Gender Project submitted that this is particularly an issue in relation to access to medical treatments, due to non-recognition of their sex/gender prior to reassignment: for example, trans people being unable to access mammograms.¹⁷⁹⁹
- Because of how their sex/gender is classified or not recognised, many intersex, trans and gender diverse people may have limited legal rights, such as the ability to access reproductive technology and adoption services.

12B.1.3 Health

12B.1.3.1 Transitioning

Access to medical/health services is of particular significance for intersex, trans and gender diverse people. They will need to access these services over their lifespan to successfully transition and/or express their affirmed gender identity.¹⁸⁰⁰

An Australian 2019 study found that for 22.5% of the trans people who were surveyed, access

¹⁷⁹⁷ Pitts M, Smith A, Mitchell A and Patel S, *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians* (2006) page 50 (accessed 4 February 2021). One hundred transgender and 18 intersex people participated in the survey.

¹⁷⁹⁸ Hill A, Bourne A, McNair R, Carman M and Lyons A, *Private Lives 3: The Third National Survey of the Health and Wellbeing of LGBTIQ People in Australia (2020)* page 40 (accessed 3 February 2021).

¹⁷⁹⁹ Submission from WA Gender Project (25 April 2007).

¹⁸⁰⁰ Victorian State Government Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing Ministerial Advisory Committee, *Transgender and Gender Diverse Health and Wellbeing - Background Paper* page 14 (2014) (accessed 4 February 2021).

to gender-affirming health services was one of their most important health issues. Their issues included 'gatekeeping', the lack of financially accessible specialists, mental health support and access to gender-affirming interventions. In the same study, 27.0% of respondents indicated that hormone effects and risks were important areas of trans and gender diverse medical research, and 19.0% thought there should be more research into gender-affirming surgical techniques.¹⁸⁰¹

Medical interventions pose unique challenges for some intersex, trans and gender diverse people because transitioning affects employment, with possible negative economic consequences, which are exacerbated by the cost of medical interventions.¹⁸⁰²

12B.1.3.2 Physical Health

The high prevalence of some physical health issues is not inherent to being trans and gender diverse. Rather, most of these issues are associated with stigma, discrimination and a lack of knowledge on the part of the healthcare provider, which can lead to marginalisation and low rates of utilisation of medical services. There are exceptions, being those health issues which are related to particular medical interventions that trans and gender diverse undergo in order to medically affirm their gender. An example is osteoporosis, which may become an issue in older trans and gender diverse men and women, particularly those who have taken hormones inconsistently and those who have had gonadectomies.¹⁸⁰³

A small Western Australian study conducted in 2006 with 50 trans and gender diverse adults reported a significant under-utilisation of cervical pap smears and mammograms for those participants who met screening criteria in the national guidelines. Only 38% of participants who met pap smear screening guidelines had been screened in the past two years, contrasted to over 60% of the total population who met the guidelines. Prostate screening was more frequently utilised. Six out of the seven participants who met screening guidelines had been

¹⁸⁰¹ Zwickl S, Wong A, Brethereton I, Rainier M, Chetchuti D, Zajac J and Cheung A, *Health Needs of Trans and Gender Diverse Adults in Australia: A Qualitative Analysis of a National Community Survey* (15 November 2019) [3.2.3] and [3.3.1] (accessed 4 February 2021).

¹⁸⁰² Submission from WA Gender Project (25 April 2007).

¹⁸⁰³ Victorian State Government Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing Ministerial Advisory Committee, *Transgender and Gender Diverse Health and Wellbeing - Background Paper* (2014) pages 17-18 (accessed 13 August 2019).

screened.¹⁸⁰⁴

This same study also found that trans and gender diverse participants were twice as likely to have used an illicit substance in the previous six months compared with the total population, and trans and gender diverse women were twice as likely as women generally to smoke.¹⁸⁰⁵

12B.1.3.3 Mental Health

Mental illness symptoms such as anxiety and depression are found in a disproportionate number of intersex, trans and gender diverse people. This can be due to influences such as the response of family and friends, harassment and discrimination, difficulty accessing appropriate services and treatment, and the trauma of dealing with sex/gender identity issues.¹⁸⁰⁶

Trans people aged 25 and under are nearly ten times more likely to be diagnosed with depression, with 74% receiving a diagnosis of depression between the ages of 14 and 25. Gender diverse adults over 18 are five times more likely to be diagnosed with depression and intersex people twice as likely, when compared to the general population. Lifetime prevalence rates of anxiety are also high: approximately 39.9% for trans and gender diverse people and 12.9% for people with an intersex variation.¹⁸⁰⁷

The National LGBTI Health Alliance reported in 2020 that trans and intersex people are significantly more likely to commit suicide than the general population: eleven and six times respectively. The data showed that 48.1% of trans and gender diverse people aged 14 to 25, and 19.0% of those with an intersex variation aged 18 and over, have attempted suicide in their lifetime. Suicidal ideation is also extremely high in this population with 41.0% of trans and 60.0% of intersex people over the age of 16 having had thoughts of suicide.¹⁸⁰⁸

¹⁸⁰⁴ Victorian State Government Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing Ministerial Advisory Committee, *Transgender and Gender Diverse Health and Wellbeing - Background Paper* (2014) page 17 (accessed 13 August 2019) citing Hyde, Z and Brown, G *Health and Wellbeing of Transgender and Transsexual Western Australians: Priorities for Public Health* (2006).

¹⁸⁰⁵ Victorian State Government Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing Ministerial Advisory Committee, *Transgender and Gender Diverse Health and Wellbeing - Background Paper* page 17 (2014) (accessed 13 August 2019) citing Hyde, Z and Brown, G *Health and Wellbeing of Transgender and Transsexual Western Australians: Priorities for Public Health* (2006).

¹⁸⁰⁶ Submission from WA Gender Project (25 April 2007).

¹⁸⁰⁷ LGBTIQ+ Health Australia, *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI People* (July 2020) page 4 (accessed 4 February 2021).

¹⁸⁰⁸ LGBTIQ+ Health Australia, *Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI People* (July 2020) pages 2, 8-9 (accessed 4 February 2021).

12B.1.3.3.1 Mental health implications of deadnaming/misgendering

A 'dead name' is the name a person had prior to their transition. 'Deadnaming' is calling a person by the name they no longer use.¹⁸⁰⁹

'Misgendering' is describing or addressing someone using language that does not match the person's gender identity.¹⁸¹⁰

Deadnaming and misgendering is invalidating and can have mental health implications. If done in front of others who do not already know that the person is intersex, trans or gender diverse, it can effectively 'out' them as transgender. This may not be something that they want other people to know. Not only can being outed cause stress, it can also subject that person to harassment and discrimination.¹⁸¹¹

Identity misclassification is psychologically disruptive because it:¹⁸¹²

- undermines belonging and coherence needs;
- disrupts the social identity process; and
- reflects a failure by others to accurately verify one's social or personal identity.

The importance of personal identity verification is:¹⁸¹³

Confirming one's self-views helps to make the world predictable and controllable, satisfying a psychological need for coherence, providing knowledge about the self, and allowing social interactions to proceed in an authentic and smooth manner (e.g., Kernis & Goldman, 2006; Pelham & Swann, 1994; Swann & Brooks, 2012; Swann, Stein-Seroussi, & Giesler, 1992). When self-views are not verified by others, people experience negative affect and arousal (e.g., anxiety, depression) and a sense of inauthenticity in social relationships, often disengaging from non-verifying relationships.

A United States study to assess the impact of deadnaming on trans youth surveyed 129 respondents from three cities. The study found that respondents who were able to choose the

¹⁸⁰⁹ LGBTI Legal Service Inc. (Queensland), *Making LGBTI Rights Real* (presentation 21 March 2019) page 31 (accessed 4 February 2021).

¹⁸¹⁰ LGBTI Legal Service Inc. (Queensland), *Making LGBTI Rights Real* (presentation 21 March 2019) page 32 (accessed 4 February 2021).

¹⁸¹¹ Healthline, *What is Deadnaming?* (accessed 4 February 2021).

¹⁸¹² McLemore KA, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals* (in *Self and Identity*, August 2014) page 1 (accessed 4 February 2021).

¹⁸¹³ McLemore KA, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals* (in *Self and Identity*, August 2014) page 2 (accessed 4 February 2021).

name they used in any context (school, work, home and with friends) experienced 71% less symptoms of severe depression, 34% less thoughts of suicide and 65% less suicide attempts.¹⁸¹⁴

12B.1.4 Children

In the first *Private Lives* survey (2006), the participants who described their living arrangement as 'living with children' in a household were 11.8% of trans males; 13.6% of trans females; 18.2% of intersex males and no intersex females.¹⁸¹⁵

In the third *Private Lives* survey (2020), the participants who described their living arrangement as 'living with children' in a household were 9.3% of trans males; 18.5% of trans females and 8.5% of non-binary participants. Over half (50.8%) of trans and gender diverse participants reported 'a lot' or 'extremely' when asked if they faced barriers to having children in relation to their gender. Those barriers included the cost of assisted reproductive technology and concerns about raising children in a heterosexist society.¹⁸¹⁶

12B.1.5 Education¹⁸¹⁷

An Australian study published in 2016 which surveyed 189 intersex, trans and gender diverse young people (aged 14-25 years; average age 19 years) reported that participants were currently or had previously attended the following types of schools:

- Government – 47%;
- Christian private – 18%;
- General private – 10%;
- Vocational education and secondary provision institutions – 19%; and
- 'Other' schooling (including distance education) – 6%.

Whilst the researchers did not claim the sample was representative, it showed:

¹⁸¹⁴ Russell ST, *Chosen Name use is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behaviour Among Transgender Youth*, *Journal of Adolescent Health* (October 2018) 63(4), pages 503-505 (accessed 4 February 2021).

¹⁸¹⁵ Pitts M, Smith A, Mitchell A and Patel S, *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians* (2006) 50 (accessed 4 February 2021).

¹⁸¹⁶ Hill A, Bourne A, McNair R, Carman M and Lyons A, *Private Lives 3: The Third National Survey of the Health and Wellbeing of LGBTIQ People in Australia (2020)* pages 31 and 32 (accessed 3 February 2021).

¹⁸¹⁷ Unless otherwise indicated, the information and statistics in this section are drawn from Jones T, Smith E, Ward R, Dixon J, Hillier L and Mitchell (2016) *School Experiences of Transgender and Gender Diverse Students in Australia* (2016) *Sex Education* 16(2), pages 156-171 (accessed 4 February 2021).

... that it would be incorrect to assume that religious school types, for example, 'do not have' transgender or gender diverse students, although in Australia, religious schools [could at that time] obtain national legal exemptions from discrimination on the basis of gender identity in their service provisions to students. Overall, 25% of the survey participants reported that they avoided their schools because they cannot conform to the gender stereotypes dominant within these contexts, including 50% of those in Christian schools.

To find out how appropriate the participants perceived sexuality and puberty education to be, participants were asked to rate provision at their current/most recent school as 'mostly appropriate', 'mostly inappropriate' or 'don't know/not applicable'. With respect to sexuality education, two-thirds of the survey participants rated their schools' provision of sexuality education as 'mostly inappropriate' and less than 10% as 'mostly appropriate'. Students at Christian schools were most likely to indicate that their sexuality education was 'mostly inappropriate' (85%); none found it 'mostly appropriate'. Regarding puberty education, 55% of the survey participants reported it to be 'mostly inappropriate'.

Those participants who reported receiving 'no teacher support' were more than four times more likely to leave school (23% compared to 5% of those with teacher support) and more than twice as likely to hide at lunch time (50% compared to 23% of those who had teacher support). They were also at increased risk of harassment and abuse, particularly being bullied on mobile phones (27% compared to 8% of those who had teacher support), by written abuse (27% compared to 11% of those who had teacher support) and through discriminatory language from friends (62% compared to 31% of those who had teacher support).

Where participants reported that their teachers' use of pronouns, name or identity, was 'mostly inappropriate', they also reported increased abuse from peers and suffered poorer educational outcomes compared to those reporting that teachers used language which was 'mostly appropriate'. They more frequently reported being unable to concentrate in class (54% compared to 22%), that their marks had fallen (54% compared to 26%) or that they dropped out of school completely (22% compared to 6%).

A 2015 Australian study showed that whilst intersex students tend not to achieve as highly as the general population at school (due to bullying, developmental delays and medical interventions during puberty adversely impact school participation), a high proportion of

intersex individuals succeed in higher education.¹⁸¹⁸

12B.1.6 Family and other relationships

Many intersex, trans and gender diverse people suffer significant social disadvantage with loss of, or breakdown in, family and other relationships due to the complexities surrounding their diverse sex or gender status.

The family and personal relationships of people who are intersex may be impacted by:

- the trauma surrounding parental consent to unnecessary medical interventions;
- non-disclosure or hiding their child's intersex difference; and
- a variety of other issues associated with their being intersex.

For any person transitioning, the associated costs such as hormone therapy, counselling/psychology and medical procedures place additional financial stress on families.

In addition, due to the harassment experienced and resultant low levels of self-confidence, many intersex, trans and gender diverse people tend to isolate themselves, afraid of others' reactions.

12B.1.7 Family, domestic and sexual violence

There is limited reliable data as to the occurrence of intimate partner violence within gender diverse relationships, due largely to under-reporting. Discrimination, stigmatisation and non-recognition of relationships present barriers to the collection of statistical and demographic data, thus obscuring the realities of intimate partner violence in intersex, trans and gender diverse communities.¹⁸¹⁹

Note that the third *Private Lives Report* (2020) found that there were higher levels of intimate abuse overall than in the two previous reports, which the authors stated may have been attributable to the more comprehensive list of the different forms of violence as response items.

¹⁸¹⁸ New South Wales Judicial Commission, *Equality before the Law Bench Book* (chapter 9 updated 13 June 2019) section 9.3.1 (accessed 12 August 2019) citing Jones T, *The Needs of Students with Intersex Variations*, (2016) 16(6) *Sexuality, Society and Learning*, page 602 (accessed 4 April 2019).

¹⁸¹⁹ Campo M and Tayton S (Australian Institute of Family Studies), *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities* (December 2015) page 2 (accessed 15 January 2020).

The report found that:¹⁸²⁰

- Non-binary participants experienced intimate partner abuse at the highest rates: 52.0% had experienced verbal abuse, 35.6% sexual abuse and 28.5% physical abuse.
- Trans male participants had experienced intimate partner abuse at the following rates: 45.9% verbal abuse, 30.5% sexual abuse and 26.7% physical abuse.
- Trans female participants had experienced intimate partner abuse at the following rates: 41.9% verbal abuse, 23.6% sexual abuse and 17.4% physical abuse.

Research suggests abusive partners may use transphobia or heterosexism to exert power and control, such as by 'outing' or threatening to 'out' their intimate partner. A threat to out can be a form of control and isolation by reducing social access to the person or group that the abuser has threatened to tell - which could be the employer, children, parents, landlord or friends.¹⁸²¹

An abusive partner may also use transphobia to control and isolate a partner by suggesting that they should not report violence as they will not be believed or will be discriminated against by social services and the law.¹⁸²²

Other unique forms of manipulation and control used by abusive partners include stealing hormone pills or showing old photos.¹⁸²³

12B.1.8 Legal system

The WA Gender Project advised that some of the more common reasons why intersex, trans and gender diverse people might come into contact with the legal system are:¹⁸²⁴

- Many intersex, trans and gender diverse people have experienced, or continue to experience, greater than average levels of depression, drug and alcohol abuse and

¹⁸²⁰ Hill A, Bourne A, McNair R, Carman M and Lyons A, *Private Lives 3: The Third National Survey of the Health and Wellbeing of LGBTIQ People in Australia (2020)* page 73 (accessed 3 February 2021).

¹⁸²¹ Campo M and Tayton S (Australian Institute of Family Studies), *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities* (December 2015) page 4 (accessed 3 February 2021).

¹⁸²² Campo M and Tayton S (Australian Institute of Family Studies), *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities* (December 2015) page 4 (accessed 3 February 2021).

¹⁸²³ Submission from Pride in Law Association (22 September 2019).

¹⁸²⁴ Submission from WA Gender Project (25 April 2007).

general ill health.

- As a result of marginalisation, some also experience homelessness or engage in sex work (sometimes in an attempt to finance very expensive treatments).
- Some people may, due to lack of access or financial restrictions, resort to obtaining hormones illegally.
- Due to being singled out for personal attacks, as evidenced in the high rate of abuse reported by intersex, trans and gender diverse people, they may come into contact with the legal system as victims of crime — particularly as victims of violence and sexual assault.
- Intersex, trans and gender diverse people may seek to access the civil justice system to resolve legal disputes - these may be family disputes, particularly custody of children or marriage issues; in relation to claims of discrimination or mistreatment in employment or when accessing services; or attempts to have their identity-related legal rights upheld by the court. Often there is minimal legal precedent in these types of cases. Any such matters need to be handled in a sensitive and informed manner.

12B.2 COMMON MISCONCEPTIONS¹⁸²⁵

There are many false assumptions made about intersex, trans and gender diverse people and those who are perceived as being so.

12B.2.1 Common misconceptions about people who are gender diverse

Some of the most common misconceptions about people who are gender diverse are that:

- ***The desire for a change in sex/gender identity is related to or even based on sexual preference or sexuality; and if a person could come to terms with their sexuality they would not need to change their sex/gender identity*** — Sex and gender are different from sexuality. Some people who change their sex/gender were previously gay or

¹⁸²⁵ Unless otherwise indicated, the information in this section is drawn from New South Wales Judicial Commission, *Equality before the Law Bench Book* (chapter 9 updated 13 June 2019) sections 9.2.2 and 9.3.1 (accessed 4 February 2021).

lesbian, some were previously heterosexual and some were previously bisexual. Once people change or move towards changing their sex/gender identity, some keep their original sexual preference towards people of a particular sex/gender, or towards people of both sex/genders, and some change their preference. For example, a person who has changed identity from male to female may be attracted to men and identify as heterosexual, or may be attracted to women and identify as lesbian. The majority of gay men and lesbians do not have issues with their sex/ gender identity.

- ***All those who are trans and gender diverse wish to medically and surgically change their sex/ gender*** — While this is true of some, it is not true of all. Some undergo only some of the medical and surgical interventions available — for example, they may take hormones, but not undergo any surgical changes. Some are medically unable to make use of medical and/or surgical options. Some may not live in a place where any medical options are available at all for gender transition. Some cannot afford surgery or have religious or philosophical convictions against it, and some simply choose not to do anything medical or surgical.
- ***People who are trans and gender-diverse identify so strongly with their gender identity that they behave and dress in a way that represents the more extreme end of the masculine spectrum of dress and behaviour for those who identify as male, and vice versa*** — A person assigned a male sex/gender, who now identifies as female, might or might not dress in an ultra-feminine style, and vice versa. Usually there is a progression towards an appearance that coincides with the general community's view of the relevant person's age, socioeconomic status and occupation.
- ***There is something mentally wrong with people who wish to change their sex/gender identity*** — 'Gender dysphoria' is listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders-5 (DSM-5) as a mental disorder,¹⁸²⁶ just as homosexuality once was. When the DSM-5 was published on 18 May 2013, 'gender identity disorder' was renamed as 'gender dysphoria'.

¹⁸²⁶ American Psychiatric Association, *What is Gender Dysphoria?* (February 2016) (accessed 4 February 2021).

In the past, the World Health Organisation's International Classification of Disease-10 (ICD-10) classified 'gender identity disorder' under 'mental and behavioural disorders'. However, on 18 June 2018, the World Health Organisation published the ICD-11, which renamed 'gender identity disorders' as 'gender incongruence' and included 'gender incongruence' in the chapter on 'sexual health' rather than in the chapter on 'mental disorders'.¹⁸²⁷ The ICD-11 is scheduled to come into use on 1 January 2022.¹⁸²⁸

While a disproportionate number of trans people suffer from symptoms of mental illness such as anxiety and depression, this is usually in response to family and social reactions, harassment and discrimination, or difficulty accessing appropriate services and treatment.

Refer to 12B.1.3.3 for more information on mental health.

- ***Intersex, trans and gender diverse people are sexually perverted and/or are going through transition because they are uncomfortable with their sexuality*** — Statistics reveal that there is no correlation between, or higher incidence of, sexual disorders or sexual offending among intersex, trans and gender diverse people than in the general population. Some people assume that trans or gender diverse people are acting out or engaging in fetishistic behaviour — again, this is untrue, with most individuals engaging in a transition in an attempt to feel peace and authenticity being themselves.
- ***Unless a trans person has surgery, they should not be allowed to legally change their sex, otherwise a person might decide to 'swap back' at any point*** — The process of changing one's sex or gender is not an easy process. It involves a number of emotional, social, medical and legal complexities, which can take years or decades. This misconception does not acknowledge the irreversible changes caused by some hormone treatments. The High Court has ruled that a person does not have to have genital surgery in order for a person's gender to be legally recognised.¹⁸²⁹

¹⁸²⁷ World Health Organisation, *WHO/Europe Brief – Transgender Health in the Context of ICD-11* (17 May 2019) (accessed 4 February 2021).

¹⁸²⁸ World Health Organisation, *WHO Releases New International Classification of Diseases (ICD 11)* (18 June 2018) (accessed 4 February 2021).

¹⁸²⁹ *AB v State of Western Australia* (2011) 244 CLR 390.

12B.2.2 Common misconceptions about intersex people

Some of the most common misconceptions about intersex people are that:

- ***There are only two categories of sex: male or female*** — Many intersex people are born with chromosomal, hormonal and/or physiological configurations that are not typically male or female. For some, this is accompanied by a gender identity that is neither male nor female, or both male and female.
- ***Intersex status is about sexual orientation or gender identity*** — There are as diverse a range of sexual orientations and gender identities amongst intersex people as non-intersex people. Intersex people have non-heteronormative bodies, which do not meet societal expectations. Cultural, familial and medical attitudes determine the sex assigned. Surgical and medical interventions are used to ensure people conform to those norms and to erase intersex differences.¹⁸³⁰ Most surgery conducted on intersex newborns is not life preserving, but rather it is cosmetic.¹⁸³¹

Given that some people with genital ambiguity do not require medical treatment in order to be healthy and thrive, guidelines are being developed regarding sex assignment at birth. Since the 1990s, activists and experts have been disclosing and publishing strong evidence against unconsented and unnecessary medical interventions on intersex people. The long-term consequences of these interventions are not well documented.¹⁸³²

- ***Compared to the general population, intersex people are more likely to have thoughts of suicide*** — As demonstrated by the statistics in 12B.1.3.3, the intersex population has higher rates of suicidal ideation and suicide attempts than the general population. Often this is a consequence of medical interventions (including traumatising or unnecessary

¹⁸³⁰ New South Wales Judicial Commission, *Equality before the Law Bench Book* (chapter 9 updated 13 June 2019) section 9.3.1 (accessed 4 February 2021) citing Carpenter M, *Intersex Health – Morgan Carpenter's Presentation to Health in Difference Conference* (22 April 2013).

¹⁸³¹ New South Wales Judicial Commission, *Equality before the Law Bench Book* (chapter 9 updated 13 June 2019) section 9.3.1 (accessed 4 February 2021) citing AHRC, *Protecting the Human Rights of People Born with Variations in Sex Characteristics* (13 July 2018) (accessed 4 February 2021).

¹⁸³² New South Wales Judicial Commission, *Equality before the Law Bench Book* (chapter 9 updated 13 June 2019) section 9.3.1 (accessed 4 February 2021) citing Carpenter M, *The Human Rights of Intersex People: Addressing Harmful Practices and Rhetoric of Change* (2016) 24(17) *Reproductive Health Matters* page 74; Kelly F, and Smith M, *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* page 118; Kennedy A, *Fixed at Birth: Medical and Legal Erasures of Intersex Variations*, (2016) 39(2) *UNSW Law Journal* page 813.

surgery) negatively impacting on wellbeing. Hormone therapy may cause a person not to feel like them self. It is important to reiterate that many intersex people identify with the sex they were assigned at birth, but some do not.¹⁸³³

12B.3 LEGAL CONSIDERATIONS

12B.3.1 Recognition of those who are intersex, trans and gender diverse

The *Gender Reassignment Act 2000* (WA) establishes a process for recognition of a person who has been 'gender reassigned'.¹⁸³⁴ This Act establishes a process for persons having had a reassignment procedure to apply for a recognition certificate. A 'reassignment procedure' is defined in s 3 as:

... a medical or surgical procedure (or a combination of procedures) to alter the genitals and other gender characteristics of a person, identified by a birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child's gender characteristics.

Once a person has undergone a reassignment procedure, the Gender Reassignment Board may issue a reassignment certificate to a person under s 15(1) of the *Gender Reassignment Act 2000* (WA) if it is satisfied that the applicant:

- believes that their true gender is the gender to which they have been reassigned;
- has adopted the lifestyle and has the gender characteristics of a person of that gender; and
- has received proper counselling regarding their gender identity.

Where an application relates to a child who has undergone a reassignment procedure, s 15(2) requires that the Board must be satisfied that it is in the child's best interests for the certificate to be issued.

Until 19 March 2019, s 15(3) of the Act provided that '[a] recognition certificate cannot be

¹⁸³³ New South Wales Judicial Commission, *Equality before the Law Bench Book* (chapter 9 updated 13 June 2019) section 9.3.1 (accessed 4 February 2021) citing Carpenter M, *Identification Documents*, (4 January 2019).

¹⁸³⁴ *Gender Reassignment Act 2000* (WA) (accessed 4 February 2021).

issued to a person who is married'. That sub-section was deleted by the *Gender Reassignment Amendment Act 2019* (WA).

12B.3.2 Prison policies

For incarcerated people, 'Commissioner's Operating Policy and Procedure (COPP), 2.1 - Reception' states that:¹⁸³⁵

4.7.1 The prisoner's gender will be determined by the gender indicated on the warrant or other instrument authorizing imprisonment ...

4.7.2 Reception Officers shall ensure that 'Trans, Non-Binary or Intersex' information is entered in the TOMS Receiving Module.

4.7.3 Where a prisoner is identified as trans, gender diverse or intersex, the prisoner may be accommodated in a single cell or special purpose cell, segregated from the prison population, with separate shower and ablution facilities until a placement decision is made in accordance with COPP 2.3 – Assessments, Placements and Sentence Management and COPP 5.5 = Prisoner Accommodation.

'COPP 2.3 - Assessments and Sentence Management' states that:¹⁸³⁶

9.1.1 The placement of prisoners should reflect a balance between security considerations, prisoner needs and program availability (where applicable). In order to achieve such a balance, it will be necessary from time to time to transfer prisoners from one prison to another.

9.1.2 In order to provide adequate security, supervision and program opportunities compatible with each prisoner's identified needs, placements are to be implemented in accordance with the prisoner's approved TOMS decision slip in an orderly and equitable manner.

¹⁸³⁵ Department of Justice, *Custodial Policy and Procedures* (2021) Policy Directives, PD 85 (accessed 15 September 2021).

¹⁸³⁶ Department of Justice, *Custodial Policy and Procedures* (2021) COPP 2.3 Assessments and Sentence Management (accessed 15 September 2021).

12B.4 EXPLANATIONS AND TERMINOLOGIES

12B.4.1 ITGD

An acronym for intersex, trans and gender diverse people.

12B.4.2 Sex/gender identity

'Sex' refers to the biological attributes that define people as either male, female, a combination of female and male, or neither female nor male. These biological attributes include chromosomes and physical anatomy.¹⁸³⁷

'Gender identity' is the socially constructed and contextual understanding and identification of oneself as a man, a woman, or another gender outside this binary. Gender identity is also the label or name one uses to define and identify their gender.¹⁸³⁸

Sex and gender may be interrelated for some, but this is not the case for all people. For example, a person might have the sexual characteristics of a female, but believe their gender to be male, and act accordingly.

12B.4.3 Gender diverse

'Gender diverse' is an umbrella term that can refer to all forms of gender identity and gender expression and includes trans and non-binary gender identities and/or expressions.¹⁸³⁹

12B.4.4 Gender history

A person has a 'gender history', as defined in the *Equal Opportunity Act 1984* (WA), if the person:¹⁸⁴⁰

... identifies as a member of the opposite sex by living, or seeking to live, as a member of the opposite sex.

... opposite sex being a sex of which the person was not a member at birth.

¹⁸³⁷ The Freedom Centre, *LGBTIQ+ Glossary* (updated 2019) (accessed 4 February 2021).

¹⁸³⁸ The Freedom Centre, *LGBTIQ+ Glossary* (updated 2019) (accessed 4 February 2021).

¹⁸³⁹ The Freedom Centre, *LGBTIQ+ Glossary* (updated 2019) (accessed 4 February 2021).

¹⁸⁴⁰ *Equal Opportunity Act 1984* (WA) s 35AA (accessed 4 February 2021).

12B.4.5 Genderqueer/non-binary¹⁸⁴¹

'Genderqueer' is a gender identity which is neither exclusively male nor exclusively female.

'Non-binary' can be used as an umbrella term, but primarily refers to a person whose gender identity is neither exclusively male nor exclusively female.

12B.4.6 Trans/transgender

A transgender person is someone whose gender identity is different to their sex assigned at birth. This encompasses binary trans people (e.g. transgender men and women) and non-binary people.¹⁸⁴²

Whilst the *Equal Opportunity Act 1984* (WA) does not define 'transgender', for comparison, the *Anti-Discrimination Act 1977* (NSW) defines a 'transgender person' as anyone:¹⁸⁴³

(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.

12B.4.7 Transitioning¹⁸⁴⁴

For trans people, 'transitioning' is a process of changing their body and presentation to match their identity and sense of themselves. This can involve some or all of:

- change of pronouns;

¹⁸⁴¹ The Freedom Centre, *LGBTIQ+ Glossary* (updated 2019) (accessed 4 February 2021).

¹⁸⁴² The Freedom Centre, *LGBTIQ+ Glossary* (updated 2019) (accessed 4 February 2021).

¹⁸⁴³ *Anti-Discrimination Act 1977* (NSW) s 38A (accessed 4 February 2021).

¹⁸⁴⁴ The Freedom Centre, *LGBTIQ+ Glossary* (updated 2019) (accessed 4 February 2021).

- dressing differently;
- hormone replacement therapy (HRT);
- gender affirmation surgeries;
- name change;
- voice training;
- legal gender recognition and other gender affirmation therapies; and
- identity documentation changes.

Transitioning can take many years and the process differs for different people.

12B.4.8 Transphobia¹⁸⁴⁵ and heterosexism¹⁸⁴⁶

'Transphobia' is a prejudice or discrimination based on a person being, or perceived as being, transgender or gender diverse. Transphobia can be expressed through hostility, verbal and physical bullying or discrimination, and can also include institutional and cultural bias and structural inequality.

'Heterosexism' is the set of beliefs that privilege heterosexuality and heterosexual relationships at the expense of other sexual orientations and gender identities and relationships. Heterosexism provides the 'social backdrop' for transphobic prejudices, violence and discrimination.

12B.4.9 Androgynous¹⁸⁴⁷

'Androgynous' can mean having both masculine and feminine characteristics, or having neither specifically masculine nor feminine characteristics. It can be used as an identity term or to describe a person's appearance.

¹⁸⁴⁵ The Freedom Centre, *LGBTIQ+ Glossary (updated 2019)* (accessed 4 February 2021).

¹⁸⁴⁶ Campo M and Tayton S (Australian Institute of Family Studies), *Intimate Partner Violence in Lesbian, Gay, Bisexual, Trans, Intersex and Queer Communities* (December 2015) page 3 (accessed 4 February 2021).

¹⁸⁴⁷ The Freedom Centre, *LGBTIQ+ Glossary (updated 2019)* (accessed 4 February 2021).

12B.4.10 Intersex

According to the United Nations:¹⁸⁴⁸

...intersex people are born with physical or biological sex characteristics (such as sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that do not fit the typical definitions for male or female bodies. For some intersex people these traits are apparent at birth, while for others they emerge later in life, often at puberty.

It was estimated in 2008 that approximately 1.7% of the population has some kind of intersex characteristics, including but not limited to Androgen Insensitivity Syndrome (AIS), Congenital Adrenal Hyperplasia and 5-alpha reductase deficiency.¹⁸⁴⁹ This includes people who are not definitely male or female, and those who have hormone levels that differ to their assigned sex — for example, people who do not have the usual XX or XY chromosomes, and those whose genitalia and reproductive organs are mismatched.

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.¹⁸⁵⁰

12B.4.11 Cisgender¹⁸⁵¹

A cisgender person is someone whose gender identity is the same as their sex assigned at birth. This term is used to describe people who are not transgender.

¹⁸⁴⁸ United Nations Human Rights, Office of the High Commissioner, *End Violence and Harmful Medical Practices on Intersex Children and Adults, UN and Regional Experts Urge* (24 October 2016) (accessed 4 February 2021).

¹⁸⁴⁹ Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (Basic Books, 2nd ed, 2008). See also Intersex Human Rights Australia, *Intersex Population Figures* (28 September 2013) (accessed 4 February 2021).

¹⁸⁵⁰ New South Wales Judicial Commission, *Equality before the Law Bench Book* (section 9 updated 13 June 2019) section 9.3 (accessed 16 September 2021).

¹⁸⁵¹ Definitions are taken from both The Freedom Centre (a Western Australian peer support centre for young people under 26 years old, funded by the Mental Health Commission) *LGBTIQ Glossary* (updated 2019) (accessed 4 February 2021).

12B.4.12 Male-to-Female (MtF) and Female-to-Male (FtM)¹⁸⁵²

Female-to-male (also abbreviated as FtM) and male-to-female (also abbreviated as MtF) refers to the gender transition that a transgender person has undertaken, or wants to undertake, to affirm their gender.

Trans people who have legal recognition of their sex may wish to be described as 'female' or 'male' instead of 'male-to-female' or 'female-to-male'.

12B.4.13 Cross-dressing¹⁸⁵³

'Transvestite' describes a person who cross-dresses rather than someone who believes that their gender identity is different to their assigned gender.

Some people only cross-dress in private or only when on stage. However, some do so more widely than this and may appear in court in cross-dress.

Cross-dressers may be gay or lesbian or heterosexual.

12B.4.14 Deadnaming¹⁸⁵⁴

A 'dead name' is the name a person had prior to their transition. 'Deadnaming' is calling a person by the name they no longer use.¹⁸⁵⁵ It is sometimes described as referring to someone by their 'birth name' or 'given name'.¹⁸⁵⁶

12B.4.15 Misgendering

'Misgendering' is describing or addressing someone using language that does not match the person's gender identity.¹⁸⁵⁷ It may or may not be intentional.

¹⁸⁵² New South Wales Judicial Commission, *Equality before the Law Bench Book* (section 9 updated 13 June 2019) section 9.3 (accessed 16 September 2021).

¹⁸⁵³ New South Wales Judicial Commission, *Equality before the Law Bench Book* (section 9 updated 13 June 2019) section 9.1.2 (accessed 16 September 2021).

¹⁸⁵⁴ LGBTI Legal Service Inc. (Queensland), *Making LGBTI Rights Real* (presentation 21 March 2019) page 31 (accessed 4 February 2021).

¹⁸⁵⁵ LGBTI Legal Service Inc. (Queensland), *Making LGBTI Rights Real* (presentation 21 March 2019) page 31 (accessed 4 February 2021).

¹⁸⁵⁶ Healthline, *What is Deadnaming?* (accessed 15 January 2020).

¹⁸⁵⁷ LGBTI Legal Service Inc. (Queensland), *Making LGBTI Rights Real* (presentation 21 March 2019) page 32 (accessed 4 February 2021).

12B.5 PRACTICAL CONSIDERATIONS

Unless appropriate account is taken of their specific needs, intersex, trans and other gender diverse people are likely to:

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

These problems are likely to be compounded if the person also happens to be older, Aboriginal, from a culturally and linguistically diverse background, a young person, female, a person with a disability, a person who practices a minority religion or a person who is self-represented. Refer to the other relevant chapter(s) for more information.

12B.5.1 Mode of address and gender to use

Points to consider in your mode of address:

- Always address a people who are gender diverse (whether the person is trans, gender diverse, intersex or a cross-dresser) using the name, gender-specific title (e.g. Ms, Mr) and sex/gender identity they wish to use.
- If there is any doubt about the sex/gender identity of a particular person, sensitively and as privately as possible ask what name and mode of address they want the court to use.
- Apologise if an initial mistake has been made about a person's sex/gender identity.
- Once established, use the agreed sex/gender terminology (they, he or she, their, her or his, them, him or her) consistently throughout the proceedings.
- Ensure that the person is treated throughout the proceedings as a person of the sex/gender with which they identify by everyone who is involved in the proceeding.
- Ensure that any previously assigned sex/gender identity is only revealed or discussed where relevant to the proceedings. In other words, unless absolutely necessary, a

person's sex/gender and any description of their sex/gender should be based on self-identification.

- Avoid drawing undue attention to the issue of intersex status, sexuality and/or of sex/gender identity.

Refer to section 12B.1.3.3.1 of this chapter for more information on the mental health implications of deadnaming or misgendering an intersex, trans or gender diverse person.

12B.5.2 Appearance and behavior

Intersex, trans and gender diverse people must be accorded the same dignity and respect as anyone else.

Points to consider – appearance and behaviour:

- Be sensitive to the fact that a person's style of dress or presentation (e.g., haircut, makeup or lack thereof) may or may not accord with the general community's view of how someone of that sex/gender should dress or look.
- No discomfort should be shown with any style that is more common in someone of the opposite sex, or with any style that might be seen as the stereotypical presentation of someone who is lesbian or gay (for example, excessively camp, femme or feminine, or excessively butch or masculine).
- A trans or gender diverse person (including a cross-dresser) should be allowed to present their evidence in the attire of whichever sex/gender they are.
- As prescribed by law, intervene if it appears that any cross-examination is unfairly or inappropriately alluding to a person's intersex status, or to any sex or gender-determined difference in appearance or behaviour.¹⁸⁵⁸

¹⁸⁵⁸ Note that s 26 of the *Evidence Act 1906* (WA) allows for intervention in the manner and form of questioning of witnesses.

12B.5.3 Language and Terminology

Points to consider – language and terminology:

- Use sexuality and gender descriptors only when relevant to the matter before the court, and then use only those that are both accurate and acceptable to the particular intersex or transgender person.
- Use the word 'partner' to describe the person a trans or intersex person is (or was) in a relationship with. It is always best to ask the person what their preferred term is for their current or previous partner.
- Do not use explicitly or implicitly discriminatory language or comments — for example, do not state or imply, or allow others to state or imply, that a trans person is not a real woman or man.
- Treat everyone as an individual, and do not make statements that imply that all trans, intersex and gender diverse people are the same or likely to act in the same way.
- Never assume or imply that the way you think the majority of trans, intersex and gender diverse people behave or think is the standard by which any individual member of that group should be judged.

12B.5.4 The impact of being trans, intersex or gender diverse on behavior relevant to the matter(s) before the court)

Points to consider:

- Be sensitive to the fact that evasiveness about personal life and activities may simply be a reluctance to reveal their intersex or trans status. You may need to intervene if any such questioning is unnecessary or irrelevant. You should consider whether it would be best to close the court.
- In particular, be sensitive to the difficulties faced by older trans or intersex people whose formative years were spent in a society which was more hostile to intersex, trans and gender diverse people.

- The same particular sensitivities may be needed when dealing with intersex, trans and gender diverse members of some ethnic or cultural groups.
- Do not let stereotyped views about trans and intersex people unfairly influence your (or others') assessment. Subject to the law, ensure that any values and practices that appear to be related to a person's intersex, trans or gender diverse status are respected in court.
- For example, you may need to:
 - As prescribed by law, intervene if any of the common misconceptions listed in 12B.2 appear to be unfairly behind any questioning.
 - Intervene if cross-examination becomes unduly annoying, harassing, intimidating, offensive or oppressive. Note that you are entitled to consider any relevant characteristic of the witness in determining this issue.
- Be mindful that family and domestic violence can affect any relationship.

For more information about family and domestic violence refer to chapter 13.

- Be aware of the extent of verbal abuse, intimidation and violence that is experienced by intersex, trans and other gender diverse people.

For more information refer to 12B.1.2, particularly the statistics
from the *Private Lives* report.

- In order to deal with this issue fairly and appropriately, you may need to take such measures as excluding people from the courtroom while the witness is giving evidence; or allowing the witness to give evidence remotely by video-link at a pre-recorded special hearing; or allowing a support person to attend.¹⁸⁵⁹
- Some of these measures may be implemented on the basis that you have declared a person to be a 'special witness' within the meaning of s 106R of the *Evidence Act 1906* (WA), in particular s 106R(3) which makes specific allowance for emotional trauma,

¹⁸⁵⁹ *Evidence Act 1906* (WA) ss 106R, 106RA, 121 (accessed 4 February 2021).

intimidation or distress by reason of the subject matter of the evidence or any other relevant factor.

- In addition to the restrictions on unrepresented persons directly cross-examining witnesses who are children, complainants in serious sexual assault proceedings or certain witnesses in restraining order matters, you have a discretion to allow the cross-examination by an unrepresented accused of any witness to be by video-link, while screened, or without questions being put directly — having regard to the nature of the charge, the wishes of the witness, and the availability of any necessary facilities or equipment.¹⁸⁶⁰
- You should consider discussing with the parties and/or their legal representatives in any proceedings the use of any special measures referred to above if to do so would be in the interests of justice.
- Instruct the jury that declaring a witness to be a special witness, or using alternative means for a witness to present evidence, are routine practices of the court and these measures should not affect how they consider the evidence.
- As prescribed by law, intervene if it appears that any cross-examination is unfairly or inappropriately alluding to any sexuality or gender-determined difference, if it is disrespectful, or if it fails to take account of a relevant sex/ gender difference.¹⁸⁶¹
- Treat a trans or gender diverse person, wherever legally possible, as someone of the sex/gender with which they identify.
- Has the fact that the person is transgender, intersex, or gender diverse, 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. 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, to ensure that justice is done and seen to be done, explain why any such

¹⁸⁶⁰ *Evidence Act 1906* (WA) ss 106R, 106RA, 121 (accessed 4 February 2021).

¹⁸⁶¹ *Evidence Act 1906* (WA) s 26 (accessed 4 February 2021).

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, and in your decision-making or sentencing.

12B.5.5 Directions to the jury

As indicated at various points throughout the chapter, it is important to ensure that the jury does not allow any ignorance or prejudice about people who are trans, intersex and gender diverse to unfairly influence their judgment.

Points to consider in directing the jury:

- In your final directions to the jury, you may need to remind them of any points in relation to anything that you alerted them to during the proceedings, or cover them for the first time now.
- For example, you may need to provide specific guidance as follows:
 - They must try to avoid making stereotyped or false assumptions — and you need to explain what is meant by this. For example, you may need to remind the jury specifically that while the particular intersex, trans or gender diverse person's behaviour, sexuality and/or gender identity may not accord with what they themselves regard as morally acceptable, they must 'remember that this is a court of law and not a court of morals'. You will then need to direct the jury to the specific questions which they must decide, and explain that they must decide these matter(s) without prejudice to anyone.
 - On the other hand, the jury may also need to assess the particular person's evidence alongside what they have learned in court about the way in which intersex, trans or people of diverse gender may (or feel they have to) live their lives, as opposed to the way in which they themselves might act.
- You may need to provide guidance on any legal limitations that exist in relation to the jury taking full account of any of these matters. You may also need to be specific about the particular aspects to which they need to pay attention.

- If you have declared a witness in the proceedings to be a special witness, or restricted the direct cross-examination by a self-represented accused, remind jurors that these are routine practices of the court and that they should not draw any inference as to the accused's guilt from these measures.

12B.5.6 Decisions and sentencing remarks

Subject to any laws, any decisions, including sentencing decisions, should be fair and non-discriminatory to intersex, trans and gender diverse people.

Points to consider in your decisions and sentencing:

- In order to ensure that any intersex, trans and gender diverse people referred to, or specifically affected by, your decisions and sentencing remarks 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 earlier in section 12.5.
- If a victim is not personally capable of giving a victim impact statement, for any reason, consider whether it is appropriate for someone else to do so on the victim's behalf.¹⁸⁶²
- Consider whether to allow a victim impact statement to be read out in court.¹⁸⁶³
- Be aware that there are limited policies in Western Australia ensuring the rights of imprisoned trans and intersex people. Trans and intersex people who are sent to prison face particular difficulties because of the way their sex/gender identity is perceived.

For further information on prison policies refer to 12B.3.2

¹⁸⁶² *Sentencing Act 1995* (WA) s 24(2) (accessed 4 February 2021).

¹⁸⁶³ See Part 3, Division 4 of the *Sentencing Act 1995* (WA). Note that a court may make a written victim impact statement available to the prosecutor and to the offender, on such conditions as it thinks fit (accessed 4 February 2021).

12B.6 FURTHER INFORMATION AND HELP

Organisations that can provide information or expertise about trans, intersex and gender diverse issues are:

Freedom Centre

The Freedom Centre aims to support young people, families and entire communities to be healthy, happy and informed about diverse sexuality, sex and gender. Volunteers and staff are all people who are young, LGBTIQ+ people who have been specifically trained to provide support and information to their peers. The Freedom Centre has drop-in spaces for young LGBTIQ+ people and those questioning their sexuality to meet others and obtain information and peer support.

GRAI (GLBTI Rights in Ageing)

GRAI is a community-run organisation based in Perth. Founded in 2005, GRAI works to support the rights and well-being of older LGBTI people. GRAI provides advocacy, works to establish partnerships with government agencies, undertakes research and provides training for the aged-care sector. GRAI also provides information and social events for the LGBTI community.

Living Proud - LGBTI Community Services of WA

Living Proud (formerly Gay & Lesbian Community Services of WA Inc.) provides support, information and resources to the Western Australian LGBTI community. Living Proud is a non-profit organization which provides a range of services, support and resources to promote wellbeing, reduce discrimination and disadvantage among LGBTI people and improve their access to services.

National LGBTI Health Alliance

The National LGBTI Health Alliance is the national peak health organisation in Australia for organisations and individuals that provide health-related programs, services and research focused on LGBTI and other sexuality, gender, and bodily diverse people and communities.

Pride in Law Association

Pride in Law was established in Brisbane, Queensland in July 2017 to support and connect LGBTI and ally legal professionals. Pride in Law is an apolitical non-profit organisation and the first of its kind in Australia. Pride in Law intends to launch in Western Australia with plans to spread to other jurisdictions.

12B.7 FURTHER READING

Australian Government, Australian Government Guidelines on the Recognition of Sex and Gender (2013) (accessed 4 February 2021)

Hill A, Bourne A, McNair R, Carman M and Lyons A, Private Lives 3: The Third National Survey of the Health and Wellbeing of LGBTIQ People in Australia (2020) (accessed 3 February 2021)

International Lesbian, Gay, Bisexual, Trans and Intersex Association, Minorities Report 2017: Attitudes to Sexual and Gender Minorities around the World (2017) (accessed 4 February 2021)

Judicial Commission of New South Wales, Equality before the Law Bench Book (2018) (accessed 4 February 2021)

Leonard W, Pitts M, Mitchell A, Lyons A, Smith A, Patel S, Couch M and Barret A, Private Lives 2: The Second National Survey of the Health and Wellbeing of GLBT Australians (2012) (accessed 4 February 2021)

LGBTIQ+ Health Australia, Snapshot of Mental Health and Suicide Prevention Statistics for LGBTI People (July 2020) (accessed 4 February 2021)

Office of the Director of Public Prosecutions Comparative Sentencing Tables (accessed 12 July 2021)

Pitts M, Smith A, Mitchell A and Patel S, Private Lives: A Report on the Health and Wellbeing of GLBTI Australians (2006) (accessed 4 February 2021)

Robinson KH, Bansel P, Denson N, Ovensden G and Davies C, *Growing up Queer: Issues Facing Young Australians who are Gender Variant and Sexuality Diverse* 2014 (accessed 16 May 2018)

Smith E, Jones T, Ward R, Dixon J, Mitchell A and Hiller L, *From Blues to Rainbows: The Mental Health and Well-being of Gender Diverse Young People in Australia* (2014) (accessed 4 February 2021)

Victorian State Government Gay, Lesbian, Bisexual, Transgender and Intersex Health and Wellbeing Ministerial Advisory Committee, *Transgender and Gender Diverse Health and Wellbeing - Background Paper* (2014) (accessed 4 February 2021)

13 FAMILY, DOMESTIC AND SEXUAL VIOLENCE

Globally, over one third of women have experienced domestic or sexual violence, which the World Health Organisation has described as a 'global public health problem of epidemic proportions'.¹⁸⁶⁴

In Australia in 2018, one in six women (17% or 1.6 million) and one in 16 men (6.1% or 0.5 million) had experienced physical and/or sexual violence by a current or previous cohabiting partner, since the age of 15.¹⁸⁶⁵

The Australian legal system is increasingly asked to consider and respond in different ways to matters involving family, domestic and sexual violence; it is recognised that more effective community responses to such violence may prevent death, serious injury and harm.¹⁸⁶⁶

There are a range of ways of defining family, domestic and sexual violence.¹⁸⁶⁷ According to the Australian Institute of Health and Welfare:¹⁸⁶⁸

Family violence refers to violence between family members as well as between current or former intimate partners. For example, it can include acts of violence between a parent and a child or between siblings. Family violence is the preferred term for violence between Aboriginal and Torres Strait Islander people, as it covers the extended family and kinship relationships in which violence may occur (COAG 2011).

¹⁸⁶⁴ World Health Organisation, *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-partner Sexual Violence* (2013) pages 3, 5 and 36 (accessed 8 February 2021).

¹⁸⁶⁵ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2018) page 2 (Cat No FDV 2) (accessed 8 February 2021).

¹⁸⁶⁶ Law Reform Commission of Western Australia, *Court Intervention Programs: Final Report* (2009) page 123 (accessed 8 February 2021).

¹⁸⁶⁷ Australian Bureau of Statistics (ABS), *Information Paper: Conceptual Framework for Family and Domestic Violence* (2009) (accessed 8 February 2021).

¹⁸⁶⁸ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2018) page 3 (Cat No FDV 2) (accessed 8 February 2021).

For this report, domestic violence is considered to be a subset of family violence. It refers to violent behaviour between current or former intimate partners – typically, where one partner tries to exert power and control over the other, usually through fear. It can include physical, sexual, emotional and psychological abuse.

... Sexual violence is a broader concept covering a range of behaviours of a sexual nature carried out against a person's will using physical force or coercion (or any threat or attempt to do so). Sexual violence can be perpetrated by partners in a domestic relationship, former partners, other people known to the victims, or strangers (COAG 2011). This also includes child sexual abuse when an adult, adolescent or child uses their power or authority to involve a child in sexual activity.

In relation to Aboriginal people, Western Australia's 'Family and Domestic Violence Prevention Strategy to 2022'¹⁸⁶⁹ also notes that:¹⁸⁷⁰

Aboriginal and Torres Strait Islander peoples generally prefer the term 'family violence'. This concept describes a matrix of harmful, violent and aggressive behaviours and is considered to be more reflective of an Aboriginal world view of community and family healing ... the use of this term should not obscure the fact that Aboriginal women and children bear the brunt of family violence.

Section 9A of the Family Court Act 1997 (WA) contains the following definition of 'family violence':

*(1) For the purposes of this Act, **family violence** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful.*

Section 9A(2) then provides a non-exhaustive list of examples of behaviour that may constitute family violence, including assault, sexual assault, stalking, intentionally damaging property or intentionally killing or injuring an animal.

¹⁸⁶⁹ Department of Child Protection and Family Support (DCPFS), Western Australia's Family and Domestic Violence Prevention Strategy to 2022 (2013) pages 6-7 (accessed 8 February 2021). N.B. from 1 July 2018, DCPFS became part of the Department of Communities.

¹⁸⁷⁰ Department for Child Protection, Family and Domestic Violence Background Paper (2012) page 2 (accessed 8 February 2021). N.B. from 1 July 2018, the Department of Child Protection became part of the Department of Communities.

In 2016, a new definition of 'family violence' was inserted in s 5A of the *Restraining Orders Act 1997 (WA)* to replace the previous definition of 'act of family and domestic violence' that had been in s 6(1). The definition 'aims to better reflect the contemporary understanding of the scope, dynamics and nature of family violence'.¹⁸⁷¹ Whilst the definition is largely taken from the *Family Court Act 1997 (WA)* it also includes additional examples of behaviour that may constitute family violence (s 5A(2)), so as to expressly indicate that technology facilitated abuses (such as intimate image abuse) are included.

As is evident from the above, the statutory definitions of family violence, while not identical, are now much more consistent. The Australian Human Rights Commission made the point in its 2016 *A National System for Domestic and Family Violence Death Review* 'that consistency of terminology in the context of statistical data and evidence based reform is critical'.¹⁸⁷²

This chapter commences with a discussion of some of the barriers to reporting and data collection; includes sections on each of the main populations affected by family, domestic and sexual violence (including both statistics and information in each section); provides background information on theories of family and domestic violence; discusses some recent legislative and court initiatives; and then finishes – like all the other chapters – with practical information for use in court and a discussion of other resources that are available.

In relation to additional resources, it may be helpful to refer to the Australian Institute of Judicial Administration's *National Domestic and Family Violence Bench Book* in conjunction with this chapter. The purpose of that Bench Book:¹⁸⁷³

is to provide a central resource for judicial officers considering legal issues relevant to domestic and family violence related cases that will contribute to harmonising the treatment of these cases across jurisdictions along broad principles and may assist them with decision-making and judgment writing.

¹⁸⁷¹ Parliament of Western Australia, *Restraining Orders and Related Legislation Amendment (Family Violence) Bill 2016 Explanatory Memorandum* (accessed 4 February 2021).

¹⁸⁷² Australian Human Rights Commission, *A National System for Domestic and Family Violence Death Review* (December 2016) (accessed 4 February 2021).

¹⁸⁷³ Australian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (updated June 2020) 1. Purpose and limitations (accessed 30 March 2021).

The Steering Committee overseeing the production of this Bench Book gratefully acknowledges the submissions and contributions of the following organisations, which have assisted in the development of this chapter in the first edition and its subsequent revision:

- Armadale Domestic Violence Intervention Project (Inc.) (17 April 2007);
- Same Sex Domestic Abuse Group (SSDAG) (20 April 2007);
- Fremantle Multicultural Resource Centre (26 April 2007);
- Office of Women's Policy (17 July 2007);
- Department of Communities (15 September 2020);
- Legal Aid Commission of Western Australia (27 October 2008, 26 February 2009, 8 June 2020);
- Women Lawyers of Western Australia (Inc.) (19 January 2009);
- Women's Council for Domestic and Family Violence Services (WA) (21 January 2009, 28 February 2020);
- Women's Health and Family Services (8 June 2020).

13.1 ABOUT THE STATISTICS

13.1.1 Barriers to reporting and data collection

The true incidence and prevalence of family, domestic and sexual violence can only be estimated. This is because there are a number of factors contributing to under-reporting, 'complicated by the different ways in which both domestic violence and sexual assault have been defined and recorded across jurisdictions'.¹⁸⁷⁴ The barriers that may prevent a victim from disclosing an incident of domestic and family violence, and seeking help, include:¹⁸⁷⁵

- fear of partner retaliation;
- economic dependence on the perpetrator;
- children or other family members suffering if the relationship breaks down;
- shame;
- fear of not being believed;
- fear/uncertainty of the criminal justice system;
- past experiences;
- cultural beliefs;
- fear of the perpetrator;
- lack of access to support networks due to age, cultural or language barriers;
- not framing the assault as criminal – the victim may not understand that they are entitled to protection from sexual violence even when in a relationship with the perpetrator;
- a perception that the incident is too minor to report to police;
- a lack of awareness that such action constitutes an offence;
- a desire to 'keep it private' and deal with it themselves;
- a lack of awareness about, or lack of availability of, culturally responsive services; and
- previous experiences of asking for help but feeling re-victimised.

¹⁸⁷⁴ Urbis, Literature Review on Domestic Violence Perpetrators (for Australian Government Department of Social Services) *Research on Domestic and Sexual Violence Perpetrator Intervention Programs* (2013) [2.2.1] (accessed 4 February 2021).

¹⁸⁷⁵ Finance and Public Administration References Committee, *Domestic Violence in Australia Report* (2015) [5.12] (accessed 4 February 2021); ABS, *Defining the Data Challenge for Family, Domestic and Sexual Violence 2013* (Cat No 4529.0) (2013) Statistical Challenges (accessed 4 February 2021).

It is important to keep these barriers in mind when looking at the available data on the prevalence and incidence of family, domestic and sexual violence.

The Commonwealth Department of Social Services is working with a number of agencies to implement the *National Data Collection and Reporting Framework* developed by the Australian Bureau of Statistics to support nationally consistent data definitions and collection methods and more accurately capture the picture of family, domestic and sexual violence in Australia.¹⁸⁷⁶

Data and statistics on family, domestic and sexual violence are collected from a number of sources including:¹⁸⁷⁷

- the National Community Attitudes to Violence against Women Survey;
- the Australian Bureau of Statistics' Personal Safety Survey (PSS);
- the Crime Victimization Survey;
- administrative by-product data such as recorded crime data produced by police; and
- other national data collections including the National Homicide Monitoring Program and the National Coronial Information System.

13.1.2 Key statistics

The Australian Bureau of Statistics' national data on family and domestic violence (FDV) related offences for the year 2019 included that:¹⁸⁷⁸

- there were 125 victims of FDV-related homicide and related offences in Australia;
- the number of FDV-related homicide and related offences in Western Australia decreased from 38 victims in 2018 to 12 victims in 2019;

¹⁸⁷⁶ Baxter R, *Insights from the Australian Government Department of Social Services' Families Group*, Family Matters (2017) No. 99, pages 52-53 (accessed 4 February 2021).

¹⁸⁷⁷ ABS, *Family, Domestic and Sexual Violence in Australia: A Data Snapshot (2013)* (Cat No 4529.0.00.002) (2013) (accessed 4 February 2021).

¹⁸⁷⁸ ABS, *Recorded Crime - Victims, Australia, 2019* (Cat No 4510.0) (released 9 July 2020) Victims of Family and Domestic Violence Related Offences (accessed 4 February 2021).

- 30% of all homicide and related offences recorded nationally were FDV-related;
- the majority of FDV-related homicides occurred at a residential location (83% or 104 victims);
- a knife was the most common type of weapon used (45 victims);
- females comprised 64% of all FDV-related homicide victims (80 victims);
- at least two out of five assaults recorded in Australia were FDV-related (ranging from 41% in the Australian Capital Territory to 63% in Western Australia);
- there were 8,985 victims of FDV-related sexual assault, which accounted for 33% of all victims of sexual assault;
- there were six times as many female victims of FDV-related sexual assault (60 female victims per 100,000 females) than male victims (10 male victims per 100,000 males); and
- the majority of FDV-related sexual assault victims were aged under 19 years old (72% of male and 52% of female victims).

For specific family, domestic and sexual violence statistics in relation to women refer to 13.2.1; for children and young people refer to 13.3; for men refer to 13.4; and for Aboriginal people refer to 13.5.1.

13.1.3. The economic cost of family, domestic and sexual violence

The economic cost of violence against women and their children in Australia in 2015-16 was estimated to be \$22 billion. There was potentially an additional \$4 billion to add to those costs taking into account underrepresented Aboriginal and Torres Strait Islander women, pregnant women, women with disability, and women experiencing homelessness. The economic costs include the cost of health problems, hospitalisations, absenteeism from employment (both victim and perpetrator, including searching for,

hiring and training replacements), property damage and provision of services for those affected.¹⁸⁷⁹

13.2 WOMEN AND FAMILY, DOMESTIC AND SEXUAL VIOLENCE

The opening section of this chapter refers to various definitions of family, domestic and sexual violence. The United Nations (1993) separately defines 'violence against women' as:¹⁸⁸⁰

any act of gender-based violence that results in, or is likely to result in, physical or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty.

The Australian Government adopted this definition in 2009 in the *National Plan to Reduce Violence against Women and their Children*.

Men and women have different experiences of violence. Violence against women must be understood in the context of unequal power relations between men and women in our society.

In November 2016, the Senate's Finance and Public Administration References Committee reported on the role of gender inequality in contributing to the prevalence of domestic violence. Submissions outlined the connection between gender inequality and domestic violence:¹⁸⁸¹

Family violence is gendered in nature. While both men and women can be victims or perpetrators of family violence, the overwhelming majority of family violence is perpetrated by men against women.

The Australian Human Rights Commission observed:¹⁸⁸²

¹⁸⁷⁹ KPMG, *The Cost of Violence against Women and Their Children in Australia* – Final Report Prepared for the Department of Social Services (May 2016) pages 8, 10 and 11 (accessed 4 February 2021).

¹⁸⁸⁰ United Nations General Assembly, *Declaration on the Elimination of Violence against Women* (A/RES/48/104) (accessed 4 February 2021).

¹⁸⁸¹ Finance and Public Administration References Committee, *Domestic Violence and Gender Equality* (2016) [2.6] (accessed 17 November 2019).

¹⁸⁸² Finance and Public Administration References Committee, *Domestic Violence and Gender Equality* (2016) [2.7]-[2.8] (accessed 6 September 2018).

Gendered violence is rooted in the structural inequalities between men and women. It is both a cause and consequence of gender inequality.

... [V]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.

Please refer to chapter 10 for more information about the gender bias and inequality experienced by women.

Family and domestic violence has long-term, detrimental implications on the health and well-being of women and children, which have been widely reported in research. Many women and children feel shame and fear, and may have been threatened by perpetrators or told that they are responsible for the abuse they experience. The systematic nature of family and domestic violence creates enduring fear in victims which is rarely the result of one-off threats.

Please refer to section 13.3.4 of this chapter for more information about the specific impacts upon children.

Legislation in Western Australia has been implemented to specifically tackle the levels and severity of violence against women in the community – for example, the *Family Violence Legislation Reform Act 2020* which amended the *Evidence Act 1906* and the *Criminal Code*.

Please refer to section 13.8 for more information about recent Western Australian legislative initiatives.

13.2.1 Key Statistics

Statistics show that women experience family and domestic violence at far greater rates than men. For example, the 2016 Australian Bureau of Statistics (ABS) *Personal Safety Survey* (PSS) found that:¹⁸⁸³

- 17% of women, compared to 6% of men, had experienced violence by a partner since the age of 15;
- women are eight times more likely to experience intimate partner sexual violence (IPSV) than men (with approximately 5.1% of women having experienced IPSV, compared with approximately 0.6% of men); and
- 53% of women, compared to 25% of men, experienced sexual harassment during their lifetime.

Key research findings from sources other than the ABS include:

- Women who had experienced either physical, sexual or emotional abuse as a child were about seven times more likely to experience abuse as an adult. Where a woman had experienced all three of those forms of abuse as a child they were more than 36 times more likely to experience abuse as an adult (not limited to domestic violence incidents).¹⁸⁸⁴
- Women who experienced child sexual abuse were more likely to experience IPSV as an adult than women who had not experienced child sexual abuse. Similarly, these women were more likely to experience domestic violence (not limited to sexual violence) in their adult relationships.¹⁸⁸⁵

¹⁸⁸³ ABS, *Personal Safety Survey* (Cat No 4906.0) (2016) (accessed 9 September 2020).

¹⁸⁸⁴ Cox P, *Sexual Assault and Domestic Violence in the Context of Co-occurrence and Re-victimisation: State of Knowledge Paper*, ANROWS, Landscapes, (2015) page 24 (accessed 8 February 2021).

¹⁸⁸⁵ Cox P, *Sexual Assault and Domestic Violence in the Context of Co-occurrence and Re-victimisation: State of Knowledge Paper*, ANROWS, Landscapes, (2015) page 2 (accessed 8 February 2021); ABS, *Personal Safety Survey* (Cat No 4906.0) (2016) Experience of Partner Violence – Prevalence of Partner Violence (accessed 9 September 2020).

- Approximately 68% of women who experienced violence from a current cohabitating partner were pregnant at some stage of the relationship, with 18% experiencing violence during the pregnancy.¹⁸⁸⁶
- The most common place for sexual assault to occur is in the home — 40% of all women who were sexually assaulted (by a male) were assaulted in their home and 17% were assaulted at the perpetrator's home.¹⁸⁸⁷
- While it is difficult to measure the full extent of violence against people with disabilities, it is estimated that women and girls with disabilities are twice as likely to experience violence as those without disabilities.¹⁸⁸⁸
- Aboriginal women are 35 times more likely to be hospitalised as a result of family violence than non-Aboriginal women.¹⁸⁸⁹
- One study found that consumption of alcohol (by either party) was a factor in 44% of all intimate partner homicides. Significantly, that study found that homicides involving a male offender and a female victim were significantly less likely to have involved alcohol (36%) than those where the offender was a female and the victim was a male (73%). By Indigenous status, 87 percent of intimate partner homicides involving both an Indigenous offender and Indigenous victim were classified as alcohol related.¹⁸⁹⁰

13.2.1.1 Statistics for emotional abuse

The 2016 Australian Bureau of Statistics (ABS) *Personal Safety Survey* showed that while women experienced emotional abuse at slightly higher rates than men the impact of the emotional abuse was greater upon women:¹⁸⁹¹

¹⁸⁸⁶ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia 2018* (2018) page 36 (accessed 8 February 2021).

¹⁸⁸⁷ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia 2018* (2018) (Cat No FDV 2) page 26 (accessed 15 July 2019).

¹⁸⁸⁸ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia 2018* (2018) page 37 (accessed 8 February 2021).

¹⁸⁸⁹ Cox P, *Sexual Assault and Domestic Violence in the Context of Co-occurrence and Re-victimisation: State of Knowledge Paper*, ANROWS, Landscapes (2015) page 37 (accessed 8 February 2021).

¹⁸⁹⁰ Drearden J and Payne J, *Alcohol and Homicide in Australia* (2009) (accessed 8 February 2021).

¹⁸⁹¹ ABS, *Personal Safety Survey* (Cat No 4906.0) (2016) (accessed 14 September 2020).

- 23% of Australian women, compared to 16% of men, had experienced emotional abuse by a partner since the age of 15.
- Amongst Western Australians, 5.3% of women and 5.0% of men had experienced emotional abuse in the 12 months prior to the survey.
- 72% of Australian women (compared to 43% of men) experienced anxiety or fear following emotional abuse by a previous partner.

A 2014 ABS study found that of those who suffered emotional abuse, the nature of that abuse differed between women and men. Women were three times more likely than men to have received threats of harm to family, friends, children or pets.¹⁸⁹² In 8% of cases of women who had been emotionally abused by their previous partner, they reported that their pets had actually been harmed.¹⁸⁹³ However, a similar proportion of both women and men reported that their previous partner had threatened to take their child or children away from them (27% and 30% respectively).¹⁸⁹⁴

13.2.1.2 Statistics in relation to beliefs and attitudes about violence against women

The Australian Institute of Health and Welfare reported that in 2018:¹⁸⁹⁵

- one in 20 Australians believe violence against women may be justified;
- young people are more likely to have attitudes that support violence against women;
- non-physical behaviours are less likely to be recognised as violence against women;

¹⁸⁹² ABS, *Australian Social Trends* (Cat No 4102.0) (2014) Emotional Abuse – Threatening Behaviour (accessed 14 September 2020).

¹⁸⁹³ ABS, *Australian Social Trends* (Cat No 4102.0) (2014) Emotional Abuse – Threatening Behaviour (accessed 14 September 2020).

¹⁸⁹⁴ ABS, *Australian Social Trends* (Cat No 4102.0) (2014) Emotional Abuse – Threatening Behaviour (accessed 14 September 2020).

¹⁸⁹⁵ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2018) pages 10 and 51 (accessed 9 September 2020).

- nearly one in five Australians believe men should take control in relationships; and
- at least two in five assaults related to family and domestic violence - of these offences, victims were most likely aged 25-34 and female.

According to tracking research by 'The Line', campaign¹⁸⁹⁶ in 2015 and 2017:¹⁸⁹⁷

- In both 2015 and 2017, 45% of young people (aged 12-20) who were surveyed believed that 'most females could leave a violent relationship if they wanted to'. This belief was particularly held by young men, amongst whom the proportion holding that belief increased from 43% in 2015 to 50% in 2017.
- In 2015 only 67% disagreed that 'if a girl is drunk or affected by drugs she is at least partly responsible for unwanted sex', which had increased to 73% by 2017.
- In both 2015 and 2017, 30% believed that 'violent acts are okay in certain circumstances; that some violent acts are not serious; and that violence is a normal way of resolving conflict'.

13.2.1.3 Statistics on abuse in relation to women from culturally and linguistically diverse backgrounds

Women from culturally and linguistically diverse backgrounds (CaLD) are at higher risk of certain types of abuse such as dowry abuse, forced marriage, female genital mutilation/cutting (FGM/C) and honour killings.¹⁸⁹⁸

Women facing dowry-related abuse may find it difficult to recognise it as abuse and may not report it, resulting in an inadequacy in data collection.¹⁸⁹⁹

¹⁸⁹⁶ An initiative under the *National Plan to Reduce Violence against Women and their Children 2010-2022* to help young people to develop healthy, respectful relationships and reject the use of all forms of violence.

¹⁸⁹⁷ The Line, *Sex, Love and Gender Roles, Views on 'What's OK' and 'What's Not' in Sex, Dating and Relationships* (accessed 8 February 2021).

¹⁸⁹⁸ Submission from the Women's Council for Domestic and Family Violence Services (28 February 2020).

¹⁸⁹⁹ Legal and Constitutional Affairs Reference Committee, *Practice of Dowry and Incidence of Dowry Abuse in Australia*, and references cited within (14 February 2019) [1.15] (accessed 8 February 2021).

There are also limited statistics on FGM/C as women may feel uncomfortable talking about the abuse, or may have been so young when it occurred that they do not know that they had FGM/C. The majority of known cases of FGM/C in Australia in 2015-18 were recorded during hospitalisations for childbirth (88% of cases). The second most common time they were recorded was during hospitalisations for genitourinary problems (18%). The recorded cases showed that:¹⁹⁰⁰

- from 2015-2018 there were an average of 159 cases per year of FGM/C;
- the age group in which FGM/C was most likely to be recorded was 25-29 years (noting that the most frequent time of recording was at childbirth, not at the time of the abuse, as discussed above); and
- the most frequent countries of birth of the recorded victims were Somalia, Sudan, Ethiopia, Sierra Leone and Eritrea.

13.2.2 Impacts upon women¹⁹⁰¹

A Victorian study measuring the burden of disease found that 'intimate partner violence has wide ranging and persistent effects on women's physical and mental health'. Health outcomes included:

- death by homicide, suicide or life-threatening sexually transmitted disease;
- self-harming behaviours;
- physical injuries including bruising, lacerations, tears and fractures;
- sexually transmitted diseases and other reproductive health issues;
- depression and anxiety;
- eating disorders;
- traumatic and post-traumatic stress symptoms;
- phobias, somatisation and dissociative disorders;
- harmful tobacco and alcohol use;

¹⁹⁰⁰ Australian Institute of Health and Welfare, *Discussion of Female Genital Mutilation/ Cutting Data in Australia* (26 August 2019) pages 25-28, citing the World Health Organisation (accessed 8 February 2021).

¹⁹⁰¹ Unless otherwise indicated, information in this section is sourced from Victorian Department of Health (2004), *Measuring the Burden of Disease Caused by Intimate Partner Violence* (accessed 8 February 2021).

- illicit and prescription drug use;
- chronic pain disorders;
- gastrointestinal and digestive disorders; and
- sleep problems.

The Victorian study noted that:¹⁹⁰²

Although men are among the victims of intimate partner violence, evidence suggests that the vast majority of victims are women and that women are more vulnerable to its health impacts.

A 2018 New Zealand paper states that women's criminal offending frequently takes place in the context of intimate partner violence. Women who may have fears for their own and their children's safety may:¹⁹⁰³

- offend because an abusive partner demanded they do so;
- offend in response to a dangerous situation that has evolved due to their intimate partner's violence;
- use physical violence to defend themselves or their children;
- claim income support when not entitled because an abusive partner refuses to support them or their children;
- know that their partner is also abusing their children but be unable to stop them doing so;
- be impeded in their ability to parent because they are suffering from trauma or other mental health issues consequent to their partner's violence; or
- offend in order to spend time in prison as a break from violence.

¹⁹⁰² Victorian Department of Health (2004), *Measuring the Burden of Disease Caused by Intimate Partner Violence* page 5 (accessed 8 February 2021).

¹⁹⁰³ Tolmie J, Smith R, Short J, Wilson D and Sach J, *Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence*, *New Zealand Law Review* (April 2018) pages 182-183 (accessed 16 April 2020).

Another major impact of domestic violence is homelessness, with women and children often forced to leave their homes to escape the violence. They face not only the loss of their homes but also the disruption of their social support, as well as of children's schooling and social networks. In many cases the perpetrator of the violence remains in the family home. Women often seek emergency accommodation through shelters and refuges, but many do not seek assistance from any agencies, preferring to seek help from family or friends. Sometimes they do not meet refuge criteria: for example, if they have adolescent male children.

The Australian Institute of Health and Welfare reported that in 2012-13, 23% of all clients who received specialist homelessness services reported domestic and family violence as the main reason for seeking assistance. Domestic and family violence was the main reason for seeking assistance for the majority of women with children, women from non-English speaking backgrounds and older women.¹⁹⁰⁴

13.2.3 Forms of family, domestic and sexual violence

Family and domestic violence includes emotional violence, physical violence, sexual violence, social violence, financial violence, spiritual violence and other controlling behaviour.

These categories have been defined as follows:¹⁹⁰⁵

Emotional violence is behaviour that does not accord equal importance and respect to another person's feelings, opinions and experiences. Even though emotional abuse can have a profound and long-term impact on victims it is often the most difficult form of violence to identify. Many emotionally abusive behaviours are not crimes, and therefore victims can find it challenging to obtain protection.

¹⁹⁰⁴ Australian Institute of Health and Welfare, *Domestic and Family Violence and Homelessness 2011-12 to 2013-14. What are the Reasons Clients Seek Assistance?* (accessed 11 September 2020).

¹⁹⁰⁵ Department for Child Protection and Family Support, *Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2nd ed., 2015) page 61 (Table 1) (accessed 1 July 2019).

...Physical violence is any actual or threatened attack on another person's physical safety and bodily integrity. In addition to threatened or actual harm to people, it includes harming or threatening to harm pets or possessions.

...Sexual violence is any actual or threatened sexual contact without consent, such as unwanted touching, rape, exposure of genitals and making someone view pornography against their will.

...Social violence is behaviour that limits, controls or interferes with a woman's social activities or relationships with others, such as controlling her movements and denying her access to family and friends. [For example] excessive questioning; monitoring movements and social media communications; preventing the victim from contact with people who share the victim's culture or language; and spreading lies about the victim through their support network as to discredit the victim.

...Financial violence includes not giving a woman access to her share of the family's resources, expecting her to manage the household on an impossibly low amount of money and/or criticising and blaming her when she is unable to, monitoring her spending, and incurring debts in her name.

...Spiritual violence is any behaviour that denigrates a woman's religious or spiritual beliefs, or prevents her from attending religious gatherings or practising her faith. It also includes harming or threatening to harm women or children in religious or occult rituals, or forcing them to participate in religious activities against their will.

... '[Other controlling behaviour is where] some men control women in ways that do not fit the above descriptions or are not - on the surface - violent, but still deny a woman's right to autonomy and equality.

'Other controlling behaviours' may include forcing the victim to go without food or water, refusing to give the victim privacy, preventing the victim from going to work and depriving the victim of sleep.¹⁹⁰⁶

¹⁹⁰⁶ Department for Child Protection and Family Support, *Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2nd ed., 2015) page 61 (Table 1) (accessed 8 February 2021).

Other categories of abuse that have been increasingly recognised in recent years include:

- Technology-facilitated abuse:¹⁹⁰⁷ Technology-facilitated abuse is when a perpetrator harasses, threatens, monitors or impersonates a victim persistently using technology. This type of abuse can occur between strangers, but most often the perpetrator is known and this form of abuse occurs together with other types of abuse. There are four main areas of technology-facilitated abuse:
 - Harassment – leaving constant phone messages, texts, emails, social media comments.
 - Monitoring/stalking – tracking a person's whereabouts using mobile apps, tracking via online banking, hacking into a person's accounts (email, social media, bank accounts) and limiting access to technology.
 - Impersonation – posting false information about someone online, pretending to be someone else to monitor a person.
 - Threats – threatening to share intimate photos/messages (image-based abuse), 'revenge-porn', getting other people to threaten via telephone calls, messages or social media.
- Reproductive coercion and control:¹⁹⁰⁸ Reproductive coercion is behaviour intended to control a woman's reproductive health decision-making, in an attempt to maintain power or control over her. Reproductive coercion generally falls into, but is not limited to, one of the following categories:
 - forcing or manipulating a woman into becoming pregnant;
 - preventing a woman from using contraception, or tampering with contraception; and/or
 - forcing or pressuring a woman to either continue or terminate a pregnancy.
- Pet Abuse:¹⁹⁰⁹ Animal abuse is an important factor in domestic violence, used for reasons including:

¹⁹⁰⁷ White Ribbon Australia, *Technology-facilitated Abuse* (2020) (accessed 18 April 2020).

¹⁹⁰⁸ White Ribbon Australia, *Reproductive Coercion* (2020) (accessed 18 April 2020).

¹⁹⁰⁹ Martinez N, *The Link Between Domestic Violence and Animal Abuse, Sexual Assault Family Violence Investigation Course* (December 2007) Vol 2(4) page 3.

- manipulating victims into staying in violent relationships or delaying them seeking assistance;
- retaliating for acts of independence and self-determination;
- perpetuating the context of terror;
- preventing the victim from leaving or coercing their return; and
- eliminating competition for attention.

Women from culturally and linguistically diverse backgrounds (CaLD) are a diverse group. That diversity is in both their countries of origin and faiths, but also diversity amongst women from the same country of origin. Relatively little is known about the experiences of intimate partner violence amongst CaLD women who have migrated to Australia or arrived as refugees.¹⁹¹⁰ Some forms of abuse that may be experienced by women from CaLD backgrounds in Australia:¹⁹¹¹

- Dowry abuse:¹⁹¹² Dowry relates to money, property, goods or other gifts that are transferred from one family to another prior to or upon marriage. The United Nations Division for the Advancement of Women has defined dowry-related violence as 'any act of violence or harassment associated with giving or receiving of dowry at any time before, during or after marriage'.

Dowry abuse may be a coercive demand for larger gifts or more cash from a woman and her family, which may be accompanied by other forms of violence including emotional or economic abuse, stalking or harassment. It may also include mutilation, sexual assault, acid throwing, wife burning, murder, threats to cancel visa sponsorship, threats to annul a marriage, abandonment and demands to terminate a pregnancy.

The Legal and Constitutional Affairs Reference Committee recommended in February 2019 that the definition of family violence in s 9A of the *Family Court*

¹⁹¹⁰ Guggisberg M and Grobbelaar M, *An Examination of Circumstances Related to Forced Marriage among Culturally and Linguistically Diverse Women in Australia, Victims of Violence* (February 2020) page 207 (accessed 18 April 2020).

¹⁹¹¹ Submission from the Women's Council for Domestic and Family Services (28 February 2020).

¹⁹¹² Legal and Constitutional Affairs Reference Committee, *Practice of Dowry and Incidence of Dowry Abuse in Australia*, and references cited within (14 February 2019) [1.5], [1.10], [1.13], [1.14] and [4.28] (accessed 8 February 2021).

Act 1997 (WA) and s 4AB of the Family Law Act 1975 (Cth) be amended to expressly include economic abuse as a form of family violence, and to provide a non-exhaustive list of examples of economic abuse, including dowry abuse.

- Forced marriage:¹⁹¹³ Forced marriage is a situation where people are forced to marry without consent and regardless of age. It may be the result of threats, coercion or deception, or because victims do not understand the implications and/or effects of a marriage ceremony.

The lack of free and full consent differentiates forced marriage from arranged marriages, which generally involve people being introduced by their respective families. There are occasions where choice is hard to assess because, in practice, there are varying degrees of choice in relation to full, free and informed consent in arranged marriages.

Forced marriage a form of modern slavery which is considered to be a distinct form of sexual violence in Western countries. Forced marriage was criminalised in Australia in 2013.

- Female genital cutting/ mutilation:¹⁹¹⁴ Female genital mutilation/cutting (FGM/C) refers to all procedures involving partial or total removal of the external female genitalia, or other injury to female genital organs, for non-medical reasons. FGM/C is a complex cultural practice that varies according to ethnicity and geography. The reasons it is practiced may include preparation for marriage and adulthood, preserving socially accepted values related to femininity and modesty, ensuring a woman's fidelity, and for subjective aesthetic reasons.

FGM/C is almost always performed on girls aged 0–18. In most cases it is performed by the age of 15, and for many before the age of nine. Practicing

¹⁹¹³ Guggisberg M and Grobbelaar M, *An Examination of Circumstances Related to Forced Marriage among Culturally and Linguistically Diverse Women in Australia, Victims of Violence* (February 2020) pages 205, 210 and 2011 (accessed 18 April 2020).

¹⁹¹⁴ Australian Institute of Health and Welfare, *Discussion of Female Genital Mutilation/ Cutting Data in Australia* (26 August 2019) page 1, citing the World Health Organisation (accessed 15 September 2021).

FGM/C in Australia or arranging for FGM/C to occur overseas for a girl who is an Australian resident is illegal and considered a form of child abuse.

- **Honour killing:** An honour killing, also sometimes referred to as a shame killing, is the murder of a family member due to the perpetrator's belief that the victim has brought dishonour or shame upon the family. Reasons may include refusing to enter an arranged or forced marriage, having or perceived to be having premarital or extramarital sex, being a victim of sexual assault, and wearing clothing which is perceived to be inappropriate.

13.2.4 Risk factors for women

'Risk factors' are particular family and domestic violence victim and perpetrator characteristics that affect the likelihood and severity of future violence.¹⁹¹⁵ The process of identifying the presence of risk factors is called 'risk assessment'¹⁹¹⁶. Western Australia has a common risk assessment and risk management framework in order to identify and respond to family and domestic violence effectively.¹⁹¹⁷ Some of the key risk factors include:¹⁹¹⁸

- use of weapon in most recent event by the perpetrator;
- escalation – increase in severity and/or frequency of violence by the perpetrator;
- perpetrator has ever harmed or threatened to harm victim;
- sexual assault of the victim (including rape, coerced sexual activity or unwanted sexual touching);
- perpetrator has ever tried to choke the victim;
- perpetrator has ever threatened to kill the victim;
- stalking of the victim by the perpetrator;

¹⁹¹⁵ Department for Child Protection and Family Support, *Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2nd ed., 2015) page 9 (accessed 8 February 2021).

¹⁹¹⁶ Department for Child Protection and Family Support (2015) *Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2nd ed., 2015) page 9 (accessed 8 February 2021).

¹⁹¹⁷ Department for Child Protection and Family Support, *Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2nd ed., 2015) (accessed 8 February 2021).

¹⁹¹⁸ Department for Child Protection and Family Support, *Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2nd ed., 2015) Fact Sheet 5, Table 1, page 72 (accessed 8 February 2021).

- obsessive/jealous behaviour towards victim by the perpetrator;
- recent separation;
- perpetrator has ever harmed or threatened to harm or kill children;
- perpetrator has ever harmed or threatened to harm or kill other family members;
- isolation;
- controlling behaviours (for example, the perpetrator telling the victim how to dress);
- perpetrator access to weapons;
- perpetrator has ever threatened or tried to commit suicide;
- perpetrator drug and alcohol misuse/abuse;
- perpetrator depression/mental health issue;
- perpetrator unemployment;
- financial difficulties;
- perpetrator has breached court orders, for example, a violence restraining order;
- perpetrator is currently on bail or parole in relation to violent offences;
- perpetrator has served a term of imprisonment or has been recently released from custody in relation to violent offences;
- perpetrator has a history of violent behaviour other than family or domestic violence;
- perpetrator's family poses a risk to the adult victim;
- victim pregnancy/new birth;
- victim was attacked while holding a child;
- children are in the home;
- children have tried to intervene in the violence;
- child contact or residency issues, including Family Court proceedings; and/or
- children from previous relationship are in the household.

While family and domestic violence crosses all ages, races and cultures, socioeconomic and demographic barriers, some women may be at higher risk than others.¹⁹¹⁹ The Australian Institute of Health and Welfare reports that the following groups are at

¹⁹¹⁹ Council of Australian Governments, *National Plan to Reduce Violence against Women and their Children 2010-2022* (2010) page 11 (accessed 8 February 2021).

particularly high risk:¹⁹²⁰

- Aboriginal women;
- people separating from their partners;
- women about to end, or who have recently ended, a relationship;
- people who were abused before the age of 15;
- children witnessing domestic violence;
- young women, particularly inexperienced in relationships or in a relationship where there is a substantial age gap between partners;
- unemployed women;
- pregnant women;
- families experiencing financial hardship; and
- women with disabilities.

Please refer to section 13.2.1 for Australian Institute of Health and Welfare statistics as to the increase in levels of abuse experienced by Indigenous women, those women who suffered abuse as children and pregnant women.

Please refer to section 13.5 for more information on the causes and dynamics of family violence in Aboriginal families.

Suffocation and strangulation perpetrated against an intimate partner is one of the strongest indicators of an increased risk of homicide. Women who experience an episode of non-fatal strangulation by their intimate partner are over seven times more likely to be killed than other women. The *Family Violence Legislation Reform Act 2020*, which was passed on 9 July 2020, provided for a new offence of strangulation or suffocation in the *Criminal Code* in Western Australia.

While exploration of domestic violence has tended to focus on its occurrence in heterosexual relationships, there is an increasing recognition that same-sex relationships must also be examined. Domestic violence can be, and is, experienced within lesbian and gay relationships and in all other types of relationships.

¹⁹²⁰ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia 2018* (2018) page 36 (accessed 8 February 2021).

Please refer to chapters 12A and 12B on diverse sexuality, sex and gender for more information.

13.3 CHILDREN AND FAMILY, DOMESTIC AND SEXUAL VIOLENCE

13.3.1 Key statistics

Young women and children are at a heightened risk of violence. While there is a scarcity of more recent statistics as to the relationships of perpetrators to their victims, a 2006 paper reported:¹⁹²¹

- The majority of physical abuse against young women under the age of 15 was perpetrated by their fathers/step fathers (52.8%) or mothers/step mothers (34.3%).
- Only 8.6% of women who were sexually abused before the age of 15 were abused by strangers.
- Most sexual abuse against women under the age of 15 was perpetrated by fathers/step fathers (16.5%), family friends (16.5%), other male relatives (35.1%) and acquaintances/neighbours (15.4%).

The 2016 ABS *Personal Safety Survey* indicates that those who experience abuse as a child are at heightened risk of violence as an adult:¹⁹²²

- Around one in three women who experienced abuse before the age of 15 experienced partner violence as an adult (36%). These women were nearly three times more likely to experience partner violence as an adult than women who had not experienced abuse before the age of 15 (13%).
- Around one in six men who experienced abuse before the age of 15 experienced partner violence as an adult (15%). Men who experienced abuse before the age of 15 were three times more likely to experience partner violence as an adult than men who had not experienced abuse before the age of 15 (4.7%).

¹⁹²¹ Phillips J and Park M, *E-Brief— Measuring Domestic Violence and Sexual Assault against Women: Review of the Literature and Statistics* (2006) (accessed 8 February 2021).

¹⁹²² ABS, *Personal Safety Survey* (Cat No 4906.0) (2016) Experience of Abuse before the Age of 15 (accessed 8 February 2021).

The 2016 ABS *Personal Safety Survey* asked whether respondents had ever seen or heard violence being directed at one parent by another before the age of 15. Some of the key findings included:¹⁹²³

- Men and women were equally likely to have children in their care at the time of experiencing partner violence.
- An estimated 50% of women who had children in their care when they experienced violence by a current partner reported that the children had seen or heard the violence.
- An estimated 68% of women who had children in their care when they experienced violence by a previous partner reported that the children had seen or heard the violence.
- An estimated 60% of men who had children in their care when they experienced violence by a previous partner reported that the children had seen or heard the violence.
- In over half (55%) of those households where the male carer 'gets drunk a lot', the young person witnessed male to female violence.

In 2015-16, Indigenous children were seven times as likely to be the subject of substantiated child abuse or neglect as non-Indigenous children.¹⁹²⁴

13.3.1.1 Statistics in relation to offending and a history of family violence as a child

The distinction between witnessing domestic violence and direct interfamilial abuse of young people and children may be a false one, in terms of the impact on future abuse and

¹⁹²³ ABS, *Personal Safety Survey* (Cat No 4906.0) (2016) Experience of Abuse before the Age of 15; Experience of Partner Violence – Characteristics of Partner Violence – Impacts of Partner Violence – Children Witnessing or During Pregnancy (accessed 5 July 2019).

¹⁹²⁴ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2018) (Cat No FDV 2) Summary (xii), pages 83 and 96 (accessed 8 February 2021).

offending. In any event, domestic violence and abuse of children often coalesce. It is of note that:¹⁹²⁵

- A study of juveniles incarcerated in Australian detention centres found that these juveniles reported physical abuse against them in 36% of cases, emotional abuse in 27% of cases and neglect in 18%. When combined, almost half the young people (46%) reported directly experiencing at least one of these types of abuse. When neglect or abuse did occur, it was most likely to be by a parent or guardian, followed by a sibling.¹⁹²⁶
- While a number of risk factors have been identified as increasing the likelihood of juvenile offending, the most consistent is a history of child abuse and/or neglect. In particular, physical abuse and neglect are significant predictive factors. Sexual and/or emotional abuse were not related to later offending.
- 23% of maltreated children who were victims of physical abuse subsequently offended, compared to 15% of children who were not physically abused.
- 42% of maltreated Indigenous children later offended, compared to 14% of non-Indigenous maltreated children.
- 26% of maltreated children who were placed in care outside the home subsequently offended, compared with 13% of children who were never placed outside the home.

13.3.2 Exposure to family, domestic and sexual violence

Children growing up in environments without the benefit of safe, stable and nurturing relationships with parents or other caregivers have difficulty forming relationships with peers and others, lack empathy for others in distress and are at much greater risk of experiencing depression and anxiety, developing poor communication skills and adopting antisocial behaviours. Exposure to family and domestic violence affects a child's physical

¹⁹²⁵ Unless otherwise indicated this data is drawn from AIC, *Pathways from Child Maltreatment to Juvenile Offending, Trends and Issues in Crime and Criminal Justice No 241* (2002) (accessed 8 February 2021).

¹⁹²⁶ Australian Institute of Criminology, *Experiences of Neglect and Abuse amongst Juvenile Detainees, Crime Facts Info No 118* (2006) page 1 (accessed 8 February 2021).

and mental wellbeing, development and schooling, and is the leading cause of children's homelessness in Australia.¹⁹²⁷ Children also have poorer educational attainment and economic productivity over their lifetimes and are more likely to be a perpetrator or victim of violence.¹⁹²⁸

Exposure of children to domestic violence has increasingly been recognised as a form of child abuse in both Australia and internationally. In 2011, the definition of 'abuse, in relation to a child' in the *Family Law Act 1975* (Cth) was amended to include causing serious psychological harm arising from the child being subjected to or exposed to family violence.¹⁹²⁹ The definition was subsequently adopted in the *Family Court Act 1997* (WA).¹⁹³⁰

Children may be subjected to or exposed to domestic violence in a variety of ways which include:

- hearing the violence;
- being used as a physical weapon;
- being forced to watch or participate in assaults;
- being forced to spy on a parent;
- being informed that they are to blame for the violence because of their behaviour;
- being used as a hostage;
- defending a parent against the violence; and/or
- intervening to stop the violence.

The child's exposure to the violence can also involve:

- having to telephone for emergency assistance;
- seeing a parent's injuries after the violence and having to assist in 'patching up' a parent;
- having their own injuries and/or trauma to cope with;
- dealing with a parent who alternates between violence and a caring role;

¹⁹²⁷ Campo M, *Children's Exposure to Domestic and Family Violence: Key Issues and Responses* (2015) Child Family Community Australia Paper No. 36, Effects of Children's Exposure to Domestic and Family Violence – Homelessness (accessed 10 February 2021).

¹⁹²⁸ World Health Organisation, *Global Status Report on Violence Prevention 2014* (2014) (accessed 15 September 2021).

¹⁹²⁹ *Family Law Act 1975* (Cth), s 4(1) (accessed 10 February 2021).

¹⁹³⁰ *Family Court Act 1997* (WA), s 5 (accessed 10 February 2021).

- seeing the parents being arrested; and/or
- having to leave home with a parent with consequential dislocation from family, friends and school.

This exposure can have psychological, neurological, behavioural, health and socioeconomic impacts upon children, and can link to intergenerational transmission of violence and re-victimisation.¹⁹³¹ A 2015 publication by Monica Campo stated:¹⁹³²

A range of longitudinal, meta-analytic and population-based studies have found that exposure to domestic and family violence can affect a child's mental wellbeing and contribute to poorer educational outcomes and a range of behavioural issues. These may include:

- *impaired cognitive functioning;*
- *behavioural problems;*
- *poorer academic outcomes;*
- *externalising and internalising behaviours;*
- *learning difficulties;*
- *depression and poor mental wellbeing;*
- *low self-esteem;*
- *low school attendance; and*
- *bullying (both as victim and perpetrator).*

13.3.3 Risk factors for children¹⁹³³

- The rate of young people and children being exposed to domestic violence varies considerably depending on the nature of household living arrangements. For example, the witnessing of an act of male-to-female violence (between parents or a parent and their partner) ranged from 14% for those young people living with both parents to 41% for those living with 'mum and her partner'.

¹⁹³¹ Richards K, *Children's Exposure to Domestic Violence in Australia AIC Trends and Issues in Crime and Criminal Justice No. 419* (2011) page 1 (accessed 10 February 2021).

¹⁹³² Campo M, *Children's Exposure to Domestic and Family Violence: Key Issues and Responses* (2015) Child Family Community Australia Paper No. 36, Effects of Children's Exposure to Domestic and Family Violence – Learning, Behaviour and Wellbeing (accessed 10 February 2021).

¹⁹³³ Unless otherwise stated or referenced, the following data is drawn from Indermaur D, *Young Australians and Domestic Violence, Trends and Issues in Crime and Criminal Justice No 195* (2001) (accessed 10 February 2021).

- Young Indigenous people were significantly more likely to have been exposed to an act of physical domestic violence between their parents or between a parent and their partner. In the case of male-to-female violence, the rate was 42% (compared to 23% for all respondents) and for female-to-male violence the rate was 33% (compared to 22% for all respondents).
- In 2015-16, Indigenous children were seven times as likely to be the subject of substantiated child abuse or neglect as non-Indigenous children.¹⁹³⁴
- In over half (55%) of those households where the male carer 'gets drunk a lot', the young person witnessed male to female violence.
- Overall, the best predictor of perpetration (and victimisation) of violence in young people's relationships was found to be witnessing certain types of male-to-female violence in the home. However, it is important to note that the majority of those who have grown up in violent homes do not go on to perpetrate violence in their own relationships.

13.3.4 Impact on children

Although the following information primarily concerns the impact of domestic violence upon children and young people, research demonstrates that there is no measurable difference in the outcomes (emotional, social, and behavioural) for children who have been physically abused than for children who have been exposed to family and domestic violence.¹⁹³⁵ Any distinction between witnessing domestic violence and direct interfamilial abuse of young people and children may be a false one, in terms of the impact on future abuse and offending. In any event, domestic violence and abuse of children often coalesce.

Exposure to domestic violence impacts on each of the developmental stages from *in utero* to young adulthood. It is possible that some children are affected by domestic violence

¹⁹³⁴ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (2018) (Cat No FDV 2) Summary (xii), pages 83 and 96 (accessed 10 February 2021).

¹⁹³⁵ Western Australia, Department of Child Protection, *Family and Domestic Violence Background Paper* (2012) page 4 (accessed 10 February 2021).

by being disabled before birth when their mother is assaulted, or by the impact of stress on fetal growth.

The responses of young people and children to domestic violence will depend on a variety of factors including age, gender, personality and family role; and includes both short- and long-term consequences. Pre-school children living with domestic violence tend to show the most behavioural disturbance. A child's progression through age-appropriate developmental tasks may be affected by initial effects such as anxiety and depression.¹⁹³⁶

Typical short-term responses of children and young people to witnessing regular episodes of violence between family members may include:¹⁹³⁷

- blaming themselves for violence (especially among younger children);
- experiencing sleeping difficulties;
- regressing to an earlier stage of development, such as thumb sucking and/or bedwetting;
- becoming increasingly anxious and fearful;
- displaying aggressive or destructive behaviour;
- starting to withdraw from people and events;
- becoming a victim or perpetrator of bullying;
- starting to show cruelty to animals;
- experiencing stress-related illness such as headache or stomach pain;
- displaying difficulties with speech, such as stuttering; and/or
- misusing drugs and alcohol (predominantly young adults).

Persistent fear may cause children to become 'hyper-vigilant'. Children in this state of arousal experience persistent anxiety, which ultimately impairs their capacity to benefit from social, emotional and cognitive experiences.¹⁹³⁸

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

¹⁹³⁶ Better Health Channel, *Family Violence and Children* (2008) Short-term Effects of Domestic Violence (accessed 10 February 2021).

¹⁹³⁷ Better Health Channel, *Family Violence and Children* (2008) Short-term Effects of Domestic Violence (accessed 10 February 2021).

¹⁹³⁸ Perry B, *Understanding Traumatized and Maltreated Children: The Core Concepts* (2004) *Children and Violence Video 7* (2004) (accessed 10 February 2021).

term effects may include copying their parental role models and behaving in similarly destructive ways in their adult relationships.¹⁹³⁹ The relationship between witnessing and perpetrating violence is complex and influenced by a number of social and situational factors, as well as the effects of family violence on the neurological development of children.

Indermaur refers to the 'cycle of violence' thesis: 'witnessing parental domestic violence is the strongest predictor of perpetration of violence in young people's own intimate relationships'.¹⁹⁴⁰ This is also referred to as the intergenerational transmission of violence.¹⁹⁴¹ However, while research has shown that children who are exposed to domestic violence are more likely to become future perpetrators of domestic violence, the majority of children exposed to domestic violence do not grow up to be either perpetrators or victims.

Exposure to domestic violence has long term neurobiological effects:¹⁹⁴²

- Whilst many children exposed to toxic stress may be trapped in a 'fight or flight' or 'alarm state', others – particularly infants and very young children who cannot fight or flee – will disassociate, turning inward and feeling more like they are observing the situation than experiencing it.
- Whilst these coping mechanisms may be adaptive in the short-term, they can result in pathological changes over time. The symptoms will relate to the neurobiology of their coping mechanism. The more prolonged the stressor, the greater likelihood of long term symptoms.
- The neurochemical system of a disassociating child predisposes that child to somatic complaints, withdrawal, helplessness, dependence, anxiety disorders and depression.

¹⁹³⁹ Better Health Channel, *Family Violence and Children* (2008) Long-term Effects of Domestic Violence (accessed 10 February 2021).

¹⁹⁴⁰ Indermaur D, *Young Australians and Domestic Violence, Trends and Issues in Crime and Criminal Justice No 195* (2001) pages 4 and 5 (accessed 10 February 2021).

¹⁹⁴¹ Submission from Women's Health and Family Services (8 June 2020).

¹⁹⁴² Hecht Shafran L, *Domestic Violence, Developing Brains and the Lifespan – New Knowledge from Neuroscience, The Judges' Journal* (2014) Vol 53(3) (accessed 10 February 2021).

- The neurochemical system of a child in an 'alarm state' predisposes that child to symptoms relating to persistent hyperarousal, such as an increased startle response, serious sleep disorders, anxiety, hyperactivity, conduct disorder, ADHD and PTSD. The fear of living in a fight or flight mode can result in cognitive distortions. Actions may be perceived as threatening (e.g. eye contact, a shoulder tap) that would not be by other people, and may elicit impulsive, violent reactions.
- Dr. Bruce Perry explains that living in an 'alarm state' has critical effects on a child's capacity to learn:¹⁹⁴³

When a child is living in a persisting state of low-level fear that results from exposure to violence, the primary areas of the brain that are processing information are different from those in a child from a safe environment. The calm child may sit in the same classroom next to the child in an alarm state, both hearing the same lecture by the teacher. Even if they have identical IQs, the child that is calm can focus on the words of the teacher and, using neocortex, engage in abstract cognition. The child in an alarm state will be less efficient at processing and storing the verbal information the teacher is providing.

- The resulting failure to learn has consequences across the child's lifespan.

13.3.5 Child protection and domestic violence

Many studies have shown that domestic violence and child abuse often co-exist.¹⁹⁴⁴

Child protection legislation often provides that a child needs a parent who is willing and able to protect the child from significant harm. Section 28 of the *Children and Community Services Act 2004* (WA) provides that a child is 'in need of protection' if, among other things, 'the child's parents have not protected, or are unlikely or unable to protect, the child from harm, or further harm'.¹⁹⁴⁵ It has been argued that too often the non-abusive parent is held accountable for failure to deal with their violent partner.

¹⁹⁴³ Hecht Shafran L, *Domestic Violence, Developing Brains and the Lifespan – New Knowledge from Neuroscience* *The Judges' Journal* (2014) Vol 53(3) page 3 (accessed 10 February 2021); citing Perry BD, *The Neurodevelopmental Impact of Violence in Childhood* in Schetky D and Benedik EP, *Textbook of Child and Adolescent Forensic Psychology* (2001).

¹⁹⁴⁴ Tomison A, *Exploring Family Violence: Links between Child Maltreatment and Domestic Violence*, *National Child Protection Clearinghouse No 13* (2000) pages 1-2 (accessed 10 February 2021).

¹⁹⁴⁵ *Children and Community Services Act 2004* (WA) s 28(2)(c) (accessed 10 February 2021).

Under s 101 of the *Children and Community Services Act 2004* (WA), a person who has care or control of a child and fails to protect the child from physical, sexual or emotional abuse is guilty of a crime punishable by imprisonment for 10 years.¹⁹⁴⁶

Part 4, Division 9A of the *Children and Community Services Act 2004* (WA) provides for reporting of sexual abuse of children. In particular, Section 124B of *Children and Community Services Act 2004* (WA) mandates a 'duty to report' sexual abuse, which applies to doctors, nurses, midwives, police officers, teachers and boarding supervisors. A failure to report is punishable by a fine of \$6,000.¹⁹⁴⁷

Fear that children may be 'taken away' is common among women who are experiencing domestic violence, and particularly among Aboriginal women. This fear can be compounded by the tactics of abuse used by the perpetrator, who may threaten to report the other parent to the authorities for neglecting the children.

13.4 MEN AND FAMILY, DOMESTIC AND SEXUAL VIOLENCE

The way in which domestic violence is understood has changed steadily since the 1960s and the belief that violence against women is the result of a patriarchal social order has been central to this reorientation.¹⁹⁴⁸ While it must be acknowledged that the majority of victims of domestic abuse are women and the majority of perpetrators are men, this can create barriers for men who are victims of domestic violence, compromising their ability to seek help and respond appropriately to abuse.

Although male victims of domestic violence undoubtedly exist, there is still considerable debate about what constitutes a male victim.¹⁹⁴⁹ For example, there is debate as to whether a male victim of female defensive or retaliatory action would be included. Some have also argued that men who report that they are victims of domestic violence may employ victimhood as a part of their manipulative and controlling behaviour.

¹⁹⁴⁶ *Children and Community Services Act 2004* (WA) s 101 (accessed 10 February 2021).

¹⁹⁴⁷ *Children and Community Services Act 2004* (WA) s 101 (accessed 10 February 2021).

¹⁹⁴⁸ University of Tasmania, Department of Rural Health, *Responding to Domestic Violence Resource Package* (2004) Module 2.4: The Impact of Domestic Violence on Men (accessed 31 July 2009).

¹⁹⁴⁹ Family and Domestic Violence Unit, *The Men's Project: Exploring Responses to Men who are Victims or Perpetrators of Family and Domestic Violence* (2006) page 6 (accessed 26 May 2008).

Less contentious is that the experiences of men who identify as victims of domestic violence are different to those of women. For example, in heterosexual relationships, there are some forms of violence that are largely confined to male perpetrators. Heterosexual men are rarely the victims of strangulation, property damage, violence against pets and sexual violence.¹⁹⁵⁰

13.4.1 Key Statistics

The available statistics indicate that the frequency of men suffering family and domestic abuse is significantly lower than for women.¹⁹⁵¹

The 2016 ABS *Personal Safety Survey* showed that:¹⁹⁵²

- 6% of men had experienced physical and/or sexual violence by a partner since the age of 15;
- 16% of men experienced emotional abuse by a partner since the age of 15; and
- 11% of men aged 18 years and over experienced abuse before the age of 15.¹⁹⁵³

The proportion of men who reported having experienced partner violence in the 12 months prior to the survey had increased between the *Personal Safety Surveys* of 2005 (0.4%), 2012 (0.6%) and 2016 (0.8%).¹⁹⁵⁴

13.4.2 Experiences of violence and controlling behaviours¹⁹⁵⁵

Men may be victims of violence inflicted by an intimate partner, a parent, a sibling, an adolescent or adult child or another family member. Male victims may be subject to

¹⁹⁵⁰ ABS, *Recorded Crime - Victims, Australia, 2018* (Cat No 4510.0) (released 27 June 2019) Victims of Family and Domestic Violence Related Offences; Victims of Crime, Australia (accessed 29 June 2020); Salter M, quoted in ABC, *What about Men?: Challenging the MRA claim of a Domestic Violence Conspiracy* (19 June 2017) (accessed 25 August 2020).

¹⁹⁵¹ Department of Social Services, *Reducing Violence against Women and Their Children – Research Informing the Development of a National Campaign* (2015) page 2 (accessed 10 February 2021).

¹⁹⁵² ABS, *Personal Safety Survey* (Cat No 4906.0) Partner Violence; Abuse before the Age of 15 (2016) (accessed 14 September 2020).

¹⁹⁵³ ABS, *Personal Safety Survey* (Cat No 4906.0) (2016) Abuse before the Age of 15 (accessed 14 September 2020).

¹⁹⁵⁴ ABS, *Personal Safety Survey* (Cat No 4906.0) (2016) Changes in Partner Violence Prevalence over Time (accessed 14 September 2020).

¹⁹⁵⁵ Unless referenced otherwise, this information is drawn from Mulrone J and Chan C, *Men as Victims of Domestic Violence* (Topic Paper No 15) (2005) (accessed 22 June 2018).

physical violence, threats, sexual, emotional, psychological, verbal and financial abuse, property damage and social isolation. As well as physical injuries, the impacts of family violence can include psychological distress, suicidal ideation and loss of work.¹⁹⁵⁶

Whilst research into family, domestic and sexual violence against men is limited, the Men's Advisory Network in Western Australia commissioned a project to investigate the experiences of adult male victims of intimate partner abuse, with the results published in 2010. This included men of all ages above 18, including Indigenous men, men in a same-sex relationships, men from culturally and linguistically diverse backgrounds, and men from a range of locations (urban, rural, remote).¹⁹⁵⁷ The findings included:¹⁹⁵⁸

- Male participants in the study reported violence against both the person and their property. Abuse against the person ranged from punching, biting, scratching spitting and the throwing of objects at men, to the spiking of their drinks. Damage to property was a strong theme in the findings, and included breaking into houses and breaking objects such as gifts.
- Participants also reported verbal abuse - that is, language designed to humiliate, degrade, demean, intimidate or subjugate - indicating that it took the form of yelling, shouting, screaming and swearing.
- Participants reported feeling pressured to submit to sex against their will, and described acquiescing rather than consenting.
- Participants reported financial abuse, namely that it took the form of their financial affairs being controlled, often in an incompetent way.

¹⁹⁵⁶ Royal Commission into Family Violence (Victoria), *Report and Recommendations* (2016) (accessed 8 July 2019).

¹⁹⁵⁷ Tilbrook E, Allan A and Dear G, *Men's Advisory Network: Intimate Partner Abuse of Men* (2010) page 9 (accessed 8 September 2020).

¹⁹⁵⁸ Tilbrook E, Allan A and Dear G, *Men's Advisory Network: Intimate Partner Abuse of Men*, Perth 2010, pages 16-21 (accessed 8 September 2020).

- Participants reported that some perpetrators manipulated legal and administrative resources to the detriment of their male partners. They believed that this occurred because staff of the relevant agencies (government and non-government) hold stereotypical attitudes that men are always the perpetrators and that females are the victims.
- Participants reported social isolation. The strategies reported to have been used by women to socially isolate their male partners included making it difficult for the male to maintain contact with close friends.

13.4.3 Risk factors¹⁹⁵⁹

There is little documented research into the prevalence of domestic violence against men within Western Australia. The 2006 Western Australian Men's Project report offered only anecdotal findings.

The Men's Project report found that there was a marked distinction between metropolitan and rural and remote settings in terms of the reporting of male victims of domestic violence, with rural and remote areas found to be much more forthcoming.

The study found that male victims in rural and remote areas tended to be Aboriginal men. However, police and service providers in Kalgoorlie, Karratha and Broome, suggested that such violence was mostly retaliatory action or self-defence undertaken by the partners of violent men. Department for Communities workers and police in Merredin were quite adamant that rural areas have a number of male victims, and offered comments like 'we build our women tough, here in the bush' in explanation. The Men's Project suggested that this explanation was suggestive of retaliatory violence being seen as the only method of conflict resolution in an intimate relationship.

It was extremely difficult to ascertain exact numbers, but the Men's Project concluded that it seemed that rural and remote communities included relatively high numbers of male victims of domestic violence.

¹⁹⁵⁹ Family and Domestic Violence Unit, *The Men's Project: Exploring Responses to Men who are Victims or Perpetrators of Family and Domestic Violence* (2006) especially pages 6-7, 32 (accessed 22 November 2019).

The gay men interviewed felt that they tended to miss out on service delivery and responses to domestic violence; and suggested that the prevalence of domestic violence in the gay community is comparable to that found among heterosexual people. Gay men cited concerns about police perceptions of their sexual preference, the lack of appropriate services and stigma within the gay community as contributing to keeping such incidents well hidden.

Additional information on abuse in same-sex relationships is provided in chapter 12A on diverse sexuality.

13.5 ABORIGINAL PEOPLE AND FAMILY, DOMESTIC AND SEXUAL VIOLENCE

Aboriginal people¹⁹⁶⁰ experience violence at rates well above those of non-Aboriginal Australians, with a greater proportion of violent incidents in Aboriginal communities being family violence-related.¹⁹⁶¹ Family violence within Aboriginal communities needs to be understood as both a cause and effect of social disadvantage, intergenerational trauma, poor parenting, and substance misuse.¹⁹⁶²

Research literature collated by Australia's National Research Organisation for Women's Safety (ANROWS) shows a number of contextual factors contributing to the prevalence and seriousness of family violence in Aboriginal communities:¹⁹⁶³

¹⁹⁶⁰ As is noted in the introductory section to chapter 11 of this Bench Book, the term Aboriginal is used in this Bench Book to refer to a person of Aboriginal descent who identifies as Aboriginal and is accepted as such by the community in which he or she lives. Although it is acknowledged that the Indigenous inhabitants resident in Western Australia descend from many hundreds of distinct and diverse cultural groups, the term Aboriginal is used following the recommendation of the Aboriginal advisers for the *Aboriginal Benchbook for Western Australian Courts* (Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Australasian Institute of Judicial Administration, 2nd ed, 2008) Note to Chapter 1). Where there are references to data and statistics from other sources, the terms Aboriginal, Aboriginal and Torres Strait Islander, and Indigenous are used consistently with the terminology in the source of that data.

¹⁹⁶¹ Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators* (2014) [4.11] (accessed 10 February 2021); ABS, *The Health and Wellbeing of Aboriginal and Torres Strait Islander Women: A Snapshot, 2004-05* (Cat No 4722.0.55.001) (2007) (accessed 10 February 2021).

¹⁹⁶² Australian Institute of Family Studies, *Closing the Gap Clearinghouse: Family Violence Prevention Programs in Indigenous Communities*, Resource Sheet no. 37 (December 2016) (accessed 10 February 2021).

¹⁹⁶³ Blagg H, Bluett-Boyd N, and Williams E, *Innovative Models in Addressing Violence against Indigenous Women: State of Knowledge Paper* (August 2015) Australia's National Research Organisation for Women's Safety, page 3 (accessed 15 February 2021).

[V]iolence against women within the Indigenous Australian communities needs to be understood within the specific historical and cultural context of colonisation and systemic disadvantage. Any discussion of violence in contemporary Indigenous communities must be located within this historical context. Similarly, any discussion of 'causes' of violence within the community must recogni[s]e and reflect the impact of colonialism and the indelible impact of violence perpetrated by white colonialists against Indigenous peoples ... A meta-evaluation of literature ... identified many 'causes' of family violence in Indigenous Australian communities, including historical factors such as: collective dispossession, the loss of land and traditional culture; the fragmentation of kinship systems and Aboriginal law; poverty and unemployment; structural racism; drug and alcohol misuse; institutionalis[s]ation; and the decline of traditional Aboriginal men's role and status – while 'powerless' in relation to mainstream society, Indigenous men may seek compensation by exerting power over women and children.

This important research by ANROWS indicates that causation, dynamics and appropriate responses may be quite different in Aboriginal communities, and that family violence in Aboriginal communities may relate more to colonialism and inter-generational trauma than the gender paradigm.¹⁹⁶⁴

The gender paradigm is discussed in section 13.7.3 of this chapter.

13.5.1 Key statistics

The incidence and nature of family violence in Aboriginal communities in Western Australia has been documented by various studies over a 20-year period:

- In 1996, a study of Aboriginal women in Western Australia found that they were 45 times more likely to be the victims of family violence than non-Aboriginal women.¹⁹⁶⁵

¹⁹⁶⁴ Submission from Legal Aid Western Australia (8 June 2020).

¹⁹⁶⁵ Ferrante A, Morgan F, Indemaur D and Harding R, *Measuring the Extent of Domestic Violence* (1996) page 34 (accessed 3 August 2009).

- In 2001, a study indicated that the Aboriginal people in rural/regional Western Australia were 33 times more likely to be victims of family violence than non-Aboriginal people; in Perth the rate of victimisation was 17.4 times higher.¹⁹⁶⁶
- In 2003-04, the Australian Institute of Health and Welfare reported that Indigenous females and males were 35 and 22 times more likely to be hospitalised after family violence-related assaults than non-Indigenous females and males. Approximately 50% of the total hospitalisations of Indigenous females for assault were found to be related to family violence, compared to one in five for men. Most hospitalisations for family violence-related assault for females were found to be a result of spouse or partner violence (82%) compared to 38% for males.¹⁹⁶⁷
- In another 2004 study it was reported that the rate of family violence victimisation was almost 40 times higher for Indigenous women than for non-Indigenous women.¹⁹⁶⁸
- In 2003-04, Indigenous children were approximately 12 times more likely to be hospitalised as a result of violence by a parent than non-Indigenous children.¹⁹⁶⁹
- In 2011-12, 'domestic altercation' was the motive for 23.1% of Aboriginal and Torres Strait Islander male homicides and 83.3% of Aboriginal and Torres Strait Islander female homicides. There were no Aboriginal and Torres Strait Islander homicides where the victim and the offender were strangers, whereas the victim and offender were strangers in 8.7% of non-Indigenous homicides.¹⁹⁷⁰

¹⁹⁶⁶ Crime Research Centre, *Aboriginal Involvement in the Western Australian Criminal Justice System: A Statistical Review, 2001* (2003; updated 25 August 2010) Executive Summary (iii), page 5 (accessed 11 February 2021).

¹⁹⁶⁷ Al-Yaman F, Van Doeland M and Wallis M, *Family Violence Among Aboriginal and Torres Strait Islander Peoples*, Australian Institute of Health and Welfare Cat. No IHW 17 (November 2006) Executive Summary (x), page 71 (accessed 11 February 2021).

¹⁹⁶⁸ Mouzos J and Makkai T, *Women's Experiences of Male Violence: Findings from the Australian Component of the International Violence against Women Survey*, IVAWS Research and Public Policy Series No 56 (2004) page 28 (accessed 9 July 2019).

¹⁹⁶⁹ Al-Yaman F, Van Doeland M and Wallis M, *Family Violence Among Aboriginal and Torres Strait Islander Peoples*, Australian Institute of Health and Welfare Cat. No IHW 17 (November 2006) Table 4.1, page 54 (accessed 11 February 2021).

¹⁹⁷⁰ Australian Government Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators* (2014) [4.93] (accessed 11 February 2021).

- In 2014-15, 14% of Indigenous women reported having experienced physical violence in the previous year. Of these, 28% reported that their most recent incident was perpetrated by a cohabiting partner.¹⁹⁷¹
- In 2014-15, Indigenous Australians were approximately 3.4 times more likely to be a victim of sexual assault than non-Indigenous Australians.¹⁹⁷²
- In 2016, the rate of hospitalisations for non-fatal assaults resulting from domestic violence were 32 and 23 times higher in Indigenous females and males than for non-Indigenous females and males.¹⁹⁷³ This was almost the same as was reported in 2003-04 (see above).
- In 2017, Indigenous people were more than twice as likely to be victims of image-based abuse as non-Indigenous people.¹⁹⁷⁴

13.5.2 Risk factors

Some factors that have been associated with family and community violence in Aboriginal and Torres Strait Islander populations include:¹⁹⁷⁵

- high levels of alcohol misuse and illicit drug use;
- younger age (from 14 years up to the early 30s and younger);
- childhood experience of violence and abuse;
- for mothers, being a single parent and/or being removed from their natural family;
- low education and income levels and high unemployment levels;
- poor and overcrowded housing conditions;
- poor physical and mental health; and/or

¹⁹⁷¹ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* Cat No FDV 2 (2018) Summary (xi), pages 83 and 86 (accessed 11 February 2021).

¹⁹⁷² Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* Cat No FDV 2 (2018) page 86, citing an ABS survey across selected jurisdictions (New South Wales, South Australia and the Northern Territory (accessed 11 February 2021).

¹⁹⁷³ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* Cat No FDV 2 (2018) page 93 (accessed 11 February 2021).

¹⁹⁷⁴ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* Cat No FDV 2 (2018) page 87 (accessed 11 February 2021).

¹⁹⁷⁵ Australian Government Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators* (2014) Chapter 4.11, page 4.90 (accessed 11 February 2021).

- remote locations and lack of services (including police presence).

13.6 OTHER VULNERABLE POPULATIONS

13.6.1 Rural, regional and remote communities

Research suggests that domestic violence is a significant problem in remote and regional Australia. According to a Practitioner Resource by Campo and Tayton for the Australian Institute of Family Studies:¹⁹⁷⁶

- Women in regional, rural and remote areas are more likely than women in urban areas to experience family and domestic violence (with the ABS reporting rates for intimate partner violence of 21% for those women living outside capital cities and 15 % for those living within capital cities).
- Women living in regional, rural and remote areas who experience domestic and family violence face specific issues related to their geographical location and the cultural and social characteristics of living in small communities.
- There is a common view in rural communities that domestic and family violence are 'family problems' which should be kept private and not talked about, which tends to silence women's experience of domestic and family violence and inhibit disclosure.
- Family harmony is considered to be an important rural value which may prevent disclosure.
- Women are deterred from seeking assistance due to fear of stigmatisation, shame, community gossip, and a lack of perpetrator accountability.

¹⁹⁷⁶ Campo M and Tayton S, *Domestic and Family Violence in Regional, Rural and Remote Communities. An Overview of Key Issues* (2015) Practitioner Resource - Australian Institute of Family Studies, pages 1-5 (accessed 11 February 2021).

- Women are often unwilling to use local services due to a lack of privacy and the 'intimacy' of living in a rural town (meaning that people tend to know and gossip about the activities of other members of the community). There is a high probability that police, health professionals and domestic and family violence workers will know both the victim and the perpetrator.
- Women who want assistance may have difficulty in accessing services due to both geographical and social isolation. Geographical isolation includes a lack of both public and private transport options.

Additional information about regional and remote Western Australia is provided in chapter 9 of this Bench Book.

13.6.2 Older people

The most widely known and accepted definition of 'elder abuse' is that provided by the World Health Organisation (WHO). It is defined as:¹⁹⁷⁷

...a single or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person.

The WHO states that 'it can be of various forms: physical, psychological/emotional, sexual, financial or simply reflect intentional or unintentional neglect'.¹⁹⁷⁸ A strong link between cognitive impairment and other forms of disability and elder abuse has been established by research.¹⁹⁷⁹

¹⁹⁷⁷ World Health Organisation, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002) (accessed 11 February 2021).

¹⁹⁷⁸ World Health Organisation, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002) (accessed 11 February 2021).

¹⁹⁷⁹ Kaspiew R, Carson R and Rhoades H (Research Report No 35 for the AIFS), *Elder Abuse: Understanding Issues, Frameworks and Responses* (2016) page 8 (accessed 11 February 2021).

Distinctions between elder abuse and domestic or family violence can be blurred. Elder abuse presents in a variety of forms, involving different relationships and taking place in a variety of settings, whereas family and domestic violence against the elderly generally occurs within the home environment by a family member.

In terms of global prevalence, a study supported by WHO and published in the *Lancet Global Health* in 2017 found:¹⁹⁸⁰

... that almost 16% of people aged 60 years and older were subjected to either psychological abuse (11.6%), financial abuse (6.8%), neglect (4.2%), physical abuse (2.6%) or sexual abuse (0.9%). The research draws on the best available evidence from 52 studies in 28 countries from different regions, including 12 low- and middle-income countries.

Elder abuse is a significant issue for Western Australia due to its ageing population, with the percentage of people over 65 years increasing exponentially. Research estimated that the rate of elder abuse in Western Australia was 4.6% (12,500) in 2011. Combined with population estimates, it was at that time predicted that the total number of victims over the age of 65 would increase by around 90% over the following twenty years.¹⁹⁸¹

Additional information on elder abuse is provided in chapter 6 (section 6.2.3).

13.6.3 People with disabilities

People with disabilities suffer additional types of abuse to those experienced by other groups, as a consequence of frequently being reliant on their partner or family members to provide them with medicine and care. In some cases of abuse, care may be withheld to the detriment of the person with a disability. The higher incidence of disabilities among elderly people makes them an especially susceptible group.

¹⁹⁸⁰ World Health Organisation, *Abuse of Older People on the Rise - 1 in 6 affected* (14 June 2017) (accessed 11 February 2021).

¹⁹⁸¹ Clare M, Blundell B and Clare J (a University of Western Australia and Advocare Inc. Joint Initiative) *A Qualitative and Quantitative Investigation of Existing Agency Policy, Service Responses and Recorded Data* (2011) page 29 (accessed 11 February 2021).

A joint project report between People with Disabilities (WA) Inc., the Ethnic Disability Advocacy Centre (later renamed Kin Advocacy) and the Centre for Social Research at Edith Cowan University explored the risk of family and domestic violence, the direct and indirect effects of abuse and the barriers to seeking help that women with disabilities face. The report found that:¹⁹⁸²

Women with disabilities face the silence of double oppression. As women and as individuals with disability they experience numerous inequities and injustices. At the root of this double discrimination are sexism and ableism, which set standards for 'women' and 'normal' that exclude, devalue and marginalise women with disabilities. Even though many women with disabilities living in the community today experience new freedoms, rights and responsibilities, they continue to confront cultural stereotypes and discriminatory practices. Of prime concern, is that double discrimination perpetuates violence against women with disabilities, justifying that violence on the basis of their devalued status in society. In addition, for perpetrators, it is even easier to put women with disabilities into a state of uncertainty and to assign guilt and responsibility to them.

Additionally, in the *Systemic Review of Family Violence Deaths*, the Victorian Coroner's Court identified specific issues for women with disabilities, who are at a greater risk of family violence, because of:¹⁹⁸³

- communication and language barriers;
- a lack of appropriate transport and accommodation options for victims immediately fleeing violence;
- reliance on family members to provide care who may also be the perpetrators of violence; and
- an absence of recognition as to their victimisation status.

¹⁹⁸² Cockram J, *Silent Voices: Women with Disabilities and Family and Domestic Violence* (2003) (accessed 11 July 2019).

¹⁹⁸³ Walsh C, McIntyre SJ, Brodie L, Bugeja and Hauge S, *Victorian Systemic Review of Family Violence Deaths – First Report* (November 2012) Coroners Court of Victoria, Melbourne, Victoria (accessed 11 February 2021).

Like women, men with disabilities experience violence and abuse; however, the research in this area is scarce in both Australia and overseas. There has been research in the United States that has shown that the men with disabilities experience higher rates of intimate partner violence than both men and women who do not have disabilities.¹⁹⁸⁴

Additional information on people with disabilities is provided in chapter 4 of this Bench Book.

13.6.4 People from culturally and linguistically diverse backgrounds

'Culturally and linguistically diverse' or 'CaLD' refers to:¹⁹⁸⁵

... people from a range of countries and ethnic and cultural groups. It includes people of non-English speaking background as well as people born outside Australia but whose first language is English ... CaLD refers to migrants, refugees and humanitarian entrants, international students, unaccompanied minors, trafficked women and tourists.

Data on the prevalence of family and domestic violence against women from CaLD backgrounds is scarce, so drawing conclusions on the nature and extent of family and domestic violence in such communities is difficult. However, the research does indicate that cultural values and immigration status enhance the complexities normally involved in family and domestic violence cases.¹⁹⁸⁶

Research also indicates that there are some specific forms of family violence experienced by women in some CaLD communities, for example, forced marriage, female genital mutilation and dowry-related violence.¹⁹⁸⁷

¹⁹⁸⁴ Refer to the studies cited in Ballan M, Freyer M and Powledge L, *Intimate Partner Violence among Men with Disabilities: The Role of Health Care Providers*, *American Journal of Men's Health* (September 2017) 11(5) (accessed 11 February 2021).

¹⁹⁸⁵ Royal Commission into Family Violence, *Summary and Recommendations* (March 2016) Volume V, page 99 (accessed 11 July 2019).

¹⁹⁸⁶ Bartels L, *Emerging Issues in Domestic/Family Violence Research* (April 2010) Australian Institute of Criminology Research in Practice Series No 10, Australian Institute of Criminology, page 5 (accessed 11 February 2021).

¹⁹⁸⁷ Royal Commission into Family Violence, *Summary and Recommendations* (March 2016) Volume V, page 34 (accessed 11 July 2019).

For more information on types of abuse which are particularly relevant for CaLD women please refer to section 13.2.3 of this Chapter.

Women from CaLD backgrounds are generally less likely than other groups of women to report cases of family and domestic violence. They may have a limited understanding of Western Australian laws relating to sexual assault within marriage or an intimate relationship. Women who come from countries with completely different legal and/or court systems are likely to find the Australian systems confusing, incomprehensible and even threatening. Women's Health and Family Services advised that this is 'the main reason why many of our clients do not wish to take any legal action in their [domestic violence] situations'.¹⁹⁸⁸

Women from CaLD backgrounds often face additional challenges in the context of family and domestic violence such as:

- They may be dependent on their spouse for their residency status, which makes it difficult for the woman to leave an abusive partner. Although the special family violence provisions under Division 1.5 of the *Migration Regulations 1994 (Cth)* allow people applying for permanent residency under prospective marriage or partner visas (subclasses 300, 309, 801 and 820) to continue with their applications after the breakdown of their relationship when family violence (actual or threatened) has occurred, this protection is not available for women and children on skilled migration (457), student and other temporary visas. The Women's Health and Family Services submitted that:¹⁹⁸⁹

We currently have a number of clients of uncertain visa status who have experienced domestic violence, whose children are citizens, but who themselves are not entitled to any benefits and are at imminent risk of deportation, potentially without their children.

¹⁹⁸⁸ Submission from Women's Health and Family Services (29 September 2016).

¹⁹⁸⁹ Submission from Women's Health and Family Services (8 June 2020).

- They may have limited access to professionally accredited interpreters. It is important that family members, especially children or the alleged perpetrators of the abuse, are not used as interpreters. Access to qualified interpreters was identified as an important access and equity issue in the Legal Aid WA submission to the first edition of this Bench Book.¹⁹⁹⁰
- Abusive behaviour towards CaLD women may include stopping women from attending English language classes.¹⁹⁹¹

Additional information on culturally and linguistically diverse people is provided in chapter 7 of this Bench Book.

13.7 SOME BACKGROUND INFORMATION

13.7.1 Theories of family and domestic violence

While long-standing stigma surrounding family and domestic violence makes it difficult to ascertain its prevalence, theories about family and domestic violence inform the responses to such cases that are reported.

A brief outline of the theories relating to domestic violence which have emerged over time, underpinned by an understanding of this as primarily gender-based violence, follows. It is important to acknowledge that the evidence shows that family and domestic violence is overwhelmingly a gendered issue, with the ABS (2016) finding that women are nearly three times more likely than men to experience violence from an intimate partner.¹⁹⁹²

¹⁹⁹⁰ Submission from the Legal Aid Western Australia (26 February 2009).

¹⁹⁹¹ Submission from Women's Health and Family Services (8 June 2020).

¹⁹⁹² Submission from the Department of Communities (15 September 2020) referring to ABS, *Personal Safety Survey* (Cat No 4906.0) (2016) (accessed 9 September 2020).

Early models of abusive behaviour attributed domestic violence to the mental state of the perpetrator, identifying mental illness, or some sort of 'trigger' (i.e. alcohol, stress, anger), as leading to a 'loss of control' and to violence. However, the 'loss of control' theory is contradicted by perpetrator behaviour. That is because perpetrators are not indiscriminate in their violence, targeting only certain people and often taking great pains to hide the abuse.¹⁹⁹³

Newer models evolved, given the difficulty in fixing the cause of violence solely on the perpetrator's 'loss of control'. Early, and now discredited, theories postulated that the victim must play some role in either passively or actively facilitating the continuation of violence. One such theory was that women who had been repeatedly victimised suffered from 'learned helplessness' which prevented them from resisting violence or leaving a violent relationship.¹⁹⁹⁴

This 'learned helplessness' theory was contradicted as further research highlighted the many social, economic and cultural reasons why women do not leave relationships. It is inconsistent with the many ways in which women in such relationships attempt to leave or often act in very conscious ways to minimise the abuse directed at them and to protect their children.

The deficiency of the 'learned helplessness' models gave credence to the so called 'family conflict model'. This model surmises that domestic violence occurs as a result of both partners' actions, feeding a cycle of violence. This theory was not only inadequate but also potentially harmful, as it implied that the victim's actions somehow justified abusive responses by the perpetrator.

One understanding of the dynamics involved in family and domestic violence in the past was the so-called 'Stockholm Syndrome', which described the behaviour of those experiencing abuse as similar to the psychological experience of those in a hostage situation. The theory was that the victim was isolated so that the only perspective they had was that of the perpetrator. The perpetrator claimed that acts of kindness towards the

¹⁹⁹³ Stop Violence against Women, *Causes and Theories of Domestic Violence* (2003, updated April 2015) (accessed 9 July 2019).

¹⁹⁹⁴ Rakovec-Felser Z, *Domestic Violence and Abuse in Intimate Relationship from Public Health Perspective* Health Psychology Research (2014) Nov 6; 2(3): 1821 (accessed 11 February 2021).

victim were the highlights in the relationship. The perpetrator would not take responsibility for the abusive and violent behaviour and focused only on occasional acts of kindness.¹⁹⁹⁵ The so-called 'Stockholm Syndrome' is no longer a helpful or accepted theory of domestic violence, with researchers contending that it was a myth which served to oppress and pathologise victims. Caution should be employed if considering it relevant to victim behaviour.¹⁹⁹⁶

The 'social entrapment model' and the 'Power and Control Wheel' are two ways of understanding family and domestic violence which now have more support. The 'social entrapment model' frames intimate partner violence as a form of social entrapment with three dimensions, which are:¹⁹⁹⁷

- the social isolation, fear and coercion that the predominant aggressor's coercive and controlling behaviour creates in the victim's/ survivor's life;
- the lack of effective systemic safety options; and
- the exacerbation of these previous two dimensions by the structural inequalities associated with gender, class, race and disability.

The 'Power and Control Wheel'¹⁹⁹⁸ attempts to explain behaviour based on power and control, expanding upon the controlling behaviours of perpetrators in the first dot point above. It was developed in the context of domestic violence being understood as primarily being perpetrated by men against women.¹⁹⁹⁹ The Power and Control Wheel identifies a number of tactics by which the perpetrator seeks to overpower and control the victim:²⁰⁰⁰

¹⁹⁹⁵ Seeley J and Plunkett C, *Women and Domestic Violence: Standards for Counselling and Practice* (2002) page 9 (accessed 11 February 2021).

¹⁹⁹⁶ Submission from the Department of Communities (15 September 2020) referring to Wade, A, *The Myth of 'Stockholm Syndrome'* (Speech, City University Canada, 20 February 2015).

¹⁹⁹⁷ Tarrant S, Tolmie J and Guidice G, *Transforming Legal Understandings of Intimate Partner Violence*, ANROWS, Research report 3/2019 (June 2019) pages 17 to 22 (accessed 31 July 2020).

¹⁹⁹⁸ Domestic Abuse Intervention Programs - Home of the Duluth Model, *Social Change to End Violence against Women* (2011) Wheels (accessed 12 February 2021).

¹⁹⁹⁹ Domestic Abuse Intervention Programs - Home of the Duluth Model, *Social Change to End Violence against Women* (2011) FAQs about Wheels (accessed 12 February 2021).

²⁰⁰⁰ Domestic Abuse Intervention Programs - Home of the Duluth Model, *Social Change to End Violence against Women* (2011) Wheels (accessed 12 February 2021).

- intimidation;
- coercion and threats;
- emotional abuse;
- economic abuse;
- isolation;
- male privilege (described as 'treating her like a servant; making all the big decisions; acting like the "master of the castle"; being the one to define men's and women's roles');
- using children (described as 'making her feel guilty about the children; using the children to relay messages; using visitation to harass her; threatening to take the children away'); and/or
- minimisation, denial and blame.

The tactics described in the Power and Control Wheel are common to many individuals or groups in positions of power. The current understanding of such behaviours is that these critically involve the need to gain power and control over another person. This understanding of abuse and violence as primarily a means of control within close interpersonal relationships can be extended to the dynamics of family violence.

The need to retain power and control is reflected by statistics which indicate that violence does not always end when a victim of domestic violence leaves the relationship. Nearly all the women (97.5%) in one study had experienced violence or abuse after separation, and many described an increase in violence immediately post-separation, although some said that it had later declined or, in a small number of instances, ceased as time passed.²⁰⁰¹

²⁰⁰¹ Kaye M, Stubbs J and Tolmie J, *Negotiating Child Residence and Contact Arrangements against a Background of Domestic Violence* (2003) *Current Issues in Criminal Justice* 15(2) page 78 (accessed 12 February 2021).

As indicated by the tactics described, domestic violence is not limited to physical abuse and extends to several forms of abuse, some of which may not be overt.

Please refer to section 13.1 for definitions of family, domestic and sexual violence.

13.7.2 Perpetrator characteristics

While there is no such thing as a 'typical' perpetrator of domestic violence, studies reveal certain common behaviours among male perpetrators. They often:²⁰⁰²

- use violence and emotional abuse to control their families;
- believe that they have the right to behave in whatever way they choose while in their own home;
- hold certain beliefs about masculinity, including that a 'real' man should be tough, powerful and the head of the household (often believing that they should make the most of the decisions, including about how money is spent);
- believe that men are entitled to sex from their partners;
- don't take responsibility for their behaviour and prefer to think that loved ones or circumstances provoked their behaviour;
- make excuses for their violence (for example, they will blame alcohol or stress);
- report 'losing control' when angry around their families, but control their anger around other people (for example, around friends, bosses, work colleagues or the police); and
- try to minimise, blame others for, justify or deny their use of violence or the impact of their violence on women and children.

²⁰⁰² Victoria State Government (in consultation with the Domestic Violence Resource Centre Victoria), Better Health Channel, *Family Violence Explained* (May 2015) Common Factors in Family Violence (accessed 12 February 2021).

13.7.3 Family and domestic violence as 'gender-based violence'

Women experience sexual, physical, psychological and/or economic violence from an intimate partner or someone they know at far greater rates than men. The United Nations has noted that:²⁰⁰³

Overwhelmingly perpetrated by men against women, gender-based violence both reflects and reinforces gender inequity. The toll it extorts on the dignity, autonomy and health of women is shocking: worldwide, one in three women has been beaten, coerced into unwanted sexual relations, or abused often by a family member or acquaintance.

A 2014 report by Liz Wall for the Australian Centre for the Study of Sexual Assault Research Summary states:²⁰⁰⁴

In a review of studies, including cross-cultural studies, Jewkes (2002), the prominent violence against women researcher, considered various theories of causation and risk factors for intimate partner violence against women. Issues such as poverty, power and gender roles were all considered in this review. It was concluded that two factors seem to be necessary for intimate partner violence against women. First is the unequal position of women within particular relationships, and second is the normative use of violence in a conflict. These factors then interact and are enhanced by societal norms about gender roles and ideologies of male superiority and legitimise demonstrations of power against women.

A 2015 joint report by Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and VicHealth states:²⁰⁰⁵

²⁰⁰³ United Nations Population Fund, *State of World Population 2005: The Promise of Equality: Gender Equity: Reproductive Health and the Millennium Development Goals* (2005) page 5 (accessed 12 February 2021). See also World Health Organisation, *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-partner Sexual Violence* (2013) page 2 (accessed 12 February 2021), which also reported that, globally, one third of women had experienced intimate partner violence.

²⁰⁰⁴ Wall L, *Gender Equality and Violence against Women: What's the Connection?* Australian Centre for the Study of Sexual Assault Research Summary (June 2014) page 6 (accessed 9 July 2019).

²⁰⁰⁵ Our Watch, Australia's National Research Organisation for Women's Safety (ANROWS) and VicHealth (2015) *Change the Story* (2015) page 22 (accessed 12 February 2021).

There is now consensus in the international research that examining the way in which gender relations are structured is key to understanding violence against women. Studies by the United Nations, European Commission, World Bank and World Health Organisation all locate the underlying cause or necessary conditions for violence against women in the social context of gender inequality.

... While gender inequality is always influential as a driver of violence against women, it cannot be considered in isolation, nor is it experienced in the same way by every woman. Other forms of systemic social, political and economic discrimination and disadvantage influence and intersect with gender inequality, and in some cases, increase the frequency, severity and prevalence of violence against women.

Legal Aid WA queried the use of 'intersect' terminology for Aboriginal and CaLD women. These communities would argue for other multi-factorial causations beyond gender.²⁰⁰⁶

For more information on the causative factors for family violence in Aboriginal and CaLD communities please refer to sections 13.5.2 and 13.6.4 respectively.

13.7.4 The co-occurrence of family and domestic violence and sexual assault

Domestic violence and sexual assault may occur in the same incident.²⁰⁰⁷

...specifically, this occurs when an intimate partner uses sexual violence. It is typically referred to as intimate partner sexual violence (IPSV) and is both a form of domestic violence and a form of sexual assault.

...In general, IPSV is characterised by 'deliberate intimidation and coercion' and may either be pressure to perform sexual acts that the victim is not comfortable with, or to engage in acts at a time that they do not wish to do so. Not all forms of IPSV are criminalised.

²⁰⁰⁶ Submission from Legal Aid Western Australia (8 June 2020).

²⁰⁰⁷ Cox P, *Sexual Assault and Domestic Violence in the Context of Co-occurrence and Re-victimisation: State of Knowledge Paper*, ANROWS, Landscapes (2015) page 11, citing Cornelius and Resseguie, 2007; Macleod, 2014; Shorey, Cornelius and Bell, 2008; McOrmond-Plummer, Eastal and Levy-Peck, 2014, Martin et al, 2007; Spohn and Tellis, 2012 (accessed 12 February 2021).

Although IPSV is the more common term, this phenomenon is referred to in different ways in the literature, often reflecting the theoretical approach of the researcher. Other common terms include:

- *marital rape;*
- *sexual coercion;*
- *date rape/violence;*
- *intimate sexual violence;*
- *intimate partner sexual assault; and*
- *domestic sexual assault.*

The most common place for sexual assault to occur is in the home — most frequently the victim's home but also commonly in the perpetrator's home.²⁰⁰⁸

Although not all sexual assault occurs in the context of family and domestic violence, the issue of sexual assault is included in this chapter because it is often one way in which perpetrators of family and domestic violence attempt to exercise power and control over their victims. Often, too, similar issues arise in relation to how the legal system responds to allegations of sexual assault (irrespective of the nature of the relationship between the accused and the complainant) and family and domestic violence offences.

In cases of sexual assault, studies have indicated that:²⁰⁰⁹

...the vast majority of people who are sexually assaulted avoid engagement with the criminal justice system, perceiving it as inappropriate to their needs or fearing the additional trauma of the legal process ... rape has the lowest reporting rate of any crime. At least 85 % of sexual assaults never reach the criminal justice system at all.

²⁰⁰⁸ Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia 2018* (2018) (Cat No FDV 2) page 26 (accessed 12 February 2021).

²⁰⁰⁹ Heath M, *The Law and Sexual Offences Against Adults in Australia*, Australian Centre for the Study of Sexual Assault Issue No 4 (June 2005) Publication Summary, citing Victorian Law Reform Commission, 2004; Cook et al, 2001; Lievore, 2003; Stubbs, 2004 (accessed 12 February 2021).

A 2008 Parliamentary Inquiry in Western Australia found that only 10% of sexual offences were reported and 1% of all alleged sexual assaults (reported and unreported) resulted in conviction.²⁰¹⁰ That Inquiry also reported the following, from a submission by the Sexual Assault Referral Centre (which has since been renamed as the Sexual Assault Resource Centre):²⁰¹¹

The clinical research evidence indicates that the most therapeutic way to process the traumatic event and hence reduce symptoms of hyper-arousal, re-experiencing the event, avoidance and numbing is to allow the victim to tell their story in their own way and at their own pace so they feel they are able to regain some control over a situation that was out of their control. However, in gathering 'evidence' the justice system (police, prosecutors) often require the victim to tell the story all at once in a logical manner, recalling all aspects of the event/s in detail and to repeat it a number of times to people they do not know. Hence victims, who initially reported the alleged crime and wanted to pursue the justice system, may subsequently withdraw from the process due to the fact that the requirements of the justice system are counter therapeutic and in fact can exacerbate the traumatic reaction by the justice system, repeatedly re-traumatising them.

For more information and statistics about domestic violence and sexual assault as it affects women, please refer to section 13.1.2 and chapter 10 (particularly section 10.1.7). For more information about children as victims, the accused, or witnesses in court proceedings, please refer to chapter 5.

²⁰¹⁰ Community Development and Justice Standing Committee, *Inquiry into the Prosecution of Assaults and Sexual Offences* Report No 6 in the 37th Parliament (2008) page 54 (accessed 12 February 2021).

²⁰¹¹ Community Development and Justice Standing Committee, *Inquiry into the Prosecution of Assaults and Sexual Offences* (Report No 6) (2008) page 123 (accessed 12 February 2021).

13.8 RECENT INITIATIVES

13.8.1 Family violence restraining orders (FVROs)

In 2016, Western Australia enacted legislative reforms to 'increase safety for victims of family violence, and strengthen integrated, accountable and effective interventions targeting perpetrators of family violence and abuse'. The *Restraining Order and Related Legislation Amendment (Family Violence) Act 2016* created a new class of order, namely the family violence restraining order (FVRO), separate from violence restraining orders (VROs) and misconduct restraining orders (MROs).²⁰¹²

In addition to the creation of FVROs, Part 1C of the *Restraining Orders Act 1997* created an order called a 'behaviour management order', which empowers a court to compel a perpetrator of family violence to undertake an approved behavioural change program, if they are assessed as eligible.²⁰¹³ However, as of June 2020 there were no funded behaviour change programmes.²⁰¹⁴

A new definition of 'family violence' was inserted in section 5A of the *Restraining Orders Act 1997* to replace the definition of 'act of family and domestic violence' that was previously in section 6(1), to better reflect the contemporary understanding of the scope, dynamics and nature of family violence'.²⁰¹⁵

Section 5A(2) provides that 'family violence' includes:²⁰¹⁶

- (a) *an assault against the family member;*
- (b) *a sexual assault or other sexually abusive behaviour against the family member;*
- (c) *stalking or cyber-stalking the family member;*
- (d) *repeated derogatory remarks against the family member;*

²⁰¹² Parliament of Western Australia, *Restraining Orders and Related Legislation Amendment (Family Violence) Bill 2016 Explanatory Memorandum* (accessed 15 February 2021).

²⁰¹³ Parliament of Western Australia, *Restraining Orders and Related Legislation Amendment (Family Violence) Bill 2016 Explanatory Memorandum* (accessed 15 February 2021).

²⁰¹⁴ Submission from Legal Aid Western Australia (8 June 2020).

²⁰¹⁵ Parliament of Western Australia, *Restraining Orders and Related Legislation Amendment (Family Violence) Bill 2016 Explanatory Memorandum* (accessed 15 February 2021).

²⁰¹⁶ *Restraining Orders Act 1997* (WA) s 5A(2) (accessed 15 February 2021).

- (e) *damaging or destroying property of the family member;*
- (f) *causing death or injury to an animal that is the property of the family member;*
- (g) *unreasonably denying the family member the financial autonomy that the member would otherwise have had;*
- (h) *unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or a child of the member, at a time when the member is entirely or predominantly dependent on the person for financial support;*
- (ha) *coercing, threatening, or causing physical abuse, emotional or psychological abuse or financial abuse, in connection with demanding or receiving dowry, whether before or after any marriage;*
- (i) *preventing the family member from making or keeping connections with the member's family, friends or culture;*
- (j) *kidnapping, or depriving the liberty of, the family member, or any other person with whom the member has a family relationship;*
- (k) *distributing or publishing, or threatening to distribute or publish, intimate personal images of the family member;*
- (l) *causing any family member who is a child to be exposed to behaviour referred to in this section.*

Paragraph (k) was not part of the 2016 reforms but was inserted later by way of the *Criminal Law Amendment (Intimate Images) Act 2019* as will be discussed in section 13.8.2. Paragraph (ha), which concerns dowry abuse, was also inserted later by way of the *Family Violence Legislation Reform Act 2020*. There is more information on dowry abuse in section 13.2.3.

'Family violence' in s 5A includes the above behaviours against a 'family member'. Section 4(3) defines 'family member' to be another person who is in a 'family relationship' with the person. Section 4(1) defines 'family relationship' (as of 1 January 2021), for the purposes of the Act, as follows:

family relationship means a relationship between 2 persons —

- (a) who are, or were, married to each other; or
- (b) who are, or were, in a de facto relationship with each other; or
- (c) who are, or were, related to each other; or
- (d) one of whom is a child who —
 - (i) ordinarily resides, or resided, with the other person; or
 - (ii) regularly resides or stays, or resided or stayed, with the other person; or
- (e) one of whom is, or was, a child of whom the other person is a guardian; or
- (f) who have, or had, an intimate personal relationship, or other personal relationship, with each other; or
- (g) one of whom is the former spouse or former de facto partner of the other person's current spouse or current de facto partner.

Section 4(2) then defines 'other personal relationship' (as of 1 January 2021), for the purposes of section 4(1) as follows:

In subsection (1) —

other personal relationship means a personal relationship of a domestic nature in which the lives of the persons are, or were, interrelated and the actions of one person affects, or affected, the other person;

related, in relation to a person, means a person who —

- (a) is related to that person taking into consideration the cultural, social or religious backgrounds of the 2 persons; or
- (b) is related to the person's —
 - (i) spouse or former spouse; or
 - (ii) de facto partner or former de facto partner.

The *Restraining Order and Related Legislation Amendment (Family Violence) Act 2016* also amended the *Criminal Code* to provide for more severe penalties for people who commit acts of family and domestic violence in the presence of children.²⁰¹⁷

Refer to section 13.9.3 for practical guidance in relation to restraining orders.

13.8.2 Intimate images

The *Criminal Law Amendment (Intimate Images) Act 2019* inserted a new Chapter XXVA in the *Criminal Code*, making it an offence to distribute or threaten to distribute intimate images without consent. Each of the terms 'distribute', 'intimate image' and 'consent' are defined in section 221B.

The *Criminal Law Amendment (Intimate Images) Act 2019* also amended the *Restraining Orders Act 1997* in the following ways:

- The definitions of 'distribute' and 'intimate images' in section 3 are adopted from section 221B of the *Criminal Code*.
- Certain conduct relating to intimate images may constitute family violence under section 5A for the purposes of seeking a restraining order.
- Section 10G(2)(g) was inserted to provide that a family violence restraining order may restrain the person bound from certain behaviour related to intimate images.

Refer to section 13.9.3 for practical guidance in relation to restraining orders.

13.8.3 National Domestic Violence Order Scheme (NDVOS)²⁰¹⁸

The National Domestic Violence Order Scheme (NDVOS) aims to better protect victims and their families by eliminating barriers to the enforcement of restraining orders. All domestic violence orders (DVOs) issued in Western Australia on or after 25 November 2017 are automatically recognised and enforceable in any Australian jurisdiction that has implemented the NDVOS.

²⁰¹⁷ *Criminal Code* (WA) s 221 (accessed 9 July 2019).

²⁰¹⁸ Australian Government, Attorney-General's Department, *National Domestic Violence Order Scheme* (accessed 15 February 2021).

Each State and Territory decides which of its orders are recognised under the NDVOS. Most jurisdictions have adopted the same approach as Western Australia: family violence orders made on or after 25 November 2017 will be automatically recognised, while orders made before that date can be recognised on application to a court. Victoria has taken a different approach. All Victorian family violence orders are automatically recognised, regardless of whether they were made before or after 25 November 2017.

The Western Australian restraining orders that are nationally recognised are:

- Family violence restraining orders (FVROs);
- Violence restraining orders (VROs); and
- Police orders.

Misconduct restraining orders are not recognised under the NDVOS.

13.8.4 Family Violence Legislation Reform Act 2020

13.8.4.1 Evidence Act 1906 amendments: admissibility of evidence of family violence

The *Family Violence Legislation Reform Act 2020* introduced into the *Evidence Act 1906* a legislative framework in relation to admissibility of evidence of family violence and jury directions in relation to that evidence. These amendments were aimed at improving the operation of section 248(4) of the *Criminal Code* as it applies to a victim of family violence who has acted in self-defence by primarily helping to rectify misunderstandings held by decision makers about intimate partner violence.

Section 248(4) of the *Criminal Code* was introduced in March 2008. It reads:

- (4) *A person's harmful act is done in self-defence if—*
- (a) *the person believes the act is necessary to defend the person or another person from a harmful act, including a harmful act that is not imminent; and*
 - (b) *the person's harmful act is a reasonable response by the person in the circumstances as the person believes them to be; and*
 - (c) *there are reasonable grounds for those beliefs.*

The Explanatory Memorandum specifically referred to the application of section 248(4) to cases involving family violence.²⁰¹⁹

The reference to whether or not the threatened harmful act is imminent allows this defence to apply to the battered spouse scenario so long as the response is reasonable to the circumstances as the person believed them on reasonable grounds to be. The requirement that the response be reasonable would preclude pre-emptive attacks where it would instead be reasonable for police to be called.

Back in 2007, 'battered women's syndrome' was defined to be.²⁰²⁰

... a psychological theory that has been developed in response to the difficulties that women who kill their abusive partners experience when seeking to rely on the available defences. The theory describes the behaviour of a woman who kills her violent partner and was developed because the behaviour of women in violent relationships was considered to be beyond the understanding of the average juror.

The use of evidence of 'battered women's/spouse syndrome', typically presented by psychologists and psychiatrists, has since been widely criticised for suggesting women's responses to intimate partner abuse are irrational: the result of a psychological condition or disorder rather than a reasonable response to the threat they were facing. The notion of a 'syndrome' pathologises the accused woman, rather than focusing on the circumstances in which the offence occurred and whether (in the context of the defence of self-defence) her actions were reasonable. There is also little by way of scientific support for the syndrome (as discussed in section 13.7.1). An understanding of intimate partner violence in terms of the 'battered women's syndrome' has declined since the 1990s and the theory is now outdated.²⁰²¹

²⁰¹⁹ *Criminal Law Amendment (Homicide) Bill 2008, Explanatory Memorandum* (Attorney General) pages 3-4 (accessed 15 February 2021).

²⁰²⁰ Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report* (2007) page 285 (accessed 15 February 2021).

²⁰²¹ Tarrant S, Tolmie J and Guidice G, *Transforming Legal Understandings of Intimate Partner Violence*, ANROWS, Research report 3/2019 (June 2019) page 17 (accessed 15 February 2021).

The 'social entrapment model' now has more support. This model frames intimate partner violence as a form of social entrapment with three dimensions, which are:²⁰²²

- the social isolation, fear and coercion that the predominant aggressor's coercive and controlling behaviour creates in the victim's/ survivor's life;
- the lack of effective systemic safety options; and
- the exacerbation of these previous two dimensions by the structural inequalities associated with gender, class, race and disability.

There was widespread criticism that section 248(4) was not being properly applied where the focus is on then moment of the killing – i.e. whether the woman was responding to an immediate physical attack, as opposed to the threat of ongoing harm, as she perceives it, within the context of the relationship.²⁰²³

The reforms to the *Evidence Act 1906* were designed to assist decision makers hearing intimate partner homicides to understand the nature and extent of the violence that an accused had suffered, and the impacts of that violence. The Explanatory Memorandum to the Family Violence Legislation Reform Bill 2019 states:²⁰²⁴

While community awareness and knowledge about family violence is improving, there is still widespread misunderstanding about the nature and dynamics of abusive relationships and their impacts. In this context, expert evidence given by, for example, researchers, family violence workers and others with expertise in this area, can be particularly vital for the judicial officer or jury to properly understand the issues at trial. This evidence can also work to dispel any misconceptions that the judicial officer or jurors may have about the nature and dynamics of family violence that may impact on their assessment of a case.

²⁰²² Tarrant S, Tolmie J and Guidice G, *Transforming Legal Understandings of Intimate Partner Violence*, ANROWS, Research report 3/2019 (June 2019) pages 17 to 22 (accessed 15 February 2021).

²⁰²³ For example, Tarrant S, *Self Defence Against Intimate Partner Violence: Let's do the Work to See It* (accessed 30 July 2020).

²⁰²⁴ *Family Violence Legislation Reform Bill 2019, Explanatory Memorandum* (accessed 30 July 2020).

Section 38 of the *Evidence Act 1906* now lists a range of evidence that may be relevant where family violence is alleged, and provides guidance as to what evidence may be relevant. Under section 38(1) 'evidence of family violence' includes but is not limited to:

- the history of the relationship between the person and a family member, including violence by the family member towards the person or by the person towards the family member, or by the family member of the person in relation to any other family member;
- the cumulative effect of family violence, including psychological effect, on the person or a family member affected by that violence;
- social, cultural or economic factors that impact on the person or a family member who has been affected by family violence;
- responses by family, community or agencies to family violence, including any further violence that may be used by the family member to prevent, or in retaliation to, the person's help-seeking behaviour or use of on safety options;
- ways in which social, cultural, economic or personal factors have affected any help-seeking behaviour undertaken by the person or the safety options realistically available to the person in response to family violence;
- ways in which violence by the family member towards the person, or the lack of availability of safety options, were exacerbated by inequities experienced by the person, including inequities associated with, but not limited to, race, poverty, gender, disability or age;
- the general nature and dynamics of relationships affected by family violence, including the possible consequences of separation from the abuser;
- the psychological effect of violence on people who are or have been in a relationship affected by family violence; and
- social or economic factors that impact on people who are or have been in a relationship affected by family violence.

The evidence of family violence that may be relevant will vary from case to case.

Under section 39(2), expert evidence of family violence is admissible in relation to any matter that may constitute evidence of family violence in a criminal proceeding. The purpose of this provision is to enable the trier of the facts to properly understand evidence of family violence where it is an issue at trial.

Expert evidence on family violence can be the subject of general expert evidence about the nature and effects of family violence, and/or case-specific expert evidence which would place the situation of a particular person and his or her reactions into the framework of current knowledge about family violence: section 39(3).

13.8.4.2 Evidence Act 1906 amendments: judicial directions on family violence

The *Family Violence Legislation Reform Act 2020* introduced sections 39C – 39F into the *Evidence Act 1906* which relate to the judicial directions that may be requested and given on family violence in criminal proceedings:

- Section 39C(1) provides that counsel for an accused, or an unrepresented accused, may request that the trial judge direct the jury on family violence, in criminal proceedings in which self-defence to family violence is an issue. If requested, the judge must give the jury the requested direction unless there are good reasons not to do so. While this reflects the position that defence counsel is best placed, in the first instance, to determine which matters are relevant in the particular case, the trial judge has the overriding responsibility for giving directions and if there are good reasons for not giving the directions, the trial judge is not compelled to do so. If an unrepresented accused does not request a jury direction, the trial judge may give the direction if it considers it in the interests of justice to do so: section 39C(3).
- As to when the trial judge should give the direction, section 39C(4) provides that the trial judge must give the direction as soon as practicable after the request is made, and may give the direction before any evidence is to be adduced at trial. The trial judge may also repeat the direction at any time in the trial: section 39C(5).

- Sections 39C, 39E and 39F do not limit what the trial judge may include in any direction to the jury, including in relation to evidence given by an expert witness. The directions in section 39F are general in nature and are designed to address general misconceptions of family violence. They will not prevent expert evidence being called in relation to the conduct of a person in a particular case, or about the dynamics of family violence generally: subsection (6).
- Section 39E provides that in giving a direction under section 39C, the trial judge must inform the jury that:
 - self-defence is, or is likely to be, an issue in the trial; and
 - as a matter of law, evidence of family violence may be relevant to determining whether the accused acted in self-defence; and
 - evidence in the trial is likely to include evidence of family violence committed by the victim against the accused or another person whom the accused was defending.
- Section 39F sets out additional matters that may be addressed in directions on family violence under section 39C or 39D. Subsection (1) provides that the trial judge may include any of the following matters in the direction:
 - that family violence —
 - is not limited to physical abuse and may, for example, include sexual abuse, psychological abuse or financial abuse;
 - may amount to violence against a person even though it is immediately directed at another person;
 - may consist of a single act;
 - may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial;
 - if relevant, that experience shows that —
 - people may react differently to family violence and there is no typical, proper or normal response to family violence;

- it is not uncommon for a person who has been subjected to family violence to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner;
- it is not uncommon for a person who has been subjected to family violence not to report family violence to police or seek assistance to stop family violence;
- decisions made by a person subjected to family violence about how to address, respond to or avoid family violence may be influenced by a variety of factors;
- it is not uncommon for a decision to leave an abusive partner, or to seek assistance, to increase apprehension about, or the actual risk of, harm;
- in the case of self-defence, that, as a matter of law, evidence that the accused assaulted the victim on a previous occasion does not mean that the accused could not have been acting in self-defence in relation to the offence charged.
- In making a direction under subsection (1), the trial judge may also indicate that behaviour, or patterns of behaviour that may constitute family violence may include, but are not limited to:
 - placing or keeping a person in a dependent or subordinate relationship;
 - isolating a person from friends, relatives or other sources of support;
 - controlling, regulating or monitoring a person's day to day activities;
 - depriving, or restricting, a person's freedom of movement or action;
 - restricting a person's ability to resist violence;
 - frightening, humiliating, degrading or punishing a person, including punishing a person for resisting violence; or
 - compelling a person to engage in unlawful or harmful conduct.
- If the trial judge makes a direction that relates to section 39F(1)(b)(iv), the trial judge may also indicate that decisions by a person subjected to family violence about how to address, respond to, or avoid family violence may be influenced by such things as:
 - the family violence itself;

- social, cultural, economic and personal factors, or inequities experienced by the person, including inequities associated with, but not limited to, race, poverty, gender, disability or age;
 - responses by family, community and agencies to the violence or to any help-seeking behaviour by the person;
 - the provision of, or failure in provision of, safety options that might have realistically provided ongoing safety to the person, and the person's perceptions of how effective those safety options may have been in preventing future harm;
 - further violence, or threat of further violence, used by the family member to prevent, or in retaliation to, the person's help-seeking behaviour or use of safety options.
- Section 39G specifies how sections s 39E and 39F apply in a judge-alone trial. It provides that if a court is sitting without a jury, the court's reasoning with respect to any matter in relation to which sections 39E and 39F make provision must, to such extent as the trial judge thinks fit, be consistent with how a jury would be directed in accordance with those sections in a particular case.

13.8.4.3 Criminal Code offences: strangulation, suffocation and persistent family violence

The *Family Violence Legislation Reform Act 2020* introduced new offences in the *Criminal Code*: suffocation and strangulation (section 298) and persistent family violence (section 300(1)).

In relation to strangulation and suffocation, it was stated in the second reading speech to the Bill for this legislation that:²⁰²⁵

²⁰²⁵ Parliament of Western Australia, Legislative Assembly, *Family Violence Legislation Reform Bill 2019, Second Reading Speech* (Mr JR Quigley, 27 November 2019) (accessed 15 February 2021).

Suffocation and strangulation is a perversely intimate and callous form of violence. In committing this act, a perpetrator conveys to the victim that they have the power to take their life away. Acts of strangulation or suffocation represent a distinct risk when committed in circumstances of family violence. Research shows that suffocation and strangulation committed against an intimate partner is one of the strongest indicators of an increased risk of homicide. Women who experience an episode of non-fatal strangulation by their intimate partner are over seven times more likely to be killed than other women.

In relation to the offence of persistent family violence, it was stated in the second reading speech to the Bill for this legislation that:²⁰²⁶

This offence recognises that physical and psychological abuse against a partner often forms a pattern of offending. The traumatic and ongoing nature of persistent acts of family violence means that victims may find it difficult to recall the specific details of each individual act of violence perpetrated against them.

... The community, and we as a government, cannot accept that a perpetrator of continued abuse against their partner is able to face fewer charges or a lesser sentence due to a victim being unable to detail the individual acts of abuse against them.

... The persistent family violence offence applies when an offender commits three or more acts of family violence against a person with whom they are in a designated family relationship over a period not exceeding 10 years.

... a charge for the offence must specify the period during which it is alleged that the acts of family violence occurred; however, it need not specify the dates, or in any other way particularise the circumstances of the acts of family violence that are alleged to constitute the offence. This means that if a victim cannot remember the exact date on which an act of family violence occurred, or, for example, in what room of the house it occurred, the offence can still be charged and prosecuted.

²⁰²⁶ Parliament of Western Australia, Legislative Assembly, *Family Violence Legislation Reform Bill 2019, Second Reading Speech* (Mr JR Quigley, 27 November 2019) (accessed 15 February 2021).

13.8.5 Family Court initiatives

The Family Court of Western Australia deals with family violence matters where relevant to cases within its jurisdiction, recognising the impact of violence on children as well as the possibility that serious and sometimes fatal family violence occurs *after* separation. It also recognises that family violence may impact significantly on a person's capacity to effectively participate in court events.

The *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth)* came into effect on 7 June 2012 and amended the definitions of 'abuse' and 'family violence'. The new definitions were adopted in the *Family Court Act 1997 (WA)* by the *Family Court Amendment (Family Violence and Other Measures) Act 2013 (WA)*.

The Family Court of Western Australia prioritises personal safety within and outside the Court. The Court's website provides safety information and contact information for family and domestic violence services. There is also a template document for requesting personal safety measures be undertaken by the Court.²⁰²⁷

13.9 PRACTICAL CONSIDERATIONS

13.9.1 Dealing with children

It is important to be familiar with legislative provisions which protect children from re-victimisation during court proceedings in cases involving family and domestic violence.

Keep in mind that these provisions apply to all children, including those who may be perpetrators of or witnesses to family violence, and not just to child complainants.

More information about dealing with children and young people can be found in: section 13.9.2 (Family Court proceedings); section 13.8.1 (restraining orders); section 13.3.5 (family and domestic violence matters including sexual assault); and chapter 5 (children and young people), particularly section 5.4 (special measures for obtaining views or evidence from young people).

²⁰²⁷ Family Court of Western Australia, *Personal Safety* (15 February 2021).

Points to consider in dealing with children generally:

- Evidence suggests that exposure to domestic violence can interfere with the neurological development of young children. It is not uncommon for children to suffer Post Traumatic Stress Disorder as a result of exposure to domestic violence, and they are also predisposed to anxiety and depression.
- The *Children and Community Services Act 2004* (WA) provides that children who are likely to suffer some harm as a result of emotional abuse are in need of protection. Emotional abuse is defined to include exposure to family violence.²⁰²⁸
- The importance of protecting children from exposure to domestic violence is also recognised in other Western Australian statutes:
 - Committing Part V offences (assaults and violence to the person) in the presence of a child is a circumstance of aggravation under the *Criminal Code* (WA).²⁰²⁹
 - The *Family Court Act 1997* (WA) states that a child's best interests are served by protecting them from physical or psychological harm from being subjected or exposed to abuse, neglect or family violence.²⁰³⁰
 - The *Restraining Orders Act 1997* (WA) provides that a family violence restraining order (FVRO) can be made on a child's behalf where they have been exposed to family violence committed by or against a person with whom the child is in a family relationship, or where there are reasonable grounds to apprehend that the child will be exposed to such an act.²⁰³¹

²⁰²⁸ *Children and Community Services Act 2004* (WA) s 28 (accessed 15 February 2021).

²⁰²⁹ *Criminal Code* (WA) s 221 (accessed 15 February 2021).

²⁰³⁰ *Family Court Act 1997* (WA) s 66(1)(b) (accessed 15 February 2021).

²⁰³¹ *Restraining Orders Act 1997* (WA) s 10E, 18(2), 24A(2) (accessed 15 February 2021).

13.9.2 Family Court proceedings

The Family Court of Western Australia has special procedures in place for dealing with parties experiencing family and domestic violence, including screening for risk issues in children's cases. The Family Court Counselling and Consultancy Service, which is staffed by qualified Family Consultants, can answer questions relating to issues arising from family and domestic violence.

In 2009, the *Family Violence Best Practice Principles* were launched as part of the Family Court of Australia's Family Violence Strategy, with the aim of providing decision-makers with practical guidance in dealing with matters in which a notice has been filed alleging family violence or the risk of family violence, or abuse or the risk of abuse. The *Best Practice Principles* were revised in July 2011, October 2012, April 2013 and December 2016.²⁰³²

Points to consider in Family Court proceedings:

- In some circumstances, Family Court proceedings or orders have been used by a perpetrator of family or domestic violence to reassert their power and control.
- The Women's Health and Family Services submitted that the requirement under *Family Court Act 1997* (WA) to provide for a meaningful relationship with both of a child's parents can lead to circumstances where perpetrators of domestic violence come into close contact with their former partner, and potentially continue to abuse their children when in their care.²⁰³³

²⁰³² Refer Family Court of Australia, *Family Violence Best Practice Principles* (Edition 4 - 1 December 2016) (accessed 15 February 2021).

²⁰³³ Submission from Women's Health and Family Services (8 June 2020).

- A 'family violence order' is invalid to the extent of any inconsistency with a Family Court parenting order.²⁰³⁴ The term 'family violence order' is defined in s 5 of the *Family Court Act 1997* (WA) to mean 'an order (including an interim order) made under a law of a State or territory to protect a person from family violence', and therefore includes violence restraining order (VROs) and family violence restraining orders (FVROs) made under the *Restraining Orders Act 1997* (WA).
- Parties to Family Court proceedings must, and other parties may, inform the Family Court of the existence of a family violence order which applies to a child or a member of the child's family.²⁰³⁵
- In considering what parenting order is in the child's best interests, the Family Court must ensure so far as possible that it is consistent with any family violence order and does not expose a person to an unacceptable risk of family violence.²⁰³⁶
- Where the Family Court makes an order which is inconsistent with an existing family violence order it must identify the inconsistency and give a detailed explanation within the order as to how the contact it provides for is to take place. The Family Court must, within 14 days, provide a copy of the order to the parties, the persons affected by the restraining order, the registrar/principal officer of the court that made the restraining order, the Commissioner of Police and the Department for Child Protection.²⁰³⁷
- The Family Court must take prompt action in relation to allegations of child abuse or family violence, including considering what interim or procedural orders should be made. In the event that a notice of risk of child abuse and/or family violence is filed, it is forwarded to the Department of Communities (Child Protection and Family Support), which provides a written report to the Family Court in relation to the allegations.²⁰³⁸

²⁰³⁴ *Family Court Act 1997* (WA) s 175 (accessed 15 February 2021).

²⁰³⁵ *Family Court Act 1997* (WA) s 66F(1) and (2) (accessed 15 February 2021).

²⁰³⁶ *Family Court Act 1997* (WA) s 66G(1) (accessed 15 February 2021).

²⁰³⁷ *Family Court Act 1997* (WA) s 174(2) and (3) (accessed 15 February 2021).

²⁰³⁸ *Family Court Act 1997* (WA) ss 158-162B (accessed 15 February 2021).

- In conducting child-related proceedings the Family Court must give effect to certain principles including the requirement to conduct the proceedings 'in a way that will safeguard ... the child concerned against family violence, child abuse and child neglect; and ... the parties to the proceedings against family violence'.²⁰³⁹
- The Family Court's website provides safety information and contact information for family and domestic violence services. There is also a template document for requesting personal safety measures be undertaken by the Court.²⁰⁴⁰
- Protocols are in place between the Family Court of Western Australia, the Department of Communities (Child Protection and Family Support) and Legal Aid Western Australia to share and exchange information to achieve the aim of providing the best possible outcomes for children.

13.9.3 Restraining orders

Reforms to the *Restraining Orders Act 1997* (WA) in 2016 recognised that family and domestic violence differs from other violent crimes: there is enormous potential for the violence to be repeated and to escalate in seriousness.

Restraining orders may be made in criminal proceedings (including bail applications), Family Court proceedings and child protection proceedings, under section 63 of the *Restraining Orders Act 1997* (WA).

The standard of proof for making a family violence order under the *Restraining Orders Act 1997* (WA) is on the balance of probabilities: see the definition of 'satisfied' in s 3. The court must be satisfied on the balance of probabilities that the respondent has committed an act of family violence against the person seeking to be protected; or that the applicant has reasonable grounds to apprehend that the respondent will commit family violence against the person seeking to be protected.

²⁰³⁹ *Family Court Act 1997* (WA) s 202B(6) (accessed 15 February 2021).

²⁰⁴⁰ Family Court of Western Australia, *Personal Safety* (15 February 2021).

Points to consider in relation to restraining orders:

- Whilst it rarely happens in practice,²⁰⁴¹ a court may request that the CEO of the Department of Communities (Child Protection and Family Support) intervene in any proceedings under the *Restraining Orders Act 1997* (WA) if these involve a child who may be in need of care and protection or where the order may affect the welfare of a child.²⁰⁴²
- A court may make a family violence restraining order (FVRO) to help protect a child if satisfied that the child has been exposed to family violence and they are likely to be exposed again, or where there are reasonable grounds to apprehend that the child will be exposed to family violence.²⁰⁴³
- Restraining orders can be made in relation to a child who is under the control or in the care of the Department of Communities (Child Protection and Family Support), but only where the application is made by the Department, or by a parent/guardian with the written consent of the Department.²⁰⁴⁴ There are situations where the Department will give consent and suggest a parent applies for an order – for example, an application against the other parent where there are family violence concerns.²⁰⁴⁵
- You should not assume that children who are not direct targets of violence want or will benefit from contact with the perpetrator of violence.

²⁰⁴¹ Submission from Legal Aid Western Australia (8 June 2020).

²⁰⁴² *Restraining Orders Act 1997* (WA) s 50D(1), (2) (accessed 8 September 2020).

²⁰⁴³ *Restraining Orders Act 1997* (WA) s 10E (accessed 8 September 2020).

²⁰⁴⁴ *Restraining Orders Act 1997* (WA) s 50B (accessed 8 September 2020).

²⁰⁴⁵ Submission from Legal Aid Western Australia (8 June 2020).

- Children are not to give oral evidence in restraining order proceedings unless the restraining order application is against another child, or a court makes an order allowing them to give evidence.²⁰⁴⁶ Where a child gives evidence, they must be afforded all the protections available under the *Restraining Orders Act 1997* (WA).²⁰⁴⁷ These include:²⁰⁴⁸
 - giving evidence by CCTV;
 - being entitled to a support person;
 - not being cross-examined by an unrepresented person; and
 - evidence of a representation made by the child about a relevant matter being admissible (where relevant) despite the rule against hearsay.
- Children can also be referred to the Department of Justice's *Child Witness Service* for specialist support and preparation for giving evidence.
- Only a child who is 10 years of age and older can be a respondent to a restraining order application.²⁰⁴⁹ Orders made against children generally may not exceed six months.²⁰⁵⁰ Where the respondent is a child under the age of 16, and the applicant is a parent or guardian, the court must notify the Department of Communities (Child Protection and Family Support) before the order can be made.²⁰⁵¹
- Consider the effect of the restraining order on an existing order or proceedings in another court; for example, an order of the Family Court.
 - A court that does not have jurisdiction to adjust Family Court parenting orders cannot make a restraining (family violence) order that conflicts with the orders of the Family Court.²⁰⁵²
 - As a result, when you are making, revoking or modifying a restraining order, it is important that you are aware of any existing or potential orders of the Family Court.

²⁰⁴⁶ *Restraining Orders Act 1997* (WA) s 53A (accessed 8 September 2020).

²⁰⁴⁷ *Restraining Orders Act 1997* (WA) s 53B (accessed 8 September 2020).

²⁰⁴⁸ *Restraining Orders Act 1997* (WA) Part 6 Division 1 (accessed 8 September 2020).

²⁰⁴⁹ *Restraining Orders Act 1997* (WA) s 50 (accessed 8 September 2020).

²⁰⁵⁰ *Restraining Orders Act 1997* (WA) s 50A (accessed 8 September 2020).

²⁰⁵¹ *Restraining Orders Act 1997* (WA) s 50C (accessed 8 September 2020).

²⁰⁵² *Restraining Orders Act 1997* (WA) s 65 (accessed 8 September 2020).

- Before you grant an application for a restraining order, or modify or revoke an existing restraining order, the Duty Registrar of the Family Court should be contacted to ascertain whether the parties are, or have been involved in child-related proceedings before the Family Court.
- Protocols are in place to allow information to be shared between the Family Court and other jurisdictions in child-related proceedings involving parties who have sought a restraining order.
- Division 10 of the *Family Court Act 1997 (WA)* aims to resolve inconsistencies between family violence orders and certain orders, injunctions and arrangements for a child to spend time with a person. Where the Family Court makes an order or injunction that is inconsistent with a family violence order it must:²⁰⁵³
 - specify in the order or injunction that it is inconsistent with a family violence order;
 - give a detailed explanation in the order or injunction as to how the contact is to take place;
 - explain the effect and operation of the order or injunction to the applicant, respondent and the persons to whom the family violence order is directed and protects – including the effects of failure to comply;
 - provide a copy of the order or injunction to the court that last made or varied the family violence order; and
 - provide a copy of the order or injunction to the Commissioner of Police and child welfare authority in the State in which the protected person resides.
- Where there are proceedings to vary a family violence order a court may revive, vary discharge or suspend a parenting order, recovery order or injunction which requires or authorises a person to spend time with a child. The court may only do so where it has new material before it that was not before the court that made the order or injunction. The court may do so on application or its own initiative.²⁰⁵⁴

²⁰⁵³ *Family Court Act 1997 (WA)* s 174 (accessed 8 September 2020).

²⁰⁵⁴ *Family Court Act 1997 (WA)* s 175 (accessed 8 September 2020).

- It may be necessary to make enquiries about whether or not an applicant for a restraining order has given any thought to a Safety Plan. A Safety Plan is a list of contingency measures which may help a person focus on what their immediate responses should be in the event that they or their children feel threatened or in danger, such as who the victim will call and where will they go.

Additional information about safety planning and an online directory of services is available on the *Western Australian Government Community Services* website.

- If an applicant has not contacted an external support agency prior to the application for a restraining order you may wish to let them know that such support is available.

A list of agencies and organisations which help people who are at risk of family and domestic violence can be found in section 13.10 of this chapter.

- Be aware that restraining order applications may be used by perpetrators of domestic violence as a way to control and punish the primary victim.

13.9.4 The co-occurrence of family and domestic violence and sexual assault

Although not all sexual assault occurs in the context of family and domestic violence, the issue of sexual assault is included in this chapter because it is often one way in which perpetrators of family and domestic violence attempt to exercise power and control over their victims.

There are commonly also issues as to how the legal system responds to allegations of sexual assault (irrespective of the nature of the relationship between the accused and the complainant) and family and domestic violence offences.

In cases of sexual assault, studies have indicated that:

*...the vast majority of people who are sexually assaulted avoid engagement with the criminal justice system, perceiving it as inappropriate to their needs or fearing the additional trauma of the legal process ... rape has the lowest reporting rate of any crime. At least 85 % of sexual assaults never reach the criminal justice system at all.*²⁰⁵⁵

Be aware that:²⁰⁵⁶

The clinical research evidence indicates that the most therapeutic way to process the traumatic event and hence reduce symptoms of hyper-arousal, re-experiencing the event, avoidance and numbing is to allow the victim to tell their story in their own way and at their own pace so they feel they are able to regain some control over a situation that was out of their control. However, in gathering 'evidence' the justice system (police, prosecutors) often require the victim to tell the story all at once in a logical manner, recalling all aspects of the event/s in detail and to repeat it a number of times to people they do not know. Hence victims, who initially reported the alleged crime and wanted to pursue the justice system, may subsequently withdraw from the process due to the fact that the requirements of the justice system are counter therapeutic and in fact can exacerbate the traumatic reaction by the justice system, repeatedly re-traumatising them.

For more information and statistics about domestic violence and sexual assault as it affects women please refer to section 13.1.2 and chapter 10 (particularly section 10.1.7).

More information on the co-occurrence of family and domestic violence and sexual assault is contained in section 13.7.4 of this chapter.

For more information about children as victims, the accused, or witnesses in court proceedings, please refer to chapter 5.

²⁰⁵⁵ Heath M, *The Law and Sexual Offences Against Adults in Australia*, Australian Centre for the Study of Sexual Assault Issue No 4 (June 2005) Publication Summary, citing Victorian Law Reform Commission, 2004; Cook et al, 2001; Lievore, 2003; Stubbs, 2004 (accessed 15 July 2019).

²⁰⁵⁶ Community Development and Justice Standing Committee, *Inquiry into the Prosecution of Assaults and Sexual Offences* (Report No 6) (2008) page 123 (accessed 25 June 2018).

Points to consider – the co-occurrence of sexual assault and family and domestic violence:

- Develop and demonstrate an informed understanding of the nature of family and domestic violence and sexual assault, and their impact on the victim.
- Do not dismiss or undervalue the nature and impact of family and domestic violence or sexual assault. Males and females from all cultural and social backgrounds can be affected by sexual assault.
- Do not repeat in court any of the unfounded assumptions and myths about family and domestic violence or sexual assault. Instead, cite the facts based on accurate statistics and research — for example:
 - *It is not easy for a victim to leave a violent relationship* — it takes considerable emotional and practical resources for an abused and frightened victim to do so, particularly if the victim is a parent and children are involved. Many who leave or threaten to leave are coerced into returning or staying by threats or further violence from their partner.
 - *There are often insufficient support and protection structures to enable a victim to either leave or leave safely.* This can be even more difficult for Aboriginal victims, victims from culturally and linguistically diverse backgrounds, victims with disabilities and victims in rural and remote locations. Statistically, the most dangerous time for a victim in a violent relationship is at separation or after leaving the relationship.
 - *People do not ask to be assaulted or raped.* It is no more acceptable for a person to assault another person because he or she felt that the other person was acting, behaving or dressing in a manner that was 'asking for it', than it is for a person to rob another person 'asking for it' by walking through a park at night wearing an expensive suit and carrying an expensive briefcase.
 - *People who are sexually assaulted can react in many different ways* — there is no standard way to react or behave.
 - *Lesbian, gay, bisexual, trans and intersex people can be violently and sexually abused by their partners.*

For more information in relation to violence and abuse suffered by these groups please refer to chapter 12A, (on diverse sexuality) - particularly 12A.1.4; and/or chapter 12B (on diverse sex and gender) - particularly 12B.1.7.

- Do not dismiss or undervalue the impact of family and domestic violence or sexual assault on a victim. In this regard, particularly note that prostitutes (male or female) are entitled to the same protection of the law as any other citizen.²⁰⁵⁷
- Be aware of the widespread criticism in relation to the use of the defence of provocation²⁰⁵⁸ - it is no more acceptable for a person to hit their spouse, partner or lover (or partner's lover) than it is to hit a work colleague.
- It is important that victims of family and domestic violence are reassured that their victimisation is not their fault and that violence and abuse are not acceptable in our society. The Department of Communities submitted that hearing these messages from a person in authority, such as a judge, can be one of the most powerful interventions that can be provided.²⁰⁵⁹

13.9.5 Evidentiary issues

Consider the difficulties for a victim in presenting evidence about family or domestic violence or sexual assault in our adversarial system — the victim may have to come face to face with their alleged attacker and generally has to be prepared to have their reputation attacked.

The Armadale Domestic Violence Intervention Project (Inc.) submitted:²⁰⁶⁰

²⁰⁵⁷ *Michael v The State of Western Australia* [2008] WASCA 66 [98], [240], [244] (accessed 15 July 2019).

²⁰⁵⁸ *Criminal Code* (WA) s 246 (accessed 14 September 2020).

²⁰⁵⁹ Submission from the Department for Communities (17 July 2007).

²⁰⁶⁰ Submission from Armadale Domestic Violence Intervention Project (Inc.) (17 April 2007).

Victims have expressed feeling tremendous intimidation and shame when engaging with the court process. The expectations around victims disclosing extremely traumatic experiences, especially when there is an intimate or family relationship connection with the perpetrator is overwhelming. Victims of domestic and family violence generally minimise violence and abuse experienced in their everyday reality. Therefore it is essential that Magistrates [and other judicial officers] are aware of the special circumstances of vulnerability associated with victims within this context.

Western Australia's *Evidence Act 1906* (WA) contains several 'special witness' provisions that relate to the admissibility of visually recorded interviews and the provision of special measures for special witnesses. 'Special witness' means a person declared by the Court to be a special witness.²⁰⁶¹

Section 106R(3) states that the grounds on which a 'special witness' order may be made are:

... if the person is not treated as a special witness he or she would, in the court's opinion -

(a) by reason of physical disability or mental impairment, be unlikely to be able to give evidence, or to give evidence satisfactorily; or

(b) be likely –

(i) to suffer severe emotional trauma; or

(ii) to be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily, by reasons of age, cultural background, relationship to any party to the proceeding, the nature of the subject-matter of the evidence, or any other factor that the court considers relevant.²⁰⁶²

²⁰⁶¹ *Evidence Act 1906* (WA) s 106R(1).

²⁰⁶² *Evidence Act 1906* (WA) s 106R(3) (accessed 15 February 2021).

Points to consider in relation to evidentiary issues:

- In proceedings for a sexual offence, evidence relating to the sexual reputation or disposition of the complainant shall not be raised by or on behalf of the accused: *Evidence Act 1906* (WA) sections 36B, 36BA.
- In proceedings for a sexual offence, evidence relating to the sexual experience of the complainant that is not directly part of the incident/s at issue shall not be raised by or on behalf of the accused without leave of the court: *Evidence Act 1906* (WA), section 6BC (1)-(2).
- You should only grant leave for that evidence to be raised if it has 'substantial relevance' to the facts and the value of allowing the evidence 'outweighs any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission': *Evidence Act 1906* (WA), section 36BC(2).
- If the alleged perpetrator is unrepresented, that person may not directly cross-examine any child witness or any complainant in serious sexual offences unless the complainant is not a child and consents to the cross-examination: see *Evidence Act 1906* (WA) section 106G.
- An unrepresented respondent or a person subject to an order under the *Restraining Orders Act 1997* (WA) may not directly cross-examine a person with whom they are in a family relationship, or an 'imagined personal relationship': see section 44C of the *Restraining Orders Act 1997* (WA). No unrepresented party in these proceedings is entitled to directly cross-examine a child: see section 53D of the *Restraining Orders Act 1997* (WA).
- You have a discretion to allow any witness in any criminal proceeding to give evidence by video-link, while screened, or without direct questioning by the accused - having regard to the nature of the charge, the wishes of the witness and the availability of any necessary facilities or equipment: see *Evidence Act 1906* (WA) section 25A.

- You can declare any witness in any proceedings to be a 'special witness' if, among other things, that person would suffer severe emotional trauma or be so intimidated or distressed by reason of relationship to any party to the proceeding or the nature of the subject-matter of the evidence, as to be unable to give evidence satisfactorily.²⁰⁶³
- The *Evidence Act 1906* (WA) provides that in any case of serious sexual assault you must declare the complainant to be a 'special witness', unless you are satisfied the complainant would otherwise be able to give evidence satisfactorily and the complainant does not wish this to occur: see s 106R(3a).
- If you have declared the witness to be a 'special witness' in criminal proceedings you make an order that the whole of their evidence be taken at a special hearing and visually recorded, or given by video-link or while screened.²⁰⁶⁴
- If you have declared a person to be a 'special witness' in any court proceedings you can allow them to be accompanied by a support person and/or communicator.²⁰⁶⁵
- There is provision under section 121 the *Evidence Act 1906* (WA) for a court, on their own initiative or on the application of any party to the proceedings, to allow evidence to be taken by video-link or audio-link from outside the place where the court is sitting - although you should not do so if it is not in the interests of justice.
- Irrespective of whether a person has been declared a 'special witness', you should consider discussing with the parties and/or their legal representatives the use of any special measures referred to above - if to do so would be in the interests of justice.

²⁰⁶³ *Evidence Act 1906* (WA) s 106R(3) (accessed 15 February 2021).

²⁰⁶⁴ *Evidence Act 1906* (WA) ss 106R(3), 106RA (accessed 15 July 2019).

²⁰⁶⁵ *Evidence Act 1906* (WA) s 106R(4) (accessed 15 July 2019).

- When allowing a witness to present evidence using alternative means, ensure that any jury is properly directed at that time that it is a routine procedure, and does not mean they should give it any less (or any more) weight than if the evidence was presented in the usual way.²⁰⁶⁶ You may also need to intervene if the accused or their legal representative tries to suggest that evidence presented in this way should be given less weight.
- Section 26 of the *Evidence Act 1906* (WA) enables a court to disallow a question put to a witness in cross-examination, or to inform the witness that it need not be answered, if the question is misleading or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.²⁰⁶⁷ Among other things, you may take into account any relevant condition or characteristic of the witness in determining whether to disallow a question.²⁰⁶⁸

13.9.6 Long-term or repeated abuse as a contributory factor to violence

Points to consider:

- Consider the impact of long-term and continually repeated abuse, assault and threats on a victim. It is very different to be subjected to such behaviour long-term from a partner or other family member than to be subjected to a single act of violence from a stranger.
- Issues of duress, provocation and/or self-defence should be carefully considered in the light of the considerable body of research about long-term family and domestic violence and its impact, as opposed to considering them in the light of case law about responses to one-off acts of violence.

²⁰⁶⁶ *Evidence Act 1906* (WA) ss 25A(4), 106P, 106RA(7) (accessed 15 February 2021).

²⁰⁶⁷ *Evidence Act 1906* (WA) s 26 (accessed 15 February 2021).

²⁰⁶⁸ *Evidence Act 1906* (WA) s 26(3) (accessed 15 February 2021).

- Remember that the changes to the laws of self-defence²⁰⁶⁹ (which originated from a 2007 review by the Law Reform Commission of Western Australia of the 'battered women's syndrome' defence to homicide - refer to section 13.8.4.1) apply to any 'harmful act', including assaults and wounding, provided that the act is reasonable and the accused believed it necessary to defend themselves or another from a harmful act. The defence may apply even if that harmful act is not imminent.
- Remember that women's criminal offending frequently takes place in the context of long-term intimate partner violence. Women who may have fears for their own and their children's safety may:²⁰⁷⁰
 - offend because an abusive partner demanded they do so;
 - offend in response to a dangerous situation that has evolved due to their intimate partner's violence;
 - use physical violence to defend themselves or their children;
 - claim income support when not entitled because an abusive partner refuses to support them or their children;
 - know that their partner is also abusing their children but be unable to stop them doing so;
 - be impeded in their ability to parent because they are suffering from trauma or other mental health issues consequent to their partner's violence; or
 - offend in order to spend time in prison as a break from violence.

13.9.7 Directions to the jury

Points to consider:

- It is important that you ensure that the jury does not allow any stereotyped or false assumptions about family and domestic violence or sexual assault to unfairly influence their judgment.

²⁰⁶⁹ *Criminal Code* (WA) s 248(4) (accessed 15 February 2021).

²⁰⁷⁰ Tolmie J, Smith R, Short J, Wilson D and Sach J, *Social Entrapment: A Realistic Understanding of the Criminal Offending of Primary Victims of Intimate Partner Violence*, *New Zealand Law Review* (April 2018) pages 182-183 (accessed 16 April 2020).

- For example, you may need to provide specific guidance such as explaining that the jury must avoid making stereotyped or false assumptions about the nature and impact of either family and domestic violence or sexual assault. Instead they must carefully consider the particular evidence presented.
- Where appropriate, explain what needs to be taken into account in relation to long-term abuse in a relationship and the defences of duress, provocation and/or self-defence.
- Where self-defence in response to family violence is at issue in a trial, the *Family Violence Legislation Reform Act 2020* has introduced into the *Evidence Act 1906* a legislative framework in relation to the admissibility of evidence of family violence and the jury directions to be given in relation to that evidence.

Please refer to section 13.8.4.2 of this chapter for more information on the statutory directions required.

- In your final directions to the jury, you may need to remind the jury of any points in relation to 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 when direct cross-examination by a self-represented accused has been restricted, or evidence given by alternative means. You must ensure that the jury is properly directed that these are routine measures, which do not mean that they should give any less (or any more) weight to the evidence than if it was presented in the usual way.²⁰⁷¹

13.9.8 Sentencing, other decisions and judgment writing

Your sentencing, decision(s) and/or written judgment or decision must be fair and non-discriminatory to any victim of family or domestic violence who is affected by or referred to within them, and preferably should be considered to be fair and non-discriminatory.

²⁰⁷¹ *Evidence Act 1906* (WA) ss 25A(4), 106P, 106RA(7) (accessed 15 February 2021).

Points to consider in sentencing, decisions and judgments:

- You may need to pay due consideration to (and indeed specifically allude to) the points raised in the rest of this section 13.9 (and in particular, to the 'points to consider' in 13.9.7, which relate to directions to the jury) that are relevant to the particular case.
- If a witness is not personally capable of giving a victim impact statement for any reason, consider whether it is appropriate for another person to do so on the victim's behalf.²⁰⁷²
- Consider whether to quote from a victim impact statement in court.²⁰⁷³

13.10 FURTHER INFORMATION OR HELP

Child Witness Service

The Child Witness Service (part of the Department of Justice) assists children and young people under 18 years of age who may need to give evidence in court. The children involved may be victims or witnesses to any criminal charge, in any Western Australian court.

The Child Witness Service provides practical information to assist children and young people emotionally prepare for court. Support is provided on an individual basis. Evidence is never discussed. Counselling is not provided, however referrals can be made to appropriate agencies when additional support is required.

Communicare Breathing Space

Breathing Space (Communicare) offers a behaviour change program to men who have been abusive in their intimate partner relationships. The therapeutic community provides men with up to six months of accommodation while they participate in an intensive

²⁰⁷² Sentencing Act 1995 (WA) s 24(2) (accessed 15 February 2021).

²⁰⁷³ See Part 3, Division 4 of the Sentencing Act 1995 (WA) (accessed 15 February 2021). Note that a court may make a written victim impact statement available to the prosecutor and to the offender, on such conditions as it thinks fit.

behaviour change program encompassing group work, individual counselling and case management.

Department of Communities (Child Protection and Family Support)

The Department of Communities (Child Protection and Family Support) provides a range of child safety and family support services to Western Australian individuals, children and their families, from the Kimberley to the Great Southern regions of the State.

The Department of Communities has produced a Referral Guide (updated June 2016) for Family and Domestic Violence services in Western Australia.

Family Violence Service

The Family Violence Service is available in the metropolitan Magistrates Courts in Western Australia, providing victims with information, advocacy, support and referral to other services. The Family Violence Service can assist people:

- to assess their level of risk of further violence;
- to develop a safety and/or support plan to keep themselves and their family safe;
- to prepare for court;
- to obtain information on ongoing court matters; and
- by referring them to other services such as counselling, police, legal, medical and other relevant services.

Lifeline Australia

Lifeline provides 24 hour seven days per week crisis support and suicide prevention services.

Men's Domestic Violence Helpline

The Men's Domestic Violence Helpline is a state-wide 24 hour service, operating through the Department of Communities (Child Protection and Family Support). This service provides counselling for men who are concerned about their violent and abusive behaviours. The service can provide telephone counselling, information and referral to ongoing face-to-face services if required. This service can provide information about

accessing legal advice, accommodation and other support services for people who have been served with a violence restraining order. Information and support is also available for men who have experienced family and domestic violence. A telephone based interpreting service is available if required.

MensLine Australia

MensLine provides 24 hour seven days per week telephone and online support and information services for Australian men. The telephone counsellors are qualified and specialised in family and relationship issues, including relationship breakdown, separation and divorce, parenting, family violence, suicide prevention and emotional wellbeing.

Mensplace

Mensplace aims to support and enable men to address relationship and family issues, whether single, partnered, separated or re-partnered. A variety of courses are offered, all using a strength-based approach which acknowledges that men can bring different perspectives to relationship issues.

Multicultural Women's Advocacy and Support Service

Multicultural Women's Advocacy and Support Service promotes the safety of women, with or without children, from migrant and refugee backgrounds. The service is available to both women who have recently arrived and to long-term residents. Women may be in crisis situations, in refuges, still remaining in their relationships or re-establishing themselves in the community after leaving refuges. Services are free. All staff members are female.

National Family Violence Prevention Legal Services

The National Family Violence Prevention Legal Services Forum was formally established in 2012, and in 2021 consists of fourteen member organisations across Australia who are service providers under the Family Violence Prevention Legal Services (FVPLSs) Program. FVPLSs provide specialist, culturally safe legal services and

supports to Aboriginal and Torres Strait Islander victims/survivors of family violence across Australia.

The FVPLSs in Western Australia include the Aboriginal Family Law Service Western Australia (Perth, Broome, Carnarvon, Kununurra, Geraldton, Kalgoorlie, Port Hedland), the Southern Aboriginal Corporation Family Violence Prevention Legal Service (Albany) and the Marninwarntikura Family Violence Prevention Unit (Fitzroy Crossing).

Relationships Australia (Western Australia)

Relationships Australia provides a relationship support services for individuals, couples, families and communities. Relationships Australia is a non-profit community service with no religious affiliation.

Sexual Assault Resource Centre (SARC)

SARC is a service provided through the Department of Health. It provides a 24-hour emergency service in metropolitan Perth (medical care, a forensic examination and counselling support) for people who have been sexually assaulted within the previous 14 days.

SARC also provides counselling in centres across the Perth metropolitan area to people who have experienced sexual assault and sexual abuse in the past. While not part of the police force, SARC can provide support to a person who has made a decision to report to the police.

SARC provides a confidential service wherever possible. However, there are some situations in which SARC is legally required to disclose information (e.g. as required by subpoenas and court orders, mandatory child abuse reporting and where risk to the safety of others has been indicated).

SARC services are free for Australian residents and people from countries with reciprocal health care arrangements with Australia. There may be some costs for people who do not fit into these two categories.

Women's Council for Domestic and Family Violence Services (WCDFVS)

The WCDFVS is a state-wide organisation which aims to ensure that all women and children live free of domestic and family violence. The WCDFVS advocates on domestic and family violence issues to facilitate and promote policy, legislative and programmatic responses.

The WCDFVS operates from a feminist perspective and proactively advocates for social justice in order to further empowerment, access, equity and safety for all women and children.

Projects in 2019 included the *Purple Benches* campaign to provide a highly visible place of support and reflection in many communities across the State; and the *Rubbish Bin* campaign which involved placing posters on public street bins to provide a reminder that domestic and family violence is endemic across Western Australia.

Women's Domestic Violence Helpline

The Women's Domestic Violence Helpline is a state-wide 24 hour service, operating through the Department of Communities (Child Protection and Family Support). This service provides support and counselling for women experiencing family and domestic violence. This includes telephone counselling, information and advice, referral to local advocacy and support services, liaison with police where necessary and support in escaping situations of family and domestic violence. The service can refer women to safe accommodation if required. A telephone based interpreting service is available if required.

Women's Health and Family Services

Women's Health and Family Services is a not for profit organisation which specialises in women's health issues, which has operated since 1977. It provides a range of services which include: medical, counselling, mental health, drug and alcohol support, domestic violence, community workshops and professional training. Creche facilities and interpreting services are available.

Women's Information Service

The Women's Information Service (WA) offers free, confidential phone line information and referrals about issues such as health, finances, legal matters, counselling and domestic violence. It operates through the Department of Communities (Child Protection and Family Support).

Women's Legal Service of Western Australia (WLCWA)

In late 2018, the Women's Law Centre changed its name to the Women's Legal Service, while its services and purpose remained the same. The WLCWA is a not for profit Community Legal Centre which provides free legal advice and casework to women facing disadvantage. It can also provide information about legal issues and referral to support services to any women. The WLCWA also undertakes several outreach projects for specific target groups, including assisting Aboriginal women in remote communities and providing services to women in Western Australia prisons.

Victim Support Service

The Victim Support Service (which is part of the Department of Justice) offers free, confidential counselling and support services to victims of crime. These services are provided by professional counsellors and trained volunteers.

Services available to victims of crime include:

- information on the status of police investigations;
- information about court proceedings;
- writing a victim impact statement;
- counselling and support;
- supporting victims during court proceedings;
- information and referrals for other services;
- answering enquiries about victim rights in the criminal justice system, including criminal injuries compensation claims.

13.11 FURTHER READING

Australian Bureau of Statistics, *Personal Safety, Australia* (Cat No 4906.0) (2017) Key Findings (accessed 15 February 2021)

Australian Bureau of Statistics, *Recorded Crime – Victims, Australia* (Cat No 4510.0) (2020) (accessed 15 February 2021)

Australian Institute of Family Studies, *Closing the Gap Clearinghouse: Family Violence Prevention Programs in Indigenous Communities*, Resource Sheet no. 37 (December 2016) (accessed 10 February 2021)

Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia* (Cat No FDV 2) (5 June 2019) Continuing the National Story 2019 (accessed 15 February 2021)

Australian Institute of Judicial Administration, *National Domestic and Family Violence Bench Book* (updated June 2020) (accessed 8 September 2020)

Blagg H, Bluett-Boyd N, and Williams E, *Innovative Models in Addressing Violence against Indigenous Women: State of Knowledge Paper* (August 2015) Australia's National Research Organisation for Women's Safety, page 3 (accessed 15 February 2021)

Department for Child Protection and Family Support, *Western Australia's Family and Domestic Violence Prevention Strategy to 2022* (2013) (accessed 15 February 2021)

Department of Communities, *Women's Report Card* (21 January 2021) (accessed 2 February 2021)

Domestic Violence Service Management in collaboration with Coates L and Wade A, *About Language and Violence: A Resource Kit for Social and Service Providers* (2018) (accessed 16 April 2020)

El-Murr A, *Intimate Partner Violence in Australian Refugee Communities* (December 2018) Scoping Review of Issues and Service Responses, Child Family Community Australia Paper 50 (accessed 15 February 2021)

Family Court of Australia, *Family Violence Best Practice Principles* (3 May 2016) (accessed 15 February 2021)

Fryer-Smith S, *The Aboriginal Benchbook for Western Australian Courts* (2nd ed) (2008) (accessed 15 February 2021)

Guggisberg M and Grobbelaar M, *An Examination of Circumstances Related to Forced Marriage among Culturally and Linguistically Diverse Women in Australia, Victims of Violence* (February 2020) (accessed 18 April 2020)

Law Reform Commission of Western Australia, *Final Report: Review of the Law of Homicide* (2007) Chapter 6 (accessed 15 February 2021)

Law Reform Commission of Western Australia, *Final Report: Enhancing Family and Domestic Violence Laws*, Project No 104 (June 2014) (accessed February 2021)

Legal and Constitutional Affairs Reference Committee, *Practice of Dowry and Incidence of Dowry Abuse in Australia* (14 February 2019) (accessed 18 April 2020)

Lyneham S and Bricknell S, *When Saying No is Not an Option: Forced Marriage in Australia and New Zealand* (2018) Australian Institute of Criminology Research Report 11 (accessed 15 February 2021)

Mulroney J and Chan C, *Men as Victims of Domestic Violence*, Australian Domestic and Family Violence Clearinghouse Topic Paper No 15 (2005) (accessed 15 February 2021)

No to Violence, *Predominant Aggressor Identification and Victim Misidentification* (21 November 2019) (accessed 17 April 2020)

Office of the Director of Public Prosecutions Comparative Sentencing Tables (accessed 12 July 2021)

Phillips J and Vandenbroek P, *Domestic, Family and Sexual Violence in Australia — An Overview of the Issues* (2014) *E-Brief* — Parliament of Australia (accessed 15 February 2021)

Our Watch, *Challenging Gender Stereotypes in the Early Years: The Power of Parents* (March 2018) Evidence Paper (accessed February 2021)

Moore T, Arney F, Buchanan F, Chung D, Chong A, Fernandes C, Hawkes M, Meiksans J, Moulding N, Martin R and Schulze D, *Practice Brief - Slow Down and Listen: Improving Children's and Young People's Safety During Periods of Violence, Separation and Reunification* (2020) Centre for Child Protection, University of South Australia (accessed February 2021)

Phillips J and Park M, *Measuring Domestic Violence and Sexual Assault against Women: Review of the Literature and Statistics* (12 December 2006) *E-Brief* — Parliament of Australia (accessed 15 February 2021)

Tarrant S, *Self Defence against Intimate Partner Violence: Let's do the Work to see it* (accessed 15 February 2021)

The National Council to Reduce Violence against Women and Children, *Economic Cost of Violence against Women and Their Children* (2009) (accessed 15 February 2021)

World Health Organisation, *Global and Regional Estimates of Violence against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-partner Sexual Violence* (2013) (accessed 15 February 2020)

ACKNOWLEDGMENTS

Special acknowledgment – New South Wales Judicial Commission

This Bench Book was inspired by, and is largely based on, the New South Wales Judicial Commission's *Equality before the Law Bench Book*.²⁰⁷⁴ The Steering Committee which oversaw the development of this Bench Book would like to thank the New South Wales Judicial Commission for kindly giving permission to use its Bench Book as a reference for our own.

Community input – first edition

Thanks are due to the following agencies, groups and individuals who provided insightful guidance on the development of the original Bench Book.

- Advocate for Children in Care - 9 March 2009
- Aged and Community Services WA - 2 July 2009
- Albany Migrant Resource Centre - 14 June 2007
- Anonymous ('David') - 5 September 2007
- Archbishop of Perth, The Anglican Church of Australia Diocese of Perth - 11 November 2008
- Archdiocese of Perth - 12 September 2008
- Armadale Domestic Violence Intervention Project Inc - 17 April 2007
- Association for the Blind of WA (Inc) - 24 February 2009
- Australian Federation of Aids Organisations Inc - 25 March 2009
- Bodhinyana Buddhist Monastery - 5 September 2008
- Buddhist Council of WA - 30 September 2008
- Catholic Social Justice Council Archdiocese of Perth - 18 September 2008
- Centre for Muslim States and Societies, UWA - 1 December 2008
- Commissioner for Children and Young People - 5 March 2009
- Council on the Ageing (WA) - 12 April 2007
- Dar al Shifah Islamic Inc - 9 September 2008
- Deaf Society of Western Australia - May 2008

²⁰⁷⁴ Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2006, as revised July 2016) (accessed 30 July 2021).

- Department for Communities - 8 September 2008, 11 November 2008 and 14 November 2008
- Department for Child Protection - 26 March 2009 and 14 July 2009
- Department of the Attorney General - 12 November 2008
- Department of the Attorney General, Child Witness Service - 28 November 2008
- Department of Families, Housing, Community Services and Indigenous Affairs (Cth) - 16 March 2007
- Department of Health, Mental Health Division - 7 October 2008
- Department of Indigenous Affairs - 8 May 2007
- Disability Services Commission - 19 April 2007 and 9 October 2008
- Ethnic Disability Advocacy Centre (later renamed as Kin Advocacy) - 20 April 2007
- Freedom Centre - 24 March 2009
- Fremantle Migrant Centre Inc - Mental Health Access Services - 26 April 2007
- Gay and Lesbian Community Services - 19 April 2007 and 31 March 2009
- GRAI (GLBTI Retirement Association Incorporated) - 18 April 2007
- Jewish Community Council of Western Australia (Inc) - 14 August 2007
- Jewish Society of WA (Chief Rabbi - Western Australia) - 24 September 2008
- Judge Kevin Sleight, District Court of WA - 22 May 2009
- Justice Ralph Simmonds, Supreme Court of WA - 22 October 2008
- Law Reform Commission (WA) - 24 April 2007
- Law Society of Western Australia - 17 May 2007 and 1 October 2008
- Legal Aid Western Australia - 2 April 2007, 1 May 2007, 27 October 2008, 26 February 2009, 3 June 2009, 17 July 2009 and 23 July 2009
- Legal Aid Western Australia and Youth Legal Service - 18 December 2007
- Magistrate Greg Benn, Magistrates Court of WA - 16 July 2009
- Magistrate Catherine Crawford, Magistrates Court of WA - 9 June 2009, 10 June 2009 and 15 June 2009
- Magistrate Brian Gluestein, Magistrates Court of WA - 2 June 2009
- Magistrate Pamela Hogan, Magistrates Court of WA - 8 May 2009
- Mental Health Law Centre WA Inc - 28 May 2007
- Ms Hannah McGlade - 28 March 2007
- Multicultural Women's Advocacy Service - 4 May 2007

- Dr Raewyn Mutch, Dr Amanda Wilkins, Dr Anita Banks and Professor Carol Bower - 6 August 2009
- National Disability Services (WA) - 27 April 2007 and 16 October 2008
- Office for Women's Policy - 17 July 2007
- Office for Women's Policy & Family & Domestic Violence Unit - 16 January 2009
- Office of Multicultural Interests - 20 April 2009
- People with Disabilities (WA) (Inc) - 3 May 2007 and 10 October 2008
- Public Advocate - 29 March 2007 and 8 October 2008
- Ruah Community Services - 29 August 2007
- Same Sex Domestic Violence Group - 23 April 2007
- The Honourable Hal Jackson - 31 March 2009
- Uniting Church in Australia - Social Justice (WA) - 11 May 2007
- WA Bar Association - 20 March 2007 and 10 October 2008
- WA Gender Project - 25 April 2007
- WACOSS (Western Australian Council of Social Services) - 20 April 2007
- Women Lawyers of Western Australia (Inc) - 15 June 2007 and 19 January 2009
- Women's Council for Domestic & Family Services (WA) - 21 January 2009

Community input - second edition

Thanks are due to the following agencies, groups and individuals who provided insightful guidance on revisions for the second edition of the Bench Book.

- Aboriginal Legal Service of Western Australia Limited – 18 April 2017, 13 October 2017, 14 September 2020 and 21 September 2020
- Archbishop of Perth, Anglican Church of Australia, Diocese of Perth - 20 March 2017
- Australian Federation of AIDS Organisations Ltd. (AFAO) - 23 September 2019
- Bodhinyana Buddhist Monastery - 27 May 2020
- Buddhist Council of Western Australia - 27 May 2020
- Commissioner for Children and Young People - 28 May 2020
- Council of the Ageing (WA) Incorporated - 26 February 2020
- Criminal Lawyers Association of Western Australia - 13 September 2017
- Department of Aboriginal Affairs - 1 May 2017
- Department of Communities - 23 October 2017 and 15 September 2020
- Department of Corrective Services - 17 October 2016

- Dr Raewyn Mutch, Refugee Health Service at Perth Children's Hospital - 5 March 2020
- Ethnic Disability Advocacy Centre (later renamed as Kin Advocacy) - 5 March 2020
- Equality Australia - 17 March 2020
- GRAI (GLBTI Rights in Ageing) Inc. - 27 February 2020
- Legal Aid Western Australia – 16 May 2017, 30 October 2017, 8 June 2020 and 9 June 2020
- Living Proud Inc. - 23 September 2019
- Office of the Public Advocate - 4 June 2020
- Office of the Public Trustee - 22 April 2020
- Office of Multicultural Interests - September 2016
- Pride in Law Association - 22 September 2019
- Professor Carol Bower, Head of Alcohol and Pregnancy and Fetal Alcohol Spectrum Disorder Research, Telethon KIDS Institute - 8 December 2017
- Magistrate Deen Potter - 22 November 2016
- Mental Health Law Centre WA Inc. - 23 June 2020
- National Disability Services WA - 22 June 2020 and 30 June 2020
- People with Disabilities (WA) Inc. - informed through collaboration with Advocacy WA, Ethnic Disability Advocacy Centre, Explorability, Sussex Street Community Legal Service, Midlas and Your Say - 9 March 2020 and 8 April 2020
- Ruah Community Services - 13 December 2016 and 24 August 2020
- Street Law Centre Inc - December 2016 and 3 August 2020
- Telethon Kids Institute (Professor Desiree Silva, Clinical Associate Professor Raewyn Mutch, Dr Jenny Downs, Ms Jenny Bourke, Ms Joanne Granich, Ms Heather Jones) - 15 May 2014
- Telethon Kids Institute (Dr R Mutch, Dr H Passmore, Dr C Bower, N Kippin and S Hamilton) - 9 March 2020
- The Humanitarian Group - 28 September 2016 and 13 February 2017
- The Law Society of Western Australia - 23 November 2017 and 17 June 2020
- The University of Notre Dame Australia - 25 May 2017
- VisAbility (formerly the Association for the Blind) - 12 December 2018
- Western Australian Bar Association (Inc.) - 13 December 2017
- Western Australian Council of Social Service (WACOSS) - 17 February 2020

- Women's Council for Domestic and Family Violence Services (WA) - 28 February 2020
- Women's Health and Family Services (incorporating the Multicultural Women's Advocacy and Support Service) - 29 September 2016 and 8 June 2020
- Youth Legal Service - 3 June 2020

Drafting, consultation and editing

Thanks are due to staff of the Department of Justice Strategic and Business Development division, Dr Jeannine Purdy and Ms Angela Milne for their work on the first and second editions of this Bench Book in consulting community members and stakeholders, undertaking research, drafting content and proofreading.

Steering Committees

Thanks are due to the following members of the Steering Committee overseeing the publication of the first edition of this Bench Book:

- the Hon Wayne Martin AC QC, former Chief Justice of Western Australia
- the late Hon Stephen Thackeray, former Chief Judge of the Family Court of Western Australia
- the Hon Justice Robert Mazza, Justice of Appeal, Supreme Court
- Mr Michael Barker, former President of the State Administrative Tribunal
- Judge Susan Duncanson, Family Court of Western Australia
- Mr Denis Reynolds, former President of the Children's Court
- Ms Judy Eckert, former Judge of the District Court
- Mr Steven Heath, Chief Magistrate
- Ms Libby Woods, Deputy Chief Magistrate
- Mr Alastair Hope, former Coroner
- Ms Yvonne Henderson, former Commissioner for Equal Opportunity
- Mr Gavan Jones, former Director, Higher Courts, Court and Tribunal Services
- Dr Jeannine Purdy, former Senior Legal Research Officer, Chief Justice's Chambers
- Dr Philip Jamieson, former Research Assistant, Chief Justice's Chambers
- Mr Neville Jones, former Principal Project Manager, Court and Tribunal Services
- Ms Andrea Walsh, former Principal Project Manager, Court and Tribunal Services
- Ms Kathy Lazaridis, former Principal Project Manager, Court and Tribunal Services

- Ms Helen Thomas, former Manager, Policy and Review, Court and Tribunal Services

Thanks are due to following members of the Steering Committee overseeing the revision of this Bench Book:

- the Hon Justice Peter Quinlan, Chief Justice of Western Australia
- the Hon Justice Jeremy Curthoys, Supreme Court
- Chief Judge Julie Wager, District Court
- Former Chief Judge Kevin Sleight, District Court
- Mr Stephen Vose, Magistrate, Children's Court
- Ms Ros Fogliani, State Coroner
- Mr Allan Macdonald, Senior Legal Officer, Equal Opportunity Commission
- Ms Angela Milne, Senior Legal Research Officer, Chief Justice's Chambers
- Mr Terry McAdam, A/Principal Project Manager, Strategic Business Development
- Mr Travis Lang, former Project Officer, Projects Team, Strategic Business Development Services
- Ms Michelle Kirwan, former Project Officer, Projects Team, Strategic Business Development Services
- Ms Lorrie Griffin, Online Services Administrator, Department of the Attorney General

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