



SUPREME COURT  
OF QUEENSLAND

# EQUAL TREATMENT BENCHBOOK

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**SUPREME COURT  
OF QUEENSLAND**

**EQUAL TREATMENT BENCHBOOK**

Supreme Court of Queensland

Second Edition

 SUPREME COURT  
LIBRARY QUEENSLAND

Supreme Court of Queensland

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**FOREWORD TO THE SECOND EDITION BY THE HON CATHERINE  
HOLMES, CHIEF JUSTICE OF QUEENSLAND**

Over a decade has passed since the first edition of the Equal Treatment Benchbook, the product of the work of Justices Atkinson and Philip McMurdo, was published. It entailed an impressive integration of information into a form which was readily usable by judges and tribunal members and was, in addition, helpful to legal practitioners and members of the public. The make-up of society, relevant information and research and statutory and case law, are not, however, static; hence the need for a new edition which accommodates the changes of the intervening years.

The second edition maintains the clear and accessible structure of the first, while reflecting those changes. It is a compendium of references to relevant legislation, case law, research and useful resources. As a tool for judicial officers confronting the difficulties of providing fairness to those from backgrounds which are unfamiliar or simply not well understood, it is invaluable. It explains, provokes thought and offers suggestions.

The Benchbook will continue to serve its purpose of aiding in the delivery of equal justice to all. The editors, Justices Atkinson, Boddice and Henry JJ, are to be congratulated, as are their many industrious assistants in the work.

**The Hon Catherine Holmes**

Chief Justice

**FOREWORD TO THE FIRST EDITION BY THE HON P DE JERSEY AC,  
FORMER CHIEF JUSTICE OF QUEENSLAND**

The publication of this benchbook is a conspicuous demonstration of the commitment of Queensland Courts to contemporary relevance. The project dates from the resolution of a Supreme Court Judges' meeting on 13 May 2003.

We rightly speak often, if sometimes a little austerely, of our judicial commitment to deliver justice "according to law". The compilation in the year 2003 of our other benchbook, the criminal court benchbook, facilitates our discharge of that mission in the criminal jurisdiction.

That commitment to the law as the constraining, indeed controlling, consideration must not neuter the judge or magistrate out of a lively perception of the importance of attendant circumstances, like presentation in the courtroom, the demeanour of the presiding officer, treatment of other participants – parties, witnesses, legal representatives, court staff – and the play of basic considerations like respect, dignity and even – dare I suggest – friendliness and cordiality.

By this benchbook, we confront a truly fundamental consideration. Doing so bespeaks determination to secure it. The comprehensiveness of the work evidences the complexity of some modern situations.

Equal treatment of participants in court proceedings is fundamental to the judicial role. The prospect of differential treatment – whether of litigants, lawyers or witnesses – is repugnant. All judges and magistrates, commissioners and tribunal members, would strive to avoid it. A risk, however, is that even a conscientious approach may not these days pick up the subtleties of a particular situation.

No judicial officer or tribunal member could be expected, absent a work of this character, to comprehend all those subtleties, or necessarily recognise an instance of them.

It will therefore be extremely helpful to have the benchbook readily available. It will be available in hard copy (published commendably by the Supreme Court Library Committee) and on the courts' webpage ([www.courts.qld.gov.au](http://www.courts.qld.gov.au)). It will thereby be accessible to courts and tribunals, the legal profession, litigants and witnesses, and the general public.

I thank all involved in the production of the benchbook, with special mention of Justices Atkinson and Philip McMurdo, who coordinated the project.

Not always does a book repay reading from beginning to end. Having carried out that exercise here, I am now much better informed and equipped to deal sensitively with the situations which inevitable arise. I commend the publication to all judicial officers in the State

**The Hon P de Jersey AC**

Chief Justice

## **ACKNOWLEDGEMENTS**

### **FIRST EDITION**

The editors of the Benchbook, Atkinson and P McMurdo JJ, would like to acknowledge the contribution to the Equal Treatment Benchbook of many people and organisations including, but not limited to, Philippa Ahern, Susan Anderson, Abhay Awasthi (Hindu Foundation), Lorraine Blanco, Andrew Boe, Susan Booth (Anti-Discrimination Commission, Queensland), Kim Buckle, Anna Cappellano, Kevin Cocks (Queensland Advocacy Incorporated), Lauren Coman, Dr Michael Comas (Hindu Council of Australia), various officers of the Department of Aboriginal and Torres Strait Islander Policy including Marjorie Weber, Emma Ogilvie and Karen Pringle, Dharmachari Vikaca (Brisbane Buddhist Group), the Federation of Aboriginal and Torres Strait Islander Languages, Christine Figg, Andrew Fraser, Melissa Gilbert, Rodney Goodbun (Queensland AIDS Council), David Groth, Neil Hansen, Deborah Hubbard, Abdul Jalal (Islamic Council of Queensland), Max Leskiewicz, Maree Liesemann, Katy Lin, Erin Longbottom, Ann Lyons (Guardianship and Administration Tribunal), Stephen Maguire (Office of Multicultural Affairs, Queensland), Kathy Mandla (Office of Women), Dr Paul Mazerolle (Crime and Misconduct Commission), John Mayo and Leonie Petersen (Paraplegic and Quadriplegic Association of Queensland), David Paratz (Queensland Jewish Board of Deputies), Dr Rob Pensalfini (University of Queensland), all members of the Police Ethnic Advisory Group, the Queensland Aboriginal and Torres Strait Islander Legal Services Secretariat Limited, Paula Rogers, Professor Sarva-Daman Singh, Uri Themal, Shih-Ning Then, Oanh Thi Tran, Serge Voloschenko (Ethnic Communities Council of Queensland), Julie Weston-Scheuber, Anne Wallace (Australian Institute of Judicial Administration), Sue Weller, Tony Woodyatt (QPILCH), Yi Zhao, and Rebecca Cook and Aladin Rahemtula of the Supreme Court Library.

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### **SECOND EDITION**

The editors of the Benchbook, Atkinson, Boddice and Henry JJ, would like to acknowledge the contribution to the Equal Treatment Benchbook of all those mentioned above, as well as the following persons who assisted in this update: Thomas Ambrose, Holly Baxter, Rachel Boivin, Mindy Booker, Emily Chalk, Courtney Coyne, Jessica Dale, Denika Dublanc, Sarah Fouhy, Ben Grant, Michelle Guy, Georgina Horsburgh, Alice Husband, Timothy Lee, Claire Leyden-Duval, Ailsa McKeon, Alicia McPherson, Andrea Noble, Gabriel Perry, Emily Vale and Jenae Webb.

## CHAPTER 1: JUSTICE AND EQUALITY

### I INTRODUCTION

This book is intended to provide judges and lawyers with information that may be of assistance in the conduct of individual cases. While this book has been compiled by judges of the Supreme Court, it has been prepared with a view to sharing information among all judges so that, where possible, judges can manage matters before them in a way that is fair to all litigants and other participants, irrespective of their circumstances.

Nothing contained in this book should be taken as reflecting the opinion of any particular judge or even of the majority of judges. To do so would be inconsistent with the stated aims of this book. Likewise, where this book suggests ways in which the effects of a particular vulnerability or disadvantage might be alleviated, it cannot be taken as an indication that any judge considers a particular course of action is appropriate in any individual case. It remains for the presiding judge, informed by this book, to determine and take any action necessary.

Whether a judge adopts any remedial measure, whether identified in this book or otherwise, will depend on all of the circumstances of the case. In deciding whether, or how, any particular need can be accommodated, the judge must necessarily balance the interests of all participants involved in a case and not just the person with a particular, identified vulnerability or disadvantage.

This book is not a research paper. It does not purport to be a comprehensive analysis of the complex social and cultural issues with which it deals. It does not – and could not – purport to cover all possible areas of vulnerability or disadvantage. The book's purpose is to provide information and background knowledge so that judges are alert to circumstances which, if overlooked, could result in real or perceived injustice.

Lord Irvine of Lairg, former Lord Chancellor of England and Wales, summarised the position as follows:

Judges wield huge power over the rest of society. We therefore have a special responsibility to ensure that there can be no possible reason to think us prejudiced and this entails a positive responsibility to demonstrate our fairness.<sup>1</sup>

Every judge aims to do justice and to treat every person who comes before the court fairly and equally with others. No judge would consciously prefer or prejudice a litigant or a party because of that person's ethnic origin, race, religion, sex or disability, for example. Judges are conscious that their duty is to do justice according to law, and not according to their own beliefs as to whether any group is deserving of some particular social or economic advancement.

The equal treatment of all persons, regardless of any particular characteristics, is assisted by an understanding of the differences between different groups. Unless judges have this understanding, there is the possibility that in some cases, the equal treatment of different persons before the court will not be achieved.

Judges need to be alert to racial and cultural diversity, and to the particular problems affecting some groups as they encounter the justice system, in order to reduce the risk

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<sup>1</sup> Judicial Studies Board (UK), *Equal Treatment Bench Book* (1<sup>st</sup> ed, 2004) [1.1.1] <[http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB\\_all\\_chapters\\_final.pdf](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf)>.

of unequal treatment of litigants or witnesses. Knowledge of these factors also reduces the risk of perceived inequality, which in itself is damaging to the administration of justice.

These matters are integral to the judicial process. As the Judicial Studies Board (UK) has said:

The quality of judicial decision making is crucial. Neutral application of legal rules is fundamental to high-quality judicial decision making. Decisions based on erroneous perceptions, interpretation or understanding may lead to faulty decisions and thus to substantive unfairness. Inappropriate language and behaviour is likely to give offence and result in a perception of unfairness, even if there is no substantive unfairness. This leads to a loss of authority and, importantly, loss of confidence in the judicial or tribunal system. Perceptions are important.

The judge or tribunal chair is manager of the hearing and should ensure that everyone who appears before the court or tribunal (or is entitled to appear but does not) has a fair hearing. This involves identifying the difficulties experienced by any party, whether due to lack of representation, ethnic origin, disability, gender, sexual orientation or any other cause, and finding ways to facilitate their passage through the court or tribunal process.<sup>2</sup>

## II PERCEPTIONS OF JUSTICE

As judges, we are conscious of the need not only for justice to be done, but to be seen to be done. Some perceptions of injustice are unavoidable because they are so unreasonable that no level of justice could satisfy some persons that they have received equal treatment.

Nonetheless, these perceptions of inequality can be reduced to some extent by knowledge of what causes them. Again, this does not require a judge to apply a different law or legal standard according to a person's race, gender, impairment, cultural or economic background or any other attributes. Nonetheless, the assessment of where the truth lies in a particular case can require some understanding of the habits, manners and customs of groups to which particular individuals involved in the case belong. One of the aims of this book is to dispel any perception that judges of this court do not have that understanding.

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<sup>2</sup> Ibid.

## CHAPTER 2: ETHNIC, RELIGIOUS, SPIRITUAL AND LINGUISTIC DIVERSITY

### I INTRODUCTION

As a modern nation, Australia is comprised of both the original inhabitants of this land, the Aboriginal and Torres Strait Islander peoples, and a rich mix of immigrants from across the globe. All of these groups have their own systems of belief, languages, cultural traditions and ways of life which interplay with and influence one another to create a diverse contemporary society. This Chapter will provide a statistical outline of Queensland society today, which is itself as varied as that of the nation as a whole.

### II ETHNIC DIVERSITY

#### A *Ethnic Diversity in Australia and Queensland*

Australia is a highly ethnically-diverse country. In all, Australians come from over 200 birth countries.<sup>1</sup> According to the Australian Bureau of Statistics:

- 5.3 million people, or 27% of Australia's population, are first-generation Australians (people living in Australia who were born overseas);
- 4.1 million people, or 20% of Australia's population, are second-generation Australians (people living in Australia who were born in Australia but have at least one overseas-born parent);
- 10.6 million people, or 53% of Australia's population, are third-plus generation Australians (people living in Australia who were born in Australia and whose parents were both born in Australia).<sup>2</sup>

In November 2013, the Australian population aged 15 years and above was 18.3 million people, 5.8 million (31.7%) of which were born in a country other than Australia.<sup>3</sup> However, Australia's ethnic diversity is concentrated in suburban areas (especially in Sydney and Melbourne);<sup>4</sup> On the basis of Census respondents' places of birth, Queensland appears marginally less ethnically diverse than New South Wales and Victoria.<sup>5</sup>

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<sup>1</sup> Racism No Way, *About Racism* (2013) NSW Government, Education and Communities <<http://www.racismnoway.com.au/about-racism/population/>>.

<sup>2</sup> Australian Bureau of Statistics, *2011.0 – Reflecting a Nation: Stories from the 2011 Census, 2012-2013 – Cultural Diversity in Australia* (16 April 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2011.0main+features902012-2013>>.

<sup>3</sup> Australian Bureau of Statistics, *6250.0 Characteristics of Recent Migrants, Australia, 2013 – Overview* (17 July 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6250.0>>.

<sup>4</sup> Bob Birrell, *Like It or Not, We're More Diverse Than Ever This Australia Day* (26 January 2012) The Conversation <<http://theconversation.com/like-it-or-not-were-more-diverse-than-ever-this-australia-day-5040>>.

<sup>5</sup> Compare Australian Bureau of Statistics, *2011 Census Quick Stats – Queensland – People* (28 March 2013), *2011 Census Quick Stats – New South Wales – People* (28 March 2013) and *2011 Census Quick Stats – Victoria – People* (28 March 2013) <<http://www.abs.gov.au/websitedbs/censushome.nsf/home/data?opendocument&navpos=200>>.

**B Birthplace**

Approximately 30.2% of Australians have a birthplace outside Australia; similarly, 26.3% of Queenslanders were born in a country other than Australia. The most common countries of birth outside Australia as at the last Census date were New Zealand, England, South Africa, India and the Philippines.

*Table 1: Ethnic Diversity in Australia and Queensland Based on Country of Birth<sup>6</sup>*

Country of birth	Australia	%	Queensland	%
<b>Australia</b>	15,017,847	69.8	3,192,114	73.7
<b>New Zealand</b>	483,398	2.2	192,036	4.4
<b>England</b>	911,593	4.2	179,496	4.1
<b>South Africa</b>	145,683	0.7	35,549	0.8
<b>India</b>	295,362	1.4	30,260	0.7
<b>Philippines</b>	171,234	0.8	29,463	0.7

**C Parental Birthplace**

More than one third (34.35%) of Australians' parents both have a birthplace other than Australia; similarly, 26.3% of Queenslanders' parents were both born in a country other than Australia. About one-tenth (11.9%) of Australians have one parent with a birthplace other than Australia and slightly more (12.2%) of Queenslanders have one parent who was born in a country other than Australia. The majority of both Australians (53.7%) and Queenslanders (61.4%) reported that both of their parents had been born in Australia.

*Table 2: Birthplace of Parents in Australia and Queensland<sup>7</sup>*

Parental birthplace	Australia	%	Queensland	%
Both parents born overseas	6,876,586	34.3	1,057,879	26.3
Father only born overseas	1,407,270	7.0	282,588	7.0
Mother only born overseas	989,220	4.9	210,570	5.2
Both parents born in Australia	10,757,087	53.7	2,471,958	61.4

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<sup>6</sup> Australian Bureau of Statistics, *2011 Census Quick Stats – Queensland – People* (28 March 2013) <[http://www.censusdata.abs.gov.au/census\\_services/getproduct/census/2011/quickstat/3?opendocument&navpos=220](http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/3?opendocument&navpos=220)>.

<sup>7</sup> Ibid.

D *Aboriginal and Torres Strait Islander Persons*

Approximately 3% of the Australian population self-identifies as Aboriginal or Torres Strait Islander.<sup>8</sup> Queensland has the second greatest Aboriginal and Torres Strait Islander population of all Australian States and Territories, numbering approximately 189,000 (4.2% of the total Queensland population). However, in terms of relative proportions of the population, Queensland falls far behind the Northern Territory, which at almost 30% has the highest proportion of Aboriginal or Torres Strait Islander residents of any State or Territory.<sup>9</sup>

III RELIGIOUS AND SPIRITUAL DIVERSITY

A *Religious and Spiritual Diversity in Australia and Queensland*

Australia is a country of great religious and spiritual diversity as well. Since the first post-federation census in 1911, the majority of Australians have reported an affiliation with a Christian religion. However, in the period between that first census in 1911 and the most recent census in 2011, there has been a trend away from reporting affiliation with Christian religions and towards reporting 'No Religion'. In 1911, 96% of respondents reported an affiliation with a Christian religion. By 2011, only 61% of respondents reported an affiliation with a Christian religion.<sup>10</sup>

Table 3: *Religious and Spiritual Diversity in Australia and Queensland*<sup>11</sup>

Religion	Australia	Queensland
Catholic	25.3%	23.8%
No religion	22.3%	22.1%
Anglican	17.1%	18.9%
Uniting Church	5.0%	6.4%
Presbyterian and Reformed	2.8%	3.5%

IV LINGUISTIC DIVERSITY

Australia is a moderately linguistically diverse country and Queensland is marginally less linguistically diverse than other States and Territories. In Queensland, 84.8% of people only speak English at home and 11.9% speak two or more languages at home (see Table 4 below).

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<sup>8</sup> Australian Bureau of Statistics, *3238.0.55.001 Estimates of Aboriginal and Torres Strait Islander Australians, June 2011* (14 November 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>>.

<sup>9</sup> Ibid.

<sup>10</sup> Australian Bureau of Statistics, *2071.0 Reflecting a Nation: Stories from the 2011 Census* (16 April 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/lookup/2071.0main+features902012-2013>>.

<sup>11</sup> Ibid.

Table 4: Languages Spoken at Home in Australia and Queensland<sup>12</sup>

Language spoken at home	Australia	Queensland
English only	76.8%	84.8%
At least two languages	20.4%	11.9%
Mandarin	1.6%	0.9%
Italian	1.4%	0.5%
Cantonese	1.2%	0.5%
Vietnamese	1.1%	0.5%
German	0.4%	0.4%

#### A Aboriginal and Torres Strait Islanders Linguistic Diversity

There are many Aboriginal and Torres Strait Islander communities in Australia, a number of which speak their own languages.<sup>13</sup> These languages are complex and diverse, with intricate grammars and extensive vocabularies.

### V CONCLUSION

The foregoing has provided an overview of the composition of Queensland society today. Much of the remainder of this book will set out the manner in which diversity may affect and be accommodated in court processes.

Beliefs and practices of major religions in Queensland will be described in Chapter 3. Chapter 5 addresses oaths (which may vary according to religious belief) and affirmations (as are appropriate when an individual objects to being, or cannot practicably be, sworn according to religious belief).

Ethnic and cultural diversity is a thread which runs throughout much of this book. Indeed, this may be considered to provide a backdrop to the discussions of religion, the practice of which often demonstrates regional variation. Aspects of Aboriginal and Torres Strait Islander culture are considered in some depth in Chapters 7, 8 and 9. The interactions of Aboriginal and Torres Strait Islander people with the criminal justice system is dealt with specifically in Chapter 10, in light of their considerable overrepresentation.

Similarly, linguistic diversity is considered at various points throughout this book. Effective communication in court proceedings is addressed substantively in Chapter 6. It is also discussed in the particular contexts of Aboriginal and Torres Strait Islander people, persons with disability and children in Chapters 9, 11 and 13 respectively. The use of interpreters is raised in several of these chapters as well.

Although this book is broken up into chapters based on particular characteristics, it is important to remember that many people's experiences of disadvantage or vulnerability

<sup>12</sup> Ibid.

<sup>13</sup> For a map of Aboriginal languages spoken in Australia, see David R Horton, *Aboriginal Australia Map*, Australian Institute of Aboriginal and Torres Strait Islander Studies  
<<http://www.aiatsis.gov.au/explore/culture/topic/aboriginal-australia-map>>.

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are cross-sectional and that other factors may also come into play throughout the court process.

## CHAPTER 3: RELIGIONS IN QUEENSLAND

### I INTRODUCTION

As at the last Census, 64.28% of Queensland's population identified with a Christian denomination.<sup>1</sup> The second largest group described in the 2011 Census said they had no religious identification.<sup>2</sup> Buddhism makes up the second largest religious group in Queensland with 65,941 followers, followed by Islam, with 34,047 followers; Hinduism, with 28,641 followers; Sikhism, with 9,428 followers, and Judaism, with 4,442 followers.<sup>3</sup> Given the predominance of Christian traditions and their influence on the development of Anglo-Australian law, a sufficient level of knowledge and understanding of Christianity amongst the judiciary is assumed. This chapter therefore provides information about religious beliefs and practices less common than Christianity as a whole.

The relationship between ethnicity and religion is quite complex. Ethnic groups are often multi-religious and assumptions cannot be made about a person's religion because of their ethnicity. For example, Vietnamese Australians may often be Christian, Buddhist or members of other belief systems. Indians may commonly be Hindus, Muslims, Sikhs or Christians. Religious practice is often not confined to a single ethnic community. For example, Muslims may be of Indonesian, Iranian, Iraqi, Bosnian, Pakistani, Indian, Malaysian, Somali or Turkish descent, to name but a few. There is also diversity within religious groups, which may reflect cultural factors or doctrinal divergence. It is important not to make assumptions or stereotype. It is, however, useful to have a broad overview of different belief systems.

### II RELIGION IN AUSTRALIA AND QUEENSLAND

#### A *Buddhism*

Buddhism has a long history in Queensland, the first permanent Buddhist community in Australia having settled in this State. The community was established in the 1870s by Sinhalese migrants from Sri Lanka who came to work on sugar cane farms and in the Thursday Island pearling industry. By the 1890s, the 500-strong Thursday Island community had built a temple to celebrate Buddhist festivals and accommodate visiting monks.<sup>4</sup> The presence of Buddhists in Australia has increased substantially from these roots: as at the 2011 Census, 2.5% of the Australian population (529,000 people) identified an affiliation with Buddhism.<sup>5</sup>

Buddhism has diverged since its founding into three main traditions. These are *Theravada*, with roots in Sri Lanka and Southeast Asia (Thailand, Laos, Myanmar/Burma and Cambodia); *Mahayana*, which is prevalent in China, Japan, Korea, Taiwan, India

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<sup>1</sup> A total of 2,785,084 persons identify with 16 named churches, and other unnamed Protestant and other Christian denominations: see Australian Bureau of Statistics, *2011 Census Community Profiles – Queensland – Basic Community Profile* (28 March 2013) <[http://www.censusdata.abs.gov.au/census\\_services/getproduct/census/2011/communityprofile/3?opendocument&navpos=220](http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/communityprofile/3?opendocument&navpos=220)>.

<sup>2</sup> 955,783 persons, or 22.06% of the population: *ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Racism – No Way, *Fact Sheets: An Introduction to Buddhism in Australia* (c. 2015) NSW Government, Education and Communities <http://www.racismnoway.com.au/teaching-resources/factsheets/25.html> ('Racism – No Way (Buddhism)').

<sup>5</sup> *Ibid.*

and Vietnam; and *Vajrayana*, which derives from Bhutan, Mongolia and Tibet, and which is led by the Dalai Lama.<sup>6</sup>

An individual may follow a Buddhist tradition having been born into it or by making the choice to follow it; heredity plays no role as such. Adherents are sometimes divided into 'ethnic' Buddhists, comprising those who were born into a Buddhist family of Asian descent, and 'Western' or 'new' Buddhists, being those who have converted.<sup>7</sup> Most Buddhists in Australia belong to the first group.<sup>8</sup> Buddhism is not theistic; it may be considered a religion or a form of spirituality,<sup>9</sup> but regardless of which, it represents a belief system that shapes the way individuals live their lives.

As the foregoing suggests, there is great diversity within Buddhism. However, the various schools are in agreement regarding the key beliefs and practices outlined below.<sup>10</sup>

### 1 *Key Beliefs and Practices*

Buddhism speaks of Four Noble Truths:

1. that there is suffering;
2. that suffering has a cause;
3. that suffering has an end; and
4. that there is a path that leads to the end of suffering.<sup>11</sup>

The Eightfold Noble Path is a guide to living a Buddhist life.<sup>12</sup> It requires wisdom, morality and concentration. All aspects of a Buddhist's life are to be led with these tenets in mind. Wisdom requires understanding and thoughtfulness in relation to the Buddha's teaching. Morality requires ethical behaviour in speech, action and choice of vocation/work. Concentration recognises that leading a Buddhist life requires effort and mindfulness in all activities and in relation to all living creatures.<sup>13</sup>

With regard to particular practices, Buddhist vegetarianism is based on a respect for life in all its forms, however being vegetarian is not necessarily a requirement of Buddhism

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<sup>6</sup> Ibid; Australia New Zealand Policing Advisory Agency, *A Practical Reference to Religious and Spiritual Diversity for Operational Police* (3<sup>rd</sup> ed, 2010) 24

<<http://www.iawp.org/diversity/pdfdoc/ANZPAARelandSpirDiverRef3rd.pdf>> ('ANZPAA Practical Reference').

<sup>7</sup> Email from Dharmachari Vikaca (Brisbane Buddhist Group) to Paula Rogers, 25 June 2003; David Torevell, 'Buddhism' in Ian Markham and Tinu Ruparell (eds), *Encountering Religion: An Introduction to the Religions of the World* (Blackwell Publishers, 2001) 190, 209-13; James William Coleman, *The New Buddhism: The Western Transformation of an Ancient Tradition* (Oxford University Press, 2001) <[http://ahandfulofleaves.org/documents/The%20New%20Buddhism%20The%20Western%20Transformation%20of%20an%20Ancient%20Tradition\\_Coleman.pdf](http://ahandfulofleaves.org/documents/The%20New%20Buddhism%20The%20Western%20Transformation%20of%20an%20Ancient%20Tradition_Coleman.pdf)>.

<sup>8</sup> Racism – No Way (Buddhism), above n 4.

<sup>9</sup> ANZPAA Practical Reference, above n 6, 24.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Torevell, above n 7, 196-7.

<sup>13</sup> Mary Fisher, *Living Religions* (Prentice-Hall, 5<sup>th</sup> ed, 2002) 141, 150-2.

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and is left to the discretion of the individual. Buddhists also tend to avoid the consumption of alcohol.<sup>14</sup>

Meditation is another key practice that evinces wisdom and concentration.<sup>15</sup> Early mornings and evenings are the most common times for Buddhists to practise meditation.<sup>16</sup>

### 2 *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.<sup>17</sup> There is, as such, no specific Buddhist holy text. However, one of the most popular canonical texts is known as the *Dhammapada*, which traces its origins to the first centuries of the Common Era and has been variously translated throughout history.<sup>18</sup> It comprises part of the much larger Pali Canon, known in the Pali language as the *Tipitaka*.<sup>19</sup> *Dhamma* (Pali) or *dharma* (Sanskrit) itself signifies "the Buddha's teaching".<sup>20</sup>

### 3 *Forms of Worship and Festivals*

Many Buddhist temples hold regular weekly services and additional services related to festivals. The main Buddhist festival is *Vesak*, also known as Buddha Day or Thrice Blessed Day. The festival lasts three days and celebrates the Buddha's birth, enlightenment and death.<sup>21</sup> The date of this festival varies depending on the culture, but traditionally, it is held around the full moon in May (in accordance with a lunar calendar).<sup>22</sup> Other important dates generally celebrate events in the Buddha's life or honour certain of those who have attained enlightenment, known as *Bodhisattvas*.<sup>23</sup>

### 4 *Appearance before the Court*

Bowing, as a way of showing honour and respect, is common among Buddhists, particularly nuns and monks. Clasped hands in a prayer-like gesture often accompany a bow.<sup>24</sup> Bowing in court is therefore unlikely to be problematic.

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<sup>14</sup> ANZPAA Practical Reference, above n 6, 25.

<sup>15</sup> Torevell, above n 7, 202.

<sup>16</sup> ANZPAA Practical Reference, above n 6, 24.

<sup>17</sup> See generally, Donald Lopez, *Buddhist Scriptures* (2007) 'Introduction: Digesting the Dharma' and 'A Brief History of Buddhist Scriptures'.

<sup>18</sup> John Ross Carter and Mahinda Palihawadana, *The Dhammapada: The Sayings of the Buddha* (Oxford University Press, 2000) xi.

<sup>19</sup> Valerie J Roebuck, *The Dhammapada* (Penguin Classics, 2010) 'Introduction', 'The Language of the *Dhammapada*', 'The Pali Canon'.

<sup>20</sup> Carter and Palihawadana, above n 18, xi.

<sup>21</sup> ANZPAA Practical Reference, above n 6, 25; Racism – No Way (Buddhism), above n 4.

<sup>22</sup> ANZPAA Practical Reference, above n 6, 25.

<sup>23</sup> Racism – No Way (Buddhism), above n 4.

<sup>24</sup> ANZPAA Practical Reference, above n 6, 27; New Zealand Police, *A Practical Reference to Religious Diversity* (New Zealand Police Maori Pacific Ethnic Services, 2005) 14

<<https://www.police.govt.nz/resources/2005/religious-diversity/religious-diversity.pdf>>.

For religious reasons, monks and nuns from Cambodia, Sri Lanka, Thailand, Burma and Vietnam may not directly look at a member of the opposite sex.<sup>25</sup> This may, for example, give rise to misconceptions as to a witness's truthfulness. This is an issues that is addressed specifically with respect to similar cultural practices in Chapter 6.

### B *Islam*

According to the Forum on Australia's Islamic Relations, "The Arabic word 'Islam' means 'submission' and is derived from a word meaning 'peace'. In a religious context, it means complete submission to the will of God" and covers "every aspect of life, including faith, family, peace, love and work."<sup>26</sup> "Allah' is the Arabic name for God, which is used by Arab Christians and Muslims alike."<sup>27</sup>

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.<sup>28</sup> According to the 2011 census, 476,000 people in Australia reported an affiliation with Islam, 62% of whom were born overseas<sup>29</sup>. Australian Muslims come from over 70 different countries and are therefore very ethnically and culturally diverse.<sup>30</sup>

The two main branches of Islam are *Shi'a* and *Sunni*. The distinction between the two groups relates to differing beliefs on succession from Muhammad, the prophet and founder of the faith; that is, who is to be the leader of the Muslim community (the Imam). The Shi'ites believe that the leader must be a descendant of Muhammad himself, whereas the Sunnis elect their leader.<sup>31</sup> The majority of Muslims are Sunnis.<sup>32</sup>

There is another branch, known as *Sufism*, which is a transcendental, esoteric form of Islam. Sufis emphasise the inner element of faith, rather than its outward practices and do not necessarily consider themselves a separate group of Muslims.<sup>33</sup>

#### 1 *Key Beliefs and Practices*

According to the Forum on Australia's Islamic Relations:<sup>34</sup>

Muslims believe in One, Omnipotent, Compassionate, Beneficent and Indivisible God (Allah). Muslims believe in the Angels created by God; in

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<sup>25</sup> New Zealand Police, above n 24, 16.

<sup>26</sup> *Appreciating Islam* (c. 2013) <<http://fair.org.au/islamarama/appreciating-islam/>>. See also Alford Welch, 'Islam' in John Hinnells (ed), *A New Handbook of Living Religions* (Penguin, 2<sup>nd</sup> ed, 1998) 162, 162-235.

<sup>27</sup> Forum on Australia's Islamic Relations, above n 26.

<sup>28</sup> *Ibid.*

<sup>29</sup> Racism – No Way, *Fact Sheets: An Introduction to Islam in Australia* (c. 2015) NSW Government, Education and Communities <<http://www.racismnoway.com.au/teaching-resources/factsheets/26.html>> ('Racism – No Way (Islam)').

<sup>30</sup> *Ibid.*

<sup>31</sup> Victoria La'Porte, 'Islam' in Ian Markham and Tinu Ruparell (eds), *Encountering Religion: An Introduction to the Religions of the World* (Blackwell Publishers, 2001) 337, 340-1.

<sup>32</sup> Welch, above n 26, 162, 178.

<sup>33</sup> See also La'Porte, above n 31, 344; Fisher, above n 13, 377-81.

<sup>34</sup> Above n 26.

the Prophets through whom His revelations were sent to humankind; in the Day of Judgement when existence as we know it will end; in the hereafter and the notion of humankind's fate or destiny.<sup>35</sup> Muslims are guided by the teachings of the Holy Qur'an and the sayings or traditions of Prophet Muhammad (peace be upon him). Islam is essentially about doing what is good for fellow human beings, regardless of their faith or race. Islam is about love and service to Allah and His creations. It is incumbent on all Muslims to seek knowledge and improve his or her condition. Muslims follow their religion both spiritually and in practice.<sup>36</sup>

### 2 Holy Books and Scriptures

"The Holy Quran 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...".<sup>37</sup> It is considered the unaltered and unalterable word of Allah.<sup>38</sup>

*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).<sup>39</sup> Islamic law is therefore considered divine rather than man-made.<sup>40</sup> 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.<sup>41</sup> *Sharia* may be divided into the categories of rules governing individuals' relationships with Allah (*ibadat*) and those detailing interpersonal relations (*muamalat*).<sup>42</sup>

The law according to Islam is expressed by Allah as revealed in the Qur'an<sup>43</sup> and is interpreted from scripture by religious scholars (*ulama*).<sup>44</sup> There are five major schools (s. *madhabs*, pl. *madhabib*) of Islamic legal scholarship or jurisprudence (*fiqh*).<sup>45</sup> The Sunni majority Muslim population adhere to any one of four (*Maliki, Hanafi, Hanbali, Shafii*), while the minority *Shia* population adhere to their own.<sup>46</sup> Much of this interpretation is ancient, having first been consolidated around the 900 CE.<sup>47</sup>

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

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<sup>35</sup> See also Welch, above n 26, 172.

<sup>36</sup> Ibid 162.

<sup>37</sup> Forum on Australia's Islamic Relations, above n 26.

<sup>38</sup> See Jamila Hussain, *Islam: Its Law and Society* (Federation Press, 2<sup>nd</sup> ed, 2004) 14-15, 31-2.

<sup>39</sup> Diane Morgan, *Essential Islam: A Comprehensive Guide to Belief and Practice* (Greenwood Publishing Group, 2010) 165.

<sup>40</sup> Ibid 168.

<sup>41</sup> Ibid 165-6, 168.

<sup>42</sup> Ibid 168.

<sup>43</sup> John L Esposito, *What Everyone Needs To Know about Islam* (Oxford University Press 2002) 166.

<sup>44</sup> Morgan, above n 39, 139.

<sup>45</sup> Ibid 168; Hussain, above n 38, 34-5.

<sup>46</sup> Hussain, above n 38, 34-6.

<sup>47</sup> Morgan, above n 39, 168.

analogy with existing rulings (*qiya*) also play a role, although with decreasing levels of significance respectively.<sup>48</sup>

### 3 *Forms of Worship and Festivals*

Five duties, known as the Five Pillars of Islam,<sup>49</sup> are regarded as central to the life of the Islamic community. The first duty is the profession of faith [*shahada*]: ‘There is no god worthy of worship except God and Muhammad is His messenger’.<sup>50</sup> The second duty is that of the five daily prayers (*salat*), said at dawn, noon, midafternoon, after sunset and before retiring. Prayers may be said anywhere that is clean but must be said facing Mecca. The third duty of a Muslim is to pay alms to the poor (*zakat*). The fourth duty is of fasting (*sawm*) during the month of Ramadan. The fifth duty is the pilgrimage to Mecca (*hajj*).<sup>51</sup>

There are two main festivals in Islam. The first festival is *Eid-al-Fitr* (also known as *Hari Raya Puasa* in South-East Asia), which falls at the end of ‘Ramadan’, or the month of fasting.<sup>52</sup> Ramadan is the ninth month on the lunar calendar. Fasting lasts for 29 to 30 days, from dawn until sunset. During this time, Muslims must abstain from eating, drinking, smoking and having sexual relations.<sup>53</sup>

The second festival is the *Eid ul-Adha* (or *Hari Raya Korban*) which commemorates the sacrificing of a sheep by the prophet Ibrahim (Abraham). In Muslim countries, a goat, sheep or other animal is slaughtered symbolically and the meat shared amongst friends, neighbours and the poor, while in western countries, this obligation of charity is commonly discharged by the making of a financial donation to Muslims in need. Attendance at the mosque for prayers is also customary,<sup>54</sup> while *hajj* should also be taken at this time if possible.<sup>55</sup>

Friday is a holy day in which Muslims pray the weekly assigned (or legislated) special congregational prayer and a sermon is delivered by the Imam in the mosque.<sup>56</sup> It is compulsory for men to attend the mosque (*masjid*) on Friday for sermon and prayers, although despite this injunction, in non-Muslim countries like Australia, many men may not attend due to being unable to leave work for this purpose.<sup>57</sup> For women, attendance is optional and may be similarly restrained.<sup>58</sup> This should not be considered to indicate a lack of piety,<sup>59</sup> but rather, the demands of a society grounded in a different world view.

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<sup>48</sup> Ibid 168. See also Wael B Hallaq, *An Introduction to Islamic Law* (Cambridge University Press, 2009) 16.

<sup>49</sup> Welch, above n 26, 178; La’Porte, above n 31, 355.

<sup>50</sup> Forum on Australia’s Islamic Relations, above n 26.

<sup>51</sup> Ibid; see also Hussain, above n 38, 14-15.

<sup>52</sup> Hussain, above n 38, 17.

<sup>53</sup> Welch, above n 26, 192-3.

<sup>54</sup> Hussain, above n 38, 17.

<sup>55</sup> Ibid 15.

<sup>56</sup> Welch, above n 26, 187-91.

<sup>57</sup> Hussain, above n 38, 16, 210.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid 210.

#### 4 *Dietary Rules and Taboos*

The dietary code that Muslims observe forbids the consumption of certain animals and their products such as pork. Animals that may be consumed are sheep, cattle, poultry, camel and goat. Muslims may also eat seafood. According to the Forum on Australia's Islamic Relations, "Muslims are commanded to consume healthy and wholesome food and meats of animals on which the name of God has been taken (so that life is not taken in vain)". Food that fits these criteria is termed *halal*.<sup>60</sup>

Again according to the Forum on Australia's Islamic Relations,

Muslims cannot eat carrion but may eat that which is forbidden in extreme cases of a life threatening nature such as starvation. The Prophet taught that 'your body has rights over you', and the consumption of wholesome food and the leading of a healthy lifestyle are seen as religious obligation[s].<sup>61</sup>

This means not only approved foods but also the avoidance of "any toxins and the consumption of harmful products including drugs and alcohol."<sup>62</sup>

#### 5 *Dress Requirements*

Modesty of attire is required by Islam, however there is scope for interpretation within this. Some Muslims adopt traditional dress, while many choose to wear 'Western' dress.<sup>63</sup> It is not uncommon for Muslim women to cover their hair with a scarf (*hijab*) as it is accepted by almost all religious authorities that they should, however there are some Muslim communities in which this is not encouraged.<sup>64</sup> There is a wide spectrum of views about the degree to which it is mandatory for women's bodies to be fully covered and what this in fact entails, ranging from a belief that it is a religious obligation for all women to conceal the shape of their bodies, their heads and faces, to a belief that it is un-Islamic to veil women.<sup>65</sup> It is said that women are increasingly making the voluntary choice to wear the *hijab* at least, as a means of expressing their Islamic identity or beliefs, and also to dissuade sexual advances.<sup>66</sup> It is therefore important not to make assumptions about a woman's independence or level of religious belief based on her dress.

### C *Hinduism*<sup>67</sup>

Hinduism is a remarkably diverse religion. It has evolved in many ways in different communities across India over thousands of years. Hinduism is one of the oldest living religions in the world. Indeed, Hindus believe that their religion is cyclical – without

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<sup>60</sup> Forum on Australia's Islamic Relations, above n 26.

<sup>61</sup> *Ibid.*

<sup>62</sup> Hussain, above n 38, 4, 67.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> La'Porte, above n 31, 356-61.

<sup>66</sup> Hussain, above n 38, 68.

<sup>67</sup> Much of the following information about Hinduism is sourced from ANZPAA Practical Reference, above n 6, 35-41.

beginning or end – preceding the existence of this earth and the other worlds beyond.<sup>68</sup> For that reason, it is also known as *Sanatana Dharma*, the eternal religion.<sup>69</sup>

Hinduism is unusual as a religion, having “no founder, no central creed and no central administration or hierarchy of ministers.”<sup>70</sup> 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*, the law of cause and effect, and reincarnation.<sup>71</sup>

As a result of this diversity, Hindus accept that there may be many manifestations of the one universal god. Hindu religious belief and cultural life go hand in hand and, as such, there are many daily customs and rituals which remain important to a Hindu in Australia.<sup>72</sup>

### 1 Key Beliefs and Practices

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.<sup>73</sup> Pronouncing the syllable is said to engender a meditative awareness.<sup>74</sup> The symbol for “Om” is also said to contain the essence of creation of the universe and life within it.<sup>75</sup> It is considered the essential mantra (sounds that assist in spiritual transformation) and its chanting is part of Hindu spiritual meditative practice.<sup>76</sup>

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.<sup>77</sup>

The *Vedas* (discussed below) 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* (purity), *indriya nigraha* (control over the senses), *dhih* (intellect), *vidya*

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<sup>68</sup> Tinu Ruparell, ‘Hinduism’ in Ian Markham and Tinu Ruparell (eds), *Encountering Religion: An Introduction to the Religions of the World* (Blackwell Publishers, 2001) 163, 168-9.

<sup>69</sup> ANZPAA Practical Reference, above n 6, 36.

<sup>70</sup> Ibid; see also Simon Weightman, ‘Hinduism’ in John Hinnells (ed), *A New Handbook of Living Religions* (2<sup>nd</sup> ed, Penguin, 1998) 261, 261-309.

<sup>71</sup> Ruparell, above n 68, 169.

<sup>72</sup> ANZPAA Practical Reference, above n 6, 36.

<sup>73</sup> Ruparell, above n 68, 179.

<sup>74</sup> Micah Issitt and Carlyn Main, *Hidden Religion: The Greatest Mysteries and Symbols of the World’s Religious Beliefs* (ABC-CLIO, 2014) 157.

<sup>75</sup> Ibid 158.

<sup>76</sup> Ibid.

<sup>77</sup> *What is Hinduism? Modern Adventures into a Profound Global Faith* (Himalayan Academy Publications, 2007) 375, 376, 377.

(knowledge), *satyam* (truth) and *akrodhah* (absence of anger). Adherence to these principles is said to be essential to spiritual development.<sup>78</sup>

## 2 Holy Books and Scriptures<sup>79</sup>

There is no single holy book in Hinduism but rather there are several, of which the *Vedas* are the oldest.<sup>80</sup>

Most Hindu holy books are written in Sanskrit, an ancient language which is only spoken by scholars. ... The *Vedas* go back to 1200 BCE [although they] were not written down until about 1400 CE. Hindus believe that [these books] came from God and are the basic truths that will never change. Instructions about how Hindus should live their lives are contained in 2685 verses in the books of the *Laws of Manu* which were written down before 300CE.<sup>81</sup>

The epic narratives of the *Ramayana* and the *Mahabharata* (of which the *Bhagavad Gita* comprises eighteen chapters) are also significant texts in the Hindu canon.<sup>82</sup> The *Ramayana* is a story of the victory of Rama (an avatar of Vishnu), while the *Mahabharata* deals with the story of a war between two royal families and “provides guidance on moral living”.<sup>83</sup> The *Bhagavad Gita* is one of the most revered texts aside from the *Vedas*.<sup>84</sup> It comprises a dialogue between an incarnation of Vishnu and the Pandava warrior, Arjuna, before the commencement of a battle against Arjuna’s own kin.<sup>85</sup> The key message of the *Bhagavad Gita* is that “*dharma* [translated as duty, righteousness or ethics]<sup>86</sup> should be performed without expectation of reward but with devotion to one God” (in the context, of course, of the various manifestations of divinity in Hinduism).<sup>87</sup>

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<sup>78</sup> Stephen Knapp, *The Power of the Dharma: An Introduction to Hinduism and Vedic Culture* (iUniverse, 2006) 51-2.

<sup>79</sup> See generally Alex Smith, ‘Religion and Scripture: The Function of the Special Books of Religion’ in Ian Markham and Tinu Ruparell (eds), *Encountering Religion: An introduction to the Religions of the World* (Blackwell Publishers, 2001) 68, 82-5.

<sup>80</sup> David Simmonds, *Believers All: A Book of Six World Religions* (Thomas Nelson and Sons Ltd, 2<sup>nd</sup> ed, 1993) 86.

<sup>81</sup> Racism – No Way, *Fact Sheets: An Introduction to Hinduism in Australia* (2013) NSW Government, Education and Communities <<http://www.racismnoway.com.au/teaching-resources/factsheets/35.html>>. Note that CE stands for Common Era, so the abbreviations BC (Before Christ) and AD (Anno Domini) are replaced by BCE (Before the Common Era) and CE (the Common Era), to avoid the Christian connotations. The abbreviation CE always goes after the year, never before (i.e. 2004 CE is the same as AD 2004): *Macquarie Dictionary*.

<sup>82</sup> See Vasudha Narayanan, *Hinduism* (Rosen Publishing Group, 2010) 15.

<sup>83</sup> *Ibid* 41, 106.

<sup>84</sup> *Ibid* 41.

<sup>85</sup> *Ibid* 41-2.

<sup>86</sup> *Ibid* 57.

<sup>87</sup> *Ibid* 15.

### 3 *Forms of Worship and Festivals*

Many homes will have a shrine or special room with pictures or small statues for their worship. Often, a small oil lamp and incense are burnt before the deities' images.<sup>88</sup>

There are Hindu festivals almost every month. They are based on the lunar calendar and the dates vary from year to year. Although there are a number of other festivals specific to particular regions and cultures, the main Hindu festivals observed in Australia are as follows:

- February/March Sivarathiri (a night-long vigil)
- March/April Holi (a celebration of fertility and harvest)  
Hindu New Year  
Ram Naumi/Ram Navami (a celebration of the birth of Lord Rama, the incarnation of the god Vishnu)
- August birth of Krishna Janmashtami/Krishna Jayanti (a celebration of the birth of the god Krishna)
- August/September deity Ganesha Chaturthi/Ganesh Chaturthi/Vinayaka Chaturthi (a celebration of the birth of the elephant-headed Ganesha/Ganesh)
- September/October Navarathiri (a 10-day festival celebrating the goddess Durga)
- October/November Deepavali/Diwali (the Festival of Lights)<sup>89</sup>

Festivals are happy occasions. It is believed that group energy attracts the gods and overcomes evil.<sup>90</sup>

### 4 *Dietary Rules and Taboos*

As noted above, *ahimsa*, or non-violence, is a central tenet of Hinduism. This, along with the characterisation of certain foods according to their perceived effects on the consumer, has led to the predominance of vegetarianism amongst many Hindus.<sup>91</sup> Many Hindus in Australia, however, practise vegetarianism only during Hindu festivals, eating fish and other meat (except beef) on other days.

Hinduism forbids the eating of beef and this is strictly observed. There is also a prohibition on eating any food that has been prepared with utensils and cooking implements previously used in the cooking of beef.<sup>92</sup>

Fasting is common in Hinduism, being "performed in virtually every arena of Hindu practice".<sup>93</sup> Fasting may be performed as a kind of offering to a deity, in preparation for particular rituals, or simply as a spiritual technique associated with purification and providing the body with a different kind of energy than that obtained by consumption.<sup>94</sup>

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<sup>88</sup> Fisher, above n 13, 111.

<sup>89</sup> ANZPAA Practical Reference, above n 6, 37.

<sup>90</sup> Fisher, above n 13, 114.

<sup>91</sup> Martin Wood, 'Food' in Denise Cush, Catherine Robinson and Michael York (eds), *Encyclopedia of Hinduism* (Routledge, 2008) 248, 248-9.

<sup>92</sup> ANZPAA Practical Reference, above n 6, 38.

<sup>93</sup> Sandra Robinson, 'Fasting' in Denise Cush, Catherine Robinson and Michael York (eds), *Encyclopedia of Hinduism* (Routledge, 2008) 241, 241.

<sup>94</sup> *Ibid* 242.

In the Hindu context, fasting may encompass complete abstention from food for a period, which may vary, but may also refer to particular dietary restrictions as are required, for example, of widows observing traditional practices.<sup>95</sup>

### D *Judaism*

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 20<sup>th</sup> 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.<sup>96</sup> In the 2011 Census, 97,300 people reported an affiliation with Judaism. 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.<sup>97</sup>

#### 1 *Key Beliefs and Practices*

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;
- 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.<sup>98</sup>

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.<sup>99</sup>

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<sup>95</sup> Ibid.

<sup>96</sup> Alan Unterman, 'Judaism' in John Hinnells (ed), *A New Handbook of Living Religions* (Penguin, 1998), 11, 29; Norman Solomon, *Judaism: A Very Short Introduction* (2014, 2<sup>nd</sup> ed, Oxford University Press) Ch 1; George Robinson, *Essential Judaism: A Complete Guide to Beliefs, Customs and Rituals* (2008, Simon and Schuster) 179.

<sup>97</sup> Racism – No Way, *Fact Sheet: An Introduction to Judaism in Australia* (2013) NSW Government, Education and Communities <<http://www.racismnoway.com.au/teaching-resources/factsheets/27.html>>.

<sup>98</sup> Ibid.

<sup>99</sup> See, e.g., Louis Jacobs, *The Book of Jewish Belief* (Behrman House, 1984) 6-7; Alan Avery-Peck and Jacob Neusner, *The Routledge Dictionary of Judaism* (Routledge, 2004) 26-7.

The *Sabbath*, or *Shabbat*, is a holy day for Jews and extends from sunset on Friday to sunset on Saturday.<sup>100</sup> 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.<sup>101</sup> Practising Jews may spend the time in religious study and prayer, attend synagogue services, and partake in festival meals at home.<sup>102</sup>

## 2 Holy Books and Scriptures

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*).<sup>103</sup> The interpretations, together with the *Torah*, comprise Jewish law (*Halakhah*), which covers all aspects of life and religious observance.<sup>104</sup>

## 3 Forms of Worship and Festivals

The most important festivals (mentioned in the *Torah* and requiring abstinence from work) are:

- *Rosh Hashanah* The anniversary of the creation of the world.
- *Yom Kippur* The holiest day of the Jewish year, when Jews fast and (Day of Atonement): repent their sins.
- *Pesah* (Passover): Celebration in remembrance of the Exodus of the Israelites from slavery in Egypt.
- *Shavu'ot* (Pentecost) Celebration of the giving of the *Torah* on Mount Sinai.
- *Sukkot* (Feast of through Tabernacles): Celebration in remembrance of the Jews' journey through the desert on the way to the Promised Land.<sup>105</sup>

The celebration of *Purim* (Feast of Lots) and *Hanukkah* (Feast of Dedication) are also of significance, dating back to Persian and Greco-Roman times but having been instituted by Jewish authorities rather than directly divinely ordained. Further, refraining from work is not necessary during these festivals. In addition, there are five fasting periods throughout the year, as well as several lesser holy days.<sup>106</sup>

## 4 Dietary Rules and Taboos

*Kashrut* is the body of Jewish laws dealing with which foods may be consumed and the proper preparation of food, while foods which fits its mandates are referred to as *kosher*

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<sup>100</sup> Matt Stefon, *Judaism: History, Belief and Practice* (Britannica Educational Publishing, 2012) 171.

<sup>101</sup> Ibid 170-1.

<sup>102</sup> Ibid; Martha A Morrison and Stephen F Brown, *Judaism* (Infobase Publishing, 4<sup>th</sup> ed, 2009) 17, 27.

<sup>103</sup> See Smith, above n 79, 70-4; Robinson, above n 96, 201-218.

<sup>104</sup> Stefon, above n 100, 356.

<sup>105</sup> Ibid 172.

<sup>106</sup> Stefon, above n 102, 172.

(meaning 'fit'). Food that is not kosher is referred to as *treif* (literally "torn", from the commandment not to eat animals that have been killed by other animals).<sup>107</sup>

The details of *kashrut* are extensive:

- Certain animals may not be eaten at all (including any flesh, organs, eggs and milk). Forbidden animals include those that do not possess a split hoof or do not chew cud, such as pigs. The consumption of many fowl, particularly birds of prey, is prohibited. The same applies to shellfish and scavenger animals.
- Of permitted animals, birds and mammals must be killed in accordance with *Halakhah*, which involves prayer by the butcher prior to the slaughter and killing by one quick slice of the trachea to avoid pain. All blood is then removed by drainage or cooking before its consumption.
- Certain parts of permitted animals may not be eaten because of their religious significance.
- Meat (comprising the flesh of birds and mammals) cannot be eaten with dairy, while fish, eggs, fruits, vegetables and grains may, according to most views, be eaten with either meat or dairy.
- Separate utensils must be used for meat and dairy, and for kosher and non-kosher foods.
- Wine or grape products made by non-Jews may not be consumed.<sup>108</sup>

However, these strictures are not followed by all Jews; some consider them entirely non-binding, others follow them in part or only inside the home. Adherence to *kashrut* is a matter of interpretation as to its necessity and individual religious practice.<sup>109</sup>

### III CONCLUSION

This has been a very brief overview of the beliefs and practices of the major religions other than Christianity which are currently practised in Queensland. The authors acknowledge that not everyone who practises each of these religions will accept everything set out as conforming to their own beliefs; rather, the intention is to help increase awareness in the court of common faith-based practices, in order to permit accommodation where necessary and to aid understanding of difference as an end in itself. Representatives of the various religions have been consulted and the information has been confirmed as representing at least a mainstream understanding of the religions discussed. Nonetheless, there will always be variations in religious practice and belief and judges are encouraged to remain aware of the possibility of such variations.

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<sup>107</sup> Sara E Karesh and Mitchell M Hurvitz, *Encyclopedia of Judaism* (Infobase, 2006) 267-9.

<sup>108</sup> *Ibid* 267.

<sup>109</sup> *Ibid* 269.

## CHAPTER 4: FAMILY DIVERSITY

### I INTRODUCTION

For statistical purposes, the Australian Bureau of Statistics defines a family as ‘two or more persons, one of whom is at least 15 years of age, who are related by blood, marriage (registered or *de facto*), adoption, step or fostering, and who are usually resident in the same household.’<sup>1</sup> This definition may be practical for statistical purposes, but it does not encompass the diversity of family composition in contemporary Australia which this chapter will discuss.

### II FORMS OF FAMILY DIVERSITY

#### A *Family Structures*

The “nuclear family” structure of a married father and mother with children predominated in Australia, North America and northern Europe during much of the 20<sup>th</sup> century. It has also become increasingly common in other parts of the world. However, most other cultures globally tend to emphasise broader family structures, encompassing grandparents, aunts, uncles, cousins and other relations.<sup>2</sup> Further, there are increasing numbers of *de facto* couples, whether of the same sex or different sexes and with or without children, as well as single parents and composite families in which children from previous marriages become part of another family on their parent commencing a new relationship.<sup>3</sup> It is no longer permissible to discriminate on the basis of, for example, sexual orientation, a child’s birth outside of marriage, single parenthood or the fact of divorce.<sup>4</sup>

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.<sup>5</sup> Migration may also have an effect on family structures, as individuals adapt to the new society.<sup>6</sup>

Nonetheless, there are many characteristics which may help to define the notion of the family against a particular ethnic or cultural backdrop. These may include:

- living in the same household as, or in close proximity to, other members of their immediate and extended family;
- the centrality of relationships with other members of the immediate and extended family to maintaining cultural and ethnic identity;

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<sup>1</sup> Australian Bureau of Statistics, *Census Dictionary* (20 May 2011) Australian Government <<http://www.abs.gov.au/ausstats/abs@.nsf/0/014F8C1E2D27DFF8CA25720A0010F03D?opendocument>>

<sup>2</sup> See James Georgas, ‘Family: Variations and Changes across Cultures’ in W J Lonner et al (eds), *Online Readings in Psychology and Culture* (Center for Cross-Cultural Research, Western Washington University, 2003) <<http://www.wvu.edu/culture/georgea.htm>>.

<sup>3</sup> Ibid.

<sup>4</sup> See, e.g. *Sex Discrimination Act* 1984 (Cth) ss 5A, 6; *Anti-Discrimination Act* 1991 (Qld) s 7(b), (d), (n), (p); *Status of Children Act* 1978 (Qld) s 6.

<sup>5</sup> Georgas, above n 2.

<sup>6</sup> Queensland Government Department of Communities, Child Safety and Disability Services (Child Safety), *Working with People from Culturally and Linguistically Diverse Backgrounds*, Practice Paper (2010) 9 (‘Working with People from CALD Backgrounds’) <<https://www.communities.qld.gov.au/resources/childsafety/practice-manual/prac-paper-working-cald.pdf>>.

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- financial and non-financial obligations to immediate and extended family members located overseas (which may involve sending remittances overseas, sponsoring family migration or arranging marriages); and
- emphasis on traditional ethnic and cultural customs relating to courtship, marriage, child-rearing and elder-care.

For many, family life is characterised by *familism*, a view which, *inter alia*, prioritises the interests of the family over the individual interests of its members, and in which family identity is stronger than personal identity.<sup>7</sup> 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.<sup>8</sup> 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).<sup>9</sup>

Similarly, ethnically and culturally diverse families may nurture and expand their kinship through traditional religious, cultural and social practices. For example, according to Sarantakos, for Greek people, "the best man at weddings or the sponsor at a child's baptism (*Koumparos*) is considered a *spiritual relative* and enters lasting and binding commitments".<sup>10</sup> Similarly, "the sponsor of *Kivrelis* (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".<sup>11</sup>

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.

Family identities may also be relevant to community belonging. For example, individuals from culturally and linguistically diverse backgrounds may be identified as part of a group on the basis that their family heritage (e.g. parentage on one or both sides) is of that group. However, having a particular family background may be seen as a necessary but insufficient criterion for a family or individual to be considered part of that group – self-identification is paramount,<sup>12</sup> while community recognition may be relevant as well.

### B *Aboriginal and Torres Strait Islander Kinship and Family*

It is important to discuss in particular the family structures of Aboriginal and Torres Strait Islander peoples, as these societies were the first and still, to varying degrees, continue to recognise extended family structures. A lack of understanding of Aboriginal and

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<sup>7</sup> Richard T Schaefer (ed), *Encyclopedia of Race, Ethnicity and Society* (Sage Publications, 2008) 477.

<sup>8</sup> Antoinette Fauve-Chamoux and Emiko Ochiai, 'Introduction' in Antoinette Fauve-Chamoux and Emiko Ochiai (eds), *The Stem Family in Eurasian Perspective* (Peter Lang AG, 2009) 1, 30; Khuat Thu Hong, 'Stem Family in Vietnam' in Antoinette Fauve-Chamoux and Emiko Ochiai (eds), *The Stem Family in Eurasian Perspective* (Peter Lang AG, 2009) 431, 448-9.

<sup>9</sup> *Ibid* 444.

<sup>10</sup> Sotirios Sarantakos, *Modern Families: An Australian Text* (Macmillan Education Australia, 1996) 69.

<sup>11</sup> *Ibid*.

<sup>12</sup> Working with People from CALD Backgrounds, above n 6, 4.

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Torres Strait Islander kin relations also underpinned such detrimental government policies as the removal of children in previous decades.<sup>13</sup>

Aboriginal and Torres Strait Islander cultures traditionally have complex kinship systems which emphasise extended family relationships. These relationships define social roles and responsibilities, in relation to other people, spiritual matters, and the land and sea.<sup>14</sup>

There are several different means of social organisation within Aboriginal societies, including skin group, which exist within the language group more broadly and determine many aspects of social interaction, and moieties, to which everything belongs (including people, spirit beings, plants and animals, and areas of land and water). Children are of the same moiety as their father, while their mother will be of a different moiety. Each clan (several family groups sharing an area of land) will fall within a moiety.<sup>15</sup>

In many Aboriginal communities, a child's mother's sisters (the child's aunts) will also be considered the child's mothers, with an obligation to support the raising of the child. Grandmothers and 'aunties' are responsible for passing on traditional knowledge to female children, but also have a role in raising male children. Fathers and their brothers (uncles) also play a role in childrearing, again with a gendered emphasis, passing on male traditional knowledge to male children. The sharing of childrearing responsibilities remains a part of Aboriginal communities regardless of whether they are in urban, regional or remote areas.<sup>16</sup> Cousins are often referred to and treated as sisters and brothers.<sup>17</sup>

Torres Strait Islander communities also place great emphasis on kinship, as well as reciprocity.<sup>18</sup> However, where Aboriginal communities do not have individual leaders, Island chiefs are key community leaders in the Torres Strait.<sup>19</sup> Although Torres Strait Islanders originally lived only on the various Islands, many have moved to mainland Australia and seek to maintain their cultural identity and relationships with the land and sea from which they derive.<sup>20</sup> Torres Strait Islander people also have particular customs about adoption, which is not uncommon. This may occur for reasons such as maintaining a family name, or a family bloodline with concomitant rights to inherit land; to balance the numbers or genders of children in two families, particularly if infertility affects one or one has all boys or girls; and to strengthen relations between families. The connection to the birth family is, however, not relinquished. Traditional adoption has not always been respected by outsiders, however there is a movement among Torres Strait Islanders for its greater recognition today.<sup>21</sup>

Elders teach and guide children, as well as being decision-makers, role models, and carers. Aboriginal and Torres Strait Islander people traditionally refer to an Elder as

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<sup>13</sup> See, e.g., *Final Report of The Royal Commission into Aboriginal Deaths in Custody* (Australian Government Publishing Service, 1991) vol 2, 11.7  
<<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>.

<sup>14</sup> Secretariat of National Aboriginal and Islander Child Care, *Foster their Culture: Caring for Aboriginal and Torres Strait Islander Children in Out of Home Care* (2008) 8 ('SNAICC'); Department of Aboriginal and Torres Strait Islander Policy and Development, *Mina Mir Lo Ailan Mun: Proper Communication with Torres Strait Islander People* (c. 1998) 3 ('Mina Mir Lo Ailan Mun').

<sup>15</sup> SNAICC, above n 14, 8.

<sup>16</sup> Ibid 9-10.

<sup>17</sup> Ibid 10.

<sup>18</sup> *Mina Mir Lo Ailan Mun*, above n 14, 3.

<sup>19</sup> SNAICC, above n 14, 13; Department of Aboriginal and Torres Strait Islander Policy and Development, *Protocols for Consultation and Negotiation with Aboriginal People* (Queensland Government, 2<sup>nd</sup> ed, 1999). See also *Mina Mir Lo Ailan Mun*, above n 14, 5.

<sup>20</sup> *Mina Mir Lo Ailan Mun*, above n 14, 5-6; SNAICC, above n 14, 13.

<sup>21</sup> Ibid.

'Aunty' or 'Uncle', but people from outside the particular community should always check first whether it is appropriate to use these titles.<sup>22</sup> Many Aboriginal and Torres Strait Islander communities recognise two types of elders: traditional elders and community elders. Traditional elders are original descendants of the area who are actively involved in community issues. In contrast, community elders are not original descendants of the area but are actively involved in community issues.<sup>23</sup>

By virtue of these social structures, an Aboriginal or Torres Strait Islander person may have multiple fathers and mothers, and many brothers and sisters.<sup>24</sup> Although their observation today varies,<sup>25</sup> these extensive kinship systems may have contributed to the difference between the composition of Aboriginal and Torres Strait Islander households, and other households. According to the Australian Bureau of Statistics, Aboriginal and Torres Strait Islander households:

- are three times as likely as other households to be multiple-family households, with 6% of Aboriginal and Torres Strait Islander households being multiple-family households, as compared with 2% of other households;
- are more likely than other households to be family households: 81% of Aboriginal and Torres Strait Islander households are family households, as compared with 71% of other households; and
- are less likely than other households to be lone-person households: 14% of Aboriginal and Torres Strait Islander households are lone-person households, as compared with 25% of other households.<sup>26</sup>

### C One-parent Families

One-parent families may be formed as a consequence of parental separation, divorce or death, or in cases where a parent is single at the time of the birth of the child.

In June 2012, according to the Australian Bureau of Statistics:

- about 961,000 families, or 15% of all families, are one-parent families;
- in about 780,000 families, or 81% of all one-parent families, the sole parent was the mother; and
- about 641,000 families, or 67%, of all one-parent families had dependants living with them (i.e. at least one child had not left home).<sup>27</sup>

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<sup>22</sup> Women's Health Goulburn North East, *MTWW Protocols & Procedures* (undated) Victorian Government <<http://www.whealth.com.au/mtww/protocols.html>>; SNAICC, above n 14, 10-11.

<sup>23</sup> Reconciliation Australia, *Toolkit for Local Reconciliation Groups* 13 <<http://www.austlii.edu.au/au/other/IndigLRes/car/2000/17/toolkit.pdf>>.

<sup>24</sup> Colin Bourke and Bill Edwards, 'Family and Kinship' in Colin Bourke, Eleanor Bourke and Bill Edwards (eds), *Aboriginal Australia: An Introductory Reader in Aboriginal Studies* (University of Queensland Press, 2<sup>nd</sup> ed, 2004).

<sup>25</sup> SNAICC, above n 14, 11, 13.

<sup>26</sup> Australian Bureau of Statistics, *Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians* (28 November 2012) Australian Government <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2076.0main+features402011>>.

<sup>27</sup> Australian Bureau of Statistics, *Labour Force, Australia: Labour Force Status and Other Characteristics of Families* (22 May 2013) Australian Government <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/6224.0.55.001~Jun%202012~Chapter~one%20Parent%20Families>>.

#### D *Same-sex Parent Families*

Same-sex couples may have children from previous heterosexual relationships, or from a same-sex relationship with the assistance of reproductive technologies or adoption. According to a publication of the Australian Institute of Family Studies, lesbian women are much more likely to have children than gay men: about 33% of lesbian women have children as compared with 11% of gay men.<sup>28</sup>

Following the Australian Human Rights Commission's report on same-sex family entitlements and an audit of Commonwealth legislation in 2009, 85 Commonwealth laws were amended to reduce federal legislative discrimination against same-sex couples and their children. The reforms particularly affected:

- taxation;
- superannuation;
- defined benefits superannuation;
- social security and family assistance;
- the Pharmaceutical Benefits Scheme Safety Net and the Medicare Safety Net;
- aged care;
- child support;
- immigration;
- citizenship; and
- veterans' affairs.<sup>29</sup>

### III FORMING A FAMILY

Over the last few decades, technology has developed enabling individuals to become parents where often they would otherwise have been unable to have children. While legal and ethical concerns have not yet been entirely resolved, assisted reproductive technologies and surrogacy are not uncommon. Adoption is still possible as well, however the numbers of adoptions taking place in Queensland have declined considerably in recent decades.<sup>30</sup>

#### A *Assisted Reproduction*

Assisted reproductive technologies are often, but not exclusively, sought where one or both partners to a relationship has fertility difficulties. There are several options, including

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<sup>28</sup> Deborah Dempsey, *Same-sex Parented Families in Australia* (Paper No 18, Australian Institute of Family Studies, December 2013) <<https://www3.aifs.gov.au/cfca/publications/same-sex-parented-families-australia>>, citing William Leonard et al, 'Private Lives 2: The Second National Survey of the Health and Wellbeing of Gay, Lesbian, Bisexual and Transgender (GLBT) Australians' (Gay and Lesbian Health Victoria and the Australian Research Centre in Sex, Health and Society at La Trobe University, 2012) 47 <<http://webstat.latrobe.edu.au/url/hdl.handle.net/1959.9/279566>>.

<sup>29</sup> Attorney-General's Department, *Overview of the Australian Government's same sex law reforms* (undated) Australian Government <<http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Samesexreforms.aspx>>.

<sup>30</sup> Australian Institute of Health and Welfare, *Adoptions Australia 2013-14*, Child Welfare Series Report No 60 (2014) vi, 14 ('Adoptions Australia 2013-14').

in vitro fertilisation and intrauterine insemination. Legislation has been enacted in Victoria, Western Australia and New South Wales to regulate the use of assisted reproductive technologies, however the same is not true of Queensland. Reference may instead be had to the National Health and Medical Research Council *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research*.<sup>31</sup>

Female same-sex parented families gained considerably through amendments to the *Status of Children Act 1978* (Qld) passed in 2010. These legislative changes mean that the Act now provides for recognition of legal relationships between both women to a de facto or registered relationship, and a child born through a fertilisation procedure undergone by one of those women (including artificial insemination and implantation of donor semen or a donor ovum). The Act now sets out a series of presumptions of law: in broad terms, when a woman has, and her partner consents to, artificial insemination or IVF procedures, both women are presumed to be the parents of any child born as a result of those procedures, regardless of the source of the ovum or semen that created the embryo. The man or woman who supplied the sperm or embryo has, in effect, no rights, liabilities or legal relationship in respect of the pregnancy or resulting child.<sup>32</sup>

## B Surrogacy

Under the *Surrogacy Act 2010* (Qld), a surrogacy arrangement comprises an arrangement under which a woman agrees to become, or try to become, pregnant, with the intention that the child then be treated as the child of the other persons to the agreement, by the transfer of custody and guardianship to them.

The *Surrogacy Act 2010* (Qld) distinguishes altruistic surrogacy arrangements from commercial surrogacy arrangements. In altruistic surrogacy arrangements, intending parents (whether heterosexual or same-sex) do not pay birth mothers anything other than the reasonable costs associated with becoming, or trying to become pregnant; with pregnancy or birth; and of being a party to a surrogacy arrangement or proceedings in relation to a parentage order.<sup>33</sup> In contrast, in commercial surrogacy arrangements, intending parents pay birth mothers an amount above those reasonable costs.<sup>34</sup> It is illegal in Queensland to enter into, or offer to enter into, a commercial surrogacy arrangement.<sup>35</sup>

The Act provides that surrogacy arrangements (whether altruistic or commercial) are not enforceable.<sup>36</sup> However, any obligation contained in a surrogacy arrangement to pay or reimburse a birth mother's surrogacy costs is enforceable unless a child is born as a consequence of a surrogacy arrangement and the birth mother either does not relinquish the custody and guardianship of the child to the intended parents, or does not consent

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<sup>31</sup> Thomson Reuters, *The Laws of Australia* (at 1 March 2011) '20 Health and Guardianship', '12 Medical Technology', [20.12.1990]. See Australian Government National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (revised ed, 2007) <<http://www.nhmrc.gov.au/files/nhmrc/publications/attachments/e78.pdf>>.

<sup>32</sup> See *Status of Children Act 1978* (Qld) div 2.

<sup>33</sup> *Surrogacy Act 2010* (Qld) s 11.

<sup>34</sup> *Ibid* s 10.

<sup>35</sup> *Ibid* s 56.

<sup>36</sup> *Ibid* s 15(1).

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to the making of an application by the intended parents for a parentage order in relation to the child.<sup>37</sup>

Despite the unenforceability of the surrogacy arrangement of itself, intended parents (whether they are a heterosexual or same-sex couple) can be legally recognised as the parents of a child born as a consequence of a surrogacy arrangement. Chapter 3 of the Act provides for the transfer of the legal parentage from the birth mother to the intended parents.

The Honourable Chief Justice Diana Bryant in 2015 called for the legalisation of commercial surrogacy arrangements in all Australian states and territories. This was on the basis that commercial surrogacy arrangements are being made in overseas countries between Australian intending parents and foreign birth mothers, irrespective of their legal unenforceability in Australia and the criminal nature of such arrangements in Queensland.<sup>38</sup>

### C Adoption

Adoption does still occur in Australia and Queensland, however it is increasingly uncommon.<sup>39</sup> In 2013-14, only 317 adoptions were finalised nationwide,<sup>40</sup> while 36 occurred in Queensland.<sup>41</sup> A substantial proportion of Queensland adoptions are intercountry adoptions, where the adoption order is effected under the *Adoption Act 2009* (Qld) in respect of a child in an overseas country. For example, in 2013-14, 27.8% of adoptions effected under the *Adoption Act 2009* (Qld) were in relation to a child in Queensland in favour of the child's step-parent; 25% were in favour of someone other than a step-parent (but possibly another relative); and 47.2% were intercountry adoptions.

The *Adoption Act 2009* (Qld) provides that a person is only eligible to submit an expression of interest in being assessed for suitability to be an adoptive parent if he or she has a spouse (including a de facto or registered partner)<sup>42</sup> who is not of the same gender and submits the expression of interest jointly with his or her spouse.<sup>43</sup> As such, same-sex couples and people who are not in spouse relationships (whether heterosexual or same-sex) are presently unable to apply for adoption. Particular principles apply to the adoption of Aboriginal and Torres Strait Islander children, and children of other ethnic

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<sup>37</sup> Ibid s 15(2).

<sup>38</sup> Bridget Brennan, 'Commercial Surrogacy Should Be Legalised, Family Court Chief Justice Diana Bryant Says', *ABC News* (online), 18 April 2015 <<http://www.abc.net.au/news/2015-04-18/commercial-surrogacy-should-be-legalised-family-court-justice/6402924>>.

<sup>39</sup> As to Australia generally, see Adoptions Australia 2013-14, above n 30, vi, 13. In relation to Queensland, see generally Queensland Government Department of Communities, Child Safety and Disability Services, *Adoption*, Child Safety (27 May 2015) <<https://www.communities.qld.gov.au/childsafety/about-us/our-performance/adoptions>>.

<sup>40</sup> Adoptions Australia 2013-14, above n 30, vi, 13.

<sup>41</sup> See generally Queensland Government Department of Communities, Child Safety and Disability Services, *Table A1: Adoption Orders Made, by Category of Adoption Order, Queensland, 2009-10 to 2013-14*, Child Safety (27 May 2015) <<https://www.communities.qld.gov.au/resources/childsafety/about-us/performance/child-protection/adoptions-1.xls>>.

<sup>42</sup> See *Acts Interpretation Act 1954* (Qld) sch 1, definition of 'spouse'.

<sup>43</sup> *Adoption Act 2009* (Qld) ss 68(2) and 76(1)(g)(ii).

or cultural backgrounds, in order to assist them to maintain a connection with kin and culture.<sup>44</sup>

#### IV THE IMPACT OF FAMILY STRUCTURE AND FORMATION ON WELLBEING

The 2014 Australian Council of Social Service 'Poverty in Australia' Report examined the risk of poverty faced by different groups (e.g. the proportion of individuals in one-parent families who live below the poverty line) and the profiles of populations living below the poverty line (e.g. the proportion of people living below the poverty line who are in one-parent families). These differing approaches produced different conclusions: for instance, the risk of poverty within one-parent families (33%) is higher than among couples with children (11.7%). However, as there are more couples with children than one-parent families, a higher proportion of people living below the poverty line come from partnered families (33.5%) than one-parent families (17.4%).<sup>45</sup>

This discussion is not intended as a criticism of single-parent families, but rather to highlight the difficulties they may face. There are a number of reasons for the correlation between sole-parented families and poverty:

- the proportion of one-parent families not in paid employment is higher than the proportion of two-parent families where both parents are not in paid employment;
- sole parents face obstacles in arranging employment which is compatible with their family responsibilities, as these responsibilities are likely to be more extensive than the responsibilities of each parent in two-parent families;
- the majority of one-parent families are female-headed and rates of pay for women are still not equal to those for men;
- child support payments are often unable to offset the financial disadvantage of separation for custodial parents;
- one-parent families are disadvantaged in finding affordable or public housing; and
- there is a high degree of reliance on government income support payments in one-parent families.<sup>46</sup>

As at the date of publication of this Benchbook, although there is considerable research comparing the wellbeing of children in planned lesbian-parented families, there is only limited research comparing the wellbeing of children in planned gay-parented families. Further, no comparative research on this issue had been conducted in Australia or New Zealand.<sup>47</sup> However, the Australian Study of Child Health in Same-Sex Families (based at the University of Melbourne) has collected data on 500 children aged 0–17 from 315 homosexual, bisexual or transgender parents. On measures of general health and family cohesion, children aged 5 to 17 years with same-sex attracted parents had significantly better scores when compared to Australian children from all other backgrounds and

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<sup>44</sup> Ibid ss 131-2.

<sup>45</sup> Australian Council of Social Service, 'Poverty in Australia' (Report, Australian Council of Social Service, 12 October 2014) 12 <[http://acoss.org.au/images/uploads/ACOSS\\_Poverty\\_in\\_Australia\\_2014.pdf](http://acoss.org.au/images/uploads/ACOSS_Poverty_in_Australia_2014.pdf)>.

<sup>46</sup> See generally *ibid*.

<sup>47</sup> Dempsey, above n 28.

family contexts. For all other health measures, there were no statistically significant differences.<sup>48</sup>

## V FAMILY CONFLICT AND BREAKDOWN

### A *Domestic and Family Violence*

The Australian Bureau of Statistics has estimated that 49% of men aged 18 years and over and 41% of women aged 18 years and over have experienced some form of violence since the age of 15.<sup>49</sup> Men were far more likely to experience physical violence from a stranger than women, on whom physical violence is predominantly inflicted by persons known to them – usually current or previous partners.<sup>50</sup> Further, while both men and women are more likely to face physical violence than sexual violence, those who did experience sexual violence were much more likely to be women: in 2012, about 17% of women had experienced sexual violence since the age of 15, as compared with 4% of men.<sup>51</sup>

However, when approaching issues of family violence, stereotypes about the gender of abusers and victims<sup>52</sup> should be avoided: all family members, regardless of gender/sex or age, may be affected. *Domestic and Family Violence Protection Act 2012* (Qld) specifically acknowledges this by identifying a ‘relevant relationship’ as an intimate personal relationship, a family relationship or an informal care relationship.<sup>53</sup>

There is growing social recognition that a wide range of behaviours may constitute domestic violence. This is reflected in the *Domestic and Family Violence Protection Act 2012* (Qld), which now provides that domestic violence includes the following acts:

- causing personal injury to a person or threatening to do so;
- coercing a person to engage in sexual activity or attempting to do so;
- damaging a person’s property or threatening to do so;

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<sup>48</sup> Ibid.

<sup>49</sup> Australian Bureau of Statistics, *4906.0 Personal Safety, Australia, 2012 – Measuring the Prevalence of Violence* (31 July 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter2002012>>.

<sup>50</sup> Australian Bureau of Statistics, *4906.0 Personal Safety, Australia, 2012 – Perpetrators of Violence* (31 July 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter3002012>>.

<sup>51</sup> Australian Bureau of Statistics, *4906.0 Personal Safety, Australia, 2012 – Demographics of Those Who Have Experienced Sexual Assault* (31 July 2014)

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter5002012>>. See also Janet Phillips, ‘Domestic, Family and Sexual Violence in Australia: An Overview of the Issues’ (Research Paper, Parliamentary Library, Parliament of Australia, 2014) 1, 4 <[http://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1415/ViolenceAust](http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/ViolenceAust)>.

<sup>52</sup> Note that the term ‘survivor’ is seen as more appropriate in some forums to describe an individual who has experienced domestic violence or sexual abuse, as it avoids a discourse of passivity or disempowerment: Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Queensland Government, 2015) 4 (‘Not Now, Not Ever’) <<http://www.qld.gov.au/community/documents/getting-support-health-social-issue/dfv-report-vol-one.pdf>>. However, the term ‘victim’ is predominantly used here as that is the language more commonly used in legal contexts, as reflected in, for example, the *Victims of Crime Act 2009* (Qld) and the *Criminal Code* (Qld).

<sup>53</sup> *Domestic and Family Violence Protection Act 2012* (Qld) s 13. Each of these terms is further defined in 14, 19 and 20, respectively.

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- depriving a person of the person's liberty or threatening to do so;
- threatening a person with the death or injury of the person, a child of the person, or someone else;
- threatening to commit suicide or self-harm so as to torment, intimidate or frighten the person to whom the behaviour is directed;
- causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the person to whom the behaviour is directed, so as to control, dominate or coerce the person;
- unauthorised surveillance of a person; and
- unlawfully stalking a person.<sup>54</sup>

The consequences of abuse are broad ranging, from psychological impacts to homelessness, economic difficulties and, tragically, physical harm including death.<sup>55</sup> Victims often report feeling ashamed for having been subjected to violence or that they are to blame for it, while others fear being considered responsible for the destruction of their family. In many cases, victims may also feel ashamed, experience depression, anxiety or a sense of hopelessness, and demonstrate low self-esteem.<sup>56</sup>

The powerlessness generally experienced by those facing domestic or family violence may be exacerbated for people from lower socio-economic groups, from culturally and linguistically-diverse backgrounds, with physical and/or mental disabilities or living in regional, rural or remote areas of Australia. All of these people are more likely to have difficulty in accessing assistance and leaving violent households.<sup>57</sup>

Chapter 14 contains further information on domestic and family violence, particularly in the context of gender equality.

### B Parental and Family Separation

The federal legislative regime in the *Family Law Act 1975* (Cth) applies to parental divorce and family separation of all families in Australia, over which the Supreme Court of Queensland no longer has any jurisdiction<sup>58</sup> (aside, arguably, from a residual *parens patriae* jurisdiction<sup>59</sup> and by virtue of cross-vested jurisdiction<sup>60</sup>). Since 2003, Commonwealth jurisdiction has extended to cover financial matters relating to *de facto* partners arising out of the breakdown (other than by reason of death) of the relationship, whether the members of the couple were of the same or different sexes.<sup>61</sup>

Although the Supreme Court does not have jurisdiction in this area, parental separation and family breakdown may be relevant in other contexts. In particular, given Queensland's ethnic diversity, it is relevant to note the stressors that recent migration can place on a family, whether fleeing violence or not. Loss of extended family and

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<sup>54</sup> *Ibid* s 8.

<sup>55</sup> Not Now, Not Ever, above n 52, 76-8.

<sup>56</sup> *Ibid* 77, 83-5, 144.

<sup>57</sup> *Ibid* 90, 148, 209, 215-18, 235, 293, 295, 328.

<sup>58</sup> See Proclamation of 27 May 1976 under the *Family Law Act 1975* (Cth) s 40(3).

<sup>59</sup> See *Secretary of Department of Health & Community Services v JWB (Marion's Case)* (1992) 175 CLR 218, 258, 262 (Mason CJ, Dawson, Toohey and Gaudron JJ), 285-7 (Brennan J).

<sup>60</sup> See *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth).

<sup>61</sup> See *Commonwealth Powers (De Facto Relationships) Act 2003* (Qld) s 4.

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support structures in the country of origin, language difficulties and intergenerational tensions as the younger generation (often) more readily adapts to the new environment than the older may all contribute to the fracturing of family relationships. This may, in turn, have consequences in the criminal and civil spheres, for example, due to detrimental effects on an individual's wellbeing and behaviour, or financial difficulties for one or both parties.<sup>62</sup>

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<sup>62</sup> Working with People from CALD Backgrounds, above n, 6.

## CHAPTER 5: OATHS AND AFFIRMATIONS

### I INTRODUCTION

At common law, no testimony could be received except on oath. Sworn testimony could be given only by those who believed in a God who would punish them should they be untruthful in their evidence.<sup>1</sup> From the 17<sup>th</sup> Century, the common law recognised that a witness who was not of the Christian faith, but possessed belief in a Supreme Being, was competent to give sworn evidence.<sup>2</sup>

The law has developed substantially since that time, today being governed largely by statute – in Queensland, by the *Oaths Act 1867* (Qld) ('the Act'). Whether the administration of an oath to a witness is lawful does not depend upon the detailed observances of a particular religion, but entails two main concerns. These are first, whether it is an oath which appears to the court to be binding on the witness's conscience, and second, if so, whether it was an oath which the witness considered to be binding on his or her conscience.<sup>3</sup>

Part 6 of the Act prescribes certain forms of oath for the swearing of jurors, witnesses, interpreters and bailiffs, but permits the use of alternative forms which are to the same or like effect.

Section 39 of the Act provides, in relation to witnesses, that "[w]henever... it is found to be impracticable ... to administer to the person an oath in the form and manner required by the person's religion to make it binding on the person's conscience, it shall be the duty of the presiding judge, if satisfied of that fact, to require such person to make a solemn affirmation...". As such, a particular requirement for the administration of an oath is unlikely to preclude witnesses giving evidence, as they may do so once affirmed.

Many people strongly believe that a witness who is able to give sworn evidence should have both the opportunity and the obligation to do so. At the same time, an individual's choice not to swear an oath, but rather to make an affirmation, should never be construed against them. Freedom of religion also entails the right not to have any form of faith. As noted earlier, atheism is prevalent within Queensland society and is a belief system as worthy of respect as any religion.

Nonetheless, the importance of providing a means by which religious oaths can be administered in an appropriate form and manner is clear. The purpose of this chapter is to facilitate guidance on the various forms of oath which are appropriate for the religions that are more widely followed in Queensland.

### II FACILITATING ALTERNATIVES

Section 17 of the Act provides that if a person objects to being sworn as a witness, the person may instead make an affirmation in the form stipulated. Section 17 provides as follows:

Affirmation instead of oath in certain cases

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<sup>1</sup> *R v Brown* [1977] Qd R 220; *Omychund v Barker* (1744) 1 Atk 21; 26 ER 15, 31; Eugene R Milhizer, 'So Help Me Allah: An Historical and Prudential Analysis of Oaths as Applied to the Current Controversy of the Bible and Quran in Oath Practices in America' (2009) 70 *Ohio State Law Journal* 1, 4, 16-17, 22-3.

<sup>2</sup> Queensland Law Reform Commission, *Report on the Oaths Act*, Report No 38 (1989) 74 ('Report on the Oaths Act').

<sup>3</sup> *R v Kemble* [1990] 91 Cr App R 178. See also J D Heydon, LexisNexis, *Cross on Evidence* (at January 2015) [13275], especially the cases at n 2.

- (1) If any person called as a witness or required or desired to make an oath affidavit or deposition objects to being sworn it shall be lawful for the court or judge or other presiding officer or person qualified to administer oaths or to take affidavits or depositions to permit such person instead of being sworn to make his or her solemn affirmation in the words following videlicet –  
‘I A.B. do solemnly sincerely and truly affirm and declare etc.’.
- (2) Which solemn affirmation shall be of the same force and effect as if such person had taken an oath in the usual form and the like provisions shall apply also to every person required to be sworn as a juror.

Since its amendment in 2000, s 17 no longer requires any grounds to be given for the objection nor does it expressly require the court to be satisfied of the sincerity of the objection. It is unnecessary and inappropriate to inquire as to the reasons for the objection. As the evident intention of s 17 is to permit a person to make an affirmation upon her or his objection to being sworn regardless for the reason for it, there is some tension between s 17 and s 37, which provides as follows:

Mode of taking evidence of persons objecting or incompetent to take an oath:

If any person tendered for the purpose of giving evidence in respect of any civil or criminal proceeding before a court of justice, or any officer thereof, or on any commission issued out of the court, objects to take an oath, or by reason of any defect of religious knowledge or belief or other cause, appears incapable of comprehending the nature of an oath, it shall be the duty of the judge or person authorised to administer the oath, if satisfied that the taking of an oath would have no binding effect on the conscience of such person and that the person understands that he or she will be liable to punishment if the evidence is untruthful, to declare in what manner the evidence of such person shall be taken, and such evidence so taken in such manner as aforesaid shall be valid as if an oath had been administered in the ordinary manner.

Nonetheless, it seems that an affirmation in the form stipulated in s 17 may be applied whether the objection arises under that section or s 37, given that it is in the judge's discretion as to how the evidence will be taken.

Where possible, it is preferable that the fact of an objection to oath be made apparent to the court in the absence of the jury, so that no juror can improperly rely on any such matter in evaluating the credit of a witness.<sup>4</sup> The objection should, however, be apparent to the court, for otherwise the giving of evidence on affirmation is permitted only in the circumstances set out in s 39:<sup>5</sup>

Mode of taking evidence of witness who cannot be sworn in manner required by witness's religion—schedule

Whenever in the course of any civil or criminal proceeding in any court of justice a person is tendered as a witness, and it is found to be impracticable, at the time and place when and where the person is so tendered, to administer to the person an oath in the form and manner required by the person's religion to make it binding on the person's conscience, it shall be the duty of the presiding

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<sup>4</sup> Report on the Oaths Act, above n 2, 96, quoting *Demirok v R* (1977) 137 CLR 20, 31 (Gibbs J).

<sup>5</sup> In this respect, the amendment to s 17 did not adopt in full the recommendation of the Queensland Law Reform Commission that a witness should not have to disclose in open court either the grounds for the objection or the objection itself: see *ibid* 96, 126.

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judge, if satisfied of the fact, to require such person to make a solemn affirmation in the form of the schedule, and upon such person making such solemn affirmation the person's evidence shall be taken, and the evidence so taken shall be as valid as if an oath had been administered in the ordinary manner.

In practice, the expression by a person that he or she wishes to take an affirmation will usually be sufficient to be recognised by the court.

The form of affirmation in the schedule is slightly different to that in s 17:

### Form of solemn affirmation

I solemnly affirm and declare that the evidence given by me to the court [or in these proceedings] shall be the truth, the whole truth, and nothing but the truth.

The Act therefore makes provision for witnesses to be affirmed where an appropriate oath is 'impracticable'. However, religious equality dictates that, as much as possible, witnesses should be sworn in a matter befitting their beliefs. It is important, especially in a jury trial, that the need for a particular form and manner of oath be identified before the witness reaches the witness box to be sworn. This would enable the appropriate holy book to be available when required. It would also ensure that witnesses are aware that they may take an oath appropriate to their beliefs, instead of simply agreeing to swear on the Bible when it is provided by the bailiff.

A previous practice note of the Federal Court of Australia provided that:

[t]he Court expects practitioners to ensure that witnesses are properly informed, in advance of their giving evidence, of the purpose of and procedure for making an affirmation or taking an oath. It also expects practitioners:

...

- to give the Court (via the Judge's Associate) at least 24 hours' notice of any other special arrangements that may need to be made by the Court to facilitate the taking of an oath or making of an affirmation by a witness. (For example, the Court must be notified if a witness requires a holy book other than the Bible).

This direction recognises the desirability of identifying the need for a particular form and manner of oath required for a witness before he or she is called. .

The United Kingdom's Equal Treatment Bench Book<sup>6</sup> recommends the following as matters of good practice. They should be adopted by practitioners in Queensland.

- Witnesses and jurors should be presented with a choice of two equally valid procedures of making an affirmation or swearing an oath by court staff, before they come into court.<sup>7</sup>
- If they wish to swear an oath, witnesses should be informed about the availability of different holy books in court. They should not be persuaded to swear an oath on the New Testament for the sake of convenience.

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<sup>6</sup> *Equal Treatment Bench Book* (Judicial College, 2<sup>nd</sup> ed, 2013) <[http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB\\_all\\_chapters\\_final.pdf](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf)> ('Equal Treatment Bench Book (UK)').

<sup>7</sup> This does not appear to be strictly in line with the Queensland Act, which requires an individual to object to making an oath before an affirmation may be made. However, subs 5(1) of the *Oaths Act 1978* (UK) requires objection in the same way as s 17 of the Act, while subs (2) and (3) are equivalent to s 39.

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- If they indicate a preference to swear an oath, witnesses and jurors should be invited to identify the holy book on which they wish to swear an oath.
- If a particular holy book is not available, it is good practice for the witness to be invited to affirm, even if they are willing to swear an oath on the holy book of another religion.
- No assumptions should be made that an individual from a particular community or ethnic background will automatically prefer to swear an oath rather than affirm, or vice versa.<sup>8</sup>

### A *Non-Christian Oaths*

#### 1 *Buddhism*

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.<sup>9</sup> Nor should Buddhists be asked to swear in the name of Buddha.<sup>10</sup> Hence, an affirmation which begins with the words, "I declare in the presence of Buddha...", is not acceptable.<sup>11</sup> Note also that, while some Buddhists recognise Dhamma as a deity, this is not so for all Buddhists. Thus, any form of oath which refers to Dhamma may be insulting to some people and have no effect on their conscience.<sup>12</sup>

Generally, as legal matters are seen as secular in nature in Buddhism, no outward sign of worship is appropriate in this context.<sup>13</sup> The Buddhist Council of Victoria, in its submission to the Law Reform Committee of the Parliament of Victoria in 2002, suggested the following form of affirmation:

In accordance with the (Buddhist) precept of truthful speech and mindful of the consequences of false speech, I (name) do solemnly, sincerely and truly declare that I will tell the whole truth and nothing but the truth.

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. The witness may require a picture of a deity or a photograph of the Dalai Lama or any other lama of the witness's practice. The witness may also wish to take an oath with a religious text book on their head and swear by it. If such a witness does not

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<sup>8</sup> Equal Treatment Bench Book (UK), above n 6, 155.

<sup>9</sup> Buddhist Council of Victoria, Submission No 35 to Law Reform Committee, Parliament of Victoria, Inquiry into Oaths and Affirmations with Reference to the Multicultural Community, 2002, 1, 2, 4 <[http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/oaths/submissions/Oaths-35-Buddhist\\_Council.pdf](http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/oaths/submissions/Oaths-35-Buddhist_Council.pdf)> ('Buddhist Council Submission').

<sup>10</sup> Ibid 2.

<sup>11</sup> See Equal Treatment Bench Book (UK), above n 6, 163, 210, and Law Reform Committee, Parliament of Victoria, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community* (2002) 117 ('Victorian Parliamentary Inquiry').

<sup>12</sup> See Law Reform Commission of Ireland, *Report on Oaths and Affirmations*, Report No 34 (1990) [2.23], citing Mark Weinberg, 'The Law of Testimonial Oaths and Affirmations' (1976) 3 *Monash University Law Review* 25, 32 n 23.

<sup>13</sup> Buddhist Council Submission, above n 9, 2.

stipulate the above type of practice and does not have the appropriate book with them, they may affirm as indicated above.<sup>14</sup>

## 2 Islam

The swearing of oaths is an established tradition in Islam. Therefore, Muslims can be expected to regard the making of an oath as a normal part of giving evidence in court.<sup>15</sup> According to the Islamic Council Submission to the Victorian *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community*, Muslims “would ... be aware of the injunction in The Qur’an: ‘[...] do not break oaths once they have been sworn. You have set up God as a surety for yourself. God knows whatever you do.’ (16:91).”<sup>16</sup> Hence, “the validity of the oath and the obligation it imposes flow directly from the invocation of the name of God”.<sup>17</sup> As long as the words, “in the name of Allah (or God),” are included, it would be recognised as an oath.<sup>18</sup> The Islamic Council Submission indicated that an oath in the following form would be acceptable:<sup>19</sup>

I swear by Almighty God/Allah that the evidence I give this court will be the truth, the whole truth, so help me God. And God/Allah is my witness.

A representative of the Islamic Council of Queensland confirmed that the following is an acceptable form of oath:<sup>20</sup>

I (name) knowing Allah Almighty to be present and looking at me, by my faith promise that what I shall say, shall be the truth and that without concealing anything I shall speak the truth, the whole truth, and that I shall speak nothing except the truth. And Allah is my witness.

There are conflicting indications as to whether Muslims should swear an oath in court on the *Qur’an*.<sup>21</sup> Nonetheless, a *Qur’an* should be available in courts for Muslims who wish to swear by their holy book.

There are specific requirements as to the treatment of the *Qur’an*. Those who touch it must be in a state of ritual purity, meaning that the witness may require to wash before taking an oath on the *Qur’an*. Additionally, as the person administering the oath would not be in a state of ritual purity, they should not touch the holy book directly.<sup>22</sup> Instead, the *Qur’an* should be kept covered at all times, except when being touched by the witness

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<sup>14</sup> Equal Treatment Bench Book (UK), above n 6, 163, 210.

<sup>15</sup> Islamic Council of Victoria, Submission No 36 to Law Reform Committee, Parliament of Victoria, Inquiry into Oaths and Affirmations with Reference to the Multicultural Community, 2002, 2 <[http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/oaths/submissions/Oaths-36-Islamic\\_Council.pdf](http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/oaths/submissions/Oaths-36-Islamic_Council.pdf)> (‘Islamic Council Submission’).

<sup>16</sup> Ibid 3.

<sup>17</sup> Ibid.

<sup>18</sup> Australian Multicultural Foundation, Minutes of Evidence (2 August 2002) No 3 to Law Reform Committee, Parliament of Victoria, 2 August 2002, 100 (H Dellal).

<sup>19</sup> Above n 15, 3.

<sup>20</sup> Email from Abdul Jalal to Oanh Thi Tran, 21 September 2004.

<sup>21</sup> See Islamic Council Submission, above n 15, 3; Victorian Parliamentary Inquiry, above n 12, 108, 117, 119, 122-3, 126-7, 130; Equal Treatment Bench Book (UK), above n 6, 180; *Equal Treatment Bench Book: Guidance for the Judiciary* (Judicial Studies Committee for Scotland, 2<sup>nd</sup> ed, 2008) [4.8], [4.9] (‘Equal Treatment Bench Book (Scotland)’).

<sup>22</sup> Islamic Council Submission, above n 15, 3; Victorian Parliamentary Inquiry, above n 11, 83-5, 130; Equal Treatment Bench Book (UK), above n 6, 180.

when taking the oath.<sup>23</sup> There is no religious significance in the colour of the cloth covering,<sup>24</sup> although the Equal Treatment Bench Book (UK) suggests a green cloth be used.<sup>25</sup>

Women may ask to affirm when they are menstruating.<sup>26</sup> When the oath is being taken, the witness should 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.<sup>27</sup> The holy book should be treated with care at all times.<sup>28</sup>

### 3 *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.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup> When the witness is taking the oath, they may hold the *Gita* in their right hand or above their head.<sup>32</sup>

In previous times, Hindus could be asked to swear “by the holy water of the Ganges and by the sacred animal, the cow”; that “if I do not tell the truth may my soul be damned”; or to use the standard Christian wording but also touch the hand or foot of a Brahmin.<sup>33</sup> However, these forms of oath may no longer be considered appropriate.<sup>34</sup>

An acceptable form of oath as suggested in the Equal Treatment Bench Book (UK) is:<sup>35</sup>

I swear by the Gita that the evidence I shall give shall be the truth, the whole truth and nothing but the truth.

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<sup>23</sup> Equal Treatment Bench Book (UK), above n 6, 180; Equal Treatment Bench Book (Scotland), above n 21, [4.8].

<sup>24</sup> Email from Abdul Jalal to Oanh Thi Tran, 31 August 2004; email from Rafi Ahmad (Chairman, Islamic Council of Queensland) to Abdul Jalal, 30 August 2004.

<sup>25</sup> Equal Treatment Bench Book (UK), above n 6, 212.

<sup>26</sup> Islamic Council Submission, above n 15, 3; Victorian Parliamentary Inquiry, above n 11, 84; Equal Treatment Bench Book (UK), above n 6, 180; *R v Kemble* (1990) 91 Cr App R 178, 180.

<sup>27</sup> Judicial Commission of New South Wales, *Equality Before the Law Bench Book* (at June 2014) [4.2.3.5] <<http://www.judcom.nsw.gov.au/publications/benchbks/equality/benchbook.pdf>>; Equal Treatment Bench Book (Scotland), above n 21, [4.9].

<sup>28</sup> Islamic Council Submission, above n 15, 3; Victorian Parliamentary Inquiry, above n 12, 84-5; Equal Treatment Bench Book (UK), above n 6, 180; Equal Treatment Bench Book (Scotland), above n 21, Appendix to Chapter 4.

<sup>29</sup> Equal Treatment Bench Book (UK), above n 6, 173.

<sup>30</sup> Equal Treatment Bench Book (UK), above n 6, 173, 211; Victorian Parliamentary Inquiry, above n 11, 84-5.

<sup>31</sup> Equal Treatment Bench Book (UK), above n 6, 154-5.

<sup>32</sup> *Ibid* 173.

<sup>33</sup> Victorian Parliamentary Inquiry, above n 11, 118, 113-14.

<sup>34</sup> *Ibid*.

<sup>35</sup> Above n 6, 173, 211.

### 4 *Sikhism*

The main holy book of the Sikh faith is the *Guru Granth Sahib* (“*Granth*”).<sup>36</sup> The *Granth* is not regarded as a holy book outside of the Sikh Temple and so a *Granth* produced in court would not be seen as being binding on the conscience.<sup>37</sup> In fact, several sources indicate that it is inappropriate for a *Granth* to be brought into court and used for this purpose.<sup>38</sup> The *Sunder Gutka* (“*Gutka*”) is a daily prayer manual which is extracted from the *Granth*. Using the *Gutka* for court purposes is preferable as it avoids difficulties associated with the *Granth*, including problems with unauthorised or ill-qualified people handling the *Granth*. The *Gutka* should therefore be used for Sikh oaths.<sup>39</sup>

There are rules governing the *Gutka* which should be followed as far as possible. The book should be kept wrapped in a clean, neat cloth. The suggested colour of the cloth is orange or yellow.<sup>40</sup> It must not be left on a seat. No-one should touch the book without first washing their hands, and any person holding the book must not have tobacco (or alcohol) in her or his possession. The book should only be directly handled by the witness.<sup>41</sup>

Sikhs taking the oath will usually wash their hands and take off their shoes.<sup>42</sup> They may also wear a small cloth, called a *Patka*, to cover the head if they are not wearing a turban.<sup>43</sup> The witness should then hold the *Gutka* in both hands while the oath is administered.<sup>44</sup>

The form of oath suggested in the Equal Treatment Bench Book (UK) is:

I swear according to the Sunder Gutka (or by Almighty God) that the evidence I give shall be the truth, the whole truth and nothing but the truth.<sup>45</sup>

### 5 *Judaism*

In the case of *Robeley v Langston* (1668) 84 ER 196, the competence of Jews to swear an oath in English courts was first recognised, on the basis that Judaism and Christianity shared a common heritage and faith in the same God.<sup>46</sup> At the time, this was of considerable significance because, as noted above, all non-Christians had until then been considered unable to be bound in conscience by virtue of lacking a belief in a Supreme Being.

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<sup>36</sup> Ibid 200, 201, 212.

<sup>37</sup> Victorian Parliamentary Inquiry, above n 11, 80-1, quoting Family Court of Australia, Submission No 16 to Law Reform Committee, Parliament of Victoria, *Inquiry into Oaths and Affirmations with Reference to the Multicultural Community*, 2002, 3; Weinberg, above n 12, 33 n 28, cited in Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) 106.

<sup>38</sup> See, e.g., Weinberg, above n 12, 38; *High Court of Delhi Rules* vol IV ch 12 r 2; Tara Singh Bains and Hugh Johnston, *Four Quarters of the Night* (McGill-Queen’s University Press, 1995) 137; Victorian Parliamentary Inquiry, above n 11, 118, 123.

<sup>39</sup> Equal Treatment Bench Book (UK), above n 6, 201, 212; Victorian Parliamentary Inquiry, above n 11, 69, 169.

<sup>40</sup> Equal Treatment Bench Book (UK), above n 6, 212; Victorian Parliamentary Inquiry, above n 11, 81, 169.

<sup>41</sup> Victorian Parliamentary Inquiry, above n 11, 81, 169.

<sup>42</sup> Equal Treatment Bench Book (UK), above n 6, 155.

<sup>43</sup> Ibid; Victorian Parliamentary Inquiry, above n 11, 169.

<sup>44</sup> Victorian Parliamentary Inquiry, above n 11, 169.

<sup>45</sup> Equal Treatment Bench Book (UK), above n 6, 201.

<sup>46</sup> *Milhizer*, above n 1, 22 n 92. See also *Omychund v Barker* (1744) 1 Atk 21; 26 ER 15, 17-18.

In that case, Jewish witnesses were sworn on the Old Testament.<sup>47</sup> In fact, the Jewish holy book is the Hebrew Bible (also known as the *Torah* or *Pentateuch*).<sup>48</sup> While the Old Testament that forms part of the Christian Bible does contain the five books which comprise the *Torah*, certain Christian denominations accept broader collections of writings as the Old Testament.<sup>49</sup> For that reason, it may be more appropriate that the Hebrew Bible be used for the swearing of oaths.<sup>50</sup>

Nonetheless, individuals consulted in preparing the Bench Book indicated that either the Hebrew Bible or the complete Old Testament would be acceptable, although in either case, it should be written in the Hebrew language (*Ivrit*).<sup>51</sup> On the other hand, some Jews (particularly Orthodox adherents) may consider it inappropriate to swear an oath on the *Torah* in a non-religious context<sup>52</sup> and should not be obliged to do so.

Some Jewish men wear a skull cap (*kippah* or *yarmulke*) or other head covering at all times, while others may wish to do so while taking the oath.<sup>53</sup> This should not be considered disrespectful to the court.<sup>54</sup> This is a matter of personal preference. The act of the oath or affirmation is equally binding whether or not the witness's head is covered, so no adverse inference should be drawn if the witness does not cover their head in any way when taking the oath or affirmation.<sup>55</sup>

In England, Wales and Northern Ireland it is prescribed that, as with a Christian oath, the witness should commence by saying "I swear by Almighty God that", then continue with the words of the oath as prescribed by law.<sup>56</sup> Under this provision, the witness ought also to hold the Old Testament, however as noted above, this may not be appropriate.

### 6 Alternatives to the Standard Oath for Some Christians

Witnesses from some Christian denominations prefer to make affirmations. The main groups to which this applies are Quakers (otherwise known as the Society of Friends), Moravians and Separatists. Quakers particularly may object to taking an oath on the Bible because they believe that this sets up a "double standard of truthfulness, whereas sincerity and truth should be practised in all dealings of life."<sup>57</sup> Hence, members of these groups consider themselves duty-bound to tell the truth in the same way in all facets of life and do not take the oath.

In Queensland, affirmations of Quakers, Moravians and Separatists are specifically dealt with in the Act. Section 18 sets out the proper form of affirmation for Quakers and Moravians:

I A.B. being [or having been as *the case may be*] one of the people called Quakers [or one of the persuasion of the people called Quakers or of the

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<sup>47</sup> Milhizer, above n 1, 22 n 92.

<sup>48</sup> Equal Treatment Bench Book (UK), above n 6, 188, 189, 211.

<sup>49</sup> John Barton, 'Introduction to the Old Testament' in John Barton and John Muddiman (eds), *The Oxford Bible Commentary* (Oxford University Press, 2001) 5, 5-6.

<sup>50</sup> Equal Treatment Bench Book (UK), above n 6, 189.

<sup>51</sup> Email from David Paratz to Justice Roslyn Atkinson, 4 May 2004.

<sup>52</sup> Equal Treatment Bench Book (UK), above n 6, 189.

<sup>53</sup> *Ibid* 158, 189.

<sup>54</sup> *Ibid* 189.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Oaths Act 1978* (UK) s 1(1).

<sup>57</sup> Religious Society of Friends, Minutes of Evidence (1 August 2002) No 2 to Law Reform Committee, Parliament of Victoria, 1 August 2002, 13 (B Polzin), quoting Society of Friends, *Christian Discipline of the Society of Friends Part II: Christian Practice* (Headley Brothers, 1911) 139.

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united brethren called Moravians *as the case may be*] do solemnly sincerely and truly affirm and declare.”

Section 19 gives the form of affirmation to be used by Separatists:

I A.B. do in the presence of Almighty God solemnly sincerely and truly affirm and declare that I am a member of the religious sect called separatists and that the taking of any oath is contrary to my religious belief as well as essentially opposed to the tenets of that sect and I do also in the same solemn manner affirm and declare.”

Each of these affirmations is stipulated to be “of the same force and effect ... as if [the person] had taken an oath in the usual form”.<sup>58</sup>

### 7 Other Belief Systems

Many of the precedents which stand for the swearing of oaths by followers of less prominent religions are, by virtue of the relative rarity of their occurrence, quite old.<sup>59</sup> It is therefore difficult to say whether many of these practices are appropriate to the modern context or may, in fact, be considered archaic and offensive. As such, these precedents should be treated with caution. If there is any uncertainty, witnesses ought to be asked as to the form that they consider appropriate to their religious beliefs. The Equal Treatment Bench Book (UK) is also a useful source to consult regarding to practices in relation to less common belief systems, such as Baha'i, Rastafarianism, Taoism and Zoroastrianism.

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<sup>58</sup> *Oaths Act 1867* (Qld) ss 18(1) and 19(2) respectively.

<sup>59</sup> See, e.g., the examples given in *Milhizer*, above n 1, 17 nn 68, 69, 70; *Victorian Parliamentary Inquiry*, above n 11, 112-15.

## CHAPTER 6: EFFECTIVE COMMUNICATION IN COURT PROCEEDINGS

### I INTRODUCTION

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.<sup>1</sup>

As discussed, in Chapter 2, Queensland is a culturally diverse State. As at 2011, it was home to people who came from more than 220 countries and spoke more than 220 different languages.<sup>2</sup> The 2011 Census also revealed that 1.1% of Queenslanders (45,927 people) who were born overseas and spoke a language other than English at home considered they did not speak English well or did not speak English at all.<sup>3</sup> This statistic indicates that there is a sizeable group of people in Queensland whose lack of proficiency in the English language may impede their ability to access our legal system. Justice Margaret Wilson, in a 2010 speech, stated:

It is critical to the administration of justice according to the law that all persons who come before the Courts, whether as litigants or witnesses, be treated fairly and consistently, and that they be able to understand and play an active part in proceedings.<sup>4</sup>

Ensuring people from culturally and linguistically diverse backgrounds<sup>5</sup> are able to comprehend and be understood in court proceedings is therefore fundamental in achieving justice according to the law.

This chapter focuses on the issues judges may encounter when dealing with legal matters involving people from culturally and linguistically diverse backgrounds and identifies some guidelines and strategies that judges may choose to employ to address such issues. The first part of this chapter discusses the use of interpreters and translators in court to enable comprehension and prevent misunderstanding, while the

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<sup>1</sup> Len Roberts-Smith, 'Communication Breakdown: The Importance of Cultural Language Awareness in Court' (1989) 27(7) *Law Society Journal* 70, 72.

<sup>2</sup> Department of Communities, Child Safety and Disability Services, *Diversity Figures Snapshot: A Statistical Snapshot of the Diversity of Queensland's population* (December 2012) Queensland Government <<https://www.communities.qld.gov.au/resources/multicultural/communities/diversity-figures-snapshot.pdf>> ('Diversity Figures Snapshot').

<sup>3</sup> Office of Economic and Statistical Research, *Census 2011: Diversity in Queensland* (2012) Queensland Treasury and Trade <<http://www.oesr.qld.gov.au/products/bulletins/diversity-qld-c11/diversity-qld-c11.pdf>>.

<sup>4</sup> 'Interpreters and the Courts' (Speech delivered at the Queensland Law Society Symposium, Brisbane, 27 March 2010) ('Interpreters and the Courts').

<sup>5</sup> A previous version of this book referred to people from 'non-English speaking backgrounds', however the term 'culturally and linguistically diverse backgrounds' has come to be favoured in recent times. "The term CALD [the acronym of culturally and linguistically diverse] is more inclusive, although less specific than NESB..." Although "commonly used to describe people who have a cultural heritage different from that of the majority of people from the dominant Anglo-Australian culture...", it can be "taken to reflect the diversity of the entire population": Queensland Government Department of Communities, Child Safety and Disability Services (Child Safety), *Working with People from Culturally and Linguistically Diverse Backgrounds*, Practice Paper (2010) 4 ('Working with People from CALD Backgrounds') <<https://www.communities.qld.gov.au/resources/childsafety/practice-manual/practice-paper-working-cald.pdf>>.

second part addresses the evaluation of non-verbal forms of communication, as well as pronunciation of names and appropriate forms of address.

## II INTERPRETERS AND TRANSLATORS

The National Accreditation Authority for Translators and Interpreters (“NAATI”) is the national standards and accreditation body for translators and interpreters in Australia.<sup>6</sup> NAATI was established in 1977 and is jointly owned by the Commonwealth, State and Territory governments.<sup>7</sup> NAATI accreditation is the only officially-recognised credential for translation and interpreting in Australia.<sup>8</sup>

Interpreters possess different skills from translators.<sup>9</sup> NAATI defines interpreting as “the oral transfer of the meaning of the spoken word from one language ... to another.” Translation is defined as “the written conversion of a text from one language ... into another language.”<sup>10</sup> As interpreters and translators are separately accredited by NAATI, there are interpreters who are not accredited to translate and translators who are not accredited to interpret. However, a practitioner may be accredited as both a translator and an interpreter.<sup>11</sup>

A translator should be used to translate texts, for example, a recorded conversation or contract. Translators will generally be called as witnesses in court proceedings to translate the meaning of written or recorded words in a document or recording in another language into English so as to make that document or recording intelligible to the court.<sup>12</sup> In *Butera v Director of Public Prosecutions (Victoria)*<sup>13</sup> the High Court held that a properly proved translation may be admitted into evidence. The court also suggested that when the accuracy of a translation has been questioned, a transcript of the cross-examination of the translator should be supplied to the jury.<sup>14</sup>

Interpreters will commonly be encountered interpreting court proceedings to a witness, party or defendant. An interpreter may employ any one of the following techniques when interpreting:

- *Dialogue interpreting* involves interpretation of conversations and interviews between two people. The interpreter first listens to short segments before interpreting them. The interpreter may take notes.
- *Consecutive interpreting* is when the interpreter listens to larger segments, taking notes while listening, and then interprets while the speaker pauses.
- *Simultaneous interpreting* is the technique of interpreting into the target language while listening to the source language, i.e. speaking while listening to the ongoing statement. Thus the interpretation lags a few seconds behind the speaker. ... In settings such as business negotiations and court cases, whispered simultaneous interpreting or *chuchotage* is practised to keep one party informed of the proceedings.

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<sup>6</sup> NAATI, *About NAATI* (16 August 2013) <[http://www.naati.com.au/about\\_naati.html](http://www.naati.com.au/about_naati.html)>.

<sup>7</sup> NAATI, *Company Information* (16 August 2013) <[http://www.naati.com.au/company\\_info.html](http://www.naati.com.au/company_info.html)>.

<sup>8</sup> NAATI, *Accreditation* (16 August 2013) <<http://naati.com.au/accreditation.html>>.

<sup>9</sup> Gavin Rebetzke, ‘Evidence by Interpreter: Be Prepared!’ (2009) 93 *Precedent* 23, 23.

<sup>10</sup> NAATI, *Concise Guide for Working with Translators and Interpreters in Australia* (2003) 2 (‘NAATI Concise Guide’).

<sup>11</sup> Rebetzke, above n 9, 24.

<sup>12</sup> *Ibid* 25.

<sup>13</sup> (1987) 164 CLR 180.

<sup>14</sup> *Ibid* 191.

- *Sign language interpreting* is a form of simultaneous interpreting between deaf and hearing people which does not require any special equipment. It involves signing while listening to the source language or speaking while reading signs.<sup>15</sup>

### A Standards of Accreditation

The following information as to the levels of accreditation available to translators and interpreters in Australia is (except where otherwise stated) sourced from NAATI's *Outline of Credentials*:<sup>16</sup>

#### 1 Paraprofessional Interpreter/Translator

Persons accredited at this level can interpret general conversations or translate non-specialised information, for example, a birth certificate. Accreditation at this level is generally limited to languages spoken by recent immigrant and refugee arrivals and the Aboriginal languages.<sup>17</sup> Practitioners accredited to this level are encouraged by NAATI to obtain Professional Level accreditation.

#### 2 Professional Interpreter/Translator

This level represents the minimum level of competence for professional interpreting and translating and is the minimum level recommended by NAATI for work in settings such as banking, law, health and social and community services.

Professional Interpreters are capable of interpreting across a wide range of semi-specialised situations and are capable of using the consecutive mode to interpret speeches or presentations.

Professional Translators at this level work across a wide range of subjects involving documents with specialised content. They may be accredited to translate into one language only (e.g. Mandarin to English) or into both languages (e.g. Mandarin to English and English to Mandarin).

#### 3 Conference Interpreter/Advanced Translator

This level represents the standard of competence required to handle complex, technical and sophisticated interpreting (in both consecutive and simultaneous modes) or translation, in line with recognised international practice.

Conference Interpreters operate in diverse situations, including at conferences, high-level negotiations and court proceedings.

Advanced Translators also operate in diverse situations including translating technical manuals, research papers, providing translations for conferences, high-level negotiations and court proceedings. As with Professional Interpreters/Translators, Conference Interpreters and Advanced Translators may choose to specialise in a particular area or areas.

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<sup>15</sup> NAATI Concise Guide, above n 10, 2.

<sup>16</sup> (16 August 2013)

<<http://www.naati.com.au/PDF/Misc/Outliness%20of%20NAATI%20Credentials.pdf>>.

<sup>17</sup> NAATI Concise Guide, above n 10, 3.

#### 4 *Conference Interpreter (Senior)/Advanced Translator (Senior)*

This is the highest level of NAATI accreditation. It reflects a level of excellence in conference interpreting or specialised translating, recognised through demonstrated extensive experience and international leadership. It encompasses and builds upon the competencies of Conference Interpreter/Advanced Translator accreditation.

### B *Obtaining NAATI Accreditation or Recognition*

NAATI accreditation is currently available in 61 languages<sup>18</sup> and may be obtained by:

- passing a NAATI accreditation test;
- successfully completing a course of studies in translation and/or interpreting at an Australian institution approved by NAATI;
- providing evidence of a specialised tertiary qualification in translation and/or interpreting obtained from an educational institution overseas;
- providing evidence of a membership of a recognised international translating and/or interpreting professional association; or
- providing evidence of advanced standing in translating or interpreting.<sup>19</sup>

Interpreters and translators of rare languages, for which NAATI does not offer accreditation testing, may be granted NAATI Recognition status. Recognition status is not based on any formal assessment but acknowledges that a candidate has had regular and recent experience as an interpreter and/or translator in a particular language for which there is low community demand. Recognition status may be granted to a candidate upon application to NAATI with the required documentary evidence and supporting paperwork.<sup>20</sup>

NAATI's Online Directory provides the most comprehensive and up-to-date record of practitioners' accreditation.<sup>21</sup>

### C *Other Professional Bodies*

#### 1 *Australian Institute of Interpreters and Translators (AUSIT)*

The Australian Institute of Interpreters and Translators Incorporated ("AUSIT") is the national association for interpreters and translators and professes the aim of promoting

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<sup>18</sup> According to a list contained in NAATI, *Accreditation by Testing Information Booklet* (version 3.1, 2015) 2 <[http://www.naati.com.au/PDF/Booklets/Accreditation\\_by\\_Testing\\_booklet.pdf](http://www.naati.com.au/PDF/Booklets/Accreditation_by_Testing_booklet.pdf)> ('Accreditation by Testing'), languages for which accreditation was available as at May 2015 were: Albanian, Amharic, Arabic, Armenian, Assyrian, Auslan, Bangla, Bosnian, Bulgarian, Burmese, Cantonese, Chinese, Croatian, Czech, Dari, Dinka, Dutch, Filipino, Finnish, French, German, Greek, Hazaragi, Hindi, Hungarian, Indonesian, Italian, Japanese, Khmer, Korean, Lao, Macedonian, Malay, Mandarin, Maltese, Nepali, Nuer, Oromo, Persian, Polish, Portuguese, Punjabi, Pushto, Romanian, Russian, Samoan, Serbian, Sinhalese, Slovak, Somali, Spanish, Swahili, Tamil, Tetum, Thai, Tigrinya, Tongan, Turkish, Ukrainian, Urdu and Vietnamese.

<sup>19</sup> NAATI, *Accreditation* (16 August 2013) <<http://www.naati.com.au/accreditation.html>>.

<sup>20</sup> Accreditation by Testing, above n 18, 3.

<sup>21</sup> See <<https://www.naati.com.au/online/PDSearch/Skill?WizardId=fd88446f-00cf-4c1b-b990-6f0dbabbae09>>.

the ethics and quality standards amongst practitioners.<sup>22</sup> AUSIT recognises NAATI accreditation or equivalent as a minimum basic qualification for membership. Full/Candidate Members must therefore have a formal qualification, as well as sufficient experience,<sup>23</sup> and adhere to the Institute's Code of Ethics and Code of Conduct.<sup>24</sup> These Codes are premised upon the principles of professional conduct, confidentiality, competence, impartiality, accuracy, clarity of role boundaries, maintaining professional relationships, professional development and professional solidarity.<sup>25</sup> AUSIT also maintains an online directory of its member interpreters and translators.<sup>26</sup>

### 2 *The Translating and Interpreting Service National*

The Translating and Interpreting Service (TIS) National is operated by the Commonwealth Government Department of Immigration and Border Protection. It provides a national, 24-hour telephone interpreting service, as well as onsite interpreters and a free translation service to eligible Australian citizens, permanent residents, and certain visa holders in relation to medical services.<sup>27</sup> TIS National has access to over 2,900 contracted interpreters throughout Australia who speak more than 160 languages and dialects.<sup>28</sup>

Most services provided by TIS National are free to non-English speakers, as ordinarily the organisation being contacted will accept the charges involved so that they can provide the non-English speaker with access to their own services.<sup>29</sup> Government organisations in Queensland are also required to provide professional interpreting services for clients who have difficulty communicating in English in accordance with the Queensland Government's Language Services Policy.<sup>30</sup>

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<sup>22</sup> See Australian Institute of Interpreters and Translators Inc ('AUSIT'), *About Us* <[http://ausit.org/AUSIT/About\\_Contact/AUSIT/Home/About.aspx?hkey=ead1c96b-63b4-4258-add8-c7f4feede37f](http://ausit.org/AUSIT/About_Contact/AUSIT/Home/About.aspx?hkey=ead1c96b-63b4-4258-add8-c7f4feede37f)>.

<sup>23</sup> See AUSIT, *Join Us* (2015) <[http://ausit.org/AUSIT/Join\\_AUSIT/Membership\\_Categories/AUSIT/Join\\_AUSIT/Membership\\_Categories.aspx](http://ausit.org/AUSIT/Join_AUSIT/Membership_Categories/AUSIT/Join_AUSIT/Membership_Categories.aspx)>.

<sup>24</sup> See AUSIT, *AUSIT Code of Ethics and Code of Conduct* (revised ed, 2012) <[http://ausit.org/AUSIT/Documents/Code\\_Of\\_Ethics\\_Full.pdf](http://ausit.org/AUSIT/Documents/Code_Of_Ethics_Full.pdf)>.

<sup>25</sup> *Ibid.*

<sup>26</sup> See AUSIT, *Find an Interpreter* <[http://ausit.org/AUSIT/Find\\_a\\_Service/Find\\_an\\_Interpreter.aspx](http://ausit.org/AUSIT/Find_a_Service/Find_an_Interpreter.aspx)>; AUSIT, *Find a Translator* <[http://ausit.org/AUSIT/Find\\_a\\_Service/Find\\_a\\_Translator.aspx](http://ausit.org/AUSIT/Find_a_Service/Find_a_Translator.aspx)>.

<sup>27</sup> See Australian Government Department of Immigration and Border Protection, *About TIS National*, TIS National <<https://www.tisnational.gov.au/About-TIS-National>> and Australian Government Department of Immigration and Border Protection, *About the Free Interpreting Service*, TIS National <<https://www.tisnational.gov.au/Agencies/Charges-and-free-services/About-the-Free-Interpreting-Service>>.

<sup>28</sup> Australian Government Department of Immigration and Border Protection, *About TIS National*, TIS National <<https://www.tisnational.gov.au/About-TIS-National>>.

<sup>29</sup> Australian Government Department of Immigration and Border Protection, *Help Using TIS National Services*, TIS National <<http://www.tisnational.gov.au/Non-English-speakers/Help-using-TIS-National-services>>.

<sup>30</sup> See generally, Queensland Government Department of Communities, Child Safety and Disability Services, *Language Services Policy* (2015) <<http://www.communities.qld.gov.au/resources/multicultural/policy-governance/lsp-policy.pdf>>.

### III LEGAL INTERPRETING

Legal interpreting across cultures involves highly skilled work.<sup>31</sup> It is therefore considered to be a more specialised field than generalist interpreting:

Court interpreters need to acquire specialised knowledge of the legal system, of different legal settings, of bilingual legal terminology and of the discourse practices and strategies particular to the courtroom. Qualified interpreters will also be familiar with a code of ethical conduct that will guide them on issues of impartiality, confidentiality, and their role in providing a true reflection of the voice of the original speakers, as far as the situation and the participants will permit. Another crucial area of competence is the interpreter's ability to manage the interaction, to know when and how to intervene to highlight a translation ambiguity or difficulty or explain a translation choice that may impact on the case at hand.<sup>32</sup>

It may be considered best practice to require the engagement of a NAATI accredited practitioner of the level of Professional Interpreter or above for courtroom interpreting. However, this is not a legislative requirement, as in some instances there will be no accredited Professional Interpreter available for particular languages. This is particularly true of Aboriginal and Torres Strait Islander languages.<sup>33</sup> In these situations, it may be necessary for a Paraprofessional Interpreter to be engaged.

In order to improve the quality and consistency of interpreting services provided in Australian courts, a 2011 research report recommended that:

- All courts and tribunals always give preference to the best qualified interpreters;
- All interpreters be required to state their qualifications at the commencement of proceedings;
- All interpreters who work in courts and tribunals complete formal legal interpreting training;
- Special legal interpreting training scholarships be established;
- NAATI introduce a specialised legal interpreter accreditation;
- A national register of qualified legal interpreters be established;
- Lawyers, tribunal members and judicial officers receive basic training on how to work with interpreters;
- Interpreters be provided with adequate working conditions in the court or tribunal;
- Interpreters be provided with background information and materials where available, before the case, in order to adequately prepare for their assignment;
- Two interpreters be used to work as a team for long trials;
- Differential pay rates be implemented according to qualifications;
- Interpreters be booked and paid for a minimum of a full day a court, and a minimum of half a day for tribunals, regardless of the actual duration of the case;
- More transparent contracting practices be implemented;
- Better feedback mechanisms be established for judicial officers, tribunal members and interpreters;
- A national register of interpreting experts be established; and
- A national protocol on working with interpreters in courts and tribunals be established.<sup>34</sup>

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<sup>31</sup> See, e.g., Anne Susskind, 'Justice Suffers When Communication Breaks Down' (2011) 20 *Law Society Journal* 19, 19.

<sup>32</sup> Sandra Hale, 'The Need to Raise the Bar: Court Interpreters as Specialised Experts' (2011) 10 *Judicial Review* 237, 241-2.

<sup>33</sup> 'Interpreters and the Courts', above n 4, 4.

<sup>34</sup> Sandra Hale, *Interpreter Policies, Practices and Protocols in Australian Courts and Tribunals: A National Survey* (Australian Institute of Judicial Administration, 2011) 20-56.

A *General Guidelines for Working with Interpreters in Court*

Many of the recommendations identified above have not yet been implemented. Nonetheless, the following guidelines for magistrates and judges on working with interpreters in court have been developed:<sup>35</sup>

- Ask interpreters to introduce themselves and state their level of NAATI accreditation and their formal qualifications (e.g. Degree or TAFE qualification in Interpreting);
- Ask them if they have worked in court before. If not, explain their role: “To interpret everything faithfully and impartially in the first/second grammatical person”.
- Remember that interpreting faithfully does not mean interpreting ‘literally’ – word-for-word translations normally produce nonsensical renditions.
- Ask them what resources they will be accessing in court (e.g. on-line 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 he/she would like to take their breaks – ideally breaks should be provided at least every 45 minutes (Interpreting requires a very high cognitive load and is mentally very taxing).
- Ensure that the interpreter is comfortable and is provided with a chair, a jug of water and glass, a table to lean on to take notes and a place to put their belongings (such as a bag or 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 he/she can follow. If it is a difficult text, give him or her time to read it through first.
- Stop any overlapping speech or any attempts from lawyers or witnesses to interrupt the interpreter while he/she is interpreting.
- Do not assume that the witness will understand the legal jargon when interpreted into their language. Interpreters must interpret accurately, and cannot simplify the text or explain legal concepts. If there are not direct equivalents, the interpreter may ask for an explanation which can then be interpreted.
- Interpreters are required to interpret vulgar language, including expletives.
- Interpreters are required to interpret everything for the defendant or accused, to make them linguistically present. This includes the questions and answers during evidence, any objections, legal arguments and other witness testimonies. The consecutive mode will be used when interpreting questions and answers. The whispering simultaneous mode (AKA chuchotage) will be used for all other instances (if the interpreter is trained in this mode of interpreting).
- If anyone questions the interpreter’s rendition, do not take their criticism at face value. Bilinguals who are not trained interpreters often overestimate their competence. Compare qualifications and give the interpreter the opportunity to respond to the criticism.

NAATI also recommends that interpreters and translators be given regular breaks due to the high degree of concentration that interpreting requires.<sup>36</sup> Speakers should also be careful to communicate clearly, articulately and slowly.<sup>37</sup> The first person should always

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<sup>35</sup> See Sandra Hale, *Guidelines for Magistrates and Judges on Working with Interpreters in Court* <[http://www.ausitawork.com.au/files/docs/guidelines\\_judges.pdf](http://www.ausitawork.com.au/files/docs/guidelines_judges.pdf)>.

<sup>36</sup> NAATI Concise Guide, above n 10, 18.

<sup>37</sup> *Ibid.*

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be used when putting questions to a person via an interpreter. For example, the question should be posed as “Where do you live?” rather than “Would you ask him where he lives?”<sup>38</sup>

The fundamental duty of an interpreter is to relate questions to the defendant, witness or party, and to accurately convey their responses back to the court.<sup>39</sup> A misconception has existed amongst the legal profession that interpreting merely involves the relaying of word-for-word utterances,<sup>40</sup> without taking into account the context or the speaker’s style, culture and intention.<sup>41</sup> This approach views interpreting from one language into another language as a purely mechanical process.<sup>42</sup> However, the work of an interpreter is not simple: for example, there may not be a linguistic equivalent between the two languages, or grammatical structures may be very different. In these situations it is necessary for an interpreter to express the idea or concept in the second language as accurately as that language will allow.<sup>43</sup> Interpreters therefore need to have a detailed understanding of the nuances of both languages in order to accurately convey the meaning of a question and any answers that are given. As suggested by the proposed guidelines above, judges should be prepared for an interpreter to ask questions which seek clarification as to the meaning of legal concepts and ideas.

Obviously, the quality of a translation or interpretation depends largely on the skill level of the practitioner involved and their level of exposure to courtroom translating or interpreting. If an incompetent practitioner is used, an accused person’s right to a fair trial may be compromised. For example, in the case of *Saraya v The Queen*<sup>44</sup> the New South Wales Court of Criminal Appeal ordered a re-trial because many deficiencies had been demonstrated in the interpretation of questions to the accused while he was cross-examined. The re-trial was ordered on the basis that the accused had not been able to give an effective account of his defence.

In *R v Watt*,<sup>45</sup> the interpreter at trial held a Masters degree in Linguistics, in which she had studied applied linguistics, language development, child language and issues in language and culture.<sup>46</sup> Nonetheless, in the Queensland Court of Appeal the view was expressed that the transcript of the trial proceedings suggested “the complainant may not have been given a full opportunity to give her version of events in the trial”.<sup>47</sup> It could not be determined whether language difficulties were the sole or a major factor for the problems at trial, but it was nonetheless held that the “evidence was so vague and so riddled with inconsistencies that the verdicts ... [were] unsafe and unsatisfactory”.<sup>48</sup> In

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<sup>38</sup> Ibid.

<sup>39</sup> ‘Interpreters and the Courts’, above n 4, 5.

<sup>40</sup> See, e.g., *Gaio v The Queen* (1960) 104 CLR 419, 430, where the interpreter was said in submissions to “have acted only as a kind of a conduit pipe” rather than been engaged in a complex human interaction. Cf Nicole Choolun, ‘Lost in Translation? An Examination of Court Interpreting in Australia’ (2009) 2 *Queensland Law Student Review* 21, 25, and generally Kathy Laster, ‘The Compromised “Conduit”’: Conflicting Perceptions of Legal Interpreters” (1995) 6(4) *Criminology Australia* 9.

<sup>41</sup> Alejandra Hayes and Sandra Hale, ‘Appeals on Incompetent Interpreting’ (2010) 20 *Journal of Judicial Administration* 119, 127. There, the authors identify as an accurate statement, that “[interpreting is] to get the real meaning of what’s being said across”: *R v Watt* [2007] QCA 286, [39].

<sup>42</sup> Choolun, above n 40.

<sup>43</sup> ‘Interpreters and the Courts’, above n 4, 2; *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6, [1999] FCA 507 [29]; *De La Espriella-Velasco v The Queen* (2006) 197 FLR 125, [2006] WASCA 31 [75].

<sup>44</sup> (1993) 70 A Crim R 515.

<sup>45</sup> [2007] QCA 286.

<sup>46</sup> Ibid [38].

<sup>47</sup> Ibid [3].

<sup>48</sup> Ibid [44] (Wilson J, with whom McMurdo P and Philippides J agreed).

this case, the interpreter did not hold any qualifications in legal interpreting or forensic linguistics. The case therefore highlights the importance of specialist legal interpretation training.<sup>49</sup>

Note that a need for caution has been expressed with respect to assessing credibility of a witness who gives evidence via an interpreter. This is both because the witness's body language may be influenced by their cultural background, as elsewhere discussed, and because it is impossible to gauge a witness's demeanour from the tone of an interpreter's speech.<sup>50</sup>

### B *Interpreter's Oath*

Interpreters should be sworn in both civil and criminal trials pursuant to ss 26 to 30 of the *Oaths Act 1867* (Qld). Section 26 provides the interpreter's oath for civil proceedings generally; s 27 for a voir dire in civil proceedings; s 28 on the arraignment of an accused person; s 29 when interpreting between a witness or the accused person when giving evidence and the Court; and s 30 where a witness and a prisoner speak different languages, so that two interpreters are required to interpret between the witness and the prisoner, and then into English. The required oath should be adapted to the interpreter's religious beliefs or substituted with an affirmation: see Chapter 5.

### C *Interpreters in Criminal Proceedings*

Generally, evidence is to be received by a court in English.<sup>51</sup> However, in a criminal trial, the assistance of an interpreter may be required to interpret the evidence of a witness who is not fluent in English to the Court (which may include the defendant, if she or he testifies), or to interpret court proceedings to a defendant who is not capable of understanding the proceedings in English.

In Queensland, there is no independent right to the assistance of an interpreter in either of these situations, either at common law or pursuant to legislation. (In contrast, a person being questioned by police who appears unable to "speak with reasonable fluency in English", whether due to inadequate knowledge of the language or a physical disability, does have a statutory right to an interpreter.)<sup>52</sup> Instead, the trial judge retains a discretion as to whether an interpreter should be used.<sup>53</sup> However, this is subject to the substantial caveat that the absence of an interpreter (of sufficient competence) to permit accurate evidence to be given may preclude the defendant having a fair trial and therefore lead to a miscarriage of justice on which a successful appeal may be grounded.<sup>54</sup>

The factors which govern the exercise of this discretion relating to a witness were discussed by the Queensland Court of Criminal Appeal in *Johnson v The Queen*.<sup>55</sup> Williams J, with whom Shepherdson and Derrington JJ agreed, considered that it will generally be obvious when a witness requires an interpreter and that "ultimately the

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<sup>49</sup> Hayes and Hale, above n 41, 128.

<sup>50</sup> *Kathiresan v Minister for Immigration and Multicultural Affairs* [1998] FCA 159, with reference to *Sun Zhan Qui v Minister for Immigration and Multicultural Affairs* [1997] FCA 324, 3 (North J).

<sup>51</sup> Andrew West, 'Witness Statements in a Foreign Language' (2008) 28 *Queensland Lawyer* 174, 174.

<sup>52</sup> *Police Powers and Responsibilities Act 2000* (Qld) s 433. Similarly, with respect to federal matters, see *Crimes Act 1914* (Cth) s 23N; see also *Customs Act 1901* (Cth) s 219ZD.

<sup>53</sup> *Johnson v The Queen* (1987) 25 A Crim R 433.

<sup>54</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 331 (Deane J), 363 (Gaudron J); *Johnson v The Queen* (1987) 25 A Crim R 433; *Saraya v The Queen* (1993) 70 A Crim R 515; *R v Lee Kun* [1916] 1 KB 337.

<sup>55</sup> (1987) 25 A Crim R 433.

decision whether or not a witness should have an interpreter will be answered in the light of the fundamental proposition that the accused must have a fair trial.”<sup>56</sup> Shepherdson J added that:

the guiding star is the need to ensure a fair trial for an accused person and that with that guiding star as the backdrop there are two needs to be considered – the need of the jury to hear and understand a witness’s evidence and the need of an accused person to hear and understand a witness’s evidence.<sup>57</sup>

As such, witnesses in criminal trials who are not proficient in English are generally permitted to give evidence via interpreters.

Supreme Court Practice Direction 4 of 2014 on the court’s Criminal Jurisdiction<sup>58</sup> sets out procedures to be followed where interpreters are to be utilised. In particular, a party to a criminal proceeding who requires an interpreter to assist her or his own comprehension of the proceedings, or to interpret between the court and a witness, must make an application for the appointment of an interpreter no less than 28 days prior to the final hearing date.<sup>59</sup> The following specific provisions are also of significance:

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(e) The court will bear the cost of interpreting the proceeding to an accused person where the interests of justice require the appointment of an interpreter for that purpose.

(f) Unless the court orders otherwise, the costs of interpreting between the court and a witness will be borne by the party calling the witness or giving evidence.

(g) When the interests of justice require, the costs of interpreting between the court and an accused person giving evidence will be borne by the court.

...

(i) A Registry officer will be designated to facilitate communications between the profession and the court, and between the interpreter and the court. That officer may be contacted at: [courtinterpreters@courts.qld.gov.au](mailto:courtinterpreters@courts.qld.gov.au).

(j) This Practice Direction does not affect the capacity of a party otherwise to engage, at that party’s expense, an interpreter to assist a party’s comprehension of a proceeding in court.

(k) For applications which relate to proceedings under the *Bail Act 1980* or the *Dangerous Prisoners (Sexual Offenders) Act 2003* see Practice Direction 6 of 2014: Interpreters – Applications under the *Bail Act 1980* or the *Dangerous Prisoners (Sexual Offenders) Act 2003*.

Legal Aid Queensland will pay reasonable fees of an accredited interpretation service when required by a client for court proceedings where the costs are not borne by the court, although prior approval for this must be obtained.<sup>60</sup>

Note that, where *Evidence Act 1995* (Cth) applies by virtue of the exercise of federal jurisdiction, s 30 essentially reverses the ordinary position at common law, allowing an interpreter unless the circumstances indicate such assistance is not warranted:

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<sup>56</sup> Ibid 440 (Williams J); see also 434 (Shepherdson J), 442 (Derrington J).

<sup>57</sup> (1987) 25 A Crim R 433, 435 (Shepherdson J).

<sup>58</sup> See <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0017/225521/sc-pd-4of2014.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0017/225521/sc-pd-4of2014.pdf)>.

<sup>59</sup> Supreme Court Practice Direction 4 of 2014, cl 3(a), (b)

<[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0017/225521/sc-pd-4of2014.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0017/225521/sc-pd-4of2014.pdf)>.

<sup>60</sup> Legal Aid Queensland, *Interpreter Fees* <<http://www.legalaid.qld.gov.au/about/Policies-and-procedures/Grants-handbook/Fees-and-payments/Payment-rules-and-audit-requirements/Pages/Interpreter-fees.aspx>>.

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### 30 Interpreters

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.

Regarding the use of interpreters to assist accused persons' understanding of courtroom proceedings, the Privy Council in *Kunnath v Mauritius*<sup>61</sup> stated:

It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant... The basis of this principle is not simply that there should be corporeal presence but that the defendant, by reason of [her or] his presence, should be able to understand the proceedings... A defendant who has not understood the conduct of proceedings against [her or] him cannot, in the absence of express consent, be said to have had a fair trial.<sup>62</sup>

This view was subsequently adopted in Australia in *Ebatarinja v Deland*<sup>63</sup> where it was held "if the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial".<sup>64</sup> In support of this view, the court (comprised by Gaudron, McHugh, Gummow, Hayne and Callinan JJ) referred to an old Queensland case of *R v Willie*: there, Cooper J had ordered that four Aboriginal prisoners be discharged on a murder charge when no interpreter could be found to interpret between them and the court.<sup>65</sup>

Williams J also held in *Johnson v The Queen* that "one aspect of a fair trial is the need to ensure that an accused person understands the evidence being led against him at his trial" and further noted "the importance of the accused person's right to instruct counsel."<sup>66</sup> In separately concurring with Williams J, Shepherdson J made reference in this respect to the decision of the English Court of Criminal Appeal in *R v Lee Kun*.<sup>67</sup> There, Lord Reading, giving the decision of the Court, stated:

We have come to the conclusion that the safer, and therefore the wiser, course, when the foreigner accused is defended by counsel, is that the evidence should be interpreted to him except when he or counsel on his behalf expresses a wish to dispense with the translation and the judge thinks fit to permit the omission; the judge should not permit it unless he is of opinion that by reason of what has passed before the trial the accused substantially understands the evidence to be given and the case to be made against him at the trial. To follow this practice may be inconvenient in some cases and may cause some further expenditure of time; but such a procedure is more in consonance with that scrupulous care of the interests of the accused which has distinguished the administration of justice in our criminal Courts, and therefore it is better to adopt it. <sup>68</sup>

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<sup>61</sup> (1993) 1 WLR 1315.

<sup>62</sup> Ibid 1319.

<sup>63</sup> (1998) 194 CLR 444.

<sup>64</sup> Ibid [27] 454.

<sup>65</sup> See *R v Willie* (1885) 7 QJ (NC) 108, cited in *ibid*.

<sup>66</sup> (1987) 25 A Crim R 433, 434-5 (Shepherdson and Derrington JJ agreeing).

<sup>67</sup> [1916] 1 KB 337.

<sup>68</sup> Ibid 343.

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Therefore, in order to safeguard the right to a fair trial, courts have the power to order a stay of proceedings where interpreting services have not been procured for an accused person. In *Dietrich v The Queen*,<sup>69</sup> Deane J said:

If, for example, available interpreter facilities, which were essential to enable the fair trial of an unrepresented person who could neither speak nor understand English, were withheld by the government, a trial judge would be entitled and obliged to postpone or stay the trial and an appellate court would, in the absence of extraordinary circumstances, be entitled and obliged to quash any conviction entered after such an inherently unfair trial.<sup>70</sup>

The court also has express power under *Evidence Act 1977 (Qld)* s 131A to order the State to provide an interpreter in a criminal case, whether for a complainant, witness or defendant, if the interests of justice so require it.

There has been no reported discussion of the factors which would satisfy a court that the interests of justice require the provision of an interpreter pursuant to this section. It is not clear whether the court may take this step on its own motion, however the Australian Law Reform Commission has noted that “the onus is on the person requiring the interpreter to show that it would be in the interests of justice for the interpreter to be provided”.<sup>71</sup> This may be contrasted with the position in jurisdictions in which uniform evidence legislation based on *Evidence Act 1995 (Cth)* applies.<sup>72</sup>

Where a child is involved, provisions of the *Youth Justice Act 1992 (Qld)* requiring the court to ensure, as far as practicable, that the child has a full opportunity to be heard and to participate, and understands particular aspects of the proceedings, must be taken into consideration.<sup>73</sup>

It may only become apparent after a witness has already started giving evidence that her or his English is not good enough to cope with the demands of the courtroom. In *Adamopoulos v Olympic Airways SA*,<sup>74</sup> Kirby P (as His Honour then was) discussed the additional demands placed on a person’s language skills in a formal public setting:

The mere fact that a person can sufficiently speak the English language to perform mundane or social tasks or even business obligations at the person’s own pace does not necessarily mean that he or she is able to cope with the added stresses imposed by appearing as a witness in a court of law. Still more powerful are the reasons for affording a person the assistance of an interpreter if he or she must present the case without the help of legal counsel. ... Those who, in formal public environments, of which courts are but one example, have struggled with their own imperfect command of foreign languages, will understand more readily the problem then presented. The words which come adequately in the relaxed environment of the supermarket disappear from recollection. The technical expressions cannot be recalled, if ever they were known. The difficulties cause panic. A relationship in which the speaker is in command (as when dealing with friends or purchasing or selling goods and services) is quite different from a potentially hostile environment of a courtroom. There, questions are asked by others, sometimes at a speed and in accents not fully understood.<sup>75</sup>

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<sup>69</sup> (1992) 177 CLR 292.

<sup>70</sup> *Ibid* 331.

<sup>71</sup> Queensland Law Reform Commission, ‘The Receipt of Evidence by Queensland Courts: The Evidence of Children’ (Discussion Paper No 53, December 1998) 9(a), 18.1(a) <<http://www.austlii.edu.au/au/other/lawreform/QLRCWP/1998/53.pdf>>.

<sup>72</sup> *Ibid*.

<sup>73</sup> See ss 72, 158.

<sup>74</sup> (1991) 25 NSWLR 75.

<sup>75</sup> *Ibid* 77-8.

It may therefore be appropriate at that point to require an interpreter to be obtained, even if some delay to proceedings is incurred.

Australia also has international obligations with respect to all persons who appear before the courts pursuant to the International Covenant on Civil and Political Rights.<sup>76</sup> Article 14 of the ICCPR guarantees the right to a “fair and public hearing”,<sup>77</sup> which includes the “minimum guarantees” that an accused person must “be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him,”<sup>78</sup> and must “have the free assistance of an interpreter if he cannot understand or speak the language used in court”.<sup>79</sup> Article 26 of the ICCPR also provides that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law” and discrimination on the ground of language, among others, is prohibited.<sup>80</sup> Australian domestic law as it presently stands goes a considerable way toward achieving these international standards.

### D *Interpreters in Civil Proceedings*

As in criminal law, there is no distinct right at common law for a party or witness in civil proceedings to give evidence in a language other than English. Accordingly, the common law position that the trial judge retains a discretion as to whether to allow the use of an interpreter in court continues to apply in Queensland. In *Dairy Farmers Co-operative Milk Co Ltd v Acquilina*<sup>81</sup> the High Court stated:

We agree with the decision of the Full Court of the Supreme Court of New South Wales in *Filios v Morland*<sup>82</sup> that there is no rule that a witness is entitled as of right to give evidence in his native tongue through an interpreter and that it is a matter in the exercise of the discretion of the trial judge to determine on the material which is put before him whether to allow the use of an interpreter and the exercise of this discretion should not be interfered with on appeal except for extremely cogent reasons.<sup>83</sup>

This position was subsequently reaffirmed by the New South Wales Court of Appeal in *Adamopoulos v Olympic Airways SA*.<sup>84</sup> However, Kirby P commented in that case that:

courts should strive to ensure that no person is disadvantaged by the want of an interpreter if that person’s first language is not English and he or she requests that facility to ensure that justice is done.<sup>85</sup>

Mahoney JA made the following remarks regarding the exercise of the discretion:

It will be necessary ... to decide what disadvantage a party may suffer from the absence of an interpreter. Thus, he may be unable to put his own case, he may be unable to

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<sup>76</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).

<sup>77</sup> *Ibid* art 14(1).

<sup>78</sup> *Ibid* art 14(3)(a).

<sup>79</sup> *Ibid* art 14(3)(f).

<sup>80</sup> *Ibid* art 26.

<sup>81</sup> (1963) 109 CLR 458.

<sup>82</sup> (1963) SR (NSW) 331

<sup>83</sup> *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458, 464.

<sup>84</sup> (1991) 25 NSWLR 75; see also the discussion of this point by the same Court (differently constituted) in *Gradidge v Grace Bros Pty Ltd* (1988) 93 FLR 414.

<sup>85</sup> *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75, 78.

understand or deal with the case of the other party in its factual or legal aspects, or (though he may be able to deal with these matters) his understanding of what is involved in fact or in law in the legal process may be defective.

But, in deciding what in the particular case is an acceptable level of fairness, the interest of that party is not the only matter to be taken into account. The judge may have regard to the fact that, as experience shows, the taking of evidence through an interpreter may sometimes not facilitate the ascertainment of the truth. The weight (if any) to be given to this factor will, of course, depend on the skill of the interpreter available and the other circumstances of the particular case.

The interest of the other party is also relevant. Ordinarily the issue facing the court will be whether the proceeding is to be delayed to enable a proper interpreter to be available. It will be relevant to consider, inter alia, whether an interpreter can be provided, when, and at whose expense. If, within the existing resources of the justice system at the time, an appropriate interpreter cannot be provided to assist the party or to interpret the evidence at the trial, it may be necessary to consider whether, for example, the claim of a plaintiff to relief is to be delayed because of the extent of the difficulties which this imposes upon the defendant.<sup>86</sup>

In civil trials, the provision of an interpreter for a witness or for a party is generally the responsibility of each party. A successful party in a civil proceeding may recover its costs of an interpreter as part of the costs order at the end of the trial.

#### IV NON-VERBAL COMMUNICATION

A large part of the assessment of a witness's credit is based on non-verbal forms of communication.<sup>87</sup> The observation of a person's demeanour is an important tool in making this assessment. However, many aspects of behaviour and demeanour are conditioned by culture. As such, where assessing credibility is relatively straightforward when both the finder of fact and the witness share a common cultural background, it becomes more difficult when they do not.

Judges must ensure that what is being observed in court is an accurate reflection of the witness's personality and that they are not being misled by responses which are attributable to the witness's cultural background. For example, an impressive witness according to Anglo-Australian culture will look her or his questioner in the eye and answer questions confidently and clearly. However, in many cultures, direct eye contact may be considered to be rude or challenging. This is often true, for example, for Aboriginal and Torres Strait Islander people.<sup>88</sup> Children in many cultures may also avoid eye contact with a questioner, as a way of displaying respect for an authority figure. Such demeanour may be perceived as demonstrating evasiveness on the part of the witness according to an Anglo-Australian frame of reference.<sup>89</sup>

Similarly, in some cultures it is considered impolite to flatly disagree with a questioner. A witness may therefore be very reluctant to completely disagree with a proposition and may try to compromise in order to find some common ground with the questioner. A person watching such an interchange from an Anglo-Australian cultural background may view this politeness as a lack of certainty.<sup>90</sup> Cross-cultural misunderstandings may also

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<sup>86</sup> Ibid 81.

<sup>87</sup> Roland Sussex, 'Intercultural Communication and the Language of the Law' (2004) 78 *Australian Law Journal* 530, 530-1, 536.

<sup>88</sup> Ibid 532.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid 532, 535-6, 538.

occur because what may sound like an aggressive or argumentative tone in one language may be considered to be neutral in another.<sup>91</sup> An understanding of cultural differences is therefore critical, especially when compromising responses are given by a witness under cross-examination.

Additionally, people who are familiar with a different legal system may perceive the Australian common law system as challenging and be deterred by this. They may be confused by the adversarial nature of the legal system, especially when compared to an inquisitorial system.

This Benchbook does not seek to devise comprehensive outlines of how a person from a given cultural background will act; attempts at such generalisation run the risk of homogenisation. Indeed, the character and behaviour of every individual are subject to many influences, of which a particular culture may be just one.<sup>92</sup>

Further, due to the multicultural nature of contemporary Australian society it would not be possible for judges to be fully aware of the nuances of every culture which she or he might conceivably encounter in the courtroom. Judges must therefore be prepared to consider the influence of cultures with which they have had no direct experience. Further, judges must be alert to ethnocentrism – using one’s own cultural assumptions to interpret other people’s behaviour – and the potential for culturally-based misunderstanding. Areas of potential misunderstanding may include politeness, body language, power dynamics, metalinguistic factors such as pitch, volume and silence, and the difference between individualistic and collectivistic cultures.<sup>93</sup> Clarification may be sought by asking questions, or it may be necessary to receive expert evidence from a linguist or an anthropologist in this regard.<sup>94</sup> It may be appropriate to give some direction to jurors as to how to view oral evidence where cultural influences have some relevant impact.

A judge may also order special measures to be taken in respect of a witness pursuant to s 21A of the *Evidence Act 1977* (Qld). A witness’s cultural background may be a ‘relevant matter’ which would be likely to cause a witness to be disadvantaged for the purposes of this section. In particular, judges may take a witness’s cultural background into account when deciding whether a question should be disallowed as improper.

## V APPROPRIATE TERMINOLOGY

Gratuitous mention of an individual’s race, ethnicity, culture or religion should be avoided. The question should always be asked: is the characteristic relevant to the situation, or does reference to it only signify difference from a perceived cultural norm? It should never be assumed that the majority sets a standard by which other members of society are judged. The gratuitous reference to racial, ethnic, cultural or religious characteristics reinforces such assumptions. Further, such characteristics should not be used to describe the whole individual, to the exclusion of their other features. For instance, it may be more relevant to refer to a person’s occupation.

Diversity within groups should be acknowledged and care should be taken to portray members of minority groups as individuals rather than as members of a monolithic group. For example, it would be preferable to identify a person as being from Hong Kong or Vietnam rather than as being Asian, because this better reflects the diversity of the Asia region and how individuals identify. It is also important not to automatically equate

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<sup>91</sup> Hayes and Hale, above n 41, 128.

<sup>92</sup> Working with People from CALD Backgrounds, above n 5, 4, 8.

<sup>93</sup> Sussex, above n 87, 535-8.

<sup>94</sup> ‘Interpreters and the Courts’, above n 4, 3.

specific religions with particular ethnic groups. For example, the majority of Muslims are not Arabs, while not all Arabs are Muslims.

The term 'Australian' should not be used to refer to those from an Anglo-Australian cultural background, as distinct from those Australians from other cultural backgrounds. If it is necessary to specify the ethnicity or cultural background of a person or group, a qualifying adjective or adjectival phrase should be used, such as 'Greek Australian' or 'Vietnamese-born Australian'. However, it is important to be aware that some Australians may object to being identified in this way; it is generally best to be guided by how a person describes herself or himself (and whether they are accepted by the relevant community as such).

## VI NAMES AND FORMS OF ADDRESS

Naming may be influenced by family, cultural and religious backgrounds. In Queensland, the top 10 birthplaces for residents born overseas were the United Kingdom, New Zealand, South Africa, India, the Philippines, China, Germany, Vietnam, the United States of America and the Netherlands.<sup>95</sup> The top 10 languages spoken by Queenslanders, other than English, included Mandarin, Cantonese, Vietnamese, Italian, German, Spanish, Hindi, Japanese, Samoan and Korean.<sup>96</sup> The main religious affiliations in Queensland were Christianity, Buddhism, Islamism, Hinduism and Judaism.<sup>97</sup>

A brief overview in relation to the construction of names and forms of address with respect to different cultural and ethnic backgrounds is provided below. The overview is by no means comprehensive and should be considered a guide only.

There is always diversity within ethnic groups regarding how names are constructed and used. It is important to respect an individual's wishes regarding their preferred form of address and the pronunciation of their name. It is always best practice to ask how a particular person's name is spelt and pronounced. (Note that reference should always be made to a person's "given" name, rather than their "Christian" name.) However, an individual may be uncomfortable with being asked how to pronounce her or his name, or what her or his preferred form of address is. If asked, some may simply wish to assent to the judge's preference. It may therefore be preferable that a legal representative (whether the individual is a party or a witness appearing for the party that the lawyer represents) clarify this beforehand and inform the Court as to pronunciation and preferred form of address.

In addition, many Australians of cultural and linguistically diverse backgrounds may adopt an English-language naming style. For example, individuals from cultures where the surname precedes the first name may invert their name to fit the English-language form. Due to the multicultural nature of Australian society, there has been much interchange of cultures; individuals cannot be assumed to be from a particular culturally and linguistically diverse background on the basis of their name, nor should it be assumed that an individual's background will be reflected in their own name or those of their family members. Further, much of the information below is sourced from Joel and Pringle's *Australian Protocol and Procedures*,<sup>98</sup> which contemplates appropriate terminology in respect of individuals visiting from other countries, rather than Australians

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<sup>95</sup> Diversity Figures Snapshot, above n 2.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> (University of New South Wales Press, 3<sup>rd</sup> ed., 2007).

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of diverse heritage. Those who live in this country may have adopted typical Anglo-Australian naming styles and forms of address.

In spite of these caveats, the following information may be of some assistance. Note that Aboriginal and Torres Strait Islander names and forms of address are discussed in Chapter 8.

### A *Chinese Names*

Chinese names are composed of a family name and given names (in that order).<sup>99</sup> Common Family Names include Chen, Cheng, Cheung, Huang (pronounced 'Wang'), Gao, Li/Lee, Lin, Liu (pronounced 'Leu'), Ma, Sun (pronounced 'Seun'), Tang, Wang, Xu, Yang, Yie, Yip, Zhang, Zhao, Zhou, Zhu.

Generally, it is acceptable and polite to address a Chinese person using their title (Dr, Professor, Mr, Mrs, Ms, Miss) followed by their family name: e.g. Ms Zhou.<sup>100</sup> Women in China do not usually change their surnames on marriage.<sup>101</sup>

### B *Indian Names*

There are variations among Indian naming systems, due to the country's breadth and, in particular, religious diversity. For example, Christian Indians generally use the Western name order whereas Hindu Indians tend to use their father's first name/s in place of surnames.<sup>102</sup> The suffix 'ji' (pronounced 'gee') may also be used after a person's first or last name to demonstrate respect.<sup>103</sup> It is appropriate to address an Indian person using their title (Mr, Mrs, Ms or Miss) followed by their family name.<sup>104</sup>

### C *Indonesian Names*

Although Indonesian people may have more than one name, they generally only use one. Surnames are not widely used outside the Chinese-Indonesian community. In addresses, Mr, Mrs, Ms or Miss should precede the first or only name.<sup>105</sup>

### D *Japanese Names*

Japanese names are composed of a family name and a given name (in that order). However, when speaking English the above order is often reversed.<sup>106</sup> In English conversation, it is customary to address a Japanese person as 'Mr', 'Mrs', 'Ms' or 'Miss' followed by their family name.<sup>107</sup>

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<sup>99</sup> Ibid 299.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid 298.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid 300.

<sup>106</sup> Ibid 298.

<sup>107</sup> Ibid 299.

E *Korean Names*

Korean names are composed of a family name and given names (in that order). First names should be avoided when addressing Korean people and formal titles should be used.<sup>108</sup>

F *Malaysian Names*

Malaysian people (who are predominantly Muslim)<sup>109</sup> may have one, two or sometimes three names. In addition to given names, a Malaysian person will use their father's name, sometimes preceded by *bin* ('son of') or *binte* ('daughter of'), as appropriate.<sup>110</sup> The use of 'Mr' and 'Mrs' and their Malay equivalents ('*Encik*' and '*Cik*') is becoming increasingly common, both with respect to ethnic Malay people as well as Malaysians of diverse heritage (usually Chinese, Indian or indigenous Bornean) and Europeans.<sup>111</sup> However, forms of address for Indians in Malaysia follow the forms used in India.<sup>112</sup>

G *Muslim Names*

Naming is important to followers of the Islamic faith, as Mohammed stipulates in his teachings that Muslims are "to keep good names".<sup>113</sup> Indeed, those who convert to Islam generally take a new Muslim name, in accordance with the Prophet having changed the names of converts.<sup>114</sup> Muslim names are commonly composed of a given name, followed by names of ancestors from whom the individual is descended, commencing with the father (which is most commonly used as the surname). The second (and any subsequent) name is sometimes preceded by *ibn* ('son of') or *binte* ('daughter of'), as appropriate. Honorific titles *Abu* ('father of') and *Umm* ('mother of') may also be used.<sup>115</sup> Certain positions have titles: for example, a Muslim community leader is called *Imam*.<sup>116</sup>

H *Thai Names*

In Thailand, the word 'Khun' (pronounced as 'Kun') is used to denote 'Mr', 'Mrs', 'Ms' or 'Miss' and is then followed by the person's first name.<sup>117</sup> It may therefore not be inappropriate to use the relevant English term, followed by the first name, however the correct form of address should, as always, be confirmed if in doubt. It is also not uncommon for a Thai person to use a nickname in conversation.<sup>118</sup>

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<sup>108</sup> Ibid.

<sup>109</sup> Ibid 295.

<sup>110</sup> Ibid 299.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid 300.

<sup>113</sup> WTS Noble, *Names from Here and Far: The New Holland Dictionary of Names* (New Holland Publishers, 2003) 16.

<sup>114</sup> Cyril Glassé, *The New Encyclopedia of Islam* (Stacey International, 2<sup>nd</sup> revised ed, 2002) 339.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid 213.

<sup>117</sup> Joel and Pringle, above n 98, 300.

<sup>118</sup> Ibid.

I *Vietnamese Names*

Vietnamese names are composed of a family name, a middle name and a given name (in that order). The middle name is commonly indicative of gender: usually *Van* for men and *Thi* for women. However, *Van* can also be a female first name.

Common family names include Nguyen, Tran, Le, Ly, Ho, Ngo.

In terms of pronunciation, Ng is pronounced as a harsh N: so Nguyen is pronounced Nwin and not N-gwin. Le is pronounced 'Lay' whilst Ly is pronounced 'Lee'. H is sometimes pronounced as 'W': as such, Hue is pronounced 'Way'. Nh is a common ending for names. The h is silent. Uo is a common diphthong and is pronounced like a short u. Many vowels strung together is common and pronounced as one syllable: the 'ieu' in Kieu is pronounced 'ew'.

Generally, a person's given name is used to address them, with the addition of their title: Ms Kieu. However, where a person is significantly older than the speaker, this may be disrespectful. It is acceptable and polite to address a Vietnamese person using their title (Dr, Professor, Mr, Mrs, Ms, Miss) followed by their family name: Ms Nguyen. Where uncertain, it is also acceptable to address using the full name: Ms Nguyen Thi Kieu.

## CHAPTER 7: ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE OF QUEENSLAND

### I INTRODUCTION

The 2011 Census recorded 669,900 persons of Aboriginal or Torres Strait Islander descent in Australia.<sup>1</sup> This represents 3% of the total estimated resident population of Australia. In Queensland, 4.2% of the population identify themselves as being of Aboriginal or Torres Strait Islander origin.<sup>2</sup> Importantly, a quarter of Australia's Aboriginal population and over 60% of Australia's Torres Strait Islander population live in Queensland.<sup>3</sup>

Figure 1: Estimated Resident Population, Indigenous Status, 30 June 2011<sup>4</sup>

	Aboriginal only no.	Torres Strait Islander only no.	Both Aboriginal and Torres Strait Islander no.	Total Aboriginal and/or Torres Strait Islander no.	Non-Indigenous no.	Total no.
NSW	198 920	5 723	3 833	208 476	7 010 053	7 218 529
Vic.	43 644	2 636	1 053	47 333	5 490 484	5 537 817
Qld	149 072	24 386	15 496	188 954	4 287 824	4 476 778
SA	35 483	1 253	672	37 408	1 602 206	1 639 614
WA	84 971	1 667	1 632	88 270	2 265 139	2 353 409
Tas.	21 869	1 428	868	24 165	487 318	511 483
NT	66 150	830	1 870	68 850	162 442	231 292
ACT	5 799	206	155	6 160	361 825	367 985
Aust.(a)	606 164	38 134	25 583	669 881	21 670 143	22 340 024

(a) Includes Other Territories.

Between the 2006 and 2011 Census dates, there was a 21% increase in Australia's Aboriginal and Torres Strait Islander populations,<sup>5</sup> whereas Australia's total population increased by only 8.3%. Seventy percent of the increase in the Aboriginal and Torres Strait Islander population can be attributed to measurable demographic changes involving births, deaths and overseas migration. The remaining 30% is largely explained by an increase in the number of persons identifying as being of Aboriginal or Torres Strait Islander descent.<sup>6</sup> Interestingly, while Census counts of Aboriginal and Torres Strait

<sup>1</sup> Australian Bureau of Statistics, *3238.0.55.00 Estimates of Aboriginal and Torres Strait Islander Australians, June 2011 – Main Features* (14 November 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>>. Note that this refers to resident population.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

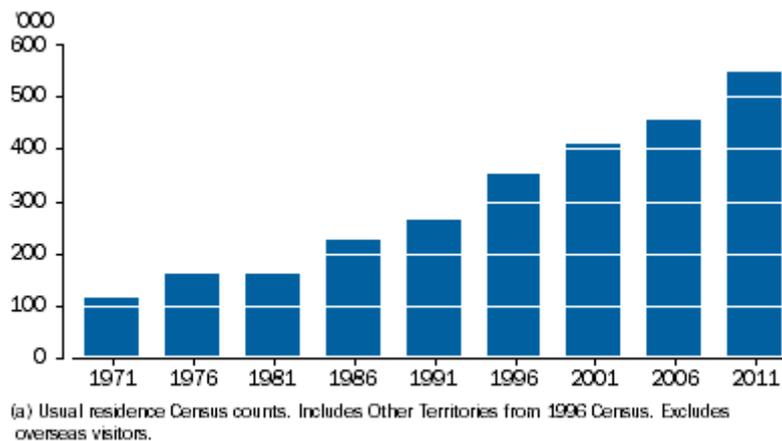
<sup>4</sup> Ibid.

<sup>5</sup> Australian Bureau of Statistics, *2077.0 Census of Population and Housing: Understanding the Increase in Aboriginal and Torres Strait Islander Counts, 2006-2011 – Frequently Asked Questions* (17 September 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2077.0~2006-2011~Main%20Features~Frequently%20Asked%20Questions~20>>.

<sup>6</sup> Ibid.

Islander people have been steadily increasing since 1971, the change between 2006 and 2011 was the largest since the 33% increase recorded between 1991 and 1996.<sup>7</sup>

Figure 2: 2011 Census Counts - Aboriginal and Torres Strait Islander People<sup>8</sup>



#### A Geographic Distribution

Brisbane has the largest population of Aboriginal and Torres Strait Islander people of any region in Queensland. 41,369 Aboriginal or Torres Strait Islander people, or 9.1% of the total resident Aboriginal and Torres Strait Islander population of Australia, reside in Brisbane. The second largest such population is in Cairns, with 18,267 persons of Aboriginal or Torres Strait Islander origin.<sup>9</sup>

Cooktown and the Torres Strait Islands have the largest proportions of residents who identify as being of Aboriginal or Torres Strait Islander origin. In the Torres Strait Area, 7,106 persons, or 82.9% of residents, self-identify as Aboriginal or Torres Strait Islander. This represents 1.6% of the total Aboriginal or Torres Strait Islander population of Australia. Similarly, Cape York has 6,944 residents who self-identify as Aboriginal or Torres Strait Islander. This equates to 1.5% of the total Aboriginal or Torres Strait Islander population in Australia.<sup>10</sup>

In general, persons of Aboriginal and Torres Strait Islander origin are more likely than other Australians to reside in remote areas. Although about 35% of Aboriginal and Torres Strait Islander people live in areas where services are highly accessible (major

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<sup>7</sup> Ibid.

<sup>8</sup> Australian Bureau of Statistics, *2077.0 Census of Population and Housing: Understanding the Increase in Aboriginal and Torres Strait Islander Counts, 2006-2011 – Introduction* (17 September 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2077.0main+features22006-2011>>.

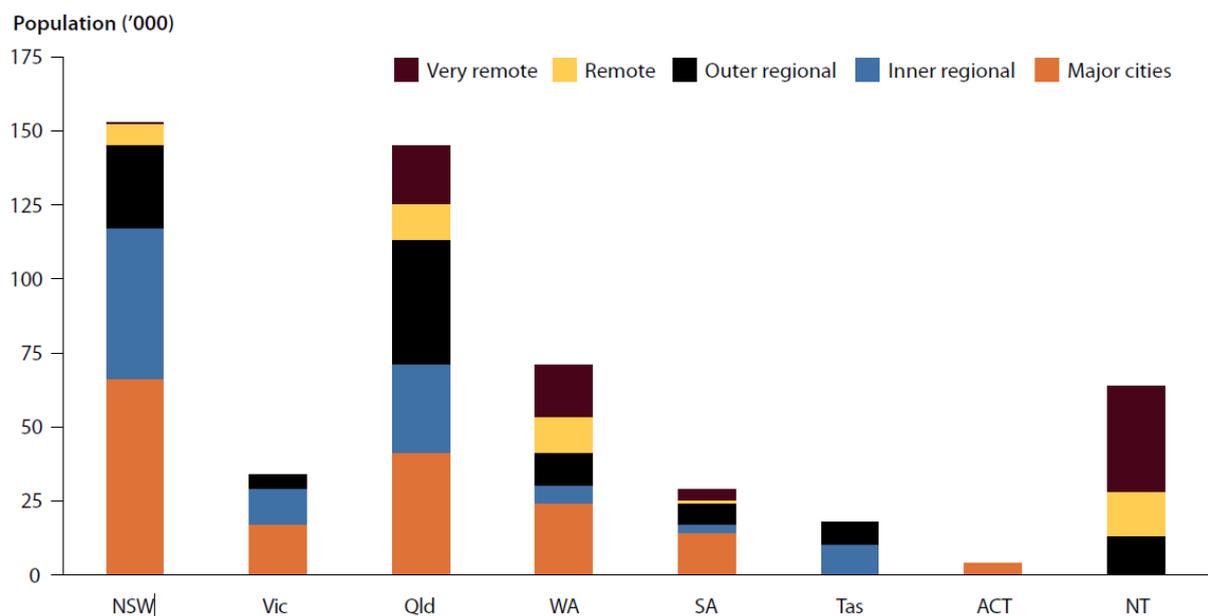
<sup>9</sup> Australian Bureau of Statistics, *4705.0 Population Distribution, Aboriginal and Torres Strait Islander Australians* (2006), 21 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4705.02006?OpenDocument#Publications>>.

<sup>10</sup> Ibid.

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cities), one in five live in areas classified as “very remote” or “remote”, as compared to only 2.5% of the rest of the Australian population.<sup>11</sup>

Figure 3: 2006 Estimated Resident Population by Remoteness Areas<sup>12</sup>



Source: ABS 2008a.

### B Socio-economic Status

In 1989, the National Aboriginal and Islander Health Organisation defined “health” as

not just the physical wellbeing of the individual but the social, emotional and cultural wellbeing of the whole community. This is a whole-of-life view and it also includes the cyclical concept of life-death-life.<sup>13</sup>

It is now generally accepted that there is a corresponding relationship between socio-economic status, physical environment and health (defined in both narrow and broad terms).

In 2011, the Australian Bureau of Statistics, in collaboration with the Australian Institute of Health and Welfare, published the latest edition in its series *The Health and Welfare*

<sup>11</sup> Australian Bureau of Statistics, 3238.0.55.00 *Estimates of Aboriginal and Torres Strait Islander Australians, June 2011 – Main Features* (14 November 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001>>.

<sup>12</sup> Australian Institute of Health and Welfare, *The Health and Welfare of Australia’s Aboriginal and Torres Strait Islander People: An Overview* (2011) 10 ('AIHW Health and Welfare Overview').

<sup>13</sup> Aboriginal Health and Medical Research Council of New South Wales, *About Us - Definition of Aboriginal Health* (2010) <[http://ahmrc.org.au/index.php?option=com\\_content&view=article&id=35:definition-of-aboriginal-health&catid=4:about-ahmrc&Itemid=37](http://ahmrc.org.au/index.php?option=com_content&view=article&id=35:definition-of-aboriginal-health&catid=4:about-ahmrc&Itemid=37)>.

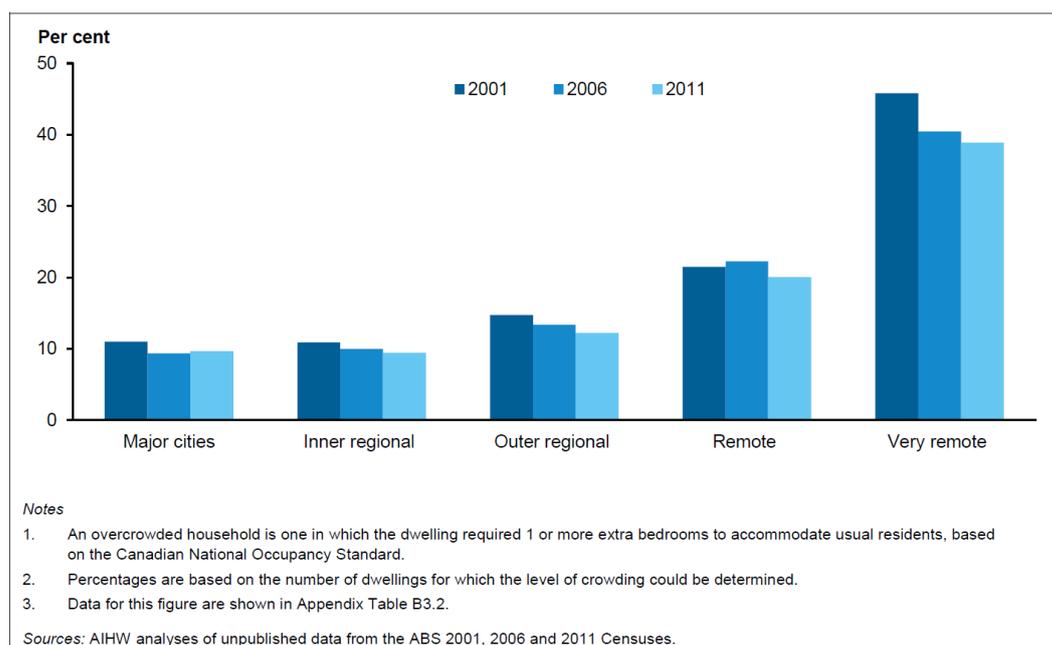
of *Australia’s Aboriginal and Torres Strait Islander Peoples*. The publication provides a comprehensive overview of indicators of socio-economic status including education, health, employment, income and housing. The report stated that:

In view of persistent and chronic disadvantage, the Council of Australian Governments (COAG) agreed to six specific targets and timelines for closing the gap between Indigenous and non-Indigenous Australians. Various interventions are aimed at improving health and welfare. These include promotional activities, preventative strategies, remedial action and the provision of appropriate assistance and care.<sup>14</sup>

### 1 Housing

One measure of socio-economic status is the number of people in a group who are in permanent housing and the conditions of such housing. In 2008, one quarter of households in which Aboriginal and Torres Strait Islander persons lived experienced overcrowded conditions, compared with only four percent of non-Indigenous households. For Aboriginal and Torres Strait Islander people, this disparity increases with remoteness, although in other Australian households the number of persons residing in a household remains constant regardless of location.<sup>15</sup>

Figure 4: Percentage of Overcrowded Indigenous Households by Remoteness – 2001, 2006, 2011<sup>16</sup>



At the time of the 2011 Census count, 9.7% of Aboriginal or Torres Strait Islander households in major cities and 38.9% in “Very Remote Australia” were defined as

<sup>14</sup> AIHW Health and Welfare Overview, above n 12, 3.

<sup>15</sup> Ibid 25.

<sup>16</sup> Australian Institute of Health and Welfare, *Housing Circumstances of Indigenous Households: Tenure and Overcrowding* (2014) 21.

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“overcrowded”.<sup>17</sup> Persons of Aboriginal or Torres Strait Islander origin are also less likely to own or be purchasing their own home (roughly 30% as compared to 70% of other households) and more likely to rent (69% compared to 26%).<sup>18</sup>

### 2 Community Infrastructure

In 2006, the most recent *Community Housing and Infrastructure Needs Survey* (“CHIN survey”) was conducted by the Australian Bureau of Statistics. A total of 1,187 “discrete Indigenous communities” across Australia, with a combined population of 92,960 persons, were identified and surveyed.<sup>19</sup> A discrete Indigenous Community is:

a geographic location, bounded by physical or cadastral (legal) boundaries, and inhabited or intended to be inhabited predominantly (i.e. greater than 50% of usual residents) by Aboriginal and Torres Strait Islander peoples, with housing or infrastructure that is managed on a community basis...<sup>20</sup>

The 2006 CHIN survey indicated that a total of only 209 (18%) of those communities had access to a town supply of water, with the remainder obtaining drinking water from bores, rain water tanks, rivers or reservoirs, or wells or springs.<sup>21</sup> Nine communities had no organised water supply.<sup>22</sup>

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<sup>17</sup> There is no universally accepted standard for the measurement of ‘overcrowding’. The method adopted in measuring the figures outlined in this section takes into account the number of bedrooms in a dwelling, the number of usual residents in the household and factors such as the age, gender and the relationships of the occupants: see *ibid* 17.

<sup>18</sup> Australian Bureau of Statistics, *4714.0 National Aboriginal and Torres Strait Islander Social Survey, 2008 – Housing* (15 December 2010)

<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4714.0Main%20Features102008?opendocument&tabname=Summary&prodno=4714.0&issue=2008&num=&view=>.

<sup>19</sup> Australian Institute of Health and Welfare, *ABS 2006 CHINS Data* (2015)

<http://www.aihw.gov.au/abs-2006-chins-data/>.

<sup>20</sup> Australian Bureau of Statistics, *4710.0 Housing and Infrastructure in Aboriginal and Torres Strait Islander Communities Australia, 2006 – Chapter 3: A Profile of Discrete Aboriginal and Torres Strait Islander Communities* (17 August 2007)

<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/4710.0Main%20Features42006?opendocument&tabname=Summary&prodno=4710.0&issue=2006&num=&view=> ('ABS Profile of Discrete Aboriginal and Torres Strait Islander Communities').

<sup>21</sup> *Ibid*.

<sup>22</sup> *Ibid*.

Figure 5: Main Source of Water for Discrete Indigenous Communities - 2006<sup>23</sup>

	COMMUNITIES WITH A POPULATION OF						All communities	Reported usual population
	Less than 50	50-99	100-199	200-499	500-999	1,000 or more		
	no.	no.	no.	no.	no.	no.	no.	no.
Main source of water								
Connected to town supply	81	53	46	19	4	6	209	28 084
Bore water	541	57	38	38	12	8	694	48 511
Rain water tank(s)	31	4	1	5	—	—	41	2 378
River/reservoir	37	3	4	7	3	3	57	11 667
Well or spring	37	—	1	1	—	—	39	887
Carted water	26	—	—	1	—	—	27	637
Other organised water supply	2	1	—	—	—	—	3	104
No organised water supply	9	—	—	—	—	—	9	20

Twenty-five of the discrete Indigenous communities surveyed had no sewerage system, an improvement on the 91 communities reported in 2001.<sup>24</sup> Septic tanks were the most common sewerage system. Of the communities with sewerage systems, 130 communities with populations of greater than 50 people reported having had problems with their sewerage system over the previous 12 months.<sup>25</sup>

Three percent of the discrete Indigenous communities surveyed were without an electricity supply.<sup>26</sup>

### 3 Health

A 2010-2011 survey by the Australian Institute of Health and Welfare indicated that 3.7% of Australia's total expenditure on health services was directed towards Aboriginal or Torres Strait Islander people. Per person, this equates to roughly one-and-a-half times more money being spent on the health of Aboriginal and Torres Strait Islander persons than that of other Australians.<sup>27</sup> This figure represents expenditure by the Commonwealth, State and local governments, as well as from private sources such as private health insurance. The pattern of health expenditure for Aboriginal and Torres Strait Islander persons also differed from that for other Australians (see Figure 6 below).

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Australian Institute of Health and Welfare, *Expenditure on Health for Aboriginal and Torres Strait Islander People 2010-11* (2013) 6.

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Figure 6: Expenditure on health for Indigenous and non-Indigenous Australians, by area of expenditure, 2010-11<sup>28</sup>

Area of expenditure	Expenditure (\$ million)			Indigenous share (%)	Expenditure (\$) per person		Ratio (Indigenous to non-Indigenous)	
	Indigenous	Non-Indigenous	Total		Indigenous	Non-Indigenous	2010-11	2008-09
Total hospitals	2,178.0	47,527.6	49,705.7	4.4	3,825.6	2,169.4	1.76	1.82
Public hospital services <sup>(a)</sup>	2,067.4	36,870.4	38,937.8	5.3	3,631.3	1,683.0	2.16	2.25
Admitted patient services <sup>(b)</sup>	1,748.7	31,106.6	32,855.4	5.3	3,071.6	1,419.9	2.16	2.27
Non-admitted patient services	333.0	5,749.4	6,082.4	5.5	584.9	262.4	2.23	2.17
Private hospitals <sup>(c)</sup>	110.7	10,657.3	10,767.9	1.0	194.4	486.5	0.40	0.19
Patient transport services	183.4	2,601.4	2,784.7	6.6	322.1	118.7	2.71	2.79
Medical services	376.3	22,148.2	22,524.5	1.7	660.9	1,011.0	0.65	0.53
MBS services	286.0	17,380.7	17,666.8	1.6	502.4	793.3	0.63	0.55
Other	90.2	4,767.5	4,857.7	1.9	158.5	217.6	0.73	0.46
Dental services	84.8	7,780.8	7,865.5	1.1	148.9	355.2	0.42	0.40
Community health services <sup>(d)</sup>	1,119.6	5,172.0	6,291.6	17.8	1,966.5	236.1	8.33	6.93
Other health practitioners	43.8	4,053.4	4,097.2	1.1	77.0	185.0	0.42	0.33
Public health <sup>(d)</sup>	185.7	1,810.3	1,996.1	9.3	326.2	82.6	3.95	2.54
Medications	209.9	18,215.2	18,425.0	1.1	368.7	831.4	0.44	0.44
Aids and appliances	15.2	3,616.6	3,631.8	0.4	26.7	165.1	0.16	0.23
Research	124.2	4,158.5	4,282.7	2.9	218.2	189.8	1.15	1.09
Health administration	31.1	2,020.1	2,051.2	1.5	54.6	92.2	0.59	0.72
Total health	4,552.0	119,104.1	123,656.1	3.7	7,995.4	5,436.5	1.47	1.39

Access to health services is a pressing issue for people in discrete Indigenous communities. A 2006 Housing and Infrastructure Survey<sup>29</sup> conducted by the Australian Bureau of Statistics indicated that 25% of all Aboriginal or Torres Strait Islander people living in such communities were located 100 or more kilometres from the nearest hospital. Of that number 30,912 were located 250 kilometres or more from the nearest hospital.

<sup>28</sup> Ibid 7.

<sup>29</sup> ABS Profile of Discrete Aboriginal and Torres Strait Islander Communities, above n 20.

Figure 7: Discrete Indigenous Communities' Access to Medical Facilities, by Reported Usual Population – 2006<sup>30</sup>

	< 50 no.	Communities with a population of					All communities no.	Reported usual pop. no.
		50- 99 no.	100- 199 no.	200- 499 no.	500- 999 no.	1,000 or < no.		
<b>Hospital</b>								
Located within the community -		1	1	-	1	7	10	14 090
Distance to nearest hospital								
Less than 10 km	35	29	15	9	1	-	89	7 743
10-24 km	44	7	14	2	1	1	69	5 634
25-49 km	54	5	7	5	-	1	72	4 766
50-99 km	57	8	5	9	3	1	83	7 968
100-249 km	227	31	22	22	3	3	308	21 080
250 km or more	347	36	26	24	10	4	447	30 912
Total	764	116	89	71	18	10	1 068	78 103
<b>Aboriginal Primary Health Care Centre</b>								
Located within the community	5	20	31	26	14	11	107	41 450
Distance to nearest Aboriginal Primary Health Care Centre								
Less than 10 km	46	34	16	7	1	-	104	7 743
10-24 km	88	13	8	1	-	-	110	3 402
25-49 km	141	10	2	3	-	-	156	3 572
50-99 km	138	9	5	7	-	1	160	6 464
100-249 km	214	18	16	19	1	-	268	12 552
250 km or more	111	12	12	8	2	4	149	12 934
Total	738	96	59	45	4	5	947	46 667
<b>Other (state funded) community health centre</b>								
Located within the community	3	19	28	39	5	10	104	35 737
Distance to nearest other (state funded) community health centre								
Less than 10 km	59	31	14	8	1	-	113	8 101
10-24 km	101	7	13	2	1	1	125	6 358
25-49 km	153	11	6	3	-	-	173	4 442
50-99 km	145	9	5	3	3	-	165	5 441
100-249 km	131	21	12	3	4	-	171	8 505
250 km or more	151	19	12	13	4	2	201	14 803
Total	740	98	62	32	13	3	948	47 650
All communities(a)	865	123	92	71	19	17	1 187	92 960

- nil or rounded to zero (including null cells)

(a) Includes communities with access to medical facilities not stated.

Although 18% of Aboriginal or Torres Strait Islanders surveyed lived within 10 kilometres of an Aboriginal Primary Health Care Centre and 18% within 10 kilometres of a State-funded community centre, 417 discrete Indigenous communities (35%) are located 100 kilometres or more from the nearest Aboriginal Primary Health Care Centre and 372 communities (31%) are more than 100 kilometres from other health centres.

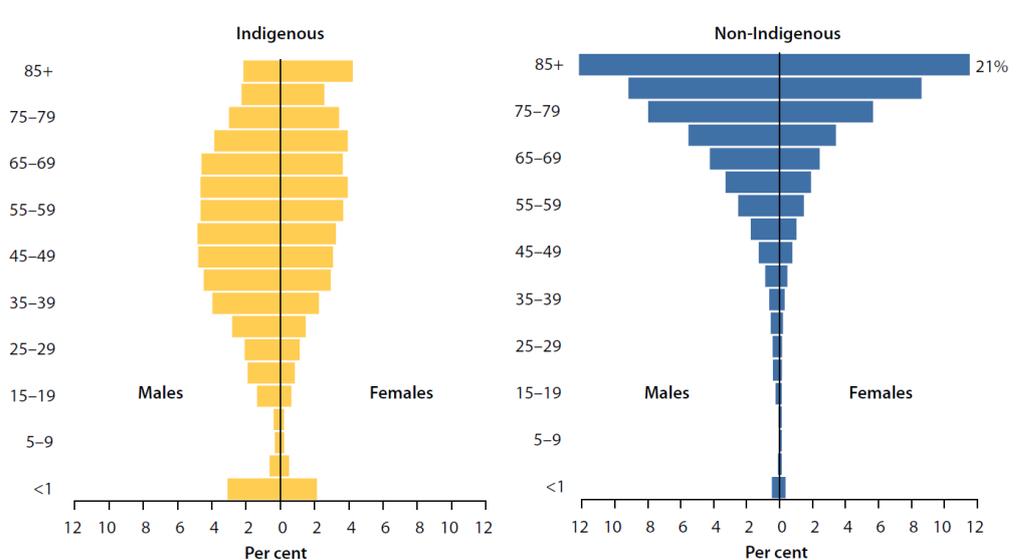
<sup>30</sup> Ibid.

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These statistics demonstrate that Aboriginal and Torres Strait Islander people experience lower levels of access to health services than the remainder of the population.

Further, in the period 2004-2008, there were almost three times as many deaths among Indigenous people in age groups under 65 years than among the remainder of the population.<sup>31</sup> After adjusting for different population compositions, the rate of death from avoidable causes for Aboriginal and Torres Strait Islander people was approximately three times that of the rest of the population.<sup>32</sup> The main causes of death during this period for the Indigenous population were diseases of the circulatory system, deaths due to external causes, and cancer.<sup>33</sup>

Figure 8: Age Distribution of Deaths, 2004-2008<sup>34</sup>



Note: Data for New South Wales, Queensland, Western Australia, South Australia and the Northern Territory only.  
Source: AIHW analysis of National Mortality Database.

In essence, the available data suggest that this population is more likely to be affected by ill health than the rest of the Australian population.<sup>35</sup>

### 4 Education and Employment

Although retention rates for full-time Aboriginal and Torres Strait Islander students have increased since the 1980s, they remain less likely than other students to remain in school beyond Year 10. In 2010, the proportion of Aboriginal and Torres Strait Islander students

<sup>31</sup> Ibid.

<sup>32</sup> Australian Bureau of Statistics, *3303.0 Causes of Death, Australia, 2012 - Potentially Avoidable Mortality* (30 March 2015)  
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/3303.0~2012~Main%20Features~Potentially%20Avoidable%20Mortality~10022>>.

<sup>33</sup> AIHW Health and Welfare Overview, above n 12, 48.

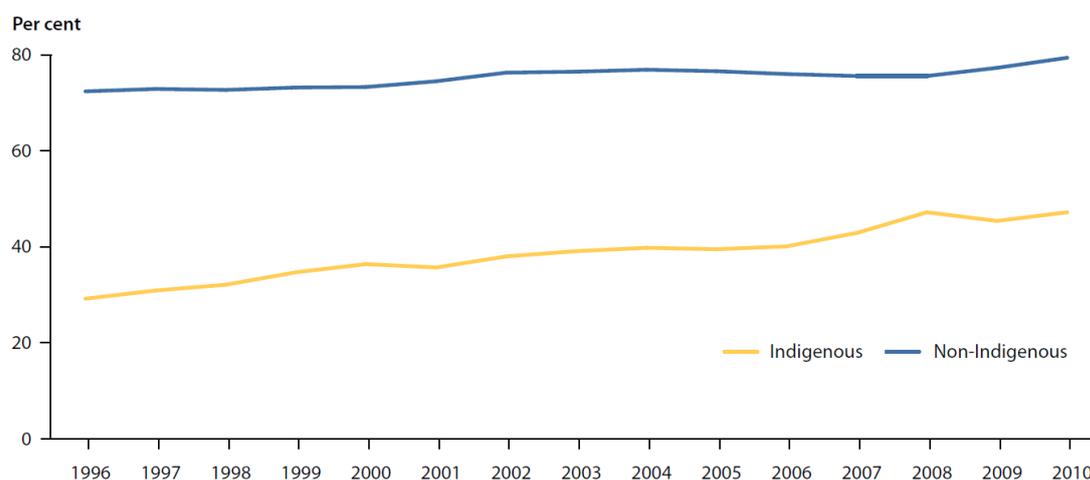
<sup>34</sup> Ibid 65.

<sup>35</sup> Ibid 63.

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continuing to Year 10 was 96%, compared to 100% of non-Indigenous students. However, only 47% of Indigenous students continued on to Year 12, as compared with 79% of other students. The Council of Australian Governments have set a target to reduce this gap by half by 2020.<sup>36</sup>

Figure 9: Trends in school retention rates, between Years 7/8 and 12, by Indigenous status, 1996–2010<sup>37</sup>



Source: ABS 2011b.

In higher education, Aboriginal and Torres Strait Islander students are highly under-represented. In the 2011 Census, around 26% of Aboriginal and Torres Strait Islander Australians aged 15 or over reported a non-school qualification, compared with 49% of other Australians in the same age group.<sup>38</sup> Only 6.5% of Aboriginal or Torres Strait Islander persons had a Bachelor degree or higher, as compared with 25% of other Australians.<sup>39</sup>

Aboriginal or Torres Strait Islander persons were almost three times more likely than other persons to be unemployed, at a rate of 17% as compared with 5% in the general population.<sup>40</sup> Sixty-five percent of Aboriginal and Torres Strait Islander persons were participating in the labour force, with a higher proportion of men employed than women (75% compared with 55%).<sup>41</sup>

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<sup>36</sup> Ibid 16.

<sup>37</sup> Ibid 17.

<sup>38</sup> Australian Bureau of Statistics, *2076.0 Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011 – Education* (28 November 2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2076.0main+features302011>>.

<sup>39</sup> AIHW Health and Welfare Overview, above n 12, 18.

<sup>40</sup> Australian Bureau of Statistics, *4704.0 The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, Oct 2010 - Executive Summary - Demographic, Social and Economic Characteristics Overview - Language, Culture and Socioeconomic Outcomes* (19 December 2012) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter230Oct+2010#labourforcestatus>>.

Note that this figure does not take into account people participating in Community Development Employment Projects, which are located in regional and remote areas of Australia and offer employment where the labour market might not otherwise offer employment.

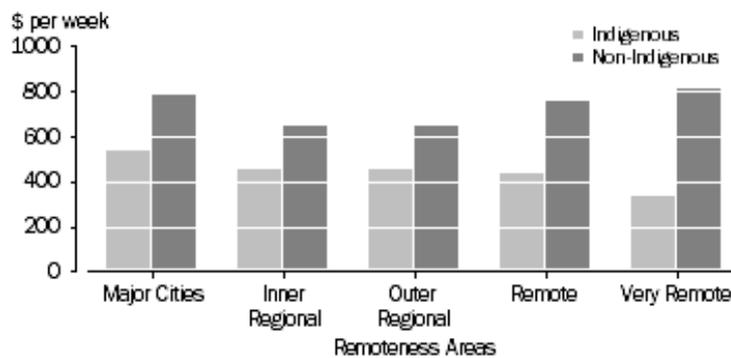
<sup>41</sup> Ibid.

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In the 2006 Census, 25% of Aboriginal and Torres Strait Islander persons stated their occupation as being “labourers and related workers”, as opposed to 10% of the general population. This was the most commonly stated occupation for Aboriginal and Torres Strait Islander people, whereas for other people in Australia, it was “professional”, at 20%. Just 12% of the Aboriginal or Torres Strait Islander population identified their occupation as falling within this category.<sup>42</sup>

The mean equivalised household weekly income for Aboriginal and Torres Strait Islander persons was \$460, as compared to \$740 for other persons.<sup>43</sup> Income levels declined with increasing geographic remoteness.<sup>44</sup> For Aboriginal or Torres Strait Islander persons, income in the major cities and regional areas was equal to about 70% of the corresponding income for other persons. In remote areas, this was equal to about 60%, and in very remote areas, 40%.<sup>45</sup>

Figure 10: Mean Equivalised Gross Household Income – Residents of occupied private dwellings (a)<sup>46</sup>



(a) Comprises persons in households in which there were no temporarily absent adults and all incomes were fully stated.

<sup>42</sup> AIHW Health and Welfare Overview, above n 12, 21.

<sup>43</sup> Australian Bureau of Statistics, *4713.0 Population Characteristics, Aboriginal and Torres Strait Islander Australians, 2006* (28 July 2011)

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/B9FFFE0FCF1E37147CA2578DB00283CCD?opendocument>>.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

## CHAPTER 8: ABORIGINAL AND TORRES STRAIT ISLANDER CULTURE, FAMILY AND KINSHIP

### I INTRODUCTION

The Final Report of the Royal Commission into Aboriginal Deaths in Custody recommended that judicial officers and persons who work in the court service participate in appropriate cross-cultural training and development programmes.<sup>1</sup> It was said that these ought to “explain contemporary Aboriginal society, customs and traditions” in a context which emphasises the “historical and social factors which contribute to the disadvantaged position of many Aboriginal people today”.<sup>2</sup>

To that end, this chapter discusses the profound impact of Western colonisation on Aboriginal and Torres Strait Islander societies, including its present-day manifestations detailed in the previous chapter. It also seeks to provide general background information on fundamental aspects of Aboriginal and Torres Strait Islander cultures and societies. It necessarily discusses these aspects in broad and general terms, although it should be noted that there is a rich diversity of Aboriginal and Torres Strait Islander cultural and linguistic groups in Australia.

For more detailed information on the history, present-day life and protocols of particular Aboriginal and Torres Strait Islander communities in Queensland, reference should be had to the series of justice resources prepared by the Department of Aboriginal and Torres Strait Islander Partnerships in consultation with judges of the Supreme Court of Queensland, Federal Court of Australia, Family Court of Australia, District Court of Queensland, Federal Circuit Court of Australia and magistrates from the Magistrates Court of Queensland.<sup>3</sup>

### II RESPECTING THE DIFFERENCE

Australia is home to two groups of Indigenous peoples: Aboriginal peoples and Torres Strait Islander peoples. Ethnically and culturally, these peoples are distinct.<sup>4</sup> The term “Aboriginal and Torres Strait Islander” is therefore to be preferred to “Indigenous”, as it acknowledges a difference which the latter term elides. Some Aboriginal and Torres Strait Islander people feel the latter term is not sufficiently specific and thus not an accurate reflection of their identity and cultural heritage.<sup>5</sup>

### III THE IMPACT OF COLONISATION

Colonisation has had a profound impact upon Aboriginal and Torres Strait Islander peoples. Colonisation, dispossession and urbanisation have resulted in the breakdown of many cultural ties, traditional practices and beliefs. As noted by the Royal Commission

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<sup>1</sup> *Final Report of The Royal Commission into Aboriginal Deaths in Custody* (Australian Government Publishing Service, 1991) vol 5, Recommendation 96

<<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>> (‘RCIADIC Report’).

<sup>2</sup> *Ibid.*

<sup>3</sup> Queensland Government Department of Aboriginal and Torres Strait Islander Partnerships, *Justice Resources* (27 May 2015) <<https://www.datsip.qld.gov.au/publications-governance-resources/justice-resources>>.

<sup>4</sup> David Horton (ed), *Encyclopaedia of Aboriginal Australia: Aboriginal and Torres Strait Islander History, Society and Culture* (Aboriginal Studies Press, 1994), vol 2, 1089.

<sup>5</sup> Queensland Health, *Guidelines for Aboriginal and Torres Strait Islander Terminology* (Queensland Government, 2011) 3 <[www.health.qld.gov.au/atsihealth/documents/terminology.pdf](http://www.health.qld.gov.au/atsihealth/documents/terminology.pdf)>.

into Aboriginal Deaths in Custody, the history of government policies of protection, integration and assimilation provides “an essential backdrop for understanding contemporary experiences of being Aboriginal and of the difficulties and uncertainties which can flow from that, both personally and in interaction with the broader society”.<sup>6</sup>

It is estimated that, in 1788, between 500,000 and 3,000,000 Aboriginal people lived across Australia. In the 1940s, ethnographer Norman Tindale recorded over 600 Aboriginal land and language groups in existence across the continent, although by that time, colonialism had had a significant impact.

That the principle of *terra nullius* was wrongly applied by colonisers is now indisputable, however that premise was seen in the late 18<sup>th</sup> to the early 20<sup>th</sup> centuries to justify the removal of Aboriginal people from their land by driving them out and by killing them through the poisoning of waterholes and flour, preventing their access to traditional sources of water, and massacre. When, despite the colonisers’ predictions, Aboriginal people continued to survive, government policies of ‘protection’ began, under which all activities of Aboriginal people (from where they resided and worked, to whom they could marry) were controlled by government agents. Labour was exploited by the setting of minimal wage rates; sometimes Aboriginal workers were not paid at all, leading to ongoing disputes as to stolen wages.<sup>7</sup>

This line of policy continued well into the 20<sup>th</sup> century, however in the 1950s, a new approach was taken: assimilation, which aimed to incorporate Aboriginal people into the rest of the population, but without their culture, beliefs or values. Only in the late 1970s and the 1980s were Aboriginal people first given some form of self-determination in Queensland, through the grant of local government status to former Aboriginal reserves held under deeds of grant in trust from 1982.<sup>8</sup>

Torres Strait Islander people were also negatively affected by the arrival of European settlers, although fortunately “colonisation of the Torres Strait was not accompanied by wholesale and violent seizure of Islanders’ land”.<sup>9</sup> The Torres Strait Islanders were first subject to indirect rule, then exclusion, then controlled integration, before finally being allowed a degree of self-determination as part of the State of Queensland.

European contact commenced in earnest during the 1860s through trochus fishing and pearl shelling, in which industries Torres Strait Islanders were often forced to work. The London Missionary Society established operations on various Torres Strait Islands from the late 1800s and provided some protection to the Torres Strait Islander people from the excesses of the marine industry. Precepts of Christianity were not altogether foreign to traditional Torres Strait Islander belief systems and the interaction between Christian and traditional values was generally not one of coercion or violence (as distinct from missionaries’ relations with some Aboriginal people on the mainland).

Missionaries had a major role in running Torres Strait Island communities until the early 1900s, when the Queensland Government determined to take control and manage them as it did Aboriginal reserves, in a segregated and restrictive fashion. This continued until

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<sup>6</sup> RCIADIC Report, above n 1, vol 2, [11.6.1].

<sup>7</sup> See generally RCIADIC Report, above n 1, 10.8, and Andrew Gunstone, ‘Indigenous Wages’ (Paper presented to The Australian Sociological Association, University of South Australia, Adelaide, 24-27 November 2014) <<https://www.tasa.org.au/wp-content/uploads/2014/12/Gunstone.pdf>>.

<sup>8</sup> See generally Queensland Government Department of Aboriginal and Torres Strait Islander Policy and Development, *Protocols for Consultation and Negotiation with Aboriginal People* (2<sup>nd</sup> ed, 1999) 19 <<http://www.datsip.qld.gov.au/resources/datsima/people-communities/protocols-aboriginal/aboriginal-protocols-for-consultation.pdf>>.

<sup>9</sup> Department of Aboriginal and Torres Strait Islander Policy and Development, *Mina Mir Lo Ailan Mun: Proper Communication with Torres Strait Islander People* (c. 1998) 3 (*‘Mina Mir Lo Ailan Mun’*) 4.

the 1960s, when changes to labour markets meant that Islanders were permitted to travel to the mainland to seek work. At this point, control over their wages and movements ended, however Islanders still faced discrimination in interactions with other Queenslanders. Further, the Torres Strait Islands were nearly broken up in the 1970s under a proposal to cede part of the area to Papua New Guinea. Due in part to many Islanders' vocal disagreement, the proposal did not go ahead.<sup>10</sup>

The history of colonialist domination remains tangibly recent and cannot simply be ignored, as it continues to affect the cohesiveness and identity of Aboriginal and Torres Strait Islander communities, as well as their relations with the broader Queensland society.

#### IV CULTURAL SURVIVAL, CHANGE AND DIVERSITY

Although there has been a great loss of traditional cultural knowledge as a result of colonisation,

everywhere in Aboriginal Australia today, including urban areas, certain cultural elements of a distinctively Aboriginal nature continue to influence individual behaviour and organisational forms. These persisting elements, which are major components of Aboriginal identity, revolve around kinship behaviours, linguistic forms and sets of values and attitudes that owe much more to Aboriginal than European worldviews.<sup>11</sup>

The Final Report of the Royal Commission into Aboriginal Deaths in Custody observed that “there are new ways of being Aboriginal” and “once Aboriginal people are released from prehistory and recognised as having a present and even a future, the space is made for them to adapt and invent... Aboriginality no longer resides only in some notional ‘tribe’; it has multiple and multiplying sites.”<sup>12</sup> This statement applies equally to Torres Strait Islander people today.

It is incorrect to suggest that Aboriginal and Torres Strait Islander cultures are not practised in urban areas. In 1998, the Aboriginal and Torres Strait Islander Commission emphasised that “the cultures of Indigenous people in Blacktown, Redfern, Fitzroy and Musgrave Park are no less ‘Aboriginal’ than the cultures of their counterparts in Cape York, Arnhem Land or the Kimberley.”<sup>13</sup> For example, Aboriginal people living in cities may still use kinship terms and courtesy titles (such as aunty, uncle, brother and sister); such practices “provide important psychological and emotional support to many Aboriginal people, and reflect the centrality of family and community in modern Aboriginal society.”<sup>14</sup>

The loss of traditional languages and practices does not reduce the authenticity of a person's Aboriginal or Torres Strait Islander identity. Aboriginal and Torres Strait Islander peoples' modes of thinking and conduct remain strong throughout Queensland and do not depend solely on traditional lifestyle and language.<sup>15</sup> Attempts to define or restrict “Aboriginality” in particular have historically caused great offence. The Royal Commission into Aboriginal Deaths in Custody observed that “the worst experiences of

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<sup>10</sup> See generally *ibid* 4-7

<sup>11</sup> Horton, above n 4, 997.

<sup>12</sup> RCIADIC Report, above n 1, vol 2, [11.12.10].

<sup>13</sup> Stephanie Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts* (Australian Institute of Judicial Administration Inc, 2008) 3:5 [3.2.1] <[http://www.aija.org.au/Aboriginal Benchbook 2nd Ed/Chap1-8.pdf](http://www.aija.org.au/Aboriginal_Benchbook_2nd_Ed/Chap1-8.pdf)> ('Aboriginal Benchbook for Western Australian Courts').

<sup>14</sup> *Ibid* 3:6 [3.2.1].

<sup>15</sup> Diana Eades, *Aboriginal English and the Law* (Queensland Law Society Inc, 1991) 11.

assimilation policies and the most long term emotional scars of those policies relate directly to non-Aboriginal efforts to define 'Aboriginality' and to deny to those found not to fit the definition, the nurture of family, kin and culture. To Aboriginal people there appears to be a continuing aggression evident in such practices."<sup>16</sup>

As such, it must be acknowledged that there is no essential notion of what it means to be Aboriginal or Torres Strait Islander. Culture and spirituality may be practised differently in different settings, yet remain a true representation of the community from which they derive.

## V ASPECTS OF ABORIGINAL AND TORRES STRAIT ISLANDER CULTURE

As noted above, Aboriginal and Torres Strait Islander cultures are as diverse and adaptable as any other. As such, what is presented below is a guide to some signal features of Aboriginal and Torres Strait Islander society and beliefs.

### A *Spirituality and Beliefs*

Aboriginal and Torres Strait Islander spirituality is a complex concept which exists in many forms, as demonstrated by the great diversity of practices and beliefs. There is not one single Aboriginal or Torres Strait Islander religion or spirituality, there are many shared traits and threads, such as stories, ceremonies, and values.<sup>17</sup>

The spirituality of Aboriginal people derives from stories of the Dreaming, whereas for Torres Strait Islanders it comes from those of the Tagai.<sup>18</sup> Fundamentally, however, the essence of both Aboriginal and Torres Strait Islander spirituality is linked to a sense of belonging – to the land, the sea, other people and one's culture.<sup>19</sup>

It must be understood that the forms and practices of Aboriginal and Torres Strait Islander spirituality have been profoundly influenced by the impact of colonialism.<sup>20</sup> For some Aboriginal and Torres Strait Islander people, the concept of spirituality has also been mixed with religious beliefs and values that were introduced with colonisation.<sup>21</sup>

#### 1 *The Dreaming*

The lifestyles of Aboriginal groups from the desert regions traditionally differed greatly from those of coastal areas.<sup>22</sup> This is reflected in distinct spiritual beliefs and practices. Despite this, however, all Aboriginal groups acknowledge a period of creation called "the

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<sup>16</sup> RCIADIC Report, above n 1, vol 2, [11.12.4]. See also *Eatock v Bolt* [2011] FCA 1103.

<sup>17</sup> Australia New Zealand Policing Advisory Agency, *A Practical Reference to Religious and Spiritual Diversity for Operational Police* (3<sup>rd</sup> ed, 2010) 6 <<https://www.anzpaa.org.au/upload/pubs/ANZPAA%20-%20Religious%20and%20Spiritual%20Diversity%20Reference%203rd.pdf>>.

<sup>18</sup> Australian Museum, 'Spirituality' (4 December 2009) <<http://australianmuseum.net.au/indigenous-australia-spirituality>>.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, 2008) 86.

Dreaming”.<sup>23</sup> This expression was coined by anthropologist W E H Stanner in 1958,<sup>24</sup> who observed that, from an outsider’s perspective, the Dreaming could be understood only as a “complex of meanings”.<sup>25</sup> The term is used to describe

a complex network of knowledge, faith and practices that derive from stories of creation, and it dominates all spiritual and physical aspects of Aboriginal life. The Dreaming sets out the structures of society, the rules for social behaviour and the ceremonies performed in order to maintain the life of the land.<sup>26</sup>

During the Dreaming, the world is said to have been created by ancestral spirits, “beings of great power who once travelled over the earth performing wonderful deeds of creation, and who now lie quiescent in focal points of the landscape.”<sup>27</sup> The spirits created rules of social life and culture (the Law) and entrusted custodianship of certain areas of land to particular groups who were then bound by the Law.<sup>28</sup> In some areas, the spirit is recognised as the Rainbow Serpent, who created the landscape (such as mountains and hills, but especially watercourses such as billabongs, rivers, creeks and lagoons) as she moved across the land.<sup>29</sup>

As the spirits did not disappear but rather remained in the land, particular areas are considered to be secret or sacred sites to Aboriginal people and are a constant reminder of the spirits’ presence and power.<sup>30</sup> In this way, the Dreaming is said to exist outside of the Western conception of linear time, embracing time past, present and future.<sup>31</sup> Knowledge of the Law and Dreaming stories among Aboriginal people is developed progressively according to age, as well as gender.<sup>32</sup>

## 2 Connection with Land

“Aboriginal people have a direct and immediate relationship with the natural environment, and a very close interest in all the living things that inhabit it.”<sup>33</sup> Aboriginal people believe the land gives life and is central to their culture, heritage and identity.<sup>34</sup> The Dreaming vests land in each member of a group and provides the foundation for the group’s existence. A connection with the land is therefore “an integral part of the psyche of every

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<sup>23</sup> Ibid.

<sup>24</sup> Aboriginal Benchbook for Western Australian Courts, above n 13, 2:5 [2.3.1]. The term has been subject to some critique for reducing “an entire epistemology ... to a single English word.”: Maggie Fletcher, *Dreaming: Interpretation and Representation* (MA Thesis, Flinders University, 2003). For further discussion of the language and terminology associated with the Dreaming, see Christine Nicholls, ‘*Dreamtime’ and ‘The Dreaming’ – An Introduction*’ (23 January 2014) The Conversation <<http://theconversation.com/dreamtime-and-the-dreaming-an-introduction-20833>>.

<sup>25</sup> Cited in Nicholls, above n 24.

<sup>26</sup> Australian Museum, above n 18.

<sup>27</sup> Horton, above n 4, 937.

<sup>28</sup> Aboriginal Benchbook for Western Australian Courts, above n 13, 2:5 [2.3.1].

<sup>29</sup> Australian Government, *The Dreaming* (31 March 2015) [australia.gov.au](http://australia.gov.au) <<http://www.australia.gov.au/about-australia/australian-story/dreaming>> (“The Dreaming” Website’).

<sup>30</sup> Aboriginal Benchbook for Western Australian Courts, above n 13, 2:5 [2.3.1].

<sup>31</sup> Nicholls, above n 24.

<sup>32</sup> “The Dreaming” Website, above n 29.

<sup>33</sup> Horton, above n 4, 937.

<sup>34</sup> Nicholls, above n 24.

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person” within the group.<sup>35</sup> The connection cannot be exchanged or lost, and thus “it would be as correct to speak of the land possessing men as of men possessing land.”<sup>36</sup>

A group’s territorial boundaries are determined and passed down through Dreaming stories. As described by Behrendt,

People had affiliations with tracts of country and had the right to hunt and feed in certain areas and to perform religious ceremonies in certain places. These custodians were also responsible for ensuring that the resources of a certain area were maintained.<sup>37</sup>

As the Dreaming stories bind people to specific territory, there is no reason for them to covet country which belongs to others. As such, prior to colonisation, it is suggested that a group’s rights to land or custodianship of land were rarely challenged.<sup>38</sup>

In some Aboriginal cultures, the relationship to land is represented through ‘totems’, as they are referred to in English. The word ‘totem’ derives from a North American Indian language which means “he/she/it is a relative of mine”.<sup>39</sup> In some areas people have three totems, which may be mammals, reptiles, birds, insects or fish. These comprise:

- a clan totem that links a person to others in the clan and dictates relationships;
- a family totem that links a person to the natural world; and
- an individual spiritual totem that links a person to the spiritual realm.<sup>40</sup>

Totem animals are treated with particular respect, it being believed that individuals are “descended from the great ancestral being that manifested as the totem during the creation period”.<sup>41</sup> As a consequence, individuals ought not to eat the meat from their totem animals.<sup>42</sup>

### 3 *The Tagai*

Torres Strait Islander people derive their spirituality from stories of the Tagai. Tagai is the creation spirit, represented by a constellation of stars which span the southern sky. The stars inform Torres Strait Islander laws, customs and practices and also contain practical information about the natural world which is essential for survival.<sup>43</sup> For example, the stars are used for navigation as well as being indicators of the seasons and the right times to garden and hunt.<sup>44</sup>

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<sup>35</sup> Aboriginal Benchbook for Western Australian Courts, above n 13, 2:8 [2.3.3].

<sup>36</sup> Kenneth Maddock, *The Australian Aborigines: A Portrait of Their Society* (Penguin, 1972) 27, quoted in *ibid.*

<sup>37</sup> Larissa Behrendt, ‘The Doctrine of Discovery in Australia’ in Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford University Press, 2010) 171, 173.

<sup>38</sup> *Ibid.*

<sup>39</sup> Horton, above n 4, 1093.

<sup>40</sup> Behrendt and Kelly, above n 22, 88.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> Duane Hamacher, *A Shark in the Stars: Astronomy and Culture in the Torres Strait* (10 July 2013) The Conversation <<http://theconversation.com/a-shark-in-the-stars-astronomy-and-culture-in-the-torres-strait-15850>>

<sup>44</sup> *Ibid.*

During colonisation, Christianity was received with much less resistance by Torres Strait Islanders than by Aboriginal peoples because “Christian principles were partly compatible with traditional religion”.<sup>45</sup> The influence of Christianity in the region has resulted in the adaptation of many traditional Torres Strait Islander beliefs and practices.<sup>46</sup>

### 4 *References to Deceased Persons*

Each Aboriginal and Torres Strait Islander community deals with the death of an individual differently.<sup>47</sup> Culturally, a person may not be able to mention the deceased person by name in the presence of the deceased’s family. In many communities, the depiction or mention of a person who is deceased can cause great distress. If in doubt about naming or visually showing someone who has passed away, advice should be sought from within that particular community as to correct protocol.<sup>48</sup>

Some difficulty may be overcome by prefacing the relevant material with a warning that it will contain references to such matters: see, for example, the sentencing remarks in *R v Poonkamelya* (16 September 2004) which commence with the warning “The following material contains references to Indigenous persons who are deceased”.

In matters covered by Practice Direction 6 of 2013, covering case management in complex criminal trials, it is incumbent on the prosecution to provide in their pre-trial memorandum, particulars of the extent to which permission to name and show images of a deceased Aboriginal person or Torres Strait Islander has been sought and obtained, if the trial will involve reference to such a person.

## B *Social Organisation*

### 1 *Units of Social Organisation*

The basic social unit in Aboriginal and Torres Strait Islander societies is the family.<sup>49</sup> The family may take a nuclear or extended form, including siblings and adult children and relations such as siblings’ spouses, children’s spouses and mothers-in-law.<sup>50</sup> Positions within the family are not necessarily fixed. For example, aunts can take on the role of mothers and be called the same name as mother, uncles can take on roles of fathers and cousins can be considered brothers and sisters.<sup>51</sup>

The autonomy of families is variable: for example, households in the Tiwi Islands were traditionally autonomous units and large households could be communities in themselves.<sup>52</sup> However, most families were not economically or socially independent and tended to live and travel together in a band consisting of a group of people who were

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<sup>45</sup> Queensland Museum, *The Coming of the Light* (2015) <[http://www.southbank.qm.qld.gov.au/Events+and+Exhibitions/Exhibitions/Permanent/Dandiiri+Maiwar/Torres+Strait+Islander+resilience/Coming+of+the+light#.VWru\\_euv37U](http://www.southbank.qm.qld.gov.au/Events+and+Exhibitions/Exhibitions/Permanent/Dandiiri+Maiwar/Torres+Strait+Islander+resilience/Coming+of+the+light#.VWru_euv37U)>; see also Paul Ban, *Torres Strait Islanders and the Torres Strait* (2015) Australian Institute of Family Studies <<https://aifs.gov.au/publications/family-matters/issue-35/torres-strait-islander-family-life>>.

<sup>46</sup> Horton, above n 4, 1091.

<sup>47</sup> ABC Message Stick, *Cultural Protocols for Indigenous Reporting in the Media* <[http://pzja.gov.au/wp-content/uploads/2011/06/TSSAC-27-August-2008-Meeting-46\\_5.1A-abc-cultural-protocol.pdf](http://pzja.gov.au/wp-content/uploads/2011/06/TSSAC-27-August-2008-Meeting-46_5.1A-abc-cultural-protocol.pdf)>.

<sup>48</sup> *Ibid.*

<sup>49</sup> Horton, above n 4, 300.

<sup>50</sup> *Ibid.*

<sup>51</sup> Behrendt and Kelly, above n 22, 88.

<sup>52</sup> Horton, above n 4, 300.

associated with a particular site or territory.<sup>53</sup> In some parts of Australia, there may be larger clan groupings whose membership is determined by descent.<sup>54</sup> Sharing a common language is also central to Aboriginal group identities.<sup>55</sup>

Torres Strait Islander people traditionally lived in established village communities, with life revolving around hunting, fishing, gardening and trading relationships. The islands' economies were based on subsistence agriculture and the collection of foodstuffs from the sea. Trade relationships existed among the various islands of the Torres Strait, as well as with people of western Papua New Guinea, the Near Western Islands and Cape York. Goods traded included food, weapons, artefacts and raw materials, such as timber. Various aspects of life in the Torres Strait, including social organisation and language, were heavily influenced by Papuan culture prior to colonisation.<sup>56</sup>

## 2 Kinship Systems and Social Roles

Within Aboriginal society, interpersonal relationships are governed by complex and intricate kinship rules.<sup>57</sup> The kinship system is based upon an expanded concept of family and associated notions of family rights and obligations.<sup>58</sup> As described by Fryer-Smith, such a system enables each person in a group

to know precisely where he or she stands in relation to every other person in that group, and to persons outside that group ... Social classification makes social life predictable, providing each person with essential guidelines concerning appropriate social behaviour towards others."<sup>59</sup>

Knowledge of kinship rules is essential for a person to properly manage their social relations with respect to a variety of matters, including birth, initiation, betrothal, hunting and gathering, access to critical physical resources, acquisition of knowledge and the process of death and mourning.<sup>60</sup>

Under the kinship system, an essential principle is the equivalence of siblings of the same sex.<sup>61</sup> Thus, a man is classed with and called by the same kin term as his brother, and a woman is classed with and called by the same term as her sister.<sup>62</sup> A child might therefore call her mother's sister "mother", who would correspondingly call her "daughter".<sup>63</sup> In this way, a child might have a number of mothers, fathers, brothers or sisters.

Kinship rules are not strictly determinative of the relationship between people: as observed in the Aboriginal Benchbook for Western Australian Courts,

actual behaviour depends on the closeness of the relationship, personal history and personalities. Kinship simply provides a code of behaviour appropriate for each kind of

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<sup>53</sup> Ibid 999.

<sup>54</sup> Ibid.

<sup>55</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into Language Learning in Indigenous Communities* (2012) 7-8 [2.3]-[2.4] <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=/atsia/languages2/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=/atsia/languages2/report.htm)>.

<sup>56</sup> *Mina Mir Lo Ailan Mun*, above n 9, 3.

<sup>57</sup> Aboriginal Benchbook for Western Australian Courts, above n 13, 2:14 [2.5].

<sup>58</sup> Ibid.

<sup>59</sup> Ibid [2.5.1].

<sup>60</sup> Horton, above n 4, 552

<sup>61</sup> Aboriginal Benchbook for Western Australian Courts, above n 13, 2:14 [2.5.1].

<sup>62</sup> Ibid.

<sup>63</sup> Ibid.

relative with whom an individual interacts. For instance, some relationships are characterised by avoidance, others by joking, intimacy or reservation.<sup>64</sup>

The most important organisational divisions in Aboriginal societies are based on sex and age.<sup>65</sup> In Aboriginal cultures, men and women have complementary social and religious roles. Male elders generally have responsibility for spiritual matters and rituals, and are custodians of the Law.<sup>66</sup> Women are responsible for matters of marriage and fertility, but also possess distinct forms of sacred knowledge and carry out rituals separate to those of men (“women’s business”). Women gain in power and prestige as they grow older, and those who have at least two children are taught the most secret of women’s business and attain the right to perform ceremonies.<sup>67</sup>

Elders, together with traditional healers, are authoritative figures in a group and carry out the functions of teachers, judges and spiritual leaders.<sup>68</sup> Generally, it is senior men who are selected as Elders, although women with strong spiritual and personal qualities may also achieve an equivalent status.<sup>69</sup> It is not merely age that determines who is selected as an Elder;<sup>70</sup> personal qualities such as intelligence and diligence, in addition to knowledge of religious and ceremonial affairs, are considered essential.<sup>71</sup> It is important to note that, although certain people may be more influential, no one individual has ultimate power.<sup>72</sup> Important decisions are reached through a process of consensus, with ample time for deliberation.<sup>73</sup>

Although differences may exist today as to the form of lifestyle adopted by Aboriginal people and their socio-economic situation, “Aboriginal people in South East Queensland [still] belong to overlapping kin-based networks sharing social life, responsibilities and rights, a common history and culture, and experience of racism and ethnic consciousness.”<sup>74</sup>

Clan, kinship and reciprocity are the underlying principles of Torres Strait Islander social structure and relationships, and therefore play a significant role in social, political and religious life.<sup>75</sup> Responsibilities are shared, being defined for each individual by their place in the clan and their gender. This is of particular significance in relation to cultural events and rituals, such as initiation, the naming of a child and funerals.<sup>76</sup>

Funerals are particularly significant in Torres Strait Islander communities: it is not uncommon for those of Torres Strait Islander descent living away from their communities of origin to travel to attend a “tombstone opening”. This is the ceremonial unveiling of a

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<sup>64</sup> Ibid.

<sup>65</sup> Horton, above n 4, 999.

<sup>66</sup> Aboriginal Benchbook for Western Australian Courts, above n 13, 2:16 [2.6.1].

<sup>67</sup> Ibid.

<sup>68</sup> Aboriginal and Torres Strait Islander Women’s Task Force, *Women’s Task Force on Violence Report* (Department of Aboriginal and Torres Strait Islander Policy and Development, revised ed, 2000) 47 [2.2].

<sup>69</sup> Aboriginal Benchbook for Western Australian Courts, above n 13, 2:16 [2.6.1].

<sup>70</sup> Behrendt and Kelly, above n 22, 91.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Aboriginal Benchbook for Western Australian Courts, above n 13, 2:17-2:18 [2.6.2]

<sup>74</sup> Diana Eades, *Aboriginal Ways of Using English* (Aboriginal Studies Press, 2013) 58.

<sup>75</sup> State Library of Queensland, *Information Awareness – Torres Strait Islands*, Indigenous Allied Health Australia <[http://iaha.com.au/wp-content/uploads/2013/03/000210\\_informationawareness\\_tis.pdf](http://iaha.com.au/wp-content/uploads/2013/03/000210_informationawareness_tis.pdf)>; *Mina Mir Lo Ailan Mun*, above n 9, 3.

<sup>76</sup> State Library of Queensland, above n 75, 2.

commemorative stone on the grave of a deceased person and is an occasion representative of unity of family and culture.<sup>77</sup>

### C Visual Art, Literature, Song and Dance

The basis of Aboriginal and Torres Strait Islander cultures is oral and as such, Aboriginal and Torres Strait Islanders' attachment to the land is expressed through song, art, dance and painting.<sup>78</sup>

Traditional Aboriginal literature, including stories, poetry, songs and chants, generally relate to things connected with traditional life, including the Dreaming stories, magic, totems, hunting, fighting, epics or mourning.<sup>79</sup> Dreaming stories about sacred sites may be passed down from generation to generation by the Elders in the form of stories. Stories can be used to dictate appropriate modes of behaviour and set collective standards.<sup>80</sup> Dreaming stories may also be honoured through dance and performance.<sup>81</sup>

In the Torres Strait, despite commonalities in community structure, each clan has its own cultural identity, including distinct traditions relating to song, dance, storytelling, carving and weaving.<sup>82</sup> Aspects of Torres Strait culture were greatly influenced during colonisation by the customs of South Sea Islanders<sup>83</sup> (who were brought to Queensland as indentured labour in primary industries between 1863 and 1904)<sup>84</sup> and simultaneously prohibited by missionaries.<sup>85</sup> Nonetheless, much of these traditions remains alive today.<sup>86</sup>

Aboriginal visual art is traditionally not conceived of as a form of self-expression, but as a “stylised form of communication” which is “inseparable from its cultural and social setting”.<sup>87</sup> The painting in the Banco Court of the Brisbane Law Courts Complex by Sally Gabori, a Kaiadilt Elder from the Gulf of Carpentaria, may be understood in this light. According to her artist statement:

This painting brings together four key, beloved places in Sally Gabori's life: the fig trees near the beach where several members of her family were born, including her mother, Mara, and her husband, Pat; the adjoining sea country where her big brother, Buddy, used to hunt for dugong and where her late warrior and hunter husband fought for women; the beach at Kalthuriy where her mother's father was born; the billabong at Nyinyilki with its casuarinas, its waterlilies and its unfailing supply of freshwater which people would scoop up in baler shells and trumpet shells. The colours and shapes of these places are interwoven with memories of her life on Bentinck Island before white people came – of

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<sup>77</sup> *Mina Mir Lo Ailan Mun*, above n 9, 6; Jeremy Beckett, *Torres Strait Islanders: Custom and Colonialism* (Cambridge University Press, 1990) 1-4, 212-13.

<sup>78</sup> Behrendt and Kelly, above n 22, 90.

<sup>79</sup> Aboriginal Benchbook for Western Australian Courts, above n 13, 2:20 [2.6.5].

<sup>80</sup> Behrendt and Kelly, above n 22, 91.

<sup>81</sup> Aboriginal Benchbook for Western Australian Courts, above n 13, 2:20 [2.6.5].

<sup>82</sup> State Library of Queensland, above n 75, 2.

<sup>83</sup> Eddie Koiki Mabo, 'Music of the Torres Strait' in Fiona Magowan and Karl Neuenfeldt (eds), *Landscapes of Indigenous Performance: Music, Song and Dance of the Torres Strait and Arnhem Land* (Aboriginal Studies Press, 2005) 46-8.

<sup>84</sup> Queensland Government Department of Communities, Child Safety and Disability Services, *Australian South Sea Islanders* (c. 2015) <<https://www.communities.qld.gov.au/multicultural/multicultural-communities/australian-south-sea-islanders>>.

<sup>85</sup> Mabo, above n 83, 46-8.

<sup>86</sup> Anna Shukul, 'Torres Strait Islanders' in Maximilian Brandle (ed), *Multicultural Queensland 2001: 100 Years, 100 Communities, A Century of Contributions* (2001) 21, 32.

<sup>87</sup> Aboriginal Benchbook for Western Australian Courts, above n 13, 2:20 [2.6.5].

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her big brother raising her after the death of her mother, of the hunting prowess of her brother, her father and her husband Pat, of fighting over women, and of the haunting songs which would be sung about kin who were off hunting or who had passed away.<sup>88</sup>

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<sup>88</sup> Queensland Government Department of Housing and Public Works, *Queen Elizabeth II Courts of Law*, <[www.hpw.qld.gov.au/SiteCollectionDocuments/PublicArtQEIICourts.pdf](http://www.hpw.qld.gov.au/SiteCollectionDocuments/PublicArtQEIICourts.pdf)>.

## CHAPTER 9: ABORIGINAL AND TORRES STRAIT ISLANDER LANGUAGE AND COMMUNICATION

### I INTRODUCTION

It is a challenge for our court system to ensure proceedings are fair where a witness, an accused or a party is not fluent in spoken English, or does not comprehend written or spoken English well. Where such difficulties are recognised early, they may be overcome to some extent by, for example, the use of interpreters and translators. These issues are dealt with generally in Chapter 6.

With respect to Aboriginal and Torres Strait Islander people in particular, the trial process could operate “unfairly to ... witnesses and accused, because that process is often outside their experience, either linguistically or culturally.”<sup>89</sup> As noted in Chapter 8, the Final Report of The Royal Commission into Aboriginal Deaths in Custody<sup>90</sup> recognised the importance of cross-cultural understanding within the judiciary,<sup>91</sup> to guard against the operation of any ethnocentric biases.

This chapter therefore seeks to provide a guide for judges in working with Aboriginal and Torres Strait Islander people. It provides an overview of some of the languages and dialects spoken by Aboriginal and Torres Strait Islander people of Queensland, and discusses cultural barriers to effective communication, the use of interpreters in court, and other strategies for enhancing communication. Appendix A to this Benchbook is a list of issues and difficulties arising for Aboriginal and Torres Strait Islander people in their contact with the courts, which was prepared by Judge Bradley of the District Court of Queensland. Appendix B contains a glossary of terms with respect to Aboriginal and Torres Strait Islander people, while Appendix H includes a list of useful contacts in relation to interpretation and translation of Aboriginal and Torres Strait Islander languages and more generally.

Note also that the Queensland Criminal Justice Commission report on Aboriginal Witnesses in Queensland’s Criminal Courts<sup>92</sup> contains many specific recommendations concerning the judiciary and the litigation process, particularly in relation to socio-cultural and linguistic issues. These include recommendations about greater cross-cultural awareness information and training, the receipt of evidence from Aboriginal witnesses and the use of interpreters. Although now somewhat dated, it may still be referred to as an informative resource in respect of various issues discussed in this chapter.

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<sup>89</sup> Justice Dean Mildren, ‘Redressing the Imbalance Against Aboriginals in the Criminal Justice System’ (1997) 21 *Criminal Law Journal* 7, 12.

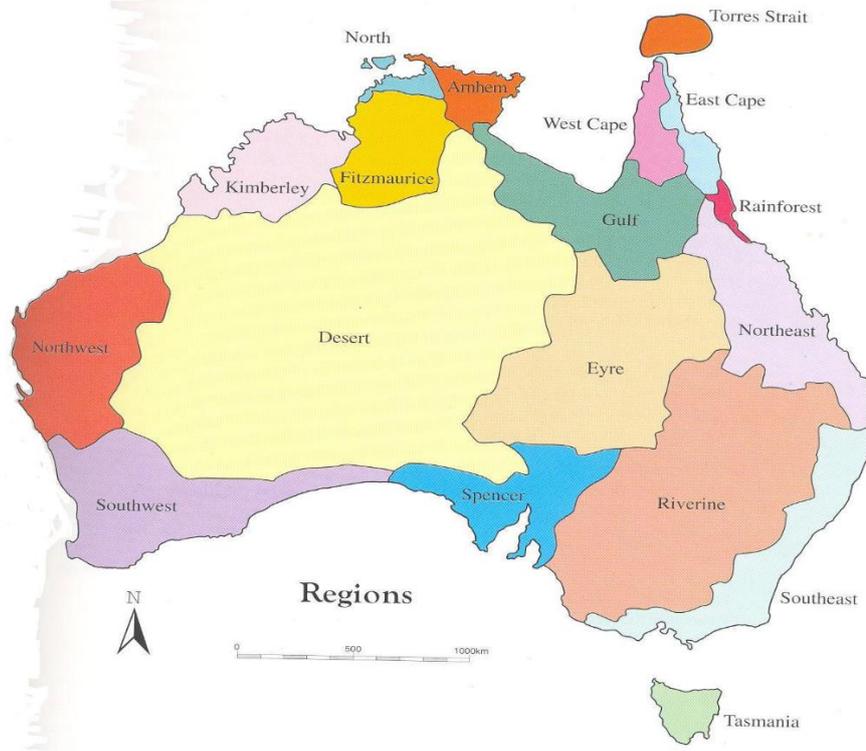
<sup>90</sup> (Australian Government Publishing Service, 1991)  
<<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>> (‘Aboriginal Deaths in Custody Report’).

<sup>91</sup> *Ibid* vol 5, 91.

<sup>92</sup> Criminal Justice Commission, *Aboriginal Witnesses in Queensland’s Criminal Courts* (1996) 32-3  
<<http://www.ccc.qld.gov.au/research-and-publications/publications/cjc/aboriginal-witnesses-in-queenslands-criminal-courts.pdf>>.

## II WHAT LANGUAGES DO ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE SPEAK?

Regional differences in Aboriginal and Torres Strait Islander culture and society continue to exist. Those regional differences are reflected in linguistic variations.<sup>93</sup> Below is a map of Australia taken from the *Encyclopaedia of Aboriginal Australia*<sup>94</sup> broadly identifying recognised regions.<sup>95</sup>



A number of different languages may be spoken by Aboriginal people including traditional languages, pidgins or Creoles, and Aboriginal English. Most Aboriginal and Torres Strait Islander people speak English when speaking with non-Indigenous people. However, it cannot be assumed that an Aboriginal person is speaking Anglo-Australian English, or is sufficiently comfortable doing so in a courtroom setting.<sup>96</sup> Details of the languages spoken and interpreter services available in many regions with a significant Indigenous population can be found under Justice Resources on the Department of Aboriginal and Torres Strait Islander Partnerships website.<sup>97</sup>

<sup>93</sup> David Horton (ed), *Encyclopaedia of Aboriginal Australia* (Aboriginal Studies Press, 1994) vol 2, 935.

<sup>94</sup> *Ibid.*

<sup>95</sup> Note that this and other maps in the *Encyclopaedia* indicate only the general location of larger groupings of people and the boundaries are not intended to be exact.

<sup>96</sup> See *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75, as discussed in Chapter 6 above.

<sup>97</sup> See <https://www.datsip.qld.gov.au/publications-governance-resources/justice-resources>.

### A *Traditional Languages*

Prior to colonisation, there were over 250 known Aboriginal and Torres Strait Islander languages, with around 600 dialects.<sup>98</sup> Today, around 145 languages are still spoken, but the vast majority are categorised as severely or critically endangered.<sup>99</sup>

In the 2011 Census, 83% of Aboriginal and Torres Strait Islander people reported speaking only English at home,<sup>100</sup> while 11% reported speaking an Indigenous language at home. Eighty-two percent of the latter group reported that they spoke English well or very well, while 17% reported not speaking English well or at all.<sup>101</sup>

Of those who spoke an Indigenous language at home, the most widely spoken language groups in Queensland were Torres Strait Creole (41.9%) and Wik Mungkan (11.5%).<sup>102</sup> Aboriginal and Torres Strait Islander people living in more remote regions in Queensland were more likely to report Indigenous language use. More than half of all Aboriginal and Torres Strait Islander persons in the Torres Strait and Cape York regions reported speaking an Indigenous language at home.<sup>103</sup>

The report of the Second National Indigenous Languages Survey found that the majority of respondents (91%) agreed or strongly agreed that the use of traditional language is a strong part of their identity as an Aboriginal/Torres Strait Islander person.<sup>104</sup>

### B *Pidgins and Creoles*

The languages spoken by Aboriginal and Torres Strait Islander people prior to colonisation are referred to in the present context as 'traditional'. Contact languages, otherwise referred to as home language, first language, or creole, have evolved from traditional languages as a result of several different language groups coming together. They may be spoken by Aboriginal and Torres Strait Islander peoples across many regions as first languages.<sup>105</sup>

The term *pidgin* refers to a language "formed from two or more different languages spoken by two linguistically distinct groups, and is used only for limited purposes arising

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<sup>98</sup> House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Our Land Our Languages: Language Learning in Indigenous Communities* (2012) 33

<[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_representatives\\_Committees?url=/atsia/languages2/report.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_representatives_Committees?url=/atsia/languages2/report.htm)> ('Our Land Our Languages').

<sup>99</sup> *Ibid* 34.

<sup>100</sup> Australian Bureau of Statistics, *2016.0 Census of Population and Housing: Characteristics of Aboriginal and Torres Strait Islander Australians, 2011 – Language* (28 November 2012)

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2016.0main+features902011>>.

<sup>101</sup> *Ibid*.

<sup>102</sup> Queensland Government Statistician's Office, *Aboriginal and Torres Strait Islander Population in Queensland (Census 2011)* (2011) 2 <<http://www.qgso.qld.gov.au/products/reports/atsi-pop-qld-c11/atsi-pop-qld-c11.pdf>>.

<sup>103</sup> *Ibid*.

<sup>104</sup> Australian Institute of Aboriginal and Torres Strait Islander Studies, *Community, Identity, Wellbeing: The Report of the Second National Indigenous Languages Survey* (2014) 28-9

<[http://aiatsis.gov.au/sites/default/files/products/report\\_research\\_outputs/2014-report-of-the-2nd-national-indigenous-languages-survey.pdf](http://aiatsis.gov.au/sites/default/files/products/report_research_outputs/2014-report-of-the-2nd-national-indigenous-languages-survey.pdf)>.

<sup>105</sup> *Our Land Our Languages*, above n 10, 35.

from interaction between the groups.”<sup>106</sup> Regional pidgins developed in Queensland during the 19th century to facilitate trade, agriculture and administration. Commonly, vocabulary is based on English while grammar and communicative style are based on traditional languages.

With wider use by a particular group, a pidgin may develop into a more complex language and become the first language of some speakers. In Queensland, this led to the growth of Aboriginal English on the one hand, and creole languages on the other. The two creole languages are Torres Strait Islander Creole and Kriol.

As reported to the Standing Committee on Aboriginal and Torres Strait Islander Affairs:

There has been widespread misunderstanding about contact language varieties in Australia. They are often referred to as being a bad form of the dominant language, which is English. People might refer to them as 'broken English' or 'bad English' and other terms like that. Creoles and related varieties are actually full linguistic languages.<sup>107</sup>

### 1 *Torres Strait Islander Creole*

In the Torres Strait, two traditional languages are spoken, namely Meriam Mir (in the Eastern islands, with two dialect groups) and Kala Lagaw La (in the remaining islands, with four dialect groups).<sup>108</sup> Torres Strait Creole (or Yumpla Tok) is also spoken as a common language amongst Torres Strait Islanders in the Strait and in mainland Queensland.<sup>109</sup> It has also become the first language of many children in the Aboriginal communities of the northern part of the Cape York Peninsula, which share many links with the mainland Islander communities and some Torres Strait Islands.<sup>110</sup> This language may also be referred to as 'Broken', 'Biz', 'Blaikman', 'Creole', 'Cape York Creole' or 'Lockhart Creole'.<sup>111</sup>

### 2 *Kriol*

A second creole, known as Kriol or Roper River Creole, is spoken largely by Aboriginal people in areas of Western Australia, the Northern Territory and Queensland.<sup>112</sup> It also has some influence on the Aboriginal English spoken in the more remote parts of Queensland.<sup>113</sup>

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<sup>106</sup> Criminal Justice Commission, above n 4, 16.

<sup>107</sup> Claire Gorman, cited in *Our Land Our Languages*, above n 10, 36.

<sup>108</sup> Torres Strait Regional Authority, Submission No 146 to House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into Language Learning in Indigenous Communities*, 2, cited in *Our Land Our Languages*, above n 10, 36 [2.118].

<sup>109</sup> *Our Land Our Languages*, above n 10, 36 [2.117].

<sup>110</sup> Criminal Justice Commission, above n 4, 16.

<sup>111</sup> Diana Eades, *Aboriginal English and the Law* (Queensland Law Society Inc, 1991) 23 ('Aboriginal English and the Law').

<sup>112</sup> Rob Amery and Colin Bourke, 'Australian Languages: Our Heritage' in Colin Bourke et al (eds), *Aboriginal Australia: An Introductory Reader in Aboriginal Studies* (University of Queensland Press, 2<sup>nd</sup> ed, 1998) 138.

<sup>113</sup> Criminal Justice Commission, above n 4, 16.

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Kriol is recognised as being linguistically different from other creole languages (hence its distinct spelling). Although the majority of Kriol words are English, the structure, grammar, spelling and sound of Kriol are unique. Accordingly, Kriol is not readily understood by most English speakers.<sup>114</sup>

### C *Aboriginal English*

Many Aboriginal people speak, as their first language, a form of English known as Aboriginal English. Aboriginal English is thought to have developed with the relocation to missions and reserves of large numbers of people from different language areas throughout Queensland. “Usually such dialects are spoken in a domestic or familiar social environment. Such dialects constitute a continuum, ranging from those close to English ... to those close to Aboriginal Kriol.”<sup>115</sup> It is considered almost impossible, for example, to distinguish between a person who is speaking heavy Aboriginal English and a person who is speaking Kriol. The differences between Anglo-Australian English and Aboriginal English are found in every area of language: sounds or accent, grammar, vocabulary, meaning, use and style.

Some examples of these differences are provided below. These have been extracted from the CJC Report on Aboriginal Witnesses in Queensland’s Criminal Courts.<sup>116</sup>

- Some sounds may be pronounced differently.<sup>117</sup> For example, “h” at the beginning of a word is often not pronounced and in heavier Aboriginal English, the sounds “f” and “v” may be changed to “p” or “b” so that the phrase “we had a fight” may sound like “we ad a bight”.
- The tense of verbs may be indicated differently.<sup>118</sup> For example, the ends of words with more than one consonant may be simplified so that, for example, “they locked him up” may be rendered as “they lock im up”. Past tense may be indicated by the use of “bin” as in “they bin lock im up”, or by a time indicator such as “before” or “that time”.
- Anglo-Australian English words may have different meanings in Aboriginal English, for example:
  - “drunk” in Aboriginal English may mean tipsy;
  - “choked down” may mean drunk or very drunk;
  - “kill” may mean to hurt;
  - “camp” may mean to live.
- The subject and object of a sentence may be misidentified by a person unfamiliar with the language structure of Aboriginal English.<sup>119</sup> The following are examples:
  - Aboriginal English: “That’s why they bin moving old people.”
    - Anglo-Australian English: “That’s why the old people moved.”
    - Misinterpretation: “That’s why they moved the old people.”
  - Aboriginal English: “We paint up all the Jakamarra and Jupurrula.”

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<sup>114</sup> Amery and Bourke, above n 24, 138.

<sup>115</sup> Queensland Government Department of Justice and the Attorney General and Department of Aboriginal and Torres Strait Islander Policy, *Aboriginal English in the Courts: A Handbook* (2000) 8 (‘Aboriginal English in the Courts’).

<sup>116</sup> Criminal Justice Commission, above n 4, 16-17.

<sup>117</sup> See also *Aboriginal English and the Law*, above n 23, 25.

<sup>118</sup> Criminal Justice Commission, above n 4, 16-17.

<sup>119</sup> *Aboriginal English in the Courts*, above n 27, 30.

- Anglo-Australian English: “All we Jakamarras and Jupurrulas get painted up.”
- Misinterpretation: “We paint up all the Jakamarras and Jupurrulas.”

These differences between Aboriginal English and Anglo-Australian English “can result in legal personnel and juries so badly misinterpreting an Aboriginal witness that they confuse the agent (usually the subject) with the person acted upon (usually the object).”

While many Aboriginal and Torres Strait Islander people may be “bi-culturally competent, adept at switching between [Anglo-Australian] English and Aboriginal [English]”,<sup>120</sup> some are not:

The extent of bi-cultural competence ... depends to a significant extent on the individual’s experience in mainstream domains, such as education and employment ... [E]xperience with Aboriginal students in tertiary education indicates that even many of them lack significant bicultural competence.<sup>121</sup>

Aboriginal English and creole languages are widely spoken even in places where traditional Aboriginal languages are no longer in use.<sup>122</sup>

#### D *The Risk of Misinterpretation*

It can be difficult for an untrained observer to detect different words, grammar and accents which may indicate that a different form of the English language is being used.<sup>123</sup> Indeed, as Muirhead J commented in *R v Jabarula*:<sup>124</sup>

[There is] a tendency in all of us to assume that as we may understand a person who is talking in his second language in a simple conversation in English, his understanding of our conversation is reciprocal.<sup>125</sup>

However, “difficulties can arise when a court, hearing the use of some English words, does not appreciate that a witness is not fluent in [Anglo-]Australian English.”<sup>126</sup>

Misunderstandings may have a significant impact on the outcome of court proceedings.<sup>127</sup> This is aptly illustrated by the Queensland Court of Appeal case *R v Kina*, where the defendant’s difficulties communicating with her solicitor and counsel meant that she did not sufficiently disclose the circumstances of the offence, which included a history of sexual violence against her by the victim.<sup>128</sup>

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<sup>120</sup> Amery and Bourke, above n 24, 138.

<sup>121</sup> Aboriginal English and the Law, above n 23, 11.

<sup>122</sup> Ibid 2 and Criminal Justice Commission, above n 4, 17.

<sup>123</sup> Diana Eades, ‘Communicating with Aboriginal Clients’ (1993) 5 *Law Society Journal* 31, 41 (‘Communicating with Aboriginal Clients’).

<sup>124</sup> (1984) 11 A Crim R 131.

<sup>125</sup> Ibid 137, as quoted in Russell Goldflam, ‘“Silence in Court!” Problems and Prospects in Aboriginal Legal Interpreting’ (1997) 17 *Australian Journal of Law and Society* 13, 26.

<sup>126</sup> Criminal Justice Commission, above n 4, 17.

<sup>127</sup> Ibid 18, and Aboriginal English and the Law, above n 23, 25.

<sup>128</sup> [\[1993\] QCA 480](#). For discussion of this case, see Chapter 10.

### III NON-VERBAL COMMUNICATION

Non-verbal communication, through facial expression, eye movement, gestures and posture, may form a significant part of face-to-face communication, as discussed generally in Chapter 6. Some of the important non-verbal aspects of Aboriginal and Torres Strait Islander communication are outlined below.

#### A *Avoidance of Direct Eye Contact*

In Aboriginal society, avoidance of direct eye contact is intended to demonstrate politeness and respect, particularly to persons of authority.<sup>129</sup> Direct eye contact with anyone other than the person's intimate peers and relations may be considered rude, disrespectful or even aggressive.<sup>130</sup> This is something which could be drawn to the attention of jurors to avoid the risk of misinterpretation.<sup>131</sup>

#### B *Silence*

Among Aboriginal and Torres Strait Islander people, silence is a common and positively valued part of communication.<sup>132</sup> It may indicate that the person wants to think, to adjust to a situation, or some other factor,<sup>133</sup> such as a lack of authority to speak on the topic or in the presence of a particular person,<sup>134</sup> or that a response has already been given.<sup>135</sup> It also may indicate that the person is uncomfortable with the discussion, does not support the proposition being put, or does not understand what is being asked and is too embarrassed to seek clarification.<sup>136</sup>

Silence can be easily misinterpreted as an indication of evasiveness, ignorance, or guilt.<sup>137</sup> It may be appropriate for courts and juries to be made aware that silences are not necessarily imbued with these meanings nor demonstrative of an unwillingness to respond more generally.<sup>138</sup>

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<sup>129</sup> Stephanie Fryer-Smith, *Aboriginal Benchbook for Western Australian Courts* (Australian Institute of Judicial Administration Inc, 2008) 5:6 [5.3.1] <[http://www.aija.org.au/Aboriginal Benchbook 2nd Ed/Chap1-8.pdf](http://www.aija.org.au/Aboriginal_Benchbook_2nd_Ed/Chap1-8.pdf)>; Criminal Justice Commission, above n 4, 25.

<sup>130</sup> Aboriginal English and the Law, above n 23, 47; Roland Sussex, 'Intercultural Communication and the Language of the Law' (2004) 78 *Australian Law Journal* 530, 532.

<sup>131</sup> Aboriginal English in the Courts, above n 27, 38.

<sup>132</sup> Criminal Justice Commission, above n 4, 23; Communicating with Aboriginal Clients, above n 35, 46; Sussex, above n 42, 532; Department of Aboriginal and Torres Strait Islander Policy and Development, *Mina Mir Lo Ailan Mun: Proper Communication with Torres Strait Islander People* (c. 1998) 13 ('*Mina Mir Lo Ailan Mun*').

<sup>133</sup> Aboriginal Benchbook for Western Australian Courts, above n 41, 5:6 [5.3.1]; Aboriginal English and the Law, above n 23, 46; Criminal Justice Commission, above n 4, 23.

<sup>134</sup> Mildren, above n 1, 16.

<sup>135</sup> Criminal Justice Commission, above n 4, 21.

<sup>136</sup> *Ibid* 24.

<sup>137</sup> Communicating with Aboriginal Clients, above n 35, 46.

<sup>138</sup> Aboriginal English in the Courts, above n 27, 39; *R v D* [2003] QCA 347, [11].

Trial judges should also ensure that examining counsel do not interrupt a period of silence by a witness with further questioning before the witness has had proper time to answer.

### C *Sign Language and Gestures*

Sign language and gestures are also important features of communication in Aboriginal and Torres Strait Islander cultures.<sup>139</sup>

Sign language may be especially important in hunting and mourning practices. Many gestures are common to Aboriginal people throughout Australia, particularly those which are intended to identify relatives or other people. For example, two arms, crossed over and held in front of the body as if in handcuffs means 'police man'.<sup>140</sup>

Some gestures, including movements of the eyes, head and lips, may be used to indicate direction of motion or location, but go unnoticed by people not accustomed to this means of communication.<sup>141</sup> Questioners should be alert to such gestures and may need to seek clarification.<sup>142</sup>

## IV CULTURAL BARRIERS TO EFFECTIVE COMMUNICATION WITH SPEAKERS OF ABORIGINAL ENGLISH

Dr Diana Eades, an anthropological linguist, has spent decades studying Aboriginal English, particularly as used in the justice system. Dr Eades has thereby identified a number of barriers to effective communication between speakers of Anglo-Australian and Aboriginal English, which are summarised below, along with observations of the Criminal Justice Commission in its 1996 report. The difficulties as between Anglo-Australian and Aboriginal English speakers are focussed on here for two reasons: first, Aboriginal English may be confused with Anglo-Australian English and the need for assistance not identified without awareness of its traits;<sup>143</sup> and second, there is far less research available on Torres Strait Islander languages. Again, however, the information below may provide some insight into matters to be aware of in cross-cultural communication more generally.

### A *Family or Kin Loyalty*

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<sup>139</sup> Aboriginal Benchbook for Western Australian Courts, above n 41, 5:7 [5.3.1]; *Mina Mir Lo Ailan Mun*, above n 44, 14.

<sup>140</sup> Aboriginal English in the Courts, above n 27, 37.

<sup>141</sup> Aboriginal Benchbook for Western Australian Courts, above n 41, 5:7 [5.3.1]; *Aboriginal English and the Law*, above n 23, 71.

<sup>142</sup> Aboriginal English in the Courts, above n 27, 37.

<sup>143</sup> National Aboriginal and Torres Strait Islander Legal Services, 'The Right to A Fair Trial', Submission to the Commonwealth Attorney-General, *Regarding the Expansion of Aboriginal and Torres Strait Islander Interpreter Services*, March 2011, 12  
<<http://www.natsils.org.au/portals/natsils/submission/Joint%20ATSILS%20Aboriginal%20and%20Torres%20Strait%20Islander%20Interpreter%20Services%20Submission%20%20March%202011.pdf>> ('Right to a Fair Trial').

Family or kin relationships are usually accorded priority in an Aboriginal person's life. Family or kin loyalty may affect how an Aboriginal person gives evidence, particularly in respect of relatives. It may create inappropriate feelings of guilt and/or distort notions of individual responsibility.<sup>144</sup> Rules of behaviour based on kinship may also affect the willingness or ability of a witness to speak to or in the presence of some people. For example, in some communities, mothers and sons-in-law rarely speak directly to each other.<sup>145</sup>

### B *Indirect Questioning*

Indirect questioning is the more common form of communication between Aboriginal people where the privacy of people's thoughts and feelings are highly respected.<sup>146</sup> In traditional Aboriginal society, personal or significant information is sought as part of a two-way exchange characterised by the volunteering of information and hinting for a response. "Question-and-answer interviews are culturally alien to many Aboriginal people" and direct questioning may be seen as bad manners.<sup>147</sup> "When Aboriginal people volunteer information about a matter, it can be intensely embarrassing for them to have their knowledge questioned."<sup>148</sup>

If something is not immediately understood, it is often assumed that clarification will come from continued interaction, and the appropriate response is to wait. To state that one does not understand what has been said can be humiliating.<sup>149</sup>

Aboriginal people may have trouble with direct questions which:

- predetermine the answer (yes/no questions);
- require them to identify a person, place, date or time;
- require a detailed description; or
- discourage a narrative-style answer,<sup>150</sup>

each of which is common in court proceedings.

### C *Gratuitous Concurrence or Suggestibility*

Gratuitous concurrence refers to the tendency of a speaker to agree with a proposition put to him or her, regardless of whether the speaker truly agrees with it or even understands the proposition. When questioned by a person in authority, in an oppressive situation or over a lengthy period of time,<sup>151</sup> an Aboriginal person is likely to gratuitously

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<sup>144</sup> Aboriginal English and the Law, above n 23, 92; Criminal Justice Commission, above n 4, 27.

<sup>145</sup> Criminal Justice Commission, above n 4, 27.

<sup>146</sup> Aboriginal English and the Law, above n 23, 10, 27; Aboriginal English in the Courts, above n 27, 13. See also Criminal Justice Commission, above n 4, 49.

<sup>147</sup> Criminal Justice Commission, above n 4, 19.

<sup>148</sup> Ibid 20.

<sup>149</sup> Ibid 19.

<sup>150</sup> Aboriginal Benchbook for Western Australian Courts, above n 41, 5:8 [5.3.2]; Aboriginal English in the Courts, above n 27, 13.

<sup>151</sup> Criminal Justice Commission, above n 4, 21.

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concur with a proposition put to her or him as a means of conveying cooperation and avoiding conflict.<sup>152</sup>

... when Aboriginal people say 'yes' to a question it often does not mean 'I agree with what you are asking me'. Instead, it often means 'I think that if I say 'yes' you will see that I am obliging, and socially amenable and you will think well of me, and things will work out well between us'.<sup>153</sup>

Gratuitous concurrence may signify feelings of hopelessness or resignation to the futility of a particular situation.<sup>154</sup> An Aboriginal person may also gratuitously concur rather than admit that he or she does not understand the question.<sup>155</sup>

The dangers of misinterpreting an answer given in gratuitous concurrence is clearly illustrated in the unreported case of *R v Kennedy*.<sup>156</sup> The extract below is from the accused's audiotaped record of interview with police:

Police Officer: Right. Now Cedric, I want to ask you some questions about what happened at Jay Creek the other day. Do you understand that?

Kennedy: Yes.

Police Officer: Right. Now it's in relation to the death of [that dead fellow]. Do you understand that?

Kennedy: Yes.

Police Officer: Right. Now I want to ask you some questions about the trouble out there but I want you to understand that you don't have to answer any questions at all. Do you understand that?

Kennedy: Yes.

Police Officer: Now. Do you have to tell me that story

Kennedy: Yes.

Police Officer: Do you have to, though?

Kennedy: Yes.

Police Officer: Do you, am I making you tell me the story?

Kennedy: Yes

Police Officer: Or are you telling me because you want to?

Kennedy: Yes.

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<sup>152</sup> Aboriginal Benchbook for Western Australian Courts, above n 41, 5:9 [5.3.2]; Aboriginal English and the Law, above n 23, 26; Aboriginal English in the Courts, above n 26, 14; Criminal Justice Commission, above n 4, 21; Sussex, above n 42, 532.

<sup>153</sup> Aboriginal English and the Law, above n 23, 26.

<sup>154</sup> Aboriginal English in the Courts, above n 27, 9.

<sup>155</sup> Criminal Justice Commission, above n 4, 22.

<sup>156</sup> (Unreported, Supreme Court of the Northern Territory, Gallop J, 30 November 1978).

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Police Officer: Now I want you to understand that you don't have to tell me, right?

Kennedy: Yes.

Police Officer: Now do you have to tell me?

Kennedy: Yes.<sup>157</sup>

Courts should be astute to, and guard against, gratuitous concurrence of this type.<sup>158</sup>

One matter of great significance to communication with Aboriginal and Torres Strait Islander persons is that information exchange in these societies is typically subject to the nature of the relationship. In order for information to be exchanged freely and frankly, a relationship must first be established between those involved in the exchange – hence the use of indirect questioning.<sup>159</sup> This is at odds with the Western cultural belief that information can be objective and independent of any relationship. The legal system indeed reflects a view that trustworthy information can only be gleaned in the absence of a close personal relationship – for example, a conflict of interest may arise where a relationship exists between parties taking part in legal proceedings. Nor is the courtroom environment conducive to the development of trusting relationships between the various actors.

As the concern of an Aboriginal person may be primarily in establishing a relationship between themselves and their questioner, the answers given in this context will be geared primarily toward that end of establishing relationship, and not towards objective accuracy. This may also lead to gratuitous concurrence.<sup>160</sup>

### D Scaffolding

Scaffolding refers to the tendency of people whose first language is not Anglo-Australian English to adopt the wording and grammatical structure of the other speaker in their reply. The borrowed words, however, may not convey the person's intended meaning. Because the speaker is not fluent in the language being used, she or he may not have the language skills necessary to frame a different and more precise reply. An answer using borrowed wording may not be reliable.<sup>161</sup>

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<sup>157</sup> Ibid, as quoted in Criminal Justice Commission, above n 4, 22.

<sup>158</sup> [R v D \[2003\] QCA 347](#), [11].

<sup>159</sup> *Mina Mir Lo Ailan Mun*, above n 44, 13-14; Queensland Government Department of Aboriginal and Torres Strait Islander Policy and Development, *Protocols for Consultation and Negotiation with Aboriginal People* (2<sup>nd</sup> ed, 1999) 23, 25-7 <<http://www.datsip.qld.gov.au/resources/datsima/people-communities/protocols-aboriginal/aboriginal-protocols-for-consultation.pdf>> ('Protocols for Consultation and Negotiation').

<sup>160</sup> Interview with Dr Rob Pensalfini.

<sup>161</sup> Criminal Justice Commission, above n 4, 18.

E *Unwillingness to Answer*

Responses like “I don’t know” may not always indicate a lack of knowledge, but rather a reaction like, “This is not an appropriate way for me to provide information.”<sup>162</sup> Such culturally-influenced responses may need to be appropriately negotiated in the context of witness compellability.

F *Quantitative Estimates*

Traditionally in Aboriginal societies, certain details may be specified in terms relative to geographical, climatic or social matters.<sup>163</sup> As a consequence, numbers, times, and distances may be used in a manner that appears vague, inaccurate or inconsistent to persons of other backgrounds.<sup>164</sup> If asked the number of people present, for example, an Aboriginal person may list the names of those people rather than provide a number.<sup>165</sup>

If persistent requests are made for specific information in unfamiliar forms of measurement, the response may simply reflect the person’s attempts to be cooperative by answering with whatever she or he thinks is desired.<sup>166</sup> This is to be avoided; arbiters of fact should seek to understand the evidence in the form it is given, albeit that further clarification may be required.

G *Speech and Hearing Impairment*

It should not be overlooked that a large proportion of the Aboriginal community suffers hearing loss.<sup>167</sup> This is largely due to the high incidence of otitis media, a middle ear infection, in Aboriginal and Torres Strait Islander communities. According to the Australian Institute of Health and Welfare in 2014, although a comprehensive national profile of the prevalence of the condition was not yet available, “the current evidence (clinical, epidemiological and by self-report) shows prevalence rates that are much higher than among non-Indigenous children and well above World Health Organization thresholds”.<sup>168</sup>

Other impairments may also affect speech. Respiratory and dental health is poor in many communities, and can affect individuals’ ability to make themselves understood.<sup>169</sup>

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<sup>162</sup> *Sussex*, above n 42, 532.

<sup>163</sup> Aboriginal Benchbook for Western Australian Courts, above n 41, 5:8 [5.3.4]; Aboriginal English in the Courts, above n 27, 15.

<sup>164</sup> Communicating with Aboriginal Clients, above n 35, 41.

<sup>165</sup> Mildren, above n 1, 15.

<sup>166</sup> Criminal Justice Commission, above n 4, 26.

<sup>167</sup> *Ibid* 29.

<sup>168</sup> *Ear Disease in Aboriginal and Torres Strait Islander Children* (Resource Sheet No 35, Closing the Gap Clearinghouse, 2014).

<sup>169</sup> See, e.g., Australian Institute of Health and Welfare, *The Health and Welfare of Australia’s Aboriginal and Torres Strait Islanders 2015* (2015) 80, 81, 85, 87-9, 110, 113-14, 131-2, 135.

## H *Expert Evidence: Linguists and Anthropologists*

In its report on Aboriginal witnesses, the Criminal Justice Commission suggested that, where an Aboriginal witness's evidence would otherwise be misunderstood, evidence from an expert linguist or anthropologist could usefully be called.<sup>170</sup> In an appropriate case, evidence of the language and culture of a particular community or person may be admissible.<sup>171</sup>

### I *Leading Questions in Cross-Examination*

Justice Mildren then of the Northern Territory Supreme Court suggested in a 1997 paper that more use should be made of the power to prevent leading questions from being put which would be unfair to a witness or accused.<sup>172</sup> His Honour referred particularly to an extract from the Victorian case of *Mooney v James*:<sup>173</sup>

The basis of the rule that leading questions may be put in cross-examination is the assumption that the witness's partisanship, conscious or unconscious, in combination with the circumstance that he is being questioned by an adversary will produce a state of mind that will protect him against suggestibility. But if the judge is satisfied that there is no ground for the assumption, the rule has no application, and the judge may forbid cross-examination by questions which go to the length of putting into the witness's mouth the very words he is to echo back again.<sup>174</sup>

In such circumstances the judge may intervene: "in the exercise of his [or her] power to control and regulate the proceedings the judge may properly require counsel to abandon a worthless method of examination".<sup>175</sup> Section 21A of the *Evidence Act 1977* (Qld) (discussed below) may also have a role in this circumstance.

## J *Special Witnesses*

Section 21A of the *Evidence Act 1977* (Qld) provides for orders to be made in respect of witnesses who, inter alia, in the court's opinion,

- (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
  - (ii) would be likely to suffer severe emotional trauma; or
  - (iii) would be likely to be so intimidated as to be disadvantaged as a witness;
- if required to give evidence in accordance with the usual rules and practice of the court...

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<sup>170</sup> Above n 4, 41.

<sup>171</sup> *R v Watson* [1987] 1 Qd R 440, 465-6.

<sup>172</sup> Mildren, above n 1, 15-16.

<sup>173</sup> [1949] VLR 22.

<sup>174</sup> *Ibid* 28 (Barry J).

<sup>175</sup> *Ibid*; LexisNexis, *Cross on Evidence* (at May 2015) [17165], [17465], [17495].

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Although obviously not an impairment, cultural differences may fall under the heading of a “relevant matter” under (i), or may also affect the likelihood of an individual being intimidated.

In respect of such “special witnesses” the court may, providing the defendant is not prejudiced, make various orders under s 21A(2), including:

- obscuring the defendant from the witness’s view;
- excluding others from the courtroom while the witness gives evidence;
- allowing a support person to be present while the witness gives evidence;
- allowing the witness to give evidence in another room; and
- allowing a videotaped recording of the witness rather than direct testimony.

Nigel Stobbs, writing in the Indigenous Law Bulletin about *R v Watt*<sup>176</sup> (discussed later in this chapter), observed that:

If allowed to tell her story in her own language and in a less intimidating and alienating context, perhaps as a narrative of the events according to her recollection, the complainant may well have avoided the inconsistencies which doomed [the prosecution’s] case.<sup>177</sup>

Stobbs further noted that the court has the power to make an order or direction about the giving of evidence by a special witness, which he suggested could conceivably include a direction that a witness be able to give evidence in narrative form.<sup>178</sup>

## V INTERPRETERS

In *Ebatarinja v Deland*,<sup>179</sup> Gaudron, McHugh, Gummow, Hayne and Callinan JJ said that

on a trial for a criminal offence, it is well established that the defendant should not only be physically present but should also be able to understand the proceedings and the nature of the evidence against him or her<sup>180</sup>

Their Honours concluded that,

if the defendant does not speak the language in which the proceedings are conducted, the absence of an interpreter will result in an unfair trial.<sup>181</sup>

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<sup>176</sup> [\[2007\] QCA 286](#).

<sup>177</sup> ‘An Adversarial Quagmire – The Continued Inability of the Queensland Criminal Justice System to Cater for Indigenous Witnesses and Complainants’ (2007) 6(30) *Indigenous Law Bulletin* 15.

<sup>178</sup> *Ibid*. Although the author there referred to *Evidence Act 1977 (Qld) s 21(2)(e)*, the correct reference appears to be s 21A(2)(f).

<sup>179</sup> (1998) 194 CLR 444.

<sup>180</sup> *Ibid* 454.

<sup>181</sup> *Ibid*.

*Johnson v The Queen*<sup>182</sup> was cited as the basis for this principle. The High Court also cited with approval the following passage from *Kunnath v Mauritius*,<sup>183</sup> where the Judicial Committee of the Privy Council said:

It was an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the defendant.

As their Lordships have already recorded, the basis of this principle is not simply that there should be corporeal presence but the defendant, by reason of his or her presence, should be able to understand the proceedings and decide what witnesses he or she wishes to call, whether or not to give evidence and, if so, upon what matter relevant to the case against him [or her].<sup>184</sup>

These matters have been discussed generally in Chapter 6, in which further information about working with interpreters and translators may be found. What follows is information specific to the use of interpreters with Aboriginal and Torres Strait Islander people.

### A Competency in English

As discussed earlier, apparent fluency in the English language may be misleading:

The apparent similarities between Standard English on one hand and Aboriginal English (or even Torres Strait Creole) on the other have no doubt led some professionals into believing that the risk of misunderstanding is minimal. However, that risk is real, and the consequences may be serious.<sup>185</sup>

At the same time, a person may have a greater capacity to comprehend what is being said than to reproduce the language through speech.<sup>186</sup> A person's proficiency in English may easily be over-estimated,<sup>187</sup> although any probing on this issue should, of course, be respectful.

### B Determining Competency in English

As discussed in Chapter 6, the use of interpreters in court may be approved and arranged, whether for civil or criminal matters.

There are no legally recognised criteria upon which to assess a person's proficiency in English. While language proficiency tests, such as the Australian Second Language Proficiency Rating scale, may be useful, they do not take into account the impact of stress and intimidation which can contribute to a witness's confusion.<sup>188</sup>

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<sup>182</sup> (1987) 25 A Crim R 433, 435 (Shepherdson J).

<sup>183</sup> [1993] 1 WLR 1315.

<sup>184</sup> Ibid 1319.

<sup>185</sup> Criminal Justice Commission, above n 4, 63.

<sup>186</sup> Aboriginal Benchbook for Western Australian Courts, above n 41, 5:10 [5.3.3]

<sup>187</sup> Michael Cooke, *Indigenous Interpreting Issues for Courts* (Australian Institute of Judicial Administration, 2002) 13 <[www.aija.org.au/ac01/Cooke.pdf](http://www.aija.org.au/ac01/Cooke.pdf)>.

<sup>188</sup> Kathy Laster and Veronica Taylor, *Interpreters and the Legal System* (Federation Press, 1994) 28.

Dr Michael Cooke regards the determination of whether an interpreter is needed to entail two related considerations: the person's competence in English and the communicative context in which the person is required to speak (that is, the courtroom environment).<sup>189</sup> A defendant's language competency would need to be higher than that of a witness given that an accused will not only need to give evidence (if he or she chooses to do so), but also to instruct and understand advice given by counsel.<sup>190</sup>

Questions to consider in evaluating the communicative demands of the proceeding would include how fast will counsel speak; will the questions be linguistically challenging (rapid-fire questions, trick questions, complex questions); and will the questions be culturally alien to the witness?<sup>191</sup> Some of these matters may, of course, be controlled by the judge throughout the course of the proceedings.

It has been recommended that where there is doubt about the witness's proficiency in English, the matter should not proceed unless an interpreter is provided.<sup>192</sup> Nonetheless, the question of whether a witness or accused requires an interpreter is a matter for the discretion of the judge. It is suggested that judges familiarise themselves with the communication difficulties faced by Aboriginal witnesses so that, where the question arises, information may be sought and reasoned determinations made as to the witness's proficiency in English and whether assistance is required or warranted.

It may be of use to note that, in the Northern Territory, three different methods are commonly used to assess a witness's need for an interpreter in the context of a court proceeding:

- Self-assessment by the witness after hearing advice in their own language;
- Assessment by a lawyer using a test developed by linguists to mimic the challenges a witness would face in court; and
- Assessment by a qualified linguist or language teacher using the Australian Second Language Proficiency scale<sup>193</sup> (although, as noted above, this is not without its difficulties).

Where it becomes apparent that there is a question as to the capacity of an accused to communicate in and understand English and no interpreter of sufficient competence can be found, s 613 of the *Criminal Code* (Qld) applies: see *Ngatayi v The Queen*<sup>194</sup> with respect to the equivalent provision in Western Australia. The procedure under that section is discussed in the Queensland Supreme and District Courts Benchbook.<sup>195</sup>

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<sup>189</sup> Cooke, above n 99, 22.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Criminal Justice Commission, above n 4, 66; see also Laster and Taylor, above n 100, 96-97.

<sup>193</sup> Cooke, above n 99, 23-8.

<sup>194</sup> (1980) 147 CLR 1.

<sup>195</sup> See Queensland Courts, *Supreme and District Courts Benchbook* (February 2016) 6.1–6.3

<<http://www.courts.qld.gov.au/information-for-lawyers/benchbooks-and-ucpr-bulletin/supreme-and-district-courts-benchbook>>.

C *Practical Difficulties in Aboriginal Interpreting*

1 *Lack of Accredited Interpreters*

The Australian National Accreditation Authority for Translators and Interpreters ('NAATI') prescribes a number of standards for translating and interpreting, as discussed in Chapter 6. *R v Watt*<sup>196</sup> highlights the difficulties in engaging an appropriate interpreter. The complainant in this case spoke Wik Mungkan and did not speak English. At the time of trial there were no Wik Mungkan language interpreters accredited by NAATI, but an interpreter was engaged who had a Masters degree in Linguistics. However, generational differences meant that the interpreter spoke a "richer" Wik Mungkan, while the younger complainant supplemented her speech with "borrowed" English words.<sup>197</sup>

Accreditation is only available for some Aboriginal or Torres Strait Islander languages. NAATI currently offers accreditation in over 25 Indigenous languages and has recently created new paraprofessional interpreter level test materials in Yindjibarndi, Kalaw Kawaw Ya and Yumplatok (Torres Strait Creole).<sup>198</sup> As part of the Indigenous Interpreters Project, NAATI aims to increase the number of accredited Indigenous languages interpreters in South Australia, Western Australia and Queensland, including increasing the range of Indigenous languages for which there are accredited Indigenous interpreters.<sup>199</sup>

Individual barriers to accreditation may include high costs associated with securing qualification, and the challenge of understanding Western institutions, processes and conceptual systems.<sup>200</sup>

2 *Inability to Obtain the Services of an Interpreter*

Even where accredited interpreters are available, obtaining the services of an appropriately trained interpreter may be difficult for a number of reasons. Russell Goldflam of the Northern Territory Legal Aid Commission has described these reasons as including:<sup>201</sup>

- insufficient notice being given to the relevant interpreting service organisation, so that demand for an interpreter cannot be met;
- the unavailability of an interpreter trained in the relevant Aboriginal language or dialect in the location where the proceedings are to be conducted, particularly as the majority of traditional Aboriginal languages are spoken by only small groups in remote areas;<sup>202</sup> and
- the unavailability of an appropriately trained interpreter, who would otherwise be available, for reasons attributable to that interpreter's own local relationships. The interpreter may believe that her or his involvement in the court proceedings will be construed as "taking sides" in the matter or that he or she may be blamed

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<sup>196</sup> [2007] QCA 286.

<sup>197</sup> Ibid [38].

<sup>198</sup> See NAATI, *Indigenous Interpreting Project*, <<https://www.naati.com.au/projects/indigenous-interpreting-project-iip/>>.

<sup>199</sup> Ibid.

<sup>200</sup> Right to a Fair Trial, above n 55, 22; Cooke, above n 99, 33.

<sup>201</sup> Goldflam, above n 37, 49.

<sup>202</sup> Criminal Justice Commission, above n 4, 64.

for the verdict, and accordingly punished or “paid back” by the accused, their family, or members of the broader community.<sup>203</sup>

### 3 *Use of Untrained Interpreters*

According to Laster and Taylor:

the use of untrained interpreters is inherently problematic. In particular:

- The use of a family member as an interpreter may be humiliating for a witness and/or may significantly inhibit a witness from disclosing information to the court.
- Untrained interpreters may be deficient in language and interpreting skills, they may possess inadequate cross-cultural understanding, or may choose imprecise, inappropriate or misleading words.<sup>204</sup>

As such, the use of independent, professional interpreters is to be preferred. While this may not always be possible, these concerns must be given due consideration before any decision is taken as to whether an unaccredited individual may be permitted to act as an interpreter.

### 4 *Effect of Court Environment*

The court environment may have an effect on both the interpreter and the Aboriginal or Torres Strait Islander witness. Legal interpreting requires a higher level of competency including command of legal terminology. It has also been observed that second language competency may decrease markedly under trauma or stress.<sup>205</sup> The formal court environment and the use of technical legal language may be overwhelming for an untrained interpreter,<sup>206</sup> which is one reason why the use of an experienced, accredited interpreter is preferable. Again, however, the paucity of accredited interpreters of Aboriginal and Torres Strait Islander languages means that it may not be feasible to expect this standard.

### 5 *Cross-cultural Facilitation*

The Aboriginal and Torres Strait Islander Legal Service (‘ATSILS’) notes that an interpreter may be required to interpret cultural matters that affect how testimony is given. This may be problematic to some who view it as violating the traditional interpreting principles of accuracy.<sup>207</sup>

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<sup>203</sup> Ibid.

<sup>204</sup> Above n 100, 91. See also *Singh v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 4.

<sup>205</sup> Ethnic Affairs Commission, *Use of Interpreters in Domestic Violence and Sexual Assault Cases: A Guide for Interpreters* (1995), as cited in Julie Stubbs, ‘Violence Against Women: The Challenge of Diversity for Law, Policy and Practice’ (Paper presented at the Second National Outlook Symposium: Violent Crime, Property Crime and Public Policy, Hyatt Hotel, Canberra, 3-4 March 1997) 3; *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75, 77-8.

<sup>206</sup> Right to a Fair Trial, above n 55, 15.

<sup>207</sup> Ibid 24.

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*R v Watt*<sup>208</sup> again illustrates the complexities associated with interpreting between Aboriginal and non-Aboriginal cultures in the court environment. The following exchange took place between the trial judge and the interpreter while the complainant was giving evidence and had repeatedly said “no” to several questions put to her by Counsel:

- Interpreter: Well, she said ‘no’. Can I, I – your Honour-----
- Her Honour: Certainly.
- Interpreter: ---may I raise an issue, which I’ve tried to get clarified before, is that this is a cultural background thing that you speak ‘yes’ to the person who is for you and ‘no’ to the person who is against you, regardless of what is involved, and I don’t know – I’ve tried to explain that you’re doing it – answering the question, you’re not – it’s not something to the person, without success.
- Her Honour: All right. So are you saying that [the complainant’s] answers now, because of the culture, are unlikely to be the truth?
- Interpreter: That’s right, your Honour.
- Her Honour: Right. Is there a way of asking that could assist?
- Interpreter: I was thinking, this morning, of whether I could try a different way of asking her to understand that it is the question you answer and not-----
- Her Honour: Not the person.
- Interpreter: -----who you’re speaking to.
- Her Honour: Asking, asking.
- Interpreter: I’ve thought of a different way of trying but I hadn’t seen her to, to actually try.
- Her Honour: All right. Well, perhaps we’ll take a bit of a break, I’ll discuss the issue with counsel, so I’ll just ask the jury to retire, hopefully for not too long.
- After the jury retired, the following occurred –
- Her Honour: So, I take it, [interpreter], for instance, to your knowledge [the complainant] would know Eleanor Woolla and-----
- Interpreter: Yes.
- Her Honour: -----And Akay Koo’oila?
- Interpreter: Yes.
- Her Honour: One would expect she would.
- Interpreter: Exactly.
- Her Honour: But she’s saying no because of the context here?
- Interpreter: Because of the context in court. She did, at the court – last case she did exactly the same, she went through no, no, no to, to events.

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<sup>208</sup> [\[2007\] QCA 286](#).

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- Her Honour: To questions that you knew-----
- Interpreter: To the questions that I knew she said – well, she had said the day before she knew.
- Her Honour: Okay. Now, you said you thought there was a tactic you could use.
- Interpreter: I have another way of trying.
- Her Honour: Do you need to talk to her privately first?
- Interpreter: I think that would probably be the easiest way.

The trial judge acknowledged that the interpreter was acting as a kind of cultural facilitator:

- Her Honour: ... and I think that's partly what [the interpreter] is doing for us here; is not just the simple language translation and interpreting but also facilitating between our culture and the Wik culture, and that's important, to get the real meaning of what's being said across ... So perhaps we should be regarding [the interpreter] something of both.

Would you agree with that ...”<sup>209</sup>

In her Honour’s judgment in the Court of Appeal, with which McMurdo P and Philippides J agreed, Wilson J stated:

While these procedures were unorthodox, this Court should be cautious about being unduly critical of them in all the circumstances, including trial counsel for the appellant’s general acquiescence. That said, they cannot be ignored in the consideration of whether upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt of the appellant’s guilt.<sup>210</sup>

### 6 *Lack of Conceptual Equivalence*

An interpreter may find it extremely difficult to translate certain legal words or phrases for which there is no conceptual equivalent.<sup>211</sup> Difficult concepts might include the meaning of a “not guilty” plea, the relevance of “intention” to certain offences, the meaning and operation of “mitigating” and “aggravating” factors, and so on.<sup>212</sup>

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<sup>209</sup> Ibid [39].

<sup>210</sup> Ibid [41].

<sup>211</sup> Len Roberts-Smith, ‘Communication Breakdown: The Importance of Cultural Language Awareness in Court’ (1989) 27(7) *Law Society Journal* 70, 75.

<sup>212</sup> Heather McRae and Garth Nettheim, *Indigenous Legal Issues: Commentary and Materials* (Thomson Reuters, 4<sup>th</sup> ed, 2009) 372.

## 7 Language/Semantic Differences

An English word may have one or more different meanings in Aboriginal languages, and vice versa.<sup>213</sup> For example, the word “kill” may mean “hit” and “hurt” as well as, literally, “to kill”. In one reported case an Aboriginal suspect stated that he intended to “kill” the complainant. On closer questioning, it was revealed that his intention was not to cause the complainant’s death, but to “kill her a little bit”, “kill her on the leg”.<sup>214</sup>

Numerous reports have reinforced the urgent need for sufficient, competent Aboriginal interpreters in the conduct of criminal proceedings.<sup>215</sup>

## VI GUIDELINES FOR EFFECTIVE COMMUNICATION WITH SPEAKERS OF ABORIGINAL ENGLISH

Dr Diana Eades has indicated a number of strategies for communicating effectively with speakers of Aboriginal English, which build on the difficulties noted earlier.<sup>216</sup> The Queensland Department of Aboriginal and Torres Strait Islander Policy and Development (as it then was) also compiled information intended to assist inter-cultural communication.<sup>217</sup> Numerous examples are also to be found in the Aboriginal Benchbook for Western Australian Courts.<sup>218</sup>

For example, as with any person for whom the language of communication is not a first language, the use of simple words, straightforward sentence structures, slow speech and patience in awaiting a response will assist greatly in the communication process.<sup>219</sup> Figurative speech often does not translate well across languages and cultural barriers and ought therefore to be avoided, as should negative questions (e.g., “You didn’t do that, did you?”).

Communication should always be respectful; one way of demonstrating respect is to ensure the person’s appropriate title and name are used and that their name is pronounced correctly. Further, loud voices and harsh tones should be avoided. Especially in the courtroom context, inappropriate modes of communication may intimidate culturally and linguistically diverse witnesses to the point that they will exhibit gratuitous concurrence (as if being bullied) or simply not respond.

Speakers of Anglo-Australian English should not speak in a manner that attempts to mimic Aboriginal English, any creole or other Aboriginal or Torres Strait Islander language, nor should they seek to ‘correct’ what they perceive to be incorrect usage of

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<sup>213</sup> Roberts-Smith, above n 123, 75.

<sup>214</sup> John Coldrey, ‘Aboriginals and the Criminal Courts’ in Kayleen M Hazlehurst (ed) *Ivory Scales: Black Australia and the Law* (New South Wales University Press, 1987) 81, 87-8.

<sup>215</sup> See, e.g., Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Australian Government Publishing Service, 1994) and Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992).

<sup>216</sup> The principal works referred to above contain comprehensive information relating to grammar, pronunciation and other linguistic features of Aboriginal communication. These are not replicated in the notes which follow. The strategies suggested were devised principally for assistance of legal practitioners in interviewing Aboriginal persons. The strategies are included in the hope that on occasion they may prove useful to judges.

<sup>217</sup> *Mina Mir Lo Ailan Mun*, above n 44; Protocols for Consultation and Negotiation above n 71, 19.

<sup>218</sup> Above n 41.

<sup>219</sup> See, e.g., Criminal Justice Commission, above n 4, 23.

Anglo-Australian English. To do so would be impolite, disrespectful and wrong linguistically.

It is suggested that communication with Aboriginal and Torres Strait Islander witnesses who are not fluent or comfortable with Anglo-Australian English could be further assisted by taking note of some of the following matters (some of which also apply more broadly).

#### A *Indirect Questions*

In Aboriginal and Torres Strait Islander cultures, it is often considered impolite to ask too many questions. An indirect approach to asking questions of a speaker of Aboriginal English is often the most successful. The Aboriginal Benchbook for Western Australian Courts suggest three approaches to asking indirect questions:

1. Hint and wait

- “I’m wondering whether you were at that house.”
- “I need to know whether you were at that house.”

2. Make a statement and await confirmation or denial

- “It seems as if you were at that house.”
- “I think that maybe you were at that house.”
- “Maybe you were at that house.”

This approach should be used carefully, as if the statement merely disguises a direct question, it is likely to trigger gratuitous concurrence.

3. Frame the question as a statement

- “You were outside that house?”

This may be the most effective method. It requires the question to be framed as a simple utterance, with rising intonation.<sup>220</sup>

#### B *Difficulties with “Either-Or” Questions*

“Either-or” type questions which ask the respondent to choose between one of two alternatives may be confusing.<sup>221</sup> “The use of such questions increases the risk that the witness’s answers may be unreliable, either because of her or his misunderstanding of the question, or the court’s misunderstanding of what it is that the witness is actually agreeing to.”<sup>222</sup> Often, the answer given will refer only to the second alternative suggested. “Thus, rather than asking ‘Were you at the house or at the pub?’ it may be better to say:

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<sup>220</sup> Aboriginal Benchbook for Western Australian Courts, above n 41, 5:12 [5.4.1].

<sup>221</sup> Aboriginal English and the Law, above n 23, 55.

<sup>222</sup> Criminal Justice Commission, above n 4, 37.

- ‘Maybe you were at the shop. Maybe you were at the pub. Tell me where you were then?’

or simply –

- ‘Where were you then?’<sup>223</sup>

### C Use of Appropriate Descriptions and Names

- When referring to Aboriginal people, it is important to use appropriate descriptors and names. For example, the use of the term ‘ATSI’, particularly in speech, to refer to Aboriginal and Torres Strait Islander people is often considered offensive.<sup>224</sup>
- As a matter of respect, always use a capital ‘A’ when referring to Aboriginal people and a capital ‘I’ when referring to Indigenous people meaning Aboriginal and Torres Strait Islanders.<sup>225</sup>
- Some Aboriginal people may prefer to be referred to by their own group names for example: “Koori” for Aboriginal people from New South Wales, Victoria and Tasmania; “Murri” for Aboriginal people from Queensland; “Nyunga” for Western Australia. However, these terms should only be used if it is the Aboriginal person’s preference. The use of the name of one group for a member of another group is inaccurate and could offend.<sup>226</sup>
- As noted at the outset, Torres Strait Islander people have different cultural and linguistic identities from Aboriginal people, which should be acknowledged by referring to them separately. The Term ‘Aboriginal’ does not encompass Torres Strait Islander people.<sup>227</sup>
- The terms “full-blood Aborigines”; “part Aborigines”; or “half castes” are considered insulting and inaccurate.<sup>228</sup>

## VII JURY DIRECTIONS

Both the Criminal Justice Commission’s report on *Aboriginal Witnesses in Queensland’s Criminal Courts* and the RCIADIC Report alluded to the significant role that judges have in ensuring proceedings involving Aboriginal witnesses in particular are conducted fairly.<sup>229</sup> In his paper on ‘Redressing the Imbalance Against Aboriginals in the Criminal Justice System’,<sup>230</sup> Justice Mildren then of the Supreme Court of the Northern Territory suggested there are two key functions that judges should fulfil in criminal trials involving Aboriginal witnesses and/or accused (which would apply similarly to Torres Strait Islanders). The first, exercising the discretion to disallow questions and forms of questioning which are unfair,<sup>231</sup> has already been discussed in this chapter, particularly

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<sup>223</sup> Ibid.

<sup>224</sup> See, e.g., ‘Protocols for Consultation and Negotiation’, above n 71.

<sup>225</sup> Ibid. Aboriginal with a lower case refers to the Indigenous peoples of any part of the world. See Appendix B to this Benchbook.

<sup>226</sup> See, e.g., Protocols for Consultation and Negotiation, above n 71, 19.

<sup>227</sup> Judicial Commission of New South Wales, *Equality before the Law Bench Book* (at June 2014) [2.2.1] (2011) <<http://www.judcom.nsw.gov.au/publications/benchbks/equality/benchbook.pdf>>.

<sup>228</sup> Ibid; Protocols for Consultation and Negotiation, above n 71, 19; Horton, above n 5, vol 1, 3.

<sup>229</sup> Criminal Justice Commission, above n 4, 31-2; RCIADIC Report, above n 2, Recommendation 96.

<sup>230</sup> Above n 1.

<sup>231</sup> Ibid 14.

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with respect to s 21A of the *Evidence Act 1977* (Qld). The second is giving suitable directions to the jury prior to the opening of the prosecution case.<sup>232</sup>

In criminal trials, it is important that juries be informed of linguistic and cultural matters which may affect their assessment of the evidence. Ideally, counsel will foreshadow the likelihood of communication difficulties with the judge before proceedings start.

The Criminal Justice Commission, in the report referred to above, proposed jury directions for cases involving Aboriginal and Torres Strait Islander witnesses and, separately, defendants.<sup>233</sup> The first pertains to cases where the witness or defendant is a speaker of Aboriginal English and the second to cases where the witness or defendant speaks Torres Strait Creole. They are included as Appendix C to this Benchbook for guidance only and will necessarily require adaptation to particular circumstances.

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<sup>232</sup> Ibid 13.

<sup>233</sup> Criminal Justice Commission, above n 4, Appendix C; see also ibid 7.

## CHAPTER 10: ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE AND THE CRIMINAL JUSTICE SYSTEM

### I INTRODUCTION

This chapter will identify a number of issues of particular significance in the context of Aboriginal and Torres Strait Islander people in the criminal justice system. These include:

- the admissibility of confessions;
- particular difficulties for Aboriginal and Torres Strait Islander women;
- Aboriginal and Torres Strait Islander children as witnesses;
- imprisonment; and
- the role of Community Justice Groups

### II CONFESSIONS

For various reasons including those outlined in Chapter 9, Aboriginal and Torres Strait Islander persons may be particularly susceptible to suggestion when questioned by police. This premise has been accepted by the courts and guidelines in the form of the *Anunga Rules* were developed to specifically deal with the manner in which an Indigenous person should be interviewed by police. It may be relevant to consider these guidelines when considering the admissibility of confessions in evidence.

#### A *The Law Relating to the Admissibility of Confessions*

A confession will be presumed to have been made voluntarily: *A-G (NSW) v Martin*.<sup>1</sup> However, where there are circumstances to suggest a confession was obtained by an inducement, threat or promise, the prosecution must prove the confession was made voluntarily: *R v Thompson*.<sup>2</sup> A confession which has been induced by any threat or promise by a person in authority shall not be received into evidence in any criminal proceeding: *McDermott v The Queen*.<sup>3</sup>

#### B *The Anunga Rules*

In *R v Anunga*<sup>4</sup> the Supreme Court of the Northern Territory set out guidelines (now known as the 'Anunga Rules') for the interrogation of Indigenous persons. These guidelines are as follows:

- (1) When an Aboriginal [or Torres Strait Islander] person is being interrogated as a suspect, unless he [or she] is as fluent in English as the average white [person] of English descent, an interpreter able to interpret in and from the Aboriginal [or Torres Strait Islander] person's language should be present, and his [or her] assistance should be utilised whenever necessary to ensure complete and mutual understanding.

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<sup>1</sup> (1910) 9 CLR 713.

<sup>2</sup> [1893] 2 QB 12; [1891-1894] All ER Rep 376.

<sup>3</sup> (1948) 76 CLR 501, 511 (Dixon J).

<sup>4</sup> (1976) 11 ALR 412.

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- (2) When an Aboriginal [or Torres Strait Islander person] is being interrogated it is desirable where practicable that a 'prisoner's friend' (who may also be the interpreter) be present. The 'prisoner's friend' should be someone in whom the Aboriginal [or Torres Strait Islander person] has apparent confidence... .
- (3) Great care should be taken in administering the caution when it is appropriate to do so. It is simply not adequate to administer it in the usual terms and say, 'Do you understand that?' or 'Do you understand you do not have to answer questions?' Interrogating police officers, having explained the caution in simple terms, should ask the Aboriginal [or Torres Strait Islander person] to tell them what is meant by the caution, phrase by phrase, and should not proceed with the interrogation until it is clear the Aboriginal [or Torres Strait Islander person] has apparent understanding of his [or her] right to remain silent... .
- (4) Great care should be taken in formulating questions so that so far as possible the answer which is wanted or expected is not suggested in any way. Anything in the nature of cross-examination should be scrupulously avoided as answers to it have no probative value. It should be borne in mind that it is not only the wording of the question, which may suggest the answer, but also the manner and tone of voice which are used.
- (5) Even when an apparently frank and free confession has been obtained relating to the commission of an offence, police should continue to investigate the matter in an endeavour to obtain proof of the commission of the offence from other sources... .
- (6) Because Aboriginal [and Torres Strait Islander] people are often nervous and ill at ease in the presence of white authority figures like [police officers] it is particularly important that they be offered a meal, if they are being interviewed in a police station, or in the company of police or in custody when a meal time arrives. They should also be offered tea or coffee if facilities exist for preparation of it. They should also be offered a drink of water. They should be asked if they wish to use the lavatory if they are in the company of police or under arrest.
- (7) It is particularly important that Aboriginal [and Torres Strait Islander] and other people are not interrogated when they are disabled by illness or drunkenness or tiredness. Admissions so gained will probably be rejected by a court. Interrogation should not continue for an unreasonably long time.
- (8) Should an Aboriginal [or Torres Strait Islander person] seek legal assistance reasonable steps should be taken to obtain such assistance. If an Aboriginal [or Torres Strait Islander person] states he [or she] does not wish to answer further questions or any questions the interrogation should not continue.
- (9) When it is necessary to remove clothing for forensic examination or for the purposes of medical examination, steps must be taken forthwith to supply substitute clothing.

In *R v Wilson*<sup>5</sup> the Queensland Court of Appeal held that although the description of the rules as "guidelines"<sup>6</sup> suggests they are not intended to be binding as a matter of law, it is relevant to consider a breach of the Anunga Rules in determining whether it is fair to

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<sup>5</sup> [1997] QCA 265.

<sup>6</sup> *R v Anunga* (1976) 11 ALR 412, 415: "These guidelines are not absolute rules, departure from which will necessarily lead to statements being excluded, but police officers who depart from them without reason may find statements are excluded".

admit an interrogation of an Aboriginal or Torres Strait Islander person into evidence.<sup>7</sup> However, the guidelines now form part of the Queensland Police Service’s Digital Electronic Recording of Interviews and Evidence Manual which is binding on officers and staff. The Anunga Rules have also been transformed into legislation, in part, by various provisions of the *Police Powers and Responsibilities Act 2000* (Qld) (‘PPRA’). Of course, the text of the legislative provisions provides greater detail and should be consulted where relevant. The Anunga Rules and corresponding provisions of the PPRA are set out in the table below.

Table 1: Comparison of the Anunga Rules and the PPRA

Anunga Rules		PPRA Provisions	
1	Right to an interpreter during police questioning.	s 433	Right to interpreter
2	Right to communicate with a friend	s 418	Right to communicate with friend, relative or lawyer
3	Appropriate cautioning	s 431	Cautioning of persons
4	Appropriate questioning	-	
5	Continued investigation of matters despite receipt of a confession	-	
6	Availability of refreshments and facilities	-	
7	Questioning when person is intoxicated or tired	s 423	Questioning of intoxicated persons
8	Legal assistance	s 420	Questioning of Aboriginal people and Torres Strait Islanders
9	Preserving personal dignity during searches	s 630	Protecting the dignity of persons during search

### III PARTICULAR DIFFICULTIES FOR ABORIGINAL WOMEN

The Criminal Justice Commission in 1996 identified several particular difficulties that Aboriginal women face when giving evidence in court, in addition to those that confront Aboriginal and Torres Strait Islander people generally.<sup>8</sup> The report focused primarily on Aboriginal people, rather than including Torres Strait Islanders as well, for two reasons: first, the most prominent criminal cases to date involving Indigenous people in Queensland had involved Aboriginal people; and second, considerably more anthropological and linguistic research had been conducted with respect to Aboriginal people than Torres Strait Islanders. It was nonetheless considered that some of the report’s consideration and recommendations might also apply to Torres Strait Islanders.

Despite the passage of time since the publication of the Criminal Justice Commission’s report, many of the difficulties there identified remain, as various socio-cultural factors

<sup>7</sup> *R v Wilson* [1997] QCA 265, 4.

<sup>8</sup> *Aboriginal Witnesses in Queensland’s Criminal Courts* (1996) 93-104 <<http://www.ccc.qld.gov.au/research-and-publications/publications/cjc/aboriginal-witnesses-in-queenslands-criminal-courts.pdf>>.

contribute to a reluctance by Aboriginal women to give evidence. These factors are summarised below.<sup>9</sup>

### A *Aboriginal Women as Victims of Violence*

There is a high incidence of domestic and family violence against Aboriginal women, particularly in remote communities. Common effects of long-term violence include low self-esteem and feelings of fear and shame. For Aboriginal women, these effects are compounded by other cultural factors, such as the nature of women's business, community pressure, and mistrust of police and the criminal justice system.<sup>10</sup>

The difficulties for a defendant in this situation are illustrated in *R v Kina*.<sup>11</sup> The defendant, an Aboriginal woman, was found guilty of the murder of her de facto husband. At trial, no evidence was led of the woman's history of physical and sexual violence suffered at the hands of her husband and the defence of provocation was not raised. The defendant had significant difficulty talking with her male solicitor and counsel about the events leading up to the stabbing of her husband, which included prolonged sexual violence and a threat of sexual violence against her niece. The Court of Appeal held that the trial involved a miscarriage of justice:

In this matter, there were, insufficiently recognised, a number of complex factors interacting which presented exceptional difficulties of communication between her legal representatives and the appellant because of:

- her Aboriginality;
- the battered woman syndrome; and
- the shameful (to her) nature of the events which characterised her relationship with the deceased.

These cultural, psychological and personal factors bore upon the adequacy of the advice and legal representation which the appellant received and effectively denied her satisfactory representation or the capacity to make informed decisions on the basis of proper advice.<sup>12</sup>

### B *Women's Business and Community Pressure*

Traditionally, women's issues (or "women's business") are only discussed and dealt with by women. Generally, Aboriginal women do not discuss matters concerning sex or genitals.<sup>13</sup> Therefore, it may be particularly difficult for an Aboriginal woman to give evidence concerning sexual assault, for example, in the presence of men.<sup>14</sup>

In addition, Aboriginal complainants in matters involving their Aboriginal partners, such as sexual assault, are often deterred from pursuing a complaint because of pressure from the community or fear of bringing shame upon themselves and their families.<sup>15</sup> This may have an effect not only the giving of evidence but on the very making of the

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<sup>9</sup> Ibid xi.

<sup>10</sup> Ibid 94-6.

<sup>11</sup> [1993] QCA 480.

<sup>12</sup> Ibid [63]-[64] (Fitzgerald P and Davies JA).

<sup>13</sup> Criminal Justice Commission, above n 8, 27.

<sup>14</sup> Ibid 94.

<sup>15</sup> Ibid 95.

complaint, which may be problematic given the impact that delay in reporting sexual offending may still have on the complainant's credibility.<sup>16</sup>

### C *Mistrust of Police and the Legal System*

Aboriginal women may also be reluctant to complain about violence because of fear of harassment from police, embarrassment, and concern about the apparent lack of care and sympathy from police in dealing with sexual assault matters.<sup>17</sup> More generally, Aboriginal women may be mistrustful of the criminal justice system, due in large part to the overrepresentation of Aboriginal women among the female prison population.<sup>18</sup>

### D *Intimidation of the Court Room*

In addition to the preceding factors, it has been observed that Aboriginal women tend to find the courtroom environment itself particularly intimidating, especially when confronted with the accused.<sup>19</sup> Lack of pre-trial preparation for witnesses will exacerbate the feeling that "the whole environment [is] foreign".<sup>20</sup>

### E *Lack of Awareness of the Legal Profession*

Significantly, the Criminal Justice Commission noted a lack of appreciation of the issues facing female Aboriginal witnesses and defendants by the legal profession.<sup>21</sup> In *R v Kina*, the adequacy of legal advice was compromised by the solicitors' lack of training in Aboriginal communication issues, and lack of understanding about how the defendant's Aboriginality affected her ability to discuss what, to her, were very shameful matters.<sup>22</sup>

## IV CHILDREN AS WITNESSES

Aboriginal and Torres Strait Islander children may be particularly susceptible to the difficulties associated with giving oral evidence. Although appearing to have significant bicultural capability, particularly where they have grown up in an urban area, they may in fact face a double disadvantage due both to being young people in an adult court and being unused to communication in Anglo-Australian English.<sup>23</sup> The 'Pinkenba case' is an example of the collision of these two forms of disadvantage, which could have been addressed by the court taking appropriate measures (as now available under s 21A of the *Evidence Act 1977* (Qld) discussed elsewhere) but were not, with negative outcomes.<sup>24</sup>

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<sup>16</sup> See *Longman v The Queen* (1989) 168 CLR 79.

<sup>17</sup> Criminal Justice Commission, above n 8, 95.

<sup>18</sup> *Ibid* 95-6.

<sup>19</sup> *Ibid* 96.

<sup>20</sup> *Ibid*.

<sup>21</sup> *Ibid* 97.

<sup>22</sup> *Ibid*.

<sup>23</sup> Diana Eades, 'Cross Examination of Aboriginal Children: The Pinkenba Case' (1995) 75(3) *Aboriginal Law Bulletin* 10, 10.

<sup>24</sup> The case was *Crawford v Vernardos* (Magistrates Court Brisbane, 24 February 1995, unreported), in which a committal hearing was conducted after charges were suggested to be laid by the Criminal Justice Commission in relation to the treatment of three Aboriginal boys by members of the Queensland

## V IMPRISONMENT

According to the National Prison Census, as at 30 June 2015, 27% of Australia's prison population (9,885 prisoners) identified as being either Aboriginal or Torres Strait Islander.<sup>25</sup> Of those prisoners, Indigenous men accounted for 90% (8,859 prisoners), whereas Indigenous women comprised the remaining 10% (1,025 prisoners).<sup>26</sup>

Between 2005 and 2015, the rate of imprisonment of Aboriginal and Torres Strait Islander people increased by 45% from 1,348 to 1,951 per 100,000 people in the Aboriginal and Torres Strait Islander population. This significant increase is to be contrasted with the rates of imprisonment for non-Indigenous prisoners, which only increased by 18% from 130 to 153 per 100,000 people in the non-Indigenous population over the same period.<sup>27</sup>

There is also a higher rate of recidivism amongst the Aboriginal and Torres Strait Islander population compared with the non-Indigenous population. Specifically, as at 30 June 2015, over three-quarters (77%) of Aboriginal and Torres Strait Islander prisoners had experienced adult imprisonment prior to their current term, compared to half (50%) of non-Indigenous prisoners.<sup>28</sup>

When breaking down the national figures by State, the 2015 National Prison Census revealed that, in Queensland, the age-standardised rate of imprisonment for Aboriginal and Torres Strait Islander adult prisoners was 1,558 per 100,000 compared with the age-standardised rate of 149 per 100,000 for non-Indigenous adults. Thus, Aboriginal and Torres Strait Islander Queenslanders were about 11 times more likely to be in prison than other Queenslanders over the 1 July 2014 to 30 June 2015 financial year.<sup>29</sup>

The Australian Institute of Criminology notes that 'Indigenous Australians ... experience contact with the criminal justice system – as both offenders and victims – at much higher rates than non-indigenous Australians'.<sup>30</sup> The institute also identifies risk factors associated with the increased contact as being the misuse of alcohol, socio-economic disadvantage, childhood exposure to violence and abuse, the younger age profile of the

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Police Service. The case did not proceed to trial, as the magistrate concluded there was insufficient evidence. See *ibid*, and more generally, Diana Eades, *Courtroom Talk and Neocolonial Control* (Mouton de Gruyter, 2008).

<sup>25</sup> Australian Bureau of Statistics, *4517.0 Prisoners in Australia 2015* (11 December 2015) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2015~Main%20Features~Aboriginal%20and%20Torres%20Strait%20Islander%20prisoner%20characteristics~7>> (*Prisoners in Australia 2015*).

<sup>26</sup> *Ibid*.

<sup>27</sup> Based on age-standardised imprisonment rates: see Table 17 of *Ibid*. Age standardisation is a statistical method that adjusts crude rates to account for age differences between study populations, in this case to permit more meaningful comparisons between Australia's Indigenous and non-Indigenous populations, where the former is proportionately much younger than the latter. By contrast, using crude rates to examine differences between Indigenous and non-Indigenous populations may lead to erroneous conclusions being drawn about variables that are correlated with age due to the differing age profiles of these populations: see further the Explanatory Notes to the *Prisoners in Australia 2015* report: <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4517.0Explanatory%20Notes12015?OpenDocument>>.

<sup>28</sup> *Prisoners in Australia 2015*, above n 25.

<sup>29</sup> Queensland Government Statistician's Office, *Prisoners in Queensland: 2015* (11 December 2015) <<http://www.oesr.qld.gov.au/products/briefs/prisoners-aus/prisoners-aus-2012.pdf>>.

<sup>30</sup> Australian Institute of Criminology, *Indigenous Justice* (29 August 2013) Australian Government <[http://www.aic.gov.au/crime\\_types/in\\_focus/indigenousjustice.html](http://www.aic.gov.au/crime_types/in_focus/indigenousjustice.html)>.

Indigenous population, previous involvement with the criminal justice system and psychological distress.<sup>31</sup>

## VI COMMUNITY JUSTICE GROUPS

The Department of Justice and Attorney-General funds Community Justice Groups (CJGs) in a number of urban, regional and remote Aboriginal and Torres Strait Islander Communities in Queensland.<sup>32</sup> CJGs consist of Elders, traditional owners and community members and they provide support to Indigenous people who have come into contact with Queensland's Criminal Justice System as either victims or offenders.<sup>33</sup> The introduction of CJGs forms part of the Queensland Government's response to recommendations made following the Royal Commission into Aboriginal Deaths in Custody.<sup>34</sup>

Judges can obtain assistance with sentencing from Community Justice Groups. Section 9(2) of *Penalties and Sentences Act 1992* (Qld) provides:

"In sentencing an offender, a court must have regard to –

...

(o) if the offender is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the offender's community that are relevant to sentencing the offender, including, for example—

- (i) the offender's relationship to the offender's community; or
- (ii) any cultural considerations; or
- (iii) any considerations relating to programs and services established for offenders in which the community justice group participates".

Section 150(1)(g) of the *Youth Justice Act 1992* (Qld) is in similar terms with respect to Aboriginal or Torres Strait Islander children.

The Supreme Court and District Court have also facilitated the making of CJG submissions through practice directions.<sup>35</sup>

Apart from assisting in the sentencing process, CJGs are also involved in providing a range of local initiatives intended to reduce crime and divert Aboriginal and Torres Strait Islander offenders away from the criminal justice system.

In May 2010, the Department of Justice and Attorney-General engaged KPMG to conduct an independent evaluation of Queensland's CJG program. The evaluation

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<sup>31</sup> Ibid.

<sup>32</sup> Department of Justice and Attorney-General, *Aboriginal and Torres Strait Islander Justice Initiatives* (30 October 2014) Queensland Government <<http://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/queensland-laws/about-queensland-laws/aboriginal-and-torres-strait-islander-justice-initiatives/>>.

<sup>33</sup> Ibid.

<sup>34</sup> Department of Justice and Attorney-General, *Community Justice Groups* (April 2008) Queensland Government <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0006/18528/Community\\_justice\\_groups.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0006/18528/Community_justice_groups.pdf)>.

<sup>35</sup> Supreme Court Practice Direction 4 of 2014, cl 24-28 <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0017/225521/sc-pd-4of2014.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0017/225521/sc-pd-4of2014.pdf)>; District Court Practice Direction 3 of 2001.

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report by KPMG made a number of recommendations,<sup>36</sup> but nonetheless found that the CJG program contributes positively to:

- reducing the likelihood of crime escalation (for individuals and the community);
- improving the cultural appropriateness and responsiveness of the justice system; and
- promoting community wellbeing through volunteerism.<sup>37</sup>

This success can be attributed to the involvement of local communities with their particular knowledge of many cultural, social, economic and other factors relevant to an Aboriginal or Torres Strait Islander offender.

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<sup>36</sup> KPMG, *Evaluation of the Community Justice Group Program Final Report* (2010) 88-92 <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0003/88905/evaluation-of-the-community-justice-group-program.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0003/88905/evaluation-of-the-community-justice-group-program.pdf)>.

<sup>37</sup> Queensland Government Department of Justice and Attorney-General, *Queensland Government Interim Response to the Independent Evaluation of the Community Justice Group Program* (December 2011) <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0018/131580/interim-response-cjg-program-evaluation-december-2011.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0018/131580/interim-response-cjg-program-evaluation-december-2011.pdf)>.

## CHAPTER 11: PERSONS WITH DISABILITY

### I INTRODUCTION

Persons with disability may play any role in a court setting; that is, they may be lawyers, litigants, witnesses, jurors, judges, or court staff. This chapter is aimed at raising awareness amongst lawyers, judges and court staff of disability and issues that may arise in relation to court processes.

It is recognised that disability is a complex subject area and that there is much information currently available. However, the purpose of this chapter is to provide a general overview and offer practical and helpful information about working with people with disability within the Supreme Court of Queensland. Much of the information in this chapter relates to people with disability as witnesses.

When looking at the issue of people with disability in a court setting, providing equal and non-discriminatory physical access to the court building is just one of a number of broader considerations, which may include trial management, communication and interpreters. These and other issues will be discussed below.

#### A *Persons with Disability in Australia*

In Australia in 2012, the Survey of Disability, Ageing and Carers (SDAC) reported that there were approximately 4.2 million Australians, or 18.5% of the population, living with a disability.<sup>1</sup> In Queensland, approximately 820,700 people, or 17.7% of the population, reported having a disability.<sup>2</sup>

Findings from SDAC indicated that 81% of people with a disability reported a physical condition as their main condition, and 19% reported a mental or behavioural disorder as their main condition.<sup>3</sup> 88% of those with a disability had a specific limitation or restriction, meaning that they were limited in the core activities of self-care, mobility or communication, or restricted in schooling or employment.<sup>4</sup>

In 2012, the majority of people who reported having a psychological disability also reported other disabling conditions, whether sensory (sight, hearing or speech difficulties) or physical.<sup>5</sup> Further statistics suggest that many peoples' experiences of disability are intersectional. For example, SDAC found that around half of Australia's

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<sup>1</sup> Australian Bureau of Statistics, *4430.0 Disability, Ageing and Carers, Australia: Summary of Findings, 2012 – Overview – Disability - Key Findings* (18 September 2014)  
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/A813E50F4C45A338CA257C21000E4F36?opendocument>>.

<sup>2</sup> Disability is defined by the SDAC as “any limitation, restriction or impairment which restricts everyday activities and has lasted, or is likely to last, for at least six months”: see *ibid*.

<sup>3</sup> Australian Bureau of Statistics, *4430.0 Disability, Ageing and Carers, Australia: Summary of Findings, 2012 – Disability – Long-Term Health Conditions* (18 September 2014)  
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/E569E99F36BB63E6CA257C210011ACDE?opendocument>>.

<sup>4</sup> Australian Bureau of Statistics, *4430.0 Disability, Ageing and Carers, Australia: Summary of Findings, 2012 – Disability – Characteristics* (18 September 2014)  
<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3A5561E876CDAC73CA257C210011AB9B?opendocument>>.

<sup>5</sup> Australian Bureau of Statistics, *4433.0.55.004 Psychological Disability, 2012 – Key Findings* (9 February 2015)  
<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4433.0.55.004Main+Features12012?OpenDocument>>

older population have a disability.<sup>6</sup> Additionally, statistics from 2010 indicate that Aboriginal and Torres Strait Islander people are around one and a half times as likely as non-Indigenous people to have a disability or long-term health condition, and are more than twice as likely to have a profound or severe core activity limitation.<sup>7</sup>

### B Interaction with the Courts

Research suggests that persons with intellectual and mental health impairments are overrepresented at all stages of the criminal justice system, both as victims and defendants.<sup>8</sup> However, as noted by Queensland Advocacy Incorporated, “there is a general paucity of quantitative evidence concerning the experience of persons with disability with the Queensland criminal justice system” and that “law enforcement agencies, victim and offender services collect little, if any, primary data on the incidence or characteristics of persons with disability with whom they have contact”.<sup>9</sup>

Research from the New South Wales Courts in 2000 revealed that 24% of people who appeared before a court (and 43% of all Aboriginal and Torres Strait Islander accused persons) had a disability.<sup>10</sup> Additionally, the results of research undertaken by the Queensland Department of Corrective Services in 2002 identified that almost 10% of prisoners scored under 70 in a functional IQ test, which is indicative of an intellectual disability. Twenty-nine percent of prisoners achieved a score of 70-84, placing them in the borderline intellectual disability range.<sup>11</sup>

The Office of the Public Advocate and the Anti-Discrimination Commission Queensland observe that persons with intellectual and mental health impairments are vulnerable to a number of risk factors that may bring them into the criminal justice system, such as

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<sup>6</sup> Australian Bureau of Statistics, *4430.0 Disability, Ageing and Carers, Australia: Summary of Findings, 2012 – Overview – Older People - Key Findings* (18 September 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/05469E71B8D5CCF8CA257C21000E4FA6?opendocument>>.

<sup>7</sup> Australian Bureau of Statistics, *4704.0 The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, October 2010 – Disability* (19 December 2012) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/58E4D2078377D4B5CA25783900FA9F0?opendocument>>.

<sup>8</sup> Office of the Public Advocate and the Anti-Discrimination Commission Queensland, Submission No 32 to Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry on Strategies to Prevent and Reduce Criminal Activity in Queensland*, July 2014, 4 (‘OPA/ADCQ Submission’), citing Tony Butler and Stephen Allnutt, *Mental Illness Among New South Wales Prisoners* (New South Wales Corrections Health Service, 2003), Jim Simpson, *Participants or Just Policed? Guide to the Role of DisabilityCare Australia with People with Intellectual Disability who Have Contact with the Criminal Justice System* (New South Wales Council for Intellectual Disability, 2013) 6, citing Eileen Baldry, Leanne Dowse and Melissa Clarence, *People with Intellectual and Other Cognitive Disability in the Criminal Justice System* (University of New South Wales, 2012) <[http://www.adhc.nsw.gov.au/\\_data/assets/file/0003/264054/Intellectual\\_and\\_cognitive\\_disability\\_in\\_criminal\\_justice\\_system.pdf](http://www.adhc.nsw.gov.au/_data/assets/file/0003/264054/Intellectual_and_cognitive_disability_in_criminal_justice_system.pdf)>, and Queensland Department of Corrective Services, *Intellectual Disability Survey 2002* (unpublished, 2002) 17-18.

<sup>9</sup> Queensland Advocacy Incorporated, *Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland* (2007) 16 <[http://www.gai.org.au/images/stories/docs/1987-2007/doc\\_199.pdf](http://www.gai.org.au/images/stories/docs/1987-2007/doc_199.pdf)>.

<sup>10</sup> OPA/ADCQ Submission, above n 8, 4, citing Susan Hayes, ‘Needle in a Haystack: Identifying the Offender with Intellectual Disability’ in A Shaddock et al (eds), *Intellectual Disability and The Law: Contemporary Australian Issues* (Australian Society for the Study of Intellectual Disability Inc, 2000) 67.

<sup>11</sup> Ibid quoting Queensland Department of Corrective Services, *Intellectual Disability Survey 2002*, (unpublished, 2002).

“difficulties with education, abuse, family violence, disrupted family backgrounds, difficulty obtaining or maintaining employment and a lack of permanent accommodation.”<sup>12</sup> It is important to note, however, that the majority of people with a disability do not offend.<sup>13</sup>

As victims of crime, people with intellectual disabilities are twice as likely to be the victim of a crime, and one and a half times more likely to suffer property crimes.<sup>14</sup> Persons with disability are also more likely to experience sexual violence, particularly women with intellectual disabilities, who are 10 times more likely than other women to be assaulted.<sup>15</sup> This higher rate of victimisation of people with a disability, particularly women, has been “associated with the presence of certain personal risk factors of: dis-inhibition, desire for affection, ready compliance with authority, inability to judge others' motivations, absence of social skills to distinguish between appropriate and exploitative behaviour, feelings of helplessness and powerlessness, low self-esteem and impulsivity.”<sup>16</sup> Queensland Advocacy Incorporated reports that sexual assaults against persons with disability are more likely to be of a repeated or continuing nature; be committed by someone known to them, in an intimate location; occur in residential services; and be committed by direct service providers (such as residential support staff, teachers and therapists).<sup>17</sup>

### C Legal Framework

In 2008, Australia ratified the United Nations Convention on the Rights of Persons with Disabilities. The stated purpose of the Convention is to “promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>18</sup> Relevantly, Article 13 of the Convention states that:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages

Australia submitted its first report to the United Nations in 2010.<sup>19</sup>

Federally, the *Disability Discrimination Act 1992* (Cth) was amended in 2009 to include an explicit duty to make reasonable adjustments. An adjustment is reasonable if it does

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<sup>12</sup> Ibid citing Simpson, above n 8, 28-35.

<sup>13</sup> Ibid citing New South Wales Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion*, Report No 135 (2012) xv.

<sup>14</sup> Ibid 5.

<sup>15</sup> DLA Piper, *Background Paper on Access to Justice for People with Disability in the Criminal Justice System* (2013) 79 <<https://www.humanrights.gov.au/our-work/disability-rights/publications/background-paper-access-justice-people-disability-criminal>>.

<sup>16</sup> Ibid 80.

<sup>17</sup> Queensland Advocacy Incorporated, above n 9, 19.

<sup>18</sup> *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 1.1.1.

<sup>19</sup> See Australian Government Attorney-General's Department, *Australia's Initial Report under the Convention on the Rights of Persons with Disabilities* (2010) <<http://www.ag.gov.au/RightsAndProtections/HumanRights/ReportCRPD/Pages/default.aspx>>.

not impose unjustifiable hardship on the person who makes it.<sup>20</sup> A failure to make reasonable adjustments may amount to direct or indirect discrimination.<sup>21</sup>

In Queensland, the fact that a person with an impairment requires special services or facilities is irrelevant to the determination of direct discrimination.<sup>22</sup>

Further, the *Disability Services Act 2006* (Qld) sets out the rights of persons with disabilities, and responsibilities of government funded service providers. The Act requires each Queensland Government department, including the Department of Justice and Attorney General, to develop a disability service plan.<sup>23</sup>

## II TERMINOLOGY

The International Classification of Functioning, Disability and Health (ICF), developed by the World Health Organisation, comprises the international standard for describing and measuring health and disability.

The ICF uses the word disability as an umbrella term to describe impairments (problems in body function or alterations in body structure), activity limitations (difficulties in executing activities) and participation restrictions (problems with involvement in any area of life).

The ICF does not distinguish between the type and cause of disability – for instance, between “physical” and “mental” health. Importantly, the ICF recognises that disability is not an attribute of a person, but a result of an interaction between that person and their social context (which includes attitudinal and environmental barriers).<sup>24</sup>

For the purposes of this Benchbook, a distinction is made between different kinds of disabilities, and some descriptions are provided below. When considering these descriptions, it should be observed that

describing a person’s disability in terms of a medical ‘condition’ — such as epilepsy, polio, paraplegia, blindness, schizophrenia or autism — focuses attention on the disability rather than on the person as an individual. These terms also suggest sickness and imperfection and reinforce negative assumptions and stereotypes about people with a disability.<sup>25</sup>

It is thus preferable to emphasise the person rather than the disability, and to speak of a “person with a disability” rather than a “disabled person”.<sup>26</sup> As noted by the New South Wales Judicial Commission’s Equality before the Law Bench Book, “most people with disabilities prefer to talk about what they can do, not what they may be unable to do, and

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<sup>20</sup> *Disability Discrimination Act 1992* (Cth) s 4.

<sup>21</sup> *Ibid* ss 5-6.

<sup>22</sup> *Anti-Discrimination Act 1992* (Qld) s 10(5).

<sup>23</sup> See Department of Justice and Attorney-General, *The DJAG Disability Service Plan 2014-16* <[http://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0008/264536/2014-16-DJAG-Disability-Service-Plan.pdf](http://www.justice.qld.gov.au/_data/assets/pdf_file/0008/264536/2014-16-DJAG-Disability-Service-Plan.pdf)>.

<sup>24</sup> World Health Organisation, *World Report on Disability* (2011) 7 <[http://www.who.int/disabilities/world\\_report/2011/report/en/](http://www.who.int/disabilities/world_report/2011/report/en/)>.

<sup>25</sup> Queensland Government Department of Communities, Child Safety and Disability Services, *A Way with Words: Guidelines for the Portrayal of People with a Disability* (2012) 7 <<https://www.qld.gov.au/disability/documents/community/way-with-words.pdf>>.

<sup>26</sup> J McArdle (ed), *The Queensland Law Handbook* (Caxton Legal Centre, 2014) 362.

indeed, to talk about the additional activities many of them might be able to do if we as a community made some (often simple) adjustments".<sup>27</sup>

As such, language used to describe people should be carefully chosen. Language may have the effect of stereotyping, depersonalising, humiliating or discriminating against people with disabilities. It is preferable to be specific about a person's circumstances and avoid stereotypes, generalisations and assumptions based on limited information.

Obviously the best way to be sure is to ask the person which term he or she prefers to be used in the situation. Appendix D contains a useful table of words to avoid and suggested alternatives as recommended by the Queensland Government Department of Communities, Child Safety and Disability Services.<sup>28</sup>

All written information provided by the Supreme Court should contain appropriate language when referring to people with disabilities.

### A *Physical Disabilities*<sup>29</sup>

A physical disability may have existed since birth or it could have resulted from accident, illness, or injury. A physical disability may be mild, moderate or severe in terms of the way in which it affects the person's life.

A person with a physical disability may need to use some sort of equipment for assistance with mobility. A person with a physical disability may have lost a limb or, because of the shape or size of their body, or because of a disease or illness, require slight adaptations to be made to enable them to participate fully in society.

Common physical disabilities include quadriplegia, paraplegia, cerebral palsy, epilepsy and arthritis.

### B *Sensory Disabilities*

**Hearing impairment:** A person who has a hearing impairment has a partial hearing loss. The hearing loss may be mild, moderate, or severe. A person who has a hearing impairment will usually prefer to rely as much as possible on their available hearing with the assistance of hearing aids or assistive listening devices. Many people who have hearing impairments regard their impairment as a disability.

**Deafness:** can be complete, or almost complete, inability to hear. People who are deaf rely on their vision to assist them to communicate, and use a variety of ways to communicate — including Australian sign language (Auslan), lip reading, writing and expressive speech. Many people who are deaf regard deafness as a culture rather than as a disability. Deaf culture includes areas such as art, language, sport and history.

**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 or seeing-eye dog, white cane,

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<sup>27</sup> Judicial Commission of New South Wales, *Equality before the Law Bench Book* (at June 2014) [5.2.3] (2011) <<http://www.judcom.nsw.gov.au/publications/benchbks/equality/benchbook.pdf>> ('Equality before the Law Bench Book (NSW)').

<sup>28</sup> Above n 25, 8-11.

<sup>29</sup> The descriptions contained in subsections A, B and C are adapted from the *Equality before the Law Bench Book* (NSW), above n 27.

or a laser sensor or pathfinder. People who are blind may read using Braille, computer assisted technology and/or audio tapes

**Deafblindness:** a loss of vision and hearing. Most people with deafblindness have some residual hearing and/or sight. Deafblindness varies with each person — for example, a person may be hard of hearing and totally blind, or profoundly deaf and partially sighted, or have nearly complete or complete loss of both senses.

### C *Intellectual Disabilities*

Intellectual disability refers to a slowness to learn and process information. The NSW Law Reform Commission has recommended the adoption of a statutory definition of intellectual disability as follows:

‘Intellectual disability’ means a significantly below average intellectual functioning existing concurrently with two or more deficits in adaptive behaviour.<sup>30</sup>

Deficits in adaptive behaviour refer to limitations in such areas as communication, social skills and ability to live independently.

An intellectual disability is permanent. It is not a sickness, cannot be cured and is not medically treatable. People are born with an intellectual disability. It may be detected in childhood or it may not be detected until later in life.

There are various types and degrees of intellectual disability. One of the more common causes of intellectual disability is Down syndrome.

People with an intellectual disability can, and do, learn a wide range of skills throughout their lives. The effects of an intellectual disability (for example, difficulties in learning and development) can be minimised through appropriate levels of support, early intervention and educational opportunities.

### D *Foetal Alcohol Spectrum Disorder*

Foetal Alcohol Spectrum Disorder (FASD) is an umbrella term which describes a range of intellectual, behavioural and physical disabilities associated with pre-natal alcohol exposure.<sup>31</sup> Although it is recognised as one of the two most common types of developmental disability, it is also described as “invisible” as many affected individuals do not exhibit outward signs of disability.<sup>32</sup> In Australia FASD is under-diagnosed and there is no data on FASD prevalence, however on the basis of Canadian and United States studies FASD may affect around 2% of the population.<sup>33</sup>

Alcohol consumption during pregnancy has been found to damage the frontal lobe of the foetal brain, or central nervous system. The consequential core impairments are

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<sup>30</sup> New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) Recommendation 3, and see generally [3.1]-[3.26] <[http://www.lawreform.justice.nsw.gov.au/Documents/report\\_80.pdf](http://www.lawreform.justice.nsw.gov.au/Documents/report_80.pdf)> (‘NSWLRC Report 80’).

<sup>31</sup> Department of the Attorney General WA, *Equality before the Law Bench Book* (2009) [4.1.8.1] <[http://www.supremecourt.wa.gov.au/files/equality\\_before\\_the\\_law\\_benchbook.pdf](http://www.supremecourt.wa.gov.au/files/equality_before_the_law_benchbook.pdf)> (‘Equality before the Law Bench Book (WA)’).

<sup>32</sup> Heather Douglas et al, ‘Judicial Views of Foetal Alcohol Spectrum Disorder in Queensland’s Criminal Justice System’ (2012) 21 *Journal of Judicial Administration* 178, 178-9.

<sup>33</sup> Equality before the Law Bench Book (WA), above n 31, [4.1.8.1]; Douglas et al, above n 32, 178.

summarised in the mnemonic ALARM, developed by Fast and Conry: adaptive behaviour, language, attention, reasoning and memory.<sup>34</sup> People with FASD may experience the following:

- attention deficit problems manifesting in distractibility, restlessness and problems with completing tasks;
- difficulty with abstract reasoning demonstrated by a failure to learn from experience and difficulty in understanding the consequence of one's actions;
- problems understanding time and sequence;
- difficulties understanding sarcasm, idiom or metaphor;
- a lack of empathy; and
- difficulty explaining actions or restraining impulses.<sup>35</sup>

FASD may also cause facial anomalies in some individuals.<sup>36</sup>

The link between FASD and criminal behaviour is strong, with one 1996 study finding that 60% of those with the disability come into contact with the criminal justice system. Persons with FASD may be rendered vulnerable at numerous junctures in the criminal justice system.<sup>37</sup> As noted by Douglas et al:

Individuals with FASD may not understand the arrest process; they may have diminished competency and capacity which may impact on the plea and the applicability of defences. Many who have FASD are highly suggestible and may make false confessions or false accusations. Wanting to please the interviewing police, they may agree to any suggestions put to them. The rushed environment of the lower courts and the pressure to plead guilty are not conducive to ensuring clear communication and understanding of the process for a person with FASD.<sup>38</sup>

The most at-risk populations for FASD are those which experience high degrees of social deprivation and poverty.<sup>39</sup>

## E *Acquired Brain Injury*

Acquired brain injury is an injury to the brain that results in changes or deterioration in a person's cognitive, physical, emotional and/or independent functioning.

People may have an acquired brain injury as a consequence of a trauma (for example, a car accident), stroke, infection, neurological disease (dementia), tumour, hypoxia and/or substance abuse.

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<sup>34</sup> Cited in Douglas et al, above n 32, 179.

<sup>35</sup> Douglas et al, above n 32, 179.

<sup>36</sup> In some cases FASD sufferers may have specific facial anomalies which indicate alcohol exposure on the nineteenth day after conception. These comprise small eye slits (referred to as short palpebral fissure lengths); no groove between nose and upper lip (referred to as a smooth philtrum); and a thin upper lip. In more serious cases of FASD the individual may be very small if the alcohol exposure continued throughout pregnancy. Physical deficits including hearing impairment are also associated with FASD: Douglas et al, above n 32, 179.

<sup>37</sup> Douglas et al, above n 32, 178.

<sup>38</sup> Ibid 180.

<sup>39</sup> Equality before the Law Bench Book (WA), above n 31, [4.1.8.1].

Disability resulting from an acquired brain injury can be temporary or permanent and can be mild, moderate or severe. It is rarely assisted by medication.

Every brain injury is different. Two injuries may appear to be similar but the outcomes can be vastly different. Brain injury may result in a physical disability only, or in a personality or thinking process change only, or in a combination of physical and cognitive disabilities.

### F *Psychiatric Disability*

A psychiatric disability is a condition that impairs a person's mental functioning.

Psychiatric disability may be long-term, but is often temporary and/or episodic. It does not affect the person's intellect. It can sometimes be assisted by medication.

Psychiatric disability is generally characterised by the presence of any one or more of the following symptoms or signs: irrational behaviour (either sustained or episodic, and which may indicate that the person is having delusions or hallucinations); serious disorder of thoughts; paranoia; mood swings of great elation or excitement; depression; and inappropriate dress, speech, expressed emotions, behaviour and/or ideas.

Some of the most common psychiatric disorders are schizophrenia, bipolar mood disorder, clinical depression and anxiety disorder.

## III TRIAL MANAGEMENT

Appendix E contains extracts from various pieces of legislation relevant in proceedings involving persons with disability, including those referred to below.

In the context of pre-trial case management in the Supreme Court, events that may alert a judge and court staff to a possible need to make special arrangements for a person with disability may include the following:

- Filing of originating process: where "a person is suing or being sued in a representative capacity, the plaintiff or applicant must state the representative capacity on the originating process"<sup>40</sup> and where a person under a legal incapacity is to start or defend a proceeding, the person must have a litigation guardian.<sup>41</sup>
- Filing of pleadings: *Uniform Civil Procedure Rules 1999 (Qld)* r 150 requires certain matters to be specifically pleaded by parties, e.g. "want of capacity, including disorder or disability of mind".<sup>42</sup>
- Service of documents: where a document "is required to be served personally on a person with impaired capacity".<sup>43</sup>
- Settlement: where "a settlement or compromise of a proceeding in which a party is a person under a legal incapacity is ineffective unless it is approved by the court or the public trustee acting under the *Public Trustee Act 1978*, section 59."

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<sup>40</sup> *Uniform Civil Procedure Rules 1999 (Qld)* r 18.

<sup>41</sup> *Ibid* r 93; see r 94 as to who may be a litigation guardian and r 95 as to how a litigation may be designated.

<sup>42</sup> *Ibid* r 150(1)(t).

<sup>43</sup> *Ibid* r 109.

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There are a number of key elements which a judge may need to consider when a person has a disability.<sup>44</sup> For example:

- such persons may need more time than is common with persons without disability;
- the stress of coming to court may exacerbate their symptoms;
- making any special arrangements in advance will save time and embarrassment at the trial;
- the person with a disability may not be able to hear, read or be understood whilst in court, or to fully comprehend what is taking place; and
- some ailments may make it impossible to attend court at all.

### A Competence to Give Evidence

In relation to competence to give evidence, it has been observed that

People with disability who need communication supports or who have complex and multiple support needs, are more likely to have prejudicial assessments of their competency to give evidence both as a witness to criminal proceedings and as a defendant to proceedings. This has the potential to preclude people with disabilities from accessing justice. This is an issue of concern for both victims of crime, that might be prevented from giving evidence necessary to secure a conviction in proceedings, and defendants, who might be prevented from bringing their case forward without additional supports in court.<sup>45</sup>

Under s 9 of the *Evidence Act 1977* (Qld), “every person, including a child, is presumed to be competent to give evidence in a proceeding, and competent to give evidence in a proceeding on oath.” When determining the issue of competency, the court will consider whether the witness’ disability will affect the reliability of evidence on the facts of a particular case, rather than whether a witness has a general lack of capacity. Issues relevant to reliability may include whether the witness has the capacity for observation, the ability to recollect events, or whether it is possible to know whether what they say is related to real experience.<sup>46</sup>

Research suggests that an intellectual disability does not necessarily prevent a person from being a reliable witness:

The questions to which individuals with intellectual disabilities provide the most accurate answers (i.e. where the proportion of correct to incorrect information is greatest) are open, free recall questions (e.g. ‘what happened?’). For these questions eyewitnesses with intellectual disabilities provide accounts with accuracy rates broadly similar to those of the general population. Although people with intellectual disabilities provide less

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<sup>44</sup> *Equal Treatment Bench Book* (Judicial College, 2<sup>nd</sup> ed, 2013) 71-2 <[https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB\\_all\\_chapters\\_final.pdf](https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf)> (‘Equal Treatment Bench Book (UK)’).

<sup>45</sup> DLA Piper, *Background Paper on Access to Justice for People with Disability in the Criminal Justice System* (Australian Human Rights Commission, 2013) [1.1] <<https://www.humanrights.gov.au/ourwork/disabilityrights/publications/background-paper-access-justice-people-disability-criminal>>.

<sup>46</sup> McArdle, above n 26, 371. In cases where there is an issue raised about the competency of a person called as a witness to give evidence in a proceeding, see of the *Evidence Act 1977* (Qld) ss 9A-9D. Further detail as to these provisions is given in Chapter 5.

information overall, they do appear to include the most important details.<sup>47</sup> (citations omitted)

Research also suggests that people with intellectual disabilities may have more difficulty with leading or closed questioning. They may be more likely to acquiesce particularly if they do not understand the question.

At the highest level of abstraction, legal capacity is the ability of a person to make decisions for themselves and deal with their legal affairs., The *Queensland Handbook for Practitioners on Legal Capacity*, prepared by Queensland Advocacy Incorporated, notes that 'generally, the requirements of capacity for an adult include understanding the nature and effect of decisions about the matter, freely and voluntarily making decisions about the matter, and communicating the decisions in some way.'<sup>48</sup> That Handbook provides extensive and helpful detail on the relevant considerations for assessing legal capacity.

### B *Witnesses with Intellectual Disabilities*

People with intellectual disabilities may find the court environment very daunting and stressful. As noted by the New South Wales Law Reform Commission,

... entering the witness box, having one's capacity to give sworn or unsworn evidence tested, being sworn (if appropriate) and giving evidence will inevitably be a very lonely and very stressful experience for a person with an intellectual disability.<sup>49</sup>

#### 1 *Considerations Relevant to Witnesses with Intellectual Disabilities*

The Equal Treatment Bench Book (UK) compiled by the Judicial Studies Board in the United Kingdom noted that there are three main areas of personal functioning which can be affected by mental impairment, and which may affect a person's performance as a witness.<sup>50</sup>

First, a person's memory may be affected, with the result that it may take longer to absorb, comprehend and recall information. The person may find it difficult to recall events in chronological order, and may block memories of significant events if they were traumatic.

Second, reduced communications skills may result in a person being able to remember things in pictures rather than words, or struggling to explain things in a way that others find easy to follow. Persons with intellectual disabilities may also have difficulty understanding the subtleties of language or social etiquette.

Third, witnesses with intellectual disabilities may be sensitive to negative emotion and threatening questioning. Some may respond to rough or persistent questioning by trying to please the questioner; others may respond with tearfulness or panic.<sup>51</sup>

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<sup>47</sup> Mark R Kebbell, Christopher Hatton and Shane D Johnson, 'Witnesses with Intellectual Disabilities in Court: What Questions Are Asked and What Influence Do They Have?' (2004) 9 *Legal and Criminological Psychology* 23, 24.

<sup>48</sup> Accessible from Publications section of <http://www.qai.org.au>. See further *Guardianship and Administration Act 2000* (Qld) sch 4 and the *Powers of Attorney Act 1998* (Qld) sch 3.

<sup>49</sup> NSWLRC Report 80, above n 30, [7.17].

<sup>50</sup> Equal Treatment Bench Book (UK), above n 44, 101.

<sup>51</sup> *Ibid* 101-2.

With these considerations in mind, the Equal Treatment Bench Book (UK) recommends that the following matters be considered when having regard to taking evidence from a witness with mental disabilities:<sup>52</sup>

- Speak more slowly, use simple words and sentences, and do not go on too long without a break.
- Avoid 'yes/no' answers and questions suggesting the answer or containing a choice of answers which may not include the correct one.
- Do not keep repeating questions as this may suggest that the answers are not believed and by itself encourage a change, but the same question may be asked at a later stage to check that consistent answers are being given.
- Do not move to new topics without explanation (e.g. 'can we now talk about') or ask abstract questions (e.g. ask 'was it after breakfast' rather than 'was it after 9.00 am').
- Do not make assumptions about timing and lifestyles – a tag to link the question may be helpful (e.g. a TV programme or phone call).
- Allow a witness to tell their own story and do not ignore information which does not fit in with assumptions as there may be a valid explanation for any apparent confusion (e.g. the witness may be telling the correct story but using one or more words in a different context at a different level of understanding).
- Advocates often do not have the necessary understanding of particular mental impairments (e.g. learning disabilities) to formulate questions in a way that the witness can understand – it may be necessary to explain something more than once using simple language.
- Always ensure that witnesses are treated with due respect and are not ridiculed if they are unable to understand the way questions are being asked.

### 2 *Evidence Act 1977 (Qld)*

The application of s 21A of the *Evidence Act 1977 (Qld)* may make it less distressing for a witness with an intellectual disability to give evidence in a proceeding. This section allows the court to make a range of orders, such as excluding certain persons from the court room while a witness is giving evidence; permitting the witness to give evidence in a separate room; allowing the witness' evidence to be video-taped; and making directions about the number and type of questions asked of a witness.

Under s 21 of the *Evidence Act 1977 (Qld)* the Court may disallow a question put to a witness in cross-examination or inform a witness a question need not be answered, if the Court considers the question is improper. The Court must take into account any mental, intellectual or physical impairment the witness has or appears to have in deciding whether a question is an improper question.<sup>53</sup>

Under the *Evidence Act 1977 (Qld)*, in criminal proceedings other than summary proceedings under the *Justices Act 1886 (Qld)*, a witness who is an intellectually impaired person is a protected witness.<sup>54</sup> Cross-examination by an unrepresented

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<sup>52</sup> Ibid 102.

<sup>53</sup> *Evidence Act 1977 (Qld)* s 21(2)(a).

<sup>54</sup> See the meaning of "protected witness" in *ibid* s 21M.

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accused of an intellectually impaired person whom the court has declared to be a protected witness is prohibited.<sup>55</sup>

Consideration may also be given to the tendering of written statements under s 93A of the *Evidence Act 1977* (Qld). For the purposes of s 93A, “intellectually impaired person” is defined to mean:<sup>56</sup>

“a person who has a disability that—

- (a) is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these; and
- (b) results in—
  - (i) a substantial reduction of the person’s capacity for communication, social interaction or learning; and
  - (ii) the person needing support.”

Some matters of which court staff and legal practitioners should be aware when working with witnesses with an intellectual disability include:

- the possibility that it may be useful for the witness to attend court prior to the proceedings to familiarise themselves with the courtroom;
- it may also be a good idea to explain the purposes of microphones, recorders, video cameras etc. at the beginning of the hearing;
- the likelihood that people with an intellectual disability will need additional special instruction in the use of the closed circuit television in order to participate;
- the fact that oath or affirmation should be administered courteously and slowly when swearing in a person with an intellectual disability as a witness;
- the likelihood that people with an intellectual disability, who have no counsel, accompanying friend or support staff, will need the outcome of the trial carefully and clearly explained to them; and
- the possibility that breaks may need to be used to ensure there is sufficient water available on the witness stand, and elsewhere — many people who are taking medications need to drink water frequently.<sup>57</sup>

Issues relating to court technology and interpreters for people with an intellectual disability are discussed below.

### C *Witnesses with Psychiatric Disabilities*

Witnesses with psychiatric disabilities may find the court environment especially stressful. At hearings, it must be recognised that a witness with a psychiatric disability may find it difficult to concentrate and remember. There may also be communication barriers, for example, if the person is easily distracted, distressed, anxious, frightened, manic, delusional or aggressive.<sup>58</sup>

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<sup>55</sup> Ibid ss 21N and 21O.

<sup>56</sup> Ibid Sch 3.

<sup>57</sup> See Equality before the Law Bench Book (NSW), above n 27, [5.4.4]

<sup>58</sup> Ibid [5.2.4].

Certain adjustments may be necessary for witnesses with psychiatric disabilities. For example:

- there may be a need to repeat information;
- it may be necessary to rephrase questions;
- there may be a need to provide regular breaks because of short concentration spans;
- the witness should be afforded adequate familiarisation with the court room;
- practitioners should provide appropriate amounts of time in their estimates for trial to accommodate necessary adjustments; and
- particularly vulnerable witnesses may benefit from the application of s 21A of the *Evidence Act 1977* (Qld).

Witnesses with an acquired brain injury may benefit from the suggested adjustments referred to above.

### D *Witnesses with Physical Disabilities*

#### 1 *Pre-trial Considerations*

Matters to be considered at the pre-trial stage when dealing with a witness with a physical disability include: witnesses with physical disabilities may often require shorter intervals for hearing of a proceeding, in order that their physical needs can be attended to; e.g. appropriate toileting or turning/movement to prevent pressure sores and to relieve discomfort.

Parties should be encouraged to include in their estimates for trial appropriate amounts of time to accommodate witnesses with physical disabilities.

There may be scope for practitioners to identify any special requirements and the likely duration of the evidence-in-chief of a witness with a physical disability in witness lists which have been ordered to be exchanged between the parties and lodged with the Court, including, if necessary, that the evidence be taken by telephone or video link.<sup>59</sup>

A change of venue for trial, or the transfer of the proceedings to another registry closer to where the person with a disability resides may need to be considered.<sup>60</sup>

Practitioners should alert court staff about people with physical disabilities proposed to be called as witnesses to give evidence at trial. Information provided will assist staff to better plan for the trial and provides an opportunity to advise the trial judge of any special requirements. Examples of what information should be provided include:

When the court has confirmed trial dates, identify to Listings staff the day/s it is proposed to call a witness with a physical disability. This will assist in the allocation of courtrooms for trials.

Listings staff and bailiffs should be advised if a witness will need the assistance of a carer in the courtroom; may require periodic breaks when giving evidence; will require the use

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<sup>59</sup> Supreme Court Practice Direction 1 of 2008; *Criminal Practice Rules 1999* (Qld) r 53; *Uniform Civil Procedure Rules 1999* (Qld) r 392; *Evidence Act 1977* (Qld) pt 3A.

<sup>60</sup> See *Supreme Court Act 1995* (Qld) ss 223, 289; *Uniform Civil Procedure Rules 1999* (Qld) r 39.

of particular technology in the courtroom (e.g., document viewer); or will be giving evidence via telephone or video link up.

## 2 *Some Useful Considerations for Court Staff*

Access to courthouses for people with mobility impairment should be equal and non-discriminatory. A person with a mobility impairment should be afforded access to the courthouse in a similar way to a person without a disability. It must be noted that not all people with mobility impairment use a wheelchair.

Allocate courtrooms closer to the location of accessible toilets for witnesses using a wheelchair.

Listings staff should inform the court bailiffs, Sheriff's office and the trial judge of any special requirements as this may determine which court room is allocated for the trial.

Bailiffs should always ensure the courtroom is free of physical obstruction, e.g. trolleys/boxes of evidence must not prevent easy access to the witness box.

If a witness with a physical disability is without assistance on the day, the witness may require the assistance of court staff to help them move around the court building, e.g. opening heavy doors to courtrooms.

### E *Witnesses with a Vision Impairment*

Here vision impairment includes witnesses who are blind and witnesses who have limited vision.

The correct method of communicating with a visually impaired person in a courtroom should be established at the outset of the trial.<sup>61</sup> Documents may need to be provided to the witness in Braille, Moon<sup>62</sup> or in large print.

Rule 961(1)(e) of the *Uniform Civil Procedure Rules 1999 (Qld)* provides that documents filed in a registry must be printed—

- (i) with type no smaller than 1.8 mm (10 point); and
- (ii) in a way that is permanent and can be photocopied to produce a copy satisfactory to the registrar.

This rule envisages that documents filed in the Registry may be of larger print.

It may be that the various provisions allowing a registrar or a judge to make directions in a proceeding could be used with this rule, so as to ensure that certain documents<sup>63</sup> filed in the Registry can be seen by a person with a vision impairment who is involved in the proceedings.

The internal practices and procedures of the Registry allow for Registry staff to enlarge copies of documents by means of word processor or photocopying. Requirements in this regard will need to be addressed with the Registrar.

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<sup>61</sup> Equal Treatment Bench Book (UK), above n 44, 95.

<sup>62</sup> Braille and Moon are codes of raised symbols that correspond to the alphabet.

<sup>63</sup> Note however that *Uniform Civil Procedure Rules 1999 (Qld)* ch 22, pt 1, div 1 does not apply to a document used with and mentioned in an affidavit: r 960.

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When communicating with a witness with a vision impairment it is important to speak clearly. It is not necessary to raise your voice as most people with a vision impairment can hear clearly.

For court staff it is necessary to ensure that a witness with a vision impairment is familiar with the layout of the court on their arrival, and is aware of the details of the court allocated to the trial, and areas where they can wait before giving evidence. Where possible these witnesses should be given the opportunity to familiarise themselves with the layout of the courtroom before giving evidence.

A guide dog may accompany some witnesses.<sup>64</sup>

### F *Witnesses with a Hearing Impairment*

Witnesses who have a hearing impairment may rely on speech and lipreading in the courtroom. However, Deaf Services Queensland makes the following observations about speech and lip-reading:

Speech reading (lip-reading) is a complex art. It is extremely difficult for a Deaf child who has never heard spoken language to learn to lip-read. Around 70% of lip-reading is guess work. Some sounds cannot be 'seen' at all, such as the 'ng' in 'long' or the 'c' in 'communication'.

Even if fluent in English, expert lip readers depend greatly on educated guesswork (syntax and context). Body language and facial expressions are also important and it helps greatly if background information is supplied to the lip-reader.<sup>65</sup>

The issue of interpreters and a discussion of technology in the Supreme Court, which may assist witnesses with a hearing impairment, are discussed later below.

Some adjustments and matters to be considered by judges, lawyers and court staff whilst a witness with a hearing impairment gives evidence include:

- where possible, ensuring that the witness is giving evidence in a room with sound reinforcement (see IV.D below), and in any event, ensuring background noise is decreased. (To enable allocation of a court room with sound reinforcement, court staff should be advised well in advance of the date set for trial.);
- modifying lighting conditions in the courtroom to ensure glare-free lighting to enable speech and lip reading;
- always facing the witness and speaking clearly;
- if the witness is to refer to printed material, ensuring that there are sufficient copies;
- when the case is ready to start, remembering that the person with hearing impairment may not hear it being called on, so the person who calls the case on will need to alert them; and

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<sup>64</sup> Under s 6 of the *Guide Dogs Act 1972* (Qld), it is an offence to fail to permit a blind or deaf person accompanied by a guide dog to enter or be in a public place or to fail to permit a blind or deaf person to take a guide dog into that place. The term "public place" is defined in s 3 of that Act and means a place that the public is entitled to use, is open to the public or is used by the public. Such a definition is apt to include a court.

<sup>65</sup> Deaf Services Queensland, *Communication Methods of Deaf and Hearing Impaired People*, <[www.deafservicesqld.org.au/sites/default/files/FAQ\\_commmethods.pdf](http://www.deafservicesqld.org.au/sites/default/files/FAQ_commmethods.pdf)>.

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- giving consideration to putting captions (text or Auslan) to any video evidence required to be put to a witness with a hearing impairment at trial.

A “hearing dog” may accompany some witnesses.<sup>66</sup>

### G *Accused Persons with Physical Disabilities*

Many of the same considerations applicable to witnesses with physical disabilities, discussed in section D above, apply where an accused person is required to attend court for trial or sentence. Practitioners should alert court staff if any special arrangements will need to be put in place to accommodate the accused’s physical impairment. For instance, if the accused uses a wheelchair practitioners should provide advanced notice to the Criminal List Manager so that the dock in the courtroom can be adjusted (as it can in the Supreme Court and District Court in Brisbane) to make it suitable for wheelchair users or other arrangements made.

## IV TECHNOLOGY IN THE SUPREME COURT

As noted above with regard to telephone and video link-up facilities, there is scope to utilise technology presently available in certain courtrooms in the Supreme Court for the management of trials where witnesses with disabilities are to give evidence.

### A *Real Time Transcript*

For witnesses who are hearing impaired, it may be possible to use this type of reporting.

When real time transcription is used, the live transcript is displayed on each participating user’s computer, allowing them to view the transcribed dialogue as it takes place, and make annotations in real-time using transcript analysis software. Real time transcription requires a stenographer and scopist to be present in the Courtroom typing word for word in real time.

Real Time services may be requested by the Court or by the parties. Auscript requires a minimum of five business days’ notice.

### B *Audio Recordings and Transcripts*

Audio recordings of most proceedings can be purchased by the parties from Auscript upon payment of the appropriate fee. This may be of benefit to parties to the proceedings who are blind or have a vision impairment.

Similarly, transcripts may also be purchased by the parties, which may be of assistance to persons with a hearing impairment.

Auscript may consider waiving or reducing fees for persons with a disability on a case by case basis.

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<sup>66</sup> See comments made above at n 64 in relation to the *Guide Dogs Act 1972* (Qld).

### C *In-Court Playback*

It is also possible to play a recording back in court, either from the same day or from a previous day. To do so, the judge's Associate should request playback from Auscript, providing the date, location and time of the recording in question. Auscript requires a 15-minute preparation time.

### D *Hearing Assist and Sound Reinforcement Systems*

All courtrooms in the Queen Elizabeth II Courts of Law complex are equipped with infra-red hearing assist systems linked into the in-court sound reinforcement, allowing for headsets to be worn and used by persons with a hearing impairment (including jurors, parties, and witnesses). The hearing assist system may also be utilised in conjunction with interpreters for witnesses and defendants.

### E *Document Viewer (Visualiser)*

All courtrooms are equipped with visualisers/document viewers for displaying documents, photos, or other evidence on the courtroom LCD screens. The viewer can magnify the evidence using zoom and auto focus controls.

### F *Evidence Display*

All courtrooms are fitted with a large LCD screen for evidence and remote witness display. Additionally, there are smaller screens throughout the courtroom for evidence display (including at the bar table, witness box, jury box, public gallery).

### G *Use of Video Conferencing*

Certain courtrooms are equipped with video conferencing systems for linking to vulnerable witness rooms, correctional centres, other courtrooms, and witnesses at remote locations. Evidence displayed digitally in court can also be transmitted and shown to persons via this video link.

## V COMMUNICATION AND INTERPRETERS

Some reference to effective communication with witnesses with disabilities has already been made in Part III of this chapter dealing with trial management. Interpreters are dealt with in Chapter 6 of this book. However there are some issues which are particularly relevant to people with a disability.

### A *People who are Deaf or Hearing Impaired*

Many people who are deaf use Auslan<sup>67</sup> as their preferred language. As noted by Deaf Australia Inc:

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<sup>67</sup> The sign language uses signs (hand shapes), body movements and facial expressions including mouth and eye movements, mime and gesture.

The ability to speak and fluency in English is usually very difficult for people deaf from birth or early childhood, requires intensive long term training and, depending on the supports available to them, many do not achieve it. For these people English is usually a second language, and many never become fluent in English even if they develop good speech, because they did not have sufficient access to English during the critical early language learning years. Deaf people use Auslan because they need it in at least some situations. Even for those who have fluent English and good speech there are situations where only Auslan enables them to participate in a meaningful way.<sup>68</sup>

The Australian Sign Language Interpreters' Association (ASLIA) asserts that “the legal rights of Deaf people can only be assured, and the integrity of the legal process can only be safeguarded, by using NAATI Interpreter level interpreters in all legal settings.”<sup>69</sup>

ASLIA's policy is that an Auslan (Australian Sign Language) interpreter with NAATI (National Accreditation Authority for Translators and Interpreters) accreditation at the Interpreter level (formerly level 3) should be booked to work within the legal framework in Australia. To do otherwise could compromise the legal process or proceedings.<sup>70</sup>

Legal settings can often be complex and challenging for interpreters to work in. ASLIA's policy is that, whenever a legal proceeding is estimated to exceed two hours, it is essential to engage two interpreters. Interpreters need breaks every hour and additionally require recovery time after several hours of interpreting.<sup>71</sup>

Further, in any proceeding that involves a contest, including trials or any hearing that involves witness statements and examinations, two interpreters should be engaged.<sup>72</sup>

### B *People Who Are Deafblind*

People who are deafblind may use a range of communication techniques. Communication may be facilitated through the use of an interpreter and/or note-taker.<sup>73</sup>

People who have severe vision and hearing impairments may adopt a “hands-on” signing method. The person places her or his 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. In the latter method, the person communicating a message spells it out on the hands of the person who is deafblind.<sup>74</sup>

A more modern method, highlighting the importance of courts being alert to relevant technological advances, is the use of digital applications to allow real time transcription of questions to be translated to braille for answering by a deafblind witness.<sup>75</sup>

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<sup>68</sup> Deaf Australia Inc, Submission No 37 to the Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014)

<[http://www.alrc.gov.au/sites/default/files/subs/37.\\_org\\_deaf\\_australia\\_jan\\_2014.doc](http://www.alrc.gov.au/sites/default/files/subs/37._org_deaf_australia_jan_2014.doc)>

<sup>69</sup> Australian Sign Language Interpreters' Association, *Legal Interpreting Policy* (2012),

<<http://aslia.com.au/index.php/docs/policies-a-procedures>> 1.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid 2.

<sup>72</sup> Ibid.

<sup>73</sup> Australian DeafBlind Council, *Communication Methods*

<<http://www.deafblind.org.au/communication-methods.asp>>.

<sup>74</sup> Ibid.

<sup>75</sup> Used at first instance, for example, in *Mules v Ferguson & Anor* [2014] QSC 051.

C *People with Intellectual Disabilities*

It is accepted that people who are deaf use interpreters in court. However, there is no authority for using interpreters for people with intellectual disabilities.<sup>76</sup>

In its 1996 report, *People with an Intellectual Disability and the Criminal Justice System*, the New South Wales Law Reform Commission noted that the position on the use of interpreters and communications boards to assist people with limited verbal speech needed to be clarified.<sup>77</sup>

The Commission acknowledged the real difficulties associated with finding an appropriate interpreter for a witness with an intellectual disability. Often, the person who is best able to understand and communicate with a witness with an intellectual disability is a family member, who does not have formal interpreting qualifications, and may have some real or perceived interest in the outcome of the matter.<sup>78</sup> Providing some independent check on the quality of the interpreting offered may be almost impossible, as would be training and accrediting appropriate interpreters.

Further, there may be no such thing as “word for word” translation for people with an intellectual disability. Communication methods will vary from person to person, and may include simple sign language, the use of a communication board, or a combination of speech, gestures and pointing to symbols.<sup>79</sup>

There may be some scope to, for example, have a witness with an intellectual disability give evidence by way of statement tendered under s 93A of the *Evidence Act 1977* (Qld) and to have a carer interpret the witness’s evidence. Whether such an application is accepted is a matter for the trial judge.

The issues raised in this section are matters which will require further consideration as the limits of these provisions in the *Evidence Act* are explored by the courts.

VI JURORS

Section 4(3) of the *Jury Act 1995* (Qld) specifies that certain persons are not eligible for jury service including a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of juror.

In Queensland prospective jurors are sent notices informing them that they may be summoned for jury duty. Under the *Jury Act 1995* (Qld), the Sheriff also includes a questionnaire to be completed by prospective jurors. Persons requiring exemption from jury duty because of a physical or mental disability must indicate this clearly on the questionnaire.

Bailiffs and staff of the Sheriff’s Office encourage jurors with disabilities who have concerns whilst on duty e.g. access to toilets, difficulty in viewing or hearing proceedings, to raise such concerns immediately. Should any concerns need to be raised with the trial judge, bailiffs ensure this is attended to promptly.

In the Supreme Court, jurors who have been summoned for jury duty are provided with induction training at the commencement of their service period. Jurors with disabilities who have any concerns about serving on a jury are encouraged by court staff to raise such issues with them during induction training. This allows court staff to better plan for

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<sup>76</sup> McArdle, above n 26, 371.

<sup>77</sup> New South Wales Law Reform Commission, above n 30, 168-9.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

the management of trials, particularly should there be a need to make arrangements for the jury to be accommodated because jury deliberations are continuing.

For certain jurors with disabilities, particularly where service is required on lengthy trials, regular short breaks during proceedings may need to be scheduled.

In its 2011 Report, *A Review of Jury Selection*, the Queensland Law Reform Commission recommended that s 4(3) of the *Jury Act 1995* (Qld) be amended to remove the ineligibility of persons with a physical disability. The Commission recommended a discretionary approach, whereby the eligibility of prospective jurors is assessed “on a case by case basis, as a matter of excusal or discharge, having regard to the availability of reasonable accommodations to assist people to serve.”<sup>80</sup>

In 2014, the first deaf Australian was selected for trial empanelment in Western Australia.<sup>81</sup> The issue of whether deaf persons are able to perform the functions of a juror have been considered recently in Queensland in the decisions of *Lyons v State of Queensland (No 2)*<sup>82</sup> and *Re: the Jury Act 1995 and an application by the Sheriff of Queensland*.<sup>83</sup> In the latter decision, Justice Douglas noted that, in the absence of specific legislative provision, it would not be appropriate to permit an interpreter into the jury room as a “13th juror”.<sup>84</sup> His Honour noted that the Act does not currently provide for an interpreter to swear an oath or make an affirmation to maintain the secrecy of the jury’s deliberations.<sup>85</sup> Similar considerations were referred to by the Queensland Court of Appeal in the course of refusing an application for leave to appeal the decision of the Queensland Civil and Administrative Tribunal to dismiss a claim of discrimination brought by a deaf person who had been excluded from jury service by the Deputy Registrar.<sup>86</sup> The High Court granted special leave to appeal this decision on 11 March 2016.<sup>87</sup>

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<sup>80</sup> Queensland Law Reform Commission, *A Review of Jury Selection*, Report No 68 (2011) 232-3.

<sup>81</sup> Sylvia Varnham O'Regan, 'WA Woman "First Deaf Australian to Participate in Jury Duty"' *SBS News* (online), 24 January 2014 <<http://www.sbs.com.au/news/article/2014/01/23/wa-woman-first-deaf-australian-participate-jury-duty>>.

<sup>82</sup> [2013] QCAT 731.

<sup>83</sup> [2014] QSC 113.

<sup>84</sup> *Ibid* [6].

<sup>85</sup> *Ibid* [5]-[6].

<sup>86</sup> *Lyons v State of Queensland* [2015] QCA 159.

<sup>87</sup> See *Lyons v State of Queensland* [2016] HCATrans 60.

## CHAPTER 12: SELF-REPRESENTED LITIGANTS

### I INTRODUCTION

The appearance of Self-Represented Litigants (SRLs) in courts and tribunals is not uncommon. With respect to the Supreme Court of Queensland in particular, the Annual Report for the 2014-15 year reported that the number of SRLs in cases where judgment was delivered in the Court of Appeal represented a total of 22% of all appeals finalised by judgment.<sup>1</sup> This figure represents a decrease on the previous reporting year. The number of Court of Appeal matters finalised by judgment where one or both parties was self-represented reduced from 122 in 2013-14 to 82 in 2014-15.<sup>2</sup> Similarly, the overall number of Court of Appeal matters finalised (including by abandonment, withdrawal, discontinuance, striking out or a stay) where one or both parties was self-represented reduced from 211 to 143.<sup>3</sup> Although the numbers have decreased, there is still a significant number of litigants self-represented in the Court of Appeal.

All litigants have a right to appear in person.<sup>4</sup> Yet, while it has been said that this right is “fundamental”, it would also be “disregarding the obvious” to pretend that the appearance of SRLs does not affect the capacity of the court to administer justice fairly and efficiently.<sup>5</sup> Further, SRLs may often face great obstacles to obtaining their desired outcomes as a result of their lack of understanding of the law and legal processes. Despite these difficulties, however, all litigants have a right to a fair trial and as such, judges (and other parties) must often take particular care to ensure that the court is fully apprised of all matters relevant to the proceedings and that justice between the parties is otherwise achieved.

In *Ley v R De W Kennedy (Finance) Pty Ltd*,<sup>6</sup> as cited in the later decision of *Rajski v Scitec Corporation Pty Ltd*,<sup>7</sup> Mahoney JA observed that the right of a litigant to present her or his case:

must not be seen as giving ... an absolute right to conduct a case, or to conduct a case in the manner and for the time that such a person chooses, whatever that choice may be. That right must be balanced against the rights of other parties who are involved in the litigation, including the right ... not to be involved in pointless litigation and to have the litigation conducted properly and with reasonable promptitude; and it must be balanced against the right of the public generally not to have the court's time wasted.

...

What steps will be appropriate, in a particular case, to prevent injustice being done to parties who find themselves involved in litigation conducted in this way, must, of course,

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<sup>1</sup> Supreme Court of Queensland, *Annual Report 2014-15* (2015) 10.  
<<http://www.courts.qld.gov.au/about/publications#Reports>>.

<sup>2</sup> Ibid 15.

<sup>3</sup> Ibid.

<sup>4</sup> See *Collins (alias Hass) v The Queen* (1975) 133 CLR 120, 122; *Supreme Court Act 1995* (Qld) s 90.

<sup>5</sup> *Cachia v Hanes* (1994) 179 CLR 403, 415.

<sup>6</sup> (Unreported, New South Wales Court of Appeal, Mahoney JA, 21 May 1975).

<sup>7</sup> (Unreported, New South Wales Court of Appeal, Kirby P, Samuels and Mahoney JJA, 16 June 1986); see also *Ivory v Telstra Corp Ltd* [2002] QCA 457 (Wilson J).

be determined in the light of the facts of that case; but it should be clear that it is proper that steps be taken to that end.<sup>8</sup>

With respect to terminology, views exist as to the appropriateness of ‘SRL’ to describe all circumstances in which a party appears in person.<sup>9</sup> Other possible terms include ‘unrepresented litigant/party’, ‘self litigant’, ‘litigant in person’ and ‘*pro se* litigant’.<sup>10</sup> Nonetheless, ‘SRL’ has been used in this chapter as that term is already commonly used in Queensland courts. Whichever is preferred, it should be noted that the term used describes a diverse group of people who appear without legal representation in court proceedings for a variety of reasons.

The following information is not intended to criticise or detract from the right of a person to represent themselves in legal proceedings. It does, however, seek to highlight some of those issues that arise for the court and for the other parties to litigation when a litigant appears without legal representation. All of the resources identified in the footnotes to this chapter are derived from, and are themselves, valuable sources of information regarding SRLs and may be consulted if concerns arise.

### A Who Are Self-Represented Litigants?

While “often consigned to one homogenous (largely problematic) group”<sup>11</sup> SRLs come from diverse cultural, economic and educational backgrounds. A few commonalities, however, can be identified.

As a group, SRLs are more likely than the population as a whole to be young, to be unemployed and to have lower education levels.<sup>12</sup>

“By definition [SRLs] lack the skills and abilities usually associated with legal professionals” and their “lack of knowledge of the relevant law almost inevitably leads to ignorance of the issues” necessary for the resolution of the matter in court.<sup>13</sup> A lack of familiarity with procedures both within and outside court may lead to a sense of

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<sup>8</sup> *Ley v R De W Kennedy (Finance) Pty Ltd* (Unreported, New South Wales Court of Appeal, Moffitt P, Reynolds JA, Mahoney JA, 21 May 1975).

<sup>9</sup> See E Richardson, T Sourdin and N Wallace, *Self-Represented Litigants: Literature Review* (Australian Centre for Justice Innovation, Monash University, 2012) 10-12 [1.4]-[1.11] <<http://www.law.monash.edu.au/centres/acji/projects/self-represented-litigants/self-rep-litigant-lit-review-accjsi-24-may-2012.pdf>>.

<sup>10</sup> *Ibid.*

<sup>11</sup> Australasian Institute of Judicial Administration and the Federal Court of Australia, *Forum on Self-Represented Litigants* (Sydney, 17 September 2004), as quoted in R W White, ‘Advocacy and Ethics: The Self-Represented Litigant’ (Paper presented at Young Lawyers Conference, Sydney, 18 October 2014) [2] <[http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/\\_assets/supremecourt/m670001i771003/white\\_20141018.pdf](http://www.supremecourt.justice.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m670001i771003/white_20141018.pdf)>. See also Judicial Studies Board (UK), *Equal Treatment Bench Book* (1<sup>st</sup> ed, 2004) 26 [8]-[10] (‘Equal Treatment Bench Book (UK)’) <[http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB\\_all\\_chapters\\_final.pdf](http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf)>.

<sup>12</sup> Richardson, Sourdin and Wallace, above n 9, 28 [3.15].

<sup>13</sup> Australasian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001), 3 <<http://www.aija.org.au/online/LIPREP1.pdf>> (‘Litigants in Person Management Plans’).

frustration at the perceived rigidity of the legal system and the length of time proceedings take to finalise.<sup>14</sup>

Further, whatever their reasons for self-representation, the subjectively-perceived 'stakes' in litigation mean that SRLs often experience "feelings of fear, ignorance, frustration, bewilderment and disadvantage, especially if appearing against a represented party."<sup>15</sup> This may lead to inappropriate behaviours, such as aggression, which the judge should seek to manage. Judges should aim to maintain a balance between assisting the SRL and also protecting their represented opponent from problems arising from the SRL's lack of legal and procedural knowledge.<sup>16</sup>

### B *Some Reasons for Appearing without Legal Representation*

Reasons for self-representation vary, however they include:

- a choice by the litigant to represent themselves;
- disillusionment with legal representatives and the legal system, including due to being either suspicious or resentful of the legal profession;
- not being able to afford legal representation;
- not qualifying for legal aid;
- not knowing they are eligible for legal aid;
- believing they are capable of running the case without a lawyer, sometimes despite legal advice that they cannot win;<sup>17</sup> and
- the unwillingness of legal representatives to act as a result of "perceived difficulties with the litigant's personal conduct or behaviour ... [which] may be the result of a disability, mental illness or an inability to communicate effectively in English."<sup>18</sup>

Further, a client may withdraw instructions or their legal representatives cease to act shortly before a matter is tried or heard. The litigant may take some time to find alternative representation at such a late stage and, if an adjournment is not possible, may have to act on her or his own behalf in the interim.<sup>19</sup>

There is no right to legal representation, except in criminal trials for serious offences in which, through no fault of their own, an indigent accused is unable to obtain legal representation.<sup>20</sup>

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<sup>14</sup> Ibid; ABC Radio National, 'Self Representing Litigants', *The Law Report*, 1 April 2014 (Elizabeth Pendlebury) <<http://www.abc.net.au/radionational/programs/lawreport/self-representatives-in-court/5355528>>.

<sup>15</sup> Equal Treatment Bench Book (UK), above n 11, 25.

<sup>16</sup> Ibid.

<sup>17</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 386 [5.147]

<<http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC89.pdf>> ('Managing Justice').

<sup>18</sup> Litigants in Person Management Plans, above n 13, 3.

<sup>19</sup> Ibid; see, e.g., *Jarrett v Westpac Banking Corporation* [1999] FCA 425.

<sup>20</sup> *Dietrich v The Queen* (1992) 177 CLR 292.

C *Self-Represented Litigants' Access to Information*

SRLs have greater access to legal information today than previously by virtue of the increase in publicly-accessible legal information, including in the form of fact sheets and assistance provided by government organisations and community legal centres.<sup>21</sup> Much good-quality material is available on the internet, meaning that most individuals even in regional areas generally have access to some information. For those who lack private internet access, the internet is now available on computers in most public libraries<sup>22</sup> while many Queensland Court precincts also provide free, albeit limited, internet access to the public through a number of wireless connection points or “hot spots”.<sup>23</sup> In addition, the Brisbane Law Courts Complex houses the Supreme Court Library, which is open to the public during opening hours of the Law Courts Complex. The Library’s research officers are able to provide only limited assistance to patrons.<sup>24</sup>

Access to electronic information still depends on an SRL’s knowledge of the existence of these sources and capacity to utilise them effectively. Some SRLs who are vulnerable or disadvantaged may lack the resources, knowledge or skills necessary both to locate and use a computer to obtain such information, or systems may not be set up to enable them to do so. These people may include older persons, people with low levels of formal education and literacy, people living in some institutions (including prisons) and people with sensory disabilities. Many SRLs may therefore still rely on information being available in hardcopy.<sup>25</sup> Others may be faced with difficulties such as the absence of interpreted materials; cross-sectional vulnerability and disadvantage may combine to obscure understanding of the law and legal process, despite the greater availability of information available.

II AREAS OF DIFFICULTY FACED BY SELF-REPRESENTED LITIGANTS

Difficulties faced by SRLs vary and the degree of difficulty experienced will depend on multiple factors. These factors include the SRL’s individual capabilities; the complexity of the proceedings; the type of party the SRL is in the proceeding (e.g. a plaintiff, respondent or defendant); and the extent of assistance available to them.

A lack of understanding of the relevant law and legal process may also lead to ignorance of matters that, for a lawyer, come as second nature by virtue of legal training. These

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<sup>21</sup> See, e.g., Queensland Legal Assistance Forum, *Legal Information* <<http://qlaf.org.au/legal-information.php>> (range of fact sheets produced by Queensland community legal centres and government agencies); QPILCH, *Fact Sheet Index* <<http://www.qpilch.org.au/resources/factsheets/index.htm>>; QPILCH, *Self Representation Service* (2015) <<http://www.qpilch.org.au/cms/details.asp?ID=564>>; Legal Aid Queensland, *Factsheets and Guides* <<http://www.legalaid.qld.gov.au/PUBLICATIONS/FACTSHEETS-AND-GUIDES/Pages/default.aspx>>; Legal Aid Queensland, *Legal Information* <<http://www.legalaid.qld.gov.au/LEGALINFORMATION/Pages/default.aspx>>; Queensland Courts, *Fact Sheets* (2 July 2014) <<http://www.courts.qld.gov.au/about/fact-sheets>>. See also Managing Justice, above n 17, 395-8 [5.169]-[5.171].

<sup>22</sup> See State Library of Queensland, *Find a Public Library* (2014) <<http://www.slq.qld.gov.au/visit-us/find-a-public-library>>.

<sup>23</sup> Queensland Courts, *Queensland Courts Wi-Fi* (4 March 2015) <<http://www.courts.qld.gov.au/representing-yourself-in-court/wi-fi>>.

<sup>24</sup> Supreme Court Library Queensland, *FAQs* (2015) <<http://www.sclqld.org.au/about-us/faqs/>>.

<sup>25</sup> Managing Justice, above n 17, 401 [5.175].

include the purpose of particular proceedings; courtroom formalities, such as bowing when entering court and not speaking across the bar table; and the language and specialist vocabulary of legal proceedings.<sup>26</sup> In respect of the last, despite having a meritorious claim, an SRL may be unable to put their case effectively in oral or written submissions, failing to address the true issues or identify the redress sought.<sup>27</sup>

Other SRLs may simply be unable to assess the merits of their claim accurately, which may lead to litigation that is found to be frivolous or vexatious.<sup>28</sup> This may be connected with a lack of objectivity and emotional distance from the court proceedings; the independence that is a hallmark of legal practice is notably absent with SRLs, often to their detriment.<sup>29</sup>

Clearly, a lack of the specialist skills of cross-examination and testing of evidence in court is a further disadvantage for SRLs. A lack of court experience and confidence, may also leave some SRLs more vulnerable to being bluffed.<sup>30</sup> Again, a lack of proficiency in the English language will render SRLs without adequate interpretation or translation assistance, which may compound their difficulties.<sup>31</sup>

### III MATTERS FOR CONSIDERATION – A WORKING GUIDE FOR JUDGES

In *Nagy v Ryan*, Gray J stated that:

The adversarial justice system is designed to be conducted with the assistance of persons of appropriate professional skill. It is inevitable that the presence of unrepresented litigants can give rise to problems.<sup>32</sup>

This sentiment was echoed by Deputy Chief Justice Faulks of the Family Court of Australia in 2013 when His Honour noted that, in an adversarial legal system such as that of Australia,

the court has a substantially passive role and relies on the parties to present all material that will be relevant/necessary to enable the court to make its decision... In the adversarial system, this lack of assistance from [an SRL lacking the knowledge and skill of a legal representative] hinders the court in discharging its function – that is, to make decisions about disputes parties cannot themselves resolve.<sup>33</sup>

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<sup>26</sup> Equal Treatment Bench Book (UK), above n 11, 26-7 [12], 32 [45]-[47]; Litigants in Person Management Plans, above n 13, 3.

<sup>27</sup> Equal Treatment Bench Book (UK), above n 11, 32 [46], 33 [49]; Richardson, Sourdin and Wallace, above n 9, 15 [2.4].

<sup>28</sup> Equal Treatment Bench Book (UK), above n 11, 26-7 [12].

<sup>29</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 302 (Mason CJ and McHugh J).

<sup>30</sup> Jeff Giddings, John Dewar and S Parker, 'Being Expected To Do More with Less: Criminal Law Legal Aid in Queensland' (1999) 23 Criminal Law Journal 69, 79-81.

<sup>31</sup> See, e.g., Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) 193 [10.53]-[10.54].

<sup>32</sup> [2003] SASC 37, [40].

<sup>33</sup> *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) 3 [6].

The Law Reform Commission of Western Australia observed in 1999, however, that when presented with an SRL, a judge may be “forced into an interventionist style” and “inadvertently becomes more of a manager of the trial while continuing to be the adjudicator.”<sup>34</sup> The Commission identified “dangers inherent in excessive judicial intervention” to include the following:

- the absence of norms and rules, making it difficult to review managerial decisions;
- the insidious influence of inappropriate performance standards;
- the loss of neutrality;
- the need to make decisions before all the facts are known;
- the impropriety of involvement in settlement negotiations; and
- the extra financial costs of managerial judging.<sup>35</sup>

In a 1998 report prepared by Professor Stephen Parker for the Australian Institute of Judicial Administration, it was recommended that:

All courts should have a Litigants in Person Plan that deals with every stage in the process, from filing through to enforcement, or the equivalent in criminal matters... so that systematic attention is given to the issues. As part of the Litigants in Person Plan, guidelines should be prepared by the judicial officers so that best practice is identified and shared between them about how to conduct a hearing where one or both parties are [self-]represented.<sup>36</sup>

Although this recommendation is now somewhat dated, it remains salient. As such, there have been various attempts made in different fora to exhaustively list the steps necessary to ensure a fair trial for SRLs (see Appendices A to D for examples). However, each case is different and it is therefore difficult to make a conclusive and general statement as to the necessary considerations.<sup>37</sup> As the Full Federal Court said in *Abram v Bank of New Zealand*,<sup>38</sup> “what a judge must 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”.<sup>39</sup> Nonetheless, the following part of this chapter will set out some of the major considerations.

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<sup>34</sup> Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia: Final Report*, Project No 92 (1999) 154 [18.7].

<sup>35</sup> *Ibid* 155 [18.7]. See also Justice Robert D Nicholson AO, ‘Litigants in Person’ (Speech delivered at the 21st Australasian Institute of Judicial Administration Conference, 20 September 2003) <<http://www.aija.org.au/ac03/papers/NicholsonJ.pdf>> 5-6.

<sup>36</sup> Stephen Parker, *Courts and the Public* (Australasian Institute of Judicial Administration, 1998) 166.

<sup>37</sup> *Nagy v Ryan* [2003] SASC 37, [43].

<sup>38</sup> [1996] ATPR 41-507, 43,341, 43,347.

<sup>39</sup> *Ibid*, as quoted in *Nagy v Ryan* [2003] SASC 37, [43].

A *Maintaining Impartiality and the Role of the Judge with Self-Represented Litigants*

As former Chief Justice de Jersey observed:

The extent to which judges may assist unrepresented parties is measured by reference to the fundamental principle that all parties have the right to a fair hearing regardless of whether they have legal representation. This is balanced by the limitation that the court needs to avoid compromising its impartial stance. Of course, in matters involving SRLs the degree of judicial intervention will depend very much on the particular circumstances of each case.<sup>40</sup>

Impartiality is the central theme of the judicial oath or affirmation of office. It requires judges to be fair and even-handed, to be patient and attentive to all parties, and to avoid stepping into the arena or appearing to take sides.<sup>41</sup>

However, as noted above, the lack of knowledge and skill on the part of many SRLs requires greater input in proceedings from judicial officers than where all parties have legal representation. Judges may need to take particular steps so that all relevant evidence may be heard and that the self-represented party knows and enforces their procedural rights. As such, when only one party is self-represented, the difficulty arises of maintaining a perception of impartiality and ensuring that no party feels the judge to be taking sides. Judges must ensure they do not apply different rules to SRLs or represented parties may see judicial intervention as partisan.<sup>42</sup> On the other hand, SRLs may perceive judges to be partial towards the represented party, by virtue of lawyers and judges being seen as part of the same “system” from which the SRL is excluded.<sup>43</sup>

What a judge must do to assist an SRL depends on the individual, the nature of the case, and the SRL’s intelligence and understanding of the case.<sup>44</sup> The court should also have regard to the position of the other party or parties and to the efficient conduct of the proceedings.<sup>45</sup> If an SRL is allowed to have complete discretion to present the case as he or she sees fit, the disadvantage is that the case may be prolonged, often with little benefit to the SRL.<sup>46</sup>

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<sup>40</sup> Chief Justice Paul de Jersey AC, ‘Keynote Address’ (Speech delivered at the Legal Educators’ State Conference, Parliament House, Brisbane, 13 August 2004) 9

<<http://archive.sclqld.org.au/judgepub/2004/dj130804.pdf>> (citations omitted).

<sup>41</sup> Australasian Institute of Judicial Administration, *Guide to Judicial Conduct* (2<sup>nd</sup> ed, 2002) 3.

<sup>42</sup> Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper No 62 (1999) [9.21]; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) 191 [10.46], quoting Australian Law Reform Commission, Submission No 26 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice*, 19 August 2003, 13.

<sup>43</sup> See, e.g. John Dewar, Barry W Smith and Cate Banks, *Litigants in Person in the Family Court of Australia*, Research Report No 20 to the Family Court of Australia (2000) 59.

<sup>44</sup> *Abram v Bank of New Zealand* [1996] ATPR 41-507, [1996] FCA 1650, applying *Neil v Nott* (1994) 121 ALR 148, 150. *Abram* was followed in *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, (1999) 166 ALR 129. However, the Queensland Court of Appeal has commented on the difficulty of making this evaluation and then providing assistance whilst still maintaining strict neutrality: *The Reserve Vault Pty Ltd v Barrier Reef Arts Pty Ltd* [2012] QCA 35.

<sup>45</sup> Cf *R v Morley* [1988] QB 601.

<sup>46</sup> See *ibid.*

The New South Wales Bar Association has commented that an SRL should not be given advice by the judicial officer as to the law or with respect to procedural issues: “Doing so may not only give the appearance of unfairness to other parties, but the advice may be given without full knowledge of the facts”.<sup>47</sup> The judge’s role is limited to providing information, rather than advice. Indeed, excessive intervention and assistance by a trial judge may amount to an error of law sufficient to ground a successful appeal if the judge’s duty to observe procedural fairness to all parties is thereby breached.<sup>48</sup>

### B *The Judge’s Role before a Hearing*

Problems that arise during the hearing of a matter often stem from the pre-hearing stage, when an SRL may have been unable to define the issues; gather evidence and put it into a useful and acceptable form; and to file documents in accordance with prescribed timeframes. These pre-hearing problems affect the nature and quality of the evidence presented at the hearing.<sup>49</sup> Many of these issues may be addressed by the utilisation of the Supervised Case List Involving Self Represented Parties (discussed below). The general points presented here may nonetheless be of use as background information and on any occasion where a referral to that list is, for some reason, not considered appropriate.

First and foremost, despite their lack of legal knowledge and skill, SRLs must comply with the rules of court, including as to pleading the case. The purpose of those rules is to enable a trial of the matter to proceed with the issues to be determined clearly defined, so that time is not wasted on irrelevant matters.<sup>50</sup>

However, even when the court brings deadlines and steps to be taken to an SRL’s attention through the giving of pre-hearing directions, SRLs sometimes fail to understand their obligations to comply. Judges should ensure that SRLs “leave a directions hearing appreciating exactly what is required of them”.<sup>51</sup> As such, a judge should always be ready to “explain fully the precise meaning of any particular direction or court order.”<sup>52</sup>

The duty to disclose documents may be neglected by SRLs, due to a lack of understanding of its necessity and significance. In accordance with the Equal Treatment Bench Book (UK), when a pre-trial hearing takes place, the judge may wish to provide a short, clear explanation of the duty of disclosure and the test as to whether or not a

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<sup>47</sup> New South Wales Bar Association, Guidelines for Barristers on Dealing with Self-Represented Litigants (2011) 15 [74]-[75], citing *Johnson v Johnson* (1997) 139 FLR 384, (1997) 22 Fam LR 141, (1997) FLC 97-764.

<sup>48</sup> *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389, 397 (Kirby P), citing *Escobar v Spindaleri* (1986) 7 NSWLR 51, 57, 59.

<sup>49</sup> Justice Mahla L Pearlman AM and Justice Nicola Pain, ‘The Dilemma Presented by the Self-Represented Party in Merit Hearings’ (Paper presented at the Australian Conference of Planning and Environment Courts and Tribunals, 5 September 2002) 6  
<[http://www.lec.justice.nsw.gov.au/Documents/pearlman\\_australian%20conference%20of%20planning%20and%20environment%20courts%20and%20tribunals.pdf](http://www.lec.justice.nsw.gov.au/Documents/pearlman_australian%20conference%20of%20planning%20and%20environment%20courts%20and%20tribunals.pdf)>.

<sup>50</sup> See, e.g., *Von Risefer v Permanent Trustee Company Pty Ltd* [2004] QSC 248; [2005] QCA 109; [2005] QCA 136.

<sup>51</sup> Equal Treatment Bench Book (UK), above n 11, 29 [30].

<sup>52</sup> *Ibid.*

document needs to be disclosed, to ensure disclosure is fully undertaken in a timely manner.<sup>53</sup>

Many SRLs do not have access to office facilities and have problems photocopying documents, preparing bundles and typing court documents. In relation to the preparation of bundles, SRLs may not appreciate that it is useful for the court for documents to be in chronological order and paginated.<sup>54</sup> At the least, SRLs should be encouraged to present documents in an organised and logical fashion. Note that the Law Courts Complex in Brisbane offers to eligible individuals free use of a resource room for legal research and case preparation. The room contains a computer with internet access, copying and printing facilities and a range of hardcopy brochures and legal fact sheets. The service is available Monday to Friday, 8:30am to 4:30pm, excluding Wednesdays from 9:30am to 4:30pm. It is open to SRLs in District or Supreme Court civil matters acting for themselves or for a small corporation of community organisation.<sup>55</sup> Use of the service must be arranged in advance over the registry counter, by telephone or by email.<sup>56</sup>

SRLs may not be aware of the possibility of resolving their dispute by settlement, including through alternative dispute resolution (“ADR”), once court proceedings have been commenced. Some SRLs may be unaware that they are permitted to speak with the other parties, who should all be asked whether they have tried to resolve their differences by negotiation.<sup>57</sup> ADR options should also be explained to SRLs; the court may refer the dispute to mediation or case appraisal if it appears that it could be settled in this way.<sup>58</sup> Finally, judges should ensure that self-represented parties are aware of the need to tell the court if they settle their cases before the appointed hearing date.<sup>59</sup>

### C *The Judge’s Role during a Hearing*

The court process and atmosphere can be unnerving for SRLs. Appearing before the court is not taken lightly even by experienced counsel; the added pressures faced by SRLs of dealing with a system that they do not well understand and their own emotional attachment to the dispute mean that SRLs often struggle to give a good account of their case.<sup>60</sup> It is advisable that the judge inform the SRL from the outset to speak slowly and take time in the presentation of their case, which may reduce some pressure on the SRL and enable them to articulate their case more clearly.

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<sup>53</sup> Ibid 30 [34].

<sup>54</sup> Ibid 30 [35].

<sup>55</sup> Queensland Courts, *Representing Yourself in Court – Common Questions* (11 February 2015) <<http://www.courts.qld.gov.au/representing-yourself-in-court/advice-and-support/common-questions>>.

<sup>56</sup> Ibid. As at June 2015, the email address is [srlservice@justice.qld.gov.au](mailto:srlservice@justice.qld.gov.au) and the telephone number is the general Registry number, (07) 3247 4313. The following note appears on the webpage cited in *ibid*: “If computer access is required, you will need to provide photo identification. An e-mail address is also required to set up a personal user name and password which remains accessible for a period of 35 days.”

<sup>57</sup> Equal Treatment Bench Book (UK), above n 11, 33 [51].

<sup>58</sup> *Ibid*; *Uniform Civil Procedure Rules* 1999 (Qld) r 320.

<sup>59</sup> Equal Treatment Bench Book (UK), above n 11, 33 [51].

<sup>60</sup> *Ibid* 12 [14], 26-7 [12]-[13].

Further, as noted above, SRLs sometimes have problems understanding the specialist vocabulary of legal proceedings. Language throughout the hearing should therefore be kept simple and clear, while technical terms should be explained.<sup>61</sup>

At the beginning of the proceeding, the judge should also identify and, if possible, have the SRL and other parties agree upon the real issues in the case. Careful explanation is required so that the SRL appreciates why those are the issues to be addressed. This may help to shorten the proceedings by focussing attention on the real issues and therefore avoiding irrelevant arguments.<sup>62</sup>

The judge should also explain to the SRL matters such as:

- the purpose of the hearing and the particular issue on which a decision is to be made;
- that the issue is decided on the evidence, documentary and oral, before the court;<sup>63</sup>
- the manner in which the hearing is to proceed; and
- the order of the calling of witnesses and the party's right to cross-examine witnesses.
- the role of case law as precedent or persuasive authority;
- the existence of various procedural rules that seek to ensure parties receive a fair hearing;<sup>64</sup> and
- the SRL's right to object to certain matters, such as evidence or the taking of a particular procedural course.<sup>65</sup>

The need for such explanations may recur throughout the hearing as various issues arise.<sup>66</sup>

### 1 *Evidentiary Issues*

Problems may arise in relation to an SRL's inability to present evidence, as well as to deal with the evidence presented by other parties.<sup>67</sup> It has been suggested that judges may have to "exercise greater control over the order and manner of presentation of the evidence by SRLs than would normally be the case".<sup>68</sup> This need can arise due to a lack of structure in an SRL's case, itself resulting from an inability to appreciate the real issues

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<sup>61</sup> See, e.g. Dewar, Smith and Banks, above n 43, 63-4.

<sup>62</sup> Equal Treatment Bench Book (UK), above n 11, 32 [45], [47], 33 [49]-[50].

<sup>63</sup> Ibid 31 [44].

<sup>64</sup> *Moore-McQuillan v Police* (1998) 196 LSJS 488, 496-497 (Bleby J); see also *Brehoi v Minister for Immigration* [2001] FCA 932.

<sup>65</sup> See, e.g., Dewar, Smith and Banks, above n 43, 85, with reference to *Johnson v Johnson* (1997) 139 FLR 384; (1997) 22 Fam LR 141; (1997) FLC 97-764.

<sup>66</sup> Justice DA Ipp, 'Judicial Intervention in the Trial Process' (1995) 69 *Australian Law Journal* 365, 370.

<sup>67</sup> Pearlman and Pain, above n 48, 7.

<sup>68</sup> Australian Institute of Judicial Administration and the Federal Court of Australia, *Report on the Forum on Self-Represented Litigants* (Australian Institute of Judicial Administration, 2005) 10 ('SRL Forum Report').

to be addressed.<sup>69</sup> Submissions can often focus on hardship and fairness, rather than on these issues.<sup>70</sup>

Further, SRLs sometimes do not fully appreciate the need to present admissible evidence or to prove what they say by evidence. As such, evidence may not be given in an acceptable format; for example, affidavits may not be properly sworn or may be filed out of time. Some SRLs do not approach witnesses in advance or ask them to come to court,<sup>71</sup> while the need for expert evidence is also frequently misunderstood.<sup>72</sup> Where SRLs have not arranged for a witness, whether expert or lay, to be present to testify, a judge may be met with an adjournment application. Clearly, this should be determined on the merits, however judges should take into account the fact that an SRL may genuinely not have appreciated the necessity to have witnesses attend.<sup>73</sup>

SRLs may also try to give evidence or opinions from the bar table as to their version of events without offering any form of proof or corroboration, not realising that this is not evidence that the court can accept.<sup>74</sup> Judges should explain that the SRL is entitled to read and rely upon any affidavit that has already been filed, or that he or she may give sworn evidence-in-chief from the witness box, and may be cross-examined on that evidence.<sup>75</sup> The SRL should also understand that he or she is entitled to make submissions about the evidence from the bar table without being subject to cross-examination.<sup>76</sup>

When oral evidence is being taken, the judge may assist the SRL to obtain basic information from witnesses called such as their name, address and occupation.<sup>77</sup> The judge should also explain the distinction between evidence and submissions and may assist the litigant to understand the correct phrasing of questions, particularly in evidence-in-chief.<sup>78</sup>

SRLs are unlikely to be skilled at cross-examination, which is a difficult process. They may ask inappropriate questions or put their questions in a form that is not readily understandable by the witness or the court. SRLs may face particular problems cross-examining expert witnesses of the other party.<sup>79</sup>

If another party seeks to tender evidence which is or may be inadmissible, the judge should advise an SRL of the right to object and enquire whether the SRL does in fact object to that material. Similarly, if a question is asked or evidence is sought to be

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<sup>69</sup> Ibid.

<sup>70</sup> See Pearlman and Pain, above n 49, 7.

<sup>71</sup> Equal Treatment Bench Book UK, above n 11, 31 [40].

<sup>72</sup> SRL Forum Report, above n 68, 10; Pearlman and Pain, above n 49, 7-8.

<sup>73</sup> Equal Treatment Bench Book UK, above n 11, 31 [41].

<sup>74</sup> Ibid.

<sup>75</sup> Louise Byrne and Craig J Leggat, 'Litigants in Person – Procedural and Ethical Issues for Barristers' (1999) 19 *Australian Bar Review* 41, 44.

<sup>76</sup> *Randwick City Council v Fuller* (1996) 90 LGERA 380, [1996] NSWSC 105, as cited in *ibid*.

<sup>77</sup> See *In Marriage of F* (2001) 161 FLR 189, 226-227 [253], [2001] Fam CA 348 (known as the 'Litigants in Person Guidelines Case').

<sup>78</sup> Equal Treatment Bench Book UK, above n 11, 33 [52].

<sup>79</sup> Pearlman and Pain, above n 49, 8.

tendered in respect of which the SRL has a possible claim of privilege, the judge should inform the SRL of their rights in that regard.<sup>80</sup>

### 2 Matters Specific to Criminal Proceedings

Criminal defendants are most likely to come before the Supreme Court Trial Division self-represented on bail applications. It is difficult to obtain legal aid funding for Supreme Court bail applications, as additional criteria apply to the usual means and merits tests: the prosecution must be opposing bail, there must be a strong likelihood of bail being granted<sup>81</sup> and the applicant must generally also have legal aid for the substantive criminal charges.<sup>82</sup>

Although less common by virtue of *Dietrich v The Queen*,<sup>83</sup> when a criminal accused is self-represented at trial, the court must give so much information as is necessary to enable a fair trial, including advice as to procedural rules such as any right to *voir dire*.<sup>84</sup> Information to be given to a self-represented criminal accused at trial is set out in Chapter 6 of the Supreme and District Courts Benchbook.<sup>85</sup>

SRLs also appear relatively frequently on criminal appeals and applications for leave to appeal against sentence: 23.4% of judgments delivered in criminal matters before the Court of Appeal in 2014-15 were from proceedings involving at least one SRL.<sup>86</sup>

### 3 McKenzie Friends

A McKenzie friend is a person, generally without legal qualifications, who assists an SRL in presenting their case by taking notes, making suggestions and giving advice from the bar table.<sup>87</sup>

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<sup>80</sup> Rosemary Hunter, 'Litigants in Person in Contested Cases in the Family Court' (1998) 12 *Australian Journal of Family Law* 171, referring to *Johnson v Johnson* (1997) 139 FLR 384, (1997) 22 Fam LR 141, (1997) FLC 92-764.

<sup>81</sup> Legal Aid Queensland, *Supreme Court Bail* <<http://www.legalaid.qld.gov.au/about/Policies-and-procedures/Grants-handbook/What-do-we-fund/Criminal-law/Bail/Pages/Supreme-court-bail.aspx>>; Legal Aid Queensland, *Guidelines – State – Criminal: Guideline 6 – Bail* <<http://www.legalaid.qld.gov.au/about/Policies-and-procedures/Grants-policy-manual/Pages/guidelines-state-criminal.aspx#Guideline%206%20-%20Bail>>.

<sup>82</sup> Legal Aid Queensland, *Supreme Court Bail* <<http://www.legalaid.qld.gov.au/about/Policies-and-procedures/Grants-handbook/What-do-we-fund/Criminal-law/Bail/Pages/Supreme-court-bail.aspx>>; Legal Aid Queensland, *Guidelines – State – Criminal: Guideline 1 – Specified and Non-Specified Criminal Proceedings* <<http://www.legalaid.qld.gov.au/about/Policies-and-procedures/Grants-policy-manual/Pages/guidelines-state-criminal.aspx#Guideline%201%20-%20Specified%20and%20Non-Specified%20Criminal%20Proceedings>>.

<sup>83</sup> (1992) 177 CLR 292.

<sup>84</sup> *MacPherson v The Queen* (1981) 147 CLR 512.

<sup>85</sup> See Queensland Courts, 6: *Unrepresented Defendant*, Supreme and District Courts Benchbook (25 August 2014) <[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0018/86004/sd-bb-6-unrepresented-deft.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0018/86004/sd-bb-6-unrepresented-deft.pdf)>.

<sup>86</sup> Supreme Court of Queensland, *Annual Report 2014-15* (2015) 10. <<http://www.courts.qld.gov.au/about/publications#Reports>>

<sup>87</sup> In *McKenzie v McKenzie* [1971] P 33; [1970] 3 WLR 472, the English case from which this term is derived, the individual who sought to assist the SRL was an Australian barrister who was not qualified to

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Although often regarded as an indulgence by Australian courts<sup>88</sup> a discretion exists to allow an application for such assistance.<sup>89</sup> However, this discretion is not usually exercised in favour of an SRL who has not applied for, or who has refused, legal assistance.<sup>90</sup> In *Damjanovic v Maley*<sup>91</sup> the court recognised the following six principles, derived from existing case law, as relevant to the exercise of the court's discretion on such applications, as follows:

- the complexity of the case;
- genuine difficulties of the unrepresented party;
- the unavailability of disciplinary measures and a duty to the court by lay advocates;
- protection of the client and the opponent;
- whether the matter is heard in a higher or lower court; and
- the interests of justice.<sup>92</sup>

The McKenzie friend is not an advocate and accordingly cannot generally address the court or conduct proceedings on the SRL's behalf. However, despite lacking a right of audience, case law indicates that the court may allow a McKenzie friend to speak and act for an SRL in court proceedings.<sup>93</sup>

However, the cases emphasise that lay advocates do not owe the same ethical duties to the court and opponents as legal representatives do.<sup>94</sup> Furthermore, lay advocates do not have the training, qualifications and experience of legal practitioners and are, at the same time, uninsured, leaving both them and their 'client' open to considerable risk should any allegation of negligence arise.<sup>95</sup>

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practise in the United Kingdom: see 'Supreme Court Oration' (2015) 72 *Hearsay* <[http://www.hearsay.org.au/index.php?option=com\\_content&task=view&id=1768&Itemid=48](http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1768&Itemid=48)>.

<sup>88</sup> Litigants in Person Management Plans, above n 13, 8, citing *R v E J Smith* [1982] 2 NSWLR 608 and Justice Dean Mildren 'Don't Give Me Any LIP – The Problem of the Unrepresented Litigant in Criminal Trials' (1999) 19(1) *Australian Bar Review* 30, 35-6.

<sup>89</sup> *Schagen v The Queen* (1993) 8 WAR 410, (1993) 65 A Crim R 500; *Smith v The Queen* (1985) 159 CLR 532, 534.

<sup>90</sup> Justice John W Perry, 'The Unrepresented Litigant' (Paper presented at the 6<sup>th</sup> Conference of the Australasian Institute of Judicial Administration, September 1998) 7. The fact that the appellant mistrusts lawyers is not a sufficient reason to allow a legally unqualified person to represent a friend in court, even if that person argued that the appellant's English language skills were not good enough for him to conduct the proceedings for himself: *Damjanovic v Maley* (2002) 195 ALR 256, (2002) 55 NSWLR 149, [2002] NSWCA 230.

<sup>91</sup> (2002) 195 ALR 256, (2002) 55 NSWLR 149, [2002] NSWCA 230.

<sup>92</sup> *Ibid* [69]-[87].

<sup>93</sup> See the discussion in *Damjanovic v Maley* (2002) 195 ALR 256; (2002) 55 NSWLR 149; [2002] NSWCA 230, esp [37]-[38], [46]-[48].

<sup>94</sup> *Ibid* [74], [80] and the cases therein cited.

<sup>95</sup> *Ibid* [79]; Legal Services Consumer Panel (UK), *Fee-Charging McKenzie Friends* (2014) 4 [1.10], 12 [3.9], 25 [4.34], 33 [5.32]

<[http://www.legalservicesconsumerpanel.org.uk/publications/research\\_and\\_reports/documents/2014%2004%2017%20MKF\\_Final.pdf](http://www.legalservicesconsumerpanel.org.uk/publications/research_and_reports/documents/2014%2004%2017%20MKF_Final.pdf)>.

### 4 *Pro Bono Assistance*

QPILCH (Queensland Public Interest Law Clearing House Inc.) has been in operation since 2001, working predominantly as a referral agency connecting individuals with civil law problems to law firms and barristers whose services are provided for low or no fees. The criteria for pro bono referral are that the matter:

- has reasonable prospects of success;
- requires legal assistance (for example, resolution by negotiation is not feasible in the circumstances of the dispute); and
- justifies the use of pro bono assistance: that is, “the likelihood of success and risks of taking on the case are supported by the important social justice issues of the case”.<sup>96</sup>

QPILCH also runs a number of clinics providing direct legal advice and assistance. These include the Self Representation Service, which arranges appointments for SRLs with solicitors from more than 20 law firms in Brisbane. These appointments may take place in person or over the telephone and enable the SRL to receive support in completing discrete tasks throughout court proceedings by means of:

- advice about whether, and how, to commence or defend proceedings;
- advice about court and tribunal processes;
- assistance to draft documents such as applications, statements of claim, defences, affidavits, submissions and court and tribunal forms;
- assistance with preparing for trial and appearing in court;
- advice about appealing court and tribunal decisions;
- referral for pro bono mediation; and
- advice about other options for the resolution of disputes.<sup>97</sup>

Both the Pro Bono Referral Service and Self Representation Service are accessible on completion of an application and, like other QPILCH services, are available only to individuals who are ineligible for legal aid, while also being unable to afford private legal representation.<sup>98</sup>

A variety of other community legal centres provide pro bono legal advice and casework assistance on criminal, civil and family law matters across the State.<sup>99</sup>

With respect to criminal appeals, the Court of Appeal Pro Bono List operates to ensure that counsel are available even where legal aid is not. The scheme was initiated in 1999/2000 through the combined effort of judges of the Court of Appeal, the Bar Association of Queensland and the Queensland Law Society. Initially, representation

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<sup>96</sup> QPILCH, *Pro Bono Referral Services* (2015) <<http://www.qpilch.org.au/cms/details.asp?ID=6>>. For further information, see QPILCH, *Referral Service – Information for Applicants* <[http://www.qpilch.org.au/dbase\\_upl/3a\\_Referral\\_Service\\_information\\_for\\_applicants.pdf](http://www.qpilch.org.au/dbase_upl/3a_Referral_Service_information_for_applicants.pdf)>.

<sup>97</sup> QPILCH, *Self Representation Service* (2015) <<http://www.qpilch.org.au/cms/details.asp?ID=564>>.

<sup>98</sup> *Ibid*; QPILCH, *Pro Bono Referral Services* (2015) <<http://www.qpilch.org.au/cms/details.asp?ID=6>>.

<sup>99</sup> See QAILS, *Queensland Community Legal Centre Directory* <[http://www.qails.org.au/01\\_directory/search.asp?action=search](http://www.qails.org.au/01_directory/search.asp?action=search)> for a list of community legal centres affiliated with the peak body and access to information about each.

from the List was available only to those appellants convicted of murder or manslaughter. In 2002/2003, it was “extended to juveniles and those under an apparent disability”.<sup>100</sup>

This scheme continues to operate, with 41 counsel (including several Senior and Queen’s Counsel) on the List in the 2014-15 year.<sup>101</sup>

## 5 Vexatious Proceedings

The *Vexatious Proceedings Act 2005* (Qld) was enacted primarily to give the Supreme Court wider scope in determining applications for orders about vexatious proceedings. Specifically, the court may now take into account proceedings commenced by, or orders made in respect of, particular litigants across all Australian jurisdictions to that end.<sup>102</sup>

Under that Act, the focus is now on the vexatious nature of the proceeding, rather than the person, although a vexatious proceeding order affects the person’s ability to conduct existing and future proceedings.<sup>103</sup> A vexatious proceeding is defined as:

- (a) a proceeding that is an abuse of the process of a court or tribunal; and
- (b) a proceeding instituted to harass or annoy, to cause delay or detriment, or for another wrongful purpose; and
- (c) a proceeding instituted or pursued without reasonable ground; and
- (d) a proceeding conducted in a way so as to harass or annoy, cause delay or detriment, or achieve another wrongful purpose.<sup>104</sup>

SRLs are more likely to be the subject of vexatious proceeding orders than people with legal representation because of the absence of restraint in the form of independent advice, their lack of understanding of the law and legal process, and the absence of a lawyer’s ethical duties. That is not to say that persons the subject of such orders will never have meritorious claims. However, even in such circumstances their engagement with the courts may call for a more managerial approach to be taken by the court if challenging behaviours are exhibited.

The court may, of its own motion, make an order prohibiting a person from continuing or instituting proceedings if satisfied that the person has frequently instituted or conducted vexatious proceedings in Australia.<sup>105</sup> If such an order is made, a vexatious litigant may not institute a proceeding without an application to the court for leave to institute the proceeding.<sup>106</sup> The vexatious litigant must comply with the requirements of the *Vexatious Proceedings Act 2005* (Qld) and Practice Direction 5 of 2010 (Amended).<sup>107</sup>

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<sup>100</sup> Supreme Court of Queensland *Annual Report 2002-2003*, 20  
<[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0006/84768/sc-ar-2002-2003.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0006/84768/sc-ar-2002-2003.pdf)>.

<sup>101</sup> See Supreme Court of Queensland *Annual Report 2014-2015*, 17  
<<http://www.courts.qld.gov.au/about/publications#Reports>>.

<sup>102</sup> See Explanatory Notes, *Vexatious Proceedings Bill 2005* (Qld) 1-2.

<sup>103</sup> Compare *Vexatious Proceedings Act 2005* (Qld) s 6 with *Vexatious Litigants Act 1981* (Qld) s 3.

Nonetheless, see Queensland Courts, *List of Persons against whom a Vexatious Proceedings Order Has Been Made Pursuant to the Vexatious Proceedings Act 2005* (29 May 2015)  
<[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0006/93912/vexatious-proceedings-orders.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0006/93912/vexatious-proceedings-orders.pdf)>.

<sup>104</sup> *Vexatious Proceedings Act 2005* (Qld) Schedule: Dictionary.

<sup>105</sup> *Vexatious Proceedings Act 2005* (Qld), s 6.

<sup>106</sup> *Vexatious Proceedings Act 2005* (Qld), s 10. See also *Uniform Civil Procedure Rules 1999* (Qld), r 389A.

<sup>107</sup> See especially *Vexatious Proceedings Act 2005* (Qld) s 11; Practice Direction 5 of 2010 (Amended), paragraph 2(b); see also *Barber v Mbuzi* [2015] QCA 269.

Alternatively, the litigant may apply to the court to have the order varied or set aside.<sup>108</sup> In either case, the application must be supported by an affidavit setting out the facts material to the application.<sup>109</sup>

### *C The Judge's Role after a Hearing*

If judgment is reserved, it may be useful to advise an SRL of the period within which judgments are usually handed down by the court (that is, three months). This is information available to the legal profession and it may relieve the SRL of some anxiety to know that the timeframe for judgment delivery is not indeterminate. This should also reduce unnecessary contact with the court.

SRLs should be advised that no party should contact the court after judgment is reserved unless they have first written to all other parties' legal representatives (and any other SRLs) providing a copy of the proposed communication. Any contact with the court must be in writing, addressed to the judge's Associate, copied to all other parties.

If submissions as to costs have not been made, the judge should consider drawing this question to the parties' attention, without offering any specific advice to the SRL. If an application is made that an SRL pays the costs, the judge should give the SRL an opportunity to argue why the SRL should not pay costs (whether to follow the event or otherwise). Note that a court has no power to order the equivalent of professional costs in favour of an SRL.<sup>110</sup>

## IV THE SUPERVISED CASE LIST INVOLVING SELF-REPRESENTED PARTIES

The Court maintains a list specifically for SRL – the Supervised Case List Involving Self Represented Parties ('SRL SCL'). The list is designed to ensure that matters in which one or more of the parties are self-represented are dealt with efficiently by the courts. It is governed by Practice Direction 10 of 2014<sup>111</sup> and applies only to matters within the civil jurisdiction of the Supreme Court's Brisbane Registry.<sup>112</sup> The SRL SCL operates to the exclusion of other lists; a matter involving an SRL cannot simultaneously be under case flow management or on the general Supervised Case List.

The Practice Direction is comprehensive, setting out the process by which matters are placed on the list, material then provided to SRLs, the procedure of review hearings, directions and supervision, listing for trial and removal from the list. It includes matters to be considered and steps to be taken by the allocated supervising judge, as well as expectations of the parties.

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<sup>108</sup> *Vexatious Proceedings Act* 2005 (Qld), s 7.

<sup>109</sup> See *Vexatious Proceedings Act* 2005 (Qld), s 11(3); Practice Direction 5 of 2010 (Amended), paragraphs 2(c) and 3(b)

<<http://www.courts.qld.gov.au/courts/supreme-court/civil-registry/supreme-court>>.

<sup>110</sup> *Cachia v Hanes* (1994) 179 CLR 403, 414 (Mason CJ, Brennan, Deane, Dawson and McHugh JJ).

<sup>111</sup> Supreme Court Practice Direction 10 of 2014

<[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0008/225638/sc-pd-10of2014.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0008/225638/sc-pd-10of2014.pdf)>.

<sup>112</sup> *Ibid.*

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Essentially, parties attend review hearings at which they provide updates to the supervising judge as to the current state of the matter and progress since the previous review. The supervising judge then makes orders to assist the parties to resolve the dispute that are consistent with the philosophy of the UCPR and the need for an SRL to have a fair opportunity to present their case, taking into account the difficulties faced by SRLs in this regard. The parties should attempt to agree on the next directions to be made before each review, however the supervising judge may make such orders as are appropriate.

No trial date will be allocated until a notice of request for trial date is filed (various procedural matters by then having been addressed) or the supervising judge orders otherwise. Once a trial date is set, information is to be provided to the trial judge well in advance of the commencement of the trial as to delivery of the pleadings to the trial judge and other procedural matters. A matter may be removed from the SRL SCL by order of any judge, or by the Supervised Case List Manager in the Registry if the matter is finalised by judicial determination, filing of a notice of discontinuance under UCPR r 309 or settlement as notified in accordance with UCPR r 308A.

Reference should be had to the Practice Direction for detailed information as to the operation of the list: see

[http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0008/225638/sc-pd-10of2014.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0008/225638/sc-pd-10of2014.pdf).

## CHAPTER 13: CHILDREN

### I INTRODUCTION

In 1997, the Australian Law Reform Commission published the seminal report *Seen and Heard: Priority for Children in the Legal Process*.<sup>1</sup> The report acknowledged for the first time that “Australia’s legal processes have consistently... marginalis[ed], ignor[ed] and mistreat[ed] the children who turn to them for assistance.”<sup>2</sup> It focused largely on the treatment of children under Commonwealth law, including children charged with Commonwealth criminal offences and those giving evidence in both criminal and civil proceedings. In 2000, the Queensland Law Reform Commission published a two-volume report examining issues relating to children giving evidence in Queensland Courts and how those children might be affected by the process.<sup>3</sup> Both reports (still the most recent and relevant) gave rise to changes in the law, particularly in relation to evidence, to the benefit of children.<sup>4</sup> Yet despite these changes, children and young people<sup>5</sup> are still generally less well-equipped to interact with legal processes than are most adults.

In its 2014-15 youth justice report, the Australian Institute of Health and Welfare reported that, on an average day in Australia, about 5,600 young people (aged 10 and older) were under youth justice supervision due to their involvement, or alleged involvement, in crime.<sup>6</sup> This figure represented a 23% decrease in young people compared to five years prior. Supervision occurred predominantly in the community, with only 15% of young people being supervised in detention. The majority of young people under supervision were male (82%) and almost half were Indigenous (43%). In fact, Indigenous young people aged 10–17 were about 15 times as likely as non-Indigenous young people to be under supervision on an average day.

This Chapter will provide a range of information with respect to children, including highlighting particular matters that should be considered when a child is involved in Supreme Court proceedings. It will first discuss matters of child development, then turn to consider various ways in which children interact with court processes, both criminal and civil. Particular legislative measures of relevance to the evidence of children will then briefly be canvassed.

### II CHILD DEVELOPMENT

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

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<sup>1</sup> Report No 84 (1987) (‘ALRC Report 84’).

<sup>2</sup> Ibid, ‘Overview’.

<sup>3</sup> *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report No 55 (2000) (‘QLRC Report 55’).

<sup>4</sup> Australian Law Reform Commission, Australian Government, *Children in the Legal Process* (20 June 2011) <<http://www.alrc.gov.au/inquiries/children-legal-process>>.

<sup>5</sup> The term ‘young people’ is used alongside ‘children’ throughout this chapter to recognise the developing capacity of under-18s and the fact that use of the term ‘child’ for those of greater maturity, while correct in law, can be perceived as patronising and disempowering.

<sup>6</sup> Australian Institute of Health and Welfare, *Youth Justice in Australia 2014-15*, Bulletin 133 (April 2016) <<http://www.aihw.gov.au/publication-detail/?id=60129554714>>.

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. It is well recognised today that childhood and adolescence are key developmental phases, and that early experiences can affect that development. Parenting, including parental absence, plays a fundamental role in how children come to perceive themselves, as well as the world around them and how they interact with it. This includes matters such as the understanding of right and wrong, impulse control, and the taking of responsibility for one's actions.

Although some theorists have argued for the existence of static developmental stages, such theories can provide little explanation of broad individual variations.<sup>7</sup> Each child will grow at their own pace, in their own way, as a product of both nature and nurture.

The development of a child's brain, however, follows a well-charted course. Although neurons continue to be created in the human brain into adulthood, 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 foetal growth. The areas of the brain necessary for higher-level functioning, such as emotion, language and abstract thought, are relatively unsophisticated.<sup>8</sup>

"Brain development, or learning, is ... the process of creating, strengthening, and discarding connections among the neurons": the synapses.<sup>9</sup> The 'pruning', or elimination, of synapses is a normal process, which continues through adolescence, well into adulthood.<sup>10</sup> At the same time, as the brain develops, 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.<sup>11</sup>

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.<sup>12</sup> It is possible to ameliorate this to some degree in later life, but it is certainly not as easy.<sup>13</sup> 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 these children struggle to comprehend any later attempts at nurturing and kindness.<sup>14</sup>

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<sup>7</sup> Kurt W Fischer and Thomas R Bidell, 'Dynamic Development of Action and Thought' in William Damon and Richard M Lerner (eds), *The Handbook of Child Psychology* vol 1 (John Wiley & Sons, 2006) 314, 315, 332-3, 336.

<sup>8</sup> United States Department of Health and Human Services, *Understanding the Effects of Maltreatment on Brain Development* Issue Brief (November 2009) 2 ('USDHHS').

<sup>9</sup> *Ibid* 3.

<sup>10</sup> *Ibid*; Jay D Aronson, 'Neuroscience and Juvenile Justice' (2009) 42 *Akron Law Review* 917, 922.

<sup>11</sup> USDHHS, above n 8, 3; Aronson, above n 10, 922.

<sup>12</sup> USDHHS, above n 8, 4.

<sup>13</sup> *Ibid* 4-5.

<sup>14</sup> *Ibid* 9; Judy Cashmore, 'The Link Between Child Maltreatment and Adolescent Offending: Systems Neglect of Adolescents' (2011) 89 *Family Matters* 34-5.

A further spurt of synapse pruning and myelination occurs around puberty in the area of the brain that controls planning, impulse control and reasoning.<sup>15</sup> Due to this on-going development in areas of higher-level function, adolescents tend to rely on more primitive areas of the brain in social interaction, which has been shown to lead to misinterpretation of emotions in others.<sup>16</sup> Puberty and adolescence are challenging times by virtue of physical growth and change, as well as social pressures. At the same time, young people are generally not well-equipped mentally to make reasoned choices, particularly when under peer pressure or stressful conditions. This can lead to impulsive behaviour,<sup>17</sup> which is characteristic of youth offending, as discussed below.

There is now reliable research to show that abuse and neglect of children can lead to altered brain functionality. A link also exists between child abuse and neglect or involvement with the child protection system and subsequent youth offending.<sup>18</sup>

Brain development continues throughout the human lifespan.<sup>19</sup> Nonetheless, legal adulthood commences at 18 years (and adult criminal responsibility at 17 in Queensland). Below this age, vulnerabilities associated with physical and mental immaturity are acknowledged in law and in society more broadly. These play into how children and young people comprehend, perceive and interact with the justice system, as will be discussed in more detail in the next section.

### III CHILDREN AND THE COURTS

#### A Capacity

Just like adults, children and young people may be involved in a variety of court proceedings in many different roles. It is certainly less common that children and young people become involved in civil and criminal proceedings than do adults. Nonetheless, children have the same human rights as adults and can also have the capacity to make decisions affecting those rights and their lives.

The question of that capacity was decided by the United Kingdom's House of Lords in the seminal case of *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112 (*'Gillick'*), as approved by the High Court of Australia in *Secretary, Department of Health and Community Services v JWB & SMB* (1992) 175 CLR 218 (also known as *'Marion's Case'*). In the High Court, a majority quoted *Gillick* as to the test for capacity being whether a "minor... achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed".<sup>20</sup> Although both cases were decided in the context of medical treatment, the test applies more broadly in relation to decisions that children and young people may make about their lives. This is because "[t]he reasoning behind the decision [in *Gillick*] was drawn from a recognition by the Court of children's increasing ability, as they gain in maturity, to make their own decisions about

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<sup>15</sup> USDHHS, above n 8, 5-6; Aronson, above n 10, 922-3.

<sup>16</sup> USDHHS, above n 8, 6; Aronson, above n 10, 924-5.

<sup>17</sup> USDHHS, above n 8, 6; Aronson, above n 10, 921-2.

<sup>18</sup> See generally Cashmore, above n 14.

<sup>19</sup> USDHHS, above n 8, 3; Aronson, above n 10, 917.

<sup>20</sup> *Marion's Case* (1992) 175 CLR 218, [19], quoting *Gillick* [1986] AC 112, 189.

their lives in general”.<sup>21</sup> Both cases eschewed the setting of a fixed age by virtue of individual variations in mental development, as highlighted in the discussion of brain development above.

### B *Levels of Understanding*

Studies into children’s comprehension of legal systems and court processes commenced around the mid-1980s. This early research indicated that, while understanding increased with age, children’s knowledge of the mechanisms and persons involved in court proceedings was quite limited.<sup>22</sup> One such study suggested that, contrary to expectations, a child’s prior involvement in court proceedings as a witness did not provide the child with any greater understanding than other children of the same age. This was because the involvement of these children in the legal system often stemmed from dysfunctional family or care situations, indicators of developmental impairment.<sup>23</sup>

That children and young people lack comprehension of a system in which they are to take part is concerning. It can lead to considerable anxiety for the child. This alone may inhibit a child from giving her or his best evidence as a witness, including as a defendant.<sup>24</sup> Where a child appears insecure in giving evidence, questions as to credibility may also arise where they are not truly warranted. Furthermore, re-traumatisation of children through the court process ought to be avoided as far as possible. These matters will be discussed in more detail with respect particularly to youth victims and witnesses below.

### C *Young Victims and Witnesses*

Children and young people are not infrequently victims of crime. It is also true that young offenders, more often than not, commit offences against other children and young people.<sup>25</sup> Unfortunately, children are often the victims of adults’ crimes as well.

However, comprehensive research conducted across six New Zealand courts and published in 2010 found the majority of children who give evidence in criminal cases do so in relation to sexual assault cases, in which they are the complainant (and the defendant is an adult).<sup>26</sup> This phenomenon has also been observed by researchers in

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<sup>21</sup> Janet Wight, Lee-Anne Hoyer and Debra Jumpertz, *Laying Down the Criminal Law: A Handbook for Youth Workers* (Youth Advocacy Centre, 2<sup>nd</sup> ed, 2004) 64.

<sup>22</sup> See, e.g., Karen J Saywitz, ‘Children’s Conceptions of the Legal System: “Court is a Place to Play Basketball”’ in S J Ceci, D F Ross and M P Toglia (eds), *Perspectives on Children’s Testimony* (Springer, 1989) 131 and Amye Warren-Leubecker et al, ‘What Do Children Know about the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research’ in S J Ceci, D F Ross and M P Toglia (eds), *Perspectives on Children’s Testimony* (Springer, 1989) 158.

<sup>23</sup> Saywitz, above n 22, 143, 152-3.

<sup>24</sup> J A Quas and B D McAuliff, ‘Accommodating Child Witnesses in the Criminal Justice System: Implications for Death Penalty Cases’ in R F Schopp et al (eds), *Mental Disorder and Criminal Law: Responsibility, Punishment and Competence* (Springer, 2009) 79, 83, quoted in Kirsten Hanna et al, *Child Witnesses in the New Zealand Criminal Courts: A Review of Practice and Implications for Policy* (New Zealand Law Foundation, 2010) 32.

<sup>25</sup> *Childrens Court of Queensland Annual Report 2010-11* (Queensland Courts, 2011) 7.

<sup>26</sup> Hanna et al, above n 24, 23.

the United States, although both sources agree that the experiences of such children can be generalised across children giving evidence in relation to other crimes.<sup>27</sup> The factors relevant to adverse effects of testimony on child witnesses were identified as a lack of legal knowledge, repetition of interviews, the actual experience of testifying, and case length and outcome.<sup>28</sup> These factors suggest that the same may be true with respect to testimony in civil proceedings, albeit that the subject matter of itself may be less traumatising.

Many, if not most, child witnesses will not have been in a courtroom prior to giving evidence, whether during a trial or via a video recording. In order that the child witness can give their best evidence, the research suggests it is important that the child understand how the courtroom works and why they are giving evidence.<sup>29</sup> Giving effect to the child's choice as to the mode of giving evidence is also said to assist in reducing anxiety, although this choice should be based on good information as to the options available.<sup>30</sup> Age alone should not provide a basis for assuming the appropriateness of one form of giving evidence over another; a young person ought not to be made to testify in open court rather than through pre-recorded evidence simply because they are older.<sup>31</sup> Note, however, that the evidence of an affected child witness must be taken and videotaped in a pre-trial hearing, regardless of age.<sup>32</sup> Discretion exists with respect to special witnesses.<sup>33</sup>

The amount of time that a child has to wait in court prior to testifying is also a significant stressor,<sup>34</sup> although one that can be largely ameliorated through pre-recording evidence in a listed hearing. Delays in bringing a case to trial may also cause significant problems, both in prolonging any trauma suffered by the child in connection with the court process and in affecting the quality of their evidence. The amount of detail that child witnesses recall may decrease or fluctuate over an extended period of time, making the child's account appear less credible.<sup>35</sup> What may, on a grander scale, be a relatively short time period can, in the perception of a child and relative to their lifespan, be quite extended. Delays should therefore be minimised to prevent trauma being drawn out and also to preserve the child's memory of the event.<sup>36</sup> In the interests of expediting proceedings involving affected child witnesses, the Prosecution is required to advise the court on presenting an indictment that an affected child witness may give evidence in the proceedings,<sup>37</sup> while Practice Direction 14 of 2014 requires that all parties then be prepared to indicate readiness to proceed with a pre-recording hearing.

Aggressive and intimidating approaches to cross-examination ought to be avoided. So, too, should questioning from either side that is apt to mislead, such as by the use of the

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<sup>27</sup> Ibid, citing Quas and McAuliff, above n 24, 81.

<sup>28</sup> Quas and McAuliff, above n 24, 81.

<sup>29</sup> See Hanna et al, above n 24, 32-4.

<sup>30</sup> Ibid 41-2.

<sup>31</sup> See ibid 42-3.

<sup>32</sup> *Evidence Act 1977 (Qld)* s 21AK. See further below.

<sup>33</sup> Ibid s 21A. See further below.

<sup>34</sup> Hanna et al, above n 24, 53-4.

<sup>35</sup> See QLRC Report 55, above n 3, 29-34.

<sup>36</sup> See Principle 11 of the Charter of Youth Justice Principles ('Charter'), which exists as *Youth Justice Act 1992 (Qld)* sch 1.

<sup>37</sup> *Evidence Act 1977 (Qld)* s 21AS(2). See further below.

negative and double negatives; unduly long and complicated questions; specific and difficult vocabulary; or unnecessarily repetitious questions.<sup>38</sup>

Various studies have been undertaken into how witness credibility is assessed. This research indicates that “children’s credibility is a multidimensional construct comprising cognitive ability and honesty”<sup>39</sup> – children are supposed to be more honest, but to lack sufficient cognitive sophistication to allow complete accuracy.<sup>40</sup> Children are more likely to be perceived as credible if they were directly involved in the incident - for example, as a victim of abuse - rather than if they were a mere bystander.<sup>41</sup> There is also some suggestion that jurors may approach viewing child testimony with negative preconceptions, but that these may be displaced when the testimony itself is seen.<sup>42</sup>

Bringing into question a witness's credibility is a valid object of cross-examination, particularly in a case where the credibility of a particular witness is crucial to the case. Nonetheless, care should be taken to protect children, whom the law recognises as vulnerable in these circumstances, from suffering adverse effects of giving oral testimony. This is so regardless of whether there are clear doubts as to its truth (which itself may or may not be related to the witness consciously lying). Children are presumed equally competent to give evidence<sup>43</sup> and, at law, as reliable in doing so as any other person;<sup>44</sup> there is no longer any requirement that their testimony be corroborated.<sup>45</sup> As such, any issues of credibility ought to be based on the individual witness, not their status as a child, and any excesses in questioning, to be controlled. Reference may be had in this respect to *Evidence Act* 1991 (Qld) ss 21 and 21A(2)(f).

## D Young Defendants

### 1 Preliminary

The *Youth Justice Act* 1992 (Qld) governs how youth defendants (that is, those who are 10 or older but not yet 17 years of age)<sup>46</sup> are to be dealt with by the courts. Youth defendants do not often come before the Supreme Court for trial because of the nature of the offending in which children and young people are more commonly involved. Most fall within the jurisdiction of the Magistrates or District Courts and are therefore dealt with by the Childrens Court or the Childrens Court of Queensland.<sup>47</sup>

The crimes with which children and young people are generally charged are property and public order offences, such as vandalism, motor vehicle theft, shoplifting and fare

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<sup>38</sup> Hanna et al, above n 24, 54; M Brennan ‘Cross-examining Children in Criminal Courts: Child Welfare under Attack’ in John Gibbons and Susan J Rosowski (eds), *Language and the Law* (Routledge, 2014) 210, 212-16.

<sup>39</sup> Melissa Boyce, Jennifer Beaudry and R C L Lindsay, ‘Belief of Eyewitness Identification Evidence’ in R C L Lindsay et al (eds), *The Handbook of Eyewitness Psychology* (Psychology Press, 2014) vol 2, 501, 511.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid 511-12.

<sup>43</sup> *Evidence Act* 1977 (Qld) s 9.

<sup>44</sup> *Criminal Code* (Qld) s 632.

<sup>45</sup> Ibid.

<sup>46</sup> *Criminal Code* (Qld) s 29, *Youth Justice Act* 1992 sch 4 (definition of ‘child’).

<sup>47</sup> *Youth Justice Act* 1992 s 63, s 99, sch 4 (definition of ‘supreme court offence’).

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evasion, rather than offences against the person.<sup>48</sup> Youth offending is often unsophisticated, public, attention-seeking and opportunistic, and therefore more likely to be apprehended by police.<sup>49</sup>

The interplay between child protection issues and youth offending noted above gives an indication of the complex needs of young offenders.<sup>50</sup> Nonetheless, their continuing youth represents greater opportunity for rehabilitation than exists for older offenders, as reflected in 8(b), 14(d) and 16 of the Charter of Youth Justice Principles ('the Charter').<sup>51</sup>

While young people do have a disproportionately high rate of offending relative to their representation in society, offences committed by them are far from the majority of crimes.<sup>52</sup> In addition, youth crime rates in Queensland have been in decline since at least 2010-11.<sup>53</sup>

Nonetheless, children and young people will occasionally appear before the Supreme Court, whether in the Trial Division or the Court of Appeal. Over the last decade, the number of juvenile defendants whose matters were finally disposed of by the Supreme Court was between two and 14 per year, but usually fewer than 10.<sup>54</sup>

### 2 Bail

The *Bail Act* 1980 (Qld) applies to a child charged with an offence, subject to the *Youth Justice Act* 1992 (Qld).<sup>55</sup> A child charged with an offence must be brought promptly before the Childrens Court.<sup>56</sup> A Childrens Court judge may grant bail to a child charged with any offence, including a Supreme Court offence, while a Childrens Court magistrate cannot deal with bail for Supreme Court offences.<sup>57</sup> However, the Supreme Court may be required to reconsider or vary bail at various points and in those circumstances, the

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<sup>48</sup> Kelly Richards, 'What Makes Juvenile Offenders Different from Adult Offenders?' (2011) 409 *Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice* 1, 3.

<sup>49</sup> *Ibid.*

<sup>50</sup> See also Claire Tilbury and Paul Mazerolle, 'The Children's Court in Queensland: Where to from Here?' in Rosemary Sheehan and Allan Borowski (eds), *Australia's Children's Courts Today and Tomorrow* (Springer, 2013) 65, 70, 81.

<sup>51</sup> See *Youth Justice Act* 1992 (Qld) sch 1, included as Appendix G to this Benchbook.

<sup>52</sup> *Ibid* 2.

<sup>53</sup> Australian Bureau of Statistics, *4519.0 Crime and Justice*. See Releases 2010-11, 2011-12, 2012-13 and 2013-14.

<sup>54</sup> See *Childrens Court of Queensland Annual Report 2003-2004* (Queensland Courts, 2004) 16-18, 25-8; *Childrens Court of Queensland Annual Report 2004-2005* (Queensland Courts, 2005) 17-19, 25-8; *Childrens Court of Queensland Annual Report 2005-2006* (Queensland Courts, 2006) 12-14, 20-3; *Childrens Court of Queensland Annual Report 2006-2007* (Queensland Courts, 2007) 17-19, 29-32; *Childrens Court of Queensland Annual Report 2007-2008* (Queensland Courts, 2008) 14-15, 24-6; *Childrens Court of Queensland Annual Report 2008-2009* (Queensland Courts, 2009) 10-11, 19-21; *Childrens Court of Queensland Annual Report 2009-2010* (Queensland Courts, 2010) 10-11, 16-17; *Childrens Court of Queensland Annual Report 2010-2011* (Queensland Courts, 2011) 12, 17-18; *Childrens Court of Queensland Annual Report 2011-2012* (Queensland Courts, 2012) 16-17, 24-5; *Childrens Court of Queensland Annual Report 2012-2013* (Queensland Courts, 2013) 12-14, 21-3; and *Childrens Court of Queensland Annual Report 2013-2014* (Queensland Courts, 2014) 15-17, 24-6  
<<http://www.courts.qld.gov.au/about/publications#Childrens%20Court%20Annual%20Reports>>.

<sup>55</sup> *Youth Justice Act* 1992 (Qld) s 47.

<sup>56</sup> *Ibid* s 49.

<sup>57</sup> *Ibid* s 59, particularly (3).

same principles apply. A child defendant must generally be released rather than kept in custody, subject to certain exceptions. Those exceptions are where legislation otherwise requires that the child be kept in custody;<sup>58</sup> where the court is satisfied that the child's safety is endangered or cannot be ensured if the child is released; or where the court is satisfied that there is an unacceptable risk that the child will not surrender into custody when required, will commit an offence while released, will endanger anyone's safety or welfare or will interfere with any witnesses or otherwise obstruct the course of justice, whether for the child or anyone else.<sup>59</sup>

A child must generally be released on his or her own undertaking, however security or surety may be taken, and conditions imposed, on a child's bail in a similar manner as with an adult.<sup>60</sup> However, the imposition of such conditions must generally be supported by written reasons.<sup>61</sup>

Where the court could grant a child bail and release them, the court may instead release the child without bail into the custody of his or her parent, or at large, subject to a condition that the child surrender into the custody of the court when required.<sup>62</sup>

### 3 Trial

When a child is charged with a Supreme Court offence,<sup>63</sup> the child must attend committal proceedings before a Childrens Court magistrate.<sup>64</sup> If the child enters a plea of guilty at this stage, the court must commit the child for sentence before the Supreme Court.<sup>65</sup> If the child does not plead guilty and the court is of the opinion that the evidence adduced is sufficient to put the child on trial for the Supreme Court offence charged, the court must commit the child for trial before the Supreme Court.<sup>66</sup> Provision is made to ensure that a parent of the child is present when the child is being dealt with by a court.<sup>67</sup>

It is fundamental that the right to a fair trial of young defendants be ensured, however this is not entirely straightforward. The European Court of Human Rights held in relation to the English trial of two eleven-year-old boys for murder that those defendants had not received a fair trial, despite various additional measures having been put in place. Those measures included the presence of social workers, explanation of procedures, shortened hearing times, and scheduled breaks. It was found that the formality with which the trial proceeded (including the usual dress and standard courtroom), the fact that it was conducted in open court with significant press coverage, and the particular immaturity and proven emotional disturbance of the defendants meant that they would have found the proceedings incomprehensible and possibly been unable to instruct counsel

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<sup>58</sup> Ibid s 48(4).

<sup>59</sup> Ibid s 48(2), (5). These are essentially the same considerations as are applicable to refusal of bail generally: see *Bail Act 1980 (Qld)* s 16.

<sup>60</sup> *Youth Justice Act 1992 (Qld)* s 53.

<sup>61</sup> Ibid s 53(5)(b), (6).

<sup>62</sup> Ibid s 55.

<sup>63</sup> That is, an offence for which the District Court does not have jurisdiction to try an adult because of the *District Court Act 1967 (Qld)* s 61: ibid sch 4 (definition of 'supreme court offence').

<sup>64</sup> Ibid s 64.

<sup>65</sup> Ibid s 91.

<sup>66</sup> Ibid ss 94, 95.

<sup>67</sup> Ibid ss 69, 70.

effectively in all of the circumstances. For those reasons, it was held that the defendants had been unable to effectively participate in the proceedings against them and therefore had been denied a fair trial.<sup>68</sup>

In order to ensure the fair trial to which a young defendant is entitled, trial procedure may need to be modified in some respects to accommodate the developmental state of the child. When determining how the trial of a young defendant should be conducted, it is said to be essential that:

the child is able to adequately comprehend proceedings and participate in those proceedings. If the child is unable to instruct counsel effectively, then the fact of legal representation will not remedy proceedings which are incomprehensible to a child.<sup>69</sup>

A judicial officer is required by *Youth Justice Act 1992 (Qld)* s 72 to ensure that the child and the child's parent understand, as far as practicable, the nature of the alleged offence, the court's procedures, and the consequences of any order that may be made.<sup>70</sup> To that end, the judge may give direct explanation of these matters in court, or take other appropriate steps.<sup>71</sup>

Similarly to the European Court of Human Rights, ALRC Report 84 identified the physical environment of the courtroom; the approach of counsel and the judicial officer; and the effective representation of the child as factors which can contribute to a young defendant's level of comprehension of the proceedings.<sup>72</sup>

With respect to the conduct of counsel, a specialist unit has existed within the Office of the Director of Public Prosecutions since 2000 to deal with juvenile justice matters.<sup>73</sup> However, concern has been expressed that there is a lack of necessary expertise amongst practitioners operating in the area of youth justice that could be ameliorated by greater training and awareness of particular concerns.<sup>74</sup>

In relation to the other factors identified by the ALRC, appropriate steps within the court's power should be taken to lessen any negative impact on the child. Many of the same considerations may apply as they do to youth witnesses above, however the specific protections for special witnesses under s 21A will only apply if the defendant testifies. It should be noted that a child defendant cannot be an 'affected child' pursuant to Division 4A of the *Evidence Act 1977 (Qld)*.<sup>75</sup> As such, the only special measures that can be taken in respect of the oral evidence of a child defendant pursuant to that Act are those contained in s 21A.

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<sup>68</sup> See *V v United Kingdom; T v United Kingdom* (2000) 30 EHRR 121.

<sup>69</sup> Gail Hubble, 'Juvenile Defendants: Taking the Rights of Children Seriously' (2000) 25(3) *Alternative Law Journal* 116, 120.

<sup>70</sup> *Youth Justice Act 1992 (Qld)* s 72(2).

<sup>71</sup> *Ibid* subs (3)(a).

<sup>72</sup> Above n 1, [18.178].

<sup>73</sup> *Childrens Court of Queensland Annual Report 1999-2000* (Queensland Courts, 2004) 3.

<sup>74</sup> Tilbury and Mazerolle, above n 50, 75, 77, 79-80.

<sup>75</sup> s 21AC; cf s 21A(1B).

### 4 Sentencing

All youth defendants must be sentenced pursuant to Part 7 of the *Youth Justice Act 1992* (Qld).<sup>76</sup> In addition to the usual matters to be taken into account in sentencing, such as the nature and seriousness of the offence, prior offending history, and the impact on any victim, the sentencing court considers the Youth Justice Principles contained in the Charter (see Appendix 1) and several special considerations.<sup>77</sup> Those considerations are that the child's age is a mitigating factor; that a non-custodial order is more conducive than detention to enabling a child's community reintegration; that rehabilitation is greatly assisted by a child's family and opportunities to engage in education and employment; and that a child without such family support or opportunities should not receive a more severe sentence on that basis.<sup>78</sup>

If a child is found guilty of a 'life offence',<sup>79</sup> the court may order that the child be detained for a period not longer than 10 years, or a period up to and including the maximum of life, but in the latter case, only if the offence involves the commission of violence against a person and the court considers the offence to be particularly heinous, having regard to all the circumstances.<sup>80</sup> The Court of Appeal has considered the word 'heinous', with McPherson JA (with whom Davies and Pincus JJA agreed) determining it to mean "odious, highly criminal, infamous."<sup>81</sup>

In either case, the order may be made with or without an accompanying conditional release order, a boot camp order,<sup>82</sup> or a publication order.<sup>83</sup> However, this does not limit the Court's power to make an order under s 175,<sup>84</sup> which provides that, subject to the *Childrens Court Act 1992* (Qld), in sentencing a child, a Court may:

- reprimand the child;
- order the child to be of good behaviour for not more than a year;
- order the child to pay a fine;
- order the child to be placed on probation;
- order the child to conduct community service;
- make an intensive supervision order; or
- order that the child be detained, which may also comprise a conditional release order or a boot camp order.

Most of these options are dealt with in more detail in various Divisions of Part 7. However, in addition to the considerations specifically raised by those Divisions, there are practical limitations on the making of some of these orders. For instance, the Queensland government website notes that their trial of youth boot camps ended in October 2015.<sup>85</sup>

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<sup>76</sup> *Youth Justice Act 1992* (Qld) s 149.

<sup>77</sup> *Ibid* s 150(1).

<sup>78</sup> *Ibid* s (2).

<sup>79</sup> That is, an offence for which a person sentenced as an adult would be liable to life imprisonment: *ibid* sch 4 (definition of 'life offence').

<sup>80</sup> *Ibid* 176(3)

<sup>81</sup> *R v Gwilliams* [1997] QCA 389, [7].

<sup>82</sup> *Youth Justice Act 1992* (Qld) s 176(4); SubDiv 2A, Div 10, Part 7.

<sup>83</sup> *Youth Justice Act 1992* (Qld) s 176(5), s 234.

<sup>84</sup> *Youth Justice Act 1992* (Qld) s 176(9).

<sup>85</sup> See Queensland Government, *Youth Boot Camps*, (28 January 2016)

Despite the principle of open justice, it has generally been accepted in the past that publication of identifying information about a youth defendant or offender is detrimental to their rehabilitation and not in their best interests. Such publication has therefore been prohibited.<sup>86</sup> However, with respect to youth offenders sentenced under s 176(3)(b), the court has the power to make an order that identifying information about the child may be published.<sup>87</sup> Such an order may be made if it would be in the interests of justice, having regard to non-exhaustive matters including the need to protect the community, the safety and wellbeing of a person other than the child, and the impact of the order on the child's rehabilitation.<sup>88</sup>

It is to be noted that the regime with respect to publication of identifying information of youth offenders generally was modified significantly in 2014.<sup>89</sup> Where a child is subject to criminal proceedings other than as a first-time offender, the default position is now that identifying information may be published, unless the court, on its own motion or application of a party, considers it in the interests of justice to prohibit such publication.<sup>90</sup> This is a matter which ought to be borne in mind by judicial officers, particularly where an incident has received significant media attention, to ensure that youth defendants receive a fair trial and may receive the benefit of efforts at their rehabilitation.

Finally, youth justice is an area that is frequently subject to legislative alteration. Ensuring that orders sought are both currently available and practically enforceable is crucial. For instance, two Bills are currently before Parliament that, if passed, would substantially amend the *Youth Justice Act 1992 (Qld)* and related legislation. The *Youth Justice and Other Legislation Amendment Bill 2015 (Qld)* has the object, among other things, of removing the availability of boot camp orders from the range of sentencing options for children and of prohibiting the publication of identifying information about a child dealt with under the *Youth Justice Act 1992 (Qld)*.<sup>91</sup> Moreover, the *Youth Justice and Other Legislation Amendment Bill 2016 (Qld)* aims to reinstate youth justice conferencing in order to give effect to what is stated to be a key restorative justice process and an effective diversionary strategy in reducing youth offending.<sup>92</sup>

### E Other Involvement in Court Proceedings

There is little statistical information regarding the involvement of children and young people in civil litigation. However, according to ALRC Report 84, personal injury matters are the predominant form of civil litigation involving children in the State courts.<sup>93</sup> Other

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<https://www.qld.gov.au/law/sentencing-prisons-and-probation/young-offenders-and-the-justice-system/youth-justice-in-queensland/youth-boot-camps/>.

<sup>86</sup> *Youth Justice Act 1992 (Qld)* s 301, as at 10 February 2014. See also, e.g., Queensland Bar Association, Submission No 22 to the Legal Affairs and Community Safety Committee, *Inquiry into the Youth Justice and Other Legislation Amendment Bill 2014* (26 February 2014) 2-4; Queensland Law Society, Submission No 16 to the Legal Affairs and Community Safety Committee, *Inquiry into the Youth Justice and Other Legislation Amendment Bill 2014* (26 February 2014) 4-5.

<sup>87</sup> *Youth Justice Act 1992 (Qld)* s 234(1).

<sup>88</sup> *Youth Justice Act 1992 (Qld)* s 234(2).

<sup>89</sup> See *Youth Justice Act 1992 (Qld)* s 299A.

<sup>90</sup> *Ibid* s 299A. See also s 301.

<sup>91</sup> Explanatory Notes to the *Youth Justice and Other Legislation Amendment Bill 2015 (Qld)*.

<sup>92</sup> Explanatory Notes to the *Youth Justice and Other Legislation Amendment Bill 2016 (Qld)*.

<sup>93</sup> Above n 1, [13.7].

matters involving older youths comprise disputes with neighbours, motor vehicle accidents, consumer matters, and issues concerning education, housing, employment and health.<sup>94</sup>

A young person, being a person under the age of 18 years, is deemed at law in Queensland to be under a legal incapacity and therefore unable to commence civil proceedings in her or his own right.<sup>95</sup> This is despite the fact of a child's developing capacity to make decisions affecting her or his life, as discussed above and as commented upon in ALRC Report 84.<sup>96</sup> Instead, litigation for a young person must be commenced and carried out through a litigation guardian.<sup>97</sup> Although there is common law precedent suggesting that a child may initiate civil proceedings if there is no objection from any other party, Queensland legislation now appears directly to abrogate that position.<sup>98</sup>

Although it is accepted at common law that the litigation guardian should act in the best interests of the child, ALRC Report 84 also recommended that this should be specifically enshrined in legislation. The Queensland position remains that a litigation guardian, aside from not being under a legal incapacity themselves, must simply not have any interest in the proceeding adverse to that of the child - the best interests recommendation has not been implemented.<sup>99</sup> Further, the litigation guardian is not required to involve the child in any decision-making or present evidence as to the child's wishes.

## IV LEGISLATIVE PROVISIONS

### A *Youth Defendants*

The *Youth Justice Act* 1992 (Qld) aims, inter alia, to "establish a code for dealing with children who have, or alleged to have, committed offences...".<sup>100</sup> Schedule 1 contains the Charter of Youth Justice Principles, which "underlie the operation of this Act".<sup>101</sup> Note that, in 2013, the principle of detention as a last resort was removed from the Charter. The *Youth Justice Act* 1992 (Qld) is discussed above in relation to criminal youth defendants.

### B *Evidence*

#### 1 *Principles for Dealing with a Child Witness*

In 2003, the *Evidence Act* 1977 (Qld) was amended with the aim of "mak[ing] our courts more sensitive when dealing with children who are victims or witnesses and ... ensur[ing]

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<sup>94</sup> Deborah Macourt, 'Youth and the Law: It's Not All about Juvenile Justice and Child Welfare' (2013) 35 *Updating Justice* 1, 3-5.

<sup>95</sup> *Supreme Court Act* 1991 (Qld) sch 5 (definitions of 'person under a legal incapacity', 'young person').

<sup>96</sup> Above n 1, [13.7].

<sup>97</sup> *Uniform Civil Procedure Rules* 1999 (Qld) s 93.

<sup>98</sup> See ALRC Report 84, above n 1, [13.16]; cf *Uniform Civil Procedure Rules* 1999 (Qld) s 93, *Supreme Court Act* 1991 (Qld) sch 5 (definitions of 'person under a legal incapacity', 'young person').

<sup>99</sup> *Uniform Civil Procedure Rules* 1999 (Qld) s 93.

<sup>100</sup> s 2(b).

<sup>101</sup> *Youth Justice Act* 1992 (Qld) s 3(2).

the legal process does not add to their stress or suffering".<sup>102</sup> Those amendments were recommended by QLRC Report 55 in response to widespread concern about the treatment of child witnesses, especially complainants in sexual abuse cases.<sup>103</sup>

One such amendment was the insertion of s 9E, which contains four general principles for dealing with witnesses under the age of 16 years. That provision is prefaced with the statement that, "[b]ecause a child tends to be vulnerable in dealings with a person in authority, it is the Parliament's intention that a child who is a witness in a proceeding should be given the benefit of special measures when giving the child's evidence."<sup>104</sup> The four principles are as follows:

- (a) the child is to be treated with dignity, respect and compassion;
- (b) measures should be taken to limit, to the greatest practical extent, the distress or trauma suffered by the child when giving evidence;
- (c) the child should not be intimidated in cross-examination;
- (d) the proceeding should be resolved as quickly as possible.<sup>105</sup>

These principles are applicable in every proceeding involving a child as a witness.

## 2 Competence

The *Evidence Act 1977* (Qld) establishes a presumption that every person, including a child, is competent to give evidence in a proceeding and to do so on oath.<sup>106</sup> This presumption is rebuttable; where a challenge arises, legislative tests exist to determine whether the person is competent to give evidence,<sup>107</sup> and if so, whether she or he is competent to do so on oath.<sup>108</sup> Expert evidence is admissible to assist the determination as to competency generally and under oath.<sup>109</sup> Older authority suggests that judges should not, on their own motion, question child witnesses as to competency.<sup>110</sup> There is no longer a rule of practice that obliges a trial judge to warn the jury that a child's evidence should be scrutinised with care because he or she is a child.<sup>111</sup>

## 3 Special Measures to Protect Child Witnesses

*Evidence Act 1977* (Qld) also makes provision for particular measures to be taken to protect 'special witnesses', including children under 16 years, in both civil and criminal

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<sup>102</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 13 May 2003, 1696 (Rod Welford).

<sup>103</sup> See, e.g., QLRC Report 55, above n 3, 36. See also ABC Radio National, 'Child Witnesses' *Law Report*, 20 May 2003 <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s857955.htm>>.

<sup>104</sup> *Evidence Act 1977* (Qld) s 9E(1).

<sup>105</sup> *Ibid* s 9E(2).

<sup>106</sup> s 9.

<sup>107</sup> *Evidence Act 1977* s 9A.

<sup>108</sup> *Ibid* s 9B. Note that the reference to an oath here also includes an affirmation.

<sup>109</sup> *Ibid* s 9C.

<sup>110</sup> *R v Dunne* (1929) 99 LJKB 117 (CCA).

<sup>111</sup> See *Criminal Code 1899*, s 632(1), (3); *R v A* [2000] QCA 520, [142] (Atkinson J); *Robinson v The Queen* (1998) 102 A Crim R 89, but see *Robinson v The Queen* (1999) 197 CLR 162.

proceedings. Note that this might also apply to a 16- or 17-year-old, where they are found to be a special witness for some other reason, such as being likely to suffer severe emotional trauma. Such measures include the exclusion of unnecessary persons from the courtroom; obscuring of an accused from the witness's view, or exclusion of the accused (subject to her or him still being able to see and hear the witness's testimony); permitting the witness to have a support person present; and the making of relevant judicial directions.<sup>112</sup> Additionally, the evidence of a special witness may be pre-recorded.<sup>113</sup> In this regard, reference should also be had to s 93A and Division 4B.

#### 4 *Affected Children*

Division 4A of the *Evidence Act 1977* (Qld), also inserted in 2003, deals with 'affected children'. For the purposes of this division, a child is a person under 16 years, or a person who is 16 or 17 years old and also a special witness, at the relevant time.<sup>114</sup> For criminal proceedings, the relevant time is when an arrest occurs, a complaint under the *Justices Act 1886* (Qld) is made, or a notice to appear is served.<sup>115</sup> For civil proceedings, the relevant time is when the proceedings start.<sup>116</sup> Such a person is an 'affected child' if they are a witness but not also a defendant in particular proceedings.<sup>117</sup> Those are criminal proceedings including an offence of a sexual nature or an offence of violence involving a person in a certain familial, household or care relationship with the child, and civil proceedings arising from such criminal proceedings.<sup>118</sup> Note that s 21A, discussed above, does not apply to the extent that division 4A does.<sup>119</sup>

Specifically, the Division addresses pre-recording of an affected child witness's evidence,<sup>120</sup> and taking of an affected child witness's evidence by use of an audio-visual link or screen.<sup>121</sup> Note that, where evidence is pre-recorded, it is considered preferable that the same judicial officer preside over that session and the trial and that the same counsel appear,<sup>122</sup> although this is not required by the legislation.<sup>123</sup> Division 4B governs how recordings under Division 4A are to be treated, while Practice Direction 14 of 2014 also provides guidance as to the process.

Further provisions as to the evidence of an affected child witness address matters such as support for the affected child witness; instructions to the jury; and the making of appropriate orders, rulings and directions.<sup>124</sup> With respect to support persons, the legislation provides no guidance to the Court as to what factors should be taken into account in deciding whether a person should be approved so to act. However, the Queensland Law Reform Commission considered that "the most important factors in

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<sup>112</sup> *Evidence Act 1977* (Qld) s 21A(2), (4).

<sup>113</sup> *Ibid* s 21A(2)(a), (5A), (6).

<sup>114</sup> *Evidence Act 1977* (Qld) s 21AD(1).

<sup>115</sup> *Ibid* s 21AD(1)(a)(i), (ii).

<sup>116</sup> *Ibid* s 21AD(1)(b)(i), (ii).

<sup>117</sup> *Ibid* s 21AC.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid* s 21A(1A).

<sup>120</sup> *Ibid* ss 21AI to 21AO.

<sup>121</sup> *Ibid* ss 21AP to 21AR.

<sup>122</sup> *R v Stevenson* (2000) 118 A Crim R 20, 32-3 [49] (WASCA).

<sup>123</sup> *Evidence Act 1977* (Qld) s 21AK(7).

<sup>124</sup> *Ibid* ss 21AS to 21AX.

choosing a support person for a child witness are that the support person fully understands the limits of the role, and that the support person's presence is acceptable to the child."<sup>125</sup> The Commission considered that it would generally be "undesirable for a person who is a party to or a witness in the proceeding to act as a support person for a child witness", although it recognised that this may on occasion be unavoidable.<sup>126</sup> The Commission was also of the view that it would be inappropriate for a child's therapist or counsellor to act as a support person because of the nature of the therapeutic relationship and the discussion of the relevant events which is likely to have occurred.<sup>127</sup>

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<sup>125</sup> QLRC Report 55, above n 3, 84.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid 85.

## CHAPTER 14: GENDER EQUALITY

### I INTRODUCTION

While there is no singular ‘female experience’ of life or the legal system, just as there is no particular ‘male experience’,<sup>1</sup> this Chapter will identify particular challenges of gender inequality and explain their possible implications for court proceedings.

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.<sup>2</sup> 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.<sup>3</sup> Gender role stereotypes still persist in relation to the working and domestic activities of both genders.

### II SOCIO-ECONOMIC FACTORS

Across Australia, women are engaged in paid employment in fewer numbers than men<sup>4</sup> and also earn less than men when they are in remunerative work.<sup>5</sup> The figures reflecting this did not change in any great degree over the 10 years to 2011, when the last available statistics were compiled.<sup>6</sup> Women are also employed on a part-time or casual basis to a much greater extent than men.<sup>7</sup> This means that women are frequently employed in areas where job security, sickness and leave benefits, and superannuation entitlements are lower. In addition, women provide the majority of unpaid work in Australia, spending on average nearly twice as much time daily as men on domestic activities and nearly three times as much on childcare.<sup>8</sup> Women are also more likely to be carers for persons who are elderly or have a disability.<sup>9</sup>

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<sup>1</sup> Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69, Part 1 (1994) [2.3]-[2.5] (‘ALRC Report 69(1)’); Judicial Studies Board (UK), *Equal Treatment Bench Book 2013* at 214 (‘Equal Treatment Benchbook (UK)’).

<sup>2</sup> Australian Law Reform Commission, *Equality Before the Law: Justice for Women*, Report No 69, Part 2 (1994) [2.3]-[2.5], [2.7]-[2.8] (‘ALRC Report 69(2)’).

<sup>3</sup> ALRC Report 69(1), above n 1, [2.8], [2.15]-[2.21], [2.24]-[2.61] and generally.

<sup>4</sup> In 2010-11, 69% of men were employed, compared with 55.8% of women: Australian Bureau of Statistics, *1301.0 Year Book 2012: Labour – Employed People* (21 January 2013)

<<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Employed%20people~46>> (‘Year Book 2012’).

<sup>5</sup> The average total weekly earnings for a Queensland woman working full-time are approximately 80% of a man’s average total weekly earnings, slightly lower than the national average of approximately 81%: see Australian Bureau of Statistics, *6302.0 Average Weekly Earnings, Australia, Nov 2014 – State and Territory Earnings* (25 February 2015)

<<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/6302.0Main%20Features6Nov%202014?opendocument&tabname=Summary&prodno=6302.0&issue=Nov%202014&num=&view=>>.

<sup>6</sup> See Year Book 2012, above n 4.

<sup>7</sup> In 2010-11, 45.7% of employed women worked part-time, as compared with 16.3% of men: *ibid.*

<sup>8</sup> Australian Bureau of Statistics, *4153.0 How Australians Use their Time, 2006* (20 February 2008) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4153.0Main%20Features22006?opendocument&tabname=Summary&prodno=4153.0&issue=2006&num=&view=>>.

<sup>9</sup> ALRC Report 69(1), above n 1, [2.9]; Australian Bureau of Statistics, *4436.0 Caring in the Community, Australia, 2012* (24 June 2014)

These factors may prompt considerations of the relative impact of identical penalties or costs orders on men and women, due to greater financial burdens on the latter; the possibility of financial dependence on male partners being a factor in women maintaining abusive or otherwise undesirable relationships; and the challenges of access to timely and adequate access to justice for women lacking an independent income. These and associated issues are discussed in the sections that follow.

### III WOMEN'S EXPERIENCES WITHIN THE LEGAL SYSTEM

#### A *Accessing Legal Aid*

Figures published by Legal Aid indicate that women make approximately 39% of legal aid applications and represent 36% of approved applicants.<sup>10</sup> In the 2013-14 year, women made 12,643 applications for legal aid, of which 8,879 (70.2%) were approved. During the same period, men made 21,146 applications for legal aid, of which 17,052 (80.6%) were approved.<sup>11</sup> The higher approval rate for men's applications is due, in significant part, to the fact that men seek aid in criminal matters almost four times as often as women do.<sup>12</sup> In addition, men are more likely to be involved in serious criminal matters than women.<sup>13</sup> There are significant pressures to prioritise the granting of aid in such cases.<sup>14</sup>

The fact that a majority of legal aid approvals are for criminal matters, in respect of which male applicants are heavily over-represented, means that less funding is available to women in family disputes, in which they represent the vast majority of applicants.<sup>15</sup> A potential consequence of being unable to receive legal aid funding is the increased pressure to settle proceedings out of court, even if the terms of the settlement are inadequate.<sup>16</sup> In addition, where women are at a disadvantage in terms of bargaining power (due to a lack of independent means, amongst other factors) there is an increased likelihood that women will not advocate for their rights or will be unable to advocate effectively.<sup>17</sup>

#### B *Childcare Considerations*

Access to justice for those with childcare responsibilities is hindered by the absence of available childcare facilities and children's play areas in most courts, as well as the difficulty of making outside arrangements.<sup>18</sup> As noted earlier, it remains the case that women are predominantly responsible for childrearing in Australian families and so are

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<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4436.0Main%20Features22012?opendocument&tabname=Summary&prodno=4436.0&issue=2012&num=&view=#Chapter2>.

<sup>10</sup> National Legal Aid, 'National Legal Aid Statistics' *Legal Aid NSW* (22 April 2015)

<http://laxextra.legalaid.nsw.gov.au/NLAREports/Default.aspx>.

<sup>11</sup> *Ibid.*

<sup>12</sup> ALRC Report 69(1), above n 1, [4.14], [4.15], [4.17].

<sup>13</sup> ALRC Report 69(1), above n 1, [4.14].

<sup>14</sup> See ALRC Report 69(1), above n 1, [4.14], [4.15], [4.17], including a discussion of the possible effect of the High Court decision of *Dietrich v The Queen* (1992) 177 CLR 292.

<sup>15</sup> ALRC Report 69(1), above n 1, [4.17].

<sup>16</sup> ALRC Report 69(1), above n 1, [4.16].

<sup>17</sup> ALRC Report 69(1), above n 1, [4.24]-[4.25]

<sup>18</sup> ALRC Report 69(1), above n 1, [7.22]-[7.25].

most likely to encounter these problems. However, court staff and judicial officers should also be attentive to the same problems facing men with primary care responsibilities and should not adopt gender stereotypes in this respect.

Difficulties may arise in attending court and appointments with legal representatives if suitable childcare is unable to be found. Occasional childcare is expensive and often available only for short hours. People involved in protracted litigation who cannot find suitable childcare face serious difficulties in accessing justice. These problems may be exacerbated when court is convened outside regular hours or matters are adjourned to later in the day without consideration of the consequences for persons with childcare responsibilities.<sup>19</sup> Such issues should be taken into consideration when, for example, the question of the order in which witnesses are to be called is raised. In particular, counsel, witnesses and jurors who have the primary responsibility for childcare may be assisted by receiving as much notice as possible of their appearance being required in court and by the court convening within regular hours as far as possible. This should ensure that appropriate alternative care arrangements may be made.<sup>20</sup>

An additional consideration related to childcare is the need to accommodate the needs of individuals responsible for feeding young infants. For instance, scheduled breaks may be necessary to allow for bottle or breastfeeding by the primary carer. Moreover, consideration should be given to the necessity for those with young infants (or pregnant women) needing to attend court at all. While appearance by telephone or video-link may be necessary and appropriate in some cases, external attendance does not resolve all of the difficulties associated with pregnancy or infant/child care.<sup>21</sup>

### C *Alternative Dispute Resolution*

Alternative dispute resolution ('ADR') processes are often undertaken prior to commencing litigation. Sometimes these processes are mandated by legislation;<sup>22</sup> more often, ADR is conducted at the suggestion of one or other of the parties' lawyers as a way of resolving the dispute at lower risk and cost than litigation. Certain forms of ADR, such as mediation, may also be ordered by a judge, particularly as part of Case Flow Management or in relation to cases on the Supervised Case List. Such orders will usually be made with the consent of the parties, but potentially also in response to inquiry by a judge about whether such a step might be useful. As discussed in Chapter 6 (Effective Communication in Court Proceedings), judges would need to be careful in the language used in making such an inquiry, particularly where parties are self-represented and from culturally or linguistically diverse backgrounds, lest the question be taken as a direction or unqualified recommendation.

Reflecting on gender difference raises a consideration relevant for judges contemplating whether to make orders referring parties to mediation: that is, how the power imbalances between parties who are or were in a relationship may affect the process and outcome of the mediation. For instance, where violence has been alleged or proven against one partner in a relationship, that person may be reluctant or unable to represent her or his

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<sup>19</sup> ALRC Report 69(1), above n 1, [7.22], [7.24].

<sup>20</sup> See generally Equal Treatment Bench Book (UK), above n 1, 218-219.

<sup>21</sup> Equal Treatment Bench Book (UK), above n 1, 219.

<sup>22</sup> See eg *Personal Injuries Proceedings Act 2002* (Qld) s 36.

own best interests in the manner envisaged when a mediation direction is made. Problems may be exacerbated by the confidential nature of mediation, which means that there is no supervision of the process by a court, and by the focus on settlement on any terms as the only reasonable means of resolving the dispute.<sup>23</sup> Where the court in civil proceedings intends to order some form of ADR, parties have the ability to make a reasoned objection.<sup>24</sup> However, courts and practitioners should be cognisant of the possibility that unrepresented parties may not be aware of their right to object and feel obligated to attend. In appropriate cases, it may be necessary to inform the litigant of their capacity to make an objection, especially where the party is self-represented.

### D *The Intersection of Gender Inequality and Other Factors*

Gender inequality often intersects with other individual characteristics like ethnicity, sexuality and age in such a way as to compound disadvantage or vulnerability. Addressing the problems of women who experience inequality on multiple levels is not simply a matter of examining these factors discretely. For example, in relation to domestic violence, the category of 'older women' is often not identified and these individuals' experiences not given a voice.<sup>25</sup> The result is that these women may be prevented from leaving or seeking to address a situation of violence due to shame, internal normalisation of their experience of violence over time and a practical unavailability of appropriate services.<sup>26</sup>

Problems associated with different individual characteristics may be compounding. For instance, women generally are more likely to experience domestic violence than men. Moreover, Aboriginal and Torres Strait Islander persons from remote or regional areas are less likely to be able to access appropriate support services and legal assistance. The result is that, in comparison to individuals falling within just one of these categories, domestic violence perpetrated against Aboriginal and Torres Strait Islander women is less likely to be addressed by necessary interventions and presents a greater risk of serious injury or death.<sup>27</sup>

Conversely, certain concerns may only arise where particular characteristics overlap, and apply to neither broader category in isolation. For example, Aboriginal and Torres Strait Islander women may have difficulty if issues arise in legal proceedings that relate to traditional "women's business", which women are forbidden to disclose to men.

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<sup>23</sup> For a discussion of these issues in relation to family law mediation, see Rachael Field, 'Family Law Mediation: Process Imbalances Women Should be Aware of Before They Take Part' (1998) 14 *QUT Law Journal* 23. See also Rachael Field, 'Women and ADR' in Patricia Eastal (Ed.) *Women and the Law in Australia* (LexisNexis 2010).

<sup>24</sup> *Uniform Civil Procedure Rules* 1999 (Qld) rr 319(1), (3), 320. See also *Personal Injuries Proceedings Act* 2003 (Qld) s 36(4).

<sup>25</sup> Nancy Lombard and Marsha Scott, 'Older Women and Domestic Abuse: Where Ageism and Sexism Intersect' in Nancy Lombard and Lesley McMillan (eds), *Violence against Women: Current Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation* (Jessica Kingsley Publishers, 2013) 125, 130.

<sup>26</sup> *Ibid* 130-8.

<sup>27</sup> Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Queensland Government, 2015) 6, 72, 77, 120, 121-2 ('Not Now, Not Ever') <<http://www.qld.gov.au/community/documents/getting-support-health-social-issue/dfv-report-vol-one.pdf>>, <<http://www.qld.gov.au/community/getting-support-health-social-issue/dfv-read-report-recommendation/index.html>>.

Because judicial officers and lawyers are predominantly male, Indigenous women may have to choose between compromising their own laws or their claim within the dominant legal system.<sup>28</sup> This particular concern does not arise in relation to women generally or Indigenous people generally.

Further examples of the intersectionality of gender and other characteristics on legal disadvantage can be found in two recent reports prepared for the Judicial Council on Cultural Diversity. The first provides additional examples of difficulties faced by Indigenous women to those already noted and will be referred to in the sections that follow.<sup>29</sup> The second addresses the experience of migrant and refugee women of the courts.<sup>30</sup> That report notes that, like Indigenous women, migrant and refugee women are far more likely than the general population to enter the legal system at a point of extreme vulnerability, often as a result of family violence or family breakdown.<sup>31</sup> It also provides examples of some of the special difficulties that may bring migrant and refugee women to court, such as their vulnerability to abuse related to their immigration status or dowry demands,<sup>32</sup> as well as the particular barriers they may face coming to court in the first place, such as the failure to recognise certain forms of family violence as a legal wrong due to a belief held by some migrant and refugee communities that a degree of violence within marriage is normal and acceptable.<sup>33</sup>

### E *Gender-Specific Language*

Australian judges are generally aware of the ways in which women can be excluded by gender-specific language and make attempts to use gender-inclusive language in court and in written judgments. For example, the use of “she or he” or “they”, when discussing situations in general terms, is more inclusive than “he” in the singular, as was formerly used to denote both sexes. Terms that apply equally to both sexes rather than one sex are also preferred: for example “worker” rather than “workman” and “police officer” rather than “police man”. Words like “administrator” and “testator” refer to people of both sexes without the need to feminise the noun. Further examples of language to be avoided are the use of terms such as “girl” to refer to a woman over the age of eighteen years and “man and wife” in reference to a married couple.

Although “Mr” has for a long time been used to address all men, women were traditionally distinguished as “Miss” (unmarried) or “Mrs” (married). It is now preferable to use the term “Ms” unless a contrary indication is given, thereby rendering the (irrelevant) marital status invisible. Court appearance slips will show an advocate’s preferred title. Additionally, it should not be assumed that a married female advocate, solicitor, witness, plaintiff or defendant ought automatically to be referred to as “Mrs”, nor should there be any assumption that a married couple will bear the same surname.

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<sup>28</sup> ALRC Report 69(1), above n 1, [5.29].

<sup>29</sup> Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women’s Experience of the Courts* (20 March 2016) (*‘ATSI Women Path to Justice Report’*).

<sup>30</sup> Judicial Council on Cultural Diversity, *The Path to Justice: Migrant and Refugee Women’s Experience of the Courts* (20 March 2016).

<sup>31</sup> *Ibid* at 6.

<sup>32</sup> *Ibid* at 13.

<sup>33</sup> *Ibid* at 19.

## IV DOMESTIC VIOLENCE

### A Introduction

According to the Special Taskforce on Domestic and Family Violence in Queensland, “Domestic violence... occurs in a variety of forms including physical, emotional and economic violence within any type of relationship against any person ... [and] encompasses a broad range of behaviours”.<sup>34</sup> The *Domestic and Family Violence Protection Act 2012* (Qld) was enacted after a review of previous legislation was said to demonstrate a need to place greater responsibility on perpetrators of violence and more power in the hands of courts to protect the safety and wellbeing of victims.<sup>35</sup> That Act was also intended to “reflec[t] contemporary understandings of domestic and family violence, particularly regarding the types of relationships and behaviours covered...”<sup>36</sup> Economic, emotional and psychological abuse are now encompassed in the legislation alongside physical and sexual abuse; while behaviour that is threatening, coercive, or otherwise aimed at controlling or dominating another person is also included.<sup>37</sup>

There is evidence that women are the most common victims of domestic violence.<sup>38</sup> In *Queensland Women 2015*, a report prepared by the Office of Women, Queensland Government, it is noted that although women are almost equally likely to be the victims of offences against the person as men, the extent to which men and women were victims of particular types of crimes differed.<sup>39</sup> In particular, between 1 July 2014 and 30 June 2015, Queensland women and girls were significantly over-represented as victims of particular crimes, such as sexual offences (81.8%) and stalking (74.3%).<sup>40</sup> Overall, in the same period, Queensland women and girls accounted for 73.8% of all victims experiencing offences against the person committed by someone who was a partner, a former partner, or other family member. Taking partner and former partner violence alone, the proportion of female victims rises to 91.0% and 85.5% respectively. The same gendered pattern of criminal offending is noted by the Report of the Royal Commission into Family Violence, delivered to the Victorian Government in March 2016. It states that:

The most common manifestation of family violence is intimate partner violence committed by men against their current or former female partners. This violence can also affect children. It is the form of family violence that we know most about, and it is the key focus of most services and programs.

The prevalence of domestic violence in Queensland is substantial and arises in relation to the most serious criminal offences. In 2013–2014, over 24,000 applications for domestic violence orders were made, either via the police or privately.<sup>41</sup> In 2014–2015, there were 15,325 reported breaches of Domestic Violence Protection Orders.<sup>42</sup>

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<sup>34</sup> Not Now, Not Ever, above n 27, 68.

<sup>35</sup> Explanatory Notes, *Domestic and Family Violence Protection Bill 2011* (Qld) 1-2.

<sup>36</sup> *Ibid* 2.

<sup>37</sup> *Ibid*.

<sup>38</sup> Not Now, Not Ever, above n 27, 72, 74, 76.

<sup>39</sup> Office for Women, Department of Communities, Child Safety and Disability Services, *Queensland Women 2015* (Queensland Government, 2015) 11 (*‘Queensland Women 2015’*).

<sup>40</sup> *Ibid*.

<sup>41</sup> Not Now, Not Ever, above n 27, 48.

<sup>42</sup> *Queensland Women 2015*, above n 39, 16.

Statistics published by the Office of the State Coroner indicate that between 1 January 2006 and 31 December 2013, approximately 45% of all homicide deaths reported in Queensland were recorded as being domestic or family violence-related.<sup>43</sup> Again, these statistics reveal a gender pattern. Men accounted for the majority of offenders convicted of breaching domestic violence protection orders (86.3%) and the majority of those responsible for domestic and family violence-related deaths (82.0%).<sup>44</sup>

Nationally, approximately one in four women has experienced emotional abuse from a current or former partner and one in six has experienced physical or sexual violence from a current or former partner.<sup>45</sup> Far more often than not, that partner is male.<sup>46</sup> It is significantly more common for a woman to be the victim of physical violence at the hands of a partner or another person she knows than at the hands of a stranger.<sup>47</sup> This is also consistent with the profile of victims of sexual assault reported to the police; the perpetrator is likely to be known to the victim and the most commonly reported location where sexual offences occur is in a residential setting.<sup>48</sup>

### B Awareness of Challenges

Members of the judiciary, court staff and legal practitioners responding to cases of domestic violence should be aware of the fact that leaving a violent relationship is often extremely difficult, on emotional and practical levels. Women may stay in violent relationships for various reasons: financial dependence, the presence of children in the relationship (and manipulation by their partner concerning this), a sense of isolation and lack of external support, and the threat of further or worse violence if the relationship is ended.<sup>49</sup> Extended abuse over a period of time may cause women to enter a state of permanent fear or “learned helplessness”, which describes a developed inability to see a way out of their situation or to work out how to protect oneself in the face of random and variable violence.<sup>50</sup>

Moreover, the challenges of domestic violence may be compounded by other issues. Women with a disability who are dependent on their partners as carers can find it especially difficult to leave violent relationships as this is a particular area where support services are limited.<sup>51</sup> The same is true of women who live in tightly-knit or small communities with which they have strong connections, including Aboriginal and Torres Strait Islander women and women from culturally and linguistically diverse backgrounds,

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

<sup>45</sup> Not Now, Not ever, above n 27, 50.

<sup>46</sup> Ibid 50, 64, 72.

<sup>47</sup> Not Now, Not Ever, above n 27, 74.

<sup>48</sup> Australian Bureau of Statistics, *4906.0 Personal Safety, Australia, 2012 – Demographics of Those Who Have Experienced Sexual Assault* (31 July 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4906.0Chapter3002012>>; *4523.0 Sexual Assault in Australia: A Statistical Overview* (Australian Bureau of Statistics, 2004) 13, 26, 29-30.

<sup>49</sup> Not Now, Not Ever, above n 27, 12, 83-85.

<sup>50</sup> Anna Carline and Patricia Easteal, *Shades of Grey: Domestic and Sexual Violence against Women* (Routledge, 2014) 132 n 36.

<sup>51</sup> Not Now, Not Ever, above n 27, 130-1.

as to leave their partner may mean cutting ties with others in their community.<sup>52</sup> Such challenges must be factored in by courts making orders in cases of domestic violence and by practitioners in advising clients who are victims of domestic violence.

It is important for lawyers to appreciate that the effects of domestic violence are wide-ranging and may be of relevance in diverse areas of law beyond the criminal jurisdiction, including equity, succession, social security and personal injury. For example, in the South Australian case of *Farmer's Cooperative Executors & Trustees Ltd v Perks*,<sup>53</sup> the legal issue was whether a memorandum of transfer of a property interest from a wife to a husband was void for duress or undue influence. The Court took into account the history of abuse in the relationship (which had culminated in the wife's murder by the husband) in finding that the transaction was void for undue influence.<sup>54</sup>

### C Domestic Violence and the Court Process

Unlike other crimes of violence, domestic violence is prosecuted far less often than it occurs. One reason for this is the historically low level of reporting of domestic violence.<sup>55</sup> Reasons for non-reporting commonly include fear of further violence or other revenge from the perpetrator, feelings of shame or embarrassment, and belief that the incident was too trivial or unimportant.<sup>56</sup> Other reasons for non-reporting include previous negative experiences of reporting (e.g., to health professionals), a continuing emotional attachment to the perpetrator, and issues relating to children from a relationship with the perpetrator.<sup>57</sup> Reluctance to report is a particular issue among Aboriginal and Torres Strait Islander women because many have had previous negative personal or community experiences with the criminal justice system, including deaths in custody.<sup>58</sup>

For women who do assent to involvement in the prosecution of domestic violence perpetrators, further obstacles arise. In particular, the same considerations that arise in respect of victims giving oral evidence in sexual offence cases (discussed below) apply to victims of domestic violence. Testifying in domestic violence cases (particularly as a complainant) can be a very stressful experience, to the extent that women who are able to detail a history of domestic violence in an interview are often unable to do so in court proceedings.<sup>59</sup> Further compounding the issue, the *Queensland Women 2015 Report*

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<sup>52</sup> *ATSI Women Path to Justice Report*, above n 29, 20. Tually et al, *Women, Domestic and Family Violence and Homelessness: A Synthesis Report* (Commonwealth of Australia, 2008) 48-9; Erminia Colucci et al, 'Nature of Domestic/Family Violence and Barriers to Using Services among Indian Immigrant Women' (2013) 3(2) *Alterstice* 9, 10.

<sup>53</sup> (1989) 52 SASR 399.

<sup>54</sup> See ALRC Report 69(1), above n 1, [8.11]-[8.12].

<sup>55</sup> *Not Now, Not Ever*, above n 27, 74; Katrina Grech and Melissa Burgess, *Trends and Patterns in Domestic Violence Assaults: 2001 to 2010*, NSW Bureau of Crime Statistics and Research Issue Paper No 61 (2011) 8.

<sup>56</sup> Emma Birdsey and Lucy Snowball, *Reporting Violence to Police: A Survey of Victims Attending Domestic Violence Services*, NSW Bureau of Crime Statistics and Research Issue Paper No 91 (2013) 4.

<sup>57</sup> ALRC Report 69(1), above n 1, [6.2].

<sup>58</sup> *ATSI Women Path to Justice Report*, above n 29, 16. Australian Institute of Health and Welfare, *Family Violence among Aboriginal and Torres Strait Islander Peoples* (Australian Government, 2006) 18; Tually et al, above n 52, 48.

<sup>59</sup> *Women's Legal Aid* (Legal Aid Queensland), Submission to the Taskforce on Women and the Criminal Code, October 1999, 11.

notes that women are less likely than men to ask for ongoing legal assistance, representing 38.9% of applications for Legal Aid in Queensland in 2013–2014.<sup>60</sup>

Concerns have also been expressed about the difficulties of having the victim's voice heard in criminal proceedings when a history of domestic violence has culminated in the death of the victim.<sup>61</sup> However, there is scope for the admission of evidence of reported threats of violence in particular cases. Under s 132B *Evidence Act 1977* (Qld), relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed is admissible in criminal proceedings against a person for an offence defined in the *Criminal Code*, chapters 28 to 30 (included in which is the offence of murder). In *Roach v The Queen*, the High Court ruled that s 130 provides the only possible basis for the exclusion of evidence admissible under s 132B, namely the discretion to exclude relevant evidence where its prejudicial effect exceeds its probative value.<sup>62</sup>

### D Legal Support Services

A number of initiatives operate in Queensland to provide support and legal assistance to victims of domestic violence who are involved in court proceedings. For example, in 2012, Legal Aid merged its Domestic Violence Unit and Women's Legal Aid service to form the Violence Prevention and Women's Advocacy team, in order to provide greater access to specialist legal services for women.<sup>63</sup> The team is equipped to deal with cross-sectionality of vulnerability or disadvantage in the forms of disability and cultural diversity.<sup>64</sup> The team offers representation in domestic violence, child protection, family law and other related matters, as well as general legal advice, information on domestic violence prevention, and referrals.<sup>65</sup>

In addition, the Women's Domestic Violence Court Assistance Service runs from the Brisbane Magistrates Court and is able to offer women free and confidential information about Domestic Violence Protection Orders.<sup>66</sup> While this is not directly relevant to Supreme Court proceedings, it may be useful for court staff to be aware that such services are available, especially in cases where Magistrates Court charges have been transmitted to the Supreme Court to be dealt with alongside more serious charges.

In Brisbane, both generalist and specialist community legal centres ("CLCs") such as Caxton Legal Centre, Women's Legal Service and the Youth Advocacy Centre (for young

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<sup>60</sup> *Queensland Women 2015*, above n 39, 18.

<sup>61</sup> Women's Legal Aid (Legal Aid Queensland), above n 59, 6.

<sup>62</sup> (2011) 242 CLR 610 at 621–622 [31]–[32].

<sup>63</sup> Legal Aid Queensland, 'A History of Women and Legal Aid' (31 October 2012)

<<http://www.legalaid.qld.gov.au/services/Womens-Legal-Aid/Pages/A-history-of-women-and-legal-aid.aspx>>.

<sup>64</sup> Legal Aid Queensland, *Annual Report 2013-14* (Legal Aid Queensland, 2014) 27

<<http://www.legalaid.qld.gov.au/publications/Reports/annual-report/Documents/laq-annual-report-2014.pdf>>.

<sup>65</sup> Legal Aid Queensland, 'Violence Prevention and Women's Advocacy Legal Services' (23 January 2014)

<<http://www.legalaid.qld.gov.au/services/womens-legal-aid/pages/violence-prevention-and-womens-advocacy-legal-services.aspx>>.

<sup>66</sup> See generally Legal Aid Queensland, *Women's Domestic Violence Court Assistance Service* (31 October 2012) <<http://www.legalaid.qld.gov.au/SERVICES/WOMENS-LEGAL-AID/Pages/Womens-domestic-violence-court-assistance-service.aspx>>.

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people under 17) also offer social work and legal assistance to women and children affected by domestic violence. In regional areas, generalist CLCs offer these services.<sup>67</sup>

Finally, Court Network volunteers operate within all Brisbane, Townsville and Cairns court precincts to offer non-legal court support, information and referrals to court users and may be of assistance to those who are distressed by the court processes for dealing with domestic violence.<sup>68</sup> Many of these services could also be of assistance to victims of rape and other sexual assaults. Victim Liaison Officers in the Office of the Director of Public Prosecutions provide support to victims appearing as witnesses on trials of indictable offences as well.<sup>69</sup>

Judicial officers, court staff and legal practitioners may consider it appropriate to inform victims of domestic violence of available services as a means of facilitating greater access to justice and fairness in court proceedings.

## V RAPE AND OTHER SEXUAL ASSAULTS

### A Introduction

The Australian Bureau of Statistics reports that in 2013–2014 the prevalence of sexual assaults and related offences grew by 19% on the previous year, representing the largest increase as a principal offence of any type of offending.<sup>70</sup> The 2013–2014 national Crime Victimization Survey estimated that 48,300 adults in Australia (approximately 83% of whom were women) had been victims of at least one sexual assault, including rape, in the 12 months prior to the survey. The same data show that approximately 62% of adult victims did not disclose the most recent incident of sexual assault to the police.<sup>71</sup> Victims' reasons for not reporting sexual assault to police are similar to those identified above in relation to non-reporting of domestic violence: fear of retribution, a lack of appreciation of the seriousness of the issue, and shame and humiliation, as well as a fear of being disbelieved.<sup>72</sup>

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<sup>67</sup> See Queensland Association of Independent Legal Services Inc, *Queensland Community Legal Centre Directory* (2015) <[http://www.qails.org.au/01\\_directory/search.asp?action=search](http://www.qails.org.au/01_directory/search.asp?action=search)>.

<sup>68</sup> See generally Court Network, *How We Can Help* (2013) <<http://www.courtnetwork.com.au>>.

<sup>69</sup> See generally Queensland Government, *Going to Court – Witnesses – Before Court*, Courts and Tribunals <<http://www.justice.qld.gov.au/justice-services/courts-and-tribunals/going-to-court/witnesses/before-court>>.

<sup>70</sup> Australian Bureau of Statistics, *4519.0 Recorded Crime - Offenders, 2013-14 – Key Findings* (25 February 2015) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyTopic/DA308C67766C3735CA257751001BD477?OpenDocument>>.

<sup>71</sup> Australian Bureau of Statistics, *4530.0 Crime Victimization, Australia, 2013-14 – Key Findings* (17 February 2015) <<http://www.abs.gov.au/ausstats/abs@.nsf/productsbytitle/371CB1F33E24E682CA2579AA000F2C7F?OpenDocument>>.

<sup>72</sup> Australian Institute of Criminology, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Australian Government, 2005) 34 ('No Longer Silent').

## B *Attrition of Complaints*

In 2010, Daly and Bouhours published a review of the rates of attrition of rape complaints through the criminal justice process across five countries, including Australia. That research shows that, in the period 1990 to 2005, 20% of complaints to police of rape progressed to court, a rate approximately the same as in the period 1974 to 1989.<sup>73</sup> In 2011, drawing on this earlier research, Daly concluded that about 88% of sexual assaults reported to police will either not be proceeded with by police or prosecution services, or will be dismissed, withdrawn or end with acquittal.<sup>74</sup> Many of those cases are not pursued because general criteria for prosecution are not met.<sup>75</sup> Victims may also withdraw their complaint due to negative interactions with police, feelings of disempowerment and confusion, and extended traumatisation through the prosecution process.<sup>76</sup> In either case, potential exists for victims to be left without redress.

## C *Delayed Complaints and Credibility*

Contrary to perceptions historically reflected in the law, women do not necessarily complain about sexual violence at the “first available opportunity”. Yet, despite law reform on this issue, failure to do so can still be used to discredit a victim-witness. It can also have a detrimental impact on the gathering of evidence.<sup>77</sup> A small-scale study conducted by the Australian Institute of Criminology found that while nearly three-quarters of women disclosed sexual assault within 72 hours of its occurrence, nearly 20% waited up to one year and the remaining 8% did not disclose for over a year. Further, not all of those disclosures constituted or led to reports to police: 17% did not. The closer the relationship between victim and perpetrator, the longer the probable delay, such that all sexual assaults by strangers amongst the cohort were reported immediately but all by a current partner were delayed.<sup>78</sup> The research also found that the decision to disclose was generally not informed by rational choice but rather by opportunities for support that presented themselves – for example, by the appearance of friends or attendance at a medical appointment.<sup>79</sup> Many women were also unable to identify their experience as sexual assault at the time it occurred,<sup>80</sup> a relevant consideration when evaluating submissions in relation to the lack of prompt disclosure.

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<sup>73</sup> Kathleen Daly and Brigitte Bouhours, ‘Rape and Attrition in the Legal Process’ (2010) 39 *Crime and Justice* 565.

<sup>74</sup> Kathleen Daly, *Conventional and Innovative Justice Responses to Sexual Violence*, Australian Centre for the Study of Sexual Assault Issues Paper No. 12 (2011) 4-5.

<sup>75</sup> See, e.g., Nicole Bluett-Boyd and Bianca Fileborn, *Victim/Survivor-focused Justice Responses and Reforms to Criminal Court Practice: Implementation, Current Practice and Future Directions*, Australian Institute of Family Studies Research Report No. 27 (2014) 28.

<sup>76</sup> Daly, above n 74, 6; Carline and Easteal, above n 50, 175.

<sup>77</sup> Carline and Easteal, above n 50, 172, 175.

<sup>78</sup> No Longer Silent, above n 72, 26.

<sup>79</sup> *Ibid* 32.

<sup>80</sup> *Ibid*.

D *Oral Evidence by Complainants*

Giving evidence of having suffered or witnessed sexual assault can be a harrowing experience, however the difficulties may be ameliorated to some degree by the manner in which evidence is given and the limitations the law places on cross-examination.

Section 21A of the *Evidence Act 1977* (Qld) allows provision to be made for “special witnesses” (including someone likely to suffer severe emotional trauma if required to give evidence in the usual way). Measures which may be ordered include having members of the public or the accused (provided he or she can still see and hear the testimony) excluded from court; having an approved person present to give support; and allowing the witness to give evidence by videotape or closed circuit television. Witnesses or complainants may be assisted by this provision in sexual assault and domestic violence cases. Many family violence services have noted the preference of Indigenous women to give evidence via video-link in order to avoid intimidation by perpetrators.<sup>81</sup> Practitioners should be aware of s 21A and advise their clients of the availability of alternative means of giving evidence at an early stage in proceedings.

As a result of the *Criminal Law (Sexual Offences) Act 1978* (Qld), a complainant can generally no longer be questioned as to prior sexual experience. However, leave may be granted for cross-examination or the production of other evidence on this issue where such activities have substantial relevance to the facts in issue (which is not established by the evidence raising an inference as to general disposition), or where the evidence would be likely to materially impair confidence in the reliability of the complainant’s evidence.<sup>82</sup> Where such evidence is allowed, it should be strictly controlled. For many women, appearing in court during the trial of their attacker exacerbates the ordeal they have been through.<sup>83</sup> It has therefore been recognised that judges play an important role in limiting irrelevant questions that relate to sexual reputation of complainants.<sup>84</sup>

VI GENDER AND CRIMINAL LAW GENERALLY

A *Introduction*

In the first half of the 2015–2016 financial year, approximately 80% of offenders in Queensland were male and 20% were female.<sup>85</sup> For offences that were punished by incarceration, 90% were committed by men and 10% by women.<sup>86</sup> Exploring the reasons behind this disparity in offending behaviour is beyond the scope of this Benchbook. However, specific issues of gender inequality relating to criminal offending will be

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<sup>81</sup> *ATSI Women Path to Justice Report*, above n 29, 28.

<sup>82</sup> *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4.

<sup>83</sup> See, e.g., Louise Ellison, ‘Cross-Examination in Rape Trials’ (1998) *Criminal Law Review* 605, 606.

<sup>84</sup> NSW Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (NSW Government, 1996) 251-3.

<sup>85</sup> Queensland Government, *Community Offender Trend Statewide – Fiscal Calendar 2016 Report*, Queensland Government Data (7 March 2016) <<https://data.qld.gov.au/dataset/community-offender-trend-statewide/resource/9fd0e28e-960d-4890-9158-2c1ccd39febd>>.

<sup>86</sup> Queensland Government, *Custodial Offender Snapshot – Statewide*, Queensland Government Data (7 December 2015) <<https://data.qld.gov.au/dataset/custodial-offender-snapshot-statewide/resource/35eadab7-d842-4250-8329-8b22f60eb26b>>.

canvassed. In particular, Battered Woman Syndrome and the relevance of a defendant's history of being abused to available criminal defences will be examined.

## B Battered Woman Syndrome

In 1984, Walker wrote of the three phases of the "cycle of violence": the tension building phase, the acute battering incident and the loving contrition stage.<sup>87</sup> "Battered Woman Syndrome" is said to occur as a result of the constant repetition of these three phases, which may result in the victim entering a state of "learned helplessness" in which her self-esteem diminishes, she becomes depressed, and her problem-solving capacity diminishes as the perpetrator's control over her grows.<sup>88</sup>

The concept of Battered Woman Syndrome<sup>89</sup> was first considered by an Australian appellate court in *R v Kontinnen*.<sup>90</sup> It has been used in Australian courts to identify the experience of living in a situation of ongoing abuse and has been successfully relied upon by women who have killed or injured violent partners to establish the defences of provocation and self-defence. The concept of Battered Woman Syndrome enables the broader circumstances of women's lives to be taken into account, rather than simply the events immediately prior to the incident in question, and provides a context within which to view the retaliatory actions of victims of domestic violence.<sup>91</sup>

The potential utility of expert evidence of Battered Woman Syndrome in certain criminal trials was explained by Wilson J of the Canadian Supreme Court in *R v Lavellee*.<sup>92</sup> Such evidence was said to be both "relevant and necessary" to allow the jury to appreciate the mental state of an individual who had been severely abused yet remained in the abusive relationship. Similarly, in *Osland v The Queen*,<sup>93</sup> the High Court of Australia accepted that, *prima facie*, expert evidence of Battered Woman Syndrome is admissible to provide an explanation to the jury for the actions of a person affected by it, as it relates to a "reliable body of knowledge and experience" outside the experience of ordinary jurors.<sup>94</sup> However, the High Court also held that Battered Woman Syndrome did not in itself provide an independent defence, but rather that evidence of it may be admitted for the purpose of establishing the defences of provocation and self-defence.<sup>95</sup>

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<sup>87</sup> Lenore Walker, *The Battered Woman Syndrome* (Springer, 1984).

<sup>88</sup> Robert Ho and Marilyn Venus, 'Domestic Violence and Spousal Homicide: The Admissibility of Expert Witness Testimony in Trials of Battered Women Who Kill their Abusive Spouses' (1995) 1 *Journal of Family Studies* 24, 27; see also *R v Lavellee* [1990] 1 SCR 852, 878-80, 882, 887-888 (Wilson J).

<sup>89</sup> For a discussion of criticisms of this term see *Osland v R* (1998) 197 CLR 316, 367-78 (Kirby J).

<sup>90</sup> (1991) 53 A Crim R 352. In that case, it was referred to as 'Battered Wife Syndrome'.

<sup>91</sup> Julie Stubbs and Julia Tolmie, 'Feminisms, Self-Defence, and Battered Women: A Response to Hubble's "Straw Feminist"' (1998) 10 *Current Issues in Criminal Justice* 73, 77.

<sup>92</sup> [1990] 1 SCR 852, 871-2, as quoted in *Osland v The Queen* (1998) 197 CLR 316, 376 (Kirby J).

<sup>93</sup> (1998) 197 CLR 316.

<sup>94</sup> *Osland v The Queen* (1998) 197 CLR 316, 336-337 (Gaudron and Gummow JJ); see also 374-376, 378 (Kirby J), cf 408 (Callinan J).

<sup>95</sup> *Osland v The Queen* (1998) 197 CLR 316, 338 (Gaudron and Gummow JJ), 376-377 (Kirby J), 408 (Callinan J).

Evidence of Battered Woman's Syndrome has also been held to be a relevant consideration in sentencing.<sup>96</sup> However, additional sentencing factors annexed to gender are also important to consider and will be examined in Section VII below.

### C Self-Defence, Provocation, and Duress

Traditionally, defences such as self-defence and provocation developed largely on the basis of male experiences of violence, the kinds of threats with which men are presented and the ways in which men typically respond to these threats.<sup>97</sup> As Chief Justice Gleeson noted when discussing the defence of provocation against the background of a woman having experienced years of domestic abuse:

One common criticism was that the law's concession to human frailty was very much, in its practical application, a concession to male frailty... The law developed in days when men frequently wore arms, and fought duels, and when, at least between men, resort to sudden and serious violence in the heat of the moment was common. To extend the metaphor, the law's concession seemed to be to the frailty of those whose blood was apt to boil, rather than those whose blood simmered, perhaps over a long period, and in circumstances at least as worthy of compassion.<sup>98</sup>

With regard to self-defence, women who kill abusive partners often do so while the victim is asleep or passed out, as they would probably be killed or seriously injured if they attempted to defend themselves during an attack.<sup>99</sup> Imminence of a threat to the accused is, however, not an express requirement under the *Criminal Code* for self-defence to be established.<sup>100</sup> Nonetheless, it may be difficult to fit the experience of abused women within the self-defence provisions where the focus is typically on a single act of violence preceding the self-defence response.<sup>101</sup> Nonetheless, it has been recognised that the threat posed by an abusive partner can be continuing, rather than fleeting and momentary.<sup>102</sup>

An experience of abuse can also be relevant to the potential application of a defence of duress to criminal charges. For example, in a Brisbane District Court case in 1998, a female defendant successfully defended a charge of attempted robbery based on a defence of duress.<sup>103</sup>

Although the defences referred to in this section may be reasonably open on the evidence to defend the most serious charge of murder, it is likely that the more recently

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<sup>96</sup> *R v Burge* [2004] QCA 161.

<sup>97</sup> Queensland Law Reform Commission, 'A Review of the Excuse of Accident and the Defence of Provocation' (Report No. 64, September 2008) 213; Stubbs and Tolmie, above n 91, 74; Zoe Rathus, *Rougher Than Usual Handling: Women and the Criminal Justice System – A Gender Critique of Queensland's Criminal Code*, (Women's Legal Service, 2<sup>nd</sup> ed, 1994).

<sup>98</sup> *Chhay v R* (1994) 72 A Crim R 1, 11, as quoted in Victorian Law Reform Commission, *Defences to Homicide*, Issues Paper (2002) 7.

<sup>99</sup> Patricia Easteal, *Less than Equal: Women and the Australian Legal System* (Butterworths, 2001), above n 45, 46.

<sup>100</sup> See s 271(2); Carline and Easteal, above n 50, 135.

<sup>101</sup> Carline and Easteal, above n 50, 131.

<sup>102</sup> See, e.g., *R v Stjernqvist* (Unreported, Supreme Court of Queensland, Derrington J, 18 June 1996) Derrington J.

<sup>103</sup> Brisbane District Court, 1998, Judge Pratt QC, cited in *Report of the Taskforce on Women and the Criminal Code* (Queensland Government, 2000) Ch 6 ('Criminal Code Taskforce Report').

available defence of 'killing for preservation in an abusive domestic relationship' will be more frequently and more straightforwardly relied on.

D *Killing for Preservation in an Abusive Domestic Relationship*

Section 304B, now entitled 'Killing for preservation in an abusive domestic relationship', was inserted into the *Criminal Code* in 2010. The purpose of this provision was to introduce a new partial defence to murder, due at least in part to the mandatory sentence of life imprisonment that attaches to a murder conviction.<sup>104</sup> The defence was expressly intended to address well-ventilated concerns about the difficulties of establishing the existing defences of provocation and self-defence in the circumstances of individuals (usually women) who killed in response to long-term domestic violence.

Under section 304B, a person who unlawfully kills another under circumstances that, but for the section, would constitute murder, is guilty of manslaughter only, if—

- (a) the deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and
- (b) the person believes that it is necessary for the person's preservation from death or grievous bodily harm to do the act or make the omission that causes the death; and
- (c) the person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case.

The section provides specifically that a history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation. Section 304B also now applies the definition of domestic violence set out in s 8 *Domestic and Family Violence Protection Act* 2012, namely that:

Domestic violence means behaviour by a person (the first person) towards another person (the second person) with whom the first person is in a relevant relationship that—

- (a) is physically or sexually abusive; or
- (b) is emotionally or psychologically abusive; or
- (c) is economically abusive; or
- (d) is threatening; or
- (e) is coercive; or
- (f) in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else.

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<sup>104</sup> Explanatory Notes, *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009* (Qld) 1-2.

## VII SENTENCING

The Australian Law Reform Commission observed in 1998 that, “while the gender of an offender should not, in itself, be a matter relevant to sentencing, the problems associated with and of particular relevance to female offenders should not be ignored”.<sup>105</sup> The Queensland Taskforce on Women and the Criminal Code in 2000 identified four concerns in relation to women and sentencing:

1. the consequences of incarceration for female offenders and society as a whole;
2. the difficulties faced by women in meeting fine obligations;
3. the inequalities in availability and types of community service orders; and
4. the difficulties faced by women with disabilities.<sup>106</sup>

An awareness of these concerns may prompt practitioners to identify these difficulties in an individual case and bring them to judicial attention for consideration along with all the other circumstances pertinent to that individual receiving a just and fair sentence.

### A Female Incarceration

The caregiving role occupied by many women is a factor often considered in relation to the imprisonment of female offenders. Studies have indicated that while the children of male prisoners are usually cared for by their partners, the children of female prisoners are frequently cared for by temporary carers, which has a greater negative impact on the children.<sup>107</sup> While hardship to others caused by the defendant’s imprisonment is not exceptional and therefore is rarely a reason for ordering a non-custodial sentence, the case of *R v Chong; ex parte Attorney-General (Qld)*<sup>108</sup> provides an example of a situation where consideration of primary caregiving responsibilities did affect the outcome. There, a woman from a remote Aboriginal community had been sentenced to a two-year term of imprisonment with an immediate parole release date, which was confirmed on appeal. The sentence was considered appropriate because the offender would have been unable to take her baby, which she was still breastfeeding, with her on the flight from the community to where she would be incarcerated.<sup>109</sup> This case also highlights the complexities of intersectional vulnerability and disadvantage.

Notably, women are convicted of offences of violence far less frequently than men – for example, in 2013–2014, charges of homicide and related offences, acts intended to cause injury, and sexual assault and related offences were finalised against four-and-a-half times fewer women than men Australia-wide.<sup>110</sup> Where offenders who are also primary caregivers are not violent offenders, considerations of community protection are likely to be less relevant to the sentence imposed. The nature and motivations for

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<sup>105</sup> Australian Law Reform Commission, *Sentencing*, Report No 44 (1988), as quoted in Criminal Code Taskforce Report’, above n 103, 392.

<sup>106</sup> Criminal Code Taskforce Report, above n 103, 393.

<sup>107</sup> Ibid 393-5.

<sup>108</sup> [\[2008\] QCA 22](#).

<sup>109</sup> *R v Chong; ex parte A-G (Qld)* [\[2008\] QCA 22](#), [13], [35], [36].

<sup>110</sup> See Australian Bureau of Statistics, *4513.0 Criminal Courts, Australia, 2013-14 – Table 5: Defendants Finalised, Sex and Age by Principal Offence* (5 March 2015) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4513.02013-14?OpenDocument>>.

women's offending – often in response to domestic violence, or a lack of financial independence or means<sup>111</sup> – may also support submissions of reduced need for community protection or personal deterrence.

### B *Fine Orders*

Women may be disadvantaged in sentencing by the imposition of fine orders that may result in imprisonment if the offender defaults. This problem is more likely to affect women than men because, as discussed in Section II above, women generally earn less than men and may lack financial independence as a result of providing unpaid primary care for children and others. The problem applies *a fortiori* in relation to Aboriginal and Torres Strait Islander women, who most frequently commit offences related to poverty, including non-payment of fines and social security fraud, and are imprisoned at higher rates than other women.<sup>112</sup> Clearly, as in any other case, the individual's capacity to pay is an important consideration in determining whether to impose a fine order.

### C *Community Service Orders*

Caring responsibilities are also relevant to the imposition of community service orders. A Tasmanian study has indicated that women may experience problems in relation to community service orders due to difficulties in balancing community service with caring for dependants, and also because the majority of approved projects are geared towards male offenders or may be perceived as such by community corrections officers.<sup>113</sup> In Queensland, concerns have also been expressed about the absence of appropriate and available community service work for women.<sup>114</sup>

### D *Female Offenders with Disability*

Increasing attention is being paid to women with intellectual impairments and mental illness in the criminal justice system, both of which can play a role in offending and recidivism.<sup>115</sup> It has been found that offenders with intellectual disability are more likely to be imprisoned, and for longer periods, than offenders without disability.<sup>116</sup> In some cases, this may be due to the offender already having an extended criminal history (albeit often for minor and public nuisance offences) or a lack of support outside a prison

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<sup>111</sup> Sentencing Advisory Council, *Gender Differences in Sentencing Outcomes* (State of Victoria, 2010) 4, 20, 56.

<sup>112</sup> Carol Quadrelli, 'Women in Prison' (1997) 2(2) *Themis* 15, as quoted in Criminal Code Taskforce Report, above n 99, 402.

<sup>113</sup> Terese Henning, 'Hidden Factors in the Assessment of Offenders for Community Service Orders in Tasmania' (1997) 8 *Current Issues in Criminal Justice* 287, 309, as cited in Criminal Code Taskforce Report, above n 103, 402.

<sup>114</sup> Criminal Code Taskforce Report, above n 103, 405-6.

<sup>115</sup> Leanne Dowse, Carolyn Frohmader and Helen Meekosha, 'Intersectionality: Disabled Women' in Patricia Easta (Ed.) *Women and the Law in Australia* (LexisNexis 2010) 266.

<sup>116</sup> Australian Human Rights Commission, *The Rights of People with Disabilities: Areas of Need for Increased Protection*, Discussion Paper (1989) <<https://www.humanrights.gov.au/publications/rights-people-disabilities-areas-need-increased-protection-chapter-5-criminal-justice#sentencing>> ('AHRC'), citing Susan C Hayes and Robert Hayes, *Simply Criminal* (Law Book Co, 1984).

environment.<sup>117</sup> There is often a complex interplay between these women offending and prior abuse, whether in institutions or the home, because of their vulnerability to exploitation.<sup>118</sup>

## VIII GENDER AND CIVIL LAW

Considerations of gender extend beyond criminal law to the court's civil jurisdiction. Of particular note is the need to avoid intrusion of stereotypes into formulating just awards of damages or imposing costs orders and in determining the application of principles of equity.<sup>119</sup>

Historically, courts and litigants may have assumed that women will hold sole or primary responsibility for domestic and childrearing activities, will not work after having children, or will generally have less of a sense for business than their male counterparts. Such assumptions can play into calculations of damages awards, particularly under the head of future economic loss, for example in a personal injuries case.<sup>120</sup> They may also influence determinations of the application of equitable principles relevant to vitiating contracts, such as undue influence, unconscionable conduct, or the 'wives' special equity' principle.<sup>121</sup> Courts have since moved away from reliance on negative stereotyping and there is certainly no excuse for such reliance today. While it remains the case that women have a greater share of child-rearing responsibilities than men (as discussed earlier in this chapter), women's participation in the workforce is at record levels, with Queensland women accounting for 46.7% of all Queenslanders employed in April 2015.<sup>122</sup> And while there remain many sectors of work dominated by one gender or another (e.g. a high proportion of women in clerical/administrative work and a high proportion of men as machinery operators and drivers), the proportion of professional workers who are men and women is roughly equal.<sup>123</sup>

An understanding of the current demographic patterns with respect to childrearing activities or occupations is only useful to members of the judiciary to the extent that it highlights areas in which particular issues for administering just outcomes *might* arise. For example, it could be that an adverse costs order may disadvantage a female litigant disproportionately to male litigants appearing in a similar type of case because she holds primary child care responsibilities and has a decreased opportunity to take on more highly remunerated employment. However, whether this is the case for the particular individual is always a question for analysis of the evidence presented in her case.

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<sup>117</sup> Dowse, Frohmader and Meekosha, above n 109, 266-7; AHRC, above n 116, quoting Ben Bodna, 'People with Intellectual Disability and the Criminal Justice System' (Speech delivered at Intellectually Disabled Offenders Seminar, Canberra, 22 April 1987).

<sup>118</sup> Sisters Inside Inc, Submission No 72 to Australian Human Rights Commission, *Inquiry into Access to Justice in the Criminal Justice System for People with Disability*, 2013, 4.

<sup>119</sup> See ALRC Report 69(2), above n 2, Ch 13.

<sup>120</sup> See eg *NSW Insurance Ministerial Corporation v Wynn* [1994] Aust Torts Rep 81-304 (successfully appealed to the High Court in *Wynn v NSW Insurance Ministerial Corporation* (1995) 184 CLR 485).

<sup>121</sup> See *Yerkey v Jones* (1939) 63 CLR 649 as affirmed in *Garcia v National Australia Bank* (1998) 194 CLR 395. See also Lisa Sarmas, 'Women and Trusts' in Patricia Easta (Ed.) *Women and the Law in Australia* (LexisNexis 2010).

<sup>122</sup> Up from 34.4% in April 1978: see *Queensland Women 2015*, above n 39, 31.

<sup>123</sup> *Ibid* 33.

## IX CONCLUSION

Gender equality is, of course, relevant in areas such as rape, sexual assault and domestic violence, where victims are overwhelmingly female and perpetrators male. However, gender is also of broader relevance, in areas of law such as personal injury, succession, equity and contract, and also plays a part in understanding the experiences of men and women generally in our community and how these may differ

## CHAPTER 15: GENDER IDENTITY AND SEXUAL ORIENTATION

### I INTRODUCTION

This chapter has two primary objectives. First, it aims to assist judges, court staff and legal practitioners in understanding the terminology most commonly used in connection with different gender identities and sexual orientations. Second, it aims to identify several areas in which different identities and orientations raise specific legal issues or other considerations relevant to the fair and open administration of justice.

### II TERMINOLOGY

This section attempts to outline terminology relevant to issues raised later in this Chapter. The intention in doing so is not to be prescriptive or limiting with regards to acceptable language to use in a given case; it is recognised that questions of gender identity and sexual orientation must be approached with sensitivity to the individual involved. As an overriding principle, it is preferable to inquire as to a litigant's, witness's or practitioner's preferred form of address and their preferred view of their own gender identity, rather than making any assumptions in this respect. This is particularly so since many of the terms outlined below have no settled meaning; they can be used to mean different things by different people.<sup>1</sup> Moreover, the vast majority of cases will not require any inquiry into an individual's gender identity or sexual orientation as these characteristics will be of no relevance for the purpose of judicial determination. Prurient inquiry, for example, under cross-examination, should, of course, be discouraged.

#### A Sex vs. Gender

Although often used interchangeably, the terms 'sex' and 'gender' can have quite distinct meanings. Sex can be used in a strict scientific sense to differentiate people by way of genetic, chromosomal or physiological characteristics. Gender, by contrast, is socially or culturally constructed, typically the product of an individual's self-identification, and need not necessarily relate to a person's biological sex. For the purpose of the subsections to follow, it is notable that both sex and gender can be conceived of as a spectrum, rather than as including discrete, inflexible categories.

#### B Sex Classifications

Whether a person is **male** and **female** is most commonly identified by reference to physiological characteristics, notably those associated with reproductive capacity.

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<sup>1</sup> See Australian Human Rights Commission, 'Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination' (Consultation Report, Australian Human Rights Commission, 2011) 5 <<https://www.humanrights.gov.au/our-work/sexual-orientation-sex-gender-identity/publications/addressing-sexual-orientation-and-sex>> ('AHRC Consultation Report') 5. See also Sam Killermann, *The Social Justice Advocate's Handbook: A Guide to Gender* (Impetus Books, 2014) 217 and Bianca Fileborn, 'Sexual Violence and Gay, Lesbian, Bisexual, Intersex and Queer Communities' (Resource Sheet, Australian Institute of Family Studies, March 2012) 2 <<http://www.aifs.gov.au/acssa/pubs/sheets/rs3/index.html>>.

A person is **intersex** if they are born with both male and female sexual characteristics. For example, their external genitalia may have the appearance of being female, while their internal reproductive organs are male. Intersex individuals may self-identify as male, female, or neither sex.

Some individuals resist being identified by reference to biological markers such as anatomy, which may make it appropriate for official records to refer to the person as **sex non-specific**. The High Court recently affirmed the proposition that, for the purposes of being registered on the Births Deaths and Marriages Register of New South Wales, a person may be neither male nor female and could appropriately be recorded as sex non-specific.<sup>2</sup>

### C *Gender Classifications*

The terms **woman**, **man**, **girl**, and **boy** are well understood and common markers of gender identity.

The terms **transgendered** and **transsexual** are used to refer to people whose preferred gender identity is at variance with their sex: for example, a person who was born with male physiology but who self-identifies as female. A distinction may be made between a transgendered person (who has not had any hormonal or surgical treatment to align her or his externally-assigned sex with that person's self-identified gender) and a transsexual person (who has had hormonal and/or surgical treatment to align her or his externally-assigned sex with that person's self-identified gender).

The term **transvestite** denotes a person who cross-dresses. The act of cross-dressing alone does not mean the individual is transgendered or of any particular sexual orientation.

Since gender is a question of self-identification, it is possible, albeit rare, that a person may not identify exclusively as having a particular gender. They may identify as having multiple genders, a combination of genders, a fluctuating gender, or no gender.

### D *Sexual Orientation Classifications*

The terms **gay** and **lesbian** are used to describe people whose primary or exclusive sexual and/or emotional attraction is towards members of the same sex. The terms 'gay man' and 'lesbian/gay woman' are preferable to '**homosexual** person', as the latter is often employed in a scientific context where the emphasis might be on sexual activity rather than sexual orientation. People who are **bisexual** are attracted to members of both the same and opposite sex.

As with gender, and perhaps to an even greater extent, human sexuality cannot always be straightforwardly placed into the above categories. Sexual orientation encompasses a spectrum. For instance, one person may be exclusively heterosexual while another may be attracted mostly to members of the same sex but also, although to a lesser

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<sup>2</sup> *New South Wales Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490.

degree, attracted to members of the opposite sex. Others may have little or no sexual attraction to people of any sex or gender.

### III GENDER, SEXUALITY AND THE LAW

#### A *Gender ID on Official Documentation*

The variety of gender identities that people hold can raise issues relating to the policy and/or legality of recording sex or gender on important documents, such as birth certificates, death certificates, and passports. Having documentation recording a person's sex or gender as different to that which they identify with can be a source of great distress for that individual.

In a case referred to earlier, *New South Wales Registrar of Births, Deaths and Marriages v Norrie*,<sup>3</sup> the respondent, Norrie, was externally-assigned the male sex at birth. Although Norrie had sex affirmation surgery, Norrie's sex was 'ambiguous' and Norrie did not self-identify as either male or female. Norrie applied to the Registrar, to register a change of sex (to 'non-specific') and a change of name. The Registrar's approach was that, for the purposes of the Register, the only sexes were male or female, so Norrie's sex could be recorded as 'not stated' but not as 'non-specific'. The Registrar's decision was upheld by the Administrative Decisions Tribunal of New South Wales at first instance and on appeal to the full panel, but set aside on appeal to the New South Wales Court of Appeal. The Registrar then sought special leave to appeal to the High Court, which was granted. The High Court unanimously held that a person may be neither male nor female and that the applicable legislation permitted the Registrar to register a person's sex as 'non-specific'.

More straightforwardly, a person who has had sexual reassignment surgery or has a recognition certificate<sup>4</sup> may apply to have the reassignment of their sex noted in their entry in the register of births or adopted children register, but only if the person is not married.<sup>5</sup> The notation of reassignment of sex on the register does not in itself, unless specifically provided otherwise, affect any entitlement a person may have under a will, a trust, or by operation of law.<sup>6</sup>

On the issue of sex reassignment and the issuing of passports, the Australian Passport Office currently issues passports to sex and gender diverse applicants as M (Male), F (Female) or X (Indeterminate/Intersex/Unspecified). The documentation required to support applications for the issuing of a passport under an individual's preferred gender (which may be different to their biological sex) or for the issuing of a passport with category X can be found on the Australian Passport Office website.<sup>7</sup>

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<sup>3</sup> (2014) 250 CLR 490, [2014] HCA 11.

<sup>4</sup> A 'recognition certificate' is a certificate issued under the law of another State that identifies a person who is the subject of the certificate as having undergone sexual reassignment surgery and being the sex stated in the certificate: *Births, Deaths and Marriages Registration Act 2003* (Qld) sch 2.

<sup>5</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) ss 22-23.

<sup>6</sup> *Births, Deaths and Marriages Registration Act 2003* (Qld) s 24(5).

<sup>7</sup> See

<<https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/Pages/changesofsexdoborpop.aspx>>.

## B *Oral Evidence*

Because of discrimination still experienced by members of sexual or gender minorities, some individuals adopt a practice of self-censorship in everyday life, for example by limiting discussion of weekend activities and changing the pronoun when referring to a partner or lover. This phenomenon of self-censorship is something that may become relevant when, for instance, a gay man or lesbian woman is giving evidence, particularly where the witness has not “come out” as openly gay or lesbian. It may appear that these witnesses are being evasive or selective when answering questions which deal with their personal lives and activities. Judges should be alert to questioning of witnesses with regard to their sexuality and be ready to restrict such questioning where unnecessary or irrelevant.

Similarly, transgender persons often suffer from adverse public reactions and discrimination with regard to their appearance. Accordingly, it is important that transgender or transsexual witnesses be treated with sensitivity. Biological sexual identity should only be revealed or discussed where relevant to proceedings; unless necessary to do otherwise, a person’s gender should be based on self-identification for the purposes of court proceedings. Where there is doubt as to which gender a person identifies as, he or she should be asked how he or she would prefer to be addressed.

The same principles apply in relation to people who cross-dress. Some transvestite persons cross-dress only in private, however some may do so publicly and may appear in court in cross-dress. For many transvestites, cross-dressing is the consequence of an emotional need to dress in a particular way. It is important to treat such witnesses with appropriate sensitivity, for example, by asking how he or she would prefer to be addressed, rather than automatically using “Ms” or “Mr”.

In addition to limiting irrelevant questions of witnesses concerning gender identity or sexuality, it may also be relevant to consider restricting, as far as possible, unnecessary or prurient court reporting of these matters. The danger of witness victimisation on the basis of such reporting may be heightened in rural communities where most residents are known to each other.

## C *Dangers of Stereotyping*

As occurs in relation to other minority groups, stereotypes or myths concerning individuals with different sexual or gender identities are held by some members of the community. Particularly egregious myths include that homosexuality is a transmissible pathological condition, that being lesbian or gay is related to paedophile desire, and that an individual’s sexual orientation or perception of one’s own gender is a matter of individual choice.

The unwarranted airing of such myths in court, or the reliance on stereotypes by witnesses, counsel, jurors or the judiciary to establish facts in a criminal or civil case, is damaging to the reputation of the judicial system. In appropriate cases, it may be necessary to provide directions to jurors warning against reaching decisions influenced by stereotypes or prejudice.

#### D *Legal Recognition of Same-Sex Relationships*

Queensland law recognises the rights and responsibilities of same-sex partners in a number of different areas. Two adults who are in a relationship as a couple, regardless of their sex, may enter into a civil partnership by having their relationship registered, or their civil partnership declared, pursuant to the provisions of the *Civil Partnerships Act 2011 (Qld)*.<sup>8</sup> The *Acts Interpretation Act 1954 (Qld)* provides that the terms “de facto partner” and “spouse” include couples who satisfy certain criteria regardless of gender.<sup>9</sup> Moreover, same-sex couples are granted entitlements in relation to bereavement and carers’ leave,<sup>10</sup> worker’s compensation,<sup>11</sup> property division,<sup>12</sup> land transactions,<sup>13</sup> succession law<sup>14</sup> and civil actions.<sup>15</sup> The broadest protections against discrimination on the basis of sex, gender identity and sexuality can be found in the *Anti-Discrimination Act 1991 (Qld)*.<sup>16</sup>

#### E *Domestic Violence*

As with any other relationship, people in same-sex relationships can be victims of domestic violence. Indeed, the problem of domestic violence may be exacerbated in such relationships due to reduced understanding of the problem in the wider community and the limited availability of specialised support services. Many of the reasons for victims of domestic violence not leaving abusive relationships canvassed in the previous Chapter remain relevant here.

As with all forms of domestic violence, possible legal responses include the application for a Domestic Violence Protection Order<sup>17</sup> and the termination of a lease if the abuse occurs in a rental property.<sup>18</sup>

Prosecution for many of the same offences applicable to partners in a violent heterosexual relationship will be available in other relationships. For instance, a male-to-female transgendered person can be the complainant in the prosecution of the offence of vaginal rape under s 349 *Criminal Code*.<sup>19</sup>

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<sup>8</sup> See s 6.

<sup>9</sup> *Acts Interpretation Act 1954 (Qld)*, s 32DA, s 36, inserted by *Discrimination Law Amendment Act 2002 (Qld)*, s 4, s 5.

<sup>10</sup> *Industrial Relations Act 1999 (Qld)*, s 39, s 40.

<sup>11</sup> *Workers Compensation and Rehabilitation Act 2003 (Qld)*, s 28 and s 29.

<sup>12</sup> *Property Law Act 1974 (Qld)*, s 260.

<sup>13</sup> *Land Tax Act 1915 (Qld)*, s 3BA, ss 11-11C.

<sup>14</sup> *Succession Act 1981 (Qld)*, s 5AA, but see s 74; *Public Trustee Act 1978 (Qld)*, s 54, s 88, s 94, s 107.

<sup>15</sup> *Supreme Court Act 1995 (Qld)*, s 18, 81.

<sup>16</sup> See, in particular, s 7(a), (m), and (n).

<sup>17</sup> See inclusive relationship definitions in *Domestic and Family Violence Protection Act 2012 (Qld)* Division 4.

<sup>18</sup> *Residential Tenancies and Rooming Accommodation Act 2008 (Qld)* ss 312, 344.

<sup>19</sup> The definition of ‘vagina’ in s 1 *Criminal Code (Qld)* ‘includes a surgically constructed vagina, whether provided for a male or female.’

## Supreme Court of Queensland

Finally, the partial defence to murder of ‘killing for preservation in an abusive domestic relationship’, pursuant to s 304B *Criminal Code*, is available to any members of an ‘abusive domestic relationship.’ That term is not confined to members of an abusive heterosexual domestic relationship.

### IV CONCLUSION

Despite increased tolerance of gender and sexuality differences in the community since the last edition of this Benchbook was published, minority characteristics in these respects still require increased sensitivity to potential issues arising from practitioners and the judiciary.

Websites that provide further information relating to gay, bisexual and transgender issues include:

#### **AIS Support Group Australia Inc**

<http://www.aissga.org.au/>

(Contains factual and legal information of relevance to those with the condition Androgen Insensitivity Syndrome, an intersex variation)

#### **Australian Lesbian and Gay Archives**

<http://alga.org.au/>

(Contains information on how to access historical materials relating to gay and lesbian issues)

#### **Gay Law Net**

<http://www.gaylawnet.com/>

(Contains summaries of worldwide laws relating to gay rights, including state laws in Australia)

#### **Transgender Law and Policy Institute**

<http://www.transgenderlaw.org/resources/index.htm>

(Contains information on US laws in relation to transgender, gay and lesbian issues)

## APPENDICES

### APPENDIX A: ISSUES AND DIFFICULTIES ARISING FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE IN THEIR CONTACT WITH THE COURTS

- There is a very real danger of miscommunication both with police and the courts.
- There is a lack of comprehension by many Aboriginal and Torres Strait Islander people of the criminal justice system and of conflicting cultural and legal assumptions and values, e.g. the right to remain silent.
- Some Aboriginal and Torres Strait Islander people are unable to speak, read or understand Anglo-Australian English.
- There may be deference to, and intimidation by, authority.
- Concepts of time and distance may differ.
- Customary law or cultural inhibitions may impede interactions.
- Health problems, especially hearing difficulties and those arising from alcohol abuse, may also make interactions more difficult.
- Some Aboriginal and Torres Strait Islander people, particularly from regional and remote areas, may be unused to airconditioned buildings.
- There may be a lack of understanding on the part of police and judicial officers of crime and responses to it within the context of a particular community.
- Lawyers may not consider the necessity to speak clearly and simply.
- Lawyers and judicial officers may lack understanding of customary law and cultural issues.

APPENDIX B: GLOSSARY OF TERMS WITH RESPECT TO ABORIGINAL AND  
TORRES STRAIT ISLANDER PEOPLE

*Aboriginal*: (adjective) the official definition is someone of Aboriginal descent who identifies as such and is recognised by their Aboriginal community to be so.<sup>1</sup> In more general terms, it is something of or relating to the Australian Aborigines (when used with a lower case 'a', aboriginal, refers to aborigines generally and is not specific to Australian Indigenous people). The word "Aboriginal", "Aborigine" and "Indigenous" are always capitalised when referring to the Aboriginal people of Australia just as any other designation such as "Arabic", "German", or "Presbyterian" would be.

*Aboriginal English*: A dialect of English which is spoken by many Aboriginal people throughout Australia. Dialects are forms of the same language which differ from each other in semantic ways. There are different ways of speaking Aboriginal English in different parts of the country. Aboriginal English is an important vehicle for the expression of Aboriginal identity and culture.<sup>2</sup>

*Aborigine*: (noun) one of a race of tribal peoples, the earliest known inhabitants of Australia and their descendants. Aboriginal, Aborigines, and Aboriginal people are the preferred terms.

*Anangu*: The name by which some Aboriginal people in the Northern Territory refer to themselves.<sup>3</sup>

*Creoles*: Languages that have developed from a pidgin and used as the first language within a speech community. Creoles develop in periods of profound social change. Over time, the language becomes more complex and more regular, or creolised, becoming a language in the full sense of the word.<sup>4</sup>

*Koori*: Means 'man' or 'people' in numerous languages of South East Australia. Since the late 1960's it has gained popular usage in New South Wales and Victoria as a term signifying Aboriginal people generally. Variations include *coorie*, *kory*, *kuri*, *kooli*, and *koole*.<sup>5</sup>

*Kriol*: A language developed and spoken in Western Australia and the Northern Territory. Many of the words are derived from English but grammar is distinct. It is often, ignorantly, regarded as bad English.<sup>6</sup>

*Murri*: The name commonly used to identify Aboriginal people from Queensland. Variations include *Murrie*, *Marri*, *Murree*, and *Marria*.<sup>7</sup>

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<sup>1</sup> David Horton (ed), *Encyclopaedia of Aboriginal Australia: Aboriginal and Torres Strait Islander History, Society and Culture* (Aboriginal Studies Press, 1994) vol 1, 3.

<sup>2</sup> *Ibid* vol 1, 13.

<sup>3</sup> Department of Aboriginal and Torres Strait Islander Policy and Development, *Protocols for Consultation and Negotiation with Aboriginal People* (Queensland Government, 2<sup>nd</sup> ed, 1999) 19 ('Protocols for Consultation and Negotiation').

<sup>4</sup> Horton, above n 1, vol 2, 866.

<sup>5</sup> *Ibid* vol 1, 559; *Protocols for Consultation and Negotiation*, above n 3, 19.

<sup>6</sup> Horton, above n 1, vol 2, 867.

<sup>7</sup> See, e.g., *Protocols for Consultation and Negotiation*, above n 3, 19.

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*Nyoongah* (also *Nyunga*, *Noongar*, *Noongah*,): The name by which some Aboriginal people from Western Australia refer to themselves.<sup>8</sup>

*Pidgin*: A restricted language that enables speakers of mutually unintelligible languages to communicate with each other for a limited range of purposes.<sup>9</sup> With wider use, a *pidgin* can develop into a more complex language and become the first language of some speakers.

*Torres Strait Creole*: The common language of Torres Strait Islanders. Also known as *Broken*, *Biz*, *Blaikman* or *Creole*.<sup>10</sup> Also spoken on Cape York, where it is known as *Cape York Creole* or *Lockhart Creole*.

*Torres Strait Islanders*: A separate and distinct culture, of Melanesian origin, of the Torres Strait Region. The Torres Strait region comprises more than 100 islands in the sea between Cape York and the coast of Papua New Guinea. There are 17 island communities with populations of between 30 and 400 people. More than 2000 people live on Thursday Island. Many others live on the mainland.<sup>11</sup>

*Yolngu*: The name by which some Aboriginal people from the Arnhem region in the Northern Territory refer to themselves.<sup>12</sup>

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<sup>8</sup> Ibid.

<sup>9</sup> Horton, above n 1, vol 2, 866.

<sup>10</sup> Diana Eades, *Aboriginal English and the Law* (Queensland Law Society Inc, 1991) 23.

<sup>11</sup> Horton, above n 1, vol 2, 1089-92; Queensland Government Department of Justice and the Attorney General and Department of Aboriginal and Torres Strait Islander Policy, *Aboriginal English in the Courts: A Handbook* (2000) 8.

<sup>12</sup> Horton, above n 1, vol 2, 1230; Protocols for Consultation and Negotiation, above n 3, 19.

APPENDIX C: JURY DIRECTIONS FOR CASES INVOLVING SPEAKERS OF  
ABORIGINAL ENGLISH AND TORRES STRAIT CREOLE <sup>1</sup>

*Speakers of Aboriginal English*

**Aboriginal English**

Many Indigenous people in North Queensland, including Indigenous people of mixed descent, do not speak English as their first language. And many, in all parts of the State, who do speak English as their first language have learnt to speak English in a manner which is different from other speakers of English in Australia: they are speakers of Aboriginal English.

Aboriginal English is not the same all over the State, and varies from person to person, and situation to situation. It ranges from “heavy” Aboriginal English to “light” Aboriginal English. Heavy Aboriginal English is harder for non-Indigenous people to understand fully, but even with speakers of light Aboriginal English there are some important things you should be aware of. And remember that speakers of heavy and light Aboriginal English are found all over the State, even in Brisbane and even with people you may think do not look distinctively Aboriginal or Torres Strait Islander.

**Word Meaning, Grammar and Accent**

There are a number of grammatical differences between Aboriginal English and other kinds of English. For example, the verb “to be” may not be used in sentences, and all the verbs may be in the present tense, even though the context shows that it is the past or the future that is being talked about. You may have noticed that pronouns, such as “he”, “she” and “you”, are used differently at times.

Many Indigenous people have trouble with some of the consonants used in the English language, especially f, v and th. F and v are often replaced with p or b, so the word ‘fight’ might sound like ‘pight’ or ‘bight’, and so on.

**Ways of Communicating**

Aboriginal English speakers may also have different cultural values which affect the way they speak and behave. The things I will tell you about now are common with a wide range of speakers of Aboriginal English, even among many who speak light Aboriginal English. Remember that skin colour is not a reliable indicator of the way that an Indigenous person communicates. Many Aboriginal and Torres Strait Islander cultural values and ways of communicating are strong even in places like Brisbane.

It is very common for Aboriginal people to avoid direct eye contact with those speaking to them, because it is considered to be impolite in some Aboriginal societies to stare. On the other hand, in most non-Aboriginal societies people who behave like this might be regarded as shifty, suspicious or guilty. You should be very careful not to jump to conclusions about the demeanour of an Aboriginal witness on the basis of the avoidance of eye contact, as it cannot be taken as an indicator of the Aboriginal witness’s truthfulness.

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<sup>1</sup> Criminal Justice Commission, *Aboriginal Witnesses in Queensland’s Criminal Courts* (1996) <<http://www.ccc.qld.gov.au/research-and-publications/publications/cjc/aboriginal-witnesses-in-queenslands-criminal-courts.pdf>>.

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It is customary among many speakers of Aboriginal English to have long lapses of silence from time to time, even in everyday speech. You should be careful not to jump to the conclusion that a witness who is doing this is being evasive or untruthful about the matter he or she is being asked about. Many Aboriginal English speakers are not used to direct questioning in the way in which it is used in the courtroom, and they are used to having the chance to think carefully before talking about serious matters, so it may take time for them to adjust to this method of imparting information.

It is very common for witnesses to be asked questions in a form in which the answer to the question is suggested by the question itself. Lawyers call this type of question a 'leading question'. An example of such a question is one like this: 'You saw the red car hit the blue car, didn't you?' Many Aboriginal English speakers will answer 'yes' to this type of question, even if they do not agree with the proposition being put to them in the question, and even if they do not understand the question.

Similarly the answers 'I don't know' and 'I don't remember' do not always refer directly to the Aboriginal English speaker's knowledge or memory. They can be responses to the length of the interview, or to the length of the question, or to the difficulty which a number of Aboriginal people have in adjusting to the use of repeated questioning.

You should also be aware that many Aboriginal English speakers use gestures which are often very slight and quick movements of the eyes, head or lips to indicate location or direction.

Some concepts, such as time and number, are understood by Aboriginal English speakers very differently from Standard English speakers.

### **Hearing Problems**

Sometimes, especially in formal situations, Indigenous people speak very softly to [non-Indigenous people] and are hard to hear, even with a microphone.

Many Indigenous people suffer from hearing problems. It may be that if a witness has a hearing difficulty, he or she may have had problems understanding questions put to him or her. In such a situation the witness might have answered inappropriately or asked for the question to be repeated.

### **Conclusion**

Aboriginal English can differ in many important ways from other kinds of English. It is not a witness's physical appearance which is relevant to the use of Aboriginal English, but the way that the witness was brought up, and the kinds of successful communication experienced by the person. I hope that this outline of some important features of Aboriginal English can help you to realise that, even if an Aboriginal person's language sounds like English, we can't always make the same assumptions about their meaning.

### *Speakers of Torres Strait Creole*

#### **Note to Judges**

*Torres Strait Creole is spoken mainly by Torres Strait Islanders, but some Aboriginal people from communities in Cape York Peninsula also speak a variety of Torres Strait Creole as their first language. The following introduction can be substituted for the introduction relating to Aboriginal English. The rest of the direction remains the same. Note that Torres Strait Islander people and Aboriginal Australians may speak Torres Strait Creole.*

### **Torres Strait Creole**

Some Indigenous people in Queensland, including those of mixed descent, do not speak English as their first language. Many Aboriginal people from the Northern Peninsula area of Queensland and Torres Strait Islanders also speak a language called Torres Strait Creole. Torres Strait Creole is also sometimes called 'Broken', 'Pidgin' or 'Blackman'.

Torres Strait Creole is similar to English; in fact a lot of the words in Creole came from English. But an English speaker can't always understand people who speak Creole, and many Creole speakers have never learnt to speak Australian English. Not all Creole speakers speak Creole in the same way: some people speak a Creole which sounds very much like Standard English, while others speak a Creole which doesn't sound like English at all and is therefore hard for English speakers to understand. Sometimes Creole speakers know enough English to get by in everyday life, but they find it very difficult to speak English in formal situations. Remember that speakers of Torres Strait Creole live all over the State, even in Brisbane and other towns.

APPENDIX D: PREFERRED TERMINOLOGY WITH RESPECT TO PERSONS WITH DISABILITY <sup>1</sup>

In the language of disability, the word ‘disability’ has replaced the word ‘handicap’. People with a disability are more likely to be handicapped by environmental barriers and attitudes than by the disability itself.

The expression, ‘person with a disability’, is the most preferred form of reference. The emphasis is on the person first without denying or obscuring the reality of the disability. Silly euphemisms like physically challenged or differently abled are unacceptable.<sup>2</sup>

WORDS TO AVOID	ACCEPTABLE ALTERNATIVES
abnormal, subnormal (These are negative terms that imply failure to reach perfection.)	Specify the disability.
“afflicted with” (Most people with a disability do not see themselves as afflicted.)	person has (name of disability)
Birth defect, congenital defect, deformity.	person with a disability since birth, person with congenital disability.
the blind, the visually impaired	person who is blind, person with a vision impairment.
Confined to a wheelchair, wheelchair-bound (A wheelchair provides mobility not restriction).	uses a wheelchair
Cripple, crippled. (These terms convey a negative image of a twisted body.)	has a physical or mobility disability

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<sup>1</sup> Appendix A contains information taken from Queensland Government Department of Communities, Child Safety and Disability Services, *A Way with Words: Guidelines for the Portrayal of People with a Disability* (2012) 7 <<https://www.qld.gov.au/disability/documents/community/way-with-words.pdf>> 8-11.

<sup>2</sup> Interview with John Mayo (Manager, Community Relations, Spinal Injuries Association) (Brisbane, 15 February 2005).

the deaf	<p>person is deaf</p> <p>(This refers to people who cannot hear but do not necessarily identify with the Deaf community.)</p> <p>or</p> <p>the Deaf</p> <p>(This refers to people who identify themselves as part of the Deaf community and who use sign language. Using 'Deaf community' is only appropriate when referring to this particular community.)</p>
<p>Deaf and dumb.</p> <p>(This is sometimes used to describe an inability to hear and speak, which does not imply any intellectual disability.)</p>	<p>person who is deaf and non-verbal</p> <p>or</p> <p>Deaf people</p> <p>(This refers to people who identify themselves as part of the Deaf community and who use sign language.)</p>
<p>Defective, deformed</p> <p>(These are degrading terms.)</p>	Specify the disability.
The disabled	People with a disability
<p>Dwarf</p> <p>(This has a negative connotation.)</p>	Short-statured person
Epileptic	Person with epilepsy
Fit, attack, spell	seizure
The handicapped	<p>person with a disability</p> <p>(If referring to an environmental or attitudinal barrier then 'person who is handicapped by a disability' is appropriate.)</p>
<p>insane, lunatic, maniac, mental patient, mentally diseased, neurotic, psycho, schizophrenic, unsound mind</p> <p>(These are derogatory terms.)</p>	person with a psychiatric disability (or specify condition)
Invalid	Person with a disability
<p>Mentally retarded also defective, feeble minded, imbecile, moron, retarded.</p> <p>(These are offensive, inaccurate terms)</p>	Person with an intellectual disability

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Mongol. (Outdated and derogatory.)	has Down Syndrome
patient (Only use in context of doctor–patient relationship.)	Person with a disability
Physically/intellectually/vertically challenged, differently abled. (These are ridiculous euphemisms for disability)	person with a disability
people with disabilities (Refers to people who have multiple disabilities.)	person with multiple disabilities, people with a disability
Spastic. (Usually refers to a person with cerebral palsy or who has uncontrollable spasms. Derogatory, often term of abuse. Should never be used as a noun.)	person with a disability.
special (This term is overused, e.g. ‘special’ person.)	Describe the person, event or achievement as you would normally.
Vegetative. (This is offensive and degrading.)	in a coma, comatose or unconscious.
victim (People with a disability are not necessarily victims and prefer not to be seen as such.)	Has a disability

APPENDIX E: RELEVANT STATUTORY PROVISIONS WITH RESPECT TO PERSONS  
WITH DISABILITY

***Disability Discrimination Act 1992 (Cth)***

Under s 4 of the *Disability Discrimination Act 1992 (Cth)*:

***disability***, in relation to a person, means:

- (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 a disability that:
- (h) presently exists; or
  - (i) previously existed but no longer exists; or
  - (j) may exist in the future (including because of a 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.

***Anti-Discrimination Act 1991 (Qld)***

The *Anti-Discrimination Act 1991 (Qld)* prohibits discrimination on the basis of impairment.<sup>1</sup> The definition of "impairment" is contained in the Schedule to the Act and in relation to a person means:

- (a) the total or partial loss of the person's bodily functions, including the loss of a part of the person's body; or
  - (b) the malfunction, malformation or disfigurement of a part of the person's body; or
  - (c) a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction; or
  - (d) a condition, illness or disease that impairs a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour; or
  - (e) the presence in the body of organisms capable of causing illness or disease; or
  - (f) reliance on a guide dog, wheelchair or other remedial device; whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that—
- (g) presently exists;
  - (h) previously existed but no longer exists.

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<sup>1</sup> *Anti-Discrimination Act 1991 (Qld)* s 7(h).

**Uniform Civil Procedure Rules 1999 (Qld)**

Chapter 3, Part 4 of the UCPR relates to persons under a legal incapacity.

Under UCPR r 93 “a person under a legal incapacity may start or defend a proceeding only by the person’s litigation guardian.”

Under UCPR r 98 “a settlement or compromise of a proceeding in which a party is a person under a legal incapacity is ineffective unless it is approved by the court or the Public Trustee acting under the *Public Trustee Act 1978 (Qld)*, section 59.”

Schedule 5 of the *Supreme Court of Queensland Act 1991 (Qld)* defines “person under a legal incapacity” to mean: -

- (a) a person with impaired capacity; or
- (b) a young person.

Schedule 5 of the *Supreme Court of Queensland Act 1991 (Qld)* also defines the term “person with impaired capacity” to mean “a person who is not capable of making the decisions required of a litigant for conducting proceedings or who is deemed by an Act to be incapable of conducting proceedings.”

**Guardianship and Administration Act 2000 (Qld) (‘the GA Act’)**

This legislation was enacted as a consequence of a report<sup>2</sup> by the Queensland Law Reform Commission that inquired into assisted and substituted decision-making for people with decision-making disabilities. The Guardianship and Administration Tribunal was amalgamated into the Queensland Civil and Administrative Tribunal (QCAT) on 1 December 2009. QCAT has the authority to appoint guardians and administrators for adults with impaired decision-making capacity.

Subject to s 245 of the GA Act (which relates to the court’s sanction of settlements), QCAT has exclusive jurisdiction for the appointment of guardians and administrators for adults with impaired capacity for “matters”.<sup>3</sup> The GA Act categorises “matters” as:<sup>4</sup>

- personal matter
- special personal matter
- special health matter
- financial matter<sup>5</sup>

QCAT has concurrent jurisdiction with the Supreme Court for enduring documents and attorneys under enduring documents.<sup>6</sup>

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<sup>2</sup> Queensland Law Reform Commission, *Assisted and Substituted Decisions*, Report No 49 (1996).

<sup>3</sup> GA Act s 82.

<sup>4</sup> *Ibid* s 10.

<sup>5</sup> *Ibid* sch 2 contains definitions of types of matters.

<sup>6</sup> *Ibid* s 82.

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Under s 164 of the GA Act, an eligible person<sup>7</sup> may appeal against a tribunal decision in a proceeding to a judge of the Supreme Court. The Supreme Court's leave is required for an appeal except for an appeal on a question of law only.

The GA Act acknowledges the following:<sup>8</sup>

- (a) an adult's right to make decisions is fundamental to the adult's inherent dignity;
- (b) the right to make decisions includes the right to make decisions with which others may not agree;
- (c) the capacity of an adult with impaired capacity to make decisions may differ according to—
  - (i) the nature and extent of the impairment; and
  - (ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
  - (iii) the support available from members of the adult's existing support network;
- (d) the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent;
- (e) an adult with impaired capacity has a right to adequate and appropriate support for decision making.

Pursuant to s 11 of the GA Act, a person or other entity who performs a function or exercises a power under the Act for a matter in relation to an adult with impaired capacity for the matter must apply the principles stated in Schedule 1 to the GA Act (the "general principles").<sup>9</sup> The first of those general principles is the presumption of capacity, that is, "an adult is presumed to have the capacity for a matter."<sup>10</sup>

Under the GA Act, "impaired capacity" for a person for a matter, means the person does not have capacity for the matter.<sup>11</sup> "Capacity" for a matter means the person is capable of—

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.<sup>12</sup>

### ***Criminal Code 1899 (Qld)***

In criminal proceedings the following two defences may be pleaded:

#### Defence of insanity

The defence of insanity is a complete defence. Under s 27(1) of the *Criminal Code*,

a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission the person is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person's actions, or of capacity to know that the person ought not to do the act or make the omission.

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<sup>7</sup> Definition of eligible person is contained in GA Act s 164 (3).

<sup>8</sup> *Ibid* s 5.

<sup>9</sup> *Ibid* s 11.

<sup>10</sup> *Ibid* sch 1.

<sup>11</sup> *Ibid* sch 4.

<sup>12</sup> *Ibid* sch 4.

### Defence of diminished responsibility

This defence is only available for murder charges. Section 304A(1) of the *Criminal Code* provides:

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair the person's capacity to understand what the person is doing, or the person's capacity to control the person's actions, or the person's capacity to know that the person ought not to do the act or make the omission, the person is guilty of manslaughter only.

The Queensland Criminal Bench Book sets out the suggested summing up a trial judge should provide to the jury where these defences are pleaded.

### ***Mental Health Act 2000 (Qld)***

The *Mental Health Act 2000 (Qld)* ('Mental Health Act') commenced on 28 February 2002 and replaced the *Mental Health Act 1974*.

The Mental Health Court is constituted by a Supreme Court judge, sitting alone. The Court must be assisted by two psychiatrists when exercising the jurisdiction under the Mental Health Act.<sup>13</sup>

The Mental Health Court was established to decide, among other things, the state of mind of persons charged with criminal offences. If there is reasonable cause to believe that an alleged offender is or was mentally ill or has an intellectual disability of a degree that the person's mental condition should be considered by the Mental Health Court then a criminal case may be referred to that court.

The Mental Health Court may have a case referred to it to have the following questions answered:

- was the alleged offender of unsound mind at the time of the offence;
- is the alleged offender unfit for trial;
- is the unfitness for trial permanent;
- if the charge is murder, was the alleged offender suffering from diminished responsibility?

A criminal case can be referred to the Mental Health Court by:

- the alleged offender or their legal representatives;
- the Director of Public Prosecutions;
- the Director of Mental Health, if the person is receiving treatment for a mental illness;

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<sup>13</sup> *Mental Health Act 2000 (Qld)* s 382.

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- the Attorney-General;
- the District Court or Supreme Court.

Section 12(1) of Mental Health Act defines mental illness as “a condition characterised by a clinically significant disturbance of thought, mood, perception or memory.”

Under s 12(2), however,

a person must not be considered to have a mental illness merely because of any one or more of the following—

- (a) the person holds or refuses to hold a particular religious, cultural, philosophical or political belief or opinion;
- (b) the person is a member of a particular racial group;
- (c) the person has a particular economic or social status;
- (d) the person has a particular sexual preference or sexual orientation;
- (e) the person engages in sexual promiscuity;
- (f) the person engages in immoral or indecent conduct;
- (g) the person takes drugs or alcohol;
- (h) the person has an intellectual disability;
- (i) the person engages in antisocial behaviour or illegal behaviour;
- (j) the person is or has been involved in family conflict;
- (k) the person has previously been treated for mental illness or been subject to involuntary assessment or treatment.”

The following definitions can also be found in Schedule 2 to the Mental Health Act:

**‘capacity’**, for a person, means the person is capable of—

- (a) understanding the nature and effect of decisions about the person’s assessment, treatment, care or choosing of an allied person; and
- (b) freely and voluntarily making decisions about the person’s assessment, treatment, care or choosing of an allied person; and
- (c) communicating the decisions in some way.

**‘diminished responsibility’** means the state of abnormality of mind described in the *Criminal Code*, section 304A.

**‘unsound mind’** means the state of mental disease or natural mental infirmity described in the *Criminal Code*, section 27, but does not include a state of mind resulting, to any extent, from intentional intoxication or stupefaction alone or in combination with some other agent at or about the time of the alleged offence.”

APPENDIX F: EXAMPLES OF WORKING GUIDELINES FOR PROCEEDINGS INVOLVING  
SELF-REPRESENTED LITIGANTS

***Possible Guidelines for the Trial of Litigation Involving Unrepresented Parties<sup>1</sup>***

1. Avoid at all cost any appearance of overt hostility to either party.
2. Indicate as soon as the nature and extent of the problem is clear the role that the judge believes he/she must play. For example, that the judge sees his [/her] role as requiring more questioning than normal, that the judge will where necessary put to the parties' witnesses questions intended not only to clarify, but also test their evidence because of the need to have a decision based on a proper examination of the facts if justice is to be done and to be seen to be done. Indicate also that it will be necessary from time to time to advise the unrepresented party of his or her rights, both procedural and evidentiary and to assist the unrepresented party at times in organising the presentation of his/her case.
3. Try to limit judicial questioning during cross-examination by counsel to minimise interruption of it and to avoid the appearance of trying to undo the effect of it.
4. Try to delay questions until after both sides have completed examination in chief and cross-examination.
5. Try to put questions in a neutral way – for example, “Dr X says ... Do you have any comment to make on that?”
6. Try to engage in a genuine questioning to elucidate the facts. This will in the end be seen to have produced answers that assist both sides and thus aid the appearance of neutrality.
7. If it be necessary to put hypotheses to experts for the parties which, if correct, will assist the unrepresented party, present the questioning on the basis of an exploration of the evidence already presented and an exploration of the theories being advanced.
8. Where the parties have different positions on facts that are in issue, put both positions to relevant witnesses, in particular experts, and seek their response.
9. Do not use leading questions unless it is reasonably clear that to do so will simply seek confirmation of what appears to be implicit in the evidence already led and/or it can be justified on the grounds of saving time. Also do not restrict use to questioning of represented parties' witnesses.
10. Avoid, if possible, any questions relating solely to the credit of witnesses. If, however, there is anything in the evidence of parties' witnesses which raises real concern and affects their credibility, it is proper and arguably necessary that they be drawn to the witness's attention in a non-aggressive manner – for example, evidence of one witness which appears to have been contradicted by other witnesses called by that party; an apparent inconsistency within the evidence given by the particular witness.
11. Where the pleadings in the case have been prepared by lawyers for the represented party, the parameters of the dispute as defined by the pleadings should be accepted. The judge should not suggest new ways of presenting the case. In that situation a judge could properly be accused of taking over the case. Where the case has not been pleaded by lawyers, what is to be done? Presumably at the outset steps would need to be taken to ensure that the issues were defined and that the unrepresented party was satisfied that they were adequately defined. In that situation again the judge should not attempt to later expand the parameters of the case.

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<sup>1</sup> Justice T H Smith in Australasian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals* (2001), Appendix 2 <<http://www.aija.org.au/online/LIPREP1.pdf>>.

12. It is necessary for the judge to be on the alert for the need to advise the unrepresented party of his or her procedural and evidentiary rights. For example, if objection is taken to evidence led by the unrepresented party on the ground that it is irrelevant and the judge is of the view that no relevant issue is raised on the pleadings, the judge should indicate to the unrepresented party that that is the case and that if the party wished to pursue that issue further the party would need to amend the pleadings to raise the issue. The judge would advise the unrepresented party that that party has a right to do so and apply for leave to amend and indicate to that party what would need to be done to exercise that right. The judge would need to make it clear that he or she is not urging the unrepresented party to do so, but simply advising that party of his or her rights.
13. In the course of running, it will be necessary to alert the unrepresented party to his or her rights and to some of the traps that exist in the laws of evidence. For example, it is necessary to alert the unrepresented party to the right to object to leading questions and hearsay and purported expert opinion evidence which may be outside the qualification of the expert giving evidence. The unrepresented party also needs to be alerted to his or her rights in the event that the other party does not comply with the rule in *Browne v Dunn*. The unrepresented party also needs to be alerted to the rule in *Jones v Dunkel*.
14. To minimise the need for advice on evidence, ensure counsel for the represented party endeavour to be scrupulous in the presentation of his or her client's evidence and warn counsel that if they appear to be overstepping the mark you may intervene.
15. To ensure that the facts are properly investigated, the judge will find that it is necessary to examine the evidence closely, with a view to being in a position to identify relevant points that need to be canvassed with witnesses in case the unrepresented party does not do so.
16. The need for judicial intervention in questioning is more likely to arise in areas of expert testimony than in evidence concerning events that are in dispute as to which the lay party has personal knowledge. In the latter situation the judge is likely to be able to take the position that both parties will in the end properly examine the evidence.
17. However annoyed the judge may feel about the complaints of counsel, the judge should try to avoid revealing that annoyance and should not say anything to tease or provoke counsel as it may be construed as an indication of hostility to counsel's client.
18. Query whether questions designed to test the represented party's case should be prefaced by statements such as "If X were represented by counsel, that counsel would probably ask you ... What would you say in response?"

***In the Marriage of F***

The Full Court of the Family Court set out guidelines for assisting SRLs in the decision of *In the Marriage of F*.<sup>2</sup> These guidelines have been adopted by the Federal Court.<sup>3</sup>

1. 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.
2. 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.
3. A judge should explain to the litigant in person any procedures relevant to the litigation.
4. A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.
5. 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.
6. 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.
7. 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.
8. 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*.<sup>4</sup>
9. 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.

The above list is not intended to be exhaustive and there may well be other interventions that a judge may properly make without giving rise to an apprehension of bias.

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<sup>2</sup> [2001] Fam CA 348; (2001) 161 FLR 189, 226-227 [253] (known as the 'Litigants in Person Guidelines Case').

<sup>3</sup> *Brehoi v Minister for Immigration & Multicultural Affairs* [2001] FCA 931, [6].

<sup>4</sup> (1994) 64 ALJR 509, 510.

***Equal Treatment Bench Book (UK)***

The Equal Treatment Bench Book (UK) contains the following guidelines for judges during hearings:<sup>5</sup>

***The Hearing***

44. The judge or chair of a tribunal is a facilitator of justice and may need to assist the unrepresented party in ways that are not appropriate for a party who has employed skilled legal advisers and an experienced advocate. This may include:

- a. attempting to elicit the extent of the understanding of that party at the outset and giving explanations in everyday language;
- b. making clear in advance the difference between justice and a just trial on the evidence (i.e. that the case will be decided on the basis of the evidence presented and the truthfulness and accuracy of the witnesses called).

**Explanations by the judge**

45. Basic conventions and rules need to be stated at the start of a hearing.

- a. The judge's name and the correct mode of address should be clarified.
- b. Individuals present need to be introduced and their roles explained.
- c. Mobile phones must be switched off, or at least in silent mode.
- d. An unrepresented party who does not understand something or has a problem with any aspect of the case should be told to inform the judge immediately so that the problem can be addressed.
- e. The purpose of the hearing and the particular matter or issue on which a decision is to be made must be clearly stated.
- f. A party may take notes but the law forbids the making of personal tape-recordings.
- g. If the unrepresented party needs a short break for personal reasons, they only have to ask.
- h. The golden rule is that only one person may speak at a time and each side will have a full opportunity to present its case.

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<sup>5</sup> Above n, 31-2 [44]-[45].

***‘Judicial Techniques for Cases Involving Self-Represented Litigants’<sup>6</sup>***

This article, based on United States law and practice, explored various techniques that may be used by judges when litigants are not represented. Below is a summary of the salient points of the article. However, due the procedural and substantive distinctions between US and Australian law, the extracts below are included only to provide a useful overview of matters to be considered, not as a set of guidelines for how judges in the Supreme Court of Queensland should operate.

**General principles**

Prepare

Pro se cases require a much more active role on the part of the trial judge – who must master the substantive law applicable to the case. When handling a case with two well-prepared lawyers, the trial judge can depend on counsel to identify the legal issues involved, but this is not so with cases in which no lawyers appear. The judge has the full responsibility for knowing and explaining the law. ...

Provide the parties with guidelines

In pro se cases it is helpful for the judge to explain the applicable substantive and procedural principles. When both parties are represented by counsel, this is not necessary; each attorney is aware of the requirements and can be expected to address them. Unrepresented litigants may need more. By presenting background at the beginning of the hearing, the judge neutrally aids both parties. Much of this information can be given to the parties in writing before the hearing or trial. The following items are particularly helpful:

- A basic primer on courtroom protocol, addressing who sits where in the courtroom, how to behave (rising when the judge enters and leaves the court room; not interrupting another person who is speaking), order of events (the moving party presents first), how to state objections, attire, and other matters the judge considers important (for example, gum chewing)
- Basic rules for evidence presentation, including the burden on the moving party to prove entitlement to relief... [SRLs] should be instructed that the judge will rule based only on the evidence presented. The judge may explain the different types of evidence – testimony, documents, exhibits – and how each is presented to the court...
- A list of elements that must be proved in order to obtain relief. This section should be short and clear, with no explication of legal nuances ...

... Providing [such] materials in advance greatly increases the likelihood that the parties will be prepared to proceed when the case is called. Some courts provide these materials on a website, and others make them available at a ‘self-help centre’ in the courthouse. Whatever the form, it is helpful either to provide the information in writing or to give the parties written notice of the location of the material, their duty to review it before the hearing or trial, and where additional copies or information are available.

Even if materials have been provided in advance, the hearing or trial should begin with the judge’s review of all three topics – explaining how the proceeding will be conducted, the legal elements of the matter, and types and forms of acceptable evidence...

Conduct the proceeding in a structured fashion based on the required legal elements

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<sup>6</sup> Rebecca A Albrecht et al, (2003) 42(1) *Judges Journal* 16, 45-48.

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We suggest that the judge provide the parties with an outline of the decision-making process and follow it explicitly during the proceeding...

Create an informal atmosphere for the acceptance of evidence

[It is recommended] that the formal rules of procedure and evidence be relaxed for cases involving [SRLs – for example,] by using informal language...

Ask questions

Judges should freely ask questions of unrepresented parties and their witnesses. When judges make clear to the parties at the beginning of the hearing that they will ask questions – and explain why (to make sure they have the information they need to make a decision) – chances are minimal that their apparent impartiality could be impaired...

Provide written notice of further hearings, referrals, or other obligations of the parties

Optimally, the parties will leave a courtroom with an order or minute entry documenting the next court date, the court's referral to another service or resource (such as the court's SRLs support office, a courthouse facilitator program, or an alternative dispute resolution program), and any other obligations the parties may have (such as preparing and serving further papers or proposed orders)....

### **Cases involving Two Unrepresented Parties**

Swear both parties at the beginning of the proceeding

When both parties are sworn, distinctions between their arguments and their testimony are not necessary. All statements made by the parties can now be considered as evidence. The judge should explain that the parties must remember they are under oath throughout the hearing or trial and that anything they say – as a question, statement or argument – must be truthful.

Maintain strict control over the proceedings

Most SRLs are respectful of the court and will conduct themselves in a dignified manner. However, especially in family law matters, emotions often flare, and the judge should quickly terminate arguments and calm anger. Recessing for a moment may be necessary to give the parties a chance to regain their composure. The judge must be alert and set and enforce clear ground rules, especially that the parties may not interrupt each other and that each will have an opportunity to be heard. The judge may need to use the contempt power or authority to dismiss the lawsuit for abuse of the legal process as a threat to restrain inappropriate behaviour.

Remain alert to imbalances of power in the courtroom

The judge must ensure that both sides have a full opportunity to present their points of view, especially where it is clear that one of the parties has more power (relationships involving domestic abuse, disputes in which one party is far more sophisticated than the other, or situations in which one of the parties has a limited knowledge of English). Judges should make a special effort here to ask the less powerful party its views on each issue or even to draw out those views with follow-up questions. The judge should not rely on the party's ability to take the initiative or to speak proactively. In extreme cases, the judge should [adjourn] the matter and seek pro bono legal representation for one or both parties.

### **Cases Involving Represented and Unrepresented Parties**

Most trial judges find cases with unequal resources most difficult, as illustrated in *Oko v Rogers* [466 N.E. 2d 658 (Ill App 3d 1984), [6]]. Problems arise when counsel advocate for their clients

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to prevent unrepresented litigants from adducing testimony or other evidence to support their cases...

Most attorneys recognise the need for the judge to proceed informally, but a few will insist that the proceeding be conducted in strict compliance with the rules of evidence. The judge has several options in dealing with this objection.

Convince the attorney of the benefits of proceeding informally

...

Overrule

The judge can overrule the objection on the grounds that it would be a waste of judicial resources to proceed in formal compliance with the rules of evidence.

Set special ground rules for the conduct of the proceeding under the rules of evidence

The judge can inform counsel that if the matter proceeds under the formal rules of evidence, the lawyer will be required to explain to the unrepresented litigant the basis for any objection the attorney makes, with enough detail so that the unrepresented litigant can take whatever corrective steps are needed to proceed...

This ... makes counsel responsible for explaining, in whatever depth necessary, the nature of counsel's objection. The judge, as well, will help [ensure] that the unrepresented litigant is equipped with the tools needed to get all evidence before the judge for a fair determination of the matter. The judge should explain to counsel that counsel may decide at any time during the proceeding to abandon the objection and proceed informally from that point.

Refuse to uphold objections to the form of questions or testimony.

The judge can decide not to entertain objections to the form of questions or testimony and limit such objections to only the admissibility of the evidence itself...

Use leading questions or prompts as often as necessary to remind the unrepresented litigant to present evidence in a manner consistent with the rules of evidence.

Offer the unrepresented litigant the option of [an adjournment] if necessary.

This could mean reconvening later the same day or returning to court another day.

...

Allow or help obtain assistance for the unrepresented litigant.

APPENDIX G: CHARTER OF YOUTH JUSTICE PRINCIPLES

- 1 The community should be protected from offences.
- 2 The youth justice system should uphold the rights of children, keep them safe and promote their physical and mental wellbeing.
- 3 A child being dealt with under this Act should be—
  - (a) treated with respect and dignity, including while the child is in custody; and
  - (b) encouraged to treat others with respect and dignity, including courts, persons administering this Act and other children being dealt with under this Act.
- 4 Because a child tends to be vulnerable in dealings with a person in authority, a child should be given the special protection allowed by this Act during an investigation or proceeding in relation to an offence committed, or allegedly committed, by the child.
- 5 If a child commits an offence, the child should be treated in a way that diverts the child from the courts' criminal justice system, unless the nature of the offence and the child's criminal history indicate that a proceeding for the offence should be started.
- 6 A child being dealt with under this Act should have procedures and other matters explained to the child in a way the child understands.
- 7 If a proceeding is started against a child for an offence—
  - (a) the proceeding should be conducted in a fair, just and timely way; and
  - (b) the child should be given the opportunity to participate in and understand the proceeding.
- 8 A child who commits an offence should be—
  - (a) held accountable and encouraged to accept responsibility for the offending behaviour; and
  - (b) dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways; and
  - (c) dealt with in a way that strengthens the child's family.
- 9 A victim of an offence committed by a child should be given the opportunity to participate in the process of dealing with the child for the offence in a way allowed by the law.
- 10 A parent of a child should be encouraged to fulfil the parent's responsibility for the care and supervision of the child, and supported in the parent's efforts to fulfil this responsibility.
- 11 A decision affecting a child should, if practicable, be made and implemented within a timeframe appropriate to the child's sense of time.
- 12 A person making a decision relating to a child under this Act should consider the child's age, maturity and, where appropriate, cultural and religious beliefs and practices.
- 13 If practicable, a child of Aboriginal or Torres Strait Islander background should be dealt with in a way that involves the child's community.
- 14 Programs and services established under this Act for children should—
  - (a) be culturally appropriate; and

- (b) promote their health and self respect; and
- (c) foster their sense of responsibility; and
- (d) encourage attitudes and the development of skills that will help the children to develop their potential as members of society.

- 15 A child being dealt with under this Act should have access to legal and other support services, including services concerned with advocacy and interpretation.
- 16 A child should be dealt with under this Act in a way that allows the child to be reintegrated into the community.

[Note that, in 2014, former s 17 was deleted, thereby removing the principle that detention should be a last resort.]

- 17 A child detained in custody should only be held in a facility suitable for children.
- 18 While a child is in detention, contacts should be fostered between the child and the community.
- 19 A child who is detained in a detention centre under this Act—

- (a) should be provided with a safe and stable living environment; and
- (b) should be helped to maintain relationships with the child's family and community; and
- (c) should be consulted about, and allowed to take part in making, decisions affecting the child's life (having regard to the child's age or ability to understand), particularly decisions about—
  - (i) the child's participation in programs at the detention centre; and
  - (ii) contact with the child's family; and
  - (iii) The child's health; and
  - (iv) the child's schooling; and
- (d) should be given information about decisions and plans about the child's future while in the chief executive's custody (having regard to the child's age or ability to understand and the security and safety of the child, other persons and property); and
- (e) should be given privacy that is appropriate in the circumstances including, for example, privacy in relation to the child's personal information; and
- (f) should have access to dental, medical and therapeutic services necessary to meet the child's needs; and
- (g) should have access to education appropriate to the child's age and development; and
- (h) should receive appropriate help in making the transition from being in detention to independence.

*Example for paragraph (h)—*  
help in gaining access to training or finding suitable employment

APPENDIX H: USEFUL CONTACTS

1 *Translation and Interpreting*

**National Accreditation Authority for Translators and Interpreters Ltd (NAATI)**

**Queensland Office**

Telephone: 1300 557 470  
(07) 3393 1358  
Fax: (07) 3393 0745  
Email: [info@naati.com.au](mailto:info@naati.com.au)  
Website: <http://www.naati.com.au>  
(including directory)  
Address: Queensland Multicultural Centre  
Room 10, Level 2  
102 Main Street  
Kangaroo Point QLD 4169  
Postal Address: PO Box 8179  
Woolloongabba QLD 4102  
Office Hours: Tues, Thurs and Fri 10:00am to 3:30pm  
Wed 10:00am to 1:00pm

**Australian Institute of Interpreters and Translators Inc (AUSIT)**

Telephone: 1800 284 181  
Email: [admin@ausit.org](mailto:admin@ausit.org)  
Website: <http://www.ausit.org>  
(including directory)  
Postal Address: PO Box 546  
East Melbourne VIC 3002  
Office Hours: Mon to Fri 9:00am to 5:00pm  
(except public holidays in Victoria)

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

Telephone:  
General Enquiries 1300 655 820  
Immediate Phone  
Interpreting 131 450/1800 131 450  
Email:  
General Enquiries [tispromo@border.gov.au](mailto:tispromo@border.gov.au)  
Existing Booking  
Enquiries [tis.prebook@border.gov.au](mailto:tis.prebook@border.gov.au)  
Website: <http://www.tisnational.gov.au>.

2 *Aboriginal and Torres Strait Islander People*

**Federation of Aboriginal and Torres Strait Islander Languages (FATSIL)**

Telephone: (03) 9602 4700  
Fax: (03) 9602 4770  
Email: [info@fatsil.org](mailto:info@fatsil.org)  
Website: <http://www.fatsil.org.au/>  
Address: 295 King Street  
Melbourne VIC 3000

**Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP)**

Telephone: 13 74 68  
Fax: (07) 3224 2070

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Email: [enquiries@atsipa.qld.gov.au](mailto:enquiries@atsipa.qld.gov.au)  
Website: <https://www.atsipa.qld.gov.au/>  
Address: Level 6A, Neville Bonner Building  
75 William Street  
Brisbane QLD 4000  
Postal Address: PO Box 15397  
City East QLD 4002

### **Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS)**

Telephone: 1800 012 255  
(07) 3025 3888  
Fax (07) 3025 3800  
Email: [info@atsils.org.au](mailto:info@atsils.org.au)  
Website: <http://www.atsils.org.au/>  
Address: Level 5  
183 North Quay  
Brisbane QLD 4000  
Postal Address: PO Box 13035  
George Street QLD 4003

### 3 *Persons with Disability*

#### **The National Disability Strategy**

Website: <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-disability-strategy-2010-2020>

#### **Department of Communities, Child Safety and Disability Services**

Telephone: 13 74 68  
Email: [disabilityinfo@disability.qld.gov.au](mailto:disabilityinfo@disability.qld.gov.au)  
Website: <https://www.communities.qld.gov.au/>  
Address: Level 3B, Neville Bonner Building  
75 William Street  
Brisbane QLD 4000  
Postal Address: GPO Box 806  
Brisbane QLD 4001

#### **Physical Disability Australia**

Telephone: (08) 7129 8085  
Email: [pda@pda.org.au](mailto:pda@pda.org.au)  
Website: <http://www.pda.org.au/home>  
Address: Level 30  
Westpac House  
91 King William Street  
Adelaide SA 5000

#### **Inclusion Australia (formerly National Council on Intellectual Disability)**

Email: [info@inclusionaustralia.org.au](mailto:info@inclusionaustralia.org.au)  
Website: <http://ncid.org.au/>  
Postal Address: PO Box 771  
Mawson ACT 2607

#### **Deaf Services Queensland**

**Head Office – Moorooka**  
Telephone: (07) 3892 8500

## Supreme Court of Queensland

Fax: (07) 3392 8511  
TTY: (07) 3892 8501  
Email: [dsg@deafsq.org.au](mailto:dsg@deafsq.org.au)  
Website: <http://www.deafservicesqld.org.au/>  
Address: 915 Ipswich Road  
Moorooka QLD 4105  
Postal Address: PO Box 465  
Moorooka QLD 4105

### **Cairns Office**

Telephone: (07) 4032 3033  
Fax: (07) 4032 2033  
TTY: (07) 4032 3033  
Address: 37 Pease Street  
Manoora QLD 4870  
Postal Address: PO Box 94  
Manunda QLD 4870

### **Maryborough Office**

Telephone: (07) 4121 5222  
Fax: (07) 4121 4322  
TTY: (07) 4121 5222  
Address: Kathleen Costello Centre  
26 Wilson Street  
Maryborough QLD 4650

### **Townsville Office**

Telephone: (07) 4724 4163  
Fax: (07) 4772 4338  
Address: 111 Charters Towers Road  
Hermit Park QLD 4812  
Postal Address: PO Box 3641  
Hermit Park QLD 4812

### **Interpreting Services**

Telephone: 1300 123 752  
After-hours (07) 3018 0333  
Fax: (07) 3392 8511  
Website: [www.slcommunications.com.au](http://www.slcommunications.com.au)

### **Blind Citizens Australia**

Telephone: 1800 033 660  
(03) 9654 1400  
Fax: (03) 9650 3200  
Email: [bca@bca.org.au](mailto:bca@bca.org.au)  
Website: <http://wordpress.bca.org.au/>  
Address: Level 3  
Ross House  
247-251 Flinders Lane  
Melbourne VIC 3000

#### 4 *People of Culturally and Linguistically Diverse Backgrounds*

##### **Multicultural Development Association Ltd (MDA) Brisbane Head Office**

## Supreme Court of Queensland

Telephone: (07) 3337 5400  
Fax (07) 3337 5444  
Website: <https://mdaltd.org.au/>  
Address: 28 Dibley Street  
Woolloongabba QLD 4102  
Office Hours: Mon, Tues, Thurs, Fri 9:00am to 5:00pm  
Wed 1:00pm to 5:00pm

### **Brisbane North**

Telephone: (07) 3198 2500  
Fax (07) 3337 5444  
Address: 9/2 Jenner Street  
Nundah QLD 4012  
Office Hours: Mon, Tues, Thurs, Fri 9:00am to 5:00pm  
Wed 1:00pm to 5:00pm

### **Toowoomba**

Telephone: (07) 4632 1466  
Fax (07) 3337 5444  
Address: 166A Hume Street  
Toowoomba QLD 4350  
Office Hours: Mon, Tues, Thurs, Fri 9:00am to 5:00pm  
Wed 1:00pm to 5:00pm

### **Rockhampton**

Telephone: (07) 4921 2222  
Fax (07) 3337 5444  
Address: 46 Denham Street  
Rockhampton QLD 4700  
Office Hours: Mon, Tues, Thurs, Fri 9:00am to 5:00pm  
Wed 1:00pm to 5:00pm